



Compliance Triage

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Feature Article

Dictionary.com defines “triage” as “the determination of priorities for action in an emergency.” Many dealers believe that they are facing more complex compliance challenges than ever. They are right. Dealers overwhelmed by the challenges because of new government mandates and actions must prioritize to get through the emergency that this flurry of new compliance challenges presents.

Just the activities at the federal level are forcing dealers to confront unique issues. Let’s look at just two federal agencies that have stepped up their activities.

Consumer Financial Protection Bureau

The new Consumer Financial Protection Bureau has been led since its inception by an interim appointee which has affected its willingness to implement wholesale regulatory changes. It has never had direct jurisdiction over franchised motor vehicle dealers. But none of this has stopped the CFPB from moving aggressively to dramatically alter the way car dealers do business.

- In March 2013, the CFPB fired a shot over the bow of big financial institutions. In a memo, it advised the institutions it oversees that they can be held liable for the disparate impact of financing rates on minorities resulting from dealer discretion in credit terms. It warned these financial institutions to either monitor and control those practices or adopt flat fee compensation practices.
- According to news reports, the CFPB has launched investigations of sales practices involving F&I products.

- According to news reports, the CFPB has launched an investigation of “high rate” lending for credit challenged individuals.
- Since its inception, the CFPB has been empowered to take, and it has had on its radar, potential actions to limit pre-dispute arbitration for financial institutions under its jurisdiction (some of whom are large buyers of retail installment contracts from dealers), an important tool for dealers and other businesses to protect against extortionate class actions.

Federal Trade Commission

In 2011, the Federal Trade Commission hosted dealer roundtables as part of its fact-finding as it considered how it would use its increased authority and funding with respect to motor vehicle dealers granted under the Dodd Frank financial regulation legislation. As a result of the roundtables, it is unlikely that dealers will face substantial changes in their practices as a result of rulemaking for the entire industry. However, the FTC has moved quickly to show that it intends to take enforcement action against individual dealers with the intent of affecting how all dealers operate.

- In 2012, the FTC sued a number of car dealers who used some variation of the claim, “We will pay off your trade no matter how much you owe.” The FTC deemed the ads deceptive.
- Earlier this year, the FTC issued its new guidelines for digital advertising. The guidelines were designed to take into account the fact that consumers may be viewing advertising on hand held devices with smaller

screens, necessitating more thoughtful use and placement of disclosures. The agency emphasized the importance of clear and conspicuous disclosures.

- There are reports that the agency has been sending complaints and proposed consent orders to car dealers over internet advertising of prices and offers that do not adequately disclose the qualifications for meeting the terms of those offers.
- Consumer advocates have long sought to outlaw spot deliveries, and the practice was a major focus of the FTC roundtables. While the FTC is not expected to take action to end spot delivery, dealers can expect that enforcement actions will be taken on certain spot delivery practices deemed abusive such as the failure to return trade-ins and downpayments.

So what should a dealer do?

There is no industry as heavily regulated as the motor vehicle dealer business. A simple listing of the federal laws that affect dealers goes on for pages. And when one adds state laws, the burden becomes even greater. A dealer wishing to avoid the expenses and losses of lawsuits and other troubles resulting from compliance failures must understand the hot issues and must continuously adjust to take those into account. That is the process of compliance triage. Listing the most serious issues is bound to be somewhat subjective, and they may often differ depending on the state or community where the dealer is located. Here is my list of the top ten questions and suggestions that an attorney representing a motor vehicle dealer should cover with a client.

1. Do you have a culture of compliance? Compliance starts from the top. Compliance is important for employees if you make it important for them. Are you doing what is necessary?

- Establish a clear policy of full compliance with the law. Broaden that to an ethics policy or standards of conduct. You want to do what is legal and what is right.
- Train your employees. There are a lot of misconceptions in the car business. Make sure that your employees understand what the law requires. More importantly, make sure that they understand what you require.
- Monitor your employees' activities. You know what you want. By training your employees they know what you want. But are they acting in that way? Review car deals and listen to your customers.
- Take action where necessary. When employees operate contrary to your policies, take action. Solve the problem. Make sure the employee knows what went wrong and why. If the employee's behavior is over the line, take disciplinary action, including termination if necessary.

2. Do you have a complaint handling system? At some point in the defense of any lawsuit, a dealer will wish that it had simply solved the problem when it arose. There is no more important key to any compliance system than handling complaints before they get out of control. If a dealership gets a complaint, it should be logged in, properly routed to a responsible manager for handling, tracked, and satisfactorily closed. Early money spent to solve a problem is generally the cheapest money.

3. Are your forms up to date? A car deal requires lots of forms. When is the last time you took a hard look at the forms your employees are using? Have they been revised to take into account the latest changes involving state and federal laws and the latest best practices? For dealers that use alternative

dispute resolution, have your mediation/arbitration provisions been updated to reflect the flurry of recent court decisions to be sure you have the best chance of having your provisions withstand attack?

