



CONSUMER
BANKERS
ASSOCIATION

September 12, 2022

Acting Secretary April Tabor
Federal Trade Commission
600 Pennsylvania Ave NW
Suite CC-5610 (Annex C)
Washington, DC 20580

Re: Notice of Proposed Rulemaking Motor Vehicle Dealers Trade Regulation Rule No. P204800

Dear Secretary Tabor:

The American Financial Services Association (AFSA)¹ and the Consumer Bankers Association (CBA),² (collectively, the “Trades”) appreciate the opportunity to comment on the Federal Trade Commission’s (FTC) proposed Motor Vehicle Dealers Trade Regulation Rule (the Rule).³ The Trades’ members include banks and companies that finance motor vehicle purchases and leases.

After a thorough review of the Rule, the Trades believe that the Rule will have several unintended consequences for vehicle finance companies, all of which can be easily avoided without impeding the FTC’s goals in promulgating the Rule. To avoid these unintended consequences, we suggest the following changes to the Rule:

- The Rule’s definition of “Dealer” should be clarified to avoid an overbroad application to vehicle finance companies;
- The Rule should provide a safe harbor from Holder Rule liability for Rule violations that vehicle finance companies cannot detect from the face of the retail installment sales contract or lease;
- The Rule will increase the time and tedium of vehicle sale and lease transactions and will make compliance with state law difficult for Dealers;
- The FTC should re-fashion the disclosure provisions of the Rule to accommodate online vehicle shopping transactions;
- The Rule’s definition of motor vehicle should be clarified to provide a level playing field for various types of vehicles;
- The Rule raises procedural and substantive concerns; and
- The Rule should allow for an ample implementation period.

¹ Founded in 1916, AFSA is the national trade association for the consumer credit industry, protecting access to credit and consumer choice. AFSA members provide consumers with many kinds of credit, including traditional installment loans, mortgages, direct and indirect vehicle financing, payment cards, and retail sales finance.

² CBA is the only national trade association focused exclusively on retail banking. Established in 1919, the association is a leading voice in the banking industry and Washington, representing members who employ nearly two million Americans, extend roughly \$3 trillion in consumer loans, and provide \$270 billion in small business loans.

³ 87 Fed. Reg. 42012 (July 13, 2022).

Below, we address each point in more detail.

1. The Rule’s definition of “Dealer” should be clarified to avoid an overbroad application to vehicle finance companies.

As drafted, the Rule’s definition of “Dealer” may unintentionally bring some vehicle finance companies within the direct scope of the Rule. The Rule’s definition of Dealer or Motor Vehicle Dealer includes any licensed entity that:

is predominantly engaged in the sale and servicing of motor vehicles, the leasing and servicing of motor vehicles, or both.⁴

The Trades’ members that engage in vehicle finance transactions sometimes maintain licensure as Dealers to facilitate sales of leased vehicles to customers who elect to purchase the vehicle at the conclusion of the lease term or to extend or transfer leases after origination. Such vehicle finance companies include banks, non-bank lenders, and captive vehicle finance companies, among others. Also, finance companies that are involved in vehicle leasing may use a passive legal entity such as a titling trust to hold title to leased vehicles and serve as the lessor after the origination of the lease.

For all these entities that play some incidental function in vehicle sales and lease markets, the Trades request clarification that the Rule’s definition of Dealer will not capture them. For example, the Trades seek clarification that periodic direct sales or leases to consumers by a vehicle finance company do not constitute being “predominantly engaged” in the sale, leasing, or servicing of motor vehicles. One means of clarifying this would be to adapt the definition of Dealer from the existing Used Motor Vehicle Trade Regulation Rule, which states that a “Dealer” *does not include a bank or financial institution, a business selling a used vehicle to an employee of that business, or a lessor selling a leased vehicle by or to that vehicle’s lessee or to an employee of the lessee.*⁵

The Trades request that the FTC modify the definition of Dealer to state that a Dealer does not include “a bank, financial institution, non-bank lender or a lessor selling a leased vehicle by or to that vehicle’s lessee.”

2. The Rule should provide a safe harbor from Holder Rule liability for Rule violations that vehicle finance companies cannot detect from the face of the retail installment sales contract or lease.

As drafted, the Rule creates unmanageable risk for vehicle finance companies through the FTC’s Holder Rule.

