

MEMORANDUM

TO: CrossState Credit Union Association **DATE:** March 17, 2021
FROM: Pillar+Aught
RE: Auto Repossession Notices

You have requested that we provide a legal analysis regarding the required notice of disposition letter and notice of deficiency after sale letter that must be sent to borrowers upon the repossession and sale of a motor vehicle by the Credit Union or its agents. This memorandum provides an analysis of the necessary contents of a notice of disposition letter and a notice of deficiency after sale letter, together with sample notice letters.

The Uniform Commercial Code¹

The Uniform Commercial Code (the “UCC”), as in effect in the Commonwealth of Pennsylvania, among other things, governs the rights of certain secured creditors in their rights after default of a debtor. See 13 Pa. C.S.A. §9601 et seq. In particular, the UCC authorizes repossession of certain personal property after default of a debtor so long as the secured creditor complies with all aspects of the UCC regarding such repossession. Once a secured creditor properly repossesses property, it has the right to dispose of such collateral subject to notification to the debtor. This memo focuses on the necessary notice of disposition that must be sent to borrowers upon legal repossession by the Credit Union, or its agents, of a motor vehicle.

Pursuant to §9614 of the UCC, in a consumer-goods transaction (i.e. the financing of a personal automobile), the following requirements apply regarding the contents and form of notification before disposition of collateral:

A notification of disposition must provide the following information

1. The information specified in Section 9613(1), which requirements are as follows:
 - (i) Describes the debtor and secured party;
 - (ii) Describes the collateral which is the subject of the intended disposition;
 - (iii) States the method of intended disposition;

¹ This memo is limited to the procedural notice requirements under the UCC and MVFSA related to the repossession and sale of an automobile. This memo does not discuss the additional requirement under the UCC that a valid Article 9 sale be “commercially reasonable.” 13 Pa. C.S.A. §§9610(b) and 9627.

(iv) States that the debtor is entitled to an accounting of the unpaid indebtedness and states the charge, if any, for any accounting; and

(v) States the time and place of a public disposition or the time after which any other disposition is to be made.

2. A description of any liability for a deficiency of the person to which the notification is sent;
3. A telephone number from which the amount which must be paid to the secured party to redeem the collateral under section 9623 (relating to right to redeem collateral) is available; and
4. A telephone number of mailing address from which additional information concerning the disposition and the obligation secured is available.

Note, that the UCC does specifically state that “a particular phrasing of the notification is not required”. §9614(2). The UCC further provides a safe-harbor form of notification which, when completed, provides sufficient information. However, the commentary of the statute clearly provides, that in a consumer goods transaction (compared to a non-consumer goods transaction), a notification that lacks any of the information as set forth in (1) above, is insufficient as a matter of law. The “safe harbor” notification provided by the UCC is as set forth below:

_____ (Name and address of secured party)
_____ (Date)

NOTICE OF OUR PLAN TO SELL PROPERTY

_____ (Name and address of any obligor who is also a debtor)

Subject: _____ (Identification of Transaction)

We have your _____ (describe collateral) because you broke your promises in our agreement.

(For a public disposition:)

We will sell _____ (describe collateral) at public sale. A sale could include a lease or license. The sale will be held as follows:

Date: _____

Time: _____

Place: _____

You may attend the sale and bring bidders if you want.

(For a private disposition:)

We will sell _____ (describe collateral) at private sale sometime after _____ (date). A sale could include a lease or license.

The money that we get from the sale (after paying our costs) will reduce the amount you owe. If we get less money than you owe, you (will or will not, as applicable) still owe us the difference. If we get more money than you owe, you will get the extra money unless we must pay it to someone else. You can get the property back at any time before we sell it by paying us the full amount you owe (not just the past due payments), including our expenses. To learn the exact amount you must pay, call us at _____ (telephone number). If you want us to explain to you in writing how we have figured the amount that you owe us, you may call us at _____ (telephone number) (or write us at _____ (secured party's address)) and request a written explanation. (we will charge you \$____ for the explanation if we sent you another written explanation of the amount you owe us within the last six months). If you need more information about the sale, call us at _____ (telephone number) (or write us at _____ (secured party's address)). We are sending this notice to the following other people who have an interest in _____ (describe collateral) or who owe money under your agreement: _____ (Names of all other debtors and obligors, if any).

