

DEALERTRACK COMPLIANCE GUIDE

Navigate today's complex regulatory environment with key F&I compliance insights, best practices, and more to help protect your dealership as the industry shifts toward digital transactions.

2022



**PREPARE YOUR DEALERSHIP FOR THE ROAD AHEAD.
KNOW YOUR COMPLIANCE OBLIGATIONS - IN-STORE OR ONLINE.**

Cox
AUTOMOTIVE

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KEY CHANGES TO THE F&I COMPLIANCE ENVIRONMENT

Stay current with the latest regulatory shifts in F&I Compliance and protect your dealership from fines and penalties.



DID YOU KNOW?

The CFPB has its eye on aftermarket product sales for possible unfair, deceptive, or abusive acts and practices (UDAAP) that could result in finance source liability for dealer activity.

COMPLIANCE TIP

Before you sell GAP insurance, make sure the customer's loan-to-value (LTV) ratio is high enough for them to benefit from it.

WHAT'S NEW FOR 2022

The CFPB has published its [Fall 2021 Rulemaking Agenda](#), which identifies the regulatory matters that the CFPB anticipates having under consideration through October 2022.

RECOMMENDED PRACTICE

Familiarize yourself with the enforcement actions affecting the automotive industry that your state's attorney general has taken recently.

BREAKOUT SECTIONS

1. Consumer Financial Protection Bureau (CFPB) Authority
2. Larger Participant Rule and Auto Leases
3. Recent Enforcement Action
4. Indirect Auto Finance Guidance
5. Federal Trade Commission (FTC)
6. State Attorneys General
7. Environmental Protection Agency
8. Additional Resources

Unlike 2020 during the COVID-19 pandemic, the majority of 2021 was filled with increased demand in the auto industry for new and used cars, and hybrid and electric vehicles, and we expect this trend to continue through 2022 due to inventory constraints.

The Biden administration issued a series of clean-energy and climate-focused executive orders throughout 2021 that have propelled momentum for electric vehicles despite the supply constraints. For example, the newly enacted infrastructure act allotted money for charging stations, and the still-pending Build Back Better Act seeks to expand tax credits for the purchases of U.S.-manufactured electric vehicles. Also, as we steadily approach normalcy, expect a continued reliance on online transactions, touchless pickup, and car delivery services.

As it pertains to compliance regulations, we can expect new infrastructure funding policies, electric and autonomous vehicle rules, and a continued scrutiny in “regulation by enforcement” in areas arguably not expressly prohibited by agency rules. Also, the Biden-Harris administration has been vocal about combating climate change, which will have knock on effects in the automotive industry, including stricter enforcement of environment issues and as an increased focus on clean tech and electric vehicles.

In addition, while recent actions involving the industry have generally focused on emissions and product safety, we also expect the DOJ will continue to emphasize companies’ compliance programs and structure both during and after the time of any misconduct. Indeed, on June 1, 2020, the DOJ Criminal Division updated its Evaluation of Corporate Compliance Programs to emphasize the need to adequately resource, evaluate risks, and monitor and assess its compliance structures and controls. Given the increased attention to compliance programs, auto dealers may consider reviewing the latest copy of the Evaluation of Corporate Compliance Programs, available at <https://www.justice.gov/criminal-fraud/page/file/937501/download>.

Here’s a look at some notable actions taken by federal agencies you should consider when preparing your dealerships’ compliance programs:

CONSUMER FINANCIAL PROTECTION BUREAU (CFPB) AUTHORITY

The CFPB is an independent federal agency established by the Dodd-Frank Act to centralize enforcement and supervision of longstanding federal consumer financial laws and regulations, exercise new authority to

prohibit unfair, deceptive, or abusive practices, and issue new regulations as it deems necessary. Auto dealers that sell or lease and service vehicles that also sell their retail installment sales contracts to non-affiliated third parties are generally not subject to the CFPB's direct supervisory, rulemaking, or enforcement authority. Buy-here-pay-here and certain independent dealers that can't fit into the exception are subject to direct CFPB regulation. Like the federal bank regulators, the CFPB can refer a matter to the Department of Justice (DOJ) when it has reason to believe that a creditor has engaged in certain legal violations, such as a pattern or practice of lending discrimination. In some matters, it can enforce the law through its own administrative process.

Last year, we noted that the appointment of Thomas G. Ward and other personnel moves along with a number of settlements generating little monetary penalties had led Democratic legislators to argue that the CFPB was not executing on its responsibilities. However, unlike 2020, 2021 was a busy enforcement year for the CFPB. As expected, we've seen an uptick in CFPB enforcement activity that coincided with the beginning of the Biden administration. We expect these trends in increasing investigations, driven in part by increased referrals from the CFPB's Action Review Committee (ARC), to continue now that Rohit Chopra is confirmed as the CFPB's new Director.

In addition, we expect increased enforcement on illegal discrimination against the LGBTQ+ community. Indeed, in March 2021, the CFPB issued an interpretive rule clarifying that the prohibition against sex discrimination under the Equal Credit Opportunity Act (ECOA) and Regulation B includes sexual orientation discrimination and gender identity discrimination. This prohibition also covers discrimination based on actual or perceived nonconformity with traditional sex or gender-based stereotypes, and discrimination based on an applicant's social or other associations.

LARGER PARTICIPANT RULE AND AUTO LEASES

In 2015, the CFPB used its authority under the Dodd-Frank Act to promulgate a rule giving itself jurisdiction over nonbank "larger participants" in the auto finance space (the "Larger Participant Rule"). Franchised auto dealers that routinely sell the retail installment sales contracts they originate to unrelated third-party finance sources are excluded from the CFPB's direct supervisory, rulemaking, and enforcement authority. However, other dealers are not as fortunate. For example, buy-here-pay-here dealers that do not sell their contracts to an unaffiliated third party are subject to CFPB oversight, as are certain independent used car dealers that do not meet the requirements

for exclusion. Dealers should consider seeking advice of counsel to determine whether they are subject to CFPB jurisdiction.

One further enhancement under the Larger Participant Rule is that the CFPB has claimed jurisdiction over consumer auto leasing. Formerly, the CFPB's authority was limited to retail finance and direct loans, but the Rule clarified that traditional auto leasing is also within the CFPB's jurisdiction.

As a result of the CFPB's expanded examination authority under the Larger Participant Rule, the CFPB will have more opportunities to gain visibility into the practices of auto dealers. The expansion of the CFPB's jurisdiction over indirect auto finance unquestionably impacts how dealers should protect themselves from regulators with which the CFPB may be sharing information from its finance source examinations and investigations. Because of this sharing, dealers should consider the CFPB's focus on transparency and fairness to consumers in all aspects of credit transactions.

The CFPB is investigating aftermarket product sales for possible unfair, deceptive, or abusive acts and practices (UDAAPs) that could violate the Dodd-Frank Act and also result in finance source liability for dealer activity.

For example, as reported in the CFPB's Summer 2019 Supervisory Highlights Report, during the 2018 examination period, the CFPB identified instances in which auto lenders sold guaranteed asset protection (GAP) products to **consumers with low loan-to-value (LTV) ratios. Because consumers with low LTV ratios would likely not benefit from purchasing these GAP products,** the CFPB reasoned that the auto lenders were taking advantage of the fact that the consumers did not materially understand these products. Consequently, the CFPB determined that the auto lenders engaged in abusive acts and/or practices and the auto lenders were required to take remedial and corrective actions, such as: (i) reimbursing the consumers for the purchase of the GAP product; and (ii) establishing a minimum LTV ratio for the sale of GAP products.

Additionally, the CFPB identified unfair and deceptive practices among automobile loan servicers of captive auto finance companies where the wrong mileage amount was used to calculate a rebate for extended-warranty calculations. The miscalculation resulted in the consumer receiving a lower rebate than what was permitted and, in some instances, led to the servicer attempted to collect on an inaccurate balance. In some instances, the servicers failed to request a rebate and



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COMPLIANCE TIP

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to notify the consumers of this fact. The CFPB determined that these misrepresentations were material to consumers because they were required to pay amount he or she did not owe, or they were prevented from pursuing their own rebate. The servicers were required to: (i) identify and remediate the borrowers; and (ii) revise the deficiency notices. Transparency and consistency in aftermarket product selling should remain a priority for 2020 and beyond.

RECENT ENFORCEMENT ACTION

On October 13, 2020, the CFPB issued a consent order against Nissan Motor Acceptance Corporation (Nissan), an auto financing subsidiary of Nissan North America, Inc. The CFPB found that Nissan wrongfully repossessed vehicles; kept personal property in consumers' repossessed vehicles until consumers paid a storage fee; deprived consumers paying by phone of the ability to select payment options with significantly lower fees and, in its loan extension agreements, made a deceptive statement that appeared to limit consumers' bankruptcy protections. These actions violated the CFPA prohibition against unfair and deceptive acts and practices. The consent order requires Nissan to provide up to \$1 million of cash redress to consumers subject to a wrongful repossession, credit any outstanding account charges associated with a wrongful repossession, and to pay a civil money penalty of \$4 million.

INDIRECT AUTO FINANCE GUIDANCE

In 2015, the CFPB increased its activity to enforce federal consumer credit protection laws into the area of indirect auto finance by furthering attempts to indirectly regulate auto dealers. While certain auto dealers (as described above) are not subject to the direct supervisory enforcement or rulemaking authority of the CFPB, the CFPB sought to indirectly regulate those dealers' auto finance practices in its March 2013 Indirect Auto Finance Guidance ("Guidance"). The Guidance found that dealer finance participation, which they refer to as "markups," frequently discriminate against protected classes of persons under the Equal Credit Opportunity Act (ECOA), most notably minorities and women, and that finance sources that buy such paper (and who are within the CFPB's jurisdiction) can be liable for the resulting credit discrimination under a so-called "disparate impact" theory. Disparate impact occurs when a facially neutral policy such as a dealer marking up a "buy rate" results in a statistically significant disparity in the treatment of protected classes of persons under the ECOA—when compared to those not in protected classes. There were many questions in the industry about the legitimacy of the Guidance starting with the CFPB's theory of credit discrimination, i.e., the so-called "disparate impact" theory. There is no question the ECOA

prohibits “disparate treatment,” i.e., policies or practices that on their face treat protected classes less favorably than non-protected classes. But there is some question as to whether the ECOA makes “disparate impact” discrimination actionable, despite the fact that the Guidance assumes it is. Under the language of ECOA, lenders are clearly liable for their own intentional conduct. In addition, a lender can be responsible for the intentional conduct of another creditor when it knows or has reason to know of a violation. But in the Guidance, the CFPB asserted that indirect auto lenders that permit dealer participation may be liable if such compensation practices unintentionally result in disparities on a prohibited basis in their dealer-by-dealer individual portfolios, and/or their aggregate portfolio.

The ECOA does not expressly prohibit credit discrimination under the “disparate impact” theory. That theory is derived from employment discrimination laws and works as follows:

- A creditor employs a facially neutral credit practice (e.g., a minimum income requirement).
- Application of the practice has a disproportionately negative effect on a protected class (in this example, this could be women who do not make incomes as high as men).
- If true, the creditor must show the practice meets, in a significant way, the legitimate goals of the business.
- If the creditor can so show, the burden then shifts to the regulator or plaintiff to show that the business goals can be met by means that are less discriminatory in their impact (e.g., substituting debt-to-income ratio for a minimum income requirement); there is no requirement to show knowledge or intent to discriminate by the creditor in a “disparate impact” case.

Finally, the CFPB asserted that dealer participation often has a disparate impact on women and minorities. Since an indirect auto creditor can’t collect demographic information on customers in auto finance transactions like a mortgage lender can in a mortgage transaction, the CFPB uses “proxies” to try to determine who among similarly qualified customers are in a protected class and who are not. Proxies are ways to try to guess who is in a protected class based on names and geography. The CFPB and DOJ use a proxy methodology called the Bayesian Improved Surname Geocoding (BISG) proxy, which has been heavily criticized by statisticians as overstating minorities and understating non-

minorities, a conclusion the CFPB subsequently confirmed.

The BISG proxy only identifies probabilities and can also overstate disparities and the amount of alleged harm by failing to take into account non-discriminatory factors such as geography, new car financing versus used, length of loan, down payment, trade-in vehicle, credit score, and competitive factors such as meeting or beating a competing offer. Despite these issues, many finance sources have followed the CFPB's direction to analyze, monitor, and take action against dealers whose rate participation on similarly situated customers differ, including the use of "proxies" to identify members of protected classes and compare dealer finance participation for protected classes as opposed to other customers.

The Guidance never had the force of law but illustrated the CFPB's approach, i.e., that finance sources must effectively monitor and police for discriminatory dealer rate participation on purchased contracts or alternatively compensate dealers through flat-fee pricing instead of dealer rate participation. After a wave of consent decrees enforcing the Guidance (i.e., Ally Bank, American Honda Finance Corporation, Fifth Third Bank, and Toyota Motor Credit), many large finance sources sought to comply with the Guidance by requiring dealers to implement ECOA/Fair Lending policies. They also monitor buy rate participation on retail installment sales contracts of similarly qualified persons that could indicate a "disparate impact," and provide redress to impacted consumers. Most of the consent decrees also required the lenders to limit the dealer participation to specific caps if they continue to permit this form of dealer participation. Most of these consent decrees have now expired.

Not surprisingly, the Guidance has been very unpopular with auto finance companies and dealers. In 2017, the Government Accountability Office (GAO) accepted a request to determine whether the Guidance is a "rule" subject to disapproval under the Congressional Review Act (CRA). Under the CRA, prior to a rule becoming effective, the proposed rule must be submitted to GAO and Congress for approval. Thus, a finding that the Guidance is a "rule" under the CRA means that the Guidance would be rendered ineffective because it was never submitted to GAO and Congress as required by the CRA. As a result of these issues, in Spring 2018, Congress formally repealed the Guidance.

What does all this mean for dealers? This has likely meant that your participation ability may have been limited by your lenders. However, as a result of the invalidation of the Guidance, the expiration of many of the consent decree limitations, and the CFPB's internal review of its fair lending authority, federal focus on fair lending appears to have waned

for the moment. But still, there are early indicators that states may be bringing enhanced scrutiny to fair lending in their examination processes.

FEDERAL TRADE COMMISSION (FTC)

Since 2012, the FTC has brought many deceptive advertising enforcement actions against dealers using its authority to prohibit unfair and deceptive acts and practices (UDAP), and the trend continued in 2018. Most recently, the FTC once again focused on bogus recall notices issued by a dealership. The notices warned consumers about supposedly urgent recalls, with prominent language, but the FTC alleged that the dealer made no effort to limit the mailing list to consumers whose vehicles were subject to open recalls.

In another instance, the FTC recently initiated an action against auto dealers for falsifying consumer income information on financing applications. Specifically, the FTC alleged that the dealers inflated the consumer's financial information, prevented the consumers from reviewing the information, signed financing document without the consumer's knowledge, used deceptive advertising that confused consumers about the financing or leasing terms, and violated the Truth in Lending Act (TILA) by failing to disclose required terms. The FTC also named the dealership owner in his individual capacity on grounds that he directed the illegal activity. The case continues to be litigated in Arizona federal court and is significant in that it is the first of its kind by the FTC against auto dealers.

On May 2020, the FTC filed a complaint in New York against Liberty Chevrolet (Bronx Honda) and its general manager, citing violations of the FTC Act, TILA, and ECOA. The FTC alleged that the Defendants engaged in (i) unlawfully misleading and deceptive practices and (ii) discriminated against its African American and Hispanic car buyers by targeting them with higher financing markup rates. In September 2020, Bronx Honda was ordered to pay \$1.5 million to settle the charges. This charge serves as an important reminder of enforcement actions for both federal consumer protection laws and cases for discriminatory practices.

Through the years, in addition to marketing, the FTC has focused on so-called "yo-yo" financing (i.e., "spot delivery") where customers were allegedly offered one finance deal to effectuate the purchase transaction, and then coerced into another less favorable deal after they signed their contracts. In addition, the FTC has also concentrated on dealers that allegedly "packed" unauthorized charges for aftermarket products and services into financed transactions.

Remember that the FTC does not need an actual complaint against a dealer to bring an action, but only needs to allege that an advertisement or practice “is likely to mislead” or that a practice is “likely to cause substantial injury” to consumers to satisfy the required legal elements of a UDAP claim.

These actions demonstrate that, as the primary federal regulator for most auto dealers, the FTC is serious about using its investigatory authority to prevent UDAP. The FTC is also authorized under the Dodd-Frank Act to promulgate rules implementing its UDAP authority as it relates to dealer activities, but it has not yet chosen to do so. However, unlike the CFPB, the FTC has issued guidelines on a variety of marketing topics, including online marketing disclosures.

STATE ATTORNEYS GENERAL

Although federal law addresses most consumer financial services topics, states are also active in regulation. Under the doctrine of “preemption,” certain federal laws, including the Federal Arbitration Act, TILA, ECOA, and FCRA will preempt and override inconsistent state laws on the same subject. However, states that have laws that are not covered by federal law or are more restrictive than their federal counterpart, are not subject to preemption, and will be enforceable by the states.

The previous CFPB Director encouraged states to take lead in enforcing consumer finance laws and collaborate with the industry. While certain aspects of this approach may continue, it is much more likely that the CFPB under the Biden administration will pivot to a more centralized and muscular approach to enforcement of consumer financial protection laws. Nonetheless, we recommend companies continue to monitor enforcement actions affecting the automotive industry that its respective state’s attorney general have taken recently.

For example, the Massachusetts Attorney General has been keen on warning auto dealerships to not engage in “bait and switch” tactics as auto prices surge due to inventory, and is pushing back on unfair tactics, such as illegally refusing to honor the terms of a lease contract and requiring consumers to return the leased vehicles at the end of lease rather than permit the purchase as previously agreed.

ENVIRONMENTAL PROTECTION AGENCY

As noted, the Biden-Harris administration is taking action to combat climate change, including by reversing numerous regulatory rollbacks from the Trump administration. As a result, expect the U.S. Environmental Protection Agency to continue to play an increasingly impactful role



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in reducing emissions, particularly in the automotive industry. Indeed, in January 2021, Toyota agreed to pay \$180 million fine to the U.S. government for violating EPA regulations and the Clean Air Act by failing to report mandatory information about potential defects in cars that interfered with the tailpipe emission regulation systems. These reporting failures resulted in delays to emission-related recalls as well as financial benefit to the company by offsetting costs onto consumers.

ADDITIONAL RESOURCES

CFPB Examination Manual, Auto Finance Section (August 2019), available at, https://files.consumerfinance.gov/f/documents/cfpb_supervision-and-examination-manual.pdf

CFPB Supervisory Highlights (Summer 2021), available at, https://www.consumerfinance.gov/documents/9840/cfpb_supervisory-highlights_issue-24_2021-06.pdf

CFPB Supervisory Highlights (Fall 2021), available at, https://www.consumerfinance.gov/documents/10279/cfpb_supervisory-highlights_issue-25_2021-12.pdf

LOOKING AHEAD: CONSIDERATIONS FOR YOUR 2021 COMPLIANCE ACTION PLAN

As you build and adapt your compliance action plan for the year, be aware of the latest regulatory, industry and best practices developments that could affect your dealership.



DID YOU KNOW?

19 consumer protection statutes are enforceable under the authority of the CFPB.

COMPLIANCE TIP

Look for opportunities to work with financial technology or “Fintech” firms to connect with consumers, lenders, and other service providers.

WHAT’S NEW FOR 2022

If you do business in California, familiarize yourself with the numerous new privacy and data security obligations your dealership has under the California Privacy Rights Act (CCPA).

RECOMMENDED PRACTICE

Establishing a culture of compliance, data security, transparency, and honesty with customers is critical to protecting your dealership.

BREAKOUT SECTIONS

1. What’s Next for Auto Dealers
2. CFPB Focus on Policies and Procedures
3. Data Safeguards and Security
4. Financial Technology Companies
5. Creating a Culture of Compliance

WHAT'S NEXT FOR AUTO DEALERS

If the previous decade is any indication, the presidential administration and its philosophy on regulation will likely continue to have a strong impact on the enforcement activities undertaken by and the rules drafted by the agencies such as the CFPB and FTC. We are already seeing the Biden administration put in place a more aggressive CFPB leadership and several of the changes under President Trump's administration have been voided. Where the auto industry is concerned, we anticipate that the FTC and state regulators will continue to investigate auto dealerships with a wide range of deceptive and unfair sales and financing practices, including spot delivery, false recall notices and payment packing. In the last few years, we have also seen regulators charging not only the dealership, but even their owners when the behavior is perceived to be particularly egregious. We anticipate the FTC will maintain its interest in auto dealer activities, initiating new investigations and entering into consent orders with dealers currently under investigation.

On the regulatory front, we think it is likely that the CFPB or the FTC will issue new rules applicable to, or affecting, auto dealers. As such, dealers should continue to monitor consent orders involving other dealers to determine whether any particular conduct is disfavored by either agency, and track actions initiated by the CFPB and FTC especially UDAAPs, UDAPs or auto dealers are involved.

CFPB FOCUS ON POLICIES AND PROCEDURES

As stated in Topic 12, auto dealers should implement and maintain current written policies and procedures, as well as effective systems and controls, to ensure its consumer financial product programs comply with federal consumer financial laws. To that end, a **compliance management system should be updated on an as needed basis to address any changes in applicable law**. For guidance, the CFPB has released a comprehensive Supervision and Examination Manual, and several additional guidance documents and bulletins that shed light on all of the different ways their examiners oversee the institutions subject to their supervisory and examination authority. While the CFPB does not have direct examination and supervisory authority over franchised auto dealers and other select independent dealers, the financial institutions it does supervise and examine are likely to continue their pattern of assessing dealer compliance as a precondition to doing business. Implementing your own compliance management policies, processes, and procedures across the business is the best way to position your dealership for the evolving lender efforts in this regard.



RECOMMENDED PRACTICE

DATA SAFEGUARDS AND SECURITY

The **California Consumer Privacy Act (the “CCPA”)** went into effect on **January 1, 2020** and contains numerous new privacy and data security obligations applicable to companies doing business in California. For example, the CCPA will require covered businesses to provide California residents with greater transparency and choice regarding how the business collects and uses consumer personal information. Covered businesses will have an affirmative obligation to respond to specific consumer[1] rights requests, observe restrictions on certain data practices, and update their privacy notices annually to provide detailed disclosures about their data handling practices relevant to California consumers’ personal information. Of note, the CCPA has a 12-month “lookback” provision such that certain of these obligations will apply to personal information collected in 2019. [See Topic 5 for additional information.](#)

FINANCIAL TECHNOLOGY COMPANIES

Financial Technology Companies or FinTech’s have been disrupting the consumer financial services industry for the past few years. FinTech’s present consumers with alternatives to traditional financial institutions. Rather than visiting a brick and mortar to obtain a loan, many consumers are finding lending through online sources that do not have physical location. We anticipate that the auto industry will continue to innovate the way in which it serves its customers. **FinTech’s may present new opportunities to dealers to connect with consumers, lenders, and other service providers.** We recommend that dealers continue to monitor this development as it may benefit from the changing technological landscape.

CREATE A CULTURE OF COMPLIANCE

Establishing a culture of compliance, data security, transparency, and honesty with customers is critical to protecting your dealership. So is establishing processes to be able to document your compliance, deal by deal. An electronic system that identifies which processes were completed for each deal can be invaluable if an audit or regulatory inquiry occurs. In addition, do not forget the importance of a systematic customer complaint system. Seek to resolve complaints using a consistent process with timelines and escalation procedures. **Remember that in the long run, it may be better to resolve a dispute in favor of the customer rather than winding up on the CFPB’s online complaint database, or similarly on the radar of your state Attorney General or Better Business Bureau.**



UPDATE FROM 2021

If you do business in California, familiarize yourself with the additional privacy requirements your dealership has under the California Privacy Rights Act (CPRA).



COMPLIANCE TIP

Look for opportunities to work with financial technology or “Fintech” firms to connect with consumers, lenders, and other service providers.



RECOMMENDED PRACTICE

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COMPLIANCE TIP

Create a consistent process for resolving customer complaints to avoid legal and reputational risk.

CREDIT APPLICATIONS, CREDIT REPORTS, AND CONTRACTS

This section provides an important overview of the key laws and regulations designed to protect consumers – and your dealership – during the credit application, reporting and contracting process. We recommend that you bookmark it!

DID YOU KNOW?

If a customer purchases a vehicle with cash or cash equivalents in excess of \$10,000, you must file IRS/FinGEN Form 8300 within 15 days.

COMPLIANCE TIP

A dealer should be prepared to show that the dealership made a good faith effort to finance a deal with multiple finance sources.

WHAT'S NEW FOR 2022

The Uniform Electronic Transactions Act (UETA) was not adopted in Illinois, New York, and Washington. Review state law in these states for any additional requirements concerning the use of electronic signatures.

RECOMMENDED PRACTICE

Always have a “permissible purpose” to pull a consumer’s credit report.

BREAKOUT SECTIONS

1. Important Laws and Regulations:

- The Fair Credit Reporting Act (FCRA)
- The Equal Credit Opportunity Act (ECOA) and Regulation B
- Adverse Action Notice Obligations Under ECOA and FCRA
- Risk-Based Pricing Notices
- Security Freeze Laws
- Truth in Lending Act (TILA) Requirements
- State Developments

- FTC Credit Practices Rule
- Electronic Signatures and Records
- Servicemembers Civil Relief Act (SCRA)
- The Military Lending Act
- CFPB Small Dollar Rule Effect on Auto Lending
- OFAC
- Car Buyer’s Bill of Rights
- Spot Deliveries
- Spot Agreements
- The Federal Odometer Law
- Internet Sales

- State Law Restrictions on Fees
- State Single Document Laws
- Cash Sales
- Disclosure of Starter-Interrupt and/or GPS Technology
- Failing to Obtain the Customers Signature

2. Recommended Practices

3. Additional Resources

4. Sample Adverse Action Notice

The following information is not intended to be legal advice. You should consult with your attorney to ensure that you are in compliance with applicable law.

Since the late 1960s, federal law has restricted the use of credit reports and required creditors to notify consumers of credit decisions and describe credit terms in finance contracts. The federal Consumer Credit Protection Act, passed in 1968, includes the Truth in Lending Act (TILA), the Fair Credit Reporting Act (FCRA), and the Equal Credit Opportunity Act (ECOA), as well as other laws relating to wage garnishments and debt collection practices. The 2003 FACT Act added additional consumer rights, disclosures, and protections concerning credit reports, affiliate information sharing, identity theft protection, and risk-based pricing notices to the FCRA. Title X of the 2010 Dodd-Frank Act, also known as the Consumer Financial Protection Act of 2010, requires additional consumer disclosures in adverse action notices. State laws also govern lease and finance transactions, limit fees and charges in connection therewith, and require certain additional consumer disclosures for motor vehicle finance and lease transactions.

IMPORTANT LAWS AND REGULATIONS

THE FAIR CREDIT REPORTING ACT (FCRA)

FCRA is a federal law that regulates, among other things, the access, use, and distribution of information that meets the definition of a “consumer report,” including a credit score. For FCRA purposes, a “consumer report” (often informally called a credit report) includes eligibility information contained in such reports, as well as certain information obtained from third parties, such as employer or landlord.

FCRA requires a dealer to have a “permissible purpose” to obtain a consumer report. **A consumer’s written consent is the best proof of a permissible purpose** and may be required to access consumer reports in a state like Vermont and may also be required under certain contracts with the credit bureaus. Most credit application forms contain language providing for such written consent. However, a dealer may also have a permissible purpose to obtain a consumer report when the consumer clearly understands that he or she is initiating a transaction to purchase or lease a vehicle and the dealer has a legitimate business need for the credit report to complete the transaction. Many dealers have reason to want a consumer report earlier in the process, in which case they must rely on written authorization from the consumer to obtain the report, as the FTC has stated that pulling a consumer report for comparison



RECOMMENDED PRACTICE

Get each consumer’s written consent to obtain a consumer report.

shopping purposes or for cash customers is not permitted under FCRA without the customer's prior written consent to do so.

FCRA also requires giving the consumer an "adverse action notice" if the creditor used a credit report, in whole or in part, as a factor in denying credit to the consumer or offering the consumer credit on terms less favorable than those the consumer requested (unless the consumer accepts the less favorable terms). Adverse action notices are discussed below.

THE EQUAL CREDIT OPPORTUNITY ACT (ECOA) AND REGULATION B

ECOA and its implementing regulation, Regulation B, prohibit auto dealer's from discriminating against applicants for credit on the basis of race, color, religion, national origin, sex, marital status, age, sexual orientation, gender identity, including discrimination based on actual or perceived nonconformity with sex-based or gender-based stereotypes, because of an applicant's associations, because an applicant receives income from a public assistance program, or because an applicant has in good faith exercised any right under the Consumer Credit Protection Act. Certain state laws include additional protected class categories. The CFPB has entered consent orders with several finance sources over alleged violations of the ECOA's antidiscrimination provisions. As a result, many finance sources require dealers to implement and maintain a fair lending compliance program.

If gross income rather than net income is used in determining a consumer's repayment ability, ECOA will generally require that nontaxable income be "grossed up" to make it equivalent to taxable income to avoid allegations of a disparate impact on applicants, such as those with disabilities and the elderly, both of whom are more likely than the general applicant pool to receive substantial nontaxable income. ECOA has other considerations relating to income, e.g., a creditor may not discount part-time income in evaluating a consumer's creditworthiness.

The Federal Reserve Board (the agency responsible for Regulation B prior to such responsibility being transferred to the BCFP) staff has long held the view that ECOA does not apply to a lease transaction because it is not "credit" as defined by the ECOA. While some courts have taken the opposite – (and in many practitioners' view, incorrect) position, most lessors in the industry treat leases as though they are subject to the ECOA as a best practice. Given the uncertainty over whether the CFPB might choose to treat leases as subject to the ECOA, doing so might be an excellent practice.

ECOA also requires that credit application forms (or scripts, as applicable) contain certain disclosures, such as the consumer's right to not reveal income from alimony, child support, or separate maintenance if the consumer does not want such income to be considered as a basis for repaying the credit obligation. Certain state laws impose additional notice requirements in credit applications. Regulation B also requires that multiple consumer applicants affirmatively state on the credit application whether or not they want to apply for joint credit.

There has been a recent increase in fair lending activity at the state level. New York is an example of a state with its own fair lending rules, and recently New York extended protected class coverage to two additional categories: military status and sexual orientation. The New York Department of Financial Institutions (NYDFS) also issued a reminder to supervised entities and sales finance companies that engage in indirect automobile lending through third parties that they must comply with New York's Fair Lending Law, including, but not limited to the development of a fair lending compliance program, despite the federal rollback. Additionally, the NYDFS guidance provides that these entities may be liable for pricing disparities or discrimination based on the dealer reserve amount.

In another recent example, Connecticut imposed a new requirement for sales finance companies to acquire and maintain information about the ethnicity, race, and sex of applicants for motor vehicle retail installment contracts. However, a temporary "no action" memo was issued by the Connecticut Banking Commissioner indicating that Connecticut's Department of Banking will not enforce that new law pending receipt of an advisory opinion it requested from the BCFFP. Under ECOA, this type of data collection is authorized for mortgage, not auto transactions.

ADVERSE ACTION NOTICE OBLIGATIONS UNDER ECOA AND FCRA

Adverse action means a refusal to grant credit or a refusal to grant credit in substantially the amount or on substantially the terms requested by the consumer unless the consumer accepts a counteroffer of credit.

Adverse action also means terminating an account or changing its terms in a manner unfavorable to the consumer, except for actions taken in connection with a default or delinquency on the account. An example is unwinding or re-contracting a "spot delivery" contract on less favorable terms. Auto dealers are identified as the creditor/seller on the retail installment sales contract (RISC), despite the fact they later sell the RISC to a finance source.



COMPLIANCE TIP

Be aware of the fair lending rules for your state.

ECOA mandates the following time frames:

- 30 days after receipt of a completed credit application concerning the approval of counteroffer to, or adverse action on an application.
- 30 days after taking adverse action on an incomplete application, unless notice is provided of an incomplete application as set for in Regulation B.
- 30 days after taking adverse action on an existing account; or
- 90 days after notifying the applicant of a counteroffer (if the applicant does not expressly accept or use the credit offered) for notifying the applicant of the credit decision, whether favorable or unfavorable, (e.g., offering credit, informing the consumer that additional information is necessary to make a credit decision, making a counteroffer, or sending an adverse action notice).

An adverse action notice is not required if the dealer denies an application by providing a counteroffer which the consumer accepts.

An ECOA adverse action notice must be in writing and, at a minimum, include either specific reasons why the credit application was denied or counter-offered, or tell the consumer how they may contact the dealership within 60 days to get the reasons along with the name, address and telephone number of the person who can provide the specific reason(s) for the adverse action. An ECOA adverse action notice must also include an antidiscrimination notice similar to the one in 12 C.F.R. 1002.9(b). There are additional state laws relating to adverse action as well.

As creditors, dealers should give adverse action notices to consumers in at least three situations:

- When a dealer takes a credit application but does not send it to any financing source, typically because the consumer is credit-challenged.
- When a dealer unwinds or re-contracts a spot delivery deal; and
- When the dealer is unable to get the customer financed on terms acceptable to the dealer.

It is a common misunderstanding that a dealer can rely on a finance source's adverse action notice. In fact, a finance source's adverse action notice will not shield the dealer from liability in these instances as it does not contain the necessary disclosures that must be given by the dealer, including but not limited to naming the credit bureaus used and



COMPLIANCE TIP

Know your timeframes for Adverse Action Notice obligations under the ECOA.



DID YOU KNOW?

A finance source's adverse action notice will not shield the dealer from liability, as it does not contain the necessary disclosures that must be given by the dealer.

the federal agency that administers compliance for dealers (i.e., the FTC). Furthermore, most lenders advise dealers in their dealer agreement or their program materials that the lender's issuance of any adverse action notice is only on such lender's behalf.

The FCRA adverse action definition is more broadly drafted but includes the adverse action definition as set forth under the ECOA. Under FCRA, an adverse action notice is required when: (i) taking an adverse action with respect to a consumer, based in whole or in part on information contained in the consumer report; (ii) denying consumer credit or increase of credit, based on information obtained from a person other than credit reporting agency (e.g. credit worthiness, credit standing, credit capacity, character, reputation, etc.); (iii) taking adverse action based upon information, in whole or in part, received from an affiliate. Generally, a single form can be used to comply with both FCRA and ECOA adverse action notice requirements. Although, additional language is required if the dealer's decision was based in whole or in part on information received directly from a third party that is not a consumer reporting agency.

An adverse action notice must inform the consumer of the adverse action; either give up to four primary reasons for the adverse action (or tell the consumer how they may contact the dealership within 60 days to get the reasons); identify any consumer reporting agency that provided a credit report or credit score used by the dealer; provide the consumer's credit score, information about the credit score, and up to four to five "key factors" that adversely affected the credit score (up to four key factors unless one of the factors is the number of recent credit inquiries, in which case up to five key factors). The notice must contain other mandatory language as well. A sample adverse action notice is attached at the end of this Topic.

If the adverse action is completely due to the credit score, the primary reasons must indicate which factors in the credit score caused the adverse action. Using a general statement like "credit score too low" as a primary reason for adverse action does not comply with ECOA.

The primary reasons for the adverse action required by ECOA are not necessarily the same as the FCRA-required "key factors" that must be disclosed to describe what most adversely affected the credit score. These "key factors" are related to the credit score only, not the consumer's overall application for credit, which may also consider other factors, for example, income and ability to repay.

If the dealer uses credit information obtained from a third party that is not

a consumer reporting agency, the adverse action notice must so inform the consumer and advise they may make a written request within 60 days of the notice to obtain the nature of that information. An example would be information received directly from the consumer's employer, landlord, or a private creditor.

RISK-BASED PRICING NOTICES

The Risk-Based Pricing Rule (RBP Rule) took effect January 1, 2011 and was amended effective August 15, 2011. Its purpose is to inform consumers that they received worse credit terms than other consumers because of information in their credit reports. Receipt of a consumer's credit application triggers the RBP Rule notice requirement. A creditor who uses a consumer report and provides credit to the consumer on "material terms that are materially less favorable than the most favorable terms available to a substantial proportion of consumers from or through that person" either has to give these customers a "risk-based pricing notice" (RBP Notice) or give a "credit score disclosure exception notice" (CSD Notice) to all credit applicants. "Material terms" generally means the APR.

Compliance with the RBP Rule is difficult and expensive, a fact that was recognized by the agencies that wrote it and evidenced by the inclusion of the CSD Notice exception. The CSD Notice exception permits a dealer to provide all applicants for credit a disclosure of their credit score and certain other information, i.e., the date and identity of the person providing the credit score; the national distribution of credit scores among consumers under the credit scoring model used, disclosed in either a bar chart form or in language indicating where the customer falls in the national range of credit scores; and certain language disclosures about credit scores in general.

CSD Notices are easily obtained from consumer reporting agencies (e.g., Experian, TransUnion, Equifax, Credco, etc.), and should be provided to every credit applicant as soon as possible after obtaining the credit score but no later than the consummation of the transaction.

If you use multiple credit scores, you must disclose the one on which you most relied. If you didn't primarily rely on one, you can disclose any one of the multiple scores. If a consumer does not have a credit score, you must give that consumer a special form alternative notice stating that no score was available. Notably, the CSD Notice exception does not require disclosing the four to five "key factors" that adversely affected the credit score. The "key factors" disclosure is only required for adverse action notices.



COMPLIANCE TIP

Provide a credit score disclosure (CSD) notice to every credit applicant as soon as possible after obtaining their credit score.

What if your dealership doesn't ordinarily need to pull credit reports or credit scores? Your lender may still expect you to handle this requirement as the initial creditor, and this may require you to buy a credit score anyway.

SECURITY FREEZE LAWS

All consumers can now freeze their credit files by contacting most consumer reporting agencies, including the three nationwide credit bureaus: Equifax, Experian, and TransUnion. If a customer freezes her credit file, you will be unable to pull her credit report (including her credit score) unless she "thaws" the credit freeze with the credit bureau. If a customer calls the credit bureau to disable the freeze, the report should be available in a relatively short amount of time. If a customer submits a written request to disable the freeze, the process could take up to several days after receipt of the request.

TRUTH IN LENDING ACT (TILA) REQUIREMENTS

TILA, the federal Consumer Leasing Act (CLA, a subsection of TILA), and their implementing regulations, Regulations Z and M respectively, govern disclosures of credit terms to consumers. TILA and CLA disclosures must be given prior to consummation of the transaction. TILA and state laws also contain disclosure and other requirements for credit applications and consumer credit contracts. Many state laws cap Annual Percentage Rates (APRs) and other charges as do the federal Servicemembers Civil Relief Act and Military Lending Act discussed below. TILA and Regulation Z, and CLA and Regulation M, do not apply to credit transactions and consumer leases in excess of the then-current amount of the cap. However, it is a best practice to comply with TILA and the CLA regardless of the amount of the obligation on all credit transactions and consumer leases. A number of states require compliance with TILA on all credit transactions, regardless of the credit amount.

TILA generally treats costs of retail installment sales as either part of the amount financed (simplistically, the price of the goods or services financed by the consumer) or as a finance charge (simplistically, the cost to the consumer to finance payment of the goods or services):

- **Amount financed:** Examples of required disclosures in retail installment sales contracts (RISCs) for the cost of the goods or services financed are the amount financed and an itemization of the amount financed. The amount financed includes the cash price of goods or services purchased on credit, and non-finance charge amounts advanced by the dealer to the consumer or paid to others on the consumer's behalf, such as vehicle cost, taxes, registration

fees, and sums paid to pay off credit obligations on a consumer's trade-in vehicle. The cost of insurance (credit or property) financed in connection with the transaction can be a component of the amount financed (as opposed to finance charge) if properly disclosed.

- **Finance charge:** This includes many types of charges that TILA defines as part of the finance charge and represents the cost of credit. The finance charge must be disclosed as the total dollar amount of finance charges and the cost of credit expressed as an APR in the RISC. These disclosures must be more conspicuous than any other required disclosures (such as by bolding them, outlining them in a border, using all capital letters, etc.). For examples of finance charges see Regulation Z, 12 C.F.R. 1026.4.
- **Lease Disclosures:** The CLA and Regulation M require that the vehicle's gross and adjusted capitalized cost, residual value, depreciation, and amortization, and rent charges be disclosed in lease agreements.

Closed-Credit Disclosures: TILA and Regulation Z also require specific disclosures concerning credit terms of the transaction (e.g., the amount financed and finance charge) that must be provided before consummation of the transaction. For additional information on the disclosures and other requirements see TILA, 15 U.S.C. 41 et seq. and Regulation Z, 12 Part 1026.

State laws may require other disclosures and mandate that certain contract terms be conspicuous. Both RISCs and lease agreements must state the number, amounts, and timing of payments.

TILA and Regulation Z also include specific rules on disclosing negative equity on a trade-in in a financing transaction. Negative equity should either be used to reduce the customer's down payment or itemized under "Amounts Paid to Others." It should not be disclosed as part of the sales price of the vehicle.

TILA requires creditors to disclose the costs of ancillary products and services that the consumer elects to purchase as part of the transaction, but that are not required in order to obtain credit. These items are typically disclosed in the Itemization of the Amount Financed on the RISC. Simply including the un-itemized cost of aftermarket items such as vehicle etching, service contracts, rustproofing, and other items into the cash price of the vehicle constitutes "payment packing," an activity of great interest to the FTC and state Attorneys General.

Even if an aftermarket product is permitted under applicable state and federal law, failing to disclose these items in the Itemization of the Amount Financed could subject the dealer to regulatory scrutiny and/or lawsuit. For example, a dealer was sued in a class action alleging a TILA violation for including vehicle etching in the cash price of new motor vehicles without disclosing that it was doing so – or that the vehicle etching was optional.

Creditors must disclose additional information regarding the cost of credit, including the Total of Payments (in both credit sales and loans) and Total Sale Price (in credit sales only). In addition, creditors must also disclose the security interest (typically in the vehicle), the amount of any late fees that could be imposed, and whether the consumer may prepay the obligation without incurring penalties. The disclosures also must include a contract reference directing the consumer to the contract documents for additional information about the extension of credit. These disclosures and others that could apply to the transaction, along with the finance charge, APR, amount financed, total of payments and total sale price, must be segregated from all other information and may not include any information not directly related to the disclosures.

Pick-Up Payments: TILA governs disclosure of deferred down payments (also called “pick-up payments”), a practice in which the consumer agrees to make a portion of the contractual down payment at a time later than contract signing and vehicle delivery. A deferred portion of a down payment may be treated as part of the down payment if it is payable not later than the due date of the second otherwise regularly scheduled payment and is not subject to any finance charge. However, most lenders require in their dealer agreements a representation and warranty from the dealer that it has received the down payment in full prior to assigning the RISC to the lender. Thus, while TILA permits deferred down payments, a lender on the receiving end of this representation and warranty could require a dealer to repurchase a RISC for breaching it.

TILA provides several ways to disclose pick-up payments. A creditor may disclose pick-up payments either as part of the down payment or as a component of the amount financed. Other disclosure requirements may apply.

State laws also have provisions relating to deferred down payments. Some states require a separate disclosure of the deferred portion of the down payment on the RISC. Non-disclosure of the deferred portion on the face of the RISC may violate some states’ laws.



COMPLIANCE TIP

Every aftermarket product should be included in the Itemization of the Amount Financed.

TILA disclosures must reflect the legal obligation of the parties. If information necessary for the accurate disclosure is unknown, the disclosure may base the information on the best information reasonably known to the creditor and label the disclosures as estimates. In the case of a refinancing, new TILA disclosures must be provided for the refinanced transaction.

TILA also includes recordkeeping requirements. Creditors must retain evidence of compliance for two years after the disclosures are required to be made.

STATE DEVELOPMENTS

New York implemented the Commercial Finance Disclosure Law, SB 5470, as amended by S898, which requires providers of commercial financing to give consumer-style loan disclosures to potential recipients when a specific offering of finance is extended for certain commercial transactions of \$2.5 million or less. “Providers” include both lenders and brokers.

FTC CREDIT PRACTICES RULE

The FTC Credit Practices Rule has three major provisions.

First, it prohibits certain unfair contract provisions, such as making consumers assign their wages to get credit or a creditor taking a lien on household goods to secure payment.

Second, the rule prohibits “pyramiding” of late fees when a payment is considered late only because the payment did not include a late fee from the previous payment.

Third, the Credit Practices Rule also requires giving cosigners an FTC-mandated notice describing their potential liability if the consumer fails to pay. The notice must be given and signed by the cosigner before the cosigner becomes obligated on the agreement. A “cosigner” is different from a co-buyer, co-borrower, or co-applicant because a cosigner receives no tangible benefit from the agreement but undertakes liability as a favor to the main debtor who would not otherwise qualify for credit.

On the other hand, a co-buyer (one who shares in the purchased goods), a co-borrower (one who shares in the loan proceeds), or a co-applicant do receive benefits. Therefore, they generally are not considered cosigners under the Rule, and you are not required to provide the cosigner notice to them. A classic example of a cosigner is a parent cosigning for their child’s credit obligation. Many states have additional

requirements for cosigner notices so check with your local attorney on the cosigner notice required in your state. Recall that when two applicants for credit apply for financing, they are required to indicate on the credit application whether or not they intend to apply for joint credit.

ELECTRONIC SIGNATURES AND RECORDS

The federal Electronic Signatures in Global and National Commerce Act (the E-SIGN Act) and the state-adopted Uniform Electronic Transactions Act (UETA) were enacted to resolve uncertainty about whether electronic documents and signatures are as valid as paper ones. Both acts provide that electronic records and signatures have the same legal status as ink signatures and paper records. Under both, an “electronic record” is information “that is stored in an electronic or other medium and is retrievable in perceivable form” and an “electronic signature” is “an electronic sound, symbol, or process, attached to or logically associated with a contract or other record and executed or adopted by a person with the intent to sign the record.”

Neither act changes the disclosure or content requirements for documents under other law. The E-SIGN Act requires that consumers specifically consent to receiving disclosures that are required to be “in writing” electronically and provides specific requirements for obtaining such consent. Alternatively, one can provide such disclosures in paper form and avoid the consent procedure imposed by the E-SIGN Act.

Please note that because of limitations in their scope, the E-SIGN Act and UETA do not alter the documentation and signature requirements of Uniform Commercial Code Article 9, which provides the requirements for the customer to grant the creditor a security interest in the vehicle sold. Fortunately, Article 9 permits the use of electronic records and signatures to grant a security interest in substantially the same way as the E-SIGN Act and UETA would. So, the electronic records and signatures used in the customer’s financing contract that satisfy the E-SIGN Act and UETA requirements will also satisfy the Article 9 requirements for the contract.

As a result, a **consumer’s digital signature** on an electronic signature pad linked to an electronic document or their digital signature on a tablet used to provide the documents has the same legal effect as their ink signature on a paper document. A click-through to a website can also be an electronic signature. The electronic document can be stored in an electronic filing cabinet or vault and should be retained for a period of time equal to the retention period for a paper version of the same document. Under TILA, the consumer must receive a copy of the disclosures that the consumer can keep prior to the consummation of



DID YOU KNOW?

A consumer’s digital signature has the same legal effect as their ink signature on a paper document.

the transaction. [See more in Topic 11](#): Recordkeeping and Destruction of Records.

The UETA was not adopted in Illinois, New York, and Washington.

We recommend reviewing state law in these states for any additional requirements concerning the use of electronic signatures.

SERVICEMEMBERS CIVIL RELIEF ACT (SCRA)

Formerly called the Soldiers and Sailors Civil Relief Act, this law imposes a 6-percent rate cap on pre-existing secured credit, including vehicle credit sale or a loan, during the period of military service. These provisions apply to both the person in military service and their dependents with respect to obligations entered into by such persons before the service member was called to active-duty status.

The SCRA also allows service members to terminate pre-service automobile leases if they are called for military service of 180 days or longer. Service members who sign automobile leases while on active duty may be able to terminate an automobile lease and receive a refund of any lease amounts paid in advance if they are given orders for a permanent change of station outside the continental United States or to deploy with a military unit for a period of 180 days or longer.

