

The Monthly Dealer Legal Newsletter compiled by "The Dealer's Law Firm," Myers & Fuller

How to Read and Understand a Market Study

A number of factors should be considered

You all know that factories conduct market studies on a periodic basis. What you don't always know is why. In some situations the factories want to take a closer look at a particular market to insure that it is defined correctly. In other situations a factory may want to insure it has its dealer body located in the best locations based on demographic changes that may have occurred. In still other instances the factory may want to look more closely at how its competitors are performing. Lastly, the factory may be conducting a market study to justify a decision that has already been made (think additional dealership location or justification for a relocation). In almost all instances the market study will look at **geography** (is the market properly defined), **performance** (how are all line-makes performing relative to the size of the retail industry),

demographics (is the market growing and if so where), **sales patterns** (which direction are you selling most of your cars and trucks and how fast does your volume fall off as you go further away from your dealership), **interbrand proximity** (where are your competitors and what line-makes are most convenient to the buying public) and lastly a **recommendation** (what needs to be done in the market to bring it up to speed or into compliance).

The first thing you want to look at is the **recommendation**. That will set the tone of how you read the rest of the study. The recommendation will tell you if you have a problem and if so, how serious it is. If the recommendation is that an additional dealership be opened in the market or that several dealers are misplaced and need to be

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Negotiating With the Factory

Yes, it is possible

Some dealers get to negotiate new terms that a factory adds to its dealer agreement. How does that happen? It happens because some state laws require a factory to give notice to the dealers of any changes that a factory proposes to its dealer agreement, the reason for each proposed change and an opportunity for the dealers in the state to challenge the change(s) as adverse to the dealers' interests.

In the states we have represented dealers having this protection, it works as follows. The factory sends a letter to each dealer in the state advising that it

proposes to make changes to the dealer agreement. The letter identifies the changes the factory proposes to make and the reason the factory proposes to make the change(s). The "stated reason" the factory gives is not usually the main reason the factory proposes the change, but it is a starting point. The letter also advises the dealers that they have a right to challenge any or all of the changes as adverse to the dealer's best interest and the time frame within which the dealer must challenge the changes. Attached to each letter is a copy of the proposed new agreement.

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What the Employee Pricing Programs Mean to You

As everyone is aware, the Big Three have all come out with a form of the employee pricing program for retail customers which was kicked off by General Motors two months ago. Ford and Chrysler have jumped on the bandwagon and instituted programs which appear to raise the stakes. GM's program generally reduced customer incentives in favor of lower sticker prices. The Ford and Chrysler programs, meanwhile, have maintained many, if not all, of their customer incentives and added the employee pricing on top of those discounts.

The early results of the GM program are in and from GM's standpoint it appears to be a success. Sales are way up and cars are

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Does Ford's Plan to Sell Online Violate your Rights?

Plans for selling Mercury hybrids may test current statutes

Ford intends to sell its new Mercury hybrid online. Does that sound familiar and what does it mean to you as a dealer? You may recall in the late 1990s and early 2000s Ford (and other manufacturers) attempted to sell directly to consumers. One of the original plans was to sell directly to consumers by having a consumer contact Ford through Forddirect.com. The consumer would

specifically design their own vehicle and Ford would deliver to the dealer who would deliver to the consumer. (Factories also tried to own their own dealerships!) Dealers in almost every state responded by getting laws passed prohibiting factory direct sales to consumers.

Ford's new plan may test the adequacy of statutes prohibiting factory direct sales. As we understand the pro-

gram, the consumer will contact Ford to negotiate price and options – then refer the consumer to a dealer selected by Ford who will deliver the vehicle.

Although the sale of Mercury hybrids may not be a threat to the dealers as a whole (it is most certainly a threat to Mercury dealers) – how and who sells those vehicles could be a big problem for everyone. Once the door to factory direct sales to consumers (with dealers being relegated to delivery services) is opened, even a crack, it is likely to be impossible to shut.

*By Loula M. Fuller
& Richard N. Sox, Jr.*

Employee Pricing Programs, continued from page 1

rapidly moving out of inventory. It is probably fair to assume that with Ford and Chrysler instituting their own programs beginning in July, none of the Big Three will enjoy the kind of sales numbers that GM saw over the last couple of months. Nevertheless, in competition with imports, it looks as though GM, Ford and Chrysler will enjoy some increase in volume as a result of the discount pricing programs. But, what should you as dealers expect?

