

***Moving the Metal: The Auto Finance Podcast – The CARS Rule*****Hosts: Brooke Conkle and Chris Capurso****Recorded: 7/7/24****Date Aired: 7/16/24****Brooke Conkle:**

Welcome to *Moving the Metal*, the premier legally-focused podcast for the auto finance industry. I'm Brooke Conkle, a partner in Troutman Pepper's Consumer Financial Services Practice Group.

**Chris Capurso:**

And I'm Chris Capurso. I'm an associate in Troutman Pepper's Consumer Financial Services Practice Group.

**Brooke Conkle:**

Today, we're going to talk about the FTC's proposed CARS Rule. But before we jump into that topic, let me remind you to please visit and subscribe to our blogs. We have two great ones that may be of interest to you, [TroutmanPepperFinancialServices.com](https://www.troutmanpepper.com/consumer-financial-services) and [ConsumerFinancialServicesLawMonitor.com](https://www.consumerfinancialserviceslawmonitor.com).

Also, let me remind you about our other podcast that you might find interesting. We also have [The Consumer Finance Podcast](#) which, as you might guess, is all things consumer finance-related; [FCRA Focus](#), a podcast dedicated to all things credit reporting; [Unauthorized Access](#), a deep dive into the personalities and issues in the privacy, data, and cyber security industry. Finally, [Payments Pros](#), a great podcast focused exclusively on the payments industry. All of these insightful shows are available on your favorite podcast platform, so please check them out.

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As I mentioned, today we're going to talk about the FTC's CARS Rule. Chris, tell us a little bit about how we got here. What is the background and policy of the CARS Rule?

**Chris Capurso:**

Yes. Before you had that last little caveat, how did we get here, I was like, Well, we did those special episodes on *The Consumer Finance Podcast*, and now we're here with microphones and headphones and all this official stuff to let us record our thoughts on the auto finance

industry. But as it relates to this topic, which is what I'm sure everybody actually wants to hear about, it's been a somewhat long road, no pun intended, for the CARS Rule.

There's been a lot of – and we've discussed this quite a bit in our five-episode series, free advertising for that five-episode series. We've discussed a lot of these different things in their own individual components, but a big one is state and federal regulator focus on optional add-on products. We discussed gap. We discussed vehicle service contracts, things like that, and the fact that state and federal regulators have been focusing on these types of things over the last couple years, these ancillary products with a vehicle sale.

Second, the war on fees which is everybody's favorite buzzword in the regulatory space, how every regulator seems to be having some kind of initiative to go after hidden fees or fees that may not necessarily tie to the transaction which the consumer is currently partaking.

Number three, this rule came about from the FTC, but it also has cross enforcement with the CFPB. The notice of proposed rulemaking was actually issued now just over two years ago in June 2022. The effective date has stayed for the moment pending the resolution of some legal challenges, which I'll discuss a little bit later.

But, In the meantime, Brooke, what is the rule? I know we've had webinars. We've had podcasts about this. But it's always good to be reminded of what a giant rulemaking entails. What exactly are the major requirements and prohibitions of the CARS Rule?

**Brooke Conkle:**

That's exactly right, and there are some big ones. For the major requirements of the CARS Rule, one of the guiding lights in this rule is an idea of an offering price. The FTC defines that as the full cash price for which a dealer will sell a vehicle. That full cash price must include all fees and mandatory add-ons and can only exclude required government fees and taxes. Doc fees, any sort of add-on that could be considered mandatory has to be included in that offering price.

Additionally, mandatory monthly payment disclosures, essentially trying to educate a consumer how much he or she is going to pay for a vehicle, clear and conspicuous and express informed consent along with add-ons. Those add-ons have to be clearly and conspicuously disclosed. What are they? What are they for? How much do they cost? Dealers must obtain express informed consent for those add-ons. We've looked at the rule a number of times, and I don't think anybody can get express informed consent in the way defined by the FTC without a separate document that expresses the consumer's full buy-in to an add-on product.

And then the fourth major requirement of the rule is a really kind of quiet requirement that frankly may be the most burdensome, frankly, and it's the recordkeeping requirements. Two years of recordkeeping that really can go from anything from the standard documents that a dealer would retain, the buyer's order, the retail installment sales contract, but also communications with consumers, text messages. Are those going to be included in the recordkeeping requirements? According to the FTC, probably so.

