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NADA REGULATORY REVIEW

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LABOR AND EMPLOYMENT

OSHA Continues Enforcement Actions Against Dealerships

Dealerships in Colorado, Hawaii and North and South Dakota continue to be targeted for OSHA Local Emphasis Program (LEP) enforcement, in some instances incurring thousands of dollars in fines. Among other things, these inspections have focused on automotive lifts. Since there are no specific federal rules governing automotive lifts, OSHA applies its “general duty clause” authority to address lift operation, service, maintenance, or repair concerns. In November 2013, Regulatory Affairs staff met with OSHA’s Director of Cooperative and State Programs in an attempt to gauge whether OSHA has any plans for new LEPs in 2014 and to better understand the process for challenging LEPs based on improper or inaccurate underlying data. Apparently, no additional automotive service LEPs are in the pipeline. In addition, while there is no formal process at OSHA to contest an LEP, Regulatory Affairs staff is reviewing additional strategies for addressing LEPs of concern.

Regulatory Affairs also is working with the American Lift Institute (ALI), a trade association representing automotive lift manufacturers and distributors, on several matters related to automotive lifts. First, Regulatory Affairs reviewed and pointed out the need for changes to ALI’s voluntary industry standard governing lift service, maintenance, inspection, and repair. This standard often is cited by OSHA during enforcement. In conjunction with the American National Standards Institute (ANSI), ALI has committed to begin a formal review of the

standard in June 2014 and staff has been asked to address ALI’s Board of Directors on NADA’s suggested changes to the standard. Second, ALI has agreed to work with ATAEs to encourage those who are interested to avail themselves of the ALI’s Inspector Certification Program. For a limited time, ALI is making its inspector certification available to NADA members at a discounted rate. Third, ALI is seeking to ramp-up its cooperative outreach to dealers through NADA and the ATAEs. The focus in this regard is ALI’s mid-January release of the latest on-line version of its time-honored lift safety materials entitled *Lifting It Right*. More information about *Lifting It Right* and the certified inspector program can be found [here](#).

OSHA Proposes Electronic Injury And Illness Recordkeeping Rule

Truck dealerships could be required to electronically submit injury/illness information to the OSHA under a proposal issued on November 8, 2013. In the past, OSHA has required injury/illness logs to be kept at dealerships for potential inspection or for submission upon request. The proposal would require such information to be posted annually to a publically available OSHA website. Moreover, OSHA intends to use the injury/illness data it collects to help target its enforcement resources. Regulatory Affairs staff worked with a coalition of affected industries to oppose this change and submitted extensive comments in February 2014. (Car dealers have long been exempted from OSHA’s annual injury/illness recordkeeping rule. OSHA is reconsidering this exemption and is expected to issue a final rule by April 2014.)

NLRB “Quickie” Election Rule Back

In February, the NLRB reissued a proposal on the conduct of union elections designed to enhance the ability of unions to garner support between the time a petition is filed and an election is held, while depriving employers of the rights they have under current rules to contest the scope of the bargaining units unions seek to represent. The proposal also would significantly shorten the period of time between a petition is filed and an election is held. Shortening this time period will make it extremely difficult for employers to educate employees about facts that they need to consider before they vote. These election rule changes originally were proposed in 2011. A 2012 final rule was invalidated by the DC Circuit based on an NLRB quorum issue. Thus, it was reissued last month by a fully staffed NLRB.

CONSUMER ISSUES

NADA Releases Fair Credit Guidance

NADA continues to be actively engaged on numerous fronts to resist the Consumer Financial Protection Bureau’s (“CFPB” or “Bureau”) unprecedented assault on the dealer-assisted financing model. As detailed below, NADA’s recent efforts have included (i) coordinating with members of Congress to demand that the CFPB explain and justify its disparate impact initiative, (ii) presenting NADA’s concerns with the disparate impact initiative to CFPB staff and the public during a November 2013 CFPB auto finance forum and to the CFPB director and the Department of Justice (“DOJ”) in separate subsequent meetings, and (iii) responding to the December 20, 2013 announcement of DOJ and CFPB consent orders with Ally Financial and Ally Bank (“Ally”) to resolve the agencies’ disparate impact discrimination allegations against Ally. In addition, NADA has developed for, and distributed to,

its members optional comprehensive fair credit compliance guidance to help protect against fair credit risks.

The pressure Congress has placed on the CFPB has begun to yield a limited amount of information concerning the CFPB’s disparate impact initiative. This, in turn, has exposed significant flaws in that initiative, including the CFPB’s November 4, 2013 acknowledgement to Senators Rob Portman and Jeanne Shaheen that it never considered how the cost of credit for consumers would be affected by a broad industry movement to a flat fee compensation system for dealers. This and other flaws in the CFPB’s disparate impact initiative have provided the substantive basis for criticism of the Bureau by members of Congress, numerous industry participants (including dealers, finance sources, and vendors), and several media outlets. It also prompted the American Financial Services Association (“AFSA”) to announce on November 12, 2013, that it would fill the void created by the CFPB’s lack of analysis into the likely effect of obligatory non-discretionary payment mechanisms for dealers by commissioning its own study on the matter.

