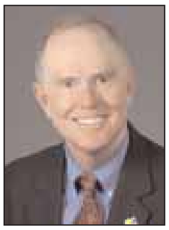
DEFENDER

THE NADC NEWSLETTER

Beware the So-Called Employee Free Choice Act

D. Gerald Coker, Esq.



D. Gerald Coker

Soon Congress will consider again the most dramatic pro-union shift in federal labor law in U.S. history. The economic fallout of this legislation will touch every American family, rivaling the energy, mortgage and housing crises we presently face. The Employee Free Choice Act (EFCA), which passed the U.S. House of Representatives last year, seeks to do away with the secret ballot in union representation elections and impose mandatory government-run arbitration in first contract negotiations between companies and organized labor.

Since 1935 employees have had the right to form, join and assist labor unions. Under the National Labor Relations Act, if 30% or more of the employees in a work group demonstrate support for a union by signing union authorization cards, the National Labor Relations Board (NLRB) will conduct a secret ballot election at the worksite 6 to 8 weeks later. If a majority vote "yes" for representation, then the union is certified as the bargaining agent for the employees. Unions win these elections 58-61% of the time according to the most recent government statistics.

After certification the employer must meet with the union at reasonable times and bargain in good faith in an attempt to

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Getting Your Client's House in Order

Oren Tasini, Esq.

Oren Tasini

As I was preparing this article, I received two emails that reflect the challenges facing our clients. The first reported that "The Big Three" continue to seek to reduce their dealer body. This comes as no surprise. The second reported on the flurry of bankers, lawyers and consultants flying to and from Detroit working to save the domestic automobile industry. This may be good for the airlines and the professionals but not so good for our dealer clients. With these uncertain challenges in mind, it is worth examining some advice we can give our clients so they are ready for the future, no matter what it holds.

Succession Planning. This is one of the most difficult conversations I have with my clients. Everyone thinks they are immortal. Sadly, there are far too many occasions where a dealer principal dies or becomes disabled without having an orderly plan in place to ensure the dealership can continue to operate. This problem is amplified by the fact that a dealership, its value and cash flow, is a significant, if not primary component of a dealer's wealth. The failure to plan for death or disability, burdens, and sometimes bankrupts a family.

The threshold question is, *does your client have a current will?* Note the word "current." If the will does not reflect the current state of facts and/or the intended plan, it is likely to provoke disputes. For

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President's Message

Michael Charapp

Can This Marriage Be Saved?

Young lawyers sometimes ask how they can best prepare for a career representing dealers in franchise disputes with manufacturers. "Should I study franchise law?" "Should I get a background in litigation?" "Should I work for a group of dealerships?" The answer is none of the above.

In my opinion, the most valuable training that one can receive in handling the relationships between dealers and manufacturers is to spend some time handling divorce cases. Nothing can prepare a lawyer for the often stormy world of manufacturer/dealer relations like time in the trenches in the wars of the spouses.

Nonsense, you say? How silly, you say? Think about it. Where but a broken marriage can one experience such an intense love/hate relationship as one finds in the occasionally combative relationship between a manufacturer and a dealer.

While it is easy to overstate the parallels between a marriage and a franchise relationship, there are some definite similarities.

• Both relationships start out with professions of undying love. Newlyweds express their awe that they could find each other among all the people of the world. Manufacturer and dealer? The dealer is just perfect to sell the manufacturer's perfect vehicles.

• Both relationships start with great dreams. For new spouses, it may be the lovely cottage with a white picket fence, a collie and the two and a half children. For a manufacturer and a dealer, it's mega-volume with 100% customer satisfaction.

• Both relationships start with expectations of eternal dedication. The marriage vows contain that explicit promise. So do dealer sales and service agreements (as interpreted by most state laws guaranteeing perpetual renewal).

Like marriages, some manufacturer/dealer relationships work out beautifully. The parties learn each other's good points, bad points, and foibles. They work hard at getting along. They make compromises.

