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CREDIT

CFPB Launches Disparate Impact Initiative

The Consumer Financial Protection Bureau (CFPB or Bureau) appears to be engaged in a concerted effort to pressure finance sources over which it has jurisdiction to eliminate dealers' discretion in determining the amount of income they receive for arranging financing for consumers. The CFPB's means of effectuating this change is a disputed theory of liability known as "disparate impact." The Bureau argues that, in addition to prohibiting intentional credit discrimination on a prohibited basis (such as color, religion, national origin, sex, marital status, age, or the fact that a consumer relies upon social security, welfare, or other public assistance), the Equal Credit Opportunity Act (ECOA) and its implementing regulation (Regulation B) also prohibit creditor policies that do not involve intentional discrimination but nevertheless result in a disparate impact on certain groups of consumers based on one of these prohibited factors (i.e., the policies result in certain groups of consumers (e.g., Hispanics) paying more for credit than similarly-situated consumers who are not in that group (e.g., non-Hispanics).

The CFPB is focusing exclusively on pricing disparities that result from finance source policies allowing dealers to negotiate with consumers the amount of dealer participation they earn for arranging financing. The Bureau determines whether disparate impact is present by conducting a statistical analysis of past transactions and examining whether pricing disparities in the amount of dealer participation paid by consumers is attributable solely to the consumers' background.

The Bureau's disparate impact initiative has manifested itself through several actions.

First, according to a February 2013 report in Bloomberg, the CFPB has used its supervisory authority over large depository institutions (those with over $10 Billion in assets) to collect data from and notify at least four large banks that their policies allowing dealers to negotiate with consumers the amount of dealer participation they earn for arranging financing may have resulted in pricing disparities between different groups of similarly-situated consumers in violation of ECOA. These CFPB investigations could result in lawsuits against one or more of the banks or consent orders in which the one or more of the banks agree to change their dealer compensation policies to eliminate the possibility of disparate impact in future transactions.

Second, in March 2013, the CFPB issued Bulletin 2013-02 entitled Indirect Auto Lending and Compliance with the Equal Credit Opportunity Act. The document provides fair lending "guidance" to all indirect finance sources within the CFPB's jurisdiction and asserts that finance source policies that permit dealers to "markup" the buy rate create a "significant risk that they will result in pricing disparities" on a prohibited basis because of the "incentives these policies create and the discretion they permit…." The guidance provides finance sources with the following two options for avoiding disparate impact violations: (i) restrict dealer discretion by imposing a series of extensive controls on dealer markup and compensation policies, or (ii) eliminate dealer discretion by using another compensation mechanism such as a flat fee per transaction. The onerous nature of the first compliance option, coupled with the Bureau's hostility to any policy that permits dealer discretion, makes its viability as a long-term compliance mechanism very doubtful. Consequently, the second compliance option (moving to a flat fee per transaction compensation system) is believed by many to be the path that the Bureau expects finance sources to adopt.

Third, NADA learned in April 2013 that the Bureau has sent Requests for Information, Interrogatories, and Documents to several captive finance companies that seek very detailed (i) information about their dealer finance compensation policies, and (ii) dealer-specific finance compensation data. Although the Bureau does not presently possess supervisory authority over these companies, it does possess authority under section 1022 of the Dodd-Frank Act (entitled Rulemaking Authority) to "require covered persons and service providers participating in consumer financial services markets to file with the Bureau, under oath or otherwise, in such form and within such reasonable period of time as the Bureau may prescribe by rule or order, annual or special reports, or answers in writing to specific questions, furnishing information… for the bureau to fulfill the monitoring, assessment, and reporting responsibilities imposed by Congress." This provision may be what the Bureau is relying upon to apply pressure in this area to finance sources over which it lacks supervisory authority.

Dealers have reported that over the past several months, and presumably in response to these developments, several finance sources have (i) notified dealers that they are monitoring the retail installment sale contracts that they purchase from the dealer to determine whether the dealer participation earned in those transaction indicates pricing disparities on a prohibited basis, and (ii) in some cases, notified individual dealers of actual findings of such pricing disparities.

