

16 for '16

2015 was the best year for the motor vehicle industry since the recession of 2008-2009. Vehicle sales volume should stay solid through 2016. Unfortunately, major forces can choke robust business growth.

The largest factor is federal intrusion in business. Anti-business bureaucrats see this as perhaps their last year for some time for unfettered imposition of government regulations. Two major federal agencies in particular have dealers in their sights. The Consumer Financial Protection Bureau and the Federal Trade Commission are likely to take unprecedented actions this year that will affect dealers.

The other factor is increasing interference from franchisors. While dealers have concentrated on restoring business, manufacturers have used the good times to concentrate on increasing control over dealers. Manufacturers are cutting dealer margins and using dealers' money for incentive programs to control dealers' facilities, advertising, personnel policies, and sales practices.

Here are sixteen issues to which you should give attention in 2016.

Recalls

The last two years have seen unprecedented numbers of recalls. Given NHTSA pressure on the manufacturers, recall volume is unlikely to reduce. Problems that previously may have led to campaigns or technical service bulletins now result in full scale recalls to avoid charges that the problems were not treated according to law.

Dealers have always been the ones to remedy problems and soothe the nerves of angry or concerned consumers. Given the publicity and governmental activity in recent years, dealers now face new obligations. Dealers have known for some time that if they have a new car subject to a recall, they cannot deliver it to a customer. There are some new, important best practices.

1. Fix open recalls on used cars you can, and disclose when you cannot. There is no federal requirement to ground a used car with an open recall. The legislation in the last session of Congress to do just that was defeated. Nevertheless, it is a best practice to check the recall status of every used car in stock. If there is a recall affecting a vehicle of the brand you handle, repair it. This will provide business to your service department and avoid potential liability issues of selling a vehicle with a problem you could have remedied. If you cannot remedy an open recall, because there is no fix or it is not a brand you sell, disclose that to a buyer.
2. Check for recalls on customer vehicles in service. At the end of last year, the federal government enacted a massive transportation bill. It included a mandate for a dealer to check for open recalls on vehicles brought for service if its franchisor requires it. This requirement goes into effect this summer, and the government is expected to issue regulations to provide guidance on many open questions. Get ahead of the game. It is a best practice to check for the open recall status on all vehicles of your brand brought in for service.

Government Intrusion.

The Obama administration has provided a white board for many policies activist bureaucrats have for years sought to impose on businesses. Since many feel this may be the last year they can act on their bucket list, 2016 will likely bring an unprecedented regulatory onslaught.

3. Personal liability for business wrongdoing raises the stakes. The U.S. Department of Justice has announced that it will actively search out individuals responsible for business wrongdoing. Although the DOJ ignored this policy in its settlement with GM over the ignition switches where no individual was indicted, DOJ has fired a shot across the bow. And many states are likely to follow. Potential personal liability makes it more important than ever to understand the dealership's legal obligations of the business and to implement compliance policies.
4. CFPB will continue its attack on dealer finance participation. The industry has pushed back hard against the Consumer Financial Protection Bureau's nearly three year old attack on dealer reserve. However, the CFPB has shown no evidence it will back off from its attempt to minimize dealer income from the sale of credit. Dealers can expect to continue to receive warning letters from finance sources concerned about the CRPB's March 2013 policy announcement. The best defense is a fair lending policy that establishes a fixed starting point for all credit discussions and permits deviations only for non-discriminatory reasons. A dealer who has such a policy can respond to a letter from a finance source it has a policy in place to protect against discrimination.
5. CFPB will increase scrutiny of F&I Products. The next extension of the CFPB's power will be over F&I products and services in finance paper purchased by finance sources under its jurisdiction. CFPB will contend that it can regulate all aspects of credit transactions, and it has already

commenced oversight of some finance sources on pricing of F&I products. End unfettered discretion on F&I product pricing. Have a set pricing matrix for all F&I products. Have a policy in place permitting deviations from the set prices only for non-discriminatory reasons, much like a fair lending policy.

6. CFPB is attacking predispute arbitration provisions. The CFPB has commenced its attempt to gut predispute arbitration provisions used by many businesses, including auto dealers. The Bureau has submitted to small business review its proposal to prohibit use of class action waivers in arbitration provisions. The CFPB can only impose this if supported by a Congressionally mandated study. There are serious questions whether the studies to date support the CFPB proposal, especially for disputes over large balances, like those resulting from sales of motor vehicles. Businesses will continue to make their case in an upcoming rulemaking, but there may be changes on the horizon in the most effective weapon dealers have to limit frivolous, but expensive, class action lawsuits.
7. Federal Trade Commission advertising oversight will continue. To date, the FTC has used its increased authority and budget to regulate motor vehicle dealers to police advertising. That will continue in 2016. Train those in charge of advertising about FTC hot buttons.
 - When advertising credit or leasing, use follow on disclosures when you use a trigger term as required by TILA and the Consumer Leasing Act.
 - Avoid bait and switch advertising. Advertised vehicle prices net of incentives or rebates of limited availability should disclose clearly and conspicuously the qualifications for the programs.
 - Zero money down leases must truly require no up-front dollars.