A large auto lessor agreed to pay millions to settle a SCRA claim with the Department of Justice (DOJ) related to DOJ charges that the lessor failed to properly refund lease amounts paid in advance consisting of a pro rata portion of the lessee's capitalized cost reduction (minus manufacturer rebates or similar incentives, the payoff of negative equity or prior lease balances, payments for vehicle maintenance and other ancillary products, the amount of any acquisition fee, and any amounts paid for tax, title, and license).

In addition, the SCRA requires a creditor to file an affidavit with the court regarding whether or not a customer is in military service before obtaining a default judgement against a customer or whether the creditor is unable to determine whether the defendant is in the military. It also permits a court to stay (delay) the repossession of a vehicle in certain circumstances. It requires a court to review and approve any repossession or termination of a lease if the service member entered into the credit sale, loan, or lease and made a payment before entering military service. The court may delay the repossession or require the creditor to refund prior payments before repossessing. It can also appoint an attorney to represent the service member, require the creditor to post a bond with the court, and issue any other orders it deems necessary to protect the service member. The law also imposes special requirements



WHAT'S NEW FOR 2022?

The Uniform Electronic Transactions Act (UETA) was not adopted in Illinois, New York, and Washington. Review state law in these states for any additional requirements concerning the use of electronic signatures.

on a creditor accepting a voluntary surrender of a vehicle.

A large subprime auto finance creditor agreed to pay millions to settle a SCRA claim with the DOJ related to charges that the creditor failed to obtain court orders before repossessing motor vehicles owned by protected service members, preventing them from obtaining a court's review on whether their repossessions should be delayed or adjusted in light of their military service.

THE MILITARY LENDING ACT

The Military Lending Act (MLA) is a federal law that imposes limitations on the cost and terms of certain extensions of credit to service members and their dependents ("covered borrowers"). The MLA applies to "consumer credit" extended by a creditor to a "covered borrower."

For purposes of the MLA, "consumer credit" means "credit offered or extended to a covered borrower primarily for personal, family, or household purposes, and that is: (i) subject to a finance charge; or (ii) payable by a written agreement in more than four installments." There are only four narrow exceptions to this definition of consumer credit, along with a temporary exemption for credit cards: (i) residential mortgages; (ii) any credit transaction that is expressly intended to finance the purchase of a motor vehicle when the credit is secured by the vehicle being purchased; (iii) any credit transaction that is expressly intended to finance the purchase of personal property when the credit is secured by the property being purchased; and (iv) any credit transaction that is an exempt transaction for the purposes of Regulation Z. These narrow exceptions were not clearly defined in the MLA and are subject to interpretation.

In December 2017, the Department of Defense released guidance clarifying that whether a transaction qualifies for the purchase-money exceptions described above depends upon "what the credit beyond the purchase price of the motor vehicle or personal property is used to finance." More specifically, "financing costs related to the object securing the credit will not disqualify the transaction from the exceptions, *but financing credit-related costs will disqualify the transaction from the exceptions.*" The Department of Defense failed to define the term "credit-related cost," but provided two examples: Guaranteed Auto Protection insurance and credit insurance. **Various trade associations immediately petitioned the Department of Defense to withdraw its guidance, particularly due to its retroactive effect, and these items have since been excluded from the Department of Defense's interpretation.** This was a victory for service members who now have financial products to protect them from total vehicle loss.



UPDATE FROM 2021

On February 28, 2020 –The Department of Defense withdrew the limitation on selling GAP Insurance to Active Service Members from the MLA.

Efforts to obtain further clarification are ongoing.

Under the MLA, a “covered borrower” is a consumer, who, at the time the consumer becomes obligated on a consumer credit transaction or establishes an account for consumer credit, is a covered member or a dependent of a covered member. A “covered member” includes members of the armed forces on active duty or on active Guard and Reserve Duty, and their dependents. Dependents can include the spouse, in some cases a child, parent or parent-in-law, or an unmarried person in the legal custody of the military member.

The MLA provides various protections for “covered borrowers.” Those protections fall into two main categories: (1) a 36% Military Annual Percentage Rate (MAPR) cap, and (2) “other MLA terms and conditions,” including oral and written disclosure requirements and certain specified prohibitions and limitations, such as a prohibition against using the title of a vehicle as security for the consumer credit obligation. The MAPR is an all-inclusive APR that eliminates some prior “finance charge” exceptions under Regulation Z. For example, the MAPR calculation must include (a) fees/premiums charged for voluntary credit insurance, debt cancellation contracts, and debt suspension agreements, and (b) fees for any ancillary products sold in connection with the consumer credit.

In order to ensure that the terms of any consumer credit transactions entered into with covered borrowers meet the requirements of the MLA, the creditor must determine the covered borrower status of every applicant for consumer credit. Though the creditor is not required to use a specific method to determine covered borrower status, the MLA Regulations do allow a safe harbor for covered borrower status determinations. In order to obtain the safe harbor, creditors must either (1) directly or indirectly (perhaps through a service provider) verify the consumer’s covered borrower status through the MLA database, or (2) verify the consumer’s covered borrower status by using a consumer report obtained from a nationwide consumer reporting agency that has a statement, code, or indicator (if any) concerning the consumer’s covered borrower status. Doing so, and keeping a record of the findings, provides a safe harbor from liability under the MLA’s terms in such status determinations.

Violators of the MLA Regulations are subject to draconian penalties, including \$500 per violation in actual damages, in addition to punitive damages, equitable or declaratory relief, court costs, and attorney’s fees. Knowing violations are treated as misdemeanors, which can lead to fines or imprisonment. Also, violating contracts are void from the inception of the contract (that is, the creditor cannot collect any principal



COMPLIANCE TIP

Be aware of MLA Regulations to avoid heavy fines and even imprisonment.

or interest).

You should seek advice of counsel to determine whether the MLA applies to your transactions. In the event it does, generally try to avoid structuring deals that enable the customer to accept cash, ensure the total cost of financing the deal does not exceed the 36% MAPR, provide customers with required disclosures, and document the sale using a contract that does not include an arbitration clause.

CFPB SMALL DOLLAR RULE EFFECT ON AUTO LENDING

On October 5, 2017, the Consumer Financial Protection Bureau (CFPB) issued its final rule on Payday, Vehicle Title, and Certain High-Cost Installment Loans (the “Small Dollar Rule” or “Rule”). Although the Small Dollar Rule is targeted at short-term, high-interest rate loans (e.g., payday loans), the Rule has potential consequences for the auto financing industry. In February 2019, the CFPB issued a notice of proposed rulemaking with regards to mandatory underwriting provisions. On June 6, 2019, they issued a *final rule* to delay compliance date for the mandatory underwriting provisions to November 19, 2020. Recently, in July 2020, the CFPB issued the 2020 Final Rule. As currently written, the Rule applies to three types of consumer loans: (i) loans with a term of 45 days or less called “short-term loans,” (ii) balloon-payment loans, and (iii) loans charging an annual percentage rate over 36% that include a “leveraged payment mechanism,” such as a debit authorization. Covered short-term loans and balloon payment loans are subject to extensive and burdensome underwriting rules and a new type of credit reporting requirement. Covered leveraged payment loans are not subject to the underwriting and credit reporting requirements, but they are subject – along with covered short-term loans and balloon loans – to new disclosures that must be given before processing certain payments and limits on the number of payment attempts.

Note that, although the Rule is written in terms of “loans,” the term loan is defined to include any extension of credit and would, therefore, include retail installment sales.

The CFPB provided an exemption from the Small Dollar Rule for “certain purchase money security loans.” Specifically, the Rule does not apply to credit extended for the “sole and express purpose of financing a consumer’s initial purchase of a good, when the credit is secured by the property being purchased, whether or not the security interest is perfected or recorded.” In other words, if a consumer receives credit for the express purpose of purchasing a car, the car secures the transaction, and the amount financed is approximately equal to, or less than the cost of acquiring the car, then the transaction is excluded from the Rule.

However, there are two important limitations on this exemption: financing ancillary products and refinancing a purchase money transaction.

Concerning ancillary products, the CFPB noted that the purchase money exemption does not encompass “ancillary products that are being sold along with a vehicle,” but “are not themselves the good in which the lender takes a security interest as a condition of the credit.” Therefore, financing an ancillary product along with a car could mean that there’s no purchase money exemption for the transaction, if the transaction otherwise meets the definition of a “covered loan.”

Additionally, the CFPB expressly states in the commentary accompanying the Rule that the purchase money exemption does not extend to refinances of purchase money credit.

Therefore, if an auto finance transaction involves ancillary products or refinancing, then it could be covered by the Rule if the (i) term is 45 days or less, (ii) transaction has a balloon payment, or (iii) APR is over 36% and the transaction includes a leveraged payment mechanism.

Note that, besides the purchase money exemption, the Rule also contains an “accommodation” exemption for loans made by a lender who makes 2,500 or fewer covered short-term or balloon payment loans per year and derives no more than 10% of its receipts from such loans. As a result, some sellers of motor vehicles may be permitted to engage in a “de minimis” volume of covered loans, without application of the Rule’s requirements to such loans.

You should seek advice of counsel to determine whether the Rule applies to your transactions.

OFAC

The USA Patriot Act, administered by the U.S. Treasury Department’s Office of Foreign Assets Control (OFAC), mandates that no U.S. person (including auto dealers) can do any business — cash or credit — with persons or entities included on OFAC’s list of Specially Designated Nationals and Blocked Persons (SDN List). These are lists of persons or entities suspected of being associated with or funding terrorist organizations and other criminal enterprises. The list is frequently updated although a searchable version of the list is published on [OFAC’s website](#).

For compliance with the USA Patriot Act, you must run all of your customers – both cash and credit – against the SDN List (including the names of any individuals who directly or indirectly own 50% or more of any entity that is a party to a new transaction). You should also run service and parts customers who make unusual orders (e.g., high quantities



COMPLIANCE TIP

Run every customer against the OFAC SDN list for USA Patriot Act compliance.

of materials that could be used in making an explosive device) or who otherwise seem suspicious. You may conduct the search online yourself, or you can purchase a product from a credit bureau or an identity verification service to systematically check a customer against the current SDN List.

If you get a preliminary match, OFAC lists a series of steps to determine if you have a true match or a false positive. If you believe you have a true match after following those steps, you must call OFAC at their designated number, and you cannot do business with that person unless instructed otherwise. You must report each blocked transaction to OFAC (there is an optional form for [reporting blocked transactions](#)), and submit an annual report of all blocked transactions (using Form TD F 90-22.50 which can be found [here](#)).

CAR BUYER'S BILL OF RIGHTS

In 2006, California passed significant legislation, known as the “Car Buyer’s Bill of Rights,” affecting the way dealers sell and finance the purchase of motor vehicles. Since then, several states have passed their own versions of the Car Buyer’s Bill of Rights. These laws generally give consumers additional rights and may, among other things, require dealers in affected states to make additional written disclosures to consumers with respect to certain charges and aftermarket products, as well as providing standards for selling “certified” used vehicles.

You should consult with your attorney to ensure that your procedures are designed to comply with the requirements of the law of the jurisdiction applicable to the transaction.

SPOT DELIVERIES

Spot delivery refers to the practice of a dealer placing a consumer in a vehicle “on the spot” to make a sale – prior to obtaining a finance source’s approval to purchase the financing contract. The sale is made contingent upon the dealer obtaining financing for the purchase, typically by a finance source agreeing to buy a RISC signed by the customer and the dealer. Spot deliveries are regulated in many states, and in a few states are either prohibited or significantly restricted. State regulation of spot delivery varies greatly. Many states have specific requirements for terms on which spot deliveries may be conducted, disclosures that must be provided to consumers, and the form of the spot delivery agreement. For example, a few states require that the conditions for delivery be included in the RISC, while others require the spot delivery terms to be in a stand-alone document.

Also, consider whether the applicable law addresses certain spot delivery practices, such as:

- Limiting fees for miles driven by the customer
- Prohibiting the sale of the customer's trade-in vehicle until the deal is finalized
- Limiting the number of days to obtain financing approval

Your dealership should also have procedures designed to ensure that spot deliveries are conducted in accordance with applicable law.

Failure to use appropriate documentation and procedures for spot deliveries invites lawsuits from consumers and the attention of regulators. In many states, botched spot deliveries may result in claims under state laws prohibiting unfair and deceptive acts. You should consult an attorney and know your state's laws on spot deliveries before engaging in the practice.

SPOT AGREEMENTS

Except in states where the spot delivery terms and conditions are required to be in a stand-alone document, it is good practice to incorporate the spot delivery terms and conditions in the RISC. This minimizes the risk that a consumer will be able to require your dealership to honor the terms of the RISC even if no financing source has agreed to purchase the RISC. Even in states where spot deliveries are unregulated, the spot delivery terms and conditions should always be agreed upon in writing. Without a signed spot agreement, the dealer will have signed an unconditional RISC with a buyer for the purchase and financing of a vehicle. If the dealer can't sell the RISC, the dealer is obligated to honor the deal unless it has a spot agreement demonstrating that the parties agreed that the deal could be unwound.

Generally, spot agreements permit either the dealer or the consumer to unwind the deal if the dealer cannot find a financing source willing to purchase the contract on the terms set forth in the RISC.

In the event that a sale is unwound and the dealer and the consumer elect to "re-contract" by entering into a new sale on different terms, it is generally a good practice to have the consumer sign a document that memorializes the fact that the parties have agreed to cancel the prior contract and enter into a new transaction. This helps a dealer



COMPLIANCE TIP

Consult an attorney and know your state's laws on spot deliveries.

to demonstrate that the consumer made a voluntary decision to sign the new contract. It is also a good practice to conduct another menu transaction when re-contracting an unwound spot deal and to keep all the documentation from both transactions together in one master deal jacket in case an issue comes up later.

Dealers should never backdate a new contract to the original date of vehicle delivery. This practice is likely to violate TILA disclosure requirements which mandate that finance charges can only accrue from the date of consummation. If the contract is backdated, a plaintiff's attorney could argue that the date of consummation was the date the customer signed, meaning that the customer will have paid interest for the days between the date on the contract and the date it was consummated and, as a result, that the APR and finance charge disclosures are incorrect. Class actions have been brought against dealers who backdate new contracts on unwound spot deals.

A pattern of numerous unwinds of spot deals may give plaintiffs' lawyers or regulators grounds to claim the dealer is engaging in "yo-yo financing," which can be a deceptive trade practice under Section 5 of the FTC Act or state law. It is a good practice to monitor what percentages of your spot deals are unwound. If you see the percentage rising, investigate and train your sales and F&I officers on what types of deals you believe your lenders will buy. **A dealer should be prepared to show that the dealership made a good faith effort to get the original deal financed with multiple finance sources.**

Many of the principles applicable to spot deliveries in a sale transaction would apply to a lease transaction, though some terms and conditions of the spot delivery might change based on state law. Any forms used to document the terms of the lease spot delivery would need to reflect those changes.

THE FEDERAL ODOMETER LAW

This law requires sellers of motor vehicles to disclose to buyers in writing the odometer reading of the vehicle being sold and prohibits tampering with odometer devices. The buyer must review and sign the disclosure. For used car sales, the odometer reading at the time of transfer must be disclosed on the title. Specific additional disclosures are required by this law and other applicable regulations, plus there are recordkeeping requirements. State laws also govern registration and titling requirements, with additional requirements at the federal level.

For example, for decades the National Highway Transportation Safety



COMPLIANCE TIP

Be prepared to show that the dealership made a good faith effort to finance a deal with multiple finance sources.

Administration (NHTSA) required a “wet signature” on an odometer disclosure for sales of vehicles 10 model-years old or less. However, in September 2019, NHTSA finally allowed states to develop their own odometer disclosure forms that may use an e- signature. It is important to note that in some states, such as California, laws still prevent fully electronic vehicle sales.

INTERNET SALES

State laws have not really caught up with the evolving online vehicle sales and financing platforms, but dealers are able to increase sales by selling to out-of-state buyers using a variety of web-based tools. When an out-of-state dispute arises, the buyer will often attempt to sue the dealer in the buyer’s home state and claim that the dealer should have been licensed in their home state and/or that the law of their home state (including those laws addressing contract disclosures, and related consumer credit requirements and limitations) applies to the transaction. This could potentially trigger scrutiny by state regulators too. Also check your dealer agreements with your lenders. Many dealer agreements contain representations by you that the deal has been conducted entirely within your dealership, and thus may subject your deal to repurchase.

Note that one area where guidance from the states does exist in connection with Internet sales is advertising. Many states do have specific rules in connection with online advertising. So, it is important to consult a knowledgeable attorney on how to minimize your risks when selling to out-of-state customers through an Internet sale process.

STATE LAW RESTRICTIONS ON FEES

State laws also limit or restrict fees that may be charged by a dealer, especially when the vehicle purchase will be financed in a credit sale. Some fees are only applicable to credit sales (e.g., application fees, credit investigation fees, lien recording fees, etc.). State retail installment sales acts and consumer credit codes often limit or prohibit the kinds of fees that may be charged in a credit sale. Some of these fees may also be treated as a finance charge under federal law, state law, or both.

Some fees are charged in both cash and credit sales. Document preparation (“doc fees”) is a good example of a fee that dealers typically charge in both cash and credit sales. As a general rule, a dealer should not charge doc fees in a credit sale unless the dealer also charges the same doc fee in a cash sale. This is because charging a doc fee only for credit sales means that the doc fee will be treated as a finance charge under federal law, and that complicates things for the dealer and any assignee of the finance contract. In many states, a doc fee that is

a finance charge would be subject to rebate upon prepayment of the finance contract. In addition, the systems responsible for creating the federal Truth in Lending disclosures on a RISC will not be able to calculate the impact of the doc fee on the finance charge and APR disclosures. So, a dealer that charges a doc fee only on credit sales is likely to understate the finance charge and APR in violation of federal law, and possibly state law as well.

Even where doc fees are charged on both cash and credit sales, state law may limit the doc fee to a specific dollar amount or to a reasonable amount in relation to the actual costs of preparing and filing documentation. A great deal of litigation has occurred relating to the propriety of doc fees charged by dealers in states where no specific amount is provided by law. Know your state law on permissible doc fees and consult your local attorney if no specific amount is permitted, or the doc fees are limited to being “reasonable.”

You should consult with your attorney to ensure that all fees comply with applicable state law.

STATE SINGLE DOCUMENT LAWS

A single document rule requires that all documents, or certain documents, evidencing the sale and financing transaction between the dealer and the buyer be contained in one document. The state single document rules take varying forms. Usually, however, a state’s rule will permit multiple pages. You should make certain that you know whether your state has a single document rule and how it applies to your documentation of a deal.

CASH SALES

If a customer purchases a vehicle with cash or cash equivalents in excess of \$10,000, you must file IRS/FinCEN Form 8300 within 15 days after receiving the cash payment. This form can now be filed electronically. For this purpose, “cash” is not only currency but currency equivalents such as traveler’s checks, cashier’s checks, bank drafts, and money orders, if they have face amounts of \$10,000 or less (note that monetary instruments with a face value of more than \$10,000 are not considered cash because the financial institution issuing the instrument is required to report the transaction). A personal check and a bank check representing the proceeds of an auto loan made to the customer by the bank are not considered cash or cash equivalents because they are part of an ongoing relationship between the customer and the bank. If the customer conducts a “related transaction” (another transaction within 24 hours such as buying another vehicle for cash, or transactions more than 24 hours apart if you know, or have reason to know, that each is



DID YOU KNOW?

If a customer purchases a vehicle with cash or cash equivalents in excess of \$10,000, you must file IRS/FinCEN Form 8300 within 15 days.

one of a series of connected transactions), then you must total all the cash and cash equivalent payments from both transactions for purposes of calculating whether you collectively meet the greater than \$10,000 threshold for filing IRS/FinCEN Form 8300. By January 31 of the following calendar year, you must send a notice to the customer informing him or her that you filed an IRS/FinCEN Form 8300 during the prior calendar year.

The penalties for failure to comply with IRS cash reporting laws can be devastating if the IRS deems it to be intentional or in reckless disregard of the dealer's obligations. Intentional disregard is the knowing or willful failure to file. For forms required to be filed on and after January 1, 2019, merely failing to file on time subjects a dealer to a penalty of \$270 per instance (i.e., a negligent violation), up to an annual aggregate limit of \$1,091,500 for businesses with gross receipts not exceeding \$5 million and \$3,275,500 for businesses with gross receipts exceeding \$5 million. Intentional disregard raises the maximum penalty to \$27,290 per instance or the cash received by the dealer in the transaction, up to a maximum of \$109,000. Note that the IRS adjusts the penalty amounts for inflation annually. A dealer should adopt a written policy to educate employees on cash reporting (including the definition of cash and cash equivalents), the dealer's obligations, and how to avoid illegally structuring transactions with the person providing the cash. A dealer can also file a Form 8300 to report a suspicious transaction, even if the transaction does not meet the \$10,000 threshold, if it suspects a customer is structuring cash payments in a manner intended to avoid reporting requirements. The criminal penalties for money laundering, the signs of money laundering, and the dealer's written policy on reporting such suspicious transactions should also be a part of your compliance plans. Consider training, monitoring, and using the DMS system in the background to flag transactions based on types of funds received.

DISCLOSURE OF STARTER-INTERRUPT AND/OR GPS TECHNOLOGY

A dealer who fails to fully disclose and obtain the consumer's consent to install and use the starter interrupt and GPS technology for payment assurance purposes may risk violation of federal and state law. At the very least, the disclosure must clearly and concisely explain that the technology is installed on the vehicle as a condition of the extension of credit, describe how the technology will be used, and obtain the consent of the buyer to the use of the technology.

While using starter interrupt or GPS technology is legal in most jurisdictions, most retail installment contracts do not allow a creditor to impose a charge for the installation and use of the technology when such



COMPLIANCE TIP

Comply with IRS cash reporting laws to avoid devastating penalties.

installation and use is a condition of the credit extension. In addition, regulators frown on such charge and therefore, dealers that assess charges for installation and use of the technology in these instances face potential litigation risk and regulatory scrutiny.

Consult your attorney for guidance relating to disclosure requirements, best practices and/or legal limitations on usage.

FAILING TO OBTAIN THE CUSTOMER'S SIGNATURE

If you fail to obtain a customer's signature on a RISC, Buyer's Order, or other document, the dealer should not sign the customer's name.

RECOMMENDED PRACTICES

- 1. Always have a “permissible purpose” to pull a consumer's credit report.** A signed authorization from the consumer (generally on a credit application) is strongly preferred but not required (except in certain states) when both the dealer and customer understand they are close to completing a credit transaction. Most credit applications, which are usually signed by the consumer, contain language where the consumer agrees that you can access their credit report. Check your agreements to confirm whether this language is included. Finance sources usually obligate dealers to provide to credit applicants a list of the names and addresses of the finance sources to which the dealer may send their credit application to avoid being deemed a consumer reporting agency under FCRA.
- 2. Give or send a risk-based pricing notice or credit score disclosure exception notice to every applicant for credit.** You can obtain the consumer's credit score and the distribution of credit scores for the scoring model used from a credit bureau, or a third-party source such as Dealertrack. The only exception is for customers who do not have a credit score, and they should receive a separate notice for consumers without a credit score. Even if you don't typically pull credit on applicants, you may have to buy a credit score to give the credit score disclosure notice to all credit applicants to meet your obligation to your lenders. Give the notice to the consumer as soon as possible after getting the credit score information necessary to complete the credit score disclosure notice form. Keep a copy in the deal jacket.
- 3. Send adverse action notices when required.** Remember to send an adverse action notice when you decline credit or when unwinding a spot deal, for example. Note that adverse action notices require



RECOMMENDED PRACTICE

Always have a “permissible purpose” to pull a consumer's credit report.



RECOMMENDED PRACTICE

Give or send a risk-based pricing notice or credit score disclosure exception notice to everyone who applies for credit.



RECOMMENDED PRACTICE

Be sure to send adverse action notices when they are required.

inclusion of a consumer's credit score and credit score disclosures including up to four to five key factors that adversely affected the credit score – if the credit score was a factor in the adverse action.

4. **Consider adopting, implementing, and monitoring compliance with an ECOA/Fair Lending policy.** Staff training and monitoring buy rate markups can be a part of the policy. One good practice, originally developed by the Department of Justice (DOJ), is to implement a consistent buy rate markup amount for all customers and permit markdowns only, based on significant, non-discriminatory, pre-identified legitimate business reasons. The reasons should be documented in the deal jacket to demonstrate the legitimacy of the action should a finance source or regulator audit the dealer's practices. This documentation should be a purely internal document and not something to give to the customer. This approach is the foundation of the NADA-NAMAD-AIADA Fair Credit Compliance Policy and Program Compliance Form ("NADA Form") which closely tracks not only the approach of the DOJ but also provides a list of the specific reasons it approved in the case settlements it entered into in 2007. You can obtain a copy of the NADA Form from NADA.
5. **Do not charge credit customers higher prices than cash customers on vehicles or aftermarket products.** Be prepared to show there is no negative purchase price differential for credit as opposed to cash customers. Use a menu-selling process for aftermarket items to show you consistently offer products to all consumers at the same prices. Comply with Car Buyer's Bill of Rights and/or other applicable state law requirements for disclosures of aftermarket products.
6. **If spot deliveries are permitted in your state, always use a spot agreement containing terms permitted or required by your state.** Include language that gives both you and the buyer the right to unwind or re-contract if you cannot obtain financing approval for the original contract on the terms set forth in the RISC. Your attorney should review and approve your form spot agreement for compliance with your state's laws. Track your percentage of unwound spot deals. A significant percentage can lead to claims of deliberate "yo-yo" financing by the dealership which some courts have held to be an unfair trade practice.
7. **Document the re-contracting of an unwound spot deal.** When you re-contract a spot deal, do not backdate the new contract the customer is signing. Date the new contract on the day when both



RECOMMENDED PRACTICE

Consider adopting, implementing, and monitoring compliance with an ECOA/Fair Lending policy.



RECOMMENDED PRACTICE

All customers should be charged the same prices, regardless of whether they pay cash or use credit.



RECOMMENDED PRACTICE

Use the terms permitted or required by your state when creating a spot agreement for spot deliveries.



RECOMMENDED PRACTICE

Document the re-contracting of any unwound spot deal.

parties sign. And don't forget to give the customer an adverse action notice for unwinding the original contract.

- 8. Be able to show customers how they can quickly thaw their frozen credit files.** For customers who have placed security freezes on their credit files, have a sheet of paper available containing the phone numbers of all three national credit bureaus (Equifax, Experian, and TransUnion) for the customer to call to temporarily “thaw” their credit files so that you can pull a credit report on the customer. This will require the customer to have available the PIN issued to them by the credit bureau when they froze their credit file. It is not advisable to take the customer's PIN or offer to make the calls for the customer. If you spot deliver or sell a vehicle to a customer with a frozen credit file, proceed with extreme caution. Consider obtaining additional information, such as a pay stub, bank statement, or other evidence of the customer's creditworthiness, and be especially diligent when verifying the customer's identity. Few lenders will purchase a contract for a customer on whom they cannot pull credit.

- 9. Provide full disclosure and obtain the customer's consent to install and use starter interrupt or GPS technology for payment assurance purposes.** Be transparent about the GPS technology and the disclosure must at minimum explain that the technology is installed on the vehicle as a condition of the extension of credit, describe how the technology will be used, and obtain the consent of the buyer to the use of the technology.

ADDITIONAL RESOURCES

Fair Credit Reporting Act and Regulation V:

<http://www.consumer.ftc.gov/articles/pdf-0111-fair-credit-reporting-act.pdf>

<https://www.consumerfinance.gov/policy-compliance/rulemaking/regulations/1022/1/>

Equal Credit Opportunity Act and Regulation B:

<https://uscode.house.gov/view.xhtml?req=granuleid%3AUSC-prelim-title15-chapter41-subchapter4&edition=prelim>

<https://www.consumerfinance.gov/policy-compliance/rulemaking/regulations/1002/>

Consumer Leasing Act and Regulation M:



RECOMMENDED PRACTICE

Be able to show customers how they can quickly thaw their frozen credit files.



RECOMMENDED PRACTICE

Before installing and using starter interrupt or GPS technology for payment assurance, provide full disclosure and get the customer's consent.

<https://uscode.house.gov/view.xhtml?req=granuleid%3AUSC-prelim-title15-chapter41-subchapter1-partE&edition=prelim>

<https://www.consumerfinance.gov/policy-compliance/rulemaking/regulations/1013/1/>

Truth in Lending Act and Regulation Z:

<https://uscode.house.gov/view.xhtml?req=granuleid%3AUSC-prelim-title15-chapter41-subchapter1&edition=prelim>

<https://www.consumerfinance.gov/policy-compliance/rulemaking/regulations/1026/1/>

Car Buyer's Bill of Rights

California:

http://www.consumer.ca.gov/publications/car_buyer_rights.shtml

Minnesota:

<http://www.mada.org/Portals/70/Documents/Legal/Consumer/BillRightsBulletin.pdf>

New York State Department of Financial Services Fair Lending Guidance:

<https://www.dfs.ny.gov/about/press/pr1808231.htm>

Servicemembers Civil Relief Act:

<https://www.justice.gov/servicemembers/servicemembers-civil-relief-act-scra>

The Risk-Based Pricing Rule:

<https://www.ecfr.gov/cgi-bin/text-idx?SID=bf7f3ee14648fb263a78182a8c1c6420&node=16%3A1.0.1.6.74&rgn=div5>

Information about Filing IRS Form 8300 on cash deals with cash payments over \$10,000:

<http://www.irs.gov/pub/irs-pdf/p1544.pdf>

Office of Foreign Assets Control

<https://www.treasury.gov/resource-center/sanctions/Pages/default.aspx>

SAMPLE ADVERSE ACTION NOTICE FORM

The following is a sample of one form of adverse action notice appropriate for use in certain circumstances. There are a number of other model forms that may be more appropriate for a given transaction. Consult your counsel for advice on which model form, if any, could serve as a template for your dealership.

<https://us.dealertrack.com/wp-content/uploads/sites/2/2020/08/Sample-Adverse-Action-Form-1.jpg>

DATA SAFEGUARDS AND IDENTITY THEFT PROTECTION

Dealerships need to protect customer information against data breaches and theft and protect themselves by verifying each customer's identity.

DID YOU KNOW?

Identity theft and data breaches affect millions of consumers each year. Don't let them happen at your dealership.

COMPLIANCE TIP

An alternative to Bring Your Own Device (BYOD) is to supply your employees with corporate-owned and issued devices, which gives employers the greatest degree of control and access over the business-related data that is stored on the device.

WHAT'S NEW FOR 2022

In March 2019, the FTC proposed strengthened provisions for the FTC Safeguards Rule. The FTC has not issued final guidance on the amendments to the FTC Rule, but we advise that you stay up to date on any potential changes in the law by consulting your counsel.

RECOMMENDED PRACTICE

Be sure to integrate checkpoints for federal Red Flag Rule and OFAC requirements into your sales process for customer identification verification.

BREAKOUT SECTIONS

1. Important Laws and Regulations:
 - The FTC Safeguard Rule
 - Employee Oversight
 - Information Systems
 - Bring Your Own Device (BYOD) Risks
 - Record Retention and Disposal
 - State Data Security Laws
2. Identity Theft and Fraud Prevention:
 - Social Security Number Protection Laws
 - FTC Red Flags Rule
 - The Address Discrepancy Rule
 - Credit and Debit Cards: Fraud Prevention
3. Recommended Practices
4. Additional Resources

Identity theft and data breaches continue to be serious and ongoing issues for consumers, affecting millions each year.

Small to Midsize Businesses (SMB) such as auto dealerships, may face many of the same cyber security threats as larger organizations, especially when the SMB maintains sensitive information about consumers.

Should a breach happen, chances are good that the response will be costly. Businesses suffering a data breach are faced with a myriad of costs including, but not limited to, those related to systems remediation, legal, public relations, forensics, communications, regulatory, diversion of management and employee time, loss of customers, and expenses to preserve the company's name and reputation in the community.

In this Topic, we discuss laws and regulations relating to a dealer's obligations to safeguard and securely dispose of customer information, and to verify customer identities. Additionally, the risks to dealers from certain forms of identity theft are changing dramatically as lenders look to dealers to repurchase contracts – even contracts that have paid for a period of time – entered into with identity thieves.

IMPORTANT LAWS AND REGULATIONS

THE FTC SAFEGUARDS RULE

The FTC's Safeguards Rule, which was recently amended in a way that incorporates additional information security requirements, requires auto dealers to ensure the security and confidentiality of their customers' personal information by using appropriate administrative, technical, and physical safeguards. The Rule also requires auto dealers to take reasonable steps to ensure that affiliates and service providers safeguard the customer information provided to them.

Under the Safeguards Rule, an auto dealer must develop, implement, and maintain a comprehensive written information security program that contains administrative, technical, and physical safeguards that are appropriate to the dealership's size and complexity, the nature and scope of its activities, and the sensitivity of the customer information at issue (Information Security Program). The Safeguards Rule requires that the Information Security Program be designed to (1) ensure the security and confidentiality of customer information; (2) protect against any anticipated threats or hazards to the security or integrity of such information; and (3) protect against unauthorized access to or use of such information that could result in substantial harm or inconvenience to any customer.

The dealer's Board of Directors (or its highest governing authority) must



DID YOU KNOW?

Identity theft and data breaches affect millions of consumers each year. Don't let them happen at your dealership.

approve the initial Information Security Program and take responsibility for it (which includes receiving reports on the program and taking appropriate action where required). A senior officer must be appointed to be the Information Security Program manager responsible for developing, overseeing, implementing, training on, updating, and administering the Information Security Program, but the final responsibility remains with the Board of Directors or the highest governing authority.

An Information Security Program must include certain basic elements to ensure it addresses relevant aspects of a dealer's operations. Among other things, the Information Security Program must:

- Describe how the program will protect customer information – both in paper and electronic format – and protect against anticipated threats to information security.
- Designate a specific employee to coordinate the Information Security Program.
- Identify and assess the risks to customer information in each relevant area of the company's operation and evaluate the effectiveness of the current safeguards for controlling these risks in each relevant area of operations (i.e., employee training, information systems, prevention/response measures for attacks).
- Design and implement safeguards to control risks identified in the risk assessment, and regularly monitor, test, and update them.
- Select service providers that can maintain appropriate safeguards, make sure your contract requires them to maintain safeguards, and oversee their handling of customer information.
- Include a documented security incident and data breach response plan in your Information Security Program for use in the event of any irregularity or in the event any consumer information is lost, stolen, or compromised.
- Test, evaluate, and adjust the program in light of relevant circumstances, including changes in the firm's business or operations, or the results of security testing and monitoring.

On October 27, 2021, the FTC issued significant updates modifying the Safeguards Rule in many relevant respects, including generally:

- additional guidance on development and implementation of the required written information security program, including in the areas of access control, authentication and encryption.

- additional focus on accountability in terms of board reporting requirements.
- exemptions for entities collecting information on fewer than 5,000 consumers.
- and additional defined terms and examples.

The final rule requires designating a single “qualified individual” to coordinate the information security program, albeit without identifying or defining specific qualifications (contrasting with the prior option to designate more than one person for this function). The required written information security program must be based on periodic and documented risk assessment and risk mitigation plans, with specific additional requirements as to what must be included: a) criteria for the evaluation and categorization of identified security risks or threats; b) criteria for the assessment of information security, and c) requirements describing how identified risks will be mitigated or accepted based on the risk assessment and how the information security program will address the risks.

Security training requirements are also enhanced under the final rule. All personnel must receive awareness training that is updated as appropriate in view of the risk assessment. Information security personnel must be provided training and updates that is “sufficient to address relevant security risks” and the organization must verify that key information security personnel are keeping their subject matter knowledge current.

Specific requirements have also been added for the written incident response plan. This documentation must cover a) plan goals; b) internal response processes; c) roles, responsibilities, and levels of decision-making authority; d) communications and information sharing; e) identification of remediation requirements; f) of any identified weaknesses in information systems and associated controls; g) event and response documentation and reporting; and h) evaluation and revision of the plan following a security event.

As with the risk assessment and the incident response plan, the report to the Board of Directors also has specific content requirements in the final rule. The report, to be delivered at least annually, must include a) overall status of the security program and compliance with it and, b) “[material matters related to the information security program, addressing issues such as risk assessment, risk management and control decisions, service provider arrangements, results of testing, security events or violations and management’s responses thereto, and recommendations for changes in the information security program.”

The final rule requires a significant slate of other specific security controls, although there may be exceptions available based on compensating controls in certain cases. These controls include:

- multi-factor authentication for consumers and the covered entity's internal users.
- physical access controls for customer information repositories or systems.
- limitation of access to customer information in accordance with "need-to-know".
- encryption of customer information, in transit and at rest.
- inventory and classification of data.
- adherence to secure software development practices (this applies both to internally developed applications and evaluation of third-party applications).
- formal management of I.T. changes to control security risk.
- logging and monitoring of systems to detect abuse by authorized users.
- penetration testing (at least annually) and vulnerability assessment (at least semi-annually); and,
- secure disposal of customer information within two years of last use and more generally, adherence to data minimization principles.

The final Safeguards Rule also expands the security measures required in connection with third party service providers. Although the prior version of the rule already required selection of service providers capable of maintaining appropriate safeguards for customer information and inclusion of contractual obligations with service providers requiring these safeguards, the final rule requires a periodic assessment of service providers based on risk in relation to the continued adequacy of their safeguards.

The timeline for compliance with the amended Safeguards Rule is staggered, with specific requirements relating to designation of a single qualified individual, written risk assessment plans, penetration testing, vulnerability assessment testing, periodic assessments of service providers, and written incident response plans becoming effective one year after the Final Rule's publication in the Federal Register, which

was December 9, 2021. All other requirements of the Final Rule will be effective within 30 days following publication of the Final Rule in the Federal Register (i.e., January 10, 2022).

EMPLOYEE OVERSIGHT

The FTC's consent decrees have made clear its expectation that businesses engage in certain practices as a baseline for safeguarding information. Among specific security requirements cited by the FTC were the following:

- Checking references or doing background checks before hiring employees who will have access to customer information and doing so in a way that comports with FTC guidance.
- Asking every new employee to sign an agreement to follow your company's confidentiality and security standards for handling customer information.
- Limiting access to customer information to employees who have a business reason to see it. For example, give employees who respond to customer inquiries access to customer files, but only to the extent they need it to do their jobs. Very few people in your dealership need access to all customer information and you should limit permissions accordingly.
- Controlling access to sensitive information by requiring employees to use "strong" passwords that must be changed on a regular basis. (Tough-to-crack passwords require the use of at least six characters, upper- and lower-case letters, and a combination of letters, numbers, and symbols.)
- Using password-activated screen savers to lock employee computers after a short period of inactivity.
- Developing policies for appropriate use and protection of laptops, PDAs, cell phones, or other mobile devices. For example, make sure employees store these devices in a secure place when not in use. Also, consider that customer information in encrypted files will be better protected in case of theft of such a device. Encrypt customer information wherever it is located.

The FTC has found that failing to have a defensible password security policy or permitting "weak" administrative passwords such as common words with no capitalization (e.g., "password"), numbers, or symbols (e.g., "12345") can constitute inadequate data security. The FTC also faulted a leading social networking provider for storing and sending passwords in

plain text emails.

As reflected in the changes to the Safeguards Rule discussed above, the FTC has also focused on employee training as a key element of an Information Security Program. Dealers should train employees to take basic steps to maintain the security, confidentiality, and integrity of customer information. Some protections may include:

- Locking rooms and file cabinets where records are kept.
- Using complex passwords and not sharing or openly posting employee passwords in work areas.
- Encrypting sensitive customer information when it is transmitted electronically via public networks.
- Not clicking on email links or attachments from unknown sources (phishing).
- Referring calls or other requests for customer information to designated individuals who have been trained in how your company safeguards personal data; and
- Reporting suspicious attempts to obtain customer information to designated personnel.

In addition to training employees, ensure that there is proper oversight and supervision, including:

- Developing policies for mobile devices and employees who use personal devices to make certain that those devices are secured. One way to do this is by using a Mobile Device Management (MDM) solution, which can be used to enforce mobile device policies, ensure secure communications and monitor and track activity.
- Developing policies for employees who telecommute. For example, consider whether or how employees should be allowed to keep or access customer data at home. Also, require employees who use personal computers to store or access customer data to adhere to secure system configuration and use policies, including for example using anti-malware protection.
- Imposing disciplinary measures for security policy violations including termination of employment.
- Triggering procedures as soon as possible, including by using automated mechanisms, to prevent terminated or departing

employees from accessing customer information.

INFORMATION SYSTEMS

Information systems include hardware and software, networks, servers, operating systems and more, performing functions involving information processing, storage, transmission, retrieval, and disposal. Replace all systems that are no longer supported and make sure your antivirus, anti-malware, firewall, and other security software is up to date at all times (other kinds of software should also be updated and patched promptly).

Here are some suggestions on maintaining security throughout the lifecycle of customer information, from data entry to data disposal.

Know where sensitive customer information is stored, both on your information systems and with service providers, and ensure that it is stored securely. Know its life cycle throughout your organization. Document this information; such documentation is often referred to as a “data map” or “data flow” diagram—the format is not important as long as it has the basic information about what data goes with what systems, and as long as it can be understood by legal and I.T. personnel. Make sure only authorized employees have access. For example:

- Ensure that storage areas are protected against destruction or damage from physical hazards, like fire or floods.
- Store physical records in a room or cabinet that is locked when unattended.
- When customer information is stored on a server or other computer, ensure that the computer is accessible only with a “strong” password and is kept in a physically secure area.
- Place customer information on a separate secure server or in a secure cloud-based server. Limit permissions and require additional access requirements (two-factor authentication) such as a randomly generated token number and additional password to be able to access the server.
- Where possible, avoid storing sensitive customer data on a computer with an Internet connection. It is a good practice to provide “read only” access to customer information and disable the ability to download customer information onto third-party devices (USBs, external hard drives, etc.).
- Maintain secure backup records and keep archived data secure by storing it off-line and in a physically secure area.



COMPLIANCE TIP

Find out what you should include in your dealership’s plan for handling customer information.

- Maintain a careful inventory of your company's computers, servers, and any other equipment on which customer information may be stored.
- Monitor employees accessing customer information in both paper and electronic format. You should review the monitoring regularly to detect any unusual spikes in activity and quickly find out the reason.
- Get a static IP address from your Internet Service Provider. This will keep your IP address from changing and enable sites like Dealertrack to only accept requests for customer information from your trusted IP address. This can be a major protection in the event employees' usernames and passwords are compromised.
- Use a cloud-based proxy server or a software-based proxy server to prevent users from going to sites that are associated with viruses, malware, or that are otherwise insecure.

Take steps to ensure the secure transmission of customer information. For example:

- When you transmit credit card information or other sensitive financial data, make sure you are using a reasonably current encryption protocol (e.g., TLS 1.2) to secure connections, so that the information is protected in transit.
- If you collect information online directly from customers, make encrypted transmission automatic. Caution customers against transmitting sensitive data, like account numbers, via email or in response to an unsolicited email or pop-up message.
- If you must transmit sensitive data by email over the Internet, be sure to use encryption.

Do due diligence and obtain appropriate assurances from third-party service providers who have access to your customer information and make sure their standards for protection are at least as comprehensive as yours. Reserve the right to do security audits of third-party vendors for compliance with required security standards. Make sure they are obligated to provide you with prompt notice in the event they experience a security incident that could compromise your customer information.

Dispose of customer information in a way that ensures it can't be accessed or recovered and, where applicable, consistent with the FTC's Disposal Rule. See Topic 11: Recordkeeping and Destruction of Records for more information.

Maintain up-to-date and appropriate programs and controls to prevent unauthorized access to customer information. Be sure to:

- Check with software vendors regularly to get and install patches that resolve software vulnerabilities.
- Use antivirus, anti-malware, and anti-spyware software that updates automatically.
- Maintain up to date firewalls.
- Regularly ensure that ports not used for your business are closed; and
- Promptly pass along information and instructions to employees regarding any new security risks or possible breaches.

Use appropriate oversight or audit procedures to detect the improper disclosure or theft of customer information. It's wise to:

- Know the life cycle and path of information that comes into your network. Monitor for any irregularities which may indicate an intruder has gained access to your system.
- Keep logs of activity on your network and monitor them for signs of irregular activity or unauthorized access to customer information.
- Use an up-to-date intrusion detection system to alert you of attacks.
- Monitor both in- and out-bound transfers of information for indications of a compromise, such as unexpectedly large amounts of data being transmitted from your system to an unknown user.
- Insert dummy accounts into each of your customer lists and monitor the dummy accounts to detect any unauthorized contacts or changes.
- Assess the vulnerability of your website and computer network to commonly known and reasonably foreseeable attacks, such as SQL injection attacks. Arrange for penetration testing by an independent security specialist or firm.
- Implement simple, free, or low-cost, and readily available security defenses to SQL and similar attacks.
- Use readily available security measures to monitor and control connections from your network to the Internet.

- Prevent users from downloading “P2P” file-sharing network software that can allow any network user to access other users’ data servers.
- Employ reasonable measures to detect unauthorized access to consumer information such as by keeping log events, paper file access records, and other records of persons accessing consumer information. Watch for changes in users’ access behavior. If a user’s access to customer records increases unexpectedly, quickly find out why.
- Configure systems to preclude downloading of customer information to portable media such as USB drives or external hard drives. Ideally, customer information should remain on a server with read-only access on user devices.
- Conduct regular audits of your security system and operations to determine the effectiveness of your Safeguards program and to correct any deficiencies; and
- Make customer information “read only” and not downloadable to any remote devices such as cell phones or tablets. These devices are typically harder to secure and should not have customer information retained in their hard drives.

Take steps to preserve and protect customer information in the event of a security incident or data breach in accordance with your Incident Response Plan which must be part of your Safeguards Information Security Program. The Incident Response Plan should consider the elements identified above as required by the Safeguards Rule, as well as:

- Taking immediate action to secure any information that has or may have been compromised. For example, if a computer connected to the Internet is compromised, disconnect the computer from the Internet but do not unplug it so you can make a forensic copy. Do the same for infected servers.
- Preserving and reviewing files or programs that may reveal how the breach occurred.
- If feasible and appropriate, bringing in security and forensics professionals to help assess the breach as soon as possible.
- Preassigning responsibilities under the incident response program to specific individuals at the dealership so a response team can be quickly assembled and begin to take action immediately.
- Notifying consumers, regulators, law enforcement, and/or businesses

in the event of a security breach:

- Assess the state laws applicable to your business. Most states have laws that require consumer notification. Your response program should include template letters for customers in all relevant states and territories.
- Notify law enforcement if the breach may involve criminal activity or there is evidence that the breach has resulted in identity theft or related harm. Certain state laws require the Attorney General or other state regulator to be notified or receive copies of notices that are sent to consumers.
- Notify the credit bureaus and other businesses that may be affected by the breach.
- Employing a best practice of offering affected consumers one to two years of credit monitoring or other identity protection service at no charge. Consumer reporting agencies from which you obtain reports may require that you do so, as do a number of states.
- Knowing the deadline by which any required notices must be sent and having a plan to meet that deadline. Some state laws have tight timeframes for when notices to consumers and government authorities must go out.
- Testing your response program periodically and making appropriate changes.
- Obtaining cyber security insurance to cover costs of responding to a breach. Cyber security insurance is available in forms to cover specific costs (e.g., costs to notify customers and provide credit monitoring, costs of forensics, and other consultants to identify and contain the breach) and is affordable based on the extent of coverage and policy deductibles.

BRING YOUR OWN DEVICE (BYOD) RISKS

A critical issue is employees using their personal smartphones, tablets, and other personal devices to access nonpublic personal information of consumers through their employer networks. “BYOD” or “bring your own device” has become the shorthand expression for use of personal devices for business purposes. The benefits of BYOD often include reduced hardware costs for the company as well as greater employee satisfaction from using a single portable device for workplace and personal use. Notably, however, some states such as California may require that employers reimburse its employees for a portion of their

employees' cell phone bill if the employee uses the device for business purposes. Consult your counsel for more information on those state law requirements.

