CFPB, The Roadmap Forward - Part Two

Part Two: Consumer & Dealer Relationship

April 1, 2021 | L. Jean Noonan and Texas Dealer Staff

This article was originally published in the April 2021 issue of *Texas Dealer* magazine, pages 12-15.

This article is the second of an exclusive three-part series interview with Jean Noonan, member of the CFPB Taskforce on Federal Consumer Law. Part One can be found in the March issue of Texas Dealer.

We resume our conversation where we left off on Part One with a question citing the Taskforce report with recommendations for improved financial protection program.

Texas Dealer: The report states:

"DOOR-TO-DOOR SALES In any contract for the sale of goods entered into outside the creditor's place of business and payable in more than four installments, the debtor should be able to cancel the transaction at any time prior to midnight of the third business day following the sale."

As you are aware, door-to-door sales statutes were originally designed to combat shady door-to-door salesmen and car dealers were excluded from the federal door-to-door rescission law. Today consumers are reaching out over the internet to car dealers from numerous states with various state statutes modeled after the federal law and some of those laws are less clear as to applicability. Would you care to share your view on the application of door-to-door statutes to internet sales?

Jean Noonan: This rule is a good example of a legal provision that creates compliance uncertainty in an area it was never intended to regulate. The FTC rule and similar state laws were created long before internet sales existed. If I order from Amazon, no one thinks I should have a three-day cooling-off period, and it is hard to imagine how disruptive such a rule would be. Similarly, if I am buying a car completely online, the door-to-door sales laws should not apply simply because I do not walk into a dealership. Ordering a car online and having it delivered is an increasingly popular way to buy a car. We should not have rules that frustrate a consumer's ability to buy a car in a way they may prefer and find convenient, especially because our consumer protection laws have not kept up with the times.

Texas Dealer: The report says, "credit that they [consumers] can afford but cannot obtain is harmful to consumers." I think a great example of this is how many of our members have stepped in to fill a void left by traditional lenders by offering a Buy Here Pay Here option for vehicle financing. However, some claim consumers are harmed by the high rates required to overcome the risk involved with financing these consumers. Should our dealers be worried about how this balance will be struck under the new administration?

Jean Noonan: Yes. I think they should be worried; I am concerned that the new administration will not appreciate the importance of making credit available for vehicle purchases to consumers who do not qualify for prime credit. As a consumer advocate, I know there is a definite role for BHPH auto finance. I understand some of the concerns that regulators have with the BHPH industry. Rates are high and sometimes the price of the car is high because the cost of doing business is high. Defaults are higher than we would all like, but even if there is a 25 percent default rate, that means 75 percent pay for the car and have transportation for their family. Consumers know the cost of the auto and the financing, and they are in the best position to decide if the cost of ownership is worth it. Do they live in a place where they can get to work by walking or is there a bus? Can their children get to school? Those are very personal decisions, and many people lack a good alternative to car ownership. Many people live in areas that lack good public transportation. I hate to see anyone lose a good job because no one will finance a car for them. If they are shopping at a BHPH dealer, it is because they know they do not qualify for traditional financing. I would like to see every BHPH dealership report to the credit agencies so customers can get the benefit of their good payment history and can graduate to more affordable credit.

Texas Dealer: Will you elaborate on BHPH dealers reporting to the credit agency?

Jean Noonan: Reportingpayment history has pros and cons for both consumers and BHPH dealers. On balance, I believe that credit reporting is a good practice. Consumers have an opportunity to build a good repayment record, and dealers will have better information for assessing credit risk. The main caution I offer BHPH dealers who report information is that their reporting must be accurate. There is not a private right of action, so customers cannot sue them for errors in furnishing information to credit agencies under the Fair Credit Reporting Act. But regulators can enforce the FCRA's accuracy provisions, so having a good compliance management system is very important.

Texas Dealer: Some of our members only offer one interest rate for all customers out of concern that regulators will accuse them of discrimination. Essentially, regulation is harming consumers by making these lower rate loans unavailable to them. Do you think this is a valid concern?

