

AUTO NOTES

GOVERNMENT AUDITS, NO 100% MARK UP RESTRICTION, WHAT'S NEXT? *By Peter Bauer*

Numerous state agencies watch over dealerships, including PennDOT, Banking, the Dealer Board and the State Police. While these various agencies have their issues to watch out for when auditing or reviewing dealership activities, one of the more unfair reviews was to ensure a dealership was not marking up service contracts, GAP products and other aftermarket products more than 100% in financing situations. The law came on the heels of abusive home financing practices occurring in the early 2000s. It was believed that abusive practices in the home financing world were also occurring in the vehicle financing arena. The mark up restriction was put in place to limit the perceived abuses that were occurring. However, in early 2012 the law was revised (thanks to the efforts of PAA) and 100% mark up restriction was eliminated.

So what will Banking focus on now that the 100% mark up restriction has been eliminated from the law as of May 2012? There is plenty for Banking and the other state agencies to look at to ensure dealers are keeping their operations compliant. Banking will continue to review the form finance contracts dealers receive and use from their finance sources. Banking has also been following up to make sure a dealer's separate disclosure form is being provided to customers before the financing contract is entered into. This disclosure reminds the customer that they do not have to purchase aftermarket products in order to secure financing. Additionally, Banking is also looking at privacy protection programs and documentation. After many years in place, and even though privacy notice forms changed and were simplified in January 2011, some dealers still do not get these privacy notices right. Dealers need to review their privacy and identity theft safeguards and make updates to their programs. These government agencies will continue to look at financing related activities and documents, PennDOT titlework and customer sales documents to ensure compliance with the various laws regulating dealerships. ■

MANUFACTURER AUDIT CHARGEBACKS AND STAY ABILITY ENHANCED *By Peter Bauer*

Manufacturer audits are still going on in sales and service departments. Dealers should remember the Act limits the manufacturer's ability to chargeback. Manufacturers are limited to a two year look back, and can only chargeback for sales incentives or warranty repairs that are not substantiated. In essence this is limiting chargebacks from being made if the paperwork "i"s and "t"s are not dotted and crossed. Dealers should make sure these Board case law decisions are shared with the auditors and their managers to try to limit the amount of chargeback that might occur on the front side. If not, these restrictions can be presented during an internal appeal process, or once a protest is filed with the Dealer Board to remind the manufacturer of the chargeback limitations under the Act.

Additionally, the Act was revised last year to require a 30 day stay window after the audit is finalized in which the manufacturer cannot debit a dealer's account for any chargeback amount being assessed. This was enacted as manufacturers were assessing the chargebacks in a prompt fashion and debiting dealer accounts before the dealer could address the issue. Once the manufacturer debited the dealer's account, there was little incentive for the manufacturer to try to resolve the issue in a reasonable fashion with the debited dealer. This 30 day waiting period gives the dealer the opportunity to try to work out a resolution with the manufacturer, or to file a protest with the Board. Dealers should recognize they have significant audit chargeback protections under the Act and should make the manufacturer aware of these strengths in an effort to help limit chargebacks in an audit situation. ■

McNees Wallace & Nurick assists dealers with the host of legal challenges found in today's highly regulated business environment. From buys and sells to franchise terminations; from environmental to employee relations; from consumer complaints to problems with PennDOT; from formation of a new dealership to successor planning; from taxes to tags. For almost 25 years McNees has provided effective representation and assistance to Pennsylvania dealerships. Call (717) 232-8000 or visit www.mwn.com.



IS THAT COVERED? COSTS OF GOVERNMENT INVESTIGATIONS *By Michael Kelley*

Dealers are heavily subject to government regulation. From time to time, these government regulators conduct investigations into a dealer's business operations and such investigations can be very costly to the regulated business. The first question for a dealer to its insurance company should be "Are the costs of a government investigation covered by insurance?"

Two recent court decisions conclude that the answer is YES – if a formal or informal government proceeding has been commenced.

In *Home Depot v. National Union Fire Insurance Co.*, Home Depot spent \$23 million in internal investigation costs, including counsel and forensic accountant fees, in response to a notice of "impending inquiry" from the Securities and Exchange Commission ("SEC"). In *MBIA, Inc. v. Federal Insurance Company*, the financial services company incurred costs of more than \$6.5 million in responding to subpoenas from the SEC and the New York Attorney General.

The court found that most of Home Depot's costs were not covered under its Director's & Officer's (D&O) insurance policy because most of the expenses were incurred before any formal or informal government inquiry actually commenced. On the other hand, since MBIA's costs were incurred after subpoena's were issued, its D&O policy did cover the costs of the investigation.

The cases were very fact specific and dependent on the specific policy language. Not all insurance policies will be triggered in the same fashion. But, here are some practical takeaways:

1. A dealer may have insurance coverage for government investigations under its insurance policy, or other specialized coverages;
2. Part of the strategy in responding to government inquiries should take into consideration the language of the potentially applicable insurance policy; and
3. If government inquiries and actions are a part of the risks that a business faces, a dealer should consider those risks now and negotiate and obtain insurance coverage tailored to those risks. ■

As the son of a new car dealer, Mike Kelley grew up washing cars at the family dealership. Mike is also the Chair of the McNees Insurance Recovery Group, which helps dealers understand their insurance coverage, submit claims and, where appropriate, sue insurance companies for failing to honor legitimate claims. McNees handles insurance issues for all kinds (auto, property, liability, fire, professional liability, environmental, D&O, medical, etc), and against companies from Allstate to Zurich. If a dealer needs insurance assistance, contact Mike Kelley or the McNees Insurance Recovery Group at (717) 232-8000, or at www.mwn.com.

PROPERTY TAX REASSESSMENT SEASON HEATS UP IN PA *By the McNees State and Local Tax Group*

On June 15 Lebanon County began to issue thousands of notices of reassessment to all property taxpayers in the county informing them of changes in their properties' assessments for 2013. Property taxpayers will have forty days from the date of the notice to evaluate the change in their assessment and determine whether an appeal is warranted. The reassessment in Lebanon County continues to be a busy year of reassessments, with similar revaluations in Bedford, Erie, Lehigh and Allegheny Counties. Additional reassessments by other counties are likely in the future. Of course, dealers need not wait for a notice of reassessment to challenge the assessment on a dealership property – it can be done each year if the dealer disagrees with the county's determination of value.

If the dealership recently received a notice of reassessment, the dealer should carefully check three items in the notice:

- the new assessed value of the dealership property;
- the previous assessed value of the dealership property; and
- the deadline for filing an appeal.

The new assessed value is the county's determination of the dealership property's fair market value. The previous assessed value is the fair

market value of the dealership's property at the time of the last reassessment, and therefore does not equal current fair market value. Consequently, an increase in the dealership property's assessed value does not necessarily mean that your taxes will increase.

If a dealer suspects the increase in the assessed value of the dealership property will result in a tax increase, the dealer should consider an appeal. Because the deadline to file an appeal is limited, time is of the essence. McNees has an experienced real estate tax team with over twenty years in the field to help a dealership evaluate its assessment notice and decide whether to file an appeal. Don't delay – time is limited! ■

The McNees State and Local Tax Group provides Pennsylvania state and local tax representation and assists clients with multi-state tax planning and dispute resolution. McNees is prepared to advise and represent clients in all areas of state and local taxation, including sales, business, transportation, insurance and real estate taxes. Please contact the McNees State and Local Tax Group, if you need tax assistance at (717) 232-8000, or at www.mwn.com.