P&A
PROVIDERS & ADMINISTRATORS
2020 QTR. 3 | VOL. 8 NO. 3

THE F&I INDUSTRY'S LEADING SOURCE FOR PRODUCT PROVIDERS & ADMINISTRATORS

ESTABLISH AN AUTHENTIC BRAND IDENTITY

POST-COVID IMPACTS ON DEALERSHIPS

THE BEST PRODUCTS FOR USED CARS

# THE PERFECT COMPLEMENT

## INSIDE THE PORTFOLIO/NAE ACQUISITION

ACE
Endorsed Publication of the ACE Certification Program

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# Introducing a Virtual-Based Event for What Is Critical

*Bobit Business Media's Dealer Group is pleased to unveil a new roster of virtual experiences for 2020, to help you connect with the automotive F&I industry from the security of your own home.*

BY KATE SPATAFORA

**Earlier this year, many of you received and participated in a survey that was sent out to gauge what our loyal attendees and sponsors wished for us to do in these uncertain times.** After processing the information you all submitted, we came to the decision that it would be best and safest for all involved to suspend plans already in place for our 2020 Summit events and begin developing a series of virtual-experiences.

The team behind Bobit Business Media's Dealer Group is excited to extend an uncompromising virtual counterpart to our annual Summit events. Developed for immediate industry needs but built as a long-term solution for business growth – this unique opportunity for industry connection is designed to complement the trusted in-person option we are all accustomed to.

Planning is well underway and we are already uncovering countless opportunities that were previously limited when developing an in-person event, such as:

- Expanded Reach: Travel restrictions and roadblocks for a standard in-person event are removed – allowing for a larger potential percentage of the automotive universe to attend.
- Expanded Influence: Companies with budgetary restrictions that may have traditionally had to pick and choose only key individuals to attend can now expand the opportunity to more of their team.
- Expanded Frequency: Your chance to take part in this wealth of knowledge and ideas is not limited to the live broadcast. Content from the virtual event will remain accessible for an extended period of time to allow you to revisit specific content and materials.

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In years past we have asked for your feedback to assist us in curating an agenda suited to the ever-changing needs of F&I product providers and administrators. This year, that feedback is more crucial than ever before!

So with that, we need your help. I ask for just a few moments of your time to send me an email that shares an experience you have faced in the past few months; a new trend or technology you want to learn more about; or a hurdle you are trying to overcome. With this insight, we can build a virtual experience that helps to solve all the new challenges being faced by the industry. If you would like to play a part in building the first *Providers & Administrators Experience*, please email me directly at kate.spatafora@bobit.com. P&A

– Kate Spatafora

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# THE PERFECT COMPLEMENT

## INSIDE THE PORTFOLIO/NAE ACQUISITION

*In late June, Portfolio officially acquired National Automotive Experts and NWAN. The companies' executives spoke to P&A about what led them to join forces, the changing world of F&I and why this match was the right move for both companies, their agents and dealers.*

BY NANCY DUNHAM

**In late June, Portfolio officially acquired National Automotive Experts and NWAN, a Strongsville, Ohio-based F&I products provider and administrator, following a 90-day regulatory and financial review.**

In a joint release issued prior to closing, Brent Griggs, president and CEO of Lake Forest, Calif.-based Portfolio, and NAE/NWAN founder and CEO Kelly Price cited their similar cultures, shared vision and complementing presence in major markets as some of the myriad benefits they expect from the acquisition.

Griggs and Price spoke to *P&A* about what led them to join forces, the changing world of F&I and why this match was the right move for both companies, their agents and dealers.

### The Partnership

"We've been watching the industry move toward consolidation for years," said Griggs, whose company manages more than 1,100 reinsurance companies affiliated with 1,900 dealerships. "I saw that years before I came to Portfolio in 2013. It's always been my belief that there are a lot of inefficient companies out there. Now we're starting to see some very big players that, for a lot of reasons, are looking to get into the business."

A large majority are private equity firms with solid financials that see the value of F&I, and specifically the significant cash flow contribution to dealers, he said.

In fact, Abry Partners, a leading Boston-based private equity firm, recently acquired a majority interest in Portfolio.

Griggs has watched the consolidations closely, tracking the high performing F&I providers. That brought Griggs and Portfolio to Price's NAE/NWAN.

"We really never found a partner that fit better than Portfolio," said Price. "That was mainly because we couldn't find the synergies related to culture and how we distributed our products. We also wanted to make sure that any acquisition would not result in the dismantling of our team or even the other company's team."

### Putting Dealers First

Both Griggs and Price discussed how fast-tracked acquisitions and mergers can leave agents and dealers scrambling to serve their clients and customers in changing landscapes.

"We were determined [any acquisition would not] disrupt the promises that we've made to our dealers and our agents," said Price. "It's very, very important to both Brent and me. No matter what happens during this transition as we merge together, we are here for our dealers and here for our agents. And we don't want anything negative to happen to them."

Both companies have strong histories of excellent service to their dealers and agents.

In addition to its F&I offerings, Portfolio is a national leader in dealer participation programs, having been ranked among the top reinsurance providers in every Dealers' Choice Awards survey commissioned by *Auto Dealer Today* since the category was introduced in 2008.

