DEFENDER
THE NADC NEWSLETTER

8300 Cash Reporting and Consolidated Business Offices

Rob Cohen

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Does your client have a consolidated business office? If so, read on.

Most dealers understand basic 8300 cash reporting requirements. At a rudimentary level, federal law requires dealers to complete IRS/FinCEN Form 8300 (downloadable from www.irs.gov/pub/irs-fill/f8300.pdf) and file it with the IRS not only when it accepts cash currency in excess of $10,000 but whenever it accepts "certain monetary instruments" which, when added together, or with other cash amounts, total over $10,000.

Recently, an issue surfaced relating to centralized business offices. If a dealership group has a centralized business office responsible for collecting cash receipts across multiple stores, that group may have to monitor for "related transaction" reporting requirements across all dealership locations.

To clarify, let's take the following scenario. Big Group Chevrolet and Big Group Ford have a consolidated business office located in the Chevrolet store. The stores are located in different cities. Mr. Good Customer comes in to the Chevy store and purchases a used Aveo for $9,000 out-the-door. He pays with cold hard cash. The next day (within 24 hours), Mr. Good Customer visits Big Group Ford and purchases a used Focus, also for $9,000 out-the-door and also pays with cash. Taken

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Sidebar

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Drafting Audit Letters in the Modern Era

Les Stracher

The response to audit letters is a seasonal event, much like the change of leaves in Fall, which afflicts the legal profession every year from December through approximately the end of February. We have all seen the form. The letter comes from the client asking that we, as counsel, provide its accountants with information regarding "pending or threatened litigation" and "unasserted claims and assessments."

There was a time when the response to such letters was, more or less, routine. This was largely due to the operation of the "treaty" between the American Institute of Certified Public Accountants and the American Bar Association. *See American Bar Association "Statement of Policy Regarding Lawyers' Responses to Auditors' Requests" (1975).* Under the "treaty," counsel provides a letter to the auditor which describes pending and overtly threatened litigation, but only where an outcome is "probable" or "remote" and where such estimate presents only a slight probability of inaccuracy. Of course, this approach contemplates that counsel may disclaim any opinion which does not meet the requisite level of certainty.

As any attorney who has acted as general counsel charged with reviewing, or who at least has been favored with copies of,

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President's Message

Jonathan P. Harvey

I have always been fascinated by the notion that history repeats itself, and by the seemingly pathological inability of humankind to learn from past mistakes. Take for example, the interesting special edition of *Automotive News* regarding the history of the franchise system and the reference to the so-called black market cars after WW II. The article regarding the growth of the franchise system between the period of the First and Second World Wars contains a section entitled "Black mark for dealers," which relates to the post-war waiting lists for vehicles that were in short supply and the dealer practice of extracting cash from customers to move up on the list. The article points out that it was a "public relations disaster that dogs them to this day." Do you think those dealers who are selling niche cars far in excess of list price might benefit from reading a little history? The Honda Prelude price gouging tells us that those dealers did not read history. The article goes on to mention that "nobody knew the exact price of a new car except the factory and the dealer. Neither was about to disclose it." Ask yourself, does that sound familiar? Do the various programs that the manufacturers use to force facility upgrades produce two-tiered pricing, and do they make it impossible to determine the "exact price of a new car"? There is nothing new under the sun, and the auto industry is not immune from repeating historical mistakes. The car buying public has a long, collective memory, and if the way in which the customer is treated in the F&I department, the service department or the sales department starts to create an odor, that odor will spread. There is no shortage of trial lawyers and government investigators available to prove the point. The solution is to look at the past mistakes and correct them. To ignore them is to make them.

