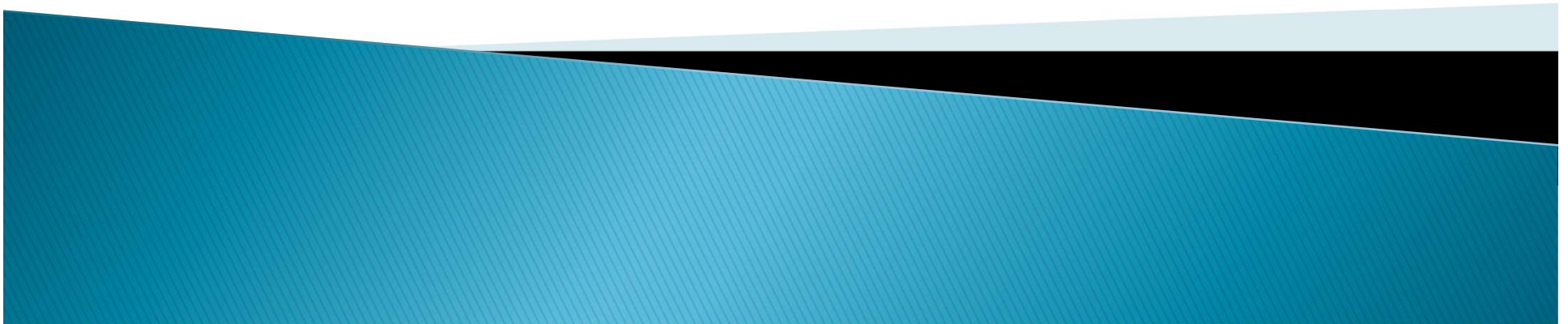




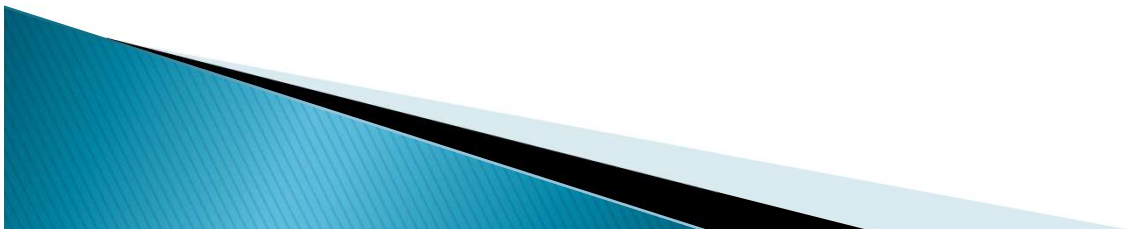
On-line Motor Vehicle Sales During the COVID-19 Pandemic: Opportunity Versus Liability

April 30, 2020



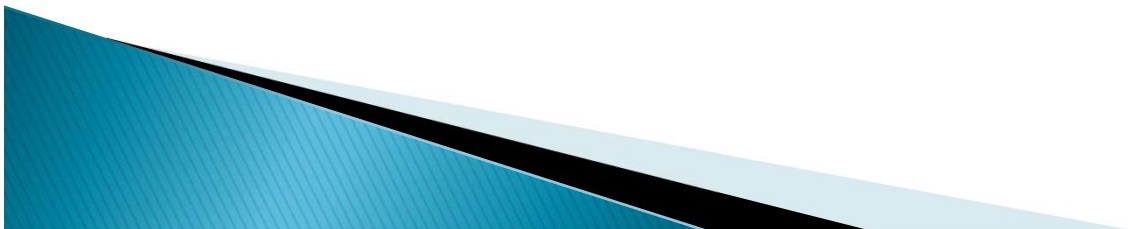
Introduction

- ▶ This webinar is based on information current as of TODAY; the situation is constantly evolving.
- ▶ Often, there are more questions than answers.
- ▶ Considering the liabilities, dealers should confer with their private attorneys when formulating a “contactless” on-line or remote sales and delivery plan.
- ▶ THIS PRESENTATION IS NOT A SUBSTITUTE FOR INDEPENDENT LEGAL ADVICE.



