**_The Consumer Finance Podcast_: Avoiding Auto Finance Pitfalls Under the FTC's New CARS Rule**
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**Guests: Alan Wingfield and Brooke Conkle**
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**Chris Willis:**

Welcome to *The Consumer Finance Podcast*. I'm Chris Willis, the co-leader of Troutman Pepper's Consumer Financial Services Regulatory Practice. I'm glad you've joined us today where we're going to be talking about the FTC's new auto dealer rule, and especially its potential impact on auto finance companies.

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Now, as I said, today, we're going to be talking about the FTC's recently finalized auto dealer rule. Joining me today to talk about that, are two of my partners who do lots and lots of work in the auto finance space. Alan Wingfield and Brooke Conkle. Alan and Brooke, thank you so much for being on the podcast today.

**Brooke Conkle:**

Thanks for having us, Chris.

**Chris Willis:**

I guess, probably, before we jump into actually talking about what the rule actually requires, maybe the $64,000 question that the listeners will be most interested in, at least at the front, is to hear like what the status of the rule is. Because the FTC finalized the rule and set a relatively short implementation period. Compliance was going to be mandatory in July 2024. But then, almost immediately, the National Auto Dealers Association, and the Texas Auto Dealers Association filed a petition in the US Court of Appeals for the Fifth Circuit, challenging the rule.

The FTC shortly, thereafter, announced that the implementation and compliance date of the rule would be stayed until the court challenge to the rule had been adjudicated.

So, the Fifth Circuit has set a briefing schedule and has said that it's going to expedite its review. But we don't know exactly when the rule is going to come into play, or what the fate of the rule will be.

Now, we can of course, share with the audience the basic arguments that the dealer associations made in that petition, and I'll do that now. But then we should talk about what are the practical implications of this while we're in this holding period. So, the filings made by the dealer associations in the Fifth Circuit, challenged the rule on a couple of grounds. First, they assert that the rule is procedurally flawed because the FTC has a regulation that requires it if it's going to enact a trade regulation, which this is, to first publish an Advanced Notice of Proposed Rulemaking, rather than jumping straight to a Notice of Proposed Rulemaking, which is what the FTC did in this instance. And the dealer associations assert that the failure to follow that procedure renders the rule procedurally invalid, and therefore cannot be implemented.

On the merits, the dealer associations generally argue that there is no evidence of widespread problems among auto dealers relating to the subject matter of the regulation, and that the FTC's so-called evidence consists only of a handful of scattered enforcement actions and a small number of consumer complaints. But when weighed against the very large number of vehicle purchase transactions that occur across the country every year, it doesn't point to anything but very anecdotal, occasional problem that's not widespread in the industry at all.

So, the dealer associations assert that compliance with the rule will be expensive for and harmful to dealers, even though they're not engaged in any misconduct, and therefore, that the FTC was arbitrary and capricious in determining that the rule was required, and that the benefits of the rule outweigh the costs. That's sort of a sketch of the arguments that I think we're going to see litigated in the Fifth Circuit. As I said, the rule has been stayed by the FTC pending the outcome of that challenge.

So, Alan and Brooke, I'd really be interested, and I know the audience will be interested too, in your thoughts. We have a rule, but it's stayed at the moment. We don't know how long it will be stayed because we don't know when the Fifth Circuit will decide this case. And if or whether anybody will go to the Supreme Court on it, or if the Supreme Court would take the case. So, from a practical standpoint, what would we say are the action items? Should the industry just wait and see? Or is there some action that we think that should be taking?

**Alan Wingfield:**

Thank you, Chris, and thank you for having me on the podcast with Brooke. We've been giving some hard thought to the quandary presented by the status of the rule. And I think, I keep coming back to what would the FTC do if the rule survives in whole or in part, the legal challenge? I think we cannot discount the possibility that FTC will move quickly and aggressively to a short compliance state in that scenario.

Given that, I feel like the minimum approach to the rule would include dealers and finance companies having in place, essentially, a strong, comprehensive plan to deal with rule if it

survives the legal challenges. Think of it as right to class and grab on emergency. As we get into in a podcast, these rules have many facets, and many trickle-down implications through the documentation and compliance systems for dealers, and hence for finance companies. It may be too much of a challenge to deal with all those complexities on a short notice and emergency manner. Therefore, pre-planning and knowing what you might do seems prudent, in my view.

**Chris Willis:**

Makes a lot of sense. And I think, Brooke, you've been thinking a lot about this too. First glance, you might say, well, the rule is fairly short and simple, so, having to comply with it isn't like that big of a deal. But I think as you've started to think about it with clients, you've reached the opposite conclusion. Could you share a little bit of that with us?

