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**BUY-IN: ADDING AN
INVESTOR—PROS,
CONS, AND POINTERS**
PAGE 1

**Buy-In: Adding an Investor—Pros,
Cons, and Pointers**

Allowing an investor to buy into your corporation or LLC can be a complicated process. While it may be a great idea for some dealerships, it may be unsuitable for others. Every case is unique, and whether to add an investor involves a series of important personal and business decisions that you should only make after careful thought and consultation with professional advisors.

This article provides a brief outline of some of the issues that you may want to consider; it is not comprehensive. Every case is different. Consult experienced dealer counsel for further information.

The Pros:

Bringing in an investor is typically done for many reasons, including (1) raising additional capital; (2) estate planning (you do have a succession plan, don't you?); (3) management assistance; (4) golden handcuffs; and/or (5) a potential exit strategy.

The Cons:

Adding an investor may lead to personal conflicts. If your co-investor owns 50% of the business or a majority of the business then management disagreements and deadlocks may arise. You will have to share profits with the investor and decisions about write downs, owner benefits, distribution of earnings, and "business as usual" may become a thing of the past. Even if your co-investor is a minority owner,

Continued on page 2

**Brakedown: Federal and Iowa
Laws on Dealer Advertising**

We recently blogged about "Operation Steer Clear," where the FTC targeted automobile dealerships for false or misleading advertising. The FTC charged a number of dealers with violations leading to litigation and consent agreements. For more on the federal crackdown, see our blog by clicking [here](#).

Iowa Law Update: More Headaches

Iowa dealers must comply with the Iowa Consumer Fraud Act and the Iowa Consumer Credit Code (ICCC), which incorporates the Truth in Lending Act at the state level. Because these laws are meant to protect consumers, the court, and law enforcement generally, will construe the code liberally so that consumers receive the maximum protections possible under the law.

Iowa consumer protection laws are enforced by the Attorney General and some protection laws fall under the Iowa Criminal Code. Like the FTC, the Attorney General can seek injunctions and a fine of up to \$40,000 for each occurrence. Iowa also has special protections for elderly citizens and veterans; there is an additional \$5,000 fine provision if the violation is against an older person (defined in the code as over age 65). As of 2009, Iowa also provides a private cause of action for consumers.

Continued on page 3

**BRAKEDOWN:
FEDERAL AND IOWA
LAWS ON DEALER
ADVERTISING**
PAGE 1

**IOWA DEALERS—
CHECK YOUR PLATES!**
PAGE 3

**CASE UPDATE:
FINNIN MOTORS V.
U.S.**
PAGE 3

DID YOU RECEIVE A LETTER FROM THE FACTORY? DON'T JUST STICK IT IN A FILE; IT CAN COME BACK TO BITE YOU. MAKE SURE YOUR ATTORNEY KNOWS ABOUT IT AND RESPONDS.

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Continued: Buy-In: Adding an Investor—Pros, Cons, and Pointers

he or she may possess certain rights, such as the right to examine records and possibly, a reasonable right to a return on investment, under Iowa law.

Things to Consider Before You Make Promises About or Enter Into A Buy-In Agreement:

1. **Your Own Motivations.** Think about this and then continue to reflect about it before you move forward with any buy-in: “What is my real motivation for doing this?” Is this the best way to achieve your goals? Talk this over with your family and professional advisors. This is critical!
2. **What About the Investor?** Really knowing a potential investor may prevent a future disaster. In our practice, we have seen the consequences of a seller failing to consider the following: How long have you known the potential investor? Are you really compatible with him/her and how do you know that? Are you comfortable with his/her spouse and how do you know that? Does he/she possess skills that complement your own skills and how do you know that? Slow down here and make a logical and not an emotional decision.
3. **To Control or Not to Control?** Most sellers will want to maintain control in a buy-in scenario. To maintain control, you must retain over 50% of the ownership interests. Your professional team should review your bylaws, articles of incorporation, and/or operating agreement and articles of organization to be certain that there are no adverse provisions involving control issues.
4. **How to Establish a Value for Your Company.** If you decide to move forward, then seek guidance in valuing your business before you enter into any oral or written agreements, including letters of intent. If you want to maximize the value that you receive for the ownership interest that you are selling, then your attorney and accountant must be familiar with auto dealership transactions and especially current goodwill and blue-sky multiples. They must also understand the best techniques for fixed and other asset valuations.
5. **How Will You be Paid?** Before you enter into any agreements you need to be comfortable with the method of payment. Is it cash? Payment from future bonuses? Will there be a promissory note involved? If there is a payment plan, when will the ownership interest transfer—at the closing or as paid? Is there security?
6. **Enter into an Employment Agreement Concurrently with the Buy-In Agreement.** You should strongly consider having counsel draft an employment agreement for the potential investor if the investor is to be a working investor. You should carefully consider the termination provisions and the effect of termination on ownership. In other words, in the event that the investor fails to perform do you want the right to buy back the investor's ownership interest? This must be coordinated with a shareholders' or members' agreement.
7. **Shareholders' and/or Members' Agreements.** Shareholder and/or member agreements should be entered into concurrently with the buy-in agreement and the employment agreement. The essential purpose of the shareholders' or members' agreement is to ensure that if there is a future dispute between seller and buyer, there is an agreed workout, including, for example a provision whereby the seller can reacquire the buyer's interest in the business at a predetermined price or formula with specified payment methods.
8. **Beware of Securities Laws!** Generally, small one-time transactions fall within an exception to the necessity to registering shares or ownership interests under the Securities Act. Proper disclosures will protect sellers! Build this in to your buy-in agreement. See your attorney.

