

Memorandum

Aaron H. Jacoby

Managing Partner, Los Angeles
213.443.7568 DIRECT
213.629.7401 FAX
aaron.jacoby@arentfox.com

Lisa Singer

LA Automotive Compliance Director
213.988.6691 DIRECT
213.629.7401 FAX
lisa.singer@arentfox.com

Date: March 24, 2020

To: Brian Maas and Anthony Bento, CNCDA

From: Aaron H. Jacoby
Lisa Singer
George Koumbis

Re: Online Vehicle Sales, Remote Selling and Home Delivery

The California New Car Dealers Association has requested a memo regarding online vehicle sales, home delivery and remote work for vehicle salespersons. Below is our executive summary followed by a brief discussion.

I. EXECUTIVE SUMMARY

While subject to California's current Stay at Home orders, dealerships can sell vehicles online, with or without the assistance of vehicle salespersons who work from home, and make home deliveries to consumers. Dealerships must comply with the following requirements:

- All deal terms must be agreed upon prior to delivery; there are to be no negotiations at the consumer's home
- Any licensed salesperson engaged in selling must have their sales license on display at the dealership
- Although most forms can be signed electronically, dealerships must obtain original (ink) signatures on DMV forms (Report of Sale and Reg 262)
- Customers entering into installment sale contracts must have an opportunity to review the contract, in a form they can keep, prior to execution
- Red-flags procedures must be followed, including the requirement to confirm each customer's identity prior to or at delivery

- CDC rules must be observed, including social distancing, use of gloves, hand-sanitizers, etc. throughout the delivery process

II DISCUSSION

A. Statewide Stay at Home Order

On Thursday, March 19, Governor Newsom issued a statewide “[Stay at Home](#)” order. This Order adopts the federal CISA (Cybersecurity and Infrastructure Security Agency) rules allowing only essential critical infrastructure sectors to remain open. The State Public Health Officer’s March 20, 2020 list of “[Essential Critical Infrastructure Workers](#)” specifically provides that auto repairs and maintenance facilities are essential. In addition, the definition of “Essential Workforce” includes:

- **Employees supporting or enabling transportation functions**, including dispatchers, maintenance and repair technicians, warehouse workers, truck stop and rest area workers, and workers that maintain and inspect infrastructure (including those that require cross-border travel)
- Taxis, transportation services including Transportation Network Companies, and **delivery services** including Delivery Network Companies
- Postal and **shipping workers, to include private companies**

Unless or until further state or federal rules provide otherwise, the above definitions are likely sufficient to permit online sales and home deliveries of vehicles. [We note that some OEMs are pressuring dealers to stay open, with a sales staff available onsite to assist consumers. OEM pressure to stay open is based on a false premise. Any dealer that does not want to offer sales at this time is not required to do so. The existing government orders trump any provision in the franchise agreement requiring an open sales department.]

Throughout the delivery process, dealership personnel should adhere to CDC rules regarding social distancing and sanitization (use of gloves, hand washing, hand sanitizers, etc.). The delivery process should be analogous to the receipt of other delivered goods, with the exception of verifying identity and obtaining a few signatures. That means, the **delivery does not include:**

- Test drives. Without test drives, the “No cooling off rule” becomes more critical than usual. If dealerships intend to impose it on home deliveries, the dealership’s website and communications with consumers should highlight this rule. Also, in the case of used cars sold for under \$40,000, more consumers may be interested in purchasing a Used Vehicle Contract Cancellation Option Agreement.

- Face-to-face attempts to sell additional products. There is to be no “up-selling” at the consumer’s home; this is a delivery, not a sales call.
- In-person explanation of vehicle features. The traditional delivery process, where a delivery specialist explains how to use the features of the vehicle, will have to be done remotely, perhaps through video conferencing, an online video, or by phone.

In sum, in order for the delivery to be permissible under the Stay at Home Order, it should be similar to the delivery of all the other products we receive at our homes.

