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October 31, 2012

To: NIADA
From: Federal Advocates
Subject: October 2012 Monthly Report

NOTE: Given that the Congress has been in recess since early this month and that the focus has been on the election, legislative action in October has been minimal. Congress returns November 13.

Auction Sales

Still no additional formal communications from the Congress on this issue. However, as previously reported, we believe that there is still interest from the Hill (specifically Senator Pryor and the House Energy and Commerce Committee) in exploring the impact of the current auction sale process on consumers and law enforcement. As previously reported, on August 15, Steve Lehrman, Legislative Assistant to Senator Pryor, visited the Adesa Washington, D.C. area auction facility to view firsthand the auction process. At the end of the visit, Lehrman indicated that “they don’t have a problem with what goes on at the auction but what happens with the auctioned cars.” He asked if we could give some thought on how best to address that situation especially as it relates to law enforcement. While we took that under advisement, we still prefer not to initiate a response until we receive more clarification from the Hill as to exactly what issue/problem they are trying to solve. While legislation, if it comes to that, would not materialize this year, there may be efforts to pursue informally issues that would involve the Association and other key stakeholders. For example, we continue to wait on a list of questions from the Democratic staff of the House Energy and Commerce Committee and staff of Congressman Henry Waxman (D-CA).

Status UPDATE: unchanged from the September report.

Rental Cars (S.1445; S.3502; and, H.R. 6094)

Still nothing more definitive on previous reports that consumer advocates are nearing “a deal” with the rental car companies on this issue. Again, it’s not clear whether such a deal, if forthcoming, would require legislation. To review, Raechel and Jacqueline Houck died in a 2004 California accident when the Chrysler PT Cruiser they rented from Enterprise apparently began leaking steering fluid and caught fire before crashing into a

truck. The rented car had been under a safety recall for the potential fire hazard and Enterprise was aware of that. As a result of the accident, four things have happened to date. First, the Houck family sued Enterprise, and after a lengthy legal fight, the company admitted negligence and was required to pay \$15 million in damages to the family. Secondly, S. 1445, the Raechel and Jacqueline Houck Safe Rental Act of 2011, was introduced on July 28, 2011, by Senator Schumer (D-NY) and cosponsored by Senators Feinstein and Boxer, both of California (new cosponsors added: Blumenthal and Gillibrand). The bill makes it unlawful for a rental company, unless the defect or noncompliance has already been remedied, to rent, lease, or sell a covered vehicle on or after the earlier of: (1) the receipt by the company of a Secretary of Transportation (DOT) ordered notification from the manufacturer that the vehicle or equipment is defective or is noncompliant with federal motor vehicle safety standards; or (2) when the vehicle or equipment manufacturer gives notice to owners, purchasers, and dealers that the vehicle or equipment contains a defect or is noncompliant. It requires a rental company that receives a notification of a vehicle or equipment defect or noncompliance during the vehicle rental or lease period to: (1) contact the renter or lessee and any authorized driver of the covered vehicle about the defect or noncompliance; and (2) offer to provide them, at no additional cost, with a comparable alternative vehicle until the defect or noncompliance has been remedied; treats violations of the requirements of this Act as unfair or deceptive acts or practices under the Federal Trade Commission Act and subjects persons who violate such requirements to certain penalties; and, requires the Administrator of the National Highway Traffic Safety Administration (NHTSA) to report to Congress on: (1) sales of motor vehicles to rental companies without standard safety features, and (2) sales by rental companies of covered vehicles known to include safety defects before they are recalled. Thirdly, Senator Boxer formally requested that Enterprise, Avis, Hertz, and Dollar Thrifty sign a pledge promising not to rent or sell cars under safety recall until those cars are fixed. To date, only Hertz has signed the pledge. While all three of the remaining companies support Federal legislation to ensure rental car safety, all maintain that their companies address safety recalls in a timely fashion, and that any legislation should also cover other businesses that transport passengers, like limousine and taxi companies. Accordingly, on August 2, Senator Boxer introduced S. 3502, the Rachel and Jacqueline Houck Safe Rental Car Act of 2012, with Senator Feinstein (D-CA) as cosponsor. The bill requires notification by car rental companies to renters of any defect or noncompliance regarding the rented vehicle at issue; imposes certain limitations on sales, leases or rentals by rental companies; holds rental companies to the same standard of responsibility as dealers with respect to various vehicle inspection, investigation and records requirements; and, authorizes the US DOT to study “the effectiveness of the amendments made by (the bill) and other related activities of rental companies.” Fourthly, on July 10, Congresswoman Lois Capps (D-CA23) introduced H.R. 6094, same title as the Senate bill, with three cosponsors. The bill was referred to the House Energy and Commerce Committee. It prohibits the rental of motor vehicles under a safety recall because of a defect related to motor vehicle safety or noncompliance with an applicable motor vehicle safety standard until the defect or noncompliance is remedied, and for other purposes.

