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September 27, 2013

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

DC Visit

On September 12, Steve Jordan, Shaun Peterson and Federal Advocates held four meetings in Washington, D.C. The first was with the staff of Representative Mike Kelly. Kelly is a Republican from Pennsylvania's 3rd District and is the Congressman representing NIADA Treasurer Andy Gabler. He is also a member of the Congressional Auto Caucus, a group of House Members with an interest in the automotive industry. Kelly will speak at the NIADA Leadership Conference in D.C. in November. The purpose of meeting was to introduce NIADA. Suanne Edmiston, Legislative Correspondent, took the meeting. NIADA provided a history and explanation of its mission, particularly as it relates to the role it plays in advocating for the independent dealer in D.C. Information packets were provided and staff was invited to contact us with any questions or for any information about the industry. The next meeting was with Senator Dean Heller's (R-Nev) Legislative Assistant, Josh Finestone. Heller is the Ranking Member on the Subcommittee on Consumer Protection, Product Safety and Insurance that has jurisdiction over the rental recall bill. After receiving NIADA's opposition letter to the bill, Heller's office contacted NIADA and requested a meeting to become more familiar with the Association. The meeting focused almost exclusively on the rental recall bill itself. Finestone said that he did not believe the bill would move beyond its current status. He agreed to inform the Association if circumstances change. Two other meetings – with the CFPB and the FTC – were attended by Steve and Shaun only and will be reported in Shaun's September regulatory report.

Rental Cars Recall

Consistent with the report NIADA received from Finestone above, no additional legislative developments since the August 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. To review, 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, last 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 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 House sent a letter to CFPB questioning the manner in which its recent 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 following a similar inquiry made by 13 Democratic Members of the House Financial Services Committee to CFPB on May 28, 2013. The CFPB guidance at issue 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, the letter requested that 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.

On June 20, CFPB provided a response to the May 28 Democrat letter which essentially reiterated 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. CFPB stated that it used a proxy methodology that is a widely accepted mathematical and systematic approach in various arenas, including for marketing in the auto industry itself. The proxy analysis is conducted through publicly available data from the Social Security Administration and Census Bureau.

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 29), the bill was also referred to the Committee on Banking, Housing, and Urban Affairs.

Status Update: One additional sponsor 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.

Status Update: No change since the last report.

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 (13) 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.

Status Update: Three additional cosponsors added since the last report.

MacMurray Petersen & Shuster LLP

To: **National Independent Automobile Dealers Association**

From: **Shaun K. Petersen**

Re: **September 2013 Regulatory Update**

Date: **October 2, 2013**

I. Consumer Financial Protection Bureau

a. Bulletin regarding furnishers duty to review information related to consumer disputes under FCRA

The CFPB issued a bulletin to "furnishers", as that term is defined in the Fair Credit Reporting Act, to review all relevant information that is forwarded to them from a credit reporting agency (CRAs) in connection with a consumer's dispute to information listed on a credit report. The CFPB expects furnishers to have reasonable systems and technologies in place to handle notices of disputes received from CRAs and information regarding disputes, including documentation forwarded by CRAs. Furnishers not currently complying with this expectation are advised to "take immediate steps" to comply with the FCRA. Those actions include:

- Maintaining a system that reasonably allows the furnisher to receive information regarding disputes from CRAs, including supporting documentation;
- Conducting an investigation of disputed information that includes a review of "all relevant information" forwarded by the CRA and the furnisher's own information with respect to the dispute;
- Reporting the results of the investigation to the CRA that sent the dispute;
- Providing corrected information to every nationwide CRA that received disputed information found to be inaccurate or incomplete; and
- Modifying, deleting, or permanently blocking disputed information that is found to incomplete, inaccurate, or could not be verified.

