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NATIONAL AUTOMOBILE DEALERS ASSOCIATION
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Legal & Regulatory Group

April 10, 2003

Via E-Mail

Financial Crimes Enforcement Network
P.O. Box 39
Vienna, Virginia 22183

Re: ATTN: ANPRM - Section 352 and 326 – Vehicle Seller Regulations

Dear Sir/Madam:

The National Automobile Dealers Association ("NADA") submits the following comments in response to the Financial Crimes Enforcement Network's ("FinCEN's") Advance Notice of Proposed Rulemaking ("ANPR") concerning the application of the requirements contained in sections 352 and 326 of the Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001 ("USA PATRIOT Act") to "businesses engaged in vehicle sales."

NADA represents over 19,000 franchised automobile and truck dealers who sell new and used motor vehicles and engage in service, repair and parts sales. Together our members employ in excess of 1.1 million people nationwide. A significant portion of our members are small businesses as defined by the Small Business Administration.[1]

NADA supports the goals of Title III of the USA PATRIOT Act to promote the prevention, detection and prosecution of international money laundering and the financing of terrorism. Consistent with this support, NADA is prepared to assist the Department of the Treasury and FinCEN with their efforts to educate franchised automobile and truck dealers on any forthcoming regulatory requirements.

For the reasons set forth below, NADA does not support the imposition of anti-money laundering program requirements or customer identification requirements on franchised automobile and truck dealers. Based on the limited nature of the money laundering threat at these businesses, the procedures dealers have instituted to comply with governmental requirements and to protect against fraud, and the extensive regulatory burden from all levels of government that our members already must contend with, NADA believes the imposition of

[1] NADA members range from small dealers with fewer than 10 employees to very large dealer chains. According to NADA Data 2002 (which is available in the May 2002 edition of NADA's AutoExec Magazine), the average franchised automobile dealership in 2001 employed 52 persons.

another entirely new regulatory scheme would fail to reasonably accomplish the goals of the statute. Instead, NADA believes that education and training are the most effective and least burdensome means of addressing money laundering threats that may exist at automobile and truck dealerships. NADA has worked diligently to provide its members with training on these threats in the past and would certainly work with Treasury and FinCEN to develop and disseminate additional educational materials to accomplish these goals.

Responses to FinCEN Questions

1) What is the potential money laundering risk posed by vehicle sellers?

The ANPR states that the "threshold issue being addressed … is the extent to which vehicle sellers pose a significant risk of money laundering." We believe the risk of money laundering at franchised automobile and truck dealerships is minimal for several reasons.

First, most motor vehicle transactions do not involve "large cash purchases" that are associated with heightened money laundering risks. The overwhelming number of vehicle deliveries at automobile dealerships are financed or leased, with cash usually being applied only as a down payment.[2] To the extent that a vehicle is purchased exclusively with cash, the amount in most cases will significantly exceed the $10,000 reporting threshold for the receipt of cash payments.[3] Therefore, the number of transactions involving the non-reportable cash purchase of vehicles from franchised automobile dealers is limited.

Second, the procedures dealers currently institute when selling a vehicle deter organized money laundering schemes. The collective requirements imposed by federal and state law, the finance company that takes assignment of the retail installment sales contract or lease ("assignee finance company"), the dealer's garage liability policy and any supplemental requirements imposed by the dealer create a document trail that dissuades attempts to cleanse illegal proceeds or integrate those proceeds into vehicles sold by our members.

The most significant federal requirement in this arena is the dealer's responsibility to file IRS/FinCEN Form 8300 when receiving more than $10,000 cash in one transaction or two or more related transactions.[4] This form collects information on the individual who provided the

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[2] CNW Marketing Research, Inc. estimates that for Calendar Year 2002, 92.2% of new vehicle deliveries were either financed or leased.

[3] According to NADA Data 2002, the average retail selling price of a new vehicle (automobile or light-duty truck) in 2001 was $25,800. The average retail selling price of a used vehicle in 2001 by a franchised automobile dealer was $13,900.

