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A DEALER GUIDE TO

Electronic Disclosure Rules For Dealership Online Commerce



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Nothing in this guide is intended as legal advice. In addition, this guide only discusses the FRB's Electronic Disclosure Rules. It does not address state or local law that may impose additional requirements or other federal laws that may apply to this topic.

Electronic Disclosure Rules for Dealership Online Commerce

If, like many other dealers, you accept online credit applications, advertise leases online, or advertise credit online, you will soon be required to provide certain required disclosures electronically.

Introduction

Historically, car and truck dealers have conducted business face-to-face with their customers. Even today, the vast majority of deals are finalized not with an email, but with a handshake. However, as electronic communications become commonplace, there is a large and growing segment of the population that wishes not only to shop for cars online, but to apply for credit online, and perhaps even consummate the transaction electronically.

Like many other businesses, dealers are striving to accommodate their customers by meeting their online needs. Almost all dealers have their own websites where customers can shop for vehicles and explore financing and leasing options. Dealers also provide this information through other electronic media (such as third-party websites or other service providers). Many dealers' websites include access to online credit applications, and some accept credit applications that are submitted electronically.

Unlike many other businesses, however, dealers must consider a wide array of federal regulatory obligations when providing online features and services. Among other requirements, these regulations mandate that certain written disclosures must be provided to customers when they shop for, finance, lease, and purchase vehicles.

On Nov. 9, 2007, the Federal Reserve Board (FRB) issued amendments to several consumer protection regulations (the "Final Rules") addressing the electronic delivery of some of these required disclosures. The amendments have a mandatory compliance date of Oct. 1, 2008. The regulations affected include¹:

- Regulation B ("Reg B," Equal Credit Opportunity);
- Regulation M ("Reg M," Consumer Leasing); and
- Regulation Z ("Reg Z," Truth in Lending).

Does Any of this Affect You?

Because electronic commerce is so prevalent in today's dealership marketplace, the answer is likely to be "yes." You must take steps to ensure compliance by Oct. 1, 2008 if you:

- Advertise leases online
- Advertise credit online
- Provide access to/accept online credit applications

If you currently engage in these online activities or think that you may in the future, you should review this bulletin and carefully review the Final Rules.

This bulletin will review the three amendments of particular interest to dealers: Reg B, Reg M, and Reg Z, and other applicable law. Let's begin by looking at how we arrived where we are today.

Background

Congress first addressed the issue of electronic disclosures in 2000, with the passage of the Electronic Signatures in Global and National Commerce Act (ESIGN). Subject to certain conditions, ESIGN generally states that electronic documents and electronic signatures have the same validity as paper documents and handwritten signatures, and that consumer disclosures that are required to be provided in writing by other laws or regulations may be provided or made available in electronic form if the consumer affirmatively consents after receiving adequate notice.

In 2001, in response to ESIGN, the FRB issued draft rules setting uniform standards for the electronic delivery of certain required consumer disclosures under federal law. The 2001 rules were designated as "interim final rules," and were never made mandatory. As a result, the interim rules were not widely followed and created confusion as to their scope and their relationship with ESIGN. In issuing the Final Rules, the FRB said they hoped to "reduce confusion" and "simplify the regulation[s]." The Final Rules dictate when certain required written disclosures may be made electronically in two basic ways:

- First, the Final Rules clarify that entities may provide electronic versions of any of the required written disclosures so long as they comply with the applicable requirements of the ESIGN Act.
- Second, the Final Rules make some specific revisions to the regulations which allow or require some disclosures to be provided electronically in certain instances, without complying with the consent requirements of ESIGN.

Global Change: Clarify Applicability of ESIGN

The Final Rules clarify that entities may provide electronic versions of the required written disclosures for each of the regulations so long as they comply with the applicable requirements of ESIGN. As discussed above, ESIGN predates the Final Rules and was technically in force under the interim rules. Specifically, ESIGN requires that:

- the consumer has affirmatively consented to the use of an electronic record to provide a required written disclosure and has not withdrawn such consent;
- the consumer, prior to consenting, is provided with a clear and conspicuous statement of his or her rights² and the hardware and software requirements for receiving the disclosures that are to be provided electronically; and
- the consumer provides his or her consent electronically “in a manner that reasonably demonstrates that the consumer can access information in the electronic form that will be used to provide the information.”³

ESIGN does not affect any laws regulating timing, content, format, acknowledgments, or record retention requirements of any required consumer notices and disclosures. Dealers and others are still required to comply with the underlying laws with respect to electronic delivery of disclosures. For example, if a law requires that a specific disclosure appear immediately above a consumer’s signature line, then such disclosure must continue to appear in the same position within the electronic form of the disclosure.