Status UPDATE: unchanged from the September report.

MAP21/S.1449, the Motor Vehicle and Highway Safety Improvement Act

Earlier this month, Senator Barbara Boxer announced she's already working on legislation to succeed MAP-21. MAP-21 expires in about 750 days. Congress is likely to be in legislative session for only about half or less that time, and is likely to be preoccupied with a number of higher priority issues. In her announcement, Boxer said that her *"goal is to find a dependable funding source and to work in a bipartisan way to find that funding source. I really believe that the Highway Trust Fund should be funded through user fees."* That might include indexing the gas tax to inflation, but probably not a vehicle miles traveled fee, which raises privacy concerns for the California senator. *Even a gas tax bump won't be enough if vehicles keep getting more and more efficient. "We've got to figure out other ways. For example, I drive a hybrid car and I get about 50 miles to the gallon, I'm not paying my fair share at all. If I get an electric car, I won't pay anything."*

On July 6, the President signed the \$105B MAP21 bill. The bill contains several provisions designed to increase transparency and accountability at NHTSA and in the auto industry. The bill adopts a modified S.1449 approach on establishing public accessibility to vehicle recall information and further modifies provisions addressing the set of communications with dealers that must be made available to the public. The bill strikes the provision regarding public availability of early warning reporting data. The bill also strikes a provision imposing new post-employment restrictions for vehicle safety officials at NHTSA, but retains language calling on the inspector general to report on the issue. The bill slightly modifies the whistleblower protection provision and calls on the Government Accountability Office to examine this and other such provisions. The bill slightly modifies the provision directing NHTSA to study crash data collection. And the bill makes slight modifications to NHTSA's authority to require additional recall notifications. All of the above are in lieu of S.1449, as passed by the Senate. The bill does NOT include any provisions regarding auction sales, rental cars, or recall requirements imposed on dealers. Most of the provisions of interest require the promulgation of regulations.

Status UPDATE: unchanged from the September report.

S.474, the Small Business Regulatory Freedom Act of 2011

Senator Olympia Snowe (R-ME) introduced S.474 on March 3, 2011. To date, it has 12 cosponsors. The bill was referred to the Committee on Homeland Security and Government Affairs.

The "Small Business Regulatory Freedom Act of 2011" amends the Regulatory Flexibility Act to revise the rulemaking process with respect to small entities (i.e., small businesses, small organizations, and small governmental jurisdictions).

It defines "economic impact" with respect to a proposed or final rule to mean: (1) any direct economic effect of a rule on small entities; and, (2) any indirect economic effect on such entities, including potential job creation or job loss.

It expands review of agency rulemaking to permit small entities to seek judicial review of initial regulatory flexibility analyses and to obtain an injunction of a proposed rule that is noncompliant with RFA requirements.

It requires each agency to establish a plan for the periodic review (every eight years) of: (1) rules that have a significant adverse economic impact on small entities; and, (2) any small entity compliance guide required to be published by an agency. It sets forth criteria for review of a rule, including the continued need for the rule, the complexity of the rule, and the impact of the rule on small entities. It terminates any rule if the issuing agency has failed to complete a required periodic review.

In addition, it expands to all agencies the procedures for gathering comments on rules that will have a significant economic impact on small entities. Requires each agency to review on a periodic basis its policies or programs for imposing regulatory penalties on small entities; imposes certain additional requirements on agencies prior to the issuance of a final rule.

Status UPDATE: unchanged from the September report.

