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Protecting Dealerships from Export Penalties

By Jonathan Michaels, *MLG Automotive Law, APLC*

Over the last several years, automobile manufacturers have gone to great lengths to curb consumer exports of their vehicles to foreign countries. Manufacturers face millions of dollars in losses annually on the sale of high-end luxury vehicles to places like China and the Middle East, where the sales of luxury vehicles can fetch two to three times the U.S. sticker price.

At a loss for how to prevent these exports on their own, manufacturers are forcing dealerships to act as unofficial enforcers, imposing stiff penalties against any dealership that unwittingly allows one of its vehicles to be exported overseas. Manufacturers, in their effort to force dealerships to police the export of luxury vehicles, now insert strict liability provisions in their franchise agreements, imposing financial penalties, chargebacks, reductions in vehicle allocations, and in some cases termination of a franchise when a dealership sells a vehicle that ends up overseas in its first nine to twelve months in service.

Dealerships are now forced to go to great lengths to investigate potential purchasers. For example, before selling a high-end luxury vehicle, a dealership seeking to avoid penalties may be required to ask the buyer

uncomfortable financial questions to determine whether the buyer can afford a luxury vehicle. Some dealerships are even going so far as to require purchasers to sign an "Agreement Not to Export", wherein the buyer agrees not to allow the vehicle to be exported in the first two years of service or face severe liability to the dealership.

For dealerships, unknowingly selling a vehicle to an exporter can be disastrous. Some estimate that manufacturers have charged dealers selling vehicles to exporters, even inadvertently, tens of millions of dollars in penalties and chargebacks. Four of the largest manufacturers of high-end luxury vehicles, BMW, Land Rover, Mercedes-Benz and Porsche, reportedly penalized their U.S. dealers with chargebacks totaling \$30.4 million from 2008 through 2013.

Fortunately, at least one state is beginning to get involved. A new California law aims to protect dealerships from oppressive penalties related to exports. Recognizing that a California dealership should not be held responsible for the unknowing sale of a vehicle to an exporter, the legislature recently passed Assembly Bill AB-1178, which recognizes that "at least one manufacturer is disregarding [California] franchise law by imposing a strict liability export

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and sale-for-resale policy against dealers. *These actions impose severe sanctions on dealers regardless of the fact that dealers are collecting sales tax and registering these vehicles in California and have no reasonable knowledge of the future fate of those vehicles.*" Assembly Bill AB-1178 now prohibits these practices.

AB-1178, which went into effect in 2016, prohibits a manufacturer from taking any adverse action against a dealer *unless the dealer knew, or reasonably should have known, of the customer's intent to export the vehicle.* Additionally, the new law creates a rebuttable presumption that a dealer did not have reason to know of the customer's intent to export the vehicle if the dealer causes the vehicle to be registered in California, or any other state, and collects any applicable sales or use tax due to that state. Most importantly, the law requires that the burden of proof for any violation of a manufacturer's export prohibition policy be on the manufacturer, not on the dealership.

In passing AB-1178 into law, the California legislature has taken an important step to protect its dealerships from a manufacturer's overreaching export prohibition policies. We can only hope that more states will follow. ■

Updated Member Contact Information

Please make sure to notify NADC Staff (info@dealercounsel.com) if your contact information has changed so that your records can be updated accordingly. We will begin to list updated contact information in *The Defender* so all members can be aware of the change.



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President's Message



Andy Weill
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NADC President

It is truly a privilege and an honor to have the opportunity to serve as your President. I'm following some very distinguished predecessors in this office, and for this first President's Message, it's appropriate to acknowledge prior Presidencies. I'll also call attention to some of their benchmark accomplishments.

Our founding President was Jonathan Harvey, who served from 2004-07. It would be easy to devote this entire column to Jonathan's numerous contributions, but he would be the first to tell me to cut it short. Under his leadership, the *Defender* was first published in November 2004 and the list-serve was established in 2005. These tools for communication to membership and for the lively interchange of information and ideas have continued to prove their value to the present.

Mike Charapp served as President from 2007-09. His term saw continued growth in membership and conference attendance, along with the establishment of more formal systems (such as the list-serve policy in 2008) as needs developed.

Rob Cohen's term was from 2009-11. Rob was determined to get membership up to 500, and by the end of his term, the member count was exactly 501. His term also saw the retention of AMS as NADC's management firm and the launch of a new website in 2010.

Patty Covington took the helm from 2011-13. Among other achievements, she oversaw the expansion of the former Fall Workshop format to the current Fall Conference in 2011 and the preparation of the first NADC Attorney Directory printed in 2012.

Oren Tasini served from 2013-15. Membership continued to expand, reaching 540. Taking the long view, under his leadership NADC held its initial Strategic Planning Committee Meeting and developed a strategic plan in 2014. An innovation of his time was seeing to it that new members had a separate welcome reception at conferences, initiated in Fall 2014.

Steve Linzer served from 2015-17. Under his leadership, membership reached 600. His term saw the launching of the weekly *Dealer Counsel Alert*, the federal registration of the NADC trademark and tradename, and the development of the Database/Website Integration Project.

