the Myers & Fuller, P.A. report

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Leveling the playing field between automobile dealers and manufacturers for over 20 years.

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FRANCHISE LITIGATION

F&I CORNER

Myers & Fuller, P.A.

www.dealerlawyer.com

CONTACT US:

2822 Remington Green Circle
Tallahassee, Florida 32308
Tel 850.878.6404 | Fax 850.942.4869
Richard N. Sox, Jr.
rsox@dealerlawyer.com

8410 Six Forks Road, Suite 201
PO Box 97275
Raleigh, North Carolina 27615
Tel 919.847.8632 | Fax 919.847.8633
Shawn D. Mercer
smercer@dealerlawyer.com

The Myers & Fuller Report

a newsletter for motor vehicle dealers and associations

Welcome to the fifth edition of the Myers & Fuller Newsletter. We intend for our newsletter to be published quarterly for use by motor vehicle dealers, dealer associations and their advisors in keeping abreast of challenges facing dealers across the United States.

Myers & Fuller has been representing automobile, truck and motorcycle dealers and dealer associations for over 20 years in disputes with manufacturers and consumers. Our practice includes counseling dealers on matters such as buy-sell transactions, terminations, relocation and addition of competing dealerships, finance and insurance, warranty and sales incentive audits, improper allocation, transfer turndowns, market realignments, internet sales, site control, exclusivity, environmental cleanup and consumer class action lawsuits. In addition to our litigation services, we assist numerous dealer associations in crafting franchise law solutions to the many manufacturer, finance and insurance as well as consumer challenges facing dealers. Lastly, we provide our clients with onsite finance and insurance compliance audits which includes reviewing and recommending changes to processes and forms used at the dealership.

Our goal with the Newsletter is to provide you up-to-date information on new developments in manufacturer initiatives, finance and insurance challenges and consumer claims. We will include articles on broad topics affecting dealers as well as specific discussion on the outcomes of our manufacturer and consumer disputes.

We hope you will find the Newsletter to be a valuable resource. Please do not hesitate to contact us with questions on any topic we cover or with suggestions on how to improve the Newsletter.

Richard N. Sox, Jr.
Managing Partner

News Brief

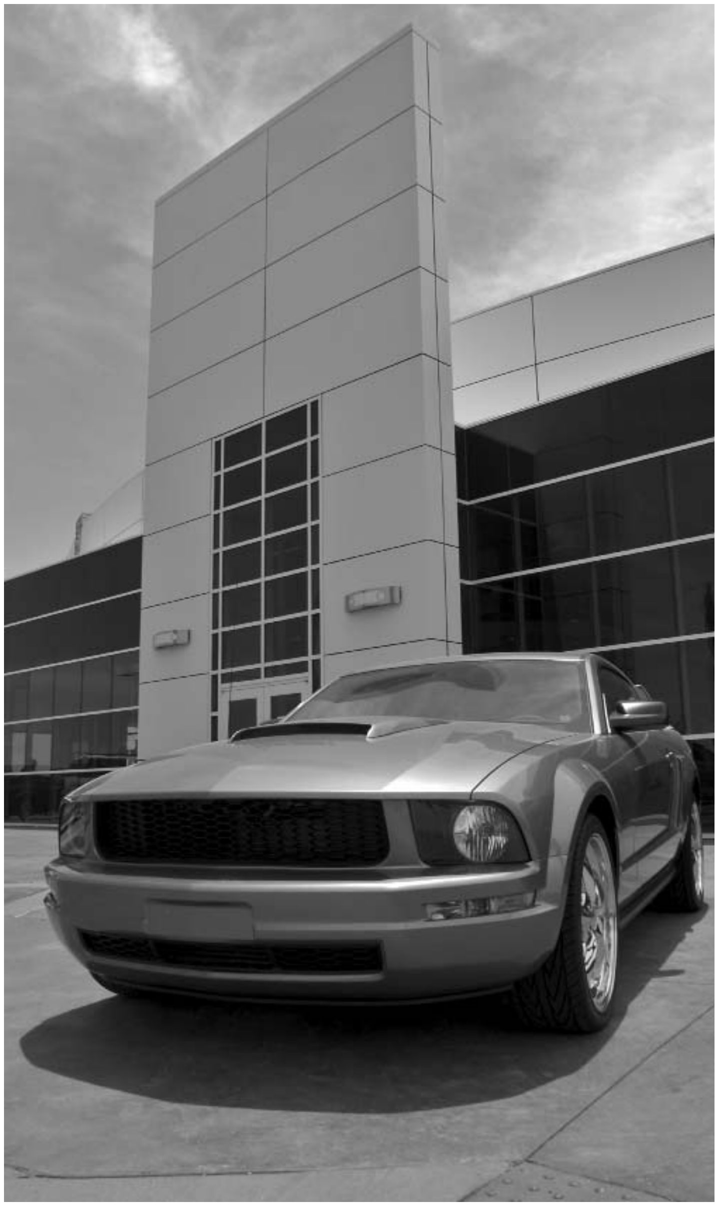
Impact of the Sale of Range Rover and Jaguar on Dealers

