Dealers are not strangers to the Consumer Financial Protection Bureau's interference in the dealership finance process. In March 2013, the CFPB declared war on dealer reserve. The CFPB charged that car dealerships discriminate against minority buyers in pricing credit, and it has relied on demonstrably false information for support. Regardless, CFPB has not backed off its attack, prompting the U.S. House of Representatives to take action.


What should a dealer do? A dealer should consider adopting a program similar to that recommended for dealer reserve. The program for F&I products should include set pricing for products, and deviations from those prices only for pre-approved non-discriminatory reasons.

As the poster child for unaccountability, the CFPB may very well drop the other shoe to attack the dealer financing process—a challenge to the pricing of F&I products. Banks subject to CFPB jurisdiction are already concerned about pricing differentials on financing products and the potential for charges of discrimination. While the evidence supporting such a claim may be no better than that supporting the attack on dealer reserve, that will be little consolation for a dealer who receives communications from a finance source claiming it fears charges of unfair, deceptive, or abusive acts and practices (UDAAP), or even discrimination because of product pricing differentials.

What should the program be? Start with set product pricing. That does not mean that every F&I product must be exactly the same price. There are differences in the products. For example, pricing for

Dictionary.com defines “triage” as “the determination of priorities for action in an emergency.” It is time to prioritize your obligations to get through the emergency this flurry of new compliance challenges presents. The activities of two federal agencies predominate in increasing the challenges.

Consumer Financial Protection Bureau

The Consumer Financial Protection Bureau was designed to be an unaccountable whiteboard for consumer activist priorities. While franchised motor vehicle dealers are exempt from its jurisdiction, that has not deterred the Bureau from exceeding expectations of unaccountability in its interference in dealer operations.

• In March 2013, the CFPB advised the institutions it oversees that they can be held liable
This quote by Egyptian Nobel Prize winner Naguib Mahfouz is great, and can provide a helpful reminder that subject matter expertise is not a commodity. Many companies will offer compliance advice to car dealers. This advice spectrum runs from the non-lawyer vendor who insists that the product that they're peddling complies with the law, to the professional law firms and compliance companies that specialize in providing guidance to dealers in a particular state. The quality of the advice received can vary widely between companies, particularly due to the variations between state and federal laws.

Because of these variations, there is often not a 50-state one-size-fits-all compliance answer. So dealers can end up receiving different answers depending upon who opines, including the notorious lawyer response: “it depends.” While frustration with the lack of a black and white answer is understandable, a nuanced answer can lead to a better compliance dialogue, particularly if the initial question was poorly phrased by the asker or was misunderstood by the answerer. Not everything is a ball or strike in legal compliance so be wary of vendors who cannot provide nuanced answers (or will not and, instead, oversimplify things in order to make a sale).

Below is a legal compliance quiz that has apparently been distributed to dealers by a national vendor. Although some of these questions are poorly drafted, they do provide a good opportunity to review some key legal issues pertaining to the retail automotive industry. The quiz also provides an opportunity to demonstrate that some compliance questions are more complicated than they may seem initially.

We encourage you to try to answer these “True/False” questions yourselves before reading our responses.

1. True or False: A dealer is a creditor.

   • Answer: This is not a good T/F question. A dealer is an entity that is engaged in the business of buying and/or selling cars. While the vast majority of dealers provide financing (directly or indirectly) as part of their business, this isn’t necessarily the case (e.g., a wholesale dealer is still a dealer).

   That said, almost all retail dealers will be considered creditors under state and federal law. Cars are generally sold by dealers on retail installment sale contracts. This is a credit sale under which the selling dealer is the creditor until the contract is assigned to a third party financial institution (which is also considered a creditor). The dealer is not a creditor in a true cash transaction. Likewise, if the customer acquires a direct personal loan and uses the proceeds to purchase the vehicle with cash, the dealer is not a creditor.

   A dealer selling a vehicle on credit also fits into the definition of “financial institutions” (also creditors) under various laws such as the Gramm-Leach Bliley Act and the Red Flags Rule.

2. True or False: As a creditor, the dealership can grant, deny, or condition customers for financing.

   • Answer: True. That said, dozens of state and federal laws govern the manner in which a dealer decides whether to grant credit, how credit is extended, and how debts are collected.

3. True or False: The Risk-Based Pricing Notice can be presented to the customer at any time during the contracting process.

   • Answer: This is not a good T/F question. Dealers generally do not provide “Risk-Based Pricing Notices”—which are specific disclosures that are provided to customers who receive credit on terms that are “materially less favorable than the most favorable material terms available to a substantial proportion of consumers from or through that person.” Instead of going through the complicated calculations to determine whether an individual consumer should be given such a notice, most dealers take advantage of an exception to this requirement by providing all applicants (even those that don’t end up purchasing a vehicle) with an “exception notice” (also sometimes called a “credit score disclosure”) that provides their credit score and other useful information. If no score is generated, a dealer taking advantage of the exception must provide a “No Score Disclosure” form. These requirements can be stricter at the state level (in California, if you pull multiple scores, you must provide multiple notices).

(Continued on page 15)
CFPB’s Proposal to Ban Arbitration Waivers

The Consumer Financial Protection Bureau held a field hearing on October 7, 2015 in Denver, CO. The Bureau used the event to announce that the CFPB is empaneling a Small Business Review Panel so it can start the process of proposing a rule to ban use of arbitration provisions to block class actions. [http://www.consumerfinance.gov/newsroom/cfpb-considers-proposal-to-ban-arbitration-clauses-that-allow-companies-to-avoid-accountability-to-their-customers/] The event consisted of CFPB Director Richard Cordray’s comments, discussion from panelists, and comments from the audience.

CFPB’s proposal to be considered is: (1) a ban on class action waivers which would prohibit companies from blocking group lawsuits through arbitration clauses in their contracts and (2) a requirement that companies under CFPB jurisdiction must send to the Bureau all filings made by or against them in consumer financial arbitration disputes and any decisions that stem from those filings.  [http://files.consumerfinance.gov/f/201510_cfpb_small-business-review-panel-packet-explaining-the-proposal-under-consideration.pdf] The CFPB emphasized that it is not proposing at this time to limit the use of arbitration clauses in individual cases.

The CFPB convened its Small Business Review Panel to review its proposal and do a report on small business impact. The Panel is made up of representatives from the CFPB, the Chief Counsel for Advocacy of the Small Business Administration (SBA), and the Office of Management and Budget’s Office of Information and Regulation Affairs. [http://files.consumerfinance.gov/f/201205_CFPB_public_factsheet-small-business-review-panel-process.pdf] The Panel has conducted an outreach meeting with a selected group of representatives from small businesses to provide feedback on the potential economic impacts of complying with proposed regulations. [id.] Within 60 days of the outreach meeting, the Panel is supposed to issue a report. [id.] The CFPB will consider the Panel’s report and comments provided by the small businesses as it prepares its proposed rule. [id.] Once the rule is proposed, any small business may submit formal written comments during the public comment period. [id.]

