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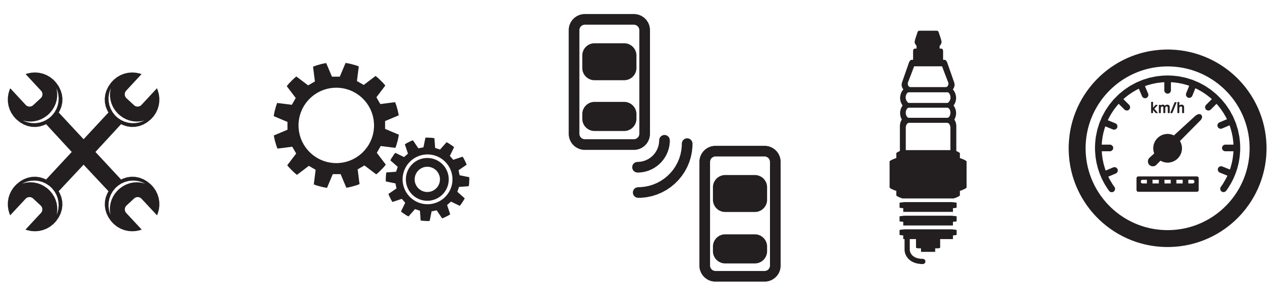
Prepared by Foley's Automotive Industry Team

Top **Legal Issues** Facing Suppliers in 2015



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Top Legal Issues Facing Suppliers in 2015

Foley's Automotive Industry Team has prepared this overview of the major trends we see affecting automotive suppliers this year. While not all legal risk can be anticipated, companies that are aware of litigation, enforcement, and regulatory trends will be one step ahead of their competition.

Top issues include:

- Product recalls, warranty issues, and safety procedures
- Issues relating to driverless/autonomous vehicles and vehicle-to-vehicle (V2V) communications, telematics, and distracted driving
- Antitrust issues, including the ongoing U.S. Department of Justice (DOJ) enforcement actions and increased enforcement activity by foreign authorities
- Corporate compliance relating to the Foreign Corrupt Practices Act (FCPA) and export controls
- The National Highway Traffic Safety Administration's (NHTSA) enforcement authority
- Issues relating to the National Labor Relations Board (NLRB) and Americans with Disabilities Act (ADA)

For more information concerning any of these topics, please contact your Foley representative.

Reducing Risk With Contracts, Warranties, Safety Programs

Over the next year, the automotive industry can expect continued focus on product recalls, warranty issues, and safety procedures.

As NHTSA and original equipment manufacturers (OEMs) waded through numerous recalls in 2014, OEMs stepped up their efforts to seek contributions or shift responsibilities to suppliers. This renewed focus on the contracts and warranties between suppliers and OEMs is also a good opportunity for companies to revisit their standard warranties and negotiation and contracting practices. As recalls and warranty issues continue to dominate the industry in 2015, automotive companies should seek to mitigate future product liabilities and claims by reviewing and updating their Corporate Product Safety Programs.

1. Reducing Supplier Exposure to Recall and Warranty Claims

The automotive industry will continue to face product recalls and warranty claims over the next year. In 2014, NHTSA pursued recalls against component manufacturers, rather than merely focusing on the OEMs. These recalls include multi-billion-dollar recalls, spanning multiple vehicle manufacturers, which promise to stretch into 2015, exposing suppliers and component manufacturers to significant liability. In addition, contracts between suppliers and OEMs often include provisions whereby the manufacturer of the defective component part bears responsibility, or a portion of responsibility, for the costs of a recall. Suppliers can expect to face increased pressure from OEMs to contribute to recalls.

Automotive companies should take steps to mitigate their exposure in the event of a recall implicating their product. These steps include comprehensively documenting the product development process, including design- and testing-level responsibilities. Design options and proposals can be of major importance, along with part- and component-level testing responsibilities. Moreover, the procedures for determining fault and responsibility for defects should be reviewed, including the limitations and disclaimers contained in the warranty and risk allocation provisions. Finally, suppliers should strongly consider implementing a Corporate Product Safety Program.

2. Handling Warranty Issues

Contract negotiations and disputes in the automotive supply chain often involve questions concerning warranties, warranty disclaimers, limitations on remedies, and limitations on damages. Understanding the basics of warranty law is critical to managing and litigating these negotiations and disputes. The starting point in most commercial disputes involves analyzing the warranty given to the buyer by the seller when supplying automotive components. These include both express warranties and implied warranties under the Uniform Commercial Code (UCC). Express warranties arise from affirmations of fact by the seller and may be created by oral statements, advertisements, specifications, drawings, samples, or models. Implied warranties under the UCC include the implied warranty of merchantability and the implied warranty of fitness for a particular purpose.

The parties should consider any warranty disclaimers, modifications, or other limitations that are part of the parties' contract in order to determine potential exposure in the event of a breach of warranty dispute. By contract, the parties may agree to disclaim certain implied warranties and to fix or limit certain remedies or damages. Any contractual provision that limits remedies must leave minimum adequate remedies for the aggrieved party and must not be unconscionable.

In particular, a supplier should expressly address design, part integration, and system-level testing responsibilities. General implied warranties should be replaced or limited, when possible, with carefully drafted express warranties that specify the design, part integration, and system-level testing responsibilities, criteria, and performance specifications.

In addition to understanding the contractual language and any disclaimers or limitations, there are two separate timing hurdles that a party must clear in order to bring a claim for breach of warranty: 1) warranty eligibility, meaning the claim falls within the applicable warranty period; and 2) timeliness under the UCC's four-year statute of limitations. The expiration of either the warranty period or the four-year statute of limitations is an absolute bar to a breach of warranty claim.

