

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 712

INTRODUCER: Transportation Committee and Senator Avila and others

SUBJECT: Motor Vehicle Sales

DATE: April 3, 2023

REVISED: _____

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

Please see Section IX. for Additional Information:

COMMITTEE SUBSTITUTE - Substantial Changes

I. Summary:

CS/SB 712 amends the Florida Automobile Dealers Act (Act), which primarily regulates the contractual business relationship between franchised motor vehicle dealers (dealers), and manufacturers, factory branches, distributors, and importers (manufacturers) and provides for the licensure of manufacturers. The Act prohibits certain manufacturers with established dealerships from conducting direct-sales or owning or operating a motor vehicle dealership; however, a manufacturer without a franchised dealership is exempt from this prohibition.

The bill revises provisions related to the licensure of, and contractual agreements between, dealers and manufacturers, as follows:

- Broadens the definition of “common entity” and expands the prohibitions on direct-to-consumer motor vehicle sales, and dealer ownership, by manufacturers that have established dealers.
- Broadens the definition of “sell” to include additional types of financial agreements.
- Prohibits new franchise agreements with manufacturers that do not include all types of “line-make.”
- Prohibits manufacturers from reserving or incentivizing the sale or lease of a motor vehicle.
- Prohibits manufacturers from requiring or incentivizing dealers to sell or lease vehicles at a specified price or profit margin, or restricts the price that a dealer may sell or lease a vehicle.
- Prohibits manufacturers from engaging in certain motor vehicle dealer activities.
- Authorizes manufacturers to sell certain motor vehicle accessories, upgrades, and options through remote electronic transmission;

- Requires the manufacturer to pay the dealer a percentage of the gross sale price, which is at least commensurate with the licensee’s dealer margin structure, from an remote electronic transmission upgrade if such upgrade is made within three years after the sale or lease of the new vehicle.
- Prohibits manufacturers from refusing to provide a dealer with an “equitable supply” of new vehicles by model, mix, or color as it offers or allocates to dealers.
- Prohibits manufacturers from using the number of motor vehicles pre-ordered or reserved by consumers when determining allocations to dealers.
- Provides that neither a distributor nor an affiliate thereof may be licensed as a motor vehicle dealer or own or operate a dealership that sells or services motor vehicles of the line-make of motor vehicles distributed by the distributor.
- Limits the administrative authority of the Department of Highway Safety and Motor Vehicles (DHSMV) to provide certain exceptions to the restriction on dealer ownership by manufacturers that have established dealers.
- Prohibits manufacturers from controlling by contract, agreement or otherwise a dealership for any “line-make” which is or has been offered for sale in Florida by a franchise agreement with an “independent person.”
- Authorizes a motor vehicle dealer association standing to intervene in any hearing held pursuant to s. 320.645, F.S., relating to restrictions on dealership ownership.
- Creates a timeline and process for DHSMV to conduct an inquiry of a manufacturer relating to a written complaint alleging a violation of the Act, when such complaint is made by a franchised motor vehicle dealer or a motor vehicle dealer association with at least one member with a current franchise agreement issued by the manufacturer.
- If the claimant is a motor vehicle dealer association and DHSMV determines that a manufacturer has violated the Act, authorizes the association standing to bring an administrative action on behalf of its members against manufacturers.

The bill may have a negative indeterminate fiscal impact on DHSMV to the extent that the bill results in increased written complaints against manufacturers.

The bill takes effect July 1, 2023.

II. Present Situation:

Background of Motor Vehicle Dealer Franchise Agreements

The first automobile franchise in the United States was established by General Motors in 1898.¹ Franchise agreements were initially voluntary.² Most state auto franchise laws now extensively regulate the contractual obligations between manufacturers and dealers. In an effort to protect consumers, these laws prevent manufacturers from selling new vehicles, new brands, and related services directly to the public.³

¹ Francine Lafontaine and Fiona Scott Morton, *State Franchise Laws, Dealer Terminations, and the Auto Crisis*, 24 J. ECON. PERSP. 233, 234 (2010), available at <https://pubs.aeaweb.org/doi/pdfplus/10.1257/jep.24.3.233> (last visited April 3, 2023).

² *Id.* at 238-239.

³ Congressional Research Service, R40712, *U.S. Motor Vehicle Industry Restructuring*

Florida has substantially regulated motor vehicle manufacturers and dealers since before 1950.⁴ Initially, Florida implemented consumer protections aimed at preventing consumer abuse by dealers.⁵ In 1970, more comprehensive regulations were adopted, embodied in Ch. 320, F.S.,⁶ which regulates the contractual relationship between manufacturers and franchised dealers,⁷ requires the licensing of manufacturers, and regulates numerous aspects of the contracts between the manufacturers and dealers.