**Brooke Conkle:**

Certainly. What's sort of complicated about this rule, frankly, is its brevity. But also, so many of the kind of inner workings of this rule is all sort of interconnected. So, there are prohibitions that then lead to requirements, and requirements that then lead to prohibitions. You have a lot of new tasks that dealers will be tasked with, both in the advertising process, and at the point of sale. Then finally, in the record keeping process. The rule has a requirement that certain disclosures, and certain marketing representations must be retained for 24 months. That kind of sounds simple, when you put it down in a rule. But the requirement really goes back to numerous instances of communications between consumers and the dealer. So, from that first outreach of the consumer, where a consumer reaches out to the dealer and says, hey, I'm interested in this car that you have. That first interaction is supposed to lead to a disclosure of an offering price, in writing, if the communication is in writing. And that disclosure also triggers a record keeping requirement.

So, you have this one instance, which is expected in the dealer industry that a consumer wants to purchase a car, wants to know how much that car costs, and suddenly that one interaction triggers a number of different disclosures, and then a number of different record keeping requirements associated with those disclosures. It's a very intricate rule and a lot of kind of A relying on B, and B relying on C.

**Chris Willis:**

Yes. That makes sense. And it's good for the audience to hear that because people will not realize if they haven't sat down to think about how complex the implementation might be. You might think, oh, this is something I could sort of plan and execute from start to finish in a couple of months. But I think in the real world, that's probably not the case, and it underscores Alan's point that it's important to have a very thorough, well-thought-out plan, sort of ready in case the rule does go into effect as finalized. Because the FTC gave a very short implementation period when it finalized the rule, and it might do the same thing again, if the Fifth Circuit decides the challenge in the FTC's favor. So, everybody needs to be ready for that.

With that out of the way, let's backtrack and talk about the rule and what it requires. So, Brooke, let me just turn to you again. Do you mind just giving the audience a little bit of background on

how we got to the final rule that was announced earlier this year by the Federal Trade Commission?

**Brooke Conkle:**

Yes. Chris, as you mentioned, in about July of 2022, the FTC issued a Notice of Proposed Rulemaking. In that proposed rulemaking, the FTC outlined much of what we see in the finalized rule. But it's also important to note that the Notice of Proposed Rulemaking, July 2022, that actually had requirements in it, that frankly, were more onerous than what is in the current rule. When we looked at that rule 18 months ago, in 2022, the things that we noticed really were kind of regulator Whack-A-Mole. All of the topics that had consistently been on federal regulators' agendas for years, all were here in this rule, whether it's add-on products, whether it's the war on junk fees, so many of the major initiatives from both the FTC and the CFPB were really baked into this rule.

**Chris Willis:**

Okay, thanks very much. So, it's a little bit of a wish list, an aggregation of different things. Do you mind continuing, Brooke, by just highlighting what are some of the things that are prohibitions in the final version of the rule? In other words, what are dealers not supposed to do after the rule comes into effect?

**Brooke Conkle:**

Yes. As you mentioned, a lot of new major prohibitions in this rule, and some of them are pretty self-explanatory. A lot go to advertising and some really change the industry. All of the speed disclosures that you would hear at the end of TV or radio advertisements, those are done. Things such as add-on products that have no value. Well, that sounds pretty self-explanatory. But once you sort of peel back the layers of the onion, suddenly, your dealer is going to be asked to really take a look at every single deal that comes through, and ensure that the consumer is getting value for everything that they add on to a retail installment sales contract.

So, the examples provided by the FTC, were things like you can't charge for nitrogen filled tires. You can't charge for VIN etching. All of that makes sense. But a lot of the devil is in the details, specifically with GAP waivers. And one of the examples that the FTC gave was that dealers are prohibited from selling GAP waivers, where the consumer's product may not be covered. So, if the GAP product has an exclusion, for example, a specific model of any vehicle, then you can't sell that GAP waiver to a customer who's purchasing that specific vehicle. That requires – it puts a pretty big burden on your dealer to know absolutely everything about the workings of their vendors. So, for every GAP waiver product that a dealer sells, they have to know absolutely everything about the agreement between the consumer and the GAP waiver provider. It's a big onus on the dealers.

**Chris Willis:**

Okay. In addition to the prohibitions, Brooke, that you just mentioned in the rule. I know, Alan, that there are a number of affirmative requirements under the rule. And I think those are also

going to be pretty material, both to dealers and finance companies. Would you mind talking a little bit about those to the audience?

**Alan Wingfield:**

Absolutely, Chris. I'll start by saying these new affirmative requirements of the rule probably represent the biggest regulatory change impacting automobile dealer activities and motor vehicle sales in America in decades. These are really truly fundamental, and wide-ranging, and burdensome, hence the legal challenges. There's four I want to talk about today. I'll be brief. I'll try to be.

