

B U S I N E S S A D V I S O R Y

TO: Alaska Car Dealers

FROM: Fair Business Practices Section
 Alaska Attorney General's Office

DATED: January 11, 2000

RE: New car price-comparison advertising and other related
 issues.

The Attorney General's Office recently conducted an extensive state Consumer Protection Act review of price comparison advertising by new car dealers in Alaska and other related advertising issues, as well as the applicable laws, regulations and policies of other states regarding these practices. Based upon its review, the Attorney General's Office hereby issues this business advisory.

I. New Car Price-Comparison Advertising

A. Invoice advertising prohibited

One problem area noted in our review is the advertising of new cars in the print, television and radio media that compares the new car sales price with the "factory invoice," "dealer cost," "dealer invoice," and other terms of similar import. Many consumers are unaware that holdbacks, incentives, dealer rebates and other types of refunds from manufacturers can reduce the dealer's actual cost of the vehicle well below the "factory invoice" amount. The Attorney General's Office has concluded, therefore, that use of the term "factory invoice," "dealer cost," "dealer invoice" and other terms of similar import in new automobile advertisements has a "tendency or capacity to mislead or deceive" the public within the meaning of State of Alaska v. O'Neill Investigations, Inc., 609 P.2d 520, 534-535 (Alaska 1980).

Several states prohibit the use of these terms in new car advertising because such terms are inherently misleading and not

entitled to protection under the First Amendment. See e.g., Barry v. Arrow Pontiac, Inc., 100 N.J. 57, 494 A.2d 804 (New Jersey 1985)(use of terms "dealer invoice," "dealer cost," and "inventory pricing" likely to mislead consumers); Commonwealth v. Fall River Motor Sales, Inc., 409 Mass. 302, 565 N.E.2d 1205 (Mass. 1991)(use of terms "dealer's cost," "invoice price," "wholesale," and "factory billing," constitutes unfair or deceptive acts or practices); Adams Belton Ford v. Missouri Motor Vehicle Commission, 946 S.W.2d 199 (Missouri 1997)(use of "invoice price," "dealer cost," "factory invoice," and other terms of like import is prohibited because consumers equate invoice with cost which is misleading); and Joe Conte Toyota v. Louisiana Motor Vehicle Commission, 24 F.3rd 754 (5th Cir. 1994)(use of the term "invoice" is inherently misleading).

Accordingly, the Attorney General's Office concludes that new car advertisements should not utilize terms such as "factory invoice," "dealer cost," "dealer invoice," and so forth. The Attorney General's Office intends to propose a regulation defining the use of such terms in new car advertisements as an unfair and deceptive trade practice.

B. Manufacturer's Suggested Retail Price ("MSRP") Advertising

Allowed

Advertising that references the manufacturer's suggested retail price ("MSRP," also known as the "factory sticker" price), is generally permissible with some precautions. Some car dealers have advertised new cars by comparing the current selling price with the MSRP indicating in the ad that the difference between the MSRP and the selling price is a savings to a consumer or is a reduction in price.

The Attorney General's Office has concluded that unless the dealer or its competitors have made regular or substantial sales at the MSRP, advertisements which indicate that the difference between the MSRP and selling price are a savings to a consumer or reduction in price are deceptive or misleading because consumers do not realize the savings represented in the advertisement. See e.g., Federal Trade Commission "Guides Against Deceptive Pricing" at 16 C.F.R. section 233.3 (a); Arizona Attorney General Opinion, Dec. 12, 1995. For a discount or reduction in price to be real, the discount or reduction must be figured from the dealer's bona fide regular selling price for the vehicle being advertised. See 9 AAC 05.020 (a)(1).

If a dealer has made regular or substantial sales at the

MSRP, a dealer may advertise that the difference between the MSRP and the selling price is a savings to a consumer or is a reduction in price. If a dealer has not made regular or substantial sales at the MSRP, the dealer may reference the MSRP in the text of an ad, but may not claim that the difference between the MSRP and the selling price is a savings to the consumer or is a reduction in price, nor may the dealer use the MSRP to create the deceptive impression that a special discount is offered.

For example, if true, it would be lawful to say "Our truck prices are always \$500.00 under MSRP"; or "MSRP - \$10,000, OUR PRICE \$9,500.". However, it is a deceptive practice to advertise discount claims such as "LIMITED TIME ONLY!!! \$500 below MSRP" when the car is normally sold at \$500 below MSRP; or "MSRP - \$10,000, OUR PRICE \$9,500 - YOU SAVE \$500!!!" if the dealer has not made regular or substantial sales at the MSRP from which a valid consumer discount can be claimed.