FOR SEVERAL MONTHS NOW, FORD MOTOR COMPANY HAS MADE IT NO SECRET THAT IT INTENDS TO SELL OFF THE RANGE ROVER AND JAGUAR LINE MAKES. As of this writing, the Indian motor vehicle manufacturer, Tata, reportedly is at the top of the list of potential buyers. Our biggest fear, or course, is that Tata does not assume all of the existing Range Rover and Jaguar dealer agreements. It is not at all a certainty that your State franchise laws regarding termination of your dealer agreement would be of help to you in that situation. Therefore, like the advice we gave Chrysler Division dealers when Daimler Chrysler had the Chrysler Division on the chopping block, it is important that Range Rover and Jaguar dealers not make any significant investment in their dealership until the dust settles.

For dealers looking to acquire Range Rover or Jaguar, now that the fact of the potential sale of these line makes is out in the public, you should proceed with such a purchase at your own peril. If you acquire one of these franchises and Tata does not assume the dealer agreement you will then have a very difficult time pursuing a claim of damages against Ford Motor Company. You will, however, have the same limited franchise law protections discussed above with regard to termination of a franchise.

Dealing with Lender "Acquisition Fees" by Shawn D. Mercer

A DEALER IS OFTEN NOTIFIED BY THE LENDER THAT IT WILL NOT ACCEPT THE ASSIGNMENT OF A RETAIL INSTALLMENT SALES CONTRACT UNLESS THE DEALER PAYS A CERTAIN FEE OUT OF ITS OWN POCKET. For the purposes of this article, this charge will be referred to as an "acquisition fee" although it may also be called an "assignment fee" or other similar names by the lender.



If a dealer elects to conduct business with that lender, there are some issues that arise in regard to the acquisition fee. For example, must those fees be disclosed to the consumer? How are they disclosed? Do they affect the maximum finance charge rate allowed under applicable state law?

The following analysis is a conservative approach to these issues that is intended to afford maximum protection to an automobile dealer in the event that a courts takes a strict view of these fees in the future.

In general, a dealer must disclose the acquisition fee to a consumer if the dealer chooses to pass the cost of that acquisition fee on to the consumer, either directly or indirectly. If a dealer passes this bank charge on to the consumer, then the amount of the acquisition fee is deemed to be a "finance charge" and must be represented as such on the Truth-In-Lending Statement. That finance charge will be treated the same as all other finance charges in determining the annual percentage rate that is reflected on the Truth-In-Lending Statement. Accordingly, if a transaction, after the addition of the acquisition fee, climbs above the maximum finance charge rates allowed by applicable law, then the dealer and the lender may be in violation of applicable usury or Retail Installment Sales Act provisions. Great care must be taken in those circumstances where a consumer with marginal credit is seeking financing.

A dealer may choose to absorb the cost of the acquisition fee. However, keep in mind that in most courts that have decided this issue, the dealer will be deemed to have indirectly imposed a finance charge on the customer if the sales price of the vehicle is increased in order to account for the acquisition fee. Some courts have found that if the existence, or possible existence, of an acquisition fee at all affects the dealer's pricing of a vehicle, then the fee will still be deemed to be a "finance charge" and must be disclosed to the customer. If, on the other hand, a dealer quotes a price to a customer that remains static regardless of whether the customer pays cash or finances the transaction, then there will likely be no resulting "finance charge." Some dealers are now building expected acquisition fees into their lot charge as an across the board cost of the vehicles.