[4] Because medium and heavy duty trucks are not considered "consumer durables," the expanded definition of "cash" in 26 C.F.R. § 1.6050I-1(c)(1)(ii) does not apply to the sale of these units unless the dealer knows that the instrument is being used to avoid the filing of a cash report. Nevertheless, medium and heavy duty truck dealers still must file IRS/FinCEN Form 8300 when they receive currency in excess of the $10,000 reporting threshold.

cash as well as the person on whose behalf the transaction was conducted. It also requires dealers to verify the identity of the person from whom the cash was received.[5] The form is filed with the IRS (and is now available to FinCEN[6]) and is maintained by the dealership for a period of 5 years from the date of the transaction.[7]

Another significant federal reporting and record retention requirement is the National Highway Traffic Safety Administration's Odometer Disclosure Rule. This requires transferors and lessees of motor vehicles to provide transferees and lessors respectively with written disclosures concerning the odometer mileage of the transferred vehicle. The disclosure must contain certain information, such as the odometer reading at the time of transfer, the date of transfer, the name and current address of both parties, the identity of the vehicle (including its make, model, year, body type and VIN), and it must be signed by the transferor or lessee.[8]

The state requirements for titling, registration and the collection of sales tax vary widely but universally require personal information that establishes the purchaser's connection to the vehicle sale. For example, New York requires that applicants for a vehicle registration or a title certificate prove their identity and date of birth,[9] and it requires registration applicants to provide proof of insurance or other specified forms of financial security.[10] Ohio similarly requires registration applicants to provide proof of insurance or other financial responsibility[11] and requires title applicants to provide their social security number.[12]

The assignee finance company requires extensive information on the credit application, a credit report, and may require proof of employment, income, insurance and other items before taking assignment of a credit contract or lease. Further, dealers' garage liability policies and their own incentive to prevent fraud often create additional procedures, such as copying the customer's drivers license before the customer test drives a vehicle and, with the proliferation of identity theft, increasingly requiring that customers provide a utility bill to verify their home address. Any purchaser who has sat through the sale and delivery process at a franchised automobile dealership is familiar with the comprehensive information exchange that takes place. The documentation and paper trail that are produced belie the notion that vehicles may be purchased in an anonymous manner that avoids scrutiny.

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[5] 26 C.F.R. § 1.6050I-1(e)(3)(ii)(2002).
[6] 66 Fed. Reg. 67,680 – 67,684 (December 31, 2001).
[7] 26 C.F.R. § 1.6050I-1(e)(3)(iii)(2002).
[8] 49 C.F.R. §§ 580.5 and 580.7 (2002).
[9] The 6-point system that New York employs for determining whether applicants have adequately proven their identity and date of birth is explained at http://www.nysdmv.com/idreg.htm.
[10] N.Y. Veh. & Traf. Law § 312 (McKinney 2003).
[11] Ohio Revised Code § 4509.10.1
[12] Ohio Revised Code § 4505.07(F)(12).

Third, the inherent characteristics of an automobile also reduce the likelihood that it will become the target of organized money laundering activity. Unlike fungible goods that lack personal identifiers, automobiles have unique markings such as a license plate and a Vehicle Identification Number ("VIN"). These identifiers allow state motor vehicle departments to match the vehicle with its present owner. In addition, unlike many other products, vehicles quickly depreciate. This is particularly true of new vehicles in the period immediately after their sale. Vehicles also are subject to significant transactional fees when they are exchanged, such as sales tax, personal property tax, registration fees, etc. These features reduce the likelihood of layering through vehicle sellers. It is not practical to "[trade] in vehicles for other vehicles and [engage] in successive transactions of buying and selling both new and used vehicles"[13] or to engage in "complex invoicing arrangements"[14] when the vehicles are easily identifiable and traceable, quickly depreciate and are subject to significant transactional costs.

