

17 for '17

Do you think 2016 was a tumultuous year? For car dealers, 2017 will make that look tranquil. Franchisors are threatening to evolve from vehicle manufacturers to mobility and technology companies, and state franchise laws are under attack. Tech companies say they want to be your suppliers but they also want your customer data and a share of your profits. With the transition to the Trump administration, dealership management may have to rethink compliance priorities.

Guiding your dealership through 2017 will require great care. Here are seventeen things to which you should give attention in 2017.

1. *The mobility revolution.* Franchisors are in an autonomous vehicle frenzy. One major manufacturer has already announced that it is transitioning to a mobility company, others wish to be seen as technology companies, and those with an eye to increasing Wall Street valuations are cloaking themselves as mobility **and** technology companies. What is causing the frenzy? Fear. The terror that they will be left behind by the revolution. Planners dream of an accident-free Uber/Lyft utopia where robot guided vehicles spend their days ferrying patrons from home to work to errands to social engagements and back home. Manufacturers are concerned that those who will actually buy vehicles but who will no longer drive them will be less interested in horsepower, handling, and the joys of driving. Vehicles will become commodities. It will be like selling refrigerators where the big question is whether ice delivery should be on the freezer door or in the freezer. Manufacturers are struggling with their roles in an autonomous tech future. Some believe (as we do) that the autonomous revolution is overblown. It will be years before technology is sophisticated enough, and drivers are trusting enough, to allow a computer to pick them up and take them where they wish to travel. But autonomy to a greater or lesser extent is coming. Just as manufacturers are struggling with how they will cope, dealers must do the same. It is awfully tempting for manufacturers to dream of controlling the distribution of autonomous vehicles directly, perhaps even with subsidiaries that own and operate them. Dealers must work hard to ensure they have a role in the distribution system for mobility **and** technology franchisors.
2. *The alternative energy evolution.* One manufacturer thinks it is on the cutting edge of all things automotive because it has adapted technology more than a century old – electric power – to deal with 21st century governmental imperatives. And it claims that only it can handle electric vehicles from design through manufacture through distribution through retail delivery through service. That is nonsense. A vehicle is a vehicle whether it is gasoline powered, diesel powered, hybrid, pure electric, or hydrogen fuel cell driven. Dealers independent of the factory are still the most effective and consumer-friendly distribution channel for them. Dealers must overcome the PR offensive lapped up by the media new age sycophants who don't much like dealers anyway. Dealers must be conversant in issues surrounding retailing alternative energy vehicles and be prepared to explain why they are the best solution for distribution.
3. *The online retail devolution.* "We can buy soap, shoes, and computers online, so why not cars?" the techies ask. The reason is that a vehicle is the most complex non-realty purchase for almost all consumers. It requires marketing, advertising, customer service, properly handling a customer's purchase transaction, providing for financing, selling ancillary products, valuing and handling trade ins, and titling the purchase, all while making sure customers are satisfied with the process.

Cars are not soap, shoes, or computers. Decades ago, state legislatures, concerned by consumer complaints of dissatisfaction by their largest non-realty purchase, enacted licensing laws to be sure dealers would have a physical presence to be there to respond to consumer dissatisfaction. Online companies wish to revert to the days where the retailer could simply disappear. Online selling will change the way you do business. However, just as dealers have adapted to other changes, they will adapt to online changes. They will still be the businesses most effective in serving customers buying and maintaining their largest non-realty purchase. The challenge for dealers will be to recognize the changes that online selling requires and control the online process rather than be controlled by tech companies or lose their businesses to invisible and unaccountable online retailers.

4. *Confront the increasing militarism of franchisors.* Many franchisors, operating from fear about their future in handling customers' transportation needs, want to control your business without accepting your risks. They want to tell you how to run the business in which you have invested your life. Dealers must remain independent. Has your manufacturer changed your market area to make it so large it gives the factory leverage by claiming you are sales inefficient? Is the factory reimbursing you for warranty and recall work unfairly? Is the factory threatening you? Protect your rights. Franchise laws exist for your protection, but only if you use them and challenge your franchisor when necessary.
5. *Support your trade association.* State franchise laws make the difference between a franchise you can own, protect and eventually pass to your heirs or sell and one subject to termination at will. There are many who would like to destroy the franchise laws. Today the challenge comes from Tesla, but it is just a stalking horse for many companies who want to deal with dealers only when it is convenient for them. State franchise laws are the most powerful tool dealers have to offset the imbalance in their relationships with franchisors. Keeping and expanding protections under state laws are essential. Support your state and local dealer associations. They are the only means

available for dealers to band together to protect themselves.

