



VADA Webinar

2022 Legislative and Legal Update

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2022 Legislative Update

- Warranty and Recall Reimbursement
- Overtime
- Electric Vehicles
- Other Issues

2022 Legal Update

- Advertising Compliance Review
- CFPB and Your F&I Department
- A More Active FTC
- New Information Safeguards Requirements
- Franchise Issues



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2022 Legislation

Warranty and Recall Reimbursement

- This bill makes several changes to the warranty statute.
 - Calculation of retail amounts
 - Reimbursement for rental vehicles
 - Compensation for assistance to customers with remote
 - Disclosure of functions and accessories subject to additional charges

2022 Legislation

VA Overtime Wage Act

- In 2021 the General Assembly enacted HB 2063, the Virginia Overtime Wage act.
- It was intended to create a state remedy for violations of federal overtime requirements.
- HB 7001 enacted by the General Assembly in 2021 Special Session II included language in the budget to put in place specific exemptions for auto dealership employees who are salesmen, partsmen and mechanics. These exemptions are only effective until July 1, 2022 when the budget expires.
- The legislation will allow Virginia employers to continue to follow federal law, including the auto dealer exemptions, yet allow aggrieved employees to pursue their rights to overtime in state court.

2022 Legislation EVs

- ZEV mandates
- State Fleet
- EV Rebates

2022 Legislation Other Issues

- Exhaust Systems
- Arbitration
- Catalytic Converters

Protecting THE Business as well as Your Business

Handling Customer Complaints

- Dealers today find themselves with increased responsibilities. Historically, they have taken care to protect their own businesses from lawsuits that can lead to crippling losses.
- Today, they find they must also protect THE business – selling new vehicles via the franchise model.
- Whenever we are asked for the best way to protect a dealership from lawsuits, our answer has been unchanged for years. It also happens to be the best way to protect THE business.
- Have a complete complaint handling system.

Handling Customer Complaints

Implement a complete complaint handling system to protect your business and THE business.

1. Appoint one person at a dealership to be in charge of complaints. If there are multiple people with responsibilities, complaints will fall through the cracks.
2. Each complaint must be forwarded to the person in charge to be logged. The complaint log should be reviewed daily to ensure continuing action on open complaints.
3. Each complaint must be treated seriously. Dealer personnel may see similar problems repeatedly until they become routine. For the customer, it is the most important issue they face. Treat it that way.
4. Delegate handling the complaint to the person best able to investigate and resolve it. For example, a service complaint it should go to the service manager. A complaint about the handling of the customer in F&I, should go to the F&I Director.

Handling Customer Complaints

Implement a complete complaint handling system to protect your business and THE business.

5. Every issue raised in the complaint should be addressed. If the complainant takes the time to contact the dealership, dealership personnel should take the time to address each issue.
6. The person to whom the complaint has been delegated should work with the complainant to see if he or she can be satisfied.
7. If it can't be resolved, the complaint should be escalated to the person in charge of complaints or even the dealer.
8. The person in charge of complaints should follow each complaint until it is either resolved or dealer personnel reach the conclusion that, despite the best efforts of the dealership, it cannot be resolved.

Advertising Compliance Review

Federal Trade Commission Advertising

- The FTC has concentrated its authority and increased budget over car dealers under the Dodd Frank Act on advertising
- Train managers with ad responsibility and ad agencies
 - TILA and Leasing ads non-compliance. If you use a trigger term, use the follow on disclosures
 - Bait and switch – This is the FTC’s hot button. Do not advertise net of incentives of limited availability without adequate disclosure, do not advertise deals that are not available, and keep proof of availability of deals when advertised. **Know the vehicles advertised and their advertised prices. Selling the vehicle for more, even if the customer did not know of the advertisement at the time, can be the basis for a bait and switch claim**

Advertising a Credit Sale (TILA)

- In a credit sale advertisement, if a trigger term is used (the amount of a downpayment, the amount of an installment payment, the number of installments (term), or the amount of any finance charge) the following required terms are also disclosed:
 - The amount of the installment payment;
 - The amount or percentage of down payment;
 - The number of installments (term); and
 - The annual percentage rate.
- Interest rate is stated as an annual percentage rate by either abbreviating APR or using the words "annual percentage rate." If the APR is in lieu of a rebate, that fact must be disclosed.
- "No down," "\$0 down" or the equivalent is not used in the advertisement unless, in fact, no payment or trade-in of any kind is required at delivery (not even sales tax, license fees or use of any manufacturer's rebate).

