

VADA/GRNCDA ANNUAL PRESENTATION

**PREVIEW OF HOT ISSUES
FOR 2024**



Disclaimer

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February 16-18, 2024

**The Greater Richmond
Convention Center**



VADA Board Members Greater Richmond

- Harry Carrion, Haley Auto Group
- Tanner Hulette, Page Auto Group
- Ross Luck, Luck Chevrolet
- Michael Patrick, Patrick Buick GMC
- Dave Perno, Loyalty Automotive



isle of palms, s.c. june 9-12

TODAY WE WILL COVER

- 2024 General Assembly Preview
- Franchise Issues
- Federal and State Enforcement Affecting Dealer Practices
 - ❖ Compliance Triage to protect against an aggressive FTC
- Personnel Developments

2024 GENERAL ASSEMBLY PREVIEW

2024 General Assembly

The 2023 Virginia Election was the first election cycle with new district lines that were drawn under the redistricting process adopted by voters in 2020.

This election already brought historic turnover with numerous retirements and incumbents losing primaries.

Democrats were able to maintain control of the Virginia Senate with a 21-seat majority. Democrats have secured control of the House of Delegates with 51 of the 100 seats.

There will be a total of **49 new faces in the General Assembly**: 33 in the House and 16 in the Senate. In addition, 30 members were elected in the last four years.

This means that 56% of new members in the General Assembly have served less than four years.

2024 General Assembly

Newly Elected Senate Members from Richmond

Senate District 10

Central VA

Senator-elect John McGuire (R)

Former member of the House



Senate District 12

Chesterfield/Colonial Heights

Senator-elect Glen Sturtevant (R)

Former member of the Senate



Senate District 13

Henrico/Petersburg/Hopewell

Senator-elect Laschrecse Aird (D)

Former member of the House



2024 General Assembly

Newly Elected Senate Members from Greater Richmond Area

Senate District 14
Richmond/Henrico
Senator-elect Lamont Bagby (D)
Former member of the House



Senate District 16
Henrico
Senator-elect Schuyler VanValkenburg (D)
Former member of the Senate



2024 General Assembly

Re-Elected Senate Members from Greater Richmond Area

Senator Ghazala Hashmi (D)



Senator Ryan McDougale (R)



2024 General Assembly

Newly Elected House Members from Greater Richmond Area

House District 57

Western Henrico

Delegate-elect David Owen (R)

NEW to General Assembly



House District 73

Western Chesterfield

Delegate-elect Mark Earley, Jr. (R)

NEW to General Assembly



House District 76

Chesterfield

Delegate-elect Debra Gardner (D)

NEW to General Assembly



2024 General Assembly

Newly Elected House Members from Greater Richmond Area

House District 77

Richmond/Chesterfield

Delegate-elect Michael Jones

NEW to General Assembly



House District 79

Richmond

Delegate-elect Rae Cousins

NEW to General Assembly



House District 80

Henrico

Destiny Bolling

NEW to General Assembly



2024 General Assembly

Re-Elected House Members from Greater Richmond Area

Delegate Rodney Willett (D) Delegate Buddy Fowler (R) Delegate Scott Wyatt (R) Delegate Mike Cherry (R)



Delegate Carrie Coyner (R) Delegate Betsy Carr (D) Delegate Delores McQuinn (D) Delegate Kim Taylor (R)



2024 General Assembly

Proposed Changes to Buy / Sell Statute

1. Time period for the manufacturer to consider the sale.

Will require a manufacturer to provide an objection to the sale within 60 days of receiving notice from the dealer, eliminating any misunderstanding about the time limit. The language will further identify what information the dealer must provide about the sale. Lastly, the language will provide that if the manufacturer does not respond within 60 days, the sale is deemed approved.

2. Grounds for objecting to the sale / proposed transferee.

Will more clearly define the reasonableness of a proposed transferee's experience as an objective measure of their years in the business as opposed to subjective measures a manufacturer may attempt to use improperly.

2024 Legislation Preview

Proposed Changes to Buy / Sell Statute

VADA will have both a House bill and a Senate bill.

The Senate bill patron is Lamont Bagby.

The House bill patron is Terry Austin.

What Can Dealers Do To Help?

