



February 26, 2014

The Honorable David Simmons
Chair, Committee on Banking and Insurance
Florida Senate
406 Senate Office Building
404 South Monroe Street
Tallahassee, FL 32399-1100

Re: Senate Bill 832 / House Bill 783 – Financing of Motor Vehicles

Dear Senator Simmons:

On behalf of the American Financial Services Association (AFSA),¹ I would like to bring your attention to serious concerns our members have about Florida Senate Bill 832 and House Bill 783. We understand the underlying goal of these bills is probably to prevent coercive actions by a manufacturer that force dealers to sell a manufacturer's captive finance company products, and this goal may be reasonable. However, the language in these bills is very troubling as it could infringe on a financial institution's freedom to contract, require a financial institution to accept a contract that would otherwise be refused, violate the Consumer Financial Protection Bureau's (CFPB) vendor management guidelines, hold financial institutions responsible for defunct companies as holders in due course of retail installment sales contracts (RISC) and potentially result in the inability to include Florida contracts in market securitizations, significantly increasing the cost of credit in the state.

1. Freedom to contract: §545.045 prohibits finance companies covered by the proposed law from adopting or implementing a policy or business practice which results in the refusal to take assignment of a contract because the contract includes a charge for a "third party automotive-related product." This requirement could be construed to require covered finance companies to accept assignment of contracts they ordinarily would not purchase, thereby, infringing on their right to contract.

545.045 Purchase or assignment of third-party financing. A finance company that is affiliated with or controlled by a manufacturer or wholesale distributor through common ownership, officers, directors, or management, or that has a contractual agreement to represent a manufacturer or wholesale distributor with respect to financing the sale or lease of motor vehicles, **may not** adopt or implement a policy or business practice that results in a:

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

(1) *Refusal to purchase or accept the assignment of a vehicle contract from a dealer because the vehicle contract includes a third party automotive related product;* (emphasis added).

Thus, SB 832 / HB 783 forces covered finance companies to purchase or take assignment of contracts that they otherwise would not accept, thereby violating a financial institution's freedom to contract, protected by a party's right to substantive due process under the XIV Amendment of the Constitution.

2. Forcing purchase of otherwise refused contracts may create credit and/or regulatory risk for covered finance companies: Further, this same language forces a covered finance company to purchase or take assignment of contracts that it would otherwise refuse to purchase, due to credit quality or even regulatory risks associated with a particular third-party product, solely because the language in §545.045 could be construed to prohibit a covered finance company from refusing any contract that contains a third party's automotive-related product.

In addition, the language could give a third party the ability to claim that a covered finance company refused to accept a particular third party product simply because it is offered by a third party. The proposed language provides no clear basis for covered finance companies to rebut this type of claim. The vagueness of the language could encourage nuisance claims and litigation against covered finance companies – and some unscrupulous providers could use these types of claims to induce covered finance companies to accept products that may be of questionable value to consumers.

3. CFPB vendor management requirement: The CFPB expects banks and non-banks to manage their business relationships with third party service providers to reasonably ensure compliance with federal consumer financial laws. SB 832 / HB 783 interferes with a company's ability to effectively oversee a relationship with service providers because it prevents a covered finance company from conducting an evaluation of the service provider's regulatory compliance history, which impedes them from being selective as to the service providers it chooses.
4. Holder in due course: As a holder in due course of a third party provider's obligations, covered finance companies need to be in a position to make sure that party is financially viable, etc. so that they are not held responsible for the obligations of that provider to a consumer if the provider should go out of business or otherwise fail to provide the services it has agreed to provide.

As an example, when a financial institution purchases a RISC with a debt cancellation or guaranteed asset protection contract, the creditor may be contractually obligated to waive some amount of the consumer's debt if certain events occur. These contracts then obligate the third party provider or administrator to provide or procure insurance to reimburse the financial institution for the amount waived. However, if the third party provider or administrator is out of business or otherwise refuses to provide the promised service, the financial institution is likely in the position of having to waive debt, but

without any protection or reimbursement on the back-end. Again, financial institutions need to be able to ensure that these third party providers or administrators can and will step up when required. This can only be assured if the financial institution has the freedom to have a say in the providers for which it assumes contractual obligations.

5. Subjective standard: The “substantially similar or superior kind and quality” standard by which covered finance companies must judge products is subjective and simply invites litigation and review. These products are complicated and have many features, which make direct comparisons difficult or impossible. Evaluating the providers’ soundness and service standards is also difficult and inherently subjective.

6. Securitization: Perhaps most important from an ability to purchase RISCs in the state of Florida perspective, financial institutions need to be able to offer these RISCs on the secondary market. In order to do so, financial institutions need consistency and guaranteed viability for the obligations made in a RISC in its entirety. SB 832 / HB 783 puts RISCs executed in Florida in serious danger of being refused on the secondary market (*i.e.*, excluded from securitizations), which means all RISCs in Florida would be inherently more expensive. Further, if covered finance companies cannot readily and efficiently offer Florida RISCs on the secondary market, they may choose to limit their business in Florida, and some may even choose to exit vehicle financing in Florida entirely.

For the foregoing reasons, we respectfully request that you take no action with respect to SB 832 and HB 783. We would be pleased to provide any further assistance that you should require in this matter. Please do not hesitate to contact me by phone 952-922-6500 or email dfagre@afsamail.org.

Respectfully,



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