Advertising a Lease (CLA)

- In a closed-end lease advertisement, if a trigger term is used (the amount of any payment; or the amount of any up-front payment, or that no down payment (e.g., "No down," "Zero drive-off") is required), the following required terms are also disclosed:
 - The fact that the transaction is a lease;
 - The total amount due at lease signing;
 - If a security deposit is required, the amount of the deposit. If no security deposit is required, the statement "No security deposit is required"; and
 - The number, amounts, due dates or periods of scheduled payments.
- If there is any reference to the amount due at lease signing (i.e., "\$0 due at signing"), the total amount due at lease signing must be "equally prominent" (i.e., in the same type size and color and be immediately adjacent to the amount being qualified). This applies to the inclusion of a factory rebate in the offer and if government fees and taxes are required.

Advertising

Example of a Compliant Ad



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.

Advertising

Some critical points about the MVDB example:

- Itemizing deductions from price is not an excuse for advertising prices that are not available. For example, **if itemized deductions are for offers that cannot be used together – customer loyalty and first time buyer incentives or lease and finance incentives – the resulting net prices are not legal.**
- Purpose of itemization is to tell customers what they must do to qualify – **the bottom line price must be available to someone who can qualify for all deductions.**
- Same principles apply to “savings” ads – customers must understand what they must do to qualify, and **total savings cannot include incentives that cannot be used together.**

Dealer Processing Fees

Protect Your Right
to Charge the Fee

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 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, although under a MVDB bulletin a fee from transferring a specific used vehicle from one location of the dealer to another location of the dealer may be permitted under limited circumstances



A Virginia Dealer Must Be Especially Careful about Properly Charging Fees

- The Virginia Motor Vehicle Dealer Board has issued several pronouncements warning that only fees allowed specifically by law may be advertised and charged.
- The Federal Trade Commission issued a complaint against a New York dealer, in part because the dealer used false advertising and fictitious pricing by overcharging for the state doc fee, charging a fee to certify used vehicles prohibited by the dealership's franchisor, and charging multiple other types of fees not authorized by law to inflate prices of vehicles.

Another Reason to be Careful about Advertised Prices

- Dealers often face a dilemma when advertising prices of vehicles. Competitors unlawfully advertise at prices at which they will not deliver vehicles, which in today's market are scarce. Dealer personnel feel they must meet or beat that price, and they advertise at a price at which they do not intend to sell the vehicle.
- When confronted, dealer personnel claim they can do this if they use a disclaimer that the actual selling price of the vehicle may be higher because of prevailing market conditions. They believe the warning in the disclaimer solves the unrealistic pricing issue.
- Advertising at a price intending to sell it for a higher price is an act of **bait and switch**, the cardinal sin for the FTC and under state unfair and deceptive acts or practices statutes.

A Word about MSRP

- Dealers are facing increased pressure from their OEMs to limit selling prices of certain vehicles – usually new model battery electric vehicles (BEVs) – to MSRP.
- Franchisor price restrictions are not automatically illegal. If a dealer wants to challenge such a restriction, a court must now consider the policy on a case by case basis to determine the impact on competition, a very stringent test.
- That is especially the case for BEVs where the OEM will argue that what they consider price gouging will negatively affect the OEM's attempt to build its BEV acceptance in a very competitive market.
- Dealers – horizontal competitors – may not agree on selling prices or terms because those agreements are still per se violations of the antitrust laws. But price restrictions imposed by an OEM on its dealers – vertical price restraints -- are not per se illegal.

