

ELECTRONIC MEDIA & TECHNOLOGIES FOCUS GROUP REPORT



PREPARED FOR:

THE EXECUTIVE DIRECTOR OF THE COLORADO DEPARTMENT OF REVENUE

AND

THE COLORADO MOTOR VEHICLE DEALER BOARD

APRIL 2014

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EXECUTIVE SUMMARY

Electronic Media & Technologies Focus Group Report

As Director of the Auto Industry Division within the Colorado Department of Revenue, I am pleased to introduce the following report to the Executive Director of the Department, the Colorado Motor Vehicle Dealer Board and all interested parties. This report is a result of a comprehensive study project, primarily related to advertising within the motor vehicle and powersports industries. The report is the culmination of the work done by a focus group over the course of the past eighteen months. This “executive summary” will briefly describe the governmental agencies involved, the general statutory authority and/or basis for these agencies, the reasons and purpose for the formation of the focus group, and the members of the group.

Executive Director – Department of Revenue

The Executive Director is a cabinet level position, appointed by the Governor. One of the many duties and responsibilities of this position is the direct oversight of the Auto Industry Division. The position employs all necessary staff to discharge the duties imposed upon the Executive Director.

The powers and duties of the Executive Director, related to the Motor Vehicle/Powersports industry, are set forth in Colorado Revised Statutes (“C.R.S.”) at sections 12-6-105 and 12-6-505. In general, the Executive Director is charged with the administration, enforcement, and issuance or denial of the licensing of manufacturers and other manufacturer related licensees. The Executive Director may also promulgate rules necessary to carry out the functions and the duties of the office.

Colorado Motor Vehicle Dealer Board

The Colorado Motor Vehicle Dealer Board (“Board”) is statutorily created in section 12-6-103, C.R.S. The powers and duties of the Board are set forth in sections 12-6-104 and 12-6-504, C.R.S. In general, the Board is charged with the administration, enforcement, issuance and denial of the licenses of motor

vehicle/powersports dealers, motor vehicle salespersons, and wholesalers. The Board may also promulgate rules necessary to implement their statutory duties.

The Board consists of nine members appointed by the Governor, who all have been residents of the state for at least five years. Three members are new motor vehicle dealers, three are used motor vehicle dealers, and three are citizens at large, who cannot have a present or past financial interest in any motor vehicle dealership. Board members serve three year terms and may be re-appointed to one additional term.

Auto Industry Division

The Auto Industry Division (“Division”) is a cash-funded agency within the Colorado Department of Revenue. The Division works in concert with the Board and the Executive Director pursuant to both the provisions of C.R.S., Title 12, Article 6, Part 1 (Motor Vehicles) and Part 5 (Powersports Vehicles), the regulations and policies implementing those statutes, and ancillary Federal and other State laws and regulations. This sizable body of law governs the licensing and regulates the activities of the motor vehicle and powersports industries.

The Division interacts with the regulated industry and the general public in furtherance of the legislative intent declared in sections 12-6-101, and 12-6-501, C.R.S.

The Division’s mission is to regulate the Motor Vehicle and Powersports Industry with balanced emphasis on Education, Compliance, and Enforcement of applicable laws and regulations. The Division strives to regulate with fundamental fairness by ensuring that three key components are the primary focus:

- To educate and protect consumers;
- To treat applicants and licensees fairly, professionally, courteously and efficiently;
- To foster an honest and healthy industry within the State of Colorado and to ensure consumer confidence for the manufacture, distribution and sale of all vehicles within the Division’s jurisdiction.

Organic Statutory Scheme

Sections 12-6-101, et seq. and sections 12-6-501, et seq. C.R.S., collectively constitute the organic statutory scheme under which the Division, the Board, and the Executive Director, in its own right, license, oversee, enforce and otherwise regulate the various entities involved in the motor vehicle and powersports industries in Colorado. Consumer protection, in a myriad of contexts (e.g., vehicle sale/resale, financing, titling, warranty-related activities, and other contracted matters), is the fundamental purpose of the statutory scheme. Protection of the interests of Colorado franchise dealerships in their interactions with manufacturers is another legislative purpose. With that said, it is imperative to always consider the legislative declaration contained in section 12-6-101, C.R.S., which is as follows:

- (1) The general assembly hereby declares that:
 - (a) The sale and distribution of motor vehicles affects the public interest and a significant factor of inducement in making a sale of a motor vehicle is the trust and confidence of the purchaser in the retail dealer from whom the purchase is made and the expectancy that such dealer will remain in business to provide service for the motor vehicle purchased;
 - (b) Proper motor vehicle service is important to highway safety and the manufacturers and distributors of motor vehicles have an obligation to the public not to terminate or refuse to continue their franchise agreements with retail dealers unless the manufacturer or distributor has first established good cause for termination or noncontinuance of any such agreement, to the end that there shall be no diminution of locally available service;
 - (c) The licensing and supervision of motor vehicle dealers by the motor vehicle dealer board are necessary for the protection of consumers and therefore the sale of motor vehicles by unlicensed dealers or salespersons, or by licensed dealers or salespersons who have demonstrated unfitness, should be prevented;
 - (d) Consumer education concerning the rules and regulations of the motor vehicle industry, the considerations when purchasing a motor vehicle, and the role, functions, and actions of the motor vehicle dealer board are necessary for the protection of the

public and for maintaining the trust and confidence of the public in the motor vehicle dealer board; and

(e) Subject to the United States constitution and the Colorado constitution, this article applies to each sales, service, and parts agreement in effect, regardless of when the agreement was adopted.

Problem Statement – Contributing Issues

The statutory scheme has existed in one form or another since 1945. The last repeal and re-enactment of the entire statutory scheme was in 1971. Across the ensuing nearly 45 years, the legislature has made various changes to the statutory scheme, in some fashion, nearly every year.

Additionally, a body of regulations (“regulatory scheme”) exists to help the Board, Division, and the Executive Director regulate the motor vehicle and powersports industries under the statutory scheme.

With very rare exceptions, the statutory and regulatory schemes have not properly addressed, and/or stayed current, with issues concerning internet marketing, internet sales, internet advertising or other electronic media trends.

In late 2011 and early 2012, it became apparent that the Division and the Board must attempt to study the dynamics related to internet industry trends. One of the key issues of concern was attempting to determine and/or define when internet market research changed or morphed into an advertisement by a licensed dealership. The Division became aware of dealerships that were at risk of major advertising violations due to this issue. This was particularly apparent with some third-party providers of advertising. The Division became concerned about the balance between consumer protection and protecting the integrity of the free market system. It was also very obvious that the issues were national in scope, with many states attempting to formulate ways to address the enormity of the electronic information age. The Federal Trade Commission was also becoming more active in its assessment of electronic media advertising.

The Division learned that Virginia had addressed similar issues in 2000 by forming a task force. Division staff reached out to our counterparts in Virginia for guidance in forming such a group. Their “Internet Task Force Report” from January of 2001 was a building block for the Division’s beginning research into the matter.

In the fall of 2012, it was determined that the Division would form an internet focus group to assist with this study. The group was formed with various industry “stakeholders” and held its first meeting in September of 2012. The group was named the Electronic Media & Technologies Focus Group (“Focus Group”)

Before the Focus Group was formed, the Division established some basic concepts for the group’s processes. The Division, along with the Senior Enforcement Director with the Department, felt it necessary to outline these concepts to ensure vision and success. We developed the concepts into guiding principles.

Guiding Principles

The primary purpose of the Focus Group was to study and evaluate new issues and scenarios in the motor vehicle industry that now exist, or may exist in the foreseeable future, due to the use of the Internet and other emerging technologies. Various new third-party entities had become involved in motor vehicle purchases. These entities did not exist when many of the current Colorado laws and regulations were passed. In forming the Focus Group, it was intended that they work under the following guiding principles:

- Reaffirm that the current statutory and regulatory framework adds tremendous value for the primary protection of consumers and for the integrity of the free market system;
- Continue to recognize the importance of the franchisor/franchisee distribution system, as well as the integral role performed by licensed motor vehicle dealers and salespersons;
- Recognize and embrace the value that new technologies and third-parties bring to the consumer and the industry as a whole; and
- Reaffirm the original legislative declarations in the existing Colorado motor vehicle dealer laws.

