

# THE WANADA BULLETIN

NEWS AND INFORMATION FOR AND ABOUT FRANCHISED NEW CAR DEALERS IN THE WASHINGTON AREA

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## 2014's top legal trends for dealers: regulation, franchise demands

The year's top legal trends for dealers, compiled annually by attorney Eric L. Chase of Bressler, Amery & Ross, Florham Park, N.J., bring good news and bad news. In the bad news column for dealers and the private sector generally, 2014 will be what Chase calls “the high water mark” of regulatory activity.



Expect more regulatory action and franchisor agreements in 2014.

The regulatory elephant in the room, of course, is the Affordable Care Act. The regulations are extremely complex and problematic, as much so as ACA's dysfunctional rollout. “As of late 2013,” says Chase, “those regulatory pages totaled *30 times* the pages of the actual legislation.” Other regulatory thickets that are more dealer-specific will continue to come from the Consumer Financial Protection Bureau, the EPA and the FTC. The FTC is likely to act against dealer advertising practices where regulators find deceptive price quotes; and *spot delivery*, where delivery occurs before financing is final.

Now some good news: 2014 will be “a year of remarkable sales rebound and profit” for dealers. But along with that, franchisors will look for big-ticket investments by their dealers, such as relocations, renovations and brand exclusivity and image programs. And, says Chase, automakers will push for more sales.

“In communicating with dealers perceived as underperforming, 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,” Chase says.



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The third problematic trend for dealers is excessive consumer activism and class action lawsuits, which Chase says are advanced by the strong regulatory environment no less than emboldened plaintiffs' lawyers.

Other top trends are involuntary franchise termination and termination threats, and the factory store issue raised by Tesla.

The ranking of the trends is based on the number of dealers likely to be affected, the probability of change from the current situation, and the seriousness of a trend's effect on dealers.

## Health care mandate delayed for employers of less than 100

Employers received a delay in their health-care coverage requirements under the Affordable Care Act, under regulations issued earlier this month. Those with 51 to 99 employees *are* required to provide health care coverage, but will not be penalized for not offering it, until January 1, 2016. Employers with 100 or more workers will have a phased-in requirement: They must cover 70 percent of their employees starting January 1, 2015, and 95 percent starting January 1, 2016.

Small businesses with 50 or fewer employees aren't required to provide coverage or fill out any forms. They may buy health plans through the Small Business Health Options Program (SHOP). Technical problems have delayed its start from last October until Fall 2014.

NADA urges dealers not to wait to provide coverage, The association expressed concern that the shifting deadlines may cause uncertainty for individual dealership employees.

On the consumer end, some of the technical problems with healthcare.gov and the state exchange websites are easing, and more people are signing up for coverage. Enrollment for health insurance through the websites jumped 53 percent in January, said HHS, for a total of 3.3 million since October 1. About 25 percent of the newly enrolled are aged 18 to 34.

The number of DC residents who signed up through DC Health Link rose nearly 30 percent in January, for a total of 26,180 enrolled to date in the District.



The employer mandate for employers with 51 to 99 employees has been delayed by a year.

## WANADA's John O'Donnell joins board of Clean Cities Coalition

WANADA's executive vice president, John O'Donnell, accepted an invitation to join the board of directors of the Greater Washington Region Clean Cities Coalition (GWRCCC), a group that promotes reduced use of petroleum-based fuels; increased use of alternative fuels, fuel-efficient vehicles and ample infrastructure; economic opportunities in clean energy technologies, and research on transportation energy efficiency.

The five Clean Cities technologies are: alternative fuels, hybrid electric vehicles, idle reduction technologies, fuel economy measures and fuel blends. The Department of Energy sets goals that can be achieved in the framework of these technologies, and coalitions around the country use their organizational skills and strategies to promote and implement the goals.

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## National Agreement on right-to-repair is detrimental to franchised dealers

Four automaker and aftermarket associations have signed a national Memorandum of Understanding (MOU) and Agreement promising not to fund state right-to-repair laws, leaving NADA concerned that franchised dealer protections are missing. Right-to-repair laws, first conceived in Massachusetts, ensure that independent repair facilities have access to the same information and tools as dealers selling that make.

The signers of the MOU are the Alliance of Automobile Manufacturers, the Association of Global Automakers, the Automotive Aftermarket Industry Association and the Coalition for Auto Repair Equality. The MOU is similar to the Massachusetts right-to-repair law adopted in 2013, but the MOU – a five-year agreement, not a federal law – drops several dealer protections that are in the state law, says NADA attorney Doug Greenhaus.

The Massachusetts law, but not the MOU, recognizes dealers as “independent repair facilities.” That is important for dealers to be able to repair cars of makes other than the ones they sell. The language in the Massachusetts law, says Greenhaus, gives dealers the same rights as independent repair shops.

But the national MOU introduces price, saying that OEMs must offer the repair information to independents at a “fair and reasonable price.” Independents are not required to buy particular tools, as dealers selling that make are. With that and other manufacturer requirements, such as mandatory facility upgrades, dealers’ cost structure can be significantly higher than that of independents, Greenhaus notes.

