

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 Transportation

BILL: SB 1678

INTRODUCER: Senator Garcia

SUBJECT: Motor Vehicle Dealers

DATE: March 21, 2017

REVISED: _____

| | ANALYST | STAFF DIRECTOR | REFERENCE | ACTION |
|----|---------|----------------|-----------|--------------------|
| 1. | Jones | Miller | TR | Pre-meeting |
| 2. | | | CM | |
| 3. | | | RC | |

I. Summary:

SB 1678 addresses issues related to contractual agreements between motor vehicle licensees (manufacturers, distributors, and importers) and motor vehicle dealers. The bill provides additional prohibitions for licensees, including prohibiting discriminatory practices between same line-make motor vehicle dealers in the state.

The bill also allows dealers to file complaints against licensees in any court of competent jurisdiction to seek injunctive relief and civil damages, and provides the court may issue injunctive relief without regard to the existence of an adequate remedy at law or irreparable harm and without requiring any bond. The court may award costs and reasonable attorney fees to the complainant if relief is granted.

The bill does not appear to have a significant fiscal impact to state and local government.

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, in part, the

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://ir.law.fsu.edu/cgi/viewcontent.cgi?article=1632&context=lr> (last visited Mar. 9, 2017).

³ See ch. 70-424, L.O.F.

contractual relationship between manufacturers and dealers,⁴ requires the licensing of manufacturers, and regulates numerous aspects of the contracts between the 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 October 1, 1988, are governed by the act, including amendments to the act, unless the amendment specifically provides 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.

⁴ See s. 320.60(11), F.S.

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

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).

Grounds for Denial, Suspension, or Revocation of a License

Section 320.64, F.S., currently includes 40 different subsections listing criteria that may cause the DHSMV to deny, suspend, or revoke the licensee's license. A licensee is prohibited from committing the following acts toward dealers:

- Being unable to carry out contractual obligations with motor vehicle dealers;
- Coercing or attempting to coerce dealers into accepting motor vehicles, parts, or accessories the dealer did not order;
- Coercing the dealer into any agreement with the licensee;
- Threatening to discontinue, cancel, or not renew a franchise agreement with a dealer in violation of s. 320.641, regarding the process for discontinuing, canceling, nonrenewing, modifying, or replacing franchise agreements;
- Threatening to, or replacing or modifying a franchise agreement in a way that would adversely alter the rights or obligations of the dealer, or which substantially impairs sales, service obligations, or investment of the dealer;
- Attempting to enter or entering into a franchise agreement with a dealer who does not have the proper facilities to provide services necessary to provide for new vehicle warranties;
- Requiring a dealer to make substantial changes to the dealer's sales or services facilities that are not considered reasonable or justified, except when offering, to its same line-make⁷ dealers a similar incentive for similar improvements, a written commitment to supply additional vehicles, a loan, or grant money;
- Coercing a dealer to provide installment financing for the dealer's purchasers using a specified financial institution;
- Preventing or refusing to accept the succession to any interest in a franchise agreement by any legal heir or devisee, as long as they meet the licensee's written, reasonable, and uniformly applied minimal standard qualifications for dealer applicants;
- Establishing or implementing a system of vehicle allocation or distribution which alters or reduces allocations or supplies of new motor vehicles to dealers in a way that is unfair, inequitable, unreasonably discriminatory, or not supported by reason and good cause;
- Without good and fair cause, delaying, refusing, or failing to provide a supply of vehicles by series in reasonable quantities;
- Threatening to require a dealer to prospectively assent to a release, assignment, novation, waiver, or estoppel intended to relieve any person from liability or obligation under this act;
- Threatening or coercing a dealer toward action whereby the dealer foregoes its right to protest the establishment or relocation of a dealer in the community;
- Refusing to deliver, in reasonable quantities and within a reasonable time motor vehicles or parts, to any dealer who has an agreement for the retail sale of such new vehicles or parts.⁸
- Performing audits on dealers outside of the required time-frames authorized in statute;

⁷ Section 320.60(14), F.S., defines "Line-make vehicles" as motor vehicles offered for sale, lease, or distribution under a common name, trademark, service mark, or brand name of the manufacturer of same. However, motor vehicles sold or leased under multiple brand names or marks constitute a single line-make when they are included in a single franchise agreement and every dealer in this state authorized to sell or lease such vehicles has been offered the right to sell or lease the multiple brand names covered by a single franchise agreement.

⁸ Exceptions are provided for acts of God, work stoppage, delays due to a strike or labor difficulty, a freight embargo, product shortage, or other cause, which the licensee cannot control. Additionally, the licensee can reasonably require the dealer to purchase special tools to service such vehicles or service person training related to the vehicle.

- Taking action against a dealer who sold or leased a vehicle that the customer then exported or resold, providing the dealer did not know the customer's intention;
- Making available dealer's confidential financial information without the dealer's consent;
- Failing to reimburse a dealer for the reasonable cost of providing a loaner vehicle, if the dealer is required by the licensee to provide a loaner;
- Offering a dealer a franchise agreement that:
 - Requires the dealer to bring administrative actions, legal actions, arbitration, or mediation in a venue outside of the state; or
 - Requires that a law of another state be applied to legal proceedings between the licensee and dealer;
- Including in any franchise agreement with a dealer, a mandatory obligation of the dealer to purchase, sell, lease, or offer any quantity of used motor vehicles;
- Refusing to sell vehicles to a dealer because the dealer has not purchased, sold, leased, or certified a certain quantity of used vehicles prescribed by the licensee;
- Failing to pay a dealer as required;
- Refusing to allow, limiting, or restricting dealers from acquiring or adding service or sale operations for another line-make of vehicles, without demonstrating justification for such refusal, limit, or restriction;
- Failing or refusing to offer an incentive or benefit, in whole or in part, to all its same line-make dealers, unless the program in this state is reasonably supported by substantially different economic or marketing considerations; and
- Requiring or coercing a dealer to purchase goods or services from a vendor selected by the licensee without making available to the dealer the option to obtain substantially similar goods or services from a vendor chosen by the dealer. This does not include:
 - Materials subject to the licensee's intellectual property rights;
 - Special tools or training required by the licensee;
 - Parts used in repairs under warranty obligations of the licensee;
 - Any good or services paid for entirely by the licensee; or
 - Any licensee's design or architectural review service.

