CHAPTER 2008-62

Committee Substitute for Senate Bill No. 2582

An act relating to motor vehicle dealers; amending s. 320.64, F.S.; prohibiting licensees from certain actions intended to coerce a dealer to improve its facilities after the licensee has approved those facilities; allowing licensees to offer certain loan or grant programs to induce the dealer to relocate or improve the existing facilities, if such inducement is not discriminatory or designed to force the dealer to do so; prohibiting certain adverse actions against a dealer who does not participate in such programs; declaring certain inducement programs void; authorizing a licensee to set reasonable standards for dealer sales and facilities; prohibiting licensees from altering allocations or supplies of new vehicles to achieve goals that are prohibited in this state by statute; clarifying a provision relating to a prohibition against a dealer selling a motor vehicle to a customer who exported or resold the vehicle; requiring the licensee to prove the dealer had actual knowledge of the customer's intent to export or resell the vehicle; creating a conclusive presumption that the dealer had no actual knowledge if the vehicle was titled or registered in this country; authorizing licensees to audit dealers to determine the validity of paid claims if the licensee complies with applicable statutory requirements; creating s. 320.6412, F.S.; providing a burden of proof in actions to terminate a motor vehicle dealer franchise based on fraud or misrepresentation; amending s. 320.696, F.S.; substantially revising provisions relating to the licensee's responsibility to timely and reasonably compensate a dealer who performs warranty, service contract maintenance plan, or other vehicle preparation work; providing methods of determining the cost for parts and labor to be paid to a dealer as compensation for performing warranty repairs and vehicle preparation for the licensee; prohibiting the licensee from taking certain adverse actions against a dealer for seeking to obtain compensation for such work; prohibiting certain acts by a licensee to reduce the amount of compensation to be paid to a dealer or to offset or recover from the dealer compensation previously received; providing for severability; providing an effective date.

Be It Enacted by the Legislature of the State of Florida:

Section 1. Subsections (10), (18), (22), (25), (26), and (30) of section 320.64, Florida Statutes, are amended to read:

320.64 Denial, suspension, or revocation of license; grounds.—A license of a licensee under s. 320.61 may be denied, suspended, or revoked within the entire state or at any specific location or locations within the state at which the applicant or licensee engages or proposes to engage in business, upon proof that the section was violated with sufficient frequency to establish a pattern of wrongdoing, and a licensee or applicant shall be liable for claims and remedies provided in ss. 320.695 and 320.697 for any violation

of any of the following provisions. A licensee is prohibited from committing the following acts:

(10)(a) The applicant or licensee has attempted to enter, or has entered, into a franchise agreement with a motor vehicle dealer who does not, at the time of the franchise agreement, have proper facilities to provide the services to his or her purchasers of new motor vehicles which are covered by the new motor vehicle warranty issued by the applicant or licensee. Notwithstanding any provision of a franchise, a licensee may not require a motor vehicle dealer, by agreement, program, policy, standard, or otherwise, to relocate, to make substantial changes, alterations, or remodeling to, or to replace a motor vehicle dealer's sales or service facilities unless the licensee's requirements are reasonable and justifiable in light of the current and reasonably foreseeable projections of economic conditions, financial expectations, and the motor vehicle dealer's market for the licensee's motor vehicles.

(b) A licensee may, however, provide to a motor vehicle dealer a commitment to allocate additional vehicles or a loan or grant of money as an inducement for the motor vehicle dealer to relocate, expand, improve, remodel, alter, or renovate its facilities if the licensee delivers an assurance to the dealer that it will offer to supply to the dealer a sufficient quantity of new motor vehicles, consistent with its allocation obligations at law and to its other same line-make motor vehicle dealers, which will economically justify such relocation, expansion, improvement, remodeling, renovation, or alteration, in light of reasonably current and reasonably projected market and economic conditions. The provisions of the increase in vehicle allocation, the loan or grant and the assurance, and the basis for them must be contained in a written agreement voluntarily entered into by the dealer and must be made available, on substantially similar terms, to any of the licensee's other same line-make dealers in this state with whom the licensee offers to enter into such an agreement.

(c) A licensee shall not withhold a bonus, incentive, or other benefit that is available to its other same line-make franchised dealers in this state from, or take or threaten to take any action that is unfair or adverse to a dealer who does not enter into an agreement with the licensee pursuant to paragraph (b).