NADA's response to the CFPB's disparate impact initiative has been multifaceted and involved regulatory outreach to numerous officials within both government and the indirect vehicle financing industry. This has included extensive coordination with the National Association of Minority Automobile Dealers (NAMAD), which joined NADA in issuing a press release on March 21, 2013 that was very critical of the Bureau's fair lending guidance to auto lenders. Central to NADA's outreach efforts has been its (i) explanation of the extraordinary consumer benefits that are produced by today's highly competitive vehicle financing market, and (ii) request for information to the CFPB to determine the validity of its disparate impact initiative.

With regard to the latter effort, NADA has sought from the CFPB (i) the "research" that supports its disparate impact initiative, (ii) the full details of the statistical methodology it has employed to determine whether disparate impact is present in an auto creditor's portfolio, (iii) the reason the Bureau did not allow follow the Administrative Procedures Act rulemaking requirements that apply to agency initiatives that are designed to create industry-wide changes in market behavior, (iv) the extent of the CFPB's coordination with the agencies Congress vested with authority over auto dealers engaged in indirect financing prior to the issuance of its March 21, 2013 fair lending guidance to auto lenders, and (v) whether, and to what extent, the CFPB has analyzed the effect that an industry movement to flat fees would have on the cost of credit to consumers.

In Spring 2013 meetings with the CFPB, NADA requested, but did not receive, this information from the Bureau. NADA subsequently presented its concerns about the Bureau's lack of transparency to members of Congress. Following this outreach, Democrats on the House Financial Services Committee sent a letter to the CFPB on May 28, 2013 seeking information about its disparate impact initiative. A similar letter was sent to the Bureau by House Financial Services Committee and other Republicans on June 20, 2013.

The CFPB submitted responses to these letters dated June 20, 2013 and August 2, 2013, respectively, however in each case the agency ignored or provided partial answers to several of the questions presented to it. NADA is currently coordinating with members of Congress to insist on complete answers to the questions they have presented to the Bureau.

NADA will continue to vigorously respond to these developments and seek to preserve the pro-competitive features of the dealer-assisted financing model

CFPB Takes Enforcement Action Against Indirect Auto Lender

On June 27, 2013, the CFPB announced that it had entered into consent orders with U.S. Bank and one of its nonbank partners, Dealers' Financial Services (DFS), that require the companies to "end deceptive marketing practices targeting active duty military." As mentioned below, this action is noteworthy for several reasons.

This action involved the Military Installment Loans and Educational Services (MILES) auto loan program, which was created by U.S. Bank to finance subprime auto financing to active duty military personnel. U.S. Bank finances the substantial majority of MILES program credit contracts, while DFS markets the program, recruits and maintains the 700 participants in the MILES auto dealer network, manages the MILES website, and processes MILES credit applications before they are forwarded to U.S. Bank. A significant feature of the MILES program was a requirement that servicemembers repay their finance contracts using the military allotment system, which deducts payments directly from a servicemember's paycheck before the servicemember's salary is deposited into his or her bank account.

In announcing its action, the CFPB stated that the program "failed to properly disclose costs associated with repaying auto loans through the military allotments system and the expensive add-on products sold to active-duty military." In particular, it cited U.S. Bank for violating the Truth In Lending Act (TILA) and the Dodd-Frank Act's prohibition on deceptive acts or practices by –

(i) failing to properly inform servicemembers about fees associated with the program (by charging a monthly processing fee for their automatic payroll allotments that was not disclosed as part of the finance charge, APR, or the total payments due on the finance contract); and

(ii) failing to properly disclose the schedule of payments (by informing servicemembers that payments were only due (and by only crediting their account) once per month even though military allotments are deducted from a servicemember's paycheck twice per month.

The CFPB cited DFS for engaging in deceptive practices by –

(i) understating the costs of the vehicle service contracts (VSC) and GAP insurance that was sold in conjunction with MILES financing (by misstating the additional monthly amount that it would cost to purchase a VSC and the additional daily amount that it would cost to purchase GAP insurance); and

(ii) misleading consumers about product benefits (by deceptively suggesting in marketing material that the VSC would protect service members from all expensive repairs when many basic parts were not covered).

In the consent order, the companies agreed to stop deceptive practices, pay restitution to servicemembers (collectively in the amount of $6.5 million), cease requiring the use of allotments to participate in the program, improve their disclosures to servicemembers, and provide a redress plan and compliance reports to the CFPB. The consent orders are available at www.consumerfinance.gov/pressreleases/cfpb-orders-auto-lenders-to-refund-approximately-6-5-million-to-servicemembers.

