

2014's Top Twenty Legal Trends for Automobile Dealers

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1. The High Water Mark of the Regulatory Wave. (The Affordable Care Act (Obamacare) Leads the Charge. Economic/Regulatory Trends and Domestic Political Uncertainties Impact the Legal Rights, Strategies, and Decision-Making of Auto Dealers in America. What a Dealer Needs to Consider in a Time of Regulatory Uncertainty.) (4)
2. Dealer Legal Strategies in a Year of Remarkable Sales Rebound, Despite Political Rancor and Uncertainty. (Increased Retail Sales Inspire Auto Franchisors to Push Their Dealers Even Harder; Coping with Franchisor Strategies: Revving up on Facilities, Pressures, and Incentives; The Two-Tiered Pricing Challenge; Punitive Actions: "Everyone Needs to be Above Average.") (1) and (2)
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NOTE: 2013 rankings are in parentheses; NR (Not Rated in 2013).

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2014's Top Twenty Legal Trends for Automobile Dealers

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On the legal front, 2014 will be an especially active year for franchised dealers. More than ever, dealers are coping with a new bevy of regulatory requirements and hurdles. This year will break regulatory records. Paradoxically, the regulatory morass, which triggers the year's #1 trend, has not deterred a recovering economy which, for dealers, has been about as good as it gets – a reality that establishes Trend #2.

Each year brings promises from office holders and candidates seeking office that *they* will champion a rollback of regulatory growth and complexity. A pending House bill is calculated to reign in executive regulation, but the Senate will not consider it.

There is now almost universal recognition that America's abundant red tape at all levels of federal, state and local government adds administrative, capital and labor costs to nearly all privately and publicly owned businesses. Statutory and regulatory obligations, compliance monitoring and fulfillment, and oversight can deter start-ups, stunt the growth of existing businesses and suppress hiring and wage levels. Notwithstanding bipartisan pledges to tame regulatory growth, the reality is that, each year businesses see more, not fewer, regulatory obligations.

This trend, #1 for 2014, poses a profound, prominent and still growing headache for America's car dealers, even as their overall profitability is soaring. According to the Competitive Enterprise Institute, annual regulatory compliance costs to the American economy in 2012 amounted to \$1.8 trillion! It wasn't so long ago that the entire federal budget was less than that.

For 2014 (and maybe 2015) the elephant in the regulatory room is the Affordable Care Act ("Obamacare") for which the effective date of the "employer mandate" has been delayed until 2015.

The stunning, massive opening failure of the *Healthcare.gov* website debut and the aftermath accentuated the bitter debate over, not only that law, but the perceived federal regulatory juggernaut in general.

We are mindful of the many other agencies, laws, and regulations that fill the pages of NADA's mind-bending publication, "The Regulatory Maze." For many, the Obamacare start-up debacle became a poster child for both regulatory overreach and perceived government incompetence in traditionally well-run private fields. From environmental issues to workplace rules to retail sales practices, dealers are besieged by duties or roadblocks that arguably cause a triple whammy: (1) shrinkage of bottom lines, *and* (2) added expenses for nothing of value to the business, *and* (3) the diversion of management time from more productive tasks. The unpredictable introduction of game changing rules also creates marketplace uncertainty – a further deterrent to investments and hiring. And dealers need to stay informed of state and local requirements, as they continue to grow as well. The regulatory phenomenon is 2014's Number One trend for good reason.

But there is good news – really great news for dealers – too! In fact, the #2 legal trend that stems from excellent sales results, profitability, and how they push factory incentives could arguably be #1. The regulatory issues, however, took first place only because they impact *every* dealer *every* day. As of the start of 2014, the *economic* and *profit* headlines for America's franchised car dealers are very positive. The overall mood of U.S. dealers has gone from sour to sweet in the last few years. For dealers, the recession has faded into the rear view mirror. Automotive retailing is on a roll, and new car sales are tallying

pre-recession numbers and even higher than that. 2013 was the best retail sales year since 2007. Year-over-year sales increases have climbed at a remarkable 10% annually for four straight years. Many industry observers forecast more sales success for 2014, and some see the possibility of 17,000,000 new unit sales in 2014 or 2015. World-wide, new car sales are pacing at a record 100,000,000. Even conservative forecasters are saying that increases in America may decelerate to "normal" growth – but growth nevertheless.