But the foregoing leaves out other areas of contribution: sage leadership at Board meetings, representation of NADC at various functions, promotion of the core values of NADC, and the numerous day-to-day details that help an organization function and thrive.

I am proud to be able to call all of these leaders my friends and valued colleagues. They are truly class acts and have set the bar high. I continue to benefit from their experience and wisdom. If I follow those taillights, I'm sure to be on the right road. ■



NADC Member Announcements

Do you have an announcement or accomplishment that you would like to share with the NADC community?

Please send any news that you would like to share to:
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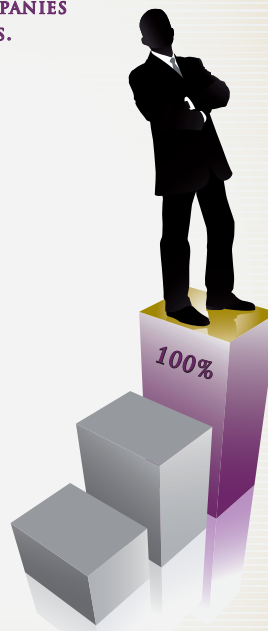
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Ignite Your Information Security Practices

By Steve Levine, *Ignite Consulting Partners*

Feature Article

Over the last year, the Federal Trade Commission has taken a renewed interest in how businesses protect customer information. The FTC has even published a booklet, [Start with Security: A Guide for Business](#), to assist businesses in formulating their own strategies. (The booklet can be found at www.FTC.gov.) This booklet is a great resource, because it includes a list of tips for business to follow based on many cases the FTC has pursued.

From talking to many dealers, though, it seems as if the message has not been heard. Too many dealers think that good information security is simply a matter of buying the right equipment, such as firewalls and virus protection. Guess again, because that is just a start, and simple things like a stolen device, employee negligence, or falling for a phony email are just as, if not more, likely as a cyber-attack to bring down the house of cards. It is important to remember that protecting both customers' sensitive information and protecting sensitive business data is the job of every employee. Dealers should perform a self-audit of the following three areas to see where things stand.

Technology – Good News and Bad News

Virtually every dealer is dependent on technology to run its business. The efficiencies and other benefits are just too great, but the bad news is that technology can also do harm unless a thoughtful approach to its use is taken. The first thing a dealer should do is check that it has an appropriately sophisticated firewall. This will help keep hackers and other bad guys out of the system. Next, the dealer should give thought to whether wireless access is provided on the premises. A lot of dealerships provide WiFi as a convenience to its customers and employees; however, outsiders can connect to the system and that can be dangerous. If a stranger figures a way to hack in the system, he or she can obtain an address within the system and then have access to information. It is a good idea to turn off wireless access outside of business hours and audit access frequency.

With more employees working from home, outside service providers like accountants looking for access, and even owners wanting easy access to reports at night and on weekends, remote access has become a big issue. Although expensive, a virtual private network ("VPN") is the safest option. Spend the extra money and get that extra level of security. Next, employees can carry the business in their pockets. A good safety precaution is to have tracking tools installed on mobile devices such as phones, laptops, and tablets. These tools allow for locating

the device when missing and can also be used to remotely wipe data from the device should the need arise. Having that ability can save sleepless nights in the event a device goes missing. It is also important to look at the policy manual and see whether it addresses what type of information employees are allowed to store on a device. Does it address whether sensitive reports and data be downloaded to a device that can be taken anywhere? Are all employees subject to the same policies, or are employees that have access to more sensitive information prompted to use additional encryption tools?

Dealers should also examine policies and procedures related to employee use of email and software. There should be a prohibition against using shared logins. Each employee should have a unique username so that his or her activities can be identified and they can be held accountable. Frequently, employees share logins for convenience, especially if they do the same job or cover for one another due to vacations and other staffing needs. Dealers should make a policy to have unique logins so that you have an audit trail of what actions were taken by each employee.

Dealers should also use an aggressive password policy that requires change on a regular basis, such as monthly or quarterly. The system should have robust password criteria that require symbols, numbers and letters and does not allow the same password to be used repeatedly. Dealers should have a policy that requires employees to lock their computers if they leave their desks and use of automatic screensavers after brief periods of inactivity, such as five to ten minutes. A visitor should never have access to sensitive information on a computer screen or access to your network because an employee failed to lock their computer.

Finally, dealers should educate employees about the practical dangers presented in today's web based environment. Many are not familiar with "phishing", "spoofing", and similar email attacks that can leave the entire network open to invasion and virus. Dealers should provide training materials, so that employees are on the lookout for fictitious emails and false web addresses. Employees should have the tools they need to act as the dealers' front line of defense. Dealers should also test the employees to make sure that they understand the information.

Facility Security – Does It Allow Access to Sensitive Information?

