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Insights

Indiana DFI Enforcement Action Against Auto Dealer Underscores the Importance of Ensuring Indirect Lending Partners Understand Consumer Credit Laws

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A recent enforcement action by the Indiana Department of Financial Institutions (the "IDFI" or the "Department") against an auto dealership is a reminder to all dealers engaged in "consumer credit sale" activities in Indiana of the importance of understanding the nuances of the Indiana Uniform Consumer Credit Code (the "IUCCC" or the "Code"), **(1)** and to financial institutions engaged in indirect auto finance of the importance of monitoring dealer compliance.

On November 23, 2016, the IDFI filed an administrative enforcement action against Webb Ford, Inc. ("Webb" or the "Dealer") for charging customers a $25 fee (the "Convenience Fee" or "Fee") to facilitate immediate electronic vehicle registration with the Indiana Bureau of Motor Vehicles. **(2)** Webb made the use of this service (and therefore the Convenience Fee) optional for cash customers, but mandatory for credit customers. The Dealer mistakenly believed that because the Fee was the same dollar amount for both cash and credit customers, it was not a finance charge under the IUCCC or Regulation Z.**(3)** Unfortunately for Webb (and those financial institutions who may have subsequently acquired their auto transactions), by failing to administer the fee payable to a third party consistently, Regulation Z and the IUCCC consider the Convenience Fee to be a part of the finance charge. While Webb clearly violated Regulation Z by failing to include a fee that was optional for some customers but mandatory for others in the finance charge, at the heart of the dispute between Webb and the IDFI is the Department's long-held position that a creditor under the IUCCC is not permitted to assess a charge unless it is either included in the finance charge (or in the case of an auto credit sale, the credit service charge) or is a permissible "additional charge" specifically authorized by the Code, and that failure to include a fee in the finance charge at the time of closing precludes charging it at all.

Following a prolonged dispute over findings from a 2015 examination, the IDFI ultimately issued a Notice of Charges and Order to Cease and Desist and Make Restitution to the Dealer in November 2016. The Dealer filed a timely Petition for Review and Stay of the Department Order, and the matter was presented to an Administrative Law Judge ("ALJ") for consideration, who issued a ruling in November 2017.**(4)** The ALJ agreed with the Department's position that the Convenience Fee was an unauthorized fee because it was not a permissible "Additional Charge" and had not been included in the finance charge at closing. The ALJ further agreed with the

Department that any charge or fee payable directly or indirectly by the buyer and imposed directly or indirectly by the seller as an incident to the extension of credit is considered a finance charge (or in this case a credit service charge) under the IUCCC, unless it is specifically excluded. The only exceptions to this limitation for consumer credit sales are charges that are paid or payable to a third party and are not required by the seller as a condition of or incident to the extension of credit; charges as a result of default; specifically identified additional charges; delinquency charges; and deferral charges. The IUCCC application is consistent with the provisions of Regulation Z with respect to charges by third parties.**(5)**

The issue of including fees in the finance charge is more prevalent under Chapter 3 (Loans) of the IUCCC with respect to non-refundable loan origination fees (now called prepaid finance charges) on Consumer Loans. Unlike the Consumer Credit Sale provisions of the Code, Chapter 3 provides for a non-refundable $50 prepaid finance charge that is specifically excluded from the calculation of the maximum permissible finance charge. While sub-prime consumer finance companies carefully adhere to this limit to avoid inadvertently exceeding the maximum permissible finance charge limitations, banks and credit unions often choose to charge a much higher prepaid finance charge, knowing they can incorporate any amount over the $50 limit into the finance charge at the time of closing, provided they remain within the parameters of the maximum permissible finance charge under the Code.

Unfortunately for the Dealer, the Department has always considered the decision as to whether a fee is an "additional charge" or a "finance charge" under the IUCCC as being made at the time of closing. Because Webb failed to include the Convenience Fee in the finance charge, the Department predictably took the position that if the Dealer did not disclose it as a finance charge it could only be collected if it were one of the IUCCC's enumerated "Additional Charges." The end result is that Webb, and the financial institutions that purchased the auto transactions, have the worst of both worlds – they have a IUCCC violation because the Dealer failed to include the Convenience fee in the finance charge, and they have a Regulation Z violation because they failed to correctly disclose the Convenience Fee.

Webb has filed a *Verified Petition for Judicial Review* of the ALJ's decision.**(6)** While the Dealer faces an uphill climb to overcome the strong deference given to an agency's interpretation of law, they may still have some arguments to make on appeal. While it is clear that the Convenience Fee is not one of the specifically identified "Additional Charges" under the IUCCC, the issue of whether a failure to correctly disclose the finance charge automatically renders a fee or charge an additional charge is one that the Code does not specifically account for, and one that Indiana Courts have not previously addressed. The fact that the Dealer could have included the Fee in the finance charge calculation without violating the IUCCC maximum permissible finance charge begs the question as to whether this is a substantive violation of the Code, or a technical disclosure violation.

While the indirect regulation of auto dealers by financial services regulators is the subject of a much larger national debate, *Webb Ford* is a reminder to financial institutions engaged in the indirect auto business of the importance of diligent oversight of your third-party relationships. If the financial institution that financed Webb's transactions had reviewed the Dealer's files, it would have identified a clear Regulation Z violation. If your financial institution is engaged in the indirect auto finance business in Indiana, an audit of dealer application of third-party fees may be time well spent.

(1) Ind. Code § 24-4.5.
(2) *Webb Ford, Inc.*, Cause No. 2017-1 (Ind. Dep't Fin. Insts. Nov. 23, 2016).
(3) 12 C.F.R. § 1026.
(4) The *Findings of Fact, Conclusions of Law and Non-Final Order of the Administrative Law Judge* were adopted by the Members of the Indiana Department of Financial Institutions on December 21, 2017.
(5) 12 C.F.R. § 1026.4(a)(1) provides in part as follows: "The finance charge includes fees and amounts charged by someone other than the creditor, unless otherwise excluded under this section, if the creditor [r]equires the use of a third party as a condition of or an incident to the extension of credit, even if the consumer can choose the third party; or [r]etains a portion of the third-party charge, to the extent of the portion retained."
(6) *Webb Ford, Inc. v. Indiana Dep't of Fin. Insts.*, Cause No. 49D03-1801-PL-002762 (Marion Cnty. Sup. Ct. Jan. 22, 2018).