Submitted via www.regulations.gov

September 12, 2022

Federal Trade Commission
Office of the Secretary
600 Pennsylvania Avenue, NW, Suite CC-5610 (Annex C)
Washington, DC 20580

Re: Motor Vehicle Dealers NPRM, File No. P204800

The National Automobile Dealers Association (NADA)[1] respectfully submits the following comments in response to the motor vehicle trade regulation rule that the Federal Trade Commission (FTC or Commission) has proposed in the above captioned matter.[2]

On July 13, 2022, the FTC issued a comprehensive proposed Motor Vehicle Dealers Trade Regulation Rule (Proposed TRR) that is unprecedented in scope and would affect tens of millions of consumer transactions annually. The proposed rule seeks to:

1. prohibit a wide range of activity;
2. establish certain advertising standards;
3. require an extensive series of oral and written disclosures governing communications with consumers related to the sales price of motor vehicles, certain credit terms, and voluntary protection products (VPPs);
4. mandate the posting of certain information on dealer websites; and
5. impose a massive set of new recordkeeping requirements.

The Commission's notice of proposed rulemaking (NPRM) is ill-conceived, ill-supported, ill-coordinated, untested, and unlawful. It also is unnecessary as each harm it seeks to address is already regulated under existing law. If finalized as proposed, the NPRM will inject massive costs into the auto retailing process, greatly extend transaction times, greatly confuse consumers, and impede efficiencies aided by technological innovations that have significantly improved – and continue to improve – the customer experience. The NPRM is severely flawed both as a matter of law and public policy. It must be withdrawn.

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[1] NADA represents over 16,000 franchised automobile and truck dealers in all 50 states who sell, finance, and lease new and used motor vehicles and engage in service, repair, and parts sales. This includes approximately 1,800 commercial truck dealers. NADA members collectively employ 1.2 million people nationwide.
[2] Motor Vehicle Dealers Trade Regulation Rule, 87 Fed. Reg. 42,012-42,048 (Jul. 13, 2022) (to be codified at 16 C.F.R. § 463).

Outline of Comments

I. The motor vehicle retailing model is efficient, consumer friendly, fundamentally sound, heavily regulated, and will not benefit from additional governmental intervention.

  a. Motor vehicle retailing in today's market.

    1. The sale of the vehicle.
    2. The disposition of the trade-in vehicle.
    3. The financing of the vehicle.
    4. The protection of the customer's investment.

  b. The positive consumer experience.

  c. The FTC's proposed restructuring of the marketplace.

II. The NPRM violates the FTC's own procedural rules and does not provide adequate transparency or notice to the public.

  a. The NPRM violates 16 C.F.R. Section 1.10's ANPRM requirement.

    1. Section 1.10 remains in effect notwithstanding Dodd-Frank.
    2. The FTC's failure to comply with Section 1.10 violates the APA.

  b. The FTC failed to gather essential information or provide adequate notice or opportunity for public engagement.

  c. The NPRM violates the PRA, RFA, and OMB requirements.

    1. The FTC failed to comply with procedural requirements in the PRA and OMB implementing regulations.
    2. The FTC failed to comply with the RFA.
    3. The FTC failed to comply with Section 1 of E.O. 12866.
    4. The FTC failed to list the Proposed TRR in the Unified Agenda of Regulatory and Deregulatory Actions as required by the RFA and E.O. 12866.

  d. The Proposed TRR impermissibly seeks to regulate the business of insurance.

III. The NPRM is based on a flawed premise and inadequate data and fails to identify a regulatory problem in need of a solution.

  a. There is nothing that mandates this action.

<u>Attachments</u>

Comments

I. The motor vehicle retailing model is efficient, consumer friendly, fundamentally sound, heavily regulated, and will not benefit from additional governmental intervention.

In assessing the FTC's comprehensive proposal to restructure multiple aspects of motor vehicle retailing in the United States, it is essential to consider key features of the current marketplace and how they serve consumers in an efficient and competitive manner and protect them from deception or manipulation by the very small number of bad actors.

a. Motor vehicle retailing in today's market.

The process of selling a motor vehicle involves multiple necessary components that do not lend themselves to a rapid transactional experience. Every sales transaction consists of up to four major segments, including the sale of the vehicle, the disposition of the trade-in vehicle, the financing of the vehicle, and the protection of the customer's investment. As briefly explained below, each of these segments offers value and convenience to consumers but also involves the need to perform operational tasks and comply with applicable legal requirements.

1. The sale of the vehicle.

The sale of motor vehicles involves multiple components that require the expenditure of considerable resources by motor vehicle dealers, provide significant value to consumers, and are subject to extensive preexisting regulation at the federal and state level.

On the front end of the process, motor vehicle dealers must acquire and store inventory (which typically must be financed via a wholesale "floor plan" line of credit), retain and train a sales force, provide necessary overhead support (buildings, computer hardware and software, electronic equipment, etc.), execute requirements associated with vehicle inventory such as preparing and affixing Used Car Buyers Guides on used vehicles,[3] comply with disclosure and other requirements applicable to warranties,[4] and advertise and market their products and services. Dealership employees then engage their customers through a variety of channels (e.g., customer visits to showrooms, customer phone calls, and customer e-mails, text messages, and online chats), explain the features and pricing of their products and services, conduct test drives, and complete an array of required tasks associated with the sale and delivery of the vehicle. A series of federal duties and restrictions apply to customer communications, including the

[3] Used Motor Vehicle Trade Regulation Rule, 16 C.F.R. § 455.2(a).
[4] Rules, Regulations, Statements and Interpretations Under the Magnuson-Moss Warranty Act, 16 C.F.R. Subchapter G.

Telephone Consumer Protection Act,[5] Junk Fax Prevention Act,[6] CAN-SPAM Act,[7] and Telemarketing Sales Rule.[8] Numerous requirements also govern advertising at both the federal[9] and state level.

Sale and delivery tasks typically require: screening potential buyers against the List of Specially Designated Nationals maintained by the Office of Foreign Assets Control (OFAC); preparing and executing a Buyer's Order (the contractual agreement governing the sale of the vehicle); preparing and delivering a federal Odometer Disclosure Statement;[10] delivering the Monroney Label in a new vehicle transaction[11] and a Used Car Buyer's Guide in a used vehicle transaction;[12] complying with federal credit and debit card truncation requirements;[13] executing other tasks and/or transaction specific documents that could arise (e.g., the FTC Mail, Internet, or Telephone Order Merchandise Rule[14] and IRS/FinCEN Form 8300 Cash Report[15]); preparing tax, title, and registration documents and completing any associated state filing requirements; and fulfilling any additional state obligations.

In addition to the foregoing legal requirements, the FTC possesses broad enforcement authority to address unfair and deceptive acts and practices (UDAP) under Section 5 of the FTC Act. Each state also possesses independent state-law UDAP enforcement authority. In addition, over half of the states further regulate motor vehicle sales transactions[16] and each provides remedies for contract law violations.

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[5] Telephone Consumer Protection Act, 47 U.S.C. § 227.
[6] Junk Fax Prevention Act, 47 U.S.C. § 227; Junk Fax Prevention Act, 47 C.F.R § 64.1200.
[7] Controlling the Assault of Non-Solicited Pornography and Marketing Act (CAN-SPAM), 15 U.S.C. § 103; CAN-SPAM Act, 16 C.F.R. § 316.
[8] Telemarketing Sales Rule, 16 C.F.R. § 310.
[9] *See generally Advertising and Marketing*, FTC, https://www.ftc.gov/business-guidance/advertising-marketing (last visited Sept. 9, 2022).
[10] Odometer Disclosure Requirements, 49 C.F.R. § 580.
[11] *See* Label and entry requirements, 15 U.S.C. § 1232; Vehicle labeling of fuel economy, greenhouse gas, and other pollutant emissions information, 49 C.F.R. § 575.401(c)(4); and Fuel economy information, 49 U.S.C. § 32908(b).
[12] Used Motor Vehicle Trade Regulation Rule, 16 C.F.R. § 455.3(a).
[13] Fair and Accurate Credit Transaction Act, 15 U.S.C. § 1681c.
[14] FTC Mail, Internet, or Telephone Order Merchandise Rule, 16 C.F.R. Part 435.
[15] IRS Cash Reporting Rule, 26 U.S.C § 6050I.
[16] *See* Alaska Stat. § 45.25.610; Ariz. Rev. Stat. Ann. §§ 44-281 - 44-295; Cal. Civ. Code §§ 2981 - 2984.6; Colo. Rev. Stat. § 6-1-708; Del. Code Ann. tit. 5, §§ 2901 - 2915; Fla. Stat. §§ 520.01 - 520.14; Ga. Code Ann. §§ 10–1–30 - 10–1–42; Haw. Code R. §§ 437-31.5 - 437-32; 815 Ill. Comp. Stat. §§ 375/1-§375/26.1; Ky. Rev. Stat. Ann. §§ 190.09 - 190.140; La. Stat. Ann. §§ 969.1 - 969.54; Md. Code Ann., Transp. Law. § 15-311; Mass. Gen. Laws ch. 255B, §§ 1 – 25; Mich. Comp. Laws §§ 492.101 - 492.151; Minn. R. §§ 53c.01 - 53c.14; Miss. Code Ann. §§ 63–19–1 - 63–19–57; Mo. Rev. Stat. §§ 365.01 - 365.200; Nev. Rev. Stat. §§ 97.297 - 97.304; N.H. Rev. Stat. Ann. §§ 361–a:1 - 361–a:13; N.J. Rev. Stat. §§ 39:10–1 - 39:10–25; N.M. Stat. Ann. §§ 57–11–1 - 57–11–13; N.Y. Pers. Prop. Law §§ 301 - 316; Ohio Rev. Code Ann. §§ 4517.40 - 4517.42; Or. Admin. R. §§ 83.510 - 83.680; 12 Pa. Cons. Stat. §§ 6201- 6275; Tex. Fin. Code Ann. §§ 348.001 - 348.606; Vt. Stat. Ann. tit. 9, §§ 2351 - 2362; Wis. Stat. § 218.0142.

While significant strides have been – and continue to be – made to streamline the sales and delivery process, it is not fast or easy as it still requires the execution of multiple steps and the need to comply with a series of consumer protection mandates at the federal and state level. Nevertheless, motor vehicle dealer retailing today is a community-based apparatus that effectively delivers over 40 million vehicles to consumers every year by franchised and independent motor vehicle dealers.[17]

2. The disposition of the trade-in vehicle.

As part of the optional services motor vehicle dealers provide, a consumer may trade in a vehicle when purchasing a replacement vehicle and many choose to do so.[18] This offers consumers (i) significant convenience by eliminating the need to market and sell their vehicle to another commercial establishment or private party and by facilitating necessary transactional requirements such as securing title transfers and lien releases, and (ii) a source of competitive pricing for their vehicles.

The disposition of trade-in vehicles requires motor vehicle dealers to execute a series of tasks such as appraisals, handling transactional requirements involving titles, liens, tags, and state personal property or excise taxes; ensuring any negative equity is properly disclosed if the consumer chooses to finance the replacement vehicle through the dealer;[19] and managing all of the functions and absorbing the corresponding overhead costs necessary to dispose of the trade-in vehicle at the dealership or through a wholesale auction.

The dealer's purchase of the trade in vehicle is subject to many of the requirements and restrictions listed above that apply to the dealer's sale of the replacement vehicle, including federal and state UDAP restrictions, supplemental state laws,[20] and state contract law requirements.

If consumers choose to dispose of their current vehicle through other means, they still must manage the tasks associated with its disposition. For example, the presence of negative equity

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[17] Franchised and independent motor vehicle dealers delivered 41,906,758 new and used motor vehicles to consumers in 2021. *See* S&P Global; Wards Intelligence; NADA.

[18] In 2021, 50.3% of new vehicle deliveries involved a trade-in vehicle, while 38.1% of used vehicle deliveries involved a trade-in vehicle. *See* J.D. Power. J.D. Power, 2021 U.S. Sales Satisfaction Index (SSI) Study (2021).

[19] Consumer Leasing (Regulation M), 12 C.F.R. § 213.2(f). *See also* Supplement I to § 226 - Official Staff Interpretation to Regulation Z, 12 C.F.R. § 226.2(a)(18)(3).

[20] *See, e.g.*, Ark. Code Ann. 23-112-316, imposing a series of restrictions on the conditional sale of vehicles, including the disposition of a customer's trade-in vehicle. Many other states impose similar restrictions. *See* Alaska Stat. § 45.25.500; Ariz. Rev. Stat. Ann. § 44-286; Cal. Veh. Code § 11709.4; Colo. Rev. Stat. § 6-1-708; Conn. Gen. Stat. § 14-62; Del. Code Ann. tit. 5, § 2907; 815 Ill. Comp. Stat. 636 / 15 and 815 Ill. Comp. Stat. 375 / 13; La. Stat. Ann. § 32:796; Me. Stat. tit. 10, § 1194; Md. Code Ann., Transp. § 15-311.3; Mass. Gen. Laws ch. 255B, § 13; Mich. Comp. Laws § 445.853; Miss. Code Ann. § 63-19-31; Mo. Rev. Stat. § 365.07; Mont. Code Ann. § 31-1-232; Nev. Rev. Stat. § 598.092; N.H. Rev. Stat. Ann. § 361-A:7; N.M. Stat. Ann. § 58-19-7; N.Y. Bus. Corp. Law § 198-c; Or. Rev. Stat. § 646A.090; Tex. Fin. Code Ann. § 348.013; Utah Code Ann. § 348.013; Vt. Stat. Ann. tit. 9, § 2355; Vt. Stat. Ann. tit. 9, § 2355.

on their existing vehicle does not disappear because they have chosen to sell the vehicle to another commercial establishment or private party instead of a motor vehicle dealer. Their current lien must be paid off, the title on their current vehicle must be released, and a host of other tasks must be performed as part of the sale process. Consequently, having the ability to execute these tasks at the same time and by the same business that sells the consumer the replacement vehicle is a very attractive feature of today's marketplace.

3. The financing of the vehicle.

Franchised motor vehicle dealers also typically offer – and a large percentage of consumers enthusiastically elect and benefit from – financing from the motor vehicle dealer to purchase the motor vehicle they have selected. While some franchised motor vehicle dealers offer in-house financing for consumers who require but cannot secure financing for a motor vehicle purchase from other finance sources (which is typically referred to as "Buy Here Pay Here" financing), franchised dealers routinely engage in indirect vehicle financing to meet their customers' financing needs.

Indirect or three-party vehicle financing transactions provide an efficient and convenient means for consumers to arrange financing through the same dealership from which they purchase their vehicles. This optional means of financing has provided millions of consumers with access to competitively priced credit for their vehicle purchases.

The efficiency that makes it cost effective for finance sources to outsource to dealers the retail distribution of their financial products stems from the fact that each creditor involved in the finance transaction (the dealer as the initial creditor and the finance source as the assignee creditor) performs distinct functions that do not overlap and that match their respective capabilities.

Dealers establish relationships with prospective vehicle purchasers, take their applications for financing, and send the applications to either some or all of the many finance sources with which they conduct business (typically determined by matching the consumer's credit report to the finance sources' lending parameters). Finance sources thereupon conduct thorough and highly sophisticated underwriting on the finance applications they receive using their own proprietary systems, which include an analysis of risk-based factors such as loan-to-value (LTV) and debt-to-income ratios, verification of employment, and routine entries on the applicant's credit report (e.g., credit score, number of delinquent accounts, bankruptcy filings, etc.). Based on this analysis, the finance source determines whether, and at what wholesale rate, it will take assignment of the credit contract from the dealer. For consumers whose credit applications have been approved by at least one finance source, dealers will offer financing at a retail rate and, if the consumer consents to the terms, enter into a credit or lease contract with the consumer and then immediately assign it to the finance source.

Dealers thus do not consummate the credit or lease contract with the consumer until after the finance source has conducted underwriting and agreed to take assignment of the contract. This arrangement is necessary as dealers typically are not equipped to either serve as their own finance source or conduct the necessary underwriting.

The retail rate that is offered to the consumer reflects the separate functions performed by the finance source, in its capacity as the underwriter, source of the funds for the vehicle purchase, and servicer of the credit or lease contract during its life, and the dealer, in its capacity as the retail distributor of the financial product. The wholesale "buy" rate set by the finance source includes the entire risk premium, along with the finance source's costs of funds, loan production and servicing costs, and return on investment on its costs. The retail margin that the dealer adds to the wholesale buy rate (known as "dealer participation") does not include a risk premium, but rather consists of the dealer's loan distribution costs and return on investment on those costs.

Motor vehicle dealers must perform a series of government-imposed obligations related to the functions they perform when extending optional financing to consumers. These include, but are not limited to, complying with the following requirements:

(i) Fair Credit Reporting Act (FCRA):
- a) Obligations of Users of Credit Reports;[21]
- b) Affiliate Information Sharing;[22]
- c) Affiliate Marketing Rule;[23]
- d) Prescreen Opt-Out Notice Rule;[24]
- e) Red Flags Rule;[25]
- f) Address Discrepancy Rule;[26]
- g) Disposal Rule;[27]
- h) Fraud and active-duty alerts;[28]
- i) Victim requests for records;[29]
- j) Medical Information (FRB[30] Regulation FF);[31]
- k) Risk-Based Pricing Rule; and
- l) Adverse Action Notices;

(ii) Gramm Leach Bliley (GLB) Act:[32]

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[21] 16 C.F.R. Part 601, Appendix C.
[22] 15 U.S.C. § 1681(d)(2)(A)(iii).
[23] 16 C.F.R. § 680.
[24] 16 C.F.R. § 642.
[25] 16 C.F.R. § 681.
[26] 16 C.F.R. § 641.
[27] 16 C.F.R. § 682.
[28] 15 U.S.C. § 1681c–1.
[29] *Id*.
[30] Board of Governors of The Federal Reserve System (FRB).
[31] Obtaining and Using Medical Information in Connection with Credit (Regulation FF), 12 C.F.R. § 232.
[32] Gramm–Leach–Bliley Act, Pub. L. No. 106–102, 113 Stat. 1338 (1999).

a) Privacy Rule;[33] and
b) Safeguards Rule;[34]

(iii) Equal Credit Opportunity Act (ECOA) and FRB Regulation B;[35]
(iv) Federal Consumer Leasing Act (CLA) and FRB Regulation M;[36] and
(v) Federal Truth In Lending Act (TILA) and FRB Regulation Z.[37]

TILA and Regulation Z require that dealer-creditors provide consumers with a series of credit disclosures that appear prominently on the front of the retail installment sale contract (RISC). The CLA and Regulation M similarly require that dealer-lessors provide consumers with a series of lease disclosures that appear prominently on the front of the lease agreement.

In addition, the FTC possesses broad UDAP enforcement authority under Section 5 of the FTC Act, and it imposes additional requirements applicable to motor vehicle dealers. For example, the FTC Holder In Due Course Rule requires sellers to include in consumer credit contracts a notice concerning claims and defenses.[38]

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[33] 16 C.F.R. § 313.
[34] 16 C.F.R. § 314.
[35] 15 U.S.C. § 1691. *See also* 12 C.F.R. § 202.
[36] 15 U.S.C. § 1667. *See also* 12 C.F.R. § 213.
[37] 15 U.S.C. § 1601. *See also* 12 C.F.R. § 226.
[38] 16 C.F.R. § 433. In November 2010, the Commission conducted a compliance sweep of 50 motor vehicle dealers and two large online dealers in 45 states that found "broad compliance" with the rule (a finding which the NPRM fails to include in any of its multiple references to the FTC's 2010-2011 Motor Vehicle Roundtables discussed below). *See FTC Finds Broad Compliance Among Auto Dealers with Rule That Protects Consumers with Car Loans*, FTC, (May 16, 2011), https://www.ftc.gov/news-events/news/press-releases/2011/05/ftc-finds-broad-compliance-among-auto-dealers-rule-protects-consumers-car-loans-0.

Each state also possesses independent state-law UDAP enforcement authority, and virtually every state has enacted a law that further regulates consumer credit sales.[39] And every state has a statute addressing consumer leasing, with many of them specific to motor vehicle leasing.[40]

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[39] *See* Ala. Code §§5-19-1 - 5-19-33 and Ala. Admin. Code r. 155-2-2-.01 - 155-2-2-.18; Alaska Stat. §§ 45.10.010 - 45.10.230; Ariz. Rev. Stat. Ann. §§ 44-281 - 44-295; Cal. Civ. Code §§ 1801 - 1812.20; Colo. Rev. Stat. §§ 5-1-101 - 5-9-102.5; Conn. Gen. Stat. §§ 36a-770 - 36a-788; Del. Code Ann. tit. 6, §§ 4301 - 4351; Fla. Stat. §§ 520.01 - 520.999 and Fla. Admin. Code Ann. r. 69V-60.001 - 69V-60.075; Ga. Code Ann. §§ 10-1-1 - 10-1-16; Haw. Code R. §§ 476-1 - 476-32; Idaho Code §§ 28-41-101 - 43-405; 205 Ill. Comp. Stat. §§ 660/1 - 660/20, §§ 670/1 - 670/27, §§ 405/1 - 405/33 and Ill. Admin. Code tit. 38, §§ 110.1- 110.430, § 160.1- §160.270; Ind. Code §§ 24-4.5-1-101 - 24-4.5-2-502 and Ind. Code §§ 24-5-2-21 - 24-5-2-24; Iowa Code §§ 537.1101 - §537.5302 and Iowa Admin. Code r. 61-10.1 - 61-14.1; Kan. Admin. Regs. §§ 16a-1-101, 16a-9-102 and Kan. Admin. Regs. §§ 75-6-9, 75-6-23, 75-6-26, 75-6-30 - 75-6-38; Ky. Rev. Stat. Ann. §§ 371.210 - 371.330; La. Stat. Ann. §§ 9:3510 - §9:3565, 10: XI.701 - §10:XI.905; Me. Stat. tit. 9a, §§ 1-101 - 8-511; Md. Code Ann., Com. Law. §§ 12-601 - 12-636; Mass. Gen. Laws ch. 255D, §§ 1 - 32 and 209 Mass. Code Regs. §§ 32.01 - 32.04; Mich. Comp. Laws §§ 445.851 - 445.873 and Mich. Admin. Code r. 125.1405; Minn. R. §§ 325G.15 - §325G.16, 53C.01 - 53C.14; Miss. Code Ann. §§ 63-19-31 - 63-19-45; Mo. Rev. Stat. §§ 364.010 - 364.070, 365.010 - 365.200, 408.250 - 408.380, 1140-3.020 -§1140-3.041; Mont. Code Ann. §§ 31-1-201 - §31-1-243; Neb. Rev. Stat. §§ 45-334 - § 45-353; Nev. Rev. Stat. §§ 97.015 - 97.335, 675.005 - 675.080; N.H. Rev. Stat. Ann. §§ 358-K:1 - 358-K:6, 361-A:1 - 361-C:4; N.J. Rev. Stat. §§ 17:16C-1 - 17:16C-103; N.M. Stat. Ann. §§ 56-1-1 - 56-1-16; N.Y. Pers. Prop. Law §§ 401 – 422, § 91.1 -§92.7; N.C. Gen. Stat. §§ 25A-1 - 25A-45; N.D. Cent. Code §§ 51-13-01 - 51-13-08; Ohio Rev. Code Ann. §§ 1317.01 - 1317.99; Okla. Stat. tit. 14a, §§ 1-101 - 9-101; Or. Admin. R. §§ 83.010 - 83.190; 12 Pa. Cons. Stat. §§ 6101 - 6355; 6 R.I. Gen. Laws §§ 6-27-1 - 6-27-11; S.C. Code Ann. §§ 37-2-101 - 37-2-416; S.D. Sess. Laws §§ 54-3A-1 - 54-3A-25; Tenn. Code Ann. §§ 47-11-101 - 47-11-111; Tex. Fin. Code Ann. §§ 345.001 - 345.357 and 7 Tex. Admin. Code §86.101 - 86.102; Utah Admin. Code r. §§ 70C-1-101 - 70C-8-203, 335-2-1 - 335-2-6; Vt. Stat. Ann. tit. 9, §§ 2351 - 2410; Wash. Rev. Code §§ 63.14.010 - 63.14.926; W. Va. Code R. §§ 46A-1-101- 46A-5-106 and W. Va. Code R. §§ 106-1-1 - 106-1-3, 106-11-1 - 106-11-7; Wis. Stat. §§ 421.101 - 422.422 and Wis. Admin. Code §§ 76.01 - 76.13; Wyo. Stat. Ann. §§ 40-14-101- 40-14-702 and 21-7 Wyo. Code R. § 1-5.

[40] *See* Ala. Code §§ 7–2a–101; Alaska Stat. §§ 45.12.101 - 45.12.532; Ariz. Rev. Stat. Ann. §§ 47–2a101 - 47–2a532; Cal. Civ. Code §§ 2985.7-2994; Colo. Rev. Stat. §§ 4–2.5–101 - 4–2.5–533 and Colo. Rev. Stat. §6-1-708; Conn. Gen. Stat. §§ 42–390 - 42-449 and Conn. Gen. Stat. §§ 42–270 - 42-279; Del. Code Ann. tit. 6, §§ 2a–101 - 2a–532; Fla. Stat. §§ 680.101 - 680.532 and Fla. Stat. § 520.07; Ga. Code Ann. §§ 11–2a–101 - 11–2a–532 and Ga. Code Ann. §10-1-39; Haw. Code R. §§ 490:2a –101 - 490:2a–532, Haw. Code R. § 437-31.5, and Haw. Code R. §§ 481L-1 - 481L-4; Idaho Code §§ 28–12–101 - 28–12–532; 815 Ill. Comp. Stat. §§ 636/1-636/999; Ind. Code §§ 26–1–2.1–101 - 26–1–2.1–532; Iowa Code §§ 554.13101 - 554.13532; Kan. Admin. Regs. §§ 84–2a–101 - 84–2a–532; Ky. Rev. Stat. Ann. §§ 355.2a–101 - 355.2a–532; La. Stat. Ann. §§ 3301 - 3342; Me. Stat. tit. 11, §§ 2–110 - 2–1532; Md. Code Ann., Com. Law. §§ 14–2001 - 14–2010; XV Mass. Code Regs. Chapter 106 §§ 2a–101 - 2a–532; Mich. Comp. Laws §§ 445.991 - 445.995; Minn. R. §§ 336.2a–101 - 336.2a–531; Miss. Code Ann. §§ 75–2a–101 - 75–2a–532; Mo. Rev. Stat. § 400.2a–101 - 400.2a–532; Mont. Code Ann. §§ 30–2a–101-30–2a–532; Neb. Rev. Stat. §§ 2a–101-2a–532; Nev. Rev. Stat. §§ 100.095 - 100.180; N.H. Rev. Stat. Ann. §§ 361–D:1 - 361–D:28; N.J. Rev. Stat. §§ 12a:2a–101 - 12a:2a–532; N.M. Stat. Ann. §§ 55–2a–101 - 55–2a–532; N.Y. Pers. Prop. Law §§ 9-a-330-9-a-353; N.C. Gen. Stat. §§ 25–2a–101 - 25–2a–532; N.D. Cent. Code §§ 41–02.1–01 - 41–02.1–80; Ohio Rev. Code Ann. §§ 1310.01 - 1310.78; Okla. Stat. tit. 12a, §§ 2a–101 - 2a–532; Or. Admin. R. §§ 72a.1010 - 72a.5310; 13 Pa. Cons. Stat. §§ 2a101-2a532; 6a-2.1 R.I. Code R. §§ 101-532; S.C. Code Ann. §§ 36–2a–101-36–2a–532; S.D. Sess. Laws §§ 57a–2a–101-57a–2a–531; Tenn. Code Ann. §§ 47–2a–101 - 47–2a–532; Tex. Fin. Code Ann. §§ 348.001 - 348.014; Utah Admin. Code r. §§ 70a–2a–101 - 70a–2a–534; Vt. Stat. Ann. tit. 9a, §§ 2a–101-2a–532; 8.2a Va. Code Ann. §§ 8.2a–101 - 8.2a–532; Wash. Rev. Code §§ 62a.2a.101 - 62a.2a–532; W. Va. Code R. §§ 46–2a–101 - 46–2a–532; Wis. Stat. §§ 429.101-429.301; Wyo. Stat. Ann. §§ 34.1–2.a–101 - 34.1–2.a–532.

These requirements, many of which involve notice requirements, require time to execute. Nevertheless, optional dealer financing injects enormous competition into the marketplace that disciplines financing rates that are offered to consumers, and it provides government regulated financing to large numbers of consumers who cannot otherwise secure financing for their essential transportation needs.

4. The protection of the customer's investment.

Motor vehicle dealers also offer their customers VPPs that can protect their investment in the motor vehicle being purchased and the financing commitment for that purchase. These products offer a range of protection against the occurrence of different events (e.g., costly vehicle repairs, windshield cracks, tire and wheel damage, key fob loss, standard maintenance, and amounts owed on a finance contract when a vehicle is declared a total loss), and their utility and value can differ depending on the circumstances of the customer and the vehicle being purchased. While these products offer value to any consumer, they are particularly valuable to consumers who cannot self-insure against these events and would experience financial hardship if they were to occur.[41] This provides consumers who are particularly vulnerable to such a loss with a convenient mechanism to budget against it, and it provides them peace of mind knowing that they have protection against these occurrences.

Motor vehicle dealers typically present consumers with VPP options when the consumer knows which vehicle the consumer will purchase and thus has some context for knowing which VPPs to consider. (As with the timing of Truth In Lending disclosures, which must be presented "before consummation of the transaction,"[42] this offers the information at the time that is most relevant to the consumer.) The dealer typically utilizes a simple and easy-to-read menu format to present these options and records the consumer's election to either purchase or decline these products.

Not surprisingly, many consumers decide to purchase VPPs, although the Commission overstates the percentage of such consumers.[43] And consumers who purchase VPPs from motor vehicle dealers display a high level of satisfaction with these products and frequently purchase them again when buying subsequent vehicles.[44] In addition, as reflected in a 2019 letter that NADA sent to the Department of Defense (DOD) after its subsequently withdrawn

[41] Many organizations have reported on this concern. *See, e.g.*, Ellen Edmonds, *One-in-Three U.S. Drivers Cannot Pay for an Unexpected Car Repair Bill,* AAA, (Apr. 4, 2017), https://newsroom.aaa.com/2017/04/one-three-u-s-drivers-cannot-pay-unexpected-car-repair-bill/.
[42] 12 C.F.R. § 226.17(b).
[43] The Commission cites NADA data in support of its statement that "approximately 94% of new vehicle sales and 86% of used vehicle sales includes an optional add-on." 87 Fed. Reg. at 42,032 and Footnote 162. This is incorrect as these percentages reflect the frequency with which a consumer elects either or both dealer-financing and at least one VPP. NADA's 2021 data reflects the following VPP penetration rates: New vehicles - 50.8% for service contracts, 15.3% for GAP Waiver, and 13.4% for maintenance plans; Used vehicles – 56.1% for service contracts, 18.2% for GAP Waiver, and 6.2% for maintenance plans.
[44] *See* Section I.c below and Attachment 2.

interpretation of the Military Lending Act effectively precluded service members and their dependents from being able to purchase optional Guaranteed Asset Protection (GAP) Waiver, the loss of availability of these products can present a serious hardship to consumers. (See Attachment 1).[45]

Numerous protections are afforded to consumers as part of the VPP sales process. In addition to the fact that *voluntary* protection products are, as their name suggests, completely voluntary, many of them may be cancelled by consumers for a full refund during the initial period of the product's coverage and for a *pro rata* refund thereafter.

In addition, TILA and Regulation Z require that, in order to exclude the premiums for these products from the finance charge and include them in the amount financed (which is standard in the industry), the creditor must disclose the premium and voluntary nature of the product and the consumer must separately sign for it.[46] Thus, consumers do not purchase these products until they have separately signed for them, and this is in addition to the menu election they have made, any separate contract addenda they may be required sign, state contract law protections, and any additional state law requirements that may apply.[47] And both the FTC and the States may independently exercise their UDAP enforcement authority in the limited instances when VPP violations arise. Therefore, consumers who purchase these products do so in a highly regulated environment.

Collectively, each major phase of the car buying process, which is executed by personnel in different dealership departments who are trained to perform the functions of their department, involves cost and effort, requires time (a considerable portion of which is devoted to executing required government disclosures), offers value and convenience to consumers, and contains built in protections for consumers on both the front end of the car buying process and remedially should bad acts occur.[48] It is not in need of further regulation.

As is evident from this overview, purchasing a motor vehicle is a multifaceted transaction that significantly differs from the purchase experience for other consumer products and services. Consequently, any use of the latter as a metric to measure the former is inapposite and would yield an apples-to-oranges comparison. In addition, the Commission's criticism of the "high volume of dense information [that consumers are presented with] during the long and complex

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[45] This is expressly recognized by the State of Louisiana which *requires* sellers to "offer the consumer the option of voluntarily purchasing gap coverage protecting the consumer from possible liability as a result of the consumer's property insurance being insufficient to fully pay and satisfy the unpaid balance under the consumer's contract as a result of a total loss of vehicle…." La. Stat. Ann. § 6:969.26.D.

[46] 12 C.F.R. § 226.4(d).

[47] *See, e.g.,* Cal. Veh. Code §§ 11713.18-11713.21.

[48] And additional protections exist as dealers must maintain their motor vehicle license, abide by the terms of the manufacturer-dealer sales and service agreement, and contend with all the adverse consequences that result from negative publicity incurred by a community-based business. In addition, further protections exist for certain group of consumers, such as service members. *See* 32 C.F.R. Part 631 (establishing procedures for military commanders to declare off-limits to service members businesses which engage in "unfair commercial or consumer practices.")

motor vehicle buying or leasing experience,"[49] which the Commission repeats throughout the NPRM, fails to recognize (i) the time needed to complete the multiple functions at each stage of this process, and (ii) as noted above, the fact that much of this time is needed to satisfy requirements that are imposed by the FTC and other federal and state agencies.

Even more confounding (and discussed in greater detail below) is the fact that the Commission's response to this "long and complex" process that involves a "high volume of dense information" is to add to it by requiring motor vehicle dealers to build into the sales process several new, confusing, dense, and redundant disclosures on multiple topics.

Equally concerning is that the Commission's proposals do not account for – and will only serve to frustrate – significant strides that have been made by motor vehicle dealers and their technology vendors to complete the required tasks in a more streamlined fashion. Innovation and competition have produced and resulted in the emergence and widespread adoption of improved in-store technologies and online sales to facilitate the purchasing experience. This positive trend should be encouraged and allowed to further develop without interference by the Commission.

b. The positive consumer experience.

The efficiencies provided by the current auto retailing model and its benefits to consumers are fully demonstrated by a wide range of data much of which is publicly available. These data, which the Commission has apparently not sought or even taken notice of, establish that the overwhelming majority of Americans are quite satisfied with their vehicle acquisition experiences. And these data speak both to consumers' general satisfaction with the car buying process and to their positive reactions to some of the specific sub-elements of that process that are the focus of the Proposed TRR. Of course, as with any sector of the economy, these data do not suggest that the process is perfectly executed in every transaction. But the fact that a small minority of consumers report some dissatisfaction with their experiences underscores that both (1) the data are valid (in that, given the size of the market, some level of dissatisfaction is inevitable) and (2) no systemic problem exists that warrants the radical restructuring that the Proposed TRR would bring.

Despite many unfounded stereotypes to the contrary, the public record contains ample data demonstrating that consumers are generally very happy with their experiences acquiring automobiles. For example, the Sales Satisfaction Index (SSI) compiled by renowned market research firm J.D. Power shows that overall customer satisfaction with all dealers (both those where they bought and those they interacted with but did not buy from) is high, scoring 789 on a 1,000-point scale in 2021.[50] Further, satisfaction with those dealers where buyers actually

[49] 87 Fed. Reg. at 42,025.
[50] *Despite Lack of New-Vehicle Inventory, Sales Satisfaction Unchanged from Year Ago, J.D. Powers Finds*, J.D. POWER, (Nov. 10, 2021), https://www.jdpower.com/business/press-releases/2021-us-sales-satisfaction-index-ssi-study.

purchased their vehicle is even higher, scoring 841 on the same scale.[51] Similarly, the 2021 Cox Automotive Car Buyer Journey Study (2021 Cox Study) indicates that a full 78% of new car buyers are *highly* satisfied with their experience at their dealership of purchase.[52] (And when additional data Cox provided to NADA is considered, which includes both moderately satisfied and highly satisfied customers, the combined overall satisfaction percentage jumps to 93 percent.)

Finally, even comments filed in this rulemaking docket demonstrate significant consumer satisfaction with the nation's auto dealers. For example, the Institute for Regulatory Analysis and Engagement (IRAE) submitted an analysis of over 300,000 randomly selected Google reviews of U.S. car dealerships.[53] This sampling came from every state and included reviews of more than 11,000 different dealerships. IRAE found the following:

- On average, dealers achieved an overall rating of 4.47 on a 5 star scale.
- Approximately 80 percent of the reviews in the set gave the subject dealer a full 5 star rating.
- The average rating has grown steadily over time, increasing from 4.25 in 2015 to 4.54 in 2022.

Supplementing this public information is data from DealerRater.com, a leading dealer review platform with more than 11 million consumer reviews of dealerships and dealership experiences on file. DealerRater shared data with NADA from 2012-2022, and this information confirms what is shown in the J.D. Power and Cox data – namely, that American car buyers are very satisfied with their experiences at the nation's car dealerships. Specifically, during that period, DealerRater collected just over 8 million consumer reviews of dealers, of which over 7.5 million were positive while approximately 500,000 were negative. This means that during this nearly 11-year range, 93.7 percent of the consumers who submitted ratings to DealerRater viewed their dealers favorably while only 6.3 percent had negative reactions. Further, during the time from January 1, 2019 through August 17, 2022 – a period in which DealerRater received over 3 million consumer reviews of dealers – only 12,730 of those (or 0.3 percent)

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[51] *Id.*

[52] *2021 Cox Automotive Car Buyer Journey Study Overview*, COX AUTOMOTIVE, (Jan. 2021). Available at: https://www.coxautoinc.com/wp-content/uploads/2022/01/2021-Car-Buyer-Journey-Study-Overview.pdf. Although the study found that buyer satisfaction with price declined, it noted that buyers recognized the impact of the chip shortage on vehicle inventory and were still highly satisfied with their dealer experience. *See also Despite Inventory Shortage, High Prices, Overall Car Buyer Satisfaction Remains Near Record Levels, According to Cox Automotive Study*, COX AUTOMOTIVE, (Jan. 18, 2022), https://www.coxautoinc.com/news/2021-car-buyer-journey-study/. Oddly, the Commission cites the 2020 version of this study in connection with its cost/benefit analysis, but omits any reference to this later study (which was available at the time the Proposed TRR was published)**.**

[53] Andrew Langer, Comment Letter on *Federal Trade Commission Proposed Rulemaking on Motor Vehicle Dealers Trade Regulation, 87 FR 42012, Document Number 2022-14214*, (Sept. 8, 2022), https://www.instituteforreganalysis.org/motor-vehicles

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were negative reviews mentioning "bait & switch" and only 754 (or less than 0.02 percent) were negative reviews mentioning extra fees, junk fees, or surcharges.[54] (These latter data also track what the IRAE analysis mentioned above found. In IRAE's data set, only 361 of the reviews (or just over one tenth of one percent) mentioned either the term "bait and switch" or "junk fees." IRAE further notes that 50 of those 361 reviews actually gave the dealer a 5 star rating, "principally because the customer was expressing appreciation for *not* having had a negative experience.")

Relevant data concerning consumer satisfaction with the auto retailing process are not limited to just these general impressions about the process as a whole. There are also important data available regarding some of the key areas of focus of the Proposed TRR. One of those key areas is the dealership finance office, as the proposal suggests that dealers are rampantly taking advantage of consumers in that portion of their operations. In particular, GAP coverage products receive much criticism for being sold when they allegedly may have no value. Indeed, part of the Proposed TRR specifically addresses GAP protection and proposes significant limitations on the ability to sell it. The Commission cites no credible data to support its assumptions about market behavior in this area. But there is actual market evidence available to inform this analysis, and those data paint a vastly different picture than that presented in the NPRM.

Notably, the 2021 Cox Study indicates that 75 percent of new car buyers were *highly* satisfied with their overall interactions with the dealer's finance office, a number that showed a statistically significant increase over the previous year. And, again, when additional data Cox provided to NADA combining both moderately satisfied and highly satisfied customers is considered, the overall finance office satisfaction percentage jumps to 91 percent.

More specifically, another recent study shows that customers are exceedingly pleased with their purchase of GAP coverage products.[55] This study was conducted by three financial experts, including one current and one former FRB economist, and explored consumer attitudes regarding GAP protection. Analyzing the results of a representative national survey conducted by the Survey Research Center of the University of Michigan in 2020, the economists found that "[m]ore than 90 percent of GAP purchasers report that buying GAP is a good idea and that *they would buy it again*." (Emphasis added.)[56] Perhaps more importantly, the study also found that ***only about 1 percent*** of the surveyed purchasers indicated dissatisfaction with their

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[54] While the DealerRater and some of the other data are not publicly available, it is clear from the NPRM that the Commission nevertheless finds probative value in such data as the National Consumer Law Center's 2017 report entitled *Auto Add-Ons Add Up* is "based on [non-public] data regarding the sale of vehicle add-on products from one major add-on provider," see Appendix, and the Commission cites to the report multiple times in the NPRM. However, the DealerRater data referenced in the text was discussed by officials from the company during a podcast conducted on September 8, 2022. S*ee Primary Care, Special Guest Jamie Oledershaw of DealerRater, FTC Comments,* AUTOMOTIVE STATE OF THE UNION, (Sept. 8, 2022), https://www.asotu.com/podcast/primary-care-special-guest-jamie-oledershaw-of-dealerrater-ftc-comments.

[55] *See* Attachment 2.

[56] *Id*. at 13 (emphasis added).

choice.[57] These data run absolutely contrary to, and wholly refute, the Commission's conclusions in the NPRM.

NADA also obtained data from Strategic Vision that addresses whether consumers feel pressure from their selling dealer when buying a car.[58] These data were drawn from the firm's highly regarded New Vehicle Experience Studies for 2018-2022. Strategic Vision inquired into the presence or absence of pressure used by a dealer in selling its vehicles. The Strategic Vision data, which are set out in the footnote,[59] show that, over this 5-year period, 72.5 percent of the buyers surveyed either loved the lack of pressure at their dealership or found it delightful or excellent and that another 22.5 percent of the respondents found it satisfactory. Thus, only 5 percent of the consumers in the Strategic Vision survey had any type of negative reaction to the pressure used by their dealer.

Finally, the NPRM fails to recognize not only that consumers are largely satisfied with the auto retailing process, including the key aspects of the process targeted by the Proposed TRR, but also that the level of satisfaction has been increasing over time. J.D. Power's data show that the overall SSI has increased from 664 to 789 from 2012-2021, and that this increase was largely attributable to the wider use of advanced sales technology by dealers.[60] As the J.D. Power data

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[57] *Id*.

[58] Strategic Vision is a research-based consultancy that helps companies understand human behavior and decision-making patterns. The firm has a respected position in the automotive market with over twenty years of New Vehicle Experience Study (NVES) data.

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Overall Lack of Pressure Used By Selling Dealer					
Year	**2022**	**2021**	**2020**	**2019**	**2018**
Sample size (n=)	*31,121*	*103,023*	*77,066*	*53,610*	*58,622*
9.5: I Love It	30%	27%	30%	33%	43%
8.2: Delightful	13%	13%	14%	15%	16%
6.8: Excellent	29%	29%	28%	25%	20%
5.5: Satisfactory	24%	25%	24%	22%	16%
4.2: Unsatisfactory	3%	3%	3%	3%	3%
2.8: A Failure	1%	1%	1%	1%	1%
1.5: I Hate It	1%	1%	1%	1%	1%
Formatted Subset Total	100%	100%	100%	100%	100%
Formatted Sample Total	100%	100%	100%	100%	100%
Unweighted Sample Total					
Count	30,742	101,799	76,318	53,329	58,844
© Strategic Vision; Source: 2018-2022 New Vehicle Experience Studies					

[60] *See* J.D. Power Sales Satisfaction Index, 2012-2021. *See* J.D. Power Sales Satisfaction Index, 2012-2021. *Despite Lack of New-Vehicle Inventory, Sales Satisfaction Unchanged from Year Ago, J.D. Powers Finds*, J.D. POWER, (Nov. 10, 2021), https://www.jdpower.com/business/press-releases/2021-us-sales-satisfaction-index-ssi-study. *Increase in Digital Automotive Retail Due to Pandemic Paves Way for New Normal, J.D. Power Finds*, J.D. POWER, (Dec. 10, 2020), https://www.jdpower.com/business/press-releases/2020-us-sales-satisfaction-index-ssi-

demonstrate, dealers significantly increased their deployment and use of technology in response to consumer demand over the past decade, especially as a result, and in the aftermath of the onset, of the COVID-19 pandemic. This trend of improving over time was, as noted above, also observed by IRAE, which found that dealer reviews climbed from 4.25 in 2015 to 4.54 in 2022. The Commission, however, fails to account for any of these market changes or their impact on consumer treatment and experiences.

In particular, these pro-consumer advances make the Commission's reliance on anecdotes collected during the 2011-2012 Motor Vehicle Roundtables particularly problematic. As explained in Section III.c.1 below, the record established during those Roundtables does not support the promulgation of the Proposed TRR. But even if it did, the changes in the market that have occurred since, as evidenced by technological improvements and the improvement in customer satisfaction, render the earlier material irrelevant. To borrow a term from the food distribution industry, the effective "use by" date of the decade-old Motor Vehicle Roundtables record has long since expired. At a minimum, the Commission needs to take a new look at the auto retailing market to determine what practices and experiences predominate *today* before deciding whether a regulation mandating significant structural changes to that market is warranted.

The foregoing data demonstrate that the NPRM's description of the auto retailing industry and the treatment of consumers inaccurately characterizes the current marketplace. Certainly, limited instances of bad behavior exist and should not be tolerated. But the Commission does not have a basis for concluding that the market as a whole is broken and needs to be fixed. To the contrary, as evidenced by this data, the market generally operates quite well, produces satisfied customers, and has been improving even more over the last decade. Rather than jump to conclusions based on dated, unverified, or limited anecdotes, the Commission should conduct a real assessment of the market before embarking on a total overhaul of it.

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study. *First Impressions Critical to Closing Sales Even before Vehicle Shoppers Visit Dealership, J.D. Power Finds*, J.D. POWER, (Nov. 13, 2019), https://www.jdpower.com/business/press-releases/2019-us-sales-satisfaction-index-ssi-study. *Digital Communication Leads to Higher Satisfaction with Vehicle Sales Process, J.D. Powers Finds*, (Nov. 14, 2018), J.D. POWER, https://www.jdpower.com/business/press-releases/2018-us-sales-satisfaction-index-ssi-study. *Online Buyers Beware! Dealers are Crucial Part of Vehicle Purchases, J.D. Powers Finds*, J.D. POWER, (Nov. 15, 2017), https://www.jdpower.com/business/press-releases/jd-power-2017-us-sales-satisfaction-index-study. *Product Specialists Help New-Vehicle Owners Understand Technology, Enhance Ownership Experience, Increase Future Demand, J.D. Power Finds*, J.D. POWER, (Nov. 10, 2016), https://www.jdpower.com/business/press-releases/2016-us-sales-satisfaction-index-ssi-study. *Product Specialist Role in Sales Process Grows as Vehicle Technology and Complexity Increase*, J.D. POWER, (Nov. 13, 2014), https://www.jdpower.com/business/press-releases/2014-us-sales-satisfaction-index-ssi-study. *Satisfaction Increases Considerably When Auto Dealers Use Mobile Technology During the New-Vehicle Sales Process*, J.D. POWER, (Nov. 14, 2013), https://www.jdpower.com/business/press-releases/2013-us-sales-satisfaction-index-ssi-study. Jeff Youngs, *2012 U.S. Sales Satisfaction Index (SSI) Study Results*, J.D. POWER, (Nov. 28, 2012), https://www.jdpower.com/cars/ratings/dealers/2012/2012-us-sales-satisfaction-index-study-results.

c. The FTC's proposed restructuring of the marketplace.

Against this backdrop of a well-functioning marketplace with overwhelmingly satisfied consumers, the Commission proposes to inject a series of ill-defined prohibitions, unnecessary advertising requirements, convoluted and untested disclosure requirements, and massive recordkeeping obligations on new motor vehicle dealers and a subset of independent motor vehicle dealers. As explained in the sections that follow: (i) the NPRM violates the FTC's own procedural rules and does not provide adequate transparency or notice to the public; (ii) the NPRM is based on a flawed premise and inadequate data and fails to identify a regulatory problem in need of a solution; (iii) the specific proposed rules in the NPRM are deeply flawed; (iv) even if additional regulation were necessary, there are better alternatives to the rules proposed in the NPRM; and (v) the Proposed TRR would violate the First Amendment.

II. The NPRM violates the FTC's own procedural rules and does not provide adequate transparency or notice to the public.

a. The NPRM violates Section 1.10's ANPRM requirement.

The Commission has ignored the first procedural step it must take when enacting unfair or deceptive acts or practices rules—the requirement to issue an advance notice of proposed rulemaking (ANPRM). Section 1.10 of the FTC's procedural rules provides: "Prior to the commencement of any trade regulation rule proceeding, the Commission must publish in the Federal Register an advance notice of such proposed proceeding."[61] A "trade regulation rule" is one that "define[s] with specificity acts or practices that are unfair or deceptive acts or practices in or affecting commerce."[62] Because the Proposed TRR proposes a new unfair or deceptive act rule "pursuant to … Section 5(a)(1) of the Federal Trade Commission Act,"[63] it is a "trade regulation rule" that cannot be promulgated unless the agency has first issued an ANPRM.[64]

1. Section 1.10 remains in effect notwithstanding Dodd-Frank.

Section 1.10 has been in force since 1981 and has not been repealed by either Congress or the Commission. In 1980, Congress passed the Federal Trade Commission Improvements Act, which required the Commission to begin the regulatory process with an ANPRM when it promulgates unfair or deceptive act rules. The Commission then issued a final rule of its own that also imposed an ANPRM requirement.[65] From that point forward, the FTC was under two distinct obligations to begin the rulemaking process with an ANPRM—a statutory one imposed by Congress and a regulatory one imposed by the agency itself.

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[61] 16 C.F.R. § 1.10.
[62] 16 C.F.R. § 1.8.
[63] 87 Fed. Reg. at 42,024.
[64] 16 C.F.R. §§ 1.8, 1.10.
[65] *See* Organization Changes in the Commissions Rulemaking and Investigatory Procedures, 46 Fed. Reg. 26,284, 26,288 (May 12, 1981) (codified at 16 C.F.R. §1.10).

In 2010, Congress enacted the Dodd-Frank Act (Dodd-Frank), which repealed the statutory ANPRM requirement for unfair or deceptive act rules for auto dealers. Section 1029(d) of Dodd-Frank provides: "Notwithstanding section 18 of the Federal Trade Commission Act, the Federal Trade Commission *is authorized* to prescribe rules under sections 5 and 18(a)(1)(B) of the Federal Trade Commission Act in accordance with [the APA] with respect to [auto dealers]."[66] By using permissive language—"is authorized"— Congress restored the Commission's pre-1980 *statutory* power to promulgate Section 18(a)(1)(B) rules utilizing the APA's rulemaking procedures.[67] At the same time, however, nothing in Dodd-Frank limited the Commission's undisputed power to impose additional regulatory procedures *on itself* beyond the APA's minimum baseline. Although Dodd-Frank exempts rulemakings regarding motor vehicle dealerships from the enhanced statutory rulemaking procedures in Section 18 of the FTC Act, Section 1.10 of the Commission's regulations remains in force and contains no exemptions from its ANPRM requirement.

Notably, just last year, the Commission comprehensively overhauled its Section 18 procedural regulations for unfair and deceptive acts rulemakings to eliminate "unnecessary" procedural rules that are not "statutorily required."[68] In doing so, the Commission expressly considered whether to amend or repeal Section 1.10 and decided not to.[69] Nor did the Commission create any carve-out or exception from Section 1.10 for rulemaking proceedings involving motor vehicle dealerships.

Beginning the rulemaking process with an ANPRM is not only required by the Commission's regulations but reflects good government and common sense. *See, e.g.*, U.S. DoT, *Rulemaking Process* (June 7, 2022), bit.ly/3Aq5JGI (ANPRMs "increase or improve the opportunities for public participation and … obtain that participation very early in the development process," particularly where the agency could benefit from comments that can "solve a problem before making a proposal," "narrow" the agency's "choices" from "a wide range of alternatives," and provide "additional information to help analyze the problem and its solutions"); U.S. Dep't of HUD, *Rulemaking 101*, bit.ly/3dWMRYh (similar); U.S. NRC, *The Rulemaking Process* (Aug.

[66] Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, § 124 Stat. 1376 (2010) (emphasis added).
[67] For this reason, the Authority section of the Proposed TRR, proposed Section 463.1, is materially incomplete. That section currently invokes only Section 1029 of Dodd-Frank, 12 U.S.C. § 5519(d). But Section 1029 does not confer substantive rulemaking authority on the FTC. Rather that section expressly specifies that if the Commission were to promulgate rules defining unfair or deceptive practices by motor vehicle dealers it must do so pursuant its authority under Section 18(a)(1)(B) of the FTC Act. The Commission even acknowledges this in the NPRM's preamble, stating: "Section 1029 of the Dodd-Frank Act authorizes the FTC to prescribe rules with respect to unfair or deceptive acts or practices by motor vehicle dealers, **and to do so pursuant to the Commission's authority under the FTC Act and in accordance with the [APA].**" 87 Fed. Reg. at 42,013 (emphasis added). Accordingly, the Authority section of the Proposed TRR should also invoke FTC Act Section 18(a)(1)(B). Indeed, the Proposed TRR must be promulgated under Section 18(a)(1)(B) if, as the FTC states is one of its objectives, monetary penalties are to be one of the remedies available in the event of a violation. 15 U.S.C. § 57b(b).
[68] Revisions to Rules of Practice, 86 Fed. Reg. 38,542, 38,543-38,544 (July 22, 2021) (to be codified at 16 C.F.R. §§ 0-1).
[69] *See id.* at 38,547-38,548 (making minor revisions).

17, 2021), bit.ly/3AlcIAF (ANPRMs are used for "especially important or complex rules"). An industry-specific Section 18 rule—like the Proposed TRR—has the potential to dramatically upend longstanding business practices and impose substantial costs on the regulated industry. It is thus imperative for the agency to ensure that it has comprehensively studied the industry and gathered all relevant data *before* beginning to formulate proposed rules. *Cf. Akina v. Hawaii*, 141 F. Supp. 3d 1106, 1120 (D. Haw. 2015) (agency changed course in response to ANPRM comments).

Indeed, the Commissioners who supported the FTC's 2021 revisions to the Section 18 procedural rules issued a statement emphasizing that while the rules "remove[d] those extraneous and onerous procedures that serve only to delay Commission business," they would still require an ANPRM to ensure there is "ample transparency and opportunity for public participation" that is "substantially greater … than [what] the Administrative Procedure Act" provides.[70]

2. The FTC's failure to comply with Section 1.10 violates the APA.

Having left Section 1.10 in place with no exceptions or carveouts for motor vehicle dealerships, the Commission must follow it as written. It is an "'established maxim' that agencies must 'adhere to their own rules.'" *United Space All., LLC v. Solis*, 824 F. Supp. 2d 68, 82 (D.D.C. 2011); *see, e.g., U.S. ex rel. Accardi v. Shaughnessy*, 347 U.S. 260, 265 (1954). An agency's "procedural rule" is "enforceable against the agency" where it does not simply "'benefit[] the agency'" but also "affects a party's rights." *Solis*, 824 F. Supp. 2d at 83. A rule is also enforceable if it 'limits the agency's discretion.'" *Still v. U.S. Dep't of Lab.*, 2021 WL 4502053, at *4 (D.D.C.). And an agency's procedural rule is binding on the agency regardless of whether the rule was promulgated through notice and comment or some other means. *See, e.g.*, *Solis*, 824 F. Supp. 2d at 82-84.

The ANPRM requirement in Section 1.10 limits the Commission's discretion and significantly affects the rights of NADA and other interested stakeholders. It limits discretion by imposing, *without exception*, a more rigorous process of rulemaking to ensure enhanced transparency and public participation. And it affects the rights of stakeholders by ensuring they are able to offer input during multiple phases of the rulemaking process. *See Nat. Res. Def. Council v. Wheeler*, 955 F.3d 68, 85 (D.C. Cir. 2020) (the "entire premise" of notice and comment is that it ensures that "an agency's decisionmaking may be affected by concerns aired by interested parties through those procedures").

Depriving NADA and other interested parties of the opportunity to participate in an ANPRM process in advance of any specific proposed rules results in manifest "prejudice" and is not "harmless." *U.S. Steel Corp. v. EPA*, 595 F.2d 207, 215 (5th Cir. 1979); *see, e.g., Health Freedom Def. Fund, Inc. v. Biden*, 2022 WL 1134138, at *13 (M.D. Fla.). The Proposed TRR

[70] *See id.* at 38,551-38,552.

represents an entirely new regulatory framework with profound consequences for motor vehicle dealerships. The Commission itself described its proposal as a "comprehensive" rule for the industry.[71] That is an understatement, as the proposal includes several brand-new federal regulatory obligations on the industry that would cost about $1.5 billion under the Commission's own estimates.[72]

As one might expect for a rule of this size, complexity, and importance, the proposal includes an "extremely broad and open-ended set of 49 questions" and "requests additional cost information in several of its Questions for Comment."[73] Those questions can be answered only by "collect[ing] … widespread and extensive market information," such as "assumptions, methodologies, calculations, and projected costs, benefits, and economic impact of the various elements of the proposed rule."[74] But the Commission gave the public a mere 60 days to perform these "massive inquiries" and denied NADA's request for a 120-day extension to give it the necessary time to provide complete information in response to the NPRM, including commissioning a thorough study of the rule.[75] Thus, by refusing to begin its rulemaking with the ANPRM required by the Commission's own rules, the Commission deprived NADA of the chance to provide crucial information to the agency—including hard data that would have been highly pertinent to the agency's decision-making.

It is no answer that the Commission could now repeal Section 1.10 after having violated it. An agency must still follow its procedural rules even if those rules "need never have been promulgated." *Solis*, 824 F. Supp. 2d at 82 (citing *Lopez v. FAA*, 318 F.3d 242, 247 (D.C. Cir. 2003); *see also Vietnam Vets. of Am. v. Sec'y of the Navy*, 843 F.2d 528, 538 (D.C. Cir. 1988) ("Internal procedures … are exempt from the coverage of §553 … [but] will be binding [on the agency]."). Unless and until the Commission expressly repeals Section 1.10 with respect to motor vehicle dealerships, the APA requires the Commission to obey it—and the Commission failed to do so here.

b. The FTC failed to gather essential information or provide adequate notice or opportunity for public engagement.

A more detailed analysis of the rushed process the Commission has launched to promulgate the Proposed TRR further highlights these flaws.

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[71] *See FTC Proposes Rule to Ban Junk Fees, Bait-and-Switch Tactics Plaguing Car Buyers*, FTC, (June 23, 2022), Available at www.ftc.gov/news-events/news/press-releases/2022/06/ftc-proposes-rule-ban-junk-fees-bait-switch-tactics-plaguing-car-buyers.

[72] 87 Fed. Reg. at 42,036.

[73] *See* NADA Extension Request to FTC (July 18, 2022) (Attachment 3).

[74] *Id*.

[75] *FTC Declines to Extend Comment Period on Proposed Auto Rule, Deadline For Comments Sept. 12*, FTC, (Aug. 23, 2022), https://www.ftc.gov/news-events/news/press-releases/2022/08/ftc-declines-extend-comment-period-proposed-auto-rule-deadline-comments-sept-12.

The Commission has skipped essential steps that are necessary to determine such basic elements as whether a rule is needed and, if so, how it should be structured and what its impact will be on the marketplace. Such an insular, non-transparent, and ill-informed process creates a substantial likelihood that its goals and objectives, even if well intended, will not be realized and may actually be undermined.

As explained in Section III.a below, this is not a situation where an agency's ability to engage in an adequate deliberative process is constrained due to a tight statutory deadline. Congress has not mandated this rulemaking. Rather, the Agency has chosen, on its own initiative, to dispense with basic procedures and public transparency that it and other agencies would typically follow even in far less impactful matters. These include the following:

- The Commission did not announce that it would be taking this action in advance of its issuance in any of the White House's semiannual unified regulatory agendas.

- The Commission did not precede this issuance with any attempt to gather information, consider alternatives, or measure the impact of proposals it was considering via a Request for Information or Comment, a review of an outline of proposals,[76] or an ANPRM.[77] This is in marked contrast to several other very recent Commission rulemakings.[78]

- The Commission issued an NPRM which reflects its premature nature in several important regards:

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[76] In contrast, *see e.g.*, the Consumer Financial Protection Bureau's *Outline of Proposals Under Consideration and Alternatives Considered* (Sep. 15, 2020) to implement Section 1071 of the Dodd-Frank Act, which followed a Request for Information on the matter. *Small Business Lending Data Collection Rulemaking; Outline of Proposals Under Consideration and Alternatives Considered*, SMALL BUSINESS ADVISORY REVIEW PANEL FOR CONSUMER FINANCIAL PROTECTION BUREAU, (Sept. 15, 2020). Available at: https://files.consumerfinance.gov/f/documents/cfpb_1071-sbrefa_outline-of-proposals-under-consideration_2020-09.pdf. *See also* 82 Fed. Reg. 22,318-22,322 (May 15, 2017); 82 Fed. Reg. 32,177-32,178 (Jul. 12, 2017).

[77] *See* Administrative Conference of the United States' *Administrative Conference Recommendation 2018-7* explaining the importance for agencies to exercise due diligence before issuing a notice of proposed rulemaking ("Agencies should consider using requests for information (RFIs) or advance notices of proposed rulemaking (ANPRMs) when they need to: i. gather information or data about the existence, magnitude, and nature of a regulatory problem; ii. evaluate potential strategies to address a regulatory issue; iii. choose between more than one regulatory alternative; or iv. develop and refine a proposed rule…."). *Administrative Conference Recommendation 2018-7*, THE ADMINISTRATIVE CONFERENCE OF THE UNITED STATES, (Dec. 14, 2018), https://www.acus.gov/sites/default/files/documents/Recommendation%202018-7%20%28Public%20Engagement%20in%20Rulemaking%29.pdf (last visited July 18, 2022).

[78] *See, e.g.*, Trade Regulation Rule on Commercial Surveillance and Data Security, 87 Fed. Reg. 51,273-51,299 (Aug. 22, 2022); Telemarking Sales Rule, 87 Fed. Reg. 33,662-33,677 (Jun. 3, 2022) (to be codified at 16 C.F.R. § 310; Deceptive or Unfair Earnings Claims, 87 Fed. Reg. 13,951-13,958 (Mar. 11, 2022) (to be codified at 16 C.F.R. § 462; and Trade Regulation Rule on Impersonation of Government and Businesses, 86 Fed. Reg. 72,901-72,905 (Dec. 23, 2021) (to be codified at 16 C.F.R. § 461).

- The NPRM does not include an effective date, and it fails to even inquire into when it would be feasible for its new duties and restrictions to take effect;

- The NPRM asks an extremely broad and open-ended set of 49 questions that typically would be asked *before* proposed standards are created as the answers to those questions would *inform* such standards. These questions include, but are not limited to, the following:

  - the scope of the proposed rule (e.g., whether it should address a range of other topics including other unfair or deceptive acts or practices, leasing, interest rates, other financing terms, electronic disabling devices, online sales, electronic disclosures, the availability of vehicles, matters involving servicemembers, conditional sales, and lien payoffs); [79]

  - the scope, timing, language, clarity, efficacy, and net effect of the proposed notice requirements;[80]

  - how the "offering price" concept works in the present market and how it would or should affect other information with regard to both advertisements and disclosures;[81]

  - what VPPs motor vehicle dealers offer, how dealers currently obtain consent for the purchase of VPPs, which other VPPs should be prohibited, whether VPP sales should be restricted when the vehicle sale occurs and whether they should be accompanied by a cancellation right, which VPPs involve pricing differentials, how VPP disclosures should be structured, and whether instructions should be provided on how to calculate LTV rations;[82]

  - whether dealers can calculate accurate monthly payment information without calculating the total amount a consumer must pay to purchase or lease a vehicle and the value of such information, particularly if presented multiple times;[83]

  - whether the scope and period of the records retention requirements is appropriate and how it affects the current records retention practices of motor vehicle dealers;[84] and

[79] Questions for Comment 2, 3, 7, 8, and 14-17. *See* 87 Fed. Reg. at 42,028-42,029.
[80] Questions for Comment 19-25. *Id.* at 42,029.
[81] Questions for Comment 26-27. *See id.*
[82] Questions for Comment 28, 31, and 33-39. *Id.* at 42,029-42,030.
[83] Questions for Comment 29 and 30. *Id*. at 42,030.
[84] Questions for Comment 40-47. *Id.* at 42,031.

  - ➢ how the proposed rule affects state law and the state experience in these areas;[85] and

  - o As explained in Section II.c, the NPRM fails to address the requirements of the Paperwork Reduction Act (PRA),[86] Regulatory Flexibility Act (RFA),[87] and the White House Office of Management and Budget (OMB); and

- The Commission has not indicated in the NPRM what, if any, coordination or research it has conducted with other federal and state agencies that exercise oversight in the areas addressed in the Proposed TRR. This includes:

  - o The CFPB, with regard to motor vehicle dealers with a service facility who are not covered by Section 1029(a). Such coordination is essential to fulfill the Commission's desire to "ensure that motor vehicle dealers compete on a level playing field";[88]

  - o The FRB, with regard to any of the credit-related disclosures imposed by the Proposed TRR. As Congress has entrusted to the FRB the development of content, form, and timing disclosures for credit-related information (see the discussion in Sections IV.a.2 and 3.B.2 below), such coordination is essential in order, at a minimum, to harmonize the Proposed TRR requirements with those that already exist in Regulations M and Z; and

  - o The various States, with regard to how the combined effect of the Proposed TRR requirements and related state law requirements will affect consumers and the ability of motor vehicle dealers to comply with each (which the Commission recognizes in Questions 48 and 49).[89]

- On top of these omissions and as noted above, the Commission denied requests for a reasonable extension of time to respond to its sweeping proposed rule that were requested by NADA, multiple other industry trade associations, and the Small Business Administration's Office of Advocacy (SBA OA).[90] This violates the law, as it failed to give NADA "enough time to comment," *Prometheus Radio Project v. FCC*, 652 F.3d 431, 450 (3d Cir. 2011), and it unnecessarily and inconsistently closes the door on

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[85] Questions for Comment 48-49. *Id.*
[86] 44 U.S.C. § 3501, et seq.
[87] 5 U.S.C. §§ 601-612.
[88] 87 Fed. Reg. at 42,019.
[89] 87 Fed. Reg. at 42,031.
[90] Major L. Clark, III, et al., Comment to *Request for Extension for the Motor Vehicle Dealers Trade Regulation Rule— Rulemaking, No. P204800*, (Aug. 22, 2022), https://www.regulations.gov/comment/FTC-2022-0046-2221.

essential information gathering that can inform the rulemaking process. As noted in a recent comprehensive report by Former FTC Chairman Timothy Muris and Former FTC Bureau of Consumer Protection Director Howard Beales:[91]

> "Careful scrutiny and public input take time. This is the reality of good rulemaking. And producing sound and lasting rules is a far more important goal than producing rules quickly, with less attention to their merits and less public input in the process."[92]

- As highlighted below, the Commission's denial of a reasonable extension to prepare critical data and research (i) departs from the approach it has taken in rulemakings that were far less consequential and involved more process than the Proposed TRR, and (ii) precludes the ability of stakeholders to provide meaningful responses to questions that the Commission has asked in the NPRM that should inform its subsequent actions in this matter. Two recent examples highlight the Commission's inconsistent (and inexplicable) treatment of comment periods in response to its issuances.

    - GLB Safeguards Rule. On March 5, 2019, the Commission released on its website proposed amendments to the GLB Safeguards Rule.[93] This followed a periodic review of the Safeguards Rule that the Commission issued for comment in 2016.[94] The notice of proposed rulemaking containing the proposed amendments was published in the *Federal Register* on April 4, 2019 and provided a public comment period of 60 days.[95]

    - In response to this issuance, NADA and other trade associations filed extension requests with the Commission.[96] The Commission responded by granting a 60-

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[91] J. Howard Beales III et. al., *Back to the Future: How Not To Write A Regulation,* AMERICAN ENTERPRISE INSTITUTE (June 2022). Hereinafter the "Back to the Future Report" - (Attachment 4).
[92] *Id*. at 27.
[93] *FTC Seeks Comment on Proposed Amendments to Safeguards and Privacy Rules*, FTC, (Mar. 5, 2019), https://www.ftc.gov/news-events/news/press-releases/2019/03/ftc-seeks-comment-proposed-amendments-safeguards-privacy-rules.
[94] Standards for Safeguarding Customer Information, 81 Fed. Reg. 61,632-61,636 (Sep. 7, 2016) (to be codified at 16 C.F.R. § 314).
[95] Standards for Safeguarding Customer Information, 84 Fed. Reg. 13,158-13,177 (Apr. 4, 2019) (codified at 16 C.F.R. § 314).
[96] The NADA extension request stated, in part: "Our request for a longer comment period is consistent with information on the proposal that is sought by the Commission. The NPR repeatedly and prudently seeks information on the burden that would be imposed by specific proposed requirements and whether they should be modified or eliminated for smaller firms or otherwise narrowed. It also generally inquires into whether the Commission's proposed approach 'creates unintended consequences for businesses, may be more stringent than necessary to achieve the objective, and/or unnecessarily modifies the current rule without creating a material benefit to security.' Developing thoughtful comments on the impact of these requirements, including 'any data, research or case studies' sought by the Commission, requires additional time to conduct sufficient outreach to our members on these matters." Kaye Lynch-Sparks, Comment to *Request for Extension for Standards for*

day extension to the comment period.[97] In approving the extension, the Commission stated:

> "The Commission agrees that allowing additional time for filing comments on the Safeguards Rule would help facilitate the creation of a more complete record…. A 60-day extension provides commenters adequate time to consider the proposed rule while not unduly delaying the rulemaking process."[98]

- In the instant matter, the Commission has denied *any* extension of the comment period, summarily declaring that "[t]he public will… have had eighty days between the proposal's announcement [on the Commission's website] and the close of the comment period" and that "[t]his period affords the public a meaningful opportunity to provide the Commission with comments regarding its rulemaking proposal."[99]

- Among the reasons NADA sought an extension of the comment period is because the NPRM (i) seeks information throughout its PRA and RFA analyses related to the assumptions, methodologies, calculations, and projected costs, benefits, and economic impact of the various elements of the proposed rule, and (ii) requests additional cost information in several of its Questions for Comment.[100] As part of this process, NADA explained that the length of time needed to conduct a properly thorough cost study exceeds the deadline for

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Safeguarding Customer Information, (Apr. 24, 2019), https://www.regulations.gov/comment/FTC-2019-0019-0008.

[97] 84 Fed. Reg. 24,049-24,050 (May 24, 2019).

[98] *Id*. at 24,049.

[99] *FTC Declines to Extend Comment Period on Proposed Auto Rule, Deadline for Comments Sept. 12*, FTC, (Aug. 23, 2022), https://www.ftc.gov/news-events/news/press-releases/2022/08/ftc-declines-extend-comment-period-proposed-auto-rule-deadline-comments-sept-12. If the Commission believes "[t]his period [eighty days] affords the public a meaningful opportunity to provide the Commission with comments regarding its rulemaking proposal," the Commission was required to measure the eighty days from the date on which it issued the NPRM in the *Federal Register* and thereby extend the comment period by at least 20 days, which it failed to do. *See* 5 U.S.C. § 553(b), requiring general notice to be published in the *Federal Register*, and 5 U.S.C. § 553(c), requiring an opportunity for comment "[a]fter notice required by this section." *See* also *Rodway v. U.S. Dep't of Agric.*, 514 F.2d 809, 815 (D.C. Cir. 1975) ("Only publication in the Federal Register meets the APA requirement of constructive notice."); *Util. Solid Waste Activities Grp. v. EPA*, 236 F.3d 749, 754 (D.C. Cir. 2001) (rejecting EPA argument that it provided actual notice by publishing amendment to rule on its website, stating "[t]his court has never found that Internet notice is an acceptable substitute for publication in the Federal Register, and we refuse to do so now").

[100] *See, e.g.*, Question 6 ("What economic burdens would be imposed on dealers if the Rule proposals were adopted?"); Question 16 ("Are there data regarding the feasibility of finalizing vehicle financing at or before the time the retail installment sales [sic] contract is signed?"); Question 20 ("What would be the economic impact, and costs and benefits, of these disclosure requirements?"); Question 21 (""If so, what are the costs and benefits associated with these additional disclosures?"); and Question 45 ("What costs would these recordkeeping requirements impose on businesses, including small businesses? What would be the overall economic impact of these requirements? Please quantify these benefits and costs wherever possible."). 87 Fed. Reg. at 42,028-42,031.

submitting comments (even if NADA had hypothetically been able to engage a research firm on the matter the day on which the Commission first announced the rule on its website).[101]

- Comparing the two rulemakings, it is clear that in the 2019 GLB Safeguards rulemaking (i) that consisted of an amendment to an existing rule, (ii) that was preceded by a notice for comment, and (iii) that involved a period between the release of the NPRM on the Commission's website and the end of the comment period of 90 days, the Commission granted an additional 60 days to the comment period.

- While in this 2022 rulemaking (i) that consists of an entirely new rule of far broader scope and magnitude, (ii) that was preceded by no advanced notice, (iii) that involves a period between the release of the NPRM on the Commission's website and the end of the comment period of only 80 days, and (iv) is filled with requests for extensive cost and other information on the impact of its proposals on businesses, the Commission remarkably shuts the door on *any* extension of the comment period.[102]

- <u>Routine PRA Request</u>. Equally remarkable is the Commission's failure to draw any distinction between the comment period it provides for a rulemaking of this magnitude and the comment period it provides for very basic matters such as routine PRA requests. For example, on August 24, 2022, one day after the Commission denied the multiple extension requests it received in the instant matter, the Commission issued for comment in the *Federal Register* a proposal to extend for an additional three years information it collects pursuant to Regulation N.[103] The proposal occupies less than three full pages in the *Federal Register*, consists of a burden statement that is three paragraphs long, and asks four routine questions. The Commission affords the public the same 60-day comment period it has afforded for the Proposed TRR even though the latter involves, among other components (i) a series of unprecedented and never before

[101] NADA explained that "a respected industry research firm informed NADA that it would require a minimum of 120 days to prepare a report on the potential costs that the proposed rule would impose on franchised automobile dealers. This would address only one of the many areas of inquiry the Commission has presented in the NPRM. And we have recent experience that supports these time estimates. NADA commissioned a narrower cost study in response to the CFPB's NPRM relating to the implementation of Section 1071 of the Dodd-Frank Act, 86 Fed. Reg. 56,356-56,606 (Oct. 8, 2021),… and that study took over 4 months to complete."

[102] The Commission's rejection of an extension of the comment period implies that its "ongoing engagement with stakeholders" over the years somehow excuses it from affording stakeholders additional time to comment on its sweeping proposal. This ignores the obvious fact that at no time prior to the Commission's release of the NPRM on its website did it identify and describe the specific components of the Proposed TRR. Consequently, there was no basis for motor vehicle dealers to assess the impact of the proposed rule on consumers and their business operations.

[103] Agency Information Collection Activities; Proposed Collection; Comment Request; Extension, 87 Fed. Reg. 51,982-51,984 (Aug. 24, 2022).

> announced advertising, disclosure, and recordkeeping requirements that span 37 pages in the *Federal Register*, (ii) a request for answers to 49 open-ended questions, and (iii) a series of additional requests for specific data and cost information. This begs the question: Where is the Commission's sense of perspective? What happened to its recognition of the need to "facilitate the creation of a more complete record?"

It should be self-evident that no one gains from the insular, truncated, non-transparent, and rushed process that has characterized this rulemaking to date. As it has in the past, the Commission should recognize the value that can be derived from an informed rulemaking and not view its process components simply as a check-the-box exercise that should be streamlined at all costs. This imperative was aptly explained by Former FTC Chairman Muris and Former FTC BCP Director Beales:

> "Because rulemaking involves generalization, sound rulemaking puts a particular premium on gathering systematic information. Sound generalizations depend on a deep understanding of why a practice occurs, the circumstances in which it is used, and the precise conditions under which the practice helps or harms consumers in different situations. Sound rulemaking procedures help ensure that the public and the potentially regulated community can examine the accuracy of information, offering critical commentary and contrary evidence as appropriate."[104]

c. The NPRM violates the PRA, RFA, and OMB requirements.

1. The FTC failed to comply with procedural requirements in the PRA and OMB Implementing Regulations.

The FTC acknowledges, as it must, that the PRA "requires federal agencies to seek and obtain … OMB approval before undertaking a collection of information directed to ten or more persons."[105] The FTC also correctly acknowledges that the "proposed rule contains disclosure and recordkeeping requirements that constitute '''information collection requirements' as defined by 5 C.F.R. §1320.3(c) under the OMB regulations that implement the PRA."[106] The FTC purports to (i) list the universe of businesses subject to the proposed rule's paperwork requirements, (ii) outline the disclosure and recordkeeping mandates associated with the proposal, and (iii) estimate the burdens imposed by those disclosure and recordkeeping mandates.[107] However, as detailed in Section IV.c and Attachment 18, the FTC has failed to accurately assess the nature and scope of the actual paperwork burdens that would result if the

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[104] Back to the Future Report at 3 (Attachment 4).
[105] 87 Fed. Reg. at 42,031.
[106] *Id.*
[107] *Id.*

proposal were to take effect. The FTC has also failed to comply with its statutory and regulatory procedural obligations under the PRA.

Among other things, the stated purpose of the PRA is to:

> "(1) minimize the paperwork burden for *individuals, small businesses*, educational and nonprofit institutions, Federal contractors, State, local and tribal governments, and other persons resulting from the collection of information by or for the Federal Government; [and]
>
> (2) ensure the greatest possible public benefit from and maximize the utility of information created, collected, maintained, used, shared and disseminated by or for the Federal Government."

(Emphasis added.)[108]

In furtherance of these important purposes, the PRA authorizes OMB to issue procedural regulations for agencies to follow and, as noted above, it has done so.[109] Not unlike the PRA, OMB's regulations "are designed to reduce, minimize and control burdens and maximize the practical utility and public benefit of the information created, collected, disclosed, maintained, used, shared and disseminated by or for the Federal government."[110]

As noted above, the FTC acknowledges that the extensive disclosure and recordkeeping mandates in the Proposed TRR constitute "information collection requirements" for purposes of OMB's regulations.[111] To aid in effectuating the purpose of the PRA, those regulations specify that "[a]gencies shall submit collections of information contained in proposed rules published for public comment in the Federal Register in accordance with the requirements in §1320.11."[112] In pertinent part, that subsection specifies that:

> "(a) The agency shall include, in accordance with the requirements in §1320.5(a)(1)(iv) and §1320.8(d)(1) and (3), in the preamble to the Notice of Proposed Rulemaking a statement that the collections of information contained in the proposed rule, and identified as such, have been submitted to OMB for review under section 3507(d) of the Act. The notice shall direct comments to the Office of Information and Regulatory Affairs of OMB, Attention: Desk Officer for [name of agency].

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[108] 44 U.S.C. § 3501(1)(2).
[109] 44 U.S.C. § 3516; 5 C.F.R. § 1320.
[110] 5 C.F.R. §1320.1.
[111] In this instance, the "collection of information" includes, but is not limited to, the categories listed in 5 C.F.R. § 1320.3(c)(1)(2) and (4)(ii).
[112] *See* 44 U.S.C. § 3506(c)(2)(B) and 5 C.F.R. §1320.5(c)(2).

(b) All such submissions shall be made to OMB not later than the day on which the Notice of Proposed Rulemaking is published in the Federal Register, in such form and in accordance with such procedures as OMB may direct. Such submissions shall include a copy of the proposed regulation and preamble.

(c) Within 60 days of publication of the proposed rule, but subject to paragraph (e) of this section, OMB may file public comments on collection of information provisions. The OMB comments shall be in the form of an OMB Notice of Action, which shall be sent to the Senior Official or agency head, or their designee, and which shall be made a part of the agency's rulemaking record.

(d) If an agency submission is not in compliance with paragraph (b) of this section, OMB may, subject to paragraph (e) of this section, disapprove the collection of information in the proposed rule within 60 days of receipt of the submission. If an agency fails to submit a collection of information subject to this section, OMB may, subject to paragraph (e) of this section, disapprove it at any time.

(e) OMB shall provide at least 30 days after receipt of the proposed collection of information before submitting its comments or making its decision, except as provided under §1320.13…."

(Emphasis added.)[113]

The FTC typically endeavors to comply with its responsibilities under the PRA.[114] But, in this instance, the Commission has failed to comply with the procedural requirements set out in 5 C.F.R. §1320.11(a) and (b), 5 C.F.R. §1320.5(a)(1)(iv), and §1320.8(d)(1). In addition, as detailed in Attachment 18 and elsewhere herein, the FTC has failed to demonstrate that its "information collection requirements" are necessary, that they minimize related burdens, and that they offer utility and public benefit. Consequently, in addition to filing these comments with the FTC, NADA is requesting that OMB disapprove the information collection as provided for in 5 C.F.R. §1320.11(d).

2. The FTC failed to comply with the RFA.

The RFA reflects Congress's intent that federal agencies adopting regulations to protect the economic welfare do so effectively and efficiently and without imposing unnecessary burdens on the public. It requires that special attention be paid to unnecessary and disproportionately burdensome demands upon small businesses, including legal, accounting, and consulting costs, and recognizes that alternative regulatory approaches may minimize significant economic impacts on small business. Congress intended for agencies considering new regulations to

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[113] 5 C.F.R. § 1320.11.

[114] OMB's website currently lists an inventory of more than 40 FTC items involving hundreds of information collection mandates.

solicit the ideas and comments of small businesses and to examine fully the potential impact of proposed rules on them, including whether such rules are necessary.

The FTC recognizes that it is an "agency" covered by the RFA and appears to acknowledge that a formal regulatory flexibility process, including OMB review, may be necessary to ensure that it has properly considered the small business impacts of the Proposed TRR.[115] At the same time, the FTC asserts that a formal analysis is not required if a regulatory proposal would not have a significant economic impact on a substantial number of small entities and, further, that the Proposed TRR "will not have a significant economic impact on small entities, although they will likely affect a substantial number of small entities."[116]

As detailed in Section IV.c, Attachment 19, and elsewhere herein, the Proposed TRR undoubtedly would impose a significant economic impact on a substantial number of small businesses. As a result, the FTC's statement to the contrary is without support. That said, had the FTC believed to the contrary, it presumably would have attempted to take advantage of Section 605(b) of the RFA to forgo conducting an initial regulatory flexibility analysis by "formally certifying" that the Proposed TRR, if promulgated, would not have a significant economic impact on a substantial number of small entities.[117] The FTC has not:

(i) made a formal Section 605(b) certification;
(ii) published such a certification together with a required factual basis statement; or
(iii) provided any such certification and statement to the Chief Counsel for Advocacy of the Small Business Administration (Advocacy).

Given the FTC's failure to comply with Section 605(b) of the RFA, the FTC must comply with Section 603 of the RFA which requires it to publish an initial regulatory flexibility analysis with the Proposed TRR and to send a copy of that analysis to Advocacy for its review.[118] Sections 603(b) and (c) specify what must be contained in an initial regulatory flexibility analysis.[119]

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[115] 5 U.S.C. § 601(1), 5 U.S.C.§ 551(1).
[116] 87 Fed. Reg. at 42,035.
[117] The RFA states: "Sections 603 and 604 of this title shall not apply to any proposed or final rule if the head of the agency certifies that the rule will not, if promulgated, have a significant economic impact on a substantial number of small entities. If the head of the agency makes a certification under the preceding sentence, the agency shall publish such certification in the Federal Register at the time of publication of general notice of proposed rulemaking for the rule or at the time of publication of the final rule, along with a statement providing the factual basis for such certification. The agency shall provide such certification and statement to the Chief Counsel for Advocacy of the Small Business Administration." 5 U.S.C. § 605(b).
[118] *Id.* at 603(a).
[119] 5 U.S.C. § 603(b) and (c) state:
"(b) Each initial regulatory flexibility analysis required under this section shall contain —
(1) a description of the reasons why action by the agency is being considered;
(2) a succinct statement of the objectives of, and legal basis for, the proposed rule;
(3) a description of and, where feasible, an estimate of the number of small entities to which the proposed rule will apply;

The Proposed TRR contains a section entitled "Preliminary Regulatory Analysis;" however, neither in that section nor elsewhere does the FTC set out an initial regulatory flexibility analysis as required by Section 603(b) and (c) of the RFA.[120] For example, the FTC has failed to:

(i) accurately estimate the number of small entities to which the rule will apply;
(ii) accurately lay out the projected reporting, recordkeeping, and other compliance requirements of the Proposed TRR, including an estimate of the classes of small entities which will be subject to those requirements and the type of professional skills necessary for compliance with them;
(iii) identify relevant federal rules which may duplicate, overlap, or conflict with the proposal; and
(iv) perhaps of greatest importance, make virtually any attempt to comply with Section 603(c)'s mandate to consider alternatives to the Proposed TRR.

Section 609 of the RFA lists the steps an agency must take when a proposed regulation will have a significant economic impact on a substantial number of small entities.[121] In this instance, it was incumbent upon the FTC to assure that small entities were given an opportunity to participate in the rulemaking through the reasonable use of techniques such as—

> "(1) the inclusion in an advance notice of proposed rulemaking, if issued, of a statement that the proposed rule may have a significant economic effect on a substantial number of small entities;
> (2) the publication of general notice of proposed rulemaking in publications likely to be obtained by small entities;
> (3) the direct notification of interested small entities;

> (4) a description of the projected reporting, recordkeeping and other compliance requirements of the proposed rule, including an estimate of the classes of small entities which will be subject to the requirement and the type of professional skills necessary for preparation of the report or record;
> (5) an identification, to the extent practicable, of all relevant Federal rules which may duplicate, overlap or conflict with the proposed rule.

(c) Each initial regulatory flexibility analysis shall also contain a description of any significant alternatives to the proposed rule which accomplish the stated objectives of applicable statutes and which minimize any significant economic impact of the proposed rule on small entities. Consistent with the stated objectives of applicable statutes, the analysis shall discuss significant alternatives such as —

> (1) the establishment of differing compliance or reporting requirements or timetables that take into account the resources available to small entities;
> (2) the clarification, consolidation, or simplification of compliance and reporting requirements under the rule for such small entities;
> (3) the use of performance rather than design standards; and
> (4) an exemption from coverage of the rule, or any part thereof, for such small entities."

[120] 87 Fed. Reg. at 42,036-42,044.
[121] 5 U.S.C. § 609(a).

(4) the conduct of open conferences or public hearings concerning the rule for small entities including soliciting and receiving comments over computer networks; and

(5) the adoption or modification of agency procedural rules to reduce the cost or complexity of participation in the rulemaking by small entities."[122]

The FTC's failure to comply with Section 603(a), (b), and (c) of the RFA, or alternatively with Section 605(b), and its failure to comply Section 609 of the RFA, require that it withdraw the NPRM.

3. The FTC failed to comply with Section 1 of E.O. 12866.

Section 1 of E.O. 12866 – issued in 1993 by President Clinton – provides federal agencies, including independent agencies such as the FTC, with certain fundamental rulemaking principles and guidelines to promote transparency, informed decisionmaking, and good government. Section 1(b) of E.O. 12866 specifically requires that:

"(1) Each agency shall identify the problem that it intends to address (including, where applicable, the failures of private markets or public institutions that warrant new agency action) as well as assess the significance of that problem.

(2) Each agency shall examine whether existing regulations (or other law) have created, or contributed to, the problem that a new regulation is intended to correct and whether those regulations (or other law) should be modified to achieve the intended goal of regulation more effectively.

(3) Each agency shall identify and assess available alternatives to direct regulation, including providing economic incentives to encourage the desired behavior, such as user fees or marketable permits, or providing information upon which choices can be made by the public.

(4) In setting regulatory priorities, each agency shall consider, to the extent reasonable, the degree and nature of the risks posed by various substances or activities within its jurisdiction.

(5) When an agency determines that a regulation is the best available method of achieving the regulatory objective, it shall design its regulations in the most cost-effective manner to achieve the regulatory objective. In doing so, each agency shall consider incentives for innovation, consistency, predictability, the costs of enforcement and compliance (to the government, regulated entities, and the public), flexibility, distributive impacts, and equity.

(6) Each agency shall assess both the costs and the benefits of the intended regulation and, recognizing that some costs and benefits are difficult to

[122] *Id.* at 609(a).

quantify, propose or adopt a regulation only upon a reasoned determination that the benefits of the intended regulation justify its costs.

(7) Each agency shall base its decisions on the best reasonably obtainable scientific, technical, economic, and other information concerning the need for, and consequences of, the intended regulation.

(8) Each agency shall identify and assess alternative forms of regulation and shall, to the extent feasible, specify performance objectives, rather than specifying the behavior or manner of compliance that regulated entities must adopt.

(9) Wherever feasible, agencies shall seek views of appropriate State, local, and tribal officials before imposing regulatory requirements that might significantly or uniquely affect those governmental entities. Each agency shall assess the effects of Federal regulations on State, local, and tribal governments, including specifically the availability of resources to carry out those mandates, and seek to minimize those burdens that uniquely or significantly affect such governmental entities, consistent with achieving regulatory objectives. In addition, as appropriate, agencies shall seek to harmonize Federal regulatory actions with related State, local, and tribal regulatory and other governmental functions.

(10) Each agency shall avoid regulations that are inconsistent, incompatible, or duplicative with its other regulations or those of other Federal agencies.

(11) Each agency shall tailor its regulations to impose the least burden on society, including individuals, businesses of differing sizes, and other entities (including small communities and governmental entities), consistent with obtaining the regulatory objectives, taking into account, among other things, and to the extent practicable, the costs of cumulative regulations.

(12) Each agency shall draft its regulations to be simple and easy to understand, with the goal of minimizing the potential for uncertainty and litigation arising from such uncertainty."

The FTC disregarded several regulatory best practices described in Section 1(b) of E.O. 12866 because the Proposed TRR does not:

- show the existence of a pervasive and significant set of unfair or deceptive practices involving motor vehicle dealers that warrant the mandates set out in the proposal;
- identify and assess available alternatives to the mandates in its proposal, including existing federal and state legal authorities and a combination of government and industry educational efforts;
- accurately evaluate and assess the proposal's negative impacts on prospective vehicle purchasers;

- assess the cost effectiveness of the mandates in its proposal, especially in the context of regulatory alternatives;
- recognize that the costs of the mandates imposed by its proposal, on both the regulated community and on consumers, far outweigh any potential benefits;
- collect and analyze sufficient accurate data and other information regarding motor vehicle dealers and the products that they sell;
- consider performance standards in lieu of prescriptive and often nonsensical regulatory mandates; or
- make any attempt to tailor the proposal to be the least burdensome possible.[123]

4. The FTC failed to list the Proposed TRR in the Unified Agenda of Regulatory and Deregulatory Actions as required by the RFA and E.O. 12866.

Section 602 of the RFA requires each agency to publish in the *Federal Register* twice annually a regulatory flexibility agenda containing a brief description of the subject area of any rule that the agency expects to propose or promulgate which is likely to have a significant economic impact on a substantial number of small entities, a summary of the nature of such rule and the objectives and legal basis for issuing it, an approximate schedule for completing action on proposed rules, and the name and telephone number of an agency contact.[124]

Section 602 also requires that each regulatory agenda be transmitted to Advocacy for possible comment, and that each agency endeavor to provide notice of their regulatory flexibility agendas to small entities (or their representatives) through direct notification, or in publications likely to be obtained by them and to invite comments on each subject area in the agenda.[125] Congress intended for these agendas to serve as important means by which small businesses are kept informed about agency regulatory plans generally and about rulemakings with potentially significant impacts on certain small businesses. As discussed below, by failing to reference the Proposed TRR in any regulatory flexibility agenda, the FTC violated Section §602 of the RFA.

In addition to Section 602(b) of the RFA, Section 4 of E.O. 12866 states that:

> "*Unified Regulatory Agenda*. For purposes of this subsection, the term ''agency'' or ''agencies'' shall also include those considered to be independent

[123] Although FTC rulemakings presently are exempt from the OMB review process set forth in Section 6 of E.O. 12866 (a review process which likely will be revisited for "independent agencies"), the FTC is not excused from complying with Section 1(b) of E.O. 12866. *See, e.g.*, *Benefit-Cost Analysis at Independent Regulatory Agencies*, ADMINISTRATIVE CONFERENCE OF THE UNITED STATES, (June 13, 2013), https://www.acus.gov/research-projects/benefit-cost-analysis-independent-regulatory-agencies; and *2018, 2019,and 2020 Report to Congress on the Benefits and Costs of Federal Regulations and Agency Compliance with the Unfunded Mandates Reform Act*, OMB, https://www.whitehouse.gov/wp-content/uploads/2021/01/2018_2019_2020-OMB-Cost-Benefit-Report.pdf (pp.19-20).
[124] 5 U.S.C. § 602.
[125] *Id.* at 602(b) and (c).

> regulatory agencies, as defined in 44 U.S.C. 3502(10). Each agency shall prepare an agenda of *all* regulations under development or review, at a time and in a manner specified by the Administrator of OIRA. The description of each regulatory action shall contain, at a minimum, a regulation identifier number, a brief summary of the action, the legal authority for the action, any legal deadline for the action, and the name and telephone number of a knowledgeable agency official. Agencies may incorporate the information required under 5 U.S.C. 602… into these agendas."

(Emphasis added.)[126]

According to OMB, the purpose of the Unified Agenda of Regulatory and Deregulatory Actions (Unified Agenda), published twice each year by OMB pursuant to both Section 602 of the RFA and Section 4 of E.O. 12866, is to provide members of the public, including small businesses and their representatives, with notice of the status of rulemakings under development.[127] For each agency, including the FTC, potential short term regulatory actions are listed by their pre-rule, proposed rule, or final rule stage of development.[128] Agencies also provide insightful regulatory activity preambles and/or priority statements and long-term regulatory initiatives, if any. The FTC typically does a thorough job listing its regulatory initiatives in appropriate Unified Agendas, thereby giving interested parties an opportunity to prepare to participate in upcoming rulemakings.

The Fall 2021 Unified Agenda, dated December 7, 2021, was published in January 2022.[129] It included an FTC Statement of Regulatory Priorities, in which the agency devoted attention to a recent Supreme Court case, recent modifications made to its rulemaking procedures, and the fact that "the Commission in the coming year will consider developing both unfair-methods-of-competition rulemakings as well as rulemakings to define with specificity unfair or deceptive acts or practices."[130] The FTC then referenced its recently issued *Made in the USA* rule, concerns regarding surveillance-based business models, and that over the coming year, "the Commission will also explore whether rules defining certain "unfair methods of competition" prohibited by Section 5 of the FTC Act would promote competition and provide greater clarity to the market."[131] Lastly, the FTC discussed potential new rulemakings aimed at promoting

[126] Regulatory Planning and Review - E.O. 12866, 58 Fed. Reg. 51,735 (October 4, 1993) (Section 4).
[127] *About the Unified Agenda*, OFFICE OF INFORMATION AND REGULATION AFFAIRS, https://www.reginfo.gov/public/jsp/eAgenda/UA_About.myjsp (last visited Sept. 7, 2022).
[128] *Id*. The activities included in individual agency agendas are primarily those currently planned to have an Advance Notice of Proposed Rulemaking (ANPRM), a Notice of Proposed Rulemaking (NPRM), or a Final Rule issued within the next 12 months. Other listings may include long-term, complicated, and inactive actions.
[129] 87 Fed. Reg 5002, *et seq.* (Jan. 31, 2022).
[130] *Id.* at 5,177.
[131] *Id.* at 5,178.

competition, referenced rules under periodic review pursuant to Section 610 of the RFA,[132] and listed significant regulatory actions it was engaged in and final rules it had issued since 2020.[133]

The preamble to the FTC's submission to OMB for the Fall 2021 Unified Agenda, dated September 17, 2021 (Attachment 5), claimed that the agency was not working on "proposed rules that would meet the RFA's publication requirements" and that "the Commission has no proposed rules that would be a "significant regulatory action" under the definition in Executive Order 12866."[134] The FTC then identified and listed "rulemakings that are likely to have some impact on small entities, but do not meet the RFA's publication requirements."[135]

All told, the FTC's Fall 2021 agenda listed twelve pre-rule stage, four proposed rule stage, and one final rule stage rulemakings. Nowhere in the FTC's Fall 2021 regulatory agenda, including in the preamble or in its Fall 2021 Statement of Regulatory Priorities, did the FTC identify its soon-to-be Proposed TRR.

The Spring 2022 Unified Agenda was released by the White House on its website on June 21, 2022,[136] and published in the *Federal Register* on August 8, 2022.[137] The FTC's preamble submission to OMB for the Spring 2022 Unified Agenda (Attachment 6) also claimed that "the Commission has no proposed rules that would meet the RFA's publication requirements," and that,"[i]n addition, the Commission has no proposed rules that would be a 'significant regulatory action' under the definition in Executive Order 12866."[138] As in the preamble to its Fall 2021 agenda, the FTC then identified and listed rulemakings that are likely to have some impact on small entities, but do not meet the RFA's publication requirements.[139]

All told, the FTC's Spring 2022 agenda listed fourteen pre-rule stage, two proposed rule stage, and two final rule stage rulemakings. Nowhere in the FTC's Spring 2022 regulatory agenda, including in the preamble, did the FTC identify its soon-to-be Proposed TRR.

By failing to include the Proposed TRR in both the Fall 2021 and Spring 2022 Unified Agendas, the FTC violated Section 602 of the RFA and Section 4(b) of E.O. 12866.[140]

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[132] 5 U.S.C. § 610.
[133] 87 Fed. Reg. at 5178-5181.
[134] *See* FTC Fall 2021 Agenda Preamble at pp. 1-2 – Attachment 5.
[135] *Id.* at 2.
[136] Sam Berger, *The Spring Regulatory Agenda*, THE WHITE HOUSE, (June 21, 2022), https://www.whitehouse.gov/omb/briefing-room/2022/06/21/the-spring-regulatory-agenda/.
[137] 87 Fed. Reg. 48,236, *et seq.* (Aug. 8, 2022).
[138] *See* FTC Spring 2022 Agenda Preamble at p. 1 – Attachment 6.
[139] *Id*.
[140] It is noteworthy that the FTC's explanation for failing to include the Proposed TRR in its regulatory agenda has shifted over time. In Footnote 153 of the pre-publication version of the proposed rule (which was posted on the FTC's website on June 23, 2022), the FTC stated that:

d. The Proposed TRR impermissibly seeks to regulate the business of insurance.

The Proposed TRR also seeks to impose a series of duties and restrictions on "add-ons" and defines "Add-on" or "Add-on Product(s) or Service(s)" in such a broad manner that it makes no distinction between – and therefore includes both – "add-ons" that are insurance products under state law and those that are not. A quintessential example is credit life insurance and credit disability insurance, which generally pays off an insured consumer's credit obligation if the consumer dies or becomes disabled. These products are regulated as credit insurance in every state and clearly are "product(s) or services(s) not provided to the consumer or installed on the vehicle by the motor vehicle manufacturer and for which the Motor Vehicle Dealer, directly or indirectly, charges a consumer in connection with a vehicle sale, lease, or financing transaction."[141] Other VPPs are regulated as insurance in some states but not others, yet all such products clearly also fall within this broad definition.

The McCarran-Ferguson Act[142] reserves to the states the right to regulate the business of insurance. The law is specific. It states:

> "Regulation by State law; Federal law relating specifically to insurance; applicability of certain Federal laws after June 30, 1948
>
> (a) State regulation. The business of insurance, and every person engaged therein, shall be subject to the laws of the several States which relate to the regulation or taxation of such business.
>
> (b) Federal regulation. No Act of Congress shall be construed to invalidate, impair, or supersede any law enacted by any State for the purpose of regulating the business of insurance, or which imposes a fee or tax upon such business, unless such Act specifically relates to the business of insurance…."[143]

> "[T]his Notice of Proposed rulemaking was not included in the Commission's *Fall 2021 Regulatory Agenda* because the Commission first considered this notice after the publication deadline for the Regulatory Agenda."

(Emphasis added.) However, in the version of the proposal published three weeks later (on July 13, 2022) in the *Federal Register*, Footnote 153 had been edited to read as follows:

> "[T]his Notice of Proposed rulemaking was not included in the Commission's *Spring 2022 Regulatory Agenda* because the Commission first considered this notice after the publication deadline for the Regulatory Agenda."

(Emphasis added.) It strains credulity that the FTC would have referenced the publication deadline in the first version of this footnote for the Fall Regulatory Agenda if, at the time of the reference, the deadline for the Spring Regulatory Agenda had also passed.

[141] 87 Fed. Reg. at 42,044 (Proposed Section 463.2(a)).

[142] 15 U.S.C. §§ 1011-1015.

[143] 15 U.S.C. § 1012.

The Act prohibits the federal government from imposing requirements in connection with the business of insurance where the field is occupied by the States. Nevertheless, the Commission seeks to regulate VPPs which are regulated as insurance by the States in each subsection of the Proposed TRR. This violates the McCarren-Ferguson Act and these aspects of the Proposed TRR must be withdrawn for this reason alone.

III. The NPRM is based on a *flawed premise* and *inadequate data* and fails to identify a regulatory problem in need of a solution.

a. There is nothing that mandates this action.

When reviewing the justification for the Proposed TRR, it is important to note that Congress has not mandated – nor has it in any way signaled – that the FTC issue a UDAP rule involving motor vehicle dealers.

As explained above, the FTC cites as the basis of its authority to prescribe the Proposed TRR Section 1029(d) of Dodd-Frank. This provision *authorizes* the FTC to promulgate UDAP rules as provided for in Section 1029(d), but it does not *direct* it to do so. This is evident from the language in Section 1029(d) (stating that the FTC "is authorized to prescribe" UDAP rules) and, equally significant, the absence of language in Section 1029(d) that directs such activity or orders the issuance of rules by a specified date.

This grant of discretionary authority differs sharply from numerous other provisions in Dodd-Frank that both *authorize and direct* an agency to engage in certain activity. *See, e.g.*, Section 1411 (stating that the FRB "shall" prescribe regulations to prohibit mortgage originators from engaging in several delineated practices), Section 1076 (stating that the CFPB "shall" conduct a study into reverse mortgage transactions not later than one year after the designated transfer date), Section 1034 (stating that the CFPB "shall" develop reasonable procedures to respond to consumer complaints and inquiries), Section 1028 (stating that the CFPB "shall" conduct a study into the use of pre-dispute arbitration agreements), and Section 941 (stating, under the heading "Regulations Required," that the Securities and Exchange Commission ("SEC") and the federal banking agencies "shall" issue risk retention regulations not later than 270 days after the enactment of this section). Consequently, because there is not a statutory directive to promulgate UDAP rules or a statutory timeframe within which this must occur, the FTC may only exercise this discretionary authority if a sufficient record has been developed to justify and support this extraordinary action.

b. There is no regulatory hole to fill.

Lacking a statutory directive to act in this matter, the Commission does not identify in its explanation of the need for the rule any harmful market conduct for which remedies to protect consumers are lacking under current federal and state law. Nor does the Commission identify elsewhere in the NPRM instances of harm to consumers that can only be addressed by the imposition of new duties and obligations on motor vehicle dealers. This reflects the fact that the Commission currently possesses adequate authority under Section 5 of the FTC Act to investigate marketplace misconduct – including the full range of concerns addressed in the NPRM – and to bring enforcement actions against bad actors.

c. There is no widespread misconduct that requires or justifies this action.

Lacking a statutory directive to act and already possessing adequate enforcement authority to address misconduct by any bad actors, the only justification for a new UDAP rule that imposes new duties and obligations on an entire industry – including the "law-abiding dealers" for which the Commission expresses concern – would be that (i) problems in the marketplace are so widespread that individual enforcement actions are insufficient to protect consumers, and (ii) the only way to provide such protection is to promulgate a new UDAP rule.[144]

The discussion that follows in this section explains in detail how each of the four primary sources the Commission has cited to justify this action completely fail to establish the presence of widespread misconduct in the marketplace. Section IV then explains how the Commission's specific proposed rules would fail even to provide the protection that the Commission asserts is lacking while imposing massive countervailing costs and burdens on the industry.

1. Motor Vehicle Roundtables

The Commission identifies as a major source of support for the Proposed TRR and cites over 25 times in the NPRM the Motor Vehicle Roundtables that it conducted in 2011. However, in addition to the pitfalls of basing a current action on a stale record that was developed over a decade ago when the marketplace has since benefitted from significant improvements in the

[144] The Commission states that it has a "need for additional measures to deter deceptive and unfair practices" (and that "[i]n addition," a UDAP rule would allow it to seek consumer redress and impose civil monetary penalties for a violation of the rule. 87 Fed. Reg. at 42,013, 42,047. These statements give pause for several reasons. First, the Commission offers no support whatsoever for its contention that making deceptive and unfair practices – which by definition violate Section 5 of the FTC Act – doubly illegal will somehow create a further deterrent to misconduct by bad actors. Second, in actions the Commission has brought against motor vehicle dealers where it has actually demonstrated consumer harm, it has been able to secure redress for harmed consumers. *See, e.g., FTC v. Liberty Chevrolet, Inc. et.al.*, No.: 1:20-cv-03945-PAE, (S.D.N.Y. May 22, 2020), Available at: https://www.ftc.gov/system/files/documents/cases/bronx_honda_stipulated_final_order_liberty_chevrolet.pdf; https://www.ftc.gov/system/files/ftc_gov/pdf/6-1%20Stipulated%20Order.pdf; *FTC v. Tate's Auto Center of Winslow, Inc., et. al.,* No. 3:18-cv-08176-DJH, (D. Ariz.), Available at: https://www.ftc.gov/system/files/documents/cases/192_stipulated_order_for_permanent_injunction_and_monetary_relief_as_to_individual_defendant_0.pdf; and *FTC v. Universal City Nissan, Inc., et al.*, No 2:16-cv-07329-CAS(AJWx) (C. D. Cal.), Available at: https://www.ftc.gov/system/files/documents/cases/170327_final_orderjudgment.pdf. And third, conferring upon itself the ability to impose civil monetary penalties of up to $46,517 per violation for alleged violations of any of the many ill-defined and cumbersome requirements in the Proposed TRR would subject thousands of well-intentioned dealers who seek to comply with these requirements, but allegedly fall short to potential crushing liability that could shut down their businesses.

customer experience aided by rapid advances in technology, the Motor Vehicle Roundtables, far from supporting the Proposed TRR, actually undermine it.