How will this affect car dealers?

If the CFPB bans class action waivers in arbitration clauses, an arbitration provision in retail paper assigned to finance sources will have to explicitly state it does not apply to cases filed as class actions unless class certification is denied by a court. Even though dealers are not directly subject to CFPB regulations, the financial institutions to which dealers assign retail installment sales contracts are. Therefore, dealers would be indirectly affected by this ban because the financial institutions could not purchase retail installment contracts with provisions waiving class actions.

The “horribles” cited by arbitration opponents do not exist in car dealer arbitrations.

- Arbitration opponents claim that consumers don’t choose arbitration for small balance disputes, leaving them unresolved. Unlike the small balance disputes that were the primary focus of the CFPB arbitration study, the rare disputes between car dealers and their customers that remain unresolved are large enough that consumers choose to arbitrate them.

- Results are achieved without the delays and expense inherent in litigation such as pretrial motions, lengthy and costly discovery, preparation and trial, and appeals. The results are more favorable to consumers than the results of individual litigation.

- The typical consumer recovery in a one-on-one arbitration is much more favorable than the typical results of class action lawsuits that can go on for years and yield small recoveries for class members.

- Car dealer class actions historically, even when successful, have resulted in small recoveries by class members and huge awards to class attorneys.

- Car deals are most often done on a one on one basis between the dealer and the vehicle buyer. They are not the faceless transactions without personal contact that were the focus of the CFPB arbitration study. Dealers who use arbitration provisions do so to maintain the informal nature of the customer/dealer relationship to resolve the issues that may develop infrequently.

What is the status of the CFPB’s proposed ban on class action waivers in predispute arbitration provisions?

On November 20, 2015, the CFPB released its Fall 2015 rulemaking agenda. The arbitration rule was listed. The rulemaking process for arbitration is still listed in its Prerule stage and it is anticipated that Pre-rule activities will be through December 2015. [http://www.reginfo.gov/public/do/eAgendaViewRule?pubId=201510&RIN=3170-AA51] December 19, 2015 was the due date for the report to be issued by the CFPB’s arbitration Small Business Review Panel, which convened October 20, 2015. The Panel’s report will

(Continued on page 4)
U.S. DOJ Guidelines on Individual Accountability and What They Mean for Car Dealers

The U.S. Department of Justice generated significant publicity in September 2015 by announcing a change in policy in business investigations. In a memorandum to prosecutors throughout the DOJ covering virtually all criminal and civil investigations of business wrongdoing the DOJ stated it would focus on individuals. [Memorandum from the U.S. Department of Justice (September 9, 2015) (http://www.justice.gov/dag/file/769036/download)]

The DOJ appeared to undercut this policy initiative almost immediately by the subsequent announcement of the deal with General Motors on the ignition problem that involved no action against an individual GM employee. [http://www.justice.gov/opa/pr/us-attorney-southern-district-new-york-announces-criminal-charges-against-general-motors-and] Business people must nevertheless give attention to the impact of the DOJ change in policy.

The memo issued by the Department sets forth six policy changes in any federal investigation. These are:

1. In order to qualify for any cooperation credit, corporations must provide to the Department all relevant facts relating to the individuals responsible for the misconduct;

(Continued on page 5)

CFPB’s Proposal To Ban Arbitration Waivers (Cont.)

(Continued from page 3)

not be public until the CFPB issues a proposed rule. It is anticipated that CFPB will propose an such a rule in Spring 2016.

For now, nothing has changed for dealers who use arbitration provisions in transaction paperwork. If the CFPB adopts a rule, by law, there will be time between adoption and its effective date to analyze the impact and take appropriate action.

Note: While not directly pertaining to the CFPB’s expected rulemaking regarding arbitration clauses in consumer financial contracts, it is worth mentioning a December 2015 United States Supreme Court decision that once again rebuked a California appellate court for not respecting the enforceability of arbitration clauses under federal law. One of the most important parts of the 2011 US Supreme Court’s decision in AT&T Mobility LLC v. Concepcion is the reemphasis that arbitration agreements must be treated equally under state law as “upon such grounds as exist . . . for the revocation of any contract.”


In DIRECTV, Inc. v. Imburgia the US Supreme Court reversed a California Court of Appeal decision which held that an arbitration clause in a DIRECTV contract could be invalidated because the arbitration clause contained a “poison pill” provision invalidating the arbitration clause if the “law of your state” made class action waivers unenforceable. Since a California law required class procedures to be available (even though that law was preempted by the preceding US Supreme Court’s interpretation of the Federal Arbitration Act in Concepcion) the California Court held that the terms of the contract should prevail. The Supreme Court found to the contrary, stating that since the FAA is the law of the United States under the Supremacy Clause, its interpretation of the FAA in Concepcion “is an authoritative interpretation of the Act... therefore] judges of every State must follow it.”


Written by Justice Stephen Breyer, considered to be one of the High Court’s more liberal justices (and a dissenter in Concepcion), the majority found that the California court’s decision contravened Concepcion, stating: “[W]e conclude that California courts would not interpret contracts other than arbitration contracts the same way... nothing in the Court of Appeal’s reasoning suggests that a California court would reach the same interpretation of ‘law of your state’ in any context other than arbitration.”

[Reference: Id. at 469.]

Hopefully the US Supreme Court decision in Imburgia will reign in courts who invalidate arbitration clauses for personal or policy reasons and will cause them to respect the FAA and parties’ right to privately contract.
U.S. DOJ Guidelines (Cont.)

(Continued from page 4)

2. Criminal and civil corporate investigations should focus on individuals from the inception of the investigation;

3. Criminal and civil attorneys handling corporate investigations should be in routine communication with one another;

4. Absent extraordinary circumstances or approved departmental policy, the Department will not release culpable individuals from civil or criminal liability when resolving a matter with a corporation;

5. Department attorneys should not resolve matters with a corporation without a clear plan to resolve related individual cases and should memorialize any declinations as to individuals in such cases; and

6. Civil attorneys should consistently focus on individuals as well as the company and evaluate whether to bring suit against an individual based on considerations beyond that individual’s ability to pay.

[Memorandum from the U.S. Department of Justice (September 9, 2015) (http://www.justice.gov/dag/file/769036/download)]

Car Dealer Impact

With the focus in any federal business investigation on individuals, what does this mean for car dealers?

Car dealers face more laws than almost any other businesses. They have dramatically increased their emphasis on compliance. However, the DOJ policy change makes a culture of compliance even more critical.

Sales Efforts

Dealers have been concerned about the increasing level of – and even criminalization of – enforcement efforts aimed at dealer sales practices. For example, F&I practices that twenty-five years ago would have resulted in simple demands that the dealership buy back certain contracts assigned to financial institutions are now leading to demands for damages and even criminal referrals for fraud on financial institutions. This has led to some notable prosecutions of dealership employees involved in the activities. The new DOJ policy changes can only accelerate that trend.

Now, if a federal prosecutor becomes involved in any activities directed at financial institutions, the focus will be on the wrongdoing of the individuals. In any investigation, prosecutors will demand information about those involved. Actions against individuals will be the rule, not the exception.