In Abry, Portfolio partnered with one of the most experienced and successful sector-focused private equity investment firms in North America.

Kelly Price Brent Griggs

In the announcement of the merger between Portfolio and NAE/NWAN, Brent Stone, a senior partner at Abry, said in a press statement, "We are very excited about the opportunity to assist the Portfolio team in the acquisition of NAE. We consider NAE one of the premier players in the F&I space and believe the combined company will be well positioned in a competitive marketplace. We look forward to continuing to provide both NAE and Portfolio the resources to help them succeed."

Since 1996, NAE/NWAN has offered leading-edge protection products and specialized service and support to dealers and agents nationwide.

Based in Southern California with operations in Dallas, Portfolio intends to maintain NAE/NWAN's operations in their Cleveland-area offices.

## Considering Other Offers

Both Price and Griggs said their companies have fielded partnership offers from a host of other companies through the years. Although the two leaders haven't known each other for a long time, they developed an immediate alliance.

"We saw it as a perfect fit for us as we talked more about it," said Griggs. "One thing is that we have very complementary geography. The areas of the country where Kelly's company is very strong are not the areas where we're strong."

"They are very strong in the Midwest. We have very little presence in the Midwest. So, if you step back and look at where we distribute our products and where she distributes her products, we don't have a huge amount of overlap. So that was one of the things that attracted us."

## Client Concerns

Although the harmony between the companies is solid, dealers and agents may naturally express concerns about how the acquisition will impact their operations. Griggs and Price are working hard to alleviate any that may arise.

"I think on the one hand, they recognize that we're complementary companies," said Griggs. "We only have one or two really large, overlapping agents, and we are committing to our existing agents that, on day one, the two companies won't be integrated.

"We don't want to eliminate the opportunities for agents to grow their business using all of their respective existing products. We're going to take a very careful approach to designing a combined product suite because we don't want our dealers to be negatively impacted by the acquisition."

In fact, Griggs and Price expect the full integration to take up to 12 months. It may even take longer, they said, depending on input from agents and dealers.

"We are going to move slowly so that we don't disrupt them," said Griggs. "And very specifically, we are telling our existing agents and dealers that if you've been dealing with Kelly and her team and you're happy with their products, you're going to continue to get all the excellent service and products you had before. And we're telling our Portfolio agents and dealers the same thing. Until we have a really good plan for integrating, we're not going to move forward."

Agents and dealers have given Price similar positive feedback about the acquisition. Like Griggs, she has taken extra steps to assure them that both companies will honor all commitments, involve agents in the decisions and work to ensure a positive integration.

"As Brent said, we don't have a lot of overlap in our agents," Price said. "Agents that do business with both of us see this as a real positive. And for those that don't do business with either of us, this is an opportunity to gain market presence in those areas."

## What Will Strengthen

Both companies have a large number of strengths they bring to the partnership.

One example cited by Griggs is that Portfolio outsources some of its claims administration for its vehicle service contracts to a large provider.

"It's been a great relationship, but quite honestly, I think we need to be moving toward vertical integration like most of our

Kelly Price: Photo courtesy of National Automotive Experts / Brent Griggs: Photo courtesy of Portfolio



No matter what happens during this transition as we merge together, we are here for our dealers and here for our agents.

competitors," said Griggs. "Kelly's company has their own staff of VSC claims administrators. That will facilitate our move in that direction without having to start from scratch. ... This is just one example."

## The Dotted Line

Price recalls talking to a few other companies about mergers and acquisitions. Some of the discussions turned serious but didn't reach fruition. One reason, she said, is that she and other leaders in her company carefully analyzed specific integration proposals.

"When we'd get down to the dotted line, we would turn to each other and say, 'You know, this doesn't work,'" said Price. "It's not really the money that mattered, it was more how are we going to be able to take care of our customers, our clients."

The ability to talk to Griggs from day one as partners is one of the reasons Price determined the partnership would be fruitful.

"One of the first things my business partner and I did was go out to the Portfolio team and interview all of the management in every single department," she said. "And this was long before they even put an offer on the table. Brent opened it up and said, 'Come on in and talk to my people.' He didn't monitor everything that happened. And every single person we talked to, we said, 'Wow. I'd hire that person right now.'"

Griggs had a similar experience with the NAE/NWAN team, noting the comfort level he felt with Price and her team.

"We all felt very, very comfortable, like both teams were rallying to be able to become one team," said Price. "To have that type of synergy was a pretty cool experience for us."

## Building the Partnership

Although the two leaders haven't known each other for a long time, their camaraderie developed quickly.

"Kelly and I had a plan from the beginning, as we worked through the details of the acquisition and negotiated the purchase price and all those things you have to negotiate," said Griggs. "We got to a point where we were pretty comfortable."

The day the paperwork was signed, Griggs flew to Cleveland to join Price as they presented the plan to employees.

"We didn't want people to think, 'Oh, Portfolio is acquiring us so we'll all be losing our jobs,'" he said. "I think Kelly did a great job of explaining to her employees, honestly, that they have skills we don't have and we have skills they don't have. Of course we will be looking for cost efficiencies, but we're more interested in growing the revenue."

"That very same day we got on a videoconference and talked to all of my employees, explaining much the same things to them. I've long believed that type of transparency is key to making a business venture successful."

