Federal Trade Commission

Re: Motor Vehicle Dealers Trade Regulation Rule –
Rulemaking, No. P204800
July 12, 2022

To Whom It May Concern:

Thank you for this opportunity to comment on the FTC's proposed regulations drafted to address deceptive sale, leasing and financing practices by auto dealers.

Although I previously served on the Board of Directors of the National Association of Consumer Advocates and am a Past President of the Maryland Consumer Rights Coalition, these comments are my own and do not purport to represent the views of these organizations.

INTRODUCTION

I graduated from law school in 1974 and passed the Maryland bar the same year. The following year, I also became a member of the bar in Washington, D.C. Initially I worked for three years as a staff attorney at the Center for Auto Safety in Washington, D.C., then joined a private law firm for 4 years that practiced largely in Maryland and the District of Columbia. In 1982, I opened my own law office to pursue a career primarily representing consumers in Maryland and D.C., focusing especially on consumers who were victimized by car dealers and auto finance companies. From 1982 to 2020, when I had largely completed transitioning toward retirement, I represented literally hundreds of individual consumers in lawsuits against these companies. In later years, I also co-counseled multiple class action lawsuits against car dealers and/or auto finance companies. In the course of my law practice, I took dozens of depositions of auto salespersons, sales managers, and upper management at car dealerships in cases involving fraud or deceptive trade practices. I consulted often with experts on auto sales and financing practices.

Car dealers, including their powerful trade associations, will be circling the wagons to oppose the Commission's rule. They undoubtedly will claim there is no need for the new rule, that everything is hunky-dory in the auto marketplace just the way it is. But the Commission knows far better, given its listening tour and enforcement actions. Dealers will argue that tens of millions of cars are sold every year, yet the Commission has brought only 37 enforcement actions, so how bad can things be? And that even if the Commission receives more than 100,000 auto dealer complaints every year, that's a tiny number given the large numbers of annual car sales.

The number of complaints filed with the FTC vastly understates the problems consumers face every day in the auto marketplace.

In fact, 100,000 is a huge number of complaints given these realities: many consumers (i) never realize they were defrauded or deceived and therefore have no reason to file a complaint, (ii) even if a consumer realizes he or she has been deceived, many of the most vulnerable, frequently abused consumers may not fully understand what happened or be able articulate what happened, (iii) many if not most students who go through high school in the U.S. never learn about the Commission, and (iv) even if consumers have heard of the Commission, they may believe (correctly) it's extremely unlikely the Commission can do anything to remedy their immediate problem, giving them little reason to file a complaint. That belief is even more well founded after the Supreme Court decided *AMG Capital Management v. FTC*, 141 S. Ct. 1341 (2021). I cannot recall a single autofraud client – among the hundreds who came to me for help -- who had already filed a complaint with the Commission. In other words, the number of persons who have fallen victim to deceptive dealership practices plainly exceeds the number of complaints submitted to the agency by a HUGE factor.

For a more informed estimate of how many consumers are deceived by car dealers, one might consider the number of individual lawsuits filed by consumers, as well as the number of consumers who have benefitted from class action lawsuits brought against dealers by private law firms (before arbitration clauses essentially put an end to class cases against dealers) or cases filed by state Attorneys General. To my knowledge, those statistics are not readily available. But consider the number of consumers who have received benefits from class actions cases just in the actions filed against car dealers by one small law firm, Gordon, Wolf & Carney in Towson, Maryland. (I co-counseled these cases and eventually joined the firm as "Of Counsel"). More than 30,000 consumers recovered damages in cases alleging that dealers charged deceptive or illegal fees, more than 200,000 recovered damages in cases when multiple large dealerships allegedly failed to disclose material facts about the cars they sold, more than 25,000 consumers recovered damages in cases against dealerships who allegedly overcharged consumers for Governmental Fees, and more than 15,000 recovered damages when a dealer allegedly deceived its customers about purportedly "free" lifetime benefits for their car purchase. Those are just the cases (in the days before widespread arbitration clauses) from one small firm in just one state. With respect to state Attorneys General, I can note only that the Maryland A.G. settled a case earlier this year with a dealer who allegedly collected hidden and duplicative fees and did not honor the dealer's advertised prices. That settlement is expected to result in more than $1,000,000 for consumers who were overcharged. https://www.marylandattorneygeneral.gov/press/2022/041922.pdf. Commission staff can uncover numerous other examples by visiting websites for state A.G.'s in places like New York, Massachusetts, Connecticut and California, among others. The simple fact remains that deceptive trade practices continue to both flourish and interfere with a well functioning auto marketplace. Now that consumers have been effectively prevented from bringing class cases, if there is to be any meaningful deterrent to dealers deceiving consumers, it will have to come from the Commission and the state Attorneys General. So the need for the Commission's proposed rule is now even greater than ever.

These comments below are submitted in the hope they will assist the FTC in evaluating the strengths and weaknesses of its proposed rule, as well as identify recurring dealer practices which create inefficiencies in the automotive marketplace that impact consumer behavior.

RESPONSES TO THE FTC'S NUMBERED QUESTIONS:

1. Does the proposed rule further the Commission's goal?

Yes. The Commission's prefatory comments demonstrate it has learned a great deal about the ways some auto dealers manipulate and mislead consumers. The proposed rule, if adopted, is well calculated to make limited but necessary improvements in protecting consumers from unfair or deceptive acts or practices in the motor vehicle marketplace. More and more dealers understand that they can bar deceived customers from taking them to court by including arbitration clauses in their deal documents. This – plus the Supreme Court's decision in *AMG Capital Management LLC v. FTC* -- has emboldened many dealers to be more aggressive than ever. This is just another reason why the Commission's proposed rule is so important. It targets important dealer practices that interfere with efficient functioning of the auto marketplace, harming consumers' ability to save time and money when shopping for a car while disadvantaging dealers who eschew deceptive practices.

2. Are there unfair or deceptive acts or practices not addressed in the rule that should be?

There are significant omissions from the rule that should be addressed.

A. Undisclosed bank fees are charged to millions of car buyers every year.

In the section of the Commission's prefatory material included in its Federal Register notice entitled "Overview of Vehicle Dealers and Motor Vehicle Financing," the agency curiously did not identify one of the leading but hidden causes of deceptive trade practices by auto dealers: undisclosed "bank fees."

