

12 for '12

2011 was a better year for car dealers, and dealers hope that business will improve in 2012. Despite continuing weakness in the general economy, customers are making their way to dealers' showrooms. There are a number of reasons for that, and barring some major disruption the improvements should continue throughout 2012, leading to enhanced dealer profits. The challenge for 2012 will be to protect your business and hold onto your profits. Here is a list of 12 areas to which you should give attention in 2012.

REGULATORY ISSUES

1. *Understand the regulatory atmosphere.* Washington is energized to regulate your business. Using enhanced powers under the Dodd-Frank financial regulation law enacted in 2010, Washington is intent on changing the relationship between consumers and the businesses that provide them credit. Even though new car dealers are exempt from the direct jurisdiction of the Consumer Financial Protection Bureau, dealers will still feel the fallout of actions by this agency because of CFPB's regulation of finance sources to which dealers assign retail installment sale contracts. The CFPB has been slow getting started because of congressional wrangling about oversight, but many of the agency's rules should go into effect in 2012.

The FTC was granted broader authority in the Dodd-Frank legislation to establish and enforce rules affecting dealerships, with F&I departments apparently the agency's main focus. In 2011, the FTC had three roundtable sessions to discuss rulemaking on auto dealer matters and what any proposed rules should cover. Dealers can expect the FTC to decide in 2012 what it will do. For now, however, the FTC is energized to take on dealer advertising. Advertising enforcement is

already at the top of the FTC list, and some dealers have received letters from the agency letting them know that unless they agree to sign a consent order to comply with federal advertising requirements, they will be sued. What interests the FTC? TILA advertising violations are at the top of the list and alleged deceptive advertising practices like the failure to disclose conditions to offers are also items of interest. State attorneys general know that advertising is at the top of the FTC's list, and they are stepping up their own enforcement of state advertising laws.

Review with your managers in charge of advertising and your advertising agency TILA advertising mandates, requirements that disclaimers on sale offers be clear and conspicuous, and your state advertising regulations. Internet advertising is an especially hot issue for the FTC and state regulators. Remember that your internet postings are just another form of advertising under the law. Make sure that those handling your internet content understand federal and state advertising requirements, and make it a point to regularly check your websites and social media for compliance.

2. *Be careful of bird-dog payments.* Because of the rise of on-line brokers, these payments are on the radar screen of state dealer licensing agencies. Under the laws of many states, dealer payments to unlicensed individuals or companies for sales of vehicles are illegal. These payments can subject a dealer to regulatory action. The fact that an on-line broker has a website and a major advertising budget does not change the law. Because brokers are usually not licensed, any enforcement actions will be taken against the dealers making prohibited payments, not the brokers receiving them. If a vendor tells you that its fee structure complies with state law, ask for evidence of that – written approval from your state licensing agency.



FRANCHISE ISSUES

3. *Your franchisor cannot refuse to renew you unless it has good cause.* New car dealers are experiencing increasing pressure by franchisors to control dealers' businesses. "Build the facilities we want; make them look the way we want; run them the way we want," are the themes of demands that dealers are receiving. To strong-arm you into agreeing that you will make changes, a franchisor may threaten that it will not give you a renewal agreement. That is an empty threat. A franchisor must have the same good cause to refuse to renew you that it requires to terminate you. And if you challenge a failure to renew through your state processes, you are entitled to a hearing on the non-renewal just as you would be for a termination.

Manufacturers are sometimes using non-renewal threats to pressure dealers to sign special agreements to take actions the manufacturer wants. Don't agree to short term or supplemental agreements with requirements that you cannot meet. By agreeing, you set a performance standard. If you do not meet the standard, you may very well prejudice your challenge to a termination. Sign agreements with your franchisor only with terms that make business sense and with which you can comply.

