



March 28, 2011

Federal Trade Commission
Office of the Secretary
Room H-113 (Annex V)
600 Pennsylvania Avenue, NW
Washington, DC 20580

Re: Motor Vehicle Roundtables, Project No. 104811

Dear Commissioners:

The American Financial Services Association (“AFSA”) appreciates the opportunity to comment on certain topics set forth in the Federal Trade Commission (“FTC”) notice announcing Public Roundtables on Protecting Consumers in the Sale and Leasing of Motor Vehicles to be discussed at the roundtable that the FTC will be hosting in Detroit on April 12th. AFSA is the national trade association for the consumer credit industry, protecting access to credit and consumer choice. Its 350 members include consumer and commercial finance companies, motor vehicle sales finance and leasing companies, mortgage lenders, mortgage servicers, credit card issuers, industrial banks and industry suppliers.

Our understanding is that the initial public roundtable will focus on certain issues relating to motor vehicle sales financing.¹ Some AFSA members operate as sales finance companies engaged in the business of purchasing retail installment sale contracts (“RISCs”) from motor vehicle dealerships. Accordingly, AFSA submits this letter to offer general background information with respect to motor vehicle sales financing and its perspective with respect to some of the financing issues that are scheduled to be discussed at the initial public roundtable.

I. Motor Vehicle Retail Financing Alternatives

Question No. 2 in the Notice concerning the motor vehicle roundtables inquires about the types of vehicle financing that are offered to consumers. Consumers may obtain credit to finance the purchase of a motor vehicle by obtaining a loan of money from a lender, such as a depository institution, a credit union or a small loan company, and paying (or having the lender pay) the loan proceeds to the seller. Alternatively, instead of obtaining a loan of money to pay the purchase price of a motor vehicle up front, consumers often avail themselves of dealer financing and purchase their vehicles from dealers on an installment sale or deferred payment basis. They do so by entering into RISCs with dealers pursuant to which the dealer agrees to sell a vehicle to the consumer and the consumer agrees to pay the dealer for it in installments over time. Installment sales by dealers, also known as credit sales, thus are structurally and legally

¹ AFSA understands that vehicle leasing will be the subject of a subsequent public roundtable. AFSA looks forward to the opportunity to respond separately to questions about vehicle leasing in the future.

different from loans of money. *See generally* FTC Rule Concerning Preservation of Consumers' Claims and Defenses, 16 C.F.R. §§ 433.1(d), 433.1(e) (distinguishing between a "purchase money loan" and "financing a sale"); *id.* § 433.1(c) (defining a "creditor" as a person who "lends purchase money *or finances the sale of goods or services to consumers on a deferred payment basis*") (emphasis added).

Because AFSA members engage in the business of purchasing RISCs from dealerships, this letter focuses on motor vehicle retail installment sales by dealers and the acquisition of RISCs by banks and sales finance companies. AFSA believes that motor vehicle retail installment sales are the predominant means by which consumers purchase motor vehicles on credit.

A. Motor Vehicle Retail Installment Sales and Acquisitions of RISCs

Installment Sales by Dealers: Retail installment sales of motor vehicles are subject to extensive consumer protection regulation at the state level. The installment sale structure is contemplated by state consumer protection laws regulating motor vehicle retail installment sales. For example, the New York Motor Vehicle Retail Installment Sales Act ("MVRISA") defines a "retail instalment sale" as "a sale . . . of a motor vehicle by a retail seller to a retail buyer for a time sale price payable in two or more instalments, payment of which is secured by a retail instalment contract." N.Y. Pers. Prop. Law § 301(4); *see id.* § 301(3) (defining the term "retail seller" as "a person who sells a motor vehicle to a retail buyer under or subject to a retail instalment contract").

In the case of a retail installment sale, the buyer thus contracts with the dealer and the dealer is the person to whom the retail installment sale obligation initially is payable. *See, e.g.*, 12 C.F.R. Part 226, Supp. I, ¶ 226.2(a)(17)(i)-2; *Riviere v. Banner Chevrolet*, 184 F.3d 457, 460 (5th Cir. 1999) (dealership that enters into a RISC is the "creditor" for TILA purposes). When the dealer extends the credit as a retail installment seller, only the dealer negotiates the credit terms with the buyer. Those terms include the contract APR, the length of the RISC, typically measured in months, and the amount of the monthly or other periodic payment. These retail credit terms, as negotiated between the dealer and buyer, are reflected in a RISC between those two parties.

