

CHAPTER 2016-77

Committee Substitute for Committee Substitute for House Bill No. 231

An act relating to motor vehicle manufacturer licenses; amending s. 320.64, F.S.; revising provisions for denial, suspension, or revocation of the license of a manufacturer, factory branch, distributor, or importer of motor vehicles; revising provisions for certain audits of service-related payments or incentive payments to a dealer by an applicant or licensee and the timeframe for the performance of such audits; defining the term “incentive”; revising provisions for denial or chargeback of claims; revising provisions that prohibit certain adverse actions against a dealer that sold or leased a motor vehicle to a customer who exported the vehicle to a foreign country or who resold the vehicle; revising conditions for taking such adverse actions; prohibiting failure to make certain payments to a motor vehicle dealer for temporary replacement vehicles under certain circumstances; prohibiting requiring or coercing a dealer to purchase goods or services from a vendor designated by the applicant or licensee unless certain conditions are met; providing procedures for approval of a dealer to purchase goods or services from a vendor not designated by the applicant or licensee; defining the term “goods or services”; creating s. 320.646, F.S.; defining the terms “consumer data” and “data management system”; requiring that a licensee or a third party comply with certain restrictions on reuse or disclosure of consumer data received from a motor vehicle dealer; requiring that such person provide a written statement to the motor vehicle dealer delineating the established procedures adopted by the person which meet or exceed certain requirements to safeguard consumer data; requiring that upon request of a motor vehicle dealer a licensee provide a list of the consumer data obtained and all persons to whom any of the data has been disclosed, subject to certain requirements; prohibiting a licensee from requiring a motor vehicle dealer to grant the licensee or third party access to the dealer’s data management system; requiring a licensee to permit a motor vehicle dealer to furnish consumer data in a widely accepted file format and through a third-party vendor selected by the motor vehicle dealer; authorizing a licensee to access or obtain consumer data from a motor vehicle dealer’s data management system with the dealer’s express written consent, subject to certain requirements; requiring the licensee to indemnify the motor vehicle dealer for certain claims or damages; providing that a person bringing a specified cause of action for certain violations must meet certain requirements; reenacting s. 320.6992, F.S., relating to the provisions that apply to established systems of distribution of motor vehicles in this state, to incorporate s. 320.646, F.S., as created by the act, in a reference thereto; providing an effective date.

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

Section 1. Subsections (25) and (26) of section 320.64, Florida Statutes, are amended, and subsections (39) and (40) are added to that section, 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:

(25) The applicant or licensee has undertaken or engaged in an audit of warranty, maintenance, and other service-related payments or incentive payments, including payments to a motor vehicle dealer under any licensee-issued program, policy, or other benefit, which ~~were~~ previously ~~have been~~ 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. Audits of warranty, maintenance, and other service-related payments shall be performed by an applicant or licensee only during the 12-month ~~1-year~~ period immediately following the date the claim was paid. ~~Audits~~ Audit of incentive payments shall ~~only be performed only during the 12-month~~ ~~for an 18-month~~ period immediately following the date the incentive was paid. As used in this section, the term “incentive” includes any bonus, incentive, or other monetary or nonmonetary consideration. After such time periods have elapsed, all warranty, maintenance, and other service-related payments and incentive payments shall be deemed final and incontrovertible for any reason notwithstanding any otherwise applicable law, and the motor vehicle dealer shall not be subject to any ~~chargeback~~ ~~charge-back~~ or repayment. An applicant or licensee may deny a claim or, as a result of a timely conducted audit, impose a ~~chargeback~~ ~~charge-back~~ against a motor vehicle dealer for warranty, maintenance, or other service-related payments or incentive payments only if the applicant or licensee can show that the warranty, maintenance, or other service-related claim or incentive 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, but only for that portion of the claim so shown. Notwithstanding the terms of any franchise agreement, guideline, program, policy, or procedure, an applicant or licensee may deny or charge back only that portion of a warranty, maintenance, or other service-related claim or incentive claim which the applicant or licensee has proven to be false or fraudulent or for which the dealer failed to substantially comply with the reasonable written and uniformly applied procedures of the applicant or licensee for such repairs or incentives, as set forth in this subsection. An applicant or licensee may not charge ~~back~~ a motor vehicle dealer ~~back~~ subsequent to the payment of a warranty,

maintenance, or service-related claim or incentive claim unless, within 30 days after a timely conducted audit, 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 chargeback ~~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 chargebacks ~~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 chargebacks ~~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 chargebacks ~~charge-backs~~ and that new information is received within 30 days after the conclusion of the timely conducted audit. 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 chargeback ~~charge-back~~ was originally presented. After all internal dispute resolution processes provided through the applicant or licensee have been completed, the applicant or licensee shall give written notice to the motor vehicle dealer of the final amount of its proposed chargeback ~~charge-back~~. If the dealer disputes that amount, the dealer may file a protest with the department within 30 days after receipt of the notice. If a protest is timely filed, the department shall notify the applicant or licensee of the filing of the protest, and the applicant or licensee may not take any action to recover the amount of the proposed chargeback ~~charge-back~~ until the department renders a final determination, which is not subject to further appeal, that the chargeback ~~charge-back~~ is in compliance with the provisions of this section. In any hearing pursuant to this subsection, the applicant or licensee has the burden of proof that its audit and resulting chargeback ~~charge-back~~ are in compliance with this subsection.