Overview

- Background on On-line Marketing and Sales in New Jersey
- Governor Murphy's COVID-19 Executive and Administrative Orders
- Federal Law
- State Law



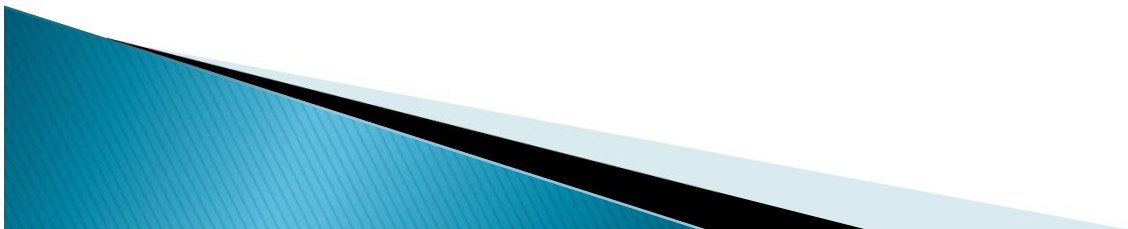
Background

- ▶ Title 39 and the NJ Motor Vehicle Commission's regulations prohibit dealers from engaging in sales activity over the Internet.
- ▶ On-line marketing and communications with consumers are permissible, but final negotiations and contracts must be completed at the dealer's licensed location.
- ▶ Off-site courtesy delivery is permissible *after* paperwork is signed and the deal is completed at the licensed location.
- ▶ Dealer compliance and NJMVC enforcement of this requirement is inconsistent.



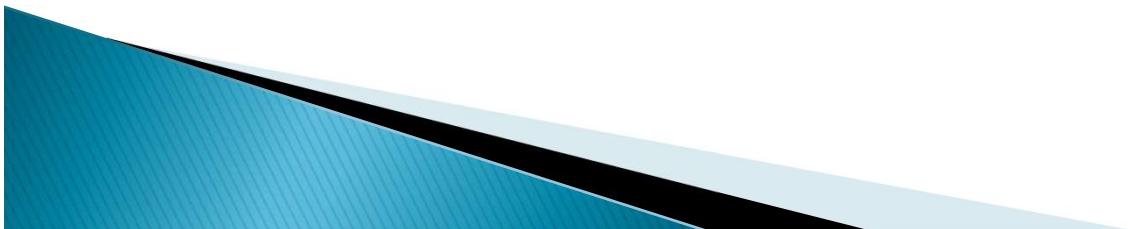
Executive Order 107

- ▶ Non-essential “brick and mortar” retail was shut down by Governor Murphy on March 21, 2020 due to the COVID-19 pandemic.
- ▶ Car dealers were considered essential retail but could only operate service departments; showrooms were closed.
- ▶ No on-line car sales were permitted under E.O. 107.
- ▶ CDC’s social distancing measures were imposed on essential retail under E.O. 107.
- ▶ “Telework” and outdoor pickup/delivery was also required to the extent possible



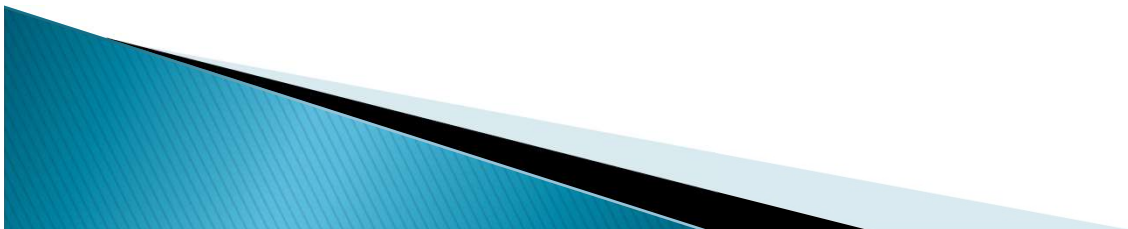
Administrative Order 2020-6

- ▶ On March 30, 2020, in response to NJ CAR's lobbying effort, Governor Murphy allowed "contactless" motor vehicle sales under the following conditions:
 - *Car dealers may continue to conduct online sales or remote sales that can be completed by phone, text, or email, and are consistent with current law. Such sales shall be deemed permissible in accordance with paragraph 6 of Executive Order No. 107. In the event of such a sale, the car may be delivered to the purchaser or the purchaser can pick up the car curbside or in the dealership service lane. Picking up a car from a dealership shall be considered essential retail business for the purposes of paragraph 6 of Executive Order No. 107. (Emphasis added).*



