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April 10, 2003

Financial Crimes Enforcement Network
Department of the Treasury
P.O. Box 39
Vienna, VA 22183

RE: ANPRM – Sections 352 and 326 – Vehicle Seller Regulations

Gentlemen and Ladies:

The American Financial Services Association ("AFSA") appreciates the opportunity to comment on the Advance Notice of Proposed Rulemaking ("ANPR"): Anti-money Laundering Compliance Program and Customer Identification Rules.

AFSA was established in 1916 and is based in Washington, D.C. AFSA is the national trade association for market-funded providers of financial services to consumers and small businesses.

1. *What is the potential money laundering risk posed by vehicle sellers, specifically the risks in the products that vehicle sellers provide that make them uniquely susceptible to money laundering, as opposed to the risks inherent in all businesses that sell products or services to the public that may be purchased with tainted funds? Do money laundering risks vary by vehicle type (boat, airplane, automobile), market (wholesale, retail), or business line (international sales, sales to governments)?*

    a. Money laundering risks are higher with cash intensive businesses. Use of tainted funds to purchase products is a risk inherent in all businesses; automobile purchases pose a somewhat higher risk because of the high price of automobiles. However, with respect to vehicle sales, the vast majority of automobile sales – both retail and wholesale – do not involve cash and, therefore pose a low risk of money laundering.

    b. In the wholesale context, dealers purchase automobiles from manufacturers usually through financing from a bank, automobile finance company, or other credit institution. The credit institution pays the manufacturer directly and the dealer repays the credit institution upon the sale of each vehicle to a retail customer. Typically, neither the original payment by the credit institution to the manufacturer nor the repayment by the dealer to the credit institution involves cash. Because cash is not involved, such transactions pose a reduced risk of money laundering.

    c. In the retail context, most automobile purchases are financed via installment sales contracts allowing small incremental payments over time, typically 48-60 months. These sales pose low risk of money laundering, as evidenced by the following exception to the CTR requirement: cash equivalents received in a designated reporting transaction are not treated as "currency" if received as payment on an installment sales contract, and if such contracts

are used in the ordinary course of the recipient's trade or business and the total payments received on or before the 60th day after the date of sale does not exceed 50% of the purchase price (31 CFR 103.30(c)(4)). Since such cash equivalents are not treated as "currency", the recipient does not have to report the receipt thereof to FinCEN upon receiving an amount exceeding the $10,000 reporting threshold. This *express* exception to the CTR requirement indicates that Treasury does not regard sales and purchases of consumer durables, such as automobiles, under installment sales contracts as posing high money laundering risk.

d. Another indicator of the low money laundering risk posed by vehicle sales is that federal regulations implementing the Bank Secrecy Act (31 USC §5311 et. seq.) have not required and do not require vehicle sellers to file suspicious activity reports ("SAR"). The regulations require SAR filings only by banks, broker-dealers, and money services businesses, and casinos, and potentially by insurance companies regarding certain insurance products (31 CFR 103.18-103.21; 67 FR 64067). This suggests that products and services offered by these financial institutions, and the ways in which their business is transacted, present greater money laundering risk than other financial institutions, such as vehicle sellers. The increased money laundering risk warrants imposing the SAR filing requirement; the absence of a SAR filing requirement for automobile sellers is indicative of the reduced money laundering risk presented by automobile sales and the manner in which sales are transacted.

e. The ANPR states that money laundering risks are minimized by the CTR requirement, but that a compliance program and customer identification rules may alleviate further the money laundering risk associated with large cash purchases. However, the ANPR does not state how the compliance program and customer identification rules will reduce money laundering risk *significantly more than* the CTR requirement. A money launderer can use his own identity and still launder tainted funds through an automobile purchase. Customer identification rules do not elicit information on the source or nature (legal or illegal) of the customer's funds for the automobile purchase. A third party could be the source of the funds and this would go undetected even if the customer's identity is ascertained and verified; similarly, the funds could be derived from illegal activity and the customer identification rules would not necessarily detect this either.

   For large cash purchases of automobiles, which pose an increased risk of money laundering, the CTR requirement already provides an effective money laundering risk management mechanism because it is an objective and subjective tool. The objective component is that the CTR must be filed upon receipt of currency over $10,000 regardless of the circumstances surrounding the receipt and regardless of the identity of the payer. The subjective component is that the recipient can check a box on the CTR form to file it as "suspicious" if the recipient has reason to believe that the transaction may involve specified unlawful activity and/or the proceeds thereof. Characterization of a currency transaction as "suspicious" alerts FinCEN that such illegal activity and/or funds may be involved. This objective-subjective feature of the CTR is an effective mechanism to alleviate the money laundering risk associated with large cash purchases.

f. The ANPR states that "while vehicle sellers may scrutinize non-cash transactions to manage fraud risk, they are undoubtedly less aware of possible money laundering risk with both cash and non-cash transactions." This statement ignores the fact that money laundering is a derivative crime. The criminal money laundering laws specify the types of unlawful activity upon which money laundering charges may be premised. These include

various kinds of fraud, including, for example, identity fraud and financial institution fraud, risks of which vehicle sellers are well aware. Therefore, management of fraud risk necessarily encompasses management of money laundering risk based on such fraud. The fact that vehicle sellers cannot recite the various specified unlawful activities that may serve as the premise for a money laundering charge does not mean that they are less aware of possible money laundering risks. Sellers already have independent economic incentives to diligently scrutinize each transaction to prevent fraud and use of tainted funds. Additional requirements under the USA PATRIOT Act would impose significant burdens on business operations with minimal benefits to the vehicle seller and law enforcement.

