

# THE WANADA BULLETIN

NEWS AND INFORMATION FOR AND ABOUT FRANCHISED NEW CAR DEALERS IN THE WASHINGTON AREA

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**Special Issue: Dealer Law Briefing**

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Staying Ahead...

## WANADA Dealer Law Briefing covers ad regs., recall laws, overtime pay, CFPB



WANADA's panel of dealer lawyers, from left: Mike Johansen, Rifkin, Weiner, Livingston; Doug Greenhaus, NADA; Mike Charapp, Charapp & Weiss.

WANADA staged a very informative Dealer Law Briefing for members on June 21 covering a range of important federal and state policies with which dealers must comply. The Briefing-- at the Bethesda North Marriott Conference Center -- covered the recent Federal Trade Commission crackdown on dealer advertising; the latest news on vehicle recalls -- including new laws in Maryland and Virginia; changes in overtime pay regulations; and an update on Consumer Financial Protection Bureau (CFPB) actions.

Panelists were Mike Charapp, Charapp & Weiss, McLean, VA; Doug Greenhaus, regulatory counsel, NADA; and Mike Johansen, Rifkin, Weiner, Livingston, Annapolis, MD; WANADA general counsel Gerard Murphy moderated.

## FTC crackdown on advertising

The first topic in last week's WANADA Dealer Law Briefing was the ramping up of law enforcement for deceptive auto sales ads by the Federal Trade Commission. Eight rounds of consent orders from the FTC involving 25 dealerships in 15 states have gotten the industry's attention, Charapp said. The "trigger terms" in dealer advertising are very clear, and dealers must know the rules.

"Some dealers today have unwittingly engaged in what the FTC considers *bait and switch* advertising," said Charapp, who then cited examples. For instance, an ad that does not disclose that the stated price includes incentives with limited availability, or an ad that features deals that are not available. Another problem: advertising programs based on automaker programs not available to everybody.

According to the Briefing Panel, one phrase that *should never appear* in a dealer's advertising is this: "Not all customers will qualify." Virginia has a specific disclosure for dealers to use that details savings and qualifications. If a dealer is offering a discount to members of the military or first-time buyers, the ad should specify *exactly* what that means.

Another phrase *never to use* in advertising: "Pay off your trade, no matter how much you owe." "All it is, is negative equity," Charapp pointed out. "But the FTC doesn't like this and has come down on dealers for it."

Charapp advises against advertising "certified pre-owned vehicles" that are under open recall unless that fact is disclosed. "If it has an open recall, you can't claim it's safe," he said.

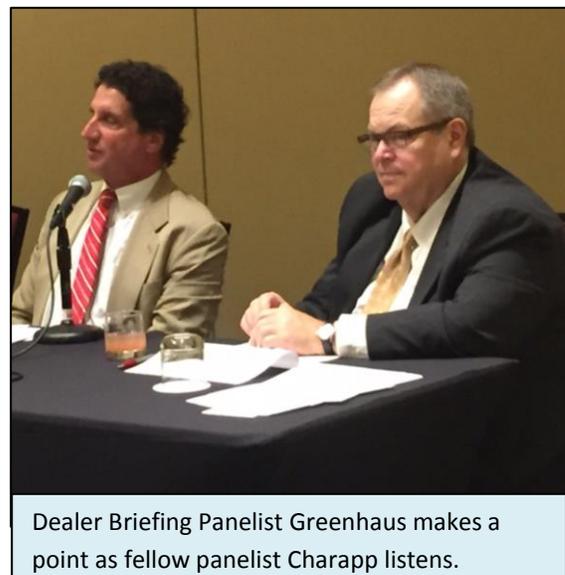
Dealers *cannot* relegate all advertising questions to their ad agency, attendees were told. The agency is likely not to be up-to-date on every FTC action and does not have the same legal exposure as the dealer. The Briefing Panel recommended [A Dealer Guide to Federal Advertising Requirements](#), on NADA's website as an indispensable frame of reference.

