FTC Final Vehicle Shopping Rule
Preliminary FAQs

INTRODUCTION

On December 12, 2023, the Federal Trade Commission announced a final Vehicle Shopping Rule that it derisively calls the "Combating Auto Retail Scams Trade Regulation Rule" or the "CARS Rule."[1]

NADA submitted extensive comments to the FTC on this Rule and has been engaged in advocacy on multiple levels and in many venues regarding this Rule. NADA continues to believe that this Rule is overly burdensome, unnecessary, and will harm consumers and dealers, making the vehicle shopping and sales process more cumbersome and time consuming, and ultimately more expensive, and NADA continues to explore all options to address this Rule.

However, this Rule is now final and will go into effect next year. It contains a number of overly complicated requirements and restrictions. Regulatory Affairs will provide a more comprehensive compliance guidance for NADA members. In the meantime, this memorandum contains an overview of the Vehicle Shopping Rule so that dealers can begin planning for compliance with the Rule.

Attached is a brief Q&A, a preliminary summary of the Rule, along with several links (at the end of this memorandum) including links to the text of the Rule and several "guides" that the FTC issued regarding the Rule. This includes "A Dealers Guide" that contains a number of questions and answers from the FTC intended for dealers. We encourage dealers to review this FAQ document, and the materials at the links below with your legal advisors and relevant vendors.

QUESTIONS AND ANSWERS:

Q **What is the effective date of the Rule?**

A The Rule is effective July 30, 2024.

Q **To whom does the Rule apply?**

A The Rule applies to "Covered Motor Vehicle Dealers," which the Rule defines as "any person or business in the United States or a U.S. territory: 1) licensed by a state, the District of Columbia, or a territory to engage in the sale of Covered Motor Vehicles; 2) that takes title to, holds an ownership interest in, or takes physical custody of covered motor vehicles; and 3) is predominantly engaged in the sale and servicing of covered motor vehicles, their leasing and servicing, or both."

This definition will include most, if not, all NADA members/franchised dealers. [2]

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1 This is the same rule that the FTC had previously called the "Motor Vehicle Dealers Trade Regulation Rule," and that NADA has been informing dealers about as the "Vehicle Shopping Rule." NADA will continue to refer to this rule by the accurate and neutral name – the Vehicle Shopping Rule.

2 Whether the FTC has authority to apply Section 5 "UDAP" rules to commercial transactions is a contested issue. While the final Vehicle Shopping Rule is not limited to advertisements or sales for personal, family, or household use, it is unclear whether this means it is intended to apply to commercial transactions. Heavy duty dealers are not specifically excluded from the definition of "Covered Motor Vehicle Dealers" as trucks are not excluded from "Covered Motor Vehicle." However, many of the requirements apply by their terms to "consumers." NADA will provide clearer guidance, as it becomes available, to heavy-duty truck dealers as to the applicability of this rule to commercial transactions and non-consumer advertisements.

Q Why did the FTC issue this Rule?

A The FTC claims that the Rule is issued in response to "chronic deceptive or unfair practices" in the automotive retail marketplace, including "bait and switch tactics and hidden charges." NADA believes that these assertions are misguided AND UNFOUNDED, and do not reflect the overwhelming majority of practices in the auto retail industry, certainly among franchised dealers.

Moreover, the FTC has issued the Rule despite the fact that almost all of its provisions are already required or prohibited under current law. The FTC has stated that "many of the problems in the motor vehicle marketplace persist in the face of repeated federal and state enforcement actions," and that it sought to issue this Rule for the express purpose of allowing the FTC to issue monetary fines to those who violate the Rule.[3]

Q Is NADA pursuing any further action with respect to the Rule?

A In addition to the advocacy efforts outlined above, NADA continues to support legislation that will deny funding to the FTC to implement the Rule. Specifically, NADA continues to urge Congress to enact Section 530 of H.R. 4664, FY 2024 Financial Services and General Government Appropriations, which would prevent the FTC from implementing or enforcing this ill-advised rule. If enacted, this provision would not limit the FTC's ability to police the market under current law. NADA is also continuing to explore all legal options related to the Rule.

Q What are the penalties for violations of the Rule?

A A violation of the Rule is deemed to be a violation of Section 5 of the FTC Act, which is the FTC's rule against unfair or deceptive acts or practices. Therefore, as the FTC notes, violations of the Rule "could result in provisions that will require a company to change how it does business going forward, to give money back to injured consumers, and to pay civil penalties of as much as $50,120 per violation."

It is unclear exactly what a "violation" would be in connection with the Rule, but it could include each allegedly violative advertisement, communication, disclosure, or failed disclosure, or any other individual failure of any of the other requirements of the Rule.

