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Attorneys Must Consider How Treasury Proposed Regulations Will Affect Dealer Clients' Estate Plans

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On August 4, 2016, the U.S. Treasury Department published the long-anticipated proposed regulations under Section 2704 of the Internal Revenue Code, which deal with the valuation of transfers of interests in family-controlled entities (including corporations, partnerships, and LLCs) for estate, gift, and generation-skipping transfer tax purposes.¹ Consequently, it is imperative for attorneys to familiarize themselves with these proposed regulations as to not only inform their clients of what is likely to come, but also to be able to provide them better legal advice and sensible planning.

The Changes

It has been rumored for more than a year that these proposed regulations would eliminate restrictions that effectively reduce the otherwise determined value of a family-owned business – which is largely applicable to the dealership industry, as the large majority of dealerships are family-run.

According to the current interpretation of IRC section 2704(b)(2), if a dealer transfers an interest in his/her business to (or for the benefit of) a member of his/her family, and the dealer and members of the dealer's family hold control of the entity immediately before the transfer,

then the “applicable restriction” is disregarded in valuing the transferred interest.² Therefore, a minority interest gift in a family-owned dealership is presently valued at its fair market value and takes into account any applicable discounts for lack of control and marketability. However, the proposed regulations would disregard restrictions on a minority owner's ability to withdraw from a given dealership entity should it be family-controlled.

Specifically, under the proposed regulations, a restriction is disregarded if it:

- Limits the ability of the interest holder (presumably the dealer) to liquidate the interest;
- Limits the liquidation proceeds to an amount that is less than a minimum value;
- Defers the payment of the liquidation proceeds for more than six months; or
- Permits the payment of the liquidation proceeds in any manner other than in cash or other property, other than certain notes.³

The proposed regulations also stipulate that the interest of a non-family member will be disregarded unless:

- The aggregate interests of non-family members is at least 20 percent;

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- Each non-family member interest is at least 10 percent;
- The interest of each non-family member has been held for at least three years; and
- Each non-family member has a put right in exchange for a proportionate share of net asset value.⁴

An additionally important note to bear in mind is that, according to the proposed regulations, operating family dealerships are subject to the same valuation rules as entities with passive investments.

What This Means for Your Dealer Clients

The potential finalization of the proposed regulations as they are currently drafted have significant implications that may impact your clients:

1. An interest in a family-owned dealership entity transferred to a family member during life or at death will be valued for transfer tax purposes at the net value of the entity multiplied by the percentage interest in the entity that is being transferred, without the application of a lack of control discount.
2. They will greatly impair the availability of minority interest discounts in estate planning. The hearing on the regulations is scheduled for December 1, 2016, meaning your clients who are interested in taking advantage of the current law's valuation principles and making inter-family transfers must act promptly.
3. Past the immediate implications, it is also important to consider the long-game. Dealers will need to reconsider how they tend to their estate plans over the course of the lifetimes – particularly during their most dynamic years of wealth accrual in order to accomplish the most tax efficient transfer of wealth.

Effective Planning

Pending the December 1 hearing, the effective date of the regulations would be 30 days following the final regulations being

published in the Federal Register. Thus, the regulations may not be finalized for another several months and there remains opportunity for you to help your clients to advantageously make gifts under the current rules. Effective estate planning to reduce transfer taxes under current law includes:

- Outright gifts of minority interests to family members;
- Outright gifts of minority interests to trusts for family members;

- Sales of interests to family members; and
- Sales of interests to trusts for family members.

While there is chatter surrounding the likelihood of challenges to the validity of the regulations should the regulations be finalized, these challenges would necessitate expensive, prolonged court proceedings and are just as likely to be unsuccessful. Erring on the side of caution and proactivity, it is strongly recommended that you proceed with



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your clients' planning under the assumption that the final regulations will be close to what we see in the proposed regulations and that dealers' valuation discounts under current law will be undesirably impacted.