Motor Vehicle Sales Finance

In addition to the UCC, in the disposition of motor vehicles, one must also look at the Motor Vehicle Sale Finance law. See 12 Pa. C.S.A. §6201. The Motor Vehicle Sale Finance law provides further requirements for the notice, as well as a borrower's right of redemption, liability for costs, and right of reinstatement, as further discussed herein. Section 6254 of the Motor Vehicle Sale Finance law provides that if repossession of a motor vehicle subject to an installment sale contract is effected other than by legal process, the holder shall immediately furnish the buyer with a written notice of repossession. Such notice shall be delivered in person or by registered or certified mail.

The notice shall contain the following information:

1. The buyer's right to reinstate the contract, *if* the holder extends the privilege of reinstatement and redemption of the motor vehicle.
2. An itemized statement of the total amount required to redeem the motor vehicle by reinstatement or payment of the contract in full.
3. Notice to the buyer of the holder's intent to resell the motor vehicle at the expiration of 15 days from the date of mailing the notice.
4. The place where the motor vehicle is stored.

5. The name and address of the person to whom the buyer shall make payment or on whom the buyer may serve notice.
6. A statement that any personal property left in the repossessed vehicle will be held for 30 days from the date of the mailing of the notice.
7. The name and address of the person that the buyer may contact to receive a full statement of account.

To further elaborate on the right to redeem as set forth in the notice, a holder must retain a repossessed motor vehicle for a period of 15 days after the mailing of the notice of repossession under, as set forth above. §6259. During such 15-day period, the buyer may redeem the motor vehicle and terminate the installment sale contract by payment or tender of payment to the holder of the following amounts:

1. If default at the time of repossession is 15 days or less, the sum of the following, less rebate of any unearned finance charge and excluding the costs of retaking, repairing and storing:
 - (i) The unpaid time balance.
 - (ii) Accrued late charges authorized by this chapter.
 - (iii) Any other amount lawfully due under the contract.
2. If default at the time of repossession exceeds 15 days, the sum of the following, less rebate of any unearned finance charge:
 - (i) The unpaid time balance.
 - (ii) Accrued late charges authorized by this chapter.
 - (iii) The costs of retaking, repairing and storing.
 - (iv) Any other amount lawfully due under the contract.

If the buyer redeems the motor vehicle and terminates the installment sale contract by payment or tender as provided above, the holder must return the motor vehicle as soon as is reasonably possible, but not later than ten business days from the receipt of the funds. See §6259.

The Motor Vehicle Finance Act also outlines liability for costs and provides that the buyer shall be liable for costs incurred by the holder in retaking, storing and repairing the motor vehicle only if the default exceeds 15 days at the time of repossession; the costs are actual, necessary and reasonable, excluding repossession costs for services by an individual who is a regular full-time employee of the holder; the costs are supported by receipts or other satisfactory evidence of payment; and the records of the holder show detailed information as to the nature and amount of each cost, the date of payment and the recipient of the payment. §6256.

A holder *may* also permit reinstatement of the contract if the buyer pays all past-due installments or makes mutually satisfactory arrangements with the holder regarding accrued late charges, costs of suit under the contract, and the costs of retaking, repairing and storing if default at the time of repossession exceeds 15 days. See §6258.

Deficiency Notice

Pursuant to Section 9616 of the UCC, in a consumer-goods transaction in which the debtor is entitled to a surplus or a consumer obligor is liable for a deficiency under section 9615 (relating to application of proceeds of disposition; liability for deficiency and right to surplus), the secured party shall comply with one of the following paragraphs:

1. Send an **explanation** to the debtor or consumer obligor, as applicable, after the disposition and:

- (i) before or when the secured party accounts to the debtor and pays any surplus or first makes written demand on the consumer obligor after the disposition for payment of the deficiency; and
- (ii) within 14 days after receipt of a **request**.

2. In the case of a consumer obligor who is liable for a deficiency, within 14 days after receipt of a **request**, send to the consumer obligor a record waiving the secured party's right to a deficiency.