If the MSRP is referenced in an advertisement, the advertisement must disclose and identify the MSRP figure as such, and must also disclose that the MSRP may not be the price at which the vehicle is sold in the trade area. It is a deceptive practice to use fictitious "retail" or list" prices which are not in fact the MSRP referred to in federal law.

C. Former price comparisons - use caution

Another area of concern is the advertising of new cars by comparing the sales price with the dealer's own former price for the vehicle. One example of this advertising technique is to compare the "new price" of the vehicle with its "sale price" wherein the "new price" contains an additional dealer mark-up ("ADM") of several thousands of dollars above and beyond the vehicle's MSRP. If the dealer has not made substantial or regular sales at the so-called "new price," the use of the dealer's "new price" as a reference price would be deceptive or unfair because the "bargain" being advertised is a false one. See e.g., Federal Trade Commission Guides Against Deceptive Pricing at 16 C.F. Section 233.1; State of Alaska v. O'Neill Investigations, Inc., at 534-535; AS 45.50.471(b)(10); 9 AAC 05.020(1).

II. Related Advertising Issues

A. Additional dealer charges

Advertising vehicle sales prices that do not include all dealer charges is also a problem. Frequently, ads include small print

stating that the advertised price excludes other payments to the dealer. These additional payments are generally for dealer administrative or overhead costs such as preparing documents or servicing a vehicle to prepare it for delivery to the consumer.

There does not appear to be any rational basis for excluding any particular item of dealer overhead or administrative cost from an advertised price. Excluding a dealer's cost of preparing documents is not substantively different than excluding any other dealer cost integral to the transaction. In reality, these charges are merely additional payments to the dealer for services that are an essential part of the deal. Excluding them from the advertised sales price has a tendency to mislead or deceive consumers as to the actual price of the vehicle.

The document preparation fee, in particular, tends to mislead consumers. Frequently, the document fee is listed in the same small print that excludes vehicle-licensing fees from the sales price. Some dealers have even combined the two in advertisements which exclude "license and document" fees from the sale price. Based on this proximity to licensing fees in advertisements, a consumer could reasonably infer that the document fee is a payment to a government agency.

An advertised sale price should include all charges known to the dealer except for the actual amount of payments on behalf of the consumer to third parties or additional equipment ordered by the purchaser. See e.g., Wash. Admin. Code § 308-66-152(4)(k); Conn. Agencies Regs § 42-110b-28(b)(6). Items which typically must be included in the advertised sale price are delivery or shipping charges imposed by the manufacturer or distributor of the vehicle, dealer administrative costs and overhead, dealer "handling" or "preparation" charges for servicing the vehicle prior to delivery to the consumer, and dealer document preparation costs.

This rule does not prohibit a dealer from actually charging a document preparation fee or any other fee the dealer chooses to impose. It merely requires that such fees be included as part of the advertised price of the vehicle. The rule also does not prohibit a dealer from treating the charge as a separate item for its own internal accounting or commission purposes.

B. Permanent fund dividend deals

Some vehicle sales promotions are based on the Alaska Permanent Fund Dividend program. One type of promotion offers a

dealer discount that matches or doubles the customer's downpayment of an amount that approximates the permanent fund dividend. These promotions are sometimes called "double dividend deals." There are two aspects of such promotions that have a potential to mislead consumers.

The first is the amount of the discount when an ad offers to "match" or "double" the customer's dividend. In some cases, dealers have advertised "double dividend deals" that offer discounts that are substantially below both the current dividend amount and the amount of the prior year's dividend. The Attorney General's Office believes that advertising which offers to match or double a permanent fund dividend is misleading if the amount of the discount is not closely related to the amount of the dividend. Therefore, any discount that is advertised as matching or doubling the permanent fund dividend must be in an amount equal to the dividend amount for the current or prior year, which may be rounded down to the nearest hundred dollars.

This rule does not prevent dealers from conducting sales aimed at the dividend program or making references to the program in their sale advertising. For example, "PFD sale," "dividend savings," "PFD special," "dividend days sale," "dividend deal," and "PFD offer" are all acceptable ways of referencing the PFD program in sales advertising.

The other practice that has the potential to mislead or deceive is the advertising of a sale price that includes the consumer's dividend in the calculation of the sales price or the savings to the consumer from the promotion. For example:

\$18,000	MSRP
-\$1,700	Dividend
<u>-\$1,700</u>	Doubled Dividend
= \$14,600	

This type of advertisement leaves the impression that the cost to the consumer is \$14,600 and not the \$16,300 at which the vehicle is actually being advertised. We believe that any dividend deal advertisement that includes the use of the consumer's payment of a dividend amount to indicate or suggest a reduction in the sale price is misleading and a violation of the Act.