In a typical auto purchase financed indirectly through auto dealerships, the dealer prepares a retail installment sales contract ("RISC") for its customer which it seeks to sell to third party financing companies like Ford Motor Credit, Credit Acceptance Corporation, banks or others whose business includes accepting assignment of retail installment sale contracts. When the customer purchasing a car has strong credit, the third party is likely to offer full price for that customer's RISC. For example, if the face value of the RISC is $25,000, the third party will pay the dealer $25,000 or something very close to it. But when the customer purchasing a car has a troubled credit history, virtually all third parties who buy RISCs will assess the selling dealership a "bank fee." This fee – or discount -- is the price the third party assignee charges a dealer to induce it to purchase the relatively risky retail installment sale contract signed by a consumer with a troubled credit history. With this kind of buyer, the third party pays a

dealership less than full price for the RISC. For example, if the RISC on its face is again valued at $25,000, the third party offering to purchase a risky contract will pay the dealership less, anywhere from $100 to $3,500 or more. That discount or out-of-pocket fee is known within the industry as a bank fee.[1]

I have personally examined far more than 2,000 RISCs for vehicle purchases during my career, including more than five hundred signed by subprime or deep subprime borrowers, but have never found a line item or other disclosure of a bank fee on any document provided to a buyer.[2] **Dealers conceal this fee for obvious reasons: if consumers knew they were being charged a risk-based fee, many would be likely to shop around further. Disclosure of bank fees for credit challenged customers undoubtedly would prompt many consumers to either look for their own financing, or find another car dealership that did not assess such a fee.**

How many consumers are impacted by undisclosed bank fees? According to Experian's report on the *State of the Automotive Finance Market Q2 2022* (August 2022), at least 17% of the car buying public need subprime or deep subprime loans (their credit scores range from 600 down to 300). https://www.experian.com/content/dam/noindex/na/us/automotive/finance-trends/2022/q2-2022-state-auto-finance-market.pdf, page 10. Another 18 % (whose credit scores range from 601 to 660) need near prime loans. *Id.* Many near prime buyers also will be charged undisclosed bank fees. If more than 17,000,000 cars are sold every year, per the FTC's Federal Register notice, at least 3,000,000 buyers are impacted annually by undisclosed bank fees.

The Commission's proposed rule should explicitly require disclosure of bank fees as a line item on every purchase order and retail installment sale contract. Without disclosure, this often significant fee is needlessly hidden from consumers, denying them the opportunity to see for themselves in real time how derogatory information on their credit history impacts their cost of auto financing or the real reason for paying high prices for a vehicle.

The Commission's newly proposed rules properly mandate increased transparency. Transparency always leads to market efficiencies. But if the Commission does not mandate disclosure of bank fees, it will needlessly allow a major inefficiency in the marketplace to remain while inexcusably leaving a huge swath of the car buying public (the most financially

[1] See, for example, https://www.petrolautosales.com/bank-fee-pay-bank-fee/ Although bank fees theoretically may not be assessed in California, dealers everywhere are not going to sell cars at a loss, so even in California the price a customer pays for a car naturally has to be bumped higher to take these fees or discounted prices for retail installment sale contracts into account. It's worth noting in the auto leasing context that federal regulations require disclosure of any acquisition or bank fee. 12 CFR 1013.4, Comment 4(m)(1). There are no principled reasons car buyers should be entitled to less disclosure of a material fee than leasing customers receive.

[2] I have uncovered bank fees charged to consumers many times, but only after filing a lawsuit and conducting discovery for a client.

vulnerable) in the dark about their true cost of credit and why they have to pay so much for a car. [3]

B. Dealers should be required to disclose material facts about a vehicle's prior use because these facts inform and clearly impact the decisions of buyers and lessees.

One of the most frequent and long-lasting headaches consumers sustain come when dealers fail to disclose negative information about a car they've put up for sale or lease.

Car buyers and lessees need and want safe, reliable transportation. Dealers are experts in evaluating and preparing their vehicles for sale and have easy access to information their customers need. **The Commission's proposed rule should recognize this and require dealers to disclose at least the following minimum, material facts about a car's prior use at the same time it transmits the dealer's Offering Price to customers**:

1. **Are there any open safety recalls?** Dealers should be required to check for open safety recalls (the info is free at https://www.nhtsa.gov/recalls) and disclose this when transmitting their Offering Price to a customer. If a car has an open safety recall, that information is material to a prospective buyer or lessee because (i) the government says the car is unsafe to drive, (ii) they likely will have to lose time from work to get the recall work done, and (iii) there are some safety recalls for which the parts needed to make the car safe are unavailable (as in the Takata airbag fiasco). Who wants to buy or lease a car the government says is unsafe to drive?

2. **Has the car been put to a prior use that may make a car less desirable (and less valuable) to most customers?** Many consumers wish to avoid

[3] If dealers are required to disclose a bank fee as a line item on an installment sale contract, that fee would have to be included in the Finance Charge whose disclosure is already required under the Truth in Lending Act. Under current federal regulations, dealers routinely hide and conceal the bank fee by including it in the cost of goods sold. But if the Commission modifies its proposed rule to require that bank fees be disclosed as a line item on a retail installment sale contract, the buyer will see for the first time the true dollar cost of financing (and realize they are paying interest charges on this fee, too). This rule change will empower consumers to make more informed decisions; it also will encourage consumers to do what they can to improve their credit scores, which is good not just for consumers but for car dealers, too.
It usually is not difficult to find documentation of undisclosed bank fees within a dealer's *internal paperwork* for a transaction. In deals where the assignee demands and receives a discount from the face value of a risky retail installment contract, that discount will be apparent by comparing the face value of the RISC and the lower payment made by the assignee to the dealer for assignment of that RISC. In other instances a dealer may make a separate payment to the assignee. Some but not all dealers note the bank fee or discount in their *internal documents* when accounting for the profit or loss on a deal. It also may appear on a dealer's *internal "recap sheet"* for a transaction, often used to determine the commissions payable to sales and finance personnel. In my experience, the bank fees reflected in a dealer's internal documents were never disclosed to a buyer or lessee.

purchasing cars that previously were put to heavy or harsh use. This includes vehicles which previously were part of a short-term rental fleet like those maintained by Hertz or Avis,[4] vehicles previously used as taxicabs or vehicles used as police cars. If consumers are informed of these prior uses, they may well wish to avoid a trip to a dealer to even look at such a vehicle, or at least adjust the price they are willing to pay. If a consumer is interested in buying such vehicles, which usually are available at a significant discount to the cost for comparable vehicles previously owned by average consumers, they can buy them directly from companies like Hertz or Avis, taxicab companies or municipal police departments. But if consumers buy a car from a car dealer, they need to be informed if a vehicle has been put to a troubling, disfavored prior use.

3. **Has the vehicle previously been declared a total loss, been caught in a flood or sustained material damage in an accident?** Dealers – who are experts in evaluating and purchasing used cars – can easily spot accident or flood damage when they evaluate the cars they purchase for their inventory. Vehicle damage matters to dealers: these cars are worth less than comparable cars that did not sustain accident or flood damage. It is vital that dealers disclose this information to buyers because it clearly will affect their decision making.

4. **Was the vehicle ever taken back by a manufacturer under a state's Lemon Law?** Few people would knowingly purchase a vehicle that was so unreliable that a manufacturer took back the vehicle under a state's Lemon Law. Those vehicles have been shown to be unreliable and defy repeated repair attempts. A reasonable consumer informed about a car's Lemon Law history would either (a) be unwilling to purchase the car for any price, or (b) be unwilling to pay the same amount as for a comparable model that had not been repurchased under a Lemon Law unless, perhaps, the dealer provided an extended warranty for the problems which led to the buyback. This information is material to a consumer's decision making and the amount, if any, they are willing to pay for such a vehicle, as well as whether they should demand an extended warranty.