## Beyond the Acquisition

As the trend toward consolidation continues to grow, Portfolio consistently looks for other companies with which to partner.

"We are absolutely looking all the time," said Griggs. "We are unlikely to be acquiring another F&I administrator in the short term. Obviously, we have our hands full now with this acquisition.

"But yes, we are also in the business of acquiring agencies. We are out there looking at how we can capture more of the workflow. But if we acquire an agency, we want it to be a positive for the agent. We want to always bring the agent along."

Such a partnership is just what Price sees as a major bonus in this acquisition.

"There are agents out there that are just looking for cash because they're getting ready to retire and they're trying to figure out how to exit the business. They don't have a succession plan. That was not the case for us," she said. "That's not where I was, where my partners are. We are looking to continue. I'd advise anyone in this situation to really think what it is that they want out of such a partnership before they go into it. Don't lose track of what you want." P&A

Nancy Dunham is a freelance journalist, having previously worked with *CarFax*, *Cars.com*, *Forbes*, *NADA*, and *The New York Times*.



Portfolio building: Photo courtesy of Portfolio / NAE building: Photo courtesy of National Automotive Experts

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# WHICH F&I PRODUCTS ARE BEST FOR DEALERS SELLING MORE USED CARS AND TRUCKS?

*More people are shopping for used cars and trucks, and that has created an opportunity for franchised and independent dealers to offer a bevy of F&I products uniquely designed to help many of these car shoppers.*

BY TIM BLOCHOWIAK

**Entering summer, the automotive industry quite possibly might be breathing a collective sigh of relief.** After the COVID-19 pandemic forced the annualized sales rate of nearly 16.8 million units in February to plummet to 8.6 million in April, industry analysts now believe vehicle sales will end 2020 just shy of 14 million[1].

However, if the seasonally adjusted numbers go the way many economists are projecting, we could see a nearly 70% jump from April lows.

That's some good news. Some equally big news is that used cars and trucks have been even hotter since the pandemic began.

## Used Cars and Trucks Are Hot

Used car prices reached a record recently, with the Manheim used vehicle price index reaching its high in mid-June, jumping 4% over the previous year, and a 7% jump since its May reading (+16% compared to April[2]).

The reasons for this were strictly supply and demand. Fewer used cars initially from a drop-off in trade-ins and less buying at auctions during the pandemic created less supply. However, price-conscious consumers hungry for used cars and trucks since states began their reopening phases has created a spike in demand. This scenario, where supplies are still short, has forced the price of used cars to rise.

## An Opportunity to Sell More F&I

Nevertheless, more people are shopping for used cars and trucks, and that has created an opportunity for franchised and independent dealers to offer a bevy of F&I products uniquely designed to help many of these car shoppers. It is also expected that federal stimulus and deferment programs enacted during the height of the pandemic will give further confidence to millions of would-be shoppers throughout the remainder of 2020.

Typically, the best F&I product programs that work well for new vehicle sales are the same ones that work best for used sales — adjusted for the pre-owned buyer. Service contract programs and various ancillary products such as windshield protection, and tire and wheel, provide a great deal of value for pre-owned buyers.

Dealers should just make sure they are working with their F&I product representatives to ensure their coverage options are well-suited for the pre-owned buyer. Many dealers are able to create additional interest and value for their customers with certified limited warranty programs. These limited warranties are included with the sale of the vehicle and provide great peace of mind for their customers and typically greater customer satisfaction.

## The Best F&I Programs for Dealers

Additional F&I products create a great opportunity for dealers, but they need to pay close attention to the program they have and how it is structured, as not all F&I dealer programs are created equal. Well-structured F&I programs are a critical component to help with profitability and customer satisfaction. It's really more important than ever for dealers and their management teams to look at their F&I programs and consider things like the dealer participation program they're using, the F&I product mix, and ensuring employees are properly trained on their F&I programs.

One of the ways in which dealers are boosting those F&I profits is through the use of a dealer participation program such as a dealer-owned warranty company, whereby dealers own, market, and sell their own branded F&I program. Besides greater profit potential on F&I sales, the great benefit here lies in the fact that dealers can actually tailor and customize their own F&I offerings. For example, an independent dealer can build a portfolio of F&I products that caters to a variety of branded vehicles, not just one. These F&I products can range from service contracts to ancillary products.

Whether a dealership is franchise or independent, transitioning to this type of a dealer-owned warranty program may be a significant key toward leveraging F&I products that increase new and used car profit potential, despite the direction of sales activity in the near future. P&A

*Sources*
*1: www.wsj.com/articles/car-sales-fell-in-the-second-quarter-despite-deals-and-covid-19-stimulus-11593621053*
*2: www.barrons.com/articles/used-car-prices-record-pandemic-heres-why-51592589604*

Tim Blochowiak is vice president of dealer sales at Protective Asset Protection, a full-service provider of F&I programs offering vehicle protection plans, GAP, ancillary products, training, and other services through vehicle dealerships.

# DOES YOUR BRAND POSITIONING RING TRUE WITH YOUR CUSTOMERS?

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*Brands work hard to form emotional connections with consumers, and brands that haven't established an authentic identity are paying the price when the statements they make don't ring true with what their customers think and feel.*

BY MARY ANN O'BRIEN

**Brands and business owners find themselves swimming in uncharted waters these days.** Not only has COVID-19 upended the sales cycle and messaging points for nearly all of us, but the wave of social justice initiatives sweeping the nation has made it more precipitous than ever for brands trying to maintain mindshare and effective positioning.