This action is noteworthy for several reasons, including (i) it reportedly is the CFPB's first announced enforcement action against a finance source engaged in indirect auto financing, (ii) it involved a program that included 700 auto dealer participants and, most significantly (iii) it listed among the violations committed by U.S. Bank and DFS misstatements concerning VSCs, which many industry observers maintain are not "financial products or services" over which the CFPB may exercise jurisdiction. The CFPB's expansive view of its jurisdiction suggests that, in the future, it may attempt to reach other non-financial products and services that are sold as part of the car buying process.

ENVIRONMENT

EPA Approves CARB Preemption Waiver

The Clean Air Act generally preempts state motor vehicle emission control laws. Only California may request a preemption waiver and only if certain criteria are met. In December 2012, the Environmental Protection Agency (EPA) granted a waiver for CARB's 2012 Advanced Clean Car Program, which mandates:

1. New light-duty tailpipe standards known as "Low Emission Vehicle (LEV) III."
2. New light-duty vehicle greenhouse gas (GHG) standards.
3. Amendments to existing ZEV standards.
4. New ZEV standards for MY 2018 and beyond.

In its comments and testimony to EPA, Regulatory Affairs opposed a waiver for items 2 and 4. We argued that CARB's GHG standards were unnecessary since California will allow vehicle manufacturers to comply with the federal CAFE/GHG program in lieu of CARB's program (a similar "deemed to comply" option exists for the CARB MY 2011-16 GHG standards now in effect. We also opposed a waiver for CARB's MY 2018 and later ZEV rules, stressing their likely negative impact on dealers. Those rules generally require that by 2025, 15% of all new light-duty vehicles sold in each ZEV state must be electric or fuel cells. By comparison, only .1% of new light-duty sales in February of this year were pure electric.

Risks to dealers primarily relate to the general public's understandable hesitation (or inability) to purchase higher-priced vehicles offering compromised performance. The majority of prospective purchasers today are unable to rationalize investing in such vehicles given their limited body styles, their need for at home refueling infrastructure, their much higher up front cost (vs. comparably sized, traditionally fueled vehicles) and their limited range and longer refueling times. Electric and fuel cell vehicles feed niche markets, now and for the foreseeable future. Dealer burdens include the higher floor plan costs and the investments in refueling infrastructure, training, tools, and equipment necessary to offer these vehicles for sale.

Following the waiver's issuance, an expert law firm was commissioned to research the option of petitioning for a federal court review of EPA's decision. We ultimately decided not to petition for review, but to devote resources to educate ATAEs in ZEV states on how CARB's rules may undermine dealership operations. To its credit, California has developed a comprehensive plan aimed at facilitating the sale of electric and fuel cell vehicles which includes an intensive consumer awareness campaign, extensive access to HOV lanes, the development of a widespread public recharging and hydrogen fueling infrastructure, streamlined permitting and financial assistance for home recharging, vehicle purchase tax incentives, parking incentives, special utility rates, etc. However, of the 13 other CARB states (and DC), 10 have adopted the ZEV mandates (ME, MA, CT, RI, VT, NY, NJ, MD, DC, and OR), but none appear to have a plan to develop and implement anything like the electric and fuel cell vehicle "support system" California is pursuing. Moreover, consumers in these states recognize that such vehicles simply do not perform as well in their less temperate climates.

EPA Issues Tier 3 Vehicle Emission Standards

In March 2013, EPA issued its "Tier 3" proposal for more stringent vehicle emissions standards and lower sulfur gasoline. The proposal is intended to harmonize with CARB's LEV III program and to coordinate with EPA's MY 2017-25 light-duty GHG rules, thereby creating a federal program designed to enable automakers to sell the same vehicles in all 50 states.

Since light-duty vehicles are responsible for a significant portion of the air pollutants emitted in most states, tighter vehicle emission standards eventually will assist states with meeting future attainment mandates. Typical of the tug-of-war that has occurred between "big auto" and "big oil" since vehicle emissions were first regulated, vehicle manufacturers have testified that Tier 3 compliance necessitates extremely low gasoline sulfur levels while oil refiners claim the fuel will be very expensive for them to produce. Comments filed by Regulatory Affairs in July primarily focused on these issues and lent support for lower sulfur gasoline. A final rule is expected in December.