The FTC initiated the Motor Vehicle Roundtables[145] following the enactment of Section 1029 of Dodd-Frank to "inform the Commission regarding what consumer protection issues, if any, exist that could be addressed through a possible rulemaking or other initiatives."[146] The Commission's subsequent examination of the industry was thorough. It consisted of in-depth panel discussions in three cities on each of the following topics:

1) Understanding the Motor Vehicle Sale, and Credit Transaction, From Both Prime and Subprime Perspectives;
2) Interest Rates, Dealer Reserves, and Markups;
3) Payment and Locator Devices and Consumer Privacy;
4) Spot Delivery;
5) Contract Add-Ons;
6) Vehicle Title Problems and Dealer Bankruptcies;
7) Military Consumers and the Auto Sales and Financing Process;
8) The Online Auto Process for Military and Other Consumers;
9) Military Consumers, Sales Representations, and Financing Process Issues;
10) Military Consumer Complaints and Military Sentinel;
11) Military Consumers, Vehicle Title Problems, and Repossessions;
12) Financial Literacy and Capability for Military Consumers;
13) Special Programs to Enhance Consumers' Financial Literacy;
14) Financial Literacy and New Approaches for Auto Sales and Financing;
15) Fair Lending – Interest Rates, Markups, and Payments;
16) Fair Lending – Compliance, Risk, and Liability;
17) Understanding the Motor Vehicles Leasing Process;
18) Misrepresentations and Other Consumer Protection Issues in Motor Vehicle Leasing;
19) Consumer and Business Education: What, If Anything, Is Needed and What Works?;
20) Which Practices, If Any, Cause Significant Harm to Consumers, and What Are Potential Solutions?; and
21) Which Practices, If Any, Are Widespread, and What Are Potential Solutions?

These panel discussions produced over 21 hours of oral testimony from 58 panelists and more than 500 pages of written transcripts. The FTC selected the panelists from a diverse range of interests throughout the marketplace which, in addition to representatives of different segments of the auto industry, included: (i) consumer group representatives from the Center for Responsible Lending, Consumer Federation of America, Consumers for Auto Reliability and Safety, National Consumer Law Center, and National Council of La Raza; (ii) representatives from the Department of Justice and CFPB; (iii) representatives of the Office of Attorney

[145] Public Roundtables: Protecting Consumers in the Sale and Leasing of Motor Vehicles, 76 Fed. Reg. 14,014-14,017 (Mar. 15, 2011).
[146] *Id.* at 14,015.

General and other state consumer protection agencies from Illinois, Iowa, Maine, and Texas; (iv) various military and civilian representatives of military service members; and (v) several plaintiffs' attorneys. The record was further supplemented by 100 written comments that the Commission received through May 2012.

A central purpose of the Roundtables was to allow the Commission to determine whether credible data existed demonstrating that alleged harmful conduct was *prevalent* in the industry. In identifying the roundtable goals and topics for comment, the Commission stated:

> "Of particular interest to the FTC staff is data and empirical evidence supporting comments provided in response to this request."[147]

In addition, in *each* of the *twelve* sets of topics for comment that the Commission set forth in the notice announcing the Motor Vehicle Roundtables, the Commission asked:

> "How prevalent is this practice in the industry as a whole or in any subset of the industry?"[148]

The importance of obtaining empirical data demonstrating the prevalence of harmful practices in the industry did not end with this *Federal Register* notice. During each of the Roundtables, Commission officials repeatedly sought this information in the following pleas:

<u>Detroit Roundtable</u>[149]

> "And just to emphasize, what we're going to be looking for throughout this session today and future sessions is as much empirical evidence as possible. We've all heard stories and anecdotes and individual cases where consumers were mistreated in one way or another. One of the real goals of this process is to find out how prevalent those practices are. So if there are any studies, any sort of empirical data – that's something we'd be interested in seeing;"[150]
>
> "Does anyone have data on these practices occurring?;"[151]
>
> "… And in order to get good useful answers, we need data. And I know you've heard that from us as a constant refrain, but we really do…;"[152]

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[147] *Id.*
[148] *Id.* at 14,015-14,016 (Topics for Comment 3-14).
[149] *The Road Ahead: Selling, Financing & Leasing Motor Vehicles*, FTC, (Apr. 12, 2011), https://www.ftc.gov/news-events/events/2011/04/road-ahead-selling-financing-leasing-motor-vehicles.
[150] Comments of FTC Division of Financial Practices Associate Director Joel Winston (Panel 1).
[151] Comments of FTC Division of Financial Practices Attorney Carole Reynolds (Panel 4).
[152] Comments of FTC East Central Region Director John Miller Steiger (Conclusion of Detroit Roundtable).

San Antonio Roundtable[153]

> "To the extent we have any information about widespread practices, that would be helpful from the panelists;"[154]

"""Has there been any kind of analysis of trends and complaints from military consumers or any kind of… statistics or any widespread practices that we have any information about?;"[155]

Washington, D.C. Roundtable[156]

> "We are especially interested in data and empirical information;"[157]
>
> "And, again, if you have data or other indicators of how frequently these practices occur, that would be great;"[158] and,
>
> at the conclusion of the roundtable process:
>
> "…We are looking at whatever data we can get. And I will continue to say, please give us hard facts and data. That's more persuasive than anecdotes."[159]

Despite this "constant refrain," the Commission did not receive credible data demonstrating that the practices it examined were prevalent in the marketplace and, not surprisingly, the Commission did not follow the Roundtables, whose express purpose was to determine whether a UDAP rulemaking involving motor vehicle dealers was warranted, by initiating such a rulemaking in the decade that followed. Consequently, it strains credulity to identify the 2011 Motor Vehicle Roundtables as somehow supporting the 2022 Proposed TRR.

In addition, the current exercise begs the unavoidable question:

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[153] *The Road Ahead: Selling, Financing & Leasing Motor Vehicles*, FTC, (Apr. 12, 2011), https://www.ftc.gov/news-events/events/2011/04/road-ahead-selling-financing-leasing-motor-vehicles.
[154] Comments of FTC Division of Financial Practices Assistant Director Malini Mithal (Panel 1).
[155] *Id*.
[156] *The Road Ahead: Selling, Financing & Leasing Motor Vehicles*, FTC, (Apr. 12, 2011), https://www.ftc.gov/news-events/events/2011/04/road-ahead-selling-financing-leasing-motor-vehicles.
[157] Comments of FTC Bureau of Consumer Protection Deputy Director Chuck Harwood (Beginning of Washington, DC Roundtable).
[158] Comments of FTC Division of Financial Practices Attorney Robin Thurston (Panel 4).
[159] Comments of FTC Division of Financial Practices Acting Associate Director Reilly Dolan (Conclusion of Washington, DC Roundtable).

What happened to the Commission's inquiry into whether the conduct it is examining is *prevalent* in the marketplace?

The Proposed TRR is based on precisely the same authority and involves the same participants that were the subject of the Motor Vehicle Roundtables, yet the NPRM does not include any inquiries into whether credible data establishes that the conduct it addresses is prevalent in the marketplace. Nor is there is a single reference to "prevalence" in the 126-page NPRM, including in any of the Commission's 49 Questions for Comment.[160]

How can it be that in 2011 (post-enactment of Section 1029(d)) "one of the real goals of this process [was] to find out how prevalent [harmful] practices are" and, in 2022, this goal, or even any mention of it, is completely ignored by the Commission? The Commission's failure to address this about-face is arbitrary in its own right. It is also contrary to the Commission's regulations for Section 18(a)(1)(B) rulemakings, which expressly require – with no exceptions – "[a] statement regarding the prevalence of the Acts or practices treated by the rule," in the statement of basis and purpose supporting a final rule.[161]

When an agency establishes a standard for proposing a UDAP rule through prior proceedings or regulations, the agency cannot credibly ignore its own standard in subsequent rulemakings. Moving the goalposts to accommodate an otherwise unsupported rulemaking is a completely arbitrary exercise that invites cynicism into the decision to advance this proposed rule.

2. Qualitative Research

Similarly perplexing and equally troubling is the Commission's reliance on a *qualitative* survey to support the Proposed TRR. It is the most prominent source of support for the Proposed TRR that is mentioned in the joint statement issued by the commissioners who voted to approve the Proposed TRR,[162] and it is quoted more than 30 times in NPRM in support of the rulemaking. As explained below, the Commission's qualitative survey is severely flawed and, therefore, cannot be relied upon as an accurate expression of the experience of the consumers who were surveyed. Even more problematic is the Commission's use of a qualitative survey – which is not appropriate for forming generalizable conclusions – to support a proposed rule of general applicability in the marketplace. As stated by Former FTC Chairman Muris and Former FTC BCP Director Beales:

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[160] Instead, the NPRM simply cites cherry-picked and unsupported allegations of harm while ignoring any information in the record that controverts those allegations.
[161] 16 C.F.R. § 1.14.
[162] Joint Statement of Chair Lina M. Khan and Commissioners Noah Joshua Phillips, Rebecca Kelly Slaughter, and Alvaro M. Bedoya Regarding the Notice of Proposed Rulemaking on a Motor Vehicle Dealers Trade Regulation Rule, FTC, (June 23, 2022), https://www.ftc.gov/legal-library/browse/cases-proceedings/public-statements/joint-statement-chair-lina-m-khan-commissioners-noah-joshua-phillips-rebecca-kelly-slaughter-alvaro.

> "Rulemaking is an exercise in generalization. Rules must apply to a well-defined population, with requirements that apply in well-defined circumstances. They cannot account for the wide range of specific factors that may be relevant to evaluate a practice in a specific context."[163]

A. The Flawed Survey

On July 30, 2020, the FTC issued two staff reports regarding the car buying experience.[164] The main report (the Auto Buyer Study) was jointly prepared by the FTC's Bureau of Economics (BE) and Bureau of Consumer Protection (BCP). It summarizes the results of 90-minute interviews with 38 consumers in a single market that the FTC conducted more than 5 years ago, in April 2017. The second report (the Supplemental Commentary) is a companion report issued by BCP which does not contain the results of any new research but rather purports to "highlight[] results from the study that are related to the broader context of sales and financing issues BCP has encountered in its enforcement role."[165]

The FTC first announced its intention to conduct consumer surveys in two PRA notices in January 2016[166] and September 2016.[167] NADA responded by filing written comments with the FTC in March 2016 (Attachment 7) and October 2016 (Attachment 8) that both questioned the need for the study and explained in detail – and asked the FTC to address – numerous flaws and missing information in the study design. Notwithstanding the very detailed problems that NADA identified, Commission staff proceeded with the interviews as intended with few modifications.

Following the Auto Buyer Study's release, NADA retained Dr. John P. Vidmar, a recognized expert in market research who has performed market research for numerous entities, including the FTC and other federal agencies, to review the Auto Buyer Study and provide his findings. Dr. Vidmar's report, *A Critique on the Limitations of the Recent FTC "Auto Buyer Study"* (September 11, 2020)("Auto Buyer Study Critique"), is set forth in full at Attachment 9. Dr. Vidmar's critique identifies numerous flaws in the Auto Buyer Study that thoroughly discredit the underlying consumer survey process and the manner in which it was reported. These flaws relate to a range of issues, including:

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[163] Back to the Future Report at 3 (Attachment 4).
[164] Mary W. Sullivan et.al., *The Auto Buyer Study: Lessons from In-Depth Consumer Interviews and Related Research*, FTC (July 2020). Available at: https://www.ftc.gov/system/files/documents/reports/auto-buyer-study-lessons-depth-consumer-interviews-related-research/bcpreportsautobuyerstudy.pdf. Carole L. Reynolds et.al., *Buckle Up: Navigating Auto Sales and Financing*, FTC, (July 2020). Available at: https://www.ftc.gov/system/files/documents/reports/buckle-navigating-auto-sales-financing/bcpstaffreportautofinancing_0.pdf.
[165] Supplemental Commentary at 5.
[166] Agency Information Collection Activities; Proposed Collection: Comment Request, 81 Fed. Reg. 780-783 (Jan. 7, 2016).
[167] Agency Information Collection Activities; Submission for OMB Review; Comment Request, 81 Fed. Reg. 63,179-63,186 (Sep. 14, 2016).

- Geographic Bias;
- Clustering Effects;
- Database Bias;
- Compensation Bias;
- Filter Bias;
- Recall Bias;
- Overall Evaluation of the Experience;
- Lack of Questions and Probing on Emotions and Thought Processes;
- Assumption that Consumers are Irrational;
- Mingling of References to Other Research; and
- Absence of Recommendations for Next Steps.

While Dr. Vidmar describes each of these flaws in detail, Dr. Vidmar's findings related to the last two topics are particularly noteworthy. With regard to the mingling deficiency, Dr. Vidmar states:

> "The FTC Study intermingles research findings from other studies with observations from the qualitative research. This purports to provide an aura of quantitative legitimacy to the report. However, one has to be careful in reading the report to identify the unique findings of this research. If you strip out the literature review which is present throughout the report, the research findings do not sound as substantial…. [M]any statements (over 80) include references to "some" respondents. Does this mean three, 15, or 20? Placed alongside a citation from the literature that is assumed to be from qualitative research, it misleads the reader to feel that the observation is a significant finding."[168]

And with regard to next steps, Dr. Vidmar states:

> "Typically, a qualitative report would make recommendation for further qualitative work to explore the wording of issues to be used in a quantitative protocol. Another typical recommendation would be for quantitative research to rigorously test, using scientific methods, the incidence and prevalence of issues of concern. Such a recommendation is lacking. That implies that this is viewed as a finished product appropriate for recommendation towards regulatory action. This study lacks that rigor."[169]

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[168] Auto Buyer Study Critique at 8.
[169] *Id.*

These deficiencies, many of which were identified to the Commission before it launched the consumer survey process, severely undermine the value of the information produced by the interviews and thoroughly discredit it as a reliable indicator of marketplace conduct.[170]

B. The Flawed Use of the Survey

However, the most egregious aspect of Auto Buyer Study is the manner in which the Commission uses it to support this rulemaking.

It is well recognized that "qualitative research is not designed to establish the prevalence of problems or characteristics"[171] and that it is typically "used as a precursor to quantitative research."[172] And these limitations on qualitative research are recognized in the Auto Buyer Study itself, which highlights the need for additional research[173] and explicitly states:

> "The study is qualitative *and exploratory*…. Because this is a qualitative study of a small, non-representative sample of consumers, *the data generated are not useful for forming quantitative or generalizable conclusions*."

(Emphasis added.) [174]

Notwithstanding these inherent limitations and the Auto Buyer Study's own acknowledgment, the Commission has used a qualitative survey that may not be used for forming generalizable conclusions to support a proposed rule of general applicability in the marketplace. In doing so, the Commission has skipped the concededly essential step of conducting quantitative research to provide scientific validity to the conclusions it has formed.

Just as the Commission has dispensed with the need to acquire credible data to determine whether certain practices are prevalent in the marketplace which it insisted upon during the Motor Vehicle Roundtables, the Commission has also dispensed with the need to conduct quantitative research to validate the "generalizable conclusions" that it has made to support the

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[170] The Supplemental Commentary is also noteworthy for the selective manner in which it highlights information from the consumer surveys, omitting statements from the Auto Buyer Study such as "many of the participants considered dealer financing to be a large convenience overall," "[s]ome participants got lower rates from the dealer than they were offered by independent sources," and "[s]ome participants with lower credit scores could not get an offer from a bank or credit union." It also ignores many positive experiences reported by the consumer interviewees with regard to the purchase and financing of the vehicle and VPPs.
[171] Auto Buyer Study Critique at 2.
[172] *Id.* at 4.
[173] *See* Auto Buyer Study at 1 ("The following lessons from the study provide a foundation for development of consumer education or *further research* into *potential* modifications of the buying process.") (Emphasis added.). *See also* the Supplementary Commentary at 13 ("Topics that may merit further study include…. Potential information gathering endeavors may include additional qualitative research, copy testing for potential remedial use, discussion with industry leaders, or expanded case-by-case investigations.").
[174] *Id.*

Proposed TRR. This reflects an arbitrary and rushed process that inspires little confidence in the support for this entire exercise.

3. Complaint Data

Another source of support that the FTC identifies for the Proposed TRR is the number of "auto related" complaints that is maintained in its Consumer Sentinel Network.[175] The FTC states that it has received "more than 100,000" such complaints in each of the past three years[176] and maintains that its inability to act upon and investigate complaints regarding motor vehicle dealerships support the need for this rulemaking.[177]

However, this eye-catching number is both significantly inflated and devoid of context and, consequently, not useful for the purpose for which it is offered.

A. Inflated Numbers

The FTC's Consumer Sentinel Network lumps into "auto related" complaints several subcategories of complaints that are (i) unrelated or not clearly applicable to motor vehicle dealers who are subject to the Proposed TRR, (ii) unrelated to conduct addressed in the Proposed TRR, and (iii) obtained from sources which report complaints that likely have nothing to do with motor vehicle dealers in the United States.

With regard to the business entities to which the complaints apply, subcategories of "auto related" complaints include those pertaining to Gasoline, which has no connection to motor vehicle dealers,[178] and those pertaining to Auto Renting, which likely involves companies other than motor vehicle dealers. Other complaint subcategories, such as Auto Financing, are vague and could involve motor vehicle dealers but also could involve finance sources that take assignment of retail installment sale and lease contracts from motor vehicle dealers and engage in account underwriting, servicing, collections, and repossessions. And while the subcategory Used Auto Sales certainly includes franchised motor vehicle dealers and independent motor vehicle dealers with a service facility who are covered by the Proposed TRR, it likely also includes to a large extent independent motor vehicle dealers who lack a service facility and likely fall outside the scope of the proposed rule.[179]

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[175] *Consumer Sentinel Network; Data Book 2021*, FTC, (Feb. 2022). Available at: https://www.ftc.gov/system/files/ftc_gov/pdf/CSN%20Annual%20Data%20Book%202021%20Final%20PDF.pdf.
[176] 87 Fed. Reg. at 42,015.
[177] *Id*. at 42,013.
[178] This subcategory is described as "price fixing and price gouging concerns against gas stations and oil companies…." Consumer Data Book 2021 at Appendix B1.
[179] In its final 2016 amendments to the Used Car Rule, the Commission explained why it believes all independent motor vehicle dealers are engaged in "servicing" and thus are covered by a trade regulation rule issued pursuant to Section 1029(d) of Dodd-Frank. 81 Fed. Reg. at 81,668 (Nov. 18, 2016) (codified at 16 C.F.R. § 455). The Commission maintained that "appearance reconditioning" to prepare a vehicle for sale is a "type of servicing" that

With regard to the subject matter of the complaints, two other subcategories – Auto Parts & Repairs and Auto Service & Warranties – could apply to motor vehicle dealers, but these subcategories are not covered by the Proposed TRR.[180] These subcategories alone represent nearly 30% of the total number of "auto related" complaints reported in 2021, a percentage that would be considerably higher if the significant number of other non-pertinent complaints were removed from the total number of complaints.

With regard to the data contributors, it appears that the total number of "auto related" complaints also includes complaints reported by government agencies and other organizations which are located outside of the United States and presumably pertain to activity occurring in their localities.[181] These organizations include the Australian Competition and Consumer Commission, which the Consumer Data Book 2021 identifies as both a new data contributor[182] and its third top data contributor,[183] as well as ten Better Business Bureau data contributors located in Canada and Mexico.[184]

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is "undertaken by essentially all used car dealers." However, if essentially all used car dealers engage in this activity because it is a routine part of the sales process, then why did Congress use the expansive phrase "sale and servicing" instead of just "sale" and "leasing and servicing" instead of just "leasing"? In other statutes that apply to motor vehicle dealers, Congress has not used this expansive language. *See, e.g.*, the Federal Odometer Act, 49 U.S.C. § 32702(2) and The Inflation Reduction Act of 2022, amending the Internal Revenue Code, 26 U.S.C. § 30D(g)(8). Consequently, Congress clearly was seeking to capture activity beyond what is engaged in by dealers as part of the sale of motor vehicles. In this regard, understanding market conditions when Section 1029 was drafted is important. In 2009, 50.3% of the average franchised motor vehicle dealer's gross income was attributable to new and used vehicle sales, while in 2010, 51.6% of the average franchised motor vehicle dealer's gross income was attributable to new and used vehicle sales. NADA. These figures are averages, meaning that many franchised motor vehicle dealers' gross income from new and used vehicle sales fell below the 50% threshold. If Section 1029(a) had excluded from the CFPB's jurisdiction motor vehicle dealers who are "predominantly engaged" in the sale of motor vehicles, the leasing of motor vehicles, or both, many franchised dealers may have not been so excluded, Accordingly, it was essential to add "or servicing" to ensure that such franchised motor vehicle dealers – whose gross income from their service departments would cover most of the remainder of their gross income from all sources, were covered by the "predominantly engaged" language in Section 1029(a). While this is not presented in Section 1029's legislative history, it also is not refuted, and any contrary explanation, including that offered by the Commission in its explanation of the 2016 Used Car Rule amendments, ignores the conditions that prevailed when Dodd-Frank was enacted and fails to recognize that Congress does not use superfluous language when creating laws. *See Corley v. United States*, 556 U.S. 303, 314 (2009)("[O]ne of the most basic interpretive canons" is that a "'statute should be construed so that effect is given to all its provisions, so that no part will be inoperative or superfluous, void or insignificant....'" (quoting *Hibbs v. Winn*, 542 U.S. 88, 101 (2004)).

[180] The subcategory Auto Service, which is described as "including dissatisfaction with service provided by auto mechanics," as well as the subcategory Auto Parts & Repairs, undoubtedly also include complaints against independent service and repair facilities that are outside the scope of the Proposed TRR. Consumer Data Book 2021 at Appendix B1.

[181] *See id.* at 2 ("In addition to taking consumer reports directly from people who call the FTC's call center or report online, Sentinel includes reports filed with other federal, state, local, and international law enforcement agencies, as well as other organizations, like the Better Business Bureau and Publishers Clearing House.").

[182] *Id*.

[183] *Id*. at Appendix A3.

[184] *Id*. at Appendix A4.

It also is unclear to what extent a complaint involving a single activity has been reported multiple times because it has been (i) placed into more than one subcategory,[185] and/or (ii) reported to more than one data contributor to the Consumer Sentinel Network. Either of these occurrences will further inflate the complaint numbers.

In addition, the complaints maintained by the Commission are "based on *unverified* reports filed by consumers." (Emphasis added.)[186]

Taken together, it is clear that the Commission's "more than 100,000 complaints" figure is significantly inflated and does not serve as a reliable indicator of the prevalence of specific harmful activity in the marketplace by motor vehicle dealers who are covered by the Proposed TRR.

B. Lack of Context

The flaw in the Commission's use of its complaint data to support the Proposed TRR is not confined to these limitations. The other glaring problem with its use is that the Commission does not take into account the size of the market in which these complaints have been reported.

The Commission states that it received more than 100,000 auto-related complaints in each of the past three years, but it fails to state that the number of new and used vehicle deliveries to consumers during the same period was (i) 42,720,306 in 2019, (ii) 39,313,272 in 2020, and (iii) 41,906,758 in 2021.[187] Accordingly, even when factoring in all of the "auto related" complaints, including the large number of such complaints that have nothing to do with motor vehicle dealers or the subject matter of the Proposed TRR, this represents a complaint-to-vehicle delivery ratio of only a small fraction of 1 percent.[188]

However, the frequency of complaints is actually much lower because the complaints in the Consumer Data Book are not confined to interactions between consumers and motor vehicle dealers involving completed deliveries. They also involve interactions between consumers and motor vehicle dealers (i) where a vehicle sale or lease did not occur, and (ii) to schedule and perform maintenance or repair work on their vehicles.[189] Were these interactions added to the

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[185] *See* Consumer Data Book 2021 at Appendix B3 ("Consumers can report more than one category or subcategory.").

[186] *Id.* at 2. In addition, the complaints include those from consumers who have not experienced a loss. *Id*. at 3 ("Except where otherwise stated, numbers are based on reports both from people who indicated a loss and people who did not.").

[187] S&P Global; Wards Intelligence; NADA.

[188] The "auto related" complaints reported by the Commission during this period are 126,096 or 3.68% of the total complaints received (2019), 131,687 or 2.71% of the total complaints received (2020), and 137,468 or 2.4% of the total complaints received. Consumer Data Book 2021 at Appendix B2.

[189] As noted above, the subcategories of "auto related" complaints in the Consumer Data Book include Auto Parts & Repairs and Auto Service. *Id*. at Appendix B3. While the NPRM does not specifically mention Auto Parts &

vehicle delivery figures, it would reflect a complaint ratio that is even more minute and certainly not indicative of prevalent or widespread problems in the marketplace.[190]

This highlights the flaw of focusing on numerators while ignoring denominators. It suffers from a lack of context that gives the reported figures outsized importance that, in turn, distorts their significance.

Similarly perplexing is how the "tens of thousands of consumer complaints received by the FTC each year"[191] that purportedly involve motor vehicle dealers are now viewed as adequate to support a UDAP rule that applies to motor vehicle dealers. During the 2011 Motor Vehicle Roundtables, the Consumer Data Book also existed and also contained tens of thousands of "auto related" complaints.[192] Nevertheless, as detailed above, the Commission repeatedly sought credible data during the Motor Vehicle Roundtables indicating that the reported abuses were prevalent in the marketplace. This included the following statement set forth earlier from an FTC official at the beginning of the first roundtable:

> "And just to emphasize, what we're going to be looking for throughout this session today and future sessions is as much empirical evidence as possible. We've all heard stories and anecdotes and individual cases where consumers were mistreated in one way or another. One of the real goals of this process is to find out how prevalent those practices are. So if there are any studies, any sort of empirical data – that's something we'd be interested in seeing;"[193]

If the "tens of thousands" of auto related complaints in the Consumer Data Book 2011 were sufficient to demonstrate prevalence, the Commission would have not needed to request such data thirteen times in its *Federal Register* notice announcing the Motor Vehicle Roundtables and eight additional times during the Roundtables themselves. How then does today's similarly structured Consumer Data Book now emerge as a major source of support for this rulemaking?

Repairs when providing the "more than 100,000 complaints in each of the past three years" figure, without it, there were fewer than 100,000 auto related complaints in 2019, so the Commission presumably is referring to the full range of subcategories when using this figure. 87 Fed. Reg. at 42,015.

[190] For example, in addition to sales interactions where a delivery did not occur, the number of service and parts transactions between franchised dealers and consumers was (i) 249,405,238 in 2019, (ii) 210,761,449 in 2020, (iii) 216,573, 707 in 2021. NADA.

[191] 87 Fed. Reg. at 42,013, 42,035.

[192] *See Consumer Sentinel Network; Data Book for January-December 2011*, FTC, (Feb. 2012). Available at: https://www.ftc.gov/sites/default/files/documents/reports/consumer-sentinel-network-data-book-january-december-2011/sentinel-cy2011.pdf. While the number of "auto related " complaints in Consumer Data Book 2021 is larger than the number of "auto related" complaints in Consumer Data Book 2011 (which undoubtedly is attributable to, among other factors, a far more robust market in 2021 than in 2011), the auto-related complaints in Consumer Data Book 2021 are (i) 2.4% of the total complaints received compared to 4% of the total complaints received in Consumer Data Book 2011, and (ii) comprise the lowest percentage of overall complaints in this category at least since 2011.

[193] Comments of FTC Division of Financial Practices Associate Director Joel Winston (Panel 1).

4. Enforcement Actions

The final primary source of support that the Commission identifies for the Proposed TRR is the "more than 50 motor vehicle-related enforcement actions" it has brought in the past ten years.[194] The Commission also references actions that have been taken by its federal and state law enforcement partners.[195] However, as with the other sources of support that it identifies, the Commission overstates the number and relevance of these law enforcement actions, which in turn fail to serve the purpose for which they are offered.

A. FTC Enforcement Actions

The Commission's overstatement is evident from the following breakdown of the "more than 50" enforcement actions figure it uses in the NPRM:

- Nearly 1/3 of these actions (sixteen) did not involve motor vehicle dealers and, therefore, similar to complaints that do not involve motor vehicle dealers, have no application to a proposed rule that only applies to motor vehicle dealers;

- Among the 37 actions that involved motor vehicle dealers, only three included allegations of unlawful conduct involving "add-ons," even though new duties and restrictions pertaining to "add-ons" are a central component of the Proposed TRR; [196]

- Almost all of the remaining actions involved allegations of deceptive advertising; however, here too, a breakdown of this broad category reveals that the FTC enforcement actions pertaining to different types of alleged advertising violations are also limited and otherwise not in need of duplicating existing consumer protection standards under federal and state law. For example:

    - Eighteen of the advertising actions involved alleged violations of TILA and Regulation Z disclosure requirements, while sixteen of the actions (most of which were against the same respondents) involved alleged violations of CLA and Regulation M disclosure requirements. These laws and regulations already establish federal disclosure standards pertaining to credit and lease advertising that are not in need of duplication;

    - The deceptive pricing claims involved 13 dealers with eight actions involving the availability of the purchase price, six actions involving monthly payments, and five actions involving the availability of rebates, incentives, and discounts;

[194] 87 Fed. Reg. at 42,013.
[195] *Id.* at 42,018.
[196] This includes the Commission's recent enforcement action against the Napleton Auto Group , which is not included in the list of Commission enforcement actions provided in Footnote 14 of the NPRM. *See F.T.C. & Illinois v. N. Am. Auto. Servs., Inc.*, No. 1:22–cv–0169 (N.D. Ill. Mar. 31, 2022); *see also* 87 Fed. Reg. at 42,013.

- Five of the actions pertain to disclosures related to unrepaired safety recalls, which are not addressed in the Proposed TRR; and

- Four of the actions pertain to statements made concerning the payoff of a consumer's trade in vehicle; however, these limited actions are both few in number and dated, as each of them occurred more than 10 years ago; and

- The remaining FTC enforcement actions involve different types of alleged violations, with two of them involving ECOA and Regulation B, which are not addressed in the Proposed TRR and which already provide protection to consumers under federal law that is not in need of duplication, and the others involve a single enforcement action per type of violation.

Consequently, the "more than 50 motor vehicle-related enforcement actions" taken over the last decade that are cited by the Commission are actually far more limited, with an average of fewer than four actions per year taken against motor vehicle dealers (during a period involving approximately 409 million motor vehicle deliveries by franchised and independent motor vehicle dealers to consumers and 2.3 billion service transactions between franchised motor vehicle dealers and consumers).[197] And of the actions that have been taken, (i) several involved activity outside the scope of the Proposed TRR, (ii) most were confined to advertising actions even though the scope of the Proposed TRR is much broader than advertising, and (iii) those addressing the broad category of advertising, when broken down by the type of alleged violation involved, offer trivial support for "additional measures to deter deceptive and unfair practices."[198]

B. Law Enforcement Partners' Actions

The Commission also cites as support for the Proposed TRR enforcement actions taken by the CFPB and state law enforcement agencies. However, these actions are similarly of limited relevance here.

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[197] The total number of new and used vehicles that franchised and independent motor vehicle dealers delivered to consumers from 2012-2021 was 409,097,738, while the total number of service and parts transactions between franchised motor vehicle dealers and consumers during this time frame was 2,275,341,690. (NADA does not have data on the number of service and parts transactions between independent motor vehicle dealers and consumers.) NADA, Wards Intelligence, and S&P Global Mobility.

[198] 87 Fed. Reg. at 42,013. This is not to question or in any way discourage the Commission from bringing enforcement actions when the Commission possesses credible evidence of misconduct and affords respondents appropriate due process. Indeed, the proper exercise of enforcement authority allows the Commission to target bad behavior where it exists without saddling the "law abiding dealers" and "honest dealerships" that it wishes to protect with a series of unnecessary, burdensome, and costly duties. *See* 87 Fed. Reg. 42,013, 42,026. When enforcement actions occur, NADA broadly announces them to its members to both promote compliance and help ensure the Commission's areas of concern are known to relevant actors in the marketplace.

With regard to the CFPB actions,[199] all but three of them pertain to entities other than motor vehicle dealers and two of the three actions that pertain to motor vehicle dealers do not involve conduct that is addressed in the Proposed TRR. Thus, these actions clearly are inadequate to support the Proposed TRR in any fashion.

With regard to "law enforcement sweeps" that states purportedly have taken with the FTC, the Commission similarly provides inflated numbers. It states: "Operation Steer Clear and Operation Ruse Control brought with state law enforcement partners around the nation and Canada, encompassed over 246 enforcement actions."[200] According to the "Operation Ruse Control" Chart of Actions that accompanied the press release announcing these actions, (i) 69 of them were brought in Canada, (ii) several of them either did not involve enforcement actions or were pending when announced, and (iii) a significant number involved entitles other than motor vehicle dealers (e.g., auto manufacturer, auto shipment broker, multiple auto finance companies, multiple auto title lending companies, auto loan modification company, auto loan acceleration company, and multiple after-market providers). Indeed, one action that was included in this count was brought by the Department of Justice's Antitrust Division against a Japanese parts manufacturer.[201] Lumping into a rulemaking involving only motor vehicle dealers in the United States a series of actions against other entities distorts the magnitude of these actions and undermines the support for this exercise.

Similarly, lumping in alleged misconduct by motor vehicle dealers that is not addressed in the rulemaking does not support the need for the Proposed TRR. In numerous actions identified as part of "Operation Ruse Control," the allegations have no connection to the conduct that is addressed in the Proposed TRR. And with regard to other actions that state authorities have taken independently, the Commission does list those cases or describe how the allegations they involve are connected to the conduct that is addressed in the Proposed TRR.[202]

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It is clear, then, that the Commission's attempt to support the Proposed TRR by piecing together cherry-picked elements from the non-data producing and dated Motor Vehicle Roundtables, the severely flawed and misused qualitative survey, the greatly exaggerated and vague complaint data, and the greatly exaggerated and limited enforcement actions falls well short of justifying

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[199] These are identified in Footnote 82 of the NPRM. *See id.* at 42,018.
[200] *See* Footnote 83 of NPRM. *Id.* at 42,018.
[201] Notwithstanding these limitations, the Commission described Operation Ruse Control in the April 2015 edition of *Penn Corner* as "252 enforcement actions… against *dishonest car dealers*" (emphasis added). *Penn Corner: Your Update to the Federal Trade Commission,* FTC, (Apr. 15, 2015), http://content.govdelivery.com/accounts/USFTC/bulletins/fea7b5. NADA identified this mischaracterization to the Commission in NADA's first set of comments in response to the Commission's first notice of its planned Auto Buyer Consumer Survey. *See* Attachment 7.
[202] The lone exception appears to be a California case cited by the Commission in Footnote 84 of the NPRM. *See* 87 Fed. Reg. at 42,018.

its imposition of a new and comprehensive set of duties and restrictions on an entire segment of the marketplace.

IV. The specific proposed rules in the NPRM are deeply flawed.

Not surprisingly, the lack of substantiation, shortcuts, and untested assumptions in the NPRM – as well as the rushed and procedurally flawed manner in which this rulemaking has been conducted – have contributed to the development of a proposed rule that is substantively deficient and will ill-serve both consumers and small businesses.

a. The substantive elements are unnecessary and ill-conceived.

1. The prohibitions are unnecessary, already unlawful, and many are poorly defined.

Section 463.3 of the Proposed TRR sets forth sixteen prohibited misrepresentations which (i) impermissibly conflict with the FTC Policy Statement of Deception and Section 5 of the FTC Act, (ii) seek to address underlying conduct that is already unlawful under federal and state law and enforceable by both the Commission and the States, and (iii) in many instances, do not provide adequately defined standards for regulated entities.

A. Conflicts with FTC Act and Policy Statement on Deception

The Proposed TRR seeks to change and impermissibly expand the concept of "deception" under Section 5 of the FTC Act, setting a new standard that applies only to motor vehicle dealers. Such a change, without any process or explanation, would (i) disrupt nearly 40 years of FTC precedent upon which motor vehicle dealers have relied and (ii) be a massive and impermissible expansion of the formally stated and statutorily required definition of Section 5 "deception."

The Section 5 "deception" standard used by the Commission has been the same since the Commission issued to Congress its 1983 "Deception Policy Statement."[203] That issuance sought to address active efforts at that time by Congress to define "deception" which were themselves in response to the Commission's use of a former deception standard that was deemed too broad and amorphous.[204]

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[203] *FTC Policy Statement on Deception*, FTC, (Oct. 14, 1983), https://www.ftc.gov/legal-library/browse/ftc-policy-statement-deception.

[204] *See* Jack E. Karns, *The Federal Trade Commission's Evolving Deception Policy*, 22 U. Rich. L. Rev. 399 (1988). Available at: http://scholarship.richmond.edu/lawreview/vol22/iss3/5. ("In 1982, Chairman Miller testified before Congress about the desirability of a statutory definition of deception. He stated that the ad hoc decision making of the Commission in this area had 'done consumers more harm than good.' The central issue was the traditional deception standard's broad prohibition of acts and practices that 'could benefit the majority of consumers,' but which had been held deceptive due to a 'tendency to mislead an unreasonable few.'" [Internal citations omitted].)

According to the FTC's Deception Policy Statement, for there to be "deception":

> "First, there must be a representation, omission or practice that is likely to mislead the consumer….
> "Second, we examine the practice from the perspective of a consumer acting reasonably in the circumstances….
> Third, the representation, omission, or practice must be a 'material' one."[205]

This Policy Statement was not only cited in the NPRM,[206] it has been followed and cited by the Commission and by courts on numerous occasions in the last forty years and forms the bedrock of current market-wide understanding of what could be deemed "deceptive" under Section 5 by the Commission as to *all* entities subject to the Commission's authority.

- *The Proposed TRR impermissibly ignores both the "Materiality" and "Reasonable Consumer" requirements of deception.*

The Commission has clarified that materiality under this time-tested standard is linked to whether the representation or omission in an advertisement "is important to a consumer's decision to buy or use the product."[207] Although Section 5 of the FTC Act does not specifically include materiality as part of the unfairness and deception standards, the term *is included* in the statutory definition of "false advertisement."[208]

However, the Proposed TRR states, categorically and without any explanation or rationale, that it is a violation of this rule *and* of Section 5 of the FTC Act, for a dealer to make "*any* misrepresentation, expressly or by implication regarding" a litany of issues, subjects, and disclosures – including some of which are made to individual consumers, and others that are made broadly to the public.[209] That formulation completely rewrites the FTC's longstanding deception standard by removing both the materiality and reasonableness requirements.

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[205] *Id.* 1-2.
[206] 87 Fed. Reg. at 42,015 ("The FTC uses its authority under Section 5 to stop deceptive and unfair acts or practices in the motor vehicle marketplace. A representation, omission, or practice is deceptive if it is likely to mislead consumers acting reasonably under the circumstances and is material to consumers—that is, it would likely affect the consumer's conduct or decisions with regard to a product or service. Some deception cases involve omission of material information, the disclosure of which is necessary to prevent the claim, practice, or sale from being misleading.").
[207] *See Advertising FAQ's: A Guide for Small Business*, FTC, (Jan. 2022), https://www.ftc.gov/business-guidance/resources/advertising-faqs-guide-small-business. Section 463.2(i) of the Proposed TRR similarly defines "Material" as "likely to affect a person's choice of, or conduct regarding, goods or services."
[208] See 15 U.S.C. § 55(a)(1) ("The term "false advertisement" means an advertisement other than labeling, which is misleading in a *material* respect; and in determining whether any advertisement is misleading, there shall be taken into account (among other things) not only representations made or suggested by statement, word, design, device, sound, or any combination thereof, but also the extent to which the advertisement fails to reveal facts *material* in the light of such representations or material with respect to consequences which may result from the use of the commodity to which the advertisement relates under the conditions prescribed in said advertisement or under such conditions as are customary or usual." (Emphasis added).
[209] 87 Fed. Reg. at 42,045 (Proposed Section 463.3) (Emphasis added.).

First, "*any* misrepresentation" express or implied, about any of the listed issues simply cannot meet the materiality threshold. For example, a typographical error adding $1 to an advertised price or a misleading implication made by a salesperson in a conversation with a consumer about whether the consumer may take a vehicle out of the country would arguably violate this requirement – whether or not it had any *possible* effect on the consumer's decision to buy a vehicle. That is, it would be deemed "deceptive" under Section 5 whether or not the statement was "likely to mislead" a consumer, or whether or not the consumer, in those examples, ever saw or was confused by the typo, or whether the consumer had any intention to leave the country with the vehicle.

There is no requirement in the Proposed TRR of any reliance or effect on the purchase decision, or even an understanding on the part of the listener or reader of such "misrepresentations," and of course no requirement that many of the listed misstatements be material. Indeed, this is made clear by the fact that several of the listed "Prohibited Misrepresentations" *contain a specific "materiality" qualifier while most do not*.[210] In short, deeming "any" misstatement about any of these topics as presumptively and conclusively deceptive, the Proposed TRR's standard completely disregards "materiality."

In addition, this new "any misrepresentation, express or implied" standard of deception also ignores the requirement that any such representation or omission be viewed "from the perspective of a consumer acting reasonably under the circumstances."[211] The Commission provides no explanation for this limitation and, given that some of the topics arise in the context of individual consumer conversations while others involve market-wide advertisements, it provides no recognition that those consumer circumstances can vary. Not only does the Proposed TRR fail to properly limit deception violations to statements likely to deceive a reasonable consumer, it also does not even limit it to a purely subjective standard. Instead, the Proposed TRR establishes a strict liability standard: *any* misstatement (implied or otherwise) on the listed topics – regardless of likelihood of deception, reasonable interpretation or, with many of the misstatements, materiality – is *de facto* deceptive.

The Proposed TRR is issued pursuant to the Commission's rulemaking authority under 15 U.S.C. § 57(A)(1)(B), which states that: "…the Commission may prescribe: …(B) rules which define with specificity acts or practices which are unfair or deceptive acts or practices in or affecting commerce (within the meaning of Section 45(a)(1) of this title)…"

However, this rule is not defining acts with specificity that violate Section 5 "within the meaning" of Section 5, but is instead seeking to establish a new, broader standard that ignores

[210] For an example of the former, *see* Proposed Section 463.3(b) ("…or any other Material aspect…") and (g) ("Any Material information…"). *Id*. And while the NPRM asserts that "the prohibited misrepresentations in this section of the proposed rule are material," that does not transform "any" statement about those topics into *de facto* material statements. *Id*. at 42,019.
[211] *FTC Policy Statement on Deception*, FTC, (Oct. 14, 1983), https://www.ftc.gov/legal-library/browse/ftc-policy-statement-deception (p. 1).

the current Policy Statement Section 5 standard as well as the statutory mandate of a materiality requirement and that will apply only to Motor Vehicle Dealers.[212]

Beyond the fact that this strict liability standard for any misstatement is impermissible under the Commission's grant of authority, it also is not practical. In the real world, actual or perceived misstatements or omissions[213] frequently occur when people communicate with one another. Under the proposed standard, a dealer could not make *any* inadvertent misstatement, nor fail to state something with precision that would otherwise make their silence misleading, in any interaction with individuals or the public regarding any of the listed prohibitions. That is simply an unworkable, overly broad, and impermissibly vague standard.

And the Commission's limitation of this more rigid standard to motor vehicle dealers covered by the Proposed TRR relative to other entities subject to the Commission's Section 5 authority creates an inconsistent standard that arbitrarily treats similar entities differently under the same statutory authority. The Commission simply cannot bootstrap a new standard into a concurrent Section 5 violation. Any alleged violations of Section 463.3 of the Proposed TRR cannot be deemed deceptive under Section 5 unless they first meet the standard for deception under Section 5.[214]

B. Addressing Already Unlawful Conduct

The Commission presumably recognizes that there is no regulatory hole to fill with this rulemaking and that making unlawful conduct doubly illegal is a superfluous exercise. Instead, it explains that its motive for including this subsection is to confer upon itself the ability to impose civil monetary penalties on top of the current set of adverse consequences that can result from such actions.[215] However, the Commission should not underestimate the effect of its current Section 5 enforcement actions on either individual respondents or the marketplace generally. Even when respondents present a meritorious defense to an investigation that does not result in the Commission filing a civil complaint in federal district court or the parties entering into a consent order to resolve the Commission's allegations, the need for a small business to engage legal counsel to respond to civil investigative demands and to interact with Commission enforcement attorneys is both costly and disruptive to its business operations. Further, when consent orders are entered into (which many respondents feel compelled to do notwithstanding their good faith belief that they have not engaged in any misconduct), they typically impose a series of comprehensive duties and obligations and are in effect for a period of 20 years. These actions are also accompanied by press releases that can be very problematic

[212] 15 U.S.C. § 55(a)(1).
[213] *See FTC Policy Statement on Deception*, FTC, (Oct. 14, 1983), https://www.ftc.gov/legal-library/browse/ftc-policy-statement-deception at 2 (Stating "[s]ome cases involve omission of material information, the disclosure of which is necessary to prevent the claim, practice, or sale from being misleading.").
[214] While Congress might be able to exercise such authority under duly passed legislation, the Commission's attempted exercise of it in the Proposed TRR raises potential Separation of Powers and Equal Protection issues as well.
[215] 87 Fed. Reg. at 42,013.

for a community-based business (and over which the Commission should exercise greater oversight as it has issued press releases that do not fairly characterize the nature of a respondent's actions).

In addition, several Commission enforcement actions against motor vehicle dealers have involved significant fines (see Footnote 144, *supra*). This is not to question the Commission's use of its current Section 5 enforcement authority in appropriate circumstances, which, as noted above, it can and should exercise. However, it would be a mistake to assume that, but for the civil monetary penalty authority the Commission is seeking, it lacks the ability to address problematic activity in the marketplace.

C. Misrepresentation Standards Lacking Clarity

In addition to these flaws, Proposed Section 463.3 sets forth several misrepresentations that are vague and unclear and would require further definition of the proscribed conduct. These sections of the Proposed TRR simply do not do what FTC Act Section 18(a)(1)(B) rules are supposed to do – namely, "define with specificity acts or practices which are unfair or deceptive."

- *The costs or terms of purchasing, financing, or leasing a vehicle*.[216]

These items should never be misrepresented, but how is this standard to be applied beyond not intentionally misstating a cost or other term of the contract? For example, if a dealership employee discusses some of the terms to purchasing, financing, or leasing a vehicle, is the employee required to discuss *all* of them so as not to be accused of omitting certain information? If so, does the dealership employee in effect have to read orally all of the terms of the buyer's order, RISC, or lease agreement to fulfill this obligation? How would this affect the length of the transaction and the consumer's comprehension of the information presented by the employee? If not, what terms can be presented and what can be left for the consumer's review of the written agreements? A regulated entity should know the Commission's expectations in this regard on the front end of this process.

- *Any costs, limitations, benefit, or any other Material aspect of an Add-on Product or Service.*[217]

Similarly, other than intentionally misstating the costs or a term set forth in an agreement to purchase an "add-on" product or service, what conduct runs afoul of this prohibition? Can a dealership employee address any of these items without triggering the need to explain each one in detail? If all the terms must be orally presented, does this mean the employee must orally present the entirety of the agreement for the product or service prior to the consumer's review of it during the closing process? How would this affect the length of the transaction and the

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[216] *Id.* at 42,045 (Proposed Section 463.3(a)).
[217] *Id*. (Proposed Section 463(b)).

consumer's comprehension of the information presented by the employee? And, in light of the prohibition on presenting "any other written materials" in Proposed Sections 463.5(b)(1)(iv) and 463.5(b)(2)(iv), is the employee precluded from supplementing an oral presentation with the presentation of written information in a non-legalese format that explains costs, limitations, and benefits of a product or service being discussed?

Because the Proposed TRR addresses not simply advertisements but also written and oral disclosures that arise during interactions between consumers and dealership employees, the Commission must carefully consider how these proposed mandates would apply in various scenarios.

- *The availability of any rebates or discounts that are factored into the advertised price but not available to all consumers.*[218]

This standard represents a departure from standards the Commission has articulated in the past and without any explanation in the NPRM as to how these current standards are deficient.

For example, in one of the enforcement actions cited in the NPRM pertaining to this standard, the Commission alleged that "the advertised discount and price are not *generally available* to consumers" (Emphasis added.)[219] And, in the consent order that accompanied the complaint in that action, the Respondent was prohibited from:

> "Represent[ing] that a discount, rebate, bonus, incentive or price is available unless:
>
> 1. It is available to all consumers, and for all vehicles advertised; *or*
>
> 2. The representation clearly and conspicuously discloses all qualifications or restrictions on: (a) a consumer's ability to obtain the discount, rebate, bonus, incentive, or price and (b) the vehicles available at the discount, rebate, bonus[,] incentive, or price."

(Emphasis added.)[220]

The new standard the Commission sets forth in Proposed Section 463.3(d) effectively converts this "generally available" standards into an "available to all" standard and dispenses with the second condition above.

[218] *Id*. (Proposed Section 463(d)).
[219] *In the matter of Jim Burke Automotive*, No. C-4523 (May 4, 2015). Available at: https://www.ftc.gov/system/files/documents/cases/150529jimburkenissancmpt.pdf (p. 9).
[220] *Id*. at II.A

And for what reason? The legal standard and public policy goal is to ensure that an advertisement is not likely to "mislead consumers acting reasonably under the circumstances."[221] Does an advertisement that prominently lists both the price that is available to all consumers and a lower price that is available to a substantial number of consumers based on a widely available and clearly identified rebate run afoul of the FTC's Policy Statement on Deception?[222]

- *The availability of vehicles at an advertised price*.[223]

This is another standard where the prohibition seems straightforward but there can be good faith reasons why an honest actor can run afoul of it (particularly since intentionality is not an element to a finding of deception). The reality is that dealers often do not fully control their own advertising platforms, as the manufacturers with which dealers have sales and service agreements as well as third parties that list dealer inventories may post vehicles, update inventory, or add or amend available rebates. Increasingly, with supply chain disruptions caused by the pandemic and especially with the oncoming introduction of new electric vehicles, automobile manufacturers are working with dealers to take "reservations" for vehicles that may not yet have been manufactured. Of course, vehicle manufacturers control and have insight into the production of the vehicles, and dealers retail them only after they have been produced, but the confluence of these factors makes the retail atmosphere very different today than it has been historically, where dealers maintained a huge physical inventory and offered only those vehicles physically on their lots.

In addition, advertising in digital media can produce situations in which inventory that has been sold is reflected on one advertising medium but is not instantaneously reflected on another advertising medium. This standard should be defined with more precision after examining both how vehicles are advertised in today's market and how state advertising requirements address vehicle availability.[224]

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[221] *Advertising FAQ's: A Guide for Small Business*, FTC, (Jan. 2022), https://www.ftc.gov/business-guidance/resources/advertising-faqs-guide-small-business.

[222] The Commission states: "When dealers advertise rebates and discounts, or offer prices that factor in such rebates and discounts, but in fact those rebates and discounts are not available to the typical consumer, but only a select set of customers, such conduct induces the consumer to select and transact with the dealer under false pretenses." 87 Fed. Reg. at 42,020. However, this ignores the fact that when "the representation clearly and conspicuously discloses all qualifications or restrictions," as provided for in the second condition in the consent order referenced in Footnote 220 above, then the dealer has not acted under false pretenses.

[223] *Id.* at 42,045 (Proposed Section 463(e)).

[224] These examples underscore the concerns expressed by Commissioner Wilson regarding how, among other factors, "[t]echnologies and markets evolve in ways regulators are unable to predict" thereby making attempts to narrowly tailor rules "frequently unsuccessful." 87 Fed. Reg. at 42,047-42,048 (Dissenting Statement).

- *When the transaction is final or binding on all parties*.[225]

This is another area where it is essential that the Commission consider applicable state disclosure standards so motor vehicle dealers understand whether statements they make to consumers pursuant to those standards comport with the Commission's application of this proposed federal standard. Issues of contract formation are governed under state law, and the standards and required disclosures that flow from them can differ.

- *Keeping cash down payments or trade-in vehicles, charging fees, or initiating legal process or any action if a transaction is not finalized or if the consumer does not wish to engage in a transaction*.[226]

This provision, which is intended to "curb" so-called "yo-yo financing," is overly broad and not carefully tailored to address the anecdotal reports upon which it is based.[227] If it is the Commission's intention to ensure parties to a conditional vehicle delivery are not prevented from returning to the *status quo ante* if objective conditions to a conditional delivery transaction that have been agreed to by the parties have not been satisfied (such as the willingness of a finance source to take assignment of the conditional RISC on the terms submitted), then it should use language to address this circumstance instead of language that precludes a motor vehicle dealer from legitimately exercising its contractual rights because, *for any reason*, a transaction has not been finalized or a consumer "does not wish" to engage in it. The Commission should review comments filed by state automobile dealer associations to gain a better understanding of why a dealer would legitimately exercise these remedies in situations that have nothing to do with so-called "yo-yo financing."

- *Whether or when a Motor Vehicle Dealer will pay off some or all of the financing or lease on a consumer's trade-in vehicle*.[228]

A dealer acting in good faith may express its intention to facilitate the issuance of a lien release on a trade in vehicle (which the dealer is incentivized to pursue so it can dispose of the trade in vehicle) but then is unable to secure it due to factors over which it has no control (since the lienholder ultimately controls when the lien is released). Consequently, the Commission's statement that "this provision would also prohibit dealers… from failing to pay off liens in a timely manner"[229] creates a liability trap for dealers who confront this all-too-frequent occurrence. The Commission should narrow this prohibition to specifically address the fact patterns giving rise to it that the Commission sets forth in the NPRM, and, in so doing,

[225] 87 Fed. Reg. at 42,045 (Proposed Section 463(h)).
[226] *Id*. (Proposed Section 463(i)).
[227] *See* Footnote 99 of the NPRM. 87 Fed. Reg. at 42,020-42,021.
[228] 87 Fed. Reg. at 42,045 (Proposed Section 463(j)).
[229] 87 Fed. Reg. at 42,021.

recognize that the dealer's business interest is to pay off the existing loan quickly so that the vehicle can be more easily and quickly retailed.[230]

- *Whether consumer reviews or ratings are unbiased, independent, or ordinary consumer reviews or ratings of the Dealer or its products or services*.[231]

This provision similarly uses unnecessarily vague language and prohibits conduct that is broader than what the Commission is seeking to address. Because it is expressed in the passive voice, this provision does not make clear that a violation only arises when the dealer, and not some other entity, affirmatively publishes consumer reviews concerning the dealership or its products or services that falsely claim they are unbiased, independent, or from an "ordinary" consumer. In addition, the Commission should further define the term "ordinary consumer." Is a relative an ordinary consumer? What about a neighbor or a member of one's church, charity, or social club? And, if not, how does a dealer police this? Or is an ordinary consumer a non-celebrity and, if so, how is a "non-celebrity" defined?

Of course, there is a common thread to the foregoing concerns about the misrepresentations stated in this subsection. As noted, the issue is not whether the Commission should possess UDAP enforcement authority when misrepresentations clearly run afoul of existing deception standards. The Commission possesses such authority and should continue to exercise it. However, when the Commission establishes broadly worded and vague standards that can result in violations with enormously adverse consequences by small businesses acting in good faith, it threatens the "honest actors" that the Commission seeks to protect. Guarding against this possibility by simply relying on the exercise of appropriate enforcement discretion is not enough. If these rules are to be finalized, the Commission needs to provide much greater precision in the articulation of these standards.

2. The obligations violate TILA.

A. Transactional Disclosures

Sections 463.3 and 463.4 of the Proposed TRR contain both prohibited misrepresentations and disclosure requirements. Many of these requirements are redundant of prohibitions and disclosure requirements that are already specifically enshrined in federal law. For over a half-century, TILA and Regulation Z have provided detailed instructions to creditors, including motor vehicle dealers, on how both to advertise financing and to disclose clearly the terms of the consumer's credit transaction.

The purpose of TILA is to aid the "[i]nformed use of credit."[232] The Act is Congress' effort to guarantee the accurate and meaningful disclosure of the costs of consumer credit and thereby to

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[230] *See* Footnote 102 of the NPRM. 87 Fed. Reg. at 42,021.
[231] *Id.* at 42,045 (Proposed Section 463(k)).
[232] 16 U.S.C. §1601(a).

enable consumers to make informed choices in the credit marketplace.[233] TILA was enacted to ensure that "the American consumer will be given the information he needs to compare the cost of credit and to make the best informed decision on the use of credit."[234]

Rather than providing accurate and meaningful information, the proposed disclosures will have the effect of confusing consumers by supplying different *TILA-like* information. The Commission is not empowered to inject new, contradictory credit protection product cost disclosure requirements, nor to intentionally enact additional barriers to a consumer's purchase of such products. Congress has delegated to the FRB the authority to prescribe regulations that may contain "such classifications, differentiations, or other provisions, and may provide for such adjustments and exceptions for any class of transactions, as in the judgment of the Board are necessary or proper to effectuate the purposes of [TILA], to prevent circumvention or evasion thereof, or to facilitate compliance therewith."[235] Congress has specifically designated the FRB as the primary source for interpretation and application of TILA,[236] empowering it to formulate interstitial policy and to create rules for administering the statute.

Simply put, the FRB is vested with authority to issue substantive regulations under TILA applicable to motor vehicle dealers within the scope of the Proposed TRR[237] that govern the content, form, and timing of credit-related disclosures, and the FTC cannot expand or otherwise alter the requirements established by FRB regulations.[238] While the Commission is empowered to enforce the provisions of TILA,[239] by encroaching into areas already clearly governed by TILA, the Proposed TRR exceeds the Commission's authority.

Moreover, by seeking to erect barriers to consumers (in the form of additional penalties, duties, repetitive and confusing disclosures, forms, limitations, and signatures), the Commission goes further, impermissibly venturing into the direct regulation of credit, rather than effectuating the Act's primary purpose which is to alleviate, through accurate disclosures, what the enacting Congress perceived as "widespread consumer confusion" about the cost of credit.[240] TILA is

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[233] *Id*.
[234] *Mourning v. Fam. Publ'n Serv., Inc*., 411 U.S. 356, 364 (1973) (citing H.R. Rep. No 1040, 90th Cong. 1st Sess., p. 13, n.18 (1967)).
[235] 15 U.S.C. § 1604(a).
[236] *See* Household Credit Servs., Inc. v. Pfennig, 541 U.S. 232, 238 (2004).
[237] Sections 1029(a), 1029(c), and 1100A(7) of the Dodd-Frank Act. Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, § 124 Stat. 1376 (2010).
[238] *See USLIFE Credit Corp. v. FTC,* 599 F.2d 1387 (5th Cir. 1979).
[239] *See* 15 U.S.C. § 1607 ("Administrative enforcement
(c) Overall enforcement authority of the Federal Trade Commission
Except to the extent that enforcement of the requirements imposed under this subchapter is specifically committed to some other Government agency under any of paragraphs (1) through (5) of subsection (a), and subject to subtitle B of the Consumer Financial Protection Act of 2010, the Federal Trade Commission shall be authorized to enforce such requirements. For the purpose of the exercise by the Federal Trade Commission of its functions and powers under the Federal Trade Commission Act, a violation of any requirement imposed under this subchapter shall be deemed a violation of a requirement imposed under that Act.").
[240] *See Gennuso v. Com. Bank & Trust Co.,* 566 F. 2d 437, 441 (3rd Cir. 1977).

meant to give consumers "the *facts* with which to make rational and informed credit judgments..." and to "...enhance and strengthen free competition in the consumer credit industry."[241] It serves that purpose by simply and clearly disclosing relevant information, not by setting up a series of complicated and confusing puzzles for consumers to discern and a sea of documents to navigate.

The FRB rules have repeatedly been the subject of notice-and-comment rulemaking and periodic regulatory review. They have been interpreted by the FRB through its Official Staff Commentary,[242] which has also been the subject of notice and extensive public comments. Further, these requirements have been the subject of extensive court rulings, which has built a rich body of caselaw that provides additional guidance on meeting these requirements.

As noted, the extensive existing credit disclosure regime governs three critical dimensions of consumer credit disclosure: the content, form, and timing. Each of these aspects has been carefully tested, adjusted, and calibrated to work together, and has been relied on by dealers and consumers for decades.

With virtually no mention of this rich and time-tested regulatory system, the Commission proposes to sprinkle in a new layer of disclosure and other regulatory requirements on the specific areas currently covered by TILA, often using the same or similar terms as those under TILA, but with different meanings. No apparent thought has been given, no coordination with the FRB has been mentioned, and certainly no supporting study has been identified regarding how these new rules would interact with existing federal requirements and, more importantly, whether the interaction will improve consumers' understanding of credit products or leave them hopelessly confused.

For example, the term "Cash Price without Optional Add-ons" (discussed at length in Section IV.a.3.B(3) below), as defined in Proposed Section 463.5, differs from the definition of "cash price" under TILA, which provides:

> "*Cash price* means the price at which a creditor, in the ordinary course of business, offers to sell for cash property or service that is the subject of the transaction. At the creditor's option, the term may include the price of accessories, services related to the sale, service contracts and taxes and fees for license, title, and registration. The term does not include any finance charge."[243]

Under current practice and consistent with this definition, the cash price disclosed on a RISC may include, for example, accessories, services related to the sale, and service contracts, while the Proposed TRR's Cash Price without Optional Add-ons does not. At the same time, the cash

[241] *Powers v. Sims & Levin Realtors*, 396 F. Supp. 12, 16 (E.D. Va. 1975), *aff'd in part and rev'd in part on other grounds*, 542 F.2d 1216 (4th Cir. 1976) (emphasis added.).
[242] 12 C.F.R. § 226, Supplement I.
[243] 12 C.F.R. § 226.2(a)(9).

price on a RISC will not have been reduced by any trade-in valuation but the Cash Price without Optional Add-ons is required to subtract that amount. As a result, the cash price on a RISC for a vehicle will very likely differ from the cash price disclosed under the Proposed TRR. At a minimum, this will cause confusion. Even worse, it could lead to consumer legal actions against dealer-creditors charging misrepresentation of the cash price prior to the disclosure under Regulation Z.

In addition, the Proposed TRR would require the dealer to disclose to the consumer (and get the consumer to countersign a document containing) a "finance charge," which is another defined term and required disclosure under TILA.[244] The required "finance charge" disclosures in the Proposed TRR may use the same term, but that term is not defined in the Proposed TRR, varies in the different required disclosures, and would seem to be based on a calculation different from that in TILA and Regulation Z.

For example, the Proposed TRR states that the dealer must disclose a form that contains the "Cash Price without Optional Add-ons in a financed transaction."[245] That figure must "factor[] in any cash down payment and trade-in valuation, and exclud[e] optional Add-ons [which could include insurance items…and] must separately itemize…the finance charge…"[246] As discussed in greater detail below, that calculation and disclosure lack clarity, but under any interpretation would be likely to result in a figure that is different from the Regulation Z required "finance charge" figure on the RISC.

Regulatory agencies have often made serious mistakes – or barely averted them – when they have proposed rules and disclosures without thoroughly testing their effectiveness. This risk of leaving consumers more confused than aided is even greater when the proposals mandate disclosures that are similar to, but different from, closely related existing regulatory requirements. Both regulatory information overload and the differences between the disclosures, which may be based on different facts, risk not only failing to add to consumers' understanding of the credit terms but also, and worse, reducing their understanding of information the Commission seeks to convey.

Section 465.3(d) of the Proposed TRR, which requires "Express, Informed Consent" from the consumer before a dealer may charge for any item, also disrupts the TILA disclosure regime. Express, Informed Consent is defined as:

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[244] *See, e.g., Regulation Z, Truth in Lending*, FRB, (Nov. 27, 2017), https://www.federalreserve.gov/boarddocs/supmanual/cch/200601/til.pdf#:~:text=The%20finance%20charge%20is%20a%20measure%20of%20the,or%20fees%20payable%20directly%20or%20indirectly%20by%20. (Noting that "[o]ne of the more complex tasks under Regulation Z is determining whether a charge associated with an extension of credit must be included in, or excluded from, the disclosed finance charge." Attachment 10 provides a visual summary of some of the considerations when calculating the TILA/Reg Z "Finance Charge."

[245] 87 Fed. Reg. at 42,046 (Proposed Section 463.5(b)(2)).

[246] *Id.*

> "…an affirmative act communicating unambiguous assent to be charged, made after receiving and in close proximity to a Clear and Conspicuous disclosure, in writing, and also orally for in-person transactions, of the following:
>
> (1) What the charge is for; and
> (2) The amount of the charge, including, if the charge is for a product or service, all fees and costs to be charged to the consumer over the period of repayment with and without the product or service.
>
> The following are examples of what does not constitute Express, Informed Consent:
>
> (i) A signed or initialed document, by itself;
> (ii) Prechecked boxes; or
> (iii) An agreement obtained through any practice designed or manipulated with the substantial effect of subverting or impairing user autonomy, decision-making, or choice."[247]

TILA Section 106(b)(1) allows premiums and fees in connection with credit protection products to be excluded from the calculation of APR if the cost is disclosed, the consumer affirmatively elects coverage, and "coverage of the debtor by the insurance is not a factor in the approval by the creditor of the extension of credit…"[248]

The Commission, however, is proposing to require expanded disclosures related to "items"[249] currently disclosed under TILA which go far beyond the disclosures mandated (or even contemplated) by Section 106(b)(1) of TILA. TILA Section 105(a) authorizes the *FRB* to interpret TILA to effectuate the statute's purposes, to prevent circumvention or evasion of the statute, or to facilitate compliance with the statute, not the Commission.[250] However, the Proposed TRR would require that the purchase of credit protection products must be with "Express, Informed Consent" and that it is an entirely new and different standard than "voluntary," as it requires the consumer to be provided with additional information about such credit protection products including "all fees and costs to be charged to the consumer over the period of repayment with and without the product or service."

This new standard is not contained in the plain language of TILA. The applicable TILA section does not use the words "Express or Informed." Rather, it requires the three conditions noted

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[247] *Id.* at 42,044 (Proposed Section 463.2(f)).
[248] 15 U.S.C. § 1605(b)(1).
[249] The scope of that term in the Proposed TRR is unclear and undefined but includes any "item" (Proposed Section 463.5(c)), for which a dealer charges a consumer "in connection with the sale or financing of vehicles." 87 Fed. Reg. at 42,046 (Proposed Section § 463.5). This would include not only "add-ons" (some of which are credit insurance products governed explicitly by TILA), but also the various "Cash Prices" and "finance charges" that are required to be disclosed under the Proposed TRR.
[250] 15 U.S.C. § 1604(a).

above to be satisfied. The disclosures in the Proposed TRR impermissibly require creditors to disclose TILA information in a different context and format.

Indeed, the proposed requirement is complicated, confusing,[251] and will inhibit or dissuade consumers from buying consumer protection products that can benefit them. This is inconsistent with the TILA mandate.

B. Advertising Disclosures

TILA's credit advertising rules, like its consumer disclosure rules, have been carefully considered by the FRB in consultation with public stakeholders. The rules have also been interpreted for decades by the FRB. Courts have similarly interpreted them. In short, these comprehensive rules have been rigorously reviewed and tested, and they have provided creditors and consumers with clear and enforceable credit and lease advertising disclosure standards. Indeed, the FTC has brought more enforcement actions against motor vehicle dealers for credit advertising violations than for any other issue. No additional regulation of credit and lease advertising is needed.

Nevertheless, the Proposed TRR contains several examples where that long-standing regime is duplicated, modified, or ignored. For example, Section 463.3(a) prohibits any misrepresentation, expressly or by implication, regarding the costs or terms of financing or leasing a vehicle. However, both TILA and CLA and their companion Regulations Z and M contain detailed rules that address finance and lease advertising. Both regulations (i) require that any advertisements of credit terms state only terms that are actually offered,[252] (ii) require that disclosures in advertisements be clear and conspicuous,[253] (iii) describe how an advertisement must express a finance charge or lease rate,[254] (iv) specify which advertised terms "trigger" additional disclosures to ensure that omissions are not misleading,[255] and (v) contain special rules for television and radio advertisements.[256]

Section 463.3(c) of the Proposed TRR would require that ads not misrepresent whether any terms are, or the transaction is, for financing or a lease. This provision is unnecessary. Regulation M already requires any advertisement containing any lease payment amount to state that the advertised transaction is for a lease.[257] Moreover, any credit advertisement containing a triggering term must disclose the annual percentage rate, using that term, which is not applicable to a lease transaction. The possibility that a consumer might misunderstand a lower-than-expected payment amount to be for a credit transaction rather than a lease is already

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[251] *See* discussion of "Express and Informed Consent" language in Section IV.a.3.B(3) below.
[252] 12 C.F.R. § 226.24(a); 12 C.F.R. § 213.7(a).
[253] 12 C.F.R. § 226.24(b); 12 C.F.R. § 213.7(b).
[254] 12 C.F.R. § 226.24(c); 12 C.F.R. § 213.7(b)(2).
[255] 12 C.F.R. § 226.24(d); 12 C.F.R. § 213.7(d).
[256] 12 C.F.R. § 226.24(g); 12 C.F.R. § 213.7(f).
[257] 12 C.F.R. § 213.7(d)(2)(i).

addressed by federal law. But if more clarity is required regarding the question of whether the advertisement is for financing or a lease, the proper regulatory solution is for the FRB to amend Regulations Z and M, not for the Commission to impermissibly assign itself this function.

Section 463.4(a)(2) of the Proposed TRR similarly would effectively attempt to amend the credit advertising rules of Regulation Z and, as with the other elements of the proposed rule, impose it solely on motor vehicle dealers who would be subject to it. This provision is not merely unnecessary; it is harmful to consumers and competition. It would create an unlevel playing field not only among auto dealers based only on whether they have a service department, but also between motor vehicle dealers with service departments and all other types of consumer retail creditors.

Regulation Z requires three specified additional disclosures whenever a credit advertisement contains any one of four "trigger" terms.[258] For covered motor vehicle dealers, the Proposed TRR would add the "Offering Price" to the additional terms required in response to a trigger term, and it would make *any* financing term a trigger term.[259] The requirement would make it virtually impossible for a dealer to advertise a credit program without also advertising Offering Prices on every vehicle covered by the advertisement. The Commission does not explain why it believes advertisements that do not contain misrepresentations about price – indeed ads that do not even reference a price – must contain these Offering Prices with any mention of a specific vehicle.

3. The obligations are unnecessary and counterproductive.

A. Advertisements

The Proposed TRR creates other new advertising requirements that are duplicative of current prohibitions and will limit, not improve, price transparency.

Section 463.4 of the Proposed TRR contains a broad requirement that dealers "must disclose" the "Offering Price" in "any advertisement that references, expressly or by implication, a specific vehicle, [or] any monetary amount or financing term for any vehicle."[260] As discussed in greater detail below, because of the nature of the "Offering Price" and the obligations it creates for dealers, this proposed requirement raises a number of practical issues that would raise difficult or impossible barriers to advertising compliance. Because the Offering Price is a price for which a dealer must apparently be willing to "*sell or finance the motor vehicle to any consumer*," it is no longer simply what is today presented as an advertised price, which is one that – while certainly accurate when posted – can change as the market changes. As outlined

[258] 12 C.F.R. § 226.24(d).
[259] The offering price requirements in Section 463.4(a) of the proposed rule apply only to financing transactions, not leases.
[260] 87 Fed. Reg. at 42,045 (Proposed § 463.4(a)(1) and (2)).

below, vehicle prices change and change often.[261] How would those changes be reflected as "Offering Prices" in static advertisements?

Moreover, this obligation will mean that dealers will certainly be more reluctant to advertise prices. For example, what if an advertised vehicle was either sold or otherwise no longer available to a consumer who sought to purchase it? Would the dealer be somehow obligated to sell some other vehicle to that consumer at that price? And dealers would not find compliance assurance in broader advertisements because the same obligation arises when the dealer "refer[s] to a specific vehicle" or any financing term "by implication." What does that mean?

This broad "by implication" standard is particularly problematic given the Commission's broad view of what constitutes an advertisement.[262] For example, would this requirement apply to any ad that simply listed a dealer website – because by implication the website lists vehicle prices and refers to specific vehicles?

All of this means that these proposed requirements will ultimately limit, if not in some cases eliminate, price advertising by dealers – and may even suppress other types of dealer advertisements as well.[263] Perhaps this is the underlying goal of this requirement, but that is unclear.[264] What is clear is that fewer price advertisements will certainly severely limit price discovery which, in turn, will require consumers to visit dealerships for price information instead of conducting online research (which will further delay the car shopping process). This will lead to less informed consumers, decrease price competition among dealers, and provide an unwarranted competitive advantage to vehicle advertisers who are not covered by the proposed rule.

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[261] In fact, technology is increasingly enabling tools like dynamic pricing to be utilized in the automotive industry, just as they are in other industries. Dynamic pricing is a strategy that involves setting flexible prices for goods or services based on real-time demand. Tools that enable this strategy allow manufacturers and dealers to change prices routinely and in real time, to increase efficiencies and adjust to market needs. The Proposed TRR would make such a practice virtually impossible, and that is yet another example of why a static rule such as the Proposed TRR risks "ossifying" practices in the market – to the detriment of consumers.

[262] For example, it would apply to "claims made online" and "[s]olicitations made in print, on the telephone, radio, TV, or online." *See Advertising FAQ's: A Guide for Small Business*, FTC, (Jan. 2022), https://www.ftc.gov/business-guidance/resources/advertising-faqs-guide-small-business (pp 3-4).

[263] To be sure, in some states (e.g., New Jersey, N.J. Admin. Code § 13:45A-26A.5), dealers who advertise vehicles are required to include a price. In those states, the likely outcome is that dealers will just list the MSRP, and forgo, for the reasons stated in the text, the advertisement of any discounts.

[264] The underlying premise of the Proposed TRR seems to be that dealer advertising, and in particular price advertising, is inherently problematic. This may be why the outcome described above may be viewed by the Commission as a "feature not a bug." However, such a view clearly underestimates the consumer benefit of price competition and discovery (however imperfect it may be in a negotiated marketplace) that is accomplished via advertising. And if the goal is to limit price advertising, there is no stated reason (and of course no study or proof as to) why such a drastic approach would be in any way beneficial to consumers or the marketplace. *See, e.g. Virginia Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 764 (1976) (striking down limits on advertising of prescription drugs and emphasizing society's "strong interest in the free flow of commercial information").

Similarly problematic are the Section 463.3(d) and (e) prohibitions for the reasons stated in Section IV.a.1.

B. Disclosures

Section 463.4 of the Proposed TRR requires a series of new disclosures, forms, and signatures that will artificially disrupt and delay the sales process, limit price transparency, frustrate and confuse consumers, and limit online sales. To be clear, *every single data item that these forms would require dealers to disclose to consumers is currently required to be (and is) disclosed to consumers before consummation of vehicle sales contracts*. Consumers are clearly told the purchase price of the vehicle, the value of their trade-in, and the cost of financing and any VPPs they choose to purchase. It is just that those disclosures are currently made in a more logical way, and at a point in the transaction process that makes sense given the nature of the transaction and the varying desires and needs of consumers.

Of course, the millions of interactions that consumers have with dealers every day vary widely, and many consumers express an interest in different portions of the overall vehicle purchase transaction at different stages of their interactions with dealers. This is the product of a diverse and dynamic marketplace. Some consumers are initially most interested in the vehicle sales price, others in performance and gas mileage, others in financing options, and still others in the value of their trade in or the cost of a service contract or other VPP. But regardless of the nature of the conversations, each of these items is fully and clearly disclosed to consumers at the time when consumers will most benefit from the information.

- The Timing and Nature of the Disclosures and Signature Requirements Will Frustrate Online Sales

As noted in detail above, there has been a strong and growing trend in the automotive retail industry toward providing an online shopping and sales experience for those consumers who wish to complete some or all of the sales process remotely. Of course, many, if not most vehicle purchasers still wish to visit the showroom to see, feel, and drive a vehicle they are considering purchasing, to ask questions, and to compare features, vehicles, and more. But for those who do wish to shop online, it is increasingly common for an online experience to be offered by franchised dealers. This trend was of course accelerated by the pandemic, but it continues to grow as a part of dealers' ongoing and successful efforts to streamline the sales process and provide world-class customer service. This is a product of an evolving marketplace.

Unfortunately, the Proposed TRR is likely to frustrate those efforts, limit efficiency, and add confusion and regulatory roadblocks to the online sales process. That is because the Proposed TRR will limit the ability of dealers to freely communicate with consumers online (and elsewhere), limit consumer price discovery, frustrate the vast majority of consumers who wish to shop online within the confines of monthly budgetary constraints, increase the time required to complete a transaction, and confuse consumers in the process. As outlined below, the timing of the disclosures, as well as the proposed rule's added consumer signature requirements, will broadly inhibit online price discovery, car shopping, and prevent many people with limited online presence from the ability to price shop for vehicles online at all.

1) Offering Price

The Proposed TRR imposes the following requirement on motor vehicle dealers:

> "(3) In any communication with a consumer that includes a reference, expressly or by implication, regarding a specific vehicle, or any monetary amount or financing term for any vehicle…
>
> (i) The Offering Price for the vehicle must be [clearly and conspicuously] disclosed in the Dealer's first response regarding that specific vehicle to the consumer; and
>
> (ii) if the communication or response is in writing, the Offering Price must be [clearly and conspicuously] disclosed in writing."[265]

The "Offering Price" is defined as:

> "the full cash price for which a Dealer will sell or finance the motor vehicle to any consumer, excluding only required Government Charges."[266]

By artificially requiring disclosure of an Offering Price at the very first interaction with a consumer, the Proposed TRR will limit consumer price discovery, create confusion, add significant additional time to the sales process, and give rise to other problems.

First, most initial consumer communications are likely to include a term that triggers the Offering Price disclosure requirement. However, at this initial stage of the process, there is a host of information that dealers do not have. For example, the dealer will not know whether the consumer is seeking to have the dealer meet or beat a competing offer that the consumer has received from another dealer for the same vehicle, and other variables that operate to the consumer's benefit. Consequently, dealers are likely to default to a price such as the Manufacturer's Suggested Retail Price (MSRP)[267] that is higher than the price they ultimately could offer the vehicle to the consumer. If dealers are locked into this price, it will limit the ability of consumers to avail themselves of pro-competitive factors that can produce cost savings. If dealers are not locked into this price and are able to discount it when more information is known, then what purpose does it serve?

[265] 87 Fed. Reg. at 42,045 (Proposed Section 463.4(a)).
[266] *Id.* (Proposed Section 463.2(k)).
[267] 15 U.S.C. §§ 1231-1233.

In fact, this outcome (Offering Price = MSRP) is seemingly required by the Proposed TRR for new vehicles because the first of the several new disclosure documents (discussed *infra)* requires the dealer to separately list any "discount,"[268] separately itemizing it as a deduction from the "Offering Price." That certainly seems to indicate that dealers would be unable to include any "discount" in the Offering Price.

The MSRP is, of course, already available and required on the Monroney label of the vehicle, and dealer fees are generally uniform (often governed by state law) and are disclosed on dealer websites, advertisements, and in sales paperwork. While there may be no obvious harm in requiring the disclosure of the MSRP and fees to consumers, it is difficult to determine how this is helpful or provides consumers with any new information.

This will further confuse consumers about the difference (if any) between the Offering Price and the MSRP. The MSRP is a well-established and understood concept that consumers rely on in the vehicle purchase process. The blurring of the lines between MSRP, Offering Price, and the various other prices and terms that the Proposed TRR requires to be disclosed will not only confuse consumers, but it will also weaken the efficacy of the MSRP disclosure.

There is also a good possibility that some, if not many, consumers could misinterpret this Offering Price disclosure as a one-price offer. [269] This is especially true as the disclosure must be in the dealer's "first response" to the consumer, and therefore the dealer would not be able to first explain why the Offering Price is being provided and what it may mean. As a result, many consumers may be less likely to negotiate a better price than they would have otherwise.

In addition, the forced disclosure of an "Offering Price" in connection with "*any communication* with a consumer," means that the first response from a dealer to most phone, text, and internet inquiries from a consumer about virtually anything will require a convoluted and overloaded disclosure communication back to the consumer. So, for example:

> **Consumer text message**: "*Do you have a silver F-150 in stock*?"
>
> **Required Reply**: "*Yes. We have 40 silver F-150s in stock: Stock no. 1234 - Offering Price $45,678, Stock no. 1237 - Offering Price $46,955, Stock no. 1276 - Offering Price $49,877, Stock no. 1298 - Offering Price $42,987, Stock no. 1222 - Offering Price $45,678 , Stock no. 1291 - Offering Price $55,122, Stock no. 1323 - Offering Price $55,877, Stock no. 1345 - Offering Price $55,877, Stock no. 1347 - Offering Price $55,448 , Stock no. 1987 - Offering Price $62,678 , Stock no. 1988 - Offering Price $45,678 , Stock no. 1332 - Offering Price $54,887 , Stock no. 1356 - Offering Price $39,555 , Stock no. 1654 - Offering Price $43,577 , Stock no. 2009 - Offering Price*

[268] And "any misstatement" about that or any other aspect of any required disclosure is a *de facto* Section 5 violation. *See* discussion of Section 5 standard *supra.*

[269] This is especially true in a market where many dealers offer "one-price" selling, and manufacturers without franchised dealers sell solely for MSRP (plus fees and other charges).

> *$58,855, Stock no. 2010 - Offering Price $58,885 , Stock no. 2011 - Offering Price $58,988 , Stock no. 2012 - Offering Price $58,887 , Stock no. 2013 - Offering Price $58,588, Stock no. 2020 - Offering Price $57,744 , Stock no. 2022 - Offering Price $45,678 , Stock no. 2021 - Offering Price $58,955 , Stock no. 2102 - Offering Price $54,555 , Stock no. 2103 - Offering Price $54,555, Stock no. 2104 - Offering Price $54,577, Stock no. 2104 - Offering Price $54,678, Stock no. 2105 - Offering Price $56,689, Stock no. 2121 - Offering Price $62,688, Stock no. 2140 - Offering Price $62,655, Stock no. 2141 - Offering Price $63,633, Stock no. 2220 - Offering Price $38,998, Stock no. 2221 - Offering Price $38,998, Stock no. 2222 - Offering Price $38,998, Stock no. 2223 - Offering Price $38,998 , Stock no. 2224 - Offering Price $39,025, Stock no. 2225 - Offering Price $66,877, Stock no. 2239 - Offering Price $66,877, Stock no. 3030 - Offering Price $66,877, Stock no. 3558 - Offering Price $72,022, Stock no. 3636 - Offering Price $75,755. Each of these vehicles is offered at the prices stated, but for more details and to see what price you may be eligible for, call me at 555-1212 for more details."*

It is difficult to see how this type of required disclosure benefits consumers or leads to improved price discovery. In addition, aside from the time it would take for a dealership salesperson to respond to this customer, it is highly likely that many dealers will find it difficult to answer such inquiries – perhaps hundreds of times a day – efficiently and accurately. As discussed, vehicle prices change – particularly used vehicles, and sometimes frequently – based on the market, and ensuring that Offering Prices like these are all accurate will be very difficult.

2) Credit Disclosures

Sections 463.4(d) and (e) mandate certain disclosures when making any representation about a monthly payment or when making any comparison between payment options that include a discussion of a lower monthly payment.

As discussed above, these requirements impermissibly and imprudently intrude on the time-tested content, form, and timing disclosures developed by the FRB to inform consumers of the cost of motor vehicle credit and leasing. The Commission has not explained (i) how the FRB's Reg Z and M disclosures are deficient in this regard; (ii) what, if any, coordination it has conducted with the FRB concerning the additional disclosures the Commission proposes to infuse into credit and lease transactions; and (iii) what, if any, level of testing the Commission has conducted to determine that its proposed disclosures would provide a net benefit to consumers. It also has not explained why it is proposing the disclosure of information that is already provided by the FRB's Regulations Z and M disclosure regimes.

The Commission explains that its proposed credit disclosures are needed because consumers' "singular focus on monthly payments" can make them susceptible to harms such as payment packing, and that they will allow consumers to "gauge how much a given financing or lease offer will ultimately cost[270] in order to compare different offers."[271]

This first concern is already squarely prohibited by both federal and state law.[272] The second requirement is already expressly covered by Regulations Z and M.

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[270] Of course, because of the time value of money, monthly payments later in a finance contract are less expensive than monthly payments in the earlier stages of the contract. Using the example in the Proposed TRR, if a borrower who would finance the purchase of a $25,000 vehicle with a $5,000 down payment and a 10% APR and a five-year (60-month) term chooses instead to finance the purchase over a seven-year (84-month) term, the "additional" cost to a consumer over the term of that loan would *be far less* than the $2,394 figure cited in the TRR. In theory, if the discount rate were equal to the APR, there would be *no additional cost* to the consumer that would result from the longer term. The Proposed TRR would seemingly require dealers to calculate and disclose (unlike the Commission's cost and benefit analysis of the TRR) only a portion of this overall "cost" calculation.

[271] 87 Fed. Reg. at 42,024. In his *Auto Buyer Study Critique*, Dr. Vidmar criticizes the assumption in the *Auto Buyer Study* that consumers who approach the car buying process with a monthly budget focus are irrational. Dr. Vidmar states:

> "The Report Assumes Consumers Are Irrational
> The researchers' approach to the automobile-purchasing experience is biased by their perspective of what is a rational approach. They assume that a person desires a particular car, goes out and finds a dealership with that car, negotiates a final price for the car, and then arranges financing. To their chagrin, automobile buyers approach the task with a monthly budget in mind that focuses on what they can afford and then work from there. Given that most vehicle purchases are financed, and that this, along with either a home mortgage or rent, is one of two major monthly budget items, it is not surprising that car buyers focus on what they can afford and work within that framework.
> The research protocol should have been modified to start with this issue and explore how a respondent deals with lengths of payment and monthly amounts to acquire the car they want or need. It should have been evident after the pretest with five participants that the protocol was not oriented to the thought processes of vehicle purchasers. In consumer research, it is generally a mistake to assume that the consumer is not rational. Consumer research shows that people bundle prices to make decisions efficiently. One wonders if the research had started with a protocol that was more open and began by asking how people approached vehicle purchases, whether different conclusions may have been derived." Auto Buyer Study Critique at 8.

[272] Indeed, the Commission cites enforcement actions it has taken in this regard. *See also* National Association Of Attorneys General, *Consumer Protection Regarding "Packing:" During Car Sale/Lease Negotiations* (Spring Meeting 1999). In addition, market forces, like the change to "one-price" selling, along with changes in technology, including online sales tools and ubiquitous payment calculators, are making this practice difficult to impossible. Most dealer (and many third-party) websites now contain tools that allow consumers to obtain a monthly payment with a simple calculator and some desired inputs. Consumers can easily check a monthly payment using one of these tools, and dealers often make it part of the sales process to simply cover options using this type of technology. These calculators and other technological tools used by dealers, finance sources, and others are making any unlawful attempt to disguise monthly payments virtually impossible.

Compare and Contrast:

- Proposed Section 463.4(d)(1) requires that dealers "disclose the total amount the consumer will pay to purchase or lease the vehicle at that monthly payment after making all payments as scheduled." Regulation Z requires that dealer-creditors disclose the Total of Payments with a descriptive explanation such as "the amount you will have paid when you have made all scheduled payments."[273] Regulation M similarly requires that dealer-lessors disclose the Total of Payments with a descriptive explanation such as "the amount you will have paid by the end of the lease."[274]

- Proposed Section 463.4(d)(2) requires that, if the consumer "will provide consideration (for example, in the form of a cash down payment or trade in valuation), dealers must disclose the amount of consideration provided by the consumer." Regulation Z requires that dealer-creditors provide a separate written itemization of the amount financed, which must include the "amount credited to the consumer's account with the creditor."[275] This disclosure includes any down payment or trade in allowance. Regulation M similarly requires that dealer-lessors disclose the Capitalized Cost Reduction, with a descriptive explanation such as "the amount of any net trade-in allowance, rebate, noncash credit, or cash you pay that reduces the gross capitalized cost."[276]

- Proposed Section 463.4(e) requires that when making any monthly payment comparison between payment options that includes discussion of a lower monthly payment, dealers must disclose that a lower monthly payment will increase the total amount that a consumer will pay to purchase or lease a vehicle, if true. Regulation Z requires that dealer-creditors disclose the Finance Charge with a description explanation such as "the dollar amount the credit will cost you."[277] Regulation M similarly requires that dealer-lessors disclose the Total of Payments, with a descriptive explanation such as "the amount you will have paid by the end of the lease."[278] This is in addition to required disclosures of other key terms such as Depreciation and Rent Charge.[279]

Each of these items is prominently disclosed at the top of the RISC and lease agreement (a consumer cannot miss them) and must be provided "before consummation" of the transaction.[280] In addition, the FRB has created model forms to provide the disclosures.[281]

[273] 12 C.F.R. § 226.18(h).
[274] 12 C.F.R. § 213.4(e).
[275] 12 C.F.R. § 226.18(c)(1).
[276] 12 C.F.R. § 213.4(f)(2).
[277] 12 C.F.R. § 226.18(d).
[278] 12 C.F.R. § 213.4(e).
[279] 12 C.F.R. § 213.4(f).
[280] 12 C.F.R. § 226.17(b); 12 C.F.R. § 213(a)(3).
[281] 12 C.F.R. § 226, Appendix H; 12 C.F.R. § 213, Appendix A.

Consequently, an effective disclosure regime already exists for the type of information the Commission desires dealers to convey.

But the problems do not end with the uncoordinated, redundant, and overlapping nature of the Commission's proposed credit and lease disclosures. They also extend to their timing and the effect that can have on their content.

The disclosures in the proposed rule are required whenever making any representation or comparison regarding monthly payments, which will necessarily be based on the *Offering Price*. As discussed, this will usually be the highest price at which the dealer would sell the vehicle. In contrast, the Regulation Z and Regulation M disclosures are based on the *actual contract price* after all price negotiations are complete. Thus, the disclosures under the proposed rule will typically be artificially high, but in any event not necessarily based on the contractual obligation.

As a result, these disclosures are likely to be different than the Regulation Z and Regulation M disclosures. Because the proposed rule's disclosures use many of the same terms as Regulation Z but will result in different numbers, consumers may find themselves confused and even overwhelmed by the volume of seemingly conflicting disclosures, rendering all of them less useful to consumers by virtue of their abundance.

The disclosure schemes in Regulations Z and M are time-tested and familiar to dealers and many or most consumers. They are reasonably uniform across creditor types. Most important, they are based on the consumer's legal obligation. The proposed rule's disclosures, in sharp contrast, are apt to be counterproductive. The Commission risks reducing consumer understanding and extending the vehicle acquisition process by sprinkling in its seemingly uncoordinated and untested proposed credit disclosures.

3) "Add-ons"

As an initial matter, we note that, appropriately, the Commission's definition of "motor vehicle dealer" appears to include motor vehicle manufacturers who sell directly to consumers without utilizing the motor vehicle dealer retailing network. As a result, one would think that all of the provisions of the Proposed TRR would apply equally to all who sell motor vehicles to the public, independently-owned dealers and factory direct sellers alike. But this is not the case. Because of the way the Commission has defined "Add-on(s)," "Add-on Product(s) or Service(s)," and "Add-on List," direct sellers are effectively excused from having to comply with the disclosure, "value" determination, and other requirements related to the offering and sale of "Add-ons." This is because those retailers technically will not be selling "Add-ons" as defined by the Commission.

The only products that are "Add-ons" under the Commission's definition are those for which a dealer charges but that "are *not* provided to the consumer or installed on the vehicle by the motor vehicle manufacturer." (Emphasis added.)[282] But when the dealer selling the product is itself also the vehicle's manufacturer, then any product it sells is, by definition, "provided to the consumer . . . by the manufacturer." And for physical "Add-ons," the product will also, again by definition, be "installed on the motor vehicle by the motor vehicle manufacturer." Factory direct sellers of motor vehicles frequently offer and sell to consumers both types of "Add-ons." For example, they sell items such as extended service contracts, towing packages, and the like. But because of the way the term "Add-on" is defined, they will be able to offer and sell these products to consumers free of the disclosure requirements, "value" determinations, and other limitations that will burden other motor vehicle dealers under the Proposed TRR. The same applies to motor vehicle manufacturers who utilize the motor vehicle dealer network but sell "Add-ons" directly to consumers, as they are not covered by the proposed definition of "motor vehicle dealer" and their products and services are not covered by the proposed definition of "Add-ons."

Whether a product or service is an "Add-on" should not depend on who is selling it; it should be a function of what the product or service is and when it is sold relative to the rest of the transaction. But that is not the case in the Proposed TRR. As a result, the foregoing outcome categorically contradicts the Commission's statement that "the Proposed TRR would help honest dealers compete on a level playing field." As drafted, the Proposed TRR leaves an unjustified and unexplainable hole in the Commission's proposed consumer protection scheme. This major flaw must be corrected.

This inconsistent treatment aside, each of the required "add-on" disclosures is problematic for a variety of reasons.

(i) First Required Disclosure

The Proposed TRR prohibits a motor vehicle dealer from charging for any optional "Add-on Product or Service" unless the following requirements are met:

> "(i) *Disclosure*. Before referencing any aspect of financing for a specific vehicle (aside from the Offering Price) or before consummating a non-financed sale, whichever is earlier, the Motor Vehicle Dealer must Clearly and Conspicuously disclose:
>
> (A) The Cash Price without Optional Add-Ons, separately itemizing the Offering Price, any discounts, any rebates, any trade-in valuation, and required Government Charges; and
>
> (B) That the consumer may purchase the vehicle for the Cash Price without Optional Add-ons; and

[282] 87 Fed. Reg. at 42,044 (Proposed Section 463.2(a)).

(ii) *Declination*. The consumer must decline to purchase the vehicle for the Cash Price without Optional Add-ons.

(iii) *Form and Signature*. The Cash Price without Optional Add-ons disclosure and declination [set forth above] must be in writing, date and time recorded, and signed by the consumer and a manager of the Motor Vehicle Dealer.

(iv) *Presentation*. The Cash Price without Optional Add-ons disclosure and declination [set forth above] must be limited to the information required by this Section and cannot be presented with any other written materials."[283]

This requirement means that at the very start of the conversation with a consumer about "any aspect of financing," the dealer would first need to undertake a complex and burdensome analysis and disclosure, and obtain both a customer signature and a signature from a dealership manager. "Any aspect of financing" specifically excludes "Offering Price," but that appears to mean that any conversation or consumer questions about the vehicle price would be deemed an "aspect of financing." Therefore, before a dealer that wanted to preserve its ability to sell an "add-on"[284] could *answer consumer questions about price other than the Offering Price* or provide a consumer with *any estimated monthly payment, any financing offer,*[285] *or even whether a consumer could even possibly finance the purchase of any specific vehicle*, the Proposed TRR would require a dealer to complete, and get the customer to sign, a form that resembles the form at Attachment 11.[286]

Again, and importantly, each item on this form is currently disclosed to the consumer today. The difference is that such disclosures currently take place at a more logical and consumer-friendly point in the sales process. Of course, every new required disclosure form adds time to the transaction, costs to dealers and ultimately to consumers, inconvenience for both parties, and added compliance risk for dealers, which will ultimately lead to more restrictive and constrained disclosures.

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[283] 87 Fed. Reg. at 42,046 (Proposed Section 463.5(b)).
[284] Of course, a dealer could avoid these requirements by exiting the "add-on" market altogether, but that certainly could not be the Commission's goal. Accordingly, these comments proceed on the basis that dealers would not comply with the Proposed TRR by simply exiting the "add-on" market.
[285] In many cases, financing offers from captive or other finance companies are tied to specific vehicles, models, amounts financed, loan to value, or other information that cannot be determined at the very outset of the conversation with the customer.
[286] As with the other sample forms in this section of the comments, this form is simply an attempt at a mock-up. This is not a recommended format for a form or an assertion that the sample would satisfy the requirements of the Proposed TRR.

The issues created by the Proposed TRR relate primarily to the timing of these disclosures – but they are exacerbated by their nature and form. As an initial matter, the time and cost of providing this document should not be overlooked. Yet another required document and consumer signature at any point in the transaction adds very real costs – both direct and in terms of time. This form, in particular, is not simply a standardized disclosure document that can be provided and explained to all consumers. It is a highly customized document that – as discussed below – will require significant time to determine and complete. In addition, because it is vehicle and consumer specific, and because it must be provided well before the consummation of the transaction, it is highly likely that more than one form (and, in some cases, many) will need to be provided to most consumers. That is because the data in this document is dependent on the specific vehicle the consumer is interested in, and because consumers generally shop for 5, 10, or more different vehicles before choosing the vehicle they wish to purchase. Consumers will therefore need to review and sign multiple versions of this document, massively multiplying the cost in dollars and time, and only adding to consumer confusion.

Second, there is a significant question about the legal effect of this document. It seems clear from the language used in the Proposed TRR – and the required written, countersigned, and dated language stating that "[t]he consumer can purchase the vehicle for the Cash Price without Optional Add-Ons," – that the Commission is seeking to establish some kind of a legal obligation for the dealer to actually sell the vehicle to this consumer for the price listed. However, it is unclear from the Proposed TRR whether or how this legal obligation to sell a vehicle would arise between two contracting parties under state contract law and under what theory a dealer could be obligated to sell a vehicle to any consumer who inquired about financing if the dealer decided they did not want to or were unable to sell to that consumer for whatever reason.

For example, would a dealer be required to sell a vehicle to a consumer who raised "red flags" of identity theft under the Red Flags Rule? Would a dealer be required to sell a vehicle to a consumer who was abusive or violent at the dealership? What if the prospective customer was on the Specially Designated Nationals List maintained by the OFAC? Would a dealer be required to sell a vehicle to a consumer who could not produce the required proof of insurance or license? Can a consumer who does not qualify for financing somehow enforce this "right" to purchase the vehicle for this price? The potential reasons abound, and it seems clear that this required disclosure cannot create any legal obligation to honor that promise in all circumstances, and therefore it would be inaccurate at best and likely misleading to the consumer. Because the required disclosure that "*[t]he consumer can purchase the vehicle for the Cash Price without Optional Add-ons*" will often not be accurate, it would be misleading for a dealer to provide this disclosure.

One can imagine the response of the Commission to a dealer advertisement issued today that promised "Anyone who asks about this vehicle can finance it for $xx,xxx.xx." Commission enforcement actions have been brought against dealers for less categorical claims, and certainly no dealer today would legitimately make this kind of promise in an advertisement or elsewhere because there is no way to ensure that *any* customer (most of whom need to finance their vehicle purchases) could qualify to finance any particular vehicle (or any vehicle at all).

Even if the Commission were to opine that such a written, countersigned, and dated document containing what appears to be a promise about a price from the dealer does not create any binding obligation between the parties (mutually or otherwise), will any such opinion be dispositive under the relevant state contract law? How can the Commission confirm that, and if it cannot and the document does operate to form a contract under state law, the dealer will have to proceed accordingly. For example, it would need to discharge all of its other pre-contract duties (such performing an OFAC check, etc.). Forcing the formation of a contract this early in the process will certainly not assist consumers in their shopping journeys."

Of course, even if this and the other required disclosures would not create legal obligations, they would clearly create risk for dealers. It would be a violation of the Proposed TRR for a dealer "to make any misrepresentation, expressly or by implication regarding: (a) the costs or terms of purchasing, financing, or leasing a vehicle…"[287] As discussed in detail above, this incredibly broad standard would present a wide array of risks to dealers should they discuss *any terms, costs, or other relevant pricing information* with *any* consumer at *any* time except in person and in a formalized (and highly trained) manner. The challenges associated with having to satisfy this obligation in an inflexible, formal manner will disincentivize dealers from communicating on price or offering any kind of price discovery to consumers.

In addition, what would be the result if that vehicle were no longer available to that consumer after such a disclosure were made? If the dealer offered another vehicle instead, would that be deemed "bait and switch" by the Commission?[288] What if the price of the vehicle changed before the consumer purchased it – would that result in a claim of deception? Does that mean that dealers would have to ensure that no vehicle prices changed after providing this document to any customer? That would be virtually impossible.

The misleading, confusing, and non-binding nature of this statement undermines its purpose. By requiring calculation and disclosure of this information prematurely, the Commission is creating tremendous inefficiencies and consumer confusion. And it overlooks the fact that a fully informed, binding offering price is presented to consumers today at the appropriate point in the transaction.

- *The requirement to provide a "trade-in valuation" at this point in the transaction is misguided and will create confusion and severely restrict online sales.*

[287] 87 Fed. Reg. at 42,045 (Proposed Section 463.3(a)).
[288] *See, e.g.,* 16 C.F.R. §§ 238 et. seq.

- *The term "trade-in valuation" is unclear and appears to be inaccurate*.

One element of this required price disclosure document is the "trade-in valuation." As an initial matter, the term is unclear and seems to suggest the overall value of the consumer's trade in vehicle. But that amount would not make sense to disclose in the context of this form. For example, if a consumer sought to trade in a vehicle with a valuation of $20,000, that had an outstanding auto loan of $15,000, listing the "trade-in valuation" ($20,000) would not reflect its net trade-in value ($5,000). Given that the information in this document "cannot be presented with any other materials,"[289] the dealer would arguably be *prohibited* from disclosing the net trade-in value at this point in the transaction. It is difficult to see how this restriction helps consumers.[290]

Even if this term is intended to reflect the amount of equity that a customer has in its trade-in vehicle that they wish to apply to the purchase price of a new vehicle, that would raise several issues. First, while many consumers wish to apply such equity to their next purchase, there is no requirement that they do so. For example, they may wish to sell the trade-in to the dealer separate and apart from a new vehicle purchase.

In addition, many consumers do not have equity in their trade-in and in fact have negative equity – that is, they owe more on their trade in vehicle than it is worth. When negative equity is present, dealers presumably would be required to include it on this form and add it back to the Offering Price to obtain the "Cash Price." However, this is not clear from the NPRM. Finally, the mathematical relationship between the itemized disclosures on this form makes the lack of such relationship in other forms even more confusing to consumers.[291]

- *Many dealers will not be able to provide a "trade-in valuation" to a consumer before physically evaluating and valuing their specific trade-in.*

In order to provide an accurate "trade-in valuation" number to a consumer, it is of course necessary that dealers have access to the vehicle being traded to perform the valuation. While valuations may be done virtually in some circumstances, in many others they cannot. In those situations, no consumer would be able to obtain any estimated monthly payment, or other relevant financing information, without visiting the dealer to enable their trade in vehicle to be evaluated. This would further limit the ability of consumers to conduct on-line shopping.

In this instance, consumers would not be able to get past the initial "sifting" steps in the shopping process without a visit to the dealership. Not only does that create a new and

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[289] 87 Fed. Reg. at 42,046 (Proposed Section 463.5 (b)(iv)).
[290] And the "Trade-in Valuation" has a direct and variable connection to the calculation of "Required Government Charges."
[291] *See* discussion *infra* of the "Vehicle Cash Price with Optional Add-ons in a Financed Transaction" disclosure document.

unnecessary restriction for consumers, it would be particularly problematic for consumers in many parts of the country who do not live in close proximity to a dealership.[292]

This will necessarily limit price discovery for consumers, because rather than simply being able to freely communicate with dealers to obtain pricing and financing information (however much those numbers represent an estimate), consumers will not be able to obtain any price, much less any competing price from another dealer, without being forced to drive to the dealership(s) with their trade-in vehicle to obtain a valuation. [293]

In addition, the trade-in valuation process involves significant costs that will only add to consumer prices. Dealership personnel time, vehicle history reports, and third-party valuation products and pricing services each have a cost associated with it. While this cost is generally borne by dealers as a cost of doing business, the current governor on those costs is that at the outset of a transaction, they are tempered by providing estimates and using estimating tools.[294] Simply put, the requirements of the Proposed TRR will eliminate the ability of a consumer to obtain such estimates from the dealer, because that amount must now be disclosed on this countersigned disclosure document.

Moreover, these costs are currently not fully incurred at the outset of *every* consumer interaction; rather they are incurred only on those transactions that reach a point in the negotiation process where it makes sense for both the buyer and seller to undertake such efforts. By artificially forcing a *binding* trade-in valuation on virtually every consumer interaction, the Proposed TRR will add massive unnecessary cost to the shopping process and increase costs significantly – costs that eventually would lead to higher prices for consumers.[295]

This artificial and forced proposed mandate raises far more questions than it answers. What would a dealer do, if as would be expected and logical, a consumer refuses or does not wish to bring its vehicle to the dealership in order to get basic information from the dealer? Would a dealer be prohibited from providing any pricing or financing information? Could the dealer provide the information without the trade-in figure? Would the dealer be prohibited from adding a trade-in figure at a later point in the process? Would the dealer need to start all over and provide and obtain a customer's signature on another (different) copy of this same form? What if the consumer initially says they do not plan to trade in a vehicle, but later decides to do

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[292] Even in urban areas, like downtown Washington, D.C., the nearest new car dealership of a particular brand may be a 45 minute or more drive – perhaps more if it is a niche or smaller brand.

[293] Assuming it is capable of being driven. Many consumers seek to trade in vehicles that require extensive repairs, and therefore the vehicle in many cases is not drivable or safely drivable at all.

[294] For example, there are a number of commonly used vehicle valuation estimator tools available to consumers and dealers. Tools such as the NADA Used Car Guide, Edmunds, or Kelley Blue Book provide prices for vehicles in an estimated range. Used vehicles are not fungible, however, and no binding price estimate can be provided without a physical inspection.

[295] The Commission's denial of NADA's request for an extension of the comment period precludes NADA from providing a projection of these and many other costs associated with the requirements in the Proposed TRR.

so? Would the dealer be prohibited from including that trade in the sale? How would the dealer prove that the customer changed their preference?

The bottom line is that this requirement fails to consider a host of factors that make it unworkable.

- *The required disclosures of "discounts" and "rebates" would require the dealer to obtain extensive information about the consumer, and in many cases will also add to consumer confusion*.

The NPRM does not define these terms or explain how they differ. A "discount" could refer to any reduction in the listed sales price that the dealer is willing to offer as part of a negotiated transaction. If so, that would clarify that the Proposed TRR is not seeking to eliminate the pro-competitive benefits of price negotiation and reduction,[296] and it would clarify that the Offering Price does not, and indeed *cannot*, contain any dealer discounts, or else it would not be susceptible to accurate disclosure in this form.

However, the requirement to disclose this figure at this point in the transaction raises questions. Is this "discount" amount the "final" discount? In other words, are dealers required to disclose the very lowest price they are willing to sell the vehicle for at this point in the transaction? It does not seem that it could be, as such a requirement would eliminate a consumer's ability to negotiate on price, or to adjust the price based on its financing or trade-in needs.

However, if this figure is not the "final and best" discount, then why is it required and what is the purpose? If, as it seems to be, it is simply the "first" offer from the dealership, what incentive (or ability) would any dealer have to disclose anything on this form for a "discount" other than $0? A dealer would simply note that it is required by federal regulation to disclose this Offering Price, but that the price is negotiable, and then continue the negotiation process in the way that meets the consumer's needs. While that outcome would limit the confusion and consumer inconvenience, it would serve no purpose.