6. *Understand the compliance challenges of the Trump transition.* The Trump administration comes into power with the avowed purpose of reducing the bureaucratic obstacles the Obama administration increased that crippled small business. How will that play out on your day to day business? Most particularly, how will it change your compliance efforts? Unfortunately, some of what you have learned over the past eight years will change – just not all at once and not completely. Revising regulations and legislation take time. Government enforcement priorities will change, but private enforcement under many laws may not. Dealers must pay special attention to changing priorities, and compliance training must consider those.
7. *Expect changes to the CFPB...at some point.* The auto dealer industry wisely worked hard to exempt itself from CFPB jurisdiction. The CFPB simply took this as a challenge to do what it wanted anyway. Its attack on dealer reserve threatened to upend the industry. Its proposed regulation on predispute arbitration provisions threatened to affect the way small businesses protect themselves. There will be changes to the CFPB during the Trump administration. The question is when? Will Congress vote to turn the Bureau's single-director fiefdom into a commission? Will Congress pass legislation overturning controversial CFPB regulations and decisions? Will changes await President Trump appointing an anti-CFPB director to replace the present anti-business director when his term is up? During the next four years, the influence of the CFPB will recede, one way or another. However, do not abandon your Fair Lending program. Because of CFPB pressure on dealer reserve, dealers were encouraged to adopt a Fair Lending program. The most effective starts at a fixed spread over wholesale rates, with deviations for non-discriminatory reasons. The CFPB may not be in a position to actively enforce its anti-reserve philosophy, but private litigants can. A Fair Lending program helps compliance and productivity. Many dealers found that a mandated process to be used in every deal improves reserve penetration.

8. *Do not expect major changes in FTC priorities.* When the Dodd Frank financial reform act was passed, the FTC was given greater authority over motor vehicle dealers and a bigger budget to exercise that authority. It is the primary national enforcement agency over car dealer practices. Any changes to that will be incremental.

9. *Pay attention to advertising compliance.* The FTC has been most active in using its Dodd Frank power regarding advertising. FTC enforcement activities will continue. Your staff in charge of ads and your ad agency must understand the rules.

a. In finance advertising, understand trigger terms and the requirement for follow-on disclosures.

b. Understand what the FTC considers bait and switch, and avoid those tactics by clear and conspicuous disclosures.

c. When an ad appears too good to be true, it likely is. Regulators understand that. Too good to be true offers will attract regulatory attention.

d. Advertising sales of used cars with open recalls is the latest enforcement hot button. Do not advertise that used cars sold with open recalls are certified, or safe, or have passed multi-point inspections.

10. *Understand that the FTC regulates unfair and deceptive practices.* Avoid those whether it is unfair spot delivery tactics, offensive sales activities, or unreasonable behavior.

11. *Data protection will continue to be an FTC hot button.* There is no hotter issue for the FTC than identity theft. Make sure your compliance efforts on mandated programs – the Privacy Rule, the Information Safeguards Rule, and the Red Flags Rule – are in place.

12. *Protecting your data is a business imperative.* Recognize the value of your data and protect it. Why let a vendor's seductive sales pitch lead you to simply allow it to download your data for free? Set limits to access of your data and make sure your agreements with vendors protect how your data will be used.

13. *Recalls will continue to be a hot issue.* The last two years have seen unprecedented recall activities. It is probably the highest visibility issue in the car business. Protect yourself.

a. *Ground vehicles with open recalls.* Everyone knows this, but what is your procedure to make sure new vehicles with open recalls are not being delivered?

b. *Fix the open recalls on used cars that you can.* If there is not a fix or parts are not available, disclose the open recall to a buyer.

17 for '17 continued on page 4

CHARAPP & WEISS, LLP
8180 Greensboro Drive, Suite 1000
McLean, VA 22102
Tel: 703.564.0220
Fax: 703.564.0221
www.cwattorneys.com

Contents © 2017 Charapp & Weiss, LLP.
Articles are for information only and do not constitute legal advice.

- c. *If your franchisor issues a stop sale on used vehicles, pay attention to that.* There is no federal law empowering a manufacturer to issue a used vehicle stop sale, but there can be consequences to your relationship with your franchisor if you disregard the mandate. Pay attention to it and seek compensation.
- d. *Be sure you are checking service vehicles of your brand for open recalls.* The law requires that you notify service customers with vehicles of your brand of open recalls if your franchise requires that. Whether or not your franchisor requires that (increasingly factories say they do), it is a good business practice.
14. *Make sure your cash reporting is in place and enforced.* The IRS will be a very busy place during the Trump administration. It was the chief enforcement arm under Obamacare, and promised changes to that law will dramatically affect the agency. So will promised tax law changes. But candidate Trump ran on a platform of anti-terrorism and law and order. As President, prevention of money laundering will be a key element of those priorities. That means increased emphasis on cash reporting audits by the IRS even though it will have many other priorities. Be prepared.
15. *Expect enhanced immigration enforcement.* The most publicized issue of candidate Trump was controlling immigration. There is likely to be a dramatic increase in immigration enforcement. For car dealers, that means compliance with I-9 requirements. There is a new I-9 form. Make sure you are using it for every new employee.
16. *Do not reduce personnel compliance efforts.* Some of the most radical changes of the Obama administration affecting businesses were regarding personnel enforcement policies by the Department of Labor, the Equal Employment Opportunity Commission, and the National Labor Relation Board. Those policies are likely to change. However, law firms that have sprung up over the last decade to handle personnel compliance issues are not going away. They will see potentially reduced DOL, EEOC, and NLRB enforcement as an opening for greater private enforcement. Pay particular attention to Fair Labor Standards Act compliance and prevention of discrimination and harassment.
17. *Have a succession plan.* A succession plan has always been important. If something happens to the dealer, how will the business continue? During the last two years, manufacturers have realized the importance of plans to continue after the death of the dealer. Several manufacturers have pressured dealers to have succession plans, and that is a good idea. If you have no succession plan in place, 2017 is the year to implement one.

Purchase Auto Dealer Law: the Definitive Legal Guide to the Purchase, Sale, and Operation of Vehicle Dealerships at www.autodealerlaw.com.