



Avoiding Hidden Traps: Complying with the Federal Trade Commission's New Junk Fees and CARS Rules, CFPB Rules, and Related State Laws

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Agenda

1. FTC Rule on Unfair or Deceptive Fees
2. FTC Combating Auto Retail Scams (CARS) Rule
3. CFPB Proposed Rules
4. Similar State Laws
5. Best Compliance Practices



FTC Rule on Unfair or Deceptive Fees

16 CFR 464

“Junk” Fees and Drip Pricing

- Regulators refer to “junk” fees as fees that are unnecessary, unavoidable, or surprise charges that inflate prices while adding little to no value.
 - “Not all fees that consumers are charged are junk fees; some are legitimate fees for additional products or services that consumers value.” – White House, *How Junk Fees Distort Competition* (2022)
- Drip pricing refers to the practice where businesses advertise only part of a product’s price and reveal other charges later as the customer goes through the buying process.
 - The additional charges can be mandatory charges, such as hotel resort fees, or fees for optional upgrades and add-ons.
 - One study found that consumers are likely to spend 14 percent more when drip pricing is utilized rather than all-inclusive pricing.

FTC Rule on Unfair or Deceptive Fees

- In November 2023, the FTC released its Proposed Rule targeting what it calls unfair and deceptive fees. The Proposed Rule would cover any business selling in physical locations and online. There is one exception for motor vehicle dealers, which is addressed in the CARS Rule (addressed later).
- The Proposed Rule would apply to businesses regardless of whether they are providing the goods or services themselves (e.g., an online travel agent advertising for a hotel chain).
- The FTC broadly identified two practices that it intends to regulate: (1) omitting mandatory charges and fees from advertised prices; and (2) misrepresenting the nature and purpose of the charges or fees.
- Comment period closed February 7, 2024.

Two Prongs: Hidden and Misleading Fees

- **Hidden Fees Prohibited**

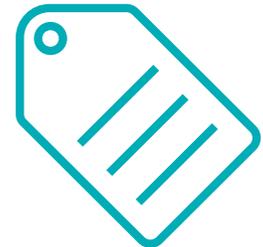
- (a) It is an unfair and deceptive practice and a violation of this part for any Business to offer, display, or advertise an amount a consumer may pay without Clearly and Conspicuously disclosing the Total Price.
- (b) In any offer, display, or advertisement that contains an amount a consumer may pay, a Business must display the Total Price more prominently than any other Pricing Information.

- **Misleading Fees Prohibited**

- (a) It is an unfair and deceptive practice and a violation of this part for any Business to misrepresent the nature and purpose of any amount a consumer may pay, including the refundability of such fees and the identity of any good or service for which fees are charged.
- (b) A Business must disclose Clearly and Conspicuously before the consumer consents to pay the nature and purpose of any amount a consumer may pay that is excluded from the Total Price, including the refundability of such fees and the identity of any good or service for which fees are charged.

Disclosing the “Total Price” for Goods and Services

- Under the Proposed Rule, businesses would be required to disclose the “**Total Price**” Clearly and Conspicuously (i.e., it must be difficult to miss and easily noticeable) in any offer, display, or advertisement. The Total Price must be disclosed *more prominently* than any other pricing information.
- The “Total Price” is the **maximum total** of all fees or charges a consumer must pay for a good or service and any **mandatory Ancillary Good or Service**.
 - Except where **Shipping Charges** and **Government Charges** may be excluded.



Disclosing the “Total Price” for Goods and Services (cont.)

Included in the Total Price

- “Mandatory Ancillary Goods or Services”
 - Any additional good(s) or service(s) offered to a consumer as part of the same transaction that a consumer **cannot avoid paying** at the completion of the transaction.
- “Maximum Total”
 - Allows businesses to apply discounts and rebates after disclosing the Total Price.

