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Navigating the ROFR Minefield¹

By Joseph S. Aboyou, *Aboyou & Heller, L.L.C.*

I. Introduction

The automotive franchisor's right of first refusal ("ROFR") under its dealer agreement has become a major component in buy-sell transactions today. The frequency of ROFR exercises has significantly increased in recent years. The exercise presents both missed opportunities for some and perceived benefits to others. No matter on what side of the field you sit, you are cautioned to fully understand the law governing ROFRs and how its exercise might affect your position in the buy-sell. Let's explore some of the concerns that may arise and how your position can be maximized.

The playing field in this context is actually triangular (if you disregard the manufacturer's position). On one side is the selling dealer. For the most part, a ROFR exercise can be neutral or even beneficial to the seller. However, there are certain instances where the exercise can present serious concerns which should be avoided. On another side is the contract buyer, who obviously seeks to avoid the ROFR exercise at all costs. On the third side is the assignee buyer designated by the franchisor. The ROFR deal may, at first blush, appear to be the proverbial "gift horse" for the assignee. However, there are several aspects of the "flip"

transaction that can be troublesome and costly to this party.

II. The ROFR

To better understand how to address the ROFR exercise from your particular position in the deal, it is imperative to understand the precise language and terms of the ROFR under the dealer (franchise) agreement in play. While there are many common features in ROFR provisions throughout the spectrum of various dealer agreements, there are important variations which must be addressed in the particular case.

The following are some of the typical ROFR provisions:

(1) *Exercise Period/Deadline.* Most dealer agreements establish a time period within which a franchisor must exercise the ROFR. This typically ranges from fifteen (15) business days to forty-five (45) calendar days.

(2) *Trigger Event.* One of the more significant aspects concerns the timing of a ROFR exercise and what triggers the right and the commencement of the prescribed time period. The language in this regard is varied in franchise agreements. The common denominator is the time at which the contract buyer has completed

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and submitted its franchise application. Of course, the submission of the acquisition agreement is also important. Many of the automotive franchise agreements are surprisingly vague on this critical aspect.²

(3) *Reimbursement*. Certain franchise agreements provide for the reimbursement of the buyer's transactional expenses³ if the ROFR is exercised; however, many franchise agreements do not.⁴

(4) *Withdrawal Rights*. Some franchise agreements entitle the selling dealer to withdraw a "buy-sell" agreement within a specified time after the ROFR is exercised,⁵ although this is not a common provision.

(5) *Family Transfers*. Many dealer agreements contain exemption provisions that do not allow the exercise of the ROFR in transactions involving family members.

The precise ROFR language of the particular dealer agreement must be carefully scrutinized.

III. The ROFR Law

A. Statutory Regulation. As the exercise of the automotive ROFR became more frequent, state legislatures responded with statutory restrictions and limitations on the ROFR.⁶ Other state franchise statutes do not explicitly address ROFRs.⁷

Common features of the statutory provisions governing automotive ROFRs include:

1. The ROFR cannot be used by the franchisor to impair or influence the price to be paid for the franchise.
2. The franchisor must assume all obligations of the contract buyer as stated in the acquisition agreement.
3. The franchisor must reimburse the contract buyer for all transactional costs.
4. The franchisor must also purchase or lease the real estate if that component is part of the acquisition.

Many of the ROFR statutes establish a specific timeframe within which the franchisor must exercise the ROFR, which can be in conflict with the time prescribed under the pertinent franchise agreement. The statute will control the timing in such instances.

Other statutes restrict the employment of the ROFR to varying degrees. For example, in Maryland, the ROFR may not be exercised if the proposed transferee meets the manufacturer's reasonable qualifications and is an existing dealer in good standing.⁸ Similarly, in Washington, the ROFR is restricted if the buyer falls within one of the following categories: transferee pre-approved by the franchisor; family member of a dealership owner; a manager-level employee who is qualified as a dealer-operator under the franchisor's standards; entity controlled by a dealer-owner; or trust established for succession planning by a dealer-owner.⁹

It is noteworthy that there is at least one jurisdiction (Georgia) that grants a motor vehicle franchisor a statutory right of first refusal. There is another (Iowa) that expressly invalidates the ROFR.¹⁰

A comprehensive chart of the ROFR provisions in various state franchise statutes is included in Appendix A.

B. The Judicial Arena. Legal challenges to ROFRs in the automotive context are numerous. As one might expect, the cases in this arena have increased in recent years as the existence and exercise of ROFRs has become more common. Interestingly, the challenges have come from several directions. Of course, the majority of the challenges come from the aggrieved contract buyer that wants to regain its contract rights. The franchisors have also joined in the challenges where the deal is structured in a manner which impairs, if not precludes, the ROFR exercise. Even the existing franchisee has sought judicial protection where the ROFR exercise creates a perceived negative result.