When the parties stop compromising and harden positions, problems start. In a manufacturer/dealer relationship, this is generally when the manufacturer demands changes. "Add eight service bays." "The dealership is short on its working capital requirement." "The letters on the dealership's signs are hunter green instead of forest green." And, every manufacturer's favorite, "the dealership is not sales effective in the midsize, urban, crossover, SUV, family, four-door segment." When problems arise there are similarities between broken marriages and troubled franchise relationships.

• Every "friendly divorce" I ever handled began with pledges by the spouses to remain eternally cordial. I learned quickly that there is no such thing as a "friendly divorce". The spouses who couldn't get along in marriage can't get along in a divorce. As the divorce proceeds, hatred grows. Before you know it, the spouses make warring middle east nations look rational. A damaged franchise relationship is the same. The dealer and the manufacturer talk about the need to resolve their differences on a friendly basis. Before long the manufacturer is seeking to crush the dealer through ridiculous demands and a termination letter. The dealer winds up pulling out all legal stops to stay in business.

• Every divorce I ever handled wound up becoming petty. One would think that spouses can work out who bought "The Beach Boys Greatest Hits" or who will get the most use out of a hot comb. Forget it. Almost all divorces degenerate into battles over appliances and icons that evoke nostalgia. Is the manufacturer/dealer relationship different? The manufacturer is upset that the dealer is four square feet short of requirements in the showroom. So it throws in that the dealer was two units short of sales effectiveness in June 2007 and two tenths short of CSI targets in November 2006.

• A broken marriage is a study in power and leverage. The spouses stake out their positions on kids, pets, homes, and vehicles with the tactical foresight that would make Von Clausewitz proud. The damaged dealer manufacturer/relationship is no different. The manufacturer threatens sanctions. "No more incentive payments." "We will terminate you." Or the worst of all threats, "We will make you watch an entire satellite pitch to buy more inventory." It's all about power and leverage over the dealer. For the dealer it's all about strategy to blunt the manufacturer's attempt at power and leverage.

One who wishes to understand the dynamics of relationships between manufacturers and dealers without some experience in the dynamics of warring spouses can learn the basics of being a dealer lawyer. However, that lawyer may be forever doomed to misunderstand his or her clients. At NADC meetings, I often hear discussions between members who can't understand why dealers don't protect their interests more effectively. Why don't dealers take their lawyer's advice to document certain rights or to make some objection in writing?

Former divorce lawyers know why. Moonstruck newlyweds don't protect their positions. Even when troubles start, hope springs eternal that the marriage can be saved – until it's too late. Then the spouses go to full Threat Level Red. Is it any different for manufacturers and dealers?

Michael Charapp, President of the NADC, is a partner with Charapp & Weiss, LLP in McLean, VA.

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reach an agreement on the terms of a contract. If the union is not satisfied with the company's offer, a federal mediator is available to help bring the parties together, but cannot impose a solution. If that fails, employees have the right to strike in order to pressure their company into greater concessions and likewise, employers have the right to hire replacement workers in order to operate during a strike.

While not perfect, this system has served America well. However, as companies have grown to realize the benefits of a well-treated workforce and the government has passed numerous laws protecting workers' rights, labor unions increasingly are viewed as an unnecessary and costly anachronism. As a result, union membership in the U.S. is at an all time low, only 7.5% in the private sector.

In an effort to reverse this trend, big labor is pushing legislation that would artificially increase its membership rolls and take away employees' right to vote and management's ability to negotiate on a level playing field.

The most inflammatory part of EFCA would abandon the secret ballot election process (common to every democratic organization in the world) and implement the "card check" system. Under that process, all a union would need to do to secure bargaining rights for a group of employees is convince a simple majority (50% + 1) to sign union cards. Typically, employees are asked to sign such cards in the presence of union officials and supporters, in settings that involve pressure tactics and limited information about the consequences of unionization.

The idea of replacing secret ballot elections with "card checks" shocks the conscience and has generated negative reactions to EFCA in some quarters. But equally disturbing is the provision of the Act which mandates arbitration. If after a set period of time the union and employer cannot come to an agreement through negotiations, a government arbitrator would be empowered to set the wage rates, health insurance levels, pensions, vacation schedules and all other terms of employment in the first contract after a business becomes unionized.

