

September 12, 2022

Honorable April Tabor, Acting Secretary
Federal Trade Commission
Office of the Secretary
600 Pennsylvania Avenue, NW
Suite CC-5610 (Annex C)
Washington, D.C. 20580

***Re: Comments of 18 State AGs in Support of Implementation of the
Motor Vehicle Dealers Trade Regulation Rule, File No. P204800***

Dear Secretary Tabor:

The Attorneys General of the States of Iowa, Illinois, Maryland, Massachusetts, Pennsylvania, California, Colorado, Connecticut, Delaware, District of Columbia, Hawaii¹, Minnesota, New Jersey, New Mexico, New York, Oregon, Rhode Island and Washington (“State Attorneys General”) submit this comment in response to the Notice of Proposed Rulemaking (“Notice”) concerning the Federal Trade Commission’s (“FTC”) proposed Motor Vehicle Dealers Trade Regulation Rule regarding the sale, financing, and leasing of motor vehicles by motor vehicle dealers.²

I. The Proposed Rule Improves Fairness in the Motor Vehicle Dealer Trade.

The State Attorneys General, as the chief law enforcement officers in their respective states, commend the FTC for its comprehensive review of the motor vehicle marketplace in preparing the proposed Rule. The Rule is necessary to combat unfair and deceptive acts or practices in the motor vehicle marketplace, and aligns with existing guidance from industry trade groups and state laws and regulations intended to serve the same purpose. We support promulgation of the proposed Rule and take this opportunity to urge the FTC to consider strengthening the proposed Rule to better protect consumers and fair competition.

As State Attorneys General, we are well-situated to appreciate the importance of the FTC’s proposed Rule in protecting consumers from unfair and deceptive practices. Historically, complaints regarding motor vehicle purchases have comprised a significant portion of the consumer complaints we receive.³ We are charged with enforcing laws to protect consumers from unfair and deceptive practices, and our vehicle-related enforcement actions and investigations have resulted in settlements that have returned tens of millions of dollars to consumers in restitution

¹ The State of Hawaii’s Office of Consumer Protection is statutorily authorized to undertake consumer protection functions, and is a separate agency which is not part of the Hawaii Attorney General’s Office.

² See 87 Fed. Reg. 42012 (July 13, 2022) (hereafter, the “Notice”).

³ In 2021 alone, the Massachusetts Attorney General’s Office received 3,036 consumer complaints regarding motor vehicles. That year, the Illinois Attorney General’s Office received 1,581 consumer complaints regarding the sale of new and used motor vehicles. The Pennsylvania Attorney General’s office received 2,189 complaints concerning motor vehicle dealers in 2021, and has received 1,821 dealer complaints in 2022, thus far. Iowa received 516 consumer complaints regarding motor vehicles in 2021, more than any other type of complaint. Maryland received 868 consumer complaints against new and used auto dealers in 2021, and an additional 591 in 2022, so far.

and/or debt relief, and as well as significant business practice changes that have prevented ongoing injury.⁴ But there is still more work to be done. The proposed Rule would provide an additional critical tool that lawful dealers, consumer advocates and enforcement agencies can employ to address misconduct and prevent consumer harm.

A. Vehicles are essential to consumers and this need is vulnerable to exploitation

Purchasing a vehicle is one of the most expensive transactions the average consumer engages in, and for most consumers, having a vehicle is an absolute necessity. The availability of affordable motor vehicle transportation is essential to maintaining employment, getting children to school or childcare, accessing healthcare, and buying food and other basic household necessities. If a vehicle does not work or is ultimately unaffordable due to misrepresentations during the sales process, consumers are not only left without essential transportation, but also may experience job loss, financial strain, repossession, loss of housing, and long-term credit