Florida's Automobile Dealer Franchise Law states that "it is the intent of the Legislature to protect the public health, safety, and welfare of the citizens of the state by regulating the licensing of motor vehicle dealers and manufacturers, maintaining competition, providing consumer protection and fair trade and providing minorities with opportunities for full participation as motor vehicle dealers."⁸

Certain manufacturers with established dealer franchises have recently indicated an intent to separate their electric vehicle (EV) and internal combustion vehicle business models, similar to how they currently separate cars and trucks into separate dealership agreements. Some manufacturers indicate they plan to offer a business model that is a hybrid between the current model and the direct-to-consumer model used by some EV manufacturers for both EV and internal combustion vehicle lines.⁹ Certain EV manufacturers have developed a cost-effective method of auto distribution known as build-to-order.¹⁰

Newer automakers that do not have franchise agreements with auto dealers have been using captive (manufacturer-owned) dealerships and the direct-to-consumer model in which consumers custom-design their vehicles on the internet and receive them directly from the manufacturer. However, for in-person needs, these automakers provide their own dealerships and service centers. State franchise laws protect independent dealerships and thus, auto manufacturers that already have franchise agreements with dealers are unable to offer this new way of buying a vehicle to consumers.¹¹

Recently, 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

and Dealership Terminations (January 8, 2010), available at https://www.everycrsreport.com/files/20100108_R40712_461532aa2624faaa80c6e8f950d6b0ad0719195e.pdf (last visited April 3, 2023).

⁴ Chapter 9157, Laws of Fla. (1923); Chapter 20236, Laws of Fla. (1941).

⁵ 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), available at <http://ir.law.fsu.edu/cgi/viewcontent.cgi?article=1632&context=lr> (last visited April 3, 2023).

⁶ Ch. 70-424, Laws of Fla.

⁷ Section 320.60(11), F.S.

⁸ Section 320.605, F.S.

⁹ Greg Rosalsky, *Inside the rise of 'stealerships' and the shady economics of car buying*, National Public Radio (NPR) (August 30, 2022), available at <https://www.npr.org/sections/money/2022/08/30/1119715886/inside-the-rise-of-stealerships-and-the-shady-economics-of-car-buying> (last visited April 3, 2023).

¹⁰ The United States Department of Justice, *Economic Effects of State Bans on Direct Manufacturer Sales to Car Buyers* (May 2009), available at <https://www.justice.gov/sites/default/files/atr/legacy/2009/05/28/246374.pdf> (last visited April 3, 2023).

¹¹ Rosalsky, *supra* note 9.

their new cars at an all-time high.¹² Ford Motor Company recently wrote a formal letter to its dealers asking them to cut down on markups, additional waiting list fees and deposits for EVs, and gave notice to dealers that it would cut back on sending them Ford's most popular vehicles if prices did not come down.¹³ Dealers have responded by arguing that manufacturer actions will not solve pricing issues and will interfere with market competition.

Florida Automobile Dealers Act

Manufacturers must be licensed to engage in business in Florida.¹⁴ The “Florida Automobile Dealers Act”¹⁵ (Act), primarily regulates the contractual business relationship between dealers and manufacturers; and provides for the licensure of the manufacturers. The Department of Highway Safety and Motor Vehicles (DHSMV) is responsible for administering and enforcing the Act.¹⁶ The Act specifies, in part:¹⁷

- The conditions and situations under which the DHSMV may deny, suspend, or revoke a regulated license;
- The process, timing, and notice requirements for manufacturers 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 manufacturers 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 these circumstances;
- The damages that can be assessed against a manufacturer who is in violation of Florida Statutes; and
- The DHSMV’s authority to adopt rules to implement these sections of law.

The Act applies 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.¹⁸

Definitions

The Act provides definitions for several terms used throughout it, which are described below.

“Agreement” or “Franchise agreement” is defined as “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

¹² Motor Biscuit, *Ford Threatens to Cut Dealer Inventories to Demolish Price Markups* (February 9, 2022), available at 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 April 3, 2023).

¹³ *Id.*

¹⁴ Section 320.61(1), F.S.

¹⁵ Forehand, *supra* note 5, at 1065.

¹⁶ Section 320.011, F.S.

