

# Federal Regulations in the Biden Era: Challenges and Opportunities

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# OPPORTUNITIES

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**Trade**

**EVs**

# CHALLENGES

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**Labor Issues**

**Fuel Economy**

**Recalls**

**Tax Proposals**

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**Safeguarding  
Customer  
Information**

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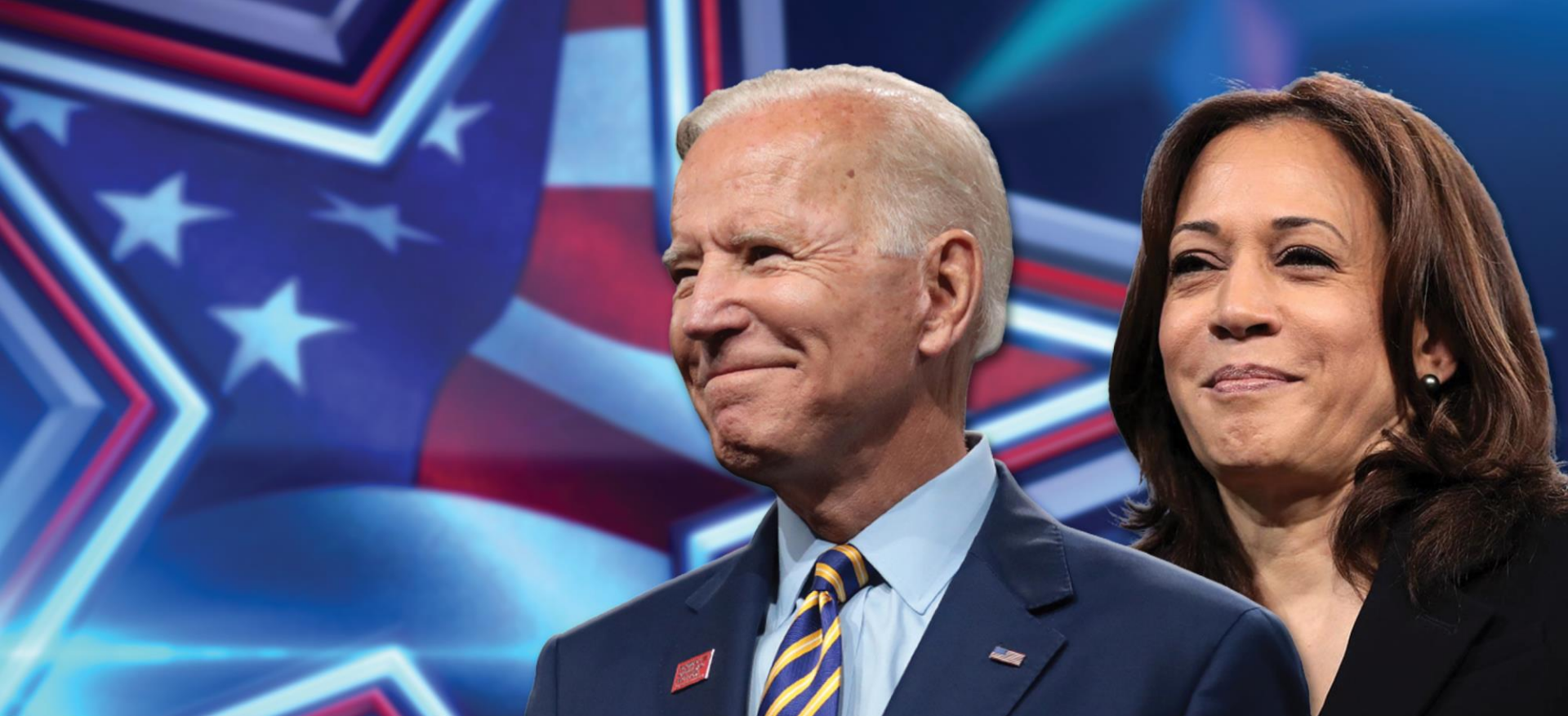
**Small  
Business Credit  
Applications**

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**Dealer  
Participation**

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**VPPs**



# Presidential Transition



# Executive Branch Transition

## 208 NOMINEES

Tracking **792** government positions among about **1,200** that require Senate confirmation

**342**

positions have no  
Biden nominee.

**5**

picks are awaiting  
formal nomination.

**149**

nominees are being  
considered by the Senate.

**54**

have been confirmed  
by the Senate.

# OPPORTUNITIES

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**Trade**

**EVs**

# Trade/Tariffs



# EV Narrative



Advertorial

NATIONAL AUTOMOBILE DEALERS ASSOCIATION  
Visit [nada.org](http://nada.org) to learn more

## The Big Lie

by MIKE STANTON

As someone who has dedicated his career to advocating on behalf of America's franchised auto dealers, I've embraced the reality that one of my chief roles is to serve as Myth Buster In Chief.

For years, one of the great myths that has persisted about the auto industry has been that franchised dealers don't want to sell electric vehicles. It's long past time to put this myth out to pasture. And it's time to call it out for what it is: A lie about franchised dealers, propagated by the handful of companies that want to destroy the franchise system.

Before we get into why this myth persists, and why it's morphed into such a blatant lie, let's acknowledge something right at the outset. More than a decade ago, there was indeed some dealer uneasiness about battery-electric vehicles. The EVs of the early and mid-2000s were—let's face it—by and large compliance cars. They had inadequate range, took forever and were a pain to

For years, one of the great myths that has persisted about the auto industry has been that franchised dealers don't want to sell electric vehicles. It's long past time to put this myth out to pasture. And it's time to call it out for what it is: A lie about franchised dealers, propagated by the handful of companies that want to destroy the franchise system.

recharge, did not perform well, had terrible resale value, and were extremely expensive.

But it wasn't that dealers didn't want to sell them to willing customers. It was that dealers didn't want to be forced to sell vehicles that OEMs were manufacturing largely in response to regulatory pressures as opposed to actual market demand, which gives dealers little capacity to avoid any such OEM force feeding you can hardly blame dealers for this early trepidation.