A copy of the bulletin can be found here:
http://files.consumerfinance.gov/f/201309_cfpb_bulletin_furnishers.pdf

b. Discrimination Inquiries

Bloomberg reports that as many as 7 auto lenders, including Toyota Motor Credit and American Honda Finance, are being investigated by the CFPB and DOJ for possible discriminatory conduct in their lending practices. The two captive finance companies stated in regulatory filings stated that the CFPB and DOJ requested information from it about pricing practices for loans the companies fund for dealers. CFPB and DOJ declined comment.

c. GLBA Privacy Exemption

The CFPB joined the SEC, the FTC, and other regulators in the issuing a guidance document exempting financial from the strict provisions of the Gramm-Leach-Bliley Act (GLBA) the reporting of suspected financial abuse of the elderly to appropriate state, local, and federal agencies.

Section 502(a) of GLBA prohibits the disclosure of personal, nonpublic financial information about consumers to unaffiliated third parties. Section 502(e) contains exceptions to that prohibition. The guidance document interprets paragraphs (e)(3)(B), (e)(5), and (e)(8) of Section 502(e) as authorizing a financial institution to appropriate government agencies for the purpose of reporting suspected financial abuse of older adults.

A copy of the document can be found here:
http://files.consumerfinance.gov/f/201309_cfpb_elder-abuse-guidance.pdf

d. Meeting with CFPB personnel

Executive Vice President Steve Jordan and I met with CFPB personnel in Washington on September 12. Earlier this spring, Director Richard Cordray announced the creation of a new office at the CFPB, the Office of Financial Institutions & Business Liaison. The purpose of this office is to connect the CFPB with bank and nonbank trade associations, financial institutions, and businesses to enhance collaboration and communication. Dan Smith was appointed to be the Assistant Director managing that office. We felt it was important to formally introduce Mr. Smith to the NIADA.

Eric Reusch, a staff member of the Installment and Liquidity Lending Markets division of the CFPB, also attending the meeting along with Craig Crowie, one of the attorneys for the CFPB. Steve and I have met previously with Mr. Reusch.

After an introduction to the NIADA for Mr. Smith and Mr. Crowie's benefit, both parties discussed substantive issues about the work that the CFPB is doing in the automotive finance sector. The CFPB encouraged us to carefully review its recent settlement with US Bank over the MILES program offered to military members. The CFPB reinforced its strong interest in military matters and the relationship between financiers and the military. We informed the CFPB staff of our interest in protecting the military members and some of the projects we have undertaken to make the car buying/financing experience easier for them.

We also discussed the bulletin that the CFPB issued on indirect auto lending. The CFPB unequivocally stated that it was not their intent to regulate dealers by proxy. They also informed us that it was not their intent to require finance companies to pay dealers by flat fee, insinuating that the flat fee comment was intended to be a passing mention and nothing more. We expressed our concern that the flat fee was even mentioned in the bulletin particularly in light of the fact that the CFPB has a statement on its website directing consumers to ask what the buy rate is and offer to pay the buy rate plus a flat fee. The CFPB did not have much of a response to that concern.

In addition, we asked the CFPB if they had any benchmark for the industry as to what would be considered a disparate impact across a financier's portfolio. The CFPB confirmed that they did not have a specific benchmark, but rather, would consider this on a case by case basis examining the facts and circumstances unique to that particular lender. We were concerned that this does not provide regulatory certainty.

Perhaps the biggest point of emphasis the CFPB left with us was the desire to have NIADA preach the importance for businesses to have a compliance management system in place. The CFPB looks more kindly on those businesses that have invested in compliance, a key element of its responsible business conduct bulletin issued over the summer.

When asked about a permanent replacement for former Assistant Director Richard Hackett, the CFPB staff confirmed that no one has yet been hired.

As we concluded our meeting, we reemphasized our desire to be partners with the CFPB on matters that we could assist with. We offered to provide them with data about the industry particularly related to buy here pay here.

It should be noted that the CFPB has agreed to have someone speak to us at the Leadership Conference. Those efforts are being coordinated between me and Dan Smith's office.

