Legal and Regulatory Issues: What Dealers Need to Know about Online Sales and Related Topics

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Topics Covered in Today’s Presentation

• Overview of “Remote” Sale / Lease Process / Licensing Issues
• Text Messaging / Telemarketing
• Identity Theft / Fraud Issues / Red Flags Rule
• FTC “Cooling Off” Rule
• Privacy / California Consumer Privacy Act Implications
• Sales and Use Taxation Issues
Topics Covered in Today’s Presentation (continued)

- Additional Language That May Be Needed in Consumer Contracts
- Which Documents Still Need Wet Signatures and Why
- E-Contracting
- Remote Working Policies and Implications
- Social Distancing and Other Practical Concerns
- Other Issues
Overview of “Remote” Sale / Lease Process / Licensing Issues

- Currently more than 22 states with some form of restriction on in-person sales.
- About 16 states with online sales only.
- About 6 with showrooms open by appointment only.
- Hundreds of additional local restrictions.
- Check with your state and metro association.
- Work with attorney and local law enforcement/health officials to ensure your practices are permitted,
In some regions, Stay-at-Home orders require dealerships to close showrooms, but permit online sales with remote deliveries.

- Any salesperson involved works remotely from home.
  - Negotiations are handled through email, video conferences, phone calls, texts or online chats.
  - Paperwork is provided online and most transaction documents are executed online/electronically.
- Protocols must be developed and followed for physical delivery of vehicle to consumer’s home or to essential business.
  - Dealerships should consider increased credit risks given significant changes in the circumstances of all consumers due to the pandemic.
Overview of “Remote” Sale / Lease Process / Licensing Issues (continued)

- States, cities, and counties are publishing various versions of stay-at-home orders.
- Some of these stay-at-home orders are broad and may prohibit all sales – including remote sales.
- Enforcement is being handled by local authorities.
- Your dealership’s ability to sell vehicles depends on your state/county’s stay-at-home order.
Overview of “Remote” Sale / Lease Process / Licensing Issues (continued)

• Check with your attorney or state dealer association to confirm the following are permissible under state laws and regulations, and any applicable stay-at-home orders:
  – Online sales through your website.
  – Remote selling by salespeople working from their homes, using technology (emails, chats, texts and phone calls).
    • Confirm there is no requirement that a salesperson must be physically present at the dealership’s licensed facility when using technology.
  – Offsite delivery.
Overview of “Remote” Sale / Lease Process / Licensing Issues (continued)

• In most states, remote sales and delivery are permissible so long as:
  – Dealership has a physical location that meets state licensing requirements.
  – If salespeople are assisting with online selling, they are licensed as required under state law.
Text Messaging / Telemarketing

• Remote marketing efforts may increase.
  – Outside of normal systems / controls – may require extra training.

• Exercise caution with text messages in particular.

• TCPA – urge extra caution in an already perilous area.
    • Joins 9th Cir. (but see D.C. Cir., 11th Cir., and others).

• Obviously, avoid any misleading COVID-related marketing.
Text Messaging/ Telemarketing (continued)

• TCPA does have an “Emergency” exception - BUT
• Dealer calls/texts generally do NOT fit within the TCPA “emergency” exception.
• FCC issued recent guidance:
  – Exception applies to hospitals, health care providers, state and local health, and other government officials.
  – The content must be solely informational, made necessary because of the COVID-19 outbreak, and directly related to the imminent health or safety risk arising out of the COVID-19 outbreak.
Identity Theft / Fraud Issues / Red Flags Rule

- Pandemic has led to an unfortunate increase in fraud, including identity theft efforts.
- Many varieties:
  - Vehicle financing;
  - Trade-in deception;
  - E-mail phishing/social engineering/other scams increasing;
    - [https://www.fcc.gov/covid-scams](https://www.fcc.gov/covid-scams)
  - Federal relief/tax fraud; and
  - Many others.
Identity Theft / Fraud Issues / Red Flags Rule (continued)

- Your duty to take steps to confirm identity continues.
- Applies equally to online sales/remote deliveries.
- From our Red Flags Rule Guide:

  “...for accounts opened remotely and without meeting the customer in person, the dealer may determine that additional Red Flags and/or customer identification methods may be necessary due to the inability to physically inspect identification documents and determine, for example, if the customer’s physical appearance matches the photograph on the identification documents...”
Identity Theft / Fraud Issues / Red Flags Rule (continued)

• Additional steps to consider:
  – “Out of wallet” questions.
  – Video / online review of ID and other documents.
  – Work with finance sources to:
    • Clarify responsibilities; and
    • Cover e-contracting issues (many of which have their own “out-of-wallet” req’mts).