However, BYOD use adds another element of security risk that should be addressed in your Safeguards Program. A comprehensive risk assessment should be conducted to assess whether employees are already using their own devices for dealership business and accessing nonpublic personal information of consumers in doing so. The risk assessment should identify the types of devices and security features available to select the best technical means for program implementation, and develop the specific policies and procedures governing BYOD administration and management.

A variety of mobile device management (MDM) software options are available to control devices accessing your systems. Physical control over the device should be high on the list for every dealership – the baseline assumption is that the device will be lost or stolen, or at the very least, accessible to unauthorized third parties. Placing tracking mechanisms on these devices if lost or stolen is a prudent security practice but may raise privacy concerns among employees. You should consult with your counsel concerning the use of tracking devices on an employee's personal device, as it may raise certain legal issues under state privacy laws.

Another good practice is to make it clear that combining business and personal communications on one device creates a risk of personal information being exposed when parties are in litigation.

Employers, may, under certain circumstances, exercise the capability to wipe or erase all data remotely from any device used for business purposes – and that means the device may be wiped entirely, including personal photos and contacts. However, in some circumstances, employees should be given notice and the opportunity to preserve their personal photos and other non-business-related data prior to the device being wiped. Consult with your counsel to determine the appropriate course of action prior to erasing or wiping an employee-owned device. Dealerships also must consider various technical issues associated with its BYOD policy which may include the use of untrusted devices, wireless networks, or applications; support for multiple mobile operating systems; installation of security patches and software updates; and interaction with other systems for data synchronization and storage.

Employees may resist the implementation of security software and measures on their personal devices as well as forced encryption of customer information in transit to and from the device and at rest on



COMPLIANCE TIP

Provide employees the information they need to weigh the risks and benefits of using their personal device for business.

the device which is a best practice. Dealerships also must detect and prevent “jail breaking” of the device where the employee circumvents the organization’s security policies and measures, a practice that MDM software can make more difficult. **An alternative to BYOD is to supply your employees with corporate-owned and issued devices**, which gives employers greater control over and access to the device and its contents.

RECORD RETENTION AND DISPOSAL

An Information Security Program should also include a written document retention and disposal policy. See Topic 11: Recordkeeping and Destruction of Records for more information on these policies.

STATE DATA SECURITY LAWS

States are also enacting strict data security laws that apply to all organizations that maintain information about their residents. For example, some states:

- Require the development of a comprehensive written information security program, and the encryption of all personal information stored on laptops and portable devices or transmitted wirelessly or across public networks. Employee access must be limited, and paper records must be locked up.
- Require compliance with the Payment Card Institute Data Security Standard (“PCI-DSS”) for credit and debit card information and transactions.

Consult your own attorney to determine what specific state laws may apply to you.

IDENTITY THEFT AND FRAUD PREVENTION

SOCIAL SECURITY NUMBER PROTECTION LAWS

Many states have passed laws restricting the use, communication, posting, emailing, or mailing of Social Security numbers (SSNs) and other nonpublic personal information (“NPI”). Many of these state laws prohibit (i) denying goods or services to a person who declines to give their SSN, (ii) printing of SSNs on ID cards, (iii) communicating SSNs to the public or posting or displaying them, (iv) mailing SSNs within an envelope; and/or (v) emailing SSN or other consumer NPI in an unencrypted email. A few states require companies that collect SSNs to have policies in place to protect the SSNs.



COMPLIANCE TIP

An alternative to Bring Your Own Device (BYOD) is to supply your employees with corporate-owned and issued devices, which gives employers the greatest degree of control and access over the business-related data that is stored on the device.

California's law provides a good example of prohibited activity and applies to businesses, government, and other entities. The law prohibits:

- Printing SSNs on ID cards or badges.
- Printing SSNs on documents mailed to customers, unless the law requires it, or the document is a form or application.
- Printing SSNs on postcards or any other mailer where it is visible without opening an envelope.
- Avoiding legal requirements by encoding or embedding SSNs in cards or documents, such as using a bar code, chip, or magnetic stripe.
- Requiring people to send SSNs over the Internet, unless the connection is secure, or the number is encrypted; and
- Requiring people to use an SSN to log onto a website unless a password is also used.

SSNs should be truncated in any visual or printed form and be safeguarded in electronic and paper files. Encryption of Social Security numbers and other NPI is a best practice for electronic records and mandatory in transmitting SSNs over electronic networks such as the Internet.

FTC RED FLAGS RULE

The Red Flags Rule requires a dealership to perform a risk analysis to develop and implement a written Identity Theft Prevention Program (ITPP) to detect, prevent, and mitigate identity theft. It is not a "one size fits all" rule. A dealer's ITPP must be appropriate to the size and complexity of the dealership and the nature of its operations.

The Red Flags Rule requires lenders to monitor accounts in their portfolio (along with written-off accounts) for evidence of identity theft to attempt to detect and mitigate further identity theft. So, more lenders are examining delinquencies and written-off accounts for identity theft, even accounts that may have paid for substantial periods of time. Instead of just writing these accounts off as credit losses as they did in the past, lenders are now forcing dealers to repurchase accounts they identify as identity theft accounts, even if the identity thief has made payments for a period of time. This "back end" repurchase risk presents perhaps your biggest financial risk from identity theft. A good ITPP program will protect you, the dealer, more than anyone else.

The dealer's Board of Directors (or its highest governing authority) must approve the initial ITPP and take responsibility for it. A senior officer must be appointed to be the ITPP program manager (Program Manager), responsible for developing, overseeing, implementing, training, updating, and administering the ITPP, but the final responsibility will rest with the Board of Directors or the senior management team.

The ITPP has four basic elements. First, identify potential "red flags" that might occur in your business. Red flags are patterns, practices, or specific activities that indicate the possible existence of identity theft. The Red Flags Rule lists 26 potential red flags that you must consider for your ITPP, including the receipt of an address discrepancy alert (discussed below), although not all will apply to your business. One type of red flag is where a consumer provides an ID that does not appear genuine.

The second step of the ITPP is to employ procedures to detect any identified red flags in your processes and transactions. An electronic identity verification service such as Dealertrack Red Flags can help you compare the customer's reported information to fraudulent databases and stolen Social Security numbers, among other red flags. Following the example of a red flag related to IDs, your ITPP would set out different processes for identity verification in person versus other methods of application. For in person, for example, you would include a practice of examining every customer's IDs (front and back) for tampering or counterfeiting. For online applications, you could leverage a third party's solution to validate the consumer's identity through a series of knowledge-based questions and answers.

The third step requires your ITPP to have measures to prevent and mitigate identity theft when you identify a red flag. In the ongoing example, it could be as simple as asking the customer for additional verification documents or, if necessary, declining to open the account. Your ITPP should have processes where significant and/or unresolved red flags are escalated to the Program Manager.

For the fourth and final step, you must update your ITPP periodically (but not less often than once per year) based upon your dealership's own experiences and new information concerning identity theft from regulators, law enforcement, and industry experts. An ITPP is a dynamic program and should be re-evaluated continually.

Employees who perform program functions should prepare annual reports to the Program Manager concerning the ITPP's effectiveness and make suggestions for improvement. The Program Manager should then use these reports and other identity theft resources to make an annual report to your Board or senior management detailing the effectiveness of the

ITPP and proposing material changes. Training of employees and strict oversight of ITPP service providers who have access to your customers' data are also critical tasks that the Red Flags Rule requires. Document everything you do and keep copies of all identity-related documents (e.g., the report of the electronic identity verification service and anything the consumer gives you to prove their identity) in the deal jacket in case you are audited. Apply your ITPP to every customer.

Note that while the Red Flags Rule does not apply to cash sales, the requirements provide a wealth of information for dealers to use broadly in their business to help avoid identity theft issues and losses.

THE ADDRESS DISCREPANCY RULE

The FCRA imposes specific obligations on users of consumer reports when an address discrepancy is identified by a consumer reporting agency. Together with its Red Flags Rule, the FTC issued a companion rule related to the address discrepancy requirements. The law requires users of consumer reports who receive a notice of address discrepancy from a consumer reporting agency to have reasonable policies and procedures in place to form a reasonable belief that the consumer report relates to the consumer about whom the report was requested. For example, there are multiple John Smiths, and the law requires you to take appropriate steps to verify that you have the consumer report for your applicant prior to taking any action based on the consumer report.

In addition, Dealers who establish a continuing relationship with consumers for whom they have received a notice of address discrepancy and who routinely furnish information to a nationwide consumer reporting agency (Experian, Equifax, Trans Union), must also reasonably verify the accuracy of the address provided by such consumers and furnish the verified address to the nationwide consumer reporting agency that provided the consumer report and notice of address discrepancy.

CREDIT AND DEBIT CARDS: FRAUD PREVENTION

In an effort to prevent credit card fraud, the industry has moved to credit cards with computer chips (a "chip card"). The use of chip cards requires more sophisticated card readers that can read a random code generated by the device. If you do not have and use such a chip card reader after October 1, 2015, you face the risk of being liable for a fraudulent transaction committed using a chip card.

Further, the Fair Credit Reporting Act (FCRA) prohibits printing more than the last five digits of a credit or debit card number or the card's expiration date on any electronically printed card transaction receipt. Damages for doing so are \$100 - \$1,000 per receipt for willful violations (generally a

knowing or reckless violation) with no cap on damages in a class action. MasterCard and Visa can also assess fines starting at \$5,000 for the first violation and going up from there. Make sure your card processing machines are set up to not print any more than the last five numbers and do not print the card's expiration date.

RECOMMENDED PRACTICES

1. **Create a culture of security at your dealership** and get senior management buy-in. Limit permissions to access customer information to only those persons who need access to perform their jobs; require passwords to contain letters, symbols, and numbers and be changed frequently. Know the flow of information that enters your system and monitor for any unusual data flows in or out. These may be signs that a hacker has entered your system and is compromising security. Keep logs of who accesses customer information and when they do so for both electronic and paper files. Train your employees on the importance of safeguarding customer information. Do not leave credit apps or credit reports out in the open or in unsecured file drawers. Consider using processes that can determine if your employees are actually following the policies and procedures in your Information Security Program. Regularly review access logs of the consumer information records and follow up promptly if you see any unusual spikes in any employee or other user accessing customer files. Lock down files at night and on weekends and implement a "clean desk" policy that requires all paper documents containing customer information to be locked up when not in use.
2. **Put into place an Information Security Program that details how you safeguard and securely dispose of all your consumer information.** Include a detailed data security incident and security breach response plan in the Information Security Program. Follow FTC guidelines for Information Security Programs and know your state's law on use, communication, and display of Social Security numbers and consumer notification requirements in the event of a data breach. Avoid storing consumer information longer than is necessary or allowing access using widely known simple passwords. Make sure your dealership's Information Security Program includes detailed provisions for the secure disposal of consumer information, both paper and electronic. Train and re-train employees perform stress tests to evaluate your systems regularly, and update provisions as required. Destroy hard drives and flash drives on computers, copiers, fax machines, and wireless devices using industry standard procedures before discarding them or trading them in for replacements. Disable USB flash memory drives. Try to store



RECOMMENDED PRACTICE

Create a culture of security at your dealership.



RECOMMENDED PRACTICE

Create an Information Security Program for safeguarding and securely disposing of all your consumer information.

customer information only in secure central servers and preclude the ability to download it. Some states (for example, Massachusetts) require that customer information contained on laptops, tablets, cell phones, and other remote devices must be encrypted. Massachusetts and Nevada also require personal information about residents be encrypted in transmissions, which is a best practice in any event and required for credit card data transmission.

3. **Manage user permissions to give customer information access only to those employees and service providers having a legitimate business need.** Negligently making customer information available for theft by outsiders, employees can and do steal customer information and sell it to identity thieves. So, it is critical that you keep event access logs of those persons who access your customer information in both paper and electronic files. Review the access logs regularly to monitor patterns of irregular activity by users. Set your system to prevent downloading or file transfers of customer information to computers, USB memory sticks, PDAs, cell phones, tablets, or other remote devices, and disable PC PSTs. If you have a credit application on your website, make sure it is encrypted and begin safeguarding and tracking access to it from the time it is completed by the consumer and securely transmitted to your dealership. Keep your antivirus, anti-malware, and firewall software up to date. If you permit employees to use their own devices to access dealership information, do a risk assessment of BYOD issues and see if it is feasible for your dealership to implement a policy to enable employees to use personal devices. If so, employ MDMS software to manage the devices. If not feasible, cease their ability to do so and require that only company-issued devices be used to access dealer databases and information.
4. **Have an acceptable use policy.** Help control risk by adopting an “acceptable use” policy that ensures employees are not sharing their device, are adhering to strong passwords, and that any corporate-owned data is encrypted. Text messaging for business communications should also be discouraged as that information may be discoverable from the device in litigation and the use of acronyms or shorthand often leads to misunderstandings.
5. **Have a pre-established plan in place to deal with data security breaches.** The FTC has said that your Information Security Program must include a detailed incident and breach response and notice plan to execute in the event of any security breach or database hack in which customer information is or may have been wrongfully accessed, whether by internal or external persons. Pre-identify a team



RECOMMENDED PRACTICE

Limit customer information access only to employees and service providers with a legitimate business need.



RECOMMENDED PRACTICE

Have an acceptable use policy.



RECOMMENDED PRACTICE

Plan to deal with data security breaches.

of people to manage the breach and responses. The team should represent each department that might be affected by a breach or that has to be mobilized to interact with the public, including legal, human resources, privacy, security, IT, communications, and, if you are publicly traded, investor relations. Part of the team's role is to analyze risks to data, data flow, and worst-case scenarios. Test your plan periodically by doing mock drills. Consult your attorney to know your state law and the laws of your customers' states of residence about when you have to give notices to customers about data breaches.

6. Prepare template customer communications in advance and consider retaining a forensics expert who can quickly capture and analyze your IT system to identify the source of an electronic breach and mitigate further losses.

Consider channeling all third-party communications through only one person for consistency. The steps you take in the first 48 hours after a data security breach may be the most critical to mitigating the breach and minimizing losses. Those steps should be laid out in advance in your security breach response plan. That is why your plan should assign roles to breach team response members in advance so each knows their precise responsibilities and the response team can be immediately assembled.

7. Do not transmit customer information over insecure channels such as unencrypted email, P2P systems, or wireless access points.

These are not secure media. The FTC has cited the absence of data loss prevention software and an intrusion detection system in these media as inadequate practices for an Information Security Program.

8. Run an OFAC SDN List check on every customer, cash, or credit.

If you get a preliminary hit, follow the steps listed by OFAC to determine whether the hit is a "false positive." Do not do business with the customer until you are certain that they are not the person listed on the SDN List. Keep a record of OFAC checks for five years.

9. Develop a risk-based Red Flags Identity Theft Prevention Program (ITPP) and implement it consistently for all consumer credit customers and business credit customers that present identity theft risks.

Use your ITPP with every customer and document that you're doing so. Choose red flags that are appropriate to the size, location, and activities of your dealership. If you sell vehicles over the Internet or to customers who never physically come to your dealership, take enhanced steps to verify those customers' identities. Examine photo IDs, look at recent credit bureau activity,



RECOMMENDED PRACTICE

Have resources ready to contact customers and quickly track down the source in the event of an electronic data security breach.



RECOMMENDED PRACTICE

Never transmit customer information over unencrypted email, P2P systems, or wireless access points.



RECOMMENDED PRACTICE

Run an OFAC SDN List check on every customer.



RECOMMENDED PRACTICE

Be sure to integrate checkpoints for federal Red Flag Rule requirements into your sales process for customer identification verification.

and use an electronic identity verification service to compare customer information against databases of fraudulent activity and to assess the customer's given Social Security number. Identify any red flags in your ITPP that these actions reveal. If you cannot readily resolve the red flags with the customer, use knowledge-based authentication "challenge" or "out-of-wallet" questions as well. Escalate problematic customers who resist requests for identity verification to your Program Manager and continue to seek additional information or ask more out-of-wallet questions. Make sure your ITPP program has a process for documenting your ITPP activities for each credit customer. Do ongoing training and periodic testing of your ITPP. Refine and update your Program as new information about identity theft comes to your attention. Don't forget about holding an annual Program review for participating employees and making an annual report to your Board of Directors and senior managers.

10. Educate your employees about the risks of identity theft and social networking attacks. As email spam filters have become more sophisticated, fraudsters have turned to other socially engineering methods that prey on consumers' trust. Tell employees not to click on any Internet link unless they are certain of the legitimacy of the source. Email's purporting to be genuine from friends, law enforcement, or trusted institutions may contain links that unload malware onto the employee's PC and network if clicked on.

ADDITIONAL RESOURCES

FTC Business Security Guide:

<https://www.ftc.gov/tips-advice/business-center/guidance/start-security-guide-business>

FTC Safeguards Rule:

<https://www.federalregister.gov/documents/2021/12/09/2021-25736/standards-for-safeguarding-customer-information>

FTC's Identity Theft Website:

<https://www.identitytheft.gov>

Department of the Treasury, information, and links to the OFAC SDN List:

<http://www.treasury.gov/resource-center/sanctions/SDN-List/Pages/default.aspx>

OFAC – Assessing SDN List Matches for a Customer

http://www.treasury.gov/resource-center/faqs/Sanctions/Pages/faq_compliance.aspx#match



RECOMMENDED PRACTICE

Educate your employees about the risks of identity theft and social networking attacks.

Searchable OFAC List – a site that lets you enter a business name to see if it matches an entry on the OFAC list:

<http://www.instantofac.com>

FTC Consumer Information Disposal Rule :

<https://www.ftc.gov/tips-advice/business-center/guidance/disposing-consumer-report-information-rule-tells-how>

State Data Security Breach Notification Laws:

<http://www.ncsl.org/research/telecommunications-and-information-technology/security-breach-notification-laws.aspx>

Information Compromise and the Risk of Identity Theft: FTC Guidance for Your Business:

<https://www.ftc.gov/tips-advice/business-center/guidance/information-compromise-risk-identity-theft-guidance-your>

Social Security Randomization:

<https://www.ssa.gov/employer/randomization.html>

PRIVACY AND CUSTOMER INFORMATION SHARING

Find out the limitations on how and when you can collect and share information about customers and potential customers without exposing your dealership to legal action and fines.



DID YOU KNOW?

Regulators are cracking down on telemarketing and the making of unsolicited phone calls, especially to cell phone numbers. Fines for calling or texting to cell phones can be \$500 - \$1,500 under the Telephone Consumer Protection Act.

COMPLIANCE TIP

A privacy notice is considered a contract with your customers, so make sure your dealership's business practices follow what is stated in your privacy notice.

UPDATE FROM 2021

Effective January 1, 2020, California passed a sweeping new data privacy law, the California Consumer Privacy Act (CCPA), that imposes significant responsibilities on businesses that collect California consumers' personal information. In addition to compliance with the CCPA, businesses will need to start considering the California Privacy Rights Act (CPRA),

which amends the CCPA and goes into effect on January 1, 2023.

RECOMMENDED PRACTICE

If your dealership tracks consumers' online behavior, follow the guidelines within the FTC's "Self-Regulatory Principles for Online Behavioral Advertising".

BREAKOUT SECTIONS

1. Important State Laws and Regulations:

- The California Consumer Privacy Act (CCPA)
- California Privacy Rights Act (CPRA)

2. Important Federal Laws and Regulations:

- The Fair Credit Reporting Act (FCRA)
- The Gramm-Leach-Bliley Act (GLB) and

the FTC Privacy Rule (Privacy Rule)

- Intersection of GLB and CCPA
- FTC Affiliate Marketing Rule
- FCRA-GLB Privacy Notice Forms
- Driver's Privacy Protection Act (DPPA)
- FTC and FCC Rules on Telemarketing and Using Cell Phone Numbers

3. Recommended Practices

4. Additional Resources

5. Example of a Model Privacy Notice Form

Federal law and regulations limit how dealers can collect, use, and share non-public personal information as well as credit information about a person. A number of laws and regulations require that dealers give disclosures concerning information collection and sharing practices to potential customers before they become customers (which occurs when they receive a financial product or service from the dealer), and to consumers (persons who provide information to seek but don't obtain a credit product) prior to the time the dealer intends to collect, use, or share their information.

For example, **the California Consumer Privacy Act (“CCPA”) imposes significant responsibilities on businesses that collect California consumers’ personal information.** In addition, in November 2020, California passed the California Privacy Rights Act (CPRA), which amends the CCPA and goes into effect on January 1, 2023, with a 12-month lookback for the personal information in scope.

Further, all 50 states and the District of Columbia now have data breach laws with which dealers must be familiar.

The FTC has brought hundreds of privacy-related enforcement proceedings over the past 15 years. Recently, the FTC has brought enforcement cases where companies have engaged in the collection and sharing of consumer data without consumers’ consent, as well as cases against businesses that fail to adequately establish and maintain sufficient information security programs and controls to prevent breaches. This Topic discusses federal and state laws and regulations relating to customer information collection, use, and sharing, and the privacy of consumer data. As used here, the word “customer” will mean both consumers and customers unless otherwise stated.

IMPORTANT STATE LAWS AND REGULATIONS

THE CALIFORNIA CONSUMER PRIVACY ACT (CCPA)

(The term “Consumer” as used within this section means a natural person who is a California resident and is different from the use of the term in context of obtaining or seeking credit.)

The CCPA is effective as of January 1, 2020 and imposes new obligations on covered businesses. A company will be a covered business under CCPA if it:

- Operates as a for-profit entity.
- Collects California Consumers’ personal information.



UPDATE FROM 2021

In addition to the CCPA, which went into effect on January 1, 2020, California passed the California Privacy Rights Act., which amends the CCPA and goes into effect on January 1, 2023 (with a 12 month “lookback” period for the personal information in scope).

- Alone, or jointly with others, determines the purposes and means of processing Consumers' personal information; and
- Does business in California.

The company must also meet one of the following three threshold criteria:

- Has annual gross revenues in excess of twenty-five million dollars (\$25,000,000); or
- Alone or in combination, annually buys, receives for the business's commercial purposes, sells, or shares for commercial purposes, alone or in combination, the personal information of 50,000 or more Consumers, households, or devices; or
- Derives 50% or more of its annual revenues from selling Consumers' personal information.

The CCPA contains numerous new privacy and data security obligations on covered businesses. These include providing additional rights to California Consumers over the collection and use of their personal information. The CCPA defines personal information as any information that identifies, relates to, describes, is reasonably capable of being associated with, or could reasonably be linked, directly or indirectly, with a particular Consumer or household. Examples include, a name, alias, postal address, unique personal identifier, IP address, email address, account name, social security number, driver's license number, Internet activity, geolocation data and other similar identifiers. Publicly available information is not personal information under CCPA.

A business will need to be able to provide California Consumers notice of the following rights and the ability to fulfill requests to exercise these rights:

- Right to know what personal information is collected about them.
- Right to know how their personal information is being used.
- Right to access a copy of their personal information.
- Right to request that a business delete the personal information that was collected from them (subject to certain exceptions); and
- Right to say no to having their personal information sold to third parties (known as the "Do Not Sell" right.)

A covered business will need to be able to respond to a Consumer request within 45 days and provide the categories of PI collected,



DID YOU KNOW?

The CCPA gave California consumers additional rights regarding the collection and use of their personal information.

the categories of sources from which PI is collected, the business or commercial purpose for collecting PI, the categories of third parties with whom the business shares PI, and the specific pieces of PI the business collected about the Consumer in the 12 months preceding the request.

A key CCPA compliance challenge concerns the law's broad definition of the term "sell" and the numerous obligations that apply to sales of PI. The definition of a sale under CCPA encompasses "releasing, disclosing, disseminating, making available, transferring, or otherwise communicating...a consumer's personal information by the business to another business or a third party for monetary or other valuable consideration." Note that disclosures to vendors that qualify as a "service provider" as defined by the CCPA are exempt from being a "sale."

Under the CCPA covered businesses are required to provide enhanced notices to Consumers of their rights through an updated website privacy notice that includes the requisite CCPA disclosures (or a separate California notice). This notice is required to be in place on January 1, 2020 and must cover on-line and offline (in-person) personal information collection and use. In addition, a business must distribute an internal employee privacy notice that includes the requisite CCPA disclosures to all California employees by January 1, 2020.

Businesses may also need to provide in-store notices about PI collection practices. This is because the CCPA requires covered businesses to provide a pre-collection notice to Consumers at or before the point and time their PI is collected. This pre-collection notice must inform Consumers of the categories of PI to be collected and the purposes for which the categories of PI will be used. Further, a business can't collect more PI than necessary, and must limit the use of PI to the stated purposes, absent further advance notice being provided. This requirement applies to online and offline personal information collection and sharing. Dealers may need to provide a just in time notice for Consumers who visit their facilities if CCPA PI is being collected.

A CCPA covered business must disclose the following information regarding their PI practices in their online privacy policy (or a separate online notice) and update that information at least once every 12 months. Online privacy policies and any California-specific privacy notices must include:

- The categories of PI collected about a Consumer.
- The categories of sources from which PI is collected.
- The categories of third parties with whom the business shares PI.

- The business purpose or commercial purpose for collecting and for selling PI.
- The categories of Consumer PI sold (or if not sold, the notice must disclose that fact); and
- The categories of Consumer PI it has disclosed for a business purpose (or if not disclosed for a business purpose, the notice must disclose that fact).

In addition, California-specific privacy notices must include:

- A description of the Consumer's right to not be discriminated against for exercising their rights under the CCPA.
- A description of the Consumer's right to request that their PI collected by the business from the Consumer be deleted (subject to exceptions).
- The right of Consumers to opt out of having their PI sold (and a link to the businesses' "Do Not Sell My Personal Information" web-based opt-out tool).
- Notice of any financial incentives and a clear description of the material terms of any such program; and
- Two or more designated methods for submitting Consumer rights requests.

Covered businesses are also required to update their website homepage to provide a link to their CCPA notice and a "do not sell" button (if applicable). Businesses should ensure that any account registration process directs California Consumers to the California privacy notice or otherwise informs them of their rights.

There are exceptions to the "Do Not Sell" right relevant for dealers to take into consideration. The "Do Not Sell" right does not apply to:

"Vehicle information or ownership information retained or shared between a new motor vehicle dealer, as defined in Section 426 of the Vehicle Code, and the vehicle's manufacturer, as defined in Section 672 of the Vehicle Code, if the vehicle or ownership information is shared for the purpose of effectuating, or in anticipation of effectuating, a vehicle repair covered by a vehicle warranty or a recall conducted pursuant to Sections 30118 to 30120, inclusive, of Title 49 of the United States Code, provided that the new motor vehicle dealer or vehicle manufacturer with which that vehicle information or ownership information is shared does not sell, share, or use

that information for any other purpose.”

“Vehicle information” is the vehicle information number, make, model, year, and odometer reading.

“Ownership information” is the name or names of the registered owner or owners and the contact information for the owner or owners.

In addition, the CCPA does not apply to personal information collected, processed, sold, or disclosed pursuant to the Driver’s Privacy Protection Act of 1994 (except for in the case of a data breach).

Overall, businesses will need to accurately reflect their PI practices in any posted privacy notice, determine how to address consumer rights requests, and develop a process for fulfilling a request within the required timeframe.

CALIFORNIA PRIVACY RIGHTS ACT (CPRA)

Overview:

The CPRA (Prop. 24), which was passed into law in November 2020, amends and expands the CCPA by adding consumer rights and additional obligations around Sensitive Personal Information (PI), Children’s PI, and the sharing of PI. The CPRA will officially replace the CCPA on January 1, 2023. At a high level, the newly enacted CPRA moves California privacy law closer to the EU’s GDPR by providing similar rights. However, the CPRA goes further than the GDPR in certain aspects, including through a broad definition of “share” that may capture many common business practices.

Like the CCPA, it applies to “consumers”—basically to anyone in California, and “personal information” (PI). Applies to all “Businesses” that process over 100,000 California consumers’ PI. While the CPRA goes into effect on January 1, 2023, there is a 12-month lookback as to the PI in scope. However, notably, the two-year extension of both the Employee and B2B exemption went into immediate effect, thereby extending these exemptions through January 1, 2023.

Enforcement:

Enforcement authority is vested both in a stand-alone, well-funded data protection authority agency to be called the California Privacy Protection Agency (CPPA), as well as with the AG, thus increasing the likelihood of an enforcement action and the repercussions for non-compliance. CPRA also removes the obligation of the government to give notice and a 30-day opportunity to cure non-compliance; provided, however, that the CPPA will have the discretion to permit a one-time cure. There will also be increased penalties for non-compliance regarding children’s PI.

Key Requirements:

The CPRA adds rights in addition to the above CCPA rights, which include the following:

1. New “Do Not Share” right (share is broadly defined as “making available” certain PI)
 - This requires businesses to enable the opt-out of sharing of PI (in addition to selling)
 - It requires a link on the business’ homepage titled “Do Not Sell or Share My PI”
2. Right to opt-out of processing of “Sensitive Personal Information” (broadly defined)
 - This requires a link on the business’ homepage titled “Limit the Use of My Sensitive PI” that businesses will need to effectuate
3. Right to object to automated processing of PI (such as for profiling and/or targeted ads); and
4. Right to correction
5. Right to know all PI collected in certain circumstances (not just in the past 12 months)
6. Right for employees and personnel to exercise privacy rights upon expiration of the HR exemption on Jan. 1, 2023

In addition to the above rights, the CPRA has additional notice and disclosure obligations, including the following:

1. Disclosure of categories of Sensitive PI collected, the purposes for collection/use, and whether it is sold or shared
2. Disclosure of PI retention periods for each category of PI in the notice at collection
3. Disclosure of commitment to maintain and use certain information in de-identified form

Similar to the CCPA, the CPRA will require company-wide compliance efforts and a detailed understanding of data handling practices. As such, business may consider taking a bifurcated approach: (1) continue with CCPA compliance and tracking; and (2) creating an internal team to identify the gaps with CPRA.

IMPORTANT FEDERAL LAWS AND REGULATIONS

THE FAIR CREDIT REPORTING ACT (FCRA)

The FCRA requires a dealer to have a “permissible purpose” to access a customer’s credit report or credit score. The FCRA also contains restrictions on sharing and using customer credit and consumer report information with both affiliated and non-affiliated companies. It requires notices to be given to customers about certain information sharing with affiliates (FCRA Privacy Notices) and in certain cases, requires giving consumers the right to opt-out of any sharing. FCRA Privacy Notices are typically combined with privacy notices required by the Gramm-Leach-Bliley Act (GLB) into one comprehensive privacy notice for the dealership (FCRA-GLB Privacy Notice). See “FCRA-GLB Privacy Notice Forms” below. The FCRA categorizes consumer credit information into two types:

- “Transaction and experience” information: the dealer’s own experience with the customer such as a customer’s payment history on any credit account (for example, a service department “house” account or a customer’s payment history for a buy-here-pay-here dealer account), name, address, and phone number would be a species of transaction and experience information; and
- “Other” information: essentially anything obtained from a credit report, a credit score, or credit information about the consumer obtained from a third party (credit information).

Under the FCRA, dealers can share vehicle purchase- or lease-transaction and/or experience information with affiliates, such as sister dealerships, insurance affiliates, or a parent company, without offering an opt-out. Subject to any contractual limitations in a contract with the consumer reporting agency that provided the “credit information,” dealers may share “credit information” with affiliates only if they offer consumers the opportunity to opt out of sharing that “credit information.” Further, the affiliates’ use of the shared information is subject to the requirements of the Affiliate Marketing Rule discussed below. The Affiliate Marketing Rule applies to all marketing based on affiliate sharing of customer information, both transaction and experience information and credit information. So, while a consumer cannot prevent sharing of transaction and experience information with a dealer’s affiliates, he or she can opt out of affiliates using that information to market to them.

Dealers may share transaction and experience information with non-affiliates (unrelated companies such as sellers of non-automobile products, realtors, charities, or local merchant associations) only if the customer is given an FCRA-GLB Privacy Notice describing the right to opt

out of non-affiliate sharing of transaction and experience information, the consumer is given a reasonable opportunity to opt out, and the customer fails to opt out.

Whenever the FCRA or GLB gives the customer the right to opt out of data sharing, the FTC has said the dealer must wait 30 days from giving the customer a privacy notice before beginning to share information. This is so the customer has time to decide whether or not to opt out up front. The 30-day rule does not apply if the customer has no right of opt out, such as when a third party is acting only as a service provider to the dealer for the customer's transaction or a joint marketer as discussed below. However, the third parties receiving such information under either the service provider or joint marketing exceptions are prohibited from using or disclosing the information for any purpose other than the one for which it was received. A dealer's disclosures to service providers and joint marketers must be stated in the FCRA-GLB Privacy Notice.

THE GRAMM-LEACH-BLILEY ACT (GLB) AND THE FTC PRIVACY RULE (PRIVACY RULE)

GLB and the Privacy Rule provide consumers with protections on how creditors are permitted to collect, use, and share their nonpublic personal information (NPI). NPI is essentially any identifying information a dealer obtains from or about a customer in connection with a possible credit transaction. GLB and the Privacy Rule also require giving customers privacy notices (GLB Privacy Notices) describing how a creditor collects, uses, and shares NPI, and giving customers rights to opt out of certain types of sharing. The Privacy Rule implements the privacy provisions of GLB. An exception to the right to opt out of third-party sharing applies and permits sharing with service providers and for joint marketing agreements with other financial companies under which the dealer and another financial institution jointly market a different credit product such as a credit card. It is important to note that automotive dealers may often fall within the definition of a financial institution under GLB to the extent they help consumers purchase vehicles through financing and leasing transactions.

Some states have specific requirements as well. A few examples include, in Vermont, where consumers must affirmatively opt-in to both affiliate and non-affiliate sharing, and in California, where consumers must opt into joint marketing agreements before their information can be shared. Note that the CCPA does not apply to information otherwise covered by GLB or FCRA. This list is not exhaustive, and prior to sharing, dealers will want to consult with their local counsel.

INTERSECTION OF GLB AND CCPA

As mentioned, a large portion of the personal information collected and processed by financial institutions will be out of scope for CCPA as it falls under GLB. The CCPA exempts information collected, processed, sold, or disclosed pursuant to the federal Gramm-Leach-Bliley Act (GLBA) and implementing regulations. It is important to note that GLBA-regulated entities are not wholly exempt from CCPA. However, the personal information collected that falls within the scope of the GLBA (or NPI) is exempt from the CCPA. For example, personal information from an individual who is not obtaining financial products or services from a financial institution, or PI that will not be used primarily for personal, family, or household purposes (such as personal information collected for targeted marketing) is certainly within the scope of the CCPA.

FTC AFFILIATE MARKETING RULE

The Affiliate Marketing Rule is an FTC regulation published pursuant to the 2003 Fair and Accurate Credit Transactions Act (FACT Act). The Affiliate Marketing Rule (AMR) prohibits a person from using consumer eligibility information received from a corporate affiliate for marketing purposes unless:

- The consumer is given a clear, conspicuous, concise written notice explaining that the person may use eligibility information about that consumer received from an affiliate to make solicitations for marketing purposes.
- The consumer is first given a reasonable opportunity and a reasonable and simple method to “opt-out,” or prohibit the use of the eligibility information to make solicitations for marketing purposes; and
- The consumer has not opted out.

For purposes of the AMR, “eligibility information” means any information that if, communicated, would constitute a “consumer report” as defined under the FCRA.

So, if your dealership has affiliated dealerships, insurance companies, other companies, or even a parent dealership group, the dealer must give its customers the right to opt out of the affiliates’ use of any shared “eligibility” information (NPI combined with transaction and experience or credit information) to market to them. The AMR notice can either be included in the dealer’s FCRA-GLB Privacy Notice or be given separately. If you use a separate Affiliate Marketing notice (such as the model “safe harbor” notice published by the FTC with the Affiliate Marketing Rule),

you only need to give the Affiliate Marketing notice once every five years, not every year, as you must do for FCRA-GLB Privacy Notices for as long as the consumer remains a customer and so long as your practices do not change. However, for consistency, it is a best practice to include the Affiliate Marketing notice in your FCRA-GLB Privacy Notice.

A sample FCRA-GLB Privacy form is provided below for your review.

The Affiliate Marketing Rule contains greater potential liability than does the Gramm-Leach-Bliley Act (GLB) with respect to customer privacy rights. While the FTC and state regulators can bring enforcement actions for failing to provide GLB Privacy Notices, customers cannot sue directly under GLB. However, the Affiliate Marketing Rule notice gives a customer the right to bring a lawsuit under the FCRA for any violation of the Affiliate Marketing Rule, including the right to bring a class action. Remedies include the possible recovery of up to \$1,000 per violation plus attorney's fees and unlimited punitive damages for each willful violation, with presumably every individual solicitation by an affiliate being a separate violation. You, the dealer, are at risk if you fail to give the Affiliate Marketing Rule Privacy Notice or if your affiliate markets to a consumer who has opted out of affiliate marketing under this Rule.

You should consult with your attorney to ensure that your AMR notice complies with applicable law.

FCRA-GLB PRIVACY NOTICE FORMS

The Privacy Rule enables a dealer to give one privacy notice to cover the GLB and FCRA requirements and opt-out provisions, as well as the Affiliate Marketing Rule notice requirements. It is a recommended practice to give this FCRA-GLB privacy notice to customers when first taking their personal information for credit (such as when they fill out a credit application or respond to an online solicitation). If a dealer maintains a credit relationship with a customer (e.g., a buy-here-pay-here dealer), the dealer must give another privacy notice to the customer annually during the term of the credit relationship. It is also a recommended practice to post the privacy notice on the dealership's website as well as to deliver a copy to consumers who come into your stores.

The FCRA-GLB Privacy Notice should describe how the dealer collects, uses, and shares customer NPI, including information about former customers. The FCRA requires that the privacy notice must also give the customer the right to opt out of sharing credit information with affiliates and GLB requires the right of opt out for transaction and experience information with non-affiliated third parties. A dealer can share customer information with service providers or financial institutions that are joint

marketers (entities with which you share information solely to jointly market the financial product like a credit card, and for no other purpose); this is permitted by the FCRA and GLB provided the dealer discloses this sharing to the customer in its FCRA-GLB Privacy Notice.

The FTC and banking regulators have published model “safe harbor” FCRA-GLB Privacy Notices written in plain English using column formats. There are six alternative forms a dealer can use, depending on whether it shares information, whether it includes the Affiliate Marketing Rule notice, and how it allows customers to opt out. Four of the six forms can be printed on the front and back side of a single sheet of 8.5 x 11-inch paper; the remaining two forms require 8.5 x 14-inch paper or two sheets of 8.5 x 11-inch paper. Using one of these six forms will provide a “safe harbor” from liability for an inadequate privacy notice. The FTC has established a page on its website to construct such a privacy notice (see references at the end of this Topic). A sample of Form 1 of the “safe harbor” notice is contained at the end of this Topic. If you have an ongoing relationship with a customer (i.e., a buy-here-pay-here) and you are sharing information, you should give an annual GLBA notice, unless you are sharing under one of the exceptions.

Certain state laws also require additional disclosures to be in privacy notices (for example, California, Nevada, and Vermont) and dealers should be aware of such state requirements. Dealers with consumers in those states should add additional disclosure language in their privacy notices.

In California, privacy notices are required to include certain disclosures in addition to the new requirements under CCPA discussed above. The California’s Online Privacy Protection Act (“CalOPPA”) requires a person or entity that collects personal information from California residents for commercial purposes, to post a privacy policy and to comply with that policy. The law also requires that the privacy policy disclose the categories of personal information collected and the third parties that may receive the personal information. It further obligates websites or online services (“publishers”) collecting personal information to disclose how it responds to browser “Do Not Track” (“DNT”) signals or other consumer choice mechanisms for personal information collected over time and across third-party websites or online services. However, the law does not mandate that publishers honor or provide a specific DNT signal response. In addition, the law requires publishers to disclose whether third parties may associate tracking devices with the publisher’s service that collect information about a visitor’s online activities over time and across different services (e.g., other websites).

Beyond tracking and targeting disclosures, if a dealer wants to share

a California customer's (note that the term customer here is defined as an individual buying or seeking household goods or services) personal information (broadly defined) with a third party (including, in most cases, affiliates) for the third party's own direct marketing purposes, then California's Shine the Light law will also apply. California's Shine the Light law requires businesses to provide customers with information regarding how and with whom their personal information is shared for third party direct marketing purposes or provide customers with the ability to opt-in or opt-out of such sharing.

Of course, the dealer's information collection, sharing, and use practices must always be consistent with what is disclosed in its privacy notices. The FTC has brought enforcement proceedings for deceptive trade practices against numerous companies including an auto dealer that did not follow the practices described in their privacy notices.

As noted above, for all privacy notices, whenever a customer has a right to opt out, you can't begin sharing their information until at least 30 days after the date you give them the privacy notice. The FTC has ruled the customer must have at least 30 days to consider whether or not they want to opt out and this 30-day waiting period applies to all opt-outs. The FCRA-GLB Privacy Notice should give the customer a toll-free phone number, website address, or mailing address to exercise their opt-out rights. Only if the customer fails to opt out during those 30 days may information sharing for the disclosed purposes subject to the opt out thereafter begin. If a customer opts out after the initial 30-day period, promptly remove them at that time from common databases or information that is stored and recall their information from persons you have shared it with, if possible. Reserve the right to do so in your information-sharing agreements.

Additionally, **courts and the FTC have ruled that privacy notices are literally contracts between a company and its customers, so a dealership's business practices must follow what is stated in its privacy notice.** The FTC has brought deceptive trade practice enforcement proceedings against companies that violated statements contained in their own privacy notices such as "we will never share any of your personal information." These proceedings show the importance of writing privacy notices using language in the present tense and not the future tense. Reserve the right to amend your privacy notice by giving the customer a revision or informing the customer that a revised privacy notice has been posted to your website. Always date your privacy notices.

The FCRA, as amended by the FACT Act and implementing regulations,



COMPLIANCE TIP

A privacy notice is considered a contract with your customers, so make sure your dealership's business practices follow what is stated in your privacy notice.

contains additional privacy provisions. For example, if a dealer accepts credit or debit cards, any electronically printed card receipt that is given to the customer must truncate all but the last five digits of the card number and cannot show the card expiration date. If not, class action liability can result. Damages for doing so are \$100 - \$1,000 per receipt for willful violations (generally a knowing or reckless violation) with no cap on damages in a class action. MasterCard and Visa can also assess fines starting at \$5,000 for the first violation and going up from there. Make sure your card processing machines are set up to not print any more than the last five numbers and do not print the card's expiration date as this has been a source of many class actions.

A dealer is also required to give identity theft victims copies of transaction documents used in connection with any identity theft incident involving the use of their identity at the dealership if the customer provides sufficient proof of their legitimate identity. Social Security numbers should also be truncated to only the last four digits on printed documents to comply with many state laws.

Other than providing consumers the opportunity to “opt out” of certain kinds of data sharing, **privacy notices are not negotiable** and should not be negotiated with any customer, even if the customer refuses to sign the privacy notice (a customer's signature on a privacy notice is not required). The privacy notice is a statement of the dealer's privacy practices applicable to all its customers and changing it for any customer will create an impossible situation to monitor and comply. You should use one of the federal “safe harbor” FCRA-GLB Privacy Notice forms, and the customer's signature, while a good practice to get, is not legally required.

DRIVER'S PRIVACY PROTECTION ACT (DPPA)

The DPPA is a federal law restricting the release and use of personal information from state motor vehicle records. “Personal information” means information identifying an individual such as a photograph, Social Security number, or driver's license number. In general, dealers can use personal information from motor vehicle records only for limited purposes such as to verify the accuracy of information the customer provides to the dealership after obtaining the consumer's written consent to the dealer to obtain that information. The DPPA makes it illegal to obtain drivers' information for unlawful purposes or to make false representations to obtain such information. The DPPA establishes criminal fines for noncompliance, and a civil cause of action for drivers against those who unlawfully obtain their information.

Tracking Customers on the Internet: No federal law or regulation directly prohibits the use of “cookies” to track consumer behavior on a



DID YOU KNOW?

Privacy notices are not negotiable and should not be negotiated with any customer, even if the customer refuses to sign them.

dealer's website or to track the customer's linking or proceeding to other websites after leaving the dealer's site.

However, the FTC has issued its final Privacy Report in March 2012, *Protecting Consumer Privacy in an Era of Rapid Change: Recommendations for Businesses and Policymakers*, indicating that Web tracking should be subject to a "Do Not Track" mechanism. The FTC has stated its support of an initiative of the Better Business Bureau in association with media and marketing companies to get companies that track consumer Web behavior to adopt a self-regulatory program that will give consumers enhanced control over the collection and use of data regarding their Web viewing for online behavioral advertising purposes. The FTC's Self-Regulatory Principles for Online Behavioral Advertising, initially published in 2009, have been adopted by many companies that track online behavior and represent a "best practice for disclosing the nature of their Web tracking and giving the consumer an opportunity to opt out." An Advertising Option Icon and accompanying language have been adopted to be displayed within or near online advertisements or on Web pages where data is collected and used for behavioral advertising. The icon links to a clear disclosure statement regarding the company's online behavioral advertising data collection and use practices as well as an easy-to-use opt-out mechanism. The FTC has stated that privacy should be promoted at every stage of a product design and made transparent to consumers. It also has said that data should only be collected consistent with the context of a particular transaction or consumers' relationship with the company, or as required or authorized by law. Beyond that, the FTC has indicated that companies should make appropriate disclosures to consumers at "a relevant time and in a prominent manner – outside of a privacy policy or other legal document." The Chairman of the FTC summarized their position as follows: "We have proposed a "Do Not Track" mechanism that will allow you [the consumer] to easily specify what information you want to share about your browsing behavior and have those preferences travel with you to every website you visit. Technologies to create such a system exist already."

FTC AND FCC RULES ON TELEMARKETING AND USING CELL PHONE NUMBERS

Regulators are cracking down on telemarketing and the making of unsolicited phone calls, especially to cell phone numbers. According to a National Health Interview Survey available at the CDC's website, almost half of U.S. households no longer have land lines and use their cell phone as their home number, so these new rules require extreme caution when calling customers because the cost of calling or texting to cell phones can be \$500 - \$1,500 under the Telephone Consumer Protection Act.



DID YOU KNOW?

Regulators are cracking down on telemarketing and the making of unsolicited phone calls, especially to cell phone numbers. Fines for calling or texting to cell phones can be \$500 - \$1,500 under the Telephone Consumer Protection Act.

Laws and regulations concerning telemarketing, email, and fax restrictions are discussed in Topic 7: The FTC: Marketing and Advertising Vehicles, and Credit Terms.

RECOMMENDED PRACTICES

- 1. Create your FCRA-GLB Privacy Notice using the FTC’s Model Consumer Privacy Online Form Builder.** It explains what personal information your dealership collects, how it collects and uses the personal information, and with whom it shares the information. (See example at the end of this Topic.) Write your FCRA-GLB privacy notice in the present tense (“We do the following”) and avoid hyperbole such as “we will never share your information” or “we maintain the highest security practices.” Date your privacy notice. If you share customer information with affiliates, be sure to comply with all applicable law. A best practice is to include the Affiliate Marketing Rule disclosure and notice in your model FCRA-GLB Privacy Notice form which meets the requirements of both the FCRA’s Affiliate Marketing Rule and GLB’s Privacy Rule. Alternatively, you may choose to use the “safe harbor” notice under the Affiliate Marketing Rule to send a single notice to disclose the customer’s right to opt out of the affiliates’ use of customers’ eligibility information to market or solicit. You can then give this Affiliate Marketing notice once every five years, unlike the combined FCRA-GLB Privacy Notice which you have to give annually for as long as the person remains your customer. If you decide to send a separate Affiliate Marketing notice, remember, you must also separately send an annual GLB notice. (Note that if you sell a vehicle to a customer and assign the contract to a financing source, that person is no longer considered your customer for privacy notice purposes unless they have another credit relationship with your dealership.)
- 2. Have your privacy notices reviewed by your counsel to ensure the notices contain all of the required disclosures.** You should also make sure that your privacy notices accurately reflect your actual information collection and sharing practices. Be careful about pooling information with affiliates or your parent company into a central database, as doing so can be considered sharing information with affiliates.
- 3. Confirm whether and how you share information with third parties in accordance with your current FCRA-GLB Privacy Notice.** Many DMS providers “pull” information out of your DMS system and use it for their own purposes and not merely to service your account. Doing so is considered third-party sharing under GLB.