(d) A licensee may not refuse to offer a program, bonus, incentive, or other benefit, in whole or in part, to a dealer in this state which it offers to its other same line-make dealers nationally or in the licensee's zone or region in which this state is included. Neither may it discriminate against a dealer in this state with respect to any program, bonus, incentive, or other benefit. For purposes of this chapter, a licensee may not establish this state alone as a zone, region, or territory by any other designation.

(e) Paragraphs (a) and (b) do not affect any contract between a licensee and any of its dealers regarding relocation, expansion, improvement, remodeling, renovation, or alteration which exists on the effective date of this act.

(f) Any portion of a licensee-offered program for a bonus, incentive, or other benefit that, in whole or in part, is based upon or aimed at inducing a dealer's relocation, expansion, improvement, remodeling, renovation, or

alteration of the dealer's sales or service facility, or both, is void as to each of the licensee's motor vehicle dealers in this state who, nevertheless, shall be eligible for the entire amount of the bonuses, incentives, or benefits offered in the program upon compliance with the other eligibility provisions in the program.

(g) A licensee may set and uniformly apply reasonable standards for a motor vehicle dealer's sales and service facilities which are related to upkeep, repair, and cleanliness.

(18) The applicant or licensee has 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 ss. 320.60-320.70, or which otherwise is unfair, inequitable, unreasonably discriminatory, or not supportable by reason and good cause after considering the equities of the affected motor vehicles dealer or dealers. An applicant or licensee shall maintain for 3 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 motor vehicle dealers in this state. As used in this subsection, "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 licensee offers or allocates to its other same line-make dealers in the state.

(22) The applicant or licensee has refused to deliver, in reasonable quantities and within a reasonable time, to any duly licensed motor vehicle dealer who has an agreement with such applicant or licensee for the retail sale of new motor vehicles and parts for motor vehicles sold or distributed by the applicant or licensee, any such motor vehicles or parts as are covered by such agreement. Such refusal includes the failure to offer to its same line-make franchised motor vehicle dealers all models manufactured for that line-make, or requiring a dealer to pay any extra fee, require a dealer to execute a separate franchise agreement, purchase unreasonable advertising displays or other materials, or relocate, expand, improve, remodel, renovate, ~~or~~ recondition, or alter the dealer's existing facilities, or provide exclusive facilities as a prerequisite to receiving a model or series of vehicles. However, the failure to deliver any motor vehicle or part will not be considered a violation of this section if the failure is due to an act of God, work stoppage, or delay due to a strike or labor difficulty, a freight embargo, product shortage, or other cause over which the applicant or licensee has no control. An applicant or licensee may impose reasonable requirements on the motor vehicle dealer, other than the items listed above, including, but not limited to, the purchase of special tools required to properly service a motor vehicle and the undertaking of sales person or service person training related to the motor vehicle.

(25) The applicant or licensee has undertaken an audit of warranty payments or incentive payments ~~payment~~ previously paid to a motor vehicle dealer in violation of this section or has failed to comply with any of its obligations under s. 320.696. An applicant or licensee may reasonably and

periodically audit a motor vehicle dealer to determine the validity of paid claims as provided in s. 320.696. Audit of warranty payments shall only be for the 1-year period immediately following the date the claim was paid. Audit of incentive payments shall only be for an 18-month period immediately following the date the incentive was paid. An applicant or licensee shall not deny a claim or charge a motor vehicle dealer back subsequent to the payment of the claim unless the applicant or licensee can show that the claim was false or fraudulent or that the motor vehicle dealer failed to substantially comply with the reasonable written and uniformly applied procedures of the applicant or licensee for such repairs or incentives. An applicant or licensee may not charge a motor vehicle dealer back subsequent to the payment of a claim unless a representative of the applicant or licensee first meets in person, by telephone, or by video teleconference with an officer or employee of the dealer designated by the motor vehicle dealer. At such meeting the applicant or licensee must provide a detailed explanation, with supporting documentation, as to the basis for each of the claims for which the applicant or licensee proposed a charge-back to the dealer and a written statement containing the basis upon which the motor vehicle dealer was selected for audit or review. Thereafter, the applicant or licensee must provide the motor vehicle dealer's representative a reasonable period after the meeting within which to respond to the proposed charge-backs, with such period to be commensurate with the volume of claims under consideration, but in no case less than 45 days after the meeting. The applicant or licensee is prohibited from changing or altering the basis for each of the proposed charge-backs as presented to the motor vehicle dealer's representative following the conclusion of the audit unless the applicant or licensee receives new information affecting the basis for one or more charge-backs. If the applicant or licensee claims the existence of new information, the dealer must be given the same right to a meeting and right to respond as when the charge-back was originally presented.