Dealers may wish to consider the following course of action with respect to acquisition fees: (1) Do not show the fee on the buyers order; (2) do not tell the customer the fee is being passed along and that is why the vehicle price is higher than it would otherwise be; (3) do not increase the cost of the vehicle to cover the fee; and (4) do not sell the vehicle at a price higher than advertised because of the fee.

In light of the uncertain state of the law in most jurisdictions on these matters, if a dealer intends to pass the acquisition fee onto the consumer, it is imperative that the dealer include the acquisition fee as a finance charge on the Truth-In-Lending Statement if the customer will be directly or indirectly responsible for paying the charge. These charges should also be factored into the calculation of the annual percentage rate for purposes of Truth-In-Lending and applicable retail installment sales acts. The dealer must further make certain that the acquisition fee will not result in a violation of state usury laws.

There are certainly circumstances where the dealer does not need to disclose these acquisition fees. However, the actual line between required disclosure and non-disclosure has not been clearly drawn in most jurisdictions and as a result, the better practice is to err on the side of caution. Contact your legal advisor should a question regarding treatment of acquisition fees arise at your dealership.

summary

- *The law is unsettled in many jurisdictions.*
- *Dealers may absorb acquisition fees.*
- *Dealers should generally treat acquisition fees as a finance charge if in any way passed on to a customer.*
- *Improper treatment of acquisition fees can result in violations of both state and federal law.*

News Briefs

Responding to Toyota's Insistence Upon Compliance with Image USA II

WE CONTINUE TO RECEIVE CALLS FROM TOYOTA DEALERS AROUND THE COUNTRY COMPLAINING THAT TOYOTA IS RELENTLESSLY PRESSING THEM TO SPEND MILLIONS OF DOLLARS TO ACQUIRE LARGE TRACTS OF LAND AND/OR CONSTRUCT A LARGE SALES AND SERVICE FACILITY UNDER THE IMAGE USA II PROGRAM. While Toyota dealers are all generally very profitable and happy to be Toyota dealers, the Image USA II requirements are simply over-the-top for many dealers.

The attorneys of Myers & Fuller have been assisting our Toyota dealers in properly responding to Toyota's Image USA II demands. These responses involve a detailed explanation as to why it is not feasible (or possible in certain metropolitan markets) for the dealer to acquire a large enough tract of land upon which to construct a new sales and service facility. The dealer's response also includes a calculation of the immense cost of constructing the size facility with the number of service bays demanded under the Image USA II program. Because the Image USA II program is based upon projections of units in operation (UIOs) for the year 2012, the dealer's written response to Toyota contains questions about how these projections were made and what assumptions were relied upon.

Although Toyota has been less than forthcoming with the basis for its 2012 UIO projections, it is most important that Toyota dealers create a "paper trail" in which to document their concerns and questions in case the day comes when a more formal dispute arises with Toyota.

Nissan Rejects a Transfer Request Stating that the Dealership is NonViable

MYERS & FULLER HAS FILED A PETITION ON BEHALF OF A KANSAS DEALER PROTESTING NISSAN'S REFUSAL TO ENTERTAIN A VALID TRANSFER REQUEST. Our client submitted the required paperwork to obtain Nissan's approval of a transfer of ownership to the dealership's General Manager. Although small, the dealership is profitable and performing well. Nevertheless, Nissan sent the transfer request back to the dealer pointing to a letter that had been sent to the dealer over 2 years ago which stated that Nissan had designated the dealership a "non-viable" point. The letter went on to say that Nissan would allow the dealer to continue to operate the dealership but would not allow a sale, transfer or relocation of the dealership.

The Petition filed before the Kansas Motor Vehicle Commission argues that Nissan is required to provide an acceptance or rejection of the dealership's transfer request within the statutorily-stated time frame and may only reject the transfer based on the qualifications of the proposed buyer. We believe Nissan's unilateral decision to designate the dealership "non-viable" is illegal and contrary to the intent of the franchise laws to protect the dealer's investment in the Nissan franchise. Nissan has yet to respond to the Petition.

Myers & Fuller, P.A. Dealership Seminar Opportunities

contact us today to schedule or modify one of these seminars for your organization

DEALERSHIP MERGERS & ACQUISITIONS/ SUCCESSION ISSUES

DEALERSHIP MERGERS AND
ACQUISITIONS/SUCCESSION
Duration: 1.5 to 2.5 hours
Content: Discussion of issues surrounding Letters of Intent, Asset & Stock Purchase Agreements, manufacturer franchise application process, and proper succession planning.