The FTC also should specify that it is an unfair practice in violation of the FTC Act to conceal, misrepresent or omit material facts about the safety, mechanical or structural condition of a vehicle.

[4] See Attachment 1, an article from the November/December 2009 issue of Auto Rental News, plus supporting data, noting that over 90% of buyers would definitely not consider or were unlikely to consider purchasing a vehicle previously used for short-term rentals.

C. While the proposed rule focuses heavily on disclosures concerning Optional Add-ons, it neglects much needed disclosures about non-optional Add-ons dealers pre-install in cars before placing them on the lot for sale.

The agency's proposed rules demonstrate the Commission's keen awareness of the way add-ons have been used to deceive consumers. Its rule, as proposed, targets ***optional*** dealer add-ons in particular. Traditionally, optional add-ons are sold by a manager in a dealer's Finance and Insurance ("F&I") office, after agreement has been reached on the cash price for a vehicle. Optional Add-ons unquestionably are very important; the rule gives buyers the option of declining their purchase.

But the Commission's proposed rule does not fully take into consideration the deception and abuse when dealers install add-ons to a car **before** placing it on the lot for sale. These **non-optional Add-ons** are pre-installed by the dealer, especially on new motor vehicles, affording the customer no opportunity to decline their purchase. In sharp contrast to Optional Add-ons, a dealer's non-optional Add-ons effectively become "Required Options." If the customer wants the car, it must come with the dealer's non-optional, pre-installed products and their costs.

Section 463.2(a) makes it clear that "Add-ons" include both a dealer's non-optional, pre-installed Add-ons *and* Optional Add-ons. But the proposed rule requires Clear and Conspicuous disclosures **only** of "Optional Add-ons." 463.2(b). In addition, **only** "Optional Add-ons" must be itemized, per 463.5(b)(3). **These provisions create much more rigorous disclosure requirements for Optional Add-ons than for a dealer's non-optional Add-ons. The irony is that dealers' non-optional, pre-installed Add-ons present even greater dangers of concealment and abuse than the dangers of Optional Add-ons.** *See*, for example, the Complaint at Attachment 2, *LeBrun v. Nationwide Motor Sales Corp., et al.*, (Circuit Court for Baltimore County, Maryland, Case No. 03-C-02-005144), demonstrating how non-optional Add-ons can be and are deceptively concealed in the base price or MSRP of a new vehicle.

Dealers pre-install non-optional, "Required Option" Add-ons for two reasons: pre-installed add-ons can offer dealers huge profit margins, and they increase the price at which negotiations for the car purchase or lease will begin. [5] Many consumers buying a new vehicle

[5] For example, one Maryland dealer charged customers $895 for an "Appearance Package" it pre-installed on all of its cars in all of its multiple franchises. The actual components of the Appearance Package: pinstripes and cheap plastic door guards. No consumer in their right mind would have willingly paid the dealer's asking price of $895, if the items had been itemized, clearly and conspicuously disclosed and offered as an option. Another dealer pre-installed a "Gas and Glaze Package" for which it charged $495. This consisted of providing the customer a free tank of gas on the day of purchase (already required by the manufacturer) and one application of wax. In order to enhance its bargaining position, another dealer increased its asking price above the MSRP by almost $1,800 for these pre-installed but largely worthless items: $995 for Zxilon Molecular Adhesion (misleading name for a spray), $249 for pin stripes, $249 for wheel locks and $299 for mud guards (cheap pieces of plastic). When dealers pre-install these kinds of add-ons before putting cars on the lot, the potential for overcharging and consumer abuse is enormous. None of these items have real value, i.e., even when dealers pre-install them, companies who finance car purchases are unwilling to loan more because these items don't tangibly increase the value of the car. None of the non-optional Add-ons dealers typically use to inflate their asking price are recognized in the Blue Book, Black

know that at least in times when dealers have their usual supply of new cars, they should be able to purchase it below a car's MSRP. But if a dealer pre-installs non-optional products or services for which it can set any price, negotiations will begin from a higher point: the MSRP plus the cost of the dealer's non-optional, pre-installed Add-ons.

There is a fundamental difference between non-optional products that dealers pre-install, and those they offer to sell as an option. As has been observed:

> Products which 'sell themselves' or have actual value can be offered to buyers at the back-end, but products which have little or no value have to be forced on buyers by pre-loading them on cars before they are placed on the lot for sale.
>
> Pre-loaded add-ons deny buyers the right to turn down products which carry a high price and provide little or no value.[6]

In short, a dealer's non-optional, pre-installed Add-ons deny consumers the right to say "no" to what often are expensive products or charges they never requested or desired. The potential for deceptive and massive overcharging is clear. If there is a reason why consumers should not receive an itemized, Clear and Conspicuous disclosure of the charges for non-optional, pre-loaded Add-ons they may not know about, those reasons are not apparent. If there is a reason why dealers should not have to obtain Express, Informed Consent from buyers for products they never requested and may not know about, those reasons also are not apparent. Yet that is what the Commission's current rule would provide. Perhaps even worse, under the Commission's proposed rule, buyers will only receive an Offering Price, which can be deceptively inflated by charges for undisclosed, non-optional pre-installed Add-ons and undisclosed bank fees. Section 463.2(k) (as to undisclosed bank fees, see pp. 3 – 5 of these comments).

Book or other guides as adding to the market value of a car. Yet Maryland dealers also often add other ambiguous charges that go by different names such as "ADM," Adjusted Market Value, or Dealer Price Add-on. (ADM –which few consumers would understand -- apparently stands for added dealer markup).
A recent report from the National Consumer Law Center found dealers mark-up Add-on products by as much as 1,000%. https://www.nclc.org/issues/auto-add-ons-add-up.html#es Even during the years before new cars were scarce as a result of the pandemic, chip shortages and shipping constraints, some dealers would routinely list a charge of $999 to $2,999 as some form of adjusted market value as a pre-loaded charge on every car. These amounts helped dealers cover the cost of bank fees they never disclose to their subprime buyers, as reviewed at pp. 3 - 5 of these comments. In today's world with its constrained new car supply, newspaper accounts report some dealers are asking for extra profit anywhere from $5,000 for a typical sedan to $90,000 for a luxury car in short supply. If such non-optional, pre-loaded charges are not itemized and disclosed clearly and conspicuously, they can amount to highway robbery.

6 https://www.nclc.org/images/pdf/conferences_and_webinars/auto_webinars/presentations/presentation_sept16.pdf

If a product or service has value, it can and should be offered to consumers as an option. If it has no value or its listed price so far exceeds its market value as to be unconscionable, the Commission should not allow dealers to sell that product or service.

Given dealers' ability to deceive and abuse consumers by forcing them to buy expensive products or services they don't want, the Commission should prohibit dealers from pre-installing ANY products not requested by its purchaser. But if the Commission decides that dealers should be allowed to continue forcing Add-ons down the throat of unwilling buyers by pre-installing them, it should require -- at a minimum -- that dealers itemize and provide Clear and Conspicuous Disclosure of pre-installed options and that a dealer obtain a consumer's Express, Informed Consent to their purchase.