Administrative Order 2020-6

- ▶ What do the terms of this A.O. 2020-6 actually mean?
- ▶ “[C]onsistent with current law” suggests that “contactless” sales must follow all the same rules that apply to in-person sales (to the extent those rules are not modified by A.O. 2020-6).
- ▶ The meaning of “curbside” is unclear. The customer certainly cannot enter the showroom to take delivery.
 - *Issue: How about an outdoor canopy or tent?*
 - *Issue: How should in-person interactions incidental to curbside or remote delivery occur?*



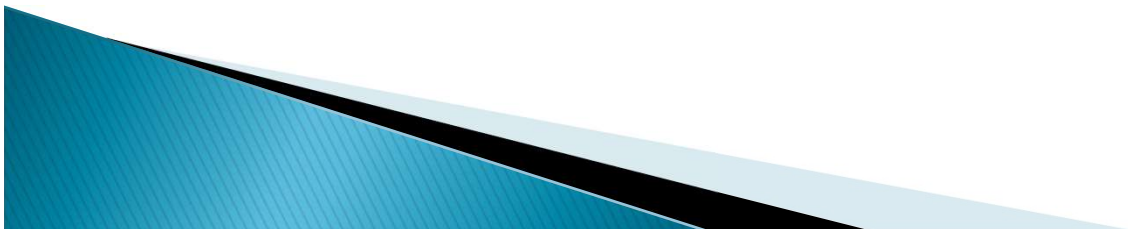
“Current Law” on On-line Sales

▶ Federal Law

- Telephone Consumer Protection Act (“TCPA”)
- Red Flags and Safeguards Rules
- FTC “Cooling Off” Rule

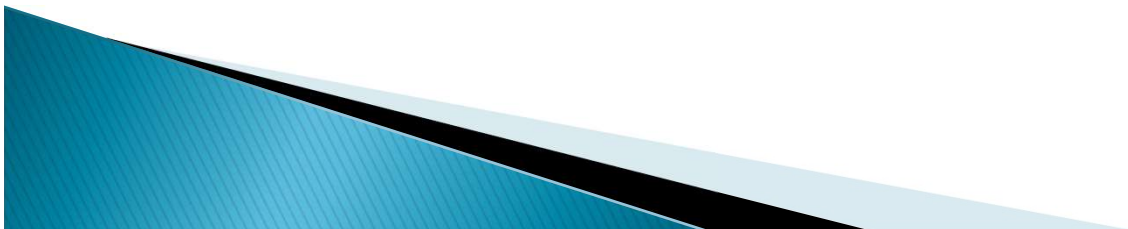
▶ State Law

- Governor’s Executive and Administrative Orders
- NJMVC Dealer Licensing Laws
- Uniform Electronic Transactions Act
- NJMVC Wet Signature Requirements
- NJ Advertising Regulations



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
 - *Duran v. La Boom Disco, Inc.*, No. 19-600-cv (2d Cir. Apr. 7, 2020)
 - Joins 9th Cir. (but see D.C. Cir., 11th Cir., and others)
- ▶ Obviously, avoid any misleading COVID-related marketing



Text Messaging/ Telemarketing

- ▶ 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.

Federal Communications Commission DA 20-318

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of)
Rules and Regulations Implementing the) CG Docket No. 02-278
Telephone Consumer Protection Act of 1991)

DECLARATORY RULING

Adopted: March 20, 2020 Released: March 20, 2020

By the Chief, Consumer and Governmental Affairs Bureau:

I. INTRODUCTION

1. The COVID-19 pandemic has endangered American lives with a respiratory illness that has spread throughout the United States.¹ Efforts to slow the spread of the disease depend in part on effective communications with the American public about measures such as social distancing that can mitigate transmission of the illness, as well as other health and safety information that could save lives.