With the decrease in numbers of dealer rooftops from pre-recession days, the average number of unit sales per rooftop (as of late 2013) is at record levels (over 850). NADA's "dealer optimism index" is, understandably, through the roof.

When new unit sales soar, so do the profits in all profit centers of dealerships, including F&I, used cars, and service and parts. Dealer profitability is way up, as are goodwill values. Buy-sells are increasing in number, as well as prices.

These rosy statistics trigger law-related developments for 2014. Some of those are not so rosy. Franchisors never miss an opportunity to push dealers to

"improve" their (*i.e.*, the franchisors') competitive standing, and retailing successes have clearly encouraged carmakers to demand more from their dealer networks.

At the same time, as stated above, the numbers are energizing buy-sells, and pushing dealership goodwill values higher.

Tesla, a big-boy newcomer, has crashed the franchised dealer party, and the ongoing legal and legislative brawls will be of great interest. The fire incidents notwithstanding Tesla, as a non-franchising automaker, is here to stay for at least a while.

In good times or bad, the consumerism trend brings customer legal actions, as well as state and local governmental inquiries and enforcements. This trend is one to be wary of. And so on. One prediction that is always right is that there will be legal issues galore for dealers in 2014.

The ranking of the top twenty legal issues/trends is based on three factors: 1) the likely number of dealers affected; 2) the probability of change from the current situation; and 3) the seriousness of a trend/issue impact on the lives of dealers.

1. *The High Water Mark of the Regulatory Wave. (The Affordable Care Act (Obamacare) Leads the Charge. Economic/Regulatory Trends and Domestic Political Uncertainties Impact the Legal Rights, Strategies, and Decision-Making of Auto Dealers in America. What a Dealer Needs to Consider in a Time of Regulatory Uncertainty.)* (4)

If there are any franchised automotive dealers who have *not* been plagued by the growth of regulatory obligations, I have yet to hear from one. Although it is true that U.S. businesses in general are weighed down by such obligations, it is hardly disputable that franchised dealers across the country must answer to more regulations and more regulatory agencies than almost any other kind of retail business. See Trend #6, and my checklist for a comprehensive list that includes regulatory requirements.

2014 is a critical “mid-term” election year. Every two years, every seat in the House and a third of the Senate will stand for election. Many (most) seats are “secure,” but in the contested races, questions about Obamacare and other federal legislation and regulations will be front and center. An enduring criticism aimed at the Obama administration is an assertion that it turns a deaf ear to the small business community’s complaint that it is drowning in a sea of ever-growing substantive requirements along with associated administrative red tape, generating added cost – often with little or no discernible benefit. Even when an enactment touts a specific purpose of *reducing* such burdens, the law, in practice, can perversely *increase* the administrative duties and expenses of affected businesses. See L. Gordon Crovitz, “A Red-Tape Turnoff For Startups,” *The Wall Street Journal* (Sept. 30, 2013).

Although the administration has lauded Obamacare as an economical and just solution to a multitude of health care problems and deficiencies, many businesses are recoiling from anticipated costs and regulatory obligations. Critics point out that such a massive legislative undertaking guaranties that there will be follow-on regulatory action *every year*. The statute itself is so long and complex that virtually no one in

Congress read it before its passage (or even later). The tens of thousands of regulatory pages, with many more to come, make Obamacare a lawyer’s dream and a user’s nightmare. As of late 2013, those regulatory pages totaled *30 times* the pages of the actual legislation.