Focus Group Members

Jerry Abboud, Executive Director of the Powersports Dealers Association of Colorado and the Colorado Off-Highway Vehicle Coalition – Mr. Abboud has been involved as an advocate for powersports dealers in Colorado since 1987. He is a professional lobbyist and a graduate of the University Of Nebraska College Of Law. Mr. Abboud spent 18 years in the retail powersports business.

Leland W. BeBee, BA, MS, J.D., Legal Assistant for the Auto Industry Division – Mr. BeBee has served in this capacity for 5 ½ years. He has performed legal work for the State of Colorado for the last 17 years in three Departments. He also taught basic and advanced legal research and writing at the University of Denver's Sturm College of Law. Mr. BeBee also worked as a contract legal and historical researcher, analyst, and writer, and also as an insurance investigator nationally and internationally.

Robert Endter, Vice President, ACE Design Studio - Mr. Endter has managed the Internet marketing programs for multiple automotive dealers over the past 10 years. He has worked for Auto Trader, Manheim, and OVE.com. He is the Executive Producer of an automotive program on ESPN Radio and a member of the Rocky Mountain Automotive Press. Mr. Endter also facilitates several popular car shows and created the Rocky Mountain Car Club.

Matt Heap, Criminal Investigations Supervisor for the Auto Industry Division - Mr. Heap has been a Criminal Investigator for the Division for over 7 years. He currently oversees Investigations for the Division, which entails compliance and enforcement of State and Federal regulations and statutes. Prior to working for the Division, he was employed with the Colorado Bureau of Investigation and Colorado Department of Corrections. He is a graduate of Colorado State University, majoring in Political Science with an emphasis in Criminal Justice.

Tim Jackson, CAE, CMP, President/CEO, Colorado Automobile Dealers Association – Mr. Jackson has led CADA for over 9 years. CADA is the trade association for 260 state new car and truck dealers. For the prior 7 years, Tim served as the Colorado state director for the National Federation of Independent Business (NFIB), a small business advocacy organization, with over 12,000 Colorado members. He is a Certified Association Executive (CAE) and a Certified Meeting Professional (CMP) with over 26 years of association management experience.

Tammi L. McCoy, J.D., Vice President, Colorado Automobile Dealers Association – Ms. McCoy has served as VP of CADA for 9 years. She attends Motor Vehicle Dealer Board meetings monthly and assists dealer members with legal/regulatory compliance obligations at both the state and federal levels. Previously, she was a Legislative Director for a Texas state representative, and worked in various marketing/sales roles in the software/technologies sector.

Todd O’Connell, Executive Director, Colorado Independent Automobile Dealers Association, Established in 1941 – CIADA is a trade association that represents more than 900 members in the used motor vehicle industry. Mr. O’Connell has been with CIADA for the last three years. Prior to the Association position, he was involved in the wholesale auto auction side of the business with over 20 years of experience in sales and management. Before moving over to the auto industry, he was a small business owner with real estate, development and insurance companies.

Gina M. Paolino, President of Affinity Auto Program, d.b.a. Costco Auto Program – Mrs. Paolino has held many positions at the auto buying program for Costco members in the past 24 years, beginning with the Price Club auto program in 1990. In recent years, she was involved in the development and expansion of auto buying services for credit union members, such as the Navy Federal Credit Union. Prior to joining the auto industry she was a small business owner/partner in the retail, construction and food industries.

Brendon C. Reese, J.D., LL.M., Assistant Attorney General – Mr. Reese served as general counsel to the Colorado Motor Vehicle Dealer Board for approximately 4 years. Mr. Reese still consults and advises the Board as needed but the majority of his time is spent representing the Colorado Department of Revenue in tax disputes.

Chris Rouze, Chief of Investigations for the Auto Industry Division. Ms. Rouze has been the Chief of Investigations for over 5 years. She has over 13 years with the Division having previously been a Criminal Investigator, then a Supervisory Criminal Investigator. She is responsible for the Investigations Teams which provide education and enforcement of State and Federal statutes and regulations pertaining to the auto industry. Ms. Rouze also is the Administration and Operations Coordinator for the Division, overseeing licensing operations. Prior to working for the Division, she was employed with Jefferson County as an Investigator for almost 10 years. Ms. Rouze is a certified paralegal, a certified fraud investigator, and a POST certified peace officer.

Y. E. Scott, J.D., Senior Assistant Attorney General – Ms. Scott has served as general counsel to the Colorado Motor Vehicle Dealer Board for approximately 3 years. Ms. Scott has also represented the Colorado Department of Revenue Liquor Enforcement Division, Racing Division and many other state agencies in Colorado and Nebraska during her 21 years with the Attorney General’s Offices of both states.

Jeff Skeen, CEO Affinity Development Group, Inc. - Mr. Skeen began his career at American Honda Motor Company in the Motorcycle Division. In 1992, Mr. Skeen founded Affinity Development Group, the parent company of several companies including: Affinity Auto Program, which does business as the Costco Auto Program, Affinity Auto Group, which operates auto buying services for credit unions including Navy Federal Credit Union, and Affinity Holdings, LLC, which owns Bikebandit.com, a leading ecommerce retailer of powersports parts and accessories.

Pat Watson, Vice President Industry Relations, TrueCar, Inc. – Mr. Watson has been with TrueCar since March of 2012. Prior to that, he served as Executive Vice President and CEO of the South Carolina Automobile Dealers Association for almost 39 years. Before working for the Dealers’ Association, Mr. Watson was an Associate Football Coach at the University of South Carolina.

Bruce Zulauf, Director of the Auto Industry Division & Executive Secretary of the Board - Mr. Zulauf has served in this capacity for 6 years. He has 28 years of governmental service. He was a three term elected Sheriff, has worked as an investigator in the Medicaid Fraud Unit within the Attorney General’s Office and was an investigative supervisor with the Department of Revenue’s Liquor Enforcement Division. He is a graduate of the FBI National Academy.

Executive Summary Conclusion

The following report is the work of the Focus Group. When the project started, it was believed to be one that could be concluded within a six month time frame. The project has continued for eighteen months. The Focus Group met monthly, only taking one month off. The time commitment was extensive and attendance by all was nearly perfect. Two individuals in the group live in southern California and one person lives in South Carolina.

From the first meeting on September 27, 2012, the group maintained the highest level of professionalism while discussing complex issues. Each member of the group is directly connected to the industry in one way or another. Each brought a different perspective, due to varying customer and/or constituency representation. The group members promoted their client's interests with passion, yet at the same time were committed to consumer protection. Discussions were always thoughtful and significant. The Focus Group completed its work ensuring a commitment to the guiding principles under which it was formed.

As a result of the collaborative work of the group, a new set of draft rules for advertising are being developed. The draft rules are not part of this report, but will be presented to the Board, separately, for their rulemaking decisions.

Respectfully Submitted,



Bruce Zulauf, Director

I. INTRODUCTION

The Focus Group recognized from its initial meeting on September 27, 2012, that it would need to explore the full modern context of advertising, which includes the elaboration of a new system of communication, sometimes referred to as the “Electronic-Media Paradigm.” The full modern context of advertising also includes the familiar, centuries-old system of communication, the “Print-Media Paradigm.”

The Focus Group also realized that the advertising laws and regulations applicable to dealers licensed by the Board (the “current regulatory scheme”) had arisen in the Print-Media Paradigm and primarily focused on that methodology. Only rudimentarily had the current regulatory scheme been designed to embrace even the original aspects of the Electronic-Media Paradigm. Furthermore, the history of the current regulatory scheme revealed that even with regard to the Print-Media Paradigm, minimal evaluation of that regime had occurred across the decades of its existence. The Focus Group formulated the following Mission Statement:

The Mission of the Electronic Media and Technologies Focus Group is to examine and to evaluate both currently-available and emerging uses of electronic media and electronic technologies in the marketing and sales of motor vehicles and powersports vehicles.

