

Podcast: *Moving the Metal: The Auto Finance Podcast*

Episode: Bait, Switch, and the Fine Print in Between: The FTC Releases Its Long-Awaited Price Advertising FAQs

Hosts: Brooke Conkle and Chris Capurso

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Brooke Conkle (00:10):

Welcome to [Moving the Metal](#), the premier legally focused podcast for the auto finance industry. I'm Brooke Conkle, a partner in Troutman Pepper Locke's Consumer Financial Services Practice Group.

Chris Capurso (00:20):

And I'm Chris Capurso, of counsel in Troutman Pepper's Consumer Financial Services Practice Group.

Brooke Conkle (00:24):

Today we'll be discussing the recent FAQs published by the FTC about price transparency. But before we jump in, let me remind you to please visit and subscribe to our blogs. We have two great ones that may be of interest to you, [troutmanfinancialservices.com](#) and [consumerfinancialserviceslawmonitor.com](#). And also we have a bevy of other podcasts that you might find interesting. [The Consumer Finance Podcast](#), which as you might guess, is all things consumer finance related. [The Crypto Exchange](#), devoted to trends, challenges, and legal issues in Bitcoin, blockchain, fintech, and regtech. [FCRA Focus](#), a podcast dedicated to all things credit reporting. And finally, [Payments Pros](#), a great podcast focused exclusively on the payments industry. All of these insightful shows are available on your favorite podcast platform, so check them out. And speaking of those platforms, if you like what you hear, please leave us a review and let us know how we're doing. We'd love to hear from you. Alternatively, please feel free to reach out to us directly. Our contact information can easily be found on the firm's website, [troutman.com](#). If you enjoy reading our blogs or listening to our podcasts, please also check out our financial services mobile app. To download, simply go to your [iOS](#) or [Android](#) app store and search for Troutman Pepper Locke. Not only does our app have all of our blog content and podcast episodes in one handy place, it also has a listing of all of the firm's financially focused attorneys. So check it out and see what you think. For today, as I mentioned, we'll be discussing the recent FAQs published by the FTC. And Chris, I don't think we could have a podcast episode without some reference to the notorious 97. And here we are close to the end of the year, and that's where we're back.

Chris Capurso (02:11):

Yeah, they really like to kick off the seasons with some reference to price advertising because we got the notorious 97 letters in March, and now this was released

September 15th, just in time for the PSLs out there to the fall season, get into the spirit. And nothing gets you into the spirit quite like FTC guidance. So here we are.

Brooke Conkle (02:31):

That's exactly right. We've got 14 pricing transparency FAQs. Let's go through them question by question. Chris, start us off with the first one.

Chris Capurso (02:39):

Sure. Right from the top. Number one, why is the FTC focused on price transparency? So, I mean, that's a good starting point. And it really reiterates, honestly, what they said in the letter, that the FTC, a priority has been price advertising. And generally across industries, they've put their money where their mouth is because they have really been looking at price transparency in every industry. Auto is not an outlier by any stretch. It just happens to be... It's one of the biggest purchases we all make, right? So it's one of the areas that they're keying in on. But it's the same types of things that they're seeing complaints about advertising, that they are concerned that consumers see one price and will have to pay another. And as they put it, that's where the entire shopping experience breaks down. Some pretty heavy words there on that. And basically just all the types of things that they've been saying. Consumers can't make informed decisions if they don't know what they're actually getting into. So it kind of sets the stage for what we're going to see in the other 13 FAQs. But generally, this just kind of reiterates the position that this is something the FTC gets complaints about. It's something that they're very consistent with across industries, and it's something that they're really trying to ensure that price advertising is transparent.

Brooke Conkle (03:57):

Which leads us to question two. What needs to be included in the advertised price and what can be left out? And Chris, this probably is the most straightforward answer in the FAQs. And the FTC's response is that the advertised price must reflect everything a consumer is required to pay to drive away with the vehicle. And the only carve-out from that price is charges the government requires the consumer to pay, taxes, title, and licensing. So any mandatory dealer fee, even if it's in a long-standing industry practice, that has to be in this headline number now. And that, of course, Chris, as we've discussed, that includes standard doc fees unless state law allows them to be treated differently. So again, here is our bright-line rule, everything's got to be in there except taxes, title, and licensing.