On another note, I recently sat on a train from New York City to Poughkeepsie and was struck by the number of passengers who were communicating by cell phone, Blackberry and various other electronic devices. I had gone to the theater the evening before, and the intermission seemed to have been wholly taken up with the analysis of and response to cell phone messages by a large majority of the audience. These days, by the time I return from court, my adversaries have usually sent me a fax or an e-mail or left a voice message. Catching your breath, having the time to consider the issue, developing a strategy and then reflecting on the matter seems to be a thing of the past. I do not think the breakneck speed at which we are compelled to practice law does justice to the subject matter or advances the profession. I know that I am a dinosaur on this issue, but let me ask how many of you would like to have a quiet hour in which to review the advice you gave during the day? And of those who say yes, how many would have made some change in your thinking? The point is, the more you contemplate an issue, within reason, the fewer mistakes you make.

My resolution for 2007 is to slow down the process enough to think, a resolution I am more likely to fulfill as I finish my term as President. I wish you all a Happy New Year.

Jonathan P. Harvey of Harvey and Mumford LLP is President of the NADC and can be reached by e-mail at: jpharvey@harveyandmumford.com

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audit letters from other counsel knows, there is little uniformity in how attorneys tend to respond to these letters. Indeed, the variability in the amount of detail and the fashion in which it is characterized can, at times, be quite striking. In this regard, I would submit that in the era of Sarbanes-Oxley, caution is more the watchword than ever.

Regulatory Pressures

One of the features of the Sarbanes-Oxley Act ("SOX") is the formation of the Public Company Accounting Oversight Board ("PCAOB"). The PCAOB was created by SOX as an independent entity to oversee the accounting profession. In its oversight capacity, the PCAOB has sought to create greater accountability and documentation in furtherance of its mandate. SOX, by its terms, only applies directly to public companies and, in some instances, to dealerships planning to go public..

Section 303 of SOX presents particular danger for the practitioner to warrant scrutiny. It provides, in pertinent part, that:

> *It shall be unlawful, in contravention of such rules and regulations as … necessary and appropriate in the public interest or for the protection of investors, for any officer or director of an issuer, or any other person acting under the direction thereof, to take any action to fraudulently influence, coerce, manipulate or mislead any independent public or certified accountant engaged in the performance of an audit of the financial statements of that issuer for the purpose of rendering such financial statements materially misleading.*

Complimenting Section 303, is Rule 13b2-2, adopted by the Securities and Exchange Commission, and which provides that it is unlawful for any officer or director of an issuer, or any other person acting under the direction of an officer or director to take any action, directly or indirectly, to coerce, manipulate, mislead or fraudulently influence any public or certified public accountant, if that person knew or should have known that such action if successful could result in rendering such financial statements materially misleading. The dealership practitioner should be aware that he or she can be held liable under the "bright-line" test established by Rule 13b2-2 under the theory that they have participated as a secondary actor in providing information to the auditors. It should be noted, as well, that such liability has also fueled private claims where there has been only "substantial participation" by the practitioner and they can be held liable under a "creation" theory where the lawyer has acted with requisite intent, but was not identified to investors.

In light of these growing trends is predictable retrenchment on the part of the legal professional to respond to requests for audits. In point of fact while the "treaty" may afford some aid and comfort based upon the ability of counsel to couch a response in terms of vague likelihoods and probabilities, this is not at all assured. To the extent that accountants may feel pressure to seek fuller disclosure, the reality may be that the current framework for responding to audit letters, at least as regards public companies, is simply not sufficient to deal with the problem.

Effect of Disclosure/Waiver of Attorney Client and Work Product Privilege

Among the more striking, albeit unrecognized, hazard of responding to requests for audits is the stark reality that such communications are not protected by attorney-client or work product privileges. Similarly, sharing information with auditors may result in the waiver of work-product privileges.

Attorney client privilege is most always waived as a result of communications between an attorney and an outside auditor. This is due to the fact that the communication destroys the seal of confidentiality between lawyer and client. Rather than draft an audit response letter which contains a negative evaluation of a claim, it is respectfully submitted that your dealership client and the auditor as well should be advised, either prior to or contemporaneously with the issuance of a response, that nothing contained in the response is privileged. The reality is that your dealership is the holder of any privilege and, as counsel, you need to be sure that your client readily understands that it may be, in advertently waiving privilege. It should also be noted that once the door is open, that once a party waives the privilege it extends to both favorable and unfavorable communications regarding the matter.

