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Reading This Article Will Make You Thinner, Stronger, and Healthier!* (Are Your Advertisements Truthful and Not Misleading?)

By Lisa Singer

* Of course, reading this article will have no physical benefits - we're just trying to make a point about deceptive advertising!

Over the years, our ad review team has reviewed thousands of dealership advertisements. By and large, most dealerships create and publish compliant ads. Every now and then, however, we are asked to review a piece with questionable representations or worse yet, flat out falsehoods. Earlier this month, the FTC issued a press release regarding such an ad, which it described as a "fake recall notice."

As explained in the press release, the FTC brought a complaint against an auto group located in the Washington, D.C. area, along with its corporate officers and a California ad agency. The complaint alleges the dealers and ad agency sent misleading recall notices to consumers, such as the one below:

According to the FTC, the notices were sent to nearly 7,000 vehicle owners, regardless of whether or not their vehicles were in fact subject to an open recall. The complaint states that the recall notices are similar to and have the same color scheme as the official recall notice that manufacturers must use, as required by the National Highway Traffic Safety Administration.

Apparently, the ad campaign worked. The complaint asserts that in response to the mailers, consumers called the dealerships and purchased repair services that were generally unrelated to the advertised recall. In fact, the complaint alleges that one defendant boasted to another, "I don't think I've ever seen [this level of] response to a non customer database in 20 years of doing car dealer direct mail (hundreds of millions of pieces)."

Misleading advertising can be effective, but it is risky business. The parties have stipulated to an Order for Entry of Permanent Injunction and Judgement. The order requires the defendants to create and retain certain records for the next twenty years. Among other items, the dealers must keep "records of all consumer complaints and refund requests, whether received directly or indirectly, such as through a third party, and any response." Although no fines were imposed as part of this settlement, you can bet the FTC will be monitoring future complaints against these dealerships, which may result in significant future fines and/or injunctions for other unrelated violations.

Advertising Tips

Here are a few things to keep in mind when you're beginning to craft a marketing or advertising campaign at your dealership. They can save you from potential headaches down the road resulting from claims by consumers, state regulators and, as noted above, the federal government.

1. If it isn't true, don't say it. Below is a list of commonly used, untrue or problematic statements, advertised by dealers:

- We have all makes and models (this is practically an infinite number of vehicles)
- Below invoice sale
- Wholesale prices
- Liquidation sale
- Prices so low, they cannot be advertised, so as not to disturb other dealers' business
- Exclusive offer
- Lenders on site
- We finance your future, not your past
- Your job is your credit
- No credit? No problem
- Everyone financed
- Easy financing

[Note – subjective claims, known as "puffery" are generally permissible. For example, a dealer could probably advertise that a particular car is "the best car." But, if the ad states that the vehicle is the "fastest car" and "gets the best mileage," both representations, which can easily be verified, should be true. (See FTC Commissioner's 1996 speech: Myths and Half Truths About Deceptive Advertising)]

2. The "net impression" must not be misleading. Sometimes, the advertised statement may be literally true, but the general impression of the ad is misleading. Often, there's a disclaimer, explaining or limiting the claim, but it's not "clear and conspicuous" as required by the FTC [*See* "Are Your Advertising Disclosures "Clear and Conspicuous?" *Transmission*, February 2018 and "Federal Trade Commission Strikes Thrice on Advertising," *Transmission*, January/February 2015]. Examples of problematic statements include:

- We'll pay off your trade no matter how much you owe
- Let's trade keys
- Guaranteed "exchange" program

3 . Avoid "rebate stacking." When multiple limited rebates (such as college graduate, legacy or military) are included in the formula used to arrive at the net cost of a vehicle, consumers may incorrectly assume they are entitled to all of the listed rebates. The FTC considers prominently advertising prices that are not generally available to consumers to be a form of deceptive advertising. [See FTC blog FTC curbs auto dealer's deceptive advertising and FTC Complaint filed against Planet Hyundai (2015)]

While we're on the subject of rebates… make sure your ads do not falsely imply that a factory rebate is from the dealership.

4. Don't imitate a form or logo used by the government. As described above, avoid fake recall notices. Also, avoid mailers designed to look like they're tax refunds or communications from the IRS.