The Focus Group began its discussions questioning whether the current regulatory scheme was sufficient to serve the needs of consumers and licensees in multiple media.

Early on, the Focus Group also considered several possible approaches to achieve its mission. It determined that the best approach would combine background research and discussion on relevant topics with the use of hypothetical or actual scenarios analyzed in a step-wise, consistent linear manner. The use of this combined approach offered the most benefit to the Executive Director, the Board, Colorado consumers, and licensees. The Focus Group adhered to the following process:

- Present and discuss relevant examples, both known and hypothetical, of the use of Electronic Media and Technologies in commercial activities.
- Evaluate the relevant examples for their commercial value to consumers and the industry, mindful of the importance of ensuring consumer

protection and the integrity of the industry and the free market system of commerce.

- Evaluate the relevant examples for compliance with relevant laws and regulations, both Colorado and Federal (as applied pursuant to Colorado's legal regime).
- Create a comprehensive report covering the Group's activities, findings, recommendations, and expressions of dissenting views (if any).

Beyond this Introduction, the Focus Group's Report includes an examination of the approach used initially by the Focus Group, including a synopsis of the specific scenarios the Focus Group examined. The Report then looks at the Federal Trade Commission's (FTC's) general approach to the regulation of advertising and examines the recent, regulatory efforts of the FTC with regard to motor vehicle advertising. Finally, the Focus Group presents its findings and recommendations, derived from broad background research, detailed scenario-analysis, and candid discussion.

II. PROCESS AND SCENARIOS

The Focus Group undertook its mission fully aware that the Electronic-Media Paradigm had already found expression in an abundance of electronic devices and other technologies, and was continuing to develop more. To accomplish its mission, the Focus Group realized that it needed to get both panoramic and close-up views of the Electronic-Media Paradigm's most significant features and landmarks. Both the composition of the Focus Group and the nature of its undertaking mandated that the Focus Group approach its mission using a methodology that integrated empirical study, traditional research, and both inductive and deductive reasoning.

In the Focus Group's Scenario Phase, members brought to the table relevant, illustrative marketing and advertising scenarios consisting of either unaltered real-world advertisements, constructions of facts based upon real-world events, and hypotheticals of potential advertisements based upon a member's actual experience and/or their expertise. The Scenario Phase proved particularly useful because it permitted the Focus Group to consider information that would otherwise have been difficult to describe and discuss. The Scenario Phase also facilitated the introduction of ancillary, relevant research materials, expert opinions and insights, developing trends, and projections of future trends. These scenarios also allowed the Focus Group to consider how features of the Electronic-Media Paradigm (e.g., the Internet) interfaced with and amplified pre-existing issues, such as "Sunday Sales" and "Dealer and Handling" ("D&H") charges, also known as "Doc Fees."

The members' scenarios were then compiled into the following seventeen Scenario Topics for efficient presentation and analysis:

SCENARIO TOPIC #1 --- Advertising on Craigslist and other Internet sites by out-of-state vehicle dealers not licensed by the Board.

SCENARIO TOPIC #2 --- Disclosures on Internet banners which are commonly too space-constrained to include all of the content required in the disclosure.

SCENARIO TOPIC #3 --- Inconsistent pricing of vehicles across different advertising media.

SCENARIO TOPIC #4 --- Internet marketing of vehicles that are not in the dealer's inventory.

- SCENARIO TOPIC #5** --- Consumer configuration on the Internet of vehicles that may not actually exist.
- SCENARIO TOPIC #6** --- Fees that are not being included in the advertised price of a vehicle.
- SCENARIO TOPIC #7** --- Advertising a low vehicle price that no consumer could ever realize because the price was based upon combining price reductions of certain rebates that, by their nature and terms, cannot be combined.
- SCENARIO TOPIC #8** --- False claims of affiliations with certain auto programs.
- SCENARIO TOPIC #9** --- “Live chat” options on websites.
- SCENARIO TOPIC #10** --- Salespersons’ advertising of vehicles for sale “by owner.”
- SCENARIO TOPIC #11** --- Vehicle dealers’ advertising that gives the impression that the dealer is a financial institution or a credit repair business.
- SCENARIO TOPIC #12** --- Vehicle dealers’ posting advertisements on Facebook representing themselves as car credit sites instead of vehicle dealers.
- SCENARIO TOPIC #13** --- Salespersons’ independently controlling and advertising vehicle dealers’ inventory on websites containing the dealership’s name.
- SCENARIO TOPIC #14** --- Salespersons’ independently controlling and advertising vehicle dealers’ inventory on the salespersons’ own websites.
- SCENARIO TOPIC #15** --- Wholesale transactions involving vehicles taking place on Sunday.
- SCENARIO TOPIC #16** --- Advertising by third-parties using smart-phone apps.
- SCENARIO TOPIC #17** --- YouTube advertisements and the identification of when an advertisement ends.

The Focus Group used each scenario’s empirical information to analyze systematically the concepts involved, possible consequences for interested parties, potential violations of existing Colorado and Federal advertising statutes and rules, and, possible statutory or regulatory changes needed to address any identified concerns. In examining each scenario, the Focus Group asked each of the following questions:

1. Would this be beneficial to the consumer?
2. What are the possible pitfalls from the consumer’s point of view?
3. How do we protect the consumer?

4. How would this positively impact the regulated community?
5. How would this negatively impact the regulated community?
6. How could this potentially be abused?
7. Does this violate current laws and/or regulations?
8. Should there be statutory change to allow for this?
9. Should there be regulatory change to allow for this?
10. What would need to be changed?

The Focus Group devoted one third of its time to discussion of the Scenario Topics. The Focus Group consistently separated the analysis into two parts --- Questions #1 through #6 --- and, --- Questions #7 through #10. In the Scenario Phase, as well as later, the Focus Group also considered so-called “boundary matters” related to market research and advertising activities, examining aspects of various scenarios as illustrations of possible concerns in the separation of these categories of activity. As part of the examination of these boundary matters, the Focus Group discussed information and presentation methodologies found on the websites of third-party marketing services and third-party information providers. The Focus Group also considered the views, strategies, and approaches to advertising regulation of the federal and various state governments.

III. NATIONAL ADVERTISING REGULATION DEVELOPMENTS

The Electronic-Media Paradigm, by its very nature, creates legal concerns within and across multiple jurisdictions. The Focus Group members were aware from the beginning that the experience of consumers, the regulated community, and regulators in Colorado was comparable to the experience of their counterparts nationwide. Highlighting the national importance of vehicle-advertising issues was the “2012 Consumer Complaint Survey Report,” issued by the Consumer Federation of America and the North American Consumer Protection Investigators (NACPI). This survey of forty state and local consumer protection agencies covered 360,538 consumer complaints in all consumer categories. For the second year in a row, complaints in the “Auto” category (including, e.g. complaints about misrepresentations in advertising or sales of new and used cars, lemons, faulty repairs, leasing and towing disputes) ranked number one on the list.

Since its inception in 1914, the Federal Trade Commission (FTC) has been the lead consumer-protection agency in the nation, enforcing a body of federal law and regulation affecting businesses of all types, including the motor vehicle industry’s interactions with consumers. The FTC’s website address is: <http://www.ftc.gov/>. The seminal authority for the FTC is the Federal Trade Commission Act, 15 U.S.C. § 41, et seq (the “FTC Act”).¹ The FTC and the Board have concurrent subject-matter jurisdiction over consumer-protection in the advertising context. With consumer-protection in mind, both Congress and the Colorado Legislature passed laws with comparable purposes, but with notable distinctions. Although both the FTC Act and the Board’s advertising law prohibit advertising that is misleading or fraudulent, these bodies of law, and their associated jurisdictions, differ significantly:

1. **The FTC Act** prohibits, among other things, “unfair” practices respective to consumers.

