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September 15, 2008

National Auto Finance Association  
Attn: Jack Tracey, Business Director  
7250 Parkway Drive  
5th Floor  
Hanover, MD 21076

Re: Federal Trade Commission (“FTC”) Red Flags Rule, 16 C.F.R. Part 681 (“Red Flags Rule”)

Dear Mr. Tracey:

Thank you for your recent inquiry regarding the scope of the Red Flags Rule. In particular, you have inquired whether auto finance companies such as the members of the National Auto Finance Association (“NAF”) are subject to the Red Flags Rule. The short answer is “yes.”

The portion of the Red Flags Rule that requires companies to develop and implement a written Identity Theft Prevention Program applies to “financial institutions and creditors that are subject to administrative enforcement of the [Fair Credit Reporting Act (“FCRA”)] by the Federal Trade Commission pursuant to 15 U.S.C. 1681s(a)(1).” 16 C.F.R. § 681.2(a). In general, the cited provision of the FCRA grants enforcement authority to the FTC for all business except those subject to regulation by the Office of the Comptroller of the Currency (“OCC”), the Federal Reserve Board (“FRB”), the Federal Deposit Insurance Corporation (“FDIC”), the National Credit Union Administration (“NCUA”), or the Surface Transportation Board of the Department of Transportation. U.S. and foreign air carriers are also exempt outside the FTC’s jurisdiction, as are any activities regulated by the Secretary of Agriculture under the Packers and Stockyards Act of 1921 (7 U.S.C. §§ 181 et seq.). To the extent your members are not subject to oversight from the agencies described above, they are generally subject to regulation by the FTC.

The Red Flags Rule requires each “financial institution or creditor” that offers or maintains one or more “covered accounts” to develop and implement a written Identity Theft Prevention Program (Program) that is designed to detect, prevent, and mitigate identity theft in connection with the opening of a covered account or any existing covered account. The Program

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must be appropriate to the size and complexity of the financial institution or creditor and the nature and scope of its activities. 16 C.F.R. § 681.2(d)(1). A “red flag” is a “pattern, practice, or specific activity that indicates the possible existence of identity theft.” 16 C.F.R. § 681.2(b)(9).

For purposes of the Red Flags Rule, a “creditor” is any person who regularly extends, renews, or continues credit; any person who regularly arranges for the extension, renewal, or continuation of credit; or any assignee of an original creditor who participates in the decision to extend, renew, or continue credit. “Creditor” includes lenders such as banks, finance companies, automobile dealers, mortgage brokers, utility companies, and telecommunications companies. 16 C.F.R. § 681.2(b)(5); 15 U.S.C. § 1681a(r)(5). This definition should encompass all of the NAF’s finance company members.

Identity Theft Prevention Programs must include four mandatory elements. These are reasonable policies and procedures to:

- (i) Identify relevant red flags for the covered accounts that the financial institution or creditor offers or maintains, and incorporate those red flags into its Program;
- (ii) Detect red flags that have been incorporated into the Program of the financial institution or creditor;
- (iii) Respond appropriately to any red flags that are detected to prevent and mitigate identity theft; and
- (iv) Ensure the Program (including the red flags determined to be relevant) is updated periodically, to reflect changes in risks to customers and to the safety and soundness of the financial institution or creditor from identity theft.

16 C.F.R. § 681.2(d)(2).

Each NAF member that is required to implement a Program must provide for the continued administration of the Program and must:

- (i) Obtain approval of the initial written Program from either its board of directors or an appropriate committee of the board of directors;
- (ii) Involve the board of directors, an appropriate committee thereof, or a designated employee at the level of senior management in the oversight, development, implementation and administration of the Program;
- (iii) Train staff, as necessary, to effectively implement the Program; and
- (iv) Exercise appropriate and effective oversight of service provider arrangements.

16 C.F.R. § 681.2(e).

The Red Flags Rule also contains provisions regarding the duty of users of consumer reports to develop and implement reasonable policies and procedures designed to enable the user to form a reasonable belief that a consumer report relates to the consumer about whom it has

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requested the report, when the user receives a notice of address discrepancy from a consumer reporting agency. 16 C.F.R. § 681.1(c). Under certain circumstances, a user also must develop and implement reasonable policies and procedures for furnishing an address for the consumer that the user has reasonably confirmed is accurate to the consumer reporting agency from which it received the notice of address discrepancy. 16 C.F.R. § 681.1(d).

I hope this missive has been responsive to your request. If you have any questions, or if I could be of further assistance, please do not hesitate to contact me.

Very truly yours,

A handwritten signature in black ink, appearing to read "Michael A. Benoit", with a stylized flourish at the end.

Michael A. Benoit