Whether you are the buyer or the seller, the following checklist should be consulted:

- Draft clear and concise express warranties concerning the goods being sold. Rather than relying solely on vague phrases ("free from defect"), include precise, objective performance criteria for the goods ("product will meet objective specifications").
- As a seller, disclaim the implied warranties and all other express warranties not specifically given in the contract. As a buyer, focus on negotiating the proper express warranties rather than relying on implied warranties.
- Sellers will want to limit the buyers' remedies, such as to repair or replace. Buyers should resist. If the seller has the leverage and a limitation on remedy is accepted, the buyer should negotiate for tight deadlines and specific activity relative to compliance by the seller with the limited remedy ("machine shall be rendered fully operational within 24 hours of notice").
- Buyers should fight against damage limitations. If, once again, the leverage is such that a seller wins on this point, the buyer should look to add carve-outs for certain circumstances (intentional acts, gross negligence, and so forth). Additionally, argue for excluding certain types of claims from the disclaimer (IP infringement, indemnity claims, and so forth).
- Whether a buyer or seller, make sure that the warranties/disclaimers that you give upstream are the same that you get downstream. Failure to do so may lead to gaps that your company will have to cover.

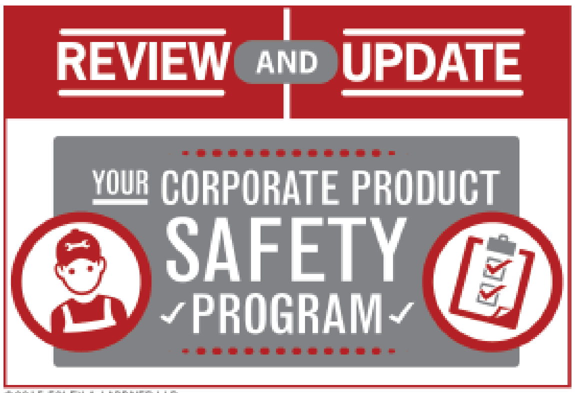
Finally, the most important focus of any commercial contract should be to capture all aspects of the parties' commercial relationship in the written agreement. Uncertainty breeds disputes and litigation. Conversely, a well-drafted, comprehensive agreement will serve as a road map for the parties' commercial dealings.

With respect to indemnities, the devil is in the details. While many contracts contain boilerplate indemnification clauses, companies should consider some specifics that are often overlooked. For example, is there a duty to defend and pay for a defense in the indemnity? If so, who picks counsel and controls the defense? If that defense leads to meaningful settlement discussions — as it almost always does — which party controls the terms of that settlement? These questions are often overlooked.

As far as insurance, there are many options and types to hedge against the inherent risks of your business. Comprehensive general liability, excess, umbrella, recall, and so forth. Further, contracting parties can help to protect each other by asking to be named "additional insureds" on each other's policies.

3. Implementing Corporate Product Safety Programs to Mitigate Risk

In light of the business, litigation, and reputational risks automotive companies face from recalls and warranty claims, companies more than ever are proactively reviewing (or for the first time implementing) their Corporate Product Safety Programs. Corporate Product Safety Programs promote a culture of safety and can identify warranty and recall issues well before they become a multi-million-dollar (or greater) exposure for the company. However, a Corporate Product Safety Program is only effective at mitigating risk if the company implements the program in a meaningful way.



Key components of an effective Corporate Product Safety Program include:

- » A written product safety policy
- » A Product Safety Committee, led by a Product Safety Manager
- » Audits and Audit Programs for both manufacturing policies and warranty issues

A written product safety policy is one of the first steps in establishing a culture of safety at a company. An effective policy contains a mission statement, details a management and accountability structure for the program, establishes goals that are both measurable and ascertainable, empowers employees to raise safety or defect issues, and is widely disseminated within the company.

The Product Safety Committee also is an integral part of a Corporate Product Safety Program. The Product Safety Committee is a working group of legal and operational leaders that establishes criteria, best practices, and procedures to support the written product safety policy. The Product Safety Committee gathers information about product defect events, establishes guidelines and criteria for product warnings and product advertising, and handles regulatory reporting. An effective Product Safety Manager should lead the Product Safety Committee, and report directly to a member of the company's management team.

Through the Product Safety Committee, the company should also initiate an Audit Program to cover the company's manufacturing policies and warranty claims. Audits are designed to identify potential defects before they reach consumers, and to identify problems in the field before they turn into claims.

Finally, companies that implement a Corporate Product Safety Program must take steps to protect the attorney-client privilege and work-product doctrine when legal counsel is involved. Although the application of these privileges varies among jurisdictions, companies can increase the likelihood of protecting the privileges by implementing the following:

- » Legal counsel (in-house or outside) should be involved with and guide any investigation
- » Product Safety Committee documents and communications should clearly indicate when the Committee is seeking or receiving legal advice
- » Information should be disseminated only to necessary individuals

A company that implements a Corporate Product Safety Program is not immune from liability for recalls and warranty claims, but companies that take these steps are taking action toward mitigating their future liabilities.

Content for this section contributed by Mark A. Aiello, Vanessa L. Miller, Jeffrey A. Soble, and Lauren M. Loew.

What's Next for NHTSA and Automotive Safety

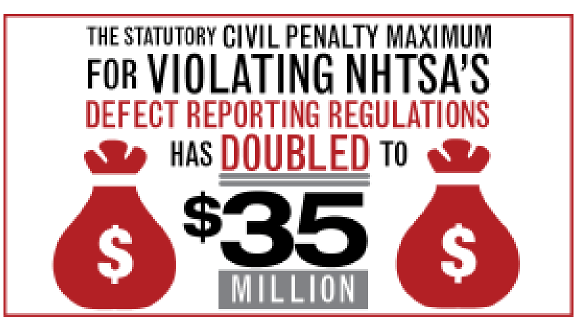
We predicted that 2014 would be a busy year at NHTSA and the agency certainly did not disappoint.