2. With this Declaratory Ruling, we ensure that public health authorities can efficiently and effectively communicate vital health and safety information to the American people. Specifically, we confirm that the COVID-19 pandemic constitutes an “emergency” under the Telephone Consumer Protection Act (TCPA) and that consequently hospitals, health care providers, state and local health officials, and other government officials may lawfully communicate information about the novel coronavirus as well as mitigation measures without violating federal law.

II. BACKGROUND

3. Congress enacted the TCPA to address certain calling practices that invade consumer privacy and threaten public safety.² In relevant part, the TCPA and the Commission’s rules prohibit autodialed, prerecorded, or artificial voice calls to wireless telephone numbers and other specified recipients in most circumstances.³ The Commission has concluded that the TCPA’s protections against unwanted calls to wireless numbers encompass both voice calls and text messages, including short message service (SMS) texts, if the call is made to a telephone number assigned to such service.⁴

4. The TCPA expressly excepts from this prohibition calls made for “emergency

¹ See Centers for Disease Control and Prevention, Coronavirus (COVID-19), <https://www.cdc.gov/coronavirus/2019-ncov/index.html> (last visited Mar. 18, 2020).

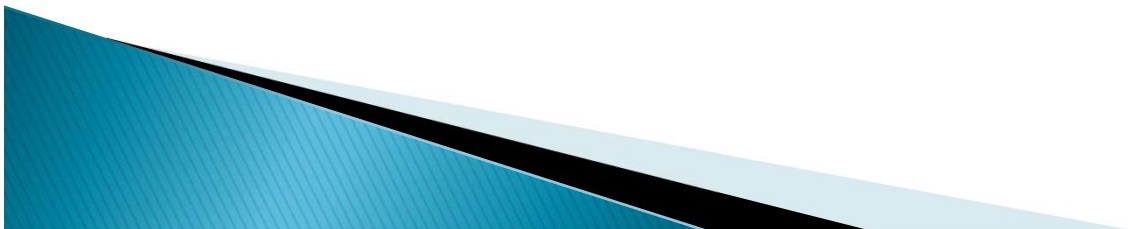
² The Telephone Consumer Protection Act (TCPA) is codified at section 227 of the Communications Act of 1934, as amended. See 47 U.S.C. § 227. Unless otherwise indicated, the term “unwanted calls” includes calls made either with an automatic telephone dialing system (“autodialer”) or with a prerecorded or artificial voice.

³ See 47 U.S.C. § 227(b)(1), (b)(2)(C); 47 CFR § 64.1200(a)(1).

⁴ See *Rule and Regulations Implementing the Telephone Consumer Protection Act of 1991*, CG Docket No. 02-278, Report and Order, 18 FCC Rcd 14014, 14115, para. 165 (2003) (2003 TCPA Order); see also *Satterfield v. Simon & Schuster, Inc.*, 569 F.3d 946 (9th Cir. 2009) (noting that text messaging is a form of communication used primarily between telephones and is therefore consistent with the definition of a “call”).

Identity Theft / Fraud Issues

- ▶ 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.consumer.ftc.gov/features/coronavirus-scams-what-ftc-doing>
 - Federal relief/tax fraud
 - Many others



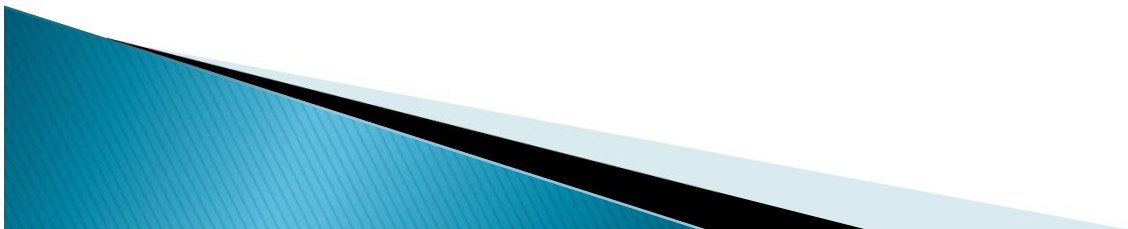
Red Flags Rule

- ▶ 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...”



