

FEDERAL TRADE COMMISSION**16 CFR Part 463**

RIN 3084–AB72

Motor Vehicle Dealers Trade Regulation Rule**AGENCY:** Federal Trade Commission.**ACTION:** Notice of proposed rulemaking.

SUMMARY: The Federal Trade Commission (“FTC” or “Commission”) seeks comment on this notice of proposed rulemaking (“NPRM”) related to the sale, financing, and leasing of motor vehicles by motor vehicle dealers. The proposed rule would prohibit motor vehicle dealers from making certain misrepresentations in the course of selling, leasing, or arranging financing for motor vehicles, require accurate pricing disclosures in dealers’ advertising and sales discussions, require dealers to obtain consumers’ express, informed consent for charges, prohibit the sale of any add-on product or service that confers no benefit to the consumer, and require dealers to keep records of advertisements and customer transactions. This NPRM invites written comments on all issues raised herein and seeks answers to the specific questions set forth in Section VIII of this document.

DATES: Comments must be received on or before September 12, 2022.

ADDRESSES: Interested parties may file a comment online or on paper by following the instructions in the Request for Comment part of the **SUPPLEMENTARY INFORMATION** section below. Write “Motor Vehicle Dealers Trade Regulation Rule—Rulemaking, No. P204800” on your comment, and file it online at <https://www.regulations.gov>, by following the instructions on the web-based form. If you prefer to file your comment on paper, mail your comment to the following address: Federal Trade Commission, Office of the Secretary, 600 Pennsylvania Avenue NW, Suite CC–5610 (Annex C), Washington, DC 20580.

FOR FURTHER INFORMATION CONTACT: Daniel Dwyer or Sanya Shahrashbi, Division of Financial Practices, Bureau of Consumer Protection, Federal Trade Commission, 202–326–2957 (Dwyer), 202–326–2709 (Shahrashbi), ddwyer@ftc.gov, sshahrashbi@ftc.gov.

SUPPLEMENTARY INFORMATION:**I. Background**

Buying or leasing a motor vehicle is, for many consumers, both essential and

expensive.¹ Millions of Americans depend on vehicles for daily living, with recent data showing that over 95% of American households own at least one motor vehicle,² and nearly 84% of Americans drive to work as of 2020.³ Americans rely on their vehicles for work, school, childcare, groceries, medical visits, and many other important tasks in their daily lives. This necessity does not come cheap: a new vehicle is the second-most expensive purchase many consumers make, falling only behind purchasing a home.⁴ For purchases at new car dealerships, the average new vehicle now sells for more than \$42,000,⁵ and the average used vehicle sells for more than \$26,000.⁶ All told, Americans spent more than \$2.8 trillion dollars on motor vehicles and vehicle parts in 2021.⁷

Given how expensive it can be to buy a vehicle, many consumers rely on

¹ In this proposed rulemaking, “auto,” “automobile,” “car,” “motor vehicle,” and “vehicle” refer to motor vehicles as defined in Section 1029 of the Dodd-Frank Wall Street Reform and Consumer Protection Act (“Dodd-Frank Act”), 15 U.S.C. 5519(f)(1).

² U.S. Census Bureau, *American Community Survey: Means of Transportation to Work by Selected Characteristics*, 2020, <https://data.census.gov/cedsci/table?q=S0802&tid=ACST5Y2020.S0802> (last visited Apr. 25, 2022) (listing 4.2% of population as having “[n]o vehicle available” in 2020); compare U.S. Census Bureau, *American Community Survey: Selected Housing Characteristics*, 2020, <https://data.census.gov/cedsci/table?q=vehicle&tid=ACSDP5Y2020.DP04> (last visited Apr. 25, 2022) (listing 8.5% of households as having “no vehicles available”).

³ U.S. Census Bureau, *American Community Survey: Means of Transportation to Work by Selected Characteristics*, 2020, <https://data.census.gov/cedsci/table?q=S0802&tid=ACST5Y2020.S0802> (last visited Apr. 25, 2022) (including those who commute in a car, truck, or van, either alone or by carpool).

⁴ Fed. Trade Comm’n, *Buying a New Car*, <https://www.consumer.ftc.gov/articles/0209-buying-new-car> (last visited Apr. 25, 2022); see also Am. Auto. Ass’n., *Average Annual Cost of New Vehicle Ownership*, <https://www.aaa.com/autorepair/articles/average-annual-cost-of-new-vehicle-ownership> (last visited Apr. 25, 2022) (“After a home purchase, buying a vehicle is usually a consumer’s second biggest expense.”); Bureau of Lab. Stats., *Consumer Expenditures: Multiyear Tables (2013–2020)* at 2, <https://www.bls.gov/ce/tables/calendar-year/mean/cu-all-multi-year-2013-2020.pdf> (noting average annual home ownership expenditures of \$7,473 and average annual vehicle purchase expenditures of \$4,523 per consumer in 2020).

⁵ Nat’l Auto. Dealers Ass’n, *NADA Data 2021* at 7, <https://www.nada.org/media/4695/download?inline> (noting average retail selling price of \$42,379 for new vehicles sold by dealerships in 2021).

⁶ *Id.* at 10 (noting average retail selling price of \$26,709 for used vehicles sold by new vehicle dealerships in 2021).

⁷ Bureau of Econ. Analysis, *National Data: National Income and Product Accounts, Personal Consumption Expenditures by Major Type of Product* at Table 2.3.5, <https://apps.bea.gov/iTable/iTable.cfm?reqid=19&step=2#reqid=19&step=2&isuri=1&1921=survey> (last visited Apr. 25, 2022).

financing to complete their purchases. Indeed, according to public reports, 81% of new motor vehicle purchases, and nearly 35% of used vehicle purchases, are financed.⁸ The motor vehicle financing market is the third-largest consumer credit market in the United States, after mortgages and student loans. By the end of 2021, Americans had more than 111 million outstanding auto loans, and owed more than \$1.46 trillion thereon.⁹ Motor vehicle financing is the third-largest source of debt for U.S. consumers under the age of 50, and the second-largest source of debt for those 50 and older.¹⁰

Buying or leasing a vehicle is not only an expensive endeavor, but the transaction itself is time-consuming and arduous. Consumers who purchase vehicles at a dealership may spend five hours or more—or even days—doing so.¹¹ And that does not include the time spent visiting dealerships when consumers do not make purchases, or the hours it can take to travel to the dealerships themselves.¹² Consumers

⁸ Melinda Zabritski, Experian Info. Sol’s, Inc., *State of the Automotive Finance Market Q4 2020* at 5, <https://www.experian.com/content/dam/marketing/na/automotive/quarterly-webinars/credit-trends/2020-quarterly-trends/v2-2020-q4-state-automotive-market.pdf>.

⁹ Fed. Rsv. Bank of N.Y., *Quarterly Report on Household Debt and Credit, 2021: Q4* at 3–4 (Feb. 2022), https://www.newyorkfed.org/medialibrary/interactives/householdcredit/data/pdf/HHDC_2021Q4.pdf; Fed. Rsv. Bank of N.Y., *Data underlying report at “Page 3 Data”* and “Page 4 Data” tabs, https://www.newyorkfed.org/medialibrary/interactives/householdcredit/data/xls/hhd_c_report_2021q4.xlsx (last visited Apr. 25, 2022) (number of open auto loan accounts and total balance outstanding).

¹⁰ Fed. Rsv. Bank of N.Y., *Data underlying report at “Page 21 Data”* tab, https://www.newyorkfed.org/medialibrary/interactives/householdcredit/data/xls/hhd_c_report_2021q4.xlsx (last visited Apr. 25, 2022).

¹¹ Mary W. Sullivan, Matthew T. Jones & Carole L. Reynolds, Fed. Trade Comm’n, *The Auto Buyer Study: Lessons from In-Depth Consumer Interviews and Related Research* 15 (2020) [hereinafter *Auto Buyer Study*], <https://www.ftc.gov/system/files/documents/reports/auto-buyer-study-lessons-depth-consumer-interviews-related-research/bcpreportsautobuyerstudy.pdf> (noting the purchase transactions in the FTC’s qualitative study often took 5 hours or more to complete, with some extending over several days); Cf. Cox Automotive, *2020 Cox Automotive Car Buyer Journey* 6 (2020), available at <https://b2b.autotrader.com/app/uploads/2020-Car-Buyer-Journey-Study.pdf> (reporting average consumer time spent shopping for a vehicle at 14 hours, 53 minutes, including 4 hours, 49 minutes visiting dealerships/sellers).

¹² For example, consumers have complained when they go to a dealership based on an offer that the dealer refuses to honor once they have spent hours driving there and have then spent additional time on the lot. See, e.g., Complaint, *FTC v. Illinois v. N. Am. Auto. Servs., Inc.*, No. 1:22–cv–0169 at ¶¶ 23–26 (N.D. Ill. Mar. 31, 2022) (alleging many consumers drive hours to dealerships based on the advertised prices; test-driving and selecting a vehicle, and negotiating the price and financing terms, is an often hours-long process; and, after this

may need to take time off work and arrange daycare or take young children to the dealership, and the process can be especially taxing for one-vehicle families who also need their vehicle for commuting and day-to-day tasks like buying groceries and attending medical appointments.

The Commission, the nation's consumer protection agency, is charged with enforcing key laws and regulations applicable to the motor vehicle marketplace, including sales, financing, and leasing.¹³ The FTC protects consumers in motor vehicle transactions through law enforcement actions, rulemaking, consumer education, and business guidance, aided by information-gathering efforts such as agency roundtables and industry research. In the past ten years, the FTC has brought more than 50 motor vehicle-related enforcement actions, including matters involving misleading motor vehicle advertising, financing paperwork falsification, “yo-yo” financing, deceptive and unfair add-on fees, discrimination, and privacy and data security issues.¹⁴ At the same time, the FTC has conducted a qualitative study of consumer experiences¹⁵ and hosted public events to engage in a dialogue with consumer and dealer groups and other stakeholders, gather information, spotlight misleading practices, and raise awareness of issues that can affect consumers in this space, including consumers who are servicemembers.¹⁶ The FTC also has

time, dealers falsely told consumers add-on products or packages were required to purchase or finance the vehicle, even though they were not included in the low prices advertised or disclosed to consumers who called to confirm prices).

¹³ These laws include the FTC Act, 15 U.S.C. 41–58; the Truth in Lending Act, 15 U.S.C. 1601–1667f, and its implementing Regulation Z, 12 CFR parts 226 and 1026; the Consumer Leasing Act, 15 U.S.C. 1667–1667f and its implementing Regulation M, 12 CFR parts 213 and 1013; and the Used Car Rule, 16 CFR part 445.

¹⁴ See generally Fed. Trade Comm'n, *The Auto Marketplace*, <https://www.ftc.gov/news-events/media-resources/consumer-finance/auto-marketplace>.

¹⁵ See, e.g., Carole L. Reynolds & Stephanie E. Cox, Fed. Trade Comm'n, *Buckle Up: Navigating Auto Sales and Financing* (2020), <https://www.ftc.gov/reports/buckle-navigating-auto-sales-financing> [hereinafter *Buckle Up*]; Auto Buyer Study, *supra* note 11.

¹⁶ For example, the FTC has held public workshops: (1) in conjunction with the National Highway Traffic Safety Administration, to examine the consumer privacy and security issues posed by automated and connected motor vehicles, see Connected Cars: Privacy, Security Issues Related to Connected, Automated Vehicles (June 28, 2017), <https://www.ftc.gov/news-events/events-calendar/2017/06/connected-cars-privacy-security-issues-related-connected>; (2) to explore competition and related issues in the U.S. motor vehicle distribution system including how consumers and businesses may be affected by state regulations and emerging

posted many educational materials to assist consumers and dealers on motor vehicle market issues, and we have worked collaboratively with industry groups to do the same.¹⁷

The Dodd-Frank Wall Street Reform and Consumer Protection Act (“Dodd-Frank Act”) was signed into law in 2010.¹⁸ 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,¹⁹ and to do so pursuant to the Commission's authority under the FTC Act and in accordance with the Administrative Procedure Act (“APA”).²⁰ Although it has engaged in law enforcement, the Commission's relatively small size and limited resources make it challenging to investigate and act upon the tens of thousands of complaints regarding

trends in the industry, Auto Distribution: Current Issues & Future Trends (Jan. 19, 2016), <https://www.ftc.gov/news-events/events-calendar/2016/01/auto-distribution-current-issues-future-trends>; (3) on military consumer financial issues including automobile purchases, financing, and leasing, Military Consumer Financial Workshop (July 2017), <https://www.ftc.gov/news-events/events-calendar/military-consumer-workshop>; and (4) through a series of three roundtables on numerous issues in selling, financing, and leasing automobiles, The Road Ahead: Selling Financing, and Leasing Motor Vehicles (Feb. 2011, Aug. 2011, and Nov. 2011), <https://www.ftc.gov/news-events/events-calendar/2011/11/road-ahead-selling-financing-leasing-motor-vehicles>, <https://www.ftc.gov/news-events/events-calendar/2011/08/road-ahead-selling-financing-leasing-motor-vehicles>, <https://www.ftc.gov/news-events/events-calendar/2011/04/road-ahead-selling-financing-leasing-motor-vehicles>; see also Consumers for Auto Reliability and Safety, Comment Letter on Motor Vehicle Roundtables, Project No. P104811 at 6 (Apr. 1, 2012), https://www.ftc.gov/sites/default/files/documents/public_comments/public-roundtables-protecting-consumers-sale-and-leasing-motor-vehicles-project-no-p104811-00108/00108-82875.pdf (stating that Director of the Navy-Marine Corps Relief Society in San Diego indicated before the California Assembly Committee on Banking and Finance “the number one issue they are confronted with is used car dealers who are taking advantage of military personnel.”). These events, and others, have included speakers representing consumers, dealers, regulators, and other industry stakeholders.

¹⁷ See, e.g., Fed. Trade Comm'n, *The Auto Marketplace*, <https://www.ftc.gov/news-events/media-resources/consumer-finance/auto-marketplace>; see also Nat'l Auto. Dealers Ass'n, *Understanding Vehicle Financing*, <https://www.nada.org/WorkArea/DownloadAsset.aspx?id=21474839119> (prepared cooperatively by Am. Fin. Servs. Ass'n Educ. Found., Fed. Trade Comm'n & Nat'l Auto. Dealers Ass'n). Industry groups also play an important role in educating their members on how to comply with the law, including by issuing guidance in specific areas. See, e.g., Nat'l Auto. Dealers Ass'n, Am. Int'l Auto. Dealers Ass'n & Nat'l Ass'n of Minority Auto. Dealers, *Voluntary Protection Products: A Model Dealership Policy* (2019), <https://www.nada.org/regulatory-compliance/voluntary-protection-products-model-dealership-policy>.

¹⁸ Public Law 111–203 (2010).

¹⁹ See *supra* note 1.

²⁰ 12 U.S.C. 5519.

dealerships. As discussed below, 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. In addition, a rule prohibiting unfair or deceptive acts or practices in the motor vehicle marketplace would allow the FTC to seek redress for harmed consumers and obtain other forms of monetary relief in cases involving FTC Act violations.²¹ Further, law-abiding dealers suffer when other dealers gain business through deceptive or unfair means. For all these reasons, the Commission believes it is appropriate to utilize its rulemaking authority to issue a rule to address unfair or deceptive acts or practices in the motor vehicle marketplace.

I. Overview of Vehicle Dealers and Motor Vehicle Financing

A. New and Used Motor Vehicle Dealerships

There are more than 21,000 new motor vehicle dealerships across the country.²² Collectively, these dealerships sold more than 17 million new vehicles per year in each of the past three years,²³ averaging more than 800 new vehicle sales per dealership per year.²⁴ New-vehicle dealers spend an average of more than \$600 on advertising per vehicle sold²⁵—more

²¹ Under Section 19(a)(1) of the FTC Act, the Commission may sue in federal district court “any person, partnership, or corporation” that “violates any rule under [the FTC Act] respecting unfair or deceptive acts or practices.” 15 U.S.C. 57b(a)(1). Where such liability is found, under Section 19(b) a court may “grant such relief as [it] finds necessary to redress injury . . . resulting from the rule violation,” including the “rescission or reformation of contracts, the refund of money or return of property, [or] the payment of damages.” *Id.* 57b(b).

²² U.S. Census Bureau, *All Sectors: County Business Patterns, including ZIP Code Business Patterns, by Legal Form of Organization and Employment Size Class for the U.S., States, and Selected Geographies: 2019*, <https://data.census.gov/cedsci/table?q=CBP2019.CB1900CBP&n=44111%3A44112&tid=CBP2019.CB1900CBP&hidePreview=true&nkd=EMPSZES-001,LFO-001> (listing 21,427 establishments for “new car dealers,” NAICS code 44111).

²³ Edmunds, *Automotive Industry Trends | 2020* at 2, <https://static.edmunds-media.com/unversioned/img/industry-center/insights/2020-automotive-trends.pdf>.

²⁴ Nat'l Auto. Dealers Ass'n, *NADA Data 2021* at 7, <https://www.nada.org/media/4695/download?inline>. New vehicle dealerships are also a significant source of used vehicles, having sold between 13.7 million and 14.9 million such vehicles per year over the past three years. *Id.* at 10 (graph of used-vehicle sales by new-vehicle dealerships, by year).

²⁵ *Id.* at 15 (listing average dealership advertising per new vehicle sold of \$602).

than half of which goes toward online advertising.²⁶ According to industry sources, these dealers averaged a gross profit of about \$2,444 per vehicle.²⁷ More than half of this profit came from the dealers' financing and insurance, or "F&I", offices, which sell consumers financing and leasing, as well as add-on products and services such as vehicle service contracts.²⁸

There are more than 25,000 used motor vehicle dealerships across the country,²⁹ and used vehicle sales are nearly evenly split between new and used car dealerships.³⁰ Used vehicles sold by new-vehicle dealerships cost \$24,542 on average.³¹ These vehicles brought in an average gross profit of about \$2,675 per vehicle, more than a

third of which came from the F&I office.³² Independent used vehicle dealerships sold an average of 684 vehicles per dealership in 2019, with an average gross profit of more than \$6,000 per vehicle.³³ While some independent used vehicle dealerships do not have a separate F&I office, more than half of them sell add-on products.³⁴

B. Motor Vehicle Financing and Leasing Overview

Consumers can finance the purchase or use of a vehicle in several ways. Those interested in purchasing a vehicle generally use either indirect financing or direct financing. Others—particularly those with thin or damaged credit—work with a so-called "buy here, pay here" dealership for financing, typically without the involvement of an outside financing entity.³⁵ Finally, some consumers opt to lease a vehicle rather than purchase it.³⁶

Approximately 70 percent of consumers use dealer-provided indirect financing at the dealership.³⁷ In this scenario, the dealership collects financial information on the consumer and forwards that information to prospective financing entities. These financing entities, who work with the dealer, evaluate that information and in the process determine whether, and on what terms, to provide credit.³⁸ These terms include the "buy rate," a risk-based finance charge that reflects the interest rate at which the entity will finance the deal.³⁹ Dealers often add a

finance charge called a "dealer reserve" or "markup" to the buy rate.⁴⁰ Unlike the buy rate, the markup is not based on the underwriting risk or credit characteristics of the applicant.⁴¹

Alternatively, those who use direct financing apply for and obtain financing directly from a credit union, bank, or other financing entity.⁴² These consumers typically receive an interest rate quote from the entity prior to arriving at a dealership to purchase a vehicle. Then, once these consumers agree to purchase a vehicle, they can use the financing from the entity to pay for the vehicle.⁴³ Dealerships do not profit on the financing portion of the transaction when a consumer arranges financing directly.

"Buy here, pay here" dealers typically finance their motor vehicle sales in-house rather than routinely assigning their financing to unaffiliated parties.⁴⁴ That means consumers borrow from and make their payments directly to the dealership. Interest rates for this financing are usually much higher than for direct or indirect financing,⁴⁵ and consumers default on this financing at

²⁶ *Id.* at 16 (listing 63.6% of estimated advertising expenditures by medium as internet expenditures).

²⁷ Nat'l Auto. Dealers Ass'n, *Average Dealership Profile 1* (2020), <https://www.nada.org/media/4136/download?attachment>.

²⁸ *Id.* (listing an average 6.3% gross as a percentage of the vehicle's selling price, and a 3.2% average F&I gross as a percentage of new-vehicle dept. sales). While many dealers have seen increased profits during the pandemic, to the extent some dealers may be profiting through unscrupulous practices, the proposed rule would help honest dealers compete on a level playing field. See Nora Eckert & Mike Colias, *Ford and GM Warn Dealers to Stop Charging So Much for New Cars*, Wall St. J. (Feb. 9, 2022), <https://www.wsj.com/articles/ford-gm-warn-dealers-charge-above-sticker-price-and-face-repercussions-11644323580> (discussing how many dealers have increased markups, including by requiring consumers to accept added fees and warranty protection as part of the asking price). Conditioning a vehicle sale or lease on the purchase of an add-on product or service is contrary to industry guidance. See Nat'l Auto. Dealers Ass'n et al., *Voluntary Protection Products: A Model Dealership Policy 4* (2019), <https://www.nada.org/regulatory-compliance/voluntary-protection-products-model-dealership-policy> (stating dealerships should "prominently display to customers a poster stating that [add-on products and services] 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.").

²⁹ U.S. Census Bureau, *All Sectors: County Business Patterns, including ZIP Code Business Patterns, by Legal Form of Organization and Employment Size Class for the U.S., States, and Selected Geographies: 2019*, <https://data.census.gov/cedsci/table?q=CBP2019.CB1900CBP&n=44111%3A44112&tid=CBP2019.CB1900CBP&hidePreview=true&nkd=EMPSZES-001,LFO-001> (listing 25,098 establishments for "used car dealers," NAICS code 44112).

³⁰ In 2020, 52.2% of used motor vehicle sales were by new car dealerships, while 47.8% were by independent used vehicle dealerships. Melinda Zabritski, Experian Info. Sol's, Inc., *State of the Automotive Finance Market Q4 2020* at 32, <https://www.experian.com/content/dam/marketing/na/automotive/quarterly-webinars/credit-trends/2020-quarterly-trends/v2-2020-q4-state-automotive-market.pdf>.

³¹ Nat'l Auto. Dealers Ass'n, *NADA Data 2021: Midyear Report 10*, <https://www.nada.org/media/4694/download?inline>.

³² Nat'l Auto. Dealers Ass'n, *Average Dealership Profile 1* (2020), <https://www.nada.org/media/4136/download?attachment> (listing an average 6.3% gross as a percentage of the vehicle's selling price, and a 3.2% average F&I gross as a percentage of new-vehicle dept. sales).

³³ Nat'l Indep. Auto. Dealers Ass'n, *NIADA Used Car Industry Report 2020* at 21 (2020).

³⁴ *Id.* at 8, 10.

³⁵ In some regions, "lease here, pay here" dealerships may provide leases to consumers through similar programs.

³⁶ Melinda Zabritski, Experian Info. Sol's, Inc., *State of the Automotive Finance Market Q4 2020* at 19, <https://www.experian.com/content/dam/marketing/na/automotive/quarterly-webinars/credit-trends/2020-quarterly-trends/v2-2020-q4-state-automotive-market.pdf> (more than 72% of new vehicle financing in MI is for leases; the Northeast ranges from 43% in VT to 66% in NY; other states range from 45% (OH) to less than 4% (AR)).

³⁷ See Nat'l Auto. Dealers Ass'n, *Dealer-Assisted Financing Benefits Consumers*, <https://www.nada.org/autofinance/> (last visited Apr. 25, 2022) (noting 7 out of 10 consumers finance through their dealership). This is also known as "dealer financing," because consumers obtain financing through the dealer that partners with other entities in the financing process.

³⁸ Dealers often may originate the financing and then sell the financing agreements to third-parties.

³⁹ Lesley Fair, *FTC says Bronx Honda discriminated against African-American and Hispanic consumers*, Fed. Trade Comm'n Business

Blog (May 27, 2020), <https://www.ftc.gov/business-guidance/blog/2020/05/ftc-says-bronx-honda-discriminated-against-african-american-hispanic-consumers>.

⁴⁰ See, e.g., Nat'l Auto. Dealers Ass'n, Nat'l Ass'n of Minority Auto. Dealers & Am. Int'l Auto. Dealers Ass'n, *Fair Credit Compliance Policy & Program 1*, n.4 & accompanying text, <https://www.nada.org/media/4558/download?inline>.

⁴¹ *Id.* (describing this as the amount dealers earn for arranging financing, measured as the difference between the consumer's APR and the wholesale "buy rate" at which a finance source buys the finance contract from the dealer, and noting finance sources typically permit dealers to retain the dealer participation).

⁴² Consumer Fin. Prot. Bureau, *Automobile Finance Examination Procedures 4* (Aug. 2019), https://files.consumerfinance.gov/f/documents/201908_cfpb_automobile-finance-examination-procedures.pdf.

⁴³ Consumer Fin. Prot. Bureau, *Consumer Voices on Automobile Financing 5* (June 2016), https://files.consumerfinance.gov/f/documents/201606_cfpb_consumer-voices-on-automobile-financing.pdf.

⁴⁴ See Consumer Fin. Prot. Bureau, *Automobile Finance Examination Procedures 4* (Aug. 2019), https://files.consumerfinance.gov/f/documents/201908_cfpb_automobile-finance-examination-procedures.pdf. ("While most Buy-Here, Pay-Here (BHPH) dealers are independently owned entities that serve as the primary lender and servicer, some larger BHPH dealers sell or assign their contracts to an affiliated BHPH finance company once the contract has been consummated with the consumer.")

⁴⁵ As of 2017, interest rates at "buy here, pay here" dealerships averaged around 20%. Nat'l Indep. Auto Dealers Ass'n, *NIADA Used Car Industry Report 2019* at 14. In contrast, the average financing rate for used vehicles across the industry was 8.43% in the fourth quarter of 2020. Melinda Zabritski, Experian Info. Sol's, Inc., *State of the Automotive Finance Market Q4 2020* at 38, <https://www.experian.com/content/dam/marketing/na/automotive/quarterly-webinars/credit-trends/2020-quarterly-trends/v2-2020-q4-state-automotive-market.pdf>.

a high rate.⁴⁶ The dealer often performs its own collections and repossession operations when consumers fall behind. “Buy here, pay here” accounts for 6–8% of financing to purchase a vehicle.⁴⁷

Leasing involves arranging to drive a vehicle for a set period of time—typically around three years⁴⁸—and for a certain maximum number of miles—typically 10–15,000 miles per year—in exchange for an upfront payment, a monthly payment, and fees before, during, and at the end of the lease, including for excess wear and usage over the mileage limit.⁴⁹ When consumers lease a vehicle, they do not own it, and they must return the vehicle when the lease expires, though they may have the option to purchase the vehicle at the end of the lease period. Nearly 27% of new vehicles are leased, as are just over 8% of used vehicles.⁵⁰

II. Deception and Unfairness in the Motor Vehicle Marketplace

For many consumers, buying or leasing a vehicle is a difficult and time-consuming experience. The process of shopping for a vehicle, conducting test drives, providing financing information, and completing stacks of paperwork at a dealership can take many hours or even days,⁵¹ and can involve unfair or

deceptive practices. The FTC received more than 100,000 complaints in each of the past three years regarding new and used motor vehicle sales, financing, service & warranties, and rentals & leasing, and complaints about motor vehicle transactions are regularly in the top ten complaint categories tracked by the agency.⁵²

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.⁵³ Some deception cases involve omission of material information, the disclosure of which is necessary to prevent the claim, practice, or sale from being misleading.⁵⁴ Deceptive information distorts the marketplace and thus, these false and misleading statements are unlawful regardless of an intent to deceive.⁵⁵

A practice is considered unfair under Section 5 if: (1) it causes, or is likely to cause, substantial injury; (2) the injury is not reasonably avoidable by consumers; and, (3) the injury is not outweighed by benefits to consumers or competition.⁵⁶

Chronic problems confronting consumers in the sales, financing, and leasing process include advertising misrepresentations and unlawful practices related to add-ons and deceptive pricing.⁵⁷

A. Advertising Misrepresentations

Advertisements for motor vehicles are often consumers’ first contact in the vehicle-buying or leasing process. Dealers utilize a variety of means to reach consumers, including television and radio commercials, social media and online advertisements, and direct mail marketing.

The FTC has brought many cases concerning misrepresentations regarding key pricing aspects of a vehicle purchase, including the price of the vehicle, the availability of discounts and rebates, the monthly payment amount for a financed purchase or lease, or the amount due at signing.⁵⁸ Other misrepresentations regarding financial terms that have been the subject of FTC complaints have included whether an offer pertains to a purchase or a lease⁵⁹ and whether the dealer or consumer is responsible for paying off “negative equity,” *i.e.*, the outstanding debt on a vehicle that is being traded in as part of another vehicle purchase.⁶⁰ And according to other FTC actions, some dealers have lured potential buyers through financial incentives incidental

misrepresentations and add-on and pricing practices.

