

DEFENDER

THE NADC NEWSLETTER

Exporting an Armored SUV, and Other James Bond Stuff



Russell P. McRory

Russell P. McRory, Esq.

One of my favorite movies of all time is “The In-Laws” – the 1979 original, of course. Alan Arkin plays Sheldon Kornpett, a dentist whose daughter is set to marry the son of CIA agent Vincent Ricardo, played by Peter Falk. Agent Ricardo embroils his future in-law Shelly Kornpett in a screwball intelligence operation and hilarity ensues. As it turns out, dentists do not get to have all the fun. Automobile dealers, too, can engage in their fair share of cloak and dagger. During the later part of last year, an email came across the National Association of Dealer Counsel list serve from an attorney

whose client was asked by a customer to modify a stock SUV and turn it into a vehicle like you would see in a James Bond movie. Among other things, the vehicle was to be outfitted with Kevlar armor, a fire suppressant system, an armored explosive-resistant fuel tank, a road tack dispensing system, a smoke dispenser, run-flat tires, bullet-proof glass, and shocking door handles. To top it all off, the customer said the modified vehicle was intended for export to Nigeria. So, what is such a dealer – and his attorney – to do?

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Sidebar

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Frequently Asked Questions Regarding the Red Flags Rule

Rob Cohen, Esq.



Rob Cohen

Yeah, I know everyone is sick of the Red Flags Rule; but with the new deadline approaching, my office is once again receiving daily Red Flags-related questions. These are largely the same questions we received the first time around but there are a couple of new ones. So, I decided to capture some of the most commonly asked questions and provide answers.

When does the Red Flags Rule take effect?

Technically, the law is already in effect and has been since January 1,

2008. The FTC originally gave dealers until November 1, 2008 to be in compliance. As this “mandatory compliance date” approached, though, the FTC issued an Enforcement Policy statement on October 22, 2008 that delays enforcement of the Red Flags Rule until May 1, 2009 (www.ftc.gov/os/2008/10/081022idtheftredflagsrule.pdf).

Why was the compliance date extended?

In the Enforcement Policy statement, the FTC said: “Given the confusion

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President's Message

How Can We Help?



Michael Charapp

No dealership is immune from the sickness afflicting the economy today. While some dealers are suffering from a more virulent strain of the infection, all dealers are ailing.

In talking to dealers, I often ask how we, their attorneys, can help. I'm sure it will come as no surprise that "Cut your fees" is the most common answer. Clearly, we all must be aware of the financial pressures on our clients and should explore alternative fee arrangements where that can lead to savings for dealers. Here are some thoughts on some other things we can do.

- **Keep your clients up to date on issues important to them.** There is a lot going on out there. Dealers are scared. They do not fully understand how a manufacturer bankruptcy may affect them. They do not fully understand how a car czar may affect them. They know there are few alternatives for floorplan sources and are concerned if their floorplan source starts making demands. How can they cut employees and restructure contracts without a lawsuit? How can they protect against losses? Communicate with the dealers you represent. Send them updates on issues critical to them, whether through simple let-

ters, newsletters your group may produce, or emails. Straightforward information can often calm a dealer's fears.

- **Get access to bankruptcy expertise.** Many dealers will go out of business in 2009. Whether you have a bankruptcy specialist in your practice, or you know a bankruptcy specialist, have access to the resources available to help dealers. Too often, dealers hold out until the last minute before calling an attorney. By the time they get to you they may very well be in a situation where their only realistic opportunity is to declare bankruptcy. You must have access to someone who can swing into action immediately to protect the dealers' interests.

- **Urge your clients to use the resources of their state association.** State dealer associations work hard to represent their members. They keep up-to-date on the latest events taking place in the industry. The association executive directors have regular communications among themselves with respect to the activities that are going on at the national and state levels to protect dealers' interests. Urge your clients to stay in contact with their state dealer associations.

- **Be candid with your clients.** As attorneys, we are obligated to repre-

sent our clients to help them realize their goals. However, sometimes the goals are unrealistic. Sometimes our best advice is the hardest advice. That is what we owe our clients. If there is hard news to deliver, it is time to deliver it.

