

FTC's Proposed Dealer Trade Rules Sets Sights on “Add-on” Product Sales

August 12, 2022

On July 13, 2022, the [FTC's proposed Motor Vehicle Dealers Trade Regulation Rule](#), was published in the Federal Register. The FTC's stated purpose of the proposed rule is to “protect consumers and honest dealers by making the car-buying process more clear and competitive”. More specifically, the FTC believes consumers do not know the true cost of the vehicle they purchase and finance, and that consumers unknowingly purchase or are tricked into purchasing Add-on products without knowing its costs, benefits, that the Add-on products are optional, or that they are even purchasing Add-ons for the vehicle at all.

The proposed rule defines “Add-on” or “Add-on Product(s) or Service(s)” as any product(s) or service(s) not provided to the consumer or installed on the vehicle by the motor vehicle manufacturer and for which the Motor Vehicle Dealer, directly or indirectly, charges a consumer in connection with a vehicle sale, lease, or financing transaction. While this is an expansive definition the FTC lists “extended warranties, service and maintenance plans, payment programs, guaranteed automobile or asset protection (“GAP” or “GAP insurance”), emergency road service, VIN etching and other theft protection devices, and undercoating” as examples of the most commonly offered Add-on products.

If the proposed rule takes effect, it will become an unfair or deceptive act or practice in violation of the FTC Act, Section 5 for a dealer of any motor vehicle to charge consumers for (i) Add-on products that provide no benefit, (ii) optional Add-on products without presenting specific disclosures including their optionality and price, or (iii) any item without obtaining a consumer's express, informed consent for the charge. The proposed rule also prohibits dealers from having consumers waive of the proposed rules' protections and will impose specific record-keeping requirements on dealers.

No Misrepresentation

Consumers cannot be told that Add-on products and services are required by law. They must be informed that the consumer can purchase or lease the vehicle without the Add-on, and that financing terms will not be dependent on the Add-on purchase. The consumer must be clearly explained the costs of these products, as well as the benefits that the Add-on product and service convey, and any limitations or exclusions.

Add-on Must Provide Benefit

A Dealer may not charge for an Add-on product or service if the consumer would not benefit from it. The proposed rule specifically calls out nitrogen-filled tire related-products or services that contain no more nitrogen than naturally exists in the air. More generally, products or services that exclude coverage for the vehicle, the consumer, or the transaction, or are duplicative of warranty coverage for the vehicle are prohibited. This would specifically include a GAP waiver 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 it.

Disclosures

Cash Price without Optional Add-ons

Before referencing any aspect of financing for a specific vehicle the dealer must clearly and conspicuously disclose, in an itemized manner, the total of the cash price, plus the finance charge, factoring in any cash down payment and trade-in valuation, and specifically excluding optional Add-ons. It must also be disclosed that the consumer can purchase the vehicle for the Cash Price without Optional Add-ons. In order for the consumer to purchase any Add-ons, the consumer must then decline to purchase the vehicle for the Cash Price without Optional Add-ons. The disclosure and declination must be in writing, date and time recorded, and signed by the consumer and a dealer manager. The Cash Price without Optional Add-ons disclosure and the declination cannot be presented with any other written materials.

Add-on List

After presentment of the Cash Price without Optional Add-ons, the dealer may then present the consumer with an Add-on List. The Add-on List would include all optional Add-on products for which the dealer charges consumers and their respective prices. If the price of the Add-on varies based on the specifics of the transaction, the Add-on List would have to include the range the typical consumer will pay. For the particular vehicle transaction, the dealer must present the consumer with the Cash Price without Optional Add-ons, the charges for any optional Add-ons selected by the consumer (which must be separately itemized), and the sum of the Cash Price without Optional Add-ons and the Add-on charges.

The Add-on List is relevant for advertisements as well. If advertisements are presented in print, radio, or television format, the dealer would not be required to include the Add-on List. Instead, those advertisements would be required to disclose the website, online service, or mobile application where consumers can access a copy of the Add-on List.

Consumer's Consent

In general, the proposed rule would require dealers to obtain clear, written and informed consent for any and all charges, fees and conditions of sale, after presenting the consumer with both the Price without Option Add-ons Form and the Add-on List. The proposed rule does not consider a signed or initialed document, on its own, as evidence of a consumer's express, informed consent. Consent also cannot be achieved through the use of "prechecked boxes" or a presentation of an agreement that impairs the consumer's "autonomy, decision-making, or choice." An active election and clear indication of each Add-on desired will individually need to be made by the consumer.

Record-Keeping Requirements

For a period of 24 months, the dealers must maintain records of (i) copies of all materially different Add-on Lists and all documents describing such products or services that are offered to consumers, (ii) copies of all purchase orders, financing and lease documents signed by the consumer, (iii) copies of all service contracts, GAP Agreements and calculations of loan-to-value ratios in contracts including GAP Agreements, (iv) the Cash Price without Optional Add-ons disclosures and declinations, and (v) copies of all written consumer complaints and inquiries related to Add-ons.

The proposed rule are similar to many of the regulatory, compliance and enforcement activity of state and federal regulators over the past few years. However, it is likely to present operational and compliance risks for dealers if the proposed rule goes into effect. The FTC estimates that it will take dealers approximately 15 hours to bring their practices into compliance. This may be an unrealistic estimate of the time it will take to set up new forms and systems, and train employees on the new proposed rule requirements. This is especially true when the dealer does not already have a website to which to direct consumers for the proposed rules required disclosures.

Further, many Add-on products and services are regulated by the states departments of insurance. Other dealer practices are also heavily regulated by the states. While the proposed rule will not supersede consistent and/or additional state law, it may cause confusion among both dealers and consumers. As the FTC points out in its reasoning for the proposed rule, the car buying process is often times long and tedious, with copious amounts of paperwork. The proposed rule, while valiant in its effort to make sure the consumer is fully informed, is going to add to the time and paperwork, often times in a duplicitous manner.

Public comments to the proposed rule are due by September 12, 2022.

This article was first published in July 2022 issue of the Consumer Credit Industry Association's publication, [The CCIA Star](#).

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