⁵⁸ See Complaint, *In re Timonium Chrysler, Inc.*, No. C–4429 (F.T.C. Jan. 28, 2014) (alleging dealership advertised internet prices and dealer discounts but failed to disclose consumer would have to qualify for multiple rebates not generally available to them); Complaint, *In re Ganley Ford West, Inc.*, No. C–4428 (F.T.C. Jan. 28, 2014) (alleging dealership advertised discounts on vehicle prices, but failed to disclose discounts were only available on the most expensive models); Complaint, *In re Progressive Chevrolet Co.*, No. C–4578 (F.T.C. June 13, 2016) (alleging deceptive failure to disclose material conditions of obtaining the lease monthly payment in their online and print advertising).

⁵⁹ See Complaint, *FTC v. Tate’s Auto Ctr. of Winslow, Inc.*, No. 3:18–cv–08176–DJH at ¶¶ 38–46 (D. Ariz. July 31, 2018) (alleging company issued advertisements for attractive terms but concealed that the terms were only applicable to lease offers); Complaint, *United States v. New World Auto Imports, Inc.* No. 3:16–cv–02401–K at ¶¶ 36–38 (N.D. Tex. Aug. 18, 2016) (alleging misrepresentation that terms were for financing instead of leasing); Complaint, *FTC v. Universal City Nissan, Inc.*, No. 2:16–cv–07239 at ¶¶ 85–87 (C.D. Cal. Sept. 29, 2016) (alleging dealerships claimed consumers could finance the purchase of vehicles with attractive terms and buried disclosures indicating such terms were applicable to leases only).

⁶⁰ *Universal City Nissan*, No. 2:16–cv–07239 at ¶¶ 82–84 (C.D. Cal. Sept. 29, 2016) (alleging misrepresentation that dealer would pay off consumer’s trade-in when in fact consumers were still responsible for outstanding debt on trade-in vehicles); Complaint, *In re TXVT Ltd. P’ship*, No. C–4508 at ¶¶ 17–19 (F.T.C. Feb. 12, 2015) (alleging failure to disclose in leasing advertising that the dealership would pay off the negative equity of consumers’ trade in vehicle, when in fact, it was merely rolled into the financed amount for the consumer’s newly financed vehicle).

⁴⁶ For example, approximately 37.5% of “buy here, pay here” consumers defaulted in 2019. Nat’l Indep. Auto. Dealers Ass’n, *NIADA Used Car Industry Report 2020* at 13. The overall motor vehicle debt default rate was 4.94% in 2019. Zhu Wang, Fed. Rsv. Bank of Richmond, *Coronavirus and Auto Lending: A Market Outlook* (Apr. 16, 2020), https://www.richmondfed.org/-/media/RichmondFedOrg/research/economists/bios/pdfs/wang_covid19_paper.pdf.

⁴⁷ Melinda Zabritski, Experian Info. Sol’s, Inc., *State of the Automotive Finance Market Q2 2020* at 8, <https://www.experian.com/content/dam/marketing/na/automotive/quarterly-webinars/credit-trends/2020-q2-safm-final.pdf>.

⁴⁸ Melinda Zabritski, Experian Info. Sol’s, Inc., *State of the Automotive Finance Market Q4 2020* at 26, <https://www.experian.com/content/dam/marketing/na/automotive/quarterly-webinars/credit-trends/2020-quarterly-trends/v2-2020-q4-state-automotive-market.pdf>.

⁴⁹ See Fed. Trade Comm’n, *Financing or Leasing a Car*, <https://www.consumer.ftc.gov/articles/0056-financing-or-leasing-car> (last visited Apr. 25, 2022) (“The mileage limit in most standard leases is typically 15,000 or fewer per year”); Consumer Fin. Prot. Bureau, *What should I know about the differences between leasing and buying a vehicle?*, <https://www.consumerfinance.gov/ask-cfpb/what-should-i-know-about-the-differences-between-leasing-and-buying-a-vehicle-en-815/> (last visited Apr. 25, 2022) (“Most leases include mileage restrictions of 10,000–15,000 miles per year.”).

⁵⁰ Melinda Zabritski, Experian Info. Sol’s, Inc., *State of the Automotive Finance Market Q4 2020* at 5, <https://www.experian.com/content/dam/marketing/na/automotive/quarterly-webinars/credit-trends/2020-quarterly-trends/v2-2020-q4-state-automotive-market.pdf>.

⁵¹ *Auto Buyer Study*, *supra* note 11, at 15 (finding the process of completing a vehicle purchase often took five hours or more, and sometimes several days); Cf. 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> (noting, on average, consumers spend 89 day in the market and 14 hours, 53 minutes shopping for a vehicle).

⁵² See, e.g., Fed. Trade Comm’n, *Consumer Sentinel Network Data Book 2021* at 7–8 & app. B3 at 85 (Feb. 2022), https://www.ftc.gov/system/files/ftc_gov/pdf/CSN%20Annual%20Data%20Book%202021%20Final%20PDF.pdf (listing motor vehicle-related complaints as the eighth most common report category in 2021, and reporting complaints about new and used motor vehicle sales, financing, service & warranties, and rentals & leasing, collectively, of more than 100,000 in 2019, 2020, and 2021).

⁵³ See Fed. Trade Comm’n, *FTC Policy Statement on Deception* 2, 5, 103 F.T.C. 174 (1984) (appended to *Cliffdale Assocs., Inc.*, 103 F.T.C. 110, 183 (1984)), https://www.ftc.gov/system/files/documents/public_statements/410531/831014deceptionstmt.pdf.

⁵⁴ *Id.*

⁵⁵ *In re Sears, Roebuck & Co.*, 95 F.T.C. 406, 517 n.9 (1980) (citing *Regina Corp. v. FTC*, 322 F.2d 765, 768 (3d Cir. 1963)).

⁵⁶ 15 U.S.C. 45(n).

⁵⁷ While other issues exist in the motor vehicle sales, financing, and leasing space, including issues involving discrimination, financing application falsification, data privacy and security, and yo-yo financing, this proposal’s core focus is on

to the purchase, such the promise of a valuable prize.⁶¹

Misleading advertisements can cause significant consumer harm, and reduce competition amongst law-abiding dealers. When dealerships advertise prices, discounts, or other terms that are not actually available to typical consumers, those consumers end up selecting that dealership instead of others and spending time visiting it and transacting with it under false pretenses.

B. Unlawful Practices Relating to Add-Ons and Deceptive Pricing

Another key consumer protection concern is the sale of “add-on” products and services in a deceptive or unfair manner. Commonly offered add-ons include extended warranties, service and maintenance plans, payment programs, guaranteed automobile or asset protection (“GAP” or “GAP insurance”), emergency road service, VIN etching and other theft protection devices, and undercoating. Individual add-ons can cost consumers thousands of dollars and can significantly increase the overall cost to the consumer in the transaction.

A significant consumer protection concern is consumers paying for add-ons without knowing about or expressly agreeing to them.⁶² The protracted and

paperwork-heavy vehicle-buying process can make it difficult for consumers to spot add-on charges, particularly when advertised prices do not mention add-ons.⁶³ If consumers are financing the vehicle, they then undergo a separate financing process, which can include wading through a thick stack of dense paperwork filled with fine print.⁶⁴ For example, according to an FTC complaint, consumers were required to complete a stack of paperwork that ran more than sixty pages and required more than a dozen signatures.⁶⁵ This paperwork can include hidden charges for add-on products and services, causing consumers to purchase those add-ons without knowing about or agreeing to them, or without knowing or agreeing to their costs, or other key terms.⁶⁶

purchased add-ons, or that the add-ons were included at no additional charge, were surprised to learn, when going through the paperwork, that they had in fact paid extra for add-ons. This is consistent with consumers’ experiencing fatigue during the buying process or confusion with a financially complex transaction, but would also be consistent with dealer misrepresentations.”).

⁶³ *Liberty Chevrolet*, No. 1:20-cv-03945 (S.D.N.Y. May 21, 2020); *Universal City Nissan*, No. 2:16-cv-07329 (C.D. Cal. Sept. 29, 2016).

⁶⁴ See, e.g., *Buckle Up*, *supra* note 15, at 10–11 (noting the long, complex transaction process); *N. Am. Auto. Servs.*, No. 1:22-cv-0169 at ¶¶ 23–28 (N.D. Ill. Mar. 31, 2022) (same).

⁶⁵ *N. Am. Auto. Servs.*, No. 1:22-cv-0169 at ¶ 24 (N.D. Ill. Mar. 31, 2022); see also *Buckle Up*, *supra* note 15, at 10–11.

⁶⁶ *Liberty Chevrolet*, No. 1:20-cv-03945 at ¶¶ 17–19 (S.D.N.Y. May 21, 2020); *The Road Ahead: Selling, Financing & Leasing Motor Vehicles*, <https://www.ftc.gov/news-events/events-calendar/2011/08/road-ahead-selling-financing-leasing-motor-vehicles>; Dale Irwin, Slough Connealy Irwin & Madden LLC, Comment Letter on Public Roundtables: Protecting Consumers in the Sale and Leasing of Motor Vehicles, Project No. P104811, Submission No. 558507–00060 (Dec. 29, 2011), available at <https://www.regulations.gov/docket/FTC-2022-0036> (consumer protection lawyer noting “payment packing” among problems “that cry out for scrutiny and regulation”); Michael Archer, Comment Letter on Public Roundtables: Protecting Consumers in the Sale and Leasing of Motor Vehicles, Project No. P104811, Submission No. 558507–00041 (Aug. 6, 2011), available at <https://www.regulations.gov/docket/FTC-2022-0036> (workshop panelist stating “I have seen cases wherein the dealer uses financing to pack in extra costs or to wipe out trade-in value.”); Comment Letter on Public Roundtables: Protecting Consumers in the Sale and Leasing of Motor Vehicles, Project No. P104811, Submission No. 558507–00027 (July 27, 2011), available at <https://www.regulations.gov/docket/FTC-2022-0036> (“Confusing or misleading sales terms Extra fees was added at the time of purchase and to this day I still do not understand what the fee was for, it made the payment higher.”); Carrie Ferraro, Legal Servs. of N.J., Comment Letter on Public Roundtables: Protecting Consumers in the Sale and Leasing of Motor Vehicles, Project No. P104811, Submission No. 558507–00061 (Dec. 29, 2011), available at <https://www.regulations.gov/docket/FTC-2022-0036> (citing dealers “engage[d] in packing” as a common consumer complaint received by LSNJ’s legal advice hotline); Rosemary Shahan, Consumers for Auto Reliability and Safety, Comment Letter on Public Roundtables: Protecting

Unscrupulous dealers are able to slip these additional costs past consumers unnoticed and into purchase contracts through a variety of means, including by not mentioning them at all,⁶⁷ or by focusing consumers’ attention on other aspects of the complex transaction, such as monthly payments, which might increase only marginally with the addition of prorated add-on costs or even be made to decrease if the financing term is stretched out, while in fact these added costs can be considerable in aggregate.⁶⁸ Dealers

Consumers in the Sale and Leasing of Motor Vehicles, Project No. P104811, Submission No. 558507–00069 (Jan. 31, 2012), available at <https://www.regulations.gov/docket/FTC-2022-0036> (noting “[m]any common auto scams do not generate complaints in proportion to how pervasive or costly the practices are, simply because the consumers generally remain unaware they have been scammed,” including as a result of “Loan packing”); Mary W. Sullivan, Matthew T. Jones & Carole L. Reynolds, Fed. Trade Comm’n, *The Auto Buyer Study: Lessons from In-Depth Consumer Interviews and Related Research, Supplemental Appendix: Redacted Interview Transcripts* (2020) [hereinafter *Auto Buyer Study: Appendix*], <https://www.ftc.gov/system/files/documents/reports/buckle-navigating-auto-sales-financing/bcpstaffreportautobuyerstudysuppappendix.pdf> (Study participant 169810 at 525 (consumer had “additional items” charges on contract that consumer could not identify); Study participant 188329 at 730, 740–42 (dealer did not tell consumer about GAP insurance or service contract but consumer was charged \$599 and \$1950 for those add-ons, respectively)); Press Release, N.Y. State Att’y Gen., A.G. Schneiderman Announces Nearly \$14 Million Settlement With NYC And Westchester Auto Dealerships For Deceptive Practices That Resulted In Inflated Car Prices (June 17, 2015), <https://ag.ny.gov/press-release/2015/ag-schneiderman-announces-nearly-14-million-settlement-nyc-and-westchester-auto> (“This settlement is part of the [New York] Attorney General’s wider initiative to end the practice of “jamming,” or unlawfully charging consumers for hidden purchases by car dealerships.”).

⁶⁷ Under the Truth in Lending Act (“TILA”) and its implementing Regulation Z, required add-on products and services must be factored into the APR and the finance charge disclosed during the transaction. See Sections 106, 107, and 128 of the TILA (15 U.S.C. 1605, 1606 and 1638) and §§ 226.4, 226.18(b), (d), and (e), and 226.22 of Regulation Z (12 CFR 226.4, 226.18(b), (d) and (e), and 226.22). It is legally impermissible for dealers to include charges for such products into a consumer’s contract without disclosing them under TILA. See, e.g., Complaint, *FTC v. Stewart Fin. Co. Holdings, Inc.*, No. 103CV–2648 at ¶¶ 57–60 (N.D. Ga. Sept. 4, 2003) (alleging violations for failure to include the cost of required add-on products in the finance charge and annual percentage rate disclosed to consumers).

⁶⁸ See, e.g., *Buckle Up*, *supra* note 15, at 6; Military Consumer Financial Workshop (July 19, 2017), <https://www.ftc.gov/news-events/events-calendar/military-consumer-workshop>; *The Road Ahead: Selling, Financing & Leasing Motor Vehicles*, Fed. Trade Comm’n (Aug. 2011) (Public Roundtables) (Session 2 transcript at 40–41) (noting optional products and services are often already included in the monthly payment prices advertised or quoted); Christopher Kukla, Ctr. for Responsible Lending, Comment Letter on Public Roundtables: Protecting Consumers in the Sale and Leasing of Motor Vehicles, Project No. P104811, Submission No. 558507–00071 (Feb. 2, 2012), available at

⁶¹ See, e.g., Complaint, *FTC v. Traffic Jam Events, LLC*, No. 9395 at ¶¶ 12, 17–19 (F.T.C. Aug. 7, 2020); Complaint, *In re Fowlerville Ford, Inc.*, No. C–4433 at ¶¶ 4, 7–9 (F.T.C. Feb. 20, 2014).

⁶² See Nat’l Consumer Law Ctr., *Auto Add-ons Add Up: How Dealer Discretion Drives Excessive, Inconsistent, and Discriminatory Pricing* (Oct. 11, 2017), https://www.nclc.org/images/pdf/car_sales/report-auto-add-on.pdf; Consumers for Auto Reliability and Safety, Comment Letter on Motor Vehicle Roundtables, Project No. P104811 at 2–3 (Apr. 1, 2012), https://www.ftc.gov/sites/default/files/documents/public_comments/public-roundtables-protecting-consumers-sale-and-leasing-motor-vehicles-project-no-p104811-00108/00108-82875.pdf (citing a U.S. Department of Defense data call summary that found the vast majority of military counselors have clients with auto financing problems and cited loan packing and yo-yo financing as the most frequent auto lending abuses affecting servicemembers); Adam J. Levitin, *The Fast and the Usurious: Putting the Brakes on Auto Lending Abuses*, 108 Geo. L.J. 1257, 1265–66 (2020), https://www.law.georgetown.edu/georgetown-law-journal/wp-content/uploads/sites/26/2020/05/Levitin_The-Fast-and-the-Usurious-Putting-the-Brakes-on-Auto-Lending-Abuses.pdf (discussing “loan packing” as the sale of add-on products falsely represented as being required in order to obtain financing.); Complaint, *FTC v. Liberty Chevrolet, Inc.*, No. 1:20-cv-03945 at ¶¶ 12–19 (S.D.N.Y. May 21, 2020) (alleging deceptive and unauthorized add-on charges in consumers’ transactions); *Universal City Nissan*, No. 2:16-cv-07329 at ¶¶ 59–64 (C.D. Cal. Sept. 29, 2016) (alleging deceptive and unauthorized add-on charges in consumers’ transactions); Complaint, *In re TT of Longwood, Inc.*, No. C–4531 at ¶¶ 6, 9 (F.T.C. July 2, 2015) (alleging misrepresentations regarding prices for added features); see also *Auto Buyer Study*, *supra* note 11, at 14 (“Several participants who thought that they had not

engaging in this type of conduct have targeted immigrants, communities of color, and servicemembers.⁶⁹

In other instances, dealers might wait until late in the transaction to mention add-ons, and then do so in a misleading manner. For example, according to an FTC study, there were situations where dealers waited until the financing stage to mention add-ons, after consumers believed they had agreed on terms, and even though many add-ons have nothing to do with financing and were not mentioned at all during the sales process or when prices were initially negotiated.⁷⁰ According to FTC enforcement actions, dealers also have represented that add-ons are required when in fact they are not,⁷¹ have

<https://www.regulations.gov/docket/FTC-2022-0036> (discussing how dealers conceal loan packing by expressing an increase in price in terms of monthly payment); Att’y General of 31 States & DC, Comment Letter on Public Roundtables: Protecting Consumers in the Sale and Leasing of Motor Vehicles, Project No. P104811, Submission No. 558507–00112 at 5 (Apr. 13, 2012), available at <https://www.regulations.gov/docket/FTC-2022-0036> (discussing the “age-old auto salesperson’s trick” of quoting monthly payment prices without disclosing the quote includes the cost of optional items the customer has not yet agreed to purchase).

⁶⁹ *Liberty Chevrolet*, No. 1:20–cv–03945 at ¶¶ 9, 26 (S.D.N.Y. May 21, 2020); Press Release, N.Y. State Att’y Gen., *Attorney General James Delivers Restitution to New Yorkers Cheated by Auto Dealership* (Nov. 17, 2020), <https://ag.ny.gov/press-release/2020/attorney-general-james-delivers-restitution-new-yorkers-cheated-auto-dealership> (dealership targeted Chinese-speakers for unlawful payment packing); Military Consumer Financial Workshop (July 19, 2017), <https://www.ftc.gov/news-events/events-calendar/military-consumer-workshop> (panelist discussing servicemembers experiencing payment packing at 19:21); see also Fed. Trade Comm’n, *Staff Perspective: A Closer Look at the Military Consumer Financial Workshop* 2–3 (Feb. 2018), https://www.ftc.gov/system/files/documents/reports/closer-look-military-consumer-financial-workshop-federal-trade-commission-staff-perspective/military_consumer_workshop_-_staff_perspective_2-2-18.pdf (explaining the unique situation of servicemembers as having steady paychecks that make them attractive customers for dealers, while having no or minimal credit history means they qualify for less advantageous credit terms and higher interest rate financing).

⁷⁰ See, e.g., *Buckle Up*, supra note 15, at 6 (observing that the introduction of “add-ons during financing discussions caused several participants’ total sale price to balloon from the cash price”) & *id.* at 9 (observing for most consumers in the study, “add-ons did not come up until the financing process, if at all, after a long car-buying process and at a time when the consumer often felt pressure to close the deal”) & *id.* at 8–9 (noting most study participants’ contracts included add-ons charges, but many “were unclear what those add-ons included, and sometimes did not realize they had purchased any add-ons at all”) & *id.* at 7 (explaining situations where the consumer reached the financing office after negotiating with the sales staff, and were then told the agreed upon price was not compatible with key financing terms—for example, a promised rebate or discount could not be combined with an advertised interest rate); *Liberty Chevrolet*, No. 1:20–cv–03945 at ¶ 17 (S.D.N.Y. May 21, 2020).

⁷¹ *Liberty Chevrolet*, No. 1:20–cv–03945 at ¶¶ 12–19 (S.D.N.Y. May 21, 2020) (alleging deceptive and

misrepresented the purported benefits of add-ons, and have failed to disclose material limitations).⁷²

Indeed, in a recent enforcement proceeding brought by the FTC, the agency cited a survey finding that 83% of consumers from ten dealership locations within the same motor vehicle dealership group—the thirteenth largest dealership group in the country in 2020, as ranked by total revenue—were charged for add-on products or services that they did not authorize or as a result of deceptive claims that they were required to purchase them.⁷³

One participant in an FTC qualitative study of consumers’ car buying experiences summed up these issues during an interview after having purchased a vehicle. The consumer purchased a \$2,000 service contract that the dealer falsely said was free, and a \$900 GAP insurance contract that the dealer falsely said was mandatory, and learned about these purchases during the study interview. This consumer remarked:

unauthorized add-on charges in consumers’ transactions); *Universal City Nissan*, No. 2:16–cv–07329 at ¶¶ 59–64 (C.D. Cal. Sept. 29, 2016) (deceptive and unauthorized add-on charges in consumers’ transactions); *TT of Longwood*, No. C–4531 at ¶¶ 6, 9 (F.T.C. July 2, 2015) (misrepresentations regarding prices for added features); see also *Auto Buyer Study*, supra note 11, at 14 (“Several participants who thought that they had not purchased add-ons, or that the add-ons were included at no additional charge, were surprised to learn, when going through the paperwork, that they had in fact paid extra for add-ons. This is consistent with consumers’ experiencing fatigue during the buying process or confusion with a financially complex transaction, but would also be consistent with dealer misrepresentations.”).

⁷² Complaint, *Nat’l Payment Network, Inc.*, No. C–4521 at ¶¶ 4–14 (F.T.C. May 4, 2015) (alleging failure to disclose fees associated with financing program; misleading savings claims in advertisements); Complaint, *Matt Blatt, Inc.*, No. C–4532 at ¶¶ 4–13 (F.T.C. May 4, 2015) (alleging failure to disclose fees associated with financing program; misleading savings claims); *Buckle Up*, supra note 15, at 10 (noting some *Auto Buyer Study* participants did not fully understanding material aspects of extended warranties or service plans they purchased and “were surprised to discover during the interview that their plans had unexpected limitations” or “they had to pay out-of-pocket for repairs or services that were not covered”); for example, one “consumer purchased a ‘Lifetime’ maintenance plan, only to discover later that he received a one-year plan that covered periodic oil changes”). Cf. Consent Order, *Santander Consumer USA, Inc.*, CFPB No. 2018–BCFP–0008 at ¶¶ 10–16 (Nov. 20, 2018) (finding defendant sold GAP product allegedly providing “full coverage” to consumers with loan-to-value ratios (“LTVs”) above 125%, when in fact coverage is limited to 125% of LTV).

⁷³ *N. Am. Auto. Servs.*, No. 1:22–cv–0169 at ¶ 27 (N.D. Ill. Mar. 31, 2022); *WardsAuto*, *WardsAuto 2020 Megadealer 100*, <https://www.wardsauto.com/dealers/wardsauto-2020-megadealer-100-industry-force> (last visited Apr. 25, 2022) (listing Napleton Automotive Group at the 13th-ranked dealership group by total revenue).

I feel I’ve been taken advantage of, to be honest with you. Even though I thought that I was getting a great deal with the interest rate, but I now see that they’re also very sneaky about putting stuff on your paperwork. They only let you skim through the paperwork that you have to sign and they just kind of tell you what it is. This is this, this is that, this is this, and then you just sign it away. You’re so tired, you’re so worn down, you don’t want to be there no more. You just want to get it done and over with. They take advantage of that. Yes, they still play this friendly card, you know, thank you for your business card kind of thing. Like I said, they never lose. They never lose.⁷⁴

III. Law Enforcement Actions and Other Responses

To address these types of unfair and deceptive practices in the motor vehicle industry, the Commission has brought enforcement actions and engaged in other efforts. In the last ten years, the Commission has brought more than fifty law enforcement actions and led two law enforcement sweeps to protect consumers in the motor vehicle marketplace, including one that involved 181 state enforcement actions.⁷⁵

To complement its law enforcement efforts, the FTC’s Bureau of Consumer Protection and the Bureau of Economics recently published two reports on the results of a qualitative study on consumer experiences while purchasing a motor vehicle.⁷⁶ The study found that many participating consumers were left in the dark about key terms. Consumers

⁷⁴ *Auto Buyer Study: Appendix*, supra note 66 (Study participant 152288 at 130; see also Study participant 180267 at 202 (dealership included a charge for GAP insurance in the final paperwork but not in retail sales contract); Study participant 146748 at 296 (consumer learned during interview with FTC that consumer purchased GAP insurance: “maybe they’re just throwing that in there without telling you.”)).

⁷⁵ Fed. Trade Comm’n, Enforcement Cases Tagged with Automobiles, https://www.ftc.gov/legal-library/browse/cases-proceedings?sort_by=field_date&items_per_page=20&search=&field_competition_topics=All&field_consumer_protection_topics=All&field_federal_court=All&field_industry=1382&field_case_status=All&field_enforcement_type=All&search_matter_number=&search_civil_action_number=&start_date=&end_date= (last visited Apr. 25, 2022); Press Release, Fed. Trade Comm’n, *FTC Announces Sweep Against 10 Auto Dealers* (Jan. 9, 2014), <https://www.ftc.gov/news-events/press-releases/2014/01/ftc-announces-sweep-against-10-auto-dealers>; Press Release, Fed. Trade Comm’n, *Multiple Law Enforcement Partners Announce Crackdown on Deception, Fraud in Auto Sales, Financing and Leasing* (Mar. 26, 2015), <https://www.ftc.gov/news-events/press-releases/2015/03/ftc-multiple-law-enforcement-partners-announce-crackdown>.

⁷⁶ *Buckle Up*, supra note 15; *Auto Buyer Study*, supra note 11.

recalled dealers renegotiating vehicle prices at different stages of the transaction and being confused about the price of the vehicle.⁷⁷ Despite the lengthy transaction, many study participants felt review of the final documents was rushed and were surprised to learn of additional add-on charges in their contracts.⁷⁸

These are long-standing issues.⁷⁹ In 2011, the agency reached out to consumers through three motor vehicle roundtable events, reviewing over 100 comments from industry representatives, consumer advocates, and state enforcement agencies, among others who attended.⁸⁰ Through these events and comments, consumers expressed confusion regarding aspects of the financing process and commented that they were surprised when they reached the dealership that the price advertised was not available to them.⁸¹

The Commission's law enforcement partners have also brought actions addressing unfair and deceptive practices in the motor vehicle industry. For example, the Consumer Financial Protection Bureau has taken action against third-party motor vehicle financing entities in matters that raise similar, and sometimes identical, claims of deceptive and unfair practices as were at issue in FTC cases.⁸²

⁷⁷ *Buckle Up*, *supra* note 15, at 5–7.

⁷⁸ *Buckle Up*, *supra* note 15, at 9.

⁷⁹ See *The Road Ahead: Selling Financing, and Leasing Motor Vehicles*, Transcript: Session 2, Washington DC (Nov. 2011), pp. 19–23.

⁸⁰ The FTC hosted three roundtable events requesting public comments to gather information about possible consumer protection issues that may arise in the sale, financing, and leasing of motor vehicles. These events took place from April to November 2011 in Detroit, Austin, and Washington DC. *The Road Ahead: Selling Financing, and Leasing Motor Vehicles* (Apr. 2011, Aug. 2011, and Nov. 2011), <https://www.ftc.gov/news-events/events-calendar/2011/08/road-ahead-selling-financing-leasing-motor-vehicles>.

⁸¹ See Comment Letters on Public Roundtables: Protecting Consumers in the Sale and Leasing of Motor Vehicles, Project No. P104811, Submission Nos. 558507–00015, 558507–00026, 558507–00046, 558507–00051, 558507–00094, 558507–00099, available at <https://www.regulations.gov/docket/FTC-2022-0036>; Consumers for Auto Reliability and Safety, Comment Letter on Public Roundtables: Protecting Consumers in the Sale and Leasing of Motor Vehicles, Project No. P104811 at 5 (Apr. 1, 2012), https://www.ftc.gov/sites/default/files/documents/public_comments/public-roundtables-protecting-consumers-sale-and-leasing-motor-vehicles-project-no.p104811-00108/00108-82875.pdf (noting military command has gone as far as banning servicemembers from conducting business from certain auto dealerships because of “abusive auto sales and financing practices.”).