Early implementation issues with an internet rollout debacle prompted admission of ineptitude and apologies. The “fixes” remain ambiguous and confusing. Some critics are challenging the administration’s many changes to the law as well-publicized difficulties mounted.

Problems, including fraud and security, may be multiplied as calendar year 2014 proceeds. A major part of the ACA – the “employer mandate” – was delayed until the beginning of 2015, and now the guidelines for the individual mandate are anything but clear. Any review of the compliance requirements reveals a sea of complexity as well as consumer cost that will cause angry reactions from those adversely affected. If, as early predictions suggest, high number of employers drop their healthcare programs in 2015, millions of affected employees could create considerable confusion and dissatisfaction in the workplace. Many employers will make their decisions to keep or not keep company health plans by Summer 2014. For dealers who provide healthcare programs, 2014 and 2015 will continue to be challenging.

As constructed, Obamacare affects *all* employer-sponsored healthcare (not just the mandatory coverage for companies employing 50+ people). That’s because *all* insurance plans must meet coverage thresholds.

Obamacare is hardly the only federal regulatory colossus; the requirements of Dodd-Frank, and numerous other regulatory initiatives monopolize way too much of a dealer’s time. Although dealers “won” exemption from jurisdiction under the new Consumer Financial Protection Bureau (CFPB), established pursuant to Dodd-Frank, we are witnessing efforts to bring dealers into the fold when they prepare financial papers on behalf of lending institutions for their customers. At present, car dealers are, at least in theory, impacted only “indirectly,” but some advocates want an amendment to allow the CFPB’s *direct* regulation over dealers.

Even without such changes in the law, dealers are already seeing CFPB inquiries to lenders about dealership F&I practices and allegations of discriminatory lending practices. The CFPB uses its authority over large lending institutions to drill down into dealership practices in bringing consumer borrowers to those lenders. In particular, the CFPB is focusing on what they see as the “disparate impact” of lending practices on minorities. If there is an alleged disparity in the cost of credit to minorities, the CFPB says there is liability, even though there is no evidence of any intent to discriminate. The clear CFPB goal is to coerce a flat fee for dealers in their service in assisting with customer financing (although the CFPB denies this). This is a battle royal, with the NADA and others accentuating the flaws and omissions in the CFPB’s position.

The EPA and FTC continue contributing to dealers’ worries and regulatory tasks. Workplace rules and ERISA obligations rank high on dealer must-do lists.

Watch for more FTC actions against advertising practices, spot delivery, and other “infractions.” The FTC views advertising violations as “low hanging fruit,” per NADA’s regulatory guru Paul Metrey. Deceptive price quotes are particularly inviting to regulation enforcers. FTC consent orders can be onerous. As well, state and local agencies monitor and target dealers, as do class action plaintiffs’ lawyers.

It’s certain that 2014 will be a year of record regulatory attention to details by dealers. Unfortunately, there’s currently every likelihood that 2015 will continue this trend.

2. Dealer Legal Strategies in a Year of Remarkable Sales Rebound and Profit, Despite Political Rancor and Uncertainty. (Increased Retail Sales Inspire Auto Franchisors to Push Their Dealers Even Harder; Coping with Franchisor Strategies: Revving up on Facilities, Pressures, and Incentives; The Two-Tiered Pricing Challenge; Punitive Actions: “Everyone Needs to be Above Average.”) (1) and (2)

For most American franchised dealers, 2013 brought a year of sales celebration. And 2014 looks great from here as this article goes to press in January 2014. Sales forecasts were frequently revised up-

wards, as new unit sales soared to an estimated total of nearly 15.7 million for the year. Of course, new car sales by themselves don’t create banner years. For most dealers, new car sales are only a part of the profit picture. But exploding retail sales always carry with them even stronger profits in other profit centers: used cars, F&I and service and parts. Dealership goodwill values have steadily climbed since the Great Recession. Dealers are happier than they’ve been in six years, and they should be.

