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August 30, 2013

To: NIADA
From: Federal Advocates
Subject: August Monthly Report

NOTE: Congress recessed on August 3 until September 9.

Rental Cars Recall

No additional legislative developments since the July report. On Tuesday, July 30, the Senate Commerce Committee reported S. 921, the rental car recall bill without amendment with the understanding that the Committee would continue working with the stakeholders. For the record, last month NIADA sent opposition letters to key Members of the Committee raising various concerns about the bill and advocating for inclusion of the NIADA/NADA amendment. In addition, this month NIADA surveyed its membership to get a better assessment of member rental car operations and the bills impact. Also monitoring developments for NAAA. No House bill introduced to date. Last Congress, Congresswoman Capps (D-CA) introduced a companion bill.

Auction Sales

We will continue to report on this issue in recognition of its importance and the possibility of congressional action at some point. However, to date there have been no further developments either from the Hill or between the industry and law enforcement.

CFPB Auto Lending

On June 20, 35 Republican Members of the U.S. House of Representatives sent a letter to CFPB Assistant Director of the Office of Fair Lending and Equal Opportunity, Patrice Ficklin, questioning the manner in which recent CFPB guidance regarding lending practices in the auto lending industry was rendered and requesting details concerning the process of analyzing potential fair lending violations. The letter comes on the heels of a similar inquiry made by 13 Democratic Members of the House Financial Services Committee to CFPB Director Richard Cordray on May 28, 2013. The CFPB guidance at

issue, contained within CFPB Bulletin 2013-02, advised bank and nonbank indirect auto financial institutions about compliance with federal fair lending requirements in connection with the practice by which auto dealers "mark up" the financial institution's risk-based buy rate and receive compensation based on the increased interest revenues.

The Republican letter takes issue with the CFPB "initiating [a] process without a public hearing, without public comment, and without releasing the data, methodology, or analysis it relied upon to support such an important change in policy." The letter notes that "allegations of disparate impact do not involve intentional conduct, but instead consist solely of statistical analysis of past transactions" and that any model assessing such impact must be reliable and accurate. Because the guidance fails to disclose the model for assessing fair lending violations, Congress requested the CFPB provide all pertinent details regarding its methodology to evaluate whether the statistical model supports its supervision and examination of financial institutions.

In addition to taking issue with the CFPB's statistical analysis, the Republican letter also characterized the ECOA compliance controls suggested in the CFPB bulletin as "onerous and unrealistic," noting that "restricting consumer choice is highly problematic." To support the controls prescribed by the guidance, the Republican letter requested that the CFPB provide "all studies, analysis, and information it relied upon in developing its guidance document." Specifically, the two congressional letters requested the analysis conducted by the CFPB on the impact of these prescribed controls on the auto lending industry and any coordination activities undertaken with other agencies in developing the guidance. The House members, like many in the auto industry, are concerned the guidance will have an adverse impact on competition, result in increased overall costs for consumers, and potentially exclude lower-income customers from the credit market entirely.

Amid these growing concerns regarding the CFPB's guidance and inquiry into auto finance practices, on June 20, Director Cordray provided a response to the May 28 Democrat letter. Mr. Cordray's response essentially reiterates both the CFPB's authority to supervise and investigate financial institutions engaged in auto finance and the CFPB's concerns that pricing discretion may create a significant risk of discrimination. In responding to the issues of the Democrat letter, Director Cordray indicated that the CFPB uses a proxy methodology to analyze disparate impact in the auto lending industry, though it is short on the specifics behind the methodology used. The CFPB response acknowledged that ECOA fair lending analysis is more complex than mortgage lending analysis given the absence of data similar to that collected in the mortgage context under the Home Mortgage Disclosure Act. Director Cordray also posited that the use of proxies for unavailable data is a widely accepted mathematical and systematic approach in various arenas, including for marketing in the auto industry itself. According to Director Cordray, the CFPB uses both surnames and geographic location as proxies for unavailable characteristics. The proxy analysis is then conducted through publicly available data from the Social Security Administration and Census Bureau.