¹⁷ *See* ss. 320.60-320.70, F.S.

¹⁸ Section 320.6992, F.S.

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.”¹⁹

“Common entity” is defined as a person:²⁰

- 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 or officers or partners with a manufacturer.”

“Distributor” is defined as “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.”²¹

“Factory branch” is defined as “a branch office maintained by a manufacturer, distributor, or importer for the sale of motor vehicles to distributors or to motor vehicle dealers, or for directing or supervising, in whole or in part, its representatives in this state.”²²

“Importer” is defined as “any person who imports vehicles from a foreign country into the United States or into this state for the purpose of sale or lease.”²³

“Licensee” is defined as “any person licensed or required to be licensed under s. 320.61, F.S., which includes motor vehicle manufacturers, distributors, and importers.”²⁴

“Manufacturer” is defined as “any person, whether a resident or nonresident 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. The term “manufacturer” includes a central or principal sales corporation or other entity through which, by contractual agreement or otherwise, it distributes its products.”²⁵

“Line-make vehicles” are defined as “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 shall 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.”²⁶

¹⁹ Section 320.60(1), F.S.

²⁰ Section 320.60(2), F.S.

²¹ Section 320.60(5), F.S.

²² Section 320.60(6), F.S.

²³ Section 320.60(7), F.S.

²⁴ Section 320.60(8), F.S.

²⁵ Section 320.60(9), F.S.

²⁶ Section 320.60(14), F.S.

“Motor vehicle dealer” is defined as “any person, firm, company, corporation, or other entity, who:”²⁷

- Is licensed as a “franchised motor vehicle dealer” and, “for commission, money, or other things of value, repairs or services motor vehicles or used motor vehicles pursuant to a franchise agreement;”
- Who “sells, exchanges, buys, leases or rents, or offers, or attempts to negotiate a sale or exchange of any interest in, motor vehicles;” or
- Who “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.”

Such persons, or persons who buy, sell, or deal in three or more motor vehicles in any 12-month period or who offer or display for sale three or more motor vehicles in any 12-month period are prima facie presumed to be a motor vehicle dealer.²⁸

The terms “selling” and “sale” “include lease-purchase transactions.”²⁹

The term “motor vehicle dealer” does not include:³⁰

- “Public officers while performing their official duties;”
- “Receivers, trustees, administrators, executors, guardians, or other persons appointed by, or acting under the judgment or order of, any court;”
- “Banks, finance companies, or other loan agencies that acquire motor vehicles as an incident to their regular business;” or
- “Motor vehicle rental and leasing companies that sell motor vehicles to licensed motor vehicle dealers.”

The terms “sell,” “selling,” “sold,” “exchange,” “retail sales,” and “leases” are defined, as follows:³¹

- “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.”
- “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 that includes the motor vehicle does not constitute a sale or lease.”³²

Grounds for Denial, Suspension, or Revocation of a License

An application for a manufacturer, distributor, and importer license (license) may be denied, or a license may be revoked or suspended, on various grounds. Denials, suspensions, or revocations

²⁷ Section 320.60(11), F.S.

²⁸ *Id.*

²⁹ *Id.*

³⁰ *Id.*

³¹ Section 320.60(15), F.S.

³² *Id.*

of licenses can be based on consumer protection; however, the grounds for acting against manufacturers arise principally out of their dealings with motor vehicle franchised dealers with whom the manufacturers have a contractual relationship allowing the dealer to sell and service the manufacturer's new motor vehicles.^{33, 34}

Currently, there are 42 different criteria that may cause the DHSMV to deny, suspend, or revoke a manufacturer's license. The criteria cross many topics, including: contractual obligations; coercion or threats; discontinuation, canceling, non-renewing, modifying, or replacing franchise agreements; requiring changes to a dealer's sales or service facility; reducing the supply of new vehicles or parts to a franchised dealer; audits; disclosure of confidential financial information; failure to pay the dealer; and denying a warranty repair claim.³⁵

An applicant or manufacturer is prohibited from establishing or implementing a system of motor vehicle allocation or distribution to 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,³⁶ inequitable, unreasonably discriminatory, or not supportable by reason and good cause after considering the equities of the affected motor vehicles dealer or dealers.³⁷

An applicant or manufacturer is required to maintain for three years records that describe its methods or formula of allocation and distribution of its motor vehicles, and records of its actual allocation and distribution of motor vehicles, to its dealers in this state.³⁸

An applicant or manufacturer is prohibited from competing (with respect to any activity covered by the franchise agreement) with a franchised dealer of the same line-make located in this state with whom the manufacturer has entered into a franchise agreement.³⁹

An applicant or manufacturer is prohibited from selling a motor vehicle to any retail consumer in the state except through a dealer holding a franchise agreement for the line-make that includes the motor vehicle. This does not apply to sales by the applicant or manufacturer to its current employees, employees of companies affiliated by common ownership, charitable not-for-profit organizations, and the federal government.⁴⁰

Dealer Licenses in Areas Previously Served

Any manufacturer who proposes to establish an additional motor vehicle dealership, or relocate an existing dealer, to a location within a community or territory where the same line-make

³³ Section 320.64, F.S.

