

Before the
FEDERAL TRADE COMMISSION
Washington, DC 20554

Notice of Proposed Rulemaking
on the sale, financing, and leasing of motor vehicles by motor vehicle dealers
16 CFR Part 463, RIN 3084-AB72

Comments of

Americans for Financial Reform
Center for Economic Justice
Consumer Federation of America
Center for Auto Safety
Center for Responsible Lending
Consumer Reports
Consumers for Auto Reliability and Safety
National Association of Consumer Advocates
National Consumer Law Center on behalf of its low-income clients
National Consumers League
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Summary of Comments

Cars are essential for most households in the United States, but access to a safe, affordable vehicle is increasingly limited for many consumers by sharply rising prices, burdensome accompanying debt obligations, and problematic dealer practices. The cost of a vehicle represents such a significant proportion of many American households' total annual income that over 88% of new car purchases and 45% of used car purchases are financed.

Enforcement actions by federal and state consumer protection agencies, as well as private litigation, have highlighted auto dealer practices that exploit the inherent power imbalance in vehicle sales, effectively further driving up the cost of many vehicles. The unfair and deceptive practices focused on in these actions include:

- Misleading advertising that conceals the vehicle price and the limited applicability of offers or rebates.
- The deceptive inclusion of Add-on products or services at inflated prices, many of which have little to no benefit for consumers.
- Discrimination against people of color in the pricing of Add-ons and finance interest rates.
- Selling unsafe and damaged vehicles.
- Engaging in yo-yo sales transactions in which dealers trick consumers into financing agreements with more expensive terms than previously.
- Verbally negotiating terms of the sale in a language other than English but presenting the consumer with contracts in English that contradict the negotiated terms.
- Installing devices to abusively facilitate electronic repossessions and harass consumers.
- Using electronic signatures and electronic records to facilitate fraud.

Auto-related complaint numbers to federal and state protection agencies are generally higher than most other consumer transactions. Indeed, complaints to the Better Business Bureau about new and used auto dealers, when combined, have been either the first or second highest against any industry in the U.S. for the past twenty years.

Research shows that deceptive dealer conduct disproportionately affects minority communities: people of color are charged higher prices for vehicles, and they are charged higher interest rates than equally or less creditworthy white consumers. Hispanic and Black consumers are also targeted for more Add-on products and services, and dealers have charged them more for these products than they charge white consumers.

Financing a purchase through a dealer allows the dealership to select the creditor and control the entire car-financing process. Dealer financing provides the mechanism that allows dealers to commit many of the unfair and deceptive practices addressed by the FTC's NPRM.

The FTC's proposed rule targets particular advertising, pricing, and financing practices to bring transparency and consistency to the marketplace. We applaud the FTC's proposal and its comprehensive rule, and we make the following recommendations regarding its provisions:

A. The FTC’s rule should be adopted and strengthened to incentivize fairness, encourage competition with honest dealers, and give consumers meaningful relief when they have been defrauded.

The FTC’s proposals are necessary to define with more specificity unfair and deceptive practices that impact consumers when purchasing and financing vehicle purchases. While adopting the proposed rule will enable the FTC to provide much needed consumer redress, **additional protections** are necessary to incentivize fairness in these transactions, and to enable consumers to obtain their own relief.

1. Add-ons

Add-ons are extremely lucrative for car dealers but often provide little benefit to consumers. Many abuses in the sale of Add-ons occur because the sales and financing process is shrouded in secrecy and occurs in a high-pressure environment at the end of a complex and fatiguing transaction. Unlike other goods, there are no listed prices for Add-ons. Different consumers are charged different amounts for the same Add-on—often resulting in discrimination against consumers of color. Some Add-ons have no or little value. This NPRM prohibits Add-ons without value and requires multiple disclosures. But to provide meaningful protection that will disincentivize unfair practices, we recommend the following additional protections:

- Consumers should have a thirty-day cooling off period within which they can obtain a full refund for Add-ons.
- The FTC should adopt its proposal prohibiting the sale of Add-ons with no value and expand that to include Add-ons with almost no value compared to the Add-on price.
- The FTC should adopt its proposed rules providing a price list for consumers to see the true cost of Add-ons. For Add-ons that differ in price based upon the vehicle being sold, the list should indicate the low, median, and high prices charged to consumers over the previous two years, and a specific list should be published for each vehicle for the prices of Add-ons for that car.

2. Offering Price

The most important factor for consumers purchasing a vehicle is its price, yet the price is almost impossible to ascertain without spending hours at the dealership. The price of cars is higher now than ever, and dealer conduct has further obfuscated consumers’ ability to learn how much the dealer will accept as full payment through advertisements that deceptively exclude fees or crowd the advertisement with special offers that have limited or no applicability to most consumers. Dealers also pack vehicle sales with mandatory and price-inflated Add-ons, increasing the cost and creating further confusion and uncertainty about the ultimate price of a vehicle.

- The FTC should require the use of a simplified, uniform, comprehensive and legally enforceable “Offering Price” by dealers.
- The Offering Price should include all pre-installed and mandatory Add-on products, and all dealer fees.
- The definition of “government charges” should be limited to those charges that are imposed by and paid to a government entity.

- The FTC should also require dealers to provide (and attach in writing to each vehicle offered for sale) an Offering Price along with a list of optional Add-ons and their non-negotiable prices, require consistent use of the Offering Price, and explicitly provide that any buyer can purchase the car by paying the Offering Price and the applicable government charges in cash or with other financing.

3. Financing disclosures

The process of financing a vehicle purchase is complex and presents a unique opportunity for dealers to take advantage of consumer confusion and lack of bargaining power. To fully appreciate the financing dynamics, consumers would need to understand the interplay of numerous components, including loan terms, monthly payment amounts, payment consideration, and the addition of products and services. A critical variable in this process is the loan's interest rate, but consumers often have no way of knowing if the rate they are offered is fair or capable of being negotiated. Although many consumers focus on the monthly payment to determine whether they can afford a vehicle, dealers exploit this confusion by focusing on the monthly payment instead of the total cost, often hiding inflated rates and Add-ons to increase their profit.

- The FTC should adopt its proposal to provide key information about monthly payments to consumers, including a disclosure that a longer loan term will increase the total cost of the vehicle, a calculation of the total vehicle cost when discussing monthly payment amounts, and an itemization of any trade-in or down payment amounts.

4. Recordkeeping

Strong recordkeeping requirements are a critical tool for enforcement agencies and victims to ensure compliance. However, the FTC's proposal to require recordkeeping for only two years is inadequate.

- The FTC should adopt the proposed content of records that dealers are required to retain, and it should extend the retention period to seven years or the length of the retail installment sales contract, whichever is longer.
- The FTC should also require dealers to make consumer-specific records available to that consumer upon request.

B. The FTC should expand its rule to address additional unfair and deceptive dealer practices.

The Commission has asked for comment on several specific dealer practices, and it has asked generally about other unfair and deceptive practices that should be addressed.

1. Safety and condition of vehicles

Some of the most harmful practices perpetuated by auto dealers involve the sale of hazardous vehicles with unrepaired recalls, mechanical defects, undisclosed collision and material damage history, and altered odometers. The FTC's Used Car Rule is decades out-of-date. We strongly recommend that:

The FTC should specify that it is an unfair practice to misrepresent the safety, mechanical, or structural condition of a vehicle, odometer reading, or history of a vehicle offered for sale by dealers.

2. Yo-yo sales

One of the most egregious auto financing practices is yo-yo sales. In these unfair and deceptive transactions, after a consumer has signed a financing contract and left the dealership with a vehicle, the dealer contacts the consumer at a later point in time, claiming that the deal “fell through” and that the consumer is required to sign a new financing contract with terms that are worse than previously agreed to. This conduct is deceptive by its very nature, and it is inconsistent with federal consumer protection law. In connection with the “yo-yo” tactics of hauling a consumer back to the dealership, the dealer holds the consumer’s down payment or trade-in hostage until the new deal is finalized. Even when the deal falls through and no subsequent contract is signed, some dealers keep the down payment or have already sold the trade-in, leaving consumers much worse off than they started. This conduct is so embedded in car sales that dealers routinely insert a “spot delivery agreement” into the loan paperwork, effectively giving them a license to change the terms.

The FTC should:

- Prohibit yo-yo sales.
- Require dealers to insert a clause into every retail installment sales contract providing that the deal is final.
- Prohibit dealers from asserting ownership over the down payment or trade-in until the binding credit contract is signed.

3. Language access

Nearly 22% of the U.S. population over the age of five speaks a language other than English at home, and, of these, 38.3% are Limited English Proficient (LEP). These consumers face significant barriers when navigating the purchase of financial products, and the purchase of a car is complex even for native English speakers. This leaves LEP consumers particularly vulnerable to unfair and deceptive dealer conduct, such as failing to translate documents after negotiating a sale in a language other than English, falsifying finance applications, and sneaking in worthless Add-ons to their contracts.

The FTC should:

- require the translation of each required disclosure, as well as the most critical sales documents: the buyer’s order and the retail installment sales contract.

4. Devices used to aid in electronic repossessions

Buy-here, pay-here and some other dealerships solicit consumers who believe they have poor credit and few options. Instead of legitimately underwriting the vehicle financing, these dealers impose excessively high interest rates, and often utilize abusive methods to scare consumers into making

their monthly payments when they fall behind and are at risk of repossession. Such methods include the installation of devices that remotely disable vehicles (sometimes dangerously and without regard to the location or operation of the vehicle), or that prevent vehicles from being started (starter interrupt devices), making them undriveable until the consumer has caught up on their payments. These practices endanger consumers, and, especially when used to scare consumers into making their payments, should be declared unlawful.

The FTC should:

- prohibit the use of electronic disabling and starter interrupt devices, and consider additional regulation of other devices used in electronic repossession.

5. Electronic records and signatures

Federal and state laws promulgated to permit electronic transactions over the internet were intended only to provide legal equivalency to electronic records, not enhanced status for electronic media. However, too often, and especially among dealers using certain finance companies, the practice of meeting statutory requirements for writings with electronic records and signatures has been the means of facilitating fraud, and unfair and deceptive practices.

The FTC should declare that it is an unfair practice for an auto dealer to fail to ensure that:

- The E-Sign demonstration of consent meets all of the material demonstration requirements found in E-Sign § 7001(c)(1)(C)(ii).
- Records required to be provided to the consumer in writing are fully visual to the consumer before the consumer is asked to sign the record.
- Records provided to the consumer electronically are provided in a manner that the consumer can review and retain the record.

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Comments

I. Introduction

These comments are submitted by **Americans for Financial Reform, Center for Economic Justice, Consumer Federation of America, Center for Auto Safety, Center for Responsible Lending, Consumer Reports, Consumers for Auto Reliability and Safety, National Association of Consumer Advocates, National Consumer Law Center** on behalf of its low-income clients, **National Consumers League, UnidosUS, and U.S. PIRG**. We appreciate the opportunity to comment on the Federal Trade Commission’s (FTC) Notice of Proposed Rulemaking (NPRM) on the sale, financing, and leasing of motor vehicles by dealers.¹ We welcome this proposal and applaud the FTC for engaging in this important area that impacts the majority of households in the United States. As the FTC has recognized and detailed in the NPRM, the process of selling, financing, and leasing new and used vehicles in the United States is fundamentally broken. Because of misrepresentations, and unfair or deceptive practices, consumers are paying far more for vehicles than they bargained for and believed.

An auto purchase is the second largest financial transaction for millions of consumers, second only to buying a home. And, for the 45 million households (35% of American households) that don’t own homes, it is their most significant financial transaction. Automobiles are the only regular major purchase that is financed primarily by the seller²—87% of buyers finance the car through the dealership, making the dealer the original creditor.³ A car purchase is arguably “the most complicated transaction a consumer ever faces, even more so than a home purchase.”⁴

The more than 100,000 complaints from car buyers that the FTC has received in three years⁵ and the many law enforcement actions and sweeps against dealers that the FTC and state authorities have initiated⁶ demonstrate that the current sales process for motor vehicles in the U.S. does not provide the necessary incentives and deterrents to create an even playing field for consumer buyers. The current mix of federal and state disclosure and other requirements and restraints on unfair and deceptive practices is clearly not sufficient. As the FTC has recognized by publishing the NPRM, substantially more must be done.

The added costs associated with persistent deceptions and unfair practices by some auto dealers unnecessarily drive up the costs of purchasing vehicles, making defaults and repossessions more likely. They demonstrate that the rules governing this marketplace fail to ensure that both parties to the transaction—the buyer as well as the seller—can manage the risks of the transactions. Indeed, in one

¹ Federal Trade Comm’n Motor Vehicle Dealers Trade Regulation Rule, Notice of Proposed Rulemaking, 87 Fed. Reg. 42,012 (July 13, 2022), available at <https://www.govinfo.gov/content/pkg/FR-2022-07-13/pdf/2022-14214.pdf> [hereinafter NPRM].

² Adam J. Levitin, *The Fast and the Usurious: Putting the Brakes on Auto Lending Abuses*, 108 Geo. L.J. 1257, 1262 (2020), available at 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 [hereinafter Levitin, *The Fast and the Usurious*].

³ See *id.* at 1316.

⁴ *Id.* at 1262.

⁵ See NPRM, *supra* note 1, at 42,015.

⁶ See *id.* at 42,015, 42,016.

corner of the auto sales market, there is a more than one in three chance that a transaction will fail: in buy-here, pay-here dealerships, the default and repossession rate is over 37%.⁷

II. While private cars are essential for most households, swollen prices create dangers.

A. Cars are essential for most households.

Access to a vehicle is necessary to reach jobs and economic opportunity in much of the nation.

- Even in the nation's most transit-oriented metropolitan area, New York City, only 15% of jobs are accessible within an hour by transit.⁸ Other cities with less robust transit systems have even fewer jobs accessible via transit.⁹
- In rural areas, owning a car is essential for almost all households to access jobs, stores, schools, medical services, and community services.¹⁰ Public transportation simply does not meet the need.¹¹

This dependence on vehicle ownership is the result of decades of public spending decisions. Since 1956, highway spending has accounted for nearly four-fifths of all government investment in the nation's transportation system.¹² Meanwhile, housing development policies routinely result in the separation of people from jobs and other necessities, making access to an automobile all but mandatory for the completion of daily tasks.¹³

For most households in the United States, a car is vital not only for physical mobility, but also for economic mobility. Car access improves families' economic outcomes in a variety of ways. In the short term, having a car provides access to more and better job opportunities, and expanded affordable

⁷ *Id.* at 42,015 n.46.

⁸ Andrew Owen & Brendan Murphy, Accessibility Observatory, Center for Transp. Studies, Univ. of Minn., *Access Across America: Transit 2019*, at 2 (Oct. 2020), *available at* https://ao.umn.edu/research/america/transit/2019/documents/AccessAcrossAmerica-Transit2019_sm.pdf (comparing Table 2, at 4—Number of Jobs Reachable by Number of Minutes, 2019, with Table 1, at 2—Metropolitan Areas Ranked by Total Employment, 2019).

⁹ *Id.*

¹⁰ Rural residents drive more miles per year than do urban residents, and make 90% of their trips by car (compared to 65% for urban residents). Jeremy Mattson & Dilip Mistry, North Dakota State Univ., Upper Great Plains Transp. Inst., Small Urban and Rural Center on Mobility Rural Transit Fact Book 2021 (May 2021), *available at* <https://www.ugpti.org/resources/reports/downloads/surtcom21-07.pdf>.

¹¹ In 2019, only 60% of rural counties nationwide had public transit, and 28% of those had very limited service. TRIP, *Rural Connections: Challenges and Opportunities in America's Heartland 5* (May 22, 2019), *available at* https://tripnet.org/wp-content/uploads/2019/08/Rural_Roads_TRIP_Report_May_2019.pdf.

¹² Congressional Budget Office, *Public Spending on Transportation and Water Infrastructure, 1956 to 2017* (Oct. 15, 2018), *available at* <https://www.cbo.gov/system/files/2018-10/54539-Infrastructure.pdf>.

¹³ Andrew Owen & Brendan Murphy, Accessibility Observatory, Center for Transport. Studies, Univ. of Minn., *Access Across America: Transit 2019*, at 2 (Oct. 2020), *available at* https://ao.umn.edu/research/america/transit/2019/documents/AccessAcrossAmerica-Transit2019_sm.pdf (comparing Table 2, at 4—Number of Jobs Reachable by Number of Minutes, 2019, with Table 1, at 2—Metropolitan Areas Ranked by Total Employment, 2019).

housing options. In the long term, research has shown that shorter commute times, which are often possible only with a car, are one of the strongest factors in helping families escape poverty.¹⁴ Transportation has a stronger role in social mobility than other community characteristics, including elementary school test scores, percentage of two-parent families, or crime.¹⁵ At the same time, owning a car is expensive and drives millions of households to take on significant debt. As prices paid for cars rise, so too does the risk of non-payment and loss of the car, which often jeopardizes access to employment and other necessities of living.

B. The high purchase costs for cars create high levels of debt.

The cost of new and used vehicles has risen steadily such that the average price of a new car in 2022 is more than \$42,000, and the average price of a used car is \$26,000.¹⁶ These are significant expenditures for almost any American family. But for low-income, and even medium-income families, the cost of a vehicle purchase can equal or exceed an entire year's income. In 2022, the average used car sale price was more than \$33,000, or 160% of the annual income for a family living at the federal poverty line (\$20,832), and well over a third of the annual income for a family of three living at the median in the U.S.¹⁷ The expense of purchasing a car—either new or used—represents such a significant proportion of many American households' total annual income that financing the purchase is essential. Indeed, over 88% of new car purchases and 45% of used cars are financed.¹⁸ An additional 27% of new cars are leased.¹⁹

Transportation is the second largest expense for American households after housing.²⁰ Purchasing, running, and maintaining the family car cost the average household more than \$6,000 in 2020.²¹

¹⁴ Raj Chetty & Nathaniel Hendren, Harvard University and NBER, *The Impacts of Neighborhoods on Intergenerational Mobility: Childhood Exposure Effects and County-Level Estimates* 70 (May 2015), *available at* http://scholar.harvard.edu/files/hendren/files/nbhds_paper.pdf.

¹⁵ Mikayla Bouchard, *Transportation Emerges as Crucial to Escaping Poverty*, *The N.Y. Times*, May 7, 2015, *available at* <https://www.nytimes.com/2015/05/07/upshot/transportation-emerges-as-crucial-to-escaping-poverty.html> (reporting on discussion with Nathaniel Hendren, one of the authors of the Chetty & Hendren study, *supra* note 14).

¹⁶ NPRM, *supra* note 1, at 42,012, nn.5 & 6.

¹⁷ CoPilot, *Return to Normal Index* (July 6, 2022), *available at* <https://www.copilotsearch.com/index-report-07-2022/>; Emily A. Shrider et al., 51 U.S. Census Bureau *Income and Poverty in the United States: 2020*, at 51 (Sept. 2021), *available at* <https://www.census.gov/content/dam/Census/library/publications/2021/demo/p60-273.pdf>; Census Report, *Median Household Income in the Past 12 Months (In 2020 Inflation-adjusted Dollars) by Household Size American Community Survey 5-year estimates*, *available at* https://censusreporter.org/data/table/?table=B19019&geo_ids=01000US&primary_geo_id=01000US.

¹⁸ Melinda Zabritski, Experian, *State of the Automotive Finance Market: Q2 2022*, at 6 (Aug. 2022), *available at* <https://www.experian.com/content/dam/noindex/na/us/automotive/finance-trends/2022/q2-2022-state-auto-finance-market.pdf>.

¹⁹ *Id.*

²⁰ News Release, U.S. Bureau of Labor Statistics, *Consumer Expenditures – 2020*, at 4, 9 (Sept. 2021), *available at* <https://www.bls.gov/news.release/pdf/cesan.pdf>.

²¹ *Id.* at 6.

In 2022, Americans carry more auto debt than at any time in history, and the amount of this type of indebtedness continues to increase. Auto debt is now the third largest consumer credit market in the U.S. and has doubled in the past ten years.²² More Americans hold outstanding auto loans than ever before. And among certain groups of Americans – particularly older Americans – auto debt is rising even more quickly than it is for the general population.²³

- Americans currently owe more for their cars than ever before; total outstanding auto debt currently sits at an all-time high of over \$1.5 trillion.²⁴
- This debt is widespread, with over 109 million accounts currently open - equivalent to nearly one in three Americans paying off their cars.²⁵
- Car financing debt is originated more frequently than mortgages or student loans. As a result, although the total dollar amount of vehicle credit is less than the dollar value of mortgage credit or student loan credit, the number of vehicle financings each year far exceeds the total number of both mortgage and student loans combined.²⁶ Each origination is a potential opportunity for abuse.
- Car debt has also grown across almost every metric that could put consumers at risk. The size of loans for new cars has increased by 17% since 2020; the average amount financed now sits at \$39,540.²⁷
- The size of monthly payments for used car purchases has jumped by 27% in the same period; for the first time, used car monthly payments exceed \$500.²⁸
- Loan terms continue a decade-long trend of getting longer, extending the time consumers are “underwater” and more vulnerable to financial trouble; of new car loans issued in the first quarter of 2022, 73% carried a term of sixty months or longer.²⁹

²² See Ryan Kelly et al., Consumer Fin. Prot. Bureau, Rising prices means more auto loan debt (Feb. 24, 2022), available at <https://www.consumerfinance.gov/about-us/blog/rising-car-prices-means-more-auto-loan-debt/>.

²³ Greg Iacurci, CNBC, *Debt among oldest Americans skyrockets 543% in two decades* (Feb. 26, 2020), available at <https://www.cnbc.com/2020/02/26/debt-among-older-americans-increases-dramatically-in-past-two-decades.html>.

²⁴ As of the second quarter of 2022. Federal Reserve Bank of New York, Center Microeconomic Data, Household Credit and Debt Report (Q2 2022) (downloaded Aug. 18, 2022) at <https://www.newyorkfed.org/microeconomics/hhdc>.

²⁵ *Id.*

²⁶ National Consumer Law Center, *New Ways to Understand the Impact of Auto Finance on Low-Income Families* (May 2016), available at http://www.nclc.org/images/pdf/car_sales/ibImportance_AutoFinanceFINAL53116.pdf.

²⁷ Melinda Zabritski, Experian, *State of the Automotive Finance Market Q1 2022* (May 23, 2022), available at <https://www.experian.com/content/dam/noindex/na/us/automotive/finance-trends/2022/q1-2022-state-of-automotive-finance-market.pdf>.

²⁸ *Id.*

²⁹ Ronald Montoya, Edmunds, *How Long Should a Car Loan Be?* (Apr. 1, 2022), available at <https://www.edmunds.com/car-loan/how-long-should-my-car-loan-be.html>.

C. Dealer financing provides a mechanism for dealers to increase costs to consumers.

The escalation in the raw prices of vehicles is only one component of the increasing debt loads held by American consumers who finance the purchase of cars. The cost of vehicles is considerably swollen because of the added costs attributable to the fact that dealers finance the majority of the sales. As noted by the FTC, approximately 70% of consumers use dealer-provided indirect financing at the dealership.³⁰

Financing a purchase through a dealer empowers the dealership to select the creditor and assert its control over the entire car-financing process.³¹ Dealers often mark up interest rates for consumers, splitting the increased cost to consumers with the assignee as extra profit.³² Buyers with high APRs assigned to them by dealers will end up paying hundreds of millions of dollars more on their vehicles than if they had received average interest rates based on their credit scores.³³ As noted by the FTC in the NPRM, dealers' arrangements for financing are a significant source of profit for car dealers. More than half of dealers' gross profit for new car sales comes from the financing and insurance,³⁴ and more than a third of the profit for used car sales came from the financing.³⁵ When dealers handle the financing process, they are able to conceal the added costs triggered by Add-ons, markups, and interest rate padding.

Dealers sell the financing contracts for consumers with better credit scores to banks and credit unions.³⁶ The financing contracts for consumers with low credit scores are siphoned to auto finance companies, which originate approximately two-thirds of all loans to borrowers with credit scores under 660.³⁷ The increase in higher-cost "subprime" loans leaves many households deeply vulnerable to high interest rates and predatory practices. In 2022, more than 16% of all auto loans originated were subprime or deep subprime.³⁸

³⁰ NPRM, *supra* note 1, at 42,014 n.37 (citing National Auto. Dealers Ass'n data).

³¹ See Ryan Felton, Consumer Reports, Many Americans are Overpaying for Their Car Loans (Oct. 27, 2021), available at <https://www.consumerreports.org/car-financing/many-americans-overpay-for-car-loans-a8076436935/> [hereinafter Many Americans are Overpaying].

³² See Center for Responsible Lending, Auto Lending Practices Can Take Consumers for a Ride, available at <https://www.responsiblelending.org/sites/default/files/nodes/files/research-publication/crl-finfairness-autoloans-mar2019.pdf> [hereinafter Take Consumers for a Ride].

³³ See Many Americans are Overpaying, *supra* note 31.

³⁴ NPRM, *supra* note 1, at 42,014 n.27 (citing Nat'l Auto. Dealers Ass'n, Average Dealership Profile 1 (2020)).

³⁵ *Id.* at 42,014 n.32 (citing Nat'l Auto. Dealers Ass'n, Average Dealership Profile 1 (2020)).

³⁶ Ashley Donohoe, The Balance, What is Dealer Financing? (Nov. 13, 2021), available at <https://www.thebalance.com/what-is-dealer-financing-5196113>.

³⁷ Andrew F. Haughwout et al., Federal Reserve Bank of New York, *Just Released: Auto Lending Keeps Pace as Delinquencies Mount in Auto Finance Sector* (Nov. 14, 2017), available at <https://libertystreeteconomics.newyorkfed.org/2017/11/just-released-auto-lending-keeps-pace-as-delinquencies-mount-in-auto-finance-sector/>.

³⁸ Melinda Zabritski, Experian, State of the Automotive Finance Market: Q2 2022 (Aug. 2022), available at <https://www.experian.com/content/dam/noindex/na/us/automotive/finance-trends/2022/q2-2022-state-auto-finance-market.pdf>.

The practices of buy-here, pay-here dealers are even more damaging to their customers. Buy-here, pay-here lots keep their lending in-house. These dealers regularly charge in excess of 20% for this financing,³⁹ with default rates ranging in the neighborhood of 37.5%.⁴⁰ Churning of vehicles by selling them, repossessing them, and then selling them again is the business model of some buy-here, pay-here dealers.⁴¹ Due to recent supply chain issues and the surging demand for used cars, the pace of repossessions has picked up, sometimes within two or three weeks of a missed payment.⁴²

An analysis by the *Los Angeles Times* of the lifecycle of a used car sold on a buy-here, pay-here lot in Kansas City found that the car, which had a Kelley Blue Book value of \$5,350, was first sold at the buy-here, pay-here lot for over twice that price at \$11,000. Then, in the span of only three years, that same car was repossessed, and resold eight times, each time at double or even triple the car's actual value.⁴³

NCLC attorneys, in their work as expert witnesses in a significant investigation action against a buy-here, pay-here lender, found that, in the majority of the randomly selected sales transactions examined: 1) the dealer performed no analysis of the buyer's ability to pay; 2) most cars were sold, repossessed and sold again—multiple times; and 3) there was often no logical relationship between the price charged for a car and its Blue Book value.⁴⁴

Unlike homes, which generally increase in value and provide a source of intergenerational wealth, cars are a depreciating asset.⁴⁵ So, the costs of purchasing cars are sunk expenses—with little likelihood that they will ever be recovered.⁴⁶

³⁹ 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, *available at* <https://www.experian.com/content/dam/marketing/na/automotive/quarterly-webinars/credit-trends/2020-quarterly-trends/v2-2020-q4-state-automotive-market.pdf>.

⁴⁰ 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, Federal Reserve Bank of Richmond, Coronavirus and Auto Lending: A Market Outlook (Apr. 16, 2020), *available at* https://www.richmondfed.org/-/media/RichmondFedOrg/research/economists/bios/pdfs/%20wang_covid19_paper.pdf

⁴¹ See Center for Responsible Lending, Signs of Predatory Auto Finance Loans, *available at* <https://www.responsiblelending.org/issues/signs-predatory-auto-finance>.

⁴² Don Lee, *In another pandemic fallout, used-car prices are way up, and the repo man is back*, L.A. Times, July 25, 2022, *available at* <https://www.latimes.com/politics/story/2022-07-25/used-car-prices-are-way-up-and-the-repo-man-is-back>.

⁴³ Ken Bensinger, *A Vicious Cycle in the Used-Car Business*, L.A. Times, Oct. 30, 2011, *available at* <https://www.latimes.com/business/la-xpm-2011-oct-30-la-fi-buy-here-pay-here-part1-storyb-story.html>.

⁴⁴ NCLC attorneys John Van Alst and Margot Saunders provided expert services in 2012 and 2013 related to litigation against a buy-here, pay-here lender.

⁴⁵ Andrew Lanoie, *Why Real Estate is One Asset that Builds Generational Wealth*, Forbes, Jan. 7, 2021, *available at* <https://www.forbes.com/sites/forbesrealestatecouncil/2021/01/07/why-real-estate-is-one-asset-that-builds-generational-wealth/?sh=575793f41f68>.

⁴⁶ Mary Van Keuren, Bankrate, *Understanding Car Depreciation* (Jan. 4, 2021), *available at* <https://www.bankrate.com/insurance/car/understanding-car-depreciation/>.

D. Dealer unfair and deceptive actions increase the costs and debt loads of American car buyers.

The dealer financing process provides the mechanism that facilitates multiple problematic practices that each independently increase the cost of a car. These problematic practices include:

1. Unclear and unjustified increases in car prices. *See* section IV. B, *infra*, on Offering Price disclosures.
2. Padded interest rates in dealer financed transactions, which often involves discrimination against consumers of color. *See* section II. E, *infra* on the impacts of discrimination, and section IV, C, *infra*, on Financing Disclosures.
3. Inconsistent and opaque pricing for dealer Add-ons, some with highly questionable benefits to the car buyer. *See* section IV. D *infra*, on Add-on practices.
4. Continued misrepresentations. *See* section IV. E *infra*, on the importance of adopting the proposed list of prohibited misrepresentations.
5. The destruction of records related to the sale and financing, making it more difficult for the consumers to protect themselves from illicit dealer actions. *See* section IV.F, *infra*, on the importance of improved Record Keeping requirements.
6. The verbal negotiation of terms of the sale in a language other than English accompanied by written financing agreements in English with terms different from those negotiated. *See* section V. A, *infra*, on Non-English Language Transactions.
7. The sale of unsafe and unsafe vehicles. *See* section V. B, *infra*, on Unsafe Vehicles.
8. The need to protect consumers from remote electronic disablement of their vehicles. *See* section V. C, *infra*, on Electronic Disablement devices.
9. Dealers' broken promises regarding financing commitments. *See* section V. D, *infra*, on Yoyo Sales.
10. The use of electronic signatures and electronic records to facilitate fraudulent changes in the financing contract. *See* section V. E *infra*, on Electronic Transactions.

Auto dealers often increase the cost of the transaction—and the amount the consumer will need to finance—well beyond the price of the car. One way they do this is by cramming “Add-on” products into the contract. These products include anti-theft devices and overpriced accessories that add little to the value of the car, as well as insurance products and extended warranties that often provide little benefit. Dealers also often “roll over” the unpaid balance of a previous loan (the portion that exceeds the value of the trade-in vehicle) into a new loan. This practice increases the cost of the new purchase, and significantly adds to the consumer’s financial vulnerability in the event of job loss or other household financial crisis. In 2019, a third of all traded-in vehicles carried negative equity – a figure that has nearly doubled over the last decade – with these vehicles being underwater by an average of \$5,000.⁴⁷ As a result of the Add-ons and the rollover of debt owed on trade-ins and Add-ons, the loan-

⁴⁷ AnnaMaria Andreotis & Ben Eisen, MarketWatch, *More borrowers are going underwater on car loans*, The Wall St. J., Nov. 9, 2019, available at <https://www.marketwatch.com/story/more-borrowers-are-going-underwater-on-car-loans-2019-11-09-111032935>.

to-value ratio for car loans often exceeds 100%. In 2021, the average loan-to-value ratio of securitized auto loans was nearly 110% on subprime loans, and 96% for prime loans.⁴⁸ More Americans are underwater on their car loans than at any time in recent history. The latest data available from 2020 revealed that nearly half of new auto loans in April 2020 were underwater, with an average negative equity of \$5,571.⁴⁹ In mid-2020, more than one-quarter of all trade-ins toward the purchase of a used vehicle carried negative equity.⁵⁰

E. Discrimination also increases the costs for purchasing and financing cars.

The lack of transparency and consistency in the auto sales and finance marketplace allowed discrimination. As explained below, studies show that a consumer's race or ethnicity can increase the cost the consumer is charged for the purchase of a car, for Add-ons sold with the car, and for financing. This discrimination reduces the ability of households with people of color to obtain a car and benefit from car ownership and the physical and economic mobility that comes with it. Of those at or below the poverty line, 31% of African American households and 20% of Hispanic households lack access to a car, compared with just 13% of white households. This disparity holds true for households above the poverty level and in both metro and non-metro areas.⁵¹

1. Discrimination increases the raw price charged for the cars.

Several studies have shown that some races and ethnicities are charged higher prices for the car itself. Two studies by Ian Ayres in 1991 and 1995 found that African Americans were quoted higher prices than whites.⁵² A 2003 analysis of more than half a million car purchase transactions at over 3,500 dealerships made similar findings.⁵³

⁴⁸ S&P Global Ratings, U.S. Auto Loan ABS Tracker: Full-Year and December 2021 Performance (Feb. 17, 2022), available at <https://www.spglobal.com/ratings/en/research/articles/220217-u-s-auto-loan-abs-tracker-full-year-and-december-2021-performance-12283024>.

⁴⁹ Edmunds, Negative Equity on Vehicle Trade-Ins Hit All-Time High in April, According to Edmunds, (May 12, 2020), available at <https://www.edmunds.com/industry/press/negative-equity-on-vehicle-trade-ins-hit-all-time-high-in-april-according-to-edmunds.html>.

⁵⁰ Edmunds, Edmunds Experts Say More Car Shoppers Are Turning to the Used Market During COVID-19, (July 7, 2020), available at <https://www.edmunds.com/industry/press/edmunds-experts-say-more-car-shoppers-are-turning-to-the-used-market-during-covid-19.html>.

⁵¹ See John W. Van Alst, National Consumer Law Center, Time to Stop Racing Cars: The Role of Race and Ethnicity in Buying and Using a Car (Apr. 2019) available at https://www.nclc.org/images/pdf/car_sales/report-time-to-stop-racing-cars-april2019.pdf.

⁵² Ian Ayres, *Further Evidence of Discrimination in New Car Negotiations and Estimates of Its Cause*, 94 *Mich. L. Rev.* 109 (1995); Ian Ayres, *Fair Driving: Gender and Race Discrimination in Retail Car Negotiations*, 104 *Harv. L. Rev.* 817 (Feb. 1991). See also Ian Ayres & Peter Siegelman, *Race and Gender Discrimination in Bargaining for a New Car*, *The Am. Econ. Review*, Vol. 85, No. 3, at 304-321 (Jun. 1995) (analyzing over 300 paired audits and finding that white male car buyers were quoted significantly lower prices than African American or female buyers).