- **Keep up-to-date on the latest issues.** None of us has expertise in all of the laws important to a car dealer. Today, one must be not only a franchise specialist but a specialist in debtor's and creditor's rights. Understand the issues. Understand the concerns dealers have. Understand what the franchisors are doing to dealers on a day-to-day basis. NADC is a great resource in this regard. The list serve carries valuable information almost daily. *The Defender* is an unmatched resource for in-depth analysis of dealer legal issues. Our upcoming annual meeting and conference will cover issues critical to dealers in these difficult times. Participate in NADC communications and activities.

Having talked about what we can do for our clients, I would like to talk about what NADC can do for you. We are always looking for better ways to represent our membership. I've already talked about the list serve and our

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From an export compliance perspective, there are two sets of regulations to be aware of – the Export Administration Regulations (“EAR”) and the International Traffic in Arms Regulations (“ITAR”). EAR governs the export of so-called “dual-use” items and is administered by the Bureau of Industry and Security at the Department of Commerce. ITAR governs the export of military articles and is administered by the Directorate of Defense Trade Controls at the Department of State. While compliance with export licensing requirements primarily falls on the exporter of an item – who is likely to be the dealer’s customer – the dealer plays an important role in the process.

As a general matter, under the EAR regulations, the exporter must first determine whether a specific Export Control Classification Number (“ECCN”) covers the item to be exported or if the item is classified as EAR99, which is a generic classification meaning the item is governed by the EAR but does not fall under a specific ECCN. Generally, an item classified as EAR99 does not require a license whereas an item covered by a specific ECCN may require a license depending on the nature of the item and the country of destination. A section of the EAR regulations, known as the Commerce Control List, describes each ECCN, states each ECCN’s “Reasons for Control,” and states any license exceptions available for that ECCN. (EAR, Supplement No. 1 to Part 774) “Reasons for Control” include, for example, national security, regional stability, anti-terrorism, nuclear non-proliferation, and crime control. Finally, yet another section of the EAR regulations, known as the Commerce Country Chart, shows whether a given “Reason for Control” requires a

Commerce Department license in order to export an item to a given country. (EAR, Supplement No. 1 to Part 738). Simply put, if an item is covered by an ECCN, the Commerce Control List gives the “Reasons for Control” for that ECCN, and the Commerce Country Chart tells whether a license is required to export an item covered by those Reasons for Control to any given country.

As it turns out, the EAR regulations specifically address the armored SUV scenario raised in the email. Unfortunately, as is often the case with government regulations, these are rather serpentine, containing exceptions and exceptions to the exceptions and at the end you find yourself back where you started. Simply put, however, there are three basic questions to answer: (1) is the vehicle “armed” or “unarmed”; (2) are any specialized military components installed on the vehicle; and (3) what is the vehicle’s level of ballistic protection. I will do my best to untie this Gordian Knot.

The EAR regulations provide that “unarmed all-wheel drive vehicles capable of off-road use which have been manufactured or fitted with materials to provide ballistic protection to level III...or better” are classified as ECCN 9A018.b. (EAR, Supplement No. 1 to Part 774, Category 9, at pp. 5-6). However, if such a vehicle is a passenger car, limousine, van, or SUV “designed for the transportation of passengers and marketed through civilian channels in the United States” and is *not* fitted with materials to provide ballistic protection to Level III or above, it is classified as EAR99 and an export license is probably not required. (See, EAR §772(h) – Interpretation 8).

What does all of that mean? Stripped down to its basics, an armored (but unarmed) SUV of sort described in that email would be classified as EAR99 *unless* it is outfitted with materials to provide ballistic protection at level III or better. What is level III ballistic protection you might ask? Level III ballistic protection would stop a 7.62mm NATO cartridge, or its civilian version, the .308 Winchester round, the most popular big-game hunting cartridge.