The ROFR issues that have made their way to the judicial arena include the following:

1. *Validity* – Is the automotive ROFR valid under the particular state franchise statute?
2. *Standing* – Who has legal standing to assert the invalidity of the ROFR? Of particular interest here is whether the contract buyer has the right to challenge the ROFR.
3. *Third-party beneficiary* – Can the contract buyer nullify the ROFR exercise as a purported third-party beneficiary of the franchise agreement?
4. *Tortious interference* – Will the exercise of a ROFR can constitute tortious interference?
5. *Time limitation* – When is the ROFR exercise period triggered under the franchise agreement or applicable law? This seemingly simple concept can become complex in certain instances. What is the notice requirement?
6. *Structural issues* – What happens when a sale transaction is structured, whether wittingly or unwittingly, in a manner which effectively averts or frustrates the exercise of the ROFR? A typical example is the sale of several dealerships or a variety of franchises in an integrated transaction.

C. Covenant of Good Faith and Fair Dealing – Does the doctrine of the covenant of good faith and fair dealing have a bearing on the exercise of the ROFR? Does the Automobile Dealers Franchise Act (ADFA) play a role in this regard?¹¹

IV. Representing the Seller

For the most part, a ROFR exercise presents no major concern to the selling dealer. The manufacturer's money is just as green as the buyer's. In many instances, the manufacturer may pay the price in

lump sum even where seller financing is provided in the buy-sell agreement. However, the ROFR can present serious concerns in certain transactions. Some of these include the following:

- 1) The deal includes several franchises – the so-called packaged deal. In this instance, the exercise of the ROFR with respect to one of the franchises (perhaps the most significant dealership in the platform to be acquired) may prompt the buyer to cancel the acquisition. Indeed, in many buy-sell's, the acquisition of the entire package or, at minimum, certain high-performing franchises, is a condition precedent.
- 2) The sale contemplates a post-closing equity position for one or more of the owners. The seller will obviously feel more comfortable in this position with a known entity (*i.e.*, the contract buyer), but not with a stranger or, worse, one of his or her competitors or even a business enemy.
- 3) The same concern is present with regard to post-closing employment.
- 4) The lease of the dealership facility to the buyer may create similar concerns. This is complicated by a personal guaranty under the lease. Fortunately, the ROFR exercise imposes a requirement that the manufacturer must guaranty the lease.
- 5) Other situations may also render a ROFR exercise as undesirable to a seller, such as a contingent consideration – *e.g.*, a deferred purchase price in the form of the vehicles sold by the buyer in the first few years of the acquisition.

Each of these potential scenarios must be carefully scrutinized and addressed in the buy-sell negotiations and the ultimate language of the acquisition agreement.

V. Representing the Contract Buyer

The contract buyer is clearly the party most victimized by the ROFR exercise. It is obviously the buyer's goal to avoid or preclude the exercise to the largest extent possible. There are many ways that a buy-sell can be structured that can assist in this regard. However, there is a fine line between what will be considered legitimate deal structuring and a transparent attempt to thwart the ROFR. The latter is potentially subject to attack under prevalent case law. The art of the deal is to accomplish the former when representing the buyer.

The art of negotiation with the manufacturer should not be overlooked in this situation. No matter how the deal is structured and the buy-sell crafted, your client, as the proposed buyer, and you as its advocate, must be persuasive and effective with the manufacturer when processing your application for franchise approval. In my experience, this concept is amazingly absent from many deals and realized far too late in the game. A rapport with the factory must start immediately upon the submission of the buy-sell. A face-to-face conference with the regional manager of the manufacturer is encouraged as soon as this can be arranged.

A correlating issue that arises in this context is whether the contract buyer should challenge the ROFR exercise, even if there is a perceived legal basis to do so. Even the most scorned buyer should consider the consequences of a challenge. The impact on the franchisor relationship, especially one involving a significant franchise, can be immeasurable. Just because one can attack the ROFR exercise does not mean that one should. This will not be an easy decision and will require your sage advice.

VI. Representing the Assignee Buyer

Representing the alternate buyer designated by the manufacturer can be extremely challenging. What may appear, at first blush, to be major opportunity for your client may slowly transform into a problematic deal. Most of the issues that arise are the reality of stepping into a deal at the twelfth hour. Due diligence is complete; closing is around the corner; the pressure to close is enormous. This situation must be scrutinized very carefully before your client decides to attempt this "opportunity". The legal format of this acceptance is an assignment and assumption agreement drafted by the franchisor in its typical one-sided fashion. This is where the war is lost or won. This is the time when you must address all apparent concerns regarding the acquisition.