Chris Capurso (04:51):

It's funny, that's straightforward in terms of text, and that's the big one that everybody's eyeballing. That's just the nature of law, right? One sentence that seems very clear just creates all the confusion and why we are here, right?

Brooke Conkle (05:04):

Once we get into the weeds, it gets a little less bright-line.

Chris Capurso (05:06):

That's right. And this is another one. Question three is another one of those instances where pretty straightforward response, but it breeds the questions, right? So question three is, in what advertisements do dealers have to be transparent and truthful about pricing? And the FTC specifically notes certain forms of media that would be covered by this. We've got third-party websites, so third-party advertisers, for example, social media, print advertisements, roadside signs, or even phone calls and text messages with a dealer's staff, which are all things when we've been asked about this, those are the things we've cautioned, right? It's like advertisement is a broad term and it's not specifically defined in the ways that you might think, and any kind of statement generally trying to sell a vehicle could be an advertisement. And that's the position the FTC is taking. I feel like anytime we discuss advertising and the means of advertising and things like that, it feels clear somewhat in the moment. But 20 years ago... Well, oh my God, Facebook's been around for 20 years. 25 years ago, we'll say 25 years ago, when social media did not exist, would we have thought of a platform like that being an advertising platform? Maybe even 20 years ago, we wouldn't have thought of Facebook like that. But in the moment, what we see as far as mediums and things like that seems somewhat clear. But technology changes, society changes, the different ways that advertisements could get out there.

So as time goes forward, I think the FTC is making it very clear that basically any kind of medium where you're making some kind of representation in effect to try to sell a vehicle is going to be covered by this. But it's always that question, is the medium covered? Is what I'm saying covered? It's just, again, straightforward answer seemingly that can really breed a lot of questions. And since we just talked about mediums, I might as well just go ahead and talk about question four, which is, for internet ads with a price, must all webpages list the actual price? The FTC is very short and succinct here, so I'll just read their response, "On webpages that state any amount a consumer may pay, the actual price must be listed as the most prominent amount. Such webpages include inventory search pages and individual vehicle listing pages." So the FTC in two sentences is saying a lot. And it's basically, okay, if the webpage actually says an amount that a consumer must pay, the actual price has to be there and it has to be the most prominent, full stop. If there is no kind of advertisement of a price or anything like that, this would not be triggered. But if there is a price, then it is triggered. It's kind of similar, honestly, for those out there in financing world, like Reg Z trigger disclosures and things like that, where you have one item, then other items need to be included. In this case, if you've got a price on the page of anything that the consumer must pay, then the actual price has to be there and it has to be the most prominent.

Brooke Conkle (08:00):

So Chris, that leads us to question five, can the MSRP or discounts and rebates be included in ads? And the FTC's response here is yes, but it really is a total look and feel sort of response. The answer is yes, as long as the actual price is still the most prominently displayed amount and consumers know what price they would need to pay

to buy the car. And the FTC notes in this response here that whether any given ad is deceptive is a fact-specific inquiry, and at the end of the day, the overall ad can't be misleading. The example that the FTC gives is advertising a car at approximately \$35,000 and offering a \$1,000 discount for the first responders in an online ad, as long as that price is one that any consumer could walk in and pay and that price is the most prominent and the terms of the discount are clear. So again, we're still talking about how that price is advertised and everything that's got to be in that total price, which leads us to question six, how should document fees be disclosed? And the FTC again says here the advertised price must include any mandatory fee, including the full document fee if the dealer requires any consumer to pay it. The example that the agency gives is an \$85 document fee. Then that \$85 document fee has to be included in the total price. The example is a \$40,000 vehicle. The advertised price must be \$40,085, and there must be no additional charges aside from government-required charges. So, Chris, one of the underpinnings that the FTC relies on here, of course, is the FTC Act, saying that the advertised price must reflect the full document fee that any consumer would be required to pay.