It is essential that the Commission's rule require that all non-optional, pre-installed products or services be included within the Offering Price. Not only is this a matter of fundamental fairness that will help buyers avoid being deceived, but requiring the cost of itemized, non-optional, pre-installed Add-ons to be included within the Offering Price will encourage dealers to set reasonable, defensible prices if those prices have to be disclosed at a time when the dealer is trying to obtain a customer's business.

The Commission recognizes this when it wrote, at the text adjacent to its footnote 111:

> 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.

Traditionally, purchases of Add-ons like extended service contracts and GAP agreements have been optional. There is a danger, unless the rule is changed, that some dealers may respond by making the purchase of these traditionally optional Add-ons absolutely mandatory. This would severely undermine the Commission's objectives. Again, I urge the Commission to prohibit dealers from making the purchase of **any** Add-ons mandatory.

D. The Commission's proposed rule does not adequately address issues presented when dealers offer "free" but illusory lifetime benefits as part of a sale or lease.

In recent years, more and more dealers seeking a competitive edge have begun advertising that their new and used cars include guaranteed "free" Lifetime benefits, such as "free oil changes for life." These "Free for a Lifetime" benefits are offered to persuade customers to buy a car from their dealership and return it to the dealership for service. (To see how widespread these programs have become, simply put "free oil changes for life" into google, or see https://www.bizjournals.com/baltimore/stories/2008/05/05/story9.html, noting that by 2008 some 45 dealers already sold cars under a "Dealer for Life" licensing program offered by Dealer for Life LLC). The free oil changes or other Lifetime benefits typically are available only at that

one dealership. These benefits can be quite an enticement, especially for vulnerable buyers drawn to anything "free." Many buyers fail to recognize that the dealer can raise the sale price of its car to cover the anticipated costs of its "free" future oil changes and other benefits. In other words, dealerships can embed, pre-load or hide the cost of future "free" oil change fees and other benefits in the car's purchase price. By doing so, they require a buyer to pay in advance for oil changes or other benefits they may never use should they or the dealership move, if their car is stolen or totaled in an accident or if they become disillusioned with the dealer for poor service, overcharging or other reasons.

Some of these "free for Life" programs require that a dealership's customer use the dealership for **all** maintenance required by a **manufacturer**; if customers miss just one oil change or decline to pay the dealership's retail price for other manufacturer recommended services like new engine air filters, changing transmission fluid or timing chain replacement, they void the free Lifetime benefits guarantee. Dealers who offer these "free" programs can more than make up for their costs by charging high fees for routine maintenance recommended by manufacturers. **This ability to overcharge for non-covered factory recommended services renders illusory the touted benefits of free oil changes.** See, for example, https://www.linkedin.com/pulse/beware-free-oil-change-life-costs-big-time-jerry-elman. These practices also allegedly violate the Magnuson-Moss Warranty Act's prohibition against "tying" arrangements. 15 U.S.C. 2302(c). *See* Complaint at Attachment 3, *Brown v. Deer Automotive Group, LLC d/b/a Liberty Ford* (Circuit Court for Baltimore County, Maryland, Case No. 03-C-15-002637).

Some dealers have found "free oil changes for life" programs such a competitive advantage that they have expanded "Lifetime" coverage for other items. For an example, see the website of Jones Toyota promoting its "Jones for a Lifetime" program, extending "free" Lifetime benefits to include not just oil changes but parts and service, engine repairs, car washes, etc. https://www.jonesjunction.com/jones-for-a-lifetime.htm (last viewed September 8, 2022). The clear purpose is to tie the customer to the dealership for all automotive needs, while leaving the dealership the ability to recoup costs and obtain further profits through other charges during the years a customer brings their car back to the dealer. **Many of the dealers advertising these programs excel at touting their benefits, yet deceptively fail to disclose the terms and conditions that severely limit or nullify their value.**[7]

There are serious questions whether the Commission's proposed rule adequately addresses issues that arise in connection with dealerships offering "free" lifetime benefits. Under section 463.2(a), it appears that "Free Lifetime" benefit programs may qualify as an "Add-on," but only where dealers charge customers for these supposed benefits by raising the

[7]Additional serious concerns arise when one of the dealerships offering free Lifetime benefits becomes insolvent or sells its assets to a third party. Customers who pay more for a car to obtain the free Lifetime benefits may be left with a hollow guarantee they can't enforce.

selling price of their vehicle to cover that expense. In so doing, a dealer arguably would be "indirectly" charging a consumer. This would qualify a "Free Lifetime" program as an "Add-on" under section 463.2(a). If, however, it can not be demonstrated that a dealer increased a car's price to take account of the cost of providing "free" benefits under the program, the Commission's rule would *not* protect consumers. Proving whether a dealer raised its car's price to cover future expenses under its free Lifetime program can be difficult. If a free lifetime benefit program does not qualify as an "Add-on" under the rule, the rule will not reach this potential product, allowing consumers to be misled.

As discussed in greater detail at pp. 7 - 9, the Commission's rule should be amended to require that dealers (i) itemize and disclose Clearly and Conspicuously all dealer non-optional, pre-installed Add-ons, and (ii) obtain Express, Informed Consent for all non-optional, pre-installed Add-ons.

If sections 463.3(a) and (b) apply to dealer advertisements of free lifetime benefit programs, dealers would be required to disclose costs, limitations, benefits or any other Material aspect of the free Lifetime benefits program. That would be very helpful; however, under the rule as proposed, it may not be sufficiently clear that section 463.3 on Prohibited misrepresentations applies to all advertising. **As reviewed more fully at pp. 16 - 17 of these comments, I urge the Commission to amend the heading of section 463.3 by clarifying that it applies to "Prohibited misrepresentations and omissions in advertising or any documents provided to a customer."**

E. Dealer falsification of documents signed by the buyer.

The Commission's proposed rule does not adequately address a problem that occurs with troubling frequency, especially where a customer is retired or reports income relatively low in comparison to the price the dealer charged for a car. Some dealers have customers sign finance applications in blank, saying they will fill them in for the client. While the customer gave honest answers in good faith to questions about their employment, income and expenses, unscrupulous dealers would falsify the information on the financing application to obtain approval from a financing source. This sometimes involved doubling or tripling the customer's social security payments or other income, inventing jobs they'd never held, increasing the amount of time they'd been employed, decreasing the amount of rent they paid, etc. Worse, the most unscrupulous dealerships took advantage of software readily available on the internet which facilitate creation or falsification of W2 or 1099 forms or other financial documents. They callously used these phony forms to substantiate the false information they inserted on the customer's signed application for financing. These practices make it appear the customer lied about their income or other information on the application for financing, when in fact it was the dealer who committed fraud against both the customer and the financing sources to whom it shopped the customer's signed application. And, of course, these practices not only expose customers to criminal prosecution, they also result in customers being approved for a loan they cannot afford, often leading to repossession, embarrassment, severe damage to their credit scores and serious marital or family squabbles.

