



Taskforce on Federal Consumer Financial Law
Bureau of Consumer Financial Protection
1700 G Street NW
Washington, DC 20552

Re: Comments in Response to Request for Information to Assist the Taskforce on Federal Consumer Financial Law [Docket No. CFPB-2020-0013]

The Association of Dealership Compliance Officers ("ADCO") respectfully submits these comments on the Consumer Financial Protection Bureau's ("CFPB" or "Bureau") Request for Information to Assist the Taskforce on Federal Consumer Financial Law ("Taskforce") regarding harmonizing, modernizing, and updating the federal consumer financial laws.

ADCO's mission is to reduce business risk for the dealer, protect the dealer's bottom line and enhance the reputation of the dealership within the community. This mission is completed by training the dealership's compliance professionals and providing additional educational opportunities and resources to build and maintain an effective dealership compliance management system and ethics program.

ADCO appreciates the opportunity to comment on the Taskforce's studies regarding how the Bureau may improve:

- the expansion of access to consumer financial products and services;
- the protection and use of consumer data;
- regulations the Bureau writes and enforces;
- federal and state coordination; and
- the market for consumer financial products and services.

Below we suggest several areas in which the CFPB could further the above goals. Under each area (A-E) is a recitation of the specific question to which ADCO responds and ADCO's response.

A. Expanding Access

Question #6: Should the Bureau clarify its position on disparate impact theory under the Equal Credit Opportunity Act? If so, what should be the Bureau's position?

ADCO Response #6: ADCO believes that the Bureau should clarify its position on disparate impact theory under the Equal Credit Opportunity Act ("ECOA"). ADCO understands that a finding of disparate impact is typically established by a statistical evaluation of past credit transactions. A dealer is not able to ensure it is complying with the ECOA/Regulation B solely by training its employees to avoid considering the prohibited factors under ECOA/Regulation B when they and/or their finance sources are making credit decisions.

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Dealers must also ensure that their policy for determining the amount they may earn when arranging financing for their customers will not result in post-transaction claims that the policy resulted in a negative statistical disparity in the amount of dealer participation paid by customers in a protected class.

To that end, ADCO recommends the Bureau adopt the Dealer Participation Certification Form found at Appendix D in the National Automobile Dealer Association's *Fair Credit Policy* and *Fair Credit Compliance Program* (found at <https://www.nada.org/faircreditprogram/>) as a safe harbor form for a dealer's compliance with ECOA/Regulation B.

With the Dealer Participation Certification Form, the dealer follows a pre-set amount of compensation when arranging financing for its customers, but can make and document downward adjustments to that amount in the event that one or more predetermined conditions occur. Some of the examples of such predetermined conditions include: (i) dealer participation limited by finance source; (ii) customer stated monthly payment constraint of a certain amount; (iii) customer's competing offer from another dealer of a certain %; (iv) a promotional offer that the dealer extends to all customers on the same terms; (v) customer qualified for a subvented interest rate from a manufacturer, finance source, or other non-affiliated third party; (vi) customer qualified for an employee incentive program; and (vii) customer purchased a vehicle that satisfied the dealer's predetermined inventory reduction criteria. Adoption by the Bureau of a properly completed Dealer Participation Certification Form as a safe harbor would help ensure a dealer's compliance with the ECOA and Regulation B.

B. Consumer Data

Question #9. Most States have enacted laws that afford consumers certain protections in the event of a data breach. There is considerable variation among these laws, including the triggering events for coverage by the law and the requirements and remedies relating to a breach. Would Federal legislation, regulation, or guidance addressing data breaches be desirable? Why or why not? Would it be desirable to have a uniform national standard for data breach obligations? Why or why not?

ADCO Response #9: ADCO believes that Federal legislation addressing data breaches on a national basis and a uniform national standard for data breach obligations would be desirable. It is particularly difficult for dealers that have dealerships in several states to track the individual and potentially different state requirements if a data breach occurs. In the absence of a federal law and a uniform set of standards or guidelines, the states have developed their own set of definitions, timing, notice requirements, remedies, etc. One of the difficulties in handling and responding to a data breach is the different state laws and requirements that a dealer must follow; rather than being able to follow a national set of requirements and standards. Therefore, ADCO recommends that Federal legislation addressing data breaches on a national basis and a uniform national standard for data breach obligations be developed, passed by Congress and implemented.