The Trades understand that none of the substantive provisions of the Rule are directly enforceable against vehicle finance companies because they are not Dealers. Nevertheless, the FTC Holder Rule provides that any holder of a consumer credit contract is subject to all claims and defenses the debtor could assert against the seller of the goods or services obtained under the consumer credit contract.⁶ Thus, in practice, the Holder Rule requires vehicle finance companies to defend against allegations of

⁴ 16 C.F.R. § 463.2(e).

⁵ 16 C.F.R. § 455.1(d)(3) (emphasis added).

⁶ 16 C.F.R. § 433.2(a).

wrongdoing made by consumers against Dealers for acts or omissions occurring during the motor vehicle sale or leasing transaction process.

Although Section 5 of the FTC Act does not provide a private right of action for consumers for violations of the Rule,⁷ state and federal regulators other than the FTC could choose to incorporate the Rule's provisions into their independent authorities to prevent unfair and deceptive acts or practices ("UDAP"). State UDAP laws typically *do* allow private rights of action, and such claims could therefore pass to vehicle finance companies by operation of the Holder Rule.

To manage liability under the Holder Rule and other legal and regulatory requirements, finance companies have established eligibility requirements relating to the sales and lease contracts they purchase from Dealers and controls to reject contracts that do not conform to those requirements. These controls include pre-purchase document reviews, quality control checks, and engagement with Dealers to share feedback.

As proposed, the Rule penalizes some conduct that is impractical or impossible for finance companies to identify through these or other controls. For example:

The Rule proposes that misrepresentations relating to the costs or terms of purchasing, financing, leasing a vehicle, or about the costs, benefits, or limitations of any add-on product constitute unfair and deceptive acts or practices.⁸ Because misrepresentations can occur in written or oral form, it is impractical for finance companies to screen for misrepresentations either before or after purchasing sales or lease contracts.

The Rule also proposes that Dealers may not charge a consumer for any item without obtaining the express, informed consent of the consumer for the charge.⁹ The Rule proposes a definition for express informed consent that includes the following language:

The following are examples of what does not constitute Express, Informed Consent: (i) a signed or initialed document, by itself, (ii) prechecked boxes, or (iii) an agreement obtained through any practice designed or manipulated with the substantial effect of subverting or impairing user autonomy, decision-making, or choice.¹⁰

One of the fundamental principles of the vehicle finance business involves facilitating efficient offers, approvals, and delivery of consumer credit contracts. Finance companies rely on executed contracts to demonstrate that a sale or lease transaction has taken place, and that the contract accurately reflects the agreed-upon terms of the transaction. The Rule's proposal that a signed contract is not an indicator of a valid contract between the customer and Dealer is problematic. Finance companies are incapable of detecting deficiencies in sales or lease transactions unless those deficiencies are apparent on the face of the contracts. In this Rule, it will be impossible for vehicle finance companies to detect and reject any transaction that included faulty advertising disclosures, Dealer misrepresentations or lacked express, informed consent because the information received from the Dealer cannot convey all the details of the entire sales or lease transaction process. Furthermore, transaction-level data cannot convey omissions.

⁷ *Holloway v. Bristol-Myers Corp.*, 485 F.2d 986 (D.C. Cir. 1973).

⁸ 16 C.F.R. § 463.3(a).

⁹ 16 C.F.R. § 463.5(c).

¹⁰ 16 C.F.R. § 463.2(f).

Passing liability to finance companies for violations that cannot be detected unfairly burdens contract assignees but does nothing to de-incentivize Dealer conduct. While the Trades understand that the Holder Rule exists to provide protection for consumers who no longer have recourse against a Dealer, that protection is unnecessary here because the FTC now has the power to impose civil penalties against Dealers and can presumably use those penalties to make harmed consumers whole. In short, passage of this Rule makes accountability at the Dealer level possible, which eliminates the need to pass liability to contract assignees.

The best way to address this difficulty is to include a liability limitation – similar to those found in other federal statutes – that balances the FTC’s consumer protection interests with the practical effects of legal mandates. For example, the Truth in Lending Act provides that an action for violation of Truth in Lending requirements can only be maintained against an assignee if the violation is apparent on the face of the contract.¹¹ Similarly, the Fair Debt Collection Practices Act provides a liability limitation if the debt collector shows by a preponderance of the evidence that an alleged violation was not intentional and resulted from a bona fide error notwithstanding the maintenance of procedures reasonably adapted to avoid the error.¹²

The Trades respectfully request FTC take steps to provide a similar safe harbor here. Specifically, that safe harbor should protect contract assignees from liability from Dealers’ violations of the Rule when (a) the violation is not apparent on the face of the contract assigned to the finance company, or (b) when the finance company shows that it maintains procedures reasonably adapted to monitor and address Dealer violations of the Rule. Such a safe harbor does not impair the goals of the Rule, but places legal responsibility on the shoulders of those who are best positioned to avoid it.

