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FINANCIAL CRIMES ENFORCEMENT NETWORK: ANTI-MONEY LAUNDERING PROGRAMS FOR BUSINESSES ENGAGED IN VEHICLE SALES

31 CFR Part 103

ATTN: ANPRM-Sections 352 and 326-Vehicle Seller Regulations

Comments of the National Independent Automobile Dealers Association Directed to the Financial Crimes Enforcement Network (FinCEN), Treasury Advance Notice of Proposed Rulemaking.

SECTION A. BACKGROUND.

On October 26, 2001, the President signed into law the Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001 ("USA Patriot Act" or "the Act"). Title III of the Act makes a number of amendments to the anti-money laundering provisions of the Bank Secrecy Act (BSA) that are intended to promote the prevention, detection, and prosecution of international money laundering and the financing of terrorism. Under the Act, the term "financial institution" is defined to include a "business engaged in vehicle sales, including automobile, airplane, and boat sales."

On April 29, 2002 and again on November 6, 2002, the Financial Crimes Enforcement Network (FinCEN) temporarily exempted certain financial institutions, including businesses engaged in the sale of vehicles, from the requirement to establish an anti-money laundering compliance program so that it could study the affected industries and consider the extent to which anti-money laundering program requirements should be applied to them. On February 24, 2003, FinCEN published an Advance Notice of Proposed Rulemaking (ANPRM) to solicit public comments on a wide range of questions pertaining to the requirements under the USA Patriot Act, including the money laundering risks that are posed by businesses engaged in the sale of vehicles, whether these businesses should be subject to the requirements to establish an anti-money laundering program and, if so, how the requirements should be structured. The two specific Sections of the Act addressed by FinCEN in the ANPRM are Sections 352 and 326.

Pursuant to Section 352 of the Act, every financial institution is required to establish an anti-money laundering program that includes, at a minimum: (i) The development of internal policies, procedures, and controls; (ii) the designation of a compliance officer; (iii) an ongoing employee training program; and (iv) an independent audit function to test programs. Section 326 of the Act requires the Treasury to prescribe regulations setting forth minimum standards for financial institutions to identify customers applying to open accounts, including: (i) Adopting reasonable procedures for verifying the identity of any person seeking to open an account; (ii) maintaining records of the information used to verify the person's identity, including the person's name, address, and other identifying information; and (iii) determining whether the person appears on any lists of known or suspected terrorists or terrorist organizations provided to the financial institution by a Government Agency.

The National Independent Automobile Dealers Association (NIADA) has represented independent motor vehicle dealers for over 50 years. The National Association and its State Affiliate Associations represent more than 16,000 independent motor vehicle dealers located across the United States. In 2002, a record 43 million used motor vehicles were retailed generating more than $370 billion in revenues. Because vehicles are lasting longer (the average

vehicle on the road today is over 8.5 years old), projections of future used vehicle sale volumes suggest that the used vehicle market will maintain its 40-million-plus volume in the years to come.[1] Given the number of used motor vehicle transactions that take place each year, a rule requiring the establishment of an anti-money laundering program could have a significant impact on the used motor vehicle industry.[2] Therefore, NIADA is submitting comments in response to the ANPRM and a recommendation that motor vehicle dealers who engage in the purchase and resale of motor vehicles be exempt from the requirements to establish an anti-money laundering program under the USA Patriot Act. Alternatively, in the event that FinCEN determines that exempting motor vehicle dealers from the requirements is not appropriate, NIADA urges FinCEN to adopt flexible requirements that will permit motor vehicle dealers to design their programs to meet the specific risks presented by the dealer's business, including a "reasonable policies and procedures" standard and related guidelines, rather than a specific rule.

SECTION B. RESPONSES TO FINCEN'S REQUEST FOR PUBLIC COMMENTS ON THE MONEY LAUNDERING RISKS POSED BY BUSINESSES ENGAGED IN THE SALE OF VEHICLES.

1. Motor Vehicle Dealers Should Be Exempt From Coverage Under Sections 352 And 326 Of The USA Patriot Act Because The Potential Money Laundering Risks Do Not Warrant The Burden Of Additional Regulations.

Having recognized that the businesses engaged in the sale of vehicles as defined in the Act includes a wide range of entities that vary drastically in function and practice, including size, the types of transactions they engage in, the types of entities with which they do business and the capital and business risks at stake, the threshold issue posed by FinCEN is the extent to which businesses engaged in the sale of vehicles pose a significant risk of money laundering. Specifically, FinCEN has solicited comments regarding the types of risks in the products that businesses engaged in the sale of vehicles 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. It is NIADA's position that motor vehicle dealers are less vulnerable to money laundering and financing a transaction for a terrorist than other industries, in part because motor vehicles cannot be easily transported all over the world or easily converted into cash. Additionally, ownership of a motor vehicle is evidenced by a certificate of title and motor vehicle dealers are subject to numerous federal and state laws that make it difficult for individuals to distance themselves from these transactions.