Notwithstanding the information provided regarding the CFPB's methodology for

analyzing potential discrimination within the auto finance industry, it appears that both Members of Congress and industry participants remain skeptical of the accuracy of such an approach and continue to call for increased transparency from the CFPB regarding its due diligence in creating this proxy methodology and disclosure of the methodology itself. Opponents also question the manner in which the guidance was released and absence of public hearings or public comment periods. The most recent Republican letter raised these precise issues and requested a response from the CFPB within 30 days.

NADA is pursuing a bipartisan Senate letter to the CFPB expressing concern for its process and conclusions.

H.R. 749, Eliminate Privacy Notice Confusion Act

This was H.R. 5817 that was introduced by Congresswoman Luetkemeyer last Congress and passed the House. He reintroduced it in the new Congress on February 15 and the bill passed the House (with 73 cosponsors) on March 12 without amendment. On March 13, it was referred to the Senate Committee on Banking, Housing, and Urban Affairs. The bill amends the Gramm-Leach-Bliley Act to exempt from its annual privacy policy notice requirement any financial institution which: (1) provides nonpublic personal information only in accordance with specified requirements, and (2) has not changed its policies and practices with regard to disclosing nonpublic personal information from those disclosed in the most recent disclosure sent to consumers. On March 21, Senator Brown (D-OH) introduced companion bill S.635, the Privacy Notice Modernization Act of 2013. With 20 cosponsors (now 28), the bill was also referred to the Committee on Banking, Housing, and Urban Affairs.

Status Update: Two additional sponsors added to S.635 since the last report.

S.1029, the Regulatory Accountability Act of 2013

Introduced on May 23 by Senator Portman with 8 cosponsors (now 9) and referred to the Committee on Homeland Security and Governmental Affairs. The bill amends the Federal regulatory process by specifying issues agency must consider in a rulemaking; various notice requirements for major and high-impact rules; public comment and hearing procedures; judicial review; and, final rulemaking. Last Congress, the Senator introduced a similar bill – S.3468, the "Independent Agency Regulatory Analysis Act of 2012."

Status Update: No change since the last report.

H.R. 1663, Promoting Automotive Repair, Trade and Sales Act of 2013 (PARTS Act)

Introduced on April 23 by Congressman Issa (CA-49) on a bipartisan basis with 4 cosponsors and referred on June 14 to the Judiciary Subcommittee of jurisdiction. The bill makes it not an act of infringement, with respect to a design patent that claims a

component part of a motor vehicle as originally manufactured, to: (1) make, test, or offer to sell within the United States, or import into the United States, any article of manufacture that is similar or the same in appearance to the component part claimed in such design patent if the purpose of such article is for the repair of a motor vehicle to restore its appearance to as originally manufactured; and (2) use or sell within the United States any such same or similar articles for such restorations more than 30 months after the claimed component part is first offered for public sale as part of a motor vehicle in any country. Defines "component part" as a component part of the exterior of a motor vehicle only (such as a hood, fender, tail light, side mirror, or quarter panel), excluding an inflatable restraint system or other component part located in the interior of a motor vehicle. Specifies that an offer to sell includes any marketing of an article of manufacture to prospective purchasers or users and any pre-sale distribution. Applies this Act to any patent issued, or application filed, before, on, or after the effective date of this Act. Also on April 23 Senator Whitehouse (RI) introduced on a bipartisan basis the identical bill (S.780) with 2 cosponsors. The bill was referred the same day to the Judiciary Committee. NIADA reviewed the legislation and determined at this point not to lend its name in support. We will continue to monitor further developments.

