

The Florida Senate
BILL ANALYSIS AND FISCAL IMPACT STATEMENT

(This document is based on the provisions contained in the legislation as of the latest date listed below.)

Prepared By: The Professional Staff of the Committee on Commerce and Tourism

BILL: CS/SB 960

INTRODUCER: Transportation Committee and Senator Bradley

SUBJECT: Protection of Motor Vehicle Dealers' Consumer Data

DATE: January 29, 2016

REVISED: _____

| | ANALYST | STAFF DIRECTOR | REFERENCE | ACTION |
|----|---------|----------------|-----------|--------------------|
| 1. | Jones | Eichin | TR | Fav/CS |
| 2. | Harmsen | McKay | CM | Pre-meeting |
| 3. | | | RC | |

Please see Section IX. for Additional Information:

COMMITTEE SUBSTITUTE - Substantial Changes

I. Summary:

CS/SB 960 requires motor vehicle manufacturers, distributors, or importers (collectively referred to as "licensees"), and third parties acting on behalf of a licensee, to comply with certain use restrictions for consumer data that is provided to them by a motor vehicle dealer (dealer).

Specifically, the bill:

- Requires licensees to comply with, and not knowingly cause a dealer to violate, all laws governing the reuse or disclosure of consumer data, and to provide a written statement that specifies the licensee's methods used to safeguard consumer data;
- Makes licensees responsible for provision, upon a dealers request, of a written list of consumer data obtained by a licensee from the dealer, and a written list of all persons to whom the consumer data has been provided to during the previous 6 months, with specific exemptions;
- Prohibits licensees from requiring a dealer to grant the licensee, or a third party acting on behalf of the licensee, direct access to the dealer's data management system in order for the licensee to collect consumer data;
- Provides for methods by which a licensee may be granted permission by a dealer to directly access the dealer's consumer data; and
- Requires the licensee to indemnify the dealer for any third-party claims asserted against or damages incurred by the dealer as a result of the licensee's or third party's access, use, or disclosure of the consumer data.

The bill also provides that any person who institutes a cause of action against a licensee for a violation of the prohibitions or requirements established in the bill, has the burden of proving that the violation was willful or with sufficient frequency to establish a pattern of wrongdoing.

The bill takes effect upon becoming law.

II. Present Situation:

Florida has substantially regulated motor vehicle manufacturers and motor vehicle dealers since before 1950.¹ Initially, the Florida Legislature approached the issue by implementing only consumer protections aimed at preventing consumer abuse by dealers.² In 1970, the Legislature passed more comprehensive legislation, embodied in ch. 320, F.S.,³ which regulates the contractual relationship between manufacturers and dealers,⁴ requires the licensing of manufacturers, and regulates numerous aspects of the contracts between manufacturers and dealers.

Florida Automobile Dealers Act

A manufacturer, factory branch, distributor, or importer (licensee) must be licensed under s. 320.61(1), F.S., to engage in business in Florida. Sections 320.60-320.70, F.S., the “Florida Automobile Dealers Act”⁵ (act), primarily regulate the contractual business relationship between dealers and licensees, and provide for the licensure of manufacturers, factory branches, distributors, or importers. The act specifies, in part:

- The conditions and situations under which the Department of Highway Safety and Motor Vehicles (DHSMV) may deny, suspend, or revoke a regulated license;
- The process, timing, and notice requirements for licensees who wish to discontinue, cancel, modify, or otherwise replace a franchise agreement with a dealer, and the conditions under which the DHSMV may deny such a request;
- The procedures a licensee must follow to add a dealership in an area already served by a franchised dealer, the protest process, and the DHSMV’s role in these circumstances;
- The damages that can be assessed against a licensee who is in violation of Florida Statutes; and
- The DHSMV’s authority to adopt rules to implement these sections of law.

Applicability

Section 320.6992, F.S., provides that the act shall apply to all presently existing or future systems of distribution of motor vehicles in Florida, except to the extent that such application would impair valid contractual agreements in violation of the State Constitution or Federal Constitution. Generally, all agreements that are renewed, amended, or entered into subsequent to

¹ Chapter 9157, L.O.F. (1923); Chapter 20236, L.O.F. (1941).

