TO: Indiana registered automobile dealers

FROM: Ryan E Black, Deputy Director, Consumer Credit Division

RE: Convenience fees and additional charges

During the course of examinations by the Indiana Department of Financial Institutions (“Department”), persistent violations of the Indiana Uniform Consumer Credit Code (“IUCCC”, Ind. Code § 24-4.5) have been discovered regarding the assessment of convenience fees for electronic vehicle titling and registration pursuant to Ind. Code § 9-14.1-3-3 (“convenience fees”). To assist in mitigating the continuing risk of this violation for the automobile industry, to ensure transparency afforded to consumers by applicable laws, and to assist the Department in ongoing prevention efforts regarding potential violations, this Advisory to industry is warranted.

Overview:

The Department is issuing this Advisory to automobile dealers (“Registrants”) to demonstrate how a convenience fee may be properly assessed as part of a financed vehicle purchase in compliance with applicable Indiana and federal laws. The Department recognizes it is a business decision by an individual Registrant to determine whether to charge and collect the convenience fee in question. When assessed in compliance with applicable law and this Advisory, the Department will take no issue with a Registrant collecting this fee. It is important to note that a Registrant should continue to ensure convenience fees are assessed within the confines otherwise permitted by the Indiana Bureau of Motor Vehicles (“BMV”).

Convenience Fees:

On August 30, 2016, the BMV issued a memo regarding the payment of convenience fees on transactions processed by a full or partial services provider.¹

¹ The full memo can be found at http://in.gov/sos/dealer/files/convenience%20fee%20memo.pdf.
Finance Charges:

Under Indiana law and federal law, an entity regularly engaged in originating consumer credit agreements, whether such entity then assigns that contract to another or retains that contract, is considered to be a “creditor.” Automobile dealers that are creditors, including those who assign retail installment contracts to financial institutions and finance companies, are subject to the Truth in Lending Act (“TILA”), the IUCCC, and the Department’s jurisdiction. Automobile dealers must ensure that convenience fees are assessed in accordance with the IUCCC and TILA².

If a convenience fee is required to be paid only by credit customers and is optional for cash customers, it is an incident to or condition of the extension of credit and meets the definition of a finance charge. Therefore, in order to assess convenience fees on financed transactions, a dealer may:

1. Require that all customers, cash and credit, pay the fee in the same dollar amount;
2. Present the fee as optional to all customers, cash and credit, in the same dollar amount, if elected; or
3. If not assessed equally to cash and credit customers, properly disclose the amount of the fee as a finance charge and reflect it in the Annual Percentage Rate (“APR”)³ pursuant to TILA, not to exceed the maximum rate allowed by the IUCCC.⁴ A convenience fee that is imposed as an incident to or a condition of the extension of credit is a finance charge that must be disclosed as such. In this case, the fee is a prepaid finance charge. Therefore, in order to be permissible as a finance charge, the convenience fee must be disclosed as a finance charge and reflected in the APR in compliance with TILA in the following two situations:
   a. when the convenience fee is required of all customers but is assessed to finance customers in a dollar amount greater than to cash customers, or
   b. when the fee is required on all finance transactions and is not required on all cash transactions.

Further, if the fee is assessed as an incident to or a condition of the extension of credit, the maximum rate of finance charge permitted under the IUCCC must not be exceeded at consummation⁵ or prepayment in full⁶. When electing to assess the fee as a prepaid finance charge, it is the creditor’s responsibility to ensure compliance with the IUCCC and TILA. In addition to points already mentioned, in this case a creditor may not disclose that a consumer “will not be entitled to a refund of the prepaid finance charge.”⁷

² TILA’s implementing regulation is Federal Regulation Z.
³ See generally Federal Regulation Z, §§1026.17, 18, and 22 regarding general disclosure requirements, content of disclosures, and determination of the APR, respectively.
⁴ If a convenience fee is disclosed as a finance charge, the dealer must ensure that the maximum rate of finance charge under Ind. Code § 24-4.5-2-201 has not been exceeded.
⁵ The maximum rate of finance charge (or “credit service charge”) may not exceed the rates specified in Ind. Code § 24-4.5-2-201.
⁶ At the time of prepayment in full, Ind. Code § 24-4.5-2-209 limits the total finance charge, including prepaid finance charges, to the maximum charge allowed under Ind. Code § 24-4.5-2 et. seq.
⁷ See Federal Regulation Z § 1026.18(k) and supplemental commentary.
When a convenience fee is assessed uniformly to cash and credit customers alike, (i.e. the fee is either required of all cash and credit customers, or is optional for all cash and credit customers) then it is not required to be classified as a finance charge.\(^8\) This means the fee is permissible as part of the cash price.\(^9\) In essence, the service and fee must be presented to all consumers in the same manner. In order to determine whether the fee meets these requirements, the Department may consider, among others, the following:

1. Policies of the Registrant, either written or unwritten;
2. Statements made by Registrant’s staff;
3. The dollar amount of the fee assessed to all credit customers compared to the dollar amount assessed to all cash customers;
4. Disclosures provided to and signed by consumers; and
5. Presentation of the fee to consumers.

Regardless of whether the fee is required of all cash and credit customers, it must be correctly disclosed in the itemization of the amount financed in compliance with TILA. As previously indicated, if the convenience fee is an incident to or a condition of the extension of credit, it must be disclosed as a prepaid finance charge in the itemization. In all cases where the fee is deemed not to be a prepaid finance charge, the fee must be separately itemized as a fee paid to a third party. Further, if the dealer is retaining a portion of the convenience fee, this fact must also be disclosed. The convenience fee must not be itemized as a fee paid to public officials.

**Additional Charges:**

Additional charges, which are charges that can be paid in a consumer credit transaction in addition to finance charges, are listed in Ind. Code § 24-4.5-2-202; convenience fees are not included as an additional charge under that code section. Therefore, if a convenience fee is imposed as an incident to or a condition of the extension of credit, and the fee is not properly disclosed as a finance charge, in addition to being a disclosure violation it is also an impermissible additional charge that is fully refundable to the consumer. This adheres to Department policy of more than 40 years; this policy is applicable to all fee types and all creditors under the IUCCC.

**Voluntary Compliance**

Internal policies and procedures should be reviewed to assure compliance with this Advisory. If a Registrant discovers that it is not in compliance with this Advisory, the Registrant should update its practices immediately in order to comply with the IUCCC and TILA. While updating practices, please be mindful of employee training. Where past practices are found not to be in compliance, refunds should be made to consumers with documentation retained. The value of such mitigation is paramount and may prevent future operational and compliance costs. Further, proactive issuance of any necessary refunds may

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\(^8\) This statement further assumes that to be charged “alike” includes that in addition to the fee being charged or not charged to all customers, the dollar amount of the fee (i.e., the maximum permitted by the BMV is $15), if charged, is the same to all customers.

\(^9\) See Ind. Code § 24-4.5-2-110 for the definition of “cash price.”
be deemed a mitigating factor in any enforcement action contemplated by the Department at the time of examination.

Finally, please consider the Department to be a resource regarding this issue. If you have any questions regarding compliance, please contact us. We would be happy to work with you to assure accurate treatment going forward, and to assist you in voluntary issuance of refunds of prior non-compliant charges before your next scheduled examination.

The above restates the Department’s longstanding policy regarding charges imposed as an incident to or a condition of the extension of credit. Registrants may wish to seek the advice of legal counsel regarding their business model. This Advisory is in effect unless later amended or withdrawn. It is not a substitute for advice from a Registrant’s legal counsel.

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