4. *Use your hard-won franchise rights.* State franchise statutes have improved over the years as dealers have worked hard to convince legislators of the need to level the playing field. Do not be afraid to stand up for yourself. Challenge franchisor threats and performance criticisms. A factory doesn't send these threatening communications because it is a kindly, tough-love practitioner. Often these communications are part of a process of building a file to support termination, to add another point, or to take some other action damaging to your business. If a manufacturer is threatening you or strong-arming you, answer every communication and explain why you are complying with your franchise agreement and state law. Make sure that the factory lawyers who review your file when they are asked to comment on the strength of a termination case against you understand the strength of your position. Most importantly,

manufacturers who threaten you and don't get answers conclude that you don't care, so why not send a termination notice? You care, and thoughtful responses show that.

5. *Protect your rights in a manufacturer's audit.* It is especially important to stand up for yourself in a factory audit. Manufacturers are counting on dealers' reluctance to challenge factory chargebacks to the point of ignoring state laws or making up fanciful excuses as to why the laws don't apply. Your state franchise laws do apply to factory audits, but you will only get the benefit of your state's protections in franchise audits if you demand that the manufacturer follow the law. Before a factory audit commences, review your state law, particularly how far back a manufacturer can go in doing its audit, and make sure that the auditor stays in bounds.

LENDER RELATIONS.

6. *Understand the lending atmosphere.* The market for dealer financing is getting better, and barring some unexpected economic disruption that trend will continue. Bankers and other finance sources have been looking at general categories of loan performance over the course of the recent economic troubles, and they are finding what dealers have told them all along: car loans perform better than any other credit category. People may not pay their credit cards or their home loans, but they will not fall behind on a car loan and risk losing their mobility. And despite the scare stories, no lender has lost money on floorplan financing simply because of the financial troubles of a dealer. The result? Lenders are finally realizing that car paper and dealer financing are excellent risks. That means that there are better opportunities to get your customers financed. That means that you may finally have some leverage when negotiating loans for your business. Use that leverage to get better rates, to eliminate or limit personal guarantees, or to eliminate or limit cross-company guarantees and cross-default agreements. You may not get everything you want in your negotiations. But for the first time in several years, it's time to start the process.

7. *Don't be afraid to challenge chargeback*



demands. Despite the general appetite for more car paper, some finance sources are looking for ways to offload losses that they suffer when customers default. There has been an upsurge in demands that dealers repurchase customer retail installment sale contracts for a violation by the dealer of the representations and warranties that accompany the assignment of RISCs. Often these demands are based on a lender's overly aggressive or unjustified position about the dealer's alleged breach. Know what your indirect dealer agreement says that you are representing or warranting about each deal that you assign, understand the lender's claim, and challenge any finance source that seeks to improperly have you take the loss from a customer default.

8. *Understand what you are agreeing to in indirect finance agreements.* As further fallout from the Dodd-Frank financial reform law, finance sources may find themselves facing increased regulation of the retail installment paper that they buy from your dealership. Finance sources are likely to alter their indirect finance agreements with your dealership to push down on you as many of the requirements as they can. Make sure that you are vigilant. There may be some changes that you cannot avoid since they are required by law. But you will want to make sure that your finance sources are not using this process as an excuse to advance their own positions against you beyond that required by federal law. Be on the lookout for these revised agreements and seek legal assistance. And whenever you sign up with a new source, review the contract carefully. If there are representations and warranties that will accompany the paper that you assign that are broader than they should be, negotiate those.

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CUSTOMER ISSUES

9. *Make sure that your documents provide you the latest protections.* Plaintiffs' attorneys have been working to turn dealers' documents against them. Whether it involves an allegation that an integration provision in a retail installment sale contract eliminates all other agreements and disclosures signed in connection with a sale or an allegation that the documents don't comply with state or federal law, plaintiffs' attorneys are going over your deal documents like they never have before. Dealer paperwork is very complicated given the numerous federal and state laws and regulations that apply. If you have had your deal package for some time, it may be time for a review. Too often, dealers pull together paperwork from a variety of sources to put together a deal package which may have forms that are out of date, inapplicable in your state, or even improperly copied so that they are not legible. Make sure that you take maximum advantage of protections available to you in your form paperwork.

