

THE WANADA BULLETIN

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

WANADA Celebrating 100 Years of Service (1917-2017)

WANADA Bulletin # 24-17

June 20, 2017

Special Report: Automotive Law Briefing

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Staying Ahead...

WANADA updates dealers on auto laws

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Presented to WANADA members last week, June 15, 2017, WANADA staged a successful Automotive Law Briefing, with the room filled with dealers and their staff and four expert speakers to guide them through the maze of regulations and legal requirements on the federal level and in Maryland and Virginia. This issue of the *Bulletin* provides a full report to refresh those who attended and enlighten those who did not.

Note that nothing here should be taken as legal advice, only as general guidance. For assistance with specific matters, dealers should consult their own legal counsel.

David Regan, NADA: Trump administration, regulatory reform



Congress repealed 13 rules enacted under President Obama. Photo by Bjoertvedt.

President Trump's greatest focus in the first 150 days of his presidency has been on easing the regulatory burden on the business community, said David Regan, executive vice president of legislative affairs for NADA. To that end, 13 rules enacted under President Obama have been repealed by Congress and cannot be put back in place. One of several presenters at WANADA's Automotive Law Briefing on June 15, 2017, Regan covered *hot button* regulatory and congressional developments.

"We need congressional overreach to correct regulatory overreach," said Regan. This administration is willing to listen, he said.

As for the Consumer Financial Protection Bureau (CFPB), a bill recently passed by the House and supported by NADA rolls back some of the agency's power. If the bill passes the Senate (which Regan admitted is a more challenging prospect), the CFPB would be subject to annual appropriations and the director would be appointed by – and could be fired by – the president. The current director, Richard Cordray, has announced plans to run for governor of Ohio, and President Trump will appoint his successor when Cordray leaves in the next year.



Health care reform is a contentious issue, even among Republicans.

In Congress, big ticket issues such as tax reform and health care are very contentious, Regan said. Even though the Republicans have nominal control of both houses, there is no consensus on these issues within the party.

Before tax reform can be passed, Congress needs to pass a federal debt extension and a budget resolution with reconciliation instructions. That means that tax reform could pass the Senate with a 51-vote margin instead of the 60 votes needed to avoid filibuster. But under reconciliation, the law expires 10 years after passage.

“It’s politically impossible to do tax reform without that,” Regan said. “I think it will happen.”

Regan thinks Congress is more likely to take an incremental rather than a comprehensive approach to tax reform, simply to ensure passage. The current plan is for dramatically reduced tax rates but very few preferences. House Speaker Paul Ryan has pushed a border adjustment tax, which would impose a 25 percent tax on imports – resulting in an estimated 25- to 50-cent increase in gasoline prices *alone*. The auto industry and large retailers such as Walmart have strongly opposed a BAT, and Regan said the legislation appears “clinically dead.” BAT’s advantage is that it would raise \$1.2 trillion a year. With no BAT, that money must be found elsewhere to pay for tax cuts.

As for health care reform, Regan said the Senate is working on a tight deadline to pass its own health care bill, which he said only about six people in Washington have seen. With no committee hearings and no public disclosure of its details, the Senate hopes to pass the bill before the July 4 recess and have it signed before the August recess.

A big point of contention on health care reform is pre-existing conditions, which Regan called “the third rail in politics.” If an individual is uninsured for a period, getting insured with pre-existing conditions will become more expensive. There will be a fund to buy down the cost, but it’s not clear if there will be enough money in that fund, or, alternately, if the states have the money to pay for it.

Preventing class action suits for phone solicitations



Dealers should not rely on their vendors for TCPA compliance.

To present the *ins and outs* of class action suits over the Telephone Consumer Protection Act, WANADA invited an expert, Ryan Donovan to the Automotive Law panel. Donovan is a class action lawyer with firm Bailey Glasser, LLP, who has represented dealers and other businesses accused of TCPA violations.

TCPA violations can total up to \$1,500 for each illegal call. That means with autodialing, a business can rack up \$100 million in liability in short order, Donovan said.

“Saying ‘It was a mistake, we won’t do it again’ is no defense,” he added. “TCPA class action lawyers have their sights on auto dealers.”