For example, take a relatively small, marginally profitable retailer which employs 15 employees in what the NLRB considers to be an "appropriate unit." Currently, these workers are free to accept or reject union representation in a secret ballot election conducted at their worksite by an NLRB official. With the passage of EFCA, however, all the union would have to do is strong-arm eight of them into signing cards in order for the company to be legally obligated to bargain a contract. Moreover, if direct and mediated bargaining did not

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Executive Director's Message

Jack Tracey

The Fall Workshop, (detailed on pages 6 and 7), is another program planned by NADC members. Suggestions made on program evaluation forms or made by contacting a board member or me are the starting points for the planning committee.

Please consider attending the workshop, and set aside April 1 through 3, 2009 for the 5th Annual NADC Member Conference in Dallas. Topic and speaker suggestions are welcome.

In August, the NADC submitted comments on the FACT Act Risk-Based Pricing Rule. The letter was written and signed by NADC President, Mike Charapp.

The full text follows these remarks. You will also find the letter on the news page of www.dealercounsel..com.

Office of the Secretary of the Federal Trade Commission

Re: FACT Act Risk-Based Pricing Rule
Project Number R411009

The National Association of Dealer Counsel is a trade association of nearly 500 attorneys who represent motor vehicle dealers throughout the United States. The membership of NADC is vitally interested in the proposed Risk-Based Pricing Rule because of its potentially negative impact on the clients of NADC's members.

At the outset, NADC would like to compliment the Federal Trade Commission for its work in attempting to craft a rule that gives due consideration to the needs of the various industries involved. NADC notes that section 311 of the Fair and Accurate Credit Transaction Act of 2003 ("FACT Act") is highly complex with a potentially substantial burden for creditors.

We appreciate the opportunity to provide these comments. We ask that our comments be taken in the spirit of this association trying to provide insight, rather than being critical of the FTC's efforts.

The FTC should reconsider the application of this Rule to motor vehicle dealers.

The language of section 311 of the FACT Act and the legislative history make clear that Congress was interested in having creditors that use risk-based factors in credit decisions provide information usable by consumers. In the vast majority

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example, consider the situation where a specific son or daughter is contemplated to take over a dealership and the will leaves the dealership to all of the children. Litigation is an almost a certainty. Additional areas of concern are related to the failure to adequately consider the estate taxes due at death and ways to minimize such taxes (or at least fund the payment of the tax through life insurance).

Legal Audit. I am surprised by how poorly clients keep track of their important legal documents. At the NADC, we spent a good deal of time discussing how our clients must deal with their customers' records. We do not spend very much time discussing how our clients should deal with their own internal documents. At a minimum, your clients should have the following legal documents up-to-date and easily accessible:

1. Corporate Records. Your client should have a copy of the Articles of Incorporation or Articles of Organization which were filed to form the company, a copy of all corporate minutes, and a copy of all Shareholder Agreements or Operating Agreements. If the dealership is owned by more than one individual, it is critical that the individuals have in place a written agreement which sets forth their understanding regarding the ownership and operation of the dealership, as well as the future exit strategy in the case of the death or disability of an owner, a disagreement, or divestiture. As with the failure to have a current will, the failure to have these agreements in place (and up-to-date) could prove to be costly.

2. Franchise Agreement. Your client should have a complete and current copy of the Franchise Agreement for each line make he/she is authorized to sell. This should include all bulletins or other communications from the manufacturer which purport to either amend the Franchise Agreement or change policies and procedures as they relate to the manufacturer/dealer relationship.

3. Insurance Policies. Your client should have a complete copy of each insurance policy related to dealership operations.

4. Material Contracts. Your client should have a copy of each material contract (indexed by vendor and subject matter) and a system to identify when these contracts either terminate or automatically renew. The vendors of dealers typically have automatic renewal provisions and the dealer's failure to monitor these may result in the unexpected renewal of a contract that the dealer

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yield agreement on a contract, a government arbitrator would step in and impose terms, many of which may be unacceptable to the company's owner due to their direct and indirect costs. In order to stay in business, the owner may have no choice other than to pass on these higher costs to consumers and/or reduce staff.