In addition, as with all of these confusing new "price" terms and disclosures, this "discount" disclosure may be understandable to some consumers, but others may view it as the dealership's best discount offer and end up paying a higher price than they would have if they had understood that, like today, final sales price is negotiable at many dealerships, after due consideration of all parts of the transaction, and the consumer's specific needs, budget, and desires.

And the term "rebate" requires further definition. Presumably, it refers to reductions in the sales price based on monetary contributions available to certain groups of consumers from third

[296] Given the massive consumer benefit of intrabrand competition created by the negotiated sale of new vehicles, we can only presume that the Commission is not seeking to limit in any way the consumer's ability to negotiate the sales price of the vehicle.

parties or dealers. This term at least has some industry recognition, although there are a number of different types of rebates – some are from the manufacturer or other third party (like the finance company) to the consumer, while some incentive payments are called "rebates" and paid directly to the dealer, and still other "rebates" are offered by dealers to consumers.[297]

For franchised dealers, the availability of manufacturer and finance company rebates is a highly complex system that often changes quickly,[298] due to a changing mix of fact patterns, eligible models, and qualifications that become more complicated when consumers shop across brands. What would the implications be of providing such a document to a consumer on the last day of the month that a rebate is expiring? Again, given that this information "cannot be provided with any other written materials,"[299] dealers would be unable to explain the time-limited nature (or any other relevant details) of any rebate offer. Would a consumer somehow be entitled to that rebate even if the consumer did not purchase the vehicle until after the rebate expired? This would lead to more confusion and cause consumer mistrust.

Moreover, many rebates provide options to the consumer, who can choose the form of rebate that works best for their circumstances. For example, a manufacturer or captive finance company may offer a promotional incentive of "3.9% APR or $2,000 cash back." This means that consumers can choose – after considering their other financing options, available cash down, monthly budget constraints, etc. – whether to seek the lower APR or to reduce the purchase price of the vehicle. How would such a "rebate" be disclosed on this document at the very outset of the conversation with the consumer? Presumably, the form would need to reflect one or the other of these options,[300] which could adversely affect many consumers.

In that context, it is critical to understand what it means to disclose "any rebates." Does it mean "any rebate that could possibly be available?" That would not make sense because it would require disclosing all possibly available rebates, no matter how remote the possibility that a particular consumer would qualify for a given rebate, which would further delay the sales process and could lead to allegations of deceptive "rebate stacking."[301] Furthermore, that would

[297] Would a dealer-offered "rebate" be listed as a "rebate" or a "discount," and in all circumstances?
[298] *See* e.g., Attachment 15 containing one example of a website listing for a vehicle with seven active potential third-party rebates, each with different (and often overlapping) date ranges, different qualification requirements, different conditions upon which they relied (military service, trade-in of certain competitive vehicles, etc.), and many other complicating factors. Not only do these rebates and terms change with considerable frequency, but their applicability is also often ultimately determined by a third party, not the dealer. These and many other factors highlight that it is often very complicated, and impossible to determine with certainty, whether a consumer qualifies for all potentially available rebates until later in the transaction.
[299] 87 Fed. Reg. at 42,046 (Proposed Sections 463.5(b)(1)(iv) and (2)(iv)).
[300] There is no accommodation in the rule for any explanation of the "rebates."
[301] *See, e.g.*, 87 Fed. Reg. at 42,020 ("When dealers advertise rebates and discounts, or offer prices that factor in such rebates and discounts, but in fact those rebates and discounts are not available to the typical consumer, but only a select set of customers, such conduct induces the consumer to select and transact with the dealer under false pretenses.").

provide no benefit regarding price transparency because it would not be probative of the price available to *that* consumer.[302]

Therefore, it would only make sense for "any rebates" to mean "any rebates for which the consumer qualifies." However, that is not only difficult to determine with any certainty at the outset of a conversation, it often requires due diligence and a more in-depth conversation than most consumers may wish to engage in at the very outset of their shopping experience. For example, a dealer would have to determine and verify facts such as state and county of residence, current lease status, college graduation qualifications, military or first responder status, trade in vehicle, repeat customer status, or any of a myriad of other qualifiers for manufacturer, finance company, or dealer rebates.

This means that shoppers would again be unnecessarily bogged down in a lengthy "qualification" conversation before they could get even the most basic pricing information from the dealer. Not only would this lead to consumer resentment and confusion, but it would also unnecessarily and considerably lengthen the sales process.

Forcing this disclosure in this way, at this point in the transaction, will also inconvenience consumers by making it far more difficult to shop online. That is because many rebates are offered to certain individuals or certain types of individuals, and to provide a "binding" number on a formal, signed disclosure document, the dealer would need to take steps to ensure the customer qualifies for the rebate. That may mean a physical identification, lease information, military ID,[303] copies of bills, or other stipulations required by the third party offering the rebate. Obtaining or providing such proof would often be more difficult (or impossible) to do remotely. Because the Proposed TRR requires dealers to disclose rebates in this way and at this time, it would in yet another way force a consumer to visit the dealership to obtain basic pricing information rather than engaging in remote price discovery.

These factors underscore why forcing an early rebate disclosure is problematic. It is generally not worth the consumer's time and engagement at the very outset of the price discovery process to engage in these types of in-depth discovery conversations. And dealers can provide broad guidance but are generally not willing to make firm commitments about rebates until all due diligence is completed. In addition to the other problems noted, this could likely lead to an "underreporting" of available rebates.

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[302] Indeed, it would be an explicit violation of the proposed rule to "make any misrepresentation, expressly or by implication regarding … the availability of any rebates or discounts that are factored into the advertised price but not available to all consumers." Is that same standard – "available to all consumers" – the standard here? If so, there will be virtually no rebates disclosed in this document, as there are very few third-party rebates available to all consumers. If not, why not, and how can a consumer understand disclosures of the same information under different standards? 87 Fed. Reg. at 42,045 (Proposed Section 463.3(d)).

[303] And because it is illegal to make a copy of a military ID (*see* 18 U.S.C. § 701), a dealer would be unable to require an electronically sent copy of such an ID.

- *Required disclosure of any "rebates" at this point in the transaction would virtually eliminate a dealer's ability to disclose the federal EV tax credit.*

One "rebate" that would be directly implicated and adversely affected by the Proposed TRR is the federal EV tax credit "rebates" recently authorized in the "Inflation Reduction Act of 2022"[304] as a key element in the Administration's effort to address climate change concerns. This rebate will ultimately be made available to consumers "at the point of sale" – that is, as a reduction in the price of the vehicle at the time of sale from the dealer. This credit is intended to be paid to the dealer as a way to reduce the sales price of the qualifying EV – *i.e.*, a rebate. To qualify for the credit, a consumer must meet a series of tests, including a limitation on "modified adjusted gross income." In other words, only certain consumers will qualify for the credit, and dealers will likely be called upon to assist in determining whether a particular customer qualifies for the rebate. This, in turn, will require a complex and highly sensitive determination of a consumer's qualifications. Therefore, to accurately disclose the availability of this credit on the Proposed TRR's newly required form will require dealers – before they are able to discuss the price or provide *any* financing information – to undertake the complex inquiry to somehow determine and verify a consumer's *modified adjusted gross income* for the current and/or prior year.

This means that for consumers to obtain any information about financing a qualified EV vehicle, they would need to provide, among other information, their personal (and obscure) tax information. This would be impossible or, at the very best, so unwieldy that many consumers would not be aware of the potential EV tax credit. This will of course have a negative effect on the availability and attractiveness of the EV tax credit and impede the adoption of EVs.

This counterproductive policy outcome is yet another example of why this proposed mandate reflects a fundamental misunderstanding of the auto retail market, is likely to lead to unintended consequences, and requires far greater research before further action is taken.

- *Artificially separating consumer consideration of VPPs is unwarranted, misguided, and hurts consumers who need those protections most.*

One of the apparent goals of requiring this new disclosure document is to separate the consideration and negotiation of any VPPs from the consideration of the price of the vehicle. As best as can be determined, its purpose is so that consumers can fully consider the price of the vehicle apart from the price of any VPP. What perceived harm or market failure this is seeking to address is unclear, but it appears to be related to the Commission's unwarranted and misguided concern about consumer's shopping based on a monthly payment.

These comments address elsewhere (i) the flaws in assuming that consumers are irrational when they shop based on monthly budget considerations, and (ii) how consumers are provided with

[304] *See* Inflation Reduction Act of 2022, Pub. L. No. 117-169, § 13401.

disclosures that indicate the price of VPPs and their optional nature before they make a vehicle purchase. However, this form invites some additional considerations.

What happens if a consumer does *not* "decline" to purchase the vehicle for the "Cash Price without Optional Add-ons"? Presumably, that means that the consumer wishes to purchase the vehicle for the price listed (which for new cars, as discussed above, would likely be the MSRP). Aside from denying the customer the ability to negotiate the sales price, this forced "declination" also prevents consumers from fully considering VPPs. Would such a choice preclude the dealer from offering, or the consumer from considering, any VPP at a later point in the process? Presumably, the Commission would still allow consumers to purchase any product or service they wish, if they deemed it to be in their best interest.

So how will this play out? A consumer with the means to pay cash for the vehicle who does not "decline" this option would nevertheless be able to consider VPPs and is free to purchase those products. There is nothing in the Proposed TRR that prevents, or could prevent, a dealer from offering any product or service to such a consumer. So, for those consumers who have the means to simply purchase that product or service, this form will have little to no consequence. They would simply add this cost to their overall payment to the dealer.

However, for the vast majority of consumers who cannot afford to pay cash for their vehicle, this form would have different consequences. Because they are forced to choose whether to sign this document before they have been offered, or even know of the existence of, VPPs, they do not have the information needed to decide what they need or would like. Not aware of what VPPs may be available to them, some of these consumers may opt not to decline to purchase the vehicle for the "Cash Price without Optional Add-ons." While the dealer may still offer VPPs to those consumers, and those consumers may wish to purchase such protection, they are unlikely to be able to simply pay for those products. These consumers need to have the full option to consider and include such products in the amount financed/monthly payment *before* they know whether to "decline" to purchase the vehicle for the "Cash Price without Optional Add-ons," not *after*. However, the Proposed TRR would preclude them from doing so because they would be forced to choose before they have all the information needed to make an informed choice.

What will be the result? Those consumers who need to finance their purchase will be at a disadvantage. Those who most need the protection and peace of mind offered by VPPs could be faced with a large repair bill and no service contract, or the prospect of paying off a loan on a totaled vehicle without GAP protection. The presumption that people need to be protected in some way from themselves, or from shopping based on a monthly budget, is untested and threatens to hurt those who can least afford it.

- *The requirement that a dealer obtain a signed "declination" from the consumer at this point in the price discovery process will also unnecessarily restrict online shopping, inconvenience those consumers least able to overcome those inconveniences, and confuse many consumers.*

As noted above, the Proposed TRR requires that the consumer (and dealer) sign this "stand-alone" disclosure form before "referencing any aspect of financing." That creates several difficulties. First, this creates an additional form for consumers to sign as part of the sales process. As outlined in greater detail above, dealers have been successful in their long-term efforts to shorten the sales process, reduce unnecessary forms and signatures, and otherwise streamline the customer experience. This frustrates that progress.

Second, the timing requirements for this disclosure form would cause additional unnecessary inconvenience for finance customers. Because the form must be provided to non-finance customers at some point "prior to consummation of the sale," that likely means that form would be added to the many other legally required forms that "cash" customers must complete at the time the contract is consummated. However, a similar (but confusingly different) form must be presented to all finance (or potential finance) customers at a much earlier point in the transaction, and therefore finance customers would face a heightened and unexplained level of inconvenience.[305]

On the other hand, because this document must be completed and countersigned when "referencing any aspect of financing," it would likely inconvenience all customers (equally and unnecessarily) because dealers offer and/or at least discuss the possibility of financing with almost all of their customers. That is because many customers who come to the dealership anticipating that they will pay cash, ultimately decide to finance (or at least consider financing) through the dealership because the dealer can offer financing that is superior to the consumer's third-party finance source, or because the financing is otherwise advantageous to the consumer. As a result, because dealers or consumers generally address the possibility of financing, this document may be required for virtually all customers.

- *The requirement to obtain a consumer signature on this and other required disclosure forms presents unnecessary data security risks.*

To obtain a consumer signature, the consumer generally must be present to sign the document. That only exacerbates the concerns outlined above about limiting the ability for consumers to shop online. Presumably, the dealership *could* obtain such "declinations" via E-SIGN[306] technology, but even if that were an option, it is not a viable option for many. First, many dealers may not currently have E-SIGN compliant capabilities or technology. While they may be able to obtain such systems, those systems often come with substantial cost.

[305] Of course, cash customers will still face the unnecessary and confusing hassle of an additional form to sign at consummation of the transaction, but they, unlike finance customers, will at least theoretically be able to avoid the artificial restriction on information and/or an additional trip to the dealership.
[306] *See* 15 U.S.C. § 7001.

Moreover, many dealers do not engage in such remote E-SIGN transactions at least in part because of concerns about a data breach or otherwise exposing sensitive information to the risk of a breach. Requiring online shoppers to send this information remotely only adds to the security risks associated with such information. As noted above, for this form to be completed as proposed, it could require the dealer to obtain highly sensitive information like tax returns, lease status, or other information that would likely be deemed "non-public personal information" under GLB and "customer information" under the Safeguards Rule. By requiring the gathering of this information at this point in time, the Proposed TRR is requiring online shoppers to provide sensitive information and, in turn, creating data security risks where none exist today. And that is in addition to data security risks raised by the massively expanded document retention requirements. Consumers should not be forced to provide sensitive information to the dealer just to obtain basic price or financing information as part of their shopping process.

In addition, consumers without access to the internet[307] and E-SIGN compliant tools and technology will be forced to come to the dealership to sign this "declination" before they can engage in any conversations with the consumer about the vehicle purchase and finance process. This further frustrates their ability to easily access price discovery information.

- *The requirement to obtain a consumer "declination" will create tremendous consumer confusion*.

Lastly, and perhaps most importantly, this disclosure and the accompanying required "declination" will create tremendous consumer confusion. Consider a dealer who receives an inquiry from a consumer who is shopping for a new vehicle and asks for an estimated monthly payment or financing option on a particular vehicle. The Proposed TRR would appear to require the following type of response:

"I'd be happy to provide you with that information, but first you must come to the dealership to let me see and evaluate your trade, tell me lots of personal details about yourself (including your federal tax forms) to see what rebates you are qualified for, and then you must sign and date a document that says …. you could, but you don't want to buy the car" …

… **What**?

How would a consumer, at that point in the transaction, *know* whether they want to purchase the vehicle at all, much less whether to purchase it at the "Cash Price without Optional Add-ons?" Before the dealer "referenc[es] any aspect of financing," the consumer may not even have any

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[307] *See e.g*. Kendall Swenson et.al., *People in Low-Income Households Have Less Access to Internet Services*, (Apr. 2020), U.S. Department of Health and Human Services, https://aspe.hhs.gov/sites/default/files/private/pdf/263601/Internet_Access_Among_Low_Income.pdf.

idea what vehicle they wish to purchase. The consumer does not know what the monthly payment will be, so they cannot know if this vehicle is in their budget. The consumer also does not know what VPPs might be advantageous, and the document does not contain the dealer's "final and best" "discount" offer, etc. The consumer simply does not have all the pieces of information needed to make this decision at the time and yet, the consumer is required to sign a document without such information.

Presumably, the dealer could try to explain that the price is dependent on financing and that there are VPPs that are available to protect the consumer's investment. But that information is prohibited from being provided in writing, and consumers who actually read this document standing alone would be confused by it. Moreover, as discussed above, "any misstatement" that a dealer may inadvertently make about these issues would violate the Proposed TRR. And inadvertent "omissions" would create the same risk. This will serve to frustrate – not facilitate – access to price discovery information.

(ii) Second Required Disclosure

But the confusion does not end there. A consumer who wishes to finance the purchase of a vehicle, after wading through the first required disclosure document, must also sign a second, similar, but different, document that resembles the form at Attachment 12.

The "Vehicle Cash Price without Optional Add-Ons in a Financed Transaction" disclosure document must be disclosed to a consumer (and signed, countersigned, and dated) "*before charging for any optional Add-on in a financed transaction*."[308] The proposed requirement states:

> "(i) *Disclosure*. Before charging for any optional Add-on in a financed transaction, the Motor Vehicle Dealer must Clearly and Conspicuously disclose:
>
> > (A) The total of the Cash Price without Optional Add-ons plus the finance charge, factoring in any cash down payment and trade-in valuation, and excluding optional Add-ons. This disclosure must separately itemize the Cash Price without Optional Add-ons, the finance charge, any cash down payment, and any trade-in valuation; and
> >
> > (B) That the consumer can finance the vehicle for that total; and
>
> (ii) *Declination*. The consumer must decline to purchase the vehicle for that total set forth in paragraph [A].

[308] 87 Fed. Reg. at 42,046 (Proposed Section 463.5(b)(2)).

(iii) *Form and signature*. The disclosure and declination set forth [above] must be in writing, date and time recorded, and signed by the consumer and a manager of the Motor Vehicle Dealer.

(iv) *Presentation*. The disclosure and declination set forth in paragraphs [above] must be limited to the information required by this Section, and cannot be presented with any other written materials."[309]

So, yet another form must be disclosed to and signed by the consumer. Clearly this disclosure cannot be made until the consumer has agreed to and qualified for a specific APR, and the vehicle sales price and trade-in amount have been finally negotiated. That is because the amount financed and APR must be known to calculate a finance charge. Further, as outlined above, this "finance charge" is likely to be a different figure than the finance charge that is calculated and disclosed pursuant to TILA.

The document will likely further confuse consumers. That is because the document itself contains several disclosures that are not only different from the dollar figures that were presented to consumers previously but include other disclosures that are unclear and mathematically unrelated.

At this point in the process, a finance customer who selected a VPP will have been given a number of "prices": (1) the "*Offering Price*" – which is a price for which a dealer "will sell or finance the vehicle to any consumer"; (2) a second price called the "*A Cash Price without Additional Add-ons*" – which the consumer needs to have seen and signed saying that they *don't* want to buy the vehicle for that price; and now (3) a "*Cash Price without Additional Add-ons in a financed transaction*" which is a *third, different* price that the customer has been shown. And the customer is now being told that they "can finance the vehicle" for this amount, but also being asked to sign this second document saying that they do not want to! That is at least three different prices[310], two separate "declinations" and two disclosure documents with different, and often contradictory information – all for the same vehicle.

In many cases, consumers change their mind during the shopping process and end up purchasing a vehicle that is different from the one they first inquired about. As noted above, it is common that consumers will inquire about several different brands, makes, and trim lines before making a final decision. Because these forms are fact and vehicle specific, the dealership could be required to make three separate, different price disclosures for *each individual vehicle the consumer* expresses an interest in, with two separately signed documents for each.

And the terms they are being presented with are not only new to consumers, as discussed in greater detail above, they are inconsistent with the well-recognized industry terms required

[309] *Id*.
[310] And as discussed above, potentially many more, depending on the number of vehicles the consumer expresses interest in.

under TILA and numerous state laws.[311] These documents, terms, and disclosures have not been tested with consumers, or analyzed in any way by the Commission prior to the issuance of the Proposed TRR. The likelihood of massive consumer confusion related to these new "price" disclosures is inevitable.

- *The "Vehicle Cash Price without Optional Add-ons in a Financed Transaction" disclosure document is inconsistent – both with the first disclosure form and internally*.

This disclosure requirement is inherently confusing for a number of other reasons. First, it discloses a dollar figure called "*Cash Price without Additional Add-ons plus finance charge*," and notes that figure is presented "*factoring in any cash down payment and trade-in valuation."* What does that mean and what exactly does this amount reflect?

Does this mean that the "cash price" figure is net of the down payment and trade equity that the consumer intends to contribute to the sale? Or does it mean that the finance charge has been calculated with the down payment and trade-in "factored into" the total? The circumstances seem to suggest the latter, but if that were so, why would it "factor" in the down payment and trade-in, but not the discounts and rebates? Trade-in valuation is an input into the "Cash Price without Optional Add-ons," yet it is also, for some reason and in some way, to be factored into the determination of the finance charge – yet neither discounts nor rebates are to be so "factored?" It is inconsistent and confusing, which lessens any possible probative value of this disclosure.

Even if the calculation of the initial dollar figure were clarified in some way, the required additional "itemized" disclosures muddy the waters further. The Proposed TRR requires an itemized disclosure of three additional figures: (1) the finance charge; (2) cash down payment, and (3) trade in valuation. However, *there is no discernable connection between the down payment or trade in figures and the "*Cash Price without Optional Add-ons plus finance charge."

The first document discloses a "Vehicle Cash Price without Optional Add-Ons" that is the net figure resulting from a mathematically related series of itemized numbers. Presumably, this is the same number that is the first itemized disclosure on this second document, under the heading "Vehicle Cash Price without Optional Add-ons." (They are the same term, so that is a viable presumption.) But once the other three required itemized disclosures are added, the final "Total of Vehicle Cash Price without Optional Add-ons Plus Finance Charge," is not a mathematical result of the itemized disclosures. There is *no apparent connection between them.*

[311] See the comments filed by state automobile dealer associations.

For example:

Vehicle Cash Price without Optional Add-ons:	$50,000
Finance Charge[312]:	$4,500
Down Payment:	$6,000
Trade-in Valuation:	$8,500

Total of Vehicle Cash Price without Optional Add-ons Plus Finance Charge: $54,500

The down payment and trade-in valuation numbers are a mystery and would certainly confuse consumers. This disclosure is presumably supposed to represent another total price – one at which a consumer could finance a vehicle. However, the itemization of the down payment and trade in valuation (which are already part of the "Vehicle Cash Price without Optional Add-ons") mean that there is no mathematical relationship between these numbers, which makes the disclosure even more confusing.

And yet again, the consumer is presented with a novel and confusing "declination" option. In addition to the myriad reasons outlined above why such a "declination" creates consumer confusion, this form also requires dealers to make a representation about financing that is inconsistent with TILA and likely with the RISC and is misleading to many consumers. Because the required disclosure that "*the consumer can finance the vehicle for the total of the Cash Price without Optional Add-ons Plus Finance Charge Listed Above*" will often not be accurate, it would be misleading for a dealer to provide this disclosure.

That is because while the finance charge and APR must be "finalized" in the sense that a final figure must be obtained that will allow a "finance charge" to be calculated based on the "amount financed" not including VPPs and the APR that a consumer qualifies for at that amount financed, in many cases, even "final" qualified quotes from finance sources are contingent on certain "stipulations." For example, the finance source might communicate that "*this customer is qualified for a $35,000 loan at 4.5% APR, as long as you [the dealer] can obtain confirmation of their listed income and home address with a W-2, and a copy of a utility bill*." In that type of circumstance, the dealer would be able to provide these disclosures in good faith, but of course if the consumer is unable or unwilling to provide the required documentation, they will not be able to finance the vehicle at that price. Therefore, a countersigned document, even at this point in the transaction, should not definitively state that the consumer "can finance the vehicle" for this amount.

It is also important to note that a consumer may qualify for one APR at that amount financed and another when the VPPs they select are added to the amount financed, and that difference will certainly cause consumer confusion.

[312] Presumably, this is the same finance charge as that disclosed on the required TILA disclosures, but that is unclear.

For example:

Vehicle Cash Price without Optional Add-ons: $39,950
Vehicle Cash Price with Optional Add-ons: $43,000
Consumer qualifies for a 4.3% APR up to $40,000,[313] and a 3.9% APR for amounts over $40,000.

In this scenario, the consumer would need to be qualified by the finance source for both of the "amounts financed" at either rate before this disclosure is provided. Using the example above, this disclosure form would presumably need to disclose a "finance charge" based on the 4.3% and $40,000 amount financed.[314]

Further, after the consumer signs this second "declination," the consumer would shortly thereafter be presented with the RISC and the federally required TILA disclosures contained therein.[315] That document would contain *yet another* figure for the finance charge – in the example above, based on the 3.9% APR and the $43,000 amount financed. This is inherently confusing.

(iii) Third Required Disclosure

Section 563.5(b)(3) of the Proposed TRR requires a *third* additional disclosure providing an "Itemization of Optional Add-ons." Specifically, "before charging for any optional Add-on," the dealer "must separately itemize and Clearly and Conspicuously disclose either the "Cash Price without Optional Add-ons" (non-financed transaction) or the Cash Price without Optional Add-ons plus finance charge (financed transaction), as well as the charges for any Optional Add-ons selected by the consumer, separately itemized, and the sum of those items.[316] Therefore, dealers (but not manufacturers who also retail vehicles) would need to provide forms for a financed transaction and a non-financed transaction that resemble the forms at Attachment 13.

It is important to note that, as explained in detail in Section IV.a.2 above, (i) current law already requires disclosure of the optional nature of "add-ons" and an itemized list of "add-ons" that are purchased, and (ii) NADA fully supports, and most dealers already routinely provide, clear and conspicuous disclosure of this information. Therefore, these disclosures are unnecessary and, as proposed, present consumers with *yet another* price that they must consider and understand – at

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[313] Financing offers are often tied to the amount financed and/or to other factors that would be affected by this discrepancy, like LTV ratios.
[314] This also raises whether a dealer could make such a "contingent" disclosure and still comply with the prohibition in the proposed rule to avoid any "misrepresentation, expressly or by implication regarding…when the transaction is final or binding on all parties." Proposed Section 463.3(h), or "whether any consumer has been or will be preapproved or guaranteed for any product, service, or term." *Id. at (f).*
[315] Of course, the consumer might not understand why it is necessary to sign two declination documents with different prices listed.
[316] *Id.*

least the fourth price for the very same vehicle. In addition, this disclosure for a finance transaction adds yet another confusing and potentially misleading number. That is because, as outlined above, the "finance charge" portion of the "Vehicle Cash Price without Optional Add-ons Plus Finance Charge" is calculated (as it suggests) based on the Vehicle Cash Price without any VPPs. A disclosure of this figure on a document disclosing the price of voluntary protection products seems to – but by definition does not - include the accurate and complete finance charge for the total transaction price listed in the form as the "sum of amounts A and B above."

As a result, a consumer in a finance transaction will see the disclosure of this "Vehicle Cash Price without Optional Add-ons Plus Finance Charge" but the finance charge could be different than the finance charge in the RISC and required by TILA.[317] That will certainly cause confusion for consumers, raise many complicated questions, and further impede the sales process.

(iv) Fourth Required Disclosure

Even after all that, the Proposed TRR requires yet one more additional signed disclosure document – the "Express, Informed Consent" document.

Section 463.4 of the Proposed TRR states:

> "It is a violation of this part and an unfair or deceptive act or practice in violation of Section 5 of the FTC Act for any Motor Vehicle Dealer, in connection with the sale or financing of vehicles, to charge for any of the following:
>
> …
>
> (c) *Any item without Express, Informed Consent*. A Dealer may not charge a consumer for any item unless the Dealer obtains the Express, Informed Consent of the consumer for the charge."

Section 463.2(f) of the Proposed TRR states that "Express, Informed Consent" means –

> …an affirmative act communicating unambiguous assent to be charged, made after receiving and in close proximity to a Clear and Conspicuous disclosure, in writing, and also orally for in-person transactions, of the following: (1) what the charge is for; and (2) the amount of the charge, including, if the charge is for a product or service, all fees and costs to be charged to the consumer over the period of repayment with and without the product or service. The following are examples of what does not constitute "Express, Informed Consent: (i) a signed or initialed document, by itself; (ii) prechecked boxes; or (iii) an agreement obtained through any practice designed or manipulated with the substantial effect of subverting or impairing user autonomy, decision-making, or choice."

[317] *See* discussion above about the multiple, conflicting "TILA-type" disclosures required by the Proposed TRR.

This is the most enigmatic of all the new required forms, but a best guess at its structure would resemble the form at Attachment 14.[318]

A copy of this completed document would be required to be provided to a consumer before a dealer "charges" the consumer for "any item"[319] "in connection with the sale or financing of vehicles."[320] Because the disclosure must be Clear and Conspicuous, and the cost must be individually disclosed, it is unclear whether a copy of this document must be provided for each such item a consumer wishes to purchase.

Therefore, after the "Offering Price" disclosure, after the (second and different) "Cash Price without Optional Add-ons" disclosure and declination signature, after the (third and also different) "Cash Price without Optional Add-ons in a finance transaction" disclosure and declination signature, and after the explanation and decision about VPPs, financing, trade-in, and sales price, the consumer is still not done. At that point,[321] before the consumer gets the keys and drives away, the consumer must also sign one or more additional documents.

It is far from clear how a dealer would calculate the information needed in order to provide this disclosure, but is seems that there is some kind of required calculation to enable the dealer to disclose the:

> *"…amount of the charge, including, if the charge is for a product or service, all fees and costs to be charged to the consumer over the period of repayment with and without the product or service."*

We have extensively reviewed the language in this requirement, sought the advice of outside third parties and industry experts, and we simply cannot determine what this means, or what it would require. Our best guess is that it seeks to require the disclosure of the cost of an "Add-on" product, but if that is so, how is it different from the third form that itemized the cost of each such product? What is an "item" that is not also an "Add-on" or the car itself? What

[318] However, we cannot be at all sure whether this document will suffice to meet the "Express, Informed Consent" requirement. The definition of that term requires "an affirmative act communicating unambiguous assent to be charged" but does not tell the regulated parties what acts will suffice; rather, it merely lists acts that do not suffice (signed or initialed document, by itself; prechecked box; practice that subverts choice). *See* Proposed Section 463.2(f). It does not assist the market to impose a requirement and then define its specifics largely by describing what does not suffice. Decades, if not centuries, of state law have established what constitutes an adequate manifestation of assent in order to form a contract, including a consumer contract. The Commission's introduction of the Express, Informed Consent concept will upset this established law and has not been justified; what's worse, to do so without describing the affirmative steps necessary to meet the new requirement will do little more than inject mass uncertainty into the auto retailing market that can only operate to raise prices and otherwise adversely affect consumers.
[319] 87 Fed. Reg. at 42,046 (Proposed Section 463.5(c)).
[320] *Id*. (Proposed Section 463.5).
[321] Or some point before "charging" for the item. It is unclear when a consumer is "charged," and that term is undefined.

amount could possibly be charged that is **not** for a "product or service?" What fee or cost could be charged "for a product or service . . . without the product of service"? What is "the period of repayment," especially in a non-financed transaction? This is completely unclear and not a standard with which dealers can be expected to comply.

Even if this were corrected, it would still lead to a massive additional increase in confusing, repetitive disclosures to the consumer. For example, in connection with a vehicle purchase, a consumer who chooses to purchase a roof rack, upgraded wheels, floor mats, software upgrades, a satellite radio subscription, a service contract, wheel and tire protection, and GAP coverage, could need to be presented with – in addition to all the documents outlined above – *eight* additional documents, each signed, with at least two different prices that must be presented both in writing *and orally* by the dealer. This will *massively* slow down the sales process, costing consumers tremendous additional time and frustration.

Piling on disclosure after disclosure of information consumers already receive in a process the Commission desires to shorten, with all its attendant ambiguities, would not serve the interests of consumers. Any further consideration of the consumer disclosures in the proposed rule should be the product of extensive and industry engagement, research, and consumer testing.[322]

C. Websites

Proposed Section 463.4(b) of the TRR requires dealers who charge, directly or indirectly, for any optional "add-on" product or service to disclose an "Add-on List" on "each website, online service, or mobile application operated by or on behalf of the dealer, and at each dealership" and, for advertisements presented elsewhere, where to obtain the "add-on" list.

This provision suffers three major flaws. First, as explained above concerning the "add-on" disclosures required under Proposed Section 463.5, the proposed rule's definition of "Add-on," "Add-on Product(s) or Service(s)" and, "Add-on List" impermissibly excuses motor vehicle manufacturers from the "Add-on List" requirement. Second, it applies definitions of "add-on" and "add-on list" that are so overly broad and unwieldy that they will both deprive consumers of any value (and, worse, serve to confuse and frustrate consumers) and impose an enormous and unwarranted burden on motor vehicle dealers who are covered by this requirement. Third, it ignores a much more efficient and relevant approach to providing "add-on" pricing disclosures that has been endorsed by the American Bar Association (ABA).

[322] And, if the Commission were to finalize disclosures of this nature, it should develop model, safe harbor forms for making the disclosures that resolve the litany of issues raised herein.

1) Inconsistent Treatment of "Add-on" Sellers

The Commission states that the "Add-on List" requirement would help ensure that dealers who provide such disclosures "will not be competitively disadvantaged relative to those that do not." Ironically, however, as discussed above, the Commission's definition of "Add-on," "Add-on Product(s) or Service(s)" and, "Add-on List" would excuse factory direct sellers of motor vehicles and motor vehicle manufacturers who utilize the motor vehicle dealer network from this requirement even though both sell "add-on" products directly to consumers. This unexplained (and unexplainable) differential treatment for businesses operating in the same market would create the competitive disadvantage that the Commission seeks to avoid. This must be corrected.

2) Overly Broad Definitions

The second flaw is created by the sheer number of products captured by proposed rule's very expansive definitions of "Add-on" and "Add-on List." It states that an "Add-on" or "Add-on Product or Service" means:

> "…any product(s) or services(s) *not provided to the consumer or installed on the vehicle by the motor vehicle manufacturer* and for which the Motor Vehicle Dealer, directly or indirectly, charges a consumer in connection with a vehicle sale, lease, or financing transaction."

(Emphasis added.)[323]

This definition is considerably broader than what is commonly understood to constitute an "add-on" and how the Commission itself has presented the term. For example, the FTC staff's Supplemental Commentary states that:

> "'Add-ons' are ancillary products and services that are purchased and financed at the time of the transaction. Common add-ons include extended warranties, service contracts, Guaranteed Auto or Asset Protection ("GAP") insurance, window etching, and credit life and credit disability insurance."[324]

Similarly, the FTC staff's Auto Buyer Study uses the term "contract add-ons" to describe these types of products and services. However, the proposed rule seeks to pull into this definition any type of product or service that the dealer can sell with the vehicle that is not installed by the vehicle manufacturer.

[323] 87 Fed. Reg. at 42,044 (Proposed Section 463.2(a)).
[324] Supplemental Commentary at 8-9. (Internal Citations omitted.)

These additions open up a pandora's box of "add-on" products and services that can reach several hundred items per vehicle.

For example, there are 599 General Motors' accessories that a consumer can purchase from a dealer and have a dealer install for a single trim line of the 2022 Chevrolet Silverado pickup truck (the Silverado Short Bed Crew Cab) (see Attachment 16). This does not include accessories that a consumer can purchase from a dealer and have a dealer install that are available from accessory providers other than the vehicle manufacturer. Franchised motor vehicle dealers typically sell a variety of trim lines for each vehicle model, multiple vehicle models for each franchise, and many of them sell vehicles from more than one franchise. Indeed, the average franchised motor vehicle dealer rooftop has 1.9 franchises, and the average franchise offers twelve vehicle models. Applying the number of dealer-sold and installed accessories that are offered for the Silverado pickup truck to all of the models offered by a franchised dealership rooftop, the accessories offered by the average motor vehicle dealership numbers 13,657 (1.9 franchises x 12 models per franchise x 599 accessories). And this excludes different accessories that are offered for each trim line of each vehicle model (which would substantially increase this number) and dealer sold and installed accessories from providers other than the manufacturer.[325]

On top of this avalanche of "add-ons" covered by the Commission's open-ended definition is the proposed rule's definition of an "Add-on List," which provides:

> "'Add-on List' means an itemized list of all optional Add-on Products or Services for which the Motor Vehicle Dealer, directly or indirectly, charges consumers. The Add-on List must Clearly and Conspicuously disclose each such optional Add-on and the price of each such Add-on. If the Add-on price varies, the disclosure must include the price range the typical consumer will pay instead of the price."[326]

Therefore, in order to comply with the website disclosure requirement, motor vehicle dealers would be required to list literally thousands (if not tens of thousands) of items and their prices and routinely update that list to ensure it remains accurate. And they would be required to do the same on their mobile applications. What other important information on the dealer's website would this drown out? How would it be presentable and comprehensible on a mobile application? And when *all* of this must be presented in a manner that is "clear and conspicuous," how will *any* of it be "clear and conspicuous"?

This is not a workable regulatory scheme. Consumers clearly will not benefit from having their eyes glazed over with this information overload, and motor vehicle dealers will incur a very significant – if not impossible – burden attempting to provide it on their website and mobile applications. This is another area where the Commission needs to

[325] NADA, Wards Intelligence, and Automotive News Data Center.
[326] 87 Fed. Reg. at 42,044 (Proposed Section 463.2(b).

completely revisit its approach to what it is attempting to accomplish and then, to the extent it decides some type of additional disclosure scheme is warranted, conduct valid testing of such scheme before moving forward.

3) Failure to Consider Menu Pricing Disclosures

The third flaw is the Commission's failure to consider the value of the menu pricing disclosure approach that most motor vehicle dealers utilize today to offer VPPs to consumers. The Commission is aware of this approach because it is explained in the optional *NADA/NAMAD/AIADA Model Dealership Voluntary Protection Products Policy*, which the Commission identifies and mentions throughout the NPRM. But the Commission fails to explain why this approach is less effective in carrying out the Commission's goals and objectives related to VPP disclosures than the approach the Commission adopted in the Proposed TRR.

Menus, which can be offered in both a paper and electronic format, present consumers with a list of financing and protection product options that they may choose to utilize with their vehicle purchase. The formats that have been developed by motor vehicle dealer vendors provide these disclosures in a simple, clear, and uncluttered manner at a time when consumers know which products could potentially benefit them based on the vehicle they have selected.

The menu approach also has been recently endorsed by the ABA. In August 2020, the ABA overwhelmingly adopted Resolution 116B (see Attachment 17), which provides in pertinent part:

> "RESOLVED, That the American Bar Association urges federal, state, local, territorial and tribal governments to:
>
> * * *
>
> c) adopt legislation requiring that the purchase of any voluntary vehicle protection product may not be made a condition of the sale or lease of the vehicle, and that there is clear and conspicuous disclosure of pricing of voluntary protection products by dealers *through reasonable means, such as a pricing sheet, menu*, and/*or* website, before a consumer purchases a vehicle…."

(Emphasis added.)[327]

The ABA resolution clearly recognizes the value that a menu can provide to consumers, and it is provided at a time when consumers have a clear understanding of what products they may need based on their purchasing decision. These products are optional and many of them may be

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[327] American Bar Association, Resolution 116B (August 3-4, 2020). *See* Attachment 17.

cancelled by the consumer after they are purchased for a full refund during the initial period of the contract and a *pro rata* refund thereafter. If the Commission finds that a motor vehicle dealer has misrepresented the optional nature of these products, it may bring an enforcement action to address the misconduct. But to ignore the menu as an effective disclosure mechanism is to disregard a concise, timely, and straightforward method for presenting products and services that can be very beneficial to consumers.[328]

D. Other Prohibitions

Proposed Section 463.5(a) prohibits the sale of "add-ons" if the consumer "would not benefit" from the product or service[329] and includes in this prohibition the sale of "GAP insurance to buyers whose financing balance was so low that ordinary insurance would be adequate to cover any loss."[330] Proposed Section 463.6(a)(4) further "would require covered motor vehicle dealers to create and retain calculations of loan-to-value ratios in contracts including GAP agreements."[331]

While products certainly should not be sold that provide no benefit to consumers, the standard the Commission has proposed is vague and requires further research and definition.

As noted above, franchised motor vehicle dealers typically sell a variety of motor vehicles and these vehicles do not depreciate at a standard rate. For example, a 2019 BMW 750i could have lost 44% of its value in the first three years of ownership, while a 2019 Toyota 4Runner SR5 2WD could have lost less than 4% of its value. With regard to the sale of the BMW, if the consumer subsequently experienced a total loss of the vehicle, a "gap" could exist (and perhaps a significant gap) even with the presence of a down payment and/or positive trade equity. However, the likelihood of a significant gap with regard to the Toyota vehicle would be much less.[332]

Of course, franchised motor vehicle dealers sell a variety of new vehicle models (approximately 23 for the average franchised motor vehicle dealer with multiple trim lines for each model) and

[328] The NPRM incorrectly states that the proposed rule's website disclosure requirement "is consistent with industry guidance." 87 Fed. Reg. at 42,023. As the footnote offered in support of this statement (Footnote 118) makes clear, the *NADA/NAMAD/AIADA Model Dealership Voluntary Protection Products Policy* supports the use of a "simple menu format" to provide pricing and other disclosures related to voluntary protection products. Nowhere does this policy endorse either the use of a website or the Commission's overly broad definition of "add-ons" as a menu provides the most effective means of providing relevant and timely VPP information to consumers.
[329] In determining whether a consumer "would not benefit" from a particular "add-on," the Proposed TRR should not exclude the peace of mind and other comparable benefits that consumers can derive from VPPs and not supplant the Commission's judgment for that of the consumer in assessing whether the product is worth the price paid.
[330] 87 Fed. Reg. at 42,026.
[331] 87 Fed. Reg. at 42,034.
[332] Other variables would need to be known to determine the extent of any gap such as the amount of the consumer's auto insurance deductible and the presence of negative equity (both of which are typically covered by dealer-sold GAP Waiver protection).

their rate of depreciation varies. In addition, it is one thing to calculate the rate of depreciation *after* it has occurred (as in the example above) and quite another to estimate the rate of depreciation *looking forward*. The latter is unknown, meaning a projection must be made, and even sophisticated valuation experts struggle to provide accurate projections as valuations depend on market conditions and market conditions are not known in advance.[333]

Consequently, requiring that motor vehicle dealers, who certainly cannot know future market conditions, to "create and retain loan-to-value calculations in contracts including GAP agreements" for every model of vehicle they sell would be convoluted, burdensome, and of limited value. Therefore, dealers should not be required to create and retain LTV calculations. In addition, to the extent the Commission seeks to establish an LTV threshold under which GAP Waiver may not be sold, it should (i) conduct considerably more research into the matter, and (ii) if an LTV threshold is retained, establish it as a safe harbor and permit dealers to rely on calculations provided by the finance source to which they assign the RISC.

E. Recordkeeping

Another major component of the Proposed TRR is its requirement that motor vehicle dealers produce and retain a series of records for a period of 24 months.[334] This includes:

> "all materially different advertisements, sales scripts, training materials, and marketing materials regarding vehicle price, financing, or leasing terms; all materially different copies of lists of add-on products and services; consumer transaction documents such as purchase orders, financing and leasing agreements (and related correspondence, including declination documents as required by the preceding section); records to show compliance with monthly payment disclosure and add-on sales requirements; written consumer complaints and consumer inquiries regarding add-ons or individual vehicles; and other records needed to demonstrate compliance with this Rule."[335]

In crafting this sweeping proposal, which the NPRM erroneously describes as involving "some incremental recordkeeping burden,"[336] the Commission has both styled itself as a supervisory agency, which it is not, and developed a scheme that will harm the honest businesses it purports to protect.

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[333] *See, e.g.*, Jonathan Lopez, *Your End-Of-Lease GM Vehicle May Be Worth Buying*, (Mar. 4, 2022), GM AUTHORITY, https://gmauthority.com/blog/2022/03/your-end-of-lease-gm-vehicle-may-be-worth-buying/. ("*Edmunds* looked at the estimated residual values for 2019-model-year vehicles leased in February or January of 2019 and compared those residual values to the trade-in values for 2019 model year vehicles that were traded in during January and February of 2022. *Edmunds* found that on average, the 2022 trade-in value for all 2019 model year vehicles was well above the original estimated residual value, up an average of 33 percent, or $7,208.").
[334] 87 Fed. Reg. at 42,046 (Proposed Section 463.6).
[335] 87 Fed. Reg. at 42,027.
[336] 87 Fed. Reg. at 42,033.

1) The FTC is not a supervisory agency.

While the Commission has created recordkeeping requirements in other contexts, its role as an enforcement agency that lacks supervisory authority should not be overlooked. Unlike federal banking regulatory agencies, it is not charged with conducting inspections of regulated entities that must retain and produce detailed records demonstrating compliance. Rather, it is an antitrust and consumer protection agency responsible for enforcing federal laws prohibiting unfair and anticompetitive business practices, fraud, and deception.[337] The records it requires motor vehicle dealers to produce should not seek to create a records inspection scheme.

2) The recordkeeping obligation is massive and will only serve to burden the honest dealer.

This aside, nowhere is the Commission's desire to "help honest dealers"[338] more misplaced than with the massive records production and retention obligations it has delineated in the NPRM.

The imposition of this requirement is problematic for many reasons.

First, there is nothing "incremental" about the Commission's proposed recordkeeping requirements. With the exception of purchase orders and finance and lease documents identified in Section 463.6(3) and certain other select documents, the retention obligations for documents identified in this subsection represent entirely new obligations.

Second, these new proposed obligations represent massive burdens. For example, the need to retain "copies of all materially different Add-on Lists"[339] would, in light of the Commission's overly broad definition of an "add-on" (see the discussion above), require the retention of pricing lists for thousands of items that can change on a frequent basis.

In addition, the need to retain "all written communications relating to sales, financing, or leasing between the Motor Vehicle Dealer and any consumer who signs a purchase order or financing or lease contract with the Motor Vehicle Dealer"[340] opens up a pandora's box of records. There are a myriad of ways that such communications occur including, but not limited to, online chat features on dealer websites, e-mails and text messages with salespersons, and social media posts. This occurs on both dealer-owned devices and employee-owned devices and both during and after normal business hours. Requiring motor vehicle dealers to develop an apparatus to capture every such written communication involving every one of the over 40

[337] *See* 15 U.S.C § 45; *See also Enforcement*, federal trade commission, https://www.ftc.gov/enforcement. (last visited Sept. 9, 2022).
[338] 87 Fed. Reg. at 42,014.
[339] *Id.* at 42,047 (Proposed Section 463.6(a)(2)).
[340] *Id*. (Proposed Section 463.6(a)(3)).

million new and used vehicle transactions with consumers that occur every year is as unrealistic as it is massive.[341]

Further, the need to retain all "inquiries related to Add-ons, and inquiries and responses referenced in Section 463.4 of this part"[342] creates a broad, open-ended requirement that seeks to capture a significant portion of the additional communications that occur between motor vehicle dealers and their customers. It is fanciful to think that dealers can (without massive expenditures of resources and diversion of employee time) develop an apparatus that effectively and confidently collects and retains every chat, e-mail, text, and social media post involving a specific vehicle, any monetary amount, any financing term, any monthly payment amount, and any "add-on." And equally perplexing is how the Commission views this obligation as "incremental."

This is all on top of the need to (i) create and retain up to four written disclosures for every "add-on" sale,[343] (ii) create and retain LTV calculations for every contract involving a GAP Agreement,[344] and (iii) retain all of the advertising, sales, training, and marketing materials set forth in the NPRM.[345]

Third, and most problematic, is the punitive effect these proposed requirements will have on the "honest" and "law-abiding" dealers that the proposed rule purports to assist. The NPRM states: "These recordkeeping provisions are necessary to ensure that dealers make required disclosures under the Rule. They will also assist the Commission in assessing dealers' compliance with the Rule and help to ensure its effectiveness."[346] But at what cost? And how does that cost relate to the benefit they will produce?

As noted above, the Commission has brought an average of less than 4 enforcement actions per year against motor vehicle dealers in the past decade (and there is no indication that any of them suffered from a lack of documentation at the dealership). So, in order to enhance its ability to bring a handful of actions per year against motor vehicle dealerships under a new TRR, the Commission proposes to require every one of the nation's 16,745 franchised light-duty motor vehicle dealers and thousands of independent motor vehicle dealers to retain voluminous new

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[341] And the burden is actually many multiples of this number as it is unrealistic to think that motor vehicle dealers could develop a mechanism that distinguishes between communications with consumers who end up signing a purchase, financing, or lease contract and those who do not. In addition, seeking to compel the retention of information on privately owned devices invites a range of privacy concerns.
[342] 87 Fed. Reg. at 42,047 (Proposed Section 463.6(a)(5)).
[343] *Id*. (Proposed Section 463.6(a)(4)).
[344] *Id*.
[345] *Id*. at 42,046 (Proposed Section 463.6(a)(1)). Other concerns with the proposed recordkeeping requirements exist, such knowing what constitutes a "written consumer complaint." *Id*. at 42,047 (Proposed Section 463.6(a)(5)). Given the variety of methods in which a written communication can occur, motor vehicle dealers would need to know what must be in a communication to meet this definition, and this standard would need to be one which can be easily implemented.
[346] 87 Fed. Reg. at 42,027.

documents in the unlikely event that the Commission will need to see them. This severely punishes honest and law-abiding dealers by requiring them to incur the burden and go to the expense of producing and retaining a massive cache of documents so that the Commission can more easily bring enforcement actions against bad actors under a new TRR even though there is plenty of basis to bring actions against such actors under existing law. This will add massive costs to the system while producing little, if any, corresponding benefit to consumers.[347]

b. The proposed disclosures have not been consumer tested.

The Commission's failure to gather adequate information on its proposals in advance of issuing them also extends to not knowing what real-world effect the multiple disclosures mandated by the Proposed TRR will have on consumers. Even if the Commission is convinced, notwithstanding the repeated concerns it has expressed about the current length of motor vehicle sale and lease transactions, that motor vehicle dealers should provide additional disclosures to consumers during the sale process, the Commission has to appreciate the importance of understanding what effect such disclosures will have on consumers before mandating them.[348] Federal agencies, including the Commission, routinely test the effectiveness of new disclosures they are contemplating for consumers *before* mandating them and often discover that such disclosures would not assist – and in some cases would actually operate to the detriment of – consumers if adopted as proposed.

A prominent example of such an exercise involved a 2002 Department of Housing and Urban Development (HUD) Real Estate Settlement Procedures Act (RESPA) reform proposal that, among other components, would have required mortgage brokers, but not other mortgage providers, to disclose certain types of compensation to consumers to assist them when shopping for mortgages. FTC BE conducted a quantitative study of the proposal and set forth its findings in a 2004 report entitled *The Effect of Mortgage Broker Compensation Disclosures on Consumers and Competition: A Controlled Experiment*.[349] It stated, in part:

> "This study of over 500 recent mortgage customers in an experimental setting finds that the mortgage broker compensation disclosure proposed by the

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[347] Former FTC Chairman Muris and Former FTC BCP Director Beales similarly identify this concern: "Rules by their nature… also apply to legitimate companies that regularly keep their promises to consumers. Remedies appropriate for demonstrated bad actors can be quite burdensome for legitimate businesses, and there is often no straightforward way to limit required remedies to fraudulent practices. Overly burdensome rules can interfere with the market processes that actually serve consumers' interests, creating harm rather than preventing it." Back to the Future Report at 4.

[348] As noted by former FTC Chairman Muris and Former FTC BCP Director Beales: "Especially for a generalist agency like the FTC, quality rules depend on quality information. Quality information in turn requires a process that produces a fulsome record, in which the key information is subject to testing, analysis, and rebuttal by the various interested parties." Back to the Future Report at 5.

[349] James Lacko, et.al., *The Effect of Mortgage Broker Compensation Disclosures on Consumers and Competition: A Controlled Experiment*, Federal Trade Commission, (Feb. 2004). Available at: https://www.ftc.gov/sites/default/files/documents/reports/effect-mortgage-broker-compensation-disclosures-consumers-and-competition-controlled-experiment/030123mortgagefullrpt.pdf.

> Department of Housing and Urban Development (HUD) is likely to confuse consumers, cause a significant proportion to choose loans that are more expensive than the available alternatives, and create a substantial consumer bias against broker loans, even when the broker loans cost the same or less than direct lender loans. Similar adverse effects were found for two alternative versions of the disclosure.
>
> If consumers notice and read the compensation disclosure, the resulting consumer confusion and mistaken loan choices will lead a significant proportion of borrowers to pay more for their loans than they would otherwise. The bias against mortgage brokers will put brokers at a competitive disadvantage relative to direct lenders and possibly lead to less competition and higher costs for all mortgage customers."[350]

As is evident from the FTC BE's findings, the well-intended effect of HUD's proposal and its actual effect were very different and only became known after the FTC conducted its controlled consumer testing.

The FRB similarly recognized the importance of – and heavily relied upon – consumer testing prior to issuing a final rule in 2010 amending Regulation Z that also related to mortgage broker compensation disclosures.[351] After engaging a survey research firm that conducted four rounds of consumer testing in different cities and receiving its report entitled *Summary of Findings: Consumer Testing of Mortgage Broker Disclosures*,[352] the FRB amended a previous proposal stating:

> "Based on the Board's analysis of comments received on the 2008 HOEPA Proposed Rule, the results of consumer testing, and other information, the Board withdrew the proposed provisions relating to broker compensation. [Citation omitted.] *The Board's withdrawal of those provisions was based on its concern that the proposed agreement and disclosures could confuse consumers and undermine their decision making rather than improve it*."

(Emphases added.)[353]

Consumer testing also was essential to the Commission's and other federal agencies' creation of a model privacy notice under the GLB Privacy Rule that has been far more effective and meaningful in explaining a financial institution's privacy policy to consumers than the privacy

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[350] *Id.* at ES-1.
[351] 75 Fed. Reg. 58,509-58,538 (Sep. 24, 2010).
[352] *Summary of Findings: Consumer Testing of Mortgage Broker Disclosures*, MARCO INTERNATIONAL, INC., (July 10, 2008). Available at: https://www.federalreserve.gov/newsevents/pressreleases/files/20080714regzconstest.pdf
[353] 75 Fed. Reg. at 58,511.

notices financial institutions used before its creation.[354] As the FTC and the other federal agencies recognized, the privacy notices that financial institutions issued to comply with the Privacy Rule when it took effect came in different shapes and sizes and were filled with legalese that clung closely to the language explaining the required disclosures that was set forth in the Privacy Rule. Both Congress and the implementing agencies recognized early on the need for improvement, but they also recognized the importance of carefully testing the effectiveness of a new model privacy notice before issuing it to the public.

The steps the agencies took reflected a process that, while not fast or flawless, involved extensive consumer research, including quantitative testing, that effectively converted the distribution by financial institutions of unwieldy and confusing privacy notices to the distribution of a model notice with a standard format that far more effectively explains a financial institution's privacy policy to consumers. This culminated in a process that far more effectively carried out the statutory mandate than what would have occurred had the agencies engaged in a truncated process that lacked consumer input.[355]

In view of both the experience of the Commission and other federal agencies in these and many other instances and the magnitude of new disclosures that the Commission has proposed, the need for consumer testing in the instant matter should be self-evident.

The Commission is proposing a series of new disclosures involving an array of terms, including (i) the "offering price" in vehicle advertisements the first time that any of three items are referenced;[356] (ii) certain credit information whenever monthly payments are referenced or compared;[357] (iii) a series of disclosures related to "add-ons" before financing is referenced and still other disclosures before "add-ons" are sold;[358] and (iv) a list of all "add-ons" on the dealer's website and mobile applications.[359] These disclosures are sprinkled and superimposed on top of existing disclosures that motor vehicle dealers currently make to consumers (a) under TILA and Regulation Z and the CLA and Regulation M, (b) under various state disclosure regimes, and (c) via menu formats that are widely used by motor vehicle dealers before consumers purchase, finance, or lease a motor vehicle.

It is essential, therefore, that the Commission conduct robust testing of these disclosures, particularly given their magnitude, to determine whether they will enhance or diminish consumers' understanding of key elements of the transaction. And, as observed by Commission staff, "any recommendations to change or add to the current disclosures would need to consider

[354] 16 C.F.R. § 313.
[355] The joint Final Model Privacy Form Under the Gramm-Leach-Bliley Act, along with an explanation of the process used by the implementing agencies to produce the form, is available at 74 Fed. Reg. 62,890-62,994 (Dec. 1, 2009).
[356] 87 Fed. Reg. at 42,045 (Proposed Section 463.4(a)).
[357] 87 Fed. Reg. at 42,046 (Proposed Section 463.4(d) and (e)).
[358] *Id*. (Proposed Section 463.5(b)).
[359] *Id*. (Proposed Section 463.4(b)).

the effect on the duration of the transaction or the already large amount of paperwork to review."[360]

Simply assuming that these additional disclosures will aid consumers – without obtaining *any* validation from experts in this field of research – amounts to a wishful and uninformed *fire-then-aim* experiment that the Commission can only hope works out for the best. The Commission should recognize from its own experience, and that of its sister agencies, that the development of sound public policy requires a more considered and responsible approach, especially for a rule of this scope and magnitude.

c. The proposed requirements have not been subject to an adequate cost-benefit analysis.

The Commission's assessment of costs and benefits is also deeply flawed.[361] The Commission's analysis both massively understates the costs of the Proposed TRR while wildly overstating its supposed benefits.

First, the Proposed TRR lacks any actual data on the economic costs of the rule, which the Commission effectively admits but tries to paper over with speculation and assumptions.[362] This failure to determine and explain the extensive costs of the rule is compounded by the FTC's refusal to go through an ANPRM process or to extend the comment period for the Proposed TRR, both of which would have allowed commenters to provide the agency with more accurate, comprehensive data. This falls far short of an agency's requirement to consider cost estimates in a way that is rational, rather than "inconsistent[] and opportunistic[]." *E.g.*, *Bus. Roundtable v. SEC*, 647 F.3d 1144, 1148-49 (D.C. Cir. 2011)(faulting the agency's cost-benefit analysis for "inconsistently and opportunistically fram[ing] the costs and benefits of the rule; fail[ing] adequately to quantify the certain costs or to explain why those costs could not be quantified; neglect[ing] to support its predictive judgments; contradict[ing] itself; and fail[ing] to respond to substantial problems raised by commenters," among other things).

In response to the NPRM and the Commission's flawed burden analysis, NADA sought to engage a reputable, widely recognized auto industry expert research center to conduct a study analyzing both:

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[360] Auto Buyer Study at 2. Commission staff further observed and recognized that the lessons learned from the Auto Buyer Study, far from standing alone, "provide a foundation for development of consumer education or for *further research into potential modifications of the buying process*."). (Emphasis added.) *Id*.
[361] *See generally*, Dan Goldbeck , *FTC Needs to Run Those Numbers Again*, AMERICAN ACTION FORUM, (September 1, 2022), https://www.americanactionforum.org/insight/ftc-needs-to-run-those-numbers-again/ (*See also* Attachment 20).
[362] 87 Fed. Reg. at 42,039 (providing "quantitative estimates" and "qualitative[]" descriptions, while admitting it "lacks enough information to determine" certain costs); *See also id.* at 42,028-31 (broadly soliciting comments on costs).

1) the cost to franchised light-duty motor vehicle dealerships of complying with the duties set forth in the Proposed TRR; and

2) how the duties will affect the time and cost of the typical motor vehicle sales transaction.

This proposed study would break out its analysis by business size, to better understand the effect of the Proposed TRR on small businesses.[363] NADA was informed that to conduct a study of this magnitude would require a minimum of four months to complete, as it would include analyzing the complex requirements of the Proposed TRR, developing a survey to obtain information about the effects of those new requirements, identifying and managing participants, conducting the survey, and analyzing the resultant data. This would, in turn, require identifying and interviewing dealer principals, general managers, and finance and insurance (F&I) managers, with expert market experience and hands-on transactional insight. It would also involve reaching out to dealership technology and advertising vendors to better understand how the Proposed TRR's mandatory forms, calculations, restrictions, disclosures, and other obligations would increase the time and cost to conduct a motor vehicle transaction. Finally, an analysis of costs would address both one-time, up-front costs, and annual recurring costs – each of which will be significant under the Proposed TRR.

Unfortunately, NADA has been unable to conduct this study because the Commission did not provide ample time to develop it and submit the results in the time allotted for comments. The FTC's failure to issue an ANPRM, together with its failure to provide a reasonable comment period extension (notwithstanding NADA's timely request), means that NADA's responses to the agency's assertions do not yet reflect any cost estimates supported by comprehensive data and rigorous analysis.

The Commission's failure to allow NADA sufficient time to conduct a cost analysis is problematic enough; but what is completely indefensible is that the Commission has apparently not undertaken any such study itself either. As noted in greater detail above, the new duties imposed by the Proposed TRR, the conscious restructuring of the sales process, the introduction of multiple and repeated new forms and added disclosures, and the inappropriately heightened liability standards will impede the efficiencies of online sales and shopping and inject massive new delay and confusion into the overall auto retail market. None of those clear effects are accounted for in the Proposed TRR – at least in part because the Commission failed to conduct a study of these consequences itself.

Indeed, there is not any clear analysis or discussion of any kind of the various additional costs. The NPRM does little more than simply list each section of the Proposed TRR and then make a summary estimate of cost or a request for comments on potential costs.[364] However, in doing so, the NPRM fails to identify many of the real world implications of the proposal, such as the

[363] Most of NADA's car dealer members are small businesses as defined by the Small Business Administration. NAICS 44111 (200 employees or less).
[364] *See, e.g.,* 87 Fed. Reg. at 42,040.

need to provide multiple additional forms, the need to explain and countersign those forms, the need to orally explain the content of the forms, the need to conduct unnecessary trade in valuations, the impediments to online shopping, the added consumer confusion over the multiple price disclosures, etc., as described in detail above.

Despite NADA's inability, due to of the rushed nature of the current rulemaking process, to proffer a comprehensive cost analysis, we have attempted to provide the best assessment of costs that we can at this point in time. Based upon our own detailed analysis of the Proposed TRR and the discussions we have been able to have with members of NADA and their vendors, NADA has prepared the tables set forth in Attachments 18 and 19. These tables are, respectively, NADA's PRA responses (set out in Attachment 18) and its RFA responses (set out in Attachment 19). Although these tables do not provide the kind of comprehensive, in-depth data that an expert research center study would contain, they nonetheless reflect good-faith analyses of the Proposed TRR's likely consequences and are certainly more robust than the Commission's cost assessments.

<u>Second</u>, as for the purported "benefits" of the Proposed TRR, the FTC's estimates are even more egregious. The NPRM's benefit assertion is not complicated, but it is little more than unsupported *ipse dixit*. The Commission relies on one thing to estimate the dollar benefits of the Proposed TRR, and that one thing is *literally* pulled from nowhere. Here is the entire basis for the NPRM's claim that significant monetary benefits will flow to consumers from the Proposed TRR:

> "The Commission assumes that, as a result of the proposed Rule provisions prohibiting misrepresentations and requiring price transparency, each consumer will spend 3 fewer hours shopping online, corresponding with dealerships, visiting dealer locations, and negotiating with dealer employees per motor vehicle transaction."[365]

That's it. That is the sole source of asserted cost savings under the Proposed TRR. There is no study, no survey, no data, no support, no analysis, not even any discussion of how this estimate was derived. It is simply just asserted.

To be sure, the Commission does cite one study – the 2020 Cox Automotive Car Buyer Journey – in connection with its time saving assertion.[366] But all that study is cited for, and all it says, is that the overall time a consumer spends "researching, shopping, and visiting dealerships for each motor vehicle transaction" is about 15 hours. The FTC then states the mathematical truism that 20% of 15 is 3 and claims that consumers will therefore save three hours.[367] Significantly,

[365] 87 Fed. Reg. at 42,037.
[366] 87 Fed. Reg. at 42,013 (Citing the 2020 Cox Car Buyer Journey study).
[367] Curiously, the study cited by the NPRM is the 2020 version of Cox Automotive Car Buyer Journey, despite the fact that the 2021 version of the same study is available. Importantly, the 2021 study reports that the total time

the Cox study cited by the NPRM says nothing about the proposals in the Proposed TRR and has absolutely no connection to any estimate of time savings.[368] The Commission's conclusory, unsupported reasoning could have equally justified an assumption that the Proposed TRR would save consumers 30% or 50% or even 90% of the time they currently spend researching, shopping, and visiting dealerships. The numbers are simply pulled from thin air.

Indeed, for many of the reasons previously discussed, far from delivering the benefits that FTC cites, the Proposed TRR will in reality result in zero benefits for consumers and, more likely, will introduce significant disbenefits. As discussed in detail in Section IV.a.3.B., above and elsewhere, many of the Proposed TRR's requirements will operate to confuse consumers, resulting at best in lengthier transactions and at worst in consumers making bad choices (as their confusion will cause them to focus on the wrong variables or transaction attributes).

What is clear from any analysis of the Proposed TRR is that the mandates set out therein will impose prohibitive costs and burdens on many dealers and their customers, resulting in very significant increases in the cost and time for motor vehicle transactions, with little or no commensurate benefits. And, because many of our members are small business and lack any in-house legal, administrative, or financial expertise necessary to comply with the mandates set out in the Proposed TRR, many dealers, particularly smaller ones, will be forced to rely more heavily on costly outside counsel and vendors to try to meet their compliance obligations. This will, by necessity, increase any cost estimates for such smaller dealers.[369]

Indeed, given the complex and inexplicable nature of many of the Proposed TRR's mandates, as discussed in-depth above, a few small dealers have even expressed a concern that it would effectively mean all dealers are noncompliant in some way. They fear that they will be unable to "self-insure" against any potential liability and would be forced instead to exit certain aspects of the motor vehicle sales market (which would make them noncompetitive and ultimately not viable) or need to sell their stores all together, which would necessarily lead to reduced employment and reduced competition.[370]

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buyers spent researching and shopping for a vehicle had dropped to 12.5 hours. *2021 Cox Automotive Car Buyer Journey Study Overview*, COX AUTOMOTIVE (Jan. 2021). Available at: https://www.coxautoinc.com/wp-content/uploads/2022/01/2021-Car-Buyer-Journey-Study-Overview.pdf. Of course, if the FTC applied its unexplained 20% metric to 12.5 hours, the number of hours saved would likewise drop – to 2.5.

[368] Even if the FTC did attempt to link the Cox study to the conclusion that 3 hours of time would be saved as a result of the Proposed TRR, it would have a very difficult time doing so. As explained in detail in the American Action Forum's article at Attachment 20, the balance of the Cox study reveals that there are not 3 hours of time available to be saved in the portion of the auto retailing process the Proposed TRR would affect.

[369] And that fact is not accounted for in the Proposed TRR.

[370] NADA suspects that the Proposed TRR will have at least as great an impact on small businesses in the independent used car and other dealer sectors falling within the proposal's scope, but NADA lacks any data to suggest what those impacts would be. Of course, as detailed in Section II.c above, it is the FTC's responsibility, and not that of the regulated community, to analyze the potential impacts on small businesses, on consumers, and on the economy in general, of any regulatory mandates it is considering *prior to issuing a proposed rule.*

d. The proposed requirements will significantly disrupt state regulatory regimes.

The Commission also refuses to "consider whether existing [federal] regulations made its proposed regulation unnecessary." *Inv. Co. Inst. v. CFTC*, 720 F.3d 370, 377 (D.C. Cir. 2013); *see, e.g.*, *Am. Equity Inv. Life Ins. Co. v. SEC*, 613 F.3d 166, 179 (D.C. Cir. 2010) ("[F]ailure to analyze the efficiency of the existing state law regime renders arbitrary and capricious the [agency's] judgment."). The Commission knows that the problems it seeks to address – advertising misrepresentations and unlawful practices related to add-ons and deceptive pricing" – are already prohibited by federal and state laws across the country and therefore have already been the subject of federal and state enforcement actions for years.[371] To ensure that such widespread regulation continues, the proposed rule expressly states that it does not preempt state law.[372] Yet the Commission never explains how preexisting and "substantial" "federal and state law enforcement efforts" are insufficient beyond the fact that such efforts have not eliminated 100% of unfair and deceptive practices.[373] That is not a *reason* for piling on with new federal regulation; the fact that a very small number of willful lawbreakers continue to break state laws does not mean that existing state law is inadequate, that additional federal regulation would improve law enforcement or compliance, or that the benefits of additional federal regulation would outweigh the costs.

The Commission also must consider the effect its regulation will have on state VPP disclosure regimes and other requirements. For example, the California Automobile Sales Act requires a signed written pre-contract disclosure of six types of products or services, if charges for those items will be included in a conditional sale contract.[374] The six types of items are contract cancellation option agreements, insurance, service contracts, debt cancellation agreements, "surface protection products," and "theft deterrent devices" (as the latter two terms are defined by California law).[375] The required written disclosure must identify the charges for each item, a total, a disclosure of the amount of the regular monthly installment payment including the listed items, and the amount of the regular monthly installment payment excluding the listed items.[376] Assuming this disclosure would not be preempted by Section 463.9 of the Proposed TRR, how would the consumer comprehend this disclosure on top of the multiple disclosures described in Section IV.a.3.b above? It is difficult to image consumers benefitting from this information overload and the fatigue that would accompany it. And how would the proposed requirements affect consumer comprehension of disclosures required by other states?

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[371] *See* 87 Fed. Reg. at 42,013, 42,015-18.
[372] 87 Fed. Reg. at 42,047 (Proposed Section 463.9).
[373] *Id*. at 42,035. The Commission effectively admits it has no evidence that state laws are deficient when it broadly seeks comments on their efficacy. *See* 87 Fed. Reg. at 42,031. And, again, the Commission's refusal to go through an ANPRM has tainted its entire decision-making process by depriving it of necessary data to conduct this analysis.
[374] Cal. Civil Code § 2982.2.
[375] Cal. Civil Code § 2982.2(a)(1)(B).
[376] Cal. Civil Code § 2982.2(a)(2)-(4).

It is essential that the Commission carefully review comments filed by state motor vehicle dealer associations to gain better insight into the disruption and confusion that the Proposed TRR would create for consumers and motor vehicle dealers on multiple fronts. Without such coordination and without adequate testing of the net effort of federal and state requirements on consumers, the FTC is inviting a costly, chaotic, and counterproductive implementation scheme.

e. The NPRM does not adequately consider detrimental reliance.

The proposed rule also fails to consider the reliance interests of motor vehicle dealerships with respect to the existing regulatory regime. When "prior policy has engendered serious reliance interests," those interests "must be taken into account." *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009). This concern is particularly acute when the agency changes its position on a "longstanding policy" – a situation where "'serious reliance interests'" are far more likely. *Encino Motorcars, LLC v. Navarro*, 579 U.S. 211, 222 (2016). Thus, for the agency to meet its obligations when it changes longstanding policy, it must affirmatively "assess whether there [are] reliance interests, determine whether they [are] significant, and weigh any such interests against competing policy concerns." *DHS*, 140 S. Ct. at 1915.

The Proposed TRR is a wholesale change to longstanding Commission policy regarding motor vehicle dealers, as it replaces targeted "federal and state enforcement actions" with a highly prescriptive regulatory regime with prophylactic disclosure rules to purportedly "deter" wrongdoing before it occurs.[377] The proposal would also empower the Commission for the first time to seek civil penalties for violations.[378] These changes upset the longstanding reliance of motor vehicle dealers on a more focused federal law enforcement regime that gave dealers flexibility to decide how they truthfully disclosed prices to consumers. The Commission's proposal arbitrarily fails to consider how auto dealers have developed such reliance or how significant those interests are. *DHS*, 140 S. Ct. at 1915.

V. Even if additional regulation were necessary, there are better alternatives to the rules proposed in the NPRM.

Even if the data the Commission has put forward could show that there is currently a serious, national problem in the motor vehicle dealer industry that requires federal intervention, the Commission has not tested its proposed solutions to determine whether less burdensome alternatives exist. *See Am. Ass'n of Cosmetology*, 258 F. Supp. 3d at 75. Indeed, there is no indication that the Commission has considered any alternatives to its Proposed TRR.[379]

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[377] 87 Fed. Reg. at 42,013.
[378] 87 Fed. Reg. at 42,039; 87 Fed. Reg. at 42,047 (Joint Statement of Comm'rs Khan, Phillips, Slaughter, and Bedoya).
[379] *See* 87 Fed. Reg. at 42,035 ("[T]he Commission has not proposed any specific alternative compliance mechanisms for small businesses. The Commission seeks comment and information on the need, if any, for

One less burdensome and more effective alternative that the Commission should have considered (and in the future should consider) to address its concerns involving VPPs (which is the largest component of the Proposed TRR) would have been to coordinate with the FRB and appropriate state authorities to establish a safe harbor against UDAP and pricing discrimination claims for motor vehicle dealers that adopt, implement, and maintain the *NADA/NAMAD/AIADA Model Dealership Voluntary Protection Products Policy* (Attachment 21). The Commission favorably cites the policy five times in the NPRM[380] but nowhere indicates that it has considered whether it provides a more prudent and cost-effective means of addressing its concerns than the approach the Commission has taken in the Proposed TRR.[381]

This is regrettable as the policy provides a robust array of protections for consumers that can be adopted in a manner that does not delay the sales process or impose massive, costly, and unnecessary burdens on motor vehicle dealers. The following is a summary of several key components of the *NADA/NAMAD/AIADA Model Dealership Voluntary Protection Products Policy* that address compliance at every stage of the life cycle of a VPP.

- *Policy Adoption and Statement*

Motor vehicle dealers who adopt the policy establish a comprehensive framework for promoting VPP compliance within the dealership and express that commitment in a poster that is prominently displayed to prospective customers. It clearly states that the purchase of VPPs is completely optional.

- *Legal Compliance, Training, Oversight, Coordination, and Records Retention*

The policy provides a mechanism to ensure that it is not simply adopted but also implemented and maintained. A key component is initial and ongoing training of all dealership employees who perform VPP functions.

- *Product Selection*

The policy provides that the dealership's VPPs must offer value, and it provides considerations for determining whether to include a particular protection product in the dealership's VPP offerings such as the product features, its claims payment and cancellation process, and the product provider's financial ability to provide the product benefits.

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alternative compliance methods that would, consistent with the statutory requirements, reduce the economic impact of the proposed rule on small entities.").

[380] *See* Footnotes 17, 28, 118, 120, and 136.

[381] In addition to considering this compliance approach, the Commission should also consider using the term "voluntary protection products" to describe the types of products addressed in the policy. It is an accurate term (these are "voluntary" "products" that are offered to "protect" the consumer's investment in the motor vehicle being purchased or the financing commitment for the purchase) and it stresses their voluntary nature every time they are referenced.

- *Product Pricing*

The policy provides an optional framework for pricing the dealership's VPPs in a manner that (i) promotes standardization, in order to address concerns about arbitrary, inconsistent, and/or discriminatory pricing, and (ii) permits discounting for legitimate business reasons, in order to promote competition in the marketplace. This portion of the policy is modelled after a similar pricing approach that is contained in the optional *NADA/NAMAD/AIADA Fair Credit Compliance Policy & Program* (Attachment 22), which fully adopts and expands on a compliance requirement contained in prior Department of Justice (DOJ) consent orders with motor vehicle dealers,[382] and that shares many elements of compliance requirements recently imposed by the FTC in consent orders with motor vehicle dealers.[383]

This approach also has been endorsed by the ABA, which included in Resolution 116B the following recommendation:

> "RESOLVED, That the American Bar Association urges federal, state, local, territorial and tribal governments to:
>
> b) adopt laws and policies that promote the adoption of an enhanced nondiscrimination compliance system for dealer compensation for arranging and/or originating a vehicle finance contract by offering a safe harbor against pricing discrimination claims for dealers that faithfully implement the NADA/NAMAD/AIADA Fair Credit Compliance Policy and Program…."[384]

- *Product Advertisement*

The policy states the imperative that the dealership will not advertise or market VPPs "in a manner that is deceptive, misleading, or otherwise inconsistent with their terms or conditions."[385]

- *Product Presentation and Sale*

The policy establishes several key responsibilities during this phase of the VPP sales process.

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[382] *See* Section 2.c of *United States of America v. Pacifico Ford, Inc.*, (E.D. Pa. Sept. 4, 2007) (consent order), Available at: https://www.justice.gov/archive/usao/pae/News/2007/aug/pacificoorder.pdf; and *United States of America v. Springfield Ford, Inc.*, (E.D. Pa. Sept. 4, 2007) (consent order), Available at: https://www.justice.gov/sites/default/files/crt/legacy/2010/12/15/springfield_order.pdf.
[383] *See* Section VII *Federal Trade Commission and People of the State of Illinois v. North American Automotive Services et.al.*, No. 1:22-cv-01690, (N.D.Ill. Mar. 31, 2022), Available at: https://www.ftc.gov/system/files/ftc_gov/pdf/6-1%20Stipulated%20Order.pdf; *See* Section V of *Federal Trade Commission v. Liberty Chevrolet, Inc. et.al.*, No.: 1:20-cv-03945-PAE, (S.D.N.Y. May 22, 2020), Available at: https://www.ftc.gov/system/files/documents/cases/bronx_honda_stipulated_final_order_liberty_chevrolet.pdf.
[384] *See* Attachment 17.
[385] Section V, NADA/NAMAD/AIADA Fair Credit Compliance Policy & Program (Attachment 22).

- The dealership will ensure that employees who offer VPPs to customers fully understand the product features, and it will not offer VPPs for which customers are ineligible or would derive no value. Unlike Section 463.5(a) of the Proposed TRR, this provision does not impose an LTV calculation requirement for the reasons stated in Section IV.a.3.D above.

- The dealership will inform customers orally that the VPPs it offers are optional.

- The dealership will present VPPs to customers in a standard, simply menu format that prominently discloses (i) that the purchase of any listed VPP is optional, (ii) that the dealer may retain a portion of the sale price and the VPPs may be available from other sources, and (iii) the pricing of VPPs (both the dollar amount of each VPP and how its purchase would affect the customer's monthly payment if the vehicle is financed through the dealership). This approach does not require the creation of any new forms or extend the time required to complete the transaction as dealers routinely employ menus as part of the VPP sales process and therefore can utilize it to provide key disclosures at a time when the customer is in a position to assess fully its protection product needs.

- The dealership will present VPPs in a manner that is designed to assist customers in making informed purchasing decisions, and this includes providing customers with available information on the products' benefits and limitations. Proposed Sections 463.5(b)(1)(iv) and 2(iv) would imprudently limit the dealership from providing such information.

- The dealership will request the customer's acknowledgement of the menu disclosures and its election to purchase or decline the VPPs that are offered, and the dealership will provide the customer with the terms and conditions of each VPP selected by the customer.

- The policy explains how the dealership will facilitate a customer's desire to exercise a right to cancel a VPP after it is purchased.

- The policy states that the dealership will promptly and courteously respond to customer complaints regarding VPPs purchased from the dealership.

The need to coordinate with the FRB in this endeavor is essential because, as discussed above, Congress has entrusted the FRB with responsibility for determining the content, form, and timing of TILA disclosures provided by motor vehicle dealers covered by the Proposed TRR and those disclosures include premiums for VPPs. Similarly, coordination with state authorities is essential as several have adopted VPP disclosure regimes that could be disrupted by any VPP mandates and indeed would be disrupted by those set forth in the Proposed TRR.[386]

The *NADA/NAMAD/AIADA Fair Credit Compliance Policy & Program* provides a sound approach to promoting VPP compliance at motor vehicle dealerships that avoids the burdens, complexities, confusion, costs, and excesses of the approach taken by the Commission in the Proposed TRR. The Commission should consider this reasonable and far less burdensome alternative to the proposed rule, and we welcome the opportunity to explore this further with the Commission moving forward.[387]

VI. The Proposed TRR would violate the First Amendment.

Finally, the Commission's disclosure rules in Section 463.4 of the Proposed TRR violate the First Amendment. The First Amendment protects speech even in the context of a "'commercial transaction.'" *Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748, 762 (1976). Compelled speech, even in a commercial setting, triggers heightened scrutiny. *See id.* at 2374; *NAM v. SEC*, 800 F.3d 518, 524 (D.C. Cir. 2015).

Dealers' ability to tailor their speech in an automobile sale, deciding whether to disclose a final price toward the end of transaction rather than at other times, is a decision that implicates the First Amendment because it is directly related to the *message* being conveyed. Some customers may want to first discuss features, performance, gas mileage, or availability, while others may focus on price or credit terms first and foremost. But the *content* and *message* of that conversation directly implicates the First Amendment. Even if end-of-transaction pricing were "potentially misleading" (it is not), the timing of a price disclosure is "not *inherently* … misleading," and therefore cannot be freely regulated as if it were categorically suspect. *See Alexander v. Cahill*, 598 F.3d 79, 96 (2d Cir. 2010) (emphasis added); *see, e.g.*, *Ocheesee Creamery LLC v. Putnam*, 851 F.3d 1228, 1238 (11th Cir. 2017). The Commission thus bears the "considerable" burden of justifying a restriction on this speech. *E.g.*, *Pagan v. Fruchey*, 492 F.3d 766, 770 (6th Cir. 2007). The Commission's restriction "will be upheld [only] if the government 'assert[s] a substantial interest in support of its regulation,' 'demonstrate[s] that the restriction on commercial speech directly and materially advances that interest[,]' and draws the regulation narrowly." *Id.* at 771.

The Commission's proposed rule fails to justify its disclosure requirements at every point of this test. First, the Commission's primary interest for imposing disclosure rules is to help consumers

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[386] *See, e.g.,* Cal. Veh. Code §§ 11713.18-11713.21, which requires that a Pre-Contract Disclosure Statement addressing VPPs be provided to consumers.

[387] NADA also welcomes the opportunity to explore further with the Commission joint educational endeavors that can enhance consumer understanding of the issues addressed in the Proposed TRR without the adverse consequences that the proposed rule would create. This includes promoting the educational resources of the Americans Well-informed on Automobile Retailing Economics (AWARE) Coalition, as well as NADA's recent *Know Before You Buy* brochure (Attachment 23). *See* Americans Well-informed on Automobile Retailing Economics (AWARE), https://autofinancing101.org/ (last visited Sept. 8, 2022).

avoid "time … negotiating under false pretenses and visiting dishonest dealerships" and thus "reduce the number of inefficient transactions."[388] But, as discussed above, the Commission has not produced reliable data showing how frequently these situations occur, how much of an economic burden they impose, and whether its proposed disclosures would alleviate those burdens.[389] The Commission has therefore not carried its burden of showing that this interest is "substantial." *Pagan*, 492 F.3d at 771.

The Commission asserts a secondary interest in preventing transactions that are consummated under false pretenses.[390] But that hypothetical involves an unscrupulous auto dealer that is *already* violating the law through active deception; the Commission fails to explain how additional burdensome regulation of *all* dealers would alleviate such harms. And the Commission has failed to produce any data indicating how frequently such deceptions would occur or how likely the disclosure rules would be to thwart them.

The Commission has also failed to demonstrate how its mandatory disclosures would directly and materially address the problem of inefficient transactions. The Commission is required to show "that the measure it adopted would 'in fact alleviate' the harms it recited 'to a material degree.'" *NAM*, 800 F.3d at 526-527; *see also AMI v. U.S. Dep't of Agric.*, 760 F.3d 18, 26 (D.C. Cir. 2014) (requiring "evidence of a measure's effectiveness"). Instead, the Commission rests on "speculation [and] conjecture," *NAM*, 800 F.3d at 526, assuming – without any evidence, data, or consumer testing – that its rules would save consumers a total of three hours per transaction.[391] After simply guessing at the rule's efficacy, the Commission also fails to consider more tailored restrictions on auto dealer speech that could effectively achieve the Commission's goals.[392]

Even if the Commission's disclosure rules were not subject to heightened First Amendment scrutiny, they would still fail under the *Zauderer* standard that applies to certain disclosure requirements.[393] *Zauderer* holds that any disclosure requirements must be "reasonably related to the State's interest in preventing [confusion or] deception of consumers." *Zauderer v. Off. of Disciplinary Couns. of Supreme Ct. of Ohio*, 471 U.S. 626, 651 (1985). A disclosure fails that test if it is "unjustified or unduly burdensome." *See NIFLA*, 138 S. Ct. at 2376-77.

The Proposed TRR fails the *Zauderer* standard. To give just a few examples (which are each discussed in greater detail above), the proposal: (1) requires disclosures that are "subject to misinterpretation by consumers," *R.J. Reynolds Tobacco Co. v. FDA*, 696 F.3d 1205, 1217

388 87 Fed. Reg. at 42,038.
389 *See* 87 Fed. Reg. at 42,022-25, 87 Fed. Reg. at 42,038-39.
390 *See* 87 Fed. Reg. at 42,038.
391 87 Fed. Reg. at 42,037.
392 *See* 87 Fed. Reg. at 42,022-25, 87 Fed. Reg. at 42,038-42,039.
393 Zauderer does not apply here because it is limited to regulations of "voluntary commercial advertising," not price disclosures. *NAM*, 800 F.3d at 523; *see also NIFLA*, 138 S. Ct. at 2372 ("*Zauderer* does not apply outside of these circumstances."). Moreover, *Zauderer* only applies to "purely factual" information, which does not include partial disclosures. *See R.J. Reynolds Tobacco Co. v. FDA*, 696 F.3d 1205, 1216 (D.C. Cir. 2012).

(D.C. Cir. 2012), *overruled on other grounds AMI*, 760 F.3d at 22; (2) imposes enormous actual costs with only hypothetical benefits, *cf. NIFLA*, 138 S. Ct. at 2376-77; (3) fails to show that the "the possibility of deception" without mandatory disclosures "is self-evident," *Zauderer*, 471 U.S. at 652-53; *see also Ibanez v. Fla. Dep't of Bus. & Pro. Regul., Bd. of Acct.*, 512 U.S. 136, 146 (1994); (4) imposes comprehensive obligations to speak that effectively prevent dealers from articulating their own views, *see Ibanez*, 512 U.S. at 146-47; (5) chills lawful commercial speech, *Zauderer*, 471 U.S. at 651; and (6) regulates all auto sales generally rather than sales that are most susceptible to deception, *cf. NIFLA v. Becerra*, 138 S. Ct. 2361, 2377 (2018) ("Our precedents require disclosures … to extend 'no broader than reasonably necessary.'"); *Am. Beverage Ass'n v. City & Cnty. of San Fran.*, 916 F.3d 749, 757 (9th Cir. 2019). The First Amendment further underscores that the Commission may not saddle dealers with forced disclosure obligations that are costly, burdensome, and confusing, and that the Commission has never shown are actually likely to achieve the Commission's purported objectives.

VII. Responses to Specific Questions

As explained in Section II.b above, it is patently unreasonable for the Commission to expect commenters to be able to prepare comprehensive, industry-wide data, studies, and analyses in response to 49 expansive questions within the meager comment period provided by the Commission. We also note that the tone of many of the questions, similar to the press release announcing the NPRM, reflects an unnecessary hostility to the industry that further undermines confidence in this exercise. In addition, the open-ended nature of the questions, which seek information that should have been obtained prior to developing specific proposals, reflect an inadequate understanding of the marketplace that contradicts the Commission's apparent view that its prior activity involving motor vehicle dealers has made it sufficiently educated to craft informed and effective proposals in this matter. Notwithstanding these flaws, we have set forth below, to the extent feasible, responses to the questions posed by the Commission that are not addressed elsewhere in these comments.

1. Does the proposed rule further the Commission's goal of protecting consumers from unfair or deceptive acts or practices in the motor vehicle marketplace? Why or why not?

It does not. As addressed throughout these comments, consumer protections already exist under multiple federal and state laws in each area addressed in the Proposed TRR. The Commission has put forth a series of requirements that are unnecessary, uninformed, unsupported, uncoordinated, untested, and highly problematic for both consumers and motor vehicle dealers.

2. Are there any unfair or deceptive acts or practices not addressed by the proposed rule that should be? For example, should there be additional provisions pertaining to leasing or provisions pertaining to interest rates or other financing terms?

There is no need or basis for such action. Optional dealer-assisted financing is extraordinarily competitive and provides access to credit and competitive rates to millions of consumers each year. See the discussion in Section I.a.3 above.

4. Portions of the proposed rule contemplate additional disclosures in an already lengthy, confusing and disclosure-heavy but low-comprehension transaction. Would any of the additional proposed disclosures do more harm than good? If so, is there another measure that should be used to address the consumer protection concerns described herein?

As discussed at length in Section IV.a above and elsewhere, the additional proposed disclosures would do much more harm than good. Regarding another measure that should be explored to address the Commission's consumer protection concerns, see Section V above regarding the optional *NADA/NAMAD/AIADA Model Dealership Voluntary Protection Products Policy*.

5. Should the Commission provide more detailed requirements regarding the content or form of any of the proposed disclosures?

As explained in detail above, questions abound regarding how the disclosures would operate in the marketplace and, in a number of areas, even what they mean. If additional disclosures are mandated, they should only be issued after extensive (i) coordination with the FRB and State authorities, (ii) stakeholder input, (iii) consumer testing regarding the efficacy of their content, form, and timing, and (iv) clarification of how they operate and should be implemented. The Commission should also develop model forms for such disclosures and provide safe harbor protection to motor vehicle dealers who use them.

6. What economic burdens would be imposed on dealers if the Rule proposals were adopted? Are there changes that could be made to lessen any such burdens without significantly reducing the benefits to consumers?

In denying NADA's request for an extension of the comment period (see Attachment 3), the Commission precluded NADA from providing comprehensive research and data that would quantify the projected burden. Multiple portions of the comments, including Attachments 18 and 19, explain the lack of justification for – and the extraordinary nature of – the burdens that the rule would impose on dealers. With regard to possible changes, the Commission should engage in consumer testing of any requirements it contemplates imposing to determine how to properly structure them.

7. Does the proposed rule adequately address sales and leasing practices that take place partially or completely online? If not, should there be different or fewer or additional requirements for online sales and leasing?

The proposed rule would have a very adverse impact on online transactions. The Commission should not impose additional requirements that would impede the technological progress that has been – and continues to be – made in this area. See the discussion in Section IV.a.3 above.

8. Should any final Rule include additional provisions to address electronic disclosures or recordkeeping? Why or why not? If yes, in what manner(s)?

The Commission should not impose additional recordkeeping obligations and should recognize that the creation and retention of additional records creates burdens, increases risks of identity theft, and raises privacy concerns. See Section IV.3.C above. Records retention requirements should certainly permit the electronic storage of those records.

9. Should any final Rule address disclosures in other languages? Why or why not? If yes, in what manner(s)?

For the reasons stated in Section IV.A.2 and 3.B above, a final rule should not include any new disclosures, including those in other languages. The imposition of such a requirement would be very unwieldy and burdensome as it would involve both written and oral disclosures involving dealership personnel in multiple departments. This would be much broader and very different from the Spanish language requirement in the Used Car Rule, which is confined to a window form and contract disclosure in Spanish using a form layout and language that is provided in the rule.[394] The sheer number of forms and circumstances that would be affected by a multi-language disclosure requirement in the Proposed TRR would be completely unworkable. In addition, because the demographics of the population differ significantly from jurisdiction to jurisdiction, any assessment of the need for – and deployment of – a foreign language disclosure requirement should be addressed at the local level.

10. Are the proposed definitions clear? Should any changes be made to any definitions? Should the scope of any of the proposed definitions be expanded or narrowed, and if so, why?

This question is addressed throughout the comments as it relates to several terms. However, to reiterate what is discussed in Sections IV.a.3.B(3) and C(1) above, the definition of "Add-on" and "Add-on Product(s) or Service(s)" impermissibly excuses motor vehicle manufacturers (especially those that themselves retail motor vehicles) from the requirements related to these definitions. In addition, as discussed in Section IV.a.3.C(2), these definitions and the definition of "Add-on List" would make the website and mobile application requirement in Section 463.4(b) of the Proposed TRR completely unworkable for motor vehicle dealers and thoroughly unhelpful to consumers. Similarly, as explained in Section IV.a.3.b(3), there are portions of the definition of "Express, Informed Consent" that are incomprehensible and need to be addressed.

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[394] 16 C.F.R. § 455.5.

11. Are additional definitions needed?

Yes. See the discussion in Section IV.a.3 above regarding the meaning of the following terms as used in the Proposed TRR: "charged," "item," "discount," "rebate," and "trade-in value." The term "online service" in Section 463.4(b) of the Proposed TRR should also be defined.

12. Are the proposed prohibitions on misrepresentations in this section clear, meaningful, and appropriate? Should the scope of any of the proposed prohibitions be expanded or narrowed, and if so, how and why?

The prohibitions on misrepresentation are unnecessary, conflict with the FTC Act and the FTC Policy Statement on Deception, and, in many respects, lack clarity. See the discussion in Section IV.a.1 above.

13. Would any of the proposed prohibitions inadvertently discourage truthful advertising to the detriment of consumers? For example, would prohibitions against misrepresenting the cost of a purchase make it less likely dealers would include truthful pricing claims in their ads? If so, please provide suggestions on how to address these issues.

Yes. As noted in Section IV.a.3.a above, the proposed requirements will ultimately limit, if not in some cases eliminate, price advertising by dealers – and may even suppress other types of dealer advertisements as well. Fewer price advertisements will severely limit price discovery which, in turn, will require consumers to visit dealerships for price information instead of conducting online research (which will further delay the car shopping process). This will lead to less informed consumers, decrease price competition among dealers, and provide an unwarranted competitive advantage to vehicle advertisers who are not covered by the proposed rule. To avoid this outcome, the Commission should focus its efforts on enforcing the existing advertising rules that already make illegal all of the problematic behavior at which the Proposed TRR is targeted. The Commission's current deception standard and state requirements provide defined, enforceable advertising standards that should not be disrupted.

14. Are there any other practices by dealers relating to vehicle sales, financing, or leasing that are particularly harmful to military servicemembers? For example, are there particular unfair or deceptive acts or practices engaged in by dealerships in the proximity of, or within, military installations?

There is no credible evidence of systemic problems in this area and, to the extent such actions occur, military commanders possess the authority to declare bad actors off limits to military personnel. See 32 C.F.R. Part 631. This area does not require further Commission intervention beyond enforcement activity against any wrongdoers.

15. Proposed § 463.3(e) would prohibit dealers from misrepresenting the availability of vehicles at an advertised price. Are there situations in which dealers misrepresent the availability of *vehicles without reference to price (e.g., the total number of vehicles of a certain make, model, and year the dealer has available)? If so, should the Commission amend the proposal in § 463.3(e) to directly address such misrepresentations? Why or why not?*

See the discussion of this prohibition in Section IV.a.1.B above.

16. Proposed § s 463.3(h) and (i) would prohibit dealers from misrepresenting when the transaction is final or binding on all parties and from making misrepresentations about keeping cash down payments or trade-in vehicles, charging fees, or initiating legal process or any action if a transaction is not finalized or if the consumer does not wish to engage in a transaction. As indicated in this document, these proposed provisions are intended to curb problems with the spot delivery of vehicles while the financing for the vehicle remains contingent—problems sometimes referred to as "yo-yo financing." Should the Commission consider alternative approaches to address such problems, such as requiring retail installment sales contracts to include a clause prohibiting financing-contingent sales, prohibiting the dealer from transferring title to a trade-in vehicle or performing any repairs or reconditioning before a sale is final or requiring dealers to return trade-in, deposit, and fees, if financing is not approved? What would be the effect of such a requirement, and what costs and benefits would it entail? Are there data regarding the feasibility of finalizing vehicle financing at or before the time the retail installment sales contract is signed?

See the discussion in Section IV.a.1.B above.

In addition, the Commission should not take action to disrupt conditional sales to consumers. Such sales are very routine in the marketplace, serve consumer preferences (and sometimes a consumer's need) for the delivery of a new or used motor vehicle at the time the transaction is conducted, and overwhelmingly are finalized on the terms agreed to by the dealer and consumer. Indeed, dealers are incentivized to finalize conditional sale contracts on such terms as dealers typically earn less if they and the consumer decide to enter into a different RISC because no finance source was willing to take assignment of the conditional sale contract on the terms submitted. While abusive spot deliveries have occurred and should not be tolerated, there is no credible evidence that they are a systemic problem in the marketplace.

When an abusive spot delivery does occur, the Commission can address it under its Section 5 UDAP enforcement authority and an array of remedies exist under state law. Aside from contractual rights that consumers possess, consumers and state attorneys general can bring an action under common law and/or their state UDAP statute if a business engages in deception, misrepresentations, wrongful repossession, or other harmful practices. These statutes typically provide for actual damages, statutory damages, exemplary damages, and attorneys fees. Depending on the fact pattern involved, abusive spot deliveries may also give rise to causes of action under TILA, CLA, FCRA, the Fair Debt Collections Practices Act,[395] and state laws including the Uniform Commercial Code and state retail installment sale acts.

17. Proposed § 463.3(j) would prohibit misrepresentations regarding whether or when a dealer will pay off some or all of the financing or lease on a consumer's trade-in vehicle. Should there be additional protections here—for example, should there be a requirement that dealers pay off outstanding financing or liens on a trade-in vehicle within a specified amount of time, or before selling the trade-in vehicle?

State laws already regulate business transactions of this nature, and paying off liens in a timely fashion is a normal business practice of dealers. When dealers take a consumer's vehicle in on trade with an outstanding lien, their primary objective is to pay off the lien as quickly as possible, obtain the title/lien release, and resell the vehicle. That's how dealers maximize profitability, improve cash flow, and maintain adequate working capital in the business. Any delays in that process hurt the dealer's business. Not surprisingly, there is no credible data that suggests there is a systemic problem that needs to be solved in this arena.

This question implies that a dealer would "intentionally" withhold payoff. There is no business reason for a dealer to delay or misrepresent paying off a trade in. Aside from the legalities and business disruption of delaying the payoff, an equally significant risk is the reputational damage caused by such action. With the free flow of information through social media, consumer advocate websites, the Better Business Bureau, and other public messaging, it wouldn't take long for such business practices to make it into the public domain. Dealers are community-based businesses that rely on their reputation for success. Such practices would also make their way to the office of the State Attorney General and Department of Motor Vehicles, possibly resulting in investigations and audits, which could lead to potential fines, suspension of business license, and/or criminal action. The consequences of delaying payoff are substantial and well known.

19. Are the disclosures that would be required by this section [§ 463.4] clear, meaningful, and appropriate? Should the scope of any of the proposed disclosures be expanded or narrowed, and if so, how and why?

These disclosures are problematic and should not be mandated for the reasons stated in Section IV.a above.

20. What would be the economic impact, and the costs and benefits, of these disclosure requirements?

In denying NADA's request for an extension of the comment period (see Attachment 3), the Commission precluded NADA from providing comprehensive research and data that responds

[395] 15 U.S.C. § 1601; 15 U.S.C. §§ 1667-1667f; 15 U.S.C. §§ 1681-1681; and 15 U.S.C. § 1681.

to this question. A general discussion of the topic is set forth in Section IV.a. above and Attachments 18 and 19.

21. Should this section include additional disclosure requirements? Given the length and complexity of the transaction, would additional disclosures make the consumer experience better or worse? Why or why not? If so, what are the costs and benefits associated with these additional disclosures?

Neither the proposed disclosures nor additional disclosures are necessary. See the discussion in Section IV.a above.

22. Is the timing of disclosures contemplated by this section appropriate and sufficient to provide consumers with useful information regarding the purchase or lease of a motor vehicle?

The timing of these disclosures is very problematic. See the discussion in Section IV.a above.

23. Would any of the required disclosures inadvertently discourage truthful advertising to the detriment of consumers? For example, to the extent the proposed rule would require that certain disclosures (e.g., Offering Price) must accompany other specific information, will dealers cease providing that other information altogether? If so, please provide suggestions on how to address these issues.

This issue is discussed in Sections IV.A.2.B and 3.A above.

24. Are there circumstances in which dealers should be required to make disclosures and contracts available in languages other than English? For instance, should dealers be required to provide disclosures and contracts in any language they use for advertising, or in any language they use to conduct sales, financing, or lease transactions? What would be the effect of such a requirement, and what costs and benefits would it entail? Are there other steps the Commission should consider taking to protect consumers from misrepresentations in dealer advertisements when the sale, lease, or financing transaction is conducted in a different language from the one used in advertising?

See the response to Question 9.

25. Are the proposed disclosures sufficient to provide consumers with clear, meaningful and appropriate information about the financing terms of the transaction? Are there other steps the Commission should consider taking to protect consumers from being misled regarding their financing terms and to ensure that consumers understand their financing options?

The proposed disclosures are very problematic. See the discussion in Sections IV.a.2 and 3.B above.

26. Proposed § 463.4(a) would require dealers to disclose the Offering Price in certain advertisements.

a. Do dealers already calculate a figure equivalent to the Offering Price for every vehicle in their inventory? If so, how is this calculated?

The question is unclear. Dealers determine the price at which they will advertise vehicles and frequently discount prices to remain competitive.

b. In particular, the Commission is contemplating whether it is necessary to prohibit advertising any price aside from the Offering Price to address concerns with unfairness and deception, including those described in this Document. Or, alternatively, should dealers be permitted to state in advertisements the Offering Price along with other offers that may be of limited applicability (provided the nature of the limited applicability is clearly disclosed)? c. Would the mandatory disclosure of Offering Price where required "crowd out" other information in advertising formats where dealers pay for time or space?

Dealers should be permitted to advertise consistent with the standards set forth in the FTC Policy Statement on Deception and state advertising requirements. Properly disclosed rebate offers or other pertinent information that can inform consumer purchasing decisions should not be prohibited or discouraged. See the discussion in Section IV.a above. Further, the discounting of motor vehicles to meet competitive pressures is one of the great consumer benefits that the current auto retailing model delivers. The Commission should not introduce limitations that operate to prevent or impede discounting and thereby force consumers to pay higher prices for the products they buy.

27. Proposed § 463.4(a) would also require a dealer to disclose the Offering Price in the first response to any query about any specific vehicle.

a. Is it appropriate to limit this requirement to only the dealer's first response about the specific vehicle? Or, should the Commission require dealers to include the Offering Price in additional communications to potential buyers?

The first response requirement would cause a variety of problems for consumers and motor vehicle dealers and extending it to additional communications with potential buyers would only exacerbate those problems. See the discussion in Sections IV.a.2.A and 3.b(1) above.

b. What other measures could be taken so consumers know the true Offering Price of a vehicle earlier in their decision-making process, including before expending resources to visit the dealership?

See the discussion in Section IV.a.3.B(1) above.

28. Proposed § 463.4(b) would require dealers to disclose an Add-on List in certain circumstances.

a. How many add-ons do dealers typically offer, and how many of those are sold regularly? Would this disclosure require such a lengthy list of add-on products and services that the list would be too long to be meaningful to consumers? If so, are there changes that could be made to this proposed requirement to reduce the amount of information disclosed while preserving the benefits to consumers? For example, would limiting this requirement to add-ons that are proposed by the dealer to a prospective buyer, as opposed to raised by the consumer, adequately address the harms that occur to consumers in the context of these transactions? Or, should the Add-on List be limited to a certain number (e.g., 15) of add-on products and services most frequently sold by the dealer in the previous quarter?

See the discussion in Section IV.a.3.C above. The Commission's proposed definitions applicable to "Add-ons" are so broad and unwieldy that they would smother the provision of any useful information to consumers. Regarding whether to limit any disclosure obligation to only those "add-ons" proposed by the dealer instead of raised by the customer, how would this be managed by the dealer and enforced by the Commission (a concern that also arises with other elements of the proposed rule applicable to oral communications)? Regarding the establishment of a limit on how many "add-ons" to include on an "Add-on" List based on a prior quarter sales calculation, this overlooks the more effective menu approach described in the same section. Consumers are in the best position to assess their VPP needs when they know which vehicle they will purchase and how the products the dealer offers might protect their investment. The menu format dealers use today provides those options without obscuring it with information that has no application to the consumer's circumstances. VPPs are optional and generally cancellable after they are purchased, and any violation involving them exposes the dealer to UDAP enforcement by the Commission and the States. See comments from state and metro automobile dealer associations regarding additional consumer protections related to "add-ons" that exist at the state and local level.

b. How common is it for the price of a given add-on product or service to vary for different vehicles and different transactions, and on what basis would the price vary? Would it be necessary for dealers to provide disclosures specific to an individual consumer, or could this proposed requirement be satisfied with a pre-formatted disclosure that could be provided to all potential buyers or lessees? If prices vary greatly, would disclosing the price range provide meaningful information to consumers?

The prices for certain "add-on" products can vary significantly, which is one of the reasons that the "Add-on" List disclosure requirement would be unhelpful to consumers and burdensome to dealers. For example, extended service contract premiums can differ based on variables such as (i) whether a vehicle is new or used; (ii) whether the coverage is comprehensive, limited to powertrain and electronics, or limited to power train; and (iii) the consumer's selections regarding the amount of the deductible and the duration of coverage. Differences can also be present for different types of vehicles. The price ranges applicable to these variables typically would be very broad and, without knowing the consumer's specific circumstances and preferences (which would allow the range to be narrowed), unhelpful as a disclosure mandate.

c. The proposed rule would allow certain advertisements (i.e., those not presented on a website, online service, or mobile application) to disclose the website, online service, or mobile application where the consumer can view the Add-on List, rather than disclosing the Add-on List itself within the advertisement. Should the Commission take the same or similar approach with advertisements presented via other forms of media? Why or why not?

Yes, however the proposed rule's overly broad definition of "add-ons" makes their disclosure on any platform unworkable. Certainly, if a disclosure requirement were imposed and motor vehicle dealers had a viable path forward to managing the requirement, it should allow for the disclosure of a website where disclosures can be provided instead of having to pack them into the advertising medium being used. For example, how would dealers effectively disclose any product related content in a short radio advertisement if they had to provide a litany of "add-on" disclosures on top of the disclosures that already are required under current law?

d. The proposed rule would require dealers that run certain types of advertisements and charge for optional add-ons to maintain a website, online service, or mobile application at which an Add-on List may be found. Do all or most such dealers already operate a website, online service, or mobile application that could display the Add-on List?

Franchised motor vehicle dealers utilize websites, although it is not reasonable to expect them to clearly and conspicuously disclose all of their "add-ons" as required by Proposed Section 463.4(b). See the discussion in Section IV.a.3.C above.

29. Proposed § 463.4(d) would require a dealer to disclose the total amount a consumer must pay to purchase or lease a vehicle when the dealer makes representations about monthly payments for a vehicle purchase. Can dealers calculate accurate monthly payment information for a consumer without calculating the total amount? If not, is there any value in a consumer learning monthly payment information before the total amount is calculated? If so, how can the proposal be adjusted to allow for such information without obscuring necessary information about the total amount required to purchase a vehicle?

The total amount being financed is needed to calculate a monthly payment. As explained in Sections IV.a.2 and IV.a.3.B(2) above, the Commission should not seek to disrupt the form, content, and timing regime established by the FRB for disclosing the monthly payment and other credit terms.

30. Proposed § 463.4(e) would require dealers to disclose that a lower monthly payment will increase the total amount, if lowering monthly payments will do so. This provision could require this disclosure multiple times in the same transaction, for example, when a dealer's financing *office is discussing a range of different monthly payments with the consumer. Would requiring multiple disclosures result in the disclosure losing effectiveness? Would limiting the disclosure, for example, to the first time the disclosure is triggered have benefits, or would this reduce the effectiveness of the disclosure by requiring it at a time that is not as meaningful to consumers?*

See the discussion in Sections IV.a.2 and IV.a.3.B(2) above. This type of repeated disclosure scheme would extend the time of the transaction, confuse consumers, and disrupt the form, content, and timing disclosure regime established by the FRB.