Sales of New Cars Above MSRP

- Manufacturer's SUGGESTED Retail Price
- Dealers should be free to price vehicles as they choose
- Best practice: use a supplemental price sticker
- CAREFULLY read OEM warnings and coop programs
- Understand what is prohibited under coop rules vs. what is discouraged

Issues in Advertising Used Vehicles

- Is the vehicle properly identified as to make, model, trim level, and equipment?
- Is the vehicle properly disclosed as used?
- If you have a vehicle with an open recall, fix it or
 - Do not certify it
 - Many manufacturer certification programs prohibit sales of vehicles with open recalls
 - Do not claim that it was subject to a multi-point safety inspection
 - Do not make general claims of safety and reliability

Social Media Advertising

- Too many dealers look at social media use by their employees as a free method of advertising. It is not. It is the newest basis for imposing penalties on dealerships for violations of advertising laws and regulations.
- Have a social media policy.
- The goals of the policy should be to drive consumers to the dealership's web pages where your advertising includes proper disclosures and disclaimers and to move prospects into the dealer's follow up system.

Social Media Dos and Don'ts

- **Dos**

- ✓ All postings should follow company policy about dealings with customers. Behavior that the dealership would not allow in face-to-face or telephone interactions should not be allowed on social media posts.
- ✓ Take the opportunity to speak positively to consumers about the dealership's products and services.
- ✓ Use contacts from prospects to initiate follow-ups through the dealership's processes to generate appointments.
- ✓ Use social media to congratulate the dealership's customers, but never post photos of or information about specific customers without having the customer sign a release allowing that.

Social Media Dos and Don'ts

- **Don'ts**

- ✓ Don't mistreat or abuse anyone through social media posts.
- ✓ Don't disclose personal information of customers or confidential information of the dealership.
- ✓ Don't do blind posts. An employee should always identify who is posting and disclose his or her role at the dealership when talking about dealership matters.
- ✓ Don't post about dealership matters after work hours.
- ✓ Don't trash competitors, but concentrate on discussing the dealership's products and services.

The Most Important “Do”

- **Train Personnel:**
 - ✓ that social media postings of prices, payments, or other offers are advertising and can easily violate advertising laws if compliance requirements are not met
 - ✓ that the goal of social media posts should be dealership awareness
 - ✓ that if the poster wishes to make prospects aware of specific offers, social media posts should drive consumers to the dealership’s website where compliant advertisements can be viewed
 - ✓ that consumer contacts should be treated as opportunities to generate appointments

Federal Enforcement It's a New World

Federal Enforcement

The Biden Administration has dramatically changed the federal agencies that oversee dealer sales and finance practices.

- **The Federal Trade Commission is the critical federal agency overseeing auto dealer practices.**
 - It has a new chairman who is a zealous opponent of free market solutions; she has expressed her support for vigorous enforcement against car dealers, particularly for vehicle financing and sale of voluntary protection products.
- **The Consumer Financial Protection Bureau has authority over the finance sources that buy dealer paper.**
 - The director has expressed a wish to crack down on dealer sales of voluntary protection products.
- **The Department of Justice is in charge of federal law enforcement.**
 - It is now highly politicized.

Use a Fair Lending Policy

- Dealer reserve challenges may have receded during the pandemic, but they have not gone away. With increased focus on social justice issues, they will be back more prominently than ever as critics attempt to show inequality in finance rates. While state regulators and private litigants can bring legal actions, beware of federal enforcement.
- Look for actions attacking aspects of financing as unfair and deceptive acts or practices
- Use the NADA policy on Fair Lending to protect your dealership.

Establish a Policy for the Sale of VPPs

- Under fair lending laws, regulators claim that one must analyze the overall costs of credit.
- To many regulators, that includes pricing of Voluntary Protection Products.
- Prior to the pandemic, pricing differences of VPPs were coming under scrutiny.
- With attention to social justice issues, that scrutiny will return.
- Use the NADA program on VPPs to ensure uniformity of pricing and to limit exposure to claims of discrimination in VPP pricing.

VPP Enforcement Action

- A multi-state franchised dealer group recently settled a federal lawsuit with the FTC and the state of Illinois for \$10 million. The FTC and Illinois charged that the group sold vehicles using unfair and deceptive practices. The most serious charges, however, involved alleged improper sales of voluntary protection products and discrimination in pricing for vehicle financing.
- In this matter, the charges went beyond pricing of voluntary protection products. The FTC and Illinois charged that customers were tricked into buying VPPs. The complaint charges that so-called add-on products (or what the FTC called misleadingly in its press release “junk fees”) were added to contracts without buyers’ knowledge and agreement or were added because consumers were told purchase was necessary to obtain financing.
- The NADA Model Dealership Policy for Voluntary Protection Products assures uniform pricing and price reductions for non-discriminatory reasons. Use it!

