

Dealing With Dealer Markups By ADR Staff

The Consumer Financial Protection Bureau (CFPB) is recommending indirect auto lenders impose controls on dealer markups or eliminate them altogether in order to ensure compliance with the Equal Credit Opportunity Act (ECOA). Consequently, auto dealers engaging in third-party or indirect lending transactions may soon be required by their lending agencies to convert to a flat fee compensation arrangement rather than the traditional APR markup.

Recommended Controls on Dealers

The CFPB recommends indirect auto lenders take steps to ensure they are in compliance with ECOA and Regulation B with respect to dealer markup and compensation policies. Those steps may include imposing controls on dealer markup and compensation policies or replacing dealer markups with a flat fee.

Reasoning Behind the Decision

The CFPB believes that lender policies allowing dealer reserve transactions increase the risk of pricing disparities among consumers based on prohibited bases, such as race or national origin. Although supporting documentation is not offered, the CFPB claims research indicates that markup practices may lead to African Americans and Hispanics being charged higher markups than other, similarly situated, white consumers.

So Now What?

Even though the CFPB has not documented the statistical analysis giving rise to the allegations of discrimination, their authority allows them to proceed at will with respect to supervision of the indirect lenders – and dealer markup arrangements.

Dealers are strongly encouraged to abstain from any hint of discriminatory practices, educate themselves and their employees on the nuances of fair lending compliance, have written policies in place to ensure compliance, and then abide by them.

As yet, no firm compliance guidelines have been issued by the CFPB. The only practical guidance sources available at this point are court cases and consent agreements. In 2007, the Department of Justice charged two franchise dealers with violations of the ECOA. The consent orders issuing from those cases specified certain procedures the dealerships should take in order to facilitate compliance going forward. The procedures generally require that:

- A formal, written “Guidelines for Setting Dealer Reserves” document be developed and implemented;
- All negotiations start at the same, pre-determined Dealer Reserve level not to exceed a documented maximum;
- Certain non-discriminatory notices be posted and provided to the customers; and
- All relevant employees be fully trained on the requirements of the ECOA and the dealership’s written compliance guidelines.

The procedures documented in the U.S. v. Pacifico Ford, Inc., Civil Action Consent Order were intended to facilitate Pacifico’s compliance with the Federal Equal Credit Opportunity Act (ECOA). An overview of those procedures, available [here](#), may serve as helpful input during development and implementation of a dealership’s non-discriminatory lending policy.