

READING & RESPONSE JANUARY 2007

LEGAL, LEGISLATIVE AND REGULATORY SUMMARY November 2006

By: Whann & Associates, LLC

• *Federal Legislative Developments*

October was a slow month on the Legislative front due to the mid-term election recess. Members of Congress left a lengthy agenda behind in Washington to hit the Campaign trail and will have little time to address remaining business during the lame-duck session. Republicans will likely take advantage of the time they have to move their proprieties in lieu of the recent gains Democrats have made in Congress. In addition to the remaining Appropriations Bills, their Legislative priorities include two Bills addressing disclosure requirements for previously damaged vehicles, Energy Legislation, and passing a measure to repeal or reduce the estate taxes, as well as extend popular tax breaks.

Attempt to Move Damaged Vehicle Information Act Likely

Rep. Cliff Stearns, the Sponsor of H.R. 6093, indicated in a letter to Members of the House that he plans to move the Legislation to the House floor when Lawmakers return from the mid-term election recess if there is enough support for passage. The Damaged Vehicle Information Act would direct the National Highway Traffic Safety Administration to issue a regulation requiring all persons who terminate a contract related to a motor vehicle due to flood or water damage, collision, fire damage, theft and recovery, or any other circumstance that adversely affects the fair market value of the vehicle, to disclose the vehicle identification number of the vehicle. It would also require disclosure of the date of termination of the contract, the odometer reading of the vehicle on the date of the termination, whether one or more airbags in the vehicle were deployed as a result of the incident and the reason for termination of the contract.

A companion Measure is pending in the Senate. S. 3707, the "Passenger Vehicle Loss Disclosure Act," would require all insurers and self-insurers to disclose to the public in a commercially reasonable manner when a vehicle has been determined or declared a total loss and the primary reason for doing so (i.e. whether it was flood or water damaged, sustained collision or fire damage, or was stolen and recovered). Over the last 2 decades, NIADA has worked on numerous projects with Congress and Federal Regulatory Agencies to improve the titling and disclosure processes, and this Legislation is no exception. While NIADA supports passage of the Legislation, we may seek the inclusion of an amendment to carry forward title brands, as well as clarification regarding the provisions in the House Bill related to the "termination of contracts."

Offshore Drilling Likely to Dominate Energy Discussions

Offshore drilling has been the focal point of energy discussions this fall and promises to be a topic of interest before the 109th Congress officially adjourns. The House Resources Committee Chairman has been pushing for some kind of compromise between the Senate Bill (S. 3711), which focuses on oil and gas exploration in the Gulf of Mexico, and the House Measure (H.R.

4761), which would also expand drilling opportunities along the East and West Coasts. If Lawmakers are not able to bridge the gap between the two Bills during the lame duck session, the 110th Congress will no doubt introduce the offshore drilling provisions early next year. Other significant Energy Legislation is unlikely to make it out of Congress this year, including Legislation passed by the House that would ban price gouging (H.R. 5253), streamline permitting procedures for new refineries (H.R. 5354), authorize drilling in the Arctic National Wildlife Refuge (H.R. 5429), and increase the Corporate Average Fuel Economy Standards for passenger vehicles (H.R. 5359).

Outlook for Passage of Tax Extenders Remains Optimistic

Efforts to pass a package of extensions of popular expiring or expired business tax breaks have not been successful as of yet, but the primary reason is the extensions are supported by both Chambers and both parties, making them a good bargaining chip to attach to more controversial Measures. In addition to the expired research and development credit, the extenders include a deduction for college tuition payments and a deduction for state and local sales taxes in lieu of income taxes that benefits residents in a handful of states. The package would probably be enacted if sent to the floor as a stand-alone Bill.

• ***Federal Regulatory Activity***

FTC Turns Down Request to Permit Pre-Recorded Sales Calls

The Federal Trade Commission (FTC) announced on October 3rd that it had rejected a petition asking it to create a “safe harbor” in the Telemarketing Sales Rule (TSR) to allow companies to send pre-recorded messages when they make sales calls to customers with whom they have an established business relationship. Under the current Rule, a telemarketer may play a pre-recorded message when a consumer answers, but only in a maximum of three percent of calls and the message may only state the name of the company calling and a phone number that the consumer can call to opt out of future calls, no sales message. The FTC’s decision was due in large part to the reaction the Agency received from consumers.