⁸² The Consumer Financial Protection Bureau has brought at least 16 enforcement actions involving motor vehicles, financing, or add-on products and services. See *Santander Consumer USA Inc.*, No. 2020–BCFP–0027 at ¶¶ 8–50 (Dec. 22, 2020) (finding auto finance company provided inaccurate records to credit reporting agencies); *Nissan Motor*

States have also taken measures to address consumer protection issues in the motor vehicle industry. In addition to participating in law enforcement sweeps with the FTC,⁸³ state regulators and Attorneys General have independently filed more than 200 actions alleging deceptive and unlawful

Acceptance Corp., No. 2020–BCFP–0017 at ¶¶ 46–52 (Oct. 13, 2020) (finding auto finance company misrepresented financing extension agreements, repossessions, and limitations to consumer bankruptcy protections); *Lobel Fin. Corp.*, No. 2020–BCFP–0016 at ¶¶ 8–22 (Sept. 21, 2020) (finding auto-loan servicer charged consumers unfair add-on charges in the form of Loss Damage Waiver premiums); *Santander Consumer USA Inc.*, No. 2018–BCFP–0008 at ¶¶ 6–30 (Nov. 20, 2018) (finding auto finance company sold GAP to consumers with LTV over 125%, misrepresenting such consumers would be fully covered with total loss); *Wells Fargo Bank, N.A.*, No. 2018–BCFP–0001 at ¶¶ 27–39 (Apr. 20, 2018) (finding bank imposed duplicative or unnecessary forced-placed auto loan insurance on consumers); *Toyota Motor Credit Corp.*, No. 2016–CFPB–0002 at ¶¶ 12–23 (Feb. 2, 2016) (finding auto finance company engaged in discriminatory pricing markup for motor vehicle financing, without regard to credit worthiness); *Y King S. Corp.*, No. 2016–CFPB–0001 at ¶¶ 73–75 (Jan. 21, 2016) (finding used car dealer failed to disclose mandatory add-ons as financing charge); *Interstate Auto Grp., Inc. & Universal Acceptance Corp.*, No. 2015–CFPB–0032 at ¶¶ 12–51 (Dec. 17, 2015) (finding dealership and financing company reported information they knew or had reasonable cause to believe was inaccurate to credit reporting entities, harming consumer credit); *Westlake Servs., LLC*, No. 2015–CFPB–0026 at ¶¶ 7–90 (Sept. 30, 2015) (finding indirect auto financing entity used illegal debt collection tactics); *Fifth Third Bank, No. 2015–CFPB–0024 at ¶¶ 8–23* (Sept. 28, 2015) (finding discrimination against loan applicants in credit applications based on characteristics such as race and national origin); *Am. Honda Fin. Corp.*, No. 2015–CFPB–0014 ¶¶ at 9–24 (Jul. 14, 2015) (same); *DriveTime Auto Grp., Inc.*, No. 2014–CFPB–0017 at ¶¶ 4–60 (Nov. 19 2014) (finding buy-here-pay-here dealership made harassing debt collection calls and provided inaccurate credit information to credit reporting agencies); *First Investor Fin. Servs. Grp., Inc.*, No. 2014–CFPB–0012 at ¶¶ 4–37 (Aug. 20, 2014) (finding auto financing company provided inaccurate records to credit reporting agencies); *Ally Fin. Inc.*, No. 2013–CFPB–0010 at ¶¶ 7–27 (Dec. 20, 2013) (finding auto lender charged discriminatory pricing to African-American, Hispanic, and Asian and Pacific Islander borrowers); *U.S. Bank Nat'l Ass'n*, No. 2013–CFPB–0004 at ¶¶ 14–28 (June 26, 2013) (finding bank failed to properly disclose all the fees charged to participants in the companies' Military Installment Loans and Educational Services auto loans program, and misrepresented the true cost and coverage of add-on products financed along with the auto loans); *Dealers' Fin. Servs., LLC*, No. 2013–CFPB–0004 at ¶¶ 10–22 (June 2013) (finding financing company made deceptive statements regarding the cost of add-on products and the scope of coverage of the Vehicle Service Contract).

⁸³ Operation Steer Clear and Operation Ruse Control brought with state law enforcement partners around the nation and Canada, encompassed over 246 enforcement actions. Press Release, Fed. Trade Comm'n, *Multiple Law Enforcement Partners Announce Crackdown on Deception, Fraud in Auto Sales, Financing and Leasing* (Mar. 26 2015), <https://www.ftc.gov/news-events/press-releases/2015/03/ftc-multiple-law-enforcement-partners-announce-crackdown>.

conduct by motor vehicle dealerships across the country.⁸⁴

Some states have also taken legislative or regulatory action.⁸⁵ For example, to “ensure that dealers do not add in hidden or undisclosed costs after the price for a vehicle has been advertised.” Oregon promulgated a rule that requires dealerships to state an “offering price” which is the actual offer and amount the consumer can pay to own the vehicle, excluding only taxes, license, registration costs, environmental fees, and a document processing fee.⁸⁶ California and Wisconsin have similarly enacted codes that make it unlawful for dealerships to advertise a total price without including additional costs to the purchaser outside the mandatory tax, title, and registration fees.⁸⁷ Other states, like Indiana, have enacted codes that prohibit the sale of add-ons in certain circumstances.⁸⁸

IV. Section-by-Section Analysis

Based on its enforcement and other experience, the Commission proposes specific legal restrictions to address deceptive and unfair conduct by motor vehicle dealers. Thus, the Commission is proposing a rule 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.

While the proposed rule is an important step in the effort to prevent harm to consumers in the motor vehicle marketplace, a comprehensive approach is needed to address the important consumer protections at issue. Therefore, in addition to this rulemaking initiative, the Commission intends to continue law enforcement, as well as its consumer education and other efforts, to ensure that consumers can make informed decisions about

⁸⁴ For example, in a recent action, California Attorney General's office sued a dealership chain under state consumer protection laws for deceiving consumers about add-on product charges and misrepresenting consumers' income on credit applications; the alleged practices specifically targeted low-income consumers with subprime credit. *People of the State of California v. Paul Blanco's Good Car Co. Auto Grp.*, No. RG19036081 (Alameda County Super. Ct. Sept. 2019).

⁸⁵ See, e.g., Cal. Veh. Code sec. 11713.1(b)–(c); Or. Admin. R. 137–020–0020(3)(c); Wis. Admin. Code. Trans 139.03(3).

⁸⁶ Or. Admin. R. 137–020–0020(3)(c); Official Commentary, Or. Admin. R. 137–020–0020(3)(c).

⁸⁷ Cal. Veh. Code sec. 11713.1(b)–(c); Wis. Admin. Code. Trans 139.03(3).

⁸⁸ Ind. Code sec. 24–4.5–3–202 (3)(e)(ix) (2018) (prohibiting the sale of any GAP program when the LTV <80%).

purchasing, financing, and leasing motor vehicles. The Commission also intends to continue its constructive engagement with consumer and dealer groups and other stakeholders.

The Commission invites written comments on the proposed rule, and, in particular, answers to the specific questions set forth below.

A. Section 463.1: Authority

Proposed § 463.1 identifies the statutory authority under which the Commission proposes to promulgate this Rule to prevent unfair or deceptive acts or practices in connection with the sale, lease, or financing of motor vehicles.

B. Section 463.2: Definitions

Proposed § 463.2 contains definitions for the following terms: “Add-on” or “Add-on Product(s) or Service(s),” “Add-on List,” “Cash Price without Optional Add-ons,” “Clearly and Conspicuously,” “Dealer” or “Motor Vehicle Dealer,” “Express, Informed Consent,” “GAP Agreement,” “Government Charges,” “Material” or “Materially,” “Motor Vehicle,” and “Offering Price.” Each of these terms is used in the proposed rule.

C. Section 463.3: Prohibited Misrepresentations

Section 463.3 of the proposed rule would prohibit motor vehicle dealers from making certain misrepresentations, to address the deceptive practices surrounding motor vehicle transactions discussed above and emerging from the landscape of enforcement actions, workshops, industry and consumer studies, and consumer interviews and complaints. As discussed in Section III above, a representation, omission, or practice is deceptive if it is likely to mislead consumers acting reasonably under the circumstances and is material to consumers.⁸⁹

This section seeks to prohibit deceptive representations to consumers, clarify dealers’ obligations under the law, and ensure that motor vehicle dealers compete on a level playing field. The prohibited misrepresentations in this section of the proposed rule are material because they are likely to affect a consumer’s choices, such as whether to visit a particular dealership or enter into a transaction.⁹⁰ These

misrepresentations also harm consumers and divert business from reputable dealerships that provide truthful advertising to consumers. Consumers who select and travel to dealerships based on an advertised offer, only to learn late in the process (if at all) that the advertised offer does not apply, have often spent hours trying to purchase a car. Even if they notice and successfully resist later-added fees, or leave after learning that advertised discounts and rebates do not apply to them, misleading advertisements cause them to waste hours driving to and visiting the dealership.⁹¹ For many consumers, however, walking away is not a realistic option—for example, restarting the hours-long process at another dealership might mean having to take an additional day off work, and for those who cannot afford a second car, finding other means of transportation to travel to another dealership. Thus, even if they somehow learn that they are paying more than what was advertised, consumers might just sign the deal rather than start the entire process anew. In other instances, as discussed below, consumers learn that they did not receive the offer as represented only after they enter into the contract and end up spending hundreds or even thousands of dollars more than they were led to believe.

Section 463.3(a) of the proposed rule would prohibit misrepresentations concerning “[t]he costs or terms of purchasing, financing, or leasing a vehicle.” This provision would bar deceptive practices surrounding, among other things, the total cost, price for added features, other charges, terms and finality of financing, and availability of discounts.⁹² The cost or price of a

vehicle is material—it is likely to affect a consumer’s conduct, including whether to purchase a particular vehicle at a particular dealership.

Section 463.3(b) of the proposed rule would prohibit misrepresentations concerning any “costs, limitation, benefit, or any other Material aspect of an Add-on Product or Service.” As discussed above, add-ons are a particularly problematic area in auto sales and financing. The cost and coverage of an add-on is likely to affect a consumer’s conduct, including the consumer’s decision to purchase the product or service.

Section 463.3(c) of the proposed rule would prohibit misrepresentations regarding “[w]hether the terms are, or transaction is, for financing or a lease.” If a dealer advertises vehicles for low monthly payments or other terms that

were subject to material limitations, or (iii) other legally required disclosures); Complaint, *In re Cowboy AG, LLC*, No. C-4639 at ¶¶ 7–16 (F.T.C. Jan. 4, 2018) (alleging false ads touting attractive terms, but concealing substantial down payments, offers were for leases and not purchases, material eligibility restrictions, and other legally required disclosures); *Universal City Nissan*, No. 2:16-cv-07329 (C.D. Cal. Sept. 29, 2016) (alleging misrepresentation of lease, credit, or purchase terms; lease terms were for purchases; add-ons were authorized, free, or required; and the finality of financing transactions or consequences when financing falls through. Failing to disclose TILA/CLA trigger terms); Complaint, *In re Jim Burke Automotive, Inc.*, No. C-4523 at ¶¶ 6–14 (F.T.C. May 4, 2015) (alleging misrepresentations regarding vehicle purchase price and promising prices and discounts not generally available to consumers); Complaint, *In re City Nissan, Inc.*, No. C-4524 at ¶¶ 8–10, 12 (F.T.C. May 4, 2015) (alleging misrepresentations regarding lease and finance terms); *TT of Longwood*, No. C-4531 at ¶¶ 6–12 (F.T.C. July 2, 2015) (alleging misrepresentations regarding vehicle purchase price and prices for added features, promising prices and discounts not generally available to consumers, and misrepresentations regarding finance and lease terms); Complaint, *In re Courtesy Auto Grp., Inc.*, No. 9359 at ¶¶ 5–7 (F.T.C. Jan. 7, 2014) (alleging misrepresentation regarding lease terms); Complaint, *In re New World Auto Imports, Inc.*, No. C-4437 at ¶¶ 8–11 (F.T.C. Feb. 20, 2014) (alleging misrepresentations regarding monthly finance payments and lease terms); Complaint, *In re Ramey Motors, Inc.*, No. C-4354 at ¶¶ 4–5 (F.T.C. Apr. 19, 2012) (alleging false ads promising to pay off consumers’ existing motor vehicle debt and failing to disclose legally required financing terms); Complaint, *In re Billion Auto, Inc.*, No. C-4356 at ¶¶ 4–6 (F.T.C. May 1, 2012) (alleging false ads promising to pay off consumers’ existing motor vehicle debt and failing to disclose legally required financing and leasing terms.); see also *Buckle Up*, *supra* note 15, at 5 (noting “[a]dvertisements with misleading financing terms (as well as those with deceptive price and discount offers) remain a concern, and stating “[d]ealers should make only accurate and non-misleading advertising claims to consumers, advertise terms that are actually available, and clearly and conspicuously disclose material qualifications or limitations on any advertised deal”); *Auto Buyer Study*, *supra* note 11, at 14 (noting, in a 2016 study by the Consumer Financial Protection Bureau, “consumers reported that lenders insisted that the purchase of add-ons were necessary for the financing to be approved”).

Belize Litig., 482 F. Supp. 3d 373, 397 (D. Md. 2020) (“Representations with respect to . . . [a product’s] cost are also presumptively material.”) (citing *In re Thompson Med. Co., Inc.*, 104 F.T.C. 648 (1984)); see also *FTC v. Crescent Pub. Grp., Inc.*, 129 F. Supp. 2d 311, 321 (S.D.N.Y. 2001).

⁹¹ See, e.g., Matthew Jones, Bruce Kobayashi & Jason O’Connor, *Economics at the FTC: Non-Price Merger Effects and Deceptive Automobile Ads* 12–26 (2018), also published at 53 Rev. Indust. Org. 593 (2018), <https://www.ftc.gov/system/files/documents/reports/economics-ftc-non-price-merger-effects-deceptive-automobile-ads/1812-be-rio.pdf> (developing and discussing a model for quantifying the consumer injury from deceptive motor vehicle ads, in which injury occurs because such ads persuade consumers “to spend time and effort to visit the dealership, when they might otherwise have pursued a legitimate offer elsewhere”).

⁹² See, e.g., *Liberty Chevrolet*, No. 1:20-cv-03945 at ¶¶ 10–11 (S.D.N.Y. May 21, 2020) (alleging false ads stating a certain price but charging consumers higher prices); *Tate’s Auto Ctr.*, No. 3:18-cv-08176-DJH at ¶¶ 38–46 (D. Ariz. July 31, 2018) (alleging false ads touting attractive terms but concealing (i) ads were for lease offers only and required substantial initial payment, (ii) discounts

⁸⁹ See *supra* note 53 (citing FTC Policy Statement on Deception).

⁹⁰ As noted above, “material”—as used in the proposed rule and throughout this Notice of Proposed rulemaking—means likely to affect the consumer’s conduct or decisions with regard to a product or service. See *supra* note 53 (citing FTC Policy Statement on Deception); *In re Sanctuary*

apply in financing offers, but the offer is actually for a lease only, that conduct misleads consumers.⁹³ These representations are likely to affect consumers' conduct, including by causing consumers to enter into a monetary transaction for a product they do not want (borrowing instead of owning), or, if the true circumstances are revealed prior to consummation of the transaction, to waste time traveling to the dealership and potentially spending hours on the sales floor and financing office.

Section 463.3(d) of the proposed rule would prohibit misrepresentations concerning "[t]he availability of any rebates or discounts that are factored into the advertised price but not available to all consumers." 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.⁹⁴ In other instances, the advertised rebates and discounts might apply only to the most expensive versions of the make and

model.⁹⁵ Consumers may learn they do not qualify for these advertised rebates or discounts, if at all, only after they spend time traveling to the dealership or at the end of the financing stage.⁹⁶

Section 463.3(e) and (f) of the proposed rule would prohibit misrepresentations surrounding "[t]he availability of vehicles at an advertised price" and representations that a consumer has been or will be "preapproved or guaranteed for any product, service, or term." This provision would prohibit dealers from first touting low prices or other attractive terms for specific vehicles and inducing consumers to spend time traveling to the dealership and pursuing the offer, but then claiming, among other things, that the advertised vehicle is no longer available, no longer available at the advertised price, or that the financing offer is only available to those with high credit scores.⁹⁷ To the

extent that dealers are advertising prices, preapprovals, guaranteed rates, or other terms for military consumers, but then charging the same prices to other consumers or otherwise failing to honor the deal, the proposed rule would cover such conduct as well. This information is material because it is likely to affect consumers' conduct, including whether to spend time traveling to a particular dealership and pursuing a specific offer on a specific car.

Section 463.3(g) of the proposed rule would prohibit dealers from misrepresenting "[a]ny Material information on or about a consumer's application for financing." Material misrepresentations on or about a consumer's financing application include instances in which dealers submit income information that is different from what consumers have stated that they earn, or alter the down payment amount from what the consumer has actually provided.⁹⁸

Section 463.3(h) and (i) of the proposed rule would prohibit dealers from misrepresenting "[w]hen the transaction is final or binding on all parties" and making misrepresentations about "[k]eeping 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." These provisions are intended to curb yo-yo financing, which occurs when a dealer obtains a consumer's agreement to a deal that has not been finalized, allows the consumer to drive the vehicle off the lot, and then directs the consumer to return and engages in unlawful tactics, such as failing to give back a consumer's trade-in vehicle, while refusing to honor the deal or pressuring the consumer into entering a new deal.⁹⁹ Yo-yo financing

⁹³ See *Tate's Auto Ctr.*, No. 3:18-cv-08176-DJH at ¶¶ 38–39 (D. Ariz. July 31, 2018) (alleging false ads touting attractive terms but concealing ads were for lease offers only); Complaint, *In re TC Dealership, L.P.*, No. C-4536 at ¶¶ 10, 13 (F.T.C. Aug. 13, 2015) (same); *Cowboy AG, LLC*, No. C-4639 at ¶¶ 9–12 (F.T.C. Jan. 4, 2018) (same); *New World Auto Imports*, No. 3:16-cv-02401-K at ¶¶ 36–38 (N.D. Tex. Aug. 18, 2016) (alleging misrepresentation that terms were for financing instead of leasing); *Universal City Nissan*, No. 2:16-cv-07329 at ¶¶ 28–37, 44 (C.D. Cal. Sept. 29, 2016) (alleging advertisements with key terms that were not generally available).

⁹⁴ See *Tate's Auto Ctr.*, No. 3:18-cv-08176-DJH, ¶¶ 41–43 (D. Ariz. July 31, 2018) (alleging false ads touting attractive terms and discounts but concealing material limitations); Complaint, *In re JS Autoworld, Inc.*, No. C-4535 at ¶¶ 8–9 (F.T.C. Aug. 13, 2015) (alleging false ads touting prices but concealing discounts with material eligibility limitations); *TC Dealership, L.P.*, No. C-4536 at ¶¶ 7–9 (F.T.C. Aug. 13, 2015) (alleging false ads touting attractive prices but concealing discounts were subject to material eligibility limitations and trade-in requirement); *TXVT Ltd. P'ship*, No. C-4508 at ¶ 14 (F.T.C. Feb. 12, 2015) (alleging false ads failed to disclose that it would match consumers' income tax refunds only up to \$1,000); *Timonium Chrysler*, No. C-4429 at ¶¶ 4–5 (F.T.C. Jan. 28, 2014) (alleging false ads touting pricing and discounts but concealing material qualifications and restrictions); *TT of Longwood*, No. C-4531 at ¶¶ 6, 9 (F.T.C. July 2, 2015) (alleging promises of prices and discounts not generally available to consumers); *Jim Burke Automotive*, No. C-4523 at ¶¶ 6–13 (F.T.C. May 4, 2015) (alleging promises of prices and discounts not generally available to consumers); see also *Auto Buyer Study*, *supra* note 11, at 8 ("A number of [study] participants were attracted by promotional offers in ads that they did not qualify for, but did not realize that they did not qualify until they got to the dealer. Some did not learn that they did not qualify until they got to the financing stage of the transaction.").

⁹⁵ *Ganley Ford West*, No. C-4428 at ¶ 5 (F.T.C. Jan. 28, 2014) (alleging false ads touting price discount but concealing offer was limited to certain high-end models).

⁹⁶ For example, one consumer had reached a three-year financing agreement with the dealership salesman over the phone, which would include a \$4,300 rebate to reduce their purchase price, only to walk into the dealership and be told at the financing office the rebates were only offered with seven-year financing agreements. *Auto Buyer Study*, *supra* note 11, at Supp. Appx 90–91.

⁹⁷ *Liberty Chevrolet*, No. 1:20-cv-03945 at ¶¶ 10–11 (S.D.N.Y. May 21, 2020) (alleging false ads stating a certain price but then charging consumers higher prices than advertised); *Tate's Auto Ctr.*, No. 3:18-cv-08176-DJH at ¶¶ 41–43 (D. Ariz. July 31, 2018) (alleging false ads touting attractive terms but concealing discounts were subject to material limitations); Complaint, *Cowboy AG*, No. C-4639 at ¶¶ 7–14 (F.T.C. Jan. 4, 2018) (alleging false ads touting attractive terms but concealing material eligibility restrictions and certain advertised vehicles not available for sale); Complaint, *FTC v. Norm Reeves, Inc.*, No. 8:17-cv-01942 at ¶¶ 28–30 (C.D. Cal. Nov. 3, 2017) (alleging deceptive representations regarding monthly payments being available to consumers while concealing credit restrictions); *New World Auto Imports*, No. 3:16-cv-02401-K at ¶¶ 36–38 (N.D. Tex. Aug. 18, 2016) (alleging deceptive representations regarding monthly and down payments being available to consumers with repossessions or foreclosures and concealing restrictions making the offer available only to consumers with good credit); *Progressive Chevrolet Co.*, No. C-4578 at ¶¶ 5–7 (F.T.C. June 13, 2016) (alleging ads touting attractive terms but failure to disclose high credit score requirement); *JS Autoworld*, No. C-4535 at ¶¶ 8–9 (F.T.C. Aug. 13, 2015) (alleging false ads touting attractive prices but concealing discounts with material eligibility limitations); Complaint, *TC Dealership*, No. C-4536 at ¶¶ 7–9 (F.T.C. Aug. 13, 2015) (alleging false ads touting attractive price but concealing discounts were subject to material eligibility limitations and trade-in requirement); Complaint, *FTC v. Ramey Motors, Inc.*, No. 1:14-cv-29603, ¶¶ 21–23 (S.D.W. Va. Dec. 11, 2014) (alleging false ads touting attractive terms but concealing substantial down payments or trade-in requirements); *Timonium Chrysler*, No. C-4429 at ¶¶ 4–5 (F.T.C. Jan. 28, 2014) (alleging false ads touting pricing and discounts but concealing material qualifications and restrictions); *Ganley Ford West*, No. C-4428 at

¶ 5 (F.T.C. Jan. 28, 2014) (alleging false ads touting price discount but concealing offer was limited to certain high-end models); Complaint, *United States v. Billion Auto, Inc.*, No. 5:14-cv-04118-MWB, ¶¶ 38–40 (N.D. Iowa 2014) (alleging false ads touting attractive terms but concealing material eligibility limitations and significant extra costs); see also Adam J. Levitin, *The Fast and the Usurious: Putting the Brakes on Auto Lending Abuses*, 108 Geo. L.J. 1257, 1282 (2020), https://www.law.georgetown.edu/georgetown-law-journal/wp-content/uploads/sites/26/2020/05/Levitin_The-Fast-and-the-Usurious-Putting-the-Brakes-on-Auto-Lending-Abuses.pdf (discussing dealership tactic of advertising one vehicle and then claiming it has been sold to upsell consumer to a different vehicle).

⁹⁸ *Tate's Auto Ctr.*, No. 3:18-cv-08176-DJH, ¶¶ 18–21, 25 (D. Ariz. July 31, 2018) (alleging dealership falsified consumers' monthly income and down payments on financing applications and financing contracts); *People of the State of California v. Paul Blanco's Good Car Co. Auto Grp.*, Case No. RG19036081 (Sept. 2019).

⁹⁹ *Universal City Nissan*, No. 2:16-cv-07329 at ¶¶ 67–72 (C.D. Cal. Sept. 29, 2016); *State ex rel.*

is often made possible because a dealer misleads consumers, directly or by omission, about whether their financing is final, and subsequently applies pressure when revealing that the financing is not final, including by threatening to retain the consumer's cash down payment or trade-in vehicle unless the consumer agrees to a new financing contract.¹⁰⁰ These tactics affect consumer conduct, including whether to enter into a new deal with less beneficial terms for the consumer. Several states have enacted statutes to protect consumers against this practice.¹⁰¹

Dewine v. Dads Car Lot Inc., No. 13CV4036, 2014 Ohio Misc. LEXIS 10987, at *4 (Ct. Com. Pl. June 6, 2014) (finding defendant violated state consumer sales protection act by including "spot delivery" document that allowed defendant to keep "all funds on deposit"); Att'y's General of 31 States & DC, Comment Letter on Public Roundtables: Protecting Consumers in the Sale and Leasing of Motor Vehicles, Project No. P104811, Submission No. 558507-00112 at 4 (Apr. 13, 2012), available at <https://www.regulations.gov/docket/FTC-2022-0036> (recommending, among other rules aimed at deterring yo-yo sales, FTC adopt rules that would require dealers to disclose the consumer's "right to walk away" if financing is rejected and, in the context of spot delivery, to disclose financing has not been finalized as well as the responsibilities and potential consequences for consumers); Legal Aid Justice Ctr., Comment Letter on Public Roundtables: Protecting Consumers in the Sale and Leasing of Motor Vehicles, Project No. P104811, Submission No. 558507-00066 (Jan. 30, 2012) available at <https://www.regulations.gov/docket/FTC-2022-0036> (explaining that in a yo-yo sale the dealer misrepresents to the consumer credit has been finalized, when in fact the dealer treats the sale as contingent, retaining the ability call off or seize the vehicle later; a "yo-yo case can result in substantial distress to the person who has been tricked"; and "the harm to the marketplace occurs when the consumer believes a credit sale has been completed and stops shopping for a car on credit"); Nat'l Consumer Law Ctr., *In Harm's Way—At Home: Consumer Scams and the Direct Targeting of America's Military and Veterans* 41 (May 2003), https://www.nclc.org/images/pdf/special_projects/military/report-scams-facing-military.pdf (listing "spot delivery" or "yo-yo sales" among scams commonly aimed at military members).

¹⁰⁰ See, e.g., Delvin Davis, Ctr. for Responsible Lending, *Deal or No Deal: How Yo-Yo Scams Rig the Game against Car Buyers*, submitted as an attachment to Comment #558507-00104 on Public Roundtables: Protecting Consumers in the Sale and Leasing of Motor Vehicles, Project No. P104811 at 1, 5-6 (Apr. 2, 2012), https://www.ftc.gov/sites/default/files/documents/public_comments/public-roundtables-protecting-consumers-sale-and-leasing-motor-vehicles-project-no-p104811-00104/00104-82860.pdf.

¹⁰¹ See Alaska Stat. secs. 45.25.500, 45.25.610(c) (prohibiting dealers from transferring title to a trade-in vehicle or performing any repairs/reconditioning before completing sales transaction, and requiring specific disclosures to consumers regarding spot delivery); Ariz. Rev. Stat. sec. 44-1371 (prohibiting sale of trade-in before financing is finalized); Ark. Code Ann. sec. 23-112-316 (prohibiting dealers from depositing money from consumer or selling a trade-in before financing is finalized and permitting consumer to cancel purchase if dealer changes any terms or consumer does not obtaining the financing agreed upon); Colo. Rev. Stat. sec. 6-1-708 (prohibiting spot

Section 463.3(j) of the proposed rule would prohibit misrepresentations regarding "[w]hether or when a Motor Vehicle Dealer will pay off some or all of the financing or lease on a consumer's trade-in vehicle." This provision would prohibit dealers from misrepresenting to consumers trading in a vehicle when the consumer owes more than the vehicle is worth, that the dealer will pay off that negative balance or negative equity when the consumer purchases a new vehicle. If the dealer does not pay off the negative balance but rather includes it in the new amount to be financed for the vehicle to be purchased, this sleight of hand (often buried in the financing paperwork) requires the consumer, not the dealer, to pay off the previous financing as promised.¹⁰² This provision would also prohibit dealers that are going out of business from representing that they will pay off liens if they do not, in fact, pay off the liens, and prohibit them from failing to pay off liens in a timely manner. This information is material because information about the amount the consumer is actually paying or will end up owing is likely to affect the consumer's decision to visit a particular dealership and purchase a particular vehicle.

Section 463.3(k) of the proposed rule would prohibit misrepresentations that consumer reviews or ratings are unbiased, independent, or from ordinary consumers, and § 463.3(l) of the proposed rule would similarly prohibit misrepresentations that "the Dealer or any of its personnel or

delivery tactics and requiring dealers to return any collateral or down payment if financing is not approved and the consumer is required to return the vehicle); Nev. Rev. Stat. sec. 482.554(2)(a) (protecting against misrepresentations surrounding spot delivery); N.H. Rev. Stat. Ann. sec. 361-A:10-b (requiring dealers to return trade-in, deposit, and fees, if financing is not approved); Or. Rev. Stat. sec. 646A.090 (requiring dealers to return trade-in vehicle if financing is not approved).