## Vehicle safety recalls: The good, the bad and the ugly

The unprecedented increase in vehicle recalls, in turn, has spawned unprecedented regulator scrutiny in how dealers sell vehicles under recalls to consumers. WANADA's Dealer Law Panel at last week's member briefing covered the gamut of dealer vehicle sales to consumers where recalls are involved.

**New cars:** The number of cars recalled has increased dramatically in the past few years, with an average of 15 million a year for each of the past three years, said NADA's regulatory counsel and Briefing panelist Doug Greenhaus.

If a dealer receives a *stop-sale* letter from the



Dealer Briefing Panelist Greenhaus makes a point as fellow panelist Charapp listens.

federal government, the dealer's new-car sales manager must be told not to deliver any vehicles of that model and year until the defect can be repaired. A customer may "reserve" a vehicle by entering into a contract for it, but the car cannot be delivered until it is repaired.

By federal law, dealers are entitled to compensation from the automaker for holding the vehicles: 1 percent of the price (usually invoice) monthly, prorated for partial months, until the vehicle is repaired. The letter about compensation comes from the franchisor; but GM is the only automaker thus far that explains how it will work.

Sometimes it is hard to find out if a vehicle is under open recall, said co-panelist Mike Charapp. Every dealer should have a system in place to check a vehicle's recall status utilizing the government's official website [www.safercar.gov](http://www.safercar.gov) that should happen just before delivery, with a dated disclosure form stating that the dealer has done so. Although the site is not 100 percent accurate, "it's the only thing a dealer can rely on," said Greenhaus. "We recommend you use it for disclosure because it's got the government's name on it."



The crowd of dealers and managers was intent on the array of topics covered at the Dealer Law Briefing.

**Used cars:** There are no federal guidelines on selling used cars under open recall. But automakers may tell dealers not to sell them. Otherwise it's at the discretion of the dealer. On average, a used vehicle sits in inventory 60 days and costs a dealer \$1,200 in floor plan, depreciation and other costs, said Greenhaus. Sometimes it may take up to two years before the parts are available to do the repair.

On the other hand, "if your automaker tells you to *stop sale*, I recommend you pay attention," Charapp said.

*Stop-sale* notices will be sent by the automaker only to dealers of that brand, so dealers with an off-brand vehicle in inventory will not know about the *stop-sale* without checking [www.safercar.gov](http://www.safercar.gov). Dealers with different franchises at different stores should be sure to share *stop-sale* notices, Greenhaus said.

Dealers should also check the VIN of any used cars they buy on [www.safercar.gov](http://www.safercar.gov) to see if the car is under recall.

**Stop-drive:** Six percent of all recalls get a *stop-drive* notice, Greenhaus said. The automaker sends a notice to the customer and the dealer, and the car is listed on [www.safercar.gov](http://www.safercar.gov). A dealer cannot sell a *stop-drive* vehicle.

**Rental fleets:** As of June 1, dealers or others with a rental fleet of 35 vehicles or more must disclose to the consumer who is renting if the vehicle is under open recall. Although most dealers do not have such large rental fleets, NADA recommends disclosing recall status even for small

fleets. The law does not define whether loaner cars are considered rental, but NADA recommends disclosure for loaners as well.

**Service vehicles:** If the dealership fails to inform service customers there is an open recall on a vehicle in for repairs, the automaker does not have to compensate the dealer for service work done under warranty, said Greenhaus.

#### **Vehicle safety recalls: Virginia law**

The Virginia recall law -- effective July 1, 2016 -- clarifies that recall repairs are compensated the same way as warranty repairs, said Charapp. Dealers cannot be denied payment if they encourage their customers to remedy vehicle problems. Mirroring federal law, the Virginia law provides that if a automaker asks a dealer to ground a vehicle under open recall, the automaker must compensate the dealer for 1 percent of invoice monthly. Additionally, the law limits the automaker's use of performance measurements for dealers when sales are affected by recalls that distort the market -- for instance, when vehicles under recall are grounded.

