

HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: CS/HB 637 Motor Vehicle Dealers, Manufacturers, Importers, and Distributors

SPONSOR(S): Civil Justice Subcommittee, Shoaf

TIED BILLS: **IDEN./SIM. BILLS:** SB 712

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR or BUDGET/POLICY CHIEF
1) Regulatory Reform & Economic Development Subcommittee	12 Y, 0 N	Thompson	Anstead
2) Civil Justice Subcommittee	15 Y, 0 N, As CS	Mawn	Jones
3) Commerce Committee			

SUMMARY ANALYSIS

The Division of Motor Vehicles (“Division”) within the Department of Highway Safety and Motor Vehicles (“DHSMV”) is responsible for administering and enforcing the “Florida Automobile Dealers Act” (“Act”), which Act regulates the contractual business relationship between franchised motor vehicle dealers (“dealers”) and manufacturers, distributors, and importers operating in the state. The Act also requires that manufacturers, distributors, and importers (“licensees”) be licensed by the DHSMV before doing business in the state and provides grounds for which such licenses may be suspended or revoked or an application for such licenses may be denied.

CS/HB 637 revises the Act to:

- Broaden the definitions of “common entity”; “unfair”; “independent person”; and “sell” and related terms, and define “motor vehicle dealer association.”
- Expand the actions which a licensee is prohibited from taking to include:
 - Conditionally or unconditionally reserving a specific motor vehicle for a specific person, except for purposes of replacing a consumer’s vehicle under ch. 861, F.S.;
 - Requiring or incentivizing a dealer to sell or lease a:
 - Specific motor vehicle to a specific person; or
 - A motor vehicle at a specific price or profit margin, or restrict the price at which a motor vehicle dealer may sell or lease a motor vehicle;
 - Engaging in any activities of a motor vehicle dealer except as otherwise authorized; and
 - Selling or leasing specified vehicles or for such vehicles activating for a fee or selling any permanent or temporary motor vehicle accessory, option, add-on, feature, improvement, or upgrade except through a licensed motor vehicle dealer.
- Authorize licensees to sell or activate for a fee a permanent or temporary motor vehicle accessory, option add-on, feature, improvement, or upgrade for specified motor vehicles through remote electronic transmission in specified circumstances, including paying a percentage of the gross sale price that is at least commensurate with the dealer margin structure established by the applicant or licensee.
- Modify the entities prohibited from owning or operating motor vehicle dealerships, an exception to such prohibition, and to whom motor vehicle dealer licenses may be issued.
- Require the DHSMV to conduct an inquiry of a licensee relating to any written complaint alleging a violation of any provision of ss. 320.60-.70, F.S. against such licensee made by a motor vehicle dealer or a motor vehicle dealer association meeting specified conditions; provide applicable timelines; expand the DHSMV’s subpoena authority as it relates to such an inquiry; and specify the actions the DHSMV may take if the DHSMV determines that a violation occurred.

The bill does not appear to have a fiscal impact on state or local governments. The bill provides an effective date of July 1, 2023.

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. EFFECT OF PROPOSED CHANGES:

Background

Florida Automobile Dealership Act

General Motors established the first motor vehicle franchise in the United States in 1898.¹ Franchise agreements² were initially voluntary and unregulated, but in 1970, the Florida Legislature adopted comprehensive regulations, embodied as the Florida Motor Vehicle Dealership Act (“Act”) in Ch. 320, F.S.,³ which chapter generally regulates motor vehicle manufacturer,⁴ distributor,⁵ and importer⁶ licensing and the contractual relationship between such entities and franchised dealers, providing substantial protections for franchised dealers.⁷

General Provisions

The Act, which charges the Division of Motor Vehicles (“Division”) within the Department of Highway Safety and Motor Vehicles (“DHSMV”) with administering and enforcing the Act, generally specifies:

- That motor vehicle manufacturers, distributors, and importers (“licensees”) must be licensed under the Act to engage in business in Florida and the conditions and situations under which the DHSMV may deny, suspend, or revoke such licenses;
- The requirements for licensees wishing 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 licensees must follow to add a franchised dealership in an area already served by a franchised dealer, the protest process, and the DHSMV’s role in such circumstances;
- The damages assessable against a licensee who violates the Act; and
- The DHSMV’s authority to adopt rules to implement these sections of law.⁸

Further, the Act provides that all presently existing or future systems of motor vehicle distribution in Florida and all franchise agreements that are renewed, amended, or entered into after October 1, 1988, are governed by the Act and any amendments thereto, unless the amendment specifically provides

¹ Francine Lafontaine and Fiona Scott Morton, *State Franchise Laws, Dealer Terminations, and the Auto Crisis*, 24 J. Econ. Persp. 233, 234 (2010), <https://pubs.aeaweb.org/doi/pdfplus/10.1257/jep.24.3.233> (last visited March 27, 2023).