31. Are the proposed prohibitions in this section [463.5(a)] clear, meaningful, and appropriate? Should the scope of any of the proposed prohibitions be expanded or narrowed, and if so, how and why?

See the discussion in Section IV.a.3.D above.

32. Is the proposal adequate and appropriate to address consumer harms that occur with the sale of add-on products or services from which the consumer cannot benefit? Why or why not? How could the proposal be modified to better address such harms?

The proposal is not needed to address such consumer harms as the FTC and the States possess authority under current law to bring enforcement actions against the very small number of dealers who charge for products for which the consumer would not benefit.[396]

33. This provision is intended to prevent conflicting and otherwise deceptive representations, and to protect consumers without requiring additional disclosures in an already lengthy, disclosure-heavy process. Given these concerns, should additional restrictions be placed on all add-ons? In particular, the Commission is contemplating whether any final Rule should restrict dealers from selling add-ons (other than those already installed on the vehicle) in the same transaction, or on the same day, the vehicle is sold or leased. Would such a provision better protect consumers without unduly burdening competition?

There is no basis to place this unreasonable restriction on commerce and competition and to limit the consumer's ability to purchase "add-ons" in this manner. As discussed throughout these comments, consumers are the only ones who fully know their needs, desires, risk tolerance, budget, and other concerns to enable them to make an informed decision about the value of any VPP. Consumers can best assess the value of protection products when they have all relevant facts, including the vehicle and financing commitment they need to protect. Dealers present menus to consumers with this information at this time but before the consumer has

[396] *See, e.g., In the Matter of Matt Blatt Inc.*, No 132 3285, (March 16, 2015) www.ftc.gov/system/files/documents/cases/150326mattblattcmpt.pdf; *Attorney General Josh Shapiro Announces Restitution For Faulkner Honda Dealership Consumers Who Were Sold Valueless Warranties*, PENNSYLVANIA OFFICE OF ATTORNEY GENERAL, (April 9, 2019), www.attorneygeneral.gov/taking-action/attorney-general-josh-shapiro-announces-restitution-for-faulkner-honda-dealership-consumers-who-were-sold-valueless-warranties/.

agreed to purchase any products. The products are optional (if they are not presented as such, it is actionable under both federal and state law) and they typically are cancellable. Therefore, there is no need or justification for the Commission to impose more mandates on this process.

In addition, consumers typically finance these products as part of their financing commitment to purchase the vehicle and therefore receive the APR for these products that applies to the vehicle purchase. If these products were sold outside of the vehicle financing transaction, how would consumers pay for them? How does the APR on a credit card (assuming the consumer can use it to pay for the products) compare to the APR applicable to the vehicle purchase? Would dealers even have authority under state law to sell certain products in a separate transaction? What optional protections would consumers not have access to if these restrictions were put in place? (See Attachment 1 explaining the adverse effect incurred by service members who experienced a total loss of their vehicle and could not protect their financing commitment with GAP Waiver protection as a result of an ill-advised interpretation that DOD issued and subsequently withdrew.)

It is essential that the Commission review comments filed by state and metro automobile dealer associations on this topic, and that the Commission conduct valid research on the value these optional products can offer consumers before seeking to limit their sale. In addition, if the Commission recognizes the presence of “honest” and “law abiding” dealers in the marketplace (which it does) and if it already possesses authority to initiate enforcement actions against the rare bad actors (which it also does), then it should recognize that these types of barriers impose unnecessary restraints on the former based on assumed, unmeasured benefits to consumers.

35. The proposed rule would also prohibit dealers from charging for GAP Agreements if the consumer's vehicle or neighborhood is excluded from coverage or the loan-to-value ratio would result in the consumer not benefitting financially from the agreement. Should any final Rule set forth how to calculate the loan-to-value ratio? If so, what should such a provision require?

See the discussion in Section IV.a.3.D above.

36. Proposed § 463.5(b) would prohibit a dealer from charging for optional add-ons unless the dealer first discloses the vehicle's Cash Price without Optional Add-ons and records that a consumer has declined to purchase the vehicle at that price. Should the Commission consider means to require more affirmative engagement by consumers to consciously select add-on products and services? In particular, the Commission is contemplating whether any final Rule should require separating the purchase of add-ons from the vehicle sale or lease transaction, or permit consumers to cancel add-ons (that do not involve physical alteration to the vehicle) within a short time after the sale or lease transaction is concluded. What practical limitations might such additional requirements impose?

Adequate VPP disclosures already are provided to consumers under federal and state law. See Section IV.a above. Moreover, most of these products already provide contract cancellation rights. And the Commission and the States possess the necessary authority to address violations by bad actors. There simply is no need to impose additional federal mandates.

37. Would the proposal prompt dealers to make offers regarding add-ons at a time and in a manner that is meaningful to consumers, or would it result in yet another disclosure being presented to consumers during an already disclosure-heavy transaction? If it would result in too many disclosures, what other measures could be taken to protect consumers from unauthorized add-ons, or from being induced to purchase add-ons under false pretenses?

See the above answers and the discussion in Sections IV.a.3.B and 3.C(3) above.

38. Proposed § 463.5(c) would prohibit dealers from charging consumers without their Express, Informed Consent, and would provide requirements for what constitutes Express, Informed Consent. Does the proposal provide a meaningful way to obtain consent in an already disclosure-heavy transaction? If it would result in too many disclosures, what other measures could be taken to protect consumers from unauthorized charges? Are there any additional requirements that should be mandated to gain Express, Informed Consent? How do dealers currently obtain consent for charges?

See the discussion in Sections IV.a.3.B(3) and 3.C(3) above. To reiterate one key point, however, it does not assist the market to impose a requirement (Express, Informed Consent) and then define its specifics largely by describing what does not suffice (signed or initialed document; prechecked box; practice that subverts choice). Decades if not centuries of state law have established what constitutes an adequate manifestation of assent in order to form a contract, including a consumer contract. The Commission's introduction of the Express, Informed Consent concept will upset this established law and has not been justified; what's worse, to do so without describing the affirmative steps necessary to meet the new requirement, will do little more than inject mass uncertainty into the auto retailing market that can only operate to raise prices and otherwise adversely affect consumers.

39. The proposed rule would define Express, Informed Consent to exclude signed or initialed documents by themselves (e.g., those without a closely proximate disclosure of the basis and amount for the charge), preprinted checkboxes, and practices designed or manipulated with the substantial effect of subverting or impairing user autonomy, decision making, or choice. Should the Commission identify other practices that do not, in themselves, constitute Express, Informed Consent? Why or why not? Are there other "dark patterns" that the Commission should address? Is there language, such as in other statutes, that the Commission should use to further protect consumers from being charged without Express, Informed Consent?

See the answer to question 38 and the discussion in Section IV.a.3.B(3) above.

40. Are the proposed recordkeeping requirements clear, meaningful, and appropriate? Should the scope of any of the proposed recordkeeping requirements be expanded or narrowed, and if so, how and why?

The proposed requirements are unnecessary, exceedingly burdensome, and should be eliminated. See the discussion in Section IV.a.3.E above.

41. Would the specified records be appropriate to verify compliance with the proposed rule? Are any of the specified records unnecessary to verify compliance with the proposed rule? If the records listed are not required to be retained, how would such compliance be verified?

Most of the records kept would have no relevance to any of the provisions of the Proposed TRR. (For example, under the Proposed TRR, dealers would be required to retain any "written communication relating to sales" between it and a customer to which it sells a vehicle. An email from the dealership to the customer establishing a time for the customer to come in and test drive a vehicle under consideration would not relate in the slightest to the subjects of the Proposed TRR but would nonetheless need to be retained. And this is only one of an almost limitless set of examples of the proposal's overbreadth.) The key consideration should be whether the imposition of this requirement would justify the massive burden it would impose on "honest" and "law abiding" motor vehicle dealers. It would not and therefore should be eliminated. See the discussion in Section IV.a.3.E above.

42. Should any additional records be specifically listed?

No. The burden that the proposed recordkeeping requirements would impose is already massive and excessive.

43. Is the 24-month record retention period appropriate? Why or why not? If not, what period is appropriate?

No retention requirement should be imposed. See the discussion in Section IV.a.3.E above.

44. What are the current record retention policies and practices of dealers with respect to the records specified in proposed § 463.6?

See the discussion in Section IV.a.3.E above.

45. What benefits would these recordkeeping requirements provide to consumers and businesses? What costs would these recordkeeping requirements impose on businesses, including small businesses? What would be the overall economic impact of these requirements? Please quantify these benefits and costs wherever possible.

No benefits would be provided to businesses. To the extent businesses benefit from retaining documents, they already will choose to do so (unless prohibited by law). As for consumers, the requirement will be a disbenefit as it will force the dealer to incur costs which will inevitably be passed on to the consumer. However, in denying NADA's request for an extension of the comment period (see Attachment 3), the Commission has precluded NADA from providing more specific cost and burden information that responds to these questions at this time. A general discussion of the topic is set forth in Section IV.a.3.E above and Attachments 18 and 19.

46. What volume of records would have to be maintained to comply with this section?

In denying NADA's request for an extension of the comment period (see Attachment 3), the Commission precluded NADA from providing comprehensive information that responds to these questions at this time. A general discussion of the topic is set forth in Section IV.a.3.E above and Attachments 18 and 19.

48. Does any portion of the proposed rule duplicate, overlap, or conflict with any federal, state, or local laws or regulations?

These comments identify and discuss the many ways in which the Proposed TRR conflicts with the Constitution, multiple federal laws and regulations, and state regulatory regimes. They also describe in detail the duplicative and overlapping nature of the various elements of the proposed rule with existing federal and state requirements. It is essential that the Commission review comments filed by state and metro automobile dealer associations regarding the manner in which the proposed rule conflicts with – and otherwise creates problems under – state and local law.

49. What has been the experience in states that have regulated unfair or deceptive conduct involving motor vehicles sales, leasing, and financing, including with respect to add-ons? How have any such regulations assisted with combatting unfair or deceptive conduct?

See the comments filed by state automobile dealer associations.

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Questions from Commissioner Wilson

1. Anticipated changes in the automobile marketplace with respect to technology, marketing, and sales, and whether it is possible to future-proof the proposed Rule so that it avoids inhibiting beneficial changes in these areas.

As outlined above, there are a number of ways that the Proposed TRR would unnecessarily interfere with the growth and benefits of online sales, and other market innovations such as personalized marketing and dynamic pricing.

Requirements that include extensive, non-standard disclosures provided at artificial and forced stages in the customer relationship will inhibit the ability of dealers and the dealer vendor marketplace to bring innovations in online and electronic retailing to consumers. Required consumer signatures will often force in-person and often inefficient interactions where efficiencies could have been created. Online tools for consumers to explore payments, leasing options, and other personalization would be effectively prohibited in these instances.

In addition, the pandemic and the associated supply chain issues it helped to create have raised many questions about automotive retailing that are yet to be answered. Proper inventory levels, vehicle "reservations," online sales platforms, and other developments have changed the way people may shop for vehicles. The Proposed TRR would severely limit price discovery and dealer/consumer communications. Rather than having the flexibility to address these issues to meet consumer needs, dealers would instead be constrained by an artificial disclosure regime.

A series of untested prescriptive prohibitions with unintended consequences, which do not allow for consumers to shop the way they want, is a recipe for the restriction of innovation and for failure. Rather, if a rule is ultimately deemed necessary, to future-proof it, the Commission should consider the creation of safe harbor mechanisms related to technological innovations after an adequate period of research.

2. Insights into why deceptive practices persist in this industry and whether additional business education would assist businesses with compliance.

As noted extensively throughout these comments, no credible evidence demonstrates that deceptive practices by motor vehicle dealers are widespread or that there is any greater prevalence of deception in the auto retail market than in any other. Indeed, the evidence strongly suggest otherwise. However, in any industry, there can be bad actors and bad actions. This perception appears magnified in an industry that (1) implicates one of the largest financial transactions most consumer undertake, (2) is cuttingly competitive, (3) involves a process that is of necessity complex (in no small part because of preexisting state and federal laws and regulations), (4) has highly public advertising, (5) allows for negotiation, and (6) involves hundreds of millions of interactions each year. Dealers work incredibly hard to meet consumer demands. And as outlined above, the auto retailing market has responded in a number of ways to those consumer demands (online shopping, "one-price" dealers, etc.) That said, like in any industry, there will be some customers who are unhappy with the process, and unfortunately, some small number of dealers who do not do the right thing.

But the answer is not to lard on unnecessary disclosures, add massive document retention requirements, and set impossibly exacting standards of liability for everyone. Dealers will suffer for sure, but the harm will extend to consumers who will face further delay, confusion, and complexity as a result of the proposed regulations.

One of NADA's core missions – one which we continuously pursue and often in concert with the FTC and other Federal agencies – is to help educate dealers regarding their compliance obligations. Those obligations are extensive, but the overwhelming majority of dealers do their best to meet those obligations every day. This education is supplemented by state and metro automobile dealer associations and a full complement of other industry compliance professionals who offer extensive compliance guidance and tools.

3. Avenues for consumer education to assist consumers with navigating these and other important financial transactions and decisions, including through improved financial literacy. How could state and local agencies support and amplify FTC consumer education efforts? To what extent is financial literacy taught in middle schools and high schools, and how effective are those efforts? What more could be done?

NADA and our dealer members have also long-supported consumer education. NADA and the American Financial Services Association (AFSA) worked in cooperation with the Commission to draft the widely-recognized "Understanding Vehicle Finance" brochure, which provides consumers with guidance about the auto finance process. NADA is also a member of the AWARE coalition, a group formed and operated with the assistance of NADA and AFSA to educate consumers about the various aspects of financing motor vehicles.[397] And NADA produces additional educational material for consumers such as the *Know Before You Buy* brochure at Attachment 23.

NADA has long supported many other varieties of consumer education, including specifically to middle and high school students. In addition to the AWARE coalition, NADA also supports the AFSA Education Foundation, which is a nonprofit organization that provides MoneySKILL and other high quality, accessible financial education resources and training to educators and students across the country.[398] MoneySKILL is a set of tools for educators to create high-quality, custom, personal finance courses. The curriculum covers a broad range of personal finance topics and can be used in a variety of learning environments, including for middle school, high school, and college students.

4. Potential negative consequences of, or costs attendant to, the Rule that the Commission may not have anticipated.

There are a number of negative consequences and material and unnecessary additional costs that the Proposed TRR would generate. These are discussed in detail throughout the comments.

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[397] AWARE stands for "**A**mericans **W**ell-informed on **A**utomobile **R**etailing **E**conomics." Information about and consumer education materials provided by AWARE can be found at www.autofinancing101.org.
[398] *See* AFSA Education Foundation, AMERICAN FINANCIAL SERVICES ASSOCIATION, https://afsaef.org/ (last visited Sept. 11, 2022).

VIII. Conclusion

When Congress considered whether to include Section 1029 in the conference report that became the Dodd-Frank Act, Senator Brownback of Kansas made the following statement on the floor of the Senate with regard to subsection (d):

> "Section 1029(d) provides that the… FTC… will have the authority to write rules to address unfair or deceptive acts or practices by motor vehicle dealers pursuant to the procedures set forth in the Administrative Procedures Act instead of the Magnuson-Moss Act. Motor vehicles dealers are set to become the only businesses in America singled out for regulation in this manner. I want to emphasize that this specific provision was neither in the House or Senate bill and was not under consideration in either chamber. It was added by House-Senate conferees. Section 1029(d) was included without any evidence to justify its inclusion, or any debate for that matter. I do not support this provision, as I believe it invites the FTC to again engage in regulatory overreach. I am concerned that the removal of the well-established ``Magnuson-Moss'' safeguards gives the FTC free rein to conduct fishing expeditions into any area of automotive finance it perceives as ``unfair.''
>
> The present leadership of the FTC has promised that if Magnuson-Moss were repealed, they would use their new power prudently. I hope that this is the case, because we do not want to repeat the kind of excessive FTC regulation that occurred in the 1970s. For that reason, Congress must monitor the FTC very closely to ensure the vast power Congress will now bestow on this agency is not once again abused."[399]

Failing to heed these concerns, the Commission has dropped onto the marketplace an unannounced NPRM that lacks any semblance of a responsible rulemaking that is the product of due diligence. It lacks critical stakeholder input, essential consumer testing, and needed coordination with other federal agencies and state governments. It asks a range of questions but then shuts off the ability of the public to answer them. It fails to support its need or properly measure its effect. It ignores requirements imposed by the Constitution, federal statutes, other federal agencies, and even the Commission's own rules. In short, it unfortunately fails at every level.

[399] 156 Cong. Rec. S5912, 105 (daily ed. July 15, 2010).

We therefore urge the Commission to withdraw the NPRM. Being proactive to protect consumers is laudable, but it must be the result of an informed process. NADA encourages the Commission to work with it and other stakeholders to achieve this result.

Sincerely,

/s/

Paul D. Metrey
Senior Vice President, Regulatory Affairs

Cc: The Honorable Maria Cantwell
Chairwoman, Senate Commerce, Science and Transportation Committee

The Honorable Roger Wicker
Ranking Member, Senate Commerce, Science and Transportation Committee

The Honorable Frank Pallone
Chairman, House Committee on Energy and Commerce

The Honorable Cathy McMorris Rodgers
Ranking Member, House Committee on Energy and Commerce

Attachments

1) NADA Letter to DOD re: Military Lending Act
2) GAP Waiver Study
3) NADA Extension Request to FTC
4) *Back to the Future: How Not To Write A Regulation*
5) Preamble to FTC submission to OMB for Fall 2021 Unified Agenda
6) Preamble to FTC submission to OMB for Spring 2022 Unified Agenda
7) NADA Comments to FTC re: Auto Buyer Consumer Survey (I)
8) NADA Comments to FTC re: Auto Buyer Consumer Survey (II)
9) *A Critique on the Limitations of the Recent FTC "Auto Buyer Study"*
10) FRB Summary of Considerations when calculating the TILA/Reg Z "Finance Charge"
11) Sample Disclosure - *Cash Price without Optional Add-ons*
12) Sample Disclosure - *Cash Price without Optional Add-ons in a Financed Transaction*
13) Sample Disclosures - *Itemization of Optional Add-ons*
14) Sample Disclosure - *Express, Informed Consent*
15) Examples of Multiple Rebate Listings for Same Vehicle
16) GM Accessories available for 2022 Silverado Short Bed Crew Cab
17) ABA Resolution 116B
18) Paperwork Reduction Act Analysis Chart
19) Regulatory Flexibility Act Analysis Chart
20) *FTC Needs to Run Those Numbers Again*
21) *NADA/NAMAD/AIADA Model Dealership Voluntary Protection Products Policy*
22) *NADA/NAMAD/AIADA Fair Credit Compliance Policy & Program*
23) *Know Before You Buy* brochure

ATTACHMENT 1

NADA Letter to DOD re: Military Lending Act

NADA

August 12, 2019

Via E-Mail

The Honorable James N. Stewart
Acting Under Secretary of Defense (Personnel and Readiness)
Department of Defense
4000 Defense Pentagon
Washington, DC 20301-1000

Dear Mr. Stewart:

I write to follow up on several letters we have sent to the Department of Defense (DOD)[1] explaining the harm to service members that has been caused by DOD's issuance of Question and Answer 2 of its Interpretive Rule pertaining to the Amended Military Lending Act Regulation (Q&A 2)[2] and to provide recent market data demonstrating the continuing and increasing nature of this harm while Q&A 2 remains in effect.

The first attachment reflects the cumulative number of active duty service member customers of a single finance source who have experienced a total loss of their vehicles without GAP Waiver protection since the finance source ceased taking assignment of credit contracts with service members that included GAP Waiver as a result of DOD's issuance of Q&A 2. (Prior to the issuance of Q&A 2, 81% of the credit contracts purchased by this finance source included optional GAP Waiver chosen by the service member.)

The second attachment reflects the cumulative liability of such active duty service member customers.

These numbers are alarming. Since January 2018 –

1) 310 service members have suffered a total loss of their vehicles without GAP Waiver protection, and

2) they collectively owe $837,000 in connection with vehicles that no longer exist.

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[1] See the Joint National Automobile Dealers Association (NADA)-American Financial Services Association petition to DOD to withdraw Q&A 2 dated January 18, 2018; the NADA letter to DOD Principal Deputy General Counsel William S. Castle, Esq. dated October 12, 2018; and the NADA letter to DOD Principal Deputy General Counsel William S. Castle, Esq. dated February 6, 2019.
[2] 82 Fed. Reg. 58,739 – 58,742 (Dec. 14, 2017).

As noted, this is data from just one of hundreds of finance sources that serve the military community. Clearly, the full effect on service members of this situation is much greater. Indeed, as set out in our February 2019 letter to DOD, a conservative estimate of the marketwide impact of DOD's issuance of Q&A 2 is that it has exposed approximately 5,000 Warfighters who purchased and financed vehicles in 2018 to approximately $15 million in liability from total loss occurrences.

Further, as the bar graphs indicate, the loss numbers are rapidly increasing. What adversely affected a limited number of service members in the months immediately following DOD's issuance of Q&A 2 now adversely affects a much greater – and growing – number of service members.

Regrettably, these service members now must contend with two sources of vehicle-related debt: that related to the vehicle they no longer possess and that related to a new vehicle they will have to acquire to satisfy their transportation needs. This presents precisely the type of financial readiness challenge that the Military Lending Act was designed to prevent.

We therefore reassert our and many other organizations' ongoing requests to DOD to move expeditiously to withdraw Q&A 2 before additional harm is caused to the military community.

Thank you for your attention to this matter. Please let me know if we can provide you with any additional information.

Sincerely,

/s/

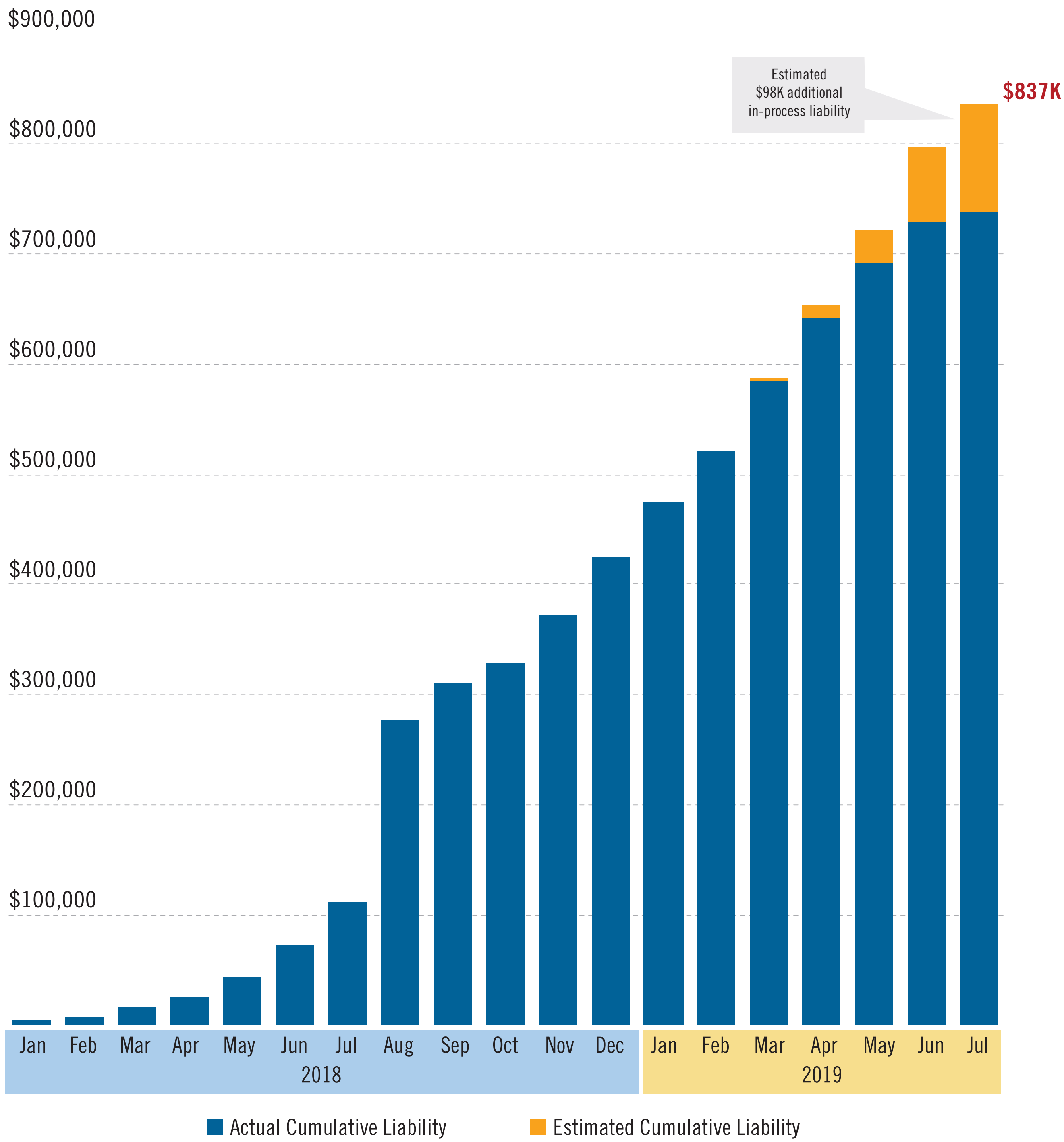
Paul D. Metrey
Vice President, Regulatory Affairs

Cc: The Honorable Mark T. Esper
The Honorable James Michael Mulvaney
The Honorable David L. Norquist
The Honorable Paul C. Ney, Jr.

The Effect of DOD Inaction on MLA

(Data from just one of hundreds of finance sources that serve the military)

Cumulative Liability of Service Members Who Suffered Total Loss of Vehicle Without GAP Waiver Protection Since DOD Issued MLA Interpretive Rule



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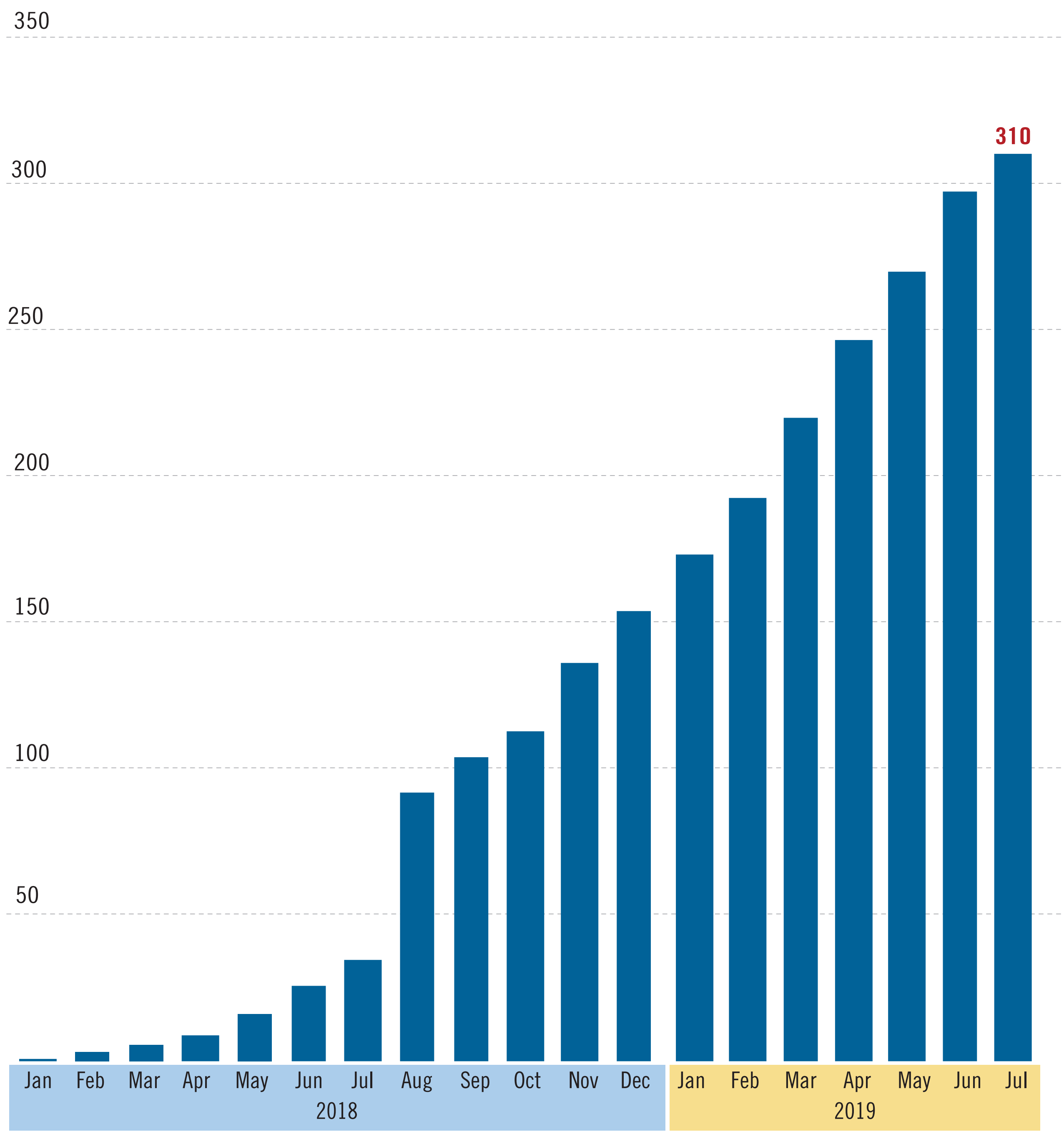
D19-0489.08092109

The Effect of DOD Inaction on MLA

(Data from just one of hundreds of finance sources that serve the military)

Cumulative Number of Service Members Who Suffered Total Loss of Vehicle <u>Without</u> GAP Waiver Protection Since DOD Issued MLA Interpretive Rule



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ATTACHMENT 2

GAP Waiver Study

The Consumers and Guaranteed Asset Protection ("GAP Protection") on Vehicle Loans and Sales-Financing Contracts: A First Look

September 2021

Consumers and Guaranteed Asset Protection (“GAP Protection”) on Vehicle Loans and Sales-Financing Contracts: A First Look

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Current Version: September 29, 2021

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* Please direct questions to: twm75@msstate.edu. Cell: (314) 494-7823.

The authors thank a subset of the Voluntary Protection Products Coalition for making their survey result available to the authors through the Survey Research Center (SRC) of the University of Michigan. The authors do not have any financial or other arrangements with any of these organizations or any financial or other arrangements with anyone to conduct the academic analysis of the survey. The authors maintain complete control of the academic research process. The views expressed are those of the authors alone and not those of any industry organizations, the SRC, the Board of Governors of the Federal Reserve System or its staff or of any other individuals or organizations. The authors thank Tuba Suzer-Gurtekin of the SRC for excellent and efficient management of the interviewing and coding process. The authors acknowledge an anonymous reviewer for helpful suggestions. Zhuo Li provided expert research assistance.

Table of Contents

Abstract

Guaranteed Asset Protection (GAP) shields purchasers from financial risks of losses exceeding insured collateral values if vehicles become total losses. Yet surprisingly little is known about the sales of this voluntary product, or consumers' attitudes toward it. In this study, we report the results of a representative national survey conducted by the Survey Research Center (SRC) of the University of Michigan. The SRC interviewed 1,206 individuals in the fall of 2020. This survey shows consumers purchased GAP about 39 percent of financed vehicle transactions. Consumers purchase GAP more often when there is a heightened financial risk: larger credit amounts, longer loan maturities, and lower income levels. More than 90 percent of GAP purchasers report that buying GAP is a good idea and that they would buy it again. Only about 1 percent of surveyed purchasers indicate dissatisfaction with their choice. A multivariate model of GAP purchase suggests that consumers' financial situation and terms of the transaction are more important that risk aversion by itself.

JEL Classifications: G22, G23, G52

Keywords: GAP, GAP Waiver, GAP insurance, vehicle financing, ancillary products, consumer credit, debt cancellation agreements

I. Introduction

Anecdotal evidence suggests growth in sales of an insurance-type protection developed in the 1980s and typically called today "Guaranteed Asset Protection," "GAP Protection," or just "GAP." GAP shields purchasers from financial risks of losses exceeding insured collateral values if vehicles become total losses due to accidents, theft, or natural disaster. GAP is found in three forms in the U.S.

1. **GAP Waiver.** The most common form is structured as a non-insurance two-party contract between the purchaser and the seller of a vehicle and is sold in connection with the extension of credit (known as "GAP waiver" since it "waives" all or a substantial portion of the owed credit amount greater than collateral value). In slightly more precise and technical language, Gap Waiver is part of a finance agreement between a motor-vehicle creditor and a motor-vehicle purchaser, in which the creditor agrees to waive its right to collect amounts the purchaser has agreed to pay the creditor in the event of a total physical damage loss or unrecovered theft (total loss) of the financed vehicle.

2. **GAP Rider.** A less-common form is offered under personal lines of auto insurance and structured as a rider to the physical damage coverage (known as "GAP rider"). It can be purchased at any time from a personal lines auto insurer, not just as part of a vehicle sale.

3. **GAP Written as Group Insurance.** The least pervasive form is GAP written as a group insurance product through an insurance company ("GAP insurance"), also sold in connection with the extension of credit. Whether insurance or not, most purchasers likely think of GAP as an insurance-type product.

Because vehicles often depreciate faster than financing for the vehicle is paid off, consumers may find themselves with "negative equity," "under water," or "upside down" on their loan contract if the remaining loan balance at any time exceeds the book value of the vehicle.[1] This might come about when there is a high loan-to-value ratio at the outset of a loan, a long maturity, or, more generally, whenever vehicle depreciation exceeds for a time the amortization of the loan balance (payoff rate). In these situations, an insured total loss of the vehicle can leave such borrowers with remaining loan balances even after the payment of the full book value by the casualty insurer. If a total loss of the vehicle arises from a catastrophe like an accident, theft, or natural disaster under such circumstances, the borrower no longer has the vehicle but is still liable for the remaining loan balance. This is hardly an enticing prospect for any borrower, and it produces situations where additional coverage of some kind might be attractive for at least some of them.

Financial inventors and entrepreneurs have stepped into this coverage gap with a product they have designated as "GAP." Although they sometimes have maintained that GAP is short for "Guaranteed Asset Protection," or "Guaranteed Auto Protection," probably most sellers and users think of it simply as coverage for the gap between loan amount still owing when a total loss of the vehicle occurs and the amount the casualty insurer pays (the book value).

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1 The authors are aware that credit from or through a dealer may not legally be considered a loan under various state laws, particularly historically. Because the term "auto loan" is used so pervasively today, however, particular by consumers who are the subject of this study, the distinction between vehicle "credit" and vehicle "loans" is unimportant here and, consequently, is ignored in the terminology used.

There is surprisingly little systematic information available even about the extent of sales of this product or consumers' attitudes toward it. Individual sellers undoubtedly understand their own sales experience, and insurance underwriters and their actuaries know about their loss rates, revenues, and loss reserves, but they typically know little about the activities of other market participants. There are virtually no academic studies of this subject and even relatively little journalistic description. There are some public-information sources that describe the product and outline when it can be useful, but there is little available in the way of statistical evidence of its uses and users.

To fill some of this information void, in 2020 an industry coalition sponsored a nationally-representative survey of consumers (exclusive of Alaska and Hawaii).[2] The survey, intended by the coalition for independent academic analysis of GAP, was undertaken by the well-known and highly respected Survey Research Center of the University of Michigan (SRC). SRC has been surveying consumers' financial attitudes and behavior, including vehicle buying, since 1946. The SRC added questions about vehicle financing and GAP to their monthly SRC survey that also produced the well-known University of Michigan Index of Consumer Sentiment. This index is widely cited by the financial press and has been an important monthly national economic indicator for decades. In the months of September and October 2020, the SRC completed 1,206 interviews about vehicle financing and GAP as part of this program. In December 2020, the coalition granted access to the survey results to the authors, directly through the SRC. The coalition did not place any conditions of any sort on the academic analysis.

The remainder of this article consists of three parts. The next section briefly describes GAP and why it may sometimes be attractive to vehicle buyers. The following section provides information from the consumer survey on such things as the frequency of GAP purchases on vehicle loans, characteristics of buyers, experiences with the purchase transaction, and consumers' attitudes toward the product. This section also contains an outline of elements of a model of the purchase decision. The final section examines hypotheses arising from the purchase model with further multivariate statistical analyses.

2 The funding organizations were a subset of the Voluntary Protection Products Coalition. See https://voluntaryproducts.org.

II. GAP

As pointed out in an industry publication, even terminology in the GAP area has been somewhat imprecise. For this reason, at the outset it seems worthwhile to examine briefly some terms and product background. For its own purposes, the Consumer Credit Industry Association ("CCIA") considers it useful to define terms in its *Fact Book of Credit-Related Insurance* (2020 edition, p. 43):

> *GAP* [insurance] insures the excess of the outstanding indebtedness over the primary property insurance benefits that may occur in the event of a total loss to a collateral asset. *Primary property insurance* refers to the underlying insurance policy insuring the property, such as vehicle physical damage insurance. GAP can be written on a variety of assets that are used as collateral to secure credit; however, it is most commonly written for motorized vehicles.
>
> GAP may or may not be insurance depending on the state regulations and the contractual relationships. Since its introduction in the mid-1980s, the products and the applicable regulations have been evolving.

As noted here and in the Introduction above, for legal and regulatory purposes, GAP takes either of three forms, depending on state regulation and market channels, although the survey questioning does not focus closely on the distinctions among them. First, GAP rider is sold by primary auto insurers as an add-on ("rider") to physical damage coverage. Apparently, most GAP coverage, however, is of the second type designated as "GAP waiver." As indicated above, GAP waiver is a two-party agreement between the financing source and the consumer to cancel ("waive") any remaining GAP owed to the lender if a total loss of the vehicle occurs under circumstances when a gap exists. (The financial lender may enter into a master insurance policy with an insurer to cover all its GAP-waiver agreements, but this commercial arrangement behind the scenes is transparent to individual consumers.) Third, in contrast to GAP waiver, "GAP insurance" is a three-party insurance agreement among financer, consumer, and an insurance company that provides the GAP coverage directly to the customer as a legal matter rather than technically through the financer. Although the distinctions among GAP rider, GAP waiver, and GAP insurance are likely not of much interest to consumers (and so, ss indicated, the consumer survey does not make much of the distinctions), apparently there can be some feature and coverage differences between GAP rider and the other two products.

In recent years, sale of either GAP waiver or GAP insurance apparently has become common enough that in now appears in various widespread sources of consumer information, although using terminology meaning the same thing as industry definitions but employing different wording. For instance, in the section titled "Gap Coverage," the Federal Reserve Board's online source called Keys to Vehicle Leasing, Comprehensive Consumer Guide notes that "Gap coverage is often included in lease agreements. If it is not, it can be purchased." Concerning buying a vehicle rather than leasing, the Guide then continues:

> Gap coverage is usually not included in finance agreements, but it can be purchased.
>
> *Gap coverage.* Gap coverage is an agreement by a lender or a third party to cover the gap amount if your vehicle is stolen or totaled.
>
> *Gap amount.* The gap amount is typically the amount by which the early payoff, not including any past-due amounts, exceeds the insured value of your vehicle. Gap coverage is

usually not included in finance agreements, but you may be able to buy it separately. If you do, gap coverage usually has a one-time charge, or premium.

Reason for gap amount. The gap amount exists because your vehicle usually depreciates faster at the beginning of the loan than as you pay down your loan balance. Gap coverage is designed to cover the gap amount of your prepayment liability if your vehicle is stolen or totaled. See the section Early Termination. However, gap coverage does not reimburse you for any down payments you have made. It does not cover past-due amounts you owe under the financing agreement or other amounts you are responsible for such as personal property taxes or unpaid parking tickets. In most cases, gap coverage does not cover your insurance deductible, any insurance policy deductions for past-due premiums, and so forth.[3]

Many other public information sources provide similar descriptions, for example, the federal Consumer Financial Protection Bureau (CFPB), Wikipedia, Investopedia, Nerdwallet, and others. There also are many online advertisements for GAP products that provide information on GAP, of course sometimes also touting their own products.

3 Industry sources suggest that part of this last sentence is correct for GAP rider but incorrect for GAP waiver in that almost all GAP waivers cover the primary deductible up to a set amount of $500 or $1000. There also apparently are other differences between GAP waiver and GAP rider contractual arrangements. Without access to individuals' contracts, it is not possible with consumer population survey design like this one that is aimed at obtaining basic indications of purchase, buyers, and attitudes, to study the impact of specific differences in aspects of individual product offerings. The survey did determine, however, that only about a third of GAP purchasers indicated that their insurance agents had offered them a GAP rider product. The rest replied negatively or did not know. It is possible to conclude from this that the majority of GAP in the marketplace is GAP waiver. Only about a quarter of nonpurchasers said that their agent had offered a GAP product.

III. GAP Uses and Users

Insurance companies, administrators, and sellers of GAP can assemble their own statistical information about their sales, and they may even survey customers about their experiences. Such information remains proprietary, however, and is not made available publicly. A search of indexing source Google Scholar using keyword terms like GAP waiver, GAP insurance, Guaranteed Asset Protection, and variations finds little analytical information beyond a few legal and legislative citations, some advertisements, some non-English citations to legal situations in other countries, a handful of citations to professionals like actuaries, and even some patent applications for product variations for the vehicle leasing market. There does not appear to be much available public analysis of the extent of GAP purchases, features of transactions where GAP purchase may be likely, consumer knowledge of and attitudes toward the product, or even consumers' purchase experience.

Among the limited available articles and sources on GAP protection, probably the most interesting is an online article by principals of the actuarial services firm Kerper and Bowron discussing some of the actuarial challenges in implementing a successful GAP program.[4] Underlying any such program are the basic elements of consumer demand for the protection. Actuarial concerns involve measuring the risks associated with product demand and then pricing the risks so that they do not endanger the solvency of the risk-coverage program. This necessarily involves explorations of the situations where demand for the risk-coverage program is likely. Presence of many of these demand elements can be measured with a consumer survey.

For instance, it is reasonable first to expect that demand for GAP would exist in situations where a large gap exists between the amount of a vehicle loan and the book value of the collateral. By definition, this occurs if vehicle depreciation is greater during some period than loan payoff, such as a high loan-to-value credit arrangement on a depreciating new vehicle. High loan to value could persist for a time if the payments are relatively small for the loan size due to extended maturity.

Second, demand for protection would be greater among individuals who are vulnerable to adverse events or are inherently more risk averse. Some people simply are more concerned about the possibility of facing unexpected large expenditures and will take more protective measures to smooth the expected value of losses than others. Degree of risk aversion among consumers can be measured by direct questioning about it, but also by exploring individual consumers' underlying financial situation, including income and liquidity.

Third, models of the marketing process find that knowledge, purchase experience, and attitudes toward a product can influence product demand. These also are measurable in a consumer survey, as marketers are well aware.

Taking these demand elements together produces a basic demand model of the following form:

$D_{GAP} = f$(Loan to value, vulnerability to adverse events, risk aversion/demographics, attitude/purchase experience)

Unfortunately, directly comparing the size of the gap between loan amount outstanding and collateral value over time on automobile purchases (loan to value ratio) is inherently difficult without extensive details of

4 See A. Lee Bowron and John Kerper, "GAP Insurance – Techniques and Challenges," Casualty Actuarial Society E Forum, Winter 2011.

the initial financial terms necessary to calculate the repayment pattern and loan amount still outstanding over time. These components include purchase amount, down payment, interest rate, maturity, ancillary purchases, etc. Further information is also necessary for a reasonable estimate of collateral value over time as well (make, model, features, intensity of use of the vehicle, vehicle demand and supply, etc.).

Nonetheless, to develop an estimating model of the probability of GAP purchase, many of the underlying elements of these calculations are ascertainable through consumer surveys. For example, other things equal, loan value will be higher over time for larger initial loans (say, for new vehicles), loans with longer initial maturities, and for loans where a remaining balance from an earlier loan is carried over into the new transaction. Likewise, depreciation will be greater if intensity of use (mileage) is higher.

Concerning risk aversion, risk aversion itself can be measured through direct questioning. But risk aversion also can be associated with demographics such as income and presence of family, and with liquidity constraints and credit scores. These factors influence individuals' ability to withstand adversity. Attitude toward the product and information about the sales experience can also be the subject of questions.

Expanding the basic model above to include such elements provides an extended demand model of the following form:

> $D_{GAP} = f$(Initial loan size, Loan maturity, New/used vehicle, Previous balance included, Mileage, Product recommendation, Availability of savings, Ability to borrow, Job security, Basic risk aversion, Demographic variables)

Table 1 provides some statistics on those who purchased (one or more) vehicles during this period and financed the purchase. The survey found that 63.2 percent of households (including single-person households) had purchased a car or truck in the prior four years and 60.0 percent of them financed the purchase. The sample consists of 1,206 individuals.[5]

Notably, among those who purchased a vehicle and financed it, 38.7 percent also purchased GAP. Whether this is a large or small proportion of households who purchased a vehicle and financed it probably depends upon the expectation of the individuals noting it, but it does seem large enough for further investigation to be interesting. How this proportion compares with past years or the trend over the past few years or decades likely will remain unknown, but what appears to be a fairly high proportion of GAP buyers among recent purchasers who financed vehicles may reflect in some way aspects of the high nominal cost of cars and trucks in recent years, especially new ones.

Table 2 provides comparisons on various dimensions of GAP purchasers and their loans compared to non-purchasers based upon the extended model above. Each comparison in the

For most questions, very few individuals answered "do not know" or refused to respond. In the statistical information and tables that follow, these cases are mostly excluded unless "do not know" is a meaningful response. Essentially, this exclusion is equivalent to the statistical assumption that the individuals answering "do not know" or refusing would have been distributed the same way as those who did respond. If the excluded cases were numerous, this would not be a good assumption. Such cases were rare, however, unless noted, and for this reason even if there were some sort of bias among them, statistical

5 All survey statistics are subject to a small sampling range that exists because it is never possible to interview everyone. At ninety-five percent confidence, all the statistics reported here are within a few, but varying, percentage points of the population value, depending on the individual measure in question.

results would not have differed more than slightly where they are excluded and would be less than the sampling-error range that exists in all surveys. table is along only one characteristic dimension at a time, but they reveal clear differences between GAP buyers and non-buyers and the circumstances of their loan arrangements. The table is divided into groupings based upon the GAP purchase model introduced above: Loan circumstances, risk aversion, vunerability to adverse events, personal circumstances, and attitudes and purchase experience. There are notable differences between GAP purchasers and non-purchasers in all of these areas.

Specifically, those borrowing larger amounts, for longer periods of time, or who rolled in a remaining balance upon trade in of a previous vehicle all exhibit more-frequent purchase of GAP products (first column, lines 1-3 of the table). These results are hardly surprising. Larger loans for longer time periods, especially with roll-in of a previous balance, are precisely the circumstances when a "gap" might arise and persist.

Some other features and expectations associated with the loan also showed association with greater prevalence of GAP purchase, although to somewhat lesser degree: expected mileage (intensity of use) of the vehicle, loan through dealer rather than directly from a financial institution (indirect versus direct credit), and purchase of a used vehicle compared to a new one (first column, lines 4-6 of the table). None of these findings is especially surprising either, and they likely are sometimes associated in various ways with the specific personal circumstances of the purchasers. For instance, those using the vehicle more intensively likely realize that value depreciation could take place more rapidly than otherwise. Likewise, some of those arranging financing through the dealer might exhibit more-fragile credit-worthiness characteristics suggesting usefulness of the dealer's participation in arranging for credit. If so, they might be more concerned about risks in the transaction and be interested in various sorts of protection, including GAP. Further, used-vehicle purchasers also often differ from new-vehicle buyers in ways that are associated with transaction risks.

The survey does show differences in various measures of personal circumstances that differ between GAP purchasers and non-purchasers. The second part of the table shows that GAP purchase was more frequent among those with lower income, with children at home, with more concern over credit history, and with more likely difficulty managing a financial emergency (first column, lines 7-10 of Table 2). Such individuals may feel they are not well suited to take on financial risks and, consequently, may become likely candidates for this sort of financial protection.

Responses to questions about attitudes and experience with the transaction and a further question about buyers' circumstances show that GAP purchase also was higher among those to whom the vehicle dealer recommended the product. Specifically, among those to whom the dealer recommended GAP coverage, more than 71 percent purchased it (first column, line 11 of Table 2). Among those who said the dealer "offered" it but who did not perceive a recommendation, only 45.3 percent purchased. Dealer salesmanship may certainly be involved in this finding, but it also seems possible that dealers would more likely recommend GAP to those with loan or personal characteristics that might make it more easily saleable (larger loans, longer maturities, previous balances rolled in, more concern over credit history, etc.). Dealers apparently never mentioned GAP to many customers, and, again hardly surprisingly, few of these individuals purchased GAP. Some did, however, in part because the customer brought up purchase of the product.

The table shows that GAP purchasers are generally much more favorably inclined to the product than non-purchasers, again hardly surprisingly (first column, line 12 of Table 3). More than 93 percent of purchasers reported that the GAP purchase was a good idea, compared to only about 43 percent of non-purchasers, still a considerable proportion considering that they had not purchased the protection. While it is hardly surprising that those favorable to a product are more likely to purchase it, the high percentage of favorable feeling among buyers suggests that apparently at most only a few had downgraded their view after the purchase took place. The 4.2 percent of purchasers who indicated the view that purchase was a bad idea, may include some cases of buyers' remorse for an expenditure that, after the fact, could have been avoided since the protected loss had not occurred. Of course, no one has that sort of foresight at the moment of initiating a transaction with risks.

To learn more about reasons for favorable or unfavorable attitudes toward GAP, both groups of respondents (favorable and unfavorable) were asked the open-ended question, "Why do you say that." Coding the responses shows substantial understanding of the GAP product among both buyers and non-buyers.

For instance, as indicated, among buyers by far the most frequent answer was that purchase is a good idea. The follow-up question found a variety of reasons for this response, with by far the most frequent that GAP protects against losses (Table 3). Given that these individuals more often than non-purchasers include those with lower incomes, smaller reserves for emergencies, and longer and larger loans (that could indicate smaller down payments and higher loan-to value, although the survey could not measure this), this result is certainly not surprising either. Such conditions entail higher risks for the individuals involved.

Some of the few among buyers who indicated that GAP purchase was not a good idea mentioned that only some people needed it, that the risk was not very great or that the coverage is expensive relative to the perceived risk. Responses of this sort might well be expected of those with better personal circumstances who, while recognizing the risk, believe they are able to self-insure. Verbatim responses to the follow-up question about reasons for purchase or not illustrate the sorts of views that GAP purchasers and non-purchasers expressed. These statements show that most respondents appeared to be quite well aware of the features of the product (e.g., see some sample statements near the bottom of the table). By comparison, the second column of the top line of Table 3 shows (as did the second column, line 12 of Table 2) that a sizeable percentage of those not purchasing GAP still thought that GAP was a good idea. Again, availability of risk prevention was the chief among reasons given by non-purchasers. Table 3 shows that many of them simply perceived that the risks to them were not worth the costs of the protection. Ultimately, this is the way that markets work. Some people do not think that protecting against the potential risk was worth the cost and they do not buy protection.

Finally, the survey also asked some further questions of buyers concerning product satisfaction. Specifically, the survey whether they would buy this protection again, whether they would recommend GAP to family or a friend, and, overall, how satisfied they were with the purchase. Responses were very similar and very one sided (Table 4).

About ninety percent of purchasers said they would purchase the product again and would recommend it to family and friends. In each case, a few were unsure. Only a bit over one percent of respondents indicated they were dissatisfied or very dissatisfied with the protection on the loan (third panel of the table). A follow up to the recommendation question asking, "Why do you say that?" produced answers largely similar to the question on whether GAP was a good idea or not (results not in table).

Immediately before asking the series of questions about measures of satisfaction with the GAP product among purchasers, the survey asked all respondents who had purchased a vehicle and financed it some questions about the GAP sales experience. Immediately after describing the GAP product and asking whether they had purchased it, respondents were asked about dealer/lender recommendation and explanation.

The first of this group of questions involved whether the dealer or lender (the latter in the case of direct credit) recommended GAP protection. A preliminary look at this question in discussion of line 11 of Table 2 described above suggested that there was a correlation between recommendation and purchase, with 71.7 percent of those receiving a recommendation also purchasing. Discussion above also briefly suggested the possibility that sellers can sometimes ascertain situations when GAP usefulness enters the picture and then recommend it, with correlated results. The survey results show that when they merely offer it, as opposed to recommending it, sales are lower, and if they do not mention it at all, sales are lower still. This, of course, does not demonstrate that it is the sales recommendation that itself produces the purchase outcome. It appears from responses to the full sequence of questioning, and especially from responses to the open-end question about why GAP purchase is a good idea or not, that customers on balance appear to understand the product pretty well and respond accordingly. Nonetheless, there were some additional questions about the sales experience.

Notably, respondents indicating that GAP was recommended or offered as an option then were asked whether they thought it was required. About 20 percent of those who purchased GAP thought it was required and 80 percent did not (Table 5). It is worth noting that requiring GAP is not illegal, if the representations and paperwork are managed and prepared properly, which cannot be determined in a consumer survey. In some cases, dealers are required to offer GAP, for instance, in Louisiana. In addition, GAP is typically included as mandatory protection in leasing transactions which may account for a portion of those purchasing GAP who thought it was ”required,” since it was not one of the purchase decisions they had to consider. Nonetheless, the large majority believed it was voluntary. A large majority also believed, even among non-purchasers, that the dealer or lender had explained the terms of the product (second panel of Table 5). For some non-purchasers, particularly if they announced early in the discussion that they were not going to purchase GAP, further review of costs and terms could well be perfunctory or even non-existent.

Finally, a hypothetical question about what they might do in a GAP situation was asked of those respondents who did not purchase GAP. Hypothetical questions of this kind do not necessarily indicate what actions would really be taken in actual situations. The motivation behind this question was more the exploration of knowledge of GAP situations than it was to determine likely actions. In this context, the hypothetical question did not elicit many vague or “do not know” responses (third panel of Table 5). Other possible answers such as taking money from savings, rolling the amount into a new loan or lease, or simply continuing to pay, were all reported frequently.

In sum, it appears that, based upon univariate responses to questions about GAP, that purchasers of vehicles who financed them and who, therefore, might be interested in the product not only purchase GAP with some frequency but also seem informed about the product and their choices. Also, a very high percentage of them would recommend the product to others. With all this as background, we now turn to a multivariate examination of GAP-purchase conditions.

IV. A Multivariate Model of GAP Purchase

As indicated, exploration of potential demand for GAP protection purchase has proceeded so far only on a univariate basis, one variable at a time. So far, all the measurements of variables associated with the proposed demand model have been consistent with expectations. It is also worthwhile, however, to explore joint impact in a multivariate equation and to discuss which model elements might be most important holding others constant.

In the multivariate analysis that follows, the dependent variable *DGAP* equals one if the respondent obtained GAP protection and zero otherwise. Independent variables used in the multivariate equation reflect the model of the decision also outlined above:

DGAP = *f* [1. Transaction characteristics; 2. Vunerability to adverse events;
3. Risk aversion and demographics (including income, family, liquidity, credit score);
and; 4. Personal characteristics.]

The estimated logistic regression model is statistically significant.[6] Statistically significant explanatory variables and their signs include the following: (Table 6):

Previous balance included	Positive
Amount of credit ≤ $10,000	Negative
Amount of credit ≥ $40,000	Positive
Recommended	Positive
Loan term ≥ 6 years	Positive
First and second lowest income quartiles	Positive
Age less than 35	Positive
Education: High school diploma	Positive
Has children at home	Positive

A positive sign indicates that holding other factors constant the variable is positively associated with likelihood of GAP purchase, and a negative sign means a negative association.

Positive signs for large loans, longer term to maturity, and need to include previous balances are suggestive that GAP purchases are associated with greater debt and higher LTV. Dealer or lender recommendations appear to play an important role in GAP purchase decisions as discussed earlier. Dealers likely visualize the situations where GAP purchase may be useful. Relatively low incomes, being young, and having children in the family suggest that early life-cycle stage and liquidity constraints might also influence GAP purchases.

In a logistic regression, the estimated coefficient for an explanatory variable indicates the rate of change in the log odds as the explanatory variable changes, which is not very intuitive. Consequently, the size of an effect is commonly evaluated by its odds ratio. The odds ratio for an indicator variable X is the probability that the dependent variable DGAP = 1 within that category of X, relative to the probability that DGAP = 1 within the reference category. An odds ratio greater than one indicates a positive effect, and less than one indicates a negative effect. For instance, in Table 7 the 2.204 odds ratio for credit amounts

6 The model likelihood ratio test statistic is 145.51. It has a chi-square distribution with 31 degrees of freedom and is significant at <0.0001.

greater than $40,000 indicates that individuals were 2.204 times more likely to purchase GAP protection than individuals borrowing between $20,001 and $30,000 (the reference group). The 0.187 odds ratio for individuals borrowing less than $10,001 indicates that these individuals were much less likely to purchase GAP protection than individuals in the reference group. Odds ratios for the statistically significant coefficients from Table 6 point to the importance of large credit amounts, previous balances rolled in, dealer or lender recommendations, and income and life-cycle considerations.[7]

These findings appear usefully indicative of buyers' reasoning concerning their GAP purchases. They also seem considerably less than surprising: Financial situation and terms of the transaction are more important than risk aversion by itself, although future research in this area should explore this contention further. Since many vehicle transactions today exhibit the characteristics where GAP purchase might be expected (Table 1), it is not surprising to find that GAP purchase also is fairly common, even if not much about its prevalence in vehicle lending has heretofore been known.

7 The logistic regression results do not mean that the vulnerability to adverse events or risk aversion considerations are not present. Individuals in early life-cycle stages may have limited savings and therefore less than $400 of reserve funds or be unable to cover 3 months' expenses, for example. Such considerations are simply weaker than those indicated by the statistically significant variables. Separate logistic regression models estimated using only variables in each of the four explanatory variables categories were all statistically significant.

V. Conclusion

A nationwide consumer survey of consumers' use of auto financing and characteristics of their purchase transactions, features, demographics, and attitudes toward features of the transaction has shown that purchase of GAP on auto loans has become fairly common since its introduction about three decades or so ago. GAP relieves a consumer's responsibility for any remaining loan balance above the collateral value of the vehicle in the case of a total loss due to accident, theft, or natural disaster. As vehicle values have increased over this period and credit requirements have eased with widespread prosperity and improved credit-granting ability through statistical credit scoring, it has seemed likely that the potential for "gaps" might have grown along with ready credit availability and the desire for GAP might have become more common.

Specifics of past trends in GAP purchase are unknown, but the survey in 2020 has shown that GAP purchase reached almost 39 percent of recent financed vehicle transactions. Survey analysis shows that GAP purchase is related to these transactions in expected ways: GAP purchase is more likely when credit amounts are greater, loan maturities are longer, previously existing loan balances are rolled into the new loan balance, and purchasers' income is lower. All these factors are associated with heightened risk among consumers entering such transactions and it is not surprising that these situations are where GAP purchase is most common. Dealers appear to be aware of such situations and recommend GAP in them. Analysis of a nationwide survey in 2020 shows the importance of these factors in both univariate and multivariate contexts.

The survey also shows that auto purchasers have realized the usefulness of GAP. Not surprisingly, since they purchased it, more than 90 percent of purchasers report the view that GAP purchase is a good idea, and more than 40 percent of nonpurchasers agree. About nine tenths of GAP purchasers say they would purchase it again and would recommend purchase to friends and family members. Only about 1 percent of purchasers indicate dissatisfaction with their choice.

As the economy has expanded, consumer demand for vehicles and vehicle credit is both a cause and result. As credit inclusion has expanded along with the economy, apparently GAP has become a significant component and survey evidence clearly indicates its importance to many purchasers. None of this seems surprising. Although there always will be risk associated with any credit transactions, it appears that many potential vehicle purchasers have chosen to purchase GAP as a means of managing some of this risk and purchasers report their satisfaction with the product. All this now seems well established and seems unlikely to change in the environment of increasing vehicle prices.

Table 1: Some Information on Households who Purchased a Vehicle and Financed It in the Previous Four Years, in Percent

Sample Size: 1,206.

1. Loan amount	Percent
$5000 or less	4.0
$5001 to $10,000	11.1
$10,001 to $20,000	31.6
$20,001 to $30,000	27.1
$30,001 to $40,000	14.6
Greater than $40,000	11.5
2. Loan maturity	
Less than 3.5 years (i.e., 3 years)	17.1
3.5 years and less than 4.5 (4 years)	15.5
4.5 years and less than 5.5 (5 years)	52.7
5.5 years and less than 6.5 (6 years)	12.1
Greater than 6.5 years	2.6
Home equity loan	0.1
3. Dealer financed (indirect credit)	65.6
4. Expected annual mileage	
Less than 12,000	44.7
12,000 and less than 20,000	42.7
20,000 or more	12.5
5. Dealer recommended or offered GAP	
Recommended	20.9
Offered	38.6
Never mentioned	37.5
Respondent initiated	2.9
6. Purchased GAP	38.7
7. GAP Purchase a Good Idea or Bad Idea	
Good	61.6
Good with Qualifications	0.7
Pro/Con (Depends)	2.1
Bad with Qualifications	0.9
Bad	31.5
Do not know; not ascertained	3.1
8. Perceived Credit History	
Excellent	48.7
Good	25.2
Average	15.1
Bad	3.6
Very bad	1.5
No credit history (if volunteered)	0.6
Do not know or not ascertained	5.4

Table 2: Some Comparisons of GAP Purchasers Versus Those Not Purchasing GAP (Percentages of those with various transaction characteristics)

	Purchased GAP protection	Did not purchase GAP protection
Loan circumstances		
1. Loan amount		
$10,000 or less	20.0	80.0
Greater than $10,000	42.1	57.9
2. Loan maturity		
Five years or less	36.6	63.4
Greater than five years	52.1	47.9
3. Rolled in a balance from a previous loan upon trade in		
No	32.8	67.2
Yes	81.0	19.0
4. Expected mileage		
Fewer than 12,000/year	37.6	62.4
12,000 to 20,000/year	39.2	60.8
More than 20,000/year	41.3	58.7
5. Indirect or direct loan		
Direct	36.1	63.1
Indirect	40.0	60.0
6. New car or used		
New	36.2	63.8
Used	41.2	58.8
Risk aversion and personal circumstances		
7. Income		
Highest one third	29.3	70.7
Middle one third	40.4	59.6
Lowest one third	54.6	45.4
8. Has children at home under age 18		
No	35.3	64.7
Yes	44.3	55.7
9. Self-Perceived Credit History		
Excellent	25.3	74.7
Else (i.e. Good, Average, Bad, Very Bad)	52.5	47.5

Continued on next page

Table 2 (continued)

	Purchased GAP protection	Did not purchase GAP protection
Risk aversion and personal circumstances		
10. Could Cover Expenses for Three Months if Lost Income		
Yes	35.9	64.1
No	55.7	44.3
Attitudes and purchase experience		
11. Dealer/Lender Recommended or not		
Recommended	71.7	28.3
Offered	43.5	56.5
Never mentioned	14.3	85.7
Do not know/recall not ascertained	24.2	75.8
12. GAP Purchase a Good Idea or Bad Idea††		
Good	93.2	42.9
Good with Qualifications	0.3	1.0
Pro/Con (Depends)	1.0	2.3
Bad with Qualifications	0.0	1.5
Bad	4.2	49.1
Do not know; not ascertained	1.3	3.1
Total	100.0	100.0

††Note: Data presentation for this line does not sum across for purchasers and non-purchasers of GAP protection, but rather explores attitudes among GAP protection purchasers and non-purchasers, respectively (sums vertically).

Table 3: Reasons Why GAP Purchase is a Good Idea or a Bad Idea
(Percentages of those purchasing GAP or not)

	Purchased GAP protection	Did not purchase GAP protection
Protects from losses/from risks of losses/ from risks of expensive cars	80.9	38.4
Protects in some situations	1.5	4.0
Gives sense of security/peace of mind	5.8	0.9
Inexpensive	0.9	
Protects borrower's credit rating	0.3	
Convenient to have full coverage	0.6	
Insurance is good/always good	1.9	0.5
Some people need it		0.4
Depends on whether you have money	1.6	2.1
Not needed		0.2
Expensive/expensive for risk/waste of money	2.2	14.4
Time of usefulness is limited		0.2
Protects company, not borrower		0.5
Redundant with other coverage	0.3	5.0
Just a profit item for company/dealer	0.4	2.7
Using debt/too much debt is the real problem		5.1
Risk is low/not needed in many or most cases	0.7	11.2
I don't buy extra coverages (not ascertained why)		1.3
Specific reasons given (E.g., I am a good driver/my mileage is low/GAP is not big/only needed if not upside down/not needed if down payment is high/not needed on used cars/not needed in rural areas/not needed because I can pay off loan)	8.5	
Do not know/not ascertained	2.8	4.7
Total	100.0	100.0

Table 4: Some Experiences and Attitudes of Purchasers (Percent of GAP purchasers)

Purchase this protection again	
Yes	88.4
No	7.7
Do not know/Not ascertained	3.9
Total	100.0
Recommend this protection to friend or family	
Yes	90.2
No	6.8
Do not know/Not ascertained	3.0
Total	100.0
Overall, how satisfied	
Very satisfied/Somewhat satisfied	88.2
Not particularly satisfied or dissatisfied	10.4
Somewhat dissatisfied/Very dissatisfied	1.4
Total	100.0

Table 5: Some Aspects of the GAP Sales Experience
(Percent of those purchasing GAP and not purchasing)

	Purchased GAP protection	Did not purchase GAP protection
GAP was required or voluntary		
Required	19.8	1.4
Voluntary	79.0	97.7
Do not know/Not ascertained	1.2	0.0
Total	100.0	100.0
Dealer explained costs and terms		
Yes	94.8	86.6
No	4.0	10.4
Do not know/Not ascertained	1.2	3.0
Total	100.0	100.0
Responses to a hypothetical question about what non-purchasers might do in a GAP situation		
Take money from savings	37.8	
Roll into new lease/loan	28.9	
Continue to pay	27.1	
Insurance/comprehensive insurance will cover	4.0	
Do not know/Not ascertained	2.2	
Total	100.0	

Table 6: Logistic Regression of Factors Associated with Purchase of GAP Protection on Vehicle Financing (Statistically Significant Variables)

Variable	Coefficient estimate	Standard error	Probability > chi sq.
Previous balance included	2.04	0.68	0.0027
Credit ≤ $10,000	–1.68	0.51	0.0011
Credit ≥ $40,000	0.79	0.45	0.0763
Loan term ≥ 6 years	0.60	0.36	0.0989
Recommended	1.64	0.33	0.0000
Lowest income quartile	1.28	0.51	0.0119
Second lowest income quartile	1.00	0.40	0.0128
Age less than 35	0.64	0.36	0.0804
Ed: HS diploma	0.60	0.35	0.0882
Has children at home	0.77	0.31	0.0115

Table 7: Odds Ratios for Factors Associated with Purchase of GAP Protection on Vehicle Financing

Effect	Point estimate	95% Wald confidence limits	
Transaction characteristics			
Bought new vehicle	0.651	0.355	1.196
Had trade in	1.001	0.568	1.762
Previous balance included	7.718	2.028	29.378
Indirect credit	1.299	0.727	2.320
Credit ≤ $10,000	0.187	0.069	0.510
Credit $10,000-20,000	0.762	0.387	1.500
Credit $30,001-40,000	0.860	0.380	1.946
Credit ≥ $40,001	2.204	0.920	5.283
Loan term ≤ 2 years	1.313	0.730	2.362
Loan term ≥ 6 years	1.819	0.894	3.700
Miles 20,00-29,999	1.001	0.583	1.720
Miles ≥ 30,000	0.530	0.230	1.221
Recommended	5.161	2.703	9.853
Vulnerability of adverse effects			
Credit history good	0.624	0.288	1.351
Credit history bad	1.253	0.318	4.934
Do not know whether credit history is good or bad	0.338	0.040	2.849
Has reserve funds ≥ 4,000	0.900	0.340	2.382
Able to cover 3 months' expenses	0.854	0.342	2.131
Worried about job loss	1.160	0.606	2.221
Risk aversion			
Unwilling to take financial risk	0.772	0.395	1.507

Table 7 (continued)

Effect	Point estimate	95% Wald confidence limits	
Personal characteristics			
Lowest income quartile	3.604	1.327	9.787
Second income quartile	2.721	1.237	5.986
Third income quartile	1.374	0.698	2.704
Age less than 35	1.891	0.926	3.863
Age 55 or older	1.355	0.690	2.660
Ed: Less than high school diploma	1.304	0.236	7.214
Ed: High school diploma	3.498	0.547	22.374
Ed: Some college	1.824	0.914	3.641
Homeowner	0.696	0.362	1.339
Married	0.753	0.416	1.360
Has children at home	2.164	1.189	3.940

ATTACHMENT 3

NADA Extension Request to FTC

Submitted via www.regulations.gov

July 18, 2022

Federal Trade Commission
Office of the Secretary
600 Pennsylvania Avenue, NW, Suite CC-5610 (Annex C)
Washington, DC 20580

Re: Request for Extension to Comment Period
Motor Vehicle Dealers NPRM, File No. P204800

The National Automobile Dealers Association (NADA)[1] hereby requests that the Federal Trade Commission (FTC or Commission) extend by a minimum of 120 days the 60-day period that the Commission has provided for the public to comment on the motor vehicle trade regulation rule it has proposed in the above captioned matter.[2]

On June 23, 2022, the FTC released on its website a comprehensive proposed unfair or deceptive acts or practices (UDAP) rule that is unprecedented in scope and would affect tens of millions of consumer transactions annually. The proposed rule seeks to:

1. prohibit a wide range of activity;
2. establish certain advertising standards;
3. require an extensive series of oral and written disclosures governing communications with consumers related to the sales price of automobiles, certain credit terms, and voluntary protection products (VPP);
4. mandate the posting of certain information on dealer websites; and
5. impose a massive set of new recordkeeping requirements.

[1] NADA represents over 16,000 franchised automobile and truck dealers in all 50 states who sell, finance, and lease new and used motor vehicles and engage in service, repair, and parts sales. This includes approximately 1,800 commercial truck dealers. NADA members collectively employ 1.2 million people nationwide.
[2] 87 Fed. Reg. 42,012 – 42,048 (Jul. 13, 2022).

The Commission did not announce that it would be taking this action in advance of its release,[3] and it did not precede this broad exercise with a Request for Information or even an Advanced Notice of Proposed Rulemaking (ANPRM).[4]

Consequently, motor vehicle dealers who are covered by the proposed rule,[5] and the many other types of businesses that will be affected by it, have had no notice of – or any opportunity to research and address – the proposed components of the Notice of Proposed Rulemaking (NPRM) or even an outline of proposals, if any, that the Commission considered prior to its release.[6]

In addition, as part of this exercise, the Commission seeks comment on an extremely broad and open-ended set of 49 questions that include, but are not limited to, the following:

- the scope of the proposed rule (e.g., whether it should address a range of other topics including other unfair or deceptive acts or practices, leasing, interest rates, other financing terms, electronic disabling devices, online sales, electronic disclosures, the availability of vehicles, matters involving servicemembers, conditional sales, and lien payoffs); [7]

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[3] The Commission states that "this Notice of Proposed rulemaking was not included in the Commission's Spring 2022 Regulatory Agenda because the Commission first considered this notice after the publication deadline for the Regulatory Agenda." 87 Fed. Reg. at 42,031. Given that the publication deadline must have been reasonably close in time to The White House's release of The Spring Regulatory Agenda on June 21, 2022 (two days before the Commission's release of the NPRM)(see www.whitehouse.gov/omb/briefing-room/2022/06/21/the-spring-regulatory-agenda/ (last visited July 18, 2022), it is remarkable that the Commission "first considered" a notice of this magnitude in this very short period of time.

[4] See Administrative Conference of the United States' *Administrative Conference Recommendation 2018-7* explaining the importance for agencies to exercise due diligence before issuing a notice of proposed rulemaking ("Agencies should consider using requests for information (RFIs) or advance notices of proposed rulemaking (ANPRMs) when they need to: i. gather information or data about the existence, magnitude, and nature of a regulatory problem; ii. evaluate potential strategies to address a regulatory issue; iii. choose between more than one regulatory alternative; or iv. develop and refine a proposed rule…."). The Administrative Conference of the United States, *Administrative Conference Recommendation 2018-7* (Dec. 14, 2018), https://www.acus.gov/sites/default/files/documents/Recommendation%202018-7%20%28Public%20Engagement%20in%20Rulemaking%29.pdf (last visited July 18, 2022).

[5] The proposed rule applies to motor vehicle dealers defined in proposed section 463.2(e) and therefore excludes motor vehicle dealers who lack a service facility.

[6] In contrast, see e.g., the Consumer Financial Protection Bureau's *Outline of Proposals Under Consideration and Alternatives Considered* (Sep. 15, 2020) to implement section 1071 of the Dodd-Frank Act, https://files.consumerfinance.gov/f/documents/cfpb_1071-sbrefa_outline-of-proposals-under-consideration_2020-09.pdf (last visited July 18, 2022), which followed a Request for Information on the matter. 82 Fed. Reg. 22,318 – 22,322 (May 15, 2017); 82 Fed. Reg. 32,177 – 32,178 (Jul. 12, 2017).

[7] Questions for Comment 2, 3, 7, 8, and 14-17.

- the scope, timing, language, clarity, efficacy, and net effect of the proposed notice requirements;[8]

- how the "offering price" concept works in the present market and how it would or should affect other information with regard to both advertisements and disclosures;[9]

- what VPPs motor vehicle dealers offer, how dealers currently obtain consent for the purchase of VPPs, which other VPPs should be prohibited, whether VPP sales should be restricted when the vehicle sale occurs and whether they should be accompanied by a cancellation right, which VPPs involve pricing differentials, how VPP disclosures should be structured, and whether instructions should be provided on how to calculate loan-to-value rations;[10]

- whether dealers can calculate accurate monthly payment information without calculating the total amount a consumer must pay to purchase or lease a vehicle and the value of such information, particularly if presented multiple times;[11]

- whether the scope and period of the records retention requirements is appropriate and how it affects the current records retention practices of motor vehicle dealers;[12] and

- how the proposed rule affects state law and the state experience in these areas.[13]

While it is extraordinary that this effort to collect such widespread and extensive market information was not initiated *prior* to the promulgation of a proposed rule,[14] stakeholders now find themselves with a very limited window of time to attempt to provide the Commission with accurate and meaningful responses to these numerous, in depth inquiries. In addition, the Commission also seeks information related to the assumptions, methodologies, calculations, and projected costs, benefits, and economic impact of the various elements of the proposed rule

[8] Questions for Comment 19-25.
[9] Questions for Comment 26-27.
[10] Questions for Comment 28, 31, and 33-39.
[11] Questions for Comment 29 and 30.
[12] Questions for Comment 40-47.
[13] Questions for Comment 48-49.
[14] This is particularly true of a discretionary rulemaking of this nature which is not mandated by Congress and, therefore, not subject to any statutory deadlines.

throughout its Paperwork Reduction Act and Regulatory Flexibility Act analyses. And the Commission requests additional cost information in several of its Questions for Comment.[15]

Any attempt to provide the Commission with meaningful data, information, and perspective on these massive inquiries will require considerably longer than the 60-day comment period set forth in the NPRM.[16] Accordingly, NADA respectfully requests that the FTC (i) extend the comment period by a minimum of 120 days, and (ii) act on this request at its very earliest opportunity.

Thank you for your consideration.

Sincerely,

/s/

Paul D. Metrey
Senior Vice President, Regulatory Affairs

[15] See, e.g., Question 6 ("What economic burdens would be imposed on dealers if the Rule proposals were adopted?"); Question 16 ("Are there data regarding the feasibility of finalizing vehicle financing at or before the time the retail installment sales [sic] contract is signed?"); Question 20 ("What would be the economic impact, and costs and benefits, of these disclosure requirements?"); Question 21 (""If so, what are the costs and benefits associated with these additional disclosures?"); and Question 45 ("What costs would these recordkeeping requirements impose on businesses, including small businesses? What would be the overall economic impact of these requirements? Please quantify these benefits and costs wherever possible.").

[16] For example, a respected industry research firm informed NADA that it would require a minimum of 120 days to prepare a report on the potential costs that the proposed rule would impose on franchised automobile dealers. This would address only one of the many areas of inquiry the Commission has presented in the NPRM. And we have recent experience that supports these time estimates. NADA commissioned a narrower cost study in response to the CFPB's NPRM relating to the implementation of section 1071 of the Dodd-Frank Act, 86 Fed. Reg. 56,356 – 56,606 (Oct. 8, 2021)(see Footnote 6 above), and that study took over 4 months to complete.

ATTACHMENT 4

Back to the Future: How Not To Write A Regulation

Back to the Future

HOW NOT TO WRITE A REGULATION

J. Howard Beales III and Timothy J. Muris

JUNE 2022

AMERICAN ENTERPRISE INSTITUTE

Executive Summary

For the first time since the 1970s, activists have taken control of the Federal Trade Commission (FTC), determined to remake the economy to match their progressive vision. To achieve that goal, the commission must again seek to become the second-most powerful legislature in Washington. When Congress authorized rulemaking authority in 1974, the commission proposed 16 transformative rules in only 12 months. Most were eventually rejected, but the reaction put the agency in serious jeopardy. Congress refused to provide funding at one stage and eventually enacted additional restrictions on the commission's rulemaking authority.

The agency's new leadership recently changed the procedures for making rules, changes based solely on the need for speed. These changes did not even consider the problems that led to the failures of 1970s rulemaking, particularly three key problems: the lack of clear theories of illegality, substantive theories of why the practices were occurring and how to fix them, and systematic evidence to evaluate the extent of the problem and the efficacy of the remedies. The new procedures, inconsistent with statutory requirements, sound public policy, or both, will increase political control of rulemaking while decreasing public participation. These procedures are contrary to the goals of Congress when it authorized FTC rulemaking and inconsistent with the development of high-quality rules.

Back to the Future

HOW NOT TO WRITE A REGULATION

J. Howard Beales III and Timothy J. Muris*

> "History doesn't repeat itself, but it rhymes."
> —Mark Twain[1]

With the political wind at their backs, activists, concerned over the putative power of business and the harm they are sure it causes, take control of the Federal Trade Commission (FTC). They prepare an assault on that concentrated power and propose to use rulemaking to transform the economy.

Today? Apparently. The 1970s? Certainly. That effort came to ruin and the near destruction of the FTC. We do not know for certain the extent to which history's rhyming will follow the 1970s. We do know that today's FTC seems every bit as determined as its predecessor was to reshape the American economy to its own vision. Here we analyze recent changes made to the procedures for promulgating rules under the FTC's primary rulemaking tool, Section 18 of the FTC Act—changes for the sole purpose of making it easier to fulfill the renewed goals.

As an agency created to provide guidance for appropriate marketplace conduct,[2] the FTC has a variety of tools available, including rules, case-by-case enforcement, and research and advocacy. Each tool is valuable, with its own strengths and limitations, as part of a consumer protection strategy. Our focus is the role of consumer protection rules: When are they appropriate, and what processes and procedures should be used to develop them?

Rather than rely primarily on rules, the commission historically has used the common-law process of case-by-case enforcement to build legal principles, supplemented by official statements of enforcement policy.[3] This is a principles-based approach to regulating economic activity to protect consumers from conduct that is "unfair or deceptive." Although decades of commission and congressional action have given those terms more detailed meaning, they remain broad principles that leave considerable discretion for their application to specific circumstances.[4]

That approach has proved highly adaptable to new challenges, including the emergence of e-commerce and growing concerns about privacy, such as inadequate information security. Attempting to write rules defining who was liable for what in advance would have risked chilling many beneficial developments. It

* The authors have decades of experience with the Federal Trade Commission (FTC) as FTC leaders, staffers, managers, academics, and advisers to parties with business before the FTC. Most recently, from 2001 to 2004, Howard Beales was director of the Bureau of Consumer Protection, and Timothy Muris was its chairman. Of direct relevance to Section 18 rulemaking is their extensive and unique experience as firsthand participants in virtually all the major rulemakings from 1974 through 1987. As an assistant to the director of the Office of Policy Planning and Evaluation, Muris helped evaluate the then-ongoing release of proposals during the rulemaking binge. Beales arrived in 1977 as a staff economist assigned to the Children's Advertising Rule and the evaluation of multiple other rulemakings. Before he returned to Washington as a member of the 1980 Ronald Reagan FTC transition, as a law and economics professor, Muris worked extensively with others on a book about the FTC during the 1970s, published by Cambridge University Press in 1981. Beales and Muris joined together in the fall of 1981, with Muris as director of the Bureau of Consumer Protection and Beales as an assistant to the director. There, they worked extensively on the many rules that remained from the 1970s; Muris continued to do so through 1983 and Beales through 1987. Although primarily based on the Telemarketing Sales Act rather than Section 18, the FTC enacted the enormously popular National Do Not Call Registry during their most recent tenure at the agency.

seems highly unlikely, for example, that an ex ante privacy rule would have anticipated that billions of people would enjoy posting details of their personal lives on Facebook and other social media.

Agency discretion, however, is also a source of uncertainty for the business community, because predicting the application of general principles to particular cases can be challenging to those who must comply. That uncertainty risks deterring socially valuable activities that are not in fact unlawful but pose some risk of agency enforcement.[5] The risks of over-deterrence increase when there is more at stake for firms that must comply: Stiffer sanctions for violations will lead to greater chilling effects on legitimate business activity that consumers value.[6]

Principles-based enforcement can be more costly for the agency as well, which must consider a broad course of conduct in individual cases. Such cases can consume precious agency time and budget.

Rules, which establish brighter lines for what constitutes a violation, can reduce these costs and the risk of future harm to consumers. For the regulated community, specific rules provide clarity about compliance obligations that can reduce the costs of over-deterrence. For the agency, enforcement actions need only establish violation of a specific requirement of the rule, without the need to consider a fuller range of circumstances.[7] These advantages can be illusory, however, if a simple general principle is replaced by a complex set of specific rules or if an overly general rule creates pressures for frequent exemptions.[8]

Rules can also establish default rules and processes for transferring rights when doing so might otherwise be difficult. For example, the Mail Order Rule provides that unless the parties agree otherwise, goods must be delivered within 30 days.[9] Similarly, the Do Not Call Registry provides an easy way for consumers to opt out of unwanted telemarketing calls from legitimate businesses.[10]

Rulemaking is an exercise in generalization. Rules must apply to a well-defined population, with requirements that apply in well-defined circumstances. They cannot account for the wide range of specific factors that may be relevant to evaluate a practice in a specific context. In evaluating advertising, for example, the meaning of words used frequently depends on their context, in a way that makes writing specific regulatory requirements difficult. Dictionaries offer multiple definitions of “natural,” but in the 1970s the FTC proposed (and in the 1980s rejected) adopting a single definition that would have applied to *any* use of the word in food advertising. Another abandoned proposal would have limited drug advertising to precisely, and only, the words describing indications for use in Food and Drug Administration (FDA) regulations, a policy even the FDA eventually abandoned.

Rules must apply to a well-defined population, with requirements that apply in well-defined circumstances.

In contrast, principles-based enforcement allows examination of specific advertisements to determine their likely meaning to consumers. Similarly, the principle of advertising substantiation—that advertisers must have support for their claims—is straightforward and well established. Writing sensible rules about how much evidence of what type is needed for particular claims would be immensely complicated, however, and would likely restrict efforts to provide consumers with truthful information.

Because rulemaking involves generalization, sound rulemaking puts a particular premium on gathering systematic information. Sound generalizations depend on a deep understanding of why a practice occurs, the circumstances in which it is used, and the precise conditions under which the practice helps or harms consumers in different situations. Sound rulemaking procedures help ensure that the public and the potentially regulated community can examine the accuracy of information, offering critical commentary and contrary evidence as appropriate.[11]

Promulgating good rules is particularly difficult for an agency that does not regulate specific industries, like the FTC. The agency lacks the regular contact and communication with entities in a specific industry that facilitate a deep understanding of what practices, or remedies, are appropriate.[12] Rather than relying on detailed knowledge of an industry, the commission's expertise is in applying general principles to a wide range of specific factual circumstances. To be sure, the commission in some areas (such as credit reporting or advertising) regulates well-established businesses, but large portions of its law enforcement deal with pathologies, bad actors with a demonstrated unwillingness to obey the law.

Rules by their nature, however, also apply to legitimate companies that regularly keep their promises to consumers. Remedies appropriate for demonstrated bad actors can be quite burdensome for legitimate businesses, and there is often no straightforward way to limit required remedies to fraudulent practices. Overly burdensome rules can interfere with the market processes that actually serve consumers' interests, creating harm rather than preventing it. For example, the commission's initial proposal for the Telemarketing Sales Rule (TSR) compiled order provisions from previous fraud cases that were designed to control the future behavior of proven violators. It would have been extremely broad and burdensome, and one of the first actions of Robert Pitofsky's commission in 1995 was to narrow it substantially.[13]

As we discuss in detail below, in the 1970s the FTC strayed from its traditional common-law approach and embarked on an extensive rulemaking campaign designed to restructure entire industries based usually on anecdotal evidence of alleged abuse by a few businesses. The effort consumed enormous resources but foundered on the commission's all-too-frequently inadequate preparation for and drafting of the many rules proposed, and it crumbled in the face of the overwhelming opposition it provoked. Even the few rules that became law were mostly pared down significantly from the initial proposals.

We believe it a mistake for the commission to devote substantial resources to rewrite rules to restructure the marketplace. As we have written extensively elsewhere, the commission has been successful when it operated as a referee, enforcing well-established legal principles against bad actors or bad acts from legitimate companies.[14] When it foundered decades ago, it was because it tried to be the second-most-powerful legislature in Washington.

Rather than relying on detailed knowledge of an industry, the commission's expertise is in applying general principles to a wide range of specific factual circumstances.

Regardless of procedures, rulemaking consumes substantial resources that could be employed elsewhere. During our tenure at the commission, for example, we used substantial resources against deceptive practices in marketing subprime mortgages, alleging failure to disclose key terms of the transaction adequately. These cases, among others, led to a $215 million settlement with Citigroup based on conduct by subsidiaries it acquired[15] and a settlement with First Alliance Mortgage that ultimately returned $65 million to affected borrowers.[16] In 2005, however, after we left, problems grew with subprime markets, yet the FTC diverted substantial resources to rules and studies Congress mandated in the Fair and Accurate Credit Transactions Act of 2003.[17] Whatever the value of those rules and studies, they consumed resources the commission could have employed productively on cases.

The FTC's new leadership has renewed interest in industry-wide rulemaking. On July 1, 2021, in a public meeting without participation by its professional staff and without public comment or input on the changes, the commission rewrote its rulemaking procedures substantially on a 3–2 party-line vote.[18] Adopted solely in the name of expediency, the rule changes are based on the myth that the Reagan administration adopted onerous procedures to curtail rulemaking for ideological reasons.[19] In fact, the rules the commission has changed were long-standing, with some changes resulting from the FTC Improvements Act of 1980, and were virtually all in place before Ronald Reagan's appointees arrived at the commission. Moreover, they have not actually been followed: In rulemakings initiated since 1976, the commission has used its authority under its rules to adopt alternative procedures.[20]

Especially for a generalist agency like the FTC, quality rules depend on quality information. Quality information in turn requires a process that produces a fulsome record, in which the key information is subject to testing, analysis, and rebuttal by the various interested parties. Unfortunately, these new procedures retreat from these goals and will likely result in rulemaking records with less public input and without a comprehensive review of the rulemaking record by an independent presiding officer that Congress required in 1980.[21] The changes also remove the statutory requirement that the commission explain its reasons for a proposed rule "with particularity."[22] They further greatly reduce the opportunity for public participation in identifying the crucial factual issues that must be resolved during the rulemaking, eliminate the ability of the public and the presiding officer to review the staff's recommended rule, and—unless great care is taken in implementation—could, in the words of the Michael Pertschuk–led commission in 1980, "create a privileged status for meetings between Commissioners and outside parties."[23]

Ironically, we think it unlikely that these changes will even serve the claimed purpose of expediting the rulemaking process. They are much more likely to result in worse rules and lost opportunities to improve consumer welfare. Moreover, some of these changes would appear to violate basic administrative law principles, which allow a court to set aside a rule "if the Commission promulgates it without observance of the procedure required by law,"[24] including respect of the underlying statutory authority.

Adopted solely in the name of expediency, the rule changes are based on the myth that the Reagan administration adopted onerous procedures to curtail rulemaking for ideological reasons.

To support these conclusions, we begin with a history of the FTC's rulemaking efforts. The following section turns to a detailed discussion of the particular changes made on July 1, 2021, and the section after that discusses how best to conduct Section 18 rulemaking. A final section summarizes our evidence, reasoning, and conclusions.

A Brief History of FTC Rulemaking

We first explore how FTC rulemaking was an innovation of the 1960s and then detail how codification of rulemaking authority helped launch a rulemaking binge in the 1970s. We next discuss how rules proposed after this initial binge used somewhat different procedures, and we consider rulemaking after Congress added additional requirements in the FTC Improvements Act of 1980. Finally, we draw some lessons from this history.

Rulemaking Begins: The Rise of Unfairness. Effective September 1963, the commission adopted rules of practice authorizing Trade Regulation Rules (TRRs)[25] under Section 6(g) of the FTC Act. Because its only remedy was a cease and desist order, the commission contemplated that TRRs would resolve legal issues in subsequent adjudicative proceedings that would potentially result in such orders.

> Where a trade regulation rule is relevant to any issue involved in an adjudicative proceeding thereafter instituted, the Commission may rely upon the rule to resolve such issue, provided that the respondent shall have been given a fair hearing on the legality and propriety of applying the rule to the particular case.[26]

Importantly, the FTC thus envisioned a more limited role for a rule than the civil penalty authority for violation of a rule itself that Congress eventually enacted and the role that most envision today when they recommend that the FTC promulgate rules.[27] The original rules also provided for oral hearings "within the discretion of the Commission,"[28] and hearings were held for each of the early rules, including the Cigarette Rule. Thus, the hearings, important in most FTC rulemakings, were the commission's own creation.

The first rule, promulgated in October 1963 and since repealed, addressed advertising and labeling of sleeping bag sizes.[29] Although some early rules cited only unfair or deceptive practices as the basis for the rule, others also maintained that the prohibited practices were also unfair methods of competition.[30] When the latter authority was included, it was typically the "diversion of trade" theory that the commission had used to attack deception before the 1938 Wheeler-Lea Act expanded the agency's authority to unfair or deceptive acts or practices.[31] For example, the sleeping bag measurement rule cited not only deception but also unfair methods of competition, because inappropriate measurements would "divert business from competitors who clearly disclose."[32] Similar language appears in other rules from the late 1960s and early 1970s. The substantive rationale for these rules is preventing deceptive practices, with diversion of trade thrown in to describe a consequence of the deception.

By far the most significant early rule, and one of the three most prominent rule proposals in FTC history,[33] was the Cigarette Rule, adopted in 1964 to require cigarette advertising to disclose the health risks of smoking. The rule was easily one of the most consequential steps in agency history, even when later overturned by Congress to impose less stringent disclosures.[34] Perhaps even more significant in its ultimate impact on the agency, the commission based its rule largely on the statutory prohibition of "unfair" practices and enunciated a three-part test for unfairness: whether a practice "offends public policy"; is "immoral, unethical, oppressive, or unscrupulous"; or "causes substantial injury to consumers."[35]

By far the most significant early rule, and one of the three most prominent rule proposals in FTC history, was the Cigarette Rule.

Although rulemaking continued, perhaps because of the hostile congressional reaction to the Cigarette Rule, the commission made no further use of the new unfair acts or practices analysis. Then, on March 1, 1972, the Supreme Court decided *FTC v. Sperry & Hutchinson Co.* Originally, the commission had argued that Sperry & Hutchinson's (S&H) restrictions on swapping trading stamps were unfair methods of competition. On appeal, however, it advanced the new argument that S&H had committed unfair acts or practices. Because this theory had not been litigated below, the Supreme Court remanded the case to the commission. The opinion stated, in a passage that we read dozens of times in internal staff memoranda during the 1970s, that the FTC

> does not arrogate excessive power to itself if, in measuring a practice against the elusive, but congressionally-mandated standard of fairness, it, like a court of equity, considers public values beyond simply those enshrined in the letter or encompassed in the spirit of the antitrust laws.[36]

The sentence ended with a footnote that, in dicta, appeared to bless the unfairness analysis underlying the Cigarette Rule.

Inspired by S&H, any reluctance to use the Cigarette Rule test disappeared, as the then–newly created Bureau of Consumer Protection devoted considerable resources and intellectual firepower to explore the outer limits of unfairness, particularly for use in rules. The bureau established a special unit, originally headed by Morton Needleman, a highly regarded career staff member, to develop rule proposals.[37] These proposals relied on the S&H "mandate" to define unfair or deceptive acts or practices.

Nevertheless, many of the proposals had a competition rationale. The Eyeglass and Prescription Drug Rules, which would have preempted state bans on advertising, were based on the anticompetitive effects of such bans, for example.[38] Similarly, the rule proposal for over-the-counter drugs, which would have required drugmakers to use only FDA-approved terminology to describe drug indications for use, was based on concerns that multiple terms for drug indications facilitated "spurious" product differentiation.[39] Although the Needleman group tried to develop coherent approaches for possible rules, what followed was the explosion of unfairness-based rulemaking discussed below.

From the beginning, the FTC's authority to write rules under Section 6(g) was in doubt, partly because the agency had contended until the 1962 revisions to the rules of practice that it lacked such authority.[40] It was not until the commission adopted the octane rule in 1971[41] (finding the failure to disclose octane ratings "an unfair method of competition and an unfair or deceptive act or practice"[42]), however, that a circuit court addressed the FTC's rulemaking authority, with the DC Circuit upholding that authority in *National Petroleum Refiners Association v. FTC*.[43] Although the continued relevance of this decision has been questioned,[44] it is important to note that the court upheld a much more limited form of rulemaking than the broadly applicable modern TRR, in which violations trigger civil penalties. What the commission claimed in the octane rule was the authority only to write a rule that was binding in an administrative adjudication that could result only in a cease and desist order.

Moreover, the court noted specifically, as had the commission in the Cigarette Rule and its 1962 rules, that

> some opportunity must be given for a defendant in a Section 5 proceeding to demonstrate that the special circumstances of his case warrant waiving the rule's applicability, as where the rationale of the rule does not appear to apply to his own situation or a compelling case of hardship can be made out.[45]

Depending on the facts, the result of such a "rule" could be more like an industry guide than a modern rule.

While the octane rule was litigated, Congress debated the commission's rulemaking authority. Many in Congress were concerned about the breadth of the commission's discretion to declare practices "unfair or deceptive," especially given the lack of clear standards of what those terms meant. "As a result, the feeling was apparently widespread among the members of the congressional committees considering the Magnuson-Moss Act that some means had to be found to control this broad discretion."[46]

The result was the Magnuson-Moss Warranty–FTC Improvements Act, passed late in 1974 and effective January 4, 1975.[47] The statute gave the commission authority in Section 18 of the FTC Act to write rules that "define with specificity" unfair or deceptive acts or practices but did not affect the commission's authority for unfair methods of competition rules.[48] Congress sought to control the agency's discretion via procedural requirements, discussed below in detail, that require hybrid rulemaking, between Administrative Procedure Act (APA) informal notice and comment rulemaking and the formal procedures of administrative litigation. The act also added Section 5(m) to the FTC Act, authorizing civil penalties for knowing violations of "any rule under this Act respecting unfair or deceptive acts or practices."[49]

Armed with Congress's new grant of authority and inspired by the Supreme Court's apparent blessing of an expansive view of unfairness, the commission launched a rulemaking binge. It published rules of practice implementing the initial notice provisions of Section 18 in April 1975, and by April 1976, it had launched 16 rulemakings under the act.[50] The rules sought to transform entire industries, touching myriad aspects of everyday life—vocational schools, food and drug advertising, used cars, clothing care labels, hearing aids, funerals, eyeglasses, and health spas, among others.[51] Of these initial rules, only five survived, virtually all in truncated form—hardly a record that inspires confidence.

The tidal wave of proposals provoked a backlash as numerous industry groups asked Congress to rein in the commission because, in their view, the rules imposed unnecessary burdens and too frequently demonstrated hostility to legitimate business practices. Early in 1978, a vote on the House floor rejected an FTC reauthorization bill backed by House leadership, with members of both parties in open revolt because the bill lacked controls over the FTC.[52]

The epitome of unfairness-based rulemaking was the Children's Advertising rule, initiated with a notice of proposed rulemaking (NPRM) in April 1978,[53] and the signature proposal of Chairman Pertschuk, an important Senate staffer while Section 18 was being drafted. The notice did not include a specific rule proposal, instead requesting comment on a range of possible remedies: a ban on all television advertising to children age 8 or younger, a ban on advertising of the foods most likely to cause cavities to children 12 and under, and a requirement for advertiser-funded counter-advertising to provide nutritional information for other products advertised to older children but not included in the ban.[54]

The proposal signaled to many in the business community, Congress, and the media that the commission was embarked on a rulemaking campaign based on its own perceptions of what public policy should be rather than on actual consumer harm. The *Washington Post*, no bastion of conservatism, famously editorialized that the FTC was becoming the "National Nanny,"[55] and Congress at one point refused to provide funding, leading the agency to shut down briefly.[56] The proposal was a key motivation for the FTC Improvements Act of 1980, which specifically prohibited the commission from adopting a children's advertising rule based on unfairness in the same or similar rulemaking proceeding and added other requirements, discussed below, to the FTC rulemaking process.[57]

The *Washington Post*, no bastion of conservatism, famously editorialized that the FTC was becoming the "National Nanny."

Early Section 18 Rulemaking: Mishandled Rulemaking Overwhelms the Binge. Although many have blamed the procedural requirements of Section 18 for the failures of 1970s rulemaking,[58] the causes lie elsewhere. In particular, the early proposals lacked clear theories of why a particular practice was unfair or deceptive, clear substantive theories of why the practice was occurring and therefore how the proposed remedies would solve the problem, and systematic evidence of the extent of the practices at issue, the market forces that produced the practices, and the likely effectiveness and impact of the proposed remedy. We discuss those problems in turn.

When it codified the commission's rulemaking authority in 1974, Congress took two related approaches to curb agency discretion. First, it sought to "heighten the element of reasoned decision-making in trade regulation rulemaking."[59] Rules must be based on a defined record and supported by "substantial evidence in the rulemaking record . . . taken as a whole,"[60] and the commission must explain its reasons for the proposed rule "with particularity" in the NPRM.[61] If it decides to promulgate a rule, it must adopt a statement of basis and purpose (SBP) that, in explaining its decision, addresses the prevalence of the practices, provides "a statement as to the manner and context in which such acts or practices are unfair or deceptive," and includes a statement of the economic effect of the rule.[62] Thus, the rulemaking process Congress adopted focused on addressing directly the evidence bearing on the decision whether to promulgate a rule and explaining the steps from data to conclusions.

The second element to curb discretion, and thereby improve the commission's rulemaking process, was an enhanced emphasis on public participation. The law requires public comment in any Section 18 rulemaking, unlike the APA, which allows agencies in certain cases to adopt final rules without comment.[63] All comments must be publicly available.[64] The law codified the commission's practice of oral hearings, requiring "an opportunity for an informal hearing"[65] and, if there are "disputed issues of material fact it is necessary to resolve," the opportunity to present rebuttal submissions and conduct appropriate cross-examination.[66]

Congress clearly thought these opportunities important. The statute allows petitioners to request and courts to order "the Commission to provide additional opportunity to make" oral or written presentations if the court finds they "would be material and that there were reasonable grounds for the submissions and failure to make such submissions."[67] It also specifically provides that a "court shall hold unlawful and set aside" a rule if it finds that denying a petitioner the right to cross-examination or rebuttal submissions or a "rule or ruling" limiting such opportunities "has precluded disclosure of disputed material facts which was necessary for fair determination by the Commission of the rulemaking proceeding taken as a whole."[68] Although there are no cases decided on these grounds, the tendency in the early rulemakings to designate numerous issues and allow broad cross-examination, discussed below, surely reduced the commission's risk of a successful legal challenge. These grounds for reversal complement the APA's usual requirements, such as the court's ability to set aside a rule "if the Commission promulgates it without observance of the procedure required by law."[69]

The commission's rules of practice provided for a presiding officer to oversee the hearings and designate issues.[70] As proposed, the commission would have appointed the presiding officer; as adopted, this task was delegated to the special assistant director for rulemaking in the Bureau of Consumer Protection.[71] In 1978, appointment of presiding officers shifted to the general counsel.[72] In 1980, Congress codified a role for the presiding officer, requiring a presiding officer responsible to a chief presiding officer who "shall not be responsible to any other officer or employee of the Commission."[73] (The commission initially implemented this provision by establishing an Office of Presiding Officers[74] and in 1989 shifted this function to the chief administrative law judge, or ALJ.[75]) The 1980 statute also codified and expanded the requirement in the commission's rules for a presiding officer's report, specifying that the presiding officer "make a recommended decision based upon the findings and conclusions of such officer as to all relevant and material evidence."[76]

The commission's original rules implementing Section 18 added one other requirement to those specified in the statute: a provision for a final staff report, analyzing the rulemaking record and making recommendations for a final rule, "taking into account the presiding officer's findings of fact."[77] The rules also provided for a 60-day post-record comment period on both reports.[78] When it implemented the 1980 FTC Improvements Act, the commission reversed the order of these reports, giving the presiding officer the opportunity to comment on the staff's recommendation while retaining the 60-day comment period.[79]

As the Administrative Conference of the United States (ACUS) noted in its 1979 report on FTC rulemaking:

> Effective implementation of the fact-testing objective of the Magnuson-Moss Act necessitates . . . a "funnel" approach in which agency practices and procedures are designed to achieve a progressive narrowing of the theories, factual issues, and policy considerations as the rule moves through the various procedural stages toward final decision.[80]

Unfortunately, FTC rulemaking practices and procedures did no such thing.

The problems began at the very start, with the initial notice of the rulemaking. Rather than explain its reasons for the rule "with particularity," ACUS found that these notices "often contained conclusory or truncated discussions of the tentative legal theories, policy judgments, and factual assumptions underlying the proposals."[81] The general standards for what constituted an unfair or deceptive practice, which too often left legality to the agency's discretion, compounded the problem.

As Barry B. Boyer, professor of law at Buffalo School of Law, noted in his consultant's report to ACUS, even when theories were discussed, they "may be so vague or incomplete as to leave the reader in a state of uncertainty about the doctrinal basis of the rule provision."[82] Teresa M. Schwartz, professor of law at George Washington University and deputy director of the FTC Bureau of Consumer Protection in the Clinton administration, came to the same conclusion, noting that the commission had not defined the legal theory of its rules, and "factors which are prominent in one rulemaking proceeding . . . are ignored in another or referred to so generally that the factor is rendered meaningless."[83] Indeed, Dorsey D. Ellis, law professor at Washington University in St. Louis, argued that the theories underlying some of the rules were directly in conflict.[84] Given the lack of standards for defining FTC Act violations, multiple vague theories empowered the bureaucrats to choose the most promising theory, while they also expanded the range of issues in dispute and the kinds of evidence that might be relevant to the ultimate decision.[85]

Besides lacking clear legal theories, the early rules often lacked clear theories of why a problem warranted regulatory intervention and why a proposed remedy would in fact solve the problem. Instead, remedies were viewed as matters for the commission's quasi-legislative discretion, rather than issues for which factual evidence could support or undermine their efficacy. Without a requirement to show why the remedy would work, the staff felt little need to develop record evidence regarding either the remedy's effectiveness or its impact.[86]

As noted above, the statutory scheme contemplated that "designated issues" would narrow the scope of rebuttal and cross-examination rights to "disputed issues of material fact it is necessary to resolve."[87] Although the commission's initial proposal for implementing this provision narrowed cross-examination to "disputed issues of specific fact, in contrast to legislative fact,"[88] the final rule broadened the requirement to "disputed issues of fact."[89] The final rule also allowed the commission or the presiding officer "to designate any other issues for consideration" using the same procedures.[90] After the initial notice was published, the rule allowed 60 days for comments proposing designated issues[91] but offered no guidance on how to determine which issues to designate, leaving the question to the discretion of the individual presiding officers. To further complicate the identification of key issues, the rules allowed written comments on any relevant issue up to 45 days before the start of the informal hearing,[92] a date that would necessarily fall after the final notice had identified the designated issues.

Of course, identifying the key factual issues that must be resolved depends on the proposed rule's theory. If that theory is ambiguous, the relevant facts are uncertain as well. As the ACUS noted, if designated issues are to narrow the matters in dispute, they can only be identified "after the major issues in the proceeding have been made as clear as possible, and with reference to specific evidence" on the rulemaking record.[93]

Yet another problem was the incentive of both presiding officers and rulemaking participants to designate issues broadly. For presiding officers, the threat of judicial reversal on appeal always existed. For participants, there would be no cross-examination unless an issue was designated, and participants erred on the side of inclusion. In many proceedings, "virtually all of the major participants favored freewheeling, unfettered cross-examination."[94] Moreover, presiding officers, drawn from staff members with prior experience in rulemaking, "seemed to exhibit a marked distaste for the procedural bickering and diversion from substantive matters"[95] that would result from limiting cross-examination. Rather than restricting cross-examination, presiding officers instead chose to limit the time allowed for cross-examination on essentially any issue.[96] ACUS termed this approach the "freedom-for-time" policy.[97]

The lack of clear theories and the scattershot approach to designating issues produced rulemaking records that all too often failed to include *any* systematic or projectable evidence about either the prevalence of the practices at issue or the effectiveness and impact of the remedy. Rulemaking by its nature is an exercise in generalization, as rules cannot account for the circumstances surrounding every specific instance of a practice. Wise decisions about rules require evidence about whether the practice is sufficiently common to justify a rule, whether a sufficient number of problems have a common cause to make the proposed remedy effective, and whether the benefits so obtained are large enough to justify the costs. All three questions require evidence that allows reasonable estimates that apply to the market as a whole,[98] yet most proposals in the rulemaking binge never developed such evidence.

As Boyer noted, for most rules the record consisted of "large quantities of almost random information" that "will not support systematic generalization to the industry as a whole."[99] When rules returned to the commission for a final decision, sufficient evidence to support them rarely existed.[100] Even when there was objective evidence, the staff often dismissed it based on "the subjective opinions of consumer advocates and enforcement officials."[101] As Ellis noted, "Reliance upon subjective and ad hoc evidence appears to be the rule, not the exception."[102]

It was not the process that failed; it was the inadequacy of the proposals themselves.

