July 11, 2014

Commissioner Robert A. Glen
Office of the State Bank Commissioner
State of Delaware
555 E. Loockerman Street, Suite 210
Dover, Delaware 19901

Re: Concerns with March 11, 2014 Amendments to 5 DE ADC §§ 2901-2904.

Dear Commissioner Glen:

The American Financial Services Association ("AFSA")[1] has serious concerns about the recently revised motor vehicle sales financing regulations, 5 Del. Admin. Code §§ 2901-2904 ("Regulations") adopted by the Office of the State Bank Commissioner ("Office") on March 11, 2014, which went into effect April 11, 2014. AFSA members include licensed motor vehicle sales finance companies,[2] which are directly and adversely affected by the Regulations. AFSA understands the Regulations were promulgated after your Office provided a 30-day comment period; however, we ask that your Office reconsider these provisions in light of the serious ramifications outlined in detail below.

As stated in your Office's public notice of proposed amendments published in the February 1, 2014 edition of the Delaware *Register of Regulations*, the purported purpose of the Regulations is to "clarify, streamline, and update the existing regulations for ease of understanding and increased relevance to current licensee operations." We believe the new requirements, particularly those in Sections 2901 and 2902, do not support the proper conduct of sales finance companies, are unnecessary and impractical to implement in the motor vehicle sales finance context, and will likely confuse consumers.

Disclosure of License Information in Advertisements and on Internet Websites

In the amended Operating Regulation 2901, new license disclosure requirements for motor vehicle sales finance company licensee advertisements and internet websites were added that are of great concern to AFSA.

Section 7.4 Advertising provides that a licensee must post license information in any advertisement:

[1] AFSA is the national trade association for the consumer credit industry, protecting access to credit and consumer choice. AFSA member companies offer vehicle financing, payment cards, personal installment loans and mortgage loans. The Association encourages and maintains ethical business practices and supports financial education for consumers of all ages

[2] *See* 5 Del. C. § 2901(9): "Sales finance company" means a person engaged, in whole or in part, in the business of purchasing retail installment contracts from one or more retail sellers. The term includes but is not limited to a bank, trust company, private banker, industrial bank or investment company, if so engaged. The term also includes a retail seller engaged, in whole or in part, in the business of creating and holding retail installment contracts. The term does not include the pledge of an aggregate number of such contracts to secure a bona fide loan thereon.

> Section 7.4 When a licensee advertises with respect to its services under 5 Del. C. Ch. 29, the advertisement shall clearly and conspicuously state that the licensee is licensed by the Delaware State Bank Commissioner to engage in business in this state and specify the license number and expiration date of the license.

Section 8.1 Internet Websites requires a licensee to disclose license information on every website it maintains:

> Section 8.1.1 The home page for every internet website that a licensee maintains shall clearly and conspicuously state that the licensee is licensed by the Delaware State Bank Commissioner to engage in business in the state under and specify the license number and expiration date of the license.

The requirement that a sales finance licensee must conspicuously post that they are licensed by the Delaware State Bank Commissioner as well as their license number and license expiration date in any advertisement and on every internet website they maintain is inconsistent with 5 Del. C. § 2900. No provision in this underlying law requires the disclosure of license information in advertisements. As Delaware law is very complete and carefully crafted, it can be inferred that the Delaware legislature decided against such a burdensome requirement.

Moreover, the required license disclosures for advertisements exceed the powers of the State Bank Commissioner under Delaware law. Five Del. C. § 2906(e) grants the State Bank Commissioner the authority to promulgate rules and regulations. While this power is broad, it is limited to rules and regulations *necessary for the enforcement of this chapter and the proper conduct of the business authorized and required to be licensed*.[3] Requiring the disclosure of motor vehicle sales finance companies' license information in advertisements does not support the proper conduct of sales finance companies.

These requirements are also inconsistent with regulatory practice across the United States. Despite the extensive regulation of motor vehicle sales finance company activities across the country, no other state has found it useful or necessary to require purchasers of retail installment contracts to disclose license information in advertisements. Because sales finance companies do not face similar requirements in other states, they will have to put in significant time and resources into completely redesigning all current industry advertisements to meet the Regulations requirements.