In an effort to stop these practices, the Commission's proposed rule should be amended to explicitly prohibit dealers from obtaining a customer's signature on a financial application before all information requested by the dealership has been placed on the application. Dealers should be required to provide customers with a copy of their signed financial application immediately after the customer signs it. Even a legible carbon copy will suffice. This requirement will enable consumers to protect themselves from criminal liability in the event dealership personnel subsequently change information on that form.

If a car buyer knew that a dealer had falsified or would falsify the information she gave it for her financial application, it's likely that buyer would decline to go through with her purchase. First, that buyer would be likely to conclude the dealer was not honest and not to be trusted. Second, the buyer would be angry that the dealer made it look as though she was trying to defraud the business, putting her in danger of being prosecuted. Third, she likely would realize the dealer did not think she could afford the loan it offered, given her actual income and expenses; few people want to enter into a loan knowing they can't afford it. Fourth, she would realize the dealer was trying to trick her into entering a deal that legitimate finance companies would realize she could not afford if the dealer had conveyed the actual income and expense information she provided to the dealer.

To the Commission's credit, its proposed section 463.3(g) recognizes dealers can and do make misrepresentations on a consumer's application for financing. However, considering the grave consequences of falsifying information on a customer's application for financing, more needs to be done beyond this trade regulation rule. I urge the FTC to consult with the CFPB and state Attorneys General to address these problems. Some companies that regularly purchase installment sale contracts from dealerships, such as Ford Motor Credit, audit dealership performance; they compile data on dealers whose installment sale contracts subsequently end in loan defaults. If the FTC, CFPB and/or state Attorneys General would investigate dealerships whose customers have higher than customary loan default rates, they are likely to identify dealerships that engage in falsification of customer information on financial applications. Because many finance companies bundle and sell packages of car loans in the market to investors, the SEC may well have a role, too. More needs to be done to close this serious avenue for fraud on consumers, third party finance companies and investors. [8]

[8] Virtually all third party companies whose business includes purchasing installment sale contracts from auto dealers require that dealers sign a master agreement under which, *inter alia,* they require a dealer to certify that the information on deal documents the dealer sends them are accurate. When a customer defaults on a contract, and the third party assignee discovers there has been a falsification of consumer income, one would expect it would require the dealer to buy back the contract, as is its right. But experience shows this does not always happen: there are many companies in the auto financing marketplace eager to purchase installment sales contracts and in cases where a dealer sends a lot of business to the third party assignee, the latter may simply decline to enforce its rights to have the dealer buy back the contract. Valuing their profitable relations with dealership clients above all, these companies do nothing to punish or deter dealer fraud and leave consumers on their own to address the dealership's wrongdoing, realizing most consumers can't afford to hire a lawyer who will challenge the dealership's bad acts or bring the assignee into litigation. And so dealers – especially larger dealers or dealers with multiple franchises and those with high volume – have little incentive to change their profitable

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

Yes – especially with regard to the Offering Price. The Commission's proposal to require that dealers provide prospective customers with an Offering Price early in that customer's communication with a dealer about a specific vehicle is an excellent one. Having this information at the outset of communications will help consumers decide if it is worth their time to follow up with a dealership. However, the value of the Offering Price communication can be enhanced enormously if that dealer's initial communication with a consumer contains disclosure of additional, essential information:

A. Section 463.2(k) defines "Offering Price" to *exclude* Governmental Charges. **Prospective customers can and should be advised of Governmental Charges in the Offering Price**. This will give prospective customers an early clear estimate of an "out-the-door" price, and may help some customers realize that given the total cost, they should look for a different model.[9] This is likely to affect consumer behavior. Dealers can readily calculate the amount of Governmental Charges based on the model in question being offered to an in-state resident.

B. **I have recommended elsewhere that the Commission should prohibit dealers from pre-installing any and all non-optional Add-ons because they so often are wildly overpriced, add no discernable market value to a vehicle and can be forced on buyers without their knowledge. Please see pp. 7 – 9. But if the Commission does not prohibit dealers from pre-installing non-optional Add-ons, it is essential that the Commission's rule at a minimum require that all non-optional, pre-installed products or services be itemized and included within the Offering Price. Not only is this a matter of fundamental fairness that will help buyers avoid being deceived, but requiring the cost of itemized, non-optional, pre-installed Add-ons to be included within the Offering Price will encourage dealers to set reasonable, defensible prices if those prices have to be disclosed at a time when the dealer is trying to obtain a customer's business.**

C. W**hen transmitting their Offering Price for a vehicle to prospective customers, dealers should be required to include a disclosure of prior uses to which a vehicle has been put. Please see pp. 5 – 6. Providing this information at the outset**

---

practices. Candidly I don't pretend to know whether the following is within the FTC's power but an appropriate agency should require when companies that accept assignment of RISCs become aware that a dealership has falsified the information on a consumer's financial application, those companies should be required to report that fact to the appropriate federal agency and to the state agency that licenses the responsible car dealer.

[9] In an era when the average cost of a new car exceeds $42,000, as the FTC observes in its prefatory comments on its proposed rule, and state tax charges may be 6% of the purchase price, state tax charges can easily add more than $2,500 to the cost of a new vehicle. That's enough to be a difference maker for many consumers, who may well decide to look for a less expensive car.

clearly will help consumers save time from visiting a dealership to look at a particular car, only to learn after investing a good deal of time that the car has an open safety recall, flood or accident damage, known adverse prior use or Lemon Law buyback that renders it unsuitable for that particular buyer or lessee.

6. Economic burdens on car dealers if the Commission's rule is adopted.

Car dealers can be expected to oppose the FTC's new rule on the grounds of economic burden. I only wish to observe that virtually all dealers of any size rely on software providers to generate the forms they use to prepare paperwork for every vehicle sale, lease or financing. There is significant, aggressive competition among the providers of the software dealers use that will help keep costs down. You can see that competition in the numerous ads by software providers in publications like Automotive News, WardsAuto Dealer Business Magazine, Auto Dealer Today, F & I and Showroom Magazine, NIADA's Used Car Dealer Magazine, NADA's many publications, the newsletters of regional auto dealer trade associations all across the country and many others. National and regional dealer conventions invariably include software provider vendors seeking to sell their products. You can google "car dealer software providers" to see a partial listing of providers in this very competitive business.[10]

Virtually all software for car dealers includes "desking software." This is software designed to print every form a dealership needs to complete a sale, lease or financing transaction. It can be used to quickly and easily determine the best way to maximize a dealer's profit on any given transaction; it also facilitates unlawful payment packing. If FTC staff have not personally seen the power of desking software, or experienced the way it empowers crafty dealership personnel to manipulate the financial terms in every transaction for the dealer's benefit with just the push of a button, I strongly encourage you to obtain a demonstration. It is eye opening. Among other things, you will quickly see why payment packing is so simple.