But that was a long, long time ago. The world has

are rapidly approaching price parity. Owning an EV for the long haul is now a vastly different proposition than it used to be. These are hugely positive developments.

One other major thing that has changed dramatically over the years? Dealer attitudes toward selling and servicing EVs. Franchised dealers aren't at all EV-reistant, and haven't been for years. And they certainly aren't anti-EV. Anyone that tells you differently just isn't telling the truth.

How do we know this? Cadillac.

Last fall, after Cadillac announced plans to abandon internal combustion engines altogether and move entirely to battery electric drivetrains, the nation's 880 Cadillac dealers faced a choice.

If they bought into Cadillac's vision for an all-electric future, they could pony up a minimum of \$200,000 of their own capital for the in-store charging infrastructure, tooling and training that Cadillac was mandating.

Conversely, if they either didn't want to be part of that all-electric future, or they simply didn't want to make the required investment, they could accept a buy-out from the automaker, and wind down their franchises.

What happened next wasn't surprising to anyone who really understands dealers and how their thinking has evolved.

More than 80% of Cadillac dealers said they were all in—not just to sell EVs, but to sell exclusively EVs, and they backed up that commitment with significant capital investments that will take time to mature.

Most of the 20% that opted out were small stores in markets where Cadillac hasn't performed well, and most of these dealers accepted the buyout because of economic conditions on the ground, not out of concern about the brand's future

product plans. And certainly not because they were anti-electric. For example, one Cadillac dealership in northern Minnesota took the buyout because it sells fewer than 50 new cars per year, and the required \$200,000 investment was simply too steep given the small size of its market.

And so, in one fell swoop, America's Cadillac dealers completely debunked the myth that franchised dealers don't want to sell and

more and better EVs—and more EV customers—come to the market.

So why does this myth persist? I think it's simple. EVs still don't yet sell in the numbers that environmentalists want, and many groups feel as though they need a

**More than 80% of Cadillac dealers have said they are all in—not just to sell EVs, but to sell exclusively EVs.**

boogymen to blame for fledgling sales. They can't blame consumers for thus far being cool to zero-emission vehicles, because it's not exactly a winning public relations strategy to blame your customers for the fact that your preferred product isn't flying off the shelf. They can't blame the automakers, because without them there would be precisely zero zero-emissions vehicles available for sale to begin with. Dealers became an easy and convenient scapegoat.

And the myth lingered. Now, however, it's taken a new and more dangerous life as a lie designed to take down the franchise system. In fact, Rivian, Lucid and Lordstown Motors seem to have hung their entire pitch for direct sales on this lie about franchised dealers and their supposed reluctance and inability to sell EVs.

We know that nothing could be further from the truth, but it isn't hard to unpack why this is their line of attack.

Direct sales have never once benefited consumers with lower prices, more convenience or better service and maintenance, despite the marketing. And they never will, because direct sales are ultimately only about creating a vertical channel for manufacturing, sales and service that allows a single entity to control everything, including prices and margins, to the obvious detriment of consumers.

In fact, if direct sales were adopted for EVs, then EV buyers—and only EV buyers—would be denied the service network and price competition that ICE-vehicle buyers have enjoyed for decades.

Direct sales are not needed for EVs. In fact, over time, direct sales could cripple EV adoption as more and more EV owners are forced to deal with higher prices and the headache of longer and longer wait times for even basic service.





# EV Public Policy





# CHALLENGES

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**Labor Issues**

**Fuel Economy**

**Recalls**

**Tax Proposals**

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**Safeguarding  
Customer  
Information**

**Small  
Business Credit  
Applications**

**Dealer  
Participation**

**VPPs**

# Labor Issues

Frances Perkins  
Building



United States  
Department  
of Labor

# Fuel Economy







**S. 1835**

**SAFETY  
RECALL NOTICE**

# President Biden's Tax Proposals

## Potential tax increases include:

- Corporate rate from **21% to 28%**
- Top income tax rate for individuals and pass-through business income from **37% to 39.6%** (43.4% after adding the 3.8 % Medicare surtax, which would now apply to all forms of income)
- Capital gains from **23.8% to 39.6%** (plus 3.8% for households earning \$1 million a year or more)
- Ending stepped-up basis for gains over \$1 million for individuals and \$2 million for joint filers on inherited assets



# LIFO Recapture



November 20, 2020

Hon. David Kautter  
Assistant Secretary (Tax Policy)  
Department of the Treasury  
1500 Pennsylvania Ave., NW, Room 3120  
Washington, DC 20220

Hon. Michael J. Desmond  
Chief Counsel  
Internal Revenue Service  
1111 Constitution Ave., NW, Room 5408  
Washington, DC 20224

Re: Request for Expedited Section 473 Relief for Certain Franchised Automobile and Truck Dealers

Dear Assistant Secretary Kautter and Chief Counsel Desmond:

On behalf of the National Automobile Dealers Association ("NADA"),<sup>1</sup> we are writing to request expedited relief under section 473 of the Internal Revenue Code for franchised new automobile and truck<sup>2</sup> dealers who (i) inventory their new vehicles under the last-in, first-out ("LIFO") accounting method, and (ii) experienced a decrease in their new vehicle closing inventories in 2020 because major foreign trade interruptions resulting from government actions to contain the spread of the novel coronavirus made replacement of new vehicle inventories difficult or impossible. Section 473 authorizes the Secretary of Treasury in such circumstances to permit taxpayers to reduce the unanticipated income from such interruptions by replacing the inventory over a three-year period. Absent such relief, many franchised new automobile and truck dealers will realize significant, unexpected tax liabilities for 2020.