Your legal advice to your dealer clients should be carefully coordinated with input from the clients' CPAs. You will often find that the CPAs have pieces of the puzzle that the client has omitted from consideration, which can significantly affect planning decisions. Determining how these proposed regulations may affect dealer clients and their families and what they can do to maximize after-tax benefits of wealth transfer planning will be most effectively and advantageously achieved through merging both legal and accounting perspectives. ■

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3. "Estate, Gift, and Generation-Skipping Transfer Taxes; Restrictions on Liquidation of an Interest". The Federal Register. August 4, 2016. <https://www.federalregister.gov/articles/2016/08/04/2016-18370/estate-gift-and-generation-skipping-transfer-taxes-restrictions-on-liquidation-of-an-interest>
4. *Id.*

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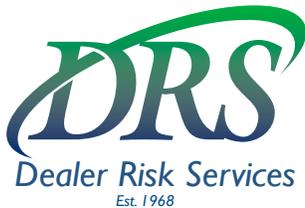
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Time flies. It is hard to believe that the summer is almost behind us and that 2016 is coming to a close. But some things seem not to change. We started the New Year with continuing attacks by the FTC and the CFPB against the automobile franchise system and its retail operating procedures. Those attacks continue and, more than ever, these attacks confirm the need for organizations such as NADC. In a conversation with Erin Murphy, our Executive Director, I was pleased to learn that our membership has increased to over 570 members. I think those numbers support our belief that an NADC membership is one of the best investments an attorney who has an automobile, RV, or truck dealer legal practice can make.

Many NADC members have told me that they are surprised when they encounter attorneys doing automobile dealer work who do not belong to NADC. It is hard to imagine confronting the unique issues involved in our daily work without the benefits of an NADC membership. In talking with colleagues who do work in our industry but who do not belong to NADC, I always try to point out many of the substantial benefits that an NADC membership provides. In no particular order, those benefits include at least the following: (1) the opportunity to attend two substantive conferences a year focusing on timely and industry specific topics; (2) the opportunity to participate in webinars dealing with industry issues; (3) significant CLE credits from conference attendance and webinar participation; (4) an online list-serve that allows members to share industry information, ask questions and get informed answers; (5) a subscription to Spot Delivery, one of the best auto industry related publications; (5) a subscription to the NADC publication, *The Defender*, which also deals with auto industry topics; (6) a weekly email dealer alert, *Dealer Counsel Alert*, summarizing the most recent pertinent industry matters; (7) a trademark branding policy that permits members to identify themselves as members of NADC on stationery and websites; (8) an online membership directory and hard copy membership directory allowing our members to locate and make referrals to industry colleagues; (9) the NADC website with forum discussions, documents and retention of all NADC conference materials; (9) a platform to address industry issues such as the recent and future FTC workshops; and (10) an NADC information booth and meeting booth at the NADA convention; (10) the ultimate networking opportunity for dealer counsel at all of our events. Overall, NADC membership offers its members access to a network of attorneys that are actively engaged in the industry, offering

all members ample opportunity to share knowledge that will improve and develop their capabilities. Should you encounter a prospective member, we hope that this list will assist. We all benefit from having well informed, competent attorneys representing dealers.

As you know, our Fall Conference will be at the Radisson Blu Aqua Hotel Chicago this year from October 23rd through the 25th. We chose a new venue for two reasons: NADC simply outgrew the available facilities at the Trump Hotel in Chicago, and we made an effort to coordinate our NADC meeting with the legislative session of the ATAE meeting which is at the same hotel from October 25th through 26th. I encourage all of you to attend our Fall Conference. Erin set out the full agenda in the last issue of *The Defender*, and it promises to be one of our best ever. Also, please note that in response to the continuing requests for ethics CLE, we have again included an ethics presentation adding special value to this meeting. We have several new speakers as well with new and significant insights into our industry and its future. I look forward to seeing you in Chicago. Travel safe! ■



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Information Security Best Practices in an Age of Spear-Phishing, Malware and Ransomware

