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Legal & Regulatory Group

December 22, 2010

Jennifer J. Johnson, Secretary
Board of Governors of the Federal Reserve System
20th Street and Constitution Avenue NW
Washington, DC 20551
Submitted via e-mail: regs.comments@federalreserve.gov.

RE: Docket No. R-1390
Proposed Changes to Regulation Z

Dear Ms. Johnson:

The National Automobile Dealers Association ("NADA") hereby submits its comments concerning the changes proposed earlier this year by the Federal Reserve Board (the "Board") to Regulation Z. These comments are also joined into by the state and local dealer associations listed on Attachment A hereto (collectively, the "State and Metro Dealer Associations") and whose signatures appear below. These comments address the proposed new disclosures related to credit insurance and debt cancellation and suspension products (which the proposal collectively refers to as "credit protection products").

INTRODUCTION

NADA represents more than 17,000 new car and truck dealers, both domestic and import, with more than 37,500 separate franchises and nearly one million employees nationwide. A significant number of NADA's members are small businesses defined by the Small Business Administration. NADA represents dealer interests before the U.S. Congress and executive branch agencies on issues that impact our members' businesses. Similarly, the State and Metro

Dealer Associations represent the interests of car and truck dealers in the various states and localities in which those associations operate.

In a notice published on September 24, 2010 at 75 Fed. Reg. 58539, the Board has proposed to dramatically expand the number, content, and substance of the disclosures that must be made in connection with the sale of credit protection products if the costs of such products are to be excluded from calculation of the annual percentage rate ("APR"). NADA supports the need to educate consumers about the costs and terms of credit. For example, it has been active in consumer financial literacy education efforts such as those of AWARE, a group formed and operated with the assistance of NADA to educate consumers about the various aspects of financing motor vehicles. However, NADA submits that any regulations ultimately promulgated should (1) be limited to those provided for by law, (2) provide for disclosures that are straightforward, enlightening, easy to understand, and fair, and (3) balance the needs of creditors and consumers.

NADA further submits that the new disclosures contained in the proposed regulation would impermissibly exceed the scope of the Truth in Lending Act and the Board's interpretive authority and would require disclosures that are unduly burdensome, misleading, inaccurate, and/or unnecessarily negative and alarmist. In fact, the proposed new disclosures would potentially do more to harm consumers than to help them. For these reasons, NADA and the State and Metro Dealer Associations respectfully ask that the proposed disclosures regulation amendment be significantly altered in line with the following comments or withdrawn with respect to closed-end credit that is not home-secured.

I. GENERAL COMMENTS

A. Federal Law Does Not Provide Authority for The Proposed New Disclosures.

i. Disclosures about the suitability and value of credit protection products are unrelated to the disclosures mandated by the Truth-in-Lending Act.

Truth-in-Lending Act ("TILA" or "the Act") section 106(b)(1) allows premiums and fees in connection with credit protection products to be excluded from the calculation of APR if the cost is disclosed, the consumer affirmatively elects coverage, and "coverage of the debtor by the insurance is not a factor in the approval by the creditor of the extension of credit..." 15 U.S.C. 1605(b)(1).

The Board, however, is proposing to require expanded disclosures which go far beyond those mandated (or even contemplated) by section 106(b)(1) of TILA. TILA Section 105(a) authorizes the Board to interpret TILA to effectuate the statute's purposes, to prevent circumvention or evasion of the statute, or to facilitate compliance with the statute. See 15 U.S.C. 1604(a). Relying on this authority, the Board in effect asserts that, to comply with TILA, the purchase of a credit protection product must be "voluntary" and that it is not voluntary unless the consumer has been warned to be wary of such a purchase. Thus, the Board concludes that TILA provides the authority to expand disclosures to enhance consumer wariness.

However, this asserted standard is not contained in the plain language of the Act. The applicable TILA section does not use the word "voluntary." Rather, it sets out three elements which must be met: (a) the cost of the product must be disclosed, (b) the consumer must affirmatively choose the product, and (c) the coverage must not be a factor in the approval by the creditor of the extension of credit. Whether the consumer has been made sufficiently "wary" of the product has nothing to do with these elements.

