

# DEFENDER

## THE NADC NEWSLETTER

### Advising A Dealer Who is Thinking of Closing A Dealership



Michael Charapp

Michael Charapp, Esq.

Given today's economic climate, some dealers are considering whether they must or should close down their dealerships. Each dealer's circumstances differ. Here is a checklist of issues that you should cover with any client who is contemplating a dealership close down.

#### 1. Why are you considering closing?

Understand clearly your reasons for thinking about closing. Is it because you are losing money? Is it because you have been given a date certain by your floorplan source when it will call your floorplan line? Are you simply

concerned that you don't see light at the end of the tunnel? The answer is important to the next steps.

**2. How long do you have?** The strategy you follow may very well depend upon how long you have before you must close. If you have no money for next month's expenses, you don't have much time. If you have time, you will want to work through the process methodically.

#### 3. Can you cut expenses to survive?

Can you reduce expenses to the point where you can minimize losses or turn

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#### Sidebar

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Rob Cohen

Rob Cohen, Esq.

National Auto Fraud and Theft Prevention System Goes Live On January 29, 2009, the U.S. Department of Justice announced the availability of an online computer system to help protect states and consumers from automobile fraud and to provide law enforcement with new tools to investigate fraud, theft, and other crimes involving vehicles. The National Motor Vehicle Title Information System, or NMVTIS, is available to consumers (and dealers) and is accessible through third party, fee-for-service Web sites. There are currently two service

### National Auto Fraud and Theft Prevention System Goes Live

providers, Auto Data Direct, Inc. ([www.add123.com](http://www.add123.com)) and CARCO Group, Inc. ([www.autotitleinfo.com](http://www.autotitleinfo.com)). Auto Data Direct charges \$2.50 for the following information:

- Current State of Title
- Title issue date
- Odometer reading
- Previous State of Title
- Current brand(s)
- Previous brand(s)
- Date the brands were applied

CARCO Group charges \$2.25 per

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## President's Message



*Rob Cohen*

Intense! That is how I describe our Fifth Annual Member Conference. For those of you who attended, I suspect you understand what I mean. I can assure you, there was no fluff in this program. The dire economic consequences many of our clients are facing gave rise to serious and thought-provoking discussions among many of our industry's top legal minds. All of us are deeply concerned about the plight of our dealer clients. How to best represent them during these challenging and unprecedented times was the backdrop for several presentations.

I would like to thank all of the presenters for contributing their time and expertise to the conference. From my perspective and based upon the feedback I received, the conference was a resounding success. We continually strive to provide timely, relevant content, and I believe we accomplished that and more.

I am both excited and humbled to be elected as this organization's third president. I'm excited for the opportunity to lead such a useful and financially

strong organization. But, I am humbled when I consider the skill of my two predecessors, Jonathan Harvey and Michael Charapp, in shaping this organization. With that, I would like to also thank the NADC Board of Directors for giving me this opportunity.

Looking further down the road, I see many ways that we can become an even stronger and more useful association. A few of the projects I look forward to working on include:

1. Website improvements
2. Additional/enhanced membership benefits
3. Expanding industry alliances

Of central importance to the advancement of this association is broad participation of its members. As such, I strongly encourage members to submit articles for publication in the Defender. Mike Charapp has graciously agreed to take over my duties as Editor of the Defender, so be sure to contact Mike if you have any questions regarding article submissions. Also, I will be assembling our conference/workshop plan-

ning committee shortly, so feel free to submit presentation topics directly to me at [robcohen@autoadvisory.com](mailto:robcohen@autoadvisory.com).

Lastly, I love feedback. As volunteers, we Board members do our best to provide the membership with quality programs and benefits. But, unless we hear from you, we can only assume that we are meeting your expectations. So, please let me know if we are doing something you like or, more importantly, something you don't like. Don't worry, I can take the criticism. After years of working in dealerships, I have pretty thick skin.

*Rob Cohen, President of Auto Advisory Services, Tustin, CA, is President of NADC.*

### NADC Job Posting Available!

Looking for an attorney to work with your dealer clients? Post the job ad for 30 days on the NADC website.

Send the posting to: [jtracey@dealercounsel.com](mailto:jtracey@dealercounsel.com).

Postings, policies and procedures for job postings can be found at:

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## Advising A Dealer ... from page 1

a small profit, allowing you to continue your business? You can only determine this by making solid financial projections with your controller or your outside accountant. Go line by line through your monthly expenses and determine what expenses can be cut. Can salary obligations be reduced either through terminations or through across the board pay reductions? You may be contemplating simply terminating your franchised operations to become a service business and a used car dealer. But, eliminating your franchise may severely reduce your service work. If you reduce your new car inventory sufficiently, won't you be doing the same thing without losing your brand sign? The manufacturer may not like that decision, but you must do what you can to survive.