II. Department of Justice

a. The Department of Justice settled a law suit against Union Auto Sales Inc., doing business as Union Mitsubishi ("Union"), for violations of the Equal Credit Opportunity Act. Union allegedly charged non-Asian customers higher interest rate markups than other customers over a period of at least three years. A large portion of the customers who received higher interest rate markups were Hispanic. As part of the settlement, Union agreed to pay $125,000 to non-Asian customers who were charged higher dealer interest rate markups. Nara Bank, the lender which financed a portion of Union's sales, entered into a consent decree with the Federal Reserve Board in 2009. The Federal Reserve Board referred Union to the Department of Justice for investigation.

b. Nine Japanese based companies and two executives plead guilty to and agreed to pay a total of $740 million in criminal fines for their roles in conspiracies to fix the price of more than 30 different parts sold to US car manufacturers.

III. Department of Labor

No Significant Activity

IV. Environmental Protection Agency

a. Used Vehicle Fuel Economy Label

The U.S. Energy Department and the Environmental Protection Agency released a new label that highlights EPA fuel economy estimates plus CO2 estimates for used vehicles. The new labels can be downloaded at **FuelEconomy.gov**.

V. Federal Trade Commission

a. Advertising Settlements

In September, the Federal Trade Commission agreed to settle two administrative actions against new car dealerships for their alleged deceptive advertisements. Both lawsuits related to deceptively including rebates in the advertised price of a vehicle in internet and newspaper advertisements.

The FTC's complaint against Timonium Chrysler, Inc. of Cockeysville, Maryland alleged the dealer was offering "dealer discounts" or "internet prices" which were actually a series of small rebates that not all consumers would qualify for. The "internet price" would include rebates for military service members, recent college graduates, bank specific rebates and so forth. Even if the consumer qualified for all the small rebates, the rebates would not add up to the advertised discount in all instances.

In the complaint against Ganley Ford West, Inc., of Cleveland, Ohio, the FTC alleged the dealer failed to disclose the advertised discount only applied to more expensive versions of the vehicle then the one advertised. For example, the advertisement would offer $12,000 off MSRP next to a generic F-150 picture (with a $23,000+ MSRP) when in actuality the $12,000 off only applied to the F-150 Lariat which carries a $45,000+ MSRP.

As part of the settlement agreement between the dealers and the FTC, the dealers are prohibited from advertising prices or discounts unless accompanied by clear disclosures of any qualifications or restrictions for the savings to apply. Further, the dealers must maintain and make available copies of all advertisements and promotional materials to the FTC for the next five years.

b. FDCPA Settlement

The FTC settled with a California-based debt collector for violations of the Fair Debt Collections Practices Act. As part of the lawsuit, the FTC alleged the debt collector illegally revealed debts to consumer's family members and friends by sending envelopes with "a large arm shaking money from a consumer who is strung upside down." This violated FDCPA because the collector cannot indicate the consumer may owe a debt. The collector also misrepresented itself to consumers via telephone calls and text messages.

c. Do Not Call Fees

As of October 1, 2013 the fees for accessing the National Do Not Call Registry will increase. The fees will increase $1, to $59, for access to a single area code, with a maximum charge of $16,228 for all area codes nationwide.

d. Meeting with FTC Personnel

Executive Vice President Steve Jordan and I met with FTC personnel in Washington on September 12. We met with James Reilly Dolan, who is the Acting Associate Director of the Division and two staff attorneys. The purpose of this meeting was to introduce Mr. Dolan to NIADA given his recent appointment to his position.

After Steve provided the history and mission of the association, we had a general discussion regarding some issues that were a concern to the FTC. The staff attorneys emphasized their recent settlement with two dealers over advertising issues and expressed concern that dealers are making offers and either not disclosing all of the terms and conditions of the offer or were burying them in a manner that was not clear and conspicuous.

In addition, we discussed the concerns the FTC has over spot delivery where they believe it turns into "yo-yo financing." The FTC did not provide any specific information or specific complaints related to their concern, but rather spoke on a theoretical level. I asked if the FTC intended to introduce formal regulation on the matter, and they declined to discuss their intentions.

