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Understanding the FTC's Proposed Motor Vehicle Dealers Trade Regulation

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FEDERAL TRADE COMMISSION
PROTECTING AMERICA'S CONSUMERS

● How Did We Get Here?

● What is Proposed?

● What's Next?

Lina Kahn - Chair – Democrat

Rebecca Slaughter – Democrat

~~Christine Wilson – Republican~~

Alvaro Bedoya – Democrat

Vacant – Republican

National Consumer Law Center – FTC Ally

- “Auto Add-Ons Add Up”– October 2017
- Add-on products sold by car dealers, such as service contracts, Guaranteed Asset Protection (GAP) insurance, and window etching, make up a large share of dealers’ profits. They also significantly increase car buyers’ costs. While many have questioned the value of these products for consumers, the pricing of these products has received less attention, largely because pricing is not transparent. Even regulators lack information about what car buyers pay for these products. Dealers decide what to charge each consumer and generally only the dealer, the finance company, and the third party provider of the add-on ever know what other consumers are paying. This National Consumer Law Center analysis of a large national data set is a revealing first look at what dealers pay for auto add-on products and what they charge consumers.
- <https://www.nclc.org/issues/auto-add-ons-add-up.html>

National Consumer Law Center – FTC Ally

- “Key Findings”
- **Add-on products are sold at prices far higher than dealer costs.** Dealers mark up add-on products more than other similar products are marked up. They mark up add-on products by a far higher percentage than they mark up cars. One dealer sold over 1,000 window etching products, each with a dealer cost of \$16 and a charge to the consumer of \$189, for a markup of \$173 or 1,081%. For Guaranteed Asset Protection (GAP) insurance products, 38 dealers had average markups of 300% or more, and 38 dealers marked up service contracts by an average of more than 300%.
- **Dealers are inconsistent in the pricing of add-on products.** Individual dealerships charge some consumers many times more than other consumers for the same product with the same dealer cost.
- **Companies that provide car financing play an important role in allowing excessive and discriminatory markups of auto add-ons.**
- **This inconsistent pricing for the same add-ons leads to pricing discrimination.**



National Consumer Law Center – FTC Ally

- **“Recommendations”**
- **Dealers should be required to post the available add-ons and their prices on each car in the lot, along with the price of the car.** To prevent the dealer from reintroducing non-transparency by offering discounts to some customers but not others, the prices for the add-on products must be non-negotiable.
- **To root out pricing discrimination, the federal Equal Credit Opportunity Act regulations should be amended to require documentation of the customer’s race or national origin** for non-mortgage credit transactions, as is currently required for home mortgage transactions. If discrimination remains hidden, it will not be possible to end it.
- **State and federal enforcement authorities should investigate discrimination in pricing of add-on products and bring enforcement actions** against a dealer if discrimination is shown.

House Financial Services (Majority) – FTC Ally

- **Chairwoman Maxine Waters**
- **May 2019 Hearing: “Examining Discrimination in the Automobile Loan and Insurance Industries”**
- **Majority Staff Memo:** “[p]redatory practices used by dealers to drive up profits, including inconsistent, opaque pricing of often ‘mandatory’ add-on products with questionable utility and value, such as service contracts and GAP (guaranteed asset protection) insurance.” The memo also implied a possible correlation between a consumer’s purchase of ancillary vehicle protection products and difficulty in making timely auto loan payments. The memo stated, “For example, research by the Center for Responsible Lending (‘CRL’) showed that the likelihood of late payment was higher (14% versus 8%) where consumers were sold multiple add-on products as compared to the likelihood of late payment where no add-on products were purchased.”

FTC History With Dealers

- 2011 Roundtable Discussions
- **“Buckle Up: Navigating Auto Sales and Financing” – July 2020**

https://www.ftc.gov/system/files/documents/reports/buckle-navigating-auto-sales-financing/bcpstaffreportautofinancing_0.pdf

- **“The Auto Buyer Survey: Lessons from In-Depth Consumer Interviews and Related Research” – July 2020**

<https://www.ftc.gov/system/files/documents/reports/auto-buyer-study-lessons-depth-consumer-interviews-related-research/bcpreportsautobuyerstudy.pdf>



FTC History With Dealers

- **Problems Identified in Reports**
 - Late, Limited, or No Discussion of Add-Ons
 - Confusion about whether Add-ons Are Free
 - Impressions that Add-ons Are Mandatory
 - Unexpected Limitations of Add-On Products
 - Opaque Pricing of Add-Ons
 - Bundling Add-Ons