This past year, we witnessed the GM Ignition Switch investigation, which involved massive recalls, multiple Congressional hearings, and civil penalties; the ongoing Takata airbag inflator investigation and recalls (and more Congressional hearings); multiple legislative proposals seeking to increase the civil penalty ceiling and expand NHTSA's enforcement authority; and an unprecedented number of other recalls, civil penalties, and investigations. In the midst of this active enforcement environment, the agency also continued its busy rulemaking docket, including major actions related to V2V communications, distracted driving, and other initiatives.

Look for the following during 2015:

1. Aggressive Enforcement From NHTSA

NHTSA has been aggressively enforcing its defect and early warning reporting regulations this past year and it will certainly continue to do so well into 2015 and beyond as it reacts to public and Congressional pressure to further flex its enforcement muscles.



The statutory civil penalty maximum for violating NHTSA's defect reporting regulations recently doubled to $35 million, and the agency has already reached one settlement in this amount. In fact, NHTSA has asserted and obtained the applicable maximum penalty at least seven times since 2010, in amounts ranging from $16.4 million to $35 million (Toyota, Hyundai, and GM), and it has reached several other settlements greater than $1 million (BMW, Ford, Volvo, Prevost, and Ferrari).

To reduce compliance risks, all vehicle and parts manufacturers should implement safety compliance policies that provide internal guidance to company personnel for identifying and investigating potential safety defects or non-compliance, and for complying with all associated NHTSA reporting requirements (e.g., defect reporting, early warning reporting, and reporting certain non-safety bulletins and customer communications). Manufacturers also should revisit their early warning reporting procedures to ensure they are capturing all relevant information and that reports are filed with NHTSA as required. It also is critical that relevant personnel across the organization — domestically and globally — are thoroughly trained to these policies and procedures.

2. NHTSA's Legislative Agenda

There have been numerous calls to increase civil penalties and expand NHTSA's enforcement authority over the past few years, but recent events have brought significant bipartisan attention to the area of motor vehicle safety. Several bills have been introduced that would establish criminal penalties for individuals who conceal safety defects, increase or remove altogether the civil penalty cap, require additional public disclosure of manufacturers' early warning data, and prohibit rental car companies from renting recalled vehicles until recall repairs are completed.

The Obama Administration's legislative wish list — contained within its long-term transportation bill, the GROW AMERICA Act, which was sent to Congress earlier in 2014 — includes:

» Increasing the civil penalty cap to $300 million

» Extending NHTSA's civil penalty authority to individuals who willfully cause a violation of the National Traffic and Motor Vehicle Safety Act

» Authorizing NHTSA to issue "stop sale" or repair orders for vehicles and equipment found to contain a defect presenting an "imminent hazard"

» Authorizing NHTSA to require rental car companies and used car dealers to remedy defective and non-compliant vehicles before rental, sale, or lease

» Authorizing NHTSA (by modifying the "render inoperative" provision) to pursue individuals who use electronic devices to remotely interfere with the vehicle electronics of others

Manufacturers should closely monitor these legislative developments and watch for new bills with bipartisan support to be introduced in the new Congress.

3. NHTSA's Continued Look at Driverless/Autonomous Vehicles and Crash Avoidance Technologies

NHTSA has been carefully studying the safety benefits of various advanced crash avoidance technologies, with a particular focus on warning technologies, such as blind spot detection and advanced lighting; intervention technologies, such as lane departure prevention, crash imminent braking (CIB), and dynamic brake support (DBS); and automatic pedestrian detection and braking. The agency is expected to continue to evaluate research data, technologies, and potential countermeasures and, if the benefits of these systems (in terms of lives saved and injuries reduced) are found to outweigh the costs, the agency could initiate rulemaking to require one or more of these technologies in vehicles.

The agency has also been studying V2V and vehicle-to-infrastructure (V2I) communications as a way to improve the effectiveness and availability of these safety systems. In August 2014, it issued an advanced notice of proposed rulemaking (ANPRM) as a first step toward adopting a V2V standard (FMVSS No. 150). According to NHTSA, "by mandating V2V technology in all new vehicles, but not requiring specific safety applications, it is NHTSA's belief that such capability will in turn facilitate market-driven development and introduction of a variety of safety applications, as well as mobility and environment-related applications that can potentially save drivers both time and fuel." The agency will review the nearly 1,000 comments it received and evaluate its next steps, which will likely be a formal proposal.

Other significant rulemaking activities expected during 2015 include agency proposals to require speed limiters and electronic stability control systems for heavy vehicles.

4. NHTSA Entering Phase Three on Distracted Driving Guidelines

In April 2013, NHTSA adopted the first phase of its three-phase federal guidelines intended to address driver distraction from in-vehicle electronics. The first phase covers original equipment in-vehicle electronic devices used by the driver to perform secondary tasks (e.g., communications, entertainment, information gathering, navigation tasks, and so forth) through visual manual means. NHTSA is now proceeding with the second phase, which would be applicable to portable and aftermarket electronics. In March 2014, NHTSA held a public meeting during which it heard from device manufacturers and other groups about alternative approaches and the various technological and behavioral challenges to developing and implementing such guidelines. During 2015, we anticipate that the agency will continue development of its proposed guidelines based upon the substantial industry and public feedback it has received, and it could be soon ready to publish a proposed set of guidelines for public comment. We also may soon see some activity related to NHTSA's third phase, applicable to auditory-vocal interfaces.