RECOMMENDED PRACTICE

Use the FTC’s Model Consumer Privacy Online Form Builder.



RECOMMENDED PRACTICE

Have your privacy notices reviewed by your counsel.



RECOMMENDED PRACTICE

Confirm that your third-party information sharing practices are in accordance with your current privacy notice.

If your privacy notice says, “we don’t share” and your DMS provider is taking and giving access to customer information to third parties (even without your knowledge), you may be in breach of your privacy notice and face a prospective class action. Given the nature of the DMS system used by many dealers, it may be a safer practice to indicate in your FCRA-GLB Privacy Notice that you do share and give customers the right to opt out. If possible, contractually prohibit your DMS providers from pulling customer data from your DMS system for any reason other than to service your account. Any such access to customer data for purposes that extend beyond servicing their account must be disclosed, and appropriate opt-out rights for sharing must be given in your privacy notice. Make sure to contractually require your affiliates and other entities with which you share customer information to comply with your privacy notices as well.

4. **Give your FCRA-GLB Privacy Notice to each consumer who provides you their personal information.** Provide it when the person first gives you their personal information, or soon thereafter. Clearly and conspicuously post your FCRA-GLB Privacy Notice on your dealership website, link to it from your online credit application form (a good practice is to compel a consumer to link to the privacy notice and be forced to scroll through it before they can submit the online credit application) and give a copy to every consumer who comes into your store inquiring about financing. The FTC has an internal group that reviews company privacy notices and “mystery shops” to uncover violations.
5. **Date your privacy notices so that you will always know that the version you are using is current.** If you use one of the models notices form, this dating reserves the right to change your privacy notice at any time. Put updated privacy notices on your website when you do make a change. The model “safe harbor” FCRA-GLB Privacy Notice forms require dating your privacy notices.
6. **Set up a process in your dealership to collect and manage all customer opt-outs from your customers.** Customers have many opt-out rights. One way to manage them is to establish separate opt-out lists for each of these and use them before sharing information or conducting marketing activity as necessary. However, to simplify the process and reduce the chance for errors, keep one master list of customers who send opt-out notices to your dealership concerning any information sharing and remove all these customers from all databases that you share or use for contact purposes, including common databases within a dealership group. Having a single omnibus opt-out system is a much simpler process and will make



RECOMMENDED PRACTICE

Give your FCRA-GLB Privacy Notice to each consumer who gives you their personal information.



RECOMMENDED PRACTICE

Always date your privacy notices.



RECOMMENDED PRACTICE

Consistently collect and manage all customer opt-outs.

you less likely to commit an error that could constitute a compliance violation.

7. If your dealership is engaged in online tracking for advertising purposes, you should consider use of the Advertising Option Icon and giving consumers a Do-Not-Track opt-out mechanism. At

minimum, disclose in your Terms of Use on your website what you are doing in the way of placing cookies on users' devices and the nature of the tracking you do. Transparency in data collection and use was a priority in the FTC's Final Privacy Report released in March 2012.

8. If your dealership does business in California, you should evaluate your CCPA obligations and specifically whether you will need to have the CCPA "Do Not Sell" link accessible on your website.

ADDITIONAL RESOURCES

The FTC's Privacy Rule and Auto Dealers:

<https://www.ftc.gov/tips-advice/business-center/guidance/ftcs-privacy-rule-auto-dealers-faqs>

FTC Model Privacy Notice Online Form Builder:

http://www.federalreserve.gov/bankinforeg/privacy_notice_instructions.pdf

Line-by-line instructions to complete model privacy notice — Go to page #62965 (FTC rules begin at the bottom of this page in this Federal Register notice):

<http://www.gpo.gov/fdsys/pkg/FR-2009-12-01/html/E9-27882.htm>

Background on the FCRA:

<http://epic.org/privacy/fcra/>

Information about the DPPA:

<http://www.accessreports.com/statutes/DPPA1.htm>

Information on the CCPA:

https://oag.ca.gov/system/files/attachments/press_releases/CCPA%20Fact%20Sheet%20%2800000002%29.pdf

EXAMPLE OF A MODEL PRIVACY NOTICE FORM

The following is a sample of a privacy notice. This sample is for illustrative purposes only. Consult your attorney to ensure the notice you intend to provide to your customers complies with the law.

Note: You will also need to add any required states notices as applicable.



RECOMMENDED PRACTICE

Alert customers if you use online tracking and give them a way to opt out.



RECOMMENDED PRACTICE

California dealerships: Find out whether you need to add the CCPA "Do Not Sell" link to your website.

<https://us.dealertrack.com/wp-content/uploads/sites/2/2020/08/Sample%20Privacy%20Notice-1.pdf>

The following is a sample of a privacy notice. This sample is for illustrative purposes only. Consult your attorney to make certain the notice you intend to provide to your customers complies with the law.

Note: You will also need to add any required states' notices as applicable.

AFTERMARKET PRODUCT SELLING

Compliance when marketing and selling aftermarket products requires consistent and transparent presentations that clearly state what the product is and how much it will cost.



DID YOU KNOW?

State laws require that specific notices be given to consumers with regard to certain aftermarket products.

COMPLIANCE TIP

Because aftermarket products are a ripe area for consumer misunderstandings, it is important that F&I professionals take the time to carefully explain what each product costs and the benefits it provides.

WHAT'S NEW FOR 2022

The FTC and the CFPB are actively investigating the sale of all types of aftermarket products for unfair and deceptive practices.

RECOMMENDED PRACTICE

Don't skip required steps in the F&I product presentation process. Failure to provide consistent options and full disclosures will put your dealership at risk for fines and penalties.

BREAKOUT SECTIONS

1. Aftermarket Product Scrutiny
2. Incentives
3. Important Laws and Regulations
 - Disclosure Rules for Aftermarket Sales
 - Insurance Products
4. Guaranteed Automobile Protection ("GAP")
5. Recommended Practices
6. Additional Resources

Many dealers offer to sell aftermarket products to consumers at the time of a vehicle purchase. Typically, the products that are offered include vehicle service contracts, GAP (guaranteed auto protection) waivers and insurance, credit life and disability insurance, and other products that are generally marketed as enhanced protection of the vehicle or the customer's credit obligations. Aftermarket transactions also include products and services to accessorize a vehicle. **In recent years, Aftermarket items must be disclosed separately, and a dealer must clearly disclose that their purchase is voluntary and not required to obtain financing. Many states (for example, California, Minnesota, and Pennsylvania) even have detailed regulations about how various aftermarket items must be separately disclosed to the consumer.**

AFTERMARKET PRODUCT SCRUTINY

The FTC as well as the CFPB are actively investigating the sale of aftermarket products of all types for unfair and deceptive practices. The CFPB, at the urging of consumer advocates, has questioned the value of aftermarket products in relation to their cost and has asserted that it has authority over the sale of certain aftermarket products directly and all aftermarket products, when financed by a consumer. While the CFPB does not have authority to bring an action directly against certain auto dealers, it can bring actions against certain independent and buy-here-pay-here dealers and refer all other dealer violations to the FTC or a State Attorney General.

Since inception, the CFPB has focused, as a top priority, on the sale and marketing of aftermarket products. Former CFPB Director Richard Cordray specifically mentioned add-on aftermarket products in his opening remarks at an auto finance field hearing in 2014, saying that by the time consumers get to the aftermarket part of the sales process, they may be invested in the car and impatient to finish up and drive it home, making them susceptible to misleading statements about the benefits of the product they are being sold.

Consumer advocates and the CFPB have found that consumers typically have little awareness regarding aftermarket products or their costs. Further, in studies and on the CFPB online complaint portal, the CFPB indicates that consumers have a negative perception of the aftermarket sales process and sometimes even of the aftermarket product itself, although other industry data disputes this.

This Topic discusses laws and regulations concerning marketing and advertising of aftermarket products. Federal and state laws govern the methods and content of advertising and marketing as well as the



DID YOU KNOW?

State laws require that specific notices be given to consumers with regard to certain aftermarket products.

disclosure of aftermarket items. The CFPB, the FTC, and state regulators are all interested in aftermarket product sales in a variety of industries and have brought enforcement actions for deceptive sales practices.

INCENTIVES

In the wake of an employee incentive consent order against a lender, in November 2016, the CFPB issued a bulletin warning supervised financial companies that creating incentives for employees and service providers to meet sales and other business goals can lead to consumer harm if not properly managed. Dealers should monitor any incentives related to the sale of aftermarket products to ensure the programs are consistent with the supervisory bulletin. Specifically, “the strictest controls will be necessary where incentives concern products or services less likely to benefit consumers or that have a higher potential to lead to consumer harm, reward outcomes that do not necessarily align with consumer interests or implicate a significant proportion of employee compensation.” To minimize risk of potential harm to consumers, the CFPB recommends that entities implement a robust compliance management system that includes: (i) oversight by the board of directors or management; (ii) adequate policies and procedures; (iii) training employees on expectations for employee incentives and ethical behavior; (iv) monitoring key metrics that may indicate incentives are leading to improper behavior; (v) a manner to implement corrective action where a risk or violation is identified; (vi) a consumer complaint management system; and (vii) an independent audit. The size and scope of the compliance management system will depend on upon the size of the dealer and its business model, among other things.

IMPORTANT LAWS AND REGULATIONS

DISCLOSURE RULES FOR AFTERMARKET SALES

State laws require that specific notices be given to consumers with regard to certain aftermarket products. For example, most state insurance laws require the dealer to inform customers that purchasing insurance from the dealer is not required to obtain credit and that the consumer can obtain insurance from any insurance agent of their own choice. Many state laws require clear and conspicuous disclosures concerning GAP liability and insurance in leasing transactions as well.

The Federal Truth in Lending Act (TILA) also requires this disclosure in order to keep the insurance cost from being included as a part of the finance charge. If a dealer fails to prominently disclose that the purchase of an aftermarket item is voluntary and not required for credit, the cost of the item is considered a part of the “finance charge” for TILA purposes.

and the APR must be calculated to reflect that fact. A dealer must also disclose if it will retain a portion of the premium or charge.

In addition, most state laws (and, effectively, TILA and Regulation Z) expressly prohibit “payment packing,” a practice whereby the dealer quotes monthly payment prices under financing plans to consumers that include the cost of optional items that the customer has not yet agreed to purchase and without disclosing to the customer that the monthly payment quote includes such optional purchases. Restated, “payment packing” describes the sales practice of deceptively increasing a consumer’s credit obligation (and in turn, increasing the dealer’s and creditor’s profits), by padding or “packing” the amount financed through the sale of unnecessary, unrequested and/or unwanted ancillary products. Other packing practices may include overcharges to consumers eligible for GAP coverage, sales of GAP to consumers ineligible for coverage, and/or sales of GAP products that provide less or more than the coverage desired. Generally, states may regulate the practice of “payment packing” through unfair deceptive acts and practices statutes and/or unfair insurance trade practices statutes. Many of these statutes may offer a private remedy for plaintiffs seeking redress for alleged transgressions.

Additional state regulations may also require a separate disclosure to be given to the buyer describing the price and the effect on the consumer’s monthly payment of each service contract, insurance product, debt cancellation agreement, theft deterrent device, exterior or interior surface protection product, and contract cancellation option. The dealer must obtain the consumer’s signature on this written disclosure prior to signing the sales contract. Discrimination claims (both common law and under anti-discrimination laws like ECOA) can be brought against a dealer if its pricing and sales practices for aftermarket products are not consistent between non-protected and protected classes of persons (for example, charging women more for the same products). While laws and regulations may not specifically require consistency in sales approaches, variations in sales practices may still trigger the possibility of being sued under various legal theories, notably UDAP laws described in Topic 8.

INSURANCE PRODUCTS

In selling aftermarket products, it is critical to know how the dealership’s home state characterizes certain protection products such as GAP, debt cancellation products, and/or service contracts.

In some states, these are considered “insurance,” which may require the dealer to be licensed by the State Insurance Department and to give the customer disclosures in the RISC that are different from disclosures for non-insurance products. In other states, where these products are not considered insurance, they still need to be separately itemized on a



DID YOU KNOW?

It is critical to know whether or not your dealership’s home state characterizes certain aftermarket protection products such as GAP, debt cancellation products, and/or service contracts as insurance.

retail installment sales contract (RISC) or lease agreement. If all or part of the payment is paid to a third party, the itemization must indicate the identity of the third party. If true, dealers should also disclose the fact that it may retain a portion of an amount paid to a third party. Federal law requires that credit insurance and GAP coverage be initialed or accepted by the consumer in writing. This is typically done by having the consumer initial an insurance box on the retail installment sales contract or lease agreement.

State laws on how products are characterized can change. For example, prior to 1997, New York considered a service contract that covers wheel and tire damage caused by road hazards such as a blowout to be an insurance product. As such, only a licensed insurer could sell this product. However, the New York legislature amended the State's Insurance Law to provide that a manufacturer or seller of a tire or its agent (such as an auto dealer) may offer coverage for damage to a wheel or tire from road hazards without needing an insurance license.

Both the FTC and CFPB have emphasized transparency, understanding, and fairness in the treatment of consumers related to the sale of aftermarket products. **Aftermarket products are a ripe area for consumer misunderstandings, and it is important that F&I professionals take the time to carefully explain what each product costs and the benefits it provides.** The review should include that the purchase of the product is voluntary and not required to obtain credit. Scripts and QAs for aftermarket selling will be examined by regulators as will any recordings of aftermarket selling sessions. Make sure yours tell a good story.

GUARANTEED AUTOMOBILE PROTECTION (“GAP”)

GAP is optional consumer protection that generally covers the difference between what the car is worth and what the consumer owes on the car after a total loss. There are two types of GAP protection: (1) GAP insurance; and (2) a two-party GAP waiver. Both GAP insurance and two-party GAP waiver have coverage limits, although GAP waiver typically has much higher coverage limits that often apply to both the amount owed on the financed vehicle and negative equity from a trade in vehicle that is included in the amount financed.

GAP insurance is an agreement entered into between the consumer and a third-party insurance company. It functions as insurance coverage to generally cover the “gap” between the amount a customer owes on their car and the car's actual cash value in the event of an accident. A car's actual cash value is the car's monetary value at the time of the



COMPLIANCE TIP

Because aftermarket products are a ripe area for consumer misunderstandings, it is important that F&I professionals take the time to carefully explain what each product costs and the benefits it provides.

accident, not the car's original price. GAP insurance is not available from many auto insurance companies and, when it is available, it often is limited to consumers with a qualifying credit profile who are purchasing new vehicles or used vehicles below a certain age. GAP Insurance also typically does not cover negative equity from a trade in vehicle and may not cover the auto insurance company's deductible. In addition, GAP insurance must be added to coverage should a customer switch insurance companies because it does not transfer from one insurance company to another. The creditor is not a party to a GAP insurance agreement.

A 2-party GAP waiver, on the other hand, is a contractual agreement between the consumer and the creditor which remains with the finance contract through maturity unless it is cancelled pursuant to the agreement. A GAP waiver is typically designed to be an addendum to the retail installment sale contract or lease. In a retail installment sale transaction, the dealer, as the initial creditor, is initially obligated on the GAP waiver. When the retail installment sale contract is assigned, the holder steps into the dealer's shoes and becomes obligated on the GAP waiver. Under a GAP waiver, the holder is obligated to "waive" the amount owned as specified in the agreement.

States typically dictate whether a creditor may sell and finance GAP. Historically, states generally permitted creditors to sell and finance GAP insurance, while only some states permitted creditors to sell 2-party GAP waivers as non-insurance products. In recent years, many states have enacted GAP waiver laws or adopted regulatory positions that expressly permit creditors to sell and finance non-insurance GAP waivers.

State GAP waiver laws typically impose disclosure and other substantive requirements for offering a GAP waiver, including limitations on GAP waiver terms, cancellation, and refund requirements, and in a limited number of states, form approval requirements, licensing, or registration requirements. The failure to comply with these requirements when offering a GAP waiver may, amongst other things, result in the GAP waiver being subject to regulation as insurance or may subject any GAP waiver charge to being treated as a finance charge. For example, in Colorado, a creditor may not exclude a GAP waiver charge from the finance charge unless certain conditions are met.

GAP insurance and GAP waivers are also subject to regulation under federal law. TILA requires the financing agreement to include certain disclosures in order to exclude GAP charges from the finance charge. Specifically, in order for a GAP charge to be excluded from the finance charge under TILA, Regulation Z requires the following conditions

to be satisfied: (i) GAP is not required by the creditor, and this fact is disclosed in writing; (ii) The fee or premium for the initial term of coverage is disclosed in writing. If the term of coverage is less than the term of the credit transaction, the term of coverage also must be disclosed; and (iii) The consumer signs or initials an affirmative written request for coverage after receiving these required disclosures. Any consumer in the transaction may sign or initial the request. If a dealer fails to prominently disclose that the purchase of GAP is voluntary and not required for credit, the cost of the item is considered a part of the “finance charge” for TILA purposes and the APR must be calculated to reflect that fact. A dealer must also disclose if it will retain a portion of the premium or charge.

Finally, when marketing and selling GAP, dealers must be mindful of complying with state and federal standards governing unfair, deceptive, or abusive acts or practices. The sale and marketing of voluntary protection products (VPPs), including GAP, have been an area of focus for government law enforcers, including the Consumer Financial Protection Bureau and the Federal Trade Commission. While the agencies have not issued any guidance to date that directly impacts the ability of a creditor to sell GAP, issues of focus include fair lending, marketing, and advertising of products, and the techniques used to sell GAP. This has resulted in enforcement actions involving deceptive claims about the benefits of GAP, failure to disclose material product exclusions, limitations, or qualifications on the benefits, violations of TILA, and billing for services not provided. Another area of potential risk with respect to GAP is high penetration rates as evidence to challenge the voluntary nature of the products. In other words, penetration rates in the high 90th percentile, while not per se evidence that the product is not voluntary, could invite heightened scrutiny around sales practices.

Most states have unfair and deceptive acts and practices statutes, and/or unfair insurance trade practices statutes, which may also govern the sale of GAP and/or disclosures made in connection with those sales. Many of these statutes offer appealing private remedies for plaintiffs seeking redress for alleged transgressions, including “payment packing” or “packing.”

“Packing” describes the sales practice of deceptively increasing a consumer’s credit obligation (and in turn, increasing the dealer’s and creditor’s profits), by padding or “packing” the amount financed through the sale of unnecessary, unrequested and/or unwanted products. Other packing practices may include overcharges to consumers eligible for GAP coverage, sales of GAP to consumers ineligible for coverage, and/or sales of GAP products that provide less or more than the coverage desired.

To the extent GAP is marketed honestly and the cost of the GAP is transparent to the consumer, dealers can reduce these compliance risks. [The National Automobile Dealers Association, in conjunction with the National Association of Minority Automobile Dealers and the American International Automobile Dealers Association, recently issued an optional Model Dealership Voluntary Protection Products Policy to assist dealers in offering a professional, transparent, and consumer friendly VPP sales process. You should consult your attorney on compliance issues relating to the GAP products you offer.

RECOMMENDED PRACTICES

1. If you conduct direct marketing of aftermarket products, scrub your target lists for persons who have excluded themselves.

You should keep a separate list of consumers who opt out of telemarketing, faxes, and email, and be sure to not use auto dialers or prerecorded telemarketing messages unless you first obtain the customer's written signed consent to receive auto-dialed or prerecorded calls or texts at a designated number with such consent containing language that "I understand that this consent is not a condition of purchase or credit." Adequately scrub telemarketing lists of phone numbers against the FTC's National Do Not Call Registry, your state's Do-Not-Call list, and your dealership's list of persons who have asked not to be called. The Direct Marketing Association (www.the-dma.org) also maintains "do not contact" lists that you can scrub your lists against. If you are telemarketing, get assurances from vendors on exclusions of persons listed on federal and state Do-Not-Call lists and double-check against state Do-Not-Call lists, as well as your own dealership's list of customers who have asked not to be called. If you are calling or texting for marketing purposes using an auto dialer or prerecorded message, getting a prior written signed consent with the above language is required or a penalty per call can be assessed. For additional information see Topic 10.

2. Understand the state law concerning a dealer's ability to disclaim warranties.

Make sure it is clear in the service contracts you sell whether you have "entered into" the service contract, in which event you cannot disclaim implied warranties under the Magnuson-Moss Warranty Act (MMWA) discussed in Topic 7: The FTC: Marketing and Advertising Vehicles, and Credit Terms. Service contracts and insurance contracts to cover the obligations can be structured in a number of different ways, each of which has different tax and liability issues. Two examples are "retro" policies and "reinsurance" policies. In "retro" policies, a portion of the customer premiums is sent by the dealer to an insurer who deposits it into an account to pay claims.



COMPLIANCE TIP

Establish a process to ensure honest and transparent marketing of GAP to help reduce compliance risk.



RECOMMENDED PRACTICE

Scrub your aftermarket products direct marketing target lists to remove anyone who has opted out or unsubscribed.



RECOMMENDED PRACTICE

Understand state laws concerning your dealership's ability to disclaim warranties.

When contracts expire or at predetermined times, the dealer receives a portion of the earned premiums. In reinsurance policy programs, the dealer sends a fixed amount to an insurance company who in turn cedes the amount to a reinsurance company that may be affiliated with the dealer. The insurer offsets claims payments against sums paid to the reinsurance company. When National Warranty went bankrupt, reinsurance companies were deemed to own the reserves, which remained available for customer claims. Retro accounts were considered part of National Warranty's bankruptcy estate and not available to satisfy consumer claims. State insurance laws also contain requirements for insurance and reinsurance for service contracts. Review how your service contracts are structured and insured with your lawyer and accountant.

3. **Charge substantially the same price for each product and each grouping of products.** Do not surcharge credit customers, as the surcharge is considered part of the "finance charge" under TILA and must be calculated into the APR and disclosed in the RISC.
4. **Use consistency in selling aftermarket products in the F&I office.** Understand what is legally required by your state's law and prepare scripts, FAQs, and presentations that fairly and honestly state what the product is and how much it will cost.
5. **Monitor and adjust your menus, presentation scripts, and practices to address consumer feedback and your CSI scores.** Adapt your menu and aftermarket product selling to consider changes in the law or unintended consumer negative reaction. Train and test your employees, and regularly audit their performances.
6. **Ensure any incentive programs are developed and monitored such that they are consistent with the CFPB bulletin on incentives.** Review and understand the CFPB bulletin on incentive programs. Apply robust controls where incentives concern products or services that may be less likely to benefit consumers or that have a higher potential to lead to consumer harm, reward outcomes that do not necessarily align with consumer interests or implicate a significant proportion of employee compensation.
7. **Ensure that any aftermarket products comply with applicable federal and state law.** Consult with your local attorney to confirm that your disclosures and consumer-facing agreements comply with applicable law.



RECOMMENDED PRACTICE

Charge substantially the same price for each product and each grouping of products.



RECOMMENDED PRACTICE

Don't skip required steps in the F&I product presentation process. Failure to provide consistent options and full disclosures will put your dealership at risk for fines and penalties.



RECOMMENDED PRACTICE

Adjust menus, presentation scripts, and practices in response to consumer feedback and CSI scores.



RECOMMENDED PRACTICE

Develop and monitor any incentive programs to be consistent with the CFPB bulletin on incentives.



RECOMMENDED PRACTICE

Make sure the aftermarket products you sell comply with federal and state law.

ADDITIONAL RESOURCES

FTC Announces Crackdown on Deception, Fraud in Auto Sales, Financing and Leasing

<https://www.ftc.gov/news-events/press-releases/2015/03/ftc-multiple-law-enforcement-partners-announce-crackdown>

Regulators Step Up Scrutiny of Ancillary Products

<https://www.autofinancenews.net/allposts/operations/comp-reg/regulators-step-up-scrutiny-of-ancillary-products/>

THE FTC: MARKETING AND ADVERTISING VEHICLES AND CREDIT TERMS

The Federal Trade Commission vigorously enforces laws against deceptive advertising by dealerships. Find out what you should — and should not — do when marketing vehicles and credit terms.



DID YOU KNOW?

The 4 P's for making effective disclosures: Prominence, Proximity, Placement, and Presentation.

COMPLIANCE TIP

Advertisers on social media must make sure that:

- Claims are truthful and substantiated
- All required disclosures are clear and conspicuous
- Advertising content is clearly distinguished from non-commercial content

WHAT'S NEW FOR 2022

Within the past few years, the FTC has revved up its enforcement of deceptive auto dealer advertising.

RECOMMENDED PRACTICE

Adopt advertising and marketing policies in accordance with government regulations and in consultation with your attorney or compliance professional.

BREAKOUT SECTIONS

1. Basics of Deceptive Advertising:
 - Claims Conveyed by the Advertisement
 - Materiality of the Claim
 - Substantiation of the Claim
 - Deception by Omission
2. Making Effective Disclosures
 - Deceptive Advertising Examples
3. Dealer Advertising Practices to Avoid
 - Credit Advertising
4. State Laws and Regulations
 - Prescreening
 - A Wrinkle on Prescreening: "Trigger Leads"
 - Prequalifying Customers
 - Sweepstakes
5. Online ("Digital") Advertising
 - Social Media Advertising
 - FTC Endorsement Guides
6. Important Laws and Regulations
 - Other Advertising Guidelines
 - State Advertising Laws and Regulations
 - FTC Used Car Rule
 - Magnuson-Moss Warranty Act (MMWA)
 - FTC Warranty Rules
7. Recommended Practices
8. Additional Resources

The Federal Trade Commission (FTC) has enforcement authority over false or misleading advertising and other wrongful activity under the authority of Section 5 of the FTC Act to prevent unfair, deceptive acts and practices (UDAPs). **Within the past few years, the FTC has revved up its enforcement of deceptive auto dealer advertising, starting with “Operation Steer Clear” in January 2014 and continuing with “Operation Ruse Control” in March 2015, in which the FTC partnered with 32 law enforcement agencies to bring hundreds of enforcement actions.**

The FTC can identify enforcement targets in many different ways. Although the agency does not need to receive consumer complaints to initiate an investigation, complaints sometimes trigger a closer look. In the case of auto dealers, many investigations arise from FTC staffers looking for problematic ads on the Internet.

In this Topic, we discuss laws, regulations, and regulatory enforcement actions concerning marketing and advertising of vehicles and credit products, as well as best practices dealers should follow. Federal and state laws govern the methods and content of advertising and marketing in any medium of communication, both offline and online, including the Internet and social media.

BASICS OF DECEPTIVE ADVERTISING

A deceptive practice is typically defined as a representation, omission, or other practice that is likely to mislead consumers acting reasonably under the circumstances in a material way. An act is deceptive where (i) a representation, omission, or practice misleads or is likely to mislead the consumer; (ii) a consumer’s interpretation of the representation, omission, or practice is considered reasonable under the circumstances; and (iii) the misleading representation, omission, or practice is material. A practice can even be deceptive if it is likely to cause substantial injury to consumers which is not reasonably avoidable by consumers themselves and not outweighed by countervailing benefits to consumers or to competition. In determining whether an act or practice is unfair, the FTC may consider established public policies as evidence to be considered with all other evidence.

Deception usually occurs through written or oral promotional messages (often referred to as “representations” or “claims”) but can also occur in other ways. Examples of deceptive practices include, but are not limited to the following:

- Misleading price claims.



WHAT’S NEW FOR 2022?

Within the past few years, the FTC has revved up its enforcement of deceptive auto dealer advertising. Make sure you know what marketing tactics to avoid.

- Sales of systematically defective products without adequate disclosures.
- Bait and switch techniques.
- Failure to perform promised services.
- Failure to meet warranty obligations; and
- Failure to disclose material limitations of an offer.

If the appearance of the product or the nature of the product itself conveys a misleading message, it can be deceptive. Simply selling a vehicle conveys the message that the vehicle is fit for its intended purpose (driving), even if the seller says nothing about its capabilities.

Advertising, promotional materials and other disclosures should be tailored to the sophistication of the target audience. In considering whether an advertising is deceptive, the FTC considers the entire advertisement, transaction, or course of dealing to determine how reasonable consumers would be likely to respond. Many factors may be considered in determining how a reasonable person would respond to a claim or practice. To that end, the FTC may consider:

- How clear is the representation?
- How conspicuous is the qualifying information?
- How important is the omitted information?
- Do other sources of for the omitted information exist?
- How familiar is the public with the product or service (i.e., car or aftermarket product)?

You should consult with your attorney for specific guidance, but the following is a practical guide to help you draft your marketing materials.

CLAIMS CONVEYED BY THE ADVERTISEMENT

In determining whether an advertisement is deceptive, an advertiser must first understand what messages the ad is likely to convey to reasonable consumers. To do that, the advertiser must consider the advertisement as a whole and the “net impression” it creates. Even if everything stated in the ad is true, it can create an overall message that is deceptive.

Advertisements may convey both express and implied claims. An express claim is one that states a fact directly, while an implied claim is one that literally says one thing but suggests something else. Advertisements often

can be subject to multiple interpretations, some of which are true and some not. **An advertisement can be deceptive if any one reasonable interpretation is false or misleading, even if other interpretations are accurate, and even if the advertiser didn't intend for the advertisement to be perceived that way.** Note that “reasonable” does not mean sophisticated or highly educated, however.

MATERIALITY OF THE CLAIMS

Claims that are likely to influence consumers' decisions about whether to buy a product or service, or about how they use it, are considered material. The FTC often presumes that certain types of claims are material, including express claims and claims about a central feature of the product, the product's cost, or its safety. Keep in mind though that most claims are likely to be considered material, unless they are “puffery” – claims that are so broad and fanciful that consumers do not take them seriously (for example, “world's best car”).

SUBSTANTIATION OF THE CLAIMS

In addition to claims that are false or misleading, it is deceptive to make a claim about an objective feature of a product or service without having competent and reliable evidence to substantiate the claim at the time it is made. This is the case even if it later turns out that the claim was true. The type and amount of evidence that is necessary depends on the type of claim made. For example, a dealer that wants to advertise that it has the “lowest prices in the county” should survey the prices for the relevant comparison at the other dealerships in that county.

DECEPTION BY OMISSION

An advertisement can be deceptive not just for what it says, but also for what it does not say, that is, if it omits material information that is necessary to dispel a misimpression that the advertiser created. This usually arises in situations where there are significant qualifications, limitations, conditions, or restrictions on an offer. For example, it is deceptive to advertise financing at a particular rate without disclosing (when such is the case) that the rate may adjust upwards. Note that a disclosure is appropriate to qualify a claim, not contradict it. It is deceptive to claim one thing in the headline or text, while saying the opposite in a fine-print footnote. Moreover, a deceptive advertisement cannot be “cured” by providing the truth in a later communication with the consumer.



DID YOU KNOW?

An advertisement can be considered deceptive even if your dealership didn't intend the interpretation that makes it appear false or misleading.

MAKING EFFECTIVE DISCLOSURES

All advertised terms must be “clear and conspicuous.” If a disclosure is not made clearly and conspicuously, it is the equivalent of not making the disclosure at all. **The FTC has identified the four P’s for making effective disclosures: Prominence, Proximity, Placement, and Presentation.**

Prominence – A disclosure must be large enough and sufficiently contrasting with the background such that ordinary consumers will notice and read it. The FTC does not state a required or minimum type size for disclosures, but there are state laws that require a minimum of 8- or 10-point type. Depending on the layout of the advertisement and the importance of the information, however, type size larger than 8- or 10-point may be necessary or appropriate. Disclosures should be distinguished from the background of the ad by using a contrasting color, bolding it, and/or putting the disclosure within a border. Asterisks next to qualified terms should be at least 50% the size of the qualified term’s print size.

Proximity – Disclosures should be located close to the terms being qualified. A small footnote at the bottom of the page or image is generally not sufficient. Nor is putting the disclosures on another page of a brochure or another screen or page of a website not close to the qualified term or referring consumers to another location entirely to see the material terms (such as “see dealer for details”). In digital advertising, if hyperlinks are used to direct the consumer to the disclosure, they must be prominently displayed and clearly labeled to convey the importance and nature of the information. Information essential for consumers to understand the offer should not be disclosed through a hyperlink.

Placement – The location of the disclosure within the advertisement must be such that ordinary consumers would notice it. Small print asterisks or footnotes, even those next to the qualified term, do not meet this standard. Referring consumers to another document or location, such as “see dealer for details,” is generally unacceptable.

Presentation – Language should be in “plain English.” It should not scroll across media or be of such detail and depth that the average consumer would not likely read or understand it. There should be no distracting elements in the ad that compete for attention with the disclosure. The disclosure should be presented unambiguously and in short phrases. Oral disclosures in radio or audio media must be in a volume and cadence that a reasonable consumer can hear and understand.

Disclosures made in online or social media advertising present some



DID YOU KNOW?

The 4 P’s for making effective disclosures: Prominence, Proximity, Placement, and Presentation.

unique challenges. This topic is discussed below.

DECEPTIVE ADVERTISING EXAMPLES

The following are a few examples of deceptive advertising by a dealer:

- Marketing a program where the consumer's outstanding debt on a trade-in vehicle would be paid off, no matter how much the consumer owed, but in reality, the dealer either financed the "negative equity" or required it to be paid off by the customer in cash.
- Failing to disclose that "dealer discounts" and "Internet prices" would require customers to qualify for other discounts that were not generally available (e.g., military member, recent college graduate, etc.) and that even with these other discounts, the consumer would wind up paying a higher price for the vehicle than advertised.
- Advertising biweekly payment plans claiming that the plan would save consumers money on their financing by shortening the duration of the financing and thus lowering total interest paid, but the marketing materials fail to disclose that the fees charged for participating in the program outweigh any potential savings.

In 2016-2017, the FTC announced a series of settlements with auto dealers regarding advertising of used vehicles subject to unaddressed open recalls. In these cases, the FTC asserted that it was deceptive for dealers to advertise that used vehicles offered for sale were subject to a rigorous inspection when that inspection process did not identify and repair open recalls. The FTC argued that "rigorous inspection" claims constituted an implied representation that the vehicles were not subject to any unaddressed recalls. The FTC further claimed that such implied representations were likely to mislead reasonable consumers if the vehicles offered for sale were, in fact, subject to open recalls. These settlements required the dealers to supplement any inspection claims with a clear and conspicuous disclosure that vehicles offered for sale, even those that the dealer inspected, may be subject to an open recall. This disclosure also needed to explain how consumers could determine whether a particular vehicle offered for sale had any unrepaired recalls.

In 2018, the FTC settled a lawsuit against nine automobile dealers in which they agreed to pay over \$3.5 million in redress to consumers allegedly harmed by the dealers because they failed to disclose required information clearly and conspicuously in their advertising and otherwise used deceptive and unfair sales and financing practices, deceptive advertising, and deceptive online reviews.

More recently, in 2020 the FTC initiated enforcement action over



COMPLIANCE TIP

Avoid hefty fines by using "clear and conspicuous" disclosures in advertising.

deceptive mailers. The mailers were designed to look like COVID-19 stimulus-related materials and instructed recipients to claim their stimulus benefits in-person at a particular address, which turned out to be a lot hosting a car sale. Other mailers contained matching numbers indicating that the recipient had won a valuable prize that had to be claimed at a particular car dealership. However, small print on the back of the mailer disclosed that the recipient had not, in fact, won a prize yet and that there was a 1-in-52,000 chance of winning. Also, in 2020, the FTC sued a dealership in part because it failed to honor advertised sale prices, changed the sales price on paperwork in the middle of the sale without informing the customer, and misrepresented to customers that they were required to pay extra reconditioning and warranty fees to purchase “certified” vehicles.

DEALER ADVERTISING PRACTICES TO AVOID

The FTC is aggressively challenging deceptive dealer advertising. Below is a non-exclusive list of “don’ts” that the FTC and others have indicated dealers should avoid:

- 1. Deceptive pricing.** This is where the dealer makes misleading statements or omits material information about the price or terms of an offer. It is deceptive to state a price when that price excludes other significant fees and charges unless the fees and charges are clearly and conspicuously disclosed. For example, a dealer luring prospective buyers onto the lot by advertising vehicles at a specific low price. But the advertised price is valid only after a \$5,000 down payment, details of which are buried in a small-font footnote.
- 2. Deceptive teaser payments.** This is where the dealer advertises interest rates that are only in effect for a short time, after which they increase substantially. For example, prominently advertising a new vehicle for \$99 per month, but failing to disclose that after the first two payments, the payment amount increases to \$525 for the remaining 70 months of the financing term.
- 3. Undisclosed Balloon Payments.** This is where advertisements state a low monthly payment without clearly and conspicuously disclosing a large “balloon” payment at the end of term. A balloon payment is one that is more than two times the regular periodic payment.
- 4. False “\$0 Down” Leases or Sales.** Claims that consumers can lease or finance for “\$0 down” are a particular area of concern with the FTC. If there are undisclosed fees or other charges due up front associated with the sale or lease (such as an acquisition fee or doc fees), or another requirement such as a particular credit score in order

to obtain the no down payment treatment, the FTC may consider a \$0 down claim to be deceptive.

5. **Hidden rates.** Claims of a low APR when the rate changes over time, or when most consumers won't qualify for that rate, can be deceptive unless these facts are clearly and conspicuously disclosed. For example, advertising a "0% APR for 60 months" promotion when the rate only applies if customers bought a new car for up to a certain dollar amount. Critically, Regulation Z and Regulation M set forth specific requirements concerning advertising credit. For additional information see below.
6. **Bogus Promotions or Sweepstakes.** Dealers should not use so-called promotions or sweepstakes that are not genuine to bring customers to the showroom. FTC and state laws also require extensive disclosures in advertising contests or sweepstakes. This is discussed in more detail below. An example is when a dealer mails out scratch-off sweepstakes cards to promote car sales, where every card scratched off indicates that the consumer is a winner, yet no one is awarded a prize.

CREDIT ADVERTISING

TILA and Regulation Z, which apply to closed-end credit transactions, and the Consumer Leasing Act and Regulation M, which apply to consumer leases, all contain advertising requirements relating to credit terms. Under both Regulation M and Regulation Z, all disclosures must be made clearly and conspicuously.

Further, Regulation Z permits creditors to state only those terms that actually are or will be arranged or offered by the creditor. If an advertisement states a rate of finance charge, it must state the rate as an "annual percentage rate," using that term.

Regulation M states that an advertisement for a consumer lease may state that a specific lease of property at specific amounts or terms is available only if the lessor usually and customarily leases or will lease the property at those amounts or terms.

Advertising the following "triggering terms" about closed-end credit requires additional disclosures:

- Down payment.
- Number of payments or period of repayment.
- Payment amount; or

- The amount of any finance charge in a credit sale.

If any of these terms are used, the advertisement must include the following terms:

- The down payment.
- Terms of repayment which reflect the repayment obligations over the full loan term, including any balloon payment; and
- The “annual percentage rate” or “APR” and whether the rate is subject to increase.

Similarly, for consumer leasing, if a lessor includes the following terms in an advertisement, they are considered “triggering terms”:

- Any lease payment; or
- The capitalized cost reduction or other payment due prior to or at lease signing (or that no payment is required), or by delivery if delivery occurs after consummation.

If the advertisement includes any of these triggering terms, then the advertisement must also include the following disclosures:

- A specific reference that the advertised transaction is a lease.
- The total amount due at lease signing or by delivery if delivery occurs after consummation.
- The number, amounts, and due dates or periods of scheduled payments.
- Whether a security deposit is required; and
- A statement that an extra charge may be imposed at the end of the lease term where the lessee’s liability (if any) is based on the difference between the residual value and its realized value at the end of the lease term.

Additionally, if an advertisement for a lease provides a percentage rate in an advertisement, the rate may not be more prominent than any of the required consummation disclosures (with the exception of the notice stating that “this percentage may not measure the overall cost of financing this lease” required to accompany the rate), and the lessor may not use the term “annual percentage rate,” “annual lease rate,” or equivalent term.

There are different rules for open-end credit. Both Regulation Z and Regulation M contain special rules for catalog and electronic advertisements, as well as television and radio advertisements.

You should consult with your local attorney to ensure that your advertisements comply with applicable law.

STATE LAWS AND REGULATIONS

State laws on unfair and deceptive acts and practices are often even stricter than Section 5 of the FTC Act and many State Attorneys General have guidelines for vehicle advertising in their state in both traditional and online media.

You should check with your attorney to make certain you comply with applicable state laws and rules.

PRESCREENING

You can also “prescreen” a list of leads or even a single lead under the Fair Credit Reporting Act (FCRA). Prescreening is governed by the FCRA and involves giving a credit bureau a list of credit criteria for the credit bureau to produce a list of consumers meeting the criteria. (Under the “prescreen of one” model, the credit bureau applies the credit criteria to a single consumer and indicates whether or not the consumer meets them.) FCRA requires dealers to make a “firm offer of credit” to these consumers, which the creditor is obligated to honor, provided the consumers continue to meet the prescreen criteria and meet any additional post-screen credit criteria as well as provide any required collateral. FCRA requires specific “clear and conspicuous” disclosures that must be included in the prescreen mailing, including conspicuously disclosing to the consumer how to opt out of further prescreening. The CFPB has issued a FCRA rule regulating the content and format of these disclosures, and the rule includes models that offer a compliance safe harbor. Dealers should apply the models for the most reliable approach to compliance with these disclosure requirements.

Prescreening differs from preapproval inquiries in that a consumer who meets the prescreen criteria must receive a firm offer of credit. Additionally, prescreening is generally initiated by the creditor whereas preapprovals are generally initiated by the consumer. Persons who do not pass the prescreen criteria do not need to receive adverse action notices unless they otherwise affirmatively apply for credit and are declined.

A WRINKLE ON PRESCREENING: “TRIGGER LEADS”

Trigger leads are products created and sold by credit bureaus. Recall from Topic 3 that a consumer provides his or her consent to have his or her credit report pulled as part of the loan application process. When the credit report is pulled during the loan application process other competing lenders are notified that the consumer is shopping for credit. The credit bureaus do not communicate the consumer’s name and contact information (usually a cell phone number) to the prescreen client until another auto dealer pulls the customer’s credit report. In other words, one creditor’s inquiry to a credit bureau regarding a consumer “triggers” the bureau to provide prescreened lead information about that consumer to a competing creditor. At that point, the prescreen/“trigger lead” client (typically a lender or another auto dealer in partnership with the lender) will call the customer on the customer’s cell phone and attempt to induce them away from the original dealership that pulled the credit report. That inducement must be a valid firm offer of credit under FCRA because the trigger lead process is a form of prescreening. Often, the client will offer this inducement by claiming to offer better purchase or financing terms on the vehicle or aftermarket products. Some customers literally have been called on their cell phones while still in the original dealer’s F&I office.

There is some general uncertainty as to the propriety of the trigger lead process in the context of indirect auto finance under federal and state law. The FTC has stated that the practice can be beneficial to consumers because it can help them more easily identify other terms and loan offers. Although the FTC’s guidance was issued in the mortgage context, it reasonably follows that the agency would look favorably on the practice in the auto lending context. While there have been efforts to ban trigger leads legislatively, no effort has yet been successful as of the date of this publishing.

To be sure, dealers should consult with legal counsel before participating in a trigger lead campaign.

PREQUALIFYING CUSTOMERS

Dealers can use their websites to market credit terms and prequalify customers even before taking a full credit application. Whether a prequalification is treated as merely an inquiry or a credit application depends on what you communicate to the consumer. Please note that the distinction between inquiries and applications in the prequalification context is complicated and fact specific.

A consumer can securely provide personal information (e.g., name, address, birth date, Social Security number) over a secure webpage (an https page or by using encrypted data transfer) and give consent allowing

the dealer to access their credit report, including their credit score, for prequalification purposes.

If a dealer responds by indicating the types of credit programs offered for which the consumer may qualify and indicate how the consumer can submit a complete credit application, the prequalification process could be treated as an inquiry which could subsequently trigger risk-based pricing or adverse action notice requirements. You can also communicate to the consumer that your dealership has many credit programs available and that you need additional information from the consumer to be able to prequalify them for one of the programs. Either way, suggest that the consumer come to the dealership or call your Internet sales manager.

If the dealer responds that there are no programs for which the consumer can qualify, then the dealer may be considered as having made a credit decision instead of treating it as an inquiry. In that case, the dealer would be required to send the consumer an adverse action notice. If you respond with information that indicates the consumer qualifies for specific financing, you have also made a credit decision and must provide the Risk-Based Pricing Notice or alternative Credit Score Disclosure Notice.

Dealers should work with legal counsel to ensure that their communications with consumers in the prequalification process do not inadvertently cross over from an inquiry into a credit application.

SWEEPSTAKES

Sweepstakes or “games of chance” present additional challenges and are regulated principally by state laws and the FTC. Sweepstakes are comprised of the giving of a prize to a winner who is selected through an element of chance. To avoid a state law violation, sweepstakes must not require the giving of consideration in order to enter or win. To do this, a sweepstakes must give consumers the right to enter without making a purchase (such as by mailing in a postcard) or without requiring a substantial amount of the entrant’s time or effort to participate.

Sweepstakes can have a method of entry that requires payment, but only if there is a free alternative method of entry. Keep in mind that some states also prohibit or restrict prize promotions that require the entrant to attend a sales pitch, so it is best practice to consult an attorney familiar with your state’s prize promotion laws.

For example, it would be a state lottery law violation to run a sweepstakes that is open only to consumers who purchased or leased vehicles. Instead, the sweepstakes should also be available without a purchase or lease by mailing in a postcard or filling out an entry form online. Some states require registration with state entities and bonding for certain

consumer sweepstakes.

Before running and advertising a sweepstakes, you must have a full set of official rules setting forth details such as the method of entry, entrant eligibility, method of determining the winner, prizes, and odds of winning. The official rules also typically contain standard legal provisions such as releases, disclaimers, governing law, etc. The official rules form a contract between the sweepstakes sponsor (oftentimes the dealer) and the entrants. The official rules and all promotional materials must state that no purchase is necessary to enter and that making a purchase will not improve the chances of winning a prize. In addition, promotional materials should include a set of “abbreviated” official rules and should direct viewers to where they can find the full set of official rules. The sweepstakes provider must provide a notification system that allows consumers to have their names removed within 60 days from the mailing lists of that provider. In addition, the provider must report to the IRS the number of prizes received by certain winners.

Dealers that use prize promotions should consider seeking advice from an attorney familiar with the laws of the states where the sweepstakes will be conducted or with the appropriate government agencies in those states, because the laws can be complex. Attorneys can also help draft or review the official rules to ensure compliance with the applicable state laws.

ONLINE (“DIGITAL”) ADVERTISING

The use of digital media to promote businesses and their products is increasing at a rapid rate, and federal and state law enforcement agencies have responded accordingly. **The most important thing to know is that the same basic compliance rules that apply to other forms of advertising also apply to digital advertisements.** For example, representations must be true and substantiated and must include clear and conspicuous disclosures when necessary to dispel any misleading impression created by the ad.

The different characteristics of the Internet and the devices used to access it can create unique compliance concerns and making effective disclosures can be especially challenging in online media, as the user experience can vary widely depending on the consumer and type of device. As in other media, online disclosures must be prominent and proximate to the claims or terms they are qualifying. Note: this can be very difficult to do on a mobile device with a small screen. In March 2013, the FTC issued an update to its Dot Com Disclosures Guide to making effective online disclosures. The FTC emphasized that consumer protection laws apply equally to all advertising, regardless of the medium



DID YOU KNOW?

The same basic advertising compliance rules also apply to digital advertising.

used, and include digital and social media. Disclosures required to avoid deception or otherwise comply with the law must be presented in a clear and conspicuous manner, and space constraints do not relieve the advertiser of this obligation.

In terms of prominence and placement, advertisers should be creative in using color, size, and graphics to make the disclosure more readily noticeable. Material disclosures should not be buried in long paragraphs of scrolling text, in the website's "terms and conditions," or in footnotes. They should be on the same screen as the claim they are qualifying and should be as close to the claim as possible. Generic statements such as "see below" are insufficient, especially if the consumer must scroll to see it. In some cases, it may be acceptable to use hyperlinks to take the reader to a separate page containing the disclosure, but only if the link itself is clear and prominent, takes the reader directly to the disclosure, and is labeled to explain the nature of the information and its importance (such as, "Click here to learn more about options you can purchase"). But hyperlinks cannot be used to communicate disclosures that are "an integral part of the claim." For example, disclosures about added fees and costs that consumers must pay to purchase the product should really be in close proximity to the price claims, and not on a separate screen or page.