Of the 13,600 comments submitted to the FTC, more than 13,000 responses were from consumers who objected to the proposal. The primary reason given was that consumers felt the messages were more intrusive and invasive of their privacy because it would be more difficult to request that the company not call again. The responses in opposition were so strong, in fact, that the FTC is now seeking comment on a new proposal to prohibit the use of prerecorded messages in telemarketing calls answered in person by a consumer, unless a consumer has consented in writing to receive such calls. The FTC also noted that because it has determined not to adopt the proposed amendment, it will no longer postpone initiating enforcement actions for violations of the call abandonment provisions against companies that use pre-recorded messages. The November Notice had announced that, pending resolution of the amendment, no enforcement action would be initiated. Sellers and telemarketers have until January 7, 2007 to revise their practices to discontinue calls that deliver a pre-recorded message to consumers with whom the seller has an established business relationship and to implement practices that conform to the current safe harbor.

FTC Warns Hundreds of Advertisers about Ads Targeting Spanish-Speaking Consumers

The FTC has sent over 200 letters to advertisers and media outlets warning them that their advertisements targeting Spanish-Speaking Consumers are potentially deceptive. The advertisements were located in Spanish-language newspapers, magazines, internet sites and on the radio and television. The focus was on identifying potentially deceptive ads in three primary areas: health, credit and business opportunities. Over half of the advertisements found were health-related; work-at-home and business opportunity ads with questionable claims were the second most common type of ads; and then came many, credit-related advertisements offering credit repair and guaranteed credit, among other services. 167 individuals took part in the review, including representatives from Better Business Bureaus, State Attorneys General Offices and state and local Consumer Protection Agencies. The letters informed advertisers that their advertisements may be in violation of the law and urged them to review their advertising and promotional materials.

Activity of Interest

Oregon Attorney General Claims Direct Mailings Contain False Credit Offers

Three Oregon Dealerships and the Marketing Company that created the direct mail advertisements that landed them in hot water with the Attorney General's Office have agreed to settle claims filed against them. The Dealerships sent out "Vehicle Buyback Notice" flyers offering to buy back vehicles at "20 percent of \$4000 over NADA book value," which violates an Oregon Administrative Rule that prohibits dealers from guaranteeing a minimum amount will be paid for a trade-in vehicle. The Attorney General also alleged that the flyers lured consumers onto the Dealer's lots with false offers of credit and did not contain mandatory Federal Truth in Lending Act disclosures. For example, some of the offers stated that loans were pre-approved for up to \$23,375, but contained disclaimers in miniscule type-size at the bottom of the page stating that the loans were only for \$1,000. The Oregon Department of Justice further discovered that the companies allegedly offering the pre-approved loans were not finance companies and could not extend credit.

Oregon Attorney General Hardy Myers said "[T]hese are the first of many sanctions to come concerning these types of misleading offers." All Dealers are well advised to review marketing materials before they are sent out on behalf of their Dealership. Remember, it doesn't matter if a third party creates and sends them, your Dealership is responsible for ensuring that its advertisements comply with all state and federal laws. The Marketing Company has agreed to comply with State and Federal Laws when obtaining mailing lists for marketing "pre-approved" loans and to ensure that any firm offers of credit are available from a valid finance company, but the Dealerships were still negotiating the terms of their settlements.

- *Case of the Month*

Consumer Attorneys Challenge Class Action Waiver Provisions in Arbitration Agreements

Nearly two years ago, the U.S. Supreme Court held in Green Tree Financial Corporation v. Bazzle that an arbitrator could certify a class when an arbitration agreement is silent or ambiguous on that issue. What the Supreme Court did not answer was the question of whether an express ban on participating in an action as a member of a class could be deemed unconscionable and unenforceable under federal or state law. That question has been the

subject of great debate and Courts throughout the Country have begun to render decisions on the issue. To date, the answer remains a mystery.

