DEFENDER
THE NADC NEWSLETTER

Surviving an FTC Investigational Hearing

Les Stracher, Esq.

The day that you have feared has finally arrived. You struggled with the rest of the dealership community to get your client FTC safeguard compliant. As counsel, you made sure it had an Information Security Plan ("ISP") in place and performed your due diligence, as best you could, to ensure your client was prepared to implement its safeguards program. Notwithstanding your herculean efforts, there has been an alleged breach of security or a random inquiry triggering an investigation.

While I have never been able to confirm the rise in the number of investigational hearings since enactment of the FTC safeguards guidelines, it has been theorized that the FTC targeted the dealership community or is conducting these investigations in furtherance of its obligations to report to Congress. In the final analysis, the only thing about which you can be sure, is that your dealership client can no longer rely on the *defacto* grace period which appeared to be in place after enactment of the Safeguards Rule.

This article is a brief outline of what to expect if your client is asked by the FTC to participate in a voluntary investigational hearing. It is not intended as a primer on FTC safeguards compliance in general, and assumes that the reader understands and has had operational experience working with an ISP.

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Mark to Market

Jonathan P. Harvey, Esq.

In the darkness of the worst economic crisis since 1929, or perhaps a worse one, a growing number of political leaders and financiers are persuasively arguing for a change in the rules of accounting to allow banks to value their assets at what they paid for them, or, what they think they might be worth in the future when the crisis clears up, rather than at their current market value. The rules arose after and in response to the savings and loan collapse in the 1980s. This rush to change the mark to market rules would boost bank balance sheets immediately and provide a deceptively intoxicating solution to the under capitalization of financial institutions. I believe it is the natural result of an absence of moral and ethical standards in the market place. Simply put, it is the culmination of a multi-generational refusal to acknowledge and practice easily defined moral principles in the world of business. During a charming scene from *High Society*, the remake of Philip Barry's *The Philadelphia Story*, in answering the question of why he had not taken advantage of an intoxicated Tracy Lord (Grace Kelly) the previous evening, Mike Connor (Frank Sinatra) says "there are rules, and gentlemen don't break them. "One of the rules in the world of finance ought to be, and I believe is, to honor and face the truth, and we ought to live by that rule.We are in this mess

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Jonathan P. Harvey

President's Message
Writing for Salespeople – It's Harder than It Looks


Michael Charapp

The hardest thing for a lawyer to write is a simple, easy to read document. That may sound like the part of a troglodyte's rant about attorneys that comes immediately before the quote from Shakespeare justifying the mass murder of legal practitioners. But, unfortunately, it's true.

Think about it. Law school and practice grind the simplicity and style out of us. Try to write a simple agreement that doesn't account for every possible negative outcome. You're toast! Use pronouns instead of the proper names of the parties leaving a scintilla of confusion about the party bound by a provision of the agreement. You're toast! Try stylin' in a memo to a stuffy judge. You're toast!

You get the point. We eventually learn that any legal literary innovation will result in our being toast.

So we learn to be boring, but precise. We cover every possible contingency. We are painfully clear, even if the prose is stilted. We write complex documents that laymen describe as unreadable.

This brings us to writing for salespeople. At some point in our careers, we will have to write something for a client that will go to salespeople, whether it is a policy, a new program, or some sort of important message that the dealer wants to get across to the sales staff.

So we write as we were trained. Eyes gloss over; groans are audible.

I know this from personal experience. When I was in the car business, I had to write many things for salespeople. I caused a lot of pain. It took me years to learn to write for salespeople.

Some would say that I learned to "dumb it down." But that suggests that salespeople are dumb, and nothing could be further from the truth. Salespeople just do things differently than lawyers. A lot differently.

Words are our products. We get paid for producing words. A salesperson can't make a dime producing words. He or she makes money by developing the analytical tools of a psychologist to qualify a prospect, the performance tools of an entertainer to excite the prospect, and the negotiating tools of an international nuclear inspector to close the sale. Salespeople get paid to sell things. Salespeople make money only when a car crosses the curb.

Is it any wonder that salespeople are not dazzled when we prepare a multi-part policy that accounts for every possible negative; or when we repeat proper names endlessly so that there is no possibility of confusion; or when we tie up every loophole leaving no possibility of discretion? Those documents are written for our world, not for theirs.

It took a lot of time and energy to learn how to write for salespeople. I have made progress. Here are some of the things I have learned that I wish to share with my fellow NADC members.

• Keep it short. Salespeople don't get paid to read our work. They don't want to read pages. They want to read a page; even less if possible.

• Organize it. Make your points in a simple, logical manner.