¹⁰² *Universal City Nissan*, No. 2:16-cv-07329 at ¶¶ 28-34, 54-55 (C.D. Cal. Sept. 29, 2016) (alleging failure to disclose remaining amount due on trade-in would be added to the consumer's new financing or lease balance); *Ramey Motors*, No. C-4354 at ¶ 4 (F.T.C. Apr. 19, 2012) (alleging false ads promising to pay off consumers' existing motor vehicle debt); *Billion Auto*, No. C-4356 at ¶ 4 (F.T.C. May 1, 2012) (alleging false ads promising to pay off consumers' existing motor vehicle debt); *TXVT Ltd. P'ship*, No. C-4508 at ¶¶ 7-11 (F.T.C. Feb. 12, 2015) (alleging false ads that consumers could exit existing debt or leases for \$1); Complaint, *In re Frank Myers Automaxx, LLC*, No. C-4353 at ¶ 4 (F.T.C. Apr. 19, 2012) (alleging false ads promising to pay off consumers' existing motor vehicle debt and leases); *Key Hyundai of Manchester*, No. C-4358 at ¶ 6 (F.T.C. May 4, 2012) (alleging false ads promising to pay off consumers' existing motor vehicle debt and leases); see also *Auto Buyer Study*, *supra* note 11, at 13 (noting a participant was "surprised" to learn during the study interview the dealer had rolled negative equity into her new financing).

products or services is or was affiliated with, endorsed or approved by, or otherwise associated with the United States government or any Federal, State, or local government agency, unit, or department, including the United States Department of Defense or its Military Departments." The FTC has combatted such misrepresentations in enforcement actions.¹⁰³ Claims that products and services are endorsed by other impartial consumers or the government are material to consumers' decision-making because a consumer is more likely to visit a dealership and select a vehicle that has been approved by an impartial consumer or a government entity.

Section 463.3(m) of the proposed rule would prohibit misrepresentations that "consumers have won a prize or sweepstakes."¹⁰⁴ Like the other provisions in § 463.3, these claims are material and harm consumers by inducing a consumer to choose and transact with a particular dealership under false pretenses.

Section 463.3(n) of the proposed rule would prohibit misrepresentations regarding "[w]hether, or under what circumstances, a vehicle may be moved, including across state lines or out of the country." This provision would prevent dealers from making misrepresentations about any liens or other restrictions that prevent or hinder consumers' ability to move the vehicle beyond certain boundaries. The manner in which a consumer can move a vehicle is likely to affect the consumer's decision to purchase a vehicle, including decisions of military consumers who may frequently need to move.

Section 463.3(o) of the proposed rule would prohibit misrepresentations regarding "[w]hether, or under what circumstances, a vehicle may be repossessed." This provision would prevent dealers from making

¹⁰³ See *Universal City Nissan*, No. 2:16-cv-07329 at ¶¶ 73-78 (C.D. Cal. Sept. 29, 2016) (alleging posting by dealership of positive, five-star reviews on third-party websites that falsely purport to be objective or independent); Complaint, *FTC v. Passport Imports, Inc.*, No. 8:18-cv-03118 at ¶ 20 (D. Md. Oct. 10, 2018) (alleging Defendants misled consumers by mailing notices that were similar to and had the same color scheme as notices manufacturers are required by the US Department of Transportation's NHTSA to use when sending information about recalls); Complaint, *United States v. Sunkey Publ'g, Inc.*, No. 3:18-cv-01444 at ¶¶ 14-112 (N.D. Ala. Sept. 6, 2018) (alleging deceptive educational marketing and lead generation that targeted potential military recruits and used a series of false representations of military affiliation and endorsement to induce recruits to submit their information and agree to future contacts).

¹⁰⁴ See *Fowlerville Ford*, No. C-4433 at ¶ 4 (F.T.C. Feb. 20, 2014) (alleging misrepresentation that consumers have won a prize that can be collected at a dealership).

misrepresentations that they may repossess a vehicle, when they cannot. For example, the Servicemembers Civil Relief Act prohibits repossession of vehicles during a servicemember's period of military service without a court order as long as the servicemember either placed a deposit for the vehicle, or made at least one installment payment on the contract before entering military service.¹⁰⁵ Thus, this provision would prevent dealers from representing that they could repossess military consumers' vehicles under these circumstances. Information about when a vehicle may be repossessed is likely to affect a consumer's conduct, including the consumer's conduct regarding which payments to prioritize while serving our country.

Section 463.3(p) of the proposed rule would prohibit misrepresentations of "[a]ny of the required disclosures identified in this part," including but not limited to representations that limit or contradict the required disclosures. This prohibition against misrepresentations complements the disclosure requirements in the proposed rule.

D. § 463.4: Disclosure Requirements

Section 463.4 of the proposed rule would require key disclosures by dealers. The proposed rule would require that such disclosures be made in a clear and conspicuous manner, but would not prescribe the form that such disclosures must take.

Proposed § 463.4(a) through (e) would require disclosures regarding pricing and certain financing information. Providing consumers with accurate and timely pricing and financing information is critical, especially in the context of motor vehicle sales and leasing, where such information has proved singularly confusing to consumers.¹⁰⁶ Such confusion is heightened when, as discussed above, advertisements list vehicle prices that are lower than that at which the dealer will sell or lease the vehicle, including because of incremental charges and fees

added to an hours-long transaction as it develops.

Misleading and false price and financing information hinder consumers' ability to comparison shop, an essential element to a competitive market. If buyers can see and compare the actual prices and costs for the same or similar goods offered by different sellers, buyers can choose to visit the seller that offers the terms most important to them, instead of wasting time and expense exploring offers based on deceptive information. When price or cost information in the market are distorted, consumers are unable to effectively differentiate between sellers, and sellers trying to deal honestly with consumers are put at competitive disadvantage.

Proposed § 463.4(a) would require a motor vehicle dealer to disclose the true "Offering Price" of a vehicle in advertisements that reference specific vehicles or price or financing terms. Under the proposed rule, the "Offering Price" of a vehicle means "the full cash price for which a dealer will sell or finance the motor vehicle to any consumer," excluding only required government charges."¹⁰⁷

This provision would prohibit deceptive and unfair practices with

¹⁰⁷ In a similar vein, a number of states have enacted laws that require any advertised or quoted vehicle price to include any non-governmental fees charged by the dealer. See, e.g., Or. Admin. R. 137–020–0020(3)(c) (requiring any price stated in an ad or in a price quotation to be the offering price, excluding only taxes, license, and other specified fees); Cal. Veh. Code sec. 11713.1(b)–(c) (making it a violation of the regulation to advertise the total price of a vehicle without including all costs to purchaser at the time of the sale, except taxes, registration, and other specified charges); Wis. Admin. Code Trans. 139.03(3) (requiring an advertised price include "all charges that shall be paid by the purchaser to acquire ownership of the vehicle with the exception of sales tax, title and registration fees"); Oh. Admin. Code 109:4–3–16(B)(21) (prohibiting advertising "any price for a motor vehicle unless such price includes all costs to the consumer except tax, title and registration fees, and a documentary service charge"); see also Ga. Dept. of Law Consumer Prot. Div., Auto Advertising & Sales Practices Enforcement Policies, 11 ("Advertised prices must state the actual total purchase price of the vehicle, excluding only government fees Any advertisement which lists a price 'plus' some additional amount will be considered to be deceptive."), <https://consumer.georgia.gov/business-services/auto-advertising-and-sales-practices-enforcement-policies>; accord N.Y.C. Admin Code sec. 20–271(b)(1) (used vehicles must display the total selling price, inclusive of all dealer fees but exclusive of government charges); cf. Att'y's General of 31 States & DC, Comment Letter on Public Roundtables: Protecting Consumers in the Sale and Leasing of Motor Vehicles, Project No. P104811, Submission No. 558507–00112 at 5 (Apr. 13, 2012), available at <https://www.regulations.gov/docket/FTC-2022-0036> (recommending the FTC adopt a rule requiring all advertised prices and price quotes for motor vehicles include all required non-governmental fees).

respect to price and add-ons. Price is one of the most material pieces of information for a consumer in making an informed purchasing decision.¹⁰⁸ Yet it is difficult for consumers to uncover the actual price for which a dealer will sell an advertised vehicle until visiting the dealership and spending hours on the lot. Sometimes dealers will tout prices based on dealer discounts, rebates, or other price reductions when such benefits are in fact subject to hidden or undisclosed restrictions that render them unavailable to typical customers.¹⁰⁹ Other times, dealers hide or omit additional dealer charges, such as for document preparation fees, amounting to several hundred dollars.¹¹⁰ It is deceptive for dealers to advertise a price without disclosing material limitations or additional charges required by the dealer that are fixed and thus can be readily included in the price at the outset.¹¹¹

¹⁰⁸ See, e.g., *Sanctuary Belize Litig.*, 482 F. Supp. 3d at 397 ("Representations with respect to . . . [a product's] cost are also presumptively material.") (citing *Thompson Med. Co.*, 104 F.T.C. 648); see also *Crescent Pub. Grp.*, 129 F. Supp. 2d at 321.

¹⁰⁹ See, e.g., *Tate's Auto Ctr.*, No. 3:18–cv–08176–DJH at ¶¶ 41–43 (D. Ariz. July 31, 2018) (alleging defendants failed to adequately disclose advertised discount incentives were available to select consumers only); *Progressive Chevrolet Co.*, No. C–4578 at ¶¶ 5–7 (F.T.C. June 13, 2016) (alleging respondents failed to disclose or disclose adequately that typical consumers cannot qualify for advertised terms); *TT of Longwood*, No. C–4531 at ¶¶ 16–17 (F.T.C. July 2, 2015) (alleging respondent advertised discounts and prices but failed to adequately disclose various qualifications and restrictions that made incentives or prices unavailable to consumers generally); *JS Autoworld*, No. C–4535 at ¶¶ 8–9 (F.T.C. Aug. 13, 2015) (alleging prominently advertised price is not generally available to consumers); *TC Dealership, L.P.*, No. C–4536 at ¶¶ 7–9 (F.T.C. Aug. 13, 2015) (same); *Timonium Chrysler*, No. C–4429 at ¶¶ 4–5 (F.T.C. Jan. 28, 2014) (alleging advertised prices and discounts but failed to disclose consumer would have to qualify for multiple rebates not generally available to them); *Ganley Ford West*, No. C–4428 at ¶¶ 4–5 (F.T.C. Jan. 28, 2014) (alleging advertised price discounts applied only to more expensive versions of vehicles featured in the ad).

¹¹⁰ See, e.g., *Liberty Chevrolet*, No. 1:20–cv–3945 (S.D.N.Y. May 21, 2020) (alleging defendants advertised vehicles for sale at a specific price that failed to include additional fees dealer later tacked onto the price, resulting in higher sales prices than advertised); see also Press Release, State of Alaska, *Dep't of Law State Settles Consumer Protection Case with Lithia Auto Dealers* (Dec. 1, 2006), <http://www.law.alaska.gov/press/releases/2006/120106-Lithia.html> (announcing settlement with dealerships for charging "doc prep fees" not included in the advertised price of the vehicle, and noting such fees are "nothing more than dealer profit" and "consumers often confuse" them with governmental fees).

¹¹¹ Indeed, an entity that induces the first contact through false or misleading representation is liable under the FTC Act, regardless if the buyer later becomes fully informed. See, e.g., *Resort Car Rental Sys., Inc. v. FTC*, 518 F.2d 962, 964 (9th Cir. 1975); *FTC v. Gill*, 71 F. Supp. 2d 1030, 1046 (C.D. Cal. 1999) (same), *aff'd*, 265 F.3d 944 (9th Cir. 2001).

¹⁰⁵ 50 U.S.C. 3952.

¹⁰⁶ See, e.g., *Buckle Up*, *supra* note 15, at 5 (noting consumer confusion about how the vehicle price they were offered was determined and consumers did not understand they could negotiate price); *id.* at 9 (observing add-on products and services, which typically increase a vehicle's purchase price, were "the single greatest area of confusion" in the study); Att'y's General of 31 States & DC, Comment Letter on Public Roundtables: Protecting Consumers in the Sale and Leasing of Motor Vehicles, Project No. P104811, Submission No. 558507–00112 at 5 (Apr. 13, 2012), available at <https://www.regulations.gov/docket/FTC-2022-0036>.

These practices are also unfair because they are likely to cause substantial injury: Consumers lose time when they pursue offers that are not actually available, and they may end up paying more for a vehicle than they expected, either because unexpected charges are not adequately disclosed until late in the transaction, or are never disclosed at all.¹¹² By requiring disclosure of the true Offering Price upfront, § 463.4(a) aims to curb this deceptive and unfair conduct, while producing the corollary benefit of increasing price competition among dealers, who would be able to compete on truthful, standard terms.¹¹³

¹¹² See, e.g., *Liberty Chevrolet*, No. 1:20-cv-03945 at ¶¶ 12–19 (S.D.N.Y. May 21, 2020) (alleging defendants falsely told consumers they were required to pay excess fees and taxes, and in other instances added such costs to the total price without consumers' knowledge or consent); *Universal City Nissan*, No. 2:16-cv-07329 at ¶¶ 59–64 (C.D. Cal. Sept. 29, 2016) (alleging defendants engaged in deceptive and unfair practices relating to add-on products, including charging consumers for add-ons the consumer rejected or did not consent to purchase); see also *Buckle Up*, *supra* note 15, at 6 (summarizing the frustrating and time-consuming experience of some consumers who negotiated what they thought was an agreed-upon price with a dealership's sales staff, only to face further rounds of negotiating with the dealer's financing office and the introduction of add-ons that caused the price to balloon), <https://www.ftc.gov/reports/buckle-navigating-auto-sales-financing>; Matthew Jones, Bruce Kobayashi & Jason O'Connor, *Economics at the FTC: Non-Price Merger Effects and Deceptive Automobile Ads* 12 (2018), also published at 53 Rev. Indust. Org. 593 (2018), <https://www.ftc.gov/system/files/documents/reports/economics-ftc-non-price-merger-effects-deceptive-automobile-ads/1812-be-rio.pdf> (discussing the injurious effects of deceptive ads about motor vehicle sales and financing, including the time and effort spent by consumers visiting the dealership, when they might have otherwise pursued a legitimate offer elsewhere).

¹¹³ The FTC has long considered the deceptive or unfair effects of “drip pricing”—the colloquial term for the pricing practice that proposed § 463.4(a) aims to curb—whereby firms advertise only part of a product's price and reveal other mandatory charges later in the buying process. In 2012, the FTC convened a workshop on drip pricing at which then-Chairman Leibowitz discussed the practice's potential to harm consumers by “causing them to pay too much and to waste time searching” goods and services with deceptively low prices. That same year, the FTC sent letters to numerous hotels warning against the practice of excluding mandatory “resort fees” from quoted room rates and urging them to make total quoted prices inclusive of all unavoidable costs. See Mary W. Sullivan, *Economic Analysis of Hotel Resort Fees*, Fed. Trade Comm'n (Jan. 2017) (concluding hotels could eliminate the potential harm and cost to consumers caused by price dripping by disclosing any mandatory fees upfront in the quoted price). Almost a decade later, complaints about mandatory fee disclosures persist. During a recent workshop to examine digital “dark patterns,” participants identified drip pricing as a leading issue in online pricing, with some suggesting the FTC implement a rule banning hidden fees and drip pricing. <https://www.ftc.gov/news-events/events-calendar/bringing-dark-patterns-light-ftc-workshop>. See Fed. Trade Comm'n, *Staff Perspective: “That's the Ticket” Workshop* (May 2020) (noting a preference for

Specifically, § 463.4(a) would require disclosure of the Offering Price when dealers advertise a specific vehicle for sale as well as when any monetary amount or financing term is advertised.

This provision would further require that, upon receipt of a consumer inquiry about a specific vehicle or price or financing term for any vehicle, the dealer must disclose the Offering Price of that vehicle, and that if any part of such an inquiry or response is made in writing, the Offering Price must be disclosed in writing as well. This provision would require dealers to provide accurate information to consumers, including those beginning their vehicle-shopping process online¹¹⁴ and those selecting a dealership based on price. Inaccurate price information is likely to cause substantial injury for consumers who waste time traveling to the dealership in pursuit of an offer that does not exist, and for consumers who never learn that unexpected charges have been added to their dense paperwork during the hours-long vehicle buying and financing process.

Section 463.4(b) would require dealers to provide consumers with information about optional add-on charges to help curb deceptive and unfair practices. As discussed in Part III.B above, misrepresenting that add-ons are required or charging for add-ons without consumers' Express, Informed Consent are significant consumer protection concerns. Section 463.4(b) would require disclosure on any website, online service, or mobile application on which vehicles are

regulating drip pricing in the context of online advertising and sale of event tickets), https://www.ftc.gov/system/files/documents/reports/thats-ticket-workshop-staff-perspective/staffperspective_tickets_final-508.pdf. One model for all-in, upfront pricing are DOT's rules requiring airlines to include all mandatory fees in ticket display prices. Under these rules, whenever a carrier advertises a price for air transportation, that price must be the full price customers will have to pay. See 14 CFR part 399 (implementing 49 U.S.C. 41712). Regardless of the market, whether air travel, hotels, or motor vehicles, the empirical evidence suggests price transparency leads to more informed consumers, lower and more uniform prices, and more competition among sellers. See, e.g., D. Andrew Austin & Jane G. Gravelle, Cong. Rsch. Serv., *CRS Report for Congress: Does Price Transparency Improve Market Efficiency? Implications of Empirical Evidence in Other Markets for the Health Sector* (July 24, 2007), <https://fas.org/sgp/crs/sec/secrty/RL34101.pdf>.

¹¹⁴ See generally Fed. Trade Comm'n, *The Road Ahead: Selling, Financing & Leasing Motor Vehicles* (Aug. 2011) (Public Roundtables) (Session 2 transcript) (discussing that each month tens of millions of consumers seek out vehicle information on edmunds.com, but also discussing the reliability (or lack thereof) of such information available online), https://www.ftc.gov/system/files/documents/public_events/52654/080211_ftc_sess2.pdf.

offered for sale, of a list of all optional add-ons and the price of each add-on (“Add-on List”).¹¹⁵ The Add-on List would have to include all optional add-on products for which the dealer charges consumers (and their respective prices). If the price of the add-on varies based on the specifics of the transaction, the Add-on List would have to include the range the typical consumer will pay.¹¹⁶ Due to space constraints, dealer advertisements presented not online but in another format—such as in print, radio, or television—would not be required to include the Add-on List. Instead, pursuant to § 463.4(b)(2), those advertisements would be required to disclose the website, online service, or mobile application where consumers can access a copy of the Add-on List.¹¹⁷ This proposed provision is consistent with industry guidance¹¹⁸ and would help ensure that dealers that follow such guidance will not be competitively disadvantaged relative to those that do not.

For optional add-on products and services, proposed § 463.4(c) would require dealers to disclose that the optional add-on product or service is not required and that a consumer can purchase or lease the vehicle without the add-on. This disclosure would curb the deceptive practice of misleading consumers into thinking an add-on is required when it is not.¹¹⁹ As with proposed § 463.4(b), this proposed provision is consistent with industry

¹¹⁵ To the extent any add-on charges are required by a dealership, and thus not optional, such charges would have to be disclosed in the Offering Price, pursuant to proposed § 463.4(a) et al.

¹¹⁶ See *FTC v. Five Star Auto Club*, 97 F. Supp. 2d 502, 528 (S.D.N.Y. 2000) (“at the very least, it would have been reasonable for consumers to have assumed that the promised rewards were achieved by the typical Five Star participant”); *Universal City Nissan*, No. 2:16-cv-07239 (C.D. Cal. Sept. 29, 2016) (alleging unlawful deception where a dealer's ads list prominent terms not generally available to consumers, including where those terms are subject to various qualifications or restrictions); *Progressive Chevrolet Co.*, No. C-4578 (F.T.C. June 13, 2016) (alleging advertised offer was deceptive because the typical consumer would not qualify for the offer).

¹¹⁷ Working in tandem, proposed § 463.4(b)(1) and (b)(2) would mean that dealers who engage in advertising and charge for optional add-ons must have a website, online service, or other mobile application by which to disclose an Add-on List.

¹¹⁸ See Nat'l Auto. Dealers Ass'n et al., *Voluntary Protection Products: A Model Dealership Policy* 11 (2019), <https://www.nada.org/regulatory-compliance/voluntary-protection-products-model-dealership-policy> (stating add-on products and services should be presented “in a standard, simple menu format that, at a minimum, prominently discloses: . . . 7. the price of—and monthly payment for—each Product”)

¹¹⁹ See, e.g., Stipulated Order, *FTC v. Universal City Nissan*, et al., No. 2:16-cv-07239 at Art. III (C.D. Cal. Mar. 22, 2017); Stipulated Order, *FTC & Illinois v. N. Am. Auto. Servs., Inc.*, No. 1:22-cv-0169 at Art. II (N.D. Ill. Mar. 31, 2022).

guidance¹²⁰ and would avoid competitive disadvantage to those dealerships that follow such guidance.

Section 463.4(d) would require dealers to disclose the total of payments when quoting monthly payment amounts to a prospective buyer or lessee. Specifically, § 463.4(d) would prohibit motor vehicle dealers from making any representation about a monthly payment for any vehicle without disclosing the total amount the consumer will pay to purchase or lease the vehicle at that monthly payment amount after making all monthly payments; if that total amount assumes consideration provided by the consumer (e.g., a cash down payment or a trade-in), those amounts must also be disclosed.

Section 463.4(e) would complement the preceding provision by requiring dealers, when they compare different monthly payment options with consumers, to inform consumers that a lower monthly payment will increase the total amount the consumer will pay, if true. These provisions are intended to prohibit dealers from using claims regarding monthly payment amounts to falsely imply savings or parity between different offers where reduced monthly payments increase the total vehicle cost due to an increased payment term, and potentially an increased annual percentage rate (“APR”) as well.

Additionally, when a consumer pays for his or her vehicle over a longer period of time, there is an increased likelihood that the consumer will continue to owe money even after he is no longer driving the vehicle. This results in negative equity when the consumer needs or wants to purchase another vehicle, because a vehicle’s value tends to decline faster than the amount owed.¹²¹ Longer motor vehicle financing terms also have higher rates of default, potentially posing greater risks to both borrowers and financing companies.¹²²

¹²⁰ See Nat’l Auto. Dealers Ass’n et al., *Voluntary Protection Products: A Model Dealership Policy 4* (2019), <https://www.nada.org/regulatory-compliance/voluntary-protection-products-model-dealership-policy> (stating dealerships should “prominently display to customers a poster stating that [add-on products and services] 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.”)

¹²¹ *Buckle Up*, *supra* note 15, at 7.

¹²² Consumer Fin. Prot. Bureau, *Quarterly Consumer Credit Trends: Growth In Longer-Term Auto Loans 7–8* (Nov. 2017), https://files.consumerfinance.gov/f/documents/cfpb_consumer-credit-trends_longer-term-auto-loans_2017Q2.pdf; see also Zhengfeng Guo et al., Off. of the Comptroller of the Currency, *A Puzzle in the Relation Between Risk and Pricing of Long-Term Auto Loans 2, 4–5*, 20 (June 2020), <https://>

Take, for example, a borrower who finances the purchase of a \$25,000 vehicle with a \$5,000 down payment and a 10% APR. With a five-year (60-month) term, her monthly payment will be \$425. If the consumer balks at that monthly payment, the dealer could quote her a lower monthly payment of \$332. If, however, the down payment and APR stay the same, that would result in a seven-year (84-month) term. Although the second offer might appear to be less costly, it will result in the consumer paying \$2,394 more in interest over the course of the longer financing term. The second offer would also obligate the buyer to make payments for two additional years; if she needed to shop for a new vehicle after 60 months, she would still owe an outstanding balance of \$7,195 on the first vehicle.¹²³

As discussed further below, singular focus on monthly payments can also make consumers susceptible to unwanted, undisclosed, or even fictitious add-on charges and fees, because consumers may not notice relatively small add-on charges secreted within a monthly payment (e.g., \$15). Such hidden charges can cost a consumer more than a thousand dollars over the course of an auto financing or lease term.¹²⁴

www.occ.gov/publications-and-resources/publications/economics/working-papers-banking-perf-reg/pub-econ-working-paper-puzzle-long-term-auto-loans.pdf (finding motor vehicle financing with six-plus-year terms have higher default rates than shorter-term financing during each year of their lifetimes, after controlling for borrower and loan-level risk factors).

¹²³ The cost disparities resulting from monthly payment fixation can be even greater because financing entities tend to charge higher interest rates for longer terms. See Nat’l Credit Union Admin., *Credit Union and Bank Rates 2021 Q1* (Mar. 26, 2021), <https://www.ncua.gov/analysis/cuso-economic-data/credit-union-bank-rates/credit-union-and-bank-rates-2021-q1> (listing national average rates for new motor vehicle and used motor vehicle financing by term). In the example above, the alternate deal presented to the consumer may be for the same \$25,000 purchase price and same \$5,000 down payment, but with a longer repayment term of 84 months and a higher 12% APR. With this alternative, the new monthly payment of \$353 is still considerably lower than the \$425 monthly payment first offered, but it will in fact result in the consumer paying in \$4,161 additional interest over the course of the extended period, and owing a balance of \$7,500 to trade in the vehicle on the same 60-month timeline as the first offer.

¹²⁴ See *Auto Buyer Study*, *supra* note 11, at 14 (“the dealer can extend the maturity of the financing to reduce the effect of the add-on on the monthly payment, obscuring the total cost of the add-on”); *Auto Buyer Study: Appendix*, *supra* note 66 (Study participant 457481 at 229, 233 (dealership pitching add-ons at the end of the negotiation, and in terms of consumer’s monthly price); Study participant 437175 at 701 (dealership pitching add-ons in terms of monthly price)); see also *Liberty Chevrolet*, No. 1:20-cv-03945 at ¶¶ 12–19 (S.D.N.Y. May 21, 2020) (alleging dealership included deceptive and unauthorized add-on

Further, when dealers advertise deceptively low monthly payments that amount to a fraction of the total cost of the vehicle, consumers may end up owing a large balloon payment in addition to the advertised monthly payment amount, either at signing¹²⁵ or after finishing their monthly payments,¹²⁶ or may be required to pay a much higher monthly payment once the artificially low “teaser rate” expires.¹²⁷

The Commission anticipates that the proposed rule’s requirement that dealers must disclose the total cost of a vehicle when quoting monthly payment amounts to a prospective buyer will help prospective buyers make more informed purchasing decisions and curb these deceptive and unfair practices.

Similarly, by requiring that dealers disclose that a lower monthly payment amount will increase the vehicle’s total cost, when true, consumers will be able to gauge how much a given financing or lease offer will ultimately cost in order to compare different offers. This will help to decrease the likelihood that a consumer will be deceived about the comparative cost of a financing or lease offer, and help prevent dealers from

charges in consumers’ transactions); *Ramey Motors*, No. 1:14-cv-29603 at ¶¶ 21–28 (S.D. W. Va. Dec. 11, 2014) (alleging dealer emphasized attractive terms such as low monthly payments but concealed substantial cash down payments or trade-in requirements); *Billion Auto*, No. 5:14-cv-04118–MWB at ¶¶ 38–46 (N.D. Iowa Dec. 11, 2014) (alleging dealer touted attractive terms such as low monthly payments but concealed significant extra costs).

¹²⁵ See, e.g., *Norm Reeves*, No. 8:17-cv-01942 at ¶¶ 28–30 (C.D. Cal. Nov. 3, 2017) (alleging deceptive representations regarding monthly payments); *Universal City Nissan*, No. 2:16-cv-07329 at ¶¶ 30–33 (C.D. Cal. Sept. 29, 2016) (alleging misrepresentations regarding monthly payments).

¹²⁶ See, e.g., *New World Auto Imports*, No. C–4437 at ¶¶ 8–11 (F.T.C. Feb. 20, 2014) (alleging misrepresentation regarding monthly finance payments); *New World Auto Imports*, No. 3:16-cv-02401–K at ¶¶ 36–38 (N.D. Tex. Aug. 18, 2016) (alleging deceptive representations regarding monthly payments); see also Melissa Harper, Comment Letter on Public Roundtables: Protecting Consumers in the Sale and Leasing of Motor Vehicles, Project No. P104811, Submission No. 558507–00007 (Apr. 2, 2011), available at <https://www.regulations.gov/docket/FTC-2022-0036> (stating consumer paid monthly payments for 4 years, told she still owed money on the car when originally told it would be paid off in this time period).