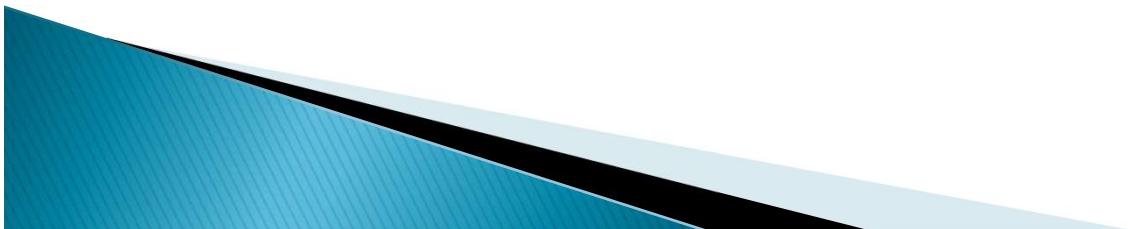
Red Flags Rule/ ID Theft Issues

- ▶ Additional steps to consider
 - “Out of wallet” questions
 - Video /online review of ID and other documents
 - Work with finance sources to
 - Clarify responsibilities
 - Cover e-contracting issues (many of which have their own “out-of-wallet” requirements)
- ▶ Also,
 - Extra caution where and how *YOU* send information
 - Security of “virtual” meetings



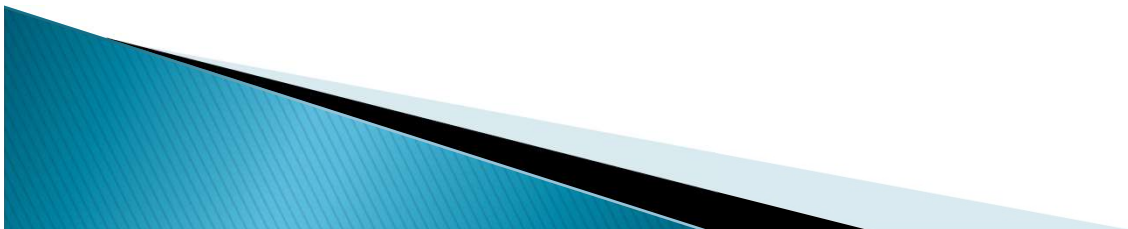
Data Privacy and Security

- ▶ Don't forget your Safeguards Rule obligations
- ▶ Employees working remotely?
- ▶ New tech vendors?
 - Likely access to sensitive data
 - Privacy Rule and Safeguards Rule implications
 - Must agree not to share/use data
 - Must agree to protect data
- ▶ Must get vendor to agree to certain contract provisions
 - See www.nada.org/dealerdata for service provider template



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



“Cooling Off” Rule

- ▶ 2001 FTC guidance in 2001 (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...”



UNITED STATES OF AMERICA
FEDERAL TRADE COMMISSION
SOUTHEAST REGION

Star 5415, 54 Pearce Street, NW
Atlanta, GA 30303-2322

Paul E. Davis
Attorney

Direct Dial
(404) 900-1354

March 16, 2001

Mr. Peter Welch
Director of Government and Legal Affairs
California Motor Car Dealers Association
915 L Street
Suite 1480
Sacramento, CA 95814-3705

Dear Mr. Welch:

This letter responds to your request for an opinion as to whether two scenarios are covered by the Commission's Trade Regulation Rule Concerning Cooling-off Period for Sales Made at Homes or at Certain Other Locations ("Cooling-Off Rule" or "Rule"), 16 C.F.R. Part 429.

