Virginia Automobile Dealers Association

VADA Webinar

2023 Legislative and Legal Update

Disclaimer

The information provided in this presentation is intended for educational purposes only. It is not intended to be and should not be considered legal advice. Be sure to consult competent legal counsel before taking any action based on the information contained herein.

2023 Legislative Update

- Virginia's groundbreaking franchise system bill
- Electric Vehicles
- Home Solicitations
- 2023 Elections Review

2023 Legal Update

- Latest franchise issues and your protections
- Building a sales and F&I compliance process to counter an increasingly aggressive FTC
- Status of new federal rules affecting your dealership
- Federal personnel policy changes

VADA Legislative Team

- Don Hall
  VADA President and Chief Lobbyist
- Anne Gambardella, Esq.
  VADA EVP and General Counsel
- Ralston King
  VADA VP, Legislative Affairs
- Mike Charapp, Esq., Mahdavi, Bacon, Halfhill, & Young, PLLC
  VADA General Counsel
- Barrie Beaty, Esq., Mahdavi, Bacon, Halfhill, & Young, PLLC
  VADA Counsel
- Meade Spotts, Esq., Spotts Fain, PC
  VADA Legislative Counsel
- Greg Habeeb, Esq., Gentry Locke
  VADA Legislative Counsel
- Tim Pohanka
  VADA Legislative Chair
- Liza Borches
  VADA Chair

2023 Legislation

Preserving the Franchise System

Manufacturers see an opportunity to seize control of the retail sale of vehicles to enhance their profits. In doing so, the manufacturers plan to sell vehicles directly to consumers, using dealers as their delivery agents. This could mean eliminating competition not only on the price of the new vehicle, but in vehicle financing, trade-ins and ancillary products like service contracts. Manufacturers could control it all.

2023 Legislation

Preserving the Franchise System

In 2023 in Virginia, auto dealers drew a line in the sand. We were the first state in the nation to put forward a piece of legislation that will outline concrete protections to the franchise system and support consumer choice.

2023 Legislation
Preserving the Franchise System

To address the manufacturer-controlled model , the bill protects dealers as independent sellers of new vehicles. Under the bill a manufacturer **CAN NOT**:

- Negotiate the sale or lease of a vehicle directly with consumers.
- Retain ownership of vehicles until they are sold or leased instead of selling vehicles to dealers for dealer inventory.
- Consign vehicles to dealers instead of selling vehicles to dealers for dealer inventory.
- Negotiate directly with consumers the sale of products like service contracts, guaranteed asset protection (GAP) agreement or waiver, or any other vehicle-related products and services.
- Alter a franchise agreement to make dealers delivery agents.

2023 Legislation
Preserving the Franchise System

The bill makes clear that manufacturers may not coerce dealers by threatening to withhold incentives.

Manufacturers use incentives to control dealers in many ways. This makes clear that manufacturers cannot use the threat of withholding incentives to which a dealer is entitled to try to control a dealer.

There are several other areas of VA Code that address abuses in incentive programs including provisions governing facilities upgrades, how a dealer's performance is measured, and how a dealer provides data to manufacturers.

The change in this bill is consistent with those existing Code sections.

2023 Legislation
Preserving the Franchise System

The bill makes clear that a manufacturer cannot unilaterally amend their franchise agreement.

VA Code provides various protections to dealers related to changes in the franchise agreement. Franchise agreements must be filed with the Virginia DMV for review and comment by dealers and to ensure consistency with VA law. A franchise agreement cannot simply be terminated on a whim by a manufacturer if a dealer does not agree to something.

The change in this bill is consistent with those existing Code sections.

2023 Legislation
Preserving the Franchise System

Lastly, the bill makes clear that an existing manufacturer cannot get around the franchise laws by simply setting up a subsidiary to distribute certain vehicles.

VA Code prohibits a manufacturer from owning or operating a dealership in VA except under certain circumstances. The changes proposed in this bill would apply those prohibitions only to existing manufacturers with dealers in VA, or to any subsidiary where a manufacturer has 25% or more ownership.

The change in this bill is consistent with those existing Code sections.

2023 Legislation
Taxation of Diagnostic Fees

The VA Department of Taxation determined that whether the diagnostic labor is taxable depends upon whether it is collected along with the repair parts and labor. If the diagnostic labor is collected separately, it is not taxable. But if it collected along with the repair that includes the sale of the parts necessary to complete the repair, the diagnostic labor is somehow converted into a taxable charge, unlike all other labor charges separately stated on the customer's invoice.

This created confusion for dealers and customers.