Service Department

Another area of concern is environmental enforcement. Criminal enforcement actions under the environmental laws are more frequent than those under OSHA. If any flagrant environmental violations occur, criminal actions are a potential problem. In those cases, the new policy will have federal prosecutors looking at the individuals involved along with the businesses.

What This Means for Employees?

The new DOJ policies apply in both criminal and civil investigations. Not only can individuals face criminal punishment, they can be defendants in U.S. government civil actions – regardless of their financial circumstances.

What Should a Dealer Do?

Compliance must be an integral part of all dealership operations. Dealers must implement programs for compliance best practices – training, oversight, and discipline for violations. Individual employees must understand that problems they create are not something they can just walk away from.

The federal government’s policy to concentrate on individual conduct in any investigation it is doing will surely bleed down to state investigations. That will affect individuals personally if they ignore the law or violate the law. Dealers must emphasize this shared liability must lead to a culture of compliance in the dealership.

Another area of concern is environmental enforcement. Criminal enforcement actions under the environmental laws are more frequent than those under OSHA. If any flagrant environmental violations occur, criminal actions are a potential problem.
Arbitration for Employees

While controversy about predispute arbitration provisions has centered on consumer agreements, you should also be careful if you use predispute arbitration agreements for personnel matters. Employees frequently challenge the enforcement of those provisions, claiming they did not agree to arbitration. A business must be clear it is entering an arbitration agreement with an employee, and a recent case from the United States Court of Appeals for the Fourth Circuit shows why. [Lorenzo v. Prime Communs., L.P., 2015 U.S. App. LEXIS 20400 (4th Cir. N.C. Nov. 24, 2015)]

The case involved an employee of a retail communications company. She contended she was deprived of wages earned as commissions and overtime pay. [Id.] She sued under the Federal Fair Labor Standards Act and the North Carolina Wage and Hour Act. [Id.]

When the employee began working for the company, she was given an employee handbook. [Id. at 3] The business contended that the case should be arbitrated because of a predispute arbitration provision it contained. The company could not locate the acknowledgment she signed noting her acceptance of the handbook. [Id. at 4] The trial court initially held there was nothing to show the employee had agreed to the arbitration provision. [Id.]

About two months after the initial trial court ruling, the company found the employee’s acknowledgment. The trial court, however, refused to change its ruling that the employee had not agreed to arbitration. [Id. at 4] The employer appealed.

The Court of Appeals reviewed the acknowledgment closely and considered its key language:

I understand that I am responsible for reviewing the Prime Communications Employee Handbook.

* * *

I understand that the Prime Communications’ Employee Handbook is not a contract of employment and does not change the employment-at-will status of employees. Moreover, no provision should be construed to create any bindery [sic] promises or contractual obligations between the Company and the employees (management or non-management).

* * *

By my signature below, I acknowledge, understand, accept, and agree to comply with the information contained in the Employment Handbook. I acknowledge that I will review and read the Company Handbook and that I have the opportunity to ask my Manager questions about the Handbook. I further acknowledge that I fully understand or will make sure that I do understand the contents there of, as they relate to my employment with Prime Communications. I understand that the information contained in the Handbook are guidelines only and are in no way to be interpreted as a contract.

[Id. at 5]

The appeals court found that the language of the acknowledgment precluded a finding that the employee had agreed that employment disputes should be arbitrated. It relied on the language that: (1) nothing in the employee handbook constitutes a contract and (2) the concepts in the handbook are guidelines only and are not to be interpreted as a contract. [Id. at 10-11]

It is common to have language in a handbook receipt that the handbook is not a contract of employment. However, that disclaimer should not apply to the predispute arbitration agreement.

Here are some things to consider.

- Employees rarely sign the handbook. Do not rely on an arbitration provision appearing solely in a handbook. This does not provide the best protection for the company;
- Ideally, the arbitration provision should be a in a separate document which can also function as a receipt for the handbook that the employee can sign;
- The document should recite that both parties have agreed to the arbitration agreement for consideration;
- The arbitration agreement must be fair. If it is too slanted for the company, it will not be enforced. Predispute arbitration agreements in consumer situations have been evolving to take account of court decisions challenging their fairness. Review the personnel arbitration agreement to be sure it reflects that evolution; and
- Any disclaimer that the handbook does not create a contract of employment should not cover the arbitration agreement. It should be clear that the predispute arbitration provision is an agreement. Any disclaimer of contract should only apply to other provisions of the handbook.
BE CAREFUL! THAT UNUSUAL REQUEST FOR A CREDIT APP MAY BE LEGITIMATE

Have you ever had a request by your provider of credit reports to produce a copy of a signed credit application to justify your request for the report? If so, you probably thought it was bogus. You may have thought it was a scam artist, or an identity thief, or even the customer's brother in law. However, it might have been legitimate.

We have received information that the Consumer Financial Protection Bureau is auditing credit reporting services and their contractors to determine whether credit reports supplied to retailers were legitimately requested under the Fair Credit Reporting Act. The service from whom you requested the credit report may contact you to obtain the information necessary to show that authorization.

However, should you be responding to a phone call? We suggest not. When you get a phone call, you do not know who is calling. Most credit reporting agencies and their contractors have an agreement with retailers allowing them to check records. However, any attempt by a provider to audit authorizations should come in a form that allows you to verify that it is a legitimate request. Here are some things to keep in mind.

- As we have written repeatedly, always have a customer sign an authorization for a credit report. A signed authorization is not required under the law – only a business purpose in connection with the extension of credit. However, how do you prove that? The signature of a consumer on an authorization for a credit report is the best way. We are regularly asked about phone calls, fax inquiries and other credit related requests from consumers who are not in the showroom. Those should go through your secure internet portal. These days, anyone who can afford to buy a car probably has internet access. Have the person verify the request through a secure internet portal;

- Keep all authorizations for at least five years (or longer if required by your state law). That means you must keep not only authorizations on deals you deliver (you will probably keep those in your deal files anyway), but you must keep them on deals not completed. The statute of limitations for a violation of the Fair Credit Reporting Act is two years from the discovery of wrongdoing up to five years. [15 U.S.C. § 1681p] So keep authorizations, whether for delivered deals or dead deals, for at least five years;

- From time to time compare your authorizations to your credit bureau bill to make sure you are getting authorizations for every report for which you are billed. If you cannot match up credit reports for which you are billed with authorizations, find out why and fix any problems; and

- If you get a request for a signed authorization from someone who claims to be from a credit reporting agency or from a contractor for the provider with whom you do business, verify it. The best way to do that is to demand the request in writing identifying:

  - The identity of the person seeking the information;
  - The authority by which the person claims to have access to the information;
  - The purpose for the request.; and
  - Identification of the person whose report was accessed, by full name, social security number, and date of access.