⁵³ Fiona Scott Morton, Florian Zettelmeyer, & Jorge Silva-Risso, Consumer Information and Discrimination: Does the Internet Affect the Pricing of New Cars to Women and Minorities?, *Quantitative Mktg. & Econ.* 1: 65 (2003), available at <https://doi.org/10.1023/A:1023529910567>.

2. Discrimination increases the price for Add-on products sold with the car.

In a comprehensive 2017 study of millions of Add-on products sold to consumers as part of car sale transactions,⁵⁴ NCLC found that variation between Add-on prices was often dramatic. Many dealers charged one consumer hundreds or even thousands of dollars more than another consumer for the same product. One dealer, who paid \$50 for a window etching product, marked the price up to as low as \$349 for some consumers and as high as \$5,000 for others.⁵⁵

As with other discretionary charges in auto sales and finance, NCLC found that where there was discretion and inconsistency, there was disparate impact by ethnicity. Examining service contract data from forty-eight states and the District of Columbia, NCLC found that average percentage markups for service contracts were higher for Hispanics than for non-Hispanics in forty-four states.

In addition to being targeted for higher prices, minority buyers may be targeted for more Add-ons by dealers than other car buyers. A 2014 study conducted by the Center for Responsible Lending found that African Americans and Latinos were sold multiple Add-on products almost twice as often as white consumers. Thirty percent of African Americans and 27% of Latinos were sold multiple Add-ons compared to 16% of whites. The study also found that car purchases that included multiple Add-ons were associated with higher delinquency rates and greater risk of repossession.⁵⁶

3. Discrimination increases the financing costs of car purchases for households of color.

Dealers make much of their profit from marking up interest rates.⁵⁷ Discrimination is often the only basis for different rates between consumers. Black and Hispanic applicants' loan approval rates are 1.5 percentage points lower, even controlling for creditworthiness. In aggregate, discrimination crowds out 80,000 minority loans each year. Results are stronger where racial biases are more prevalent and banking competition is lower. Minority borrowers pay seventy basis point higher interest rates, but default less, all things equal.⁵⁸ Analyses of investigations into these markups show that consumers with the same credit risk can pay very different interest rates, depending on how much the dealer marks up

⁵⁴ See John W. Van Alst, Carolyn Carter, Marina Levy, and Yael Shavit, National Consumer Law Center, *Auto Add-Ons Add Up: How Dealer Discretion Drives Excessive, Arbitrary, and Discriminatory Pricing* (Oct. 2017), available at <https://www.nclc.org/issues/auto-Add-ons-add-up.html> [hereinafter NCLC Auto Add-Ons Add Up]

⁵⁵ *Id.* at 21-22.

⁵⁶ Delvin Davis, Center for Responsible Lending, *Non-Negotiable: Negotiation Doesn't Help African Americans and Latinos on Dealer-Financed Car Loans* (Jan. 2014), available at <https://www.responsiblelending.org/other-consumer-loans/auto-financing/research-analysis/CRL-Auto-Non-Neg-Report.pdf> [hereinafter Non-Negotiable].

⁵⁷ Ian Ayres, *Guess how much cheaper your auto loan would be if dealers had to play fair*, *The Wash. Post*, June 26, 2019, available at <https://www.washingtonpost.com/opinions/2019/06/26/guess-how-much-cheaper-your-auto-loan-would-be-if-dealers-had-play-fair/>.

⁵⁸ Alexander W. Butler, Erik J. Mayer, & James P. Weston, *Racial Discrimination in the Auto Loan Market* 41-42 (Mar. 31, 2021), available at https://files.consumerfinance.gov/f/documents/cfpb_mayer_racial-discrimination-in-the-auto-loan-market.pdf. [hereinafter *Racial Discrimination in the Auto Loan Market*].

the interest rate for each customer, and that minority car buyers were marked up more often and by a greater amount than other car buyers.⁵⁹

These discriminatory patterns were confirmed in an investigation by the Consumer Financial Protection Bureau (CFPB) and the U. S. Department of Justice (DOJ), which determined that over 235,000 people of color were charged higher interest rates for car loans than other consumers between April 2011 and December 2013.⁶⁰

More recently, research has shown continued differences in financing terms between white and minority car buyers. In 2018, the National Fair Housing Alliance released findings showing that better qualified non-white testers were quoted more expensive financing options than white testers, with their average total payment being \$2,662.56 higher.⁶¹

In 2020, the FTC filed a complaint and stipulated order against a New York car dealer that included data analysis showing that the practices at the dealership resulted in higher charges to African American and Hispanic customers, who were charged the maximum allowable interest rate markup 50% more often than non-Hispanic white borrowers. Non-Hispanic white consumers were not charged any markup or were given an interest rate below the buy rate the dealer was provided, about twice as often as African American or Hispanic borrowers.⁶²

Consumers have no way of knowing that their interest rate is being marked up or by how much.⁶³ Even those charged with supervising auto finance for fair lending purposes find it difficult to see if there is

⁵⁹ Analyses by Professor Ian Ayres of the Yale Schools of Law and Management and Professor of Vanderbilt University's School of Management showed that African Americans were marked up more often than whites and that their average markup was higher. Since the buyer's credit score and other indicia of creditworthiness are already included in the buy rate, the differences in markup were not a reflection of any differences in creditworthiness. *See* Ian Ayres, Expert Report, *Willis v. American Honda Fin. Corp.*, No. 3-02-0490 (M.D. Tenn. July 1, 2004), available at <https://www.nclc.org/images/pdf/litigation/closed/ahfc-ianayresreportexhibits.pdf>; Mark A. Cohen, Report on the Racial Impact of AHFC's Finance Charge Markup Policy, *Willis v. American Honda Fin. Corp.*, No. 3-02-0490 (M.D. Tenn. June 30, 2004), available at <https://www.nclc.org/images/pdf/litigation/closed/ahfc-cohenreportappendices-a-c.pdf>.

⁶⁰ Administrative Proceeding Consent Order, *In re Ally Financial Inc. & Ally Bank*, File No. 2013-CFPB-0010 (CFPB Dec. 20, 2013), available at https://files.consumerfinance.gov/f/201312_cfpb_consent-order_ally.pdf. This analysis focused on just one major car financing company, Ally Financial, Inc. Subsequent enforcement actions followed, based on similar analyses against American Honda Finance Corporation, Fifth Third Bank, and Toyota Motor Credit Corporation. Information about the enforcement actions is available at <https://www.consumerfinance.gov/policy-compliance/enforcement/actions/?page=1&topics=auto-loans#o-filterable-list-controls>.

⁶¹ Lisa Rice & Erich Schwartz Jr., National Fair Housing Alliance, *Discrimination When Buying A Car: How the Color of Your Skin Can Affect Your Car-Shopping Experience* (Jan. 2018), available at <https://nationalfairhousing.org/wp-content/uploads/2018/01/Discrimination-When-Buying-a-Car-FINAL-1-11-2018.pdf>.

⁶² *See, e.g.*, Complaint, *Federal Trade Comm'n v. Liberty Chevrolet, Inc. d/b/a Bronx Honda*, Case No. 20-CV-3945 (S.D.N.Y. May 21, 2021), available at https://www.ftc.gov/system/files/documents/cases/bronx_honda_complaint_0.pdf.

⁶³ *Id.*

racial bias in these markups, because the Equal Credit Opportunity Act (ECOA) prohibits the collection of race data for consumers financing a car.⁶⁴

4. Discrimination reduces the ability of consumers to successfully negotiate for better terms.

One hypothesis that is sometimes suggested to explain why people of color are charged more for cars, financing, and Add-ons is that perhaps they just do not negotiate enough to obtain a lower price. Research by the Center for Responsible Lending looking at attempts to negotiate financing terms for car sales at dealers found that African-American and Latino consumers attempted to negotiate financing terms slightly more often than white car buyers, yet were still left with worse terms.⁶⁵

These results are in line with what we might expect from a process that places a great deal of discretion with a dealership employee in an F&I office. The need to quickly size up a potential car buyer and quickly reach the most profitable deal possibly leads many to rely, consciously or subconsciously, on race and ethnicity.⁶⁶

III. The persistence of unfair and deceptive actions by many auto dealers requires this FTC rulemaking.

The NPRM itself contains a plethora of proof that the practices of auto dealers addressed in the proposed regulation are pervasive, persistent, and—to date—have not been ameliorated by enforcement actions or private litigation.

This proof includes the following:

1. “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.”⁶⁷
2. The FTC has brought more than fifty law enforcement actions and led two law enforcement sweeps relating to the problems in the motor vehicle marketplace, including one that involved 181 state enforcement actions.⁶⁸

⁶⁴ 12 C.F.R. §§ 1002.5(b), 1002.12(a), (b).

⁶⁵ See Non-Negotiable, *supra* note 56.

⁶⁶ Gregory Arroyo, *The Editor Goes One-On-One With the Man who Helped Chart the CFPB’s Course Into the Auto Finance Industry*, F&I and Showroom, Apr. 2014 (citing Rick Hackett, former assistant director at the CFPB who represented auto finance companies both before and after his service with the CFPB, and who was told by a dealer: “Look, you’ve got to understand, we’ve got a very short period of time to figure out the best way to put together all the moving parts of a complex transaction for the consumer, and how we’re going to be able to negotiate to have a deal the consumer can accept and is adequate for the dealership. And so we have to make quick judgments when we sort out the process. So when you pick that initial rate for negotiating a finance rate, we all know Asians are better negotiators.”).

⁶⁷ NPRM, *supra* note 1, at 42,015.

⁶⁸ *Id.* at 42,017 n.75.

3. A U.S. Department of Defense data call found that “the vast majority (79%) of military counselors are seeing clients with auto financing problems,” and cited loan packing and yo-yo financing as the most frequent auto lending abuses affecting servicemembers.⁶⁹ Some in military command have “gone so far as banning servicemembers from conducting business with certain auto dealerships because of ‘abusive sales and financing practices.’”⁷⁰
4. The CFPB sent a letter to the auto financing industry noting that servicemembers carry more auto loan debt at younger ages than do civilians, and that they are targeted by predatory practices like costly loans and expensive contracts.⁷¹
5. Groups assisting members of the armed services with their consumer needs have told the FTC that “the number one issue they are confronted with is used car dealers who are taking advantage of military personnel.”⁷²
6. Thirty-one state Attorneys General came together to submit comments to the FTC about problems with Add-ons.⁷³
7. The CFPB has brought at least sixteen enforcement actions involving motor vehicles, financing, or Add-on products and services,⁷⁴ and, according to the CFPB’s complaint database, complaints against auto dealers are the seventh most common type of complaint received.⁷⁵
8. In its various investigations, the FTC has received multiple, detailed comments from lawyers who have represented many consumers in cases involving hidden costs, Add-ons, payment packing, common auto scams, inflated prices.⁷⁶
9. There have been ongoing efforts by state regulators and Attorneys General involving over 246 state enforcement actions “alleging deceptive and unlawful conduct by motor vehicle dealerships across the country.”⁷⁷

The sheer volume of complaints to all sources about the practices of auto dealers is an indication of the extent of the unfair and deceptive trade practices in automobile sales that fully justifies the promulgation of regulations designed to protect consumers from those practices.

⁶⁹ Consumers for Auto Reliability and Safety, DoD Data Call Summary (2012), *available at* https://www.carconsumers.org/pdf/DoD_Data_Call_Summary.pdf.

⁷⁰ NPRM, *supra* note 1, at 42,018 n.81.

⁷¹ Consumer Fin. Prot. Bureau, CFPB and Justice Department Caution Auto Finance Companies about Servicemember Protections (July 29, 2022), *available at* <https://www.consumerfinance.gov/about-us/newsroom/cfpb-and-justice-department-caution-auto-finance-companies-about-servicemember-protections/>.

⁷² NPRM, *supra* note 1, at 42,013 n.16.

⁷³ *Id.* at 42,016 n.68.

⁷⁴ *Id.* at 42,018 n.82.

⁷⁵ *See* Consumer Fin. Prot. Bureau, Consumer Complaint Database, *available at* https://www.consumerfinance.gov/data-research/consumer-complaints/search/?date_received_max=2021-12-31&date_received_min=2021-01-01&page=1&product=Vehicle%20loan%20or%20lease&searchField=all&size=25&sort=created_date_desc&tab=List.

⁷⁶ These comments are cited throughout the NPRM but see in particular those referred to at 42,016 nn.62 and 66.

⁷⁷ NPRM, *supra* note 1, at 42,018 n.83 (citing Press Release of Operation Steer Clear and Operation Ruse Control).

That there is a dire need for comprehensive regulations to address the unfair and deceptive practices of auto dealers should be beyond dispute. These comments are a combined effort of XX national consumer and civil rights groups, all of which have worked for decades to protect consumers. Chief among the issues that all these groups deal with are complaints from consumers about being cheated and mistreated by automobile dealerships. Many of our groups have researched and written extensive analyses of the problems caused by auto fraud. These include:

1. National Consumer Law Center, *Auto Add-ons Add Up: How Dealer Discretion Drives Excessive, Inconsistent, and Discriminatory Pricing* (Oct. 11, 2017).⁷⁸ Analyzing a large national data set, this report shows what dealers actually pay for automobile Add-ons versus what they charge consumers, and it exposes how the arbitrary and inconsistent pricing of these optional products fosters discriminatory pricing.
2. U.S. PIRG, *Driving Into Debt: The Hidden Costs of Risky Auto Loans to Consumers and Our Communities* (Feb. 2019).⁷⁹ This report discusses the evidence demonstrating extensive predatory, abusive, and discriminatory lending practices.
3. Consumer Reports, *Many Americans are Overpaying for Their Car Loans* (Oct. 27, 2021).⁸⁰ This report analyzes almost 858,000 loans from seventeen major lenders and concludes that, due to a fractured, state-specific, and confusing landscape of laws, many consumers are charged interest commonly associated with predatory lending and it is nearly impossible for borrowers to determine whether and when they are being overcharged.
4. Consumer Federation of America (CFA), *Consumer Complaint Surveys*. These annual surveys show trends in the complaints that state and local consumer protection agencies receive from consumers. For the past six years, participating agencies have told CFA that auto-related complaints were the top complaint received from consumers.⁸¹ These annual reports include stories that exemplify the nature of the problems the FTC seeks to address in this rulemaking, such as undisclosed Add-ons,⁸² hidden dealer fees,⁸³ deceptive leasing practices,⁸⁴ fraudulently altered financing applications,⁸⁵ and yo-yo financing.⁸⁶

⁷⁸ NCLC Auto Add-Ons Add Up, *supra* note 54.

⁷⁹ R.J. Cross & Tony Dutzik, Frontier Group, Ed Mierzwinski & Matt Casale, U.S. PIRG Educ. Fund, *Driving Into Debt: The Hidden Costs of Risky Auto Loans to Consumers and Our Communities* (Feb. 2019), *available at* https://publicinterestnetwork.org/wp-content/uploads/2019/02/US_Driving-into-Debt-Feb-2019_web.pdf.

⁸⁰ Many Americans are Overpaying, *supra* note 31.

⁸¹ *See* Consumer Federation of America, 2021 Consumer Complaint Survey Report 4 (Aug. 8, 2022), *available at* <https://consumerfed.org/reports/2021-consumer-complaint-survey-report/> [hereinafter CFA 2021 Survey Report].

⁸² *See* Consumer Federation of America, 2016 Consumer Complaint Survey Report 9 (July 27, 2017), *available at* <https://consumerfed.org/reports/2016-consumer-complaint-survey-report/>.

⁸³ *See* CFA 2021 Survey Report, *supra* note 81, at 7.

⁸⁴ *See* Consumer Federation of America, 2016 Consumer Complaint Survey Report 9 (July 27, 2017), *supra* note 82, at 14.

⁸⁵ *See* Consumer Federation of America, 2018 Consumer Complaint Survey Report 11-12 (July 30, 2019), *available at* <https://consumerfed.org/reports/2018-consumer-complaint-survey-report/>.

⁸⁶ *See* CFA 2021 Survey Report, *supra* note 81, at 8.

5. Center for Responsible Lending, *Road to Nowhere: Car Dealer Interest Rate Markups Lead to Higher Interest Rates, Not Discounts*.⁸⁷ This policy brief presents data showing that, while the auto industry portrays dealer interest markups as a kind of discount program, these markups actually lead to unnecessarily high interest rates for consumers, and that consumers would benefit if dealers moved to a flat rate compensation system.
6. Consumers for Auto Reliability and Safety, *Auto Scams*.⁸⁸ This advisory describes common scams, such as yo-yo financing and buy-here, pay-here sales.

There have been many other studies, analyses, and news and other reports detailing the extensive problems with auto dealers. A sampling of these includes:

1. An article in NPR's Planet Money entitled "*Inside the rise of 'stealerships' and the shady economics of car buying*."⁸⁹ This article explains that the pricing strategy that many dealerships employ is predicated not on standard pricing, as with other products, but on charging consumers based on their willingness to pay, and it often involves "deceptive marketing tactics, hidden fees, and overpriced Add-ons."
2. A law review article entitled "*The Fast and the Usurious: Putting the Brakes on Auto Lending Abuses*."⁹⁰ This article proposes to reform identified lending abuses by requiring a three-business-day waiting period before delivery of a vehicle for consumers who do not have a bona fide third-party financing offer, along with a prominently disclosed, penalty-free prepayment right during that period, and it also advocates for a system of mandatory data collection on auto loans that will allow for effective regulatory oversight.
3. A law journal article entitled "*Roadmap to Economic Justice: Enhancing Protections for Auto Consumers*."⁹¹ This article states that buying and financing a car is one of the most critical consumer transactions, and advocates and regulators should assist the most vulnerable citizens by promoting fair and equitable practices.
4. A law review article entitled "*Consumers' Declining Power in the Fintech Auto Loan Market*."⁹² This article contends that power imbalances between auto lenders and consumers have widened and will continue to widen unless measures are taken to facilitate essential "car security" for consumers.

⁸⁷ Center for Responsible Lending, *Road to Nowhere: Car Dealer Interest Rate Markups Lead to Higher Interest Rates, Not Discounts* (Nov. 2015). *See also* Take Consumers for a Ride, *supra* note 32 (highlighting the pervasive problems of discriminatory practices, discretionary dealer markup, and yo-yo scams).

⁸⁸ Consumers for Auto Reliability and Safety, *Auto Scams*, available at <https://carconsumers.org/autoscams.htm>.

⁸⁹ Greg Rosalsky, NPR, Planet Money, *Inside the rise of 'stealerships' and the shady economics of car buying* (Aug. 30, 2022), available at <https://www.npr.org/sections/money/2022/08/30/1119715886/inside-the-rise-of-stealerships-and-the-shady-economics-of-car-buying> ("Ten people could go into a dealership and each pay a wildly different amount to buy the same exact vehicle.").

⁹⁰ Levitin, *The Fast and the Usurious*, *supra* note 2, at 1265–66 (discussing "loan packing" as the sale of Add-on products falsely represented as being required in order to obtain financing).

⁹¹ James J. Pierson, *Roadmap to Economic Justice: Enhancing Protections for Auto Consumers*, 44 Hum. Rts. 12 (2019), available at https://www.americanbar.org/groups/crsj/publications/human_rights_magazine_home/economic-justice/roadmap-to-economic-justice--enhancing-protections-for-auto-cons/.

⁹² Pamela Foohey, *Consumers' Declining Power in the Fintech Auto Loan Market*, 15 Brook. J. Corp. Fin. & Com. L. 5 (2020), available at <https://brooklynworks.brooklaw.edu/bjcfcl/vol15/iss1/2/>.

5. A law review article entitled “*Bursting the Auto Loan Bubble in the Wake of COVID-19.*”⁹³ This article describes how the current structure of auto sales and lending had created “an unsustainable sector in need of change, even before the adverse economic conditions brought by the pandemic,” and it posits that the economic fallout wrought by the pandemic “might provide the necessary jolt to foster legislative change.”
6. A NerdWallet article entitled “*Don’t Let a Car Dealer’s ‘Yo-Yo’ Financing Scam Reel You In.*”⁹⁴ This article describes the practice of yo-yo financing and lists the warning signs that a dealership is employing this scam.

Complaints to the Better Business Bureau (BBB) are also a good gauge of problems in the industry. While the BBB is not a government agency, it is often turned to by consumers for assistance in gauging the reliability of a particular business and for assistance in resolving controversies:⁹⁵

- In 2020⁹⁶ and 2021,⁹⁷ the combined complaints to the BBB about new and used car dealerships made complaints about car dealers the second highest of any industry in the U.S.
- For the years 2010 through 2019, the combined complaints about new and used car dealerships were the highest of any industry in the U.S.⁹⁸

⁹³ Pamela Foohey, *Bursting the Auto Loan Bubble in the Wake of COVID-19*, 106 Iowa L. Rev. 2215 (July 2021), available at https://ilr.law.uiowa.edu/assets/Uploads/E5_Foohey_1.pdf.

⁹⁴ Phillip Reed, NerdWallet, *Don’t Let a Car Dealer’s ‘Yo-Yo’ Financing Scam Reel You In* (Feb. 19, 2019), available at <https://www.nerdwallet.com/article/loans/auto-loans/avoid-yo-yo-financing-spot-deliveries>.

⁹⁵ See Wikipedia, Better Business Bureau, available at https://en.wikipedia.org/wiki/Better_Business_Bureau.

⁹⁶ Better Business Bureau, US BBB 2020 Statistics, available at <https://www.bbb.org/content/dam/iabbb/systemwide-pages/complaint-stats/2020-stats/US%20BBB%202020%20Complaint%20Statistics.pdf> (combining the number of complaints about new car dealerships (21,520) with the number of complaints about used car dealerships (13,477), which equals 34,997).

⁹⁷ Better Business Bureau, US BBB 2021 Statistics, available at <https://www.bbb.org/content/dam/iabbb/systemwide-pages/complaint-stats/2021-stats/US%20BBB%202021%20Complaint%20Statistics.pdf> (combining the number of complaints about new car dealerships (24,375) with the number of complaints about used car dealerships (16,308), which equals 40,668,).

⁹⁸ Better Business Bureau, US BBB 2019 Statistics, available at https://www.bbb.org/content/dam/iabbb/systemwide-pages/complaint-stats/2109-stats/US_2019%20By%20Complaints.pdf (number of complaints about new car dealerships (27,848) plus number of complaints about used car dealerships (14,087), which equals 41,935); Better Business Bureau, US BBB 2018 Statistics, available at <https://www.bbb.org/content/dam/iabbb/systemwide-pages/complaint-stats/2018-stats/US-BBB-2018-STATISTICS-Complaints.pdf> (number of complaints about new car dealerships (23,885) plus number of complaints about used car dealerships (14,168), which equals 38,053); Better Business Bureau, US BBB 2017 Statistics, available at <https://www.bbb.org/content/dam/iabbb/systemwide-pages/complaint-stats/2017-stats/2017-US-BBB-Statistics-SB-Complaints.pdf> (number of complaints about new car dealerships (23,689) plus number of complaints about used car dealerships (14,760), which equals 38,449); Better Business Bureau, US BBB 2016 Statistics, available at https://www.bbb.org/content/dam/iabbb/systemwide-pages/complaint-stats/2016-stats/USA_2016-%20Sorted%20by%20Complaints.pdf (number of complaints about new car dealerships (25,364) plus number of complaints about used car dealerships (15,894), which equals 41,258); Better Business

Finally, while there have been tens of thousands of cases initiated by individuals or their attorneys against auto dealerships seeking redress for the harms, the number of reported cases has fallen in recent years because of the ubiquitous presence of arbitration clauses.⁹⁹ But, while these arbitration clauses prevent us from illustrating the need for this rule through reported cases, in addition to the reports, these comments include several appendices to substantiate the extent of the problems.

Appendix A provides consumer stories related to unfair auto practices about their personal transactions with car dealers. **Appendix B** is summary of complaints received by state and local consumer protection agencies about these issues. **Appendix C** is a sworn statement from a car dealer explaining increased finance charges imposed by the assignee and issues relating to electronic records and signatures.

Bureau, US BBB 2015 Statistics, available at <https://www.bbb.org/content/dam/iabbb/systemwide-pages/complaint-stats/2015-stats/US-2015-Sorted-by-Complaint-Statistics.pdf> (number of complaints about new car dealerships (25,725) plus number of complaints about used car dealerships (16,281), which equals 42,006); Better Business Bureau, US BBB 2014 Statistics, available at <https://www.bbb.org/content/dam/iabbb/systemwide-pages/complaint-stats/2014-stats/2014US%20-%20Sorted%20by%20Complaint.pdf> (number of complaints about new car dealerships (24,739) plus number of complaints about used car dealerships (16,039), which equals 40,778); Better Business Bureau, US BBB 2013 Statistics, available at <https://www.bbb.org/content/dam/iabbb/systemwide-pages/complaint-stats/2013-stats/us-stats-complaints-2013.pdf> (number of complaints about new car dealerships (24,921) plus number of complaints about used car dealerships (16,982), which equals 41,903); Better Business Bureau, US BBB 2012 Statistics, available at https://www.bbb.org/content/dam/iabbb/systemwide-pages/complaint-stats/2012-stats/2012_US_STATSBYCOMPLAINTS.pdf (number of complaints about new car dealerships (26,136) plus number of complaints about used car dealerships (16,968), which equals 43,104); Better Business Bureau, US BBB 2011 Statistics, available at <https://www.bbb.org/content/dam/iabbb/systemwide-pages/complaint-stats/2011-stats/US%20-%20Complaint%20-%202011.pdf> (number of complaints about new car dealerships (25,053) plus number of complaints about used car dealerships (15,801), which equals 40,854); Better Business Bureau, US BBB 2010 Statistics, available at <https://www.bbb.org/content/dam/iabbb/systemwide-pages/complaint-stats/2010-stats/US%202010%20Sorted%20by%20Complaint.pdf> (number of complaints about new car dealerships (23,905) plus number of complaints about used car dealerships (13,902), which equals 37,807).

⁹⁹ See, e.g., Fair Arbitration Now, Auto Lending, available at <https://fairarbitrationnow.org/auto-arbitration/> (forced arbitration clauses are included in nearly all automobile sales contracts and leases); Remar Sutton, *Why You Shouldn't Buy a Vehicle From Any Seller That Requires a "Mandatory Binding Arbitration Agreement,"* available at <http://www.autoissues.org/arbitration.htm> ("Mandatory Binding Arbitration Agreements are the newest scam in the arsenal of unethical dealership weapons used to protect dealerships from accountability when they defraud consumers."); David G. Murphy, Todd Kim, John Lukanski & Abraham Colman, ReedSmith, Financial Litigation Report, Auto Leasing Companies Can Force Arbitration Agreements from the Dealership's Retail Order Forms (May 5, 2020), available at <https://www.financialserviceslitigationreport.com/2020/05/auto-leasing-companies-can-enforce-arbitration-agreements-from-the-dealerships-retail-order-forms/>; Michael S. Barr, *Mandatory Arbitration in Consumer Finance and Investor Contracts*, 11 N.Y.U. J. L. & Bus. 793, 793 (2015) ("Mandatory pre-dispute arbitration clauses are pervasive in consumer financial and investor contracts—for credit cards, bank accounts, auto loans, broker-dealer services, and many others. These clauses often ill serve households."); Donna Harris, The Ctr. for Auto Safety, *Dealers Push for Arbitration* (June 7, 2004), available at <https://www.autosafety.org/dealers-push-arbitration/> (more dealerships demand that customers give up the right to sue).

IV. The FTC’s proposals are necessary to protect consumers from dealers’ unfair and deceptive practices.

In this section of our comments, we provide feedback on the specific regulations proposed by the FTC:

- In subsection A, we discuss our recommendation that to the extent possible, the new regulations should be required to be terms of the financing contract between the dealer and the consumer.
- Section B deals with the disclosure of the Offering Price proposed by § 463.4.
- Section C addresses the proposed financing disclosures.
- Section D addresses the disclosures relating to Add-ons as well as the substantive provisions in § 463.5.
- Section E covers misrepresentations as proposed by § 463.3.
- Section F covers recordkeeping issues as raised by proposed § 463.6.

To the extent relevant, we answer questions posed in the NPRM in each discussion. The balance of the questions that we answer are discussed in section V, *infra*.

A. Incentivize fairness with enforceable remedies.

As the Overview to the NPRM details, the existing regulatory structure is not sufficient to balance the playing field between car buyers and lessees and car dealers. The result is substantial unfairness, and a misaligned marketplace that allows dealers, using the profusion of information and paperwork, to take advantage of consumers.

The key to a successful rebalancing of this dynamic is to build in incentives for fairness. Despite all the good work already accomplished by the FTC and state enforcement agencies, government and private enforcement efforts are clearly not sufficient to incentivize dealers to behave responsibly. We urge the FTC, to the extent possible, to structure the rule so that its protections are privately enforceable by consumers who are victimized by the unfair and deceptive practices the rule addresses. This can be done by requiring the protections of the rule to be reflected in the dealers’ sales and financing contracts with consumers. Since consumers have the right to enforce the terms of their contracts, a consumer will have a contract remedy for a violation of the rule, giving dealers a greater incentive to comply with it. In some states, the consumer will have also a claim under the state’s deceptive practices statute, especially if the dealer has engaged in a pattern of breach of contract or the breach is accompanied by other unfairness or deception.¹⁰⁰ Mandating that required disclosures be included in the contract also provides an easy way to ensure that assignees are aware—or at least should be aware—of the promises made by the dealer.

B. Mandate a contractual Offering Price disclosure—Proposed § 463.4(a).

The FTC proposes in § 463.4(a) that dealers must provide a single “Offering Price” in advertisements and communications regarding a specific vehicle and its cost, and that the Offering Price be disclosed clearly and conspicuously. We fully support this proposal, and we suggest several specific additions to it.

¹⁰⁰ See National Consumer Law Center, *Unfair and Deceptive Acts and Practices* § 5.6.5 (10th ed. 2022), *updated* at www.nclc.org/library.

1. Consumers and honest dealers need this proposal.

Mandating that a simplified, uniform, comprehensive and legally enforceable Offering Price be provided for every vehicle that is offered for sale at a dealership would serve several important purposes. First, it will provide consumers with the ability to comparison shop without wasting time at the dealership. Second, it will level the playing field among dealerships and increase competition, ultimately lowering prices at the margin and helping consumers. Third, it can be structured to give consumers important contractual protections as a firm offer to sell the car at the offered price.

As a vehicle is the most expensive purchase many Americans will make, it is critical to require dealers to be honest about their pricing instead of deceptively baiting consumers with meaningless offers. It has become stunningly commonplace for dealers to advertise cars at the Manufacturers Suggested Retail Price (MSRP) and then refuse to sell it at this advertised price, instead charging thousands of dollars more.¹⁰¹ These price increases are benignly referred to by industry members as “market adjustments.” Higher demand vehicles, like electric vehicles, have often generated “market adjustments” in the tens of thousands of dollars over MSRP.¹⁰² Dealers have persisted in this practice even as auto manufacturers have decried it, warning their franchise dealerships that this conduct is “not allowable,”¹⁰³ and that it takes advantage of “the current imbalance between supply and demand.”¹⁰⁴ Hyundai specifically urged its dealers to stop advertising a low price online and then charging a much higher price in the store.¹⁰⁵ Some dealers do not even advertise a price online, instead instructing consumers to contact the dealership to obtain a price.

Surprise price increases can also be in the form of pre-installed, mandatory Add-ons, which may be overpriced, objectively worthless, or not valuable for a particular consumer. This practice creates

¹⁰¹ See Mike Colias & Nora Eckert, *A New Brand of Sticker Shock Hits the Market*, The Wall St. J., Feb. 26, 2022, available at <https://www.wsj.com/articles/a-new-brand-of-sticker-shock-hits-the-car-market-11645851648> (noting that, in January 2022, buyers paid an average of \$728 above the MSRP, contrasted with a January 2021, when vehicles sold for an average of \$2,152 below MSRP). See also Appendix A, *infra*, at 3-4 (providing consumer stories about “Advertised Price – Vehicle Markups,” where consumers report that vehicles were marked up “\$8,000 without telling me,” and that “on the website the price was right, but when I when at the dealership I was told if I wanted the vehicle which was in high demand I had to fork up an extra \$8k”).

¹⁰² See Jack Fitzgerald, *Now There's a Crowdsourced Website That Tracks Car-Dealer Markups*, Car and Driver, July 11, 2022, available at <https://www.caranddriver.com/news/a40576948/dealer-markups-cars-website-details/> (describing the crowdsourced website, markups.org, where consumers have reported markups of over hundreds of thousands of dollars).

¹⁰³ Phoebe Wall Howard, *Ford threatens dealers: We won't send you F-150 Lightnings if you break sales rules*, Detroit Free Press, Jan. 7, 2022, available at <https://www.freep.com/story/money/cars/ford/2022/01/07/ford-f-150-lightning-dealerships-sales/9129717002/>.

¹⁰⁴ See Lawrence Hodge, Jalopnik, *Subaru is the Latest Automaker to Shame its Dealers over Markups* (Feb. 24, 2022), available at <https://jalopnik.com/subaru-is-the-latest-automaker-to-shame-its-dealers-ove-1848586738> (embedding letter from Thomas J. Doll, President and CEO of Subaru of America, Inc. to dealers (Feb. 23, 2022)).

¹⁰⁵ Chris Bruce, Motor1.com, *Hyundai Is Latest Automaker Fed Up With Ridiculous Dealership Markups* (Feb. 23, 2022), available at https://www.motor1.com/news/569524/hyundai-genesis-avoid-dealer-markups/?utm_source=npr_newsletter&utm_medium=email&utm_content=20220826&utm_term=7163011&utm_campaign=money&utm_id=4320608&orgid=&utm_at1=.

confusion for consumers who may wish to (but cannot) decline the product. *See* discussion in section D, *infra*.

Potential car buyers often find it difficult to ascertain the exact price of a vehicle without spending hours at a dealership.¹⁰⁶ Nearly every website advertisement for a vehicle includes fine print warning that “actual vehicle costs may vary,” and “prices shown do not include [insert fee].” The FTC highlights the wildly varying definition of the term “price” in its qualitative buyer study.¹⁰⁷ The “Know Your Prices” chart included in this study notes six different “prices,” each of which includes or excludes rebates, options, dealer fees, finance charges, dealer markups, and transportation charges. The result is that a consumer does not know the dollar amount the dealer is willing to accept for the car without going through the painful and arduous process of visiting the dealership, having their credit report pulled, and haggling about the price and terms. This process is intentionally backwards and puts consumers at a tremendous disadvantage. Before a consumer steps foot into a dealership, the dealership knows exactly how much it will accept for the car, but it exploits this informational imbalance and withholds precise numbers or details until the consumer has spent hours on the dealer’s turf.

Because of the proliferation of internet advertising, enabling consumers to comparison shop easily and select which dealership they will contact or visit to inquire about purchasing a vehicle, the advertised price is very important. The FTC has highlighted the fact that there is a tremendous time expense¹⁰⁸ for consumers who respond to an advertisement and visit a dealership only to learn that the advertisement was false.

