***The CARLAWYER©***

***By Eric L. Johnson***

Here’s our monthly article on selected legal developments we think might interest the auto sales, finance, and leasing world. This month, the developments involve the Consumer Financial Protection Bureau, Federal Deposit Insurance Corporation, Federal Reserve Board, National Credit Union Administration, Office of the Comptroller of the Currency, Financial Crimes Enforcement Network, state financial regulators, U.S. Department of Justice,Treasury Department,Federal Trade Commission, State of Illinois, and Office of the Maryland Attorney General. As usual, our article features the “Case(s) of the Month” and our “Compliance Tip.” Note that this column does not offer legal advice. Always check with your lawyer to learn how what we report might apply to you or if you have any questions.

**Federal Developments**

On December 3, the **Consumer Financial Protection Bureau issued a proposed rule that would require data brokers to comply with the Fair Credit Reporting Act**. The proposed rule seeks to significantly amend the scope of Regulation V and ultimately the FCRA. Among other changes, the proposed rule would clarify the definitions of "consumer report" and "consumer reporting agency" as follows: (1) clarify that data brokers that sell certain information - specifically information about a consumer's credit history, credit score, debt payments, or income or financial tier - are consumer reporting agencies and that the information sold is a consumer report, regardless of the intended use of the information; (2) clarify that a communication of consumer information is a consumer report if it is used for eligibility purposes, even if the entity providing the information did not expect it to be used for such purposes; (3) treat credit header information from consumer reporting agencies, such as the consumer's name, address, date of birth, social security number, phone number, and age, as a consumer report if the information is collected for the purpose of preparing a consumer report about the consumer; (4) characterize the sharing of medical information or medical payment information with an affiliate to be a consumer report if the information is used or expected to be used for eligibility purposes; (5) restrict consumer reporting agencies from using consumer report information to decide which consumers should receive certain ads, treating such use as the constructive furnishing of consumer reports; and (6) seek to include de-identified consumer report data within the definition of a consumer report and set forth three proposed approaches to when de-identified consumer report data should be treated as a consumer report. The proposed rule also seeks to expand the scope of the FCRA by sweeping in different entities that obtain and process data. Importantly for data aggregators covered by the Dodd-Frank Section 1033 Rule on Personal Financial Data Rights, the proposed rule defines the term "assembling or evaluating" under the definition of a consumer reporting agency to include, among other things, an entity that collects information about a consumer from a consumer's bank account or assesses it, such as by grouping or categorizing it based on transaction type. Similarly, the proposed rule seeks to include entities that gather and normalize data by including the act of modifying the year date fields to reflect all four, rather than two, digits in the definition of "assembling or evaluating." The proposed rule would even sweep in such activities as verifying or validating information with external sources. Finally, the proposed rule addresses permissible purposes under the FCRA, proposing to restrict various uses of consumer reports as follows: (1) defines the activity of furnishing a consumer report to include a consumer reporting agency's use of information from a consumer report to target advertising to the consumer for financial gain; (2) requires that users, in order to obtain a report under the written instructions permissible purpose, provide consumers with a clear and conspicuous disclosure of how the consumer report will be used and requires that consumers have the ability to revoke their consent. The proposed rule also limits the use of a report based on written instructions to one year from the date of authorization; and (3) clarifies that users may not rely on the legitimate business interest permissible purpose to solicit consumers for a product or service that the consumer did not initiate or to otherwise market products or services to the consumer. Comments on the proposed rule are due by March 3, 2025.

On December 4, the **Federal Deposit Insurance Corporation, the Federal Reserve Board, the Consumer Financial Protection Bureau, the National Credit Union Administration, the Office of the Comptroller of the Currency, the Financial Crimes Enforcement Network, and state financial regulators issued a joint statement to provide supervised institutions with examples of risk management and other practices that can be effective in identifying, preventing, and responding to elder financial exploitation**, including but not limited to: (1) developing effective governance and oversight, including policies and practices to protect account holders and the institution; (2) training employees on recognizing and responding to elder financial exploitation; (3) using transaction holds and disbursement delays, as appropriate, and consistent with applicable law; (4) establishing a trusted contact designation process for account holders; (5) filing suspicious activity reports with FinCEN in a timely manner; (6) reporting suspected elder financial exploitation to law enforcement, Adult Protective Services, and other appropriate entities; (7) providing financial records to appropriate authorities where consistent with applicable law; (8) engaging with elder fraud prevention and response networks; and (9) increasing awareness through consumer outreach.

