

## The Revised FTC Used Car Rule Is Now In Effect

At the end of last year, we alerted you to the FTC's revision to the Used Car Rule. The revised Rule does not change the circumstances and method for display of the Buyers Guide. It does change the Buyers Guide form.

On January 27, 2017, the revised Rule went into effect. Unfortunately, there has been little publicity about the change, and there appears to be some misunderstanding about the revised Rule and dealer compliance obligations. Here are some questions and answers about dealer responsibilities under the new FTC Rule.

**Q:** *I don't have compliance obligations now since there is a lengthy period during which I can get ready to comply, correct?*

**A:** Incorrect. The revised Rule was published November 18, 2016. Its effective date was January 27, 2017.

**Q:** *I understand I can still use the old forms under the revised rule. That is all I need to do, correct?*

**A:** Incorrect. The revised rule allows you to continue to work through "remaining stock" of the former Buyers Guide forms until January 27, 2018. However, that does not mean you have no new obligations. If you choose to work through the "remaining stock", you still must take action on guides for vehicles where you disclose available

### IN THIS ISSUE...

**The Revised FTC Used Car Rule Is Now In Effect**

page 1

**FTC Bares Its Teeth**

page 1

**Address the Causes of Personnel Claims**

page 3

## FTC Bares Its Teeth?

For several years, we have been reminding you that the Federal Trade Commission is a federal agency about which dealers should be particularly concerned. When the Dodd Frank financial reform act created the CFPB, Congress gave the FTC greater budget and powers to oversee auto dealer practices to make up for the CFPB's intrusion on the FTC's historic jurisdiction. The FTC has been increasingly active in using its powers against auto dealers, most visibly in consent orders for advertising violations against dealers around the country.

A recent consent order with a California auto dealer group should raise red flags for dealers. The defendants who signed the consent order were nine new car dealers, a used car dealer, their holding and management companies, and their senior officials. The order was no ordinary "thou shalt not" administrative slap. Instead, it resulted from a multi-count complaint filed by

non-dealer warranties. For vehicles where “manufacturer’s warranty still applies” or there is a manufacturer certified warranty or one not backed by the dealer, the following statement must be made: “Ask the dealer for a copy of the warranty document and an explanation of warranty coverage, exclusions, and repair obligations.” Therefore, if you choose to work through the remaining stock of the former Buyers Guide forms, you must still change guides on vehicles in stock and must complete guides for newly stocked vehicles with the required language if you are disclosing a non-dealer warranty.

Q: *We will change over to the new forms, but there is no difference in filling those out, correct?*

A: Incorrect. There is a substantial difference in disclosing non-dealer warranties. In selling under the revised Rule, one must either disclose the vehicle is being sold “as is” (or with limited warranties only in some states that prohibit “as is” sales, like Maryland), or that a dealer warranty is being issued. If a dealer warranty is being issued, that is when the box for “limited warranty” is checked. If there is a warranty other than a dealer warranty, the “as is” (or implied warranties only) box must be checked. That is a significant difference from the former Buyers Guide where a dealer could check that a vehicle is sold with a limited warranty if sold with the remainder of the manufacturer’s factory warranty, a factory certified program warranty, or a non-dealer backed warranty.

Q: *But there are no other significant changes in filling out the Buyers Guide, right?*

A: Incorrect. In the revised Rule, the FTC made clear that when disclosing the covered systems of a dealer warranty, a dealer may not use the shorthand term “powertrain”. It must disclose the individual covered systems like engine, transmission, differential. Also, there is a significant change in the signature of the Buyers

Guide by the consumer. There is now mandated language that must be included, and the language must be included in the box for the contact for complaints. If you have customers sign the Buyers Guide, which we recommend since that is the best proof the customer saw and received the Buyers Guide, and it is mandatory in Virginia by state law, the following phrase must be used: “I hereby acknowledge receipt of the Buyers Guide at the closing of the sale.”

Q: *If I know that the vehicle is covered by the original factory warranty I can disclose that even if I don’t have a copy of it, correct?*

A: Incorrect. The rule provides that a dealer “may” disclose if there is original factory warranty remaining. However, the language that is incorporated in the new form and the language we discussed above that must be used on the former form inviting the customer to ask about the warranty terms requires the dealer to be able to provide that information. If you do not have the actual warranty, and you cannot provide that information, you probably should not disclose a remainder of the factory warranty.

Q: *I have the same flexibility on service contracts to disclose or not disclose they are available if I choose, correct?*

A: Incorrect. If you are offering to make available a service contract for a used motor vehicle, that must be disclosed.

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*FTC from page 1*

in federal court against the dealer group for a variety of sales and advertising practices. The result is an order requiring the group to pay \$3.6 million in consumer restitution/government compensation and a long list of “thou shalt nots” that can be backed by further federal court punitive action.