(26) Notwithstanding the terms of any franchise agreement, including any licensee's program, policy, or procedure, the applicant or licensee has refused to allocate, sell, or deliver motor vehicles; charged back or withheld payments or other things of value for which the dealer is otherwise eligible under a sales promotion, program, or contest; ~~or~~ prevented a ~~the~~ motor vehicle dealer from participating in any promotion, program, or contest; or has taken or threatened to take any adverse action against a dealer, including charge backs, reducing vehicle allocations, or terminating or threatening to terminate a franchise because the dealer sold or leased a motor vehicle to a customer who exported the vehicle to a foreign country or who resold the vehicle, unless the licensee proves that the dealer had actual knowledge that the customer intended to export or resell the motor vehicle. There is a conclusive presumption that the dealer had no actual knowledge if the vehicle is titled or registered in any state in this country ~~for selling a motor vehicle to a customer who was present at the dealership and the motor vehicle dealer did not know or should not have reasonably known that the vehicle would be shipped to a foreign country. There will be a rebuttable presumption that the dealer did not know or should not have reasonably known that the vehicle would be shipped to a foreign country if the vehicle is titled in one of the 50 United States.~~

(30) The applicant or licensee has conducted or threatened to conduct any audit of a motor vehicle dealer in order to coerce or attempt to coerce the dealer to forego any rights granted to the dealer under ss. 320.60-320.70 or under the agreement between the licensee and the motor vehicle dealer. Nothing in this section shall prohibit an applicant or licensee from reasonably and periodically auditing a dealer to determine the validity of paid claims, as permitted under this chapter, if the licensee complies with the provisions of ss. 320.60-320.70 applicable to such audits.

A motor vehicle dealer who can demonstrate that a violation of, or failure to comply with, any of the preceding provisions by an applicant or licensee will or can adversely and pecuniarily affect the complaining dealer, shall be entitled to pursue all of the remedies, procedures, and rights of recovery available under ss. 320.695 and 320.697.

Section 2. Section 320.6412, Florida Statutes, is created to read:

320.6412 Franchise termination based on fraud; standard of proof.—Notwithstanding the provisions of any franchise agreement, a franchise agreement of a motor vehicle dealer may not be terminated, canceled, discontinued, or not renewed by a licensee on the basis of misrepresentation or fraud, or the filing of any false or fraudulent statements or claims with the licensee, unless the licensee proves by a preponderance of the evidence before a trier of fact either that the majority owner, or if there is no majority owner, the person designated as the dealer-principal in the franchise agreement, knew of such acts at the time they allegedly were committed, or that the licensee provided written notice detailing such alleged acts to the majority owner or dealer-principal who, within a reasonable time after receipt of such written notice, failed to take actions reasonably calculated to prevent such acts from continuing or recurring.

Section 3. Section 320.696, Florida Statutes, is amended to read:

(Substantial rewording of section. See
s. 320.696, F.S., for present text.)

320.696 Warranty responsibility.—

(1)(a) A licensee shall timely compensate a motor vehicle dealer who performs work to maintain or repair a licensee's product under a warranty or maintenance plan, extended warranty, certified pre-owned warranty, or a service contract, issued by the licensee or its common entity, unless issued by a common entity that is not a manufacturer; to fulfill a licensee's delivery or preparation procedures; or to repair a motor vehicle as a result of a licensee's or common entity's recall, campaign service, authorized goodwill, directive, or bulletin.

(b) As used in this section, the terms "compensate" and "compensation" shall include all labor and parts included in the work as provided in this section. The term "labor" shall include time spent by employees for diagnosis and repair of a vehicle. The term "parts" shall include replacement parts and accessories. The term "retail customer repair" means work, including parts

and labor, performed by a dealer which does not come within the provisions of a licensee's or its common entity's warranty, extended warranty, certified pre-owned warranty, service contract, or maintenance plan, and excludes parts and labor described in paragraphs (3)(b) and (4)(c).