Additionally, the advertised price of a vehicle does not include the taxes, fees, and titling costs that a consumer will be required to pay, and the FTC’s proposal does not propose to change this practice. The definition of “Offering Price” excludes “Government Charges,” which are “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.” § 463.2(h). These fees can add several thousand dollars to the price of the vehicle, which is a material increase to consumers.¹⁰⁹ We recognize these charges are difficult to advertise accurately and uniformly because they are often unique to the consumer who purchases, registers, and titles the vehicle. However, we believe that these are the **only fees** that dealers should be permitted to exclude from the Offering Price

¹⁰⁶ *See* Appendix A, *infra*, at 1-2, (consumers report spending between two and six hours at the dealership before receiving a negotiated price).

¹⁰⁷ Carole L. Reynolds & Stephanie E. Cox, Buckle Up: Navigating Auto Sales & Financing: Staff Report of the Bureau of Consumer Protection, Federal Trade Commission 6 (July 2020), *available at* https://www.ftc.gov/system/files/documents/reports/buckle-navigating-auto-sales-financing/bcpstaffreportautofinancing_0.pdf [hereinafter Buckle Up].

¹⁰⁸ NPRM, *supra* note 1, at 42,012 (citing 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), *available at* <https://www.ftc.gov/system/files/documents/reports/auto-buyer-study-lessons-depth-consumer-interviews-related-research/bcpreportsautobuyerstudy.pdf> [hereinafter FTC Auto Buyer Study] (noting that the purchase transactions in the FTC’s qualitative study often took 5 hours or more to complete, with some extending over several days) and 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)).

¹⁰⁹ The NPRM defines “material” as likely to affect a person’s choice of, or conduct regarding, goods or services.” § 463.2(i).

and recommend that the FTC amend its definition of “government charges” to ensure that only charges that are imposed by **and payable to** a government entity are excluded.

In addition to withholding information, dealerships have a proven record of hiding information about pricing or using pricing advertising tactics that are intentionally deceptive. In the NPRM, the FTC details its long history of enforcement actions against dealerships for misrepresentations about “key pricing aspects of a vehicle purchase,” both on its own and with state partners.¹¹⁰ Both Appendix A and B, attached, include stories from consumers about dealers who changed the price of the purchased cars above the advertised prices, and insisted on adding unwanted Add-ons.

Notably, however, this conduct persists despite these and other enforcement actions, underscoring the need for a rule. In recent years, there have been multiple actions by state attorneys general involving allegations that dealerships misrepresented the price of the vehicle in the advertisements.¹¹¹ In 2020 and 2021, the Georgia Attorney General brought actions against twenty-three dealerships for deceptive pricing advertising practices, such as hiding fees and failing to honor the advertised price.¹¹² In September 2021, Massachusetts Attorney General Maura Healey issued an Advisory on Automobile Advertising, Pricing, and Lease Buyouts.¹¹³ The Advisory was prompted by a “rapid increase in pricing,” and a significant increase in complaints about deceptive dealer pricing practices, including

¹¹⁰ *Id.* at 42015-16 nn.58, 59, 60, 61.

¹¹¹ Arizona: Press Release, Office of the Arizona Att’y Gen., AG Brnovich Obtains Over \$400,000 in Restitution from Arizona Nissan Dealers (Mar. 29, 2022), *available at* <https://www.azag.gov/press-release/ag-brnovich-obtains-over-400000-restitution-arizona-nissan-dealers>;

California: Complaint, California v. Paul Blanco’s Good Car Co. Auto Group, Case No. RG-19036081 (Cal. Super. Ct. Sept. 23, 2019), *available at* <https://oag.ca.gov/system/files/attachments/press-docs/Paul%20Blanco%20Filing.pdf> [*hereinafter* California Complaint];

Maryland: Press Release, Office of the Maryland Att’y Gen., Attorney General Frosh Announces Settlement with Koons Kia (Apr. 19, 2022), *available at* <https://www.marylandattorneygeneral.gov/press/2022/041922.pdf>;

New Jersey: Press Release, Office of the New Jersey Acting Att’y Gen., Acting AG Platkin: Division of Consumer Affairs Reaches Settlements Totaling Nearly \$400,000 with Three Car Dealerships over Alleged Consumer Protection Violations (May 20, 2022), *available at* <https://www.njoag.gov/acting-ag-platkin-division-of-consumer-affairs-reaches-settlements-totaling-nearly-400000-with-three-car-dealerships-over-alleged-consumer-protection-violations/>;

Oregon: Press Release, Oregon Dep’t of Justice, Attorney General Rosenblum Cracks-Down on Deceptive Car Dealership Promotions (Apr. 7, 2021), *available at* [https://www.doj.state.or.us/media-home/news-media-releases/cracks-down-on-deceptive-car-dealership-promotions/#:~:text=Oregon%20Attorney%20General%20Ellen%20Rosenblum,they%20had%20won%20a%20prize](https://www.doj.state.or.us/media-home/news-media-releases/cracks-down-on-deceptive-car-dealership-promotions/#:~:text=Oregon%20Attorney%20General%20Ellen%20Rosenblum,they%20had%20won%20a%20prize;);

Rhode Island: Complaint, State of Rhode Island v. MAG Ventures L.L.C., Case No. PC-2022-01301 (R.I. Super. Ct. Mar. 4, 2022).

¹¹² *See* Office of the Georgia Att’y Gen., Consumer Prot. Div., Accomplishments of the Division, *available at* <https://consumer.georgia.gov/organization/about-us/accomplishments-division-0> (listing achievements in 2020 and 2021).

¹¹³ Office of the Massachusetts Att’y Gen., Attorney General Advisory on Advertising, Pricing and Lease Buyouts (Sept. 28, 2021), *available at* <https://www.mass.gov/doc/automobile-advertising-advisory/download>.

refusing to honor advertised prices.¹¹⁴ These cases are a small sampling of the conduct that consumers experience throughout the United States on a daily basis.

Finally, some dealers do not permit “outside financing.”¹¹⁵ They instead require consumers to finance the purchase through the dealership, enabling the dealer to profit from its existing arrangements with finance companies, some of which may require the price of the vehicle to be increased or require the consumer to purchase overpriced Add-on products as a condition of financing. The Texas Office of the Comptroller reported complaints from consumers such as:

- “I was turned down as a veteran with an approval from Navy Federal Credit Union.”
- “The manager... stated that it would allow him to make money on the back end.”
- “The interest rate was about 2.5% higher but I needed a car quickly, so I agreed.”
- “The sales manager told me directly, 'If you choose to go with the credit union this will change the price of the vehicle.'”
- “I handed them a check from my credit union for \$50,000. Salesman...stated at this time they were not accepting financing from credit unions.”¹¹⁶

These cases demonstrate that advertisements for vehicles are not reliable, and they are not treated as binding offers to purchase. The result is that consumers are taken advantage of in situations where they have little to no negotiating power. This backwards process does not serve a goal of creating a competitive market for dealerships that benefits consumers: it does the opposite. Dealers who advertise accurately and truthfully are harmed by competing with dealers who do not. Several of these honest dealers have already expressed support for this rule for this exact reason:

We are an independent motor vehicle dealer in Pompano Beach, Florida and providing quality cars and trucks for our community since 2004. We strongly support Your proposal P204800. It is really time to end the current madness of lying competition at this marketplace. The general public and the majority of the automotive industry needs this reform, everyone will benefit from transparency. It's that plain and simple. Please pass these new regulations!

Thankfully,

¹¹⁴ Press Release, Office of the Massachusetts Att’y Gen., AG Healey Issues Advisory for Consumers and Auto Dealers On Their Rights and Obligations on Advertising and Pricing September 28, 2021, available at https://www.mass.gov/news/ag-auto_news-issues-advisory-for-consumers-and-auto-dealers-on-their-rights-and-obligations-on-advertising-and-pricing.

¹¹⁵ Ben Eisen, *Car Dealerships Don’t Want Your Cash – They Want to Give You a Loan*, The Wall St. J., Mar. 1, 2022, available at <https://www.wsj.com/articles/car-dealerships-dont-want-your-cashthey-want-to-give-you-a-loan-11646113637>. See also Appendix A, *infra*, at 4 (consumer reported that paying cash for their vehicle would raise the price by over \$2,000).

¹¹⁶ Jason Wheeler, WFAA, *Forced financing at the car dealership: Following WFAA story, Texas regulators getting complaints about dealers who refuse outside financing* (Oct. 11, 2021), available at <https://www.wfaa.com/article/money/business/right-on-the-money/forced-financing-at-the-car-dealership-following-wfaa-story-texas-regulators-getting-complaints-about-dealers-who-refuse-outside-financing/287-88790042-172a-48e2-964a-60be573e6209>.

Attila Tolli, Auto Brasil, Pompano, FL¹¹⁷

I am an independent auto dealer in Gainesville Florida. I have been in the car business my entire adult life and my wife and I have owned and operated our current dealership for 25 years... I read about your proposal P204800, and I would strongly support the regulations that you are considering.

Overwhelmingly, automotive dealership advertising is ridiculously deceptive. Advertised prices often assume a trade-in credit, a finance credit, or maybe some sort of incentive or rebate that usually doesn't apply. The advertised prices will also not include add-on's such as dealer fees, prep fees, market adjustment fees, and/ or reconditioning fees. These fees add up to thousands of dollars that have been undisclosed to the consumer. It's really become a joke.

Most dealerships will not disclose these costs until a customer is on the property, or more often when the customer is ready to sign paperwork. Most importantly, there is no way for any consumer to actually shop for competitive pricing and compare "apples to apples".

Furthermore, dealerships will add in extended service contracts, wheel or rust protection, paint protection, etc.. without telling the customer. They will also add a "power pack" or a "bonus pack", which would include items such as pinstripes, wheel locks, mud flaps, etc... These items will show on an addendum window sticker and my cost the customer thousands of dollars for products that should cost a couple hundred. The dealership will refuse to take off any of these "add-ons".

Selling cars to the general public has been reduced to a contest of which dealership can effectively lie the best. In our current environment, even the most savvy customers are intentionally confused and deceived. It is a terribly unfriendly and unfair marketplace.

*JD Tomlinson
Tomlinson Motor Company
Gainesville FL¹¹⁸*

I am a salesperson from a car dealership, and I completely agree with these proposed regulations. I believe these will only help the car market to make more responsible transactions and take care of manufacturers, dealers, and especially consumers. Manufacturers will be more clear on pricing of their vehicles, dealers will be forced to expose their unfair practices, and consumers will begin to be able to afford the vehicles that get them to their daily routines and work... Almost every dealer in our area (including the one I work at) are charging markups that are well beyond 15%, even 20% above the cars' MSRP, making it unjustifiable to purchase, and harder to get approved by a bank for the loan. It is time for this to change and for dealers to be held accountable for their wrong-doing.¹¹⁹

¹¹⁷ Comment Submitted by Auto Brasil, Comment ID No. FTC-2022-0046-0576 (posted July 22, 2022), available at <https://www.regulations.gov/comment/FTC-2022-0046-0576>.

¹¹⁸ Comment Submitted by Tomlinson Motor Company, Comment ID No. FTC 2022-0046-0003 (posted July 14, 2022), available at <https://www.regulations.gov/comment/FTC-2022-0046-0003>.

¹¹⁹ Comment Submitted by Sean Wooters, Comment ID No. FTC-2022-0046-1910 (posted Aug. 18, 2022), available at <https://www.regulations.gov/comment/FTC-2022-0046-1910>.

2. The FTC proposal regarding Offering Price will even the playing field.

The FTC has proposed in § 463.4(a) that dealers must clearly and conspicuously¹²⁰ disclose the “Offering Price” of a vehicle in any advertisement for that vehicle, in advertisements that include monetary or financing terms, and in any communication with a consumer about a specific vehicle or a monetary amount or financing term for a vehicle.

This proposal will advance protections to ensure that consumers have access to accurate, up-front information before they enter a dealership. It would allow consumers to comparison shop by reviewing advertisements, and it also provides an anchor point for negotiations going forward. Consumers would more easily ascertain whether the dealership is inserting impermissible fees or discriminatorily inflating the vehicle price if they have a firm, accurate, advertised Offering Price to refer to. The importance of this “anchor point” cannot be overstated. It is the deciding factor for consumers about whether to engage in the next step of the process: going to the dealership to begin hours-long negotiations where much of the unfair and deceptive dealer conduct occurs.

We share the concerns expressed by the FTC that consumers cannot readily ascertain when fees and products are inflated, tacked on, and misrepresented. The lengthy, document-heavy nature of a vehicle purchase transaction is fertile ground for deceptive behavior, and arming consumers with more information at the outset will enable them to better navigate this process and negotiate a fairer deal. For that reason, the FTC should also ensure that the Offering Price is as simple as possible, always presented in a uniform manner (to facilitate apples-to-apples comparisons), and comprehensive. Most important, the Offering Price should be considered to be a legally binding open offer by that dealer to any buyer who can pay it, subject only to the changes in the estimated taxes imposed by local governments. There are several additional steps the FTC should take in this regard.

First, the FTC should amend the definition of “Offering Price” to include all Add-ons that are attached to the vehicle when it is offered or are required by the dealer to be sold with the vehicle, and all applicable dealer fees. As explained above, these fees are known to and imposed by the dealer at the time they advertise, and there is no reason not to include them in the Offering Price. Second, the FTC should amend the definition of “government charges” to reflect that only fees which are imposed by **and payable to** a government entity are excluded from the Offering Price.

Third, the FTC should require consistency in its Offering Price requirements to eliminate consumer confusion. It should require dealers to provide an Offering Price for every vehicle offered for sale or lease, attach the written Offering Price to each such vehicle, and ensure that the same Offering Price is used throughout the sales process. This consistency will reinforce the principle that the Offering Price is a firm offer. It will eliminate the ability of dealers to increase the price after the consumer arrives at the dealership.

Finally, the FTC should require that any buyer can purchase a vehicle by paying the Offering Price in cash or by bringing their own financing. This will prohibit dealers from holding consumers captive to a dealer’s preferred financing company, where they profit by marking up a pre-arranged buy rate that is not known to the consumer.¹²¹

¹²⁰ The phrase “Clearly and Conspicuously” is defined in proposed § 463.2(d). NPRM, *supra* note 1, at 42,044.

¹²¹ The buy rate is a “risk-based financing charge that reflects the interest rate at which the entity will finance the deal,” to which dealers often add a finance charge (“markup”) that is not based on the creditworthiness of the

3. Recommendations

- a) Amend the definition of “Offering Price” in § 463.2(k) to include all Add-ons that are attached to the vehicle when it is offered, or required to be sold by the dealer, along with all fees imposed by the dealer.
- b) Amend the definition of “Government Charges” in § 463.2(h) to mean “all fees or charges imposed by and payable to a Federal, State, or local government agency...”
- c) Add subsections to § 463.4 requiring that:

(i) The Offering Price must be provided for every vehicle offered for sale or lease at the dealership, which should be attached in writing to every vehicle on the dealer’s lot, and which must be the same as that used in all advertisements, including television, online, and radio which refer to a particular vehicle.

(ii) Dealers must accept an offer from a buyer of the Offering Price, plus any additional, applicable government charges to be paid in cash, or through alternative financing.

(iii) Dealers are permitted to reduce the price from the Offering Price and the sales contract must separately reflect any decrease from the Offering Price.

4. Answers to the FTC’s questions about “Offering Price” provisions.

The Commission asks in Question 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.*

No, requiring the Offering Price to be included in every advertisement of a vehicle would not crowd out other advertising that is helpful to consumers, as clarity of the price for the vehicle is among the most helpful bits of information to car buyers.

Requiring that the Offering Price be included in all advertising would provide dealerships that do advertise vehicles a significant advantage. However, regardless of whether dealers advertise specific vehicles, we recommend that the proposed rule be amended to require dealers to attach the Offering Price in writing to all vehicles that are offered for sale or lease at the dealership. This step would ensure that dealers do not disclose the Offering Price only if and when a consumer asks, which would create the possibility of an Offering Price made up on the spot.

The Commission asks in Question 26(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*

applicant. NPRM, *supra* note 1, at 42,014. This is one of the reasons consumer advocates encourage consumers to obtain their own financing: they may get a better deal on the interest rate in the absence of this pre-existing profit-sharing agreement between dealers and their lenders. See Consumer Fin. Prot. Bureau’s, Consumer Education, What is a buy rate for an auto loan?, available at <https://www.consumerfinance.gov/ask-cfpb/what-is-a-buy-rate-for-an-auto-loan-en-727/> (advising consumers to “shop around” for the best rate).

Price along with other offers that may be of limited applicability (provided the nature of the limited applicability is clearly disclosed)?

It is essential that all other “price” measures should be prohibited, so as to ensure that consumers are not confused. One of the primary objectives of the NPRM is to reduce confusion, and allowing dealers to use multiple “prices” would completely undermine the FTC’s excellent proposal to require a clear Offering Price. We would again point to the FTC’s qualitative buyer study, where it made the following findings:

Some participants in the qualitative study expressed confusion about how the price they were offered depended on rebates or other offers. **One participant complained that she had to work backwards from the sticker price multiple times to figure out how each offer was calculated.**¹²²

Rebates that are offered to all car buyers should be included in the Offering Price. Rebates that are offered only to some buyers can be advertised separately, but should be required to be clearly noted as available only to some buyers.

c. Would the mandatory disclosure of Offering Price where required “crowd out” other information in advertising formats where dealers pay for time or space?

A clear, simplified Offering Price that is considered a firm contractual offer to purchase, is of paramount importance. Further, should the Commission adopt the recommendations to include all government fees, mandatory Add-ons and dealer fees, this should actually serve to reduce much of the “fine print” that dealers use to disclaim liability and reliance on their advertised price. There certainly may be other information in the advertisement that is important to consumers (such as options, availability, the VIN, and vehicle specifications), but we believe that the FTC should prioritize the clarity and accuracy of the Offering Price over these other items.

The Commission asks in Question 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?*

It is not appropriate to limit this requirement to the first response, and it should be included in additional communications. There is no question that these transactions are complicated and center on the disclosure and calculation of numbers, so it is important to ensure that consumers have a consistent “anchor point” in the form of the Offering Price. Limiting this disclosure to the first response will almost certainly encourage dealers to avoid making the disclosure in writing,¹²³ making it nearly impossible for consumers to identify impermissible markups and unwanted fees or Add-ons.

¹²² Buckle Up, *supra* note 107, at 5 (emphasis added).

¹²³ Section 463.4(a)(3) requires dealers to disclose the Offering Price in writing only if the “communication or response” is in writing.

C. The proposed financing disclosures are essential to balance information asymmetry between dealers and consumers.

1. Consumers do not understand the dynamics of automobile financing.

As the FTC has detailed throughout the NPRM, studies have shown repeatedly that consumers are often taken advantage of in the car buying process.¹²⁴ The process of financing the vehicle purchase presents particularly ripe opportunities for dealers to capitalize on consumers' confusion and lack of bargaining power. A CFPB study understated the problem by saying that "consumers faced challenges in understanding loan features during negotiations on financing."¹²⁵ The CFPB study illustrated the complexity that car buyers must navigate, involving seven different variables that consumers must resolve:

- where to get financing (the dealer, a bank, a credit union, or a finance company)
- how much to finance
- the duration of the loan
- how much of a down payment to make
- whether to trade in a vehicle, or sell it separately
- whether to purchase Add-ons such as extended warranties and whether to include those in the financing.¹²⁶

An additional important variable is the interest rate (or APR) charged for the loan. Yet, although consumers have the power to negotiate the interest rate charged on their loan, they are often not aware that it is possible to do so.¹²⁷ Consumers generally enter the financing process with the mistaken belief that the most important part of the negotiations have already taken place—the price for the car.¹²⁸ The result, as recognized by the FTC in the NPRM, is substantial confusion among car buyers, especially during the financing process.¹²⁹ And, as highlighted throughout the NPRM, dealers capitalize on that confusion by changing terms, adding in costs that consumers did not bargain for, want, or benefit from, and failing to carry through on promises made earlier in the process.

The CFPB has documented the difficulties consumer face in assessing the effect of all of these interrelated variables, particularly since a single variable can affect so many others.¹³⁰ For example,

¹²⁴ See, e.g., NPRM, *supra* note 1, at nn.81, 82, 83, 84, 91, 92, 93, 94, 97, 98, 99.

¹²⁵ Consumer Fin. Prot. Bureau, Consumer Voices on Automobile Financing 4 (June 2016), *available at* https://files.consumerfinance.gov/f/documents/201606_cfpb_consumer-voices-on-automobile-financing.pdf [hereinafter Consumer Voices].

¹²⁶ *Id.* at 8.

¹²⁷ Buckle Up, *supra* note 107, at 8 ("Few participants in the qualitative study tried to negotiate the APR offered to them. In fact, most interviewed consumers did not even know that this was possible."). See also Consumer Voices, *supra* note 125 at 7.

¹²⁸ See Consumer Voices, *supra* note 125 at 8-9. Consumers mostly did the research about the selection and price of the car, and did not focus on financing terms. *Id.* at 15.

¹²⁹ NPRM *supra* note 1, at 42,016 n.66 (citing FTC Auto Buyer Study, *supra* note 108 (Supplemental Appendix: Redacted Interview Transcripts)).

¹³⁰ See Consumer Voices, *supra* note 125 at 8; Buckle Up, *supra* note 107, at 7.

setting a longer loan term as a way of reducing the consumer's monthly payment creates many risks. First, the longer loans mean that interest is paid for a longer period, which increases the total amount for the loan. Second, creditors often charge higher interest rates for longer terms. Third, longer loans create the risk that the consumers will be "upside down" on their loans, such that they will owe more on the loan than the car is worth at any given time. Fourth, a lengthier term for a car loan, especially for a used car, means that there is a risk that the loan will last longer than the car will be drivable. Finally, the longer the loan, the more opportunity there is for the consumer to default and lose the car to repossession.

A leading cause for this consumer confusion is the practice engaged in by many dealers to keep changing the various terms of the transaction.¹³¹ The CFPB noted:

[C]onsumers may find it challenging to shop for and consider the financing separately from the choice of product. This situation can be particularly complicated in the vehicle purchasing and financing process, in which multiple terms and factors are considered simultaneously. Consumers may be unaware of the full costs of the transaction, their financing options, or the ability to negotiate terms. For example, consumers may negotiate on many of the aspects of the auto financing, such as interest rate, and term of loan – but this negotiation can be difficult when the impact of these loan terms are not immediately transparent, or can change during negotiations. A consumer may negotiate for a lower interest rate, but if the financing offer then has a longer loan duration, the total cost of the loan may not be lower. If the lender or dealer emphasizes and the consumer focuses on primarily on the monthly payment, other important aspects that contribute to the overall cost of the auto loan may not be fully considered. Auto financing discussions generally come at the end of hours of shopping and negotiation. Consumers may feel pressure to accept financing terms so that they do not have to renegotiate the transaction.¹³²

The degree of consumer confusion about financing terms, how the all the loan terms relate to one another, and which terms, if any, are actually negotiable, substantiates the need for much better and more reliable information to be provided to consumers, as is proposed in §§ 463.4(d) and (e).

2. The disclosures required by §§ 463.4(d) and (e) will provide an appropriate amount of helpful information.

As the FTC recognizes, financing costs are premised on multiple moving parts (the price of the car, the interest rate, and the term of the financing), and consumers often lack a full understanding of the

¹³¹ See *Buckle Up*, *supra* note 107, at 7 (“During financing negotiations, the dealer may treat different elements of the deal as interdependent, such that aspects of the deal that were critical to consumers during their negotiations with sales personnel are incompatible with key financing terms. For example, a finance officer told one study participant that his negotiated price included a cash back offer that could not be coupled with an advertised 0% APR offer. Another participant had negotiated the price of the car down by nearly a quarter only to have the F&I office tell him that the financing terms would make him ineligible for any rebates, pushing the price back up to where he started. Similarly, a few participants indicated that to obtain rebates, they had to accept a higher interest rate on the financing or a 72-month finance term, and one consumer was under the impression that she could either get a lower APR or dealer incentives but not both.”)

¹³² *Consumer Voices*, *supra* note 125, at 9.

dynamics of financing costs. This confusion facilitates dealers’ unfair and deceptive practices regarding financing, the cost of the vehicle, and Add-ons.¹³³ To remedy this, the proposed regulations would require three essential items of information:

1. whenever the dealer discusses monthly payments, the dealer must also provide the total of payments;¹³⁴
2. if the terms of the loan used to derive the monthly payments discussed include a down payment or a trade-in, the “amount of consideration to be provided by the consumer” must also be provided;¹³⁵ and
3. whenever there is a discussion of more than one 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,”¹³⁶

This proposal will provide essential information to the consumer, while not contributing to the information overload the consumer is already dealing with during the car buying and financing process. These are three discrete, important pieces of information, **all of which the dealer must have already calculated as part of determining the proposed monthly payment.** Unless the dealer’s representative is pulling figures out of thin air—which is clearly unhelpful—any representation that is made about monthly payments requires that the dealer input at least three numbers that must be used to determine the monthly payment:

1. the amount to be financed (which necessarily includes both purchase price for the car, the taxes and fees to be added, as well as any reductions in the price caused by a downpayment or a trade-in); and
2. the term of the loan;
3. the interest rate to be charged.

Any calculation of a loan using that information produces both the monthly payments and the total of payments. While providing this information would be immensely helpful for consumers, it will require little or no effort by dealers.

Providing this information should cost dealers virtually nothing. Already, many dealers with an online presence allow shoppers to input their proposed down-payment and trade-in, estimate their credit, and then answer how long they want the loan term. These interactive websites calculate the full purchase

¹³³ NPRM, *supra* note 1, at 42,014 (“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.”) and 42,018 (“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.”). *See also id.* at 42,018 n.81 (“[M]ilitary command has gone as far as banning servicemembers from conducting business from certain auto dealerships because of ‘abusive auto sales and financing practices.’”).

¹³⁴ Proposed § 463.4(d)(1).

¹³⁵ Proposed § 463.4(d)(2).

¹³⁶ Proposed § 463.4(e).

price, including taxes and fees, the amount financed, the monthly payments, and the total of payments.¹³⁷

One caveat: we believe that the FTC intends § 463.4(e) to require the dealer to disclose the new total of payments that would result from any difference in monthly payments discussed. However, the language in the current proposed regulation could be read to require only a generic disclosure along the lines of “A lower monthly payment will increase the total amount the consumer will pay to purchase or lease the vehicle.” To clarify that the *amount* of the total of payments reflected in the changed monthly payment under discussion must also be disclosed, we recommend that the language in subsection (e) be changed to add the bolded words:

(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, **and the new total amount that the consumer will pay with the lower monthly payment under discussion.** If the representation is in writing, the disclosure must be in writing.

3. Recommendations

We fully support the proposal to require that, whenever a monthly payment is discussed, the dealer should also be required to disclose the total of payments, the consideration expected to be paid by the consumer in the loan calculations, and the new total of payments if a reduced monthly payment is also discussed. To ensure that all of these important pieces of information are provided, we recommend that the regulation be amended as described above.

4. Answers to questions about proposed financing disclosures.

The Commissions asks in Question 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?*

These numbers already need to be calculated to comply with TILA disclosure requirements.¹³⁸ When dealers calculate monthly payments that they are using software designed for to produce the terms of the loan based on the numbers inputted. It would be a highly unusual program that did not spit out the total of payments when it also provided the monthly payments.

If not, is there any value in a consumer learning monthly payment information before the total amount is calculated?

As the FTC has pointed out, discussing a lower monthly payment without also disclosing that the effect of that lower monthly payment will result in a higher total of payments is misleading and deceptive.

¹³⁷ See, e.g., Philip Reed & Shannon Bradley, NerdWallet, Car Payment Calculator: Estimate Monthly Loan Payments (July 20, 2022), available at <https://www.nerdwallet.com/article/loans/auto-loans/car-loan-calculator>; MortgageCalculator.org, Car Loan Calculator (accessed on Sept. 7, 2022), available at <https://www.mortgagecalculator.org/calcs/car.php>.

¹³⁸ See 15 U.S.C. § 1638(a)(5); Reg. Z 12 C.F.R. § 1026.18(h).

If so, how can the proposal be adjusted to allow for such information without obscuring necessary information about the total amount required to purchase a vehicle?

The proposal should not be adjusted, except to make the clarification we suggest in section IV.C.2, *supra*.

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?

No, it will not, as long as the rule is amended to make it clear that it is the dollar amount of the total of payments that must be disclosed. Given the complexity of the transaction repeating some information—in the same format—would highlight that information and assist most consumers in understanding the financial consequences of their choices more clearly.

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?

It would reduce the effectiveness of the disclosure. The disclosures related to financing should be provided in the same format whenever the subject is discussed.

D. The Commission should bring transparency and consistency to the pricing of Add-ons with price lists and time for consumers to calmly reflect on the Add-on purchase through a cooling-off period.

In the NPRM, the Commission proposes to prohibit dealers from selling Add-ons that either provide no benefit to consumers,¹³⁹ or that the consumer has not affirmatively agreed to after receiving an itemized list and other disclosures.¹⁴⁰ Before charges for optional Add-ons could be charged, a dealer would be required to present to the consumer several disclosures, and have the consumer sign several documents indicating receipt of the information and willingness to proceed with the purchase of the vehicle with the Add-ons.¹⁴¹ The regulation would require that the consumer sign a written declination of the vehicle *without* the Add-ons, which must be signed, dated and time-recorded, and signed by the dealer's manager.¹⁴² When the sale is to include Add-ons, they must be separately itemized, and the financial impact of the Add-ons on the cash price and the financing must be disclosed.¹⁴³ No Add-ons can be included in the price for the vehicle unless the consumer has indicated "Express, Informed consent" for them.¹⁴⁴

¹³⁹ § 463.5(a).

¹⁴⁰ § 463.5(b).

¹⁴¹ § 463.5(b)(1)(i)(B).

¹⁴² § 463.5(b)(1) (non-financed sales), (2) (financed sales).

¹⁴³ § 463.5(b)(3).

¹⁴⁴ § 463.5(c).

We strongly support the objectives of these requirements—to make prices transparent and consistent, reduce discrimination, and allow consumers to truly choose to buy optional Add-ons rather than to be pressured or deceived into purchasing them. An Add-on list that discloses all available Add-ons and their prices, if the prices are actual prices and non-negotiable, will help avoid discrimination.

However, because of the “stacks of paperwork [that] can take many hours” at a dealership to complete,¹⁴⁵ the separate documents and disclosures required under § 463.5(b) may be perceived as overly burdensome. Beyond the perception of additional burdens, even perfect disclosures provided to confused and weary consumers will not resolve the problems of Add-ons being presented in a high-pressure environment. A more meaningful protection would be a cooling-off period for Add-ons, allowing consumers time to review the paperwork after the transaction, and cancel the Add-ons for a full refund. This cooling-off period will counter the high-pressure and confusing environment of the dealers Finance and Insurance (F&I) office. It will undermine dealers’ misrepresentations about Add-ons and, through calm reflection about the value of Add-ons, allow the consumer the opportunity to compare prices with other providers, thus increasing competition in the marketplace.

1. Reform is needed to make pricing for Add-ons transparent, consistent, and fair.

As detailed in the NPRM, the sale of different Add-on products and services create a great deal of confusion for consumers at tremendous expense with little benefit. This stems in large part from the opaque way in which Add-ons are priced and sold. Unlike most other consumer goods, Add-ons are sold in a closed F&I office after a number of long and difficult negotiations—what car the consumer will be purchasing and its price, the amount the dealer will give the consumer for a trade in, whether to finance at the dealership, and if so determining what interest rate the dealer will be willing to offer.¹⁴⁶ At a point when consumers are tired and anxious to complete the transaction, they are presented with Add-ons (or sometimes the Add-ons are included in the sales contract without their knowledge). Consumers currently have little information to decide if the Add-ons are worthwhile or priced fairly. Consumers do not know what Add-ons are being offered to other consumers and the prices other consumers are being charged. This opaque system leads to overpriced Add-ons that are priced far above their actual value. They unnecessarily increase the consumer’s cost for the car sale transaction, which in turn increases the likelihood of default and deficiency. The lack of transparency and the different prices charged to different consumers lead to discrimination.

a. The current market results in consumers paying extraordinarily high prices for Add-ons that are often of little or no value.

There are a mind-boggling variety of Add-ons,¹⁴⁷ but they all generally share at least one attribute: a price markup by dealers that is much higher than the markups for most consumer goods and that

¹⁴⁵ NPRM, *supra* note 1, at 42,015 (citing at n.51 the FTC Auto Buyer Study, *supra* note 108),

¹⁴⁶ See FTC Auto Buyer Study, *supra* note 108, at 15.

¹⁴⁷ For a discussion of many Add-ons, see NCLC Auto Add-ons Add Up, *supra* note 54. In addition in Question 28, the Commission asks: *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?* This varies from dealer to dealer. Often the choice of how many and which Add-ons to offer is determined by the F&I manager, General Manager and/or Principal. It may be partly based upon whether the Principal (or persons related to the Principal) has an interest in a particular reinsurance company or program, whether an Add-on provider offers incentives for a

results in consumer charges greatly in excess of their value to consumers.¹⁴⁸ Markup by dealers on many of these items can be astronomical. The resulting contribution to dealer profits cannot be overstated and has continued to increase.¹⁴⁹ For example, while etching a VIN into a window may cost \$10 to \$15, dealers often charge several hundred dollars or more.¹⁵⁰ Consumers have been charged as much as \$2,000 for a pen and key chain costing the dealership \$15.¹⁵¹

In NCLC's analysis of approximately 1.8 million car sale transactions at over 3,000 car dealers, resulting in the sale of almost three million Add-on products from September 2009 through June 2015, the combined average markup for service contracts, GAP products, and etch products was 170%.¹⁵² While other retailers also mark up retail prices above cost, the magnitude of auto Add-on markups is often exceptionally high, especially considering the nature of the products and services being sold. Most Add-ons are not tangible items and need not be shipped or stored or sold at low prices to clear inventory if they go out of style. As dealers do not buy them ahead of time, they do not tie up capital for inventory. Unlike cars on a dealer's lot, they need not be insured, and the dealer need not obtain financing to keep them in stock. Unlike used cars, they need not be reconditioned.

A useful comparison for the price to value of Add-ons markups is insurance, which also does not involve a tangible item. Many Add-on products, such as service contracts, GAP products, and etch,

certain volume of sales, and whether a finance provider encourages the sale of Add-ons, such as permitting higher LTVs if a finance provider's own branded Add-ons are included.

¹⁴⁸ See, e.g., Group 1 Automotive, Inc., Annual Report for FY ended Dec. 31, 2021 (Form 10-K), U.S. Sec. & Exch. Comm'n file number: 1-13461 (F&I represented just 4% of gross revenue but 24% of gross profits). See also Autonation, Inc., Quarterly Report for the quarterly period ended June 30, 2022 (Form 10-K), U.S. Sec. & Exch. Comm'n file number: 1-13107 (gross profit per vehicle F&I \$ 2,724).