Legislation has clarified that diagnostic fees are NOT TAXABLE.

2023 Legislation
Home Solicitation Act

Dealers have embraced many remote methods of selling vehicles for the convenience of their customers. There was some uncertainty if the VA Home Solicitation Act created a cooling-off period/right to rescind for customers in certain circumstances.

Legislation concerning the Home Solicitation Act and the three-day recission right was introduced in 2023.

We secured an explicit exemption for auto dealers.

2023 Legislation
Other Issues

- Exhaust Systems
- Catalytic Converters

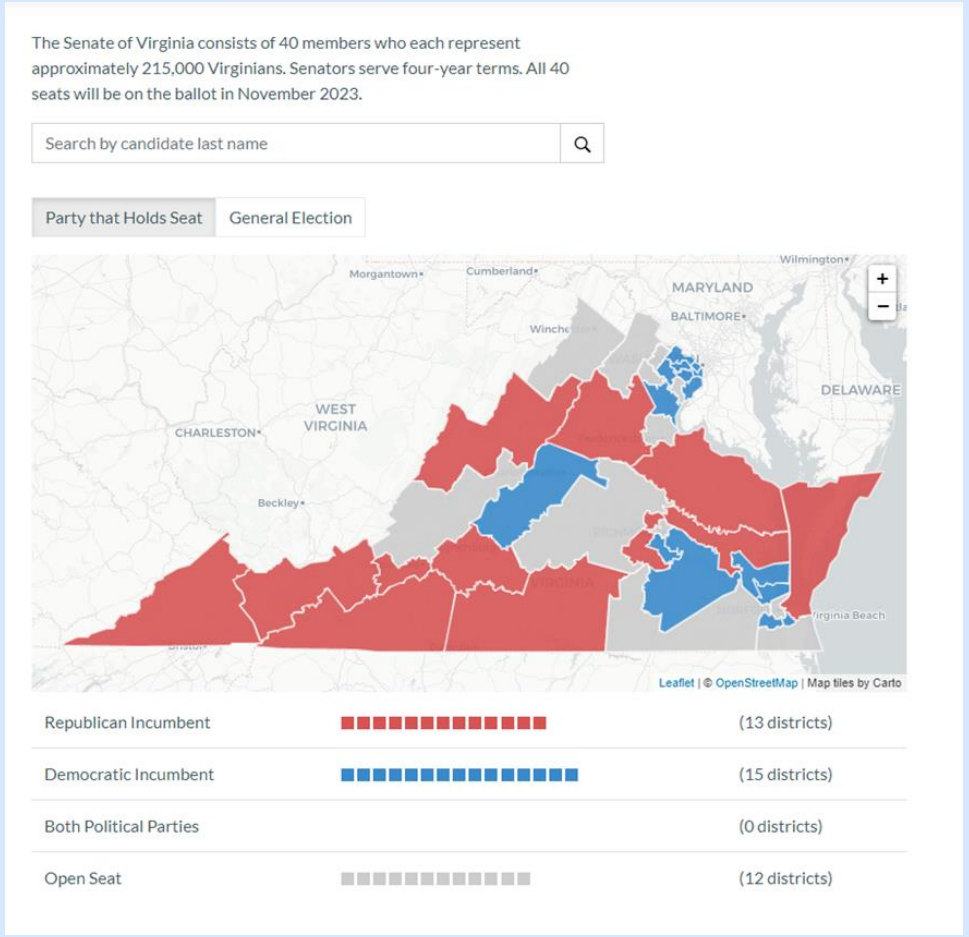
Virginia Automobile Dealers Association

A Word about EVs

2023 Legislative Elections

Senate Retirements:

