NADC
NATIONAL ASSOCIATION OF DEALER COUNSEL

DEFENDER

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EEOC Issues Enforcement Guidance on Pregnancy Discrimination and Related Issues

Keith A. Watts, *Ogletree, Deakins, Nash, Smoak & Stewart, P.C.*
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Recently, the U.S. Equal Employment Opportunity Commission (EEOC), by a 3-to-2 vote, approved a new guidance on the Pregnancy Discrimination Act (PDA). In the first comprehensive update on the subject of discrimination against pregnant employees in over 30 years, the "Enforcement Guidance on Pregnancy Discrimination and Related Issues" supersedes the EEOC's 1983 Compliance Manual chapter and provides the public with information regarding the rights and obligations of all parties under the PDA.

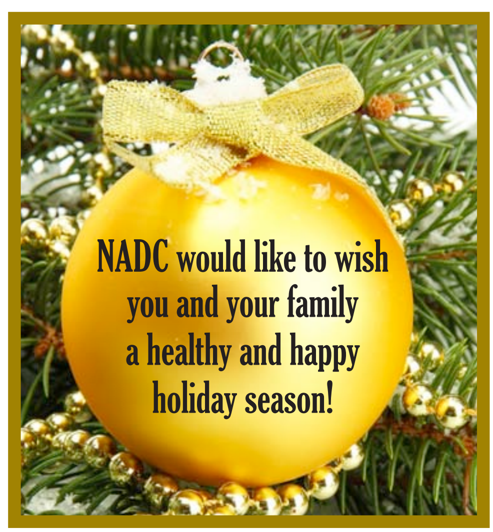
In addition, the guidance discusses the application of the Americans with Disabilities Act (ADA) to pregnancy-related disabilities. The federal agency also issued a "Fact Sheet for Small Businesses: Pregnancy Discrimination," a document of questions and answers explaining the guidance and providing direction, which is applicable to dealerships. Below is an overview of these changes.

The Pregnancy Discrimination Act

Under the PDA, a dealership cannot fire, refuse to hire, demote, or take any other adverse action against a woman if pregnancy, childbirth, or a related medical condition is a motivating factor in the adverse employment action. Therefore, pregnant women who are able to work must be permitted to do so subject to the same terms and conditions as other employees; when unable to work, they must be accorded the same rights, leave privileges, and benefits as other similarly-situated employees.

The recent guidance reinforces the PDA's treatment of discrimination based on pregnancy, childbirth, or a related medical condition as a form of sex discrimination. The guidance reviews the obligations that the PDA imposes on dealerships with regard to discrimination, harassment, medical leave, parental leave, benefits, health insurance, light duty requests, and other accommodations. Among the topics covered by the guidance are the following:

- The law's general prohibitions and requirements, including the protection of indi-



viduals who are not currently pregnant, examples of pregnancy-related medical conditions, and whether a dealership may ask an employee or applicant if she is currently or intends to become pregnant;

- Discrimination based on an employee's caregiving responsibilities, including relevant prohibitions under Title VII of the Civil Rights Act of 1964 and protections provided to employees under the Family and Medical Leave Act after the birth of a newborn or the adoption of a child;
- The dealership's safety concerns regarding the employment of pregnant employees as balanced against an employment requirement that a pregnant worker be able to perform the duties of her job;
- The PDA's prohibition of harassment based on pregnancy, childbirth, or related medical conditions; and
- The dealership's responsibility to treat employees who are temporarily unable to perform the functions of their jobs because of pregnancy or related medical conditions in the same manner as other employees in terms of alternative assignments, fringe benefits, and modified tasks.

The Americans with Disabilities Act

Title I of the ADA forbids discrimination on the basis of a disability in any aspect of employment, including hiring, firing, pay, job assignments, promotions, layoffs, training, fringe benefits, and any other term or condition of employment. The ADA likewise requires dealerships to provide reasonable accommodations to qualified individuals with disabilities if doing so would not impose an undue hardship on the operation of the dealership's business.

While pregnancy is not an impairment that qualifies as a disability within the meaning of the ADA as amended in 2008, the guidance states that, "in some circumstances," workers with pregnancy-related impairments are covered under the ADA's definition of "disability." The guidance reviews a number of examples of pregnancy-related medical conditions that would qualify as an ADA disability and thus give rise to a dealership's duty to accommodate. In addition, the guidance provides examples of reasonable accommodations that dealerships may be required to implement for disabilities caused by pregnancy-related impairments.