Assignees of RISCs: A RISC is an asset of the dealer that it may chose to retain or to sell to a bank or sales finance company of its choice. A dealer is not obligated to assign any of its RISCs to any bank or sales finance company, including one owned by the vehicle manufacturer (a "captive finance company"). Dealers are independent businesses that operate autonomously and some dealers, known as "buy here, pay here" dealers, have their own captive finance companies. (Except on rare occasions, franchised new vehicle dealers are not affiliated with the vehicle manufacturer or its captive finance company.)

Although they are not obligated to do so, dealers generally do assign their RISCs to banks and sales finance companies that compete for their RISCs. This allows the dealer to satisfy its floor plan financing obligation triggered by the sale of the vehicle to the consumer. A dealer may submit information concerning the installment sale transaction to multiple prospective assignees, soliciting whether they would purchase a RISC between the dealer and the retail buyer if the dealer were to enter into one and tender it for purchase. The dealer will typically transmit

the information concerning the transaction by facsimile, direct computer input, or telephone. This process can begin either before or after the dealer has entered into RISC with the retail buyer. An assignee, by definition, is not a party to a RISC and does not deal with the retail buyer during the application or contracting process. Only after a RISC is sold to an assignee, does the assignee begin to deal with the retail buyer.

When a prospective assignee receives a completed credit application of a retail buyer, from a dealer, it decides whether it is willing to purchase from the dealer a RISC executed or to be executed by the retail buyer. Once the prospective assignee has completed its evaluation, it informs the dealer whether or not it would be willing to purchase the RISC and, if it is willing to do so, the rate at which the assignee will discount the contract (the “buy rate”) to determine the price that it is willing to pay to acquire the RISC. The assignee’s compensation typically is derived from the buy rate, not the retail contract APR. Assignees of RISCs usually have tiered buy rates, reflecting their assessment of credit risk, and will purchase a RISC at the “buy rate” for the risk tier within which the transaction falls.²

The dealer then typically sells the RISC to an assignee of its choice, presumably taking into consideration the buy rates offered by, or likely to be offered by, the competing purchasers of its RISCs. Competition among prospective assignees helps keep dealers’ costs low and benefits consumers by helping to make cost-effective financing available to them. If the retail contract APR turns out to be more than the wholesale “buy rate,”³ the RISC is sold at a discount and the dealer receives from the assignee some or all of the portion of the finance charge attributable to the rate spread.⁴ *See* Notice, Question No. 7; *see also* Question No. 5. (Many prospective assignees will decline to purchase a RISC if the retail contract APR exceeds the wholesale buy rate by a specified number of percentage points.). Alternatively, if the APR turns out to be less than the buy rate, the dealer will not be able to sell the RISC unless it pays the assignee an amount equal to the portion of the finance charge attributable to the negative rate spread. (This is referred to as “dealer subvention”.) The business of purchasing RISCs from motor vehicle dealerships for an agreed-upon price, and the secondary market for RISC assignments, is contemplated by many of the state motor vehicle retail installment sales acts or comparable laws.⁵

² Many motor vehicle sales finance companies employ sophisticated credit scoring models to establish risk tiers for buy rates, analyzing extensive contract and performance data which allows them to predict the RISC performance based on certain variables or features. These models allow sales finance companies to acquire RISCs with a greater range of retail buyers by assessing buy rates based on risk.

³ The assignee does not become aware of the contract APR until after the dealer enters into the RISC with the retail buyer, selects a purchaser of the RISC (who, in turn, decides to purchase it, and physically submits the RISC to that purchaser.

⁴ While some AFSA members may use alternative means of determining the price they pay to acquire a RISC and/or their method of paying it, the vast majority of AFSA members determine the amount they will pay to purchase a RISC in the manner described above. AFSA believes that the rate spread methodology described above is used in connection with the vast majority of RISC assignments.