Jean Noonan: I think offering multiple rates can be done with very little legal risk if done correctly. I have some subprime clients who have one rate, and it is usually the state cap. If they wanted to offer a risk-based rate with several levels, there are ways to do it quite safely. For example, dealers can set very objective criteria for pricing at each risk level, so consumers at highest risk pay highest rate. A problem can arise if the consumer's interest rate is not set objectively. If customers who appear to be of equal risk are paying different rates, this can create an inference of illegal discrimination. Unless the dealer can explain that pricing difference convincingly, the dealer is at risk. But there are legitimate business reasons customers of equal risk may pay different rates. A dealer must be able to explain these differences in each case. Perhaps the customer who received a lower rate walked in with a credit rate quote from another dealer or creditor. Maybe the dealer was especially motivated to sell particular cars and decided to offer a lower rate to get those cars off the lot. Those would be legitimate nondiscriminatory reasons. Unless the dealer makes a note of that, however, it will be hard to defend those decisions.

Our Taskforce recommended that Regulation B be amended to provide a safe harbor if a dealer uses the NADA/NAMAD/AIADA fair credit compliance program. I have advised many of my dealers to use that program, because, even without a safe harbor, a dealer is able to defend its pricing decision, if challenged. The NADA Fair Credit compliance program sets up a strong and defensible way to explain discretionary differences. Many independent dealers do not want to offer just one rate because it prices them out of the market for the best qualified customers. A lot of us believe a used car is one of the best bargains out there, so I think that every independent dealer should strongly consider risk-based pricing.

Texas Dealer: One of the recommendations made was "the CFPB reorganize its internal structure and operations to instantiate a 'markets-based' organizational structure, as opposed to a 'tools-based' operational structure." In such an approach, would BHPH dealers be regulated by the same group as other used car dealers?

Jean Noonan: Probably so. A benefit of a markets-based internal structure is that it gives the Bureau staff the opportunity to understand the auto finance market, including the ways in which BHPH dealers differ from other independent dealers.I always told my lawyers who worked for me at the FTC you cannot be a good regulator unless you understand the business. I believe the CFPB staff members want to be good at understanding the business and specializing in a market promotes that knowledge much more than specializing in the use of a tool like enforcement or rulemaking. Certainly, in private practice you cannot be a good attorney without understanding the business.

From the perspective of good policy, we want to eliminate laws that interfere with a valuable business practice without a significant benefit to consumers. That is a law that is actually hurting consumers, so there is no upside with this law in this context. That's what I think we really need to look at. More laws do not necessarily mean better consumer protection. We need smarter laws. A smart law is one that focuses on preventing consumer harm, while still supporting financial inclusion and innovation.

Texas Dealer: A portion of the report focuses on the need for financial education. Do you worry that the attorneys, government workers, and people providing input about that education will not understand the needs of our customers?

Jean Noonan: That is an excellent question and, yes, I do worry about this. Trade associations like TIADA have a very important role in making sure regulators understand the informational needs of consumers. Often education and disclosure rules are designed by people who are not using those services and are shaped by what they want consumers to know rather than by what those consumers themselves want to know. For example, if I am a government lawyer writing a disclosure pertaining to a product or service I don't like, I might emphasize everything I can to discourage a consumer from choosing it, even if that product might be a reasonable choice for a particular consumer. Consumers need objective facts so they can make an informed choice. A BHPH purchase can be a very rational decision for consumers. Reducing the risk or cost of default by using a starter interrupter or GPS can also benefit consumers by making credit more available or at a better price. We should focus our education on helping consumers shop intelligently and not have disclosures meant to discourage.

I do believe that we should have disclosures and education that meet consumers where they are and tell consumers what they really want to know. I do think the Truth in Lending Act does a pretty good job of that. Whether a consumer is shopping for a used BMW at a high end independent or buying whatever she can afford at a BHPH dealer, there are some basic things she needs to know, such as the cost of credit, both in dollars and interest rate, what the monthly payment is, and the number and frequency of the payments. The one thing a disclosure won't tell me is whether I could have gotten a better deal elsewhere. Disclosures can facilitate shopping, but consumers must decide for themselves whether to invest that time.

Texas Dealer: The report states "Currently, the use of alternative data to make credit decisions is allowed, but liability concerns over its use, methods of collection, and compliance with credit reporting laws have slowed its widespread adoption by industry." If a dealer wanted to implement the use of alternative data, what would be some of your recommendations?

Editor's Note: Next month read part three of this series to find the answer to this question and more.

HUDSON
COOK

Celebrating its 25th anniversary in 2022, Hudson Cook, LLP is a national law firm representing the financial services industry in compliance, privacy, litigation, regulatory and enforcement matters.

7037 Ridge Road, Suite 300, Hanover, Maryland 21076
410.684.3200

www.hudsoncook.com