

Team VADA

2018 Annual Convention

Myth Busters – Legal Update

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Compliance Myths

- ▶ There are a number of things that dealership employees think they know that are not true.
- ▶ These myths can lead to expensive – and even dangerous – liability for the dealership.
- ▶ Let's bust some of the myths that may not be fact.

MYTH #1

- ▶ A used vehicle sold with the remainder of the OEM warranty or with a factory program vehicle warranty is not “AS IS” for purposes of the FTC’s Used Car Rule.
- ▶ Fact – If there is no dealer warranty, the vehicle is “AS IS” for purposes of the FTC Used Car Rule.

Revised FTC Used Car Rule is in Effect

- ▶ Published November 18, 2016
- ▶ Went into Effect January 27, 2017
- ▶ Does not change requirements to post Buyers Guides on all used vehicles for retail sale
- ▶ Changes the form itself
- ▶ Use of the new form was mandatory on January 27, 2018

BUYERS GUIDE

IMPORTANT: Spoken promises are difficult to enforce. Ask the dealer to put all promises in writing. Keep this form.

VEHICLE MAKE _____ MODEL _____ YEAR _____ VEHICLE IDENTIFICATION NUMBER (VIN) _____

WARRANTIES FOR THIS VEHICLE:

AS IS - NO DEALER WARRANTY

THE DEALER DOES NOT PROVIDE A WARRANTY FOR ANY REPAIRS AFTER SALE.

DEALER WARRANTY

- FULL WARRANTY.
- LIMITED WARRANTY. The dealer will pay _____% of the labor and _____% of the parts for the covered systems that fail during the warranty period. Ask the dealer for a copy of the warranty, and for any documents that explain warranty coverage, exclusions, and the dealer's repair obligations. *Implied warranties* under your state's laws may give you additional rights.

SYSTEMS COVERED:

DURATION:

NON-DEALER WARRANTIES FOR THIS VEHICLE:

- MANUFACTURER'S WARRANTY STILL APPLIES. The manufacturer's original warranty has not expired on some components of the vehicle.
- MANUFACTURER'S USED VEHICLE WARRANTY APPLIES.
- OTHER USED VEHICLE WARRANTY APPLIES.

Ask the dealer for a copy of the warranty document and an explanation of warranty coverage, exclusions, and repair obligations.

- SERVICE CONTRACT. A service contract on this vehicle is available for an extra charge. Ask for details about coverage, deductible, price, and exclusions. If you buy a service contract within 90 days of your purchase of this vehicle, *implied warranties* under your state's laws may give you additional rights.

ASK THE DEALER IF YOUR MECHANIC CAN INSPECT THE VEHICLE ON OR OFF THE LOT.

OBTAIN A VEHICLE HISTORY REPORT AND CHECK FOR OPEN SAFETY RECALLS. For information on how to obtain a vehicle history report, visit ftc.gov/usedcars. To check for open safety recalls, visit safercar.gov. You will need the vehicle identification number (VIN) shown above to make the best use of the resources on these sites.

SEE OTHER SIDE for important additional information, including a list of major defects that may occur in used motor vehicles.

Si el concesionario gestiona la venta en español, pídale una copia de la Guía del Comprador en español.

FTC Used Car Rule

Mandatory January 27, 2018

- ▶ There is a substantial difference in disclosing non-dealer warranties. In selling under the revised Rule, one must either disclose the vehicle is being sold as is or that a dealer warranty is being issued. If a dealer warranty is being issued, that is when the box for “dealer warranty” is checked. If there is a warranty other than a dealer warranty, the as is box must be checked.
- ▶ A non-dealer warranty may be described in the “Systems Covered/Duration” but it must be clear this is not a dealer warranty
- ▶ **If there is no dealer warranty, you must check the “AS IS – NO DEALER WARRANTY” box.**

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MYTH #2

- ▶ All registrations in VA for vehicles sold by the dealership are for a minimum of one year.
- ▶ Fact – If a customer owes fees to a locality like property tax or utilities fees, the registration is only valid for 90 days.

Titling and Registration

HB 489

- ▶ Would permit DMV to process a transaction for a customer that owes fees to a locality like property tax or utilities fees for a newly purchased vehicle. The registration would be valid for 90 days. This would keep dealers from being held up in processing sale transactions.