Bell
Cosgrove
Edwards
Hanger
Howell
Lewis
McClellan
Newman
Norment
Saslaw
Vogel



2023 Legislative Elections

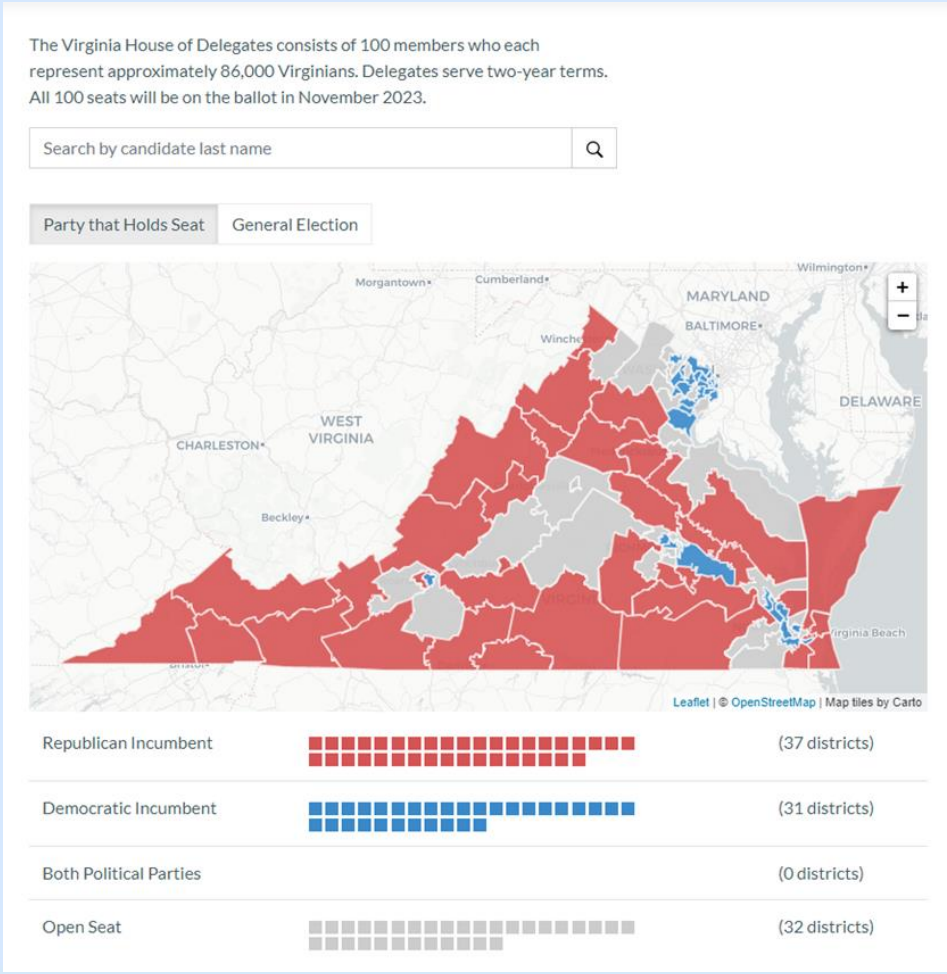
House Retirements:

D. Adams
Anderson
Avoli
Bell
Bourne
Byron
Campbell
Davis
Edmunds
Farris
Filler-Corn
Gooditis
Kory
Mullin
Murphy
Plum
Robinson
Ransone
Wampler

Running for Senate:

Bagby
Brewer
Durant
Guzman
Head
Hudson
Jenkins
LaRock
McGuire
Roem
Subramanyam
VanValkenburg
Williams Graves

32 of 100 members leaving the House



VA Auto and Truck Dealers PAC
Contribute TODAY!!

VIRGINIA AUTO & TRUCK DEALERS
POLITICAL ACTION COMMITTEE

https://vada.com/pac/#pac

Virginia Automobile Dealers Association

Franchise Issues

Franchise Issues

Know Your Rights

You Are Entitled To A Fair Share Of All Models Of Your Line-make

- Virginia Code 46.2-1569(7a)states that dealers are entitled to “all models manufactured for the line-make” [and may not] “require a dealer to pay any extra fee, or remodel, renovate, or recondition the dealer's existing facilities, or purchase unreasonable advertising displays or other materials as a prerequisite to receiving a model or a series of vehicles”
- Virginia Code 46.2-1569(7)states that dealers are entitled to order and receive in reasonable quantities and within a reasonable time new vehicles of each series and model sold or distributed by the franchisor as covered by the franchise and which are publicly advertised in the Commonwealth to be available for immediate delivery.

Franchise Issues

Now More Than Ever – Understand What The Factory Asks That You Sign

- Are required expenditures reasonable?
- Is the payout worth the investment?
- Are practices mandated that have long been on the OEM's wish list?
- If you are agreeing to construction, is the timetable reasonable?
- What rights are you giving up?
- Use the franchise agreement checklist.