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C. The Regulations

Question #12. Uncertainty can increase compliance costs and litigation risk without benefitting consumers. Are there areas of significant ambiguity or inconsistency in the regulations? Where would regulations benefit significantly from increased clarity or harmonization—both with respect to the Bureau's regulations and with respect to overlap, duplication, or inconsistency with regulations issued by other Federal agencies? Please explain the lack of clarity and how the regulations should be clarified.

ADCO Response #12: ADCO believes that some of the federal laws and regulations are ambiguous. In addition, some of the federal and state laws and regulations appear to overlap. Some examples of potential ambiguity and overlap include:

Buyers Guide. The FTC Buyers Guide is a federally required form, but each state deals with it differently. The Buyers Guide is not actively enforced in the states of Michigan or Ohio by state or federal regulators. However, it's an issue looming over dealers in those states in that, if a state agent does check and finds the dealer to be in violation, the dealer's noncompliance will be reported to federal regulators. So, the dealer will be enforced against by the state and also by the Federal Trade Commission.

Odometer Statement. The odometer statement is an overlap in every state. Michigan has a regulation that requires odometer statements to be wet-ink signed, which is impractical, if not impossible during the current Coronavirus crisis and state shelter-in-place orders. It is the only form in that state that must be wet-signed. President Obama signed a law asking NHTSA to promulgate rules so the odometer statement could be signed electronically. The rules were finally adopted in the fall of 2019. However, the problem is that the states still have to adopt new rules that allow the odometer statement to be signed electronically, and they haven't done it, along with the other title and/or registration documents for the state.

Cosigner Notice. There is also some ambiguity about the cosigner notice. Bank retail installment contracts say "applicant" and "co-applicant." The definition of what a cosigner is varies depending on what finance source the dealer may be working with on a transaction. Some banks require cosigner notices, some don't, because a dealer may no longer have cosigners on the contract.

TILA/Regulation Z Disclosures. There also appears to be some ambiguity under Regulation Z because federal disclosures are required before consummation, but the federal rules leave it up to the individual state to define consummation.

ESIGN Act and TILA/Reg Z Disclosures. Although the ESIGN Act has been in effect since 2000, TILA/Reg Z requires that a dealer provide a credit buyer with the required TILA/Reg Z disclosures in writing in a form the buyer can keep prior to consummation of the transaction. See Reg Z § 1026.17(a)(1).

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The required TILA/Reg Z disclosures may be provided in electronic form, subject to compliance with the consumer consent and other applicable provisions of ESIGN. See Reg Z § 1026.17(a)(1) and 15 U.S.C. § 7001 et seq., specifically § 7001(c).

However, if the ESIGN consumer consent process is not followed, and the reasonable demonstration step is not taken, which is particularly troublesome for a dealer in a face-to-face setting at the dealership, then a dealer must satisfy the federal TILA/Reg Z requirement by printing out a paper contract and providing it to the buyer in advance of electronic or wet ink signing. In a face-to-face transaction at the dealership, a dealer still has to give the customer a paper copy of the federal required disclosures, which defeats the whole purpose of going through ESIGN. The requirements have never been updated. The requirement to give the ESIGN § 101(c) disclosures and go through a reasonable demonstration requirement doesn't quite work in a face-to-face setting with a customer at the dealership.

Question #13. Where have regulations failed to keep up with rapid changes in consumer financial services markets? Are regulatory changes needed to address new products and services and the way consumers obtain them? Are there regulations that have outlived their usefulness? Are there new regulations that might be needed? Are there regulatory areas or specific regulations now sufficiently so overlapping as to be redundant?

ADCO Response #13: ADCO recommends that all of the CFPB regulations need to be reviewed every two to three years. The FTC is tasked with reviewing its regulations every few years or so, depending on the regulation. The Safeguards Rule is one example. The FTC is tasked with reviewing the Rule in light of the current environment to see if it needs to be changed, updated, pulled back or stricken.

Much like how the FTC provides different "Tips and Advice" and resources for business to comply with the laws and regulations it enforces, it would also be helpful if the Bureau would provide similar business compliance resources and training material so that businesses could ensure they are properly complying with the laws and regulations that the Bureau enforces.

Question #14. Some stakeholders favor regulations with specific requirements, which draw bright lines for a company's compliance obligations but can apply a one-size-fit-all approach. Others favor "principle-based" regulations, which can provide a company with flexibility but can create compliance uncertainty. Federal regulations currently employ both approaches (e.g., Regulation Z's highly specific disclosure rules, and Regulation V's requirement that data furnishers implement and maintain reasonable written policies and procedures concerning the accuracy of the data they furnish). Which approach is preferable, and does this depend on the industry, the statute, or other considerations? Please explain.