Current disclosures contain the three elements described in the preceding paragraph, as TILA and existing Regulation Z mandate. The proposed disclosures are unrelated to these requirements and, instead, impermissibly require creditors to counsel consumers about the wisdom of purchasing such products. Indeed, the proposed language is so negative and misleading as to inhibit or dissuade consumers from buying consumer protection products that are likely to be beneficial to them. It is one thing to ensure that a consumer is adequately informed of the facts that the law requires about the credit protection products he or she may wish to buy. It is quite another to demand that a creditor provide notice containing opinions about the wisdom of the consumer buying the products.

ii. The proposed new disclosures go beyond the permissible boundaries established by TILA.

Congress has authorized the Board to promulgate regulations implementing TILA, but only to the extent that they "carry out the purpose" of the Act. 16 U.S.C. §1604(a). The proposed disclosures run far afield of TILA's purpose.

The purpose of TILA is to aid the "[i]nformed use of credit." 16 U.S.C. § 1601(a). The Act is Congress' effort to guarantee the accurate and meaningful disclosure of the *costs* of consumer credit and thereby to enable consumers to make informed choices in the credit marketplace. See id. Rather than providing accurate and meaningful information, the proposed disclosures in their current form will have the effect of discouraging consumers from electing coverage.

TILA was enacted to ensure that "the American consumer will be given the information he needs to compare the cost of credit and to make the best informed decision on the use of credit." *Mourning v. Family Publication Service, Inc.*, 411 U.S. 356, 364 (1973) (citing H.R.

Rep. No 1040, 90th Cong. 1st Sess., 13, n.18 (1967)). The Act's purpose is to arm the consumer with easily understandable information so that he or she can make an informed choice. The Act does ***not*** authorize the Board to require creditors to deliver disclosures to consumers intended to largely pre-judge what that choice should be.

The proposed amended regulation goes well beyond "informing" consumers of facts. It mandates the delivery of opinions designed to steer consumers away from buying credit protection products. The Board seems to adopt the perception of credit protection products, mistakenly held by opponents of such products, that either consumers get no value from, or do not need, credit insurance protection products. Yet, in these trying times, where events that trigger payments under credit protection products are occurring with increasing frequency, these products are more valuable than ever. However, regardless of current economic conditions, the Board is not empowered to inject subjective preferences as to the worth or wisdom of credit protection products through a provision of TILA that simply provides that a consumer must know the cost, must be notified that the availability of credit cannot be based on a choice of the products, and must make an affirmative choice to purchase.

The Board is impermissibly venturing into the direct regulation of credit, rather than effectuating the Act's primary purpose which is to alleviate, through accurate disclosures, what the enacting Congress perceived as "widespread consumer confusion" about the cost of credit. See *Gennuso v. Commercial Bank & Trust Co.*, 566 F. 2d 437, 441 (3rd Cir. 1977). TILA is meant to give consumers "the *facts* with which to make rational and informed credit judgments..." and to "...enhance and strengthen free competition in the consumer credit industry." *Powers v. Sims & Levin Realtors*, 396 F. Supp. 12, 16 (E.D. Va. 1975), *aff'd in part and rev'd in part on other grounds*, 542 F.2d 1216 (4th Cir. 1976) (emphasis added). NADA supports full disclosure of factual and unbiased information. Unfortunately, the Board's proposed disclosures are not objective *facts* designed to inform consumers of the cost of credit or simply that they may decide to purchase credit protection products free of the concern that this may affect the credit decision. Instead, they inappropriately include subjective statements apparently designed to influence what consumers purchase based on the drafters' assessment of what is best for them.

iii. To the extent the proposed new disclosures affect the sale of credit protection insurance, they violate the McCarran-Ferguson Act.

Debt cancellation and suspension products are regulated, sometimes by states, and sometimes under federal mandates. However, credit insurance is regulated in every state. Every state has a statute or regulations that controls the terms of credit life and credit disability insurance. Creditors who sell such products must do so in compliance with, and using the processes and procedures mandated by, state laws.

The McCarran-Ferguson Act, 15 U.S.C. § 1012, reserves to the states the right to regulate the business of insurance. The law is specific.