³⁴ Section 320.60(l) (defining "agreement" or "franchise agreement").

³⁵ Section 320.64, F.S.

³⁶ As used in this provision, "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. *See* s. 320.64(18), F.S.

³⁷ Section 320.64(18), F.S.

³⁸ *Id.*

³⁹ Section 320.64(23), F.S.

⁴⁰ Section 320.64(24), F.S.

vehicle is presently represented by a franchised dealer, is required to give written notice of its intention to the DHSMV.⁴¹

An existing franchised dealer or dealers has standing to protest a proposed additional or relocated motor vehicle dealer when the existing dealer or dealers have a franchise agreement for the same line-make vehicle to be sold or serviced by the proposed dealer and certain physical location mileage requirements are met. Specific mileage requirements that are based on county population are as follows:⁴²

- In counties with a population of less than 300,000, the existing dealer has standing if the existing dealer of the same line-make has a licensed franchise location within a radius of 20 miles of the location of the proposed dealer.⁴³
- In counties with a population over 300,000, an existing dealer has standing if the existing dealer of the same line-make has a licensed franchise location within a radius of 12.5 miles of the location of the proposed additional or relocated motor vehicle dealer.⁴⁴

When a proposed addition or relocation concerns a dealership that performs or is to perform only service and not the sale or lease of new motor vehicles, the proposal is subject to the notice and protest provisions. Standing to protest the addition or relocation of a service-only dealership is limited to those instances in which the applicable mileage requirements based on county populations are met.⁴⁵

The addition or relocation of a 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.⁴⁶

In determining whether existing franchised dealers are providing adequate representations in the community or territory for the line-make in question in a protest of the proposed addition or relocation of a service-only dealership, the DHSMV is authorized to consider certain elements.⁴⁷

If an application for a service-only dealership is granted, the DHSMV is required to issue a license which permits only service, and does not permit the selling or leasing of new motor vehicles. If a service-only dealership subsequently seeks to sell new motor vehicles at its location, the notice and protest provisions apply.⁴⁸

⁴¹ Section 320.642(1), F.S.

⁴² Section 320.642(3), F.S.

⁴³ Section 320.642(3)(a)2., F.S.

⁴⁴ Section 320.642(3)(b)1., F.S.

⁴⁵ Section 320.642(6)(a), F.S.

⁴⁶ Section 320.642(6)(b), F.S.

⁴⁷ Section 320.642(6)(c), F.S.

⁴⁸ Section 320.642(6)(d), F.S.

Restriction on Ownership of Dealerships

Current law prohibits the following entities from owning or operating a dealership in this state for the sale or service of motor vehicles that are already offered for sale under a franchise agreement with a dealer in this state:⁴⁹

- “Licensees;”
- “Distributors;”
- “Manufacturers;”
- “Agents of a manufacturer or distributor;” or
- “Any parent, subsidiary, common entity, or officer or representative of the licensee.”

In such cases, manufacturers may not be issued a dealer license. However, manufacturers are not deemed to be in violation under the following circumstances:⁵⁰

- When operating a dealership for a temporary period of up to a year, during the transition from one owner of the dealership to another;
- When operating 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
 - The licensee “deems lack the resources to purchase or capitalize the dealership outright; or
- If the DHSMV determines, after an administrative hearing on the matter, at the request of any person, that there is no independent person available in the community or territory to own and operate the dealership in a manner consistent with the public interest.

In any such case, the manufacturer is required to 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.

“Independent person” is defined as a person who is not an officer, director, or employee of the manufacturer.⁵¹

Procedure for Administrative Hearings and Adjudications

A franchised dealer who is directly and adversely affected by the action or conduct of a manufacturer, which is alleged to be in violation of the Act, may seek a declaration and adjudication of its rights by filing one of the following with the DHSMV:⁵²

- Request for a proceeding and administrative hearing; or
- Written objection or notice of protest.