#### **Vehicle safety recalls: Maryland law**

Panelist Mike Johansen discussed the Maryland recall law -- effective October 1, 2016. Originally, the legislation required disclosure to consumers for any open recall. That requirement was eliminated, and disclosure remains voluntary; but is required as a matter of prudence and sound business practice, Johansen said. "In other words, dealers are well advised to disclose recall information to customers in writing," he said. WANADA counsel Gerry Murphy said the association has a model disclosure form available, free for the asking, courtesy of Mike Charapp.

Like Virginia, Maryland's law clarifies that recall repairs are compensated the same way as warranty repairs. Dealers cannot be denied payment if they encourage their customers to fix vehicle problems -- even if the warranty or recall repair is discovered "during the course of a separate repair requested by the customer."

The Maryland law also allows the dealer to distribute repair, recall and Technical Service Bulletin information to customers without fear of reprisal from the automaker. The dealer may provide information "related to any condition that may substantially affect motor vehicle safety, durability, reliability or performance." That part of the law supersedes any clauses in a Technical Service Bulletin saying the dealer cannot disclose the information in it to the customer.

Maryland law, like federal law, requires automakers to compensate dealers when the automaker issues a *stop-sale* order on used vehicles, either 1 percent monthly on the value of the vehicles, or at a rate under a uniform national program.

## DOL White Collar Overtime Exemption Rule



Attendees at WANADA's Dealer Law Briefing hear about overtime pay.

WANADA's Dealer Law Briefing also covered overtime pay changes, which are formidable for employers. On May 18, 2016, the U.S. Department of Labor issued a rule dramatically increasing the salary level that must be met for "white collar" dealership employees to be exempt from overtime pay. The new rule does not change the duties test for white collar employees.

The rule raises the threshold for white collar employees – executive, administrative, professional and computer – from \$23,660 to \$47,476 per year. "Administrative," the

hardest to define, means the employee must use discretion to make decisions, Greenhaus said. The term can apply to business office workers or warranty clerks.

"It doesn't matter what they're called or what their job description says," said Greenhaus. "It's what they do."

Dealers should re-evaluate their white collar employees and make sure they are still exempt from overtime, he said. If they are now eligible for overtime, a dealer has several alternatives:

- Change the job to one paid on commission, not salary.
- Split the job between two people.
- Raise the employee's salary so he or she is exempt from overtime.
- Pay overtime under the law. Make sure the employee clocks his or her hours accurately.

On June 20, the U.S. Supreme Court upheld the overtime exemption for service writers by returning an earlier decision to a lower court. The service writer exemption had been DOL's position for 20 years until a change in 2011. The recent decision is a victory for dealers after much hard work by NADA.

## CFPB: Attack on dealers as credit arrangers and F&I product providers

WANADA's Dealer Law Panel turned its attention finally to regulatory attacks against dealers by the Consumer Financial Protection Bureau. Dealers continue to deal with the fallout from the CFPB's 2013 auto lending advisory to financial institutions, including captives and banks. The CFPB has no jurisdiction over dealers, but the agency is clearly trying to limit or eliminate dealers' role as credit arrangers, said co-panelist Mike Charapp.

The problem, says the CFPB, is racial discrimination – even if unintended – reflected in the rates African Americans get on auto loans compared with non minorities. Toyota and Honda have

created voluntary programs to eliminate “disparate impact” on minorities. Charapp recommends that dealers use a written fair lending policy, such as the one developed by NADA.

Under the [NADA Fair Credit Compliance Program](#), the dealer chooses the margin it will hold above the wholesale buy rate of the financial institution and uses that margin as the starting point in every transaction. Deviations are permitted for established, nondiscriminatory reasons and management approval is required for other deviations. The dealership should keep records to support all deviations.

