July 7, 2016

The Honorable George E. Burns
Commissioner
Financial Institutions Division
State of Nevada
2785 E. Desert Inn Road, Suite 180
Las Vegas, Nevada 89121

Re: Petition for Advisory Opinion Regarding the Conduct of Indirect Vehicle Finance Business Activity

Dear Commissioner Burns:

Thank you for the opportunity to outline our position to you on the matter of indirect vehicle financing in Nevada. The American Financial Services Association ("AFSA") appreciates the opportunity to comment on and share its interpretation of the Nevada Installment Loan and Finance Act (the "Act") and the Act's applicability to indirect vehicle finance businesses.

While AFSA shares the opinion of the Nevada Department of Business and Industry, Financial Institutions Division (the "Division") that regulation and oversight of consumer credit is very important, we respectfully disagree with the Division's position that the purchase of a retail installment sale contracts ("RISC") from a dealer in Nevada constitutes "making a loan" under the Act by the purchaser of the RISC. The Division's position on this matter is most troubling to AFSA and its members given the fact that the Act requires direct lenders to maintain a physical presence in Nevada in order to conduct business in the state. Most AFSA members are licensed to conduct business in numerous states, and while a formal survey has not been conducted, we believe most AFSA members would not object to obtaining a license in Nevada should the Division deem it necessary. However, AFSA is concerned that the physical presence requirement would have a significant and immediate impact on its non-captive members' ability to continue doing business in Nevada, and therefore on Nevada consumers' ability to obtain vehicle financing. We estimate that between 60 to 110 non-bank, non-captive financial institutions would be affected. In turn, this will have a significant impact on the ability of the state's many auto dealers to obtain competitively-priced financing for their customers, and consequently on their ability to sell automobiles in the state.

STATEMENT OF INTEREST

Founded in 1916, AFSA is the primary trade association for the consumer credit industry, protecting access to credit and consumer choice. AFSA members provide consumers with many kinds of credit, including direct and indirect vehicle financing, mortgage lending and servicing, payment cards, and traditional installment loans. Many of AFSA's members are non-depository consumer finance companies that primarily conduct the business of purchasing RISCs from franchised and independent motor vehicle dealers. In the indirect vehicle finance business model,

a consumer purchases a vehicle from a dealer, and the dealer agrees to accept payment in deferred installments. The payment arrangements are set forth in the RISC between the dealer and consumer. The dealer is the original party to the contract with the consumer. The dealer may retain the RISC, but typically sells it to a financial institution such as a bank, a non-bank finance company (either a captive or a non-captive financial institution), or a credit union[1] – an *assignee*. The purchase of RISCs from dealers is commonly referred to as "dealership financing" or "indirect financing." Indirect financing is advantageous for consumers because it allows dealers to consider offers from various potential assignees and accept the offer that best fits a particular transaction. Competition among assignees helps keep dealers' costs low and benefits consumers by helping to make competitive financing available via the dealership financing business model.

This business model differs distinctly from direct vehicle lending, wherein a consumer obtains financing directly from a financial institution for the purpose of purchasing a vehicle from a dealer.

STATEMENT OF ISSUES

AFSA requests that the Division advise on two issues regarding the Act:

I. Is a financial institution that purchases RISCs from motor vehicle dealers in the state of Nevada (*i.e.*, indirect financing) required to be licensed under the Act?

II. Does the Act require licensees to have an in-state physical presence?

For the reasons that follow, AFSA's position is that the answer to both questions should be "No."

ANALYSIS

I. Indirect Financing Does Not Require a License Under the Act

a. The Indirect Finance Model is Distinct from the Fact Patterns Described in the Division's Advisory Opinions

The Division's position that the conduct of an indirect vehicle finance business requires a license under the Act is based on two opinion letters it issued in 2010. The first letter was issued to Cindy Armentrout and was dated May 20, 2010 (the "Armentrout Letter"). The Armentrout Letter analyzed how the Act applied to a retail seller of computers who financed its computer sales. The seller then sold the financing contracts to unnamed third parties. The petitioner asked whether or not a seller entering into a retail sales agreement must be licensed under the Act if the sale price was financed. The second letter was issued to Peter Whelpley and was dated May 28, 2010 (the "Whelpley Letter" and together with the Armentrout Letter, the "Advisory Opinions"). The Whelpley Letter analyzed how the Act applied to a seller of agricultural equipment who financed the sale of the equipment. The letter did not indicate if the seller in question retained the contracts or sold the contracts to a third party. The petitioner asked a question similar to the

[1] AFSA does not represent credit unions.

question presented in the Armentrout Letter regarding the applicability of the Act to a retail seller of agricultural equipment.