• Also:
  – Extra caution where and how YOU send information.
  – Security of “virtual” meetings.
FTC “Cooling Off” Rule

- FTC “Cooling Off” Rule governs “door-to-door” sales.
  - Including those done away from a place of business (not just at a customer’s home).

- If applicable:
  - Requires additional disclosures at the time of sale.
  - Allows for a three-day rescission right for the consumer.

- Historically, not an issue for dealers, but with increase in online sales it could become.
• 2001 FTC guidance (attached) indicates that obtaining signatures from a consumer at their home for a previously negotiated transaction does not, by itself, implicate the Cooling Off Rule.

“If, however, the delivery driver’s only function is to obtain the buyer’s signature on a fully completed contract that contains terms that have been negotiated before the delivery occurred, then the act of obtaining the buyer’s signature at the buyer’s residence would not constitute an act of solicitation that would trigger Rule coverage...”
FTC “Cooling Off” Rule (continued)

• What also seems clear is that if any part of the transaction is negotiated or solicited at the customer’s home, it could implicate the Cooling Off Rule.

• You should ensure that all aspects of the transaction (the trade-in value, F&I, final price, etc.) are fully negotiated prior to delivery of a vehicle.

• Delivery should:
  – Include only the ministerial act of obtaining a signature;
  – Not be done by a salesperson (check state law); and
  – Include modified (if necessary) identity verification and other procedures.

• Don’t forget to check your state “door-to-door” law (if applicable).
Privacy / California Consumer Privacy Act Implications

• Dealers should make sure their privacy policies are current.

• CA dealers must post a privacy policy meeting CCPA requirements. Must include:
  – Information about the rights of CA consumers to make data requests, and
  – Disclosures regarding the collection and sharing of private information.

• CA dealers should consult the CCPA Handbook that Arent Fox developed with the CA New Car Dealer Association.
Sales and Use Taxation Issues

• No matter where the purchase is made, upon registration a buyer must pay any applicable vehicle sales tax of their state of residence.
  – Typically, tax is based on a percentage of the sale price.
  – Counties and cities may add additional taxes.
  – All states charge a registration fee, but four do not charge sales tax.
    • Delaware, Montana, New Hampshire, Oregon.
Sales and Use Taxation Issues (continued)

• As with an in-person sale, require/maintain documentation proving the residency.
  – Seller is charged for failure to collect applicable tax where dealership located.

• Never lead a customer to believe tax is not owed where they reside.

• Dealers should be generally aware of the following:
  – Several states do not allow a credit on sales tax for the value of a trade.
  – Many states require payment of tax on the purchase price before mfg. rebates.
Additional Language That May Be Needed in Consumer Contracts

• Two things to keep in mind:
  – **First**, there are federal and state laws governing the use of electronic signatures (discussed later).
  – **Second**, the Uniform Commercial Code (UCC), adopted substantially by all states, should be followed for the sale of goods and services both on and off-line.
Additional Language That May Be Needed in Consumer Contracts (continued)

• Disclaimers of implied warranties of merchantability and fitness for a particular purpose should be made *clearly and conspicuously*.
  – Set off in highly visible, capitalized and bolded/contrasting text.
  – Never simply reference by a hotlink.
  – Place in a prominent location in any paper or electronically reproduced contract.
Additional Language That May Be Needed in Consumer Contracts (continued)

- Same applies to statements such as “AS IS” & “WITH ALL FAULTS.”

- Make disclaimers prior to consummation of the sale.

- Regarding consumer sales, note that some states:
  - Prohibit or restrict disclaimers; and
  - Offer protections that exceed UCC requirements.

- Provide detailed and easily understood information pertaining to warranty coverage.
Which Documents Still Need Wet Signatures and Why

• Nearly all states still require wet (original ink) signatures for title transfers and vehicle registrations.

• New York requires that signatures on the Certificate of Sale (the MV-50) must be written in ink or indelible pencil.