MYTH #3

- ▶ We can avoid disclaimers in TV, radio, and newspaper advertising if we have all disclaimers in our internet ads and our other ads invite customers to review the disclaimers on the internet.
- ▶ Fact – Each ad stands alone. Customers must understand the limitations that qualify each offer, and those limitations must appear in each ad.

MVDB Advertising



- ▶ The VA MVDB and the FTC have similar positions on advertised offers
- ▶ When advertising a price of a vehicle that is eligible for rebates/incentives, that price may be based on incentives and rebates that are available to ALL purchasers. If other incentives/rebates are available based on specific criteria (e.g. military rebate) these additional incentives/rebates can be listed but not subtracted from the advertised price except as specifically provided by MVDB

MVDB Advertising Example from the Dealer Board



Smith Motors

MSRP: \$25,000
Discounts: \$ 1,500*
Military Rebate: \$ 500**
College Grad \$ 500**

Smith Motors Price \$22,500***

Standard Features include:

- Horn
- Special Red Wheels
- Wood steering wheel
- Windshield wipers
- Spare Tire

*Discount includes \$1,000 Acme Rebate for qualified buyers who finance through Acme financing and \$500 Smith Motors discount.
**To qualify for \$500 military rebate, you or your spouse must be an active military member or have received an honorable discharge within the last 2 years. To qualify for College Grad Rebate, you or your spouse must have graduated from an accredited two or four year college within the last 2 years.
***Price does not include \$399 processing fee; \$900 freight, taxes and registration fees.

MVDB Advertising



▶ Removal of Vehicles from Website

- ▶ Upon selling a vehicle listed on its website, the dealer should take action to remove the vehicle from the website within 5 business days.

▶ Freight Charges/Shipping Charges/Delivery Charges/Destinations Charges

- ▶ The advertised price should ensure that customers are properly informed if the advertised price includes freight and destination charges; if the advertised price does not include freight and destination charges it must be clearly and conspicuously disclosed.
- ▶ This fee cannot be charged on any preowned vehicle, nor can it be charged to the customer for the movement or transport of the vehicle from another location to the licensed dealership location.

MVDB Advertising (cont'd)



▶ Vehicle Location

- ▶ When a dealership advertises vehicles for sale the advertisement should clearly identify the location of each vehicle listed for sale in the advertisement and each vehicle that is advertised for sale should physically be located at the advertised location.

▶ Transfer Fees

- ▶ This fee is allowed when a dealership has multiple locations and the customer requests the vehicle be transferred to a specific location for potential purchase. The customer should be given the option of purchasing the vehicle at the dealership where the vehicle is located. However, if the customer requests that the vehicle be transferred to a dealership other than where the vehicle is located, the dealership may charge a transfer fee. The transfer fee should be reasonable and should be disclosed to the customer prior to the transfer of the vehicle.

MYTH #4

- ▶ Members of my 20 group are having great success advertising prices for used vehicles that are subject to a reconditioning fee. That is OK in VA as long as we disclose the amount of the fee in advertising.
- ▶ Fact – There are only two permissible fees VA dealers may charge, the processing fee and the electronic titling fee. A Virginia dealer may not advertise a price subject to other fees such as a reconditioning fee.

Dealer Processing Fees and Electronic Titling Fees are the Only Fees Authorized

- ▶ Processing fees have been a lightning rod for complaints for years.
- ▶ Virginia dealers have the privilege of charging processing fees based on the business decision of each dealer.
- ▶ The processing fee is a privilege that **should not be abused**.
- ▶ The only other fee that **MUST** be charged is the electronic titling fee
- ▶ Other than those two fees and pass-throughs, **NO** other fees are permitted
 - ⊘ Used vehicle preparation and reconditioning fees
 - ⊘ Sales compensation fee
 - ⊘ Transportation fees on used vehicles, with one exception

Dealer Processing Fees

- ▶ Protect your right to charge processing fees.
- ▶ “It is an amount the dealership is allowed to charge to compensate for services not otherwise paid for in the transaction.”