Chris Capurso (10:03):

Yeah, that's really underpinning almost all these, and it makes sense that this is the backdrop for all of these responses. Number seven is an interesting one, and I know this is one that came up on the NADA webinar quite a bit, and it's one that, honestly, I don't know if the response really answers the question. The question is, there are also state laws on doc fees. How should dealers comply with those laws and disclose the actual price accurately? And the FTC, both in the webinar and here, acknowledged that there are state laws like that and also acknowledged that the FTC and some of these states are just relying on general rules around unfair deceptive acts or practices. But then it goes on to say what the FTC expects is, "straightforward," and that being that the actual price, i.e., the price that any consumer could walk in and pay, is the most prominent amount in an advertisement.

So, in other words, the dealer has to make that actual price the clearest and most prominent amount. And once that's satisfied, the FTC says dealers are free to provide the additional disclosures that state law mandates and that state-specific document fee rules do not change the fundamental FTC Act requirement that the advertised price must reflect every dealer-required charge outside of the ones you noted earlier. I don't think that's the answer people want because the question was, what happens if a state requires that the doc fee be separately disclosed and not included? Or what happens if there's a situation where the total price disclosure under the FTC rule is technically a violation of the state law disclosure because things aren't included the right way? I mean, the response says then you can do your state disclosures, but then are you going to have a different price? I mean, that's confusing, and that really feels like a deceptive practice if you're going to have multiple prices going.

And I know some states are actively trying to change their rules. We covered one of them, I believe it was Louisiana, where they just specifically changed or at least proposed to change their motor vehicle regulations to align with this because they had in there to keep them separated. So it's, I don't think this is the exact response, and to me, honestly, it feels a little bit like a punt because, sure, if there's a required disclosure for doc fees that's just not numbers-based and it says, "This is a documentary fee. This covers blah, blah, blah, blah, blah," sure, yeah, you can put that in there. That has nothing to do with the price advertised. But if it's a price-related disclosure, I mean, there still could be some confusion in some of these states where it might not totally align with the FTC. So, I mean, the FTC is clear it thinks it is the standard and that you need to do the actual price in the most prominent way, but I think there could still be some confusion here on the FAQs. And to be honest, it's something that the FTC can't fix, right? It's the states. It's state law. And this FTC respects federalism, as they've said many times in a lot of these actions. So it's just one of those things where I don't think there is a perfect answer, and I think it's clear to me that the FTC also sees it that way.

Brooke Conkle (12:57):

So, Chris, question eight moves on to leasing and lease transactions. How should a processing fee be disclosed in a leasing advertisement? So the FTC's response is that processing fees due upfront in a lease must be included in any advertisement referencing the total amount due at signing. And this is an obligation that sits alongside and not in place of the Consumer Leasing Act and Reg M, the Truth in Lending Act and Reg Z requirements. So, this is kind of a compliance stacking issue. Any ad can technically satisfy Reg M's disclosure formatting but still run afoul of the FTC Act and the prominence and accuracy standard. So leasing ad reviews need to have both regulations in mind, both Reg M and the FTC Act sort of riding shotgun with it, sitting alongside.

Chris Capurso (13:53):

So question nine, we had kind of that detour to leasing and now we're coming back to the actual price disclosures again. And number nine is, how should dealers account for price negotiations and optional items when advertising prices? Again, this is another one of those, you're going to see this with almost all of these, these all came up for those who were able to attend the NADA webinar, the second one, let me be clear, the second one, and discussing all these different types of things. And this came up and the FTC is very clear, dealers and consumers can negotiate and consumers can certainly pay less than the price advertised.