B. DMV/Regulatory Compliance

Online Sales. The Vehicle Code does not prohibit online sales of inventory from a dealership’s licensed, established place of business. Although the Vehicle Code requires that sales must be conducted through a licensed location [[Vehicle Code § 11714\(b\)](#)], there is no requirement that the salesperson or the consumer be physically present at the licensed location throughout the sales process. There is no published decision or administrative action that prohibits licensed salespeople from using technology to communicate with customers, whether by texts, emails, chats or phone calls, from an offsite location. So long as a licensed dealer has an established place of business where the licenses of all salespeople are displayed [[Vehicle Code § 11709\(a\)](#)], and the dealership’s forms and processes are used to perform the sale, a licensed salesperson’s use of technology from an offsite location should not violate the Vehicle Code. However, aside from this offsite use of technology, a salesperson must not engage in “selling” at a physical location other than the dealer’s established place of business (excluding temporary licensed locations, such as tent sales). In other words, Vehicle Code Section 11714(b) may prohibit a salesperson from engaging in face-to-face sales at another physical location besides the dealership, but it does not prohibit “selling” through texts, emails, chats or phone calls, from an offsite location. Thus, all deal terms must be agreed in advance, and no further “selling” may occur at a customer’s home during the delivery process. By ensuring that no negotiations occur at a consumer’s home, dealers will also avoid residential solicitation laws (*see* [16 CFR § 429.0](#), allowing a 3-day rescission period, among other requirements).

E-contracting vs. Wet/Ink Signatures. This memo will not address the details of e-contracting or compliance with the federal E-SIGN act, but will touch on a few important issues. They are as follows:

- California law does not permit electronic disclosures to consumers for vehicle retail installment sales and leases, while the federal E-Sign Act does. Although California permits e-contracts for most agreements, [Civil Code § 1633.3\(c\)](#) specifically excludes vehicle retail installment sale contracts and vehicle lease agreements from California’s Uniform Electronic Transactions Act. Generally, when there is a conflict between state

law and federal law, federal law takes precedence over state law. This is why more and more lenders have switched to e-contracting. However, no California court has issued a ruling regarding this conflict between state and federal law. Although we are aware of some consumer attorneys alleging that a vehicle installment sale contract or lease agreement that was signed electronically is invalid under California law, we are not aware of any such claim being pursued through trial or arbitration. Such claims are generally quickly dismissed when challenged by defense counsel.

- Regulation Z requires creditors, including dealerships, to give the Regulation Z disclosures to customers (APR, finance charge, total of payments, etc.) in writing, in a form the customer may keep, before consummation of the transaction [[12 CFR § 226.17](#)]. If the dealership will be presenting a paper copy of the Retail Installment Sale Contract to the customer at the time of delivery, and an electronic copy has not previously been provided, the customer must be given an opportunity to review the document prior to signing it.
- Regardless of whether or not a dealership engages in e-contracting or completes hard-copy sale/lease documents, DMV forms such as REG 262 and Reports of Sale must be signed with wet (ink) signatures. *See* Vehicle Industry Registration Procedures Manual §§ [5.075](#), [6.025](#), and [8.010](#).

Home Deliveries. The Vehicle Code does not prohibit offsite deliveries. Although the Vehicle Code does not specifically address offsite deliveries at all, the DMV acknowledges that dealers do in fact make remote deliveries. *See* Vehicle Industry Registration Procedures Manual, [Section 8.055](#) (“Dealers may use dealer plates to deliver the vehicle if the sale is consummated after delivery of the vehicle.”). Similarly, dealers with an autobroker’s endorsement are permitted to deliver vehicles to an offsite location. *See* [Vehicle Code § 11735\(d\)](#). For dealerships engaging in home deliveries, here are a few issues to consider.