Used Oil

In December 2012, EPA issued revisions to its area source burner and boiler rules and to a related rule governing non-hazardous secondary material fuels. These regulatory amendments largely serve to reduce the burden and cost on the regulated community of rules EPA first issued in 2010. As finalized, 99 percent of all smaller commercial boilers of the size commonly used in dealerships are either categorically exempt or will be able to comply simply by performing routine maintenance and tune-ups. For example, dealership boilers that burn natural gas are not covered by this rule. Dealerships with boilers that burn oil, coal, or other fuels must comply initially with the rule's tune-up mandate by no later than 3/21/14, and periodically thereafter.

Consistent with testimony and comments submitted by Regulatory Affairs, EPA also amended related rules governing solid waste fuels to exclude scrap tires subject to tire collection and recycling programs, and used oil burned on-site in small burners and boilers. EPA's initial proposal would have limited the off-site management of used oil and waste tires to strictly-regulated solid waste incinerators, eliminating a wide range of burners that historically have recovered heat value from these common motor vehicle maintenance wastes. Regulatory Affairs argued that used motor oils and tires should be treated as "traditional fuels" exempt from the definition of "solid waste," pointing to a long history of carefully tailored regulation, to the sensitive nature of recycling markets, to the benefits of on-site recycling, to the need to maximize the collection of "do-it-yourselfer" used oil, and to the fact that tires should not be deemed "solid waste" if they are never "discarded." EPA's final rules do not restrict the burning of used oil collected from do-it-yourselfers (DIY) in space heaters, important given that the willingness to collect DIY oil is a key element of a dealership's eligibility for the federal used oil Superfund exemption. In most states, dealerships may burn the used oil they collect in space heaters vented to the atmosphere that are under 500,000 BTUs/hour in size, including any used oils collected from DIYs. With respect to used oil sent off-site for fuel processing, Regulatory Affairs is counseling dealerships to attempt to prevent contamination during storage and to separately ship any DIY used oil they collect.

In August, several large waste management companies (i.e., Safety-Kleen/Clean Harbors, Heritage-Crystal Clean, FCC Environmental, and Noble Oil), pushed their trade association (National Oil Recyclers Association) to adopt a position in support of an effort to attack used oil space heaters. By doing so they sought to reduce the competition for used oil, the feedstock for their extensive re-refining and fuel processing operations. The economics of used oil management is largely tied to the world price of petroleum which significantly influences the price of motor oil and petroleum-based fuels. In addition, the recession combined with longer oil change periods has led to a reduction in used oil generation/supply.

In light of the wide-spread beneficial use of used oil space heaters by dealerships, Regulatory Affairs urged NORA and several of its key members to oppose this anti-space heater push. NORA's used oil policy committee ultimately voted to reject the proposal, however the four large companies behind it apparently are moving forward with their own anti-space heater initiative. Many dealerships are waste management service customers of these companies. Regulatory Affairs is engaging in strategies for bringing dealership concerns to their attention.

NADA and EPA Partner to Complete Dealership Energy Use Study

NADA and EPA's ENERGY STAR program have partnered to launch the 2013 NADA/ATD Dealership Energy Use Survey. To create a baseline against which dealerships can be measured for ENERGY STAR certification, 500 dealership survey responses are needed. Data collected will be provided anonymously to the ENERGY STAR program for an analysis of average dealership energy use, focusing on the key drivers of dealership energy consumption. EPA will then develop a 1-to-100 ENERGY STAR performance scale to enable dealerships to compare their energy use to others nationwide. Dealerships with energy performance scores of 75 or higher will be eligible to earn an ENERGY STAR designation.

The survey asks dealerships to provide:

1. Square footage totals for various areas of the dealership (e.g., parking, showroom, etc).

2. The types of energy used to heat, cool, and power dealership facilities.

3. A listing of certain equipment used (e.g., lifts, computers, refrigerators, etc).

4. Info on 2012 energy consumption, such as metered data normally found on utility bills.

Along with the survey, an Energy Ally Program was initiated to encourage third parties to complete surveys for the dealerships they know. For example, a business such as an accounting or energy management firm that assists at least five dealerships with their survey responses will qualify to be an "NADA Energy Ally." To date, the Energy Ally Program has generated significant interest from energy utilities, dealership consultants and energy management consultant firms, several of whom have applied to be NADA Energy Allies. Regulatory Affairs also is working with ATAEs and OEMs on further outreach to dealers about the survey.