My mind immediately went to Homer Simpson as the key negotiator for the union where he says, "I'm great at negotiating," and then Bart gives him a doorstop for a Danish. You're probably not going to get scenarios where the consumer is going to negotiate to pay more, hopefully, but they can certainly negotiate to pay less. And the FTC has no problems with that, and that really aligns with everything we've seen. Advertised price needs to be what they would come in and pay absent the government fees, they could

certainly pay less than that. And it's the same kind of deal with add-on products too. If somebody decides at the dealership they want something extra that's not included in the base trim or it just wasn't contemplated as being part of the sale in the beginning, that's fine. Consumer has the right to choose what they want for sure, what they want to pay for. Obviously, with that comes its own disclosure requirements, which we've talked about several times. But after they are in the dealership and they want to pay more than what was advertised for other products or whatnot, or if they want to negotiate for less, all of that is after-the-fact price changes. And the FTC says that's fine. If the consumer decides they want to do that, that's fine. But it's still the same principle where you can't essentially have hidden fees that are not included in the advertisement that the consumer would pay regardless of what happens in the dealership. Using the doc fee as an example, if the doc fee was not included in the advertised price, that is something they were going to pay regardless. That's not a negotiation thing, that's not an extra product that they're choosing. So that needs to be in the advertised price. The same principle permeates, right? Advertised price is what gets them in there. After that, if they choose different things or negotiate or whatnot, that's fine. But the advertised price upfront needs to be what it was going to be.

Brooke Conkle (16:06):

Chris, in questions 10 and 11, we shift away from price transparency and really are geared more towards bait and switch and the availability of particular vehicles. Question 10, can dealers advertise a car that is in transit in the dealer's inventory but at an off-site location or recently sold? So essentially, can you advertise a vehicle that may or may not be available? And the FTC says that this is not inherently deceptive, but an advertisement has to clearly disclose that status, that the vehicle is not physically on the lot, it's in transit, or it's located elsewhere. Advertising a vehicle that's no longer available to draw consumers into the dealership, that's a prohibited bait and switch tactic. And this is one of the fact patterns that we talk about, Chris. A consumer drives to a dealer's lot expecting to find a specific advertised vehicle and it's not there, and then they suddenly are buying a vehicle that is more expensive. Inventory feed accuracy and that real-time lot status, it's difficult to maneuver, but the FTC is saying here you can't engage in those standard sort of bait and switch tactics.

Which leads us to question 11, can dealers use a representative photo of a particular vehicle in an ad? And the FTC's answer here is consistent with the industry knowledge for years. We can use a representative photo if it is truly representative of the vehicle being sold. And when a consumer sees that picture, they would understand that this is illustrative rather than the exact car. And the FTC acknowledges here that this is probably going to be more common for new vehicles where the units are, for the most part, they're the same and consumers expect stock photos to stand in for the actual car. When it's a used car or an antique, that's where it gets a little bit more particularized. Consumers expect the photo to show the exact vehicle that's being offered for sale. And that distinction between new versus used is where the FTC is drawing a line. When it's new and you are kind of waiting for those vehicles, then consumers understand that

what they are seeing is probably the model vehicle and not necessarily the particular one that's on the lot. When it's a used car, consumers want to know this is the actual vehicle that is being offered for sale.

Chris Capurso (18:35):

And I think those two, 10 and 11, are actually really helpful just for industry in general. I mean, they're not necessarily right along the price advertisement, I mean, it's advertising, but it's not the notorious 97 price advertising. It's different.

Brooke Conkle (18:47):

That's right.

Chris Capurso (18:47):

Especially 11. I think that's very helpful guidance that that's the way they view it, because that does run more into traditional kind of UDAP advertisement analysis. And they're basically... They're not saying it's a true bright line, but they are giving examples and saying with new cars that I, as the reasonable consumer, might expect it to be a stock photo. But if I'm buying a car from 2015 and I see a pristine vehicle against a white background, that's probably not the car, is my guess. So that's actually very helpful guidance that kind of strays just a smidge from what you have expected the FAQs to have said. So I think that's helpful. We kind of jump back into the price advertising with number 12, and I think this is a question that has been on everybody's mind and the answer will not be satisfying, who is responsible for accurately disclosing price in ads? Dealers, third-party advertisers, or OEMs? If this was a multiple choice: A, dealers; B, third-party advertisers; C, OEMs; D, all of the above. Friends, we're choosing D. That's what the FTC has chosen. In brief, according to the FTC, everyone who has control over the advertising is responsible for making sure the ads state the actual price as the most prominent amount.