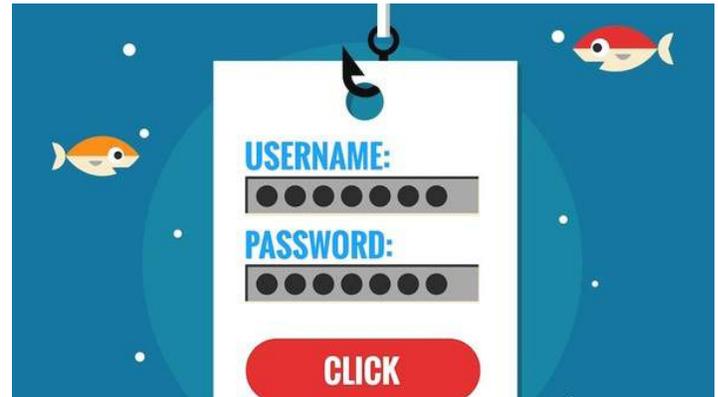
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State and federal law require auto dealers to protect their customers' non-public private information (NPPI), such as email addresses, mailing addresses, and financial information. And dealers have their own sensitive and confidential information, *e.g.*, financial information, projections, customer lists, and lease return dates, all of which may have value by virtue of their being secret from their competitors. Much of this information is stored in the form of data, which is vulnerable to data security threats, including, among other things, hacking, theft of customer information, and risks caused by vendor access to the Dealer Management System (DMS). Dealers should, by now, be very familiar with these risks and ways to combat them. But newer risks have surfaced in the last few years, *e.g.*, spear-phishing and ransomware, that require updates to safeguards policies and other actions and vigilance to effectively combat. This article discusses these new threats and best practices to protect against them.

According to Symantec Corporation's 2016 Internet Security Threat Report, "spear-phishing campaigns targeting employees increased 55 percent in 2015."¹ Dealerships are not immune to this threat, either, as 43% of all spear-phishing attacks last year targeted companies with less than 250 employees.² Meanwhile, ransomware attacks increased by 35% in 2015.³ And employee use of smartphones in both personal and professional lives increases mobile threats. Understanding the devastating impact of attacks on a dealership is vital to creating and implementing a complete information security program to monitor and enforce protections against these sorts of threats.

What is Spear-Phishing?

In spear-phishing campaigns, the hacker researches targets by culling information about the target from publicly available sources such as social media, LinkedIn, company websites, and other sources so as to focus their efforts toward particular units or individuals within an organization. Attackers attempt to learn about the company structure, the names and roles of various personnel, and the contact information for said personnel. The culling of specific information adds an extra layer of legitimacy, which is often lacking in a more broadly aimed attack. Automotive dealers are particularly enticing targets due to their retention of vast amounts of valuable customer information. Once attackers make contact with individuals within a company, they could attempt to either out-right collect information from their targets or infect the target's system with tracking software, Trojans, or other malware. While some employees are savvy enough to cast a critical eye on potential phishing emails, spear-phishing is not as easy to detect.



What is Ransomware?

Ransomware is a singularly insidious type of malware that has increased in use over the past year, wherein a device or system is locked unless the user pays the ransom amount. Sometimes these messages will pop up with claims that the Federal Bureau of Investigation discovered child pornography or terrorism-related materials on the victim's computer; the user will then be told they must pay a fine or face arrest. Other variants, known as crypto-ransomware, will use a key-based encryption system to make retrieval of this data impossible without the special key in the possession of the thieves. "One crypto-ransomware tactic that seeks to increase the pressure on victims to pay-up, threatens to destroy the only copy of the secret key after a certain time, with the encrypted data potentially lost forever."⁴ Depending on which systems or machines become infected, the cost to the victim company can be devastating.

The Mobile Device Factor

Phishing, ransomware, and other malware attacks are not limited to computer work stations and servers; smartphones, *i.e.*, Apple iOS and Android devices also pose significant risk. Attacks range from transmitting data contained on the mobile devices, to holding the device hostage, or tracking valuable information. In addition to relying upon malware-infected programs and phishing, attackers also rely upon operating system and API exploits, malware-embedded advertising on mobile web, and ad-supported applications to gain access to valuable information from the user.⁵ While the risk of downloading an infected application has traditionally been more frequent on Android phones and jailbroken iPhones, threats have increased in non-jailbroken iPhones.⁶ Finally, an added threat unique to mobile devices is the potential carelessness on the part of employees in simply losing or misplacing their devices.