Any elements of the ad that detract from the effective communication of a disclosure should be removed or altered. Pop-up disclosures typically do not comply because many consumers block pop ups. A disclosure should be made in the same manner as the claim it qualifies and may need to be included each time the claim is presented. The content of the disclosures should be clear, simple, and straightforward. The test for whether a disclosure is effective is the extent to which consumers can actually read, perceive, and understand it. Rapidly scrolling pages of text are likely to fail the test for acceptability.

For example, the FTC issued a complaint against an online lender in connection with its lack of prominent disclosures regarding fees, because the company used methods such as pop ups, scrolling and fine print to qualify the nature of the fees. The FTC's complaint asserted that the fee disclosures were not clear and conspicuous and that this constituted a deceptive act or practice.

In addition to the challenges posed by making disclosures on electronic devices, the FTC has identified three other major issues with online and social media advertising:

- **Native Advertising ("sponsored content").** Promotional messages that blur the lines between advertising and "editorial" content

are common on the Internet but may be deceptive. The FTC has issued an enforcement policy statement on “deceptively formatted advertisements,” defined as promotional messages that are integrated into and indistinguishable from non-promotional content, such as news, featured articles, or product reviews. The policy statement states that advertising and promotional messages that are not readily identifiable as such are deceptive, because they are likely to mislead consumers into believing the messages are independent and impartial. In these situations, the advertiser must clearly and conspicuously disclose that the embedded message is an advertisement, for example by putting the phrase “PAID ADVERTISEMENT” at the top of the message.

- **Deceptive Endorsements/Testimonials/Customer Reviews.**

Endorsements, testimonials, and customer reviews are a hot topic at the FTC, and we anticipate lots of regulatory scrutiny and enforcement action in this area over the next few years. Importantly, all endorsements/testimonials/customer reviews should reflect the honest opinions, beliefs, and experiences with using the advertiser’s products or services. In addition, whenever there is a “material connection” between the advertiser and the person making the endorsement or providing the testimonial/review, that material connection must be disclosed. A “material connection” can be any of the following: monetary payment; the offering of an incentive such as a coupon, discount, or sweepstakes entry; providing free product; an employment or contractor relationship; and a family relationship. The type of disclosure will depend on the type of material connection. For example, someone paid to promote the advertiser will typically include #ad in the post or will state #freegift if the advertiser provides free product. However, if one of the advertiser’s employees posts about the advertiser’s products (or about competitors’ products), the disclosure would typically look something like #[advertiser] employee. The FTC’s Guides Concerning the Use of Endorsements and Testimonials in Advertising (“FTC Endorsement Guides”), which set forth these rules, are described in more detail below.

- **Online Influencers.** The FTC has indicated that it will continue to monitor the use of online influencers for compliance with the FTC Endorsement Guides. Specifically, the FTC will assess whether the influencer made an appropriate material connection disclosure. The FTC may pursue enforcement action against both the influencer as well as the advertiser. If you engage influencers, it is important to have an agreement in place and to train the influencer on “do’s” and “don’ts.” You should monitor the influencer’s posts to make sure the requisite disclosures are made and reach out to the influencer

for corrective action in the event of noncompliance. And remember, the influencer cannot make any advertising claim that the advertiser cannot make itself. As with the use of endorsements/testimonials/customer reviews, this is another area of importance for the FTC.

SOCIAL MEDIA ADVERTISING

Social media sites offer dealers a new way to connect with consumers through consumers' principal means of staying in touch with friends, colleagues, and companies with whom they share an interest or have a relationship. But, increasingly, advertisers are using social media to disseminate commercial messages, and government regulators are actively monitoring social media to look for deceptive practices. The suggestions for advertising practices described above, including those described as part of the FTC's "Dot Com Disclosures" guide, should be reviewed to help advertisers make effective online disclosures.

Advertisers on social media must make sure that (i) their claims are truthful and substantiated, (ii) all required disclosures are clear and conspicuous, and (iii) advertising content is clearly distinguished from non-commercial content. Several of the FTC's deceptive advertising cases have addressed social media advertisements. The ads came to the FTC's attention as a result of FTC staffers searching the Internet and finding the ads on sites such as YouTube.

Any dealership that plans to launch a social media presence, or whose employees have access to and use such sites, should adopt a Social Media Policy. The Policy should place reasonable limits on employees' use of social media in a way that can be tied to the dealership. Relatedly, if the dealership has its own social media accounts, policies should be set for who can access/post from those accounts and what they can/cannot say.

FTC ENDORSEMENT GUIDES

In 2009, the FTC issued revised guidelines on the use of endorsements and testimonials in advertising. The FTC Endorsement Guides include the following:

- There are several kinds of endorsers, including experts providing their expert opinions about the advertised product, consumers relating their experiences with the product (commonly referred to as "testimonials"), and organizations that may grant some sort of certification or approval. On the other hand, individuals who are merely spokespersons and are not purporting to provide their own opinions or experiences are not covered by the FTC Endorsement Guidelines. Nor are bloggers or others who go on review websites



COMPLIANCE TIP

Advertisers on social media must make sure that:

- Claims are truthful and substantiated
- All required disclosures are clear and conspicuous
- Advertising content is clearly distinguished from non-commercial content

and provide their opinions, so long as they are not connected in any way with the advertiser.

- Endorsements must reflect the honest opinions, beliefs, or experiences of the endorser. Any claims made by the endorser beyond this must be true and substantiated. In other words, if the claim would have been deceptive if made directly by the advertiser, it is deceptive when made by the endorser.
- Endorsements may not be presented out of context or reworded in a way that distorts the endorser's opinions or experiences. If the endorser is presented as a user of the product, he or she must have actually used it.
- The experiences related in consumer testimonials must reflect the typical, or representative, experience of consumers generally. If they do not, the advertiser must clearly and conspicuously disclose what the typical experience is. A disclosure like "results not typical" or "results may vary" is not sufficient.
- If there is a material connection between the endorser and the advertiser that might affect the weight or credibility of the endorsement, that connection must be disclosed clearly and conspicuously. A material connection could include the payment of compensation or providing free products to the endorser, for example, an endorser who touts her experiences with the product on a social networking site in exchange for free product or payment of money.

OTHER ADVERTISING GUIDELINES

The FTC has published additional advertising guidelines that often apply to dealers. One example concerns the use of the word "free" in advertising. The FTC prohibits use of the word "free" in describing a product if that product is sold with another product or service as to which the price is arrived at through bargaining. FTC guidelines also warn that it is deceptive to advertise a discount unless the price is less than the regular price of the product. For example, an advertiser cannot raise the regular price of a product and then advertise a discount on that inflated price. Statements such as "repossession sale," "fleet liquidation," "end-of-lease sale," or other unusual sale circumstances must be true in fact. If a vehicle is advertised at "factory invoice" or the like, the terms must represent the dealer's ultimate total vehicle cost, including any holdbacks or manufacturer incentives. Advertisements for a particular product need to include a disclosure if there are limited quantities of that product available. And advertisers should not engage in "bait and switch" advertising.

STATE ADVERTISING LAWS AND REGULATIONS

Almost all states have laws specifically prohibiting misleading advertising. The state standards summarized in this section are for example purposes only. This section does not provide a comprehensive review of all state laws regulating advertising. An example of a relevant regulatory scheme is Florida, which prohibits any statement known or which could have been ascertained to be untrue or misleading and which was made with the intent or purpose of selling goods or services. Mississippi lists a series of phrases that are deemed to be untrue including “everybody financed,” “no credit rejected,” “name your own monthly payments,” and a statement that no other dealer gives a greater allowance for trade-ins.

A number of state laws give consumers a right to sue for misleading advertising and specifically provides that a consumer can recover attorney’s fees and punitive damages. Other states specifically prohibit using any unexplained abbreviations in dealer advertising that are not commonly understood and lists FTB, A/R, TOP, POF, and DOC as examples.

The advertising requirements for dealers are different in each state. The Attorney General and state Motor Vehicle Department websites are two good resources to find rules and regulations concerning what activities are permissible and impermissible for auto dealer advertising. Attorney General websites usually publicize enforcement actions brought against auto dealers for deceptive trade practices, including deceptive advertising. Many State Attorney General offices publish specific guidelines for auto dealer advertising in that state as well.

For example, **many states prohibit a dealer from selling a vehicle at a price higher than an advertised price even if the consumer has not seen the advertisement.** In some states, this rule will not apply if the advertisement provides clearly and conspicuously that the consumer must bring in or at least mention the advertisement to get the advertised price. A number of states also have laws governing advertising of rebates. There are states that require a disclaimer that dealer participation may affect consumer cost when a dealer must contribute to the cost of an incentive in order to participate in a manufacturer or distributor incentive.

You should check all your advertising against your state guidelines as well as the FTC’s rules and guidelines. In the present environment of aggressive enforcement, it is a best practice to have your local attorney review all advertising. It is also important to have staff that tracks advertised vehicles price to ensure that all price listings regardless of where posted reflect the most up to date price.



DID YOU KNOW?

Many states prohibit a dealer from selling a vehicle at a price higher than an advertised price even if the consumer has not seen the advertisement.

IMPORTANT LAWS AND REGULATIONS

FTC USED CAR RULE

The FTC Used Car Rule, which was amended in 2016 (the “Rule”), requires auto dealers to prominently post a “Buyer’s Guide” in plain view on all used vehicles before they are offered for sale. The Rule defines a “used car” as any car that has been driven more than necessary to move it or for road testing prior to delivery to a consumer. This would include many “demo” models used for customer test drives. The Buyer’s Guide must disclose whether the vehicle is being sold “as is” or with a warranty. State law governs the legal requirements for disclaiming warranties and will determine whether a dealer must use the “As Is – No Dealer Warranty” or “Implied Warranties Only” version of the Buyer’s Guide. If the vehicle is sold with a written warranty, the Buyer’s Guide must state the general terms of the warranty, including whether it is full or limited; the duration of the coverage; the specific systems covered (engine, transmission, etc.); a list of parts or systems not covered if necessary for clarity (e.g., a battery); what percentage of repair costs the dealer will pay under the warranty; an explanation of how the customer gets warranty service; and whom to see about complaints.

The Buyer’s Guide must also tell consumers that (1) oral promises are difficult to enforce and that consumers should get all promises in writing, (2) the major mechanical and electrical systems on the car that are covered by the warranty, (3) the major problem areas that consumers should look for, and that they should ask to have the car inspected by an independent mechanic before they buy, and (4) they should obtain a vehicle history report and check for open recalls at the government website, safercar.gov. If a used car transaction is negotiated in Spanish, the dealer must post a Spanish language Buyer’s Guide. In addition, the English version of the Guide must advise Spanish speakers, in Spanish, to ask for the Spanish version. The Buyer’s Guide becomes part of the sales contract and the disclosures cannot be contradicted orally or in writing. In addition to the Buyer’s Guide, the dealer must provide a separate warranty document unless the dealer is not selling the used vehicle with its own warranty. The Buyer’s Guide is not a warranty document. The Buyer’s Guide also includes a non-dealer warranties section for a dealer to disclose whether the original manufacturer’s warranty, manufacturer’s used vehicle warranty, or other used vehicle warranty applies. A dealer may also disclose whether a service contract is available to purchase in this section.

The FTC is actively monitoring dealers’ compliance with the Used Car Rule. In 2018, the FTC, working jointly with 12 partner agencies in seven states, conducted the first compliance sweep of car dealerships since the



COMPLIANCE TIP

Used cars must be displayed with a Buyer’s Guide that includes warranty and other consumer information.

Rule was amended. Following the sweep, the FTC notified the inspected dealerships of the inspection results and indicated that dealerships not displaying the revised Buyers Guide can expect follow-up inspections to ensure that they have brought themselves into compliance.

The Used Car Rule applies in all states except for a few states that have enacted their own state law provisions, such as Maine and Wisconsin, that require notices with additional disclosures for used car sales.

MAGNUSON-MOSS WARRANTY ACT (MMWA)

This is a federal law that requires manufacturers and sellers to disclose information about warranties given with the sale of a product. A warranty is a statement or representation, express or implied, about the character or quality of the goods sold. Express warranties result from statements or affirmations made about a product that the buyer relies upon in deciding to purchase. The MMWA covers written express warranties. Implied warranties derive from state law and automatically attach to the vehicle from the sale, such as an implied warranty of merchantability, which is a promise the vehicle will perform in a manner fit for its usual and ordinary purposes.

The MMWA requires any written warranty to be clearly and conspicuously labeled as “full” or “limited” and be described in a single, easy-to-read document and to state any qualifications to the warranty (such as the consumer performing scheduled maintenance) with the full warranty terms available. At minimum, the document must describe who is making the warranty; when the warranty begins and ends; what is covered and what is not; what the warrantor will do if there is a problem; and how the consumer can obtain warranty service. It must also indicate that the consumer may have additional rights under state law and contain the following specific disclosures: “This warranty gives you specific legal rights, and you may also have other rights which vary from state to state. Some states do not allow limitations on how long an implied warranty lasts, so the above limitation may not apply to you.” If a dealer sells the customer its own service contract within 90 days of the vehicle sale (as opposed to the consumer purchasing a service contract from a third party), the dealer cannot disclaim any implied warranties, but the duration of implied warranties can be limited under certain circumstances.

A common misconception concerns the concept of a warranty versus an “extended warranty” or service contract. For a new car, a warranty is included in the vehicle price and it provides the customer a right from the manufacturer to obtain certain repair services that must be adequately described under MMWA. Manufacturer warranties do not cover aftermarket products such as dealer-added equipment. Some vehicle

manufacturers permit transfer of unexpired warranties to subsequent purchasers, and state laws restrict or limit any charges that can be imposed for doing so. Used car dealers can also provide warranties for the vehicles they sell, but a dealer cannot charge a customer for a warranty; it must be included in the cost of the vehicle. If the customer pays separately for additional coverage or an “extended warranty,” that is a “service contract.”

An “extended warranty” is somewhat of a misnomer. Any product that provides for repair or servicing of the vehicle after the original manufacturer’s (or seller’s) warranty expires and for which the customer pays an additional charge is generally deemed to be a “service contract,” not a warranty. Service contracts can be sold directly by the dealer or by a third party. They do not extend the manufacturer’s warranty obligation but give the consumer a contractual right against the seller of the service contract in the event of a breakdown or service need. Under MMWA and state law, a consumer’s legal rights and remedies will be different for warranties and service contracts.

Some states require implied warranties in any vehicle sale. Other states permit “as is” sales of used cars. Used car warranties and the availability of a manufacturer’s warranty must be disclosed in the Used Car Buyer’s Guide discussed earlier in this Topic.

In 2015, President Obama signed the E-Warranty Act which does away with a requirement that has been on the books since passage of the Magnuson-Moss Warranty Act of 1975, which compelled manufacturers to include warranty terms on a single printed document on or within packaging of products costing more than \$15. The E-Warranty Act now permits, but does not compel, manufacturers to avoid the requirement by directing consumers to their websites to find the terms and conditions of their consumer warranties. Pursuant to the FTC’s rules implementing the E-Warranty Act, which took effect October 17, 2016, if a warrantor or seller opts to post warranty terms electronically, the warrantor or seller must: (i) provide consumers the Internet address of the website where the warranty terms can be reviewed; (ii) provide a non-Internet based method, such as a phone number or mailing address, for consumers to request the warranty terms; upon request, the warrantor must provide the warranty terms promptly and free of charge; (iii) ensure that all required warranty terms are posted in a clear and conspicuous manner and that any limitation on implied warranties appears in close proximity to the location where the text of the warranty terms begin; and (iv) ensure that warranty terms remain accessible to the consumer on the warrantor’s website.

FTC WARRANTY RULES

Two additional FTC rules, the Consumer Product Warranty Rule (Warranty Rule) and the Rule Governing Pre-Sale Availability of Written Warranty Terms (Pre-Sale Availability Rule), specify language for warranties, require that warranties be displayed in close proximity to the vehicle, and the full warranty terms be made available to consumers upon request before they buy. State laws, such as the California and Minnesota Car Buyer's Bill of Rights, provide minimum requirements for dealers to be able to use the term "certified" (or any similar term) in connection with a used car sale, and require other warranty and used car disclosures as well.

RECOMMENDED PRACTICES

- If you conduct direct marketing, periodically scrub your target lists for persons who have excluded themselves from the means of communication you intend to use (telemarketing, faxes, and email).** You should keep a separate list of consumers who opt out of telemarketing (calls and text messages), faxes, and email and be careful before using an auto dialer or prerecorded message to obtain the appropriate consents from the party you are calling or texting. This consent must include specific disclosures and comply with specific content requirements. Adequately scrub telemarketing lists of phone numbers against the FTC's National Do Not Call Registry, your state's Do-Not-Call list and your dealership's list of persons who have asked not to be called. The Data & Marketing Association (www.the-dma.org) also maintains "do not contact" lists that you should scrub your lists against. If you are telemarketing, get assurances from vendors on having obtained customer consents and exclusions of persons listed on federal and state Do-Not-Call lists, then double-check against Do-Not-Call lists, as well as your own dealership's list of customers who have asked not to be called. The class action liability potential under the TCPA makes this a critical area for you to be compliant. Also, note that many State Attorneys General and Motor Vehicle Departments have their own rules or guidelines for advertising motor vehicles.
- Advertisers must ensure that any express or implied claims made in their advertisements are truthful and substantiated.** Remember that every statement in an ad can be literally true, but if its net impression is misleading, the ad is deceptive. Be able to prove the truth of every statement made or implied in your advertising and consider your advertising's net impression. For example, if you are advertising sales of repossessed or off-lease vehicles, be prepared to show that substantially all of the vehicles meet those criteria. If your ad says, "factory authorized," be prepared to produce the



RECOMMENDED PRACTICE

Periodically scrub your direct marketing target lists to remove people who do not wish to be contacted via the means of communication you plan to use.



RECOMMENDED PRACTICE

Make sure any express or implied claims made in your advertisements are truthful and substantiated.

written “factory authorization” that supports that statement. Be wary of advertisements promising credit to subprime borrowers (e.g., “bankruptcy not a problem”).

3. **Don’t stack rebates to advertise the price of a vehicle.** Rebates that are available to the general public can be itemized as deductions from the MSRP. You can show additional conditional rebates separately from the vehicle pricing and those should be itemized along with a clear and conspicuous explanation of the qualifications for each. Note that state laws also govern the advertising of rebates such as the California and Nevada laws referenced above. If an advertisement would mislead consumers in the absence of additional information, the disclosure of that information must be “clear and conspicuous.” Advertisers should apply the four P’s of effective disclosures – prominence, presentation, placement, and proximity – as a starting point. The FTC has stated if a disclosure is not made clearly and conspicuously, it is the equivalent of not making the disclosure at all. Avoid putting required disclosures in “mouse type” or in a color that blends into the background or in pop-ups on websites. Use plain English and don’t use abbreviations not commonly understood by the public. Fast-talking TV or radio disclaimers are also problematic. The CFPB specifically has cited fast-talking telemarketers as part of a deceptive selling process.
4. **If you use an advertising agency, try to get the agency to indemnify you if the ads it produces lead to litigation or an FTC or Attorney General action.** It is a best practice to have your attorney review all your advertising before publication.
5. **Use caution in promoting your products in digital media.** Remember that advertising online must be considered from the perspective of all devices that will be used to view it, including cell phones and tablets. Make sure any disclosures are clear and conspicuous on any type of device used by consumers. In addition, make sure you disclose any material connections between you and an endorser of your product, including if the endorser is receiving monetary or other compensation. If you engage online influencers, be sure to have an agreement in place, train the influencer on “do’s” and “don’ts,” monitor the influencer’s posts for compliance, and require corrective action in the event of noncompliance
6. **Adopt a social media policy in accordance with the guidelines described above and in consultation with your attorney or compliance professional.** Make sure that your social media policy protects against improper disclosure of company or consumer



RECOMMENDED PRACTICE

Don’t stack rebates to advertise the price of a vehicle.



RECOMMENDED PRACTICE

Try to get any advertising agency you use to indemnify you from litigation or regulatory action.



RECOMMENDED PRACTICE

Use caution in promoting your products in digital media.



RECOMMENDED PRACTICE

Adopt advertising and marketing policies in accordance with government regulations and in consultation with your attorney or compliance professional.

information but does not inhibit the employee.

7. **The FTC’s website, www.ftc.gov, and State Attorney General websites provide a great deal of information on auto dealer advertising guidelines.** Checking those websites to see recent enforcement proceedings involving auto dealer advertising can also be helpful.
8. **Understand the state law concerning a dealer’s ability to disclaim warranties.** Make sure it is clear in the service contracts you sell whether you have “entered into” the service contract, in which event you cannot disclaim implied warranties under the Magnuson-Moss Warranty Act (MMWA) discussed in Topic 7: The FTC: Marketing and Advertising Vehicles, and Credit Terms. Service contracts and insurance contracts to cover the obligations can be structured in a number of different ways, each of which has different tax and liability issues. Two examples are “retro” policies and “reinsurance” policies. In “retro” policies, a portion of the customer premiums is sent by the dealer to an insurer who deposits it into an account to pay claims. When contracts expire or at predetermined times, the dealer receives a portion of the earned premiums. In reinsurance policy programs, the dealer sends a fixed amount to an insurance company who in turn cedes the amount to a reinsurance company that may be affiliated with the dealer. The insurer offsets claims payments against sums paid to the reinsurance company. When National Warranty went bankrupt, reinsurance companies were deemed to own the reserves, which remained available for customer claims. Retro accounts were considered part of National Warranty’s bankruptcy estate and not available to satisfy consumer claims. State insurance laws also contain requirements for insurance and reinsurance for service contracts. Review how your service contracts are structured and insured with your lawyer and accountant.

ADDITIONAL RESOURCES

FTC Guidance on Advertising Consumer Leases

<https://www.ftc.gov/tips-advice/business-center/guidance/advertising-consumer-leases>

A consumer compliance handbook published by the Federal Reserve Board to promote compliance with Section 5 of the FTC Act which prohibits unfair and deceptive acts and practices:

www.federalreserve.gov/boarddocs/supmanual/cch/200806/ftca.pdf



RECOMMENDED PRACTICE

Look for auto dealer advertising guidelines at ftc.gov and your state attorney general’s website.



RECOMMENDED PRACTICE

Be sure you understand state law regarding a dealer’s ability to disclaim warranties.

FTC Guidelines for Small Business Advertising:

<http://www.business.ftc.gov/documents/bus35-advertising-faqs-guide-small-business>

FTC Guidelines for Advertising and Marketing on the Internet:

<http://business.ftc.gov/documents/bus28-advertising-and-marketing-internet-rules-road>

A Dealer's Guide to the Used Car Rule:

<http://business.ftc.gov/documents/bus13-dealers-guide-used-car-rule>

Answering Dealers' Questions About the Revised Used Car Rule:

<https://www.ftc.gov/tips-advice/business-center/guidance/answering-dealers-questions-about-revised-used-car-rule>

Information about the Self-Regulatory Program for Online Behavioral Advertising and the Advertising Icon:

<http://www.aboutads.info/principles/>

A Businessperson's Guide to Federal Warranty Laws, including the MMWA:

<https://www.ftc.gov/tips-advice/business-center/guidance/businesspersons-guide-federal-warranty-law>

A Good Summary of Guidelines for Advertising:

<http://www.ahbbo.com/adsftc.html>

MMWA:

<https://www.ftc.gov/tips-advice/business-center/guidance/businesspersons-guide-federal-warranty-law#Magnuson-Moss>

A Businessperson's Guide to Federal Warranty Laws, including the MMWA:

<http://business.ftc.gov/documents/bus01-businesspersons-guide-federal-warranty-law>

How to Write a Social Media Policy:

<http://www.inc.com/guides/2010/05/writing-a-social-media-policy.html>

UNFAIR AND DECEPTIVE PRACTICES (UDAP) LAWS

Treating customers with honesty and transparency is not only good business practice, it's the law. Uncover what regulators consider unfair, deceptive, and abusive trade practices.

DID YOU KNOW?

The FTC considers an act or practice unfair when:

- It causes or is likely to cause substantial injury to consumers.
- The injury is not reasonably avoidable by consumers; and
- The injury is not outweighed by countervailing benefits to consumers or to competition.

COMPLIANCE TIP

Don't use the word "free" in your advertising without knowing the limitations.

WHAT'S NEW FOR 2022

The FTC continues to be aggressive on scrutinizing dealer advertising, especially on the Internet and in social media.

RECOMMENDED PRACTICE

Make sure your advertising and other communications with customers are true, accurate and clearly state the terms of any offer you are making.

BREAKOUT SECTIONS

1. Important Laws and Regulations

- Section 5 of the FTC Act
- Unfair Trade Practices
- Deceptive Conduct

• "Abusive Practices"

- State UDAP Laws
- Criminal Liability for Deceptive or Unfair Dealer Practices

2. Recommended Practices

3. Additional Resources

Unfair and Deceptive Acts and Practices laws are designed to protect consumers from unfair and deceptive trade practices in the marketplace, including false or misleading advertising. They cover merchants of goods and services generally, not just auto dealers. These laws were originally passed to ease the legal burden for proving common law fraud. The original UDAP law is Section 5 of the Federal Trade Commission (FTC) Act, which prohibits unfair and deceptive acts and practices. However, the FTC Act does not afford consumers any private right of action and many practices require the FTC to first obtain an enforcement consent order prior to seeking the up to \$43,792 per violation penalty that the Act permits if the consent order is violated. Under Section 5 of the FTC Act,

an act or practice is unfair when:

- It causes or is likely to cause substantial injury to consumers;
- The injury is not reasonably avoidable by consumers; and
- The injury is not outweighed by countervailing benefits to consumers or to competition.

A “substantial injury” typically takes the form of monetary harm, such as fees or costs paid by consumers because of the unfair act or practice. However, the injury does not have to be monetary; emotional or other impact and other more subjective types of harm may constitute a substantial injury. Injury can be substantial if it causes a small harm to a large number of people or a severe harm to a small number of people. An injury also does not need to have already taken place. It is sufficient that a practice be likely to cause substantial consumer injury in order to be actionable.

An injury is not reasonably avoidable by consumers when an act or practice interferes with or hinders a consumer’s ability to make informed decisions or take action to avoid that injury. Injuries caused by transactions that occur without a consumer’s knowledge or consent are also not reasonably avoidable. Injuries that can only be avoided by spending large amounts of money or other significant resources also may not be reasonably avoidable.

Finally, to be unfair, the injury must not be outweighed by offsetting consumer or competitive benefits that the practice also produces. Offsetting benefits may include lower prices for consumers or the wider availability of products or services. The cost to the company of removing the injury is also a consideration.



DID YOU KNOW?

The FTC considers an act or practice unfair when:

- It causes or is likely to cause substantial injury to consumers.
- The injury is not reasonably avoidable by consumers; and
- The injury is not outweighed by countervailing benefits to consumers or to competition.

An act or practice is deceptive when:

- The act or practice misleads or is likely to mislead the consumer;
- The consumer's interpretation is reasonable under the circumstances;
and
- The misleading act or practice is material.

Most deception cases involve some form of communication to consumers — whether it be an advertisement, a sales technique, or a contractual provision. The initial inquiry for deception concerns whether the communication is misleading to consumers. To determine whether a communication is misleading, the totality of the circumstances is considered. This includes both express and implied claims or representations about a product or service; deception also considers omissions from communications as well as express representations.

The meaning of a communication is determined from the perspective of a “reasonable” consumer. It does not mean someone who is highly sophisticated or educated, but where a communication is directed at a particular audience, the inquiry focuses on a reasonable member of that group. Whether an act or practice is material concerns the importance of information to consumers. A material misrepresentation or omission is one which is likely to affect a consumer's choice or conduct regarding a product or service.

All 50 states and the District of Columbia have also enacted their own UDAP laws (state UDAP laws). In addition to these laws authorizing Attorney General actions, many state UDAP laws give consumers a private right of action to obtain injunctions and recover actual damages, court costs, and attorney's fees. Many of the laws also permit recovery of statutory, punitive, or treble damages as a deterrent to deceptive or unfair business conduct. Some state UDAP laws permit a consumer to bring a lawsuit as a private Attorney General. Most state UDAP laws allow class actions as well.

This Topic discusses auto dealer liability risks for UDAP practices under the FTC Act, the Dodd-Frank Act, and state UDAP laws. As these laws are a “catch all” for bad conduct, they present a substantial risk for a variety of misdeeds in selling vehicles to, or financing vehicles for, consumers.

IMPORTANT LAWS AND REGULATIONS

SECTION 5 OF THE FTC ACT

Section 5 of the FTC Act prohibits “unfair methods of competition and unfair or deceptive acts and practices in or affecting commerce” against consumers. Enforcement authority is vested in the FTC and the FTC has not hesitated to use its authority, most recently for lax data security practices that it considers to be an unfair act or practice and for deceptive dealer advertising as discussed in Topic 7: The FTC: Marketing and Advertising Vehicles, and Credit Terms. The FTC can bring an administrative enforcement action and, depending on the nature of the violation, bring a court action to seek injunctive relief or damages. States look to FTC lawsuits on UDAP violations or consent decrees as precedent for their own state UDAP actions.

UNFAIR TRADE PRACTICES

The FTC has noted that “[u]njustified consumer injury is the primary focus of the FTC Act”. As noted above, the FTC’s standard for “unfairness” is: (i) whether the practice creates a substantial consumer injury; (ii) whether the injury exceeds any offsetting consumer benefits or benefits to competition; and (iii) whether the injury was one that consumers could not reasonably have avoided. The FTC considers “deceptive” practices to consist of a material representation, omission, or practice that is likely to mislead a consumer, as examined from the perspective of a reasonable consumer. An “unfair” practice may not be “deceptive,” and some deceptive practices may not be unfair. The legal standards are independently applied.

The FTC may also consider public policy in determining whether an act or practice is unfair, but it may not solely rely on public policy in making its determination. The FTC has also been given a streamlined process to issue new rules and regulations for auto dealer unfair and deceptive trade practices by the Dodd-Frank Act. Previously, the FTC had to conduct detailed studies and hold hearings under procedures contained in the Magnuson-Moss Warranty Act and demonstrate that the prohibited act was “prevalent” in the industry. Now, the FTC merely needs to publish proposed regulations for a comment period and then can adopt final rules or regulations after reviewing the comments without having to make the prior showing that the regulated practices are “prevalent.”

One authority indicated the lead time for the FTC to enact unfair or deceptive practice regulations against auto dealers has been reduced from approximately seven years to approximately one year. In 2011, the FTC conducted a series of roundtable hearings on dealer auto finance

practices and continues to investigate practices like spot deliveries, with the expectation that the FTC will use its new streamlined authority to restrict or limit dealer practices or require more transparent disclosures to consumers. However, the FTC appears to be employing the CFPB's general practice of not writing rules or regulations but "regulating by enforcement," which means bringing actions for practices that the FTC first deems to be unfair or deceptive by bringing an enforcement proceeding against a dealer, thereby putting other dealers on notice that the practice violates the FTC Act.

DECEPTIVE CONDUCT

Most dealer deceptive conduct involves failure to make required disclosures (e.g., triggered terms under TILA or the CLA when a dealer advertises a payment amount), written or oral misrepresentations, or omissions of both in advertisements and in personal dealings with a consumer. The issue is whether the act or practice is likely to mislead a consumer, rather than whether it actually misleads the consumer. The FTC considers all of the facts and circumstances of a transaction in order to reach this conclusion. As you may be aware, the FTC has focused on deceptive dealer advertising in recent years, including its 2014 Operation Steer Clear and its 2015 Operation Ruse Control. And in 2020, the [FTC released a staff report on the car buying and financing experience](#), as well as the results of an [auto buyers study](#), highlighting consumer concerns throughout the entire buying and financing process. The takeaways from the report may indicate what the enforcement priorities are for the years ahead.

The FTC has pursued numerous deceptive practice claims against auto dealers. For example, FTC regulations set forth restrictions on advertising practices it considers to be deceptive, such as "bait and switch" advertising and advertising discounts from MSRP if few, or any, sales below MSRP take place in the dealer's geographic area.

Another deceptive practice is "rebate stacking," where multiple rebates available only to select groups (military, recent college grads, first time car buyers, etc.) are advertised together to calculate a vehicle price, even though few, if any, consumers will qualify for all of them.

The FTC has brought complaints against dealers for misrepresenting the down payment in lease and financing transactions; failing to disclose fees, security deposits, etc.; selling vehicles with known defects that consumers were not able to determine (e.g., selling new vehicles with paint defects likely to cause rust, odometer rollbacks, and other concealment of conditions on used vehicles); selling vehicles that are

subject to an open recall while advertising a rigorous pre-sale inspection; discriminating against certain protected classes of potential buyers (such as buyers of a particular race or religion); and payment packing.

The FTC has indicated that advertising the fuel economy of vehicles can also trigger liability.

The FTC has further taken the position that no item can be advertised as “free” when the primary item being sold (such as an automobile) is subject to a negotiated price. In fact, **the FTC has issued an entire regulation on when the word “free” can be used in advertising without being deceptive.** Since 2012, the FTC brought more than 30 deceptive practice enforcement actions against dealers. Four involved dealers who advertised that they would pay off a customer’s trade-in balance even if the customer was “under water.” At least five enforcement actions involved dealers advertising prices and discounts that were either not available to all consumers or deceptive in terms of being available only on higher-priced, “loaded” vehicles, terms that were not disclosed.

Others are discussed in Topic 7: The FTC: Marketing and Advertising Vehicles, and Credit Terms, including deceptive pricing, concealment of terms, and making the advertised terms available on only a small number of vehicles. **The FTC is being very aggressive on scrutinizing dealer advertising especially on the Internet and in social media.** Disclaimers or qualifications must be disclosed “clearly and conspicuously” and in close proximity to the advertised language they qualify.

The term “advertising” should also be viewed broadly. In 2016 the FTC acted against one dealer for posting fake positive reviews about the dealership on social media. Each of the enforcement actions brought by the FTC involved consent orders that can last up to 20 years and many of the consent orders will be followed by class action lawsuits for state UDAP claims, as FTC consent orders can provide a road map to plaintiffs’ lawyers.

“ABUSIVE” PRACTICES

Similar to Section 5 of the FTC Act, the Dodd-Frank Act prohibits unfair, deceptive acts or practices, however, it differs in that it prohibits abusive acts or practices. Specifically, Section 1031 of the Dodd-Frank Act provides that abusive practices include practices that materially interfere with the consumer’s ability to understand a term or condition of the product or service or take unreasonable advantage of a consumer’s lack of understanding, inability to protect their interests, or their reasonable reliance on the credit provider (dealer) to act in the consumer’s interests.



COMPLIANCE TIP

Don’t use the word “free” in your advertising without knowing the limitations.



WHAT’S NEW FOR 2022?

The FTC is being very aggressive on scrutinizing dealer advertising especially on the Internet and in social media.

Ex-CFPB Director Richard Cordray had indicated the agency would not publish regulations further clarifying what are abusive practices but would do so by bringing enforcement actions against perceived violators. Said Cordray, “For an institution, if they are in a situation, they should be thinking carefully about whether they are taking unreasonable advantage of their customer ... It’s a customer-by-customer thing.”

Again, the CFPB does not have authority to enforce “abusive” trade practice violations against franchised auto dealers but the same conduct that the CFPB would consider to be “abusive” may support a private UDAAP action under state law. Honesty and transparency in the sales and F&I processes are perhaps the best defense to a claim of an unfair or abusive practice.

Section 1042 of Dodd-Frank extends this UDAAP enforcement authority to State Attorneys General and other regulators. Already, several State AGs have brought civil actions involving creditors other than auto dealers.

The FTC and CFPB signed a memorandum of understanding in December 2012 to share information and coordinate their supervisory and enforcement efforts among their respective regulated entities. The FTC partnered with 32 law enforcement agencies in the U.S. and Canada to implement Operation Ruse Control, a crackdown on perceived deception and fraud in auto sales. Collectively, they brought over 185 actions against auto dealers. Both the FTC and the CFPB have signed similar memoranda of understanding with State Attorneys General.

Note that despite the fact that the CFPB has slowed somewhat in its use of UDAAP as an enforcement tool, the FTC continues to exercise its UDAP authority, and in novel ways. Recently, the FTC charged a dealership group with falsifying consumers’ income and down payment information on vehicle financing applications and misrepresenting financial terms in vehicle advertisements. This is the first time the FTC has brought such an income falsification claim. In addition, the FTC continues in its more traditional pursuits of advertising and disclosure violations, including recall notices used a tool to increase business. In fact, in a recent public statement, the FTC warned consumers about fake recall notices from car dealerships and provided tips for checking the veracity of such notices.

STATE UDAP LAWS

State UDAP laws are not uniform, and a number of states apply different tests for “unfairness” or “deception” than does the FTC. Many enumerate specific practices deemed to be unfair. Others use differing standards

that include: (i) whether the practice, even if not previously considered unlawful, offends public policy under any state authority; (ii) whether it is unconscionable, unethical, immoral, oppressive, or unscrupulous; and (iii) whether it causes substantial injury to consumers. In particular, state standards for “unfairness” may include a lower threshold for liability than the FTC’s “unfairness” standard.

Many state UDAP laws also cover Internet or out-of-state transactions if a resident of the state is adversely affected. You should be aware that state Attorneys General are very liberal in using UDAP laws to bring claims against auto dealers. Private lawsuits, especially class actions, present another risk under state UDAP laws. Examples of suits brought against dealers include:

- Misrepresentations about the vehicle’s fuel efficiency, safety features, and warranty.
- Payment packing.
- Retaining amounts of itemized sums listed as “amounts paid to others” on retail installment sales contracts without disclosing that the dealer may retain part of the funds.
- Concealing negative equity in the cash price of a vehicle.
- Violating the FTC’s Used Car Buyer’s Rule which requires a Used Car Buyer’s Guide to be affixed to the window of each used vehicle offered for sale or lease (remember that a federal law violation is automatically a UDAP violation under many state UDAP laws).
- Hiding the cost of an “etch” product in the vehicle’s sale price; and
- Imposing extra charges when customers who leased cars attempted to exercise their right to purchase at a previously determined price.

UDAP plaintiffs may not be bound by contractual limitations of liability or merger clauses, or contributory negligence, and they often do not have to prove reliance on the act or practice. Arbitration clauses may not apply as well depending on state law and how the clauses are drafted. Also, courts have ruled that it is not a good defense that the seller acted in good faith under the advice of counsel. Unlike the FTC, most state courts adopt the least sophisticated consumer standard for assessing whether a practice could be unfair or deceptive and do not use a “reasonable consumer” standard.

State UDAP laws are written very broadly and courts have held that they are to be liberally construed in favor of the consumer. This puts conceivably any selling or financing practice at risk from an enterprising plaintiff's lawyer who finds a disgruntled consumer. **As a “catch-all” for dealer misconduct, state UDAP laws offer consumers a powerful weapon in many states.**

State attorneys general, continue to bring UDAP claims against dealers for a variety of allegedly unfair and deceptive practices, often relating to the advertising and disclosures made by the dealer. One state even filed a complaint against a dealer's lender for facilitating perceived deceptive practices by the dealer in the selling of inoperable vehicles by providing the financing of the vehicles.

CRIMINAL LIABILITY FOR DECEPTIVE OR UNFAIR DEALER PRACTICES

Criminal violations have been brought against auto dealers in extreme situations when their conduct meets the requirement of criminal fraud and related criminal statutes under federal or state law. A federal statute makes it a felony to make a knowing and willful misrepresentation to a federally insured financial institution. Under this statute, indictments have been brought and dealers have paid criminal fines, or been imprisoned, for defrauding banks in order to obtain financing.

The federal odometer tampering statute has been a basis for indictments against dealers as well. Altering vehicle titles and documentation to reflect the inaccurate mileage only compounds the crime, and the Justice Department has indicted dealers for doing so.

RECOMMENDED PRACTICES

1. **Adopt a dealership code of conduct emphasizing honesty and transparency with customers and train all your employees on it.** While you can't specifically prohibit every possible practice your employees should not do; you can establish a set of principles and guidelines to govern employee conduct. Your employees have to know how you want your business to be conducted, and each employee should sign their affirmation that they understand and will comply with the code of conduct to reflect well on your dealership. Your code of conduct and training should contain specific standards of behavior that exemplify the principles embodied in the code of conduct. Enforce your code of conduct by reviewing deal files, listening to customers, and stressing the importance of proper behavior. Make employees understand shortcomings and why it is



COMPLIANCE TIP

Familiarize your dealership staff with your state's UDAP laws and how they might be used in lawsuits against your dealership.



RECOMMENDED PRACTICE

Adopt a dealership code of conduct emphasizing honesty and transparency with customers and train all your employees on it.

necessary to immediately correct them. Make compliance with the code of conduct a part of compensation decision-making.

2. **Know your state’s law on the amount of “doc fees” a dealer can collect, and if the law permits such a fee, but does not prescribe a specific amount, be sure you can reasonably defend your “doc fees” in relation to your cost of preparing documents and titling work for vehicles you sell.** Many states permit “reasonable” doc fees but do not give any guidance on what constitutes “reasonable” for this purpose. And other states have limits on the amount and type of fees that can be charged, and related disclosures in connection with their imposition.
3. **Make sure your advertising and other communications with customers are true, accurate and clearly state the terms of any offer you are making.** Many dealerships get into trouble when their advertising goes beyond simple puffery. We all know that the advertising needs to drive customers through your doors, but you need to stand behind promises and offers you make. And you need to make sure you are transparent about the required terms of the offer to avoid claims that you deceived the public.
4. **Establish a consumer complaint resolution process and include timelines for a quick and efficient resolution.** Keep track of your complaints and note any trends. For example, if a number of consumers complain that they did not know they were being charged for an aftermarket product, consider improving your communication strategies so that consumers only purchase the products they intend. Where disputes cannot be resolved through complaint resolution, try to establish an informal mediation process with your consumers either with a neutral officer at the dealership or through a local association such as your regional auto dealer association or a mediation company. Many problems can be resolved by an effective mediator prior to litigation or arbitration if the dealer and customer are at an impasse. A consumer complaint process is an integral element of a Compliance Management System. Consult your local attorney on the possible use of arbitration clauses and class action waivers if mediation or informal efforts to resolve disputes are unavailing. Arbitration and class action waivers are discussed in Topic 9: Arbitration and Mediation.
5. **Have an attorney or compliance professional conduct periodic compliance audits and “mystery shopping” at your dealership to identify areas that might support UDAP violations.** Remember that



RECOMMENDED PRACTICE

Be sure you can defend the legality of your “doc fees” and how reasonable they are in relation to what it costs for you to prepare documents and handle titling.



RECOMMENDED PRACTICE

Make sure your advertising and other communications with customers are true, accurate and clearly state the terms of any offer you are making



RECOMMENDED PRACTICE

Establish a consumer complaint resolution process that includes timelines for quick and efficient resolution.



RECOMMENDED PRACTICE

Have an attorney or compliance professional conduct periodic compliance audits and “mystery shopping” at your dealership.

in many states a violation of any federal consumer protection law or regulation (e.g., failing to publish a Spanish-language Used Car Guide on a used vehicle that was negotiated for sale in Spanish or failure to provide an adverse action notice) is an automatic violation of a state's UDAP laws. Promptly correct any deficiencies identified using appropriate staff training to avoid repetition or other conduct that may lend itself to being an unfair or deceptive trade practice. Remember to adhere to your dealership's code of conduct and train your employees frequently.

ADDITIONAL RESOURCES

A summary of the evolution of the FTC's rules on unfair acts and practices:

<http://www.federalreserve.gov/boarddocs/supmanual/cch/ftca.pdf>

A summary of the FTC's views on the standard for deceptive acts or practices under Section 5 of the FTC Act:

<https://www.fdic.gov/regulations/compliance/manual/7/VII-1.1.pdf>

Code of Federal Regulations: Using the word "free" in advertising:

<http://www.law.cornell.edu/cfr/text/16/251.1>

The FTC's summary of the Used Car Buyer's Rule:

<http://www.business.ftc.gov/documents/bus13-dealers-guide-used-car-rule>

A list of free FTC compliance publications:

http://www.consumerfraudreporting.org/pubs_business.htm

The CFPB's consumer complaint hotline:

http://www.consumerfinance.gov/complaint/CFPB_Symposium:_Abusive

Acts or Practices

<https://www.consumerfinance.gov/about-us/events/archive-past-events/cfpb-symposium-abusive-acts-or-practices/>

CFPB Symposium: Behavioral Economics

<https://www.consumerfinance.gov/about-us/events/archive-past-events/cfpb-symposium-behavioral-economics/>

ARBITRATION AND MEDIATION

What makes an arbitration clause enforceable? How often do you need to register your arbitration language? Stay up to date on legal developments relating to arbitration and class action waivers in consumer contracts.

DID YOU KNOW?

The American Arbitration Association (AAA) now requires you to annually register your arbitration language for approval and pay a fee.

COMPLIANCE TIP

Be sure to state within the arbitration provision of a contract whether a judge or arbitrator decides questions of arbitrability.

WHAT'S NEW FOR 2022

Three key rulings, actions and changes have reshaped or promise to revise the approach to arbitration and mediation.

RECOMMENDED PRACTICE

Use an attorney to help navigate state arbitration laws and provide language to make certain that your state's contract laws will not operate to negate the arbitration provisions you are using.

BREAKOUT SECTIONS

1. Section 1028 of the Consumer Financial Protection Act of 2010, aka, the Dodd-Frank Act
2. AT&T Mobility v. Concepcion, 563 U.S. 333 (2011)
3. Challenges to Arbitration Clauses Post-Concepcion
4. Important Laws and Regulations
 - Questions of Arbitrability
 - Mass Arbitration Trend
 - FAIR Act
 - Class Action Fairness Act
5. Recommended Practices
6. Additional Resources
 - American Arbitration Association's Mandatory Filing Policy

This Topic discusses recent arbitration-related rulemaking activities, federal arbitration laws, and the types of arbitration clauses that may be stricken by courts as unconscionable and unenforceable in the aftermath of the *Concepcion* decision.

Indeed, there are **three key rulings, actions, and changes that have reshaped the approach to arbitration and mediation**. They are:

- **Section 1028 of the 2010 Dodd-Frank Act:** The guidance from the Dodd-Frank Act directed the Consumer Financial Protection Bureau (CFPB) to conduct a study on consumer arbitration and report to the U.S. Congress concerning the use of mandatory pre-dispute arbitration in contracts for consumer financial products, including retail installment credit agreements.
- ***AT&T Mobility v. Concepcion*, 563 U.S. 333 (2011):** This ruling pre-empted state laws prohibiting contracts from disallowing class action remedies.
- **American Arbitration Association (AAA):** AAA now requires you to annually register your arbitration language for approval by the AAA for compliance with its “Consumer Due Process Protocol,” and pay a fee. Each dealer must make its own filing and pay its own fees.

SECTION 1028 OF THE CONSUMER FINANCIAL PROTECTION ACT OF 2010, AKA, THE DODD-FRANK ACT

In enacting the Dodd-Frank Act, Congress directed the CFPB to conduct a study on the use of mandatory pre-dispute arbitration clauses (“Arbitration Clauses”) in contracts for consumer financial products and services and report back with its findings. Accordingly, the CFPB issued its arbitration study in March of 2015. The study focused on Arbitration Clauses containing provisions through which consumers waive their right to make class action claims, either in court or by arbitration. The study concluded that Arbitration Agreements with these class action waivers restrict consumers’ ability to obtain relief for disputes. The report found that, in the consumer finance markets studied, very few consumers individually seek relief through arbitration or the federal courts, while millions of consumers could be eligible for relief each year through class action claims. It also found that such Arbitration Clauses did not result in the reduction of pricing to consumers. The study concluded that class actions provide consumers with a better chance for relief than arbitration, although their statistics arguably did not support that conclusion. After an October 2015 hearing, the CFPB indicated it was inclined to issue a rule that would prohibit Arbitration Clauses containing class action



WHAT’S NEW FOR 2022?

Key rulings, actions, and changes have reshaped or promise to revise the approach to arbitration and mediation.



DID YOU KNOW?

