



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/NAMAD/AIADA Fair Credit Compliance Policy & Program (NADA Fair Credit Compliance Program).*¹

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 2007.²

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 official³ 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.⁴

¹ The program and other supporting material are available at www.nada.org/faircredit.

² *In re Pacifico Ford*, DOJ Civil Action No. 07-3470 (September 4, 2007) (consent order); *In re Springfield Ford*, DOJ Civil Action No. 07-3469 (September 4, 2020) (consent order), available at www.justice.gov.

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

⁴ CFPB Auto Finance Forum (November 14, 2013), currently available at www.consumerfinance.gov/about-us/blog/live-from-the-cfpb/.

Two months later, after extensive preparation and review, the three national trade associations representing franchised automobile dealers released the NADA Fair Credit Compliance Program.

As noted above, the NADA Fair Credit Compliance Program fully adopts the framework established in the DOJ consent orders and builds on it. A dealer who adopts the program has it approved by its board of directors and appoints a senior dealership official to serve as the Program Coordinator (PC). The PC oversees the implementation and maintenance of the program by establishing the SDPR, conducting initial and periodic training, reviewing pricing certification forms, submitting an annual compliance report to the board and performing other related tasks. The program explains each of these steps in detail.

Since its inception, the NADA Fair Credit Compliance Program has gained widespread support from many prominent observers both inside and outside of the industry.⁵ Recent additions to the list of supporters include (i) the American Bar Association, which overwhelmingly approved a resolution at its 2020 annual meeting that, in part, urges governments at all levels to offer “a safe harbor against pricing discrimination claims for dealers that faithfully implement the *NADA/NAMAD/AIADA Fair Credit Compliance Policy and Program*”;⁶ and (ii) a CFPB Taskforce on Federal Consumer Financial Law, which made a similar recommendation to the CFPB and the Federal Reserve Board in January 2021.⁷

The FTC has also seen value in this approach to managing pricing discretion, as it included the framework and many elements of the NADA Fair Credit Compliance Program in a May 2020 consent order it entered into with an automobile dealership to settle allegations of intentional credit discrimination.⁸

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.

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⁵ See, for example, the statement made by Rep. Joyce Beatty (D-Ohio) before the U.S. House Financial Services Committee in March 2016 referring to the NADA Fair Credit Compliance Program as a “wonderful document” while Rep. Beatty held up the publication and asked that it be included in the record; and testimonials from 12 prominent industry attorneys expressing support for the program (available at www.nada.org/faircredit), including from former CFPB Assistant Director Rick Hackett, who stated his belief that the program “can resolve issues raised by the CFPB related to discretionary pricing... assuming it is faithfully executed as described by NADA.”

⁶ American Bar Association, Resolution 116B (August 3, 2020), available at www.americanbar.org.

⁷ Taskforce on Federal Consumer Financial Law (TFCFL), CFPB, TFCFL Report Volume II, Recommendation 66 (January 2021), available at www.consumerfinance.gov.

⁸ *In re Bronx Honda*, FTC Docket No. Case 1:20 (May 22, 2020) (consent order), available at www.ftc.gov.