The following are some of the usual problems that can be encountered:

1. Since due diligence is already completed by the time your client steps into the deal, great care must be taken in scrutinizing the usual concerns, including environmental, facility, and franchise/business issues, which in most instances, can take weeks, if not months, to properly evaluate.
2. What if the dealership has a union and your client's other stores do not? How does this play out?
3. Can your client line up financing in time, whether in the form of acquisition or working capital funding, or the requisite floor plan?
4. Do you have sufficient time to analyze and/or line up required management and employee staff?

VII. Conclusion

The exercise of a ROFR impacts every party in the transaction in one way or another. It is up to you, as the experienced automotive professional, to navigate your client through the minefield presented by the ROFR. The failure and/or inability to do this can result in significant injury and consequences. To accomplish this effectively for your client can be most rewarding for the both of you. ■

Mr. Aboyou has been involved in automotive (buy-sell) transactions for over 35 years. He has handled hundreds of transactions over that period. He also advises his dealer clients on a myriad of franchise and related issues. He writes and speaks regularly on buy-sell issues.

References

1. This article is, in part, an adaptation of an article written for the FRANCHISE LAW JOURNAL by this author, entitled *The Franchisor's Right of First Refusal: an Automotive Industry Perspective* and printed in the Fall 2016 issue ("FLJ Article"). However, this article is streamlined and written solely from the perspective of the franchisee.
2. For example, the current Ford Sales & Service Agreement requires the exercise of the ROFR within thirty (30) days of its receipt of a "completed proposal for the proposed sale or transaction." ¶24(b) (2). Similarly under the GM Dealer Sales and Service Agreement (Standard Provisions), the submission of a "proposal for a change of ownership" triggers the ROFR. ¶12.3.1. In contrast, in the Acura/Honda Automobile Dealer Sales and Service Agreement, the ROFR is not triggered unless and until the franchisor has received the "completed documentation and information." This is expressly specified as follows:
 - (1) the ownership transfer agreement(s) executed by Dealer (or Dealer Owner(s)) and the prospective buyer(s), including all exhibits, schedules, attachments, applicable real and personal property leases and any relevant "side" agreements relating to the transfer of money, value or other performance in exchange for the Ownership Interest or Assets; (2) the proposed third party purchaser's application (as defined by American Honda); and (3) if a transfer of ownership of real property is contemplated and all of the preceding has been completed, a real estate appraisal and/or environmental report prepared in connection with or relied upon by the parties to, the proposed ownership transfer.
 ¶19.2. Needless to say, the Acura/Honda agreement leaves very little doubt as to what is required to commence the ROFR exercise period.
3. Transactional expenses typically include attorneys' fees, accountant fees, and due diligence expenses, such as environmental studies and building inspection costs.
4. Even if the franchise agreement does not require it, several state franchise statutes do. See Part III *infra*.
5. For example, the Chrysler Sales and Service Agreement gives the dealer a specified time frame within which to withdraw the sale transaction. Par. 34 (Additional Terms and Provisions). The Mercedes-Benz Passenger Car Dealer Agreement also gives the selling dealer a 10-day period following MBUSA's exercise of its ROFR to withdraw the deal (Art. IX B.3.). The Audi and VW Dealer Agreement limited this withdrawal right to transactions involving dealer owner, family members, dealership employees and successors pre-approved by the franchisor. See *e.g.*, Audi Dealer Agreement Standard Provisions, Art. 12(3).
6. Ariz. Rev. Stat. Ann. § 28-4459 (2015); Del Code Ann. tit. 6, §§ 4910; Ga. Code Ann. § 10-1-663.1 (2015); La. Rev. Stat. § 32:1267(B) (2015); Nev. Rev. Stat. Ann. § 482.36419 (2013-2014), N.J. Stat. § 56:10-13.6, N.J. Stat. § 56:10-13.7; Or. Rev. Stat. § 650.162, 63; Pa. Stat. Ann. § 818.16 (2015); Va. Code Ann. § 46.2-1569.1 (2015); Vt. Stat. Ann. tit. 9 §4100e (2015); Wash. Rev. Code Ann. § 46.96.200 and 220 (2015).
7. See Ky. Rev. §190.047 and §190.070 (2015); Neb. Rev. Stat. § 60-1439 and § 60-1430 (2015); N.Y. Veh. & Traf. §466 and §467 (2015); N.C. Gen. Stat. §20-305 (2014); Ohio Rev. Code Ann. §4517.541, 4517.542, 4517.56, and 4517.6; and Tex. Stat. Ann. tit. 14 Occ. Code §2301.359 (2015).
8. Md. Transp. Code Ann. § 15-211 (2015).
9. Wash. Rev. Code Ann. § 46.96.220 (2015).
10. Iowa Code § 322A.12(2)(2014).
11. 15 U.S.C. §§ 1221-25.