¹⁴⁹ See Jim Henry, *Dealer Profits On Auto Finance Way Up; It's Not The Interest, It's The Add-ons*, Forbes, May 31, 2022, available at <https://www.forbes.com/sites/jimhenry/2022/05/31/dealer-profits-on-auto-finance-way-up-its-not-the-interest-its-the-Add-ons/?sh=1558f983142b> (citing example of Sonic Automotive Inc., Charlotte, N.C., which reported an average gross profit per vehicle of \$2,280 for the first quarter in the category of "finance, insurance and other," an increase of 26.1% versus a year ago, on a same-store basis for Sonic's franchised new-car dealerships); Jackie Charniga, *F&I profits soar at largest U.S. dealership groups*, Automotive News, July 19, 2021, available at <https://www.autonews.com/finance-insurance/fi-profits-soar-largest-us-dealership-groups> (F&I revenue per vehicle and overall F&I revenue rose for most of the 150 largest dealership groups in the U.S. in 2020, according to an Automotive News survey); Adrienne Roberts, *Add-on Services Emerge as Car Dealers' Profit Generator*, The Wall St. J., Apr. 7, 2019, available at <https://www.wsj.com/articles/Add-on-services-emerge-as-car-dealers-profit-generator-11554634800>. See also John Huetter, *5 of 6 publicly traded dealership groups top \$2K in per-car F&I profit*, Automotive News, June 19, 2022, available at <https://www.autonews.com/finance-insurance/5-6-publicly-traded-dealership-groups-top-2k-car-fi-profit> (both Group 1 and AutoNation average more than \$2,500 per vehicle).

¹⁵⁰ See NCLC Auto Add-Ons Add Up, *supra* note 54.

¹⁵¹ See Gregory Arroyo, *Payment Packing in Los Angeles*, F&I and Showroom, Feb. 1 2007, available at <https://www.fi-magazine.com/308453/payment-packing-in-los-angeles>.

¹⁵² NCLC Auto Add-ons Add Up, *supra* note 54, at 21. Note that the increase in the retail price over the wholesale price can be expressed as either a markup or a margin. Markup is the ratio of gross profit to the wholesale price, while margin is a ratio of gross profit to the retail price. For example, a product that costs a retailer \$4 may be sold for \$5. The \$1 by which the retail price exceeds the wholesale price can be expressed as a 25% markup, or a 20% margin. Throughout these comments, we use markup percentages.

have insurance-like qualities.¹⁵³ For example, the cost to actually etch a number into a windshield is only a few dollars. Much of the alleged value is in the insurance-like benefit provided to the consumer if the vehicle is stolen.

However, pricing for real insurance products is different from pricing for Add-on products with insurance-like benefits such as etch. Insurance rates are subject to review and approval by state regulators. Insurance agents are generally not permitted to mark up prices; instead, the premium is set by the insurer, and the agent generally receives a predetermined commission. The individual selling the policy has no pricing discretion.¹⁵⁴ Rather, variations in price are typically based on permissible factors such as the consumer's age, sex, place of residence, marital status, and driving record.¹⁵⁵ While the use of these factors can result in unfair insurance pricing policies, the insurance agent receives a predetermined commission from the insurance company based on a fixed pricing schedule, typically in the range of 10 to 15% of the first year's premium.¹⁵⁶

Insurance prices are typically subject to cost-based pricing requirements: rates must be reasonable in relation to benefits. With credit insurance products, insurance regulators typically use loss ratios (also termed benefit ratios) to measure value to consumers relative to consumer cost. These ratios are calculated as benefits paid (claims) divided by premiums collected.¹⁵⁷ If for every \$100 in consumer premium payments, \$80 is paid out to consumers in claims, the insurance product has an 80% loss ratio. Most property and casualty insurance products have loss ratios in the 50 to 65% range.¹⁵⁸ Insurance products with higher loss ratios provide better returns to consumers (more premium dollars are returned to consumers in claims).

Using the same loss-ratio approach to compare the expense of car dealer Add-ons to the value received by consumers reveals that these Add-ons are very expensive. Due to the lack of available data regarding the amount paid out in claims, analysis has not provided exact loss ratios for auto Add-on products.

¹⁵³ Many Add-on products were previously regulated as insurance, but in recent years the industry has obtained legislation in a number of states to exempt them from insurance regulation. If the FTC chooses to explore our proposal to require a cancellation period for these products, the interplay between an FTC rule and state insurance law will require some special consideration. We will be happy to provide additional detail about how to handle Add-ons that are regulated as insurance under state law.

¹⁵⁴ Although the person selling the insurance may have discretion about which insurance company's policy or which specific policy of an insurer will be sold to a specific individual.

¹⁵⁵ See Julia Angwin, ProPublica, *California to Investigate Racial Discrimination in Auto Insurance Premiums*, (May 19, 2017), available at <https://www.propublica.org/article/california-to-investigate-racial-discrimination-in-auto-insurance-premiums>); Douglas Heller & Michelle Styczynski, Consumer Federation of America, *Major Auto Insurers Raise Rates Based on Economic Factors* (June 2016), available at http://consumerfed.org/wp-content/uploads/2016/06/6-27-16-Auto-Insurance-and-Economic-Status_Report.pdf (detailing how low-income drivers are charged higher premiums than those with higher incomes based upon economic factors that are unrelated to driving safety).

¹⁵⁶ See Nolan Hester, Insure.com, *How much is your insurance agent making off you?* (Apr. 2, 2010,) available at <http://www.insure.com/car-insurance/insurance-agent-commissions.html> (quoting Wesley Bissett of the Independent Insurance Agents & Brokers of America (IIABA)).

¹⁵⁷ Technically, the loss ratio used for evaluating rates is incurred claims divided by earned premiums.

¹⁵⁸ See National Ass'n of Ins. Comm'rs, *Report on Profitability By Line By State in 2020 (2021)*, available at http://www.naic.org/prod_serv/PBL-PB-16.pdf (IEE percent of direct premiums earned losses incurred).

However, known information about how much of the consumer's payment was kept by dealers as the markup on the product and so unavailable for payment of claims allows a calculation of the upper limit on the loss ratios for these products, and the calculation suggests that loss ratios are shockingly low. Based upon the average 325% dealer markup for etch products (an average markup of \$189 over the dealer's average cost of \$58) in 2012,¹⁵⁹ the loss ratio was below 25%—and that is assuming that every penny paid to the third-party provider was paid out in claims to the consumers and that the provider kept nothing for itself. This would mean that 75% of every dollar charged in premiums is profit to the seller.

A 2011 advertisement¹⁶⁰ for Safeguard Products International, LLC—a company that claims to be the top Add-on product provider by volume and provides a variety of Add-on products, such as service contracts, etch products, GAP, and tire and key protection—provides another illustration of this point. The advertisement (directed to dealers and not to consumers) states that Safeguard has paid out \$600 million in claims, and generated \$5 *billion* in profits for its clients (the dealers).¹⁶¹

Even assuming that Safeguard kept only exactly enough money to pay out claims (and did not retain anything for claims adjusting, administrative expenses, marketing, other costs, or profit), these figures would still result in a loss ratio of just 10.7%—\$600 million paid on \$5.6 billion in premium payments. Of course, the loss ratio would be even lower if Safeguard kept an additional part of the consumer's payment for its own costs or as profit.¹⁶²

Even credit insurance, commonly sold by car dealers and notorious for its low pay-out rates and high dealer profits, has a substantially higher loss ratio than indicated in this advertisement. In many states, there are minimum loss ratios for some types of credit insurance, although these minimum loss ratios can be very low—40%—and actual experience may not even meet this minimum.¹⁶³ Yet loss ratios in the area of 40% are double or quadruple the loss ratios for Add-on products, as discussed *supra*.

The value that consumers receive relative to the price paid is often further eroded because the dealer or the assignee (or both) may also have an ownership interest in the company producing the Add-on products or in a reinsurance company, so that they receive financial rewards even from the portion of

¹⁵⁹ NCLC Auto Add-Ons Add Up, *supra* note 54.

¹⁶⁰ See F&I and Showroom, Sept. 2011, at 31, available at https://issuu.com/bobit_fm_mag/docs/fi_sept2011_flipbk.

¹⁶¹ This number may be slightly low, in that certain claims have yet to be paid on the policies reflecting the \$5 billion in dealer profit.

¹⁶² Insurance rates are calculated based on claims, claim settlement expenses, selling expenses, general and administrative expenses, and profit. We know only two elements from the advertisement – claims (\$600 million) and selling expenses (\$5 billion in profits paid to car dealers), so the total paid by consumers will be significantly more than \$5.6 billion. Even if no insurance company is involved in the provision of these products, there must be some administrative expenses for tracking sales and claims, and the seller is surely intending to make a profit.

¹⁶³ See National Ass'n of Ins. Comm'rs, Credit Life Insurance and Credit Accident & Health Insurance Experience 2011-2015 (2016) (showing that, from 2005 through 2014, annual credit life insurance loss ratios ranged from 41.5% to 47.7%, and credit life loss ratios from 34.93% to 45.23%).

the purchase price of an Add-on product that is passed on to what appears to be an independent third-party provider.¹⁶⁴

High prices and low value of Add-ons compound the harm done to the typical targets: low-income or less sophisticated consumers.¹⁶⁵ One way of reducing customer resistance to costly Add-ons is “payment packing.” In the negotiations with the consumer, the salesperson often asks the consumer to specify the monthly payment that the consumer is prepared to pay, and then steers the consumer toward a car that can be financed for less than that amount, leaving room to pack Add-ons in the transaction without the consumer seeing any increase in the monthly payment.¹⁶⁶

Sometimes dealers charge for Add-ons they never actually provide to the consumer or for which the consumer or the car is not eligible.¹⁶⁷ Sometimes consumers will not be told the Add-on is being included in their transaction, but it will simply be added without the consumer’s consent.¹⁶⁸ Sometimes

¹⁶⁴ See, e.g., Kaplan v. Wholesale Auto. Supply Co., 2009 WL 1347404 (N.J. Super. Ct. May 15, 2009) (describing dealer-owner cooperative’s marketing of vehicle etch product and its use of Bermuda “rent-a-captive” insurer).

¹⁶⁵ See, e.g., Press Release, Office of the California Att’y Gen., Attorney General Bonta and Assemblymember Maienschein Announce Legislation to Strengthen Protections for Car Buyers (Feb. 16, 2022), available at <https://oag.ca.gov/news/press-releases/attorney-general-bonta-and-assemblymember-maienschein-announce-legislation> (describing (GAP) waivers, a costly Add-on product of little value to consumers that is often sold by car dealers along with auto loans and is generally targeted at consumers with lower incomes and subprime credit).

¹⁶⁶ See Press Release, Office of the New York Att’y Gen., A.G. Schneiderman Announces Lawsuit Against Staten Island Auto Dealerships for Alleged Deceptive Practices that Illegally Inflated Car Prices (July 28, 2016), available at <https://ag.ny.gov/press-release/ag-schneiderman-announces-lawsuit-against-staten-island-auto-dealerships-alleged> (detailing deceptive loan packing settlements with nine dealership groups); Press Release, Office of the New York Att’y Gen., A.G. Schneiderman Announces Settlements with Four Auto Dealer Groups for Deceptive Practices that Resulted in Inflated Car Prices (Apr. 21, 2016), available at <https://ag.ny.gov/press-release/ag-schneiderman-announces-settlements-four-auto-dealer-groups-deceptive-practices> (announcing loan-packing settlements with four dealership groups); California Complaint, *supra* note 111 (alleging that some F&I products, including service contracts and GAP coverage, were simply packed into the transaction.)

¹⁶⁷ Press Release, Office of the Massachusetts Att’y Gen., Central Massachusetts Used Car Dealership Agrees to Nearly \$1 Million Settlement on Deceptive Sales Practices (Nov. 19, 2019), available at <https://www.mass.gov/news/central-massachusetts-used-car-dealership-agrees-to-nearly-1-million-settlement-over-deceptive-sales-practices> (alleging that dealer sold Add-on service contracts at a cost of up to \$3,000 that were invalid due to the foreign origin of the cars).

¹⁶⁸ Press Release, Office of the New York Att’y Gen., Attorney General James Secures More Than \$125,000 For Consumers After Car Dealerships Illegally Overcharged For Bogus Anti-Theft Product (July 26, 2019), available at <https://ag.ny.gov/press-release/2019/attorney-general-james-secures-more-215000-consumers-after-car-dealerships> (consumers charged for etch, in many cases without the knowledge or consent of consumers); Complaint, Federal Trade Comm’n v. Liberty Chevrolet, Inc. d/b/a Bronx Honda, Case No. 20-CV-3945 (S.D.N.Y. May 21, 2021), available at https://www.ftc.gov/system/files/documents/cases/bronx_honda_complaint_0.pdf (alleging unauthorized Add-on included in consumers’ transactions); Complaint, Federal Trade Commission v. Universal City Nissan, Inc., Case 2:16-cv-07329 (Sept. 29, 2016) (alleging Add-ons included in consumers’ transactions without authorization); Mark Gokavi, *Jeff Schmitt Auto Group accused of ‘deceptive’ business practices*, Dayton Daily News, Aug. 5, 2013.

dealers will lie to consumers and tell them that they have to purchase Add-ons in order to buy the car or obtain financing.¹⁶⁹

Some dealers will “preload” their Add-ons and claim they are not optional.¹⁷⁰ In that case, it is important for the consumer to understand the basis for the price charged for the vehicle, which is why a clear and finite Offering Price should be required, as we discuss in section IV.B, *supra*. Some providers refuse to return refunds for Add-ons owed to consumers as required by state law.¹⁷¹ It is not surprising that consumer experts recommend that consumers not buy Add-ons at all.¹⁷²

b. The lack of transparency and different prices for different consumers leads to discrimination.

As explained in the previous section, many dealerships have no fixed prices for the Add-ons it sells to consumers. NCLC’s study showed an enormous range of prices for Add-ons with the same cost to the dealer. For example, the price that one dealership charged for a particular vehicle protection product (window etching) ranged from \$349 to \$5,000 during a single month, while the dealer’s cost for the product was only \$50.¹⁷³ Enforcement actions often show similar variations.¹⁷⁴

While the variations in pricing are sometimes more difficult to see for products that have different dealer costs for different cars, these, too, prove to have highly variable dealer markups, both by percentage and in absolute dollar terms, and therefore highly variable consumer costs.¹⁷⁵

¹⁶⁹ Press Release, Office of the Arizona Att’y Gen., AG Brnovich Obtains Over \$400,000 in Restitution from Arizona Nissan Dealers (Mar. 29, 2022), available at <https://www.azag.gov/press-release/ag-brnovich-obtains-over-400000-restitution-arizona-nissan-dealers> (alleging that that dealers told consumers they had to purchase certain Add-ons); California Complaint, *supra* note 111 (alleging that consumers were told that some F&I products, including service contracts and GAP coverage, were required by law); Levitin, *The Fast and the Usurious*, *supra* note 2 (Add-on products falsely represented as being required in order to obtain financing).

¹⁷⁰ Jamie LaReau, *Preloading products boosts per-car F&I sales*, *Automotive News*, Dec. 26, 2012, available at https://www.autonews.com/article/20121226/FINANCE_AND_INSURANCE/312269996/preloading-products-boosts-per-car-f-i-sales.

¹⁷¹ Press Release, Office of the Massachusetts Attorney General, GM Financial to Pay More Than \$1.8 Million Relating to Its Auto Loan Servicing Practices More Than 2,000 Massachusetts Consumers May Be Eligible for Restitution (Mar. 7, 2022), available at <https://www.mass.gov/news/gm-financial-to-pay-more-than-18-million-relating-to-its-auto-loan-servicing-practices>; Press Release, Office of the Colorado Att’y Gen., Ongoing GAP insurance investigation leads to over \$6.5 million in refunds for Colorado vehicle owners (Mar. 3, 2022), available at <https://coag.gov/press-releases/3-3-22/> (credit unions distribute refunds after failing to return GAP fees for cars that were paid off, totaled, or repossessed).

¹⁷² See, e.g., Beth Braverman, *Consumer Reports*, Why You Should Steer Clear of Extended Warranties (Dec. 22, 2018), available at <http://www.consumerreports.org/shopping/dont-buy-extended-warranties/>; The Simple Dollar, *Don’t Buy a Service Contract or Extended Warranty* (Feb. 1, 2012).

¹⁷³ NCLC, *Auto Add-ons Add Up*, *supra* note 54, at 21.

¹⁷⁴ Press Release, Office of the New York Att’y Gen., Attorney General James Secures More Than \$125,000 For Consumers After Car Dealerships Illegally Overcharged For Bogus Anti-Theft Product (July 26, 2019), available at <https://ag.ny.gov/press-release/2019/attorney-general-james-secures-more-215000-consumers-after-car-dealerships> (consumers charged different amounts from \$129 to \$3,998 for etch, in many cases without the knowledge or consent of consumers).

¹⁷⁵ NCLC, *Auto Add-Ons Add Up*, *supra* note 54, at 21.

These large variations in price among consumers lead to discrimination, with some races and ethnicities charged more for Add-ons than others.¹⁷⁶ In addition to higher interest rates,¹⁷⁷ and higher prices charged for the cars,¹⁷⁸ minorities also seem to be targeted for more Add-ons by dealers than other car buyers. A 2014 study conducted by the Center for Responsible Lending found that African Americans and Latinos were sold multiple Add-on products almost twice as often as white consumers: 30% of African Americans and 27% of Latinos were sold multiple Add-ons compared to 16% of whites.¹⁷⁹ The study also found that car purchases that included multiple Add-ons were associated with higher delinquency rates and greater risk of repossession, and that consumers could not simply negotiate their way out of discrimination.¹⁸⁰ A significant contributing factor to this discrimination is largely attributable to the lack of transparency and consistency in Add-on pricing.¹⁸¹

2. The Commission should require a cooling-off period within which to cancel Add-ons.

To transform the marketplace in a meaningful way, the Commission should require a cooling-off period for all Add-ons sold as part of a motor vehicle sales transaction, except for those that are included in the Offering Price, and are required to be sold with the vehicle by the dealer. Typically, Add-ons are first introduced in the F&I office after the consumer has spent hours negotiating on the price of the car they want to purchase, the amount they will receive for their trade-in, and the amount of any down payment, and often after they have been persuaded to finance at the dealership. Even with the availability of the price list, as proposed in this NPRM, unless the consumer has spent many hours researching price comparisons of Add-ons prior to visiting the dealership, they are unlikely to have the information to make well informed choices at that point in their shopping experience. A cooling-off period allows for thoughtful reflection and encourages a vibrant and competitive marketplace where both dealers and other providers of these products can compete fairly.

Such a cooling-off period would reduce the incentive for high-pressure tactics and deception in the sale of Add-ons. If dealers continue such tactics to include unwanted Add-on products, the result would be a high rate of cancellations by consumers. High cancellations would discourage these tactics and encourage the offering of products with prices related to their value. It would also allow consumers to compare prices for these products from providers other than the dealer.

¹⁷⁶ See, e.g., Complaint, N. Am. Auto. Servs., No. 1:22-cv-0169, at ¶ 27 (N.D. Ill. Mar. 31, 2022) (defendants had a discretionary policy permitting its employees to mark up interest rates and tack on charges for Add-on products, resulting in higher costs to Black applicants than similarly-situated non-Latino white applicants and charge, on average, Black borrowers more for markups and Add-ons than similarly situated non-Latino white consumers).

¹⁷⁷ See Racial Discrimination in the Auto Loan Market, *supra* note 58 (minority borrowers pay 70 basis point higher interest rates).

¹⁷⁸ See *id.* at 6 (explaining “discrimination by automobile salespeople in the form of quoting minority shoppers higher car prices. . .”).

¹⁷⁹ See Non-Negotiable, *supra* note 56.

¹⁸⁰ See *id.*

¹⁸¹ See section II.E, *supra*.

3. Examples of other transactions with a cooling-off period.

a. Door-to-door sales.

One of the most valuable trade regulation rules issued by the FTC requires a cooling-off period for door-to-door and other off-premises sales.¹⁸² The rule was issued in recognition of the history of high-pressure tactics, deceptions, and misrepresentations about price and quality, high prices for low quality products, and other systematic consumer abuse that occurred in these transactions. The Commission based its decision to issue the rule in part on the positive experiences that states had in the use of a cooling-off period in transforming the marketplace.¹⁸³ The rule allows a three-day cooling-off period to address these problems by giving consumers an opportunity to reevaluate their purchase decisions away from the salesperson's hard sell. The remedy also reduces sellers' incentive to use high-pressure sales tactics, because when consumers cancel high-pressure sales, sellers are left with no profit for their investment of time and energy.

b. Home loans.

Several laws allow those obtaining credit secured by their home a period for reflection during which they may cancel the transaction. Under the Truth In Lending Act, a consumer has a three-day period during which to exercise the right to cancel any loan secured by the home other than a purchase money mortgage.¹⁸⁴ This cancellation right is in addition to the requirement that the lender give the consumer disclosures seven business days prior to closing.¹⁸⁵

c. Existing state requirements for a cooling-off period for certain vehicle Add-ons.

A number of states already have requirements that mandate a cooling-off period during which the consumer can cancel certain Add-ons for a full refund, or a full refund less a small cancellation charge.

Service Contracts. More than a third of states have a cooling-off period for service contracts, allowing consumers to obtain a refund of the cost of a motor vehicle service contract if the consumer cancels the contract soon after purchase. Some states mandate a full refund within ten to twenty days, generally from the date of the delivery of the service contract to the person guaranteed, sometimes less a small administrative fee.¹⁸⁶ A number of states provide for a longer cooling-off period. Arkansas, Idaho,

¹⁸² 16 C.F.R. § 429.

¹⁸³ Statement of Basis and Purpose, 37 Fed. Reg. 22,933, 22,941 (Oct. 26, 1972) (“Documentation of the effectiveness of the cooling-off remedy as a solution to many of the problems arising out of door-to-door sales was provided by State officials and others concerned with consumer protection who reported an almost immediate and dramatic drop in the number of consumer complaints following the enactment of cooling-off laws in the various States. These reports prove that the remedy is effective.” (emphasis added)).

¹⁸⁴ 15 U.S.C. § 1635(f); Reg. Z §§ 1026.15(a)(3), 1026.23(a)(3).

¹⁸⁵ Reg. Z § 1026.19(a)(2); Official Interpretations of Reg. Z § 1026.19(a)(2)-2, (a)(2)(i)-1.

¹⁸⁶ See, e.g., Iowa Code § 523C.7; Md. Code Ann., Com. Law § 14-403; Mass. Gen Laws ch 175, § 149n; Mo. Rev. Stat. § 385.206; Nev. Rev. Stat. § 690C.250; N.J. Stat. Ann. § 56:12-93; N.M. Stat. Ann. § 59A-58-9; N.Y. Ins Law § 7905; S.C. Code Ann. § 38-78-30(F); Vt. Stat. Ann. Tit. 8§ 4251; Wis. Stat. § 616.56; Wyo. Stat. Ann. § 26-49-105.

Illinois, Texas, and Washington all provide for a thirty-day cooling-off period.¹⁸⁷ California and Florida provide a sixty-day cooling-off period.¹⁸⁸ Some other states that do not specifically have a cooling-off period allow customers to cancel whenever they wish and obtain a pro-rated refund minus an administrative fee that cannot be more than 10% of the refund amount.¹⁸⁹

GAP Coverage. About half of states require a thirty-day “free-look” period during which the borrower can cancel the GAP waiver products and receive a full refund.¹⁹⁰ Many of these are based upon a model act developed by the Guaranteed Asset Protection Alliance, an alliance of GAP providers, underwriters and finance sources.¹⁹¹

Credit Insurance. A number of states provide for a cooling-off period for credit insurance.¹⁹² The National Association of Insurance Commissioners has produced a model law for credit insurance.¹⁹³ Sec. 6(G) of the model provides:

The debtor has thirty (30) days from the date that he or she receives either the individual policy or the group certificate to review the coverage purchased. At any time within the 30-day period, the debtor may contact the creditor or insurer issuing the policy or certificate and request that the coverage be cancelled. The individual policy or group certificate may require the request to be in writing or that the policy or certificate be returned to the insurer or both. The debtor shall, within thirty (30) days of the request, receive a full refund or credit of all premiums or insurance charges paid by the debtor.

A cooling-off requirement established by the Commission would transform the marketplace and protect buyers. While existing cooling-off periods for some Add-ons in some states can be helpful to consumers in some circumstances, they are not straightforward. They may require that consumers understand small nuances in order to determine what cancellation rights they have. For instance, in some states, the right to cancel GAP coverage that is provided as a “credit waiver” may differ from cancellation rights for GAP coverage that is insurance. The cancellation right for a service contract may differ from the cancellation rights for a tire protection plan or window etching. A uniform rule that provides for a cooling-off period for all optional Add-ons sold as part of a car purchase transaction would alleviate this confusion, allowing consumers to choose whether or not to purchase these products away from the high-pressure and deception of the F&I office, and ensure that consumers are giving their expressed and informed consent. Including Add-ons that involve a physical component may encourage dealers to sell those items to consumers outside of the car sales transaction or risk

¹⁸⁷ Ark. Code Ann. § 4-90-506 ; Idaho Code § 41-6205 ; 215 Ill. Comp. Stat. § 152/35 ; Tex. Occ. Code Ann. § 1304.1581; Wash. Rev. Code § 48.110.075.

¹⁸⁸ Cal. Civ. Code § 1794.41; Fla. Stat. § 634.121.

¹⁸⁹ See, e.g., N.C. Gen. Stat. § 66-372(e)(3) (2019).

¹⁹⁰ See, e.g., Ga. Code Ann. § 33-63-3; Mich. Comp. Laws § 492.23 ; Tenn. Code Ann. § 56-59-102; Wash. Rev. Code § 48.160.

¹⁹¹ Guaranteed Asset Protection Alliance, GAP Waiver Model Act, *available at* <https://www.cga.ct.gov/2019/insdata/tmy/2019SB-00980-R000307-GAPA%20CT-TMY.PDF>.

¹⁹² See, e.g., Del. Code Ann. tit. 18, § 3706(a)(4).

¹⁹³ NAIC Model Laws, Regulations, Guidelines and Other Resources—July 2001, National Ass’n of Ins. Comm’rs MO-360-1, *available at* <https://content.naic.org/sites/default/files/MO360.pdf>.

allowing the consumer to keep the physical Add-on if it cannot be removed without damaging the car. Alternatively, the dealer could preinstall the Add-on and include it in the Offering Price.

4. The proposed Add-on list, with the addition of a list specific to each vehicle, will be helpful with limits.

The Commission proposes in § 463.2(b) to require dealers to create and provide an itemized list of all optional Add-ons that clearly and conspicuously discloses each Add-on and its price. We strongly support this requirement, but with clarifications to ensure that the list will make prices transparent and consistent.¹⁹⁴

§ 463.2 (b) defines the Add-on List:

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.¹⁹⁵

We disagree with the proposed language to the extent that it would allow a range of prices. As discussed *supra*, much of the abuse in the pricing of Add-ons occurs because there is no transparency about the price of Add-ons, and the pricing is not consistent from one buyer to another. An Add-on list that discloses all available Add-ons and their fixed prices would be helpful to enable savvy consumers to avoid these abuses. But setting out a range is likely to confuse many people. Where the cost of the Add-on varies by vehicle, the list should simply say that. Additionally, there should be a list of Add-on prices for each vehicle, as described *infra*.

To accomplish the goal of reducing sucker pricing and discrimination, the rule must require that the prices for the Add-ons be non-negotiable. While some consumers can and do negotiate the price of the vehicle, few negotiate the price of Add-ons or realize that they can do so. Dealers make efforts to make the prices appear non-negotiable. This, and the fact that negotiation does not allow consumer to overcome discrimination in pricing, makes a set price for Add-ons imperative. If prices from the list are simply a starting point, and dealers are permitted to charge some consumers the full stated price and some much less, the wide variations in pricing and discrimination in pricing will remain.

Requiring that the prices be fixed can be straightforward for those products that have the same price regardless of the car being sold. The proposed rule rightly anticipates that some Add-ons will have a legitimate reason for the price to vary based on the specific vehicle. One example is vehicle service contracts, where the actual dealer cost of the Add-on product varies by vehicle. For these products, the proposed rule would require a “price range the typical consumer will pay.” Without clarification, this would be counterproductive.

¹⁹⁴ The following discussion address the Commission’s Question 5: *Should the Commission provide more detailed requirements regarding the content or form of any of the proposed disclosures*, and 11: *Are additional definitions needed?*

¹⁹⁵ NPRM, *supra* note 1, at 42,044 (emphasis added).

Such a vague and ill-defined disclosure would make the rule meaningless, and perhaps detrimental, to consumers. Without further specification, the range could vary so greatly that it could be used to convince consumers they are paying a fair price when, in fact, the price far exceeds a reasonable one.

In addition to a general Add-on list for the dealership that applies set prices for some of the non-vehicle specific Add-ons, **there should be a specific Add-on list for each car offered for sale.** The vehicle-specific list will ensure that consumers can see the price for those Add-ons that vary in price based on the actual vehicle offered for sale. Having the general Add-on List and the Individual Vehicle Add-on List linked to the Offering Price for each vehicle and available on a website also would be helpful for consumers. This same information should also be provided in writing on the car to allow consumers who are physically viewing vehicles to see the Add-ons offered and their prices.¹⁹⁶

If the Commission does not accept our recommendation to exclude a range of prices, then, to make the price range useful, the range should be the actual high, low, and median prices for the product charged over the prior two years.¹⁹⁷

In Question 28, in regard to proposed § 463.4(b), the Commission asks:

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?

Providing a list with the set prices may encourage dealers to offer fewer, higher quality Add-ons at lower prices. A thirty-day cooling-off period will also encourage dealers to limit their Add-ons to those that are actually beneficial to consumers. The Add-on list should not be otherwise limited.

5. If the above recommendations are implemented, the Commission should remove the separate documents and disclosures required under § 463.5(b), other than the itemized list of Add-ons selected and their prices.

Non-negotiable price lists and a cooling-off period as described *supra* would protect consumers from opaque and inconsistent pricing, and allow them a period for calm reflect to assure themselves that buying any optional Add-on is in their best interest. These protections will significantly streamline the purchase and finance process the current proposal by removing all requirements of § 463.5(b), except for the itemized list of Add-ons selected and their prices, which would then be a requirement of § 463.5(d)(1). This will make the process more straightforward and address concerns that multiple disclosures under § 463.5(b) would be burdensome or add to a consumer's confusion.

¹⁹⁶ This discussion responds to the Commission's Question 28(c).

¹⁹⁷ While we are not aware of Add-ons for which the legitimate price varies based on the consumer's characteristics, if there is such a thing, then the price list should also contain a range relevant to that Add-on. The range should be the actual high, low, and median prices for the product charged to all consumers who purchased it over the prior two years.

6. Consumers should not be charged for items of little or no value.¹⁹⁸

The proposed rule¹⁹⁹ would make it an unfair deceptive act or practice for a dealer to charge for an Add-on product or service from which the consumer would not benefit. The application of this rule is clear if the consumer or vehicle is not actually eligible for the Add-on sold. However, it is less clear where the Add-on may provide some miniscule benefit. For example, if the GAP loan-to-value ratio meant that the consumer, through a successful claim against the GAP agreement, could conceivably recover one dollar more than the cost of the GAP coverage, does that mean the Add-on has value even though the likelihood of an event occasioning payment under the agreement is small?

Sometimes consumers are charged for tracking devices that the dealer will use for electronic repossession but that are portrayed as being valuable to the consumer as a theft recovery device. The rule should make clear that such devices do not provide benefits to consumers and dealers are prohibited from charging for them. Consumers are also often charged for vendor's single interest (VSI) insurance (discussed *infra*), which also provides no benefit to consumers.

We recommend adding a provision to the proposed rule to prohibit charging for any Add-ons with little benefit in excess of the charge for the Add-on.

7. The Commission should require that for any Add-on for which there is a policy, contract, or other document detailing coverage and requirements, such document be provided to the consumer at the time of sale.

Consumers are often sold Add-ons without detailed information about the specifics of the Add-on, such as the coverage provided and other details. Some Add-ons, such as GAP, may have limitations on coverage or exclusions. Other Add-ons, such as vehicle service contracts may require routine maintenance or exclude normal wear and tear. Add-ons, such as VSI insurance may provide little or no benefit to the consumer, but may include items like skip tracing, coverage to the creditor if the creditor failed to perfect their security interest, or other benefits for the dealer or the assignee. To make an informed decision within the cooling-off period, consumers must have the documentation related to Add-ons for which they paid.

8. Recommendations

a. The Commission should create a cooling-off period by adding the following:

To § 463.5, a new subsection (d):

(d) Cooling-off period. 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 do any of the following:

¹⁹⁸ This section is responsive to the Commission's Questions 31, 32, and 34.

¹⁹⁹ § 463.5(a) Dealer Charges for Add-ons and Other Items.

(1) Fail to furnish the consumer with a fully completed contract in writing which shows the date of the transaction and contains the name, physical address, and email address of the Motor Vehicle Dealer, and in immediate proximity to a list of the charges for any optional Add-ons selected by the consumer, separately itemized, a statement in substantially the following form:

“You, the buyer, may cancel any of these Add-ons for a full refund at any time prior to midnight of the thirtieth day after the date you have received a copy of the service contract, insurance policy, GAP waiver contract or other document containing the particulars of the Add-on. See the attached notice of cancellation form for an explanation of this right.”

The Motor Vehicle Dealer shall provide the buyer with the duplicate notice of cancellation form set forth in paragraph (b) of this section in writing, provided however, that in the event of cancellation the buyer must be able to retain a complete copy of the contract. Furthermore, if both copies of the form are not attached to the contract or receipt, the seller is required to alter the last sentence in the statement above to conform to the actual location of the written forms.

(2) Fail to furnish each consumer, at the time the consumer signs the contract, a form in writing, with the information about the contract filled in by the dealer, captioned either “ELECTION TO CANCEL,” which shall contain in at least ten point bold face type the following information and statements in the same language, e.g., Spanish, as that used in the contract.

Election to Cancel

Regarding optional Add-ons sold to [Name of Consumer] by [Name of Dealer]

Date this Election was provided to consumer: [Date Form provided to Consumer]

On [Date of Car Sales Transaction], [Name of Car Dealer] sold you the following:

[A list of all optional Add-ons selected by the consumer and their prices, separately itemized, notation if the Add-on includes a physical component which will require the consumer to make the vehicle available to the Dealer for removal if the Add-on is canceled along with a box for the consumer to check to indicate they wish to cancel and receive a refund for that Add-on].

You may CANCEL any or all of these Add-ons for a full refund at any time prior to midnight of the thirtieth day after the date of the transaction, or at any time prior to midnight of the thirtieth day after you have received a copy of the service contract, policy, GAP waiver contract or other document containing the particulars of the Add-on.

If you cancel any Add-on, a refund of the charge for that Add-on reflected in the itemized list above will be returned to you at the address you provided at the time of purchase within TEN BUSINESS DAYS following receipt by the seller of your cancellation notice.