² “Franchise agreement” means a contract, franchise, new motor vehicle franchise, sales and service agreement, or dealer agreement or any other terminology used to describe the contractual relationship between a manufacturer, factory branch, distributor, or importer, and a motor vehicle dealer, pursuant to which the motor vehicle dealer is authorized to transact business pertaining to motor vehicles of a particular line-make. “Line-make vehicles”, in turn, means motor vehicles which are offered for sale, lease, or distribution under a common name, trademark, service mark, or brand name of the manufacturer of same (such as Ford, General Motors, or Honda).

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 motor vehicle dealer in this state authorized to sell or lease any such vehicles has been offered the right to sell or lease all of the multiple brand names or marks covered by the single franchise agreement. S. 320.60(1) and (14), F.S.

³ Ch. 70-424, Laws of Fla.

⁴ “Motor vehicle manufacturer” means any person, whether a resident or non-resident of this state, who manufactures or assembles motor vehicles or who manufactures or installs on previously assembled truck chassis special bodies or equipment which, when installed, form an integral part of the motor vehicle and which constitute a major manufacturing alteration. This term includes a central or principal sales corporation or other entity through which, by contractual agreement or otherwise, it distributes its products. S. 320.60(9), F.S.

⁵ “Distributor” means a person, resident or nonresident, who, in whole or in part, sells or distributes motor vehicles to motor vehicle dealers or who maintains distributor representatives. S. 320.60(5), F.S.

⁶ “Importers” means a person who imports vehicles from a foreign country into the United States or into this state for the purpose of sale or lease. S. 320.60(7), F.S.

⁷ “Motor vehicle dealer” means any person, firm, company, corporation, or entity who holds a license under s. 32.27, F.S., as a “franchised motor vehicle dealer” and, for commission, money, or other things of value, repairs or services motor vehicles pursuant to a franchise agreement; sells, exchanges, buys, leases or rents, or offers, or attempts to negotiate a sale or exchange of any interest in, motor vehicles; or is engaged wholly or in part in the business of selling motor vehicles, whether or not such motor vehicles are owned by such person, firm, company, or corporation. Further, any person who repairs or services three or more motor vehicles; buys, sells, or deals in three or more motor vehicles in any 12-month period; or offers or displays for sale three or more motor vehicles is presumed to be a motor vehicle dealer, with exceptions. S. 32.60(11), F.S.

⁸ S. 320.011, F.S.; ss. 320.60-320.70, F.S.

otherwise and except to the extent that such application would impair valid contractual agreements in violation of the State and Federal Constitutions.⁹

Manufacturer, Factory Branch, Distributor, and Importer Licenses

An application for a motor vehicle manufacturer, distributor, or importer license (“applicant”) may be denied on various grounds as specified in the Act, and, for the same grounds, such a license, once issued, may be revoked or suspended at any specific location or across the state.¹⁰ Generally, such grounds arise principally out of the applicant’s or licensee’s dealings with motor vehicle dealers with whom the applicant or licensee has a franchise agreement, including that the applicant or licensee, or in some cases a common entity¹¹ thereof:

- Coerced or attempted to coerce any motor vehicle dealer to enter into any agreement;
- Threatened to discontinue, cancel, or not to renew a franchise agreement of a licensed motor vehicle dealer, where the threatened discontinuation, cancellation, or nonrenewal, if implemented, would violate the Act;
- Threatened to modify or replace, or has modified or replaced, a franchise agreement with a succeeding franchise agreement which would adversely alter the rights or obligations of a motor vehicle dealer under an existing franchise agreement or which substantially impairs the sales, service obligations, or investment of the motor vehicle dealer;
- Without good cause shown, delayed, refused, or failed to provide a supply of motor vehicles by series in reasonable quantities, including the models publicly advertised by the applicant or licensee as being available, or has delayed, refused, or failed to deliver motor vehicle parts and accessories within a reasonable time after receipt of an order by a franchised dealer; or
- Established a system of motor vehicle allocation or distribution or has implemented a system of allocation or distribution of motor vehicles to one or more of its franchised motor vehicle dealers which reduces or alters allocations or supplies of new motor vehicles to the dealer to achieve, directly or indirectly, a purpose that is prohibited by the Act, or which otherwise is unfair,¹² inequitable, unreasonably discriminatory, or not supportable by reason and good cause after considering the equities of the affected motor vehicles dealer or dealers.¹³

Further, licensees and applicants:

- Must maintain for three years records describing their methods or formula for vehicle allocation and distribution, and of their actual allocation and distribution, to their franchised dealers; and
- Are prohibited from:
 - Competing (with respect to any activity covered by the franchise agreement) with a franchised dealer of the same line-make vehicles located in this state with whom the licensees or applicants have entered into a franchise agreement.¹⁴
 - Selling a motor vehicle to any retail consumer in the state except through a dealer holding a franchise agreement for the line-make vehicles that includes the motor vehicle sold.¹⁵

Dealer Licenses in Areas Previously Served

Any manufacturer, distributor, or importer who proposes to establish a motor vehicle dealership, or relocate an existing dealership, to a location within a community or territory where the same line-make vehicle is presently represented by a franchised dealer must give written notice of its intention to the

⁹ See Article I, s. 10 of the Florida Constitution and Article 1, s. 10 of the United States Constitution. 320.701, F.S.S. 320.6992, F.S.