The common question presented in the Advisory Opinions was whether or not a retail seller of goods who financed the sale of such goods was engaged in lending and thus subject to the Act. Both Advisory Opinions indicated that the retailers that financed the sale of goods engaged in lending governed by the Act.

In indirect vehicle financing, the original party to the RISC—the retailer—is the dealer. The financial institution does not sell the underlying goods to consumers, which is a key distinction from the fact patterns analyzed in the Advisory Opinions. Neither Advisory Opinion concluded that the purchaser of the contracts was engaged in lending governed by the Act. Given the dissimilarities between the facts analyzed in the Advisory Opinions and the operations of an indirect vehicle finance business, AFSA believes that the Division should analyze financial institutions that purchase retail installment sales contracts (*i.e.*, indirect vehicle finance companies) from the original parties to the contracts (*i.e.*, dealers) without regard to the Advisory Opinions.

b. Indirect Vehicle Finance Companies Do Not Engage in the "Business of Making Loans" or the "Business of Lending" Under the Act

The applicability of the Act is set forth in Nevada Revised Statutes (NRS) 675.035 and NRS 675.060. NRS 675.035 provides that the Act applies to any person who "[m]akes installment loans that are not subject to regulation pursuant to chapter 604A of NRS." NRS 675.060 provides that "no person may engage in the business of lending in this State without first having obtained a license . . . ." It further provides that a person "engages in the business of lending in this State if he or she: (a) solicits loans in this State or makes loans to persons in this State, unless they are isolated, incidental or occasional transactions." The Act, however, makes it clear that it is not intended to apply to the purchase of RISCs by indirect vehicle finance companies.

First, the express statutory language of NRS 675.035 indicates that the Act applies only to an entity that "[m]akes installment loans." Indirect vehicle finance companies do not "make" loans. To "make" a loan, a financial institution would have to deal directly with the borrower at origination and be a party to the contract. To the extent any party is "making a loan," it would be the motor vehicle dealer, which extends credit to the consumer at the time of sale. Indirect vehicle finance companies only purchase completed retail installment sales contracts from dealers after the retail installment sales contract has already been completed to extend financing between the dealer and the consumer. Accordingly, because indirect vehicle finance companies do not "make" loans, the Act should not apply to them.

In addition, it is well-established that retail installment sale contracts are not loans. The Division's position that RISCs originated by auto dealers are "loans" by the indirect auto finance company that purchased the contract is inconsistent with the interpretation of every other state, where loans of money are distinguished from the credit sale of goods, consistent with AFSA's views expressed in this letter. Adding further support to this position, the Consumer Financial Protection Bureau has addressed this topic on its website under its "Ask CFPB" section relating to auto loans.

> What is a retail installment sales contract or agreement? Is this a loan?
>
> A retail installment sales contract agreement is slightly different from a loan. Both are ways for you to obtain a vehicle by agreeing to make payments over time. In both, you are generally bound to the agreement after signing.
>
> A loan is a transaction between you and a bank or other lender for money, where you use the money to purchase a vehicle and agree to repay the loan balance plus interest. A retail installment sale, on the other hand, is a transaction between you and the dealer to purchase a vehicle where you agree to pay the dealer over time, paying both the value of the vehicle plus interest. A dealer could sell the retail installment sales contract to a lender or other party.

AFSA is not aware of any other state or federal regulator that considers the indirect vehicle finance business one that involves "making loans." Should the Division agree that RISCs are not loans, or that, in any event, it is not the vehicle finance company that "makes" the loan, then the Act would not apply to indirect vehicle finance companies.