¹²⁷ See, e.g., Complaint, *In re Paramount Kia of Hickory, LLC*, No. C–4450 at ¶¶ 5–6 (F.T.C. Apr. 11, 2014) (alleging misrepresentation regarding monthly payment amount); Complaint, *In re Nissan of South Atlanta, LLC*, No. C–4435 at ¶ 5 (F.T.C. Feb. 28, 2014) (alleging misrepresentation of monthly payment amount); *Universal City Nissan*, No. 2:16-cv-07329 at ¶¶ 30–34 (C.D. Cal. Sept. 29, 2016) (alleging advertised \$38 monthly payment only applied for the first 6 months; offer in fact required \$179.62 per month for the remaining 30 months).

including optional add-on products or services without the consumer's Express, Informed Consent. These proposed provisions do not conflict with "triggering term" requirements under other federal rules, including Regulation Z (of the Truth in Lending Act) and Regulation M (of the Consumer Leasing Act).¹²⁸

Taken together, provisions 463.4(a) through (e) are intended to curb deceptive and unfair conduct related to pricing and add-ons. As discussed above, consumers are presented with a high volume of dense information during the long and complex motor vehicle buying or leasing experience. In some cases, prospective buyers receive conflicting information or are not provided key information, or fully informed about applicable charges. These practices harm consumers who may incur time and expense during the vehicle-shopping process or incur unexpected costs when dealers tout artificially low costs and other incentives in advertising and during negotiations, only revealing that those deals are not available late in the buying process, if at all. For example, participants in the FTC's qualitative *Auto Buyer Study* encountered situations where dealers settled on a price with them on the sales floor, but later a financing representative revoked the agreed upon price, claiming that it could not be honored.¹²⁹

Dealer control over the flow and timing of information enables them to add charges or change contract terms late in the purchase or lease process.¹³⁰ In some instances, after consumers have spent hours traveling to the dealership and then on the lot (perhaps after already having spent hours comparing prices and features online), dealers present a large pile of paperwork and

give consumers little time to review it. As a result, consumers are unaware that charges have been added or promised discounts or benefits have been removed.¹³¹ In other instances, consumers learn about additional charges or changes to their terms after they have invested substantial time and energy in the buying or leasing process.¹³² Requiring that consumers receive clear pricing disclosures early in the process will curb situations where consumers face unexpected charges at the end of the vehicle-buying process.¹³³

E. § 463.5: Dealer Charges for Add-Ons and Other Items

Section 463.5 of the proposed rule would prohibit charging for add-on products that provide no benefit to the consumer and would prohibit charging consumers without Express, Informed Consent. Add-on products and services are commonly offered by dealers in conjunction with vehicle financing or leasing, and these products and services make up a significant share of dealers' profits.¹³⁴ In some cases, dealers appear

to charge for add-on products or services under circumstances in which the consumer could never benefit from that product or service.¹³⁵ However, charging for non-beneficial products is inconsistent with industry guidance,¹³⁶

www.edmunds.com/car-buying/where-does-the-car-dealer-make-money.html. As of August 2021, approximately 94% of new vehicles and 86% of used vehicle sales involved dealerships' finance and insurance office, which offers products and services such as GAP insurance, alarm systems and extended warranties. Nat'l Auto. Dealers Ass'n, *Average Dealership Profile* at 1 (Aug. 2021), <https://www.nada.org/media/4129/download?inline>.

¹³⁵ See, e.g., Individual consumer complaint, filed Mar. 27, 2021 ("I bought this warranty February 2nd with insistence from the dealer. They advertise false coverage, most of the things they supposedly covered come with limitations and exclusions in which you are ultimately not covered at all. The [re] are so many exclusions it's ridiculous, there is a total of A-Z of letters with each one stating various parts that are not covered, I will only mention one since there is an absurd amount. Letter B states, 'repair or replacement of any covered component when it has been determined that the condition existed prior to purchase of this agreement.' Lovely, so if you bought your vehicle used, you are not covered. Their contract is misleading, you're promised coverage but then they find loopholes and you are left with no coverage."); Individual consumer complaint, filed Aug. 29, 2019 ("Federal Trade Commission, I believe I have been treated unfairly as a consumer in the state of Iowa . . . I was aggressively sold GAP insurance while purchasing a vehicle . . . The [] dealership made a lot of promises when selling the GAP insurance which I have documentation for, but then failed to honor those promises once I needed the GAP insurance after a no fault deer collision . . . The [] dealership aggressively sold me GAP insurance as 'an add-on car insurance coverage that would cover the 'gap' between the amount owed on the car and the car's actual cash value in the event of an accident or collision. I was told my primary insurance company . . . would only cover the cash value, I would pay my \$500 deductible, and [the dealership]'s GAP would cover the remaining amount owed to pay the lien holder down to a zero balance . . . Instead of getting the peace of mind they sold by adding GAP insurance, [the dealership] left me to cover the remaining balance of \$998.62 after I pay the \$500 insurance deductible."); Individual consumer complaint, filed June 23, 2021 ("The dealership also sold an aftermarket warranty. 24 hours after taking delivery, I had the vehicle inspected and was informed of \$6,000 in repairs . . . Once the warranty company checked the vehicle, they informed me that the warranty was void due to intake and tubing modifications. Therefor[e], the dealership sold a warranty for a vehicle that could not be warrantied by the company"); Individual consumer complaint, filed May 12, 2021 ("I purchased a 2011 Chevy Malibu from a dealer and with the purchase, also purchased a 5 year, 100,000 mile power train warranty. I have had the car for 39 months and have driven about 35,000 miles since purchase. The car has had a couple issues and the warranty has never covered ANY repair costs at any time. 2 weeks ago, an item in the engine broke and now is not functioning at all. The mechanic reached out to [the extended warranty provider] and was told nothing will be covered. I called and asked and got told that covered items would be covered along with labor. We continue to get the run around with me being told one thing and the mechanic another. This warranty has been nothing more than a waste of time, money, and is now in my mind a scam to get money from unsuspecting customers.");

¹³⁶ See Nat'l Auto. Dealers Ass'n et al., *Voluntary Protection Products: A Model Dealership Policy 5*

Continued

¹²⁸ See 12 CFR 1026.24(d) (Regulation Z triggering terms provision); 12 CFR 213.7 (Regulation M triggering terms provision). These rules require that when an advertisement for a financed purchase or a lease mention a specific triggering term—for example, a monthly payment amount—that those advertisements also disclose other specified terms, including the number, amount, and timing of payments.

¹²⁹ See *Auto Buyer Study*, *supra* note 11, at 11.

¹³⁰ Att'y's General of 31 States & DC, Comment Letter on Public Roundtables: Protecting Consumers in the Sale and Leasing of Motor Vehicles, Project No. P104811, Submission No. 558507-00112 at 5 (Apr. 13, 2012), available at <https://www.regulations.gov/docket/FTC-2022-0036> (describing the addition of documentary fees that "often come as complete surprises to consumers, and are not disclosed until well after the dealer and consumer agree on a sales price for the vehicle."); *Auto Buyer Study*, *supra* note 11, at 13-14, (offering add-ons after a vehicle price is negotiated is a form of drip pricing, which can result in higher prices to consumers by reducing the likelihood consumers will search for alternative suppliers).

¹³¹ See *Liberty Chevrolet*, No. 1:20-cv-03945 at ¶¶ 17-18 (S.D.N.Y. May 21, 2020) (alleging dealer inflated vehicle prices and charged consumers double for sales tax or other fees, and often consumers did not notice the bait and switch from an earlier price document to the final sales price contained in "a stack of complex, highly technical documents presented at the close of a long financing process after an already lengthy process of selecting car and negotiating over its price."); *Universal City Nissan*, No. 2:16-cv-07329 at ¶¶ 60, 91-93 (C.D. Cal. Sept. 29, 2016) (alleging dealer rushed consumers through signing process, and often consumers were unaware of add-on products included in the paperwork); see also *Buckle Up*, *supra* note 15, at 10-11. As part of the FTC's study of dozens of motor vehicle buyers who recently purchased a vehicle, many consumers reported they were unable to review the paperwork consummating the purchase transaction. The consumers reported several reasons, including that the long transaction left them exhausted, the dealer rushed them through the signing process, and they were overwhelmed or thought it would take them a few hours or days to read all of the fine print in the paperwork. These factors likely contributed to many consumers lacking awareness of critical financing terms.

¹³² See *Auto Buyer Study*, *supra* note 11, at 13.

¹³³ See *Buckle Up*, *supra* note 15, at 6. Some study participants found "after negotiating what they thought was an agreed-upon price for a vehicle with sales personnel, they faced negotiating again during the dealer's financing process, which they found frustrating and time-consuming." In addition, "introduction of add-ons during financing discussions caused several participants' total sale price to balloon from the cash price." Accordingly, the staff report recommends "discussing the 'out-the-door' price of the vehicle (the total price, before financing, including taxes and fees) before discussing financing could help avoid confusion."

¹³⁴ See Adrienne Roberts, *Add-On Services Emerge as Car Dealers' Profit Generator*, Wall Street Journal, Apr. 7, 2019, <https://www.wsj.com/articles/add-on-services-emerge-as-car-dealers-profit-generator-11554634800>; Edmunds, *Where Does the Car Dealer Make Money*, June 13, 2019, <https://>

and dealerships that profit from such sales put honest dealerships at a competitive disadvantage.

Proposed § 463.5(a) would prohibit this practice. A dealer would be in violation of this provision if, for example, the dealer offered and charged for products such as “rustproofing” that did not actually prevent rust, offered purported theft-prevention or theft-recovery services without proof that the services actually prevented theft or recovered stolen items, or charged for “nitrogen-filled tires” that in fact contained no more nitrogen than naturally exists in the air. A dealer would also violate this provision if the dealer sold GAP insurance to buyers whose financing balance was so low that ordinary insurance would be adequate to cover any loss.¹³⁷ Further, the proposed restriction would prohibit the sale of GAP insurance when hidden restrictions would exclude a vehicle buyer from coverage (e.g., where the consumer’s vehicle is among a list of vehicles excluded from coverage, or the consumer’s neighborhood is excluded from coverage). Similarly, the proposed rule would prohibit other optional add-on products or services that offer consumers no benefit, including extended warranties that merely duplicate coverage already provided on the vehicle.¹³⁸

(2019), <https://www.nada.org/regulatory-compliance/voluntary-protection-products-model-dealership-policy> (explaining that when determining which voluntary protection products to offer to customers, “the dealership should have confidence in the value that the product offers to customers”), including that it should “understand whether its coverage is already provided by another product being purchased by the customer,” and stating “[i]t is essential customers have a clearly defined path to receiving such benefits.”).

¹³⁷ GAP products cover the difference, or “gap,” between the amount the consumer owes on the motor vehicle financing and the amount received from the vehicle insurer in the event of a total loss. A gap is more likely when the loan-to-value (LTV) ratio is high, since the outstanding balance owed by the consumer at the time of a total loss is more likely to exceed the insurance proceeds; conversely, with a low LTV, the insurance payout for a totaled vehicle will likely cover the consumers’ outstanding debt, rendering GAP unnecessary. See Consumer Fin. Prot. Bureau, *Supervisory Highlights, Issue 19—Summer 2019* at 4, https://files.consumerfinance.gov/f/documents/cfpb_supervisory-highlights_issue-19_092019.pdf (describing as unlawful the sale of “a GAP product to consumers whose low LTV meant that they would not benefit from the product”).

¹³⁸ The Road Ahead: Selling, Financing & Leasing Motor Vehicles, a Roundtable, Panel 2: Misrepresentations and Other Consumer Protection Issues in Motor Vehicle Leasing, comment of panelist Tom Domonoske, transcript at 19–21 (Nov. 17, 2011), https://www.ftc.gov/sites/default/files/documents/public_events/road-ahead-3rd-roundtable-november-17th/dc_sess2.pdf; Dale Irwin, Slough Connealy Irwin & Madden LLC, Comment Letter on Public Roundtables: Protecting Consumers in the Sale and Leasing of Motor

Consumers do not agree to purchase additional products from which they could not benefit unless they are led to believe, directly or by omission, that these products would be beneficial. Rather than requiring an additional, confusing disclosure—e.g., that the dealer is charging extra for an item that will not provide the consumer any benefit—this provision would prevent dealers from being able to extract additional charges from consumers based on deception. Accordingly, and similar to provisions enacted by a number of states,¹³⁹ § 463.5(a) of the proposed rule would prohibit motor vehicle dealers from marketing or selling an add-on product or service if the consumer would not benefit from such an add-on product or service.

Section 463.5(b) of the proposed rule would curb the practice of charging for optional add-ons without the consumer’s consent or misrepresenting that an optional add-on is instead a required purchase. It would also prohibit dealers from changing pricing information in the financing office. Specifically, proposed § 463.5(b)(1) states that dealers may not charge for optional add-ons unless they disclose up front the cash price at which a

Vehicles, Project No. P104811, Submission No. 558507–00060 (Dec. 29, 2011), available at <https://www.regulations.gov/document/FTC-2011-0027-0001> (“fraudulent sale of duplicative extended warranty coverage on new cars”); FSP and Assocs., LLC, Comment Letter on Public Roundtables: Protecting Consumers in the Sale and Leasing of Motor Vehicles, Project No. P104811, Submission No. 558507–00094 (Mar. 19, 2012), available at <https://www.regulations.gov/docket/FTC-2022-0036> (one of “the most insidious elements of car dealer financing is . . . insurance [add-ons] they load into every contract,” which in “most cases the purchaser has no idea it is there” and “adds to the overall interest and vehicle cost and usually provides no benefit to the purchaser”); Consent Order, *Consumer Fin. Prot. Bureau v. Wells Fargo Bank, N.A.*, No. 2018–BCFP–0001 at ¶¶ 27–39 (Apr. 20, 2018) (finding force-placing duplicative or unnecessary collateral-protection insurance on hundreds of thousands of borrowers’ vehicles); *StewartFin. Co. Holdings*, No. 103CV–2648 at ¶¶ 28, 45–48 (N.D. Ga. Sept. 4, 2003) (“On numerous occasions, Stewart Finance has sold Car Club to borrowers who do not own cars or do not have driver’s licenses and thus, would not benefit from the product”); cf. *Nat’l Payment Network*, No. C–4521 at ¶¶ 4–14 (F.T.C. May 4, 2015) (alleging provider of third-party vehicle repayment service failed to disclose fees associated with financing program often exceed consumers’ savings from using the program); *Matt Blatt*, No. C–4532 at ¶¶ 4–13 (F.T.C. May 4, 2015) (alleging dealership failed to disclose fees associated with third-party vehicle repayment service often exceeded consumers’ savings from using the program).

¹³⁹ See, e.g., Ind. Code sec. 24–4.5–3–202(e)(ix) (prohibiting sale of GAP when LTV is less than 80); 4 Colo. Code Regs. sec. 902–1:8(g) (prohibiting sale of GAP when the consumer, the credit terms, or the purchased vehicle do not qualify for, or conflict with, coverage); S.C. Code sec. 37–30–120(I)(1) (prohibiting sale of GAP unless seller reasonably believes the borrower will be eligible for a benefit).

consumer may purchase the vehicle without additional add-ons. The proposed rule would require that dealers disclose, and offer to close the transaction for, the Cash Price without Optional Add-ons, separately itemizing the Offering Price, any discounts, rebates, or trade-in valuation, and required government charges. If the prospective buyer declines to purchase the vehicle at that price, the dealer must obtain confirmation in writing, with the date and time recorded, signed by the consumer and a manager of the dealership. The dealer must retain this signed form to document that the dealer has provided the required Offering Price disclosure to consumers before including optional add-ons in a sales transaction. The Cash Price without Optional Add-ons disclosure and declination must be limited to the information required by this §, and cannot be presented together with any other written materials.

Proposed § 463.5(b)(2) would require similar disclosures in the context of financed transactions: dealers would not be permitted to charge for optional add-ons without disclosing, and offering to consummate the transaction for, the Cash Price without Optional Add-ons plus the finance charge, factoring in any cash down payment or trade-in valuation (and separately itemizing the components of the offer).¹⁴⁰ If the consumer declines to finance the transaction for that amount, the dealer, as above, must obtain confirmation of that declination in writing. The disclosure and declination must be limited to the information required by this section, and cannot be presented with any other written materials.

Proposed § 463.5(b)(3) would require a dealer, before charging for any optional add-on, to disclose the cost of the transaction without any optional add-ons (whether the transaction is financed or not), and also disclose the charges for the optional add-ons selected by the consumer, separately itemized.

Section 463.5(c) of the proposed rule would prohibit motor vehicle dealers, in connection with the sale, financing, and leasing of vehicles, from charging consumers for any item without their Express, Informed Consent. “Express, Informed Consent” is defined as 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

¹⁴⁰ Consistent with TILA, charges included entirely in the finance charge are not “optional Add-ons.”

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.¹⁴¹ The definition also provides nonexclusive examples of what is not considered Express, Informed Consent. First, documents with a mere signature or initials, or a form presented to a consumer with preprinted checkboxes, would not constitute Express, Informed Consent. Similarly, agreement obtained through any practice, such as a user interface or document, designed or manipulated with the substantial effect of subverting or impairing user autonomy, decision-making, or choice, would not constitute Express, Informed Consent.

As discussed above, the length and complexity of motor vehicle transactions has created an environment ripe for deceptive or unfair conduct. Consumer complaints suggest some dealers have added thousands of dollars in unauthorized charges, including for add-ons consumers had already rejected.¹⁴² These issues are exacerbated when pre-printed consumer contracts automatically include charges for optional add-ons, when consumers are rushed through stacks of paperwork, or when they are asked to sign blank documents.¹⁴³

This provision would help protect consumers from unfair or deceptive charges buried within lengthy contracts or stacks of paperwork.¹⁴⁴

In sum, the complexities and duration of a typical motor vehicle transaction, and the myriad problems observed in the industry, call for a means to obtain and record Express, Informed Consent to charges instead of simply collecting signatures or initials within dense paperwork. Other statutes and rules enforced by the FTC likewise include Express, Informed Consent requirements for consumer purchases,¹⁴⁵ and similar provisions appear in Commission orders resolving charges that motor vehicle dealers or other sellers have levied unauthorized charges on consumers.¹⁴⁶

F. § 463.6: Recordkeeping

The proposed rule also includes various recordkeeping requirements to help ensure compliance with the Rule's disclosure requirements. Section 463.6 of the proposed rule describes the types of records motor vehicle dealers must keep, and the time period for retention. Specifically, this provision requires motor vehicle dealers subject to the Rule to keep for a period of 24 months: all materially different advertisements, sales scripts, training materials, and marketing materials regarding vehicle

claims in a particular way to induce them to click on a link on a website or to agree to a transaction, even if it includes charges for unwanted items. *See, e.g., Bringing Dark Patterns to Light: an FTC Workshop, Fed. Trade Comm'n* (Apr. 29, 2021) (Public Event), <https://www.ftc.gov/news-events/events-calendar/bringing-dark-patterns-light-ftc-workshop>; *see also supra* note 113. And the Commission has seen via extrinsic evidence (including consumer complaints and surveys) that large numbers of consumers experience unexpected and unauthorized charges, notwithstanding disclosures, contract disclaimers, and signature lines. Summary Judgment Order, *FTC v. Amazon.com*, No. 2:14-cv-01038-JCC, at 17–20 (W.D. Wash. 2016); *N. Am. Auto. Servs.*, No. 1:22-cv-0169 at ¶ 27 (N.D. Ill. Mar. 31, 2022) (alleging that, according to a survey of dealership customers, at least 83% of them were charged for add-on products without authorization or as a result of deception).

¹⁴⁵ 15 U.S.C. 8402(a)(2), 8403(2) (Restore Online Shoppers' Confidence Act); 16 CFR 310.4(a)(7) (Telemarketing Sales Rule).

¹⁴⁶ *Liberty Chevrolet*, No. 1:20-cv-03945 at Art. II (S.D.N.Y. May 27, 2020); Stipulated Order, *FTC v. Consumer Portfolio Servs.*, No. 14-cv-00819 at Art. III (C.D. Cal. June 11, 2014). Based on years of experience in a variety of contexts (including for dealings not nearly as complex as motor vehicle transactions), the Commission has often required such Express, Informed Consent provisions. *See, e.g., Stipulated Order, FTC v. Yellowstone Capital LLC*, No. 1:20-cv-06023-LAK at Art. III (S.D.N.Y. May 4, 2021); Stipulated Order, *FTC v. Prog. Leasing*, No. 1:20-cv-1688-JPB at Art. IV (N.D. Ga. Apr. 22, 2020); Decision and Order, *FTC v. Bionatrol Health, LLC*, No. C-4733 at Art. VI (F.T.C. Mar. 5, 2021); Stipulated Order, *FTC v. Bunzai Media Grp., Inc.*, No. CV 15-4527-GW(PLAx) at Art. I.E (C.D. Cal. June 27, 2018); Stipulated Order, *FTC v. T-Mobile USA, Inc.*, No. 2:14-cv-00967-JLR at Art. I (W.D. Wash. Dec. 19, 2014); Stipulated Order, *FTC v. AT&T Mobility, LLC*, No. 1:14-cv-03227-HLM at Art. I (N.D. Ga. Oct. 8, 2014); Decision and Order, *In re Google, Inc.*, No. C-4499 at Art. I (F.T.C. Dec. 2, 2014).

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. These recordkeeping provisions are necessary to ensure 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.¹⁴⁷ These recordkeeping obligations are consistent with and similar to requirements included in similar Commission disclosure rules, as tailored to individual industries and markets.¹⁴⁸

G. § 463.7: Waiver Not Permitted

Section 463.7 of the proposed rule provides that “[a]ny attempt by any person to obtain a waiver from any consumer of any protection provided by or any right of the consumer under this part constitutes a violation of this part.” This provision would prevent attempts to circumvent provisions of the proposed rule, for example during the paperwork review process with consumers. This provision is modeled on a similar provision in the Mortgage Assistance Relief Services Rule.¹⁴⁹

V. Request for Comment

You can file a comment online or on paper. For the Commission to consider your comment, we must receive it on or before September 12, 2022. Write “Motor Vehicle Dealers Trade Regulation Rule—Rulemaking, No. P204800” on your comment. Your comment—including your name and your state—will be placed on the public record of this proceeding, including, to the extent practicable, on the <https://www.regulations.gov> website.

¹⁴⁷ *Norm Reeves*, No. 8:17-cv-01942 at ¶¶ 42–45 (C.D. Cal. Nov. 3, 2017) (alleging dealer failed to keep records of previous advertisements needed to demonstrate compliance with prior order); *New World Auto Imports*, No. 3:16-cv-22401 at ¶¶ 32–35 (N.D. Tex. Aug. 18, 2016) (alleging dealer failed to keep records of previous advertisements needed to demonstrate compliance with prior order).

¹⁴⁸ 16 CFR 310.5 (Telemarketing Sales Rule); 16 CFR 437.7 (Business Opportunity Rule); 16 CFR 453.6 (Funeral Industry Practices Rule); 16 CFR 301.41 (Fur Products Labeling).

¹⁴⁹ *See* 12 CFR 1015.8.

¹⁴¹ *See, e.g., Stipulated Order, FTC v. Liberty Chevrolet, Inc.*, No. 1:20-cv-03945 (S.D.N.Y. May 22, 2020) (defining Express, Informed Consent in the same manner).

¹⁴² *See generally Buckle Up*, *supra* note 15. As part of the FTC's qualitative study of dozens of consumers who had recently purchased a vehicle, nearly all complained about the time spent at the dealership and the hefty paperwork needed to complete the transaction. Several consumers learned during their post-purchase interviews that they had bought add-ons that they did not know about (or that they had declined), others thought they got add-ons for free but in fact paid for them, and some purchased GAP insurance only because the dealer said or implied that it was mandatory.

¹⁴³ *Universal City Nissan*, No. 2:16-cv-07329 at ¶¶ 58, 60 (C.D. Cal. Sept. 29, 2016) (alleging preprinted contracts and rushing consumers to sign); *Liberty Chevrolet*, No. 1:20-cv-03945 at ¶¶ 17–19 (S.D.N.Y. May 21, 2020) (alleging charging consumers for taxes twice by rushing consumers to sign); *see also* Individual consumer complaint, filed May 18, 2021 (“They signed me up for a service plan even though I never requested one and charged an extra \$1000 to my auto loan without my consent. They stated I signed the paperwork so theres nothing I could do that its my fault for not being more careful and they refused to reimburse me even though I never knew of or used the service.”).

¹⁴⁴ The Commission has observed that some businesses use “dark patterns” to steer consumers to take particular action, whether it is making

Because of the public health emergency in response to the COVID-19 outbreak and the agency's heightened security screening, postal mail addressed to the Commission will be subject to delay. We strongly encourage you to submit your comments online through the <https://www.regulations.gov> website. To ensure the Commission considers your online comment, please follow the instructions on the web-based form.

If you file your comment on paper, write "Motor Vehicle Dealers Trade Regulation Rule—Rulemaking, Matter No. P204800" on your comment and on the envelope, and mail your comment to the following address: Federal Trade Commission, Office of the Secretary, 600 Pennsylvania Avenue NW, Suite CC-5610 (Annex C), Washington, DC 20580.

Because your comment will be placed on the public record, you are solely responsible for making sure your comment does not include any sensitive or confidential information. In particular, your comment should not include any sensitive personal information, such as your or anyone else's Social Security number; date of birth; driver's license number or other state identification number, or foreign country equivalent; passport number; financial account number; or credit or debit card number. You are also solely responsible for making sure your comment does not include any sensitive health information, such as medical records or other individually identifiable health information. In addition, your comment should not include any "trade secret or any commercial or financial information which . . . is privileged or confidential"—as provided by Section 6(f) of the FTC Act, 15 U.S.C. 46(f), and FTC Rule 4.10(a)(2), 16 CFR 4.10(a)(2)—including in particular competitively sensitive information such as costs, sales statistics, inventories, formulas, patterns, devices, manufacturing processes, or customer names.

Comments containing material for which confidential treatment is requested must be filed in paper form, must be clearly labeled "Confidential," and must comply with FTC Rule 4.9(c). In particular, the written request for confidential treatment that accompanies the comment must include the factual and legal basis for the request and must identify the specific portions of the comment to be withheld from the public record. *See* FTC Rule 4.9(c). Your comment will be kept confidential only if the General Counsel grants your request in accordance with the law and the public interest. Once your comment

has been posted publicly at www.regulations.gov—as legally required by FTC Rule 4.9(b)—we cannot redact or remove your comment from the FTC website, unless you submit a confidentiality request that meets the requirements for such treatment under FTC Rule 4.9(c), and the General Counsel grants that request.

Visit the FTC website to read this document and the news release describing it. The FTC Act and other laws the Commission administers permit the collection of public comments to consider and use in this proceeding as appropriate. The Commission will consider all timely and responsive public comments it receives on or before September 12, 2022. For information on the Commission's privacy policy, including routine uses permitted by the Privacy Act, see <https://www.ftc.gov/site-information/privacy-policy>.

VI. Communications by Outside Parties to the Commissioners or Their Advisors

Written communications and summaries or transcripts of oral communications respecting the merits of this proceeding, from any outside party to any Commissioner or Commissioner's advisor, will be placed on the public record. *See* 16 CFR 1.26(b)(5).

VII. Questions for Comment

The Commission seeks comments on various aspects of the proposed rule. Without limiting the scope of issues it seeks comment on, the Commission is particularly interested in receiving comments on the questions that follow. Responses to these questions should be itemized according to the numbered questions in this document. In responding to these questions, include detailed, factual supporting information whenever possible.

General Questions for Comment

When responding to any of the following general questions, please specify the portion(s) of the proposal to which your comment relates.

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?

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?

3. Are there any additional practices that occur largely or exclusively at

certain types of dealerships that any final Rule should address? For example, should there be additional provisions pertaining to collection or repossession practices employed by "buy here, pay here" dealerships, including the use of electronic disabling devices (sometimes called "starter interrupt" or "kill switches")?

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?

5. Should the Commission provide more detailed requirements regarding the content or form of any of the proposed disclosures?

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?

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?

8. Should any final Rule include additional provisions to address electronic disclosures or recordkeeping? Why or why not? If yes, in what manner(s)?

9. Should any final Rule address disclosures in other languages? Why or why not? If yes, in what manner(s)?

§ 463.2: Definitions

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?

11. Are additional definitions needed?

§ 463.3: Prohibited Misrepresentations

Proposed § 463.3 would prohibit dealers from making specified misrepresentations.

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?

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.

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?

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?

16. Proposed §§ 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?

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?

18. Are there any other common misrepresentations in the motor vehicle marketplace that are not adequately addressed by the proposed rule? If so, please identify them and how they should be addressed in any final Rule. Please also identify the potential costs and benefits associated with the approach you propose.

§ 463.4: Disclosure Requirements

Proposed § 463.4 would require dealers to make specified disclosures.

19. Are the disclosures that would be required by this section clear, meaningful, and appropriate? Should the scope of any of the proposed disclosures be expanded or narrowed, and if so, how and why?

20. What would be the economic impact, and the costs and benefits, of these disclosure requirements?

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?

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?

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.

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?

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?

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?

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?

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?

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?

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?

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?

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?

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?

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?

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?