Excluded from the Total Price

- “Optional Ancillary Goods or Services”
 - Any additional good(s) or service(s) offered to a consumer as part of the same transaction that a consumer **has the option to purchase** at the completion of the transaction.
- **Shipping Charges**
 - Fees or charges that reasonably reflect the amount a Business incurs to send physical goods to a consumer through the mail, including private mail services.
- **Government Charges**
 - All fees or charges imposed on consumers by a federal, state, or local government agency, unit, or department.

Government and Shipping Charges

Government Charges

- Covers only fees or charges imposed by the government on consumers and does not encompass fees or charges that the government imposes on a business and that the business chooses to pass on to consumers.

Shipping Charges

- Does not include delivery through couriers, such as those in mobile delivery applications. Included shipping charges are limited to the amount that reasonably reflects what a Business incurs to send goods.

Optional vs. Mandatory Ancillary Goods & Services

1. Optional

- i. If a hotel offers a consumer the option to purchase or decline trip insurance with a room reservation.
- ii. A car rental service offers the option to add baby seats, satellite radio, or navigation systems.
- iii. Tipping or gratuity.

2. Mandatory

- i. A housing rental agreement includes a fee that the consumer cannot reasonably avoid for a trash valet service.
- ii. A “processing” or “service” fee charged by a concert venue in order to complete the transaction.
- iii. A telecommunications company charging mandatory licensing fees.

Disclosing the “Nature and Purpose” of Charges and Fees

- When listing any charges or fees, a business would be prohibited from categorizing different charges or fees under the same label **if they serve distinctly different purposes.**
- Relatedly, the FTC addressed several comments that complained of the use of labels such as “convenience fees,” “improvement fees,” and “economic impact fees,” which are often used as **catchall terms for multiple fees.**
- Example: A meal delivery application could not charge both a fee to compensate its drivers and a fee to run the service under the same label or line item and instead must list the two fees separately.
 - The same business must also disclose the allocation of fees, for example, if a portion of an additional gratuity is used to offset the driver’s wages or benefits. If any charges or fees are refundable, that information must also be disclosed.

FTC Combating Auto Retail Scams (CARS) Rule

16 CFR 463

FTC CARS Rule – Effective Date Delayed

- Final Rule published on January 4, 2024.
- Originally set to go into effect July 30, 2024.
- But FTC paused the effective date pending a legal challenge by the National Automobile Dealers Association and the Texas Automobile Dealers Association.
 - Filed a petition in the United States Court of Appeals for the Fifth Circuit.
 - The Petition challenged the Rule on the asserted grounds that it is “*arbitrary, capricious, an abuse of discretion, without observance of procedure required by law, or otherwise not in accordance with law[.]*”
 - A procedural challenge, among other things, arguing that the FTC did not go through the advanced notice rulemaking process as required by the Administrative Procedure Act.
 - Briefing schedule set to be completed by June 2024.

No. 24-60013

**UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT**

NATIONAL AUTOMOBILE DEALERS ASSOCIATION, AND
TEXAS AUTOMOBILE DEALERS ASSOCIATION,
Petitioners,

v.

FEDERAL TRADE COMMISSION,
Respondent.

On Petition for Review of a Final Trade Regulation Rule
of the Federal Trade Commission

**PETITIONERS' OPPOSED MOTION FOR STAY OF FINAL RULE AND
FOR EXPEDITED CONSIDERATION**

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Counsel for Petitioners

FTC CARS Rule – Who Does It Apply to?

- Applies to any “**Covered Motor Vehicle Dealer**,” which means any person or entity that:
 - Is licensed to engage in the sale of Covered Motor Vehicles;
 - Takes title to, holds an ownership interest in, or takes physical custody of Covered Motor Vehicles; and
 - Is predominantly engaged in the sale and servicing of Covered Motor Vehicles, the leasing and servicing of Covered Motor Vehicles, or both.
- A “**Covered Motor Vehicle**” means any self-propelled vehicle designed for transporting persons or property on a public street, highway, or road.
 - Express exceptions include:
 - ❖ (1) Recreational boats and marine equipment;
 - ❖ (2) Motorcycles, scooters, and electric bicycles;
 - ❖ (3) Motor homes, recreational vehicle trailers, and slide-in campers; or
 - ❖ (4) Golf carts.