10. *Understand that pre-dispute arbitration provisions are under attack.* In the spring of 2011 dealer attorneys thought the issue of pre-dispute arbitration was finally settled. In a decision known as *AT&T Mobility v. Concepcion*, the United States Supreme Court overruled California's invalidation of a pre-dispute arbitration provision because the class action waiver was improper. The Supreme Court ruled that a state could not alter the strong presumption in favor of arbitration under the Federal Arbitration Act by a ruling that pre-dispute arbitration is unconscionable. Rather than settling the issue, however, this has only sharpened the divide.

Many courts that are opposed to pre-dispute arbitration have been looking for ways to continue the assault on these provisions in agreements despite the U.S. Supreme Court's opinion. They have seized on a portion of the Supreme Court opinion suggesting that litigants could still challenge an arbitration provision based upon state laws concerning formation of an agreement. Using this, courts in California and other states have

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continued to challenge the validity of pre-dispute arbitration agreements contending that because of unconscionable provisions there is really no meeting of the minds on the agreement.

In addition, in the Dodd Frank financial reform law, Congress granted authority to the government to change the Federal Arbitration Act's applicability in certain circumstances. Given these developments, pre-dispute arbitration of consumer issues is now under attack more than ever. Dealers who have chosen to utilize pre-dispute arbitration provisions in their agreements with consumers should not abandon those, but it would be foolhardy to depend heavily on pre-dispute arbitration provisions as an effective road block to substantial liability in the future.

11. *Make sure that you have a complete procedure for handling every complaint.* With pre-dispute arbitration under fire, you have to be sure you are doing what you can to head off lawsuits. One thing is common among all dealer defendants in class actions and other serious lawsuits – at some point they say they wish they would have handled the problem early. Learn the lessons that many dealers have learned the hard way. Major consumer lawsuits almost always result from complaints that should have been handled when first received by the dealership. The best preventative measure against lawsuits is a complete complaint handling system in which every complaint to your dealership is logged in, you as dealer or a senior manager of the dealership track and supervise the handling of every complaint, your managers are trained and empowered to handle complaints and know your instructions to solve problems, and you follow up to make sure every complaint has been handled and that the customer is satisfied. Stop problems when they arise through a complete complaint handling process.

OPERATIONS

12. *Make sure that your DMS agreement works for you, not for the DMS provider.* Many dealers in 2011 were shocked to hear that online brokers may be using dealer information to publicize “transaction prices” for vehicles. Others were shocked to learn that their DMS provider would not allow outside

vendors to have access to the Dealer's DMS system to provide services for which dealers contracted. Dealers must remember this when they next shop for a dealer management system. Dealers spend a lot for these capabilities. It is essential to the operation of their businesses. They must get what they want, not what the computer company wants. So how does a dealer do this?

- Consider using a consultant. There are people who know a great deal more about purchasing a DMS system than you do.
- Use a request for a proposal. Tell the computer vendors what you want and have them bid on your terms.
- Carefully review the agreement that you are about to sign. Are you getting what you want?
- What does your DMS agreement provide about customer information? Who owns your information? Who has the right to use your information? And for what purpose?
- Make sure the system will do what you want it to do. Are you able to generate your own reports? Are you able to give vendors access to your information so that they can provide it?
- Make sure that your DMS agreement protects you. How do the boiler plate provisions affect you? Where can you sue or be sued? What state law applies? What warranty and performance protections do you have? What limitation on the DMS provider's liability is in the agreement?

Buying a DMS system is a complicated transaction for which dealers often require expert assistance and solid legal assistance. Use the resources

Purchase [Auto Dealer Law: the Definitive Legal Guide to the Purchase, Sale, and Operation of Vehicle Dealerships](http://www.autodealerlaw.com) at **www.autodealerlaw.com**.