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September 8-10, 2002 - Fair Lending Conference, Consumer Bankers Association, Marriott Crystal Gateway Hotel, Arlington, VA, (For information, dial 703-276-1750 or visit www.cbanet.org)

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Terrorism to Increase Dealer Risks and Costs

By [Thomas B. Hudson](#) and [Elena A. Lovoy](#)*

We participated in an Internet "chat room" a couple of weeks ago. You know how those things work - the chat room provider invites some "expert" to hold forth for a couple of hours, while people log on and play "Stump the Chump." During the course of the chat session, the topics of the USA Patriot Act and the Office of Foreign Assets Control came up. Much to our surprise, the chat room participants were startled by the news that they were facing yet another round of federal regulation of their businesses. One requirement is already here and another is coming soon. Here's what's happening.

Checking the "Bad Guy" List. The requirement that is already here is one administered by the Treasury Department's Office of Foreign Assets Control. The basic thrust of the requirement goes like this - the feds will maintain a list of designated bad guys, and before a car dealer or sales finance company does business with an individual, the car dealer or finance company will check the federal list to make sure that the individual's name is not on the "bad guy" list. Car dealers and sales finance companies also have to establish "reasonable procedures" to ensure that they have correctly identified their customers. Finally, if the customer's name appears on the bad guy list, the dealer or finance company cannot do business with the customer until it confirms that the individual is merely someone that shares a name with the bad guy, and is not the bad guy himself. Note that OFAC has no dollar thresholds, and applies to all-credit, part-credit-part-cash, and all-cash deals.

It doesn't matter that a genuine bad guy would have to be as dumb as a manhole cover to give his real name - dealers and finance companies still have to follow the rules. A dealer who enters into a retail installment sale or lease with one of these specified bad guys violates federal law. The contract evidencing the lease or credit sale transaction is unenforceable. If the dealer has sold the contract to a sales finance company or bank, the sales finance company or bank could no doubt force the dealer to buy the contract back, whereupon the dealer would be holding a contract that it could not enforce, and the bad guy customer would have possession of the car.

You Didn't Realize That You Were a Bank, Did You? The regulatory burden that is "coming soon" will be effective October 24, 2002, when regulations are to be issued by the Treasury Department under the Bank Secrecy Act. It's true - the Bank Secrecy Act applies to you. How's that, you ask? Read on, McDuff.

The BSA has also been around for awhile, but, until recently, auto finance companies and car dealers were not considered to be "financial institutions" subject to the BSA. That has changed as a result of the USA Patriot Act, which required Treasury to issue regulations dealing with money laundering. These requirements were to have become effective earlier this spring, but the auto finance industry was given a reprieve when the Department of the Treasury's Financial Crimes Enforcement Network (FinCEN), on April 29, published an "interim final rule" in the Federal Register. The interim final rule

regarding financial institutions temporarily exempts (until October 24, 2002), pending further analysis and review by Treasury and FinCEN, all financial institutions not addressed in other interim rules from the requirement to establish anti-money laundering programs. So car dealers and finance companies have a little breathing room, but not much.

The Treasury Department is now trying to determine what rules will apply to these businesses newly swept into the BSA. It is likely that the finance companies and dealers will be required to adopt anti-money-laundering programs and so-called "know-your-customer" programs. The BSA has two different dollar thresholds that apply to two different activities. The threshold for reporting cash transactions is \$10,000, while the threshold for reporting "suspicious activity" is \$5,000. It is too soon to say whether these thresholds will be used in fashioning the anti-money-laundering and know-your-customer rules for dealers and finance companies.

So, What's a Dealer To Do? Well, RIGHT NOW dealers need to begin to comply with OFAC, checking the bad guy list and taking appropriate action (whatever that might be - you'll need to discuss that with your lawyer) when a customer's name shows up on the bad guy list. And dealers will need to be watching closely for those regulations expected to be issued by October 24, and should plan to develop and implement whatever procedures are mandated by those regulations.

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