⁴⁹ Section 320.645(1), F.S.

⁵⁰ *Id.*

⁵¹ Section 320.645(2)(a), F.S.

⁵² Section 320.699(1), F.S.

Hearings are held no sooner than 180 days, or 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.⁵³

Civil Damages

A franchised dealer who can demonstrate that a violation of, or failure to comply with, any of the provisions of the Act by an applicant or manufacturer will or can adversely and pecuniarily affect the dealer, is entitled to pursue treble damages and attorney's fees in civil court.⁵⁴ The manufacturer has the burden to prove that such violation did not occur upon a prima facie showing by the person bringing the action.⁵⁵

Injunctions

A franchised dealer may make an application to any circuit court of the state for a temporary or permanent injunction, or both, restraining any manufacturer from violating or continuing to violate any of the provisions of the Act or from failing or refusing to comply with these statutory requirements.⁵⁶

Market Background

Electric Vehicle Sales

In the United States revenue in the electric vehicles (EV) market is projected to reach approximately \$61 billion in 2023, and will result in a market volume of \$139 billion by 2027.⁵⁷ The growth of the EV market has been significant despite the COVID-19 pandemic and the resulting supply chain bottlenecks. Despite such challenges and rising production costs as a result of increasing raw material prices, EV sales are still increasing.⁵⁸

As more automakers introduce EVs, they are rethinking the sales process, including selling new vehicles largely, if not fully, online. Historically, dealers rely on automakers for product to fill and move off lots, and the automakers rely on dealers to sell and service the vehicles and customers. How that historical relationship fits into an all-electric future is at the forefront of discussions between automakers and dealers.⁵⁹

⁵³ Section 320.699(2), F.S.

⁵⁴ Sections 320.64, 320.694, and 320.697, F.S.

⁵⁵ Section 320.697, F.S.

⁵⁶ Section 320.695, F.S.

⁵⁷ Statista, *Electric Vehicles – United States*, available at <https://www.statista.com/outlook/mmo/electric-vehicles/united-states> (last visited April 3, 2023).

⁵⁸ *Id.*

⁵⁹ Michael Wayland, *Carmakers face a crossroads as they work to fit auto dealers into their EV plans*, CNBC (Jan. 28, 2023), available at https://www.cnbc.com/2023/01/28/ev-sales-automakers-dealers.html?_source=sharebar&email&par=sharebar (last visited April 3, 2023).

Direct-Sales

According to the National Conference of State Legislatures (NCSL),⁶⁰ a number of states have amended dealer franchise laws to either explicitly prohibit or allow for direct-sales of motor vehicles. Most enacted state laws authorizing limited direct-sales appear to be narrowly tailored to apply to Tesla by requiring that a manufacturer either have no existing franchise agreements in a relevant market area and/or have an existing direct-sales operation. Recently, legislation has trended toward providing for new manufacturers to engage in direct-sales.⁶¹

The NCSL provides that:⁶²

- Approximately 17 states have laws that expressly ban direct-sales.
- Approximately 18 states have laws that expressly allow for manufacturers to directly sell vehicles to consumers.
- Approximately nine states have laws prohibiting all new direct-sales, while allowing for manufacturers already engaged in direct-sales in the state to maintain a certain number of sales locations.
- Of the states that provide for direct-sales, at least eight states tied their direct-sales provisions to a requirement that the manufacturer exclusively sell non-fossil-fuel, electric, or zero-emission vehicles.
- Most states that provide for the direct-sales model still require a manufacturer to obtain a dealer license or permit to be able to operate in the state. Some states, like Utah, restrict the use of the direct-sales model to only those manufacturers that sell new non-fossil fuel powered vehicles, like those that rely on electricity or hydrogen fuel.
- Other states, like Ohio, provide for the direct-sales model, but only for manufacturers engaged in the market by a certain date and place a limit on the number of dealerships that direct-sale manufacturers may operate within the state.
- In states like Arizona, Tesla’s ability to sell vehicles through its direct-sales model is a result of a favorable judicial or administrative ruling regarding the applicability of state law as opposed to changes in the statutory text. In these states, the question of whether manufacturers may sell vehicles directly to consumers would likely be decided on a case-by-case basis.
- Some states, like Louisiana, have recently enhanced protections for franchise dealerships by explicitly prohibiting direct-sales.

III. Effect of Proposed Changes:

Definitions

The bill expands the definition of “common entity” to mean a person who:

- Is directly or indirectly controlled by 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, or a licensee, or an affiliate thereof.