If you cancel and the Add-on includes physical goods that can be removed from the vehicle by the dealer with no damage to the vehicle, you must make the vehicle available to the motor vehicle dealer during business hours at some time convenient to the consumer within twenty business days after you notify the dealer of cancellation so that the dealer may remove the physical Add-on at the motor vehicle

dealer's expense and risk. If the physical good cannot be removed without damaging the vehicle you may retain the physical good.

If you do make the vehicle available to the dealer within the twenty business days of the date of your Notice of Cancellation and the dealer does not remove the physical Add-on, you may retain it without any further obligation.

To cancel this transaction, deliver a signed and dated copy of this Cancellation Notice or any other written notice, or an email (as provided by the dealer), to [Name of dealer], at [address of dealer's place of business and an available email address] NOT LATER THAN MIDNIGHT OF [date].

I HEREBY CANCEL THE ADD-ONS CHECKED ABOVE.

(Date) _____

(Buyer's signature) _____

The Commission should also add the following:

In § 463.3, by adding a new subsection (q), as follows:

(q) Misrepresent in any manner the consumer's right to cancel Add-ons as described in § 463.5.

b. To improve the Add-on List and the Individual Vehicle Add-on List, the Commission should:

Amend § 463.2(b) as follows:

§ 463.2 (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 **non-negotiable** price of each such Add-on.

Add a new subsection (l) to § 463.2, as follows:

§ 463.2 (l) *Individual Vehicle Add-on List* means an itemized list of all optional Add-on Products or Services offered for sale with any motor vehicle offered for sale by a Motor Vehicle Dealer. The Individual Vehicle Add-on List must Clearly and Conspicuously disclose each such optional Add-on and the price of each such Add-on.

Add a new subsection § 463.4 (f) as follows:

§ 463.4 (f) Individual Vehicle Add-on List.

In connection with the sale or financing of vehicles, a vehicle's Individual Vehicle Add-on List must be disclosed:

- (1) On each website, online service, or mobile application operated by or on behalf of the Dealer that identifies a specific vehicle, and at each dealership on each car offered for sale; and
- (2) In any advertisement that references, expressly or by implication, a specific vehicle; and
- (3) 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 Individual Vehicle Add-on List.
- (4) 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 Individual Vehicle Add-on List 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 Individual Vehicle Add-on List must be disclosed in writing.

c. To protect against consumers being sold Add-ons of little or no value the Commission should amend § 463.5 as follows:

§ 463.5

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 little or 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, or would only receive a very small benefit in relation to the price of the Add-on 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; or
- (3) Products used to aid repossession by secured creditors; or
- (4) Vendor's single interest (VSI) insurance.

d. In order to ensure that consumers receive a copy of the policy or contract and other relevant information the Commission should add:

A new subsection (e) to § 463.5, as follows:

(e) Provision of policy, contract, and other relevant documentation. For every Add-on that includes a policy, contract or stated coverage the consumer must be provided all documents and related details at the time of sale. Such supporting documentation includes but is not be limited to:

(1) For Vehicle Service Contracts, a copy of the contract itself including the administrator and backup insurance company;

(2) For GAP, the requirements for protection, conditions, exclusions and administrator; and

(3) For VSI, the insurance policy, optional endorsements, and any agreements between the dealer and assignee or insurance company that affect coverage.

E. The Commission should adopt the proposed list of prohibited misrepresentations.

The Commission has proposed a list of specific prohibited misrepresentations, addressing the conduct exposed and highlighted by research, enforcement matters, and consumer complaints. We support the inclusion of this list and believe that it will serve to clearly define acts that constitute Rule violations and support the FTC's efforts to obtain consumer redress.

Specifically defining a list of unfair and deceptive acts and practices (UDAP) eliminates the need to determine whether that practice falls within a broad but not precisely defined notion of deception or unfairness. This also provides clear guidance to dealers about what conduct is considered unfair and deceptive instead of engaging in costly litigation and negotiations to make a case-by-case determination. A well-defined list provides further clarity for state UDAP provisions, which similarly prohibit unfair and deceptive practices, and particularly where the state statute places great weight on the FTC's rules and interpretations. Some states provide that violations of the FTC Act or other consumer protection laws are "per se" UDAP violations,²⁰⁰ and courts have interpreted that violations of certain FTC rules are "per se" state UDAP violations.²⁰¹

Defining these prohibited acts will also assist the Commission in obtaining consumer redress in its enforcement actions, including disgorgement and restitution. The United States Supreme Court ruled in *AMG Capital Management, LLC v. FTC*²⁰² that the FTC does not have authority to obtain consumer redress in cases pursuing violations of Section 13(b) of the FTC Act. This differs from cases pursued as violations of a trade practice rule, where in 15 U.S.C. §57b(b) Congress explicitly authorizes the FTC to obtain consumer redress. Ensuring that there is a clear list of prohibited acts will permit the FTC to pursue meaningful relief for consumers and prohibit unscrupulous dealers from keeping money obtained through the use of deceptive conduct.

²⁰⁰ D.C. Code § 28-3905(k)(1); Fla. Stat. § 501.203(3)(c); Nev. Rev. Stat. § 598.0923(1)(c); Conn. Agencies Regs. § 42-110b-28(b)(23) (violation of federal or state statute or regulation concerning the sale or lease of motor vehicles is a state UDAP violation); Idaho Consumer Prot. Regs., Idaho Admin. Code r. 04.02.01.033; Mass. Consumer Prot. Regs., 940 Mass. Regs. § 3.16; Mo. Code Regs. Ann. tit. 15, § 60-8.090.

²⁰¹ See *Morgan v. Air Brook Limousine, Inc.*, 510 A.2d 1197 (N.J. Super. Ct. Law Div. 1986) (violation of FTC Franchise Rule is a per se deceptive and unconscionable practice); *Anderson v. DaimlerChrysler Corp.*, 2005 WL 3891034 (Ohio Ct. Com. Pleas Nov. 23, 2005) (consent order; seller's failure to include FTC Holder Notice in financing contract is UDAP violation).

²⁰² ___ U.S. ___, 141 S. Ct. 1341, 209 L. Ed. 2d 361 (Apr. 22, 2021).

Recommendations:

We recommend that the FTC adopt its proposed list of prohibited misrepresentations in § 463.3.

F. Recordkeeping requirements are essential for enforcement.

The recordkeeping requirements of the NPRM are an essential component of enforcing the other requirements in these proposed rules, along with other federal and state consumer protection laws. Expanded requirements for recordkeeping will assist the FTC and honest dealerships, as well as consumers.

The current proposal addresses three aspects of recordkeeping: (1) the retention time period, (2) the content of the records required to be kept, and (3) the availability of the retained records.

The FTC proposal would require dealers to maintain all records necessary to demonstrate compliance with the rule, including materially different advertisements and Add-on lists, financing and lease documents signed by consumers, documents evidencing compliance with the Add-on requirements in § 463.5, and written consumer complaints. The proposal in § 463.6 would require these records to be retained for two years from the date they are created.

1. The retention period should be much longer.

The stated purpose of the rule is to ensure that records that are “necessary to demonstrate compliance” are maintained. This purpose would not be served by a two-year retention period.²⁰³ Statutes of limitation extend well beyond the proposed two-year time frame, yet the proposed time period would effectively limit enforcement to the two years after the original transaction. For example, when the FTC seeks monetary redress (refunds and damages) for violation of a trade practice rule, it has a **three-year** statute of limitations,²⁰⁴ and claims seeking civil penalties in these cases are subject to a **five-year** statute of limitations.²⁰⁵

The discrepancy between a two-year retention period and longer limitations periods would simply aggravate a problem noted by Chief Litigation Counsel for the FTC’s Bureau of Consumer Protection, Bikram Bandy:

Many Commission actions involve schemes that have been operating for many years, primarily because it takes several years for such schemes to generate a sufficient volume of complaints to justify the Commission’s use of its limited resources to commence an investigation. As a result, by the time the Commission commences and completes its

²⁰³ The Commission asks in Question 43 whether the proposed twenty-four month retention period is appropriate, and what period would be appropriate.

²⁰⁴ 15 U.S.C. § 57b(d).

²⁰⁵ 28 U.S.C. § 2462 (general five-year statute of limitations for actions seeking a civil fine or penalty).

investigation and files suit, multiple years may have elapsed from the time the unlawful conduct first began.²⁰⁶

Instead, we propose a much longer retention period of seven years, or the length of the financing contract, whichever is longer. The longer retention period will not only aid the Commission in its investigative and enforcement capacities, but it will also aid other enforcement efforts. State attorneys general have regularly brought enforcement actions against dealerships for much of the conduct squarely at issue in this rule.²⁰⁷ These state agencies have widely varying statutes of limitation in their UDAP enforcement provisions, and in some instances do not have any limitations period at all, and many states require dealers to keep records for longer than the FTC's proposed recommendation of two years.²⁰⁸ Failing to require dealers to maintain records longer than two years will hinder enforcement efforts.

A longer retention period will also serve dealerships by enabling them to readily provide records that may prove their compliance with the rule. And, a longer retention period is not inconsistent with dealerships' current practices. The National Automobile Dealers Association has recommended a retention period that corresponds with the length of the consumer's retail installment sales contract for compliance with the FTC's Used Car Rule:

There is no mandatory retention period for Buyers Guides, but consider retaining copies for as long as the Retail Installment Sales Contract (RISC) term.²⁰⁹

We recommend that the FTC amend its record retention period to seven years, or the Retail Installment Sales Contract term (if applicable), whichever is longer.

2. The proposed content of the records to be retained is appropriate.

We support the FTC's proposal to maintain the records identified in § 463.6.²¹⁰ Section 463.6(a)(1) requires retention of "all Materially different advertisements, sales scripts, training materials, and marketing materials regarding the price, financing or lease of a motor vehicle" used during the relevant time period. This requirement is critical and is essential to enforce the proposed disclosure requirements in § 463.4 relating to Offering Price and the finance disclosures, as well as the prohibited misrepresentations in § 463.3. Requiring the retention of these records will ensure that the FTC is able to determine whether dealers comply with these provisions.

²⁰⁶ Bikram Bandy, Chief Litig. Counsel, Consumer Fin. Prot. Bureau, Fed. Trade Comm'n, Not a One-Trick Pony: FTC Monetary Remedies Beyond Section 13(b) (Mar. 1, 2021), *available at* <https://www.consumerfinancemonitor.com/wp-content/uploads/sites/14/2021/06/ABA-Paper-on-Monetary-Remedies.pdf>.

²⁰⁷ See section III, *supra*.

²⁰⁸ See, e.g., Va. Code § 46.2-1529 (requiring retention of dealer records, including "purchases, sales, trades, and transfers of ownership" for five years); Mich. Comp. Laws § 257.251 (requiring licensed dealers to retain records for five years).

²⁰⁹ National Auto. Dealers Ass'n, A Dealer Guide to Federal Records Retention and Reporting 9 (Mar. 2018), *available at* <https://www.mada.org/userfiles/fck/file/NADA%20Record%20Retention%20Guide.pdf>.

²¹⁰ The Commission asks in Question 41 whether the specified records would be appropriate to verify compliance with the proposed Rule.

Section 463.6(a)(2) requires retention of “Materially different Add-on Lists and all documents describing such products or services that are offered to consumers.” Requiring the Add-on List to be made publicly available as provided in §463.4(b) will help preclude wide variations and discriminatory pricing practices by dealers,²¹¹ and retention of these records will enable the FTC to determine whether dealers have stayed within the bounds of their own pricing guidelines. Retention of these records will also enable the FTC to determine whether dealers have complied with the prohibitions against misrepresentations about Add-ons in § 463.3(b) and compliance with the disclosure requirements regarding “required Add-ons” in § 463.4(c).

Section § 463.6(a)(3) pertains to records that are unique to particular consumers, including purchase and financing documents that are signed by the consumer regardless of whether final approval is received, and all written communications between the dealer and a consumer who has signed a purchase or financing contract.

The FTC has expressed its concern about dealer “bait and switch” tactics prompting the need for this rule, and this record retention requirement would help the FTC determine whether dealers have “baited” consumers through conduct prohibited by § 463.2. The requirement to retain records “whether or not final approval is received for a financing or lease transaction” is also critical to ensure that dealers who engage in yo-yo sales conduct maintain records about these transactions.²¹²

Section 463.6(a)(4) requires retention of records that demonstrate compliance with § 463.5, related to Add-on disclosures. Requiring the retention of records that evidence compliance with the disclosure requirement is critical. There is simply no other way to ensure that dealers have complied with these provisions.

Section 463.6(a)(5) requires retention of “written consumer complaints relating to sales, financing, or leasing, inquiries related to Add-ons, and inquiries and responses about vehicles referenced in Section 463.4 of this part.” We support this requirement. Investigations and enforcement actions are often prompted by consumer complaints, and enforcement agencies frequently struggle to identify consumers who have been affected by a pattern of illegal conduct. This requirement will enable the FTC to identify these patterns of complaints and the affected consumers. The requirement to retain “inquiries and responses” referenced in § 463.4 is critical in light of the timing provisions about the Offering Price in § 463.4(a)(3)(i), and ensures that dealers are providing the required disclosures in writing “if the representation is in writing” as required in § 463.4(a)(3)(ii), and 463.4(c), (d), and (e).

We also recommend that the FTC explicitly require dealers to retain language-translated versions of the required records where those translations have been provided or made available to consumers.²¹³ This will ensure dealers’ compliance with the language translation requirements in § 463.2(d)(5) and allow the FTC to evaluate the translations for accuracy and compliance with the rule itself. We make recommendations regarding additional requirements to address additional language issues in section V.A, *infra*.

²¹¹ See discussion of discriminatory practices in section II.E, *supra*.

²¹² The FTC addresses yo-yo sales in § 463.3(h) and (i), prohibiting dealers from misrepresenting when a transaction is final and from retaining down payments or trade-ins if the transaction is not finalized.

²¹³ The Commission asks in Question 42 whether additional records should be specified.

3. The FTC should clarify that the retained records should be available to consumers and enforcement agencies upon request.

The FTC's proposal does not address to whom these records should be made available.²¹⁴ We recommend that dealers be required to make documents that pertain to a particular consumer available to that consumer.

This would include portions of the records identified in:

- § 463.6(a)(3): “purchase orders; financing and lease documents... signed by the consumer,” and “all written communications relating to sales, financing, or leasing” between the consumer and the dealer.
- § 463.6(a)(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)”;
- § 463.6(a)(5): copies of the consumer’s “complaints relating to sales, financing, or leasing, inquiries related to Add-ons, and inquiries and responses about vehicles referenced in § 463.4.”

If dealers are required to maintain these records that pertain to a particular consumer, that consumer should be entitled to access them. Dealers routinely deny consumers access to their own records, prompting the need for a consumer to hire an attorney and make a demand or engage in litigation.

Even consumers who attempt to litigate these issues are often forced into arbitration, where discovery is sometimes not permitted at all, or typically far more limited than in litigation. Requiring access to these records at the outset would likely preclude the need for litigation in some instances, ultimately reducing the cost for all parties involved.

4. Recommendations

We recommend the following changes to § 463.6:

1. Amend § 463.6 to require dealers to maintain these records for seven years, or the Retail Installment Sales Contract term (if applicable), whichever is longer;
2. Add a provision requiring dealers to retain language translations of the records identified in § 463.6 where those records have been made available to or provided to consumers; and
3. Add a provision requiring dealers to make the records that pertain to a particular consumer, including records identified in § 463.6(a)(3), (4) and (5), available to that consumer upon request.

²¹⁴ The Commission asks in Question 40 whether the scope of the recordkeeping requirements should be expanded or narrowed.

V. Answers to Questions.

This section responds to questions that were not addressed in section IV, *supra*, regarding the explicit proposals in the NPRM. Through answering the FTC's questions, we are making five recommendations for additional provisions to be included in the final rule. These relate to:

- A. Ensuring that non-English speakers have translated versions of essential terms.
- B. Protecting consumers from the sale of unsafe vehicles.
- C. Prohibiting the use of electronic disabling devices in repossessions.
- D. Ensuring compliance with federal law when electronic records and signatures are used.
- E. Providing substantive prohibitions against yo-yo sale transactions.

A. The need to protect non-English speakers from unfair and deceptive practices by automobile dealers.

The Commission asks in Questions 9 and 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?*

The answer is yes. To guard against unfair and deceptive actions being hidden because of language barriers, we recommend that the Commission expand its proposed approach to language access issues within this proposed rule by amending the definition of “Clearly and Conspicuously” in § 463.2(d) to include stronger language translation requirements, and affirmatively including translations of retail installment sales contracts and buyer’s orders.

According to the U.S. Census, nearly 22% of the U.S. population over the age of five speak a language other than English at home, and, of these, 38.3% have limited proficiency in English, meaning that they speak English less than very well.²¹⁵ (These consumers are referred to as limited English proficient, or “LEP.”²¹⁶)

These consumers face significant barriers when navigating the purchase of financial products, including completing financial documents, resolving problems with financial documents, and accessing financial education.²¹⁷ The harmful practices that the NPRM proposes to address are exacerbated when consumers are not proficient in English. The reasons include the “protracted and paperwork-heavy

²¹⁵ U.S. Census Bureau, 2019 American Community Survey 5-Year Estimates, Table S1601: Language Spoken at Home (2020), available at <https://data.census.gov/cedsci/table?q=S1601&tid=ACST5Y2020.S1601>.

²¹⁶ See LEP.gov at <https://www.lep.gov/source-and-methodology>.

²¹⁷ See Consumer Fin. Prot. Bureau, Spotlight on Serving Limited English Proficient Consumers: Language Access in the Consumer Financial Marketplace (Nov. 2017).

vehicle-buying process,”²¹⁸ the buyer’s need to “wad[e] through a thick stack of dense paperwork filled with fine print,”²¹⁹ and yo-yo financing schemes that are used to pressure consumers into a new deal.²²⁰

When the complex financial documents involved in a dealer financed car purchase are presented in a foreign language to the consumer, there is virtually no chance that the consumer will be able to understand the content.²²¹ A 2017 report by the New York City Department of Consumer and Worker Protection found that many of the most common predatory auto financing practices by used car dealers disproportionately affect LEP individuals.²²²

Fannie Mae and Freddie Mac commissioned a study of LEP borrowers to identify major barriers in accessing mortgage credit.²²³ The study found that trust is a critical part of the process for LEP borrowers, particularly for Spanish-speaking consumers who expressed a high level of trust with Spanish-speaking industry members.²²⁴ This high level of trust leaves these individuals vulnerable to fraudulent behavior, particularly in the context of the sale of a vehicle, where salespeople may go to extraordinary lengths to solicit a consumer’s business.

Dealers advertise in foreign language publications and employ salespeople that speak other languages, creating a trusting environment for consumers who are not confident in their English-speaking abilities.²²⁵ Enforcement agencies have brought actions against dealers who exploit this vulnerability by failing to translate sales documents, falsifying finance applications, including worthless Add-ons in the transaction, and failing to provide completed contracts.²²⁶ In a class action against subprime auto lender Westlake Financial Services, a plaintiff alleged that the auto dealership’s employees negotiated with the

²¹⁸ NPRM, *supra* note 1, at 42,016

²¹⁹ *Id.* at 42,016.

²²⁰ *See id.* at 42,020-42,021.

²²¹ The CFPB’s Spotlight on Serving Limited English Proficient Consumers, *supra* note 218, highlights the role of children in LEP families to assist in translations, but children may or may not be able to accurately translate highly-specialized terminology. In the context of an auto sale transaction, even the term “warranty” can have extraordinarily different meanings depending upon the context in which it is used.

²²² New York City Dep’t of Consumer & Worker Prot., *Used and Abused by the Used Car Industry: Predatory Lending in the Secondhand Auto Industry 9* (Apr. 2017). The study reports that the most common tactics include the conduct at issue in this proposed rule, including deceiving consumers into more expensive loans, deceptive Add-on sales practices, falsely lowered monthly payment amounts, and failing to accurately disclose the cost of the vehicle. *See id.* at 8.

²²³ Kleimann Commc’n Group, *Language Access for Limited English Proficiency Borrowers: Final Report 14* (Apr. 2017), available at <https://www.fhfa.gov/PolicyProgramsResearch/Policy/Documents/Borrower-Language-Access-Final-Report-June-2017.pdf>.

²²⁴ *Id.* at 46-47.

²²⁵ *See* Consent Order and Judgment, *New York v. Star Auto Sales of Bayside, Inc.*, Case No. 2020/718092 (N.Y. Sup. Ct. Nov. 10, 2020), available at https://ag.ny.gov/sites/default/files/07.0_star_coj_fully_executed_final.pdf.

²²⁶ *Id.* *See also* Press Release, New York City Dep’t of Consumer & Worker Prot., Department of Consumer Affairs Announces Decision in Major World Case, (Jan. 25, 2019), available at <https://www1.nyc.gov/site/dca/media/pr012519-DCA-Announces-Decision-in-Major-World-Case.page>.

consumer in Spanish, but failed to properly translate the sales documents (including the arbitration agreement pertaining to a GAP Add-on contract).²²⁷

The FTC has acknowledged the importance of language translation in consumer transactions, including auto sales. Recognizing that dealers frequently advertise cars and negotiate sales in a language other than English, but then provide written disclosures in English, the Used Car Rule requires dealers to provide a Spanish-language version of the Buyer's Guide to consumers when the auto sale has been conducted in Spanish.²²⁸ The FTC has also issued a policy statement specifically pertaining to advertising practices, clarifying that where the FTC requires certain disclosures contained within advertising materials to be "clear and conspicuous," the disclosure must be translated into the language of the "target audience." Finally, the FTC requires translation of disclosures into the language in which the transaction was conducted in the Cooling-Off Rule²²⁹ (pertaining to door-to-door sales) and the Business Opportunity Rule.²³⁰ Unlike the Used Car Rule, neither of these rules is limited to Spanish translations.

The FTC proposed rule requires certain disclosures and information to be made "clearly and conspicuously," and defines that term in § 463.2(d). We applaud the FTC's expansive definition of this term, and its acknowledgement of language access in currently included in proposed subsection (d)(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.** (*emphasis added*).

The FTC requires dealers to clearly and conspicuously disclose (1) all of the disclosures identified in § 463.4; (2) the cash price without optional Add-ons (in financed and non-financed transactions) in § 463.5; and (3) the itemization of optional Add-ons in § 463.5.

However, as currently written, the proposed rule may not require the translation of each required disclosure, it is not clear that oral disclosures must also be translated, and it requires reliance on a separate FTC policy statement on advertising translations that does not carry the same effect as a rule.

First, the "clearly and conspicuously" language translation requirement in § 463.2(d)(5) implicitly requires a "trigger": **if** there is a representation that requires the disclosure, **then** the disclosure must be in the language of the representation. This could be interpreted to mean that, for any of the required disclosures, if there is no triggering representation, then the disclosure need not be translated unless otherwise required by the FTC's policy statement in 16 C.F.R. § 14.9 (but see below for additional consideration of § 14.9). Each of the disclosures and whether it may be required to be translated pursuant to the proposed definition of § 463.2(d) is addressed below:

²²⁷ Ramos v. Westlake Serv., 195 Cal. Rptr. 3d 34, 36 (Cal. Ct. App. 2015) (affirming trial court's denial of defendant's motion to compel arbitration).

²²⁸ 16 C.F.R. §§ 455.2, 455.5.

²²⁹ 16 C.F.R. § 429.1.

²³⁰ 16 C.F.R. § 437.5.

Section	Description	Representation Included?	Otherwise required to be translated?
463.4(a)(1)	Disclose the Offering Price in vehicle advertisement	No.	Yes. § 14.9 as advertising materials
463.4(a)(2)	Disclose the Offering Price in monetary amount of financing term advertisement	No.	Yes. § 14.9 as advertising materials
463.4(a)(3)	Disclose the Offering Price in “communications” that reference specific vehicle, etc.	Maybe. “Communications” may be considered a representation.	No.
463.4(b)	Add-on List – advertisement covered by § 14.9	No	Yes. § 14.9 as advertising materials
463.4(c)	Add-ons not required	Yes.	
463.4(d)	Total of payments	Yes.	
463.4(e)	Monthly payments comparison	Maybe. “When making a comparison” may be considered a representation.	
463.5(b)(1)	Cash Price without Add-ons	No.	No.
463.5(b)(2)	Cash Price without Add-ons (financed transaction)	No.	No.
463.5(b)(3)	Itemization of Add-ons	No.	No.

Some of the disclosures above, such as § 463.4(a)(3) and 463.4(e), are not clear about whether there is a triggering representation requiring translation. These provisions are premised upon conversations with a consumer, so it is possible that these conversations could be interpreted to constitute the representation. The disclosures in §§ 463.5(b), however, almost certainly do not include triggering representations. These disclosures must be provided only if a dealer intends to charge a consumer for Add-ons.

To resolve any ambiguity, the FTC should explicitly require translation of disclosures **into the language in which the sale has been negotiated**, instead of only when there is a particular representation. This is consistent with the existing definition of “clearly and conspicuously,” as well as other FTC guidance. This could be accomplished by amending the definition of “clearly and conspicuously” in § 463.2(d)(5) to add the phrase “or in the language in which the sale has been negotiated.”

Second, subsection (d)(5) of the definition of “clearly and conspicuously” uses the word “appears” when it refers to the disclosures. This is ambiguous, and could be interpreted to mean that this subsection, and any attendant language translation requirements, apply only to written disclosures or representations instead of written **and** oral. This is important because the rule does not affirmatively require that each of the disclosures (include those required in § 463.4(c), (d) and (e)) be made in writing.²³¹ The FTC should amend the definition to ensure that the disclosure must appear **or occur** in each language in which the representation that requires the disclosure appears **or occurs**.

²³¹ See NPRM, *supra* note 1, at 42,046 (proposing § 463.4(c), (d), and (e), which provide that the disclosure need be in writing only if the representation is in writing).

Third, while the FTC’s policy statement in 16 C.F.R. § 14.9 is useful to interpret and require the translation of advertising materials, this policy statement is not a rule. The FTC should incorporate the provisions of § 14.9 into this rule to ensure that they are equally enforceable.

Finally, the FTC should require dealers to translate any buyer’s order and retail installment sales contract into the language in which the sale has been negotiated. These two documents form the basis of the sale, and it simply does not logically follow to require the translations of disclosures made during the negotiations but not the actual documents memorializing the sale itself. While there are many documents that may accompany the sale of a vehicle, we believe that these two are the most critical and their translation should be prioritized. As the FTC has done with the Used Car Rule disclosure, it should create model translations of these documents in the five most common non-English languages spoken in the United States.²³²

We would encourage the FTC to expand its approach to language access and LEP individuals by ensuring that all required disclosures are translated into the language in which the sale was negotiated (in addition to the triggering “representation” language), and to require translation of the most salient car purchase documents -- the retail installment sales contract and the buyer’s order -- into the language in which the sale has been negotiated.

Recommendations

- 1) Amend the definition of “Clear and Conspicuous” in § 463.2(d)(5) to ensure that all disclosures are translated into the language used during the sale as follows:

The disclosure must use diction and syntax understandable to ordinary consumers and must appear or occur in each language in which the representation that requires the disclosure appears, or occurs, or in the language in which the sale has been negotiated.

- 2) Add a provision requiring dealers to translate any Buyer’s Orders and Retail Installment Sales Contracts signed by the consumer into the language in which the sale was negotiated.
- 3) Add a provision incorporating the FTC’s policy statement in 16 C.F.R. § 14.9.

B. The regulation should prohibit misrepresentations related to the condition of the vehicles.

NPRM Question 18 asks: “*Are there any other common misrepresentations in the motor vehicle marketplace that are not adequately addressed by the proposed rule?*” The answer is yes – the FTC Final Rule should prohibit unfair and deceptive advertising and representations regarding the safety, condition, mileage, and history of

²³² The U.S. Census Bureau reports that the five most common non-English languages (in order) are (1) Spanish, (2) Chinese, (3) Tagalog, (4) Vietnamese, and (5) Arabic. U.S. Census Bureau, 2020 American Community Survey 1-Year Estimates, Table B16001: Language Spoken at Home by Ability to Speak English for the Population 5 Years and Over (2020), *available at* <https://data.census.gov/cedsci/table?q=Table%20B16001&tid=ACSDT5Y2020.B16001&tp=false>.

used vehicles.²³³ Dealers sell cars with open recalls and other mechanical defects, either deliberately concealing these defects, or negligently failing to perform the most basic inspection or vehicle history search before selling them to a consumer. Not only are these defects serious safety issues, but they also are worth less than vehicles in safe and roadworthy condition. The FTC's trade regulation rule governing the sale of used cars, issued in 1984, provides that "[i]t is a deceptive act or practice for any used vehicle dealer...[t]o misrepresent the mechanical condition of a used vehicle."²³⁴ This rule is decades out-of-date, and the Final Rule resulting from this NPRM should provide more specificity and update the existing requirements.

1. Dealers sell cars with significant mechanical defects and misrepresent the safety, certification, and history of their vehicles.

Dealers' deceptive and fraudulent sales of vehicles that are unsafe or damaged presents an extremely harmful practice, sometimes even resulting in severe injuries or deaths not only to the consumers who have purchased the car, but also to their passengers and other drivers on the road. The FTC has acknowledged the special safety risk of vehicles with open recalls:

Unrepaired auto recalls pose a serious threat to public safety. Car manufacturers and the National Highway Traffic Safety Administration have recalled tens of millions of vehicles in each of the last several years for defects that pose significant safety risks to consumers. In 2015, for example, recalls affected 51 million vehicles nationwide. And defects that have been the subject of recalls have led to severe injuries and even death for many consumers.²³⁵

Typical safety recall defects include faulty brakes, catching on fire, loss of steering, wheels that fall off, hoods that fly open in traffic, seat belts that fail to work in a crash, and exploding Takata airbags that propel metal shrapnel into drivers' and passengers' faces, necks, and torsos.²³⁶ Despite this, many dealerships still advertise vehicles with open recalls as "safe," and represent that they are certified or have passed some dealer inspection process.²³⁷ It is deceptive to permit dealers to claim that vehicles are safe when they are subject to unresolved, open recalls, as demonstrated by the National Highway Traffic Safety Administration's description of a recall:

²³³ This is a frequent complaint by consumers about vehicles they have purchased. See Appendix B, *infra*, which includes consumer stories and consumer agency reports about dealerships selling vehicles with mechanical defects and undisclosed damage history.

²³⁴ 16 C.F.R. §455.1(a)(1).

²³⁵ Statement of the Federal Trade Commission Concerning Auto Recall Advertising Cases (Dec. 15, 2016), *available at* https://www.ftc.gov/system/files/documents/cases/161216_six_auto_recall_cases_statement_of_the_commission_1_0.pdf.

²³⁶ U.S. Dep't of Trans., National Highway Traffic Safety Admin., Motor Vehicle Safety Defects and Recalls 3 (revised Aug. 2017), *available at* https://www.nhtsa.gov/sites/nhtsa.gov/files/documents/14218-mvsdefectsandrecalls_041619-v2-tag.pdf. See also Jeff Plungis & Patrick Owen, Consumer Reports, *Will the Takata Airbag Recall Ever End? What You Should Know About the Deadly Defect* (Feb. 13, 2018), *available at* <https://www.consumerreports.org/recalls/will-the-takata-airbag-recall-ever-end/>.

²³⁷ Christopher Jensen, *Buyer Beware: 'Certified' Used Cars May Still Be Under Recall*, The N.Y. Times, Dec. 16, 2016, *available at* <https://www.nytimes.com/2016/12/16/business/buyer-beware-certified-used-cars-under-recall.html>.

A recall is issued when a manufacturer or NHTSA determines that a vehicle, equipment, car seat, or tire creates an unreasonable safety risk or fails to meet minimum safety standards.²³⁸

Enforcement cases show the frequency with which dealers sell cars in dangerous condition after advertising that they are safe, that they have been through a rigorous inspection, or that they have no collision or damage history.²³⁹ Allegations in a recent spate of cases brought by the Pennsylvania Attorney General are illustrative and include consumer complaints about dealers:

- Selling a car that burst into flames immediately after purchase;²⁴⁰
- Telling a consumer that the car had “no issues and a clean CARFAX report,” only to learn that the dealer had manipulated the car to turn off the check engine light;²⁴¹

²³⁸ U.S. Dep’t of Transp., Safety Issues and Recalls, *available at* <https://www.nhtsa.gov/recalls>.

²³⁹ Alaska: State of Alaska Dep’t of Law, Attorney General Treg Taylor Announces Restitution Fund for Anchorage Auto Mart Customers (May 3, 2022), *available at* <https://law.alaska.gov/press/releases/2022/050322-AutoMart.html> (announcing settlement of claims against an Alaska dealership for selling cars without valid title, failing to disclose reconstructed titles, misrepresenting accident history, and making misleading advertisements).

Massachusetts: Press Release, Office of the Massachusetts Att’y Gen., Used Auto Dealership in Westport Agrees to Pay \$450,000 for Selling Defective and Unsafe Vehicles (Dec. 17, 2018), *available at* <https://www.mass.gov/news/used-auto-dealership-in-westport-agrees-to-pay-450000-for-selling-defective-and-unsafe-vehicles> (announcing settlement with a dealership that frequently misrepresented that vehicles were safe and reliable),

New York City: Press Release, New York City Dep’t of Consumer and Worker Prot., Department of Consumer Affairs Files Charges Against Brooklyn Used Car Dealerships for Deceptive Financing and Illegal Sales Practices (May 24, 2017), *available at* <https://www1.nyc.gov/site/dca/media/pr052417.page> (announcing settlement with dealerships that sold unsafe vehicles by preventing consumers from test-driving the cars and failing to inspect the cars before sale).

Texas: Complaint, Texas v. Vroom Auto., L.L.C., Case No. D-1-GN-22-001809 (Tex. Dist. Ct. Apr. 19, 2022), *available at* https://www.texasattorneygeneral.gov/sites/default/files/files/branding/files/01_Vroom%20POP%204.19.22.pdf (alleging that state had received 5,000 complaints against this dealership, and the dealership misled consumers to believe that cars were sold in good condition after a rigorous “four inspection” process before selling cars that had water and rust damage, undisclosed collision history, salvage titles, and other mechanical problems) [hereinafter Texas Complaint].

West Virginia: Complaint, State of West Virginia *ex rel.* Patrick Morrissey v. Mr. V & Sons Pre-Owned Auto Sales, Inc., Case No. 21-C-775 (W. Va. Cir. Ct. Sept. 2, 2021), *available at* <https://ago.wv.gov/Documents/2021.09%20Mr.%20V%20Complaint.PDF>, (alleging that dealership sold vehicles with cracked and rusted frames that were concealed, seat belts cut out, decommissioned airbags, transmission and engine defects, undisclosed flood damage, rebuilt motors, and many other defects).

²⁴⁰ *See* Complaint, Commonwealth of Pennsylvania v. Carspot, Inc., Case No. 220701786 (Pa. Ct. Com. Pl. July 21, 2022), *available at* <https://www.attorneygeneral.gov/wp-content/uploads/2022/07/2022-07-22-Carspot.pdf>.

