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Dealer Associations

By Bruce Anderson, *Iowa Automobile Dealers Association*

When you represent a franchised automobile dealership, your client comes with a valuable resource that you are likely not fully utilizing: the state and metro dealer associations to which it belongs. It is not unusual at NADC conferences or on its email list for someone to ask whether the legal staff of the National Automobile Dealers Association (NADA) has weighed in on or addressed a topic of concern. While NADA brings high level federal legal and regulatory expertise, advocacy and assistance to its membership, there are more than 100 other dealer associations in the United States and Canada that provide those services to member dealers on the state and local level. Automotive Trade Association Executives (ATAE) is an organization comprised of the executives of automobile dealer associations.

Organized in 1915, ATAEE has always worked as a partner with NADA to assist its members in serving automobile dealers' needs, providing regulatory education, consulting and best practice programs, newsletters, conventions and meetings. Like NADA, state and metro dealer associations are staffed by automotive industry experts, including accountants, attorneys, lobbyists and other association management professionals who go to work everyday to serve the needs and interests of their members – and your clients.

The perception of some may be that state and metro dealer associations are responsible only for annual conventions, auto shows and

arranging for discounts on dealer forms and insurance products; however, their greatest value from a practicing attorney's perspective is their pipeline to information. These organizations have been in existence since the dawn of automotive retailing. They employ government relations professionals who have working relationships and daily contact with the legislators, regulators and manufacturer representatives who directly impact the profitability and even survival of your clients' businesses.

The leaders of state and metro dealer associations are in continual contact with one another – through the ATAEE email list, weekly newsletter, regional and national meetings and a host of formal and informal contacts that have been built and nurtured for a century. Plugging yourself and your clients into that network of experience and expertise could make a big difference for your client and amplify the value of your NADC membership.

State and metro associations maintain archives including legislative history. Many offer dealership consultations and most develop regulator relationships. State and metro associations can serve as an early warning system to your clients on everything from state DOT enforcement dealership inspection activity to formal and informal consumer protection and taxing entity enforcement practices, policies and procedures.

NADA and many ATAEE-led associations maintain legal defense funds and stand ready

to assist with amicus briefing or providing assistance with direct funding of litigation costs associated with legal disputes that pose common dealership threats, typically involving automobile manufacturers. Additionally, association executives can serve as expert witnesses or connect you with specialists in all aspects of dealership operations.

Dealer associations exist to provide technical guidance and generalized best practice advice to dealer members, and many would welcome guest submissions to their newsletters and presenters at conventions, conferences and webinars. Many state and metro dealer associations accept attorneys who represent automobile dealers as associate or affiliate members, thereby permitting access to newsletters, online regulatory websites and training opportunities. For example, many dealer associations permit dealer members' attorneys, accountants and other business professionals to access their services, including guides to legal and regulatory topics and

webinars presented by subject-matter experts.

I was engaged in the private practice of law for twenty years before I went to work for the Iowa Automobile Dealers Association. I had five automobile dealers as clients during those years, but I have no recollection of having ever engaged with the attorneys and staff of the association I now lead. Looking back on the issues that I faced with those dealer clients, ranging from routine consumer complaints to the impact of the farm crisis of the '80s to the shuttering of the Oldsmobile division in 2004, I'm frankly embarrassed that I didn't take advantage of the ATAЕ resources that were right in front of me. Those were resources that my clients had already paid for and unfortunately didn't direct me to. Learn from my mistake and take advantage of the wealth of resources ATAЕ provides. Visit atae.info for more information and to get the contact information to connect with the ATAЕ in your area. ■

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Interim Executive Director's Message



Carrie Hoffman
NADC Interim Executive Director

First of all I would like to congratulate Erin Murphy, Executive Director, on the birth of her son Daniel Clark Murphy born on May 10th. I will be filling in for Erin while she is on maternity leave, and I am excited to work with NADC during the coming months.

I had the pleasure to attend the 9th Annual NADC Member Conference in Laguna Beach, CA April 28 – 30. 159 NADC members attended the conference, making it our best attended conference. The beauty of the scenery at the Montage could only be matched by the excellent program. Thanks to the Conference Planning Committee in providing attendees with a first-class, topical program.

The conference opened with the annual meeting of the membership during which Tammi McCoy of the Colorado Automobile Dealers Association was elected to her second consecutive term as a direc-

tor. The membership also elected three directors to their first term. Michael Dommermuth, Fairfield and Woods PC; Russell McRory, Robinson Brog Leinwand Greene Genovese & Gluck P.C.; and J. Timothy Sparks, Sonic Automotive Inc. will each serve a three year term.