A WALK THROUGH THE MANUFACTURER
FRANCHISE APPLICATION PROCESS
Duration: 1 hour
Content: Detailed, step-by-step, walk through of the manufacturer application process involved in buying and selling a dealership.Includes examples of various manufacturer applications and the particular items certain manufacturers look for.

FRANCHISE LAW ISSUES

MAJOR TOPIC REVIEW
Duration: 2 to 3 hours
Content: Review major issues impacting franchises including points of sale, terminations, ownership transfers, management changes, incentive programs, audits, dealership succession, mergers and acquisitions.

FRANCHISE BY FRANCHISE REVIEW
Duration: 1 to 2 hours
Content: Covers latest franchise trends as well as issues covered in MAJOR TOPICS REVIEW as they apply to particular linemakes.
Audience: Most commonly presented to 20 Group meetings.

LEGISLATIVE REVIEW
Duration: 1 to 2 hours
Content: Reviews a specific State's motor vehicle franchise law provisions. Covers both the important provisions which should be taken advantage of by the motor vehicle dealers within the State as well as areas in which the franchise laws could be updated.
Audience: Motor Vehicle Dealer Association directors and board members.

STATE OF THE INDUSTRY
Duration: 1.5 to 2.5 hours
Content: Covers the latest trends in the industry – topic by topic. Focuses on the latest trends in sales incentive programs, facility/image programs and dealer body consolidation programs, etc. Includes recommendations to avoid participation in unreasonable programs and protect the dealer's investment in the franchise.

FINANCE AND INSURANCE ISSUES

INTRO TO KEY F&I CONCEPTS
Duration: 1 to 2 hours
Content: Overview of current industry developments and legal compliance requirements facing dealership F&I departments. Question and answer is an integral part of this presentation.

CONTINUING EDUCATION FOR F&I
(Intermediate/Advanced Level)
Duration: 2 to 3 hours
Content: Overview of key elements of dealership forms as well as a detailed discussion of state and federal laws covering F&I dealership operations. Includes suggestions on improving F&I performance while reducing liability.

COMPREHENSIVE ON-SITE F&I REVIEW
Duration: 7 to 8 hours
Content: On-site comprehensive review of dealership policies and procedures. Sampling review of dealership deal files. Update forms and training for management and staff. Conduct exit meeting with Dealer/Principal to discuss results of review.

by Richard N. Sox, Jr. and Loula M. Fuller

Proper Restrictions on Additional Points of Sale

IN A RECENT REPORT ARTICLE, WE DISCUSSED TWO OUT OF THE FOUR PROVISIONS WHICH MUST BE INCLUDED IN AN EFFECTIVE STATE FRANCHISE LAW GOVERNING ADDITIONAL POINTS OF SALE. The four provisions which must be included in such a protection are:

1. the right for an existing dealer to protest any proposed add point;
2. adequate notice of such an add point;
3. a "stay" of the add point while a protest is pending; and
4. detailed criteria by which a decisions-maker (administrative law judge, for example) can balance the need for the new point with the harm to the existing dealer.

In this article, we will review the last of these four items. Once notice has been given to dealers impacted by the proposal add point and one or more of those dealers protests the add point, it is critical that the State franchise law provide that the add point not proceed until a final determination by the Judge hearing the case.

We have defended dealers against manufacturer add points in State's containing a "stay" provision as well as in State's without this provision. The difference in outcomes is tremendous. Without a provision forcing the manufacturer to cease and desist from proceeding with the add point, it is extremely difficult if not impossible to stop it in the future. It is our experience that once a dealer goes to the trouble of acquiring land, constructing facilities, stocking cars and hiring personnel, a Judge ultimately deciding that the add point was not warranted will, nevertheless, not order that the new dealership be shut down. The economic impact on the dealer and his/her employees will be too great. Instead, in ruling in favor of the protesting dealer the Judge will simply order that damages be paid to the protesting dealer. Those damages will typically amount to a year or two worth of lost profits.