If such a vehicle is classified EAR99, a Commerce Department export license is generally not required. On the other hand, if such a vehicle is classified ECCN 9A018.b (generally because of its level of ballistic protection), a Commerce Department export license will almost certainly be required. The EAR regulations specifies that ECCN 9A018.b’s “Reasons for Control” are national security, regional stability and anti-terrorism. (EAR, Supplement No. 1 to Part 774 at p. 5). The Commerce Country Chart, in turn, states that exports to Nigeria are controlled for National Security and Regional Stability. (EAR, Supplement No. 1 to Part 738). In short if the vehicle described in the email was outfitted to ballistic protection level III, it would be classified under ECCN 9A018.b and a Commerce Department license would be required to export the vehicle to Nigeria. In fact, due to the national security Reason for Control, a Commerce Department license will be

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Executive Director's Message



Jack Tracey

The program for the Member Conference in April focuses on the realities confronting auto dealerships in the current economic climate. There will be an update of the NADA initiatives that support the dealership community. Sessions on compliance, labor law, dealer and supplier agreements and a panel on UCC vehicle titling issues are also scheduled.

We believe those who attend our

conferences find the presented information to be timely and insightful; however, the informal interaction can be equally edifying. Based on feedback we've received from prior conference attendees, the collegial atmosphere alone may make the trip worthwhile.

Please take a moment to look over the information on pages 6 and 7 in this issue. The conference takes place April 1-3 in Dallas. Register online at www.dealercounsel.com (click on "Events").

Only NADC members can attend the conference. If there is someone in your practice who would benefit from membership in the NADC, invite him or her to become a fellow member. As soon as membership is confirmed, new members can register to attend the conference. Think of

attorneys outside your firm who would benefit from joining, and issue the invitation. New members help keep the association vital, and each member brings a wealth of experience to the NADC.

We encourage all members to participate in the NADC. Attending programs is one way, but there are others. The NADC relies on members to suggest topics and speakers for the conferences and workshops and to volunteer to be presenters. It is from these suggestions that our programs develop.

Another important way members participate is by submitting articles to *Defender, The NADC Newsletter*. You don't have to wait to be asked. Feel free to make suggestions or submit articles at any time. The more members that participate, the more dynamic and vital the association will be.

Contact Jack Tracey, CAE, NADC Executive Director, at: jtracey@dealercounsel.com

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FAQ ... from page 1

and uncertainty within major industries under the FTC's jurisdiction about the applicability of the rule, and the fact that there is no longer sufficient time for members of those industries to develop their programs and meet the November 1 compliance date, the Commission believes that immediate enforcement of the rule on November 1 would be neither equitable for the covered entities nor beneficial to the public." (*Id.*).

As it turns out, there were certain industries and entities that were blindsided by the sudden realization that the FTC had jurisdiction over them.

Why are some people telling me the delayed enforcement date doesn't matter?

The FTC does not have jurisdiction over banks. Banks fall under the juris-

diction of various federal banking agencies. Since the federal banking agencies did not extend the compliance deadline, banks were still required to fully comply with the Red Flags Rule by November 1, 2008. Since many (if not most) dealers assign contracts to banks, those banks may require dealers (by way of written agreement) to comply with the Red Flags Rule.

Do we have to buy a new computer system to comply with the Red Flags Rule?

No. There is nothing within the Rule that requires dealers to employ technology in order to comply with the law. Full compliance with the Red Flags Rule can be achieved by "low-tech" methods. I introduced one such low-tech method in my Red Flags Guidebook (i.e., a customizable writ-

ten program and an identity theft prevention worksheet).

This is not to say that employing technology is a bad idea. A good customer identification system can be an important part of a dealer's identity theft prevention program. For example, a dealer may want to employ an electronic "reader" that can verify information by reading the magnetic strip or bar code on a government-issued identification card. Another example may be a report-based system that pulls information from credit reports and returns a score related to the possible existence of identity theft.