> § 1012. Regulation by State law; Federal law relating specifically to insurance; applicability of certain Federal laws after June 30, 1948
>
> (a) State regulation. The business of insurance, and every person engaged therein, shall be subject to the laws of the several States which relate to the regulation or taxation of such business.
>
> (b) Federal regulation. No Act of Congress shall be construed to invalidate, impair, or supersede any law enacted by any State for the purpose of regulating the business of insurance, or which imposes a fee or tax upon such business, unless such Act specifically relates to the business of insurance....

The Act prohibits the government from imposing requirements in connection with the business of insurance where the field is occupied by the states. And the field of credit protection insurance is occupied by every state.

The United States Supreme Court has ruled that where a state has a statute forbidding deceptive advertising, the Federal Trade Commission is without authority to control advertising practices of an insurance company in that state. *FTC v. National Casualty Co.*, 357 U.S. 560 (1958). While courts have allowed federal oversight in TILA cases of premium finance agreements, federal courts have ruled that those do not generally constitute the "business of insurance" for purposes of the McCarran-Ferguson Act. See, e.g., *Cochran v. Paco, Inc.*, 606 F. 2d 460 (5th Cir. 1979); *Perry v. Fidelity Union Life Ins. Co.*, 606 F.2d 468 (5th Cir. 1979), cert. denied 446 U.S. 987 (1980). However, where a state occupies the field by regulating the activities of insurance companies in a comprehensive manner, the McCarran-Ferguson Act prevents federal intrusion on that regulatory scheme. See, e.g., *Ben v. General Motors Acceptance Corp.*, 374 F. Supp. 1199 (D. Colo.) (1974).

States regulate the terms of sale, including in most states the pricing of credit insurance. The proposed changes in Regulation Z disclosures would infringe on that regulation. Specifically, the proposed regulation intrudes on the states' regulatory prerogatives by mandating disclosure of negative subjective opinion to dissuade consumers from purchasing credit protection products. The proposed disclosures impermissibly opine on the wisdom of purchasing insurance and seek to put a thumb on the scale against purchase by consumers, thus affecting the process under which sales take place and intruding on the field fully occupied by states. As such, the proposed regulation violates the McCarran-Ferguson Act.

For an illustration of why the proposed regulation of credit protection products violates the McCarran-Ferguson Act, one needs only to examine the basis of complaints by opponents of credit protection products about these products. Such complaints are generally not based on claims of deception regarding the need to buy credit insurance to obtain an extension of credit. Instead, complaints against credit insurance products generally concern rates and, in particular, alleged overcharges and low-loss ratios. Therefore, the primary critique of credit insurance is not a lack of disclosure (as the Board's proposal suggests), but that credit insurance is allegedly overpriced. Given that insurer's credit life rates and average loss ratios are regulated by the states (see, e.g., 28 Tx. Admin. Code § 3.5202, Ky. Rev. Stat. Ann § 304.19-080, Tenn. Code Ann. § 56-7-908(a)), the proposed regulations are thus indirectly aimed at these problems and, as such, the proposed amended regulation is within the exclusive province of the states under the McCarran-Ferguson Act.

II. ISSUES SPECIFIC TO THE PROPOSED ADDITIONAL DISCLOSURES

The intended impact of the additional disclosures in the proposed regulation is clear – the disclosures seek to dissuade consumers from buying credit protection products. They are designed to suggest to consumers both that there are better and less expensive options available to them and that the credit protection products may not provide benefits to them. However, contrary to the assumptions embedded in the proposed regulation, the protections offered by the subject products are important. These products provide valuable benefits and protections to consumers. And they are products that many consumers like.

Against this background, NADA submits the following comments on those specific aspects of the proposed new disclosure mandates that are particularly troubling.

A. The Disclosure of the Optional Nature of the Products Contains an Unnecessarily Negative Element. NADA has no issue with either a general disclosure of the optional nature of the product or the statement that the consumer does not have to buy the product to get credit. That is in line with the clear congressional intent in enacting TILA. NADA does object, however, to use of the word "STOP." It is designed to unnerve the consumer and is too negative. This is not what Congress had in mind when it enacted TILA. Congress clearly intended there to be a plain factual disclosure of the fact that a consumer does not have to purchase a credit protection product to obtain credit if the creditor wished to exclude the costs of the product from the finance charge. The rule should require a simple and plain statement of that. The word "STOP" should not be used.