(c) Compensation not paid to a motor vehicle dealer within 30 days after receipt of a claim is not timely. A licensee shall not establish or implement a term, policy, or procedure different from those described in this section for any motor vehicle dealer to obtain compensation under this section, and shall not pay a motor vehicle dealer less than amounts due pursuant to this section.

(2) A licensee shall not take or threaten to take adverse action against a motor vehicle dealer who seeks to obtain compensation pursuant to this section. As used in this subsection, the term "adverse action" includes, without limitation, acting or failing to act, other than in good faith; creating or implementing an obstacle or process that is inconsistent with the licensee's obligations to the dealer under this section; hindering, delaying, or rejecting the proper and timely payment of compensation due under this section to a dealer; establishing, implementing, enforcing, or applying any policy, standard, rule, program, or incentive regarding compensation due under this section other than in a uniform and nondisparate manner among the licensee's dealers in this state; conducting or threatening to conduct any warranty, retail customer repair, or other service-related audit more frequently than once each calendar year; or denying, reducing, or charging back a warranty claim because of a dealer's failure to comply with all of the licensee's requirements for describing or processing a claim.

(3)(a) A licensee shall compensate a motor vehicle dealer for parts used in any work described in subsection (1). The compensation may be an agreed percentage markup over the licensee's dealer cost, but if an agreement is not reached within 30 days after a dealer's written request, compensation for the parts is the greater of:

1. The dealer's arithmetical mean percentage markup over dealer cost for all parts charged by the dealer in 50 consecutive retail customer repairs made by the dealer within a 3-month period before the dealer's written request for a change in reimbursement pursuant to this section, or all of the retail customer repair orders over that 3-month period if there are fewer than 50 retail customer repair orders in that period. The motor vehicle dealer shall give the licensee 10 days' written notice that it intends to make a written request to the licensee for a warranty parts reimbursement increase and permit the licensee, within that 10-day period, to select the initial retail customer repair for the consecutive repair orders that will be attached to the written request used for the markup computation, provided that if the licensee fails to provide a timely selection, the dealer may make that selection. No repair order shall be excluded from the markup computation because it contains both warranty, extended warranty, certified pre-owned warranty, maintenance, recall, campaign service, or authorized goodwill work and a retail customer repair. However, only the retail customer repair portion of the repair order shall be included in the computation and the parts described in paragraph (b) shall be excluded from the computation;

2. The licensee's highest suggested retail or list price for the parts; or

3. An amount equal to the dealer's markup over dealer cost that results in the same gross profit percentage for parts used in work done under subsection (1) as the dealer receives for parts used in the customer retail repairs, as evidenced by the average of said dealer's gross profit percentage in the dealer's financial statements for the 2 months preceding the dealer's request.

If a licensee reduces the suggested retail or list price for any replacement part or accessory, it also shall reduce, by at least the same percentage, the cost to the dealer for the part or accessory. The dealer's markup or gross profit percentage shall be uniformly applied to all of the licensee's parts used by the dealer in performing work covered by subsection (1).

(b) In calculating the compensation to be paid for parts by the arithmetic mean percentage markup over dealer cost method in paragraph (a), parts discounted by a dealer for repairs made in group, fleet, insurance, or other third-party payer service work; parts used in repairs of government agencies' repairs for which volume discounts have been negotiated; parts used in special event, specials, or promotional discounts for retail customer repairs; parts sold at wholesale; parts used for internal repairs; engine assemblies and transmission assemblies; parts used in retail customer repairs for routine maintenance, such as fluids, filters and belts; nuts, bolts, fasteners, and similar items that do not have an individual part number; and tires shall be excluded in determining the percentage markup over dealer cost.

(c) If a licensee furnishes a part or component to a motor vehicle dealer at no cost to use in performing repairs under a recall, campaign service action, or warranty repair, the licensee shall compensate the dealer for the part or component in the same manner as warranty parts compensation under this subsection, less the dealer cost for the part or component as listed in the licensee's price schedule.