Fourth, the likelihood of money laundering at franchised automobile and truck dealerships is greatly reduced by the dealer's incentive to avoid the severe consequences that can result from a money laundering conviction. A standard provision in automobile and truck Dealer Sales and Service Agreements authorizes the manufacturer or distributor to terminate the dealer's Agreement if the dealer is convicted of any crime. In addition, a criminal conviction may further result in a state revoking a dealer's motor vehicle license.[15]

These consequences contribute to dealers' clear understanding that they must take proactive measures to guard against attempts to launder money at their dealerships. Long before the USA PATRIOT Act became law, NADA produced training materials for its members to address this threat. In addition to presentations on the topic to dealer groups, money laundering is addressed in Chapter 1 of NADA's A Dealer Guide to Federal Tax Issues (1994), and in the NADA video entitled The Buck Stops Here: Cash Reporting, Money Laundering, The Law, and You (1996). The video provides: (i) extensive information on cash reporting and money laundering, (ii) vignettes on how cash reporting and money laundering scenarios arise at automobile dealerships, and (iii) the IRS rules for appropriately reporting cash transactions and the appropriate way to respond to different money laundering scenarios.[16] State and metro dealer associations and

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[13] 68 Fed. Reg. 8,570 (Feb 24, 2003).
[14] Id.
[15] See, e.g., VA. Code Ann. § 46.2-1575 ("Grounds for denying, suspending, or revoking licenses or certificates of dealer registration or qualification.—A license or certificate of dealer registration or qualification issued under this subtitle may be denied, suspended, or revoked on any one or more of the following grounds: … 8. Having been convicted of any fraudulent act in connection with the business of selling vehicles or any consumer-related fraud; 9. Having been convicted of any criminal act involving the business of selling vehicles; …. 13. Having been convicted of a felony….").
[16] NADA also has provided presentations and written materials on cash reporting, including A Dealer Guide to the IRS Cash Reporting Rule (1994).

dealer accounting firms also educate dealers on these requirements. These training aides assist dealers in preventing money laundering at their dealerships, which in turn enable them to continue their business operations and maintain their livelihood.

The ANPR requests responses to several other questions under this section. FinCEN inquires into the existence of structuring sequential deposits of cash near the $10,000 cash reporting threshold. Customers will occasionally render cash payments to franchised dealers in amounts near $10,000, and we have included guidance on structuring in the NADA video mentioned above. We periodically receive questions on these and other cash reporting fact patterns, which we routinely discuss with the IRS Motor Vehicle Technical Advisor to ensure our members are provided with the Service's guidance on the issue. Regarding multiple cash payment scenarios, dealers are advised to follow the information contained on Page 3 (General Instructions) of IRS/FinCEN Form 8300. It is important to note that it may be disadvantageous or even prohibited to extend the period for collecting cash payments. Dealers increase their risk of loss when this occurs and, to the extent the vehicle purchase is financed, the assignee finance company may not permit the down payment to be paid in installments.[17]

Regarding FinCEN's desire to identify "risks in the products that vehicle sellers provide that make them uniquely susceptible to money laundering," we believe that motor vehicles, for the reasons stated above, are less susceptible to money laundering than many other products. We do not believe the section 352 requirements must be imposed to address the money laundering risk presented by third party payments. IRS/FinCEN Form 8300 already requires businesses to provide identifying information on the individual from whom cash was received (Part I) as well as the person on whose behalf the transaction was conducted (Part II).[18] Most of the third party payment situations involve payments made by one family member for another (such as a parent for a child) who cannot afford to purchase the vehicle without financial assistance from someone else. If the IRS identifies situations where this requirement is not being complied with, the most appropriate remedy is enhanced education and enforcement efforts.

Regarding the likelihood of a customer providing an overpayment to the vehicle seller to obtain a refund of what appears to be legitimate money, we believe this rarely occurs with automobile and truck dealers. Dealers generally do not have a business reason for providing this type of a

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[17] The regulation that implements the Federal Truth In Lending Act similarly limits what a dealer-creditor may disclose as a down payment. The Board of Governors of the Federal Reserve System's Regulation Z states in the definition of "downpayment": "A deferred portion of a downpayment may be treated as part of the downpayment if it is payable not later than the due date of the second otherwise regularly scheduled payment and is not subject to a finance charge." 12 C.F.R. § 226.2(a)(18)(2002).

