

Articles + Publications | June 24, 2022

FTC Proposed Ground-Breaking Federal Regulation of Motor Vehicle Dealer Sales Practices

WRITTEN BY

Alan D. Wingfield | Brooke K. Conkle | Christopher J. Capurso | Sarah Siu

The Federal Trade Commission (FTC) has proposed a new and historic federal regulation specific to car dealers to address concerns of consumer deception in the sales process. On June 24, the FTC released a proposed [Motor Vehicle Trade Regulation Rule](#) (Rule), which would:

- Require price advertising to be based on a standard formula for presenting the “Offering Price” for a vehicle;
- Require new paperwork in the sales process to confirm that any optional “add-on” products included in a sale are voluntarily purchased with the “Express, Informed Consent” of the consumer; and
- Prohibit a laundry list of specific kinds of misrepresentations in the sales process.

The proposal was approved on a 4-1 vote by the commissioners, garnering support of three Democratic appointees and one Republican appointee, which bodes well for final adoption of the Rule. The FTC is acting on authority granted under the Dodd-Frank Act to regulate motor vehicle dealers; under Dodd-Frank, dealers are expressly exempted from the supervisory and regulatory jurisdiction of the Consumer Financial Protection Bureau. The FTC is seeking comments on the proposed rule within 60 days of the official publication of the Rule in the *Federal Register*.

The stated rationale for the Rule is largely focused on two concerns: that consumers never learn during the sales process the true cost of a motor vehicle purchase, and that consumers unwittingly purchase and pay for optional add-on products (such as extended warranties or GAP products) without understanding that the products are not a required part of the purchase, learning the cost of the products, or even understanding that they are purchasing the products at all.

The Rule is likely intended to federalize regulation of many specific aspects of car dealer trade practices, addressing issues currently regulated, often in exacting detail, by state law. In doing so, the FTC raises a host of costs and compliance quandaries, the foremost of which would be the additional paperwork layered into the sales process as required by the Rule. Paradoxically, the FTC bemoans the complexity of paperwork necessary to complete a motor vehicle sale as causing a lack of understanding and confusion in consumers, yet it *proposes more paperwork as the solution*.

Here's a summary of the main topics of the Rule:

1. **A national standard for price advertising.** Under the Rule, dealers would be required to provide a “true offering price” for a vehicle, including the “full price” a consumer would pay, exclusive of taxes and government fees and any optional add-on fees.
2. **Trigger disclosure for monthly payments.** The Rule requires any disclosure of a monthly payment be accompanied by the total of monthly payments.
3. **Paperwork required for sale of optional products.** The Rule requires the “Express, Informed Consent” of consumers, including a clear and conspicuous written disclosure of the amount and purpose of each charge, including any cost of financing. The FTC noted that a signed or initialed document, by itself, does not constitute “Express, Informed Consent,” and that such consent cannot be obtained by use of “prechecked boxes” or a memorandum with presentation of an agreement manipulating, subverting, or impairing consumers’ “autonomy, decision-making, or choice.” In addition, the Rule requires a second form with a separate itemization of any optional add-on products included in the purchase, including separate itemization of costs for each item.
4. **Prohibition of “no benefit” add-on products.** The Rule would prohibit dealers from charging for “fraudulent add-on products” not beneficial to the consumer. The example provided by the FTC is “nitrogen filled” tires that “contain no more nitrogen than normal air.”
5. **Sales practice prohibitions.** The Rule would also prohibit 16 types of misrepresentations on specific topics. The FTC identifies practices, such as bait-and-switch practices, deception related to the cost of a vehicle or the terms of financing, the cost of any add-on product or service, whether financing terms are for a lease, the availability of any discounts or rebates, the availability of vehicles advertised, and whether a financing deal has been finalized, among others.
6. **New record keeping requirements.** The Rule requires dealers to retain, for at least 24 months, all advertisements, sales scripts, training materials, and marketing materials regarding price, financing, or leasing terms; lists of different add-on products offered; all consumer transactions, including purchase orders, financing, and leasing agreements with related correspondence; records that would show compliance with monthly payment disclosure and add-on sales requirements; all written consumer complaints and inquiries regarding vehicles and/or add-on products; and any other records required to demonstrate compliance with the Rule.

The Rule raises a host of questions, including:

1. **Overlap and confusion with other mandatory disclosures.** The Rule would require presentation of cost information in advertising and in the negotiation phase of the transaction that overlaps with, and in some ways is inconsistent with, how cost information is presented in the final paperwork under the Truth in Lending Act (TILA), creating potential confusion. Moreover, state laws typically specify, in detail, how the cost of a motor vehicle purchase is disclosed on a buyer’s order and in the retail installment contract. This creates a scenario where the new disclosures required by the regime would present different figures, labelled differently, from the disclosures required by TILA and state law, which can only create confusion.

2. **Impact of more paperwork on consumers.** The Rule notes that selling a motor vehicle already requires voluminous and complex paperwork, but it does not address how adding even more paper to the pile will actually increase consumer understanding.
3. **Substantial compliance burdens.** The Rule estimates the compliance burden on dealers to be minimal, without recognizing that many motor vehicles in the United States are sold by dealers using automated systems driving form creation, requiring a massive amount of computer reprogramming. The Rule verges on the absurd in calculating that a dealer would incur only 15 (yes, 15) hours of time to comply. Experience shows that the actual effort to operationalize a whole new form in an existing sales process is orders of magnitude larger than the FTC acknowledges.
4. **Failure to consider remote sales scenarios and future developments in the industry.** As [noted](#) by the dissenting commissioner, the Rule appears written for an age when advertisements appeared in newspapers and consumers shopped at the physical dealership. The motor vehicle dealership industry has undergone, and continues to undergo, a massive shift in advertising through digital platforms and remote sales models. The future undoubtedly holds more and more change. Yet, the Rule does not address how the requirements and prohibitions could be operationalized in the current complex digital environment, much less how the Rule might be adapted to future developments in technology and business practices.
5. **Effect on state laws.** State laws already regulate heavily in the space covered by the Rule. How are state laws and the new Rule going to co-exist in the same space?
6. **Impact on finance companies.** Where dealers have added obligations related to pre-sale disclosures, those burdens could be indirectly passed along to auto finance companies, courtesy of the FTC's Holder Rule. Recent [FTC guidance](#) has suggested that the Holder Rule's traditional limitations, including limitation of a consumer's recovery from a holder to the amounts paid under a retail installment sales contract, do not create any bar to a plaintiff's ability to recover attorneys' fees from a defendant. New dealer compliance challenges will likely create new auto finance challenges as well.

In her dissenting statement, Commissioner Christine S. Wilson encouraged stakeholders to submit comments to address “whether it is possible to future-proof the Rule” to avoid it becoming a roadblock to beneficial innovation, whether there are different ways that the concerns animating the Rule could be addressed, and whether the Rule would generate “negative consequences” not anticipated by the FTC. Doubtless many stakeholders will accept the invitation, and the story of the Rule is yet to be fully told. We will be closely watching and reporting.