NADA also has partnered with Xcel Energy, a utility serving seven Western and Midwestern states where it provides both electricity and natural gas to an estimated 1500 dealerships. Through a pilot project in New Mexico, emails were sent to dealerships in the zip codes that Xcel services. Xcel has trained their call center staff on the Energy Star survey and will assist dealerships with its completion while telling them about rebates they can earn for conducting energy efficient upgrades.

A dealership energy efficiency video was produced over three days at a dealership in Christiansburg, VA. The video was released at a press conference announcing the Energy Ally program and was highlighted at the 2013 NADA Convention. Additional information on the NADA/ATD Energy Star Initiative is found here.

Biofuel Battle

The Renewable Fuels Standard (RFS) enacted by Congress in 2007 calls for the production of ever-increasing volumes of gasohol and biodiesel. For 2013, the RFS requires the blending of at least 13.8 billion gallons of ethanol, more than can be absorbed into the nation's largely E10 (i.e., no more than 10 percent ethanol) fuel supply. A very small amount of fuel with between 10 and 100 percent ethanol is marketed for use by vehicles designed for fuels blended with up to 85 percent ethanol. To address the ethanol "blend wall", EPA last year approved a waiver enabling E15 (i.e., no more than 15 percent ethanol) for use in MY 2001 and newer vehicles, and a rule aimed at preventing misfueling in other engines. Regulatory Affairs' participation in those rulemakings primarily focused on the service and warranty issues.

To date, very little E15 is being produced and marketed. Interestingly, Valero Energy, both an oil refiner and a large ethanol producer, recently indicated that its company-owned and -operated stores would not sell E-15. In addition, refiners, OEMs and others concerned about the liability associated with potential vehicle damage associated with use of the fuel have filed legal challenges to the E15 fuel waiver and associated rules. Two split D.C. Circuit decisions have ruled that none of the interested parties seeking review of EPA's rules had the requisite legal standing to do so. In March 2013, NADA joined the U.S. Chamber of Commerce and others in the filing of an amicus brief urging the U.S. Supreme Court to review these rulings. Unfortunately, the case was not accepted.

New A/C Refrigerant Hits Roadblock

In February 2011, EPA approved HFO-1234yf for use in light-duty motor vehicle air conditioning (A/C) systems. Used appropriately, HFO-1234yf can reduce the environmental impact of motor vehicle A/C systems. It has a global warming potential that is 99.7 percent less than HFCB134a and no ozone-depleting potential. Prior to HFC-134a, motor vehicle A/C systems used CFC-12, a potent greenhouse gas and ozone-depleting substance. The use of HFO-1234yf, will earn OEMs credit toward their motor vehicle fuel economy/GHG reduction targets.

Apparently, HFO-1234yf raises flammability and price concerns. Thus, Daimler and a few other OEMs have preliminarily decided against using it. Regulatory Affairs recently met with EPA to discuss this issue and whether it makes sense to require dealerships and other service shops to purchase a recycling unit designed for HFC-134A replacement refrigerants such as HFO-1234yf or CO2. In addition, NADA members were recently reminded of the importance of avoiding the purchase and use of contaminated motor vehicle refrigerants.

EPA Issues Long-Awaited Rags/Wipes Rule

In July 2013, EPA issued a rule conditionally excluding solvent-contaminated wipes from its hazardous waste regulations. Wipes used in dealership service and autobody operations run the gamut from woven laundered cloths to paper disposable wipers, shop towels and/or rags. Some are used with solvents, others to wipe up liquids such as oils, greases, paints and antifreeze.

Wastes contaminated with EPA-listed solvents generally are "hazardous waste" and must be managed as such. Under the new rule, used wipes contaminated with EPA-listed solvents are not "hazardous" waste if they are:

1. Stored in closed, labeled containers.
2. Liquid-free when sent off-site for cleaning or disposal.
3. Not accumulated for longer than 180 days.

Service and body department wipes are used with various liquids and for several purposes, and are often intermixed prior to off-site cleaning or disposal. Consequently, Regulatory Affairs suggests that dealerships consider implementing the above three management strategies for all used wipes. Of course, dealerships must also be mindful of state law variations.

The push to obtain regulatory relief for rags and wipes began in 1992. Since then, NADA filed several sets of comments, participated on a Small Business Regulatory Enforcement Fairness Act panel, and met with EPA numerous times to discuss the issue. The protracted deliberations leading up to EPA's final rule largely stems from a competitive battle between disposable wipe manufacturers, their reusable wipe counterparts, and commercial laundries.