Two rulings issued by the Supreme Court of New Jersey on the same day concerning the validity of arbitration agreements containing class action waivers illustrate the point. The Plaintiff's individual claim in Muhammad v. County Bank of Rehoboth was for \$600. This was a key factor for the Court, which elected to follow the rationale set forth by the California Supreme Court in Discover Bank v. Superior Court. In Discover Bank, the California Supreme Court held that "All class action waivers are not necessarily unconscionable. But when the waiver is found...in a setting in which disputes between the contracting parties predictably involve small amounts of damages...such waivers are unconscionable under California law." The New Jersey Supreme Court likewise found that precluding the consumer from participating in a class action proceeding rendered the arbitration agreement unconscionable because when an individual claim exists for such a small amount of damages, many "rational" consumers will determine that is not worth the time or money to pursue their claim.

According to these two Courts, and many others that have followed this assumption, to hold otherwise would take away the only effective forum these consumers have to seek relief under consumer protection laws. In Delta Funding Corporation v. Harris, which happened to be the other case decided that same day, the New Jersey Supreme Court upheld a class action waiver provision written in a consumer loan agreement. It distinguished the case from Muhammad stating that "[U]nder New Jersey law, the class-arbitration waiver...is not unconscionable per se... as Harris is seeking more than \$100,000 in damages...Harris's claim is not the type of low-value suit that would not be litigated absent the availability of a class proceeding."

Many dealers are wondering whether they should remove the class action waiver provisions from their arbitration agreements, or do away with using the agreements altogether. The answer likely is not yet, as long as the rest of your arbitration agreement is in good shape. It is important to take a look at these cases and what the Courts are really saying in them. The consensus appears to be that class action waivers are not "per se" unconscionable. Rather, the answer depends on a variety of factors, including the amount of the claim at stake, whether the arbitration agreement contains one-sided remedies that favor the drafter of the agreement, which party is responsible for paying fees incurred to arbitrate claims, whether these obligations are defined, and whether the waiver and other key provisions are clear and conspicuous or buried in fine print. A good approach would be for dealers to have their agreements evaluated by an attorney or other advisor familiar with Court decisions issued around the Country and, more specifically, the Courts in the States where they conduct business.

NEW: Electronic Submission of your 165 and your 6890's.

You now have the ability to submit the 735-165 "Notice of Vehicle Purchase" and the 735-6890 "Notice of Sale or Transfer of a Vehicle" electronically to DMV.

You will need to follow DMV's procedures carefully for this process to work.

You also need to be sure you have the ability to provide documentation you submitted these forms timely.

You do not have to keep a copy of the spreadsheet in each dealer jacket but you need to be able to produce proof this was submitted if asked. You may just annotate your deal jacket with the date you sent this to DMV and then keep the original in a notebook for reference to if needed.

If you have any questions please contact OIADA and we will be glad to assist you in the process. This is another example of OIADA working on your behalf.

DMV INSTRUCTIONS

If you would like to begin submitting electronically, send an e-mail requesting the "Dealer Flag Register Templates" to: bizregs@odot.state.or.us. Please include the name of your dealership when requesting the templates. Copies of the Excel spreadsheet formatting examples are available electronically.

DMV, working with representatives of Oregon Dealer Advisory Committee, developed templates for submission of the information contained on these two forms electronically. Some dealers have been using this method since 2002. We are now able to expand this to all dealers.

Following you will find the “Flag Register setup requirements” as well as sample copies of how the registers must look when they are completed. We have the templates available electronically in a Microsoft Excel spreadsheet format.

- Do not combine Flag 10 (Dealer Notice of Vehicle Purchase) information on the same register as Flag 49 (Notice of Sale or Transfer of a Vehicle) information. The information on these must be done on separate registers.
- List plate in alpha-numeric order by register. This is to simplify lookup once microfilmed.
- List only Oregon titled vehicles.
- Make sure you start each time with a “clean” register. Do not submit information on vehicles more than once. Registers containing vehicle information that has already been submitted will be returned to the dealer.
- Paper size must be 8½ X 11, letter size, oriented in the “landscape” format.
- Font size must be at least 9 point, preferably at least 10 point.
- Line spacing must be double spaced.
- Keep a copy of the sheet(s) for your records. After you have saved the copy, delete all the information to make sure you start the report next time with a clean sheet.
- Print or save a copy of the report that you submit to keep for your records.

Once completed, these registers can be sent to DMV as an e-mail attachment to:

Vehicle.Purchase@odot.state.or.us

OR mailed to: DMV Record Services, 1905 Lana Ave NE, Salem, OR 97314

Faxed registers will **NOT** be accepted.