If you get requests for authorizations, consider whether you have a problem. Audit your own processes to make sure that reports are only run based upon written authorization of a customer.
an extended service agreement will vary based on the type of vehicle, its year, its equipment (such as a turbo-charged engine), and other factors. However, the asking price for the same F&I product would be the same to all customers. That means that products with variable pricing based upon various factors, should have a pricing matrix. For products where pricing does not vary, there should be a set price. Once you establish set asking prices for F&I products, train F&I personnel. Permit deviations from set prices only for pre-approved non-discriminatory reasons.

Some dealers may contend this is unnecessary because two virtually identical vehicles may have different prices out the door to different customers. That is true. However, we have not reached the point (yet) where a federal agency is examining vehicle price differentials. The difference on F&I products is that a federal agency is closely scrutinizing dealer reserve and is likely to extend that scrutiny to F&I product pricing in enforcing the Equal Credit Opportunity Act and UDAAP laws.

How can the CFPB do that? It is likely the CFPB will claim several bases for enforcement actions over differential pricing of F&I products in the credit portfolios of the institutions under its jurisdiction (which include all of the “too big to fail” banks and most of the manufacturer captives who collectively buy most of the consumer paper generated by motor vehicle dealers).

The first basis for an assertion of CFPB authority may be a claim that product price differential is actually hidden interest. Given the CFPB’s attempt to eliminate dealer participation, or to squeeze it dramatically as it did in the Honda Financial consent order, it may contend that this will lead dealers to overprice products to try and pick up income they would otherwise have charged as dealer participation. The CFPB may argue that product price differential should be added to the interest charged to minority buyers in calculating their true cost of credit.

The other basis for challenge may be the ECOA itself. Under the ECOA and its implementing regulations, a “creditor shall not discriminate against an applicant under a prohibited basis regarding any aspect of a credit transaction.” [12 CFR 1002.4 (a); emphasis added]. The CFPB may argue that the broad definition of the ECOA permits action to insure that products sold in credit transactions should be priced in a non-discriminatory manner. The definition of a credit transaction in the ECOA supports this broad definition.

Credit transaction means every aspect of an applicant's dealings with a creditor regarding an application for credit or an existing extension of credit (including, but not limited to, information requirements; investigation procedures; standards of creditworthiness; terms of credit; furnishing of credit information; revocation, alteration, or termination of credit; and collection procedures); emphasis added [12 CFR 1002.2(m)]

The CFPB may also address F&I product sales using its authority to enforce the prohibition against unfair, deceptive, or abusive acts and practices, or knowingly providing assistance to a third party financial institution or service provider in performing such acts [12 USC 5531, 5536]. Recall that the Dodd-Frank Act gives a very broad definition of “abusive” for these purposes, to include an act or practice that “takes advantage of

- a lack of understanding on the part of the consumer of the material risks, costs, or conditions of the product or service;
- the inability of the consumer to protect the consumer's interests in selecting or using a consumer financial product or service; or
- the reasonable reliance by the consumer on a covered person to act in the interests of the consumer.” [12 USC 5531]

The CFPB’s focus on the perceived lack of consumer knowledge about pricing of F&I products, combined with this broad notion of “abusive” acts is creating a significant amount of concern with lenders and finance attorneys. When a finance company purchases a contract from a dealer that includes charges for an F&I product sponsored or affiliated with that finance company or an affiliate of that finance company, the finance company is in a position to understand the retail margin involved. When a dealer sells the same F&I product for the same type of vehicle at substantially different prices, the finance company purchasing that contract runs the risk of being accused of either acting directly, or knowingly providing assistance to a party who acts in contravention of these prohibitions.

“Wait,” you ask, “aren't franchised motor vehicle dealers exempt from the jurisdiction of the CFPB?” Yes they are. However, that did not stop the CFPB from trying to end dealer participation with a memo announcing an enforcement policy against the banks over which it did have jurisdiction. The CFPB counted on the banks pushing down flat fees on dealers to end the practice the CFPB

(Continued on page 19)
F&I PRODUCT PRICING REPORT
(For Internal Use Only)

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<th>Identification of Parties</th>
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<tr>
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Reason(s) for Price difference. Note applicable reason(s) by letter in Reason(s) box above.

A. Product price limited by finance source.
B. Product price reduced to meet finance source limitation.
C. Product price necessary to fit payment within customer’s budget.
D. Competitive product price advertised at ____________________________
E. Customer had competing offer from ____________________________
F. This was our special promotional offer available to qualified customers.
G. This is an employee purchase/lease.
H. Price reduced to complete sale of vehicle to meet our inventory reduction criteria.

______________  ____________________________
Date             General Manager/Finance Director’s Signature

Acknowledgement by Finance Department

THIS DOCUMENT IS FOR INTERNAL USE ONLY AND SHOULD NOT BE DISTRIBUTED.

I declare that the above information is true and correct to the best of my knowledge.

______________  ____________________________
Printed Name     Finance Department Representative’s Signature

______________
Date

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EXPORTER SUES TO CHALLENGE NON-EXPORT REQUIREMENTS

Most franchisors impose requirements on dealers to prevent sales of new vehicles for export. U.S. franchisors contend these limitations are necessary because their rights to distribute vehicles are limited to this country, and any dealer sales for shipment to other countries will cause a violation of contractual limitations.

Many manufacturers regularly review port export reports, and they impose chargebacks on dealers for “swimmers” - vehicles sent outside the country. Dealers have great difficulty trying to identify those who will or may export, and this is complicated by the efforts of some exporters to train straw buyers.

Given the interests of the franchisors in the appropriate distribution of vehicles and dealer sales and service agreements preventing sales for export, dealers must try to protect their relationships with their franchisors. Many dealers have put in place processes to identify straw buyers and prevent sales to exporters. Some dealers use agreements with buyers that they will not export the vehicle for a period of time.

Dealers are frequently concerned about claims of discrimination or other legal actions resulting from their efforts to prevent exporting. The need to comply with franchisor requirements to protect the right to sell and service vehicles is critical for dealers. Nevertheless, a potential buyer may seek to challenge a dealer’s practices. An example of what dealers fear has happened in California where an exporter has sued a dealer and a franchisor. [Araman Nahavandifar v. Don Rasmussen Company et al, No. 2:15-cv-09315 (C.D. Cal. filed December 2, 2015).] The plaintiff identifies itself as “a licensed wholesale automobile broker/dealer in the State of California.” [Id.] One defendant is a Land Rover dealer in Portland, Oregon and the other is the franchisor – Jaguar Land Rover of North America. [Id.] The dealership required the buyer to sign an agreement that it will not export a new vehicle imposing liquidated damages if it does so. [Id.] The lawsuit alleges an illegal conspiracy between the dealer and JLRNA in violation of the antitrust laws by preventing the exporter from buying vehicles and selling them as it wishes. [Id.]

We will see from developments whether it states a claim. The case clarifies dealers’ needs to be careful in activities to prevent exports.

Across the country, states have passed laws permitting a franchisor to penalize dealers only for exports about which the dealer knew or should have known. These state laws provide no license to sell to exporters, however. To the extent possible, a dealer must take action to identify potential exporters and not do business with them.