There are many vendors offering different types of identity theft prevention systems and many offer "Red Flags Solutions." These types of systems, while not mandatory under the Rule,

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5th Annual NADC Member Conference April 1 – 3, 2009 Four Seasons Dallas at Las Colinas

Join your colleagues in Dallas for the fifth annual meeting of NADC members. Sessions reflect the special interests of members. Plan to arrive on Wednesday, April 1, for an evening reception and stay until the conference concludes mid-day on Friday. Register now on the events page at www.dealercounsel.com.

The conference is open to NADC members only. Registration is \$495 per person. Receptions, luncheon and

breaks provide ample time for members to get to know each other. CLE credit is available for the 690 minute program.

Reserve your hotel room by March 5, 2009 for conference rates, Superior \$250 plus tax; Deluxe \$275 plus tax, pending availability. Contact the hotel by calling 972-717-2499 and referencing NADC.

Check www.dealercounsel.com for updates.

Wednesday, April 1, 2009

3:00 - 5:30 pm Board of Directors Meeting
6:00 - 7:30 pm Opening Reception

Thursday, April 2, 2009

7:30 - 8:15 am Continental Breakfast, Sponsored by
The Fontana Group

8:15 - 8:30 am Opening Remarks

Jack Tracey, NADC, Hanover, MD & Michael Charapp,
Charapp & Weiss, LLP, McLean, VA

8:30 - 10:30 am Session 1 Compliance

Rob Cohen, Auto Advisory Services, Inc., Tustin, CA and
Patricia Covington, Hudson Cook, LLP, Hanover, MD

An in-depth analysis into the convoluted world of information sharing. Most dealers (and even some of their attorneys) are unfamiliar with the numerous restrictions placed upon information sharing by various federal laws and regulations. In this session we will address:

- The new Affiliate Marketing Rule (under FACTA)
- The Affiliate Sharing Rule (under FCRA)
- NPI sharing (under GLBA)
- Opt-out requirements under FACTA, FCRA, and GLBA

- Taking advantage of the joint user exception (FTC commentary to FCRA; "Foster" letter)
- Using credit applications for disclosures and/or opt-outs
Will also address the new Telemarketing Sales Rule amendment.

10:30 - 10:45 am Break

10:45 am - 12:45 pm Session 2 Franchise & Bankruptcy,
Part 1

Leonard Bellavia, Bellavia Gentile & Associates LLP;
Oren Tasini, Haile, Shaw & Pfaffenberger, PA, North Palm
Beach, FL; Eric Chase, Bressler, Amery & Ross, PC,
Florham Park, NJ; and Lawrence Young, Hughes Watters
Askanase LLP, Houston

As the world of automotive franchising has been turned upside down, this session has been carefully planned and extended to cover all of the pressing franchise, litigation, and bankruptcy issues, including a special segment on warranty audits, that have suddenly come to the forefront and with which all attorneys advising dealers should become familiar. Eric Chase will present: The Automotive Industry Crisis in America: Identifying the Issues and Developing Responses and Strategies for Franchised Dealers. Lawrence Young will present an in depth analysis of bankruptcy; the bankruptcy options for dealers; the implications to dealers in the event of a franchisor bankruptcy filing; and planning for either or both.

.12:45 - 1:45 pm **Lunch, Sponsored by
CNA National Warranty Corp.**

1:45 - 4:15 pm **Session 2 Franchise & Bankruptcy,
Part 2**

Leonard Bellavia; Oren Tasini; and David Henson,
Warranty Matters, Lakeland, TN

The session will begin with an interactive panel discussion that will include the moderators, the speakers and Michael Charapp. Then, noted warranty audit expert for both dealers and manufacturers, David Henson, President of Warranty Matters, will provide an analysis of a factory audit, including how to avoid one, preparing for an audit, properly defending one, the audit process, and post audit procedures and appeals.

4:15 - 4:30 pm **Break**

4:30 - 5:30 pm **Session 3 NADA Update**

Andy Koblenz, NADA, McLean, VA

Mr. Koblenz will describe: NADA's efforts on behalf of dealers on a variety of regulatory and franchise matters; the status of efforts by NADA to help dealers through the recession and the credit freeze; and NADA's strategies, actions and negotiations involved in the manufacturer bridge loans, TARP, TALE, SBA loan arrangements and other programs to unfreeze credit and stimulate dealer sales.