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FLAG 10

Oregon Plate	Vehicle Identification Number	Oregon Title Number	YR	Make	Sale date	Sold To:	
ABC123	4TAWM72N8XZ446060	1234567890	1999	Toyo	3/18/02	Toyota Motor Credit	1905 Lana A

ABC124	4TAWM72N8XZ446061	1234567890	1999	Toyo	3/19/02	Toyota Motor Credit	1906 Lana A
ABC125	4TAWM72N8XZ446062	1234567890	1999	Toyo	3/20/02	Toyota Motor Credit	1907 Lana A
ABC126	4TAWM72N8XZ446063	1234567890	1999	Toyo	3/21/02	Toyota Motor Credit	1908 Lana A
ABC127	4TAWM72N8XZ446064	1234567890	1999	Toyo	3/22/02	Toyota Motor Credit	1909 Lana A
ABC128	4TAWM72N8XZ446065	1234567890	1999	Toyo	3/23/02	Toyota Motor Credit	1910 Lana A
ABC129	4TAWM72N8XZ446066	1234567890	1999	Toyo	3/24/02	Toyota Motor Credit	1911 Lana A
ABC130	4TAWM72N8XZ446067	1234567890	1999	Toyo	3/25/02	Toyota Motor Credit	1912 Lana A
ABC131	4TAWM72N8XZ446068	1234567890	1999	Toyo	3/26/02	Toyota Motor Credit	1913 Lana A
ABC132	4TAWM72N8XZ446069	1234567890	1999	Toyo	3/27/02	Toyota Motor Credit	1914 Lana A
ABC133	4TAWM72N8XZ446070	1234567890	1999	Toyo	3/28/02	Toyota Motor Credit	1915 Lana A

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FLAG 49

Oregon Plate	Vehicle Identification Number	Oregon Title Number	YR	Make	Purchase date	Pu
ABC123	4TAWM72N8XZ446060	1234567890	1999	Toyota	03/18/2002	Toyota M
ABC124	4TAWM72N8XZ446061	1234567890	1999	Toyota	03/19/2002	Toyota M
ABC125	4TAWM72N8XZ446062	1234567890	1999	Toyota	03/20/2002	Toyota M
ABC126	4TAWM72N8XZ446063	1234567890	1999	Toyota	03/21/2002	Toyota M
ABC127	4TAWM72N8XZ446064	1234567890	1999	Toyota	03/22/2002	Toyota M
ABC128	4TAWM72N8XZ446065	1234567890	1999	Toyota	03/23/2002	Toyota M
ABC129	4TAWM72N8XZ446066	1234567890	1999	Toyota	03/24/2002	Toyota M
ABC130	4TAWM72N8XZ446067	1234567890	1999	Toyota	03/25/2002	Toyota M
ABC131	4TAWM72N8XZ446068	1234567890	1999	Toyota	03/26/2002	Toyota M
ABC132	4TAWM72N8XZ446069	1234567890	1999	Toyota	03/27/2002	Toyota M

“Kelly’s Korner”
Oregon IADA Newsletter
January 2007

Privacy Policy Pointers

By Jan Kelly

A rash of recent questions about the “Privacy Policy” lead me to believe that it may be time to review this important aspect of the Graham-Leach-Bliley Act. I do so along with the reminder that none of the information that follows is intended as legal advice. Please consult your attorney for compliance matters concerning your own dealership.

What is the Privacy Policy?

The Privacy Policy is the first part of the Graham-Leach-Bliley (GLB) Act. The Privacy Policy stipulates that businesses who collect information about their clients / customers / consumers must provide notification about what they will do with the information supplied to the business. This includes who will receive the customer information, as well as why and how the information will be shared.

How does the Privacy Policy apply to dealerships?

When dealerships finance vehicle purchases and sell their customers a variety of policies and services, it becomes necessary to share certain information gathered with third parties in order to secure funding and to process the policies and services which the customer chooses to purchase.

Some states require that the privacy form must include an opt-out and/or an opt-in choice for the customer. You will need to check with your dealership’s legal counsel to determine what your privacy policy should contain.

When should the customer receive the Privacy Policy?

