National Alliance of Buy Here Pay Here Dealers
October 23-25, 2017
Advertising Do’s and Don’ts
Terry O’Loughlin, Eric Johnson, Allen Denson, & Nora Udell
Your Advertising:

1. What it is and how to do it right.

2. Why you should do it right.

3. What happens when you do it wrong.
Advertising: What it is and how to do it right.

• An Advertisement is a notice given in a manner to attract public attention. In any medium.

• Avoid deception. It’s easier said than done.
Advertising: What it is and how to do it right.

- An act or practice is **deceptive** if there is a representation, omission or practice that is likely to mislead reasonable consumers in a material way.

- **Use this Basic Test:** Does the advertisement have the tendency or capacity to mislead the consumer?
Advertising: What it is and how to do it right.

• Asterisks and Footnotes
  o Contradicting or confusing the major message with asterisks and footnotes the ad can be made deceptive.

• Print Size
  o Using print size to hide important information such that it is illegible.
Advertising: What it is and how to do it right.

• Color Contrasts
  ○ Utilization of color contrasts can prevent a consumer from seeing and understanding the advertisement.

• Photographs and Illustrations
  ○ Portraying a different model or vehicle in the ad, than the one which is being sold, is clearly deceptive.
Advertising:
What it is and how to do it right.

• "Sales"
  • “discount,” “price cut,” “bargain,” “reduced,” or even “on sale,”
  • Dealer must establish that the new offered price is materially lower than what he offered recently and he may avoid a violation of advertising law.

• “Tent Sale” or “Liquidation Sale” or “Public Sale” or “Going Out of Business Sale”
  • May have state-specific definitions.
  • Must be true
Advertising: What it is and how to do it right.

• Using the word “Free”
  “Free warranties” that are really built into the price of the car. “Free” offers that have conditions are not free!

• Bait & Switch
  Advertising a car at a certain price that isn’t available or a new vehicle is pictured, but the price stated in the ad is for a used vehicle. Many examples of bait & switch.
Advertising: What it is and how to do it right.

ZERO DOWN

• Use of the terms “No Money Down” or “Zero Down” are prohibited in some states.
• Some states require a disclosure if other fees (tax, title, license) must be paid when the contract is signed.
• Other states—no money down means the customer has NOTHING due at signing.
Advertising: What it is and how to do it right.

• Comparisons to other prices in your Market:
  “Lowest Prices” or “Guaranteed Prices”

• “Up to” or “as much as” or “as low as” claims
  “Rates as low as 5%”

• Can you SUBSTANTIATE your claims?
Advertising: What it is and how to do it right.

Disclaimers may not be sufficient to cure other deceptive acts/practices

“Our prices are 25% lower than the competitors”*

*only in Spokane, Washington

- If consumers are misled by your first communication with them, the fact that the misimpression is “cured” later in the transaction is not a defense (for example, a false claim in an advertisement is corrected later at the point of sale).
Advertising: What it is and how to do it right.

- **Use Plain Language** that could be understood by a reasonable person.
  - Use understandable language
  - Use a 10th grade reading level or lower.
  - Avoid technical language and dealer jargon/abbreviations.
Advertising: What it is and how to do it right.

Be Clear and Conspicuous
Your disclosures should be made in a way that is likely to be noticed, read, or heard.
Advertising:
What it is and how to do it right.

• Use the 4 P’s
• Prominence, Presentation, Placement, and Proximity to know if your disclosures are:
  • Large enough for customers to notice/read it?
  • In wording/format easy for ordinary consumers to understand?
  • In a place that consumers will notice/read it?
  • Near the claims that it qualifies?
Advertising: Why you should do it right.

• Your Regulators see your ads, just like everyone else.
• You have a lot of Regulators.
• Your Regulators have a lot of authority.
Advertising: Why you should do it right.

- FEDERAL
  - FTC
  - CFPB
  - UDAP / UDAAP
  - TILA & REG Z
  - CLA & REG M

- STATE
  - ATTORNEYS GENERAL
  - UDAP / UDAAP
  - FALSE ADVERTISING STATUTE OR REGULATION
Advertising: Why you should do it right.

