

## WHAT IS YOUR SUCCESSION PLAN?

You are healthy and enjoy the car business. You have no reason to be concerned about a succession plan, right? Well, not so fast.

Companies important to your business – notably your franchisor and your lenders – worry a lot about your succession plan. No matter how healthy you are, what will happen to your business if you step off a curb and get hit by a bus? Who will be in control of the dealership? Will you have quality management to successfully continue your business? Will your business have the financial strength to survive?

These are not questions for which your franchisor and your lenders should have to guess the answers. You should have a sound succession plan.

What should that look like? One cannot describe a one-size-fits-all plan to suit everyone. Each dealer will have his or her own situation, and the structure of the succession plan depends on what businesses the dealer has, what real estate is involved, the dealer's family situation, and numerous other factors. Here are some things that all dealers should consider.

### Planning Team

Sound succession planning requires teamwork. You must involve your estate/tax attorney, your business attorney, and your accountant. They must work together to develop an effective plan.

### Estate Plan

The place to start is with your will. (Yes, you absolutely must have a will!) To

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## OPERATE LIKE YOU ARE PREPARING TO SELL

Even if you aren't planning on selling your dealership, it always pays to run your dealership as if you are. Keeping the dealership free from unnecessary encumbrances and obligations will help you keep your operations streamlined and reduce your worries.

Here are some things you should be looking at.

- Leases and Contracts

A dealer who wishes to sell is likely to be left with the obligations of long-term leases and supplier contracts unless the purchaser will accept assignment of those. Even if you don't sell, if you wish to terminate the services of a vendor, your options will be limited if you have a long-term contract. You will want to be sure that you

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## Succession (Continued)

whom will you leave your estate? Will you use trusts in your planning? How will your estate be structured? Should you be making gifts to family members? Only a qualified team can help you design this. With estate taxes returning with a vengeance in 2011, a state-of-the-art estate plan is a necessity.

### Funding

If something happens to you, how will the transition to a new control and management structure be funded? Will unencumbered business and personal financial resources be sufficient so that there are no critical funding shortages during the transition? Will there be insurance funds available to help overcome short term financial dislocation? More importantly, how will you fund the payment of estate taxes that return as a major concern in 2011? Planning for this will require the combined efforts of your entire team working with an insurance professional.

### Operating the business immediately after your death

If you die tomorrow, who will be in charge? How will the company continue? Answering these questions is a critical aspect of any succession plan.

You should have a dealer successor designated by your franchisor. That person will be in a position to step in as dealer if you are no longer available. To list a dealer successor, most franchisors require that the person have some interest in the dealership. Structuring an ownership interest for your successor should be considered as part of your overall plan.

It is not enough to simply name a successor. Your dealer successor must understand your wishes and should have a plan to keep management in place. What steps must be taken to calm fears in the event of your death? What incentives can be used to prevent loss of managers and employees during the transition to new management? These issues should be addressed in the succession plan.

### Continuing Operations

How will the business be operated for the long run? Is your designated successor qualified to successfully operate to maximize returns? Will your franchisor have the faith in that person based on experience? Will your lenders have faith in that person so that they will continue to advance necessary funds? If your successor is not one of your heirs, will your surviving spouse or other heirs be qualified to oversee the management or will that structure lead to friction?

### Due on death clauses

This brings us to the subject of due on death clauses. These are quite common in loans to dealers, whether one is discussing real estate loans or working capital loans. A due on death clause basically provides that if a dealer dies, the lender may call the outstanding loans.

If you die, your survivors already have enough issues without having the bank on the dealership's doorstep calling your loans. Eliminate due on death clauses. This will require you to have a succession plan in which your lender can have confidence.

### Operate or Sell?

Will your heirs be in a position to continue your business or is selling the appropriate strategy? If a sale is appropriate after your death, how can your heirs maximize the sale price?

### Selling by necessity

There is no worse time to sell than when others think you have no choice. Consequently, your succession plan should not presume a sale, unless necessary. If possible, the succession plan should be geared around continuing operations. This will allow your heirs to best determine when a sale can take place at the most effective price and terms.

### Operate as if You Will Sell at any Time

If your heirs decide to sell, will they be plagued by unfunded liabilities, questionable occupancy rights, suspected environmental issues, or other problems? Nothing causes a buyer to reduce an offer like questions about problems that can carry over to the new operation. Eliminate uncertainty. Run your business like you may sell it at any time. (See the accompanying story.)

### Future Planning

Lenders or franchisors that are unsure of your company's future will factor this into any decision-making process involving your business. Don't leave this to chance. A dealer with a solid succession plan is one in which franchisors and lenders can have confidence and can support in future endeavors.