The Cooling-Off Rule was promulgated in 1972¹ under Section 6(g) of the FTC Act due to five problems associated with sales away from the seller's place of business. These are: (1) deception by the seller in getting inside the door; (2) high pressure sales tactics; (3) misrepresentation as to the quality, price or characteristics of the product; (4) payment of high price for low quality merchandise; and (5) the nuisance created by the uninvited visit of the salesperson to the home. Although the Rule is primarily directed toward door-to-door sales, the Commission also was concerned with the possibility that salespersons would attempt to evade the Rule's application by luring consumers outside the home by subterfuge. The Commission therefore expanded the definition of a door-to-door sale to include those sales made away from the seller's place of business.²

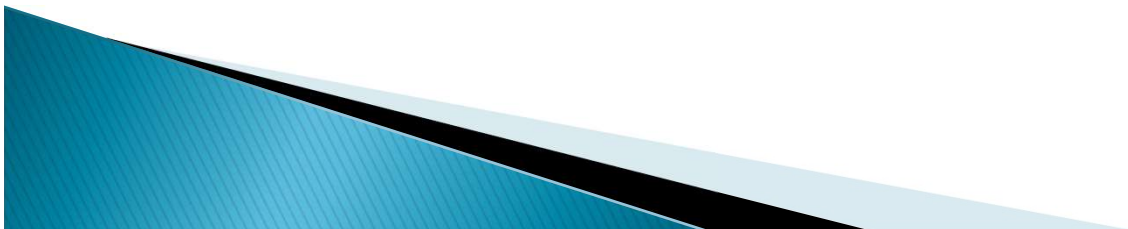
The Rule requires that consumers be given a three-day right to cancel transactions covering consumer goods and services, including courses of instruction, that cost more than \$25. The Rule requires that buyers be orally advised of their right to cancel a contract. It also requires that buyers be provided with a copy of the contract, which shows the date of the contract, the

¹The Rule became effective June 7, 1974.

²Statement of Basis and Purpose, 37 Fed. Reg. 22,927 (Oct. 26, 1972).

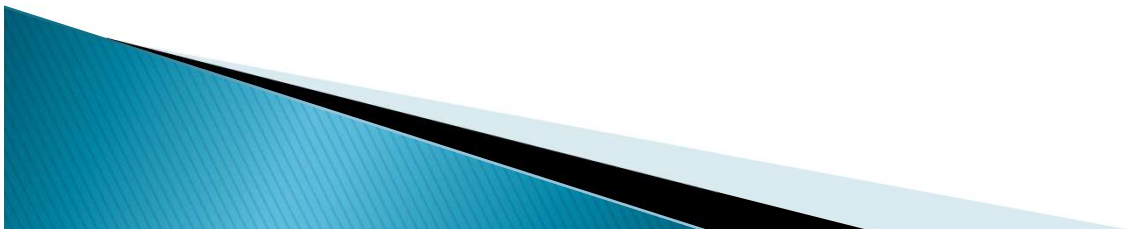
“Cooling Off” Rule

- ▶ 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)
 - include modified (if necessary) identity verification and other procedures
- ▶ Don’t forget to check your state “door-to-door” law (if applicable)




Executive Order 122

- ▶ On April 8, 2020, Governor Murphy issued Executive Order 122.
- ▶ E.O. 122 incorporated many of the CDC's and OSHA's guidance and requirements regarding operation of essential businesses and workplace safety during the COVID-19 pandemic.
- ▶ To the extent that dealership employees have any in-person interactions with customers during an on-line or remote sale, Executive Order 122 must be followed.
- ▶ This includes any interactions at the point of delivery, conducting test drives, or obtaining wet signatures on NJMVC documents (see below).



Executive Order 122

- ▶ Stagger pickup times to meet 50% occupancy requirement and maintain social distancing
 - ▶ Establish special pickup times for high-risk individuals
 - ▶ Set up physical barriers to ensure six (6) feet of distance between employees and customers during service lane or “curbside” pickups.
 - ▶ Provide ample time for employees to disinfect areas (e.g., outdoor desks for wet signatures) and wash their hands between deliveries.
 - ▶ Engage in e-contracting whenever possible
- 