The officers were elected on the second day of the conference. Oren Tasini of Haile, Shaw & Pfaffenberger, P.A. was elected President, replacing former President Patty Covington of Hudson Cook, LLP. Stephen Linzer of Tiffany & Bosco, P.A. and Diane Cafritz of CarMax were elected Vice Presidents. Andrew Weill of Benjamin, Weill & Mazer was elected Treasurer, and Tom Hudson of Hudson Cook, LLP was elected Secretary. The officers will serve two year terms.

Douglas Greenhaus, Chief Regulatory Counsel, Environment, Health and Safety for NADA, kicked off the conference program with a presentation highlighting the new federal mandates impacting service, body and parts operations. While Dr. Melissa Pigott, Director of Research for Magnus Research Consultants, offered fascinating insight into maximizing voir dire, many in-house counsel members attended an informal networking and brainstorming discussion.

Katherine Kelley, CarMax, educated the audience on vehicle



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history reports prior to a beautiful lunch looking over the ocean. After lunch, Buddy Dearman, CPA, Dixon Hughes Goodman, LLP, updated attendees on the latest federal tax updates.

Popular NADC speakers, Andy Koblenz, Executive Vice President and General Counsel, and Paul Metrey, Chief Regulatory Counsel, Financial Services, Privacy, and Tax, returned to the podium with an update on the NADA's efforts on a variety of regulatory and legislative matters.

The second day of the conference started with a panel discussion focused on manufacturer performance standards. The panel included Chris DeVito, of Morganstern, MacAdams & Devito Co., L.P.A., Joe Roesner, The Fontana Group and Scott Watkins, Anderson Economic Group, LLC. Following that session, Eric Chase, of Bressler Amery & Ross, P.C., and Michael Flanagan, The Law Office of Michael J. Flanagan, discussed problems and possible solutions for dealers facing factory pressures and incentives.

The next panel session covered AG and CFPB investigations from a range of practical perspectives. Panelists included Jim Chareq, of Hudson Cook, LLP, Judy Fiorentini, with the State of California, Office of the Attorney General and Paige Fitzgerald, Troutman Sanders, LLP. The session created much discussion amongst the attendees.

NADC founding member and Past President, Jonathan Harvey,

of Jonathan P. Harvey Law Firm, PLLC, and Steve Linzer, Tiffany & Bosco, P.A., captivated the crowd with their knowledge in their ethics focused session. The session covered several key issues that dealer attorneys face on a day-to-day basis. The conference ended with John Bauer, Littler Mendelson, P.C., reporting on wage and hour compliance under the Fair Labor Standards Act. John kept the crowd captivated until the very end of the conference.

Thank you to all of the speakers who presented at the conference. I encourage all of you not in attendance to visit our members only website at www.dealercounsel.com and benefit from the conference materials that have been uploaded. Please look under the Conference, Workshop and Webinar Handouts section in the eLibrary (9th Annual NADC Member Conference).

I would like to thank all of our event sponsors for their contributions to the Annual Conference. These sponsors help to elevate the quality of the event. Many thanks to Anderson Economic Group, Arent Fox, LLP, Capital Automotive REIT, CounselorLibrary.com, LLC, Dixon Hughes Goodman LLP, The Fontana Group, Inc., Moss Adams LLP, Portfolio General Management Group, Inc., Rosenfield & Company, PLLC and U.S. Trust.

Be sure to Save the Date for the 2013 Fall Conference! The Conference will be held October 6-8, 2013 at the Trump International Hotel & Tower in Chicago. All NADC educational programs rely on members' suggestions for topics and speakers. If you have a suggested session and/or topic you think should be covered at Fall Conference please email me at choffman@dealercounsel.com. ■

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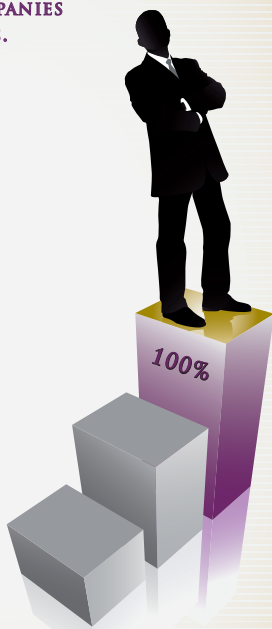
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Compliance Triage

By Michael Charapp, *Charapp & Weiss, LLP*

Feature Article

Dictionary.com defines “triage” as “the determination of priorities for action in an emergency.” Many dealers believe that they are facing more complex compliance challenges than ever. They are right. Dealers overwhelmed by the challenges because of new government mandates and actions must prioritize to get through the emergency that this flurry of new compliance challenges presents.

Just the activities at the federal level are forcing dealers to confront unique issues. Let’s look at just two federal agencies that have stepped up their activities.

Consumer Financial Protection Bureau

The new Consumer Financial Protection Bureau has been led since its inception by an interim appointee which has affected its willingness to implement wholesale regulatory changes. It has never had direct jurisdiction over franchised motor vehicle dealers. But none of this has stopped the CFPB from moving aggressively to dramatically alter the way car dealers do business.