• California requires wet signatures on certain DMV forms such as Reg 262 and Reports of Sale.
E-Contracting

• Will likely need the help of a vendor.

• If none yet – exercise caution in choosing – trust but verify.
  – ESIGN and Reg Z compliance (discussed below).
  – System must address any state/local issues.
  – GLB Service Provider / safeguarding provisions.
  – Mobile applications? Meet disclosure/other requirements?

• Coordination / approval from finance sources.
E-Contracting (continued)

- Signing and approving documents online is replacing traditional paper financing documents.
- Removes the need for customers to come to the store in person.
- Customers can look at documents on their computer, tablet or phone.
- Dealers must comply with the federal Electronic Signatures in Global and National Commerce Act (E-SIGN) and similar state laws.
- E-SIGN gives equal validity and enforceability to electronic signatures as “wet” signatures.
E-Contracting (continued)

• When you send an electronic document to a customer, they have to electronically provide their consent to receiving electronic records.
  – There must be an “opt-out” option.

• Electronic methods of signature must be agreed to by both parties.

• You have to put the E-Sign consent form first in every transaction.
  – Consent must be obtained prior to disclosures being received or contracts being entered into.
E-Contracting (continued)

• Regulation Z Disclosures:
  – Requires creditors, including dealerships, to give the Regulation Z disclosures to customers (APR, finance charge, total of payments, etc.);
  – Must be in writing and must be in a form the customer may keep;
  – Must be provided to customer before completion of the transaction; and
  – If the dealership gives the customer a paper copy of the Retail Installment Sale Contract at the time of delivery, and an electronic copy has not previously been provided, then the customer must be given an opportunity to review the document prior to signing it.
Remote Working Policies and Implications

• Employers should implement a Remote Work Policy that sets forth the terms of a work-from-home (WFH) arrangement.
  – Could be a stand-alone document or an email to employees.
  – Policy should clearly address the following:
    • Who is allowed to WFH (not all jobs are conducive to WFH);
    • Employees’ expected hours of work (start and stop times, meals, rest breaks);
    • Expected productivity standards;
    • Importance of accurately recording one’s time;
    • Connectivity/logistical issues;
    • Continued adherence to confidential and data security protocols; and
    • Overtime policy.
Remote Working Policies and Implications (continued)

• Employers that are enacting a WFH policy for the first time (or significantly expanding their existing WFH policy) should state that:
  – This policy is being enacted solely as a response to the COVID-19 pandemic (and perhaps future pandemics);
  – This is not a permanent arrangement;
  – Policy will be subject to re-evaluation/modification at employer’s sole discretion; and
  – Once pandemic subsides, policy may be terminated/employee attendance will be mandatory.
Employers may need to reimburse their employees for reasonable and necessary home office expenses, such as:

- Cell phone or landline plan.
- Home internet plan.
- Personal computer or tablet.

Employers should check to see if their state requires reimbursement.

- California, Illinois, Massachusetts, Montana, and New Hampshire have reimbursement requirements.

On a federal level, employers must consider Fair Labor Standards Act (FLSA).

- Must reimburse employees for any business expenses incurred that would bring their pay below the minimum wage.
Social Distancing and Other Practical Concerns

- If you are delivering vehicles to customers, make sure that your delivery process complies with CDC Guidance for protecting employees and customers from COVID-19.
  
  • **Sick employees should stay home.**
    • If an employee has a fever or cold-like symptoms, they should not be allowed to perform deliveries or interact with customers.
  
  • **Frequent hand washing.**
  
  • **Hand sanitizer readily available.**
  
  • **Clean and disinfect regularly.**
    • Frequently used surfaces (such as the steering wheel or door handles) should be cleaned and disinfected.
  
  • **Use disposable gloves and face masks when interacting with a customer.**
    • Use a fresh pair of gloves for each delivery.
  
  • **Practice social distancing.**
    • Stay at least 6 feet away from customers and other employees.
  
  • **Consider local requirements when making deliveries.**
    • For example, in some cities and counties using a face covering may be required.
Other Issues


• Advertising:
  – Online pricing.
  – COVID – related.

• Insurance coverage/workers comp issues.

• Delivery “fees” – relationship to doc fees?

• Lease or loan modifications?

• Customer lease returns - where showrooms closed.
Questions?
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