By comparison, the Board’s Statutory and Regulatory Scheme, has no specific “unfairness” provision in its statutes and regulations.

¹ <http://www.gpo.gov/fdsys/pkg/USCODE-2012-title15/pdf/USCODE-2012-title15-chap2-subchapI-sec41.pdf>

2. **The FTC Act** provides for nationwide personal jurisdiction, making it enforceable against any person or entity wherever federal law applies, provided the person or entity has “minimum contact” (as that term is understood in jurisdictional analysis) with the United States.

By comparison, the Board’s Statutory and Regulatory Scheme, together with other provisions of Colorado jurisdictional law, limits the reach of the Board’s advertising law to persons or entities licensed by the Board.

3. **The FTC Act** provides for personal jurisdiction to reach third-party marketing services and/or third-party information providers with charges of both direct and indirect violations of the FTC Act.

By comparison, the Board’s Statutory and Regulatory Scheme does not have personal jurisdiction to reach third-party marketing services and/or third-party information providers with charges of either direct or indirect violations of the Board’s advertising law, because neither of these types of entities are licensed by the Board.

4. **The FTC Act** does not include a process to specifically resolve each consumer dispute. The FTC does accept complaints, comments, and inquiries from consumers and other entities, and uses these communications to look for patterns of violations that may require enforcement action. The Commission issues an administrative complaint when it has “reason to believe” that the law has been or is being violated, and it appears that a proceeding is in the public interest. When the Commission issues a consent order on a final basis, it carries the force of law with respect to future actions. A consent order may set out a variety of requirements and obligations with which the person or entity must comply for a designated period of time, often stretching twenty years into the future. Each violation of such an order may result in a civil penalty of up to \$16,000. The FTC enters complaints into Consumer Sentinel, a secure, online database available to more than 2,000 civil and criminal law enforcement agencies in the U.S. and abroad.

By comparison, the Board’s Statutory and Regulatory Scheme, together with other generally-applicable provisions of Colorado law, requires the Board to resolve each complaint against a licensee through a full and fair investigation which may culminate in the production of an affidavit of probable cause. In the event that the Board finds probable cause of a violation, the Board may order an administrative adjudication, and may, in appropriate circumstances, also summarily suspend a licensee’s license or issue cease-and-desist orders to a licensee. The Board may, in a single adjudication against a licensee, seek to resolve a number of complaints with similar or different advertising violations. The Board may choose to deal with each violation, separately, or to address a set of violations, cumulatively. The Board has a range of fines and penalties it may apply.

As a lead agency in consumer protection nationally, the FTC is not only an enforcement entity but also a significant source of information for state regulators, consumers, and advertisers. The materials available from the FTC form a body of significant resources for consumers, regulators, and advertisers. Certain materials are particularly relevant to the Focus Group’s mission. For example, the FTC has issued long-standing policy statements, each of which communicates fundamental principles relevant to the Focus Group’s activities. The FTC has also promulgated various advertising guidelines and other types of instructional documents. Over approximately the last thirty years, the FTC has enforced its advertising-related consumer-protection law and regulations vigorously, resulting in an informative body of enforcement cases. Information on three policy statements is set out below, followed by materials related to two instructional documents, and concluded by a discussion of recent, motor vehicle-industry-related advertising enforcement actions.

BULLET-POINT SUMMARIES OF FTC POLICY STATEMENTS

FTC POLICY STATEMENT ON DECEPTION²

The key concepts in this policy statement are:

- There must be a representation, omission, or practice that is likely to mislead the consumer.
- The act or practice must be considered from the perspective of the reasonable consumer.
- The representation, omission, or practice must be material.

² <http://www.ftc.gov/ftc-policy-statement-on-deception>

FTC POLICY STATEMENT ON UNFAIRNESS³

The key concepts in this policy statement are:

- Substantial consumer injury
 - usually monetary harm,
 - that the consumer could not reasonably have avoided, and
 - that is not outweighed by any offsetting consumer benefits or competitive benefits also resulting from the sales practice.
- Violation of public policy.
- Unethical or unscrupulous conduct.

FTC POLICY STATEMENT REGARDING ADVERTISING SUBSTANTIATION⁴

The key concepts in this policy statement are:

- An advertiser must be able to substantiate that there was a reasonable basis for a product-related claim before an advertisement making that claim is disseminated.
- An advertiser must be able to produce evidence substantiating a product-related claim.

EXAMPLES OF FTC GUIDELINES AND INFORMATION DOCUMENTS

As a part of its continuing mission to inform consumers and businesses of what is and is not appropriate in advertisement, the FTC has come up with a number of instructional resources of various types with various focuses. Among these, for example, are:

8 ADVERTISING POTHoles AUTO DEALERS SHOULD AVOID, by Leslie Fair⁵

The author suggests that with respect to advertising by motor vehicle dealers, the dealers should consider not only a checklist of “To Do’s” but also a checklist of “To Don’ts,” to include the following to avoid:

- Deceptive pricing
- Deceptive teaser payments

³ <http://www.ftc.gov/ftc-policy-statement-on-unfairness>

⁴ <http://www.ftc.gov/ftc-policy-statement-regarding-advertising-substantiation>

⁵ <http://www.business.ftc.gov/blog/2014/01/8-advertising-potholes-auto-dealers-should-avoid>

- Undisclosed balloon payments
- False \$0 up-front leasing claims
- Undisclosed lease terms
- Hidden rates
- Bogus prize-promotions, and
- Credit and leasing violations

.COM DISCLOSURES --- HOW TO MAKE EFFECTIVE DISCLOSURES IN DIGITAL ADVERTISING⁶

This document is considered an FTC “staff guidance document” for businesses, describing “the information businesses should consider as they develop ads for online media to ensure that they comply with the law.” The document speaks directly and authoritatively about best practices for producing legally-acceptable advertisements on modern electronic media platforms. “.com Disclosures” belongs in any modern advertiser’s library and could assist regulators in assessing whether advertisements on electronic platforms conform to law and regulation.

DISCUSSION OF RECENT MOTOR VEHICLE ADVERTISING-RELATED ACTIONS BY THE FTC

During the last several years, the FTC has undertaken a sizable number of motor vehicle-related advertising cases across the entire United States. These cases represent a growing FTC interest in stemming violations of federal consumer-protection law and regulation. In September, 2013, the FTC announced settlements of deceptive advertising cases against a Maryland motor vehicle dealer and an Ohio motor vehicle dealer. The September 3, 2013, FTC press release⁷ summarized the charges:

⁶ <http://www.business.ftc.gov/documents/bus41-dot-com-disclosures-information-about-online-advertising>

⁷ <http://www.ftc.gov/news-events/press-releases/2013/09/ftc-halts-two-automobile-dealers-deceptive-ads>

The FTC charged that Timonium Chrysler, Inc., of Cockeysville, Md., violated the FTC Act by advertising discounts and prices that were not available to a typical consumer. Ganley Ford West, Inc., in Cleveland, also is charged with misrepresenting that vehicles were available at a specific dealer discount, when in fact the discounts only applied to specific, and more expensive, models of the advertised vehicles.

The September 3, 2013, press release provided additional details on the violations in the two cases:

Timonium Chrysler's website touted specific "dealer discounts" and "internet prices," but allegedly failed to disclose adequately that consumers would need to qualify for a series of smaller rebates not generally available to them. The complaint further alleges that, in many instances, even if a consumer qualified for all the rebates, the cost of the vehicle was still greater than the advertised price.

Ganley Ford West advertised its discounted vehicles on its website and in local newspapers, and it allegedly failed to disclose that its advertised discounts generally only applied to more expensive versions of the vehicles advertised.