(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; prevented a 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 chargebacks ~~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 knew or reasonably should have known that the customer intended to export or resell

the motor vehicle. There is a rebuttable presumption that the dealer neither knew nor reasonably should have known of its customer's intent to export or resell the vehicle if the vehicle is titled or registered in any state in this country. A licensee may not take any action against a motor vehicle dealer, including reducing its allocations or supply of motor vehicles to the dealer, or charging back to a dealer ~~any~~ ~~for an~~ incentive payment previously paid, unless the licensee first meets in person, by telephone, or video conference with an officer or other designated employee of the dealer. At such meeting, the licensee must provide a detailed explanation, with supporting documentation, as to the basis for its claim that the dealer knew or reasonably should have known of the customer's intent to export or resell the motor vehicle. Thereafter, the motor vehicle dealer shall have a reasonable period, commensurate with the number of motor vehicles at issue, but not less than 15 days, to respond to the licensee's claims. If, following the dealer's response and completion of all internal dispute resolution processes provided through the applicant or licensee, the dispute remains unresolved, the dealer may file a protest with the department within 30 days after receipt of a written notice from the licensee that it still intends to take adverse action against the dealer with respect to the motor vehicles still at issue. If a protest is timely filed, the department shall notify the applicant or licensee of the filing of the protest, and the applicant or licensee may not take any action adverse to the dealer until the department renders a final determination, which is not subject to further appeal, that the licensee's proposed action is in compliance with the provisions of this subsection. In any hearing pursuant to this subsection, the applicant or licensee has the burden of proof on all issues raised by this subsection. An applicant or licensee may not take any adverse action against a motor vehicle dealer 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 applicant or licensee provides written notification to the motor vehicle dealer of such resale or export within 12 months after the date the dealer sold or leased the vehicle to the customer.

(39) Notwithstanding any agreement, program, incentive, bonus, policy, or rule, an applicant or licensee may not fail to make any payment pursuant to any agreement, program, incentive, bonus, policy, or rule for any temporary replacement motor vehicle loaned, rented, or provided by a motor vehicle dealer to or for its service or repair customers, even if the temporary replacement motor vehicle has been leased, rented, titled, or registered to the motor vehicle dealer's rental or leasing division or an entity that is owned or controlled by the motor vehicle dealer, provided that the motor vehicle dealer or its rental or leasing division or entity complies with the written and uniformly enforced vehicle eligibility, use, and reporting requirements specified by the applicant or licensee in its agreement, program, policy, bonus, incentive, or rule relating to loaner vehicles.

(40) Notwithstanding the terms of any franchise agreement, the applicant or licensee may not require or coerce, or attempt to require or coerce, a motor vehicle dealer to purchase goods or services from a vendor selected, identified, or designated by the applicant or licensee, or one of its

parents, subsidiaries, divisions, or affiliates, by agreement, standard, policy, program, incentive provision, or otherwise, without making available to the motor vehicle dealer the option to obtain the goods or services of substantially similar design and quality from a vendor chosen by the motor vehicle dealer. If the motor vehicle dealer exercises such option, the dealer must provide written notice of its desire to use the alternative goods or services to the applicant or licensee, along with samples or clear descriptions of the alternative goods or services that the dealer desires to use. The licensee or applicant shall have the opportunity to evaluate the alternative goods or services for up to 30 days to determine whether it will provide a written approval to the motor vehicle dealer to use said alternative goods or services. Approval may not be unreasonably withheld by the applicant or licensee. If the motor vehicle dealer does not receive a response from the applicant or licensee within 30 days, approval to use the alternative goods or services is deemed granted. If a dealer using alternative goods or services complies with this subsection and has received approval from the licensee or applicant, the dealer is not ineligible for all benefits described in the agreement, standard, policy, program, incentive provision, or otherwise solely for having used such alternative goods or services. As used in this subsection, the term “goods or services” is limited to such goods and services used to construct or renovate dealership facilities or furniture and fixtures at the dealership facilities. The term does not include:

- (a) Any materials subject to the applicant’s or licensee’s intellectual property rights, including copyright, trademark, or trade dress rights;
- (b) Any special tool and training as required by the applicant or licensee;
- (c) Any part to be used in repairs under warranty obligations of an applicant or licensee;
- (d) Any good or service paid for entirely by the applicant or licensee; or
- (e) Any applicant’s or licensee’s design or architectural review service.