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waivers and did so on July 10, 2017. In addition to banning class waivers, the final rule required companies to report data concerning individual or class arbitrations to the CFPB, including the nature of the claim(s) and their resolution. Under the final rule as published, the CFPB would both analyze and publish the reported claims and resolutions on its website. Once the final rule went into effect, it would operate to override court decisions that have upheld the use of Arbitration Clauses with class action waivers in contracts for consumer financial products and services.

Shortly after the final rule was published, the House of Representatives voted to exercise its authority under the 1996 Congressional Review Act (CRA) to reject agency rulemaking by passing a joint resolution disapproving the final rule. In a 51-50 late-evening vote on October 24, 2017 in which Vice President Pence cast the deciding vote, the Senate also passed the joint resolution and sent it to the White House for the President's signature.

The CRA's original purpose was to allow Congress the opportunity to undo so-called "midnight regulations" promulgated under an outgoing administration. Prior to 2017, it had been successfully used only once to overturn a Department of Labor Rule relating to ergonomics in 2001. The joint resolution signed by the President on November 1, 2017 overturning the arbitration rule was the 15th time the CRA was successfully used in 2017 alone, and the first time in history it was used to strike a final rule published during a current administration.

The import of Congress using its CRA authority to overturn a rule is that the promulgating agency is prohibited from reissuing the rule in substantially the same form or issuing a new rule that is substantially the same, "unless the reissued or new rule is specifically authorized by a law enacted after the date of the joint resolution disapproving the original rule." This means the CFPB may not reissue its arbitration rule, or issue another rule banning class waivers in Arbitration Clauses or requiring reporting on arbitration actions and results, unless specifically authorized by Congress at some future date.

Following the House's exercise of its authority under the CRA, the Supreme Court decided to shed some light on class action arbitration. In *Lamps Plus, Inc. v. Varela*, 139 S. Ct. 1407 (2019), the Court found that an arbitration agreement's silence as to class actions does not, without more, permit a party to pursue class action arbitration.

AT&T MOBILITY V. CONCEPCION, 563 U.S. 333 (2011)

In the 2011 case *AT&T Mobility, LLC v. Concepcion*, the U.S. Supreme Court ruled in a 5-4 decision that arbitration agreements in standard form

consumer financial services contracts that waive the right to pursue a class action are enforceable, and that the Federal Arbitration Act (FAA) preempted a California court ruling to the contrary. The case involved a large number of consumers, each of whom had been overcharged by a small amount of money (approximately \$30) so that it was unattractive for any consumer to bring an individual action. Each consumer's contract provided for mandatory arbitration and a waiver of any right to bring or participate in a class action. Based on these circumstances, the Federal Ninth Circuit Court of Appeals in California had ruled the class action waiver as unconscionable under the law of California and thereby unenforceable. Under these facts, the class action waiver had been ruled to undermine California consumer protection statutes which rely on private causes of action for enforcement.

The FAA provides that arbitration agreements are "valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." Even so, the Supreme Court reversed the Ninth Circuit's decision, noting that California's law stood as obstacles to the intent of Congress, as expressed in the FAA, of favoring arbitration where the parties have agreed to it as part of a contract. The Court also held that class action waivers are not inconsistent with the intent of Congress or the FAA, noting that "[a]rbitration is a matter of contract, and the FAA requires courts to honor parties' expectations." The Supreme Court further ruled that "States cannot require a procedure that is inconsistent with the FAA, even if it is desirable for unrelated reasons."

After the *Concepcion* decision, in an employment case, the Supreme Court affirmed that class action waivers in arbitration clauses are valid and enforceable. See *Epic Systems Corp. v. Lewis* 138 S. Ct. 1612 (2018) (finding that arbitration agreements in employment contracts requiring individualized proceedings are enforceable).

CHALLENGES TO ARBITRATION CLAUSES POST-CONCEPCION

Unconscionability. In the aftermath of the *Concepcion* decision, plaintiff's lawyers continued to attempt to invalidate arbitration clauses for unconscionability under state law with limited success. For example, in October 2012, both the Third and Eleventh Circuit Courts of Appeal affirmed district court orders granting defendant creditors' motions to compel arbitration on an individual (rather than on a class-wide) basis over plaintiffs' objections that Arbitration Clauses containing class waivers in credit card and wireless telephone service agreements were unconscionable and unenforceable. The circuit courts followed Supreme Court precedent from *Concepcion*. On the other hand, courts from Massachusetts to California have struggled to invalidate Arbitration

Clauses on unconscionability grounds. One state court addressed the issue of whether the arbitration agreement as a whole was unenforceable as unconscionable under applicable state contract law. The majority concluded that it was indeed unenforceable as unconscionable because it was:

- Non-negotiable and difficult for consumers to understand.
- The record showed it would be unlikely for the plaintiff to be able to retain counsel to proceed individually in arbitration.
- There was considerable disparity in bargaining power.
- The substantive terms were much less fair to consumers than those of the agreement upheld in *Concepcion*.

Scope. Following *Concepcion*, plaintiff's lawyers continue to challenge the scope of arbitration clauses. If the arbitration clause does not encompass certain issues or individuals, then arbitration will not be compelled. *White v. Sunoco*, 870 F.3d 257 (3d Cir. 2017) (declining to compel arbitration when the defendant was not a signatory to an arbitration agreement).

Lack of Mutual Assent. A challenge to an arbitration provision may also arise based on a lack of assent to the provision. In order for an individual to be bound by an arbitration provision that individual must know, understand, and assent to the terms of the arbitration agreement. If an individual does not assent to the arbitration agreement, then the arbitration agreement will not be enforceable. Courts have applied this principle in a manner that is very consumer friendly. For example, one court invalidated an arbitration provision contained in terms and conditions that could be accessed through a hyperlink. The court ruled that the hyperlink was not conspicuous because it was presented in a grey rectangular box with white text, not the commonly used blue color with underlining. *Cullinane v. Uber Techs., Inc.*, 893 F.3d 53 (1st Cir. 2018).

In another case, a court found a lack of mutual assent when an individual was blind and could not physically read the arbitration clause. There was no evidence that the terms of the arbitration clause were read to the individual. *National Federation of the Blind v. Container Store*, 904 F.3d 70 (1st Cir. 2018). In sum, it is important that an individual to be aware of, and have easy access to, the arbitration agreement.

Waiver. Even if a court finds an arbitration agreement valid and binding, a party may waive its right to compel arbitration by proceeding with litigation in court. Filing a responsive pleading, engaging in discovery, and

allowing a court to rule on significant issues in the case will lead some courts to find the right to arbitration has been waived. *Martin v. Yasuda*, 829 F.3d 1118 (9th Cir. 2016) (ruling that a defendant waived arbitration by proceeding with litigation for 17 months); *Forby v. One Technologies*, No. 17-10883, 2018 U.S. App. LEXIS 33408 (5th Cir. Nov. 28, 2018) (finding the defendant waived arbitration by invoking arbitration after the court ruled on several key issues). In 2021, the U.S. Supreme Court is set to resolve a split amongst courts regarding whether a party must show prejudice when claiming that the other party waived its right to arbitrate by acting in a manner inconsistent with the arbitration agreement. *Morgan v. Sundance, Inc.*, 142 S. Ct. 482 (2021) (“The question presented is: Does the arbitration-specific requirement that the proponent of a contractual waiver defense prove prejudice violate this Court’s instruction that lower courts must ‘place arbitration agreements on an equal footing with other contracts?’ *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 339 (2011).”)

Appellate Review. A consumer may ask an appellate court to review an arbitration award. Such request may be denied if the arbitration agreement includes an “appellate waiver.” Courts in the Fourth and Tenth Circuits must enforce appellate waivers in arbitration agreements. *Beckley Oncology Assoc., Inc. v. Abumasmah*, 993 F.3d 261, 264 (2021) (enforcing provision whereby parties agreed that arbitrator’s decision “shall be final and conclusive and enforceable in any court of competent jurisdiction without any right of judicial review or appeal”); *MACTEC, Inc. v. Gorelick*, 427 F.3d 821, 830 (10th Cir. 2005) (arbitration provision providing that “[j]udgment upon the award rendered by the arbitrator shall be final and nonappealable” clearly established parties’ intent to preclude appellate court from reviewing lower court’s judgment upon award).

QUESTIONS OF ARBITRABILITY

When a challenge to an arbitration agreement arises, a question of who gets to resolve the challenge often arises as well. The Supreme Court determined, in *Henry Schein Inc. v. White Sales, Inc.*, 139 S. Ct. 524 (2019), that questions of arbitrability may be resolved by an arbitrator. Therefore, it **is best practice to state, in the arbitration provision, whether a judge or arbitrator decides questions of arbitrability.**

In 2022, the Supreme Court is set to determine whether federal courts have subject-matter jurisdiction to confirm or vacate an arbitration award when the only basis for jurisdiction is that the underlying dispute involved a federal question. *Badgerow v. Walters*, 141 S. Ct. 2620 (2021). The U.S. Chamber of Commerce has argued that the business community will benefit from the Court answering this issue in the affirmative. U.S. Chamber of Commerce Amicus Curiae Brief, *Badgerow v. Walters*,



COMPLIANCE TIP

Be sure to state within the arbitration provision of a contract whether a judge or arbitrator decides questions of arbitrability.

No. 20-1143, 2021 WL 4296021, *2 (“First, denying federal courts the authority to enforce awards in federal-question disputes would undermine commercial parties’ ability to rely on federal court protection when structuring contractual agreements, exposing them to the risk of disuniformity and anti-arbitration sentiment in state court. Second, petitioner’s patchwork approach to jurisdiction under the FAA would invite gratuitous and wasteful litigation by which parties file extraneous actions and motions to preserve federal-court jurisdiction. The added costs, complexities, and risks of denying a federal forum for the enforcement of federal-question arbitral awards would undermine the FAA’s benefits and harm the commercial interests it was designed to advance.”).

MASS ARBITRATION TREND

Plaintiff’s lawyers are now using “mass arbitration” to turn arbitration agreements against companies. Mass arbitration occurs when a firm files hundreds or thousands of individual arbitrations at once, thereby requiring the company to pay significant fees (e.g., initial filing fee, case management fee, hearing costs, etc.). Mass arbitration can create leverage for consumers looking to settle claims before the company can proceed on the merits.

Thus far, the American Arbitration Association (AAA) and Judicial Arbitration and Mediation Services (JAMS) have been reluctant to institute “mass arbitration” protocols. AAA did, however, amend its fee structure for “Multiple Consumer Case Filings” in late 2020. Even so, the initial filing fee for such cases is still between \$75 and \$300 per case. AAA, Consumer Arbitration Rules at 33-40, <http://www.adr.org/sites/default/files/Consumer-Rules-Web.pdf>. Accordingly, companies must assess opportunities to amend arbitration agreements to avoid or curb mass arbitration filings from the plaintiff’s bar.

FAIR ACT

In 2021, the bipartisan Forced Arbitration Injustice Repeal (FAIR) Act, H.R. 963, was introduced to prohibit pre-dispute arbitration agreements for consumer, employment, antitrust, and civil rights disputes. On November 3, 2021, the FAIR Act passed the House Judiciary Committee. The FAIR Act now be sent to the full House for a vote. Businesses should continue to monitor this important piece of legislation because, if enacted into law, the FAIR ACT would significantly alter the landscape of mandatory arbitration. H. 963, 117th Cong. (2021), available at <https://www.congress.gov/bill/117th-congress/house-bill/963/>.

CLASS ACTION FAIRNESS ACT

The federal Class Action Fairness Act of 2005 actually made it easier to file a class action if there are at least 100 class members and the total amount sued for exceeds \$5 million. Jury members may have unfavorable opinions of auto dealers and may be sympathetic to the plaintiff class of consumers if the case gets to them for a decision. But the *Concepcion* case has made such cases more difficult to bring. If properly drafted by allowing the consumer reasonable access to a fair and inexpensive dispute resolution process and forum like the consumer-friendly clause in *Concepcion*, at least for now, most courts will enforce Arbitration Clauses

IMPORTANT LAWS AND REGULATIONS

THE FEDERAL ARBITRATION ACT (FAA)

This law, originally passed in 1925, states a broad national policy in favor of enforcing agreements to arbitrate and applies whenever a transaction involves “interstate commerce.” Interstate commerce means some aspect of the transaction touches more than one state and is an easy standard to meet. It should cover most automobile sales and financing transactions if any person or item purchased comes from out of state (such as the financing source or provider of an aftermarket product). Generally, the FAA preempts inconsistent state laws such as a law that prohibits arbitration of consumer claims. The U.S. Supreme Court has also held as a general proposition that the FAA does not allow class arbitrations absent an agreement between the parties in their arbitration clauses. The validity and preemptive effect of the FAA was affirmed in the Supreme Court’s *Concepcion* decision.

While more difficult after *Concepcion*, courts still have the power to refuse to enforce arbitration provisions if they find it to be “unconscionable” or void under state law. The so-called “Savings Clause” of the FAA (arbitration provisions are “valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract”) permits a challenge on grounds of fraud, duress, or unconscionability. One court described unconscionability as “the absence of meaningful choice on the part of one of the parties, together with contract terms that are unreasonably favorable to the other party.” A California court held that while *Concepcion* and the FAA require that class action waivers be enforced, the case does not preempt generally applicable state contract law defenses, such as fraud, duress, or unconscionability, from applying to other arbitration provisions.

To defeat a claim of unconscionability, arbitration provisions must be carefully drafted. Consult your attorney for assistance. Some points to consider when drafting:

- Treat both parties equally, giving either party the right to invoke arbitration.
- Don't use small boilerplate type in non-negotiable contracts.
- Don't draft a provision that contains hardships from a consumer's perspective.
- Arbitration provisions should be conspicuous in a contract (perhaps in larger type and bolder printing than the rest of the document).
- Consider whether you want to prohibit class action arbitrations.
- Arbitration provisions may be best placed near the customer's signature or at least require separate initialing by the consumer.
- Consult state law, which may require that arbitration provisions contain specific language.
- If exceptions for small claims actions or repossessions are stated, make them clear and conspicuous.

One other point worth noting: courts that have upheld arbitration provisions against challenges of unconscionability have looked favorably on language stating that the dealer/creditor will pay the consumer's arbitration costs if the consumer is unable to afford them. Provisions that give the consumer a choice of national arbitration organizations are also helpful against such challenges.

Notwithstanding the Concepcion decision, interpreting arbitration provisions is constantly evolving, and dealers should try to keep abreast of changes as they occur, especially in case decisions in the dealer's home state.

AMERICAN ARBITRATION ASSOCIATION'S MANDATORY FILING POLICY

The American Arbitration Association (AAA) requires you to annually register your arbitration provisions for approval by the AAA for compliance with its "Consumer Due Process Protocol" and pay a fee. A forms provider may not file an approval for all users of the form. Each dealer must make its own filing and pay its own fees. If you don't register in advance, you may register at the time you are seeking to arbitrate a matter but must pay an additional fee.

The AAA will evaluate your arbitration provision to see if it complies with the Consumer Due Process Protocol. If it complies, it will be posted on the AAA's Consumer Clause Registry for public access along with your dealership's name, address, and other related

documents and information. You can register your arbitration provisions at consumerreview@adr.org or at this website: www.adr.org/consumerclauseregistry.

If AAA determines that your arbitration provisions do not comply, an amended version can be resubmitted. Dealers should note, however, that the mere fact that arbitration language has been reviewed and approved by the AAA does not guarantee that a court will agree to enforce it.

RECOMMENDED PRACTICES

1. **Use an attorney to help navigate state arbitration laws and provide language to make certain that your state's contract laws will not operate to negate the arbitration provisions you are using.** Have a periodic "check-up" with your attorney to make sure that new cases have not changed what is necessary to make your arbitration language more likely to be enforceable.
2. **Give the customer time to read and understand the entire RISC or Leasing Agreement, but especially the arbitration and class action waiver provisions.** Such provisions in a Buyer's Order, RISC, or lease agreement, or a stand-alone arbitration agreement should be easy to understand, as well as clear and conspicuous, preferably in bold type and in a larger type size than other provisions. If the deal was negotiated in Spanish or another foreign language, make sure to explain the arbitration provisions to the consumer in that language when explaining the contract terms of the deal. It is a best practice to give the consumer a translation of the arbitration provisions as well (if you are not already required to provide a translation of documentation under applicable law).
3. **Get the consumer's signature or initials on any arbitration provisions.**
4. **Avoid one-sided terms that favor the dealership.** Cases invalidating arbitration provisions as unconscionable almost invariably gave the dealer greater rights than the consumer. Consider using provisions that give the consumer a choice of arbitrators and venue for the arbitration, and otherwise maintain a sense of fairness in the arbitration process.



RECOMMENDED PRACTICE

Use an attorney to help navigate state arbitration laws and provide language to make certain that your state's contract laws will not operate to negate the arbitration provisions you are using.



RECOMMENDED PRACTICE

Give the customer time to read and understand the entire RISC or Leasing Agreement, but especially the arbitration provisions.



RECOMMENDED PRACTICE

Get the consumer's signature or initials on any arbitration provisions.



RECOMMENDED PRACTICE

Avoid one-sided arbitration terms that favor the dealership.

5. Correct invalid employment arbitration agreements. An arbitration agreement signed as a condition of employment could be deemed unenforceable depending on the state and surrounding circumstances. Therefore, for the avoidance of doubt, seek counsel and consider implementing one arbitration agreement and any remove arbitration language from other documents.

ADDITIONAL RESOURCES

The U.S. Supreme Court's decision in *Concepcion*:

<http://www.supremecourt.gov/opinions/10pdf/09-893.pdf>

Website of the American Arbitration Association which contains additional information on the registration requirement:

<http://www.adr.org/>

An article concerning the Consumer Financial Protection Bureau's complaint system and how it works:

<http://www.mondaq.com/unitedstates/x/197780/Consumer+Law/The+CFPB+Company+Portal+Its+Your+Company+Radars>

TELEMARKETING SALES RULE AND TELEPHONE CONSUMER PROTECTION ACT

Just having a customer's phone number or email address doesn't give you a green light to market to them without their further consent. Careful planning is necessary to implement a telemarketing campaign that complies with regulations.



DID YOU KNOW?

You could risk a penalty of \$42,530 for calling a customer who asked not to be called, so be sure to maintain your dealership's "do not call" list.

COMPLIANCE TIP

Scrub telemarketing lists against both the FTC's National Do Not Call Registry and applicable state do-not-call lists.

RECOMMENDED PRACTICE

If you conduct direct marketing, don't forget to periodically remove people who have opted out or unsubscribed.

BREAKOUT SECTIONS

1. Telemarketing Sales Rule
2. Telephone Consumer Protection Act
3. Email
4. Fax
5. Recommended Practices
6. Additional Resources

At the federal level, telemarketing is regulated by two sources: (i) the Telephone Consumer Protection Act (TCPA), which is enforced by the Federal Communications Commission (FCC); and (ii) the Telemarketing Sales Rule (TSR), which is enforced by the FTC and in some instances the CFPB (which treats violations of the TSR as an unfair, deceptive, or abusive act or practice). While both the TCPA and the TSR continue to generate increasing numbers of lawsuits and litigation each year, the TCPA has been used in many notable class actions garnering multimillion-dollar settlement (for example, AT&T Mobility, Caribbean Cruise Line, Capital One, US Coachways and Dish Network, all paid over \$300 million in settlements between 2014 and 2017). However, as a result of the ruling in the Facebook v. Duguid case in April 2021, the scope of the TCPA has been significantly limited and the likelihood of seeing significant class action settlements in 2022 is low. Nonetheless, these regulatory regimes can be complicated because in some cases, the two standards are similar, in other cases, the two standards cover the same subject with different requirements and prohibitions, and in still other cases, one standard may address an issue on which the other is silent. This structure requires careful planning and consultation with legal and marketing teams to implement a telemarketing campaign that complies with all applicable standards, particularly TCPA and TSR.

TELEMARKETING SALES RULE

The Telemarketing and Consumer Fraud and Abuse Prevention Act (Telemarketing Act) directed the FTC to issue a rule prohibiting deceptive and abusive telemarketing conduct. In response, the FTC established the TSR. The TSR regulates “telemarketing” which is defined as “a plan, program, or campaign . . . conducted to induce purchases of goods or services. . . by use of one or more telephones and involves more than one interstate telephone call.” It applies to all businesses or individuals that engage in “telemarketing” including “telemarketers” when they initiate or receive calls to or from consumers and “sellers” when they provide, offer to provide, or arrange to provide goods or services to consumers in exchange for payment. Even if an entity or individual does not meet the definition of a “seller” or “telemarketer” in this context, the TSR may still apply if they provide substantial support to sellers or telemarketers. Calls made from outside of the United States must also comply with the TSR.

The FTC maintains the national “Do-Not-Call” list prohibiting telemarketing calls to the listed numbers, which include both land lines and cell numbers, subject to exceptions for calls based on a business relationship or express permission. (The FCC also enforces compliance with the national list.) **Because several states maintain their own “do-not-call” lists independent of the national list, dealers must**



COMPLIANCE TIP

Scrub telemarketing lists against both the FTC’s National Do Not Call Registry and applicable state do-not-call lists.

scrub telemarketing lists against both the FTC’s National Do Not Call Registry and applicable state do-not-call lists. Additionally, dealers are required to keep their own internal company-specific list of customers who opt-out of telephone and their contact information must be deleted from marketing lists as well. If you share customer information with affiliates or third parties, make sure to scrub from the shared lists any customers who have opted out of being contacted in any medium of expression. The TSR expressly prohibits callers from interfering with consumers’ efforts to exercise their company-specific do-not-call rights and lists specific proscribed activities, including hanging up on the consumer and requiring the consumer to listen to a sales pitch before processing the do-not-call request. **The penalty for calling a consumer who asked not to be called potentially exposes a seller and telemarketer to a civil penalty of \$42,530 for each violation.**

Beyond do-not-call provisions, the TSR, among other things, requires a certain “prompt” disclosure of material information at the outset of each sales call or sales pitch and certain other disclosures of important information before the consumer agrees to purchase any goods or services in a telemarketing transaction. The prompt disclosures include the seller’s identity and the call’s sales purpose. These disclosures must be “clear and conspicuous” in a way that a consumer will notice and understand.

The TSR specifies several categories of material information that must be provided to consumers:

1. **Cost and Quantity.** The total cost to buy, receive, or use the offered goods or services. If disclosing the installment payments and the amount of each payment satisfies the requirement, then the amount and number of the payments must correlate to a billing schedule T Note also that if the offer is for a consumer credit product, the TSR provides that TILA and Regulation Z disclosure requirements may apply.
2. **Material Restrictions, Limitations or Conditions.** Material information is information that would likely affect the consumer’s choice of goods, services, or charitable contribution.
3. **No Refund Policy.** If applicable, a no-refund policy and/or “all sales are final” policy must be disclosed clearly and conspicuously as well as all terms and conditions likely to affect a consumer’s decision whether to buy the goods or services offered.
4. **Prize Promotions.** Includes any sweepstakes or game of chance and a representation that the consumer has won, selected to receive or



COMPLIANCE TIP

You could risk a penalty of \$42,530 for calling a customer who asked not to be called, so be sure to maintain your dealership’s “do not call” list.

may be eligible to receive a prize or purported prize.

5. Full details of any “negative option plan” which is an offer or agreement to sell or provide any goods or services on an ongoing basis where, following a consumer’s initial enrollment in a program the seller interprets the consumer’s silence or failure to affirmatively reject or cancel the agreement as acceptance of receiving future goods or services.

Other disclosures concerning sales of credit card loss protection and debt relief services are also required to be disclosed although they likely do not apply to a dealer’s model.

Any misrepresentations regarding this information are prohibited.

The TSR requires sellers to obtain a consumer’s “express verifiable authorization” confirming a telemarketing transaction, which means giving the consumer several prescribed items of information to complete and confirm the transaction. It is required where a payment is made by a method other than a credit card.

The TSR separately requires sellers to obtain the consumer’s “express informed consent” to a telemarketing transaction. The specific requirements of this “informed consent” standard differ depending on the details of the relationship between the seller and the consumer and the nature of the offer. However, consent would not meet the requirement if the consumer does not receive the required material disclosures. The TSR’s list of prohibited abusive practices includes repeated calling with an intent to harass or annoy, calling before 8:00 a.m. or after 9:00 p.m., and restrictions on abandoned calls and prerecorded message telemarketing.

The TSR generally prohibits a high percentage of abandoned calls but establishes a limited safe harbor if the telemarketer:

- Uses technology that ensures abandonment of no more than three percent of all calls answered by a live person, measured over the duration of a single calling campaign, if less than 30 days, or separately over each successive 30-day period or portion thereof that the campaign continues.
- Allows the telephone to ring for 15 seconds or four rings before disconnecting an unanswered call.
- Plays a recorded message stating the name and telephone number of the seller on whose behalf the call was placed whenever a live sales representative is unavailable within two seconds of a live person answering the call.

- Maintains records documenting adherence to the three requirements above.

A telemarketing call is abandoned if a live consumer answers the call, and no live sales agent is available to speak to the consumer within two seconds. Predictive dialers can produce abandoned calls when the dialer calls more consumers than there are available sales agents. To take advantage of the safe harbor, callers may use a predictive dialer provided that it does not abandon more than three percent of all calls answered by a live consumer. For the permitted three percent of calls that can be abandoned, the caller must provide a recorded message identifying the caller by name and telephone number. As explained below, the FCC's TCPA rule also regulates abandoned calls but establishes a stricter set of requirements for its safe harbor.

The TSR requires the called consumer's express written agreement to deliver prerecorded telemarketing messages. This agreement must be in writing, must be signed by the consumer, must include the consumer's telephone number, must identify the seller receiving the consent, and must explain what the consumer is agreeing to. The seller must also meet the following three requirements:

- Before the consumer agrees, the seller must clearly and conspicuously disclose the consequences of agreeing — namely, that the agreement will result in the seller delivering prerecorded messages to the consumer via telemarketing calls.
- Sellers are prohibited from requiring a consumer to provide this agreement as a condition of any purchase. In other words, consumers must be able to do business with the seller without providing this agreement to receive prerecorded telemarketing messages.
- Sellers must give the consumer an opportunity to designate the telephone number to which the calls may be placed.

As with respect to the call abandonment provision, the FCC's TCPA rule also regulates in this area with standards that are stricter than the TSR's. The FCC's approach is set out below.

Even when the seller has the consumer's consent, all prerecorded telemarketing calls must include an automated interactive opt-out mechanism that allows the consumer to make a company-specific do-not-call request. This mechanism must be presented to the consumer within two seconds at the start of the call and must begin with the "prompt" disclosures required by the TSR. This opt-out mechanism must be available throughout the call and must disconnect from the consumer's



DID YOU KNOW?

The Telemarketing Sales Rule (TSR) requires the called consumer's express written agreement to deliver prerecorded telemarketing messages.

line immediately after the consumer uses the mechanism to opt out. For prerecorded telemarketing calls delivered to a consumer's voicemail, where the opt-out mechanism would not be operational, the message must provide a toll-free number that connects to an automated opt-out mechanism.

Note that the TSR offers a partial exemption for telemarketing calls that require a face-to-face sales presentation before the transaction is completed. Some but not all TSR provisions apply to these calls.

TELEPHONE CONSUMER PROTECTION ACT

As noted above, the FCC also regulates telemarketing and servicing calls and text messages using auto-dialers and pre-recorded messages to cell phones under the TCPA.

Historically, a key issue under the TCPA was what constituted an "auto dialer". Generally, "auto dialers" were any device that "have the capacity" to store numbers to be called and to dial such numbers. Even if the machine is being used to make calls manually, if the device had the capability of auto dialing, it was considered an auto dialer and the call treated as if it were made by an auto dialer. When asked for an example of a device that is not an auto dialer, the FCC responded that a rotary dial phone is not an auto dialer. Over time, the FCC had consistently expanded its interpretation of what constitutes a regulated auto dialer. Indeed, in July 2015, the FCC adopted the position that the TCPA's auto dialer standard can even judge equipment based on its "potential functionalities." This interpretation exposed companies to a constant increase of class action lawsuits, many resulting in multi-million-dollar settlements.

However, on April 1, 2021, the Supreme Court issued its highly anticipated decision in *Facebook v. Duguid*, resolving the long-standing dispute as to the scope of an "auto dialer", by concluding that merely having the capacity to store numbers and dial them is not enough to make a device qualify as an "auto dialer". The impact of this narrow interpretation is that lawsuits under TCPA must now prove the use of a "random or sequential number generator" (i.e., auto dialer) for notifications such as calls/texts for the business/individual to be subject to TCPA liability. This is a favorable decision for businesses that call or text individuals, so long as the business does not use an auto dialer. However, the ruling sparked outrage from members of Congress and consumer advocacy groups, and it remains to be seen whether Congress, the FTC, the FCC, or certain states draft new laws on calls/texts to fill the void left from the decision. For example, Florida has already passed its own legislation (CS/SB 1120)

that reestablishes the interpretation that a random or sequential number generator is not required for individuals to file a private right of action in Florida for calls/texts. We recommend that dealers consult with their local attorney to confirm whether they are using an auto dialer, are subject to other aspects of the TCPA, or calling/texting individuals with zip codes of states such as Florida that have enacted specific statutes. Given the potential TCPA liability at stake, conflicts among courts on the issue of implied consent, and the frequent difficulty to determine what is a cell phone number and what is a residential landline, it is a recommended best practice for a dealer to obtain prior express consent to use auto dialers to send servicing calls or texts to customers.

The FTC also addresses telemarketing calls made to a cell phone or a landline. Some of these standards mirror the TSR's, and others do not. The FCC's standards for complying with the national do-not-call list for telemarketing calls are similar to the TSR's. The FCC, like the TSR, establishes company-specific do-not-call rights for consumers, but the standards are different. Most significantly, the FCC's approach requires callers to have a written do-not-call compliance policy that is available upon request to anyone who asks to see it.

Other than do-not-call provisions, the second key element of the FCC's telemarketing standards regulates the use of auto dialers and prerecorded messages. This is primarily a consent standard. Callers must have "prior express written consent" to use an auto dialer or a prerecorded message to place a telemarketing call to a cell phone, and it must obtain "prior express consent" to use auto dialers or prerecorded messages to place a telemarketing call to a residential landline. The "prior express written consent" required by the FCC's TCPA rule must be a written agreement signed by the consumer. It should include the consumer's telephone number, identify the seller receiving the consent, and be sufficient to show that the consumer received "clear and conspicuous" notice of what the consumer is agreeing to. What makes the FCC's approach for TCPA stricter than the FTC's for TSR is that the consent must also be sufficient to show that the consumer received clear and conspicuous notice of the fact that the seller cannot condition a purchase on the consumer providing this consent. The TSR also prohibits conditioning a purchase on this consent, but the TSR does not require the agreement to say so. Customers can withdraw their consent "through any reasonable means" including orally, at any time.

The FCC has taken the position that a text message is a telephone call to a cell phone subject to the same consent requirements as auto dialed calls and prerecorded messages. As a result, any marketing text message sent using technology that satisfies the TCPA's auto dialer definition

requires “prior express written consent.”

The FCC’s TCPA rule also imposes disclosure requirements that are specific to prerecorded messages. Prerecorded telemarketing messages must identify the seller at the outset of the message and provide the seller’s telephone number during the message. Consumers must be able to use the telephone number provided to make a company-specific do-not-call request. These messages, even with valid consent, must include an automated mechanism for making a company-specific do-not-call request. Messages left on voicemail must provide a toll-free number that connects to this type of automated opt-out mechanism. The mechanism must immediately disconnect from the consumer’s line after the consumer uses it.

Like the TSR, the FCC’s TCPA rule prohibits abandoned telemarketing calls but establishes a safe harbor allowing for restricted use of a predictive dialer. Notably, unlike the TSR, the FCC’s safe harbor requires the brief message identifying the caller by name and telephone number to also include an automated mechanism for making a company-specific do-not-call request. **The TCPA, like the TSR, prohibits telemarketing calls before 8:00 a.m. or after 9:00 p.m.** and requires transmission of caller ID information in every telemarketing call. The Telemarketing Sales Rule can be enforced by the FTC and State Attorneys General.

The TCPA provides for unlimited strict liability of \$500 - \$1,500 per call or text message made using an auto dialer without obtaining proper advance written consent. There is a similar penalty structure for the TCPA’s do-not-call provisions, but the penalty figure is an “up to” amount that courts can adjust, rather than a fixed amount. In the past, numerous class actions have been filed under the TCPA in large part because of the absence of any cap on class action damages. As a practical matter, the ability to enforce extends to the called party. The “called party” means the current phone subscriber or the customary user of the cell phone. As a result, you can be held strictly liable for a call to a wrong number, regardless of whether the original subscriber had previously provided his or her consent. The FCC had established a one-call safe harbor for unintended calls to reassigned numbers, but the same March 2018 federal appellate court decision that vacated the FCC’s “auto dialer” guidance also set aside the FCC’s handling of TCPA liability for improper calls to reassigned numbers. At this time, such liability has been suspended, pending new FCC guidance. The TCPA can also be enforced administratively by federal agencies.

Federal agencies have also brought cases alleging unfair, deceptive, or abusive acts or practices in the context of a telemarketing campaign.



COMPLIANCE TIP

Do not make telemarketing calls before 8:00 a.m. or after 9:00 p.m.



DID YOU KNOW?

You could be fined \$500 - \$1,500 per call or text message under the Telephone Consumer Protection Act (TCPA) if you haven’t obtained written consent.

Among other things, when telemarketing products, a dealer must state promptly the purpose of the call; clearly disclose, prior to purchase, the cost of the product; disclose prior to purchase all material conditions, benefits, and restrictions relating to the product; disclose clearly that the purchase of the product is voluntary and not required; make all legally required disclosures in a clear manner and at reasonable speed and cadence so the consumer can understand them; and after disclosures are read, require the customer to acknowledge the purchase is voluntary and that the customer affirmatively requests or consents to purchase the product. If the product has a cancellation or refund policy, the dealer must disclose the policy and give the phone number to cancel and the time in which to get a refund. The customer's purchase and means of payment must also be disclosed and confirmed. If paying by credit card, the customer must give the full credit card number for payment to the sales representative.

States also have laws regulating telemarketing. In addition to the existence of several state-specific do-not-call lists, some states give consumers three-day cancellation rights for telemarketing sales and a number of states have tougher telemarketing sales rules than the FTC and FCC (examples include Texas, New Jersey, Arizona, Louisiana, and Wyoming). Since the rules are very complicated, you should get advice from your counsel on your specific practices.

EMAIL

The federal CAN-SPAM Act of 2003 requires that each commercial email conspicuously give the consumer a way to opt out of receiving further commercial messages. Senders must honor opt-out requests within 10 business days. Commercial emails also must contain the sender's address, a notification that the message is an advertisement, and other specific language. CAN-SPAM prohibits misleading subject lines and "from" line information. The prohibition on misleading "from" lines also applies to "transactional or relationship" messages: emails that relate to an existing business relationship between the sender and recipient and that do not market products or services, such as messages informing a customer of a warranty or recall notice. Your counsel can advise you about state email laws and the interplay between federal and state email standards.

FAX

The Telephone Consumer Protection Act, as amended by the Junk Fax Prevention Act of 2005, restricts the ability to send fax advertisements. Unsolicited fax advertisements are prohibited unless they are based on



DID YOU KNOW?

When a customer unsubscribes from an email list, you have 10 days to honor their opt-out request.

an established business relationship between the parties. (In addition, fax advertisements that are based on the recipient's prior express invitation or permission are not "unsolicited" and are therefore permitted.) Permitted fax advertisements are subject to regulation by the TCPA. The general rules are that the first page of the fax advertisement must include a clear and conspicuous notice providing instructions for opting out of future advertising faxes from the sender. This notice must explain the recipients opt-out rights and note that a sender's failure to honor an opt-out request within 30 days is unlawful. This notice must also include a telephone number and fax number for submitting an opt-out request. If neither of these options is toll-free, the notice must also provide a cost-free opt-out mechanism available via a website or email address. The sender's opt-out mechanism must be available to receive opt-out requests 24 hours a day, 7 days a week. Opt-out requests must be submitted a particular way to be valid, and the required opt-out notice must include instructions for submitting a valid request. Specifically, the notice must explain that the request must include the recipient's fax number, and the request must be submitted using the means made available by the sender. The FCC has said that even fax advertisements that are based on the recipient's express permission must include this opt-out notice, but a federal appellate court has challenged this position as regulatory overreach that is not supported by the statute. Senders must honor opt-out requests in the shortest reasonable time, not to exceed 30 days.

Under a separate standard administered by the FCC, all fax communications must contain, at the top or bottom margin on the first page, the date and time of transmission and, on every page, the sender's identity.

RECOMMENDED PRACTICES

1. **If you conduct direct marketing, periodically scrub your target lists for persons who have excluded themselves from the means of communication you intend to use (telemarketing, faxes, and email).** You should keep a separate list of consumers who opt out of telemarketing, faxes, and email and be careful before using an auto dialer or prerecorded message to obtain the appropriate consents from the party you are calling or texting. This consent must include specific disclosures and comply with specific content requirements. Adequately scrub telemarketing lists of phone numbers against the FTC's National Do Not Call Registry, your state's Do-Not-Call list and your dealership's list of persons who have asked not to be called. The Data & Marketing Association (www.the-dma.org) also maintains "do not contact" lists that you should scrub your lists against. If you are telemarketing, get assurances from vendors on having obtained



RECOMMENDED PRACTICE

If you conduct direct marketing, don't forget to periodically remove people who have opted out or unsubscribed.

customer consents and exclusions of persons listed on federal and state Do-Not-Call lists, then double-check against Do-Not-Call lists, as well as your own dealership's list of customers who have asked not to be called. The class action liability potential under the TCPA makes this a critical area for businesses to be compliant. Also, note that many State Attorneys General and Motor Vehicle Departments have their own rules or guidelines for advertising motor vehicles.

2. **Maintain an internal “do-not-call” list independent of the FTC’s National Do Not Call Registry and any applicable state do-not-call lists.** You must regularly scrub your internal target lists, against the federal and any applicable state do-not-call lists, of consumers who have opted out of communications from you and/or your affiliates (i.e. telemarketing, texts, faxes, e-mails) and update these opt-out lists at least every 30 days for landlines and every 15 days for wireless cell numbers. Out of an abundance of caution, we recommend that you scrub your internal target lists every 14 days. Note that state laws may have more restrictive requirements and we recommend that you consult with your local attorney.
3. **As discussed in Topic 10, you should obtain a customer’s prior express written consent before delivering telemarketing calls with an automatic dialer including prerecorded messages.** If you want to take a more prudent approach, you could adopt a policy and implement a practice whereby you obtain a consumer’s express written consent before making any telemarketing calls regardless of whether the calls are made with an automatic dialer and/or include a prerecorded message. Indeed, this prior consent approach is required in a number of countries outside the U.S. For example, see Canada’s Anti-Spam Law (“CASL”).
4. **Vet all third-party telemarketing vendors.** If you decide to hire a third-party to make telemarketing calls, it is recommended that you conduct due diligence on the third-party’s policies and procedures, litigation history (e.g., was the third-party named in any relevant litigation) and any public complaints lodged against the third-party, among other things. Also, as with the use of any third party, ensure that any personal information shared with them will not be used for purposes outside the scope of the agreement to avoid the transfer of data constituting a “sale.”

ADDITIONAL RESOURCES:

A Guide to the FTC Telemarketing Sales Rule:

<http://business.ftc.gov/documents/bus27-complying-telemarketing-sales->



RECOMMENDED PRACTICE

Maintain an internal “do-not-call” list independent of the FTC’s National Do Not Call Registry and any applicable state do-not-call lists.



RECOMMENDED PRACTICE

Get a customer’s written consent before using an auto dialer to call with marketing messages.



RECOMMENDED PRACTICE

Vet all third-party telemarketing vendors.

[rule](#)

Summary of June 2015 FCC Rulings on the TCPA:

https://apps.fcc.gov/edocs_public/attachmatch/FCC-15-72A1.pdf

FTC Guide on Complying with the CAN-SPAM Act:

<http://business.ftc.gov/documents/bus61-can-spam-act-compliance-guide-business>

Complying with the FTC's Telemarketing Sales Rule:

<http://business.ftc.gov/documents/bus27-complying-telemarketing-sales-rule>

RECORDKEEPING AND DESTRUCTION OF RECORDS

Your dealership's records are critical assets of your business, whether they are physical or electronic. It's important to have plans and policies for safeguarding, storing, and disposing of vehicle sale, lease, and F&I records according to the law (also referred as a retention schedule when it pertains to data).

DID YOU KNOW?

An appointment, an IM, a text message, an expense record and even a social media post are all considered company records.

COMPLIANCE TIP

Destroy paper and electronic records in such a way that the information cannot be read or reconstructed.

RECOMMENDED PRACTICE

Consider using electronic documents and obtaining electronic signatures instead of paper ones.

BREAKOUT SECTIONS

1. Records Maintenance and Retention Policy
2. Important Laws and Regulations
 - FTC's Consumer Report Information and Records Disposal Rule
 - The Telemarketing Sales Rule
 - Telephone Consumer Protection Act (TCPA)
 - Electronic Storage of Business Records
3. Recommended Practices
4. Additional Resources

The records of an auto dealer are critical assets of its business, including all records produced and received in connection with the operation of the dealership's business, whether such records are in a physical or electronic format. **A company record may be as obvious as a memorandum, an email, or a contract, or something less obvious, such as a computerized desk calendar, an appointment book, an IM, a text message, an expense record, a social media website entry, or a blog posting.** Information contained in flash drives, memory sticks, PSTs, USB drives, and backup tapes, and on wireless devices such as iPhones, Android phones, PDAs, tablets, and other portable media can also be company records. This Topic focuses principally on federal laws and regulations regarding records concerning vehicle sales, leases, and F&I records.

RECORDS MAINTENANCE AND RETENTION POLICY

It is important that your **dealership have a policy on records maintenance and retention**, and it is recommended that your records be kept centrally rather than contained on local PCs or portable devices to the greatest extent possible to facilitate the administration of your policy. You have to know where your records are located before you can effectively manage them. This is especially true for electronic records.

In addition to knowing where your records are, you also want to know how long to keep (or not keep) records. In particular, you want to ensure that you are not maintaining sensitive consumer information longer than necessary. The FTC has repeatedly warned that companies should retain nonpublic personal information (NPI) data only as long as necessary to fulfill the business and regulatory purposes for which it was collected, because keeping such information creates a risk to consumers. Moreover, retaining all sensitive consumer information forever is expensive from a storage perspective and, in the event of a data security breach in which that information is compromised, could subject the business to increased liability. There are many reasons to retain records, however. State record retention laws range from employment records to service and waste disposal records, and record retention requirements are not uniform among the states. Every state has its own retention requirements for dealer sales records, auto repair and servicing records, tax records, payroll and employment records, and environmental and facility-related records, among others. Consult your local counsel or compliance professional when establishing retention periods for specific categories of your dealership's records.



DID YOU KNOW?

An appointment, an IM, a text message, an expense record and even a social media post are all considered company records.



COMPLIANCE TIP

Create a policy on records maintenance and retention that includes keeping records centrally, rather than on local PCs or portable devices.

IMPORTANT LAWS AND REGULATIONS

Federal and state record retention requirements generally apply no matter what the record's format or characteristic (i.e., both physical and electronic). **Failure to retain records for the required time periods can subject a dealership to penalties or fines.** Adequate resources should be allotted to develop and implement a record retention policy that reflects applicable federal or state requirements.

For example, ECOA requires generally that all written or recorded information concerning a credit application (including any credit report on the consumer, any notation of action taken, such as adverse action notices, risk-based pricing notices, and decisions sent back by finance sources, as well as any documents submitted by the consumer such as paystubs) must be retained for a minimum period of 25 months after the consumer is notified of the action taken on their credit application (e.g., approval, counteroffer, adverse action notice, or notice of incomplete application). This includes information on completed deals, "dead deals," or withdrawn credit applications, where the dealer never completes a credit transaction with the consumer. However, many attorneys advise dealers to retain these records for five years from notification of the credit decision, which is the outside limit of the statute of limitations period during which a consumer can bring a claim under ECOA.

An entity is required to maintain evidence of compliance with the EFTA and Regulation B for 2 years.

Under the FCRA, the statute of limitation is the earlier of two years after the date of discovery by the plaintiff of the violation that is the basis for such liability, or five years after the date on which the violation that is the basis for such liability occurs. Under the FCRA, prescreen selection criteria must be maintained in writing for three years after the offer was made to the consumer.

OFAC records must be retained for five years as well. States may impose additional retention period requirements. Consult your local counsel on the appropriate retention period for your dealership in your state.

Under Regulation Z, creditors are required to retain evidence of compliance with the disclosure requirements up to two years after the date the disclosures are required to be made or action is taken. Lessors are required to retain evidence of compliance with Regulation M, other than advertising, for a period of not less than two years after the date of the disclosures are required to be made or an action is required to be taken.



DID YOU KNOW?

Different regulations at both the state and federal level require various records to be maintained for different periods of time.

Your contracts with consumer reporting agencies and lenders may also have record retention rules with which you are required to comply.

FTC'S CONSUMER REPORT INFORMATION AND RECORDS DISPOSAL RULE

The Disposal Rule requires persons who maintain or otherwise possess consumer report information for a business purpose to properly dispose of such information by taking reasonable measures to protect against unauthorized access to or use of the information in connection with its disposal. For example, **paper records should be cross-shredded, burned, or pulverized so the consumer information cannot be read. Consumer information must also be destroyed or erased from all electronic media so that the information cannot be read or reconstructed.** For PCs, copiers, smartphones, tablets, and fax machines, this means not only deleting the information but wiping the hard drive clean, as deleted information can remain on the hard drives of these digital devices even if the data is “deleted” by the user. The Disposal Rule also requires that dealers properly vet and supervise any records disposal company.

Disposal destruction procedures should be included as a part of a dealership's Information Security Program (See Topic 4) and followed systematically.

THE TELEMARKETING SALES RULE

This requires telemarketing scripts and marketing materials, customer information, and other information relating to telemarketing campaigns be kept for a minimum of 24 months from the date the record is produced. If a dealer uses a telemarketing firm, the dealer should consider requiring the telemarketing firm by contract to retain the necessary records on its behalf. However, record retention remains the dealer's responsibility. An agency's failure to do so for the dealer will not provide a viable defense in court. The TCPA's recordkeeping provision is much narrower. However, callers bear the burden of proving that their telemarketing conduct complies with the law, and that creates a virtual recordkeeping obligation. Based on the statute of limitations for bringing a TCPA claim, dealers should consider keeping these records for at least four years.

Electronic technology has made the issue of recordkeeping and destruction far more complex and critical than was the case when all records were kept only in paper format. Electronic records include more than Word documents, emails, and text messages. They include any electronically stored information generated or contained in the hard drive



COMPLIANCE TIP

Destroy paper and electronic records in such a way that the information cannot be read or reconstructed.

Once the record is no longer needed or legally required, completely destroy paper and electronic records in such a way that the information cannot be read or reconstructed.



DID YOU KNOW?

Telemarketing scripts and related marketing campaign materials must be kept for a minimum of 24 months.

of any media or in any storage item including PCs, servers, copiers, fax machines, smartphones, tablets, PDAs, USB flash drives, laptops, and other portable devices. Electronic records include drafts, IMs, charts, Power Points, spreadsheets, and other documents composed, sent, or received by the device. They constitute probably the largest percentage of documents your dealership creates and uses today. If you are sued, discovery of electronic documents becomes a costly process as you need to search all devices and cannot simply rely on what is on your central servers.

Email and text messages present a particular challenge for records retention programs, particularly as email and text messages have become preferred means of business communications. **It is important to develop and consistently implement a specific policy on email and text message retention** and deletion. There is no magic time period during which you must generally retain emails or text messages (subject to the requirements of any laws that apply to the subject matter of such message), but long email or text message retention periods will cause a greater expense in searching and identifying relevant emails and texts in the event of a lawsuit. The same is true for other forms of instant messages and chats, which are also electronic records. For example, consider encouraging best practices such as discouraging employees hitting “reply to all” on sensitive emails when it is not necessary as it causes emails to proliferate and possibly being mistakenly forwarded to the wrong people.