¹⁰ S. 320.64, F.S.

¹¹ “Common entity” means a person who is either controlled or owned, beneficially or of record, by one or more persons who also control or own more than 40 percent of the voting equity interests of a manufacturer; or who shares directors, officers, or partners with a manufacturer.

¹² As used in this section, “unfair” includes, without limitation, the refusal or failure to offer to any dealer an equitable supply of new vehicles under its franchise, by model, mix, or colors as the manufacturer offers or allocates to its other same line-make dealers in the state.

¹³ *Id.*

¹⁴ S. 320.64(23), F.S.

¹⁵ This does not apply to sales to current employees and to employees of companies affiliated by common ownership, charitable not-for-profit organizations, and the federal government. S. 320.64(24), F.S.

DHSMV.¹⁶ An existing franchised dealer has standing to protest a proposed additional or relocated motor vehicle dealership when the existing dealer has a franchise agreement for the same line-make vehicle to be sold or serviced by the proposed dealership and certain physical location mileage requirements are met.¹⁷ Specifically, in counties with a population of:

- Less than 300,000, an existing dealer of the same line-make vehicles has standing if the dealer:
 - Has a franchise agreement designating the same area of responsibility in which the proposed dealership is to be located;
 - Has a licensed franchise location within a 20-mile radius of the proposed dealership's location; or
 - Can establishing that during any 12-month period of the 36-month period preceding the filing of the application for the proposed dealership, the dealer or its predecessor made 25 percent of its retail sales of new motor vehicles to persons whose registered household addresses were located within a 20-mile radius of the proposed dealership's location, so long as the existing dealer is located in the same county as or any county contiguous to the county of the proposed dealership's location.¹⁸
- Over 300,000, an existing dealer of the same line-make vehicles has standing if the dealer:
 - Has a licensed franchise location within a radius of 12.5 miles of the location of the proposed dealership; or
 - Can establishing that during any 12-month period of the 36-month period preceding the filing of the application for the proposed dealership, the dealer or its predecessor made 25 percent of its retail sales of new motor vehicles to persons whose registered household addresses were located within a 12.5-mile radius of the proposed dealership's location, so long as the existing dealer is located in the same county as or any county contiguous to the county of the proposed dealership's location.¹⁹

However, different procedures apply where the proposed dealership is a dealership which only services vehicles and does not sell or lease new vehicles ("service-only dealership"). Specifically, an existing dealer only has standing to protest such a proposed dealership when the dealer is within a 20-mile radius in counties with a population less than 300,000 and a 12.5-mile radius in counties with a population over 300,000.²⁰ Further, a proposed service-only dealership is not subject to protest if:

- The applicant for the service-only dealership location is an existing motor vehicle dealer of the same line-make as the proposed additional or relocated service-only dealership;
- There is no existing dealer of the same line-make closer than the applicant to the proposed location of the additional or relocated service-only dealership; and
- The proposed location of the additional or relocated service-only dealership is at least seven miles from all existing motor vehicle dealerships of the same line-make, other than motor vehicle dealerships owned by the applicant.²¹

If a service-only dealership subsequently seeks to sell new motor vehicles at its location, however, all notice and protest provisions apply.²²

¹⁶ S. 320.642(1), F.S.

¹⁷ S. 320.642(3), F.S.

¹⁸ S. 320.642(3)(a)2., F.S.

¹⁹ S. 320.642(3)(b)1., F.S.

²⁰ S. 320.642(6)(a), F.S.

²¹ S. 320.642(6)(b), F.S.

²² S. 320.642(6)(d), F.S.

Restrictions on Owning or Operating Dealerships

The Act prohibits licensees, manufacturers, distributors, agents of a manufacturer or distributor, or any parent, subsidiary, common entity, officer, or representative of a licensee from owning or operating a dealership in Florida for the sale or service of motor vehicles that are already offered for sale²³ under a franchise agreement with a dealer in this state.²⁴ However, a licensee may operate a dealership and still be deemed to be in compliance with the Act if:

- The entity operates a dealership for a temporary period of up to one year, during the transition from one dealership owner to another;
- The entity operates a dealership temporarily for a reasonable period for the exclusive purpose of broadening the diversity of its dealer body and enhancing opportunities for qualified persons who are:
 - Part of a group that has historically been underrepresented in its dealer body; or
 - Deemed to lack the resources to purchase or capitalize the dealership outright; or
- The DHSMV determines, after an administrative hearing on the matter held at the request of any person, that there is no “independent person”²⁵ available in the community or territory to own and operate the dealership in a manner consistent with the public interest.²⁶

In any such case, the licensee must continue to make the dealership available for sale to an independent person at a fair and reasonable price, and approval of the sale may not be unreasonably withheld.²⁷