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Appendix A

Selected Motor Vehicle Franchise Right of First Refusal Statutes

State	Statute(s)	Notable Features
Arizona	Ariz. Rev. Stat. Ann. § 28-4459 (2016)	<ul style="list-style-type: none"> • Franchisor must notify franchisee in writing of intent to exercise right of first refusal (or “ROFR”) within 60 days of receipt of completed transfer application and related info • Cannot exercise ROFR if proposed transferee is a family member • Franchisee must receive equal or greater compensation to the proposed transfer if Franchisor exercises ROFR • Franchisor must reimburse transferee for reasonable expenses including legal fees
California	Cal Veh Code § 11713.3(t) (2016); Cal Bus & Prof Code §20028(c) (2016)	<ul style="list-style-type: none"> • Franchise agreement must provide ROFR • To exercise ROFR, franchisor must provide written notice no later than 45 days after receipt of all info required by the statute • sale must relate to all or substantially all of business assets • Cannot exercise ROFR if proposed transferee is a family member • Consideration paid by franchisor is to equal or exceed that to be paid by proposed transferee • Franchisor shall reimburse proposed transferee for reasonable expenses including legal fees
Colorado	Col. Rev. Stat. §12-6-127 (2015)	<ul style="list-style-type: none"> • Franchisor must reimburse proposed transferee for reasonable expenses including legal fees
Connecticut	Conn. Gen. Stat. § 42-133cc (2016)	<ul style="list-style-type: none"> • Franchisor must notify franchisee in writing of intent to exercise ROFR within 60 days of receipt of proposed transfer and info and documents • Cannot exercise ROFR if transferee is a family member • Franchisee must receive equal or greater compensation to the proposed transfer if franchisor exercises right of first refusal • Franchisor must assume all duties, obligations, and liabilities contained in the agreement between franchisee and proposed transferee • Franchisor must reimburse proposed transferee for reasonable expenses including legal fees
Delaware	Del. Code Ann. tit. 6, §4910(d)	<ul style="list-style-type: none"> • ROFR allowed if in franchise agreement • Franchisor must notify franchisee in writing of intent to exercise right of first refusal within 60 days of receipt of completed proposal and all related agreements • Cannot exercise ROFR if transferee is a family member • Franchisee must receive equal or greater compensation to the proposed transfer if franchisor exercises right of first refusal • Franchisor must reimburse proposed transferee for reasonable expenses including legal fees • Cannot use ROFR in order to influence the consideration or influence person to refrain from acquisition
Florida	No Statute, but see Bayview Buick-GMC Truck, Inc. v. General Motors Corp., 597 So.2d 887 (Fla. Dist. Ct. App. 1992)	<ul style="list-style-type: none"> • Franchisor’s ROFR held void as against public policy because it violated state bar to manufacturer ownership of dealership. • Also, franchisor failed to deny transfer within time limit and via statutory procedure, including filing of complaint with agency
Georgia	Ga. Code Ann. § 10-1-663.1 (2016)	<ul style="list-style-type: none"> • Franchisor may exercise ROFR if the proposed sale or transfer is of more than 50 percent of the ownership or assets of the dealership being transferred • Franchisor must notify franchisee in writing of intent to exercise right of first refusal within 60 days of receipt of completed written proposal and info and agreements • Franchisee must receive equal or greater compensation to the proposed transfer if franchisor exercises right of first refusal • Franchisor must reimburse proposed transferee for reasonable expenses including legal fees
Illinois	815 ILCS 710/4 (Ill. Compilation Stat. Ann. 2016)	<ul style="list-style-type: none"> • To exercise ROFR, franchisor must provide notice 60 days from receipt of applications forms generally utilized and all agreements • Franchisee must receive equal or greater compensation to the proposed transfer if franchisor exercises ROFR • Franchisor must reimburse prospective transferee for reasonable expenses