FTC History With Dealers

- **Unfair Practices in "Add-ons"**
- Add-ons unfairly may be charged without a consumer's express, informed consent
 - Practice causes consumers to suffer substantial injury
 - Injury is not reasonably avoidable
 - Neither consumers nor competition benefit from such practices

FTC History With Dealers

- **Deceptive Practices in "Add-ons"**
- Add-ons be charged based on misrepresentations
 - Included for free or as part of purchase price
 - Required as a condition of sale or financing
 - Improves chances of financing or better finance terms
- Information about an add-on product's price or terms is material
 - Omission of facts bearing on overall cost is also material
- Representations likely to mislead consumers
- Subsequent disclosures do not cure initial tactics!



FTC History With Dealers

- **Enforcement Actions**

- 37 cases against dealerships in 10 years
- 450 million vehicles sold; 1.2 billion vehicles serviced (courtesy: NADA)

- Concurrent opinion:

“The automobile-financing market in the United States is profoundly broken. [A] cornucopia of consumer abuses...from bait-and-switch advertising to rip-off fees for “certified” vehicles and from illegally exorbitant fees for vehicle registration to padding final sales contracts with “air money” consumers would not detect. [The] perils that consumers, especially people of color, face in purchasing and financing a vehicle. . . In my view, far-reaching structural reform to the automobile-financing and -sales markets is long overdue and urgently needed.”

- Commissioner Rebecca Slaughter

The Proposed Rule

- **What Does it Cover?**

- Misrepresentations
- Advertising
- Communication with Customers
- Voluntary Protection Products (aka "Add-ons")
- Recordkeeping

Prohibited Misrepresentations

- The costs or terms of purchasing, financing, or leasing a vehicle.
- Any costs, limitation, benefit, or any other Material aspect of an Add-on Product or Service.
- The availability of any rebates or discounts that are factored into the advertised price but not available to all consumers.
- The availability of vehicles at an advertised price.
- Any Material information on or about a consumer's application for financing.
- 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.
- Whether or when a Motor Vehicle Dealer will pay off some or all of the financing or lease on a consumer's trade-in vehicle.
- Whether, or under what circumstances, a vehicle may be repossessed.



Disclosures

- **Full Upfront Disclosure of Costs and Conditions**
 - **“Offering Price”** of the vehicle must be disclosed
 - Full cash price at which will sell or finance the vehicle, minus only government fees and taxes
 - When?
 - Any ad that references a specific vehicle
 - Any ad that represents any monetary amount or financing term for any vehicle
 - Any communication with a consumer that includes a reference to a specific vehicle, or any monetary amount or financing term for any vehicle.
 - Must be disclosed in the Dealer's first response regarding that specific vehicle to the consumer;
 - If the communication or response is in writing, must be disclosed in writing

More Disclosures

- **Full Upfront Disclosure of Costs and Conditions**
 - “Add-on List” must be disclosed if sell Voluntary Protection Products
 - What is it?
 - Itemized list of all optional Add-on Products or Services charged to consumers
 - Clearly and Conspicuously disclose each such optional Add-on and the price of each such Add-on
 - If the Add-on price varies, include price range the typical consumer will pay instead of the price.
 - Where?
 - On each website, online service, or mobile application operated by or on behalf of the Dealer
 - At each dealership location
 - If an ad is not presented on a website, online service, or mobile application, must disclose the website, online service, or mobile application where the consumer can view the Add-on List.

Even More Disclosures

- **Full Upfront Disclosure of Costs and Conditions**
 - **Add-ons not required**
 - If the representation is in writing, the disclosure must be in writing.
 - **Total of payments and consideration for a financed or lease transaction**
 - When making any representation about a monthly payment for any vehicle, disclose the total amount the consumer will pay to purchase or lease the vehicle at that monthly payment after making all payments as scheduled.
 - If the representation is in writing, the disclosure must be in writing.
 - Disclose the amount of trade in or down payment
 - If the representation is in writing, the disclosure must be in writing.
 - **Monthly payments comparison**
 - When making any comparison between payment options that includes discussion of a lower monthly payment, disclose that the lower monthly payment will increase the total amount paid, if true
 - If the representation is in writing, the disclosure must be in writing.