The TCPA is a 1991 law with three prohibitions for businesses:

- Prerecorded calls to residential phone lines, for which the business needs prior written consent from the consumer. That marketing method is mostly gone.
- Autodialed calls to wireless numbers.
- Telemarketing calls to numbers on the Do Not Call Registry, *unless* the dealership has an existing business relationship with the person called. That means a transaction in the past 18 months, or an inquiry in the past three months.

Donovan emphasized that *a dealership may be liable for calls made on its behalf, too, even if the dealer does not physically dial the calls.*

He offered a list of *do’s and don’ts*.

- **Don’t** rely on your vendors for TCPA compliance.
- **Don’t** use new technologies that purport to fall outside the scope of TCPA.

The do’s:

- Get TCPA-compliant consent from the people you plan to call.
- Develop a checklist of strategies for obtaining consent.
- Record and communicate consent to your vendors.
- Identify all sources of customer data intake.
- Identify all outbound communications subject to TCPA.

For Phase 2 compliance:

- Develop written TCPA compliance policies.
- Train key managers and employees.
- Create a firewall between the dealership and the vendors.
- Renegotiate vendor relationships.
- Identify new threats.
- And, importantly, do a risk assessment of new technologies and marketing strategies.

Emailed marketing messages are generally not subject to the TCPA, Donovan said, but they are regulated by other laws.

Dealers who have further questions may email Donovan at rdonovan@baileyglasser.com.

Maryland: EV tax credits, dealer performance standards, paid sick leave

WANADA advisor on Maryland matters Mike Johansen of Rifkin Weiner Livingston LLC, provided an overview of new and old Maryland laws and regulations. Among them were the electric vehicle (EV) tax credit, tax on leased vehicles, dealer performance standards, new vehicle damage disclosure, spot delivery and paid sick leave.



Maryland tax credits for EVs such as the Chevrolet Spark should start again on July 1.

- EV tax credit reinstated

The Maryland EV tax credit will be reinstated starting July 1. This year the funds were used up by March and no money has been available since then. The credit is \$100 per kilowatt hour, up to \$3,000, for all vehicles costing less than \$60,000. There is more money in the budget for next year to ensure that the funds will not run out again.

- Protections on Dealer Performance Standards

The new legislation that will become law clarifies the existing law on dealer performance standards in franchise agreements. Things like sales objectives and dealer programs must be fair; reasonable and equitable; and be based on accurate information, to include demographic characteristics and consumer preferences in the dealer's assigned market area. The automaker has the burden of proving that measures are fair and reasonable.

- New laws on leased vehicles

Starting October 1, two new laws kick in for leased vehicles:

- There is no vehicle excise tax on vehicles leased to state agencies or Maryland local governments.
- No used vehicle safety inspection has to be performed where the lessee keeps the vehicle at the end of the lease term.

- Regulations made less burdensome: damage disclosure, salesman's license

MD Gov. Larry Hogan is pro-business and eager to remove *red tape*, said Mike Johansen. The Motor Vehicle Administration is working to that end with MADA and WANADA through the administrator's Dealer Advisory Panel. Some results, effective March 13, 2017:

- A dealer must disclose new vehicle damage to a consumer *only* if it is more than 3 percent of MSRP. The salesperson should disclose the

damage before negotiating the price. The dealer associations have been trying to get that law passed for 20 years, Johansen said.

- Salesman license applications and renewals must be accompanied by a copy of the state criminal history record check. The MVA will review the application for disqualifying crimes. The salesman's license has been extended from one to three years.
- Dealer licenses have been extended from two years to three.
- Sixty-day temporary permits for transfer tags must now be processed electronically. That process replaces form CS-124.

- **Spot delivery in MD**

When the spot delivery law was passed in 2015, consumer groups had wanted to make spot delivery illegal, Johansen said. The resulting law may be imperfect, but is clearly better for dealers than an outright ban.

Under the law, if dealer-arranged financing is not final, the dealer must notify the buyer of the rights and duties of the buyer and dealer, in language specified by the law. If financing does not get approved, the dealer must notify the buyer in writing within four days of vehicle delivery. The customer must then bring the car back in two days *or* enter into new financing. If no new deal is agreed on, the dealer must return the customer's down payment and trade-in.

- **2016 TSBs, recalls, warranty-recall repairs**

Dealers may provide recall notices and Technical Service Bulletins (TSBs) to their sales and service customers *if* the information in the bulletins relates to *any condition that may substantially affect motor vehicle safety, durability, reliability or performance*.