5. NHTSA to Streamline Recall Review and Completion Rates

During 2014, NHTSA launched its online “Recalls Portal,” where most defect reporting and recall-related correspondence must now be submitted. During 2015, we expect the recall review process to become significantly more streamlined, with quicker NHTSA review and response times. As a consequence, recalls will likely be posted to the NHTSA website more quickly, so manufacturers must be prepared to respond to inquiries from customers, dealers, and the media sooner than they have in the past.

The large number of recalls during 2014, and the correspondingly large number of unrepaired vehicles, have brought renewed attention to the issue of recall completion rates, which have historically averaged 70 to 80 percent for passenger cars. Therefore, we anticipate that NHTSA will take further steps over the next year — likely by working with manufacturers and others — to find creative ways to increase completion rates.

Content for this section contributed by Christopher H. Grigorian.

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Telematics at the Intersection of Innovation and Liability

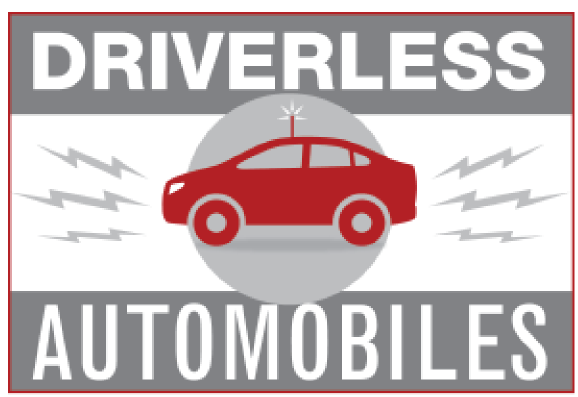
With GPS tracking, engine diagnostics, vehicle monitoring, recording, instant driver feedback, and more, telematics data can be useful in all sorts of situations. But the collection and use of telematics raises a host of legal issues, including privacy and litigation concerns.

Telematics Systems Create New and Unsettled Areas of Legal Risk

A hypothetical car crash can serve to illustrate these issues. Assume a GM OnStar-enabled automobile driven by the owner's 16-year old son with the owner's 12-year old daughter in the passenger's seat collides with a BMW ConnectedDrive-enabled car that was rented from a major rental car company, resulting in damages and disputed issues regarding fault.

The telematics systems may have information about the location, direction, and speed of travel — thus creating a potential source of evidence to show who was at fault, and to address any other issues (such as allegations an airbag failed to deploy properly). In the United States, a party has a duty to preserve evidence upon the reasonable anticipation of litigation. Thus, presumably the car owners (and the rental car company) may need to act quickly to ensure the telematics data — likely stored with a non-party on a server — is preserved. This can be difficult to do, and the collection and preservation of telematics data is a concern due to the practical difficulty and the potential liability for failing to preserve such data. Failure to preserve data can lead to liability for the disputed damages; thus, telematics preservation may take a front-seat role in future automotive litigation.

Additionally, the children of the owner may not have consented to the collection of the data surrounding the crash, and there are privacy issues surrounding the collection of data regarding their driving habits. The children probably never agreed to any terms and conditions regarding data collection, and neither are of the age of majority to where they could enter into a contract. The person renting the BMW also may have never agreed (due to an omission in the rental company's rental contract) to the collection of any of the telematics data that could be used against him or her — and consent is a major issue in telematics collection. Thus, all of the data surrounding the crash may well have been collected without authorization — creating potential liability for all in the chain of collection, and potential evidentiary issues to the introduction of telematics evidence in legal proceedings. Companies should disclose to consumers what data they are collecting, and obtain consent prior to collection (and, ideally, de-identify and anonymize data when possible).



Looking to the future, telematics regarding self-driving automobiles will complicate the issue. Certain automated value decisions need to be made in the programming phase about how to react to certain driving situations, some of which will involve making significant moral choices between the lesser of two evils (e.g., collide with Car A or Pedestrian B). Assuming both the cars in the hypothetical were self-driving, suddenly there are multiple issues surrounding the underlying programming and the reasonableness of the choices made by the computing choreographer of the crash. Also, no system is hack-proof — and data security and automotive security will hit new levels of importance with self-driving cars.

Content for this section contributed by Robert H. Huey and Adam C. Losey.

Know the Risks: Domestic and International Compliance

The aggressive enforcement of U.S. laws governing exports and international conduct was amply illustrated by the continuing imposition of large penalties on companies, including the large $8.9 billion penalty imposed on BNP Paribas for violations of U.S. economic sanctions and anti-money laundering laws.

Although BNP Paribas is a bank, and not an automotive-sector company, the staggering size of the penalty imposed, for conduct that occurred outside the United States, underscores the far reach of U.S. law and the premium that all multinational companies need to place on aggressively identifying and managing regulatory risk, particularly for their international operations.

Further amplifying the risks for the automotive sector is that it is a high-profile industry that often attracts special enforcement and regulatory attention. In addition to the well-publicized antitrust enforcement actions that have targeted the industry, high-profile FCPA investigations involving prominent OEMs and special OFAC sanctions that target the automotive sector and any such operations in Iran underscore the risks that automotive suppliers incur when selling or operating overseas. Similar developments are evident in the domestic domain as well, where the growing frequency and intensity of antitrust, False Claims Act, and government contract investigations present new challenges for manufacturers, suppliers, and service providers of all kinds.