Contact Your legislators

- We will soon send you a pre-written letter, on our website, that you can fill out and send to your legislators. The process takes two minutes or less (or longer, if you choose to customize the letter)

Don't let the FTC harm consumers

The Federal Trade Commission has proposed a rule that will drastically **alter the way franchised dealers advertise, sell, and finance** every new or used vehicle, and **impose exceedingly burdensome record-keeping requirements**. As a result, customers **will spend more time to buy a car, not less** (as claimed in the FTC's proposed rule).

VADA has made extensive comments to the FTC ([which you may review here](#)). Now, it's your turn. Please take one minute to send a comment to the FTC warning them that these new rules will create undue burdens for consumers. Here, you will find a pre-written comment, and **we encourage you to personalize it with your role and any personal anecdotes you care to share**.



Contact Information

 Remember Me I would like to receive email in the future.

SEND

PREVIEW

Message



Regulatory Comment Form

FTC-2022-0046-0001

[Terms of Participation](#) • [Privacy Notice](#)

Subject: Don't give customers more forms

We use a transparent menu of finance and insurance options for our customers. Every customer has unique needs, and we offer products that make sense for the customer. The requirement for disclosure on products and services where prices vary must include the price range the "typical consumer" will pay instead of the price. This is a vague standard and is confusing. For example, extended service contracts can vary based on whether the car is new or used, the age and type of car as well as any additional equipment of the vehicle. There are many factors that go into underwriting the price of the extended service contract.

FRANCHISE ISSUES

Franchise Laws

Separate Channels for EVs

- OEMs see the historic price rise in Tesla's stock (prior to recent downturn) and want a taste
- They believe creating EVs as a separate channel will allow them to fool Wall Street into higher valuations
- They are using the present waiting lists for certain SUVs to require changes they have always wanted to implement

Amazon / Hyundai Announcement

Remember 2023 VA Legislation

Under the law passed in 2023 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.

Amazon / Hyundai Announcement

Other Franchise Laws

Laws on Leads

Virginia law prohibits an automobile manufacturer from discriminating when giving leads to franchised auto dealers. This law provides that dealers should receive the leads from their “relevant market area.” The OEM also should not be able to hold a dealer accountable for sales in an area or withhold potential sales leads from that area. Additionally, manufacturers are prohibited from conditioning lead distribution on the use of designated financing.

Prohibiting coercion to use Manufacturer Financing and Products

Virginia law prohibits an OEM from undermining competition in financing and other products by forcing dealers to offer only their financing or products. Dealers offer a wide variety of options to consumers. Manufacturers want to use their monopoly on new vehicles to force dealers to only offer their financing and other products to consumers.

Franchise Laws

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

KNOW YOUR RIGHTS TO PROTECT YOUR RIGHTS

- OEM compliance with Virginia laws will not be automatic
- It is possible that the market for EVs will collapse of its own weight, and OEMs will disregard the failure to sign up for an EV program to sell dealers cars and avoid a build-up in storage lots.
- More likely – dealers will have to fight for their rights under state law
- Challenge to refusal to deliver or limiting delivery of EVs because a dealer failed to sign up for a top tier EV program will be through a DMV hearing on the OEMs failure to comply with the law.

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 accessories
 - Body Shop – challenges of proper repairs to EVs
- Working with your OEM to obtain allocations of EVs

Franchise Issues

EVs ARE HERE TO STAY

Let our customer's voices be heard.

In just three weeks, 3,882 dealerships reflecting the voice of our customers, representing all major vehicle manufacturing brands spanning 50 states, called on the President of the United States to tap the brakes on the proposed Electric Vehicle Mandate. Below is the letter and [list of the dealerships](#) that signed.

[Voice of the Customer \(evvoiceofthecustomer.com\)](http://evvoiceofthecustomer.com)

A Letter to the President

Dear Mr. President,

We are auto dealers from across the country who collectively sell every major brand in the U.S. We are small businesses employing thousands of Americans. We are deeply committed to the customers we serve and the communities where we operate, which is why we are asking you to slow down your proposed regulations mandating battery electric vehicle (BEV) production and distribution.

Franchise Issues

IRS PORTAL FOR EV SALES

- Dealers who sell “clean vehicles” need to register the dealership with the IRS for submissions of Time of Sale Reporting and any transfer EV tax credits that eligible buyers wish to use for towards the purchase of the vehicle.
- Registration can be done at the following link:
<https://www.irs.gov/credits-deductions/register-your-dealership-to-enable-credits-for-clean-vehicle-buyers> .
- For registration, Dealers must provide their EIN, dealer license issued by the state, and upload the license.