TELEPHONE CONSUMER PROTECTION ACT (TCPA)

To comply with the TCPA, an entity must develop policies and implement procedures to meet retention obligations as well as train employees on compliance. The policy should outline retention of various pieces of information. Specifically, the policy should: (i) clearly address opt-out mechanisms; (ii) require periodically scrubbing call lists against the national Do-Not-Call Registry and internal do-not-call lists (which requires maintaining opt-out lists and internal do-not-call requests); (iv) ensure that any third-party vendor, used to make calls, complies with the TCPA, (v) obtain written consent among other things. Further, to maintain compliance, keep all records of consent for at least four years.

ELECTRONIC STORAGE OF BUSINESS RECORDS

Both the federal government and most states have adopted a form of the Uniform Photographic Copies of Business and Public Records as Evidence Act. Except for certain limited categories of documents, states generally permit the conversion of paper documents to electronic form for recordkeeping purposes. Federal and state evidence laws also permit



COMPLIANCE TIP

Develop and consistently implement a specific policy on email and text message retention and deletion.

the use of electronically converted documents in lawsuits or regulatory proceedings. The overriding requirements are that the electronic records be authentic reproductions of the original and be deemed to be reliable, trustworthy, and accurate. A paper record should be electronically captured at or near the time of the event or transaction and must be complete and available for retrieval as requested for regulatory or business purposes. The context and the structure of the electronic record must also be preserved for the full retention life of the record, including any migration of the record from one system or medium to another. If a record is electronically converted in a trustworthy manner, the original paper record generally can be securely destroyed.

As you may know, federal privacy laws and regulations require that documents containing personal customer information must be handled, maintained, and disposed of in a secure manner. If these documents and records are not securely maintained or not securely destroyed when no longer required or of use/ value, they may be vulnerable to unauthorized acquisition or use – for example, to perpetuate identify theft, or to commit a fraud. Further, a dealership may be subject to an enforcement action by the FTC for violating the Safeguards Rule and Disposal Rule or in private litigation or administrative proceedings under state law.

The FTC has cited companies for keeping consumer information longer than is necessary as a shortcoming in data security that, along with other security deficiencies, can constitute “unfair acts or practices” in violation of Section 5 of the FTC Act. Again, the FTC has repeatedly stated its position that you should keep records containing customer information only for as long as necessary, and then destroy them in a secure manner, uniformly for both paper and electronic records.

In the event of actual or threatened litigation or regulatory enforcement proceedings, a dealer should immediately implement a “litigation hold” process suspending all electronic and physical document destruction and requiring employees to identify and preserve relevant documents, including emails and text messages. Even inadvertent or negligent destruction or loss of email, texts, or other documents relevant to a threatened or pending lawsuit or investigation can be grounds for a court to impose sanctions for “spoliation” (destruction) of evidence. Recently, a number of states have recognized private tort claims for the negligent spoliation of evidence.

RECOMMENDED PRACTICES

1. **Have a comprehensive record retention policy for both paper and electronic records and consistently apply it.** Know what



RECOMMENDED PRACTICE

Have a comprehensive record retention policy for both paper and electronic records and consistently apply it.

records you keep and keep only records you need for business. Know where they are located, and why you keep them there. Categorize your records and know the federal and state laws on mandatory time periods for retaining different categories of records. Your records policy should define how, for how long, and where your records are maintained, as well as when and how records are to be destroyed. Your practices should be consistent with your policy. The policy should also describe responsibilities relating to company records. Train your employees on your policy and obtain their written acknowledgement to comply with it. Limit and log all access to all records (paper and electronic) containing personal customer information.

2. **Avoid maintaining records in the hard drives of personal computers, laptops, tablets, memory sticks, PSTs, flash drives, or remote storage devices such as smartphones.** It is a best practice to maintain records only on central servers and limit users to “read only” access on their remote devices.
3. **Consider using electronic documents and obtaining electronic signatures instead of paper ones.** Electronic documents – credit applications, contracts, notices, consents – can be more securely stored centrally in limited-access electronic databases or in a secure cloud server where they won’t get lost in file warehouses and are capable of being easily retrieved. Scan paper documents to upload into your electronic document storage system. Most states generally permit electronic storage of records, including conversion of paper original documents to electronic format for storage. Certain electronic records systems permit key word or phrase searching to locate documents as well. This makes locating documents much less tedious, particularly if the records are maintained in a central server or repository and not on PCs and remote devices. Your records storage policy should also address employees using their own devices for dealership business. No NPI should be permitted to be downloaded to any personal device or storage means such as a USB port or external hard drive.
4. **Retain company records only until they are of no further use or value to you and after any legally imposed retention time periods have expired.** After a record’s current use or need has passed, either securely destroy the record or store it in a safe and secure location that is less accessible subject to any legally mandated time period for retaining such. Securely destroy all records containing any personal information of customers, especially records that contain Social Security numbers, drivers’ licenses, and credit or debit card account



RECOMMENDED PRACTICE

Avoid maintaining records in the hard drives of personal computers or portable computing or storage devices.



RECOMMENDED PRACTICE

Consider using electronic documents and obtaining electronic signatures instead of paper ones.



RECOMMENDED PRACTICE

Retain company records only until they are of no further use or value to you and after any legally imposed retention time periods have expired.

numbers. Be careful in discarding old computers, cell phones, flash drives, iPhones, and smartphones. Even “deleted” information may remain on a hard drive or flash memory. Copiers and fax machines also contain hard drives that retain copies of records, especially if they contain scanning functions or Internet connections. Destroy the hard drive or use a software program that will irrevocably erase and expunge all of the information before trading the items in or discarding them.

5. **Implement and enforce a policy concerning retention periods for email and text messages.** Most casual email and text messages should be purged from your system within a very short period of time, subject to any retention laws relating to subject matter or your email or text message. Junk email can be purged immediately. Identify a general time frame from creation in which all email (both sent and received items) will be purged unless a user takes affirmative action to archive or otherwise preserve the email as a business record. (A practical tip is to not allow users to preserve emails in mass; make preservation an email-by-email task.) Attempt to centralize all emails and avoid the ability of email to be moved to PC hard drives, memory sticks, PSTs, USB drives, remote devices, or forwarded to a Web-based email address or other non-central storage. Do the same with text messages. Educate employees on good email practices such as limiting the number of recipients and ccs and sending shorter emails only for the purpose of creating action by the recipient. Have a procedure to suspend email and text message purging in the event of a litigation hold until all email and text messages relevant to the litigation hold have been identified, segregated, and preserved. Failure to do so may give rise to a “spoliation” claim.
6. **Identify and retain any records that may be relevant to a lawsuit or possible regulatory inquiry.** Establish a process for a “litigation hold” that halts the document destruction process for paper and electronic documents (including emails and text messages) so as not to destroy documents that may be relevant to ongoing or potential litigation or to a government inquiry, examination, or audit. A consistent document destruction policy and centralization of electronic records onto company or cloud-based servers, and not individual PCs or remote devices like flash drives, laptops, tablets, smartphones, or external hard drives, can facilitate electronic discovery in litigation.
7. **Secure records that contain consumer information in accordance with your FTC Safeguards Rule Information Security Program** and destroy these documents securely when they are no longer required



RECOMMENDED PRACTICE

Implement and enforce retention periods for email and text messages.



RECOMMENDED PRACTICE

Retain any records that may be relevant to a lawsuit or regulatory inquiry.



RECOMMENDED PRACTICE

Secure records that contain consumer information in accordance with your FTC Safeguards Rule Information Security Program.

under your FTC Information Disposal Program. Be consistent in recordkeeping and destruction times. The current Safeguards Rule requires automobile dealers to develop, implement, and maintain an information security program consistent of technical, administrative, and physical safeguards as it pertains to the handling of consumer data.

8. **Exercise due diligence in hiring a vendor to store, dispose of, and destroy your records.** Have a trusted employee of your dealership supervise any vendor destroying your records that contain customer information. Ask the vendor about its background checking processes and their bonding of employees who will collect and destroy customer information documents. Do your diligence on a vendor who will store your records in a cloud server, particularly as to their security certifications and experience in handling attempted or actual breaches of their server. Your contract with such a vendor should give you the right to audit and obtain a copy of their security audits and impose indemnification and liability on the vendor for any costs or losses incurred in any data security breach of their cloud or system that results in your customer information being wrongfully accessed or compromised, including the costs of sending notices and giving affected customers at least a year of credit monitoring services.

9. Assess the risk of collecting and keeping too much data or records that are not required. Many businesses believe that the more data they have, the better they can perform. While it is true that a lot of data often leads to better analytics, it is equally important to assess the cost to benefit analysis of keeping too much data. Remember: If you do not need it and it is not legally required, consider deleting it.

ADDITIONAL RESOURCES

Directions for erasing data from many models of cell phones and wireless devices:

<http://www.wikihow.com/Delete-Cell-Phone-Memory>

<http://www.packerthomas.com/services/links/AutoRecordRetention.pdf>

When to shred: Purging data saves money, cuts legal risk:

http://www.computerworld.com/s/article/9114882/When_to_shred_Purging_data_saves_money_cuts_legal_risk

An excellent website collection of practices concerning records management and destruction:

www.arma.org

IRS publication on conversion to electronic records and retention periods:

http://www.autodealerco.com/Computer_Records_Retention.pdf



RECOMMENDED PRACTICE

Exercise due diligence in hiring a vendor to store, dispose of, and destroy your records.

PRACTICAL ADVICE AND IMPLEMENTATION TIPS

To avoid information breaches and violations of important state and federal regulations, it's important to build and adopt a Compliance Management System (CMS). This will give you the ability to monitor dealership activity and reduce compliance risks.



DID YOU KNOW?

A principal cause of data security breaches is simply employee oversight and negligence, so it's important to have regular training on your compliance policies.

COMPLIANCE TIP

Have a formal program in place for tracking and responding to consumer complaints to meet the expectations of regulators.

RECOMMENDED PRACTICE

Adopt a dealer wide ECOA/Fair Lending policy and consider naming a senior officer to be in charge of the policy.

BREAKOUT SECTIONS

1. CMS Implementation
2. CMS Policies and Procedures
3. Training and Monitoring Employees
4. Tracking and Responding to Customer Complaints
5. Vendor Management
6. Dealer Finance Participation
7. Recommended Practices
8. Additional Resources

Compliance is a critical priority for any auto dealer. Done properly, it will save costs, expenses, and help dealerships avoid practices that could result in fines, damages, and penalties from regulators or Attorney General investigations – not to mention consumer claims and lawsuits. In today’s business environment, it’s more than a best practice to adopt a Compliance Management System (“CMS”). It’s a business necessity, just as it is critical to bring a culture of compliance into your dealership, one that starts with senior management support.

CMS IMPLEMENTATION

A CMS consists of your policies, procedures and operational practices and is designed to promote compliance with applicable laws and regulations. It does not have to be a hugely complex undertaking; you may have many of the necessary policies and procedures described in this Compliance Guide – as well as corresponding practices – already in place. Effectively documenting and maintaining your policies, procedures and practices can be key to your defense if you are ever investigated.

An effective CMS starts from the top. It should be approved and championed by your Board of Directors or, if you don’t have a Board, your executive officers and dealer principal(s). The senior officer in charge of the CMS should report to your Board or senior management group on dealership compliance at least semi-annually and preferably quarterly, so that omissions or potential violations are quickly identified and corrected.

CMS POLICIES AND PROCEDURES

The bottom line? Your CMS program and documentation should be aligned with your dealership’s policies and practices and be in full compliance with the requirements of consumer protection laws. It should **develop and maintain a sound policy and compliance program for the entire set of products and services offered to consumers.** The CFPB has issued guidance about the components of a CMS for financial institutions. These represent best practices for dealers not subject to CFPB jurisdiction as well. A CMS must have control procedures to ensure your dealership stays compliant. Compliance audits, policy reviews, corrective action, and policy and procedure modifications on an ongoing basis are required. The CMS and component policies should also provide that dealership employees be held accountable for conduct that does not meet the requirements under the CMS, whether in the form of adverse compensation consequences and/or termination of employment for repeat offenders.

Much of your CMS will include a compilation of policies that we have discussed in this Compliance Guide. These include your Privacy,



COMPLIANCE TIP

Develop and maintain a policy and compliance program for all the products and services your dealership offers to consumers.

Safeguards, Data Destruction, Red Flags, Fair Credit, Fair Lending, UDAP, Advertising and Marketing, Customer Complaints, Record Retention, and other subject matters referenced within the preceding Topics.

TRAINING AND MONITORING EMPLOYEES

A CMS is only effective if properly implemented. A critical component of an effective CMS is to train your employees and monitor for their compliance. For example, **a principal cause of data security breaches is simply employee negligence**. The training must include legal requirements and security requirements that you include in your Safeguards program. Employees should also be trained on unfair, deceptive, and abusive acts and practices and the expectations for conduct as a representative of your dealership. Monitoring employee conduct in individual transactions, as well as monitoring data flow in your system and user activity to identify possible patterns of irregularities, is also critical.

TRACKING AND RESPONDING TO CONSUMER COMPLAINTS

As part of your CMS, **regulators expect that you will have in place a formal program for tracking and responding to consumer complaints**. The CFPB has established an online consumer complaint database and the FTC encourages consumers and businesses to file complaints about auto dealerships as well. Consumer complaints go a long way toward establishing which dealerships the FTC and State Attorneys General will investigate for violations. You want to stay off the regulatory radar screens and seek to resolve consumer complaints informally through the dealership. This is not just about increasing customer satisfaction scores. It's about avoiding the costs, expenses, and divergence of management time related to a regulatory investigation. Your CMS should describe the process for customer complaints, timelines for responding, escalation and mediation processes, the resolution by a senior dealership officer or neutral third party, if necessary, as well as establish a mechanism for tracking complaints. Consider going the extra mile to resolve consumer complaints even if it means the consumer may receive more than you believe they are entitled. Treat every customer individually but use a consistent process of initiating complaint responses within a short period of time and having appropriate escalation procedures. Do whatever you can to resolve the complaint within your dealership.

VENDOR MANAGEMENT

The FTC and CFPB have been particularly concerned with vendor management oversight policies and functions, as some of your compliance work and many of your business processes may be



DID YOU KNOW?

A principal cause of data security breaches is simply employee negligence.



COMPLIANCE TIP

Have a formal program in place for tracking and responding to consumer complaints to meet the expectations of regulators.



DID YOU KNOW?

The FTC and CFPB have been particularly concerned with vendor management oversight policies.

outsourced to third parties. While your dealership can outsource services, it cannot outsource responsibility for compliance. You are ultimately responsible for the performance and any failures to perform or comply by your vendors. Your CMS should contain a policy for selecting, managing, auditing, and resolving service, security, and performance issues with third-party service providers, and include the right to audit. It is not enough to delegate any of your compliance obligations to third parties. You need to stay on top of them and make sure they are following your policies, particularly if they will have the ability to access your customers' nonpublic personal information. In the CFPB's 2012 Bulletin on service providers, which was amended and re-issued in 2016, the agency indicated that it is critical for those subject to its jurisdiction to:

- Conduct thorough due diligence of service providers
- Review service providers' compliance policies, procedures, internal controls, and training materials
- Include clear compliance expectations in service provider contracts as well as appropriate and enforceable consequences for non-compliance
- Regularly monitor service providers for compliance
- Take prompt and appropriate action for non-compliance, including termination of contracts

While the CFPB's guidance applies to those subject to its jurisdiction, it can be used by any organization as a foundation for a customized program.

DEALER FINANCE PARTICIPATION

Dealers, if they have not already done so, should consider adopting, implementing, and monitoring compliance with an ECOA/Fair Lending policy that states the dealership's policy to not discriminate in any aspect of a credit transaction. Staff training and monitoring buy rate participation can be a part of the policy. One good practice, originally developed by the Department of Justice (DOJ) as part of a prior enforcement action, is to implement a consistent buy rate participation amount for all customers and permit markdowns only, based on significant, nondiscriminatory, pre-identified legitimate business reasons. The reasons should be documented in the deal jacket to demonstrate the legitimacy of the action should a finance source or regulator audit the dealer's practices. This documentation should be a purely internal document and not something to give to the customer. This approach is the foundation of the NADA-

NAMAD-AIADA Fair Credit Compliance Policy and Program Certification Form (“NADA Form”) which closely tracks not only the approach of the DOJ but also provides a list of the specific legitimate business reasons it approved in the case settlements it entered into in 2007 with two dealers. You can obtain a copy of the NADA Form from NADA.

Examples of legitimate business reasons that justify differences in participation are many and you should consult with your counsel to determine those applicable to your dealership. But **using the seven reasons “blessed” by the DOJ in 2007 may be the safest course of action**. These are:

1. The finance source’s restriction on rate participation being lower than the dealers’ standardized rate participation.
2. A constraint on the customer’s ability to satisfy monthly payment requirements.
3. Customer has a competing offer from another dealer or finance source.
4. A special promotional offer extended to all customers on the same terms.
5. The fact that the transaction was eligible for a captive’s or other finance source’s subvented interest rates (a rate typically subsidized by a vehicle manufacturer such that the APR the customer pays is below the finance source’s typical buy rates, such as a 0% APR program).
6. The fact that the transaction is eligible for the dealership’s employee incentive program; or
7. Documented inventory reduction considerations related to specific vehicles.

For example, if the customer has another offer of credit from a bank, credit union, or another dealer meeting or beating your APR, this could be a legitimate, non-discriminatory business practice. Your ECOA/Fair Lending policy should have the specific requirements of your program, for example, whether you meet or beat a competing APR and, if you beat it, by how much. A good practice is to document in the deal jacket the name of the other creditor and the terms of the competitive offer. While such a practice will certainly not guarantee immunity from a credit discrimination claim, you will at least have a consistent policy and process to justify potential disparities in your portfolio.



COMPLIANCE TIP

Avoid differences in dealer finance participation with the exception of the seven reasons “blessed” by the DOJ in 2007.

In each credit sale deal jacket, you would insert the NADA Form (or similar form) indicating either that you charged the customer the dealership's standard participation rate or the pre-identified reasons for decreasing that rate down. Doing this consistently on every credit sale deal is one way to help protect your dealership from a credit discrimination claim. In creating the standardized non-discriminatory business reasons for a reduced participation, you should discuss your choices with your attorney prior to implementation. Consider using the DOJ reasons identified above as a guide to developing your reasons. Note that the CFPB has informally indicated that an open-ended "other" reason is not acceptable because they believe such a practice creates an opportunity for a dealer to apply its rate participation exception policy in an inconsistent manner.

When coupled with training, monitoring for rate deviations, and taking remedial action as needed, this dealer participation practice positions a dealer to be better able to respond to a fair lending inquiry. Note that despite the CFPB's activity in the indirect auto finance market, the consent decrees and other regulatory resolutions have not produced the CFPB's desired result of eliminating rate participation in the market generally.

RECOMMENDED PRACTICES

1. **Adopt a dealer wide ECOA/Fair Lending policy and consider naming a senior officer to be in charge of the policy** if you have not already done so. The policy should clearly state the dealership's commitment to equal treatment and non-discrimination in all aspects of a credit transaction. Sales and F&I personnel who set prices or rates to consumers should be trained and tested regularly with respect to the policy. Monitor rate markups to ensure consistent application of the policy. Make the policy available to finance sources who send you communications about fair lending issues and be prepared to show the affirmative steps your dealership takes to make fair lending a priority.
2. **Begin all negotiations with a set rate markup amount for credit transactions.** Starting each customer with the same rate markup (and hopefully completing a large number of your deals at that figure or close to it) will provide good evidence of the absence of discriminatory pricing. It is critical that you monitor rate markups for similarly qualified customers, and if you observe material differences that you speak with the dealership personnel involved and learn the reasons. Make redress to customers if appropriate. Document your final rate markup on each credit sale – be it the standard rate markup or a lower rate based on the pre-identified list of legitimate



RECOMMENDED PRACTICE

Adopt a dealer wide ECOA/Fair Lending policy and consider naming a senior officer to be in charge of the policy.



RECOMMENDED PRACTICE

Begin all negotiations with a set rate markup amount for credit transactions.

business reasons – in the deal jacket using something like the NADA Form. Include supporting documentation if you are deviating from the standard rate markup.

3. Develop and implement a Compliance Management System.

All dealerships should create and implement a compliance management system that addresses the various issues addressed in this guide including, but not limited to: Privacy, Safeguards, Data Destruction, Red Flags, Fair Credit, Fair Lending, UDAP, Advertising and Marketing, Customer Complaints, Record Retention, and other subject matters. All employees should be trained on the applicable laws as well as the dealer's policy on the respective issue. For example, what is the dealer's process for accepting and responding to consumer complaints? A best practice is to delegate a senior level official or manager in the development and implementation of the CMS. The senior leadership of the dealership should approve of the CMS and be made aware of any compliance-related issues. A periodic audit of the CMS of at least one year should be conducted in order to identify any concerns, potential issues, or violations. Where applicable, the dealer's processes and procedures should be updated to avoid any issue or violation. The senior leadership should be involved in any corrective or remedial measures.

4. **Review FTC, CFPB and other industry guidance.** We also recommend that the dealer delegate an employee, senior official or work with outside counsel to monitor applicable federal and state laws. This is a dynamic industry and with the regulatory changes at the federal and state level, a dealer minimizes risk if they monitor changes in the law and updates their CMS accordingly.

ADDITIONAL RESOURCES

Webinar on indirect auto finance presented by the Federal Reserve Board, the Consumer Financial Protection Bureau, and the U.S. Department of Justice:

<http://www.cfpbmonitor.com/2013/08/09/recording-of-agency-auto-fair-lending-webinar-available/>

2021 Fair Lending Report of the CFPB:

https://files.consumerfinance.gov/f/documents/cfpb_2020-fair-lending_report_2021-04.pdf

The CFPB's 2014 Supervisory Highlights on actions taken to audit for and enforce perceived findings of disparate impact credit discrimination:

http://files.consumerfinance.gov/f/201409_cfpb_supervisory-highlights_auto-lending_summer-2014.pdf



RECOMMENDED PRACTICE

Develop and implement a Compliance Management System.



RECOMMENDED PRACTICE

Review FTC, CFPB and other industry guidance.

NADA-NAMAD-AIADA Fair Credit Compliance Policy and Program:

https://www.nada.org/regulatory_affairs/faircreditlanding/

Defining a Compliance Management System:

<http://www.dealermarketing.com/exactly-compliance-management-system/>

CFPB Requirements for a Compliance Management System:

http://files.consumerfinance.gov/f/201308_cfpb_supervisory-highlights_august.pdf

TRANSFORMATION RELATED TO AUTOMOTIVE ECOMMERCE SALES

Consumers have been waiting with various degrees of patience for the auto industry to catch up to online shopping, and an increasing number are ready to apply these conveniences to the car buying experience.

DID YOU KNOW?

80% of consumers say that they want to do at least part of their vehicle purchase online.³

COMPLIANCE TIP

Include a link to your terms of use and privacy policy on every page of your website.

RECOMMENDED PRACTICE

You should review your online disclosures and advertising periodically to ensure that they do not contain false, deceptive, or misleading information.

BREAKOUT SECTIONS

1. eCommerce – the next step in automotive digital retailing
2. Terms of Use & Privacy
3. Disclosures & Advertising
4. Signature Requirements
5. ADA Compliance
6. Jurisdiction
7. Potential Pitfalls
8. Recommended Practices
9. Citations and Additional Resources

The way the world buys and sells vehicles is changing stemming from changing consumer expectations who have grown accustomed to the convenience and speed of online shopping. Consumers have been waiting with various degrees of patience for the auto industry to catch up, and an increasing number are ready to apply these conveniences to the car buying experience. While it's not happening all at once and the changes vary by retailer and consumer, the industry is currently at a major tipping point in its transformation toward eCommerce and it's important that you know the additional challenges and compliance obligations.

- Consumer satisfaction with car buying has increased with digitization, reaching an all-time high of 72% in 2021, up from 60% in 2019.²
- Today, 80% of consumers say that they want to do at least part of their vehicle purchase online.³
- 64% of car buyers want to handle more of their purchase online compared to the last time they purchased a vehicle.⁴
- In 2021, 25% of consumers stated they would purchase entirely online.⁵
- New form (online only) retailers are realizing greater than 100% annual revenue growth.⁶

ECOMMERCE – THE NEXT STEP IN AUTOMOTIVE DIGITAL RETAILING

As you know, digital retailing is a spectrum that serves different buying styles. Consumers want to be able to begin, continue and complete their shopping journeys across all channels. At one end, you have the car buyer who wants a 100% digital experience with no human interaction. On the other end, there are buyers looking for a 100% physical in-store experience, with no digital touchpoints. Digital retailing and fully online eCommerce are often viewed as synonymous, but they are not. Digital retailing represents a range of discrete online capabilities that enables some of the consumer journey. Shop and compare, configure, trade valuation, and estimated payments are just a few. However, completing a digital retailing deal still requires manual engagement by the dealership which would also mean that the rules above apply for those deals. But what about those deals that are fully online. eCommerce represents the convergence of existing digital retailing capability with new automation and data intelligence that creates a fully online end-to-end purchase experience with no manual intervention required by the dealership.

Just over 13% of all transactions currently take place online and all require some level of sales support.⁷ As the mismatch between consumer

demand and availability of eCommerce at dealerships equalizes, up to 25% of global auto sales are expected to be online by 2025 and continue to grow through 2030 and beyond.

This Topic focuses on potential pitfalls relevant to online deals / transactions : (i) terms of use and privacy policies; (ii) disclosures and advertising; (iii) signature requirements; (iv) ADA compliance; (v) jurisdiction; and (vi) potential pitfalls.

TERMS OF USE & PRIVACY POLICIES

The CMS addressed in Topic 12 should also include policies and procedures covering online sales. As noted in Topic 12, some of the necessary policies and procedures may already be in place. You may, however, need to review them with a lawyer to determine whether updates or revisions are necessary given your expansion into the online marketplace.

For example, a “terms of use” sets forth the obligations and procedures governing the relationship between you and any consumer using your website or platform. Terms of use typically contain provisions delineating, among other things, the scope of services, data sharing, prohibited conduct, consent to contact the consumer, warranties, indemnification, and arbitration.

A privacy policy is another important document for dealers selling cars online. This policy discloses how a company collects, manages, uses, and discloses customer data. Common components of a privacy policy include:

- **Types of Information Received or Collected** (e.g., vehicle information, financials, address, social security number, IP address, etc.)
- **When Information is Collected** (e.g., online forms, automatically, recorded calls, etc.)
- **Use of Information** (e.g., credit checks, targeted advertising, legal purposes, etc.)
- **Sharing Information with Third Parties** (e.g., business partners, affiliates, vehicle inspectors, vehicle history providers, other service providers, government agencies, etc.)
- **Internet-Based Advertising** (e.g., targeted advertising based on consumers’ interests)

- **Ways to Limit Information Collection** (e.g., opt-outs, unsubscribe, etc.)
- **Accessing Consumers' Personal Information**
- **Third-Party Links**
- **Data Security**
- **State-Specific Disclosures** (e.g., California)
- **Children's Policy** (e.g., indicate that you do not target children with your websites or sales platform)
- **Users Outside of the U.S.**
- **Changes to the Privacy Policy** (e.g., when, and how changes are made)
- **Contact Information** (e.g., specific email, address, phone number)

A best practice is to include a link to your terms of use and privacy policy on every page of your website. At minimum, these policies should be displayed on the homepage. And, as always, the terms of use, privacy policy, and other legal documents should not be created just to “check the box.” Rather, you should strive to create policies that accurately reflect your obligations and procedures, and then ensure that such policies are implemented properly.

DISCLOSURES & ADVERTISING

The disclosure and advertising requirements addressed in other Topics are applicable to online sales. Many states also have specific requirements for online advertising. Accordingly, you should consult a knowledgeable attorney on how to minimize your risks when selling cars to customers online.

You should review your online disclosures and advertising periodically to ensure that they do not contain false, deceptive, or misleading information. This will require you to consider many factors as part of a “totality of the circumstances” approach.

- **Federal Disclosures.** There are specific disclosures required by various federal laws. For example, if you run a credit report on a consumer, the Fair Credit Reporting Act (FCRA) requires certain disclosures (e.g., pre-screen opt-out notice). Another example is the Truth in Lending Act (TILA), which requires certain disclosures for loan advertisements containing “triggering terms” (e.g., finance charge).



COMPLIANCE TIP

Include a link to your terms of use and privacy policy on every page of your website

You must operationalize these disclosures as part of your online sales process.

- **Buyer's Guide.** Be sure to post the FTC's Used Car Buyers Guide and comply with Used-Car Rule (see Topic 7).
- **Summaries.** You should consider a summary of terms and/or frequently asked questions ("FAQs") related to program eligibility, the sales process, and vehicle financing. This would include information related to inventory, the online platform, credit applications, credit inquiries, financing terms, down payments, and monthly payments.
- **Pre-Qualified.** If you include advertisements or banners regarding pre-qualified offers (e.g., "Get Pre-Qualified for an Auto Loan"), it should substantiate the pre-qualification amounts and any related rates. If you or the lender require consumers to meet other requirements, you should make clear to the consumer that the offer is not guaranteed if he or she does not meet additional underwriting criteria.
- **Testimonials/Endorsements.** As detailed in Topic 7, never use testimonials or endorsements that are fake, misleading, or make claims that you could not legally make.
- **Links.** Add a notice to alert consumers if they are leaving your website or platform (e.g., "When you click this link, you will leave our platform and will go to a website that is not controlled by us. We provided this link for your convenience. We do not guarantee any products or services that are offered on other websites. Other websites may not reflect our same privacy policies and security procedures.").
- **APR.** If you advertise finance charges or other rates, then state them as an "Annual Percentage Rate," using that term.
- **Phrasing.** Avoid using "lowest costs," "lowest rates," "quickest service," "easy payments," or "repayment in easy installments."
- **Other Representations.** Avoid making statements or representations with reference to the speed or ease of procuring a loan, the freedom from credit inquiries, or to any other implied differentiation in policy or loan service, unless you will comply with the representation made.
- **Transparency.** Disclose your relationship with lenders, relevant third parties, fees, and other terms and conditions.
- **Formatting.** As detailed in Topic 7, consider the prominence,

presentation, placement, and proximity of disclosures on your website (i.e., make disclosures clear and conspicuous through text boxes, interactive text, and/or pop-outs).

- **Language.** If specific language is not required by federal or state law, consider using disclosures and disclaimers that are not overly verbose or complicated.
- **Apps/Mobile Website.** Confirm that the presentation and formatting of disclosures made available on a mobile platform have been appropriately adapted for that platform.

SIGNATURE REQUIREMENTS

When executing sales contracts, loan agreements, vehicle titles, or other legal documents, auto dealers must adhere to signature requirements. Given the unique nature of car sales, states may require certain hard-copy signatures or hard-copy documents. An attorney can help guide you through state laws and DMV regulations concerning signatures for sale, loan, and vehicle documents.

Also, as addressed in Topic 3, the E-Sign Act allows documents to be signed electronically where certain disclosure, consent, and other requirements are satisfied. These issues should be addressed in an electronic signatures and records policy posted on your website.

ADA COMPLIANCE

Website accessibility lawsuits have been on the rise for several years. In short, these lawsuits allege that a company's website does not provide full and equal enjoyment for all consumers.

Unfortunately, courts are split regarding the ADA's application to websites. Regulatory agencies have also struggled to provide binding and consistent guidance. To minimize risk, many businesses have implemented the Website Content Accessibility Guidelines 2.0 ("WCAG"), the universally accepted standards created by accessibility experts.

To provide equal accessibility and avoid ADA website lawsuits, you should publish an accessibility statement on your website. Among other things, this statement would: (i) announce your commitment to providing an accessible website; (ii) indicate what standards have been implemented (e.g., WCAG 2.0); (iii) solicit feedback from website users and provide contact information; (iv) outline procedures for assessing consumer complaints and requests for accommodation; and (v) provide alternate means for users to obtain information (e.g., telephone support). A corresponding website accessibility policy will assist you in implementing

this statement.

JURISDICTION

Online sales can create unique jurisdictional issues should a dispute arise with an out-of-state customer. As noted in Topic 3, when a dispute with an out-of-state buyer arises, the buyer will often attempt to sue the dealer in the buyer's home state. The buyer may claim that the dealer is not licensed in the home state and/or that the law of their home state should apply.

The types of online activity that are sufficient for a court to establish jurisdiction over a party continue to emerge. When faced with jurisdictional and "choice of law" issues for online sales, most courts examine several factors, including: (i) contractual provisions (e.g., governing law and venue provisions); (ii) the auto dealer's state of incorporation and principal place of business; (iii) consumer's state of residence; and (iv) the auto dealer's contacts with the forum state (e.g., targeted websites, state-specific advertising, communications sent into the state, sale and loan documents signed in the state, etc.).

By including governing law and choice of venue provisions in your contracts, you can improve the chances that your "choice of law" and/or "choice of venue" will control any dispute between you and an out-of-state customer. As such, you should work with your attorney to review the governing law and venue provisions in your contracts.

POTENTIAL PITFALLS

Online car retailers should be mindful about the risks associated with incorrect paperwork, title and registration delays, and other purchasing issues when making the transformation to online eCommerce sales.

These risks can lead to consumer complaints and demonstrate the importance of prioritizing compliance and customer satisfaction in the online marketplace. Some items to consider include:

Ensuring titles and registrations are properly turned over to new buyers within the appropriate timeframe.

Ensuring during the process of selling cars online you are providing all necessary documentation such as inspection reports to consumers prior to sales.

Ensuring you have processes, services and procedures in place to account for proper use of temporary registrations, have properly assigned certificates of title in immediate possession (if required by law), proper odometer disclosures, and proper maintenance of police books or

washout systems.

Ensuring you have processes, services and procedures in place to account for obtaining any required insurance information on purchased vehicles.

Ensuring purchased vehicles are consistent with and match the online photos on your website.

RECOMMENDED PRACTICES

1. **Create and Implement Website Policies.** A term of use, privacy policy, and electronic signatures policy should all be posted on your website. Your staff should fully understand and implement these policies. You should then routinely update these policies to conform with changes in the law and best practices.
2. **Perform Periodic Reviews of Your Website.** Your website must not contain false, deceptive, or misleading information. Periodic reviews will help ensure that your products and services align with your disclosures and advertising.
3. **Monitor Lawsuit and Enforcement Trends in the Industry.** Lawsuits and enforcement actions disrupt normal business operations and are expensive. By monitoring those issues plaguing others in the industry, you can improve your operations and limit the business and reputational risks that come with noncompliance.

CITATIONS AND ADDITIONAL RESOURCES

¹[Millennials overtake Baby Boomers as America's largest generation, Pew Research Center, 2020](#)

^{2,3,4,5}[Cox Automotive Digitization of End-to-End Retail Study](#)

⁶Morgan Stanley/Quarterly Investor Reports

⁷U.S. Census Bureau Second Quarter 2021 Retail E-Commerce Report

⁸2020 McKinsey Automotive Retail Consumer Survey (US, China, Germany)

⁹2020 Cox Automotive Car Buyer Journey

PENALTIES FOR VIOLATION OF FEDERAL CONSUMER CREDIT LAWS AND REGULATIONS

Note: *The following is a quick reference to potential federal penalties for certain key tasks referenced in the Compliance Guide to be performed by your dealership. It is not intended as an exhaustive or official analysis of all penalties that may be assessed for a violation. You should consult your attorney with any questions you may have for your particular situation. Please also note that some of the penalties identified below are subject to periodic adjustment, and the amounts reflected below are indicative of a particular period in time only (January 2022), and may be subject to change.*

Also note that most states have their own laws in connection with the federal laws outlined below, with additional penalties that may be imposed, as well as other causes of action that may be brought by consumers. You should consult your counsel for advice on the impact of state laws on your business practices.

PRIVACY NOTICES

Gramm-Leach-Bliley Act (GLB), Federal Trade Commission (FTC) Privacy Rule, and Fair Credit Reporting Act (FCRA)

- The FTC enforces the Privacy Rule and GLB. It may seek injunctive relief, with potential for damages of up to \$43,792 per

violation if FTC enters into an enforcement decree. 16 C.F.R. § 1.98

- FCRA violations (FTC): \$4,111 for a knowing violation, which constitutes a pattern or practice of violations. 15 U.S.C. § 1681s(a)(2)(A); 16 C.F.R. § 1.98. Any violation of the FCRA also violates FTC Act § 5, with potential for damages of up to \$43,792 per violation if FTC enters into an enforcement decree. 15 U.S.C. § 1681s(a)(1); 16 C.F.R. § 1.98.
- FCRA violations (Private right of action). For negligent violations under private action: actual damages and the costs of the action together with reasonable attorney's fees. 15 U.S.C. § 1681o. For willful violations under private action: actual damages or statutory damages of not less than \$100 and not more than \$1,000 per violation, punitive damage liability with no cap, and costs of the action together with reasonable attorney's fees. 15 U.S.C. § 1681n.

CREDIT APPLICATION

Equal Credit Opportunity Act (ECOA), Regulation B, and FCRA

- ECOA violations (FTC): The FTC can enforce violation of ECOA as a violation of the FTC Act, with potential for damages of up to \$43,792 per violation if the

FTC enters into an enforcement decree. 15 U.S.C. § 1691c(c); 16 C.F.R. § 1.98.

- ECOA violations (DOJ): If unable to obtain compliance, the FTC may refer ECOA violations to the U.S. Dept. of Justice (DOJ). The DOJ may pursue a civil action where creditors are engaged in a pattern or practice of violations, and obtain such relief as may be appropriate, including actual and punitive damages and injunctive relief. 15 U.S.C. § 1691e(g)-(h).
- ECOA violations (private right of action): Individuals may seek recovery individually or as a class for actual damages. In addition, punitive damages are available but limited to \$10,000, but in a class action total recovery must not exceed the lesser of \$500,000 or 1% of dealer's net worth. Equitable and declaratory relief are also available. In addition, costs and reasonable attorney's fees can be recovered by individuals or a class. 15 U.S.C. § 1691e; 12 C.F.R. § 202.16.
- FCRA violations: \$4,111 for a knowing violation, which constitutes a pattern or practice of violations. 15 U.S.C. § 1681s(a)(2)(A); 16 C.F.R. § 1.98. Any violation of the FCRA also violates FTC Act § 5, with potential for damages of up to \$43,792 per violation if FTC enters into an enforcement decree. 16 C.F.R. § 1.98.

- FCRA violations (private right of action): For negligent violations under private action: actual damages and the costs of the action together with reasonable attorney's fees. 15 U.S.C. § 1681o. For willful violations under private action: actual damages or statutory damages of not less than \$100 and not more than \$1,000 per violation, punitive damage liability with no cap and costs of the action together with reasonable attorney's fees. 15 U.S.C. § 1681n.

RISK-BASED PRICING RULE NOTICE

FCRA

- \$4,111 for a knowing violation, which constitutes a pattern or practice of violations. 15 U.S.C. § 1681m(h)(8); 15 U.S.C. § 1681s; 16 C.F.R. § 1.98. Any violation also violates FTC Act § 5, with potential for damages of up to \$43,280 per violation if FTC enters into an enforcement decree. 15 U.S.C. § 1681s(a)(1); 16 C.F.R. § 1.98. No private right of action. 15 U.S.C. § 1681m(h)(8).

RED FLAGS RULE

FCRA

- \$4,111 per violation for a knowing violation, which constitutes a pattern or practice of violations. 15 U.S.C. § 1681s(a)(2)(A); 16 C.F.R. § 1.98.

Any violation also violates FTC Act § 5, with potential for damages of up to \$43,792 per violation if FTC enters into an enforcement decree. 15 U.S.C. § 1681s(a)(1); 16 C.F.R. § 1.98. No private right of action. 15 U.S.C. § 1681m(h)(8).

OFAC SDN LIST CLEARANCE

Trading With the Enemy Act (TWEA), International Emergency Economic Powers Act (IEEPA), Antiterrorism and Effective Death Penalty Act (AEDPA), Foreign Narcotics Kingpin Designation Act (FNKDA), Clean Diamond Trade Act (CDTA)

Civil penalties per violation:

- TWEA violations: Up to \$91,816.
- IEEPA violations: Up to the greater of \$311,562 or twice the amount of the underlying transaction.
- AEDPA violations: Up to the greater of \$82,244 or twice the amount of which a financial institution was required to retain possession or control.
- FNKDA violations: Up to \$1,548,075
- CDTA violations: Up to \$14,074.

31 C.F.R. § 501, App. A.

Criminal penalties:

- TWEA: Fines up to \$250,000 for individuals and \$1,000,000 for organizations or twice the pecuniary gain or loss from the violation 10 years imprisonment. 31 C.F.R. § 501.701(b).
- IEEP: imprisonment for not more than 20 years and a fine of not more than \$1,000,000. 50 U.S.C. § 1705.
- AEDPA: \$500,000 per count against corporations, and 10 years imprisonment and \$250,000 per count for individuals. 18 U.S.C. § 2332d; 18 U.S.C. § 3571; 31 C.F.R. § 596.701.
- FNKDA: 10 years imprisonment and fine of not more than \$10,000,000. 31 C.F.R. § 598.701.
- CDTA: for individuals, \$250,000 per count and 10 years imprisonment; for corporations, \$500,000. 19 U.S.C. § 3907; 18 U.S.C. § 3571.

ADVERSE ACTION NOTICES

ECOA (including Regulation B) and FCRA

- ECOA violations (FTC): The FTC can enforce violation of ECOA as a violation of the FTC Act, with potential for damages of up to \$43,792 per violation if the FTC enters into an enforcement decree. 15 U.S.C. § 1691c(c); 16 C.F.R. § 1.98.

- ECOA violations (DOJ): If unable to obtain compliance, the FTC may refer ECOA violations to the U.S. Dept. of Justice (DOJ). The DOJ may pursue a civil action where creditors are engaged in a pattern or practice of violations, and obtain such relief as may be appropriate, including actual and punitive damages and injunctive relief. 15 U.S.C. § 1691e(g)-(h).
- ECOA violations (private right of action): Individuals may seek recovery individually or as a class for actual damages. In addition, punitive damages are available but limited to \$10,000, but in a class action total recovery must not exceed the lesser of \$500,000 or 1% of dealer's net worth. Equitable and declaratory relief are also available. In addition, costs and reasonable attorney's fees can be recovered by individuals or a class. 15 U.S.C. § 1691e; 12 C.F.R. § 202.16.
- FCRA violations: \$4,111 for a knowing violation, which constitutes a pattern or practice of violations. 15 U.S.C. § 1681m(h)(8); 15 U.S.C. § 1681s; 16 C.F.R. § 1.98. Any violation also violates FTC Act § 5, with potential for damages of up to \$43,792 per violation if FTC enters into an enforcement decree. Potential private right of action exists. For negligent violations under private action: actual damages. For knowing

violations under private action: actual damages or statutory damages up to \$4,111 per violation, and punitive damage liability with no cap. 15 U.S.C. § 1681s(a)(1); 16 C.F.R. § 1.98.

CREDIT DISCLOSURES IN RISK

Truth In Lending Act (TILA) and Regulation Z

- Regulator may adjust the account of the person to whom credit was extended so that such person is not required to pay a finance charge in excess of the charge disclosed, or the dollar equivalent of the annual percentage rate disclosed, whichever is lower. 15 U.S.C. § 1607(e).
- Private right of action (for certain violations):
 - Court costs.
 - Actual damages.
 - For individual actions: twice the amount of the finance charge Class action damages of up to the lower of \$1,000,000 or 1% of creditor's net worth. 15 U.S.C. § 1640.
- Willful and knowing violations – fine of \$5,000, one-year imprisonment, or both. 15 U.S.C. § 1611(1).
- Assignees liable to the extent

the violation is apparent on the face of the disclosure statement. 15 U.S.C. § 1641.

DISCLOSURES IN LEASE AGREEMENT

Consumer Leasing Act (CLA) and Regulation M

- Regulator may adjust the account of the person to whom credit was extended so that such person is not required to pay a finance charge in excess of the charge disclosed, or the dollar equivalent of the annual percentage rate disclosed, whichever is lower. 15 U.S.C. § 1607(e).
- Private Right of Action:
 - Court costs.
 - Actual damages.
 - Individual actions:
 - 25% of total monthly payments.
 - Minimum of \$200, Maximum of \$2,000.
 - Class action damages of up to the lower of \$1,000,000 or 1% of creditor's net worth.
- Willful and knowing violations – fine of \$5,000, one-year imprisonment, or both. 15 U.S.C. § 1611(1).
- Assignees liable to the extent

the violation is apparent on the face of the disclosure statement. 15 U.S.C. § 1641.

CASH DEALS — IRS FORM 8300 FILING

Internal Revenue Code

Effective for forms required to be filed on and after January 1, 2019:

- Generally, for failure to timely file a complete and accurate Form 8300 or to furnish notice to persons on whom Form 8300s were filed, the penalty is \$270 per report with an aggregate annual limit of \$1,091,500 for businesses with gross receipts not exceeding \$5 million and \$3,275,500 for businesses with gross receipts exceeding \$5 million. Revenue Procedure 2018-18.
- For failure to file due to intentional disregard, for each filing the penalty is the greater of (1) \$27,290 or (2) the amount of cash received in the transaction not to exceed \$109,000. For failure to furnish notice to persons on whom Form 8300s were filed due to intentional disregard, the penalty is \$540 per failure or, if greater, 10% of the aggregate amounts of the items required to be reported. Revenue Procedure 2018-18.

USED CAR RULE BUYERS NOTICE

FTC Used Car Rule

- Up to \$43,792 per violation. 16 C.F.R. § 455.1; 16 C.F.R. § 1.98.

- Possible state AG claims under UDAP and motor vehicle sales laws.
- Possible UDAP or fraud claims under state law.

ODOMETER TAMPERING

Federal Odometer Act

- The Department of Transportation can impose penalties of up to \$11,256 per violation, subject to a \$1,125,668 cap for a related series of violations. 49 C.F.R. § 578.6(f)(1).
- In a private party civil action where the violation involves the intent to defraud, liability is the greater of: three times the actual damages or \$11,256. 49 C.F.R. § 578.6(f)(2).

TELEMARKETING RESTRICTIONS

FTC Telemarketing Sales Rule and Telephone Consumer Protection Act (TCPA)

- TSR: Up to \$43,792 for each violation; redress to injured consumers; disgorgement of ill-gotten gains earned from the unlawful conduct. 16 C.F.R. § 310.3; 16 C.F.R. § 310.4; 16 C.F.R. § 1.98.
- TSR: For dealers, subject to CFPB regulation: (1) violations that are not reckless or knowing are subject to per-day penalties

of up to \$5,953 (2) reckless violations are subject to penalties of up to \$29,764 per day; (3) knowing violations are subject to penalties of up to \$1,190,546 per day. 12 U.S.C. § 5565(a), (c); 12 C.F.R. § 1083.1.

- TCPA: In private action, up to \$500 in statutory damages; up to \$1,500 in statutory damages for willful or knowing violations. In regulator action, civil penalty up to \$20,134 per violation or per day of continuing violation for violations of provisions other than Truth in Caller ID Act, subject to a cap of \$151,00547 U.S.C. § 503; 47 C.F.R. § 1.80.
- TCPA: Potential civil forfeiture penalties for violations of the Truth in Caller ID Act: \$11,905 per violation, \$37,715 per day for each day of continuing violation up to \$1,190,546 for any single act or failure to act. 47 U.S.C. § 227(e); 47 C.F.R. § 1.80; FCC Order DA 18-12 (Jan. 5, 2018) available at <https://docs.fcc.gov/public/attachments/DA-18-12A1.pdf>.
- TCPA Criminal penalties: a fine for willful and knowing violations of not more than \$10,000 for each violation or \$30,000 for each day of a continuing violation, or imprisonment of not more than 1 year or both; for repeat violations following an initial conviction, an individual could be fined not more than \$10,000 or imprisoned not more

than 2 years, or both. 47 U.S.C. § 227(e); 47 U.S.C. § 501.