[18] 26 C.F.R. § 1.6050I-1(e)(3)(ii)(2002)("… a return will be considered incomplete if the person required to make the return knows (or has reason to know) that an agent is conducting the transaction for a principal, and the return does not identify both the principal and the agent").

rebate or refund, and many state laws restrict their ability to do so.[19] Regarding the sale of vehicles to governmental entities, we agree that these transactions present minimal money laundering risks.

2) Should vehicle sellers be exempt from coverage under sections 352 and 326 of the USA PATRIOT Act?

Based on the limited nature of the money laundering threat at franchised automobile and truck dealerships, the difficulty dealers would have effectively implementing an entirely new regulatory scheme, and the availability of less burdensome but equally effective alternatives to addressing money laundering threats at motor vehicle dealerships, NADA believes franchised automobile and truck dealers should be exempt from coverage under sections 352 and 326 of the USA PATRIOT Act.

Before determining whether to propose anti-money laundering program requirements for vehicle sellers, it is essential that FinCEN consider the existing regulatory burden on these businesses. All too often regulatory regimes are imposed on businesses without due consideration for the cumulative requirements these businesses must comply with. Whereas the four corners of the new requirements may appear reasonable, they do not exist in a vacuum. Contrarily, they represent a significant addition to an increasingly complex regulatory maze that businesses must carefully navigate through to avoid criminal penalties, administrative sanctions and/or civil liability. This is particularly the case for small businesses that do not have an in-house legal and regulatory compliance department or the necessary resources to retain outside consultants to coordinate and implement their compliance efforts. The net effect can be the creation of a regulatory scheme that exposes businesses and fails to mitigate the concerns that brought it about. It often is possible to address the concerns through less burdensome measures.

Persons familiar with the motor vehicle industry have long recognized the extensive regulatory burdens that are imposed on automobile and truck dealers by all levels of government.[20] Two recent federal requirements under the Gramm Leach Bliley Act of 1999 are particularly noteworthy.[21] Pursuant to implementing regulations promulgated by the Federal Trade Commission,[22] automobile dealers and other businesses "significantly engaged in financial activity" were required by July 1, 2001 to develop privacy policies concerning the way they collect and disclose "nonpublic personal information" that they obtain from customers in financial transactions. They had to set forth their privacy policy on a privacy notice that must be furnished to consumers not later than the time they establish a "customer relationship" with the

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[19] See, e.g., Cal. Veh. Code § 11713.1(j).
[20] To view a brief synopsis of the federal regulatory requirements imposed on franchised automobile dealers, see "The Regulatory Maze" in the February 2003 edition of NADA's AutoExec Magazine.
[21] See 15 U.S.C. Chapter 94 (2002).
[22] 16 C.F.R. Part 313 (2002).

dealership. They also must furnish their privacy notice to consumers who have not established a customer relationship with the dealership when certain types of disclosures are made. To the extent the disclosures fall outside of certain exceptions, dealers must offer their consumers and customers the right to opt out of the disclosures. Dealers also must impose confidentiality restrictions in their contracts with joint marketers and certain types of service providers. The details for carrying out these requirements are set forth on 13 pages of the *Federal Register*.[23] This new set of rules, exceptions and definitions created (and continues to create) an enormous compliance burden for automobile dealers.

Another Gramm Leach Bliley Act requirement that was recently implemented by the Federal Trade Commission is the requirement that each automobile dealer and other "financial institution" develop by May 23, 2003 a comprehensive written information security program to protect the information they receive from their customers and the customers of other financial institutions.[24] The program must contain five elements and requires dealers to complete such tasks as conducting an assessment of reasonably foreseeable internal and external risks to the dealer's customer information, defining and implementing safeguards to control those risks, regularly testing and monitoring the effectiveness of the dealer's safeguards and overseeing service providers that have access to customer information. The compliance challenge this rule presents will be monumental and, consequently, very difficult for the average dealer to fully satisfy.[25]

Our concern about the proliferation of these new requirements does not negate our recognition that the government is attempting to address very legitimate concerns. We respectfully suggest, however, that less burdensome means may exist to fulfill many of the congressional mandates that the various federal agencies are responsible for executing.