The September 3, 2013, press release concluded with a brief summary and discussion of the rationale and terms of the two consent orders:

The proposed orders settling the FTC's charges against Timonium Chrysler and Ganley Ford West are designed to prevent them from engaging in similar deceptive advertising practices in the future. The two motor vehicle dealers cannot advertise prices or discounts unless accompanied by clear disclosures of any required qualifications or restrictions. The motor vehicle dealers are also barred from misrepresenting:

- the existence or amount of any discount, rebate, bonus, incentive, or price;
- the existence, price, value, coverage, or features of any product or service associated with the motor vehicle purchase;
- the number of vehicles available at particular prices; or
- any other material fact about the price, sale, financing, or leasing of motor vehicles.

The dealers must maintain and make available copies of all advertisements and promotional materials to the Commission for inspection upon request for the next five years, and they are required to comply with the FTC's order for 20 years.

In the last three months, the FTC announced a sweep against ten (10) motor vehicle dealers, nine (9) of whom have already settled the deceptive advertising charges against them

through Consent Orders now in the final stages of federal regulatory adjudication.⁸ As the FTC's own news release states, "Operation Steer Clear drives home that motor vehicle ads must be truthful." The list of dealerships against which the FTC brought its actions included dealers in various geographic regions. For each case against a dealership, the published materials usefully include the FTC's "Complaint," "Exhibits to the Complaint" (actual advertisements), "Agreement Containing Consent Order," "Analysis of Proposed Consent Order to Aid Public Comment," and, "Federal Register Notice Containing Consent Agreement."⁹ Each of the affected dealerships will be under orders for strict advertising compliance for the next twenty (20) years.

⁸ <http://www.ftc.gov/news-events/press-releases/2014/01/ftc-announces-sweep-against-10-auto-dealers>

⁹ See, e.g., In the Matter of Luis Alfonso Sierra, also doing business as Casino Auto Sales, <http://www.ftc.gov/enforcement/cases-and-proceedings/cases/132-3107/luis-alfonso-sierra-dba-casino-auto-sales-matter>.

IV. FINDINGS AND RECOMMENDATIONS

Through the Focus Group's research, consideration of advertising examples, and general discussion, the Focus Group isolated a set of key concepts --- representing recurrent or especially significant themes --- which permit principled, policy-driven evaluation and regulatory action. These key concepts and the Focus Group's recommended approach to them are found in this section of the Report.

A. Regulation of Advertising in Multiple Paradigms

Advertising in Colorado in 2014 is occurring in multiple ways, primarily the Print-Media and the Electronic-Media Paradigms. The Print-Media Paradigm involves familiar methods and modalities (e.g., books, magazines, newspapers, journals, pamphlets, brochures, handouts, and signs). The Electronic-Media Paradigm involves a vast array of media and associated materials (e.g., videos, Facebook or other social media postings, blog entries, internet listings, chat-room interactions, etc.), and continues to evolve and develop new forms and combinations of forms, including modalities that may combine with the Print-Media Paradigm. Consumers, licensees, and governments will contend with advertisements in multiple paradigms for the foreseeable future.

The same communication principles apply to advertising in any medium. Advertising has almost always been "commercial" in nature, associated with a definable profit, gain, or benefit to the advertiser. The Central Paradigm of Commercial Advertising is the distillation of fundamental commercial advertising concepts and includes any activity that makes consumers aware of a product or service, attracts consumers to a business, influences consumers to choose a particular product or service, and/or instills in consumers an interest in or a desire for a product or service.

The Focus Group considers the following points fundamental to the regulation of advertising in a multiple-paradigm environment:

1. **Consistent Principles Across Media.** The same policies apply to all forms of advertising to protect the consumer and the integrity of the Free Market System. There is no basis to distinguish among communication modalities with respect to governmental regulation of advertising. Government should not, through its regulatory structure, set out to regulate advertising in one paradigm differently from advertising in another paradigm. Equivalent regulation among advertising methods is not merely desirable, but is the goal of government. Such principled consistency provides the consumer and the licensee with a sound approach that can reduce confusion and improve both compliance and enforcement.

2. **Equivalent Regulation.** This does not mean mindlessly applying exactly the same specifications in every medium or methodology. Equivalent regulation occurs when an expression in a given medium or methodology achieves the same results as comparable expressions in other media or methodologies. An illustration of such tailoring is the “clear and conspicuous” standard for presentation of important or required information. In the Print-Media Paradigm, that might mean displayed immediately beside or displayed right beneath the reference point for the information. In the Electronic-Media Paradigm, that might mean one click away. Another illustration of such tailoring associated with the “clear and conspicuous” standard for presentation is the print-media guideline of prominent display. An advertiser can often satisfy the “clear and conspicuous” standard by creating a prominent display of the required information. However, prominent display, in one medium or methodology will be different from prominent display in another. For example, in print media, it could mean font size 16 or larger, bold, underlined, or boxed, whereas, in electronic media, it could mean highlighted in a bright color, alone in the center of the screen, or bordered by flashing bright lines.

3. **Development of Guidelines.** “Equivalent regulation” works best when a formulation of guidelines exists to aid advertisers. Regulations can require “equivalency,” but the amount of detail needed to achieve that principle across multiple media, methods, and display devices, may exceed what is usually considered possible in general advertising regulations. It should, nevertheless, be viewed as an appropriate goal. It may be possible to achieve this goal by devising guidelines and regularly revising them to keep them up to date with

technological developments, changes in law and regulation, and case precedents. The merit of such guidelines is that licensees of the Board would have appropriately-tailored examples which could be referred to when evaluating potential advertisements.

B. Market Research and Advertising --- Boundary Matters

As electronic technologies evolved, an array of new means and methods of information-delivery evolved and many new types of third-party marketing services and/or third-party information providers came into existence. Moreover, even third-party marketing services and/or third-party information providers, that were active in the Print-Media Paradigm, have undertaken new forms of marketing and advertising communication. Commercial interests have found that they can pursue marketing, including advertising, in many new ways. Occasionally, these marketing pursuits either appear to or actually do challenge significant differentiations between market research and advertising. The Focus Group believes that market research represents a definite benefit for consumers. Uncertain distinctions, however, between classifications of activities can result in consumers being confused and vehicle dealers unintentionally breaking the law. Therefore, it is desirable, to clarify demarcation lines to eliminate ambiguities.

Certain general principles always apply to ensure appropriate differentiations between market research and advertising, and to assign legal responsibility. Fundamental among these is the law of agency, which applies to define the relationship between a licensed dealer and third-party marketing services and/or third-party information providers. According to § 1.01 of the Restatement (Third) of Agency, the definition of “agency” is:

the fiduciary relationship that arises when one person (a “principal”) manifests assent to another person (an “agent”) that the agent shall act on the principal’s behalf and subject to the principal’s control, and the agent manifests assent or otherwise consents so to act.

If the analysis of the relationship between a licensed dealer and third-party marketing service and/or third-party information provider determines that the third-party marketing service and/or third-party information provider is an “agent” of a licensed dealer, then the activities of the third-party marketing service and/or third-party information provider respective to the licensed dealer are the legal responsibility of the licensed dealer. The dealer must ensure that a third-party

marketing service and/or third-party information provider, acting as the dealer's agent, complies with the Board's advertising law and regulations.

A third-party marketing service and/or third-party information provider, which may not, in and of itself, be subject to the Board's jurisdiction, can, despite its avowed purpose(s) and stated pursuits, become an agent of a licensed dealer in the advertisement. The simple act of combining the name of a dealer with a display of inventory related to the dealer can establish an agency relationship. That agency relationship can occur on any electronic medium or in any electronic methodology, including Facebook, Twitter, a blog, an internet site, or any combination of these or other media and technologies. A licensed dealer should assume that any third-party marketing service and/or third-party information provider may be considered an agent of the dealer, even if the licensed dealer and the third-party marketing service and/or third-party information provider have no written agreement.

Agency may be established even under the circumstance when a third-party marketing service and/or third-party information provider has "scraped" dealer-inventory information from a dealer's website or another website containing the information, without an express agreement. If a dealer gains the benefit of the apparent agency status of a third-party marketing service and/or third-party information provider, it may not matter whether the dealer had any contractual relationship to the third-party marketing service and/or third-party information provider for the dealer to be liable for any advertising violation.