3. The Rule will increase the time and tedium of vehicle sale and lease transactions and will make compliance with state law difficult for Dealers.

Dealers, vehicle manufacturers, vehicle finance companies, and consumers all agree that the process of purchasing or leasing a vehicle could be improved. The Rule describes the process of buying or leasing a vehicle as “time-consuming and arduous,” “difficult and time-consuming,” and “protracted and paperwork-heavy.” Too often, the transaction stretches over several hours while Dealer staff are reviewing trade-ins, assessing the consumer’s credit standing, negotiating the price of the vehicle, preparing documents, and getting signatures. The Trades are concerned that this Rule adds new disclosure and documentation requirements that will slow transactions further rather than helping them be efficient for consumers.

The current practice for vehicle sales and lease transactions involves negotiation between the consumer and Dealer on the material terms of the transaction, including the vehicle price, trade-in value, financing or leasing terms, selection of voluntary protection products and their cost. When all the terms are agreed, they are compiled into a retail installment sales contract or a lease agreement that represents the terms of the transaction in its entirety.

¹¹ 15 U.S.C. § 1641(a).

¹² 15 U.S.C § 1692k(c).

This consolidation has proved effective for all stakeholders, and it complies with state laws that require the entire sale or lease agreement between the parties to be on one document.¹³ It will be difficult for Dealers to comply with the Rule and state laws mandating the entire agreement to be on one document because the Rule requires Dealers to create new documentation signed by the Dealer and consumer when the Dealer charges the consumer for voluntary protection products.¹⁴ Although the Rule contains a preemption provision, Dealers will likely have to seek a court decision on whether these two provisions directly conflict before they can safely comply with one or the other. For this reason and to assist in streamlining the vehicle purchase or lease transaction, The Trades request that the Rule be modified to eliminate requirements to create new documents beyond the retail installment sales contract or lease agreement.

4. The FTC should re-fashion the disclosure provisions of the Rule to accommodate online vehicle shopping transactions.

To accommodate consumer demand for efficient, speedy vehicle purchase and lease transactions, the industry is steadily working to enable consumers to research and shop for vehicles, obtain financing, negotiate terms, and complete purchase and lease transactions online. Allowing consumers to complete portions of their vehicle purchase or lease transactions online is both pro-consumer and pro-competition because consumers can educate themselves before they visit the dealership and compare prices and features across multiple vehicles and dealerships.

As the dissenting commissioner appeared to recognize, some of the Rule's requirements clearly envision an in-person experience where the consumer and a dealership employee are exchanging and signing pieces of paper while sitting across a desk. Those procedures will be difficult to implement online in a consumer-friendly way. For example:

- Section 463.4(d) of the Rule requires a Dealer to disclose the total amount the consumer will pay to purchase or lease the vehicle at that monthly payment after making all payments as scheduled. Many Dealer websites now give consumers the ability to see estimated or pre-qualified monthly payments. Those monthly payments may appear in multiple places on a site, including in search results pages and pages showing details about a specific vehicle. Does the Rule require the "total amount" disclosure in every place a monthly payment appears on a website? If so, the Trades fear that Dealers and lenders with online car-buying experiences could be dissuaded from providing consumers with the ability to see monthly payments online, or consumers could be overwhelmed by the amount of information presented online.
- Section 463.4(b) requires Dealers to publish an "add-on list" on any website or mobile app operated by or on behalf of the Dealer. For some Dealers, this list could be hundreds of items long because a single add-on product might have multiple deductible and coverage options. Many add-on products offered by a Dealer may not be relevant to a particular consumer because of eligibility restrictions, yet the Rule requires Dealers to disclose those to every consumer anyway.

¹³ See Ohio Rev. Code § 1317.07; Fla. Stat. §520.07; Cal. Civ. Code § 2985.8.

¹⁴ 16 C.F.R. §§ 463.5(b)(1)(iii) and (b)(2)(iii).