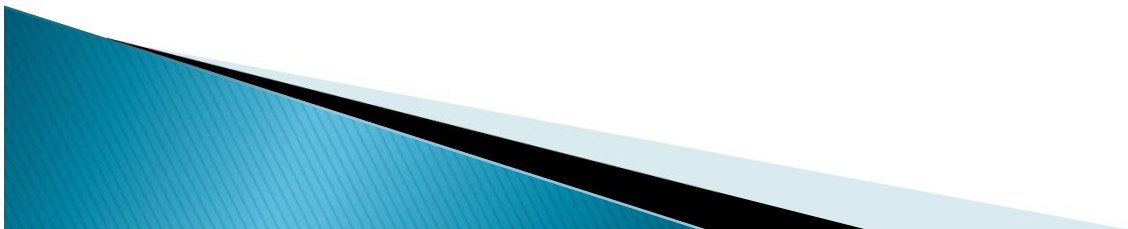
Executive Order 122

- ▶ Demarcate areas in the service lane or “curbside” pickup area where the customer can go
- ▶ Post signs that clearly instruct how all interactions should occur
- ▶ For any required wet signatures, customers should be encouraged to use their own pens.
- ▶ Sanitize the inside of the vehicle and keys before delivering them to a customer.
- ▶ To the extent permissible, require employees conducting delivery and customers to wear gloves and face masks at all times (see E.O. 122 for restrictions).
- ▶ If delivering to a customer’s home, maintain six (6) feet of social distance at all times and wear gloves and face masks.



Administrative Order 2020-10 (Test Drives)

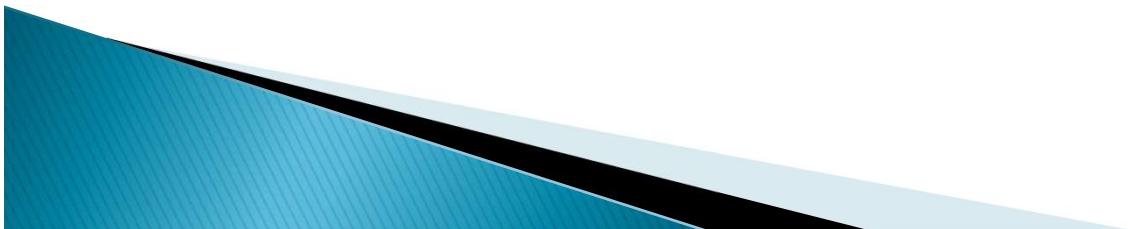
- ▶ On April 27, 2020, Governor Murphy released Administrative Order 2020-10, which provides:
 - *Car dealerships may permit customers that have ordered and/or purchased a vehicle online or by phone to test drive the vehicle at the time of pick-up or prior to delivery, provided that the dealership adopts in-person operation policies that 1) include, at a minimum, the enhanced social distancing practices detailed in paragraph 1 of Executive Order No. 122 (2020), 2) permit the individual to access the vehicle alone, and 3) provide that the dealership is to appropriately clean and sanitize the vehicle after such test drive if the customer does not purchase the vehicle.*



Administrative Order 2020-10

(Test Drives)

- ▶ Showrooms are still closed—Test drives are for online sales and remote sales only.
- ▶ Customer must test drive the vehicle alone.
 - *Issues: Is your insurance carrier OK with this? Can you effectively guard against vehicle theft?*
- ▶ Customer must have ordered/purchased the vehicle online or by phone before taking the test drive, with the test drive taking place at pick-up or before delivery.
 - *Issue: Can a salesperson bring cars to a customer's home for test drives? Probably not.*
- ▶ Clean and disinfect the car after each test drive if the customer does not purchase the vehicle
 - *Issue: Dealers probably can't make all customers wear face masks in the car during test drives; E.O. 122 prohibits dealers from requiring customers with medical conditions to wear them. How about gloves?*



Dealer Licensing Regulations

- ▶ NJMVC's dealer licensing regulations require sales activity to occur at a dealer's licensed location.
- ▶ Executive Order 107 does not require closure of back offices or BDCs
- ▶ Likewise, Administrative Order 2020-6 is unclear on where salespersons can operate.
- ▶ Remote negotiations and e-contracting should probably be conducted and administered by a salesperson working at dealer's licensed location.
 - *Issue: As mentioned above, sales agreements completed at the customer's home may create right to rescission under federal law*
- ▶ No "upselling" during remote deliveries; sale must be complete before delivery.
- ▶ Salespersons should probably not conduct remote deliveries to avoid possible claims of off-site upselling; delivery must be ministerial act.