B. The Proposed Federal Reserve Board Website Disclosure Promotes Use of That Resource Too Late in the Process. NADA has no objection to the requirement of a statement that the consumer can visit the Board's website for additional information . In fact, for the reasons noted above, NADA is more than willing to assist the Board in creating content for its website that is balanced and factual. NADA believes, however, that the introduction of the website at the point of sale is simply misplaced. An increasing majority of consumers already research their options for credit, including credit protection products, before they even walk into the showroom. There should be a campaign to encourage consumers to visit the Board's website while the consumers are doing their research. The website is a great idea. Introducing it at the point of sale is not.

C. The Required Questioning of the Consumer's Need for Credit Protection Products is Inappropriately Negative. NADA objects to the proposed required disclosure headed with the question "Do I need this product?" It is inappropriate for the government to mandate that product sellers inject into their discussions with customers the question of whether the customer needs to buy the product being considered. As discussed above, the disclosures should be limited to the provision of unbiased information about the products being offered. The government has no place mandating questions that, simply by being asked, raise doubts in the customers' minds as to whether the product is something they should be buying. Moreover, this question may lead to scenarios that could involve insurance counseling or credit counseling, which, in some states, may require licenses.

D. The Required Suggestion that Consumers May Already Have Sufficient Resources May Be Misleading. The proposed mandated disclosure that a consumer who has enough insurance or savings may not need a credit protection product is potentially misleading and inappropriate. When purchasing a vehicle on credit, consumers are incurring substantial new debt. This may be an exceedingly significant obligation for a consumer who falls ill or for the consumer's family if the consumer dies. Why should a consumer necessarily draw from existing resources in these events? What if those resources are barely sufficient to allow a consumer to maintain his or her lifestyle? Why should a consumer deplete present resources to cover a car loan? What about the payoff of the potential shortfall if the customer's car is stolen or destroyed? The response that the Board is proposing is most unsatisfactory and potentially misleading.

NADA has similar issues with the proposed requirement to disclose that other types of products may give similar benefits and are less expensive. This statement is not necessarily accurate with respect to the sale of a vehicle as indicated by the following analyses:

- Many consumers have standard life insurance, but this product is frequently designed to provide liquidity for the consumer's estate or heirs. Generally, it is not bought in contemplation of new debt that may be incurred with the purchase of a vehicle. In contrast, this is precisely the purpose of credit life insurance. And the suggestion that a customer can simply find and buy less expensive insurance is frequently incorrect. Credit life insurance unconnected with the purchase of a vehicle is generally not available. Term life insurance may be available, but it often requires an underwriting decision based on a lengthy process of application and acceptance that probably will include a physical and other in-depth examinations concerning the person's insurability. A consumer may not qualify for new or additional term insurance. Simply put, there often are not the alternatives suggested by the proposed mandated disclosure.

- Most consumers have hospitalization insurance. But this product is intended to cover the medical costs for a consumer who is sick or injured. It provides no funds to cover the monthly payment for a car loan which a consumer cannot afford as a result of incapacity due to disease or illness.

- Some consumers may have short term or long term disability benefits, usually through their jobs. However, if a person is out of work, those benefits will probably be desperately needed to maintain the person's lifestyle. They simply are not designed to pay the customer's car payment. Credit disability policies unrelated to the purchase of a vehicle generally are not available. In the unusual case where they may be available, the purchase process will entail a lengthy application and acceptance process involving in-depth examination of the consumer.

- Finance sources require that consumers purchasing vehicles on credit have collision and comprehensive coverage in an amount sufficient to cover the vehicle. However, that coverage typically only extends to some objective valuation of the vehicle when stolen or destroyed. When the balance of the loan is more than the valuation of the vehicle, debt cancellation coverage covers the resulting gap. That coverage is generally not available to consumers unconnected to the purchase of the vehicle.

- Unemployment debt suspension coverage protects a consumer from default in the event he or she loses employment, an all too familiar problem these days. Debt suspension coverage to protect car payments for unemployment unconnected to sale of a vehicle is generally not available.