Refunds for Cancellations

- A provider of VPP products should not expect to keep the money if a VPP is cancelled. A VPP certificate generally addresses the responsibility for refunds on cancellation of the VPP agreements.
- If a customer trades a vehicle previously sold by the dealership before the end of the finance or lease period, the dealer should have in place a policy to process the VPP refunds which may even include a process whereby the customer is given credit for the refund in the new deal.
- If a finance or lease source notifies that a customer's finance or lease obligation has been terminated, the dealership should check to determine what VPPs may be outstanding and process any necessary refunds.
- When notification by some other means comes to the dealership of the termination of the finance or lease obligation, have a process to determine whether there are VPPs in effect and process the refunds.
- In the event of threatened chargebacks to the dealership for cancellations where the dealership says that it never knew of the termination of the finance or lease obligations, the dealer should marshal its facts and challenge the finance source.

Make Sure Deals are Neat and Complete

- **Have the correct forms available.** F&I personnel can't use the right forms if they don't have them.
 - **Design or Buy Compliant Forms**
 - **Forms should be updated regularly**
 - **Have forms printed** unless you are laser printing them for each deal
- **Use the Right Forms in the Deal.** Train F&I personnel in the proper forms to use.
- **Use a Deal Completion Checklist.**
- **Review and Audit Deals.**

New Information Safeguards Requirements

Your Information Safeguarding Obligations WILL Get More Expensive

- The FTC published the final revised Safeguards Rule on Oct. 27, 2021.
- It is in effect.
- Dealers have one year from original publication to implement new procedures under the revised Rule.
- Criticism: *The original Safeguards Rule maintained flexibility for businesses permitted under the GLBA by allowing them to make their own determinations of the best policies and methods to ensure protection of customer data. The revised Rule removes that flexibility, particularly regarding digital consumer data. The revision makes small companies that are deemed financial institutions because they meet the overly-inclusive definition of that term under the Rule, like car dealers, implement procedures used by the world's largest financial institutions.*
- Review the NADA Publication

Revised Safeguards Rule New Requirements

A Written Information Security Program Including Specific Requirements

- Designate a qualified individual responsible for overseeing and implementing the information security program.
- Perform a written risk assessment with specific evaluation and assessment criteria that identifies reasonably foreseeable internal and external risks.
- Periodically perform additional risk assessments that reexamine the reasonably foreseeable internal and external risks.
- Design and implement safeguards to control the risks identified in the risk assessment, including limiting access to data only to those with a need to know, encryption, multi-factor authentication, a log for users, and a 2 year maintenance requirement with safe disposal of customer data unless an exception applies.

Revised Safeguards Rule Other Requirements

- **Testing.** Regularly test or otherwise monitor the effectiveness of the critical controls, systems, and procedures.
- **Continuous Monitoring.** For information systems, monitoring and testing shall include continuous monitoring or periodic penetration testing and vulnerability assessments.
- **Awareness and Training.** Implement policies and procedures to ensure that personnel can properly use the information security program.
- **Regular Updates.** Continually evaluate and adjust the security program to address changes.
- **Service Providers.** Oversee service providers to ensure their compliance with Safeguards requirements.
- **Incident Response Plan.** Establish a written incident response plan.
- **Regular Reports.** Require the Qualified Individual to report in writing, regularly and at least annually, to the board of directors or equivalent governing body.

Franchise Issues

Franchise Issues

Despite Challenges, the Franchise System Will Endure

- The franchise system has operated for over a century for sale of retail motor vehicles for a reason – It efficiently allocates duties in the supply chain to match the strengths of the participants.
- The benefits of franchising for franchisors – concentrate on design and manufacturing while saving the \$ billions required for marketing and sales -- and for franchisees – concentrate on marketing and sale in markets they know best.
- Why it will continue to be the method for retail distribution of mass market vehicles in the US.