• Make it simple. Think about what you want to say. Then say it in active, declaratory sentences.

• Make it important to them. "So the company wants me to do something to protect the company." Yawn. Yawn again. "What's in it for me?"

• Sell it. Salespeople want to be sold. Don't tell them what might be, or what the greater weight of authority provides, or what might result as the law develops. Tell them how it is. Be forceful.

• Get it signed. Rule of thumb #1 for a disclosure document provided to customers is that if it is not signed, it was not seen. (Rule of thumb 1A is that even when it was signed some customers may deny that they saw it. Fortunately, the courts generally won't listen to that excuse.) The same rules apply with salespeople.

Don't expect to get the hang of writing for salespeople right away. I have a personal goal of making everything I write readable at the 8th grade level. I have been at it for years, and I still have a way to go. I seldom produce writing that is readable for those below the 11th grade level.

Nevertheless, I think that writing for salespeople has made me a better writer, overall. Sometimes, I get inspired like I was for this article, and I can really be clear. According to the Microsoft Word readability statistics this article has a readability score of 69.1 and a grade level of 6.0. Now that's readable! That's writing for salespeople!

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

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The inquiry to start the process is generally the same. It contains form instructions for response (such as the requirement that documents submitted be Bates stamped) and requests items such as (i) corporate information, (ii) a copy of the client's ISP, (iii) the identity of the individuals responsible for implementing the program, (iv) a description of planned testing, monitoring and protocols for evaluating the security program, (v) screening procedures for new hires, (vi) a description of training and (vii) the dealerships due diligence with service providers. It may be that the FTC will accept your client's written response, admonish your client to remediate any deficiencies it finds and close their file. However, it may also be that they will want to conduct an investigational hearing, and it is the conduct of those proceedings to which this article is directed.

Having been through the process, I will share with you the FTC's "playbook" as to how they conduct the investigational hearing and the areas of inquiry to which you should be prepared to respond.

The Procedure for an Investigational Hearing

The first question you are going to have to deal with is, of course, the most basic. What is an investigational hearing? You will quickly discover that this is somewhat of a misnomer. An FTC investigational hearing is governed by the rules described in 16 CFR §§ 2.8 and 2.9. The first thing to understand is that the investigational hearing is voluntary and non-adjudicative. Under section 2.9, witnesses are entitled to be accompanied by counsel, but there is very little that can be done to protect your client once the investigational hearing has commenced. Section 2.9 indicates that counsel may instruct the witness not to answer to preserve privilege or object that the information sought is beyond the scope of the investigation. Objections to the sufficiency or legality of a subpoena or a civil investigative demand must be provided to the FTC in advance of the commencement of the investigative hearing. Moreover, 16 CFR § 2.9(6) provides a mechanism for the FTC investigator to report the actions of counsel to the commission, which are deemed to be "disorderly, dilatory, obstructionist or contumacious."

If the FTC investigator asks you to identify the persons you believe to possess the most knowledge (much as one would expect in a corporate deposition where you are required to name individual(s) to testify on behalf of the corporate deponent), do not be fooled into thinking that the investigator will agree with or otherwise be limited by your selection. Rather, the investigator is much more likely to focus on your document production and make an independent determination as to the witnesses to be examined. You should, however, as a

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Executive Director's Message

Jack Tracey

The NADC Fall Workshop in Chicago was a great success with 70 people attending. There was no fall in attendance desspite the dour state of the economy and its effects on the auto industry.

Chicago was a popular site for the workshop, and we are planning to return there for the 2009 Fall Workshop.

The 5th Annul Member Conference is scheduled for April 1-3, 2009 at Four Seasons Resort and Club Dallas at Los Colinas. Registration and program details will be posted on the website as they develop.

All NADC educational programs rely on members' suggestions for topics and speakers. If there is a subject you think should be covered in depth, please contact me. The conference planning committee will be meeting in November, and your input will be appreciated.

We also appreciate your submissions and your suggestions on topics for *The Defender*. You will notice that our authors are NADC members. Please submit your suggestions to the editor, Rob Cohen, at rob.cohen@autoadvisory.com.

April 1 – 3, 2009

5th Annual NADC

Member Conference

Four Seasons Resort and Club

Dallas at Las Colinas

The NADC Board of Directors has approved a job posting policy. Members may submit postings for attorney positions that relate to representing dealers. No other job openings at member companies will be posted.

The job notices will be posted on the news page at www.dealercounsel.com for 30 days. Please read the terms and conditions prior to submitting a job opening for posting.

The NADC was formed four years ago out of a growing need for information. The conference, workshops, newsletters, website and list serve work together to fill that need. Membership is now about 500 and growing.

