LEGAL UPDATES

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FTC Finalizes—and Then Pauses—CARS Rule Impacting Dealers, Auto Finance Companies

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On December 12, 2023, the Federal Trade Commission (FTC) announced it has finalized the Combating Auto Retail Scams Rule (CARS Rule), which imposes various obligations affecting dealers' sales practices and will also impact downstream finance companies that purchase retail installment contracts from dealers. The CARS Rule follows several FTC enforcement actions against dealers in recent years and was set to take effect on July 30, 2024.

However, on January 18, 2024, the FTC issued an order staying the effective date "to allow for judicial review" after two industry groups challenged the CARS Rule.

1. The legal challenges to the rule

On January 5, 2024, the National Automobile Dealers Association and the Texas Automobile Dealers Association (together, the petitioners) petitioned the U.S. Court of Appeals for the Fifth Circuit for review of the CARS Rule. The petitioners request that the Fifth Circuit vacate or modify the rule on the grounds that the rule is "arbitrary, capricious, an abuse of discretion, [and issued] without observance of procedure required by law."

Although the petition did not elaborate on those grounds, the petitioners also filed a motion for stay of the rule and expedited consideration (which the petitioners have since moved to withdraw), which previews some of the petitioners' arguments. In that motion, petitioners argue that the FTC unlawfully promulgated the CARS Rule by failing to comply with advance notice requirements. Petitioners further argue that the rule is arbitrary and capricious because the FTC did not reasonably evaluate the rule's costs and

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benefits. Petitioners also argue that the FTC failed to "show that a significant industry-wide problem exists that would justify a disruptive and burdensome industrywide regulatory response."

Following the FTC's stay of the rule's effective date, the FTC and the petitioners have requested that the Fifth Circuit expedite the case. The parties have proposed a schedule under which briefing would conclude in mid-June 2024, with oral argument to follow shortly after. We will follow and discuss those developments here, so stay tuned.

2. The CARS Rule

The CARS Rule, when (or if) it goes into effect, imposes several additional obligations on car dealers as follows:

a. Dealers are prohibited from making misrepresentations regarding "material" information

The CARS Rule prohibits a dealer from misrepresenting "material" information about a vehicle. The rule defines "material" as "likely to affect a person's choice of, or conduct regarding, goods or services." The rule expressly prohibits misrepresentations in several categories, including: (1) the cost or terms of purchasing, financing, or leasing a vehicle; (2) the costs, limitations, benefits, or any other aspect of an add-on product or service; (3) whether the transaction is for financing or a lease; (4) the availability of rebates or discounts that are factored into the advertised price but not available to all customers; (5) whether a customer has been or will be preapproved for any product, service, or term; and (6) any information on or about a customer's application for financing.

b. Dealers must disclose the offering price of a vehicle

The CARS Rule changes the disclosure requirements associated with the purchase or lease of a vehicle. Specifically, in all advertisements and communications, a dealer must disclose the "offering price" of a vehicle. The CARS Rule defines "offering price" as the full cash price for which a dealer will sell or finance the vehicle to any consumer, with the exclusion of government charges.

There are additional disclosure changes with the CARS Rule. When making a representation about an add-on, the dealer must disclose that the add-on is not required and the consumer can purchase or lease the vehicle without the add-on, if true. The CARS Rule also adds disclosure requirements about the total amount the consumer will pay to purchase a vehicle when the dealer makes a representation about monthly payments. Further, when showing customers different financing options, such as different monthly payment amounts, dealers must disclose that lowering a monthly payment will increase the total amount that the customer will pay.

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All disclosures required under the rule must be made "clearly and conspicuously," defined under the rule as "in a manner that is difficult to miss (i.e., easily noticeable) and easily understandable."

c. Dealers are prohibited from charging for add-ons that provide no benefit to the customer

The CARS Rule prohibits a dealer from charging any add-on product or service if the add-on provides no benefit to the consumer. This includes products or services that do not provide coverage for the vehicle, consumer, or the transaction, or products or services that are duplicative of warranty coverage from the vehicle.

d. Dealers are subject to new recordkeeping requirements

The CARS Rule places extra recordkeeping requirements on dealers. Specifically, dealers must retain all records necessary to demonstrate compliance with the CARS Rule for 24 months. Some specific records that are encompassed by the CARS Rule are: copies of all advertisements, sales scripts, training and marketing materials, all purchase orders, and financing and lease documents (regardless of whether the consumer is approved); all communications related to the sales, financing, or leasing of a vehicle between a dealer and a consumer who signs a purchase order or financing or lease; copies of all service contracts, GAP agreements, and calculations of loan to value ratios; and copies of all written consumer complaints regarding sales, financing, or leasing, and inquiries related to add-ons.

e. Servicemembers

The CARS Rule places additional protections that the FTC believes to benefit servicemembers. Under the CARS Rule, dealers are prohibited from misrepresenting that they are affiliated with the military or government organization, from misrepresenting whether a vehicle can be moved out of state, and whether a vehicle can be repossessed.

What this means to you

Dealers. Even though the CARS Rule is paused, dealers may wish to begin reviewing their recordkeeping systems, contract forms, disclosures, marketing channels, and policies for how these items interact with customers to ensure that they satisfy the new requirements. Dealers should also consider conducting training of all personnel involved in sales.

Finance companies. Further, finance companies that purchase motor vehicle retail installment contracts should consider working with dealers from which they purchase retail installment contracts to ensure as much as possible compliance with the CARS Rule. As a purchaser of retail installment contracts, a finance company may become liable for violations by the dealer under the FTC Holder

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Rule and state UDAP laws that provide for private rights of action for violating the federal prohibitions on UDAAPs.

Even further, and despite the pause, expect the FTC to continue to monitor motor vehicle markets and take action it deems necessary. In an Open Commission Meeting on January 18, 2024, FTC Commissioner Rebecca Kelly Slaughter expressed a desire for the FTC to expand the CARS Rule to cover all motor vehicles instead of just automobiles.

Contact us

If you have questions about the CARS Rule or other matters related to consumer finance compliance, please contact Marci Kawski, AJ Fabianczyk, Daniel Wilkinson, or your Husch Blackwell attorney.

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