Voluntary Protection Products

- Cannot charge for products and services that do not provide a benefit to the consumer
 - "Nitrogen-filled" tires that have no more more nitrogen than exists naturally in the air
 - GAP Waiver where LTV does not warrant it
 - Require specific disclosures and **Express, Informed Consent** for any other optional add-ons products.
- Before discussing financing or closing cash deal, must clearly and conspicuously disclose:
 - Cash price without any of the optional add-ons (separately itemize all other charges, discounts, trade/down)
 - Consumer can purchase/finance without add-ons
 - Consumer must decline no add-on offer in writing, signed, date and time recorded by consumer and manager
 - Cannot be presented with any other written materials
- Itemize purchased add-ons
- No add-on products or services without **Express, Informed Consent**.

Express, Informed Consent

- What does it mean?
 - Affirmative act communicating unambiguous assent to be charged
 - Made after receiving and in close proximity to a Clear and Conspicuous disclosure, in writing, **and also orally**
 - Must include the following:
 - What the charge is for
 - The amount of the charge, including, if the charge is for a product or service, all fees and costs to be charged to the consumer over the period of repayment with and without the product or service
- What does it NOT mean?
 - A signed or initialed document, by itself
 - Prechecked boxes
 - An agreement obtained through any practice designed or manipulated with the substantial effect of subverting or impairing user autonomy, decision-making, or choice

Record Retention

- **Maintain Records for 2 Years**

- “All records necessary to demonstrate compliance”
- Materially different advertisements; marketing materials relating to price, financing or lease terms
- Sales; consumer transactions, including purchase orders, financing, and leasing agreements
- Materially different add-on lists; add-on products and services offered
- Training materials; scripts
- Written consumer complaints and inquiries relating to vehicles and/or products
- Records that demonstrate compliance with monthly payment disclosures

Does It Apply To Me?

What is a Motor Vehicle Dealer?

- Any person or resident in the United States, or any territory of the United States, that:
 - Is licensed by a State, a territory of the United States, or the District of Columbia to engage in the sale of motor vehicles;
 - Takes title to, holds an ownership interest in, or takes physical custody of motor vehicles; and
 - Is predominantly engaged in the sale and servicing of motor vehicles, the leasing and servicing of motor vehicles, or both.

Comments

“The rule enacts a host of new restrictions on auto dealers that would increase the complexity of the purchasing process for consumers, including new record-keeping and disclosure requirements that will likely increase transaction time. The new mandates put government in between consumers and retailers, an unwarranted federal intervention into negotiations between private parties. For example, one requirement would prohibit sellers from informing consumers about any aspect of a vehicle without first stating the initial selling price, even though the ultimate selling price could end up being much lower. ...

“The FTC promulgated this rulemaking without an in-depth examination of the market, ignoring prior evidence that the industry generally functions well. The FTC’s cost-benefit analysis vastly overestimates the proposed rule’s benefit to consumers, raising critical questions about the agency’s methodology in promulgating the rule.”

- Americans for Tax Reform and the Open Competition Center

Senate Letter

“If implemented, this proposal would confuse customers, lengthen the transaction time to purchase a vehicle, limit consumer choice, increase paperwork, and mandate burdensome new recordkeeping requirements on small businesses.”

Among the questions it asks:

- Why the FTC did not pursue a more traditional approach to rulemaking in its process.
- Whether the FTC consulted with other agencies when crafting the proposal.
- What the FTC was trying to accomplish, given all the allegations are already against the law.
- Why the FTC did not issue a quantitative study on the issue before proposing the rule.

Sens. Cynthia Lumis (R-Wyo), John Thune (R-S.D.), Todd Young (R-Ind.), Shelley Moore Capito (R-W.Va.), Mike Lee (R-UT) and Dan Sullivan (R-Alaska)

What to Do?

- Grassroots advocacy
- Compliance Management System Check-up
- NADA Fair Lending Program/Policy
- NADA Voluntary Protection Products Program/Policy
- NADA Federal Advertising Compliance Guide

What Will the FTC and CFPB Look at Next?

- FTC
 - GPS Devices?
 - Dealer Participation?
 - Spot Delivery specifics?
 - Junk Fees
 - Enforcement!
- CFPB
 - Mirror proposed rule for BHPH Dealers?
 - Junk Fees
 - Voluntary Protection Products in Financing?
 - Repossession

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Thank You For Your Time