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 320.646, Florida Statutes, is created to read:

320.646 Consumer data protection.—

(1) As used in this section, the term:

(a) “Consumer data” means “nonpublic personal information” as such term is defined in 15 U.S.C. s. 6809(4) collected by a motor vehicle dealer and which is provided by the motor vehicle dealer directly to a licensee or third

party acting on behalf of a licensee. Consumer data does not include the same or similar data which is obtained by a licensee from any other source.

(b) “Data management system” means a computer hardware or software system that is owned, leased, or licensed by a motor vehicle dealer, including a system of web-based applications, computer software, or computer hardware, whether located at the motor vehicle dealership or hosted remotely, and that stores and provides access to consumer data collected or stored by a motor vehicle dealer. The term includes, but is not limited to, dealership management systems and customer relations management systems.

(2) Notwithstanding the provisions of any franchise agreement, with respect to consumer data a licensee or a third party acting on behalf of a licensee:

(a) Shall comply with all, and not knowingly cause a motor vehicle dealer to violate any, applicable restrictions on reuse or disclosure of the consumer data established by federal or state law and must provide a written statement to the motor vehicle dealer upon request describing the established procedures adopted by the licensee or third party acting on behalf of the licensee which meet or exceed any federal or state requirements to safeguard the consumer data, including, but not limited to, those established in the Gramm-Leach-Bliley Act, 15 U.S.C. ss. 6801 et seq.

(b) Shall, upon the written request of the motor vehicle dealer, provide a written list of the consumer data obtained from the motor vehicle dealer and all persons to whom any consumer data has been provided by the licensee or a third party acting on behalf of a licensee during the preceding 6 months. The dealer may make such a request no more than once every 6 months. The list must indicate the specific fields of consumer data which were provided to each person. Notwithstanding the foregoing, such a list need not include:

1. A person to whom consumer data was provided, or the specific consumer data provided to such person, if the person was, at the time the consumer data was provided, one of the licensee’s service providers, subcontractors or consultants acting in the course of such person’s performance of services on behalf of or for the benefit of the licensee or motor vehicle dealer, provided that the licensee has entered into an agreement with such person requiring that the person comply with the safeguard requirements of applicable state and federal law, including, but not limited to, those established in the Gramm-Leach-Bliley Act, 15 U.S.C. ss. 6801 et seq.; or

2. A person to whom consumer data was provided, or the specific consumer data provided to such person, if the motor vehicle dealer has previously consented in writing to such person receiving the consumer data provided and the motor vehicle dealer has not withdrawn such consent in writing.

(c) May not require that a motor vehicle dealer grant the licensee or a third party direct or indirect access to the dealer's data management system to obtain consumer data. A licensee must permit a motor vehicle dealer to furnish consumer data in a widely accepted file format, such as comma delimited, and through a third-party vendor selected by the motor vehicle dealer. However, a licensee may access or obtain consumer data directly from a motor vehicle dealer's data management system with the express consent of the dealer. The consent must be in the form of a written document that is separate from the parties' franchise agreement, is executed by the motor vehicle dealer, and may be withdrawn by the dealer upon 30 days' written notice to the licensee.

(d) Must indemnify the motor vehicle dealer for any third-party claims asserted against or damages incurred by the motor vehicle dealer to the extent caused by access to, use of, or disclosure of consumer data in violation of this section by the licensee, a third party acting on behalf of the licensee, or a third party to whom the licensee has provided consumer data.

(3) In any cause of action against a licensee pursuant to s. 320.697 for a violation of paragraph (2)(a), paragraph (2)(b), or paragraph (2)(c), the person bringing the action has the burden of proving that the violation was willful or with sufficient frequency to establish a pattern of wrongdoing with respect to such person's consumer data.

Section 3. For the purpose of incorporating section 320.646, Florida Statutes, as created by this act, in a reference thereto, section 320.6992, Florida Statutes, is reenacted to read:

320.6992 Application.—Sections 320.60-320.70, including amendments to ss. 320.60-320.70, apply to all presently existing or hereafter established systems of distribution of motor vehicles in this state, except to the extent that such application would impair valid contractual agreements in violation of the State Constitution or Federal Constitution. Sections 320.60-320.70 do not apply to any judicial or administrative proceeding pending as of October 1, 1988. All agreements renewed, amended, or entered into subsequent to October 1, 1988, shall be governed by ss. 320.60-320.70, including any amendments to ss. 320.60-320.70 which have been or may be from time to time adopted, unless the amendment specifically provides otherwise, and except to the extent that such application would impair valid contractual agreements in violation of the State Constitution or Federal Constitution.

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

Approved by the Governor March 24, 2016.

Filed in Office Secretary of State March 24, 2016.