## Vehicle dependability drops; more engine, transmission problems

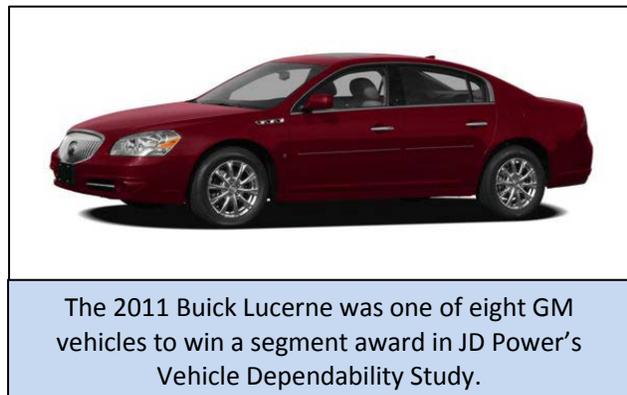
Owners of 3-year-old vehicles (2011 model year) report 6 percent more problems than owners of 3-year old vehicles last year, according to the J.D. Power 2014 U.S. Vehicle Dependability Study. It’s the first time since 1998 that the number of problems has increased.

“Some of the changes that automakers implemented for the 2011 model year have led to a noticeable increase in problems reported,” said David Sargent, vice president of global automotive at J.D. Power.

Engine and transmission problems accounted for the majority of the increase. The decline in quality is particularly acute for vehicles with 4-cylinder engines and those with large diesel engines.

“While striving to reduce fuel consumption, automakers must be careful not to compromise quality,” said Sargent. “Increases in such problems as engine hesitation, rough transmission shifts and lack of power indicate that this is a continuing challenge.”

Lexus ranks highest in vehicle dependability for the third straight year. The gap between Lexus and the rest is substantial, but following it are Mercedes-Benz, Cadillac, Acura and Buick.



## Highway, transit maintenance is top regional transportation priority

In the Regional Transportation Priorities Plan approved recently by the National Capital Region Transportation Planning Board (TPB), maintenance of the region's existing highway, bridge and transit network now and in the future is listed as the top priority.

"The infrastructure we've already built is the backbone of our economy and is the foundation for any improvements we make in the future," the plan says. Maintenance projects should be the first priority for the use of highway funding. In a public opinion survey done to gauge people's highest priorities, highway and transit maintenance received positive ratings from 90 percent of respondents, more than any other strategy in the plan.

The second priority in the plan is to increase public confidence in local transportation through greater accountability, efficiency and accessibility, and to ensure fairness and equity throughout the region.

The third priority aims to address congestion and crowding by increasing the capacity of the system and alleviating demand on it.

"Targeted roadway improvements and other ways to smooth traffic flow can squeeze more capacity out of the existing road network in the short term, while longer term efforts including express toll lanes on highways, cost-effective surface transit, and running more trains and buses on the existing Metro system, would help accommodate future growth in travel," says the TPB.

The National Capital Region Transportation Planning Board is the federally mandated entity covering the Metropolitan Washington area of DC, the Maryland suburbs and Northern Virginia.

## Chamber of Commerce, AFL-CIO support gas tax hike

At a recent hearing in the U.S. Senate, more voices were added to the chorus of those pushing for a gas tax increase. But Congress is in no mood to raise any taxes in an election year.

In the strange bedfellows department, both the U.S. Chamber of Commerce and the AFL-CIO pushed for the tax hike at a hearing of the Senate Environment and Public Works Committee. Chamber President Tom Donohue called an increase in the gas tax "the simplest, most straightforward, and most effective way to generate enough revenue" to cover the \$20 billion shortfall in transportation funding, reports TheHill.com. With cars becoming more fuel efficient and Americans driving less, the Highway Trust Fund is gradually going bankrupt, he said.



Advocates for a gas tax increase testify at Senate hearing.

Funding for transportation is allocated only through this year, and \$20 billion of that was brought from other areas of the federal budget.

AFL-CIO President Richard Trumka spoke to the Senate committee about the importance of infrastructure repair. He too advocated a gas tax increase.

"The gas tax was last raised in 1993, when it represented 17 percent of the price of fuel; it now represents about 5 percent of the cost of fuel," Trumka said, according to TheHill.com.

Committee Chairwoman Barbara Boxer (D-Calif.) said she intends to pass a five- or six-year transportation bill before April. The Congressional Budget Office has estimated that a six-year bill would cost another \$100 billion, to maintain current levels of spending on roads and transit.

Rep. Tom Petri (R-Wis.), chairman of the House Highways and Transit Subcommittee, said a gas tax increase “resonates” with many of those involved with transportation funding. He said the Trucking Association told the committee it supported raising the diesel fuel tax so truckers would have safe roads to drive on.

## Safely—and legally—disposing of undeployed airbags

Your dealership replaces an undeployed airbag under recall, or you replace a defective one under warranty. What are your obligations under environmental regulations?

Undeployed airbags are regulated as hazardous materials by the U.S. Department of Transportation and are considered hazardous waste in most states. Here’s how to comply with the law:

- *Train employees.* Federal regulations require training for dealership personnel to prepare, transport or supervise transportation of hazardous materials.
- *Use a hazardous waste transporter, disposal facility or recycler for disposal of undeployed airbags.* Putting undeployed airbags in the trash is the same as pouring used oil in there.
- *If you are operating under a recall or warranty, review your manufacturer’s policy.* The return of undeployed airbags may present a special problem that should be addressed by the manufacturer’s policy.
- *Check who pays for handling and disposal of undeployed airbags in a recall or warranty.* The manufacturer should pay as part of the replacement, but make sure you know the manufacturer’s policy and your rights under state law before making a claim.

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### Staying ahead...

With hurricanes, tornadoes, fires out of control, mud slides, floods, severe thunder storms tearing up the country from one end to the other, are we sure we want to take God out of the Pledge of Allegiance?

--Jay Leno  
Tonight Show, 1992-2014