

by Scott Silverman

# Setting Goals for the New Year

As the holiday season approaches, I thought it would be a good idea to highlight some issues that dealers should remember as they establish their goals and expectations for the coming year.

## **Non-Compete/Non-Solicitation Agreements With Key Employees.**

How important are your key employees? If they are doing their job, they are an integral part of the goodwill you establish with your customers, vendors and other business partners. You do not need to ask them to sign an over-the-top non-compete that prevents them from earning a living if they leave. However, you should strongly consider evaluating how their departure would impact your business. Every employer should ensure that departing employees are not given opportunities to compete unfairly with their former employer – either by poaching employees, key clients or using confidential information you provided them only because they were trusted. This can be accomplished through very simple, but clearly drafted agreements that fairly address the most important concerns. Competition in the car business is tough enough – don't give anyone an unfair advantage.

## **Contract Management:**

There are some basic steps that all dealers should be following.

1. Make sure your managers are formally advised who can, and cannot sign agreements on behalf of the dealership;
2. Save yourself the unneeded frustration and expense of being locked into an unfavorable contract by reviewing your arrangements with vendors on a regular basis;
3. If a vendor hands you a boiler-plate contract that (they claim) cannot be amended, negotiate an addendum to document a handful of key amendments. Contracts are not one size fits all – and even the most difficult vendors secretly agree to amend their non-negotiable contracts.

## **Performance Statistics:**

Don't give in to the idea that your manufacturer improperly assesses your statis-

tics – but you will correct them when or if a dispute ever arises. Changes to APR, PMA or AOR may significantly and negatively impact the performance “scores” utilized by manufacturers. We strongly urge you to carefully consider the impact any proposed changes may have on your sales performance as measured by GM or other manufacturers. If you have reasons to believe you will be negatively impacted, then you must communicate those reasons, in writing, to your manufacturer, and you must do so before conceding to their proposed changes.

## **Special Promotions & Advertising Compliance:**

Dealers are constantly looking to identify a marketing promotion that generates consumer interest. However, do not assume that regulators are too pre-occupied to review your ads.

The first rule – are you pushing your advertisements to meet how edgy the competition has become, or are you assessing your advertisements based on how they would be interpreted by a lay-person that only looks at car ads every couple of years? Every manager responsible for reviewing (and approving) advertisements should be well aware of the AG's regulations (940 CMR 5.00) and the requirements of Reg Z and Reg M. However, put simply, what grabs the attention of the AG are advertisements that are not reasonable. Ask this question – is any customer going to get the “deal” that is highlighted, or is there always going to be additional costs and/or price adjustments after the fine-print conditions are applied? You do not need to include tax, title and doc fee. Everything else must be included in the advertised price. Strongly consider periodically walking through the regulations with your counsel to ensure you understand the rules.

If a dealer is considering running a promotion or a give-away, they should keep in mind a few important points to ensure that

their advertisements are drawing the attention of consumers and not the Attorney General's Office:

- 1) Never use the word “free” in an ad. The Federal Trade Commission regulations strictly prohibit using the term “free” or otherwise implying that something comes free with a purchase of an item where the final price is negotiated, whether that “free” item is something as insignificant as a sweatshirt or something more expensive like a GPS device.
- 2) Never require a customer or participant to pay a price for the chance to win a prize.
- 3) Stay clear of raffles as they can only be conducted by certain non-profit organizations to raise money for recognized non-profit purposes.
- 4) Dealers are permitted to operate promotions or giveaways but only the state can operate a lottery. The major difference between the two is that a promotion is missing one of the three following elements of an illegal lottery: payment, a prize, and chance. If your promotion contains all three, you are in trouble!
- 5) Once you determine that any promotion is permissible (after consulting professional advice, if necessary), you must still ensure you make all of the necessary disclosures within all promotions – including but not limited to the chances of winning, implication of taxes, the start and end date of the promotion and other matters required by 940 CMR 6.08. In the end, the rules are easy to follow – just be sure to exercise sound judgment and common sense.



ATTORNEY SCOTT SILVERMAN IS THE PRINCIPAL AT SILVERMAN ADVISORS, PC. CONTACT HIM AT SCOTT@SILVERMANADVISORS.COM