In addition, in many states, violations of federal rules such as this Rule, can be used to form the basis of an alleged violation of state law, leading to potential class actions and attorney fee awards. Dealers should consult with their legal counsel regarding the implications, if any, under state or local law.

Q Can I agree with my customers that the Rule will not apply?

A No. The Rule states that it is a violation of the Rule for any person to obtain, or attempt to obtain, a waiver from any consumer of any protection provided by or any right of the consumer under the Rule.

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3 "[A] rule prohibiting unfair or deceptive acts or practices in the motor vehicle marketplace would allow the FTC to seek redress for harmed consumers and obtain other forms of monetary relief in cases involving FTC Act violations." See https://www.federalregister.gov/d/2022-14214/p-28.

Q Do I still need to comply with local or state laws governing these issues?

A It depends, but mostly yes. You do generally still need to comply with any state or local laws or regulations regarding advertising or the sales process – *unless* it is inconsistent with the Rule. However, even if a state or local law or regulation is inconsistent with the Rule, you still need to comply with that law or regulation if it provides "greater" consumer protection than the Rule. As The FTC states:

> "The CARS Rule doesn't change or supersede any state law or regulation unless the state standard is inconsistent with the FTC Rule. In that case, the CARS Rule will apply.
>
> But here's an important caveat: If a state law or regulation gives consumer greater protections, the FTC doesn't consider that to be inconsistent and residents of that state will get the greater protections their state law gives them."

Q What does the Rule require?

A The Rule contains a series of advertising requirements, required disclosures, and prohibitions, along with a significant new recordkeeping requirement.

In general, the Rule:

- Prohibits dealers from making misrepresentations regarding material information, including about the cost of the vehicle, the financing terms, and the availability of rebates or discounts;
- Requires dealers to disclose:
  - the offering price of the vehicle—that is, its full cash price – provided that dealers may exclude required government charges;
  - that optional add-ons are not required;
  - the total of payments for the vehicle when making a representation about monthly payment or other financing terms; and
  - that a discussed lower monthly payment will increase the total amount the consumer will pay, if true.
- Prohibits dealers from charging for "add-on" products or services that provide no benefit to the consumer; and
- Requires dealers to obtain "Express, Informed Consent" from the consumer for any charge.

While these may seem largely a straightforward restatement of the current law, a closer look shows that many of these requirements are not only new, but they also have the potential to be extremely complicated and disruptive in practice.

A brief overview of these requirements is provided below[4]:

DISCLOSURE OBLIGATIONS

(A) Offering Price Disclosure

a. "Offering Price" means the "full cash price for which a dealer will sell or finance the vehicle to any consumer" – excluding "required government charges."

   i. This price must include all fees, including "doc fees" or "admin fees," even if specifically permitted or outlined under state law.

   ii. This must also include all charges for "preinstalled add-on[s]" or "required add-ons."

   iii. This price cannot be "based on discounts or rebates that are not available to "any consumer,"" nor can this price "factor out" the amount of any required down payment.

   iv. Government charges are "all fees or charges imposed by a Federal, State or local government agency, unit, or department, including taxes, license and registration costs, inspection or certification costs, and any other such fees or charges."

   v. Dealers may, but need not, exclude required government charges.

      1. It remains unclear, but this may mean that dealers could include "anticipated" or "estimated" required government charges in the Offering Price. Importantly, however, such charges are not required to be included.

b. The "Offering Price" must be disclosed in both advertisements and in "first" responsive communications with customers:

   i. In any advertisement that

      1. references a specific vehicle or,
      2. represents any monetary amount or financing term with respect to "any vehicle."

   ii. In any communication with a consumer that includes a reference

      1. to a specific vehicle or,
      2. to a monetary amount or financing term for "any vehicle."

   iii. The Offering Price must be disclosed in the dealer's first response to the customer, and if the communication is written, it must be in writing.

c. This obligation is completely new, untested, and likely to create massive difficulties for consumers and dealers. In particular, the requirement to provide a written record of an Offering Price – as your first response to a consumer – each and every time that a consumer asks about a specific vehicle, price, or financing term – is likely to create consumer confusion.

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4 This is simply a summary and is not intended to be a thorough review of the requirements of the Rule. As noted above, NADA Regulatory Affairs will be providing comprehensive compliance guidance on the new rule to NADA members. Nothing in this document is intended as legal advice. Dealers must consult with their attorney or other professional advisors regarding their own facts and circumstances, and application of the Rule to their operations. This document is only an overview of one federal regulatory requirement in this area and does not address related federal law, or state or local law in any way.

(B) Total Payments Disclosure

a. When making any representation about a monthly payment, the dealer must disclose the total amount the consumer will pay at that monthly payment after making all payments as scheduled.

b. If the representation is in writing, disclosure must be in writing.