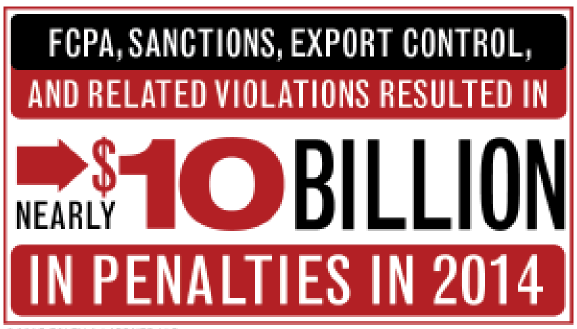
Managing these issues on a piecemeal basis is a recipe for failure and frustration. Instead, companies can better manage their risk and mitigate costs by adopting a risk-based approach to compliance tailored to their unique method of operations, risk profile, countries of operation, and products sold.

Greater Risk Awareness Leads to Greater Exports and International Compliance

U.S. laws governing exports and international conduct pose unique risks for the automotive sector. From the FCPA to ever-tightening sanctions and export controls, companies involved in the automotive supply chain face an increasingly complex universe of requirements governing how and where they conduct business overseas. These regimes also shape business decisions at home, with the so-called "deemed export" rule compelling exclusively domestic companies to seek export licenses before disclosing controlled articles, data, software, and technology to their non-U.S. employees. Combined with new disclosure requirements for listed companies and government contractors, the regulatory environment grows more complicated with each passing day.

Enforcement trends amplify these risks. In recent years, U.S. government agencies have targeted automotive and automotive supply chain companies under a number of different regulatory regimes. Notable examples include FCPA enforcement actions against AB Volvo, Daimler AG, Fiat, Iveco, Ingersoll-Rand, and Renault. The revelation of ongoing FCPA investigations within the industry, such as the disclosure by Delphi Corporation in its SEC filings that it is investigating potential FCPA violations in China, underscore that the regulatory risks posed by foreign operations are real and not going away any time soon. Sanctions enforcement is also on the rise, with Toyota Motor Credit Corporation and Volvo Construction

Equipment North America both targeted by the U.S. Treasury Department's Office of Foreign Assets Control. Automotive companies like GM-Daewoo have even faced government enforcement actions in relatively obscure areas like anti-boycott violations — a little-known legal regime that has both export and tax implications.



These trends show no sign of changing. From improved databases and forensic tools to enhanced collaboration between law enforcement, licensing, and intelligence agencies, enforcing these laws is now second only to fighting terrorism in terms of U.S. government enforcement priorities. FCPA, sanctions, export control, and related violations resulted in nearly $10 billion in civil and criminal penalties in 2014 alone.

Many companies in the automotive sector have attributes that contribute to elevated risk. Chief among them are large global supply chains, downstream manufacturing by worldwide affiliates, and frequent international trade in U.S.-origin goods, services, and technologies. Multinational business practices also raise concerns, with sales, operations, and joint ventures reaching into countries known for high levels of corruption, industrial espionage, and illegal export diversion. With U.S. companies increasingly liable for the actions of their overseas agents and affiliates, a risk-based, integrated approach to international compliance offers the best means of identifying, managing, and mitigating these risks.

Faced with these challenges, automotive companies should carefully consider how U.S. laws impact behavior both within and outside the United States. This means identifying and addressing the risks that are likely to arise based on the nature of their business, the places where they conduct business, and the customers they serve. It also means evaluating the degree to which foreign parties — whether subsidiaries, joint ventures, or even contractors — engage in activities that expose their U.S. counterparts to civil and criminal liability. Managing these issues in piecemeal fashion is a recipe for failure and frustration. Instead, companies can best manage their risk and mitigate costs by conducting periodic risk assessments, crafting tailored internal controls, conducting frequent training, and coordinating common standards across their entire organizations.

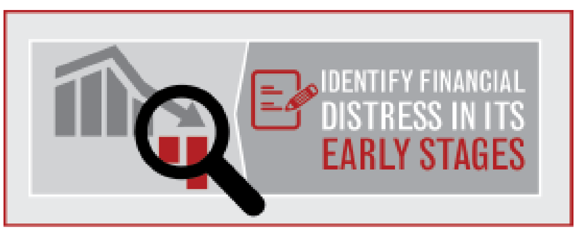
The same principles apply in the domestic compliance context. Suppliers need to understand their areas of risk and rigorously monitor and enforce their compliance policies, procedures, and codes of conduct. Conducting periodic internal reviews, reviewing and updating written policies and procedures, and updating and enhancing training programs are all components of a robust compliance program. Encouraging your employees to report any improper, unethical, or illegal conduct is critical to uncovering any potential fraud within your organization. Clearly delineating responsibility for compliance with various policies and internal controls ensures accountability.

Content for this section contributed by Gregory Husisian, Christopher M. Swift, and Brandi F. Walkowiak.

Financially Distressed Manufacturers and Preparing for Bankruptcy

Even while the automotive industry enjoys the current uptick in productivity and sales of new vehicles, some manufacturers will continue to face pressures presented by financially troubled customers and suppliers in 2015.

We know from past experience that manufacturers will look to leverage their position in the case of financial distress and, indeed, can improve their positions in the face of such pressures.



