



## Back to the Basics

May 16th, 2018 | [Thomas B. Hudson](#) and [Eric L. Johnson](#)

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We hang out, literally and online, with lawyers who represent dealers. Most of these lawyers deal with parts of the dealer regulatory scheme—issues involving taxes, franchise relationships, environmental law, labor regulations, estate planning and other parts of the law we’ve either forgotten or know very little about. Often when we’re asked questions about their areas of expertise, we strike out.

So, we don’t know why we’re startled when we realize most of these lawyers whiff when they get into our particular bailiwick—federal and state laws and regulations governing financing and leasing. And, sometimes those whiffs involve some pretty basic finance and leasing concepts. We were talking about these whiffs at a recent conference and thought a column about some of these basic concepts would be a great refresher.

Here are a few of those concepts dealership lawyers and compliance types ought to squirrel away.

### **TILA Thresholds**

Federal lease and financing laws do not apply to transactions in which the consumer’s obligation exceeds a certain dollar amount. For example, the Truth in Lending Act (TILA)/ Regulation Z (Reg Z) doesn’t apply if the amount financed (threshold amount) is more than \$55,800, unless the RV is used or expected to be used as the principal dwelling of the buyer. An RV not used as a residence is not a dwelling. High-line dealerships might find a significant number of their transactions are simply not subject to federal disclosure laws.

That can be a handy little thing to know if you are an RV dealer and the buyer who turns her complaint into a class action lawsuit has no case because the amount financed is too high.

### **TILA/CLA Applicability**

Likewise, these federal financing and lease laws don’t apply to financing and lease transactions when the buyer or lessee is a corporation, partnership, association or any entity that isn’t a human being. That’s the case even if the RV is to be used for personal purposes by an individual.

So, RV dealers who do a lot of financing and leasing transactions with businesses and professionals will find a significant portion of their deals are exempt from these laws. Even transactions with individuals are not subject to these laws when the primary purpose of the transaction is for something other than personal, family or household use.

A seller/creditor must determine in each case if the transaction is primarily for an exempt purpose. Reg Z has some factors a seller/creditor can consider in determining whether the credit is primarily for business or commercial purposes (as opposed to a consumer purpose).

### **TILA/Reg Z Disclosures and Electronic Transactions**

Speaking of disclosures, you must give the required disclosures to the consumer: (a) clearly and conspicuously in writing; (b) in a form the consumer can keep; and (c) before consummation (a term defined by state law). The requirement to provide disclosures to the consumer in a form he/she can keep is problematic for electronic contracts. You can't have the consumer electronically sign the retail installment sales contract without first providing the TILA/Reg Z required disclosures in a form the consumer can keep (i.e., on paper).

### **Scope of Advertising Regulations**

For the purposes of the federal disclosure laws, an "advertisement" is a commercial message in any medium that promotes, directly or indirectly, a credit transaction. However, an advertisement doesn't include direct personal contacts, such as follow-up letters, cost estimates for individual consumers (e.g., "first pencil"), or oral or written communication relating to the negotiation of a specific transaction.

So, under Reg Z, those face-to-face negotiations with the buyer are not considered an "advertisement" that would require certain disclosures be provided. Likewise, face-to-face negotiations also aren't considered "advertisement" under the Consumer Leasing Act and Regulation M, which applies to consumer leases.

### **Triggering terms**

If you use any certain terms in an advertisement, Reg Z requires you also disclose some additional terms. For example, if you advertise the: (a) amount or percentage of any down payment; (b) number of payments or period of repayment; (c) amount of any payment; or (d) amount of any finance charge, then you also must disclose: (i) the amount or percentage of the downpayment; (ii) the terms of repayment, which reflect the repayment obligations over the full term of the contract, including any balloon payment; and (iii) the APR, and, if the rate can be increased after consummation.

So, watch out for those traveling advertisements on your fleet vehicles, those front-line models with the big monthly payments plastered on the sides, company shirts and hats that say "\$199 down!" and any other situations in which triggering terms appear without the other required disclosures.

### **Finance Charge Definition**

Under federal disclosure laws, the finance charge is the cost of consumer credit as a dollar amount and includes any charge payable directly or indirectly by the consumer, and imposed directly or indirectly by the creditor as an incident to or a condition of the extension of credit. However, it doesn't include any charge that would be payable in a comparable cash transaction.

Many dealer lawyers seem to forget the last part of the definition-if it's a charge payable in a comparable cash transaction, then it isn't a finance charge. It's surprising how often this exemption

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can apply, and how often lawyers overlook it.

### **Loans/RISCs (refinancing)**

Under federal law, a refinancing occurs when an existing obligation is satisfied and replaced by a new obligation by the same consumer. Certain transactions are not considered refinancing, even if they are accomplished by cancellation of the old obligation and substitution of a new one. Some examples of such a transaction include: a reduction in the APR with a corresponding change in the payment schedule; agreements involving a court proceeding; a change in the payment schedule or change in collateral requirement as a result of the buyer's default or delinquency, with certain exceptions; and a renewal of optional insurance purchased by the consumer. A refinancing is a new transaction that requires a complete new set of disclosures be given to the consumer.

These are just a few concepts dealer lawyers and compliance types ought to squirrel away. Again, these are basic federal law concepts and you still need to take state law into consideration, as some state definitions don't always track the federal definitions. Make sure you check to see whether state financial services laws apply to the transaction, as they could impact your rates, terms, disclosures, permitted fees, etc.

Hopefully these basic concepts can save you time, effort and money in responding to plaintiffs' and/or attorney general claims.

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