The layout of the dealership present lots of ripe opportunities for

the compromise of information. One of the most common mistakes is information being open and available at the receptionist or other employee's desks, where customers, vendors, or other invitees can catch a glimpse or do worse. Thought should be given to what type of information is handled by employees that interact directly with the public, thus increasing the odds that visitors will be in proximity to documents they should not see. More importantly, every dealership should have a "clean desk" policy which prohibits sensitive information from being kept on a desk when left unattended. Employees should have access to locked drawers and file cabinets in which to store papers when stepping away from the desk. Employees with offices should either have the ability to lock up their papers or their offices.

Dealers need to consider whether all employees have access to the entire facility, or whether access is restricted by job description so that employees are not free to enter areas where they have no reason to go. In a larger dealership that handles both front end sales and collections, for instance, the front end employees would not have much of a reason to have unfettered access to the collections department, and collections personnel would have no reason to freely walk through the accounting office. Those areas could be kept behind locked doors. In a smaller dealership, it may not be practical to restrict access, so it is important for dealers to consider proper placement of personnel and the other measures discussed herein.

Additionally, what policies and procedures are in place to limit the access of third party vendors such as delivery personnel, repairmen, and other service providers? Are they required to physically sign in and out when they come and go? Are they escorted back to the work area and supervised, or are they left to wander around the facility? What kind of due diligence is done to investigate these vendors? Dealers should know with whom they are doing business and make sure they have policies and procedures in place to hire trustworthy people before letting them into the business. Special attention should be given to cleaning crews and any other personnel that are given access to the facility after hours without supervision. For those sensitive positions, even more due diligence is appropriate, and it is not unreasonable to ask if those employees are bonded and what type of insurance is covered to protect the dealership in the event of wrongful conduct.

Do not choose convenience over security. Both are important. Copy machines, fax machines, and scanners should be put behind locked doors. Good shredders should be placed next to every waste paper basket. Additionally, a dealer should understand where various employees need to go within the dealership and where access should be limited to those with a specific purpose. These are simple steps that can eliminate problems.

Employees Can Be a Threat

Employees, through careless or negligent conduct or through intentional acts, are probably the biggest point of vulnerability for a dealership. Dealers can protect their businesses by conducting

robust pre-employment screening to make sure future employees are trustworthy. On the first day of work (or as soon as possible if not done previously) employees should sign a confidentiality agreement setting forth how they are to handle confidential information they come across as an employee and restricting their use of such information in any capacity.¹ Employees should be tested at least annually on their confidentiality obligations and, upon separation, provided with a copy of the signed agreement and a reminder of their obligations under it.

Employee handbooks should include sections dealing with information security and the expectations being placed upon them. Dealers should have a one page summary for them to sign which should be placed in their personnel files. Dealers need a strong training program that includes education on security concerns and then should test every employee on those standards, documenting the results in personnel files. This should be done at least annually and preferably more often so that employees understand the seriousness of the issue.

"Hot button" issues that should be referenced in these training materials include:

- What are the company policies regarding use of thumb drives, camera phones, and any other portable devices?
- Are employees allowed to access the internet while at work and, if so, is access restricted to certain sites?
- Are employees allowed to access their personnel email accounts while at work? Are employees allowed to email company information to their personal email accounts?
- Can employees download data, reports, or customer information to portable devices such as tablets and phones?

The possible topics are extensive and will vary greatly depending on the size and type of business of the dealership.

Dealerships are especially vulnerable to an information breach upon the separation of an employee. A good way to protect the business is to have a sophisticated separation process that is systematic, routine, and applied consistently no matter the job description. Critical items should include:

- a list of all parties that should be notified of the employee's departure;
- a list of all systems and programs to which employee has access;
- a list of company property in their possession;
- the disabling of system access and recover keys and badges; and
- the deletion or redirection of accounts (including VPN, network, email, and voicemail), removal from distribution lists, and notification to vendors and clients as appropriate.

Another good practice is to provide exiting employees with copies of the confidentiality agreements they signed during their employment and to remind them of the serious consequences of any breach.

¹ If confidentiality agreements are signed later, dealerships may have to offer some consideration to the employees for them to be enforceable.

Learn About Cyber-Liability Insurance

Dealers should be proactive and ask insurance professionals about obtaining cyber liability insurance to protect them in the event of an unfortunate episode. This type of insurance can save a business! If there is a data breach, most dealers are not prepared to incur significant costs that hit quickly such as legal and forensic services to discover a breach, regulatory compliance and notice of affected persons, customer credit monitoring, business interruption expenses, damage to the network and lost data, and a public relations campaign to control reputational damage. This type of insurance coverage is very valuable and it is important for the business leaders to understand how it is different than regular errors and omissions coverage and how it can be tailored to fit a particular business.

Dealers can no longer lock up the gates at night and feel that their businesses are protected. It is necessary to build controls for the facility, the technology, and the employees. By attacking all three of these prongs highlighted in this article, a dealer can put itself in the best position to protect its information and its customers' information. ■

Steve Levine is Chief Legal and Compliance Officer of Ignite Consulting Partners, a company that provides compliance, cybersecurity, process improvement and other services to car dealers and finance companies. You can follow him on Twitter @LawyerLevine.

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