

Legal Article: F&I Menus and the Car Buyer's Bill of Rights by Aaron Jacoby, Esq. and Rob Cohen, Esq.

In light of the new F&I disclosure requirements imposed by the Car Buyer's Bill of Rights (CBBOR), finance personnel, now more than ever, are looking for ways to reduce the number of documents required during the financing process. With this goal in mind, some dealers have elected to use an F&I menu as a way to both sell F&I products and meet the itemization requirements under the CBBOR. This article explores the use of F&I menu products for that purpose.

California dealers should now be fully aware of the itemization and disclosure requirements of the CBBOR (Civil Code Section 2982.2, an amendment to the Motor Vehicle Sales and Finance Act).¹ Prior to the CBBOR, many dealers already disclosed F&I products on an itemized basis to their customers using an automated F&I menu presentation. In addition to being an effective sales presentation format, showing and offering every product to every customer every time, an F&I menu has proven to be an effective compliance tool, negating non-disclosure claims arising out of the F&I process.

Therefore, for many dealers, rather than improving disclosure practices, the now familiar F&I product itemization form required by the CBBOR, only added another piece of paper to the deal file. For that reason, many dealers seeking to comply with the CBBOR's disclosure and itemization requirements would prefer to use their F&I menu system as the pre-contract itemization disclosure document.

F&I menu products can be used to meet the CBBOR's requirements, but we urge dealers to use caution. The mere use of an F&I menu does not automatically accomplish compliance with the CBBOR. However, a properly drafted F&I menu can, when presented properly, bring you into compliance with the F&I disclosure requirements without the need for a separate products and services disclosure form.

¹ That section of the CBBOR provides that, "Prior to the execution of a conditional sale contract, the seller shall provide to a buyer, and obtain the buyer's signature on, a written disclosure that sets forth the following information: (a) (1) A description and the price of each item sold if the contract includes a charge for the item. (2) Paragraph (1) applies to each item in the following categories: (A) A service contract. (B) An insurance product. (C) A debt cancellation agreement. (D) A theft deterrent device. (E) A surface protection product. (F) A vehicle contract cancellation option agreement. (b) The sum of all of the charges disclosed under subdivision (a), labeled "total." (c) The amount that would be calculated under the contract as the regular installment payment if charges for the items disclosed pursuant to subdivision (a) are not included in the contract. The amount disclosed pursuant to this subdivision shall be labeled "Installment Payment EXCLUDING Listed Items." (d) The amount that would be calculated under the contract as the regular installment payment if charges for the items disclosed under subdivision (a) are included in the contract. The amount disclosed pursuant to this subdivision shall be labeled "Installment Payment INCLUDING Listed Items." (e) The disclosures required under this section shall be in at least 10-point type and shall be contained in a document that is separate from the conditional sale contract and a purchase order."

In order for an F&I menu to achieve compliance with the CBBOR, the menu must be drafted to include a description and price for each of the following enumerated products and services: (1) service contracts, (2) a debt cancellation agreement, (3) theft deterrent devices, (4) surface protection products, and (5) a vehicle contract cancellation option agreement. (Note that insurance products must also be itemized, but, we will assume that most dealers do not sell insurance products as very few are properly licensed to do so.) Furthermore, the menu must present the "Installment Payment EXCLUDING Listed Items" and the "Installment Payment INCLUDING Listed Items."

The next generation menu software must meet all of these requirements and protect the dealership and customers with a best disclosure practices approach. Clearly, the best disclosure practice would be to set forth an itemization of ALL optional products and services sold in finance, as opposed to limiting the disclosure to those enumerated above. While not readily apparent from the plain language of the statute, it is certainly likely that the drafters of the legislation would approve of more rather than less disclosure (so long as the additional disclosures do not distract attention from the mandated disclosures). In other words, the five-product disclosure may be viewed as only a floor rather than a ceiling to a dealer's effective product selling and disclosure practices.

Because the law is new, we can expect some confusion surrounding the disclosure of all products and services on the required disclosure form. The confusion is due to the requirement to disclose the installment payment including only the five regulated products and services as well as excluding those, and only those same products and services. Adding other non-regulated F&I products to the mix (as would be the case with a typical menu system) changes the calculation of the installment payment—adding to the monthly payment the amount attributable to an item not included on the "required" list; e.g., LoJack®, which is a theft recovery device as opposed to a theft deterrent device.²

To avoid the potential confusion discussed above, the menu presentation and disclosure process will need to incorporate

(Continued on page 8)

² The CBBOR requires disclosure of a "Theft Deterrent Device" only, which is defined under Civil Code § 2981 as: "the following devices installed by the seller after the motor vehicle is sold: (1) A vehicle alarm system, (2) A window etch product, (3) A body part marking product, (4) A steering lock, (5) A pedal or ignition lock, (6) A fuel or ignition kill switch."