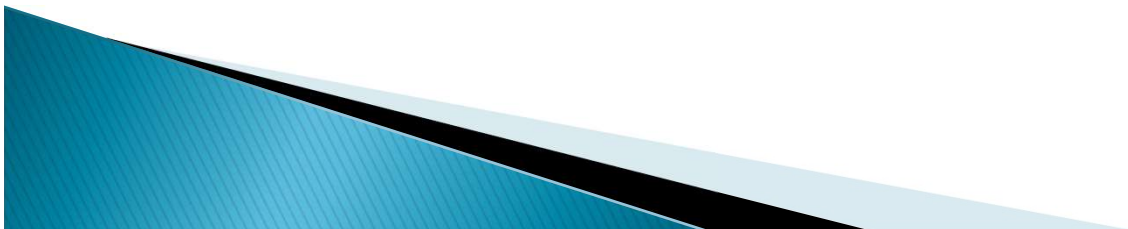
NJ Uniform Electronic Transactions Act (“NJUETA”)

- ▶ Under NJUETA, electronic records, signatures and contracts cannot be denied enforceability solely because they are electronic
- ▶ Touchstone of NJUETA is the customer’s understanding of the electronic contracting process (i.e., they must understand the process in order to assent)
- ▶ Get explicit consent from the customer to conduct an electronic transaction
 - *Issue: Confirming identity of contracting party (Red flags)*
 - *Issue: Complying with document retention laws for electronic documents and ensuring security*
 - *Issue: Will lenders accept assignment of e-signed contracts? Varies from lender to lender.*
 - *Tip: HIRE A REPUTABLE VENDOR AND HAVE YOUR ATTORNEY VET THEIR PROCESS!*



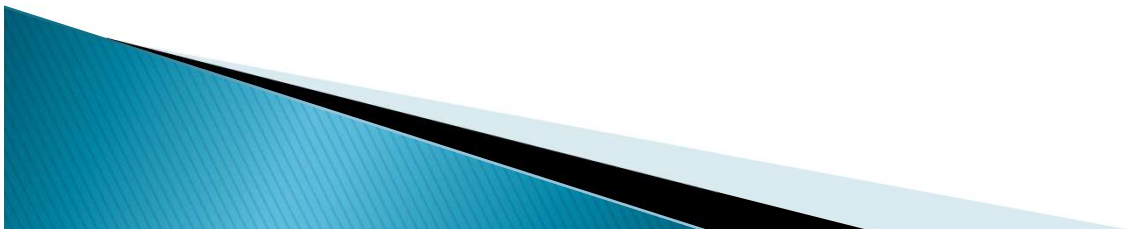
“Wet Signature” Requirements

- ▶ NJMVC still requires wet signatures on all documents submitted for purposes of titling and registration (POAs, odometer disclosure statements).
- ▶ Unclear as to how dealers can obtain these signatures in a “contactless” manner as required by Administrative Order 2020-6
- ▶ Executive Order 122 serves as a guide on how to interact safely with customers.
- ▶ Dealers should seek advice of counsel when formulating written policies for obtaining any wet signatures and train employees accordingly.



NJ Motor Vehicle Advertising

- ▶ All of the strict NJ advertising rules still apply!
- ▶ Be very careful about making guarantees regarding vehicle safety or selling products that purport to guard against COVID-19
- ▶ We recommend against referencing the pandemic in any advertised promotions or statements; very bad taste and could land you in trouble with regulators.
- ▶ *Issue: How must delivery fees be disclosed?*



Thank you and please stay safe!

▶ Panelists:

- James B. Appleton, President, NJ CAR
- Anthony M. Anastasio, Director of Legal and Regulatory Affairs, NJ CAR
- Bradley Miller, Director of Legal and Regulatory Affairs, NADA
- Michael P. McMahan, Attorney, Arent Fox LLP
- Perry A. Pittenger, Attorney, Schiller Pittenger & Galvin, P.C.