Regulation-Specific Changes

In addition to the clarification regarding ESIGN described above that applies to all of the regulations, the Final Rules also make some specific revisions to several of the regulations. In each case, the Final Rules clarify that in certain instances, if a consumer accesses material electronically, then the written disclosures required by the regulation must also be provided electronically.

Regulation B:

Regulation B implements the Equal Credit Opportunity Act (ECOA), which makes it unlawful for creditors to discriminate in any aspect of a credit transaction on the basis of sex, race, color, religion, national origin, marital status, age, the fact that an applicant derives income from public assistance, or because an applicant has in good faith exercised any right under the Consumer Credit Protection Act. The ECOA and Reg B require certain disclosures to be provided to applicants, and some of those disclosures must be provided in writing.

The Final Rule amending Reg B states that if a credit application is accessed in electronic form (for example, via a dealer website), certain disclosures that are required to be provided on or with that credit application may be provided in electronic form without obtaining the consumer’s consent as required by ESIGN. Specifically, dealers and other creditors may electronically provide disclosure regarding (1) a process known as self-testing⁴; (2) the title of the applicant⁵; (3) marital status of the applicant⁶; and (4) the existence and treatment of alimony/child support/separate maintenance.⁷

The FRB’s staff commentary explaining the regulation (“Staff Commentary”) explains that while the Final Rule states that these disclosures generally may be made electronically, if a consumer accesses a credit application electronically, for example, using a home computer via the dealer’s website, the dealer must provide the disclosures in electronic form with the application on the website in order to meet the requirement to provide disclosures in a timely manner on or with the application. This requirement would not be met if the dealer chose to mail paper disclosures to consumers who have accessed the dealer’s website.

The limited circumstance contemplated by the rule where providing these disclosures electronically is optional is in a case where a dealer provides a kiosk at the dealership to allow consumers to electronically access and complete a credit application. Where the customer is physically present, but inputs the data electronically, a dealer could (but is not required to) provide the customer a printout of the required disclosures in lieu of electronic disclosures.

Regulation M

Regulation M implements the Consumer Leasing Act (CLA), which requires lessors to provide lessees with certain cost and other disclosures, in writing, about consumer lease transactions. Automobile leases are “the most common type of lease covered by the act.”⁸

Among its other requirements, Reg M requires disclosures for lease advertisements and requires that if an advertisement includes “trigger terms” (such as the payment amount), the advertisement must also “contain” certain required (advertising) disclosures (such as the total amount due prior to or at consummation and a statement that an extra charge may be imposed at the end of the lease term). The Final Rule amends Reg M to require lessors to provide the “advertising” disclosures to lessees in electronic form on or with an advertisement that is accessed by the lessee in electronic form without regard to the consumer consent and other provisions of ESIGN.⁹

In other words, if a consumer electronically accesses a vehicle lease advertisement (such as on a website), the Final Rule requires the dealer to provide the required advertising disclosures on the website. As with Reg B, it would not meet the requirements of the rule to provide paper disclosures for an electronic lease advertisement (just as it would also not suffice to provide a reference to a website in a paper lease advertisement).

The Final Rule also provides that in a catalog or other multipage lease advertisement (such as on a dealer website), the required disclosures need not be shown on each page where a “trigger term” appears, as long as each such page includes a cross-reference to the page where the required disclosures do appear.

Regulation Z

Regulation Z implements the Truth in Lending Act (TILA) which is designed to promote the informed use of consumer credit by requiring certain disclosures about credit terms and cost. TILA requires creditors to disclose the cost of credit as a dollar amount (the finance charge) and as an annual percentage rate (the APR). TILA and Reg Z require a number of disclosures to be provided in writing.

As with Reg M, Reg Z also contains requirements for credit advertisements and requires that if an advertisement contains certain “trigger terms” (such as the payment amount), the advertisement must also contain certain required disclosures such as the APR, the amount or percentage of any down payment, and the terms.

The Final Rule amends Reg Z so that for advertisements containing trigger terms, the dealer or other creditor must provide the required advertising disclosures to the consumer in electronic form, such as at an Internet website, without regard to the consumer consent or other provisions of ESIGN¹⁰. As with Regs B and M, it would not meet the requirements of the rule to provide paper disclosures for an electronic credit advertisement (just as

it would also not suffice to provide a reference to a website in a paper credit advertisement).