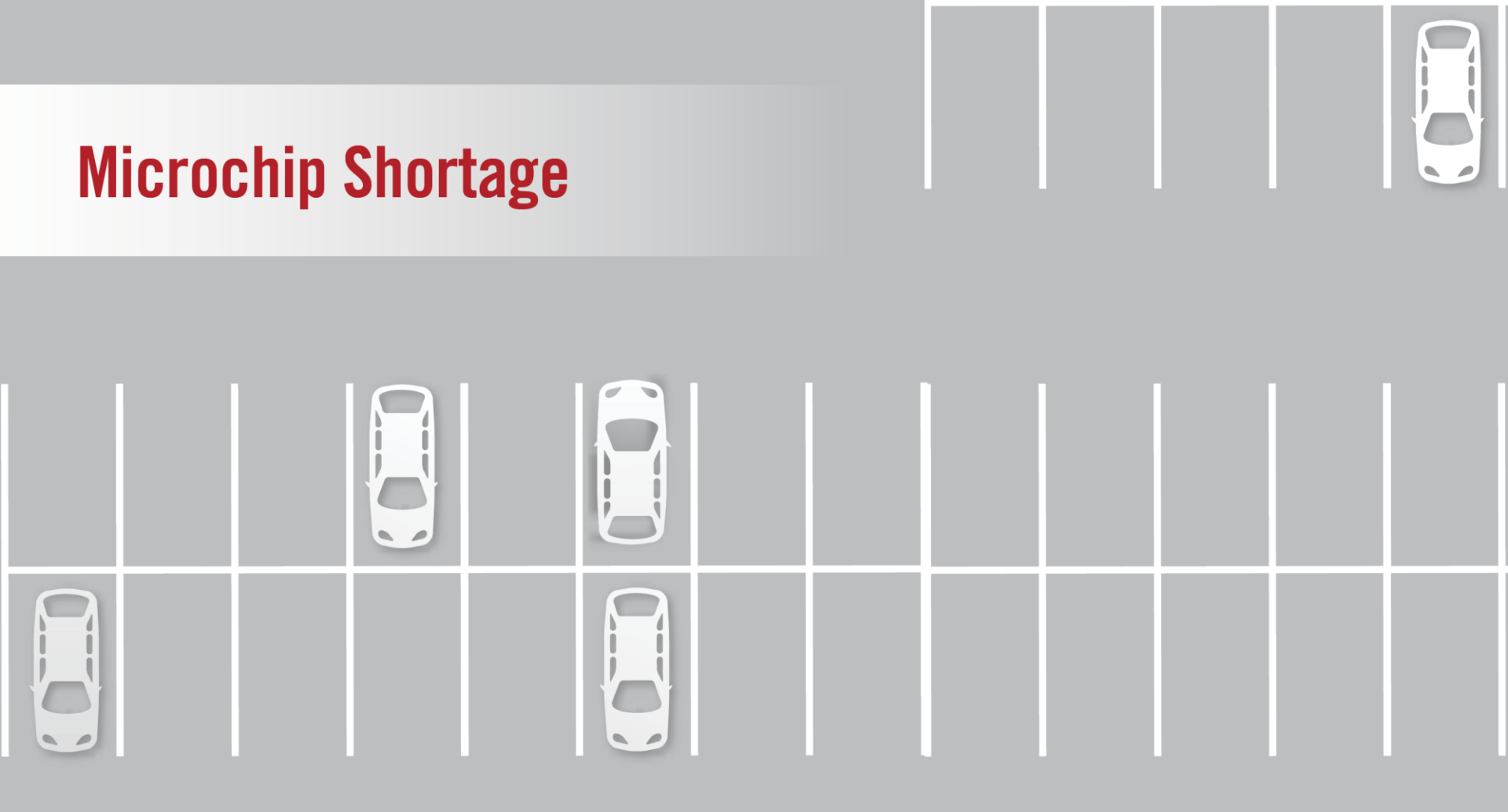
## Government Actions to Contain the Novel Coronavirus

Beginning in January 2020, the Chinese government began to take measures to contain the spread of the novel coronavirus within China. The government "locked down" its economy, prohibiting travel within China and closing many of its factories. By February 1, 2020, 24 provinces, municipalities, and regions within China were locked down. The affected area accounted for approximately 90% of exports

<sup>1</sup> NADA represents over 16,000 franchised dealers in all 50 states who sell, finance, and lease new and used motor vehicles and engage in service, repair, and part sales. This includes approximately 1,800 commercial truck dealers. NADA's members, most of whom are small businesses as defined by the Small Business Administration, collectively employ 1.2 million people nationwide.

<sup>2</sup> "Truck" refers to light, medium, and heavy-duty trucks, as well as vans.

# Microchip Shortage



# Safeguards Rule



# Proposed Amendments

**CISO/Board  
of Directors**

**Inventorying**

**Encryption**

**Multifactor  
Authentication**

**Audit Trails**

**Monitoring  
Authorized Users**

**Penetration  
Testing**

**Service Provider  
Safeguards**

**Incident  
Response Plan**



# NADA Comments to the FTC



August 2, 2019

Federal Trade Commission  
Office of the Secretary  
600 Pennsylvania Avenue NW, Suite CC-5610 (Annex B)  
Washington, DC 20580.

Submitted electronically at <https://regulations.gov>

**Re: Safeguards Rule, 16 CFR Part 314, Project No. P145407**

The National Automobile Dealers Association ("NADA") submits the following comments to the Federal Trade Commission ("FTC" or "Commission"), regarding the notice of proposed rulemaking ("NPRM" or "Notice") to amend the FTC Standards for Safeguarding Customer Information ("Safeguards Rule" or "Rule").

NADA represents over 16,000 franchised dealers in all 50 states who market and sell new and used cars and trucks, and engage in service, repair, and parts sales to consumers and others. Our members collectively employ over one million people nationwide. As our members assist consumers in obtaining financing or leasing options for new and used vehicles, they are generally deemed to be financial institutions under the Gramm-Leach-Bliley Act<sup>1</sup> ("GLB"), and thus are subject to the Safeguards Rule.

The NPRM seeks to modify the Rule in five main ways: (1) by adding provisions "designed to provide covered financial institutions with more guidance on how to develop and implement specific aspects of an overall information security program"; (2) by adding provisions "designed to improve accountability of financial institutions' information security programs"; (3) by exempting certain small businesses from some requirements; (4) by "expanding the definition of 'financial institution' to include entities engaged in activities ... incidental to financial activities;" and (5) by including the definition of "financial institution" and related examples in the Safeguards Rule itself rather than by cross-reference to the Privacy Rule.