⁴ See, e.g., *Com. of Massachusetts v. Auto Number One, Inc., et al.*, Civil Action No. 15-0123B (Suffolk Superior Court) (November 29, 2016) (resolving allegations that the dealership made material misrepresentations to consumers and knowingly facilitated the sale of defective vehicles); *In the Matter of 181 South Main Street, Inc., d/b/a Auto Drive One*, Civil Action No. 17-84CV02170 (Suffolk Superior Court) (July 11, 2017) (resolving allegations that the dealership engaged in bait-and-switch tactics regarding financial products, engaged in false advertising and misrepresentation, and sold defective vehicles); *In the Matter of Source One Financial Corporation*, 18-84CV00959 (Suffolk Superior Court) (March 27, 2018) (resolving allegations that Source One Financial Corporation knowingly did business with automotive dealers that it knew or should have known routinely sold defective vehicles); *Com. of Massachusetts v. F & R Auto Sales, Inc., et al.* Civil Action No. 16-73CV00849 (Bristol Superior Court) (November 27, 2018) (resolving allegations that dealer sold unsafe and defective vehicles and failed to provide consumers with transactional documents); *Com. of Massachusetts v. New England Automax*, Civil Action No. 19-81CV02983 (Middlesex Superior Court) (November 19, 2019) (resolving allegations that the dealership, *inter alia*, failed to disclose to consumers vehicle's prior use and made misrepresentations in the financing transaction that harmed consumers); *Com. of Massachusetts v. Venturecap, et al.*, Civil Action No. 1784CV03091 (Suffolk Superior Court Business Litigation Session) (March 4, 2020) (resolving allegations that Venturecap d/b/a JDByrider used aggressive and misleading advertising and sales techniques); *Com. of Massachusetts v. United Auto Credit Corporation*, Civil Action No. 21-84CV01234 (Suffolk Superior Court) (May 27, 2021) (resolving allegations, *inter alia*, that the finance company did business with dealerships it knew or should have known were selling defective vehicles); *Com. of Massachusetts v. Credit Acceptance Corporation*, Civil Action No. 21-84CV01996 (Suffolk Superior Court) (September 1, 2021) (resolving allegations of unfair and deceptive practices in the origination, collection, and securitization of subprime auto loans); *Com. of Massachusetts v. Santander*, Civil Action No. 22-84CV00377 (Suffolk Superior) (February 18, 2022) (resolving allegations that the lender failed to provide consumers sufficient disclosures related to its auto loan debt collection practices); *FTC and People of the State of Ill. v. North American Automotive Services, Inc.*, Civil Action No. 1:22-cv-01690 (Northern District of Illinois)(March 31, 2022) (resolving allegations, *inter alia*, that the dealerships were charging consumers for add-on products which the consumers had not requested nor consented to); *People of the State of Ill. v. Santander Consumer USA*, 2020 CH 04242(Circuit Court of Cook County, Chancery Division)(May 19, 2020) (Consent Decree resolving a multi-state investigation concerning subprime auto lending practices which exposed borrowers to unnecessary risk and placed them into loans with a high probability of default) ; *Com. of Pennsylvania v. Paxton Associates, Inc. d/b/a Faulkner Honda*, Civil Action, No. 2019 CV 2628 MD (Dauphin Co.) (April 9, 2019) (Assurance of Voluntary Compliance resolving allegations of dealership selling consumers worthless add-on warranties); and *Com. of Pennsylvania v. Martino Motors, Inc.*, Civil Action, No. GD-14-015176 (Allegheny Co.) (3/31/2022) (permanently enjoining dealership from engaging in business as a result of selling defective vehicles, failure to make necessary disclosures). *In re: Koons of Reisterstown Road, Inc. t/a Koons Kia* (In the Consumer Protection Division, Office of the Attorney General) (4/19/22) (resolving allegations that the dealership charged consumers large hidden fees that violated Maryland vehicle price advertising laws).

damage.