FTC Removes Special Label Requirement for Alternative Fueled Vehicles

The FTC announced in April 2013 that, effective at the end of May 2013, it will no longer require a special label for new alternative-fueled vehicles (AFVs). Regulatory Affairs had strongly advocated for this change, arguing that alternative-fuel information on the FTC label duplicated that found on EPA's revised fuel economy label. The FTC also has eliminated its AFV label mandate for used vehicles, agreeing with NADA that such labels were of limited usefulness for consumers yet imposed undue regulatory burdens on dealerships.

LABOR & EMPLOYMENT

OSHA Targets Enforcement Actions Against Dealerships; Focus Is on Lifts

Dealerships in Colorado and Hawaii currently are being targeted with inspections and enforcement actions pursuant to OSHA Local Emphasis Programs (LEPs). LEPs typically are approved by OSHA based on data showing a workplace injury/illness pattern of concern. These LEPs follow on similar ones in 2010 and 2012 in North Dakota and Montana where the alleged concern involved injuries resulting from automotive lifts. Together, these LEPs have resulted in tens of thousands of dollars in fines for dealerships (and other vehicle maintenance facilities). OSHA has implied that other automotive lift LEPs for other areas are being considered.

There are no specific federal OSHA rules governing lifts. Instead, OSHA applies its "general duty clause" when raising concerns regarding lift operation, service, maintenance, or repair in the context of inspections or enforcement. Regulatory Affairs is in the process of taking issue with the data upon which OSHA apparently is justifying its lift LEPs, with the process by which these LEPs have been approved, and with respect to the ALI/ANSI consensus standard often cited as establishing a dealership's obligation under law. At the same time, Regulatory Affairs is using this recent OSHA activity as the basis for reminding members of the importance of maintaining safe and healthy workplaces.

NADA Joins in Victorious Federal Court Ruling Striking Down NLRB Poster Requirement

As a member of the Coalition for a Democratic Workplace (CDW), NADA joined in a victorious May 2013, federal court decision invalidating an NLRB mandate that 6 million employers - including dealerships - post notices informing employees of their rights under the National Labor Relations Act. The CDW successfully argued that the NLRB lacked the statutory authority to require the poster. Other parties to the lawsuit included the National Association of Manufacturers, the National Federation of Independent Business, and the U.S. Chamber of Commerce. As a result of this decision, dealerships do not need to display the poster.

Hazard Communication (Hazcom) Standard Overhauled

Designed to protect employees against workplace chemicals, OSHA's HazCom rule has covered dealerships since 1998 and has been a high enforcement priority for the agency ever since. The rule requires manufacturers and importers to evaluate hazardous materials and to provide information to employers and workers through container labels and safety data sheets (MSDSs). Revisions to the HazCom rule made last year specify that by December 1, 2013, dealerships train service, parts, and body shop employees on new hazard classifications, new hazard labels, and new safety data sheets.

Working with NADAU, Regulatory Affairs presented a webinar in April 2013 on the new changes. Revisions to NADA's *A Dealer Guide to OSHA's Hazard Communication Standard* are being finalized. Additional efforts to education dealers and their fixed operations managers on these changes and on the December 1, 2013 deadline will be undertaken during the year.

DOL Revises FMLA Requirements for Military Service Members

In February 2013, the DOL revised its FMLA regulations to implement directives in the FY 2010 National Defense Authorization Act. It also clarified that employers may use different increments of leave at different times of the day or shift, provided the leave is tracked using the smallest increment used for other forms of leave (subject to a one hour maximum). These changes were recently discussed in a 60-second e-mail, which also noted the need to display a revised FMLA poster. Highlights of the DOL's final rule include:

An expanded 26-workweek military caregiver leave provision. It now includes care for a covered veteran undergoing medical treatment, recuperation, or therapy for a serious injury or illness incurred or aggravated in the line of duty on active duty and that manifested before or after the veteran left active duty.

A revised definition of "covered veteran." It now includes those discharged or released under conditions other than dishonorable in the five-year period prior to the date an employee first takes military caregiver leave. For veterans discharged before March 8, 2013, the period from October 28, 2009 to March 8, 2013 is excluded.

Revised definitions of "serious injury or illness" for military caregiver leave.