5:30 - 7:30 pm **Cocktail Reception, Sponsored by
Auto Advisory Services Litigation
Support Team & Compli**

Friday, April 3, 2009

7:15 - 7:55 am **Continental Breakfast, Sponsored by
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7:55 - 8:00 am **Opening Remarks**
Jack Tracey and Michael Charapp

8:00 - 9:30 am **Session 4 Labor & Employment
Update**

**D. Gerald Coker, Ford & Harrison LLP, Atlanta and
Michael Maslanka, Ford & Harrison LLP, Dallas**

2009 will be a year of major changes on the labor and employment front. Mr. Coker will discuss labor and employment law developments that will significantly impact dealerships this year, including new statutes and increased enforcement of existing laws. Additionally, since the economic crisis may force many dealerships to downsize their workforces, Mr. Coker will address the employment law implications of reductions in force and other cost-savings initiatives. Also on the program will be noted Texas attorney and entertaining speaker, Michael Maslanka. He will make an intriguing presentation on how focusing on issues that appeal to the instinctive or "reptilian"

mind can change the way we present information and make our arguments more persuasive - whether your audience is a jury or a CEO.

9:30 - 9:45 am **Break**

9:45 - 11:15 am **Session 5 Master Dealer
Agreements/Supplier
Contract Policy**

**Michael Charapp, Charapp & Weiss, LLP, McLean, VA and
Mark Counts, Counts & Bonacci LLP, Houston**

Dealers regularly suffer losses because of difficulties with suppliers whether it is a computer vendor, a finance source, its environmental service provider, or the dealership's janitorial service. Whether losses result from unfavorable long term agreements or poor accounting department procedures that lead to payment of scam invoices, the source of the problem is often poor or non-existent policies. Advice to dealer clients on sound payables policies can help clients avoid unnecessary expenses and losses in these difficult times. The presenters will discuss:

- General policies that a dealer should have in place for ensuring that supplier agreements are necessary and fair to the dealership
- Provisions to avoid in any supplier agreement
- General policies that a dealer should have in place for non-recurring payables to protect against inflated charges and false invoices
- Critical terms in finance source master dealer agreements and response to buy back demands
- Critical issues in DMS agreements
- Negotiating and entering DMS agreements
- Buying and negotiating insurance coverage.

11:15 am - 12:45 pm **Session 6 UCC Panel**

**Donn Wray and Michael Shanahan, Stewart & Irwin, P.C.,
Indianapolis**

Discussion of practical impact of vehicle titling issues. Interplay between UCC concepts of title passing upon delivery and ownership as manifested on title certificates, in case of conflict, which prevails? Bona fide purchaser (BFP) rights and ability of BFPs to defeat record title ownership as shown on certificate. "Branded" title issues, CarFax and similar services and impact upon warranty eligibility and accurate description of vehicle history. "Hidden" liens placed upon title of vehicle by state authorities such as child support or tax liens.

- Titling issues
- 50 state survey
- Buyer in ordinary course

12:45 - 1:00 pm **Closing Remarks**
Michael Charapp

Armored SUV ... from page 3

required to export any vehicle classified as ECCN 9A018.b to any country except Canada. The Bureau of Industry and Security has an excellent website that can walk you through the licensing process: www.bis.doc.gov.

Now where does ITAR fit in? ITAR will govern the export if the vehicle is "armed" or if it is outfitted with military components. In those cases, the export is governed by the State Department's Directorate of Defense Trade Controls.

The definition of an "armed" vehicle is quite broad and does not simply require that actual weaponry be installed – a license would be required on that basis alone. Rather, a vehicle is considered "armed" if it has *mounts* for weapons installed and even if it has merely been *reinforced* to *accept* mounts for weapons. (See, EAR §772(h) – Interpretation 8). In short, a State Department export license will be required if the vehicle has weapons mounts or has been reinforced to accept weapons mounts.