Federal laws already require substantial disclosures in advertisements for automotive finance. Federal Regulation Z,[4] which implements the federal Truth in Lending Act, and Regulation M,[5] which implements the federal Consumer Leasing Act ("CLA"), require substantial disclosures for consumer credit and consumer lease advertisements, respectively. Section 226.24 of Regulation Z, for example, provides that if an advertisement contains "triggering terms," (including the amount or percentage of a down payment, the number of payments or period of

[3] *See* 5 Del. C. § 2906(e) The Commissioner may make such rules and regulations, and such specific rulings, demands and findings as the Commissioner deems necessary for the enforcement of this chapter and the proper conduct of the business authorized and required to be licensed thereunder. Such rules and regulations, specific rulings, demands and findings shall be in addition to, and not inconsistent with, this chapter.
[4] 12 C.F.R. § 226
[5] 12 C.F.R. § 213

repayment, the amount of any payment, or the amount of any finance charge), the advertisement must also contain clear and conspicuous disclosures such as (i) the amount or percentage of down payment; (ii) terms of repayment over the full term of the loan; and (iii) the annual percentage rate (APR), and if the rate may be increased after consummation.

Section 213.7(d) of Regulation M specifies required disclosures for consumer leases, including providing for certain disclosures when "triggering terms" are used. In this case, if an advertisement states the amount of any payment or a statement of any capitalized cost reduction or other payment (or that no payment is required) prior to or at consummation or by delivery, it must state (i) that the transaction advertised is a lease; (ii) the total amount due prior to or at consummation or by delivery; (iii) the number, amounts, and due dates or periods of scheduled payments under the lease; (iv) a statement of whether or not a security deposit is required; and (v) a statement that an extra charge may be imposed at the end of the lease term where the lessee's liability (if any) is based on the difference between the residual value of the leased property and its realized value at the end of the lease term.

In addition to these federal disclosures, sales finance companies provide supplemental information for incentives and vehicle performance claims, resulting in full yet important disclosure sections. As these required text disclosures are already crowded, the addition of the license information will result in disclosures that are too long for a sales finance company to practically implement. To comply, licensees will need to completely redesign all advertisements to accommodate the extra text. Furthermore, adding this unnecessary information takes away from the prominence of the important disclosures already required and likely will cause consumer confusion.

There is also no evidence that the disclosure of this license information will in any way benefit consumers. For example, a customer typically enters into a retail installment sales contract ("RISC") with a motor vehicle dealer at an automobile dealership. The dealer then assigns the contract to a sales finance company. The fact that the company who purchases the RISC from the dealer provides their license information on their advertisements or website is not useful information to the consumer, as it is disconnected from the actual transaction the consumer has with the dealer.

Due to these concerns, AFSA respectfully requests that the Office repeal the sections of the regulation requiring a sales finance company to post license information.

Repossession Policy

AFSA members do not understand the rationale for 5 Del. Admin. Code § 2901-10.0 Repossession Policy, which requires a licensee to "maintain and follow a written comprehensive policy that describes the manner and timing of repossessing collateral after default," and references 6 Del. C. § 9-600, the default section of Delaware's Uniform Commercial Code.

Six Del. C. § 9-609 simply provides that, "[A]fter default, a secured party may take possession of the collateral." These laws for secured transactions are very broad and simple, allowing for repossession of the collateral upon default. However, the new Regulations specify that the secured party must have a comprehensive policy on the "manner" and "timing" of repossessing the collateral (in this case, a vehicle). Accordingly, we would like further clarification as to the concerns the Office intended to address in the regulation and additional specifics regarding the

following aspects of the required comprehensive policy in order to ensure AFSA members can meet the requirements.

