



Can a Foreign Manufacturer Legally “Buy” the American Market?

By: John J. Pico, JD

Can We Afford to Assume One Will Not Try?

According to CBN (Britain’s News Channel)

“The United States has taken direct action against Chinese automaker BYD and other popular companies, alleging that they have ties to the Chinese military, which has been strongly denied by the manufacturer.

BYD is one of the most high-profile names identified in a new Department of War list of “Chinese military companies” which operate directly or indirectly with the United States.

The United States accuses BYD of being directly and indirectly affiliated with China's State-owned Assets Supervision and Administration Commission of the State Council (SASAC) . . .

House of Representatives China Select Committee Chair John Moolenaar described the list as a ‘warning’ to American businesses, the government and the American people.”

As mentioned in my previous article, BYD does not export its vehicles to the United States, although it remains the best-selling electric car brand in the world, recently surpassing Tesla; and, I believe it would be naïve to think it will not eventually enter the United States.

Several readers of my previous article raised thoughtful questions concerning facilities, F&I income, margin compression, and consumer acceptance.

Those are important issues, but my articles address a different question:
What if the competitive environment itself changes?

What Happens If BYD or Another Nation Backed Car Company Decides to “Buy” the American Market?

Suppose BYD or another heavily government-subsidized foreign manufacturer enters the United States and decides to sell vehicles at prices domestic manufacturers cannot profitably match.

And, suppose further that it is prepared to absorb those losses for years, not merely to introduce a new product, but to gain enough market share in order to weaken or eliminate competitors.

Who would be harmed?

Not only automobile dealers; but American manufacturers, domestic assembly plants, suppliers, employees, lenders, communities, and ultimately consumers would all have something at stake.

So, if we believe that day will come, we must ask ourselves:

1. Can a foreign manufacturer truly “buy” the American automobile market? And, assuming the answer is “Yes” and that one will try,
2. How should we prepare for it now?

At first glance, “buying the American automobile market” may sound absurd.

Yet history teaches that markets are not always won by producing the best product. Sometimes they are won by sustaining losses longer than competitors can survive.

My dad grew up in Belleville, New Jersey, during the depression era, and I remember him telling me how he tried to persuade his friends to keep buying gasoline from the last independent Esso competitor in town. He warned if everyone kept buying Esso's cheaper gas, the independent station would eventually disappear and, when that happened, Esso would raise its prices.

His friends kept buying the bargain. The independent closed. And Esso did exactly what my father predicted.

Has so much changed since then that today's consumers would willingly pay more for a vehicle in order to protect America's dealers and manufacturers from suffering the same result?

If you believe BYD, or its sister, or its cousin, will likely come, the next question becomes obvious:

Do American laws adequately protect dealers and manufacturers against such actions, by countries with much deeper financial resources than Esso ever had?

A Beginning Framework

States have long regulated automobile dealers, distributors and manufacturers and, in some circumstances, restricted below-cost selling, loss-leader advertising, and other practices considered harmful to fair competition.

Those laws recognize an important principle:

A price that benefits consumers today may damage them tomorrow – if it is used to eliminate competitors and concentrate the market.

Current consumer protections may not adequately address a manufacturer capable of absorbing enormous losses, particularly when a competing manufacturer may benefit from foreign governmental support.

I do not believe either a dealer or a manufacturer can afford to lose thousands of dollars on every vehicle they sell and survive indefinitely.

On the other hand, it is not inconceivable that a manufacturer subsidized by a government may be able to do precisely that.

For starters, today’s dealers and manufacturers should begin asking state associations and state and federal legislators a straightforward question:

If below-cost selling can be restricted when a dealer uses it to injure competition, why should the same principle not apply when a manufacturer, financed by a foreign government, uses below-cost pricing to capture a market?

The purpose would not be to prevent legitimate price competition by our existing dealers or manufacturers, or to protect inefficient companies.

It would be to protect the public from the aftermath of such an event.

It would be to distinguish ordinary competition from a sustained pricing strategy designed to eliminate competitors that cannot draw upon comparable financial or governmental resources.

What Preventative Measures Could Dealers, Manufacturers and Distributors Now Seek?

Dealers should not approach this issue alone. Manufacturers and dealers should begin working together now to determine whether existing trade and antitrust laws would adequately protect the American market from sustained, subsidized below-cost pricing.

If the dealers and manufacturers agree current laws to be inadequate, the industry should seek federal legislation before the threat arrives — not after the damage has been done.

The objective should not be a crude law saying, “No manufacturer may sell a vehicle below cost.”

That could interfere with introductory pricing, model closeouts, temporary incentives, and legitimate competition.

A better proposal would be to target sustained predatory pricing, perhaps by having Congress pass a law prohibiting all manufacturers from:

- Selling or supplying vehicles below a legally defined measure of cost for the purpose of destroying competition, or if it has a reasonably foreseeable effect of substantially injuring competition.
- Using manufacturer incentives, rebates, credits, or affiliate payments to conceal the true amount of the loss.
- Discriminating between affiliated and independent retailers to finance below-market sales.
- Recouping losses after competitors have been weakened or eliminated.
- Using foreign subsidies or related-company transfers to disguise vehicle cost.

The law could also require manufacturers entering the market to disclose relevant subsidies, affiliated-company transactions, and the method used to calculate vehicle cost.

It is the author’s opinion that the time to construct those guardrails is before a vehicle reaches the highway—not after the collision.

Why does a national law make more sense?

A state-by-state effort could produce 50 different definitions of “cost,” 50 different enforcement mechanisms, and years of uncertainty.

It could also be challenged as interfering with interstate or international commerce.

A federal law could create one national standard covering:

- Manufacturers and distributors
- Direct-to-consumer sales
- Affiliated retailers
- Manufacturer-owned dealerships
- Rebates and incentives used to disguise the effective selling price
- Foreign subsidies and related-party transactions
- Vehicles imported directly or assembled in North America from imported components

That would also close a potential loophole: a restriction applying only to dealers would accomplish little if the manufacturer could sell directly, or operate through an affiliated company, or reimburse the retailer for the loss.

History rarely gives us advance notice of events; however, it sometimes gives us advance opportunity.

Whether BYD ultimately enters the United States or not is almost beside the point.

The more important question is whether our laws adequately address the possibility if it does and our understanding that this question is best answered before events force the answer upon us.

John Pico is a retired attorney and founder of Advising Automobile Dealers, LLC and has been consulting with automobile dealers for over fifty-years. For more articles about the dealerships and dealers, visit www.advisingdealers.com

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