At the same time, auto franchisors seek to capitalize on profitable times by persuading (or coercing) dealers to take actions that the carmakers deem appropriate for retailers. Sometimes such factory initiatives are modest, but often, the factories look for big-ticket investments by their dealers, such as relocations, renovations, and brand exclusivity and imaging. They also frequently push harder for more sales, and the incentive programs can be both imaginative and expensive.

Most franchised dealers focus on their retailing mission. Dealers sell and service cars; they want to concentrate on the core business. That is, in terms of their time allocation and daily efforts, the 500-pound gorilla – the franchisor – is not a dealer’s main priority. Until it is.

The carmakers want to sell cars, too. But they have a separate focus – on interbrand competition. And they often think that their road to success is through their retail networks who, they say, need urging from the top – to renovate, to relocate, to upgrade, to train; *etc., etc.* Interbrand duelling is a negative; exclusivity is a key goal.

The 2012-2013 surge of factory initiatives is continuing in 2014.

For now, the incentive trend will remain fast and furious. Carmakers compete creatively and ingeniously to bring retail customers to their franchised dealers, and the incentives to dealers frequently drive their retail strategies. Scores of programs among the many different brands can also create competitive and legal quagmires. “Two-tiered pricing” has been a heated issue for years, and will remain so in 2014. Basically, the “two-tiered” concept is simple. When factories

reward dealers with cash incentives that are based on sales thresholds, that scenario means that the “best performing dealers” will enjoy a per-unit retail advantage over those who do not meet the same thresholds. The factories do not see this result as unfair or illegal, but rather, as legitimate incentive/inspiration to push retail performance. Dealers who do not satisfy their thresholds for incentive payments believe that they are victims of discriminatory pricing. Expect more legal controversy on this issue in 2014.

In addition, the auto franchisors try to take advantage of profitable retail years by pushing their wishlists to the limit. In good times, such as we are now enjoying, dealers may be more receptive to investing in facility improvements and relocations – not to mention brand exclusivity and brand imaging. Of course, franchisors almost always incentivize such dealer investments with more allocations, or in some instances, payments toward facility improvements.

One area of franchisor coercion that has drawn ever-more criticism is the “everyone needs to be above average” policy. In communicating with dealers perceived as under-performing, many auto franchisors try to coerce “agreements” in which a signing dealer “agrees” to *minimum performance* of above average in sales penetration and above average in CSI.

Except for Garrison Keillor’s ingenious invention of the children of Lake Wobegone, it is statistically and mathematically impossible for everyone to be above average. Indeed, in the real world, there are usually about as many dealers performing above average (against a measurable threshold) as there are below average. Such coercive “agreements” should be deemed unlawful under most state franchise laws, because those laws generally require performance standards to be reasonable. In my opinion, a “reasonable standard” is one that is obtainable by all dealers being measured at the same time. An above average requirement negates any possibility that all dealers can be viewed as effective.

For some dealers, particularly those viewed as under-performing, despite the overall foreseeable profitability, 2014 could be a difficult year of coping with factory demands and strategies.

3. Consumerism (4)

We may be in a year of political uncertainty and regulatory angst, but the continuing consumerism trend is aided and abetted by regulatory growth. In areas of legislative agendas, consumerism, and class action lawsuits (to name a few), dealers are popular targets. It is difficult, if not impossible, for a dealer to stay out of the line of fire.

Nevertheless, some of the best performing dealers remind me that their best legal strategies are to try to avoid the kind of infighting that leads to potentially expensive and protracted dispute resolution. Sometimes, legal combat cannot be avoided, as when, for example, you are served with a summons and complaint naming your dealership as a class action defendant for some alleged technical violation of a provision in a consumer protection statute or regulation.

In at least a few states, consumer class actions still loom as a major threat. Although the case law dealing with consumer arbitration clauses that prohibit class action waivers remains in flux, it nevertheless is a sound practice to offer such clauses to customers. See Trend #9.