Indiana	Ind. Code Ann. § 9-32-13-22(c) (Burns 2016)	<ul style="list-style-type: none"> • Franchisor must notify franchisee in writing of intent to exercise right of first refusal within 60 days of receipt of proposed transfer info • Franchisor must provide same or better consideration to franchisee • Franchisor may exercise ROFR if the proposed sale or transfer is of more than 50 percent of the ownership or assets of the dealership being transferred • Franchisor must reimburse franchisee for reasonable expenses including legal fees • Cannot exercise if proposed transfer is to family member or manager
Iowa	Iowa Code §322A.12 part 2 (2016)	<ul style="list-style-type: none"> • Notwithstanding terms of franchise agreement, the transfer of the dealership “shall not make applicable any right of first refusal of the franchiser”
Louisiana	La. Rev. Stat. § 32:1267(B) (2016)	<ul style="list-style-type: none"> • Franchise agreement must have ROFR • Franchisor must notify franchisee in writing of intent to exercise right of first refusal within 60 days of receipt of completed proposal and all agreements • Cannot exercise ROFR if transferee is a family member • Franchisee must receive equal or greater compensation to the proposed transfer if franchisor exercises ROFR • Franchisor must reimburse prospective transferee’s for reasonable expenses including legal fees • Dealer is not liable to any person as a result of the exercise of the ROFR
Maine	10 Me. Rev. Stat. Ann. tit. 10. §1174 (2016)	<ul style="list-style-type: none"> • Franchisor can exercise ROFR • Franchisor must assume or acquire lease/real property • Franchisor must assume all obligations of proposal • Franchisor must reimburse prospective transferee’s reasonable expenses • Cannot use ROFR in order to influence the consideration or influence person to refrain from acquisition
Maryland	Md. TRANSPORTATION Code Ann. § 15-211(h) (2016)	<ul style="list-style-type: none"> • Franchisor may not exercise right of first refusal if the proposed transferee meets manufacturer’s reasonable qualifications, is a member of franchisee’s family, a qualified manager with at least 2 years management experience, or an existing dealer in good standing • Franchisor must reimburse prospective franchisee for reasonable expenses including legal fees
Massachusetts	Mass. Ann. Laws ch. 93B, § 10 (Michie/ Law. Co-op. 2016)	<ul style="list-style-type: none"> • Franchisor must notify franchisee in writing of intent to exercise right of first refusal within 45 days of receipt of completed proposal. • Franchisor has 30 days after issuing notice of intent to franchisee to exercise the right of refusal • Cannot exercise ROFR if transferee is a family member • Franchisee must receive equal or greater compensation to the proposed transfer if franchisor exercises right of first refusal • Cannot use ROFR in order to influence the consideration or influence person to refrain from acquisition • Franchisor must reimburse prospective transferee for reasonable costs and expenses
Michigan	Mich. Comp. Laws § 445.1527(g) (2016)	<ul style="list-style-type: none"> • Requirement that there must be good cause to deny transfer does not include exercise of ROFR
Minnesota	Minn. Ann. Stat. § 80E.13(j) (2016)	<ul style="list-style-type: none"> • In order to exercise ROFR, franchise agreement must provide for ROFR • Franchisor may exercise right of first refusal if the proposed sale or transfer is of more than 50 percent of the ownership or assets of the dealership being transferred • Franchisor must notify franchisee in writing of intent to exercise right of first refusal within 60 days of receipt of written proposed transfer • Cannot exercise if transferee family member • Franchisee must receive equal or greater compensation to the proposed transfer if franchisor exercises right of first refusal • Franchisor must reimburse proposed transferee for reasonable expenses including legal fees
Missouri	Mo. Rev. Stat. § 407.825(7)(c)	<ul style="list-style-type: none"> • Franchise agreement must allow for ROFR • Cannot exercise ROFR if proposed transferee is a family member • Franchisee must receive equal or greater compensation to the proposed transfer if Franchisor exercises right of first refusal • Franchisor must reimburse proposed transferee for reasonable expenses including legal fees