⁵ *See, e.g.,* N.Y. Pers. Prop. Law § 302(10) (New York MVRISA provision stating that “a financing agency may purchase a retail instalment contract from a seller on such terms and conditions and for such price as may be mutually agreed upon”). Many states require the licensing of motor vehicle sales finance companies. *See, e.g.,* N.Y. Banking Law § 492(1).

Vehicle manufacturers periodically offer incentivized financing programs that enable their captive finance companies to purchase RISCs written at subvented APRs. In those instances, the manufacturer enables participating dealers to offer a promotional APR by effectively buying down the wholesale buy rate charged by the captive finance company. Dealers that elect to participate are willing to accept limits on the finance income they earn when assigning subvented RISCs. The income that the dealer receives from the assignment of a RISC whose APR has been subvented by the manufacturer is typically a flat dollar amount or a specified percentage of the amount financed.

Question No. 4 in the Notice concerning the motor vehicle roundtables inquires about whether dealers engage in what it characterizes as “yo-yo financing.” Dealers may submit a credit application to numerous prospective assignees, and often receive responses from them prior to entering into a RISC. In a significant percentage of transactions, however, the dealer will enter into a RISC and deliver the subject vehicle to the retail buyer prior to receiving responses from prospective assignees. The resulting scenario is commonly referred to as a “spot delivery” because the dealer consummates its installment sale transaction and delivers the vehicle to the consumer on the spot without waiting to learn whether a prospective assignee will purchase the RISC.

II. Finance Charge Rate Spreads – Comparison Shopping of Retail Rates, Consumer Awareness of Finance Charge Rate Spreads and Analogues in Retailing Generally

Question No. 7 in the Notice announcing the public roundtables inquires about the prevalence and consumer awareness of what it termed “dealer mark-ups in addition to the cost of credit . . .” *See also* Question No. 5. Question No. 7 also inquires as to whether “there are other industries where sellers charge mark-ups of which buyers are unaware” and “whether the sale and financing of motor vehicle should be treated differently from other industries . . .”

AFSA respectfully submits that the portion of the finance charge attributable to the spread between a retail contract APR and a wholesale “buy rate” is not, in fact, an amount that is “in addition to” the cost of credit. It is, instead, *part of* the cost of the retail credit and is included in the Truth In Lending Act (“TILA”) disclosures of the APR and the dollar amount of the “Finance Charge.” This treatment serves the principal purpose of TILA, which is to “assure a meaningful disclosure of credit terms so that the consumer will be able to compare more readily the various credit terms available to him or her and avoid the uninformed use of credit . . .” 15 U.S.C. § 1601(a). The TILA cost of credit disclosure regime thus is predicated on the notion that what is relevant for comparison shopping purposes are the retail rates that are available to consumers from retail credit grantors. *See id.* (“Congress finds that . . . competition among financial institutions and other firms *engaged in the extension of consumer credit* would be strengthened by the informed use of credit”) (emphasis added).

A. TILA Regulatory History

TILA and its regulatory history reflect the view that the focus of consumers should not be diverted from the retail cost of credit by extraneous information regarding the difference between the retail contract APR and the wholesale buy rate. Early in the history of TILA, the Federal Reserve Board publicly reviewed what the Notice characterizes as “dealer mark-up.” Specifically, in April 1977, the Board considered and rejected a proposed amendment to Regulation Z of TILA that would have required disclosure that a portion of the finance charge was attributable to what the Board characterized as “dealer participation.” *See Interpretation on Disclosure of Amount of Dealer Participation*, 42 Fed. Reg. 19124, 19124-25 (April 12, 1977).

Responding to comments from consumer representatives, the Board had proposed for public comment a proposed amendment to Regulation Z that would have required the “disclosure of the existence but not the amount of a dealer participation.” *Id.* at 19124. The Board ultimately rejected the proposed disclosure requirement, however, because the additional information was not material for comparison shopping purposes and would lead to “confusion and misunderstanding by consumers”:

The Board feels that disclosure of the total finance charge, the annual percentage rate and the periodic payment, all required by the Truth in Lending Act and Regulation Z, together with the widespread advertisement of credit terms, have afforded and continue to afford consumers the most important information with which to comparison shop for credit. The Board does not believe that the proposed § 226.8(c)(9) would significantly enhance the consumers ability to shop for credit. Conversely, the addition of another disclosure requirement to Regulation Z would result in more complex disclosure statements and could lead to confusion or misunderstanding by consumers. The adoption of an additional disclosure requirement of doubtful value to consumers is also contrary to the perceived need for simplification of Regulation Z.