4. A Continuing Area to Watch: The “Fiduciary Relationship” (3)

In more and more disputes with their franchisors, dealers will include a claim for breach of fiduciary duty. There are now many dealer versus factory cases pending with fiduciary claims, and it remains to be seen whether courts will find that, in auto franchise disputes, auto franchisors owe fiduciary duties to dealers.

The basics of a fiduciary relationship are straightforward. It usually entails one party’s position of power, control, or authority of the other, and a reliance of the “lesser” party on the “greater” party’s trust and good faith. When there is such a relationship, the duties owed may be substantial. In my opinion, the established control, power, and authority of automakers with detailed discretionary items in the dealer agreement, make a strong case for dealers.

5. *Involuntary Franchise Terminations, Termination "Threats," Brand "Withdrawals," "Pressured" Buyouts, Financially-Driven Resignations, Consolidations, and Rights of First Refusal.* (5)

Of the actions taken by auto franchisors, none inspires more dealer trepidation than the prospect or threat of involuntary termination, except, of course, the actual delivery of a termination notice. From an anecdotal observation, it seems that both threats of termination and actual notices are on the rise. Sound dealer practices in sales and service are always the best medicine, but when faced with factory adversity, dealers *must* respond promptly and responsibly.

6. *Tesla and "The Factory Store" Issue.* (NR)

This is a battle that will persist for a while, maybe quite a while. Tesla, of course, is a non-franchise brand. It aspires to continue operating (at least for now) solely with company-owned retail outlets. To the surprise of many, it has enjoyed early financial success, and a good bit of legal triumph as well – its loss in Texas notwithstanding. The product has (so far) been well received, and dealers would love to see the Tesla brand in the franchise mode. Maybe that will happen, eventually. For now, the fight continues.

Unexpectedly, Tesla has had to confront some serious product issues, most especially three fires in a five week period in 2013 in Tesla Model S vehicles.

7. *Coping with Daily Challenges of the Law: The Legal Audit Checklist.* (6)

I have a standing invitation to dealers who have an interest in my annually updated checklist. It's a practical tool for a self-audit of legal requirements. On request, we will email it for free to anyone who asks.

8. *Buying and Selling Dealerships: Higher Values in Times of Higher Profitability. Factory "Stealth" Conditions; Right of First Refusal: The Threat.* (12)

Buy-sell transactions that closed in 2013 increased by 200% over 2012, according to the Presidio Group. And there is no sign of a slowdown. In addition to the

increased *pace* of sales, multiples and sales *prices* are on a sharp upward trajectory, too. Some luxury brand goodwill numbers (*e.g.*, BMW, Lexus, Mercedes) have been off the charts. Look for even more buy-sell activity, with rising goodwill values, through 2014 and 2015.

At the same time, the franchisors are taking discerning looks at pending deals. Watch for battles over exercises of rights of first refusal, and possible gimmickry in conditioned approvals and letters of intent.

9. *Alternate Dispute Resolution (ADR).* (7)

This trend remains a perennial top issue for good reasons. Courts have weighed in on dealers' ability to include arbitration in agreements with retail buyers and lessees. In general, it's a good idea to include an arbitration provision in the agreements with consumers. That said, it is critical to make sure that the provisions are both fair and conspicuously disclosed. The terms should provide that the customer cannot combine his or her dispute with others, including class actions.

10. *Customer Satisfaction: CSI vs. Reality.* (17)

CSI is – and will continue to be – one of my pet peeves. This is because the statistics and "scores" associated with CSI cannot withstand scientific scrutiny. I have studied and written about the fallacies of CSI over many years, yet auto franchisors continue to push CSI as a meaningful test for dealer performance. The conceit is that the various measurements from very subjective "surveys" reflect a true representation of real world "customer satisfaction" derived from customer experience with a given dealer.

Nevertheless, the industry perception trumps reality. CSI is – and will remain – an enduring part of dealer performance measurement.

11. *Taxes* (8)

For many, federal taxes are going up. Increases are in both the blatant and stealthy categories, but they are clearly costly for the target customer groups for car dealers.