> Manner: Six Del. C. § 9-609 gives a secured party the right to repossess after default and does not indicate any other conditions a secured party must meet to repossess. As such, it is arguable that under § 609 a suitable policy would simply require that the contract be in default in order for the secured policy to repossess the vehicle. We ask that the Office clarify whether this is sufficient under the regulation.
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> Timing: Six Del. C. § 9-609 does not include any specifics on timing, stating only that a vehicle can be repossessed *after default*. The law does not require secured parties to limit their decisions on when they may repossess a vehicle. As such, AFSA members have their own policies on when they repossess personal property. A company's decision to repossess a vehicle is very fact-specific and risk-based. Some companies may repossess a vehicle the day after the customer fails to make a payment. Others may decide not to repossess upon default, in circumstances such as when a customer is getting a loan or is granted an extension. Creditors may also remain flexible; holding the collateral for as long as they believe the consumer may make the account current or even make a partial payment. Additionally, in circumstances where a consumer who is not otherwise in default on their contract voluntarily surrenders the collateral, even a broad repossession policy that is tied to contractual default may not be workable. A company's approach would need to be fact-specific, and would best be governed by the underlying consumer credit agreement.

We believe the requirement for a comprehensive policy specifying the manner and time of repossession adds no value to consumers or sales finance licensees. Licensees' repossessions are conducted in compliance with the law. Most licensees have policies that provide clear guidance on following the law, but that also allow flexibility after default so that they are not restricted in working with consumers to keep them in their vehicles. If a licensee is required to maintain policies on the manner and timing of repossession, it loses its flexibility to work with customers, and may create policies to repossess at the first sign of non-payment, which is not in the best interest of the consumer.

Minimum Advertising Record Requirements

Revised 5 Del. Admin. Code § 2902-1.0 Minimum Records specifies the advertising records each licensed office must maintain on a constant basis. Of particular concern to AFSA are the advertising record requirements specified in Sections 1.7, which are extremely burdensome and impractical to implement.

1.7 Advertising Record. The office shall maintain a record containing copies of all advertising materials used by the licensee:

> 1.7.4 for internet advertising, this record shall contain a copy of each screen on which the advertising appeared, an identification of the website and web address of each screen, and the dates on which the screen appeared at that web location; and
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> 1.7.5 for the licensee's own website, this record shall contain a complete copy of the website indicating the dates on which the licensee maintained that site. Whenever any

screen on the site is changed, the record shall contain a new copy of the complete site and identify each screen that has been changed.

In contrast to print, radio and television advertising, Internet advertising continually shifts and is repetitive, meaning a particular advertisement could be shown on a wide variety of websites at many different times. These characteristics make compliance with Section 1.7.4 very burdensome and impractical for licensees, who would need to devote extensive resources to ensure a copy of the screen, and the date and website on which the advertisement appeared is recorded. In addition to the burden on licensees, these records are not necessary to ensure a licensee's compliance with the advertising and internet website requirements specified in 5 Del. Admin. Code §§ 2901-7.0-8.0. Rather, requiring a licensee to maintain a simple copy of the internet advertisement would demonstrate that they are providing the necessary disclosures and not advertising in any way that is false, misleading or deceptive. (*See* 5 Del. Admin. Code. §§ 2901-7.1-7.3.)

Section 1.7.5's requirements that licensees maintain records that contain a complete copy of their own website, the dates on which it was maintained, and a new copy of the complete website every time any screen on the site is changed, are also extremely burdensome and impracticable. Websites are organic in nature and constantly change. Small format changes and improvements that have no effect on the substance of advertisements are commonly made. In order to comply with these sections, licensees would need to devote extensive resources to ensure that there is a new record of each page of each site any time any change is made, even if the change is very minimal. These records are also unnecessary for the Office to ensure a licensee's compliance with applicable laws. Accordingly, we respectfully submit that the Office should remove this provision from the Regulations.

Conclusion

For the reasons expressed, AFSA recommends reconsideration of the Regulations and revisions in accordance with its comments. We look forward to working with you and your staff to resolve the concerns our members have with the Regulations. To discuss this further, please do not hesitate to contact me by phone at 952-922-6500 or email at dfagre@afsamail.org. Thank you in advance for your time and consideration.

Sincerely,

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