E. The Disclosure of Maximum Charge is Unnecessarily Complicated. The required disclosure of a maximum premium or charge per period together with the statement that the cost depends on the consumer's cost or interest rate is confusing and is likely inapplicable in connection with a vehicle purchase. The present disclosure of the cost of a credit protection product is far superior.

F. The Disclosure That Benefits are Available Only When Triggering Events Occur Provides No Meaningful Information. Requiring the response "You may not receive any benefits even if you buy this product" to the question "Can I receive benefits?" mandates a disclosure that is both inaccurate and misleading. It is inaccurate because it operates from the presumption that the only type of benefit that a buyer of insurance receives is a cash payout. This ignores one of the key benefits that insurance provides – peace of mind. Insurance is a risk-shifting/risk-sharing product. There is a significant benefit to having one's risks shifted and shared, and this benefit is fully delivered by the products at issue even if the risk never matures into a loss.

The disclosure is misleading because it suggests that one should always expect a cash payout from any insurance product one buys. But the only insurance product where one is practically assured of benefits in the form of a cash payout is a whole life policy. Everybody ultimately dies, and the beneficiaries of those with fully paid life policies will collect. In most other insurance or contractual protection policies, there is always the risk that the cash benefits may not be realized. Even for health insurance, if someone does not get sick they may not receive any cash benefit from the program. In term life insurance, if one does not die during the policy's term, one gets no cash benefits despite having paid the full premium charged. Similarly, in certain types of specialty coverages, it is very possible that a consumer may never see any cash benefits (cancer coverage will not pay if the insured never contracts cancer; disability insurance will provide no cash benefits if the person does not become disabled; long term care insurance will provide no payout if the person does not ultimately need long term care prior to death). It is the nature of most insurance or contractual protection policies that the customer ultimately may not receive the cash benefits, and this is well understood by those buying the product. Suggesting otherwise is misleading.

G. The Mandated Eligibility Disclosures are Unnecessary. The answer to the question of whether the buyer will receive benefits also requires disclosure that the consumer may not meet eligibility requirements other than the specific ones mandated by the particular coverage. However, products sold by dealerships have explanatory documentation that discloses eligibility requirements. There are specific certificates in plain language issued which are required by providers or by state law.

III. THE PROPOSED NEW DISCLOSURES ARE CONTRARY TO THE INTERESTS OF CONSUMERS

A. The Proposed Disclosures Come From a Pre-Internet Era and are Unnecessary Today.

TILA was enacted in 1968 when few consumers had the means by which they could make informed decisions about their use of credit. It is apparent in the legislative record that Congress was concerned that consumers were confused about credit and were ill-informed. *H.R. Rep. No. 1040*, 90th Cong., 1st Sess., 10-11 (1967). The Secretary of the Treasury at the time referred to the credit marketplace as "blind economic activity." Id. n. 18.

In those pre-Internet days, there were many fewer tools than today for consumers to use to prepare themselves for the sale process when they entered a car dealership. There were few resources for the majority of consumers to research available credit options. There were even fewer resources for researching and understanding credit protection programs.

This is not the current reality. With the use of the Internet and the surge in information readily available to consumers, car buyers are vastly more informed today than ever before. Presently, the majority of consumers walk into dealerships armed with research about what they want, what is available, and what options they have. It simply does not make sense to burden consumers with expanded point of sale disclosures, especially since the Board's proposed action runs the risk of misleading consumers and harming them by dissuading them from purchasing potentially beneficial products.

The purpose of TILA is to assist consumers in making intelligent choices in the marketplace. Consumers are doing just that today on the Internet – without the proposed unduly negative and misleading disclosures. For instance, a recent survey by AWARE, the collaborative industry effort to educate consumers about auto financing, shows that consumers are more savvy than ever about auto financing. Specifically, the survey found:

- 86% of Americans say it is important to be aware of their financing options
- 57% feel informed about financing
- 82% plan on setting a budget for their next vehicle purchase
- 66% plan to do more research on financing options before their next purchase
- 67% plan to negotiate financing

http://www.autofinancing101.org/media_center/103008_release.pdf. The reality is that today's automotive consumer has done far more preparation and research than he or she has ever done before prior to going to a dealer's showroom. According to a 2010 Chrome Consumer Survey, 83% of respondents said they were likely to shop for a vehicle online before making a purchasing or leasing decision. According to a GMAC Survey, many consumers are seeking to further educate themselves online, with almost half (49%) responding that they conducted online research regarding financing before buying their most recent car.