Contact Jack Tracey, CAE, NADC Executive Director, at:
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general rule, anticipate that the FTC will want to examine the Program Administrator and Program Coordinator designated in your ISP.

The watchword, therefore, is to take the time to prepare your client, up front, for the questions that will be asked. The best way to accomplish this, in my view, is to conduct the same type of preparation you would for a deposition by throwing "mock" questions at the witnesses. In fact, in almost every way, save for the limitations on the right to object, the investigational hearing will feel like and be conducted in the same fashion as a routine discovery deposition.

Your ISP – Your Best Friend or Worst Enemy

As you should already know, the ISP sets forth the protocol for FTC safeguards. It should:

- identify the individuals charged with administrating and maintaining the program;
- identify areas of high risk and the remedial measures contemplated to manage those risks;
- specify how your client's employees are trained in FTC safeguards compliance;
- cover issues of IT compliance; and
- contain an end-user agreement as well as safeguards addendums and safeguard agreements for execution by your service providers.

The first step towards getting ready for an FTC investigational hearing is to review the ISP with your client. If your client has prepared and implemented its ISP properly, then ideally, it should be reflective of your client's actual practices. Unfortunately, this sometimes proves not the case. With the implementation of the FTC safeguards guidelines a cottage industry of ISP preparers and compliance companies literally sprang up overnight to service the perceived need to provide compliance documentation. Unfortunately, these providers were sometimes more preoccupied with preparing something that looked good, than providing the client with an ISP that was reflective of its actual practices. In this regard, the old adage "less is more" comes immediately to mind. You and your client should anticipate that the FTC will review your ISP line by line and ask you to substantiate all of the practices outlined.

Here, one example comes to mind regarding service providers. Often the ISP contains checklists for due diligence in the selection of service providers. While the financial solvency, reputation and longevity of the service providers should be considered, you should counsel your client against creating checklists that create due diligence requirements which are beyond what you are used to experiencing with your client in connection with their operations in the field.

Document, Document, Document

The best defense will be provided by conscientious documentation. It is not enough to schedule regular meetings between your Program Administrator and Program Coordinator. Keeping minutes of those meetings is key. Without question, the identification of areas of high risk is extremely important to show the FTC evidence of your clients heightened sensitivity to issues of safeguards compliance. However, it is more if not equally important, that your client document the curative measures that were taken once the risk is identified. Making adjustments to security is helpful in demonstrating to the FTC investigator that your client has a living, breathing security plan, and not just a canned ISP sitting in a drawer.

This rule also applies to breaches. While there is a natural hesitancy for a dealership client to alert its customers of a potential problem, FTC investigators take a very dim view of such conduct. While your client should address security breaches from a personnel and IT standpoint, they should also be armed with a written form notice which complies with your State privacy laws and FTC safeguards as well, and use it. I would counsel any dealer client against being hesitant in sending out such notices. The notices not only create some insulation for claims from your client, they show the FTC that you had a plan to deal with customer notification and followed it. Again, everything you can do to show that your client is reacting to security issues on an ongoing basis is going to be helpful to your client.

IT Issues

It should be no surprise that any investigational hearing will focus most heavily on IT issues. In this regard, I would take little comfort in the fact that your dealership client has a competent IT department capable of dealing with day to day computer issues. The FTC will want your Program Administrators and Program Coordinators to have a command, if not of the technical issues, of how information is moved electronically through your client's store, of password protocols, of the signing outs of lap tops, and of issues related to the encryption of customer data as it moves through cyberspace. If you represent a multiple point dealership, you should also take steps to ensure that your witnesses are prepared to testify about issues which relate to whether data from each of the your client's stores is segregated by a fire-

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because a relatively few people, filled with greed and impatience, acted in a way that no parent would ever allow their child. These few gamed the system with reckless abandon, suffered few consequences, and left an indelible path of destruction. They were just human beings who ignored the difference between right and wrong.

The question for us is not how we can casually and foolishly increase the value of our assets from market value to aspirational value to pump up our balance sheets, but rather, whether we are ready to change our behavior, start telling ourselves and our business associates the truth, and begin living that way. To argue that undercapitalization of our financial institutions is a serious problem and then simply increase the asset value to eliminate that problem raises sophistry to a new art form. It is the wrong thing to do, just as the default credit swaps and the sub prime mortgage securities were massaged into the dangerous weapons they became. I do not believe the people responsible for this mess were unaware of the risk and the danger. Rather, I think, they were overcome by avarice and unable to control themselves.