Two practices specifically mentioned by FinCEN include the practice of cleansing illegal proceeds by introducing them into the financial system and then distancing the illegal funds from their criminal source through the creation of complex layers of financial transactions. The example suggested in the Comments was trading in vehicles for other vehicles and engaging in successive transactions of buying and selling both new and used vehicles. However, a key distinction between the buying and selling of other products and services whereby this may be a feasible system and the buying and selling of motor vehicles is that an ownership interest in a motor vehicle is evidenced by a certificate of title. When a motor vehicle is sold to a retail

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[1] The 2003 Used Car Market Report, Manheim Auctions, 1400 Lake Hearn Drive, NE, Atlanta, GA 30319-1464.

[2] The scope of this Comment is limited to the potential impact the establishment of an anti-money laundering program will have on motor vehicle dealerships that engage in the wholesale and retail sale of automobiles.

customer, a motor vehicle dealer is required to file documentation with the appropriate state agency to obtain a certificate of title in the name of the buyer, in addition to executing a sworn odometer statement mandated by the Federal and various State Odometer Disclosure Acts. This process is repeated each time ownership in a motor vehicle is transferred to another person or entity, thereby creating a permanent record identifying each transferor and transferee of the vehicle.

In addition to certificate of title laws, motor vehicle dealers must comply with a collective total of over 900 Federal and State Laws and Regulations, including requirements to maintain credit related documents, sales and lease contracts, statements regarding cash proceeds, and daily sales summaries, for a period of time extending anywhere from two to six years.[3] These Laws and Regulations obligate motor vehicle dealers to obtain specified information from their customers, make mandated disclosures, and ensure that records are stored and maintained for the appropriate period of time. Before a dealer permits a customer to take a vehicle for a test drive, the customer must enter into a written agreement that contains terms related to his use of the vehicle, provide a valid driver's license, proof of insurance and meet any other financial responsibility requirements imposed by the dealer's insurance carrier and/or state law. When a motor vehicle is sold, virtually all State Motor Vehicle Codes and State Unfair and Deceptive Acts and Practices (UDAP) Statutes mandate that all retail and wholesale transactions be evidenced by a written document that contains the identity of and all the agreements of the parties. Information obtained from a retail customer to verify his identity includes his address, home and work telephone numbers, social security number, birth date and a copy of his driver's license or other state issued picture identification.

Since the vast majority of motor vehicle transactions are financed, motor vehicle dealers typically obtain additional information from their customers to verify their creditworthiness. Such information includes a copy of the customer's credit report, information pertaining to his employment history, credit references and, in some cases, copies of pay stubs to verify employment and income. By agreement with the dealer, outside lending sources, such as banks, credit unions and finance companies usually require the dealer to warrant that it will comply with applicable laws, verify the identity of the buyer and the legitimacy of the transaction, and take steps to ensure that any payments made in connection with the transaction are paid by the buyer, not a third party. In addition to its contractual obligations, a motor vehicle dealer must also comply with a number of Federal and State Laws that govern the financing portion of a purchase transaction. The Equal Credit Opportunity Act and Fair Credit Reporting Acts require motor vehicle dealers to retain copies of credit applications, supplemental information used in evaluating applicants, and written notifications related to the request for credit; the Truth in Lending Act/Regulation Z and Truth in Leasing Act/ Regulation M mandate that consumers be provided with and that dealers maintain copies of disclosure statements; and State Retail Installment Sales Acts mandate that all of the agreements of the parties with respect to the financing portion of the transaction be incorporated into the finance contract between the parties.

In the rare instances when a customer pays cash for the purchase of a motor vehicle, motor vehicle dealers are subject to additional disclosure and reporting requirements. For example, under most State UDAP Statutes any time a motor vehicle dealer accepts a cash payment, whether it be for a deposit, partial payment or payment in full, it typically must be evidenced by a receipt from the dealer that specifies the amount paid, the method of payment, the name of the individual payee, the name of the entity accepting the payment and a description of the products

[3] Guide to Record Retention Requirements, G.P.O., Washington, D.C. 20402.

and services being purchased. If a motor vehicle dealer receives more than $10,000 in cash in any single or series of related transactions, it is also subject to federally mandated reporting requirements under Section 365 of the USA Patriot Act and pre-existing cash reporting laws.