**4. Will your franchisor help?** Your franchisor may have a prospect for your store. The manufacturer may have an interest in acquiring your point as part of a strategic reduction of the market or a realignment of dealers. Contact your franchisor and explore alternatives.

**5. Can you sell?** Many dealers believe that in today's economy there are few prospects for a sale. That is not necessarily the case. With a number of line-makes on the manufacturer chopping block, you may have local competitors who have a strategic need to acquire a new franchise. Or a dealer with a struggling brand may have the need to acquire an additional brand to dual.

**6. Is there a franchise reason you cannot close down?** Review your franchise agreement. Of special concern is a site control agreement. Have you agreed with the factory that your site will remain a dealership for your brand whether you are there or not? If so, even if you close down you may be

hampered from doing something different with your real estate. Or you may incur a substantial liquidated damages penalty if you are no longer a dealer for your brand.

**7. What will your franchisor take back?** Every dealer sales and service agreement addresses the issue of termination assistance. Most require the manufacturer to buy back certain inventories and assets. Some leave that to the discretion of the franchisor. Some states require franchisor buy backs. Understand your franchise agreement and state law and answer these questions:

- What new cars will the franchisor take back?
- What parts and accessories will the franchisor take back?
- What signs will the franchisor take back and at what price?
- What special tools will the franchisor take back and at what price?
- Who will be responsible for freight charges and handling fees?
- When will I get my money?

**8. What is the totality of your obligations and how will you handle those?** Whether you sell or close down, will you have sufficient funds to satisfy your customers and suppliers? What will it cost to pay off your floorplan source? Don't forget, your floorplan source pays the manufacturer in advance for the invoice amount, but the manufacturer often sends you holdback, rebate money, and other amounts that it will net against what it will pay you when it takes a vehicle back. That will leave you with a balance owing to the floorplan source even if you can send back all floorplanned vehicles.

**9. What do you owe customers?** You must under-

stand what obligations are outstanding to customers. Dealer warranties? Free rental car agreements? Free oil changes? Free safety inspections? Have you taken any new car orders for which you are holding deposits?

**10. What other outstanding obligations does the dealership have?** Review your monthly payment schedule. Understand your regular payables and whether you have any long term commitments. In particular, review your dealer management system agreement with your computer vendor, any equipment leases, and any other long-term agreements you may have for uniforms, environmental waste removal, and the like.

**11. What F&I obligations do you owe?** Do you have finance reserves that may lead to chargebacks? How about potential chargebacks for sale of extended service contracts and credit life and accident health insurance? How will you handle those obligations?

**12. What real estate obligations do you have?** Do you lease your property from a third party? How long do you have left on your lease? Will you be able to assign or sublet your lease? Do you own your real estate personally or through an affiliated company? When the lease payments stop, how will you handle your obligations for mortgage, taxes, insurance and maintenance?

**13. Do you account for vehicle inventories, on a LIFO basis?** If so

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## Executive Director's Message



Jack Tracey

"It was the best of times, it was the worst of times, it was the age of wisdom, it was the age of foolishness, it was the epoch of belief, it was the epoch of incredulity..." This famous

Dickens quote from the opening of *A Tale of Two Cities* seems appropriate as I reflect on the automotive marketplace and the recent NADC member conference. At a time when member clients are suffering through a historic bad market and Association members are dealing with legal issues that many have never faced before, we had the best educational event in the Association's five year history. Over

120 members attended our annual conference on April 1 to 3, which was held at the beautiful Four Seasons Dallas Resort, Las Colinas Texas.

The conference planning committee strived to provide conference attendees with a relevant and timely program against a backdrop of a tumultuous marketplace. And, the program hit the mark! In all the years that I have been involved in conducting educational events for NADC members, I have never heard such positive feedback from attendees. This year's program was exceptional. From the extended session on bankruptcy, where the implications of both manufacturer and dealership bankruptcies were explored, to a wonderfully and humorously presented session on employ-

ment law, the meeting room was full, and members were actively engaged in discussions with the presenters and each other. If ever there was an opportunity for group learning, this conference provided it.

While the backdrop of the auto industry may not be quite as bad as the French Revolution in Dickens novel, our conference certainly provided "a season of light in the season of darkness."