Some basic steps to consider include:

- Implementing a process to identify potential exporters;
- Checking the names of new vehicle buyers against the list of exporters a manufacturer may provide to you;
- If your manufacturer has provided a list of suggested export “signals”, follow that. You have the right to refuse to sell a vehicle to someone whom you suspect to be an exporter; and

- If the dealership finds itself threatened with legal action or is sued for its activities in protecting against exporting activity, immediately seek indemnification from the manufacturer. The activities to protect against exporting protect the manufacturer’s rights under its agreements with the supplier of vehicles. The franchisor should indemnify the dealer against any lawsuit challenging the activities of the dealer to protect the rights and interests of the franchisor, particularly where the dealer has complied with the franchisor’s policy.
for the disparate impact of financing rates on minorities resulting from dealer discretion in credit terms. It warned these financial institutions to either monitor and control those practices or adopt flat fee compensation practices. The Bureau’s pressure has been unrelenting. [http://files.consumerfinance.gov/f/201303_cfpb_march_Auto-Finance-Bulletin.pdf]

- The Bureau has announced that it plans to propose a regulation preventing the financial institutions it regulates from using class action waivers in predispute arbitration provisions. That is likely to result in changes in the relationship between dealers and their finance sources regarding predispute arbitration provisions in retail installment sales contracts. [http://www.consumerfinance.gov/newsroom/cfpb-proposal-to-ban-arbitration-clauses-that-allow-companies-to-avoid-accountability-to-their-customers/; see accompanying story]

Federal Trade Commission

When the CFPB was created by the Dodd-Frank Act, the Federal Trade Commission used its bureaucratic turf protection instincts. It sought and received greater authority to protect its role. One area that Congress expanded for the FTC was auto dealer practices. The FTC is the agency with direct enforcement authority over franchised car dealers, and the Dodd-Frank Act gave it expanded authority and an expanded budget in this area. [https://www.ftc.gov/news-events/media-resources/consumer-finance/auto-marketplace]

- Advertising – The FTC has brought 23 complaints, resulting in consent orders, against dealers in fifteen states since its authority was expanded. It has also brought two cases against dealers it alleged violated their consent orders resulting in punishing civil penalties. [https://www.ftc.gov/news-events/press-releases/2015/12/ftc-seeks-public-comment-proposed-survey-consumers-regarding]

So what should a dealer do?

A dealer wishing to avoid the expenses and losses of lawsuits and other troubles resulting from compliance failures must understand the hot issues and must continuously adjust to consider those. That is the process of compliance triage, and here are the items to which you should give attention.

- Have a culture of compliance. Compliance starts from the top. So how do you do it?
  - Establish a clear policy of full compliance with the law. Broaden that to an ethics policy or standards of conduct. You want to do what is legal and what is right;
  - Train your employees. They must understand how they will act to reach your goals; and
  - Take action where necessary. When employees operate contrary to your policies, solve the problem. Make sure the employee knows what went wrong and why. If the employee’s behavior is over the line, take disciplinary action, including termination, if necessary.

(Continued on page 12)
COMPLIANCE TRIAGE (CONT.)

(Continued from page 11)

- **Have a solid complaint handling system.** There is no more important key to a loss prevention system than handling a complaint before a customer visits an attorney and the situation gets out of control. If a dealership gets a complaint, it should be logged in, properly routed to a responsible manager for handling, tracked, and satisfactorily closed. Early money spent to solve a problem is the cheapest money.

- **Control your advertising.** The FTC has spent the bulk of its time on dealer matters enforcing advertising compliance. Give attention and require in-store advertising personnel and your advertising agency to know the rules and live by them. Here are the hot buttons:
  - Comply with requirements for follow-on disclosures in the event of a trigger term under the Truth in Lending Act and the Consumer Leasing Act. These laws are clear. When you advertise a trigger term, make the follow-on disclosures. [12 CFR 1026.24; 12 CFR 213.7];
  - Prevent bait and switch advertising. A primary focus of FTC advertising activity has been offers that are not available to all consumers and lack clear and conspicuous disclosures. Do not advertise prices net of incentives that are not available together, such as a first time buyers’ incentive and customer loyalty incentive. Where prices reflect rebates and incentives of limited availability clearly and conspicuously disclose the qualifications a buyer must meet to obtain those benefits;
  - Do not use zero down lease ads unless the consumer can take delivery without reaching in his or her pocket;
  - Give special attention to your internet site since the FTC understands that is where dealers are advertising today; and
  - **Handle spot deliveries carefully.** Spot deliveries are still one of the two most highly scrutinized areas of the car business (the other being dealer participation which we will discuss next). If there is a law in your state concerning spot delivery, follow it scrupulously. Avoid abusive practices on which the FTC and state regulators will surely take action in the coming years if they find them. What are those?
    - Failure to use contract provisions and selling practices that disclose to customers the conditional nature of the transaction;
  - Coercing a customer to continue with a deal on less attractive terms because the original terms were not approved;
  - Retaking/repossessing vehicles contrary to law and/or contract;
  - Charging for use of the returned vehicle while it was in the customer’s hands; and
  - Failing to return the trade and/or downpayment after the deal is rescinded and the vehicle returned. As part of this, you should consider how you handle trades. Many dealers will wholesale a trade “on a string,” hoping to bring it back if the deal is not completed. However, what if delays or an inability to get the trade back prevent you from rescinding your deal? What if it comes back with equipment removed or added? What about damage? Or excess mileage? The best way to avoid these concerns is to bullpen trades until deals are complete.

- **Take action to protect the dealership because of the attack on dealer participation.** The CFPB cannot enforce its wishes on dealers directly, but it can force finance sources to do the CFPB’s bidding. The agency has been unrelenting in the pressure on lenders. If a finance source communicates that there appear to be discrepancies negatively affecting consumers in protected classes, you must respond. Have a fair

(Continued on page 13)
Compliance Triage (Cont.)

(Continued from page 12)

lending policy, in which the discretion of F&I personnel on rates is eliminated through a set starting point with downward deviations for pre-established non-discriminatory reasons. [https://www.nada.org/faircreditprogram/] Respond that your dealership does not discriminate, and you have a fair lending policy that you apply in every deal to prove it.

- Establish set prices for F&I products. The CFPB believes that its pressure on reserve can lead to attempts to enhance income in other areas. When F&I personnel have unlimited discretion on pricing of F&I products, there is the possibility that the CFPB could contend that consumers in protected classes were negatively affected by differing prices for the same F&I products. To combat this, use set pricing for F&I products, with provision for downward deviation for non-discriminatory reasons similar to those in a fair lending policy. [See accompanying story]

- Comply with the Truth in Lending Act. TILA provides transparency for the cost of credit, including the cost of additional products. Have a system for clear disclosure of the products you are selling and the costs. The best systems include a menu that explains what the customer is being offered.