It is my understanding that the Privacy Policy should be given to each customer immediately after obtaining the credit application. Most privacy policies I have seen are 2-part NCR (No Carbon Required) forms. The forms have a place for the customer to sign an acknowledgement. The original stays with the deal. The copy goes to the customer.

What happens when the customer refuses to sign?

I recommend that you note on the form that the customer refused to sign and that a copy of the form was given to the customer for later review.

What else should I know about the Privacy Policy?

Many privacy forms state that the dealership takes steps to protect the NPI (Non-Published Information) through physical and electronic safekeeping measures. This statement seems to tie the Privacy Policy to the Safeguards Rule, which is the second part of the GLB Act.

If your dealership uses an online credit application, you should also have an online version of the Privacy Policy. Your association and Reynolds & Reynolds are great sources of sample forms and information.

Compliance with the Privacy Policy of the GLB Act is not optional. For the well being of your personnel and your business, be sure to confirm with your legal counsel that are in full compliance with both the Privacy Policy and Safeguards Rule contained in the GLB Act.

Article written by: Jan Kelly, President of Kelly Enterprises. She is a sales trainer and consultant, convention speaker, and writes frequently for industry publications. For information about training opportunities telephone 800.336.4275 or contact Kelly Enterprises at www.JLKelly.com.

Kelly Enterprises 2007 F&I Training Calendar

4-Day F&I Seminar Schedule

January 23-26	Phoenix, AZ
April 23-26	Portland, OR
May 8-11	Minneapolis, MN
July 24-27	Baltimore, MD
October 23-26	Portland, OR
November 6-9	Dallas, TX

2-Day Advanced F&I Seminar Schedule

February 22-23	Portland, OR
March 15-16	Atlanta, GA
June 7-8	Portland, OR
August 9-10	Portland, OR
September 13-14	Kansas City, MO
December 13-14	Portland, OR

Junk Vehicles and California “Acquisition” Bill of Sale

Junk Vehicles

Many states issue a Non-Repairable Vehicle Certificate, Junk Certificate or a title with some other brand to indicate the vehicle is considered unsafe and can no longer be titled or operated on that state’s public roads or highways.

Since Oregon law changed on January 1, 2004, DMV has not issued an Oregon title or salvage title for a vehicle that has been issued a title or ownership document that contains a notation including, but not limited to the following: Destroyed, Dismantled, Hulk, Junk, Non-rebuildable, Non-repairable, Parts Only, Scrap, Wreck, Dismantler or Wrecker Only.

If you purchase a vehicle with one of these types of ownership documents, you will need to go back to the state that issued the ownership document to get a title without the “junk” or similar notation, and then submit the new ownership document to Oregon DMV. If you sell a vehicle with one of these types of ownership documents, your customer will not be able to title or register the vehicle in Oregon.

California "Acquisition" Bill of Sale

Several years ago, Oregon DMV received information from the California DMV that the California Vehicle/Vessel Transfer and Reassignment Form (REG 262), is not an ownership document for the purpose of titling a vehicle.

Effective December 1, 2002, Oregon DMV discontinued accepting the REG 262 as an ownership document when applying for Oregon title. The REG 262 is only acceptable as a bill of sale, odometer disclosure, or power of attorney.

Title transactions **received from an Oregon licensed dealer** that include the Form REG 262 as an ownership document will be returned to the dealer if the vehicle purchase date by the dealer was on or after December 1, 2002.

Stephanie Zellner
Vehicle Programs

DEFENSIVE DRIVING

By: Larry Hecht

Businesses and individuals buy insurance for many reasons. Some people buy insurance because it is required. In Oregon, Dealer insurance is required by the Oregon Department of Motor Vehicles. Individuals operating Oregon licensed autos are required to meet Financial Responsibility Laws. If you finance a car, insurance is required. You name it and if it involves "RISK" there probably is an insurance product you can purchase to help you offset a loss.

There are other ways to protect oneself from loss other than simply relying on insurance. There are forms of "self insurance" such as having higher deductibles, changing the way one does business that helps avoid the possibility of loss. If you consistently use the Loaner Test Drive form (available from OIADA) when customers drive your dealer cars, you are attempting to transfer the risk of a claim to the customer and his insurance rather than the dealer policy.

Another way to reduce risk is DEFENSIVE DRIVING. So many times when accidents are reported to us, we hear "well I had" or "so and so had the right of way". In many instances if we would have only been paying a little more attention the accident could have been avoided... Being right may not always be the right decision. We see people being "RIGHT" and some of the time they are "DEAD RIGHT".