For the past decade, brands have been working hard to form emotional connections with consumers.

We've asked consumers to invite our brands in and form emotional, personal and intimate connections with them. We've taught them to think of brands as extensions of themselves. From the coffee they drink, to the clothes they wear, to where they shop for groceries, consumers have been influenced into choosing brands that align with their deeply held beliefs and that reflect their unique personalities.

And consumers have embraced this influence and are attracted to brands they perceive as transparent. Indeed, consumers aren't just attracted to a brand's products or services anymore; they are attracted to the brand itself.

## Now is the Time to Reassess Your Positioning Statement

The time has never been more critical for brands to involve their target demographics in their branding decisions and marketing strategies.

Now is the time to reassess your marketing strategies to ensure they still create value for your customers in these unprecedented times. Since brand positioning embodies crafting associations in your customers' minds that cause them to view your brand in specific ways, it's critical to make sure your messaging, strategy and tactics position your brand as favorable, different, and credible right now.

## 3 Ways to Strengthen Your Brand Positioning Right Now

Strengthening your brand positioning starts very simply, by understanding what your customers want; knowing who you are and what you offer; and finding the intersection points where your interests and those of your prospects align.

Don't assume you know what your customers want or where your interests and theirs align. Invest in research to reveal the answers. Don't make the mistake so many businesses do — use the insights you discover in research to inform and guide your marketing messaging, strategy, and tactics.

Reinforce what makes your brand not just unique, but attractive. Keep saying, showing, doing, and making the things that your customers can identify with and champion to others.

## After Knowing What Your Customers Want, Create Value

You must give your customers a compelling reason to choose your brand. Continue to provide emotional value. Strive to inspire your customers.

Spend time digging deep to discover what your customers treasure and do your best to offer that.

## Align Your Operations with Your Positioning

You can have the best campaign in the world, but if your operations, sales, and service don't embody your brand, you will lose your customers. Your brand identity and positioning should inform everything from hiring to training to logistics to customer service.

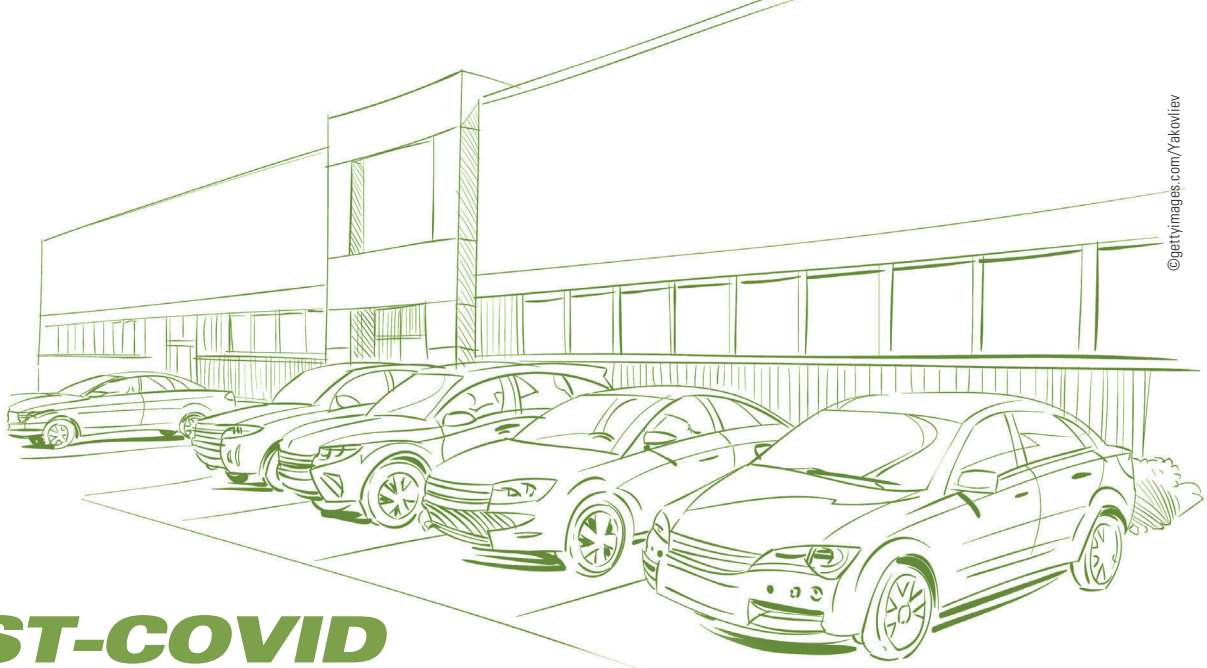
The best brands deliver a consistently satisfying experience to their customers at every single point along the customer journey. Every touchpoint matters. Every invoice, call, text, product package, and service interaction is an opportunity to communicate your brand identity, values, and positioning to your customers.

If you occupy an industry where everyone competes on price or features, stand out with a strong, clear identity statement.