One is the offering price. The rule requires dealers to use a standardized formula for coming up with an offering price that would be used and having any kind of conversation with consumer about the price of a vehicle. The offering price would include the full cash price, excluding only mandatory government fees and taxes, and it must include all required fees and mandatory add-ons other than those government fees and charges.

This standardized price needs to be used in the first communication with the consumer about specific vehicles, mandatory disclosure. Brooke was talking about that. It's important that the price, and must be used in advertising marketing materials. So, there's a requirement to use a standard template for coming up with an offering price and these disclosure instances.

Second big requirement is that if a monthly payment is ever quoted to consumer, that monthly payment quote is a trigger term. It triggers additional disclosures, in particular requires the dealer to disclose the total all payments to be made at a given monthly payment amount. Monthly payment conversations is a big part of automobile sales. Consumers come in wanting to know if they can afford a vehicle, and many consumers translate affordability into the monthly payments. So, a monthly payment is a fundamental data point the consumers want to know about the sales process. So, dealers now have to – whenever they talk about a monthly payment, need to give not only the monthly payment being proposed, but also the total, all payments to be made at that monthly payment amount.

The third big requirement is the area of add-on disclosures. An add-on is an additional goods or services, typically viewed as being not mandatory, that is made available to consumer, and consumer would be purchasing as part of the transaction. For example, Brooke was talking about GAP waiver products. That'd be an add-on. Service plans would be an add-on as another example. When there's conversations about add-ons that leads to an agreement, because by then, there needs to be what's called a clear conspicuous disclosure add-on, an expressive form consent by consumer to the add-on before they execute paperwork about obligating to buy those products.

There needs to be a disclosure before consumer is asked to sign a buyer's order or retail installment sales contract that identifies the charge. It gives the amount of the charge, and also gives a comparison of the monthly payment. If it's a finance deal, a difference comparison, the monthly payment with or without that on charge. The consumer can see what impact the add-on charge has on the monthly payment.

This will require, obviously, developing systems to generate these numbers. Changing paperwork in an automobile sale probably for most dealers is going to involve a new form that need to be inserted in this process. That's a new form to become fundamental to the deal, that will have impact, trickle down impacts, as we talked about a minute to sales finance companies that take paper from the automobile dealers.

Fourth, requirements are around record keeping, and it's hard to underestimate the significance and burden of the record keeping requirements. In the rule, this may turn out to be one of the single biggest new requirements in terms of expense, and burden on dealers. All documents required to show compliance with the rule are need to be required to be retained for 24 months. There's an open-ended requirement. Then, they call out specific things that need to be kept under that. One would be written communications with consumers about a car sale.

So, if a salesperson is texting the consumer or emailing the consumer by a specific vehicle, or maybe chatting with them through a website, then all that experience needs to be retained in the document retention. So, dealers have to figure out how to do that. There's also a requirement to keep all complaints, need to keep all advertising, and marketing materials. And of course, there's a requirement to keep the deal documents. The written disclosures and consent to the add-on charges and the deal documents such as a buyer's order, and retail on the sales contract, memorialize the purchase of vehicle at a price, as well as any add-ons that are being sold. Those are the four the key affirmative requirements this rule would apply that are, in fact, largely new.

**Chris Willis:**

Thanks, Alan. I think some of your comments about those requirements foreshadow the next thing that I was going to ask you to talk about, which is, obviously the rule is aimed at dealers. But we think there's going to be significant potential impacts on auto finance companies as well. I wonder if you just take a couple of minutes to outline what some of those possibilities may be, once the rule becomes final, if in fact does.

**Alan Wingfield:**

I'd break it into three buckets. One would be regulatory risk, second one would be private litigation risk, and third would be compliance burdens. Probably, the one that grabs people's attention here is the risk of regulatory enforcement against the finance company for the sins of the automobile dealers. We've seen how regulators have held finance companies responsible for things that have occurred at the dealership. Put it simply, regulators seem to be taking a position, Chris, I expect you have a lot to say about this, that if a specific element of a transaction, like a specific charge, that is imposed as part of the sales process, finds his way into the finance document, then it becomes illegal and unfair practice, for the finance company to try to collect that sum through the enforcement of the retail installment sales contract. So, regulators seem to take a position that there's a lot connecting the chain of logic, one would expect that the regulators will take the position that if the dealer does not comply with the rule, does not sell an add-on product, for example, a way that complies with the rule, that the regulators will take the position to finance company, they can't collect those items when they enforce a retail sum on the sales contract. And if they do collect it, then that's an unfair practice and subject to enforcement action.