- Run credit reports when authorized under the Fair Credit Reporting Act. Lawyers for debtors count on dealers not having adequate records to show they had a permissible purpose in connection with the extension of credit when running credit reports of customers whose sales were not completed. Do not fall into this trap. While the law does not require that a customer sign an authorization, a signed authorization for access to a credit report is the best way to show compliance. Run no credit report without a signed or secure internet authorization. Keep every authorization for five years, even for deals not completed. While the record retention for credit applications and related documents when no sale is made may only be 25 months, the statute of limitations on a Fair Credit Reporting Act claim is two years from discovery, with a maximum of five years. [15 U.S. Code § 1681p]

- Keep your identity theft protections fresh. Federal and state laws concerning identifying theft are geared to protecting consumers. But if you get trapped in a transaction involving ID theft, your dealership will be the real loser. And if your customer data walks out your door with an existing salesperson, that will threaten the goodwill value of your business. A recent federal case confirmed that the FTC may treat inadequate protection of consumer data as an unfair practice under the FTC Act for which the agency may sue a business. [FTC v. Wyndham Worldwide Corp., 799 F.3d 236 (3d Cir. N.J. 2015); https://www.ftc.gov/system/files/cases/150824wyndhamopinion.pdf]

There are three critical ID theft programs you should make sure are fresh in your dealership.

- The FTC Privacy Rule requires that you give notice to a customer in a finance or an insurance transaction of what you will do with their non-public personal information. Your customers want to know you are protecting their information. [https://www.ftc.gov/enforcement/rules/rulemaking-regulatory-reform-proceedings/privacy-consumer-financial-information];

- The FTC Information Safeguards Rule requires that you have safeguards to protect the non-public personal information of your customers. Your customer information is one of the key elements of the goodwill of your business. Make sure this information is not being hacked from your computer system, walking out your door with your salespeople when they go to work for someone else, or being misused by suppliers to whom you give access to your computer system. The law requires that you have in place an information safeguards plan, and it requires that you regularly review and update that. [https://www.ftc.gov/enforcement/rules/rulemaking-regulatory-reform-proceedings/standards-safeguarding-customer]; and

- The FTC Red Flags Rule requires that you know your customer. If you get involved
in a transaction with an identity thief, your dealership will be the loser. You must have a Red Flags plan in place. Review and update it every year. [https://www.ftc.gov/tips-advice/business-center/privacy-and-security/red-flags-rule]

- Have a dealership recall policy. There is no more publicized subject in the car business today than recalls.
  - If you have new vehicles in inventory with open recalls, they may not be delivered until the recalls have been remedied. [49 U.S. Code § 30120(i)(1)] Federal law provides for compensation for new cars grounded for safety defects, and you should request that from your automaker. [49 U.S. Code § 30116(a)]; and
  
  - While there is no federal requirement to ground used cars subject to recall, it is good sense to create business for the service department by repairing recalls on the brand of vehicles you sell. It is easier today to determine open recalls on any brand of vehicles through the www.safercar.gov website. Have a policy of repairing the open recalls you can on the brands you sell, and disclose open recalls on other brands or when you cannot remedy the recall.

- Comply with the Fair Labor Standards Act. The FLSA provides substantial relief for employees including attorneys’ fees. Law firms have been springing up exclusively to bring FLSA claims.
  
  - The Obama administration wants government agencies to presume that someone doing work for you is an employee unless you can meet the test developed by the Department of Labor to deem someone an independent contractor. Be sure to avoid misclassifying your employees. [http://webapps.dol.gov/elaws/whd/flsa/docs/contractors.asp; http://www.dol.gov/whd/regs/compliance/whdfs13.htm];

  - Properly pay employees entitled to premium overtime pay;

  - Make sure non-exempt employees make minimum wage for each hour worked; and

  - Use pay plans to protect your business. They should:
    
    i. be in writing and signed;
    ii. for sales pay plans, state that the basis for pay is commissionable gross determined as defined in the pay plan, or (if your state allows) in the sole discretion of the dealership;
    iii. identify when commissions are earned and when they are paid; and
    iv. preserve the dealer’s right to change the policy and to correct clerical errors.

- Protect your franchise with a policy for responding to franchisor criticisms.
  
  - If a franchisor claims you have sales performance issues, understand the objection and reply to explain that your sales performance is consistent with your obligations;

  - If your franchisor If your franchisor complains about your CSI programs, be prepared to use your internal CSI data to challenge that;

  - If the manufacturer complains about net working capital, consult with your accountant to determine whether your financial statements are properly reflecting your true working capital. If not, solve the problem; and

  - Protect against audits and chargebacks for selling new vehicles that are exported. Have a policy for detecting straw buyers and protecting against sales to exporters. Check any available manufacturer’s list of known exporters, especially for new vehicles known to “swim”. If the manufacturer provides a due diligence list for detecting exporters, use it. Many states have passed legislation to protect dealers from export chargebacks by requiring the manufacturer to show the dealer knew or had reason to know of the potential export. That is not a license to sell to exporters. A policy of due diligence to prevent sales for
CLEVER ANSWERS WISE QUESTIONS (CONT.)

As for timing, the actual “Risk-Based Pricing Notice” (which dealers do not generally provide) must be provided prior to consummation, but after the decision to grant credit has been made (and not at the time of application). With the exception notice (which is what dealers generally provide since they use the exception), the notice must be provided as soon as reasonably practical, but no later than at or before consummation of the transaction.

4. True or False: A creditor can discourage potential applicants with poor credit from applying for credit.

• Answer: This is not a good T/F question. How did the dealership learn of the customer’s poor credit? If a customer completes a credit application in connection with a potential vehicle credit sale or lease, and the dealer learns of poor credit from the credit report, this is an application for credit under both the Equal Credit Opportunity Act (ECOA) and Fair Credit Reporting Act. If the dealer decides, based upon the credit report, not to submit the application to a finance company (either directly or because they convince the applicant that doing so would be futile), this would be considered an adverse action, requiring the dealership to provide an adverse action notice to the customer. That does not, however, necessarily render doing so illegal. If the customer volunteered his poor credit standing outside of a credit application scenario, these requirements would not apply.

That said, there are a number of reasons why you would not want to discourage a customer from pursuing a credit application. First, in an era of heightened attention to fair credit laws, such behavior could be misconstrued as being discriminatory if the applicant belongs to a protected class (e.g., a minority) under state or federal law (either generally across your customer base of similar applicants or in this specific instance). Second, the information provided to the customer (e.g., “no finance company will buy this contract”) may be inaccurate, and you don’t want your employee making a misrepresentation about creditworthiness.

5. True or False: According to the Equal Credit Opportunity Act (ECOA), you may require the co-applicant on a joint application to be a spouse.

• Answer: False. The co-applicant does not have to be a spouse. It can be a friend, son, father, grandmother, etc. Requiring the co-applicant to be a spouse could be considered discrimination on the basis of marital status—a violation of federal and California law.

6. True or False: ECOA says that a dealer may offer different terms to similar customers of different races, if there is not a conscious intent to discriminate.