Dealer Processing Fees and BPOL Tax

- ▶ Recent letter to Automotive News about processing fees and BPOL tax.
- ▶ Train employees about the purpose of the fee and BPOL.
- ▶ It is an amount the dealership is allowed to charge to compensate for services not otherwise paid for in the transaction.
- ▶ BPOL is an amount to be paid by customer by statute, similar to sale tax.

MYTH #5

- ▶ If we are having trouble getting a deal bought, we can work it as long as necessary since there is no time limit in VA for dealer rescission under the spot delivery conditional language.
- ▶ Fact – Not only is that bad business, Virginia law gives customers rescission rights if the deal is not complete in 30 days

Spot Delivery

- ▶ VA dealers are fortunate to have a spot delivery statute that gives dealers a roadmap for compliance
- ▶ REMEMBER: you are only insulated if you follow the VA procedures
 - Do not verbally contradict the spot delivery terms
 - Recognize the practical 30 day limit if you cannot get a deal approved
 - Do not shortcut if the spot delivery goes bad
 - Any repossessions should be done in compliance with the contract and without a breach of the peace

Spot Delivery Issues

- ▶ If customer is told financing is not approved, either customer or dealer may cancel the contract. If application is out to several finance sources, get your answers before contacting the customer
- ▶ When the spot delivery language was written for the statute, there was no time deadline. However, if titling is not done within 30 days, the customer has the right to cancel. Set a deadline and either get approval or bring the car back
- ▶ If a deal is cancelled based on the spot language, the customer is entitled to the trade and downpayment. Bullpen trades until deals are done, and do not pay off the trade until the deal is complete
- ▶ Vehicle usage fees are prohibited

MYTH #6

- ▶ If a customer writes and requests copies of his or her deal file, we must provide copies of the documents we originally provided to the customer
- ▶ Fact – Not so, with one exception

Victim Requests for Records

- ▶ If a consumer:
 - (i) alleges that dealer entered into a transaction with someone else who used the consumer's identity, and
 - (ii) requests records of the transaction...the dealer must comply within 30 days without charge to the customer!
- ▶ The customer must be prepared to prove his or her ID and to prove there was a theft.

MYTH #7

- ▶ We understand from our Congressman that the DoD has rescinded the problem position on GAP. We can now sell it to service members and their dependents
- ▶ Fact – DoD has done something, but the result has not yet been released

Motor Vehicle Sales Pre-12/14/2017

- ▶ Pre-12/14/2017, it appeared that a sale of a motor vehicle on credit to a covered person was exempt as long as the vehicle was security for the credit.
- ▶ The issuance of the 12/14/2017 DoD position changed that.

Effect of answer 2 revised 12/14/2017

Sale of vehicle to covered person

Includes GAP and/or credit insurance and/or cash out



Covered by MLA

Does not include GAP or credit insurance or cash out



Not covered by MLA

Effect of coverage by MLA

- ▶ Creditor may not impose on covered borrower an MAPR > 36%
- ▶ Creditor must provide mandatory written and oral loan disclosures, including statement of MAPR applicable to extension of credit
- ▶ Covered borrower may not be required to submit to arbitration
- ▶ Some legal observers believe that the title loan prohibition (financing subject to the MLA may not require “the title of a vehicle as security for the obligation”) applies with respect to a lien on a motor vehicle title as a result of the signature on retail installment sale contract.

Penalties & Enforcement

- ▶ Misdemeanor for knowing violation
- ▶ **Contract Void if violation occurs**
- ▶ Civil liability in private lawsuit for violation
 - actual damages (not less than \$500/violation)
 - punitive damages
 - equitable or declaratory relief and other relief provided by law
 - reasonable attorney fees and costs of the action
- ▶ Arbitration Agreement unenforceable w/ covered borrower
- ▶ Administrative Enforcement authorized
- ▶ SOL – 2 Years from discovery of violation (Max - 5 Years from date of violation)

Some Additional Compliance Issues

- ▶ Who Is Covered?
 - ▶ Safe Harbor Methods
 - DOD Database - <https://mla.dmdc.osd.mil/mla/#/home>
 - Consumer Report from Nationwide CRA
 - Both methods require creditor to timely create and thereafter maintain a record of the information obtained
 - ▶ Eligibility Certification form – not a safe harbor method
 - ▶ Must check every buyer – Covered borrowers are not just active duty military, but military on active guard or reserve duty, or their dependents

What Should You Do?