- In March 2013, the CFPB fired a shot over the bow of big financial institutions. In a memo, it advised the institutions it oversees that they can be held liable for the disparate impact of financing rates on minorities resulting from dealer discretion in credit terms. It warned these financial institutions to either monitor and control those practices or adopt flat fee compensation practices.
- According to news reports, the CFPB has launched investigations of sales practices involving F&I products.

• According to news reports, the CFPB has launched an investigation of “high rate” lending for credit challenged individuals.

• Since its inception, the CFPB has been empowered to take, and it has had on its radar, potential actions to limit pre-dispute arbitration for financial institutions under its jurisdiction (some of whom are large buyers of retail installment contracts from dealers), an important tool for dealers and other businesses to protect against extortionate class actions.

Federal Trade Commission

In 2011, the Federal Trade Commission hosted dealer roundtables as part of its fact-finding as it considered how it would use its increased authority and funding with respect to motor vehicle dealers granted under the Dodd Frank financial regulation legislation. As a result of the roundtables, it is unlikely that dealers will face substantial changes in their practices as a result of rulemaking for the entire industry. However, the FTC has moved quickly to show that it intends to take enforcement action against individual dealers with the intent of affecting how all dealers operate.

- In 2012, the FTC sued a number of car dealers who used some variation of the claim, “We will pay off your trade no matter how much you owe.” The FTC deemed the ads deceptive.
- Earlier this year, the FTC issued its new guidelines for digital advertising. The guidelines were designed to take into account the fact that consumers may be viewing advertising on hand held devices with smaller

screens, necessitating more thoughtful use and placement of disclosures. The agency emphasized the importance of clear and conspicuous disclosures.

• There are reports that the agency has been sending complaints and proposed consent orders to car dealers over internet advertising of prices and offers that do not adequately disclose the qualifications for meeting the terms of those offers.

• Consumer advocates have long sought to outlaw spot deliveries, and the practice was a major focus of the FTC roundtables. While the FTC is not expected to take action to end spot delivery, dealers can expect that enforcement actions will be taken on certain spot delivery practices deemed abusive such as the failure to return trade-ins and downpayments.

So what should a dealer do?

There is no industry as heavily regulated as the motor vehicle dealer business. A simple listing of the federal laws that affect dealers goes on for pages. And when one adds state laws, the burden becomes even greater. A dealer wishing to avoid the expenses and losses of lawsuits and other troubles resulting from compliance failures must understand the hot issues and must continuously adjust to take those into account. That is the process of compliance triage. Listing the most serious issues is bound to be somewhat subjective, and they may often differ depending on the state or community where the dealer is located. Here is my list of the top ten questions and suggestions that an attorney representing a motor vehicle dealer should cover with a client.

1. Do you have a culture of compliance? Compliance starts from the top. Compliance is important for employees if you make it important for them. Are you doing what is necessary?

- Establish a clear policy of full compliance with the law. Broaden that to an ethics policy or standards of conduct. You want to do what is legal and what is right.
- Train your employees. There are a lot of misconceptions in the car business. Make sure that your employees understand what the law requires. More importantly, make sure that they understand what you require.
- Monitor your employees' activities. You know what you want. By training your employees they know what you want. But are they acting in that way? Review car deals and listen to your customers.
- Take action where necessary. When employees operate contrary to your policies, take action. Solve the problem. Make sure the employee knows what went wrong and why. If the employee's behavior is over the line, take disciplinary action, including termination if necessary.

2. Do you have a complaint handling system? At some point in the defense of any lawsuit, a dealer will wish that it had simply solved the problem when it arose. There is no more important key to any compliance system than handling complaints before they get out of control. If a dealership gets a complaint, it should be logged in, properly routed to a responsible manager for handling, tracked, and satisfactorily closed. Early money spent to solve a problem is generally the cheapest money.

3. Are your forms up to date? A car deal requires lots of forms. When is the last time you took a hard look at the forms your employees are using? Have they been revised to take into account the latest changes involving state and federal laws and the latest best practices? For dealers that use alternative

dispute resolution, have your mediation/arbitration provisions been updated to reflect the flurry of recent court decisions to be sure you have the best chance of having your provisions withstand attack?

4. Are your employees using your forms appropriately? If the forms are not being completed properly, or if the right forms are not being used, or if important forms are just being skipped, you must solve those problems. Use a deal completion checklist. Those completing deals should follow the deal completion checklist to get it right the first time, and those reviewing deals should make sure that the forms required under the deal completion checklist are completed properly.