The decision and the process for allowing an investor to buy into your dealership business may seem deceptively simple at first glance. In our experience, it requires a great deal of planning and execution. Knowing the benefits, drawbacks, and overall process can help your decision-making process. However, nothing substitutes for the knowledge of an experienced auto dealer attorney who can walk you through this complicated process.

**Arenson & Maas would like to congratulate IADA
on 95 years of service to Iowa Automobile Dealers!**

Continued: BrakeDown: Federal and Iowa Laws on Dealer Advertising

This means that, in addition to the state action, the consumers with claims may also sue the dealership individually for damages.

Here's the BrakeDown: What to do, What to do?

Know that Iowa Code Chapter 322 makes compliance with the ICCA a condition of maintaining your dealer license. Although the consumer protection laws in Iowa and at the federal level focus on fraud and financing, they apply throughout the car-buying experience. The consumer's first interaction with a dealership is usually through its advertising. Therefore, the consumer protection laws extend to advertising as well as the negotiations and sales after the customer walks in the door.

From a defense perspective, note that a "misrepresentation" is only a violation if it relates to a "material fact." A material fact is a fact that, if the buyer had known or understood it, would have caused the buyer to act differently during the sale. For example, a material fact might be one that would change the price the customer is willing to pay or whether the customer would even purchase the vehicle. If you question whether the information is a "material fact," then it probably is. Further, liability for a violation of the consumer protection laws does not depend on whether the dealership had an intent to deceive their customers. Occasionally, an ad that you think is crystal-clear may be confusing or misleading to a potential customer. Be careful and review your ads!

Of course, in the government's overzealousness to protect consumers, it may drag automobile dealerships into litigation where the dealership did not even know it was to deceiving its customers. These advertising concerns can be avoided if experienced auto dealer counsel reviews advertising that you deem to be questionable. The NADA specifically recommended that dealerships ensure "their legal counsel review all advertising."

CASE UPDATE: *Finnin Motors v. U.S.*

In 2009, GM and Chrysler terminated over 100 franchises during the course of their bankruptcies. In two class action lawsuits, which include some Iowa dealers, franchise-owners claimed that the termination of their franchises created an illegal "taking." Under the U.S. Constitution, the government cannot take property without just compensation. These dealerships argued that because the government would only provide GM and Chrysler with financial assistance if they terminated these franchises, then the federal government was engaging in an illegal taking.

Here, the dealerships have alleged that the termination is a regulatory taking, i.e. one that does not completely cut off ownership rights, but is overly burdensome. It either requires the owner to suffer a "physical invasion of his property" or "prohibit all economically beneficial or productive use." Contracts (like franchise agreements) can be "taken," just like real and personal property. However, if this case is successful, it will be the first time that the regulatory taking approach is applied to contract rights.

The takings allegation requires that the dealerships must have suffered economic loss and that the governmental taking must have been the cause of that loss. According to the court, the dealerships are struggling with this aspect of the case because they attribute the loss to the overall bankruptcy more so than any government action. Nonetheless, the dealerships were given the opportunity to amend their complaint so they can adjust their argument.

The government attempted to dismiss these suits for failure to state a claim, but the United States Court of Federal Claims denied the dismissal. In April 2104, the United States Court of Appeals for the Federal Circuit again denied the government's pleas to dismiss. At this point, it is unclear whether the dealerships will prevail. Arenson & Maas will continue to keep a close watch on this case because it may affect dealerships and their dealings with manufacturers.

Iowa Dealers— Check your Plates!

An Iowa Supreme Court May 2, 2014 decision may affect Iowa Automotive dealers and their customers. Many dealerships promote their business through the use of plate frames. The Iowa Supreme Court has put a small hiccup in the use of plate frames for dealerships and all Iowans.

Under Iowa Code 321.37(3), "It is unlawful for the owner of a vehicle to place any frame around or over the registration plate which does not permit full view of all numerals and letters printed on the registration plate." The Court determined that "all numerals and letters" includes the county information on the bottom of Iowa plates. Based on that decision, police can stop a vehicle and is-

sue citations for any license plate in which numerals or letters are covered or partially covered. This decision may give police "probable cause" to stop a vehicle without evidence of other violations.

Arenson & Maas urges dealerships to look at your advertising plate frames. Don't be the reason that your customer gets stopped. The dissenting Iowa Supreme Court Justice, Justice Appel, warned: "For the thousands of Iowans who have a frame that promotes a sports team, or an auto dealer, or have a nice (or not so nice) slogan, beware!"

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