Congressional criticism of the Bureau’s unwillingness to allow the public to comment on its disparate impact initiative prompted the CFPB to arrange an auto finance forum that it conducted in Washington, D.C. on November 14, 2013. The two and a half hour program was limited to three panels, with National Association of Minority Automobile Dealers (“NAMAD”) President Damon Lester and NADA Chief Regulatory Counsel, Financial Services, Privacy, and Tax Paul Metrey serving as dealer representatives on the panels. NADA used this opportunity to advance its primary concerns with the CFPB’s disparate impact initiative and was particularly critical of the Bureau’s assumption that a flat fee payment mechanism for dealers would eliminate discretion from the indirect

financing market. Mr. Metrey noted in an opening statement that a flat fee payment system, if broadly adopted by finance sources, would eliminate discretionary pricing by the finance source but would not do so for dealers because dealers typically have a variety of finance source partners, those finance sources would compete with each other for the dealer’s business by offering dealers different flat fee payment amounts, and dealers would (as they do today) select the finance source to which they would assign the credit contract. Consequently, if fair lending risks were created by dealer discretion (which the Bureau has alleged but not substantiated), then attempting to force finance sources to move to a flat fee payment structure would not reduce those risks because dealers would continue to exercise discretion affecting the APR paid by consumers. NADA used this example to illustrate the incorrect assumptions upon which the Bureau issued its March 2013 fair lending guidance.

Aside from NADA’s participation at the auto finance forum, Steven Rosenbaum, Chief, Housing and Enforcement Section, Civil Rights Division, DOJ, identified an approach to addressing fair credit risks that follows the terms of consent orders that DOJ entered into with two Pennsylvania dealerships in 2007 to resolve the agency’s allegations of unintentional disparate impact discrimination. Mr. Rosenbaum’s statements, while neither binding on DOJ nor establishing a formal agency position, are nevertheless significant because they articulate a current, non-flat fee approach to Equal Credit Opportunity Act (“ECOA”) compliance that potentially could be adopted broadly by dealers. NAMAD President Lester expressed support for this general approach during his comments at the forum.

In addition to the auto finance forum, NADA met with (i) CFPB Director Cordray on December 2, 2013, and (ii) the DOJ Housing and Enforcement

Section on December 12, 2013 and January 9, 2014. During these lengthy meetings, NADA underscored practical problems with the CFPB's March 2013 fair lending guidance and discussed non-flat fee approaches to promoting compliance with ECOA, including the approach discussed by Mr. Rosenbaum at the CFPB's auto finance forum.

In the midst of this activity, the CFPB and DOJ announced on December 20, 2013 that they had entered into consent orders with Ally to settle allegations that Ally had engaged in unintentional, disparate impact discrimination that resulted in African American, Hispanic, and Asian Americans/Pacific Islander consumers paying more dealer participation than similarly situated white consumers, and that these pricing disparities were the result of Ally allowing dealers to exercise discretion (and failing to adequately control that discretion) in determining the amount of dealer participation to charge consumers for arranging financing. While not admitting to the charges, Ally agreed to pay \$80 million in compensation to the alleged victims and \$18 million in civil penalties, and it agreed to several other actions. However, it did not agree to adopt a flat fee payment mechanism for dealers (and *Automotive News* quoted Ally CEO Mike Carpenter as subsequently stating: "[w]e are not going to go to flats"). Ally also issued a press release on the day that the consent order was announced stating that "based on the company's analysis of its business, it does not believe that there is measurable discrimination by auto dealers."

In light of the uncertain resolution of these issues and the difficult compliance environment that the CFPB's disparate impact initiative has created for dealers (as well as finance sources), several dealers and ATAEs requested that NADA provide guidance to dealers on steps dealers should consider adopting to protect their businesses from allegations of dispa-

rate impact discrimination. In response, NADA developed an optional fair credit compliance program and policy template for a member to use should it and its legal counsel determine that the program would assist the dealership in stating its commitment to fair credit compliance and mitigating fair credit risks. The program template is modeled on the compliance approach contained in the two 2007 DOJ consent orders referenced above and the comments of Mr. Rosenbaum during the CFPB's November 2013 auto finance forum.

After briefing NADA directors and ATAEs on the *NADA Fair Credit Compliance Policy & Program* at their respective pre-2014 NADA convention meetings, NADA Regulatory Affairs released the document to NADA members via e-mail on the day prior to the opening of the convention (January 24, 2014). The document was accompanied by a joint cover memorandum from NADA, the American International Automobile Dealers Association ("AIADA"), and NAMAD to their respective members. Following the release, NADA conducted a press conference to announce the issuance of the document and to explain its purpose, content, and the fact that adopting the NADA's fair credit compliance program template (or any portion of it) is voluntary and is an individual dealer decision that should be made in consultation with the dealer's legal counsel. Regulatory Affairs also provided an advanced copy of the guidance to DOJ, the CFPB, the Federal Reserve Board, and the Federal Trade Commission.