Other Laws

In addition to the PDA and ADA, the guidance addresses the relevant protections provided under the federal Family and Medical Leave Act, including its requirement to provide certain employees with pregnancy-related or child care leave. The guidance also briefly mentions Executive Order 13152168, which prohibits discrimination in federal employment based on an individual's status as a parent, and section 4207 of the Patient Protection and Affordable Care Act, which requires dealerships to provide reasonable break times for nursing mothers until the child's first birthday.

Best Practices

The guidance concludes with a series of "suggestions for best practices that employers may adopt to reduce the chance of pregnancy-related PDA and ADA violations and to remove barriers to equal employment opportunity." In light of the new guidance, the EEOC suggests that small businesses, such as dealerships, take a number of actions with regard to their general policies, in terms of hiring and promotion, leave and fringe benefits, the terms and conditions of employment, and reasonable accommodations. The recommended actions involve the development and review of policies affecting leaves, light duty requests, reasonable accommodations, and pregnancy and disability discrimination.

Problems, Predictions, and Future Concerns

As delineated in two dissenting opinions, the guidance announces significant changes that must be brought to a dealership's attention. According to EEOC Commissioners Constance S. Barker and Victoria A. Lipnic, the guidance offers an interpretation of the PDA for which there is no apparent legal basis. Both commissioners have distributed public statements detailing their reasons for voting against the newly-issued draft and citing fatal flaws to the now-approved guidance. Both have deplored the failure of the EEOC to provide an opportunity for public comment on the draft guidance before its issuance in final form.

In the section on "Persons Similar in Their Ability or Inability to Work," Commissioner Barker stated that the EEOC introduced an entirely new legal interpretation of the PDA, which is unsupported by congressional intent and current case law. According to Commissioner Barker, despite the lack of legal authority, the guidance suggests that the PDA requires businesses to give reasonable accommodations to all employees who have work restrictions because of their pregnancy. This gives even those women who do not have a disability as defined by the ADA a right to reasonable accommodations that is similar to the right of individuals with disabilities.

In effect, the guidance permits all pregnant employees who are restricted in their ability to work to bypass the ADA's requirements for protection—namely, that the employee be disabled and qualified for the position with or without a reasonable accommodation. The EEOC thus pioneered a new interpretation of the PDA, analyzing the act not only as a nondiscrimination law but also as a reasonable accommodation law.

Moreover, in the section on "Light Duty Work Assignments," Commissioner Barker noted that the guidance wrongly interprets the PDA to require businesses with policies limiting light duty work to those who have been injured on the job, to also offer light duty work to pregnant employees (who have not been injured on the job). The Supreme Court of the United States will consider similar issues next term when it reviews a case on appeal from the Fourth Circuit Court of Appeals. The case concerns whether and to what extent the PDA requires businesses to provide accommodations to pregnant employees. We will keep you abreast of any new developments in this area. ■

Keith A. Watts is a founding and Office Managing Shareholder of "The OC," the Orange County, California offices of Ogletree Deakins. Keith practices labor and employment law and has handled a wide range of matters, including sexual harassment, discrimination, wage and hour and wrongful termination claims. Keith regularly advises Dealerships on a myriad of workplace issues, including employment contracts, severance agreements, company policies and procedures, and supervisor training as well as successfully representing employers in union organizing campaigns and collective bargaining negotiations,. In addition to his practice, Watts is a frequent lecturer on labor and employment law issues, having conducted workshops, seminars, and speaking engagements throughout the United States.

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NADC 2015 Attorney Directory

Contact information for the directory will be obtained from your profile on the NADC website. Please log in to make sure your profile is updated by **December 12, 2014.** You can also purchase entry upgrades and ad space. Please contact Charlotte Valentine at cvalentine@dealercounsel.com for more details.

All Materials and Profile Updates Due: Friday, December 12, 2014.

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Executive Director's Message

Erin H. Murphy
NADC Executive Director

This issue marks the final 2014 publication of *The Defender*. We have already started to solicit articles for 2014. We encourage all members to share their knowledge and expertise with the NADC community by submitting an article to be published in *The Defender*. Please contact me at emurphy@dealercounsel.com or Editor Jami Farris at jamifarris@parkerpoe.com for more information.