As to work product, it is incumbent on the practitioner to recognize that, prior to sharing any information, a determination needs to be made as to whether the auditor, based on their independent status, might be considered to an adversary or conduit to a potential adversary. To the extent that the law may be unsettled as to how this test is applied, the only protection that you may be able to afford your client is to try to get the auditor to enter into an agreement to keep such information confidential. Such an agreement should specifically contain a provision which requires the notification of the client in the event that a third party attempts to conduct discovery upon them.

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Message From Executive Director

Jack Tracey, CAE

The third annual member conference is scheduled for March 11 to 13 in Dallas. Gene Kelley and his committee are working hard to create another top-notch program this year. Member suggestions, made on evaluation forms or communicated directly to the committee, form the basis for topic and speaker selection. Timely, relevant program content is the result.

Preliminary program details appear on page five, and frequent updates will be made on the events page at www.dealercounsel.com. You will also find on-line registration on the events page. This year the form includes space for CLE information, and we will apply for credit to all the states requested on the form. With three 90 minute and five 60 minute sessions, there will be 570 minutes of content eligible for CLE credit.

Registrations are coming in steadily, and we anticipate that more than 150 members will attend. The conference is open only to NADC members, and if you know attorneys who are not members but should be at the conference, please direct them to www.dealercounsel.com to apply for membership.

Those who have attended past conferences can attest to the fact that the networking that occurs during breaks, lunch and receptions is as valuable as what is learned in the sessions. Important contacts are made, questions find answers, and genuine friendships form. This colleague-to-colleague communication is why NADC was created.

Sign up today at www.dealercounsel.com and you will not regret it!

Contact Jack Tracey, CAE, NADC executive director, at:
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individually, neither of these transactions is reportable under IRS rules. However, they become reportable if they are considered to be "related transactions."

What are "related transactions"? "Any transactions between a buyer (or an agent of the buyer) and a seller that occur within a 24-hour period are related transactions. If you receive over $10,000 in cash during two or more transactions with one buyer in a 24-hour period, you must treat the transactions as one transaction and report the payments on Form 8300." (*Reporting Cash Payments of Over $10,000*, IRS Publication 1544, Rev. May, 2003) Two or more transactions that take place outside a 24-hour period can also be deemed related if the seller "has reason to know" the transactions are related. (*Id.*)

To determine whether the transactions described in our scenario above are "related," we have to figure out how the IRS treats multiple locations (or branches) for cash reporting purposes.

The instructions found on the reverse side of IRS/FinCEN form 8300 defines "recipient" as:

> The person receiving the cash. Each branch or other unit of a person's trade or business is considered a separate recipient unless the branch receiving the cash (or a central office linking the branches), knows or has reason to know the identity of payers making cash payments to other branches. (emphasis added)

As you might expect, federal regulations (specifically 26 CFR 1.6050I-1(c)(8)) contain a definition that is consistent with the above instructions.

It is the "or a central office linking the branches" part of this definition that is of the greatest concern.

Getting back to our scenario, it is safe to assume that given the hypothetical facts, an IRS agent could conclude that the Big Group centralized business office sufficiently links the Chevy and Ford stores. As such, these two stores may be treated as one recipient. Since the transactions were with the same individual payer and took place within 24 hours of each other, the transactions may be deemed "related."

As many dealers have discovered the hard way, the IRS is relentless when it comes to assessing penalties for non-compliance with cash reporting requirements. If your client has a centralized business office, I recommend establishing (or reviewing) controls to ensure that cash receipts accepted from each location serviced by that office are cross-referenced to assure proper compliance with "related transaction" requirements.