9. Should any final rule address disclosures in other languages?

Yes. When a consumer negotiates a purchase, lease or financing transaction at a dealership in a language other than English, and does not have the ability to understand complex legal documents written in English, that person is literally dependent on the integrity of multiple personnel at the dealership who are involved in their transaction, most of whom the customer never meets. That's a frightening prospect, given that over 90% of the American public have zero trust in the car buying process. https://www.strongautomotive.com/how-public-perceives-car-salespeople/

The FTC already requires that when a sale is conducted in Spanish, the Buyer's Guide must be available in Spanish. 16 C.F.R. 455.5(a). Over 40 million Americans speak Spanish as

[10] Some dealers may use RISCs or other forms prepared by their local car dealer trade association. The cost of any changes required by the Commission's rule are thus spread across a large number of companies, minimizing the impact on any one dealer.

their primary language. https://en.wikipedia.org/wiki/Spanish_language_in_the_United_States. And while proficiency in English is growing among Spanish speakers, one-third of all latinos are not proficient. https://www.pewresearch.org/hispanic/2015/05/12/english-proficiency-on-the-rise-among-latinos/

At a bare minimum, the FTC's rule should require that when a purchase, lease or financing transaction is negotiated in Spanish, Spanish speaking customers must receive all disclosures they are asked to sign be written in easily understood Spanish.

California already mandates that customers who negotiate a car sale in the five most commonly spoken foreign languages in the state receive copies of their contracts in that language. https://leginfo.legislature.ca.gov/faces/billTextClient.xhtml?bill_id=201920200AB3254. This requirement has not caused dealers to stop selling cars in California to consumers for whom English is a second tongue, but it brings needed transparency, efficiency and fundamental fairness to consumers looking to purchase, lease or finance a vehicle in that state. The FTC's proposed rule should require no less.

Dealers can be expected to complain about costs this would entail. But, again, deal documents are prepared by software providers, who compete with one another on price. It's unlikely that any increased costs will be little more than *de minimis* if the Commission requires that disclosures or all deal documents be written in the language in which they were negotiated.

10. Clarity and scope of Definitions in section 463.2.

A. Section 463.2(a) describes Add-on or Add-on Products and Services broadly, but in 463.2(b), it requires that *only* Optional Add-on Products or Services be included in an Add-on List. *Only* those optional products or services on the Add-on List must be Clearly and Conspicuously disclosed. *Only* Optional Add-ons are required to be itemized, per 463.5(b). **But as reviewed more fully at pp. 7 - 9, it is imperative that dealers also be required to itemize and disclose Clearly and Conspicuously when they pre-install non-optional Add-ons to cars before putting those cars on the lot for sale; the rule also must require that consumers give their Express, Informed Consent to each of a dealer's non-optional, pre-installed options.** Please review the more detailed comments at pp. 7 – 9 with respect to Add-on definitions – these are extremely important.

B. Section 463.2(c) defining "*Cash Price without Optional Add-ons*" may not be sufficiently clear in one respect. It provides that this figure means the Offering Price, plus required Governmental Charges, minus any discounts, rebates, or trade-in valuation amounts, and excludes optional Add-ons. How are dealers to derive this figure where a customer has negative equity in her trade? In

determining "Cash Price without Optional Add-ons" must the dealer use the gross amount of the trade, or the net amount, which would be a negative figure in cases where the customer owes more on her loan than her trade is worth? Dealers should be required to use the net amount a customer receives on their trade; otherwise, buyers will be misled into paying more than they were expecting.

C. Section 463.2(h) defines *Government Charges*. As proposed, the definition of Governmental Charges includes "inspection and certification costs, and other such fees and charges." It is entirely foreseeable that dealers will use this language to justify as Government Charges various fees that are NOT imposed by the Government. For example, dealers may exploit this language to justify their adding a charge to inspect and certify a used car under a manufacturer's Certified Used Car Program, which is NOT a fee imposed by any Government. They also are likely to include "doc fees" as Government Charges, but these are not charges imposed by the Government; instead, many dealers charge doc fees to cover their own costs of processing paperwork for a buyer or lessee. Again, doc fees are not imposed by the Government. Those fees, which sometimes are authorized and regulated by states, actually constitute nothing more than added dealer profit. Yes, dealers incur some costs for obtaining title and registration for a customer, but that cost is nothing more than a routine overhead cost, akin to what a dealer pays to provide coffee or air conditioning for its employees and customers. Document processing fees cannot legitimately be passed along to buyers or lessees under the rubric of Government Charges. In many cases, one component of dealer costs in this regard are those paid for electronic title and registration. Again, those fees are not paid to the Government; they are paid to private companies. Charges for electronic titling and registration should not be allowed as Government Charges.

Thus, to avoid confusion, the Commission should delete from 363.2(h) the phrase "inspection or certification costs." A sentence should be added at the end of (h) to the effect that "Government Charges" do not include dealer document or document processing fees ("doc fees"), or electronic titling and registration fees, which are not imposed by the Government. This will help assure that dealers do not try to pass off their own self-serving doc fees or those for electronic titling and registration as ones imposed by the Government.

D. On the definition of Offering Price, please see comments at p. 13.

12. Are the proposed prohibitions on misrepresentations in section 463.3 clear, meaningful and appropriate?

A. The scope of prohibited misrepresentations should explicitly include "omissions," and clarify that misrepresentations are prohibited in both advertising and documents provided to customers at any time.

In the Commission's prefatory material to the rule, it notes 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" (emphasis added; citing footnote 53).

While the Commission rightly observes that an "omission" can be an act or practice that is deceptive, it surprisingly did not include "omissions" within the explicit scope of "Prohibited misrepresentations" in section 463.3. A simple modification of the heading to section 463.3 will clarify this.

In addition, the FTC writes a good deal about the importance of Advertising Misrepresentations. However, its proposed definition in 463.3 ("Prohibited misrepresentations") curiously does not explicitly make it clear that a dealer's advertisements are subject to prohibitions against misrepresentations. (Whenever there's the smallest loophole, some dealers will exploit it, realizing that the FTC can only bring a limited amount of cases).

In order to clarify and drive home the meaning of the Commission's rule, I strongly urge that the heading of 463.3 be changed by inserting the words included below in **bold:**

> "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 **or omission, in advertising or any documents provided to a customer,** regarding:
>
> [(a) through (p) in 463.3]

B. The rule should prohibit dealers from impersonating police officers.

As reviewed in more detail at pp. 18 – 19 of these comments, some dealers try to force dealers return a car when they can't sell the customer's RISC on terms they find acceptable. Their most effective tactic is to have someone call the customer, indicating that they are a police officer in the local area. That person falsely informs the customer there is a warrant out for the customer's arrest or that the dealer has reported the car as stolen, when in fact none of that is true. This kind of deception should be explicitly prohibited by adding a new item in the list of Prohibited misrepresentations in section 463.3, as follows: "causing any person to impersonate a police officer for any purpose."