² Walter E. Forehand and John W. Forehand, *Motor Vehicle Dealer and Motor Vehicle Manufacturers: Florida Reacts to Pressures in the Marketplace*, 29 Fla. St. Univ. Law Rev. 1058, 1064 (2002), <http://law-wss-01.law.fsu.edu/journals/lawreview/downloads/293/Forehand.pdf> (last visited Jan. 29, 2016).

³ See ch. 70-424, L.O.F.

⁴ See s. 320.60(11), F.S.

⁵ Walter E. Forehand, *supra* note 2, at 1065.

October 1, 1988, are governed by the act, including amendments to the act, unless specifically providing otherwise.

In 2009, the DHSMV held in an administrative proceeding that amendments to the act do not apply to dealers whose franchise agreements were signed prior to the effective date of various amendments to the act.⁶ The DHSMV has indicated that it will apply the *Motorsports* holding to every amendment to the act. This may result in different protections accruing to dealers, depending on when they signed their franchise agreements.

Civil Damages

Section 320.697, F.S., provides that any person who suffers pecuniary loss or is otherwise affected by a licensee's violation of the act has a cause of action against the licensee for damages and may recover damages and attorney's fees, notwithstanding any other remedies under the act. The licensee has the burden to prove that such violation did not occur upon a prima facie showing by the person bringing the action.

Consumer Data Protection

Consumer data can refer to a variety of information, including, but not limited to:

- Personal-identifying data: name, address, telephone number, or email address;
- Demographic data: age, race, occupation, income, or education;
- Retail data: purchase history, credit card numbers, or bank account information; and
- Government data: social security or driver license numbers.

In the United States there is no all-encompassing law regulating the acquisition, storage, or use of consumer data in general terms. However, partial regulations do exist in state and federal law, including in the Federal Trade Commission (FTC) Privacy and Safeguards Rule, the Gramm-Leach-Bliley Act, and state law.

Gramm-Leach Bliley Act (GLBA)⁷

The GLBA, also known as the Financial Services Modernization Act of 1999, implemented law regarding the protection and disclosure of nonpublic personal information obtained by financial institutions, limitations on reuse of information, and privacy notice requirements. The GLBA gives the Federal Trade Commission (FTC) authority to prescribe rules necessary to carry out certain purposes of the GLBA.⁸

⁶ See *Motorsports of Delray, LLC v. Yamaha Motor Corp., U.S.A.*, Case No. 09-0935 (Fla. DOAH Dec. 9, 2009). The DHSMV ruled that a 2006 amendment to the Florida Automobile Dealers Act does not apply to a dealer terminated in 2008 because the dealer's franchise agreement was entered into prior to the effective date of the amendment. This Final Order was initially appealed but was later voluntarily dismissed. See also, *In re Am. Suzuki Motor Corp.*, 494 B.R. 466, 480 (Bankr. C.D. Cal. 2013).

⁷ 15 U.S.C. ss. 6801 *et. seq.*

⁸ 15 U.S.C. s. 6804

The FTC is the chief federal agency on privacy policy and enforcement.⁹ The FTC's Privacy Rule (Privacy Rule)¹⁰ is a principle part of the GLBA, and applies to vehicle dealers who extend credit to someone, arrange for someone to finance or lease a car, or provide financial advice or counseling to individuals.¹¹ Personal information collected by a dealer to provide these services is covered under the Privacy Rule, which outlines when privacy notices must be given to consumers, what information must be included in the privacy notices, limitations on the disclosure and reuse of non-public personal information, and opt-out requirements.¹²

The FTC's Safeguards Rule, also part of the GLBA, outlines standards for safeguarding customer information.¹³ The rule requires service providers who, through their services to a financial institution, handle or are permitted access to customer information to have a written security plan to protect the confidentiality and integrity of customer data.¹⁴

Florida Information Protection Act of 2014¹⁵

The Florida Information Protection Act of 2014 provides the procedure for protection and security of confidential personal information¹⁶ that is in the possession of covered entities.¹⁷ Covered entities, governmental entities, and third-party agents are required to take reasonable measures to protect and secure electronic data containing personal information. When the security of a data system is breached, a covered entity must provide notice to the Department of Legal Affairs and affected individuals, unless an investigation and consultation with relevant law enforcement agencies determines the breach has not and will not likely result in identity theft or financial harm to the individuals whose personal information has been accessed.¹⁸ If a covered entity fails to provide the required notices, it may face civil penalties.