Information Security Best Practices to Incorporate into Your Safeguards Program:

1. **Designate an information security coordinator.** The coordinator is responsible for overseeing the Information Security Program, which should be a part of your Safeguards Program.
 2. **Conduct a Risk Assessment.** The assessment covers all dealer operations to identify reasonably foreseeable risks, both internal and external, to the confidentiality, security, and integrity of customer (and dealership) information. At a minimum, the assessment should evaluate information systems, employee training and management, and system failures.
 3. **Information Security Policies.** Create or update existing policies to address the safeguarding of customer (and dealership) information by employees, consultants, and outside service providers, as well as the needs of the program.
 4. **Information Security Program and HR.** Integrate the Information Security Program with HR policies, background checks and the employee handbook.
 5. **Training.** Provide training to new and existing employees, consultants, and service providers who have access to customer (and dealership) information on safeguarding and the program policies. Internal communication to dealership employees must be habitual. Regular training should be provided, particularly because the type and nature of these attacks and risks change frequently. In addition to safeguarding, the training should consist of “common sense” training on suspicious emails, basic IT safeguards, malware, and mobile phones:
 - a. Employees should be trained to spot suspicious emails and to avoid the opening attachments and links to said suspicious emails – even if the emails appear to come from people they know.
 - b. Direct IT to block domain names once a suspicious email is received by an employee.
 - c. Prohibit employees from responding to any such emails with personal or company information, passwords, customer information, or financial information of the dealership in response to any such emails.
 - d. Disable the tracking of cookies and other methods by which outsiders can monitor system activity.
 - e. Establish password protocols to ensure that system and user passwords are sufficiently “strong” and regularly changed.
 - f. When an employee with access to important programs or systems is no longer with the company, the passwords related to those programs and systems should change the passwords related to these programs and systems.
 - g. Use a plugin for web browsers that block ads. This can help limit potential exposure to malicious, compromised, or otherwise vulnerable banner and pop-up ads.
 - h. To protect against ransomware, ensure that all software application used by employees are up to date -- this includes everything from endpoint security software to browser plugins and productivity applications.
 - i. Maintain a proper backup policy that includes saving multiple prior backups. This serves two vital functions: First, it ensures the system can be restored with minimal loss; second, it protects the backup itself from also being compromised by the ransomware. It is nearly impossible to recover data from crypto-ransomware.
6. **Monitoring and Internal Auditing.** Regularly monitor and audit for program effectiveness of safeguarding systems and procedures to ensure all safeguards effectively control the risks identified in the risk assessment.
 7. **External Auditing.** Consider utilizing a “white-hat” hacker to test the effectiveness of your safeguarding program. Update and create new policies in response to audit results.
 8. **Limit Third Party Access.** Oversee vendors and consultant access to customer information.
 - a. Insist on additional insured certificates naming the dealership.
 - b. Insist on indemnity and confidentiality agreements.
 - c. Require vendors to maintain their own Information Security Program.
 9. **Insurance.** Ensure the dealership has its own cybersecurity insurance endorsement – this endorsement is typically a separate endorsement and not commonly included with general commercial liability, garage, or E&O insurance policies.
- Forewarned is forearmed. Data protection is a complicated compliance area and one that dealers and automotive attorneys alike will need to grapple with as the threats dealers face continue to become more sophisticated and dangerous. ■

References

1. Source: Symantec Corporation, *Internet Security Threat Report*, Volume 21, April 2016, p. 6.
2. *Id.*
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6. *Id.*

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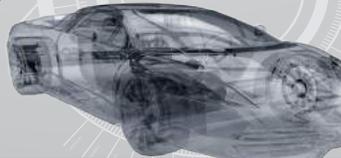
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