FTC CARS Rule – Mandated Disclosures



Offering Price



Add-Ons Not Required



Total of Payments and Consideration for a Financed or Lease Transaction



Monthly Payments Comparison

Disclosing the Offering Price

(1) Offering Price

- Defined as “*the full cash price for which a Dealer will sell or finance the Vehicle to any consumer, provided that the Dealer may exclude only required Government Charges.*”
- Must be disclosed in
 - (1) any ad that references a specific vehicle;
 - (2) any monetary amount or financing term; and
 - (3) any communication with a consumer regarding a specific Vehicle, including the first response to a consumer inquiry.
- The Offering Price would include:
 - Charges for a preinstalled add-on or require any consumer to pay for an add-on to purchase or finance the vehicle.
- The Offering Price **cannot be based on:**
 - Discounts or rebates that are not available to “any consumer,” including rebates contingent upon the use of a certain financing company or upon qualifying for any other rebate.
 - Required down payments amount to sell or finance the vehicle.

Mandatory Disclosures – Add Ons

(2) Add-Ons That Are Not Required

- Add-Ons means “*any product(s) or service(s) not provided to the consumer or installed on the Vehicle by the Vehicle manufacturer and for which the Dealer, directly or indirectly, charges a consumer in connection with a Vehicle sale, lease, or financing transaction.*”
- Dealers must disclose that the Add on is not required, and the consumer can purchase or lease the Vehicle without the Add-on, if true.

Add-On List – **NOT REQUIRED**

- FTC decided **not** to finalize the provision that would have required all dealers to disclose an itemized menu of all optional add-on products and services along with prices, or price ranges.

Prohibited Charges for Add-Ons



- **Any item without Express, Informed Consent.** Such consent means “*an affirmative act communicating unambiguous assent to be charged, made after receiving and in close proximity to a Clear and Conspicuous disclosure.*”
- **Clear and Conspicuous:** A manner that is difficult to miss (i.e., easily noticeable) and easily understandable.
- Disclosures include:
 - What the charge is for and 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 is **NOT** consent:
 - ❖ A signed or initialed document by itself; and
 - ❖ Prechecked boxes
- **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.

Additional Mandatory Disclosures

(3) Total of payments and consideration for a financed or lease transaction

- Dealers must disclose the total amount the consumer will pay to purchase or lease the Vehicle at that monthly payment after making all payments as scheduled.
- FTC calls out that dealers cannot avoid this disclosure requirement by making only implied reference to monthly payments, for example, by referring to a regular periodic payment made on a different installment basis (e.g., a biweekly payment) to indirectly illustrate a consumer's monthly payment obligations.
- If the total amount disclosed assumes the consumer will provide consideration (for example, in the form of a cash down payment or trade-in valuation), the Dealer must disclose the amount of consideration to be provided by the consumer.

(4) Monthly payments comparison

- When making any comparison between payment options, Dealers must disclose that the lower monthly payment will increase the total amount the consumer will pay to purchase or lease the Vehicle, if true.

FTC CARS Rule – Prohibited “Misrepresentations”



Advertising and Marketing



Pricing and Payments



Add-on Products or Services



Final Transactions

**Combating
Auto
Retail
Scams**

**New CARS Rule will
protect car buyers
and honest dealers.**

Learn more: [ftc.gov/carsrule](https://www.ftc.gov/carsrule)

 **FEDERAL TRADE
COMMISSION**

Misrepresentations – Advertising & Marketing

- These provisions **do not** require affirmative disclosures. Only prohibits misrepresentations.
- **The availability of Vehicles at an advertised price.**
 - Dealers may not make claims about the availability of vehicles at an advertised price *without a reasonable basis at the time the claims are made.*
 - Prohibits dealers from promoting low prices for specific vehicles, but then later misrepresenting, among other things, that the advertised vehicle is no longer available or no longer available at the advertised price.
- **The availability of any rebates or discounts that are factored into the advertised price but not available to all consumers.**
 - Not limited to any particular type of rebate or discount.
 - Examples include where an advertised rebate or discount applies only to the most expensive version of a particular vehicle make and model or is only available to consumers with high credit scores.