Obtaining objective evidence is not particularly difficult. Indeed, as the proposals came back to the commission, the agency conducted "baseline" surveys to provide the foundation for a later assessment of the rule's effects. These surveys, however, were conducted after the commission had made a tentative decision to adopt a rule and thus *after* the rulemaking record had closed. The baseline study for proposed extensions of the Care Labeling Rule found that the overwhelming majority of consumers were satisfied with their experiences in cleaning the types of products the extensions would have covered, and the commission ended up rejecting those expansions.[103] The baseline study for the Funeral Rule substantially undercut a key factual premise of the rule: that funeral directors would not discuss prices over the telephone; the commission nevertheless adopted a modified rule. Unfortunately, however, these studies were never subject to public comment or careful exploration during the rulemaking itself. Similar studies should occur when the rulemaking starts, not after the fact.[104]

The lack of clear theories and systematic evidence produced records that were voluminous but often included little information addressing the key questions. It was not the process that failed; it was the inadequacy of the proposals themselves. In fact, the process did what a good process should do: It assured careful consideration of all the facts available to determine whether a rule should be promulgated. The deficiencies discussed here caused many rulemakings to take far longer than necessary. Tellingly, the process often made the lack of evidentiary support for the original proposal apparent, and when the rules finally returned to the commission, the ultimate decision to terminate most of them without a rule was mostly uncontroversial.[105] The process worked: It prevented the promulgation of poorly thought-out and poorly supported regulations that were more likely to harm than to help consumers.

When theories were clear and facts were properly marshaled, Section 18 rulemaking was not unduly burdensome. The Eyeglass Rule, which originally would have preempted state bans on advertising of eyewear and was eventually narrowed to a requirement to give the consumer a copy of the eyeglass prescription after the Supreme Court's protection of commercial speech rendered the bans unconstitutional, was completed in just over two years. The R-Value Rule, which required labeling for home insulation to disclose a standardized measure of resistance to heat flow, took just under two years.[106] Each rule had a clear theory and clear evidence of both the effects of the challenged practices and the effectiveness of the proposed remedies.

Rulemaking Procedures Immediately After the Binge: Alternative Procedures, Rule by Rule. After the initial wave of rule proposals ended in April 1976, the commission used Rule 1.20 to "dispense with" the procedures required in its rules, if they were not otherwise required by statute, if it found those procedures were "impractical, unnecessary, or contrary to the public interest."[107] Thus, in three late 1970s rules, the commission used this authority essentially to endorse the "freedom-for-time" approach. For example, the notice in the Standards and Certification rulemaking invited comment on 37 questions the commission posed but made clear that the only limits on cross-examination were time, relevance, and the scope of the direct testimony.[108]

The commission also used special procedures for the Children's Advertising rulemaking, but with a different tack, seeking to employ the funneling approach to narrow the issues before hearings with cross-examination. It appointed Needleman, by then an ALJ, as presiding officer in the hope that a respected ALJ's experience with an adversarial process would help manage a proceeding that was clearly controversial and adversarial. The commission established a first round of written comments and "legislative" hearings, with only the presiding officer allowed to question witnesses,[109] concluding in March 1979. After the commission proposed that parties suggest disputed issues for later adjudicative hearings, with the commission itself to decide which issues to designate, interested parties proposed numerous issues as disputed; on July 30, however, the presiding officer recommended that the commission designate only three issues.[110]

The commission never ruled on this recommendation, and in May 1980, Congress, in the FTC Improvements Act of 1980, removed the commission's authority to promulgate the rule based on an unfairness theory and required the agency to publish the text of any newly proposed rule for comment. Instead, following the defeat of President Jimmy Carter in 1980, the commission decided to terminate the proceeding before President Reagan's appointees arrived.[111]

Rulemaking After the FTC Improvements Act of 1980: The Decline of Rulemaking, the Demise of Designated Issues, and the Rise of the Search for Consensus. Congress acted to rein in many of the real and perceived excesses of the unfairness-based rulemaking proposals with the 1980 FTC Improvements Act.[112] It prohibited the then-ongoing Standards and Certification rulemaking based on unfair or deceptive acts or practices[113] and a Children's Advertising rule based on unfairness,[114] while also changing Section 18's procedures. The act required that all rulemakings begin with an advance notice of proposed rulemaking (ANPRM)[115] and required an independent presiding officer, who shall "make a recommended decision based upon the findings and conclusions of such officer as to all relevant and material evidence."[116] It expanded the requirement that the commission explain the reasons for the rule "with particularity," requiring an NPRM to include the text of a proposed rule, "including any alternatives."[117] The act also restricted ex parte contacts with commissioners, including commissioner contacts with the rulemaking staff;[118] required preliminary and final regulatory analyses for any rule, specifically including rules promulgated under Section 6; and extended this requirement to rule amendments that were expected to have major effects. The regulatory analysis is not subject to judicial review unless "the Commission has failed entirely to prepare a regulatory analysis."[119] Finally, the act adopted a two-house legislative veto, later ruled unconstitutional.[120]

The commission implemented these requirements in its rules in 1980 and 1981. Before July 2021, the only substantive change in the commission's rules of practice for rulemaking since the implementation of the 1980 Improvements Act was the designation of the chief ALJ as the chief presiding officer in 1989.[121]

Congress made one additional change in Section 18. Although the original Section 18 had required that the SBP include "a statement as to the prevalence of the acts or practices,"[122] Congress in 1994 required that the commission could issue an NPRM only "where it has reason to believe" the practices are prevalent. The commission can make this determination if it has issued cease and desist orders addressing the practice or if any other information "indicates a widespread pattern of unfair or deceptive acts or practices."[123] Because two orders may be enough to find prevalence under this requirement, it is not clear this provision has any significant effect.

After implementation of the FTC Improvements Act of 1980, Section 18 rulemaking has been rare, especially involving significant rules, to say the least.[124] We were in the leadership of the FTC's Bureau of Consumer Protection when the pivot from rulemaking occurred. The shift reflected not a decision that Section 18 procedures were too cumbersome, but instead our judgment that the rules the FTC should enforce already existed in the "principles" of Section 5 of the FTC Act, providing rules of the road for a market economy, best enforced case by case and through agency guidance.[125] As discussed below, rulemaking remained useful but was hardly the agency's central tool.

Jeffrey Lubbers, a professor at American University Washington College of Law, identified nine amendments of pre–Magnuson-Moss Warranty Act rules promulgated since 1983.[126] One of these, an amendment of the Care Labeling Rule, was substantially complete before the FTC Improvements Act of 1980 and followed the commission's original rules of practice.[127] In addition, there was one new rulemaking, the Business Opportunity Rule, promulgated in 2011,[128] and proceedings that led to the repeal of 14 pre–Magnuson-Moss Warranty Act rules, virtually all of which had fallen into disuse.

None of the post–FTC Improvements Act of 1980 rulemakings followed the general rulemaking procedures in the commission's rules of practice. Instead, the commission used Rule 1.20 to adopt alternative rulemaking procedures after the ANPRM concluded.[129] Each proposal after 1984 used a modified format with a single NPRM[130] and no designated issues. The early proposals included a schedule of hearings in the notice for which parties could ask for cross-examination, subject to the presiding officer's discretion and limitations, on any issue.

This approach was followed for the Unavailability Rule,[131] Eyeglasses II,[132] the first Mail Order Rule amendment proceeding,[133] and the Funeral Rule.[134] In each instance, there were oral hearings, and the final rule SBPs specifically mention cross-examination, except for Eyeglasses II. Two rule repeals initiated in 1989 took a similar approach but without oral hearings. One was completed in 13.5 months, the other in just under 17 months.[135]

In 1995, the commission adopted a new tack for multiple rule repeals, seeking (successfully) to avoid oral hearings entirely. ANPRMs for eight rule repeals were published in 1995. Although one (the Light Bulb Rule) took 14 months to conclude,[136] six others were completed in seven months,[137] and one took just over eight months.[138] In each case, there were no hearings, no presiding officer, and no staff reports.[139] Although the Light Bulb Rule attracted five comments, the other seven rules received only two comments in total.

The commission also sought to discourage hearings when it proposed amendments to the Amplifier Rule in 1999. It did not schedule hearings and stated that "written comments appear to be adequate" to make a decision.[140] There were no requests for a hearing, no presiding officer, and no staff report or post-record comment period.[141] The same process was followed for the amendments to the R-Value Rule, proposed in 2003. Again, there were no hearings, no presiding officer, and no staff report or post-record comment period,[142] and neither rule was controversial. There were only five comments on the Amplifier Rule[143] and apparently only limited comments on the R-Value Rule, although the SBP does not include a count.[144]

The commission took a similar approach with the NPRM for the proposed amendments to the Franchise Rule in 1999, noting that written comments appeared adequate and that anyone asking for a hearing "must designate specific facts in dispute."[145] Before the NPRM, however, there were extensive opportunities for oral input, as the commission conducted a series of six public workshops after the ANPRM, presumably seeking to build consensus about needed changes. It worked: There were no requests for a hearing and, again, no presiding officer. There was, however, a staff report and post-record comment period.[146] The second amendment to the Mail Order Rule proposed in 2011 followed a similar process, although there is no mention of public workshops.[147]

The commission's most recent rulemaking foray, the Business Opportunity Rule, is a revealing case study. The initial NPRM followed the same process as the Franchise Rule amendment,[148] and based on that proceeding, it was not expected to be controversial. Inadvertently, the proposed rule's coverage swept in all multilevel marketers, leading to extensive comment and numerous requests for hearings and cross-examination. Rather than appoint a presiding officer and proceed with hearings, the commission issued a revised NPRM exempting multilevel marketing firms.[149] Unlike the original proposal, which received more than 17,000 comments, the revised proposal received fewer than 125 comments, including some requests for oral hearings.[150] Rather than hold hearings, the commission held a public workshop that became part of the rulemaking record.[151] And although the commission never appointed a presiding officer, it did release a staff report and allow a post-record comment period.[152]

The Lessons of History: Clarity and Evidence Matter. Several conclusions emerge from this review of the FTC's history with rulemaking procedures. First, clarity is crucial. As detailed above in "Early Section 18 Rulemaking," failure to articulate and understand the basis for the rule, the industry involved, and the necessary connection between the proposed remedies and the asserted problems doomed most of the rules in the 1970s, not Section 18 procedures. Clear legal and substantive theories, along with systematic evidence supporting them, are the sine qua non of effective rulemaking. Multiple analyses of early Section 18 rulemaking echo the conclusions of ACUS that the rulemaking records were strikingly inadequate to support reasoned analysis of rulemaking proposals designed to transform major sections of the American economy.

Clear legal and substantive theories, along with systematic evidence supporting them, are the sine qua non of effective rulemaking.

Second, the agency attempted seriously to use "disputed issues" to narrow the range of issues subject to hearings and cross-examination only once, perhaps ironically, in the highly controversial Children's Advertising rulemaking. In other cases, either the presiding officer or the commission itself defaulted to allowing cross-examination limited primarily by time, without regard to the issue. Moreover, although the controversy surrounding the rule was clear when the presiding officer recommended three designated issues in the Children's Advertising rulemaking, this was the only time the commission reserved to itself the decision about which issues to designate, although it ultimately did not do so.[153]

Third, although the commission featured oral hearings from the beginning of its rulemaking in the early 1960s, over time it has sought increasingly to avoid oral testimony entirely. Consistent with the statutory requirement, it has always offered "an opportunity for an informal hearing"[154] but has sought to dissuade such requests by, for example, stating that it believes written comments are adequate or asking parties requesting a hearing to explain why they believe one is needed. Instead, it has substituted informal workshops that help identify the issues and build consensus (e.g., the Franchise Rule amendment) or as a replacement for a more formal hearing.

An approach that avoids requests for informal hearings also avoids entirely the need for a presiding officer. Indeed, the last appointed presiding officer was in 1989, for a Mail Order Rule amendment. Seeking to avoid hearings, however, is unlikely to succeed with a controversial rule that seeks major changes in industry practices. Workshops were a useful part of the rulemaking that led to the National Do Not Call Registry, but it is inconceivable that telemarketers with a statutory right to a hearing would have agreed to abandon that right. From their perspective, there would simply have been too much at stake.[155]

Fourth, the commission's success in avoiding requests for hearings suggests that, post-1980, it has provided much more clarity about its proposals, their rationales, and the supporting evidence. That greater clarity, so lacking in the early rulemakings, helps the parties determine whether a hearing might advance their interests. The ANPRM, required since 1980, has likely helped provide some of that clarity, because the commission has needed to respond to the comments filed in that proceeding. The ANPRM can thus help identify key facts and the most promising regulatory approaches.

Fifth, except when there was virtually no controversy, the commission has published a staff report summarizing the rulemaking record and solicited comment on the report. Only after public comment on the proposal, the staff's analysis of the record, and its recommendations has the commission determined whether to adopt a final rule.

Sixth, the well-thought-out and well-supported rule proposals (e.g., Eyeglasses and R-Value) and the swift action on uncontroversial rule repeals make clear that the statutory requirements are not the primary reasons that 1970s FTC rulemaking was protracted and contentious. The early rules themselves, and some subsequent proposals such as the Business Opportunity Rule, were controversial, leading to lengthy proceedings before the rulemaking finally concluded. Controversial rules, however, deserve careful attention and thorough exploration of their factual predicates. That is what Congress sought to require in establishing Section 18 rulemaking procedures.

What has made many rulemakings so time-consuming after the FTC Improvements Act of 1980 is not the time required for the steps in the process, but rather the time between steps. It would appear that the staff and the commission often have not regarded rulemakings as high-priority matters requiring prompt attention. In the six-year Funeral Rule amendment proceeding, for example, preparation of the staff report took 14 months, the commission took more than 19 months to vote on the staff's final recommendation, and preparation of the Final Rule took another 11.6 months. In contrast, it was only 10 months from the NPRM through the public hearings and to the close of the rebuttal comment period. The presiding officer's report and the post-record comment period added five months, and it took just under eight months for the staff to prepare its final recommendations.[156] Similarly, the repeal of the Picture Tube Rule in 2018 featured a 10-month delay between the ANPRM, which received only two comments, and the NPRM.[157]

To expedite rulemaking requires staff managers and commissioners themselves to make the rules a priority. The recent ill-considered steps to reduce public input and cut a few weeks from the basic process of promulgating a rule will likely not even serve the goal of expediting the process, as we show next.

The Biden FTC Changes the Rules for Rulemaking

The commission's recent changes to its rules of practice were adopted in highly unusual haste. After first debunking the process and rationale for the FTC's changes of July 1, 2021, this section identifies various key changes in the rules and discusses how those changes degrade the quality of the rulemaking process.

Are We There Yet? The FTC's Rush to Judgment. One might think that an agency about to embark on a new rulemaking campaign would study its experience to find what had worked and what had not. It might even solicit the views of outside parties on how to improve the process. Instead, on July 1, 2021, the commission adopted substantial changes to its rulemaking procedures on a 3–2 party-line vote, in a meeting styled "public," with no public comment or input about the changes.

The commission majority's rationale for change is a myth—convenient, to be sure, but a myth nonetheless. The majority claims, truthfully to start, that the commission in the 1980s moved away from rulemaking, which the James Miller commission concluded had been a tremendous drain on the commission's resources, without producing commensurate consumer benefits. The majority then claims that "a fundamental part of that posture are the agency-promulgated Rules of Practice" that "shape Commission behavior and process for Section 18 rulemaking."[158]

As described in detail above,[159] this claim has two serious problems. First, the rules of practice have not changed in substance since implementation of the congressionally mandated changes in the FTC Improvements Act of 1980. The rules the Lina Khan commission revised are far more the product of FTC Chairman Pertschuk, part of the Carter administration and an architect of the original Section 18 when he was a Senate staffer, with the last of the rules implementing the 1980 act adopted before the Reagan-appointed chairman arrived. Second, the rules of practice the commission recently amended have not been followed since the initial wave of rulemaking, with the commission opting for some form of alternative procedures in every rulemaking proposal since April 1976. Unfortunately, however, the recent changes ignore the successful innovations those alternative procedures incorporated.

The commission majority's rationale for change is a myth—convenient, to be sure, but a myth nonetheless.

Similarly, the majority claims that the shift of the function of the chief presiding officer to the chief ALJ "reinforced the myth that Section 18 rulemakings required elaborate, interminable judicial processes."[160] In fact, it appears that the only practical effect of the change in the rule was to move Henry B. Cabell, who was chief presiding officer throughout the 1980s,[161] from the Office of the Chief Presiding Officer to the Office of the Administrative Law Judges. Only one presiding officer was ever appointed after that change, however, and that was none other than Henry B. Cabell.[162] It strains credulity to think that this organizational decision, made well after the 1970s rulemaking binge when there was no longer demand for presiding officers, is the reason that Section 18 rulemaking became cumbersome. In fact, the only time an experienced ALJ presided over a rulemaking was when Pertschuk's FTC decided to use one for the controversial Children's Advertising rule.

Rather than a careful consideration of what has worked and what has not, the revisions appear to be based substantially on an examination of differences between the precise statutory requirements and the commission's rules of practice.[163] The assumption seems to have been that anything not expressly required should be dropped because it interfered with "efficient" rulemaking, a word that the commission uses repeatedly to explain its changes, seemingly as a synonym for "timely." Rulemaking procedures are supposed to gather reliable information, however, with the goal to improve agency decisions, and the quality of the resulting rules is crucial to assess the "efficiency" of the process. The commission's explanation contains not one word about writing better rules or about the possible impact of process changes on the substance of any rule that might be adopted.[164] The need for speed trumps all other considerations, so much so that other considerations *were not deemed worth even mentioning*.

The process to change the rules was very different from the process used before, reflecting the current leadership's belief in speed as *the* goal in making decisions. When Congress enacted Section 18, the commission published many key provisions as a proposed rule, seeking public comment.[165] These included the content of the final notice of rulemaking, the presiding officer, and the designation of issues. Comments led to changes in the rules eventually promulgated. Among other changes, while the proposal had specified that the commission would appoint the presiding officer, the final rule instead gave this responsibility to the special assistant director for rulemaking in the Bureau of Consumer Protection.[166] Moreover, although the 1975 proposal required cross-examination only for "disputed issues of specific fact, in contrast to legislative fact"[167] that are material and necessary to resolve, the final rule broadened the requirement to "disputed issues of fact."[168] Without even acknowledging this history or explaining the reasoning behind the change, the July 1 rules resurrect the distinction between "specific" and "legislative" facts as the first listed factor in deciding whether to grant requests for cross-examination.[169]

The commission followed a similar process when it amended its rules to implement the requirements of the FTC Improvements Act of 1980. It issued an interim rule,[170] accepted public comments, and later issued revised, final rules.[171] The commission's rules regarding ex parte communications went through four separate rounds of public comment—two in 1977,[172] one in 1979,[173] and one in 1980.[174] The current commission revised these rules without input from anyone outside of a chosen few, excluding most of the career staff and the Republican commissioners.

Of course, efficiency and speed in rulemaking are important goals, but the process must be judged ultimately by its results. Rules have potentially major consequences for consumers and for businesses that must comply with them. Bad rules can produce long-lasting adverse effects that harm, not protect, consumers. As Congress understood when it gave the commission rulemaking authority, procedural checks help assure full consideration of the issues and the facts about whether a problem exists and, if so, a rule's potential effects.

If there is consensus about the outcome, as the commission carefully built during its Section 18 rulemakings starting in the late 1980s, the result is likely to be a good rule according to those who participate in the process, including the affected businesses and consumer advocates.[175] Consensus is built by acquiring the information necessary to understand the problem as those most affected see it and seeking solutions that maximize the benefit to consumers, net of compliance costs. Building consensus often takes time, however, and is not always consistent with the fastest-possible process. And, of course, sound and beneficial rules are possible even when some may disagree with the commission's decision.

When there is no consensus, and consensus is unlikely for controversial rules that seek substantial changes in industry practices, speed is only one dimension of rulemaking efficiency. Achieving the "right" result is most crucial, lest a rule inadvertently prohibit practices that benefit consumers or unnecessarily raise costs for consumers. In particular, rulemaking procedures should provide ample opportunity to clarify the issues, surface as much systematic evidence addressing those issues as feasible, and allow careful exploration of the proposal's factual predicates. Section 18 procedures were designed to do exactly that, even at the cost of some additional resources, including time, in rulemaking.

Careful exploration of the issues and impacts is especially important for an agency like the FTC. Many business practices are beneficial or benign in some contexts but harmful in others. Because much of its activity involves law enforcement, often against clear frauds, the commission and its staff may see primarily instances in which the practice harms consumers and are far more likely to understand the operations of "bad actors." The agency staff and the commissioners themselves have far less experience with the impact of potential remedies on legitimate businesses using similar business practices.

Achieving the "right" result is most crucial, lest a rule inadvertently prohibit practices that benefit consumers or unnecessarily raise costs for consumers.

That was the case earlier in this century with the Business Opportunity Rule, for example, when a rule based on seemingly simple disclosures that made sense for the fraudulent operations that the commission often attacked would have resulted in useless, telephone book–sized disclosures when applied to legitimate direct selling companies.[176] The rulemaking process identified the problem and led the commission to revise its proposal to exempt legitimate direct sellers.[177]

As we discuss in the next section, the commission's recent revisions to its rules of practice upset this careful congressional balance and are more likely to lead to bad rules. Ironically, past experience suggests that the changes are unlikely to achieve even the more expeditious process that is the only justification proffered for the changes. As we explain above,[178] failure to articulate and understand the basis for the rule, the industry involved, and the necessary connection between the proposed remedies and the asserted problems doomed most of the rules in the 1970s, not Section 18 procedures. Undue haste now risks repeating those failures.

Taken as a whole, the commission's changes are reminiscent of the DC Circuit's concerns when it dismissed on grounds of ripeness an interlocutory challenge to the special procedures adopted for the Children's Advertising rule. The court noted:

> Indeed one gets the impression that the proceeding itself is window dressing for the benefit of a court passing on a final trade regulation rule that was in stock long before its tentative models were displayed in the children's advertising Notice. . . . Some of the Commission's activities at least suggest that it long ago settled on what it had in mind and deliberately fashioned its special rules to achieve that result with the fewest possible outside intrusions from precisely the parties Congress intended to have participate in a proceeding of this kind.[179]

Although specific rule proposals have yet to emerge, today's overall impression is much the same. The commission appears to have decided how to proceed, has sought to remove anything that might stand in the way, and will tell us what it proposes whenever it chooses.

Yet, even with a rule that appeared to the court predetermined, the facts were not as supposed. One of us, as a young economist at the FTC, was assigned to work with the Children's Rule staff on potential remedies. Audience and advertising data showed that the staff's initial idea, a ban on all advertising when young children were a majority of the audience, would have affected only one program in 1977—*Captain Kangaroo*, the cherished adult friend to millions of children who grew up before Mr. Rogers entered the neighborhood. Even had the captain survived without advertising, the impact on the amount of advertising seen by children would have been trivial. Indeed, most of the advertising that children saw was not in children's shows; it was in popular adult or family sitcoms such as *Laverne & Shirley* and *Happy Days* or in the reruns of older sitcoms such as *I Love Lucy* in the after-school hours on local television.

To say the least, these facts were disappointing to the rulemaking staff, who realized that any effective remedy was highly problematic. Thus, the final staff report concluded that any proposed rule would be both underinclusive (the *Captain Kangaroo* problem) and overinclusive (the *Happy Days* problem).[180] As John Adams famously said, "Facts are stubborn things."[181]

Key July 1, 2021, Revisions to the Rulemaking Process: Enhancing Political Control and Downgrading Public Input. Among the many changes the commission made, we consider in detail five key issues: particularity, the presiding officer, oral hearings and designated issues, the final staff report, and the ex parte rules.

"Particularity." When Congress first codified the commission's rulemaking authority, it required an initial NPRM "stating with particularity the reason for the proposed rule,"[182] a requirement included in the commission's original rules of practice implementing Section 18.[183] The FTC Improvements Act of 1980 amended this provision to require a notice "stating with particularity the text of the rule, including any alternatives, which the Commission proposes to promulgate, and the reason for the proposed rule."[184] The commission's 1981 implementing rules construed this language to publish the text of the rule as an additional requirement and retained the requirement to state its reasons "with particularity."[185] That is surely the text's plain meaning.

Moreover, in the rulemaking controversy at the time, there was no hint that Congress wanted to remove the requirement that the commission explain its reasons "with particularity." Instead, among other problems—the entire context of the 1980 amendments was a congressional reaction to the FTC's perceived excesses—Congress was trying to prevent a repeat of the Children's Advertising rule's failure to include the rule's text at the beginning. Thus, a far more sensible reading of the statute is that three elements must be described "with particularity"—the rule, any alternatives, and the commission's reasons.

Nevertheless, without any comment or explanation, the commission on July 1, 2021, deleted "with particularity" from the requirement to explain its reasons, leaving only "a statement describing the reason for the proposed rule."[186] A rule promulgated based on an NPRM that does not state the reasons for the rule "with particularity" would appear to be one promulgated "without observance of the procedure required by law,"[187] subject to reversal.

The experience of the 1970s made clear that the problem with the commission's notices was too little explanation, not too much.

The experience of the 1970s made clear that the problem with the commission's notices was too little explanation, not too much. Given this history, a retreat from particularity is particularly ill-advised. As discussed above, the multiple, detailed assessments of the 1970s rule experience concluded that the commission needed to provide greater clarity and specificity about its theories for a rule. Experience demonstrated that, in Section 18 rulemaking, a general description of the reason for the rule is insufficient to define the issues. And, of course, it is hard to see how commission rules that begin by ignoring clear legal requirements will proceed on a sound footing; in fact, such changes to the rulemaking procedures will almost certainly lead to legal challenges, thus prolonging—not expediting—the rulemaking process.

Presiding Officer. A hearing requires a presiding officer, and the commission's initial rules provided for appointment of such an official, although there was no specific statutory requirement to do so. Congress codified this unchanged requirement, used throughout the 1970s, in the FTC Improvements Act of 1980 and added that the officer "shall be responsible to a chief presiding officer who shall not be responsible to any other officer or employee of the Commission." Thus, Congress contemplated an independent review of the rulemaking record, requiring that official to "make a recommended decision based upon the findings and conclusions of such officer as to all relevant and material evidence."[188]

The July 2021 rules of practice make two changes inconsistent with the intent and language of the 1980 act. First, the rules gut the independence of the presiding officer. Second, they seek to limit the scope of the presiding officer's decision.

Regarding the presiding officer's independence, the changes seem clearly inconsistent with the 1980 act's intent. Under the new rules, the agency chair is the chief presiding officer, although the chair can choose to appoint someone else.[189] The commission offers no rationale for this change, which serves to consolidate the chair's control of the rulemaking process. Both the director of the Bureau of Consumer Protection, who manages the rulemaking staff and ultimately controls its recommendations, and the presiding officer for the particular rulemaking report directly to the chair. It is hard to imagine that they will publicly disagree about a rule proposal that the chair has presumably endorsed and perhaps emphasized as an important part of the agency's consumer protection agenda.

Second, the changes limit the scope of the presiding officer's decision. Although the new rule includes the statutory language quoted above, it also provides that "the presiding officer's recommended decision will be limited to explaining the presiding officer's proposed resolution of disputed issues of material fact."[190] Apparently, the presiding officer's recommended decision is to ignore any undisputed issues. The commission offers no basis for, nor explanation of, the rationale for this limitation and fails to reconcile the restriction with the plain statutory language. A "recommended decision based upon . . . all relevant and material evidence," as the statute requires, would necessarily include both undisputed facts and the designated issues.

In the Children's Advertising rulemaking, for example, there was essentially undisputed record evidence that a ban on advertising would raise prices of products advertised to children and significantly undermine the financial foundations of television programs for children, facts surely relevant to any recommended decision.[191] Thus, while Congress envisioned an independent analysis of the entire rulemaking record—"all relevant and material evidence"—the commission now limits the recommendation to the answers to specific questions that the commission itself will pose. The rule changes presume that a presiding officer whom the chair appoints and supervises is not sufficient to ensure that inconvenient but undisputed facts can be ignored.

The early rulemakings revealed the value of a both broad and independent review of the rule's record. Until the FTC Improvements Act of 1980, the presiding officer's report came before the staff report. The staff often disagreed with the presiding officer, thus effectively surfacing issues that the commission itself had to resolve. After the 1980 act, the commission switched the order of the reports, thus allowing the presiding officer to comment on the staff's analysis, with the last (public) word on the recommended rule. In at least one instance under this process, the Unavailability Rule, the presiding officer recommended amendments that "deviated substantially" from the commission's proposal and the staff's recommendation, although the commission rejected his recommendation.[192]

Independence is particularly important because rulemaking staffs will always feel obliged to advocate for and defend the commission's proposal. In multiple rulemakings, advocacy for the original proposal occured over the objections of new bureau managers, who often added their different views in a separate memorandum accompanying the staff report.[193] To be sure, staff reports often recommended final rules that differed significantly from the original proposal, but the tendency to champion the proposal in whatever was the current form was unmistakable.

In his review of FTC rulemaking, Ellis concluded that "there appears to be a pattern of giving deference to evidence that supports regulation and downgrading, explaining away or disregarding that which is inconsistent with the need for further regulation."[194] As then-Commissioner Pitofsky (later FTC chairman) noted in his separate statement when the commission adopted its ex parte rules regarding staff communications,

> staff devotion to a single project over a period of years and the adversary clashes that often develop during the proceeding can generate in some rulemaking projects a will-to-win in the staff which influences their view of the record and their recommendations.[195]

In that statement, Pitofsky also noted that at a July 1980 policy review session, "a consensus was reached that the Presiding Officer should play a more important role in assessing staff recommendations."[196] These competing views of the same rulemaking record helped define the issues that the commission itself would ultimately resolve. Rather than following the commission's long-standing bipartisan consensus, first formed under Chairman Pertschuk, that the agency should use the presiding officers to check the staff, the July 1, 2021, changes ensure that the presiding officer *will not even see* the staff's recommendations, as discussed below.

When the FTC first required that the presiding officer be responsible to no one other than the chief presiding officer, the agency provided for periodic evaluations of the performance of presiding officers through the executive director.[197] This language was eliminated in 1989 when the function was transferred to the chief ALJ, given the existing process for evaluating ALJs.[198] It was not replaced in the 2021 revisions. Under the new rules, presiding officers are responsible to no official other than the chair, and there is no provision for periodic evaluations. Apparently the chair dictates all.

If the commission's new rule revisions aim to achieve greater political control of the rulemaking process, making the chair the chief presiding officer does exactly that. Enhancing the chair's power, however, is very different from the congressional goals of heightening reasoned decision-making and enhancing public participation as checks on agency discretion and to ensure that the outcome of FTC Section 18 rulemakings benefit consumers.[199] A promulgated rule based on a recommended decision from a presiding officer who is not independent and who only addresses some issues in the record would again appear to be one adopted "without observance of the procedure required by law"[200] and thus subject to reversal or at least prolonged challenge.

Oral Hearings and Designated Issues. Section 18 includes two provisions relevant to informal hearings. First, the initial notice must include "an opportunity" for an informal hearing.[201] If a hearing occurs, interested parties are "entitled" to present their position orally.[202] Neither the statute nor the commission's rules limit the content of oral presentations, although the commission has often required that written comments include the substance of any oral testimony. As noted above, recent practice and the July 1, 2021, rule provide for a hearing only on request, with the new rule requiring a request and a statement identifying the party's interests.[203] This is somewhat less restrictive than the 2006 Business Opportunity Rule, in which parties requesting a hearing were required to include "a statement explaining why they believe a hearing is warranted."[204] For any controversial proposal, there will surely be many such requests, as there were with the Business Opportunity Rule.

Second, if there are "disputed issues of material fact it is necessary to resolve," parties are entitled to present rebuttal submissions and cross-examination as the commission determines is appropriate and "required for a full and true disclosure"[205] about those issues. These are the "designated issues" in the proceeding. As ACUS saw it, designation is an important part of the process of progressive narrowing of the issues, using more formal proceedings to explore the key factual issues. Yet, as described above, outside of the Children's Advertising rule, that did not happen.

The 2021 rule revisions provide that the NPRM will include "a list of disputed issues of material fact designated by the Commission as necessary to be resolved, if any."[206] This is a substantially different approach to designated issues than used in any prior proceedings. Originally, interested parties proposed designated issues to the presiding officer, who made a determination.[207] In the next set of rulemakings, the procedures the commission adopted generally took the "no designated issues" approach, essentially allowing cross-examination on any issue. After the FTC Improvements Act of 1980, parties were to propose designated issues in a second round of comments after the initial comment period closed.[208] And in the most recent consensus-based rulemakings, there were of course no designated issues and usually no hearings.

When the commission has allowed for the possibility of hearings and disputed issues, it used interested parties' comments to identify the key issues. As with the Business Opportunity Rule, the crucial issues may not become apparent until parties that have to comply with the rule weigh in. Thus, when it changed the rules to allow such parties to propose designated issues in rebuttal comments in 1981, the commission specifically noted that it "anticipates that interested persons will then be able to use the written comments in framing proposals for disputed issues."[209] Indeed, in the only rulemaking that actually tried to use designated issues to narrow the scope of the hearings, the Children's Advertising rule, the presiding officer identified three disputed issues based on the written comments.[210]

Under the new rules, the commission will define the issues first and only then hear from interested parties. Hearing the views of interested parties before identifying the key facts in dispute is a far more sensible way to proceed.

Designating issues in the NPRM seems particularly problematic. The commission will attempt to identify disputed issues before anyone outside the commission has seen the proposed rule. Comments on the ANPRM may offer some insights, but without a specific proposal on the table, the key issues may well remain ill-defined. The rules allow parties to propose other designated issues in their request to the commission for an oral hearing, but they too must do so without the benefit of public comments: Requests must be made before the close of the written comment period. Because this is the only opportunity to propose designated issues, there will be a clear incentive for both interested parties and the commission staff to propose anything that might be disputed in the comments. This approach is inconsistent with the fundamental policy that designated issues should narrow the issues to be disputed in a more formal proceeding.

Under the new rules, the commission will define the issues first and only then hear from interested parties.

Designating any issue creates a statutory right to rebuttal submissions and cross-examination, unless the commission determines that neither is appropriate nor required for full disclosure.[211] Were the commission to state at the beginning of the rulemaking that there are no material facts in dispute it would invite a claim that the commission has prejudged the matter and that comments from interested parties are simply a hoop to jump through. This is very different from the "no designated issues" approach used often in post-binge rulemakings, which scheduled a hearing and allowed cross-examination on essentially anything. There is a clear difference between "no facts are in dispute" and "you can dispute anything you want."

Returning designating issues to the commission when parties suggest other issues in their requests for a hearing seems more likely to delay than expedite the process. Identifying the issues in dispute requires some familiarity with the facts included in the record, but how will the commission acquire that familiarity? Relying on the staff to summarize the record would create at the very least the appearance of significant ex parte communication issues, giving the staff a nonpublic channel to advise the commission. Although such communications might be technically permissible if they are confined to material in the record, because of the timing, the nature, and the significance of the conversation, the approach of the commission in the Children's Advertising rule is more prudent and thus preferable.[212]

Rulemaking decisions under Section 18, after all, are supposed to be based on the rulemaking record, which needs to be public. Nor is it likely, or feasible, for individual commissioners or their attorney advisers to invest the time necessary to read all the comments, let alone analyze them and separate the factual questions on which the written record is clear from those that are in dispute.[213] The lengthy delays in the commission's consideration of the Funeral Rule amendments[214] and the commission's failure to decide on designated issues in Children's Advertising[215] hardly inspire confidence that commission designation will expedite the process.

Final Staff Report. Until July 1, 2021, the commission's rules since Section 18 was enacted always provided for a final staff report, to include the staff's "analysis of the record and its recommendations as to the form of the final rule."[216] Until the 1980 act, the staff report followed the presiding officer's report; after that act, the staff report came first. Since 1975, both reports were subject to a post-record comment period.[217] The July 2021 changes eliminated the staff report and the post-record comment period to "provide more efficient proceedings."[218]

Rather than enhancing efficiency, this change will reduce the opportunity for public input into the decision-making process and thereby increase the probability that an overly invested rulemaking staff will influence the result. Because the staff will certainly prepare its analysis of the record and recommendations in any event, there is no avoiding the time it takes to do so. Under the new rules, however, only the commission will see that analysis. (Although the ex parte rules might be expected to make staff recommendations public, those rules only apply to communicating "any fact which is not on the rulemaking record."[219]) The presiding officer will not see it, abandoning the long-standing consensus that presiding officers should independently review staff recommendations. Nor will there will be any opportunity for interested parties to assess this crucial analysis of the record, note key evidence that was overlooked or downplayed, or assess the impact of any recommended changes in the rule. In past rulemakings, such changes from the original proposal have sometimes been significant, and the views of interested parties on the adequacy of those changes to address concerns raised in earlier comments can be invaluable to the quality of the ultimate decision.[220]

Eliminating the public staff report will also undermine the comprehensiveness of the presiding officer's report. The team of attorneys and others who have worked on the rule prepare staff reports, which can be more thorough in their analysis of record evidence, including potentially numerous comments, because the staff can divide the labor. A presiding officer, limited to 60 days and charged with accounting for "all relevant and material evidence," can use the staff report as a guide to the key evidence. Working alone or with a much smaller staff than that on the rule, the presiding officer's assessment of the record will almost inevitably be both less complete and less comprehensive.

Reviewing courts have also found the staff report summary and analysis of record evidence useful. When it considered a challenge to the first Eyeglass Rule, for example, the DC Circuit cited the staff report's discussion of record evidence extensively.[221] Opinions upholding the Used Car Rule[222] and the Credit Practices Rule[223] also included numerous citations to the staff report.

Ex Parte Rules. Just as post-record comments on the staff report can be useful, post-record comments directly to the commission or individual commissioners can be valuable as well. The original rules of practice allowed oral presentations to the commission before final consideration, at the commission's discretion. Presentations had to be "confined to information already in the rule making record."[224] Such meetings, often in the form of round table discussions, were "routinely" part of the first wave of rulemaking.[225]

Of course, parties may communicate with individual commissioners as well. Since 1977, the commission's rules have required that any such communications be made public, but they distinguished between timely communications (within the comment period for the proceeding) and untimely ones. Only timely communications (or summaries of oral communications) were placed on the rulemaking record that forms the basis for the commission's decision, with other communications placed on the public record.[226] When Congress in 1980 required the commission to apply its ex parte rules to communications with the rulemaking staff, the commission specifically rejected proposals that argued for eliminating this distinction and including all communications to commissioners on the rulemaking record. The agency explained:

> We find no indication in the legislative history that Congress intended subsection 18(j) [of the 1980 act] to afford outside parties the opportunity to submit information for the record after established deadlines and thereby subvert the orderly rulemaking process and create a privileged status for meetings between Commissioners and outside parties.[227]

The July 2021 revisions to the ex parte rule abandon that decision in part. The distinction between timely and untimely communications remains for written comments, with only timely written communications included in the rulemaking record. But for oral communications, the new rule abandons the distinction, placing all communication summaries on the rulemaking record.[228] Moreover, the rule providing for oral presentations to the commission is gone, along with its requirement that presentations be confined to materials in the rulemaking record.

The "rulemaking record" is crucial in Section 18 proceedings. Commission decisions must be supported by "substantial evidence in the rulemaking record taken as a whole,"[229] which arguably requires the commission to consider the oral communication, if only to dismiss it. Moreover, the statute allows a court to order the commission to provide additional opportunities for presentations if there are "reasonable grounds for the submissions and failure to make such submissions and presentations in the proceeding before the Commission."[230] The lack of an opportunity to respond to new, material evidence presented by a single party to a single commissioner would certainly appear to constitute "reasonable grounds" for failure to make the presentation earlier, unless the commission allows another opportunity for public comment.

When communications include new evidence, effective public participation in the rulemaking process requires an opportunity for all parties.

Multiple objectives are at play in the treatment of ex parte communications. One is transparency: The public should be able to determine who communicates what to the ultimate decision makers. Placing ex parte communications on the public record satisfies this objective. A second objective is fairness and due process: When communications include new evidence, effective public participation in the rulemaking process requires an opportunity for all parties, not just those who can secure a meeting with a commissioner, to address the strength and the implications of that evidence.

Whether new evidence is sufficiently material to require reopening a rulemaking record and an additional round of public comment is often a difficult question that requires careful consideration. The commission's new ex parte rule makes the decision essentially automatic: Anything communicated orally to a commissioner becomes part of the rulemaking record, without any process for considering whether that information requires additional opportunities for public comment.

The majority claims that the changes “enhance Commission transparency by requiring records of both written and oral communications to a Commissioner . . . will be placed on the rulemaking record.”[231] This claim misstates the rule and the likely results. In fact, only timely written comments will be placed on the rulemaking record. Other written comments will be placed on the public record. For oral communications, all will go on the rulemaking record.

Rather than enhancing transparency, this could well, in the words of the Pertschuk-led commission in 1980, “create a privileged status for meetings between Commissioners and outside parties.”[232] Those with whom any commissioner chooses to meet can provide whatever information they wish, whether it is already on the rulemaking record or not, and the commission can base its decision on that information—even if it was not submitted in a timely fashion, and there was therefore no opportunity for rebuttal comments that become part of the written comment process. It is hard to imagine how one might make the process any more opaque. To paraphrase George Orwell, all comments would be created equal—but some are more equal than others.

In principle, there is nothing wrong with putting material received late in the process on the record, and the rules of some agencies, such as the Federal Communications Commission, allow just that.[233] With such material, however, to avoid creating the “privileged status communications” that concerned the Pertschuk-led commission, the commission will have to allow sufficient time and opportunity for rebuttal. The FTC’s rules do not even acknowledge this important issue.

How to Run a Magnuson-Moss Rulemaking

Successful rulemaking using Section 18 procedures is quite feasible; it has been done multiple times with careful planning and effort.[234] We offer suggestions about how the commission could complete rulemaking, even for a controversial rule. The modified procedures employed since the late 1980s are useful for rules that are not especially controversial, but they are unlikely to succeed when a rule proposes major changes for an industry.

We take as our model one of the three most significant rulemakings in FTC history, in which we were heavily involved: the National Do Not Call Registry. Although the rulemaking was conducted under APA procedures and was strongly contested by telemarketers, it could also have succeeded under Section 18 procedures.

First, the commission must be clear about the legal theories and the factual basis for its proposals. Too many of the 1970s rules avoided a clear statement of a particular legal theory; after all, if one theory was insufficient to justify a rule, a different one might succeed. Different theories often depend on different facts, however, expanding the range of issues in dispute, the opposite of the funneling approach that should be central to Section 18 rulemaking. As Boyer noted about the facts, “The investigational material available to support the first wave of proposed rules consisted of large quantities of almost random information collected for purposes other than that for which it was ultimately used.”[235] He concluded that the data were more “fine-grained detail about individual firms and transactions than would be needed to assess general patterns and practices in the industry,” but they were not gathered in a way that would “support systematic generalization to the industry as a whole.”[236]

As Boyer described, agencies often use APA rulemaking

> as a loosely-structured process for fact-gathering and public statement of policy preferences—that is, as a form of decision-making in which the agency simply identified a problem, outlined possible solutions in general terms, and then sought public data, views and arguments as a means of educating itself about the subject matter.[237]

The experience of the 1970s shows that such an approach is unworkable using Section 18 procedures for providing rules in which anyone could have confidence.

An ANPRM might become a fact-gathering tool for the agency to help educate itself, and workshops at an early stage could also help illuminate the issues in greater detail. Indeed, the staff first used workshops with an APA rulemaking to implement the 900-number provisions of the Telephone Disclosure and Dispute Resolution Act of 1992, reasoning that it would gain a far better understanding of the issues by hearing the affected interests debate those issues than it would gain from relying on only interviews or written comments. Such interchanges are likely highly informative at this early stage, as the parties may well differ on key facts, which should heavily influence the commission's own research and analysis.

Second, before issuing an NPRM, therefore, the commission should develop systematic, quantitative, and qualitative empirical evidence to address the extent of the problem it seeks to address, the forces that cause the problem or the reasons that prevent a market resolution, and the efficacy of the proposed remedy. The commission's research should complement and support its rulemaking efforts. As Boyer notes, rules such as "Ophthalmic Goods" (Eyeglass I) and "Prescription Drugs," which started with just such a foundation, "seemed to move more swiftly and smoothly through all stages of the process."[238]

In short, the commission needs to put its cards on the table. The earlier the commission articulates the law and the facts on which it relies, the better, thereby allowing interested parties to scrutinize that theory and those facts with the time often necessary to develop additional empirical analyses of a proposal's foundation and impact, including the viability of a remedy. Discovery rules in litigation seek to prevent parties from delaying key evidence to deny the other side the opportunity to respond effectively, thus improving the accuracy of fact-finding. The same principles apply to rulemaking: If the commission delays key evidence, it may succeed in promulgating more rules, but some are likely to be of poorer quality because their underpinnings have not been tested fully.

Third, use the designation of issues to narrow the range of facts in dispute and focus the hearing and the later stages of the process on the key issues. The initial round of public comments will likely provide the best insights into what matters, even in a highly controversial proceeding such as Children's Advertising. The combination of a clear theory and the commission revealing its own factual and legal analysis on the record should provide a firm basis for interested parties to identify both what remains in dispute and its importance to the outcome. Disputed issues can narrow the use of cross-examination and thereby increase its utility and focus rebuttal comments on the same, relatively narrow set of questions. The key, however, is to develop a record that narrows what is actually in dispute rather than simply limit time spent in cross-examination.

In short, the commission needs to put its cards on the table. The earlier the commission articulates the law and the facts on which it relies, the better.

Finally, take public comments seriously. Interested parties will have knowledge about the likely effects of a proposed rule that are difficult for the commission to acquire elsewhere. Even in the most widely supported rule in FTC history, the Do Not Call Registry, public comments led to two significant changes in the final rule: an exemption allowing companies to call consumers if they had an established business relationship with the consumer and an exemption for paid telemarketers engaged in charitable solicitations. (Charities themselves were exempt because they are not subject to the FTC's jurisdiction.) The existing business relationship exemption in particular made the rule far more workable, and far less burdensome, than it otherwise would have been. Public comment led to substantial changes in virtually all the early section 18 rule proposals, and, most recently, comments led to a far more focused and less burdensome Business Opportunity Rule.

More generally, the Do Not Call Registry, although using APA procedures, provides a useful example of a successful approach to rulemaking. Pursuant to a requirement in the Telemarketing Sales Act that authorized the rule, the commission launched a review of the TSR in November 1999. Comments during that review led the agency to hold public forums in 2000 on issues related to the rule's do not call provisions and a separate public forum to address other provisions of the TSR. In October 2001, the new leadership, including the authors, made do not call a centerpiece of the agency's new privacy agenda.[239]

In January 2002, the agency published an NPRM proposing the National Do Not Call Registry and several other changes to the TSR, including new restrictions on the use of pre-acquired account information and on the practice of "upselling" in telemarketing transactions. The proposal was based on clear evidence of increasing consumer concern about the intrusions of telemarketing, including rapid growth in sign-ups for state registries and the national registry maintained by the Direct Marketing Association, as well as surveys indicating that most consumers found calls to be annoying and intrusive and overwhelmingly wanted to stop them.[240] Following written comments, a three-day public forum in June 2002 explored the issues further, and a final rule was adopted in January 2003.[241]

The Do Not Call Registry is regarded as the most popular consumer protection measure in the agency's history.[242] It would have been somewhat more complicated as a Section 18 rulemaking, but it certainly could have been concluded expeditiously using those procedures. Because of telemarketer opposition, the full panoply of Section 18 procedures would have been necessary.[243]

Conclusion

Regardless of the procedures used, writing good rules is a challenge for any agency, particularly for an enforcement agency like the FTC, which in its daily business develops far more detailed knowledge about bad actors with a demonstrated willingness to ignore the law than about legitimate businesses that normally comply. The commission has always imposed remedies on proven violators beyond the requirements that it would apply to legitimate companies. Rules, however, apply to all, and an understanding of their marketplace impact is essential if rules are to benefit consumers rather than damage the market processes that enable the most effective forces for consumer protection.

In the wake of the 2020 election, the commission appears poised to embark on a new rulemaking wave and appears willing to impose sweeping changes to long-standing business practices. Its December 10, 2021, Statement of Regulatory Priorities identifies possible Section 18 rules addressing "the abuses stemming from surveillance-based business models," including "lax security practices, limiting intrusive surveillance, and ensuring that algorithmic decision-making does not result in unlawful discrimination."[244] Regarding possible "unfair methods of competition," the agency lists noncompete clauses, pay-for-delay pharmaceutical agreements, and unfair competition in online marketplaces, among others.[245]

Priorities aside, the commission has given few clues about how it plans to address any of these practices. To prevent the excesses and backlash of the 1970s, the commission must follow a rulemaking process that guarantees careful scrutiny of its proposals, provides for a searching inquiry into their factual predicates, and ensures a critical evaluation of proposed remedies and their likely effects. That is what Congress sought to codify when it passed new rulemaking authority in 1974.

Careful scrutiny and public input take time. This is the reality of good rulemaking. And producing sound and lasting rules is a far more important goal than producing rules quickly, with less attention to their merits and less public input in the process.

To produce high-quality rules—indeed, to avoid the fiasco of the 1970s—the commission itself needs to know and be able to explain clearly, at the beginning of any rulemaking, the legal and substantive theories of why the rule is necessary and appropriate. It needs to detail the facts on which it relies to support those theories and subject both theories and evidence to searching scrutiny. It needs to articulate its rationales fully—"with particularity," as Congress required.

Careful scrutiny and public input take time. This is the reality of good rulemaking.

Unfortunately, the changes in rulemaking procedures adopted on July 1, 2021, will result in decisions with more political, but less public, input and fewer opportunities to evaluate the commission's assertions about the facts. The changes remove the statutory requirement that the commission explain its reasons for a proposed rule "with particularity," allowing the agency to initiate rulemaking only with a general statement of its rationale. In the 1970s, that generality was at the root of many failures.

More problems exist. The rule changes effectively eliminate the presiding officer's independent review of the rulemaking record that Congress required in 1980. The chair is now the chief presiding officer, and anyone the chair appoints will report only to the chair, greatly reducing the independence of presiding officers. Although Congress required an independent recommendation from the presiding officer, "based upon . . . all relevant and material evidence,"[246] the new rules seek to limit the presiding officer's recommendation to the disputed issues that the commission itself will determine. In short, the commission will decide the questions that the presiding officer can address. Surely, however, when Congress mandates a recommended decision of the presiding officer based on "all relevant and material evidence," the presiding officer must also consider all the facts, not just those the commission considers to be disputed.

Having the commission identify designated issues in the NPRM reduces the opportunity for the public to participate in identifying the crucial factual issues that the rulemaking must resolve. The designation of issues should narrow the issues that are truly in dispute, rather than try to identify the issues before hearing about the proposed rule from any interested party. Moreover, the commission may fail to anticipate crucial issues a proposal raises, as it did in the initial version of the Business Opportunity Rule. Even if parties suggest other issues to the commission for designation, determining which issues are both disputed and necessary to resolve requires familiarity with the rulemaking record. It is difficult to see how the commission can develop that familiarity in the middle of the rulemaking process and, to avoid even the appearance of an ex parte problem, presumably without the assistance of the rulemaking staff.

With controversial rules, previously the commission has always published the staff's final recommendations for another round of comments. The new rules eliminate the public staff report and therefore require the presiding officer to make a recommended decision without knowing the staff's view of what the record supports. The presiding officer will apparently be the sole resource available to review what is likely to be an extensive record in any controversial proceeding. The commission will then make a final decision without an opportunity for public comment on the staff's final recommendations, which will have been made in any event and have often differed significantly from the original proposal. Rather than transparency, this is rulemaking by the wise and powerful Oz behind the curtain.

The commission resisted applying ex parte rules to communications with the rulemaking staff until Congress insisted it do so in 1980 but excluded staff communications that were confined to the rulemaking record. The commission nevertheless always distinguished between communications with outsiders during the comment period and those that came later.

Timely communications became part of the rulemaking record; communications received after the comment period closed were made public but excluded from the record. For oral communications, the new rules provide that all communications are in the rulemaking record on which the commission can rely for its decision.

When the Pertschuk-led commission rejected just such a proposal in 1980, it said that placing late communications on the rulemaking record would "create a privileged status for meetings between Commissioners and outside parties."[247] There are solutions to avoid this problem, consistent with transparency, fairness, and the full development of a high-quality rulemaking record. Solutions, however, depend on a process for considering whether any new information requires additional opportunities for public comment, and the new rules propose no such process.

All of these changes were adopted on July 1, 2021, solely in the name of speed. How the new FTC adopted these procedural rules bodes poorly for the substantive rules to come. Speed is not the sole—nor even the most important—goal in making a rule. A rule's quality matters far more, and that quality depends directly on the information in the rule's record.

Yet, there is no indication that the new FTC leadership believes there is a connection between how a rule is made and the quality of the rule itself. Had they believed such a connection exists, presumably they would have used the many studies of the 1970s to try to avoid that era's mistakes in drafting new procedures for making rules. Those studies documented the FTC's failures to develop the necessary prerequisites for successful industry-wide rules, gathering systematic evidence about the potential problems, seeking and using meaningful public comment, and linking the remedies to the perceived problems. Such an approach requires attention to history and to the public's views. Both were stunningly absent on July 1, 2021.

Perhaps, like their similarly activist and ambitious counterparts in the 1970s, the new FTC leadership has supreme confidence in its ability to remake the American economy in its own image. If so, then the goal of July 1, 2021, was to "streamline" the process to implement that vision as soon as possible. If that is their goal, then the new leaders would appear to think that they are smarter than their 1970s predecessors or that it was the process itself that defeated those long-ago progressives, or perhaps both.

Whatever the cause, to return to Mark Twain's view of history, we appear to be in for some serious rhyming with the FTC's disastrous past. Buckle your seat belts!

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Notes

1. Although widely attributed to Mark Twain, the origin of this aphorism is uncertain. See Quote Investigator, "History Does Not Repeat Itself, but It Rhymes," https://quoteinvestigator.com/2014/01/12/history-rhymes/.

2. See generally Sidney M. Milkis, *Theodore Roosevelt, the Progressive Party, and the Transformation of American Democracy* (Lawrence, KS: University Press of Kansas, 2009).

3. See, for example, James C. Miller III, letter to John D. Dingell, "FTC Policy Statement on Deception," https://www.ftc.gov/system/files/documents/public_statements/410531/831014deceptionstmt.pdf. We were the principal staff draftsmen of this policy statement.

4. For example, the statutory definition of unfairness helped narrow this discretion, as did the Federal Trade Commission's (FTC) Deception Policy Statement. See J. Howard Beales III, "Brightening the Lines: The Use of Policy Statements at the Federal Trade Commission," *Antitrust Law Journal* 72, no. 3 (2005): 1057–73.

5. The literature often discusses the issue as a choice between standards, which we term here "principles," and rules. See Richard A. Posner, *Economic Analysis of Law*, 9th ed. (New York: Wolters Kluwer Law & Business, 2014).

6. We have written elsewhere that the FTC's efforts to obtain monetary relief in conventional advertising cases risks chilling truthful commercial speech that is valuable to consumers. See J. Howard Beales III and Timothy J. Muris, "Striking the Proper Balance: Redress Under Section 13(b) of the FTC Act," *Antitrust Law Journal* 79, no. 1 (2013): 1–45, https://www.jstor.org/stable/43486952. See also J. Howard Beales III, Benjamin M. Mundel, and Timothy J. Muris, "Section 13(b) of the FTC Act at the Supreme Court: The Middle Ground," *Antitrust Source*, December 2020, https://www.americanbar.org/content/dam/aba/publishing/antitrust-magazine-online/2020/dec-2020/v20_i3_dec2020_beales.pdf.

7. FTC rules also allow the agency to obtain monetary relief, either through civil penalties pursuant to Section 5(m)(1)(A), USC § 45(m)(1)(A), or through an action under Section 19 , 15 USC § 57b(b).

8. See Posner, *Economic Analysis of Law*. Truth in Lending rules provide an example of both problems. The regulation itself has grown to 380,000 words of "complicated legalese," along with thousands more words of commentary and examples. See Bureau of Consumer Financial Protection, *Taskforce on Federal Consumer Financial Law Report*, vol. 1, January 2021, 322, https://files.consumerfinance.gov/f/documents/cfpb_taskforce-federal-consumer-financial-law_report-volume-1_2022-01_amended.pdf.

9. Federal Trade Commission, "Mail or Telephone Order Merchandise Rule," *Federal Register* 79, no. 180 (September 17, 2014): 55615.

10. Federal Trade Commission, "Telemarketing Sales Rule," *Federal Register* 68, no. 19 (January 29, 2003): 4580. See endnote 242 for discussion of Do Not Call's impact and coverage.

11. As we discuss in detail in the section titled "The Biden FTC Changes the Rules for Rulemaking," many of the commission's recently adopted changes in rulemaking procedures impair this crucial information-gathering function.

12. This regular interaction with an industry makes single industry regulators more prone to capture by the companies they are supposed to regulate, unlike a multipurpose agency such as the FTC.

13. Office of the Federal Register, National Archives and Records Administration, "Telemarketing Sales Rule," *Federal Register* 60, no. 30 (February 14, 1995): 8313–33 (original proposal); and "Telemarketing Sales Rule," *Federal Register* 60, no. 110 (June 8, 1995): 30406–28 (revised proposal).

14. See J. Howard Beales III and Timothy J. Muris, "FTC Consumer Protection at 100: 1970s Redux or Protecting Markets to Protect Consumers?," *George Washington Law Review* 83, no. 6 (November 2015): 2157–229, https://www.gwlr.org/wp-content/uploads/2016/01/83-Geo-Wash-L-Rev-2157.pdf.

15. *Federal Trade Commission v. Citigroup*, 239 F. Supp. 2d 1302 (ND Ga. 2001).

16. *Federal Trade Commission v. First Alliance Mortgage Co.*, No. SA CV 00-964 (CD Cal. 2000).

17. The commission, which had previously had no rulemaking authority under the Fair Credit Reporting Act, asked for rulemaking authority to address one practice, risk-based pricing. Instead, it received mandates for more than a dozen separate rules and studies.

18. US Federal Trade Commission, "FTC Votes to Update Rulemaking Procedures, Sets Stage for Stronger Deterrence of Corporate

Misconduct," press release, July 1, 2021, https://www.ftc.gov/news-events/press-releases/2021/07/ftc-votes-update-rulemaking-procedures-sets-stage-stronger.

19. US Federal Trade Commission, "Statement of Commissioner Rebecca Kelly Slaughter Joined by Chair Lina Kahn and Commissioner Rohit Chopra," July 1, 2021, https://www.ftc.gov/system/files/documents/public_statements/1591522/joint_rules_of_practice_statement_final_7121_1131am.pdf.

20. 16 CFR § 1.20.

21. The statute specifically requires a recommended decision by the presiding officer, separate from the rulemaking staff, and that the presiding officer be responsible only to a chief presiding officer. See Unfair or Deceptive Acts or Practices Rulemaking Proceedings, 15 USC § 57a(c)(1)(B). See the discussion in the text beginning at endnote 188.

22. Unfair or Deceptive Acts or Practices Rulemaking Proceedings, 15 USC § 57a(b)(1)(A). See the discussion in the text beginning at endnote 182.

23. Federal Trade Commission, "Oral Presentations Before the Commission and Communications with Commissioners and Their Staffs in Trade Regulation Rulemaking Proceedings," *Federal Register* 45, no. 230 (November 26, 1980): 78626–30.

24. *Association of National Advertisers v. Federal Trade Commission*, 617 F.2d 611, 615 (DC Cir. 1979).

25. 16 CFR § 1.63, as cited in the Cigarette Rule statement of basis and purpose (SBP). See Federal Trade Commission, "Unfair or Deceptive Advertising and Labeling of Cigarettes in Relation to the Health Hazards of Smoking," *Federal Register* 29, no. 129 (July 2, 1964): 8325, 8364. The rules were adopted at Federal Trade Commission, "Procedures, Rules of Practice, and Orders," *Federal Register* 27, no. 95 (May 16, 1962): 4611–12.

26. 16 CFR § 1.68(c),quoted in the Cigarette Rule SBP.

27. Because the current commission appears determined to return to rulemaking under 6(g), despite considerable uncertainty about its authority to do so, understanding the far more limited role of such rules is essential. See also the discussion at endnotes 40–45.

28. Commission Rule 1.67(c), quoted in the Cigarette Rule SBP, note 128.

29. 16 CFR § 400; and Federal Trade Commission, "Advertising and Labeling as to Size of Sleeping Bags," *Federal Register* 28, no. 199 (October 11, 1963): 10900.

30. These rules were originally codified as 16 CFR § 401; Federal Trade Commission, "Misuse of Term 'Automatic' or Terms of Similar Import as Descriptive of Household Electric Sewing Machines," *Federal Register* 30, no. 135 (July 15, 1965): 8900; 16 CFR § 402; Federal Trade Commission, "Deception as to Non-Prismatic and Partially Prismatic Instruments Being Prismatic Binoculars," *Federal Register* 29, no. 110 (June 5, 1964): 7316; 16 CFR § 403; Federal Trade Commission, "Deceptive Use of 'Leakproof,' 'Guaranteed Leakproof,' etc, as Descriptive of Dry Cell Batteries," *Federal Register* 29, no. 99 (May 20, 1964): 6535; 16 CFR § 404; Federal Trade Commission, "Deceptive Advertising and Labeling as to Size of Tablecloths and Related Products," *Federal Register* 29, no. 152 (August 5, 1964): 11261; 16 CFR § 405; Federal Trade Commission, "Misbranding and Deception as to Leather Content of Waist Belts," *Federal Register* 29, no. 126 (June 27, 1964): 8166; and 16 CFR § 406; "Deceptive Advertising and Labeling of Previously Used Lubricating Oil," *Federal Register* 29, no. 159 (August 14, 1964): 11650. All were subsequently repealed.

31. The problem with the "diversion of trade" theory is that all successful competition, including lowering the price, will divert trade from competitors. This "diversion" should be illegal only if it also harms consumers, not just competitors.

32. 16 CFR § 400.1(a)(2)(ii); and Federal Trade Commission, "Advertising and Labeling as to Size of Sleeping Bags."

33. The other two were Children's Advertising, proposed in 1978 and discussed in the text beginning at endnote 53, and the Do Not Call Registry, promulgated in 2003 and discussed in the section titled "How to Run a Magnuson-Moss Rulemaking." See Sidney M. Milkis, "The Federal Trade Commission and Consumer Protection: Regulatory Change and Administrative Pragmatism," *Antitrust Law Journal* 72, no. 3 (2005): 911–41; and William MacLeod, Elizabeth Brunins, and Anna Kertesz, "Three Rules and a Constitution: Consumer Protection Finds Its Limits in Competition Policy," *Antitrust Law Journal* 72, no. (2005): 943–68.

34. See An Act to Regulate the Labeling of Cigarettes, and for Other Purposes, Pub. L. No. 89-92, 79 Stat. 282 (1965). Congress temporarily "limited" the FTC's authority, prohibiting the imposition of any additional advertising requirements beyond those required in the statute, before July 1, 1969. See Federal Cigarette Labeling and Advertising Act, Pub. L. No. 89-92, §§ 5, 10.

35. 16 CFR § 408; Federal Trade Commission, "Unfair or Deceptive Advertising and Labeling of Cigarettes in Relation to the Health Hazards of Smoking," 8355.

36. *Federal Trade Commission v. Sperry & Hutchinson Co.*, 405 US 233, 244 (1972). The footnote stated that "the Commission has described the factors it considers in determining whether a practice that is neither in violation of the antitrust laws nor deceptive is nonetheless unfair" and quoted the unfairness test from the Cigarette Rule SBP.

37. The efforts to think creatively spawned a running joke among staff attorneys that lasted for decades about the "unfair distribution of wealth" rule. Perhaps such a rule will yet emerge.

38. The proposals to preempt state advertising bans became unnecessary when the Supreme Court extended First Amendment protection to commercial speech. See *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council*, 425 US 748 (1976); and *Bates v. State Bar of Arizona*, 433 US 350 (1977). The policy underlying the substantive part of the Eyeglass Rule that became law, which requires that patients receive a copy of any prescription their doctor writes, is based on increasing competition among sellers of eyewear and related products.

39. One rule with a substantive unfair methods theory was the Standards and Certification Rule, discussed in endnote 113.

40. See Richard J. Pierce, "Can the Federal Trade Commission Use Rulemaking to Change Antitrust Law?" (working paper, George Washington University Law School, Washington, DC, September 30, 2021), https://ssrn.com/abstract=3933921.

41. The rule was originally adopted as 16 CFR § 422. After passage of the Petroleum Practices Marketing Act, it was re-promulgated as 16 CFR § 306, a regulation under a specific act of Congress rather than a trade regulation rule.

42. Federal Trade Commission, "Posting of Minimum Octane Numbers on Gasoline Dispensing Pumps," *Federal Register* 36, no. 242 (December 16, 1971): 23871.

43. *National Petroleum Refiners Association v. Federal Trade Commission*, 482 F.2d 672 (DC Cir. 1973).

44. See Maureen K. Ohlhausen and James Rill, *Pushing the Limits? A Primer on FTC Competition Rulemaking*, US Chamber of Commerce, August 12, 2021, https://www.uschamber.com/sites/default/files/ftc_rulemaking_white_paper_aug12.pdf ; and Pierce, "Can the Federal Trade Commission Use Rulemaking to Change Antitrust Law?".

45. *National Petroleum Refiners Association v. Federal Trade Commission*, 482 F.2d 672, 692 (DC Cir. 1973). The opinion also referred to this as a "safety-valve" procedure. 482 F.2d at 705.

46. Barry B. Boyer, "Report in Support of Recommendation 79-1: Executive Summary of Barry B. Boyer Report. Trade Regulation Rulemaking Procedures of the Federal Trade Commission," Administrative Conference of the United States, 43, https://www.acus.gov/sites/default/files/documents/1979-01%20Hybrid%20Rulemaking%20Procedures%20of%20the%20Federal%20Trade%20Commission.pdf. Congress mandated this study.

47. Magnuson-Moss Warranty–Federal Trade Commission Improvement Act, Pub. L. No. 93-637.

48. Unfair or Deceptive Acts or Practices Rulemaking Proceedings, 15 USC § 57a(a)(2).

49. Unfair Methods of Competition Unlawful; Prevention by Commission, 15 USC § 45(m)(1)(A). This civil penalty authority is limited to Section 18 rules. Two of the 16 initial Section 18 rules were re-proposals previously published under section 6(g). When one of us began at the FTC in 1974, first as a student intern in the Los Angeles Regional Office and then in the planning office in Washington, DC, in the summer following graduation, he learned it was widely assumed that the agency would soon receive explicit statutory authority for rulemaking, with monetary penalties for rule violations.

50. Boyer, "Report in Support of Recommendation 79-1," 49. We discuss the history of the implementing rules in the text beginning at endnote 165.

51. For a table listing the 20 rules proposed before 1979, see Administrative Conference of the United States, "Recommendation 79-1, Hybrid Rulemaking Procedures of the Federal Trade Commission," 1979, https://www.acus.gov/sites/default/files/documents/79-1-with-table.pdf.

52. The floor vote was 146 yeas, 255 nays, with House leadership voting for the measure. 124 Cong. Rec. 5017–18 (Feb. 28, 1978). Objections included the lack of controls over the FTC that became part of the 1980 FTC Improvements Act, such as the legislative veto. See, for example, 124 Cong. Rec. at 5012, detailing Rep. Joel Broyhill's (R-VA) remarks that

> H.R. 3816, as it passed the House, contained a provision which provided for congressional review and possible veto of FTC trade regulation rules. This provision . . . was dropped in conference in favor of a provision which would merely require the FTC to forward to Congress a copy of any final rule . . . Frankly, I do not believe that the conference substitute addresses the concerns of the Members of the House who voted in favor of a congressional veto provision. The FTC has very broad authorities to prohibit conduct which is "unfair or deceptive.". . . The FTC's rules are not merely narrow interpretations of a tightly drawn statute: instead, they are broad policy pronouncements which Congress has an obligation to study and review. The congressional veto provision would have provided us with a mechanism to use to more closely scrutinize the rulemaking authorities exercised by the Federal Trade Commission.

53. 16 CFR § 461; and Federal Trade Commission, "Children's Advertising; Television Restrictions," *Federal Register* 43, no. 82 (April 27, 1978): 17967.

54. Federal Trade Commission, "Children's Advertising."

55. *Washington Post*, "The FTC as National Nanny," March 1, 1978, https://www.washingtonpost.com/archive/politics/1978/03/01/the-ftc-as-national-nanny/69f778f5-8407-4df0-b0e9-7f1f8e826b3b/.

56. See J. Howard Beales III, "The Federal Trade Commission's Use of Unfairness Authority: Its Rise, Fall, and Resurrection," *Journal of Public Policy & Marketing* 22, no. 2 (September 1, 2003): 192, 193.

57. Federal Trade Commission Improvements Act of 1980, Pub. L. No. 96-252.

58. See, for example, Dee Pridgen and Richard Alderman, *Consumer Protection and the Law* (Toronto, Canada: Thomson Reuters, 2017) (process is "too slow to be of much use"); and Mike Swift, "FTC's 'Mag-Moss' Rulemaking Authority Could Break Logjam on US Privacy Legislation," MLEX, March 8, 2021, https://mlexmarketinsight.com/news-hub/editors-picks/area-of-expertise/data-privacy-and-security/ftcs-mag-moss-rulemaking-authority-could-break-logjam-on-us-privacy-legislation ("unworkable"). A common view at the commission, until recently, that the process is unduly cumbersome is discussed in Kurt Walters, "Reassessing the Mythology of Magnuson-Moss: A Call to Revive Section 18 Rulemaking at the FTC," *Harvard Law & Policy Review* 16 (forthcoming), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3875970. Walters has three closely related papers posted on SSRN. When possible, we cite the most recent version, as we do here, except when the relevant information is only in an earlier version.

59. Boyer, "Report in Support of Recommendation 79-1," 46.

60. Unfair or Deceptive Acts or Practices Rulemaking Proceedings, 15 USC § 57a(e)(3)(A).

61. Unfair or Deceptive Acts or Practices Rulemaking Proceedings, 15 USC § 57a(b)(1)(A). After the FTC Improvements Act of 1980, rulemaking must begin with an advance notice of proposed rulemaking (ANPRM), submitted to the relevant congressional committees, that describes the area of inquiry and possible regulatory alternatives. Unfair or Deceptive Acts or Practices Rulemaking Proceedings, 15 USC § 57a(b)(2).

62. Unfair or Deceptive Acts or Practices Rulemaking Proceedings, 15 USC § 57a(d)(1).

63. Boyer, "Report in Support of Recommendation 79-1," 44.

64. Unfair or Deceptive Acts or Practices Rulemaking Proceedings, 15 USC § 57a(b)(1)(B).

65. Unfair or Deceptive Acts or Practices Rulemaking Proceedings, 15 USC § 57a(b)(1)(C).

66. Unfair or Deceptive Acts or Practices Rulemaking Proceedings, 15 USC § 57a(c)(2)(B).

67. Unfair or Deceptive Acts or Practices Rulemaking Proceedings, 15 USC § 57a(e)(2). The commission can also request remand for additional submissions, a procedure that was used in the Second Circuit in a challenge to the Used Car Rule. See the discussion in *Consumers Union of US v. Federal Trade Commission*, 801 F.2d 417, 420–21 (DC Cir. 1986).

68. Unfair or Deceptive Acts or Practices Rulemaking Proceedings, 15 USC § 57a(e)(3)(B).

69. *Association of National Advertisers v. Federal Trade Commission*, 617 F.2d 611, 615 (DC Cir. 1979).

70. The commission's 1962 rules provided that a presiding officer would conduct hearings. 16 CFR § 1.67(c)(2), quoted in Cigarette Rule statement of basis and purpose: Federal Trade Commission, "Unfair or Deceptive Advertising and Labeling of Cigarettes in Relation to the Health Hazards of Smoking," 8365. The 1975 rules established the role of the presiding officer in designating issues. 16 CFR § 1.13 (c)(1)(ii); and Federal Trade Commission, "Procedures and Rules of Practice: Trade Regulation Rulemaking Authority," *Federal*

Register 40, no. 157 (August 13, 1975): 33966, 33967.

71. Federal Trade Commission, "Rulemaking Authority."

72. Federal Trade Commission, "Rules and Rulemaking Under Section 18(a)(1)(B) of the FTC Act," *Federal Register* 43, no. 171 (September 1, 1978): 39083.

73. Unfair or Deceptive Acts or Practices Rulemaking Proceedings, 15 USC 57a(c)(1).

74. Federal Trade Commission, "Organization; General Procedures; Nonadjudicative Procedures; and Miscellaneous Rules," *Federal Register* 45, no. 105 (May 29, 1980): 36338.

75. Federal Trade Commission, "Employment of Administrative Law Judges as Presiding Officers in Rulemaking Proceedings," *Federal Register* 54, no. 88 (May 9, 1989): 19885. We shall see that an administrative law judge (ALJ) was used as the presiding officer in the highly controversial Children's Advertising rule.

76. Unfair or Deceptive Acts or Practices Rulemaking Proceedings, 15 USC 57a(c)(1)(B). Under the commission's original rules, the report was to be a "summary of the record" with "initial factual findings and conclusions" regarding the designated issues and "other findings and conclusion as he sees fit." See 16 CFR § 1.13(f); and Federal Trade Commission, "Procedures and Rules of Practice: Trade Regulation Rulemaking Authority," 33966, 33968.

77. 16 CFR § 1.13(g); and Federal Trade Commission, "Procedures and Rules of Practice: Trade Regulation Rulemaking Authority," 33966, 33968.

78. 16 CFR § 1.13(h); and Federal Trade Commission, "Procedures and Rules of Practice: Trade Regulation Rulemaking Authority," 33966, 33968.

79. 16 CFR § 1.13 (f)-(h); and Federal Trade Commission, "Organization; General Procedures; Nonadjudicative Procedures; and Miscellaneous Rules," *Federal Register* 45, no. 105 (May 29, 1980): 6338, 36341.

80. Boyer, "Report in Support of Recommendation 79-1," 46.

81. Administrative Conference of the United States, "Recommendation 79-1," 9.

82. Boyer, "Report in Support of Recommendation 79-1," 55.

83. Teresa M. Schwartz, "Regulating Unfair Practices Under the FTC Act: The Need for a Legal Standard of Unfairness," *Akron Law Review* 11, no. 1 (Summer 1977): 26, https://ideaexchange.uakron.edu/akronlawreview/vol11/iss1/1/.

84. See Dorsey D. Ellis Jr., "Legislative Powers: FTC Rule Making," in *The Federal Trade Commission Since 1970: Economic Regulation and Bureaucratic Behavior*, ed. Kenneth W. Clarkson and Timothy J. Muris (Cambridge, NY: Cambridge University Press, 1981), 163.

85. Boyer, "Report in Support of Recommendation 79-1," 54.

86. See Timothy J. Muris, "Rules Without Reason: The Case of the FTC," *Regulation: AEI Journal on Government and Society* (September/October 1982), https://techliberation.com/wp-content/uploads/2010/04/v6n5-4.pdf.

87. Unfair or Deceptive Acts or Practices Rulemaking Proceedings, 15 USC 57a(c)(2)(B).

88. Federal Trade Commission, "Trade Regulations Rulemaking Procedures," *Federal Register* 40, no. 66 (April 4, 1975): 15237.

89. 16 CFR § 1.13(d)(1); and Federal Trade Commission, "Procedures and Rules of Practice: Trade Regulation Rulemaking Authority," 33966, 33967.

90. 16 CFR § 1.13(d)(1); and Federal Trade Commission, "Procedures and Rules of Practice: Trade Regulation Rulemaking Authority," 33966, 33967.

91. 16 CFR § 1.13(b); and Federal Trade Commission, "Procedures and Rules of Practice: Trade Regulation Rulemaking Authority," 33966, 33967.

92. 16 CFR § 1.13(a); and Federal Trade Commission, "Procedures and Rules of Practice: Trade Regulation Rulemaking Authority," 33966, 33967.

93. Administrative Conference of the United States, "Recommendation 79-1," 5.

94. Boyer, "Report in Support of Recommendation 79-1," 61.

95. Boyer, "Report in Support of Recommendation 79-1," 61.

96. Boyer, "Report in Support of Recommendation 79-1," 63.

97. Boyer, "Report in Support of Recommendation 79-1," 12.

98. See Muris, "Rules Without Reason."

99. Boyer, "Report in Support of Recommendation 79-1," 57.

100. See Muris, "Rules Without Reason," 23. "The records of the commission's proceedings are voluminous indeed, but they are collections of trees from which the size and shape of the forest can seldom be determined."

101. See Ellis, "Legislative Powers," 182.

102. Ellis, "Legislative Powers," 182.

103. For the chronology of the rulemaking for the amendments, see Federal Trade Commission, "Amendment to Trade Regulation Rule Concerning Care Labeling of Textile Wearing Apparel and Certain Piece Goods," *Federal Register* 48, no. 99 (May 20, 1983): 22733, 22735, This is described in more detail in endnote 127.

104. Muris, "Rules Without Reason," 23.

105. The initial wave of proposals occurred during the Ford administration. The commission concluded several rulemakings during the Carter administration, but many rules were still pending at the beginning of the Reagan administration. Although the views of the Ronald Reagan appointees at the FTC clearly played a role, decisions to terminate rulemakings were often unanimous.

106. Jeffrey S. Lubbers, "It's Time to Remove the 'Mossified' Procedures for FTC Rulemaking," *George Washington Law Review* 83, no. 6 (2015), https://digitalcommons.wcl.american.edu/facsch_lawrev/1082/.

107. 16 CFR § 1.20; and Federal Trade Commission, "Procedures and Rules of Practice: Trade Regulation Rulemaking Authority," 33966, 33969.

108. Federal Trade Commission, "Standards and Certification," *Federal Register* 43, no. 236 (December 7, 1978): 57269. See the discussion in Boyer, "Report in Support of Recommendation 79-1," 63. A rulemaking, based on unfair or deceptive acts or practices was specifically prohibited in the Federal Trade Commission Improvements Act of 1980. See Unfair or Deceptive Acts or Practices Rulemaking Proceedings, 15 USC § 57a(a)(1)(B). See endnote 113 for its subsequent history. The other rulemakings were the R-Value Rule and the Games of Chance amendment.

109. Federal Trade Commission, "Children's Advertising." Although the DC Circuit rejected interlocutory challenges to the special rules on grounds of ripeness, it expressed serious reservations about some of the procedures. *Association of National Advertisers v. Federal Trade Commission*, 617 F.2d 611, 618–19 (DC Cir. 1979). See the discussion of the court's concerns in the text at endnote 179.

110. Although there was some delay, the publication of disputed issues was reasonably close to the February 27 date the commission had specified in the initial notice. Federal Trade Commission, "Children's Advertising." The issues were the extent to which children age 2–11 can distinguish between programs and commercials to comprehend the selling purpose of advertising, the extent to which they can defend against persuasive techniques, and the health effects of any lack of understanding. Federal Trade Commission, "Children's Advertising," *Federal Register* 46, no. 191 (October 2, 1981): 48710, 48711.

111. Federal Trade Commission, "Children's TV Advertising." The staff report, issued in March 1981, suggested that the commission could proceed with the rule based entirely on a deception theory, without relying on the unfairness theory that Congress had prohibited. Although the staff recommended terminating the proceeding, this theory could have been used to continue the rulemaking had President Jimmy Carter won reelection.

112. Federal Trade Commission Improvements Act of 1980, Pub. L. No. 96-252.

113. Federal Trade Commission Improvements Act of 1980, Pub. L. No. 96-252, § 7. Originally proposed on grounds of unfair methods of competition and unfair or deceptive practices, the FTC decided to continue the rulemaking under Section 6(g) early in 1981. See Federal Trade Commission, "Standards and Certification; Proposed Trade Regulation Rule," *Federal Register* 46, no. 23 (February 4, 1981): 10747. The Reagan administration began case-by-case investigations in 1983 and decided to terminate the rulemaking. Federal Trade Commission, "Standards and Certification," *Federal Register* 50, no. 209 (October 29, 1985): 44971. The rulemaking followed modified Section 18 procedures, as noted in the text at endnote 108.

114. Federal Trade Commission Improvements Act of 1980, Pub. L. No. 96-252, § 11.

115. Federal Trade Commission Improvements Act of 1980, Pub. L. No. 96-252, § 8. The ANPRM must be provided to the House and Senate Commerce Committees. The law also requires that a notice of proposed rulemaking (NPRM) be provided to those committees 30 days before publication.

116. Federal Trade Commission Improvements Act of 1980, Pub. L. No. 96-252, § 9.

117. Federal Trade Commission Improvements Act of 1980, Pub. L. No. 96-252, § 11.

118. Federal Trade Commission Improvements Act of 1980, Pub. L. No. 96-252, § 12.

119. Federal Trade Commission Improvements Act of 1980, Pub. L. No. 96-252, § 15.

120. Federal Trade Commission Improvements Act of 1980, Pub. L. No. 96-252. The veto was held unconstitutional in *Immigration and Naturalization Service v. Chadha*, 462 US 919 (1983).

121. Federal Trade Commission, "Practice and Procedure Rules: Administrative Law Judges as Presiding Officers in Rulemaking Proceedings," *Federal Register* 54, no. 88 (May 9, 1989): 19885.

122. Unfair or Deceptive Acts or Practices Rulemaking Proceedings, 15 USC § 57a(d)(1)(A).

123. Unfair or Deceptive Acts or Practices Rulemaking Proceedings, 15 USC § 57a(b)(3).

124. In contrast, there have been multiple, significant, and successful rules under specific statutes, including the Telemarketing Sales Rule, the amendments to that rule establishing the National Do Not Call Registry, and the Safeguards rule. Often, these rules have been principles based rather than including specific, detailed requirements. For example, the Safeguards Rule for information security requires firms to have a process for assessing and responding to security risks but does not require specific security measures.

125. See J. Howard Beales III and Timothy J. Muris, "FTC Consumer Protection at 100: 1970s Redux or Protecting Markets to Protect Consumers?," *George Washington Law Review* 83, no. 6 (November 2015): 2157–229, https://www.gwlr.org/wp-content/uploads/2016/01/83-Geo-Wash-L-Rev-2157.pdf.

126. Lubbers, "It's Time to Remove the 'Mossified' Procedures for FTC Rulemaking."

127. See Federal Trade Commission, "Textile Wearing Apparel and Piece Goods; Care Labeling." There were oral presentations before the commission in 1979, followed by a markup session at which the commission "approved in substance" an amended rule. It was published for "technical comments" in 1981. In 1982, the commission rejected the proposed expansions of the rule's coverage that had been the major focus of the rulemaking and eventually promulgated the more limited amendments in 1983.

128. Federal Trade Commission, "Business Opportunity Rule," *Federal Register* 76, no. 236 (December 8, 2011): 76816, https://www.federalregister.gov/documents/2011/12/08/2011-30597/business-opportunity-rule.

129. The alternative procedures appear to have respected the statutory requirements. In the uncontroversial rulemakings, there was no hearing, and therefore no presiding officer, because ultimately no party requested a hearing.

130. Without the alternative procedures, the rules of practice specified an initial NPRM with written comments, a rebuttal comment period for proposing designated issues, a final notice identifying designated issues and scheduling a hearing, and finally a hearing.

131. Federal Trade Commission, "Retail Food Store Advertising and Marketing Practices," *Federal Register* 49, no. 238 (December 10, 1984): 48059.

132. Federal Trade Commission, "Ophthalmic Practice Rule," *Federal Register* 50, no. 3 (January 4, 1985): 598.

133. Federal Trade Commission, "Mail Order Merchandise Rule," *Federal Register* 54, no. 227 (November 28, 1989): 49060.

134. Federal Trade Commission, "Funeral Industry Practices," *Federal Register* 53, no. 104 (May 31, 1988): 19864.

135. 16 CFR § 401; and Federal Trade Commission, "Misuse of 'Automatic' or Terms of Similar Import as Descriptive of Household Electric Sewing Machines," *Federal Register* 54, no. 84 (May 3, 1989): 18906. For its repeal, see Federal Trade Commission, "Misuse of 'Automatic' or Terms of Similar Import as Descriptive of Household Electric Sewing Machines," *Federal Register* 55, no. 114 (June 13, 1990): 23900. See also 16 CFR § 414; and Federal Trade Commission, "Deception as to Transistor Count of Radio Receiving Sets, Including Transceivers," *Federal Register* 54, no. 20 (February 1, 1989): 5090. For its repeal, see Federal Trade Commission, "Deception as to Transistor Count of Radio Receiving Sets, Including Transceivers," *Federal Register* 55, no. 119 (June 20, 1990): 25090. There were no hearings in either repeal, but there were presiding officer and staff reports and a post-record comment period.

136. 16 CFR § 409; and Federal Trade Commission, "Incandescent Lamps (Light Bulbs)," *Federal Register* 60, no. 66 (April 6, 1995): 17491. For its repeal, see Federal Trade Commission, "Incandescent Lamp (Light Bulb) Industry," *Federal Register* 61, no. 125 (June 27, 1996): 33308.

137. 16 CFR § 400, 402, 404, 413, 417, 418. ANPRMs for each rulemaking appear starting at Federal Trade Commission, "Sleeping Bags; Advertising and Labeling as to Size," *Federal Register* 60, no. 99 (May 23, 1995): 27240. The repeals appear starting at Federal Trade

Commission, "Sleeping Bags; Advertising and Labeling as to Size," *Federal Register* 60, no. 244 (December 20, 1995): 65528. Nevertheless, one (part 417) did not appear in the *Federal Register* until the next day.

138. 16 CFR § 405; and Federal Trade Commission, "Trade Regulation Rule on Misbranding and Deception as to Leather Content of Waist Belts," *Federal Register* 60, no. 180 (September 18, 1995): 48070. For its repeal, see Federal Trade Commission, "Trade Regulation Rule on Misbranding and Deception as to Leather Content of Waist Belts," *Federal Register* 61, no. 100 (May 22, 1996): 25560.

139. In the Light Bulb Rule, two parties requested to participate in oral hearings if they were held, but when no other parties sought hearings, the requests were withdrawn. Federal Trade Commission, "Incandescent Lamp (Light Bulb) Industry." The same procedures were used to repeal 16 CFR § 410, the "picture tube rule," with an ANPRM in 2017. See Federal Trade Commission, "Trade Regulation Rule Concerning Deceptive Advertising as to Sizes of Viewable Pictures Shown by Television Receiving Sets," *Federal Register* 82, no. 123 (June 28, 2017): 29256. An NPRM followed almost 10 months later and a repeal within six months. See Federal Trade Commission, "Deceptive Advertising as to Sizes of Viewable Pictures Shown by Television Receiving Sets," *Federal Register* 83, no. 75 (April 18, 2018): 17117; and Federal Trade Commission, "Deceptive Advertising as to Sizes of Viewable Pictures Shown by Television Receiving Sets," *Federal Register* 83, no. 195 (October 9, 2018): 50484.

140. Federal Trade Commission, "Trade Regulation Rule Relating to Power Output Claims for Amplifiers Utilized in Home Entertainment Products," *Federal Register* 64, no. 137 (July 19, 1999): 38610.

141. See Federal Trade Commission, "Trade Regulation Rule Relating to Power Output Claims for Amplifiers Utilized in Home Entertainment Products," *Federal Register* 65, no. 247 (December 22, 2000): 81232.

142. Federal Trade Commission, "Labeling and Advertising of Home Insulation: Trade Regulation Rule," *Federal Register* 68, no. 135 (July 15, 2003): 41872, https://www.federalregister.gov/documents/2003/07/15/03-17854/labeling-and-advertising-of-home-insulation-trade-regulation-rule.

143. Federal Trade Commission, "Trade Regulation Rule Relating to Power Output Claims for Amplifiers Utilized in Home Entertainment Products," 81232, 81233.

144. Federal Trade Commission, "Labeling and Advertising of Home Insulation: Trade Regulation Rule," *Federal Register* 70, no. 103 (May 31, 2005): 31258, https://www.federalregister.gov/documents/2005/05/31/05-10683/labeling-and-advertising-of-home-insulation-trade-regulation-rule.

145. Federal Trade Commission, "Franchise Rule," *Federal Register* 64, no. 204 (October 22, 1999): 57294.

146. See Federal Trade Commission, "Disclosure Requirements and Prohibitions Concerning Franchising," *Federal Register* 72, no. 61 (March 30, 2007): 15444, 15446, https://www.federalregister.gov/documents/2007/03/30/E7-5829/disclosure-requirements-and-prohibitions-concerning-franchising.

147. Federal Trade Commission, "Mail or Telephone Order Merchandise Rule," *Federal Register* 76, no. 190 (September 30, 2011): 60765, https://www.federalregister.gov/documents/2011/09/30/2011-24352/mail-or-telephone-order-merchandise-rule. See also the SBP at Federal Trade Commission, "Mail or Telephone Order Merchandise Rule," *Federal Register* 79, no. 180 (September 17, 2014): 55615, https://www.federalregister.gov/documents/2014/09/17/2014-22092/mail-or-telephone-order-merchandise-rule.

148. Federal Trade Commission, "Business Opportunity Rule," *Federal Register* 71, no. 70 (April 12, 2006): 19054, https://www.federalregister.gov/documents/2006/04/12/06-3395/business-opportunity-rule. We advised Primerica Financial Services, a multilevel marketer of term life insurance, during this proceeding.

149. Federal Trade Commission, "Business Opportunity Rule," *Federal Register* 73, no. 59 (March 26, 2008): 16110, https://www.federalregister.gov/documents/2008/03/26/E8-6059/business-opportunity-rule.

150. For the SBP, see Federal Trade Commission, "Business Opportunity Rule," 76816, 76819.

151. Federal Trade Commission, "Public Workshop: Business Opportunity Rule an FTC Workshop Analyzing Business Opportunity Disclosure Form and Other Proposed Changes to the Business Opportunity Rule," *Federal Register* 74, no. 78 (April 24, 2009): 18712, https://www.federalregister.gov/documents/2009/04/24/E9-9440/public-workshop-business-opportunity-rule-an-ftc-workshop-analyzing-business-opportunity-disclosure.

152. Federal Trade Commission, "Disclosure Requirements and Prohibitions Concerning Business Opportunities," *Federal Register* 75, no. 215 (November 8, 2010): 68559, https://www.federalregister.gov/documents/2010/11/08/2010-28044/disclosure-requirements-

and-prohibitions-concerning-business-opportunities.

153. See text beginning at endnote 109 for an explanation of the Children's Advertising timeline.

154. Unfair or Deceptive Acts or Practices Rulemaking Proceedings, 15 USC § 57a(b)(1)(C).

155. As discussed below, because Do Not Call was an Administrative Procedure Act (APA) rulemaking under the Telemarketing Sales Act, rather than a Section 18 proceeding, there was no right to a hearing or cross-examination.

156. See the detailed chronology in the Final Rule SBP: Federal Trade Commission, "Funeral Industry Practices Trade Regulation Rule," *Federal Register* 59, no. 7 (January 11, 1994): 1592, 1595. Few rules provide the specific dates of each event needed for similar calculations.

157. See endnote 139.

158. Federal Trade Commission, "Revisions to Rules of Practice," *Federal Register* 86, no. 138 (July 22, 2021): 38542, https://www.federalregister.gov/documents/2021/07/22/2021-15313/revisions-to-rules-of-practice; Federal Trade Commission, "Statement of Commissioner Rebecca Kelly Slaughter Joined by Chair Lina Khan and Commissioner Rohit Chopra Regarding the Adoption of Revised Section 18 Rulemaking Procedures," *Federal Register* 86, no. 138 (July 22, 2021): 38551, https://www.ftc.gov/public-statements/2021/07/statement-commissioner-rebecca-kelly-slaughter-joined-chair-lina-m-khan.

159. See the section titled "A Brief History of FTC Rulemaking."

160. Federal Trade Commission, "Statement of Commissioner Rebecca Kelly Slaughter Joined by Chair Lina Khan and Commissioner Rohit Chopra Regarding the Adoption of Revised Section 18 Rulemaking Procedures."

161. See, for example, *1989–1990 Official Congressional Directory* (Washington, DC: US Government Printing, 1989): 770. Henry B. Cabell was the last presiding officer appointed to oversee the Mail Order amendment proceeding in 1989. Federal Trade Commission, "Mail Order Merchandise Rule."

162. Cabell's obituary stated that he was an ALJ. See Tribute Archive, "Henry Bertrand Cabell," https://www.tributearchive.com/obituaries/2415667/Henry-Bertrand-Cabell. We do not know when he became an ALJ. He was not an ALJ during the several rulemakings over which he presided in the 1970s and early 1980s, and FTC *Federal Register* notices from 1995 and 1996 identify him as a presiding officer. See, for example, Federal Trade Commission, "FTC Staff Recommends Repeal of Trade Regulation Rule on Games of Chance in the Food Retailing and Gasoline Industries," press release, June 7, 1996, https://www.ftc.gov/news-events/news/press-releases/1996/06/ftc-staff-recommends-repeal-trade-regulation-rule-games-chance-food-retailing-gasoline-industries; and Rules for Using Energy Costs and Consumption Information Used in Labeling and Advertising of Consumer Appliances Under the Energy Policy and Conservation Act," *Federal Register* 58, no. 42 (March 5, 1993): 12818. Appliance labeling is a rule under the National Appliance Energy Conservation Act rather than Section 18.

163. See Walters, "FTC Rulemaking." The FTC's decisions on July 1 closely track these recommendations. See also Walters, "Reassessing the Mythology of Magnuson-Moss." As Walters reports, this article was "initially prepared while serving as a summer law clerk" in a commissioner's office and written in 2019.

164. See Federal Trade Commission, "Revision to Rules of Practice."

165. Federal Trade Commission, "Trade Regulations Rulemaking Procedures." Some provisions were adopted as a final rule. Federal Trade Commission, "General Procedures," *Federal Register* 40, no. 66 (April 4, 1975): 15232.

166. Federal Trade Commission, "Procedures and Rules of Practice."

167. Federal Trade Commission, "Trade Regulations Rulemaking Procedures."

168. Federal Trade Commission, "Procedures and Rules of Practice."

169. 16 CFR § 1.12(b)(1); and Federal Trade Commission, "Revisions to Rules of Practice."

170. Federal Trade Commission, "Organization; General Procedures; Nonadjudicative Procedures; and Miscellaneous Rules."

171. Federal Trade Commission, "Organization Changes in the Commission's Rulemaking and Investigatory Procedures," *Federal Register* 46, no. 91 (May 12, 1981): 26284.

172. Federal Trade Commission, "Restrictions on Ex Parte Communications," *Federal Register* 42, no. 170 (September 1, 1977): 43974; and Federal Trade Commission, "General Procedures," *Federal Register* 42, no. 228 (November 28, 1977): 60561.

173. Federal Trade Commission, "Ex Parte Communications," *Federal Register* 44, no. 54 (March 19, 1979): 16366.

174. Federal Trade Commission, "Oral Presentations Before the Commission and Communications with Commissioners and Their Staffs in Trade Regulation Rulemaking Proceedings."

175. What appears to be "consensus" could instead reflect incumbents in an industry seeking to disadvantage their competitors rather than a solution that helps consumers. Such problems are more likely in agencies subject to regulatory capture than in a generalist body with multiple constituencies, such as the FTC.

176. For example, the rule required sellers to disclose as references either all purchasers in the past three years or the 10 nearest purchasers. In the case of Primerica, for which we helped prepare a comment, the former option would have required a 2,000-page disclosure. The latter option would have required agents to produce a minimum of 200,000 customized forms, counting only the forms for consumers who actually applied for a position. See Federal Trade Commission, *Comment of Primerica Financial Services, Inc. on the Notice of Proposed Rulemaking on the Business Opportunity Rule R511993*, July 17, 2006, https://www.ftc.gov/system/files/documents/public_comments/2006/07/522418-11929.pdf.

177. The original NPRM was published April 12, 2006. See Federal Trade Commission, "Business Opportunity Rule." The revised proposal was published March 26, 2008. See Federal Trade Commission, "Business Opportunity Rule."

178. See the section titled "A Brief History of FTC Rulemaking."

179. *Association of National Advertisers v. Federal Trade Commission*, 617 F.2d 611, 618–19 (DC Cir. 1979).

180. For the commission's decision terminating the rulemaking, see Federal Trade Commission, "Children's Advertising," *Federal Register* 40, no. 191 (October 2, 1981): 48710, 48712.

181. John Adams, "Adams' Argument for the Defense: 3–4 December 1770," National Archives, Founders Online, https://founders.archives.gov/documents/Adams/05-03-02-0001-0004-0016.

182. Magnuson-Moss Warranty–Federal Trade Commission Improvement Act, Pub. L. No. 93-637. Section 202(a) added Section 18(b)(1) to the Federal Trade Commission Improvements Act of 1980.

183. 16 CFR § 1.11; and Federal Trade Commission, "Procedures and Rules of Practice."

184. Unfair or Deceptive Acts or Practices Rulemaking Proceedings, 15 USC § 57a(b)(1)(A). See Federal Trade Commission Improvements Act of 1980, Pub. L. No. 96-252, § 11(a)(3).

185. 16 CFR § 1.11(a)(1), (a)(3); and Federal Trade Commission, "Organization Changes in the Commission's Rulemaking and Investigatory Procedures."

186. 16 CFR § 1.11 (b)(3); and Federal Trade Commission, "Revisions to Rules of Practice." The discussion of the reasons for changes in this section of the rule is on page 38544, and the rule provision itself is on page 38548.

187. *Association of National Advertisers v. Federal Trade Commission*, 617 F.2d 611, 615 (DC Cir. 1979).

188. Unfair or Deceptive Acts or Practices Rulemaking Proceedings, 15 USC § 57a(c)(1)(B).

189. 16 CFR § 0.8; and Federal Trade Commission, "Revisions to Rules of Practice."

190. 16 CFR § 1.13(d); and Federal Trade Commission, "Revisions to Rules of Practice."

191. Moreover, as we discuss in the next subsection, under the new rules the commission will decide what constitutes a "disputed issue of material fact."

192. Federal Trade Commission, "Amendment to Trade Regulation Rule Concerning Retail Food Store Advertising and Marketing Practices," *Federal Register* 54, no. 165 (August 28, 1989): 35456, 35457. There were three other rulemakings in which a presiding officer was appointed and issued a report after the staff report: Eyeglasses II, Mail Order Merchandise (amendment), and Funeral Industry Practices (amendment).

193. See, for example, Ellis's discussion of the schism within the Bureau of Consumer Protection between the "new staff" and the "original staff" on the Funeral Rule. Ellis, "Legislative Powers," 170.

194. Ellis, "Legislative Powers," 183.

195. Federal Trade Commission, "Oral Presentations Before the Commission and Communications with Commissioners and Their Staffs in Trade Regulation Rulemaking Proceedings."

196. Federal Trade Commission, "Oral Presentations Before the Commission and Communications with Commissioners and Their Staffs in Trade Regulation Rulemaking Proceedings."

197. 16 CFR § 1.13(c)(5); and Federal Trade Commission, "Organization; General Procedures; Nonadjudicative Procedures; and Miscellaneous Rules," 36338, 36341.

198. Federal Trade Commission, "Practice and Procedure Rules: Administrative Law Judges as Presiding Officers in Rulemaking Proceedings."

199. See the discussion of these goals in the section titled "Early Section 18 Rulemaking."

200. *Association of National Advertisers v. Federal Trade Commission*, 617 F.2d 611, 615 (DC Cir. 1979).

201. Unfair or Deceptive Acts or Practices Rulemaking Proceedings, 15 USC § 57a (b)(1)(C).

202. Unfair or Deceptive Acts or Practices Rulemaking Proceedings, 15 USC § 57a (c)(2)(A).

203. 16 CFR § 1.11(e).

204. Federal Trade Commission, "Business Opportunity Rule."

205. Unfair or Deceptive Acts or Practices Rulemaking Proceedings, 15 USC § 57a (c)(2)(B). The commission is authorized to prescribe rules "to avoid unnecessary costs or delay," including reasonable time limits. Unfair or Deceptive Acts or Practices Rulemaking Proceedings, 15 USC § 57a (c)(3). The Fourth Circuit upheld the presiding officer's decisions limiting cross-examination in the Funeral Rule proceeding. The proceeding included 52 days of hearings, at which 315 witnesses testified, all of whom were subject to cross-examination, albeit with some cross-examined only by the presiding officer. See *Harry & Bryant Co. v. Federal Trade Commission*, 726 F.2d 993 (4th Cir. 1984).

206. 16 CFR § 1.11(b)(5); and Federal Trade Commission, "Revisions to Rules of Practice," 38542, 38548.

207. Interested parties could petition the commission to modify the presiding officer's determinations within 10 days after publication of the final notice (identifying designated issues), but the commission had discretion to permit the appeal, and the petition did not stay the rulemaking unless the commission or the presiding officer so determined. 16 CFR § 1.13(c)2(ii); and Federal Trade Commission, "Procedures and Rules of Practice," 33966, 33967.

208. Federal Trade Commission, "Organization Changes in the Commission's Rulemaking and Investigatory Procedures," 26284, 26286.

209. Federal Trade Commission, "Organization Changes in the Commission's Rulemaking and Investigatory Procedures," 26284, 26286.

210. There were legislative hearings with oral testimony before the issue designation, but the procedures in use required that written comments include the substance of what would be in an oral statement. Federal Trade Commission, "Children's Advertising; Television Restrictions." Thus, it seems unlikely that the hearing, as opposed to the comments, made a significant contribution to identifying the key issues.

211. The July 1, 2021, rules seek to limit this right, providing that requests for rebuttal submissions or cross-examination should be granted if it "is an issue of specific fact in contrast to legislative fact." 16 CFR § 1.12(b)(1). The commission offers no explanation for either the change or what the distinction means. As discussed above, the commission rejected this distinction, dubious under the statute, in its 1975 rules implementing Section 18. See the discussion in the subsection titled "Are We There Yet? The FTC's Rush to Judgment."

212. In Children's Advertising, while reserving designated issues to itself, the commission treated the staff essentially as it did other interested parties, allowing it to file on-the-record comments on the presiding officer's recommendations.

213. In the Do Not Call rulemaking, with which we were both involved, there were 65,000 comments. Although an APA rather than a Section 18 rule, the staff read all the comments. We are quite confident that no one in a commissioner's office did so.

214. See text at endnote 156.

215. See text at endnote 110.

216. 16 CFR § 1.13(f) (2020).

217. 16 CFR § 1.13(h) (2020). Post-record comments "shall be confined to information already in the record." Although always considered as "post-record," these comments are in fact part of the rulemaking record. See 16 CFR § 1.18(a) (2020).

218. Federal Trade Commission, "Revisions to Rules of Practice," 38542, 38544.

219. 16 CFR § 1.18(c)(2). Because the commission can base its decisions only on the rulemaking record, staff analyses,

recommendations, and reports have always been confined to material on the record and therefore do not need to be public because they are not ex parte communications..

220. See, for example, the *Staff Report and Recommendation on Proposed Trade Regulation Rule* from August 1980, which recommended significant changes in the Credit Practices rule, and the bureau director's memorandum (Appendix D of the *Staff Report*) specifically soliciting comment on several of those changes. The director's memorandum also highlights differences between the staff recommendations and those of the presiding officer, illustrating the value of an independent evaluation of the record discussed above. Federal Trade Commission, Bureau of Consumer Protection, *Credit Practices: Staff Report and Recommendation on Proposed Trade Regulation Rule*, August 1980, https://www.google.com/books/edition/Credit_Practices/7Z2YMfH1IToC.

221. See *American Optometric Association v. Federal Trade Commission*, 626 F.2d 896 (DC Cir. 1980).

222. *Consumers Union of US v. Federal Trade Commission*, 801 F.2d 417 (DC Cir. 1986).

223. *American Financial Services Association v. Federal Trade Commission*, 767 F.2d 957 (DC Cir. 1985).

224. 16 CFR § 1.13(i); and Federal Trade Commission, "General Procedures."

225. Boyer, "Report in Support of Recommendation 79-1," 49.

226. 16 CFR § 1.18(c); and Federal Trade Commission, "General Procedures."

227. Federal Trade Commission, "Oral Presentations Before the Commission and Communications with Commissioners and Their Staffs in Trade Regulation Rulemaking Proceedings."

228. 16 CFR § 1.18(c)(ii).

229. Unfair or Deceptive Acts or Practices Rulemaking Proceedings, 15 USC § 57a(e)(3)(A).

230. Unfair or Deceptive Acts or Practices Rulemaking Proceedings, 15 USC § 57a(e)(2).

231. Federal Trade Commission, "Revisions to Rules of Practice," 38542, 38552.

232. Federal Trade Commission, "Oral Presentations Before the Commission and Communications with Commissioners and Their Staffs in Trade Regulation Rulemaking Proceedings."

233. See 47 CFR §§ 1.1200–1.1216. Even at the FCC, comments can be disregarded because they are not timely. Unlike the FTC, the FCC does not appear to distinguish between the "rulemaking" record and the "public" record.

234. See the discussion of successful rules in the subsection "Early Section 18 Rulemaking."

235. Boyer, "Report in Support of Recommendation 79-1," 57.

236. Boyer, "Report in Support of Recommendation 79-1," 57.

237. Boyer, "Report in Support of Recommendation 79-1," 46.

238. Boyer, "Report in Support of Recommendation 79-1," 57. Both rulemakings were completed in 1978. See endnote 51.

239. See Timothy J. Muris, "Protecting Consumers' Privacy: 2002 and Beyond" (speech, Federal Trade Commission Privacy 2001 Conference, Cleveland, OH, October 4, 2001), https://www.ftc.gov/public-statements/2001/10/protecting-consumers-privacy-2002-and-beyond.

240. For the discussion of the evidence in the NPRM, see Federal Trade Commission, "Telemarketing Sales Rule," *Federal Register* 67, no. 20 (January 30, 2002): 4517–18, https://www.federalregister.gov/documents/2002/01/30/02-1998/telemarketing-sales-rule.

241. Federal Trade Commission, "Telemarketing Sales Rule," *Federal Register* 68, no. 19 (January 29, 2003): 4580, https://www.federalregister.gov/documents/2003/01/29/03-1811/telemarketing-sales-rule. The SBP for the rule summarizes the procedures and timeline.

242. The Do Not Call Registry was extremely successful against the legitimate businesses that dominated telemarketing at the time. In the past few years, improvements in technology have allowed unscrupulous businesses to use robocalls to bombard consumers, in violation of numerous laws, many with more serious penalties than Do Not Call. As with email spam, the likely solution is better technology to screen such calls, not more government regulation.