Franchise Issues

IRS PORTAL FOR EV SALES

- Time of Sale Reporting through the portal starts December 2023
- Transfer Tax Credits through the portal starts January 1, 2024
- Tax credits are available based on buyer qualifications and vehicle eligibility
- Eligible vehicles can be verified at <https://fueleconomy.gov/feg/tax2023.shtml>.
- Buyer qualifications are based on Buyer's Adjusted Gross Income.

Franchise Issues

IRS PORTAL FOR EV SALES

- Dealers need not verify income requirements.
- *Best Practices:* Dealers should know whether the tax credit is available and inform the buyer that the tax credit is only available to those qualified Buyers before factoring that into the reduction of cost of the eligible vehicle.

Franchise Issues

WARRANTY REIMBURSEMENT

- In 2022, the Virginia Warranty reimbursement statute in Virginia (Virginia Code § 46.2-1571) was amended to provide:
 - Calculation of retail amounts
 - Reimbursement for rental vehicles
 - Compensation for assistance to customers with remote
 - Disclosure of functions and accessories subject to additional charges
- Virginia Code § 46.2-1571(a)(1) Manufacturers are to pay reimbursement for “All manufacturer or distributor compensated parts, service, diagnostic work, updates to a vehicle accessory or function, or initialization or repair of a vehicle part, system, accessory, or function performed by the dealer..”

Franchise Issues

WARRANTY REIMBURSEMENT

- Virginia Code § 46.2-1571(a)(1-3) the rate shall be “...a percentage of markup, which shall be an agreed reasonable approximation of retail markup...” and if not agreed, “shall be based on 100 consecutive repair orders or all repair orders over a 90-day period, whichever occurs first.”
- Manufacturers have to be notified in writing for increases in compensation
- If the Manufacturers are not following Virginia statutes, notify the manufacturer and demand payment pursuant to the law
- Know your rights under Virginia statutes

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

FACILITY UPGRADES / DE-DUALING

- Age of the facility?
- What is the Manufacturer threatening?
- Is the Manufacturer offering any incentives other than program compliance? Monies?
- State Franchise Law Protections: What rights do dealers have?
- *Buy/Sells*: Franchisors who, more often than ever before, try to improperly/unlawfully use transfer approval power during buy/sells to coerce facility upgrades, de-dualing or relocation.

Franchise Issues

FACILITY UPGRADES / DE-DUALING

- VA law protects dealers from having to make changes to their facilities that will replace or substantially alter improvements approved or required by the manufacturer and done within the past ten years. Dealers who are protected under this statute are deemed qualified for any facility upgrade requirements in a manufacturer incentive program.
- Virginia was the first with the 10-year rule, and first with the automatic qualification with the improvement requirements to back it.

Franchise Issues

FACILITY UPGRADES / DE-DUALING

- This statute offers significant protections to VA dealers from having to undertake duplicative improvements and renovations on their facilities or risk losing incentives monies.
- If Dealers are being asked to redo any part of your facilities built or renovated in the last 10 years under a program that provides an incentive, Dealers are eligible for the incentives without additional investments in your facilities.
- Dealers are protected under Virginia law from de-dualing requirements of a manufacturer (Va. Code Ann. § 46.2-1569(7b)).
- *Buy/Sells*: In Virginia, Buyer steps into the shoes of the Seller and cannot be required to do facility upgrades/de-dualing that the manufacturer cannot require of the Seller.

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 - Challenges

Performance measurements are no longer just important in terminations because of potential disqualification for new deals and losses of incentives. When receiving performance threats 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

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.

FEDERAL AND STATE ENFORCEMENT

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 and ad agencies on key issues:
 - 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"

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 (TCLA)

- 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.
 - **DO NOT USE A DISCLAIMER....**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.

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.

Sale of New Cars Above MSRP

- It is a 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 Co-op rules vs. what is discouraged.
- Do not advertise a price you do not intend to honor.

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.

Advertising Motor Vehicle Dealer Board

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 Motor Vehicle Dealer Board

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.

Federal Trade Commission

Advertising

- FTC published its final version of the “Guides Concerning Use of Endorsements and Testimonials in Advertising”
- Key Rules for Testimonials:
 - Bona fide purchasers
 - Real reviews
 - Disclose any material connections (i.e., if the customer is incentivized, it has to be disclosed)
 - Do not distort any reviews by customers

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 an upcoming 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

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 Credit 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

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.