²⁴¹ *Id.* at 5.

- Advertising that the dealership sold “clean, inspected reliable vehicles at affordable prices,” but provided consumers with cars that had rotted and rusted components, multiple instances of defective transmissions, leaks and engine problems;²⁴²
- Selling a vehicle with rust damage that was concealed with spray paint;²⁴³
- Representing that a truck was “full of life,” despite that the vehicle’s bumper was rusted and “held on a by a thread;”²⁴⁴ and
- Advertising that a vehicle was in “very good condition” and “functioning as it should,” but that was unsafe to drive and shut down completely.²⁴⁵

All too often, dealers have not performed a vehicle history search or a satisfactory physical inspection that would reveal many of these dangerous defects.²⁴⁶ Since the Used Car Rule was written in 1984, there have been major changes in the production and marketing of motor vehicles, making much of this information readily available to dealers. It is an unfair practice to permit dealers, as professionally licensed entities, to avoid obtaining this information and then advertise or represent vehicles’ safety, history, reliability, or roadworthiness when these resources exist.

2. Recommendations

We recommend that the FTC amend § 463.3 to add a new subsection, to read as follows (proposed language is underlined):

§ 463.3. 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

(g) The safety, mechanical or structural condition, odometer reading, or history of a vehicle offered at retail. Such deceptive acts or practices include, but are not limited to, the following:

1. Representing that a vehicle is safe, repaired for safety, passed an inspection, meets standards, qualifies to be sold as "certified" or other similar term, or is otherwise merchantable, roadworthy, or superior to other vehicles, unless the dealer has determined there is no open recall on the vehicle and that the vehicle contains an operable airbag or airbags if that vehicle originally included such airbag(s).

²⁴² Complaint, Commonwealth of Pennsylvania v. WPK Holdings, Co., d/b/a JK Motor Cars, L.L.C., Case No. GD22-009111 (Pa. Ct. Com. Pl. July 21, 2022), available at <https://www.attorneygeneral.gov/wp-content/uploads/2022/07/2022-07-22-JK-Motor.pdf>.

²⁴³ Complaint, Commonwealth of Pennsylvania v. Great Auto Deals Inc. d/b/a/ A Impuls Auto Inc., Case No. 220802711 (Pa. Ct. Com. Pl. Aug. 24, 2022), available at <https://www.attorneygeneral.gov/wp-content/uploads/2022/08/2022-08-24-A-Impuls-Auto-Inc.-and-Great-Auto-Deals.pdf>

²⁴⁴ *Id.* at 8.

²⁴⁵ *Id.* at 20.

²⁴⁶ See Appendix B, *infra*, at 5 (a consumer purchased a vehicle in South Carolina for \$12,000 and learned that the vehicle had an undisclosed power steering recall, but the dealership argued that “it had no responsibility to review the car’s recall history”).

2. Representing that a consumer can obtain free safety recall repairs when adequate repair parts are not available, the manufacturer indicates that no remedy is available, or the repairs are no longer provided for free.
3. Representing that a vehicle is safe when the vehicle has previously sustained material damage from a collision, flood, or other harmful event, and it has not been sufficiently repaired to ensure that it is safe, merchantable, roadworthy, and would provide the same level of protection from injury or death in a subsequent collision as if the same vehicle had never suffered damage.
4. Misrepresenting a vehicle's mileage, regardless of the age of the vehicle.
5. Representing that a vehicle is eligible for coverage under an extended service contract or warranty when the extended service contract or warranty offered is void due to prior damage, an altered odometer, or other pre-existing condition(s).
6. Representing that a vehicle that sustained material damage, has an unrepaired safety recall or recalls, or has an altered odometer is worth the same as or more than other vehicles that do not have those material defects or history.

C. The regulation should prohibit the use of electronic disablement as a means of repossession.

Question 3 asks: *Are there any additional practices that occur largely or exclusively at certain types of dealerships that any final Rule should address? 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”)?*

Our answer is yes. We propose that the Commission should ban the use of starter interrupt and disablement devices as an unfair practice for all dealers.

Buy-here, pay-here dealerships and auto title lenders often install electronic devices that can remotely disable the vehicles in which they have a security interest. A growing number of subprime automobile finance companies also encourage or require the use of these devices.²⁴⁷ Most newer devices allow the creditor to electronically disable a vehicle from a remote location.²⁴⁸ Even eight years ago, reports indicated that at least two million such devices were already installed.²⁴⁹ PassTime, just one device manufacturer, claimed to have over one million of its disabling devices in circulation.²⁵⁰ Improper installation or a defect in the device might disable a car while it is being driven or prevent it from starting even if no payment is due. Reports indicate that such malfunctions do in fact occur.²⁵¹

²⁴⁷ See, e.g., *Peel v. Credit Acceptance Corp.*, 408 S.W.3d 191 (Mo. Ct. App. 2013) (describing how Credit Acceptance Corp. required the use of a remote disabling and GPS tracking device).

²⁴⁸ See Kevin Poulsen, *Hacker Disables More Than 100 Cars Remotely*, *Wired*, Mar. 17, 2010, available at <https://www.wired.com>.

²⁴⁹ Michael Corkery & Jessica Silver-Greenberg, *Miss a Payment? Good Luck Moving That Car*, *The N.Y. Times*, Sept. 24, 2014, available at <https://dealbook.nytimes.com/2014/09/24/miss-a-payment-good-luck-moving-that-car/>.

²⁵⁰ National Alliance of Buy Here, Pay Here Dealers, BHPH Report, PassTime Refutes Shut-Off Allegations Made in New York Times Story (Sept. 30, 2014), available at <https://www.autoremarketing.com/bhph/passtime-refutes-shut-allegations-made-new-york-times-story>.

²⁵¹ See Iowa Att’y Gen., Iowa Consumer Credit Code Informal Advisory No. 90 (Oct. 22, 1999). See also Auto

Even if the device is operating properly, consumers may find themselves unable to start their vehicle in awkward or dangerous situations. The car may stall in moving traffic or may be stopped in a remote area far from the consumer's home, and the device may prevent the driver from restarting the car. The threat of vehicle disablement has a particularly strong *in terrorem* effect because it is so immediate and so easily and inexpensively done compared to physical repossession. The immediacy of the threat, and the ease with which secured creditors can deploy the device, can be used to force a consumer to pay a car loan while ignoring other pressing and perhaps more serious obligations—such as medicine, rent, or heat.

There is no authority in the Uniform Commercial Code to disable consumer cars.²⁵² The UCC does not explicitly address electronic repossessions, and while it does permit secured creditors to disable "equipment," the definition of equipment notably excludes consumer goods.²⁵³ However, courts have not resolved this issue, and many creditors, particularly "buy-here, pay-here" dealers and subprime finance companies, now use electronic repossession extensively.

As part of the rule it is considering, the FTC should state that the use of electronic disablement is an unfair practice. Electronic disabling of a car, particularly if the creditor does not immediately seize the vehicle, is used primarily for its *in terrorem* effect²⁵⁴ to obtain payment, rather than to satisfy the obligation by selling the vehicle. The FTC has already prohibited creditor practices like this when their primary purpose was to scare the consumer into paying the debt, rather than to satisfy the obligation through sale of the collateral.²⁵⁵

The FTC uses the Fair Debt Collection Practices Act (FDCPA) as the standard for determining whether a creditor has committed an unfair or deceptive practice in collecting a debt.²⁵⁶ The FDCPA prohibits a debt collector (including a repossession company) from "taking or threatening to take any nonjudicial action to effect dispossession or disablement of property" if there is no present intention to take possession of the property.²⁵⁷ Accordingly, disabling a vehicle without intending to take possession of it at the moment the car is disabled is a violation of the FDCPA. The FTC's proposed rule, consistent with its general policy of using the FDCPA as the standard, should provide that the same practice is unfair and deceptive.

Liquidation Ctr., Inc. v. Chaca, 47 N.E.3d 650 (Ind. Ct. Ap. 2015).

²⁵² U.C.C. § 9-609(a)(2).

²⁵³ U.C.C. § 9-102(a)(33).

²⁵⁴ See Dawson v. J & B Detail, L.L.C. (*In re Dawson*), 2006 WL 2372821, at *7 (Bankr. N.D. Ohio Aug. 15, 2006) (discussing the pernicious nature of an electronic disabling system and comparing it to the "doomsday machine" in the 1964 film *Dr. Strangelove*), *aff'd*, 2006 WL 3827459 (N.D. Ohio Dec. 27, 2006); Hanes v. Darar, 722 S.E.2d 211 (N.C. Ct. App. 2012) (table) (affirming UDAP claim when dealer/lender refused to accept payments tendered and used disabling device two months before physical repossession of the car; describing the actions as "immoral, unethical, oppressive, unscrupulous, and arising out of a position of power the defendants had over plaintiff").

²⁵⁵ See FTC's Credit Practice Rule, Statement of Basis and Purpose, 49 Fed. Reg. 7740 (Mar. 1, 1984). The FTC's Credit Practices Rule prohibits the practice of taking a non-purchase money security interest in household goods. 16 C.F.R. pt. 444. Affirmed by Am. Fin. Services Ass'n v. Fed. Trade Comm'n, 767 F.2d 957 (D.C. Cir. 1985).

²⁵⁶ See 60 Fed. Reg. 40,263 (Aug. 8, 1995).

²⁵⁷ 15 U.S.C. § 1692f(6)(B).

As the FDCPA is not applicable to creditors collecting their own debts in their own names, it does not apply to buy-here, pay-here dealers who are repossessing cars based on financing agreements owed to them.²⁵⁸ Similarly, if a dealer assigns the credit agreement prior to default, both the assignee and the dealer are exempt from FDCPA coverage.²⁵⁹ On the other hand, if a creditor hires an independent company to handle its electronic repossessions, the independent company may qualify as a debt collector within the scope of the Act.

The fact that disabling the vehicle without intending to seize it would have violated the FDCPA if committed by a debt collector or independent repossession company is a reasonable basis for the FTC to state that it is also an unfair practice when committed by a creditor.

Recommendations

The Commission should state that it is an unfair practice for dealers to use electronic disablement to repossess a vehicle unless the creditor is present when the vehicle is disabled and intends to take possession of it. The Commission should also review the use of electronic repossession in general, and take steps to protect consumers' privacy and ensure consent and proper notification of the use of electronic repossession devices.²⁶⁰

D. The rule should prohibit “Yo-Yo” sales transactions.

The Commission's Question 16 asks whether the proposed sections 463.3(h) and (i) in the NPRM are adequate, and, if not, what alternative approaches should be considered. The question also asks about the effect of alternative requirements, as well as the costs and benefits.²⁶¹ As currently written, these two provisions would prohibit dealers from misrepresenting when the transaction is final or binding on all parties and from making misrepresentations about what happens if a transaction is not finalized.

These proposed provisions are not sufficient to accomplish the goal of stopping problems with “yo-yo financing.” **Instead, the Commission should require all retail installment sales contracts and leases to include clauses prohibiting financing-contingent credit contracts or leases.** Giving a consumer the Truth in Lending Act (or Consumer Leasing Act) disclosures and a credit contract or lease to sign before the dealer has actually agreed to extend that credit or lease is by definition an unfair

²⁵⁸ 15 U.S.C. § 1692a(6)(A).

²⁵⁹ 15 U.S.C. § 1692a(6)(F).

²⁶⁰ See National Consumer Law Center, Principles for Laws Permitting Electronic Repossession of Vehicles (Jan. 2020), available at https://www.nclc.org/images/pdf/car_sales/principles-model-electronic-repossession-law.pdf.

²⁶¹ Question 16 asks: *Proposed § s 463.3(h) and (i) would prohibit dealers from misrepresenting when the transaction is final or binding on all parties and from making misrepresentations about keeping cash down payments or trade-in vehicles, charging fees, or initiating legal process or any action if a transaction is not finalized or if the consumer does not wish to engage in a transaction. As indicated in this document, these proposed provisions are intended to curb problems with the spot delivery of vehicles while the financing for the vehicle remains contingent—problems sometimes referred to as “yo-yo financing.” Should the Commission consider alternative approaches to address such problems, such as requiring retail installment sales contracts to include a clause prohibiting financing-contingent sales, prohibiting the dealer from transferring title to a trade-in vehicle or performing any repairs or reconditioning before a sale is final or requiring dealers to return trade-in, deposit, and fees, if financing is not approved? What would be the effect of such a requirement, and what costs and benefits would it entail? Are there data regarding the feasibility of finalizing vehicle financing at or before the time the retail installment sales contract is signed?*

and deceptive practice. Directly placing a clause in credit contracts and leases that provides that the credit or lease terms are final and cannot be changed would prevent unfair and deceptive practices.

1. Prevalence of Yo-Yo transactions.

As the FTC has documented, yo-yo practices, based on dealers' misrepresentation of the finality of a car deal, are prevalent in auto sales.²⁶² In its enforcement work, the FTC has found that car buyers typically do not realize that a dealer is not treating a transaction as final.²⁶³ For example, in an enforcement action alleging multiple violations against one dealer, the FTC contended that "even after consumers have signed a contract and driven the vehicles off Defendants' lots, Defendants have used deceptive and unfair tactics to pressure consumers to agree to different financing terms or have otherwise refused to honor the contract."²⁶⁴

In 2022 alone, three states have tried to address the problems of yo-yo sales through either enforcement actions or consumer advisories.²⁶⁵ One of these actions, an enforcement action filed by the State of Texas, alleges that the online car dealer would "wait until after consumers enter retail purchase contracts, receive delivery of the vehicle, and drive for several weeks before telling some consumers that they failed to obtain financing."²⁶⁶

Appendices A and B, *infra*, contain additional case histories showing the harm suffered by consumers in yo-yo sales transactions. These examples are just a drop in an ocean of unfair and deceptive

²⁶² See, e.g., NPRM, *supra* note 1, at nn.62, 99, 100. See also *Salvagne v. Fairfield Ford, Inc.*, 264 F.R.D. 321 (S.D. Ohio 2009) (noting that of 375 consumers required by one dealer to sign a spot delivery form, 90 were subsequently contacted by the dealer and required to sign a new installment sales contract with different terms).

²⁶³ See, e.g., Buckle Up, *supra* note 107, at 4 (in the scores of automobile enforcement actions the FTC has brought, the agency has confronted misleading auto advertising, loan falsification, yo-yo financing, deceptive Add-on fees, and privacy and data security issues, among other practices.)

²⁶⁴ Complaint, *Federal Trade Commission v. Universal City Nissan, Inc.*, Case 2:16-cv-07329, at 10 (Sept. 29, 2016) (alleging that, when the dealers failed to assign financing, "instead of providing consumers accurate and truthful information about the deal or abiding by the terms of the contract," they "deceptively or unfairly induce(d) consumers who have signed contracts and driven off the lots with the vehicles to sign new contracts and pay a higher interest rate, make an additional down payment, or agree to other terms that differ materially from the original terms to which the consumer agreed").

²⁶⁵ See, e.g., Texas Complaint, *supra* note 240 (enforcement action filed by state against nationwide online car dealer Vroom Inc. and Vroom Automotive LLC alleged, among deceptive trade practices, that Vroom misrepresented or failed to disclose financing terms and approval to consumers and subjected consumers to "spot delivery scams," and that Vroom would threaten consumers with repossession if they did not agree to new (and often more expensive) terms, to pay in full, or to obtain their own financing); Press Release, Office of the Kansas Att'y Gen., Consumer Corner: Be mindful of current financial pitfalls when purchasing a vehicle (May 26, 2022), available at <https://ag.ks.gov/media-center/news-releases/2022/05/26/consumer-corner-be-mindful-of-current-financial-pitfalls-when-purchasing-a-vehicle> (advising consumers to obtain financing before shopping for a car, but, if using dealer financing, consumers should "ask if the deal is final and get that assurance in writing before taking the vehicle home"); State of Georgia, Consumer Prot. Div., Spot Delivery Pitfalls (last accessed on Sept. 3, 2022), available at <https://consumer.georgia.gov/consumer-topics/spot-delivery-pitfalls> (providing the following advice: "If you do finance through the dealer, seriously consider waiting until financing has been approved before you take possession of the vehicle").

²⁶⁶ Texas Complaint, *supra* note 240, at 14.

transactions. Attorneys affiliated with the signatories to these comments regularly see similar cases. For more details, see, the petition filed by the National Association of Consumer Advocates and five other national consumer organizations.²⁶⁷

2. Yo-Yo sales are unfair and deceptive and cause significant injury.

In this NPRM the FTC notes that “yo-yo financing is often made possible because a dealer misleads consumers, directly or by omission, about whether their financing is final.”²⁶⁸ The FTC also notes that, after a dealer misleads a consumer about whether a deal is final, the dealer “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.”²⁶⁹

Yo-yo practices are also very harmful to consumers.²⁷⁰ In a yo-yo sale, consumers are led to believe that they have purchased and own a car, but the dealer tries to retain the right to back out of the deal for days or even weeks after the consumer drives home with the vehicle. If the dealer decides to unwind the deal, it demands the vehicle back or requires the consumer to pay more in financing costs or other charges. While dealers will often call such a transaction a “spot delivery” or conditional sale, in these comments we use the more descriptive term: a “yo-yo” sale.²⁷¹

The consumer is led to believe that a vehicle’s installment sale or lease is final when the dealer gives the consumer possession of the car “on the spot.” In some cases, however, the dealer later tells the consumer to return the car because financing ostensibly has “fallen through.”²⁷² If the consumer does not return the vehicle or agree to rewrite the transaction on less favorable terms, the dealer repossesses the vehicle or, in some extreme cases, reports the car as stolen, both to threaten the consumer and to enlist law enforcement to repossess the car.

Yo-yo sales are one-sided. The dealer insists that the consumer is bound by the agreement, but the dealer feels free to back out of the deal. Although the true motivation for the dealer backing out can be

²⁶⁷ National Ass’n of Consumer Advocates et al., Request for Rulemaking Concerning the Finality of a Car Purchase (Spot Delivery and Yo-Yo Financing) (Apr. 29, 2022), *available at* https://www.consumeradvocates.org/wp-content/uploads/2022/04/NACA_spotdelivery_FTC_04292022_exh.pdf.

²⁶⁸ NPRM, *supra* note 1, at 42,020-42,021.

²⁶⁹ *Id.* at 42,021.

²⁷⁰ See Appendix A, *infra*, at 8-12 (describing several yo-yo sales in detail). See also Appendix B, *infra*, at 6 (a consumer reported to the South Carolina Department of Affairs that he purchased a vehicle but never received information about how to make monthly payments; his car was subsequently repossessed, with the dealer claiming that they were “unable to secure financing”).

²⁷¹ See, e.g., *Cartier v. Brown Credit Lot*, 2005 WL 3867414, at *2 (Ohio Mun. Ct. Apr. 4, 2005) (describing the “pernicious” practice as a “variation of the classic bait and switch” in which the “consumers were unknowingly on a string”). See generally Levitin, *The Fast and the Usurious*, *supra* note 2 (describing the practice, and proposing a three-business-day waiting period before delivery for consumers who do not have a bona fide third-party financing offer, as well as a penalty default rule to encourage consumers to shop for financing before shopping for a car).

²⁷² See, e.g., *Barnes v. Rosenthal Toyota, Inc.*, 727 A.2d 431 (Md. Ct. Spec. App. 1999).

one of any number of things, the stated justification usually is that the financing fell through.²⁷³ In the current automobile financing system, in which dealers and potential assignees communicate electronically and almost instantaneously through systems such as Dealertrack, this rationale is unlikely to be true.

But even if this stated justification is in fact the real one, it is still misleading. It implies that the dealer is simply arranging financing with a third-party assignee, and that it is the third party who is extending the credit, not the dealer. In fact, the dealer is the originating creditor extending the installment sales credit to the consumer. The dealer then seeks to sell that installment sales contract, generally at a profit although sometimes at less than face value, to a finance company or bank.

In the credit marketplace, the dealer can always find a buyer for the installment sales contract.²⁷⁴ The only question is whether the dealer will sell the chattel paper at a loss, break even, or make a profit. Because dealers want to make a significant profit when selling the paper, another way to reframe the dealer's justification for canceling the sale is that the dealer could not sell the chattel paper *at a large enough profit*, and therefore wants to back out of the deal.

In its most insidious form, a yo-yo sale is a premeditated sales tactic to squeeze more money out of the consumer by canceling the first contract in the hopes of reworking the terms of the sale and financing to better advantage the dealer. The dealer attempts to gain more leverage by pretending to agree to one finance or lease package, but then bringing the consumer back to the dealership a second, third, or even fourth time, to keep renegotiating the deal. The dealer tells the consumer they must either return the vehicle or agree to substantially higher monthly payments, a higher down payment, a longer credit term, or a different (worse) car.²⁷⁵

The dealer's leverage on the typical consumer in this situation is crushing. After selling a previously owned car to the dealer, and showing off the car to family and friends, the consumer must either agree to the changes that the dealer demands or admit to their family and friends that their credit record is so bad that the car had to be returned. Moreover, dealers often pressure consumers into rewriting the deal by claiming that their trade-in has already been sold, that the consumer must pay a rental fee for the use of the purchased car for the time they had it, or that the consumer will not get back any of their down payment if the deal dissolves.

²⁷³ See *Whited v. Galindo (In re Galindo)*, 467 B.R. 201 (Bankr. S.D. Cal. 2012) (dealer's multiple assurances that the retail installment sales contract had been assigned constituted fraud), *aff'd*, 2013 WL 3389556 (9th Cir. B.A.P. July 8, 2013). *But see* *Janikowski v. Lynch Ford Inc.*, 210 F.3d 765 (7th Cir. 2000) (no UDAP violation when dealer, clearly warned consumer that deal was not final and dealer, on the facts of that case, was taking a greater risk than the consumer if deal fell through); *Love v. O'Connor Chevrolet, Inc.*, 2006 WL 2460581 (N.D. Ill. Aug. 21, 2006) (no UDAP violation as consumer was warned that transaction was not final).

²⁷⁴ See Declaration of James Spade, *Credit Acceptance Corp. v. Sandra Nelson & Randall Nelson v. Hah Pre-Owned Auto Outlet, Inc. & Credit Acceptance Corporation*, CC-23-2019--C-102, at ¶ 4(a) (W. Va. Cir. Ct. June 24, 2020) (included in Appendix C, *infra*) (explaining that, through Credit Acceptance Corporation, "all applications are approved," and the sole determining factor for which vehicle the consumer would receive was the amount of their down payment).

²⁷⁵ This practice is described in *Gibson v. LTD*, 434 F.3d 275 (4th Cir. 2006) and *Rucker v. Sheehy Alexandria, Inc.*, 228 F. Supp. 2d 711 (E.D. Va. 2002). See also *Byrd v. Frost*, 2008 WL 5412088 (E.D. Pa. Dec. 29, 2008).

Usually, the dealer will want to hide the one-sided nature of the transaction. It does not want consumers to think that they can get out of a deal just because the dealer can. So, while there may be some purported conditional sales form in the numerous papers signed by the consumer, the dealer will behave as though, and often orally state that, it is a done deal, and will not disclose that the deal, from the dealer's point of view, is not final.²⁷⁶ Dealers may even affirmatively represent that a deal is final when it is not.

The prevalence of “yo-yo” sales also distorts the marketplace. Disclosed credit terms are not reliable when they are so often re-negotiated. Comparison shopping is less effective and Truth in Lending disclosures less reliable.²⁷⁷

3. State regulation is not sufficient.

At present, about 40% of the states have statutes, regulations,²⁷⁸ or administrative pronouncements²⁷⁹ about yo-yo sales, although there are significant variations from state to state. Most of these statutes do

²⁷⁶ See *Whited v. Galindo (In re Galindo)*, 467 B.R. 201 (Bankr. S.D. Cal. 2012) (dealer's multiple assurances that the retail installment sales contract had been assigned constituted fraud), *aff'd*, 2013 WL 3389556 (9th Cir. B.A.P. July 8, 2013). *But see Janikowski v. Lynch Ford Inc.*, 210 F.3d 765 (7th Cir. 2000) (no UDAP violation when dealer, clearly warned consumer that deal was not final and dealer, on the facts of that case, was taking a greater risk than the consumer if deal fell through); *Love v. O'Connor Chevrolet, Inc.*, 2006 WL 2460581 (N.D. Ill. Aug. 21, 2006) (no UDAP violation as consumer was warned that transaction was not final).

²⁷⁷ *Salvagne v. Fairfield Ford, Inc.*, 794 F. Supp. 2d 826 (S.D. Ohio 2010) (use of a separate spot delivery agreement imposing a condition subsequent on a fully integrated, binding installment sales contract purporting to contain the entire agreement between the parties violates TILA as consumers are unable to compare credit offers). *But see Chastain v. N.S.S. Acquisition Corp.*, 2009 WL 1971621 (S.D. Fla. July 8, 2009) (installment sales contract that contains spot delivery agreement creating condition subsequent sale does not violate TILA), *aff'd*, 378 Fed. Appx. 983 (11th Cir. 2010).

²⁷⁸ Fifteen states have statutes directly addressing yo-yo sales. Alaska Stat. § 45.25.610; Ariz. Rev. Stat. Ann. § 44-1371; Ark. Code Ann. §§ 23-112-316 (new vehicles), 23-112-613 (used vehicles); Colo. Rev. Stat. § 6-1-708; Conn. Gen. Stat. § 14-62(h); 815 Ill. Comp. Stat. § 505/2C; La. Stat. Ann. § 32:1261(A)(2)(f); Md. Code Ann., Transp. § 15-311.3 (West); Nev. Rev. Stat. § 482.554; N.H. Rev. Stat. Ann. § 361-A:10-b; Tex. Fin. Code Ann. § 348.013 (West); Utah Code Ann. §§ 41-3-401 (sales), 41-3-401.5 (leases) (West); Va. Code Ann. § 46.2-1530; Wash. Rev. Code § 46.70.180(4). *See also* N.C. Gen. Stat. § 20-75.1. New Jersey has a law restricting the use of yo-yo procedures in vehicle leases. N.J. Stat. Ann. § 56:12-67 (West) (in lease transactions, if transaction is contingent upon approval of credit, dealer must provide notice that lease is contingent and lessee must complete credit check within five days). Three states have regulations: Idaho Admin. Code r. 04.02.01.237; 940 Mass. Code Regs. § 5.04; Ohio Admin. Code 109:4-3-16(A)(30). *See Braucher v. Mariemont Auto*, 2002 WL 1393570 (Ohio Ct. App. June 28, 2002) (yo-yo seller violated regulation by not providing written contingency agreement). *See generally* National Consumer Law Center, *Automobile Fraud Appx. D* (6th ed. 2018), *updated at* www.nclc.org/library.

²⁷⁹ The Arizona Attorney General's Automobile Advertising Guidelines (1993); Idaho Admin. Code r. 04.02.01.237; Maine Office of Consumer Credit Reg., *Maine Creditor Update*, Issue No. 38 at 8 (Oct./Nov. 1999); Maine Office of Consumer Credit Reg., *Examination of Cens Auto Group, Inc.* (Oct. 29, 1999); Maryland Motor Vehicle Admin. Bull. No. D-03-05-01 (Mar. 10, 2005); Maryland Motor Vehicle Admin., “Spot Delivery”—“Fronting”—“MacArthur Statement” etc., Bull. No. D-11 98-01 (Nov. 30, 1998); 940 Mass. Code Regs. § 5.04; Ohio Admin. Code 109:4-3-16(A)(30); Letter from Murray Brown, Deputy Comm'r, Michigan Dep't of Commerce to [licensee] (May 22, 1989); Michigan Sec'y of State, *Dealer's Manual* § 3-3.4 (revised Oct. 2021) (requiring dealer to honor contract if assignment fails and informing dealers that attempting repossession

little to protect consumers, often simply requiring disclosures,²⁸⁰ although a few of these statutes provide limited substantive protections for consumers, such as by regulating portions of the yo-yo transaction. For example, a number of states restrict a dealer’s ability to resell the consumer’s trade-in before a deal is final.²⁸¹

4. Prohibiting misrepresentations in yo-yo sales is not enough.

There is no question that yo-yo sales are misleading. The evidence is more than ample to support the FTC’s proposal to prohibit the misrepresentation regarding whether the transaction is final, as is proposed in § 463.3(h). However, prohibiting this specific misrepresentation will not solve the problem.

Deception and misrepresentations are inherent when a dealer provides Truth in Lending disclosures where the dealer may not extend the credit on those terms even after the terms are binding on the consumer. There is a congressional intent that Truth in Lending disclosures provide consumers with essential information,²⁸² and yo-yo sales frustrate that intent. Merely prohibiting misrepresentations related to these issues will not stop the abuses after a customer, having signed a contract containing financing terms, faces further harassment from unsatisfied dealers that insist on changing the terms days, and even weeks, later.

By simply prohibiting misrepresentations, dealers will rely even more on these side “spot delivery” agreements,²⁸³ creating a conflict between the terms of the credit contract, which car buyers rely on, and the separate spot delivery document that makes the terms conditional. This will only exacerbate the unfair one-sidedness of the transaction—that the consumer cannot cancel, but the dealer can.

In proposed § 463.3(i), the NPRM seeks to address the consequences of yo-yo financing, such as prohibiting car dealers’ misuse of trade-ins while the deal is still pending in the dealer’s mind, “keeping cash down payments, charging fees, or initiating legal actions” to forcibly achieve their goals, including forcing return of the car, while the transaction is not finalized. That prohibition is useful, but not sufficient. Instead, we recommend that the FTC prohibit the unfair and deceptive activity altogether, as described in subsections 5 and 6, *infra*.

under such circumstances would violate state law). *See also* Mich. Auto. Dealers Ass’n, Dealer Advisory, Spot Deliveries (Oct. 24, 1997).

²⁸⁰ See, e.g., N.J. Stat. Ann. § 56:12-67 (West) (in lease transactions if transaction is contingent upon approval of credit the dealer must provide notice that lease is contingent and lessee must complete credit check within five days). *See also* Patterson v. Univ. Ford, Inc., 785 S.E.2d 185 (N.C. Ct. App. Mar. 14, 2014) (table) (the parties had agreed to a permissible conditional delivery agreement rather than to a conditional sale—which would be prohibited under the statute—despite dealer’s role as both seller and original creditor under the terms of the retail installment sales contract).

²⁸¹ *See generally* National Consumer Law Center, Automobile Fraud Appx. D (6th ed. 2018), *updated at* www.nclc.org/library.

²⁸² 15 U.S.C. § 1601 states that TILA was enacted “to assure a meaningful disclosure of credit terms so that the consumer will be able to compare more readily the various credit terms available to [them]. . .”

²⁸³ Dealers frequently include, in the myriad of paperwork signed by a consumer, a fairly uniform “spot delivery” agreement stating that the deal is not final, in an effort to disclaim any potential liability for this inherently deceptive conduct.

5. The rule should prohibit dealers from treating a trade-in or down payment as theirs until the transaction is final.

In addition to requiring a specific statement about the finality of the transaction in any credit contract, the rule should declare it to be unfair or deceptive for a dealer to take title to a trade-in until a final credit contract or lease has been signed that is binding on both parties and that cannot be cancelled. Also, it should be declared unfair or deceptive for a dealer to transfer physical possession of the trade-in to any party and prohibit dealers from making any modifications to it until that time.

Additionally, for such credit transactions and leases, it is unfair or deceptive for a motor vehicle dealer to retain any portion of a consumer's down payment that was obtained before the credit transaction or lease was finalized. The down payment is made on the condition of a transaction binding on both parties, and if there is no such transaction, the down payment must be returned.

6. Recommendations

We urge the FTC to confront the core issue: the inherent unfairness and deception of conditional sales of which car buyers are typically unaware that ultimately lead to toxic yo-yo financing practices.

To adequately protect consumers from the unfairness, confusion and deception related to whether a transaction is final and binding, the FTC should:

- (a) Issue a bright-line rule stating that, once signed, the credit contract is final whether or not it is assigned to a third party.
- (b) Require dealers to insert a clause in the credit contract stating that the signed contract and its credit or lease terms is final and binding, notwithstanding any other agreements between the parties or any other notice provided by the dealer. This approach would remove ambiguity about when a sale is complete. It would ensure that all parties to a contract that sets forth the credit terms of a car sale can reasonably rely on the finality of those terms.
- (c) Prohibit dealers from taking title to any trade-in before a binding credit contract has been signed by all parties.

A bright-line FTC rule, as proposed in a petition signed by six national consumer advocacy groups,²⁸⁴ would benefit all market participants. The FTC should require language in every credit contract explaining the plain legal consequences of a signed contract, stating that the credit terms of the signed contract are final when presented to the car buyer to sign, and that the credit terms cannot be changed whether or not the contract is or will be assigned to a third party.

The proposed language:

²⁸⁴ National Ass'n of Consumer Advocates et al., Request for Rulemaking Concerning the Finality of a Car Purchase (Spot Delivery and Yo-Yo Financing) (Apr. 29, 2022), *available at* https://www.consumeradvocates.org/wp-content/uploads/2022/04/NACA_spotdelivery_FTC_04292022_exh.pdf.

A. Every consumer credit contract for the sale or lease of a vehicle by a dealer shall include the following:

“By presenting this consumer credit contract [or lease] to a consumer for signature, the dealer as creditor [lessor] affirms that this offer is binding on the dealer.

This contract supersedes any notice of other agreement that asserts or at a later time asserts that this credit contract [lease] is “conditional” or “not yet approved” or words to that effect.

Any such notices or other agreements are void and unenforceable.

Once signed by the consumer, this credit contract [lease] cannot be withdrawn by the dealer whether or not this credit contract [lease] is assigned to a third party.

This provision will promote clarity in auto transactions. Dealers themselves often are unclear about who owns a car when a consumer drives it off the lot: is the sale subject to a condition precedent (the dealer owns the car) or a condition subsequent (the consumer owns the car)? Too often, the transaction is a confusing mixture of both—*e.g.*, insurance terms start when the consumer drives off the lot, but other aspects of the transaction are not considered final.

If the transaction is always considered final at the time of signing, dealers’ and consumers’ obligations regarding odometer disclosures, insurance coverage, warranties, and other legally significant issues that hinge on who owned the car at a point in time are clear. It will simplify the flow of information throughout a car sale or lease, making it easier to enforce legal requirements.

The rule would enhance competition in the auto market. Currently, any dealers that do not use yo-yo practices are at a competitive disadvantage.

E. The FTC should prohibit certain behaviors to ensure compliance with federal law when electronic records and signatures are used.

The FTC asks in Question 8: *Should any final Rule include additional provisions to address electronic disclosures or recordkeeping? Why or why not? If yes, in what manner(s)?*

Federal and state laws promulgated to permit electronic transactions over the internet were intended only to provide legal equivalency to electronic records, not to provide an enhanced status for electronic media. However, too often, and especially among dealers using certain finance companies, the practice of meeting statutory requirements for writings with electronic records and signatures has been the means of facilitating fraud, and unfair and deceptive practices. We request that the FTC include in the Final Rules specific prohibitions against certain activities to help address these frauds and unfair and deceptive practices.

1. Federal and state laws establishing legal equivalency for electronic records and signatures should not be the cover for fraud.