In the Armentrout Letter, the Division also references NRS 675.040 and NRS 675.330 in support of its conclusions. With regard to NRS 675.040, the Division reasons that because transactions involving retail sales agreements are not specifically exempt from the Act under NRS 675.040, the sales finance business must be covered. AFSA respectfully disagrees with this interpretation. Rather, it is our view that NRS 675.040 was meant to exempt persons that would otherwise be considered engaged in the business of lending and therefore subject to the Act. We believe that indirect financing is not exempted from the Act in NRS 675.040 because, as explained above, the Act does not apply to indirect financing to begin with.

With regard to NRS 675.330, which states that "the payment of money, credit, goods or things in action, as consideration for any sale, assignment or order for the payment of wages, salary, commissions or other compensation for services earned or to be earned, shall . . . be deemed a loan of money secured by the sale, assignment or order," the Division has referred to this provision as a basis for its opinion that an indirect vehicle finance business must be licensed under the Act. However, AFSA believes NRS 675.330 does not support that conclusion.

First, indirect finance companies are not party to the original sale transaction, so they are not involved in "the payment of money, credit . . . as consideration" for that original sale. As noted above, indirect vehicle finance companies purchase retail installment sales contracts, which govern a sale transaction that has already been completed, from the dealer. The dealer need not—and in some cases does not—sell the RISC. We believe the Division's reading of this provision could cause the Act to apply to dealers, but not to indirect vehicle finance companies.

Second, and more significantly, it is clear from both the title of the section and the construction of the provision itself that NRS 675.330 applies only to transactions in which an individual's "wages, salary, commissions or other compensation" are sold, assigned or ordered in exchange for the payment of money, credit, goods or things in action. The most common example of a covered transaction would be what is typically referred to as a "payday loan." Dealership

financing does not involve the assignment of wages or other compensation. We believe the Armentrout Letter misinterpreted the intent of NRS 675.330, and that the plain meaning of the provision limits its application to transactions involving the assignment of compensation.

AFSA also notes that like nearly every other state in the country, Nevada has its own independent statute governing retail installment sales, NRS Chapter 97. If the Act *was* intended to apply to indirect vehicle finance companies, then there would be no need for NRS Chapter 97. NRS Chapter 97 exists because its activity does not fall within the Act and its provisions were needed in order to regulate the conduct of retail installment sales. NRS Chapter 97 involves only "retail installment transactions," and makes no reference to a "loan" or "lending." Furthermore, NRS Chapter 97 does not require entities engaged in retail installment sales, like indirect vehicle finance companies, to obtain a license. AFSA members have long relied on this fact to establish and maintain business operations in Nevada.

In the Armentrout Letter, the Division connected NRS Chapter 97 to the Act by noting that, because the Nevada Administrative Code (NAC) 675.060 authorizes a licensee under the Act to conduct the business of making loans in the same office where the licensee conducts a sales finance business, a license under the Act must be necessary in order to conduct a sales finance business. However, this section of the NAC was created to provide an exemption from another provision of the Act, NRS 675.230, which prohibits a licensee under the Act from making loans in a place where other business is conducted. This exemption is logical because many lenders also engage in a sales finance businesses, and requiring separate offices for both businesses would cause an undue burden.

We respectfully strongly disagree with the Division's suggestion that this section of the NAC supports the conclusion that the sales finance business must be licensed under the Act. NAC 675.060 applies only to licensees under the Act and makes no mention of sales finance companies except in the context of sales finance companies that also make loans. This very fact bolsters the argument that the legislature views these businesses as separate and distinct. We believe that if the Act was intended to cover retail installment transactions, then there would be no need for NRS Chapter 97, or at the very least the text of NRS Chapter 97 or the Act would identify the overlapping coverage. If the conduct of a sales finance business was intended to be included in the business of "lending" under NAC 675.060, it would also require these companies to comply with the substance of that section, as opposed to mere licensure. Instead, NRS Chapter 97 is the substantive governing law. Further, if the Division's position that the sales finance business is an act of making loans were correct, there would be no need for NAC 675.060 (or NRS Chapter 97 for that matter) because the activity would be permitted, and one would not need an exemption from the Act to perform activities governed by the Act.

c. Non-Captive Finance Companies Function in the Same Way as Captive Finance Companies in the Purchase of Retail Installment Sales Contracts

The Division has taken the position that the Act does not apply to captive (or manufacturer-owned) finance companies because "the Act does not apply to a company that finances the sale of its own product through a retail installment sales contract." (Research Division, Legislative Counsel Bureau, Policy and Program Report, April 2014). While we agree that the Act does not

require captive finance companies to be licensed, we respectfully disagree with the Division's reasoning.