- Advertising on the internet is especially targeted by the FTC, and it is likely to turn more attention to ads visible on portable devices to be sure disclaimers are readable.
8. Look out for FTC action on spot deliveries. The FTC has been investigating spot delivery practices since 2012. In 2016, the FTC may well take action. A dealer that enjoys spot delivery protection under state law should carefully follow the law. If there is no state statute, a dealer should avoid the practices that can lead to criticism.
- Use a clear and understandable disclosure of the conditional nature of the spot delivery.
 - If the vehicle is retaken, return the trade and the downpayment.
 - Do not charge for use of the vehicle while it was in the hands of the customer.
 - Retake vehicles in strict compliance with the law.
9. The FTC will increase its criticism of and pressure against state franchise laws. For years, the agency has been critical of state franchise laws. Many of the FTC's criticisms are based on false information and assumptions such as dealers add significantly to the vehicle costs. (In fact, dealers save customers money because retailing from licensed facilities, servicing warranties, and performing recall repairs would have to be undertaken by a manufacturer anyway, and dealers perform those functions more efficiently.) The FTC has scheduled in January a workshop concerning various aspects of motor vehicle dealer and manufacturer franchise issues. It has also announced that it is considering surveying buyers of vehicles on credit. Dealers should be prepared to talk about how their investments and hard work have been the reason for the success of the US auto business whenever they have the chance to address these issues in newspaper editorial pages, speeches to community groups, and lobbying legislators.

Privacy and Identity Theft.

Security of their personal information is top of mind for most of your customers. Make sure it is top of mind for you.

10. FTC will increase its emphasis on data protection and prevention of identity theft. In 2015, the FTC won a significant victory in federal court. The decision allows the FTC to charge a business with an unfair practice for failing to protect private customer information.

- Make sure that your program under the FTC's Information Safeguard Rule is updated regularly. The FTC rule requires this, and you want to make sure that the customer information which is an important part of the goodwill of your business does not walk out the door with departing salespeople.
- Your policy under the FTC Red Flags Rule must be updated annually. Your dealership will be the biggest loser if an identity thief drives out with a car for which you are never paid.

11. Protect your data from supplier overreach. Information is not only lost because of inadequate protections in the dealership. Many suppliers seek open access to a dealership's computer system. They will sign an assurance they will not misuse non-public personal information of customers because that is required by the FTC.

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However, data on vehicle sale prices, consumer preferences for vehicles in your area, service patterns, and similar information can be valuable even without customer identifying information. Carefully review agreements with suppliers to ensure that your information is used only for your account. Do not agree to open access to your DMS. Push selected information necessary to service your account.

Franchise Relations.

The franchise system is under constant attack. Lead suppliers, new technology entrants, and even the government would like to break down the franchise system. However, franchised motor vehicle dealers are the most important reason for the success of motor vehicle manufacturers for the last century. Dealers take the risk of capitalizing their businesses, buying vehicle inventory and parts before they even sell them, and being on the front line on sales and service of vehicles for consumers.

12. Insist on proper labor and service reimbursement for warranty work and recall work. Warranty work may have decreased, but repairs to remedy recalls have increased dramatically. If your state law requires retail reimbursement for labor and/or parts you may leave tens, if not hundreds, of thousands of dollars on the table in parts and service gross profit if you do not insist on that.

13. Protect your rights in audits. Manufacturers are required to and should pay for warranty and recall service that the dealership performs. Manufacturers have reduced gross margins over the years, and have used dealer money to fund incentive programs to control dealer business practices. If audited, fight for your money. Challenge the auditor's findings. Use your franchisor's internal appeal process. Use your rights under state law to challenge a chargeback that you feel is improper.

14. Protect against exports chargebacks. Manufacturers continue to impose chargebacks for sales of vehicles that wind up being exported. . Know your customers and do what is necessary to prevent exports. Use the manufacturer's known exporter list. If the manufacturer has issued due diligence recommendations, use them. Many states have passed laws to permit chargebacks only when the dealership knew or should have known that a vehicle would be exported. If a vehicle is exported despite your best efforts, and state law protects your rights, challenge the factory's improper chargebacks through the available state process.

Administrative Issues

15. What Is Your Policy on Doc Fees? A recent case in South Carolina has brought prominence to doc fees (which may be called processing fees or some similar term under your state's law). Plaintiffs' lawyers are looking for reasons to challenge doc fees. If your state has a statute specifically permitting a doc fee, follow the law carefully. If your state does not have such a law, then determine and implement a reasonable price for the items for which the doc fee is designed to compensate you.

16. Comply with the federal Fair Labor Standards Act. The Obama administration has made FLSA enforcement a priority.

- The government assumes that everyone who works in your dealership should be an employee. Make sure the folks you treat as independent contractors are truly in business for themselves.
- Make sure every non-exempt employee earns minimum wage for all hours worked.
- Make sure every employee entitled to premium overtime earns that.

2016 will be another strong sales year. Your challenge will be to protect your business and hold onto what you earn. Good selling in 2016!