(C) Monthly Payments Comparison Disclosure

a. When making any comparison between payment options, expressly or by implication, directly or indirectly, that includes discussion of a lower monthly payment, the dealer must disclose that the lower monthly payment will increase the total amount the consumer will pay to purchase or lease the Vehicle, if true.

b. If the representation is in writing, the disclosure must be in writing.

(D) Add-Ons Not Required Disclosure

a. "Add-Ons" are any product or service provided to the consumer that is not installed on the vehicle by the manufacturer and for which the dealer charges the consumer.

b. When making any representation about any "Add-On," dealer must state that "the Add-On is not required and the consumer can purchase or lease the vehicle without the Add-on, if true."

c. If the "Add-On" representation is in writing, disclosure must be in writing.

(E) Disclosures required to be made "Clearly and Conspicuously."

a. Each of the disclosures required under the Rule (including the four categories outlined above) are required to be made *clearly and conspicuously*. The Rule does not require a specific font or size of disclosure, but instead defines clear and conspicuous as being made "in a manner that is difficult to miss (i.e., easily noticeable) and easily understandable, including in all of the following ways":

   i. Made through the same means (i.e., audible/visual) through which the communication is presented.

   ii. In a size, contrast, location, and length of time so that it "must stand out from any other accompanying text … so that it is easily noticed, read, and understood."

   iii. Audible disclosures (telephone, video) must be in a volume, speed, and cadence sufficient for ordinary customers to easily hear and understand it.

   iv. In any communication using an interactive electronic medium, such as the Internet or software, the disclosure must be unavoidable.

   v. The disclosure must use diction and syntax understandable to ordinary consumers and must appear in each language in which the representation that requires the disclosure appears.

   vi. The disclosure must comply with these requirements in each medium through which it is received.

   vii. The disclosure must not be contradicted or mitigated by, or inconsistent with, anything else in the communication.

b. The FTC notes that:

   i. This clear and conspicuous requirement "does not prohibit all advertising offers that are limited in some way," but

   ii. If a dealer makes "an unqualified representation of" a consumer offer (such as financing terms], "those terms must be available to the typical consumer."

   iii. And that "to qualify as clear and conspicuous, disclaimers or qualifications in any particular ad are not adequate to avoid liability unless they are sufficiently prominent and unambiguous to change the apparent meaning of claims and to leave an accurate impression."

c. As noted above, each of the four categories of required disclosures must be provided in writing only if the related communication is in writing. As a practical matter, however, given the steep potential penalties and broad standard for liability, it is likely that many dealers (or their attorneys) will establish procedures to ensure that all such disclosures are provided in writing in all circumstances[5] so that the dealership is better protected from allegations that they have failed to make the required disclosures.

PROHIBITIONS ON MISREPRESENTATIONS

(A) Prohibition on "Misrepresentations"

It is a violation of the Rule for a dealer to "make any misrepresentation, expressly or by implication, regarding Material information about the following":

a. Costs or terms of purchasing, financing, or leasing.

b. Any costs, limitation, benefit, or any other aspect of an Add-On.

c. Are terms for financing or lease.

d. Availability of rebates or discounts that are factored into advertised price.

e. Availability of vehicles at advertised price.

f. Whether any consumer has been or will be preapproved or guaranteed for any product, service, or term.

g. Any information on or about a consumer's application for financing.

h. When the transaction is final or binding on all parties.

i. Keeping cash down payments or trade-in Vehicles, charging fees, or initiating legal process or any action if a transaction is not finalized or if the consumer does not wish to engage in a transaction.

j. Whether or when a Dealer will pay off some or all of the financing or lease on a consumer's trade-in Vehicle.

k. Whether consumer reviews or ratings are unbiased, independent, or ordinary consumer reviews or ratings of the Dealer or the Dealer's products or services.

l. Whether the Dealer or any of the Dealer's personnel or products or services is or was affiliated with, endorsed or approved by, or otherwise associated with the United States government or any Federal, State, or local government agency, unit, or department, including the United States Department of Defense or its Military Departments.

m. Whether consumers have won a prize or sweepstakes.

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5 Or to otherwise maintain proof of compliance by recording consumer interactions where allowed by law.

n. Whether, or under what circumstances, a Vehicle may be moved, including across State lines or out of the country.

o. Whether, or under what circumstances, a Vehicle may be repossessed.

p. Any of the [other] required disclosures identified in [the Rule.]

(B) The scope of these prohibitions is exceedingly broad and apply not only to express misrepresentations, but also to "implied" misrepresentations about any of these issues, or any other issue that they deem "material."