Franchise Issues
EVs Are Here to Stay

- Whether the result of federal government policy or OEM planning, EVs are here to stay
- Train personnel
  - Advertising and Marketing – How to engage EV buyers
  - Sales – the benefits of EVs and selling to EV buyers
  - Service – the challenge of selling service to EV owners
  - Parts – proper handling of batteries and other EV parts and accessors
  - Body Shop – challenges of proper repairs to EVs
- Working with your OEM to obtain allocations of EVs

Franchise Issues
OTA Upgrades

- § 46.2-1571(10) permits an OEM to sell certain OTA upgrades directly to customers provided it gives to a dealer a written disclosure that may be provided to a potential buyer of each accessory or function of the vehicle that may be initiated, updated, changed, or maintained by the manufacturer or distributor through over the air or remote means, and the charge to the customer for such initiation, update, change, or maintenance

- If a customer requires assistance at the dealership on an OTA upgrade or repair, the dealer is entitled to compensation at its retail labor rate

Franchise Issues
Changes in Ownership

- More than ever, it is important that your dealer documents accurately reflect the ownership of your dealer. You do not want to give your OEM an excuse to deem you in default and demand that you do as it says to avoid termination

- Some dealers believe that as long as a change in control of the dealership is not involved, they may make minor ownership changes and notify manufacturers later. Examples include:

  ✓ Gifts of small ownership interests to children;
  ✓ Sale of minority interests to managers; and
  ✓ Transfer of ownership to a trust controlled by the existing owner

- Under most dealer sales and service agreements, **any** ownership change must be approved by the franchisor.

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 and as a result of supply change disruptions
- ✓ 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.

CSI

- ✓ CSI measures are notoriously subject to challenge for statistical insufficiency

Franchise Issues Challenging PMA

- VA Code 46.2-1572.4 requires that a performance standard by which a manufacturer measures the performance of a dealer "shall be fair, reasonable and equitable"
- A dealer that feels its assigned PMA is misdefined may request a hearing under this statute before the Department of Motor Vehicles
- The dealer will argue that a PMA including areas where the dealer does not have a sales advantage because of distance, time of travel, geographical issues, demographics, or vehicle choice biases will distort the dealer's performance in violation of the Code
- Expert opinion backing the dealer's opinions of the census tracts or zip codes in the PMA will usually be necessary

FEDERAL AND STATE ENFORCEMENT

Federal Trade Commission
The Zealots Are In Control

- In May 2022, the fifth Commissioner was confirmed to the FTC, breaking the2- 2 deadlock of Democrat and Republican appointees
- The 2 Republican Commissioners have since resigned, leaving 3 Democrats and 2 vacant seats With the confirmation of Commissioner Bedoya, the Commissioners whose past statements reflect their belief that auto dealers must be stringently regulated assumed control
- **The Federal Trade Commission is the critical federal agency overseeing auto dealer practices**
- It has already moved vigorously on auto dealer issues with aggressive complaints and consent orders and a stifling proposed trade regulation rule
- Given the FTC's aggressive moves, dealers must carefully review and control practices in numerous areas

Federal Trade Commission Compliance Triage

- **Advertising** –Understand what the FTC is looking for and avoid those problems
- **Selling practices** – The FTC has been highly critical of dealer selling practices, particularly failure to honor advertised prices
- **Compliance with the Equal Credit Opportunity Act** -- Do you have a Fair Credit Policy? Are you aggressively enforcing it?
- **Sales of Add-on Products** – The Commission has been highly critical of practices used to sell voluntary prevention products. What is your policy on consistent pricing for VPPs?
- **New Safeguards Rule** – New effective date is June 9, 2023 for all elements of the revised Safeguards Rule to be in place. Will you be prepared?
- **Credit Reports** – A critical aspect of protection of customer's identities and non-public, personal information involves care in running credit reports. What is your policy?
- **Used Car Rule** – The Rule itself is nearly four decades old, but it was amended five years ago. The FTC believes that many in the industry are not complying with the revised Rule.

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 in this key areas:

1. **Advertising under the Truth in Lending Act and Consumer Leasing Act**: there is really only one area in which cut and dry requirements are fully set out in the law -- advertising credit sales and leases. TILA and CLA prescribe specific rules
   - If you advertise a trigger term you must make the follow-on disclosures
   - A dealer's failure to follow these rules is puzzling for regulators. They see it as a lack of concern about following the law
   - The problem is that when personnel do not give attention to these requirements, the FTC has "gotcha"

Federal Trade Commission

Midwest Consent Order

- In spring 2022, the FTC announced a consent order with a Midwest dealer group
- It agreed to pay $10 million to settle charges that it discriminated against buyers in protected classes and used unfair tactics in selling voluntary protection products (what the FTC called junk fees)
- The case started because of TILA and Consumer Leasing ad non-compliance. Once the Commission had the group on these clear-cut violations, it was free to charge the dealer group with a variety of additional violations and fashion more painful and aggressive remedies

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.