Rob Cohen is President of Auto Advisory Services, Tustin, CA, First Vice President of the NADC and Editor of Defender, The NADC Newsletter

3rd Annual NADC Member Conference
March 11-13, 2007
The Adolphus Hotel, Dallas

Join your colleagues in Dallas for the third annual meeting of NADC members. Sessions are being planned to reflect the special interests of members. Arrive on Sunday, March 11, for an early evening reception and stay until the conference concludes mid-day on Tuesday.

Receptions, luncheon and breaks provide ample time for members to get to know each other. Three 90 minute sessions and five 60 minute sessions assure in-depth presentations. CLE credit is available.

The conference is open to NADC members only. Registration is $495 per person. Register now at www.dealercounsel.com!

To reserve a hotel room at the conference rate of $185 plus tax, call 800-221-9083 and reference "NADC." Reserve your room now — the deadline for this rate, pending availability, is February 14.

Topics include:

- Employment practices: Employment law is everywhere, and dealerships are in the thick of it. What are the most recent developments in harassment law? Should employees be required to submit their employment claims to arbitration instead of a jury? How does the EEOC, the federal agency that investigates and prosecutes discrimination claims, make its decisions? Why are there multi-million dollar verdicts in employment cases, and how can dealerships avoid them? Why are wage/hour cases attractive for plaintiffs' lawyers?
- Latest trends in franchise relations: Discussion will emphasize issues related to the factory relationship, the recent areas of dispute and the legal rights available to dealers. How will these emerging legal trends impact business decisions, including sale transactions? Panelists will provide answers to problem areas with suggested solutions, approaches or strategies. A legal audit checklist for dealers will also be discussed.
- The current revolution in dealership computer systems: The past year saw major changes in the computer industry that serves dealerships. There were several major changes in the electronic parts catalog business and in Dealer Management Systems (DMS). There are pending group arbitrations. This revolution presents major contract issues and related business decisions to all dealers.
- What attorneys should know when reviewing dealership financial statements: The session will be divided into three sections: valuation; due diligence; and litigation exposure.
- Ethics: Presentation includes discussion on joint responsibility issues when an attorney takes on referral work from another attorney. Multi-jurisdictional practice (MJP) of law will also be discussed
- A Former Prosecutor's Guide to Help Auto Dealers Minimize Risks and Add Value: The regulatory criminal enforcement climate continues to drastically change for many businesses, and automobile dealerships are no exception. Years ago, white-collar investigations and prosecutions were limited to only the most egregious violations; now, every dealership faces higher risks, harsher consequences and more uncertainty. This presentation provides a practical overview of: recent enforcement trends; a rare glimpse inside the government's playbook; practical steps to reduce risks, demonstrate good faith compliance efforts; and pointers in responding to subpoenas and search warrants.
- Electronic discovery rules: This session will provide a better understanding of the pertinent pre-litigation, litigation and practical issues surrounding e-discovery. The program will discuss the various phases of e-discovery: document retention guidelines; litigation hold obligations; meet and confer responsibilities; actual discovery; and trial. Attendees will be prepared for the changes to the Federal Rules of Civil Procedure, Local and State Rules, ethical concerns and will develop critical case analysis techniques. The questions to ask and the answers will be revealed. There is no need to bring your computer.
- Associate member presentations: Brief presentations will be made throughout the conference.

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In point of fact, the American Bar Association continues to lobby and has created its own set of recommendations, formulated by its Task Force on Attorney-Client Privilege, encouraging the SEC, PCAOB, accounting professionals and other relevant organizations to adopt standards, policies, practices and procedures to ensure that attorney-client and work product protections are preserved throughout the audit process. Clearly, the courts do not provide assurance that privileged information to auditors will not result in a waiver of privilege, thereby preventing clients from fully benefiting from the advice of counsel for the purpose of corporate governance.

