

## More Considerations When Conducting Off-Site Sales in a COVID-19 World

May 6, 2020 | [Eric L. Johnson](#)

I know it's been a long month, but you may remember that I wrote about the [Federal Trade Commission's cooling-off rule](#) in early April. That rule is just one of the many laws and regulations that a dealer should review and consider when engaging in off-site sales. In this article, I'll cover several more considerations for a dealer doing business during the COVID-19 pandemic, including off-site sales prohibitions, dealer agreement language, home deliveries, and the Red Flags Rule.

### Off-Site Sales Prohibitions

In some states, a dealer may be prohibited from conducting a sale from an unlicensed location. Take Texas, for example. In Texas, the Sale or Lease of Motor Vehicles chapter in the Occupations Code and the Dealer's and Manufacturer's Vehicle License Plates chapter in the Transportation Code govern the distribution and sale of motor vehicles. A dealer may sell or offer to sell a motor vehicle only from an established and permanent place of business approved by the Texas Department of Motor Vehicle's Motor Vehicle Division and for which a general distinguishing number has been issued.

However, a Texas dealer may sell or offer to sell a motor vehicle online through an advertisement on the Internet to a buyer who never personally appears at the dealer's established and permanent place of business.

The 2017 edition of the *Texas Motor Vehicle Dealer Manual* states that Texas law allows "dealers who advertise on the Internet directly through their own websites to sell a vehicle to those persons who respond to that advertisement without having those people come to their dealership. Responses to non-Internet ads still require the potential buyers to visit the dealership at least once to avoid the off-site sale rule."

Therefore, auto transactions conducted *solely* via the Internet from advertising to origination are permitted without violating the off-site sales prohibition in Texas. In that case, a Texas dealer could make a home delivery, subject to the requirements related to drive-away permits (for persons who transport and deliver vehicles in Texas from the manufacturer or another point of origin to a location in Texas). However, assuming any part of the transaction is *not* conducted online, the buyer must visit the dealership at least once to avoid the off-site sales prohibition.

That's just the analysis for Texas. If you're located in another state, you should review your state's laws to find out if there is an off-site sales prohibition and how you may need to adjust your sales practices to comply.

### **Dealer Agreement Language**

If you're engaging in off-site sales or plan to do so once the pandemic has passed, you need to review the terms of your dealer agreement with your financing source(s). Many form dealer agreements have a representation and warranty by the dealer that the entire transaction, including the delivery of the vehicle and the buyer's acceptance of the vehicle, occurred at the dealer's licensed place of business. Why include such a provision? One reason is because of the off-site sales issues I addressed above. If you have such a provision in your dealer agreement and you're engaged in off-site sales, then you need to speak to your financing source to make sure you're not in default. You don't want to have to defend a demand by your finance source for the repurchase of a contract under your dealer agreement down the road.

### **Home Deliveries**

If delivery of the vehicle to the buyer is considered an action required to complete the sale of the vehicle, then some states may require that the delivery of the vehicle occur only at the dealer's licensed "established place of business." If you're in one of those states, then you may not be permitted to deliver the vehicle to the customer's home. You may be required to deliver the vehicle to the customer at your dealership, or, instead, you could recommend that the customer contract with a shipping company to pick up the vehicle from the dealership.

If you *are* permitted to deliver the vehicle to the customer's home, then the delivery should include only the ministerial act of obtaining a signature on any purchase, financing, and/or delivery receipt documents. Unless required by state law, be careful about sending your salesperson to make the delivery. If further negotiations are conducted at the customer's home, it could trigger the FTC's cooling-off rule and/or a state home solicitation or door-to-door sales law.

### **Red Flags Rule**

Remember the Red Flags Rule and your requirement to have an Identity Theft Protection Program? Well, your duty to take steps to confirm the identity of your customer still applies to online sales and remote deliveries.

There's a lot of fraud out there now, and your red flags duties still apply. What additional red flags or customer identification methods are necessary if you're not able to physically inspect a customer's driver's license and confirm that the picture on the license matches the customer's physical appearance? Consider asking the customer some "out of wallet"-type questions, conducting an online or video review of the confirming documents and identity, or matching the customer's provided documents and identity against a database.

These are just a few of the possible issues and challenges a dealer could face when

engaging in off-site sales. There are many others you should be aware of. For example, is there a state executive order or mandate in place that limits or prohibits dealership sales activities during the COVID-19 crisis?

If dealership sales are considered essential and can still be conducted, are in-person sales at the dealership permitted, must they be by appointment only, or must they be remote or online only (e.g., Michigan)?

Finally, note that there may be restrictions on or requirements for engaging in electronic transactions that would apply to a consumer executing transaction documents electronically.

Before you engage in off-site sales, or even if you're conducting them now, I encourage you to have a talk with your friendly lawyer about how to address each of the issues I raised. Some of the penalties for violating the applicable laws include voidance of the contract, actual damages, and attorneys' fees and costs. In addition, a violation of the home solicitation/door-to-door sales law in some states is also deemed a violation of the state's unfair or deceptive trade practices law, which may allow for, among other remedies, treble damages.

Addressing these issues now could save you further headaches down the road.

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