<sup>1</sup> 15 U.S.C. § 6801 et. seq.



August 12, 2020

Filed electronically at <https://www.regulations.gov>

Federal Trade Commission  
Office of the Secretary  
600 Pennsylvania Avenue NW  
Suite CC-5610 (Annex F)  
Washington, DC 20580.

**Re: Safeguards Rule, 16 CFR part 314, Project No. P145407**

Dear Secretary:

The National Automobile Dealers Association (NADA) submits the following comments in response to the Federal Trade Commission's ("Commission" or "FTC") request for comment on the FTC's public workshop ("Workshop") relating to its April 4, 2019, Notice of Proposed Rulemaking ("NPRM") announcing proposed changes to the Commission's Safeguards Rule ("Rule"). The Workshop was held virtually and explored "information concerning the cost of information security for financial institutions, the availability of information security services for smaller financial institutions, and other issues raised in comments received in response to the NPRM."<sup>1</sup>

NADA represents over 16,000 franchised dealers in all 50 states who market and sell new and used cars and trucks, and engage in service, repair, and parts sales to consumers and others. Prior to the pandemic, our members collectively employed over 1 million people nationwide. Most of our members are small businesses as defined by the Small Business Administration. Our members assist consumers in obtaining financing or leasing for new and used vehicles and are generally deemed to be financial institutions under the Gramm-Leach-Bliley Act and are thus subject to the Rule.

NADA, along with a number of other organizations and individuals, submitted extensive comments in response to the NPRM ("NADA Comments").<sup>2</sup> Those comments addressed a variety of concerns about the requirements outlined in the NPRM, but also expressed support for not only the overall goal of improving data security but also for several of the specific proposals in the NPRM. Although the current Rule is self-modernizing and requires financial institutions to ensure their information security programs respond to ongoing threats to their customer

<sup>1</sup> See <https://www.federalregister.gov/documents/2020/03/06/2020-04610/public-workshop-examining-information-security-for-financial-institutions-and-information-related-to>

<sup>2</sup> See <https://www.regulations.gov/document?D=FTC-2019-0019-0046>



## NADA COST STUDY: AVERAGE COST PER U.S. FRANCHISED DEALERSHIP

Proposed Change <sup>i</sup>	One-Time Up-Front Cost	Annual Cost
Proposed Paragraph (a) – Appointing a CISO to increase program accountability.	\$27,500	\$51,000
Proposed Paragraph (b) – Requiring that the Information Security Program Be Based on a Written Risk Assessment.	\$26,500	\$26,500
Proposed Paragraph (c) (2) – Required Data and Systems Inventory	\$16,750	\$10,250
Proposed Paragraph (c) (4) – Requirement to Encrypt Data at Rest and in Transit.	\$9,000	\$8,500
Proposed Paragraph (c) (5) – Requirement to Adopt Secure Development Practices	\$9,000	\$37,500
Proposed Paragraph (c) (6) – Required Multi-Factor Authentication	\$33,750	\$18,500
Proposed Paragraph (c) (7) – Requirement to include Audit Trails.	\$30,000	\$18,000
Proposed Paragraph (c) (8) – Requirement to Develop Secure Disposal Procedures	\$30,000	\$10,800
Proposed Paragraph (c) (9) – Required Adoption of Procedures for Change Management	\$30,000	\$2,000
Proposed Paragraph (c) (10) – Required Unauthorized Activity Monitoring	\$20,000	\$29,000
Proposed Paragraph (d) – Required Penetration Testing and Vulnerability Assessments	\$20,125	\$23,125
Proposed Paragraph (e) – Required Employee Training and Security Updates	\$2,100	\$14,875
Proposed Paragraph (f) – Required Periodic Assessment of Service Providers	\$14,250	\$11,250
Proposed Paragraph (h) – Required Incident Response Plan	\$16,000	\$6,625
Proposed Paragraph (i) – Required Written CISO report	\$9,000	\$9,000
<b>Total Cost Incurred/ Dealership<sup>ii</sup></b>	<b>\$293,975</b>	<b>\$276,925</b>

**Total Cost Incurred Across All Dealerships<sup>iii,iv,v</sup>**

**\$2,236,267,825**

**\$2,106,568,475**



## Finance Issues



# Small Business Credit Applications



Consumer  
Financial  
Protection  
Bureau



# Dealer PARTICIPATION

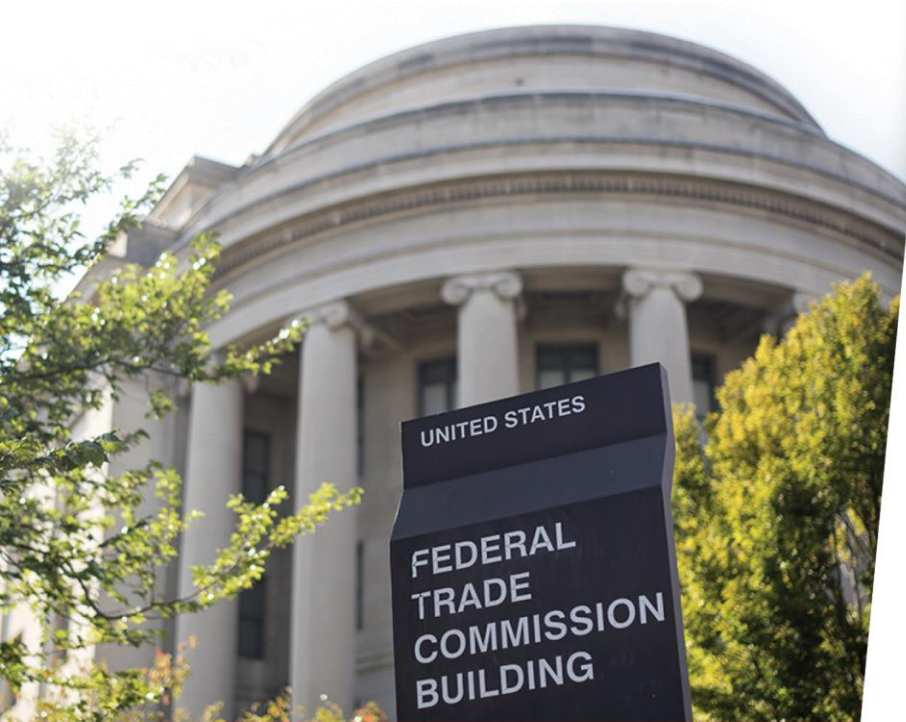


# Voluntary PROTECTION PRODUCTS





# Bronx Honda



UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

FEDERAL TRADE COMMISSION,  
Plaintiff,

v.