Expansion of military caregiver leave to cover a current servicemember with a serious injury or illness that existed before the servicemember's active duty, but that was aggravated by service in the line of duty on active duty.

An expanded list of health care providers (HCPs) who can provide medical certification to support FMLA military caregiver leave. It now includes those unaffiliated with the military. Employers may request a second (or third) opinion from employees when a medical certification is obtained from an unaffiliated HCP, but not when obtained from an HCP associated with the military.

Expansion of the qualifying exigency leave entitlement to employees whose spouse, son, daughter, or parent serve in the Regular Armed Forces, and a requirement that the military member must be deployed to a foreign country.

Changes to "qualifying exigency leave," including an increase in the maximum leave an eligible employee may take related to a military member's Rest and Recuperation to 15 calendar days. Eligible employees also may now take FMLA leave for certain activities related to the care of a military member's parent if incapable of self-care and to activities arising from the military member's deployment or impending deployment. Such care includes arranging for alternate care, providing care directly for urgent, immediate needs, admitting or transferring a parent to a care facility, and attending certain meetings with staff at a parent's care facility.

Revisions to A Dealer Guide to the Family and Medical Leave Act are being finalized.

Consultation Program Remains Intact

Responding to the objections of several small business groups, including NADA, OSHA in August withdrew a proposal to weaken the "wall" between its time-honored consultation program and OSHA enforcement. NADA has long pointed to OSHA's On-Site Consultation program as one way for dealerships to review their federal or state OSHA compliance and to enhance workplace health and safety. More information on the program is found here.

ADVERTISING

FTC Takes Another Enforcement Action Against Auto Dealers

On September 3, 2013, the FTC announced that it had entered into proposed consent orders with a Cleveland dealership and a Baltimore area dealership for alleged advertising violations that appeared on their respective websites. This is the second time since 2012 that the FTC has announced advertising enforcement actions against motor vehicle dealers.

In the former case, the FTC alleged that the dealer advertised that particular Ford models are available at a specific dealer discount when "in fact, once consumers reach the dealership, they find out that [the dealership] has failed to disclose that the specific discounts are available for some, but not all, of the Ford models advertised."

In the latter case, the FTC alleged that the dealer advertised specific dealer discounts and prices as being generally available to consumers when "in fact, once consumers reach the dealership, they find out that there are significant restrictions on obtaining the advertised discounts or that the advertised discounts are not available in full." In particular, the FTC alleged: "In numerous instances, the advertised discount and price are subject to various qualifications and restrictions… for example, being a member of the military, being a recent college graduate, possessing a bank account at a particular bank, or owning a vehicle that has a lien on it. In numerous instances, even if consumers meet all of these qualifications or restrictions, they cannot obtain the advertised discount and price."

The FTC alleged that these are deceptive practices which violate Section 5 of the FTC Act. The proposed consent orders with each dealership (in which the dealerships do not admit or deny the alleged violations) would be in effect for 20 years and generally –

(i) prohibit the dealership from representing that a discount, rebate, bonus, incentive, or price is available unless the representation clearly and conspicuously discloses any material qualifications or restrictions, including but not limited to (a) a consumer's ability to obtain such item(s), and (b) the vehicles available at the discount, rebate, bonus, incentive, or price;

(ii) prohibit the dealership from misrepresenting: (a) the existence or amount of any discount, rebate, bonus, incentive, or price; (b) the existence, price, value, coverage, or features of any product or service; (c) the number of vehicles available at particular prices; or (d) any other material fact about the price, sale, financing, or leasing of motor vehicles;

(iii) require that the dealership's ads, promotional materials, complaints, compliance documents, and certain other items be retained for 5 years after the last date in which the ad is disseminated;

(iv) require that the dealership provide copies of the consent order to certain dealership personnel and that the FTC be notified of relevant changes to the dealership's corporate structure; and

(v) require the dealership to file compliance reports with the FTC.

The FTC's press release, which contains links to its complaints, the proposed consent orders, and the ads that gave rise to these actions, is available at: www.ftc.gov/opa/2013/09/autoads.shtm.

Payoff Litigation

Dealers should be aware of a developing legal theory that has arisen based on alleged "overcharges" and misrepresentations in connection with the pay-off of a lien on a customer trade-in. A number of such lawsuits have been filed in California, and reports are surfacing of similar claims elsewhere around the country. While the claims differ somewhat, the basic allegations are the same: plaintiffs allege that in connection with a trade-in of a vehicle on a purchase or lease transaction, the dealer personnel obtain a pay-off amount for the trade-in from the lienholder and include it on the retail installment sales contract ("RISC"), but that the pay-off figure obtained and used by the dealership is not for the transaction date, but for some future date.