We also discussed issues related to GPS/starter interrupt devices. We provided the FTC with some information on how we understand the technology to be used and our position that the use of such devices should be clearly disclosed to the consumer. Again, the FTC declined to discuss what if any future requirements would be placed on dealers relative to the use of such devices.

Just as we heard from the CFPB, the FTC also asked us to emphasize the need for dealers to have a viable compliance management system including the tracking of consumer complaints. The FTC stated that the decision to impose a fine or the amount of the fine would be based in part on the dealer's compliance management system.

We concluded our meeting reiterating our desire to partner with the FTC on matters where we could, including updates to the guide on complying with the Used Car Rule, once the final rule is released.

It should be noted that Mr. Dolan is confirmed to speak at our Leadership Conference in November.

VI. Internal Revenue Service

a. The IRS released Notice 2013-61 providing guidance for same-sex married couples filing tax returns in the wake of the Supreme Court decisions earlier this year. Couples married in any state which recognizes same sex marriage will not be required to file taxes as "married filing jointly" or "married filing separately." Couples may also amend their 2010, 2011 and 2012 tax returns and claim deductions. Additionally, employees who purchased employer provided health insurance for their spouse may treat the payment as pre-tax and excludable from income.

b. For tax payers who requested an automatic six month extension to file their federal income taxes must file by October 15th, unless special circumstances apply (i.e. serving in a combat zone). Tax payers may want to consult Notice 2013-77 for often overlooked tax benefits.

VII. National Highway Traffic Safety Administration

No Significant Activity

VIII. National Motor Vehicle Title Information System

No Significant Activity

IX. Significant State Law/Regulatory Updates

a. **Pending Legislation/Regulation**

i. Kentucky: 2013 KY 20542

The commission may deny an application for a license if the name or proposed trade name of the licensee is the same or so similar to the trade name of an existing licensee that the proposed name would confuse or otherwise mislead the public into believing that the two (2) entities are the same or related. If no other grounds are cited for the denial of the application, the applicant may reapply with a new trade name within ten (10) days of denial without remitting an additional application fee.

ii. Kentucky: 2013 KY 20544

Adds "electronic" medium in the definition of Advertising in its rules on motor vehicle advertising.

iii. New Jersey: A.B. 6310

Requires disclosure of storm or flood damage requiring repairs prior to vehicle sales; authorizes a secure power of attorney; authorizes a dealer to make such disclosure on the certificate of title.

b. **Passed Legislation/Regulations**

i. Mississippi: 2013 MS Regulation 13854

Changed regulations to require a "full disclosure" when advertising financed vehicles. Each disclosure must include: year, make model, stock number, amount of down payment, amount of monthly payment, applicable APR, number of payments, the fact its "with approved credit" and finally that the price is plus tax, title and doc fee. The regulation also created a new requirement for Addendum stickers when adding equipment to vehicles; discount ads and other minor grammatical/syntax changes.

ii. Nebraska: 2013 NE L.B. 165

Changed provisions relating to motor vehicle dealer warranty service; relates to compensation schedules and prevailing wage rates for tire repair or replacement.

X. Significant Case Law Updates

a. **Florida**
Beam v. Domani Motor Cars, Inc., 922 F. Supp. 2d 1338

Plaintiff purchased a 1970 Chevrolet Chevelle from a dealership with an odometer reading of 56,537 miles. This reading was reflected in the odometer disclosure as well. Once Plaintiff drove the vehicle from the dealership to his home, he realized the odometer was not functioning. Plaintiff demanded the dealership refund his money and take back the vehicle, however the dealer would not. Plaintiff then commenced the lawsuit, alleging violations of the Federal Odometer Act. The dealer defending the lawsuit, claiming that since the Chevelle was over 10 years old it was exempt from the odometer disclosure law. This court found that the dealer was exempt from violations of the Odometer Act for its misrepresentation on the odometer disclosure that the odometer was working and read 56,537. However, the court did find the dealership liable for violations of the Odometer Act for tampering with odometers and allowing a vehicle with a non-operational odometer to be driving on public streets or highways.