Another way to keep up with the ever changing landscape of the auto industry is to attend the educational sessions at the NADC Biannual Conferences. Plan now to attend the 11th Annual NADC Member Conference, April 26-28, 2015 at the Montage Resort in Laguna Beach, CA.

The planning committee is working hard to put together a program of 14 to 15 hours of educational sessions. As usual, CLE credit will be available. Preliminary topics will be released soon.

Hotel reservations must be made directly with the Montage by calling 866-271-6953. Please reference the NADC Annual Conference to receive our discounted rate of $315 plus applicable taxes. A deposit equal to the room rate and tax (12.2%) for the first and last night for each reservation is required to reserve a room.

The room block deadline for hotel reservations is April 3, 2014. Please make your reservation early to avoid the room block selling out.

The deposit is refundable if the Montage receives notice of cancellation at least three days prior to the scheduled arrival.

Additional program information and registration will be available on our website, www.dealercounsel.com, in early 2015.

I hope everyone has a happy and healthy holiday season! ■

NADC Topical Practice Groups

In accordance with the NADC Strategic Plan the Board of Directors has decided to activate the following two topical practice groups:

* Regulatory Compliance
* Consumer Litigation

Get Involved!

If you are interested in being involved in either practice group, please contact Erin Murphy at emurphy@dealercounsel.com.

The Four Factors Affecting Today's Blue Sky Multiples

Erin Kerrigan, *Kerrigan Advisors*

Feature Article

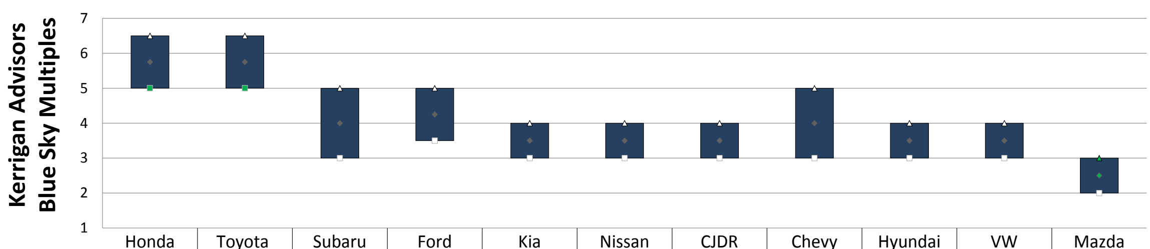
Dealers often ask me where a given franchise should be valued in today's active buy/sell market. To answer that question, Kerrigan Advisors publishes The Blue Sky Report™ - a Kerrigan Quarterly that details the blue sky multiples of the major franchises. These charts lay out the high, average, and low multiples for each franchise in the luxury and non-luxury segments. In Charts I and II, you can see the most recent information and some of the key metrics that drive franchise value.

The Kerrigan Advisors' multiples are based on our view of franchise values in the current buy/sell market. Each franchise in the chart is designated with either a high, an average, or a low multiple. Although most dealers understand what constitutes an average performance multiple, which is associated with an average performing franchise, I am often asked what would cause a dealership to be valued in the high versus the low range.

Chart I

Kerrigan Advisors Blue Sky Chart: Non-Luxury

Source: Kerrigan Advisors Analysis



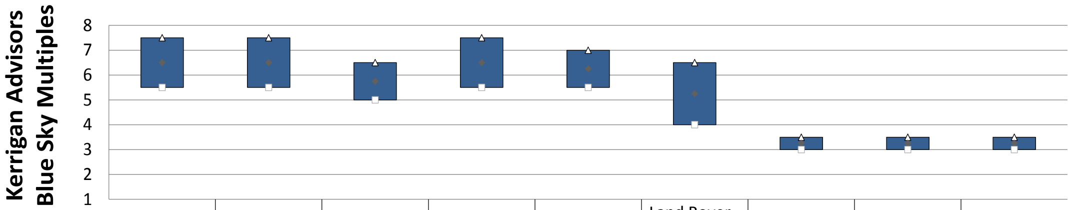
	Honda	Toyota	Subaru	Ford	Kia	Nissan	CJDR	Chevy	Hyundai	VW	Mazda
High	6.5	6.5	5	5	4	4	4	5	4	4	3
Average	5.75	5.75	4	4.25	3.5	3.5	3.5	4	3.5	3.5	2.5
Low	5	5	3	3.5	3	3	3	3	3	3	2