§ 463.5: Dealer Charges for Add-Ons and Other Items

Proposed § 463.5(a) would prohibit dealers from marketing or selling an add-on product or service to a consumer who would not benefit from the add-on product or service in connection with the sale or financing of a vehicle.

31. Are the proposed prohibitions 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?

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?

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?

34. The proposed rule would prohibit dealers from charging for non-beneficial add-ons, such as nitrogen-filled tires that contain no more nitrogen than naturally exists in the air, and GAP insurance that cannot be used by the consumer. Are there other add-ons for which dealers commonly charge that are similarly non-beneficial and should be specifically referenced in any final Rule?

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?

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?

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?

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?

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?

§ 463.6: Recordkeeping

Proposed § 463.6 would require dealers to keep, for a period of 24 months, records necessary to demonstrate compliance with the proposed rule including 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 proposed § 463.5(b)); records to show compliance with monthly payment disclosure and GAP sales requirements; and certain written consumer complaints and consumer inquiries.

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?

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?

42. Should any additional records be specifically listed?

43. Is the 24-month record retention period appropriate? Why or why not? If not, what period is appropriate?

44. What are the current record retention policies and practices of dealers with respect to the records specified in proposed § 463.6?

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.

46. What volume of records would have to be maintained to comply with this section?

47. What has been the experience of State and local law enforcement agencies with respect to record retention requirements? Have such requirements been useful? If yes, how? If no, why not?

To what extent have recordkeeping requirements impacted businesses?

§ 463.9: Relation to State Laws

48. Does any portion of the proposed rule duplicate, overlap, or conflict with any federal, state, or local laws or regulations?

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?

IX. Rulemaking Procedures

Pursuant to the Dodd-Frank Act, the FTC is authorized to prescribe rules under Section 553 of the Administrative Procedure Act (“APA”) ¹⁵⁰ with respect to unfair or deceptive acts or practices by motor vehicle dealers as defined in Section 1029 of the Dodd-Frank Act. ¹⁵¹ Under the Dodd-Frank Act, the FTC’s APA rulemaking authority became effective as of July 21, 2011, the designated “transfer date” established by the Treasury Department. ¹⁵² Accordingly, the Commission is publishing this Notice of proposed rulemaking pursuant to Section 553 of the APA. ¹⁵³

X. Paperwork Reduction Act

The Paperwork Reduction Act (“PRA”), 44 U.S.C. 3501 *et seq.*, requires federal agencies to seek and obtain Office of Management and Budget (“OMB”) approval before undertaking a collection of information directed to ten or more persons. The proposed rule contains disclosure and recordkeeping requirements that constitute “information collection requirements” as defined by 5 CFR 1320.3(c) under the OMB regulations that implement the PRA.

The Commission estimates that there are approximately 46,525 franchise, new motor vehicle and independent/used motor vehicle dealers in the U.S. ¹⁵⁴

¹⁵⁰ 5 U.S.C. 553.

¹⁵¹ 12 U.S.C. 5519.

¹⁵² See 75 FR 57252 (Sept. 20, 2010).

¹⁵³ Pursuant to Section 22(d)(4) of the FTC Act, 15 U.S.C. 22(d)(4), 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.

¹⁵⁴ See U.S. Census Bureau, *All Sectors: County Business Patterns, including ZIP Code Business Patterns, by Legal Form of Organization and Employment Size Class for the U.S., States, and Selected Geographies: 2019*, <https://data.census.gov/cedsci/table?q=CBP2019.CB1900CBP&n=44111%3A44112&tid=CBP2019.CB1900CBP&hidePreview=true&nkd=EMPSZES-001.LFO-001> (listing 21,427 establishments for “new car dealers,” NAICS code

Estimated Annual Hours Burden: 7,816,819 hours.

Estimated Annual Labor Cost: \$221,870,782.

Disclosure Requirements

The proposed rule includes disclosure requirements designed to curb pricing, leasing, and financing-related deception and unfairness, particularly regarding the truthfulness of key terms, the costs of add-on products and services, and obtaining consumers’ consent to charges, and to promote competition by ensuring that transparent, law-abiding dealers are not competitively disadvantaged.

Add-on List Disclosures: Under § 463.4(b), the proposed rule would require covered motor vehicle dealers that charge for optional add-on products and services to disclose clearly and conspicuously in advertisements and on any website, online service, or mobile application through which they market motor vehicles, and at any dealership, an itemized Add-on List of such products and services and their prices. This information is necessary to prevent misrepresentations regarding add-ons and unfair charges to consumers without their awareness. ¹⁵⁵ As set out in detail in the Preliminary Regulatory Analysis, ¹⁵⁶ of the 46,525 motor vehicle dealers that would be subject to this Rule, the Commission anticipates those that charge for such add-ons and do not already maintain a list will require approximately 14 hours to create an initial disclosure system, including the time necessary to create and review the required Add-on List, and to design a system that provides for display of the Add-on List on websites or other online services. In addition, the Commission anticipates that periodic revision of these lists will be required, at an estimated 1 hour of clerical staff time per year. Finally, for dealers with an online presence, the Commission estimates 8 additional hours of programmer time to integrate this system across the dealership’s online and mobile applications. Assuming all covered dealers charge for such add-ons and do not already maintain this information for consumers, this yields an initial burden estimate of 651,350 hours for the industry (46,525 covered motor vehicle dealers × 14 hours). The Commission further estimates an

44111, and 25,098 establishments for “used car dealers,” NAICS code 44112). The discussion in this section of the NPRM concerns facts and statistics for automobiles; we invite submissions of comparable information for other types of motor vehicles.

¹⁵⁵ See *supra* Part V.D.

¹⁵⁶ See *infra* Part XII.C.3.

ongoing, annual periodic revision burden at 46,525 hours (46,525 covered motor vehicle dealers \times 1 hour). Combined, this yields an overall estimated annual burden of 697,875 hours for the initial design and periodic revision of Add-on Lists.

The Commission estimates the associated labor costs for these disclosures by applying appropriate hourly labor cost-rates to the hours calculated above.¹⁵⁷ The Commission anticipates that managerial, administrative, and programming staff are likely to perform the tasks associated with preparation of Add-on Lists, including entering data, posting the Add-on Lists in dealerships or submitting them for inclusion on a dealer's website or mobile application, and revising them as needed. In particular, the Commission estimates as follows: 5 hours of time for a finance manager to compile and review a master Add-on List, at a cost-rate of \$65.54 per hour; 1 hour of review by a compliance officer, at a cost-rate of \$26.83 per hour; 8 hours of time for an programmer to design a system for posting prices on location, at a cost-rate of \$28.90 per hour; and 1 hour of time for administrative support staff to make periodic revisions, at a cost-rate of \$18.37 per hour. This yields an associated annual labor cost burden of \$28,105,752 for the industry.

The Commission also anticipates that the estimated 81% of dealers with an online presence will require 8 hours of programmer work for integration work across online and mobile applications. This yields an estimated annual hours burden of 301,480 hours (46,525 motor vehicle dealers \times 81% \times 8 hours). Applying associated costs to this estimate yields an annual labor cost burden of \$8,712,722 (\$28.90 per hour \times 81% \times 8 hours).

Disclosures Relating to Cash Price without Optional Add-ons: Under § 463.5(b), the proposed rule would require covered motor vehicle dealers that charge consumers for optional add-on products or services to disclose pricing and cost information without such add-ons. First, before discussing any aspect of financing for a specific vehicle, aside from its Offering Price, the dealer must provide the consumer with an itemized disclosure of the vehicle's Cash Price without Optional Add-ons, along with the option to purchase or finance the vehicle for this

price, which excludes optional add-on products or services. Second, before charging a consumer for an add-on product or service in a financed transaction, the dealer must provide the consumer with an itemized disclosure of the vehicle's Cash Price without Optional Add-ons, the finance charge, and any consumer-provided consideration. These disclosures must be dated and signed by the consumer and a manager for the dealer prior to consummation of the transaction. As with the proposed Add-on List provision, this information is necessary to prevent misrepresentations regarding the costs of add-ons and to make clear that these products and services are optional to the consumer. This requirement is also intended to prevent unfair practices where dealers include add-ons in contracts without consumer awareness.¹⁵⁸

As set out in detail in the Preliminary Regulatory Analysis,¹⁵⁹ the Commission anticipates that dealers that charge for optional add-ons will incur certain initial and ongoing costs to provide the disclosures relating to Cash Price without Optional Add-ons. Dealers likely will incur some costs to create and implement templates for these disclosures, either in paper or electronic form. The Commission estimates that these tasks will require approximately 8 hours of work by a compliance officer, at a cost-rate of \$26.83 per hour; 4 hours by a sales manager, at a cost-rate of \$63.93 per hour; and 8 hours of programmer time, at a cost-rate of \$28.90 per hour, for a total of \$701.56 and 20 hours per average dealer (((\$26.83 per hour \times 8 hours) + (\$63.93 per hour \times 4 hours) + (\$28.90 per hour \times 8 hours)). This yields an estimated hours burden for all dealers, in the first year, of 930,500 hours and an associated labor cost burden of \$32,640,079.

Dealers are also likely to incur some annual labor costs to populate data into these disclosures. The Commission anticipates that the added time to input this data for the disclosures relating to Cash Price without Optional Add-ons will be minimal, as they consist of information that dealers already obtain from the consumer in the ordinary course of business in order to complete these vehicle sales transactions. The Commission estimates that inputting the data needed for the disclosures in § 463.5(b)(1), (b)(2), and (b)(3) will take two minutes for a salesperson to complete at a rate of \$21.84 per hour. This yields an average cost per disclosure of \$0.73 (rounded to the

nearest cent) for completing the required disclosures. Dealers would need to provide the § 463.5(b)(1) disclosure for every vehicle they offer for sale with any optional add-on products or services; the 463.5(b)(2) disclosure for every vehicle sale that is financed and includes an optional add-on; and the 463.5(b)(3) disclosure for every vehicle sale that includes an optional add-on.

The Commission estimates that approximately 57,866,000 vehicles are sold annually, including an estimated 17,059,000 new vehicles and 40,807,000 used vehicles.¹⁶⁰ The Commission assumes that each vehicle sale involves an offer of optional add-ons, and further estimates that approximately 81% of new vehicle sales and 35% of used vehicle sales are financed,¹⁶¹ and that approximately 94% of new vehicle sales and 86% of used vehicle sales includes an optional add-on.¹⁶²

Given these estimates and assumptions, the Commission anticipates that dealers will be required to provide the disclosures in § 463.5(b)(1) in an average of 1,244 transactions per dealer (57,866,000 transactions \div 46,525 motor vehicle dealers).¹⁶³ This yields an annual hours burden of 1,929,237 hours or approximately 41 hours per average dealer (1,244 \times 2/60 hours). The associated annual estimated labor cost is \$42,250,283 for all dealers (1,244 transactions \times 46,525 dealers \times \$0.73 per transaction) or approximately \$908.12 per average auto dealer.

The Commission anticipates that the average dealer will be required to provide the disclosures in § 463.5(b)(2) in an average of 543 transactions per year. This results in an estimated annual burden of 842,103 hours across the industry or an average of approximately 18 hours per average auto dealer (543 \times

¹⁶⁰ U.S. Dept. of Trans., Bureau of Trans. Stat., *New and Used Passenger Car and Light Truck Sales and Leases*, <https://www.bts.gov/content/new-and-used-passenger-car-sales-and-leases-thousands-vehicles> (last visited Apr. 25, 2022) (listing 17,059,000 new vehicle sales and 40,807,000 used vehicle sales in 2019).

¹⁶¹ Melinda Zabritski, Experian Info. Sol's, Inc., *State of the Automotive Finance Market Q4 2020* at 5, <https://www.experian.com/content/dam/marketing/na/automotive/quarterly-webinars/credit-trends/2020-quarterly-trends/v2-2020-q4-state-automotive-market.pdf> (listing 81.12% of new vehicles and 34.59% of used vehicles with financing in 2020).

¹⁶² Nat'l Auto. Dealers Ass'n, *Average Dealership Profile* at 1 (Aug. 2021), <https://www.nada.org/media/4129/download?inline> (reporting "F&I penetration" figures of approximately 93.6% for new vehicles and 86.2% for used vehicles).

¹⁶³ The Commission calculates the estimated number of covered transactions as follows: 57,866,000 total vehicle sales \div 46,525 dealers.

¹⁵⁷ Applicable wage rates are based on data from the Bureau of Labor Statistics' May 2020 National Industry-Specific Occupational Employment and Wage Estimates for NAICS industry category 441100—Automobile Dealers, which is available at https://www.bls.gov/oes/2020/may/oes_nat.htm.

¹⁵⁸ See *supra* Part V.E; see also *supra* Part V.D.

¹⁵⁹ See *infra* Part XII.C.5.

2/60 hours).¹⁶⁴ The associated annual labor cost is estimated at approximately \$18,442,045 for the entire industry or approximately \$396 per average auto dealer (543 transactions \times \$0.73 per transaction).

The Commission estimates that the average dealer will be required to provide the disclosures in § 463.5(b)(3) in an estimated 1,099 transactions.¹⁶⁵ This yields an annual hours burden for providing required itemizations of optional add-ons that are estimated at 1,704,366 across the industry or approximately 37 hours per average auto dealer (46,525 auto dealers \times 1,099 \times 2/60 hours). The associated labor cost is an estimated \$37,325,612 for the industry or approximately \$802 per average auto dealer (46,525 motor vehicle dealers \times 1,099 transactions \times \$0.73).

Other Required Disclosures. The proposed rule would prohibit dealers from making certain misrepresentations in the course of selling, leasing, or arranging financing for motor vehicles. The proposed prohibitions are consistent with the existing prohibition on misrepresentations under Section 5 of the FTC Act, and do not themselves require additional information collection or disclosures. Thus, while dealers may elect to undertake monitoring or review to ensure compliance, the Commission estimates for present purposes that any additional costs associated with the proposed misrepresentation prohibitions to be *de minimis*.

The proposed rule also would require covered motor vehicle dealers to clearly disclose the Offering Price of a motor vehicle in advertisements and in response to consumer inquiries. This requirement is necessary to address deceptive and unfair practices with respect to vehicle pricing representations, whether add-on products and services are optional and their costs, and consumer consent to purchase such optional products and services.¹⁶⁶ Vehicle pricing activities are usually and customarily performed by dealers in the course of their regular business activities. While the proposed provision may increase the importance

of these activities, or alter when in the course of business they are undertaken, the Commission estimates, for present purposes, that any additional costs associated with the proposed offering price requirement to be *de minimis*.

In addition, the proposed rule would require dealers, when making any representation about the monthly payment for a vehicle, to disclose the total amount the consumer will pay to purchase the vehicle at that monthly payment after making all payments as scheduled, as well as the amount of consideration to be provided by the consumer if the total amount disclosed assumes the consumer will provide consideration. The Commission anticipates that such disclosures would contain information already produced in the ordinary course of business and known to dealership staff at the time such disclosures would be required. As such, the Commission anticipates that this proposed provision would merely require a covered motor vehicle dealer to provide readily available information, and that the disclosure burdens associated with these requirements is likely *de minimis*.

Finally, the proposed rule would require covered dealers that sell optional add-on products and services to disclose to consumers that these products are not required. This requirement is necessary to address deceptive and unfair practices regarding these products and services, including misrepresentations that these products are required when they are not, and charging consumers for such products without the consumers' Express, Informed Consent.¹⁶⁷ The proposed rule would also require covered dealers to disclose the total cost of a vehicle when making representations about the monthly payment for the vehicle, as well as that a lower monthly payment will increase the total cost where applicable. These requirements are necessary to address deceptive practices with respect to vehicle pricing representations, including the use of monthly payment amounts to incorrectly imply savings or parity between offers.¹⁶⁸

The Commission anticipates that the disclosure burdens associated with these requirements is likely *de minimis*. These proposed rule provisions would merely require a covered motor vehicle dealer to provide readily available information to consumers in advertisements or direct communications with customers, as applicable.

Recordkeeping

The proposed rule would require covered motor vehicle dealers to retain, for a period of twenty-four months from the date the record is created, records sufficient to demonstrate their compliance with the Rule and its disclosure requirements. Such records would include advertising materials regarding the price, financing or lease of a motor vehicle; copies of Add-on Lists offered to consumers; copies of the disclosures relating to Cash Price without Optional Add-ons required by the Rule; copies of purchase orders and financing and lease documents signed by the consumer; and records demonstrating compliance with the proposed rule's requirements for add-ons in consumer contracts.

As set out in detail in the Preliminary Regulatory Analysis,¹⁶⁹ the Commission anticipates some incremental recordkeeping burden for covered motor vehicle dealers who would be required to retain copies of Add-on Lists, disclosures relating to Cash Price without Optional Add-ons, and other transaction records necessary to demonstrate compliance with the proposed rule's requirements.

The Commission anticipates that it will take covered motor vehicle dealers approximately 15 hours to modify their existing recordkeeping systems to retain the required records for the 24-month period specified in the proposed rule. This yield a general recordkeeping burden of 697,875 hours annually (46,525 motor vehicle dealers \times 15 hours per year).

The Commission anticipates that programming, administrative, compliance, and clerical staff are likely to perform the tasks necessary to comply with these recordkeeping requirements. In particular, the Commission estimates as follows: 8 hours of time for a programmer to design, implement, or update systems for record storage, at a cost-rate of \$28.90 per hour; 5 hours of additional clerical staff work, at a cost-rate of \$18.37 per hour; 1 hour of sales manager review, at a cost-rate of \$63.93 per hour; and 1 hour of review by a compliance officer, at a cost-rate of \$26.83 per hour. Applying these cost-rates to the estimated hours burden described above, the total estimated initial labor cost burden is \$413.81 per average dealership ((\$28.90 per hour \times 8 hours) + (\$18.37 per hour \times 5 hours) + (\$63.93 per hour \times 1 hour) + (\$26.83 per hour \times 1 hour)), totaling \$19,252,510 (rounded to the nearest dollar) across

¹⁶⁴ The Commission estimates the estimated number of covered transactions as follows: ((17,059,000 new vehicle sales \times 81% financed \times 94% with optional add-ons (*i.e.*, 12,988,722)) + (40,807,000 used vehicle sales \times 35% financed \times 86% with optional add-ons (*i.e.*, 12,282,907)) + 46,525 dealers).

¹⁶⁵ The Commission calculates the estimated number of covered transactions as follows: ((17,059,000 new vehicle sales \times 94% with optional add-ons) + (40,807,000 used vehicle sales \times 86% with optional add-ons)) + 46,525 dealers.

¹⁶⁶ See *supra* Part V.D.

¹⁶⁷ See *id.*

¹⁶⁸ See *id.*

¹⁶⁹ See *infra* Part XII.C.7.

the industry (\$413.81 per average dealership \times 46,525 dealerships).

Beyond those records already created and retained in the ordinary course of business, proposed § 463.6(a)(4) would require covered motor vehicle dealers to create and retain calculations of loan-to-value ratios in contracts including GAP agreements. This requirement is necessary to prevent deception and unfairness relating to the sale of GAP agreements under circumstances in which the consumer would not benefit from such products. As described above, the Commission estimates that covered motor vehicle dealers sell approximately 57,866,000 vehicles each year. The Commission further estimates that approximately 25.7% of such sales include GAP agreements, for an estimated total of 14,871,562 covered vehicle sales.¹⁷⁰

The Commission estimates that covered motor vehicle dealers will require approximately 1 hour for a sales manager to create and implement a loan-to-value calculation template, at a cost-rate of \$63.93 and 1 hour for a compliance officer to review the template, at a cost-rate of \$26.83. This yields an estimated initial hours burden for the creation of loan-to-value calculation templates for all dealers of 93,050 hours (46,525 covered motor vehicle dealers \times 2 hours). Applying the above-described cost-rates, the associated labor cost burden is estimated at \$4,222,609 for all dealers (((\$63.93 per hour \times 1 hour \times 46,525 dealerships) + (\$26.83 per hour \times 1 hour \times 46,525 dealerships)). The Commission also anticipates that, with the template in place, covered motor vehicle dealers will expend one minute per sales transaction for a salesperson to perform the calculation contemplated by this requirement, at a cost rate of \$21.84 per hour. As described previously, the Commission estimates that covered motor vehicle dealers sell approximately 57,866,000 vehicles each year and approximately 25.7% of such sales include GAP agreements, for an estimated total of 14,871,562 covered vehicle sales. While the number of motor vehicles sold will vary by dealership, this yields an average sales volume of 320 sales transactions per average dealership per year that include a GAP agreement. This yields an estimated annual hours burden for all dealers of 248,133 hours (46,525

covered dealers \times 320 covered transactions \times 1/60 hours). Applying the associated labor rates yields an estimated annual labor cost for all dealers of \$5,419,232 (248,133 hours \times \$21.84 per hour).

Capital and Other Non-Labor Costs: \$14,769,361.

The Commission anticipates that the proposed rule would impose limited capital and non-labor costs. Covered motor vehicle dealers already have in place existing systems for providing sales and contract-related disclosures to motor vehicle buyers and lessees as well as persons seeking information during the vehicle-shopping process. While the proposed rule's disclosure requirements might make limited additions to the types of forms and disclosures that must be provided during the process of selling or leasing a motor vehicle, the Commission anticipates that these changes will not require substantial investments in new systems. Moreover, many dealers may elect to furnish some disclosures electronically, further reducing total costs.

Section 463.4(b) would require dealers who engage in advertising and who also charge for optional add-ons to have a website, online service, or other mobile application by which to disclose an Add-on List. In the Commission's estimation, dealers who engage in covered advertising generally already operate a website or other application by which they could make such disclosures. As such, the Commission estimates the capital costs associated with such additional disclosures are likely *de minimis*.

Covered motor vehicle dealers already have in place existing recordkeeping systems for the storage of documentation they would retain in the ordinary course of business irrespective of the Rule's requirements, including records associating vehicle financing and customer contracts and leases. As set out in detail in the Preliminary Regulatory Analysis,¹⁷¹ the Commission anticipates the proposed rule's additional recordkeeping requirements may result in incremental non-labor costs to add capacity to these systems in order to store the records. The proposed rule provides that covered motor vehicle dealers may keep the required records in any legible form, and in the same manner, format, or place as they may already keep such records in the ordinary course of business. Accordingly, the proposed rule would not require covered persons to invest in new recordkeeping systems and may

retain records in whatever form they prefer, whether hard copy or electronic.

The Commission estimates the non-labor costs incurred by dealers for providing disclosures in written or electronic form will differ based on the method of disclosure employed by the dealer. As explained in detail in the Preliminary Regulatory Analysis,¹⁷² the Commission estimates an average physical cost of disclosure of \$0.11 across paper and electronic disclosure methods—a figure which includes (1) an estimated cost of \$0.15 per printed disclosure at one single-sided page per disclosure, which is based on industry input regarding the printing costs associated with the FTC's Used Car Rule Buyers Guides;¹⁷³ and (2) a cost of \$0.02 per disclosure made electronically.¹⁷⁴ As noted above, dealers would need to provide the § 463.5(b)(1) disclosure for every vehicle they offer with any optional add-on products or services; the 463.5(b)(2) disclosure for every vehicle sale that is financed and includes an optional add-on; and the 463.5(b)(3) disclosure for every vehicle sale that includes an optional add-on. The estimated cost of providing these three disclosures annually is approximately \$317.45 per average covered dealer,¹⁷⁵ totaling approximately \$14,769,361.

The Commission further estimates that covered motor vehicle dealers that store records in hard copy are unlikely to require extensive additional storage for physical document retention. Further, due to the low cost of electronic storage, the Commission anticipates that motor vehicle dealers who store their records electronically

¹⁷² *Id.*

¹⁷³ Fed. Trade Comm'n, Agency Information Collection Activities; Proposed Collection; Comment Request; Extension, 84 FR 38979, 38981 (Aug. 8, 2019) (estimating that average printing cost for the one-page, double-sided Buyers Guide is thirty cents). In making this estimate for printed disclosures, the Commission assumes that all dealers will purchase pre-printed template forms instead of producing them internally, although dealers may produce them at lower expense using their own office automation technology.

¹⁷⁴ The Commission arrived at this figure based on the approximate estimated cost differential between hard copy and electronic disclosures under the Commission's Franchise Rule. Fed. Trade Comm'n, Agency Information Collection Activities; Proposed Collection; Comment Request, 85 FR 19479, 19480 (estimating \$35 for paper disclosures and \$5 for comparative electronic disclosures).

¹⁷⁵ The Commission obtains this cost estimate as follows: (a) (($\$0.11 \times 57,866,000$ total vehicle sales) + 46,525 dealers) + (b) (($\$0.11 \times (17,059,000$ new vehicle sales \times 81% financed \times 94% with optional add-ons) + 40,807,000 used vehicle sales \times 35% financed \times 86% with optional add-ons) + 46,525 dealers) + (c) (($\$0.11 \times (17,059,000$ new vehicle sales \times 94% with optional add-ons) + 40,807,000 used vehicle sales \times 86% with optional add-ons) + 46,525 dealers)).

¹⁷⁰ See Nat'l Consumer Law Ctr., *Auto Add-ons Add Up: How Dealer Discretion Drives Excessive, Inconsistent, and Discriminatory Pricing* 9 (Oct. 11, 2017), https://www.nclc.org/images/pdf/car_sales/report-auto-add-on.pdf (nationwide dataset of 1.8 million car sale transactions, of which 462,170 included GAP agreements).

¹⁷¹ See *infra* Part XII.C.7.

would incur minimal incremental cost to expand their storage capacity in order to comply with the proposed rule's recordkeeping requirements due to the low cost of cloud and other electronic storage options. Any other capital costs associated with the proposed rule are likely to be minimal.

The FTC invites comments on: (1) Whether the proposed information collection requirements should be altered to reduce burdens without reducing protections to consumers, and if so, what alteration should be made; (2) the accuracy of the agency's burden estimates, including the validity of the methodology and assumptions used; (3) ways to enhance the quality, utility, and clarity of the information to be collected; and (4) ways to minimize the burden of maintaining records and providing the required information to consumers.

XI. Regulatory Flexibility Act

The Regulatory Flexibility Act ("RFA")¹⁷⁶ requires that the Commission conduct an initial and a final analysis of the anticipated economic impact of the amendments on small entities. The purpose of a regulatory flexibility analysis is to ensure the agency considers the impacts on small entities and examines regulatory alternatives that could achieve the regulatory purpose while minimizing burdens on small entities. The RFA provides that such an analysis is not required if the agency head certifies that the regulatory action will not have a significant economic impact on a substantial number of small entities.¹⁷⁷

The Commission believes that the amendments will not have a significant economic impact on small entities, although they will likely affect a substantial number of small entities. The proposed rule 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. Most covered dealers would be classified as small businesses, as explained below.

The Commission invites comment on the burden on any small entities that would be covered and has prepared the following analysis:

1. Description of the Reasons That Agency Action Is Being Considered

The FTC proposes the Rule 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's law enforcement, outreach and other engagement in this area, and the tens of thousands of consumer complaints received by the FTC each year indicate that dealership misconduct and deceptive tactics persist despite substantial federal and state law enforcement efforts. The FTC proposes this Rule pursuant to the Dodd Frank Act, which authorized the FTC to prescribe rules with respect to unfair or deceptive acts or practices by dealers.

2. Statement of the Objectives of, and Legal Basis for, the Proposed Rule

The objective of the proposed rule is to prevent unfair or deceptive acts or practices in the sale, financing, and leasing of motor vehicles. The legal basis for the Rule is the FTC Act, 15 U.S.C. secs. 41 *et seq.*, and the Dodd-Frank Act, Public Law 111–203. Section 1029 of the Dodd-Frank Act, 15 U.S.C. 5519, authorizes the Commission 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.

3. Description and Estimate of the Number of Small Entities To Which the Proposed Rule Will Apply

The proposed rule applies to motor vehicle dealers as defined in Section 1029 of the Dodd-Frank Act.¹⁷⁸ The Commission estimates that there are approximately 46,525 franchise, new motor vehicle, and independent/used motor vehicle dealers in the U.S. The Commission believes that many of these dealers are small businesses according to the applicable Small Business Administration ("SBA") size standards. Under those standards, new vehicle dealers having fewer than 200 employees each, and used vehicle dealers having annual receipts of less than \$27 million, are classified as small businesses.¹⁷⁹

¹⁷⁸ The Commission is authorized to prescribe rules with respect to a motor vehicle dealer that is predominantly engaged in the sale and servicing of motor vehicles, the leasing and servicing of motor vehicles, or both, as defined in 12 U.S.C. 5519(a).

¹⁷⁹ U.S. Small Business Admin. Table of Small Bus. Size Standards Matched to North American Indus. Classification System ["NAICS"] Codes (effective Aug. 19, 2019), <https://www.sba.gov/document/support-table-size-standards.19, 2019>, https://www.sba.gov/sites/default/files/2022-05/Table%20of%20Size%20Standards_Effective%20May%202022_Final.pdf. New motor vehicle dealers are classified as NAICS code 441110. Used motor vehicle dealers are classified as NAICS code 441120.