1. Know the Early Signs of Financial Distress

It is critical that manufacturers identify early signs of financial distress in their customer or supplier base, including:

- » Supplier requests for price increases, accelerated payment terms, or customer financing support
- » Late deliveries or changes in product quality
- » Requests for technical support
- » Failure to update IT systems or to appropriately use existing technology in the industry
- » Failure to effectuate cost reductions
- » Deteriorating accounts receivable and accounts payable
- » Employment of consultants
- » Deteriorating market position
- » Restatement or delays in issuing audited financial statements
- » Changes in key management positions

2. Have a Proactive Approach to Contracts

Where these signs exist, Foley recommends the exercise of common law and statutory remedies in order to achieve proactive changes to standard terms and conditions of new contracts (or negotiated changes to existing contracts.) Through the use of these tactics, manufacturers can prioritize, understand, and address troubled supplier situations with greater advance awareness. Manufacturers also should continually analyze their contracts to maximize leverage, and therefore available legal options, in dealing with troubled suppliers. A manufacturer's existing contracts with a given supplier have a substantial effect on the manufacturer's rights and remedies, both pre-bankruptcy and post-bankruptcy. For example, the terms of the contracts impact issues such as:

- » Each party's ability to terminate the contracts
- » The supplier's ability to stop shipment and impose "hostage" demands

» A manufacturer's ability to resource production to another, healthier supplier

» A manufacturer's ability to utilize certain contract remedies, including to demand adequate assurance of future performance pursuant to section 2-609 of the UCC or consider the contracts repudiated by the supplier

» Whether a contract is considered an "executory" contract in bankruptcy, whether it is integrated with other contracts, and the impact of this on the duty to perform in bankruptcy

» The troubled supplier's ability to assume and assign, or reject, the contract in bankruptcy

» A manufacturer's ability to recover tooling

» Lien rights

» Setoff rights

Through the imposition and application of statutory and common law contract rights, manufacturers can avoid troubled companies' use of their own ordinarily broad bankruptcy rights to reject contracts for continued supply of goods. Where signs of financial distress are apparent, or a manufacturer otherwise has reasonable grounds to believe that a supplier's future performance under a contract for the sale of goods is in doubt, a manufacturer may be able to demand adequate assurance of future performance from the supplier under section 2-609 of the UCC. If such assurance is not provided, a manufacturer may be able to consider the contract repudiated, enabling a manufacturer to resource or suspend shipment, to "shore up" contract rights before a bankruptcy filing. These strategies can drastically alter the parties' rights after a bankruptcy filing and provide greater leverage in negotiations.

Manufacturers also may participate in a pre-bankruptcy workout, intended to keep troubled suppliers on the verge of bankruptcy from filing, by restructuring the supplier's debt and capital structure. These transactions often include tripartite agreements among the troubled supplier, its significant customers, and its secured lenders to solidify the commitments of each party to keep the supplier operating while the workout (or bankruptcy) is progressing. These agreements commonly consist of access and accommodation agreements, and subordinated participation agreements. Through an accommodation agreement, the customers may provide (often as a group) accommodations that solidify the lenders' collateral base through protections on inventory and receivables, commitments to continue sourcing of existing parts to the troubled supplier and limitations on setoffs, while the lender agrees to provide working capital financing and not to foreclose. Furthermore, customer accommodations may include financing support, in which case the customer should obtain a participation agreement to obtain collateral for any financing it provides. An access agreement permits the customer, under certain circumstances threatening production and only as a last resort, to access the supplier's plant to produce parts pending transfer of the contract or facility to a healthier supplier.

3. Identify Sale Opportunities

Buying assets or an ongoing business from a company while it is in bankruptcy can be an excellent means of acquiring valuable assets free and clear of liens, claims, encumbrances, and other interests. Many opportunities exist to obtain such assets at bargain prices. Below we identify the advantages and disadvantages to these types of sales:

A. ADVANTAGES OF 363 SALES

» The debtor's assets can be acquired free and clear of liens and claims

» The debtor may assume and assign existing contracts and leases

» Transaction can be consummated over creditor objections

» Avoids risk of the transactions being characterized as a fraudulent transfer or a preference

» Minimizes the risk of successor liability

» The buyer has a convenient and accessible forum to enforce its rights (i.e., the bankruptcy court)

B. DISADVANTAGES OF 363 SALES

» Subject to higher and better offers (buyer may be used as a "stalking horse")

» Auction procedures will be imposed

» Bankruptcy courts are often sympathetic to the debtor in the event of a dispute with the buyer

» Multiple constituencies have a voice in the case and may delay, or impede, the sales process

» Representations and warranties of the debtor typically will not survive the closing

» Break-up fee or expense reimbursement provisions may not be approved by the bankruptcy court in the amounts requested

A debtor must give appropriate notice with an opportunity for parties-in-interest to request a hearing. *11 U.S.C. § 363(b)(1).* Typically, the debtor must give all creditors, indenture trustees, and the U.S. Trustee 20 days' notice of any proposed sale of assets, which notice must state the time and place of any public sale, the terms and conditions of any private sale, and the time fixed for filing objections. Objections to the sale normally must be filed at least five days before the sale unless the court orders otherwise. The bankruptcy court will approve a sale of substantially all or a portion of a debtor's assets "if all provisions of section 363 are followed, the bid is fair, and the sale is in the best interests of the estate and its creditors." *In re Quality Stores, Inc., 272 B.R. 643, 647 (Bankr. W.D. Mich. 2002).*

Content for this section contributed by Ann Marie Uetz and John A. Simon.

Three Key Labor and Employment Issues

Employees are an integral part of the manufacturing process but also can be the source of legal issues.

With increased activity from federal agencies, suppliers will face many employment-related issues in 2015, including the NLRB coming to non-union facilities, ADA accommodation issues, and protecting confidential and proprietary information. The risk in each of these areas can be reduced by the creation and enforcement of proper policies and procedures.