Inspection and Investigation of Books or Other Documents of License

The Act gives the DHSMV the authority to inspect a licensee’s pertinent books, records, letters, and contracts relating to any written complaint made to the DHSMV against the licensee.²⁸ In the exercise of such duties, the Act gives the DHSMV the power to subpoena witness attendance and the production of any documentary evidence necessary for DHSMV’s disposition of any such written complaint, but provides that any such information obtained may not be used against the licensee as the basis for a criminal prosecution under Florida law.²⁹

Administrative Hearings and Adjudications

A franchised dealer who is directly and adversely affected by the actions or conduct of a manufacturer, distributor, or importer, which actions or conduct allegedly violate the Act, may seek a declaration and adjudication of its rights by filing with the DHSMV either a:³⁰

- Request for an administrative hearing under ch. 120, F.S.; or
- Written objection or notice of protest as prescribed by the Act.³¹

If a written objection or notice of protest is filed with the DHSMV, a hearing must occur no sooner than 180 days, or later than 240 days, from the date of the filing of the first written objection or notice of protest, unless the time is extended by the administrative law judge for good cause shown.³²

Civil Remedies

²³ “Sell,” “selling,” “sold,” “exchange,” “retail sales,” and “leases” means any transaction where the title of motor vehicle or used motor vehicle is transferred to a retail consumer; any retail lease transaction where a retail customer leases a vehicle for a period of at least 12 months; and lease-purchase transactions. However, under the Act, establishing a price for sale when an applicant or licensee has sold a motor vehicle to any retail consumer in the state except through a motor vehicle dealer holding a franchise agreement for the line-make vehicles that includes the motor vehicle does not constitute a sale or lease. S. 320.60(6) and (15), F.S.

²⁴ S. 320.645(1), F.S.

²⁵ “Independent person” means a person who is not an officer, director, or employee of the licensee. S. 320.645(2)(a), F.S.

²⁶ S. 320.645(1), F.S.

²⁷ *Id.*

²⁸ S. 320.67(1), F.S.

²⁹ S. 320.67(2), F.S.

³⁰ S. 320.699(1), F.S.

³¹ *Id.*

³² S. 320.699(2), F.S.

Any person who suffers a pecuniary loss or who has been otherwise adversely affected because of a violation of the Act by a manufacturer, distributor, or importer has a cause of action against such manufacturer, distributor, or importer for damages in an amount equal to three times the pecuniary loss, along with reasonable costs and attorney fees.³³ The person bringing such an action must make a prima facie showing that the alleged violation occurred, after which the manufacturer, distributor, or importer has the burden to prove that such a violation did not occur.³⁴

Additionally, the DHSMV, or any motor vehicle dealer in the name of the DHSMV and the State and for the use and benefit of the motor vehicle dealer, may generally apply to any circuit court of the state for a temporary or permanent injunction³⁵ restraining any person from acting as a licensee under the Act without being properly licensed thereunder; from violating or continuing to violate the Act; or from failing or refusing to comply with the requirements of injunction statute or any rule or regulation adopted thereunder.³⁶

However, on May 3, 2022, the First District Court of Appeal affirmed a decision by the DHSMV that the Florida Automobile Dealers Association (“FADA”) lacked standing to challenge a licensee’s alleged violations of the Act.³⁷ Specifically, the court held that, even though FADA’s members are motor vehicle dealers, FADA lacked standing because:

- It is not itself a motor vehicle dealer or other statutorily-authorized person or entity that may bring such a challenge; and
- Was not directly and negatively impacted by the licensee’s actions or conduct.³⁸

Market Background

Traditionally, dealers rely on licensees for product to fill and move off lots, and such licensees in turn rely on dealers to sell and service their vehicles. However, as more licensees introduce electric vehicles³⁹ (“EV”), such licensees are re-envisioning their sales methods in ways which may eliminate or reduce a licensee’s reliance on dealers. Specifically, some EV manufacturers, distributors, and importers, and newer motor vehicle manufacturers, distributors, and importers without existing franchise agreements, have adopted a “direct-to-consumer” approach for selling their vehicles; in other words, they sell their vehicles directly to consumers without the need for a dealership to act as a go-between.⁴⁰ These manufacturers, distributors, and importers often also:

- Adopt a cost-effective distribution method known as “build-to-order,” in which a vehicle purchaser can custom-design his or her vehicle online and have it delivered without needing to involve a dealer; and
- Operate their own dealerships and service centers to handle any in-person needs a customer may have.⁴¹

How the traditional licensee-dealer relationship fits into an EV future is at the forefront of discussions between such licensees and dealers.⁴² These discussions are of particular importance as, in the United

³³ S. 320.697, F.S.

³⁴ *Id.*

³⁵ An “injunction” is a court order requiring a person to do or cease doing a specific action. Legal Information Institute, *Injunction*, <https://www.law.cornell.edu/wex/injunction> (last visited March 27, 2023).

³⁶ S. 320.695, F.S.

³⁷ *Fla. Auto. Dealers Ass’n v. Hyundai Motor Am. Corp.*, 337 So. 3d 893, 894 (Fla. 1st DCA 2022), *reh’g denied* (May 3, 2022).