⁹ Federal Trade Commission, *Protecting Consumer Privacy*, <https://www.ftc.gov/news-events/media-resources/protecting-consumer-privacy> (last visited Jan. 29, 2016).

¹⁰ 16 C.F.R., §§ 313.1-313.3.

¹¹ Federal Trade Commission, *FTC's Privacy Rule and Auto Dealers: FAQ*, (January 2005), <https://www.ftc.gov/tips-advice/business-center/guidance/ftcs-privacy-rule-auto-dealers-faqs> (last visited Jan. 29, 2016).

¹² See 16 C.F.R. § 313.

¹³ See 16 C.F.R. § 314.

¹⁴ *Id.*

¹⁵ Section 501.171, F.S.

¹⁶ "Personal information" includes an individual's first name or first initial and last name in combination with one of the following: a social security number; driver license or identification card number, passport number, military identification number, or other number issued by a governmental entity used to verify identity; a financial account number or credit or debit card number, in combination with any required security code, access code, or password needed to permit access to the financial account; an individual's medical history, mental or physical condition, or medical treatment or diagnosis; or an individual's health insurance policy number or subscriber identification number and any unique identifier used by a health insurer. A user name or e-mail address, in combination with a password or security question and answer is also considered "personal information." Information that is publicly available from a federal, state, or local governmental entity or information that is encrypted, secured, or modified by a method or technology that removes personally identifiable information is not considered "personal information."

¹⁷ A "covered entity" is a sole proprietorship, partnership, corporation, trust, estate, cooperative, association, or other commercial entity that acquires, maintains, stores, or uses personal information.

¹⁸ Section 501.171(4), F.S.

III. Effect of Proposed Changes:

Section 1 of the bill creates s. 320.646, F.S., within the “Florida Automobile Dealers Act” to provide protection for consumer data that is collected by a motor vehicle dealer.

Definitions

The bill defines “consumer data” as “nonpublic personal information” as used in 15 U.S.C. s. 6809(4), which means personally identifiable financial information that is:

- Provided by a consumer to a financial institution, or
- That results from any transaction with the consumer or service performed for the consumer, or
- Obtained by the financial institution in any way.

For purposes of this bill, the personally identifiable financial information (consumer data) must have been collected by a motor vehicle dealer *and* have been directly provided to the licensee or third party. It does not, therefore, include consumer data that has been obtained by a licensee from any other source, or that was otherwise publicly available.

The bill also defines “data management system” as any computer hardware or software system that is owned, leased, or licensed by a motor vehicle dealer.

Compliance with Privacy Regulations

The bill requires a licensee or a third party acting on behalf of the licensee who receives consumer data from a motor vehicle dealer to comply with, and not knowingly cause a dealer to violate, all restrictions on the reuse or disclosure of data established by state and federal law. In the interest of such compliance, a dealer may require a licensee to provide a written description of the licensee’s or third party’s procedures adopted to safeguard consumer data. The licensee’s safeguard procedures must meet, at a minimum, the requirements of the GLBA.

The dealer may also request that a licensee document the consumer data obtained by the licensee or third party from the dealer, in addition to a list of all persons to whom the data has been provided during the preceding 6 months. Both lists must indicate the specific fields of consumer data that were provided to each person. A licensee may exempt the following information from his or her documentation, however:

- The name of a service provider, subcontractor, or consultant, and data provided to him or her, if that person in the course of his or her performance of services on behalf of or for the benefit of the licensee or dealer, agreed to comply with applicable consumer data laws; and
- The name of a person or data provided to him or her, if the dealer has consented in writing that such person may receive consumer data.