1. Watch for the NLRB to Come to Non-Union Facilities

For unionized employers, dealing with the NLRB is nothing new. However, the NLRB increasingly has been focused on non-union employers and the Section 7 rights of non-union employers under the National Labor Relations Act (NLRA), which provides:

> *"Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all such activities."*

In seeking to protect Section 7 rights, the NLRB has focused on policies in employee handbooks dealing with confidentiality and social media that have the potential to "chill" protected concerted activity. Specifically, the NLRB has held that blanket policies mandating confidentiality during investigations are unlawful. Requiring confidentiality is acceptable only if the circumstances of the particular case require confidentiality.

Additionally, negative comments about working conditions by employees on social media sites, such as Facebook and Twitter, can be protected concerted activity. Employer policies prohibiting disparaging or defamatory comments on social media can be held as overbroad and, thus, unlawful. Both union and non-union suppliers should review their policies to ensure compliance with the NLRB's guidance.

2. Address ADA Accommodation Issues

The ADA, as amended by the ADA Amendments Act of 2008 (ADAA), increased the number of employees who qualify as disabled and, thus, require suppliers to use the interactive process to determine if there is a reasonable accommodation. The interactive process is an individualized analysis that is not a one-time event. Suppliers should focus on the essential job functions for the employee at issue and whether the employee can perform the essential job functions with or without a reasonable accommodation.

Accommodation issues related to pregnancy will likely increase in 2015. On July 14, 2014, the Equal Employment Opportunity Commission (EEOC) published enforcement guidelines on pregnancy discrimination and related issues. While the EEOC had previously taken the position that pregnancy is not a disability under the ADA, the recent guidance provides that pregnancy and pregnancy-related impairments can be qualifying disabilities under the ADA. The guidance also provides examples of possible reasonable accommodations including: 1) redistributing marginal functions that the employee cannot perform; 2) modifying work schedules; 3) granting leave; and 4) modifying workplace policies. Suppliers should be prepared to make additional accommodations for pregnant employees that may not have been required in the past.

3. Protect Confidential and Proprietary Information

Technology and innovation are necessities for today's suppliers. However, technology can be a double-edged sword. On the one hand, technological innovations and advancements make suppliers more profitable and able to adjust to changing conditions. On the other hand, technology also makes confidential and proprietary information more vulnerable to disclosures, either intentionally or inadvertently. Protecting a supplier's investment in innovation must start early and continue throughout the employment relationship, especially at the end of the relationship. When key employees leave, they may take confidentiality and proprietary information to a competitor.

To help prevent confidential and proprietary information from walking out the door, suppliers must treat such information as if it is truly confidential and send that message to their employees. Policies dealing with protecting confidential and proprietary information should be implemented and enforced. For key employees, agreements containing confidentiality and/or non-compete provisions are advisable. Ensuring that processes are in place at the beginning and end of the employment relationship (as well as in between) can save suppliers future headaches.

Content for this section contributed by Michael W. Groebe.

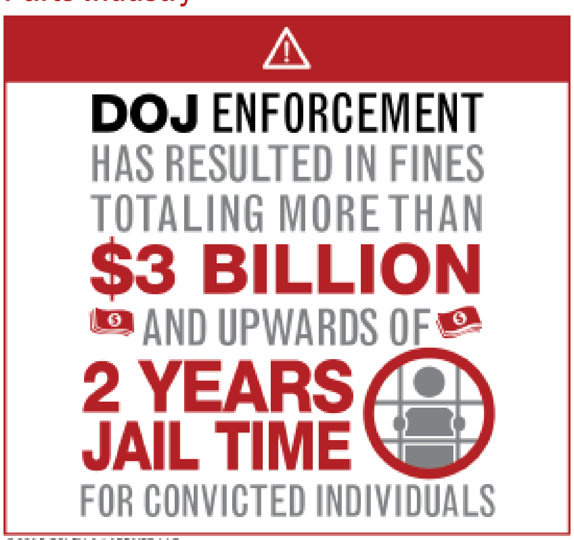
On the Antitrust Horizon

Recent U.S. and international antitrust developments will have important implications in 2015 for the automotive industry, including 1) the ongoing antitrust investigations and civil damage litigation involving the auto parts industry; 2) ever-increasing pressure for effective legal compliance programs; and 3) challenges to mergers (large and small, non-reportable) underscoring continued tough and aggressive enforcement of the merger laws.

In the international sector, important developments include: 1) European Union (EU) enactment of legislation that would facilitate private antitrust actions throughout the EU and collective redress of damages through class actions; 2) efforts to eradicate cartel activity have increased exponentially, particularly in the automotive parts sector; and 3) the European Commission's emphasis on "competitive effect" requirement as predicate to a violation.

On the U.S. Front

1. The DOJ Antitrust Division and the Auto Parts Industry



For more than 10 years, the DOJ's Antitrust Division has been conducting ever-expanding criminal investigations of the auto parts industry. The investigations have, so far, resulted in guilty pleas from more than 30 companies and almost 50 individuals have been charged to date. In these proceedings, the defendants have admitted engaging in price-fixing and market allocation involving dozens of different auto parts sold to major motor vehicle manufacturers. The DOJ has used its leniency and leniency plus programs effectively, as leverage, to expand the enforcement net. Enforcement efforts have resulted in fines totaling more than $3 billion and substantial jail time for convicted individuals (upwards of two years). A vast majority of total DOJ fines in 2014 were related to auto parts investigations. Massive class action treble damage litigations are pending in which billions of dollars in damages for overcharges are sought.