• Answer: This is not a good T/F question. ECOA prohibits credit discrimination against an applicant based upon them belonging to a protected class (e.g., race, gender, or age). This is known as disparate treatment, and is clearly illegal. The federal Department of Justice (DOJ), backed by the CFPB, also interprets this law to prohibit activity (even if unintentional) that has a proportionally negative effect upon a protected class, unless the activity meets a legitimate business need that cannot reasonably be achieved through means that are less disparate in impact. This is called the “disparate impact” theory.

That said, if a dealer has a sound fair credit policy and program in place (such as the NADA-NAMAD-AIADA Program), whereby they establish a standard retail margin over a finance company’s buy rate that can be discounted for certain specified reasons (e.g., when the customer provides a better finance quote), doing so may be permissible. Accordingly, a dealer may offer different credit terms in such circumstances, and the dealer would (hopefully) have documentation explaining the disparity in compliance with the federal DOJ’s interpretation of federal law.

7. True or False: The federal Red Flag Rule requires creditors to comply with 100 specific guidelines.

• Answer: This is not a good T/F question. The Red Flag Rule
really imposes one general requirement, create and implement a written identity theft prevention program based upon their own risks, experiences, and level of sophistication. At a minimum, the program must (1) identify relevant patterns, practices, and specific forms of activity that signal possible identity theft; (2) be incorporated into your business practices so you will detect red flags; (3) detail the appropriate response when a red flag is detected; and (4) be updated periodically to reflect changes in risks from identity theft.

That said, according to these requirements, a dealership’s own identity theft prevention program could very well impose more than 100 separate and specific guidelines, if appropriate to that dealership given the dealership’s risk, experiences, and level of sophistication.

8. True or False: It is a felony to defraud a federally-insured financial institution.

• Answer: True. However, defrauding many types of “financial institutions”—even those that are not federally insured—would also be considered a felony.

9. True or False: According to the FTC's Used Car Rule, ANY vehicle driven for purposes other than moving or test driving is considered a used vehicle.

• Answer: True. And this includes demos. But keep in mind that this standard only applies for purposes of the Used Car Rule. Whether a vehicle should be sold or registered as new or used is a matter of state law.

10. True or False: Dealers who violate the Used Car Rule may be subject to penalties of up to $16,000 per violation.

• Answer: This is not a good T/F question. While the FTC does have the authority to impose fines of up $16,000 per violation (and the FTC’s position is that it’s $16,000 per violation, per day), doing so is not quite as simple as writing a speeding ticket. The FTC will instead either file a complaint (and perhaps enter into a consent decree with the dealer) or issue a formal warning. After these steps are completed, the FTC generally follows up regularly to determine whether the dealer continues to violate the law. If they find violations the second time around, they will seek monetary penalties.

11. True or False: A dealer who supplies a Spanish speaking customer with a Spanish Buyer’s Guide at the time they sign their Retail Installment Sales Contract, has complied with the FTC’s Used Car Rule.

• Answer: False. If the dealership negotiates a significant number of deals in Spanish, then Spanish Buyers Guides must be posted on all used vehicles. Also keep in mind that if a Buyers Guide is posted in Spanish, the retail installment sale contract must contain Buyers Guide incorporation language in Spanish as well (generally on the back of the contract). Not all pre-printed contracts contain a Spanish language incorporation clause.

12. True or False: This disclosure meets the Truth in Lending Act requirements: A creditor has a customer sign a multiple-copy Retail Installment Sale Contract after reviewing the figures with the customer.

• Answer: This is not a good T/F question. The Truth in Lending Act (as implemented through Regulation Z) imposes several disclosure, calculation, and copy requirements. One requirement of Regulation Z is that the creditor must provide the customer with a completed copy of the contract in a form that the customer may keep. After quite a bit of litigation and handwringing, the Federal Reserve Board formally provided its interpretation allowing the creditor to give the consumer a multiple-copy form containing the required disclosures and credit agreement, which the customer reviews and signs before returning the form to the dealer, which separates the copies and gives a copy to the customer to keep.

13. True or False: At the time of signing, customers should be given a copy of their contract.

• Answer: True. The customer must be given a copy of the contract in a form that the
Clever Answers Wise Questions (Cont.)

(Continued from page 16)

customer can keep at the
time of the signing.

14. True or False: You offer loans to
your customers at the dealer-
ship.

- Answer: This is not a good T/F
question. If a dealer has ob-
tained proper licenses, they
could conceivably provide
loans to customers. Being a
dealer and being a lender are
not mutually exclusive. That
said, most dealers do not wish
to jump through those regula-
tory hoops (running a dealer-
ship is complicated enough as
it is!) and instead enter into
credit sale agreements.

15. True or False: On a Retail In-
stallment Sales Contract, TILA
requires creditors to disclose
the cost of credit as a dollar
amount commonly referred to
as interest.

- Answer: This is not a good T/F
question. Dealers are re-
quired to disclose the “cost of
credit as a dollar amount” on
an installment sale contract.
That said, this definition ap-
plies to the finance charge.
The word “interest” is com-
monly conflated with either
the Annual Percentage Rate
(APR) or the finance charge,
but it is neither. Interest is
part of the finance charge,
but so would be other fees
required to be paid by a cus-
tomer as a condition of credit
(e.g., if a subprime lender
required a customer to pur-
chase a starter interrupt de-
vice as a condition of lending,
the cost of that device to the

customer would be part of the
finance charge, along with
interest). Likewise, APR is not
interest. APR is the total cost
of credit expressed as a year-
ly rate. It is actually the solu-
tion of an equation, not a
mathematical term in it.

APR is calculated by using (1)
the finance charge (which is
the total cost of that will be
paid over the life of the credit
obligation), (2) the amount
financed, and (3) the term of
the transaction/payment
schedule.

16. True or False: You send credit
applications to lenders in order
to obtain financing for your
customers.

- Answer: This is not a good T/F
question. You send credit
applications to lenders to deter-
mine whether they will buy the
paper from you. Generally, you
are the initial creditor who in-
dependently grants the exten-
sion of credit.

17. True or False: It is OK to back-
date a contract when a custom-
er returns to re-sign because
financing could not be obtained
on the original retail installment
sale contract.

- Answer This is not a good T/F
question. This issue will de-
depend upon your state’s law.
For example, this issue is cur-
rently before the California
Supreme Court because of
conflicting state appellate deci-
sions and has been discussed
by federal courts in Virginia but
has not been addressed by the
courts or legislature of most
states. At least in California
and Virginia, dealers can face
significant liability for backdat-
ing credit sale/financed con-
tracts.

18. True or False: Highlighting a
contract is the best way to en-
sure a customer signs in the
right place

- Answer: This is not a good T/F
question. It has become some-
what of a myth that highlight-
ers absolutely cannot be used
on contracts. Using highlight-
ers (or making any other nota-
tion) in the Federal Truth In
Lending box is absolutely im-
permissible. Likewise, use of a
highlighter in a manner that
could arguably take the cus-
tomer’s attention away from
other information should cer-
tainly be avoided. That said, if
a highlighter is used merely to
mark the “x” next to each re-
quired signature line to remind
the customer where to sign,
this does not present a prob-
lem and can be useful to avoid
greater problems that arise
with improperly-executed con-
tracts.