243. The challenges to the rule were many but in the end appeared to rest most strongly on First Amendment grounds, forcefully rejected by the 10th Circuit Court of Appeals. See *Mainstream Marketing Services v. Federal Trade Commission*, 358 F.3d 1228 (10th Cir. 2004). An initial decision questioning the FTC's authority was overturned by Congress in record time: The district court's decision was issued September 23, 2003, and Congress passed legislation on September 25 that was signed into law by President George Bush on

September 29. See *US Security v. Federal Trade Commission*, 282 F. Supp. 2d 1285 (WD Okla. 2003); CNN, "Bush Signs 'Do-Not-Call' Bill into Law," September 30, 2003, http://www.cnn.com/2003/ALLPOLITICS/09/29/do.not.call/index.html; and Rodney A. Smolla, "The 'Do-Not-Call List' Controversy: A Parable of Privacy and Speech," *Creighton Law Review* 38, no. 4 (2005): 743–60, https://scholarlycommons.law.wlu.edu/cgi/viewcontent.cgi?article=1212&context=wlufac.

244. Executive Office of the President, Office of Management and Budget, Office of Information and Regulatory Affairs, "Federal Trade Commission (FTC): Statement of Regulatory Priorities," https://www.reginfo.gov/public/jsp/eAgenda/StaticContent/202110/Statement_3084_FTC.pdf.

245. Executive Office of the President, Office of Management and Budget, Office of Information and Regulatory Affairs, "Federal Trade Commission (FTC)."

246. Unfair or Deceptive Acts or Practices Rulemaking Proceedings, 15 USC § 57a (c)(1)(B).

247. Federal Trade Commission, "Oral Presentations Before the Commission and Communications with Commissioners and Their Staffs in Trade Regulation Rulemaking Proceedings."

ATTACHMENT 5

Preamble to FTC submission to OMB for Fall 2021 Unified Agenda

FEDERAL TRADE COMMISSION

16 CFR Ch. I

Semiannual Regulatory Agenda

AGENCY: Federal Trade Commission.

ACTION: Semiannual regulatory agenda.

SUMMARY: The Federal Trade Commission (FTC or Commission) is publishing its semiannual regulatory agenda in accordance with section 22(d)(1) of the Federal Trade Commission Act, 15 U.S.C. 57b-3(d)(1), and the Regulatory Flexibility Act (RFA), 5 U.S.C. 601 to 612, as amended by the Small Business Regulatory Enforcement Fairness Act. The Commission's agenda follows guidelines and procedures issued August 16, 2021, by the Office of Management and Budget in accordance with the provisions of Executive Order 12866, "Regulatory Planning and Review," of September 30, 1993, 58 FR 51735 (Oct. 4, 1993).

The Government-wide Unified Agenda of Federal Regulatory and Deregulatory Actions includes the Commission's Regulatory Plan and a list of all regulatory actions under development or review and is scheduled for publication in its entirety on www.reginfo.gov and www.regulations.gov in a format that offers users a greatly enhanced ability to obtain information from the agenda database.

The RFA requires publication in the **Federal Register** of agenda entries for rules that are likely to have a significant impact on a substantial number of small entities (5 U.S.C. 602) and any such rules that the agency has identified for periodic review under section 610 of the RFA. For fall 2021, the Commission has no proposed rules that would meet the RFA's publication requirements. In addition, the

Commission has no proposed rules that would be a “significant regulatory action” under the definition in Executive Order 12866.

The Commission has identified rulemakings that are likely to have some impact on small entities, but do not meet the RFA’s publication requirements. The current rulemakings that are likely to have some impact on small entities are: (1) the Energy Labeling Rule, 16 CFR 305; (2) Telemarketing Sales Rule, 16 CFR 310; (3) Children’s Online Privacy Protection Rule, 16 CFR 312; (4) Privacy of Consumer Financial Information, 16 CFR 313; (5) Standards for Safeguarding Customer Information, 16 CFR 314; (6) Health Breach Notification Rule, 16 CFR 318; (7) the Made in the USA Labeling Rule, 16 CFR 323, (8) the Care Labeling Rule, 16 CFR 423; (9) the Amplifier Rule, 16 CFR 432; (10) Disclosure Requirements and Prohibitions Concerning Franchising, 16 CFR 436; (11) Business Opportunity Rule, 16 CFR 437; (12) Funeral Rule, 16 CFR 453; (13) Eyeglass Rule, 16 CFR 456; (14) the Duties of Creditors Regarding Risk-Based Pricing Rule, 16 CFR 640; (15) the Duties of Users of Consumer Reports Regarding Address Discrepancies Rule, 16 CFR 641; (16) the Prescreen Opt-Out Notice Rule, 16 CFR 642; (17) the Duties of Furnishers of Information to Consumer Reporting Agencies Rule, 16 CFR 660; (18) the Affiliate Marketing Rule, 16 CFR 680; and (19) Identity Theft Rules, 16 CFR 681. The Commission’s rulemaking review process carefully considers regulatory burdens and streamlines rules when feasible and appropriate.

The majority of the rulemakings listed in the agenda are being conducted as part of the Commission’s systematic review of all of its regulations and guides on a rotating basis. Under the Commission’s program, rules are reviewed on a 10-year schedule. In each rule review, the Commission requests public comments on, among other things, the economic impact and benefits of the rule; possible conflict between the rule and state, local, or other federal laws or regulations; and the effect on the rule of any technological, economic, or other industry changes. These reviews incorporate and expand upon the review required by the RFA and regulatory reform initiatives directing agencies to conduct a review of all regulations and eliminate or revise those that are outdated or otherwise in need of reform.

Except for notice of completed actions, the information in this agenda represents the judgment of Commission staff, based upon information now available. Each projected date of action reflects FTC staff's assessment that the specified event will occur this year. No final determination by the staff or the Commission respecting the need for, or the substance of a rule should be inferred from the notation of projected events in this agenda. In most instances, the dates of future events are listed by month, not by a specific day. The information in this agenda may change as new information, changes of circumstances, or changes in the law occur.

FOR FURTHER INFORMATION CONTACT: For information about specific regulatory actions listed in the agenda, call, email, or write the contact person listed for each proceeding. General comments or questions about the agenda should be directed to G. Richard Gold; Attorney, Federal Trade Commission, 600 Pennsylvania Avenue NW, Washington, DC 20580, telephone: (202) 326-3355; email: rgold@ftc.gov.

DATE: September 17, 2021.

By direction of the Commission.

NAME: April Tabor,

Secretary.

ATTACHMENT 6

Preamble to FTC submission to OMB for Spring 2022 Unified Agenda

FEDERAL TRADE COMMISSION

16 CFR Ch. I

Semiannual Regulatory Agenda

AGENCY: Federal Trade Commission.

ACTION: Semiannual regulatory agenda.

SUMMARY: The Federal Trade Commission (FTC or Commission) is publishing its semiannual regulatory agenda in accordance with section 22(d)(1) of the Federal Trade Commission Act, 15 U.S.C. 57b-3(d)(1) and the Regulatory Flexibility Act (RFA), 5 U.S.C. 601 to 612, as amended by the Small Business Regulatory Enforcement Fairness Act. The Commission's agenda follows guidelines and procedures issued March 3, 2022, by the Office of Management and Budget in accordance with the provisions of Executive Order 12866, "Regulatory Planning and Review," of September 30, 1993, 58 FR 51735 (Oct. 4, 1993).

The Government-wide Unified Agenda of Federal Regulatory and Deregulatory Actions includes a list of all regulatory actions under development or review and is scheduled for publication in its entirety on www.reginfo.gov and www.regulations.gov in a format that offers users a greatly enhanced ability to obtain information from the agenda database.

The RFA requires publication in the Federal Register of agenda entries for rules that are likely to have a significant impact on a substantial number of small entities (5 U.S.C. 602) and any such rules that the agency has identified for periodic review under section 610 of the RFA. For spring 2022, the Commission has no proposed rules that would meet the RFA's publication requirements. In addition, the Commission has no proposed rules that would be a "significant regulatory action" under the definition in Executive Order 12866.

The Commission has identified rulemakings that are likely to have some impact on small entities, but do not meet the RFA's publication requirements. The current rulemakings that are likely to have some impact on small entities are: (1) the Energy Labeling Rule, 16 CFR 305; (2) Telemarketing Sales

Rule, 16 CFR 310; (3) Children’s Online Privacy Protection Rule, 16 CFR 312; (4) Privacy of Consumer Financial Information, 16 CFR 313; (5) Standards for Safeguarding Customer Information, 16 CFR 314; (6) Health Breach Notification Rule, 16 CFR 318; (7) the Care Labeling Rule, 16 CFR 423; (8) the Use of Prenotification Negative Option Plans, 16 CFR 425; (9) the Amplifier Rule, 16 CFR 432; (10) Disclosure Requirements and Prohibitions Concerning Franchising, 16 CFR 436; (11) Business Opportunity Rule, 16 CFR 437; (12) Funeral Rule, 16 CFR 453; (13) Eyeglass Rule, 16 CFR 456; (14) Identity Theft Rules, 16 CFR 681; (15) the newly proposed Trade Regulation Rule on Commercial Surveillance, (16) the newly proposed Trade Regulation Rule on Earnings Claims and (17) the newly proposed Trade Regulation Rule on Impersonation of Government and Businesses. The Commission’s rulemaking review process carefully considers regulatory burdens and streamlines rules when feasible and appropriate.

The majority of the rulemakings listed in the agenda are being conducted as part of the Commission’s systematic review of all of its regulations and guides on a rotating basis. Under the Commission’s program, rules are reviewed on a 10-year schedule. In each rule review, the Commission requests public comments on, among other things, the economic impact and benefits of the rule; possible conflict between the rule and state, local, or other federal laws or regulations; and the effect on the rule of any technological, economic, or other industry changes. These reviews incorporate and expand upon the review required by the RFA and regulatory reform initiatives directing agencies to conduct a review of all regulations and eliminate or revise those that are outdated or otherwise in need of reform.

Except for notice of completed actions, the information in this agenda represents the judgment of Commission staff, based upon information now available. Each projected date of action reflects FTC staff’s assessment that the specified event will occur this year. No final determination by the staff or the Commission respecting the need for or the substance of a rule should be inferred from the notation of projected events in this agenda. In most instances, the dates of future events are listed by month, not by a specific day. The information in this agenda may change as new information, changes of circumstances, or changes in the law occur.

FOR FURTHER INFORMATION CONTACT: For information about specific regulatory actions listed in the agenda, call, email, or write the contact person listed for each particular proceeding. General comments or questions about the agenda should be directed to G. Richard Gold; Attorney, Federal Trade Commission, 600 Pennsylvania Avenue NW, Washington, DC 20580, telephone: (202) 326-3355; email: rgold@ftc.gov.

By direction of the Commission.

April J. Tabor,

Secretary.

ATTACHMENT 7

NADA Comments to FTC re: Auto Buyer Consumer Survey (I)

March 7, 2016

Via Web

Office of the Secretary
Federal Trade Commission
Suite CC-5610 (Annex J)
600 Pennsylvania Avenue, NW
Washington, DC 20580

Re: Auto Buyer Consumer Survey
Project No. P154800

Dear Secretary:

The National Automobile Dealers Association ("NADA")[1] submits the following comments in response to the Notice that the Federal Trade Commission ("FTC" or "Commission") published in the *Federal Register* in the above captioned matter.[2] As explained in detail below, NADA offers these comments (i) to question the purpose and necessity of the consumer survey initiative that the Commission has announced in the Notice, and (ii) if the Commission decides to proceed with the consumer survey, to identify – and request that the Commission address – a series of concerns with the manner in which it plans to conduct the survey.

Description of Consumer Survey

The Notice states that the FTC plans to conduct a "qualitative survey of consumers who recently purchased an automobile and financed that purchase though a dealer" for the purpose of "inform[ing] the Commission about current consumer protections (sic) issues that may exist and that could be addressed through FTC action, including enforcement initiatives, rulemaking, or education."[3] The survey will be conducted by a survey research firm, which will produce a brief methodological report and other written report as requested by the FTC.

The respondents who will be surveyed are consumers who have (i) indicated that they are willing to participate in surveys but who have not participated in an in depth interview in the past year, (ii) purchased an automobile from a dealer in the previous six months and used financing

[1] NADA represents over 16,000 franchised dealers in all 50 states who (i) sell new and used cars and trucks; (ii) extend vehicle financing and leases to consumers that routinely are assigned to third-party finance sources; and (iii) engage in service, repair, and parts sales. Our members collectively employ over 1 million people nationwide. Most of our members are small businesses as defined by the Small Business Administration.
[2] 81 Fed. Reg. 780-783 (Jan. 7, 2016).
[3] 81 Fed. Reg. at 780, 781.

offered or arranged by the dealer, and (iii) retained the documentation received as part of the transaction. The survey will involve in-person interviews that last approximately 90 minutes with 40 consumers (20 with prime credit scores and 20 with subprime credit scores) but may include interviews with 40 more consumers "if the FTC deems the additional interviews likely to be helpful."[4] The respondents will be racially diverse and include participants of both sexes.

The scope of the planned interviews is very broad and, "among other things," will include: (i) the consumer's experience in shopping for and choosing an automobile; (ii) the process of agreeing to a price for the automobile; (iii) the process of trading in the consumer's old automobile, if applicable; (iv) the consumer's experience in obtaining financing; (v) additional products or services the dealer may have offered; (vi) contacts between the consumer and the dealer after the purchase; and (vii) the consumer's overall perception of the purchase experience.[5] The survey questionnaire will be tested with "an initial sample of five in-person consumer interviews;" however, the questions that will be included are not identified. The interviews will conclude with the survey research firm reviewing the consumer's documentation and "exploring the consumer's understanding of that documentation."[6]

The results of the survey "will not be generalizable to the U.S. population." Nevertheless, the Commission "believes that they can provide useful insights into consumer understanding of the automobile purchasing and financing process at the dealership."[7]

The Purpose and Necessity of the Survey

As noted above, the FTC states that it plans to initiate this effort to "inform the Commission about current consumer protections (sic) issues that may exist and that could be addressed through FTC action, including enforcement initiatives, rulemaking, or education."[8] However, this statement ignores the fact that – less than four years ago - the Commission concluded an extraordinarily broad and comprehensive examination of the same question and developed an in depth record that completely obviates the need for a further examination of this matter.

The examination that the Commission conducted was a series of motor vehicle roundtables that it held in three cities across the country (Detroit, Michigan; San Antonio, Texas; and Washington, D.C.) in 2011. In language nearly identical to the language in the instant notice, the FTC stated that the purpose of the motor vehicle roundtables was "to explore consumer protection issues pertaining to motor vehicle sales and leasing" and "to inform the Commission regarding what consumer protection issues, if any, exist that could be addressed through a possible rulemaking or other initiative."[9]

[4] 81 Fed. Reg. at 781.
[5] Id.
[6] Id.
[7] Id.
[8] Id.
[9] 76 Fed. Reg. 14,014, 14,015 (Mar. 15, 2011).

The breadth of the Commission's examination of these issues was enormous and included in-depth panel discussions on each of the following topics:

1) Understanding the Motor Vehicle Sale, and Credit Transaction, From Both Prime and Subprime Perspectives;
2) Interest Rates, Dealer Reserves, and Markups;
3) Payment and Locator Devices and Consumer Privacy;
4) Spot Delivery;
5) Contract Add-Ons;
6) Vehicle Title Problems and Dealer Bankruptcies;
7) Military Consumers and the Auto Sales and Financing Process;
8) The Online Auto Process for Military and Other Consumers;
9) Military Consumers, Sales Representations, and Financing Process Issues;
10) Military Consumer Complaints and Military Sentinel;
11) Military Consumers, Vehicle Title Problems, and Repossessions;
12) Financial Literacy and Capability for Military Consumers;
13) Special Programs to Enhance Consumers' Financial Literacy;
14) Financial Literacy and New Approaches for Auto Sales and Financing;
15) Fair Lending – Interest Rates, Markups, and Payments;
16) Fair Lending – Compliance, Risk, and Liability;
17) Understanding the Motor Vehicles Leasing Process;
18) Misrepresentations and Other Consumer Protection Issues in Motor Vehicle Leasing;
19) Consumer and Business Education: What, If Anything, Is Needed and What Works?;
20) Which Practices, If Any, Cause Significant Harm to Consumers, and What Are Potential Solutions?; and
21) Which Practices, If Any, Are Widespread, and What Are Potential Solutions?

These panel discussions produced over 21 hours of oral testimony from 58 panelists (several of whom served on multiple panels) and more than 500 pages of written transcripts. The FTC selected the panelists from a diverse range of interests throughout the marketplace which, in addition to representatives of different segments of the auto industry, included: (i) consumer group representatives from the Center for Responsible Lending, Consumer Federation of America, Consumers for Auto Reliability and Safety, National Consumer Law Center, and National Council of La Raza; (ii) representatives from the Department of Justice and Consumer Financial Protection Bureau; (iii) representatives of the Office of Attorney General and other state consumer protection agencies from Illinois, Iowa, Maine, and Texas; (iv) various military and civilian representatives of military service members; and (v) several plaintiffs' attorneys. The record was further supplemented by 100 written comments that the Commission received through May 2012.[10]

In light of the foregoing, it is difficult to imagine how the Commission could have conducted a more comprehensive examination into issues that it now contends – less than four years after this process concluded – it needs to consider again. It is equally difficult to

[10] The record developed during the motor vehicle roundtable process is available at https://www.ftc.gov/policy/public-comments/initiative-369.

comprehend what justification – from either a substantive or budgetary perspective – exists for revisiting topics that are all a subset of those listed above.

The Notice fails to address these matters. It does not cite complaint data or data from any other source that supports this redundant exercise.[11] Nor does the Notice acknowledge that, during the year-long motor vehicle roundtable process, the Commission repeatedly requested credible data demonstrating that prevalent abuses exist in the auto industry but received none.[12] While the Notice states that the "proposed survey will explore in more detail the experience of actual consumers who recently purchased and financed an automobile from a dealer,"[13] it

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[11] While offering no data to support the need for the proposed consumer survey, the FTC mentions some advertising enforcement actions it has taken against auto dealers since 2011 along with "a coordinated federal-state effort that yielded more than two hundred automobile actions for fraud, deception, and other illegal practices." 81 Fed. Reg. at 780. This statement, which refers to "Operation Ruse Control," omits the fact that, according to the Operation Ruse Control Chart of Actions that accompanied the press release announcing these actions, 69 of the them derived in Canada, several of them either did not involve enforcement actions or were pending when announced, many of them (including each of the FTC administrative actions that were listed as part of Operation Ruse Control) did not involve a finding or admission of a legal violation, and a significant number of actions involved entitles other than auto dealers (e.g., auto manufacturer, auto shipment broker, multiple auto finance companies, multiple auto title lending companies, auto loan modification company, auto loan acceleration company, and multiple after-market providers). Indeed, one action that was included in this count was brought by the Department of Justice's Antitrust Division against a Japanese parts manufacturer. Consequently, referencing "more than two hundred automobile actions for fraud, deception, and other illegal practices" as support for conducting consumer surveys that focus solely on consumer experiences with auto dealers is both hyperbolic and suggests a predisposition towards these issues. These concerns are further manifested by the Commission's erroneous description of Operation Ruse Control in the April 2015 edition of *Penn Corner* as "252 enforcement actions… against *dishonest car dealers*" (emphasis added). *See* http://content.govdelivery.com/accounts/USFTC/bulletins/fea7b5.

[12] *See, e.g.*, the Commission's Statement under "Roundtable Goals and Topics for Comment" in the FTC Notice announcing the motor vehicle roundtables (76 Fed. Reg. 14,014 – 14,017 (Mar. 15, 2011)): "Of particular interest is data and empirical evidence supporting comments provided in response to this request;" the comments of then-Associate Director of the FTC's Division of Financial Practices Joel Winston at Panel 1 of the Detroit Roundtable: "And just to emphasize, what we're going to be looking for throughout this session today and future sessions is as much empirical evidence as possible. We've all heard stories and anecdotes and individual cases where consumers were mistreated in one way or another. One of the real goals of this process is to find out how prevalent those practices are. So if there are any studies, any sort of empirical data – that's something we'd be interested in seeing;" the comments of FTC Division of Financial Practices Attorney Carole Reynolds at Panel 4 of the Detroit Roundtable: "Does anyone have data on these practices occurring?;" the comments of FTC East Central Region Director John Miller Steiger at the conclusion of the Detroit Roundtable: "… And in order to get good useful answers, we need data. And I know you've heard that from us as a constant refrain, but we really do…;" the comments of then-FTC Division of Financial Practices Assistant Director Malini Mithal at Panel 1 of the San Antonio Roundtable: "To the extent we have any information about widespread practices, that would be helpful from the panelists" and "Has there been any kind of analysis of trends and complaints from military consumers or any kind of… statistics or any widespread practices that we have any information about?;" the comments of then-FTC Bureau of Consumer Protection Deputy Director Chuck Harwood at the beginning of the DC Roundtable: "We are especially interested in data and empirical information;" the comments of then-FTC Division of Financial Practices Attorney Robin Thurston at Panel 4 of the DC Roundtable: "And, again, if you have data or other indicators of how frequently these practices occur, that would be great;" and the comments of then-Acting Associate Director of the FTC's Division of Financial Practices Reilly Dolan at the conclusion of the DC Roundtable: "…We are looking at whatever data we can get. And I will continue to say, please give us hard facts and data. That's more persuasive than anecdotes."

[13] 81 Fed. Reg. at 781. It is not apparent what level of detail the Commission hopes to explore that was not covered during the motor vehicle roundtables by many of the FTC-selected panelists who are trained to examine every aspect of the auto purchasing and financing process and who presented extensive written as well as oral comments on the range of topics listed above.

overlooks the fact that credible *quantitative* surveys into this process have been conducted in recent years that found a high level of consumer satisfaction.[14]

The dearth of indicators of systemic problems in this area should be recognized by the Commission as reflective of a fully functioning marketplace and not as an imperative to attempt to fill the void. The fact that the Commission nonetheless is poised to move forward with this initiative, coupled with the concerns about the survey mechanics expressed below, invites cynicism into this process.

Concerns with the Mechanics of the Survey

In addition to NADA's concerns about the purpose and necessity of the survey, NADA also is concerned with how it will be conducted and analyzed and the very real possibility that the results it produces could serve to misinform – rather than inform – the Commission about "current consumer protections (sic) issues that may exist and that could be addressed through FTC action…."[15] Consequently, NADA offers the following questions and comments concerning the survey mechanics.[16]

1) The qualitative nature of the survey

a. How will the Commission control for the effects of respondent fatigue?

There is sufficient time in a 90-minute structured quantitative survey to ask more than 200 questions. Questionnaires of this length will most likely breed survey respondent fatigue, causing respondents either not to answer questions or to answer them dismissively (quickly without thought), which will minimize the quality of information from the questionnaire.

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[14] *See, e.g.*, Sabatini, J. (Jan. 18, 2016). Survey Says! What Our Car-Shopping Survey Revealed About Enthusiasts vs. Non-Enthusiasts. Retrieved from http://blog.caranddriver.com/survey-says-what-our-car-shopping-survey-revealed-about-enthusiasts-vs-non-enthusiasts/ (80 percent of 4,977 respondents were "very satisfied" or "extremely satisfied" with their dealership experience). Syndicated studies also have addressed the experience of consumers who purchase vehicles from auto dealers and reflect similar results. One example is J.D. Power's 2015 U.S. Sales Satisfaction Index (SSI) Study (Nov. 12, 2015), which surveyed 27,831 consumers and found that (i) 80% of respondents rated their overall experience purchasing a new vehicle at a dealership as "truly exceptional" or "outstanding," and (ii) 87% of respondents stated that they either definitely or probably will purchase or lease a vehicle in the future from the same dealer.

[15] 81 Fed. Reg. at 781.

[16] These questions and comments are consistent with the Office of Management and Budget's direction to agencies when designing and conducting a survey. *See* Office of Information and Regulatory Affairs, Office of Management and Budget, *Questions and Answers When Designing Surveys For Information Collections* 15-16 (2006)("OMB Questions and Answers")("The quality of a survey design can be judged by the strategies that are taken to prevent, adjust for, and measure potential problems and sources of error in surveys. How well a survey is designed and conducted can lead to either more or less variance (or noise) or bias (or systemic errors) in results. Well-designed and conducted surveys anticipate potential problems and try to prevent or minimize the impact of different sources of error as much as possible. Additionally, good surveys make efforts to measure and adjust for errors that are not controlled. The best surveys are those that check and verify each step of the research process…. Agencies designing and conducting surveys need to consider all of the potential sources of errors and plan to adequately prevent, measure, and adjust for them. Conducting a high quality survey requires careful planning and sufficient resources to yield quality data that have practical utility for the agency. Agencies should carefully document and justify the adequacy of their survey methods in their ICRs [Information Collection Requests].").

b. What questions will be asked and how will the Commission control for the effects of interviewer influence?

A loosely structured, 90-minute qualitative survey must be strictly monitored to ensure the moderators/interviewers do not influence the discussion and the opinions of the respondents. A one-on-one interview of this length creates significant opportunity for discussion, which can produce responses that include the effects of social desirability (which implies that respondents answer questions to achieve consensus with the perceived view of the interviewer or the sponsors of the survey). This happens most often in responses to open-ended, attitudinal, and recall questions. The likelihood of this occurring is enhanced given the Notice's reference to potential problems that consumers may experience when purchasing and financing the purchase of an automobile.[17] Consequently, the length and loose structure of the interview, coupled with the interviewer's inclination to search for problems, could lead to respondents providing answers that do not reflect their overall experience with the purchasing and financing process.[18]

c. How will the Commission be aided by the anecdotal results that the survey will produce?

A 90-minute, loosely structured qualitative survey provides the Commission with a very limited ability to generalize and extrapolate from the answers of the 40 individuals. The results will provide impressions about some experiences, but it will not create a feel for the prevalence of practices or measures of perception with the consumers' experiences. This has little value and certainly does not comport with the FTC's repeated calls during the motor vehicle roundtables for credible data instead of anecdotes.[19]

2) The survey design

a. How will the Commission control for the limitations imposed by the use of central location research facilities?

Although the Notice states that the study will ensure racial and gender diversification, it nonetheless lacks breadth. It is unclear whether it will take place at one location in each of 4 or 5 major metropolitan areas or whether all 40 interviews will occur in a single metropolitan area. There will be a cost and logistical preference to conduct the study at one location. Either way, the prospective sample will be highly recruited from one or only a few concentrated areas.

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[17] 81 Fed. Reg. at 780 ("Financing that is offered or arranged by dealers, however, can be a complicated, opaque process and potentially involve unfair and deceptive practices.").

[18] *See,* Arkowitz and Lilienfeld, *Why Science Tells Us Not to Rely on Eyewitness Accounts: Eyewitness testimony is fickle and, all too often, shockingly inaccurate,* Scientific American (Jan. 1, 2010), available at http://www.scientificamerican.com/article/do-the-eyes-have-it/ ("[P]sychologists have found that memories are reconstructed rather than played back each time we recall them. The act of remembering, says eminent memory researcher and psychologist Elizabeth F. Lotus of the University of California, Irvine, is "more akin to putting puzzle pieces together than retrieving a video recording." *Even questioning by a lawyer can alter the witness's testimony because fragments of the memory may unknowingly be combined with information provided by the questioner, leading to inaccurate recall*." (internal citation omitted)(emphasis added)).

[19] *See* Footnote 12.

Facilities tend to recruit respondents that have to travel no more than 30 to 60 minutes from the facility and, indeed, the Commission estimates 60 minutes of roundtrip travel time in its Paperwork Reduction Act (PRA) Burden Analysis.[20] To the extent that some perceived practices are more prevalent in one market than others, those practices will appear to have a much higher rate of occurrence than they do nationwide. In fact, because consumers in certain sections of metropolitan areas may have only interacted with a limited number of automobile dealership chains, there is a strong possibility that the sample will simply pertain to the practices of those dealership chains and not the industry as a whole.

b. How will the Commission control for characteristics of the survey respondents that may not be representative of the consumer population at large?

Central location research facilities are very often used for specialized qualitative research. The facilities often maintain lists of willing research participants, and they recruit from this list for many of their studies. As a result, the list is very confined, and the respondents are likely to be more sensitive to the nuances of issues brought up during the session than the population at large. Consequently, it is difficult to generalize beyond the experiences of the few people who are surveyed.

c. How will the Commission control for different attitudinal and experiential responses that occur over different periods of time?

The survey respondents must have purchased and financed an automobile in the past six months. Six months is a long recall period to ask about nuances of the purchase and financing experience. Consumers recalling the experience in the past 30 days will have very different levels of recall, saliency, and emotion compared to consumers whose purchase experience occurred almost a half year before the interview.[21] This calls into question the consistency of the survey's attitudinal and experiential responses.

3) The survey analysis

a. How will the Commission ensure that the survey analysis includes all of the key analytical variables?

How the survey research firm analyzes the 40 interviews is critical. There are several key analytical variables that should be considered beyond simply the race and sex of the consumer and whether the consumer has a prime or subprime credit score. (Examples of other key analytical variables include the age of the consumer, whether the vehicle purchased is new or used, and the amount financed.) A sample size of 40 respondents will yield too little information

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[20] 81 Fed. Reg at 782.

[21] *See* Woocher, *Did Your Eyes Deceive You? Expert Psychological Testimony on the Unreliability of Eyewitness Identification*, 969, 982 (1977)("Even if someone accurately perceived an event, its representation in the observer's memory would not remain intact for very long. People forget both quickly and easily. The phenomenon of forgetting what once has been perceived and encoded in memory, known as 'retroactive inhibition,' is one of the earliest and most consistent findings of cognitive psychology. Simply put, the more time that has elapsed since the perception of some event – and, therefore, the more intervening occurrences that must be stored in memory – the poorer a person's memory is of that event….").

to accurately analyze or compare the experiences of these subgroups or to ensure the respondents reflect the experiences of the population at large.

It is essential that the Commission keep in mind that the market it is attempting to examine consisted last year of the sale of 13.4 million new vehicles from franchised dealers to consumers[22] and 27.9 million used vehicles from franchised and independent dealers to consumers.[23] Consequently, the Commission plans to survey one consumer for every 1,000,000 vehicle sales from dealers to consumers. While the Commission acknowledges that its planned qualitative survey will not produce results that are generalizable to the U.S. population, it nonetheless must ensure that the survey's sample size is sufficient to "yield quality data that have practical utility for the agency."[24]

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In light of the foregoing concerns, NADA requests that the Commission reconsider the necessity of pursuing this initiative. If the Commission nonetheless decides to move forward, NADA requests that the Commission provide far greater transparency concerning the consumer survey process it will employ,[25] including by –

(i) providing answers to the full range of questions and concerns raised above;

(ii) prior to any data collection, publishing and making available for comment the full study design plan for the consumer survey;

(iii) identifying the scope of – and the pre-set review criteria that will be applied to – the "review [of] the consumer's documentation;"[26]

(iv) identifying the pre-set criteria the FTC will apply in determining whether to exercise the option to interview 40 consumers beyond the initial 40 consumers who will be interviewed "if the FTC deems the additional interviews likely to be helpful;"[27]

(v) publishing and making available for comment the full "methodological report, or other written report as requested by the FTC;"[28] and

(vi) identifying the additional stages, if any, of this initiative that the Commission will conduct and whether the public will have an opportunity to comment on them.

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[22] WardsAuto and National Automobile Dealers Association.
[23] National Automobile Dealers Association.
[24] OMB Questions and Answers, *supra* Footnote 16, at 16.
[25] Id. ("Agencies should be transparent and report in their ICRs the methods they plan to use, what is known about the different sources of error, and the impact of the error on the analytical results.").
[26] 81 Fed. Reg. at 781.
[27] Id.
[28] Id.

Thank you for the opportunity to comment on this matter. Please contact me if we can provide further information that would be useful to the Commission.

Sincerely,

Paul D. Metrey
Vice President, Regulatory Affairs

ATTACHMENT 8

NADA Comments to FTC re: Auto Buyer Consumer Survey (II)

October 14, 2016

Via Web

Office of the Secretary
Federal Trade Commission
Suite CC-5610 (Annex J)
600 Pennsylvania Avenue, NW
Washington, DC 20580

Re: Auto Buyer Consumer Survey
Project No. P154800

Dear Secretary:

The National Automobile Dealers Association ("NADA")[1] submits the following comments in response to the second Notice that the Federal Trade Commission ("Commission") published in the *Federal Register* in the above captioned matter,[2] which invites comment on, among other items, "the practical utility of the proposed survey" and "the proposed survey methodology and specific issues or questions that should be included in the interview process."[3] As briefly explained below, the Commission's limited and incomplete responses to the comments that were presented on these topics in response to the first Notice coupled with its apparent predisposition towards many of the issues it is examining continue to invite cynicism into this initiative.

NADA's comments in response to the Commission's first Notice (see attachment) described in detail how the Commission's planned Auto Buyer Consumer Survey was redundant and unnecessary and failed to provide important details about the mechanics of the survey process. We then requested that the Commission provide greater transparency about the survey process in six delineated areas. Our comments below briefly detail how the Commission, while providing some limited additional information about the survey mechanics, failed to address most of the questions presented to it and largely failed to provide greater transparency in the delineated areas specified in our comments.[4]

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1 NADA represents over 16,000 franchised dealers in all 50 states who (i) sell new and used cars and trucks; (ii) extend vehicle financing and leases to consumers that routinely are assigned to third-party finance sources; and (iii) engage in service, repair, and parts sales. Our members collectively employ over 1 million people nationwide. Most of our members are small businesses as defined by the Small Business Administration.

2 81 Fed. Reg. 63,179 – 63,186 (Sep. 14, 2016).

3 81 Fed. Reg. at 63,185.

4 Regarding our concerns about the redundant and unnecessary nature of this exercise, the Commission cites several enforcement actions it has taken against auto dealers since the FTC Motor Vehicle Roundtable process concluded in 2012 as examples of "persistent conduct [which] indicates that additional measures are necessary, including to study

Examples of Issues That Are Inadequately Addressed by the Commission

In response to our question about how the Commission will control for the effects of respondent fatigue that can set in during a 90-minute interview, the Commission simply responded: "There is no indication that respondent fatigue will impede consumers in their ability to describe their own experiences, which they will do on a voluntary basis"[5] (suggesting that respondent willingness to participate in a voluntary survey somehow prevents the possibility of respondent fatigue and the inaccuracies that it can produce).

In response to our question about how the Commission will control for the effects of interviewer influence during the planned survey and our explanation of how a loosely structured qualitative survey is susceptible to such influence, the Commission simply ignored the issue of controls and declared: "The interviewer will avoid suggesting particular problems."[6]

In response to the question that we and others asked about what questions will be asked by the interviewers, the Commission acknowledged what we asked but failed to identify the questions that will presented to the respondents.

In response to our question about how the Commission will control for the distortions that can be produced by using a small number of central location research facilities to conduct its interviews, the Commission acknowledged that the interviews will take place in a single metropolitan area (Washington, DC) and failed to explain how such localized results are reflective of consumer experiences nationwide.[7]

Regarding the Commission's plan to interview consumers who had purchased and financed an automobile from an automobile dealer in the past six months, the Commission responded to our question about how it will control for different consumer attitudinal and

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consumer experiences and help determine additional ways to protect consumers in auto transactions." 81 Fed. Reg. at 63,183. However, the examples cited by the Commission pertain almost exclusively to alleged federal advertising violations. The Commission's planned Auto Buyer Consumer Survey is considerably broader than advertising and includes topics, such as ("among other things") contacts between the consumer and the dealer after the purchase, that are completely unrelated to dealer advertising. Consequently, the Commission's recent enforcement actions do not support its foray into such a wide swath of issues. Nor does the Commission's reference to its "auto-related complaints" data in Footnote 35 of its second Notice offer support for this exercise as the complaints in its Consumer Sentinel Network Data Book are unverified, do not specify whether they involve alleged conduct by automobile dealers or other types of entities in the automotive sector, and include complaints such as "price gouging concerns against gas stations and oil companies" that cannot involve conduct by automobile dealers.

5 81 Fed. Reg. at 63,184.

6 Id.

7 While the Commission states that "this survey is not intended to be representative of the full population," it also states that "the proposed survey is expected to provide in-depth information about consumer protection issues that could be addressed through FTC initiatives, including enforcement, *rulemaking*, or education." (Emphasis added.) 81 Fed. Reg. at 63,183. In light of the Commission's acknowledgement that the localized information it will obtain is not generalizable to the entire population, it should not entertain the possibility that such information could be used to support a rulemaking that would affect businesses nationwide.

experiential responses that may occur throughout this time period by simply asserting that six months "is a recent timeframe."[8]

Our requests for greater transparency on several related issues – such as our recommendation that the Commission publish its study design plan and identify the scope of and the pre-set review criteria that will be applied to the review of the consumer's documentation – were also not addressed by the Commission. Similarly, the Commission did not respond to our recommendation that it identify the pre-set criteria the it will apply in determining whether to exercise the option to interview 40 consumers beyond the initial 40 consumers who will be interviewed other than to suggest that this decision "may, in part, be contingent on the time required for that first segment"[9] and that, ultimately, the decision will be based on whether "the FTC deems the additional interviews likely to be helpful."[10]

The Commission's unwillingness to provide important details about the survey it plans to conduct cannot be viewed in a vacuum. Unfortunately, it exists alongside recent Commission actions that suggest a predisposition towards the topics it intends to research. Recent examples of such a predisposition include the unbalanced nature of several videos the Commission recently posted to its website[11] and its erroneous description of "Operation Ruse Control" in 2015.[12]

<u>Conclusion</u>

For the Commission's planned Auto Buyer Consumer Survey to be probative of reliable and meaningful information that can assist it in its consumer protection mission, it must be structured in a transparent manner that controls for potential distortions,[13] and it must be

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[8] 81 Fed. Reg. at 63,184.

[9] Id.

[10] 81. Fed. Reg. at 63,180.

[11] *See, e.g.*, the FTC video entitled "Understanding Car Add-ons" (Jun. 23, 2016)(currently available at https://www.ftc.gov/news-events/audio-video/video/understanding-car-add-ons), which focuses exclusively on the price of "add-on" products without any recognition of the benefits such products can provide to consumers.

[12] *See* Footnote 11 of NADA's first set of comments in this matter. Regrettably, notwithstanding the information that we presented in that footnote specifying the inaccurate nature of the information the Commission has used to describe "Operation Ruse Control," the Commission continues to associate the full range of those actions with automobile dealer conduct. *See* 81 Fed. Reg. at 63,180, including the link it provides at the end of Footnote 7, which leads to a FTC blog entitled *Operation Ruse Control* (Mar. 26, 2015) that references "more than 250 enforcement actions" under the statement: "Not all dealers play by the rules" (currently available at https://www.consumer.ftc.gov/blog/operation-ruse-control).

[13] *See* Office of Information and Regulatory Affairs. Office of Management and Budget, *Questions and Answers When Designing Surveys for Information Collections* 15-16 (2006)("The quality of a survey design can be judged by the strategies that are taken to prevent, adjust for, and measure potential problems and sources of error in surveys. How well a survey is designed and conducted can lead to either more or less variance (or noise) or bias (or systemic errors) in results. Well-designed and conducted surveys anticipate potential problems and try to prevent or minimize the impact of different sources of error as much as possible. Additionally, good surveys make efforts to measure and adjust for errors that are not controlled. The best surveys are those that check and verify each step of the research process…. Agencies designing and conducting surveys need to consider all of the potential sources of errors and plan to adequately prevent, measure, and adjust for them. Conducting a high quality survey requires careful planning and sufficient resources to yield quality data that have practical utility for the agency. Agencies should carefully document and justify the adequacy of their survey methods in their ICRs [Information Collection Requests].").

developed and executed in an objective manner. Simply dismissing structural concerns that have been raised so as to move on to the next phase of the project falls well short of this imperative and inspires little confidence in this exercise.

Thank you for the opportunity to comment on this matter. Please contact me if we can provide further information that would be useful to the Commission.

Sincerely,

Paul D. Metrey
Vice President, Regulatory Affairs

ATTACHMENT 9

A Critique on the Limitations of the Recent FTC "Auto Buyer Study"

A Critique on the Limitations of the Recent FTC "Auto Buyer Study"*

John P. Vidmar, Ph.D. | **September 11, 2020**

**The Auto Buyer Study: Lessons from In-Depth Consumer Interviews and Related Research. A Joint Report by the Bureau of Economics and the Bureau of Consumer Protection (Federal Trade Commission).*

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About the Author

Dr. John P. Vidmar received his Masters Degree in Political Science from the University of Chicago, where he also trained at the National Opinion Research Center, one of the leading academic survey research organizations. He received his Doctorate in Public Policy Analysis from the University of Illinois. He also had an appointment in the Survey Research Laboratory at the University of Illinois and was adjunct faculty teaching Statistics and Research Methods. During this period, he was also a polling consultant for elections to NBC News, National Bureau.

Dr. Vidmar left the University of Illinois in 1989 and joined the Public Sector Research Group of Market Facts, Inc. This group within one of the largest market research firms served federal agencies such as the Federal Trade Commission, the Consumer Product Safety Commission, the Department of Health and Human Services, the National Institutes of Health, the Food and Drug Administration, the National Drug Administration, the Centers for Disease Control, the Environmental Protection Agency, the National Highway Traffic Safety Administration, the military health commands, the Veterans Administration, the Internal Revenue Service, and the Department of Housing and Urban Development. Market Facts subsequently merged into Synovate, which was acquired by Ipsos in 2011. Dr. Vidmar moved up through the ranks within this group to become its President and retired as its Chairman. During his tenure at Synovate, he was also the Head of the Solutions Group for North America and the Global Head of Tracking for Brand Tracking and Customer Satisfaction while still directing the Public Sector Research Group. Dr. Vidmar also sat on the global committee to review political polling for Ipsos across the world. He retired from Ipsos in December 2018.

From 1990 to 1995, Dr. Vidmar also served on the CASIC Committee for the U.S. Census Bureau, which conducted a review of the survey operations of the Census Bureau to prepare for the decennial Census of 2000. This committee was composed of survey research experts from the USA, Canada, and the UK, from both the academic and industry fields. They made a number of recommendations to update systems at the Census Bureau. Following this assignment, he was a member of a committee that evaluated the national and then global survey operations of Synovate.

Executive Summary

Nature of Study

The study upon which the report is based (the "FTC Study") was qualitative in nature and, as designed, cannot be used to extrapolate to any vehicle-buying population.

The context of qualitative research is to explore feelings, underlying thought processes, and a person's understanding of experiences. Qualitative research is not designed to establish the prevalence of problems or characteristics. Comments made by qualitative participants are heavily influenced by the direction of the probing done by moderators.

Concerns Regarding the Selection of Survey Participants

The sample of participants selected for the FTC Study came from only one area: the suburbs of Washington, D.C. Due to geographic bias and clustering effects, these people are not representative of the USA and probably do not even reflect the automobile-buying population of the greater Washington, D.C., area.

Participants were recruited from a database of people who have agreed to participate in research in the past, thereby introducing database bias.

Participants may have visited the same automobile dealerships. There was no filtering to prevent this. This could defeat the goal in exploratory research to obtain as wide a distribution of experiences as possible.

Potential participants who refused to share financial documents related to the automobile purchase were excluded. These were potentially more knowledgeable respondents.

Focus group participants were compensated. There is no discussion whether compensation attracted a participant who differs from the typical automobile purchaser.

No information is provided to inform the reader of how many people were screened to obtain a sample of 43. (Five were used in a pretest, and a follow-up was done with 38.)

There was a serious memory recall issue introduced by recruiting participants who had purchased a motor vehicle as long as six months ago.

Ultimately, the sample is representative only of people in the Washington suburbs who have (i) a prior agreement to participate in market research studies for a given market research firm, (ii) agreed to provide financial documents related to an automobile sale, (iii) purchased a vehicle in the last half year, and (iv) agreed to participate in the qualitative sessions for compensation.

Concerns Regarding Survey Design

The design of the interviewing protocol was more rigorous and looked more like a draft for a quantitative survey. The protocol lacked the typical probes for feeling, emotion, and underlying thought processes usually found in qualitative research. It appears to be an attempt to conduct quantitative research with a sample design and number of cases that do not permit extrapolation to any population.

The measurement of overall experience was placed at the end of the protocol so that it becomes a summary measurement of issues probed up to that point in time. It is not a measure of overall experience. The industry standard is to place overall experience questions before specific probing is begun.

Concerns Regarding Reporting of Participant Experiences

The FTC Study focuses on incidences of experiences, although these remarks are limited by references using words such as “some.” For example, the word “some” in reference to the participants is used over 80 times in the report without any explanation of how many participants that number references.

There is no reporting of emotions or underlying thought processes commonly found in qualitative research.

The FTC Study treats automobile purchasers as irrational for focusing on monthly budgets and what they can afford instead of focusing on the sales price. In consumer research, however, it is generally a mistake to assume that the consumer is not rational. If the protocol explored how an automobile purchaser approaches car buying instead of the assumed logical approach of the researcher, different conclusions might have been drawn.

Recommendation

Based on this report, the FTC should consider conducting additional research on how motor vehicle purchasers think about the affordability of a purchase given a monthly budget and how they define affordability given the long-term cost of the vehicle.

A Critique on the Limitations of the Recent FTC "Auto Buyer Study"*

John P. Vidmar, Ph.D. | **September 11, 2020**

Background: An Overview of Qualitative and Quantitative Research

In survey research methods, a distinction is made between the two major branches of research: qualitative and quantitative research. Qualitative research is usually used as a precursor to quantitative research. Typically, the people recruited to qualitative research are referred to as participants and not respondents. The reference to participants more clearly identifies the role these people play in a process of dialogue that occurs between themselves and the moderator or facilitator who leads the qualitative sessions. To guide the facilitator or moderator, a protocol is put together that covers a series of topics about a subject. Questions are formulated, which tend to be probing questions on the subject of interest. This document is called an interviewing protocol. The term "questionnaire" is usually reserved for quantitative research. In quantitative research, a questionnaire is designed to ensure that every respondent is exposed to the same wording, with no influence from the person administrating the document. The data elicited from this process is meant to be used to extrapolate to provide definition to the prevalence of a subject topic.

Since the interviewing protocol in qualitative research is a dialogue between the participant and the moderator, the purpose is typically to probe underlying attitudes, emotions, and thought processes about a specific matter. Since this is a dialogue between the moderator and the participant, we accept the fact that the moderator can influence where a participant goes with his or her responses. In fact, instructions are often given to moderators to pursue issues which are of greater interest to the researchers. This, of course, sacrifices the route a participant may take in describing what happened, how he or she feels about it, and his or her thoughts about the process. The remarks made by participants are not considered to be any kind of representative sample of thoughts. We accept this so that the moderator may be permitted to probe deeply in areas that are of concern to the researcher to help understand underlying feelings and thoughts of participants. We leave the calculation of prevalence to quantitative research.

At this stage of the research process, the focus is not on understanding how often something happens or to what degree it happens. We want to understand how a person views and processes the matter at hand. For example, in a qualitative study about automobile purchasing, a respondent might say that they felt the salesperson was "pushy." The moderator would be expected to probe that statement with questions such as: "What did the salesperson do to make you feel that he was pushy?" or "Were you uneasy or uncomfortable as you began to feel that the salesperson was pushy?" or "Did you signal to the salesperson that you felt uncomfortable?" These types of questions can be leading because the moderator is probing by introducing different dimensions of what might encompass the concept of being "pushy" to see if there is something deeper in the feelings or thought processes of that participant that can help us understand what "pushy" means to that person. As biasing as this might be, these probes are valuable to understand the person's psychological stance in this situation. We are not trying to have them rate "pushy" on a 10-point scale. The probing is there to help us understand how to word quantitative measures to objectify the experience so that prevalence can be ascertained in a more rigorous study.

**The Auto Buyer Study: Lessons from In-Depth Consumer Interviews and Related Research. A Joint Report by the Bureau of Economics and the Bureau of Consumer Protection (Federal Trade Commission).*

This evaluation of qualitative research is most frequently used to begin the formulation of a questionnaire that will be used in the quantitative phase. Oftentimes, a second wave of qualitative research is conducted to evaluate whether or not the questionnaire and its wording appropriately address the subject matter. In such a situation, qualitative research is used to probe to find out if the language of the questionnaire is understood correctly (an especially important issue in areas such as finance, which is dominated by technical terms not used in everyday language) and whether the appropriate terms are used to tap into a particular dimension of a respondent's thought processes. In this case, participants are administered a questionnaire draft and the moderator goes through the document question-by-question, and sometimes even word-by-word, to probe what the person thinks and understands about those words and phrases.

The quantitative stage is the culmination of this effort. Through rigorous scientific design, it can be used to determine prevalence and incidence rates of particular experiences. In survey research methods, we have a couple of methods of data collection that involve no facilitator, such as mail and internet surveys as well as some face to face and telephone, which do involve an administrator who is referred to as an interviewer. In the case of the latter, the interviewers undertake training to try to minimize their influence over the responses of the survey respondent. To further obviate any interviewer influence, additional measures are taken, such as making sure that the same interviewer does not conduct interviews in the same area or with the same types of respondents. Restrictions will be placed on the total number or proportion of interviews conducted by any given interviewer in order to reduce or wash any individual interviewer's impacts on the survey respondents.

Classifying the Methodology Reported in the FTC Study

What type of research is reported in the FTC Study—that is, the document entitled *The Auto Buyer Study: Lessons from In-Depth Consumer Interviews and Related Research, Joint Staff Report of the Bureau of Economics and Bureau of Consumer Protection?*

The FTC Study is a hybrid of qualitative and quantitative research, which is not necessarily bad in and of itself. Research should always be focused on addressing the issue at hand and the methodology should be designed to address that question. However, one needs to then establish the purposes and limitations of the ensuing research design as well as what conclusions are appropriate to draw given the framework from which the methodology was designed and executed. The following sections present an evaluation of the limitations of the qualitative research reported in the FTC Study. These comments are meant to address the question: How can this report be used?

Limitations of the Research

1. Obtaining Participants

Geographic Bias

The FTC Study explains that five people were interviewed in a pretest of the protocol phase and that an additional 38 participants were engaged in the full qualitative study. These were combined for reporting to arrive at a total sample of 43 people for analysis. This sample of participants was recruited from a narrow geographical area, the suburbs of Washington, D.C. Since these people were recruited to a centralized facility, no information is provided concerning the distance the participants traveled to reach the facility where the interviews were conducted. Given the constraints of travel in a large metropolitan area such as Washington, D.C., we assume that there was a bias toward participants who lived closer rather than farther from the facility. Not only were these participants not representative of the USA, they probably do not reflect the automobile-buying population of the greater Washington, D.C., area.

Clustering Effects

The danger of recruiting from a small geographical area is that the participants may have actually visited the same dealerships either in their search for a vehicle or for their final vehicle purchase. In the worst cases, participants may have actually encountered each other in the past. In exploratory research, the goal is to obtain as wide a distribution of experiences as possible. That means recruiting people who are "independent observations" (i.e., they are not associated with each other in any fashion). Recruiting from a small geographic area potentially compromises this goal. There is nothing in the research protocol that filters out people who have shopped for a vehicle at the same dealership.

There is also a secondary concern here. There was an attempt to recruit people who are demographically diverse. However, demographics do not define many consumer decisions. People are heavily influenced by the context of where they live and the existing market conditions of an area. Restricting the recruitment to just one area hinders the ability to capture more diverse experiences.

Database Bias

Many marketing research firms that manage central focus group facilities build databases composed of lists of people who have agreed to participate in focus group activities. Recruiting from such a list is more efficient than recruiting from the general population because cooperation is much higher. In addition, the recruitment process includes gathering information about the recruits that can be used later to make screening for qualitative sessions more efficient. Various demographics, such as age, gender, ethnicity, and geographic location, are collected at a minimum. This permits artificially balancing the sample on critical demographics. Prior knowledge of this information makes screening respondents more efficient. However, no firm should claim that this type of database is representative of any population beyond agreeable responders who live close to their facilities. It is clear from the FTC Study that such a database was used.

These databases are biased by definition. They do not represent any kind of scientific sample of the general population nor the population that is critical to the issue at hand. The database represents a group of people who have agreed to participate in market research projects. The research methodology was designed to mitigate some of this bias by recruiting from people who had not participated in a research project in at least a year. Nonetheless, there is no information made available that explains why this makes the potential recruits more representative of the population in question. It does mitigate for any influence on a respondent of a recent in-depth interview.

Compensation Bias

The FTC Study does not provide information about how many people were screened in order to find five participants for the pretest and 38 for the follow-up protocol. Typically, many people refuse because the demands of participating are not trivial. One has to drive back and forth to the central facility and then spend time going through the protocol. The level of traffic is fairly heavy in suburban Washington, and it is difficult to get anywhere in less than an hour. Respondents are usually compensated for their time. At times, it is necessary to vary compensation in order to recruit people who live farther away.

The FTC Study does not discuss compensation issues nor the impacts of compensation on the type of respondent likely to volunteer for such a task. Participation in these types of protocols is sensitive to compensation, and it is necessary to evaluate how this impacts the types of subjects who participate in the protocol. Is it possible that participants who were attracted to this study were also those for whom the compensation was meaningful? Were these less affluent people who agreed to participate? If the compensation were greater, would more knowledgeable people have agreed to participate in the study?

Filter Bias

The protocol is designed so that it was necessary for participants to bring financial documents related to their vehicle purchase to the interview. People who refused to bring such documents were eliminated from the process. There is no information provided concerning how many people were eliminated because of these filters. Nor is there any discussion concerning how this may have biased the sample. A nonresponse bias analysis would be helpful to frame the findings of the study. The critical question should be addressed, which is, in terms of the automobile purchase experience, how different are people who are willing to provide their financial documents compared with those who are not.

Recall Bias

Participants were recruited from the database who had purchased a motor vehicle within the last six months. Given that thousands of automobiles are purchased every week across the USA, it is difficult to understand why the research protocol would introduce a recall factor into the methodology. The thrust of the protocol was to look at finance issues. Previous research in the financial industry has documented that people throw themselves into the details of a particular purchase at the time of the purchase and then, after it is resolved (purchase made), they move on to other things. The details of the transaction are no longer top of mind and the longer the time elapsed from the purchase, the worse the recall of the details of the transaction. There really is no reason why they could not have recruited recent automobile purchasers for the study other than the convenience and cost of using an existing database of agreeable participants.

2. Protocol Issues

Overall Evaluation of the Experience

Within the Customer Satisfaction Measurement community, it is an industry standard to ask for overall buying experience as close to the beginning of the questionnaire as possible. In the protocol reported in the FTC Study, overall evaluation of the buying experience was placed at the end of the protocol after asking about each segment of the buying experience and having the moderator probe in depth into problems. This decreases the value of obtaining the overall evaluation because it reflects the psychological sum of all of the preceding parts of the protocol. We typically find when analyzing overall satisfaction with a buying experience that, when it is located at the beginning of the questionnaire or protocol, the response reflects an experience that is more than the sum of all the parts of the buying experience that are reviewed in the rest of the questionnaire. This indicates that we as researchers struggle to identify all the parts of the buying experience from the perspective of the buyer and then properly weigh the individual parts of the buying experience. By parsing buying experiences into segments, we stray from the context of the purchasers. We need to do this, but we miss things that are important to buyers. That is why overall evaluations go first in protocols to reflect the context of the purchaser. This prevents the protocol from influencing the responses of the participants in qualitative research or respondents in quantitative research. That still leaves us an opening to ask respondents about things we may have missed, such as:

"Is there anything I missed in discussing your automobile purchasing experience that was important in your decision to purchase your automobile?"

This question was not asked in this research protocol.

Lack of Questions and Probing on Emotions and Thought Processes

The protocol lacks references to emotions and underlying thought processes which are used to understand the psychological state of the participants as they talk about a particular experience. This is a key characteristic of qualitative research, and the absence of these references calls into question the purpose of the research effort.

Nor is there an attempt to test question or phrase wording. This looks like an attempt to conduct quantitative research under the guise of qualitative research.

Mingling of References to Other Research

The FTC Study intermingles research findings from other studies with observations from the qualitative research. This purports to provide an aura of quantitative legitimacy to the report. However, one has to be careful in reading the report to identify the unique findings of this research. If you strip out the literature review which is present throughout the report, the research findings do not sound as substantial. As already mentioned, many statements (over 80) include references to "some" respondents. Does this mean three, 15, or 20? Placed alongside a citation from the literature that is assumed to be from quantitative research, it misleads the reader to feel that the observation is a significant finding.

Absence of Recommendations for Next Steps

Typically, a qualitative report would make recommendation for further qualitative work to explore the wording of issues to be used in a quantitative protocol. Another typical recommendation would be for quantitative research to rigorously test, using scientific sampling methods, the incidence and prevalence of issues of concern. Such a recommendation is lacking. That implies that this is viewed as a finished product appropriate for recommendation towards regulatory action. This study lacks that rigor.

The Report Assumes Consumers Are Irrational

The researchers' approach to the automobile-purchasing experience is biased by their perspective of what is a rational approach. They assume that a person desires a particular car, goes out and finds a dealership with that car, negotiates a final price for the car, and then arranges financing. To their chagrin, automobile buyers approach the task with a monthly budget in mind that focuses on what they can afford and then work from there. Given that most vehicle purchases are financed, and that this, along with either a home mortgage or rent, is one of two major monthly budget items, it is not surprising that car buyers focus on what they can afford and work within that framework.

The research protocol should have been modified to start with this issue and explore how a respondent deals with lengths of payment and monthly amounts to acquire the car they want or need. It should have been evident after the pretest with five participants that the protocol was not oriented to the thought processes of vehicle purchasers. In consumer research, it is generally a mistake to assume that the consumer is not rational. Consumer research shows that people bundle prices to make decisions efficiently. One wonders if the research had started with a protocol that was more open and began by asking how people approached vehicle purchases, whether different conclusions may have been derived.

Conclusion

This critique addresses the limitations of the FTC Study and the resulting limits on how this research report can be used.

The critique of the recruitment process demonstrates that these findings cannot be used to extrapolate out to any population. They are representative only of a group of people who live in the Washington, D.C., area, have agreed to participate in market research studies, purchased a vehicle in the last half year, and were willing to bring personal financial documents to an interviewing situation.

The report was useful in identifying that people think about the process of automobile purchasing much differently than researchers, who broke the process down into logical steps assuming a person goes from step 1 to step 2 to step 3. However, the report identifies that people have monthly budgets in mind and work within that framework.

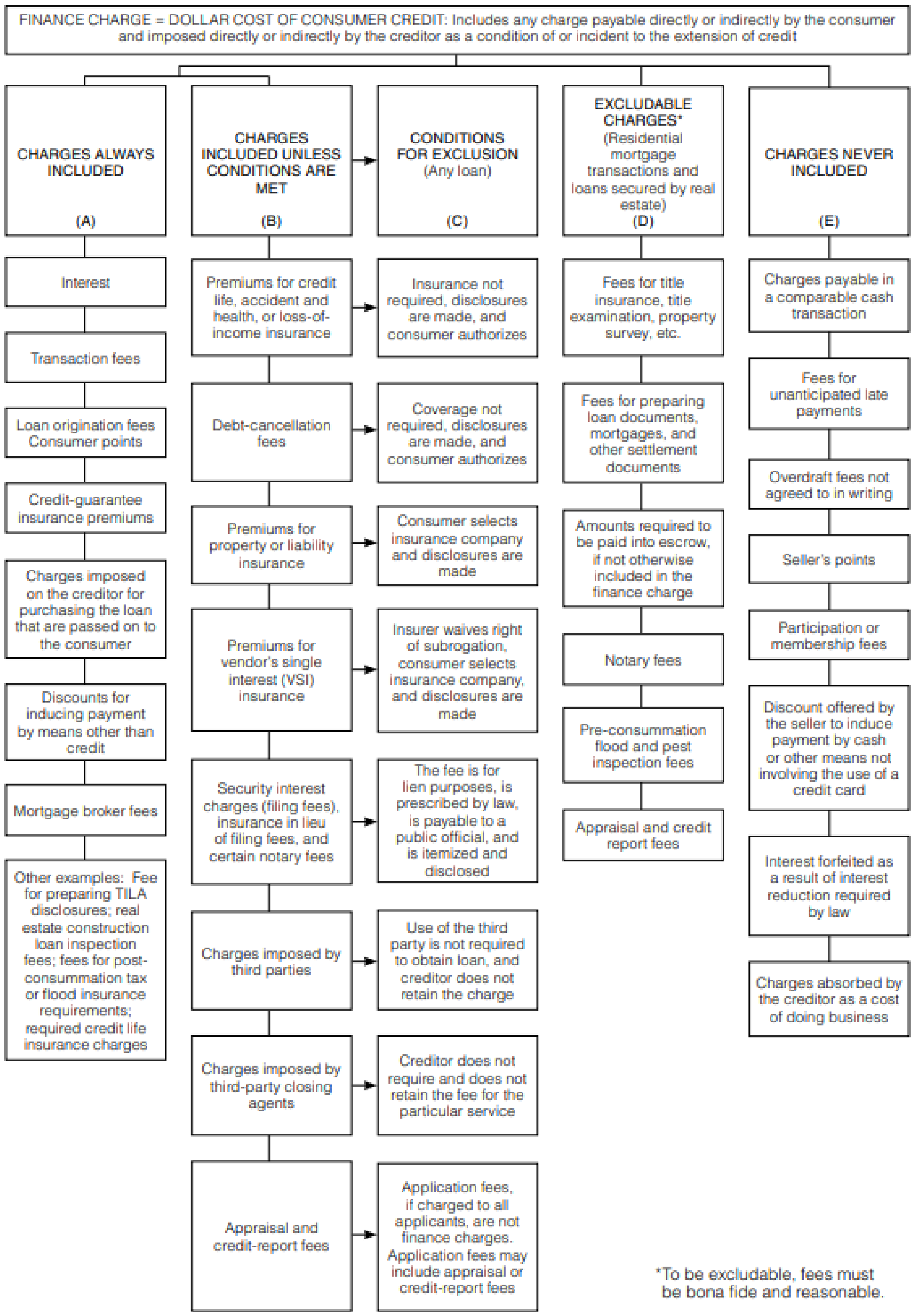
The report was useful in identifying the fact that people did research information about cars ahead of time. They probably had something in mind about what they might be able to afford as they walked in the door. The report seems to lead us to believe that sales and finance people understand this about vehicle purchasers as well.

This research found that the participants in this study consider a final sales price secondary and their monthly budget primary. There should be more research to look at how people think and feel about the final price and how comfortable they are with that as the “best price” if it fits within their monthly budget.

ATTACHMENT 10

FRB Summary of Considerations when calculating the TILA/Reg Z "Finance Charge"

Finance Charges



*To be excludable, fees must be bona fide and reasonable.

ATTACHMENT 11

Sample Disclosure
Cash Price without Optional Add-ons

DISCLOSURE FORM

Vehicle Cash Price without Optional Add-ons

Customer Information

Name

Address

City

State

Zip

Vehicle Information

Make

Model

Year

Color

Odometer Reading

VIN #

Offering Price		$
Discounts	–	$
Rebates	–	$
Trade-in Valuation	–	$
Required Government Charges	+	$
Vehicle Cash Price without Optional Add-ons	**Total**	$

The consumer can purchase the vehicle for the Cash Price without Optional Add-ons.

Declination

I hereby decline to purchase the vehicle identified above for the Cash Price without Optional Add-ons.

Customer

Print Name

Date

Signature

Time

Dealership Manager

Print Name

Date

Signature

Time

ATTACHMENT 12

Sample Disclosure
Cash Price without Optional Add-ons in a Financed Transaction

ATTACHMENT 12

Sample Disclosure

Cash Price without Optional Add-ons in a Financed Transaction

DISCLOSURE FORM

Vehicle Cash Price without Optional Add-ons

in a Financed Transaction

Customer Information

Name

Address

City | State | Zip

Vehicle Information

Make | Model

Year | Color

Odometer Reading | VIN #

Total of Vehicle Cash Price without Optional Add-ons Plus Finance Charge → $

Note: *This Cash Price without Optional Add-ons Plus Finance Charge factors in any cash down payment and trade-in valuation but excludes optional Add-ons.*

Vehicle Cash Price without Optional Add-ons	$
Finance Charge	$
Down Payment	$
Trade-in Valuation	$

The consumer can finance the vehicle for the total of the Vehicle Cash Price without Optional Add-ons Plus Finance Charge listed above.

Declination

I hereby decline to purchase the vehicle identified above for the total of the Vehicle Cash Price without Optional Add-ons Plus Finance Charge listed above.

Customer

Print Name | Date

Signature | Time

Dealership Manager

Print Name | Date

Signature | Time

APPENDIX 13

Sample Disclosures
Itemization of Optional Add-ons

DISCLOSURE FORM

Itemization of Optional Add-ons

(Financed transaction)

Customer Information

Name

Address

City | State | Zip

Vehicle Information

Make | Model

Year | Color

Odometer Reading | VIN #

A. Vehicle Cash Price without Optional Add-ons Plus Finance Charge → $

B. Charges for Optional Add-ons selected by the consumer

Extended Service Contract	+	$
Service and Maintenance Plan	+	$
Emergency Road Service	+	$
GAP Waiver	+	$
____________________	+	$
____________________	+	$
Total	=	$

C. Sum of amounts A and B, above → $

Note: *This total represents the sum of (i) the Cash Price without Optional Add-ons Plus Finance Charge and (ii) the charges for any optional add-ons selected by the consumer.*

DISCLOSURE FORM

Itemization of Optional Add-ons

(Non-financed transaction)

Customer Information

Name

Address

City | State | Zip

Vehicle Information

Make | Model

Year | Color

Odometer Reading | VIN #

A. Vehicle Cash Price without Optional Add-ons → $

B. Charges for Optional Add-ons selected by the consumer

Extended Service Contract	+	$
Service and Maintenance Plan	+	$
Emergency Road Service	+	$
GAP Waiver	+	$
____________________	+	$
____________________	+	$
Total	=	$

C. Sum of amounts A and B, above → $

Note: *This total represents the sum of (i) the Cash Price without Optional Add-ons and (ii) the charges for any optional Add-ons selected by the consumer.*

ATTACHMENT 14

Sample Disclosure
Express, Informed Consent

Express, Informed Consent Form

Customer Information

Name

Address

City State Zip

Vehicle Information

Make Model

Year Color

Odometer Reading VIN #

Information about the item for which the consumer will be charged

What the charge is for:

Amount of charge:

$

If the item for which the consumer will be charged is a product or service, this includes all fees and costs to be charged to the consumer over the period of repayment with the product or service:

$

If the item for which the consumer will be charged is a product or service, this includes all fees and costs to be charged to the consumer over the period of repayment without the product or service:

$

Consumer Consent to be Charged

I hereby consent to the purchase of the item described above.

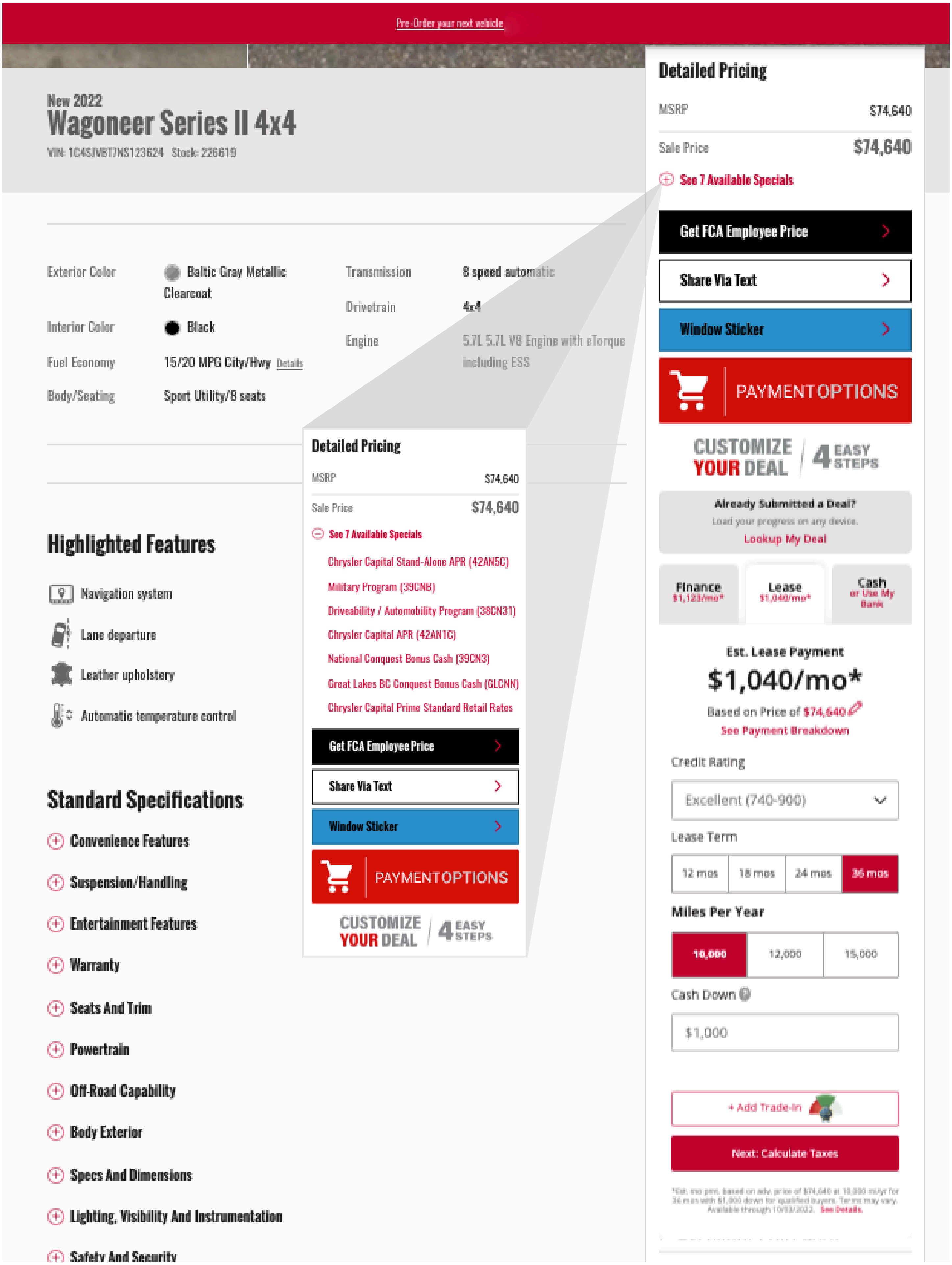
Customer

Print Name Date

Signature Time

ATTACHMENT 15

Examples of Multiple Rebate Listings for Same Vehicle



Pre-Order your next vehicle
New 2022
Wagoneer Series II 4x4
VIN: 1C4SJVBT7NS123624 Stock: 226619
Exterior Color
Baltic Gray Metallic Clearcoat
Interior Color
Black
Fuel Economy
15/20 MPG City/Hwy Details
Body/Seating
Sport Utility/8 seats
Transmission
8 speed automatic
Drivetrain
4x4
Engine
5.7L 5.7L V8 Engine with eTorque including ESS
Highlighted Features
Navigation system
Lane departure
Leather upholstery
Automatic temperature control
Standard Specifications
Convenience Features
Suspension/Handling
Entertainment Features
Warranty
Seats And Trim
Powertrain
Off-Road Capability
Body Exterior
Specs And Dimensions
Lighting, Visibility And Instrumentation
Safety And Security
Detailed Pricing
MSRP
$74,640
Sale Price
$74,640
See 7 Available Specials
Chrysler Capital Stand-Alone APR (42AN5C)
Military Program (39CNB)
Driveability / Automobility Program (38CN31)
Chrysler Capital APR (42AN1C)
National Conquest Bonus Cash (39CN3)
Great Lakes BC Conquest Bonus Cash (GLCNN)
Chrysler Capital Prime Standard Retail Rates
Get FCA Employee Price
Share Via Text
Window Sticker
PAYMENT OPTIONS
CUSTOMIZE YOUR DEAL
4 EASY STEPS
Detailed Pricing
MSRP
$74,640
Sale Price
$74,640
See 7 Available Specials
Get FCA Employee Price
Share Via Text
Window Sticker
PAYMENT OPTIONS
CUSTOMIZE YOUR DEAL
4 EASY STEPS
Already Submitted a Deal?
Load your progress on any device.
Lookup My Deal
Finance
$1,123/mo*
Lease
$1,040/mo*
Cash
or Use My Bank
Est. Lease Payment
$1,040/mo*
Based on Price of $74,640
See Payment Breakdown
Credit Rating
Excellent (740-900)
Lease Term
12 mos
18 mos
24 mos
36 mos
Miles Per Year
10,000
12,000
15,000
Cash Down
$1,000
+ Add Trade-In
Next: Calculate Taxes

1

Conquest Offer : $1,500 cash back on select 2022 JEEP Wagoneer

Cash Offer from Jeep
Great Lakes BC Conquest Bonus Cash (GLCNN)

Details
Applies to select new 2022 Jeep Wagoneer.

$1,500 cash back

Effective Aug 2, 2022 through Sep 6, 2022

Disclaimer: Customers who currently own or are leasing a competitive brand vehicle (Expedition, Explorer, Suburban Tahoe, Blazer, Armada, Land Cruiser, Sequoia, Highlander, 4Runner, Navigator, Escalade, Mercedes-Benz GLS, Pilot, Range Rover, Telluride, Yukon , Yukon XL) and enter into a new purchase or lease of an eligible model are eligible to participate. Program compatibility is now available in DealerCONNECT. This program is NOT compatible with Returning Lessee or Owner Loyalty Programs. Offers for qualified buyers only. See dealer for details. Offer information and data is provided by a third-party source. Contact Dealer for any program details, rules or Incentive Questions. Dealer.com assumes no responsibility for errors or omissions.

2

0.00% APR for 72 months on select 2022 JEEP Wagoneer

APR Finance Offer from Jeep
Chrysler Capital Stand-Alone APR (42AN5C)

Details
Applies to select new 2022 Jeep Wagoneer.

Effective Aug 25, 2022 through Sep 6, 2022

Disclaimer: Residents residing in qualifying regions of the United States listed in the BUSINESS CENTER BOUNDARIES section. APR financing must go through Chrysler Capital. For Chrysler Capital qualification: Customers must be considered 1/2Tier This program is not compatible with the Customer Cash Allowance, Combo Cash and Combo APR programs, Bonus Cash programs, affinity. This program is compatible with employee purchase, CDI, Dealership Rewards and Affiliate programs. Offers for qualified buyers only. See dealer for details. Offer information and data is provided by a third-party source. Contact Dealer for any program details, rules or Incentive Questions. Dealer.com assumes no responsibility for errors or omissions. Truth in Lending Act Disclosure: Down payment will vary with APR and credit. For example, 0.0% APR with $2,500 down payment provides for 72 monthly payments of $13.89 per $1000 financed for qualified buyers. 0.0% APR for a term of 60 months corresponds to a monthly cost of $16.67 per $1000 financed. The rates described are for estimation purposes only; you may not be able to finance at this rate.

3

Military Offer : $500 cash back on select 2022 JEEP Wagoneer

Cash Offer from Jeep
Military Program (39CNB)

Details
Applies to select new 2022 Jeep Wagoneer.

$500 cash back

Effective Aug 2, 2022 through Jan 3, 2023

Disclaimer: Eligible consumers include: active military, active military reserve, retired military (honorably discharged), and retired military reserve (honorably discharged). Honorably discharged veterans within 12 months of discharge date, and 100% disabled veterans are eligible. Eligible branches of the military are: Army, Navy, Air Force, Marines, Coast Guard, National Guard, Public Health Service Commissioned Corps and National Oceanic and Atmospheric Administration Commissioned Officer Corps. Eligible customers must be in possession of a valid Military Authorization Number that was generated either from the Get Military Authorization Number or Get Disabled Military Authorization link which is located on each of the Brands websites on the Military Bonus Cash page. The vehicle sale or lease must be registered in either the name of the eligible participant or registered in the name of an immediate family member living in the same household. Spouses of deceased military members who meet the eligibility criteria above are eligible to participate. These programs are compatible with the following program types, providing the vehicle meets all program eligibility requirements: Automobility Program, National or Regional Consumer Cash Allowance/APR Programs, National or Regional Lease Programs, National or Regional Consumer Lease Cash Programs, National or Regional Consumer Lease Loyalty Cash Programs, All other Certificate Programs, FCA US Employee Advantage Program, Dealership Employee Purchase Program, FCA US Affiliate Rewards Programs. This program is not compatible with the following program types: USAA Member Certificate Program. Any vehicle sold or leased to a registered Fleet Customer, regardless of whether a Fleet Allowance or payments are available or claimed. Offers for qualified buyers only. See dealer for details. Offer information and data is provided by a third-party source. Contact Dealer for any program details, rules or Incentive Questions. Dealer.com assumes no responsibility for errors or omissions.

4

Automobility Offer : $1,000 cash back on select 2022 JEEP Wagoneer

Cash Offer from Jeep
Driveability / Automobility Program (38CN31)

Details
Applies to select new 2022 Jeep Wagoneer.

$1,000 cash back

Effective Aug 9, 2022 through Jan 3, 2023

Disclaimer: Residents residing in qualifying regions of the United States listed in the BUSINESS CENTER BOUNDARIES section. Offers for qualified buyers only. See dealer for details. Offer information and data is provided by a third-party source. Contact Dealer for any program details, rules or Incentive Questions. Dealer.com assumes no responsibility for errors or omissions.

5

5.11% APR for 60 months on select 2022 JEEP Wagoneer

APR Finance Offer from Jeep
Chrysler Capital Prime Standard Retail Rates

Details
Applies to select new 2022 Jeep Wagoneer.

Effective Aug 2, 2022 through Sep 6, 2022

Disclaimer: Residents residing in qualifying regions of the United States listed in the BUSINESS CENTER BOUNDARIES section. Offers for qualified buyers only. See dealer for details. Offer information and data is provided by a third-party source. Contact Dealer for any program details, rules or Incentive Questions. Dealer.com assumes no responsibility for errors or omissions. Truth in Lending Act Disclosure: Down payment will vary with APR and credit. For example, 5.11% APR with $2,500 down payment provides for 60 monthly payments of $18.92 per $1000 financed for qualified buyers. 5.11% APR for a term of 24 months corresponds to a monthly cost of $43.92 per $1000 financed. 5.11% APR for a term of 36 months corresponds to a monthly cost of $30.02 per $1000 financed. 5.11% APR for a term of 39 months corresponds to a monthly cost of $27.88 per $1000 financed. 5.11% APR for a term of 42 months corresponds to a monthly cost of $26.05 per $1000 financed. 5.11% APR for a term of 48 months corresponds to a monthly cost of $23.08 per $1000 financed. The rates described are for estimation purposes only; you may not be able to finance at this rate.

6

Conquest Offer : $3,500 cash back on select 2022 JEEP Wagoneer

Cash Offer from Jeep
National Conquest Bonus Cash (39CN3)

Details
Applies to select new 2022 Jeep Wagoneer.

$3,500 cash back

Effective Aug 2, 2022 through Sep 6, 2022

Disclaimer: Customers who currently own or are leasing a competitive brand vehicle (non FCA Group vehicle) and enter into a new purchase or lease of an eligible model are eligible to participate. This program is NOT compatible with any Returning Lessee or Owner Loyalty Programs. Offers for qualified buyers only. See dealer for details. Offer information and data is provided by a third-party source. Contact Dealer for any program details, rules or Incentive Questions. Dealer.com assumes no responsibility for errors or omissions.

7

2.90% APR for 72 months on select 2022 JEEP Wagoneer

APR Finance Offer from Jeep
Chrysler Capital APR (42AN1C)

Details
Applies to select new 2022 Jeep Wagoneer.

Effective Aug 2, 2022 through Sep 6, 2022

Disclaimer: Residents residing in qualifying regions of the United States listed in the BUSINESS CENTER BOUNDARIES section. APR financing must go through Chrysler Capital. To qualify for all listed special APR rates through Chrysler Capital, customers must be considered 1/2 Tier. Customers who are considered Tier 3 will have an increased rate. Program compatibility is available in DealerCONNECT. This program is not compatible with the Customer Cash Allowance, Combo Cash, Combo APR and Non-prime programs. Offers for qualified buyers only. See dealer for details. Offer information and data is provided by a third-party source. Contact Dealer for any program details, rules or Incentive Questions. Dealer.com assumes no responsibility for errors or omissions. Truth in Lending Act Disclosure: Down payment will vary with APR and credit. For example, 2.9% APR with $2,500 down payment provides for 72 monthly payments of $15.15 per $1000 financed for qualified buyers. 2.9% APR for a term of 36 months corresponds to a monthly cost of $29.04 per $1000 financed. 2.9% APR for a term of 48 months corresponds to a monthly cost of $22.09 per $1000 financed. 2.9% APR for a term of 60 months corresponds to a monthly cost of $17.92 per $1000 financed. The rates described are for estimation purposes only; you may not be able to finance at this rate.

ATTACHMENT 16

GM Accessories available for 2022 Silverado Short Bed Crew Cab

Short Bed Supertop® Soft Top by Bestop® – Associated Accessories	19420886	$ 703.99
Short Bed SmartCap™ EVO by RSi - Associated Accessories	19421305	$ 3,436.00
Drop Rack for Short Bed SmartCap™ by RSi - Associated Accessories	19431874	$ 1,196.00
Platform Rack for Short Bed SmartCap™ by RSi - Associated Accessories	19431879	$ 716.00
Load Bars for Full-Size Truck SmartCap™ by RSi - Associated Accessories	19431883	$ 196.00
Camp Kitchen for Full-Size Truck SmartCap™ by RSi - Associated Accessories	19431885	$ 1,436.00
Drawer-Bin for Full-Size Truck SmartCap™ by RSi - Associated Accessories	19431887	$ 476.00
Stow Away Table for SmartCap™ by RSi - Associated Accessories	19432164	$ 356.00
Torch Magnetic LED Flashlight for SmartCap™ by RSi - Associated Accessories	19432165	$ 44.00
Bed Mat in Gray for Short Box Models by BedRug™ - Associated Accessories	19417380	$ 167.20
Bed Mat in Black with Bowtie Logo for Short Bed Models	84050996	$ 146.25
Bed Liner with Bowtie Logo and Integrated Storage Pockets (for Short Bed Models)	84648940	$ 318.75
Carpeted Bed Liner with Bowtie Logo (for Short Bed Models)	84655118	$ 446.25
Bed Horizontal Cargo Net	12343606	$ 45.00
Half-Steel Utility Ladder Rack by TracRac®, a Division of Thule® - Associated Accessories	19299111	$ 295.96
Longer Bolts for use with Thule® Carriers on GearOn™ Bars by Thule® - Associated Accessories	19330106	$ 19.96
Front Stake Pocket Push-Up Tie-Down Anchor by Putco® - Associated Accessories	19353879	$ 101.59
6-Foot Bed Cargo Net by LoadTamer™ - Associated Accessories	19367357	$ 159.20
Cantilever Cab-Over Aluminum Ladder Rack Extension by TracRac® a division of Thule® - Associated Accessories	19371246	$ 383.96
Complete Rack System Aluminum Ladder Rack by TracRac®, a Division of Thule® - Associated Accessories	19371248	$ 719.96
D-Box Storage Box by DECKED® - Associated Accessories	19371495	$ 48.00
BEDSLIDE 1000 Classic for Short Bed By BEDSLIDE® – Associated Accessories	19417016	$ 1,439.20
Bed Extender/Bed Divider in Black by LUND® - Associated Accessories	19417394	$ 239.20
Bed Extender/Bed Divider in Silver by LUND® - Associated Accessories	19417395	$ 239.20
Short Bed Locker Side Rails Traditional in Chrome by Putco® - Associated Accessories	19417434	$ 359.19
Short Bed Locker Side Rails Traditional in Black Powder Coat by Putco® - Associated Accessories	19417436	$ 256.79
Short Box Truck Bed Storage System by DECKED® - Associated Accessories	19417571	$ 999.20
Rear Stake Pocket Push-Up Tie-Down Anchor by Putco® - Associated Accessories	19417688	$ 127.99
Full-Frame Steel Utility Ladder Rack by TracRac®, a Division of Thule® - Associated Accessories	19417971	$ 759.20
ORIGINAL STYLE Rack by BACKRACK™ - Associated Accessories	19417978	$ 172.80
SAFETY RACK by BACKRACK™ - Associated Accessories	19417979	$ 225.60
Standard Hardware Installation Kit by BACKRACK™ - Associated Accessories	19417980	$ 100.80
Toolbox Hardware Installation Kit by BACKRACK™ - Associated Accessories	19417981	$ 100.80
Low Profile Hardware Installation Kit by BACKRACK™ - Associated Accessories	19417982	$ 143.20
Wide Top Hardware Installation Kit by BACKRACK™ - Associated Accessories	19417983	$ 143.20
SHORTENED ORIGINAL Rack by BACKRACK™ - Associated Accessories	19417984	$ 172.80
Short Bed Bed Rail New in Black Powder Coat by Putco® - Associated Accessories	19418293	$ 308.79
Short Bed Bed Rail New in Chrome by Putco® - Associated Accessories	19418295	$ 341.59
Heavy Duty Bed Divider Cargo Net with Rope Tensioning Device and Gated S-Hooks by LoadTamer™ - Associated Accessories	19419331	$ 64.00
VentureTEC Rack for LD Short bed (Rack, Cross Rails, 36 Blade) by PUTCO® - Associated Accessories	19419390	$ 1,591.20
VentureTEC Grab Handle by Putco® - Associated Accessories	19419395	$ 56.80
VentureTEC Small Mount Plate by Putco® - Associated Accessories	19419396	$ 95.20
VentureTEC Full Length Mounting Plate - 54 by Putco® - Associated Accessories	19419397	$ 267.19
VentureTEC Side Table Brackets w/12 x 24 Shelf by Putco® - Associated Accessories	19419398	$ 207.20
VentureTEC Tie Down - Pair by Putco® - Associated Accessories	19419399	$ 32.80
DRAWERGANIZER™ Tote by DECKED® - Associated Accessories	19420424	$ 24.00
Short Bed Truck Bed Storage System by DECKED® - Associated Accessories	19421491	$ 1,199.99
Short Bed TEC Rails in Black Powder Coat by Putco® - Associated Accessories	19431718	$ 441.59

Elevated Cross Rails for TEC Rails by Putco® - Associated Accessories	19431721	$ 425.59
Elevated Cross Rails for Venture TEC Rack by Putco® - Associated Accessories	19431722	$ 383.99
Full-Bin for Full-Size Truck SmartCap™ (Driver Side) by RSi - Associated Accessories	19431889	$ 356.00
Full-Bin for Full-Size Truck SmartCap™ (Passenger Side) by RSi - Associated Accessories	19431890	$ 356.00
Half-Bin for Full-Size Truck SmartCap™ (Driver Side) by RSi - Associated Accessories	19431893	$ 316.00
Half-Bin for Full-Size Truck SmartCap™ (Passenger Side) by RSi - Associated Accessories	19431894	$ 316.00
MOLLE Cab-Side Panel for Short & Standard 1500 Truck Bed by PUTCO® - Associated Accessories	19431914	$ 431.19
MOLLE Driver-Side Panel for Short 1500 Truck Bed by PUTCO® - Associated Accessories	19431915	$ 331.99
MOLLE Passenger-Side Panel for Short 1500 Truck Bed by PUTCO® - Associated Accessories	19431916	$ 331.99
Mounting Kit - Freespirit Tent for VentureTEC Rack by PUTCO® - Associated Accessories	19431980	$ 46.39
Double Drawerganizer™ Tote for DECKED® Full-Size Drawer by DECKED® - Associated Accessories	19433726	$ 36.00
Wide Piecekeepers for DECKED® Wide Drawer by DECKED® - Associated Accessories	19433727	$ 64.00
Cargo Tie-Down Rings	23146899	$ 78.75
GearOn™ Tiered Storage Cross Rail	84065979	$ 296.25
GearOn™ Utility Rack Stanchions	84065985	$ 562.50
Tailgate Gap Cover	84184471	$ 48.75
Tailgate Step Lighting	84347814	$ 112.50
Cargo Light Kit	84659238	$ 116.25
Bed Vertical Cargo Net with Storage Bag featuring Chevrolet Bowtie Logo	84050683	$ 48.75
Tiered Storage Cross Rail Brackets	84753982	$ 225.00
Mega Box for Hard Folding Tonneau Cover by REV® - Associated Accessories	19370811	$ 359.20
Short Bed Hard Rolling Tonneau Cover by REV® – Associated Accessories	19416967	$ 863.20
Short Bed Embark Poly Retractable in Black by Advantage® - Associated Accessories	19416969	$ 1,135.20
Short Bed Embark Max Aluminum Retractable in Black by Advantage® - Associated Accessories	19416971	$ 1,463.20
Short Bed Embark Power Max Retractable in Black by Advantage® - Associated Accessories	19416974	$ 2,079.20
Short Bed Soft Tri-Fold Tonneau Cover in Black by Advantage® - Associated Accessories	19416976	$ 391.20
Short Bed Soft Roll-Up Tonneau Cover in Black by Advantage® - Associated Accessories	19416979	$ 287.20
REV® Megabox Storage Box for REV® Tonneau Covers - Associated Accessories	19416982	$ 359.20
Short Bed Retractable Tonneau Cover by Roll-N-Lock® in Black - Associated Accessories	19417403	$ 1,191.20
Short Bed One-Piece Hard Tonneau Cover Ready to Paint by UnderCover® - Associated Accessories	19418032	$ 1,023.20
Short Bed One-Piece Hard Tonneau Cover by UnderCover™ in Summit White - Associated Accessories	19418033	$ 1,199.20
Short Bed One-Piece Hard Tonneau Cover by UnderCover™ in Black - Associated Accessories	19418034	$ 1,199.20
Short Bed One-Piece Hard Tonneau Cover by UnderCover™ in Silver Ice Metallic - Associated Accessories	19418035	$ 1,199.20
Short Bed Hard Folding Tonneau Cover in Gloss Black by REV® - Associated Accessories	19418277	$ 919.20
Short Bed E-Series Retractable Tonneau Cover by Roll-N-Lock® - Associated Accessories	19419470	$ 1,999.20
Removable Rail Kit by Thule® for Embark LS Retractable Tonneau Cover by Advantage® - Associated Accessories	19419777	$ 511.84
Short Bed Embark LS retractable Tonneau Cover by Advantage® - Associated Accessories	19419842	$ 1,679.20
Short Bed Embark LS Power Retractable Tonneau Cover by Advantage® - Associated Accessories	19419848	$ 2,239.20
Short Bed Tri-Fold Hard Tonneau Cover with Battery Operated LED Light in Black by UnderCover™ - Associated Accessories	19431672	$ 1,143.20
Short Bed Tri-Fold Hard Tonneau Cover with Battery Operated LED Light in Silver by UnderCover™ - Associated Accessories	19431675	$ 1,143.20
Short Bed Tri-Fold Hard Tonneau Cover with Battery Operated LED Light in Summit White by UnderCover™ - Associated Accessories	19431678	$ 1,143.20
Short Bed Tri-Fold Hard Tonneau Cover with Battery Operated LED Light in Red by UnderCover™ - Associated Accessories	19431681	$ 1,143.20
Short Bed Tri-Fold Hard Tonneau Cover with Battery Operated LED Light in White Frost by UnderCover™ - Associated Accessories	19431684	$ 1,143.20
Short Bed Hard Retractable Tonneau Cover with T-Slot Rails by Roll-N-Lock® - Associated Accessories	19433453	$ 1,279.20
Short Bed Hard Power Retractable Tonneau Cover with T-Slot Rails by Roll-N-Lock® - Associated Accessories	19433456	$ 2,063.20
Short Bed Hard Folding Tonneau Cover in Matte Black by REV® - Associated Accessories	19433568	$ 959.20
Short Bed Soft Tri-Fold Tonneau Cover with Chevrolet Bowtie Logo	84060332	$ 450.00
Standard Bed Soft Tri-Fold Tonneau Cover with GMC Logo	84625349	$ 450.00

Short Bed Soft Tri-Fold Tonneau Cover with Chevrolet Bowtie Logo	84815929	$ 450.00
Short Bed Soft Roll-Up Tonneau Cover with Chevrolet Bowtie Logo	85120309	$ 390.00
Short Bed Soft Roll-Up Tonneau Cover with Chevrolet Bowtie Logo	87816007	$ 390.00
Mega Box for Hard Folding Tonneau Cover by REV® - Associated Accessories	19370811	$ 359.20
Short Bed Hard Rolling Tonneau Cover by REV® – Associated Accessories	19416967	$ 863.20
Short Bed Embark Poly Retractable in Black by Advantage® - Associated Accessories	19416969	$ 1,135.20
Short Bed Embark Max Aluminum Retractable in Black by Advantage® - Associated Accessories	19416971	$ 1,463.20
Short Bed Embark Power Max Retractable in Black by Advantage® - Associated Accessories	19416974	$ 2,079.20
Short Bed Soft Tri-Fold Tonneau Cover in Black by Advantage® - Associated Accessories	19416976	$ 391.20
Short Bed Soft Roll-Up Tonneau Cover in Black by Advantage® - Associated Accessories	19416979	$ 287.20
REV® Megabox Storage Box for REV® Tonneau Covers - Associated Accessories	19416982	$ 359.20
Short Bed Retractable Tonneau Cover by Roll-N-Lock® in Black - Associated Accessories	19417403	$ 1,191.20
Short Bed One-Piece Hard Tonneau Cover Ready to Paint by UnderCover® - Associated Accessories	19418032	$ 1,023.20
Short Bed One-Piece Hard Tonneau Cover by UnderCover™ in Summit White - Associated Accessories	19418033	$ 1,199.20
Short Bed One-Piece Hard Tonneau Cover by UnderCover™ in Black - Associated Accessories	19418034	$ 1,199.20
Short Bed One-Piece Hard Tonneau Cover by UnderCover™ in Silver Ice Metallic - Associated Accessories	19418035	$ 1,199.20
Short Bed Hard Folding Tonneau Cover in Gloss Black by REV® - Associated Accessories	19418277	$ 919.20
Short Bed E-Series Retractable Tonneau Cover by Roll-N-Lock® - Associated Accessories	19419470	$ 1,999.20
Removable Rail Kit by Thule® for Embark LS Retractable Tonneau Cover by Advantage® - Associated Accessories	19419777	$ 511.84
Short Bed Embark LS retractable Tonneau Cover by Advantage® - Associated Accessories	19419842	$ 1,679.20
Short Bed Embark LS Power Retractable Tonneau Cover by Advantage® - Associated Accessories	19419848	$ 2,239.20
Short Bed Tri-Fold Hard Tonneau Cover with Battery Operated LED Light in Black by UnderCover™ - Associated Accessories	19431672	$ 1,143.20
Short Bed Tri-Fold Hard Tonneau Cover with Battery Operated LED Light in Silver by UnderCover™ - Associated Accessories	19431675	$ 1,143.20
Short Bed Tri-Fold Hard Tonneau Cover with Battery Operated LED Light in Summit White by UnderCover™ - Associated Accessories	19431678	$ 1,143.20
Short Bed Tri-Fold Hard Tonneau Cover with Battery Operated LED Light in Red by UnderCover™ - Associated Accessories	19431681	$ 1,143.20
Short Bed Tri-Fold Hard Tonneau Cover with Battery Operated LED Light in White Frost by UnderCover™ - Associated Accessories	19431684	$ 1,143.20
Short Bed Hard Retractable Tonneau Cover with T-Slot Rails by Roll-N-Lock® - Associated Accessories	19433453	$ 1,279.20
Short Bed Hard Power Retractable Tonneau Cover with T-Slot Rails by Roll-N-Lock® - Associated Accessories	19433456	$ 2,063.20
Short Bed Hard Folding Tonneau Cover in Matte Black by REV® - Associated Accessories	19433568	$ 959.20
Short Bed Soft Tri-Fold Tonneau Cover with Chevrolet Bowtie Logo	84060332	$ 450.00
Standard Bed Soft Tri-Fold Tonneau Cover with GMC Logo	84625349	$ 450.00
Short Bed Soft Tri-Fold Tonneau Cover with Chevrolet Bowtie Logo	84815929	$ 450.00
Short Bed Soft Roll-Up Tonneau Cover with Chevrolet Bowtie Logo	85120309	$ 390.00
Short Bed Soft Roll-Up Tonneau Cover with Chevrolet Bowtie Logo	87816007	$ 390.00
16-oz Hard Surface Cleaner by Adam's Polishes® – Associated Accessories	19420391	$ 10.40
1-Gallon Hard Surface Cleaner by Adam's Polishes® – Associated Accessories	19420392	$ 28.00
2-Pack of ProKure® V 32-oz. ClO2 Disinfectant and 32-oz. Spray Bottle by Proklean Services - Associated Accessories	19421418	$ 60.00
12-oz Hand Soap by Adam's Polishes® – Associated Accessories	19420389	$ 5.60
8-oz Hand Sanitizer by Adam's Polishes® – Associated Accessories	19420390	$ 3.67
Wash and Wax Kit by Adam's Polishes® - Associated Accessories	19355473	$ 79.20
Perfect Interior Cleaning Kit by Adam's Polishes® - Associated Accessories	19355481	$ 71.20
Tire and Wheel Kit by Adam's Polishes® - Associated Accessories	19368747	$ 60.00
Floor Liner Cleaning Kit by Adam's Polishes® - Associated Accessories	19368930	$ 20.00
New Car Care Kit by Adam's Polishes® - Associated Accessories	19370661	$ 47.32
Ceramic Paint Coating Kit by Adam's Polishes® - Associated Accessories	19418578	$ 128.00
Swirl Killer Polisher Kit by Adam's Polishes® - Associated Accessories	19421454	$ 239.96
Graphene Ceramic Coating Kit by Adam's Polishes® - Associated Accessories	19431942	$ 88.00
Buttery Wax by Adam's Polishes® - Associated Accessories	19355474	$ 15.20

16-oz Car Shampoo by Adam's Polishes® - Associated Accessories	19355475	$ 8.00
16-oz Detail Enhancer Spray by Adam's Polishes® - Associated Accessories	19355476	$ 10.40
Double Soft Towel by Adam's Polishes® - Associated Accessories	19355477	$ 12.00
Great White Towel by Adam's Polishes® - Associated Accessories	19355478	$ 20.00
Microfiber Applicator Cloth by Adam's Polishes® - Associated Accessories	19355479	$ 4.80
Wash Pad by Adam's Polishes® - Associated Accessories	19355480	$ 7.99
16-oz Tire and Rubber Cleaner by Adam's Polishes® - Associated Accessories	19368748	$ 10.40
1-Gallon Car Shampoo by Adam's Polishes® - Associated Accessories	19369090	$ 32.00
1-Gallon Detail Spray by Adam's Polishes® - Associated Accessories	19369091	$ 36.00
1-Gallon Tire and Rubber Cleaner by Adam's Polishes® - Associated Accessories	19369092	$ 36.00
Waterless Wash Kit by Adam's Polishes® - Associated Accessories	19417237	$ 20.00
1-Gallon Waterless Wash by Adam's Polishes® - Associated Accessories	19417238	$ 32.00
Standard Foam Gun by Adam's Polishes® - Associated Accessories	19417715	$ 32.00
Clay Mitt by Adam's Polishes® - Associated Accessories	19417716	$ 24.00
16-oz. Waterless Wash by Adam's Polishes® - Associated Accessories	19417717	$ 8.00
24-Pack Super Black Tire Sponges by Adam's Polishes® - Associated Accessories	19418010	$ 24.00
16-oz Ceramic Boost Spray by Adam's Polishes® - Associated Accessories	19418579	$ 24.00
1-Gallon Ceramic Paint Coating Boost by Adam's Polishes® - Associated Accessories	19418580	$ 96.00
8-oz. Ceramic Paint Prep by Adam's Polishes® - Associated Accessories	19418581	$ 8.00
Blue Microfiber Cutting Pad 5.5-Inch by Adam's Polishes® - Associated Accessories	19421455	$ 12.80
Blue Foam Compound Pad 5.5-Inch by Adam's Polishes® - Associated Accessories	19421456	$ 10.40
White Foam Polishing Pad 5.5-Inch by Adam's Polishes® - Associated Accessories	19421457	$ 10.40
16-oz Glass Cleaner by Adam's Polishes® - Associated Accessories	19421466	$ 10.40
1-Gallon Glass Cleaner by Adam's Polishes® - Associated Accessories	19421467	$ 32.00
16-oz Wheel Cleaner by Adam's Polishes® - Associated Accessories	19421468	$ 12.00
1-Gallon Wheel Cleaner by Adam's Polishes® - Associated Accessories	19421469	$ 48.00
16-oz Tire Shine by Adam's Polishes® - Associated Accessories	19421470	$ 12.00
1-Gallon Tire Shine by Adam's Polishes® - Associated Accessories	19421471	$ 48.00
12-oz Graphene Ceramic Spray Coating by Adam's Polishes® - Associated Accessories	19432037	$ 26.40
16-oz Graphene Detail Spray by Adam's Polishes® - Associated Accessories	19432038	$ 12.00
1-Gallon Graphene Detail Spray by Adam's Polishes® - Associated Accessories	19432039	$ 40.00
16-oz Graphene Tire Dressing by Adam's Polishes® - Associated Accessories	19432040	$ 13.60
1-Gallon Graphene Tire Dressing by Adam's Polishes® - Associated Accessories	19432041	$ 56.00
12-oz Compound by Adam's Polishes® - Associated Accessories	19432042	$ 20.00
12-oz White Polish by Adam's Polishes® - Associated Accessories	19432043	$ 20.00
Interior Detailing Swabs by Adam's Polishes® - Associated Accessories	19355358	$ 8.00
16-oz Carpet and Upholstery Cleaner by Adam's Polishes® - Associated Accessories	19355483	$ 8.80
16-oz Leather Conditioner by Adam's Polishes® - Associated Accessories	19355484	$ 20.00
Interior Applicator Pad by Adam's Polishes® in Red - Associated Accessories	19355486	$ 6.40
Glass Cleaning Towel by Adam's Polishes® - Associated Accessories	19355487	$ 7.20
Edgeless Utility Towel by Adam's Polishes® - Associated Accessories	19355488	$ 8.00
Rubber Mat and Liner Cleaner by Adam's Polishes® - Associated Accessories	19368931	$ 12.00
Two-Pack Waterless Wash Towels by Adam's Polishes® - Associated Accessories	19417718	$ 13.60
Two-Pack Borderless Microfiber Utility Towels by Adam's Polishes® - Associated Accessories	19418007	$ 13.60
12-Pack Borderless Microfiber Utility Towels by Adam's Polishes® - Associated Accessories	19418008	$ 60.00
12-Pack Edgeless Microfiber Utility Towels by Adam's Polishes® - Associated Accessories	19418009	$ 36.00
16-oz Interior Detailer with Microban® by Adam’s Polishes® - Associated Accessories	19420340	$ 10.40
1-Gallon Interior Detailer with Microban® by Adam’s Polishes® - Associated Accessories	19420341	$ 32.00

EB300 Bluetooth® Earbuds by KICKER® - Associated Accessories	19368028	$ 63.20
Bullfrog® BF100 Portable Bluetooth® Waterproof Speaker by KICKER® in Gray/Green - Associated Accessories	19368951	$ 143.96
MultiPro™/Multi-Flex Tailgate Audio System By KICKER® - Associated Accessories	19417163	$ 591.20
200-Watt Subwoofer Kit by Kicker® - Associated Accessories	19417164	$ 599.20
200-Watt Subwoofer and 200-Watt Amp Kit by KICKER® - Associated Accessories	19417165	$ 1,023.20
CushBT™ Bluetooth® Headphones by KICKER® - Associated Accessories	19417989	$ 120.00
CushNC™ Bluetooth® Headphones by KICKER® - Associated Accessories	19419586	$ 160.00
Tabor®2 Bluetooth® Headphones by KICKER® - Associated Accessories	19420040	$ 80.00
G15000 Genius Smart Charger by NOCO® - Associated Accessories	19417442	$ 156.76
XGC4 Power Adapter by NOCO® - Associated Accessories	19418382	$ 50.36
Eyelet Terminal Connector by NOCO® - Associated Accessories	19418383	$ 14.36
X-Connect 10-foot Extension Cable by NOCO® - Associated Accessories	19418384	$ 19.96
XL Eyelet Terminal Connector by NOCO® - Associated Accessories	19418385	$ 14.36
Genius 5 Smart Battery Charger by NOCO® - Associated Accessories	19419854	$ 67.16
Genius 10 Smart Battery Charger by NOCO® - Associated Accessories	19419855	$ 95.96
3,000-Amp Battery Jump Starter by NOCO® - Associated Accessories	19366933	$ 260.76
2,000-Amp Battery Jump Starter by NOCO® - Associated Accessories	19366934	$ 172.76
1,000-Amp Battery Jump Starter by NOCO® - Associated Accessories	19366935	$ 87.96
GB40 Boost Plus EVA Protective Case by NOCO® - Associated Accessories	19418379	$ 17.56
GB70 Boost Plus EVA Protective Case by NOCO® - Associated Accessories	19418380	$ 26.36
GB150 Boost Plus EVA Protective Case by NOCO® - Associated Accessories	19418381	$ 31.16
Standard Thinkware F200 Dashcam by EchoMaster® - Associated Accessories	19418274	$ 239.99
Premium Thinkware F800 Dashcam by EchoMaster® - Associated Accessories	19418275	$ 399.99
IntelliHaul 2.0 Trailering Camera System by EchoMaster® - Associated Accessories	19421450	$ 959.20
Add-On Front Camera for IntelliHaul 2.0 Systems by EchoMaster® - Associated Accessories	19421452	$ 120.00
Add-On Wireless Trailer Camera for IntelliHaul 2.0 Systems by EchoMaster® - Associated Accessories	19421453	$ 326.40
Full HD Front Dash Cam with ADAS, 32 GB SD Card and Full HD Rear Camera by EchoMaster® - Associated Accessories	19433432	$ 223.99
2K QHD Front Dash Cam with ADAS, 32GB SD Card and Full HD Rear Camera by EchoMaster® - Associated Accessories	19433433	$ 399.99
4K Ultra HD Front Dash Cam with ADAS, 32GB SD Card and available with 2K Quad HD Rear Camera by EchoMaster® - Associated Accessories	19433434	$ 519.99
IntelliHaul 2.0 Trailering Camera System (for vehicles with IOK radios) by EchoMaster® - Associated Accessories	19433460	$ 959.20
IntelliHaul 2.0 Trailering Camera System (for vehicles with IOR) by EchoMaster® - Associated Accessories	19433462	$ 959.20
Trailering Camera System	84946379	$ 356.25
Trailering Camera System	85004154	$ 446.25
Trailering Camera System	85587357	$ 0.00
Garage Door Opener Package (for Vehicles Equipped with Manual-Dimming Rearview Mirrors)	84350232	$ 138.75
Garage Door Opener Package (for Vehicles Equipped with Auto-Dimming Rearview Mirrors)	84738651	$ 186.66
Keyless Entry Keypad	84945062	$ 146.25
1-Meter Micro USB Cable by iSimple® - Associated Accessories	19368579	$ 20.00
1-Meter Lightning Cable by iSimple® - Associated Accessories	19368580	$ 24.00
1-Meter USB-C Cable by iSimple® - Associated Accessories	19368581	$ 20.00
1-Meter Lightning and Micro-USB Combination Cable by iSimple® - Associated Accessories	19368582	$ 24.00
Universal Tablet Holder with Integrated Power	84068618	$ 112.50
Universal Tablet Holder with Integrated Power	84574938	$ 112.50
4-Button Keyless Entry Remote Key Fob	86810371	$ 221.25
5-Button Keyless Entry Remote Key Fob	86810372	$ 221.25
60-Inch Blade LED Tailgate Light Bar by Putco® - Associated Accessories	19418352	$ 263.99
Hornet 16-Inch Amber LED Light Bar Kit by Putco® - Associated Accessories	19421081	$ 288.79
Hornet 24-Inch Amber LED Light Bar Kit by Putco® - Associated Accessories	19421082	$ 375.19