Section 365 of the USA Patriot Act mandates that motor vehicle dealers file a report with FinCEN anytime they receive more than $10,000 in cash in one transaction (or two or more related transactions). Section 365 also prohibits dealers from structuring a transaction to avoid the cash reporting requirements. The Form, titled "IRS Form 8300/FinCEN Form 8300," is virtually identical to the IRS Form 8300 that motor vehicle dealers are required to complete pursuant to a similar provision under the Internal Revenue Code. Now they are required to report to FinCEN as well as the IRS. In fact, the IRS issued a Rule amending its regulations to clarify that the information reported to the IRS on cash transactions is also required to be reported to FinCEN. The penalties for failing to file the Form 8300 with FinCEN or otherwise evading the filing requirements are substantial, including fines, seizure of assets and, in some cases, imprisonment. As a result, motor vehicle dealers have taken steps not only to ensure that transactions involving payments of more than $10,000 in cash are reported, but also to implement policies and procedures designed to prevent structuring such transactions in a manner designed to evade the reporting requirements.

During the past year, motor vehicle dealers across the United States have also adopted procedures to determine whether their customers appear on any lists of known or suspected terrorists issued by the Federal Government. Pursuant to the International Emergency Economic Powers Act and Executive Order 13224, U.S. citizens are prohibited from entering into "any transaction or dealing" with individuals or entities identified either in the Executive Order, by the Department of Treasury or by the Secretaries of State as posing a significant risk of committing terrorist acts or providing support to these organizations or individuals. In order to comply with the Executive Order, motor vehicle dealers have taken steps varying from downloading the master list of Specially Designated Nationals and Blocked Persons and applicable updates maintained by the Office of Foreign Asset Control (OFAC) to paying fees to credit bureaus to run checks on their behalf.

Effective as of September 26, 2002, motor vehicle dealers have had to establish a mechanism for law enforcement agencies to communicate the names of suspected terrorists and money launders to facilitate efforts to locate and secure accounts and transactions involving those suspects as well. The Treasury Department issued a Final Rule implementing Section 314 of the USA Patriot Act, which establishes procedures that encourage information sharing between governmental authorities and financial institutions, and among financial institutions themselves. Any motor vehicle dealership that receives the name of a suspect must designate one person at the dealership to be the contact person regarding the request and any future requests that it receives. A motor vehicle dealer must be prepared to provide FinCEN with the contact person's name, title, mailing address, e-mail address, telephone number and facsimile number. The contact person must also be able to search both current and past account and transaction records for the names provided and report the applicable information if the dealer has entered into a transaction with an individual or entity on the list, including account numbers, the date and type of each transaction, and the social security number, taxpayer identification number, passport number, date of birth, address, or other identifying information provided by the individual or entity at the time of the transaction.

Finally, motor vehicle dealers are in the process of developing programs to comply with security requirements mandated by the Federal Trade Commission's Safeguards Rule, which was promulgated pursuant to the Gramm-Leach-Bliley Act. By May 23, 2003, motor vehicle dealers

must develop, implement, and maintain an information security program that is appropriate to the dealership's size and complexity, the nature and scope of its activities and the sensitivity of the customer information it collects. In order to develop, implement and maintain an information security program, they must: 1) Designate an employee or employees to coordinate its program; 2) assess internal and external risks to its security, confidentiality and integrity of customer information in each area of its operations; 3) design and implement an information security program to control these risks; 4) require service providers (by contract) to implement appropriate safeguards for the customer information at issue; and 5) adapt its program in light of material changes to its business that may affect its safeguards. One of the primary objectives of the Safeguards Rule is to protect the nonpublic personal information that motor vehicle dealers obtain from their customers in their day-to-day business operations and to reduce the potential misuse and/or fraudulent use of the information collected.

Given that motor vehicle dealers and the salespeople they employ must be licensed to engage in the sale of motor vehicles, they have a strong incentive to have procedures in place to identify their customers, scrutinize cash and non-cash transactions, prevent fraud and illegal activity, and manage money laundering and terrorist financing risks. Moreover, they are required to do so in order to comply with their legal, regulatory and contractual obligations. The failure to comply with applicable laws may result in the loss of their licenses and could even cost them the dealership. Taking into consideration the numerous legal and regulatory requirements imposed upon motor vehicle dealers, applicable licensing requirements and the economic incentives they have to develop internal policies and procedures to prevent illegal and fraudulent activity, NIADA does not believe that existing or potential risks of money laundering or the volume of possible illicit funds that may flow through the sale of motor vehicle sales transactions justify the imposition of a regulation designed to protect motor vehicle dealers from the risks of money laundering and terrorist financing activities.