- Section 463.5(b) requires Dealers to provide a series of additional disclosures to a consumer - and obtain signatures from both the consumer and the Dealer's manager - before it can charge a consumer for optional add-on products and services. While this exchange would be easy to accomplish when the consumer and Dealer representative are together in a room, it is not clear how this exchange could be accomplished online, when a consumer might initiate a transaction at any time, including when dealership personnel are unavailable. In effect, this requirement will force consumers interested in purchasing additional products to do so in-person.

The Trades urge the FTC to survey the online car-buying experiences currently available to consumers and evaluate how the Rule will affect those experiences. The Trades strongly believe that many of the Rule's requirements do not lend themselves to inclusion in online vehicle purchase or lease transactions, which may actually lead to negative consequences for consumers.

5. The Rule's definition of motor vehicle should be clarified to provide a level playing field for various types of vehicles.

The Rule's definition of motor vehicle includes references to use on "a street, highway or other road" and "other vehicles that are titled and sold through Dealers."¹⁵ The Trades' members seek clarification that sales or leases of vehicles for off-road use (off-road vehicles, all-terrain vehicles, snowmobiles, etc.) are not governed by the Rule. Because off-road vehicles are required to be titled in some states, the Trades request that the FTC eliminate the phrase "other vehicles that are titled and sold through Dealers" from the definition of motor vehicle in the Rule. This will allow a level playing field nationally by excluding off-road vehicles from the scope of the Rule.

6. The Rule raises procedural and substantive concerns.

The Trades are concerned that the Rule may not fully comply with the Administrative Procedures Act ("APA").¹⁶ A reviewing court will set aside agency action that is, among other things, arbitrary or capricious.¹⁷ The Rule is potentially arbitrary, capricious, and contrary to law because the Rule: (1) is not supported by an adequate cost/benefit analysis; (2) violates the Regulatory Flexibility Act; (3) and violates the Paperwork Reduction Act.

The Rule sets forth insufficient support for the cost/benefit analysis offered in its text. Moreover, it does not realistically represent the true costs to the automotive industry that will be required to build-out compliance with the Rule as currently written. Perceived consumer benefits driven by the Rule may not accurately consider the Rule's effects that will increase the time spent on a vehicle purchase or lease transaction, as well as the Rule undermining the ability of the industry to offer transactions online – which again negatively impacts consumer convenience and time savings.

As for the Regulatory Flexibility Act ("RFA"),¹⁸ it requires Federal agencies to review their regulations to ensure that they do not unduly inhibit the ability of small entities to compete. A large segment of the used-vehicle market consists of small, independent auto Dealers. These small Dealers may have limited numbers of legal/compliance professionals on staff. To require small Dealers with limited revenues to

¹⁵ 16 C.F.R. § 463.2(j).

¹⁶ 5 U.S.C. § 551, et. seq.

¹⁷ 5 U.S.C. § 706(2)(A).

¹⁸ 5 U.S.C. § 601, et. seq.

implement the substantial changes to their documents and processes that will be required by the Rule would entail significant economic impact. This impact does not appear to have been considered by the FTC, and less burdensome alternatives should be further assessed.

The Paperwork Reduction Act (“PRA”),¹⁹ sets limitations on federal agencies adopting regulations which impose paperwork requirements on the public. The Rule significantly understates the additional recordkeeping burden that it would impose on the automobile industry, particularly small/independent auto Dealers. The Rule would require the creation and storage of new documents related to the origination process, thereby increasing the already burdensome recordkeeping requirements that Dealers and finance companies face today.

7. The Rule should allow for an ample implementation period.

The Rule’s requirements will fundamentally reshape interactions between customers and Dealers, leading to revisions to systems, processes, and documentation. There will be a significant training effort necessary for Dealer personnel to adapt to the Rule’s provisions. These changes will most keenly affect online vehicle transaction systems. For these reasons, the Trades request that the FTC provide an ample implementation period of at least 18 months to allow stakeholders time to design, build, and test their systems and processes.

* * *

The Trades appreciate the FTC’s careful consideration of our letter. We look forward to continuing to work with the FTC to help develop a robust, workable set of rules that benefit all stakeholders in the vehicle industry. Please contact Celia Winslow (cwinslow@afsamail.org), Philip Bohi (pbohi@afsamail.org), or Shelley Thomson (sthompson@consumerbankers.com) with any questions.

Sincerely,

American Financial Services Association
Consumer Bankers Association

¹⁹ 44 U.S.C. § 3501, et. seq.