ADCO Response #14: For some regulations such as Regulation Z, ADCO prefers this regulation have specific requirements, which permit its dealer members to follow bright lines for ensuring proper disclosures be given to their customers. For other regulations, such as the Safeguards Rule and the Red Flags Rule, ADCO prefers these regulations to be more "principle-based" regulations as they provide dealers with more latitude in which to comply.

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As a general rule, dealers want to know where the boundaries have been set so they can comply. Once they know the boundaries, they can be more productive within those parameters than if they are not clear about the boundaries.

As a recommendation, ADCO would submit that the CFPB invite the guidance of a dealer industry council to help it navigate the gray areas in the law to see how the industry would handle the issue(s). In addition, the formation of a peer review group may be helpful for issue resolution. Issues within an industry could be highlighted and resolved before they rise to the level of CFPB and/or FTC enforcement.

D. Federal and State Coordination

Question #16. Are changes to the shared-jurisdiction framework desirable (e.g., by legislation)? In what way? For instance, would it be beneficial to assign to one agency sole (or primary) responsibility for supervising or enforcing some or all the consumer financial protection laws? Would having a single source of authority enhance or detract from competition and consumer welfare? What are the costs and benefits of overlapping enforcement jurisdiction for nonbank creditors?

ADCO Response #16: ADCO submits that in some cases, it is not entirely clear who the dealer's primary regulator is for its business. For instance, a franchised dealer that wants to open a buy here, pay here operation may have to answer to the CFPB in addition to the FTC. It would be helpful and beneficial to assign to one agency sole (or primary) responsibility for supervising or enforcing all of the consumer financial protection laws. In lieu of assigning to one agency the sole or primary responsibility for supervising or enforcing all of the consumer financial protection laws, ADCO recommends that the Bureau develop and implement robust business friendly training material, similar to the FTC's business guides, to ensure compliance.

Question #18. Given the jurisdictional overlap between State and Federal regulators on consumer financial markets, are there quantifiable examples of whether this overlap has led to disproportionate compliance costs for small financial institutions, such as community banks or credit unions?

ADCO Response #18: Compliance costs definitely make it more difficult for smaller dealers to comply. Compliance costs vary by state. Some states have a lot of laws and regulations governing vehicle sales and leases; some hardly have any. Although it is more than six years old, the CAR study, "The Impact of Federal Regulations on Franchised Automobile Dealerships" is a good reference for illustrating compliance costs associated with federal regulations.

E. Improving Consumer Protection

Question #19. Which markets for consumer financial products or services are functioning well—that is, which markets are fair, transparent, and competitive? Which markets might benefit from regulatory changes that could facilitate competition and materially increase consumer welfare?

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ADCO Response #19: The retail automotive market is fair, transparent, competitive and self-regulating.

Question #20. What types of disclosures regarding consumer financial products or services are effective and what types are not? Could the content, timing, or other aspects of disclosures be improved and, if so, how?

ADCO Response #20: Better education of consumers is important. The better educated and informed the consumer, the easier it is for them to understand the disclosures. The disclosures should be limited to key points in plain concise language with limited verbiage so the customer grasps the key message without having to read long paragraphs of legalese. Longer explanations could be provided (to comply with legal requirements, if needed), but the customer should be able to grasp the key point of each disclosure by reading a simple statement. During a typical retail installment sale transaction, a customer may have to listen to up to 19 pages of disclosures, which takes about 45 minutes. Customers stop listening after a few minutes and just want to get the car and leave.

Question #22. What is the optimal mix of regulation, enforcement, supervision, and consumer financial education for achieving the Bureau's consumer protection goals?

ADCO Response #22: The CFPB should provide more supervision and education. Supervision to include familiarizing itself with industries before imposing new regulations by inviting feedback from trade associations. Additionally, it would be helpful if the Bureau could help educate businesses regarding its expectations before enforcing a law or regulation.

Question #23: How can we best assess the efficacy of the Federal consumer financial protections in achieving their goals?

ADCO Response #23: Better-educated consumers mean fewer penalties, and that may also mean that consumers shift their business away from unscrupulous dealers who don't follow the law. The CFPB's efficacy could also be improved if it invited and formalized industry input into its goals and solutions with the addition of something like a dealer council to advise and consult with the Bureau on issues of importance to the industry and to better protect consumers.

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ADCO appreciates the opportunity to comment on this request for information, which is of great importance to its members.

Sincerely,

Linda Robertson

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