Areas of Particular Concern for Dealerships

Automotive dealerships present some truly unique problems when responding to audit letters. While most businesses deal with some level of contingent liability, the automotive business lends itself to greater exposure in this regard than most businesses. Examples of the sort of contingent liability that one would anticipate are the following:

- Tires for Life or other "for life" promotions
- We Owes or Due Slips
- Promotions dealing with third party vendors (e.g. vacation packages)
- Lender Chargebacks
- Environmental Concerns

Whether these matters should be properly reserved, is treated by most auditors under the "treaty" as something not requiring the assistance of counsel. It remains to be seen whether this will change.

Of course, keeping in mind the fact that disclosures to auditors may not always be privileged, this all can be somewhat of a slippery slope. A classic example would be the situation in which the characterization of long term liability is produced in discovery and becomes the basis of additional claims or otherwise provides comfort and aid to the enemy during the course of litigation. At the risk of incurring the ire of your auditors, I think resisting such requests is both in the best interests of you, as a practitioner, and the client. This is particularly true of estimates provided for environmental contingencies. Consistent with the treatment of tax opinions, counsel's assessment of this type of liability may properly be sought by an auditor if the client justifies its position based upon advice of counsel. However, one might properly argue that such matters are not truly within the province of counsel and, in fact, are more properly addressed by engineers and other professionals. To the extent that you may be called upon to provide such advice, it is worth noting that to the extent you were relied upon by your client in formulating its position, auditors may well be within their rights to require disclosure.

Conclusion

As lawyers, we have come to treat audit letters as somewhat of a ritualistic encounter. It behooves all of us to understand how dramatically and seriously the landscape has changed. The harsh reality is that there are forces acting to erode safe harbors for the drafter. If that were not bad enough the medium that we are using to communicate this information is fully discoverable by adverse parties in litigation.

Again, in the current environment, it is best to disclose to your dealership client, up front, of your current obligations and the fact that disclosures of attorney client and work product privilege made in the context of responses to audits may not privileged. To the extent that liabilities need to be footnoted or otherwise reflected in an audit, the best source of that information, from my perspective, is the client or third party professional. Of course, for those attorneys representing public dealership groups or, in some instances, a dealership group that is planning to go public, greater disclosure is mandatory. In such event, the course of action for counsel may be simply to try to take him or herself completely out of the mix and establish a methodology to channel information directly from the client to the auditors. A solution to this paradox is desperately needed because things are bound to get worse for the day-to-day practitioner, who will be increasingly pressed upon to craft an approach and a solution to address these competing interests that protects his clients as well as himself and which fully complies with applicable law.

Les Stracher is a Shareholder with the twenty-five member law firm of Rothstein Rosenfeld Adler, PA, in Fort Lauderdale, Florida. He is the Chairman of the firm's Automotive Law Practice Group. In that capacity he advises dealers on mergers and acquisitions for dealers throughout the country, and concentrates on advising dealers on their day-to-day operations. Mr. Stracher has been involved in numerous buy-sells as well as complex corporate structuring and third party negotiations associated with these transactions as well as other legal issues related to the representation of dealers including, franchise disputes, fixed operations, consumer defense, contractual review and compliance issues.

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NADC welcomes the following new members:

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CLE Update November Workshop

We applied for continuing legal education credit to all states requested for the NADC F&I Compliance Workshop in November. The table shows the status of the applications. We submitted rosters of attendees to the states that awarded credit hours. Not all states accredit educational programs, and educational requirements and CLE record-keeping vary from state to state

Please include your state bar identity number(s) when requesting CLE credit for an NADC program.

State	CLE Hrs.	State	CLE Hrs.
California	Use Reciprocal	New Mexico	6.00
Florida	7.50	New York	Use Reciprocal
Georgia	6.30	North Carolina	6.25
Illinois	6.25	Ohio	6.25
Indiana	6.30	Oklahoma	7.00
Kansas	7.00	Pennsylvania	6.00
Kentucky	6.00	Texas	6.25
Maryland	Submit Certificate	Virginia	6.00
Massachusetts	Submit Certificate	Washington	6.25
Michigan	Submit Certificate	Washinton, DC	Non-Mandatory
Missouri	7.20	West Virginia	7.50

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