12. Retail Reimbursement for Warranty Work and Parts (18)

Notable items in this long-standing issue are ongoing lawsuits brought in Connecticut and Florida by the Alliance of Automobile Manufacturers challenging, *inter alia*, the constitutionality of state warranty reimbursement laws. While there is no clear end in sight to this venerable nationwide controversy, occasional decisions in critical cases will be instructive.

13. Privacy Concerns and Identity Theft. (9)

We are firmly entrenched in a brave new world – one in which the conveniences of computer access and connection are tempered by the dangers posed by ingenious and aggressive predators. The multifaceted subject of data security is a growth industry – and a concern that should grab the attention of every dealer. The consequences of security breaches can be harmful and expensive.

14. Environmental Regulation Explosion (10)

For some activists, the “greening” of America is the nation’s first priority. For all of us, initiatives to develop more and more renewable and less-polluting energy sources affects products, lifestyle, and costs. In 2007, the U.S. Supreme Court ruled in *Massachusetts v. EPA* that carbon dioxide (CO₂) is a pollutant and that the Environmental Protection Agency has the power to regulate CO₂ emissions from new cars.

Most dealers are now accustomed to obedience to a multitude of federal and state standards and requirements in the environmental field.

15. Internet Marketing (11)

Among many phenomena associated with the internet is the huge increase of internet advertising by dealers, compared with other media. Per dealer, the percentage of internet expenditures went from 5% to 26% in the ten years spanning 2002 to 2012. This trajectory will continue, as consumer shopping and purchasing habits push the virtual marketplace further. It is foreseeable that, in a few years, more cars will be sold online than in face-to-face transactions. Even

now, a large majority of car shoppers do their preliminary searches online.

Inevitably, legal repercussions follow the commercial activity. Dealers are well advised to stay current with regulatory developments covering online business and advertising practices.

16. Audits of Incentive or Warranty Claims: Dealer Beware. (16)

Factory audits, of late, are more commonplace than anytime in recent years. This development is especially common in factory oversight of dealer compliance with various incentive programs. Franchisor rules tend to be wordy, and sometimes ambiguous. Dealers need to be cautious in their adherence to program rules that generate bonus monies. Auditors have tended recently to be aggressive in assessing chargebacks for even technical violations of rules.

17. Living with the Threat of Terror, Unrest, and Natural Disasters: Doing Business in an Era of Constant Vigilance. (13)

Dealers everywhere should have contingency plans for the most awful of events – like the terror that shut down Boston or a hurricane, tornado or earthquake. *See* Hurricane Sandy. Such plans do not need to be elaborate. They should include items like emergency call lists for employees, and a review of insurance coverage, including business disruption insurance.

18. Workforce Issues: Employee Rights and Benefits and an Activist NLRB. (15)

Each year, dealers seem to improve their record of adherence to applicable workplace laws and regulations. From issues of discrimination and harassment to wages and hours, most dealerships stay current and vigilant. Yet, it is especially important for dealers to make sure of their policies and procedures to address such issues when a worker complains.

Of course, healthcare is the dominant topic and it is discussed in Trend #1. In other respects, however, workforce issues remain prominent. Unionized dealer-

ships and those faced with unionization need to carefully heed a multitude of laws and regulations. Compensation disputes and workplace discrimination cases continue to be stressful and expensive events for many dealers. Every dealer needs compliance refreshers annually, and regular employee training to avoid workplace transgression is a must. Every dealer should have an up-to-date policy manual, signed and acknowledged by all employees.

19. Encroachment (Protest Laws) (19)

Strong, solid retail sales inevitably invite an uptick in efforts to relocate and add dealerships. It appears that 2013 saw its share of such network actions and it is likely that we will see more in 2014 and beyond.

20. Credit Landscape (14)

The credit picture for dealers is vastly improved since recession days and many, if not most, dealers have little to complain about with their floorplan lenders, as well as other debt obligations.

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