

STATE OF NEW MEXICO
OFFICE OF THE ATTORNEY GENERAL



HECTOR H. BALDERAS
ATTORNEY GENERAL

May 31, 2019

Representative Javier Martinez
javier.martinez@nmlegis.gov

Via Electronic Mail Only

Re: Fees Covered by Office of Attorney General Rules Governing Advertising and Sale of Motor Vehicles

Dear Representative Martinez:

You requested our advice regarding provisions of the Office of the Attorney General's rule governing the advertising and sale of motor vehicles, including certain fees charged by motor vehicle dealers. Rule 12.2.4 NMAC (1998, recompiled 2001) ("Rule"). In particular, you asked (1) for clarification of the Rule's requirements for dealer transfer services fees, documentary fees, and dealer preparation fees; and (2) whether those fees may include a profit component. Discussed below are the Rule's requirements for each of the fees mentioned in your request. The Rule does not permit a dealer to add any charges that represent additional dealer profit after the dealer negotiates the terms of a sale.

The OAG promulgated the Rule under the authority vested in the Attorney General by Section 57-12-13 of the New Mexico Unfair Practices Act, NMSA 1978, §§ 57-12-1 to -26 (1967, and as amended), and Section 57-15-7 of the New Mexico False Advertising Act, NMSA 1978, §§ 57-15-1 to -10 (1965, and as amended), "to issue and file all regulations necessary to implement and enforce any provision of" the acts. The purpose of the Rule is to address unfair and deceptive practices connected to the advertising and sale of motor vehicles. *See* 12.2.4.6 NMAC.

Two provisions of the Rule address the fees specified in your request. First, Section 12.2.4.21(A) makes it "an unfair or deceptive trade practice for a dealer to advertise the price of a new motor vehicle unless the advertised price is the full cash price for which the dealer will sell the vehicle." It states in relevant part:

The only charges that may be excluded from the advertised price are:

- (1) federal and state taxes;
- (2) license fees;
- (3) vehicle registration; and
- (4) dealer transfer service fees, if the advertisement clearly and conspicuously discloses, in close proximity to the advertised price, the amount of any such fee and that the fee is a dealer imposed fee; provided, however, that it is

an unfair or deceptive trade practice for a dealer to fail to disclose in writing to a buyer purchasing a vehicle on which no security interest is retained that the buyer may register the vehicle on his own without paying a dealer transfer service fee.

12.2.4.21(A) NMAC.

Second, Section 12.2.4.24 addresses fees added to a motor vehicle sales contract after the terms of the sale are negotiated. It provides:

A. It is an unfair or deceptive trade practice for a dealer to negotiate the terms of a sale and then add the cost of such items as extended warranty, credit life, dealer preparation, undercoating, etc., to the contract without the customer's knowledge and consent.

B. It is an unfair or deceptive trade practice for a dealer to use "documentary fee" or other similar term for any charges other than those actually required by law for processing of documents.

C. It is an unfair or deceptive trade practice for a dealer to negotiate the terms of a sale and then add the cost of "comptroller inventory adjustment", "floor plan, handling, overhead and advertising", or any other charges, however denominated, that represent additional dealer profit, are part of the overhead expenses of running a dealership, are necessary incidents of the sale of a vehicle, do not represent payment for a bona fide product or service or are fictitious.

12.2.4.24 NMAC.

1. Dealer Imposed Fees

A. Dealer Transfer Service Fee

Under Section 12.2.4.21(A) of the Rule, the advertised price of a new vehicle must be "the full cash price for which the dealer will sell the vehicle." This provision permits a dealer to exclude four specific charges from the advertised price of a vehicle, including "dealer transfer service fees," subject to the specified disclosure requirements. 12.2.4.21(A)(4) NMAC. The Rule does not define "dealer transfer service fees," but as commonly understood and used in the Rule, the term refers to the fees a dealer may charge for preparing the paperwork necessary to transfer vehicle title and registration to a purchaser who has paid for the vehicle up front. *See* MVD Vehicle Procedures Manual, ch. 6, § D, www.mvd.newmexico.gov (last visited on Jan. 4, 2019) (stating that a dealer transfer service fee "for document preparation and processing" is not part of a vehicle's price for purposes of the motor vehicle excise tax); 12.2.4.21(A)(4) NMAC (dealer must disclose "to a buyer purchasing a vehicle on which no security interest is retained that the buyer may register the vehicle on his own without paying a dealer transfer service fee").

B. Documentary Fee

Section 12.2.4.24(B) prohibits a dealer from using the term "documentary fee" for "charges other than those actually required by law *for processing of documents.*" 12.2.4.24(B) NMAC (emphasis added). It does not include fees for document preparation, which may be assessed as a component

of dealer transfer service fees. *See* 12.2.4.21(A)(4) NMAC. The provision is intended to prohibit a dealer from charging a “documentary fee” that exceeds the amount agencies such as the Motor Vehicle Division (“MVD”) may charge for processing title, registration and similar documents related to the sale of motor vehicles.

C. Dealer Preparation Fee

Section 12.2.4.24(A) precludes a dealer from negotiating the terms of a sale and then adding the cost of certain items to the contract, including “dealer preparation,” without the buyer’s knowledge and consent. The Rule does not define “dealer preparation,” but the term generally refers to the cost of preparing a vehicle for sale to a buyer such as those costs associated with removing plastic covering from the seats, vacuuming, adding fluids, for example. Under Section 12.2.4.24(A), a dealer may add charges for dealer preparation to a sales contract only with the buyer’s knowledge and consent. *See also* 12.2.4.24(C) NMAC, which prohibits a dealer from adding charges for, among other things, “necessary incidents of the sale of a vehicle.”

2. Profit Component

Section 12.2.4.24(C) makes it an unfair or deceptive trade practice for a dealer to “add the cost of ‘comptroller inventory adjustment,’ ‘floor plan, handling, overhead and advertising,’ *or any other charges, however denominated, that represent additional dealer profit*, are part of the overhead expenses of running a dealership, are necessary incidents of the sale of a vehicle, do not represent payment for a bona fide product or service or are fictitious.” (emphasis added.) In contrast to the dealer preparation and other charges covered by Section 12.2.4.24(A), the charges covered by Section 12.2.4.24(C) are absolutely prohibited and may not be added to a sales contract, even with the buyer’s consent.

Section 12.2.4.24(C) prohibits a dealer from adding “any other charges, however denominated, that represent additional dealer profit...” We believe the provision plainly prohibits a dealer from including a profit component within any otherwise permissible fee the dealer charges, including the dealer transfer service fee, documentary fee, and dealer preparation fee.

Your request to us was for a formal Attorney General’s Opinion on the matters discussed above. Such an opinion would be a public document available to the general public. Although we are providing our legal advice in the form of a letter instead of an Attorney General’s Opinion, we believe this letter is also a public document, not subject to the attorney-client privilege. Therefore, we may provide copies of this letter to the public.

Sincerely,



Sally Malavé,
Assistant Attorney General