Misrepresentations– Advertising & Marketing (cont.)

- **Consumer reviews.** 
 - Applies to all reviews or ratings, in any format or wherever displayed
 - Applies to third-party relationships. For example, if a dealer were to pay a third party or consumer to post positive reviews.
- **Affiliation, endorsements, and approvals.**
 - Specifically calls out advertised relationships with the U.S. government or any federal, state, or local government agency, unit, or department, including the United States Department of Defense or its Military Departments.
- **Sweepstakes and prizes.**
 - Misrepresentations about whether consumers have won a prize or sweepstakes harm consumers.

Misrepresentations – Pricing, Payments, Financing

- 1. The costs or terms of purchasing, financing, or leasing.**
 - E.g., dealers would make misrepresentations by including on a consumer's application that is submitted to a third-party financing institution:
 1. Consumer income information that is different from what the consumer has stated to the dealer that the consumer actually earns;
 2. Representing a different down payment amount than the amount the consumer has actually provided;
 3. That the vehicle is being sold or leased with certain add-on products.
- 2. Whether or when a Dealer will pay off some or all of the financing or lease on a consumer's trade-in Vehicle.**
- 3. Preapproval or guarantees for any product, service, or term.**
- 4. Any Information on or About a Consumer's Application for Financing.**

Misrepresentations – Add-on Products or Services

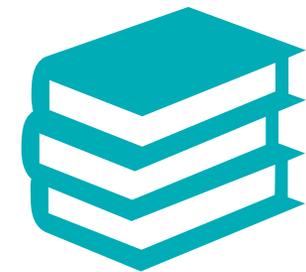
- **Any costs, limitation, benefit, or any other aspect of an Add-on Product or Service.**
 - No mandate for boilerplate, set list of disclosures.
 - Prohibiting misrepresentations about:
 1. Whether or not a car has add-ons already installed.
 2. The consumer's right to cancel add-on products or services.
 3. Whether add-ons are required in order to purchase or lease a vehicle.

FTC CARS Rule – Final Transactions

- **When the transaction is final or binding on all parties.**
- **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.**
- These two provisions work together and cover practices such as “spot delivery” and “yo-yo financing.”
 - These are where a dealer delivers a vehicle to a consumer on the spot before the financing or leasing has been finalized, leads a consumer to believe that the transaction is final, and then later directs the consumer to return the vehicle and engages in certain tactics, such as failing to return the consumer's trade-in vehicle while refusing to honor the finance or lease transaction, or pressuring the consumer to enter into a new transaction.

Recordkeeping Requirements

- Any Covered Motor Vehicle Dealer must create and retain, **for a period of 24 months** from the date the record is created, all records necessary to demonstrate compliance with the CARS Rule, including the following records:
 1. Advertising and marketing;
 2. Sales scripts, training materials;
 3. Purchase orders, financing and lease documents;
 4. Written communications relating to sales, financing, or leasing between the Dealer and any consumer who signs a purchase order or financing or lease contract;
 5. Records demonstrating that Add-ons in consumers' contracts meet the Rule's requirements; and
 6. Copies of all written consumer complaints relating to sales, financing, or leasing, inquiries related to Add-ons, and inquiries and responses about Vehicles.