Franchise	Buyer Demand	Market Share Change YOY (Jan-Oct Period)	Change in Sales YOY (Jan-Oct Period)	Sales per Franchise YTD (Jan - Oct)	Average Dealership Profitability	YOY Change in OEM Profit	Days Supply Inventory (11/1/14)	Moody's Credit Rating
HONDA	High	-5%	+1%	1,100	Consistently High	+9%	62	A1
TOYOTA	High	None	+5%	1,362	Consistently High	-16%	55	Aa3
SUBARU	High	+14%	+20%	674	Variable	+20%	21	NA
Ford	Average	-6%	-1%	638	Variable	-51%	87	Baa3
KIA	Average	+2%	+7%	636	Variable	-10%	87	Baa1
NISSAN	Average	+8%	+14%	1,011	Variable	+54%	78	A3
Jeep RAM	Average	+9%	+16%	706	Variable	+27%	84	B1
CHEVROLET	Average	-2%	+3%	560	Variable	-27%	92	Ba1
HYUNDAI	Average	-4%	+1%	736	Variable	-8%	81	Baa1
VW	Low	-17%	-12%	471	Consistently Low	+56%	94	A3
mazda	Low	+2%	+8%	408	Consistently Low	+195%	98	NA

Chart II

Kerrigan Advisors Blue Sky Chart: Luxury

Source: Kerrigan Advisors Analysis



	BMW	Mercedes	Audi	Lexus	Porsche	Land Rover - Jaguar*	Acura	Cadillac	Infiniti
High	7.5	7.5	6.5	7.5	7	6.5	3.5	3.5	3.5
Average	6.5	6.5	5.75	6.5	6.25	5.25	3.25	3.25	3.25
Low	5.5	5.5	5	5.5	5.5	4	3	3	3

Franchise	Buyer Demand	Market Share Change YOY (Jan-Oct Period)	Change in Sales YOY (Jan-Oct Period)	Sales per Franchise YTD (Jan - Oct)	Average Dealership Profitability	YOY Change in OEM Profit	Days Supply Inventory (11/1/14)	Moody's Credit Rating
BMW	High	+5%	+11%	791	Consistently High	+1%	39	A2
Mercedes-Benz	High	+2%	+7%	780	Consistently High	+73%	52	A3
Audi	High	+9%	+15%	522	Consistently High	+4%	41	A3
LEXUS	High	+8%	+14%	1,043	Consistently High	-16%	58	Aa3
	High	+5%	+11%	207	Consistently High	+18%	59	A3
Land Rover / Jaguar	High (LR)	+1% LR -13% Jag	+6% LR -8% Jag	252 LR 79 Jag	Consistently High (LR)	-9%	22 LR 62 Jag	Ba2
ACURA	Low	-5%	0%	492	Consistently Low	+9%	62	A1
Cadillac	Low	-10%	-5%	152	Consistently Low	-27%	103	Ba1
INFINITI	Low	-1%	+4%	458	Variable	+54%	74	A3

There are four key factors that drive the variability of blue sky multiples: (i) earnings growth expectations; (ii) buyer demand; (iii) real estate, and (iv) market preference. The combination of these four factors plays a major role in the blue sky multiple a buyer is ultimately willing to pay. Below is a review of each factor, including some specific examples.

Factor One: Earnings Growth Expectations

- *Higher Growth = Higher Multiple*
  - **Underperforming dealerships provide an opportunity for higher earnings growth.**
    A dealership that is underperforming, meaning its profitability and/or sales are below market expectations, often commands a higher blue sky multiple. Why? Because some buyers believe they can grow profits at an above-average rate by reducing expenses, increasing gross profit, or growing sales. Simply by "fixing" the underperformance, buyers should experience a higher level of earnings growth. For example, I recently represented two underperforming dealerships that commanded very high multiples (even higher than the multiples in our chart). The profitability of both of these stores was far below market. The buyers felt that they could achieve outsized earnings growth within a year and accordingly priced the blue sky at a multiple above average.
  - **Dealerships in high growth markets have higher earnings growth expectations.**
    Dealerships located in high growth markets, meaning cities/regions that are growing their economy and population at a faster pace than the U.S. average, often command a higher blue sky multiple. Buyers are willing to pay a higher multiple for these stores because they expect their sales and earnings to grow at a faster pace than the industry. By way of example, Texas, Arizona, and Florida are high growth markets where dealerships often command premium multiples.