## Preparing to Sell (Continued)

have as few long-term supplier contracts as possible. Under your dealership's contracting policy, you should not be entering long-term contracts unless absolutely necessary. Contracts for things such as janitorial services, linens, and the like should be month to month. Even where contracts such as leases for equipment must be long-term, be sure they are assignable. Failure to control the dealership contracting process is one that continually leads to problems for dealers. Minimizing long-term contracts maximizes your flexibility.

- Liens

What liens have you granted on your dealership assets? Quite clearly, your floorplan lender will have a lien on the floorplanned vehicles. Equipment lessors will have liens on equipment. However, watch the extent of the liens carefully. Don't volunteer to provide greater lien coverage than necessary. Keep liens limited only to the assets being financed or leased, if you can. When you pay off an account, make sure that any accompanying lien is released. Avoid broad liens that can interfere with the security interests of other lienholders or that tie up assets that you may want to use as security for other loans or lines of credit.

- Judgments

Did you have a case which led to a judgment against the dealership? If so, have you paid it off? Then make sure the judgment is released. Unreleased judgments can become a problem down the line.

- Customer Plans

Do you provide to your customers benefits which are not funded? Examples are future rights to safety inspections, future vehicle loaners, even future car washes and oil changes. You may view these as business builders that any potential buyer should want. A buyer may view them as liabilities they are assuming

that require a reduction of the price for the business. Consequently, make provisions for these kinds of benefits. Have a separate company that you fund that is responsible for providing these benefits. In the event of sale, the funding for these benefits can be transferred if your buyer does not view the customer benefits as business builders. Or, place in your documentation the right of the dealer to cancel in the event of the sale of the business or loss of the franchise. Unfunded liabilities can have a serious impact on the value of your dealership unless you make adequate provision for them.

- Environmental Status

What is the environmental status of your dealership? If there is uncertainty, a buyer will penalize the seller. Eliminate the uncertainty. Document the environmental status through a Phase I study. Clean up any issues found in the Phase I. Do further studies if necessary to eliminate doubt. Document all tank closings. Document any problems that have arisen and have been successfully remediated. Have all of the documentation available so that there are no questions about the environmental quality of the dealership. Even if you are not selling, if you wish to refinance your real estate, this information will be invaluable.

- Occupancy

What right does the dealership have to occupy its premises? If leased, how long is the lease? What increases in rent or other obligations are on the horizon? If you own your property, what are the terms of your mortgage? Is it scheduled to mature shortly? Does the interest rate float which can threaten you financially in the event of substantial rate increases? Solid and secure occupancy rights not only encourage Buyers to maximize offers, they protect your peace of mind while you own the dealership. Be sure that you carefully protect your occupancy rights, and have important documents handy in the event of any questions..

- Insurance

How solid is the company's liability insurance? Is there a possibility that a claim or judgment could cloud the title to the assets being transferred in the event of a sale? Make sure insurance is solid. Make sure there are sufficient limits in the underlying policy or in an umbrella policy to protect you. This will not only give a potential buyer comfort, it will give you greater comfort that your financial well-being is protected.

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**THE LEXICON OF A PLAINTIFFS' LAWYER**

Did you ever get a letter from a plaintiffs' lawyer and say "huh?" The problem may be that you speak a different language from a plaintiffs' lawyer.

Like those in every trade, business, and profession car people have their own, unique vocabulary. So do plaintiffs' lawyers who use words and phrases that mean something to them different than they mean to people of ordinary, common sense. Here is a glossary of definitions for words and phrases you are likely to see in demand letters sent to dealers.

**Class Action** – *A lawsuit on behalf of a large group of customers who actually have no idea that they have something to complain about.*

**Consumer** – *a customer so devoid of knowledge and experience that he or she hung on every word of the salesperson, put such total and complete faith in the salesperson that he or she did no independent research and did not use common sense, and can only remember the one phrase that every disgruntled car buying plaintiff looking for a pay day magically remembers with absolute clarity: "The salesperson said that this is a perfect car."*

**Mental Anguish** – *the life-altering damage suffered by a consumer (see definition above) who misrepresented current employment, income, and time at the current residence and has to return a car because the proposed finance company learned the truth.*

**UDAP** – *the state Unfair and Deceptive Acts and Practices statute that outlaws salesmanship in all its forms.*

**Unconscionable behavior** – *(1) when used in relation to the dealer's business, the attempt by the dealer to operate at a profit; or (2) when used in connection with a vehicle sale transaction, earning anything at all for F&I services.*

**Warranty of merchantability and fitness for a particular purpose** – *the warranty accompanying the sale of a vehicle that was breached because the buyer simply does not like the car, commonly known as "Buyer's Remorse" even there is no comparable term in the lexicon of a Plaintiff's lawyer.*