The Commission seeks comment and information regarding the estimated number and the nature of small business entities for which the proposed rule would have a significant economic impact.

4. Description of the Projected Reporting, Recordkeeping, and Other Compliance Requirements

The proposed rule prohibits unfair or deceptive acts or practices, including misleading practices and unauthorized charges, in motor vehicle sales, financing, and leasing. To prevent such practices, the proposed rule imposes recordkeeping and disclosure requirements. The proposed rule contains no reporting requirements.

The proposed rule would require motor vehicle dealers to clearly disclose the Offering Price of a vehicle in advertisements and in response to consumer inquiries. It would also require dealers to make certain disclosures during the sales or leasing process, such as by providing consumers with written disclosures relating to Cash Price without Optional Add-ons stating price information. To enforce the Rule and its disclosure requirements, the proposed rule would require dealers to retain records necessary to demonstrate compliance. Among others, records that would need to be retained include advertising materials regarding the price, financing or lease of a motor vehicle; copies of Add-on Lists offered to consumers; copies of disclosures relating to Cash Price without Optional Add-ons; copies of purchase orders and financing and lease documents signed by the consumer; and, records demonstrating compliance with the proposed rule's requirements for add-ons in consumer contracts. Such records would need to be retained for a period of 24 months from the date they are created, and could be kept in the same manner and form (so long as its legible) they are already kept in the ordinary course of business.

5. Identification of Duplicative, Overlapping, or Conflicting Federal Rules

Although there are other federal statutes, rules, or policies that address motor vehicle sales and financing, the Commission has not identified any duplication, overlap, or conflict with the proposed rule. The Commission invites comment and information on this issue.

6. Description of Any Significant Alternatives to the Proposed Rule

The Commission envisioned and drafted this Rule mindful that most

¹⁷⁶ 5 U.S.C. 601–612.

¹⁷⁷ 5 U.S.C. 605.

motor vehicle dealers are small entities. Accordingly, the Commission has not proposed any specific alternative compliance mechanisms for small businesses. The Commission seeks comment and information on the need, if any, for alternative compliance methods that would, consistent with the statutory requirements, reduce the economic impact of the proposed rule on small entities.

XII. Preliminary Regulatory Analysis

A. Introduction

The Federal Trade Commission is proposing a rule to provide additional protections to consumers when shopping for motor vehicles. The proposed rule contains several provisions targeted at increasing price transparency for consumers with respect to purchasing, leasing, and financing new and used cars and other motor vehicles. The proposed rule prohibits misrepresentations in the marketing of motor vehicles and motor vehicle financing as well as mandates certain disclosures about prices (of both vehicles and add-on options), fees, and interest rates. In addition, charging for add-on products from which an individual consumer would not benefit is prohibited by the proposed rule.

Section 22 of the FTC Act, 15 U.S.C. 57b–3, requires the Commission to issue a preliminary regulatory analysis when publishing a Notice of proposed rulemaking. The preliminary regulatory analysis must contain (1) a concise description of the need for, and objectives of, the proposed rule; (2) a

description of reasonable alternatives that would accomplish the Rule’s stated objectives consistent with applicable law; and (3) a preliminary analysis of the benefits and adverse effects of the proposed rule and any alternatives, and of the effectiveness of the proposed rule and any alternatives in meeting the objectives of the proposed rule.

The NPRM discusses regulatory requirements in the following broad areas:

- 1. Prohibited Misrepresentations
- 2. Required Disclosure of Offering Price in Advertisements and in Response to Inquiry
- 3. Required Disclosure of Add-on List and Associated Prices
- 4. Required Disclosure of Total Cost for Financing/Leasing Transactions
- 5. Prohibition on Charging for Add-ons in Certain Circumstances
- 6. Requirement to Obtain Express Informed Consent Before any Charges
- 7. Recordkeeping

In the analysis below, we describe the anticipated impacts of the Rule as currently proposed. Where possible, we quantify the benefits and costs and present them separately by provision. If a benefit or cost is quantified, we indicate the sources of the data relied upon. If an assumption is needed, the text makes clear which quantities are being assumed. The Commission solicits comments from the public to improve these estimates before promulgation of any final Rule.

Because of the relative size of the automobile market compared to other

types of motor vehicle dealers, and the greater availability of relevant information for this market, this preliminary analysis exclusively considers automobile dealers. The Commission expects the analysis and results to be representative of the majority of covered entities and transactions, and that expanding the scope of the analysis is unlikely to lead to different conclusions. The Commission invites submissions of market information for other types of motor vehicles such as boats, RVs, and motorcycles that would allow expansion of the scope of this analysis.

A time period of 10 years is used in the baseline scenario because FTC 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 in Table 1.1. 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 automobile dealers in developing the systems necessary to comply with the provisions of the Rule. 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 a number of times equal to the number of years in the future the net benefit accrues.

TABLE 1.1—PRESENT VALUE OF NET BENEFITS, 2022–2032

	Present value
Total Benefits:	
3% discount rate	\$36,337,956,234
7% discount rate	31,081,811,411
Total Costs:	
3% discount rate	1,568,408,501
7% discount rate	1,360,694,552
Net Benefits:	
3% discount rate	34,769,547,733
7% discount rate	29,721,116,859

Note: Total costs reflect highest cost scenarios, for a conservative estimate of Net Benefits.

B. Estimated Benefits of Proposed rule

In this section, we describe the beneficial impacts of the proposed rule, provide preliminary quantitative estimates where possible, and describe benefits that we can only assess qualitatively. Most of the benefits cut across multiple areas addressed by the Rule and these benefits may be impossible to identify separately by area. As a result, we enumerate the

benefits of the Rule not by provision, but by category.

1. Consumer Time Savings When Shopping for Motor Vehicle Dealers

Several provisions of the Rule are associated with time savings as a benefit. Required disclosures of relevant prices and prohibitions on misrepresentations save consumers time when shopping for a vehicle by

requiring the provision of salient, material information early in the process and eliminating time spent pursuing misleading offers. The Commission’s enforcement record shows that consumer search and shopping is sometimes influenced by deceptive advertising that draws consumers to a dealership 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. Motor vehicle consumers frequently begin the process of a motor vehicle transaction (e.g., by visiting a dealership 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. This bait-and-switch or deceptive door-opener advertising has the effect of wasting consumers' time traveling to and negotiating with the dishonest dealership, time which would otherwise be spent pursuing truthful offers in the absence of deception. Unfortunately, the Commission lacks adequate information to determine the quantity of such abandoned transactions and the amount of time spent pursuing them. As a result, this benefit is unquantified in the current analysis. The Commission solicits comment on the frequency of and reasons for abandoned transactions

in the motor vehicle market in order to help quantify this important benefit.

However, many consumers end up completing transactions under the status quo—either because full revelation of prices and terms still results in a mutually beneficial transaction or because of constraints on the time consumers can dedicate to their search. These consumers also spend additional, unnecessary time discovering information that dealers would be required to disclose earlier under the proposed rule. The Commission expects these disclosures to improve information flows and consumer search efficiency, including but not limited to, curbing the influence of deception on consumer search and shopping behavior.

The Commission assumes that, as a result of the proposed rule provisions prohibiting misrepresentations and requiring price transparency, each consumer who ends up purchasing a vehicle will spend 3 fewer hours

shopping online, corresponding with dealerships, visiting dealer locations, and negotiating with dealer employees per motor vehicle transaction.¹⁸⁰ Assuming that motor vehicle purchase, financing, and lease transactions will be stable at the 2019 level of 62.1 million transactions per year, that amounts to a total time savings of more than 186.3 million hours per year. According to the Bureau of Labor Statistics Occupational Employment Statistics,¹⁸¹ the average hourly wage of U.S. workers in 2020 was \$27.07, and recent research suggests that individuals living in the U.S. value their non-work time at 82% of average hourly earnings.¹⁸² Thus, the value of non-work time for the average U.S. worker would be \$22.20 per hour. The resulting total benefit from time savings for completed transactions is roughly \$4.1 billion per year, which translates to a present value of between \$31.1 billion and \$36.3 billion as described in Table 2.1.

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.

2. Consumer Welfare Benefits From Curbing Non-Mutually Beneficial Transactions or Price Effects of Deception

Due to the obfuscation and deception that has been identified in prior FTC 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 the consumer obtains 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 the 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, the presence of deceptive marketing results in a transfer of welfare from these consumers to the dishonest dealers. While it is possible that the Rule may prevent such transfers of wealth that occur through prices supported by deception, the overall effects of the Rule on pricing and competition are difficult to predict.

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. However, as the redistribution of welfare from deceptive firms to victimized consumers is part of the agency's mission, transfers of this kind might weigh in favor of proceeding with the Rule.

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 that 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 proposed rule, no such transaction would transpire. These cases are emblematic of the reduction in social welfare caused by the information asymmetry under the status quo. Under the proposed rule, this information asymmetry between dealers and

¹⁸⁰ 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>.

¹⁸¹ Bureau of Lab. Stats., *May 2020 National Occupational Employment and Wage Estimates*,

United States, https://www.bls.gov/oes/2020/may/oes_nat.htm (listing mean hourly wage of \$27.07 for all occupations).

¹⁸² Daniel S. Hamermesh, *What's to Know About Time Use?*, 30 J. Econ. Survs. 198, 203 (2016).

consumers is mitigated and some fraction of these transactions (and the associated welfare losses) are prevented. This avoidance of transactions that reduce social welfare is a benefit of the Rule.

i. Advertising Misrepresentations

As discussed above, some advertising misrepresentations regarding prices, the availability of rebates/discounts, monthly payment amounts, and amount due at signing are discovered prior to the consumer consummating the transaction. In these cases, consumers 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 transaction anyway because they do not believe that they will find a better offer (especially considering the time and cost to start the process anew, which can be prohibitive for some consumers). For these individuals, the time spent negotiating under false pretenses and visiting dishonest dealerships is a main source of injury.

In other cases, however, the inaccurate beliefs engendered by such misrepresentations can remain through the consummation of the transaction. For example, if actual terms differing from those that attracted the consumer are buried in the paperwork, the consumer can only discover them at signing. The consumer may persist in the belief that they are getting the deal that the misleading advertising or salesperson's verbal misrepresentations suggested. Only after completing a transaction, if ever, does the consumer realize that they have been misled into a deal that they would not have agreed to with full knowledge of the terms. For these transactions, the cost may exceed the consumer's lost time, provided that the true value the consumer would receive from the transaction is less than the dealer's cost. In these cases, the transaction reduces 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 rule would reverse to some extent.

By prohibiting misrepresentations in advertising and enhancing the flow of truthful information to consumers, the proposed rule will reduce the number of inefficient transactions. Fewer consumers will 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 misrepresentations by dealers. This does

not necessarily imply an overall reduction in vehicle sales, as such consumers may instead find transactions with true terms that are mutually agreeable. Ensuring that vehicles are sold, leased, or financed with terms that are mutually agreeable to consumers and dealers will result in an allocation of resources that yields greater social welfare overall.

ii. Add-On Products and Services

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.). However, these add-on products are often not discussed until near the end of the transaction, sometimes after financing terms have already been settled. 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 the consumer thought they had negotiated. Alternatively, add-ons that were declined by the consumer or not discussed at all, may simply be "packed" into the contract paperwork near the end of the process without the consumer's knowledge. The presence or true price of these packed add-ons often can be obscured by the dealer only reporting the monthly payment amount to the consumer in these late stages of the transaction.

In cases where such misrepresentations are discovered before the transaction is completed, the consumer will learn of the add-on price and the add-on features, decide whether the product is worth the price being charged, and either proceed or not. Again, the consumer's 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 proposed rule depending on whether redistribution of welfare from dishonest dealers to consumers is a goal of the regulation.

In cases where the consumer never learns of the misrepresented or packed add-ons, the consumer may end up paying for add-ons that he or she would not have purchased if the dealer had been transparent about the terms of the contract. Additionally, when the dealer's cost of providing the add-on exceeds the true value the consumer receives, the transaction reduces social

welfare, as resources are allocated to a lower value use. The timely flow of truthful information facilitated by the proposed rule can empower consumers to avoid such transactions, generating benefits under the Rule.

Finally, some dealers will charge consumers for add-ons from which the consumer 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 in the event that the vehicle is totaled and one's auto insurance payout would not cover the debt. In some circumstances, a consumer's financing contract will outright foreclose this possibility (*i.e.*, if the consumer's down payment is sufficiently high and they will never owe more than the car is worth). Some dealers, however, will still market GAP coverage to such consumers, extracting payments for a product that will never provide any benefit to the consumer. In these cases, it is obvious that the transaction should never occur when a consumer has full information. The proposed rule would prohibit such charges, thus eliminating these transactions and generating benefits.

Without additional information, it is difficult to quantify the number of transactions or potential price effects that would be avoided by the proposed rule. The Commission invites comments on these issues, including information that may be used to quantify this important benefit of the proposed rule.

3. Benefits Related to More Transparent Negotiation

An additional, albeit difficult to quantify, benefit is the 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 dealerships.¹⁸³ Under the proposed rule, all three of these issues will be mitigated somewhat by the transparency facilitated by the Rule's required disclosures. As a result, the time that consumers spend shopping and negotiating motor vehicle transactions will be less stressful. The Commission invites comment on the best approach to quantifying the overall benefits of the

¹⁸³ Cox Automotive, *2020 Cox Automotive Car Buyer Journey* 37 (2020), available at <https://b2b.autotrader.com/app/uploads/2020-Car-Buyer-Journey-Study.pdf>.

Rule's provisions that reduce information asymmetries in search and negotiation.

C. Estimated Costs of Proposed Rule

In this section, we describe the costs of the proposed rule provisions as enumerated in Part XII.A, provide preliminary quantitative estimates where possible, and describe costs that we can only assess qualitatively.

1. Prohibited Misrepresentations

The misrepresentations prohibited by the proposed rule 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 will continue to be compliant under this provision of the proposed rule. Accordingly, we present one scenario in Table 3.1 where dealers conduct no additional review.

However, because of the enhanced penalty associated with violating the Rule (relative to a *de novo* violation of Section 5 of the FTC Act), dealers may choose to incur additional administrative burdens and costs in order ensure compliance. We present another scenario in Table 3.1 where dealers employ professionals to engage

in additional compliance review for all new advertisements, websites, listings, etc. For this scenario, the Commission assumes a professional will spend 5 additional minutes reviewing each public-facing representation and that each dealer produces an average of 150 unique marketing representations per year.¹⁸⁴ At a labor rate of \$26.83 per hour for compliance officers employed at auto dealers, this cost is estimated at \$15.6 million per year.¹⁸⁵ The total present value of costs is tabulated in Table 3.1. The Commission seeks comments on the foregoing assumptions required to reach these estimates.

TABLE 3.1—ESTIMATED COMPLIANCE COSTS FOR PROHIBITED MISREPRESENTATIONS

	2022–2032
Scenario 1—No Review:	
No cost	\$0
Total Cost	0
Scenario 2—Heightened Compliance Review:	
Number of dealers ^a	46,525
Number of documents per dealer per year	150
Minutes of review per document	5
Cost per hour of review	\$26.83
Total Cost:	
3% discount rate	137,092,486
7% discount rate	117,262,588

Note: In scenarios with ongoing expenses, costs have been discounted to the present at both 3% and 7% rates.

^aCounty Business Patterns 2019, NAICS Code 4411 (Automobile Dealers, used and new)

2. Required Disclosure of Offering Price in Advertisements and in Response to Inquiry

The proposed rule requires all dealers to disclose an Offering Price in any advertisement that references an individual vehicle or in response to any consumer inquiry about an individual vehicle, as well as on the disclosures required at various points in the negotiation. Since dealers already choose prices for all vehicles under the status quo, we present one scenario in Table 3.2 where there is no cost to dealers of complying with this requirement.

However, another scenario accounts for the increased cost to the dealers resulting from the increased importance of the pricing decision under the proposed rule. The discussion below considers the marginal costs to the dealer associated with calculating prices that conform to a certain definition and are associated with penalties should they fail to conform to that definition.

We assume that all dealers will incur some upfront cost to create/update a pricing model that incorporates the requirements of the Rule. The Commission assumes that each dealer employs 8 hours of sales and marketing manager time and 8 hours of programmer time—at hourly rates of \$63.93 and \$28.90, respectively—in order to reformulate their pricing system to comply with the required disclosures. This total cost is estimated to be \$34.6 million. Both scenarios are summarized in Table 3.2.

The Commission further assumes that, once calculated, the cost of including this information in response to consumer inquiries about specific vehicles will be negligible to the extent that the dealer would respond to such inquiries under the status quo baseline. If, however, this provision leads to a behavioral adjustment by some dealerships to not respond at all to consumer inquiries about specific vehicles, there may be associated costs

to consumers and dealers relative to the baseline. The Commission lacks enough information to determine whether and the extent to which such behavioral responses would occur or what the welfare costs of those adjustments would be. As a result, these costs are left unquantified in the preliminary analysis.

In addition to the expenditure associated with pricing the vehicles, there is an opportunity cost to dealers and consumers associated with mandating disclosures of Offering Prices on advertisements. If dealers choose to convey the same amount of information about offered vehicles as before disclosure was required, they must reformat their advertisements accordingly, spending the required resources to do so. If not, dealers must choose which information will be replaced by the mandated Offering Price disclosure. Finally, it is also possible that some dealers will choose to comply by refraining from advertising

¹⁸⁴ While many dealers disseminate more than 150 marketing representations per year, most are variants on the same underlying “model” marketing

representation. It is these materially distinct “models” that we consider in this scenario.

¹⁸⁵ Wage data for dealer employees comes from the U.S. Bureau of Labor Statistics, Industry-

Specific Occupational Employment and Wage Estimates, https://www.bls.gov/oes/2020/may/naics4_441100.htm, unless otherwise noted.

individual vehicles or responding to consumer inquiries about specific vehicles, which would require consumers to seek this information through some means other than an

advertisement, thus increasing their costs of search. These opportunity costs are difficult to estimate and our preliminary analysis does not include quantification of these impacts. The

Commission seeks comments on these costs, particularly regarding how dealers anticipate complying with these requirements, in order to reach more accurate estimates of costs.

TABLE 3.2—ESTIMATED COMPLIANCE COSTS FOR OFFERING PRICE DISCLOSURES

	2022 only
Scenario 1—No Review:	
No cost	\$0
Total Cost	0
Scenario 2—Calculation of Offering Price:	
Number of dealers	46,525
Pricing hours per dealer	8
Cost per hour of pricing	\$63.93
Programming hours per dealer	8
Cost per hour of programming	28.90
Total Cost	34,551,326

3. Required Disclosure of Add-on List and Associated Prices

The proposed rule requires all dealers to disclose an itemized menu of all optional add-on products and services along with prices on all dealer-operated websites, online services, and mobile applications as well as at all dealership locations. As add-on product pricing is not uniformly posted publicly in dealerships or on dealer websites at baseline, compliance with the Rule will require every dealer who charges for optional add-ons to create a public-facing master Add-on List and a system

for posting prices at their dealerships. In addition, every dealer with an online presence must create a system for posting add-on prices online and via any applications they may publish. Without additional information on how many dealers charge for optional add-ons, the Commission assumes that every dealer incurs an upfront cost, employing a finance manager for 5 hours at an hourly rate of \$65.54 to create the master Add-on List and a compliance manager for 1 hour at an hourly rate of \$26.83 to review the master list to ensure it satisfies the requirements

under the Rule. In addition, each dealer will employ 8 hours of programmer time at an hourly rate of \$28.90 in order to design such a system for posting prices on location. Additionally, each dealer with an online presence (assumed 81%) employs 8 additional hours of programmer time to implement such a system across their online and mobile applications. The Commission further assumes that periodic revision of these lists will be required and budgets 1 hour of clerical staff time per year (at a cost of \$18.37 per hour) for this task. These costs are summarized in Table 3.3.

TABLE 3.3—ESTIMATED COMPLIANCE COSTS FOR ADD-ON LISTS

	2022 only	2022–2032
Creation of Add-On Lists and display systems		
Number of dealers	46,525	
Finance manager hours per dealer	5	
Cost per hour of list development	\$65.54	
Compliance manager hours per dealer	1	
Cost per hour of compliance review	\$26.83	
Programmer hours per dealer	8	
Number of dealers with online presence	37,685.25	
Add'l programmer hours per online dealer	8	
Cost per hour of programming	\$28.90	
Subtotal	\$35,963,918	
Periodic revision of lists		
Number of dealers		46,525
Clerical hours spent revising Add-on List		1
Cost per hour of revision		\$18.37
Subtotal		
3% discount rate		\$7,509,173
7% discount rate		\$6,423,000
Total Cost		
3% discount rate		\$43,473,091
7% discount rate		\$42,386,918

Note: In scenarios with ongoing expenses, costs have been discounted to the present at both 3% and 7% rates.

4. Required Disclosure of Total Financing/Contract Costs

The proposed rule requires all dealers to disclose, in any transaction that features a monthly payment, the total cost of the financing/leasing contract. In addition, in any comparison of two contracts with different monthly payments, the dealer is required to 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. We consider two scenarios that bear on the mechanical costs of implementing the requirements under these provisions. In the first scenario, dealers incur a one-time, upfront cost when designing these disclosures and informing associates of their obligations to provide the disclosures, but incur

negligible ongoing costs on a per transaction basis. This reflects a compliance regime where dealers already generate the required information during the normal course of business and must only convey it to consumers verbally at an appropriate point in the transaction. In the second scenario, dealers incur an additional ongoing cost per financed transaction in order to communicate the required disclosures to consumers in writing. This reflects a compliance regime where dealers may or may not generate the required information during the normal course of business and/or find it necessary to maintain a documentary record of compliance with the Rule.

The upfront costs of complying with this provision are relatively limited; every dealer must create a template disclosure script that contains this

information and communicate it to associates so that they understand their obligations. The Commission assumes an employee will spend 8 hours creating this disclosure and informing sales staff. At a labor rate of \$26.83 for compliance managers, this cost is estimated at \$10 million.

For the second scenario involving ongoing costs, we estimate there are roughly 32 million vehicle transactions each year subject to this requirement (financed sales of new and used vehicles plus leased vehicles). The Commission assumes an employee will spend 2 minutes per vehicle populating these disclosures and dealers will incur a printing cost of \$0.15 per transaction. At a labor rate of \$21.84 for sales staff, the total additional cost under this scenario is estimated at \$213.4–\$249.5 million; see Table 3.4.

TABLE 3.4—ESTIMATED COMPLIANCE COSTS FOR FINANCING COST DISCLOSURES

	2022 only	2022–2032
Scenario 1—Creation of disclosure only		
Number of dealers	46,525	.....
Compliance manager hours per dealer	8	.....
Cost per hour of disclosure creation	\$26.83	.....
Scenario 1—Total Cost	\$9,986,126	.....
Scenario 2—Disclosures per transaction		
New vehicle sales per year ^a		17,059,000
% New vehicle sales involving financing ^b		81%
Used vehicle sales per year		40,807,000
% Used vehicle sales involving financing		35%
New vehicle leases per year		4,242,000
Total transactions involving monthly payment/financing		32,342,240
Disclosure minutes per transaction		2
Cost per hour of disclosure		\$21.84
Printing costs per disclosure		\$0.15
Subtotal		
3% discount rate		\$249,494,625
7% discount rate		\$213,406,193
Scenario 2—Total Cost		
3% discount rate		\$259,480,751
7% discount rate		\$223,392,319

Note: In scenarios with ongoing expenses, costs have been discounted to the present at both 3% and 7% rates.

^a National Transportation Statistics 2021, Table 1–17.

^b Experian Information Solutions, Inc., State of the Automotive Finance Market Q4 2020.

5. Prohibition on Charging for Add-ons in Certain Circumstances

The proposed rule prohibits dealers from marketing or selling add-on products or services from which the targeted consumer would not benefit. Compliance with this provision will require dealers to have a transaction-level system for identifying consumers who will not benefit or, in some cases, predicting the potential consumer benefit from particular add-on products and services. In addition, this system will have to be supplemented with policies and transaction-level rules about when add-on products and services can be offered. Finally, because

dealers will not always have all of the relevant information at their disposal at the point of sale, such a system is likely to falsely identify some transactions as non-beneficial for the consumer. In cases where consumers would benefit in excess of the price of the add-on product or service, this provision will result in welfare costs associated with the foreclosure of such transactions.¹⁸⁶ At this stage, all of these costs are difficult to quantify. The Commission invites comment from dealers and consumers in order to assess the

¹⁸⁶ The benefits from transactions correctly identified as non-beneficial to the consumer are discussed at *supra* Part XII.B.2.

difficulty of implementing this requirement and the possibility for foreclosure of mutually beneficial transactions.

The proposed rule also prohibits dealers from charging for any optional add-on products or services unless dealership employees make certain disclosures at various points in the buying process. Before referencing any financing terms (other than Offering Price) for a specific vehicle or consummating a cash transaction, the dealer must disclose the total cost of purchasing the 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. The dealer must further indicate clearly that the consumer has the option to purchase the vehicle for this amount in cash and obtain the consumer's signed declination of that option.

Furthermore, before charging for any optional add-ons in a transaction involving financing, the dealer must disclose 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. The dealer must also indicate clearly at this point that the consumer has the option to finance the vehicle for this amount and obtain the consumer's signed declination of that option. Finally, before charging for any optional add-ons, the dealer must disclose 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.

In order to comply with these disclosure provisions, each dealer will have to design form disclosures that contain the required information, create a system for populating these forms, and then provide the disclosures in writing, with the appropriate information filled in, to each consumer prior to completing the transaction. We assume that each consumer will receive each disclosure required by the provisions exactly once during each transaction (if relevant).¹⁸⁷

The Commission assumes that each dealer will employ 8 hours of compliance manager time (at a rate of \$26.83) and 4 hours of sales manager time (at a rate of \$63.93) creating these

disclosures, and 8 hours of programmer time (at a rate of \$28.90) creating a system to populate these forms when provided inputs by sales staff. We further assume that sales staff will spend 2 minutes per disclosure (at a rate of \$21.84 per hour) updating, printing, and delivering these forms to consumers and that the physical costs of delivering the disclosure are roughly \$0.11 per disclosure.¹⁸⁸ 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).¹⁸⁹ All of these costs are summarized in Table 3.5. The Commission seeks comments on these costs, particularly regarding how dealers anticipate complying with these requirements, in order to reach more accurate estimates of costs.

TABLE 3.5—ESTIMATED COMPLIANCE COSTS FOR ITEMIZED DISCLOSURES

	2022 only	2022–2032
Creation of disclosures		
Number of dealers	46,525	.....
Compliance manager hours per dealer	8	.....
Cost per hour of compliance manager	\$26.83	.....
Sales manager hours per dealer	4	.....
Cost per hour of sales manager	\$63.93	.....
Programmer hours per dealer	8	.....
Cost per hour of programming	\$28.90	.....
Subtotal	\$32,640,079	.....
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
Total Cost.		
3% discount rate		\$1,026,996,944
7% discount rate		\$883,167,070

Note: In scenarios with ongoing expenses, costs have been discounted to the present at both 3% and 7% rates.

^a National Automobile Dealers Association, Average Dealership Profile (Aug. 2020)

^b National Automobile Dealers Association, Average Dealership Profile (Aug. 2020)

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.

¹⁸⁸ The physical costs are \$0.15 per paper disclosure and \$0.02 per electronic disclosure,

assuming that 27% are made electronically. This assumption is informed by a consumer survey that indicates 73% of consumers with motor vehicles prefer to receive registration renewal notices by mail as opposed to electronically. See Consumer Action, Your opinion wanted: Paper vs. electronic bills, statements and other communications (Winter 2018–2019), https://www.consumer-action.org/downloads/Consumer_Action_Paper_v_electronic_survey.pdf.

¹⁸⁹ We implicitly assume there is no correlation between the presence of optional add-ons and the use of financing in a transaction, such that we can multiply the percentages. We also assume the percentage of sales featuring optional add-ons will not decrease in response to the Rule, although decreasing the frequency of deceptive or unauthorized sales is a significant channel through which consumer and social benefits may accrue.

6. Requirement To Obtain Express Informed Consent Before Any Charges

The proposed rule requires dealers to obtain Express Informed Consent before charging any consumer for any product or service in association with the sale, financing, or lease of a vehicle. It is the understanding of the Commission that all dealers that are complying with the law currently have policies in place to prevent charges without consent; it is unclear what additional practices for those dealers will be required to comply with this provision.

7. Recordkeeping

The proposed rule requires dealers to retain records of all documents pertaining to Rule 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-ons charged for meet the requirements under the Rule, including calculations of loan-to-value ratios in contracts including GAP Agreements.

- Copies of all purchase orders, financing and lease contracts signed by the consumer (whether or not final approval is received), and all written communications with any consumer who signs a purchase order or financing or lease contract.