2. If FinCEN Determines That Motor Vehicle Dealers Should Be Subject To The Anti-Money Laundering Program Requirements, The Requirements Should Be Flexible To Permit Each Dealer To Design A Program That Meets The Specific Risks Presented By The Dealer's Business.

In applying Section 352 of the Act to businesses engaged in the sale of vehicles, FinCEN must take into account which requirements are "commensurate with the size, location and activities" of this industry. NIADA appreciates the difficulty of the task imposed upon FinCEN in establishing and implementing appropriate anti-money laundering programs for the wide range of financial institutions subject to its jurisdiction. Given the variation in size and complexity of the businesses engaged in the sale of vehicles addressed in the ANPRM, the nature and scope of their activities and the nature of their respective resources, NIADA believes it is virtually impossible for FinCEN to develop standardized rules or procedures for every business engaged in the sale of vehicles subject to its jurisdiction. For instance, in the motor vehicle industry there is an enormous disparity in the size of dealerships. Some dealers operate single locations and others operate multi-locations. They also differ vastly with respect to the number of motor vehicles they sell, how they acquire the vehicles for resale, the average price of the vehicles, the types of financing transactions they engage in (i.e. sale or lease, traditional, subprime, or buy here-pay here financing), the type and amount of records they generate, how they retain records (i.e. by filing hard copies or storing computer files), and the systems to which they have access. FinCEN should not expect entities that vary so vastly in size and business practices to implement and comply with the same anti-money laundering programs.

Furthermore, as this is a Rule that will be applied nationally, uniformity in how the Rule affects businesses should be one of the foremost considerations of FinCEN. Implementation of uniform laws and rules is an underlying principal that has led to the rewrite of Articles in the Uniform Commercial Code and enactment of legislation such as the Gramm-Leach-Bliley Act. Therefore, rather than specifying particular anti-money laundering programs, FinCEN should require all businesses engaged in the sale of vehicles to develop "reasonable policies and procedures" that are designed to meet the goals of the Act. FinCEN should include guidelines to assist with the assessment of existing and potential risks, as well as examples of mechanisms and procedures that FinCEN would consider reasonable to minimize those risks. The actual compliance mechanisms implemented by each business engaged in the sale of vehicles will vary depending upon its size, the potential threats it identifies and the policies and procedures it has in place to comply with other laws and regulations that impose reporting and identity verification requirements.

Utilizing a general standard as proposed by NIADA will allow FinCEN to establish a more thorough and consistent standard that applies to every motor vehicle dealer and other businesses engaged in the sale of vehicles. It will avoid overly burdensome, costly, and impractical standards from being imposed upon smaller dealers and will create less confusion about how to comply with the Act and FinCEN's Rules. Establishing a more general "reasonable policies and procedures" standard is also consistent with standards adopted in other Federal and State Statutes. The reasonableness of the procedures may be impacted by the standard practices in the industry and the specific experiences of that entity. Many businesses engaged in the sale of vehicles, including most motor vehicle dealers, may already have adequate mechanisms in place to protect themselves against fraud and potential money laundering risks.

3. FinCEN's Regulations Should Apply Uniformly To Motor Vehicle Dealers.

Currently, the BSA identifies businesses engaged in the sale of vehicles as a financial institution and includes sellers of automobiles, airplanes and boats, which encompass very large and extremely diverse businesses that may be subject to vastly different legal, regulatory and licensing requirements. While it is not NIADA's intent to comment with respect to the appropriate definitions for sellers of airplanes and boats, it is NIADA's position that the definition of businesses that engage in the sale of motor vehicles (automobiles) should include all entities that engage in the business of selling motor vehicles, both retail and wholesale sales and new and used vehicles. NIADA further proposes that FinCEN define sellers of motor vehicles as financial institutions for purposes of BSA only if they accept over $10,000 in cash for any one or related series of transactions with a customer, which is the current threshold amount for the Form 8300 cash reporting requirements mandated by the Internal Revenue Service and FinCEN. This monetary threshold was set by the Department of Treasury and reflects the Department's judgment that businesses that do not engage in transactions above this level fail to present a risk sufficient to justify additional regulatory burdens. NIADA maintains that this threshold has been and remains the appropriate threshold for motor vehicle dealers.