5. Never send fake checks. California Vehicle Code § 11713.1(w) provides it is unlawful for a dealer to "Use a simulated check, as defined in subdivision (a) of Section 22433 of the Business and Professions Code, in an advertisement for the sale or lease of a vehicle."

If you work with a third-party ad agency (AKA "mail house"), confirm the ad is compliant. Ask the mail house for written confirmation, from a reputable law firm, that the ad has been approved for use by dealerships in your state. Also, inquire whether the mail house will provide an indemnity in the event the ad is challenged or found to be unlawful.

Questions?
If you have any questions or would like information about our informal ad review service, please contact us at (800) 785-2880 or questions@autoadvisory.com.

What's Hot on the Hotline? Out-of-State Transactions

By Hao Nguyen

Thanks to the internet, many of our dealer clients are experiencing a continual year-over-year increase in sales to out-of-state purchasers. Not surprisingly, our Hotline has been experiencing a corresponding increase in calls relating to these transactions. Below are some of the most common questions we've been asked that you may find applicable to your dealership, along with the answers.

Q: Should We Collect Sales Tax on out-of-state transactions?

A: If the vehicle is delivered outside of California, for use outside of California, no sales

tax is due (Revenue and Taxation Code § 6396). So, what exactly is "delivery?" Generally, delivery occurs when the customer, or the customer's agent, takes physical possession of the vehicle and the keys. (See California Department of Tax and Fee Administration, Publication 101.) If this is done out-of-state, California sales tax should not be collected. Below are a few scenarios to clarify the meaning of "delivery":

Scenario 1:
An out-of-state customer finds the vehicle through an online advertisement. She comes to California to purchase the vehicle. After completing the paperwork, she drives the vehicle from the dealership to her home state. Though the customer has indicated that she resides out-of-state and that the vehicle will be primarily operated in that other state, she has taken delivery of the vehicle in California because she took physical possession of it at the dealership. Therefore, sales tax is due on the transaction.

Scenario 2:
An out-of-state customer finds the vehicle through an online advertisement. She contacts the dealer over the phone and purchases the vehicle. After completing the paperwork, the dealer arranges to have a transportation company ship the vehicle to the customer on a flat-bed truck. The delivery is made out-of-state because she takes physical possession of the vehicle in her state. The state of California is not entitled to sales tax, provided the dealer has proper documentation to show the out-of-state delivery (described below).
What if the *customer* wishes to arrange for the common carrier to take the vehicle out-of-state? Sales tax would still not be due because delivery is made out-of-state. However, we recommend that the dealer arrange for the transportation, instead of the customer. If the customer arranges the delivery, the customer can unilaterally intercept the vehicle and re-route it to a location within California without the dealer's knowledge. If the CDTFA finds out that the vehicle is still in California, it may come after the dealer for the tax.

Scenario 3:
The out-of-state customer finds the vehicle through an online advertisement. She comes to California to purchase the vehicle. After completing the paperwork, she takes possession of her vehicle and drives it to her hotel. The following day, she arranges for a common carrier to flatbed the vehicle to her home state. Much like Scenario 1 above, the customer has taken delivery of the vehicle in California and sales tax is due on the transaction.

Q: How do we document the out-of-state delivery for the sales tax exemption?

A: What it all boils down to is this: you must have evidence to convince the CDTFA that vehicle delivery occurred outside of California. In prior articles, we have suggested that you retain a bill of lading, an employee's expense report for meals, lodging, and mileage, and even photographs of the out-of-state delivery. The CDTFA attempts to streamline this process by allowing the dealer and purchaser to complete form CDTFA-448 and, if applicable, form CDTFA-447. These forms are optional and can be used to replace or supplement other forms of evidence.

Form CDTFA-448 documents the out-of-state delivery. Both the seller (or person making the delivery on behalf of the seller) and purchaser must sign the form before a notary. If the parties cannot arrange for this document to be signed before a notary, then the dealership will need to retain other evidence of the out-of-state delivery, such as the types of documents mentioned above.