If more cars are sold as a result of these employee pricing programs, then why shouldn't dealers benefit? There are a couple of concerns that the dealers should keep in mind. **The first two concerns are immediate ones – margins and commissions.** From our discussions with dealers, we understand that the employee pricing programs are resulting in margins being cut in half. For some dealers volume may make up for those losses but for others the net effect is less front-end profits overall. The second concern is salesperson commissions. Everything I read in trade journals indicates that salespeople aren't happy. In some editorial pieces, salespeople are claiming to be down to \$100 per car. **Volume will probably not make up the deficit.** The question is will you as the dealer have to make it up in order to retain good salespeople? If so, you are forced to eat into your margin again.

The last concern is a more fundamental, long-term one. Watching the industry all these years as legal counsel for dealers across the country, one trend

has been obvious – factory control over your dealership. From certification programs to exclusive use agreements to image programs to captive finance incentives **the goal for the manufacturers has clearly been to assume more and more control over the day to day operations of your dealership.** In analyzing these employee pricing programs, we have that sinking feeling again. These programs have already attempted to set your document processing fee at a fixed number (GM's program \$75), far below what most of you charge. And most importantly, these programs result in one price selling. There is no room left for negotiation by the dealer. There is no ability on the part of the dealer to obtain the highest price for a particular vehicle that the market will bear. Instead, you are forced to sell at the price called for under the terms of the employee pricing program.

The Big Three's employee pricing programs raise very serious concerns related to fixed pricing. Generally speaking, a manufacturer is prohibited from fixing the retail price of a product such that the positive aspects of competition are removed from the equation. The U.S. Congress and courts have overwhelmingly held to the view that competition is a good thing for the buying public. In the short term, the employee pricing programs may be the best thing that happened to the car buyer but with more and more factories jumping on board, the result could be anti-competitive. Thus, at this point in

time, we are left with a scenario where the manufacturers are clearly benefiting, and the short-term car buyers are benefiting, but **the ones who have poured out their blood, sweat and monetary investment in order to make it possible to do any of this – the automobile dealers – may be losing on these employee pricing programs.**

By Richard N. Sox, Jr.

Article summary

- The manufacturers are sure to benefit from increased volumes resulting from the employee pricing programs.
- The programs may adversely impact a dealer's margin.
- These programs are adversely impacting salesperson commission schedules.
- Increased sales volume may not make up for these reductions in margins and commissions.
- These programs may lead to one price selling which takes away a dealer's ability to negotiate the highest price the market will bear and may ultimately create an anti-competitive environment which adversely affects the buying public.

FTC Publishes Model Forms and Procedures for ID Theft Victims

On May 2, 2005, the Federal Trade Commission made available its updated booklet "Take Charge: Fighting Back Against Identity Theft," (previously entitled "ID Theft: When Bad Things Happen to Your Good Name"). The booklet contains model form affidavits, letters and procedures to be used by identity theft victims for contacting and informing creditors – including motor vehicle dealers – and consumer reporting agencies of the theft of their identity.

The FACT Act was signed into

law on December 4, 2003. Public Law 108-159, 117 Stat. 1952. Portions of the Act amend the FCRA to enhance consumers' ability to resolve problems caused by identity theft. Section 153 of the Act (section 621(f)(2) of the FCRA), requires the Commission, in consultation with the federal banking agencies and the National Credit Union Administration, to develop a model form and procedures to be used by identity theft victims for contacting and informing creditors and consumer reporting agencies of the fraud. The Commission's book-

let contains guidance for identity theft victims, which describes the different types of identity theft problems that victims can confront and the best means of recovery. This guidance includes the ID Theft Affidavit and sample letters as well as a description of the circumstances under which victims would use a particular form to contact creditors or consumer reporting agencies.

For example, an identity theft victim can use the ID Theft Affidavit to dispute with a creditor – such as a dealer – an account opened fraudulently in the victim's name. The guidance also provides sample letters that an identity theft victim can use when disputing with a creditor fraudulent charges to an existing

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Beacon Mailers: Are yours Ready to Provide Required Notifications?