This legislation has received relatively little attention to date. This is because its advocates realize it is fundamentally undemocratic and recognize that the best strategy for passing such an intentionally mislabeled law is to do so very quietly.

Passage of EFCA would have chilling, tangible adverse consequences for workers, businesses and the nation's economy. But since some version of this legislation could become law early next year, forward – thinking employers will want to examine all aspects of the employment relationship and take appropriate steps to build positive employee relations at all locations.

D. Gerald Coker is Chair of the NADC Labor Law Section and a member of the NADC Board of Directors. He is a senior partner in the Atlanta office of Ford & Harrison LLP, a national law firm which represents dealerships in labor and employment matters.

New Members

NADC welcomes the following new members:

Full Members

William R. Brunner
D.T. Murphy & Company, LLC
Montclair, NJ

Larry Evans
Grenley Rotenberg
Portland, OR

RS Johnson
Johnson, Cebula & Rygh
Long Beach, CA

Stephen Lancaster
Wright, Lindsey & Jennings LLP
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Pohanka Automotive Group
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Paige Larrabee
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NADC
NATIONAL ASSOCIATION OF DEALER COUNSEL

NADC 2008 Fall Workshop
October 13-14, 2008
Westin Chicago River North, Chicago

Join your colleagues in Chicago in October for in-depth presentations on critical issues affecting dealerships. The workshop is open to NADC members. The registration fee is $395 and includes the reception, breakfast, breaks and lunch. CLE credit will be available for the 6.0 hours of presentations.

Register now at www.dealercounsel.com, and check the website for program updates. Call the hotel at 800-937-8461 for room reservations.

Monday, October 13

3:00 to 5:00 pm	**Board Meeting**
5:30 to 7:30 pm	**Reception — Sponsored by *CounselorLibrary.com***

Tuesday, October 14

7:00 to 8:00 am	**Breakfast— Sponsored by *CNA National Warranty Corp.***
8:00 to 11:15 am	**Compliance**

Rob Cohen, Auto Advisory Services, Tustin, CA; **Michael Charapp**, Charapp & Weiss, LLP, McLean, VA; and **Robert Shimberg**, Hill, Ward & Henderson, P.A., Tampa

There will be a break from 10:00 to 10:15 am

Introduction

Spot deliveries and retail installment sale contracts
- Bev Smith Ford/Jones v TT of Coconut Creek Cases
- Florida contract changes
- Common problems and discussion

Developing related polices to compliment Red Flags Program
- Credit report policy
- Credit application policy
- Internet/telephone credit application policy
- Customer information policy
- Customer-not-present and off-site delivery policies

Out of state deliveries and cross-jurisdictional issues
- Minimum contacts and other reported case review
- Can contract language reduce exposure?
- Sales tax issues
- Discussion

Tire Information Placards and Load Carrying Capacity Modification Labels

Navy Pier

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Tuesday, October 14 continued

Skyline, John Hancoock

Art Institute

Photos used courtesy of the Chicago Convention & Tourism Bureau. ©Cesar Russ REALVIEWS™ Photography

11:15 to 11:30 am **Break**

11:30 am to 12:30 pm **Employment Issues**

Ron Smith, Stewart & Irwin, P.C., Indianapolis; and **James F. Hendricks**, Ford & Harrison, Chicago

A panel of attorneys experienced in dealer personnel matters will discuss issues that are critical for attorneys representing dealers today. Among the issues that the panel will analyze for the participants are:

- Common wage/hour traps for dealerships
- Are dealer trade drivers really independent contractors?
- Changes to the Family and Medical Leave Act and compliance tips
- When the union organizer calls
- Future look: terrifying anti-employer changes after the election

12:30 to 1:30 pm **Lunch**

1:30 to 3:30 pm **Franchise**

Moderators: **Len Bellavia**, Bellavia Gentile & Associates, LLP, Mineola, NY; and **Oren Tasini**, Haile, Shaw & Pfaffenberger, P.A., Palm Beach, FL

Panel: **Marvin Brauth**, Wilentz Goldman & Spitzer P.A. Woodbridge, NJ and others to be named