A dealer’s request for a list of released data may only be made once every 6 months.

Access to Consumer Data

The bill permits a licensee to be granted direct access to a dealer’s consumer data but only by written document that is separate and apart from the franchise agreement between the two

parties. Conversely, the licensee may not under any circumstances, require that a dealer grant the licensee or a third party access to his or her data management system to collect consumer data. In these cases, the dealer is permitted to furnish consumer data to the licensee in a widely accepted file format and through a third-party dealer who is selected by the dealer.

Civil Claims

Section 1 also requires licensees to compensate dealers for any third-party claims against or damages incurred by the dealer as a result of the licensee's or third party's access, use, or disclosure of the consumer data.

The bill provides that in any cause of action against a licensee for prohibitions or requirements within the bill, the person bringing the action has the burden of proving that the violation was willful or with sufficient frequency to establish a pattern of wrongdoing with respect to such person's consumer data.

Section 2 reenacts s. 320.6992, F.S., to incorporate the newly created section.

Section 3 provides that the bill takes effect upon becoming law.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

None.

B. Public Records/Open Meetings Issues:

None.

C. Trust Funds Restrictions:

None.

V. Fiscal Impact Statement:

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

The bill could positively impact motor vehicle dealers who will be compensated by a licensee for any damages incurred as a result of the licensee's or a third party's access, use, or disclosure of consumer data. For that reason, as well as the additional restrictions placed upon licensees in obtaining consumer data from a dealer, the bill could have a negative impact on the licensees.

C. Government Sector Impact:

The bill does not appear to have an impact on state or local government.

VI. Technical Deficiencies:

None.

VII. Related Issues:

None.

VIII. Statutes Affected:

This bill creates section 320.646 of the Florida Statutes.

This bill reenacts section 320.6992 of the Florida Statutes.

IX. Additional Information:

A. Committee Substitute – Statement of Substantial Changes:

(Summarizing differences between the Committee Substitute and the prior version of the bill.)

CS by Transportation on January 20, 2016:

The CS:

- Changes the definition of “consumer data” from information collected or record created by a motor vehicle dealer which contains personal information from which the consumer’s identity could be derived, to the definition of “nonpublic personal information” as defined in 15 U.S.C. s. 6809(4), collected by the dealer and provided to the licensee or third party acting on behalf of the licensee.
- Adds that the definition of “consumer data” does not include the same or similar data obtained by a licensee from any source other than the dealer.
- Clarifies in the bill that the consumer data restrictions apply to a third party *acting on behalf of the licensee*.
- Adds that a licensee may not *knowingly* cause a dealer to violate any applicable restrictions on the reuse or disclosure of consumer data.
- Adds *upon request* from the dealer, the licensee or third party acting on behalf of the licensee must provide a written statement describing the established procedures to safeguard consumer data.
- Regarding the dealer requesting a list of consumer data obtained by the licensee and all persons the dealer’s consumer data has been provided to by the licensee or third party acting on behalf of the licensee, the CS lowers the preceding period of time the list must include, from 12 to 6 months.
- Adds that the list need not include a licensee’s service providers, subcontractors or consultants acting in the course of his or her performance of services on behalf of or for the benefit of the licensee or dealer, or the data provided, if the person also has agreed to comply with applicable consumer data laws. The list also need not include

persons or the data provided to a person if the dealer has consented in writing that such person may receive consumer data.

- Makes a technical change regarding widely accepted file formats, from comma delineated to comma delimited.
- Concerning a dealer granting a licensee access to the dealer's data management system to obtain consumer data, the CS adds the dealer must provide the licensee 30 days' written notice to withdraw such consent.
- Adds a section to the bill providing in any cause of action against a licensee for prohibitions or requirements within the bill, the person bringing the action has the burden of proving that the violation was willful or with sufficient frequency to establish a pattern of wrongdoing.

B. Amendments:

None.