Equally important among general principles that always apply to ensure appropriate differentiations between market research and advertising, is the Central Paradigm of Commercial Advertising, which covers, generally, the nature and types of activities considered to be advertising activities. Whether any given communication, transaction, or combination of communications or transactions, can be characterized as market research or advertising, however, always depends on the application of facts (produced by careful and thorough investigation) to the law and the Board's regulations.

Derived from the concepts of the law of agency and the features of the central Paradigm of Advertising, the following two questions constitute a simple analytic framework to characterize communications, transactions, or combinations of communications or transactions, involving a consumer, as either market research or advertising:

1. Do the circumstances include at least one explicit mention of or unmistakable reference to the name of a specific licensed vehicle dealer? and,
2. Do the circumstances promote the commercial interests of the same licensed vehicle dealer?

A “YES” answer to both questions allows an individual to conclude that the circumstances are almost certainly advertising in nature. However, a “Yes” answer to both of these questions, without additional evidence of a violation of advertising law and regulation, will not subject a licensed vehicle dealer to any charges.

A “NO” answer to the first question allows an individual to conclude that the circumstances are most likely market research in nature, and not likely to be subject to regulation by the Board, which lacks independent jurisdiction over third-party marketing services and/or third-party information providers. (The FTC and the Attorney General of Colorado may, under their own statutory and regulatory schemes, have both subject-matter and personal jurisdiction over such third-party marketing services and/or third-party information-providers when the third-party marketing services and/or third-party information-providers have, by knowledge and participation, exceeded the limitations of mere “agency.”)

A “YES” answer to the first question coupled with a “NO” answer to the second, allows an individual to conclude that the circumstances are not advertising, but may be market research. Circumstances that could illustrate this combination of answers involve, for example, the consumer obtaining information about a specific licensed vehicle dealer from, e.g., the Better Business Bureau, another consumer-advocate group, courts, or a regulatory agency.

The following recently-observed third-party marketing service and/or third-party information provider circumstances illustrate actions that may cross the line between market research and advertising activity. With some variation and nuance, different third-party marketing service and/or third-party information provider sites have used statements like, “learn true dealer cost,” and “pay below invoice,” while others will post a sale price on a configured

vehicle that is not an actual vehicle on a dealer's lot. Additionally, these third-party marketing service and/or third-party information-provider sites will post a sale price on a vehicle, which can either be on the dealer's lot or configured by the consumer, that excludes at least one of these essential vehicle descriptions: stock number for an actual vehicle; dealer handling fee; or, dealer-installed options. Also, some third-party marketing services and/or third-party information-providers have even made the term, "below invoice," a part of their own business name, apparently to imply that all vehicles on the site are available at or below the manufacturers' invoice prices to the dealer. Dealers who advertise on these sites may seek to evade responsibility by claiming that it is the third-party marketing service and/or third-party information-provider, not the dealer who is doing the advertising. Dealers who make this excuse do so despite the fact that they have purposely associated themselves with the site and allowed their information to post there.

The following types of information, activities and interactions are further examples of communications that the Board needs to sort either into market research, advertising, or sales categories:

- Information regarding aggregate data on vehicle prices or other vehicle data.
- Determining whether a consumer is currently in the market to buy or lease a vehicle, either of a specific kind, or just generally, by communications originating from a dealer, a dealer's in-house business development center, or an outside business development center.
- Assisting a consumer (e.g., through an internet chat function) to navigate currently available dealer inventory on a website or app.
- Discussing, transmitting, handing out, or mailing information about product features, functions, and benefits, warranties, etc.
- Listing vehicles on third-party marketing service and/or third-party information provider sites without the dealer's knowledge but showing the dealer's name in association with the vehicles.
- Providing an MSRP for a vehicle.
- Discussing trade-in value for a vehicle without reference to a specific vehicle or class of vehicle for purchase or lease.

- Discussing options for financing or leasing without reference to a specific vehicle or class of vehicle for purchase or lease.

Because of the importance of the law of agency in the context of modern advertising, the Board should clarify through regulation that the law of agency applies to the Board’s advertising regulations. Also, because of the importance of the boundary between advertising and market research, the Board should clarify through regulation the definition of advertising, delineating the component features and activities that distinguish advertising from market research.

In addition to the boundary matters, two licensure questions pervade discussions about distinctions between market research and advertising. These questions may require the Board to consider additional regulatory actions or recommendations to the Legislature for statutory change:

1. Pursuant to the Board’s existing organic statutes and regulations, must a person or entity performing the activities in question have a license issued by the Board? and,
2. If “No,” do the activities in question require statutory changes to create a new type of license in order to regulate the person or entity and the potential harm from the activities?

C. Upholding Both Consumer Protection And the Integrity of the Free Market System

The Electronic-Media Paradigm, still in its early stages, continues to evolve and produce more electronic devices and methods of delivery of information. As technological changes occur, both the regulated industry and the regulators will always be playing “catch up” with the evolving technology. The consumer will, indeed, need to be a “reasonable consumer,” in fact --- i.e., a consumer exercising those qualities of attention, knowledge, intelligence, and judgment which society requires of its members for the protection of their own interests and the interests of others. In this conceptual environment, two extremes present themselves: that a careful, conscientious dealer’s advertisement might, inadvertently, create consumer harm; and, that the most business-friendly regulatory body might devise regulations that, equally inadvertently, impact the integrity of the free market system. Therefore, the Board should seek answers to each of the following questions respective to any proposed new or modified advertising regulation:

1. Is this rule or change of rule going to increase protection of consumers, and, if so, how, and to what degree?

2. Is this rule or change of rule going to further the integrity of the free market system or diminish it, and, if so, how, and to what degree?
3. If this rule or change of rule is either a) not only going to increase consumer protection but also going to diminish the integrity of the free market system, or, b) if this rule is not only going to increase the integrity of the free market system but also going to decrease consumer protection, then does the rule or change of rule strike the best balance between the two policies or does an approach exist that could strike a better balance?

D. Regulation and Education --- the Need for Both

Any features of the transformation into the Information Age, including any electronic advertisements, and any resulting new or changed regulations of advertisements by Colorado or any other governmental entity, will, initially, and likely for the indefinite future, produce uncertainties, both for consumers and the regulated community. The following activities and products appear most likely to help both the regulated community and consumers deal with uncertainties and prevent or at least reduce the number of advertising violations:

1. An on-going educational campaign regarding the application of the Electronic-Media Paradigm to vehicle advertising;
2. An on-going forum (web-enabled and/or composed of regular open-meeting days) to which advertising questions could be submitted or entertained, and responses provided; and,
3. The development of regularly-revisited advertising guidelines.

E. Guiding Principles

Advertising --- regardless of the medium or modality of expression --- is a form of communication between sellers and buyers. As such, it employs tangible, visual, and/or audible symbols, including words, images, and sound-forms, to convey messages. As with all communication, advertising affects the recipient according to his or her own psychology, education, social and occupational status, and life history. The best-constructed advertisements utilize the following principles in the interest of consumer-protection:

1. The “clear and conspicuous” standard of placement in an advertisement of material information (including disclosures and other materials required for a legally complete

advertisement) is the time-honored fundamental for advertisement structure, and should be required.