You might offer the same widgets as your competitors, but the experience you provide around and along with those widgets can make all the difference in the minds of your customers.

Most importantly, don't be afraid to stand out. When you know who you are, and what your customers want, you can distinguish yourself with confidence, knowing your positioning will enable you to succeed. P&A

Mary Ann O'Brien is the CEO and Founder of OBI Creative, a research-based, innovation-driven advertising agency based in Omaha, Neb.



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# POST-COVID IMPACTS ON CAR DEALERSHIPS

*As car dealerships continue to tackle the difficulties of the pandemic, it is important to also acknowledge the ways in which this transformation has moved the needle forward.*

BY STEVEN MANZI

**Stay-at-home orders resulting from COVID-19 have impacted industries across the board.** Organizations have had to find new and innovative ways to continue on with their businesses. Retail and sales industries that typically conduct their work in person have had to pivot in new and challenging ways in order to stay afloat. Car dealerships are one of the businesses that thrive due to a 1:1 sales format, and while some of the buying process had transitioned online prior to the pandemic, the lasting effects of a fully remote car-buying process are still being navigated by business owners. The nature of the sales process for buying a car has drastically changed, and will continue to do so.

## Remote Car Buying

Online resources have long been used to supplement research that car buyers use to inform their decisions prior to purchasing. Access to details that compare and contrast different brands, makes, and models can greatly streamline the job of the customer. While some dealerships have tailored their sales processes to meet the demands of modern consumers prior to the pandemic, the digital transformation of this process has escalated exponentially due to the prolonged lockdown. This rapidly evolving transition to the "new norm" will likely continue in the future as consumers become more comfortable with the conveniences of remote car shopping.

While much of the research and information gathering aspects of the car-buying process can be adequately transitioned online, there is no virtual supplement for getting a true feel for a vehicle during a physical test drive. As a result, some dealerships have had to restructure their test-driving process to cooperate with important social distancing guidelines, allowing buyers to take the vehicles out alone. As expected, there are elevated risks involved with this modification, including added concern that vehicles may be damaged or stolen, and a correlated increase in the theft via the use of fraud and fake identification. To combat these challenges, dealerships can develop stronger inventory and lot management by implementing vehicle tracking and diagnostics monitoring. The insights from these lot management tools will provide the visibility and security dealerships need to be confident in the transition to remote car buying. Increased visibility is crucial for test drives, pick-up and drop-off service, and monitoring car maintenance.

Online car shopping — while convenient for car buyers — presents an interesting dilemma for dealerships: How do you drive F&I profit when more and more customers are bypassing their visit to the F&I office? Without the typical heavy traffic in the physical showroom, dealerships may struggle to replicate the F&I profit that comes with an in-person store visit. Dealerships have had to get creative with their customer experiences in order to maintain this critical revenue stream, providing an advanced level of service in this new remote environment.

## The Future of Car Buying

The impact of the pandemic will continue to weave through the way organizations do business for years to come. Many consumers are not going to feel comfortable or safe in public environments until a clear solution is in place, and while the timeline for that event remains foggy, dealerships need to be dedicated to protecting their customers and vehicles by adding support and security wherever possible. Hygiene safety is of the utmost importance now, and in the future, as it is unlikely that reopening procedures alone will quell the fears of customers. While looking into telematics technology that can secure their vehicles and improve lot management, dealerships should also look to partners who offer vehicle sanitization packages in addition to other protective services.

Many online car-buying procedures are likely to remain ingrained in the car-buying process in the future, so dealerships will need to find new ways to cultivate trust and customer loyalty. Dealers are now more frequently offering to pick up and drop off customers' vehicles for them, providing an additional level of service. A complete sanitary wipe down of the car interior before and after a test drive promotes hygiene safety and maintains consumer confidence. Because face-to-face interactions will likely diminish over the long term because of COVID-19, dealerships must continue to build loyalty with their customers. By providing value-added services including concierge, maintenance, and other connected car services like new safety and hygiene features and driver assistance, dealers will build trust, maintain customer relationships, and drive repeat business.

## Time for Transformation

This pandemic has caused decision-makers to innovate in previously unimaginable ways and has transformed the way business is done across industries. As car dealerships continue to tackle the difficulties of the pandemic, it is important to also acknowledge the ways in which this transformation has moved the needle forward. Dealerships will now be better equipped with stronger practices for hygiene safety, lot management and security, as well as providing more personalized test-driving processes by allowing drivers to take vehicles out alone. With sanitization practices in place, dealerships will not only be able to protect their customers, but also themselves, from any health concerns now and in the future. While the shift to digital/remote purchasing came with unexpected speed and urgency, the automotive retail industry, previously one that conducted business largely in person, can now embrace digital transformation to handle any additional shifts an unpredictable market may send its way. **P&A**

Steven Manzi is vice president of Connected Car at LoJack.

# Down the Road: Selling Cars Remotely

*The coronavirus appears to be driving the automotive industry to selling vehicles remotely, a radical departure from the traditional dealer model. By identifying the issues that dealers need to contemplate, we find some solutions to the new direction we're heading.*

BY **TERRENCE J. O'LOUGHLIN**, J.D., M.B.A.

**If one adds the element, Cesium, to water, there is an immediate explosion.** This reaction is so dangerous that even if a small amount of this metal is added to a glass of water the glass will explode.