In times of plenty, it is relatively painless to act with integrity in the business world. If you are not in danger of collapse, there is little incentive to take a quarter that does not belong to you. Faced with financial ruin, the result is often different. The act is equally wrong. The question for us, and our clients in these difficult, dangerous and chilling economic times is whether our ethics are going to be marked to market, or we are going to adhere to higher and more painful principals of ethics and morality? This is a tough goal and it is clear that standards change. But if we are to rebuild a strong, lasting and honorable system for future generations, we must be able to live with ourselves. Ethics are not for sale, and they don't get marked to market.

Jonathan P. Harvey, Senior Partner, Harvey and Mumford LLP is Past President of the NADC .

New Members

NADC welcomes the following new members:

Full Members

J. Martin Hayes
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Robert C. Spickard
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Tallahassee, FL

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wall or other electronic device that prevents sharing of customer information.

Training

Ironically, the rule in connection with training is the opposite of the rule that applies to your ISP. In connection with training, the FTC's position is that you can never do enough. Group training is good, but the FTC is more interested in the one to one orientation of each new employee, and that each employee sign an enduser agreement and understand his or her obligations under the terms of that document. Elements of the enduser agreement to which the FTC appears to be especially sensitive are (i) not providing customer information to any employee, person or entity that does not have an authorized and legitimate business need for the information, (ii) not making unauthorized use of any customer or business information obtained from prior employment or sources outside of the dealership, (iii) that the employee's local workstation has a password protected screen saver, (iv) that sensitive information is not stored on the employee's local workstations, (v) that the utilization of unauthorized personal software and/or hardware on the employee's local workstation is strictly prohibited, (vi) that the removal of any customer information or dealership's written or electronic materials, or any materials documenting the ISP from the dealer's place of business is strictly prohibited and (vii) that the employee understands that internet email services do not offer any absolute guarantees of privacy, confidentiality and/or integrity of data and that private and/or confidential material are not be sent through the internet or email.

In addition, you should be prepared to discuss with the FTC how your client's employees are trained to deal with viruses (eg. they should discontinue work on the effected workstation and quarantine the virus) and unauthorized access (eg. they should document the incident and notify a Program Administrator). You should be prepared to present to the FTC all of your client's training materials and make sure that your witness is conversant with them and can explain how they are implemented.

The Post Mortem

After completion of the investigation phase involving document production and testimony, you may expect a written or verbal critique of your dealership's practices. Provided your client has made a colorable effort at implementing and maintaining a program, the imposition of a fine (at least thus far) is unlikely. If you are asked to participate in a telephone conference with your client, the watchword is to simply listen and take note of the deficiencies which the FTC believes it has discovered. It is important to instruct your client not to become adversarial with the FTC investigator even though they might feel they are being criticized. While your client will, doubtless, be less than thrilled with the process and the legal expense associated with it, the FTC will be appreciative of your client's treating their comments in a constructive manner. Implementation of the curative measures they suggest will help ensure that your client is not exposed to such investigative proceedings in the future.

Conclusion

The key to surviving an FTC investigation is to recognize the hot buttons and understand that the FTC's focus is on the detail and minutia contained in your ISP. So long as your client is prepared to stand behind the printed word of its ISP, and maximizes its training and conducts regular documented meetings to discuss safeguards issues you should come out of the process with a successful outcome and a satisfied client.

Les Stracher

Les Stracher is a Shareholder with Rothstein Rosenfeld Adler, PA, in Fort Lauderdale.

He is the Chairman of the firm's Automotive Law Practice Group and advises dealers on mergers and acquisitions throughout the country. 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.,.

Red Flag Rules Update

The following article was adapted from the October 22, 2008 news release issued by the Federal Trade Commission.

The Federal Trade Commission will delay enforcement of the new Red Flags Rule until May 1, 2009 to give creditors and financial institutions additional time to develop and implement written identity theft prevention programs.

The Red Flags Rule was developed pursuant to the Fair and Accurate Credit Transactions (FACT) Act of 2003. Under the Rule, financial institutions and creditors with covered accounts must have written programs to identify, detect, and respond to patterns, practice, or specific activities that could indicate identity theft.

The Rule applies to creditors and financial institutions. Federal law defines a creditor to be: any entity that regularly extends, renews or continues credit; any entity that regularly arranges for the extension, renewal or continuation of credit; or any assignee of an original creditor who is involved in the decision to extend, renew or continue credit. Accepting credit cards as a form of payment does not, in and of itself, make an entity a creditor. Some examples of creditors are finance companies, automobile dealers, mortgage brokers, utility companies, telecommunications companies, and non-profit and government entities that defer payment for goods or services. Financial institutions include entities that offer accounts that enable consumers to write checks or to make payments to third parties through other means, such as other negotiable instruments or telephone transfers.

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