- ▶ Dealers avoid the obligations and penalties of the MLA if they avoid application of the MLA to deals.
- ▶ To avoid application of the MLA to deals, implement a process to determine whether a customer is a MLA covered person. Sale of GAP and/or credit insurance and/or providing cash out financing will cause application of the MLA to the deal.

MYTH #8

- ▶ We sold a vehicle to an active duty servicemember. We could not get the financing approved. We have rescinded the deal under the spot delivery statute, but the customer will not bring the car back. Because of the Servicemembers' Civil Relief Act we cannot repossess the vehicle.
- ▶ Fact – In fact, if the person was an active duty servicemember when you sold the vehicle on a retail installment sale contract, you may repossess it if you have the right to do so under law.

Service Members' Civil Relief Act

- ▶ Service member rights
 - May terminate lease for change of status
 - Provides rights to those who financed vehicles as civilians and joined the military
 - Provides rights on enforcement of liens, including repair and storage during service and 90 days after
- ▶ Federal DoJ has been active in enforcing these rights including 2 recent consent orders

MYTH #9

- ▶ President Trump signed the Congressional Review Act disapproval of the CFPB's memorandum on dealer reserve. We do not have to be concerned any longer about differences in reserve by type of customers
- ▶ Fact – This may no longer be a CFPB issue, but the federal Department of Justice, state attorney general and private attorneys can still enforce the ECOA

Dealer Reserve and F&I Products

- ▶ Dealer Reserve – Equal Credit Opportunity Act prohibits discrimination in any aspect of a credit transaction based on race, color, religion, national origin, sex, or marital status.
- ▶ **Establish a written fair lending policy -- Review the NADA policy as an example**
- ▶ For some time, dealer critics have contended that the ECOA should apply to F&I products – particularly GAP based on the recent government declaration that it is a credit related product
- ▶ Dealer focus:
 - Concentrate on products that provide value to consumers;
 - Use a transparent process for selling F&I products, through use of a menu or a similar tool; and
 - Establish fixed selling prices for those products with deviations for established non-discriminatory reasons.

MYTH #10

- ▶ Because of Trump administration deregulation, we can be less concerned about all regulatory burdens on our dealership.
- ▶ Fact – That may be true for certain agencies. However, given the administration emphasis on prevention of illegal immigration, expect increased I-9 audits.

I-9 Audits

- ▶ By mid-May, Homeland Security had opened nearly twice as many 2018 I-9 audits as it did in all of fiscal 2017.
- ▶ Make sure your I-9 procedures are in place.
 - Keep original I-9s in one place with copies in employment files.
 - Self-audit your compliance. Correct any errors.
 - Keep completed I-9 forms for three years or one year after employee termination, whichever is later.
 - The employee must complete section 1 of the I-9 form.
 - The employee may choose the document or documents to verify identity and right to work.

MYTH #11

- ▶ It is much safer to require wire transfers than checks on DX transactions and out of state deals. The money is there immediately and we don't have to worry about checks bouncing.
- ▶ Fact – Email wire transfer instructions make you more susceptible to hacking that can be extremely expensive for your dealership.

Don't Be A Victim of Cyber Crime

- ▶ Fastest growing category of crime
- ▶ Dealers are especially vulnerable because of the size of transactions
- ▶ Concerns
 - Phishing: e-mails, text messages, or phone calls to dupe an individual into revealing sensitive information, especially e-mail with a link to a recognizable—but fake—website that prompts the recipient to enter his or her credentials;
 - Spoofing: directing to a fake, albeit similar, e-mail account to impersonate an individual and deceive others; and
 - Malware: malicious software to infiltrate a system and collect information, intercept communications, or steal credentials.

Preventing Cyber Crime

- ▶ **Remember the classic protections**
 - Don't share passwords or keep them on desktop or in a drawer
 - Do not click on an email unless you know the sender
 - If it is your job to receive email from prospects, do not click on links or download apps
 - Never reveal sensitive information – yours or a customer's
- ▶ **Be especially careful of wire transfer scams.** If a seller, establish immediately the method of payment. In each email or document created, use a message warning against fraud, such as: “Because of the possibility of fraud, only accept payment directions such as wire transfer instructions if you personally verify the information by a telephone call to our publicly advertised phone number.” Never accept payment directions, such as wire transfer information, without calling a known person at the seller using the publicly advertised phone number.