So there's a word doing a lot of lifting in that sentence, and it's "responsible." Who is responsible for the ad? And that's going to come down to, for example, dealers probably have the least pushback on that because it is their car, they're the ones selling it. Third-party advertisers, what do the contracts say? How much did you put into it? Are you merely just the billboard for the dealers to advertise as they will? OEMs, do you let go of the price advertising as soon as the dealer gets the vehicle? How much input do you have into how the price is advertised? Things like that. "Responsible" is a big part of that. And the FTC provides some tips, as they call them. Dealers should make sure the pricing information they're advertising is accurate, of course. I mean, that's what have we been talking about. And when working with third parties, dealers should provide the actual price and take all steps within their control to ensure that the third party discloses it as the most prominent amount. So the FTC there is saying, "Dealers, it should be incumbent on you to make sure that the actual price is given to anybody you send out your ads to." Like, you are the source. It's kind of the old data adage, garbage in, garbage out. If the advertiser gets the wrong thing, they're going to advertise the wrong

thing because that's what they were given. So the FTC is making clear, like, this is initially going to be on the dealers. That's kind of the way they're saying it. It's their vehicles; they're the ones trying to sell it.

They specifically say third-party advertisers should be essentially responsible for making sure the accurate price is the one that appears and make sure that it appears as the most prominent when the amount is stated. So that's more towards the format. In this scenario, the dealer provides the information, then it's on the advertiser to kind of follow these format requirements is essentially what the FTC is saying. Then OEMs are supposed to make sure that none of their policies or practices conflict with the FTC's requirements and to keep in mind that everyone who has control over the advertising is responsible. So essentially, OEMs, don't contradict what we've said and keep in mind that if you do, everyone can be responsible. So that is helpful guidance, even though it's not the answer anybody would've wanted and it is still a gray area. I read it to say there are different levels to this. It's not if a dealer just went out and shared the wrong price, then the OEM would be automatically hit with it. They are establishing different levels of potential culpability here with a violation. So I think in that sense it's helpful, even though it's basically saying everybody has to be aware of this.

Brooke Conkle (22:23):

And Chris, in questions 13 and 14, we shift into the penalty portion of the FAQs. Number 13, how long do dealers have to come into compliance? And this really isn't a question, is it, Chris?

Chris Capurso (22:36):

It's rhetorical.

Brooke Conkle (22:37):

The answer here is today. Price transparency is not new. The FTC Act and Section 5 have been in effect for decades, and if anyone is misleading consumers about price, according to the FTC, they're risking an enforcement action. Then in question 14, we get to the finger-pointing portion of the question, if some dealers aren't advertising prices accurately, those who follow the law can't compete, how can the FTC help? And Chris, we heard this in the NADA webinar. The FTC points to its complaint structure and encourages consumers and also competitors to report potential violations. And this was one of the highlights, I think, of the NADA webinar that we were not necessarily prepared for, I'll say, this idea that if you want a level playing field, then it is also up to those in the industry to point out bad actors.

Chris Capurso (23:35):

What a way to end with that question 14. But I think these FAQs are very helpful. I do, especially when all we had to go on was letters that were sent articulating a position. This does help, and with the webinar on this, it helps. We'll see if we get any more guidance or clarification in the future, but for right now, this is what we have and it's

more helpful than what we had before. So with that, we'll wrap it up for today's podcast. Thank you to our audience for tuning in. Don't forget to check out our blogs where you can subscribe to the entire blog or just the specific content you find most helpful. That's the consumerfinancialserviceslawmonitor.com and the troutmanfinancialservices.com blogs. And while you're at it, why don't you head on over to troutman.com and sign up for our consumer financial services mailing list so you can stay abreast of current issues with our insightful alerts and advisories and receive invitations to our Industry Insider webinars. And of course, please mark your calendars for this podcast, *Moving the Metal*, which we will be releasing every two weeks in 2026. That'll be generally on the second and fourth Tuesdays of each month. And as always, if you have any questions or if we can help in any way, please reach out to us. Until next time.

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