LIBERTY CHEVROLET, INC., a corporation, also  
d/b/a Bronx Honda, and

Carlo Fittanto,

Defendants.

Case No. \_\_\_\_\_

**STIPULATED ORDER FOR  
PERMANENT INJUNCTION AND  
OTHER EQUITABLE RELIEF**

Plaintiff, the Federal Trade Commission ("Commission" or "FTC"), filed its Complaint for Permanent Injunction and Other Equitable Relief ("Complaint") in this matter, pursuant to Sections 13(b) and 19 of the Federal Trade Commission Act ("FTC Act"), 15 U.S.C. § 53(b) and 57b. Defendant Liberty Chevrolet, Inc. ("Liberty Chevrolet") has waived service of the summons and the Complaint. The Commission and Liberty Chevrolet now stipulate to the entry of this Stipulated Order for Permanent Injunction and Monetary Judgment ("Order") to resolve all matters in dispute in this action between them.

THEREFORE, IT IS ORDERED as follows:

**FINDINGS**

1. This Court has jurisdiction over this matter.
2. The Complaint charges that Liberty Chevrolet participated in deceptive and unfair acts or practices in violation of Section 5 of the FTC Act, 15 U.S.C. § 45, Section 5(a) of the FTC Act, 15 U.S.C. § 45(a), the Truth in Lending Act ("TILA") and its implementing Regulation Z, 12



# Concurring Statements



**Rohit Chopra**  
FTC Commissioner



UNITED STATES OF AMERICA  
**Federal Trade Commission**  
WASHINGTON, D.C. 20580

## STATEMENT OF COMMISSIONER ROHIT CHOPRA

*In the Matter of Liberty Chevrolet, Inc. d/b/a Bronx Honda*  
Commission File No. 1623238  
May 27, 2020

### Summary

- Given the difficulty of uncovering direct evidence of discriminatory intent, disparate impact analysis is critical for detecting potentially unlawful discrimination.
- With the proliferation of machine learning and predictive analytics, the FTC should make use of its unfairness authority to tackle discriminatory algorithms and practices in the economy.
- A decade ago, Congress gave the FTC additional tools in the auto market. Given growing concerns and abuses, we should use this authority.

Access to reliable transportation is a vehicle for higher wages and greater opportunities. For millions of Americans, this means taking out a loan to buy a car. Federal law forbids auto dealers from discriminating based on race when making or arranging loans.<sup>1</sup>

For the first time, the FTC is charging an auto dealer with illegal racial discrimination. As detailed in the complaint, Bronx Honda and its general manager, Carlo Fittanto, ordered employees to charge African-American and Hispanic families higher interest rates than their white counterparts, as well as employing a host of other tactics to cheat car buyers.

### Disparate Impact and Unfair Discrimination

Most auto buyers finance their purchase, and auto dealers make much of their money in opaque ways. One of these ways is called a “dealer markup.” A dealer markup is an undisclosed kickback that dealers earn for convincing prospective car buyers to agree to a higher interest rate than they actually qualify for with a lender. These kickback arrangements are kept secret from car buyers, who end up paying far more for financing.

In addition to evidence gathered regarding Fittanto’s racist staff directives, the Commission’s loan data analysis also confirmed that these pricing practices resulted in a disparate impact on

<sup>1</sup> The Equal Credit Opportunity Act, 15 U.S.C. § 1691 *et seq.*, prohibits creditors from discriminating against



Office of Commissioner  
Rebecca Kelly Slaughter

UNITED STATES OF AMERICA  
**Federal Trade Commission**  
WASHINGTON, D.C. 20580

## STATEMENT OF COMMISSIONER REBECCA KELLY SLAUGHTER

*In the Matter of Liberty Chevrolet, Inc. d/b/a Bronx Honda*  
Commission File No. 1623238  
May 27, 2020

The automobile-financing market in the United States is profoundly broken. Although this matter involves extreme conduct that may make it seem like an outlier, the tricks and traps that Bronx Honda used against consumers are all too prevalent at auto dealerships across the country. The complaint against and settlement with Bronx Honda and its general manager, Carlo Fittanto, highlight the perils that consumers, especially people of color, face in purchasing and financing a vehicle, and they illustrate the limited utility of one-off enforcement actions to fix a broken market. In my view, far-reaching structural reform to the automobile-financing and -sales markets is long overdue and urgently needed: First and foremost, the Commission can start by initiating a rulemaking, under the Dodd-Frank Act, to regulate dealer markup.

### Bronx Honda’s Lawbreaking

The Commission’s Division of Financial Practices expertly uncovered a cornucopia of consumer abuses allegedly committed by Bronx Honda, from bait-and-switch advertising to rip-off fees for “certified” vehicles and from illegally exorbitant fees for vehicle registration to padding final sales contracts with “air money” consumers would not detect. *See* Compl. ¶¶ 10–19. Our complaint alleges that these practices all violate the prohibition against unfair or deceptive acts or practices under section 5 of the Federal Trade Commission Act, 15 U.S.C. § 45(a)(1). Bronx Honda also allegedly ran afoul of two important safeguards provided by the Truth In Lending Act and its implementing regulation, Regulation Z, when it advertised financing terms without disclosing the advertised interest rate as an Annual Percentage Rate (APR) and without clearly and conspicuously disclosing key financing terms, such as required down payment, when advertising a specific monthly payment. *See* Compl. ¶¶ 20–22; 15 U.S.C. § 1664(c)–(d); 12 C.F.R. § 226.24(c)–(d).