SAMPLE

Customer(s) Name: Joe Smith Karen Smith
Vehicle Description: 2004 Ford Focus (VIN 3FAFP31301R133056)

Cash Price Vehicle and Accessories: \$10,000 APR: 7.9% Contract Length: 60 mos
Downpayment: \$1,500 Net Trade-In Value:** -\$2,000 Rebate N/A

SAMPLE

Diamond Package	Platinum Package	Gold Package	Silver Package	Bronze Package
Service Contract				
3-year/36,000 miles*	\$1,995	3-year/36,000 miles*	\$1,995	3-year/36,000 miles*
Debt Cancellation Agreement				
GAP Contract*	\$395	GAP Contract*	\$395	GAP Contract*
Theft Deterrent Devices				
Theft Etch* Alarm	\$125 \$299	Theft Etch* Alarm	\$125 \$299	N/A
Surface Protection Product				
Magic Coat Paint Protection*	\$119	Magic Coat Paint Protection*	\$119	N/A
Contract Cancellation Option Agreement				
2 DAYS, 250 MILES* Sub-Total	\$150 \$3,083	2 DAYS, 250 MILES* Sub-Total	\$150 \$3,083	N/A
Installment Payment EXCLUDING Listed Items above	\$231.08	Installment Payment EXCLUDING Listed Items above	\$231.08	Installment Payment EXCLUDING Listed Items above
Installment Payment INCLUDING Listed Items above	\$294.41	Installment Payment INCLUDING Listed Items above	\$294.41	Installment Payment INCLUDING Listed Items above
Additional Products/Services				
LoJack® Vehicle Recovery System*	\$895	LoJack® Vehicle Recovery System*	N/A	N/A
XM® Radio Receiver	\$395	N/A	N/A	N/A
Total	\$4,373	Total	\$3,083	Total
Total Installment Payment	\$322.78	Total Installment Payment	\$294.41	Total Installment Payment
I choose this package _____ I choose this package _____ I choose this package _____				

All payment quotes include dealer document preparation charge, any smog fee paid to seller, and any optional DMV electronic filing fee. Financing subject to finance company approval. *Please see accompanying documentation for more information concerning this option. **A negative net trade-in value may result in negative equity being added to your amount financed. See your retail installment sale contract for details.

I/We, the undersigned, acknowledge: The charges for each of the products/services described above (if purchased) will be included in the retail installment sale contract accompanying the purchase of the above described vehicle. These products/services are not required as a condition to purchase the vehicle or to obtain financing. This document was presented to me/us prior to the execution of the retail installment sale contract.

Joe Smith

Karen Smith

NOTICE TO DEALER: THIS IS A SAMPLE SOLUTION ONLY. THE CONCEPTS AND DISCLOSURES IN THIS EXAMPLE MENU SHOULD NOT BE USED IN CONJUNCTION WITH LEASE TRANSACTIONS. NUMBERS AND PRODUCT DESCRIPTIONS ARE FOR ILLUSTRATION PURPOSES ONLY. CONSULT WITH YOUR OWN LEGAL COUNSEL PRIOR TO ADOPTING ANY ASPECT OF THIS EXAMPLE MENU.

SAMPLE

SAMPLE

Legal Article: F&I Menus and the Car Buyer's Bill of Rights (Cont.)

(Continued from page 6)

two disclosure steps on one form, one for the required product disclosures and one for all other products. The first step, after showing the customer the vehicle price (including the price of hard accessories already on the vehicle) and finance terms, will be to itemize the regulated products and services. The customer would then be shown in writing the effect on the monthly installment payment including and excluding those products and/or the cancellation option. The second step would be to show any F&I products that are not on the "required" list on an itemized basis and to show the effect on the monthly installment payment.

Included with this article (on the preceding page) is a sample menu form that complies with all aspects of the CBBOR.

To flesh out the concept in step-by-step terms, the sample menu shows a vehicle price (including hard accessories not sold in finance), interest rate and term. The menu then lists the required disclosures on an itemized basis: service contracts, debt cancellation agreement, theft deterrent devices, surface protection products, and the vehicle contract cancellation option agreement.

Next, the menu shows the sum of all of the charges disclosed and labeled as "sub-total." Then, the amount that would be calculated under the contract as the regular installment payment if charges for the items required to be disclosed pursuant to the CBBOR were not included would be set forth, labeled "Installment Payment EXCLUDING Listed Items." The menu then sets forth the total monthly payment in a section labeled "Installment Payment INCLUDING Listed Items."

Below the regulated items are the non-regulated (for these disclosure purposes) F&I products; LoJack® would be one example. We then include a grand total and a total installment payment disclosure.

There are caveats to the process. First, the monthly payment calculation can be a pitfall. Menu products and the various DMS providers may use different calculation engines that generate inconsistent monthly installment payments. To be safely within the CBBOR's disclosure requirements, pricing of the

monthly installment payment set forth on the disclosure form must be equal to the monthly installment payment shown on the customer's contract. Therefore, the dealer must ensure that the installment payment numbers are the same on both documents. That will typically mean that either: a) the dealership's DMS permits the pricing calculations to be drawn directly into the menu software program, or b) that the monthly installment payment is produced by the DMS and then manually entered into the menu software program. This will avoid any minor technical errors that may result from differing calculation engines or rounding algorithms.

A second caveat making matters even more difficult is that the CBBOR is newly enacted in California as of July 1, 2006. As of the date of this article, there is no interpretive case law pertaining to the CBBOR, its enforceability or constitutionality. Therefore, there is no certainty as to the final interpretation or application of the CBBOR.

Dealers will need to work closely with their menu providers and their legal counsel to ensure that this next-generation process is properly designed to implement a menu system as an effective sales and compliance tool. That way, dealers will continue to be able to offer every F&I product to every customer every time, and will be able to show that the customer knew that the product was part of the deal and elected to make the purchase. If done correctly, this will be a "best practice" that will enable the dealer to both make money and keep it.

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