4. Whether Businesses Engaged In The Sale Of Vehicles Maintain "Accounts" For Their Customers.

Within the used motor vehicle industry there is a segment of dealerships commonly referred to as "buy here-pay here" dealerships. The phrase buy here-pay here is a term of art that is commonly used to refer to a consumer's ability to purchase a vehicle and obtain financing for the purchase directly from the dealership. Dealerships offering buy here-pay here financing

have been around for almost 50 years. There are approximately 54,250 used motor vehicle dealerships in the United States.[4] A recent survey conducted by Used Car Dealer Magazine indicates that 44%, or 25,740, of the used motor vehicle dealerships across the Country offer some form of buy here-pay here financing.[5] The vast majority of them qualify as small businesses according to the most recent Service interpretations (i.e earn gross receipts of less than $10 million annually). Most of them are family owned and operated, with 56% having 5 or fewer employees.[6] When these dealerships opened their doors, their main objective was to sell used motor vehicles. Over the years, however, offering financing at the dealership has become a necessity for many consumers wishing to purchase used motor vehicles. Dealerships that engage in buy here-pay here financing have evolved in order to provide financing to those consumers who could only afford to purchase older model vehicles and to those with derogatory or non-existent credit who were unable to obtain financing from other sources.

In a motor vehicle transaction that is financed through traditional means, when the dealer sells a vehicle to a customer, it enters into a retail purchase agreement with the customer and assists the customer in obtaining financing for the transaction from an outside lending source. In this scenario, the finance agreement is commonly referred to as two-party paper because it is an agreement between the customer and the lender. In a buy here-pay here financed transaction, the dealer still enters into a retail purchase agreement with the customer, but it is also entering into the finance agreement with the customer. The customer will pay a certain amount at the time of the transaction as a down payment and promise to pay the dealer the remaining principal amount due together with interest over time. Since FinCEN has determined to focus on the money risks associated with the sale of the vehicles themselves, and not with the financing of such sales, whether or not sellers of motor vehicles that engage in buy here-pay here financing should be subject to anti-money laundering requirements should be addressed separately in the proposed Rule to be issued that will require loan and finance companies to have anti-money laundering programs.

SECTION C. CONCLUSION.

FinCEN published the ANPRM to solicit public comments on the money laundering risks that are posed by businesses engaged in the sale of vehicles, whether these businesses should be subject to the requirements to establish an anti-money laundering program and, if so, how the requirements should be structured. Taking into consideration the numerous legal and regulatory requirements imposed upon motor vehicle dealers, existing policies and procedures dealers have implemented to verify the identity of customers and document a transaction, applicable licensing requirements, and the economic incentives dealers have to develop internal policies and procedures to prevent illegal and fraudulent activity, NIADA does not believe that potential risks of money laundering or the volume of possible illicit funds that may flow through the sale of motor vehicle sales transactions justify the imposition of a regulation designed to protect motor vehicle dealers from the risks of money laundering and the financing of terrorism. In fact, the vast majority of motor vehicle dealers have already developed internal policies, procedures, and controls to verify customer identities and prevent fraudulent transactions from occurring; have procedures to determine whether customers appear on any lists of known or suspected terrorists or terrorist organizations; maintain records of every transaction that occurs at the dealership and the information used to verify the person's identity, including the person's

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[4] Id.
[5] 2002 National MarketReport, NIADA, 2521 Brown Blvd., Arlington, TX 76006.
[6] Id.

name, address, and other identifying information; have designated someone to be in charge of ensuring compliance with applicable laws and internal policies; and utilize ongoing employee training and audit programs.

In the event that FinCEN determines that exempting motor vehicle dealers from the requirements under Sections 352 and 326 of the Act is not appropriate, the definition of businesses that engage in the sale of automobiles for purposes of BSA should include all entities that engage in the business of selling motor vehicles, both retail and wholesale sales of new and used vehicles, but only if they accept over $10,000 in cash for any one or related series of transactions with a customer. FinCEN should also adopt flexible requirements that will permit each motor vehicle dealer to develop and implement a program reasonably designed to protect the dealer from being used to facilitate money laundering or the financing of terrorist activities that addresses the risks specific to that dealer's business practices and related policies and procedures.

NIADA would like to thank FinCEN for the opportunity to comment with respect to the establishment of Anti-Money Laundering Programs for Businesses engaged in the sale of motor vehicles. Any questions FinCEN has regarding NIADA's comments and the position taken herein may be directed to NIADA's Legal Counsel, Keith E. Whann or Deanna L. Stockamp, of the Law Firm Whann & Associates, LLC located at 6300 Frantz Road, Dublin, Ohio 43017, (614) 764-7440.