⁶⁰ National Conference of State Legislatures, *State Laws on Direct Sales*, available at <https://www.wispolitics.com/wp-content/uploads/2021/08/State-Laws-on-Direct-Sales.pdf> (last visited April 3, 2023).

⁶¹ *Id.*

⁶² *Id.*

- Has more than 30 percent of his or her equity interest directly or indirectly controlled or owned, beneficially or of record, through any form of ownership structure, by one or more persons who also directly or indirectly control or own, beneficially or of record, more than 30 percent of equity interests of a manufacturer, an importer, a distributor, or a licensee, or an affiliate thereof.

However, the bill provides exceptions for certain common entities of distributors. An entity that would otherwise be considered a common entity of a distributor is not considered a common entity of the distributor if:

- The distributor that the entity is related to was a licensed distributor on March 1, 2023;
- The entity is not a common entity of a manufacturer or importer; and
- The distributor is not, and has never been, a common entity of a manufacturer or importer.

The bill deletes the provision in the definition of “common entity” that includes a person who shares directors or officers or partners with a manufacturer.

The bill defines an “independent person” as a person who is not an agent, parent, subsidiary, common entity, officer, director, or employee of the licensee or an employed representative of a licensee, manufacturer, importer, or distributor.

The bill defines a “motor vehicle dealer association” as 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.

The bill expands the definition of “sell,” “selling,” “sold,” “exchange,” “retail sales,” and “leases,” as follows:

- Includes:
 - Accepting a deposit or receiving a payment for the purchase, lease, or other use of a motor vehicle, but does not include facilitating a motor vehicle dealer’s acceptance of a deposit or receipt of a payment from a consumer;
 - 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, or other use of a motor vehicle;
 - Offering or negotiating with a retail consumer the value of a motor vehicle being traded in as part of the purchase, lease, or other use of a motor vehicle, but does not include a website or other means of electronic communication that identifies to a consumer a conditional trade-in value that is not binding on a 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;

- Clarifies that the reference to a “retail customer” refers to a “retail consumer” in the provision describing a 12-month lease, and that the definition does not include administering lease agreements, taking assignments of leases, performing required actions pursuant to such leases, or receiving payments under a lease agreement originated by a motor vehicle dealer; and
- Removes a provision that exempts the establishment of a price for sale under certain circumstances from the definition of sell.

Legislative Intent

The bill adds to the statement of legislative intent that ss. 320.61-320.70, F.S., are intended to apply solely to the licensing of motor vehicles dealers and manufacturers and do not apply to non-motor-vehicle-related businesses.

Grounds for Denial, Suspension, or Revocation of a License

The bill includes additional actions that constitute grounds for which a license of a motor vehicle manufacturer, distributor, or importer may be denied, suspended, or revoked, as follows:

- Conditionally or unconditionally reserving 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 chapter 681, F.S., relating to motor vehicle sale warranties;
- Requiring or incentivizing 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; or
- Requiring or incentivizing a motor vehicle dealer to sell or lease a motor vehicle at a specified price or profit margin, or restricting the price at which a motor vehicle dealer may sell a motor vehicle.

The bill revises the term “unfair” for purposes of this provision 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.

The bill revises the violation criteria related to competition, as follows:

- Specifies that it is a violation for the applicant or licensee to engage in any of the activities of a motor vehicle dealer as defined in s. 320.60, F.S.
- Creates an exception for the remote electronic transmission of a motor vehicle accessory, option, add-on, feature, improvement, or upgrade.

The bill revises the violation criteria relating to selling a motor vehicle to any retail consumer in the state except through a motor vehicle dealer holding a franchise agreement for the line-make that includes the motor vehicle, as follows:

- Prohibits the applicant or licensee, or a common entity thereof, from selling or leasing a motor vehicle of a line-make manufactured, imported, or distributed by the applicant or licensee.
- Prohibits, for a motor vehicle of such line-make, activation for a fee or sale of, any permanent or temporary motor vehicle accessory, option, add-on, feature, improvement, or

upgrade, to any retail consumer in the state except through a motor vehicle dealer properly licensed and holding a franchise agreement for the line-make that includes the motor vehicle.