³⁸ *Id.*

³⁹ “Electric vehicle” means a motor vehicle that is powered by an electrical motor that draws current from rechargeable storage batteries. S. 320.01(36), F.S.

⁴⁰ Proponents of the direct-to-consumer sales model argue that it lowers end prices for consumers, increases consumer choice between industry brands, and gives manufacturers greater control over marketing and sales. Opponents of the model argue that it reduces price competition, lowers consumer safety, and reduces investments in local communities.

⁴¹ The U.S. Department of Justice, *Economic Effects of State Bans on Direct Manufacturer Sales to Car Buyers*, <https://www.justice.gov/sites/default/files/atr/legacy/2009/05/28/246374.pdf> (last visited March 27, 2023); Greg Rosalsky, *Inside the Rise of ‘Stealerships’ and the Shady Economics of Car Buying*, National Public Radio (NPR) (Aug. 30, 2022), <https://www.npr.org/sections/money/2022/08/30/119715886/inside-the-rise-of-stealerships-and-the-shady-economics-of-car-buying> (last visited March 27, 2023).

⁴² Michael Wayland, *Carmakers Face a Crossroads as they Work to Fit Auto Dealers into their EV Plans*, CNBC (Jan. 28, 2023), https://www.cnbc.com/2023/01/28/ev-sales-automakers-dealers.html?_source=sharebar|email&par=sharebar (last visited March 27, 2023).

States alone, revenue in the electric vehicles⁴³ (“EV”) market is projected to reach approximately \$61 billion in 2023, and will result in a market volume of \$139 billion by 2027.⁴⁴

According to the National Conference of State Legislatures (“NCSL”), a number of states have begun to address this issue by amending their dealer franchise laws to either explicitly prohibit or authorize the direct-to-consumer sales model.⁴⁵ Specifically, according to the NCSL:

- At least 17 states expressly prohibit the direct-to-consumer sales model;
- At least 18 states expressly authorize the direct-to-consumer model; and
- At least nine states prohibit all new direct-to-consumer sales arrangements, while authorizing manufacturers, distributors, and importers already engaged in direct-to-consumer sales in the state to maintain a certain number of sales locations.⁴⁶

Further, according to the NCSL:

- Of the states authorizing direct sales, at least eight states tie their direct-to-consumer sales provisions to a requirement that the entity exclusively sell non-fossil-fuel, EVs, or other zero-emission vehicles.
- Most states authorizing the direct-to-consumer sales model still require an entity to obtain a dealer license before operating in the state.
- In some states, authorization for the direct-to-consumer sales model comes from favorable judicial or administrative rulings as to the applicability of state law.⁴⁷

Recent Developments

Some licensees with established dealer franchises have indicated their intent to separate their EV and internal combustion vehicle lines with separate dealership agreements and to offer a sales model that is a hybrid between the manufacturer-dealership model and the direct-to-consumer model for both lines.⁴⁸ This stems in part from the fact that, recently, motor vehicle manufacturers and dealers have engaged in public disputes about how vehicles should be sold in the future, and about whether dealer franchise laws have contributed to dealers pricing new cars at an all-time high.⁴⁹ At least three major motor vehicle manufacturers recently asked their dealers to cut down on markups, additional waiting list fees, and deposits for EVs, and at least one notified its dealers that it would cut back on sending them the manufacturer’s most popular vehicles if prices did not come down.⁵⁰ Dealers, in turn, suggest that such actions will not solve pricing issues and will interfere with market competition.

The Federal Trade Commission (“FTC”) has advocated for the relaxation of state franchise laws so that manufacturers, distributors, and importers can utilize the lower cost direct-to-consumer business models and has stated that “[s]tates should allow consumers to choose not only the cars they buy, but also how they buy them.”⁵¹ The FTC has also proposed new rules aimed at combating rising consumer

⁴³ “Electric vehicle” means a motor vehicle that is powered by an electrical motor that draws current from rechargeable storage batteries. S. 320.01(36), F.S.

⁴⁴ Statista, *Electric Vehicles – United States*, <https://www.statista.com/outlook/mmo/electric-vehicles/united-states> (last visited March 27, 2023).

⁴⁵ National Conference of State Legislatures, *State Laws on Direct Sales*, <https://www.wispolitics.com/wp-content/uploads/2021/08/State-Laws-on-Direct-Sales.pdf> (last visited March 27, 2023).

⁴⁶ *Id.*

⁴⁷ *Id.*

⁴⁸ *Id.*

⁴⁹ Motor Biscuit, *Ford Threatens to Cut Dealer Inventories to Demolish Price Markups*, https://www.motorbiscuit.com/ford-threatens-cut-dealer-inventories-demolish-price-markups/?utm_source=npr_newsletter&utm_medium=email&utm_content=20220826&utm_term=7163011&utm_campaign=money&utm_id=4320608&orgid=&utm_att1= (last visited March 27, 2023); Motor1.com, Christopher Smith, *Dealership Profits Are At Record Levels Through Q1 2022: Report: The Average Profit for New-Car Dealerships is Estimated at \$7.1 million*; <https://www.motor1.com/news/589765/dealership-profits-at-record-levels-q1-2022/> (Last visited March 27, 2023) (Data from 2022 shows dealerships profits at record levels: The average gross profit per new vehicle is \$6,244, which is a 180 percent increase from pre-pandemic levels in 2019.)