The Electronic Signatures in Global and National Commerce Act (E-Sign)²⁸⁵ establishes the enforceability of electronic records and signatures as a matter of federal law and preempts state laws to the contrary.²⁸⁶ The fact that a record or signature is electronic does not provide it with any enhanced validity: E-Sign does not limit, alter, or otherwise affect any requirement imposed by a statute, regulation, or rule of law relating to the rights and obligations of persons under such statute, regulation, or rule of law.²⁸⁷

In consumer transactions, E-Sign requires a specific electronic consent process before an electronic notice may replace a written document that must be provided to the consumer.²⁸⁸ This consent process was explicitly added to protect consumers in real-world transactions from unfair and deceptive practices. As Senators Hollings, Wyden, and Sarbanes noted when passing E-Sign, “the validity of a consent obtained as the result of an unfair or deceptive practice can be challenged and found to be invalid, in which case any records which were provided electronically will be deemed to not have been provided to the consumer.”²⁸⁹ Thus, the legal consequences of that lack of consent are whatever consequences exist in the underlying law for the failure to deliver to the consumer documents required to be in writing. For example, if a state law provides that a particular fee cannot be charged unless the consumer has been notified in writing that the fee will be charged, and the electronic delivery of that notice is invalid, then the imposition of the fee would be illegal.²⁹⁰

The E-Sign consent provision requires that the consumer consent electronically “in a manner that reasonably demonstrates that the consumer can access information in the electronic form that will be used to provide the information.”²⁹¹ This means that consumers must demonstrate, not just affirm, that they have access to the equipment and programs necessary to receive, open, and read the relevant electronic documents.²⁹²

²⁸⁵ 15 U.S.C. §§ 7001 to 7006.

²⁸⁶ 15 U.S.C. §§ 7001(a), 7002(a).

²⁸⁷ 15 U.S.C. § 7001(b)(1).

²⁸⁸ 15 U.S.C. § 7001(c).

²⁸⁹ 146 Cong. Rec. S5229 (daily ed. June 15, 2000).

²⁹⁰ *See, e.g., Collins v. Mo. Elec. Coop. Employees Credit Union*, 2006 WL 2189693 (E.D. Mo. July 26, 2006) (credit union’s failure to obtain the consumer’s consent pursuant to E-Sign (15 U.S.C. § 7001(c)(1)) to receive written notice required by the Elec. Fund Transfer Act, 15 U.S.C. § 1693c(b), means that the notice is not considered to have been provided).

²⁹¹ 15 U.S.C. § 7001(c)(1)(C)(ii). *See also* 146 Cong. Rec. S5224 (June 15, 2000) (statement of Senators Hollings, Wyden, and Sarbanes) (“The Act requires that consumers consent electronically—or confirm their consent electronically—in either case, in a manner that allows the consumer to test his capacity to access and retain the electronic records that will be provided to him.” (emphasis added)).

²⁹² *See* 146 Cong. Rec. S5216 (June 15, 2000) (comments of Senator Wyden) (“Reasonably demonstrates means just that. It means the consumer can prove his or her ability to access the electronic information that will be provided.”).

The legislative history states:

It means the consumer, in response to an electronic vendor enquiry, actually opens an attached document sent electronically by the vendor and confirms that ability in an e-mail response. . . . It is not sufficient for the consumer merely to tell the vendor in an e-mail that he or she can access the information in the specified formats.²⁹³

This requirement affords the consumer three protections:

- It ensures that the consumer has reasonable access to a computer and the internet to be able to access information provided electronically.
- It ensures that the consumer's means of access to electronically provided information includes the software to read the electronic records provided.
- It underscores to the consumer the fact that, by electronically consenting, the consumer is agreeing to receive the described information electronically in the future.²⁹⁴

Not all consumers regularly engage in electronic transactions. Access to the internet varies considerably based on the characteristics of the user's household. The lower the income, the less likely the user is to have access to the internet. While 95.2% of households with an annual income of at least \$75,000 had a broadband subscription in 2020, only 62.2% of houses earning below \$20,000 had broadband access.²⁹⁵ Strict compliance with E-Sign's consumer consent provision is necessary to protect consumers from the ever-growing use of electronic commerce for fraud. To reduce the opportunities for fraud in vehicle sales and finance, the FTC should ensure that the process for obtaining E-Sign consent is meaningful, and actually complies with E-Sign's requirements.

2. Electronic records and signatures are often used to facilitate fraud.

While the use of electronic records and signatures is necessary for smooth commerce between parties when both are online, that is not the case when both parties are standing in the same physical space.

²⁹³ *See id.*

²⁹⁴ Senator Leahy emphasized these differences when, regarding the passage of E-Sign, he stated on the floor of the Senate:

[This bill] avoids facilitating predatory or unlawful practices. . . . [It] will ensure informed and effective consumer consent to replacement of paper notices and disclosures with electronic notices and disclosures, so that consumers are not forced or tricked into receiving notices and disclosures in an electronic form that they cannot access or decipher.

* * *

I maintained that any standard for affirmative consent must require consumers to consent electronically to the provision of electronic notices and disclosures in a manner that verified the consumer's capacity to access the information in the form in which it would be sent. Such a mechanism provides a check against coercion, and additional assurance that the consumer actually has an operating e-mail address and the other technical means for accessing the information.

¹⁴⁶ Cong. Rec. S5219–S5222 (daily ed. June 15, 2000) (statement of Senator Leahy).

²⁹⁵ U.S. Census Bureau, American Community Survey, Types of Computers and Internet Subscriptions (2020), available at <https://data.census.gov>.

We hear from attorneys around the country regarding cases in which fraud was facilitated by the dealer's use of electronic records and signatures. Many attorneys have reported cases in which the consumer was in the same physical space as the auto dealer, but the required state and federal disclosures, supposedly provided electronically, were never actually delivered to the consumer, or were delivered days later. Others report that the consumer's electronic signature was applied to a contract with very different terms from what the consumer believed they were entering into.²⁹⁶

Although the federal E-Sign Act²⁹⁷ and the Uniform Electronic Transactions Act²⁹⁸ (which has been enacted in every state except New York) both require that the parties agree to engage in an electronic transaction before either law's validation of electronic documents and signatures is applicable,²⁹⁹ consumers and their attorneys routinely tell us that:

- If the consumer balks at using electronic media, the dealer refuses to proceed with the transaction without that acceptance of electronic media.
- Consumers are not shown the TILA disclosures and the retail installment sales contracts before signing, and they do not have control over the mouse when they are asked to sign the documents.
- When consumers provide a signature electronically, they provide it on a small signature pad, such that they cannot see the terms of the electronic record that is being signed.
- Sometimes they are provided the documents by email immediately, but often they never receive the documents.
- At the end of the process in some dealerships, they are asked to apply a wet signature to a piece of paper saying that they did provide E-Sign consent and that they did see the document they signed.

People with language barriers seem to be particular targets for abuses facilitated through electronic media.³⁰⁰

These all-too-typical scenarios are evidenced by in the Declaration of James Spade,³⁰¹

²⁹⁶ This statement is based on the scores of requests for assistance to NCLC from attorneys with this type of fact scenario.

²⁹⁷ 15 U.S.C. §§ 7001 *et seq.*

²⁹⁸ See National Consumer Law Center, Consumer Banking and Payments Appx. I.2 (6th ed. 2018), *updated at* www.nclc.org/library.

²⁹⁹ 15 U.S.C. § 7001(b)(2) (“This subchapter does not... (2) require any person to agree to use or accept electronic records or electronic signatures,”; UETA § 5(b) “This [Act] applies only to transactions between parties each of which has agreed to conduct transactions by electronic means. . . .”

³⁰⁰ See Diana Hembree, E-Contract Abuse Alert: How Car Dealers Can Fake Your Auto Loan, *Forbes*, Apr. 15, 2017, available at <https://www.forbes.com/sites/dianahembree/2017/04/15/e-contract-abuse-alert-how-car-dealers-can-fake-your-auto-loan/?sh=458cc13865c5> (“Experts say e-contracting abuses are rampant in Spanish-speaking communities. Attorney David Valdez of Culver City, Calif., currently has three cases involving Spanish-speaking clients in which auto lenders failed to provide a Spanish translation of their leases as required by law in California.”).

³⁰¹ See Declaration of James Spade, *Credit Acceptance Corp. v. Sandra Nelson & Randall Nelson v. Hah Pre-Owned Auto Outlet, Inc. & Credit Acceptance Corporation*, CC-23-2019--C-102 (W.Va. Cir. Ct. June 24, 2020) (included in Appendix C, *infra*).

the owner of a used car lot in South Charleston, West Virginia, the defendant in an auto fraud case filed in West Virginia state court. In the declaration, the dealer states that

All Credit Acceptance Corporation financing contracts must be completed through electronic signature documentation. There is no option in Credit Acceptance Corporation financed transactions to do the transactions using paper documents only. Refusal to use the electronic contract process would end the financing with CAC.

Our employee sits at the computer monitor and the customer has a signature pad or clicker. . . . There is no determination as to whether the consumer has access to or can use a computer to access documents electronically. No documents are provided to the customer in advance of clicking or signing the signature pad.

After all contractual documentation is completed, the consumers are presented with a CAC Declaration Acknowledging Electronic Signature Process which they are asked to sign with their actual hand signature.³⁰²

As noted in one article about the problem, “E-contracting may be easy and convenient, but it has also generated consumer complaints and lawsuits across the country. Some unethical dealers have used e-contracts to charge more than the agreed-upon sales price, tack on hundreds or thousands of dollars in extra Add-ons that consumers didn’t want or agree to buy, or overcharge for government fees and engage in other illegal practices – such as e-signing consumers’ names without showing buyers the contract.”³⁰³

3. Recommendation

We recommend that the rule articulate that it is an unfair practice for a dealer to fail to ensure that:

- 1) the E-Sign demonstration of consent meets all of the material demonstration requirements found in E-Sign § 7001(c)(1)(C)(ii);
- 2) records required to be provided to the consumer in writing are fully visible to the consumer before the consumer is asked to sign the record; and
- 3) records provided to the consumer electronically are provided in a manner that the consumer can review and retain.

³⁰² *Id.* (emphasis added).

³⁰³ See, e.g., Diana Hembree, E-Contract Abuse Alert: How Car Dealers Can Fake Your Auto Loan, *Forbes*, Apr. 15, 2017, available at <https://www.forbes.com/sites/dianahembree/2017/04/15/e-contract-abuse-alert-how-car-dealers-can-fake-your-auto-loan/?sh=458cc13865c5>. See also Eric L. Johnson, Texas Indep. Auto. Dealers Ass’n, *Car Buyer Granted Default Judgment Against Dealership for Violations of TILA, Connecticut Retail Installment Sales Finance Act, and State’s Unfair Trade Practices Act* (Oct. 7, 2020), available at https://www.txiada.org/blog_home.asp?display=337 (blog including a story about a consumer who agreed to buy the car and to make a \$6,500 down payment; without the consumer's knowledge, the dealership prepared a retail installment contract, electronically forged his signature, and submitted the forged contract to a finance company).

VI. Conclusion

We very much appreciate the Commission's close attention to the many details required to make the marketplace for consumer purchases of vehicles safe from unfair and deceptive trade practices.

Respectfully submitted, this the 12th day of September, 2022, by:

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Appendices

APPENDIX A. Consumer Stories Related To Unfair Auto Sales Practices³⁰⁴

ADVERTISED PRICE – BAIT AND SWITCH

I purchased a used 2016 GMC Terrain from [dealership] after seeing it advertised online for \$18,xxx. Phoned the dealership to set an appointment to see the car. Spent about 4 hours at the dealership while the salesman kept changing the terms of the deal (including him going online and changing the price of the vehicle). I was co-signing to buy this vehicle for my granddaughter, who was very excited about getting a new car. Shame on me for getting worn down after all the scamming by the salesman and wanting to please my granddaughter. Wound up paying about \$21,xxx and basically giving them the car we traded in (didn't realize until after sale completed that they had given us only \$100 for a 2009 Mercury Mariner). Also was promised a spare key and owner's manual that never appeared after buying the car. Needless to say I will never, ever do business with that dealer again. And I tell everyone I know that they are scammers and dishonest.

Vicki M., Illinois

Source: Consumer Reports

On the official Subaru website, and all the dealer websites I visited, I encountered bait and switch tactics. Models with specific options were listed, but at all the dealerships the actual prices were 5-8% higher than advertised. This also held true for the "build a model" feature on the corporate Subaru website. I was told that dealerships in Connecticut were often adding \$2500-5000 to MSRP prices because of supply and demand.

John O., Connecticut

Source: Consumer Reports

A couple of years ago my mother (who was 81 at the time and NOT tech and consumer savvy) needed to get a new car. She had a slight accident that was enough to total her old car. She wanted to stay with the same car, but we opted for a lease because of her age and usage. So we kept an eye out for "good deal" ads for the model she wanted, and saw several in her price range.

The ads were complete misrepresentations. No money down does not include a whole slew of fees, most of them made up and some even duplicates. And all the other offerings only applied to very specific people (like students who are buying their first car). Yes it is stated in the ad, but in the hard to read fine print and even then not very specifically. So the price we would have had to pay was almost twice what was advertised.

The only way to get something at the price we wanted was to buy a different vehicle. Then they proceeded to play this game of "let's see how we can lower the costs" which literally lasted for six

³⁰⁴ Some edits have been made to correct grammatical errors in an effort to improve readability. Names of particular dealerships have been removed.

hours. Every time we tried to leave, they ganged up on us to give us a reason to stay. Finally, we agreed on a price just to get out of there, and because going anywhere else would have resulted in the same trauma all over again. And when we finally sat down with the finance guy, the final price was increased with warranty services that we were convinced you were obliged to have ... fees that were never discussed until that point. We finally left with a different vehicle than we sought at a higher price than we wanted. And after all that we didn't even get a gift certificate that the salesperson promised us. I have had at least two other similar sessions through the years to the point that I will NEVER buy from a dealer again.

Steve K., Massachusetts

Source: Consumer Reports

It all started when I saw an advertisement on both TV and the dealer's website offering a new 2021 Honda Accord for \$129 per month for 36 months. Also stated upfront were some fees associated with the lease. When I entered the dealer showroom, I thought that it would be a simple transaction, since the parameters of the sale were already established. Was I wrong! The salesperson made me negotiate for hours, trying to sell add-ons and increase the lease price. This happened on my initial visit to the dealer.

Finally, we agreed to the advertised price but I could not finalize the deal until my wife drove the car on a test drive. We returned 3 days later assuming the deal struck 3 days previous was a done deal. Wrong again! I had to renegotiate all over again and spent almost 2 more hours doing so. Finally, we agreed but I did pay a slight fee for something not advertised, but overall I ended up with the lease that I wanted.

One would think that when something is advertised it would be easy for the dealer to know all of the facts and simply write up the deal at the advertised price. Not a good experience, especially since all of the lease details were upfront in the ad. Just another example of the dealer trying to get you in the door to do a bait and switch.

John B., Illinois

Source: Consumer Reports

I was shopping for a Honda Civic Si, a highly rated Consumer Reports vehicle. I used the internet to request vehicle pricing from three dealerships. One was quite competitive, priced about 10% less than the invoice price indicated by Consumer Reports online pricing tool. I made an appointment to see the dealer.

When I arrived, and sat at the salesman's desk, he started talking about all the costs, add-ons, etc., that were not included in the emailed price. He showed me a list of prices he just jotted down, and the total number was about 10% more than invoice. When I pointed out that even the new base price, before add-ons, was thousands more than the email quoted price, he simply said, "Oh, we made a mistake. That is not the right price."

This then led to bringing around a manager, who reduced this newfound price, to something still thousands more than the quoted price. I said I was leaving. They said, what will it take to sell you this car. I said, the price you already quoted me. They said, they could not do that. I left.

I then went to some dealer review sites, and also trip advisor and google. I found about 90% of the dealer's ratings follow similar language, tone and even words. It seems the same person posted hundreds of positive reviews. When I looked at only the negative reviews, I found many stories similar to my own. It seems the dealer is paying an employee to write false reviews.

Both these acts, quoting a price then not honoring it all just to get me into the showroom, and posting illegitimate dealership reviews, should have legal consequences. Consumers are at the mercy of these horrible tactics, while negatively impacting our economy in lost productivity for both the buyer and seller.

Maria B., New Jersey

Source: Consumer Reports

ADVERTISED PRICE – UNAVAILABLE DISCOUNT, UNWANTED ADD-ONS

I bought a new car 2 years ago. One of the dealerships that I contacted had quoted me a very low price. When I went into the showroom prepared to buy the car, the price had changed dramatically. In the original quote, unbeknownst to me, they had included a discount for being a military veteran and a discount for being a student. Neither of these situations applied to me and I never was asked about either one when they gave me the original quote.

Another addition that was in the showroom pricing was for nitrogen in the tires, \$995.00! When I told them I did not want that, nor any other items to be included in the pricing, I was told that all of their cars were outfitted that way. The other extras were wheel locks, splash guards and pinstriping. I told them they could order the car that I wanted and to not accessorize it in any way. I said that I could wait 2 - 4 months. They said that they couldn't do that. Naturally, I went to a different dealership and got what I wanted, at a very similar price to the original quote without paying for any extras that I did not request.

Wayne C., Maryland

Source: Consumer Reports

ADVERTISED PRICE – VEHICLE MARKUPS

The Prius Prime Ltd I bought in May 2022 was marked up \$8000 without telling me. I was hurried through the signing of the numerous documents and trusted the dealership to charge me what the car (and other same model cars) was advertised for. When I got home I realized that I paid an unspoken markup of \$8000 for the car. When I questioned the ethics of this, the day after I bought this car, I was told that the figures were there when I signed the papers.

The dealership was not willing to change anything. I consider this to be deceptive practice.

James T., Maryland

Source: Consumer Reports

I wanted to buy my 2022 [Toyota] GR Supra 3.0 Premium local, however shortages changed the complexion of that thought quickly. I found one but the Toyota dealership in North Augusta, SC keep adding in a ADM (adjust to deal a markup) over \$8,000.00. This was after using my credit union's preferred dealer program. On the website the price was right but when at the dealership I was told if I

wanted the vehicle which was in high demand I had to fork up an extra \$8k. They were pretty sure of themselves so much that they pulled the car off the showroom floor. Oh and I couldn't test drive it first either. Yeah.

So I contacted a great dealership in Hackensack New Jersey, NJ made the purchase, flew up when in arrived from the port in NY and drove down back to Augusta, GA where I live saving \$8000.00 minus my plane ticket, less than \$130, lunch at local favorite slider joint, dinner with my 2 daughters in PA and gas back home.

A negative turned into a positive. But it's a shame that auto industry sales aren't regulated by state or federal governments. Vehicles are required in many parts of this country and the thievery is real and has been for decades with pricing and financing of automotive vehicles. A car/truck is an appliance and the experience should be like going to Lowe's, Home Depot or Best Buy.

John M., Georgia

Source: Consumer Reports

We have been looking to upgrade our BMW i3 to something with longer range and with no suicide doors. We picked the Kia EV6, then went to our local Kia dealership. Everything was great except they wanted a \$5,000 dealer markup. We left without buying the car. We did our research and found all dealers within 250 miles had markups ranging from \$3,000 to \$7,500. We went back to our local Kia dealership and showed them the ad from a Bay Area dealer for \$3000 markup. We did talk them down to \$2,500, but still felt ripped off. Everything else about Roseville Kia dealership was great.

Merivel T., California

Source: Consumer Reports

The [Honda Civic] Type R is a popular car. I contacted numerous dealerships, over 20 (seriously). Every single one after calling them added a \$5k "high demand" surcharge even though that was not listed online. Further, I finally found a dealership that backed off from this but demanded I purchase some \$1k exterior detail (total ripoff). I caved because \$1k was better than \$5k but I was still ripped off purchasing a car for more than MSRP.

Khomsi M., Kansas

Source: Consumer Reports

PENALIZED FOR USING OWN FINANCING

My wife and I were shopping for a new electric vehicle and we picked one out at a Nissan dealership. As we were starting the paperwork, we told the salesman we were going to be paying for it upfront without a loan. It was only then that he told us that we'd need to pay more for that. Paying cash ended up raising the price of the car by over \$2,000 more than what we thought we were going to be paying. He acted like this was totally normal and we should have known that this was how things worked, but I don't know how we were supposed to know that when none of the ads or the pricing on the lot or even the salesman said anything about it until we were in the office doing paperwork.

Matt C., Massachusetts

SOURCE: USPIRG

ABUSIVE SALES PRACTICES

I went to look at a car at Napleton St. Louis. As I entered the lot, they asked for my keys to review my vehicle for a trade in estimate. I looked at one vehicle and decided I didn't want it, but they wouldn't give me back my keys until I was forced to sit and listen to a lengthy high-pressure discussion from the sales and finance person. I repeatedly asked for my keys back, and they said they would return them in just a few minutes (after they told me their spiel).

Collen T., Missouri

SOURCE: USPIRG

I liked the car he wanted to sell to me. However, I wanted to go home and think it through. He tried to force me into the owner's office. All the while refusing to return my keys until I agreed to buy. The owner of the car dealership finally gave them to me. I'll never go back.

Brenda S., Florida

SOURCE: Consumer Reports

I had a 3 year lease on a car that I bought out, so I then owned the car. The auto dealer where I leased the car called me and told me he could give me the same monthly lease price for a new car of the same make and model. The dealer location is not close to my home. When I got there they started their offer for the lease price at more than twice the price that I previously paid. They had taken the keys to my car, supposedly to price it for a trade in. I told him that I was not interested in their offer and had to demand my car keys back at least 3 times and finally had to yell at him.

Michael S., Wisconsin

SOURCE: Consumer Reports

UNWANTED OR WORTHLESS ADD-ONS

[The dealership] tried to intimidate us into purchasing insurance, and made us sign a statement that basically we were too stupid to accept their add-on insurance. Then we were forced to pay for window tinting, and ceramic coating. We didn't want either one but were initially told that it had already been done and couldn't be removed. It also had an add-on price for chrome lug nuts.

After they had our money, they then told us that we would have to set up an appointment to get the ceramic coating and window tinting done. We told them we didn't want either one, and that we wanted the car without them and the add-on price subtracted. They refused so we reluctantly agreed to let them do it.

We got called three days later and were told that they wouldn't be able to schedule us for another month. I demanded to talk to the manager who then told me they could only do the ceramic coating and didn't have anyone to do the tinting.

The ceramic coating was a \$1400 add-on that for our kind of car usually goes for \$1200.

Larry D., Indiana

SOURCE: USPIRG

I bought a 2021 Kia Sorento Hybrid in May of 2021. The sales process itself was very smooth, I didn't feel pressured by the salesperson to look at anything that was more or less expensive, and he didn't suggest anything off my list of musts and wants. Once I filled out the finance paperwork and actually sat down with the finance manager it became a three-hour ordeal to complete the sale.

The finance manager was extremely high pressure about protection packages (they told me originally that the protection package was included in the price, but magically they knocked off \$1,500 if you decline it), GAP insurance which I already have, an extended warranty, and even had an "accessory guy" from the dealer try to sell me on a set of WeatherTech floormats at a 150% markup over buying directly from WeatherTech. After saying no to everything when we got to review the final sale paperwork I noted that the protection package and extended warranty were still there. He told me that it was a decline but the line items on the Bill of Sale clearly showed I was paying for them.

He told me I could get a refund on them if I called to cancel or I would have to wait an additional HOUR for him to redo the paperwork. I waited the hour, and he took his time to make sure it was really an hour.

I will **never** go back to this dealership for sales or service. I had to contact Kia directly for a refund because I still ended up paying for the protection package even after it had been "removed."

Benjamin D., Wisconsin

Source: Consumer Reports

A couple of years ago we bought a used Nissan Rogue and ended up getting surprised with a couple of extra charges. What made it worse was that I (a man) had to leave early, so I negotiated the deal with my wife (a woman) there, and left her to finish the paperwork. They slid these charges in without her noticing.

In the end we were left with 2 surprises:

- 1) Glass VIN etching charge. The sales person mentioned the glass etching as a feature of the car during the test drive. He never told me it was an add-on charge that wasn't optional.
- 2) A High deductible extended warranty. The car already came with an extended powertrain warranty with a low \$50 deductible. We agreed to an additional bumper-to-bumper warranty to cover the electronics on the car. I can't recall the exact details, but the warranty was relatively expensive considering most of the features were already covered in the Powertrain warranty.

The worst part was that they snuck in a high deductible that didn't match the Powertrain Warranty \$50 deductible. I want to say it was \$300 or \$500 for the deductible.

I went back to the dealer the next day, but they refused to refund the glass etching. However, I knew my rights with the extended warranty and canceled it to prove a point. I also made a point to warn other customers who were about to do paperwork.

In the end, I learned to never leave before the deal is done. I don't think that dealers should be allowed to charge extra for features they added before the sale of the car. The price of the car should be the price of the car as-is; especially for used cars.

Andrew W., California

Source: Consumer Reports

I shopped through my credit union buying service and received a small discount. I knew exactly what I wanted, Honda CR-V. The car was very limited at the time and even in a large metropolitan area, I only found one dealer that had just what I wanted. I went to the dealer and was ready to pay total cash and drive out with the car. I was disappointed to see several add-ons, protection package and alarm system, which I did not want. This added \$2500 to the price. I could have added just the parts I wanted for far less. But they were already installed and the dealer would not budge for removal. "This is how we prepare all our cars," he said.

One item, clear protection package, was not even installed yet and I did not want it, but he still would not remove that cost. Ultimately it was installed later, but one part of the package could not be installed on my model. Still the dealer would not lower the cost of that item. He offered a free oil change credit, but it was more trouble and distance for me to travel back there to get it. This is a large dealer with multiple showrooms and he takes advantage of his power. I tell others not to go there, or at least be prepared for a fight. Also, I sold my old car to a large buying service which gave me far more in cash than I was offered in trade-in.

Marilyn F., California

Source: Consumer Reports

During purchase with finance several extras were presented without disclosure of extra costs to the earlier agreed on bottom line price. At one point we were told the "extras" would cost an additional \$19 per month. Review of documents then discovered costs to be \$3150 and \$710 that were added to final total cost. These would both be financed resulting in total costs much higher than the stated \$3150 and \$710. Interest would be paid on both at 3.99 percent.

Gene S., Colorado

Source: Consumer Reports

Since many dealers are adding a \$4-10k markup to the cost of a new vehicle, my Mazda dealer included a \$1295 1-year maintenance package which includes 2 oil changes worth \$200 at most. Only when signing the purchase agreement, did I see the \$495 etching/security package, which absorbed the \$500 dealer loyalty rebate. If given the chance, I would have refused both of these charges.

Source: Consumer Reports

“YO-YO SALES”

Heidi McGill v. Bob Moore Dodge Chrysler Jeep – In November 2020, Heidi McGill, an Oklahoma consumer, arrived at a dealership to buy a car. While there, after the dealer conducted a review of her credit history, Ms. McGill made a down payment on a new Dodge Charger, traded-in her old car, and took the Dodge Charger home. Ms. McGill alleged that she did not receive a copy of the contract at the time. She reported that the dealer told her that the bank it intended to sell her loan to was not available on the weekend.

A week later, she returned to the dealer and was asked to sign a new set of documents with different financing terms. She was provided a copy of the contract with the new terms, but with pages missing. Seventeen days after she took the car home, the dealer asked her repeatedly for additional financial information including her W-2, and then demanded return of the car.

According to Ms. McGill, about 26 days after she took possession of the car, the dealer demanded a co-signer for the financing terms, indicating that the process was still not completed from the dealer’s perspective. Ms. McGill alleged that the dealer allowed 10 other banks to review her credit during this time, lowering her credit score.

About 31 days after she took possession of the car, Ms. McGill alleged the dealer told her that if no financial entity purchases her loan, then they will give her some funds back based on the value of her trade-in. She returned to the dealer and signed a third set of financing documents. Yet, around 37 days after taking possession of the vehicle, the dealer told her she would have to find her own financing, according to Ms. McGill. In response, she offered to return the Dodge Charger in return for her down payment and trade-in, which the dealer declined to do.

Around 40+ days later, according to Ms. McGill, the dealer threatened to file a stolen vehicle report if the Dodge Charger was not returned. Ms. McGill returned the Charger the next day. The dealer refused to return the down payment unless she executed a release of all claims. McGill did not execute the release, and the dealer repossessed the Charger without filing for replevin.

The deal included a signed Retail Installment Sale Contract setting forth the financing terms, as well as a “Spot Delivery Agreement” (signed with the same date), which stated the car purchase was conditional on the dealer finding a lending institution willing to purchase the Retail Installment Sales Contract. In her filed complaint against the dealer, Ms. McGill alleges breach of contract, fraud, fraudulent inducement, negligence, credit defamation, failure to accurately disclose loan terms, deceptive trade practices, intentional infliction of emotional distress, conversion, and wrongful repossession.³⁰⁵

³⁰⁵ Copies of relevant documents are included in the filing submitted by National Ass’n of Consumer Advocates et al., Request for Rulemaking Concerning the Finality of a Car Purchase (Spot Delivery and Yo-Yo Financing) (Apr. 29, 2022), available at https://www.consumeradvocates.org/wp-content/uploads/2022/04/NACA_spotdelivery_FTC_04292022_exh.pdf.

Source: National Association of Consumer Advocates (NACA)

Justin Sacco v. Paradise Auto Center – Oregon consumer Justin Sacco went to Paradise Auto Center, an auto dealer, to purchase a car in mid-August 2020. According to Mr. Sacco, after a review of his credit history, the dealer selected a 2017 Mitsubishi Mirage to sell to Mr. Sacco. The dealer and Mr. Sacco agreed to a loan, a \$3,000 down payment, and signed a Retail Installment Contract (RISC) containing the credit terms. Mr. Sacco signed all the papers that day and drove the car home. He returned to the dealer the next day and gave them the down payment.

Mr. Sacco reported that about two weeks after paying the down payment, Paradise called and told him that the bank did not approve the loan with the terms on the RISC and that he needed to return to the dealer. Mr. Sacco returned to the dealer on August 29, 2020 where they discussed new financing options. Mr. Sacco said that he and the dealer agreed to new credit terms.

Mr. Sacco alleged that about a month later, on September 25, 2020, Paradise called him and said that they could not get secure the financing and that he needed to return the car (a phrase commonly used by dealers to conceal the truth that an assignee would not agree with the terms it demanded for the sale of the credit contract). He returned the car on the same day, but Paradise refused to return his down payment. Consequently, he did not have sufficient funds for a down payment to purchase another car, lacked transportation to go to work, and lost wages as a result.

According to Mr. Sacco's filed complaint, the dealer allowed him to execute a purchase order and a retail installment contract (RISC) and to take possession of the car prior to Mr. Sacco's loan being approved by another financing entity. Paradise offered to sell the motor vehicle to Mr. Sacco under a retail installment contract that is subject to a finance company's agreement to purchase the retail installment contract. Prior to offering or negotiating new financing terms in person, the dealer failed to return all items of value to Mr. Sacco. No assignee agreed to purchase the retail installment contract on the exact terms that the dealer and Mr. Sacco negotiated, and Paradise did not receive final approval of its sale of the credit contract to another financing entity on terms acceptable to Paradise. Mr. Sacco alleged that the dealer's conduct violated Oregon's unlawful trade practices law.³⁰⁶

Source: National Association of Consumer Advocates (NACA)

Estephania Palacios Gomez v. Low Price Auto LLC DbA Salem Auto Market – On March 23, 2021, Oregon resident Ms. Estephania Palacios Gomez bought a 2012 Mercedes Benz C250 from Salem Auto, an auto dealer. Ms. Gomez traded in her current car, paid a \$2,000 down payment, and agreed to pay additional funds in deferred down payment. After applying the down payment, Salem Auto and Ms. Gomez agreed to a loan for the remaining amount, and signed a Retail Installment Contract (RISC) with the understanding that the dealer Salem Auto was to obtain financing for Ms. Gomez. Ms. Gomez signed all the purchase paperwork that day and drove the car home.

Ms. Gomez alleges that on or about June 2, more than two months after signing the original RISC and taking home the car, Salem Auto called Ms. Gomez and told her that it could not obtain financing for her and told her to come in to sign a new loan. Ms. Gomez returned to the dealer, and signed a new

³⁰⁶ *Id.*

RISC. According to Ms. Gomez, the dealer did not return the original down payment to her before entering into the new agreement, but it increased the price of the car by \$1,000. Ms. Gomez also reported that the dealer falsely represented the amount of her down payment. The parties signed the second RISC with the understanding that Salem Auto was to obtain financing from another entity for Ms. Gomez.

A month later, Ms. Gomez reported in her complaint that the dealer called and informed her that the second entity rejected the loan and that it was back with Salem Auto. Ms. Gomez asked if Salem Auto would carry the loan in house but the dealer refused. Ms. Gomez returned her key to the dealer and requested return of her down payment. Ms. Gomez made multiple requests for her down payment, but the dealer refused to return it.

According to Ms. Gomez' filed complaint, the dealer allowed her to execute a purchase order and/or a retail installment contract and take the car home, prior to the credit terms being approved by a third-party financial entity.³⁰⁷ The dealer offered to sell a motor vehicle to her under a retail installment contract which contains terms which conditioned the transaction on a lender's agreement to purchase the retail installment contract. No third-party entity agreed to purchase the RISC on the exact terms that Ms. Gomez and the dealer negotiated, and the dealer did not receive final approval of funding from any third-party lender within 14 days of Ms. Gomez taking the car home, as required under Oregon law. Ms. Gomez alleged violations of Oregon's unfair trade practices law, fraudulent misrepresentations, and violations of the Truth in Lending Act, against the dealer.³⁰⁸

Source: National Association of Consumer Advocates (NACA)

Renee Galloway v. Priority Imports Richmond LLC, – Virginia resident Renee Galloway, an African-American woman, went to Priority Imports Richmond (Priority), a car dealer, to make a deal on a Toyota Camry that she test-drove days earlier. After a dealer review of her credit history, Ms. Galloway reported an offer where she could buy the car on credit at 8.49% interest, with 72 payments of \$572.68 with a \$3,000 down payment. She accepted the offer, signed documents to purchase the Camry on credit, and the down payment was withdrawn from her account.

Ms. Galloway and the dealer signed the electronic credit contract, specifically the retail installment sales contract. The credit contract stated that it “is not contingent upon obtaining financing on terms which are satisfactory to the parties.” The contract was final and was not conditional on other terms. Under the dealer's signature, the credit contract stated that the dealer “sells and assigns (the credit contract) to Toyota Motor Credit Corporation.”

Ms. Galloway stated that beginning two weeks after the transaction, the dealer contacted her and falsely told her that she needed to return to sign additional documents regarding her credit transaction. to complete the purchase of the Camry. She returned to the dealer to do so, and was then told that the signed credit contract was not valid. She asserted in her filed complaint that the dealer lured her back to “force her to either pay more money for the Camry or buy a different car.” Ms. Galloway returned the car keys and left the dealership without her Camry. So that she would have a car to drive, she then agreed to a second transaction.