This lawbreaking is already outrageous enough to merit severe consequences, but it is Bronx Honda’s, and Mr. Fittanto’s, practice of brazenly and systematically discriminating against African-American and Hispanic consumers, as alleged in the complaint, that angers me most:

Defendants have instructed sales personnel to charge African-American and Hispanic consumers higher markups and additional fees, leading to higher prices for vehicles.



**Rebecca Slaughter**  
FTC Commissioner

# Notable Quotes



**Rohit Chopra**  
FTC Commissioner

“A dealer markup is an undisclosed kickback that dealers earn for convincing prospective car buyers to agree to a higher interest rate than they actually qualify for with a lender. These kickback arrangements are kept secret from car buyers, who end up paying far more for financing.”

# Notable Quotes



**Rohit Chopra**  
FTC Commissioner

“The FTC should stop ignoring Congress when it comes to auto market abuses. Ten years ago, Congress authorized the FTC to write rules to protect car buyers and honest auto dealers.... Nevertheless, the agency has not even solicited comment or otherwise initiated a rulemaking process to combat these harms.”

# Notable Quotes



**Rohit Chopra**  
FTC Commissioner

“In addition to loan document falsification and undisclosed and often discriminatory dealer markups, the Commission could also use the [rulemaking] authority granted by Congress to address consumer protection concerns like fake recall notices, yo-yo financing schemes, deceptive advertising, GPS trackers and kill switches, and add-on products.”



# Notable Quotes



**Rebecca Slaughter**  
FTC Commissioner

“The automobile-financing market in the United States is profoundly broken.”

“Far-reaching structural reform to the automobile-financing and -sales markets is long overdue and urgently needed.”

# Notable Quotes



**Rebecca Slaughter**  
FTC Commissioner

“Dealer markup has got to go. And I would like to help.”

# Notable Quotes



**Rebecca Slaughter**  
FTC Commissioner

“[Dealers] make money by selling credit and add-on products, such as guaranteed asset protection (GAP), window etchings, extended warranties, and anti-rust coatings. Nearly all of these moneymaking strategies can be bad for consumers.”

# Presidential Appointments



**Rohit Chopra**  
FTC Commissioner



**Rebecca Slaughter**  
FTC Commissioner



# Notable Quotes



**Rebecca Slaughter**  
FTC Commissioner

“The policy of permitting unfettered discretionary dealer markup leads to the same racist result, whether or not discriminatory intent is involved.”

# 2007 DOJ Consent Orders

IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

UNITED STATES OF AMERICA, :  
 :  
Plaintiff, :  
 :  
v. : Civil Action No. \_\_\_\_\_  
 :  
PACIFICO FORD, INC., :  
 :  
Defendant. :  
\_\_\_\_\_ :

CONSENT ORDER

I. INTRODUCTION

1. This Consent Order is submitted jointly by the parties for the approval of and entry by the Court simultaneously with the filing of the United States' complaint. The Consent Order fully resolves the claims of the United States that Defendant Pacifco Ford, Inc. ("Pacifco Ford") has violated the Equal Credit Opportunity Act, 15 U.S.C. §§ 1691-1691f ("ECOA"), and its implementing regulations located at 12 C.F.R. Part 202. The United States alleges that Pacifco Ford has engaged in practices involving setting interest rates on loans that discriminate against African-American consumers who receive dealer financing to purchase motor vehicles. Pacifco Ford denies that it has violated ECOA or engaged in any discriminatory practices against African-Americans or any other consumers.
2. There has been no factual finding or adjudication with respect to any matter alleged by the United States. Accordingly, the execution of this Consent Order is not, and should not be considered as, an admission or finding of any violation of ECOA by Pacifco Ford.

IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

UNITED STATES OF AMERICA, :  
 :  
Plaintiff, :  
 :  
v. : Civil Action No. \_\_\_\_\_  
 :  
SPRINGFIELD FORD, INC., :  
 :  
Defendant. :  
\_\_\_\_\_ :

CONSENT ORDER

I. INTRODUCTION

1. This Consent Order is submitted jointly by the parties for the approval of and entry by the Court simultaneously with the filing of the United States' complaint. The Consent Order fully resolves the claims of the United States that Defendant Springfield Ford, Inc. ("Springfield Ford") has violated the Equal Credit Opportunity Act, 15 U.S.C. §§ 1691-1691f ("ECOA"), and its implementing regulations located at 12 C.F.R. Part 202. The United States alleges that Springfield Ford has engaged in practices involving setting interest rates on loans that discriminate against African-American consumers who receive dealer financing to purchase motor vehicles. Springfield Ford denies that it has violated ECOA or engaged in any discriminatory practices against African-Americans or any other consumers.
2. There has been no factual finding or adjudication with respect to any matter alleged by the United States. Accordingly, the execution of this Consent Order is not, and is not to be considered as, an admission or finding of any violation of ECOA by Springfield Ford.