2. Advertisements should provide sufficient information for a reasonable consumer to make an informed decision.
3. Advertisements should not leave out information that a reasonable consumer would consider material to the consumer's decision.
4. Information in advertisements should be true and verifiable, and if testimonial in nature should also be supported by relevant evidence.
5. Advertisements in their entirety and in their separate parts should be understandable by a reasonable consumer and not be misleading. If a term used in an advertisement would not be readily understood by a reasonable consumer, an accurate definition or explanation of the term needs to be included within the advertisement.
6. The physical form of the advertisement should reveal --- not obscure --- information. A corollary to this is that each piece of information should have sufficient prominence and be sufficiently proximate to related other information that a reasonable consumer is not misled.
7. Advertising should foster trust in the free market by avoiding the use of false or misleading comparative or competitive information relative to a product or a competitor. The concept here is that all parties benefit from fair competition. Therefore, to be avoided are advertisements with exaggerated claims, claims that can't be validated, claims that disparage others' products or businesses, and, claims that it is urgent that a person purchase a product when there is no basis for such urgency.
8. Advertisements should clearly and correctly identify the purveyor of the advertisement by name. A corollary to this is that the purveyor should not appear in the guise of or in the name of another entity or person.
9. Advertisements should clearly identify the product by a market-recognizable name and market-recognizable identifying features. A corollary to this is that the identity of the product can be as specific as a single, identifiable item or can be as general as a class of the same kind of item, but, regardless must be sufficiently identified so as to avoid ambiguity.
10. Advertisements should exist solely for products on hand or that are readily obtainable. A corollary to this is there should be no bait advertising.

F. Miscellaneous Other Important Considerations

The Focus Group also considered the topics that follow.

1. Motor Vehicles and Powersports Vehicles. The Board regulates the advertising of two sets of licensees --- those concerned with motor vehicles and those concerned with powersports vehicles. It regulates the sale of both new and used vehicles for both types of dealerships. Advertising rules should as closely as possible be the same for both motor vehicle dealers and powersports vehicle dealers, for both new and used vehicles. The unique features of motor vehicles and powersports vehicles, as well as of “new” as opposed to “used” may mean some advertising provisions will not apply to one or another of the categories, or will apply in slightly different ways. The regulators’ goal is to adhere to and enforce advertising law and regulations consistently, regardless of the category of vehicle.

2. Holistic Regulatory Approach. In its advertising-related regulatory process, the Board must consider not only its own statutory and regulatory scheme, but also other relevant Colorado and Federal statutes and regulations, to prevent confusion and contradiction, and to foster clear, consistent expectations and expression, to the extent that is possible.

3. Extraterritorial Enforcement of Advertising Law and Rules. Neither the personal nor subject-matter jurisdictions of the Board have been altered by the Electronic-Media Paradigm nor by advertising promulgated within the Electronic-Media Paradigm. The Focus Group determined that enforcement of Electronic-Media-Paradigm-related matters beyond Colorado’s boundaries is possibly outside of regulation by the Board. To some extent, oversight and enforcement of advertising promulgated within the Electronic-Media Paradigm can only occur with statutory change, preferably at the federal level, or by judicial interpretation.

4. Bait and Switch. The Focus Group is not aware of any jurisdiction where any form of “bait and switch” advertisement is permitted. Most states explicitly forbid it. The

Board should consider a regulatory definition of “bait and switch,” as well as an explicit, straightforward regulation prohibiting “bait and switch” advertisement.

5. Advertising Time Frames. The Focus Group discussed the advantages and disadvantages of requiring advertisements to state the initial effective date and the final effective date for an advertised price for a vehicle or set of vehicles of the same year, make, and model. With respect to effective dates, Print-Media Paradigm advertisements have seldom created significant ambiguities or problems for enforcement, particularly in the current advertisement context where a five-day default feature exists, and because a reasonable consumer would not consider an advertisement bearing a printed date well in the past to constitute a currently valid advertisement. However, in the Electronic-Media Paradigm, web-based advertisements, commonly lacking any date marker, can persist into the indefinite future and can confound the reasonable consumer. The duration of a motor vehicle dealer’s or powersports dealer’s electronic advertisement is in the dealer’s control, whether the advertisement appears on the dealer’s own website or is contracted by the dealer to appear on a third-party marketing service and/or third-party information provider website. Therefore, it would be desirable for the Board to consider a requirement that each electronic advertisement declare an effective period with explicit beginning and ending dates, while also acknowledging that if the dealer should sell or lease the vehicle at any time during the effective period, the dealer must sell or lease it at the advertised price.

6. Removal of Sold, Leased, or Otherwise Unavailable Vehicles from Advertisements. On-line advertisements can create confusion as well as bait-and-switch opportunities whenever a sold, leased, or otherwise unavailable vehicle is not quickly removed from the dealer’s inventory as displayed on-line on the dealer’s own website or on the website of any third-party marketing service and/or third-party information provider acting as an agent for the dealer. Therefore, the Board should require that a sold, leased, or otherwise unavailable vehicle be removed within a time certain from the dealer’s own on-line inventory list and that the dealer take verifiable steps to have third-party marketing services and/or third-party information providers remove a sold, leased,

or otherwise unavailable vehicle from their inventory lists related to the dealer, also within a time certain.

7. Rebates. The Focus Group believes that an advertisement that mentions any rebate or set of rebates alleged to be available must specifically set out the qualifications and restrictions that will apply to such a rebate. In the event that more than one rebate can be used, the advertisement must specifically set out each restriction that might preclude “stacking” (i.e., combining) any two or more rebates.

8. Lowest Advertised Price Concept. The Focus Group discussed the potential for various contemporaneous advertisements to display discrepant prices for the same vehicle or class of vehicles. The Focus Group recommends that the Board require a dealer to honor from among all available advertisements the Dealer’s lowest advertised price for a given vehicle or class of vehicles. The Board must take into account the inclusion or exclusion of an advertisement with effective dates set out in the advertisement. Any advertisement lacking an effective date or any other date marker should be considered to be in effect until the vehicle is sold or leased.

9. Out-of-Colorado Dealerships Specifically Targeting Colorado Consumers. The Focus Group learned of circumstances, particularly easily facilitated in the Electronic-Media Paradigm, where dealerships, located outside of Colorado and not licensed in Colorado, had clearly targeted Colorado consumers with advertisements that did not follow Colorado’s advertising laws. The Board’s jurisdiction does not now extend to such entities, and a solution to this problem may not be possible without an interstate compact or specific federal legislation.

10. Manufacturers’ Advertisements. The Board lacks jurisdiction to regulate manufacturers’ advertisements. Manufacturers fall under the licensing jurisdiction of the Executive Director, who, alone, has the direct authority to regulate manufacturers’ advertisements. The Focus Group identified several sets of circumstances in which it appeared that manufacturers had violated existing advertisement laws and regulations of

the Board, promoting through their advertisements the sale of their products through licensed Colorado dealers. Arguably, in such circumstances, manufacturers are acting as agents of their franchise dealers. However, such an analysis creates dilemmas for dealers who may be held accountable for actions they cannot prevent. The Focus Group, therefore, recommends that the Executive Director consider promulgating advertising rules applicable to manufacturers and distributors.

11. Third-party marketing service and/or third-party information provider Liability for Advertisements --- The Board lacks jurisdiction to bring direct actions against third-party marketing services and/or third-party information providers for advertising violations. The Focus Group, therefore, recommends that the Board suggest that the General Assembly consider new legislation applicable explicitly to the licensing of third-party marketing services and/or third-party information providers.

12. Modernization of Language --- Various terms in the existing statutes and Board regulations, e.g., “computer display,” need to be updated by regulation to solidify and make explicit that most known features of the Electronic-Media Paradigm are covered. To the extent possible, amended terminology should be broad enough to anticipate future media and methodologies.

13. Inclusions within and Exclusions from an “Advertised Price.” The Board’s current regulations, relevant to inclusions within and exclusions from an advertised price of a vehicle, are as follows:

Regulation # 12-6-118 (3) (k) (respective to motor vehicles):

Advertising shall be construed to be misleading or inaccurate in the following particulars: Rule 13. Advertising the price of a vehicle without including all costs to the purchaser at the time of delivery, except sales tax, finance charges, cost of emissions test, and transportation costs, incurred after sale, to deliver the vehicle to the purchaser at the purchaser’s request.

Regulation 12-6-520 (3) (i) (respective to powersports vehicles):

Advertising shall be construed to be misleading or inaccurate in the following particulars:Rule 12. Advertising the price of a powersports vehicle without including all costs to the purchaser at the time of delivery, except sales tax, finance charges, cost of any required emissions test, and transportation costs, incurred after sale, to deliver the powersports vehicle to the purchaser at the purchaser's request.