If a *stop sale* is issued on recall vehicles and the parts are not available, auto makers must pay the dealer either 1 percent, per month of the value of the vehicle(s) or the funds promised in its national program. In addition, the automaker must pay for covered warranty or recall repairs even if the dealer discovers the need for the repair (1) while doing other work the customer requests; or (2) through notice of an outstanding recall under federal law for a safety-related defect.

- **Paid sick leave in MD and Mont. Co.**

Gov. Hogan vetoed the paid sick leave bill, but Mike Johansen expects the General Assembly to override the veto, either in a special session this fall or at the start of the new legislative session in January. In either case, the law would not take effect until January.

"Don't wait to see if the veto is overridden," said Johansen. "I am 90 percent certain there will be a sick leave law in Maryland." Dealers should start to plan how they will comply with it.

The law requires all employers with 15 or more employees to offer paid sick leave; smaller employers must offer unpaid leave. It applies to all employees 18 or older who regularly work at least 12 hours a week. Employers must allow leave for care or treatment of illness, maternity/paternity leave and certain other absences. Employees earn one hour of leave for every 30 hours worked, up to 40 hours per year. They may carry over hours to the next year.



WANADA advisor Mike Johansen expects MD General Assembly to override Gov. Hogan’s veto on paid sick leave.

“Recordkeeping is the piece that’s going to kill you,” Johansen said. Dealers may avoid extensive recordkeeping if they grant a full 40 hours of leave to full-time employees at the beginning of each year. Dealers may also wrap sick leave into scheduled vacation time and simply offer paid time off.

The Montgomery County paid sick leave rules already in effect will not be affected by the new state law.

Virginia: Tax on shop supplies, MVDB Internet Task Force

WANADA advisor on Virginia matters, Mike Charapp, Charapp & Weiss, LLP, focused on two areas affecting dealers in Virginia: A new sales tax on shop supplies and the actions of the state Motor Vehicle Dealer Board (MVDB).



Starting July 1, Virginia dealers must collect retail sales tax on shop supply charges.

Starting July 1, automobile repair shops will be authorized to buy eligible supplies *exempt* from the tax, but will be required to collect the tax on any separately stated charge billed to the customer for supplies used during auto repair. That means *Virginia dealers will have to collect retail sales tax on shop supply charges.*

Virginia’s Motor Vehicle Dealer Board is reviewing the Internet Task Force report that has been the basis for much of the board’s policy for a decade. The task force is a consumer protection tool against internet brokers, unlicensed retailers and the like. Its findings will eventually be a roadmap for Board policy on many new methods of doing business in Virginia.

Mike Charapp spotlights additional U.S. regulatory issues

Dealer lawyer and Auto Law panelist Mike Charapp went over several *hot button* issues for Washington regulators in the Federal Trade Commission, Consumer Financial Protection Bureau, Internal Revenue Service, Department of Transportation and Department of Labor.

- **FTC: Advertising enforcement**

The FTC was funded specifically to oversee car dealer issues by the Dodd-Frank Act, said Charapp. *Hot button* issues are advertising, spot delivery, sales and F&I tactics, and consumer privacy, he said.

A consent order by the FTC in March against a California franchised dealer group shows FTC aggressiveness. The FTC action was in response to a federal court complaint alleging yo yo sales, misrepresentation of vehicles and terms, false online reviews of dealer performance and false advertising. The dealer group had to pay \$2.6 million and will be closely monitored by the FTC for *20 years*.

Internet advertising is the true target today, Charapp said. One of the biggest red flags for the FTC is advertising, “pay off your trade no matter how much you owe.” Other *hot button* issues in advertising are: Truth-in-Lending and Truth-in-Leasing noncompliance; bait and switch (advertisement net of incentives of limited availability without adequate disclosure and advertising deals that are not available); and untrue *\$0 down lease claims*.

- **FTC: Revised Used Car Rule**

The revised FTC Used Car Rule that went into effect in January does not change the requirement to post the Buyers Guide on all used vehicles for retail sale. But the revision does change the form itself. The FTC will do compliance orders in the next year, *and dealers should be prepared*.