Given the essential nature of reliable transportation, the opacity of the vehicle-buying process has long been an issue for consumers. The COVID-19 pandemic and related shutdowns have starkly elucidated this longstanding problem by highlighting both the prevalence of deceptive pricing practices and the need for more regulation of this marketplace.⁵ Both the new and used vehicle markets have been disrupted by these challenges, including a global shortage of the semiconductor chips used in automobiles, which has greatly reduced the availability of new or used vehicles and resulted in sharp increases in prices.⁶ The motor vehicle market may feel the impact of these conditions for years to come. The limited supply, increased unsatisfied consumer demand, and high-pressure sales tactics can combine to force consumers into making decisions with limited or incomplete information.

B. Provisions of the proposed Rule

The proposed Rule offers balanced, common-sense solutions to address the above-noted concerns by:

- (1) Prohibiting motor vehicle dealers from making certain misrepresentations in the course of selling, leasing, or arranging financing for motor vehicles;
- (2) Requiring accurate pricing disclosures in dealers' advertising and sales discussions;
- (3) Requiring dealers to obtain consumers' express, informed consent for charges;
- (4) Prohibiting the sale of non-beneficial Add-On Products or Services; and
- (5) Requiring dealers to keep records of advertisements and customer transactions, among other provisions.⁷

The undersigned State Attorneys General support each provision of the proposed Rule, as they create a complementary system for transparency. We respectfully offer the comments herein to suggest additional ways to clarify and strengthen the proposed Rule.

⁵ We note that some auto manufacturers are taking steps to address dealers' pricing practices. See Bogage, Jacob and Gregg, Aaron, *Car dealers are raising prices. Automakers are pushing back. Consumers are stuck in between*, Washington Post, February 12, 2022, <https://www.washingtonpost.com/business/2022/02/12/fordgm-dealer-markups>.

⁶ See e.g. "The used car boom is one of the hottest, and trickiest, coronavirus markets for consumers," CNBC, October 15, 2020, <https://www.cnbc.com/2020/10/15/used-car-boom-is-one-of-hottest-coronavirus-markets-for-consumers.html>.

⁷ Notice at 42044-7.

II. The Proposed Prohibitions on Misrepresentations in Motor Vehicle Transactions Provide Needed Transparency.

The State Attorneys General support the proposed Rule's identified efforts to prohibit misrepresentations in the motor vehicle-buying process.⁸ Section 463.3 evinces the FTC's understanding of the realities of the consumer experience in motor vehicle transactions and sets clear standards for lawful conduct during each phase of the vehicle purchase interaction: from advertising and purchase selection through financing and any related collection activity. It should already be clear that misrepresentations about these material aspects of a vehicle transaction are unfair and deceptive. However, the continued widespread use of such unlawful tactics, as evidenced by enforcement actions across the nation,⁹ demonstrates the need for "more cops on the beat" with authority to secure restitution and other redress for harmed consumers.

Bait-and-switch practices in motor vehicle sales and advertising have been a common and long-standing issue for consumers. Over the past few years, the volume of consumer complaints to our offices¹⁰ regarding deceptive motor vehicle advertising and/or pricing practices have increased sharply, including reports of dealers' failure to honor posted or advertised prices and/or couching such deceptive price increases as "market adjustments" necessitated by supply chain issues or shortages.¹¹ Many consumers describe receiving written confirmation of vehicle pricing from a dealer, only to learn after arriving at the dealership that the actual price is hundreds – or even thousands – of dollars more than advertised. This practice leaves consumers with a Hobson's choice of having to either pay the increased price (having invested time and effort in going to the dealership, engaging in the negotiation process, and potentially foregoing other purchase opportunities) or walk away from the transaction without the vehicle. The ephemeral nature of online advertisements and in-person oral communications compounds this problem, making it more difficult for consumers to capture evidence that an advertised price or term varies from those offered at the time of sale.