16. **Should the Commission consider stronger provisions to eliminate the abuses endemic to spot deliveries/yo-yo financing?**

Yes. Some "spot deliveries" work out satisfactorily for both dealers and their customers. But when bad spot deliveries go bad – as so many of them do -- it's only when a dealer develops "seller's remorse." In spot deliveries gone bad, the dealer decides it's no longer willing to honor the RISC that it prepared and presented to its customer for signature and which it also signed, a document which plainly informs the buyer that it is the **selling dealer** who is unconditionally extending credit for the buyer's purchase. Not surprisingly, as experienced by more than 20 of my clients who were victimized by spot deliveries, dealers don't explain the deal is contingent on financing.

Most spot delivery agreements that purport to make a deal contingent on financing say this is necessary because the customer wants to take the car home on the day of sale. But instead of explaining that a deal is contingent on financing (contrary to the language of the customer's RISC) and actually asking whether the customer would like to delay delivery until final approval is obtained, dealers remain silent to simply deny consumers that choice. By doing so, dealers have for many years denied consumers the right to make an informed decision, in favor of an action that gives themselves the ability to assure its customer can't buy a car from one of its competitors.

Applying fundamental principles of fairness, if dealers can change their mind after presenting a RISC to customers which it signs, customers should have a concomitant right to change their minds. Yet if that idea was presented to dealers, they wouldn't think it's fair to dealers.

But the traditional justification for spot deliveries (customers always want to take delivery the same day they see the car, and it can take days to get the paperwork back and forth from dealer to third party finance source) is transparently misguided and woefully outdated. First, dealers claim the customer insists on taking delivery right away, but they deny their customer that choice. Second, in today's fast changing world, information and documents are transmitted instantly by electronic means. It no longer takes days to complete a deal. See, for example, a December 13, 2017 report about Credit Acceptance Corporation – a major subprime financing source – which notes:

> For each deal [in Credit Acceptance Corporation's CAPS program], a dealer can input information about a borrower (monthly income, co-signer information, bank data, etc.) and deal structure (down payment, interest rate, and loan term) **and receive a response within 30 seconds** with finalized profit/loss information

> for every vehicle [in a dealer's inventory] available. (emphasis added).[11]

The Commission clearly appreciates the potential for abuse in spot deliveries. Its proposed provisions are certainly a step forward, but they are not sufficient. Spot delivery sales are so profitable for dealers that they will continue to engage in them, even if the Commission enacts all of its proposed rules intended to prevent dealer misrepresentations about the finality of a financed transaction. The Commission has more than adequate information to know that dealers don't always comply with its rules. Stronger action is needed to put a stop to the chronic, harmful practices associated with spot deliveries and yo-yo financing.

Maryland presents a case study. Beginning not later than the early 1980's and for multiple decades, the Maryland Motor Vehicle Administration issued a series of Bulletins to dealers, reminding them that spot deliveries were prohibited as contrary to Maryland law under the state's MVA regulations. The Maryland Attorney General also issued guidance advising dealers to the same effect. Maryland dealers knew all about the regulations, yet lured by irresistible profits and their burning desire to make sure their customers didn't buy from another dealer, dealers simply continued to mislead customers by engaging in spot deliveries for decades. They repeatedly hauled customers back in to their offices like a yo-yo on a string, relying upon the widely criticized "Spot Delivery Agreement." Dealers simply made – and continue to make -- too much money to stop these practices; it's entirely foreseeable they will do everything they can to continue profiting from their yo-yo financing schemes, notwithstanding the Commission's proposed rule. Paying the rare customer who takes them to court or arbitration is just a cost of doing business, like electricity or insurance. In all likelihood dealers will continue to engage in these practices unless the agency takes definitive steps to eliminate them.

In Question 16, the Commission wisely asks whether it should require that retail installment sale contracts include a clause prohibiting financing-contingent sales. Yes! Many years ago, the Commission promulgated its rule on the Preservation of Consumer Claims and Defenses, 16 CFR 433. This rule, which requires inclusion of prescribed contract terms on retail installment sales contracts, works well. The language is straightforward; consumers can see it for themselves on their copy of the RISC; dealers know they cannot finance car purchases if their form RISC does not include the required language. Courts know how to enforce it. Every vendor who provides form Retail Installment Sales Contracts to dealers can readily incorporate a new paragraph into their products.

As proposed by the National Association of Consumer Advocates ("NACA") and other consumer groups, the following provisions (carefully modeled after the Commission's Rule for

[11] See Attachment 4, a Reality Check on Credit Acceptance Corporation prepared for the Think Computer Corporation and Foundation, p. 2. Credit Acceptance Corporation's attempt to patent its rapid response system for quick approvals was unsuccessful. *Id.,* p. 38.

Preservation of Consumer Claims and Defenses) should be included in every RISC in 15 point type:

> A. A consumer credit contract for the sale of a vehicle by a dealer shall include the following paragraph:
> "BY PRESENTING THIS CONSUMER CREDIT CONTRACT TO A CONSUMER FOR SIGNATURE, THE DEALER AS CREDITOR AFFIRMS THAT THE CONSUMER HAS BEEN FULLY APPROVED FOR THE CREDIT THAT IS BEING EXTENDED. ANY TERMS THAT ASSERT THAT THIS CREDIT CONTRACT IS "CONDITIONAL" OR "NOT YET APPROVED" OR SIMILAR [WORDS] TO THAT EFFECT SHALL BE VOID AND UNENFORCEABLE. ONCE SIGNED BY THE CONSUMER, THIS CREDIT CONTRACT CANNOT BE WITHDRAWN BY THE DEALER WHETHER OR NOT THIS CREDIT CONTRACT IS ASSIGNED TO A THIRD PARTY."
> B. Regarding a consumer credit contract for the sale of a vehicle by a dealer, misrepresenting the credit contract as conditional after the consumer has signed it is an unfair and deceptive practice under 15 USC Section 45(a)."

In my experience, informed by the way Maryland auto dealers disregarded regulations and repeated admonitions from the MVA and state Attorney General, dealers will continue looking for every possible way to continue engaging in profitable spot deliveries. The only way to effectively and truly ban spot deliveries, is to make it crystal clear on the face of a RISC that financing for a deal is complete when the customer is offered and signs the dealer's retail installment sales contract.

DEALERS COERCE CONSUMERS TO RETURN CARS THROUGH UNLAWFUL SCARE TACTICS

When evaluating what changes, if any, to make in its proposed rule regarding spot sales and yo-yo financing, the Commission should take into consideration the incredibly deceptive acts many car dealers use to coerce customers into returning their cars. I was surprised to find no mention of this in the Commission's prefatory material.

As far as I know, Maryland is no better or worse than other states when it comes to deceptive trade practices by car dealers. When a consumer in Maryland balks at returning a car she thought was hers, some dealers get impatient. They arrange to have an employee or

someone else call that customer, identifying themselves (falsely) as a police officer in the local area. That person will inform the customer there is a warrant out for their arrest, for either driving a stolen car or refusing to return a vehicle that belongs to the dealership. In my experience, that threat works: customers return the car. Customers then are pressured to sign new deal documents on worse terms. Some dealers even assess these customers a fee for the mileage they put on the "dealer's car," or keep some or all of their downpayment. At a minimum, the Commission should add a provision prohibiting dealers from impersonating a police officer to obtain return of a car from a customer who believes the purchase of her car was complete. *See* p. 17.

