

For Dealers, Many COVID-19 Questions, but Not Many Answers

April 3, 2020 | [Patricia E.M. Covington](#) and [Thomas J. Buiteweg](#)

The coronavirus hit the auto sales, finance, and lease business suddenly and hard. Companies in those areas were not alone - the entire U.S. economy is wrestling with the virus's effects. Every area of commerce, it seems, suddenly has a litany of questions that need answers, and some of the answers are ones that lawyers will need to address.

As the virus news spread, the lawyers in our firm started identifying issues, collecting questions, and, in some cases, working out answers to the flood of inquiries landing in their inboxes. Here is just a sample of the questions we're seeing:

Marketing and Advertising

- Can you continue marketing in areas with a "shelter in place" or similar directive or order? You need to consider whether you can deliver on any offers you are making, given restrictions on operations, and whether you want to be seen as encouraging consumers to leave their homes.
- Can you increase your use of the telephone and email to replace in-person functions? You need to continue to be vigilant about complying with Do Not Call requirements, CAN-SPAM, authentication, and other requirements for and restrictions on using automatic dialing equipment. Remember that there are state requirements, too. And there are special requirements during this crisis. For example, New York has a prohibition on telemarketing sales to persons in a county, city, town, or village under a declared state of emergency or disaster emergency, which applies to the whole state right now.
- Is it OK to use the crisis in your marketing pitches? You need to be extremely sensitive to this fluid situation. There very likely will be heightened scrutiny post-crisis. Attorneys general will be looking to punish folks they believe took advantage of the crisis situation and perhaps even those who were merely tone-deaf.

Operations

- Can you be open for business? The answer depends on careful interpretation of the many different "shelter in place," "stop business," and "stay at home" orders in effect in different parts of the country. Generally, "essential businesses" may operate on at least a limited basis. In some areas, only service operations are permitted. In many areas, it is unclear if dealers can continue sales operations. And even if you are able to be open, you will need to abide by the social distancing limits in your area. This may require you to rearrange furniture or the layout of a room

where multiple people may be present. And you will need to think through the measures needed to protect your employees and customers, such as reminders to wash hands and taking extra care in cleaning and sanitizing.

- Can you close sales and deliver vehicles to customers' homes and businesses? Assuming your sales operations are allowed to continue in the area, there are potential legal issues with closing sales and delivering vehicles away from the dealership location. For example, some states have restrictions on off-site sales under dealer licensing statutes, and both federal and state law may impose restrictions and conditions on off-site sales under "door-to-door sales" and other laws. (For more information on the topic of doing business away from your regular location, see Eric Johnson's article [here](#).)
- Will finance sources purchase retail installment sale contracts and leases if the area is under some type of mandated closure? Your finance sources may use their own determinations about whether you can continue to operate your sales functions, and they will need to decide if they are able to operate under current conditions. You will want to know if you can sell contracts before you start closing them, or you may end up holding them for a lot longer than you're comfortable doing, given down-stream servicing requirements.
- How do you do a test-drive when people are supposed to be six feet apart? Sorry, we don't have an answer for that one, unless you are selling a stretch limo, comfortable riding in the trunk, or willing to let the customer take the vehicle out alone. You also will want to ensure that the vehicle is disinfected properly after the drive.
- How do you handle phone credit applications? You need to make sure that your process meets all the disclosure requirements for taking applications and that you are clear that a bureau pull will result.
- Can you offer incentives? Remember, the same dealer rebate, discount, and other requirements apply. And you need to make sure you can deliver on the incentives, given the restrictions on your business operations and others around you. For example, you shouldn't offer free tickets to a movie theater if all the theaters in your area are closed.
- Do you have to worry about filing or registering title applications if the DMV is closed? Yes, you do. Some states have deadlines for you to file the registration and/or title application for the customer. Your contracts with your finance sources are likely to make you responsible if a delay in filing these applications impairs their security interest in the vehicles. And delays in processing a title application that includes a request to have the finance source's security interest noted on the title can result in the security interest being set aside in bankruptcy. You should consider whether your state has an electronic titling system that both you and your finance source are able to use.

Post-Crisis Planning

- What types of programs can you offer to kick-start sales and get people back into the showroom? As always, you need to carefully vet the program with your lawyer to ensure it complies with all applicable legal requirements. If you are contemplating new transaction structures, like deferred payments or finance charges, you will need to ensure that your systems

and your finance source's systems can disclose and service the transactions properly.

- Will there be additional underwriting risks? Will finance sources tighten their underwriting? Will finance sources want to make certain transactions recourse? No one knows the future with certainty, but odds seem pretty good that this crisis and the economic upheaval accompanying it will cause a seismic shift in people's credit histories, and the industry folks will need to scramble to adjust their underwriting appropriately to reflect the new reality. But before you start asking people if their jobs allow them to work from home, you need to remember that the fair lending rules are still out there. Any shifts in underwriting criteria still need to be evaluated for compliance with them.

This may not be the time to be bullish on risk-taking. Reputation is a big part of repeat business for dealers. The fact that dealers continue to operate while most other businesses are prohibited from doing so may not play so well with other industries, and even with your own employees. How a business behaves during a crisis matters - not only to regulators but to consumers.

If you and your lawyer are not already huddled up and discussing one or more of these topics, you can be sure you will be shortly. Remember to sit at least six feet apart.

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