⁵⁰ *Id.*; Chris Bruce, *Hyundai is Latest Automaker Fed Up with Ridiculous Dealership Markups*, Motor1.com (Feb 23, 2022), <https://www.motor1.com/news/569524/hyundai-genesis-avoid-dealer-markups/> (last visited March 27, 2023).

⁵¹ Marina, et al., *Direct-to-Consumer Auto Sales: It’s Not Just About Tesla*, Federal Trade Commission (May 11, 2015), <https://www.ftc.gov/enforcement/competition-matters/2015/05/direct-consumer-auto-sales-its-not-just-about-tesla> (last visited March 27, 2023).

prices.⁵² Such rules propose to ban deceptive advertising, in which dealerships market motor vehicles for lower prices than the dealership actually intends to sell them for; ban junk fees for fraudulent add-on products and services that provide no benefit to the consumer; and require dealerships to disclose upfront all costs and conditions for buying their vehicles.⁵³ However, NADA opposes these proposed rules and has stated that such rules “would cause great harm to consumers by significantly extending transaction times, making the customer experience much more complex and inefficient, and increasing prices.”⁵⁴

Effect of Proposed Changes

Manufacturer, Distributor, and Importer Licenses

CS/HB 637 expands the grounds for which an application for a manufacturer, distributor, or importer license may be denied, and such a license, once issued, may be suspended or revoked, to include:

- Establishing a system of motor vehicle allocation or distribution or implementing a system of allocation or distribution for motor vehicles to one or more of its franchised dealers which:
 - Conditionally or unconditionally reserves a specific motor vehicle identified by a vehicle identification number or other unique identifier for a specifically named person, except for purposes of replacing a consumer’s vehicle pursuant to ch. 861, F.S.;
 - Requires or incentivizes a motor vehicle dealer to sell or lease, or to negotiate the sale or lease of, a specific motor vehicle identified by a vehicle identification number or other unique identifier to a specifically named person; and
 - Requires or incentivizes a motor vehicle dealer to sell or lease a motor vehicle at a specified price or profit margin, or restricts the price at which a motor vehicle dealer may sell or lease a motor vehicle.
- Engaging in any of the activities of a motor vehicle dealer as defined in the Act, except as prohibited by the Act and with respect to the electronic transmission of a motor vehicle accessory, option, add-on, feature, improvement, or upgrade; and
- Selling or leasing, whether directly or through a common entity,⁵⁵ a motor vehicle of a line-make manufactured, distributed, or imported by the applicant or licensee to any retail consumer in Florida, or has for a motor vehicle of such line-make activated for a fee or sold any permanent or temporary motor vehicle accessory, option, add-on, feature, improvement, or upgrade, to any retail consumer for a motor vehicle the consumer purchased from a motor vehicle dealer in Florida, except through a properly licensed motor vehicle dealer holding a franchise agreement for the line-make that includes the motor vehicle.

However, the bill specifies that an applicant or a licensee, or a common entity thereof, may sell or activate for a fee a permanent or temporary motor vehicle accessory, option, add-on, feature, improvement, or upgrade for a motor vehicle of a line-make manufactured, imported, or distributed by the applicant or licensee and registered in Florida if and only if the accessory, option, add-on, feature, improvement, or upgrade is provided directly to the motor vehicle through remote electronic transmission. If such motor vehicle was sold or leased as new by a franchised dealer in the state within three years before such remote electronic transmission, the bill requires the applicant or licensee to pay the dealer a percentage of the gross sale price for the accessory, option, add-on, feature, improvement,

⁵² Federal Trade Commission, *FTC Proposes Rule to Ban Junk Fees, Bait-and-Switch Tactics Plaguing Car Buyers*, <https://www.ftc.gov/news-events/news/press-releases/2022/06/ftc-proposes-rule-ban-junk-fees-bait-switch-tactics-plaguing-car-buyers> (last visited March 27, 2023).

⁵³ *Id.*

⁵⁴ Rosalsky, *supra* note 45.

⁵⁵ The bill redefines “common entity” to mean a person who is either directly or indirectly controlled, or has more than 30 percent of his or her equity interest directly or indirectly owned, beneficially or of record, through any form of ownership structure, by a manufacturer, an importer, a distributor, a licensee, or a distributor thereof; or by one or more persons who also directly or indirectly control or own, beneficially or of record, more than 30 percent of the equity interests of a manufacturer, distributor, licensee, or an affiliate thereof. However, the bill provides that, notwithstanding the foregoing, an entity which would otherwise be considered a common entity of a distributor because of its relation to a distributor shall not be considered a common entity of that distributor if the distributor was licensed as a distributor as of March 1, 2023; the entity is not a common entity of a manufacturer or an importer; and the distributor is not, and has never been, a common entity or a manufacturer or importer.

or upgrade that is at least commensurate with the dealer margin structure established by the applicant or licensee for the sale of the vehicle to which the accessory, option, add-on, feature, improvement, or upgrade was remotely transmitted. To calculate the "dealer margin structure," the bill requires the applicant or licensee to subtract the invoiced vehicle wholesale price from the Manufacturer's Suggested Retail Price, then add to that figure all monetary per-vehicle incentives offered by the applicant or licensee whether or not received by the motor vehicle dealer, and then divide that sum by the invoiced vehicle wholesale price.