Even if a vehicle is "unarmed" it may still require a State Department export license if military articles are installed on the vehicle. Whether a component is a "military article" under the ITAR regulation is a question best answered by the manufacturer of that component. Military articles are defined in 22 CFR part 121 (also known as the Munitions List) and include compo-

nents, parts, accessories, attachments and associated equipment designed or modified for military use. Thus the dealer will need to find out from the manufacturer of the components it is installing on the armored SUV whether any of those components are military articles. In all likelihood, the components described in the original email are probably not covered by ITAR, but the dealer should ask the manufacturer of each component to be installed. If the manufacturer of a particular component informs the dealer that an item is a military article, then a State Department export license will be needed to export the vehicle. An example of a military article requiring a State Department export license would be a radio frequency jammer intended to interfere with the remote detonation of roadside bombs.

The State Department requires that exporters of military articles be registered with the Directorate of Defense Trade Controls prior to the submission of any license application. The license application will require detailed information about the vehicle and its installed components and disclosure of the vehicle's end user, end use and ultimate country of destination. The State Department's Directorate of Defense Trade Controls has a very informative website to walk the customer through the licensing procedure:

<http://pmdtc.state.gov>.

It bears repeating that while the formal obligation to comply with EAR and ITAR and obtain any necessary licenses falls on the exporting customer and not the dealer, the customer will likely need the dealer to obtain relevant information from the manufacturer of the installed components in order to prepare the

license application. Dealers should require that the customer sign an acknowledgment that the vehicle may be or is subject to export controls under EAR and ITAR and that it is the customer's responsibility to obtain any necessary export licenses prior to exporting the vehicle. The customer should be further required to indemnify and hold the dealer harmless for all claims and liabilities arising from any violation of the export laws and regulations of the United States. Finally, the dealer should also consider requiring proof of submission of an export license application (or better yet the actual granting of a license) before delivery of the vehicle. In the case of a vehicle covered by ITAR, proof of the exporter's registration with the State Department's Directorate of Defense Trade Controls should also be required.

Finally, as if FACTA were not enough, the export regulatory arena has its own "Red Flags" and "Know Your Customer" regimens. The Bureau of Industry and Security's website contains guidance in these areas: www.bis.doc.gov/enforcement/know-cust.htm.

The following website provides various lists to check the customer against:

www.bis.gov/complianceand enforcement/liststocheck.htm.

If the customer shows up on any of the control lists or if the dealer otherwise detects any "red flags," the transaction should be reported to the appropriate authorities.

Russell P. McRory, Esq. is a partner at Robinson Brog Leinwand Greene Genovese & Gluck P.C. in New York, NY.

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can be a helpful component of your identity theft prevention program. However, it is important to remember that even the best technological system cannot take the place of diligent employees who are properly trained to inspect driver licenses, take complete credit applications, and read credit reports in their entirety.

Here are some things to remember when deciding whether or not to purchase a technological Red Flags solution:

- Don't let the vendors scare your clients into thinking there will be huge fines and massive class-action lawsuits against dealers over Red Flags. It is true that the FTC can impose fines (see below) and conceivably, class-action suits could be filed under some States'

laws. However, in my opinion, neither of these outcomes is very likely.

- It is important to understand that the Red Flags Rule is an important compliance issue but it is no more important than dozens of other compliance issues dealerships must address. In fact, there are compliance issues that (again in my opinion) are much more important than this one; particularly when you consider the fact that the Red Flags Rule does not provide for a private right of action. This is in sharp contrast to, for example, failure to properly disclose negative trade equity or relevant vehicle history, both of which practices can result (and have resulted) in expensive class action lawsuits and consumer rescission rights even years after delivery of the vehicle.

The point I am making is this. If your

clients are selecting a vendor for Red Flags only, this may be shortsighted. Ask the vendor what other compliance programs they offer and how their Red Flags solution fits into a larger compliance strategy.

- Use well-known and reputable vendors. Judging by the number of vendors I saw promoting Red Flags solutions at NADA this year and last, I can only imagine how many cold calls dealers are receiving from companies looking to cash in on this law.