So, a lot going into the major requirements of the CARS Rule but also major prohibitions. A lot of these are some that are fairly self-explanatory for misrepresentations. Fine print and speed disclosures are out. Dealers cannot not advertise vehicles that are not available for sale to a

standard bait-and-switch kind of operation. That's out. Fake reviews about either a dealer or the vehicles, those are prohibited. Then finally, misrepresentations about repossessions. How can repossessions happen? When can they not happen? Any sort of the material details about a repossession, those misrepresentations are prohibited.

Third, there's valueless add-ons, and the FTC used really specific examples about what a valueless add-on would be such as nitrogen-filled tires, where the nitrogen composition of the air is no different than the air that we breathe. But also add-ons such as gap insurance, where a consumer likely wouldn't be able to take advantage of gap insurance. Those are prohibited. Then finally, pre-printed forms where the add-ons have been pre-selected. They've already been checked on that pre-printed form. Those are now prohibited.

Chris, tell us a little bit about the legal challenge and what's going on in the Fifth Circuit.

**Chris Capurso:**

Sure. Before you even heard Brooke finish that sentence, you hear legal challenge, and your guess is probably that it's going to be the Fifth Circuit considering everything that has gone on in especially the financial services regulatory space but in others as well. That seems to be the battleground du jour for any of these types of challenges. The specific challengers in this case are NADA and TADA, which is the National Automobile Dealers Association and the Texas Automobile Dealers Association. They're both challenging the rule.

And again, in the Fifth Circuit where the challenge is, the FTC has agreed to stay that compliance deadline, as I mentioned before, pending the resolution of this challenge in the Fifth Circuit. The FTC's initial brief in response to NADA and TADA's suit was due back in May, and we have it now. Not only do we have that but we also have NADA and TADA's response to that brief. There's been quite a bit that's happened just in the last two months or so where we have the initial complaint, we have the response, and then we have the response to the response. There are a lot of legal arguments flying around, a lot of data arguments flying around.

Brooke, what are those legal arguments like?

**Brooke Conkle:**

Yes. Unfortunately, for those of us who like really thrilling stories, the legal arguments themselves are not going to be page-turners. These are very technical arguments about whether the FTC was required to provide an advanced notice of proposed rulemaking or whether the notice of proposed rulemaking was sufficient. Really, this goes to the tension between the FTC's regulations and the Dodd-Frank Act.

The FTC is saying, "We have the authority that we need under Dodd-Frank." NADA and TADA are saying, "Actually, no. There needed to be an advanced notice of proposed rulemaking." As you read the briefing which, as Chris mentioned, is now completed, really NADA and TADA are really focusing on this procedural challenge that this procedurally is improper. But they're not giving short shrift to the data that the FTC used to support the need for the rule.

Frankly, one of the best lines in NADA's opening brief was a line. I don't know whether it's to credit a partner or an associate who was burning the midnight oil on this brief. But a line in it

says, "This rule is a solution looking for a problem." Really, NADA and TADA, certainly NADA and TADA, their first line of defense is that procedural challenge, but they're also attacking the data that the FTC used to support this rule. Now, Chris, what are some of those arguments like?

**Chris Capurso:**

Well, reading through the rule, there are some very, I'll say, interesting arguments. One of my favorites is from the FTC saying the rule imposes minimal administrative burdens, which just based on everything you just said seems like an absolutely insane statement considering record retention, having to change dealer management systems to account for all these different things. Just on its face, however you feel about the rule pro or against, minimal is an interesting choice of words.

Another really interesting thing I found was the cost-benefit analysis. Anyone who's read these rules, you usually see these where it's like, Oh, well sure it's going to cost something to business, but the benefits to consumers just outweigh. Each side came up with their own study for this, and the numbers could not be more opposed, which is somebody's wrong. There's no missed assumption here. I mean, somebody is wrong.

The FTC estimated that over a 10-year period, the rule confer 13.4 billion in benefits by saving consumers time while shopping for their cars. By contrast, the FTC estimated that the rule would only impose \$1.1 billion in costs on dealers over that same 10-year period. Now, keep those numbers in mind; \$13.4 billion in savings for consumers, \$1.1 billion in costs for dealers.