The bill also expands the definition of:

- "Unfair" to include using the number of motor vehicles pre-ordered or reserved by consumers as a factor in determining the allocation of motor vehicles to motor vehicle dealers.
- "Sell," "selling," "sold," "exchange," "retail sales," and "leases," to include:
 - Accepting a deposit or receiving a payment for the purchase, lease, exchange, subscription, or use of a motor vehicle, except that this definition shall not include facilitating a motor vehicle dealer's acceptance of a deposit or receipt of a payment from a customer;
 - Accepting a reservation from a retail consumer for a specific motor vehicle identified by a vehicle identification number or other product identifier;
 - Setting the retail price for the purchase, lease, or other use of a motor vehicle;
 - Offering or negotiating with a retail consumer the terms for the purchase, lease, financing, or other use of a motor vehicle;
 - Offering or negotiating with a retail consumer a value for a motor vehicle being traded in as part of the purchase, lease, or other use of a motor vehicle, provided that this definition shall not include a website or other means of electronic communication that identifies to a consumer a conditional trade-in value that contains language informing the consumer that the trade-in value is not binding on any motor vehicle dealer;
 - Offering or negotiating with a retail consumer any service contract, extended warranty, vehicle maintenance contract, guaranteed asset protection agreement, or any other vehicle-related products or services in connection with the purchase or lease of a motor vehicle;
 - Any transaction where the title of a motor vehicle or a used motor vehicle is transferred to a retail consumer; and
 - Any retail lease transaction where a retail consumer leases a vehicle for a period of at least 12 months, but does not include administering lease agreements, taking assignments of leases, performing required actions pursuant to such leases, or receiving payments under a lease agreement that was originated by a motor vehicle dealer.⁵⁶

Restrictions on Owning or Operating Dealerships

The bill revises the restriction on owning or operating dealerships by:

- Adding "importer" to the list of entities the Act restricts from such ownership or operation;
- Prohibiting a manufacturer, importer, or distributor from directly or indirectly owning, operating, or controlling by contract, agreement, or otherwise a motor vehicle dealership for any line-make in Florida if such entity has manufactured, imported, or distributed motor vehicles of any line-make which have been offered for sale under a franchise agreement in this state with an independent person.⁵⁷
- Specifying that a person prohibited from owning, operating, or controlling a motor vehicle dealership may not be issued a motor vehicle dealer license, but such a license may be issued to a person not so prohibited.

The bill also amends an exception to the restrictions on owning or operating dealerships if the DHSMV determines, after an administrative hearing on the matter, that there is no independent person available

⁵⁶ The bill also deletes a provision stating that establishing a price for sale pursuant to s. 320.64, F.S., does not constitute a sale or lease.

⁵⁷ The bill modifies the definition of "independent person" to mean a person who is not an agent, parent, subsidiary, common entity, officer, or employed representative of a licensee, manufacturer, importer, or distributor.

in the community or territory to own and operate the motor vehicle dealership in a manner consistent with the public interest. Specifically, the bill provides that:

- This exception only applies if the motor vehicle dealership sells motor vehicles of a line-make which, at the time of the hearing, are offered for sale by at least one other existing motor vehicle dealership not owned, operated, or controlled by the licensee; a licensee's officer or employed representative; a licensee's parent, subsidiary, or common entity; or a manufacturer, importer, or distributor.
- A motor vehicle dealer association⁵⁸ has standing to intervene in any hearing held on such exception.

Investigation and Inspection of Books or Other Documents of License

The bill requires that the DHSMV conduct an inquiry of a licensee relating to any written complaint alleging a violation of any provision of ss. 320.60-.70 against such licensee made by a motor vehicle dealer with a current franchise agreement issued by the licensee or motor vehicle dealer association with at least one member with a current franchise agreement issued by the licensee. The bill also provides, that:

- In the exercise of such duties, the DHSMV is granted and authorized to exercise the power of subpoena for the purposes of compelling production of and inspecting pertinent books, records, letters, and contracts of a licensee and compelling the attendance of witnesses at deposition.
- The inquiry required by this section must be commenced within 30 days of the date of the written complaint.
- The DHSMV must obtain a written response from the licensee to the allegations contained in the complaint within 60 days of the DHSMV inquiry and must respond to the inquiring party within 30 days of the response from the licensee.
- If any investigation or examination conducted pursuant to the DHSMV inquiry results in a determination that the licensee has committed a violation, the DHSMV must take appropriate action against the licensee, which may include license suspension or revocation; denial of a license renewal application; assessment, imposition, levy, and collection of an appropriate civil fine; or instituting a civil action for issuance of an injunction pursuant to s. 320.695, F.S.