Form CDTFA-447 focuses on use tax and is recommended when the customer has an address in California. This form is essentially a written promise by the customer that the vehicle will not be taken back into California within the first 12 months from the date of delivery for any reason, other than a qualifying warranty or repair service, and that the vehicle will be primarily used out-of-state. If the vehicle is brought back into California, it will be presumed that the vehicle was purchased for use in California and use tax will be due (Revenue and Taxation Code §§ 6247 and 6248). Unlike form CDTFA-448, this form does not need to be notarized.

If either of these forms is completed, one copy of the form should be kept in the deal jacket. Another copy of the form along with a copy of the purchase contract should be sent to the CDTFA within 30 days of the date of delivery to the purchaser. The CDTFA has up to 8 years to audit these types of out-of-state transactions.

Q. Should we collect the California Tire Fee?

A: The fee of $1.75 per new tire is not due when the vehicle is sold for registration out-of-state and the vehicle is delivered outside of California. **(***See* CDTFA California Tire Fees FAQs - exemptions or exclusions for the tire fee.) Essentially, the tire fee will not be due on new vehicle sales that are exempt from California sales or use tax.

Q: If the car is driven out-of-state, is a one-trip permit required?

A: The answer depends on who drives the vehicle out-of-state. If a dealership employee drives the vehicle out-of-state to deliver the vehicle, dealer plates should be used. However, dealer plates may not be used by a *customer* to drive the vehicle out-of-state. Rather, if the customer takes delivery at the dealership and will be driving the vehicle out-of-state, a one-trip permit (REG 402) is required. Note – the use of a one-trip permit only allows the unregistered vehicle to be operated on California roads and does not affect California tax requirements. The CDTFA Audit Manual explains, "Even though a one-trip permit is secured in place of registration, this does not relieve dealers of their sale tax liability. Vehicles sold and delivered in California are subject to tax." (CDTFA Audit Manual, Chapter 6, Section 0611.25).

Additionally, a one-trip permit is valid for one continuous trip from a place within California to another place in or outside of California by the most direct route (Vehicle Code § 4003; DMV's FFVR 36, Fast Facts Vehicle Registration). The customer should be advised that the vehicle must be driven directly to the out-of-state destination shown on the one-trip permit.

Q: The customer resides in a state that does not share a boundary with California. Will the California one-trip permit be accepted in the intermediate state(s)?

A: It depends. Some states allow foreign one-trip permits to be used in their state as long as the vehicle is properly insured, such as Oregon. We recommend that either the dealer or the customer contact the local department of motor vehicles in all intermediate states the vehicle will travel through to make sure the correct paperwork is in place.

Q: Which party, the dealer or the customer, is responsible for registering the vehicle out-of-state?

A: It depends. There is no law that requires a dealer to register a vehicle in another state. If the customer will be paying cash, the dealer can allow the customer to be responsible for titling and registering the vehicle in the customer's home state. However, if the transaction is a financed purchase or lease, the dealer's agreement with the lender or leasing company likely requires the dealer to make a guarantee of title to the lender/leasing company. This means that the dealer promises it will procure title that secures lienholder status for the lender/leasing company. A dealer can apply for a California "Title Only" **(**Vehicle Industry Registration Procedures Manual, Chapter 6, Section 6.055), but beware, some states will not do a "Registration Only" to reflect California's practice. (*See* "Vehicles Sold for Registration Out of State," Transmission, April/May, 2013 .) If a dealer wants to do the registration itself, the dealer should contact the customer's home state and inquire about the necessary forms and fees for title and registration, as well as any sales or use tax that may be due. All of this needs to be considered before contracting, so that the contract can reflect these specific fees and charges accordingly. Unless the dealership has expertise in handling out-of-state registration matters, we recommend contracting with a reputable national titling and registration service to complete the out-of-state registration.

Q: How do we complete the DMV paperwork for out-of-state transactions?

A : The DMV's Vehicle Industry Registration Procedures manual sets for the required procedures. Below are links to the relevant sections.

- New vehicles to be registered out-of-state: Section 6.075
- Used vehicles to be registered out-of-state: Section 8.050
- Vehicles wholesaled to an out-of-state dealer: Section 9.000

Questions?
If you have any questions about out-of-state sales transactions, or any other issue that is affecting your dealership, Hotline clients should contact us at (800) 785-2880 or questions@autoadvisory.com.

For More Information, Contact Us:

(800) 785-2880

questions@autoadvisory.com