Revised requirements take effect August 1, 2005

Direct mail has become an integral part of dealers' growth and marketing strategy. Direct mail provides another way to reach the customer that you could not reach or would not respond to your TV, radio, or other advertising. Dealers usually contract with an advertiser or mail house to send out pre-approved credit mailers – also known as "beacon mailers." Direct mailings provide targeted recipients an opportunity to respond to the financing options available at your dealership. These solicitations must be prepared in advance of mailing and often run for periods of 30 to 60 days. **Regardless of whether a dealership prepares and sends its own solicitations or retains a marketing company to do so, the dealership is ultimately responsible for ensuring that the solicitations comply with applicable federal and state laws.**

"Prescreened" solicitations/beacon mailers sent to consumers – such as "pre-approved" offers for auto loan financing – are required to contain a

notice with information about the offer and instructions on how consumers can opt-out of receiving future offers by calling a toll-free number or writing to a specified address. The



Federal Trade Commission (FTC) recently issued final regulations designed to strengthen required notices in prescreened credit offers. The new regulations are the result of the Fair and Accurate Credit Transactions Act of 2003 (FACTA) provisions that require the FTC to pre-

scribe prescreen notices that are "simple and easy to understand." FACTA specifies that the FTC must establish a format, type size, and manner for the presentation of opt-out notices. The stronger notices are designed to better inform consumers about their right to opt out of receiving future prescreened offers. **These revised requirements take effect August 1, 2005.**

The FTC rule provides for a "layered" approach. Each prescreened offer must contain a short statement informing consumers of their right to opt-out and listing a toll-free number to call, as well as a longer statement providing additional information about prescreening. Current law requires disclosure to consumers of their right to opt out of future mailing. The new rules provide for much more prominent disclosure. Instead of a disclosure buried in the print, the new rule will require a "short notice" on the front page of the mailer in a box or otherwise set off. The disclosure must be in the same size type as the principal text on the page – but no smaller than 12-point type. The "long notice" includes the information in the short form and adds a clear and conspicuous statement that: (A) information contained in the consumer's consumer report

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Negotiating with the Factory, continued from page 1

After receiving the factory letter with the proposed new agreement many dealers call our firm and request that we review the proposed new agreement and determine if all the changes have been identified and what the changes mean to the dealers. In virtually every case, our firm ends up representing a group of dealers in the state, not just one individual dealer. This is important, not only because it reduces each dealer's cost, but *there is power in numbers*. Once the new agreement has been evaluated and if the dealers conclude that the changes will adversely impact their dealership, a petition is filed naming all participating dealers. This is a necessary step because the statutes have clearly defined time frames within which a petition must be filed. **Usually the grounds for challenging proposed changes to the dealer agreement are due to an adverse economic impact on the dealer, the factory attempting to shift liability from the factory to the dealer or the added term violates existing state law.**

In every case that we have been involved in, we have been able to settle with contract terms that are more favorable to the dealers. By giving up litigation, we don't get everything we want – but we get a substantially better agreement for the dealers and eliminate the risk of loss. The new terms (modifying the new agreement) are written into a settlement agreement which is adopted into a final order. That order and the settlement agreement are adopted into the new agreement, amending it to include the settlement terms which supercede the standard terms in the agreements of the participating dealers.

By participating in this process, you, as a dealer, not only get a better agreement, you often learn about your factory's new programs and how they will affect your dealership before those programs are implemented. If your state law does not provide this protection, you will never have the opportunity to engage in this process to protect your dealership and its employees.

You should have an expert review your state statute. If it does not have this protection, contact the executive director of your association and ask him/her to put this protection on the legislative agenda. This provision has proved to be a powerful tool for dealers.

*By Loula M. Fuller
& Richard N. Sox, Jr.*

Article summary

- Some states give dealers power to negotiate new terms in dealer agreements.
- When challenging a proposed new agreement—there is power in numbers.
- If your state does not have this protection, put in on the legislative agenda.

Beacon Mailers, continued from page 3

was used in connection with the transaction; (B) the consumer received the offer of credit because the consumer satisfied the criteria for credit worthiness under which the consumer was selected for the offer; (C) if applicable, the credit may not be extended if, after the consumer responds to the offer, the consumer does not meet the criteria used to select the consumer for the offer or any applicable criteria bearing on credit worthiness or does not furnish any required collateral; (D) the consumer has a right to prohibit information contained in the consumer's file with any consumer reporting agency from being used in connection with any credit or insurance transaction that is not initiated by the consumer; and (E) the consumer may exercise the right referred to in subparagraph (D) by notifying a notification system established under section 604(e) of the Fair Credit Reporting Act (FCRA).

Your dealership should review its existing contracts with beacon mailers/mail houses and other advertisers

to ensure that the credit offers include the required notices after the August 1, 2005, effective date. Penalties under FACTA include fines of \$1,000 for each piece in a non-complying mailer. You may recall that last year a Minnesota dealership paid \$250,000 to settle a complaint under FCRA and state law by that state's attorney general's office alleging that it misused the credit information of 12,000 consumers. The misuse was based upon a beacon mailer that used data about people who had filed for bankruptcy to develop sales leads. The mailers resembled checks, which promised credit for a vehicle purchase. **Remember, mail houses do little, if any, legal review.** Dealers should consider obtaining legal review of beacon mailers prior to final printing to evaluate compliance with FACTA, FCRA, FTC and other requirements of state and federal law.