In another area, the CFPB is pressuring West Coast dealers on prices for F&I products -- such as extended service agreements -- to make sure they don’t vary widely, Charapp said. The Briefing Panel suggests using a transparent process for selling F&I products, such as menus. The dealership should establish fixed selling prices for each product, with deviations permitted for established competitive reasons.

## CFPB: Attack on predispute arbitration agreements

Another assault by the Consumer Protection Bureau on dealers is in the realm of predispute arbitration agreements. The Legal Briefing Panel said the Dodd-Frank Act empowers the CFPB to regulate arbitration, and the agency has decided to go after arbitration agreements that waive the consumer’s right to join a class action suit. Many Maryland dealers added those agreements to their sales contracts a few years ago after a rash of class action suits in the state came forward.

The CFPB has proposed a regulation to prohibit finance and lease sources from including class action waivers in predispute arbitration provisions. Although the CFPB cannot directly regulate dealers, indemnification clauses in indirect finance and lease agreements could impose staggering losses from class action on dealers, said Charapp.

NADA cannot fight the CFPB on this regulation because 10 years ago, it protested automakers’ inclusion of an arbitration agreement as part of the franchise agreement. WANADA is part of a group of state and metro associations protesting the CFPB regulation. Comments are due by August 22, 2016. The rule will likely take effect in spring 2017 barring a legal challenge.



Edward Roberts, instructional dean of Montgomery College, with WANADA President John O’Donnell at ADEI Career Day

## ADEI holds Auto Tech Career Day at Montgomery College

The same day as the Dealer Law Briefing last week, WANADA staged a full-fledged Career Day for its Auto Dealer Education Institute’s (ADEI) Technician Training Program. And it was a big success. The event at Montgomery College was open to area high school students and anyone interested in becoming an entry-level auto technician. WANADA ran radio ads to recruit newcomers to the field.



WANADA had an impressive display during ADEI's Technician Development Career Day at Montgomery College.



Above, WANADA's Billy Painter points a student to part of the display. Right, a DARCARS rep discusses a technician opportunity with a student.

"Most of the ones who came are going to get hired," said ADEI coordinator Billy Painter. That means they will work as technicians at area dealerships while attending classes through the ADEI training program.

A number of WANADA dealerships sent fixed operations managers to meet with the aspiring auto technicians. Participating dealer organizations included DARCARS, Sheehy, Passport, Mile One and Fitzgerald Auto Malls. Snap-On, which supplies ADEI students with a starter set of tools, also sent a representative.

ADEI's Technician Development operates at Montgomery College in Rockville, MD and Marshall Academy in Falls Church, VA. WANADA recruits and places young adults aspiring to careers in auto technology in area dealer service departments where two years of course work is systematically blended with on the job training with mentor technicians. At the end of the process, a line technician is developed or "home grown" by the dealership, for the dealership. Hundreds of line technicians employed in WANADA dealerships today are where they are because of ADEI technician development training

For more information, contact Billy Painter at (202) 237-7200 or [bp@wanada.org](mailto:bp@wanada.org)

## Optional holiday hours signs for WANADA dealers for July 4<sup>th</sup>

Earlier this week, WANADA mailed out optional holiday hours signs to dealer members, on which to indicate any special business hours to customers over the upcoming July 4th holiday. The national holiday -- being observed by federal offices, financial institutions and many private businesses -- will be on Independence Day itself, Monday, July 4.

Any WANADA dealer who desires obtaining more than the two signs per store that were distributed, may contact Kathy Teich, [kt@wanada.org](mailto:kt@wanada.org) or (202) 237-7200.

### Staying Ahead...

Live as if you were to die tomorrow. Learn as if you were to live forever.

--Mahatma Gandhi



WASHINGTON AREA NEW AUTOMOBILE DEALERS ASSOCIATION