New Mexico	N.M. Stat. Ann. Art. 16 §57-16-5 U (2016)	<ul style="list-style-type: none"> • It is unlawful to enforce a ROFR by a manufacturer or to require dealer to grant a right or option thereto
Nevada	Nev. Rev. Stat. Ann. § 482.36419 (2015)	<ul style="list-style-type: none"> • Franchise agreement must contain ROFR • Franchisor must notify franchisee in writing of intent to exercise right of first refusal and material reasons within 60 days of receipt of completed form and info • A right of first refusal may not be exercised if the proposed sale is to a member of the franchisee's family, a qualified manager, or a trust • Franchisee must receive equal or greater compensation to the proposed transfer if franchisor exercises right of first refusal • Franchisor must reimburse proposed transferee for reasonable expenses including legal fees • Cannot use ROFR in order to influence the consideration or influence person to refrain from acquisition
New Jersey	N.J. Stat. § 56:10-13.6 and 13.7 (2016)	<ul style="list-style-type: none"> • Requires franchisor to assume or acquire lease or real property of dealership in order to exercise ROFR unless otherwise agreed to by franchisor and franchisee • Cannot use ROFR in order to influence the consideration or influence person to refrain from acquisition • Franchisor must reimburse prospective transferee for reasonable expenses including legal fees
Oregon	Or. Rev. Stat. § 650.162(5) (2016)	<ul style="list-style-type: none"> • ROFR must be in franchise agreement • Franchisor must notify franchisee via cert. mail R.R.R. of intent to exercise right of first refusal within 60 days of receipt of proposed transfer • ROFR may not be exercised if the proposed sale is to a member of the franchisee's family, a qualified manager, or a trust • Franchisor may exercise right of first refusal if the proposed sale or transfer is of more than 50 percent of the ownership or assets of the dealership being transferred • Franchisee must receive equal or greater compensation to the proposed transfer if Franchisor exercises right of first refusal • Franchisor must reimburse prospective transferee for reasonable expenses including legal fees
Pennsylvania	Pa. Stat. Ann. tit. 63 § 818.16 (2016)	<ul style="list-style-type: none"> • Franchisor must notify franchisee of intent to exercise right of first refusal within a statutory period of 60 or 75 day time limitations of section 12(b)(5) • Cannot exercise ROFR if transferee is family member • Franchisee must receive equal or greater compensation to the proposed transfer if franchisor exercises right of first refusal • Provides for franchisor to assume lease of dealership and acquire real property unless franchisor and franchisee otherwise agree • Franchisor must assume all duties, obligations, and liabilities contained in the agreement between franchisee and proposed transferee • Franchisor must reimburse franchisee for reasonable expenses including legal fees
Tennessee	Tenn. Code Ann. § 47-25-1505(2)(A) (2016)	<ul style="list-style-type: none"> • Prohibition against franchisor refusal to renew for purpose of converting dealer's business into operation by franchisor or its agents/employees does not apply to franchisor exercise of ROFR
Vermont	Vt. Stat. Ann. tit. 9, §4100e (2016)	<ul style="list-style-type: none"> • ROFR must be in franchise agreement • Franchisor must notify franchisee in writing of intent to exercise right of first refusal and material reasons within 60 days • A right of first refusal may not be exercised if the proposed sale is to a member of the franchisee's family, a qualified manager, or a trust • Franchisor must reimburse proposed transferee for reasonable expenses including legal fees • Franchisee must receive equal or greater compensation to the proposed transfer if franchisor exercises right of first refusal
Virginia	Va. Code Ann. § 46.2-1569.1 (2016)	<ul style="list-style-type: none"> • Franchisor must notify franchisee in writing of intent to exercise right of first refusal within 45 days of receipt of completed proposal • Cannot exercise if proposed transfer is to a family member • Franchisee must receive equal or greater compensation to the proposed transfer if Franchisor exercises right of first refusal • Franchisor must reimburse prospective transferee for reasonable expenses including legal fees

Washington	Wash. Rev. Code Ann. §46.96.220 (2016)	<ul style="list-style-type: none"> • ROFR must be in franchise agreement • Franchisor must notify franchisee via cert. mail R.R.R. of intent to exercise right of first refusal within the lessor of 45 days of receipt of proposed transfer or the time period specified in the franchisee's franchise agreement • Proposed transfer must be at least 50% of the franchise • Franchisee must receive equal or greater compensation to the proposed transfer if franchisor exercises right of first refusal • Franchisor may not exercise right of first refusal if proposed transferee was pre-approved, is a family member or was a manager continuously employed by franchisee for 3 years and is otherwise qualified • Franchisor must reimburse prospective transferee for reasonable expenses including legal fees • Requires franchisor to assume lease or acquire real property of dealership • Franchisee is not liable to proposed transferee for damages resulting from franchisor's exercising right of first refusal if disclosed in writing the existence of the ROFR
Wisconsin	Wis. Stat. Ann. § 218.0134(4)(c) (2015-2016)	<ul style="list-style-type: none"> • Franchisor may exercise ROFR but must be in the franchise agreement • Franchisee must receive equal or greater compensation to the proposed transfer if franchisor exercises right of first refusal • ROFR does not apply if proposed transferee is a family member or a qualified manager for franchisee with 2 years' experience • Franchisor must reimburse franchisee for reasonable expenses including legal fees

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Executive Director's Message



Erin H. Murphy
NADC Executive Director

The National Association of Dealer Counsel has reached a membership milestone. There are currently 590 members of the NADC . . . the organization's highest number to date! We are hoping to hit the 600 mark in the very near future . . . and we need your help!

The NADC relies on its members to act as ambassadors on behalf of the organization. NADC members are the organization's strongest supporters and most effective recruiters. The membership has a strong professional network that is invaluable.