Federal Trade Commission

Advertising

2. Do not advertise a price you do not plan to honor.

- For the FTC, offering a product at a price at which the retailer does not intend to sell it is the cardinal sin – bait and switch.
- We are in unusual times. This has led a few dealers to advertise MSRP as the franchisor requires but to sell the vehicle at a higher price to a user in its market.
- Once you list the MSRP as the price in the ad, the vehicle must be sold for that.
- Some dealers believe that the problem may be solved with a disclaimer that they will not sell the vehicle for the advertised price. That is not a solution. A disclosure is used to explain an advertised term, not to negate it.

Federal Trade Commission

Advertising

3. Do not reduce a vehicle price with the benefits available under manufacturer programs unless the programs are available and the qualifications are disclosed.

- Advertising a price reduced by manufacturer programs and using the disclaimer that “not all buyers will qualify” is a sure-fired way to tempt a regulator to act.
- The FTC has been emphatic that the requirements a buyer must meet to qualify for program benefits must be disclosed.
- Also, benefits from programs advertised together must be available together. For example, you cannot have first time buyer program savings combined with customer loyalty program savings to reduce the price of a vehicle.

Virginia Automobile Dealers Association

Motor Vehicle Dealer Board

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.

Motor Vehicle Dealer Board

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.**

Federal Trade Commission

Advertising

4. Do not add fees not specifically allowed by law to the advertised price of a vehicle.

- Most states allow certain specific fees that may be added to the price of a vehicle, usually a processing or doc fee (in Virginia it is the processing fee) and a pass through of the electronic titling fee.
- Any other fees, including the creative ones that emerge from 20 Group meetings, such as a salesperson commission fee, a dealer reconditioning fee, a record creation fee, or any other fee not specifically allowed by law is simply an invitation to a legal action for charging excessive fees.

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

Federal Trade Commission

Selling Practices

- **Bait and Switch** – This is the practice about which the FTC has been most vocal for years. It involves the advertisement to sell a vehicle without the intention to sell it at the price advertised. This problem was exacerbated by recent vehicle shortages leading to ads for vehicles at MSRP with the intention to sell them for higher prices
- **Lack of Consent to Additional Fees** – The FTC delights in calling these junk fees, and they are add-ons to the vehicle price. Not only does the FTC object to the addition of fees, whether these are for used vehicle reconditioning, certification, or the like, the Commission charges that they are added to deals without the buyers understanding they are being included
- **Improper Sales of VPPs** – The FTC lumps sales of legitimate vehicle protection products into its pejorative "junk fees". According to the FTC, VPPs are added to deals without buyers understanding that they are being added and what they are getting
- **Discrimination** – According to the FTC, discrimination against buyers in protected classes is rampant in setting finance rates, lease amounts, and prices for VPPs

Federal Trade Commission

Proposed Trade Regulation Rule

- The United States Supreme Court ruled last year that the FTC does not have the power to order monetary impositions as part of an administrative cease and desist order. That upset the FTC's normal practice
- As part of their enhanced regulatory energy for auto dealers, The FTC's answer to that decision is a proposed trade regulation rule on sales of vehicles issued in June 2022
- A violation of a TRR can be punished by civil penalties of $46,517 per violation, adjusted annually.
- The TRR has the effect of imposing on every dealer exempt from CFPB jurisdiction a cease and desist order for which a dealer found to be violating it can suffer crippling monetary impositions.
- The FTC set the minimum deadline for public comments on the proposal of September 12, 2022. We do not have a final rule at this time.
- As a measure of how energized the FTC is to impose this poorly conceived TRR on auto dealers, it denied all requests for an extension of the deadline to comment, including a compelling request from NADA

Federal Trade Commission

Proposed Trade Regulation Rule

- The Proposed TRR will upend the business as it is being done today and impose on dealers requirements that will drastically increase make-work obligations during deals with buyer.
- The proposed TRR consists of prohibited misrepresentations, mandatory disclosures, and other requirements.
- What are the prohibited misrepresentations?
  - ✓ There are sixteen specific misrepresentations included in the proposed TRR. Many are repeats of previous FTC positions on the state of the law and are straightforward. We have counseled dealers for years about some of the issues covered to be sure it is clear whether a transaction involves financing or leasing, the qualifications a consumer must have to qualify for rebates and discounts not available to all, the number of vehicles available at the advertised price or terms, and at what point a transaction is final as to both the buyer and the seller.
  - ✓ Unfortunately, several specific prohibitions of the TRR are loosely written to enhance FTC discretion and cause dealer anxiety about what is covered.