The coronavirus would appear to be the Cesium to the automotive industry, and the reaction is a mad dash to retail vehicles remotely, a radical departure from the traditional dealer model. Do dealers understand the implications of this new model? Especially with the way less than satisfactory results from previous attempts to sell vehicles remotely.

## Consumer Protections from a Traditional Age

There is a very large body of consumer law that addresses consumer protection. For the most part, this law is steeped in an ink-on-paper world where consumers are fully apprised of their purchases via advertising, written documents, and other forms of practices and procedures based in the 20th century. Consumer law places the burden on merchants. The fact that a pandemic has prevented the traditional approach to commerce doesn't negate the application of these laws and their enforcement. For example, state attorneys general are currently prosecuting dealers for various remote sales violations, regardless of the existing public welfare restrictions.

## New and Unknown Vendors

There are many creative businesses in the automotive industry reacting to the remote selling needs of dealers. But have all these companies recognized the regulatory framework in which they operate? Based upon this writer's perspective, some of these vendors have not and could enmesh a dealer in liability. Dealers should be aware that they may be fully liable for the actions taken by their vendors on their behalf. They may be relying on vendors that are unaware of the legal strictures. Ignorance of the law is never a defense. Dealers need to know these vendors and question them.

## Legal Woes of Remote Transactions

As with the traditional business model, car transactions include garnering the prospect, presenting the car, agreeing on the trade-in, getting credit approved, consummating the transaction at the signing ceremony, and, ultimately, delivering the vehicle. All these factors in the transaction can now be done remotely without the customer leaving his residence with distant computer applications designed for virtual sales presentations, trade-in appraisals, electronic documentation and signatures, and even replacing a person for the signing ceremony with an avatar.

Each of these steps has corresponding legal peril. Dealers who embrace these technologies place themselves in legal jeopardy should they not address these compliance issues.

There are also legal corollaries to these various sales steps and technological solutions. There are a litany of legal issues: OFAC, Red Flags Rule, vendor liability, specific off-site sales issues, Home Solicitation Sales Acts, local zoning, Safeguards Rule, document disclosure laws, insurance risks, ECOA, FCRA, UETA, ESIGN, UCC, DMV regulations, privacy, FTC Cooling-Off Rule, odometer laws, Sunday Blue Laws, and UDAP. This is a daunting list, and the remote selling challenges of these issues need to be studied by dealers and their legal advisors.

## A Modest Checklist of Questions and Issues

The following is an executive checklist of questions and issues that dealers, engaging in remote sales, need to contemplate:

- Is the website accurate in all respects? Advertising has a broad application and is one of the favorite targets of regulators and applies to websites.
- Is the virtual conference portal secure?
- How are telephone credit applications being addressed? Are disclosure requirements for taking these applications being provided?
- If a virtual test drive is being implemented, does it mislead a consumer in its use? If it does, it could be a UDAP violation.
- How are OFAC policies being implemented remotely?
- If utilizing a cell phone, and other technologies, for a virtual trade-in evaluation, is the evaluation in any manner deceiving?
- Is care being employed for outbound sales calls using auto-dialers?


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- With more e-mail use, is CANSPAM being observed?
- How are the documents being presented and signed? On-site or electronically?
- Are customers who are entering into installment sale contracts being given the opportunity to review the contract, in a form they can keep, prior to execution?
- Does state law prohibit vehicle sales on Sunday? How is "sale" defined in these states?
- Are all deal terms agreed upon prior to delivery or are there negotiations at the consumer's home? (It should be the former.)
- Have dealers studied the terms and conditions of their vendor agreements for which actions of these third parties are dealers liable?
- Are there any forms that the state requires be signed manually and in ink?
- How are the identities of customers being ascertained? Are all Red Flags procedures being followed?
- In delivering the vehicle, is it being driven or conveyed by truck? Is the odometer reading correct upon delivery?
- If a dealer is using generic e-signature tools, is the conversion of electronic chattel paper into UCC Article 9 tangible chattel paper legally adequate? (If the dealer doesn't understand this question, it raises a host of other disquieting issues.)
- In an electronic document environment, are the disclosures appearing in the correct font size or larger? Are signature and initial lines closely aligned with their corresponding language? Is all the language at least six point type on the electronic device and clearly legible?
- There are certain states that have deadlines for filing registration and title applications. How are those deadlines being met?
- Many financing source dealer agreements have a representation and warranty by the dealer that the entire transaction, including the delivery of the vehicle and the buyer's acceptance of the vehicle, occur at the dealer's licensed place of business. Has the dealer reviewed this language in his agreement? Is there compliance with this contractual provision?
- Are dealers conducting sales from an unlicensed location? In some states, such as Texas, it is prohibited. (It should be noted, however, that a Texas dealer may sell, or offer to sell, a motor vehicle online through an advertisement, on the internet, or to a buyer who never personally appears at the dealer's established and permanent place of business.)
- Is the dealer negotiating the sale at the customer's home? It may violate state dealer licensing statutes that may restrict sales to the dealership location, and it might also be violating a federal law permitting a "cooling-off period" for sales made at a customer's home. In addition, it may be violating a comparable state law on home solicitation sales addressing a cooling-off period.
- Home solicitation laws vary by state. Has the dealer reviewed its state's law and is following this law?
- How are dealers observing the FTC's Cooling-Off Rule? The rule requires written and oral disclosures, gives a buyer a three-day right to cancel, prohibits misrepresentations regarding that right, and restricts a seller's ability to assign the contract for a period of time.
- Does a dealer's state mandate that the delivery of the vehicle occur only at the dealer's licensed established place of business?
- Has the dealer considered insurance laws, zoning issues, and reflected on potential tort matters?