If you know a colleague or industry partner that would benefit from NADC membership, please contact Erin Murphy at emurphy@dealercounsel.com. The NADC works hard to assure that the membership has access to pertinent, up-to-date information and educational resources to help represent the best interests of your dealership clients. This increase in membership is furthering the organization's mission developed in the strategic plan: to provide education and information for attorneys representing automotive dealers for the purpose of improving and developing their capabilities. It is a win-win to get your colleagues involved!

Thank you to everyone who stopped by the NADC booth at the NADA Convention & Expo in New Orleans to say hello. We were happy to see so many members were able to take advantage of the conference space available at the booth to meet with colleagues and clients. A special thanks to the members who joined NADC staff at the booth to help educate prospective members on the many benefits of NADC membership.

We hope you have made plans to join us at the 2017 Annual Member Conference, April 23-25 in Dana Point, CA. Please visit www.dealercounsel.com for more information and to register for the conference.

For the first time, we will be offering a Dealer Counsel 101 Course on Sunday, April 23rd from 1:00 – 3:00 PM. Our Speaker, Jim Neustadt, will provide the audience with a general introduction and 30,000 ft view of a typical retail automotive dealership. Jim will discuss the various departments of a dealership, how they are organized and some of the unique challenges they face. The audience will learn how the various departments operate with a focus on regulatory compliance issues. Jim offers great insight into the day-to-day operations, having managed all aspects of several different dealerships. This session is an introductory level course for those



NADC Member Robert C. Byerts passed away this month in a boating accident. Rob was a member of the Bass Sox Mercer firm in Tallahassee, Florida. We mourn his loss and extend our deepest sympathies.

attorneys who are new to practicing auto dealer law or those attorneys who want a refresher on dealership operations.

This session is free for all members. Registration is required. 2 CLE credits available pending state approval (must select CLE credit on registration form).

Additional Preliminary Agenda Topics Include:

- NADA Update
- Key Legal & Market Considerations in Today's Buy-Sell Market
- Legal Issues of DMS Systems
- Cyber Security
- Legal Ramifications of Vendor "Solutions" and Products Peddled to Dealers
- Next Generation Vehicle Sales: Legal Hurdles of On-Line and Mobile App Platforms
- NIADA Update
- Top Legal Issues for Dealers in 2017
- Conditional Margin, Tiered Margins, Market Stratification, and Project Pinnacle
- The Politics of Employment Law: Understanding L&E in a New Administration

Also, a big thank you to all of our sponsors for the Conference. The generous sponsors help to elevate the quality of the events, while keeping the cost low for you all, the members.

We hope to see you in California! ■



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- The Politics of Employment Law: Understanding L&E in a New Administration

Agenda topics subject to change.

Travel Plans

Conference attendees and guests are invited to join NADC for a cocktail reception on Sunday, April 23 from 6:00 – 7:30 pm. The conference will conclude on Tuesday, April 25 at 2:00 pm.

NEW MEMBER AND FIRST TIME ATTENDEE WELCOME RECEPTION

New members and first time conference attendees are invited to join the NADC Board of Directors at a welcome reception immediately prior to the conference opening cocktail reception on Sunday, April 23. The welcome reception will begin at 5:30 pm. New members and first time conference attendees will receive an invitation email after registering for the event.

NEW THIS YEAR!

NADC Dealer Counsel 101:

Basic Introduction to a Typical Retail Automotive Dealership

Jim Neustadt will provide the audience with a general introduction and 30,000 ft view of a typical retail automotive dealership. Jim will discuss the various departments of a dealership, how they are organized and some of the unique challenges they face. The audience will learn how the various departments operate with a focus on regulatory compliance issues. Jim offers great insight into the day-to-day operations, having managed all aspects of several different dealerships. This session will serve as an introductory level course for those attorneys who are new to practicing auto dealer law or those attorneys who want a refresher on dealership operations.

This session is free for all members. Registration is required.

Date: Sunday, April 23, 2017

Time: 1:00PM - 3:00PM

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IRS Notice 2016-66: Potential Pitfall for Dealerships in Captive or Reinsurance Programs

By Andy Weill, *Benjamin, Weill & Mazer*

The Internal Revenue Service has been quite active with regard to perceived abuses in the area of microcaptive insurance. In particular, the IRS promulgated Notice 2016-66 in November 2016, designating certain microcaptive transactions to be “transactions of interest,” mandating certain reporting requirements. Counsel who know that their clients participate in captive or reinsurance programs should be mindful of this new development and advise clients accordingly.