On December 5, the **Department of Justice and the Consumer Financial Protection Bureau issued a joint letter to certain financial services providers to remind them of the interest rate protections available to servicemembers, recent veterans, and their spouses (collectively, "servicemembers") under the Servicemembers Civil Relief Act and to encourage providers to evaluate their practices to ensure compliance with the SCRA**. In the letter, the agencies detail the interest rate benefit available to servicemembers under the SCRA, specifically noting that: (1) the Act limits the amount of interest that may be charged on certain financial obligations that were incurred before military service to no more than 6 percent per year, including most fees; (2) servicemembers are required to submit a specified notice and documentation of their military service to creditors in order to receive the interest rate benefit; and (3) creditors must respond to a servicemember's proper request by forgiving, not deferring, interest greater than 6% per year, forgiving interest retroactively back to the first day of SCRA eligibility, and reducing the monthly payment by the amount of interest forgiven (and cannot accelerate payment of principal). The agencies also clarify certain "misunderstood" details about the SCRA's interest rate benefit, including protections for servicemember spouses who have co-signed the servicemember's loan or obligation, the date SCRA protections begin for servicemembers, National Guard member eligibility for interest rate benefits, veteran eligibility for interest rate benefits, and verification of a servicemember's military status using the Defense Manpower Data Center ("DMDC"). Finally, the agencies suggest two ways for creditors to offer greater protections to servicemembers than those guaranteed by the SCRA: (1) "proactively checking accounts using the DMDC and automatically applying the SCRA interest rate cap to all eligible servicemembers"; and (2) "automatically apply[ing] the SCRA interest rate cap to all eligible accounts held at that institution if a servicemember invokes protections for a single account."

On December 9, the **Consumer Financial Protection Bureau issued an Advance Notice of Proposed Rulemaking ("ANPR") seeking information in advance of preparing a proposed rule to address the Bureau's concerns regarding the furnishing of credit information involving "coerced debt" to consumer reporting agencies**. The CFPB's press release states that the ANPR is in response to a petition for rulemaking submitted by the National Consumer Law Center and the Center for Survivor Agency and Justice and to "harmful effects of inaccurate credit reporting affecting survivors of domestic violence, elder abuse, and other forms of financial abuse." According to the Bureau, "[a]busers often use coerced debt as a tool of control, forcing their partner or other family members to take out credit cards or loans through threats, physical violence, or manipulation. They may secretly open accounts in survivors' names, force them to sign financial documents, or run up charges on existing accounts." The ANPR specifically seeks information on amending the definitions of "identity theft" and "identity theft report" in Regulation V, which implements the Fair Credit Reporting Act, as well as other related amendments to Reg. V, to include information stemming from transactions that occurred without the consumer's effective consent. The ANPR asks for public comment on: (1) the prevalence and extent of harms to victims of economic abuse, particularly coerced debt, including how the credit reporting system contributes to or reduces those harms; (2) evidence regarding the relevance of coerced debt to a victim's credit risk; (3) existing protections under federal or state law for victims of economic abuse with respect to consumer reporting information and the barriers that may exist to prevent victims from availing themselves of existing protections; (4) challenges facing specific populations as a result of coerced debt; (5) the definition of "coerced debt," noting that the petition defines the term as "all non-consensual, credit-related transactions that occur in a relationship where one person uses coercive control to dominate the other person"; and (6) potential documentation or self-attestation requirements to show that a person's debt was coerced. Comments on the ANPR are due by March 7, 2025.

On December 12, the **Consumer Financial Protection Bureau adopted a final rule on overdraft fees that applies to banks and credit unions with more than $10 billion in assets**. According to the CFPB's press release, the rule "close[s] an outdated overdraft loophole that exempted overdraft loans from lending laws" by not treating overdraft fees as finance charges. The new rule gives covered banks and credit unions three options to manage overdrafts: they can cap their overdraft fee at $5, they can charge a fee that covers no more than their costs or losses, or they can continue to extend overdraft loans if they comply with standard requirements governing other loans, like credit cards, including giving consumers a choice as to whether to open the line of overdraft credit, providing account-opening disclosures that would allow comparison shopping, sending periodic statements, and giving consumers a choice to pay automatically or manually. According to the CFPB, the final rule would save consumers up to $5 billion annually in overdraft fees, or $225 per household that pays such fees. The new rule is effective October 1, 2025.

On December 19, the **Treasury Department released a report following the issuance of its June 2024 Request for Information on the uses, opportunities, and risks of artificial intelligence in financial services**. The report summarizes key themes from respondent feedback and recommends several next steps to be considered by government agencies and the financial services sector.

On December 19, the **Federal Trade Commission and the State of Illinois announced a proposed settlement with a group of 10 affiliated car dealerships located in Illinois, their parent company, and an individual defendant,** **alleging unfair and deceptive practices in connection with the advertising, marketing, promotion, sale, lease, and financing of motor vehicles**. The complaint specifically alleges that the defendants attracted consumers to their dealerships using illegal prize mailers and "bait-and-switch" tactics, including advertising vehicles online at low prices and then adding fees for preinstalled add-on products, like protective coatings and theft protection, to the prices of the vehicles once consumers arrived at the dealerships. The unauthorized fees also included charges for add-on items such as guaranteed asset protection coverage and service contracts. In addition, the complaint alleges that the defendants advertised vehicles as being "certified pre-owned" and available at a specific advertised price but then charged consumers additional "certification fees" once they arrived at the dealerships. The complaint also claims that some of the vehicles advertised as "certified pre-owned" had not actually gone through the certification process. The complaint also alleges that the defendants sold vehicles at U.S. dealerships that were manufactured for the Canadian market without disclosing that fact to consumers. Finally, the complaint alleges that the defendants induced their employees to post fake, positive online reviews, either by threatening to withhold compensation or by paying as much as $25 per review, and that the defendants manipulated their online reviews by pressuring consumers into posting reviews that did not represent their actual experiences, views, or opinions. The proposed settlement would, among other things, require the defendants to pay $20 million to provide refunds to affected consumers.

