January 10, 2025

The Honorable Rohit Chopra
Director
Consumer Financial Protection Bureau
1700 G St. NW
Washington, DC 20552

Re: Supervisory Highlights: Auto Finance Special Edition, Issue 35 (Fall 2024)

Dear Director Chopra,

The American Financial Services Association (AFSA)[1] appreciates the Consumer Financial Protection Bureau's (CFPB) periodic release of "Supervisory Highlights" (Highlights). We understand that the goal of these publications is to "help industry limit risks to consumers and comply with federal consumer financial law,"[2] which is part of our members' mission as well. However, this most recent edition of the Highlights does not provide sufficient detail for the auto finance industry to adjust practices to conform to the Highlights. The Supervisory Highlights are not the proper place to address such issues, a more thoughtful approaching towards clarify this would be through the rulemaking process. Our comments below discuss specific parts of the Highlights on which we request clarification.

Sec. 2.2.1 on wrongful repossession.

AFSA agrees that servicers should take steps to prevent erroneously repossessing consumer's vehicles. The Highlights seem to focus on situations in which the servicer places a defaulted account for repossession but then fails to timely cancel that repossession because the customer either makes a payment, makes a payment arrangement, or is granted an extension. Servicers view repossession as a last resort because of the negative impact to consumers and the financial loss it generally creates for the servicer. As a result, many servicers continue to work with customers even after the vehicle has been assigned for repossession in order to avoid the negative outcome of a repossession.

In order to better understand the issue the CFPB has identified, it would be helpful to know the statistical significance of the finding as it relates to the benefit of servicers continuing to attempt to work with customers. One alternative to reduce or even eliminate wrongful repossessions would be for servicers to stop working with customers once an account is assigned for repossession, but that does not seem to help either the customer or the servicer.

Without expounding on the nature of the issue, or what policies or procedures the CFPB would deem as acceptable to prevent this, it is extremely difficult for companies to adjust practices accordingly.

[1] Founded in 1916, the American Financial Services Association (AFSA) is the national trade association for the consumer credit industry, protecting access to credit and consumer choice. AFSA members provide consumers with many kinds of credit, including traditional installment loans, mortgages, direct and indirect vehicle financing, payment cards, and retail sales finance.
[2] https://www.consumerfinance.gov/compliance/supervisory-highlights/.

Sec. 2.2.2 on repossessing vehicles without a recorded lien.

We respectfully ask the CFPB for clarification on this section, in which the CFPB states that failing to record liens or repossessing vehicles without a valid lien constituted unfair acts or practices.

By placing the emphasis on the existence of a recorded lien, the CFPB is overlooking important considerations relating to the creditor's rights to collateral. The creditor's rights regarding the collateral are established by the operation of the retail installment sales contract, vehicle lease, or other agreement with the consumer. The notation of a lien appearing on a vehicle title or registration document perfects and provides notice of the security interest delineating priority rights with respect to other creditors and in bankruptcy, but the absence of a recorded lien on title does not mean a security interest does not exist.

The lack of specificity in this section makes it difficult to determine what practice is at issue. In most states, the title is sent to the lienholder who is also the servicers, but in a minority of states, the title is provided to the owner making it impossible for the servicer to ensure that its lien remains properly in place.

The CFPB needs to provide additional clarity about its concern with respect to recorded liens and what the bad act or practice is that needs to be corrected. It is simply too broad a statement and not accurate to say that repossessions are wrongful in every instance where a lien is not recorded or missing on a title or registration document.

Sec. 2.3.2. on delays in providing title.

While AFSA agrees that titles should be provided in a timely manner, in many instances some delay is necessary to ensure that good funds are received before the title can be released. In those instances, delay in releasing the vehicle lien is in direct correlation to the finance company having to wait for the customer's payment to clear.

To prevent fraud, companies have developed a system to ensure that the vehicle lien is paid in full before releasing the title. Many states dictate specific time frames in which the title must be released, but those timeframes are predicated on receipt of the payment. Until the funds have cleared, the payment has not been received. Member companies have shared instances where a fraudster, either the customer or a third party, has submitted payoff amounts that do not clear their bank accounts. Releasing liens too soon can also be detrimental to the customer. For example, a member company identified a situation in which it worked to facilitate release of the title to a third party at the customer's request. It was later determined that the payment from the third party was fraudulent. In this instance, there was as much benefit to the customer of ensuring that the payment cleared before releasing the title as there was to the servicer.