Id. at 19125. This view thus was consistent with the desire to guard against the larger phenomenon of “information overload” – a fundamental public policy concern that ultimately manifested itself in the Truth in Lending Simplification and Reform Act of 1980. The Board also noted that, “in many instances, the portion of the finance charge which represents the dealer’s participation is not an amount which the consumer could save by obtaining a direct loan from a lending institution.” *Id.* Instead, the Board adopted an official staff interpretation “stating that a dealer participation need not be identified or disclosed in the Truth in Lending disclosures as a separate component of the finance charge.”⁶ *Id.* at 19124 (discussing former Interpretation § 226.821 (Disclosure of dealer participation)).

⁶ This interpretation of the pre-simplification version of Regulation Z was rescinded in connection with the implementation of the TILA Simplification and Reform Act of 1980, which repealed the finance charge itemization requirement under which the issue had arisen.

B. Consumer Awareness of APR Negotiability and Finance Charge Rate Spreads

Most forms of RISCs acquired by AFSA's members contain narrative disclosures of the fact that the APR is negotiable. These disclosures further serve the comparison shopping purpose of TILA and are consistent with the considered decision of Congress and the Board to focus consumer attention on the retail cost of credit. Most of the forms of RISCs acquired by its members contain a narrative disclosure of the fact that the dealer may assign the RISC and retain its right to receive a portion of the finance charge.

A typical formulation of these disclosures is reflected in the RISC forms that a popular forms vendor, The Reynolds and Reynolds Company, produces and markets to dealers nationwide:

The Annual Percentage Rate may be negotiable with the Seller. The Seller may assign this contract and retain its right to receive a part of the Finance Charge.

E.g., FORM NO. 553-TN (REV. 2/08). This disclosure appears in large boldface type in a separate rectangular box that is located proximate to the space reserved for the signature(s) of the retail buyer(s). Narrative disclosures of this nature thus ensure that consumers who sign RISCs containing them are reminded of their ability to comparison shop and to negotiate the contract APR. They further ensure that consumers realize that the dealer with whom they are contracting may assign their RISC and retain its right to receive a portion of the finance charge.

Motor vehicle retail installment sales also are the subject of readily-available consumer educational brochures. The AFSA Education Foundation and the National Automobile Dealers Association ("NADA"), in cooperation with the FTC, prepared an informative consumer educational brochure entitled "*Understanding Vehicle Financing*."⁷ This brochure explains dealership financing to consumers in clear, easy-to-understand language.

Among other things, *Understanding Vehicle Financing* clearly explains that dealers ordinarily assign their RISCs and that the retail contract APR is typically higher than the wholesale buy rate:

Each finance company or other potential assignee decides whether it is willing to buy the contract, notifies the dealership of its decision and, if applicable, offers the dealership a wholesale rate at which the assignee will buy the contract, often called the "buy rate."

...

⁷ *Understanding Vehicle Financing* also is available on various internet website, including the FTC website. See <http://www.ftc.gov/bcp/edu/pubs/consumer/autos/aut04.pdf>.

When there are no special financing offers available, you can negotiate the annual percentage rate (APR) and the terms for payment with the dealership, just as you negotiate the price of the vehicle. The APR that you negotiate with the dealer is usually higher than the wholesale rate described earlier. This negotiation can occur before or after the dealership accepts and processes your credit application.

The AFSA Education Foundation and dealers distribute thousands of these brochures to consumers each year in an attempt to educate them consumers about dealership financing.

AFSA is also a member of Americans Well-Informed on Automobile Retailing Economics (“AWARE”). AWARE is a collaborative industry effort to provide consumers with information, tools and other resources to better understand the auto financing process. In educating consumers about vehicle financing and ways to make informed financing decisions, the members of AWARE seek to ensure that vehicle financing remains available and affordable to the broadest possible spectrum of consumers. For additional information regarding AWARE educational initiatives, please see <http://www.autofinancing101.org/>.