- Provides an exception if the accessory, option, add-on, feature, improvement, or upgrade is provided directly to the motor vehicle through remote electronic transmission. Requires, if such motor vehicle was sold or leased as new by a franchised motor vehicle dealer in this state within three years before such remote electronic transmission, the applicant or licensee must pay such franchised motor vehicle dealer a percentage of the gross sale price for the accessory, option, add-on, feature, improvement, or upgrade, which is at least commensurate with the licensee's dealer margin structure for the sale of the vehicle to which it was remotely transmitted.

The bill provides that the "dealer margin structure" is calculated by the applicant or licensee subtracting the invoiced vehicle wholesale price from the manufacturer's suggested retail price, then adding to the figure all monetary per-vehicle incentives offered by the applicant or licensee whether or not received by the motor vehicle dealer, and then dividing that sum by the invoiced vehicle wholesale price.

Restriction on Ownership of Dealerships

The bill revises the restriction on ownership of dealerships by licensees, distributors, manufacturers, or agents of a manufacturer or distributor, or any parent, subsidiary, common entity, or officer or representative of the licensee, as follows:

- Adds "importer" to the list of entities that are restricted;
- Specifies that a manufacturer, importer, or distributor may not directly or indirectly own, operate, or control by contract, agreement, or otherwise a motor vehicle dealership for any line-make in this state if the licensee, manufacturer, importer, or distributor 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;
- Specifies that a person not prohibited from owning, operating, or controlling a motor vehicle dealership may be issued a motor vehicle dealer license; and
- Specifies that a person prohibited from owning, operating, or controlling a motor vehicle dealership may not be issued a motor vehicle dealer license.

The bill limits the administrative authority of the DHSMV to provide an exception to the ownership requirements in situations where no independent person is available in the community or territory to own and operate a motor vehicle dealership in a manner consistent with the public interest. The bill:

- Specifies that the DHSMV's authority only applies in these situations 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;
 - An officer or employed representative of the licensee;
 - A parent, subsidiary, or common entity of the licensee; or
 - A manufacturer, an importer, or a distributor.
- Provides standing to a motor vehicle dealer association to intervene in any hearing held under this provision.

The bill clarifies that dealerships that are owned and operated under any of the three exceptions to the restriction on dealership ownership requirements must be continually made available for sale to an independent person at a fair and reasonable price.

The bill also provides that neither a distributor nor an affiliate thereof may be licensed as a motor vehicle dealer or own or operate a dealership that sells or services motor vehicles of the line-make of motor vehicles distributed by the distributor.

DHSMV Inquiry of Written Complaints

The bill requires the DHSMV to conduct an inquiry of a manufacturer relating to a written complaint alleging a violation of any provision of the Act is made by a Florida-franchised motor vehicle dealer or a motor vehicle dealer association with at least one member with a current franchise agreement issued by the manufacturer.

The DHSMV may use its subpoena power to compel production of, inspect pertinent books, records, letters, and contracts of a licensee, and compel attendance of witnesses at deposition.

The DHSMV must commence the inquiry within 30 days after receipt of the written complaint, and may allow the licensee subject of the complaint no more than 60 days to provide a written response. Within, 30 days following the deadline to receive a written response, the DHSMV must provide a written response to the complainant stating whether the DHSMV intends to take action against the manufacturer and what action the DHSMV intends to take. Such actions 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.

If the complainant is a motor vehicle dealer association and the inquiry determines a violation has occurred, the motor vehicle dealer association may seek a declaration and adjudication through an administrative hearing.

The bill takes effect July 1, 2023.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

None.

B. Public Records/Open Meetings Issues:

None.

C. Trust Funds Restrictions:

None.

D. State Tax or Fee Increases:

None.

E. Other Constitutional Issues:

The bill appears to apply only prospectively.⁶³ Accordingly, it would apply only to contracts entered into after the bill's effective date.⁶⁴ Thus, the bill does not appear to impair existing contracts in violation of the contracts clauses of the Florida Constitution or the United States Constitution.⁶⁵

V. Fiscal Impact Statement:

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

The bill appears to further prevent manufacturers with established dealer franchises from conducting direct-to-consumer sales or operating a dealership regardless of the type of product being sold. Some manufacturers have indicated an intent to separate their electric vehicle and internal combustion vehicle business models, similar to how they currently separate cars and trucks, and some plan to offer a business model that is a hybrid between the current model and the direct-to-consumer model used by some EV manufacturers.