- *Lower Growth = Lower Multiple*
    - **Over-performing dealerships can experience below average earnings growth post sale.**
      Ironically, a dealership that is over-performing, meaning its profitability and/or sales are above market expectations, often commands a lower blue sky multiple. This usually surprises sellers, as they believe their over-performing store should command a higher blue sky multiple. The reason over-performing stores receive lower multiples is because most buyers do not expect earnings to grow at an above average pace post-transaction; in fact, they often believe earnings will decline after the sale. As a result, buyers are more likely to pay a below average multiple for an over-performing store.
    - **Dealerships in slow growth markets can expect slower earnings growth.**
      Dealerships located in low growth markets, meaning markets that are growing their economy or population more slowly than the national average, often command a low blue sky multiple. As an example, certain markets in the Midwest and Northeast command lower multiples because of their slower population growth.

Factor Two: Buyer Demand

- *Higher Demand = Higher Multiple*
    - **Dealerships located in major metro markets are in high demand.**
      The supply/demand imbalance in major metro markets is more extreme than in smaller markets. This is in part due to our country's continued urbanization. There are significantly more buyers seeking acquisitions in big cities than there are sellers willing to part with their highly valuable, metro stores. Large, well-funded buyers are seeking dealerships in major metros either because they already have a presence in the market or because they are seeking higher volume franchise opportunities where they can put a significant amount of their acquisition capital to work. High buyer demand, with limited seller supply, drives up price (Economics 101).
    - **Dealerships in the Sunbelt are in high demand.**
      Most of the largest, well-funded private and public dealership consolidators are focused on the Sunbelt states. Accordingly, dealerships in these states can expect a higher multiple.

- *Lower Demand = Lower Multiple*
    - **Dealerships located in rural markets have fewer buyers.**
      There are fewer buyers seeking dealerships in smaller/rural markets. Less demand means less competition and lower blue sky multiples. In addition, buyers seeking dealerships in smaller markets often have less capital, which can result in lower blue sky multiples.
    - **Dealerships located outside the Sunbelt are in lower demand.**
      As stated above, the largest dealership consolidators are expanding primarily in the Sunbelt states due to their population growth and lack of sales seasonality (minimal winter weather). Conversely, due to less demand, dealerships located in non-Sunbelt markets can receive lower blue sky multiples.

Factor Three: Real Estate

- *Image Compliant Facilities & Low Rent = Higher Multiple*
    - **Image compliant dealerships with low rent command higher multiples.**
      These dealerships are highly attractive to buyers because they require no additional investment and they have an attractive rent factor, thus low fixed expenses and less risk. Note: In 2014 the average dealership according to NADA had a rent factor of 7.1% of gross profit. In general, if a dealership is image compliant and its rent to gross profit is at or below 7.1%, then it is considered to have low rent. A rent to gross profit margin above 10% is considered high.

- *Real Estate Investment Required and/or High Rent = Lower Multiple*
    - **Dealerships that require major real estate investments command lower multiples.**
      Most buyers are not looking for real estate development projects. When a dealership requires a significant real estate investment, both known and unknown costs are created. These costs result in increased future rent, which could reduce future earnings (see Factor One). As such, buyers often price non-image compliant franchises at lower multiples to take into account the risks to future earnings. Exception: If a buyer believes that by building a new facility, sales growth will more than make up for the increased rent expense, then the new facility could positively impact the blue sky multiple.
    - **Dealerships with high rents receive lower multiples.**
      These dealerships are often located in expensive real estate markets, such as urban centers, or have overbuilt facilities. Their high rent expense relative to gross profit adds risk to the dealership profitability, because rent is a fixed expense that does not fluctuate when sales decline. (We certainly learned that lesson during the last recession.) Also, the price of new vehicles does not fluctuate from market to market. Thus, dealers in high rent markets generally have higher expenses and can make less profit than those in low rent markets. *Exception:* An underperforming dealership may have high rent relative to gross profit because either its sales and/or its gross profits are below market expectations. In this case, the

high rent may not impact the blue sky multiple, because the buyer believes sales and gross profits will grow post sale to a level that brings the rent in line with industry averages.