Procedure for Administrative Hearings and Adjudications

A dealer who is directly and adversely affected by the action or conduct of a licensee which is alleged to be in violation of the act, may seek a declaration and adjudication of its rights by either filing a request with the DHSMV for a proceeding and administrative hearing, or filing a written objection or notice of protest with the DHSMV.⁹

Hearings are held no sooner than 180 days nor later than 240 days from the date a written objection or notice of protest is filed, unless extended with good cause by the administrative law judge.¹⁰

Civil Damages

A motor vehicle dealer who can demonstrate that a violation of, or failure to comply with any of these provisions by an applicant or licensee will or can adversely and pecuniarily affect the

⁹ Section 320.0699(1), F.S.

¹⁰ Section 320.0699(2), F.S.

dealer, is entitled to pursue an injunction against the licensee, treble damages, and attorney's fees.¹¹ The licensee has the burden to prove that such violation did not occur upon a prima facie showing by the person bringing the action.¹²

III. Effect of Proposed Changes:

The bill addresses several issues related to the contractual agreements between motor vehicle licensees and dealers.

Section 1 of the bill adds additional criteria in s. 320.64, F.S., that a licensee is prohibited from committing. A violation is grounds for the DHSMV to deny, suspend, or revoke the licensee's license. The bill:

Adds a new paragraph to subsection (10) to provide:

- A dealer who completes any licensee-approved program related to facility construction, improvements, renovations, expansion, remodeling, or alterations or installation of signs or other image elements is deemed to be in full compliance with all of the licensee's requirements related to the facility, sign, and image for a ten-year period following such completion; and
- A dealer who has completed a prior approved facility incentive program, standard, or policy during the ten-year period but does not comply with the provisions related to facility, sign, or image under a new incentive program is not eligible for the new benefits, but is entitled to all prior benefits plus any increase in benefits between the old and new programs for the remainder of the ten-year period.

Adds a new subsection (41) prohibiting a licensee from failing to act in good faith toward or to deal fairly with one of its franchised motor vehicle dealers regarding the terms or provisions of an agreement. To determine if a licensee has failed to act in good faith or deal fairly with a dealer, the DHSMV or court of competent jurisdiction shall consider:

- Whether the licensee has fairly taken into account the dealer's investment in its facilities, its sales or parts promotions; its staffing, its general operations, and equities and interests;
- Whether the licensee has altered the rights of the dealer or the dealer's independence in operating the dealership; or
- Whether the licensee has altered the sales or service obligations of the dealer or adversely impaired the dealer's investments or financial returns.

Adds a new subsection (42) prohibiting a licensee from establishing, implementing, or enforcing criteria for measuring sales or service performance of franchised dealers which may have a negative material or adverse effect on any dealer; which is unfair, unreasonable, arbitrary, or inequitable; or which does not include all applicable local and regional criteria, data, and facts. A licensee or affiliate thereof that seeks to establish, implement, or enforce against any dealer any performance measurement must promptly describe in writing to the dealer, in detail, how the measurement criteria for the dealer's sales and service performance was designed, calculated, established, and applied.

¹¹ See ss. 320.64, 320.694, and 320.697, F.S.

¹² Section 320.697, F.S.

For a violation of this subsection, the dealer may file a complaint in any court of competent jurisdiction. If the dealer's complaint is successful, the dealer is entitled to treble damages plus attorney fees, and injunctive relief without regard to the existence of an adequate remedy at law or irreparable harm and without requiring a bond of any complaint.

Section 2 creates s. 320.648, F.S., prohibiting discriminatory practices by licensees. The section prohibits a licensee from:

- Selling or offering to sell a new vehicle to a dealer at a lower actual, effective cost, including cost of vehicle transport, than is offered to another same line-make dealer in this state during a similar period; or
- Discriminating between same-line make dealers by use of promotions, incentives, bonus plans, program devices, benefits, or otherwise, which results in a lower cost for a vehicle than is offered or made available to another same line-make dealer in this state during a similar period.

Section 3 adds in s. 320.699, F.S., that a dealer may file a complaint in a court of competent jurisdiction to seek injunctive relief and civil damages. A court may issue injunctive relief without regard to the existence of an adequate remedy at law or irreparable harm and without requiring any bond. The court may award costs and reasonable attorney fees to the complainant if relief is granted.

Section 4 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:

To the extent the agreements between licensees and dealers change, the parties could experience a positive or negative impact.

C. **Government Sector Impact:**

The bill does not appear to have a significant fiscal impact on the government sector.

VI. Technical Deficiencies:

Lines 831-833 of the bill may need to be amended to provide consistent terminology when referring to same line-make motor vehicle dealers.

VII. Related Issues:

None.

VIII. Statutes Affected:

This bill substantially amends the following sections of the Florida Statutes: 320.64 and 320.699.

This bill creates section 320.648 of the Florida Statutes.

IX. Additional Information:

A. **Committee Substitute – Statement of Changes:**

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

None.

B. **Amendments:**

None.