Without a provision forcing the manufacturer to cease and desist from proceeding with the add point, we find that the manufacturer is much less likely to engage the protesting dealer in settlement discussions and will instead take the risk of fighting it out. This is because the manufacturer's ultimate risk is likely a payment of money damages. If a manufacturer can add the new dealership they want then paying a couple of year's worth of lost profits to the protesting dealer is of no real concern. The factory gets what it really wants which is the new point of sale which will generate profits for years and years to come.

In contrast, in a State where the manufacturer is prevented from proceeding with the add point until final resolution the leverage swings more towards the protesting dealer. For the same reason just discussed, the manufacturer goal is to add that new point. The manufacturer is much more likely to pay several year's worth of lost profits to the protesting dealer and/or add other goodies to the settlement such as a Letter of Intent for the next new point for the protesting dealer to avoid the lengthy (sometimes as much as 1 year) delay in getting that new point open.

Another benefit of having the State franchise law include the "stay" provision is that the profits which would have otherwise been lost to the new competing dealership will generally far outweigh the cost of fighting the add point or, in other words, will more than pay for the protest – win or lose. This is in contrast to the scenario where the protesting dealer is coming out of pocket to pay his/her attorney and market expert while at the same time having less of a revenue stream to make those payment because the add point is taking sales away. If the protesting dealer ultimately wins then, unlike in a State not providing the "stay" protection, the Judge will more than likely order that the add point not be opened at all.

The fourth and final critical element to be included in any State franchise law protecting dealer's from unreasonable add points is one which specifically guides the Judge as to the criteria which should be considered in making a determination as to whether the add point is necessary and reasonable. Again, the difference in outcomes between States which have a detailed listing of criteria and ones which do not is astonishing. In States which do not specifically guide the Judge, the Judge is left to his/her own devises in deciding whether the add point is necessary and reasonable. The fundamental problem we have had in States like this is that Judge generally see additional competition as a good thing for the public. The Judge is not likely to have pity on a dealer who is making more money each year than the average American. Despite arguments that the protesting dealer has invested a substantial amount of time and money in developing the business in the market which the add point is intended to serve and should be permitted to reap the return on that investment as long as the market is being adequately served both from a sales and service standpoint, the typical Judge will rule against the protesting dealer.

The cure for this systemic problem with the way Judge's view competition is to force the Judge to rule on the protest with certain specific criteria in mind. Such criteria should include:

1. financial impact on the protesting dealers, to include recent capital investments;
2. reasonably expected market penetration of the motor vehicle line-make at issue;
3. distance, travel time, traffic patterns, and accessibility between existing dealers in relation to the proposed location;
4. whether any material benefit to customers will occur from the establishment of the add point;
5. whether there exists adequate interbrand and intrabrand competition; and
6. performance of existing dealers in comparison to dealers in a like market.

These specific criteria will keep the Judge focused on a proper balance between the existing dealer's interest and the interests of the consumer, proposed new dealer and manufacturer.

A State franchise law provision which contains (i) proper notice requirements; (ii) a right to protest; (iii) an automatic stay of the add point; and (iv) specific criteria in determining the reasonableness of the add point will provide dealers in that State with the best protection against a manufacturer's attempt to overload the market with dealers.

summary

- *A comprehensive add point protection law must include a provision which automatically prevents the add point from going forward until final resolution of the existing dealers protest.*
- *The "stay" provision provides the protesting dealer with greater leverage to settle the dispute on favorable terms or to have the Judge ultimately prevent the new point from opening.*
- *A comprehensive add protection law must include specific criteria which must be followed by the Judge in determining the reasonableness of the proposed add point.*
- *These specific criteria will help avoid Judges' tendencies to see add points as good for competition and the consumer while ignoring the damage to the protesting dealers.*

by Robert C. Byerts

The FTC's Red Flag Rules are Here

BY NOW YOUR DEALERSHIP SHOULD ALREADY HAVE IN PLACE POLICES AND PROCEDURES TO COMPLY WITH LAWS AND REGULATIONS REQUIRING THE SAFEGUARDING OF CUSTOMER INFORMATION, REGULATING DISPOSAL OF PERSONAL INFORMATION AND PROTECTING THE PRIVACY OF CONSUMERS. New rules, the "Red Flag" regulations intended to better prevent fraud and identity theft, have now been finalized and will become effective November 1, 2008.