PROHIBITIONS REGARDING "ADD-ONS"

(A) Dealer charges for "Add-Ons" - It is a violation of the Rule for a dealer, in connection with the sale or financing of Vehicles, to charge for any of the following:

a. Add-Ons that provide no benefit. A Dealer may not charge for an Add-on Product or Service if the consumer would not benefit from such an Add-on Product or Service

i. The FTC provides two examples:

1. Nitrogen-filled tire-related products or services that contain no more nitrogen proportionately than naturally exists in the air; or
2. Products or services that do not provide coverage for the Vehicle, the consumer, or the transaction or that are duplicative of warranty coverage for the Vehicle, including a GAP Agreement if the consumer's Vehicle or neighborhood is excluded from coverage or the loan-to-value ratio would result in the consumer not benefiting financially from the product or service.

a. This seems to suggest that dealers will be required to complete (and then retain) a loan-to-value calculation in determining whether to offer GAP to any particular consumer.

b. Notably, however, the FTC declines to provide any "particular numeric threshold or calculation" regarding the adequate LTV ratio in the sale of GAP, stating only that "this provision restricts sales of GAP agreements where the consumer would not benefit."

ii. This prohibition is not limited to these two examples. It would apply to any charge for any Add-On product or service that provides no benefit to the consumer.

b. Any item without Express, Informed Consent from the consumer: The Rule prohibits a dealer from charging for any "item" without "Express, Informed Consent." This requirement is quite broad and ambiguous, and it remains unclear exactly how such consent would be obtained or proven. As stated in the Rule, the following applies:

i. First, an "item" is more than just "Add-Ons," it refers to anything that the dealer charges the consumer for in the course of the sale or financing of a vehicle.

1. Presumably, this includes the vehicle itself, although that remains unclear.

ii. Second, "Express, Informed Consent" is defined as:

1. an affirmative act by the consumer,
2. communicating unambiguous assent to be charged,
3. made after receiving and in close proximity to a clear and conspicuous disclosure, in writing, and also orally for in-person transactions, of the following:

a. what the charge is for; and

b. the amount of the charge, including,

i. if the charge is for a product or service[6], all fees and costs to be charged to the consumer.

1. over the period of repayment
2. with the product or service
3. and without the product or service.[7]

iii. Third, the FTC lists examples of what does NOT constitute express, informed consent, including:

1. "a signed or initialed document by itself;
2. prechecked boxes, or;
3. an agreement obtained through any practice designed or manipulated with the substantial effect of subverting or impairing user autonomy, decision-making, or choice."

iv. While the FTC claims that dealers are already required to obtain such consent today, and that "law-abiding dealers would not have to change their practices for obtaining express, informed consent," it is clear that the Rule creates a standard that did not exist before the Rule and it remains unclear how exactly dealers can meet this ambiguous requirement.

RECORDKEEPING REQUIREMENTS

(A) Recordkeeping: Dealers must create and retain, for a period of twenty-four months from the date the record is created, all records necessary to demonstrate compliance with the Rule. This includes:

a. Copies of all materially different advertisements, sales scripts, training materials, and marketing materials regarding the price, financing, or lease of a Vehicle, that the dealer disseminated during the relevant time period;

i. Provided that a typical example of a credit or lease advertisement may be retained for advertisements that include different vehicles, or different amounts for the same credit or lease terms, where the advertisements are otherwise not materially different;

b. Copies of all purchase orders; financing and lease documents with the dealer signed by the consumer, whether or not final approval is received for a financing or lease transaction; and *all written communications relating to sales, financing, or leasing between the dealer and any consumer who signs a purchase order or financing or lease contract with the dealer*;

c. Records demonstrating that Add-ons in consumers' contracts meet the requirements of the section above entitled "Dealer Charges for Add-Ons," including copies of all service contracts, GAP Agreements and calculations of loan-to-value ratios in contracts including GAP Agreements; and

d. Copies of all written consumer complaints relating to sales, financing, or leasing, inquiries related to Add-ons, and inquiries and responses about Vehicles referenced in the Disclosure Obligations section above.

e. Any dealer subject to this part may keep the required records in any legible form, and in the same manner, format, or place as they may already keep such records in the ordinary course of business. Failure to keep all records required as outlined above will be a violation of the Rule.

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6 It is unclear what charge could be for something other than a product or service. It also remains unclear how, or if, "item" differs from "product or service," and if so, how this disclosure should or could be made.

7 In the final Rule, the FTC provides some limited attempted explanation of how this required disclosure is to be calculated and disclosed, but that explanation is confusing, and it remains unclear exactly how this could be accomplished.

Links to the Final Rule and FTC resources concerning the Rule:

- Text of the Final Rule
- FTC Press Release
- FTC CARS Rule: Combating Auto Retail Scams – A Dealers Guide
- The new CARS Rule: What you need to know – A Customer Guide

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