Revised Safeguards Rule

New Rule on Data Breach Reporting

- In October, the Federal Trade Commission (FTC) published a release signaling amendments to the Safeguards Rule that will greatly affect dealers once effective (180 days from date of publishing the rule in the Federal Registrar, which is still TBD).
- The FTC looks to expand the Safeguards Rule to require Non-Banking Financial Institutions (i.e., CAR DEALERS) to Report Data Security Breaches.
- The rule if expanded would require a dealer that suffers a data breach of 500 or more persons causing customer information to be accessed without authorization, the dealer must notify the FTC of the breach as soon as possible, and no later than 30 days, after discovery of the breach.
- The notice to the FTC must include certain information about the event, such as the number of consumers affected or potentially affected.
- This notification requirement will lead to an FTC investigation of the organization's entire Safeguards Rule compliance efforts and a public notice of the breach itself.

Used Car Rule Compliance

- 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?
 - Do you keep a signed copy of the form?

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
- In Virginia, the Buyers Guide must be signed and dated by the Buyer.

Federal Trade Commission

Proposed Spot Delivery Regulations

- In August 2023, NADA requested comments from the state ATAEs proposed spot delivery language advanced by consumer advocacy groups at the Federal Trade Commission.
- The proposed language essentially provides that if a lender does not accept assignment of a RISC (for any reason), dealer cannot cancel the transaction and dealer will become creditor.
- The proposed language conflicts with Virginia's conditional delivery language specifically required on the Buyers Order in 46.2-1530(A)(12).
- VADA submitted comments to the NADA, wherein it highlighted:
 - Conflict with state law
 - Difference between spot delivery and “yo-yo” sale
 - Consumers will be most affected by this language
 - Subject dealers to regulation that they are not currently subject to

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 Arbitration 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 waiver 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.

Personnel Practices

Employee Severance Agreements

- 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.**”

Personnel Practices
Employee Severance Agreements

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

NLRB Joint Employer Rule

- The National Labor Relations Board ("NLRB") issued its final rule on the standard for determining joint-employer status, which becomes effective on December 26, 2023.
- Under the new rule, entities will be considered joint-employers of employees if
 - 1) each entity has an employment relationship with the employees and
 - 2) each entity shares or codetermines one or more of the employees' essential terms and conditions of employment.
- Essential terms and conditions of employment are defined as:
 - ✓ wages, benefits, and other compensation,
 - ✓ hours of work and scheduling,
 - ✓ the assignment of duties to be performed,
 - ✓ the supervision of performance of those duties,
 - ✓ issuing work rules and directions governing the manner, means, and methods of the performance of duties and the grounds for discipline,
 - ✓ the tenure of employment, including hiring and termination, and
 - ✓ working conditions related to the safety and health of employees.

Personnel Practices

NLRB Joint Employer Rule

The new rule focuses on the joint employers' authority or ability to control essential terms and conditions of employment, regardless if the control is directly or indirectly.

The new joint-employer rule will impact dealer groups that operate under a common management company. Typically, dealer management companies are directly involved in codetermining many of the employees' essential terms and conditions of employment such as wages, benefits, and other compensation, hirings and terminations, working conditions related to the safety and health of employees, and issuing work rules, policies and procedures.

Personnel Practices

Proposed Regulation of 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 of 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 went 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.
- EEOC filed proposed regulations on August 11, 2023 in the Federal Registrar, with comments due to the EEOC on or before October 10, 2023.
- Proposed regulations follow the Americans with Disabilities Act (ADA) definitions and regulations
- The EEOC began accepting charges under the Act on June 27, 2023.

Personnel Practices

RetirePath VA

RetirePath was created by Virginia state law to expand access to retirement savings. It's designed for businesses that don't have the time, money or resources to offer their own employer-sponsored retirement plan.

State law requires Virginia employers to register and facilitate RetirePath if the following criteria apply:

- ✓ 25 or more eligible employees (18 or older, receiving wages, and employed at least 30 hours for any portion of a week in the preceding 12 months.)
- ✓ Operating for two or more years, and
- ✓ Does not offer a qualified, employer-sponsored retirement plan

For employers eligible in 2023, the RetirePath registration deadline is **February 15, 2024.**

Personnel Practices **RetirePath VA**

<https://www.retirepathva.com/employers>

Employer's role in three steps

Running your business is your top priority. That's why RetirePath makes it as simple as possible to register and facilitate the program. Follow these three steps.