5. Is your advertising under control? The FTC has become energized in the last year

to regulate advertising. State regulators have been emboldened by the FTC to increase their oversight. They understand that advertising has moved from traditional media into electronic media, and they are more heavily scrutinizing advertising on the internet and through social media. Train your personnel in charge of advertising to give attention to compliance with federal and state requirements. Make sure your advertising agency is similarly aware. Track all of your advertising to be sure that it appears as you expect it to in compliance with federal and state laws.

6. How do you handle spot deliveries? Spot deliveries are still one of the two most highly scrutinized areas of the car business (the other being dealer participation which we will discuss next). If there is a law in your state concerning spot delivery, follow



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The graphic features a blue background with white and light blue geometric shapes. On the left, there is a photograph of the Chicago skyline, including the Willis Tower. The text is centered and right-aligned in a clean, sans-serif font.

it scrupulously. Avoid abusive practices on which the FTC and state regulators will surely take action in the coming years if they find it. What are those?

- Failure to use contract provisions and selling practices that clearly disclose to customers the conditional nature of the transaction.
- Coercing a customer to continue with a deal on less attractive terms because the original terms were not approved
- Retaking vehicles contrary to law
- Failing to return the trade and failing to return the downpayment after the deal is rescinded and the vehicle returned
- Charging for use of the returned vehicle.

7. How will you respond to the attack on dealer participation? The other hot button of consumer advocates – dealer participation – is under unprecedented attack using the Equal Credit Opportunity Act. CFPB has notified major financial institutions under its jurisdiction that dealer discretion that results in disparate impact on minorities can result in claims against those finance sources. Dealers must recognize that this attack is underway and is well advanced. To protect themselves, dealers must implement systems to remove discretion in rate setting by F&I personnel. Regardless of the system that you implement, there should be a fixed starting point for rate spread on all deals. Deviations from that should be permitted only for specified non-discriminatory reasons such as the need to meet competition, to meet the customer's budget, or to meet the dealer's inventory reduction needs. Reasons for deviation should be noted in every deal.

8. Do you monitor compliance with the Truth in Lending Act? The recent publicity about the CFPB's inquiry into practices involving other F&I products indicates there may be action on the way with regard to how F&I products are sold. TILA is designed to

provide transparency for the cost of credit, including the cost of additional products. Recently, F&I service firms have been pushing the concept of "bundling" – basically the sale of packages. While that may increase sales, it may also increase the threat of "packing" lawsuits. Have a system for clear disclosure of the products you are selling and the costs. The best systems include a menu that provides full explanation of what the customer is being offered.

9. What is your policy for running credit reports in compliance with the Fair Credit Reporting Act? Threatening dealers over doing credit inquiries has become a cottage industry for some lawyers. They are counting on dealers not having adequate records to show that they had a permissible purpose in connection with the extension of credit when running credit reports of customers whose sales were not completed. Do not fall into this trap. While the law does not require that a customer sign an authorization, a signed authorization for access to a credit report is the best way to show compliance. Do not run a credit report without a signed authorization. And, more importantly, keep all authorizations. It is easy to maintain the authorization for the deals that you complete. But that is not where troubles arise. Make sure you keep every authorization for five years, even for deals that are not completed.

10. Are your identity theft protections fresh? Federal and state laws concerning ID theft are geared to protecting consumers. But if you get trapped in a transaction involving ID theft, your dealership will be the real loser. And if your customer data walks out your door, that will threaten the goodwill value of your business. There are three critical ID theft programs that you should make sure are fresh in your dealership.

- The FTC Privacy Rule requires that you give notice to a customer in a finance or an insurance transaction of what you will do with their non-public personal

information. It is important that your customers understand you are protecting their information. Make sure you are using the most recent privacy notice form issued by the federal government.

- The FTC Information Safeguards Rule is designed to ensure that you have safeguards in place to protect the non-public personal information of your customers. It is important for your customers. It is more important for your dealership. Your customer information is one of the key elements of the goodwill of your business. Make sure that this information is not being hacked from your computer system, or walking out your door with your salespeople when they go to work for someone else, or being misused by suppliers to whom you give access to your computer system. The law requires that you have in place an information safeguards plan, and it requires that you regularly update that.

- The FTC Red Flags Rule requires that you know your customer. If you get involved in a transaction with an identity thief, your dealership will be the loser. You will lose a vehicle, you will not be paid for it, and you may wind up in a fight with your insurance company over who should suffer the loss. You are required to have a Red Flags plan in place. You are required to make sure it is updated every year. You don't want a lawsuit from someone whose identity is stolen and used to buy a car from you. More importantly, you don't want to lose a vehicle to an identity thief.

As noted, the hot compliance issues may vary from state to state or community to community. However, these are ten critical ones to which your clients should give attention. If there are other issues that are hot in the dealer's locality, add them to this list. ■

Michael G. Charapp is a lawyer in the Washington, D.C. metro area who represents car dealers and dealer associations. He is editor of the Defender and encourages submissions. Email: mike.charapp@cwattorneys.com.



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