C. Industrial Analogues

Through the AFSA Education Foundation, and in partnership with AWARE, AFSA has taken meaningful steps to ensure that consumers are conversant with dealership financing. This includes reminding them that motor vehicle dealers, like other retailers, seek to make a profit on whatever goods or services they sell. *See* FTC Notice Concerning Public Roundtables, Question No. 7 (inquiring about “whether the sale and financing of motor vehicle should be treated differently from other industries . . .”).

AFSA respectfully submits that a buyer purchasing on credit from a dealer “knows, or at least has no reason to doubt, that the dealer seeks a profit on the financing as well as on the underlying sale.” *Balderos v. City Chevrolet*, 214 F.3d 849, 853 (7th Cir. 2000). Although the pejorative term “mark-up” is sometimes used to refer to the difference between a wholesale buy rate and a retail contract APR, this rate spread is merely the financial services analogue to the difference between the wholesale and retail prices of merchandise. Courts have acknowledged that there is nothing unusual about a spread between wholesale and retail prices and certainly nothing deceptive or fraudulent about the failure to disclose it:

No state or federal law requires either currency exchanges or wire-transfer firms to disclose the interbank rate at which they buy specie, as opposed to the retail rate at which they sell currency (and the retail price is invariably disclosed). That is why the plaintiffs have been driven to make generic fraud claims. ***But since when is failure to disclose the precise difference between wholesale and retail prices for any commodity “fraud”?***

. . . Neiman Marcus does not tell customers what it paid for the clothes they buy, nor need an auto dealer reveal rebates and incentives it receives to sell

cars. *This is true in financial markets no less than markets for physical goods* . . . Moneygram and Western Union revealed truthfully . . . the exchange rate they offered... and the rate for the wire transfer to Mexico. Each customer was told how many dollars in the United States would result in how many pesos delivered in Mexico. Nothing in this transaction smacks of fraud

In Re Mexico Money Transfer Litig., 267 F.3d 743, 749 (7th Cir. 2001) (emphasis added); *accord McCann v. Lucky Money, Inc.*, 129 Cal. App. 4th 1382, 29 Cal. Rptr. 3d 437, 448-49 (Ct. App. 2005) (money transmitter “is not statutorily obligated to disclose the rate at which it purchases foreign currency or disclose its profit on the FX spread”).

Indeed, in the context of motor vehicle retail installment sales, numerous courts have uniformly held that there is no duty affirmatively to disclose that there may be a “spread” between the retail contract APR and the wholesale buy rate.⁸ These cases recognize that, notwithstanding the dealership’s sale of a RISC to a bank or SFC, the buyer pays exactly the APR that he or she agreed, in writing, to pay – no more, no less. *See Ford Motor Credit Co. v. Majors*, No. A04-1468, 2005 WL 1021551, at *6-7 (Minn. Ct. App. May 3, 2005) (“when a retail installment contract fully discloses the total amount the consumer is required to pay, the dealer discount or markup is immaterial. Neither TILA nor the consumer-protection statutes imposes on dealers the duty to disclose that Majors seeks to create”); *cf.* FTC Bureau of Economics Staff Report, *supra*, at 53 (“Consumers who are considering the purchase of any type of good or service make their decisions based on the characteristics of the product and its cost, not the compensation earned by the seller. There appears to be little reason why this should be different in the market for mortgage loans.”).

In sum, dealership financing is comparable to other retail businesses in which the retailer and its consumer product offerings are supported by unaffiliated enterprises that do not deal directly with consumers. AFSA believes it is commonly understood that dealerships, like other retailers, earn their profits from the difference between the retail prices they offer consumers and their costs of doing so. *See, e.g., Beaudreau*, 160 S.W.3d at 877-81 (discussing finance charge rate spread cases and concluding that “[e]ach of the aforementioned cases holds, in essence, that a reasonable consumer should be aware that a for-profit retailer, in arranging for financing for a consumer, would expect to receive some sort of remuneration for its efforts”). All creditors, including lenders, seek to earn profits on the difference between their wholesale cost of funds and the retail rates at which they offer to extend credit to consumers.