19. True or False: It is a potential
straw purchase when a parent
buys a vehicle for a son or
daughter.

- Answer: True. This is a position
that some banks take, and
they sometimes use this sce-
cnario as an excuse to force you
to buy back a nonperforming
contract (e.g., after being
shocked) to find out from a tel-
phone conversation with the
father that he bought the car
for his high school-aged daugh-
ter) years down the road.

(Continued on page 18)
A solution is to have the son/daughter sign as a cobuyer or “other owner” line on the contract. Most retail installment sale contracts have a line beneath the buyer/cobuyer line for an “other owner” (which also gives you the direct contractual benefits against both signors in the event you have to buy the contract back). Doing this may help defeat a bank’s straw purchaser argument because it would be on notice of the other individual’s ownership of the vehicle. The other option is just to have the family member sign the contract as a co-signor, of course but only if the bank will buy the deal that way. You will at least have the parent as an adult on the contract since they were under the age of majority.

Also, keep in mind that some contracts (including the most recent California 553 RISC) take a default position that the vehicle is being purchased for “personal, family or household” use (unless the “business or commercial” use box is checked).

20. True or False: Dead deals should be kept for 5 years.

• Answer: This is not a good T/F question. “Dead deal” files generally contain several documents in addition to a credit application—many of which (e.g., scratch paper) may not be subject to any record retention requirements. Federal law requires credit applications where no sale is made to be held for a minimum of 25 months. That said, given statutes of limitation under the Fair Credit Reporting Act and other potential statutory causes of action, we recommend that such files be retained for a minimum of five years. Some jurisdictions may have their own record retention requirements that exceed five years. If your statute of limitations is longer, then you may want to keep them for a longer period of time in case you get sued and want to prove that you did everything right.

21. True or False: It is OK to hold a check for a week while a customer transfers funds from one account to another.

• Answer: This is not a good T/F question. Holding a customer’s check may be permissible if it (a) is properly disclosed on the RISC as a deferred downpayments, and (b) is not going to be held for longer than the second regularly scheduled installment payment. One important lesson to help stay out of court: don’t put a deferred downpayment (i.e., pick payment) on the downpayment line of the RISC.

22. True or False: A dealer has permissible purpose to run a credit report on a customer at any point through the ownership period once they have received the customer’s signature on a credit application.

• Answer: False. You can only run the customer’s credit under certain circumstances: (1) when the dealership has received written authorization from the consumer (i.e. a signed credit application); (2) when the dealership has a permissible purpose to do so as part of a credit transaction under federal law; (3) when the dealership intends to use the information for employment purposes (which can be further regulated by state law); and (4) when the dealership has a legitimate business need for the information in connection with a business transaction that is initiated by the consumer.

When a decent amount of time has elapsed after the original application, you may no longer have a legitimate business purpose for running the customer’s credit. Even if the customer calls and gives you verbal authorization to use an old credit app on record, it’s a bad idea because the information on the old credit application may no longer be correct.

23. True or False: All dealerships should be checking the “Specially Designated Nationals and Blocked Persons” list for all their transactions.

• Answer: True. Technically, McDonalds should be checking the SDN/OFAC list every time they sell a cheeseburger to a customer. If a terrorist or drug dealer on the Specially Designated Nationals list came in and bought a Happy Meal,
McDonalds would be in violation of federal law.

Applying this test to such a low dollar transaction seems (and is) absurd, but an explanation may be that the roots of this law are very old. It can be traced all the way back to before the War of 1812, and subsequently the Civil War. The law was intended to prevent commerce with enemies of the United States. The modern version, enacted after World War II, created the Office of Foreign Assets Control. That agency is tasked with preventing prohibited transactions, which could be the result of country based sanctions (Iran, Syria, Cuba, etc.) or individuals or organizations involved in terrorism, narcotics or something else that causes concern for our federal government.

While, technically, the OFAC requirements apply even to your sale of a floor mat, enforcement agencies focus on large purchases, like cars, because they are more likely to involve money laundering or illicit activity. Plus, a vehicle is more likely to be used to blow up a building or smuggle drugs than a floor mat.

24. True or False: Each dealership must maintain a dealership specific Do Not Call list.

- Answer: This is not a good T/F question.
  Technically, a dealer who does not make calls involving solicitations can avoid the Do Not Call list requirements. That said, the vast majority of dealers will make solicitation calls. For those dealers, a customer who requests to be added to your Do Not Call list must be added as soon as possible but at least within 30 days.

CFPB - THE OTHER SHOE (CONT.)

(Continued from page 8)

found offensive. Dealers have pushed back hard, and that has prevented widespread flight to flat fees by finance sources. However, the finance sources are still under pressure from the CFPB to keep heat on dealers, and the consent orders that captives have signed with the CFPB show that. Just as the dealer exemption from CFPB jurisdiction has not deterred the Bureau from trying to control dealer reserve, it will not deter the Bureau on F&I product pricing.

If a dealership has set pricing for its F&I products, how can it remain competitive? It can do so on the same basis it can remain competitive in a fair lending policy - with a set starting point for prices with pricing deviation based on pre-established non-discriminatory factors.

ADL has included a sample form for F&I products (see page 9) to implement such an F&I product pricing policy. (The example form is included in this update as an insert on page 9, please feel free to contact us for a Word version.) The form contains a listing of various F&I products that a dealership may offer. It then provides listings for the standard price, the customer price negotiated in the deal, and the reason or reasons for deviation. When a product is sold, the standard price, the customer price and the reason or reasons for deviation should be listed. If a customer declines a product, the declination can be noted.

The F&I representative will then sign the form and a copy will go into each deal file after review by a superior. What benefit does this policy provide? Just like the fair lending policy for reserve, it provides a basis for response by a dealer contacted by its finance source about differences in product pricing. The dealer will have the ability to justify the price based on its set price and to any deviation based on non-discriminatory reasons. The policy will provide an answer to a dealer under pressure from a finance source to make refunds to customers because the product pricing differential appears to be discriminatory. It can also show that a dealer has a policy in place with set pricing to help avoid a claim that a consumer was treated unfairly. Of course, this form should be modified to reflect the actual products sold at the dealership, and implemented after consultation with counsel.
Compliance Triage (Cont.)

(Continued from page 14)

- Protect yourself from supplier overreach. Dependence on suppliers is unavoidable. However, make sure your agreements with your suppliers protect the dealership.

  - Have a written agreement that the supplier will protect all customer information, with the right to use it only to provide services to your company; and

- Review contracts

  i. Make sure they provide benefits which you expect;

  ii. Confirm the pricing is accurate;

  iii. Limit the duration of the agreement;

  iv. Insist that renewals are month to month; and

  v. Check to see where you can be sued, and work to have any disputes determined where the dealership is located.

Compliance issues may vary from state to state and community to community. However, these are critical concerns to which you should give attention. And if there are other issues hot in your community, add them to this list.

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