Federal Trade Commission

Proposed Mandatory Disclosures

- If a dealer advertises that it may have a specific vehicle in stock, the TRR specifies that it must list the offering price. More seriously, in "any communication with a consumer that includes a reference, expressly or by implication, regarding a specific vehicle", dealer personnel must affirmatively disclose in their first response about the availability of a specific vehicle the offering price for the vehicle.
- A dealer must produce a list of "add-ons" to be digitally available to the public on its website or app. It must list all optional Add-on Products or Services for which the Motor Vehicle Dealer, directly or indirectly, charges consumers
- When selling a vehicle to a customer, the dealer must disclose the cash price of a vehicle without the "add-ons", and it must advise the customer that the vehicle can be purchased for the cash price

Federal Trade Commission

Proposed Mandatory Disclosures in Sales of Add-ons

- The process for sales of vehicles with so-called "'add-ons" is incredibly cumbersome, including a requirement of a new form
  - ✓ The consumer must specifically decline to purchase the vehicle for the cash price without optional "add-ons."
  - ✓ The process must be evidenced by a new document. "The Cash Price without Optional Add-ons disclosure and declination … must be in writing, **date and time recorded**, and signed by the consumer and a manager of the Motor Vehicle Dealer. [emphasis added]"
  - ✓ Somehow, that presentation must be in a vacuum. According to the TRR: "The Cash Price without Optional Add-ons disclosure and declination … **must be limited to the information required by this Section, and cannot be presented with any other written materials**. [emphasis added]"
  - ✓ There is a process for selling financing besides add-ons requiring similar disclosures.
  - ✓ There must be a separate itemization of the chosen "add-ons" listing the price for each.

Federal Trade Commission

Proposed TRR Other Burdens

- **Redefinition of consumer consent overriding state law.** A customer's signature is no longer enough to prove that the customer agreed to purchase "add-ons". There must be express informed consent:

  "Express, Informed Consent" means an affirmative act communicating unambiguous assent to be charged, made after receiving and in close proximity to a Clear and Conspicuous disclosure, in writing, and also orally for in-person transactions, of the following: (1) what the charge is for; and (2) the amount of the charge, including, if the charge is for a product or service, all fees and costs to be charged to the consumer over the period of repayment with and without the product or service. The following are examples of what does not constitute Express, Informed Consent: (i) a signed or initialed document, by itself, (ii) prechecked boxes, or (iii) an agreement obtained through any practice designed or manipulated with the substantial effect of subverting or impairing user autonomy, decision-making, or choice.

- **Burdensome record-keeping requirements.** For 24 months, all advertisements, training materials, "scripts", "add-on" lists, detailed deal information not only regarding completed deals but also as to dead deals where a purchase order may have been signed, and, of course, all information developed to show compliance with the TRR.

Federal Trade Commission

Recent Consent Order

- In October 2022, the FTC issued a complaint and a consent order involving a dealer group in Northern Virginia and Maryland. Under the consent order, the group agreed to cease and desist allegedly illegal activities and pay $3.3 million for consumer relief
- **“Junk Fees”** – the FTC charged that the dealer advertised cars as “certified,” “inspected,” or “reconditioned” at specific prices, but when customers tried to pay the amount advertised for those vehicles, it added hundreds or thousands of dollars in fees without the expressed, informed consent of buyers.
- **“Discriminating against Black and Latino customers” -** The complaint alleged that the dealer regularly charged black and Latino customers more in financing costs and fees than they charged non-Latino white customers. Although the dealer claimed that it had a policy to prevent discrimination, the complaint alleges that the dealer did not enforce or monitor the policy.

Use a Fair Lending Policy and ENFORCE IT

- Discrimination in sales of financing and leasing is high on the list of dealer practices the FTC wishes to act against
- The best Fair Credit Policy is one developed by NADA
  - The dealer chooses its own addition to buy rate to start each deal
  - Downward deviations for non-discriminatory reasons
  - Maintain documentation of reason for rate
- **Implement the NADA policy on Fair Credit to protect your dealership**
- **ENFORCE IT!** The failure to enforce it was the reason cited by the FTC in the reason complaint and consent order against the dealer group in Virginia and Maryland

Establish a Policy for the Sale of VPPs and ENFORCE IT

- 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.

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.

Federal Trade Commission

Accessing Customer Credit Reports

- Run credit reports only when authorized.
- While the law does not require that a customer sign an authorization, a signed authorization for access to a credit report is the best way to show compliance. According to long-standing FTC policy, a dealer may access a consumer's credit report if express authorization is given regardless of any other reason for running it.
- Run no credit report without a signed or secure internet authorization.
- Keep every authorization for five years, even for deals not completed.