- Selling vehicles for export and factory chargebacks
- Out of state deliveries and cross-jurisdictional issues
- Factory buy-backs of franchises as part of consolidation
- Selling the franchise in the face of manufacturer pressure to close the point
- Negotiating the sale/buy-back with the factory
- Dealing with a designation as a non-preferred point so that you cannot sell when you wish to do so
- Dealing with manufacturer pressure to close/sell/sell to or acquire a related brand
- Audits, especially incentive audits where exports are involved
- Resisting pressure for facility or sign upgrade
- Site control and how it impedes sales and/or forces consolidation.
- How to structure buy/sell agreements to avoid manufacturer exercise of right of first refusal
- Dealer participation in termination of neighboring points
- Workout and forbearance agreements

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intended to terminate.

It is difficult to have your clients focus on these issues as they perceive this as spending money needlessly. However, by maintaining these records and consistently and continually updating them, your client can avoid significant expense and aggravation in the future. In the case of a death of a dealer, or a dispute among dealer owners, having current records easily accessible will ease the transition and/or allow for an early resolution of any potential dispute. The absence of these records usually leads to chaos. In the event of a dispute regarding either the Franchise Agreement, or any policy or procedure of the manufacturer, a dealer with complete and accurate records will face a much better chance of success than one who has to rely upon either the recollection of the dealer or documentation from the manufacturer. In the context of a buy-sell, the lack of adequate record keeping impedes (and can sometimes prevent) the parties from reaching an agreement. In addition, a buyer who is unable to determine what he/she is buying, may seek a price concession from the seller to compensate the buyer for the risk of assuming unknown obligations which the seller is unable to adequately identify. On the other hand, a seller who is seeking to have a buyer assume contractual obligations in connection with the purchase of a dealership might very well be stuck with an obligation if the dealer failed to identify it in sufficient time to the buyer as part of the buy-sell process.

In these difficult economic times, it is a hard sell to get your clients to spend legal fees on what may be perceived as "house cleaning." Although perhaps trite, it is still true that an ounce of prevention is worth a pound of cure.

Oren Tasini, Haile, Shaw & Pfaffenberger,PA, North Palm Beach, FL, is Chair of the NADC Buy-Sell Agreements Section and a member of the NADC Board of Directors.

The NADC website is a source of information for members:

- *Member Directory, searchable by name, firm, state, area of interest and dealership type*
- *Archive of Defender, the NADC Newsletter*
- *List Archive, a collection of messages shared by those members who sign up for the List Serve*
- *Events, conference information and downloadable materials from conferences and workshops*
- *Banners that link to associate member websites for information on products and services*
- *Those wishing to apply for membership will find an online application*

www.dealercounsel.com

FACT Act Comments ...
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of cases involving three-party financing, motor vehicle dealers do not utilize risk-based factors in determining the credit worthiness of the consumers with whom they deal.

In making this comment, NADC does not contend that dealers who are involved in two-party financing and who are the ultimate determinors of the creditworthiness of their customers should be exempt. In two-party credit situations, where the dealer sells a vehicle and actually extends credit pursuant to a financial instrument it does not assign, the application of the Risk-Based Pricing Rule may be appropriate. Those situations, which generally take place in "buy here pay here" transactions in the motor vehicle business, look more like the traditional financing arrangements considered by Congress when it passed section 311 of the FACT Act.

Three-party financing, which makes up the bulk of the transactions in the motor vehicle dealer business, do not look like the traditional financing transactions that Congress apparently contemplated when it enacted section 311. In these transactions, a dealer sells a vehicle, the customer signs a retail installment sale contract ("RISC") with the dealer as the nominal creditor in most states, and then the dealer assigns the RISC to a third party creditor that has notified the dealer that it accepts the credit of the customer. The third party creditor then services the debt directly with the customer.

NADC does not contend that dealers are not creditors in three party financing. Under the law in most states they are, nominally, creditors at the initiation of the transaction. However, they are not creditors who consider risk-based pricing factors in determining the sale of a vehicle. Simply stated, motor vehicle dealers only finalize sales of vehicles on credit if they can assign the RISC to a third-party financing source. Risk-based factors do not generally enter the picture in the decision to extend the credit or in the decision about the type of credit to be extended. The desire to make the sale is the overriding factor to be considered. Dealers will sell a vehicle if an assignee that does consider risk-based factors will accept assignment of the RISC.