S.330, the Consumer Recall Protection Act of 2011

Senator Charles Schumer (D-NY) introduced S. 330 on February 14, 2011. To date, it has no cosponsors. The bill was referred to the Committee on Commerce, Science, and Transportation.

The bill prohibits a person from selling to consumers any covered product that is subject to a recall. It defines a "covered product" to include a motor vehicle or replacement equipment, food, drugs, devices, cosmetics, a biological product, a consumer product, a meat or meat food product, a poultry or poultry product, and an egg or egg product. It defines "recall" with respect to a motor vehicle or replacement equipment when the Secretary of Transportation makes a determination that a motor vehicle contains a defect related to safety or does not comply with specified motor vehicle standards.

The bill exempts from such prohibition the sale of a covered product that was subject to a recall because of a defect in such product if: (1) such defect was remedied prior to such sale; and (2) the seller of such product notifies such consumer of such recall, defect, and remedy. It treats a violation of such prohibition as a violation of a rule defining an unfair or deceptive act or practice described under the Federal Trade Commission Act, and requires the Consumer Product Safety Commission (CPSC) to establish, maintain, and make available to the public a searchable list of covered products that are subject to a recall.

Status UPDATE: unchanged from the September report.

H.R.860 and S.110, "Promoting Charitable Donations of Qualified Vehicles Act of 2011"

Senator John Ensign (R-NV) introduced S. 110 on January 25, 2011. To date it has no cosponsors. It was referred to the Committee on Finance. Congressman John Larson (D-

CT) introduced H.R. 860 (identical to S. 110) on March 1 with 183 (now 319) cosponsors. The bill was referred to the Committee on Ways and Means.

Ordinarily, with the large number of bill sponsors with bipartisan support as is the situation with H.R.860, one would expect the bill to move expeditiously and without controversy through the legislative process. However, that has not happened with H.R.860 owing to a number of reasons: the somewhat problematic tax deduction history of motor vehicle donations; the fact that no revenue bills are moving in the House; the uncertainty as to the revenue impact of the bill; the lack of Senate interest/support; the fact that the issue is not a priority for the House Leadership; and, the limited amount of time remaining in the Congress to consider legislation.

To review, the bill amends the Internal Revenue Code with respect to the charitable tax deduction for contributions of qualified vehicles (i.e., motor vehicles, boats, or airplanes) to: (1) set forth revised acknowledgment requirements for vehicles valued at \$2,500 or less and vehicles valued at more than \$2,500; and (2) revise the penalty for submitting a fraudulent acknowledgment.

According to the Internal Revenue Service, as a result of Congress tightening the deductibility rules in 2005, the volume of used car donations reduced by approximately 67%. Specifically, under the 2005 rules, if the charity sells the automobile, the donor's deduction is limited to the gross proceeds from the sale. This impacts the donor in two ways – (1) proceeds are normally less than the private sale value of the car; and, (2) a donor claiming a deduction of \$500 or more cannot claim the deduction until he or she received a written acknowledgement from the charity showing the gross sales proceeds. In addition, if the charity uses the automobile in its programs, the donor can deduct the private party sale value of the automobile, and only needs an acknowledgement from the charity of that use.

The major proposed changes in the legislation are as follows: (1) the charity won't have to sell the automobile before it provides written acknowledgement to the donor; (2) the gross proceeds from the sale of the automobile by the charity will have no bearing; (3) for any car where the donor seeks a deduction of \$2,500 or less, the donor's deduction will be based on the value of the car determined by the charity under rules set by the Internal Revenue Service (the existing rule suggests that this would be private sale value); (4) for a car where the donor seeks a donation greater than \$2,500, the deduction will be based on an appraisal provided by the charity; and, (5) the charity's use of the automobile will have no bearing (the advantage for donating to a charity that will use the automobile in its programs – rather than sell it – will reduce significantly. Under the proposed legislative changes, because charities will now be responsible for providing a statement of fair market value or an appraisal, they are more likely to use commercial dealers to handle their automobile donation programs.

Status UPDATE: twelve additional cosponsors added on House bill since the September report.

H.R.1449, the Motor Vehicle Owners Right to Repair Act of 2011

Congressmen Edolphus Towns (D-NY) and Todd Platts (R-PA) introduced H.R.1449 on April 8, 2011. To date it has 33 (now 51) cosponsors. It was referred to the Committee on Energy and Commerce.