On December 27, the **Federal Trade Commission and the Office of the Maryland Attorney General filed a complaint against a group of three affiliated car dealerships located in the greater Washington, DC, metropolitan area, their management company, and several individual defendants, alleging unfair and deceptive practices in connection with the advertising, marketing, promotion, sale, lease, and financing of motor vehicles**. The complaint specifically alleges that the defendants attracted consumers to their dealerships by using "bait-and-switch" tactics, including advertising vehicles online at low prices but not honoring the advertised prices once consumers arrived at the dealerships because they allegedly did not qualify for certain rebates and incentives included in the advertised prices or because they were required to pay additional fees in order to purchase the vehicles. The complaint also alleges that the defendants falsely claimed that consumers must pay additional fees to purchase vehicles if they did not finance through the dealerships. In addition, the complaint alleges that the defendants charged consumers for unwanted add-ons such as service contracts, guaranteed asset protection coverage, and extended warranties without consent or after falsely telling consumers that those add-ons were required. The FTC and the Maryland AG seek a permanent injunction, restitution to affected consumers, a civil penalty, and other relief.

**Case(s) of the Month**

**City and Towing Companies Violated Due Process and Takings Clauses of U.S. Constitution by Seizing, Impounding, and Selling Vehicle on Which Creditor Held Lien:** A creditor sued a city and two towing companies for violating the U.S. Constitution and New York law in connection with the seizure of a car on which the creditor held a lien. The towing companies seized the vehicle after the car's owner was arrested for driving while intoxicated and stored the vehicle in their lot. Although the creditor learned about the seizure and tried to obtain the vehicle's release, it was told that the car could not be released without a release from the district attorney. Neither the creditor nor the towing companies obtained the DA's release, and, pursuant to the towing companies' letter to the creditor and the car's owner informing them that they had 10 days to claim the vehicle, the towing companies deemed the vehicle abandoned, retitled it, and sold it. The parties cross-moved for summary judgment on the creditor's claims, and the **U.S. District Court for the Southern District of New York** granted each party's motion in part and denied it in part. After determining that the towing companies may be state actors for purposes of the creditor's constitutional law claims, the court turned to the substance of those claims. The creditor first claimed that the defendants unreasonably seized the vehicle, in violation of the Fourth Amendment, because they retained it longer than warranted. The court found that the initial seizure was reasonable based on the car owner's arrest for driving while intoxicated and that, pursuant to case law, the failure to return items lawfully seized does not state a claim under the Fourth Amendment. Therefore, the court granted the defendants summary judgment on this claim. Second, the creditor claimed that the defendants violated its Fourteenth Amendment due process rights because they failed to provide it adequate notice or an opportunity for a hearing. The court found that all of the defendants provided notice of the impoundment to the creditor, but the delay of 28 to 51 days between seizure and notice violated the creditor's due process rights. Moreover, the court found that the creditor was not provided a hearing before it was deprived of its interest in the vehicle. Therefore, the court granted the creditor summary judgment on this claim. Third, the creditor claimed that the defendants violated its Fifth Amendment rights against a taking of its property for public use without compensation. The court granted the creditor summary judgment on this claim, finding that the "public use" requirement was satisfied where the vehicle was taken under the city's police powers. Finally, the creditor claimed that the defendants violated the New York Constitution's guarantees of equal protection and due process. The court granted the defendants summary judgment on this claim, noting that courts have held that there is no private right of action under the New York Constitution where there are remedies under the U.S. Constitution. *See****Santander Consumer USA, Inc. v. City of Yonkers***, 2024 U.S. Dist. LEXIS 211330 (S.D.N.Y. November 18, 2024).

**This Month’s *CARLAWYER©* Compliance Tip**

The month of January is a time for making New Year’s resolutions, whether it be to exercise more, eat healthier, lose weight, or to quit those bad habits. What are your resolutions for the New Year? Hopefully your New Year’s resolutions include quitting those bad habits at your dealership and getting your dealership into compliance shape for whatever challenges it may face during 2025. As you can see by the Federal Trade Commission, state regulators and enforcers’ actions in the Federal Developments section above, they are keenly interested in the activities of dealers and individuals, particularly related to alleged unfair and deceptive practices in connection with the advertising, marketing, promotion, sale, lease, and financing of motor vehicles. Make a New Year’s resolution to get your dealership into compliance shape for the New Year!

So, there’s this month’s roundup! Stay legal, and we’ll see you next month.

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