Federal Trade Commission

Information Safeguards Rule

- 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.

Federal Trade Commission

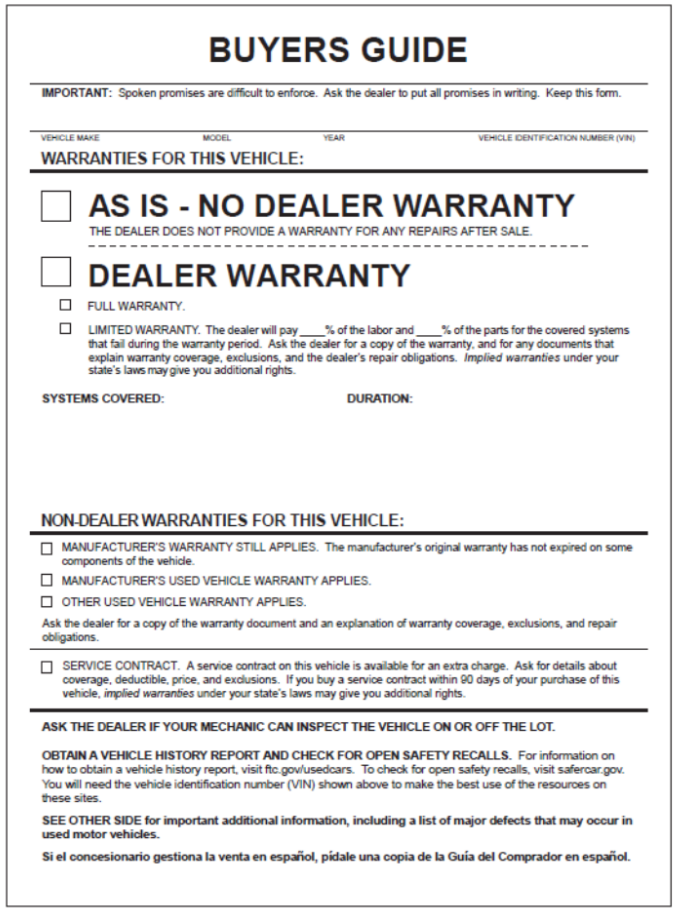
Used Car Rule Requirements

- The original Used Car Rule was promulgated by the Federal Trade Commission in 1985.
- In 2017 the Rule was revised, and the buyers guide was redesigned.
- Know:
  - What vehicles must have a buyers guide?
  - How should the form be completed for each vehicle?
  - Is the customer given the form upon delivery?
  - Was the deal done in Spanish?
  - Do you keep a signed copy of the form?

Virginia Automobile Dealers Association

Federal Trade Commission

Used Car Rule Requirements



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.

Federal Trade Commission

Used Car Rule Requirements

- When a dealership sells a used vehicle with a dealer warranty, the FTC buyer's guide may **not** serve as the warranty document that the customer must receive
- In fact, a customer who buys a used car with the dealer warranty must also receive a separate warranty document
- The federal Magnuson Moss Warranty Act requires that a warranty must be a written description of a consumer's rights in a clearly worded, single document. There is a simple answer why the buyer's guide cannot be the warranty document – the buyer's guide itself says that it isn't. The form buyer's guide states: "Ask the dealer for a copy of the warranty document and an explanation of warranty coverage, exclusions, and repair obligations
- Provide a separate warranty document to the buyer of a used car with an express warranty

Personnel Practices

Personnel Practices

Review Your Employee Arbitration Agreements

- Congress passed The Ending Forced Arbitration of Sexual Assault and Sexual Harassment Act of 2021, which President Biden signed into law on March 3, 2022
- The Act amends the Federal Arbitrations Act so that "at the election of the person alleging conduct constituting a sexual harassment dispute or sexual assault dispute, or the named representation of a class or in a collective action alleging such conduct, no predispute arbitration agreement or predispute joint-action waver shall be valid or enforceable with respect to a case which is filed under Federal, Tribal or State law and relates to the sexual assault dispute or the sexual harassment dispute."
- Review your employment arbitration agreements to be sure they do not cover any sexual harassment or sexual assault claims brought against your dealership by an employee after March 3, 2022