- Employing a technological solution does not eliminate the need to have written procedures and policies in place. The Red Flags Rule requires a written identity theft prevention program. It is true that a written program can describe how a dealership utilizes

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technology to detect red flags. However, there are various other aspects of the Red Flags Rule that must be addressed in writing and cannot be accomplished through technology, i.e., risk assessments, training, program updates, reporting to the board of directors, etc.

- Ultimately, I think the best indicator of whether a dealership requires a technological solution could be prior I.D. theft experiences. If a dealership has repeatedly been the target of identity thieves, then a more robust solution may be required. If, however, a dealership has had little to no experience with I.D. theft, a properly implemented, low-tech solution may be sufficient.

Do we have to fill out an identity theft form on every deal?

A crucial element of the sample Red Flags Program I created is the Identity Theft Prevention Program Worksheet (ITPPW). As such, if your dealership client decides to implement our suggested program, then the ITPPW should be completed on every consumer retail installment sale and lease transaction. Keep in mind though, the law does not expressly require the completion of any form during a transaction. The ITPPW was designed to provide dealership management with proof that dealership personnel are complying with the Red Flags Rule and as a way to walk finance or other per-

sonnel through the Red Flags compliance process.

Do these rules apply to cash deals?

The Red Flags Rule requires that dealerships prevent identity theft with respect to “covered accounts.” A covered account is defined as (1) an account that a creditor offers or maintains, primarily for personal or family purposes, that involves multiple payments such as automobile financing and (2) any other account (including business and commercial accounts) that the creditor offers for which there is a risk of identity theft to customers or to the financial safety of the creditor.

Insofar as true cash deals do not normally involve multiple payments, these types of transactions do not have to be addressed by a Red Flags program. However, there are a couple of things to consider:

- I don't consider “one-pays” as cash deals. If a consumer provides dealer personnel with a check (personal, bank, or cashier's), I suggest treating that no differently than a standard retail installment deal. Meaning, personnel should still run a credit report and apply all normal Red Flags procedures.

- My definition of a true cash deal is when the customer uses cold, hard cash or a wire transfer to pay for the vehicle in full. In these circumstances, dealer personnel should still obtain proper identification from the customer in order to run an OFAC check and (if necessary) complete an IRS/FinCEN 8300 form. However, there is no legal requirement to run a credit report or apply Red Flags procedures on a true cash deal.

Does the Red Flags Rule apply to fleet or commercial deals?

Maybe. Looking back at the definition of “covered accounts” (stated above), you can see that commercial and/or business accounts may be included within that definition if it is determined that there is a risk of identity theft associated with these types of deals. Ultimately, dealer personnel must make this determination for themselves when creating their Red Flags program. I believe that many dealers will conclude that business and commercial deals (as well as commercial parts/service accounts) are not exposed to significant identity theft risk and therefore do not need to be addressed by their Red Flags program. Nevertheless, this must be determined on a dealer-by-dealer basis.

Important Note: If an individual is cosigning or otherwise guaranteeing a business/commercial deal, I recommend applying all Red Flags program requirements to that individual.

What happens if we don't comply?

The FTC is authorized to impose fines of \$3,500 per violation. And, that number can be increased to \$16,000 if an FTC order goes uncorrected. What constitutes a violation to the FTC is always a bit of a mystery. However, the mere possibility that “per violation” could translate to “per customer” should be enough to convince a dealer to stay in compliance.

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



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**President's Message ...
from page 2**

workshops. Members have commented to me that the information available in *The Defender* and at the workshops is the most professional and best information available on dealer legal issues. Some even tell me that access to the list serve alone is worth the cost of membership. I agree. However, we must always work to get better.

We are always looking for ways to improve service to members. If you have ideas, I would like to hear them. How can NADC serve you better? How can NADC improve the services we provide? What resources can NADC provide that will help you become a

more effective advocate for your clients?

I would like to hear your ideas. My email is

Mike.Charapp@cwattorneys.com

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

NADC

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