As it relates to the ANPR, we believe additional education efforts and, if necessary, revisions to the cash reporting procedures are the most effective means to protect against money laundering at franchised automobile and truck dealerships. If desired by Treasury and FinCEN, NADA can provide significant support in executing these tasks. One potential means of enhancing dealer education on these issues would be to have FinCEN identify money laundering threats beyond those set forth in the NADA educational video mentioned above and work with NADA to create vignettes that can be added to the video. NADA could then ensure its wide distribution. The same could be accomplished for additional cash reporting scenarios that FinCEN identifies as requiring further attention. This would enable FinCEN to participate in the development of educational materials on the most salient money laundering threats and enhance its ability to

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[23] 65 Fed. Reg. 33,677 – 33,689 (May 24, 2000).
[24] 16 C.F.R. Part 314.
[25] Another example of a recently-implemented statute that may affect motor vehicle dealers is the information sharing requirements under section 314(a) of the USA PATRIOT Act. 67 Fed. Reg. 60,579 – 60,588 (September 26, 2002).

communicate this information to these financial institutions. NADA could supplement this effort by revising its cash reporting and money laundering guides and offering presentations on the topic at its annual convention and other forums.

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?

If FinCEN applies section 352 to vehicle sellers or a subset that includes franchised motor vehicle dealers, it should build on the cash reporting procedures and education efforts that motor vehicle dealers already are familiar with. To the extent FinCEN imposes additional requirements, it is essential that the final standards be flexible enough to account for the different size, structure and operations of the regulated entities. A one-size-fits-all approach would work a hardship on smaller financial institutions that lack the resources to satisfy the new requirements. It also would frustrate the goals of the program. In addition to the need for flexibility, it is equally important that FinCEN clearly delineate the financial institution's responsibilities under each required element of the program. The creation of general, vague standards without illustrative guidance will likely result in compliance disputes with regulators and the possibility of inconsistent enforcement. We believe FinCEN can reduce this likelihood by setting forth nonexclusive examples of how businesses may comply with the new requirements.

4) How should a vehicle seller be defined?

NADA does not believe the definition of "vehicle seller" should include franchised motor vehicle dealers for the reasons stated above.

5) Do vehicle sellers maintain "accounts" for their customers?

Franchised motor vehicle dealers generally do not maintain accounts for customers that fit within the bank definition of "account" that is set forth in the ANPR.[26] Franchised vehicle dealers often have informal account receivables for their wholesale customers. This is most prevalent with services or parts, although it also exists for vehicles.[27] An example would be a dealer that sets up an account receivable with a heating and air conditioning company for the servicing of company vehicles or with a municipality for the servicing of city vehicles. Invoices or repair orders generally are used to collect payments and interest may be charged on late payments. There typically is no formal procedure for opening or closing an account receivable and its duration is usually dictated by the existence of an ongoing business relationship.

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[26] 68 Fed. Reg. 8,571 (February 24, 2003).

[27] Wholesalers that purchase used vehicles for resale generally pay with a site draft or check that is drawn against a bank account.

Dealers may create account receivables for consumers in the manner described above, but this is not as common as account receivables for wholesale customers. Some dealers also provide in-house financing or leasing and thus create accounts to collect the vehicle payments. The account generally is established for the duration of the financing and thus is limited in the services that it provides.

The imposition of customer identification requirements under section 326 would not serve a useful purpose and would be redundant given the existing intricate processes and detailed documentation requirements that currently apply to the sale (and financing) of motor vehicles.

Conclusion

For the foregoing reasons, NADA does not believe it is appropriate or prudent to subject franchised new car and truck dealers to the requirements set forth in sections 352 and 326 of the USA PATRIOT. We appreciate the opportunity to comment on this matter.

Sincerely,

Paul D. Metrey
Director, Regulatory Affairs