There is debate about the economic impacts from allowing manufacturers to sell their vehicles directly to consumers or changing current practices. Proponents generally argue that the direct sales model lowers end prices for consumers, increases consumer choice between industry brands, and gives manufacturers greater control over marketing and sales. Opponents argue that the model reduces price competition, lowers consumer safety, and reduces investments in local communities.⁶⁶

⁶³ See, e.g., *Yamaha Parts Distributors Inc. v. Ehrman*, 316 So. 2d 557, 559 (“Florida legislation is presumed to operate prospectively unless there exists a showing on the face of the law that retroactive application is intended.”); *Young v. Altenhaus*, 472 So. 2d 1152, 1153 (Fla. 1985) (stating that “in the absence of an explicit legislative expression to the contrary, a substantive law is to be construed as having prospective effect only.”); *Fla. Ins. Guar. Ass’n., Inc. v. Devon Neighborhood Ass’n., Inc.* 67 So. 3d 187, 196 (Fla. 2011) (stating that the inclusion of effective date generally rebuts intent for retroactive application of law).

⁶⁴ See, e.g., *Yamaha Parts Distributors Inc. v. Ehrman*, 316 So. 2d 557, 559 (stating that a law affecting contracts which applies prospectively does not apply to contracts entered before the law’s effective date); *State Farm Mut. Auto. Ins. Co. v. Hassen*, 650 So. 2d 128, 134 (Fla. 2d DCA 1995) (inferring that prospective application of a law affecting contracts means applying it only to contracts arising after the law’s effective date).

⁶⁵ See Fla. Const. art. I s. 10; U.S. Const. art. I s. 10.

⁶⁶ Connecticut General Assembly, Office of Legislative Research, *Arguments For and Against Direct Sales by Motor Vehicle Manufacturers* (Feb. 27, 2019), available at <https://www.cga.ct.gov/2019/rpt/pdf/2019-R-0088.pdf> (last visited April 3, 2023).

The Federal Trade Commission (FTC) has advocated relaxing state franchise laws so that manufacturers can create new, direct-to-consumer business models: “States should allow consumers to choose not only the cars they buy, but also how they buy them.”⁶⁷

The FTC has also proposed new rules aimed at combating rising consumer prices.⁶⁸ The FTC’s new rules propose to ban deceptive advertising in which dealerships market cars as cheaper than they actually intend 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 all upfront costs and conditions for buying their vehicles.⁶⁹

The National Auto Dealers Association (NADA) opposes these proposed rules: “The FTC’s proposed rules would cause great harm to consumers by significantly extending transaction times, making the customer experience much more complex, inefficient, and increasing prices. The NADA again urges the FTC to go back to the drawing board before forcing implementation of a series of unstudied and untested mandates that will have such significant negative impacts on customers.”⁷⁰

C. Government Sector Impact:

The bill may have a negative indeterminate fiscal impact on the DHSMV to the extent that the bill results in increased written complaints against manufacturers. Under the bill, the DHSMV will be required to conduct an inquiry of a manufacturer if a written complaint is made against such manufacturer.

VI. Technical Deficiencies:

None.

VII. Related Issues:

None.

VIII. Statutes Affected:

This bill substantially amends the following sections of the Florida Statutes: 320.60, 320.605, 320.64, 320.642, 320.645, 320.67, 681.102 and 681.113.

⁶⁷ Marina, et al., *Direct-to-consumer auto sales: It’s not just about Tesla*, Federal Trade Commission (May 11, 2015), available at <https://www.ftc.gov/enforcement/competition-matters/2015/05/direct-consumer-auto-sales-its-not-just-about-tesla> (last visited April 3, 2023).

⁶⁸ Federal Trade Commission, *FTC Proposes Rule to Ban Junk Fees, Bait-and-Switch Tactics Plaguing Car Buyers* (June 23, 2022), available at <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 April 3, 2023).

⁶⁹ *Id.*

⁷⁰ Rosalsky, *supra* note 9.

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 March 20, 2023:

The CS makes numerous changes to the bill. Specifically, it:

- Clarifies that certain entities that would otherwise be considered a common entity of a motor vehicle distributor are not a common entity under specified conditions.
- Revises the definition of “sell,” “selling,” “sold,” “exchange,” “retail sales,” and “leases” to except facilitating a motor vehicle dealer’s acceptance of a deposit or receipt of a payment from a customer, and excludes a website or other electronic communication that identifies certain consumer-related information from the definition.
- Adds to the statement of legislative intent that ss. 320.61-320.70, F.S., are intended to apply solely to the licensing of motor vehicles dealers and manufacturers and do not apply to non-motor-vehicle-related businesses.
- Prohibits a manufacturer from restricting the price that a dealer may sell or lease a vehicle.

- B. **Amendments:**

None.