⁸ *Beaudreau v. Larry Hill Pontiac/Oldsmobile/GMC, Inc.*, 160 S.W.3d 874, 880-01 (Tenn. Ct. App. 2004) (“[w]e find the approach to dealer reserve followed by these other jurisdictions to be well-reasoned and we adopt it as our own”) (discussing *Balderos v. City Chevrolet*, 214 F.3d 849 (7th Cir. 2000); *Kunert v. Mission Fin. Servs. Corp.*, 110 Cal. App. 4th 242, 1 Cal. Rptr. 3d 589 (Ct. App. 2d Dist. 2003); *Ex Parte Ford Motor Credit Co.*, 717 So.2d. 781 (Al. 1997)).

III. The Inclusion of Debt Attributable to Negative Equity in the Amount Financed Under a Motor Vehicle Retail Installment Sale Contract

Question No. 8 in the Notice inquires as to the frequency with which debt attributable to negative equity on a trade-in vehicle is included in the amount financed under a RISC, the benefits to the consumer of doing so and whether the financing of debt attributable to negative equity is disclosed to consumers.

Many consumers purchasing a new automobile come to dealerships with a trade-in vehicle that they offer to sell to the dealership as part of the down payment for the new car. They choose this option, rather than selling the vehicle on their own, because of the convenience. Sometimes the trade-in is subject to an existing lien resulting from a previous purchase-money financing. The outstanding debt on the trade-in vehicle must be satisfied in order to extinguish the lien and enable the dealership to sell the trade-in. If the debt secured by the lien is less than the trade-in value of the vehicle, the dealership will be able to extinguish the lien without incurring any additional cost and the purchaser will receive a credit for the difference between the trade-in value and the debt secured by the existing lien.

In a significant number of cases, however, the debt secured by the lien on the trade-in exceeds its value. The amount by which debt on the trade-in vehicle exceeds its value is commonly referred to as the trade-in deficit or negative equity. When there is negative equity, the dealership clears the title to the trade-in vehicle by paying the debt secured by the existing lien, including the negative equity. Typically the additional cost to the dealership associated with its payment of negative equity, net of any cash downpayment and manufacturer's rebate, is included in the amount financed under the RISC for the new vehicle as the net trade-in payoff or net-negative equity obligation.

Many consumers would be unable or unwilling to acquire a new vehicle unless the dealer finances the net negative equity. This practice benefits consumers by providing them with a convenient means of clearing the title to their trade-in vehicle and disposing of it. Additionally, this practice can be particularly advantageous to consumers when debt attributable to negative equity is included in a RISC with subvented rate.

ASFA believes that financing negative equity on a trade-in is a common practice that has become an integral element of vehicle financing.⁹ Evidence of the prevalence of the practice may be found in the numerous state consumer credit regulatory laws and decisions that expressly authorize debt attributable to negative equity to be included in the "cash price" or the "amount financed" under a RISC. AFSA believes that regulatory laws or decisions of this nature exist in approximately 37 states.¹⁰ The manner of disclosing its inclusion in the "amount financed" is addressed in detail by the Official Staff Commentary to Federal Reserve Board Regulation Z, which implements TILA. *See* 12 C.F.R. Pt. 226, Supp. I, ¶¶ 2(a)(18)-3 (discussing the effect of

⁹ *See* FDIC Supervisory Insights, *The Changing Landscape of Indirect Automobile Lending*, June 23, 2005 ("J.D. Power and Associates estimates that approximately 38 percent of new car buyers have negative equity at trade-in . . .").

¹⁰ *See, e.g.*, Cal. Civ. Code § 2981(e); N.Y. Pers. Prop. Law § 301(6); Tex. Fin. Code Ann. § 348.404(b).

existing liens on TILA the “downpayment” disclosure), 18(j)-3 (discussing effect of existing liens on TILA “total sale price” disclosure).

As a result of the detailed guidance afforded by the Commentary, debt attributable to negative equity is disclosed in the itemization of the amount financed under a RISC. An illustrative example of such a disclosure is included is reflected in a RISC form that a popular forms vendor, The Reynolds and Reynolds Company, produces and markets to dealers nationwide.