This is a good time to refresh and mention again that cell phones are a distraction while driving. We can find all kinds of statistics that are "pro" or "con" when it comes to cell phone use. If we are talking on the cell phone while driving, we are being distracted. If you have to use your cell phone while driving, keep your call as short as possible. Pull over and talk. This is particularly true if you are experiencing other distractions such as bad weather or traffic. Consider purchasing a hands-free or voice activated phone. A new law will be going into effect in California, making it against the law to hold and talk on a cell phone while driving. It is only a matter of time and laws in California are enacted in Oregon.

School zones and construction sites are areas often just taken for granted. We need to pay particular attention to the speed limits and watch for our little ones. New laws regarding school zones are now in force. Kids often are day dreaming and not always attentive and they just may appear somewhere other than the "crosswalk". Just because we see the sign that says "fines double in construction sites" doesn't give us the right to drive the speed limit. We still have the responsibility to get through the construction site without having an accident.

As we get older, night driving may start to impair our vision. A 50 year old may need twice as much light to see as well as a 30 year old. As we age, our pupils don't allow as much light to enter the eye and our retinas do not respond as quickly as when we were young. Make sure your windows are clean both inside and outside and your wiper blades are in good shape. If you smoke, possibly refrain from smoking inside your car, particularly at night. Avoid glare by not looking directly into the lights from oncoming traffic.

Winter months bring on wet and icy weather conditions -- Again more reason for defensive driving. Just because we have a certain speed limit or even green light, doesn't always mean proceed. The person coming slowly down a snowy hill may not be able to stop at the intersection that has the control signal. A truly defensive driver will do what needs to be done to avoid being hit. Make sure your vehicles are equipped for winter driving. Check anti-freeze, wiper blades, condition of tires and snow tires and carry chains.

Defensive driving doesn't always mean doing what the law allows, it means operating your vehicle within the law. Defensive driving is just another form of INSURANCE. It costs nothing and SAVES LIVES—maybe your own!

Hecht and Hecht Insurance Agency, Inc. is a full service insurance agency operating from Portland Oregon. We serve dealers throughout the Northwest and are the agent of Record for the Oregon Independent Auto Dealers Assn. We can be reached at 1-800-285-1773 or locally 503-288-6371 fax 503-288-6374 or email info@hechtinsur.com

READING & RESPONSE FORM
OIADA CONTINUING EDUCATION PROGRAM

ARTICLE:

QUESTION

LLR The Damaged Vehicle Information Act would direct the NHTSA to issue a regulation requiring all persons who terminate a contract related to a motor vehicle due to flood, water damage, collision, fire, theft recovery, etc., that affects the fair market value to disclose the VIN and other vehicle information that would determine the reason for the termination of the contract.

(1) True _____ False _____

DMV DMV now offers dealers the ability to submit their 165 and 6890 notices electronically.

(2) True _____ False _____

Kelly's Korner The Privacy Policy stipulates that businesses who collect information about their clients / customers / consumers must provide notification about what they will do with the information supplied to the business.

(3) True _____ False _____

DMV Junk Certificates indicate that the vehicle is unsafe and can no longer be titled or operated on that state's public roads or highways.

(4) True _____ False _____

LLR Sellers and telemarketers have until January 7, 2007 to revise their practices to discontinue calls that deliver a pre-recorded message to consumers with whom the seller has an established business relationship and to implement practices that conform to the current safe harbor.

(5) True _____ False _____

Hecht & Hecht If you consistently use the Loaner Test Drive form when customers drive your dealer cars, you are attempting to transfer the risk of a claim to the customer and his insurance rather than the dealer policy.

(6) True _____ False _____

LLR All dealers are well advised to review marketing materials before they are sent out on behalf of the dealership, unless a third party creates it for you.

(7) True _____ False _____

I certify to OIADA that I have personally read these articles in Squeaky Wheel Magazine issue **Jan. 2007**
Jan. 2007

Continuing Education Packet # 1-07

NOW DROP DOWN AND SEE HOW YOU DID!

READING & RESPONSE FORM
OIADA CONTINUING EDUCATION PROGRAM

ARTICLE:

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