Also, as in Reg M, in an electronic catalog or multiple-page credit advertisement (such as those appearing on a dealer website), the required disclosures need not be shown on each web page where a “trigger term” appears, as long as each page includes a cross-reference to the web page where the required disclosures appear.

Compliance Considerations

In many cases, the Final Rules will not require significant changes for dealers. However, dealers should carefully review their practices with regard to online credit applications and electronic lease and credit advertisements, and then review the Final Rules to ensure that systems are in place by Oct. 1, 2008 to electronically provide those disclosures that the Final Rules require to be provided electronically.

If you outsource functions related to online credit applications or electronic lease and credit advertisements, talk with your service provider about whether the changes will have any impact on the services they are providing, and if so, how they are going to ensure compliance with the rule changes.

Also, you may consider developing a global ESIGN consent process for all customers (or review your current process). You should consult with legal counsel to ensure that you have fully complied with ESIGN before relying on this approach, and of course you will want to ensure that all elements of the process are adequately addressed. Once you have fully complied with ESIGN, you can send any disclosures or notices required under federal law. Review any and all disclosure requirements with legal counsel to determine whether any additional requirements exist.

¹The other amended regulations, Reg DD and Reg E, do not generally apply to dealers. Reg DD implements the Truth in Savings Act and applies generally to disclosures related to deposit accounts, such as yields and fees. Reg E implements the Electronic Fund Transfer Act and applies generally to disclosures related to ATM and other electronic fund transfer services.

²This includes (1) any right or option of the consumer to have the record provided or made available on paper or in nonelectronic form, and (2) the right of the consumer to withdraw the consent to have the record provided or made available in an electronic form and of any conditions, consequences (which may include termination of the parties' relationship), or fees in the event of such withdrawal; (3) informing the consumer of whether the consent applies only to the particular transaction which gave rise to the obligation to provide the record, or to identified categories of records that may be provided or made available during the course of the parties' relationship; (4) describing the procedures the consumer must use to withdraw consent and to update information needed to contact the consumer electronically; and (5) informing the consumer how, after the consent, the consumer may, upon request, obtain a paper copy of an electronic record, and whether any fee will be charged for such copy. See 15 U.S.C. § 7001(c)(1)(B).

³15 U.S.C. § 7001(c)(1)(C)(ii).

⁴Self-testing generally refers to a situation where a creditor inquires about an applicant's race, color, religion, national origin, or sex for the purpose of conducting a self-test. If a creditor does self-test, the creditor must disclose to the consumer that (a) providing the information is optional for the applicant, (b) the information is being provided to monitor compliance with ECOA, and (c) the creditor may not discriminate either on the basis of the information provided or whether the applicant chooses to furnish it.

⁵When a creditor requests the use of a title (Mr., Mrs., Ms. Miss, etc.) on an application, the form must disclose that the use of the title is optional.

⁶If an application is for other than individual unsecured credit, the creditor may inquire about the applicant's marital status, but may only use the terms "married, unmarried, and separated." The creditor may explain that the unmarried category includes single, divorced, and widowed individuals.

⁷A creditor may not inquire about whether income is derived from alimony, child support, and/or separate maintenance payments unless it discloses that such income need not be revealed if the applicant does not want the creditor to consider it in determining the applicant's creditworthiness.

⁸72 Fed. Reg. 63,456 (Nov. 9, 2007).

⁹Just as with Reg B, the Final Rule states that the disclosures "may" be provided in electronic format (12 CFR § 213.3), but notes that because the advertisement must "contain" the disclosures, "providing paper disclosures for an advertisement in electronic form, or vice versa, would not comply because the disclosures would not be in the advertisement itself." 72 Fed. Reg. 63,458 (Nov. 9, 2007). The net result is that the Final Rule requires these disclosures to be provided electronically.

¹⁰Just as with Regs B and M, the Final Rule states that the creditor "may" provide the notices electronically (12 CFR § 226.17(a)). However, because the existing regulation requires that any advertisement that includes the trigger terms itself must "state" the required disclosures (*id.* at 226.24(c)), "providing paper disclosures for an advertisement in electronic form, or vice versa, would not comply because the disclosures would not be stated in the advertisement itself." 72 Fed. Reg. 63,469 (Nov. 9, 2007). The net result is that the Final Rule requires the creditor to provide the disclosures electronically if the advertisement contains the trigger terms and is accessed electronically.



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