The “Right to Repair Act” protects motoring consumers from vehicle repair costs by requiring that car manufacturers: (1) provide to the vehicle owner and service provider all information necessary to diagnose, service, maintain, or repair the vehicle; (2) offer for sale to the vehicle owner and service providers any related tool or equipment; and, (3) provide the information that enables tool companies to manufacture tools with the same functional characteristics. The legislation further provides car companies with protections for their trade secrets, only requiring them to make available the same non-proprietary diagnostic and repair information they provide their franchised dealers. Lastly, the bill authorizes enforcement by the Federal Trade Commission and civil actions by the states.

Status UPDATE: one additional cosponsor added since the September report.

H.R.527, the Regulatory Flexibility Improvements Act of 2011

Congressman Lamar Smith (R-TX), Chairman of the House Judiciary Committee, introduced H.R. 527 on February 8, 2011. To date it has 26 cosponsors. It was reported by the Judiciary Committee on July 7, 2011, and reported by the Small Business Committee on November 16, 2011. Passed the House on Dec. 1 by recorded vote of 263-159. Referred to the Senate Homeland Security and Governmental Affairs Committee.

In 1980, Congress passed the Regulatory Flexibility Act (RFA), which was aimed at relieving the stress of onerous regulation on small businesses. The RFA mandates that all Federal agencies examine the impact of their proposed rules on small businesses, and if those impacts are significant, the agency must consider less burdensome alternatives.

Generally, H.R. 527 would ensure that Federal agencies comply with the RFA and close loopholes used by agencies to avoid compliance with the RFA. This bill would also require a better assessment of the impacts that regulations will have on small businesses, forcing agencies to perform better periodic review of rules, and granting the Chief Counsel for Advocacy at the Small Business Administration greater powers for enforcement of the RFA.

Specifically, it amends the RFA to revise the definition of "rule" under such Act to exclude a rule of particular (and not general) applicability relating to rates, wages, and other financial indicators and to define "economic impact" with respect to a proposed or final rule as any direct economic effect on small entities from such rule and any indirect economic effect on small entities that is reasonably foreseeable and that results from such rule. Includes tribal organizations within the definition of "small governmental jurisdictions" for purposes of such Act.

It requires initial and final regulatory flexibility analyses to: (1) describe alternatives to a proposed rule that minimize any adverse significant economic impact or maximize the beneficial significant economic impact on small entities, and (2) include revisions or amendments to a land management plan developed by the Secretary of Agriculture or the Secretary of the Interior under specified Acts.

It expands elements of initial and final regulatory flexibility analyses under RFA to include estimates and descriptions of the cumulative economic impact of a proposed rule on a small entity. It repeals provisions allowing a waiver or delay of the completion of an initial regulatory flexibility analysis.

It requires each agency to publish in the Federal Register a plan for the periodic review of existing and new rules that have a significant impact on a substantial number of small entities to determine whether such rules should be continued, changed, or rescinded; provides for judicial review of an agency final rule for compliance with RFA requirements after the publication of such rule; and, grants federal courts of appeal jurisdiction to review all final rules issued in accordance with RFA.

Status UPDATE: unchanged from the September report.

H.R.229, the Michael Jon Newkirk Transportation Safety Enhancement Act of 2011

Congresswoman Sheila Jackson Lee (D-TX), Ranking Member of the House Subcommittee on Transportation Security of the House Committee on Homeland Security, introduced H.R. 229 on January 7, 2011. To date it has no cosponsors. It was referred to the Committee on Transportation and Infrastructure.

The legislation directs the Secretary of Transportation to withhold a graduated percentage of federal-aid highway funds of states for FY2014 and thereafter that do not enact or enforce a law that requires the annual inspection of registered motor vehicles so that they meet or exceed state motor vehicle standards (including the operability of vehicle seatbelts and speedometers).