Short Bed Retractable Bed Step in Black by LUND® - Associated Accessories	19417392	$ 231.20
Crew Cab 4-Inch Round Assist Steps in Black	84011355	$ 633.75
Crew Cab 4-Inch Round Assist Steps in Chrome	84011356	$ 633.75
Crew Cab 6-Inch Rectangular Wheel-to-Wheel Assist Steps in Chrome	84016709	$ 671.25
Crew Cab Work Step Assist Steps in Black	84017116	$ 371.25
Crew Cab Short Bed 6-Inch Rectangular Wheel-To-Wheel Assist Steps in Black	84126245	$ 671.25
Crew Cab Off-Road High-Clearance Assist Steps in Black with Silverado Script	84453734	$ 858.75
Crew Cab 6-Inch Rectangular Assist Steps in Chrome	84676693	$ 596.25
Crew Cab 6-Inch Rectangular Assist Steps in Black	84676694	$ 596.25
Crew Cab Sport Step Assist Steps in Black with Silverado Script	84742421	$ 821.25
Crew Cab Rocker Panel Guard	85534568	$ 896.25
Polished Stainless Steel CHEVROLET Tailgate Lettering by Putco® - Associated Accessories	19417967	$ 79.20
3-D Stamped CHEVROLET Tailgate Lettering in Polished Stainless Steel by Putco® - Associated Accessories	19419884	$ 87.19
3-D Stamped CHEVROLET Tailgate Lettering in Black Stainless Steel by Putco® - Associated Accessories	19419885	$ 112.79
3-D Stamped CHEVROLET Front Grille Lettering in Polished Stainless Steel by Putco® - Associated Accessories	19421157	$ 33.59
3-D Stamped CHEVROLET Front Grille Lettering in Black Platinum by Putco® - Associated Accessories	19421158	$ 39.99
3-D Urethane CHEVROLET Tailgate Lettering in Gloss Black by Nox-Lux™ - Associated Accessories	19432560	$ 79.20
3-D Urethane CHEVROLET Tailgate Lettering in Gloss Red by Nox-Lux™ - Associated Accessories	19432561	$ 79.20
3-D Urethane CHEVROLET Tailgate Lettering in Liquid Chrome by Nox-Lux™ - Associated Accessories	19432562	$ 79.20
3-D Urethane CHEVROLET Tailgate Lettering in Americana by Nox-Lux™ - Associated Accessories	19432563	$ 79.20
3-D Urethane CHEVROLET Tailgate Lettering in Carbon Fiber by Nox-Lux™ - Associated Accessories	19432564	$ 95.20
3-D Urethane CHEVROLET Tailgate Lettering in Gloss White by Nox-Lux™ - Associated Accessories	19432565	$ 79.20
4x4 Decal	84324923	$ 60.00
CHEVROLET Tailgate Lettering Decal in Black Vinyl	84370615	$ 112.50
Bedside Decal Package with Chevrolet Bowtie	84425973	$ 281.25
CHEVROLET Tailgate Lettering Decal in Silver Vinyl	84425985	$ 112.50
Fender Hash Mark Decal Package in Dark Grey with Red Outline	84426011	$ 131.25
Fender Hash Mark Decal Package in Black with Silver Outline	84426012	$ 131.25
Fender Hash Mark Decal Package in Silver with Black Outline	84426013	$ 131.25
Rally Stripe Package in Black	84426093	$ 412.50
Bodyside Decal Package in Matte Black and Carbon Grey Metallic for Crew Cab Models	84476481	$ 307.50
Bodyside Decal Package in Grey Metallic and Light Grey Metallic for Crew Cab Models	84476482	$ 307.50
Bedside 4x4 Decal in Matte Black	85146630	$ 75.00
Aeroskin® Hood Protector in Smoke Black by LUND® - Associated Accessories	19417396	$ 87.20
Aeroskin® Hood Protector in Matte Black by LUND® - Associated Accessories	19417397	$ 95.20
Aeroskin® Hood Protector in Chrome by LUND® - Associated Accessories	19417398	$ 143.20
Aeroskin II® Hood Protector in Textured Black by LUND® - Associated Accessories	19417399	$ 103.20
Crew Cab Front and Rear Tape-On Low-Profile Door Window Weather Deflectors in Smoke Black by LUND® - Associated Accessories	19417400	$ 71.20
Crew Cab Front and Rear Tape-On Low-Profile Door Window Weather Deflectors in Matte Black by LUND® - Associated Accessories	19417401	$ 79.20
Crew Cab Front and Rear Tape-On Low-Profile Door Window Weather Deflector in Textured Black by LUND® – Associated Accessories	19417402	$ 87.20
Hood Deflector in Dark Smoke by EGR® – Associated Accessories	19417467	$ 79.20
Hood Deflector in Matte Black by EGR® - Associated Accessories	19417468	$ 87.20
Crew Cab Tape-On Door Window Weather Deflectors in Dark Smoke by EGR® - Associated Accessories	19417475	$ 79.20
Crew Cab In-Channel Door Window Weather Deflectors in Dark Smoke by EGR® - Associated Accessories	19417480	$ 79.20
Crew Cab In-Channel Door Window Weather Deflectors in Matte Black by EGR® - Associated Accessories	19417481	$ 95.20
Crew Cab Front and Rear Low Profile In-Channel Side Window Deflector in Chrome by Putco® - Associated Accessories	19421170	$ 158.39
Front Bowtie Emblem in Black	84293092	$ 41.25
Bowtie Emblems in Black (for Work Truck and Custom Trim Levels with Multi-Flex Tailgate)	84434788	$ 127.50

Front Illuminated Bowtie Emblem in Black	84602325	$ 217.50
Silverado WT Emblems in Black	84806931	$ 52.50
Silverado Custom Emblems in Black	84806933	$ 52.50
Silverado LTZ Emblems in Black	84806935	$ 82.50
Silverado LT Emblems in Black	84806939	$ 82.50
Silverado RST Emblems in Black	84950118	$ 120.00
Silverado Custom Trail Boss Emblems in Black	84950119	$ 112.50
Silverado LT Trail Boss Emblems in Black	84950122	$ 112.50
Silverado High Country Emblems in Black	84978012	$ 112.50
Chevrolet Z71 Emblems in Black	85109485	$ 63.75
Bowtie Emblems in Black (for LT, RST, LTZ and High Country Trim Levels with Multi-Flex Tailgate)	85524932	$ 127.50
Silverado WT Emblems in Black	85592697	$ 52.50
Silverado Custom Emblems in Black	85592700	$ 52.50
Silverado LT Emblems in Black	85592704	$ 82.50
Silverado LTZ Emblems in Black	85592709	$ 82.50
Silverado RST Emblems in Black	85592711	$ 120.00
Silverado LT Trail Boss Emblems in Black	85592713	$ 112.50
Front Bowtie Emblem in Black	86771880	$ 63.75
Front Illuminated Bowtie Emblem in Black (for Vehicles with Multi-Flex Tailgate)	86777776	$ 281.25
Front Illuminated Bowtie Emblem in Black	86777778	$ 281.25
Rugged Look Fender Flare Set by EGR® in Black - Associated Accessories	19417482	$ 383.20
Bolt-On Look by EGR® in Black - Associated Accessories	19417483	$ 423.20
Low Profile Fender Flare Set in Black by AirDesign® - Associated Accessories	19419893	$ 359.20
Smooth Front and Rear Fender Flare Set in Black	84297538	$ 412.50
Grille in Black with Chevrolet Script Lettering in Gloss Black (for Vehicles without HD Surround Vision Camera)	84938575	$ 375.00
Grille in Black with Chevrolet Script Lettering in Galvano (for Vehicles without HD Surround Vision Camera)	84938577	$ 375.00
Grille in Black with Chevrolet Script Lettering in Red (for Vehicles without HD Surround Vision Camera)	85529035	$ 375.00
Chevrolet Script Lettering in Red	85544866	$ 63.75
Chevrolet Script Lettering in Gloss Black	85544867	$ 63.75
Chevrolet Script Lettering in Galvano	85544868	$ 63.75
License Plate Frame by Baron & Baron® in Chrome with Black Chevrolet Script - Associated Accessories	19330378	$ 33.60
License Plate Frame by Baron & Baron® in Chrome with Black Bowtie Logo and Chevrolet Script - Associated Accessories	19330379	$ 33.60
License Plate Frame by Baron & Baron® in Chrome with Black Silverado Script - Associated Accessories	19330384	$ 33.60
License Plate Frame by Baron & Baron® in Black with Chrome Chevrolet Script - Associated Accessories	19330391	$ 36.00
License Plate Frame by Baron & Baron® in Chrome with Black Bowtie Logo and Performance Script - Associated Accessories	19330392	$ 33.60
License Plate Frame by Baron & Baron® in Black with Bowtie Logo and Chrome Performance Script - Associated Accessories	19330393	$ 36.00
License Plate Frame by Baron & Baron® in Chrome with Black Chevrolet Script - Associated Accessories	19368098	$ 33.60
License Plate Frame by Baron & Baron® in Chrome with Black Bowtie Logo and Chevrolet Script - Associated Accessories	19368099	$ 33.60
License Plate Frame by Baron & Baron® in Chrome with Black Chevrolet Script - Associated Accessories	19368100	$ 33.60
License Plate Frame by Baron & Baron® in Chrome with Black Silverado Script - Associated Accessories	19368101	$ 33.60
License Plate Frame by Baron & Baron® in Black with Chrome Silverado Script - Associated Accessories	19368102	$ 36.00
License Plate Frame by Baron & Baron® in Black with Chrome Chevrolet Script - Associated Accessories	19368103	$ 36.00
License Plate Frame by Baron & Baron® in Black with Chrome Chevrolet Script - Associated Accessories	19368104	$ 36.00
License Plate Frame by Baron & Baron® in Chrome with Black Bowtie Logo and Performance Script - Associated Accessories	19368105	$ 33.60
License Plate Frame by Baron & Baron® in Black with Chrome Bowtie Logo and Performance Script - Associated Accessories	19368106	$ 36.00
License Plate Frame in Black with Trail Boss Logo by Baron & Baron® - Associated Accessories	19432771	$ 36.00
Outside Rearview Mirror Covers in Black	84328136	$ 75.00
Outside Rearview Mirror Covers in Chrome	84328137	$ 75.00

Outside Rearview Mirror Covers in Summit White	84612941	$ 75.00
Double Cab and Crew Cab Pillar Trim in Stainless Steel by Putco® – Associated Accessories	19417429	$ 123.99
Short Bed Crew Cab Rocker Panel Moldings in Stainless Steel by Putco® - Associated Accessories	19417430	$ 323.99
Bolt-On Look Body Side Molding for Crew Cab Trucks by EGR® - Associated Accessories	19418822	$ 199.20
Rugged Look Body Side Molding for Crew Cab Trucks by EGR® - Associated Accessories	19418824	$ 183.20
Exhaust Bezels in Black	84667764	$ 206.25
Wire Harness by Baja Designs® - Associated Accessories	19369744	$ 116.00
A-Pillar Lights by Baja Designs® - Associated Accessories	19417863	$ 276.00
Sport Bar Mounted Off-Road 40-Inch Light Bar by Baja Designs® - Associated Accessories	19417864	$ 1,188.00
Outside Rearview Mirror Puddle Light kit with Bowtie Logo Projection (for Heated Outside Rearview Power-Adjustable Mirrors)	84408372	$ 93.75
Recovery Hooks in Chrome	84726048	$ 127.50
Recovery Hooks in Black	84726049	$ 56.25
Recovery Hooks in Red	84726050	$ 93.75
Front and Rear Rubber No-Drill Gatorback Mud Flap Kit with Black Chevrolet Bowtie Logo and Fender Plugs in Black by Truck Hardware - Associated Accessories	19433173	$ 349.60
Front and Rear Rubber No-Drill Gatorback Mud Flap Kit with Black Chevrolet Bowtie Logo and Fender Plugs in Summit White by Truck Hardware - Associated Accessories	19433174	$ 349.60
Front and Rear Rubber No-Drill Gatorback Mud Flap Kit with Black Chevrolet Bowtie Logo and Fender Plugs in Silver Ice Metallic by Truck Hardware - Associated Accessories	19433175	$ 349.60
Front and Rear Rubber No-Drill Gatorback Mud Flap Kit with Silver Outlined Chevrolet Bowtie Logo and Fender Plugs in Black by Truck Hardware - Associated Accessories	19433176	$ 410.40
Front and Rear Rubber No-Drill Gatorback Mud Flap Kit with Silver Outlined Chevrolet Bowtie Logo and Fender Plugs in Summit White by Truck Hardware - Associated Accessories	19433177	$ 410.40
Front and Rear Rubber No-Drill Gatorback Mud Flap Kit with Silver Outlined Chevrolet Bowtie Logo and Fender Plugs in Silver Ice Metallic by Truck Hardware - Associated Accessories	19433178	$ 410.40
Front and Rear Rubber No-Drill Gatorback Mud Flap Kit with Trail Boss Logo and Fender Plugs in Black by Truck Hardware - Associated Accessories	19433179	$ 419.20
Front and Rear Rubber No-Drill Gatorback Mud Flap Kit with Trail Boss Logo and Fender Plugs in Summit White by Truck Hardware - Associated Accessories	19433180	$ 419.20
Front and Rear Rubber No-Drill Gatorback Mud Flap Kit with Trail Boss Logo and Fender Plugs in Silver Ice Metallic by Truck Hardware - Associated Accessories	19433181	$ 419.20
Front and Rear Rubber No-Drill Gatorback Mud Flap Kit with Black High Country Logo and Fender Plugs in Black by Truck Hardware - Associated Accessories	19433182	$ 349.60
Front and Rear Rubber No-Drill Gatorback Mud Flap Kit with Black High Country Logo and Fender Plugs in Summit White by Truck Hardware - Associated Accessories	19433183	$ 349.60
Front and Rear Rubber No-Drill Gatorback Mud Flap Kit with Black High Country Logo and Fender Plugs in Silver Ice Metallic by Truck Hardware - Associated Accessories	19433184	$ 349.60
Front Flat Splash Guards in Black	84109903	$ 41.25
Rear Splash Guards in Black with Bowtie Logo	84109906	$ 45.00
Rear Flat Splash Guards in Black with Bowtie Logo	84109907	$ 41.25
Front Splash Guards in Black	84649174	$ 45.00
Standard Box Sportz® Camping Tent by Napier - Associated Accessories	19329817	$ 216.00
Sportz Link Model 51000 Ground Tent by Napier - Associated Accessories	19369207	$ 175.99
Short Box Sportz® Camping Tent by Napier® - Associated Accessories	19417138	$ 239.99
Horizon Rooftop Tent by Napier - Associated Accessories	19419283	$ 1,599.20
Adventure Series 55-inch Premium Gas Strut-Equipped Tent by Freespirit Recreation® - Associated Accessories	19420418	$ 2,076.00
High Country 55-Inch Rooftop Tent by Freespirit Recreation® - Associated Accessories	19420419	$ 2,316.00
High Country 80-inch Premium Tent by Freespirit Recreation® - Associated Accessories	19420420	$ 2,716.00
Door Sill & Rocker Panel Protection by LUND® - Associated Accessories	19432307	$ 199.20
Tubular Nudge Bar	84027398	$ 562.50
Rear Wheelhousing Liner Set	84263801	$ 112.50
Underbody Skid Shield Package	84962765	$ 146.25
Rear Wheelhousing Liner Set	85561532	$ 112.50
MultiPro™/Multi-Flex Protective Hitch Cap by CURT™ – Associated Accessories	19421060	$ 91.20
TRANSPORTER COMBI™Hitch-Mounted Cargo Box by Thule®- Associated Accessories	19257871	$ 719.96
Hitch-Mounted Tram™ Ski Carrier by Thule® - Associated Accessories	19302831	$ 303.96
Hitch-Mounted Bicycle Frame Adapter in Silver by Thule® - Associated Accessories	19353376	$ 55.96
Hitch-Mounted 2-Bike T2 Classic Bicycle Carrier in Black by Thule® - Associated Accessories	19366639	$ 479.96
Gate mate PRO Tailgate Pad/Bike Carrier in Large by Thule® - Associated Accessories	19418147	$ 199.96
Hitch-Mounted 2-Bike Helium Pro Bicycle Carrier in Silver by Thule® - Associated Accessories	19419507	$ 415.96

Hitch-Mounted 2-Bike Camber™ Bicycle Carrier in Black by Thule® - Associated Accessories	19419508	$ 303.96
Hitch-Mounted 4-Bike Camber™ Bicycle Carrier in Black by Thule® - Associated Accessories	19419509	$ 359.96
ROOF-MOUNTED Board Shuttle Stand-Up PaddleBoard/Surfboard Carrier by Thule® - Associated Accessories	19330171	$ 159.96
Roof-Mounted Portage™ Canoe Carrier by Thule® - Associated Accessories	19331868	$ 159.96
Roof-Mounted Canyon XT™ Roof Basket by Thule® in Black — Associated Accessories	19331872	$ 399.96
Roof-Mounted Stretch Cargo Net for Roof Basket by Thule® - Associated Accessories	19331873	$ 63.96
Roof-Mounted Snowpack L Ski & Snowboard Carrier by Thule®- Associated Accessories	19371249	$ 303.96
Roof-Mounted Dock Glide Kayak Carrier by Thule® - Associated Accessories	19371250	$ 239.96
Roof-Mounted Force XT L™ Cargo Box by Thule® - Associated Accessories	19419503	$ 599.96
Roof-Mounted Force XT XL™ Cargo Box by Thule® - Associated Accessories	19419504	$ 639.96
Roof-Mounted ProRide XT™ Upright Bicycle Carrier in Black by Thule® - Associated Accessories	19419505	$ 207.96
Roof-Mounted Compass Watersport Kayak Carrier by Thule® - Associated Accessories	19419506	$ 279.96
Vacuum-Mounted 1-Bike Talon Bicycle Carrier by SeaSucker® - Associated Accessories	19420399	$ 239.20
Vacuum-Mounted 2-Bike Mini Bomber Bicycle Carrier by SeaSucker® - Associated Accessories	19420400	$ 391.20
Removable Roof Rack Package by Thule® - Associated Accessories	19420413	$ 575.84
Axle Combo Set by SeaSucker® - Associated Accessories	19421440	$ 31.99
First-Row Premium All-Weather Floor Liners in Jet Black with Chevrolet Script (for Models with Center Console)	84333602	$ 97.50
First-Row Premium All-Weather Floor Liners in Very Dark Atmosphere with Chevrolet Script (for Models with Center Console)	84333603	$ 97.50
First-Row Interlocking Premium All-Weather Floor Liner in Jet Black with Chevrolet Script (for Models without Center Console)	84333606	$ 97.50
First-Row Interlocking Premium All-Weather Floor Liners in Very Dark Atmosphere with Chevrolet Script (for models without Center Console)	84333607	$ 97.50
Crew Cab Second-Row Interlocking Premium All-Weather Floor Liner in Jet Black	84333635	$ 67.50
Crew Cab Second-Row Interlocking Premium All-Weather Floor Liner in Very Dark Atmosphere	84333636	$ 67.50
First-Row Premium All-Weather Floor Liners in Jet Black with Chrome Z71 Logo (for models with Center Console)	84348118	$ 112.50
First-Row Premium All-Weather Floor Liners in Very Dark Atmosphere with Chrome Z71 Logo (for models with Center Console)	84348119	$ 112.50
First-Row Interlocking Premium All-Weather Floor Liners in Jet Black with Chrome Z71 Logo (for models without Center Console)	84348123	$ 112.50
First-Row Interlocking Premium All-Weather Floor Liners in Very Dark Atmosphere with Chrome Z71 Logo (for models without Center Console)	84348124	$ 112.50
Crew Cab Second-Row Interlocking Premium All-Weather Floor Liner in Jet Black for AT4/Z71	84348198	$ 67.50
Crew Cab Second-Row Interlocking Premium All-Weather Floor Liner in Very Dark Atmosphere for Z71	84348199	$ 67.50
Crew Cab First- and Second-Row Carpeted Floor Mats in Jet Black with Chevrolet Script	84519743	$ 97.50
Crew Cab First- and Second-Row Carpeted Floor Mats in Jet Black	84519750	$ 120.00
Crew Cab First- and Second-Row Carpeted Floor Mats in Atmosphere	84519751	$ 120.00
Crew Cab First- and Second-Row Premium All-Weather Floor Mats in Jet Black	84521602	$ 138.75
Crew Cab First- and Second-Row Premium All-Weather Floor Mats in Atmosphere	84521603	$ 138.75
Crew Cab First- and Second-Row Carpeted Floor Mats in Jet Black	84655254	$ 150.00
Crew Cab First- and Second-Row Carpeted Floor Mats in Dark Atmosphere	84655255	$ 150.00
Crew Cab First- and Second-Row Premium Carpeted Floor Mats in Jet Black with Red Stitching, Bowtie and Chevrolet Performance Script	84989131	$ 120.00
Crew Cab First- and Second-Row Premium Carpeted Floor Mats in Jet Black with Red Stitching, Bowtie and Chevrolet Performance Script	85105239	$ 120.00
Rear Bench Seat Cover by ARIES™ Manufacturing in Black - Associated Accessories	19367173	$ 96.00
Rear Bench Seat Cover by ARIES™ Manufacturing in Gray - Associated Accessories	19367174	$ 96.00
Rear Bench Seat Cover by ARIES™ Manufacturing in Brown - Associated Accessories	19367175	$ 96.00
Automatic Transmission Sport Pedal and Cover Package	84712883	$ 123.75
Front Door Sill Plates with Jet Black Surround and Silverado Script	84529475	$ 93.75
Illuminated Front Door Sill Plates in Stainless Steel with Silverado Script	85527845	$ 262.50
Window Sunshade Package with Silverado Script	84641433	$ 93.75
Interior Trim Kit in Silver for Crew Cab (for models without Center Console)	84469330	$ 112.50
Crew Cab Under seat Lockable Storage Organizer in Black	84734683	$ 191.25
Console-Mounted Safe	84867168	$ 206.25
Under Rear Seat Lockbox with Three-Digit Combination Lock by Tuffy Security Products® - Associated Accessories	19417361	$ 463.20

Dometic CFX3-25 Powered Cooler - Associated Accessories	19432145	$ 671.99
Dometic CFX3-35 Powered Cooler - Associated Accessories	19432146	$ 719.99
Dometic CFX3-45 Powered Cooler - Associated Accessories	19432147	$ 767.99
Dometic CFX3-55IM Powered Cooler IM - Associated Accessories	19432148	$ 879.99
Dometic CFX3-75DZ Powered Cooler Dual Zone - Associated Accessories	19432149	$ 1,039.99
Dometic CFX3-95DZ Powered Cooler Dual Zone - Associated Accessories	19432150	$ 1,199.99
Dometic CFX3-100 Powered Cooler - Associated Accessories	19432151	$ 1,119.99
Dometic CFX3-PC25 Powered Cooler Protective Cover - Associated Accessories	19432534	$ 103.99
Dometic CFX3-PC35 Powered Cooler Protective Cover - Associated Accessories	19432535	$ 103.99
Dometic CFX3-PC45 Powered Cooler Protective Cover - Associated Accessories	19432536	$ 103.99
Dometic CFX3-PC55 Powered Cooler Protective Cover - Associated Accessories	19432537	$ 103.99
Dometic CFX3-PC75 Powered Cooler Protective Cover - Associated Accessories	19432538	$ 119.99
Dometic CFX3-PC95 Powered Cooler Protective Cover - Associated Accessories	19432539	$ 119.99
Dometic CFX3-PC100 Powered Cooler Protective Cover - Associated Accessories	19432540	$ 119.99
Dometic Cooler Tie-Down Kit - Associated Accessories	19432541	$ 39.99
Dometic Cooler Tie-Down Straps (2) - Associated Accessories	19432542	$ 15.99
Dometic Patrol 35 Cooler in White - Associated Accessories	19432604	$ 191.99
Dometic Patrol 55 Cooler in White - Associated Accessories	19432605	$ 239.99
Dometic Patrol 75 Cooler in White - Associated Accessories	19432606	$ 287.99
Dometic Patrol 105 Cooler in White - Associated Accessories	19432607	$ 335.99
Dometic Patrol 35 Cooler in Ocean Blue - Associated Accessories	19432608	$ 191.99
Dometic Patrol 55 Cooler in Ocean Blue - Associated Accessories	19432609	$ 239.99
Dometic PLB40 Portable Lithium Battery 40Ah - Associated Accessories	19432628	$ 679.99
Fridge Slide for CFX3-35 and CFX3-45 Powered Coolers by Dometic - Associated Accessories	19432631	$ 279.99
Fridge Slide for CFX3-55IM Powered Coolers by Dometic - Associated Accessories	19432632	$ 279.99

ATTACHMENT 17

ABA Resolution 116B

AMERICAN BAR ASSOIATION

ADOPTED BY THE HOUSE OF DELEGATES

AUGUST 3-4, 2020

RESOLUTION

RESOLVED, That the American Bar Association urges federal, state, local, territorial and tribal governments to:

a) enforce fair lending laws and other federal, state and local laws targeting unfair or deceptive acts or practices to address discrimination in vehicle sales and financing markets;

b) adopt laws and policies that promote the adoption of an enhanced nondiscrimination compliance system for dealer compensation for arranging and/or originating a vehicle finance contract by offering a safe harbor against pricing discrimination claims for dealers that faithfully implement the NADA/NAMAD/AIADA Fair Credit Compliance Policy and Program; and

c) adopt legislation requiring that the purchase of any voluntary vehicle protection product may not be made a condition of the sale or lease of the vehicle, and that there is clear and conspicuous disclosure of pricing of voluntary protection products by dealers through reasonable means, such as a pricing sheet, menu, and/or website, before a consumer purchases a vehicle;

FURTHER RESOLVED, That the American Bar Association encourages state, local, territorial and tribal bar associations to work with consumer, dealer and creditor representatives to offer educational programming and materials to lawyers and consumers to help them understand and navigate purchases and financing of vehicles and understand consumers' legal rights with respect to such purchases and loans.

ATTACHMENT 18

Paperwork Reduction Act Analysis Chart

Table I Paperwork Reduction Act Analysis	
FTC Proposed Rule and PRA Estimate	**NADA Response**
General Estimate and Burdens Issues	
The FTC estimates that there are some 46,525 franchised new and independent used motor vehicle dealers in the U.S.[1]	The FTC estimates that there are 21,427 franchised new motor vehicle dealers in the U.S., all of which fall within the scope of the proposed definition of "Dealer or Motor Vehicle Dealer."[2] There are some 25,000+ independent used motor vehicle dealers, but only those engaged in vehicle servicing fall within the proposed definition, so the FTC's estimate is inaccurate to that extent. The FTC's estimate also fails to recognize that the proposed definition of "Motor Vehicle" would cover motor vehicle manufacturers who sell directly to consumers without using a dealer retail network, as well as RV, marine, motorcycle, recreational, and other dealers licensed to sell or lease, and service, new and/or used motor vehicles.[3] It is estimated that there are some 20,000 dealers selling and leasing and servicing the other motor vehicles, which is approximately the same as the number of independent dealers that the FTC erroneously includes in its estimate. Consequently, the FTC's regulated entity estimate is fairly accurate numerically, but the Commission's understanding of the specific entities that comprise that universe is erroneous.
The FTC estimates the following total PRA burdens and costs: *Estimated Annual Hours Burden:* 7,816,819 hours. *Estimated Annual Labor Cost:* $221,870,782.[4]	Absent the type of rigorous study that NADA sought to conduct but that the FTC did not provide adequate time to complete, it is difficult to estimate the time and costs resulting from obligations and prohibitions contained in the Proposed TRR. Throughout the NPRM, the FTC fails to provide any basis for its task time estimates or to explain what assumptions underlie those estimates. Again, this makes it very difficult, if not impossible, to meaningfully assess or respond to the FTC's articulations of the burdens the Proposed TRR would impose. Nonetheless, in this Table, we provide a conservative analysis of the overall cost impact the proposal would have, although there are likely many additional material costs that this total would not include. And, for the reasons detailed below, the FTC's total PRA burden and cost estimates are inaccurate and insufficient and require the agency to revisit its burden and cost calculations.
Add-on List Disclosures: Section 463.4(b)	
The FTC claims that dealers would require approximately 14 hours to create initial disclosure systems, including the time necessary to create and review the required "Add-on" Lists and to design systems that provides for the display of "Add-on" Lists on websites and other online services.[5]	The FTC has underestimated the time and resources necessary to develop "Add-on" lists that comport with its very broad proposed definitions of "Add-on," "Add-on Products," and "Add-on List."[6]. See NADA's comments for further discussion of these terms. The FTC also has failed to provide any basis for its task time estimates or any explanation of the assumptions it is making in proffering those estimates. For example, it does not explain its assumptions regarding how many different "Add-ons" an average dealership sells, which is critical to determining how long it would take to complete an "Add-on" List. These lists could be quite lengthy, with hundreds if not thousands of items per dealer. Moreover, they would vary widely by vehicle make and model, and thus would be very time intensive to develop and maintain. For example, for a single truck model at just one GM store, an "Add-on" List might include some 600 items that could be added before finalization of a transaction. See Attachment 16. And a dealer's "Add-on" lists would not be static; they would change regularly, and each change would require an updated listing. In addition, dealers frequently maintain multiple websites, web applications, and other places where such a list would need to be posted. Each of these facts would increase the costs associated with this requirement.

[1] 87 Fed. Reg. 42012 at 42031.
[2] Section 463.2(e).
[3] Section 463.2(j).
[4] 87 Fed. Reg. at 42031.
[5] 87 Fed. Reg. at 42031-32.
[6] Sections 463.2(a) and (b).

Table I Paperwork Reduction Act Analysis

FTC Proposed Rule and PRA Estimate	NADA Response
	Finally, the development of "Add-on" lists would require dealerships to work with, among others, their: • OEMs who manufacture vehicle "Add-ons" for sale through their dealerships to determine what may apply for each vehicle make and model; • financial product providers to determine acceptable price ranges; • web and IT developers to modify dealership websites and mobile applications; and • attorneys to review for compliance. These interactions would also involve costs for dealers for which the FTC does not account.
The FTC assumes that all covered dealers charge for "Add-ons," and that none currently maintain "Add-on" Lists for customers. It estimates an initial burden of 651,350 hours (based on 46,525 dealers × 14 hours). The FTC estimates associated labor costs by applying hourly labor cost rates to the hours calculated above. The FTC expects certain managerial, administrative, and programming staff would likely perform the tasks associated with the creation, posting, and revision of "Add-on" Lists. For each dealer, the FTC estimates five hours of manager time at $65.54 per hour, one hour of compliance officer time at $26.83 per hour, and eight hours of programmer time at $28.90 per hour. These figures yield a total annual labor cost burden of $28.1 million.[7]	The FTC likely underestimates the actual labor involved for development and posting "Add-on" lists. To begin, the FTC again provides no basis for its assumed task time estimates or any explanation of the assumptions it is making in proffering those estimates. And, for all the reasons stated above, the actual per dealership hours that would be necessary for creating and posting "Add-on" lists would likely be significantly higher.
The FTC claims that some 81% of dealers with an online presence would require eight hours of programmer integration time, resulting in an estimated annual burden of 301,480 hours (based on 46,525 dealers × 81% × eight hours). A programmer rate of $28.90 per hour yields a total annual labor cost burden of $8.7 million.[8]	A more reasonable expectation would be that 100% of dealers would maintain an online presence and that integrations across platforms would be necessary for all dealers. But given the databases and number of entries involved and the need to coordinate with IT and website vendors, significantly more programmer time would be necessary.
The FTC claims that the periodic revision of these "Add-on Lists" would require one hour of clerical staff time per year, per dealer for a total annual periodic revision burden of 46,525 hours (based on 46,525 dealers × 1 hour). A per hour rate of $18.37 yields a total annual review estimate of $.855 million.[9]	As explained above, "Add-on" lists would be much more complicated and extensive than the FTC understands. And the same would be true of their maintenance and upkeep as prices and offerings change often. It strains credulity that all such changes would be able to be made in one hour per year. The periodic review of "Add-on" lists to ensure that they remain accurate, and the related coordination with multiple parties and vendors, would alone involve several more than one hour of clerical staff time per dealer, per year.
Disclosures Relating to Cash Price without Optional Add-ons: Section 463.5 (See Attachments 11-13) • **Vehicle Cash Price Disclosure: Cash Transactions: Section** 463.5(b)(1) • **Vehicle Cash Disclosure: Financed Transactions: Section** 463.5(b)(2) • **Itemization of Add On Disclosure: Section** 463.5(b)(3)	
The FTC anticipates that dealers charging for optional "add-ons" would incur certain initial and ongoing costs to provide the disclosures relating to Cash Price without Optional "Add-ons". Dealers likely would incur some costs to create and implement templates for these disclosures, either in paper or electronic form. The FTC estimates that these tasks would require some eight hours of compliance officer time at $26.83 per hour, four hours of sales manager time at $63.93 per hour, and eight hours of programmer time at $28.90 per hour, for a total of $701.56 per dealer, on average. The FTC claims that	The FTC underestimates the cost to develop the forms. First, the FTC has again failed to provide any basis for its task time estimates or any explanation of the assumptions it is making in proffering those estimates. Second, dealers would need to work with forms vendors, attorneys, compliance professionals and others to develop new forms and to deploy a rigorous forms review process. There is no market evidence to suggest that this process can be completed for less than $750. Rather, these interactions are likely to entail many more hours than the FTC estimates.

[7] 87 Fed. Reg. at 42031-32.
[8] 87 Fed. Reg. at 42031-32.
[9] 87 Fed. Reg. at 42031-32.

Table I Paperwork Reduction Act Analysis	
FTC Proposed Rule and PRA Estimate	**NADA Response**
this yields an estimated total burden for all dealers, in the first year, of $32.6 million.[10]	
The FTC claims that the added time to input data for the disclosures relating to Cash Price without Optional "Add-ons" would be minimal, as they consist of information that dealers already obtain from customers in the ordinary course to complete vehicle sales transactions. The FTC estimates that, for each disclosure, mandated by Sections 463.5(b)(1), (b)(2), and (b)(3), it would take two minutes of salesperson time to complete at $21.84 per hour, yielding an average cost per disclosure of $0.73. Dealers would need to provide the Section 463.5(b)(1) disclosure for every vehicle they offer for sale with optional "add-on" products or services; the Section 463.5(b)(2) disclosure for every vehicle sale that is financed and includes an optional "add-on;" and the Section 463.5(b)(3) disclosure for every vehicle sale that includes optional "add-ons." The FTC claims that approximately 57,866,000 vehicles are sold annually by dealers, including 17,059,000 new and 40,807,000 used vehicles. The FTC also claims that each vehicle sale involves an offer of optional "add-ons," estimates that some 81% of new vehicle sales and 35% of used vehicle sales are financed, and that approximately 94% of new vehicle sales and 86% of used vehicle sales include optional "add-ons.[11]	The FTC grossly underestimates the costs that would be involved in making these disclosures. First, the FTC has again failed to provide any basis for its task time estimates or any explanation of the assumptions it is making in proffering those estimates. Second, there is at least one glaring omission from the FTC's enumeration of dealer costs; the training of sales staff, both initially and ongoing (given an industry average 67% annual turnover in sales staff). The need for, and cost of, such training would be significant, especially considering the consequences for not strictly complying with the proposal's disclosure mandates. Further, although individually small, the combined cost of printing these forms would be significant and must not be overlooked. As discussed in NADA's comments, dealers would generally need a minimum of four, and in some cases many more, printed forms for each customer and their many prospective customers. Given the number of vehicle transactions that occur each year, the total number of forms needed would be in the hundreds of millions. Assuming a printing cost of $0.10 per form, a conservative estimate of the annual cost just for printing these forms would be tens of millions of dollars. In addition, the disclosures mandated by Sections 463.5(b)(1) and (b)(2)) do not lend themselves to a standardized disclosure document that could be provided and explained to all customers. As discussed above, highly customized documents would be necessary that would require significant time to use. Moreover, because the form must be vehicle and customer specific, and because it would need to be provided well before transaction consummation, several iterations likely would need to be provided per customer since customers typically often inquire about more than one vehicle but rarely buy more than one. Similarly, since these forms must include a trade-in valuation at a very early point in the process, more trade-in valuations would need to be conducted than occur today. This is because in today's more rational and natural price discovery process, some customers decide not to proceed long before precise trade-in valuations are conducted. The FTC must assess and include additional estimates per transaction for the time it takes to complete the form multiple times, the time it takes for additional trade-in valuations, and the time it takes for customers to read and sign these disclosure forms. And, of course, most of the time spent by dealers filling out and explaining these new forms would also be time spent by consumers either waiting for the forms or listening to and asking questions about the explanations. This would add hundreds of millions, if not billions, of dollars more in costs that would far exceed the purported consumer benefits of the Proposed TRR. Finally, the FTC's estimates are incorrect for several additional reasons: : • The FTC fails to account for dealership and customer time expended on disclosures during transactions that are not completed. • The FTC must assess and add to that subtotal the total number of new and used transactions made by the other "motor vehicle dealers" that would be subject to its Proposed TRR. • The FTC wrongly assumes that all used vehicle transactions fall within the scope of its proposal by claiming that all 40,807,000 used vehicle transactions in the DOT table were made by either franchised or independent dealers subject to the Proposed TRR. But this 40.8 million transaction number includes those involving only private parties and

[10] 87 Fed. Reg. at 42032.
[11] 87 Fed. Reg. at 42032.

Table I Paperwork Reduction Act Analysis	
FTC Proposed Rule and PRA Estimate	**NADA Response**
	independent dealerships without service shops, which would not be subject to the Proposed TRR. The FTC must subtract from its used vehicle number both those involving only private parties and those involving independent used vehicle dealers not covered by its proposal. • The FTC also assumes without support that approximately 94% of new vehicle sales and 86% of used vehicle sales include "optional add-ons." This is apparently based on a misinterpretation of NADA "F&I penetration" data measuring transactions where customers purchased at least one of the following: a finance, vehicle insurance, or GAP insurance contract. Because some customers buy more than one of these products, NADA estimates that many fewer transactions would involve them.
Vehicle Cash Price Disclosure: Cash Transactions: Section 463.5(b)(1) Given the above estimates and assumptions, the FTC claims that proposed Section 463.5(b)(1) disclosures would be provided in 1,244 transactions per dealer, on average, (based on 57,866,000 transactions ÷ 46,525 dealers), for a total annual burden of 1,929,237 hours, or 41 hours per dealer, on average (based on 1,244 transactions × 2/60 of an hour). The annual total labor cost estimate is $42.2 million (based on 1,244 transactions × 46,525 dealers × $0.73 per transaction), which equates to $908.12 per dealer, on average.[12]	The FTC has not provided any basis for its time estimates or any explanation of the assumptions it is making in proffering those estimates and has not properly identified the appropriate number of transactions or dealers subject to this disclosure mandate. Further, the FTC has failed to account for the time it takes 1) to provide multiple forms per negotiation, or 2) for customers to read, understand, and sign the proposed disclosure forms. As discussed in NADA's comments, each item on the proposed mandatory form is already disclosed to customers, but with those disclosures taking place at a more logical and consumer-friendly point in the sales process. Thus, the proposed mandate would be duplicative and would impose unnecessary paperwork burdens.
Vehicle Cash Disclosure: Financed Transactions: Section 463.5(b)(2) The FTC claims that dealers would provide proposed Section 463.5(b)(2) disclosures in an average of 543 transactions per year, on average, resulting in an annual burden of 842,103 hours, or some 18 hours per dealer, on average (based on 543 transactions × 2/60 hours). The FTC estimates an annual total labor cost of $18.4 million (based on 46,525 dealers x 543 transactions × $0.73 per transaction) or $396 per dealer, on average.[13]	The FTC has not provided any basis for its time estimates or any explanation of the assumptions it is making in proffering those estimates and has not properly identified the appropriate number of transactions and dealers subject to this disclosure mandate. Further, it has failed to account for the time it takes 1) to provide multiple forms per negotiation and 2) for customers to read, understand, and sign the proposed disclosure forms. As discussed in NADA's comments, each item on the proposed mandatory form is already disclosed to customers, but with those disclosures taking place at a more logical and consumer-friendly point in the sales process. Thus, the proposed mandate would be duplicative and would result in unnecessary paperwork burdens.
Itemization of "Add-on" Disclosure: Section 463.5(b)(3) The FTC claims that dealers would provide proposed Section 463.5(b)(3) disclosures in 1,099 transactions per dealer, on average. This yields a total annual burden of 1,704,366 hours, or 37 hours per dealer, on average, (based on 46,525 dealers × 1,099 transactions × 2/60 hours). The FTC estimates the total labor cost for this mandate to be $37.3 million or some $802 per dealer, on average (based on 46,525 dealers × 1,099 transactions × $0.73).[14]	The FTC has not provided any basis for its time estimates or any explanation of the assumptions it is making in proffering those estimates and has not properly identified the appropriate number of dealers or transactions subject to this proposed mandate. The FTC has also failed to account for the time it takes 1) to provide multiple forms per negotiation, or 2) for customers to read, understand, and sign the proposed disclosure forms. As discussed in NADA's comments, current law already requires disclosure of the optional nature of "add-ons" and an itemized list of "add-ons" that are purchased. Thus, the proposed mandate would be duplicative and would result in additional time added to the transaction and unnecessary paperwork burdens.
Misrepresentations: Section 463.3	
The FTC asserts that proposed Section 463.3 is consistent with existing misrepresentation prohibitions arising under Section 5 of the FTC Act, and thus do not themselves require additional information collection or disclosures. The FTC further states that, while dealers may elect to undertake monitoring or review to ensure compliance, any additional costs associated with proposed Section 463.3 would be *de minimis.*[15]	The broad nature of proposed Section 463.3 would necessitate additional annual training due to increased liability risks, and would require dealers to create, use, and keep records of additional forms, scripts, disclosures, and related training, imposing unnecessary paperwork burdens on both dealers and customers. Proposed Section 463.3 also would result in longer transaction times. And, as discussed in NADA's comments, since dealers selling new motor vehicles share control of their advertising platforms with the vehicle manufacturers with which they have sales and service agreements and with third parties, they have limited control over new vehicle advertising. Consequently, proposed Section 463.3 would result in very significant

[12] 87 Fed. Reg. at 42032.
[13] 87 Fed. Reg. at 42032-33.
[14] 87 Fed. Reg. at 42033.
[15] 87 Fed. Reg. at 42033.

Table I Paperwork Reduction Act Analysis	
FTC Proposed Rule and PRA Estimate	**NADA Response**
	paperwork burdens and related costs, and it is incumbent upon the FTC to properly assess and codify those burdens and costs.
Disclosure of Offering Price in Advertisements and In Response to Inquiry: Section 463.4(a)	
The FTC asserts that any additional burdens and related costs associated with the proposed Section 463.4(a) offering price mandate would be *de minimis,* based on an assumption that such vehicle pricing activities are usually and customarily performed by dealers in the normal course, and that while proposed Section 463.4(a) may increase the importance of those activities, it would not alter when they are undertaken.[16]	The FTC incorrectly characterizes the burden and cost impact of proposed Section 463.4(a). As discussed above, the proposal does not accurately or realistically define "offering price," given the variety of circumstances that would trigger the proposed disclosure mandate during the initial stages of a motor vehicle sales negotiation. The proposed Section 463.4(a) mandate would make it difficult for dealers to respond to customer inquiries efficiently or accurately as they might trigger an offering price disclosure and would most certainly lengthen transaction times. The costs of training sales staff on how to navigate this mine field alone would be material. Moreover, it is estimated that for any given consummated new or used vehicle transaction, there would be an average of three Offering Price disclosures based there being an average of three dealer-customer discussions regarding three specific motor vehicles, per transaction. Thus, the FTC must reassess and codify the burdens and costs for both dealers and their customers that would result from the disclosures mandated by proposed Section 463.4(a).
Disclosure of Total Cost: Section 463.4(d) and Disclosure of Effect of Lower Monthly Payments: Section 463.4(e)	
The FTC claims that the disclosures mandated by Sections 463.4(d) and (e) would involve information produced in the ordinary course that would be known to dealer staff at the time such disclosures would be required. The FTC asserts that these proposed mandates would require dealers to provide readily available information, and that related paperwork burdens and costs would be *de minimis.*[17]	As discussed in NADA's comments, the FTC is proposing the disclosure of information that impermissibly and imprudently intrudes on the time-tested content, form, and timing disclosures developed by the FRB to inform consumers of the cost of motor vehicle credit and leasing. Therefore, any paperwork burden associated with this requirement is confusing, somewhat duplicative, and unnecessary. NADA is further concerned that these new disclosures would add time to the transaction process and create confusion as they may have to be updated and provided to the customer several times throughout the transaction. This necessitates time being added to the transaction to provide the disclosures and for customers to review, which the FTC has neglected to consider. Finally, the costs of training sales staff on how to navigate this mine field alone would be material and must be properly assessed by the FTC.

[16] 87 Fed. Reg. at 42033.
[17] 87 Fed. Reg. at 42033.

Table I Paperwork Reduction Act Analysis	
FTC Proposed Rule and PRA Estimate	**NADA Response**
Recordkeeping: Section 463.6	
As detailed in its Preliminary Regulatory Analysis, the FTC claims "incremental" increases in recordkeeping burdens and costs related to retaining copies of "Add-on" Lists, of disclosures related to Cash Price without Optional "Add-ons", and of other records necessary to demonstrate compliance. The FTC asserts that it would take dealers approximately 15 hours to modify their existing recordkeeping systems to retain required records for the proposed 24-months. This would yield a general recordkeeping burden of 697,875 hours annually (based on 46,525 dealers × 15 hours per year).[18] The FTC claims that, beyond those records created and retained in the ordinary course of business, proposed Section 463.6(a)(4) would mandate that dealers create and retain calculations of loan-to-value ratios in GAP contracts. The FTC estimates that of the 57,866,000 vehicles sold each year, approximately 25.7% or 14,871,562 sales include GAP agreements[19]	As discussed in NADA's comments, the recordkeeping costs and burdens associated with Section 463.6 would be major. Except for purchase orders and finance and lease documents identified in Section 463.6(3) and certain other select documents, the documents identified in this subsection represent new obligations. For example, dealer communications covered by the scope of this mandate include, but are not limited to, online chat features on dealer websites, e-mails and text messages with salespersons, and social media posts. These communications involve both dealer-owned and employee-owned devices and communications made both during and outside of normal business hours. Requiring dealers to develop systems to capture all written communications involving tens of millions of new and used motor vehicle transactions each year would, if possible, involve massive costs. As noted above, the costs of training sales staff on how to navigate these requirements would be significant and should be properly estimated by the FTC. The FTC has severely underestimated the time and resources necessary to develop recordkeeping systems that would comport with the Section 463.6 mandate's very broad application. Moreover, it has virtually ignored the multiple dealership systems and vendors that would be involved with keeping a record of all dealer advertisements, customer communications, and transactions. The FTC also drastically underestimates the scope of this burden by incorrectly assuming that dealerships would only have to retain these records for vehicles sold. This requirement would apply to *all* consumer facing communications and consumer inquiries regardless of a vehicle sold, since dealers cannot predict which of their customers will ultimately purchase vehicles from them.
The FTC asserts that its loan-to-value recordkeeping mandate would require one hour of sales manager time to create and implement a loan-to-value calculation template, at a cost-of $63.93, and one hour for a compliance officer to review the template, at a cost of $26.83. This equates to an estimated total initial burden of 93,050 hours (based on 46,525 dealers × 2 hours). Total labor costs are estimated at $4.2 million (based on a combined $63.93 per hour × 1 hour × 46,525 dealers and $26.83 per hour × 1 hour × 46,525 dealers).[20] The FTC also claims that, with templates in place, dealers would expend one minute per transaction for a salesperson to perform the calculations contemplated by this mandate, at a cost of $21.84 per hour. Again, the FTC states that dealers sell approximately 57,866,000 vehicles each year, and that 25.7% of those or 14,871,562 sales include GAP agreements. This equates to 320 GAP sales transactions per dealer, per year, on average, and a total burden of 248,133 hours (based on 46,525 dealers × 320 transactions × 1/60 hour). Applying associated labor rates yields a total annual paperwork cost of $5.4 million (based on 248,133 hours × $21.84 per hour).[21]	As discussed in NADA's comments, LTV ratios vary by vehicle, by depreciation rate, by transaction, and over time. Consequently, it would be virtually impossible to create a simple calculator template. In addition, the Proposed TRR states that dealers would be prohibited from charging for "add-on" products that provide no benefit to customers. Because this standard is vague and requires further definition by the FTC, complying with it would require resolving or addressing those uncertainties, and that involves cost. Of course, while dealers should not be offering valueless products to customers, with respect to many products it is far from clear whether in the eyes of the FTC the product fails that standard. Indeed, the value of any product depends on several factors related to the customer and vehicle. For example, with GAP coverage: variable market conditions would have to be measured and assessed to determine in the LTV ~ depreciation relationship warrants the coverage to determine whether "value" is being provided. To minimize recordkeeping burdens, the FTC must more clearly define the scope of the proposed mandate, accurately determine the number of annual transactions that are within that scope and apply a multiplier to those transactions to reflect those where assessments must be performed multiple times. Only after calculating an accurate number of assessments can the FTC further calculate the costs and burdens associated with those assessments, both for dealers and for their customers. And as with other mandates set out in the Proposed TRR, Section 463.6 would necessarily lengthen the time it takes to conduct transactions to which it applies.
Capital and Other Non-Labor Costs The FTC asserts that the Proposed TRR would impose limited capital and non-labor costs, stating that dealers already have systems for providing sales and contract-related disclosures to motor vehicle	As mentioned throughout this Table, the capital and other non-labor paperwork costs and burdens related to the Proposed TRR would not be *de minimis and* must be properly assessed and calculated by the FTC.

[18] 87 Fed. Reg. at 42033.
[19] 87 Fed. Reg. at 42034.
[20] 87 Fed. Reg. at 42034.
[21] 87 Fed. Reg. at 42034.

Table I Paperwork Reduction Act Analysis	
FTC Proposed Rule and PRA Estimate	**NADA Response**
customers and to consumers seeking information during the vehicle-shopping process. The FTC asserts that the proposals' disclosure mandates might make limited additions to the types of forms and disclosures that must be provided, but that these changes would not require substantial investments in new systems. Moreover, many dealers would elect to furnish some disclosures electronically, further reducing total costs. Section 463.4(b) would require dealers who engage in advertising and charge for optional add-ons to have a website, online service, or other mobile application by which to disclose "Add-on" Lists. The FTC claims that dealers who engage in covered advertising typically already operate websites or other applications by which they could make disclosures and asserts that the capital costs associated with such disclosures would likely be *de minimis*.[22]	
The FTC claims that dealers already have recordkeeping systems for the storage of documentation retained in the ordinary course of business, including records relating to vehicle financing and customer contracts and leases. As set out in detail in the Preliminary Regulatory Analysis, the FTC asserts that the proposals' additional recordkeeping mandates may result in incremental non-labor costs to add capacity to these systems to store records. The Proposed TRR provides that covered motor vehicle dealers may keep required records in any legible form, and in the same manner, format, or place as they may already keep records in the ordinary course. Accordingly, the FTC asserts that the proposal would not require dealers to invest in new recordkeeping systems.[23].	As laid out above, the recordkeeping costs and burdens associated with Section 463.6 would be major, would impact every customer-facing communication, and would require investments in and coordination of new recordkeeping systems.
The FTC estimates the non-labor costs incurred by dealers for providing disclosures in written or electronic form would differ based on the method of disclosure employed. As detailed in its Preliminary Regulatory Analysis, the FTC estimates an average physical per disclosure cost of $0.11 across paper and electronic methods. This includes (1) a cost of $0.15 per printed single-sided page disclosure (based on printing costs associated with the Used Car Rule); and (2) a cost of $0.02 per electronic disclosure. As noted above, dealers would need to provide Section 463.5(b)(1) disclosures for every vehicle they offer with any optional" add-on" products or services; the Section 463.5(b)(2) disclosure for every vehicle sale that is financed and includes an optional "add-on"; and the Section 463.5(b)(3) disclosure for every vehicle sale that includes an optional "add-on". The estimated annual cost of providing these disclosures is approximately $317.45 per dealer, on average, for a total of $14.8 million.[24]	As mentioned above, the FTC has failed to address the following in providing its estimate regarding the Section 463.5(b) disclosures: • These disclosures would likely be provided multiple times during a customer interaction • These disclosures would be provided to customers who do not finalize a vehicle sale with the dealership. Without accounting for these facts, the FTC is drastically underestimating the cost of this paperwork burden.
The FTC further claims that dealers currently storing records in hard copy are unlikely to require extensive additional storage for physical document retention. Moreover, due to low cost of cloud and other electronic storage, dealers who store records electronically would incur minimal incremental costs to expand their storage to comply with Proposed TRR's recordkeeping mandates.[25]	As mentioned above, due to the scope of the recordkeeping requirement, the costs to expand storage capacity would be material and should be properly assessed and calculated by the FTC.

[22] 87 Fed. Reg. at 42034.
[23] 87 Fed. Reg. at 42034.
[24] 87 Fed. Reg. at 42034.
[25] 87 Fed. Reg. at 42034-35.

ATTACHMENT 19

Regulatory Flexibility Act Analysis Chart

Table II Regulatory Flexibility Act Analysis	
FTC RFA Analysis	**NADA Response**
General The FTC asserts that its proposal would not impose a significant economic impact on small entities but acknowledges that it likely would affect a substantial number of small entities. The FTC notes that the proposal would apply to motor vehicle dealers predominantly engaged in the sale and servicing of motor vehicles, the leasing and servicing of motor vehicles, or both, as defined in Section 1029 of the Dodd-Frank Act, and that many such dealers would be classified as small businesses[1].	As detailed below, the Proposed TRR would absolutely have a significant economic impact on small entities. It appears that the only small entities that would be impacted by the Proposed TRR would be small business "Dealers or Motor Vehicle Dealers" as defined in proposed Section 463.2(e). "Motor Vehicle" is defined in proposed Section 463.2(j).[2]
1. Description of the Reasons That Agency Action Is Being Considered The FTC states that the Proposed TRR aims to curb misleading practices and unauthorized charges to consumers during the vehicle buying or leasing process, and to provide an additional enforcement tool to deter dealer misconduct and remedy consumer harm. The FTC claims that its law enforcement, outreach, and other engagement in this area, together with the tens of thousands of consumer complaints it receives each year, indicate that dealer misconduct and deceptive tactics persist despite substantial federal and state law enforcement efforts. The FTC issued the proposal pursuant to the Dodd Frank Act, which it claims authorizes it to prescribe rules addressing unfair or deceptive dealer acts or practices.[3]	Unfair or deceptive acts or practices by dealer are rare and, when they occur, are being addressed with existing federal, state, and industry tools. The FTC's claim that it receives tens of thousands of complaints each year involving dealers is addressed in NADA's comments. Also discussed in NADA's comments, is the FTC's characterization of the number and nature of unfair and deceptive acts and practices by dealers is unfounded.
2. Statement of the Objectives of, and Legal Basis for, the Proposed Rule The FTC claims that the objective of the Proposed TRR is to prevent unfair or deceptive acts or practices involving the sale, financing, and leasing of motor vehicles. The FTC claims that the legal basis for the proposal is the FTC Act, 15 U.S.C. secs. 41 *et seq.,* and Section 1029 of the Dodd-Frank Act, 15 U.S.C. 5519, which authorizes it to prescribe rules with respect to motor vehicle dealers pursuant to the FTC Act, which prohibits unfair or deceptive acts or practices in or affecting commerce.[4]	The FTC's invocation of authority to in support of this rulemaking is addressed in NADA's comments.
3. Description and Estimate of the Number of Small Entities to Which the Proposed Rule Would Apply The Proposed TRR applies to motor vehicle dealers as defined in Section 1029 of the Dodd-Frank Act. The FTC estimates that there are a total of approximately 46,525 franchised and independent/used dealers in the U.S. The FTC recognizes that many of these dealers are small businesses based on applicable Small Business Administration (SBA) size standards. SBA's standards classify as small businesses new vehicle dealers with fewer than 200 employees each and used vehicle dealers with annual receipts of less than $27 million.[5]	The FTC claims that there are 21,427 franchised new motor vehicle dealers in the U.S., all of which fall within the scope of the definition of "Dealer or Motor Vehicle Dealer" set out in proposed Section 463.2(e). There are some 25,000+ independent used motor vehicle dealers, but only those engaged in vehicle servicing fall within the proposed definition. The FTC's fails to recognize that the proposed definition of "Motor Vehicle" found in Section 463.2(j) would pull in RV, marine, motorcycle, recreational, and other dealers licensed to sell or lease, and service, new and/or used motor vehicles. See NADA's comments for further discussion of proposed Section 463.2(j). It is estimated that there are some 20,000 dealers selling or leasing and servicing those latter motor vehicles, which is approximately the same as the number of independent dealers that the FTC erroneously includes in its estimate. Thus, the FTC's regulated entity estimate is fairly accurate numerically, but its understanding of the specific entities that comprise that universe is erroneous.[6] The average new vehicle dealer (NAICS 44111) employs 65 people and at least half fall within the SBA size standard. NADA has no information on the number of small businesses in the other covered "dealer" categories. The RFA requires the FTC to accurately determine the number of small businesses that would be impacted by the Proposed TRR in order that it properly analyze the nature and degree to which they would be impacted.

[1] 87 Fed. Reg. at 42035.
[2] 87 Fed. Reg. at 42045.
[3] 87 Fed. Reg. at 42035
[4] 87 Fed. Reg. at 42035.
[5] 87 Fed. Reg. at 42035.
[6] 87 Fed. Reg. at 42045.

Table II Regulatory Flexibility Act Analysis	
FTC RFA Analysis	**NADA Response**
5. Identification of Duplicative, Overlapping, or Conflicting Federal Rules Although other federal statutes, rules, or policies address motor vehicle sales and financing, the FTC states that it has not identified any duplication, overlap, or conflict with the proposal.[7]	The FTC's statement is inaccurate. As NADA discusses in its comments, the Proposed TRR problematically duplicates, overlaps with, and conflicts with other federal law. In addition, NADA's comments and those submitted by numerous state dealer associations also discuss the intersection of the Proposed TRR with various state UDAP and other laws.
6. Description of Any Significant Alternatives to the Proposed Rule The FTC envisioned and drafted the Proposal TRR mindful that most dealers are small entities, and thus did not include alternative compliance mechanisms for small businesses. The FTC states that because of the relative size of the automobile market compared to other types of dealers, and the greater availability of relevant information for this market, its preliminary analysis exclusively considers motor vehicle dealers, and concludes that its analysis and results are representative of most dealers and transactions, and that expanding the scope of its analysis to other dealers is unlikely to lead to different conclusions.[8]	As noted above, the FTC has not accurately characterized the nature and scope of the small businesses that would be regulated by the Proposed TRR. Moreover, prior to issuing its proposal, the FTC neither attempted to consult with, survey, or otherwise study the dealers it intended to regulate, nor did it attempt to examine whether differing sets of potential mandates should apply to small dealers vs. large dealers. For example, there is no evidence suggesting that the FTC considered (1) different compliance or recordkeeping mandates for small entities, (2) clarifying or simplifying compliance or recordkeeping mandates for small entities, or (3) exempting certain or all small entities from all or part of its rule. The FTC's obligations under the RFA and under E.O. 12866 include more than the proper consideration of appropriate accommodations for small businesses. Of great importance is the obligation of the FTC to consider alternatives to *doing a rule at all.* In its comments, NADA discusses the FTC's failure to consider any such alternatives.
The FTC uses 10 years in its baseline scenario as its rules are subject to review every 10 years. Quantifiable aggregate benefits and costs are summarized as the net present value over this 10-year time frame. Quantifiable benefits derive from time savings due to greater price transparency leading to a more efficient shopping and sales process. Quantifiable costs primarily reflect the resources expended by dealers in developing the systems necessary to comply with the Proposed TRR. The discount rate reflects society's preference for receiving benefits earlier rather than later; a higher discount rate is associated with a greater preference for benefits in the present. The present value is obtained by multiplying each year's net benefit by the discount rate equal to the number of years in the future the net benefit accrues.[9]	As discussed below, the FTC's benefits calculations are both misplaced and grossly inaccurate. The FTC's cost calculations, while not necessarily misplaced in that they attempt to assess the compliance costs associated with the Proposed TRR's up front and ongoing disclosure and recordkeeping mandates, also are grossly inaccurate.
Estimated Benefits of Proposed Rule	
1. Consumer Time Savings When Shopping for Motor Vehicle Dealers The FTC claims that the Proposed TRR's mandates to disclose relevant prices, and its prohibitions on misrepresentations would save consumers time when shopping for motor vehicles as the provision of salient, material information early in the process would eliminate time spent pursuing misleading offers. The FTC further claims that its enforcement records show that consumer search and shopping behaviors are sometimes influenced by deceptive advertising that draws them to dealers in pursuit of an advertised deal, only to find out at some point later in the process (if at all) that the advertised deal is not actually available to them. The FTC further claims that motor vehicle consumers frequently begin the process of a motor vehicle transaction by visiting a dealer in response to an ad or initiating negotiations in response to a quoted price that is incomplete, and then later abandon the transaction when additional information is revealed. The FTC states that bait-and-switch or deceptive door-opener advertising has the effect of wasting a consumer's time traveling to and	NADA's comments discuss in detail the inadequacy of the FTC's benefits analysis. NADA also notes that, in Table 2.1 in the NPRM, the FTC points to U.S. Department of Transportation (DOT) Statistics[11] in support of its claim that there were 62.1 million covered transactions in 2019.[12] This 62.1 million transaction number is grossly inaccurate for the following reasons: First, the FTC appears to have double-counted the new vehicle lease transactions listed in DOT's table. The U.S. DOT lists 57,865,000 total new and used vehicle sales and leases in 2019. The difference between this number and the 62.1 million number claimed by the FTC is 4,242,000, which coincides with the number of new vehicle leases listed in the DOT table. Second, the FTC wrongly assumes that all used vehicle transactions fall within the scope of its proposal by claiming that all 40,807,000 used vehicle transactions in the DOT table were made by either franchised or independent dealers subject to the Proposed TRR. But this 40.8 million transaction number includes those involving only private parties, which would not be subject to the Proposed TRR. Also, as stated previously, most of the transactions by independent dealers would not be subject to the

[7] 87 Fed. Reg. at 42035
[8] 87 Fed. Reg. at 42035-36.
[9] 87 Fed. Reg. at 42036.
[11] U.S. DOT Bureau of Transportation Statistics, National Transportation Statistics, (2021). Available at: https://www.bts.dot.gov/sites/bts.dot.gov/files/2021-12/NTS-50th-complete-11-30-2021.pdf. (Table 1-17, p. 21).
[12] 87 Fed. Reg. at 42037.

Table II Regulatory Flexibility Act Analysis	
FTC RFA Analysis	**NADA Response**
negotiating with a dishonest dealer time which would otherwise be spent pursuing truthful offers in the absence of deception. The FTC then notes that since it *lacks adequate information to determine the quantity of such abandoned transactions and the amount of time spent pursuing them,* this benefit is unquantified in the current analysis. The FTC acknowledges that many consumers end up completing transactions under the status quo—either because full revelation of prices and terms still result in mutually beneficial transactions, or because of constraints on the time consumers can dedicate to their search. But the FTC claims that even these consumers spend unnecessary time discovering information that dealers would be required to disclose earlier under the proposal. The FTC claims further that these disclosure mandates would improve information flow and consumer search efficiency, including but not limited to, curbing the influence of deception on consumer search and shopping behavior. Ultimately, the FTC asserts, without support, that the Proposed TRR's provisions prohibiting misrepresentations and requiring price transparency would result in *each consumer who ends up purchasing a vehicle would spend 3 fewer hours shopping online, corresponding with dealerships, visiting dealer locations, and negotiating with dealer employees per motor vehicle transaction.* The FTC then uses 62.1 million motor vehicle purchase, finance, and lease transactions per year to calculate a total time savings of more than 186.3 million hours per year. The FTC next applies an hourly rate of $22.20 per hour (based on average rate of $27.07 per hour x 82%) to claim a total time savings benefit for all completed transactions of $4.1 billion per year, which translates to a present value of between $31.1-$36.3 billion.[10]	Proposed TRR. The FTC must subtract from its 62.1 million transaction number both those involving only private parties and those involving independent used vehicle dealers not covered by its proposal. Lastly, the FTC must assess and add to that subtotal the total number of new and used transactions made by the other "motor vehicle dealers" that would be subject to its Proposed TRR. All told, NADA suggests that less (and likely significantly less) than 40 million new and used motor vehicle transactions in 2019 would fall under the Proposed TRR. As explained in NADA's comments, the FTC's assertion that consumers would save three hours per transaction due to the Proposed TRR's mandates is without any basis or foundation. To arrive at this number, the FTC points to a 2020 Cox Automotive Study[13] stating that consumers spend roughly 15 hours researching, shopping, and visiting dealers per motor vehicle transaction. Notably, a 2021 version of the Cox Study[14] concludes that the total time spent by consumers in the car buying process fell in 2021 to an average of 12 hours and 27 minutes on shopping, researching, and visiting dealers. It is well recognized within the auto retailing industry that the downward trend in the amount of time consumers spend researching, shopping, and visiting dealers will continue into the foreseeable future as dealers increasingly conduct motor vehicle transactions digitally.[15] This trend reflects both the degree to which (1) dealers are increasingly utilizing digital marketing and transactional tools and (2) consumers are moving to online sources for: A) background research on features and pricing; B) online dealer advertising and transactional portals. To better understand this very important trend in motor vehicle transactions, the FTC must conduct a thorough review of how much time consumers now spend, and in the future would spend, researching, shopping, and visiting dealers per motor vehicle transaction. By way of example, J.D. Power has studied for 36 years how much time is spent at dealerships during the sales process.[16] The FTC then goes on to assume, *without explanation or support,* that 20% of the total time spent researching, shopping, and visiting dealers per motor vehicle transaction would be eliminated should the proposal take effect. This also assumes that *all* shopping experiences and transactions include additional time due to dealership misrepresentations. Again, as explained in the comments, the FTC is perpetuating a flawed narrative of widespread misconduct and underestimating the intelligence of customers. As further discussed in NADA's comments, the more accurate conclusion is that the mandates in the Proposed TRR would result in an *increase* in the amount of time spent by consumers researching, shopping, and visiting dealers per motor vehicle transaction. The bottom line is that no consumer time savings would result from the mandates in the FTC's Proposed TRR and, in fact, the FTC's proposal would likely result in an *increase* in the time consumers would otherwise spend, per transaction.

[10] 87 Fed. Reg. at 42036-37.

[13] Cox Automotive, 2020 Cox Automotive Car Buyer Journey Study Overview (2020). Available at: https://b2b.autotrader.com/app/uploads/2020-Car-Buyer-Journey-Study.pdf.

[14] Cox Automotive, 2021 Cox Automotive Car Buyer Journey Study Overview (Jan. 2021). Available at: https://www.coxautoinc.com/wp-content/uploads/2022/01/2021-Car-Buyer-Journey-Study-Overview.pdf.

[15] Cox Automotive, Digitization of End-to-End Retail (Jan. 2021). Available at: https://www.coxautoinc.com/wp-content/uploads/2021/01/2021-Digitization-of-End-to-End-Retailing-Study-Highlights.pdf.

[16] *U.S. Sales Satisfaction Index Study*, J.D. Power, https://www.jdpower.com/business/automotive/us-sales-satisfaction-index-ssi-study (last visited Sept. 10, 2022). *Despite Lack of New-Vehicle Inventory, Sales Satisfaction Unchanged from Year Ago,* J.D. Power, https://www.jdpower.com/business/press-releases/2021-us-sales-satisfaction-index-ssi-study.

Table II Regulatory Flexibility Act Analysis	
FTC RFA Analysis	**NADA Response**
2. Consumer Welfare Benefits from Curbing Non-Mutually Beneficial Transactions or Price Effects of Deception The FTC claims that, due to the obfuscation and deception it has identified in prior law enforcement actions, some consumers end up consummating transactions where the price paid is more than the value they obtain from the product or service (*i.e.,* the highest price the consumer would be willing to pay were the product marketed transparently and non-deceptively). In cases where the value consumers obtain still exceeds the cost of providing the product or service, there is still a net gain in social welfare from that transaction despite the deception, as resources are allocated to a higher value use. However, those consumers may receive less benefit (*i.e.,* lower consumer surplus), and their dealers may receive higher profits in some transactions relative to a full information benchmark because of the higher prices that can be sustained through deception. Therefore, deceptive marketing can result in a transfer of welfare from consumers to dishonest dealers. The FTC then states that, while it is possible that the proposal may prevent transfers of wealth that occur through prices supported by deception, the overall effects of the proposal on pricing and competition are difficult to predict. It goes on to assert that typically, transfers of welfare from one set of people in the economy to another are documented in a regulatory analysis, but do not weigh on the outcome, but as the redistribution of welfare from deceptive firms to victimized consumers is part of the FTC's mission, transfers of this kind might weigh in favor of proceeding with the proposal. The FTC also asserts that, in cases where the value a consumer obtains is less than the cost of providing the product, there is a net *loss* in social welfare from the transaction, as resources are allocated to a lower value use. Even under the lower prices that may result from prohibiting the deceptive or unfair practices considered in the proposal, no such transaction would transpire. These cases are emblematic of the reduction in social welfare caused by the information asymmetry under the status quo. The FTC then asserts that this information asymmetry between dealers and consumers would be mitigated, and some fraction of these transactions (and the associated welfare losses) would be prevented under the Proposed TRR.[17]	Notwithstanding its obligations under the RFA, the FTC fails to provide any support for, or quantification of, "non mutually beneficially transactions," the "consumer welfare benefits" associated with eliminating such transactions, or how the TRR would reduce those transactions relative to alternatives. The number of such transactions, and any benefits that would result from their elimination, likely are too small to measure. As discussed in NADA's comments, motor vehicle customer satisfaction is strong and on the rise with survey after survey showing that most retail vehicle purchasers have a positive experience at and with their selling dealer. The FTC has failed to account for this overwhelming evidence on customer satisfaction, or to assess the real-world transaction experience of retail motor vehicle purchasers. Such high satisfaction rates suggest that the FTC cannot show, let alone quantify, a significant number of "cases" or "fraction of transactions" where the benefits were not "mutually beneficial." It also suggests that the Proposed TRR is a solution in search of a problem and that, as mandated by the RFA, the FTC should have considered and analyzed alternatives that impose fewer burdens and costs on dealers and their customers while targeting in a focused manner those small number of "cases" or "fractions of transactions" where deceptive or unfair practices occur.
i. Advertising Misrepresentations The FTC asserts that some price advertising misrepresentations, the availability of rebates/discounts, monthly payment amounts, and amount due at signing are discovered before transactions are consummated. The FTC also asserts that consumers who learn that these deceptive door-opener claims were false or misleading, update their beliefs about the deal being presented, and either walk away from the transaction or proceed with the it anyway because they do not believe that they would find a better offer (especially considering the time and cost to start the process anew, which can be prohibitive). For these individuals, the time spent negotiating under false pretenses and visiting dishonest dealers is a source of injury. The FTC goes on to assert that, in other cases, however, the inaccurate beliefs engendered by such misrepresentations can remain through the transaction consummation. For example, if actual terms differing from those that attracted consumers are buried in the paperwork, they can only discover them at signing. Consumers may persist in the belief that they are getting the deals	Motor vehicle advertising misrepresentations are, as they should be, already prohibited under Section 5 of the FTC Act and under state law. That said, the FTC provides no credible analysis to support its assertions regarding systemic consumer behavior in response to motor vehicle advertising misrepresentations. The RFA requires the FTC to identify with specificity the problems it seeks to address and to evaluate alternatives to address those problems. This is especially necessary where, as with the poorly defined mandates in the Proposed TRR, the costs imposed on dealers and consumers would be very large.

[17] 87 Fed. Reg. at 42037-38.

Table II Regulatory Flexibility Act Analysis	
FTC RFA Analysis	**NADA Response**
that the misleading advertising or salesperson's verbal misrepresentations suggested. Only after completing their transactions, if ever, may consumers realize that they have been misled into deals that they would not have agreed to with full knowledge of the terms. For these transactions, the cost may exceed the consumers' lost time, provided that the true value they would receive is less than the dealers' cost. In these cases, transactions reduce social welfare. As discussed above, these misrepresentations may also have price effects that result in transfers from the consumer to a dishonest dealer, which the Proposed TRR would reverse to some extent. The FTC concludes that by prohibiting advertising misrepresentations and enhancing the flow of truthful information to consumers, the Proposed TRR would reduce the number of inefficient transactions. Fewer consumers would end up consummating transactions that do not benefit them but occur under the status quo due to false beliefs propped up by misleading advertisements or other dealer misrepresentations. The FTC concludes that this would not necessarily imply an overall reduction in vehicle sales, as consumers may instead find transactions with true terms that are mutually agreeable.[18].	
ii." Add-On" Products and Services The FTC states that dealers typically offer a host of optional "add-on" products and services that are sold in a bundle with the vehicle (*e.g.,* extended warranties, service and maintenance plans, payment programs, guaranteed asset protection insurance, emergency road service, VIN etching, undercoating, etc.). It further states that these "add-on" products are often not discussed until near the end of transactions, sometimes after financing terms have already been settled, and that some unscrupulous dealers then suggest that some set of "add-ons" may be required (even if they are truly optional), inflating the price of the bundle beyond what consumers thought they had negotiated. Alternatively, "add-ons" that are declined by consumers or not discussed at all may simply be "packed" into the contract paperwork near the end of the process without the consumers' knowledge. The presence or true price of these packed "add-ons" often can be obscured by dealers only reporting the monthly payment amount to consumers in these late stages of the transaction. The FTC then asserts that in cases where such misrepresentations are discovered before transactions are completed, consumers would learn of "add-on" prices and "add-on" features, decide whether the product is worth the price being charged, and either proceed or not. Again, the consumers' time is wasted, but the transaction itself still yields an increase in social welfare. Price effects of this type of deception may also result in transfers from the consumer to a dishonest dealer, the reversal of which may or may not weigh on the net benefits of the proposal depending on whether redistribution of welfare from dishonest dealers to consumers is a goal of the Proposed TRR. The FTC also states that in cases where consumers never learn of misrepresented or packed "add-ons," they may end up paying for "add-ons" that they would not have purchased if dealers had been transparent about the terms of the contract. Additionally, when the dealers' cost of providing "add-ons" exceeds the true value "consumers" receive, transactions reduce social welfare, as resources are allocated to lower value uses. The timely flow of	As noted throughout, unfair or deceptive acts or practices involving voluntary protection products (VPPs), or so-called "add-ons," are, as they should be, already prohibited under Section 5 of the FTC Act and under state law. That said, the FTC acknowledges that it lacks any analysis in support of its assertions regarding consumer behavior in response to unfair or deceptive acts or practices involving "add-ons" and has not quantified how often misrepresentations involving "add-ons" occur. The RFA requires the FTC to identify with specificity the problems it seeks to address and to evaluate alternatives to address those problems. This is especially necessary where, as with the poorly defined mandates in the Proposed TRR, the costs imposed on dealers and consumers would be very large, and where, as discussed in NADA's comments, each of the disclosure mandates in the Proposed TRR regarding VPPs is currently being made today at a more logical and consumer-friendly point in the sales process.

[18] 87 Fed. Reg. at 42038

Table II Regulatory Flexibility Act Analysis	
FTC RFA Analysis	**NADA Response**
truthful information facilitated by the proposal would empower consumers to avoid such transactions and generate benefits. Lastly, the FTC claims that some dealers would charge consumers for "add-ons" from which they cannot reasonably expect to receive any benefit. For example, guaranteed asset protection (GAP) is an insurance product that covers the difference between what a car is worth and the principal on one's loan to address when a vehicle is totaled and one's auto insurance payout would not cover the debt. In some circumstances, financing contracts would outright foreclose this possibility (*i.e.,* where a down payment is high enough so that a customer would never owe more than the car is worth). Some dealers, however, would still market GAP coverage to such consumers, extracting payments for a product that would never provide any benefit to them. In these cases, it is obvious that the transaction should never occur when a consumer has full information. The FTC asserts that the Proposed TRR would prohibit such charges, thus eliminating these transactions and generating benefits. The FTC acknowledges that without additional information, it is difficult to quantify the number of transactions or potential price effects that would be avoided by the proposal.[19]	
3. Benefits Related to More Transparent Negotiation The FTC asserts that an additional, albeit difficult to quantify, benefit is a reduction in "discomfort and unpleasantness" that consumers associate with negotiating motor vehicle transactions under the status quo. According to the 2020 Cox Automotive Car Buyer Journey study, filling out paperwork, negotiating vehicle price, and dealing with salespeople are three of the top four frustrations for consumers at car dealers. The FTC then asserts that the proposal would, through greater transparency, mitigate all three of these issues. As a result, the time consumers spend shopping and negotiating motor vehicle transactions would be less stressful.[20]	The FTC's claim that the mandates in the Proposed TRR would mitigate consumer frustrations related to paperwork, negotiating vehicle price, and dealing with salespeople are without support or foundation. First, the FTC has made no attempt to quantify any "reduction" in alleged "discomfort or unpleasantness." As noted throughout NADA's comments, customers are generally very pleased with their motor vehicle shopping experiences and the unjustified and confusing mandates in Proposed TRR would only serve to confuse and frustrate those customers. Second, customer satisfaction, while a critical business objective for motor vehicle dealers, falls outside of the scope of Section 5 of the FTC Act and thus outside of the FTC's regulatory authority. Under the RFA, benefits must measurable and must directly relate to the legal purpose of the proposal. As noted in NADA's comments, the FTC should engage in thorough stakeholder engagement and consumer testing to ensure that any proposed benefits are realistic.
Estimated Costs of Proposed Rule	
1. Prohibited Misrepresentations: Section 463.3 The FTC asserts that the misrepresentations prohibited by the Proposed TRR are all material and would therefore be considered deceptive under Section 5 of the FTC Act. As a result, motor vehicle dealers who are compliant with Section 5 would continue to be compliant under the TRR. The FTC points out that Table 3.1 includes a scenario where no additional reviews of potential misrepresentations would be conducted, but notes that because of the enhanced penalties associated with violating the Proposed TRR (versus a *de novo* violation of Section 5 of the FTC Act), dealers may choose to incur additional administrative burdens and costs to help ensure compliance. Consequently, a second scenario in Table 3.1 has dealers employing professionals to engage in additional compliance reviews for all new advertisements, websites, listings, etc. For this scenario, the FTC assumes that a professional would spend 5 additional minutes reviewing each public-facing representation, and that each dealer produces an average of 150 unique marketing representations per year. Using a compliance officer labor rate of $26.83 per hour, the FTC estimates a total compliance review cost of $15.6 million per year (based on 46,525 dealers x 150 reviews per dealer, on average x 5/60 hour. Total	The FTC significantly underestimates the compliance review costs and additional annual training costs that would be required by the Proposed TRR. Further, as discussed in NADA's comments and in Table I (Attachment 18), the broad nature of proposed Section 463.3 would require dealers to create, use, and keep records of additional forms, scripts, disclosures, and related training, imposing unnecessary costs for both dealers and their customers. Proposed Section 463.3 also would result in longer transaction times. As also stated above, the FTC's 46,525 dealer estimate seems reasonable. However, the FTC's estimate of 150 reviews and of five minutes per review both fall short given that the actual average number of per dealer reviews is likely to be several times 150, and that each review likely would take at least 15 minutes. There are at least two reasons why these reviews would take at least 15 minutes. First, as stated in Table I (Attachment 18), dealers typically do not fully control the advertising platforms they use given the direct involvement of the vehicle OEMs with which they have sales and service agreements, and that of other third parties. Also, many dealers, and especially small business dealers do not employ internal compliance officers or attorneys who could conduct marketing reviews. Consequently,

[19] 87 Fed. Reg. at 42038.
[20] 87 Fed. Reg. at 42038-39.

Table II Regulatory Flexibility Act Analysis	
FTC RFA Analysis	**NADA Response**
present value estimates for such costs range from $137.1-117.3 million.[21].	they would need to pay outside vendors to ensure compliance, which would necessarily increase both the time and cost involved with each review. The RFA requires the FTC to properly assess the costs of the Proposed TRR, especially as they would impact small businesses. It also requires the FTC to examine and consider less costly alternatives. With respect to the Proposed TRR's prohibited misrepresentations mandates, the FTC has failed to do either.
2. Required Disclosure of Offering Price in Advertisements and in Response to Inquiry: Section 463.3(a) The Proposed TRR would require dealers to disclose an Offering Price in advertisements that reference individual vehicles, in response to consumer inquiries about individual vehicles, and in the disclosures required at various points in a negotiation. Since dealers already choose prices for all vehicles under the status quo, Table 3.2 contains a scenario involving no additional cost for dealers to comply. A second scenario in Table 3.2 accounts for the increased costs to dealers resulting from the increased importance of pricing decisions under the Proposed TRR. The FTC considers the marginal costs to dealers associated with calculating prices that conform to the proposal. The FTC also assumes that all dealers would incur some upfront costs to create/update pricing models that incorporate the proposal's mandates. And the FTC assumes that each dealer would make a one-time investment in eight sales and marketing manager hours and eight programmer hours to reformulate their pricing system to comply with the Proposed TRR's required disclosures. At rates of $63.93 and $28.90, respectively, the FTC estimates a total pricing reformulation cost of $34.6 million (based on 46,525 dealers x 8 hours at $63.93 and 8 hours at $28.90). The FTC further assumes that the marginal cost of including this information in response to consumer inquiries about specific vehicles would be negligible to the extent that dealers would respond to such inquiries under the status quo baseline. If, however, this Proposed TRR results in some dealers not responding at all to consumer inquiries about specific vehicles, there may be associated costs to consumers and dealers relative to the baseline. The FTC has not quantified the extent to which such behavioral responses would occur or what the welfare costs of those adjustments would be. There is also an opportunity cost to dealers and consumers associated with the advertising Offering Price mandate. Dealers that choose to convey the same amount of information about offered vehicles must reformat their advertisements and spend the required resources to do so. Alternatively, dealers must choose which information would be replaced by the mandated Offering Price disclosure. Finally, it is also possible dealers would elect to refrain from advertising individual vehicles or to respond to consumer inquiries about specific vehicles. This would require consumers to seek this information elsewhere, increasing their costs of search. Since these opportunity costs are difficult to estimate, the FTC does not include them.[22]	As discussed in NADA's comments, it would be difficult to establish an upfront pricing model in conformance with the Proposed TRR, and unlikely that any small dealership would be able to achieve it without significant support. As discussed, vehicle prices change – particularly used vehicles, and sometimes frequently – based on market conditions, consequently ensuring that Offering Prices are accurate would often be difficult. The FTC incorrectly assumes that, once calculated, the cost of including Offering Price information in response to consumer inquiries involving specific vehicles would be negligible. As noted in Table I (Attachment 18) and in the Offering Price discussion in NADA's comments, the Offering Price disclosure mandate set out in the Proposed TRR is very broad and would require a significant expansion in disclosure, legal review, and document storage. The FTC's estimates fail to include these issues, or the time it would take for dealers to make Offering Price disclosures and, importantly, the time it would take for customers to review, discuss, and understand, such disclosures. It is estimated that for any given consummated new or used vehicle transaction, there would be an average of three Offering Price disclosures based there being an average of three dealer-customer discussions regarding three specific motor vehicles, per transaction. This impacts the Proposed TRR's cost estimates in two ways. First, it impacts the total number of disclosures and thus the total cost of making those disclosures. Second, it points to the fact that each time an Offering Price disclosure needs to be made, it would delay the transaction. Consequently, in addition to the cost of making and receiving and discussing Offering Price disclosures, the FTC must consider the cost of these transaction delays.
3. Required Disclosure of "Add-on" List and Associated Prices: Section 463.4(b) The Proposed TRR would require dealers to	The FTC underestimates the time and resources necessary to develop" Add-on" lists that comport with its very broad proposed definitions of "Add-

[21] 87 Fed. Reg. at 42039

[22] 87 Fed. Reg. at 42039-40.

Table II Regulatory Flexibility Act Analysis	
FTC RFA Analysis	**NADA Response**
disclose an itemized menu with prices of all optional "add-on" products and services at all dealer locations and on all dealer-operated websites, online services, and mobile applications. As laid out in Table 3.3, the FTC assumes that dealers would incur upfront costs to create master "Add-on" Lists and would employ a finance manager for five hours at a rate of $65.54, a compliance manager for one hour at a rate of $26.83, and a programmer for eight hours at a rate of $28.90 to do so. The FTC also assumes that each dealer with an online presence (assumes 81%) would employ eight additional hours of programmer time to implement such a system across their online and mobile applications. Lastly, the FTC claims that the periodic revision of these lists would require one hour of clerical staff time per year, per dealer, at a rate of $18.37. All told, the FTC estimates the present value of compliance costs for the development, posting, electronic distribution, and annual review of "Add-on" Lists to total in the range of $42.4-43.5 million.[23]	on," "Add-on Products," and "Add-on List."[24] See NADA's comments for a further discussion of these terms. The FTC also fails to provide any basis for its task time estimates or any explanation of the assumptions it is making in proffering that estimates. For example, it does not explain its assumptions regarding how many different "Add-ons" an average dealership sells, which is critical to determining how many hours it may take to complete an "Add-on" list. These lists would be lengthy, with hundreds if not thousands of items per dealer. Moreover, they would vary widely by vehicle make and model, and thus would be very time intensive to develop and maintain. For example, for a single truck model at just one GM store, an "Add-on" list might include some 600 items that could be added before finalization of a purchase. See Attachment 16. The development of "Add-on" lists would require dealerships to work with, among others, their: • OEMs who manufacture vehicle "Add-ons" for sale through their dealerships to determine what may apply for each vehicle make and model; • financial product providers to determine acceptable price ranges; • web and IT developers to modify dealership websites and mobile applications; and • attorneys to review for compliance. Outreach to the above-mentioned parties would be significantly more difficult for small dealers lacking the staff internally to perform this work. The FTC underestimates the labor involved for "Add-on" list development and posting. A more reasonable expectation would be that 100% of dealers would maintain an online presence and that integrations across platforms would be necessary for all dealers. But given the databases and number of entries involved and the need to coordinate with IT and website vendors, significantly more programmer time would be required. Moreover, the periodic review and revision of "Add-on" lists to ensure that they remain accurate, and the related coordination with multiple parties and vendors, would involve several more that one hour of clerical staff time per dealer. Importantly, the RFA requires the FTC to identify the degree to which these costs would impact small businesses and to identify less burdensome alternatives. This it has not done.
4. Required Disclosure of Total Financing/Contract Costs: Section 463.4(d) The Proposed TRR requires dealers to disclose, in any transaction featuring a monthly payment, the total cost of the financing/leasing contract. In any comparison of two contracts with different monthly payments, dealers also would disclose that the contract with the lower monthly payment features a higher total cost (if true) and disclose the total cost corresponding to each monthly payment offer. Table 3.4 considers two scenarios for implementing these mandates. In the first, dealers incur a one-time, upfront cost when designing these disclosures and informing staff of their obligations to provide them but incur negligible per transaction costs. This scenario assumes that dealers already generate the required information during the normal course of business and only need	As discussed in NADA's comments and in Table I (Attachment 18) , these disclosure mandates would impermissibly and imprudently intrude on the time-tested content, form, and timing disclosures developed by the FRB to inform consumers of the cost of motor vehicle credit and leasing and would create confusion by introducing new meanings for terms that currently have recognized (and statutorily required) definitions. In addition, these mandates, like all mandates related to the Proposed TRR, necessarily would involve significant annual training requirements for new employees given that, according to NADA's 2021 Dealership Workforce study (referencing 2020 data), the average dealer experiences an annual sales consultant turnover rate of 67%. Dealers cannot provide a total cost figure that applies to *any* consumer at the outset of their relationship for a finance price for a vehicle because they do not know what the finance price would be. Dealers cannot with any

[23] 87 Fed. Reg. at 42040.
[24] Sections 463.2(a) and (b).

Table II Regulatory Flexibility Act Analysis	
FTC RFA Analysis	**NADA Response**
convey it verbally at an appropriate point in the transaction. In the second scenario, dealers incur additional costs per financed transaction to communicate the required disclosures in writing. In this scenario, dealers may or may not generate the required information during the normal course of business and/or may find it necessary to maintain a documentary record of compliance. The upfront costs of complying with this provision are relatively limited; every dealer must create a template disclosure script that contains this information and must communicate it to sales staff so that they understand their obligations. The FTC assumes a compliance manager would spend eight hours creating this disclosure and informing sales staff. At a labor rate of $26.83 for compliance managers, the total cost is estimated at $10 million (based on 46,525 dealers x 8 hours x $26.83 per hour). For the second scenario, the FTC estimates that there are roughly 32 million vehicle transactions each year subject to this requirement (financed sales of new and used vehicles plus leased vehicles). The FTC assumes that a sales employee would spend two minutes per vehicle populating these disclosures and that dealers would incur a printing cost of $0.15 per transaction. At a labor rate of $21.84 for sales staff, the FTC estimates a total additional cost under this scenario of $213.4-$249.5 million.[25]	certainty know what rates consumers would qualify for with third-party finance sources, what terms consumers would want, or any other details of the finance transaction. For these reasons, the FTC's second scenario should be the only one considered. And the FTC's estimates of the costs associated with that scenario are too low in that they fail to account for disclosures being provided multiple times as terms change, or to assess the time involved with the discussing, reviewing, and completing forms with customers.
5. Prohibition on Charging for Add-ons in Certain Circumstances: Section 463.5 **Section 463.5(a):** The Proposed TRR prohibits dealers from marketing or selling "add-on" products or services from which the targeted consumer would not benefit. This mandate would require dealers to have a transaction-level system for identifying consumers who would not benefit or, in some cases, to predict potential consumer benefits from "add-on" products and services. This system would have to be supplemented with policies and transaction-level rules about when "add-on" products or services could be offered. Because dealers would not always have all relevant information at their disposal, such systems are likely to falsely identify some transactions as non-beneficial for consumers. In cases where consumers would benefit in excess of the price of "add-on" products or services, Section 465(a) would result in welfare costs associated with the foreclosure of such transactions. The FTC, recognizing that these costs are difficult to quantify, has not done so. The proposal also prohibits dealers from charging for optional "add-on" products or services unless certain disclosures are made at various points in the buying process. These include: **Section 463.5(b)(1):** Disclosing the total cost of purchasing a vehicle in cash—without any charges for optional "add-ons" or financing—in a format that itemizes the Offering Price; any discounts, rebates, or trade-in values; and required government charges, before referencing any financing terms (other than Offering Price) for a specific vehicle or consummating a cash transaction. Dealers must further indicate clearly that consumers have the option to purchase the vehicle for this amount in cash and must obtain the consumer's signed declination of that option.	The Proposed TRR's prohibits dealers from charging for "add-on" products or services unless certain requirements are met. The RFA mandates that the FTC identify the cost and burdens associated with this mandate, especially with respect to small businesses, and to identify feasible and less burdensome alternatives. The FTC underestimates how long it would take to develop necessary forms. Dealers typically work with forms vendors, attorneys, compliance professionals, and others to develop new forms and to deploy a rigorous forms review process. These interactions will likely entail many more hours than the FTC estimates. Also, as stated above, each disclosure required by proposed Section 463.5 is being disclosed to customers today, but at a more logical and consumer-friendly point in the sales process. Thus, the additional burdens associated with this mandate would be duplicative. The disclosures mandated by Sections 463.5(b)(1) and (b)(2)) do not lend themselves to a standardized disclosure document that could be provided and explained to all customers. As discussed in NADA's comments, highly customized documents would be necessary that would require significant time to use. Moreover, because it must be vehicle and customer specific, and because it would need to be provided well before transaction consummation, several iterations would need to be provided per customer since customers typically inquire about more than one vehicle but rarely buy more than one. Again, the FTC's estimates are based on all dealers covered by the TRR and on all motor vehicle sales by those dealers. The FTC has not properly identified the appropriate number of transactions or dealers subject to the Section 463.5(b)(1), (b)(2) and (b)(3) disclosure mandates. First, the FTC wrongly assumes that all 40,807,000 used on-road vehicle transactions are covered, as not all sales by independent used vehicle dealers and no private sales would be covered. The FTC also assumes without support that approximately 94% of new vehicle sales and 86% of used vehicle sales include optional "add-ons." This is apparently based on a misinterpretation

[25] 87 Fed. Reg. at 42041.

Table II Regulatory Flexibility Act Analysis	
FTC RFA Analysis	**NADA Response**
Section 463.5(b)(2): Disclosing the total cost of financing the vehicle—without any charges for optional "add-ons"—in a format that itemizes the Offering Price; any discounts, rebates, or trade-in values; any cash down payment made; and required government charges, before charging for any optional "add-ons" in a transaction involving financing. Dealers must further indicate clearly that consumers have the option to finance the vehicle for this amount and must obtain the consumer's signed declination of that option. **Section 463.5(b)(3):** Disclosing the total cost of purchasing or financing the vehicle plus the "add-ons" selected by the consumer—either as a separately itemized total cash price for a non-financed transaction, or a separately itemized total price for a financed transaction, before charging for any optional "add-ons." To comply with these disclosure mandates, dealers would have to design disclosure forms containing the required information, create systems for populating those forms, and provide required disclosures to consumers in writing prior to completing transactions. The FTC assumes that each consumer would receive each Section 463.5(b) disclosure only once during each transaction (if relevant). As shown in Table 3.5, the FTC assumes that each dealer would require eight hours of a compliance manager time, at a rate of \$26.83, and four hours of sales manager time, at a rate of \$63.93, to create these disclosures, and eight hours of programmer time, at a rate of \$28.90, to create a system to populate these forms when provided inputs by sales staff. The FTC further assumes that sales staff would spend 2 minutes per disclosure, at a rate of \$21.84, updating, printing, and delivering these forms to consumers, and that the physical cost of each disclosure would be roughly \$0.11 each. The FTC assumes that one disclosure would be required for all new and used vehicle sales, that an additional disclosure would be required for transactions with optional add-ons (94% new and 86% used), and that a third disclosure would be required for financed transactions with optional add-ons (76% new and 30% used).[26]	of NADA "F&I penetration" data measuring transactions where customers purchased at least one of the following: a finance, vehicle insurance, or GAP insurance contract. Because some customers buy more than one of these products, NADA estimates that many fewer transactions involve them. The FTC also significantly underestimates the scope of this burden by incorrectly assuming dealers would only have to complete these disclosures for vehicles sold. But as explained in NADA's comments, the Section 463.5(b)(1) and (b)(2) disclosures would occur early in the sales process, and not every such transaction would proceed to completion. Lastly, the FTC has fails to account for the time it takes for customers to read, understand, and sign the proposed disclosure forms. As discussed above, each item on the proposed mandatory form is already currently disclosed to customers, but with those disclosures taking place at a more logical and consumer-friendly point in the sales process. Consequently, these mandates would be duplicative, and given the requirements imposed on the FTC by the RFA, they should be eliminated as unnecessary.
6. Requirement to Obtain Express Informed Consent Before Any Charges The proposal would mandate that dealers obtain the express informed consent of consumers before charging them for products or services in association with the sale, financing, or lease of motor vehicles. The FTC states that dealers that are complying with the law currently have policies in place to prevent charges without consent.[27]	As explained in NADA's comments, the mandate in the Proposed TRR to obtain express informed consent would upset years of state law and, in any event, is so vague as to be unworkable.
7. Recordkeeping The Proposed TRR mandates that dealers retain records of all documents pertaining compliance. These recordkeeping requirements include: • Copies of all materially different marketing materials, sales scripts, and training materials that discuss sales prices and financing/lease terms. • Copies of all materially different "Add-on" Lists. • Records demonstrating that all "add-on" charges comply with the Proposed TRR, including calculations of loan-to-value ratios in contracts with GAP Agreements.	As laid out in NADA's comments and in NADA's Responses in Table I (Attachment 18), the costs and burdens associated with the Proposed TRR's recordkeeping mandates would by no means be "incremental." To the contrary, the proposal would impose massive new and costly recordkeeping mandates. For example, dealers would have to keep records pertaining to a myriad of communications including, but not limited to, online website chats, e-mails, text messages, and social media posts involving both dealer-owned and employee-owned devices and occurring both during and after normal business hours. Mandating that dealers develop an apparatus to capture all such communications for tens of millions of new and used vehicle transactions would be extremely

[26] 87 Fed. Reg. at 42041-42.
[27] 87 Fed. Reg. at 42043.

Table II Regulatory Flexibility Act Analysis	
FTC RFA Analysis	**NADA Response**
• Copies of all purchase orders, financing and lease contracts signed by consumers (whether final approval is received), and all written communications with consumers who sign purchase orders or financing or lease contracts. • Copies of all written consumer complaints, inquiries related to "add-ons", and inquiries and responses about individual vehicles. Most of these documents are already being produced in the normal course of business, or the costs of creating them have already been accounted for in this Preliminary Regulatory Analysis. As shown in Table 3.6, the FTC assumes that each dealer would incur the upfront cost of eight 8 hours of programmer time, five hours of clerical time, one hour of sales manager time, and one hour of compliance officer time, at hourly rates of $28.90, $18.37, $63.93, and $26.83, respectively, to upgrade their systems and to create the templates necessary to accommodate the retention of all relevant materials. In addition, loan-to-value calculations would be required for all transactions with GAP Agreements, the cost of which has not been accounted for in previous sections of the Preliminary Regulatory Analysis. The FTC assumes that each dealer would employ one additional minute of sales staff time per transaction with a GAP agreement to populate and store all relevant materials. The FTC expects that some small dealers may not have the ability to automate these processes in a way that reduces the ongoing costs of recordkeeping to the level stated here. In addition, the expansion of the volume of records that dealers would be required to retain and manage would likely require investments in additional IT systems and hardware. In the absence of information regarding the volume of new data (*e.g.,* numbers of inquiries per dealer, numbers of consumer complaints, communications per consummated transaction, etc.), the FTC has not quantified these capital costs in its Preliminary Regulatory Analysis.[28]	expensive and unrealistic. The FTC is correct in assuming that small dealerships would not have the ability to automate these recordkeeping burdens and would have to perform those functions manually or to hire vendors to facilitate compliance. With respect to specific recordkeeping mandates, including those summarized in the Proposed TRR Table 3.6, see the NADA Responses in Table I (Attachment 18).
D. Other Impacts of Proposed Rule The FTC asserts that the status quo in this industry features consumer search frictions, shrouded prices, deception, and obfuscation, and that dealers likely would charge higher prices than could be supported under the Proposed TRR for several products and services. The FTC claims that prices are likely to adjust in response to the transparency facilitated by the Proposed TRR. Part XII.B of the FTC's Preliminary Regulatory Analysis purports to discuss the benefits that occur when quantities adjust in a more transparent and less deceptive equilibrium. Price adjustments typically serve to transfer welfare from one side of the market to the other. For example, in a typical market if quantity sold remains constant in response to the implementation of a rule but prices decrease, consumer welfare would increase, but producer profits would decrease by roughly the same amount, leaving total social welfare roughly constant. The FTC claims further that if the Proposed TRR curbs price effects caused by *deception,* the transfers caused by these price effects would redistribute welfare away from dishonest dealers and toward consumers. The FTC also claims that deceptive practices by dishonest dealers lead consumers to engage with those dealers instead of honest dealers, and that under the Proposed TRR, some business that	The main foreseeable pricing impact of the Proposed TRR is that the costs and burdens of compliance would inevitably be passed onto customers, thereby increasing the price of motor vehicle sales transactions for customers. In addition, the costs and burdens directly imposed on customers by the Proposed TRR would serve to decrease consumer welfare and would undermine customer satisfaction. The FTC's description without evidence of potential benefits of the proposal cannot stand. The RFA requires the FTC to analyze and assess such hypothetical potential benefits, especially given the proposal's massive cost and burdens on dealers (and especially small business dealers) and their customers.

[28] 87 Fed. Reg. at 42043.

Table II Regulatory Flexibility Act Analysis	
FTC RFA Analysis	**NADA Response**
would otherwise have gone to dealers using bait-and-switch tactics or deceptive door opening advertisements would instead go to honest dealers. Again, assuming that the costs of the firms are similar, any one-for-one diversion of sales from one set of businesses to another is generally characterized as a transfer under the OMB guidelines for regulatory impact analysis. However, in this case, it would represent a transfer from a set of dishonest dealers to honest dealers, which may weigh differently if profits from law violations are not counted towards social welfare in a regulatory analysis. While each provision above would affect consumer prices for vehicles, “add-ons”, financing etc. and the distribution of sales across dealerships, estimating the magnitudes of these effects is difficult and requires information that is currently not available. As a result, the FTC has not attempted to quantify these impacts. However, these transfers should be documented because, at minimum, they inform the distributional effects of the proposal.	

ATTACHMENT 20

FTC Needs to Run Those Numbers Again

Insight

FTC Needs to Run Those Numbers Again

DAN GOLDBECK | SEPTEMBER 1, 2022

EXECUTIVE SUMMARY

- The Federal Trade Commission (FTC) recently published a proposed rule seeking to establish more rigorous regulatory standards for automobile dealerships that – especially for an agency known for its enforcement actions – stands as its most significant rulemaking action in recent memory.
- The FTC expects the proposal to yield tens of billions of dollars in benefits due primarily to time savings for consumers, but a closer look at the agency's underlying assumptions and emerging market trends suggests that such estimates are dramatically overstated.
- The proposal's cost calculations take an overly conservative estimate that, when adjusted to account for more realistic circumstances, make the benefits-to-costs ratio appear at best to be roughly even, in contrast to the 30-to-1 benefits-to-costs ratio put forth in the rulemaking's current analysis.

INTRODUCTION

For many people, the process of buying a car can be a challenging, albeit important one. The amount of effort and time involved in acquiring what is likely one of a person's most valuable material assets (outside of perhaps their home) can be extensive. The Federal Trade Commission (FTC) – armed with regulatory authority granted to it by the Dodd-Frank Act of 2010 – has recently decided to step into the fray here with a proposed rule that would require more rigorous cost disclosure requirements for automotive dealers.

Beyond simply the subject at hand, this proposal is notable because it represents the first time in at least recent history that FTC has promulgated a rulemaking of this magnitude with a cost-benefit analysis. Considering how relatively novel this may be for an agency that is traditionally more focused on enforcement instead of rulemaking, it is perhaps unsurprising to find that, upon greater scrutiny of some key assumptions, the monetized cost-benefit balance is potentially closer to even, if not on the net-cost side, than the roughly 30-to-1 benefits-to-costs ratio the agency's current calculations suggest. Having billions of dollars of potential impact hinge on a few flawed assumptions should give FTC pause and perhaps spur a re-evaluation of this rulemaking's overall direction.

A NOVEL RULEMAKING FOR FTC

According to FTC, "many of the problems observed in the motor vehicle marketplace persist in the face of repeated federal and state enforcement actions, suggesting the need for additional measures to deter deceptive and unfair practices." As such, the agency is invoking its authority under Section 1029 of the Dodd-Frank Act to "to prescribe rules with respect to unfair or deceptive acts or practices by motor vehicle dealers."

In particular, the key parts of the proposed rule's potential new regulatory standards include: "Requiring dealers, whether acting directly or indirectly, to refrain from misrepresentations, provide for material disclosures at key points in the transaction, refrain from the sale of deceptive or unfair add-on products, and require retention of dealers' advertisements and consumer transaction documents." Enshrining these provisions into relevant regulatory code would allow FTC to utilize its authority under Section 19 of the FTC Act to bring legal action against "any person, partnership, or corporation," in the automobile dealer industry, that "violates any rule under [the FTC Act] respecting unfair or deceptive acts or practices."

Per FTC's economic analysis, this proposal would impose nearly $1.4 billion in total costs on automobile dealers to provide roughly $31 billion in benefits to consumers, primarily through expected time savings in the car-buying process. Given the magnitude of these figures, it is one of the more consequential rulemakings of the year thus far. Moreover, it represents (by a wide margin) the most economically significant FTC rulemaking currently on record.

The American Action Forum's (AAF) RegRodeo contains 28 rules from FTC since 2005 that had some quantified cost or paperwork estimate. The most significant rule recorded in RegRodeo beyond this current proposal is a 2010 rule (jointly produced with the Federal Reserve) regarding credit reporting practices that brought an estimated $252 million in total costs. No other proposed or final rule from FTC has costs that exceed the $100 million threshold (since 2005, at least).

Of note, while virtually all of the FTC rulemakings included in RegRodeo draw their estimated economic impact from their discussions of paperwork burdens, this FTC proposal includes a full-blown "Preliminary Regulatory Analysis" that mirrors much of the same structure as other agencies' cost-benefit analyses. This is because a statutory requirement (Section 22 of the FTC Act, 15 U.S.C. 57b-3,) compels FTC to produce such an analysis. Despite being statutorily required, however, a search of FTC final rules that address this provision at all currently yields five entries (essentially 1.2 percent of the more than 400 final rules from FTC currently posted on federalregister.gov).

Yet all five of these entries only mention this cost-benefit analysis section by way of establishing that they do not meet the economic impact threshold that would require a full analysis. As such, if this current automotive dealer proposal were to become finalized it would represent *the only* FTC rule (currently available online, at least) to ever trigger this provision. Given its singular nature, it is more understandable that – as discussed in the following sections – perhaps an agency historically more focused on handing out enforcement decisions on antitrust proceedings could use more refinement in its cost-benefit calculations.