§9616(b) (emphasis added). “Explanation” is defined in Section 9616 as “a writing which:

- (1) states the amount of the surplus or deficiency;
- (2) provides an explanation in accordance with subsection (c) of how the secured party calculated the surplus or deficiency;
- (3) states, if applicable, that future debits, credits, charges, including additional credit service charges or interest, rebates and expenses may affect the amount of the surplus or deficiency; and
- (4) provides a telephone number or mailing address from which additional information concerning the transaction is available.”

§9616(a). A “Request” for purposes of Section 9616 is defined as “a record:

- (1) authenticated by a debtor or consumer obligor;
- (2) requesting that the recipient provide an explanation; and
- (3) sent after disposition of the collateral under section 9610 (relating to disposition of collateral after default).”

Id.

To comply with paragraph (2) of the definition of the term “explanation” in subsection (a) of Section 9616, a writing must provide the following information *in the following order*:

1. The aggregate amount of obligations secured by the security interest under which the disposition was made and, if the amount reflects a rebate of unearned interest or credit service charge, an indication of that fact, calculated as of a specified date:
 - (i) if the secured party takes or receives possession of the collateral after default, not more than 35 days before the secured party takes or receives possession; or
 - (ii) if the secured party takes or receives possession of the collateral before default or does not take possession of the collateral, not more than 35 days before the disposition.
2. The amount of proceeds of the disposition.
3. The aggregate amount of the obligations after deducting the amount of proceeds.
4. The amount, in the aggregate or by type, and types of expenses, including expenses of retaking, holding, preparing for disposition, processing and disposing of the collateral and attorney fees secured by the collateral which are known to the secured party and relate to the current disposition.
5. The amount, in the aggregate or by type and types of credits, including rebates of interest or credit service charges, to which the obligor is known to be entitled and which are not reflected in the amount in paragraph (1).
6. The amount of the surplus or deficiency.

§9616(c).

The UCC further provides that no particular phrasing of the explanation is required, but the notice should comply substantially so long as it does not have misleading errors. See §9616(d). Additionally, Section 9616 also states that a debtor or consumer obligor is entitled without charge to one response to a request under section 9616 during any six-month period in which the secured party did not send to the debtor or consumer obligor an explanation pursuant to subsection (b)(1). The secured party may require payment of a charge not exceeding \$25 for each additional response. §9616(e).

Sample Notices and Compliance

We have provided three sample letters – two disposition notices (one of which is to be used for a public disposition and the other of which is to be used for a private disposition) and a deficiency notice. Each disposition letter complies with the foregoing, as further analyzed below.

Disposition Notices - All Requirements Under the UCC and Motor Vehicle Finance Act

- Must be sent by registered or certified mail: Each letter provides that it must be sent by one of these methods.