(d) A licensee shall not establish or implement a special part or component number for parts used in predelivery, dealer preparation, warranty, extended warranty, certified pre-owned warranty, recall, campaign service, authorized goodwill, or maintenance-only applications if that results in lower compensation to the dealer than as calculated in this subsection.

(4)(a) A licensee shall compensate a motor vehicle dealer for labor performed in connection with work described in subsection (1) as calculated in this subsection.

(b) Compensation paid by a licensee to a motor vehicle dealer may be an agreed hourly labor rate. If, however, an agreement is not reached within 30 days after the dealer's written request, the dealer may choose to be paid the greater of:

1. The dealer's hourly labor rate for retail customer repairs, determined by dividing the amount of the dealer's total labor sales for retail customer repairs by the number of total labor hours that generated those sales for the month preceding the request, excluding the work in paragraph (c); or

2. An amount equal to the dealer's markup over dealer cost that results in the same gross profit percentage for labor hours performed in work covered by subsection (1) as the dealer receives for labor performed in its customer retail repairs, as evidenced by the average of said dealer's gross profit percentage in the dealer's financial statements provided to the licensee for the 2 months preceding the dealer's written request, if the dealer provides in the written request the arithmetical mean of the hourly wage paid to all of its technicians during that preceding month. The arithmetical mean shall be the dealer cost used in that calculation.

After an hourly labor rate is agreed or determined, the licensee shall uniformly apply and pay that hourly labor rate for all labor used by the dealer in performing work under subsection (1). However, a licensee shall not pay an hourly labor rate less than the hourly rate it was paying to the dealer for work done under subsection (1) on January 2, 2008. A licensee shall not eliminate flat-rate times from, or establish an unreasonable flat-rate time in its warranty repair manual, warranty time guide, or any other similarly named document. A licensee shall establish reasonable flat-rate labor times in its warranty repair manuals and warranty time guides for newly introduced model motor vehicles which are at least consistent with its existing documents. As used in this subsection, the terms "retail customer repair" and "similar work" are not limited to a repair to the same model vehicle or model year, but include prior repairs that resemble but are not identical to the repair for which the dealer is making a claim for compensation.

(c) In determining the hourly labor rate calculated under subparagraph (b)1., a dealer's labor charges for internal vehicle repairs; vehicle reconditioning; repairs performed for group, fleet, insurance, or other third-party payers; discounted repairs of motor vehicles for government agencies; labor used in special events, specials, or express service; and promotional discounts shall not be included as retail customer repairs and shall be excluded from such calculations.

(5) A licensee shall not review, change, or fail to pay a motor vehicle dealer for parts or labor determined under this section unless the dealer has requested a change, or the action is pursuant to the licensee's written, predetermined schedule for increasing parts or labor compensation that is not contrary to any provision of this section. A dealer may make written requests for changes in compensation for parts or labor performed under this section not more than semiannually. The dealer shall attach supporting documentation to each written request. Any increase in parts or labor reimbursement determined thereafter to be owed to the dealer shall be paid pursuant to this section retroactively for all claims filed by a dealer 15 days after the date of the licensee's receipt of the dealer's written request.

(6) A licensee shall not recover or attempt to recover, directly or indirectly, any of its costs for compensating a motor vehicle dealer under this section, including by decreasing or eliminating solely in this state or as it relates to any of its dealers, any bonuses or other incentive that the licensee has in effect nationally, regionally, or in a territory by any other designation; by reducing the dealer's gross margin for any of the licensee's products or services where the wholesale price charged to the dealer is determined by

the licensee and the reduction is not in effect nationally or regionally; by imposing a separate charge or surcharge to the wholesale price paid by a dealer in this state for any product or service offered to or supplied by a licensee under a franchise agreement with the dealer; or by passing on to the dealer any charge or surcharge of a common entity of the licensee.

(7) A licensee shall not require, influence, or attempt to influence a motor vehicle dealer to implement or change the prices for which it sells parts or labor in retail customer repairs. A licensee shall not implement or continue a policy, procedure, or program to any of its dealers in this state for compensation under this section which is inconsistent with this section.

(8) If a court determines with finality that any provision of this section is void or unenforceable, the remaining provisions shall not be affected but shall remain in effect.

Section 4. This act shall take effect upon becoming a law.

Approved by the Governor May 28, 2008.

Filed in Office Secretary of State May 28, 2008.