2. Antitrust Enforcement Concerns in Mergers and Acquisitions — Large Versus Small Deals

The Federal Trade Commission (FTC) and the DOJ, which share merger enforcement responsibility, continue to investigate anticompetitive acquisitions. The regulators may initiate court proceedings to try to block the transaction or demand that the competitive problems posed by the transactions be resolved before granting clearance. The enforcement agencies continue to challenge small, non-reportable transactions, even years after consummation, if the acquisitions raised significant anticompetitive risks for the markets involved. Disgruntled customers frequently disclose deals to regulators, sparking regulatory interest, whether or not the deal was reportable. Almost 25 percent of all DOJ/FTC merger investigations involve transactions that are non-reportable under the Hart-Scott-Rodino Act (HSR). Many of those investigations of non-reportable transactions resulted in enforcement actions to challenge the deal, even if it was previously consummated. As such, automotive suppliers must proactively vet in advance their potential competitive issues in potential deals even if the size of the proposed transaction would not be reportable under HSR rules.

3. DOJ/FTC Turn Up the Heat to Spur Adoption of Effective Legal Compliance Programs

The DOJ and FTC initiated high-profile campaigns/litigation to encourage companies to adopt comprehensive and effective legal compliance programs. In a series of well-publicized speeches, senior Antitrust Division officials have warned of serious consequences if a company under investigation is found not to have adopted and implemented an effective compliance program. The regulators threatened that, in addition to heighten penalties, companies risk being put on probation, and also may run the risk that an external corporate monitor be appointed to assure compliance. The regulators emphasize that a compliance program has three principal goals: prevention, detection, and mitigation. To be effective, the program must be "top-down" creating a "culture of compliance." It must be company-wide, proactive, and emphasize training, accountability, and discipline.

4. U.S. Court of Appeals Decisions Raise Questions on the Extraterritorial Reach of U.S. Antitrust Laws

In a series of decisions over the last several years, several U.S. courts of appeals have dealt with important questions regarding the extraterritorial reach of U.S. antitrust laws as embodied in the Foreign Trade Antitrust Improvements Act (FTAIA). In essence, the FTAIA (15 U.S.C. §6A) provides that basic U.S. antitrust laws apply to domestic-sited trade restraints, trade restraints affecting imports into the United States, or trade restraints (not involving imports or domestic-sited trade restraints) that have a direct, substantial, and reasonably foreseeable effect on competition in the United States and which give rise to the claim asserted. There seems to be an emerging consensus that the FTAIA deals not with subject matter jurisdiction, but rather involves the substantive elements of a claim. Some view the FTAIA to apply when anticompetitive effects follow immediately from the conduct of the defendants. Others see the FTAIA as applicable when those foreign effects are "reasonably proximately causal" to the anti-competitive effect alleged. There will be important additional decisions in 2015 that may ultimately lead to U.S. Supreme Court consideration.

On the International Front

5. The EU Adopts Directive for the Recovery of Restrictive Trade Practice Losses

The EU has adopted legislation (a "directive") that requires all EU member states in the next several years to enact national laws that facilitating persons injured by violations of EU antitrust laws (e.g., cartels and abuses of dominant positions) to recover damages for their injuries. A directive is an EU-level mandate in which the EU member states enact national legislation to implement the substantive requirements of the EU legislation. The directive includes required steps to harmonize and liberalize current national rules on damage actions, particularly with regard to discovery of evidence, statutes of limitations, measure of damages, consensual settlements, and presumptive effects of national determinations of injury. There also is a parallel effort to establish an EU-wide system of "collective redress." The EU Court of Justice has expanded the scope of recoverable damages. These developments reflect the increasing priority to redress the perceived ongoing failure of the EU member states to protect persons injured from antitrust violations. The result will likely be additional exposure to damage actions for violation of European competition laws.

6. EU Court of Justice Issues Major Ruling, Potentially Narrowing the Scope of Article 101 (1) of the Treaty on the Functioning of the European Union (TFEU)

On September 11, 2014 the Court of Justice issued its ruling in *Groupement des cartes bancaires v. European Commission* (Case C-67/13). This decision may have major implications on the enforcement of Article 101 (1) TFEU. Article 101 (1) contains two seeming alternative standards of illegality — trade restraints that "affect" competition or trade restraints that have the "object" to restrict competition. The Court of Justice decided that the "by object" restriction of competition standard should be interpreted narrowly and can only apply to conduct that in itself reveals a sufficient degree of harm to competition such that it may be found that there is no need to examine their effects. Thus, not all agreements, even if they include some pricing measures, can be presumed to harm competition but only those that are clearly and sufficiently injurious to competition. For all other agreements that do not have the object of restricting competition, the appreciable effect on competition needs to be assessed taking into account the conditions in which the agreement operates and the economic context, thus placing a greater burden on the competition authorities. It remains to be seen how this decision will be interpreted by the European Commission, national competition authorities, and member state courts and by the Court of Justice itself in subsequent decisions.

7. EU Cartel Prosecution Remains, Like in the United States, a High-Enforcement Priority

While EU competition rules are not criminal, the European Commission has used its sweeping powers to detect, investigate, and prohibit cartel activity. Through December 10, 2014, the European Commission has imposed €1.689 billion in fines and penalties in cartel cases. As in the United States, the EU has an aggressively enforced system of leniency and leniency-plus. Like the DOJ, the EU incentivizes "whistleblowers" to alert the Commission to cartel activity. The Commission regularly engages in so-called "dawn raids" to gather evidence from company records. Like the United States, the European Commission actively cooperates with other enforcement agencies to further strengthen its enforcement leverage. Thus, as with the United States, EU cartel enforcement underscores the need for strict compliance efforts. Similar to the United States, the European Commission is actively pursuing investigations in the auto parts industry. When the new European Commission took office on November 1, 2014, the outgoing Competition Commissioner said that there was a "long list" of investigations being turned over to the incoming commissioner including investigations involving more than six auto part components industries.

Content for this section contributed by Howard W. Fogt.