**NAMAD**  
NATIONAL ASSOCIATION OF MINORITY AUTOMOBILE DEALERS

**NADA**  
NATIONAL AUTOMOBILE DEALERS ASSOCIATION

**American International**  
Automobile Dealers

# Fair Credit Compliance POLICY & PROGRAM

**Credit Application**

**Step One**  
Your full name, exactly as it appears on your Social Security card

1. Last name  
2. First name  
3. Middle initial

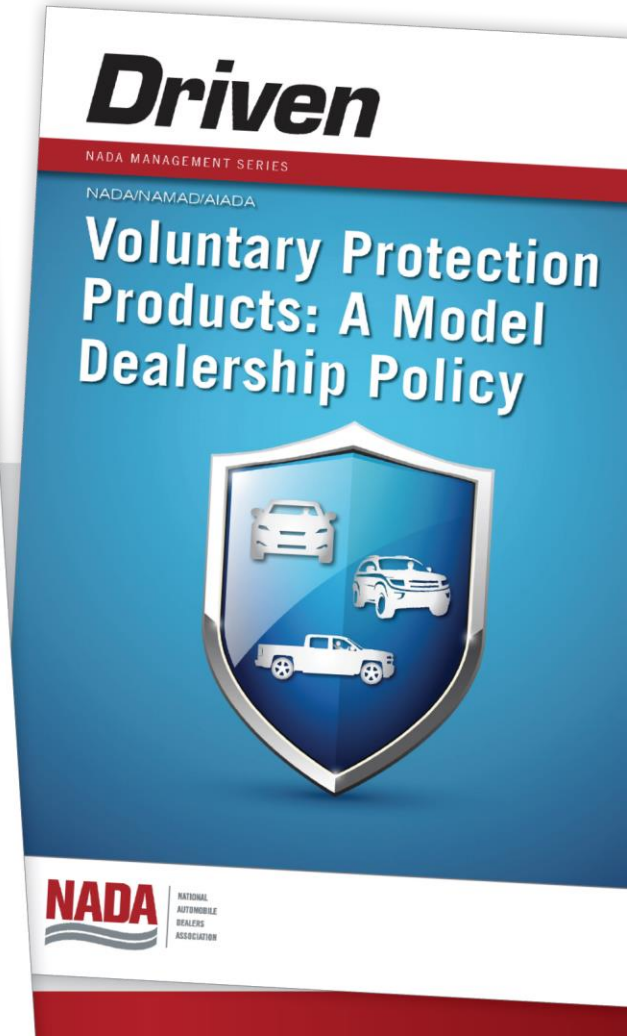
Your mailing address

4. Number and street (include apt. number)  
5. City and country if not U.S.  
6. State  
7. ZIP code

8. Your date of birth  
9. Your Social Security Number

10. Telephone number  
11. Home 12. Office

13. Signature 14. Date





## Managing Pricing Discretion in Credit Transactions: A Path Forward

One of the most attractive benefits to consumers in any industry is the ability to purchase products and services at a discounted price. Discounting saves customers money, allows companies to earn their business and disciplines the prices competitors offer for the same items. In a normally functioning market, it is a win-win for both consumers and businesses.

At the same time, discounting involves pricing discretion, and pricing discretion that is not carefully exercised by a business can give rise to concerns about arbitrary pricing and, worse, pricing that discriminates against protected groups of consumers. It is this concern that has driven the efforts of many consumer advocates and government officials over the years to eliminate dealer pricing discretion. In the context of dealer financing, this would be attempted by eliminating the dealer participation that dealers earn for originating credit contracts and replacing it with a non-discountable, flat fee.

Many finance sources that are assigned credit contracts compensate dealers with non-discountable flat fees, and the National Automobile Dealers Association takes no position on the form of compensation freely entered into by dealers and their finance sources. Nevertheless, NADA has resisted—and will continue to resist—efforts by the government to prohibit finance sources from being able to compensate dealers with discountable dealer participation for originating credit contracts with their customers. The pro-competitive benefits that dealer participation provides to consumers should not be eliminated by unwarranted and untested government intrusion into the marketplace.

Notwithstanding the flaws of such a mandate, concerns about “unfettered” pricing discretion that have been expressed by the acting chair of the Federal Trade Commission (FTC) and others should not be ignored, and dealers should consider ways to address those concerns while striving to provide their customers with affordable and competitively priced products. One approach a dealer should consider to fulfill this goal (managing discretion while promoting competition) when earning dealer participation in a credit contract is to adopt the optional

NADA/NAMADA/IAADA Fair Credit Compliance Policy & Program (NADA Fair Credit Compliance Program).<sup>1</sup>

The NADA Fair Credit Compliance Program was not developed in a vacuum. Rather, it stems from—and fully adopts—an approach to fair credit compliance that was set forth in consent orders that the Department of Justice (DOJ) entered into with two automobile dealerships to settle pricing discrimination claims in 2007.<sup>2</sup>

In those consent orders, the dealers were required to adopt “Guidelines for Setting Dealer Reserve,” in which the dealer established a standard dealer participation rate (SDPR) that it included in credit offers to consumers (i.e., the dealership would offer an APR that is the sum of the wholesale buy rate offered by the finance source and its SDPR) unless a “good faith, competitive reason” that supports a lower dealer participation rate was present in the transaction. The consent orders included seven such legitimate business reasons for discounting the SDPR, with the three most common being the presence of a lower cap imposed by the finance source, a consumer’s monthly budget constraint and a consumer’s access to a more competitive offer. The consent orders further required that any deviations from the SDPR be recorded on a pricing certification form, reviewed by the general manager or his or her designee, and retained by the dealership.

In November 2013, while speaking at a Consumer Financial Protection Bureau (CFPB) Auto Finance Forum, a senior DOJ official<sup>3</sup> validated this approach when explaining that—

- i. pricing discretion is not prohibited by the Equal Credit Opportunity Act;
- ii. however, when exercised, pricing discretion presents a fair lending risk that needs to be managed; and
- iii. one way to manage that risk is to adopt the approach set forth in the 2007 DOJ consent orders.<sup>4</sup>

<sup>1</sup> The program and other supporting material are available at [www.nada.org/faircredit](http://www.nada.org/faircredit).

<sup>2</sup> *In re Pacific Ford*, DOJ Civil Action No. 07-3470 (September 4, 2007) (consent order); *In re Springfield Ford*, DOJ Civil Action No. 07-3469 (consent order); *In re Springfield Ford*, DOJ Civil Action No. 07-3469 (September 4, 2020) (consent order), available at [www.justice.gov](http://www.justice.gov).

<sup>3</sup> Steven H. Rosenbaum, Chief, Housing and Civil Enforcement Section, Civil Rights Division, U.S. Department of Justice.