NADA is continuing to actively track and respond to fair credit developments and provide its members with educational information to assist them with their compliance responsibilities. This includes a NADA University webinar that it will present to ATAEs, dealers, and dealer compliance professionals on

Wednesday April 2, 2014 at 1 p.m. EDT (register [here](#)).

FTC Launches Another Round of Advertising Enforcement Actions

Since March 2012, the Federal Trade Commission ("FTC") has engaged in three separate advertising enforcement sweeps against 16 automobile dealerships in 11 states (California (4), Connecticut (2), Georgia, Illinois, Maryland, Michigan, North Carolina (2), Ohio, South Dakota, Texas, and West Virginia), and additional FTC advertising enforcement actions may be forthcoming. The sweeps involved ads that were presented over several different advertising mediums.

The first sweep was announced in March 2012 and resulted in consent orders between the FTC and five auto dealers to resolve allegations that the dealers engaged in deceptive advertising in connection with statements that they would "pay off" a consumer's negative equity regardless of the amount the consumer owed on his or her current vehicle. It also involved allegations against several of the dealers for violating the "trigger term" requirements that pertain to credit and lease advertising. The allegations are described in the FTC press release that accompanied the announcement, which is available [here](#).

The second sweep was announced in September 2013 and resulted in final consent orders between the FTC and two auto dealers to resolve allegations that the dealers engaged in deceptive advertising in connection with statements about the cost of, or available discounts for, certain vehicles. The allegations are described in the FTC press release that accompanied the announcement, which is available [here](#).

The third sweep, which the FTC labelled "Operation Steer Clear," was announced in January 2014 and involves proposed consent orders between the FTC and nine auto dealers to resolve allegations that the dealers engaged in

deceptive advertising in connection with a variety of different claims. In addition to the deception claims, the FTC alleged that seven of the nine dealers engaged in trigger term violations. The allegations are described in the FTC press release that accompanied the announcement, which is available [here](#). A FTC enforcement action against a tenth dealer is pending.

NADA has broadly disseminated information about these actions to its members and also arranged for two attorneys with the FTC's Division of Financial Practices to serve as guest presenters at a NADA University compliance webinar that was conducted on March 19, 2014. The event set a record for participation at a NADA University webinar.

TAX

Treasury Issues Final "Tangibles" Regulation

On September 19, 2013, the Department of the Treasury ("Treasury") issued a final regulation governing the tax treatment of amounts paid to acquire, produce, or improve tangible property. The Final Tangible Property – or "Tangibles" – Regulation largely focuses on whether certain expenditures are repairs (which may be currently expensed) or capitalized improvements (which must be depreciated) for tax purposes. Importantly, various provisions in these regulations will likely require dealers to change their accounting method using IRS Form 3115.

The final regulation, which is summarized in a fact sheet prepared for NADA by Crowe Horwath (available [here](#)), is effective for tax years beginning on or after January 1, 2014, and replaces the temporary tangibles regulation that Treasury issued in December 2011.

To assist dealers in understanding the requirements applicable to tangible property payments, NADA posted the fact sheet at www.nada.org/regulations and

covered the topic during a 2014 NADA Convention workshop entitled "Explore Hot Tax Topics with Industry Experts."

Treasury Issues Final Net Investment Income Tax Regulation

On November 26, 2013, Treasury issued a final regulation to implement a new 3.8% tax on net investment income that is mandated by the Affordable Care Act and took effect January 1, 2013. The Final Net Investment Income Tax ("NIIT") Regulation is summarized in a fact sheet that was prepared for NADA by Dixon Hughes Goodman (available [here](#)). The summary includes a discussion of a favorable clarification that the final regulation provides regarding income derived from real estate rental activity in certain circumstances.

To assist dealers in understanding the requirements applicable to the Final NIIT regulation, NADA posted the fact sheet at www.nada.org/regulations and covered the topic during a 2014 NADA Convention workshop entitled "Explore Hot Tax Topics with Industry Experts."

DATA SECURITY

NADA Issues Sample Dealer Data Contract Addendum to Dealers

As a follow-up to the 2013 dealer data memorandum sent to all NADA members, NADA recently issued a Service Provider Dealer Data Access Addendum ("Addendum") to all dealers for use with their third party service provider vendors.

The Addendum is a two-page sample contract addendum that dealers can customize and send to all their service provider vendors for approval. The Addendum is only one way to meet the regulatory obligations, is optional, and may not work in every situation. However, adoption of the Addendum will mean that dealers have the required provisions in their service provider contracts to comply with federal law. NADA urges dealers to review the Addendum with their lawyer, and if appropriate, to adopt it with any third parties seeking access to any dealer data as part a service provided to the dealer. Dealers and their counsel can obtain an editable Word version of the Addendum (as well as a copy of the 2013 dealer data memorandum) at www.nada.org/dealerdata.

Meanwhile, the NADA Dealer Data working group is continuing to meet with manufacturers, manufacturer trade associations, dealer vendors, and others about Dealer Data, privacy, and related issues. NADA is also continuing its educational efforts for dealers and other industry participants to ensure that dealers understand and meet their regulatory obligations with respect to dealer data.