- 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 prior to the Rule, or the costs of creating them have already been accounted for in previous sections. The Commission assumes that each dealer incurs an upfront cost, employing 8 hours of programmer time, 5 hours of clerical time, 1 hour of sales manager time, and 1 hour of compliance officer time, at hourly rates of \$28.90, \$18.37, \$63.93, and \$26.83, respectively, in order to upgrade their systems and create the templates necessary to accommodate retention of all relevant materials. In addition, loan-to-value calculations are now required for all transactions with GAP Agreements, the creation of which has not been accounted for in previous sections. The Commission assumes that each dealer

employs 1 additional minute of sales staff time per transaction with a GAP agreement in order to populate and store all relevant materials. These costs are summarized in Table 3.6.

We expect that some small dealerships may not have the ability to automate these processes in a way that reduces the ongoing costs of recordkeeping to the level stated here. We invite comment on the proportion of dealerships that would rely more heavily on manual record retention and the associated impact on costs so that we may update our cost estimates for this provision accordingly.

In addition, the expansion of the volume of records that dealers are required to retain and manage will likely require investment 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 Commission leaves these capital costs unquantified in the preliminary analysis and seeks comment from stakeholders in order to obtain the information necessary to estimate costs.

TABLE 3.6—ESTIMATED COMPLIANCE COSTS FOR RECORDKEEPING

	2022 only	2022–2032
Updating systems		
Number of dealers	46,525	.....
Programming hours per dealer	8	.....
Cost per hour of programming	\$28.90	.....
Clerical hours per dealer	5	.....
Cost per hour of clerical work	\$18.37	.....
Sales manager hours per dealer	1	.....
Cost per hour of sales manager review	\$63.93	.....
Compliance officer hours per dealer	1	.....
Cost per hour of compliance review	\$26.83	.....
Subtotal	\$19,252,510	.....
Recordkeeping (per transaction)		
Number of motor vehicle sales ^a .....	.....	57,866,000
% of sales with GAP agreement ^b .....	.....	26%
Sales staff minutes per transaction .....	.....	1
Cost per hour of recordkeeping .....	.....	\$21.84
Subtotal .....	.....	.....
3% discount rate .....	.....	\$47,561,392
7% discount rate .....	.....	\$40,681,820
Total Cost		
3% discount rate .....	.....	\$66,813,902
7% discount rate .....	.....	\$59,934,330

Note: In scenarios with ongoing expenses, costs have been discounted to the present at both 3% and 7% rates.

^a National Transportation Statistics, Table 1–17

^b National Consumer Law Center, *Auto Add-ons Add Up: How Dealer Discretion Drives Excessive, Inconsistent, and Discriminatory Pricing*

D. Other Impacts of Proposed Rule

As the status quo in this industry features consumer search frictions,

shrouded prices, deception, and obfuscation, dealers likely charge higher prices than could be supported under the Rule for a number of products and

services. The Commission expects that prices are likely to adjust in response to the transparency facilitated by the new Rule. Part XII.B discussed 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. However, if the Rule curbs price effects caused by *deception*, the transfers caused by these price effects would redistribute welfare away from dishonest dealers and toward consumers, which may be an explicit goal of the rule.

In addition, deceptive practices by dishonest dealers lead consumers to engage with those dealers instead of honest dealerships. Under the proposed rule, some business that would otherwise have gone to dealers using bait-and-switch tactics or deceptive door opening advertisements will now go to honest dealerships. 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 the set of dishonest dealers to honest dealers, which may weigh differently if profits from law violations are not counted towards social welfare in the regulatory analysis.

While each provision above will 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, we have not attempted to quantify these impacts. However, these transfers should be documented because, at minimum, they inform the distributional effects of the proposed rule. The Commission invites comment on how prices might be expected to respond to the proposed rule, in order to quantify its price effects and resulting distributional impact or impact on net benefits and costs.

E. Conclusion

In the preceding Preliminary Regulatory Analysis, we have attempted to catalog and quantify the incremental benefits and costs of the provisions included in the proposed rule. Extrapolating these benefits out over the 10-year assessment period and discounting to the present provides an estimate of the present value for total

benefits and costs of the proposed rule, with the difference—net benefits—providing one measure of the value of regulation.

The present value of benefits for consumers from the proposed rule’s requirements over a 10-year period using a 7% discount rate is estimated at \$31.1 billion. The present value of costs for covered motor vehicle dealers of complying with the proposed rule’s requirements over a 10-year period using a 7% discount rate is estimated at \$1.4 billion. This generates an estimate of the present value of net benefits equal to \$29.7 billion using a discount rate of 7%.

Consequently, this Preliminary Regulatory Analysis indicates that adoption of the proposed rule would result in benefits to the public that outweigh the costs.

PRESENT VALUE OF NET BENEFITS, 2022–2032

	Present value
Total Benefits:	
3% discount rate	\$36,337,956,234
7% discount rate	\$31,081,811,411
Total Costs:	
3% discount rate	\$1,568,408,501
7% discount rate	\$1,360,694,552
Net Benefits:	
3% discount rate	\$34,769,547,733
7% discount rate	\$29,721,116,859

Note: Total costs reflect highest cost scenarios, for a conservative estimate of Net Benefits.

List of Subjects in 16 CFR Part 463

Consumer protection, Motor vehicles, Reporting and recordkeeping requirements, Trade practices.

For the reasons stated in the preamble, the Federal Trade Commission proposes to add part 463 to subchapter D of Title 16 of the Code of Federal Regulations as follows:

PART 463—MOTOR VEHICLE TRADE REGULATION RULE

- Sec.
- 463.1 Authority.
- 463.2 Definitions.
- 463.3 Prohibited misrepresentations.
- 463.4 Disclosure requirements.
- 463.5 Dealer Charges for add-ons and other items.
- 463.6 Recordkeeping.
- 463.7 Waiver not permitted.
- 463.8 Severability.
- 463.9 Relation to State laws.

Authority: 15 U.S.C. 41 *et seq.*; 12 U.S.C. 5519.

§ 463.1 Authority.

This part is promulgated pursuant to Section 1029 of the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010, 12 U.S.C. 5519(d). It is an unfair or deceptive act or practice within the meaning of Section 5(a)(1) of the Federal Trade Commission Act (15 U.S.C. 45(a)(1)) to violate any applicable provision of this part, directly or indirectly, including the recordkeeping requirements which are necessary to prevent such deceptive acts or practices and to enforce this part.

§ 463.2 Definitions.

(a) *Add-on or Add-on Product(s) or Service(s)* means any product(s) or service(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.

(b) *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.

(c) *Cash Price without Optional Add-ons* means Offering Price, plus required Government Charges, minus any discounts, rebates, or trade-in valuation amounts, and excludes optional Add-ons.

(d) *Clearly and Conspicuously* means in a manner that is difficult to miss (*i.e.*, easily noticeable) and easily understandable, including in all of the following ways:

(1) In any communication that is solely visual or solely audible, the disclosure must be made through the same means through which the communication is presented. In any communication made through both visual and audible means, such as a television advertisement, the disclosure must be presented simultaneously in both the visual and audible portions of the communication even if the representation requiring the disclosure is made in only one means.

(2) A visual disclosure, by its size, contrast, location, the length of time it appears, and other characteristics, must stand out from any accompanying text or other visual elements so that it is easily noticed, read, and understood.

(3) An audible disclosure, including by telephone or streaming video, must be delivered in a volume, speed, and

cadence sufficient for ordinary consumers to easily hear and understand it.

(4) In any communication using an interactive electronic medium, such as the Internet or software, the disclosure must be unavoidable.

(5) The disclosure must use diction and syntax understandable to ordinary consumers and must appear in each language in which the representation that requires the disclosure appears.

(6) The disclosure must comply with these requirements in each medium through which it is received.

(7) The disclosure must not be contradicted or mitigated by, or inconsistent with, anything else in the communication.

(e) *Dealer or Motor Vehicle Dealer* means any person or resident in the United States, or any territory of the United States, that:

(1) Is licensed by a State, a territory of the United States, or the District of Columbia to engage in the sale of motor vehicles;

(2) Takes title to, holds an ownership interest in, or takes physical custody of motor vehicles; and

(3) Is predominantly engaged in the sale and servicing of motor vehicles, the leasing and servicing of motor vehicles, or both.

(f) *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.

(g) *GAP Agreement* means an agreement to indemnify a vehicle purchaser or lessee for any of the difference between the actual cash value of the insured's vehicle in the event of an unrecovered theft or total loss and the amount owed on the vehicle pursuant to the terms of a loan, lease agreement, or installment sales contract used to purchase or lease the vehicle, or

to waive the unpaid difference between money received from the purchaser's or lessee's motor vehicle insurer and some or all of the amount owed on the vehicle at the time of the unrecovered theft or total loss, including products or services otherwise titled "Guaranteed Automobile Protection Agreement," "Guaranteed Asset Protection Agreement," "GAP insurance," or "GAP Waiver".

(h) *Government Charges* means all fees or charges imposed by a Federal, State or local government agency, unit, or department, including taxes, license and registration costs, inspection or certification costs, and any other such fees or charges.

(i) *Material or Materially* means likely to affect a person's choice of, or conduct regarding, goods or services.

(j) *Motor Vehicle* means:

(1) Any self-propelled vehicle designed for transporting persons or property on a street, highway, or other road;

(2) Recreational boats and marine equipment;

(3) Motorcycles;

(4) Motor homes, recreational vehicle trailers, and slide-in campers, as those terms are defined in §§ 571.3(b) and 575.103(d) of title 49, Code of Federal Regulations, or any successor thereto; and

(5) Other vehicles that are titled and sold through Dealers.

(k) *Offering Price* means the full cash price for which a Dealer will sell or finance the motor vehicle to any consumer, excluding only required Government Charges.

§ 463.3 Prohibited misrepresentations.

It is a violation of this part and an unfair or deceptive act or practice in violation of Section 5 of the Federal Trade Commission Act ("FTC Act") for any Motor Vehicle Dealer to make any misrepresentation, expressly or by implication regarding:

(a) The costs or terms of purchasing, financing, or leasing a vehicle.

(b) Any costs, limitation, benefit, or any other Material aspect of an Add-on Product or Service.

(c) Whether the terms are, or transaction is, for financing or a lease.

(d) The availability of any rebates or discounts that are factored into the advertised price but not available to all consumers.

(e) The availability of vehicles at an advertised price.

(f) Whether any consumer has been or will be preapproved or guaranteed for any product, service, or term.

(g) Any Material information on or about a consumer's application for financing.

(h) When the transaction is final or binding on all parties.

(i) 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.

(j) 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.

(k) Whether consumer reviews or ratings are unbiased, independent, or ordinary consumer reviews or ratings of the Dealer or its products or services.

(l) Whether the Dealer or any of its personnel or products or services is or was affiliated with, endorsed or approved by, or otherwise associated with the United States government or any Federal, State, or local government agency, unit, or department, including the United States Department of Defense or its Military Departments.

(m) Whether consumers have won a prize or sweepstakes.

(n) Whether, or under what circumstances, a vehicle may be moved, including across state lines or out of the country.

(o) Whether, or under what circumstances, a vehicle may be repossessed.

(p) Any of the required disclosures identified in this part.

§ 463.4 Disclosure requirements.

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 to fail to make any disclosure required by this section, Clearly and Conspicuously.

(a) *Offering Price*. In connection with the sale or financing of vehicles, a vehicle's Offering Price must be disclosed:

(1) In any advertisement that references, expressly or by implication, a specific vehicle;

(2) In any advertisement that represents, expressly or by implication, any monetary amount or financing term for any vehicle; and

(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. With respect to such communications:

(i) The Offering Price for the vehicle must be 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 disclosed in writing.

(b) *Add-on List.* If a Dealer charges, directly or indirectly, for any optional Add-on Products or Services, an Add-on List must be disclosed:

(1) On each website, online service, or mobile application operated by or on behalf of the Dealer, and at each dealership; and

(2) If an advertisement is not presented on a website, online service, or mobile application, the Dealer must disclose the website, online service, or mobile application where the consumer can view the Add-on List.

(c) *Add-ons not required.* When making any representation, expressly or by implication, directly or indirectly, about an Add-on Product or Service, the Dealer must disclose that the Add-on is not required and the consumer can purchase or lease the vehicle without the Add-on, if true. If the representation is in writing, the disclosure must be in writing.

(d) *Total of payments and consideration for a financed or lease transaction.* (1) When making any representation, expressly or by implication, directly or indirectly, about a monthly payment for any vehicle, the Dealer must disclose the total amount the consumer will pay to purchase or lease the vehicle at that monthly payment after making all payments as scheduled. If the representation is in writing, the disclosure must be in writing; and

(2) If the total amount disclosed assumes the consumer will provide consideration (for example, in the form of a cash down payment or trade-in valuation), the Dealer must disclose the amount of consideration to be provided by the consumer. If the representation is in writing, the disclosure must be in writing.

(e) *Monthly payments comparison.* When making any comparison between payment options, expressly or by implication, directly or indirectly, that includes discussion of a lower monthly payment, the Dealer must disclose that the lower monthly payment will increase the total amount the consumer will pay to purchase or lease the vehicle, if true. If the representation is in writing, the disclosure must be in writing.

§ 463.5 Dealer Charges for Add-ons and Other Items

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.

(a) *Add-ons that provide no benefit.* A Dealer may not charge for an Add-on

Product or Service if the consumer would not benefit from such an Add-on Product or Service, including:

(1) Nitrogen-filled tire related-products or services that contain no more nitrogen than naturally exists in the air; or

(2) Products or services that do not provide coverage for the vehicle, the consumer, or the transaction, or are duplicative of warranty coverage for the vehicle, including a GAP Agreement if the consumer's vehicle or neighborhood is excluded from coverage or the loan-to-value ratio would result in the consumer not benefiting financially from the product or service.

(b) *Undisclosed or unselected Add-ons.* A Dealer may not charge for any optional Add-on Product or Service unless the following requirements are met:

(1) *Cash Price without Optional Add-ons.*—(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 can purchase the vehicle for the Cash Price without Optional Add-ons; and

(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 in paragraphs (b)(1)(i) and (ii) of this section 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 in paragraphs (b)(1)(i) and (ii) of this section must be limited to the information required by this section, and cannot be presented with any other written materials.

(2) *Cash Price without Optional Add-ons in a financed transaction.*—(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 (b)(2)(i)(A).

(iii) *Form and signature.* The disclosure and declination set forth in paragraphs (b)(2)(i) and (ii) of this section 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 (b)(2)(i) and (ii) of this section must be limited to the information required by this section, and cannot be presented with any other written materials.

(3) *Itemization of optional Add-ons.* Before charging for any optional Add-on, the Motor Vehicle Dealer must separately itemize and Clearly and Conspicuously disclose:

(i) For a non-financed transaction:

(A) The Cash Price without Optional Add-ons;

(B) Charges for any optional Add-ons selected by the consumer, separately itemized; and

(C) The sum of the items set forth in paragraphs (b)(3)(i)(A) and (b)(3)(i)(B) of this section; or

(ii) For a financed transaction,

(A) The total described in paragraph (b)(2)(i)(A) of this section;

(B) Charges for any optional Add-ons selected by the consumer, separately itemized; and

(C) The sum of the items set forth in paragraphs (b)(3)(ii)(A) and (b)(3)(ii)(B) of this section.

(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.

§ 463.6 Recordkeeping.

(a) Any Motor Vehicle Dealer subject to this part must create and retain, for a period of twenty-four months from the date the record is created, all records necessary to demonstrate compliance with this part, including the following records:

(1) Copies of all Materially different advertisements, sales scripts, training materials, and marketing materials regarding the price, financing or lease of a motor vehicle, that the Motor Vehicle Dealer disseminated during the relevant time period. Provided that a typical example of a credit or lease advertisement may be retained for advertisements that include different

vehicles, or different amounts for the same credit or lease terms, where the advertisements are otherwise not materially different;

(2) Copies of all Materially different Add-on Lists and all documents describing such products or services that are offered to consumers;

(3) Copies of all purchase orders; financing and lease documents with the Motor Vehicle Dealer signed by the consumer, whether or not final approval is received for a financing or lease transaction; and 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;

(4) Records demonstrating that Add-ons in consumers' contracts meet the requirements of § 463.5, including copies of all service contracts, GAP Agreements and calculations of loan-to-value ratios in contracts including GAP Agreements; and the Cash Price without Optional Add-ons disclosures and declinations required by § 463.5(b); and

(5) Copies of all written consumer complaints relating to sales, financing, or leasing, inquiries related to Add-ons, and inquiries and responses about vehicles referenced in § 463.4.

(b) Any Motor Vehicle Dealer subject to this part may keep the records required by paragraph (a) of this section in any legible form, and in the same manner, format, or place as they may already keep such records in the ordinary course of business. Failure to keep all records required under paragraph (a) of this section will be a violation of this part.

§ 463.7 Waiver not permitted.

It is a violation of this part for any person to obtain, or attempt to obtain, a waiver from any consumer of any protection provided by or any right of the consumer under this part.

§ 463.8 Severability.

The provisions of this part are separate and severable from one another. If any provision is stayed or determined to be invalid, it is the Commission's intention that the remaining provisions will continue in effect.

§ 463.9 Relation to State laws.

(a) *In General.* This part will not be construed as superseding, altering, or affecting any other State statute, regulation, order, or interpretation relating to Motor Vehicle Dealer requirements, except to the extent that such statute, regulation, order, or

interpretation is inconsistent with the provisions of this part, and then only to the extent of the inconsistency.

(b) *Greater protection under State law.* For purposes of this section, a State statute, regulation, order, or interpretation is not inconsistent with the provisions of this part if the protection such statute, regulation, order, or interpretation affords any consumer is greater than the protection provided under this part.

By direction of the Commission.

April J. Tabor,
Secretary.

Note: The following statement will not appear in the Code of Federal Regulations: Joint Statement of Chair Lina M. Khan, Commissioner Noah Joshua Phillips, Commissioner Rebecca Kelly Slaughter, and Commissioner Alvaro M. Bedoya Regarding the Notice of Proposed Rulemaking on a Motor Vehicle Dealers Trade Regulation Rule (June 23, 2022)

The Commission has voted today to release a Notice of Proposed Rulemaking to address unfair and deceptive practices in car sales. Cars are vital for Americans, especially those living in rural areas or where mass transit is limited. They are crucial for people to get to work, to shop for groceries, and to get to doctor's appointments. For many Americans, buying a car is the most expensive purchase they will ever make. And in this time of rising prices and supply shortages, it is vitally important that Americans not be deceived when purchasing a car, particularly when it comes to "junk fees" or unnecessary add-ons.¹⁹⁰ Add-ons can cost consumers thousands of dollars and can significantly increase the overall cost to the consumer in the transaction.

The proposed rule builds on the FTC's work over decades, which confirmed that add-ons are a significant pain point for the car buying public.¹⁹¹ FTC staff's in-depth interviews with consumers during a recent study revealed that consumers were unaware which add-ons they had purchased, were unable to identify add-ons in the paperwork, were unclear what those add-ons included, and sometimes did not realize they had purchased any add-ons at all. Indeed, add-ons were the

¹⁹⁰ See Nat'l Consumer L. Ctr., *Auto Add-Ons Add Up: How Dealer Discretion Drives Excessive, Arbitrary and Discriminatory Pricing* (2017), https://www.nclc.org/images/pdf/car_sales/report-auto-add-on.pdf. Not all add-ons provide no value. The NPRM limits its prohibition to ones that do.

¹⁹¹ Fed. Trade Comm'n, *Buckle Up: Navigating Auto Sales and Financing* (2020), https://www.ftc.gov/system/files/documents/reports/buckle-navigating-auto-sales-financing/bcpstaffreportautofinancing_0.pdf.

single greatest area of confusion observed in the study.¹⁹²

If this rule is finalized, the FTC will be able to bring enforcement actions to obtain civil penalties or redress for consumers from those who violate the rule's provisions. This tool will be especially important given last year's Supreme Court decision in *AMG*,¹⁹³ which held that the FTC cannot use Section 13(b) of the FTC Act to make consumers who are harmed by deception or unfair practices financially whole. The proposed rule also has been crafted carefully not to impose unnecessary burdens on the mostly small businesses in this industry.

This proposed rule is another example of how the FTC is using the full set of tools granted us by Congress to protect Americans from deceptive or unfair practices. Here, we are using—for the first time—authority that Congress gave us back in 2010 through the Dodd-Frank Act,¹⁹⁴ which authorizes the FTC to prescribe rules governing motor vehicle dealers, and to do so pursuant to the FTC Act and the Administrative Procedure Act.

Given the panoply of harms that Americans face from unlawful business practices, bringing an end to unlawful fees that hurt Americans already struggling with high prices is critical. We thank the Bureau of Consumer Protection staff for their excellent work on this effort and look forward to hearing from the public on this vital initiative.

Dissenting Statement of Commissioner Christine S. Wilson

Today the Commission votes to seek comment on a proposed Motor Vehicle Dealers Trade Regulation Rule. Experience reveals that even when motivated by the best of intentions, regulatory schemes frequently fail to generate promised improvements for their intended beneficiaries. Instead, they tend to create market distortions that stifle innovation, increase costs and prices, and ultimately harm consumers. For these reasons, I respectfully dissent.

Here, there is no question that our staff is motivated by the best of intentions. The FTC has brought scores of law enforcement actions attempting to curb deceptive or unfair practices in this industry, including deceptive pricing claims and undisclosed charges for add-ons. Staff also has conducted an industry study, worked extensively with industry trade associations to educate

¹⁹² *Id.* at 9.

¹⁹³ *AMG Capital Mgmt., LLC v. FTC*, 141 S. Ct. 1341 (2021).

¹⁹⁴ 12 U.S.C. 5519.

businesses on best practices, and engaged in consumer education about vehicle purchases. Despite this array of efforts that spans law enforcement, consumer and business education, and guidance on industry self-regulatory programs, unlawful practices persist.

The proposals in this **Federal Register** Notice generally are tied to the practices challenged in our law enforcement. Notably, the Commission has authority to promulgate this Rule under the Administrative Procedures Act (APA), and therefore does not need to demonstrate prevalence as would be necessary for a Rule proposed under Section 18 of the FTC Act (*i.e.*, a so-called Mag-Moss Rule). Nevertheless, the Notice sets forth a record of law enforcement that likely would satisfy a prevalence analysis. I commend staff on their careful approach to this proposed Rule.

Despite staff's meticulous analysis and drafting, I have concerns about this proposal. It prohibits deceptive practices but also requires numerous disclosures related to offering price, add-ons, and monthly financing. Although staff endeavored to tailor these provisions to the deceptive practices challenged in our cases, I anticipate unintended but negative consequences.

Several factors drive this concern. First, even APA rulemaking is cumbersome and lengthy, making it difficult to keep rules up to date.¹ Politically charged topics (as this one may be) impose even greater delays on rulemaking.² Second, historical experience demonstrates that complex regulatory frameworks stifle innovation, increase costs, raise prices, limit choice, and decrease output. For example, the intricate regulatory frameworks for the airline and railroad industries suppressed competition and harmed the very parties they were intended to benefit.³ Ultimately, they were repealed

on a bipartisan basis.⁴ The FTC has its own experience with rules that limit competition: the FTC's Care Labeling Rule has been criticized for excluding new competition in the form of wet cleaners that would compete with dry cleaners.⁵ Third, attempts to narrowly tailor rules are frequently unsuccessful. Technologies and markets evolve in ways regulators are unable to predict, leading either to mission creep⁶—the expansion of regulatory regimes to address these unforeseen

developments—or to ossification, given the opportunity cost of frequent updates to reflect emerging market realities.

Notably, the motor vehicle industry has benefitted from innovation in all areas—safety, performance, options, and sales.⁷ For example, in the 1980s, GM created the Saturn project, introducing a then-revolutionary way to manufacture, market, and sell cars.⁸ More recently, consumer car shopping has moved online with services that assist consumers in price negotiation and location of desired vehicles.⁹ In

(2019), <https://academic.oup.com/antitrust/article/8/1/10/5614371>; Remarks of Christine S. Wilson at British Institute of International and Comparative Law, Remembering Regulatory Misadventures: Taking a Page from Edmund Burke to Inform Our Approach to Big Tech (June 28, 2019), https://www.ftc.gov/system/files/documents/public_statements/1531816/wilson_remarks_biicl_6-28-19.pdf; Dissenting Statement of Christine S. Wilson on the Energy Labeling Rule, Comm'n Matter No. R611004 (Oct. 22, 2019), https://www.ftc.gov/system/files/documents/public_statements/1551786/r611004_wilson_dissent_energy_labeling_rule.pdf.

⁴ See Remarks of Christine S. Wilson for the Federalist Society at "The Future of Rulemaking at the FTC" Event, *supra* note 2.

⁵ *Id.* at 9.

⁶ *Id.* at 8 (describing how ICC jurisdiction over railroads expanded to include other forms of transportation, including trucks, barges, and pipelines, as those industries grew to compete with railroads).

⁷ See, e.g., McFadden, Christopher, *20+ Greatest Innovations and Inventions of Automobile Engineering: From the First Engine to Today*, Interesting Engineering (Jun. 18, 2020), <https://interestingengineering.com/20-greatest-innovations-and-inventions-of-automobile-engineering-from-the-first-engine-to-today> (discussing the 20 greatest innovations in automobiles from the steam engine to internal combustion, including flashing turn signals, air bags, rear back-up cameras, GPS and connected cars).

⁸ See Stern, Randy, *Historiography: A Different Kind of Car Company*, Victory & Reseda (Jul. 25, 2020), <https://www.randystern.net/historiography-saturn/>.

⁹ See, e.g., Howarth, Josh, *5 Important Auto Industry Trends (2022–2024)*, exploding topics (May 19, 2022), <https://explodingtopics.com/blog/auto-industry-trends> (noting over 90% of car purchasers perform online research; 80% of buyers used third-party services to assist in purchasing a car in 2019; and Carvana's sales grew 37% in 2020); Soucie, Hale, *NADA 2022: Top 3 Trends & Strategies To Watch*, Edifice Automotive Marketing (Mar. 2022), <https://blog.edificeautomotive.com/nada-2022-top-3-trends> (noting continued increase in digital car buying).

addition, Tesla and Carvana have introduced sales models that obviate the need to enter a dealership at all.¹⁰ And sales practices will continue to evolve.¹¹ The market dynamism flowing from these innovations make it likely that an FTC rule will be incomplete even as it is finalized.

Stakeholder input on these potential concerns would be constructive. I would be interested in comments on the following issues:

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.

2. Insights into why deceptive practices persist in this industry and whether additional business education would assist businesses with compliance.

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?

4. Potential negative consequences of, or costs attendant to, the Rule that the Commission may not have anticipated.

I encourage stakeholders to provide detailed comments on these questions, as well as on the issues in the **Federal Register** Notice. I look forward to reviewing the record as it develops. But for the reasons discussed above, I respectfully dissent.

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¹⁰ Stenquist, Paul, *Why You Might Buy Your Next Car Online*, N.Y. Times, Jun. 21, 2022, <https://www.nytimes.com/2022/06/21/business/tesla-online-sales-dealerships.html?referringSource=articleShare> (discussing the Tesla online car buying system); Korn, Morgan, *More consumers are shopping online for cars. Can dealerships keep up?* ABC News, Mar. 28, 2021, <https://abcnews.go.com/Business/consumers-shopping-online-cars-dealerships/story?id=76650042> (discussing increase in online shopping for cars, limited trips to dealerships to buy chosen vehicles, and solely online purchases through Carvana and Tesla).

¹¹ See, e.g., *The future of car buying: Omnichannel, personalized, and fun*, McKinsey & Co. (Sept. 2020), <https://www.mckinsey.com/-/media/McKinsey/Featured%20Insights/The%20Next%20Normal/The-Next-Normal-The-future-of-car-buying-vF>.

¹ One study found the FTC takes more than five years, on average, to formulate a consumer protection rule. See Jeffrey S. Lubbers, *It's Time to Remove the 'Mossified' Procedures for FTC Rulemaking*, 83 Geo. Wash. L. Rev. 1979 (2015), https://digitalcommons.wcl.american.edu/cgi/viewcontent.cgi?article=2086&context=facsch_lawrev.

² The updates to the Contact Lens Rule generated significant interest from Congress and industry trade groups, for example, and took 5 years to complete. See Remarks of Christine S. Wilson for the Federalist Society at "The Future of Rulemaking at the FTC" Event, Hey, I've Seen This One: Warnings for Competition Rulemaking at the FTC (June 9, 2021), https://www.ftc.gov/system/files/documents/public_statements/1591666/wilson_statement_back_to_the_future_of_rulemaking.pdf.

³ Christine S. Wilson & Keith Klovers, *The Growing Nostalgia for Past Regulatory Misadventures and the Risk of Repeating These Mistakes with Big Tech*, 8 J. Antitrust Enft. 10