The new regulations are based on Sections 114 and 315 of the Fair and Accurate Credit Transactions Act (FACTA), which was signed into law in 2003. These two sections of the FACTA amend Sections 615 and 605, respectively, of the Fair Credit reporting Act (FCRA). These new, and quite complex, regulations will apply to "financial institutions and creditors," which includes automobile dealerships. The new rules require dealers to implement an Identity Theft Prevention program which, according to the Federal Trade Commission, must include "reasonable policies and procedures for detecting, preventing and mitigating identity theft."

An Identity Theft Prevention program must comprise several areas: it must identify relevant red flags; detect red flags; respond to red flags to prevent or lessen the chance of identity theft; and periodically review the program to stay up-to-date on trends. The red flags rule includes guidelines addressing how to identify relevant red flags; where to look to learn about emerging red flags; typical scenarios where identity theft is more likely to occur; how to detect the existence of red flags; steps to take to prevent or mitigate identity theft when a red flag is detected; and how to update the program to keep it current. Among other things, the new regulations require that:

— A dealership evaluate its current identity theft prevention practices and, all of the "red flags" of identity theft that could apply during a credit transaction with a car buyer. Although the new rules provide some examples of these "red flags," each dealership must perform their own internal audit to identify which red flags may be unique to its business. What do you know, or should you know, about activities or information involved in credit transactions at your store that tells you something about the buyer is not right, and what do you do to confirm a buyer's identity? You must review, and periodically re-review, your practices to ensure your procedures incorporate what you have learned about preventing identity theft.

— Once a dealership completes this evaluation, it must create new policies and procedures, and then conduct training for all relevant staff so they can recognize the pertinent red flags, and take appropriate action when red flags show up.

— A dealership's designated program manager must continuously monitor new identity theft trends and activities and periodically adjust the dealership's compliance program.

— Once each year, a dealership's designated program manager must prepare detailed reports on the compliance program's effectiveness. These annual written reports will be time consuming and burdensome, especially for small businesses like your dealership.

Some examples of "red flags" suggested by the Federal Trade Commission may already be part of your program- e.g.- verification that the date of birth and Social Security number provided by a customer match the accepted ranges, and verification that the address provided by a consumer during a credit transaction matches the consumer's address provided to the dealer by consumer credit reporting agencies.

Other "red flags" may be new to your dealership staff. The FTC's new rules state that a dealership should determine whether an address, social security number or home or cell phone supplied by a customer is the same as that submitted by other credit applicants. This requires the dealership to run every customer's information against the dealer's customer database, to see if any other applicant previously provided the same information to the dealer. Another proposed "red flag" arises when personal information provided by a customer is not consistent with information that is already on file. Can your dealership compare the credit application and identifying information with information submitted by the customer in past transactions?

These amended regulations will affect virtually all vehicle sales transactions and will require increased vigilance by dealerships to manage and monitor regulatory compliance. Dealerships must automate as much of their compliance activity as possible. The new rules will test the skills of every dealership's leadership and management personnel, and require nearly constant sales and F&I training for personnel to catch the Red Flags. Plan now to check every single customer against some part of a list of 26 potential red flags before being able to deliver a car to be compliant with the rules.

The FTC's enforcement will likely pale compared to plaintiffs' lawyers who are already filing class actions and individual lawsuits related to these rules. All they have to do is find a dealership out of compliance and they can file a class action or settle individually.

Only those dealers who can prove that they have implemented a 'good faith' effort at complying with the new red flag rules will survive the scrutiny of the regulators and the courts. Examples will likely be made of dealers across the country in order to make the point that ID theft is serious stuff.

At a minimum, take steps as soon as possible to measure your policies and procedures against the new requirements of the Red Flag rule prior to November 1, 2008. If you do not do, some Plaintiff's attorney will be glad to do it for you.

summary

- *New "Red Flag" regulations intended to better prevent fraud and identity theft will become effective November 1, 2008;*
- *The new rules require dealers to implement a program which must include "reasonable policies and procedures for detecting, preventing and mitigating identity theft;"*
- *An Identity Theft Prevention program must: identify relevant red flags; detect red flags; respond to red flags to prevent or lessen the chance of identity theft; and periodically review the program to stay up-to-date on trends;*
- *FTC's enforcement will likely pale compared to plaintiffs' lawyers who are already filing class action and individual lawsuits related to these rules.*

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2822 Remington Green Circle
Tallahassee, Florida 32308