

# Dealer Markup and Discrimination

Options for global resolution:

- 1) Rulemaking that bans markup (UDAAP or ECOA)
- 2) Rulemaking that discloses markup (TILA)
- 3) Consent order that is prospective only
- 4) Consent order that is both prospective and retrospective

# Track 1 market share and timing

	<u>1<sup>st</sup> wave</u> of [REDACTED]	<u>2<sup>nd</sup> wave</u> of [REDACTED]	<u>1<sup>st</sup> wave</u> of [REDACTED]	<u>2<sup>nd</sup> "wave"</u> of [REDACTED]
<b>Market Share</b>	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]
<b>Timing</b>	Analyses completed Disparities found PARRs sent or soon	Data requests sent this week Analysis thru fall	Info requests pending DOJ approval Analysis thru fall/winter	Info request ~June
	[REDACTED] Ally	[REDACTED]	[REDACTED] Honda	[REDACTED]

[REDACTED] To be decided based on market monitoring

# Rulemaking options

	<b>UDAAP-§1031(b)</b>	<b>ECOA-§1691b(a)</b>	<b>TIILA-§1032</b>
Goal	Ban markup	Ban markup	Disclose markup
Framing	Unfairness	Discrimination	Transparency
Relevant rulemaking authority	Rules identifying as unlawful unfair, deceptive, or abusive acts or practices in connection with any transaction with a consumer for a consumer financial product or service	Rules to effectuate the purpose of ECOA, to prevent circumvention or evasion of ECOA, or to facilitate or substantiate compliance with ECOA.	Rules to ensure that features of any consumer financial product are fully, accurately, and effectively disclosed to consumers so that they understand the costs, benefits, and risks associated
Theory implicating indirect lenders	Covered person engaging in unfair behavior via compensation agreements with dealers	Creditors because of regular participation in credit transactions	?
Factual predicate	Evidence that markup is unfair or deceptive	Evidence that markup creates a substantial risk of discrimination	Evidence of information imbalance
Concerns	<ul style="list-style-type: none"> <li>• High external pressure</li> <li>• Authority over dealers</li> <li>• What would replace markup?</li> <li>• Timing (end of 2014)</li> </ul>	<ul style="list-style-type: none"> <li>• High external pressure</li> <li>• Proof of substantial risk</li> <li>• What would replace markup?</li> <li>• Timing (end of 2014)</li> </ul>	<ul style="list-style-type: none"> <li>• Is disclosure effective for such a complex transaction?</li> <li>• Timing (end of 2014)</li> </ul>
Interagency role	FTC	FRB	FRB

# Consent agreement vehicles

	<b>"enforce" authority and 1053(b)</b>	<b>"ensure" authority and 1053(a)</b>	<b>"condition imposed in writing" authority and 1053(b)</b>	<b>Contract: either MOU or immunity agreement</b>
Benefits	<ul style="list-style-type: none"> <li>Familiar use of our authority</li> </ul>	<ul style="list-style-type: none"> <li>If we internally required a "substantial risk" threshold, markup offers good facts supporting a substantial risk of violating ECOA</li> </ul>	<ul style="list-style-type: none"> <li>Easy to execute</li> </ul>	<ul style="list-style-type: none"> <li>Easy to execute</li> </ul>
Concerns	<ul style="list-style-type: none"> <li>We currently don't have "facts constituting [a] violation," except for the 1st wave of [REDACTED]</li> <li>That factual predicate will likely not exist for the 2nd wave of [REDACTED] or the 1st wave of [REDACTED] until fall.</li> </ul>	<ul style="list-style-type: none"> <li>Unavailability of judicial review</li> <li>Loose definition of "ensure"</li> <li>Potentially no retrospective relief</li> </ul>	<ul style="list-style-type: none"> <li>Too broadly expands our authority to allow us to impose conditions without clear factual predicate and then enforce them via cease-and-desist.</li> <li>"condition" of what?</li> </ul>	<ul style="list-style-type: none"> <li>Except for the 1st wave of [REDACTED], there is no credible threat of suit until data is analyzed, at which point our "enforce" authority seems most apt.</li> <li>Specific performance is unlikely</li> </ul>