However, the bill provides that nothing in this section alters or affects a motor vehicle dealer's right to bring a claim or action against a licensee pursuant to any other provisions of ss. 320.60-.70, F.S.

The bill provides an effective date of July 1, 2023.

B. SECTION DIRECTORY:

- Section 1:** Amends s. 320.60, F.S., relating to definitions for ss. 320.31-320.70.
Section 2: Amends s. 320.64, F.S., relating to denial, suspension, or revocation of license; grounds.
Section 3: Amends s. 320.645, F.S., relating to restriction upon ownership of dealership by licensee.
Section 4: Amends s. 320.67, F.S., relating to inspection of books or other documents of license.
Section 5: Provides an effective date of July 1, 2023.

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

None.

2. Expenditures:

⁵⁸ The bill defines "motor vehicle dealer association" to mean a not-for-profit entity organized under the laws of this state which is qualified for tax-exempt status under s. 501(c)(6) of the Internal Revenue Code, acts as a trade association that primarily represents the interests of franchised motor vehicle dealers, and has a membership of at least 500 franchised motor vehicle dealers.

None.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

None.

2. Expenditures:

None.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

The bill may have a positive economic impact on franchised dealers in the state as it protects their current business model even where the licensee with whom they have the agreement expands into EV production and sales. However, the bill may have a negative economic impact on consumers in the state to the extent that it prevents them from buying a vehicle using the potentially less-expensive direct-to-consumer sales model.

D. FISCAL COMMENTS:

None.

III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

Not applicable. This bill does not appear to require counties or municipalities to spend funds or take action requiring the expenditure of funds; reduce the authority that counties or municipalities have to raise revenues in the aggregate; or reduce the percentage of state tax shared with counties or municipalities.

2. Other:

Contracts Clause

Both the State and Federal Contracts Clauses prohibit states from passing any law which impairs the obligation of contracts but does not operate to obliterate a state's police powers.⁵⁹ Courts consider three factors when evaluating whether a particular law violates the Contracts Clauses:

- Whether the law substantially impairs a contractual relationship;
- Whether there is a significant and legitimate public purpose for the law; and
- Whether the adjustments of rights and responsibilities of the contracting parties are based upon reasonable conditions and are of an appropriate nature.⁶⁰

All presently existing or future systems of motor vehicle distribution in Florida and all franchise agreements that are renewed, amended, or entered into after October 1, 1988, are governed by the Act and any amendments thereto, unless the amendment specifically provides otherwise and except to the extent that such application would impair valid contractual agreements in violation of the State and Federal Constitutions.

B. RULE-MAKING AUTHORITY:

The DHSMV is already vested with the necessary rulemaking authority to implement any changes made by the bill which impact the DHSMV. Thus, additional rulemaking authority is likely unnecessary.

⁵⁹ Art. 1, s. 10, Fla. Const.; U.S. Const. art. 1, s. 10; *Allied Structural Steel Co. v. Spannus*, 438 U.S. 234 (1978).

⁶⁰ *Vesta Fire Ins. Corp. v. State of Fla.*, 141 F.3d 1427, 1433 (11th Cir. 1998).

C. DRAFTING ISSUES OR OTHER COMMENTS:

None.

IV. AMENDMENTS/COMMITTEE SUBSTITUTE CHANGES

On March 27, 2023, the Civil Justice Subcommittee adopted one amendment and reported the bill favorably as a committee substitute. The committee substitute:

- Modified the definitions of “common entity,” “independent person,” and of “sell,” “selling,” “sold,” “exchange,” “retail sales,” and “leases.”
- Defined “reasonable terms and conditions” and “significant investments” as the terms relate to dealership ownership restrictions.
- Modified the grounds for which an application for a manufacturer, distributor, or importer license may be denied, and such a license, once issued, may be suspended or revoked.
- Deleted a provision amending s. 320.695, F.S., to authorize a motor vehicle dealer association to apply for an injunction under that section.
- Deleted a provision amending s. 320.699, F.S., to authorize a motor vehicle dealer association to seek a declaration and adjudication of its rights or the rights of its members by filing a request for an administrative hearing.
- Amended s. 320.67, F.S., to:
 - Provide that the DHSMV must conduct an inquiry of a licensee relating to a written complaint made against the licensee by a motor vehicle dealer or a motor vehicle dealer’s association alleging that the licensee violated any provision of ss. 320.60-.70, F.S.
 - Expand the DHSMV’s subpoena powers under this section.
 - Provide timelines applicable to the DHSMV’s inquiry.
 - Specify what action the DHSMV may take against the licensee if the DHSMV’s inquiry results in determination that the licensee committed a violation.
 - Provide that nothing in this section alters or affects a motor vehicle dealer’s right to bring a claim or action against a licensee under any other provision of ss. 320.60-.70, F.S.
- Made technical changes.

This analysis is drafted to the committee substitute as passed by the Civil Justice Subcommittee.