Contact Jack Tracey, CAE, NADC Executive Director, at:

[jtracey@dealercounsel.com](mailto:jtracey@dealercounsel.com)

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## National Auto Fraud ... from page 4

record for the following information:

- VIN
- Current State of Title (SOT)
- Title issue date (if available)
- Odometer reading/unit of measure

CARCO Group charges \$3.25 per record for the following information:

- Title history records:
  - VIN
  - State of Title (SOT)
  - Title issue date
  - Odometer reading/unit of measure
- For each brand:
  - VIN
  - Brand code
  - Brander
  - Date the brand was applied

The Office of Justice Programs' (OJP)  
Bureau of Justice Assistance (BJA)

administers NMVTIS in coordination with the Federal Bureau of Investigation (FBI).

The system allows state motor vehicle administrators (e.g., DMVs) to verify and exchange titling and brand data and provides law enforcement officials, consumers and others with critical information regarding vehicle histories. Through NMVTIS, consumers have access to the vehicle's brand history, odometer data and basic vehicle information. Law enforcement can track the vehicle's status from state to state by accessing the system directly. According to the NMVTIS website ([www.nmvtis.gov](http://www.nmvtis.gov)) 27 states currently participate or contribute to the NMVTIS, with 10 others currently working towards participation. All states are required to be fully participating on or before January 1, 2010. California is currently providing data to the NMVTIS, but is restricting the release of that data to consumers.

- State motor vehicle titling agencies (e.g., DMVs)
- Insurance carriers (including some self-insuring entities)
- Auto recyclers and junk and salvage yards (including scrap vehicle shredders and scrap metal processors, as well as "pull- or pick-apart yards," salvage pools, salvage auctions, and other types of auctions, businesses, and individuals that handle salvage vehicles (including vehicles declared a "total loss"))

It is unclear how, if at all, this new "public" database will impact the use of existing vehicle history databases such as CarFax and AutoCheck. These "private" databases pull vehicle data from many more sources than those required to report to the NMVTIS (which, in my opinion, can be a plus and a minus). Ultimately, it remains to be seen if the new NMVTIS should be used in conjunction with CarFax or AutoCheck, as a substitute for either (highly unlikely), or not used at all.

*Rob Cohen, President of Auto Advisory Services, Tustin, CA, is President of NADC.*

Under the regulations, the following entities are required to report to the NMVTIS:

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## Advising A Dealer ... from page 3

the termination of your business may lead to LIFO recapture. How will you handle that?

**14. Must you stay in business as an independent dealer?** Do you have long-term obligations that will be too expensive to cancel? Is the zoning for your dealership such that if you stop using it for a time as a dealership you will lose your zoning rights? Will it be necessary to continue as a dealer, even if it is not as a franchised dealer?

**15. What impact will terminating as a franchised dealer have on other obligations?** The real estate financing on your dealership premises may contain a covenant that you will maintain your business as a franchised dealer. Your dealership may guarantee obligations of affiliated companies. Will ceasing business as a franchised dealer violate the covenants of those guarantees? Understand all of your company's obligations before making the decision to terminate.

**16. What is your personal liability as the dealer?** Have you personally guaranteed your floorplan? Have you personally guaranteed your lease or other obligations? What will a close down mean for you personally?

**17. Is your franchisor insisting upon a release?** To get the benefits of termination, does your franchisor want a release? Does the release protect your right to payment of incentives and

warranty payments earned prior to close down? Does the release prevent you from making future claims in the event your company is hit with a lawsuit for product liability or a lemon lawsuit for which you would have had the right to indemnification if you would have continued as a dealer?

**18. What will you do with your employees?** Do you have other dealerships where you can hire your employees? If not, do you have the legal obligation to give notice of the close down under the federal WARN Act or a similar state law? Even without a legal obligation, do you feel a personal obligation to your employees to assist them with placement services or COBRA assistance?

**19. What is your tax position?** Are there any tax considerations that will drive your decisions about bankruptcy, winding down, or liquidation? Do you have accumulated losses that you can use in another company? Would a merger or other corporate restructuring give you the advantage of those? Do you have shareholder loans, the forgiveness of which will be taxable events?

**20. Once you close, what will you do with your corporation or LLC?** Will you leave it in place while you work through the various liabilities? Must you declare bankruptcy? What will the effect of that bankruptcy be on affiliated companies or you personally? Do you have sufficient assets to proceed through wind down and liquidation?

A dealer should not go through the close down process by guesswork. A dealer must plan the termination and the following steps. Advice of an attorney is important to

a comprehensive plan to take a dealer through the process.

*Michael Charapp, a partner with Charapp & Weiss, LLP in McLean, VA, is Editor of Defender, The NADC Newsletter, and Chairman Emeritus of the NADC.*

## New Members

**NADC welcomes the following new members:**

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