By Robert C. Byerts

Article summary

- FACTA provision on beacon mailers goes into effect August 1, 2005.
- Dealerships are ultimately responsible for compliance with FACTA.
- Specific language is required within the "short" and "long" notice to be included on the mailer.
- Mail houses don't typically perform the necessary legal review to insure compliance.
- Have an experienced compliance lawyer evaluate the mailing to determine compliance with FACTA, FCRA, FTC and other state and federal laws.
- Penalties for violation of these provisions can be substantial.

Identity Theft, continued from page 3

account. Finally, the guidance offers victims sample letters that they can use in combination with a report of the theft to local, state or federal law enforcement agencies, when contacting a consumer reporting agency to block fraudulent accounts from their credit reports.

Dealers may soon see one of the sample letters accompanied by an Identity Theft Affidavit and ID Theft Report if a dealership customer or consumer falls victim to an identity thief. Alternatively, dealers processing a financing transaction may see a fraud alert on a consumer or customer credit report obligating the dealer to take additional steps to verify the consumer/customer's identity. Dealers should ask for:

- **Proof of identity:** This may be a

photocopy of a government-issued ID card, the same type of information the identity thief used to open or access the account, or the type of information the dealer usually requests from applicants or customers.

- **Police report** and a completed affidavit, which may be the Identity Theft Affidavit or the dealer's own affidavit.

Dealers and other "information providers" must stop reporting fraudulent information to the consumer reporting companies once they receive an identity theft report and a letter explaining that the information that they're reporting resulted from identity theft.

By Robert C. Byerts

Article summary

- FTC has published Model ID Theft Reporting Forms/Letters.
- ID theft victim uses ID Theft Affidavit to dispute fraudulently opened account at dealer.
- If dealers processing financing "fraud alert" on credit report dealer must take additional steps to verify the consumer/customer's identity.
- Dealers must stop reporting fraudulent information to consumer reporting companies once they receive an ID theft report and letter explaining that information they're reporting resulted from ID theft

Understanding a Market Study, continued from page 1

relocated, you will want to look very closely at the **performance and inter-brand proximity** sections of the study. If the recommendation is to consolidate (ala Chrysler Plan Alpha or GM Channel Strategy) or eliminate dealerships you will want to look closely at **demographics/sales pattern** sections of the study. If the recommendation is to bring fringe dealers into the market definition you will want to look closely at the geography section of the study. Depending on what the **recommendation** is you can study the various sections and determine how valid the recommendation is and what you need to do.

Every dealer who is given a market study should review and respond in writing. Since the late '80s the factories have begun to rely more heavily on computer data and less on human oversight. That means that the study is in most cases flawed in some respect. It is your job to review and determine where and what the impact on your dealership is. You can do it yourself or contact an expert but it must be done and documented in writing. Failure to do so can and usually does result in a silent agreement that the contents of the market study are accurate and the **recommen-**

dation is agreed to. Writing to say you don't agree won't defeat the **recommendation** but it will ensure you have a ticket in the event you ever want to dispute it in a court of law. That is very important to your chances for success.

When I say the studies are flawed I mean really flawed. We have seen instances where dealer locations were off

"You all know that factories conduct market studies on a periodic basis. What you don't always know is why."

by several miles. We have seen markets where existing dealers were not included in the market study at all. We have seen instances where PMA boundaries had no correlation to customer shopping patterns. The factories all use a data base called Dealersites that is created and maintained by our arch enemy, Urban Sciences Application, Inc. (USAI).

USAI is the company the factories use as expert witnesses in virtually every law suit dealing with performance and/or geography. They are good but they are not infallible. It is their software that forms the basis for all the market studies conducted by factories operation in the US. All those color maps and dot maps are the product of USAI and were designed, in most instances, to justify factory initiatives (add points, relocations, consolidations and terminations).

Next month we will tell you what to look for in each section and how to insure you are protecting home base!

*By Daniel E. Myers
and J. Martin Hayes*

Article summary

- The market studies look very scientific and tend to lull the reader into blindly accepting the results and the recommendation.
- Don't be fooled!
- Look closely at each section.
- Tell the factory where it is wrong and why.

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