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May 31, 2013

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

### **Rental Cars Recall**

On May 9, Senator Schumer introduced S. 921, the “Raechel and Jacqueline Houck Safe Rental Car Act of 2013.” Eight cosponsors joined the legislation – Senators Blumenthal, Boxer, Casey, Feinstein, Gillibrand, McCaskill, Murkowski, and Schatz. On May 21, the bill was referred to the Senate Commerce Committee. Also on May 21, the Senate Commerce Subcommittee on Consumer Protection, Product Safety, and Insurance held a legislative hearing on the bill. Testifying at the hearing were David Strickland, Administrator, National Highway Traffic Safety Administration; Sharon Faulker, Executive Director, American Car Rental Association; Rosemary Shahan, President, Consumers for Auto Reliability and Safety; Mitch Bainwol, President and CEO, Alliance of Automobile Manufacturers; and Peter K. Welch, President, National Automobile Dealers Association. Prior to these witnesses, the Subcommittee received testimony from Carol S. Houck. Senator Schumer (D-NY) was also to testify with Houck but had a scheduling conflict. In attendance at the hearing from the Subcommittee were Senators McCaskill (Chair), Heller (Ranking Republican Member), Boxer, Blumenthal, and Blunt. Only Senators McCaskill and Boxer stayed for the entire hearing. Of note regarding the Members’ opening statements was that of Senator Boxer. She was very adamant on her commitment to getting the bill enacted into law. She said that “it was a no brainer. a common sense approach” and she was going “to be dogged” about it. She referred to her May 7, 2012, voluntary agreement with the major rental companies “until a bill could be enacted into law.” Houck’s testimony, as expected, was very emotional. She is the mother of the two women who were killed in the accident caused by a defect in a rental car that the rental car company knew about but did not correct. S.921 is named after her two daughters. She is an attorney who learned about the pending recall on her daughters’ rental car from friends. She also learned that the same car had been rented three other times before her daughters rented it. She said that “a car subject to recall should not be rented no matter what.” She also said that used car dealers should be required to repair defects. Strickland spoke in strong support of the bill. He called it a “fantastic bill” and an

opportunity for NHTSA to address “a wrong that needs to be made right.” He referred to a November 2012 survey (which is still ongoing) of new car dealers and major rental car companies as to how long it takes them to correct a recall defect once they receive notice. Apparently, one year after receiving notice, only 60% of the defects have been corrected. He also said that dealers should not be the ones to decide which recall defects should be fixed. He did not mention used car dealers in his remarks. Faulkner also endorsed the legislation, saying that they were an active participant in its formulation and that safety is their number one priority. They had apparently negotiated some issues to their satisfaction such as the time frame for grounding vehicles. She did not mention used car dealers in her remarks. Shahan is one the driving forces behind the legislation as she not only represents a key consumer group but liaisons with other consumer groups such as AAA, Advocates for Highway and Auto Safety, MADD, etc. She said that she had surveyed a number of states as to whether consumers support the legislation. What she heard most often from them, she said, was “this isn’t a law already!?” and/or “they have to be told” not to rent cars subject to recalls. She did not reference used car dealers. Bainwol said that they support the legislation in principle but have some concerns which he prefaced by pointing out that there has been no other car rental recall defect fatality in the last 10 years, and that they were not part of the bill crafting process. He said that as currently drafted the bill raises some consequences that are anti-consumer: first, it places rental cars in a higher priority for defect repairs to the disadvantage of the general public who might be needing car repairs; and, second, it will increase the cost of renting a car because of the “loss of use liability.” He concluded that the bill needs work and he pledged to work with the Subcommittee as he is open to other approaches. He did not mention used car dealers. Welch also said that they support the purposes of the bill but had concerns: first, that not all recalls are the same (he used the example of a recall for a defective visor); and, second, that the bill approach is overly broad in that big businesses and small businesses require different treatments. He did not mention the amendment that NADA/NIADA have drafted or used car dealers. During the question and answer session, the Members focused on the safety concerns for the driving public. Again, Boxer was the more aggressive questioner and Bainwol the focus of most of the questions as the Members took issue with much of what he said. No one mentioned or asked any questions related to used car dealers. In the end, McCaskill did leave open the opportunity to work with those that have concerns about the bill. Following the hearing, NIADA submitted “opposition” letters to key members of the Subcommittee with reference to NIADA presence in their states as well as the amendment NADA/NIADA jointly drafted and support (see attachments). The Subcommittee’s next steps and timing are unclear. For witnesses’ written statements, see the link below. Click on the name of the witness and it takes you to a page that has a link under Related Files: Testimony.