What is a microcaptive? “Captive” insurance is an insurance relationship between an insurer that accepts the risk of its owner or related party. Captive insurance does not properly refer to arrangements where the underlying risk derives only from unrelated third parties. The use of the prefix “micro” refers to the size of the company, and primarily whether the captive makes an election under 831(b) of the Internal Revenue Code. This election is only available for property and casualty companies. It is irrevocable once made, and it permits the insurance company to be taxed only on its investment income, not its premium income. To qualify, the company must not have more than \$1.2 million in annual premium (\$2.2 million as of 2017).

The IRS has identified situations where it considers section 831(b) has been abused. On February 3, 2015 the IRS published its “Dirty Dozen” list of questionable tax transactions. (Notice IR-2015-19.) The IRS notes: “In the abusive structure, unscrupulous promoters persuade closely held entities to participate in this scheme by assisting entities to create captive insurance companies onshore or offshore, drafting organizational documents and preparing initial filings to state insurance authorities and the IRS.”

This language was directed to two separate concerns: (1) coverages that move risks from traditional insurers to captives, especially if this results in a higher premium than would be paid in the regular market; and (2) “esoteric, implausible risks.” One story involves an arrangement wherein a Midwest taxpayer took a \$1 million deduction by paying a microcaptive for tsunami insurance. The Dirty Dozen listing also noted, “Total amounts of annual premiums often equal the amount of deductions business entities need to reduce income for the year; or, for a wealthy entity, total premiums amount to \$1.2 million annually to take full advantage of the Code provision.”

The IRS escalated its attention to the issue in Notice 2016-66. In Section 1 of the Notice, the IRS describes in greater detail the same abusive captive insurance practices described in the “Dirty Dozen” announcement. The Service indicated its intention to raise questions about:

1. Legitimacy of the risks being insured;
2. Pricing of the premiums;
3. Risk sharing mechanism; and
4. Proper capitalization.

In Section 2 of the Notice, the Service listed the factors that would trigger a requirement to report participation as a “transaction of interest,” requiring the submission of Form 8886 by participants. TOI status is determined by a three-part test:

1. The insurance company has made an election under IRC § 831(b) (Captive);
2. There is a 20% (or greater) owner of the Captive who is also an owner of a company (Insured) which transfers risks to the Captive, directly or through an Intermediary; and
3. The Captive has a loss ratio of less than 70% and/or has loaned any portion of the payments under insurance policies or reinsurance agreements to the Insured or a related party.

Although typical automotive F&I programs are well outside the extreme and obviously abusive examples described in Section 1 of the Notice, that provides little comfort to tax practitioners. Section 2 sets out the Transaction of Interest test and designation and expressly states that it applies even if the transaction is not as described in Section 1. In other words, just because your client is not a Section 1 company does not mean it is not within Section 2.

The Service has amplified that participants in F&I reinsurance programs will be considered within the Notice if the dealership and reinsurance company have common ownership and if the dealership is an obligor or otherwise can be considered “insured” under the program structure.

This will create a significant filing requirement (filings and annual returns, along with a “catch-up” filing with the Office of Tax Shelters Analysis due by May 1, 2017), because certain components of the F&I product mix have the dealership on risk, even if briefly. A primary example will be GAP debt waiver protection. The IRS considers this product to be insurance. Even though the debt waiver obligation invariably is assigned to a financing institution, the initial contract is between the consumer and the dealership. According to the IRS, this highly transitory relationship is sufficient to bring a reinsurance program with GAP products into the ambit of Notice 2016-66.

Multiple efforts to educate the Service on this issue and dissuade them from this position have been unsuccessful to date. However, the Service has stated that it is merely in information-gathering mode and that after review, it will eventually consider the industry's arguments as to whether GAP and other F&I products merit continued treatment as TOIs.

Dealership counsel who know that their clients are involved in F&I programs are encouraged to alert their clients to the potential applicability of the Notice and have them check with their tax advisors about their obligations, if any. The Notice will not apply to all programs; if a program only utilizes third party administrator obligors and the dealership is not on the risk as to any products, the relatedness of the Insured to Insurer is not present. However, if the Notice applies, the disclosure requirements apply to not just the Captive; the related dealership, owners, and other participants will have to consider their own filing obligations.

At the time of writing this article, several issues remain obscure and there are industry efforts to limit and/or clarify various aspects of the requirements of the Notice, particularly with regard to the application of rules defining who is a "related party" for purposes of the Notice.

The IRS has indicated a potential willingness to clarify but no definitive word has been received yet. ■

Andrew J. Weill is a Principal with Benjamin, Weill & Mazer, a leading complex litigation firm in San Francisco. Mr. Weill's practice includes complex business, tax and estate disputes across the nation.

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