Now, we turn to the study that NADA and TADA used in their press release from the Center for Automotive Research which says that it will increase costs on dealers by \$24.1 billion, which they say consumers and small business dealers will have to absorb. On top of that, it says that it will actually cost consumers \$1.3 billion per year because they say it's actually going to add time to the car-buying process, so very different numbers. We have \$13.4 billion in savings for consumers from the FTC versus \$1.3 billion in cost to consumers from NADA and TADA and then \$1.1 billion in costs on dealers from the FTC, \$24.1 billion in costs by NADA and TADA. Both of these are over the same 10-year period. Like I said, they could not be more opposed. They could not be more of an opposite.

Brooke, what are your initial thoughts on that? I mean, I just keep going back to how staggering the differences are.

**Brooke Conkle:**

That's exactly right. One of NADA and TADA's arguments was that when you look at the FTC's rationale for this rule, they cited a certain number of complaints that they receive on a yearly basis. It was a pretty staggering figure of thousands and thousands of complaints that they receive. But if you compare the number of complaints to the overall number of vehicle sales in the United States on an annual basis, then it worked out to only less than one percent of all vehicle sales were going to drive a complaint to the FTC and to its partners.

That's a pretty staggering figure, and that really was driving the line that I mentioned earlier about this is a solution in search of a problem. The monetary figures are eye-popping, but who's right? Is this going to create a benefit for consumers that's going to outweigh the burden on

dealers? Are dealers just going to then in turn impose that burden right back on consumers? Is this a wash in the end? Who wins?

**Chris Capurso:**

As you said, I mean, there are a lot of different numbers floating around, and some might say like, "Okay, you mentioned that there's less than one percent of all automobiles sales represented by the complaints that drove this rule, and yet 100% of dealers and vehicle sales are going to be subjected to this rule." One might ask why is this new rule even going to be put into place. There's quotes about new rule because the FTC doesn't necessarily believe this is a new rule, right?

**Brooke Conkle:**

That's exactly right. What the FTC makes very clear both in the commentary to the CARS Rule and in their response brief in the Fifth Circuit is the FTC takes a firm position that the CARS Rule is just a codification of existing law, that this has been the FTC's standard for a number of years, that these disclosures are already required. It's just that the FTC is laying this out in a unified fashion in the CARS Rule.

So, with that in mind, what is next for auto finance companies? Really, there are two things that we see on the horizon. One, new compliance challenges with new paperwork in a deal file. This is presuming that the CARS Rule survives the Fifth Circuit challenge intact without any changes. If that happens, there's going to be new forms submitted with each deal file. How do you intake those forms? How do you audit those forms for compliance with the CARS Rule? All of these are going to be new challenges for auto finance companies.

Then the second issue that we see coming down the pike is the need for auto finance companies to shore up their dealer agreements. It's going to be the first line of defense and a consumer's challenge to a vehicle sale. Really working out the language of those dealer agreements and making sure that they are dynamic enough to survive the new requirements of the CARS Rule.

Third, we also see the junk fee rule on the horizon. For dealers, even if the CARS Rule is totally struck down, we still have the specter of the junk fee rule which has a specific carve out for dealers that is only operative if the CARS fee rule goes into effect. If it does not, then dealers are going to have to deal with the junk fee rule. This stuff is coming your way, regardless of whether it's in the CARS Rule or the junk fee rule.

Finally, what about Loper Bright? How does the Supreme Court's decision striking down Chevron deference change all of this analysis? Frankly, that's something that the Fifth Circuit is going to have to deal with when it rules on the NADA and TADA petition. Frankly, there may be more briefing that's coming our way. We'll wait to see what the Fifth Circuit does with the CARS Rule. But for the time being, as Chris mentioned earlier, the effective date has been stayed nationwide pending the Fifth Circuit's decision. Of course, once that comes down, we will certainly be around to talk about it.

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**Chris Capurso:**

We sure will with this new auto finance podcast. And with that, we're going to wrap it up for the inaugural edition of *Moving the Metal: The Auto Finance Podcast*. Thank you so much for being our first audience to tune in. Tell your friends. Tell your families. Tell everybody about this podcast. Don't forget to check out our blogs where you can subscribe to the entire blog or just specific content that you find most useful. Our big blogs are the [ConsumerFinancialServicesLawMonitor.com](http://ConsumerFinancialServicesLawMonitor.com) and [TroutmanPepperFinancialServices.com](http://TroutmanPepperFinancialServices.com).

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For Brooke and I, we'll see you next time.

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