H.R.2414, the Black Box Privacy Protection Act

On June 18, Congressman Capuano (MA-7) introduced H.R.2414, the Black Box Privacy protection Act with 10 cosponsors. On July 15, the bill was referred to the Homeland Security Committee Subcommittee. The bill amends the Automobile Information Disclosure Act to require manufacturers of new automobiles to disclose on the information label affixed to the window of the automobile: (1) the presence and location of an event data recorder (commonly referred to as a "black box"), (2) the type of information recorded and how such information is recorded, and (3) that the recording may be used in a law enforcement proceeding. Sets forth similar requirements for motorcycle manufacturers. Defines "event data recorder" as any device or means of technology installed in an automobile that records information such as automobile or motorcycle speed, seatbelt use, application of brakes, or other information pertinent to the operation of the automobile or motorcycle. Prohibits the manufacture, sale, offering for sale, or import into the United States of an automobile manufactured after 2015 (bearing a model year of 2016 or later) that is equipped with an event data recorder, unless the consumer can control the recording of information. Requires the event data recorder in an automobile or motorcycle, and any data recorded, to be considered the property of the owner of the automobile or motorcycle. Makes the retrieval or downloading of recorded data by any other person unlawful, except: (1) with the owner's consent, (2) in response to a court order, or (3) by a dealer or automotive technician to service the vehicle. Requires certain violations to be treated as unfair or deceptive acts or practices under the Federal Trade Commission Act.

MACMURRAY PETERSEN & SHUSTER LLP

To: **National Independent Automobile Dealers Association**

From: **Shaun K. Petersen**

Re: **August 2013 Regulatory Update**

Date: **September 3, 2013**

I. Consumer Financial Protection Bureau

A. Indirect Auto Lending Webinar

The CFPB, Federal Reserve Board, and the Department of Justice held a webinar related to fair lending in indirect automotive financing. The CFPB discussed the CFPB's recent indirect auto lending bulletin, its perception on the indirect auto finance model, as well as its jurisdiction and enforcement authority in fair lending. Other topics discussed were the process the Federal Reserve Board uses to investigate risk in indirect auto lending as well as enforcement cases brought by the DOJ.

The CFPB indicated that compliance with its indirect auto financing bulletin is required immediately.

To view the webcast, follow this link:

http://www.visualwebcaster.com/VWP/Player/advplayer.html?id=94628&uid=6882120&time=GEFHEMEKFMFEIF&digest=1sZ5Q124hNNa8zNWbP8Nkg&ls=

To view the slides used in the webcast, follow this link:

http://www.visualwebcaster.com/imageSlides/94628/Outlook%20Live%20Slides%20-%20Indirect%20Auto%20Webinar.pdf

B. CFPB Response to House Republican's Letter on Indirect Auto Lending Guidance

The CFPB responded to a letter from 35 House Republicans raising concerns about the CFPB's indirect auto lending guidance. The response, dated August 2, 2013, provided little substantive response to the concerns raised by the House members. The CFPB stated that it did not provide an

opportunity for interested parties to comment because the law did not require such notice and comment for general policy statements. Moreover, the CFPB did not provide any substantive response on the Republican's request for information on the methodology on how disparate impact would be demonstrated for a violation of the Equal Credit Opportunity Act to have occurred.

A copy of the letter can be found here:

http://www.infobytesblog.com/wp-content/uploads/2013/08/CFPB-Response-to-6-20-13-Republican-Letter-8-2-13.pdf

II. Department of Justice

No significant updates.

III. Department of Labor

No significant updates.

IV. Environmental Protection Agency

No significant updates.

V. Federal Trade Commission

No significant updates.

VI. Internal Revenue Service

The IRS has extended the date for highway vehicles over 55,000 GVW to file their Form 2290, Federal Highway Use tax return. The 2290 is usually due August 31; however this is the Saturday of Labor Day weekend, meaning the returns are due the next business day. Since the return cut off falls over the holiday weekend, the IRS will also be unable to accept acknowledge receipts of electronic filing.

VII. National Highway Traffic Safety Administration

NHTSA issued a final rule this month that will require auto and motorcycle manufacturers to provide consumers a free online search tool for to check for uncompleted recall information. All manufacturers must have the free tool available beginning August 14, 2014. The information must be searchable by VIN number and updated weekly. The search information will also be available at safercar.gov. The Rule will also require Manufacturers' to provide consumers notice of the recall within 60 days of the date the manufacturer notifies NHTSA.

VIII. National Motor Vehicle Title Information System

No significant updates.