[http://www.commerce.senate.gov/public/index.cfm?p=Hearings&ContentRecord\\_id=6940f58c-a3f8-43b5-a33c-dbdb79352b12&ContentType\\_id=14f995b9-dfa5-407a-9d35-56cc7152a7ed&Group\\_id=b06c39af-e033-4cba-9221-de668ca1978a](http://www.commerce.senate.gov/public/index.cfm?p=Hearings&ContentRecord_id=6940f58c-a3f8-43b5-a33c-dbdb79352b12&ContentType_id=14f995b9-dfa5-407a-9d35-56cc7152a7ed&Group_id=b06c39af-e033-4cba-9221-de668ca1978a)

[http://www.commerce.senate.gov/public/index.cfm?p=Hearings&ContentRecord\\_id=6940f58c-a3f8-43b5-a33c-dbdb79352b12&ContentType\\_id=14f995b9-dfa5-407a-9d35-56cc7152a7ed&Group\\_id=b06c39af-e033-4cba-9221](http://www.commerce.senate.gov/public/index.cfm?p=Hearings&ContentRecord_id=6940f58c-a3f8-43b5-a33c-dbdb79352b12&ContentType_id=14f995b9-dfa5-407a-9d35-56cc7152a7ed&Group_id=b06c39af-e033-4cba-9221)

## **Auction Sales**

To review, we will continue to report on this issue even if there are no additional monthly developments. We do so in recognition of its importance and the possibility of congressional action at some point. However, to date there have been no further developments from the Hill. Also, no further developments between the industry and law enforcement. When Senator Rockefeller, Chair of the Senate Commerce Committee that has jurisdiction over this issue, announced his legislative priorities for this year, he did not mention the auction sale issue.

## **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, the bill was also referred to the Committee on Banking, Housing, and Urban Affairs.

STATUS UPDATE: Nine additional cosponsors added to S. 635 since the last report.



**To:** National Independent Automobile Dealers Association  
**From:** Shaun K. Petersen  
**Re:** May 2013 Regulatory Update  
**Date:** May 31, 2013

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**I. Consumer Financial Protection Bureau**

- A. The Wall Street Journal reports that several auto lenders have received subpoenas from the CFPB related to the sale of F&I products such as service contracts and other add-ons. The reports suggest that the CFPB may be looking at whether the terms and conditions of these add-on products are adequately disclosed. The CFPB has not confirmed the reports.
- B. In March, the CFPB issued a guidance document relating to potential discrimination in indirect auto financing. (See March 2013 regulatory report). In response to that document, 13 House Democrats sent a letter to Director Richard Cordray asking for information behind the position that the CFPB took in the guidance document. The Congressmen have asked for, among other things, background information behind the origination and investigation of the alleged practices in the auto industry as well as the compliance expectations contained in the guidance. The letter can be found here:  
<http://newsmanager.commpartners.com/nadah2/downloads/CFPBAutodealerLetter.pdf>

**II. Department of Justice**

- A. In a presentation at the George Mason University of Law, Deputy John Seward told attendees that the Department of Justice is receiving more reported violations of fair lending in auto loans. He mentioned that the DOJ is working closely with the CFPB to investigate fair lending. He specifically mentioned that some come from indirect auto lending and some involve buy-here, pay-here dealerships. The DOJ did not elaborate on his statements.