Register

Eligible employers are notified when registration is available. You'll need your Employer Identification Number (EIN) and unique RetirePath Access Code.



Set up payroll

Upload payroll information and submit your employees' contributions. You can invite a payroll representative to help facilitate this process.

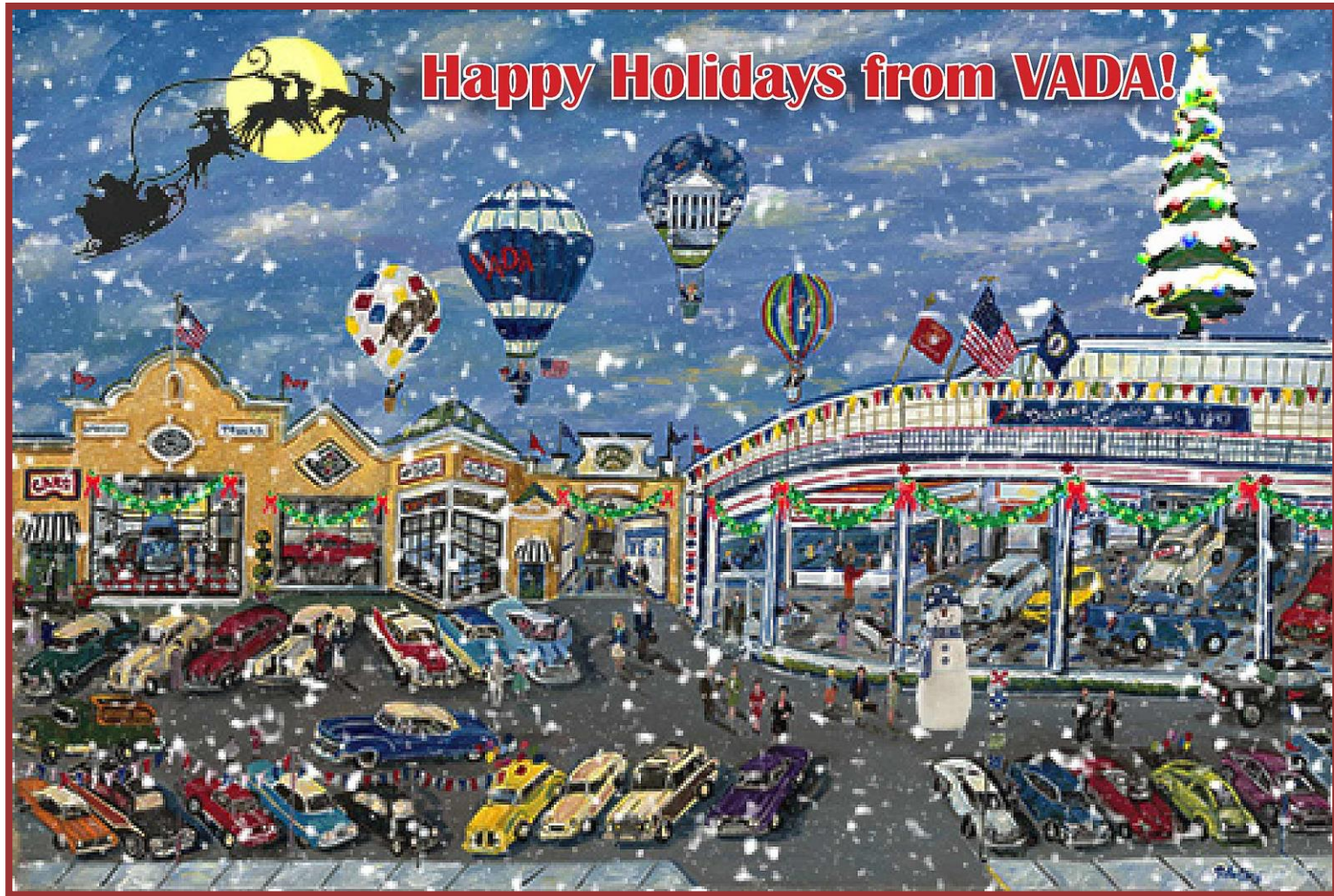


Update

Keep your employee records up to date. Submit payroll details each pay period.

Note: Employers are not responsible for answering questions about the program, managing investments, processing distributions, or giving advice. Employees maintain their account through RetirePath.

Questions



GREATER RICHMOND
NEW CAR DEALERS
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VADA
Virginia Automobile Dealers Association