These issues, and various others, are the legal traps that dealers must elude to be successful in remote selling.

## Recommendations

These issues are wide-ranging and can be daunting. Dealers need to be judicious in exchanging exotic technological solutions for traditional and tested practices. They should also be careful in relying upon companies that are new at providing remote selling services. It is quite obvious dealers need to study all the laws that may apply to remote sales. One should hope that a Cesium-type explosion in liability and fines can be avoided through dealer due diligence.

Govern yourselves accordingly. P&A

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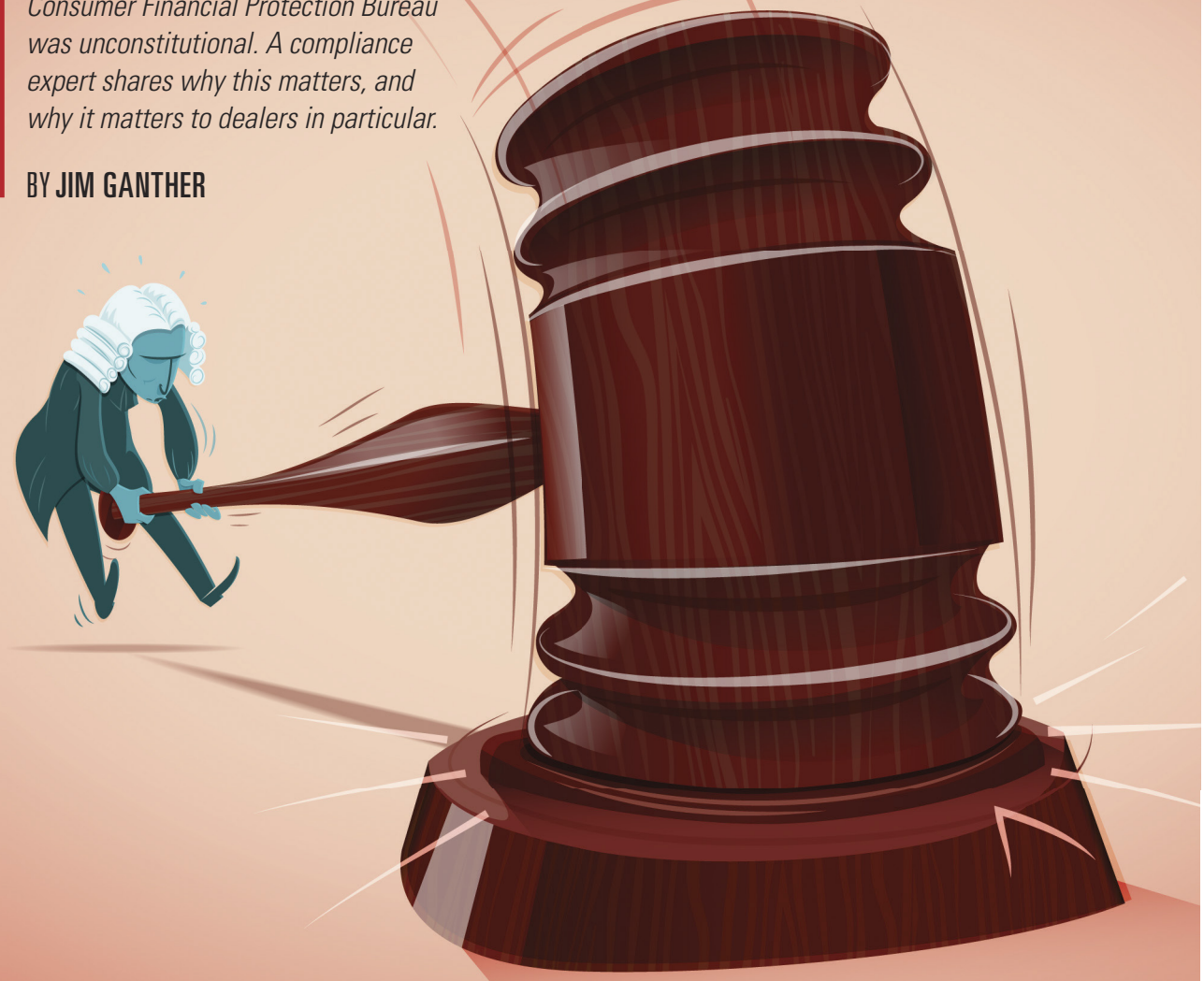
# Reigning in Frankenagency

*On June 29, the United States Supreme Court ruled that the structure of the Consumer Financial Protection Bureau was unconstitutional. A compliance expert shares why this matters, and why it matters to dealers in particular.*

BY **JIM GANTHER**



**By a 5-4 decision, the United States Supreme Court on June 29, ruled that the structure of the Consumer Financial Protection Bureau was unconstitutional.** At issue was whether the head of an executive agency could not be fired by the head of the Executive Branch, i.e., the President.