**III. Federal Trade Commission**

- A. The FTC testified in a Congressional subcommittee about its study on the accuracy of credit reports. The Commission emphasized that errors in credit reports and scores can cause consumers to be denied credit or receive credit at higher rates than they otherwise would be entitled to. The Commission also emphasized that it will continue aggressive enforcement of applicable credit reporting laws.
- B. The FTC sent its annual report to the CFPB detailing the FTC's enforcement and other actions taken related to the Truth in Lending Act and other financial laws. A copy of the letter can be found at: <http://www.ftc.gov/os/2013/05/130514cfpbreport.pdf>

**IV. Internal Revenue Service**

No significant updates

**V. Environmental Protection Agency**

No significant updates

**VI. Department of Labor**

No significant updates

**VII. National Highway Traffic Safety Administration**

No significant updates

**VIII. National Motor Vehicle Title Information System**

- A. The National Advisory Board meeting originally scheduled to be held in March convened via teleconference earlier this month.

**IX. Significant State Law/Regulatory Updates**

**a. Pending Legislation**

New Jersey

A.B. 4042 would allow consumers to walk away from vehicle purchases with major nonconformities or material defects. Under the bill, consumers purchasing used cars would be able to request that the dealer immediately repurchase the used motor vehicle rather than waiting for the dealer to attempt to fix the problem. Similarly, new car buyers would be able to request that the manufacturer, co-manufacturer, or post-manufacturing modifier accept immediate return of the problem motor vehicle.

Indiana

S.B. 194 would allow purchasers of a used motor vehicle from a dealer to rescind the purchase of the vehicle within 72 hours after purchase under certain circumstances if the vehicle has a defect that substantially impairs the use, market value, or safety of the vehicle.

Connecticut

S.B. 318 was passed and sent to the House this month. The bill provides that a used motor vehicle may be sold "as is" by a dealer only if its cash purchase price is less than three thousand dollars or if such used motor vehicle is nine years of age or older, which age shall be calculated from the first day in January of the designated model year of such vehicle.

California

A.B. 964 is still in the Assembly in its third reading. The Bill prohibits the holder of any motor vehicle dealer's license from selling a vehicle as part of a used vehicle certification program if the dealer knows or should have known that the vehicle is the subject of an open or unaddressed recall. It also prohibits such dealer from selling any used car, including a car that is not part of a used vehicle certification program, without providing the buyer a completed inspection report. Prohibits the sale of a used car without disclosure indicating which conditions are present.

S.B. 686 has passed the Senate and has been sent to the Assembly. The bill would prohibit dealers from reselling or offer for sale a new or used vehicle that is subject to a manufacturer's recall, unless recall work performed.

**b. Passed Legislation**

Nevada

A.B. 282 passed this month and provides that certain persons may recover on the bond or deposit that each broker, manufacturer, distributor, dealer and rebuilder of motor vehicles is required to procure or make with the Department of Motor Vehicles; and providing other matters properly relating thereto.

**X. Significant Case Law Updates**

California: Vasquez v. Greene Motors, Inc., 214 Cal. App. 4th 1172

A retail installment sales contract contained an arbitration clause, which was located on the reverse side of the preprinted contract and had a large bold header in capital letters. A statement above the final signature line, also in capital letters, noted the presence of an arbitration clause on the reverse side. The consumer asserted that he had not read the arbitration clause and was unaware of its existence when he bought the car. The court held that the consumer could not avoid the arbitration clause under Code Civ. Proc., § 1281, based on unconscionability under Civ. Code, § 1670.5, because the degree of procedural unconscionability arising from the use of the preprinted contract was minimal. The arbitration clause was conspicuous, and lengthy two-sided contract forms were commonly used by

dealers to comply with Civ. Code, § 2981.9, and other statutes. Moreover, the only suggestion of substantive unconscionability was a one-sided term pertaining to a second arbitration. Requiring the consumer to pay his own costs did not violate Code Civ. Proc., § 1284.3, subd. (a), and was not unconscionable absent evidence that arbitration would be prohibitively expensive.