Franchise Issues

Franchise Materials

- Dealers who may seek to challenge factory initiatives based on pre-pandemic franchisor thinking will need to have the basic materials provided to them by their manufacturers to get advice.
- Dealers must maintain digitally and in paper:
 - Dealer sales and service agreement
 - Addenda and amendments to the DSSA
 - Performance reports
 - Bulletins affecting compensation, particularly sales, warranty, and recall compensation, and performance criteria
 - Advisories and technical bulletins

Franchise Issues

Review Every Document the Factory Rep Tells You to Sign, Particularly Renewals

- Boilerplate language is not negotiable.
- Specific details filled in for your dealership are.
- The fact of a term agreement is not necessarily objectionable, the conditions may be.
- Review particularly:
 - Details about the dealership on the agreement face page
 - Requirements in any supplement or schedule
 - Conditions in any term agreement
- Use the franchise agreement checklist.

Franchise Issues

Post-Pandemic Operations and Franchisor Facility Requirements

- Dealers had to adapt to reduced customer showroom traffic – by consumer choice or government mandate.
- Dealers substantially increased digital operations to answer the challenge of decreased customer showroom traffic.
- COVID-19 operation changes – likely to remain -- undercut franchisor rationales for single point Taj Mahals when sales activities are increasingly electronic.
- When facing facility demands, understand your VA protections – particularly 10 year protection for approved facility upgrades and prevention of dedualing demands -- and agree only if they make economic sense in a post-pandemic world.

Franchise Issues - Performance Threats

Performance measurements are no longer just important in terminations because of potential disqualification for new deals and losses of incentives. When receiving performance threats, understand the impact of the pandemic and be prepared to challenge them.

- Sales Effectiveness

- Allocations – a dealer cannot sell cars it cannot get, and inventories have been especially tight in the pandemic.
- PMA – Hard to penetrate markets where the dealer does not have an advantage. A PMA that is too large or with census tracts of residents resistant to buy dealer's vehicles will negatively affect the performance results.
- Failure to adjust for geographic, demographic, brand or vehicle choice, traffic or work travel issues.

- COVID 19

- The pandemic conditions make factory calculations unreliable, and the market disruption will continue for some time.

Franchise Issues

Be Sure Recall Repairs Are Performed

- Dealers are critical to the performance of recall repairs.
- Protect the role of dealers from challenge, particularly with proposals for over the air recall remediation.
- Be sure recalls that your dealership says are done are in fact done.
- Unfortunately, there have been several cases where recall repairs were claimed but were not in fact performed.
 - The repair is seen as unimportant.
 - The repair is small.
 - The time granted to do the work is seen by the technicians as inappropriately short.

Franchise Issues

Steps to Verify Recall Repairs

- Make staff aware of your policy that all recall repairs must be completed as required
- Train technicians with respect to each type of recall repair and how the work is to be done.
- Regularly self-audit recall repairs done in your service department.
- Review the time spent by your technicians. The time allotted by manufacturers is seldom generous. Beating factory time on recall repairs is unusual. If your technicians are shown as regularly beating factory time allowances on recall repairs, investigate whether they are actually spending the time to do the work to completion.
- Require all old parts to be returned on every job.
- Maintain the old parts along with the records on each recall repair.

Franchise Issues - Indemnification

- The indemnification provisions of your DSSA are important.
- If you are sued based on a product problem, you will want the OEM to foot the bills for defense, and today some dealers are seeing mesothelioma claims going back decades.
- Understand the procedures for seeking indemnification.
- Write to your OEM to request indemnification as soon as you are made aware of a claim.
- If you sell your dealership, and your franchisor wants a release, make sure that you do NOT release the franchisor from its indemnification obligations.

Franchise Issues - Succession

- Franchisors are increasingly concerned about future control of dealerships.
- In the past, succession planning was something that dealer lawyers and their accountants worried about.
- Today, the franchisors are becoming much more active to require that succession plans be in place:
 - They want to prevent control fights and paralysis of the dealership.
 - They want to control as much as possible who will be operating their franchisees.
 - They want to ensure that dealerships are run by those with adequate training and experience.
- Having a succession plan in place is now a critical franchise issue, especially nominating a successor.

VADA Webinar *QUESTIONS*