- Describes the debtor and secured party: The letters specifically set forth the Credit Union and its address as well as the borrower and its address.
- Describes the collateral which is the subject of the intended disposition: Each letter provides that the vehicle shall be described by year, make, model and VIN.
- States the method of intended disposition: There are two separate letters provided. One is to be used in the case of a public disposition and the other to be used for a private disposition and each letter specifically describes how the Credit Union intends to dispose of the collateral in either event.
- States that the debtor is entitled to an accounting of the unpaid indebtedness and states the charge, if any, for any accounting: Each letter provides the following to comply with this requirement: “If you want us to explain to you in writing how we have figured the amount that you owe us, you may call us at [telephone number] or write us at [address] and request a written explanation. [**Optional** - *We will charge you \$[] for the explanation if we sent you another written explanation of the amount you owe us within the last six months.*].”
- States the time and place of a public disposition or the time after which any other disposition is to be made: The public disposition letter provides that the date, time and place shall be included. Please note that the UCC provides that the hour and day shall be provided. This need only be the time of start of the auction, and not necessarily the exact time this particular vehicle will be sold as that is likely not known. The private disposition notice provides that the vehicle may be sold beginning on a date certain, thereby complying with the requirement above of time after which the disposition may be made.
- A description of any liability for a deficiency of the person to which the notification is sent: Each letter provides: “The money we get from the sale (after paying our costs) will reduce the amount you owe. If we get less money than you owe, you will be held responsible for any deficiency and we may take action against you for that deficiency. If we get more money than you owe, you will get the extra money, unless we must pay it to someone else.”
- A telephone number from which the amount which must be paid to the secured party to redeem the collateral under section 9623 (relating to right to redeem collateral) is available: Each letter has the following: “If you want us to explain to you in writing how we have figured the amount that you owe us, you may call us at [telephone number] or write us at [address] and request a written explanation.”
- A telephone number or mailing address from which additional information concerning the disposition and the obligation secured is available: Each letter provides: “If you need more information about the sale, call us at [telephone number] or write us at [address].”
- The buyer’s right to reinstate the contract, *if* the holder extends the privilege of reinstatement and redemption of the motor vehicle: Each letter provides this as an option.
- An itemized statement of the total amount required to redeem the motor vehicle by reinstatement or payment of the contract in full: Each letter contemplates an itemized amount to be paid.
- Notice to the buyer of the holder’s intent to resell the motor vehicle at the expiration of 15 days from the date of mailing the notice: Each letter clearly sets forth the 15-day time period.
- The place where the motor vehicle is stored: Each letter provides: The vehicle is being held at [location address of vehicle].
- The name and address of the person to whom the buyer shall make payment or on whom the buyer may serve notice. Each letter provides: “You may make payment or serve notice at: [Name and address of Credit Union].”

- A statement that any personal property left in the repossessed vehicle will be held for 30 days from the date of the mailing of the notice. Each letter clearly has this statement set forth at the end of the letter.
- The name and address of the person that the buyer may contact to receive a full statement of account. As set forth above, each letter clearly has contact information set forth.

Based on the above analysis of each requirement under the UCC and the Motor Vehicle Finance Act, the two form letters provided meet the statutory requirements for a notice of disposition as of the date of this memorandum.

Moreover, the deficiency notice also meets the following requirements of the UCC:

Deficiency Notices - All Requirements Under the UCC²

- Provides an explanation of the calculation of how the Credit Union calculated the deficiency by stating the following IN THE FOLLOWING ORDER;
 - The aggregate amount of obligations secured by the security interest under which the disposition was made and, if the amount reflects a rebate of unearned interest or credit service charge, an indication of that fact, calculated as of a specified date. The letter provides for this and describes the rebate clause and date calculation.
 - The amount of proceeds of the disposition. The letter states: [Credit Union Name] sold your vehicle for the sale price of \$[]....
 - The aggregate amount of the obligations after deducting the amount of proceeds. The letter states: ... the proceeds were applied to your total loan balance above, leaving a deficiency balance of \$[].
 - The amount, in the aggregate or by type, and types of expenses, including expenses of retaking, holding, preparing for disposition, processing and disposing of the collateral and attorney fees secured by the collateral which are known to the secured party and relate to the current disposition. A breakdown of the loan balance is included, specifically delineating these expenses.
 - The amount, in the aggregate or by type and types of credits, including rebates of interest or credit service charges, to which the obligor is known to be entitled and which are not reflected in the amount in paragraph (1). A note is included in the letter stating that these amounts should be included if applicable.
 - The amount of the surplus or deficiency. The letter states: After application of the proceeds of the sale to the total loan balance, you owe a deficiency balance of [\$] to [Credit Union Name].
- States, if applicable, that future debits, credits, charges, including additional credit service charges or interest, rebates and expenses may affect the amount of the surplus or deficiency. The letter explains that interest will continue to accrue and, if the Credit Union has to collect the balance through legal action, the borrower will be responsible for any legal costs incurred.

² Please note that the deficiency notice must be sent before or when the Credit Union first makes written demand on the borrower after the disposition for payment of the deficiency AND within 14 days after receipt of a request

- Provides a telephone number or mailing address from which additional information concerning the transaction is available. The letter states: If you need more information about this transaction, call us at [telephone number] or write us at [address].
- Provides optional language if the Credit Union wishes to charge a fee for any additional response requested during any six-month period. The following language is included:
[Optional - We will charge you \$[] for the explanation if we sent you another written explanation of the amount you owe us within the last six months.