**UDAAP** – Unfair Deceptive or Abusive Acts or Practices

- An act or practice is **Unfair** if: (1) it causes or is likely to cause substantial injury to consumers; (2) the injury is not outweighed by any offsetting consumer or competitive benefits; and (3) consumers could not have reasonably avoided the injury.
  - Billing or debiting an account for charges the consumer did not authorize.
  - Failing to take reasonable measures to protect consumers’ sensitive personally identifiable information.
  - Coercive debt collection or sales practices.
Advertising: Why you should do it right.

UDAAP – Unfair Deceptive or Abusive Acts or Practices

• An act or practice is **Abusive** if: (1) it materially interferes with the ability of a consumer to understand a term or condition of a CFPS; or (2) takes unreasonable advantage of (i) a lack of understanding, (ii) a consumer’s inability to protect his interest, or (iii) the consumer’s reasonable reliance.

• Not a lot of guidance on what Abusive acts are but meant to reach acts/practices that exploit the imbalance in market power between consumers and businesses.
Advertising: What happens when you do it wrong.

Herbies Auto Sales. In 2016, CFPB settled charges against a BHPH dealer including for advertising misleadingly low APRs without disclosing a required warranty, a payment reminder device, and other credit costs as finance charges. The dealer was ordered to pay $700,000 to harmed consumers (and a suspended civil penalty of $100,000).

July 2017, Massachusetts Attorney General settled charges including for bait and switch advertising -- the dealership paid $240,000 in civil penalties. $50,000 in customer restitution and won’t collect over $650,000 on loans that ended in repossession.
Advertising:
What happens when you do it wrong.

April 2017, New York Attorney General Eric T. Schneiderman announced settlements with 104 auto dealerships that sold vehicles subject to unrepaired safety recalls. As part of its investigation, the Attorney General’s office surveyed advertisements.

March 2017, FTC settled charges against Sage Auto Group for more than $3.6 million (“yo-yo” financing, packing of extra and unauthorized charges for add-ons or aftermarket products and services, making phony online reviews to tout dealerships, and discrediting negative reviews about the company's advertising, sales, & financing practices).
Advertising:
What happens when you do it wrong.

Make sure you’re compliant.

• Hire a compliance officer.
• Develop a well-functioning CMS.
• Use the same process/procedure for all new advertising campaigns in any medium. In print, on the radio, on TV, on the internet, on facebook, etc.
• Consult with counsel before you start a new advertising campaign.
Advertising:
What happens when you do it wrong.

Answer these questions from Tom Hudson:

• What ads are you running?
• There are federal laws and regulations that apply to your ads, but what state laws apply, and have you made the effort to comply with them?
• Who conducts the legal review for the ads you run, and what does your documentation of those ads look like?
• If you don’t use a lawyer for those legal reviews (and you should), is the person you are using trained and knowledgeable about state and federal advertising laws?
• Does that person maintain current copies of federal and state advertising laws and regulations, and have a systematic way of updating them to be sure that he or she is working from the latest revisions of them?
• Does that person regularly check with the websites of the Federal Trade Commission, the state Attorney General and your state dealer association for information relating to dealer advertising?
Resources

• NABD
• State Independent Auto Dealer Associations
• NADA & the free NADA Advertising Guide
• NIADA
• Vendors (but be very careful)
• Spot Delivery
• F&I Legal Desk Book
• Compliance Certification
More Resources

www.ftc.gov

Click on “Tips and Advice,” then “Business Center,” then “Advertising and Marketing”

Advertising and Marketing Basics
Online Advertising and Marketing
Telemarketing

Read Them!!!!!
QUESTIONS?
Contact Information

**Terry O’Loughlin**  
Reynolds and Reynolds  
7201 NW 80th Street  
Tamarac, FL 33321  
954.718.9266  
✉️ terrence_oloughlin@reyrey.com

**Allen Denson**  
Hudson Cook, LLP  
1909 K Street, NW  
4th Floor  
Washington, DC 20006  
📞 202.327.9718  
✉️ adenson@hudco.com

**Eric Johnson**  
Hudson Cook, LLP  
8524 S. Western  
Suite 114  
Oklahoma City, OK 73139  
📞 405.602.3812  
✉️ ejohnson@hudco.com

**Nora Udell**  
Hudson Cook, LLP  
7037 Ridge Road  
Suite 300  
Hanover, MD 21076  
📞 410.865.2321  
✉️ nudell@hudco.com