Factor Four: Market Preference

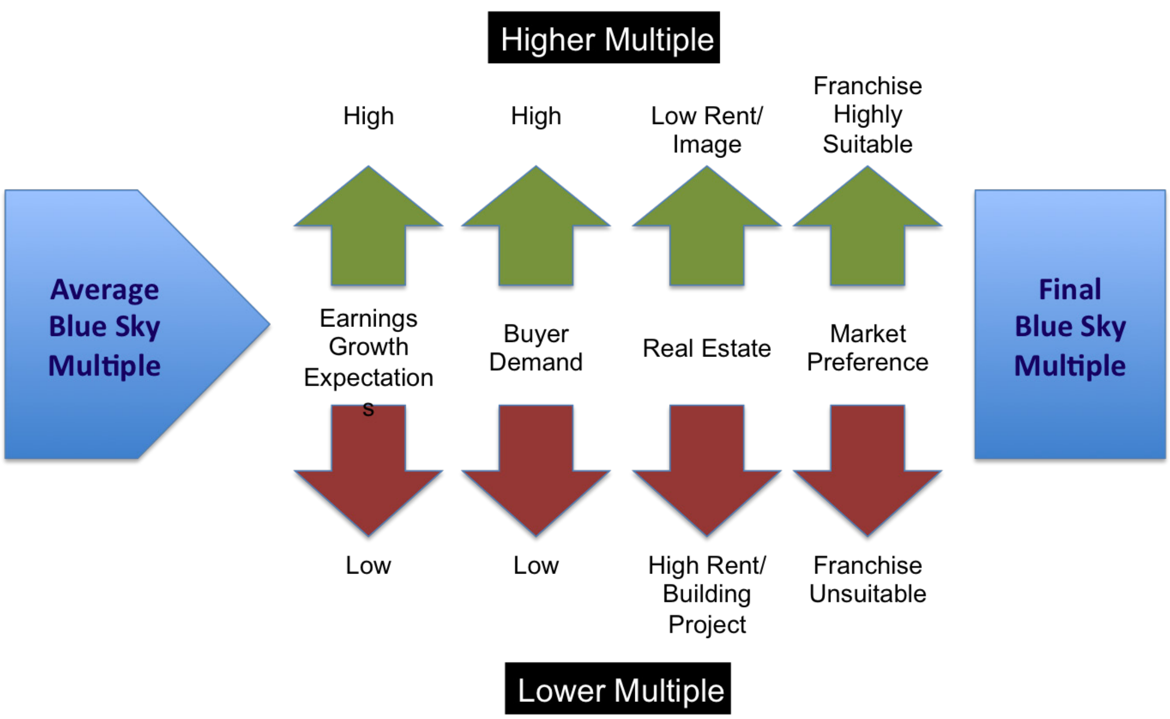
- *Highly Suitable Franchise for a Particular Market = Higher Multiple*
    - **Franchises that are highly suitable for a particular market receive higher multiples.**
      For example, a domestic franchise located in a truck market, such as Colorado, is more valuable than the average domestic franchise in the U.S., and thus will likely command a higher multiple. This is due to the fact that unit sales volume and dealership earnings in those markets are expected to be far above the average domestic franchise.
- *Unsuitable Franchise for a Particular Market = Lower Multiple*
    - **Franchises that are unsuitable for a particular market receive lower multiples.**
      For example, a luxury franchise in a small city with fewer high-income wage earners will be much less valuable than the average luxury franchise located in a major metro. The lower multiple is due to the fact that the new unit sales volumes and earnings will be below franchise average, particularly if the dealer is required to have a stand alone, image compliant facility.

In each case, these multiples coalesce to push dealership multiples up or down. Sometimes all of these valuation factors can counterbalance one another, as already noted in Factor Three (Real Estate). For instance, you may have an underperforming dealership located in a low demand market or an over-performing dealership located in a high demand market. In both cases, each store could command an average franchise multiple as the factors counter weight each other.

Valuing dealerships is much more of an art than a science. The goal of Kerrigan Advisors' Blue Sky Charts is to help bring a bit more science into the process. Ultimately, a dealership is only worth what a buyer can and will pay, and what a seller can and will accept--in other words the market-clearing price. ■

Erin Kerrigan founded Kerrigan Advisors in 2014. Kerrigan Advisors is a national dealership brokerage firm focused on sellers. The firm's leadership has advised on over $2 billion worth of transactions in their careers in auto retail, private equity and investment banking. Ms. Kerrigan is a recognized, industry expert on dealership valuation, real estate, and buy/sells, and is a frequent speaker at leading auto retail events and conferences. She was the number one rated speaker at NADA 2012.

Chart III
Drivers of Blue Sky Multiple Variability
Source: Kerrigan Advisors Analysis



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