To understand why this matters, and why it matters to dealers in particular, we need to get into the "Way Back Machine." Destination: 2010, the birth of the CFPB. Recall that, in the wake of the 2008 financial markets meltdown, those in power in Washington, D.C. thought a new bureaucracy was in order. That new bureaucracy was the CFPB.

Recall also, the cause of the 2008 meltdown or, more accurately, what was not the cause. The collapse of the subprime mortgage market was not the fault of the retail automotive industry. In fact, no one ever invested in a vehicle finance portfolio with the expectation that the value of the underlying collateral was going to increase.

Thus, a new federal agency that had the right to oversee the retail automotive industry for failings it did not commit was not a welcome development. The industry pushed back.

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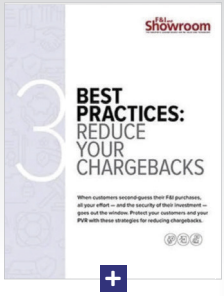


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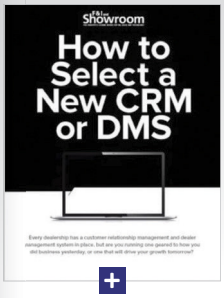


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This pushback resulted in the Brownback Amendment, which exempted most franchised dealerships from direct oversight by the CFPB (buy-here-pay-here dealers, for example, were still subject to CFPB oversight). But what the Brownback Amendment gave, the Automobile Dealer Participation Guidance took away.

In that guidance, issued in 2013, the CFPB alleged that bank policies that allowed dealerships to mark-up interest rates above the buy rate resulted in discrimination against women and minorities. Please note that there has never been any credible evidence presented to prove this allegation. [See "Requiem for a Guidance," *Providers & Administrators* Magazine, Q3 2018).

So the CFPB effectively began regulating dealership's finance function (which the Brownback Amendment prohibited) by regulating the financial institutions that bought dealerships' installment sale contracts, which the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 allowed it to do.

The Automotive Dealer Participation Guidance was repealed in 2018, but industry distrust of the CFPB lingers. One reason for this mistrust (and this is not unique to car dealers) is that the CFPB was intentionally designed to evade oversight and accountability. This is repugnant to most patriotic Americans, and most dealers seen themselves as patriotic Americans.

If a normal agency — say, the Department of Veterans Affairs — is not responsive to the expectations of the voting public, the voting public has a means of expressing its displeasure. First, the citizens can vote against the Boss – the President who, as Chief Executive, is supposed to be responsible for the Executive Branch.

Second, the citizens can express their displeasure by voting against their elected representatives. While members of Congress don't govern Executive Branch agencies, they do have the power of the purse and can influence agency behavior by the level of funding they approve.

Unfortunately for democracy, the CFPB was designed to be immune from these levers of accountability. To address the second lever first, the CFPB is not subject to congressional appropriations. Rather, the CFPB is funded directly through a percentage of the earnings of the Federal Reserve. Therefore Congress' power of the purse does not apply.

And, as originally designed, the CFPB was run by a single director who was not subject to presidential oversight. The director could only be removed for narrowly-defined "cause." In other words, the director weaponized the agency against, say, the retail automotive industry, and the President couldn't do a thing about it, including terminating the director.

Taken together, the CFPB was, from its inception unique, something of a "Frankenagency" — unlike any other Executive Branch agency ever created. Where similar agencies have a five-member set of commissioners, the CFPB had a single director, literally answerable to no one. Where similar agencies are subject to Congressional appropriations, the CFPB is immune. Eventually, this monster had to be confronted and its legality tested.

And that brings us to the present Supreme Court decision. The case before the high bench, Seila Law v. CFPB, arose when the CFPB issued a subpoena (technically, a "civil investigative demand") seeking documents related to a law firm's business practices. The law firm sought to have the subpoena set aside on the ground that the agency's leadership under a single director who could only be removed for cause violated the Constitution's doctrine of separation of powers.

In striking down the CFPB's contention that its director could not be fired by the President, Chief Justice John Roberts wrote: "Such an agency lacks a foundation in historical practice and clashes with constitutional structure by concentrating power in a unilateral actor insulated from Presidential control."

Such power and lack of oversight was unprecedented. As of June 29, it is now also unconstitutional.

The CFPB itself remains intact. The immediate impact of the high court's decision is that the CFPB is now more directly responsive to the democratic process. If the bureau goes in a direction unfavored by the voting public, their elected official — the President — may make a change.

One issue left unresolved by this recent decision is its impact on pending or completed enforcement actions. Specifically, is an enforcement action in the name of a director with unconstitutionally broad power valid?

Taken together with the repeal of the CFPB's "dealer participation guidance" in 2018, the CFPB has certainly had its wings clipped under the current administration. But as a result of the most recent decision, a different administration with different priorities could install a new director to change the bureau's direction. According to the Supreme Court, that is what the Constitution intended. P&A

*The CFPB was, from its inception unique, something of a "Frankenagency" — unlike any other Executive Branch agency ever created.*

James S. Ganther is president of Mosaic Compliance Services and co-founder of Automotive Compliance Education (ACE).

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