**Chris Willis:**

Well, not only that, Alan, but they would not be able to collect interest on that portion of the principal amount of the retail installment contract too. So, we saw an example of this with the CFPB in the summer of 2023, where the CFPB asserted creatively, I might add, that if a dealer makes some misrepresentation to the finance company about the options on a vehicle, that that necessarily also means that the dealer made a misrepresentation about the options on the vehicle to the customer who bought the vehicle, and who saw it with their own eyes. So, that portion of the amount financed in the retail installment contract was in the words of the CFPB fraudulently inflated, and it was a huge violation for the finance company to collect that amount, or any interest on that amount.

So, the exact sort of chain of argument that you just made with respect to a potential optional product sale, like a GAP waiver, for example, that's alleged to be in violation of the FTC rule. The CFPB has already done it in another context, just last year. So, I think that also comes against the backdrop of a very evident desire by the CFPB, to have auto finance companies, police the conduct of dealers, and monitor the conduct of dealers. With the record retention requirements in the FTC rule, it provides a perfect opportunity, I think, for CFPB supervisory examiners, to say to the auto finance company, “Where is your evidence that you're ensuring dealer compliance with this rule, in connection with the deals you're buying?” Because how can you be sure that the deal is enforceable and proper, unless you collect all this documentation and monitor the dealers. I think that's likely what's going to happen from the finance company standpoint.

**Alan Wingfield:**

Since you’ve opened the Pandora's box of compliance, Chris, let's go and drill down on that a moment before we turn to the private litigation risk. One thing that the finance companies need to think about is the deal documents will be changing. The documents that they're used to receiving from dealers, and indirect auto finance operations will be changing. There'll be a new form likely for many dealers that will deal with add-ons. So, what do you do in your compliance systems with these new forms to review them, vouch for their facial regularity, et cetera. That's something that's coming, whether you like it or not.

Then the other part of compliance is what new affirmative functionalities do you put into your dealer monitoring compliance systems, though, given the possibility, Chris, as you stated that the regulators basically may have an expectation that if finance companies are going to be deputized, going to be deputized by the regulators enforce this thing. What do you do about that? Do you engage in heightened scrutiny with the paperwork as it comes in? Do you sensitize your complaint management system, to pick up traces of problems at a dealership with greater alacrity? Do you do some training and or on-site visitation with dealers? I mean, the option list goes on and on and the industry's got to find some happy medium place on all that, I believe.

**Chris Willis:**

Yes, that all makes sense to me too, Alan. But you mentioned something else, which I think bears discussion, which is private litigation. Now, there's no private right of action under the Federal Trade Commission Act. But I don't think that creative plaintiff's lawyers are going to feel

stymied by that. Brooke, do you mind talking to the audience about what some of the private litigation risks might be for auto finance companies, after the rule comes into effect, again, assuming that it does?

**Brooke Conkle:**

Absolutely. And just as you mentioned, there is no private right of action in the FTC actor in the CARS Rule. However, this is still a UDAAP violation. If the car's rule goes into effect, and if a dealer is alleged to have violated it, then that is essentially a UDAAP violation under state consumer protection laws, and the sort of attractive portion of state consumer protection laws for plaintiff's lawyers is the ability to recover fees. What makes it even more complex and unpredictable for auto finance companies is the new state of affairs with the Holder Rule.

Because for years, for years and years, the Holder Rule had long been found to not incorporate attorney's fees. So, the plain language of the Holder Rule, the amount that a plaintiff could recover under the Holder Rule against the auto finance company will be limited to the amounts paid here under. The amount paid under the contract is the limit of the auto finance company's exposure. Well, the FTC really flipped that on its head about a year and a half ago, and came out with a regulatory guidance that said, well, actually, we had never said that plaintiffs couldn't recover attorney's fees. If a state should have a consumer protection statute, and if that statute should provide for attorney's fees, there's nothing in the Holder Rule that would prevent plaintiffs from recovering attorney's fees from auto finance companies.

That was a complete 180 from sort of bedrock knowledge and jurisprudence about the Holder Rule. With that uncertainty, the auto finance companies see the CARS Rule, there's no private right of action, but there still is this potential of state UDAAP causes of action, and with that, attorney's fees. Suddenly, we have burdensome new requirements and prohibitions at the dealer level that really can be enforced against the auto finance company with that risk multiplier of attorney's fees.

**Chris Willis:**

Brooke, those are great points. So, I think it really is a good idea, I think, both from the standpoint of regulatory risk and private litigation exposure, to do some of the preventative measures that Alan was talking about a few minutes ago if you're an auto finance company, and if this rule comes into play. So, I think both of you have shared some really important insights with our audience today. Thank both of you for being on the podcast today. Of course, thanks to our audience for tuning in as well.

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