Captive finance companies are not financing the sale of their own product (*i.e.,* a vehicle) through a retail installment sales contract. Rather it is the dealership that owns, sells and finances the product. Dealerships are separate legal entities and, except in rare situations (such as a failed dealership), are not owned by vehicle manufacturers. Non-captive finance companies and captive finance companies purchase retail installment contracts from the dealer in the exact same way. In light of this incongruent conclusion, AFSA respectfully asks the Division to clarify its position, recognizing that the Act doesn't apply to indirect vehicle finance companies.

II. The Act should not Require Licensees to have an In-State Physical Presence because it would Create an Undue Hardship on Applicants and Discriminate Against Interstate Commerce in Violation of the Dormant Commerce Clause

Even if the Division concludes that the Act applies to indirect vehicle finance companies, the Act should not be read to require licensees to maintain an in-state physical presence. AFSA members are licensed in numerous jurisdictions throughout the Unites States and conduct their businesses in compliance with all applicable laws and regulations, and of course, state licensing requirements. AFSA members do not object to state licensing.

However, the in-state physical presence requirement that appears to be set forth in NRS 675.090 would impose a significant burden on our members. AFSA members with nationwide operations generally maintain offices in only one state, or in some cases up to a few states, with centralized operations. It would not be cost efficient or practical for AFSA members to lease and staff an office in Nevada simply to satisfy a physical presence requirement for licensing. If AFSA members who purchase retail installment sales contracts from automobile dealers in Nevada are suddenly required to open a Nevada office, many may cease doing business in Nevada altogether and others will have to temporarily halt those operations while office space is located and leases are negotiated.

Requiring a physical presence would have a significant and immediate impact on consumers purchasing vehicles in Nevada, as the dealers selling those vehicles will be deprived of a substantial financing source, ultimately resulting in fewer options and higher prices for consumers because the dealers will have fewer companies competing to purchase retail installment sales contracts from them.

Additionally, requiring indirect vehicle finance companies to have a physical in-state presence provides no added benefit to consumers. Indirect finance companies are not part of the financing transaction prior to consummation of the RISC between the consumer and dealer. As such, there is no reason a consumer would need physical access to an indirect financing company for purposes of purchasing and financing a vehicle.

Furthermore, the Constitution's dormant Commerce Clause prohibits states from interfering with interstate commerce—particularly where a state favors in-state businesses over out-of-state businesses. In *Granholm v. Heald, 544 U.S. 460 (2005),* the Supreme Court found statutes in

Michigan and New York unconstitutional because they prohibited, or imposed additional burdens on, out-of-state businesses that lacked an in-state presence. If the Division requires businesses to have an in-state presence in order to purchase retail installment sales contracts from Nevada dealers, it would be imposing the same type of discrimination against out-of-state businesses that was rejected by the Supreme Court in *Granholm*.

If the Division is unable to waive the in-state requirement because of the Division's analysis of the statutory framework, we would ask that the Division consider alternative solutions to avoid imposing additional significant burdens on out-of-state businesses and the resulting negative effects on interstate commerce. One possible alternative would be to allow AFSA members to apply for a license under the Act using their Nevada registered agent's address. We would welcome the opportunity to discuss this or other possibilities with the Division.

CONCLUSION

AFSA sincerely thanks the Division for its time and consideration of this matter, and would be happy to discuss these issues further in person or by phone, at a time convenient to you. AFSA believes that upon review of this letter, the Division will agree the Act does not apply to indirect vehicle finance companies that purchase retail installment sales contracts from automobile dealers in the state. Even if the Division does not reach that conclusion, we hope that the Division agrees with AFSA that an in-state presence requirement would have an immediate and material detrimental effect on consumers and motor vehicle dealers in Nevada. Accordingly we ask that the Division issue an advisory opinion confirming its position on these matters and clarifying the scope of the Advisory Opinions.

Yours very truly,

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