The investigation that led to this appears to have been an outgrowth of the FTC’s look at spot deliveries about which we have reported. The court order refers to spot delivery practices used by the settling dealers by the old consumer standby – yoyo sales – but the requirements the dealer must follow for the future mirror those we have told you about in warning you to be careful about your spot delivery practices. These are:

- Failing to return the downpayment and trade in if the deal falls through.
- Disposing of the trade before financing has been finalized.
- Charging the customer for the terminated transaction.
- Threatening or commencing abusive repossession or debt collection practices.

But that is not all.

The dealer is prohibited from making a long list of prohibited “misrepresentations relating to the sale, financing, or leasing of vehicles”, including a gray area prohibition of misrepresenting any “material fact”.

The complaint in the case alleged that the dealer had been loading the internet with false or misleading testimonials. The dealer is required to make true and accurate disclosures about a sale including refraining from “an opinion, belief, finding, or experience of any person unless the opinion, belief, finding, or experience is not misleading and the representation clearly and conspicuously discloses any material connection between such person and [the dealer group].”

The order prohibits the dealer from charging a consumer for any “add-on product or service” without having obtained express, informed consent. It also includes requirements that the dealer comply with advertising under the Truth in Lending Act and the Consumer Leasing Act, which is common in consent orders.

Finally, the order contains punitive oversight, record-keeping, and monitoring obligations with which the dealer group must comply for twenty years.

All in all, the dealer group wound up paying a lot of money to have the FTC set up shop in its showroom to monitor each deal it does for the next twenty years.

## **Address the Causes of Personnel Claims**

In the last decade, the obligations of human resource professionals – those in charge of employee issues – have mushroomed. Your dealership probably has coped with this by assigning office staff to deal with these issues. The demands can be dizzying.

You are properly concerned with personnel lawsuits. They are expensive to defend, particularly if federal agencies such as the Equal Employment Opportunity Commission became involved. You should have a program that is designed to protect against employee lawsuits. In developing a program, dealers should give attention to those things that lead to problems. Here are some tips that you should consider to lower your chance of becoming a defendant in a personnel lawsuit.

- Do background checks. The most common source of lawsuits are employees who are “bad hires”. Do what you can to protect against bad hires. Checking references and contacting past employers is the most basic

Claims continued on page 4

protection. Dealer personnel sometimes dismiss this because many past employers will only confirm the person's employment and time on the job. However, even that sort of information is valuable. If you find that an employee has skipped a significant time period in reporting past employment, that can be important. And you may find a past employer willing to be candid, especially if you have the applicant sign a document releasing prior employers from liability for providing candid responses to background questions. Beyond these steps, consider criminal background checks. In many states, the government licensing agency will perform a criminal background check for positions that require a sales license. However, how about those employees who don't require a license where trust is critical, such as cashiers or others handling funds and confidential data? And don't forget about driving records since many employees will be driving your cars.

- Have updated applicant and new employee materials. The laws are changing rapidly. When was the last time you reviewed your applicant forms packet? Your new employee packet? Your personnel handbook?

- Make sure all personnel documents are completed. It does not help if you have up to date applicant and new hire packets if the forms are not properly completed. Have in place a checklist for those responsible for employee records to make sure all forms are completed and signed before an employee is put on the payroll.

- Make sure your senior staff understand your personnel handbook. It is one thing to adopt a personnel handbook and make sure it is updated. It is something else entirely to make sure that those in charge of recruiting, hiring, disciplining and firing know your personnel policies. Take the time to train those with managerial authority on your policies.

- Make sure all job actions are well documented. Too often, we encounter cases involving employee terminations where the dealer claims the employee has been counseled repeatedly on unsatisfactory performance. Yet the personnel file is pristine – no record of disciplinary notices, no notes about counseling, perhaps even a glowing review. If an employee's performance is below par and you discuss it with the employee, make a record.

- Terminate employees properly. Donald Trump popularized the phrase, "you're fired", but just saying it and expecting everything to turn out all right is not the best way of terminating an employee. Review an employee's performance before taking action for job effectiveness. Investigate thoroughly and be sure your action is consistent with prior discipline for a policy violation. If you must fire an employee, do it with another manager present. Determine beforehand how you will explain the termination. You do not owe an employee a detailed legal brief of reasons, but a succinct explanation of why the employee's performance was unsatisfactory or the policy breach was serious to the point of termination is important. Make a record of your decision-making and actions in the employee's personnel file.

- Always recruit. Many problems arise in car dealerships because dealers must get a backside into a chair when a vacancy develops, the most common reason for "bad hires". It helps if the dealer has list of qualified individuals to contact in the event of a job opening. Constantly recruit new applicants. Hand out business cards, even think of having an employment brochure you and your managers can use to recruit individuals. Build a list of employment suspects to turn into prospects when the need arises.