EXAMINING THE BENEFITS

Core Time Savings Estimate

FTC discusses a number of qualitative benefits this proposed rule could produce, but in terms of quantified benefits its core contention boils down to the following table:

Table 2.1—Estimated Benefits of Time Savings for Completed Transactions

	2022-2032
Completed Transactions:	
Number of vehicle transactions per year [a]	62,107,000
Hours saved per transaction	3
Value of time for vehicle shoppers	$22.20
Abandoned Transactions	*Unquantified*
Total Quantified Benefit:	
3% discount rate	$36,337,956,234
7% discount rate	$31,081,811,411

Note: *Benefits have been discounted to the present at both 3% and 7% rates.*

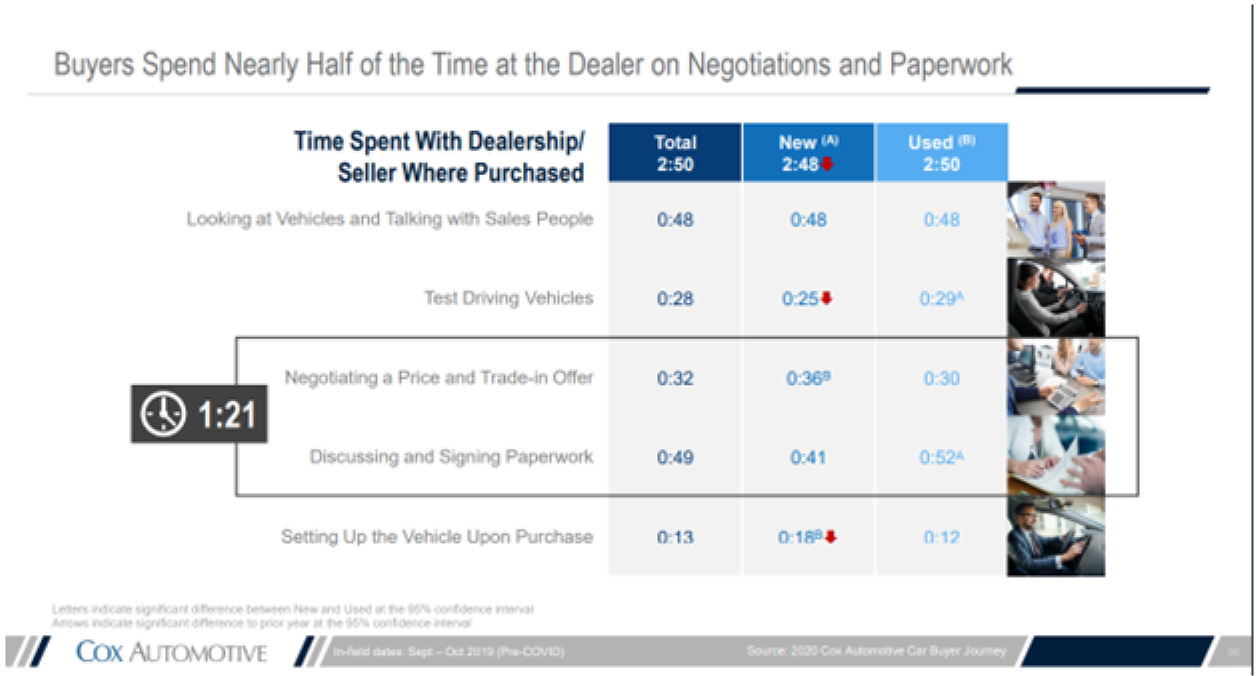
[a] *National Transportation Statistics, Table 1-17.*

Essentially, FTC expects that the clarity afforded to the average consumer by these newly required disclosure materials would save this typical consumer three hours in their car-buying experience.[1] The agency then applies the monetary value of this avoided opportunity cost and extrapolates it out to the overall total number of transactions in a year. This "three hours saved" figure is the most questionable component of these calculations. In footnote 180, FTC explains its assumption thusly:

> According to the 2020 COX Car Buyer Journey study, consumers spent roughly 15 hours researching, shopping, and visiting dealerships for each motor vehicle transaction. 3 hours corresponds to 20% of an average consumer's time spent on such activities. Cox Automotive, *2020 Cox Automotive Car Buyer Journey* 5-6 (2020), *available at* *https://b2b.autotrader.com/?app/?uploads/?2020-Car-Buyer-Journey-Study.pdf*.

First, it should be noted that the FTC doesn't cite the Cox study to support its assertion that the proposed rule will save consumers three hours per transaction. Indeed, the FTC cites the Cox study only to support the claim that consumers spend a total of 15 hours purchasing a car. The FTC then simply calculates 20 percent of 15 hours, and thus arrives at its conclusion that three hours will be saved per transaction.

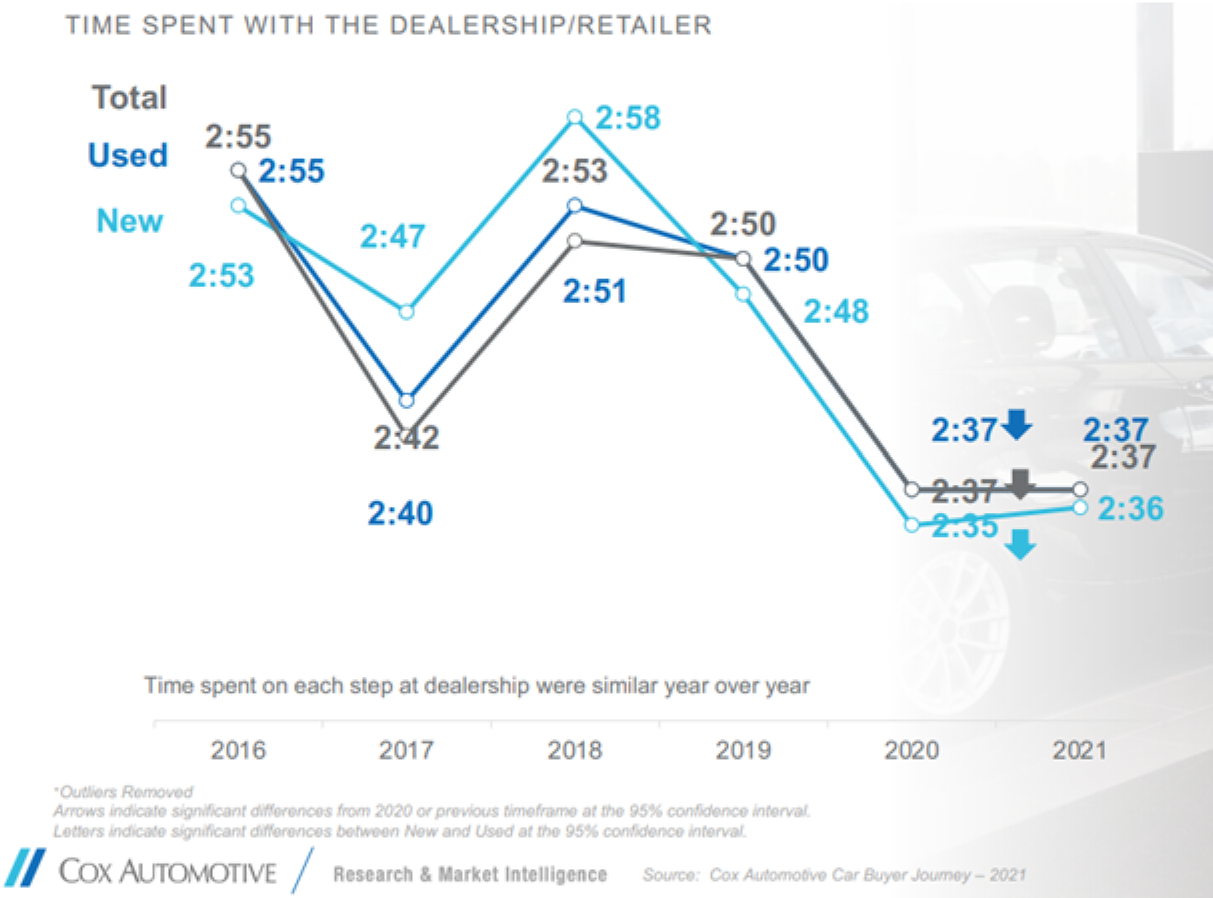
But even if this 20 percent reduction in transaction time seems plausible and reasonable on its face, a closer look at the very report the FTC cites calls that into question. Take page 36 of said report:



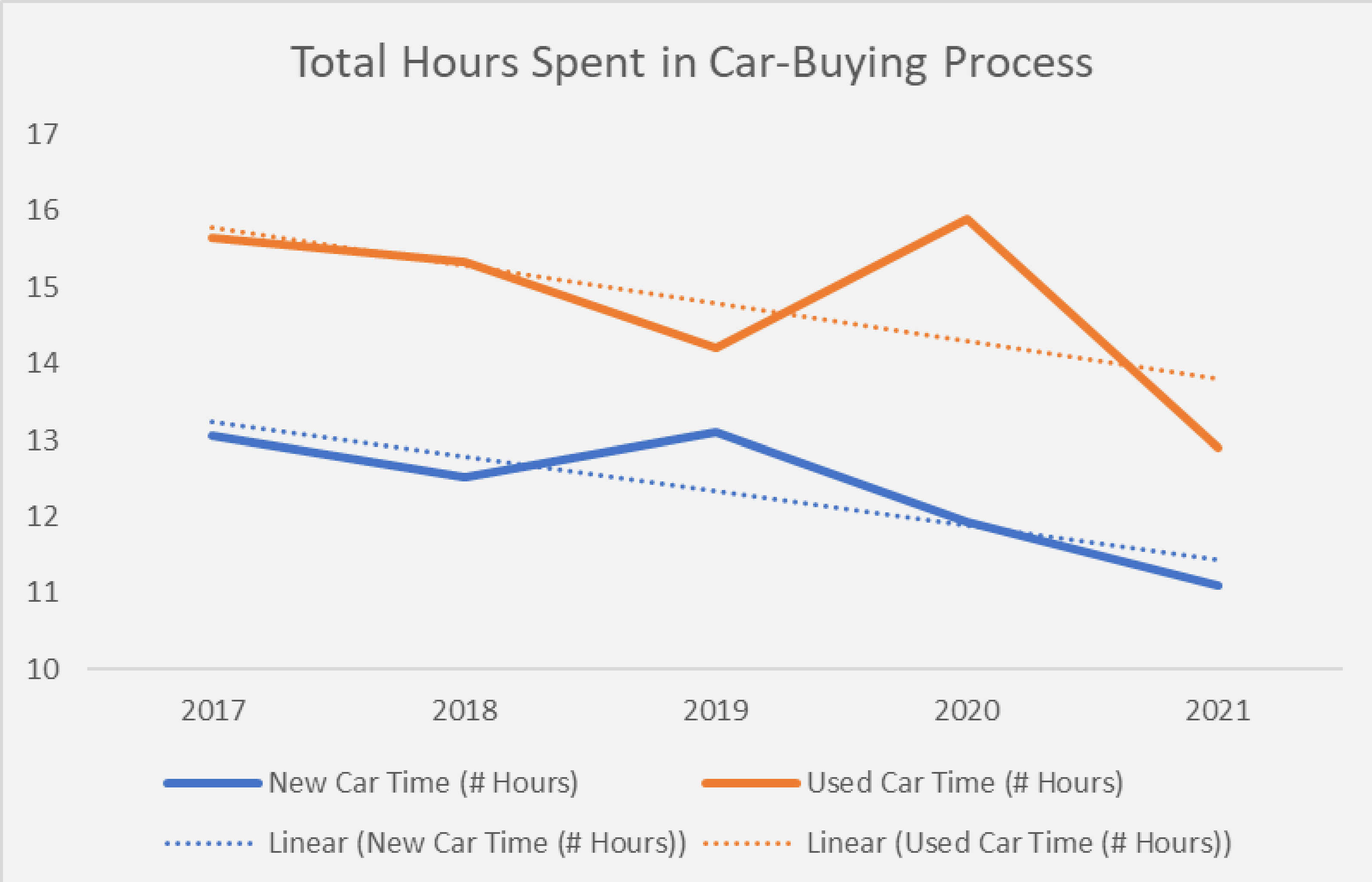
In this breakdown of the time spent at a dealer, the only item that this rulemaking would materially affect would be the 32 minutes spent "Negotiating a Price and Trade-In Offer;" all other aspects of this estimated "visit" are rote aspects of the process that largely fall outside the scope of the new requirements. While these increased disclosures may have some ancillary savings to the pre-visit time or time spent at another dealership, it is difficult to see how one can expect 3 hours of savings when the primary aspect of the car-buying process that the proposal seeks to address is roughly half an hour. If one applies 30 minutes saved (instead of the original 3 hours) to FTC's benefits formulation, it yields only $689 million in annual benefits, or $5.2 billion in present value under a 7 percent discount rate.

Broader Market Trends

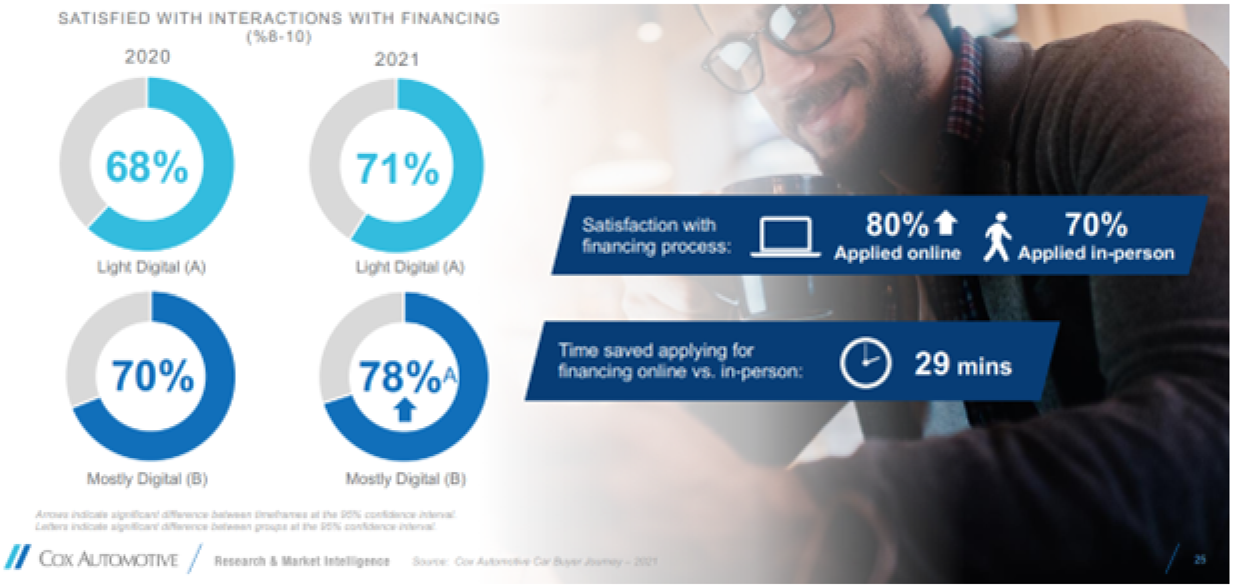
Beyond the exact components of FTC's current calculations, there is also the issue of how changing market conditions may provide diminishing returns in terms of the amount of time savings benefits a regulation like this can really draw from the car-buying process going forward. For instance, take this chart from the 2021 Cox report:



These data suggest that, in recent years, the time spent interacting with a dealer has generally declined. Examining further data across the past few years of reports suggests that this trend also applies to the overall buying process (from research to purchase):



These trends make some sense intuitively as consumers have moved toward online sources for either: A) background research on features and pricing to leverage during in-person negotiations, or B) online dealer portals that market themselves as low- or no-hassle operations. Another portion of the 2021 Cox report demonstrates one aspect of this phenomenon:



As consumers continue to gain relative advantages in terms of time savings and increased satisfaction due to these already-occurring market trends, it raises the question of how many more benefits a rulemaking like this could squeeze out of the process – and thus, calls into question the rationale for such a dramatic rule.

EXAMINING THE COSTS

The costs portion of FTC's economic analysis also suffers from some questionable assumptions that, if adjusted, could potentially shift the calculations involved in such a way that their magnitude becomes comparable to the agency's potential benefits, further eroding the rationale for the rulemaking. The most substantial portion of FTC's cost estimates comes in its calculation of the cost to dealers in disclosing accurate pricing information regarding potential "add-ons":

Disclosure delivery (per transaction)		
New vehicle sales per year		17,059,000
% New vehicle sales involving optional add-ons[a]		94%
% New vehicle sales involving financing		81%
Used vehicle sales per year		40,807,000
% Used vehicle sales involving optional add-ons[b]		86%
% Used vehicle sales involving financing		35%
Minutes per disclosure		2
Cost per hour of disclosure		$21.84
Physical costs per disclosure		$0.11
Subtotal		
3% discount rate		$994,356,865
7% discount rate		$850,526,991

The calculation here is that each disclosure costs the dealer two minutes in labor costs and 11 cents in materials that is then extrapolated as: "One disclosure is required for all new and used vehicle sales, an additional disclosure is required for transactions with optional add-ons (94% new and 86% used), and a third disclosure would be required for financed transactions with optional add-ons (76% new and 30% used)." This requirement accounts for a majority of the proposal's overall cost estimate.

The issue with this calculation, however, is that FTC only applies it once for each transaction. See footnote 187:

> One consequence of this provision is that consumers, with the benefit of clear disclosure of the various prices, will renegotiate some aspect of the sale in order to obtain a more favorable deal. Any such renegotiation would require the completion of another disclosure prior to consummating the transaction, *which is assumed away here*. [emphasis added]

FTC acknowledges that having this additional information will spur more negotiation, which will in turn require additional disclosures and the commensurate costs from such. Nevertheless, its current topline cost estimate is largely based on the (unlikely) assumption that there will only be one disclosure per transaction.

Perhaps this assumption stems from the lack of data available on the question of "how many specific negotiation points would require this disclosure?" Turning back to the 2020 Cox report (the 2021 version did not contain these data), however, one can find at least a potential baseline to this question. Take, for instance, this section:

According to this, each eventual transaction involves the buyer visiting at least two dealerships. One can reasonably assume that there would thus be *at least* one "disclosure point" at each dealership. Doubling up this disclosure cost section would yield total costs of $1.7 billion. If one merely assumes that there are, say, three "disclosure points" at each of these two dealership visits to yield a six-fold increase in add-on disclosure costs, that would bring total costs of $5.1 billion. If one simply adds on the roughly $510 million for all other cost subsections as they currently stand per FTC's estimation, then the proposal's total costs would exceed its benefits under the half-hour savings scenario discussed earlier.

CONCLUSION

It is often easy to see why the car-buying experience is a vexing one for many consumers. Between the high economic stakes, potential information asymmetry, and incentives for dealers to "upsell," purchasing a car can be a challenging process. Yet with greater amounts of information available online for consumers and an increasing prevalence of dealers that make of point of taking the "haggle" out of the process, it is difficult to assert that consumers are suffering from a clear market failure in the automotive sales industry that requires dramatic FTC intervention. In fact, the proposed rule contains minimal quantitative assessments that federal agencies typically rely on to justify the need and cost of such comprehensive rulemakings. Even if one grants FTC's overall rationale, one hopes that the agency would be thorough and deliberative in drafting its most significant rulemaking in modern times. Yet the potential flaws in the FTC's calculations reveal a lack of analytical rigor – perhaps driven by a relative lack of familiarity with considering cost-benefit balances – that raises significant questions about the underlying merits of this rulemaking.

[1] Although it should be noted, there is a possibility that the proposed rule could actually increase the length of the average motor vehicle transaction. The rule would require several additional disclosures, including a number that must be signed by the customer and countersigned by the dealer. This additional material could confuse consumers and drive additional questions and increased transaction times.

ATTACHMENT 21

NADA/NAMAD/AIADA Model Dealership Voluntary Protection Products Policy

Driven

NADA MANAGEMENT SERIES L60

NADA/NAMAD/AIADA

Voluntary Protection Products: A Model Dealership Policy

NADA
NATIONAL AUTOMOBILE DEALERS ASSOCIATION

This management guide has been prepared for informational purposes to assist dealerships in presenting their Voluntary Protection Products (VPPs) in a fair, ethical and legally compliant manner. Nothing in this guide, including the appendices, is intended as legal advice. Furthermore, each dealership should consult an attorney who is familiar with federal and state law applicable to VPPs and the dealership's operations before deciding whether and how to adopt this optional VPP policy. The presentation of this information is not intended to encourage concerted action among competitors or any other action on the part of dealers that would in any manner fix or stabilize the price or any element of the price of any good or service.

L60

Driven

NADA/NAMAD/AIADA

Voluntary Protection Products: A Model Dealership Policy

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NADA/NAMAD/AIADA

Voluntary Protection Products: A Model Dealership Policy

Introduction

Among the many products and services that automobile and truck dealerships offer their customers are voluntary products designed to protect their customers' investment in the vehicles they purchase or lease.

When offered, sold, and administered in a professional and consumer-friendly manner, these voluntary protection products (VPPs) can offer customers valuable protection against an unexpected and potentially costly event such as a flood, hail damage, theft, vandalism, vehicle accident, mechanical breakdown or the customer's death, disability, or unemployment. In addition to the economic protection they provide, VPPs also can offer customers—particularly those who live paycheck to paycheck or who otherwise cannot self-insure—peace of mind knowing that the occurrence of such an unexpected event will not prevent them from keeping current on their financial obligations.[1]

Conversely, to the extent VPPs are not offered, sold, and administered in a professional manner, they can fail to provide these valuable protections, confuse and create a false sense of security for customers, result in litigation and/or administrative enforcement actions against the dealership, and undermine the goodwill of the dealership in the community.

Consequently, it is essential that dealerships strive to develop an approach toward VPPs that ensures they are offered, sold, and administered in an ethical, lawful, transparent, professional, and consumer-friendly manner. This requires that dealerships engage in several proactive steps such as conducting product research, employee training, and sales oversight, and executing their post-sale responsibilities. However, this process all begins with articulating a clear, straightforward VPP policy that provides a framework for the dealership's VPP activities. The *NADA/NAMAD/AIADA Model Dealership Voluntary Protection Products Policy*[2] provides an optional policy template that is intended to assist a dealership with this process.

ESSENTIAL STATE LAW CONSIDERATIONS

Several states impose VPP requirements that address one or more components of this optional policy template. Some of these requirements could make portions of the policy template inapplicable to—or not prudent to adopt for—dealerships operating in those states. It is essential that dealerships review communications from their state dealer associations concerning such requirements and consult with legal counsel to determine whether—and to what extent—they should adopt the policy template.

[1] In April 2017, AAA cited a new study indicating that "64 million American drivers would not be able to pay for an unexpected vehicle repair without going into debt" and noted that "the average repair bill is between $500 and $600."

[2] For ease of reference, this title will be used to refer to *NADA/NAMAD/AIADA Voluntary Protection Products: A Model Dealership Policy*.

Instructions for Completing the VPP Policy Template

GENERAL INSTRUCTIONS AND DISCLAIMERS

Coverage and Approach

The *NADA/NAMAD/AIADA Model Dealership Voluntary Protection Products Policy* template applies to optional products that a dealership offers to its customers to protect their investment in vehicles being purchased or leased.

The policy template is structured to:

i. have the dealership provide upfront a prominent poster informing customers of the optional nature of VPPs and the dealership's commitment to providing information about each VPP before a customer decides to purchase it;

ii. state the dealership's commitment to legal compliance, training, and interdepartment coordination to effectively carry out the dealership's VPP policy; and

iii. provide a sequential list of duties the dealership will execute throughout the life cycle of VPPs, from their selection to their pricing, advertisement, presentation, sale, and, if applicable, cancellation and any customer complaints pertaining to them.

Relationship to *NADA/NAMAD/AIADA Fair Credit Compliance Policy & Program*

The *NADA/NAMAD/AIADA Model Dealership Voluntary Protection Products Policy* template is separate from—but entirely consistent with—the *NADA/NAMAD/AIADA Fair Credit Compliance Policy & Program* template.

The *NADA/NAMAD/AIADA Fair Credit Compliance Policy & Program* provides an optional template for developing a policy—and a detailed program to implement that policy—to promote compliance with the Equal Credit Opportunity Act (ECOA). It primarily focuses on one item (dealer participation, which is the portion of the finance charge that a dealership retains for originating a finance contract), one element of that item (pricing), and one of several statutes governing that item (ECOA), and is modeled on a consent order that the Department of Justice (DOJ) entered into with two automobile dealerships in 2007 to resolve allegations of ECOA violations.

Conversely, the *NADA/NAMAD/AIADA Model Dealership Voluntary Protection Products Policy* template focuses on multiple products (service contracts, GAP coverage, and other VPPs), multiple elements of those products (selection, pricing, advertisement, presentation, sale, cancellation, and customer complaints), multiple statutes governing those products (ECOA, the federal prohibition on unfair and deceptive acts or practices—UDAP—and other federal laws), and is not modeled on a government consent order with automobile dealerships.

These differences suggest that policy template documents for these items (dealer participation and VPPs) may need to differ. Accordingly, the *NADA/NAMAD/AIADA Model Dealership Voluntary Protection Products Policy* template is (i) broader in coverage than its fair credit counterpart (applying to the vast array of products and product elements mentioned above), and (ii) not as deep as its fair credit counterpart (as a detailed approach to compliance in a nationwide template would be difficult given the widespread differences in the state regulatory regimes and provider contractual requirements that govern these products). The *NADA/NAMAD/AIADA Model Dealership Voluntary Protection Products Policy* template therefore is more general in nature and is designed to give a dealership that chooses to adopt it a general framework for VPPs without including an extensive series of detailed requirements that may be inapplicable in a dealership's state and/or that may not fit a dealership's product offerings.

Notwithstanding the different approaches to the fair credit and VPP policy templates, they are designed so that both may be adopted by a dealership, and a dealership that chooses to adopt both may conclude that its Fair Credit Compliance Program Coordinator should also oversee the development and implementation of its VPP Policy. In addition, both templates adopt a standardized approach to pricing with a dealership that chooses to adopt the VPP policy establishing a standard retail price for its VPPs (to the extent it has discretion to do so) and only deviating from its standard retail price for pre-established, legitimate business reasons. Additionally, a dealership may conclude that it should adopt other aspects of the fair credit policy and program template that are not included in the VPP policy template, such as having the dealership's board of directors or other governing officer formally approve the policy and having the person who is responsible for executing the policy conduct periodic compliance audits and submit annual compliance reports to the board of directors or other governing officer.

Disclaimers

The *NADA/NAMAD/AIADA Model Dealership Voluntary Protection Products Policy* is an optional template that is not mandated by federal law and has not been adopted by any federal agency as a means of satisfying the requirements of federal law. In addition, as noted above, as a template that is being made available to dealerships across the country whose operations and state laws vary significantly, portions of the template may not be applicable to—or prudent to adopt by—an individual dealership. For these reasons, it is essential that each dealership consult with legal counsel who is familiar with its operations to determine whether—and to what extent—it should adopt the *NADA/NAMAD/AIADA Model Dealership Voluntary Protection Products Policy* template.

SPECIFIC INSTRUCTIONS FOR USING THE VPP POLICY TEMPLATE

Overview

This paragraph generally describes the purpose and scope of the VPP Policy.

It also contains a footnote stating that the policy does not confer any rights, benefits, or remedies to any person, except that it may be used by the dealership to discipline employees who do not comply with its terms. This is intended to forestall a third party from bringing a legal action against the dealership for a violation of the policy.

Section I. Policy Statement

This section states that the dealership will prominently display to customers a poster stating that (i) VPPs offered by the dealership are optional and are not required to purchase or lease a vehicle or obtain warranty coverage, financing, financing on particular terms, or any other product or service offered by the dealership, and (ii) the dealership is fully committed to providing customers with the price, terms, and conditions of each VPP before they decide to purchase it. The sample poster at Appendix A is available for this purpose.

The dealership should consult with its counsel concerning whether the poster should be adopted and, if so, the language it should contain. For example, if the dealership already displays a poster with similar or related language, the creation of an additional poster could be distracting or otherwise create confusion. However, it is essential that customers understand that the VPPs offered to them are completely optional.

Section II. Legal Compliance, Training, Coordination, and Document Retention

Section II.a states the dealership's commitment to complying with all applicable legal requirements,

including governing statutes, regulations, and contracts with third parties. This applies to both:

i. requirements applicable to customers, such as (a) ECOA's prohibition against discrimination on a prohibited basis, (b) the Truth in Lending Act's disclosure requirements applicable to VPPs, (c) federal and state prohibitions on unfair and deceptive acts or practices; and (d) state requirements applicable to retail installment sales and leases, VPPs that are insurance products under state law, and licensing and other requirements applicable to VPPs; and

ii. requirements applicable to other businesses, such as contractual obligations to VPP providers pertaining to remitting premiums, registering contracts, and verifying the payment of refunds.

Sections II.b and II.c state that the dealership will (i) conduct initial and periodic training of—and oversee—its employees involved in the VPP sales process, and (ii) coordinate within its departments as necessary to ensure its VPP Policy is properly carried out. An element of the oversight process could include periodically spot-checking or reviewing a sample of vehicle sales or leases entered into with customers to ensure the dealership's transactions comport with this policy. Training, oversight, and coordination are essential as the development of a policy document—by itself—will not give effect to the policy. Rather, this can only occur if the dealership takes the necessary steps to implement and maintain it.

Section II.d states that the dealership will retain records used to demonstrate compliance with this policy for an appropriate period. This should include the VPP Certification Form referenced below as well as other records documenting the completion of the various elements of this policy. The dealership should consider retaining such documents for the greater of (i) any records retention period under federal and state law for the VPPs it offers,[3] and (ii) the statute of limitations under federal and state law for violations involving those products.[4] The dealership should consult with counsel concerning the appropriate records retention period for these documents.

Section III. Product Selection

This section sets forth criteria for determining whether a particular product will be included in the dealership's VPP offerings to customers. In making this determination, the dealership should only engage reputable VPP providers, and the dealership should have confidence in the value that the product offers to customers. While a dealership may determine that additional or other criteria should be used, the following criteria in the policy template should assist the dealership with this analysis:

a. *Cost, coverage, limitations, and other terms and conditions.* The dealership should understand how a product's features offer protection of the customer's investment and whether its coverage is already provided by another product being purchased by the customer.

b. *Claims payment process.* The dealership similarly should understand the ease with which customers can file claims and receive the product benefits when a triggering event occurs. It is essential that customers have a clearly defined path to receiving such benefits. The same applies to the customer's ability to cancel and obtain any available refund for a product.

c. *Financial ability to provide product benefits.* The dealership should also consider the financial ability of the VPP provider to provide the product benefits. While this may be self-evident for many VPP providers, with others it may be prudent to inquire into their ability to pay claims.

Of course, other factors such as known reputational concerns stemming from customer complaints or litigation should not be ignored.

The analysis the dealership conducts is not intended to validate or guarantee the services provided by its VPP providers. Rather, as with vendors that dealerships retain, it is prudent to review the quality of the company, the products and services it provides, and the terms and conditions of the provider-dealer contract as part of the VPP selection process.

[3] The federal records retention requirements applicable to documents retained by automobile and truck dealerships are set forth in NADA's *A Dealer Guide to Federal Records Retention and Reporting*. Consult your state automobile dealers association concerning any applicable state records retention requirements.

[4] Among the federal laws that are most likely to apply to the sale of a VPP (e.g., ECOA, Truth in Lending Act, Federal Consumer Leasing Act, and Section 5 of the Federal Trade Commission Act), ECOA has the longest statute of limitations which generally is five years after the occurrence of a violation. See 15 U.S.C. § 1691e(f). Consult your state dealer association concerning applicable statutes of limitations under state law.

Section IV. Product Pricing

This section establishes the manner in which the dealership will determine the retail price for each VPP it offers to customers for which pricing discretion exists. For example, pricing discretion does not exist for—and this section therefore does not apply to—a VPP that is defined as an insurance product under state law and that must be offered to customers at an amount that has been established by the state insurance commissioner. Pricing discretion also may not exist as a result of—or may be limited by—other provisions of state law or policies of the VPP provider.

Where pricing discretion does exist, Section IV.a states that the dealership will establish a standard retail price (SRP) for each VPP and each bundle of VPPs it offers to customers. The dealership should sell the VPP or VPP bundle at its SRP unless one of the reasons set forth in Section IV.b for discounting that price is present in the transaction. (Section IV.c clarifies that the limitation on discounts in Section IV.b does not preclude the dealership from establishing an SRP for a bundle of VPPs that is less than the combined sum of the SRP of each individual VPP in the bundle.)

Section IV.b identifies five good-faith, competitive reasons unrelated to the customer's background that, if present, allow the dealership to sell a VPP or VPP bundle at a price that is lower than its SRP for that product or bundle. These reasons (which are set forth and described below) are among the allowable reasons for discounting a standard dealer participation rate in credit offers to customers that were (i) included in 2007 consent orders that DOJ entered into with two dealerships to resolve allegations of credit pricing discrimination, and (ii) incorporated into the *NADA/NAMAD/AIADA Fair Credit Compliance Policy & Program* as allowable reasons for discounting a standard dealer participation rate in credit offers to customers. A dealership should be able to identify additional or different pre-established reasons for discounting the SRP it has established for a VPP or VPP bundle provided they are limited to good-faith, competitive factors that are completely unrelated to the customer's background. However, as explained in the *NADA/NAMAD/AIADA Fair Credit Compliance Policy & Program*, dealerships should proceed cautiously in allowing discounts that differ from those listed in the DOJ consent orders.

Section IV.d states that the dealership will establish procedures for recording, reviewing for corrective action, and retaining determinations that a pre-established, legitimate business reason supported a decision to discount the SRP the dealership has established for a VPP (or VPP bundle), and that the dealership will utilize the Voluntary Protection Products Certification Form at Appendix B for this purpose. (As noted below, if the dealership has another mechanism to record such discounting decisions, it would not need to adopt the VPP Certification Form at Appendix B to carry out this policy.) In order to implement these requirements, the dealership should consider adopting the following:

PRICE NEGOTIATIONS

Nothing in the model policy or these instructions is intended to foreclose price negotiations that can result in lower prices to customers for VPPs if a dealership chooses to allow them. Rather, as noted in the Introduction, the model policy and instructions are intended to promote the offering, sale, and administration of VPPs in an ethical, lawful, transparent, professional, and consumer-friendly manner. As part of this process, a dealership could allow price negotiations for VPPs while adopting and implementing appropriate procedures to ensure those negotiations are conducted in a fair and non-discriminatory manner. Alternatively, the dealership could adopt an approach that does not involve price negotiations such as the approach discussed in this section.

a. *VPP Certification Form.* The dealership should use the VPP Certification Form to record VPP discounting decisions. If the dealership does not discount any VPP or VPP bundle (i.e., if the customer pays the SRP for each VPP or VPP bundle that he or she selects), it is not necessary to execute the VPP Certification Form. The dealership should modify the VPP Certification Form template at Appendix B to reflect the dealership's specific circumstances and it may be possible, in consultation with a menu and/or software provider, to forgo the use of the VPP Certification Form by incorporating the information it contains into the menu described in Section VI.c of this policy. However, it is important to note that while the menu is presented to customers, the VPP Certification Form is intended solely as an internal dealership document to record the legitimate business reason for a VPP or VPP bundle discount.

Because the customer may choose to purchase more than one VPP and it could be unwieldy to complete a separate certification form for each VPP that the customer purchases, the VPP Certification Form at Appendix B includes a table that allows a dealership to record on a single form the pricing determination applicable to the sale of one or more VPPs to a customer.

The VPP Certification Form at Appendix B is structured in the following manner:

1. *Buyer/Lessee Information.* The top section of the form identifies the buyer(s) or lessee(s) and other transaction-specific information such as the date of the VPP sale and the VIN of the vehicle being purchased or leased. The dealership should replace or add to these data fields as necessary to reflect the information it uses to identify a vehicle delivery (such as by adding the stock number or deal number).

2. *Pricing Determination Table.* A table appears below the Buyer/Lessee Information that includes the following columns:

   A. *Name of VPP.* This column should include a preprinted listing of all VPPs or VPP bundles offered by the dealership (with the information in the columns to the right only filled in for VPPs purchased by the customer) or, alternatively, a listing of only those VPPs or VPP bundles purchased by the customer.

   B. *Standard Retail Price.* This column states the SRP for each listed VPP and VPP bundle.

For many VPPs or VPP bundles, it may be possible to preprint this price.

For others, such as an extended service contract where a dealership has established standard pricing but the SRP differs based on the deductible amount, length of coverage, or other selections made by the customer, the SRP may need to be entered after the customer has made the necessary selections. The dealership should consult with software vendors to determine how it may enter an SRP when such variables are present.

C. *Selling Price.* This is the price the customer paid for the VPP or VPP bundle. As noted above, it is only necessary to use the VPP Certification Form when the Selling Price for a VPP or VPP bundle is less than the SRP.

D. *Number of Allowable Discount.* After entering a Selling Price that is less than the SRP, the Number of the Allowable Discount from the list of Allowable Discounts that appears below the table should be entered. For example, if the Selling Price had to be discounted due to a payment cap imposed by the finance source that took assignment of the credit contract, then "1" should be entered.

E. *Discount 2.* If the SRP was discounted because the customer stated a monthly payment constraint in a fixed dollar amount that would preclude the customer from accepting a VPP or VPP bundle at the SRP, then the amount of the monthly payment constraint stated by the customer should be entered in this column. Otherwise, nothing should appear in this column.

F. *Discount 3.* If the SRP was discounted because the customer stated that he or she had access to a lower price for the same or similar VPP, then the name of the entity that offered the competing product and the price of the product stated by the customer should be entered in this column. Otherwise, nothing should appear in this column.

3. *List of Allowable Discounts.* Below the Pricing Determination Table is a list that contains the number and identification of each of the five allowable discounts (discussed in greater detail below) under the *NADA/NAMAD/AIADA Model Dealership Voluntary Protection Products Policy*. As noted above, an adopting dealership may determine that fewer or additional pre-established discounts are allowed for good-faith, competitive reasons that are unrelated to the customer's background, but such

dealerships should consult with counsel before adding to the list of allowable discounts.

4. *Selling Employee's Certification.* Below the list of Allowable Discounts is a certification that should be signed and dated by the dealership employee who arranged the sale of the VPP(s) to the customer.

5. *Reviewer Certification.* A Reviewer's Certification is set forth in a separate box on the VPP Certification Form. Within two business days of—or another specified time period shortly after—the transaction, a senior manager who was not involved in the transaction should review the VPP Certification Form completed by the Selling Employee and any other required substantiating documentation to ensure that each VPP or VPP bundle sold to the customer was priced in accordance with this policy. (As noted above, a dealership that has also adopted the *NADA/NAMAD/AIADA Fair Credit Compliance Policy & Program* should consider designating its Program Coordinator under that program as the reviewer of its VPP Certification Forms.) If the reviewer determines that this policy was not followed, the reviewer should initiate appropriate corrective action as it relates to the customer, the employee who arranged the VPP sale, or otherwise, and record such action on the VPP Certification Form. The reviewer should then sign, date, and retain the document.

b. *Supporting Information & Document Retention.* For each allowable discount from the SRP, the dealership should clearly state the prerequisites that must be present in order to apply that discount and retain in the deal jacket or other specified location the VPP Certification Form and, if applicable, other supporting documentation. At a minimum, the documentation should include:

1. *Pricing or Payment Cap.* For the first discount, a pricing cap imposed by state law or a payment cap imposed by the company providing financing for the purchase serves as an allowable basis to discount the SRP to the pricing cap level. Documentation of—or reference to—the applicable pricing or payment cap serves as documentation for this discount.

2. *Monthly Payment Constraint.* For the second discount, a monthly payment constraint in a fixed dollar amount stated by the customer that precludes the dealership from selling a VPP or VPP bundle at its SRP serves as an allowable basis to discount the SRP to the level that allows the customer to purchase the VPP or VPP bundle. The VPP Certification Form records this information and therefore serves as appropriate documentation for this discount.

3. *More Competitive Offer.* For the third discount, a more competitive offer for the same or similar VPP to which the customer states that he or she has access serves as an allowable basis for the dealership to discount the SRP to the level necessary to either meet the competing offer or beat the competing offer by a certain set amount. (In order to promote consistent discounting decisions, the dealership should determine, as a matter of policy, whether it will offer to meet competing offers or beat competing offers by a set amount.) The VPP Certification Form records this information (the name of the VPP provider and the price of the VPP) and therefore serves as appropriate documentation for this discount. **As part of this process, the dealership should not seek to verify the existence of a more competitive offer by contacting the competitor.**

4. *Promotional Pricing.* For the fourth discount, a promotional program that allows all customers to receive a VPP or VPP bundle at a discounted price serves as an allowable basis to discount the SRP pursuant to the terms of the promotional program. The dealership advertisement or other communication identifying the terms of the promotional program serves as appropriate documentation for this discount.

5. *Employee Pricing.* For the fifth discount, a dealership employee incentive program that allows employees to receive a VPP or VPP bundle at a discounted price serves as an allowable basis to discount the VPP or VPP bundle pursuant to the terms of the program. The dealership employee incentive program or reference to it serves as appropriate documentation for this discount.

Section V. Product Advertisement

This section states that the dealership will not advertise, solicit, or otherwise market VPPs in a manner that is deceptive, misleading, confusing, or otherwise inconsistent with their terms and conditions. While all areas addressed by the *NADA/NAMAD/AIADA Model Dealership Voluntary Protection Products Policy* can invite scrutiny by regulators, this area in particular has witnessed several recent enforcement actions by federal agencies alleging that finance sources, VPP providers, and dealers have deceptively marketed VPPs to consumers.[5] It is essential that the dealership have a process in place to review all forms of marketing (e.g., newspaper and internet ads, YouTube videos, emails, text messages, social media, signage at the dealership, etc.) to ensure its marketing materials comport with this section.

Section VI. Product Presentation and Sale

This section establishes a process for ensuring that customers are fully informed about the features, optional nature, and price of VPPs before deciding to purchase them.

a. Section VI.a states that the dealership will (i) ensure its employees who offer VPPs to customers fully understand their benefits, limitations, and other terms and conditions before offering them to customers; and (ii) not offer products to customers for which they are ineligible or would derive no value. As with the other elements of this section, information about dealer product offerings should be a component of the VPP training that such employees receive, and customers should not be offered products

[5] Recent examples include (i) a consent order the Consumer Financial Protection Bureau (Bureau) entered into with a bank engaged in indirect vehicle financing to resolve allegations that the bank overstated to consumers the extent of coverage provided by its optional Guaranteed Asset Protection (GAP) product (*Santander Consumer USA, Inc.*, BCFP File No. 2018-BCFP-0008 (Nov. 20, 2018)); (ii) consent orders the Bureau entered into with a bank engaged in indirect vehicle financing and its non-bank partner company to resolve allegations that the respondents understated to service members the costs of optional vehicle service contracts and GAP coverage (*U.S. Bank Nat'l Ass'n*, BCFP File No. 2013-CFPB-0003 (Jun. 26, 2013) and *Dealers' Fin. Serv., LLC*, BCFP File No. 2013-CFPB-0004 (Jun. 25, 2013)); and (iii) consent orders that the Federal Trade Commission entered into with the provider of an optional bi-weekly payment product and an automobile dealership group that sold the product to resolve allegations that the respondents failed to disclose to consumers the total amount of the fees associated with the product and that those fees could offset any savings to consumers who purchased the product (*Nat'l Payment Network, Inc.*, FTC Docket No. C-4521 (May 4, 2015) and *Matt Blatt, Inc.*, FTC Docket No. C-4532 (Jul. 2, 2015)).

that would not provide value based on the circumstances of the customer's transaction (such as being offered an extended service contract on a leased vehicle whose protection is covered by the manufacturer's warranty during the lease term). During this training, employees should be reminded that while knowledge of the product and the elements of the customer's transaction are essential, dealer employees are not—and should not present themselves as—agents of the customer who are working on the customer's behalf.

b. Section VI.b states that the dealership will inform customers orally that the VPPs it offers are optional, and that the dealership will not contradict this disclosure in any way such as by stating or implying that the purchase of a VPP is required as a condition of purchasing or leasing the vehicle, obtaining warranty coverage, qualifying for financing or obtaining particular financing terms, or executing any other part of the transaction. Because this involves an oral disclosure that cannot be monitored solely through a document review, the dealership should have a process in place to monitor periodically product presentations by its employees to ensure they adhere to this requirement, and the dealership should take immediate corrective action if it learns that an employee has deviated from it.

c. Section VI.c states that the dealership will present VPPs to customers in a standard, simple menu format that, at a minimum, prominently discloses:

    1. that the purchase of any listed product is optional;
    2. that any listed product may be purchased separately;
    3. that the purchase of any listed product is not required to purchase or lease a vehicle, obtain warranty coverage, qualify for financing, or receive financing on particular terms;
    4. that the listed products or the protections they provide may be available from other sources;
    5. that the dealer may retain a portion of the sale price of the listed products;
    6. the price of—and monthly payment for—the vehicle without the purchase of a VPP;
    7. the price of—and monthly payment for—each product if purchased separately; and
    8. the price of—and monthly payment for—each product bundle if products are purchased as a bundle.

    By making these disclosures prominently, dealers provide useful information that facilitates the customer's understanding of the price, optional nature, and potential availability from other sources of—and the dealer's economic interest in—the VPPs being offered.

d. Section VI.d states that the dealership will present VPPs in a manner that is designed to assist customers in making informed purchasing decisions by presenting information on the VPP's price, deductible, limitations, benefits, eligibility, requirements for maintaining coverage, claims process, cancellation and refund rights and procedures, and other important terms and conditions. Section VI.e further states that prior to the sale of a VPP, the dealership will provide the customer with a copy of—and an opportunity to review—each purchased VPP's terms and conditions as well as other required disclosures and request the customer's acknowledgement that he or she has received the menu disclosures and elected to (i) purchase each selected VPP or VPP bundle, or (ii) decline purchasing any VPP or VPP bundle.

    While it typically is not practical to present orally to customers all of the information about a VPP that is contained in the VPP policy document(s), dealership employees should explain to customers (i) basic product information that may inform their purchasing decision, and (ii) that the full terms and conditions applicable to the VPP are contained in the written VPP policy document(s), which the dealership employee should provide the customer—and ensure the customer has an opportunity to review—prior to the sale of the VPP. The customer should then acknowledge in writing that he or she has received the menu disclosures and elected to purchase the VPP.

e. Section VI.f states that the dealership will provide to customers all required post-sale forms. The dealership should consult with counsel to ensure that any requirement to provide such forms under state law or pursuant to the dealer's agreements with the finance or lease source and VPP provider is fulfilled.

Section VII. Product Cancellation

This section generally establishes that the dealership will facilitate both customer requests to cancel VPPs customers have purchased from the dealership and the customer's receipt of any refunds due.

Section VII.a states that the dealership will ensure customers have a simple and clear method to exercise any cancellation rights applicable to VPPs they have purchased. While state law and/or VPP provider policy documents typically specify how VPP cancellations and refunds will be administered, the dealership, as noted above, should consider the ease with which customers can exercise these rights when deciding whether to offer particular VPPs. This process should not be convoluted or unnecessarily burdensome to the customer.

Section VII.b states that the dealership will take no action to delay, prevent, or otherwise frustrate customers' exercise of such rights. This is another area that should be particularly emphasized during the employee training to carry out this policy.

Section VII.c states that the dealership will promptly and courteously process customer cancellation requests and issue, or facilitate the issuance of, refunds due to customers or to the finance or lease source, as required. If the dealership is responsible for providing such refunds, then the dealership should have a process in place to process the refund request without delay. If the dealership is not responsible for providing such refunds but the dealership nonetheless receives a cancellation request from a customer, the dealership should provide information to the customer on how to exercise his or her cancellation right.

Section VII.d states that the dealership will maintain, or send to the VPP provider, verification that the refund was provided to the customer or to the finance or lease source, as required, if the dealership issues the refund. Because multiple parties may be involved in the sale, financing, and administration of VPPs to customers, it is incumbent on all parties (the dealership, the finance or lease source, and the VPP provider) to communicate with one another to ensure customer cancellation requests have been honored. The dealership should

review state law as well as its contract with the finance or lease source and VPP provider to ensure it is fulfilling any obligations in this regard.

Section VIII. Customer Complaints

This section states that the dealership will promptly and courteously respond to customer complaints regarding VPPs purchased from the dealership. While robust training, transparency, clear communications, responsiveness, and oversight should greatly diminish the likelihood of customer complaints regarding VPPs, the dealership should nonetheless be prepared to handle customer complaints that may arise (both as a complaint applies to the individual transaction involved and any systemic problems that the complaint may reveal). Developing the following procedures is one way to assist the dealership in addressing customer complaints:

a. Assign an appropriate dealership manager with responsibility for overseeing the dealership's customer complaints process;

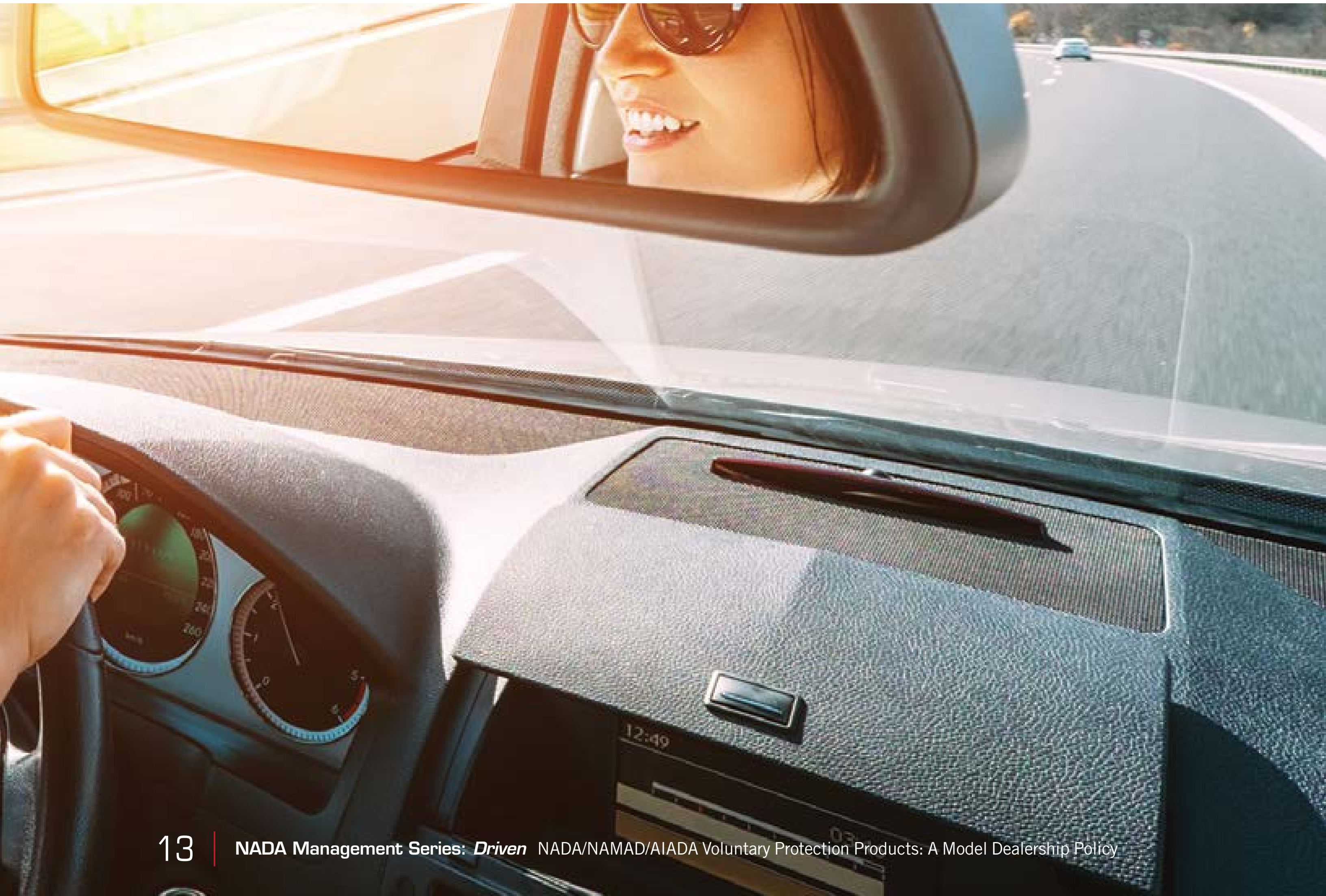
b. Ensure customers are provided with the name and phone number of the dealership manager to contact if they have a complaint;

c. Establish a process for logging in customer complaints;

d. Direct the manager with oversight responsibility to handle the customer complaint or refer it to another dealership employee to (i) determine how the complaint can be resolved, and (ii) attempt to resolve the complaint; and

e. Record (i) the resolution of the complaint and whether the customer is satisfied with the resolution, or (ii) the reason it cannot be resolved.

As with other aspects of this policy, the development of a customer complaint process should be tailored to the dealership's circumstances. However, if the dealership develops an effective customer complaint process (which should be in place for all of the dealership's departments), it will help the dealership address customer concerns in their early stages, enhance its business processes, and further demonstrate its commitment to a fair, ethical, and legally compliant VPP sales process.



Templates

[*Name of Dealership*] Voluntary Protection Products Policy

OVERVIEW

Among the many products and services that the Dealership offers its customers are voluntary products that are designed to protect the customers' investment in the vehicles they purchase or lease. These voluntary protection products (VPPs) can provide great value to customers when they are offered in a fair and transparent manner and customers fully understand their costs, benefits, and limitations. In order to facilitate a compliant, professional, and consumer-friendly VPP sales process, the Dealership adopts the following Policy:[1]

I. POLICY STATEMENT

The Dealership will prominently display the poster at Appendix A, within clear view of prospective customers, stating that (i) VPPs offered by the Dealership are completely optional and are not required to purchase or lease a vehicle or to obtain warranty coverage, financing, financing on particular terms, or any other product or service offered by the Dealership, and (ii) the Dealership is fully committed to providing customers with the price, terms, and conditions of each VPP before they decide to purchase it.

II. LEGAL COMPLIANCE, TRAINING, OVERSIGHT, COORDINATION, AND RECORDS RETENTION

a. The Dealership will fully comply with federal, state, and local law (including applicable licensing and insurance requirements and the prohibition against discrimination on a prohibited basis) as well as contractual obligations the Dealership has entered into with VPP providers, finance and lease sources, and other third parties.

b. The Dealership will conduct initial and periodic training on this Policy for—and oversee—Dealership employees involved in VPP selection, pricing, advertisement, presentation, sales, cancellation, and customer complaints.

c. The Dealership will coordinate the efforts of its departments to ensure a consistent and harmonized approach toward the proper execution of this Policy.

d. The Dealership will retain records used to document compliance with this Policy for an appropriate period.

III. PRODUCT SELECTION

The Dealership will only offer to customers VPPs that offer value. At a minimum, to the extent it is available, the Dealership will consider:

a. the product's cost, coverage, limitations, and other terms and conditions;

b. the product's claims payment and cancellation process; and

c. the product provider's financial ability to provide the product benefits.

IV. PRODUCT PRICING

a. The Dealership will establish a Standard Retail Price (SRP) for each VPP and each bundle of VPPs it offers for which pricing discretion exists.

b. The Dealership will only discount the SRP for the following pre-established, legitimate business reasons:

   1. a pricing or payment cap imposed by law or by the company providing financing for the purchase;
   2. a customer's stated monthly payment constraint;
   3. a more competitive offer for the same or similar VPP;
   4. promotional pricing for which the customer qualifies; and
   5. employee pricing for which the customer qualifies.

c. The limitation on discounts in Section IV.b of this Policy does not preclude the Dealership from establishing an SRP for a bundle of VPPs that is less than the combined sum of the SRP of each individual VPP in the bundle.

d. The Dealership will establish procedures, including the utilization of the VPP

[1] Nothing in this policy, express or implied, is intended to or shall confer upon any person any right, benefit, or other remedy of any nature whatsoever under or by reason of these standards or any federal, state, or local law. However, any violation of this Policy by a Dealership employee can be the basis for disciplinary action, including termination of employment and/or the agency or independent contractor relationship.

Certification Form at Appendix B, to record, review for corrective action, and retain determinations that a pre-established, legitimate business reason supported a decision to discount the SRP.

V. PRODUCT ADVERTISEMENT

The Dealership will not advertise, solicit, or otherwise market VPPs in a manner that is deceptive, misleading, confusing, or otherwise inconsistent with their terms and conditions.

VI. PRODUCT PRESENTATION AND SALE

a. The Dealership will ensure its employees who offer VPPs to customers fully understand their benefits, limitations, and other terms and conditions before offering them to customers. The Dealership will not offer products to customers for which they are ineligible or would derive no value.

b. The Dealership will inform customers orally that the VPPs it offers are *optional*. The Dealership will not contradict this disclosure in any way, including by stating or implying that the purchase of a VPP is required as a condition of purchasing or leasing a vehicle, obtaining warranty coverage, qualifying for financing or obtaining particular financing terms, or executing any other part of the transaction.

c. The Dealership will present VPPs to customers in a standard, simple menu format that, at a minimum, prominently discloses:

1. that the purchase of any listed VPP is optional;
2. that any listed VPP may be purchased separately;
3. that the purchase of any listed VPP is not required to purchase or lease a vehicle or to obtain warranty coverage, qualify for financing, or receive financing on particular terms;
4. that the listed VPPs or the protections they provide may be available from other sources;
5. that the dealer may retain a portion of the sale price of the listed VPPs;
6. the price of—and monthly payment for—the vehicle without the purchase of a VPP;
7. the price of—and monthly payment for—each VPP if purchased separately; and
8. the price of—and monthly payment for—each product bundle if VPPs are purchased as a bundle.

d. The Dealership will present VPPs in a manner that is designed to assist customers in making informed purchasing decisions. This includes presenting to the customer information about the VPPs' price, deductibles, limitations, benefits, eligibility, requirements for maintaining coverage, claims process, cancellation and refund rights and procedures, and other important terms and conditions.

e. Prior to the sale of a VPP, the Dealership will:

1. provide the customer with a copy of—and an opportunity to review—each selected VPP's terms and conditions as well as any other required disclosures; and
2. request the customer's acknowledgement of the menu disclosures and election to:

   A. purchase each selected VPP or VPP bundle, or

   B. decline purchasing any VPP or VPP bundle.

f. Following the sale of a VPP, the Dealership will provide to customers all required post-sale forms.

VII. PRODUCT CANCELLATION

The Dealership will:

a. ensure customers have a simple and clear method to exercise any cancellation rights applicable to VPPs they have purchased;

b. take no action to delay, prevent, or otherwise frustrate customers' exercise of such rights;

c. promptly and courteously process customer cancellation requests and issue, or facilitate the issuance of, refunds due to customers or to the finance or lease source, as required; and

d. maintain, or send to the VPP provider, verification that the refund was provided to the customer or to the finance or lease source, as required, if the Dealership issues the refund.

VIII. CUSTOMER COMPLAINTS

The Dealership will promptly and courteously respond to customer complaints regarding VPPs purchased from the Dealership.

[*Name of Dealership*]
Voluntary Protection Products Policy

[*Name of Dealership*] offers vehicle service contracts and other voluntary products that are designed to protect your investment in a vehicle you purchase or lease from us. The purchase of any of these voluntary protection products is completely **optional** and is **not** required to purchase or lease a vehicle or obtain warranty coverage, financing, financing on particular terms or any other product or service offered by the dealership. [*Name of Dealership*] is fully committed to providing you the price, terms and conditions of each voluntary protection product before you decide to purchase it.

Appendix B

Voluntary Protection Products Certification Form

Buyer(s)/Lessee(s) Name(s) ________________________________ Date _____________________ VIN ________________________________

Name of VPP (or VPP Bundle)	Standard Retail Price	Selling Price	If Selling Price is less than Retail Price, enter the Number of the Allowable Discount from the list below.	If Discount 2 is selected, enter the Amount of the Monthly Payment Constraint.	If Discount 3 is selected, enter the Name of the Competing Offeror *and* the Price of the Competing Offer.

Allowable Discounts

Discount 1 VPP limited by pricing or payment cap

Discount 2 Customer stated monthly payment constraint

Discount 3 Customer stated competing offer

Discount 4 Customer qualified for Dealership Promotional VPP Campaign

Discount 5 Customer qualified for Dealership Employee Incentive Program

I certify that the information above is true and correct to the best of my knowledge and that any discount from the Standard Retail Price was made in good faith and in a manner that is consistent with the requirements of the [*Name of Dealership*] Voluntary Protection Products Policy.

____
Signature

____
Date

____
Printed Name

____
Title

Reviewer Certification

I have reviewed the above information and supporting documentation and:

❑ certify that the Selling Price complies with the [*Name of Dealership*] Voluntary Protection Products Policy, or

❑ certify that I have initiated the corrective action noted below.

- Reduced the customer's Selling Price for _______________ to $______ or provided a refund to the customer in the amount of $______.
- Taken the following employee corrective action (describe):________________________________
____
- Other (describe): ________________________________
____

____
Signature

____
Date

____
Printed Name

____
Title

nada.org

ATTACHMENT 22

NADA/NAMAD/AIADA Fair Credit Compliance Policy & Program

NAMAD
NATIONAL ASSOCIATION OF MINORITY AUTOMOBILE DEALERS

NADA

American International Automobile Dealers

Fair Credit Compliance
POLICY & PROGRAM

Table of Contents

Overview of Fair Credit Policy & Fair Credit Compliance Program Templates

The Equal Credit Opportunity Act ("ECOA") and its implementing regulation, Regulation B, prohibit discriminating against credit applicants on the basis of their race, color, religion, national origin, sex, marital status, age and other factors.[1] Regulation B states that this prohibition applies not just to intentional discrimination[2] but also to credit practices that appear neutral but nevertheless *result* in a negative "disparate impact" on customers who are members of one of these protected classes (assuming the customers in the different classes being compared are similarly situated).[3] Because a finding of disparate impact typically is established by a statistical evaluation of past credit transactions, dealers and other creditors cannot ensure they are complying with ECOA solely by training their employees to avoid considering these prohibited factors when making credit decisions. Dealers must also ensure that their policy for determining the amount they earn for arranging financing will not give rise to post-transaction claims that the policy resulted in a negative statistical disparity in the amount of dealer participation paid by customers in a protected class (i.e., a class defined by color, national origin or one of the other prohibited bases listed above).[4]

On March 21, 2013, the Consumer Financial Protection Bureau ("CFPB") issued a fair lending guidance bulletin to indirect auto finance sources (which the CFPB refers to as indirect auto lenders) stating "that certain lenders that offer auto loans through dealerships are responsible for unlawful, discriminatory pricing" and that lender policies "that allow auto dealers to mark up lender established buy rates and that compensate dealers [for originating credit contracts] in the form of dealer [participation]" create a "significant risk" of fair lending violations.[5] The bulletin instructs indirect auto finance sources on steps they should take to address this risk, which include either (i) eliminating dealer pricing discretion (such as by paying dealers a flat fee per transaction), or (ii) constraining dealer pricing discretion (by adopting a series of controls and monitoring the credit contracts the finance source purchases from dealers to see if there exists a statistical disparity in dealer participation as described above). Because the bulletin sets forth limitations on how indirect auto finance sources may compensate dealers for arranging financing for customers, it affects dealers even though the Dodd-Frank Act prohibits the CFPB from exercising any authority over dealers engaged in indirect financing transactions. [6]

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1 Other factors include the fact that a credit applicant relies on social security, welfare or other public assistance or has exercised a right under a federal consumer credit law.

2 The term usually associated with intentional discrimination is "disparate treatment." Disparate treatment involves treating credit applicants differently on a prohibited basis even if there is not a deliberate intent to discriminate. An example of disparate treatment would be if a creditor were to require that a minority applicant provide greater documentation to secure financing than a similarly situated non-minority applicant.

3 While ECOA clearly prohibits disparate treatment, substantial controversy exists over whether ECOA also prohibits disparate impact. Consistent with NADA's cautious approach to disseminating compliance guidance to its members, this guidance and the policy and program templates assume (but do not concede) that a disparate impact theory of liability exists under ECOA.

4 The term "dealer participation" (also known by such terms as "dealer reserve" or "dealer spread") refers to the dealer's participation in (i.e., its portion of) the contract interest rate that the customer pays to finance the purchase of a vehicle from the dealer. It is the difference between this retail rate (also known as the Annual Percentage Rate or "APR") and the wholesale "buy rate" at which a finance source buys the finance contract (also known as a retail installment sale contract or "RISC") from the dealer. Finance sources typically compensate dealers for arranging financing with the customer by permitting dealers to retain the dealer participation subject to parameters established by the finance source.

5 The guidance bulletin (CFPB Bulletin 2013-02) and its accompanying press release are available at www.consumerfinance.gov/newsroom/consumer-financial-protection-bureau-to-hold-auto-lenders-accountable-for-illegal-discriminatory-markup/.

6 The CFPB was created in Title 10 of the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010, Pub. Law. §§ 111-203 (July, 21, 2010)("Dodd-Frank Act"). Section 1029 of the Dodd-Frank Act excludes motor vehicle dealers engaged in indirect financing transactions (in which a dealer enters into a RISC with a customer and then assigns the contract to a third party finance source) from the authority of the CFPB, while continuing to subject dealers to the authority of the federal agencies that could exercise authority over dealers prior to the enactment of the Dodd-Frank Act. The CFPB, therefore, may not take actions directly against dealers engaged in indirect financing. However, CFPB actions affecting indirect finance sources (over which the CFPB may exercise authority) can also affect dealers to the extent they

Since the CFPB issued its fair lending guidance bulletin, several indirect auto finance sources have informed dealers that they will monitor (i.e., conduct a statistical analysis of) the contracts they purchase from dealers. In many cases, these indirect finance sources have sent letters to dealers indicating that the finance source's statistical analysis identified unexplained differences in the amount of dealer participation paid by customers who are members of protected classes and customers who are not members of those classes. These letters typically offer the dealer the opportunity to respond to the finance source's preliminary findings. Usually as part of this process, dealers may provide to the finance source legitimate (non-prohibited) reasons that explain the purported pricing disparities.

In addition, on December 20, 2013, the CFPB and the Department of Justice announced an enforcement action against an indirect auto finance source (Ally) for alleged disparate impact discrimination. The action resulted in a consent order between the United States and Ally to resolve the government's allegation that "Ally engaged in a pattern or practice of discrimination on the basis of race and national origin in violation of ECOA based on the interest rate 'dealer markup' – the difference between Ally's buy rate and the contract rate – paid by African-American, Hispanic, and Asian/ Pacific Islander borrowers who received automobile loans funded by Ally." Ally did not admit to the allegations and no court determined their validity. In addition, Ally stated in a press release that "it does not believe that there is measurable discrimination by auto dealers."[7] Nevertheless, to resolve the matter, Ally agreed to undertake several actions, including the payment of a civil penalty and compensation to the alleged victims, monitoring the amount of dealer participation earned by dealers in retail installment sale contracts ("RISC") purchased by Ally, and taking "appropriate corrective action" if such monitoring reveals that dealers charged a higher amount of dealer participation to similarly situated protected groups of customers.[8]

cause indirect finance sources to amend the contracts that govern their relationship with dealers.

7 Ally's press release is available at http://media.ally.com/2013-12-20-Ally-Financial-Statement-on-Auto-Financing-Consent-Orders.

8 The full terms of the consent order are available at http://images.magnetmail.net/images/clients/NADA/attach/Ally_Consent_Order.pdf.

Fair Credit Compliance Program

These and other related developments have prompted dealers and their attorneys to seek from NADA compliance guidance to minimize the fair credit risk identified in the CFPB guidance bulletin. This guidance and the *Fair Credit Policy* and *Fair Credit Compliance Program* templates are intended to respond to these requests. NADA may issue supplemental guidance as necessary to address additional compliance issues or subsequent developments related to this topic.

Although NADA is not aware of any evidence demonstrating that the ability of automobile dealers to negotiate contract rates with their customers results in disparate impact discrimination in today's marketplace, we recognize that our members strive to adopt policies and procedures that will reduce their litigation exposure while demonstrating their ongoing commitment to regulatory compliance and the fair treatment of their customers. Therefore, in order to promote these goals, we set forth below and in the Fair Credit Compliance Program template that follows an alternative means for dealers to arrive at the amount of compensation they earn for arranging financing. **Keep in mind that the finance compensation model that dealers adopt is an individual dealer decision that must be consistent with federal and state law as well as any contractual restrictions imposed on the dealer by its finance sources. It is essential that dealers consult their legal counsel when making decisions related to this topic.**

The most obvious way to reduce the possibility of a finding of disparate impact discrimination is for individual dealers to establish a means of compensation in which the determination of the amount of finance income they earn does not vary on a customer-by-customer basis. Examples of such an approach include charging each customer (i) a fixed number of basis points over the wholesale buy rate (i.e., the rate at which the finance source will purchase the credit contract from the dealer), (ii) a fixed percentage of the amount financed or (iii) a fixed dollar amount. Of course, a major drawback to customers of such a rigid pricing policy is that it deprives dealers of the ability to "meet or beat" the most competitive credit offer that the customer has received from another creditor, which in turn limits the customer's ability to reduce the amount that the customer pays for credit. It also may be unrealistic to assume that most dealers would be able to adopt such an inflexible compensation approach when they typically have contractual arrangements with multiple finance sources and each of those sources establishes its own compensation schedule and financing parameters.

One potential way to eliminate a customer-by-customer determination of the amount the dealer earns for arranging financing while preserving sufficient flexibility to accommodate scenarios that may benefit customers, such as the "meet or beat" dynamic, is to establish a pre-set amount of compensation but allow for downward adjustments to that amount in the event that one or more pre-determined conditions occur. Examples of such conditions could include (i) the customer's inability to satisfy a monthly payment constraint at the pre-determined amount, (ii) the customer's access to a more favorable offer of credit from another creditor, (iii) a promotional offer that the dealer extends to all customers on the same terms, (iv) the fact that a particular transaction is eligible for a subvened interest rate from a manufacturer, finance source, or other non-affiliated third party, (v) the fact that a transaction is eligible for an employee incentive program, and (vi) documented inventory reduction considerations that are related to specific vehicles.[9]

If a dealer chooses to adopt this or a similar approach to dealer finance compensation, it should adopt written procedures that (a) identify each pre-determined condition that permits a downward deviation from its pre-set amount of dealer participation, (b) require its finance personnel to execute a standardized form that identifies the pre-set dealer participation amount, the final dealer participation amount, and, where the two differ, which pre-determined condition or set of conditions is present in the transaction that authorizes the deviation, (c) conduct formal training of all relevant personnel on its finance compensation policy, and (d) retain the compensation forms and otherwise monitor and document its compliance efforts.[10] The training and monitoring functions are particularly important as fidelity to the program from the employees who must carry it out is essential to its success.

An attractive feature of this approach is that if the dealer develops appropriate, well-defined allowable adjustments and ensures that its personnel properly and consistently apply, document and retain them, then the dealer is in a much better position to explain any unexplained pricing disparities that might otherwise lead a court, governmental enforcement agency or indirect auto finance source that is monitoring the dealer's credit contracts to conclude that such disparities are attributable to a customer's background[11] and therefore in violation of ECOA.

Dealers are not required to adopt this approach to standardizing the amount of dealer participation they charge in credit transactions and should consult with their individual legal counsel about whether they should do so. For dealers who wish to adopt this or a similar approach, we have developed the Fair Credit Policy and Fair Credit Compliance Program templates that begin at page 9. General and specific instructions for completing these forms are provided below.

[9] Dealers who follow this approach may wish to identify and include additional or different pre-determined reasons for deviating from their pre-set dealer participation amount. This should be acceptable provided the additional or different reasons are limited to neutral, pro-competitive factors that are completely unrelated to the customer's status as a member of a protected class and are executed in good faith. However, it must be noted that the ECOA compliance approach set out in the text and the attached Program is modeled after the ECOA compliance framework that the Department of Justice ("DOJ") incorporated into consent orders with two automobile dealers in 2007 to resolve claims of unintentional disparate impact discrimination. One of the consent orders is available at www.justice.gov/crt/about/hce/documents/pacifico_order.pdf (see, in particular, paragraph 7 entitled "Guidelines for Setting Dealer Reserves" and Appendix B). While this framework was developed solely for that purpose (and therefore does not create a safe harbor for complying with ECOA), it nevertheless provides a useful template for dealers to consider in developing their own approach to ECOA compliance. With this in mind, dealers should be aware that the specific allowable deviations noted in the text and the attached Program are those that were included in the DOJ consent orders. Dealers and their attorneys who adopt this compliance approach should proceed cautiously in adopting specific allowable deviations that differ from or are in addition to those contained in the DOJ consent orders.

[10] These features were also part of the DOJ ECOA compliance framework that was included in the 2007 consent orders referenced above.

[11] As used in this document, the term "customer's background" refers to the customer's status as a member of a protected class.

Instructions for Completing Fair Credit Policy & Fair Credit Compliance Program Templates

General Instructions and Disclaimers

Use of Templates. It is essential that, prior to adopting this *Fair Credit Policy* and *Fair Credit Compliance Program*, dealers read the templates carefully, make adjustments that are appropriate to their individual circumstances, and ensure that the final policy and program they adopt are reviewed by qualified counsel. While italicized language that appears in brackets identifies areas of the document where an individualized dealer entry is appropriate, dealers should modify both italicized and non-italicized portions of the document that they and their counsel determine is necessary.

Program Scope. The *Fair Credit Compliance Program* is broader than a pure dealer participation pricing policy that is designed to help mitigate a finding of disparate impact discrimination under ECOA and Regulation B. This is because, as explained above, ECOA and Regulation B prohibit intentional discrimination and (in the view of federal regulators) disparate impact discrimination, and it is therefore essential that fair credit training programs address both prohibitions. However, the *Program* does not attempt to address every issue that potentially relates to fair credit compliance at a franchised automobile dealership (e.g., how the dealership handles oral requests for financing, desking procedures, conditional sales agreements and the sale of products to protect the customer's investment in the financed vehicle). These issues are very dealer specific and need to be addressed in a manner that is appropriate to the dealership's circumstances. For these reasons, the *Program* template should be viewed as part of a broader dealership effort to develop a comprehensive approach to fair credit compliance.

Program Approval. Neither ECOA nor Regulation B require creditors to adopt a written fair credit program or, if they adopt such a program, to have it approved by any particular body or individual officer within their business.[12] However, for the reasons stated above, it is prudent for creditors to do so.

The *Program* template assumes that a board of directors will adopt the dealership's *Fair Credit Compliance Program*, appoint a Program Coordinator to administer the *Program*, receive compliance reports from the Program Coordinator, and amend the *Program* as necessary to address fair credit risks that are present at the dealership. If the dealership's governing structure dictates that another dealership body or officer should exercise these functions, the template should be modified accordingly. Regardless of which dealership body or officer acts in this manner, it is important that its leadership affirmatively establish and express support for its fair credit commitment.

Program Limitations. The *Program's* approach to determining the compensation dealers receive for arranging financing for customers is not, and the *Program* template has not been, mandated by ECOA or Regulation B and neither have been formally adopted by any federal agency as a means of satisfying the requirements of federal law. Nor is there any guarantee that adopting the attached *Program* or any component of it will adequately protect a dealership from a governmental enforcement action or private lawsuit.[13]

Notwithstanding these limitations, NADA believes the *Program* template represents a solid attempt to promote compliance with ECOA and Regulation B while preserving enough flexibility to allow customers to continue leveraging the overwhelming benefits that are produced by today's intensely competitive vehicle financing market.

[12] This is in contrast to other regulatory requirements such as the FTC Red Flags Rule, which requires financial institutions and creditors to adopt a written identity theft prevention program and to have it approved by their board of directors or an appropriate committee of the board of directors. See 16 C.F.R. § 681.1(e)(1).

[13] As with other areas of the law, it is essential that dealers and their attorneys stay abreast of legislative, regulatory and judicial developments as well as finance source issuances that could affect their compliance obligations.

Specific Instructions

Fair Credit Policy

This document, which is set forth at Appendix A of the *Program*, serves as a strong, unambiguous statement affirming the dealership's commitment to ensuring equal credit opportunity and complying with all applicable fair credit laws. Whether adopting this or a different statement, dealers should ensure that their fair credit commitment is stated clearly and unequivocally. In addition, dealers should strongly consider prominently posting their fair credit policy in locations where it can easily be viewed by both consumers and employees.

Fair Credit Compliance Program

Section I – Scope. Paragraph (a) identifies the dealership employees, agents, and/or independent contractors ("dealership employees") who are covered by the *Policy* and *Program* and the consequences for failing to comply with the *Program*.

Paragraph (b) states that the *Program* (i) carries out the *Policy*, (ii) applies to all activity related to the extension of credit at the dealership, and (iii) establishes how dealership compensation will be determined in indirect vehicle financing transactions (which it defines).

Paragraph (c) states that the *Program* does not confer any rights, benefits or remedies to any person, except that it may be used by the dealership to discipline dealership employees who do not comply with the terms of the *Program*. This is intended to forestall a third party from bringing a legal action against the dealership for a violation of the *Program*.[14]

Section II – ECOA and Regulation B Compliance. Paragraph (a) states the dealership's strict prohibition against unlawful credit discrimination and defines what constitutes credit discrimination under ECOA and Regulation B. If the law of the dealer's state or municipality (or other states or municipalities where the dealer conducts business) identifies "prohibited bases" beyond those contained in ECOA (for example, some jurisdictions identify sexual orientation as a prohibited basis), the additional prohibited bases should be listed in this paragraph (by entering them either in subparagraph 1 or in a new subparagraph 4) and the name of the state or local law containing the prohibition should be added to the section heading (after "Regulation B"). Paragraph (a) also states that this prohibition applies to disparate treatment as well as disparate impact discrimination.

Paragraph (b) states that the dealership complies with all applicable requirements contained in ECOA and Regulation B (not just the prohibition against unlawful discrimination) and cites, in particular, the dealership's adherence to the law's adverse action and other notification requirements (such as the need to issue a notice of incompleteness to credit applicants if the credit application is missing information required to make a credit decision) and the law's records retention requirements.[15] It then includes a placeholder for dealers to either (i) incorporate into this portion of the *Program* its written procedures for adhering to these requirements, or (ii) cross-reference the separate procedures the dealer has adopted for this purpose.

Section III – Appointment of Program Coordinator. This section creates the position of Fair Credit Compliance Program Coordinator to administer the *Program* and specifies that the Program Coordinator will report directly to the board of directors. The employee who will perform this function is identified at the end of the *Program* (just above the resolution and signatures of the board of directors adopting the *Program*) and his or her specific duties are delineated in section V of the *Program*.

It is important to note that, as with the adoption of a written fair credit program, nothing in ECOA or Regulation B mandates the appointment of a Program Coordinator.[16] However, the dealership's ability to implement and carry out an effective fair credit compliance program will clearly be strengthened if it designates a senior manager to oversee (and, in many cases, execute) the multiple, recurring functions

[14] However, this language would not prevent a third party from bringing a legal action against a dealership for a violation of applicable federal, state or local law to the extent permitted by such law.

[15] Additional information on these topics is contained in NADA University's publications entitled *A Dealer Guide to Adverse Action Notices* (2011) and *A Dealer Guide to the Federal Records Retention Requirements* (1998), which are available at www.nadauniversity.com.

[16] This is in contrast to other federal rules, such as the requirement in the FTC Safeguards Rule that financial institutions appoint an employee or employees to coordinate the comprehensive written information security program that the rule requires financial institutions to develop, implement and maintain. See 16 C.F.R. § 314.4(a).

established by the *Program*.[17] It is essential that the Program Coordinator (i) have the full support of the board of directors, (ii) have the substantive expertise, time and seniority to carry out the duties established in sections IV and V of the *Program* (including the ability to initiate the corrective action identified in the Dealer Participation Certification Form Review process set forth in section IV.d and Appendix D of the *Program*), and (iii) is not routinely involved in establishing the Final Dealer Participation Rate offered to the customers in individual transactions. This last requirement is important because the *Program* (a) requires in section IV.d that a review of the transaction be conducted by a person who did not participate in it to ensure it was carried in a manner that is consistent with the terms of the *Program*, and (b) designates the Program Coordinator to carry out this function. While the *Program* permits the Program Coordinator to designate another employee to perform the review function, the Program Coordinator generally should not participate in transactions as this could compromise the integrity of the designee's review.

Section IV – Guidelines for Establishing Dealer Participation. This section establishes the manner in which the dealership will determine the dealer participation amount to include in credit offers to customers.

Paragraph (a) states that the Program Coordinator will establish the pre-set standard dealer participation rate for the dealership and identify that rate (the "Standard Dealer Participation Rate") on the form at Appendix B. Unless an allowable downward deviation identified in Paragraph (b) applies, the Standard Dealer Participation Rate will be added to the buy rate of the indirect finance source to which the dealer will assign the RISC to arrive at an APR that the dealership will offer to the customer.

Paragraph (b) identifies seven good-faith, competitive reasons that are unrelated to the customer's background which, if present, allow the dealership to include in credit offers a dealer participation rate that is lower than the Standard Dealer Participation Rate. These are the same reasons listed in the 2007 DOJ Consent Orders mentioned in footnote 9 above. As stated in that footnote, dealers should be able to identify additional or different reasons for downward deviations in paragraph (b) provided they are limited to neutral, pro-competitive factors that are completely unrelated to the customer's background and are executed in good faith. However, as also explained, dealers should proceed cautiously in adopting downward deviations that differ from those listed in the DOJ consent orders.

For each allowable deviation that is contained in this paragraph, dealers should clearly state the prerequisites, including the necessary supporting documentation, that must be present in order to apply that deviation. In addition, dealers should, to the maximum extent possible, standardize the application of each deviation. For example, the third deviation allows the dealership to reduce the Standard Dealer Participation Rate when the customer states that he or she has access to a more competitive offer from another dealer or finance source. Dealers should determine whether, as a matter of policy, it will (i) reduce the Standard Dealer Participation Rate by the amount necessary to meet the competing offer, or (ii) reduce the Standard Dealer Participation Rate so as to beat a competing offer by a certain number of basis points. The bracketed italicized language that appears in the description of this allowable deviation should be modified to reflect this determination.

Similarly, the seventh deviation allows the dealership to reduce the Standard Dealer Participation Rate based on Inventory Reduction Considerations. It is essential that this subparagraph explain the process by which such considerations will be applied. In addition, because inventory reduction criteria may change more frequently than the frequency with which the dealership would be able to amend this portion of the *Program*, it may be prudent to permit the Program Coordinator to establish the current inventory reduction criteria on a separate document that can be provided to dealership employees who arrange the credit sale with the customer. The *Program* adopts this approach and creates Appendix C for this purpose.

[17] Because dealerships require the services of a Program Coordinator to oversee their compliance efforts in a variety of areas (whether as a matter of prudence or as necessary to comply with federal mandates such as the FTC Safeguards Rule requirement mentioned in the previous footnote), dealers should consider whether their management structure would allow them to achieve greater operational efficiency by consolidating the various program coordinator functions under a single senior dealership manager.

Paragraph (c) states that dealership employees who arrange the credit sale with the customer must complete, sign, and date a Dealer Participation Certification Form that documents the Standard Dealer Participation Rate, the final Dealer Participation Rate, and, where the two rates differ, the allowable deviation that applies to the transaction. Appendix D has been created to record this determination. Note that dealership employees who arrange credit sales with customers should be required to complete a Dealer Participation Certification Form for every credit sale transaction regardless of whether the Standard Dealer Participation Rate or a different dealer participation rate based on an allowable deviation was applied.

Paragraph (d) states that the Program Coordinator, or his or her designee, must (i) review each dealership credit sale within two business days of the credit sale to ensure that the Dealer Participation Certification Form was executed properly and in a manner that is consistent with the terms of the *Program*, and (ii) complete, sign and date the Reviewer Certification that appears on that form. Should the reviewer determine that the form was improperly executed or that the *Program* terms were not otherwise followed, he or she will initiate the corrective action set forth in this paragraph and record that action in the Reviewer Certification. This may require coordinating with the finance source that took assignment of the RISC. In order to preserve the integrity of the review, the *Program* does not permit the reviewer to have participated in the credit transaction under review.

Dealers should ensure this paragraph and the corresponding language in Appendix D are tailored to reflect the dealership's operational circumstances. For example, dealers should determine whether the reviewer requires two business days or a slightly longer period to complete the review and the date on which that period will begin (e.g., date of the credit sale, date of delivery, etc.) Similarly, dealers should identify the employees within the dealership with whom the Program Coordinator must coordinate to ensure corrective action is carried out with regard to both the affected customer and the responsible employee.

Section V – Training, Oversight, and Reporting. This portion of the *Program* is intended to ensure that the dealer's fair credit commitment is fully carried out.

Paragraphs (a) through (h) delineate and explain the Program Coordinator's duties. Dealers should carefully review this list to determine whether any of these duties, such as setting and prospectively changing the Standard Dealer Participation Rate, should be retained by the board of directors. If dealers decide that the board should retain any of these duties, this must be reflected in the other portions of the *Program* (including the appendices) that reference the retained duty.

With regard to paragraph (d), the Program Coordinator must clearly identify and communicate to dealership employees who arrange credit sales with customers both the Standard Dealer Participation Rate (as required in section IV.a of the *Program*) and the documentation required to substantiate each of the allowable deviations contained in section IV.b. This will facilitate the consistent application of the allowable deviations by dealership employees and will assist the Program Coordinator or his or her designee in completing the Reviewer Certification set forth in section IV.d and Appendix D of the *Program*.

With regard to paragraph (f), the Program Coordinator must randomly monitor dealership credit offers and conduct periodic audits of dealership credit sales to ensure the *Program* is being effectively implemented. As part of this auditing function, the Program Coordinator should monitor the frequency with which different dealership employees who arrange credit sales apply the dealership's allowable deviations to the Standard Dealer Participation Rate. If such monitoring reveals that particular dealership employees have applied one or more allowable deviations significantly more or less frequently than the other dealership employees who arrange credit sales, then the Program Coordinator should closely scrutinize the employee's application of such deviations to determine whether the employee is correctly applying the deviations and whether additional corrective action may be necessary.

The documents that should be retained (or cross-referenced) in the deal jacket or other location specified by the Program Coordinator include, at a minimum, those that set forth the buy rate and –

- for the first deviation, the rate cap imposed by the finance source (including a transaction specific rate cap that is lower than the finance source's standard rate cap based on its assessment of the customer's repayment ability);

- for the second deviation, the monthly budget constraint stated by the customer (the Dealer Participation Certification Form records this information and therefore serves as appropriate documentation for this deviation);
- for the third deviation, the name of the dealer or lender that provided the more competitive offer and the APR contained in that offer (the Dealer Participation Certification Form records this information and therefore serves as appropriate documentation for this deviation);
- for the fourth deviation, the dealership advertisement or other communication identifying the terms of the dealership's promotional financing campaign;
- for the fifth deviation, the manufacturer's, finance source's, or other third party's advertisement or other communication identifying the terms of the subvention program;
- for the sixth deviation, the terms of the dealership's employee incentive program; and
- for the seventh deviation, a description of how the vehicle to which the indirect financing transaction applies satisfies the inventory reduction criteria set forth on the form at Appendix C (the Dealer Participation Certification Form records this information and therefore serves as appropriate documentation for this deviation).

Section VI – Program Amendments. This section establishes that the Program may only be amended by the board of directors, except that the Program Coordinator may, after consulting with the dealership's legal counsel, add an allowable deviation from the Standard Dealer Participation Rate provided it consists of a good-faith, competitive reason and the board of directors approves the amendment at its first meeting following such amendment. If this occurs, the Program Coordinator needs to ensure that dealership employees are trained on the appropriate application and documentation of the added deviation and it needs to be appropriately reflected on the Dealer Participation Certification Form. Program Coordinators should be reminded of the need to exercise caution in adding to the list of allowable deviations.

Appendix A – Fair Credit Policy

See the description above under Fair Credit Policy.

Appendix B – Standard Dealer Participation Rate

See the description above under section IV.a.

Appendix C – Inventory Reduction Criteria

See the description above under section IV.b.

Appendix D – Dealer Participation Form

See the description above under sections IV.c and IV.d.

Attached Templates

Fair Credit Compliance Program

Appendix A	Dealership Fair Credit Policy
Appendix B	Dealership Pre-Set Dealer Participation Rate ("Standard Dealer Participation Rate")
Appendix C	Dealership Inventory Reduction Criteria
Appendix D	Dealer Participation Certification Form

Nothing in this guidance or the *Fair Credit Policy* or *Fair Credit Compliance Program* templates is intended as legal advice. It is essential that dealers consult with an attorney who is familiar with applicable federal, state, and local law and their operations to determine appropriate fair credit compliance procedures for their business to adopt.

This information is also not intended to urge or suggest that dealers adopt any specific practices or policies for their dealerships, nor is it intended to encourage concerted action among competitors or any other action on the part of dealers that would in any manner fix or stabilize the price or any element of the price of any good or service.

[*Name of Dealership*]

Fair Credit Compliance Program

[It is essential that dealers and their attorneys read the NADA Overview and Instructions that accompany this Program template before deciding whether and how to adopt it.]

I. Scope

a. Persons Covered

This Program (which includes all appendices to this Program) applies to all employees, agents, and/or independent contractors of [*Name of Dealership*] who are involved in any aspect of the Dealership operations described in section I.b of this Program ("Dealership employees"). Failure to comply with any requirement in this Program may result in disciplinary action, including termination of employment and/or the agency or independent contractor relationship.

b. Operations Covered

This Program carries out the [*Name of Dealership*] Fair Credit Policy at Appendix A of this Program, sets forth the fair credit requirements applicable to all Dealership activity related to the extension of credit, and prescribes in section IV the manner in which [*Name of Dealership*] determines the amount of its compensation when it engages in an indirect vehicle financing transaction. For purposes of this Program, an "indirect vehicle financing transaction" refers to a transaction in which –

1. [*Name of Dealership*] enters into a retail installment sale contract ("RISC") with a customer for the purchase of a vehicle from [*Name of Dealership*];
2. [*Name of Dealership*] subsequently assigns the RISC to a third-party finance source ("the Assignee"); and
3. [*Name of Dealership*] retains its right to receive a portion of the finance charge payable under the RISC, specifically the difference between the retail annual percentage rate ("APR") and the wholesale interest rate at which the Assignee will buy the RISC from the dealer ("buy rate") within the parameters established by the Assignee. This amount is referred to in this Program as "dealer participation."

c. No Third-Party Beneficiaries

Nothing in this Program, express or implied, is intended to or shall confer upon any person any right, benefit, or remedy of any nature whatsoever under or by reason of this Program or by reason of any federal, state or local law. Notwithstanding this provision, this is a program of [*Name of Dealership*], and any violation of the Program by a Dealership employee can be the basis for disciplinary action, including termination of employment and/or the agency or independent contractor relationship.

II. Complying with the Equal Credit Opportunity Act and Regulation B

a. Prohibition Against Unlawful Credit Discrimination

As part of its fair credit commitment, [*Name of Dealership*] strictly prohibits discriminating against any credit applicant with respect to any aspect of the credit transaction –

1. on the basis of race, color, religion, national origin, sex, marital status or age (provided the applicant has the capacity to contract);
2. because all or part of the applicant's income derives from a public assistance program; or
3. because the applicant has in good faith exercised any right under the federal Consumer Credit Protection Act.

[These are the "prohibited bases" set forth in the federal Equal Credit Opportunity Act. Add any additional prohibited bases that are identified by the law of your state and/or municipality and add the title of that law to the heading of this section.]

This prohibition against credit discrimination extends to both disparate treatment (i.e., treating a credit applicant differently than other credit applicants on one of the prohibited bases mentioned above) and disparate impact (i.e., applying a facially neutral policy in a manner that has an adverse impact on credit applicants who are members of a class protected against discrimination relative to similarly-situated credit applicants who are not members of that protected class).

b. Other Requirements

[*Name of Dealership*] also fully adheres to and will comply with other applicable requirements set forth in the Equal Credit Opportunity Act and Regulation B including, but not limited to, the adverse action and other notification requirements prescribed in 12 CFR § 202.9 and the records retention requirements prescribed in 12 CFR § 202.12.

[Set forth or cross-reference the Dealership's specific procedures for complying with these requirements.]

III. Appointment of Fair Credit Compliance Program Coordinator

Upon its adoption of this Program, the [*Name of Dealership*] Board of Directors will appoint (and, thereafter, replace as necessary or appropriate) a Fair Credit Compliance Program Coordinator who will administer the Program. The Program Coordinator will report directly to the Board of Directors.

IV. Guidelines for Establishing Dealer Participation

The dealer participation rate that [*Name of Dealership*] will include in a credit offer to a customer in an indirect vehicle financing transaction will be determined in accordance with the guidelines set forth in this section.

a. Pre-Set Standard Dealer Participation Rate

The Program Coordinator will establish a pre-set rate of dealer participation that will be included in all credit offers that the Dealership extends to customers (the "Standard Dealer Participation Rate") except as provided in section IV.b of this Program. The Program Coordinator will set forth the Standard Dealer Participation Rate in writing on the form at Appendix B of this Program and provide it to all Dealership employees. The Program Coordinator may change the Standard Dealer Participation Rate prospectively on a periodic basis through a written declaration to all Dealership employees.

b. Pre-Determined Allowable Deviations

Dealership employees may include a lower dealer participation rate in a credit offer to a customer only for the good faith, competitive reasons listed below. (Immediately below each reason is how that reason appears on the Dealer Participation Certification Form at Appendix D of this Program, which is described in paragraph (c) of this section.) When this occurs, Dealership employees must include sufficient documentation in the deal jacket or other location specified by the Program Coordinator to support the Dealership employee's application of that reason and to verify that the final dealer participation rate was determined in a manner that comports with the terms of this Program.

1. Lower Cap Imposed by Assignee

❑ Dealer participation limited by finance source

If the Assignee has imposed a cap on the dealer participation that may be earned in the transaction that is lower than the Standard Dealer Participation Rate, the credit offer may include a dealer participation rate that is reduced to the rate cap level.

2. Monthly Payment Constraint

❑ Customer stated monthly payment constraint of $______ per month

If the customer states a monthly payment constraint in a fixed dollar amount that would preclude the customer from accepting a credit offer made under this Program, the Standard Dealer Participation Rate may be reduced to the level that will allow the customer to satisfy the monthly payment constraint.

3. More Competitive Offer

❑ Customer stated competing offer by ____________________ (name) of _____%

If the customer (i) states that he or she has access to a credit offer from another dealer or a lender that is lower than the credit offer from the Dealership made under this Program and (ii) identifies the terms and source of the competing credit offer, the Dealership's credit offer may include a dealer participation rate that is reduced so as to [*select one of the following* — [*meet the competing credit offer*][*beat the competing credit offer by a pre-determined number of basis points established by the Program Coordinator for all such scenarios*]].

4. Dealership Promotional Financing Campaign

❑ Customer qualified for Dealership Promotional Financing Campaign

If the Dealership extends a promotional credit offer to all customers on the same terms or to all purchasers of certain vehicles on the same terms, the credit offer may include a dealer participation rate that is reduced to the level necessary to extend the promotional credit offer.

5. Manufacturer Subvention Program

❑ Customer qualified for subvened interest rate of ____% from ________________ (name)

If the customer qualifies for a manufacturer, finance source, or other third-party interest rate subvention program, the credit offer may be made pursuant to the terms of that program without regard to the Standard Dealer Participation Rate.

6. Dealership Employee Incentive Program [*Include only if applicable.*]

❑ Customer qualified for Dealership Employee Incentive Program

If the customer qualifies for [*Name of Dealership*]'s Employee Incentive Program, the credit offer may include a dealer participation rate that is reduced pursuant to the terms of that program.

7. Dealership Inventory Reduction Considerations

❑ Customer purchased a vehicle that satisfies the Dealership's pre-determined inventory reduction criteria (describe how vehicle satisfies the criteria)

If the Dealership extends a credit offer pertaining to a vehicle that satisfies inventory reduction criteria that have been pre-determined by the Program Coordinator, the credit offer may include a dealer participation rate that is reduced in order to secure the sale of the vehicle. In establishing the inventory reduction criteria, the Program Coordinator will (i) consult with the manager(s) responsible for vehicle sales and the Dealership's floor plan line of credit, and (ii) identify in writing on the form at Appendix C of this Program and provide to Dealership employees the written inventory reduction criteria that a vehicle must satisfy in order to qualify for the reduction in the Standard Dealer Participation Rate. The written inventory reduction criteria should include relevant thresholds that the vehicle must satisfy such as the number of such vehicles in stock, the number of days the vehicle has been in inventory and/or the declining value of the vehicle. The Program Coordinator may revise the inventory reduction criteria on a prospective basis as warranted by the circumstances provided these requirements are satisfied.

c. Dealer Participation Certification Form

A Dealership employee who arranges a credit sale with a customer must fully complete, sign and date the Dealer Participation Certification Form set forth at Appendix D of this Program for each such credit sale and place the form in the deal jacket. The Dealer Participation Certification Form will be retained for the same period of time that the Dealership retains other documents related to credit transactions as set forth in section II.b of this Program.

d. Dealer Participation Certification Form Review

The Program Coordinator, or his or her Designee, will review each Dealership credit sale within two (2) business days of the sale to ensure that the Dealership employee who arranged the transaction executed a Dealer Participation Certification Form and completed and retained it in a manner that is consistent with the terms of the Program. The person conducting this review may not have participated in the credit transaction under review. If the reviewer determines that the Form was executed in a manner that is inconsistent with the terms of the Program, the reviewer will note the defect on the Form and initiate appropriate corrective action. Such action will include (i) ensuring that the customer receives a reduced interest rate or a refund if the transaction should have resulted in a lower interest rate for the customer, (ii) ensuring that appropriate corrective action is taken with regard to the Dealership employee who improperly executed the Form, and (iii) if the reviewer is not the Program Coordinator, promptly notifying the Program Coordinator of the defect. The Program Coordinator will coordinate with the [*enter position title of appropriate employee(s)*] to ensure such corrective action was carried out. Upon completion of the review, the reviewer will complete, sign, and date the Form's Reviewer Certification.

V. Training, Oversight and Reporting

The Program Coordinator will complete the tasks listed below.

a. Ensure all current Dealership employees receive training on the [*Name of Dealership*] Fair Credit Policy and Fair Credit Compliance Program within 60 days of the Board of Director's adoption of the Program.

b. Ensure all new Dealership employees receive training on the [*Name of Dealership*] Fair Credit Policy and Fair Credit Compliance Program prior to engaging in any credit operation described in Section I.b of the Program.

c. Ensure all current Dealership employees receive recurring training on the [*Name of Dealership*] Fair Credit Policy and Fair Credit Compliance Program on a periodic basis, at least once per year, and more frequently if the Program is amended in a substantive manner or if the Program Coordinator determines that additional training is necessary.

d. Establish the Standard Dealer Participation Rate as set forth in section IV.a of this Program and provide to Dealership employees this and any other information that is necessary to carry out the terms of the Program, including the documentation that must be present to support a Dealership employee's application of an allowable deviation to the Standard Dealer Participation Rate.

e. Complete or ensure the completion of the Dealer Participation Certification Form Review as described in section IV.d of this Program.

f. Randomly monitor Dealership credit offers and conduct periodic audits of Dealership credit sales to ensure the [*Name of Dealership*] Fair Credit Compliance Program is being effectively implemented.

g. Submit a report to the Board of Directors, at least once per year, that sets forth (i) the Dealership's level of compliance with the Fair Credit Compliance Program, and (ii) any recommended changes to the Program that may assist in carrying out its purpose.

h. Retain records documenting the completion of the training, oversight and reporting tasks outlined in this section.

VI. Program Amendments

a. Except as provided for in section VI.b of this Program, amendments to the Program may only be made by the [*Name of Dealership*] Board of Directors.

b. After consulting with the Dealership's legal counsel, the Program Coordinator may amend section IV.b of this Program in a manner that adds a good-faith, competitive reason for an allowable deviation from the Standard Dealer Participation Rate that is consistent with [*Name of Dealership*]'s Fair Credit Policy and is capable of being uniformly applied by Dealership employees. Any such amendment must be ratified by the Board of Directors at its first meeting following such amendment.

Appointment and Policy & Program Approval

The following employee has been appointed as the [*Name of Dealership*] Fair Credit Compliance Program Coordinator pursuant to section III of this Program:

____

[*Insert appropriate language indicating the Dealership's approval of this Policy and Program, such as:*]

By signing below, the undersigned, constituting all of the members of the [*Name of Dealership*] Board of Directors, acknowledge the Board's approval of the foregoing [*Name of Dealership*] Fair Credit Policy and Fair Credit Compliance Program and its appointment of the [*Name of Dealership*] Fair Credit Compliance Program Coordinator this ____ day of ______________, 201_.

______________________________ ______________________________

______________________________ ______________________________

______________________________ ______________________________

______________________________ ______________________________

______________________________ ______________________________

[*Name of Dealership*]
Fair Credit Policy

[*Name of Dealership*] is fully committed to complying with the letter and spirit of federal, state, and local laws and regulations that are designed to protect its customers. This includes ensuring that all qualifying credit applicants have equal access to credit and are treated in a manner that is fair, professional and consistent with the terms of the [*Name of Dealership*] Fair Credit Compliance Program. Engaging in any form of unlawful credit discrimination is destructive, morally repugnant and will not be tolerated by [*Name of Dealership*].

Appendix B

[*Name of Dealership*]
Standard Dealer Participation Rate

The [*Name of Dealership]* Pre-Set Dealer Participation Rate (“Standard Dealer Participation Rate”) is ______%.

This rate applies to all indirect vehicle financing transactions beginning on _________ (enter date) and is in effect until further written notice from the [*Name of Dealership*] Fair Credit Compliance Program Coordinator.

[*Name of Dealership*] Fair Credit Compliance Program Coordinator:

____

Signature

____

Printed Name

Appendix C

[*Name of Dealership*]
Inventory Reduction Criteria

In order for a Dealership employee to reduce the [*Name of Dealership*] Pre-Set Dealer Participation Rate ("Standard Dealer Participation Rate") based on Inventory Reduction Considerations as set forth in section IV.b.7 of the [*Name of Dealership*] Fair Credit Compliance Program, the vehicle must meet or exceed the following threshold(s):

____

____

____

____

These inventory reduction criteria apply to all vehicle indirect financing transactions beginning on __________ (enter date) and is in effect until further written notice from the [*Name of Dealership*] Fair Credit Compliance Program Coordinator.

[*Name of Dealership*] Fair Credit Compliance Program Coordinator:

____
Signature

____
Printed Name

Dealer Participation Certification Form

Buyer(s) Name(s) ____ Date _____________________________________

Assignee ____ VIN ______________________________________

Standard Dealer Participation Rate ____% Final Dealer Participation Rate ____%

If the Final Dealer Participation Rate does not equal the Standard Dealer Participation Rate, check the allowable deviation box below and fill in the corresponding blanks.

- ❑ Dealer participation limited by finance source
- ❑ Customer stated monthly payment constraint of $______ per month
- ❑ Customer stated competing offer by ____________________ (name) of _____%
- ❑ Customer qualified for Dealership Promotional Financing Campaign
- ❑ Customer qualified for subvened interest rate of ____% from ________________ (name)
- ❑ Customer qualified for Dealership Employee Incentive Program
- ❑ Customer purchased a vehicle that satisfies the Dealership's predetermined inventory reduction criteria (describe how vehicle satisfies the criteria)

  ____

  ____

I certify that the information above is true and correct to the best of my knowledge and that any deviation from the Standard Dealer Participation Rate was made in good faith and in a manner that is consistent with the requirements of the [*Name of Dealership*] Fair Credit Compliance Program.

____

Signature

____

Date

____

Printed Name

____

Title

Reviewer Certification

I have reviewed the above information and supporting documentation and:

- ❑ certify that the Final Dealer Participation Rate complies with the [*Name of Dealership*] Fair Credit Compliance Program, or
- ❑ certify that I have initiated the corrective action noted below.
  - Reduced the customer's interest rate to ____% or provided a refund to the customer in the amount of $_____.
  - Taken the following employee corrective action (describe):

    ____

    ____
  - Other (describe):

    ____

    ____

____

Signature

____

Date

____

Printed Name

____

Title

ATTACHMENT 23

Know Before You Buy brochure

NATIONAL AUTOMOBILE DEALERS ASSOCIATION

KNOW BEFORE YOU BUY

TIPS FOR SERVICE MEMBERS BEFORE BUYING OR LEASING THEIR NEXT CAR

NADA

Ensure your vehicle purchase is affordable and supports your transportation needs.

DETERMINE HOW MUCH YOU CAN AFFORD

Never make a big purchase decision in a vacuum.

- Figure out how much money to apply toward a down payment (a larger down payment reduces the amount you need to borrow).
- Determine how much you will be able to spend every month for the car you want to buy—plus the sales tax, financing costs and any voluntary protection products (like service contracts) that you choose to purchase.
- Estimate your annual insurance, fuel and maintenance costs.

RESEARCH THE TYPE OF CAR YOU WILL NEED

Be realistic about the type of car you will need and can afford.

- A sports car may be fun, but is it practical for hauling kids or supplies?
- Did you know some cars are more expensive to insure than others?
- Is fuel economy important, especially if you drive a lot of miles?
- Do you want to buy new or used?

TIP: You may have to live with your vehicle for a long time, so be sure to make a wise choice.

KNOW THE DIFFERENCE BETWEEN BUYING AND LEASING

- When you buy a car, you own it.
- When you lease a car, you use it for the lease term and then must return it.

Buying usually involves higher monthly payments, but—unlike leasing—there are no annual mileage limits and you own the vehicle after you pay it off.

TIP: Learn more about these and other differences between buying and leasing in *Keys to Vehicle Leasing*.

RESEARCH THE PRICE OF THE VEHICLE YOU WANT TO BUY

Many websites give you an idea of what buyers generally pay for the make and model of a vehicle.

RESEARCH YOUR TRADE-IN VALUE

Many consumers like the convenience of trading in their current vehicle to the dealership when buying or leasing a new vehicle. But just as you should research the price of a car before buying it, be sure to research the value of your trade-in. Then, determine how you want to sell your old vehicle.

TIP: Be sure to pay off as much as possible on your current auto loan to limit your financing obligation on the new vehicle.

RESEARCH FINANCING OPTIONS

Most consumers need to borrow money to purchase a car. Learn how to obtain financing that is competitive and affordable.

- Check your credit report and correct any mistakes. Get a free copy of your credit report at annualcreditreport.com.
- Remember, you are not required to obtain financing from any particular source. It's your decision, so find out what annual percentage rate (APR) you can get from banks, finance companies and credit unions. Then, see if the dealer can meet or beat that rate.
- Compare the length of financing terms that are offered. The longer the term, the more interest you pay.

RESEARCH VOLUNTARY PROTECTION PRODUCTS

Local dealerships often offer products like extended service contracts (to protect your vehicle if there is a mechanical breakdown) or a GAP waiver (to help pay for any obligations not covered by your insurance company if your vehicle is totaled, stolen or destroyed). These products are completely optional and may be available from other sources.

- Know what these products cost, as well as what they do and do not cover (including whether any geographical limitations apply to the coverage).
- Know whether—and how—these products may be cancelled after you purchase them.

NEGOTIATE

You often can negotiate prices for new or used vehicles, trade-ins, optional financing and voluntary protection products. Knowing what other dealerships and finance sources are offering for these items puts you in the driver's seat to get a competitive deal.

ALWAYS READ THE CONTRACT BEFORE YOU SIGN IT

The documents presented to you contain important terms and conditions. Take your time and read these documents carefully and thoroughly before you sign them.