- Temporary License Plates. As with any delivery, if the vehicle does not already have plates, temporary license plates must be affixed to the vehicle. *See* DMV’s webpage: [Temporary License Plates and Electronic Report of Sale](#). Unless the delivery vehicle has a printer, the dealership will need to enter the Report of Sale information and print the Temporary License Plates prior to delivery.
- Contract Signing and Retention. All contracts should be signed by the dealership in advance of the delivery, so the deal will be fully consummated when the customer signs the documents and takes the keys. After the customer signs the required documents, all signed documents must be returned to the dealership. The DMV Report of Sale form is the property of the DMV and “may be taken up at any time for inspection” by the DMV.

See [Vehicle Code 11714\(e\)](#). Accordingly, the delivery driver must promptly return the Report of Sale (along with other signed documents) to the dealership following the delivery.

- Odometer Disclosures. The odometer sections of the sales and DMV forms must be accurate. Pursuant to [Vehicle Code § 5901\(d\)](#), a sale is not completed and consummated until the vehicle is delivered. Therefore, the proper odometer reading would be the reading at the time of delivery, after driving the vehicle to the customer's home. There are no issues if the vehicle will be delivered by a flat-bed delivery truck. All odometer readings can be entered into contracts and DMV forms prior to loading the vehicle on the delivery truck. However, complications arise if the vehicle will be driven to the customer's home. In this situation, some dealerships determine the added mileage based on the distance from the dealership to the customer's home and adjust the odometer information accordingly. This is probably a low-risk practice, if the mileage reading is accurate.
- Red flags/identification. The delivery driver must verify the customer's identification, in person, to avoid potential identity theft. See [16 Code of Federal Regulations § 681.\(b\)\(9\)](#). The driver must insist upon meeting the purchaser and comparing the photo on the customer's unexpired identification with the customer's appearance. To avoid surprises, in advance of the delivery, the dealership could require a Skype or FaceTime conversation, so the customer's ID can be preliminarily checked remotely. In addition, to minimize the risk of identity theft, the dealership should require that offsite deliveries be made only to the residential address appearing on the customer's credit application.
- Trade-in Vehicles. If the customer will be trading in a vehicle, the trade vehicle will have to be valued prior to the time the dealership employee arrives at the customer's home. The customer can be required to provide photos or videos in advance of the delivery. In addition, the delivery driver should be required to visually inspect the trade-in before the delivery of the new vehicle is completed. If it is obvious to the delivery driver that the trade-in does not match the agreed-upon value stated in the contract, the driver should not re-negotiate the value of the trade, but should return to the dealership without completing the deal. If the deal is consummated and concealed defects or title issues are subsequently discovered, the dealership will have the same rights available as it would if the deal were completed at the dealership.

C. Wage and Hour Concerns

Nonexempt employees who work from home are subject to all the same rest break, meal periods and timekeeping requirements as employees who work on the dealership's premises. Employees

who are permitted to work remotely must be instructed to take their required breaks and meal periods, and to keep an accurate record of time worked each day.

D. Health and Safety Recommendations

Dealerships should implement a delivery process that complies with [CDC Guidance](#) for protecting employees and customers from the Coronavirus:

- Sick Employees Should Stay Home. Only healthy employees who do not have a fever or cold-like symptoms should be permitted to perform deliveries.
- Hand Washing. Wash hands often with soap and water, for at least 20 seconds.
- Hand Sanitizer. When soap and water are not available, use a hand sanitizer that contains at least 60% alcohol. Delivery drivers should carry hand sanitizer or if using a flat-bed delivery truck, keep a bottle of sanitizer in the truck.
- Clean and Disinfect. Frequently used surfaces, including the steering wheel and door handles of delivery vehicles, should be regularly cleaned and disinfected.
- Disposable Gloves. When checking a customer's identification, or exchanging documents with a customer, wear disposable latex gloves. Use a fresh pair of gloves for each delivery.
- Social distancing. The disease is spread when an infected person coughs or sneezes. To the extent available, use a mask and, to the extent possible, stay at least 6 feet away from other employees and customers. Do not touch surfaces in homes with bare hands. Do not touch face, eyes, nose or mouth without washing hands in between touching a person or surface.