The Focus Group has affirmed that the only costs that can be added to the advertised price of a vehicle are:

- a. Taxes and fees;
- b. Finance charges;
- c. Parts or services that a consumer specifically requests that a dealer add to the vehicle; and,
- d. Delivery costs associated with a consumer's request to have a vehicle delivered to the consumer at a location other than the dealership.

The use of "Dealer and Handling" charges is one of the most pervasive violations. Currently, Dealer and Handling charges must be included in the advertised price, although Dealer and Handling charges may be displayed in the manner of an arithmetic formula (i.e., $A + B = C$, where "A" is the vehicle's price before Dealer and Handling charges are added, "B" is Dealer and Handling charges, and "C" is the advertised price, provided that "C" is always displayed at least as prominently as "A" and "B" are displayed). The Focus Group discussed the relative merits of continuing the status quo for Dealer and Handling charges in Colorado compared to the various resolutions of the question other states have reached. No consensus exists on how Dealer and Handling charges should be addressed in advertising.

V. CONCLUSION

The members of the Focus Group are honored to have been included in this research and analysis project for the benefit of the Executive Director and the Board. At every meeting and in every discussion, the Focus Group recognized the immensity and the importance of this project for the consumers of Colorado and for the various constituencies represented by Focus Group participants. The Information Age is upon us all, and cannot be avoided. How we embrace it will make all the difference.

The Electronic-Media Paradigm in the Information Age is an evolving multi-faceted, powerful media complex that individuals, businesses, and governments ignore at their peril and avoid to their disadvantage. The best approach individuals or governments could take toward the Information Age would appear to be exactly this: we must all take a hard, honest look at the changes as they emerge, and strive to understand how they will impact us. The Information Age is a world of promise that offers considerable bounty for consumers and businesses alike. But it is also a world of potential hazards and challenges. Responsible governments vigilant in their citizens' and business' interests must examine the new landscape, discover and appreciate the values of the Electronic-Media Paradigm, support its technological changes, wherever reasonable, and eliminate or control its adverse impacts, wherever necessary.

APPENDIX

Alternative Views – Additional Comments

Electronic Media & Technologies Focus Group Report, April 2014

Alternative Views - Additional Comments

Submitted by:

Tim Jackson, President/CEO - Colorado Automobile Dealers Association (CADA)

Tammi L. McCoy, V.P. - Colorado Automobile Dealers Association (CADA)

Todd O'Connell, Exec. Director - Colorado Independent Automobile Dealers Association (CIADA)

Jerry Abboud, Exec. Director - Powersports Dealers Association of Colorado (PDAC)

IV. Findings and Recommendations, Section F. Miscellaneous Other Important Considerations, 4. Bait and Switch (pages 22-23)

It seems worthwhile to point out that Colorado law does already explicitly prohibit any type of “bait” advertising in C.R.S. 18-5-303 which is a criminal statute that covers all industries. We fully agree that any intentional scheme or plan to advertise a product with no intent to honor it should be illegal. We believe such conduct is a rare occurrence in Colorado and outliers that engage in such conduct should be targeted with strict enforcement in order to protect the overall integrity of our industry. The intent of this recommendation from our perspective as participants in the focus group was to adopt a Board rule with more specifics related to the motor vehicle industry and to give the Auto Industry Division more direct enforcement authority.

IV. Findings and Recommendations, Section F. Miscellaneous Other Important Considerations, 5. Advertising Time Frames (page 23)

We believe that the concept of adding explicit beginning and end dates to every electronic ad is problematic and overly burdensome. Advertisements in electronic media typically have even more constraints on space than those in traditional print media—especially banner ads, pop-up ads, or those that may appear on smart-phones or other small devices. Further, the differentiation that most print-ads would bear a “printed date” may not always be accurate as many consumers would likely cut out or make a copy of an ad without also copying the date of publication of the paper. Similar to print-ads, the current five-day default that applies from the last date the ad was “published” could refer to the last date an ad “appeared” online. Regardless, it would seem a much more appropriate balance to continue a default concept that an advertisement must be honored until the vehicle (or relevant category of vehicles advertised) is sold, unless an end-date is included. Similarly, if the beginning date is after a consumer may see an ad, then the beginning date must be disclosed, or by default will be considered to be as soon as the advertisement is publicized. In addition to a default rule that would avoid a need for explicit beginning and ending dates in every ad, a dealer would certainly have the *option* to include effective dates in order to limit the applicability as desired.

Note: This default concept is also contemplated in #8. Lowest Advertised Price Concept.

IV. Findings and Recommendations, Section F. Miscellaneous Other Important Considerations, 6. Removal of Sold, Leased, or Otherwise Unavailable Vehicles from Advertisements (page 23-24)

Adding a ‘time-certain’ requirement on the removal of all electronic ads presents challenges for dealers. One of the key problems is that many of the online listings today are based on data-feeds from Dealer Management Systems—either directly to larger third-parties, or via intermediaries that then feed into multiple third parties. Removing a particular vehicle from various downstream third parties within a time-certain could be impossible in some cases. Further, when a vehicle sale is signed contractually between a dealer and a consumer, if the sale is dependent upon financing and final lender approval, there may be a short delay in the sale being truly finalized. Many computer systems do not automatically pull inventory from the available pool until the sale is completely final and approved. Short of that, this would require very time-intensive manual removal for what could be a short delay. Ideally, computer system vendors would provide a ‘hold’ status or something similar, but that would require upgrades to computer systems on which dealers rely. We certainly believe that any intentional delays to mislead and draw-in consumers are problematic, but there are also legitimate reasons that delays can occur. A requirement to remove items from inventory in a reasonable timeframe that accommodates legitimate factors and delays would be preferable to a time-certain.

IV. Findings and Recommendations, Section A. Regulation of Advertising in Multiple Paradigms, 2. Equivalent Regulation. (page 14)

One of the primary reasons for forming the EMTFG was to discuss differences in automotive advertising in various electronic media. One of the primary issues in advertising on the Internet is space available for an Internet banner ad, either in physical dimensions or file size. Internet banner ads do not provide enough room to list information for the advertisement and the full disclaimer required for many types of ad. For example, some of these Internet banners only have enough room for the "hook" or the discounted price or offer. So, what options do dealers have for placement of the disclaimer. This section mentions the "one-click" concept. This concept should be further expanded upon and formed into a definitive ad regulation. At the very minimum, acknowledge that this is an education issue and tell dealers that placing terminology on the ad like "click here for details" on the ad is required and make the required disclaimer at the top of the page where the banner click takes the customer.

IV. Findings and Recommendations, Section F. Miscellaneous Other Important Considerations, Added Item (page 26+?)

One item that was mentioned during the last regular meeting of the EMTFG group was disclaimers on dealer websites that go beyond simple errors. This was not fully discussed as we were near the end of the final report. However, mention should be made to complete the report. An example from a local large franchise dealership reads: "Dealer XXX does not guarantee and will not be held responsible for typographical or other errors that appear on this site. Dealer XXX will not honor errors in pricing due to system error, human error, or otherwise". Is this disclaimer legal? Does it go too far? This type of disclaimer is common on dealer websites.

IV. Findings and Recommendations, Section B. Market Research and Advertising - Boundary Matters. (page 15-19)

The members of the EMTFG discussed Sunday closing laws in various degrees throughout this process. Sunday closing law itself is not an issue for the EMTFG, however, in relation to the line between market research, advertising and sales, this is a problem. This line is an issue on Sundays. Does chatting with a customer on Sunday through an Internet chat program constitute sales? Where is the line drawn? Some Internet chat companies use personnel outside of Colorado that simply get customer information and answer basic questions. However, many dealers use chat applications with dealer personnel actually chatting with, and negotiating with, customers. Does Sunday closing law apply in these situations?