The bill is named after Michael Jon Newkirk, an 18 year old who passed away after being involved in a head-on collision while a passenger in a friend's truck. The police report states that he was not wearing a seatbelt. However, on a visit to see where her son died, his mother, Suzanne, discovered why: it was broken. Upon closer investigation, she learned that the only kinds of seatbelts that require checks are lap belts and automatic seatbelts. But three-point harness seatbelts – the kind in most new cars – aren't specifically mentioned. Across the nation, nearly 20 states don't do any safety inspections at all – a process that usually includes checking seatbelts. That's when Suzanne began to work with Representative Lee to enact legislation to establish national inspection standards, including operable seatbelts, and require states to adhere to them.

Status UPDATE: unchanged from the September report.

H.R.164, the Damaged Vehicle Information Act

Congressman Cliff Stearns (R-FL), Chairman of the House Energy and Commerce Committee's Subcommittee on Oversight and Investigations, introduced H.R. 164 on January 5, 2011. To date the bill has no cosponsors. The bill was referred to the Committee on Energy and Commerce.

The bill directs the U.S. Department of Transportation's National Highway Traffic Safety Administration (NHTSA) to issue a regulation to require greater disclosure of information relating to the market value and safety of damaged motor vehicles. Specifically, it requires all persons who terminate a contract related to a motor vehicle due to flood or water damage, collision, fire damage, theft and recovery, or any other circumstance that adversely affects the fair market value of such motor vehicle, to disclose to the public, in a commercially reasonable, electronically accessible manner, the following: the vehicle identification number of the motor vehicle; the date of the termination of the contract; the odometer reading of the motor vehicle on the date of the termination of the contract; whether, as a result of the incident that resulted in the termination of the contract, one or more airbags in the motor vehicle were deployed; and, the cause of the termination of the contract, including whether such cause was flood or water damage, collision, fire damage, theft and recovery, or another cause. The proposed legislation also states that the private sector will be responsible to collect, aggregate and disclose to the public the fair market value and safety information with respect to the damaged vehicle and all such information shall be accessible by vehicle identification number.

In January 2009, The National Motor Vehicle Title Information System was implemented, providing a national database of vehicles compiled from state, salvage and insurer reporting. It requires insurance companies and salvage yards to report vehicles that are severely damaged or totaled, giving consumers access to such information as odometer readings and theft records. The implementation stemmed from a 2008 court case in which Public Citizen Inc. filed the suit to fight for a used car database that was established by Congress in 1992 in the Anti-Car Theft Act. However, the U.S. Department of Justice had never made the system available to the public.

Status UPDATE: unchanged from the September report.

H.R. 4471, the “Gasoline Regulations Act of 2012”

On May 17, the House Committee on Energy and Commerce reported H.R. 4471, the “Gasoline Regulations Act of 2012.” It has 15 (now 25) cosponsors.

The bill would establish a temporary interagency committee, chaired by the Secretary of Energy, to estimate the cumulative impacts of certain EPA rulemakings and actions on gasoline and diesel fuel prices, jobs, the economy, as well as other cumulative costs and cumulative benefits, and submit a final report to Congress within 210 days after enactment; defer until at least 6 months after submission of the final report the following new regulations: (i) Tier 3 motor vehicle emission and fuel standards; (ii) new or revised performance or emissions standards applicable to petroleum refineries; and (iii) new ozone standards; and, require EPA consider cost and feasibility in setting new ozone standards.

Status UPDATE: unchanged from the September report.

S. 3468, the “Independent Agency Regulatory Analysis Act of 2012”

On August 1, Senator Portman (R-OH) with cosponsors Sens. Collins (R-ME) and Warner (D-VA) introduced S.3468, the "Independent Agency Regulatory Analysis Act of

2012." The bill was referred to the Senate Homeland Security Committee. Under the bill, current and future White Houses would receive explicit authority to influence the rule-making process of non-independent regulatory agencies including the Federal Trade Commission, which is specifically identified as an independent agency pursuant to 44 USC 3502(5), and the Consumer Financial Protection Bureau which is generically referenced therein. The Federal Reserve is exempt.

The President, through an executive order, would be allowed to mandate at the minimum a 13-point test for rule-making. That includes finding "available alternatives to direct regulation," evaluating the "costs and the benefits," drafting "each rule to be simple and easy to understand" and periodically reviewing existing rules to make agencies "more effective or less burdensome."