4. Are your employees using your forms appropriately? If the forms are not being completed properly, or if the right forms are not being used, or if important forms are just being skipped, you must solve those problems. Use a deal completion checklist. Those completing deals should follow the deal completion checklist to get it right the first time, and those reviewing deals should make sure that the forms required under the deal completion checklist are completed properly.

5. Is your advertising under control? The FTC has become energized in the last year to regulate advertising. State regulators have been emboldened by the FTC to increase their oversight. They understand that advertising has moved from traditional media into electronic media, and they are more heavily scrutinizing advertising on the internet and through social media. Train your personnel in charge of advertising to give attention to compliance with federal and state requirements. Make sure your advertising agency is similarly aware. Track all of your advertising to be sure that it appears as you expect it to in compliance with federal and state laws.

6. How do you handle spot deliveries? Spot deliveries are still one of the two most highly scrutinized areas of the car business (the other being dealer participation which we will discuss next). If there is a law in your state concerning spot delivery, follow it scrupulously. Avoid abusive practices on which the FTC and state regulators will surely take action in the coming years if they find it. What are those?

- Failure to use contract provisions and selling practices that clearly disclose to customers the conditional nature of the transaction.

- Coercing a customer to continue with a deal on less attractive terms because the original terms were not approved

- Retaking vehicles contrary to law
- Failing to return the trade and failing to return the downpayment after the deal is rescinded and the vehicle returned
- Charging for use of the returned vehicle.

7. How will you respond to the attack on dealer participation? The other hot button of consumer advocates – dealer participation – is under unprecedented attack using the Equal Credit Opportunity Act. CFPB has notified major financial institutions under its jurisdiction that dealer discretion that results in disparate impact on minorities can result in claims against those finance sources. Dealers must recognize that this attack is underway and is well advanced. To protect themselves, dealers must implement systems to remove discretion in rate setting by F&I personnel. Regardless of the system that you implement, there should be a fixed starting point for rate spread on all deals. Deviations from that should be permitted only for specified non-discriminatory reasons such as the need to meet competition, to meet the customer's budget, or to meet the dealer's inventory reduction needs. Reasons for deviation should be noted in every deal.

8. Do you monitor compliance with the Truth in Lending Act? The recent publicity about the CFPB's inquiry into practices involving other F&I products indicates there may be action on the way with regard to how F&I products are sold. TILA is designed to provide transparency for the cost of credit, including the cost of additional products. Recently, F&I service firms have been pushing the concept of "bundling" – basically the sale of packages. While that may increase sales, it may also increase the threat of "packing" lawsuits. Have a system for clear disclosure of the products you are selling and the costs. The best systems include a menu

that provides full explanation of what the customer is being offered.

9. What is your policy for running credit reports in compliance with the Fair Credit Reporting Act? Threatening dealers over doing credit inquiries has become a cottage industry for some lawyers. They are counting on dealers not having adequate records to show that they had a permissible purpose in connection with the extension of credit when running credit reports of customers whose sales were not completed. Do not fall into this trap. While the law does not require that a customer sign an authorization, a signed authorization for access to a credit report is the best way to show compliance. Do not run a credit report without a signed authorization. And, more importantly, keep all authorizations. It is easy to maintain the authorization for the deals that you complete. But that is not where troubles arise. Make sure you keep every authorization for five years, even for deals that are not completed.

10. Are your identity theft protections fresh? Federal and state laws concerning ID theft are geared to protecting consumers. But if you get trapped in a transaction involving ID theft, your dealership will be the real loser.

And if your customer data walks out your door, that will threaten the goodwill value of your business. There are three critical ID theft programs that you should make sure are fresh in your dealership.

- The FTC Privacy Rule requires that you give notice to a customer in a finance or an insurance transaction of what you will do with their non-public personal information. It is important that your customers understand you are protecting their information. Make sure you are using the most recent privacy notice form issued by the federal government.

- The FTC Information Safeguards Rule is designed to ensure that you have safeguards in place to protect the non-public personal information of your customers. It is important for your customers. It is more important for your dealership. Your customer information is one of the key elements of the goodwill of your business. Make sure that this information is not being hacked from your computer system, or walking out your door with your salespeople when they go to work for someone else, or being misused by suppliers to whom you give access to your computer system. The law requires that you have in

place an information safeguards plan, and it requires that you regularly update that.

- The FTC Red Flags Rule requires that you know your customer. If you get involved in a transaction with an identity thief, your dealership will be the loser. You will lose a vehicle, you will not be paid for it, and you may wind up in a fight with your insurance company over who should suffer the loss. You are required to have a Red Flags plan in place. You are required to make sure it is updated every year. You don't want a lawsuit from someone whose identity is stolen and used to buy a car from you. More importantly, you don't want to lose a vehicle to an identity thief.

As noted, the hot compliance issues may vary from state to state or community to community. However, these are ten critical ones to which your clients should give attention. If there are other issues that are hot in the dealer's locality, add them to this list. ■

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