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CONSUMER CREDIT DIVISION
ADVISORY LETTER 2017 - 03
October 6, 2017

TO: Indiana registered automobile dealers ("Registrants")
FROM: Ryan E Black, Deputy Director, Consumer Credit Division
RE: Lease-Here, Pay-Here business model for used motor vehicles

This Advisory Letter is being issued by the Consumer Credit Division of the Indiana Department of Financial Institutions ("the Department"). Certain examination findings and trends have raised concerns that Registrants subject to Indiana's Uniform Consumer Credit Code ("IUCCC") providing financing for the sale of motor vehicles may be engaging in disguised credit sales, either knowingly or unknowingly, by utilizing a Lease-Here, Pay-Here ("LPH") business model for used motor vehicles. All comments outlined in this Advisory Letter pertain only to transactions for a personal, family, or household purpose.¹

Background

A long-standing practice of many used automobile dealers, and some new automobile dealers, includes engaging in consumer credit sales² that are retained in-house, commonly known as Buy-Here, Pay-Here ("BHPH") transactions. In the typical BHPH transaction, a consumer enters into a retail installment contract with a Registrant whereby the consumer is obligated to make more than four payments or to pay a finance charge in order to pay for the purchase of the vehicle over time. Such transactions are subject to the IUCCC, specifically Ind. Code §24-4.5-2. Significant provisions that a creditor must comply with include but are not limited to: maximum rate of finance charge (or credit service charge)³; permitted additional charges⁴; delinquency charges⁵; rebate upon prepayment of a precomputed transaction⁶; and restrictions on deficiency judgments in consumer credit sales⁷.

During recent routine examinations of Registrants, the Department has observed an increased prevalence of a business model where the transactions are structured as leases. In these transactions, a consumer does not obtain ownership of the motor vehicle at consummation. Rather, the seller/creditor retains ownership of the vehicle until such time that the consumer exercises either an early purchase option or end of term purchase option, if provided for in the contract.

¹ The IUCCC does not apply to transactions for a purpose other than a personal, family, or household purpose; extensions of credit primarily for a business, a commercial, or an agricultural purpose are exempt. See Ind. Code §24-4.5-1-202(b).

² Ind. Code §24-4.5-1-301.5(8)

³ Ind. Code §24-4.5-2-201

⁴ Ind. Code §24-4.5-2-202

⁵ Ind. Code §24-4.5-2-203.5

⁶ Ind. Code §24-4.5-2-210

⁷ Ind. Code §24-4.5-5-103

Analysis of Applicable Statutes

Ind. Code §24-4.5-1-301.5(8) states in pertinent part, “‘Consumer credit sale’ is a *sale of goods*, services, or an interest in land...” (*emphasis added*).

Further, the IUCCC states,

“Sale of goods” includes any agreement in the form of a bailment or lease of goods if the bailee or lessee agrees to pay as compensation for use a sum substantially equivalent to or in excess of the aggregate value of the goods involved and it is agreed that the bailee or lessee will become, or for no other or a nominal consideration has the option to become, the owner of the goods upon full compliance with his obligations under the agreement⁸.

The Commentary to Ind. Code §24-4.5-2-106 derived from the 1968 Uniform Consumer Credit Code states in pertinent part,

Leasing has become a popular alternative to credit sales as a means of distributing goods to consumers and merits inclusion in a comprehensive consumer credit code... If the transaction, though in form a lease, is in substance a sale within the meaning of Section 2.105(4), it is treated as a sale for all purposes in this Act and the provisions on consumer leases are inapplicable.

In addition, Registrants are advised that Ind. Code §24-4.5-1-101(5) states,

This article applies to a transaction if the director determines that the transaction:

- (a) is in substance a disguised consumer credit transaction; or
- (b) involves the application of subterfuge for the purpose of avoiding this article.

A determination by the director under this subsection must be in writing and shall be delivered to all parties to the transaction. IC 4-21.5-3 applies to a determination made under this subsection.

During future examinations, the Department will be reviewing all transactions in the form of a lease to ensure the transactions are not in substance a “sale of goods” within the meaning of Ind. Code §24-4.5-2-105(4). If the transactions are determined to be in substance a sale of goods, the Department may conform the fees and charges assessed to the limitations under Ind. Code §24-4.5-2. The Department may require refunds of overcharges, impose civil penalties not greater than \$10,000 per violation⁹, or take other enforcement actions.

⁸ Ind. Code §24-4.5-2-105(4)

⁹ Ind. Code §24-4.5-6-113(3)

The Department may consider, among others, the following in determining if transactions are in substance a sale of goods:

1. If the consumer agrees to pay as compensation for use a sum substantially equivalent to or in excess of the aggregate value of the goods involved.
2. If the consumer becomes, or for no other or a nominal consideration has the option to become, the owner of the goods upon full compliance with his or her obligations under the agreement.
3. To determine if the amount the consumer must pay at the end of the agreement to become the owner is nominal, the Department may compare this amount to the actual cash value of the goods at the end of the agreement as well as the amount of the periodic payment amount due under the agreement. In addition, the Department may review what formula was used or what analysis was conducted to determine the amount.
4. The percentage of consumers that return the goods at the end of the agreement as opposed to the percentage of consumers that acquire ownership.
5. In those instances where consumers do not acquire ownership, the amount the registrant obtains for returned goods and whether goods were subsequently re-sold to the public or at a dealer auction.
6. If a consumer trades in the goods during the term of the agreement for other goods, does the registrant provides the consumer any net trade-in allowance toward the price of the new goods or any discount toward the price of the new goods.
7. If the goods are items that a consumer, at consummation, would not reasonably contemplate returning at the end of the agreement.
8. The age of the goods subject to the transaction at the time of consummation.

All LPH transactions will be evaluated on their merits to determine if the transactions are in substance disguised credit sales.

Recommended Action

Registrants are advised to review current practices and to make any changes necessary to ensure compliance with Ind. Code §24-4.5 *et seq.* Registrants may wish to seek the advice of legal counsel regarding their business model.

Sellers of motor vehicles may have sales/use tax liabilities and should consult with the Indiana Department of Revenue and review their Sales Tax [Information Bulletin #28L](#) to ensure procedures are compliant.

If you have questions regarding this publication, please contact the Department.

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