Consumer Financial Protection Bureau

Two New Proposed Rules

CFPB Proposes Rule to Close Bank Overdraft Loophole that Costs Americans Billions Each Year in Junk Fees

English | [Español](#)

Rule would require nation's largest banks to apply longstanding consumer protections, including interest rate disclosures, to overdraft loans

JAN 17, 2024

CFPB Proposes Rule to Stop New Junk Fees on Bank Accounts

English | [Español](#)

Proposed rule would prohibit non-sufficient funds fees on transactions declined right at the swipe, tap, or click

JAN 24, 2024

CFPB Overdraft Loans Proposed Rule

Who Does it Cover?

- Applies to insured financial institutions with more than \$10 billion in assets, which covers approximately the 175 largest depository institutions in the country.

What Does the Proposed Rule Regulate?

- An overdraft loan allows access to a small amount of money to help cover an overdraw on a consumer's account.
- Would close a loophole that exempts overdraft lending services from longstanding provisions of the Truth in Lending Act and other consumer financial protection laws.
 - For example, financial institutions would be required to disclose interest rates and fees on overdraft loans.
- The CFPB expects the Proposed Rule would become effective October 1, 2025.

CFPB NSF Fee Proposed Rule

Who Does it Cover?

- Applies directly to “very large financial institutions,” defined as insured depository institutions or insured credit unions that have total assets of more than \$10 billion, and their affiliates, which is any person controlled by or under common control of the insured depository institution.

What Fees are Regulated?

- Regulates how financial institutions may charge the consumer an insufficient funds fee (sometimes referred to as an “NSF fee”).
 - An NSF is a charge assessed by a financial institution for declining a consumer’s attempt to withdraw, debit, pay, or transfer funds from their account due to insufficient funds.
- The Proposed Rule focuses on transactions that are instantaneously declined.
 - Such fees include declined debit card purchases and ATM withdrawals, as well as some declined peer-to-peer payments (as opposed to when an ACH or check is declined).
- Would not apply to overdraft fees that may also be charged when a consumer’s account has insufficient funds, but where the transaction is not declined by the financial institution.

State Laws

California, Massachusetts, Pennsylvania

California Law Targeting Drip Pricing - SB 478

- Effective July 1, 2024.
- Amends the California Consumers Legal Remedies Act (CLRA) to generally prohibit “junk fees” and “drip pricing” by making “unlawful advertising, displaying, or offering a price for a good or service that does not include all mandatory fees or charges other than taxes or fees imposed by a government on the transaction.”
- Penalties include actual damages of at least \$1,000 per violation, an order enjoining the violative business practice, restitution, punitive damages, and attorney fees.



Other States Considering Fee Disclosure Action

Massachusetts - Proposed Regulations 940 C.M.R. 38.00: Unfair And Deceptive Fees

- Would prohibit “misrepresenting or failing to disclose Clearly and Conspicuously, at the time of the initial presentation of the price of any Product, or any subsequent presentation thereafter, the Total Price of that Product; and
- Misrepresenting or failing to disclose Clearly and Conspicuously, at the time of the initial presentation of the price of any Product, or any subsequent presentation thereafter”

Pennsylvania - Pay the Price You See Act, House Bill 636.

- Would prohibit any “advertising, displaying or offering a price . . . that does not clearly and conspicuously display the total price at the point in the shopping experience when the consumer is first shown the product or service, including each mandatory fee or charge that does not vary by consumer choice, or that does not clearly or conspicuously display each mandatory fee or charge associated with the sale of the product or service prior to purchase, except for taxes imposed by a government entity.”

Best Compliance Practices

Compliance Tips

- ❖ Monitor federal and state laws governing disclosures to ensure compliance and be aware of the patchwork of legislation, rules, and regulations.
- ❖ Assess your company's fee structure and how and when it is disclosed to consumers to avoid unnecessary regulatory risk.
- ❖ Review company advertising, including third-party advertisers.
- ❖ Review training, compliance, and recordkeeping systems.
- ❖ Track litigation that might alter the effective dates or how courts interpret the governing laws and regulations.

Questions? Contact Us



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