MYTH #12

- ▶ Our reimbursement rate for warranty labor and parts is not retail, but it is difficult to change and not worth the trouble of seeking retail reimbursement.
- ▶ Fact – The Virginia statute establishes guidelines for seeking retail reimbursement, and a warranty uplift can be quite remunerative for the dealership.

Warranty Labor and Parts Reimbursement

- ▶ VA law protects a dealer's rights to retail labor and parts reimbursement
- ▶ The manufacturer may **not** impose a surcharge because dealers demand their rights
- ▶ The statute sets forth the process for justifying the reimbursement rate
- ▶ With increasing recalls, and the new legislation protecting compensation for recall repairs on the same basis as warranty repairs, this is an increasingly important issue.

VA Code § 46.2-1571- Reimbursement

- ▶ Compensation of a dealer for warranty parts, service and diagnostic work shall not be less than the amounts charged by the dealer for the manufacturer's or distributor's original parts, service and diagnostic work to retail customers for nonwarranty service, parts and diagnostic work installed or performed in the dealer's service department
- ▶ Based on 100 consecutive repair orders or all repair orders over a 90-day period
- ▶ Calculation excludes discounted services or special promotions

MYTH #13

- ▶ Fighting factory chargebacks is time consuming and expensive. It is generally not worth it.
- ▶ Fact – There are several opportunities to fight factory chargebacks, and you can make progress at each step.

Audits - Chargebacks

§ 46.2-1571. Warranty and sales incentive obligations

- ▶ Any chargebacks for warranty parts or service compensation and service incentives shall only be for the **six-month** period immediately following the date of the claim and, in the case of chargebacks for sales compensation only, for the **six-month** period immediately following the date of claim.
- ▶ However, such limitations shall not be effective if a manufacturer, factory branch, distributor, or distributor branch has reasonable cause to believe that a claim submitted by a dealer is intentionally false or fraudulent. For purposes of this section, "reasonable cause" means a bona fide belief based upon evidence that the material issues of fact are such that a person of ordinary caution, prudence, and judgment could believe that a claim was intentionally false or fraudulent.

Audits - Chargebacks

- ▶ **Challenge the Audit findings**
 - The dealership's representative should engage the auditor on questions and comments
 - Prepare for the closing meeting and challenge improper conclusions

- ▶ **Challenge through the franchisor's internal process and through state administrative or judicial process**
 - Virginia had the first statute of its kind in the country the manufacturer cannot debit the dealer's account if the dealer files challenges
 - The law changes the leverage in negotiations

Audits - Appeals

- ▶ A manufacturer, factory branch, distributor, or distributor branch may **not collect chargebacks**, fully or in part, either through direct payment or by charge to the dealer's account, for warranty parts or service compensation (including service incentives) or for sales incentives or other sales compensation **until 40 days following final notice of the amount charged** to the dealer following all internal processes of the manufacturer, factory, factory branch, distributor, or distributor branch.
- ▶ Within 30 days following receipt of such final notice, the dealer may petition the Commissioner, in writing, for a hearing.
- ▶ If a dealer requests such a hearing, the manufacturer, factory branch, distributor, or distributor branch may not collect the chargeback, fully or in part, either through direct payment or by charge to the dealer's account, until the completion of the hearing and a final decision of the Commissioner concerning the validity of the chargeback.

Audits - Appeals

- ▶ § 46.2-1573.01. Recovery of attorney's fees.

Any party to a proceeding under § 46.2-1573 who is found to have violated any provision of this article may be ordered by the circuit court before which an application therefor is pending **to pay the reasonable attorney's fees and costs incurred by the complaining party**, including those attorney's fees and costs incurred as a result of any appeal.

QUESTIONS?



75 YEARS DRIVING VIRGINIA
VADA
Virginia Automobile Dealers Association

The 2018 VADA Convention
Celebrate 75 Years of VADA
at The Omni Homestead Resort
Hot Springs, VA
June 21 - 24, 2018
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