SAFEGUARDING CUSTOMER INFORMATION AND SECURE DISPOSAL

GLB, FCRA, FTC Safeguards Rule, FTC Disposal Rule

- GLB violations: The FTC enforces the Safeguards Rule and the Disposal Rule. It may seek injunctive relief, with potential for damages of up to \$43,792 per violation if FTC enters into an enforcement decree. 16 C.F.R. § 1.98
- FCRA violations (FTC): \$4,111 for a knowing violation, which constitutes a pattern or practice of violations. 15 U.S.C. § 1681s(a)(2)(A); 16 C.F.R. § 1.98. Any violation of the FCRA also violates FTC Act § 5, with potential for damages of up to \$43,792 per violation if FTC enters into an enforcement decree. 15 U.S.C. § 1681s(a)(1); 16 C.F.R. § 1.98.
- FCRA violations (Private right of action). For negligent violations under private action: actual damages and the costs of the action together with reasonable attorney's fees. 15 U.S.C. § 1681o. For willful violations under private action: actual damages or statutory damages of not less than \$100 and not more than \$1,000 per violation, punitive damage liability with no cap, and costs of the action

together with reasonable attorney's fees. 15 U.S.C. § 1681n.

WARRANTY DISCLOSURES

Magnuson-Moss Warranty Act

- May constitute an FTC § 5 UDAP violation. 15 U.S.C. § 45(m)(1).
- Consumer can recover actual damages, and remedies available under state law. 15 U.S.C. § 2310(d).

UNFAIR OR DECEPTIVE PRACTICES (UDAPS)

UNFAIR, DECEPTIVE, ABUSIVE ACTS OR PRACTICES (UDAAP)

FTC Act

Consumer Financial Protection Act 12 U.S.C. § 5531; 12 U.S.C. § 5565(c)(2)(C); 12 C.F.R. § 1083.1

- Up to \$43,792 per violation. 15 U.S.C. § 45(m)(1).
- The CFPB can assess penalties in excess of \$1,190,546 per day for knowing violations against independent and buy-here-pay-here dealers for violations.

MILITARY BORROWERS

Military Lending Act (MLA)

- Private right of action for: actual damages of not less than \$500 per violation, punitive damages, equitable or declaratory relief, reasonable attorney's fees,

court costs, and any other relief provided by law. 10 U.S.C. § 987(f)(5)(A), (B).

- Violating contracts are void from inception. 10 U.S.C. § 987(f)(3).
- Arbitration agreements are unenforceable. 10 U.S.C. § 987(f)(4).
- Knowing violations are misdemeanors, punishable by fines, up to one-year imprisonment, or both. 10 U.S.C. § 987(f)(1).

DRIVER'S PRIVACY PROTECTION ACT

Driver's Privacy Protection Act (DPPA)

- Private right of action for: actual damages (but not less than \$2,500); punitive damages upon proof of reckless or willful disregard for the law; reasonable attorney's fees; and preliminary and equitable relief as the court deems appropriate. 18 U.S.C. § 2724(b).
- Criminal penalties under federal law. 18 U.S.C. § 2723.

**SHORT-TERM LOANS PAYABLE
WITHIN 45 DAYS; LONGER-TERM
SINGLE-PAYMENT OR INSTALLMENT
LOANS WITH BALLOON PAYMENTS;
AND INSTALLMENT LOANS WITH AN
ANNUAL PERCENTAGE RATE OVER
36% REPAYABLE WITH A LEVERAGED
PAYMENT MECHANISM**

CFPB Small Dollar Rule

Relief may include:

- rescission or reformation of contracts;
- refund of moneys or return of real property;
- restitution;
- disgorgement or compensation for unjust enrichment;
- payment of damages or other monetary relief;
- public notification regarding the violation, including the costs of notification;
- limits on the activities or functions of the person; and
- civil money penalties
- \$5,953 per day that the violation continues.

- If reckless violation, \$29,764 per day that the violation continues.
- If knowing violation, \$1,190,546 per day that the violation continues.

12 U.S.C. § 5565(a), (c).

A ADVERSE ACTION

A decision on an application that is adverse to the interests of the consumer, including a refusal to grant credit in substantially the amount or on substantially the terms requested in a credit application unless the creditor makes a counteroffer and the consumer uses or accepts the credit offered in the counteroffer. Also, the termination of, or unfavorable change to, an existing credit account or an action taken in connection with a credit application or an account that is adverse to the interests of the consumer. Unwinding or re-contracting a spot delivery deal can be an example of this “unfavorable change” type of adverse action.

ADVERSE ACTION NOTICE

Under ECOA, any creditor “who in the ordinary course of business regularly participates in a credit decision, including setting the terms of credit,” needs to notify a consumer in writing of adverse action taken on a credit application if it cannot offer financing to the consumer within 30 days after receiving the completed application. This includes an auto dealer that participates in the credit process such as by negotiating financing, rehashing, or marking up “buy rates.” Under the FCRA, an adverse action notice must be provided if the adverse action was based in whole or in part on information contained in

a consumer report and must identify the credit bureau whose report was used. A FCRA adverse action notice must also include the customer’s credit score used by the creditor and additional information, including up to four to five “key factors” that adversely affected the credit score if the credit score was used in taking the adverse action. These two notices (ECOA and FCRA) can be combined into one adverse action notice form that must include mandatory language from the ECOA, Regulation B, and the FCRA. An example of such an adverse action notice is set forth at the end of Chapter 4 of this Compliance Guide.

AFFILIATE

Any company that is related by common ownership or common corporate control with another company. A Non-Affiliate is any company that has no such common ownership or control.

AFFILIATE MARKETING RULE

An FTC Rule published under the 2003 FACT Act that requires you to give a notice and opt-out rights to your customers if you share any customer information with your Affiliates such as sister dealerships, in-house insurance agencies, or a parent group. You must give the customer the right to opt out of your Affiliates using any shared information for marketing or solicitation purposes. The notice need only be given once every five years, unlike a FCRA-GLB privacy

notice that may need to be given once every year that the consumer remains a customer. It is a best practice to include the Affiliate Marketing Rule notice together with your dealership’s privacy notice and to use a “safe harbor” FTC form of privacy notice to do so.

ARBITRATION

A process by which a dispute is decided by a private individual or panel of individuals under a set of agreed-upon rules instead of through a lawsuit. Arbitrators do not tend to strictly follow legal precedent in making their decisions. Grounds to appeal arbitration awards are very limited.

B BALLOON PAYMENT

A final lump-sum payment due at the end of a finance contract or lease that is more than two times the amount of the regularly-scheduled payment. The lump sum payment must be disclosed at the time of sale and financing.

BANK SECRECY ACT

A federal anti-money laundering law that requires reporting to the Treasury Department of certain suspicious activity transactions and currency transactions in excess of \$10,000 on IRS/FinCEN Form 8300. This form can be filed electronically. Dealers should also report to the Financial Crimes Enforcement Network (FinCEN) in the Treasury

Department transactions that may involve money laundering of funds from illegal activity even if the total of such funds does not meet the \$10,000 threshold.

BRING YOUR OWN DEVICE (BYOD)

“Bring Your Own Device,” a shorthand for employees using personal smartphones, tablets, and other remote devices for business purposes. If your dealership permits employees to combine business and personal use on non-dealership-issued equipment of any type, you need to implement hardware and software protocols on the devices, restrict certain uses and permissions to safeguard customer information, and protect against unauthorized access to or use of the dealership’s and its customers’ information. BYOD policies should be addressed in your Safeguards and Data Destruction programs.

C CALIFORNIA CONSUMER PRIVACY ACT (CCPA)

Enacted in 2018, the CCPA creates new consumer rights concerning the access to deletion of, and sharing of personal information that is collected by businesses. The rule creates unprecedented obligations for entities collecting and selling consumer data. The compliance deadline for the CCPA is January 2020.

CAN-SPAM ACT

A federal law that regulates sending of email messages. It requires the sender to include an opt-out provision with certain types of email communications (such as marketing or promotional messages), to be honored within 10 business days. The law also bans false or misleading header information, prohibits deceptive subject lines, requires commercial email to be identified as an advertisement, and requires the sender to include a valid physical postal address. If a customer opts out of receiving email from you, you thereafter cannot sell, lease, exchange, or otherwise transfer or release that email address to any third party including through any transaction or transfer that contains the email address.

CAR BUYER’S BILL OF RIGHTS

Consumer protection laws in certain states. These laws generally give consumers additional rights and may, among other things, require dealers in affected states to make additional written disclosures to consumers with respect to certain charges, aftermarket products, and providing standards for selling “certified” used vehicles.

CLASS ACTION

A legal process by which one person sues a defendant on behalf of a class of similarly situated persons for damages or other relief for all persons included within the class. A class action requires the class members to have received similar

treatment from the defendant and be too numerous to include in an individual lawsuit. Class arbitration is a similar process before an arbitrator or panel of arbitrators instead of a judge.

CLOSED-END LEASE

In a closed-end lease, the lessee is not obligated to buy the vehicle at end of term. However, some closed-end leases offer lessees a purchase option at the end of the lease term, either for a pre-specified amount or fair market value. Compare Open-End Lease.

CONSENT DECREE/CONSENT ORDER

A formal settlement between a company and a regulator such as the FTC or CFPB in response to an actual or threatened regulatory administrative or enforcement proceeding. Most FTC consent orders subject the company to 20 years of regulatory oversight by the agency, require external reviews and certifications of its policies and conduct, and can impose fines or restitution penalties for conduct that the FTC deems to have violated applicable laws or regulations. A consent order is often followed by civil lawsuits raising the same allegations that led to the consent order. Any violation of an FTC consent order is typically subject to a fine of up to \$41,484 per violation under Section 5 of the FTC Act. CFPB consent orders have generally required restitution to affected

consumers along with penalties. CFPB consent orders have often required total payments, penalties, and customer remuneration well in excess of \$100,000.

CONSUMER

An individual who initiates the process of seeking a financial product or service from your dealership to be used primarily for personal, family, or household purposes. For example, if someone applies for credit to finance a vehicle purchase for personal use at your dealership, he or she is a “consumer,” even if credit is not extended to that individual.

CONSUMER FINANCIAL PROTECTION (CFPB)

Formerly known as the Consumer Financial Protection Bureau or CFPB, an independent federal agency established by the 2010 Dodd-Frank Act to supervise certain institutions, enforce consumer protection regulations, and issue new regulations under many federal consumer protection laws (including TILA, ECOA, FCRA, and FDCPA). The Federal Reserve Board (the Fed) retains authority to issue statutory regulations under the consumer protection laws within the CFPB’s jurisdiction to the extent they affect auto dealers. Dodd-Frank also authorizes the CFPB to publish rules and enforce violations constituting unfair, deceptive, or abusive trade practices. The FTC may enforce conduct similar to the

CFPB’s authority under its unfair or deceptive practices authority under Section 5 of the FTC Act.

CONSUMER IDENTIFICATION PROGRAM (CIP)

A Customer Identification Program prescribed by the USA Patriot Act by which a creditor establishes formal policies and procedures for verifying the identity of its customers and preventing money laundering. Auto dealers that act as agents for a bank (such as in originating two-party paper) are required to implement the bank’s CIP.

CONSUMER LEASING ACT (CLA)

A part of the federal Truth in Lending Act that governs disclosures in consumer lease transactions.

The authority for the Bureau of Consumer Financial Protection’s and the Federal Reserve Board’s Regulation M. This is one of the laws for which rulemaking authority (except with respect to franchised auto dealers) was transferred to the BCFP.

CONSUMER REPORTING AGENCY (CRA)

Also known as a “credit bureau.” Any person or entity which, for monetary fees, dues, or on a cooperative nonprofit basis, regularly engages in whole or in part in the practice of assembling or evaluating consumer credit information or other information on consumers for the purpose of furnishing consumer

reports to third parties.

COSIGNER

A person who agrees to be liable on a loan, lease, or credit sale if the borrower or co-borrower does not pay. Typically, the cosigner does not have an interest in the vehicle but is liable on the credit agreement. Dealers must give cosigners special notices under the FTC’s Credit Practices Rule (as well as under certain state laws) at the time of cosigning.

CREDIT DISCRIMINATION

A practice by which members of one or more “protected classes” under ECOA (race, color, religion, national origin, sex, marital status, age, receipt of public assistance, or exercise of consumer credit rights) are denied credit or provided worse credit terms than other similarly-qualified persons who are not in a protected class. Credit discrimination is generally proven by either a “disparate treatment” (knowing or intentionally discriminating) or a “disparate impact” or “effects test” in which a facially-neutral practice (e.g., marking up buy rates) is statistically demonstrated to result in higher pricing to the members of the protected class. Knowledge or intent to discriminate is not required in a disparate impact case.

CREDIT SALE

A transaction in which a seller agrees to sell an item to a consumer

for a set or variable price in a fixed number of installment payments over time, instead of requiring a cash payment in full up front. Most auto financing is done by a dealer making credit sales to consumers and then assigning its rights to collect the installment payments to a bank or financial institution. Also called closed-end credit. Sometimes referred to as a three-party credit transaction (dealer, financial institution, and consumer). Compare to Loan.

CREDIT SCORE

A numerical representation of a consumer's credit report intended to determine the non-payment risk that a consumer might pose to a potential creditor. The scoring algorithm takes into account many factors, such as credit history, recent credit inquiries, open credit lines, recent credit activity, and debt-to-income ratio. It also factors in whether a consumer pays bills on time or has outstanding or delinquent balances on existing credit accounts. Credit scores are consumer reports within the meaning of the FCRA and need to be disclosed in adverse action notices if used in any way in making a credit decision. Also, a credit score disclosure notice indicating a credit applicant's current credit score along with information about the date and provider of the score is one way to comply with the FTC's Risk-Based Pricing Rule.

CUSTOMER

A consumer, who signs a credit or lease agreement, purchases an insurance product, or otherwise obtains a financial product or service from your dealership. A consumer who receives and accepts credit becomes a customer.

D DEALER MANAGEMENT SYSTEM (DMS)

A management system used by dealership employees that consists of software that enables the dealer to efficiently manage all aspects of its operations.

DEFERRED DOWN PAYMENT

A creditor may defer payment of all or a portion of the down payment in a transaction provided the deferred down payment is paid in full by the second scheduled installment payment and is not subject to any finance charges. However, check your lender agreement as it may contain a representation and warranty that you received the entire down payment for each assigned contract. If you assign the contract with the down payment still owing, you will be in breach of that representation and warranty and may be required by the lender to repurchase the contract. Also known as "pick-up" payment.

DEPARTMENT OF JUSTICE (DOJ)

The federal executive department of the U.S. government, responsible for the enforcement of the law

and administration of justice in the United States, which is headed by the Attorney General. The DOJ has authority to bring lawsuits against auto dealers for violations of most federal consumer credit laws and regulations.

DEPRECIATION

Reduction in a vehicle's value due to age, mileage, and wear and tear. The "Residual Value" is the predicted value of the vehicle at the end of a lease term established at the beginning of the lease assuming normal wear and tear.

DISPARATE IMPACT CREDIT DISCRIMINATION

A claim for credit discrimination under ECOA that does not require any knowledge or intent to discriminate on the part of the dealer. Also referred to as the "effects test." There are three parts to the analysis:

Under a disparate impact analysis, a neutral business practice (such as marking up a lender's buy rate) is examined to determine if application of the practice has a disproportionately negative effect on a protected class of persons under ECOA, these being: (1) race, color, religion, national origin, sex, marital status, or age (provided the applicant has the capacity to contract); (2) because all or part of the applicant's income derives from any public assistance program; or (3) because the applicant has in good

faith exercised any right under the federal Consumer Credit Protection Act.

If so, the burden then shifts to the creditor to show the practice meets in a significant way, the legitimate goals of the business. There is no requirement that the challenged practice be essential or indispensable, only significant and non-discriminatory.

If so, the burden then shifts to the regulator to show that the business goals can be met by means that are less disparate in their impact. If the regulator cannot show this, then there is no disparate impact credit discrimination because a significant, non-discriminatory business reason is the cause of the rate differential.

THE DODD-FRANK ACT

The Dodd-Frank Wall Street Reform and Consumer Protection Act, the comprehensive banking reform and consumer protection law passed by the Congress and signed by President Obama on July 21, 2010.

The Act reforms many aspects of bank regulation and authority and establishes the BCFP as the agency in the Federal Reserve Board to protect consumers, re-write regulations under many consumer protection acts, and enforce violations concurrently with the DOJ, FTC, and state Attorneys General. The Dodd-Frank Act also streamlines the process for the FTC to promulgate rules relating to unfair and deceptive practices by auto

dealers.

DRIVERS PRIVACY PROTECTION ACT (DPPA)

A law prohibiting disclosure by state Departments of Motor Vehicles (DMVs) or other authorized persons of personal information consisting of that which identifies an individual, including an individual's photograph, Social Security number, driver identification number, name, address (but not the five-digit zip code), telephone number, and medical or disability information from DMV records or otherwise without the individual's prior written consent.

Exceptions exist to verify or correct information about the individual and for certain motor vehicle safety or theft situations. Resale or re-disclosure of the information by a recipient is highly limited. Penalties include potential criminal liability and a private cause of action for actual damages (but not less than \$2,500 as liquidated damages) plus punitive damages, attorney's fees, and equitable relief.

EMV CARDS

Europay, Mastercard, and Visa chip-embedded credit and debit cards.

Effective October 1, 2015, card association rules imposed chip card risk of loss liability for in-person fraudulent transactions on a dealer that does not have a card processing device capable of reading chip cards as opposed to traditional magnetic stripe cards.

Chip cards are more secure than magnetic stripe cards because they are harder to counterfeit and generate a unique random transaction number to authenticate each transaction unlike a magnetic stripe card that can be easily counterfeited and used by simply reading the information on the magnetic stripe. EMV card risk-of-loss liability does not apply to card-not-present transactions such as telephone or Internet card transactions.

EQUAL CREDIT OPPORTUNITY ACT (ECOA)

As implemented by the Consumer Financial Protection Bureau's and the Federal Reserve Bureau's Regulation B, ECOA prohibits discrimination in all aspects of a credit transaction on the basis of race, color, religion, national origin, sex, marital status, age, the fact that all or part of an applicant's income is derived from any public assistance program, or the fact that the applicant has in good faith exercised any right under the Consumer Credit Protection Act ("protected classes"). ECOA also requires creditors to send credit decisions and any adverse action notices to consumers. Rulemaking authority for ECOA was transferred from the Federal Reserve Board to the CFPB as of July 21, 2011 for all creditors except franchised auto dealers. The Federal Reserve Board retains ECOA rulemaking authority as it pertains to franchised auto dealers.

E-SIGN ACT

A federal law that permits electronic signatures to substitute for paper signatures in most consumer and commercial transactions. Enables electronic contracting of motor vehicle retail installment sales and leases. Requires consent disclosures to the consumer and communications indicating a “reasonable demonstration” of a consumer’s ability to receive electronic communications along with their electronically-communicated consent to conduct business electronically in consumer transactions such as auto finance.

FACT ACT

The Fair and Accurate Credit Transactions Act.

A 2003 federal law that amended the FCRA and provided consumers with certain additional credit report disclosure rights and identity theft protections. Through the FACT Act amendments, the FCRA restricts affiliate use of shared information for marketing or solicitation purposes; requires notices of credit score information under the Risk-Based Pricing Rule; provides new identity theft protections by requiring dealers to implement a written Identity Theft Prevention Program under the Red Flags Rule; gives consumers the right to access their credit reports once per year from each national consumer reporting agency (Equifax, Experian, and TransUnion) for free; expands consumer rights to dispute

items in credit files; and requires detailed consumer notices on credit applications and credit reports, among other things. Also requires credit and debit card electronic receipts to truncate all but the last five card numbers and not print the card expiration date.

FAIR CREDIT REPORTING ACT (FCRA)

The FCRA governs the permissible uses of credit reports and requires disclosures to consumers when a credit report is used in making an adverse credit decision. Also requires giving consumers opt-out rights with respect to sharing of consumer report information with affiliates or the use of shared information by affiliates for marketing or solicitation purposes. Contains requirements for credit bureaus and reporting creditors to make credit reports more accurate, to correct inaccurate reporting, and not report or re-report erroneous items. Enables prescreening unless the consumer has opted out of all credit bureau prescreening. In addition, the FCRA is the law pursuant to which the Red Flags Rule, Risk-Based Pricing Rule, and the Disposal Rule were issued.

FEDERAL ODOMETER ACT

A federal law that prohibits the manipulation of odometer devices and mileage readings on them. It requires a person transferring ownership of a vehicle to give to the person obtaining ownership a

written disclosure of the odometer’s mileage reading. If the transferor knows the odometer reading is incorrect or inaccurate, he must state in the disclosure that the actual mileage is unknown. For used cars, the odometer disclosure typically is made on the vehicle’s title. The Act also prohibits persons from tampering with an odometer. Dealers are required to retain written odometer disclosures for five years. The federal Department of Transportation issues regulations implementing the requirements of the Act.

FEDERAL TRADE COMMISSION (FTC)

A federal agency that regulates and enforces consumer credit and privacy laws, among other duties. The FTC is the regulator for franchised auto dealers on consumer protection, privacy and data safeguards, and identity theft prevention as well as other consumer protection laws and regulations. The FTC is authorized to supervise franchised auto dealers and bring enforcement actions for violation of federal consumer protection laws and regulations including under its general authority in Section 5 of the FTC Act, which prohibits unfair and deceptive acts and practices. The Dodd-Frank Act streamlined the process for the FTC to issue new regulations concerning unfair and deceptive practices by auto dealers.

FTC SAFEGUARDS RULE

The FTC's rule pursuant to GLB that requires dealers to develop and implement a comprehensive written Information Security Program to secure, safeguard, and protect nonpublic personal information (NPI) on consumers and customers in all forms of media. The Safeguards Rule requires a dealer to designate a named individual as the Program Manager responsible for implementing and managing the program including ongoing training and monitoring of employees on the need to protect customer information. A Safeguards Program must include a security incident and breach incident response plan and address all prospective threats to the security of nonpublic personal information maintained by the dealership. The Information Security Program must be periodically updated to address new security threats and regulatory guidelines.

G GLOBAL POSITIONING SYSTEM (GPS)

GPS is a technology that provides location and time coordinates to a satellite to signal the location of an individual vehicle, or any other item equipped with GPS-supported technology. Utilizing GPS technology in a vehicle allows a creditor to identify the location of a vehicle serving as its collateral and assists the creditor in physically recovering or repossessing the vehicle upon default or theft by locating the

vehicle without having to conduct a costly search.

GRAMM-LEACH-BLILEY ACT (GLB)

A federal law requiring auto dealers, creditors and other "financial institutions" to protect and safeguard the privacy of customers' nonpublic personal information and not share such information with third parties unless the customer is given notice and the opportunity to opt out of sharing the information. GLB also requires giving a consumer a privacy notice describing the dealer's information collection, use, and sharing practices when a customer first provides personal information and annually thereafter if the person is still a credit customer. Consumers who do not become customers must be given a privacy notice before you begin sharing their information. The FTC regulates auto dealers' compliance with GLB and has published its Privacy Rule and Safeguards Rule to implement the GLB requirements. The Safeguards Rule mandates using administrative, technical, and physical safeguards to protect the security, confidentiality, and integrity of customer information in its gathering, retention, and disposal, in both electronic and paper form.

GROSS CAPITALIZED COST

The total selling price of the leased vehicle including negotiated selling price plus optional equipment such as GAP coverage and anti-theft

devices. Also referred to as "cap cost."

GUARANTEED AUTO PROTECTION (GAP)

GAP is optional consumer protection that covers the difference between what the car is worth and what the customer owes on the car. It comes into play if the car is stolen or totaled (damaged to the point that repair would cost more than the car is worth) while the owner is still making payments. Whether or not GAP is insurance and requires an insurance license to be sold is determined by state law. In New York, for example, a dealer can sell the consumer a "GAP waiver" that is not insurance and covers a total loss due to theft or casualty. In so doing, the dealer must disclaim the right to claim against the consumer for the GAP amount and is limited to selling the GAP waiver for the insurance cost to the dealer of obtaining the GAP insurance for itself.

IDENTITY THEFT PREVENTION PROGRAM (ITPP)

See Red Flags Rule.

IDENTITY THEFT OR IDENTITY FRAUD

Under federal criminal law, identity theft takes place when someone knowingly transfers, possesses, or uses, without lawful authority, a means of identification of another person with the intent to commit,

or in connection with, any unlawful activity such as fraud. Under this definition, a name or Social Security number is considered a “means of identification.” So is a credit card number, cellular telephone electronic serial number, or any other piece of information that may be used alone or in conjunction with other information to identify a specific individual.

INFORMATION SECURITY PROGRAM

The administrative, technical, and physical safeguards you use to access, collect, distribute, process, protect, secure, store, use, transmit, or otherwise handle nonpublic personal information of consumers and customers. This Program must also contain provisions dealing with how you will respond in the event of a security breach. The term also refers to written documents and procedures evidencing these safeguards. Also called a Safeguards Program.

INQUIRY

A request to a consumer reporting agency for a credit report. Only persons having a “permissible purpose” under the FCRA or consumers requesting their own credit report may obtain a credit report in response to an inquiry. Inquiries other than consumer inquiries of their own credit report appear on the consumer file, are reported in subsequent credit reports, and are used as factors in

credit scoring algorithms.

IRS/FINCEN FORM 8300

A form required to be filed with the IRS within 15 days of completing a cash sale or multiple cash sales in related transactions (generally multiple transactions within 24 hours or which you know or should know are connected) for which the customer paid cash or cash equivalents (cashier’s checks, travelers checks, bank drafts, and money orders, if they have face amounts of \$10,000 or less, but not a personal check or the proceeds of a bank auto finance loan) totaling in excess of \$10,000. The Form 8300 can be filed electronically. Regulations require informing a customer on whom you filed a Form 8300 that you did so by January 31 of the following calendar year. Keep a copy of all filed Forms 8300 for five years. For IRS/FinCEN Form 8300 filings required on and after January 1, 2019, penalties for failing to file Form 8300 can range from \$270 per return not filed, up to an annual aggregate limit of \$1,091,500 for businesses with gross receipts not exceeding \$5 million and \$3,275,500 for businesses with gross receipts exceeding \$5 million, to the greater of \$27,290 per return or the cash received in the transaction up to \$109,000 per transaction if the IRS deems the dealer to be in intentional disregard of its obligations, which the IRS frequently does. Note that the IRS adjusts the penalty amounts for inflation annually.

JUNK FAX PREVENTION ACT OF 2005

A federal law that prohibits sending unsolicited facsimile advertisements to persons unless the person consents in writing to receive fax advertisements or the sender has a “prior business relationship” with the recipient and the recipient has not opted out of receiving faxes from the sender. Senders of unsolicited faxes must include a clear and conspicuous notice on the first page on how the recipient can opt out of future faxes from the sender at no cost. Persons who opt out must be removed from all fax lists within 30 days.

LOAN

In contrast to a credit sale, a transaction in which a bank or financial institution directly lends a consumer money and the consumer agrees to pay the loan back with interest over time. Sometimes referred to as a two-party credit transaction (financial institution and consumer). Dealers may act as agents for financial institutions in originating two-party loans for consumers. Compare Credit Sale.

MAGNUSON-MOSS WARRANTY ACT (MMWA)

A federal law that governs written warranties in connection with the

sale of consumer products including automobiles. The Act requires disclosures concerning express and implied warranties and restricts disclaimers of implied warranties if a dealer offers a written warranty or sells a service contract within 90 days of the vehicle sale. The law contains mandatory disclosure language for warranties, including what vehicle systems are covered, which ones are not, the duration of the warranty, how a customer gets warranty service, and what obligations the customer has as a condition to warranty service. This law also prohibits certain acts and provides consumers with remedies for breaches of warranties including the ability to bring class actions and recover damages and attorney's fees. Pursuant to the E-Warranty Act, which became law in 2015, and the FTC's rules issued in 2016, warrantors and sellers can opt to provide warranty disclosures electronically if they comply with certain requirements.

MENU SELLING

A process by which each customer who has agreed to purchase or lease a vehicle is presented with a document indicating each optional aftermarket item available from the dealership along with its price and its effect on the customer's monthly payment. A menu should disclose groupings of aftermarket offerings (e.g., Platinum Package, Gold Package, Silver Package) the same way. The customer initials an acceptance or decline for each

product.

METADATA

Literally, data behind data in electronic documents such as emails and Microsoft Office documents. Properties of electronic documents can reveal who created the document, when it was created, accessed, and who it was distributed to, plus changes made along the way. Additional metadata can be gleaned from computer systems forensics analyses. Metadata can be valuable in litigation and is the reason why most electronic discovery requests seek electronic documents to be produced in their native (original) form, as opposed to a printed or electronic image format (e.g., .pdf or .tif format).

MILITARY LENDING ACT

A federal law that imposes limitations on the cost and terms of certain extensions of credit to service members and their dependents. 10 U.S.C. § 987; 32 C.F.R. Part 232. The Military Lending Act does not apply to credit that is expressly intended to finance the purchase of a motor vehicle, when the credit is secured by the vehicle being purchased. In December 2017, the Department of Defense released guidance clarifying that whether a transaction qualifies for this purchase-money exception depends upon what the credit beyond the purchase price of the motor vehicle is used to finance. More specifically,

“financing costs related to the object securing the credit will not disqualify the transaction from the exceptions, but financing credit-related costs will disqualify the transaction from the exceptions.” The Department of Defense failed to define the term “credit-related cost,” but provided two examples: Guaranteed Auto Protection insurance and credit insurance. The BCFP has established an Office of Servicemember Affairs to educate service members about credit and to coordinate complaints by and responses to service members and their families about consumer credit, including auto finance credit.

NATIONAL DO NOT CALL REGISTRY

An FTC list of telephone numbers populated by consumers who have indicated their desire not to receive telemarketing calls. States also maintain do-not-call registries and your dealership should also keep a record of persons who have asked not to be called. Exclude all such persons from telemarketing lists.

NEGATIVE EQUITY

A term used to describe a consumer whose trade-in vehicle is worth less than their credit pay-off balance for the car. Negative equity can be paid off and financed in a vehicle purchase or lease transaction. However, TILA requires negative equity to be disclosed either by reducing the consumer's down

payment (but not below \$0) or itemizing the amount of negative equity separately in the Amount Financed list of Amounts Paid to Third Parties. Negative equity should never be added to increase the cash price of the vehicle, and dealers who do so may be subject to class action liability. Also called “upside down” or “under water.”

NONPUBLIC PERSONAL INFORMATION (NPI)

Personally identifiable financial information provided by a consumer to a dealer or otherwise obtained by the dealer and any list or grouping of consumers derived from any personally identifiable financial information that is not publicly available. This includes any information a consumer provides on a credit application or any information derived from a consumer report or credit transaction. It also includes lists of credit customers or even the fact of a customer being a credit customer. Information you collect through a “cookie” in connection with an inquiry about a financial product or service can also be nonpublic personal information. The term does not include anonymized and aggregated information that does not contain personal identifiers such as names, addresses, Social Security numbers, driver’s license numbers, or account numbers.

OFFICE OF FOREIGN ASSET CONTROLS (OFAC)

O An agency of the United States Department of the Treasury under the auspices of the Under Secretary of the Treasury for Terrorism and Financial Intelligence. OFAC administers and enforces economic and trade sanctions based on U.S. foreign policy and national security goals against targeted foreign states, organizations, and individuals. Among other things, OFAC publishes the SDN List which is a frequently-updated list of persons with ties to blocked countries or persons with whom you cannot do any business per the USA Patriot Act. See SDN List.

OPEN-END LEASE

In contrast to a closed-end lease, a lease that obligates the lessee customer to purchase or arrange for the sale of the vehicle at the end of the lease term.

OPT OUT

The right of a consumer under GLB and the FCRA to remove themselves from information sharing with third parties and certain information sharing and all information usage by Affiliates of a dealer. Whenever a consumer has a right of opt-out (e.g., Affiliate Marketing Rule, sharing credit information with Affiliates, sharing any information with a third party), a dealer must wait 30 days from the day it delivered its privacy notice informing the consumer of their opt-out rights

before sharing the consumer’s information and only then provided the consumer does not opt out within the 30 days. This is true even if the consumer does not choose to opt out during the 30 days. The only exceptions to the requirement to wait 30 days before using or sharing the customer’s information is for service providers involved in the customer transaction or joint marketing agreements with other financial institutions to market a financial product or service, provided these are disclosed to the customer in the privacy notice. Whenever a consumer opts out of any information sharing or Affiliate marketing, it is a best practice to opt them out of all databases that are shared with Affiliates or third parties. A “safe harbor” model privacy notice has been published by the FTC.

P PAYDAY, VEHICLE TITLE, AND CERTAIN HIGH-COST INSTALLMENT LOANS – FINAL RULE

A federal rule that imposes limits on (i) short-term loans payable within 45 days; (ii) longer-term single-payment or installment loans with balloon payments; and (iii) installment loans with an annual percentage rate over 36% repayable with a leveraged payment mechanism. The Final Rule includes an express exclusion for “certain purchase money security loans,” which it defines as “[c]redit extended for the sole and express purpose of financing a consumer’s initial purchase of a good when the

credit is secured by the property being purchased, whether or not the security interest is perfected or recorded.” In January 2018, the Bureau of Consumer Financial Protection announced that it intended to reconsider the Rule, and in June 2018, the BCFP indicated that it expects to issue a notice of proposed rulemaking by February 2019.

PAYMENT CARD INDUSTRY DATA SECURITY STANDARD (PCI-DSS)

Applicable to merchants such as auto dealers who accept credit or debit cards for payment. PCI-DSS includes requirements for security management, policies, procedures, network architecture, software design, and other critical protective measures to protect customer credit and debit card account data. Among other things, merchants are prohibited from storing information contained on the magnetic stripe of cards or the three-digit CVC/CVV code imprinted on the signature panel of cards or debit card PINs or access codes. Card information must be captured and transmitted over encrypted media, and terminals must print only the last five digits of a card number and cannot print the card expiration date. Merchants who violate PCI-DSS are subject to penalties from the card associations and networks and may incur civil liability as well. Nevada has also made compliance with PCI-DSS a requirement of Nevada law. Nevada has essentially adopted the PCI-DSS as its legal standard for card

security. See EMV Cards for liability issues for fraudulent transactions using chip cards.

PERMISSIBLE PURPOSE

According to the FCRA, a dealer must have a “permissible purpose” to pull a customer’s credit report. A customer’s written consent is always the best permissible purpose. However, the FCRA lists several other conditions for permissible purpose without the customer’s written consent (although certain states like Vermont require a written consent in all cases). Otherwise, subject to its contract with a consumer reporting agency, a dealer can pull the credit report without the customer’s written consent only if it is clear to both the customer and the dealer that the customer is initiating the financing or lease of a vehicle and the dealer has a legitimate business need for the credit report, such as to arrange financing requested by the consumer. However, a customer merely walking into a showroom does not give the dealer a permissible purpose to pull the customer’s credit report.

PHISHING

Social engineering techniques used by identity thieves to “fish” for personal information on the Internet. Generally done by creating fake emails and websites that appear legitimate but are designed to attempt to get users to disclose their personal information or click on a web link which puts a keylogger

virus or other malware on your PC that tracks your keystrokes on a banking or personal information website. “Vishing” involves sending an email to get the consumer to call a fraudulent number to reveal personal information. “Smishing” involves the use of text messages to induce the consumer to reveal personal information or go to websites that will download a virus onto their mobile device. “Spear-phishing” is a phishing message directed to targeted company executives and directors that may indicate the desire to purchase or partner with the company and include an attachment such as a claimed Non-Disclosure Agreement to initiate discussions.

PREEMPTION

A doctrine by which certain federal laws such as the Federal Arbitration Act, TILA, ECOA, and FCRA preempt and override inconsistent state laws on the same subject. Also, a doctrine created by courts construing the National Bank Act for federally regulated financial institutions to do business uniformly in all states by using their home state law to preempt certain other states’ laws. The 2010 Dodd-Frank Act limited preemption of state consumer protection laws to banks and not their subsidiary or affiliated corporations and only when application of the state law would discriminate against the national bank, or prevent or significantly interfere with the national bank’s exercise of its powers, such

determination to be made on a case-by-case basis by the Office of Comptroller of the Currency. Certain other federal laws also expressly preempt state laws.

PRIVACY NOTICE (FCRA-GLB PRIVACY NOTICE)

An initial or annual notice concerning your collection and sharing of personal information that is required to be given to your consumers and customers under GLB and the FTC Privacy Rule. The FCRA also requires notices that give the consumer the right to opt out of Affiliate sharing of credit information, and its Affiliate Marketing Rule requires a notice that gives consumers the right to opt out of Affiliates using any shared information for marketing or solicitation purposes. The required privacy notices are typically combined into one FCRA-GLB Privacy Notice, although the Affiliate Marketing privacy notice can be given separately. Model privacy notice forms have been issued by the FTC and use of one of these forms is intended to provide a “safe harbor” from liability. Of course, a dealer’s practices of collecting and sharing consumer information must comply with what is disclosed in its privacy notice.

PUFFERY

A seller’s exaggerated expression of its subjective opinion about the merits of a product, as opposed to a factual description of a characteristic

of a product. One court described puffery as “exaggerated advertising, blustering, and boasting upon which no reasonable buyer would rely.” A factual statement about a vehicle is not likely to be considered puffery. Puffery is a subjective, fanciful boast or some vague generality about how wonderful a vehicle is as opposed to a factual representation about the vehicle. Puffery is generally not legally actionable whereas factual representations, if material and relied upon by the customer, can be legally actionable as misrepresentations or deceptive trade practices. Puffery does not include misrepresentations or claiming benefits vehicles do not possess or any statement made for the purpose of deceiving prospective purchasers.

REBATE STACKING

A deceptive advertising practice in which a dealer prices a vehicle after applying a series of rebates that few, if any, customers will qualify for. An example is pricing a vehicle and indicating a reduction for “rebates” where the rebates include recent college grad, military, returning lessee, loyalty, and perhaps other rebates for which few, if any, consumers can meet all of the qualifications. Itemize rebates and do not reduce the purchase price in advertising except for rebates that are available to substantially all of your customers.

Red Flags

Any pattern, practice, or specific activity that indicates the possible existence of identity theft at your dealership.

Red Flags Rule

Required by the FCRA and implemented via the FTC’s rulemaking authority, auto dealers must develop and implement a written Identity Theft Prevention Program (ITPP) designed to detect, prevent, and mitigate identity theft in connection with establishing or maintaining consumer credit accounts and business accounts that present identity theft risks. The Red Flags Rule is not a “one size fits all” rule. Your ITPP must be appropriate to the size and complexity of the dealership and the nature and scope of its activities. The plan must identify relevant red flags; develop procedures to detect the presence of any red flags in credit transactions; prescribe ways to respond appropriately to any red flags that are detected; and be periodically updated to address new risks and experiences with identity theft. The dealership’s Board of Directors must approve the dealership’s initial ITPP and designate a senior dealership officer to develop, oversee, implement, and administer the ITPP. The Rule also requires oversight of service providers, annual reporting to the Board or senior management, and training of all employees who participate in the ITPP. The FTC revised its Guide to the Red Flags Rule to emphasize the need for

annual review and oversight by the Board or senior management and to make appropriate changes based on experiences with attempted identity theft or new insights gleaned from studies and other materials. The FTC has identified Red Flags as a priority area.

RESELLER

A consumer reporting agency that assembles and merges information contained in the database of another consumer reporting agency or multiple consumer reporting agencies and does not itself maintain a database of the assembled or merged information from which new consumer reports are produced.

RETAIL INSTALLMENT SALES CONTRACT (RISC)

The document that a dealer signs with a consumer to sell and finance the sale of a vehicle under the time-price doctrine. See Credit Sale and compare Loan. The dealer will then sell the RISC and the consumer's obligations to make payments under the RISC to a bank or finance company except for buy-here-pay-here dealers who hold RISCs and collect payments from buyers directly. Requirements for RISCs are set forth in state motor vehicle retail installment sales acts as well as in federal Truth in Lending.

SDN LIST

Specially Designated Nationals and Blocked Persons List.

SOFAC's list containing persons, countries, and organizations, with which U.S. entities are prohibited from doing any business. Every customer – cash and credit – must be checked against the SDN List at the time the customer relationship is established. If there is a definitive match, you must call OFAC and cannot do business with the individual or entity until the hit is cleared. OFAC updates the SDN List as often as several times a month and publishes it on its website. Penalties for noncompliance are substantial and can range as high as \$1,466,485 in civil penalties per violation and criminal penalties of up to \$10 million and 20 years imprisonment.

SECURITY FREEZE

A consumer's right to prohibit their credit file, including their credit report and credit score, from being accessed by new creditors. Although state laws may vary, consumers may freeze their files either for free or for a fee throughout the U.S. This right is available to all consumers. A consumer can initiate a security freeze online, by phoning, or sending a certified letter to each national credit bureau where the consumer wants his or her file frozen. A freeze can be temporarily "lifted" relatively quickly by the consumer contacting the credit bureau or using a special PIN provided by the credit bureau to the consumer when the file was first frozen.

SERVICEMEMBERS CIVIL RELIEF ACT

A federal law that imposes a six-percent rate cap on pre-service credit obligations during the member's period of military service. This includes secured credit such as motor vehicle financing for members of the military and their dependents. A service member or their dependent may also terminate an auto lease if the service member, after the lease is executed, enters military service for a period of 180 days or more. A service member or his dependent may also terminate an auto lease entered into while the service member was on active duty if the service member receives military orders for a permanent change of station outside the continental U.S. or a deployment of 180 days or more. For any lease termination, the vehicle must be returned to the lessor within 15 days of delivering the notice of termination. During the period of military service, a vehicle cannot be repossessed without a court order.

SINGLE DOCUMENT RULE

Provisions of state laws (for example, Minnesota and California) that require all of the agreements of the dealer and buyer to be contained in a single document, typically the RISC. The purpose of this rule is to prohibit dealers from relying on separate agreements containing financing terms which contradict those disclosed in the RISC or required by law. Courts

in some states have held that the single document rule may not require everything to be on one piece of paper and permit multiple, contemporaneous pieces of paper such as, for example, a deferred down payment agreement or a buyer's order.

SOCIAL MEDIA

Websites such as Facebook, LinkedIn, YouTube, and Twitter where consumers share information with other people in a virtual community. Companies can establish social media pages to promote their products and services interactively as well as purchase advertising on social media sites to target specific types of users. Social media sites are widely used by consumers who reveal preferences and interests and can raise challenges for auto dealers when a disgruntled consumer posts negative information about the dealership to a social networking site. Employees also use social media. A best practice is to adopt a social media policy that focuses on engaging consumers, participating, influencing, and monitoring social media sites. Employee posts on social media sites should be addressed in the social media policy as they may qualify as protected free speech particularly if related to unions or other concerted activity. All advertising rules and requirements that apply to media advertising generally also apply to social media advertising including ensuring that any disclaimers are

clear and conspicuous in relation to the devices that will likely be used to view the ad (cell phone, tablet, laptop, etc.).

STARTER INTERRUPT

A starter interrupt is technology or a device that is typically installed on the vehicle at the time of the extension of credit or reinstatement after default and repossession. Starter interrupt technology allows a creditor to remotely disable the starter on a vehicle if the buyer fails to comply with the terms of a credit agreement. A starter interrupt cannot disable a vehicle while the vehicle is in operation. The technology can include payment reminder and pre-disablement warnings.

SWEEPSTAKES

A "game of chance" in which consumers enter to win prizes picked at random. A sweepstakes must have a "no purchase necessary" means of entry (typically by mailing in a postcard) and sweepstakes rules must state the date the sweepstakes ends, the odds of winning, or that the odds depend on the number of entries received. Certain states require bonding of certain consumer sweepstakes, and other states have specific disclosure requirements. In contrast, a "game of skill" involves winning a prize by objectively outperforming other contestants in a universally assigned task (e.g., employee who sells the most vehicles in a month). Federal law

requires the sweepstakes disclosure to provide that no purchase is necessary and making a purchase does not increase one's chances of winning, as well as giving the consumer a way to remove themselves from future mailings from the sweepstakes sponsor.

TELEMARKETING

The Telemarketing Sales Rule is an FTC regulation that, among other things, requires disclosures in telemarketing campaigns and prohibits specific deceptive or abusive telemarketing acts or practices that are proscribed by the Rule. For example, the FTC Rule prohibits telemarketing to persons whose phone numbers are on the FTC National Do Not Call Registry, subject to limited exceptions. It also enables a consumer to opt out of a company's telemarketing. The FCC's regulation of telemarketers under the Telephone Consumer Protection Act establishes a second set of federal standards regulating telemarketing. Some of the FCC's standards are identical to the FTC's. In other cases, the FCC and FTC regulate the same conduct, but in different ways. The FCC requires obtaining a consumer's prior express written consent to deliver prerecorded telemarketing calls to landlines and cell phones as well as requiring prior written consent to the use of an auto dialer to make telemarketing calls or send marketing text messages to cell phone numbers (text messages are considered a

form of calling). The FCC requires that the prior written consent identify the specific phone number to which it applies and indicate that the consent cannot be required as a condition of the purchase of a product or service. This consent must also include the consumer's signature. States also have Do-Not-Call lists that must be used to scrub telemarketing lists, and your dealership must keep its own list of customers who have requested not to be called and delete those persons from telemarketing campaigns as well. This is not a comprehensive summary of federal and state telemarketing standards. Compliance with the full range of these standards requires development and implementation of a thorough compliance plan.

TRIGGER LEADS

A prescreening product sold by credit bureaus to dealers and lenders and used in the auto finance context. When a creditworthy consumer's credit report is accessed by an auto dealer, doing so may trigger a notice to the trigger leads buyer (another dealer or lender) who also receives the consumer's cell phone number to call the consumer and counteroffer him or her on the spot.

TRUTH IN LENDING ACT (TILA)

The federal Truth in Lending Act (TILA) includes the federal Consumer Leasing Act, together with Federal Reserve Board (for auto dealers) and Consumer Financial Protection

Bureau (for other creditors) Regulations Z and M. TILA provides for mandatory consumer disclosures in credit and leasing transactions and the advertising of credit. Regulation M covers consumer leasing transactions. Regulation Z covers credit sales, open-end credit (e.g., credit cards or lines of credit), and loans.

U UNIFORM ELECTRONIC TRANSACTIONS ACT (UETA)

Adopted in 48 states and the District of Columbia, this law provides a framework for conducting transactions electronically instead of by paper. UETA is the state counterpart to the federal E-SIGN Act.

UNCONSCIONABILITY

A doctrine used to void contracts or provisions of contracts as being unfair and void against public policy and used particularly by plaintiffs' lawyers in challenging the enforceability of arbitration and class action waiver clauses in consumer finance contracts. Unconscionability consists of both an absence of meaningful choice for the party opposing enforceability of the agreement such as a non-negotiable contract (so-called procedural unconscionability) combined with contract terms that are unreasonably favorable to the other party (substantive unconscionability).

THE USA PATRIOT ACT

A post-9/11 law requiring, among other things, that certain creditors verify the identity of every customer, establish formal anti-money laundering programs, and report suspicious activity. Dealers are currently exempt from these requirements but are subject to other requirements under the USA Patriot Act, including reporting of certain currency transactions (see IRS/FinCEN Form 8300) and OFAC requirements (see Office of Foreign Asset Controls (OFAC) and SDN List).

USED CAR RULE

An FTC rule requiring dealers to prominently and conspicuously post a Buyer's Guide on all used cars prior to the car being offered for sale or lease. The Buyer's Guide must disclose detailed warranty information and contain other consumer disclosures. If the sale negotiations are conducted in Spanish, a Spanish version of the Buyer's Guide must be posted on the car. The Used Car Rule does not apply in Maine or Wisconsin, where similar state regulations require posted disclosures on used vehicles. Other states may have additional requirements for posting disclosures on used vehicles.

WARRANTY

A promise by the manufacturer or seller of a vehicle to make repairs or correct defects during a defined

W

period of time. Warranties can be express or implied, full or limited, and are

a part of the cost of the vehicle.

The warranty terms must be clearly and conspicuously summarized, with the full warranty terms made available to the customer under the MMWA. Separate vehicle protection coverage that a customer pays for in addition to the vehicle price is a “service contract,” and different legal rules apply to warranties and service contracts. Implied warranties are governed by state law but cannot be disclaimed by a dealer who offers a written warranty or sells the customer a service contract within 90 days of the vehicle sale.