Sec. 2.4 on voluntary products.

This section appears to reference finance companies selling ancillary products but, typically, it is the dealership that sells these voluntary products.

We appreciate the Bureau's concerns regarding the sale of ancillary products but we ask for clarification in this section in the context of the indirect lender. For instance, could the Bureau explain whether the term "originator" refers to the finance source or the dealership? In an indirect finance transaction, the dealership is actually the originator and the finance source simply buys the contract after the point of sale of the ancillary products. In these cases, the finance source should not be regulated as the seller of the ancillary product.

Sec. 2.4.6 on providing refunds for voluntary products in all states, even when there is no requirement to issue that refund under the law.

In this section, the CFPB explains that it expects supervised entities – financial institutions – to issue refunds for voluntary products. However, the Bureau does not acknowledge the dealers' role in this process. Many of these ancillary products are not credit-related products, and customers must exercise their cancellation rights to get a refund. It is the dealer that makes a profit from selling these products and so the dealer should be responsible for the refund. Moreover, state law governs the refund process in many states.

For example, guaranteed asset protection (GAP) refunds have been squarely addressed in several states with laws that dictate or provide guidance as to which entity bears the responsibility for making the refund. Some states require the creditor to make the refund, while others merely require the creditor ensure the refund is made or cause the refund to be made, but in most states do not address or clarify who is required to make the refund.

The position taken by the CFPB in this section expressly contradicts certain state law, and it also puts the servicer in the position of potentially violating the terms of the governing contract, and harms consumers.

Sec. 2.4.7 on the date of calculation for refunding voluntary products.

The Highlights assert that the date of making a pro rata calculation should be the date of the repossession. AFSA respectfully requests that the CFPB review this decision. Depending on the state, there may be a reinstatement period by law during which the customer may reinstate (and if the customer does, s/he would be unable to reactivate the coverage provided by the voluntary product if it has been cancelled). Specifically, if the customer has a non-financed product that is cancelled upon repossession, that product is terminated. If the contract is later reinstated, this could be considered an unfair cancellation. This is a complicated issue and should not be wholesale labeled as a UDAAP. The Supervisory Highlights are not the proper place to address such an issue, a more thoughtful approaching towards clarify this would be through the rulemaking process.

Sec 2.4.9 on when a consumer should be notified to stop making payments on a total loss when covered by a GAP product

Examiners found servicers engaged in unfair acts or practices by collecting monthly payments even after they knew the GAP waiver would cover the outstanding balance of a total loss vehicle.

The Bureau acknowledges that the GAP waiver *generally* waives the amount owed under the retail installment contract or loan as of the date of the loss, but not always, and cited circumstances where

servicers collected monthly payments from consumers for months after a total loss event despite knowing that these consumers purchased GAP waivers to cover the outstanding balance as a violation.

In the event of a total loss, the application of GAP is dependent on the consumer's own property and casualty insurance company's payment of any settlement proceeds. Until that occurrence, it is impossible to determine the level of GAP benefits a consumer will receive. Also, most consumer retail installment sale contracts provide that the consumer's payment obligations continue even in the event of loss of the vehicle.

As such, the mere existence of a GAP waiver product is an insufficient litmus test for whether the consumer may owe a deficiency balance, as GAP benefits are subject to conditions and deductions based on each consumer's individual circumstances.

We agree with the Bureau that the calculations of the amount of refunded payments must be accurate, but the Bureau's blanket position of the existence of GAP should suspend a consumer's contractual obligations is inappropriate and inconsistent with the actual operation of GAP products.

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Companies rely on the CFPB's Supervisory Highlights to review and adjust policies and practices to ensure proper compliance. Therefore, the CFPB must release the Highlights with enough information and proper use of industry language so that companies have clarity on what needs to be changed. Additionally, when the CFPB contradicts state law, it puts companies in an impossible situation. Encouragement of practices that would cause a company to break the law should be reconsidered by the CFPB immediately. AFSA member companies are happy to meet with the CFPB to share further detail on these issues. Please contact me at cwinslow@afsamail.org or (202) 776-7300 with any questions or to set up a meeting.

Sincerely,

Celia Winslow
Executive Vice President
American Financial Services Association