Dealers have two options for compliance until January 27, 2018, Charapp said. In the option he recommends, dealers use the form redesigned by the FTC. In the revised form, dealers can no longer check a box saying the vehicle is being sold with a limited warranty. If there is no dealer warranty, a dealer must mark the box stating that the vehicle is being sold with limited warranties only (Maryland), “as is” (Virginia), or with a dealer warranty.

If a dealer warranty is being issued, the box for “dealer warranty” must be checked. If there is a warranty other than a dealer warranty, the “implied warranties only” or “as is” box must be checked. If dealers have customers sign the Buyers Guide – required in Virginia and recommended by Charapp in Maryland – a specific phrase must be used.

In the second option for compliance, dealers may continue to use up remaining stock of the former Buyers Guide form until January 27, 2018. Specific language is required on the form if a non-dealer warranty applies to the vehicle.

See the earlier report in the [WANADA Bulletin](#) for more detail on these options and other changes in the Used Car Rule. Click [here](#) for the FTC’s Dealer’s Guide to the Used Car Rule.

- **CFPB: Dealer reserve and class action waivers**

The CFPB is still creating enforcement actions on dealer reserve through finance providers, and the lenders are pressuring dealers, Charapp said. It is imperative for

dealers to establish a written fair lending policy, said Charapp, who highly recommends NADA's policy.

The CFPB has proposed a regulation that would prevent waivers of class actions in predispute arbitration provisions in agreements acquired by finance sources under its jurisdiction. It is still sorting through more than 6,000 comments, said Charapp. NADA's David Regan added that if the rule is released, it could be stopped by the U.S. Chamber of Commerce or Congress.

- **IRS: Cash reporting, 8300 program design**

The IRS is regularly auditing dealer compliance with the cash reporting requirement, Charapp said. Dealers must file Form 8300 to report cash transactions more than \$10,000 or a series of related transactions totaling \$10,000 or more. Penalties can be severe – \$25,000 per violation for second violations. Dealerships **must** have a cash reporting policy that has a written program using a redundant system, said Charapp.

- **Vehicle Recalls: A continuing problem**

Every dealer should have a vehicle recall policy, Charapp said. *New vehicles with open recalls should be grounded*, no question asked, said Charapp. Each dealer should check, what is the dealership policy to make sure such vehicles are not being delivered?

Used vehicles with open recalls should be fixed if possible. If it is not possible, the recall should be disclosed. If the dealer's franchisor issues a stop sale on used vehicles, that should be followed. Dealers must also check service vehicles of their brand for open recalls. Dealers should also explore the issue of compensation for vehicle downtime.

- **U.S. DOL: Overtime Rule**

There have been more delays in the appeal of the U.S. Labor Department's overtime rule. The rule raises the *white collar* exemption level for overtime from \$23,660 to \$47,476 per year or less. The rule applies to full-time, salaried executive, administrative and professional employees.

"Dealers need to be concerned about the new overtime rules," said Charapp. "This was going to go into effect the first part of 2017."

Salespeople and service technicians are exempt from overtime pay, but there is a dispute in the courts about the longstanding exemption for service advisors.

- **U.S. DOL: Wage and Hour issues**

Charapp offered dealers pointers in the challenging area of Wage and Hour Law from the U.S. Department of Labor:

- *Employee vs. independent contractor*. Make sure that contractors fully meet the criteria.
- *Classification of employees*. Salespeople, qualifying mechanics and "partsmen" are exempt from premium overtime. Dealers should know the limits for the positions.

- *Minimum wage.* The general office should check every pay period to determine whether exempt employees are making the minimum wage for each hour worked.
- *Premium overtime.* Dealers should ensure proper pay for eligible employees.

WANADA holiday closing signs for July 4th going out this week!

Optional holiday closing posters designating Tue., July 4 as Independence Day, are being sent by U.S. mail to all dealer members for the information of customers and staff. Any dealer needing more than the two posters per store that will be sent, can contact the WANADA office (202) 237-7200, or Katy Orme, ko@wanada.org.

Staying Ahead...

Outside of Washington, DC, most Americans aren't concerned with doing things "big." They're looking for less government spending, lower taxes and good jobs.

-- Elaine Chao, Sec. of Transportation



WASHINGTON AREA NEW AUTOMOBILE DEALERS ASSOCIATION