IX. Significant State Law/Regulatory Updates

a. Pending Legislation

Wisconsin: A.B. 277
The House introduced legislation which would remove the reference to a maximum finance rate when retail installment contracts are refinanced or consolidated by a "sales finance company."

Massachusetts: H. B. 952
H.B. 952 is in the Joint Committee on Finance Services and is eligible for Executive Session. The bill provides additional consumer protections in the repair of damaged motor vehicles. It also provides that whenever repairs are necessary to the visible exterior sheet metal or plastic parts of a damaged motor vehicle, any insurer or repairer preparing a written estimate of the cost of such repairs shall clearly identify in such estimate each major generic crash part to be used which is not manufactured or supplied by the original manufacturer of the motor vehicle.

b. Passed Legislation

Illinois: H.B. 2773
In August, Illinois passed H.B. 2773. The bill amends the fee schedule for new and used vehicle dealers that is charged for inclusion in the Dealer Recovery Trust Fund to a graduated payment schedule based on the number of cars sold in the previous year. It also provides that dealers selling less than a specified number of vehicles a year are considered dealers for the purpose of the Fun.

X. Significant Case Law Updates

a. Georgia:

Wilcher v. Redding Swainsboro Ford Lincoln Mercury, Inc., 743 S.E. 2d 27 (Ct. App. GA, 2013)

A van carrying a driver and eight passengers left the roadway and crashed into a tree after the left front tire malfunctioned and the van's driver lost control, killing one of the passengers and injuring the others. The passengers contended that the auto dealer's "cursory walk around" and test drive of the van prior to purchasing it constituted an inspection, such that the auto dealer owed a duty to the purchaser to conduct such inspection non-negligently. The appeals court found that the only evidence presented by the passengers that the auto dealer inspected the vehicle was that he conducted a "cursory walk around" prior to purchasing the vehicle from another defendant. Georgia law does not obligate a retail to test any article sold by him in order to discover latent defects and is not negligent in failing to exercise care to determine whether the article is dangerous. However, if the retail undertakes the duty to inspect, he must do so non-negligently. Here, since the auto dealer sold the vehicle on an "as is" basis to the purchaser, did not undertake to inspect and made no

representations or warranties to the purchaser regarding the condition of the vehicle or its tires he was not liable to the passenger.

Raysoni v. Payless Auto Deals, LLC, 2013 Fulton County D. Rep. 2425

A customer purchased a vehicle that sustained frame damage and brought suit claiming the vehicle had been verbally misrepresented to her as "clean" vehicle without damage. The sales person even provided the consumer with a clean CarFax history report. Two months later, the consumer, after noticing a smell, took the vehicle to the repair shop where she was informed the vehicle had extensive frame damage. Once she became aware of the damage, she attempted to return the vehicle to the dealer, but they would not accept it. She then filed suit claiming the dealer misrepresented the vehicle and violated the consumer practices law. The Court denied the consumer recovery, pointing to the "numerous disclaimers" on the Buyer's Order including the "AS-IS No warranty" statement and a separate statement indicating "This vehicle was announced having unibody damage at the auction" and the dealer "strongly recommend customers should get vehicle inspected by a mechanic of their choice before making the purchase" in all caps.

b. Missouri

Johnson v. JF Enters., 400 S.W. 3d 763 (Supreme Court of Missouri)

Ms. Johnson came into the Defendant's dealership after receiving a direct mail piece advertising an extremely $100 per month payment. Once at the dealership she orally confirmed the monthly payment amount with the sales associate and purchased the vehicle. One the installment contract, the monthly payment was actually over $700. She again questioned this and was informed the dealership would reimburse her the difference between her monthly payment amount and the $100 advertised payment. In the paperwork at closing, the installment contract contained a merger clause and a one page arbitration agreement was signed by Ms. Johnson.

When the dealership failed to reimburse Ms. Johnson the difference, she brought suit in County Court. The dealership Defendant moved to compel arbitration. The trial court overruled the motion to compel arbitration and the Defendant appealed. The appeals court determined that the single page arbitration agreement was enforceable because multiple documents signed contemporaneously are to be construed together, absent evidence of intent to the contrary.