g. Money laundering risks associated with automobile sales vary by business line (i.e., the anticipated purchaser). Any regulations issued should distinguish between lines of business that have minimum money laundering risk and expressly exclude these from coverage under the rules. These lines of business include, but are not limited to the following:
   - sales by manufacturers to franchise dealers;
   - sales of repossessed/used/off-lease vehicles by secured creditors/lessors, whether through their own efforts or through auctions;
   - sales by licensed dealers to retail consumers under retail installment sales contracts;
   - sales under manufacturer repurchase agreements;
   - sales to government entities under government contracts

h. As a point of clarification, Footnote 4 of the ANPR states that "some vehicle sellers that provide financing for their products (generally through a finance subsidiary) perform a function similar to that of financial institutions such as banks and loan companies . . . ." This is not true of vehicle sellers that are automobile manufacturers. Manufacturers do NOT provide financing for automobiles. Although an automobile may have a finance subsidiary, financing provided by that subsidiary is wholly independent of the manufacturer.

2. *Should vehicle sellers be exempt from §326 and §352?*
   a. <u>§326 Customer Identification Program</u>.
      i. Manufacturers sell automobiles to dealers to whom they have granted a franchise. The process of establishing the franchise relationship necessarily involves ascertaining and verifying the identity of the franchisee (customer). Since such identification and identity verification occur as a matter of course, there is no need to impose a regulatory customer identification program requirement. Therefore, Treasury should exempt automobile manufacturers from customer identification rules.

      ii. For purchases of automobiles with large amounts of cash, the existing CTR requirement provides an effective mechanism to alert the government to possible money laundering. Customer identification rules do not elicit information on the source of funds used in cash (or non-cash) transactions. Therefore, the rules do not aid in the detection and prevention of money laundering. To the extent customer identification rules do not alleviate the risk that a purchaser will use proceeds derived from specified unlawful activity to purchase vehicles and thereby launder money, Treasury should exempt automobile sellers from customer identification rules.

      iii. In credit sales under a retail installment sale contracts, dealers have an economic incentive- independent of anti-money laundering concerns- to ensure accurate

identification of a customer in that the subsequent sale of the retail installment sale contract to a credit institution is conditioned upon the accuracy of all information presented in the contract. A credit institution can re-assign the contract back to the dealer in the event the customer's identity is not as represented on the contract. The dealer would have to re-pay the credit institution for the value of the contract, thereby incurring a financial loss. Since dealers have an independent incentive to ascertain and verify a customer's identity, there is no need to impose a customer identification requirement as a regulatory requirement. Therefore, Treasury should exempt automobile sellers from customer identification rules.

b. §352 Anti-money laundering compliance program. Treasury has indicated that the required anti-money laundering compliance program should be risk-based: each financial institution should assess the money laundering risk posed by its business activities and tailor the compliance program to minimize those risks. In the wholesale context, the risk of money laundering in sales from manufacturers to dealers is extremely low since payment for the vehicles is typically made by the dealer's finance source directly to the manufacturer and such payment occurs electronically. Because the cash flow from the dealer directly to the manufacturer is negligible, if any, the risk of money laundering posed by the sale from the manufacturer to the dealer is negligible. Since the risk of money laundering is so low, Treasury should exempt manufacturers from the anti-money laundering compliance program requirement.

3. *If vehicle sellers, or some subset of the industry, should be subject to the anti-money laundering program requirements, how should the program be structured?*

In general, the program should be risk-based and allow the automobile seller flexibility to develop program parameters and procedures tailored to its risks. Automobile sellers should be allowed to rely on existing practices to minimize the requirement's impact on business operations.

4. *How should a vehicle seller be defined? Should there be a minimum threshold value in the definition? Should it include wholesale and retail sellers? Should sellers of used vehicles be included?*

"Vehicle seller" should be defined to be an entity or individual whose principal business is the sale of automobiles to consumers. The definition should:

- exclude automobile manufacturer sales to franchise dealers;
- exclude secured creditors/lessors with respect to sales of repossessed and used/off-lease automobiles;
- exclude sales that are incidental to the seller's primary business activity;

5. *Do vehicle sellers maintain "accounts" for their customers?*

The USA PATRIOT Act definition of "account" for banks (a formal banking or business relationship established to provide regular services, dealings, and other financial transactions; 31 USC 5318A) may be construed to cover some automobile sales. For example, manufacturers who sell vehicles to their franchise dealers may be deemed to maintain accounts because of the formal franchise business relationship and the on-going, regular sales to the dealers. In contrast, in the retail context, when the dealer sells an automobile to the customer, it is a one-time transaction that does not result in an on-going business relationship. The sale of an automobile to a customer is not analogous to a bank account in function, use, or structure. Therefore, we do not believe that

dealers maintain "accounts" for their customers as that term is defined by the USA Patriot Act. We urge a narrow construction of the term "account."

In closing, we submit that many of the requirements that Treasury may impose on vehicle sellers under the USA PATRIOT Act would have a severe impact on business operations of vehicle sellers with little concomitant benefit to law enforcement.

We appreciate the opportunity to comment on the Proposed Rule. If we can provide any additional information about any of the issues we have raised in this letter, please do not hesitate to call Monique Gaw, AFSA's Vice President for Federal Government Relations, at (202) 296-5544.

Very truly yours,

AMERICAN FINANCIAL SERVICES ASSOCIATION

Cc: Charles D. Klingman
Office of Consumer Affairs and Community Policy
Department of the Treasury