In this illustrative form of RISC, the gross trade-in allowance, the trade-in payoff advance made by the dealer and the amount of the negative equity is reflected in the itemization of the total downpayment:

ITEMIZATION OF AMOUNT FINANCED

. . .

2 Total Downpayment =
Trade-in _____
(Year) (Make) (Model)
Gross Trade-in Allowance \$ _____
Less Pay Off Made by Seller \$ _____
Equals Net Trade In \$ _____
+ Cash \$ _____
+ Other \$ _____
(If total downpayment is negative, enter “0” and see 4I below) \$ _____

E.g., Itemization of Amount Financed, Section 2 (Total Downpayment) FORM NO. 553-TN (REV. 2/08). If the negative equity results in a Total Downpayment less than zero, the debt attributable to the negative equity is reflected in Section 4.I of the itemization as an amount paid to the lienholder as a “prior credit or lease balance”:

4 Other Charges Including Amounts Paid to Others on Your Behalf

. . .

I Other Charges (Seller must identify who is paid and describe purpose)
to _____ for Prior Credit or Lease Balance \$ _____

Id., Itemization of Amount Financed, Section 4.I (Other Charges). Accordingly, pursuant to the detailed Commentary provisions concerning the disclosure of negative equity, consumers are informed that debt attributable to negative equity is being included in the amount financed under their RISC.

V. Motor Vehicle Auction House Issues

Question No. 15 in the Notice concerning the public roundtables inquires about motor vehicle auction houses. Creditors use motor vehicle auction houses to reduce losses and increase recoveries on repossessed vehicles. Motor vehicle auction houses also benefit consumers because secured parties often receive the highest price through them.

Article 9 of the Uniform Commercial Code (“UCC”) requires every aspect of the disposition of collateral to be commercially reasonable, and there are numerous judicial decisions interpreting its requirements:

Every aspect of a disposition of collateral, including the method, manner, time, place, and other terms, *must be commercially reasonable*. If commercially reasonable, a secured party may dispose of collateral by *public or private proceedings*, by one or more contracts, as a unit or in parcels, and at any time and place and on any terms.

UCC § 9-610(b) (emphasis added). Although Article 9 does not define what is “commercially reasonable,” it provides three non-exclusive situations that are commercially reasonable:

A disposition of collateral is made in a commercially reasonable manner if the disposition is made:

- (1) in the usual manner on any recognized market;
- (2) at the price current in any recognized market at the time of the disposition; or
- (3) *otherwise in conformity with reasonable commercial practices among dealers in the type of property that was the subject of the disposition.*

UCC § 9-627(b) (emphasis added). The first two scenarios require the existence of a “recognized market”, such as a stock exchange. *See* UCC § 9-627(b), cmt. 4 (“[T]he concept of a ‘recognized market’ . . . applies only to markets in which there are *standardized price quotations* for property that is *essentially fungible*, such as stock exchanges.”) (emphasis added). Accordingly, the third scenario is the one most likely to be relevant to motor vehicle dispositions.

Article 9 expressly states that the “fact that a greater amount could have been obtained by a [disposition] at a different time or in a different method from that selected by the secured party is not of itself sufficient to preclude the secured party from establishing that the [disposition] was made in a commercially reasonable manner.” UCC § 9-627(a). Article 9’s commentary, however, does note that “a low price suggests that a court should scrutinize carefully all aspects of a disposition to ensure that each aspect was commercially reasonable.”¹¹ UCC § 9-627, cmt. 2.

¹¹ *See also* UCC § 9-610, cmt 10 (“While not itself sufficient to establish a violation of this Part, a low price suggests that a court should scrutinize carefully all aspects of a disposition to ensure that each aspect was commercially reasonable.”).

CONCLUSION

AFSA thanks the FTC for the opportunity to comment on this issue and commends the FTC for its work in protecting consumers. Please feel free to contact me with any questions at 202-296-5544, ext. 616 or bhimpler@afsamail.org.

Sincerely,

A handwritten signature in black ink that reads "Bill Himpler". The signature is written in a cursive style with a large, stylized initial "B".

Bill Himpler
Executive Vice President