This amount (sometimes referred to as a "10-day pay-off" or a "15-day pay-off, or similar) is given to the customer for a variety of reasons: the finance source only provides that number; the dealer requests is because of delays in actual funding of the sale and the pay-off of the lien; etc. The result, however, is that the amount listed on the RISC is allegedly not the actual pay-off amount as of the date of the RISC. These lawsuits further allege that because of that discrepancy the dealer has violated numerous disclosure obligations and unfair trade practices and that the customer (or class of customers) is harmed because that pay-off amount includes finance charges related to a period when the customer no longer owns the vehicle.

The resulting claims are often based in state law, but also implicate TILA and other federal disclosure requirements. This is a complicated issue and NADA is working with AFSA, dealer lawyers, and others to address it. NADA and an outside attorney will be presenting on this issue at the ATAE Legal Conference as well as the AFSA Law Committee meeting in coming weeks.

TAX

Cash Reporting - Electronic Filing of Form 8300

As previously explained, any person in a trade or business who receives more than $10,000 in cash in a single transaction or related transactions must complete a Form 8300, Report of Cash Payments Over $10,000 Received in a Trade or Business. Form 8300 is a joint form issued by the IRS and the Department of the Treasury's Financial Crimes Enforcement Network (FinCEN) and is used by the government to track individuals that evade taxes and those who profit from criminal activities. Although the cash reporting requirements apply to many types of businesses, auto dealerships frequently receive cash in excess of $10,000 and are required to comply with the filing requirements.

Currently dealers may satisfy their 8300 filing obligation with both the IRS and FinCEN by filing Form 8300 in paper form directly with the IRS. However, last year, FinCEN announced that a wide variety of businesses are now able to electronically file their Form 8300 reports using the FinCEN Electronic Filing (E-Filing) System. In that announcement, FinCEN specifically referenced automobile dealers and implied that, while not currently mandatory, such electronic filing is likely to become mandatory.

Regulatory Affairs has been working over the past few months with FinCEN and the IRS to seek clarification of whether the new electronic reporting tool would satisfy dealers' obligations to the IRS. Recently, representatives from the IRS confirmed that dealers nationwide may safely use this new transmission mechanism to file their Form 8300s. In particular:

1) the IRS considers the FinCEN E-Filing system to be a permissible alternative to filing a paper Form 8300;

2) the date of filing will be the date of filing on the E-Filing system; and

3) the FinCEN E-Filing system provides a filing confirmation that can be printed out.

While there is not yet any requirement that dealers file their Form 8300 electronically (unlike many other entities subject to FinCEN reporting requirements), there are benefits to E-Filing that make it an attractive option for dealers. The ability to get written confirmation of the filing is particularly helpful for dealers, who have reported to NADA in the past that they have faced difficulty proving the specifics of an 8300 filing in the face of an IRS audit. Go here to learn more, and to register to E-File: http://bsaefiling.fincen.treas.gov/main.html.

DATA SECURITY

NADA Issues Dealer Data Guidance to Industry

NADA recently sent a memorandum to all NADA members and others in the industry about this issue. The NADA memo outlines the problem of third party access to Dealer Data, contains a dealer data checklist that dealers can review, as well as sample contract provisions for inclusion in service provider contracts. In response to this guidance, at least one large service provider has already agreed to review their service provider contract language. NADA will continue to work toward adoption of these regulatory compliance provisions, and we hope that dealers, their counsel and vendors will work together to ensure these basic provisions are included in all service provider agreements.

NADA has formed a Dealer Data task force that is continuing to address this issue on a number of fronts. For example, NADA representatives recently met with one of the leading DMS companies about Dealer Data issues and are finalizing meeting dates with the other large DMS providers, as well as several other large vendors with access to Dealer Data. NADA also is continuing to meet with OEMs on this issue, and is working on meetings with the OEM trade associations.

NADA is also continuing its educational efforts for dealers, OEMs and other industry participants. NADA regulatory affairs, in conjunction with industry relations, legislative staff, and others will continue to work to educate parties regarding what dealers' obligations are, and from a vendor perspective, what tools dealers need to meet their obligations.