Personnel Practices

Employee Severance Agreements

- In a February 21, 2023 decision, McLaren Macomb, et al., Case 07-CA-263041, the National Labor Relations Board ('NLRB") overturned a Trump-era decision that gave employers latitude in drafting and executing severance agreements with their employees, and it found the language of the confidentiality and non-disparagement clauses in the agreement in the McLaren case improperly required employees to broadly give up their rights under the National Labor Relations Act ("NLRA").
- The McLaren decision has caused confusion as to all severance agreements with employees involving confidentiality and non-disparagement provision.
- On March 22, 2023, the NLRB General Counsel issued a memorandum attempted to clarify the Board's position of the Board on several important issues.
- This is important because under the Obama administration several NLRB decisions affecting personnel handbook provisions stated that the Act is not limited to employers of unionized employees. The portion of the NLRA at issue, section 7, protects the rights of workers whether unionized or not to engage in concerted activities "for the purpose of collective bargaining or other mutual aid or protection." As the NLRB did when it was invalidating handbook provisions, it will protect the rights of workers to communicate about working conditions and other related matters for their protection.
- The Board's position applies only to employee severance agreements, not those involving managers or supervisors (with the limited exception of activity by a supervisor that can be construed to further employee concerted activities). Obviously, the NLRB will be restrictive in its determination of who is a manager or supervisor, and job titles will not be determinative.

Personnel Practices
Employee Severance Agreements

- The NLRB memo made clear that the severance agreement in McLaren contained overly broad non-disparagement and confidentiality clauses that potentially interfered with employees' exercise of their Section 7 rights under the NLRA.
- According to the memo, narrowly tailored confidentiality and non-disparagement provisions are allowable **provided they do have a chilling effect that precludes employees from assisting others about workplace issues and/or communicating with the [Board]**, a union, legal forums, the media or other third parties are unlawful.
- The memo failed to define what is "narrowly tailored language" but gave limited examples. For confidentiality requirements, provisions that "**restrict the dissemination of proprietary or trade secrets for a period of time based on legitimate business justifications"** may still be lawful. For non-disparagement requirements, a provision that is **"limited to employee statements about the employer that meet the definition of defamation… may be found lawful."**
- Conclusion: any severance agreement which the dealership enters with departing workers will be subject to this NLRB policy.
- Unfortunately, the memo suggests that the NLRB position is retroactive, allowing it to review and rule on severance agreement provisions used in agreements before the McLaren decision and that the NLRA on confidentiality and non-disparagement provisions may not be limited to severance agreements.

Personnel Practices

Proposed Regulation on Non-Competes

- On January 5, 2023 when the Federal Trade Commission proposed a trade regulation rule that would prohibit employers from entering into, attempting to enter into, or maintaining non-compete clauses with their employees
- While the proposed rule does not explicitly prohibit other forms of restrictive covenants, such as non-disclosure agreements or non-solicitation agreements, it cautions that those alternative restrictions can be broadly drafted to have the same effect as a non-compete and can be de facto non-compete agreements.
- The proposed rule prohibits the use of any form of agreement with the effect of prohibiting workers from seeking or accepting new employment, no matter what it may be labelled by the employer.
- The proposed rule has limited exceptions. For instance, non-compete agreements restricting an owner, member, or partner holding at least a 25% ownership interest in a business entity would not be affected by the proposed rule. This is a significant issue for auto dealers since buyers of dealerships sometimes wish an outgoing general manager to be subject to a non-compete clause. It is not unusual for a general manager to have little or no equity interest in the dealership, making such a restriction unenforceable under the proposed TRR.

Personnel Practices

Proposed Regulation on Non-Competes

- Comments on the proposed FTC Rule were due on March 10, 2023. We do not have a final rule at this time.
- Virginia has already passed statutes regulating use of non-compete agreements, but limited to certain low-wage workers.
- The proposed TRR makes unenforceable any agreement by an employee to repay training costs unless they are reasonably related to what it cost to train the worker. Repayment agreements on training costs are often required by car dealers of technicians sent to specialized schools and courses if they fail to work for a minimum time. If you use such an agreement, be sure you are only seeking to recoup from the employee what you paid for the employee's training.

Personnel Practices

Pregnant Workers Fairness Act

- The Pregnant Workers Fairness Act will go into effect on June 27, 2023.
- Requires covered employers to provide “reasonable accommodations” to a worker’s known limitations related to pregnancy, childbirth, or related medical conditions, unless the accommodation will cause the employer an “undue hardship.”
- Covered Employers are those employers with 15 or more employees.
- Implementing regulations are to be issued within one year from the effective date by the EEOC.
- The EEOC will begin accepting charges under the Act on June 27, 2023.

VADA Webinar

QUESTIONS