The Internet is empowering car buyers, both in getting a competitive price for the vehicles they buy and in arranging financing to buy those cars. Few customers shop for vehicles without extensive research. Fewer still shop for their cars by going dealer to dealer; now they go online checking inventories. And they are doing the same thing with financing. In light of these realities, greatly expanded point of sale disclosures that mandate the disclosure of misleading and speculative opinions are hardly the answer in today's commerce.

B. The Regulations Should Contribute to Streamlining the Car Buying Process, Not to Increasing Its Burdens.

For years, one of the most serious issues dealers have faced is consumer dissatisfaction with the length of time it takes to complete the purchase of a vehicle. Once the process of choosing a vehicle has been completed, there is still much to be done to finalize the transaction. This process can be cumbersome and time consuming. The customer must work with dealership personnel to explore how to pay for the chosen vehicle. Other products that a consumer may want or need to protect the investment such as an extended service contract or an extended maintenance plan are presented. State titling paperwork must be completed. Mandated collision and liability insurance must be verified or a purchase of insurance must be arranged. The dealers' own paperwork with the myriad disclosures required by state and federal laws must be prepared, reviewed, and completed.

In surveys, dealers regularly hear from consumers that the post-choice sale completion process should be streamlined. Achieving this objective, however, is a continuing challenge for dealers. But dealers have responded. For example, dealers have invested, and are continuing to invest, heavily in technology and new products meant to ease the process for consumers. Unfortunately, the proposed regulations add yet another disclosure document to a large and growing list. As such, they will further burden rather than further streamline the post-choice process, and they do so without significant informational benefit to the consumer as explained above. Rather than add to the complexity of the system, the Board should endeavor to identify ways to simplify it.

IV. THE POTENTIAL COSTS OF THESE DISCLOSURES OUTWEIGH ANY BENEFITS.

The Board is proposing disclosures with the effect of dissuading purchase of credit protection products at a time when these products have never been more important for consumers. Despite the current economic situation, cars are no longer a luxury that consumers can simply forego. Vehicles are an important means of livelihood – most Americans get to their jobs in a car – and they are vital to the health and well-being of the consumer's family. In America today, the lives of families revolve around transportation in the family vehicle.

The importance of this type of protection was recently highlighted by a nationwide promotion conducted by one automobile manufacturer that provided guarantees similar to other credit protection products to a vehicle purchaser if the consumer lost their job. Analysts praised the program as a success, and the peace of mind offered by the promotion was widely credited as an important factor in increasing sales for that manufacturer, demonstrating the value such products have for consumers.

Most consumers borrow to acquire their vehicles, and because of today's economic conditions, many buyers find themselves borrowing a higher percentage of the purchase price of the vehicle than ever before. In these circumstances, a disruption in the ability to make payments can be disastrous. And this is true however that disruption occurs – whether as a result of a consumer dying, becoming disabled, or losing a job. Similarly, if a car is stolen or destroyed, there may be a shortfall between the value paid by the insurance company and the amount necessary to pay off the loan. Whatever the cause, missing payments and defaults can lead to repossession of a vehicle and/or damage to the customer's credit. That means that replacement of the vehicle may be difficult.

For these reasons, credit protection products are more necessary today than ever to help customers protect themselves against unfortunate events that can seriously damage their ability to maintain their lifestyles. The changes that the Board has proposed may lead to a reduction in credit protection products purchased by consumers, making it more difficult for consumers to buy vehicles when their credit histories are damaged or when they must replace a vehicle that is destroyed or stolen.

CONCLUSION

For the reasons noted, NADA and the State and Metro Dealer Associations request that the Board reconsider the proposed change in regulations pertaining to sale of credit protection products. The proposed new disclosures should be redrawn to address the concerns outlined above or withdrawn with respect to closed-end credit that is not home-secured.

Thank you for the opportunity to comment.

Respectfully submitted,

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/s/

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Attachment A

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