<sup>4</sup> CFPB Auto Finance Forum (November 14, 2013), currently available at [www.consumerfinance.gov/about-us/take-the-term-the-cfpb/](http://www.consumerfinance.gov/about-us/take-the-term-the-cfpb/).

er, after extensive preparation and review, national trade associations representing mobile dealers released the NADA Fair Credit Compliance Program.

The NADA Fair Credit Compliance Program adopts the framework established in the consent orders and builds on it. A dealer who adopts the program must be approved by its board of directors or a prior dealership official to serve as administrator (PC). The PC oversees the day-to-day maintenance of the program by the dealer, conducting initial and periodic pricing certification forms, submitting a pricing certification report to the board and performing other duties. The program explains each of these

elements of the NADA Fair Credit Compliance Program. The program has widespread support from many dealers, both inside and outside of the NADA. The list of supporters includes the National Automobile Dealers Association, which overwhelmingly approved the program at its 2020 annual meeting that took place in person at all levels to offer “a safe harbor” to dealers from discrimination claims for dealers who adopt the NADA/NAMADA/IAADA Fair Credit Compliance Program,<sup>5</sup> and (ii) a CFPB rulemaking process under the Consumer Financial Law, which the CFPB announced in January 2021.<sup>6</sup>

The value in this approach to managing pricing discretion is that it included the framework and many of the details of the NADA Fair Credit Compliance Program. The program was entered into with an understanding that it would settle allegations of intentional

discrimination by Rep. Joyce Beatty (D-Ohio) before the Committee in March 2016 referring to the program as a “wonderful document” while asking that it be included in the National Automobile Dealers Association’s (NADA) industry attorneys expressing their support for the program, including Rick Hackett, who stated his belief that the program was the best way to address the CFPB’s concerns about discretionary pricing as described by NADA.<sup>7</sup>

<sup>5</sup> 115th (August 3, 2020), available at [www.nada.org](http://www.nada.org).

<sup>6</sup> 115th (January 2021), available at [www.consumerfinance.gov](http://www.consumerfinance.gov).

<sup>7</sup> 115th (May 22, 2020).

<sup>8</sup> 115th (May 22, 2020).

<sup>9</sup> 115th (May 22, 2020).

<sup>10</sup> 115th (May 22, 2020).

<sup>11</sup> 115th (May 22, 2020).

<sup>12</sup> 115th (May 22, 2020).

<sup>13</sup> 115th (May 22, 2020).

<sup>14</sup> 115th (May 22, 2020).

<sup>15</sup> 115th (May 22, 2020).

<sup>16</sup> 115th (May 22, 2020).

<sup>17</sup> 115th (May 22, 2020).

<sup>18</sup> 115th (May 22, 2020).

<sup>19</sup> 115th (May 22, 2020).

Notwithstanding its broad support, the NADA Fair Credit Compliance Program remains optional, and its adoption does not guarantee that a dealer will be protected from liability for a fair credit violation. However, if faithfully adopted, implemented and maintained, the NADA Fair Credit Compliance Program provides a dealer with a well-regarded path forward in a very challenging environment. This should not be overlooked when a dealer discusses with its attorney how it will ensure the fair and lawful treatment of its customers.

**This article is offered for informational purposes only and is not intended as legal advice.**

*This article was prepared by Paul D. Metrey, vice president, regulatory affairs and chief regulatory counsel, financial services, privacy, and tax for the National Automobile Dealers Association.*



# Military Lending Act

IN THE UNITED STATES DISTRICT COURT FOR THE  
EASTERN DISTRICT OF VIRGINIA  
Alexandria Division

JERRY DAVIDSON, individually, and on )  
behalf of all others similarly situated, )  
 )  
Plaintiff, )  
 )  
v. ) 1:20-cv-1263 (LMB/JFA)  
 )  
 )  
UNITED AUTO CREDIT CORPORATION, a )  
California corporation, )  
 )  
Defendant.

MEMORANDUM OPINION

Before the Court is defendant United Auto Credit Corporation (“defendant” or “United”)’s Motion to Dismiss Plaintiff’s Second Amended Class Action Complaint Pursuant to Federal Rule of Civil Procedure 12(b)(6) (“Motion to Dismiss”) [Dkt. No. 66], to which Jerry Davidson (“plaintiff” or “Davidson”) has responded. The Motion to Dismiss has been fully briefed and oral argument has been held. For the reasons discussed below, defendant’s Motion to Dismiss will be granted.

I. BACKGROUND

The parties do not dispute the facts alleged in the Second Amended Complaint (“SAC”), and agree that the dispositive issue is whether defendant’s Retail Installment Contract and Security Agreement (the “Contract” or “Installment Contract”), through which plaintiff, who was an active member of the United States military, financed his purchase of a 2011 GMC Acadia SUV on October 13, 2018, is covered by the Military Lending Act (“MLA”), 10 U.S.C. § 987 et seq.

Plaintiff describes United as one of the ten largest non-prime automobile lenders in the United States, having over 4,500 auto dealer customers and financing over \$350 million in auto

# New Educational Resources

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NADA MANAGEMENT SERIES

A DEALER GUIDE TO  
**Federal Consumer Leasing Act  
Requirements**

## ***Driven***

NADA MANAGEMENT SERIES

A DEALER GUIDE TO  
**Buying and Selling a Dealership**

BM4

## ***Driven***

NADA MANAGEMENT SERIES

A DEALER GUIDE TO THE  
**Federal Odometer Law**

L25



A red-tinted photograph of a car dealership. Several cars are parked in rows, with a person visible in the background near a car on the left. The word "Questions?" is overlaid in large white text.

# Questions?



The background of the image is a solid red color with a faint, semi-transparent pattern of several cars parked in a row, viewed from a front-three-quarter angle. The cars are slightly out of focus, creating a sense of depth. In the center of the image, the word "NADA" is written in a large, bold, white, sans-serif font. Below the text, there is a white graphic element consisting of two parallel, wavy horizontal lines that curve upwards at both ends, resembling a stylized wave or a bridge.

**NADA**