³⁰⁷ *Id.*

³⁰⁸ *Id.*

The dealer did not record transfer of title or the registration of the lien for the financing with Virginia DMV. Ms. Galloway asserted that the dealer intentionally misrepresented that it had assigned its rights in the contract to a financing company and never intended to provide the Camry on the unconditional terms shown in the credit contract. The dealer, she said, falsely represented its intent to sell the Camry to Ms. Galloway for the terms shown in the credit contract.

Ms. Galloway asserted in her complaint a fraudulent scheme by the dealer against her that violated the federal Truth In Lending Act (TILA), the federal Equal Credit Opportunity Act (ECOA), and the 42 U.S.C. § 1983. The dealer's actions, according to the complaint, also violated the Virginia Consumer Protection Act (VCPA) and the Uniform Commercial Code, and constituted fraud and conversion. After Ms. Galloway filed her lawsuit, the dealer compelled arbitration even though the arbitration clause prohibited the award of punitive damages in arbitration. The arbitration decision is currently on appeal to the Fourth Circuit.

There is no way to reconcile the statements in the first credit contract with how the dealer treated the transaction. As an intended assignee, the financing company will claim that it only buys such electronic credit contracts which are fully final and unconditional when they are signed. The form electronic credit contracts are assigned and do not allow for modifications by a separate physical document signed in ink which is not electronically associated with the credit contract.

Source: National Association of Consumer Advocates (NACA)

Additional allegations as experienced by Virginia residents:

i) A Virginia consumer pursued claims against in arbitration against a Koons Ford dealership. After driving home with a car and thinking a car sale was completed, the consumer reported receiving a notice from the financing company telling him that the credit had been denied. The consumer was confused and thought the deal was canceled. The electronic credit contract, which was an unconditional extension of credit, that the dealership used when it sold the care to the consumer, as well as the standard delivery form that the dealership also uses. The "Permissive Vehicle Use Agreement And/Or Addendum to Proposed Installment Sale Agreement or Lease" states that the transaction is conditional.³⁰⁹ The statements in the delivery form that that the dealer is merely granting the consumer use of the dealer's car while credit is pending, and the credit contract's unconditional terms are inconsistent and cannot be reconciled. The standard delivery form shows how the dealer considered the transaction conditional while at the same time attempting to sell an unconditional credit contract to an assignee.

ii) A Virginia consumer filed a demand for arbitration against a Priority dealership alleging that after signing a credit contract and completing a transaction to buy a car, he was contacted by the dealer and ordered to return the car to the dealership. He asserted that he was threatened with arrest if he did not return the car. He reported that he was then told that his financing had not been approved. Attached is the credit contract that the dealer used when it sold a Dodge Challenger to the customer. It states that the dealer had assigned it. The transaction also included a standard delivery form that the dealership uses. This "Addendum to Retail Installment Sale Contract/Lease and Buyer's Order Conditional Delivery Agreement" states the transaction is conditional on it being assigned. In this transaction, the form was paired with a fully endorsed credit contract that represented it had already been assigned. The

³⁰⁹ *Id.*

statements in the standard form with the statement that the credit contract had already been assigned are irreconcilable. The standard delivery form used by this multi-state dealer shows how the dealer considers the credit transaction conditional on assignment while at the same time telling the customer the credit contract is fully completed.

These examples are just a drop in an ocean of unfair and deceptive transactions. Most car dealers currently do not consider the credit transaction final until they are paid from an assignee, but they continue to give consumer's credit documents that are legally premised on the credit being provided that day by the dealer.

Source: National Association of Consumer Advocates (NACA)

APPENDIX B. Complaints Received By State And Local Consumer Protection Agencies

The Consumer Federation of America (“CFA”)³¹⁰ issues an annual survey to state and local consumer protection agencies across the country about trends in complaints they receive from consumers and publishes a report analyzing the responses. CFA’s annual report identifies the “top ten” categories of complaints received and includes excerpts of actual complaints along with the results of the agency’s attempt to mediate or resolve the dispute. For the past six years in a row, participating agencies have reported to CFA that auto-related complaints were the number one complaint they received from consumers.³¹¹ These annual reports include stories which exemplify the nature of the problems the FTC seeks to address in this rulemaking, such as undisclosed add-ons³¹², hidden dealer fees³¹³, deceptive leasing practices³¹⁴, fraudulently altered financing applications³¹⁵ and yo-yo financing and spot deliveries³¹⁶.

Excerpts from the report containing examples of complaints received include the following:

ADD-ONS AND SERVICE CONTRACTS

A Virginia consumer purchased a new car along with a “total loss protection coverage plan” from the dealer for an additional \$899. The plan could be cancelled for a full refund within 30 days. But when the consumer attempted to cancel, the dealer never returned the calls. By the time they connected, the 30 days had elapsed and the dealer claimed that it was too late. The **Fairfax County, Virginia Department of Cable and Consumer Services** successfully negotiated for the plan to be cancelled for a full refund. (2016 report, p. 9)

A couple agreed to make a \$5,000 down payment on a used car but could only withdraw \$2,500 from the bank that day, so they returned to the dealership the next day with the balance. They were informed that they needed to pay an additional \$3,000 plus tax for an extended warranty, which they had never requested. After mediation by the **New York City Department of Consumer Affairs**, the couple received a full refund for the unwanted add-on. (2016 report, p. 9)

A disabled senior signed a lease for a new car with the understanding that the monthly payments would be \$235, but they turned out to be \$360, which he could not afford. The higher amount was due to

³¹⁰ The Consumer Federation of America is an association of nearly 300 nonprofit consumer groups that was established in 1968 to advance the consumer interest through research, advocacy and education.

³¹¹ See 2021 Annual Consumer Complaint Report, p. 4. <https://consumerfed.org/reports/2021-consumer-complaint-survey-report/>

³¹² 2016 Annual Consumer Complaint Report, p. 9. <https://consumerfed.org/reports/2016-consumer-complaint-survey-report/>

³¹³ 2021 Annual Consumer Complaint Report, p. 7. <https://consumerfed.org/reports/2021-consumer-complaint-survey-report/>

³¹⁴ 2017 Annual Consumer Complaint Report, p. 14. <https://consumerfed.org/reports/2017-consumer-complaint-survey-report/>

³¹⁵ 2018 Annual Consumer Complaint Report, p. 11-12. <https://consumerfed.org/reports/2018-consumer-complaint-survey-report/>

³¹⁶ 2021 Annual Consumer Complaint Report, p. 8. <https://consumerfed.org/reports/2021-consumer-complaint-survey-report/>

several add-on services that he never agreed to. In response to his demand for a refund, \$1,220 was deducted from the contract but it did not decrease the monthly lease payments. When the **Vermont Attorney General's Office** attempted to mediate, the dealer produced a video of the transaction to disprove the man's claim that he had difficulty understanding the agreement. The man protested but he was stuck with the deal that he had made. (2016 report, p. 11)

Used car sales were the fastest growing complaints to the **NYC Department of Consumer Affairs** last year. In one example that the agency provided, a consumer asked for help after finding that the contract for a used Toyota Highlander contained charges for several add-ons that were unwanted and had gone unnoticed in the flurry of paperwork that was presented for signing at the time of purchase. The agency mediated a refund of \$5,392, which was sent directly to the bank that owned the installment contract as payment towards the consumer's balance. (2017 Report, P. 12)

The worst complaint to the **Summit County Office of Consumer Affairs** last year was from a woman who purchased a used car from a well-known dealership. She also purchased three warranties, the cost of which were rolled into her bank loan. Over the next two+ years, whenever the consumer took the car in for repairs that should have been covered by the warranties, she was told that they were not. The agency discovered that the dealer never notified the warranty companies that the consumer purchased the coverage, and the dealer has refused to respond to the complaint. (2018 Report, p. 14)

ADVERTISED PRICE – BAIT AND SWITCH

A consumer purchased a vehicle from a used car dealership for \$46,295. **The consumer stated the business charged them \$9,000 more than what was initially agreed on.** The consumer stated there were some issues with the vehicle and filed a complaint with **New York City Department of Consumer and Worker Protection** for help. After mediation, the business agreed to refund the consumer \$11,050. (2021 Report, p.8)

A consumer went to a used car dealership to purchase a vehicle that he saw advertised online for \$26,050. The consumer provided a down payment of \$5,000. However, a few weeks later, the consumer received documents from his financial institution that stated he paid \$38,228 for the vehicle. The consumer filed a complaint with the **New York City Department of Consumer and Worker Protection**, and through mediation, the business agreed to refund the down payment of \$5,000. The consumer was satisfied with this resolution. (2021 Report, p.8)

In May 2017 the **NYC Department of Consumer Affairs** brought legal action against multiple used car dealerships in Brooklyn, all under the same ownership, and the owners for misleading consumers about the price and safety of cars they sold and failing to disclose the financing terms. The dealerships even refused to give consumers copies of their sales documents for weeks after the purchases to conceal the actual prices and high interest rates they were charged. For instance, one consumer was quoted a price of \$8,000 for a 2004 Nissan Pathfinder Armada only to discover later that the dealer had surreptitiously written a price of \$12,999 on the finance agreement and charged her an additional \$1,730 for an extended service plan that she had already expressly declined. Another consumer saw an ad that one of the dealerships placed online offering a 2007 Volvo XC90 for \$6,900. Before going to see it she called the dealer to make sure that it was still available. When she got there, the salesperson informed her that the price was \$12,900. She agreed to buy it and failed to notice as she was rushed through the paperwork (which the dealer neglected to give her a copy of) that the price had been upped once again, to \$14,500, more than twice the price that was originally advertised. The settlement in this case resulted in \$400,000 in restitution for consumers. (2017 Report, p. 14)

“YO-YO SALES”

The **Hillsborough County Department of Consumer & Veterans Services** received a complaint from a man who put a \$5,000 deposit on a recreational vehicle with the understanding that the dealer would hold it until he could obtain affordable financing. The financing fell through, however, and the dealer refused to return the deposit even though no purchase agreement had ever been signed and the man never took possession of the vehicle. With the help of the consumer agency, the man received a full refund. (2020 Report, p.30)

A consumer purchased a vehicle but never received information on where or how to make the monthly payments. **After several months, the vehicle was repossessed. The business responded to South Carolina Department of Consumer Affairs stating they were unable to secure financing for the consumer.** Our office worked with the dealership to obtain and return the consumer’s personal belongings left in the vehicle and, in the end, assisted with getting the vehicle back to the consumer. (2021 Report, p.8)

DEFECTIVE AND UNSAFE MECHANICAL CONDITION

In another case of undisclosed damage, a consumer brought the used car he’d recently bought to a mechanic after repeated trips back to the dealer for repairs to the headlights failed to fix the problem. The mechanic said that the vehicle had been in an accident and as a result the fuse box needed to be replaced. The Louisiana Attorney General’s Office was unable to convince the dealer to take the car back, however, because he insisted that the fact that it was sold “as is,” which is allowed by state law, absolved him of any responsibility. (2016 Report, p. 10).

The first day that a Long Island woman’s teenage son drove the used car that she bought for him, it had engine problems. She took it to a mechanic, who determined that there had previously been a fire under the hood and the damage was so extensive that the car was unsafe to drive. The dealer, who never informed the woman that the vehicle was involved in a fire and had assured her that it was in perfect working condition, refused to take it back. With the help of the **New York State Department of State Division of Consumer Protection**, she was able to return the hazardous car for a full refund of \$14,000. (2016 Report, p. 10)

The worst complaint made to the **Summit County Office of Consumer Affairs** last year was from an out-of-state person who purchased a used BMW, sight-unseen, from Dave Walters BMW in Akron for \$20,000. The car was delivered to a BMW dealer in the buyer’s area. As the consumer drove it home, the engine seized up. The car was towed back to the local dealer, where it was determined that it needed a new engine and other repairs that would cost nearly as much as the purchase price. Since the vehicle was purchased without a warranty, the dealer who sold it disclaimed responsibility for the repairs. The agency’s investigation, however, revealed that the car was a “buy back” vehicle, the fact of which must be disclosed and was not. The dealer agreed to cover the cost of the repairs. (2017 Report, p. 12)

The **Consumer Assistance Council** noted an uptick in complaints last year involving CARFAX reports that failed to provide the whole picture of the condition of used cars. In one case, the CARFAX report a dealer gave to the prospective buyer showed that the car had been in a minor accident, with no major damage. The consumer bought it on that basis. Later, when he went to trade it in to another dealer, he was told that a “structural damage report” had been added to the CARFAX report for the vehicle about a month after he purchased it. Since it indicated that there had been major damage from

the accident, the new dealer declined to take the car in trade. The first dealer disclaimed any responsibility since it merely provided the information that was available at the time of the sale. (2018 Report, p. 12.)

Car sales were the top complaint to the **South Carolina Department of Consumer Affairs** last year. Some of the problems involved serious safety issues. In one complaint from 2018, the consumer had taken out a \$12,000 loan two years earlier to buy a used Acura. Within a week the consumer noticed problems with the power steering and finally had to pay to install a new steering shaft. Last year when the consumer was considering selling the vehicle, he discovered there was a recall related to the power steering that was dated before she made the purchase. The dealer argued it had no responsibility to review the car's recall history, but after the agency contacted the business, it agreed to pay off the \$7,587 remaining on the consumer's loan. (2018 Report, p. 13.)

After a consumer bought a used car he noticed that it had some problems; the headlights were coming out and the vehicle was out of alignment. He brought it to a mechanic and was advised that it had been in a serious wreck, despite the fact that he was given a vehicle report claiming that it was never in an accident. When the dealer refused to take it back, he complained to the **Ohio Attorney General's Office**. As a result of mediation, the dealer agreed to the vehicle's return, waived the remaining \$12,064 owed on it, and cleared the transaction from the consumer's credit record. (2018 Report, p. 14)

A car dealer in Maryland assured a consumer that the used car he was considering buying was accident-free. After the sale, however, the man started to have problems with the vehicle and brought it back several times for repairs, which failed to resolve them. Finally, he took the car to another dealership and learned that the vehicle had been in a significant accident and the damage was not properly repaired. The seller was unwilling to do anything for him until the **Maryland Attorney General's Office** got involved. As a result of mediation, the dealer agreed to buy back the vehicle at the original purchase price. (2019 Report, p. 11)

The **Ohio Attorney General's Office** joined agencies in 48 other states, territories and the District of Columbia in a settlement last year with American Honda Motor Company, Inc. to resolve charges that it failed to warn consumers of the dangers of the now-recalled frontal airbags manufactured by Takata. Equipped with dual-stage inflators that used phase-stabilized ammonium nitrate as the propellant, these airbags tended to rupture during deployment, sending shrapnel into the cars' passenger compartments. The settlement included broad injunctive relief and reporting requirements, plus an \$85 million payment to the states. Ohio's share was \$2,367,714.89. (2020 Report, p. 32)

OTHER UNFAIR AND DECEPTIVE ACTS

Consumers were left in the lurch when a used car dealer in Ohio closed its doors and moved out of state. Some who had traded in their vehicles discovered that the liens had never been paid off as promised. Others hadn't received titles for the cars they'd purchased from the dealer or the extended warranties that they'd paid for. The **Summit County, Ohio Office of Consumer Affairs** worked with the state attorney general's office to resolve dozens of complaints against the dealership. (2016 Report, p.10)

While used cars sales have long been a top complaint to the **South Carolina Department of Consumer Affairs**, the agency noticed an uptick last year in complaints about high-pressure and misleading tactics to sell new cars to elderly consumers. For example, a 72 year-old woman claimed that she was pressured at a local dealership to buy a new car that she could not afford. When she returned the next day to ask if she could cancel the purchase, she was ordered off the property and threatened

that the police would be called if she came back. The agency convinced the dealer to unwind the \$15,000 contract and return the woman's trade-in. In another complaint, an older couple bought a vehicle that was represented as new for more than \$44,000, only to discover a week later that the transmission had been replaced just days before they purchased it. The dealer was uncooperative and the manufacturer disclaimed any responsibility. Once the agency got involved, the dealer agreed to buy the vehicle back. (2017 Report, p. 13)

When the niece of a woman who had been hospitalized and was experiencing early stages of dementia learned that her aunt had been talked into giving a car salesman her debit card information and that payments for an extended auto warranty were now coming out of the bank account, she sprang into action. She cancelled the debit card and lodged a complaint on her aunt's behalf with the **Arkansas Attorney General's Office**. The agency found that three companies working together had been bombarding the woman with solicitations for auto-related services. The warranty contract was cancelled and the \$2,840 that was debited from her account was refunded. (2017 Report, p. 13)

The **Massachusetts Attorney General's Office** also provided an example of an auto dealer taking advantage of an older person. In this case it was a 79 year-old man on a fixed income who was undergoing evaluation for Alzheimer's. The lease was up on his vehicle and the dealer convinced him to buy a car for well over its value, plus add-ons, for a total of \$22,000. His children filed the complaint, explaining that because of his condition he could no longer drive and that the \$400 monthly car payment was more than a third of his Social Security income. Unable to afford the payments, he had voluntarily surrendered the car and the finance company was pursuing him for the outstanding deficiency of \$9,508. The consumer specialist handling the complaint reviewed the original paperwork and determined that the finance company could not have verified the man's income because there were incorrect entries on the loan application. Furthermore, it would not have provided the loan if his ability to pay it had been properly assessed. When the agency brought these issues to the finance company's attention, it agreed to waive the deficiency and correct the consumer's credit report. (2017 Report, p. 13)

The **Maryland Attorney General's Office** received a new type of auto complaint last year from consumers who thought they were buying a car only to learn that they were leasing. In one case, the consumer signed a purchase agreement and brought the car home, but the dealer asked him to come back because there was better financing available. The salesperson had the new paperwork mostly covered up, with just the area to sign showing, so the consumer could not read it. He assumed that it was just an agreement for a lower monthly payment. In fact, it was a lease. By the time he contacted the agency, unfortunately, he had already tried to sue the dealer and the court dismissed the case on the grounds that he could have refused to sign the contract if he couldn't read it. (2017 Report, p. 14)

Another financing problem that car buyers may encounter is when dealers fail to pay off the loans on their trade-ins, leaving them liable for two loans. This was one of the issues that led the **Georgia Department of Law's Consumer Protection Unit** to sue The Momentum Group, Inc., which operates two dealerships, Gwinnett Mitsubishi and Gwinnett Suzuki, last year. The defendants are also accused of failing to apply for titles in car purchasers' names within the 30 days required by state law, selling vehicles without the Emissions Certificates that are required in order to register cars in 13 Georgia counties, and taking payments from consumers for third-party products such as extended service contracts but failing to turn the money over to those parties, causing consumers' claims to be denied. The office is seeking restitution for consumers, civil penalties and recovery of court costs, as well as a permanent injunction to prevent the defendants from violating state law in the future. (2017 Report, p. 15)

An elderly consumer bought a seven-year-old car with more than 100,000 miles on it from a dealer who pressured her to finance the \$11,000 purchase price through it at an exorbitant interest rate of 24.89 percent. To make matters worse, the finance agreement contained several hidden fees, the most egregious of which was a \$5 fee added to the amount debited every month when she made her payments from her bank account via phone. After struggling for four years to keep up with her loan obligation and having paid more than \$22,000 on the loan, she fell into arrears and began to get calls from the loan company threatening repossession. Fortunately, she contacted the **New York State Division of Consumer Protection**, which was able to negotiate a low lump sum payment to stop the repossession and get her clear title of the vehicle. (2018 Report, P. 11)

Another complaint to the **Massachusetts Attorney General's Office** (AGO) illustrates how vulnerable populations can be taken advantage of. A consumer with a cognitive disability was sold two vehicles when he only wanted to buy one. The second transaction occurred under the guise that the first vehicle would be picked up by the dealer at the consumer's house and then applied as a trade-in toward the second vehicle. As a result of this false promise, the consumer stopped payment on the loan for the first vehicle and defaulted. The finance company repossessed it and wanted to hold the consumer liable for any remaining loan balance after it was sold at auction. The AGO learned the dealership had also misrepresented the man's income by stating that he made about \$4,000 more a month than he received in Social Security Income, his only source of income. The finance company, which had never verified the information, agreed to waive the balance of the loan and provide the consumer with a sum of money that would cover any tax liability he incurred as a result. (2018 Report, P. 11)

The worst complaint to the **Maryland Attorney General's Office** last year was from a woman who went to the dealership where her recently-deceased husband had purchased his car to transfer the title to her name. She spoke only limited English, but the dealer was able to communicate with her in her native language. By law, the vehicle would have passed to her through the estate, but the dealer bought her out of the amount still owed on the car, then resold it to her and extended the loan by a year at a slightly lower interest rate. As a result, the woman became liable for almost \$10,000 more than she should have. The agency persuaded the dealer to pay the financing company the increase in debt that she incurred, leaving her with the correct amount left to pay. (2018 Report, P. 12)

Combatting predatory sales and lending in the used car industry has been a priority for the **NYC Department of Consumer Affairs**. Two notable cases were resolved last year. The agency obtained more than \$3 million in fines from a Queens-based used car dealership, Major World, as well as secured \$142,000 in restitution for 40 consumers and \$68,000 on outstanding consumer loans. Major World used deceptive and illegal practices to profit from vulnerable low-income and immigrant consumers. The dealership was found guilty of falsifying consumers' income and/or monthly rent on credit applications; falsely advertising the finance terms in print media and on its websites; concealing the finance terms from consumers; failing to provide documents in Spanish to Spanish-speaking consumers; misrepresenting the history, condition, and quality of cars; and misleading consumers about their legal rights. The other case was against Champion Auto Sales in Brooklyn, which was charged with deceptive advertising designed to lure vulnerable consumers; disregarding automobile safety and consumer rights; failing to provide receipts for deposits; and attempting to cover-up and conceal its illegal practices. In November, the consumer agency closed Champion Auto Sales for repeated unlicensed activity after failing to renew, then lying on its application, and continuing to operate without a license. The agency also sought consumer restitution from a lending institution which financed the transactions that resulted from the dealerships' illegal marketing and business practices. The finance company agreed to a settlement that requires it to pay \$105,289 to 11 consumers, including

two who returned their cars for a full refund. It also requires the company to help repair the consumers' damaged credit by requesting that consumer reporting agencies delete any negative information that it reported to them, and to attempt to resolve any future consumer complaints. (2019 Report, p.12-13) The **Ohio Attorney General's Office** sued several dealerships last year that sold used cars to consumers and never provided the titles. Under state law, a consumer is entitled to rescind an auto contract and get a full refund if the dealer fails to provide the title, fails to disclose that the vehicle was a salvage rebuild, or makes an inaccurate odometer disclosure. If the dealer doesn't refund the money, the Attorney General can make the refund on its behalf through the state Title Defect Recission Fund, which the agency administers. In one of last year's cases, the owner of #1 Auto Exchange did not dispute the fact that she failed to provide the title; she said she simply did not have enough money to refund the customer. She promised to pay the fund back in increments of \$100 per week, but when she stopped making payments the agency sued to recover the balance due, about \$4,600, plus attorney's fees and investigative costs. The lawsuit also sought to prevent her from operating the business until she repays the fund, complies with Ohio consumer protection laws and files a surety bond. (2019 Report, p.12-13)

Another case the **Ohio Attorney General's Office** resolved last year was against Unlimited Investment Group LLC, doing business as Unlimited Auto Group of West Chester, and its owner, Abraham Falah. This used car dealer allegedly charged consumers for title, license, registration and filing fees they never authorized. The defendants entered into an Assurance of Voluntary Compliance and agreed to pay \$94,345.76 to reimburse 467 consumers. (2020 Report, p.32)

A consumer filed a complaint with the **South Carolina Department of Consumer Affairs** approximately 30 days after trading in a vehicle. **The dealership was responsible for paying off the vehicle in the amount of \$20,012.20. The consumer was getting calls regarding the payment being late on the vehicle and tried to explain the vehicle should be paid off.** The consumer made multiple attempts to resolve the matter with the dealership and no one was returning her calls. The consumer filed a complaint with our office outlining the failure of the dealer to complete the payoff and concerns of how it would affect her credit score. We sent the complaint, and the business responded within 3 days. They apologized for the inconvenience and indicated it was an error on their part. The business also offered to resolve any negative information if it showed up on her credit report. (2021 Report, p.8)

APPENDIX C. Auto Dealer's Explanation of How Electronic Records Are Routinely Presented To Consumers

APPENDIX C. AUTO DEALER'S EXPLANATION OF HOW ELECTRONIC RECORDS ARE ROUTINELY PRESENTED TO CONSUMERS

Credit Acceptance Corporation v. Sandra Nelson & Randall Nelson v. Hah Pre-Owned Auto Outlet, Inc. and Credit Acceptance Corporation, Circuit Court of Logan County, WV, CC-23-2019--C-102.

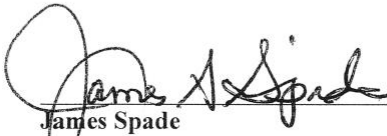
Declaration of James Spade

I, James Spade, a resident of 596 Shawber Bridge Road, Hico, Fayette County, West Virginia, hereby state the following facts are true to the best of my knowledge and belief:

1. That I am the president of the used car lot, HAH Preowned Auto Outlet, 724 2d Ave., South Charleston W.Va. 25303, since its inception, May, 2015.
2. That this used vehicle sales lot purchases vehicles from auto auctions and takes in trades for resale.
3. That over 80% of our sales to consumers are financed by Credit Acceptance Corporation, 25505 West 12 Mile Rd., Southfield, Michigan 48034. The format of these sales and financings are directed by Credit Acceptance Corporation.
4. The format of these sales is as follows:
 - (a) Our employee fills out a credit application for a prospective consumer (many times even before the consumer first arrives at our lot). All applications are approved. The one factor that determines which vehicle a prospective consumer can purchase is the net amount of down payment available.
 - (b) Once the credit process is completed, Credit Acceptance Corporation adds a "Financing Cost" to the fictional cash price of a vehicle to be priced to the consumer. This "financing cost" is a lump sum added to my (the dealer's) actual cash sale price for every vehicle financed by Credit Acceptance Corporation. The disclosed finance charge is added later on the retail installment contract. For example:
 - (i) Exhibit A - My actual cash sale price in the Exhibit A transaction would have been \$2000 to the consumer, but the CAC directed cash price after it added \$3915.33 "financing cost" to the cash price was \$5990.
 - (ii) Exhibit B - My actual cash sale price in the Exhibit B transaction would have been \$11,250 to the consumer, but CAC directed cash price after it added \$5676.66 "financing cost" to the cash price was \$21,990.
 - (c) All Credit Acceptance Corporation financing contracts must be completed through electronic signature documentation. There is no option in Credit

Acceptance Corporation financed transactions to do the transaction using paper documents only. Refusal to use the electronic contract process would end the financing with CAC.

- (d) Our employee sits at the computer monitor and the customer has a signature pad or clicker. The consumer may ask to look at our computer screen and is given the opportunity to have it turned around to look at it.
- (e) There is no determination as to whether a consumer has access to or can use a computer to access documents electronically. No documents are provided to the customer in advance of clicking or signing the signature pad.
- (f) After all contractual documentation is completed, the consumers are presented with a CAC Declaration Acknowledging Electronic Signature Process which they are asked to sign with their actual hand signature.


James Spade

6-24-20
Date


Witness

6/24/20
Date

Report: Recap-C

SALES RECAP SHEET

Printed: 2/12/20
07:27 PM

Stock #: JS832T

Sale date: 7/19/18 ; Salesman: TODD (1008)

CAROLYN L SONGER
55 RIPPLEWIND WAY
CHARLESTON, WV 25309 County: KANAWHA
(h) (w)

06 CHRYSLER PACIFICA; GOLD
2A8GF68496R625298
(c) 304-444-5834

Selling Price:	5,790.00	Original cost:	800.00
		Lot Fee:	300.00
		Added Costs:	76.04
		Financing Cost:	3,915.33
Net Selling Price:	5,790.00	Vehicle Cost:	5,091.37

PROFIT ON SALE OF VEHICLE: 698.63

	PRICE	COST	PROFIT
Service Contract:	1,710.00	1,325.00	385.00

Document Prep Fee: 175.00

PROFIT: 1,258.63
less Commission: -150.00

TOTAL PROFIT: 1,108.63

Original Cash Position: 908.63
Current Cash Position: 1,108.63

Deposit: 500.00
Pick-Up Note: 200.00

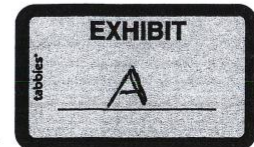
Other Charges - Government Fees: 79.50

Tax 1 at 6.0000%: 347.40
Tax 4 at 7.0000%: 131.95

Total Sales Tax Charged: 479.35

Finance charge on contract at 15.49%: 2,620.55

Lien Holder: CREDIT ACCEPTANCE
Amount due from lien holder: 2,293.52



Recap-S

SALES RECAP SHEET

Printed: 5/07/18

#: JS832A

Sale date: 5/07/18 ; Salesman: CARLA STALNAKER (001)

SANDRA NELSON; RANDALL NELSON
95 SHINEY DRIVE
SWITZER, WV 25647 County: LOGAN
(h) 304-896-2457 (w)

11 FORD F150; BLUE
1FTFW1EFXBFA27492

Selling Price:	21,990.00	Original cost:	9,250.00
less Trade In:	4,500.00	Lot Fee:	300.00
plus ACV of Trade:	1,800.00	Buy Fee:	350.00
		Added Costs:	600.00
		Financing Cost:	5,676.66
Net Selling Price:	19,290.00	Vehicle Cost:	16,176.66

PROFIT ON SALE OF VEHICLE: 3,113.34

	PRICE	COST	PROFIT
Service Contract:	1,477.00	1,092.00	385.00
Document Prep Fee:			175.00
TOTAL PROFIT:			3,673.34

Original Cash Position: 3,173.34

Pick-Up Note: 500.00

Trade-in allowed: 4,500.00

Other Charges - Government Fees: 35.50

Tax 1 at 6.0000%: 1,049.40

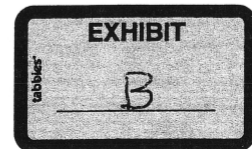
Tax 4 at 7.0000%: 115.64

Total Sales Tax Charged: 1,165.04

Finance charge on contract at 22.99%: 11,422.50

Lien Holder: CREDIT ACCEPTANCE

Amount due from lien holder: 13,073.88





0068216548-1

DECLARATION ACKNOWLEDGING ELECTRONIC SIGNATURE PROCESS

ACCOUNT # 90870787

LOT # K7A

Buyer Name and Address CAROLYN L SONGER 55 RIPPLEWIND WAY SOUTH CHARLESTON, WV 25309	Co-Buyer Name and Address N/A	Seller Name and Address HAH PREOWNED AUTO OUTLET, INC 724 SECOND AVENUE S CHARLESTON, WV 25303
------------------------------------------------------------------------------------------------------	-----------------------------------------	----------------------------------------------------------------------------------------------------------------

Used	Year and Make 2006 Chrysler	Model and Body Style Pacifica 4D SUV AWD	Color GOLD	Vehicle Identification Number 2A8GF68496R625298
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BUYER DECLARATION

By signing below, I, CAROLYN L SONGER (Buyer) and/or N/A (Co-Buyer) hereby state that:

1. I read, understood, and agreed to the eSign Consent form and consented to use electronic signatures to sign all documents necessary to process a retail installment transaction with the Seller named above.
2. I was given the opportunity to review a paper version of the retail installment contract I was being asked to sign prior to using electronic signatures to electronically sign the documents.
3. I was in physical control of the key board, mouse or other device to click a button, signature box, or initial box that applied my e-signature to the documents with the intent to sign the documents as if I provided my handwritten signature on the documents.
4. I received a fully executed copy of the retail installment contract.


 Signature of Buyer
 07/19/2018
 Date

 Signature of Co-Buyer

 Date

SELLER DECLARATION

By signing below, the Seller solemnly declares and affirms under the pains and penalties of perjury, as follows:

1. I am an authorized representative of Seller and am knowledgeable about the retail installment transaction between Seller and the Buyer / Co-Buyer named above.
2. The Buyer and Co-Buyer were each in physical control of the key board, mouse or other device to click a button, signature box, or initial box that applied his/her e-signature to the documents, and I witnessed the Buyer and Co-Buyer applying their electronic signature to the documents.
3. I understand Credit Acceptance Corporation is relying on this declaration in accepting for assignment the electronically signed retail installment contract between Seller and Buyer/ Co-Buyer.

Seller: HAH PREOWNED AUTO
OUTLET, INC

By: 

Title: Agent Date: 07/19/2018



0066279668-1

DECLARATION ACKNOWLEDGING ELECTRONIC SIGNATURE PROCESS

ACCOUNT # 90345548

LOT # K7A

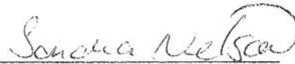
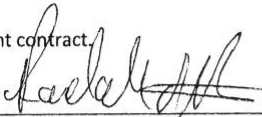
Buyer Name and Address SANDRA NELSON 95 SHINEY DRIVE SWITZER, WV 25647	Co-Buyer Name and Address RANDALL NELSON 95 SHINEY DRIVE SWITZER, WV 25647	Seller Name and Address HAH PREOWNED AUTO OUTLET, INC 724 SECOND AVENUE S CHARLESTON, WV 25303
----------------------------------------------------------------------------------------	--------------------------------------------------------------------------------------------	----------------------------------------------------------------------------------------------------------------

Used	Year and Make 2011 Ford	Model and Body Style F150 Supercrew 4WD	Color B;UE	Vehicle Identification Number 1FTFW1EFXBFA27492
------	----------------------------	--------------------------------------------	---------------	----------------------------------------------------

BUYER DECLARATION

By signing below, I, SANDRA NELSON (Buyer) and/or RANDALL NELSON (Co-Buyer) hereby state that:

1. I read, understood, and agreed to the eSign Consent form and consented to use electronic signatures to sign all documents necessary to process a retail installment transaction with the Seller named above.
2. I was given the opportunity to review a paper version of the retail installment contract I was being asked to sign prior to using electronic signatures to electronically sign the documents.
3. I was in physical control of the key board, mouse or other device to click a button, signature box, or initial box that applied my e-signature to the documents with the intent to sign the documents as if I provided my handwritten signature on the documents.
4. I received a fully executed copy of the retail installment contract.


05/07/2018

05/07/2018
 Signature of Buyer Date Signature of Co-Buyer Date

SELLER DECLARATION

By signing below, the Seller solemnly declares and affirms under the pains and penalties of perjury, as follows:

1. I am an authorized representative of Seller and am knowledgeable about the retail installment transaction between Seller and the Buyer / Co-Buyer named above.
2. The Buyer and Co-Buyer were each in physical control of the key board, mouse or other device to click a button, signature box, or initial box that applied his/her e-signature to the documents, and I witnessed the Buyer and Co-Buyer applying their electronic signature to the documents.
3. I understand Credit Acceptance Corporation is relying on this declaration in accepting for assignment the electronically signed retail installment contract between Seller and Buyer/ Co-Buyer.

Seller: HAH PREOWNED AUTO OUTLET, INC By:  Title: Agent Date: 05/07/2018