For more "significant" rules — those that have an annual effect of at least \$100 million on the economy — independent agencies would have to submit their proposals to the Office of Information and Regulatory Affairs, an arm of the White House that acts as a sort of regulatory referee. A negative review from the Office would delay a rule for up to three months and force an agency to explain its approach.

Senator Lieberman, Chair of the Homeland Security Committee, has indicated that the Committee may take action on the bill this month although nothing has been scheduled as yet. While there is little time left on the legislative calendar, it is possible that this issue could find its way into the omnibus FY2013 appropriations bill.

If enacted, the bill would clearly impact various aspects of the regulatory process, the most obvious being timing.

Status UPDATE: unchanged from the September report.



To: National Independent Automobile Dealers Association
From: Shaun K. Petersen
Re: October 2012 Regulatory Update
Date: November 5, 2012

I. Federal Trade Commission

A. In October, the FTC entered into a Decision and Order with Franklin's Budget Car Sales, for alleged breach of privacy laws. The Complaint originated in July alleged that the dealership failed to comply with its privacy policy when it exposed confidential consumer information to a peer-to-peer file sharing system. Consumer's private information, including social security number, could be accessed by anyone logged into the peer-to-peer system. As a part of the settlement reached between the FTC and Franklin's, Franklin's is required to adopt and implement a privacy program and complete a biannual assessment by a qualified third-party for the next twenty years.

II. Consumer Financial Protection Bureau

A. The CFPB is now accepting and assisting individuals with complaints relating to individuals credit reports. The items the CFPB is looking for are: incorrect information, improper use, issues obtaining or monitoring credit reports and any consumer reporting independent investigations.

B. The CFPB released its final rule which defined "large market participants" in the debt collection industry. Beginning January 2, 2013, any firm which has in excess of \$10 million in annual receipts from consumer debt collection activities will be subject to the CFPB's supervisory authority. The rule includes three main types of debt collection: firms that may buy defaulted debt and collect the proceeds for themselves; firms that collect defaulted debt owned by another company in exchange for a fee; and debt collection attorneys that collect through litigation.

In overseeing this industry, the CFPB will evaluate whether debt collectors provide required disclosures; provide accurate information; have a consumer complaint and dispute resolution process; and communicate civilly and honestly with consumers.

III. Environmental Protection Agency

- A. The EPA entered into two settlement agreements for violations of underground storage tank regulations. The companies were cited for failing to comply with safeguards designed to prevent and control leaks of diesel and gasoline fuel from underground storage tanks. Those entities were fined \$8,000 and \$5,000, respectively.
- B. Two men from North Carolina were arrested and sentenced for conducting false onboard diagnostic inspections. One man was sentenced to three months jail and three months house arrest. The second man was sentenced to four months in jail and four months under house arrest. While conducting emissions test required under the Clean Air Act, the men collected higher than average fees for completing the inspection and allowed vehicles to pass the test which did not meet the minimum criteria.

IV. Internal Revenue Service

- A. The IRS announced an adjustment to retirement contribution limitations to reflect the increased cost-of-living index. Employees may now contribute \$17,500 a year into their 401(k), 403(b) and most 457 plans. Additionally, individuals may contribute \$5,500 to their IRA accounts. Additionally, changes have been made to the deductions allowed for IRA contributions and phase-out range categories. <http://www.irs.gov/uac/2013-Pension-Plan-Limitations>

V. National Highway Transportation Safety Administration

- A. NHTSA released a safety advisory on October 10, 2012, relating to the sale of counterfeit air bags for use as replacement parts for vehicles that have been involved in a crash. The counterfeit airbags look almost identical to certified, original parts and may even bear the insignia of manufacturers. The counterfeit air bags have been proven to malfunction including failing to deploy and exploding with shrapnel when deployed. NHSTA believes this issue effects less than .1% of the US fleet. A list of vehicles which may have had these replacement air bags installed is available at www.nhtsa.gov.

- B. In a fight against distracted driving, NHTSA is giving each state \$275,000 to train police officers on spotting texting while driving as well as educating consumers about the dangers. Massachusetts and Connecticut will be given additional monies to conduct a high-visibility awareness campaign.

VI. National Motor Vehicle Title Information System

- A. In the wake of Hurricane Sandy, NMVTIS released a safety advisory about flood damaged vehicles.