NADC agrees that dealers receive credit applications from their customers and access credit reports. The purpose of these activities is to make a decision as to the likelihood that a creditor will accept assignment of the contract. In the motor vehicle dealer business, this is known as "approval" by a finance source. If a dealer believes that a finance source will approve a deal, the dealer will enter the deal with the customer and will complete it with the customer upon assignee approval. If a finance source does not approve a deal, then the dealer most likely will not to complete the deal, or if the vehicle was delivered, it will rescind the RISC pursuant to contract rights and terminate the deal.

NADC appreciates the decision by the Federal Trade Commission to require only one risk-based pricing notice in a three-party finance transaction. However, NADC notes that placing this requirement for compliance on the dealer is placing it on the wrong party. The potential assignees make the decision as to the creditworthiness of customers. The potential assignees ultimately make the credit decisions based upon risk-based factors, not the dealer.

For this reason, NADC requests that the FTC reconsider its decision to impose the compliance requirements of the Risk-Based Pricing Rule on motor vehicle dealers.

If dealers are required to comply, they should only be required to deliver Notice B-1.

NADC appreciates the decision of the FTC to provide a mechanism by which motor vehicle dealers can comply through delivery of an alternative notice to customers. However, dealer personnel who deal directly with customers are seldom experts in the complexities of credit scoring. Because of this, NADC suggests that motor vehicle dealers should be required only to deliver the model form for risk-based pricing notice B-1 as contained in the proposed Rule.

NADC is concerned that requiring motor vehicle dealers to issue a notice that contains detailed information concerning credit scores and the credit score itself will simply be another source of litigation against car dealers. The sales personnel who deal with customers in car dealerships are generally knowledgeable in selling vehicles. F&I personnel in dealerships who deal with customers are knowledgeable in the selling of financing and other products and services. Each type of employee may know the function of the credit score and its implication as to the creditworthiness of a customer from experience. However, these personnel generally do not know the processes used by those

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Member Spotlight: Moss Adams, LLP

MOSS ADAMS LLP

Moss Adams LLP is the 11th largest accounting and consulting firm in the United States, headquartered in Seattle. Our staff of over 1,900 includes more than 240 partners.

Our Dealer Services Group serves 500+ dealerships nationwide, ranging in size from single-point stores to mega dealerships and publicly-held groups. Our professionals apply their specific industry experience to the challenges faced by dealers specializing in:

- Automobiles
- Heavy equipment
- Commercial trucks
- Recreational vehicles
- Rental and fleet companies

In addition traditional tax, consulting and assurance services, the Dealer Services Group also offers business valuation services.

Moss Adams wrote the book on valuing dealerships: NADA's Management Guide: A Dealer Guide to Valuing an Automobile Dealership. Our staff of 30 credentialed full-time appraisal professionals has performed valuation assignments for 700+ dealerships, and provides business valuation expertise on a national basis. Assignments include valuations for buy/sell transactions, estate planning, succession planning, purchase price allocation, financing and various forms of litigation.

We can be reached at 206-302-6523 and www.mossadams.com.

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issuing credit scores to determine a score and the detailed factors that are involved.

Consistent with the intent of Congress, the "teachable moment" involved in the extension of credit should really involve those who are able to teach. When a motor vehicle dealer provides a notice of the credit score and detailed credit score information, that can lead to questions that may generate answers that a plaintiff's lawyer may label misleading in a subsequent lawsuit by a disgruntled customer. The answers in the "teachable moment" should be provided by either those who are immersed in the processes of determining credit scores or those who use scores and other factors in making decisions on credit that are risk-based.

For this reason, we suggest that the B-1 notice is the notice that should be required of motor vehicle dealers involved in three-party financing if the Federal Trade Commission believes it should continue to apply the risk-based pricing notice requirements to motor vehicle dealers in three-party finance transactions.

Save the dates —

April 1 – 3, 2009

5th Annual NADC

Member Conference

Four Seasons Dallas at Las Colinas

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