Other common practices involved dealers telling consumers (usually falsely) that their trade-in car had already been sold, so the customer would have no transportation unless they signed papers for a new (worse) deal. When some customers would bring their car back to a dealer to discuss signing new paperwork, yet balk at signing a worse deal, the dealer would ask for their keys to the car so they could check its condition. And then the dealer would refuse to give back the keys until the customer signed the paperwork with new, worse terms.

The Commission should flat-out prohibit spot deliveries by requiring that dealers include the quoted language noted above in their purchase orders and retail installment sale contracts. It also should prohibit dealers from selling or even moving a customer's trade-in vehicle off of a dealer's lot, or making any repairs to changes to a customer's trade-in, before a buyer or lessee and the dealer sign a mutually binding contract.

18. Are there other common misrepresentations in the marketplace that are not adequately addressed by the proposed rules?

Yes. Please see pp. 5 - 6 for comments on dealers who misrepresent vehicles they offer for sale or lease by concealing or failing to disclose material facts that affect a consumer's decision to purchase and the price they are willing to pay. Please see pp. 7 – 9 on the urgent need for itemized disclosures of the product, services and prices dealers charge when they pre-install products or services on their cars **before** placing them on the lot for sale.

For certain disclosures to have maximum utility, they should be made a part of any document forwarded to a prospective customer as part of the Offering Price. Please see p. 13.

19. Are the rule's disclosures clear, meaningful and appropriate?

If the Commission declines to prohibit dealers from pre-installing **non-optional Add-ons** before their cars are put on the lot for sale, it is imperative the Commission's rule require that **all** such Add-ons be itemized, that dealers be required to make Clear and Conspicuous disclosures of those items and their cost, and that dealers be required to obtain Express, Informed Consent to purchasing these products or services. As the rule currently is written, only Optional Add-ons are subject to these crucial consumer protections. Please see pp. 7 – 9 on this extremely important point.

The rule's disclosures are meaningful, but can be made far more substantive and useful if the Commission requires that dealers disclose basic information that affect consumers' choice of or conduct regarding buying or leasing decisions. These are outlined at pp. 5 – 6 of these comments.

21. Should this section 463.4 include additional disclosure requirements?

Yes, please see pp. 3 – 5 of these comments urging disclosure of undisclosed bank fees and pp. 5 – 6 urging disclosure material facts about a vehicle's prior use.

22. Is the timing of required disclosures appropriate and sufficient?

As reviewed at pp. 5 – 9 of these comments, when a dealer first provides a prospective customer with an Offering Price for a vehicle, it should also be required to disclose material facts about its vehicle's prior use – along with the Offering Price. Dealers should not be allowed to simultaneously attract customers with a low Offering Price, while keeping to themselves material facts that absolutely affect the car's fair market price and suitability for a given customer. Providing these disclosures at the outset of a possible transaction will save consumers valuable time.

24. Should dealers be required to make disclosures and contracts in languages other than English?

Yes. Please see pp. 14 – 15 for comments on this question.

25. Are there other steps the Commission should consider to protect consumers from being misled and to ensure consumers understand their financing options?

Yes. Please see pp. 3 – 5 of these comments on undisclosed bank fees.

In addition, a huge concern is the way dealers focus a prospective customer's attention on the monthly payment. Dealers have learned that especially when buyers have had trouble getting an auto loan, there primary concern is whether they can afford that payment. But dealers have long used this misdirection to sneak extra fees into a purchase or lease transaction. It is very important that all disclosures be presented to a dealer's customer **in writing**, enabling a customer to see, for example, that the dealer proposes to charge them $895 for pinstripes and cheap plastic door edge guards.

When the Commission issues its rule, it will be helpful if it simultaneously provides the public with an easy-to-understand explanation that consumers are (i) encouraged to inquire about auto financing through their credit union or bank **before** they start shopping for a vehicle, (i) free to negotiate over the price of each and every dealer Add-on, and (ii) explain

how the rule gives consumers the tools they need to understand a dealer's offer to sell, lease and finance a vehicle.

43. Is the 24 month record retention period appropriate and sufficient?

No, 24 months is an insufficient period for record retention, given the Commission's need to monitor whether car dealers comply with its new rule and whether changes should be considered.

Given the broad swath of the Commission's responsibilities, with only limited staff and resources – and its prior experience with how long it can take to investigate, negotiate and potentially litigate with car dealers over rule violations – it's perfectly clear the rule must require a considerably longer record retention period. If dealers are allowed to destroy critical documents before the Commission is ready to move, the Commission will seriously undermine enforcement of the rule, shortchanging itself and the public.

Car dealers already must retain their odometer disclosure statements for a minimum of 5 years. 49 CFR 580.8. The federal Sarbanes-Oxley Act of 2022 requires that some public car dealers retain records needed for auditing purposes for seven years. Various federal and state laws require record retention of specific documents for differing time periods. But car dealers are widely advised by those in the industry to maintain many documents for 7 or 8 years. *See*, for example, https://vada.com/wp-content/uploads/2018/04/Dixon_Hughes_Auto_Records_Retention_Sheet701.pdf or https://www.hhcpa.com/wp-content/uploads/2016/10/Record-Retention-Guidelines-for-Dealerships.pdf

If the public is to obtain the maximum benefit of its rule, the document retention period should be for an absolute minimum of 7 years or for the length of the consumer's retail installment sales contract, whichever is greater. But if the Commission believes an even longer retention period is required, given its realistic estimate based on its experience of how long it may require to address and resolve investigations into dealer compliance with the rule, that should be an important factor.

45. The benefits and costs of record retention.

Establishing a period for record retention long enough to enable the Commission to investigate dealer compliance with its rule has huge benefits: dealers will have a meaningful incentive to comply. Without the documents it needs, the Commission will have no ability to monitor the dealer compliance critical to achieving its rule's worthy objectives. Without the ability to access deal documents, consumers who wish to try to hold dealers to account for violating the rule will be denied justice.

Dealers surely will push back on record retention, knowing that their deal documents can and will be used against them. One argument, of course, will be that record retention will

be expensive. But before the crocodile tears of car dealers are taken too seriously, please examine what's happened to the cost of digital document storage in the last 60 years. As noted by the USC Marshall School of Business in its 2018 article "How Did Digital Storage (effectively) Become Free," those costs have gone from astronomical to almost nothing. https://www.marshall.usc.edu/blog/how-did-digital-storage-effectively-become-free.

46. What records should be maintained to comply with the rule?

I believe the Commission has identified the documents needed to determine dealer compliance with the rule, though I emphasize the importance of retaining the customer's application for financing and supporting documents. See comments above at pp. 11 – 12.

Sincerely,

/s/

Mark Steinbach