The proposed Rule would significantly decrease such interactions. Section 463.3 increases the transparency of the purchase transaction by requiring dealers to be honest when they communicate with consumers regarding the goods being sold (i.e., the purchase or use of a vehicle), the price and finance costs associated with a vehicle, the availability of discounts, the cost of any Add-On Products or Services, and other material information regarding the consumer's application for financing as well as the party responsible for paying off any lien or lease remaining on a consumer's trade-in vehicle.¹²

⁸ Proposed 16 CFR § 463.3, Notice at 42045.

⁹ See footnote 3, *supra*.

¹⁰ In 2021, the Massachusetts AGO received 133 consumer complaints related to dealerships failing to honor posted or advertised pricing. Similarly, in 2021, the Illinois AGO received 100 complaints related to auto advertising.

¹¹ News Release, Massachusetts Office of the Attorney General, *Attorney General Advisory on Automobile Advertising, Pricing and Lease Buyouts*, <https://www.mass.gov/doc/automobile-advertising-advisory/download> (September 24, 2021). See also News Release, *Office of Attorney General Josh Shapiro, AG Shapiro Puts Auto Dealerships on Notice for Unfair and Deceptive Practices*, <https://www.attorneygeneral.gov/taking-action/ag-shapiro-puts-auto-dealerships-on-notice-for-unfair-and-deceptive-practices/> (March 3, 2022). *In re: Koons of Reisterstown Road, Inc. t/a Koons Kia* (In the Consumer Protection Division, Office of the Attorney General) (4/19/22) (resolving allegations that the dealership charged consumers large fees not included in advertised prices).

¹² Notice at 42045-6.

We support these requirements because we frequently hear from consumers who complain of confusion surrounding these terms. Based on our experience investigating these transactions, it appears that some consumers may have their focus diverted by the dealership to the monthly payment during the negotiation process. These consumers are stunned to learn after completing the transaction that the true cost of a lower monthly payment is a longer loan term and the increased finance charge that accompanies it. Other consumers complete the purchase transaction and later learn that Add-On Products or Services have been added to the transaction without their consent, or that the Add-On Products or Services that were offered to them – such as GAP insurance, rustproofing, and service contracts – may offer little to no benefit, while substantially increasing the dealer’s profits through the increased amount paid or financed in such transactions. These practices harm consumers, who are at a distinct disadvantage in navigating these lengthy, and often high-pressure, sales transactions.

By explicitly prohibiting these kinds of misrepresentations, Section 463.3 will increase transparency and promote fair competition in the vehicle marketplace, which benefits both consumers and dealers. When dealers compete with clear information regarding pricing and terms, consumers can accurately compare offerings across a range of dealers. Such transparency empowers the consumer to make informed decisions and levels the playing field for honest dealers.

III. The Proposed Disclosure Requirements Also Improve Fairness and Transparency.

In a natural complement to the prohibition on misrepresentations, Section 463.4 of the proposed Rule requires dealers to make specific disclosures regarding the terms of motor vehicle transactions.¹³ These provisions are intended to stop unfair or deceptive practices related to vehicle and financing pricing, as well as the offer, sale, and pricing of Add-On Products.¹⁴ The State Attorneys General are very supportive of these provisions. We receive numerous complaints from consumers demonstrating confusion or outright deception concerning pricing or financing terms that consumer did not understand, or fees and other costs that they did not know they would have to pay. Consumers reasonably expect merchants to honestly provide basic information about the material terms of a transaction, such as the price of the goods and/or services sold and the material terms under which the transaction will be completed. The increased transparency mandated by the proposed disclosure requirements will benefit consumers enormously by mandating that dealers meet this benchmark of fair-dealing.

A. Offering Price Disclosures

Section 463.4(a) requires dealers to disclose the true “Offering Price” of a vehicle in at least three situations:

- (1) In an advertisement that references a specific vehicle;
- (2) In an advertisement that references any monetary amount or financing terms for a specific vehicle; and

¹³ *Id.* at 42022.

¹⁴ *Id.* at 42024-5.

- (3) In response to a consumer inquiry about a specific vehicle or the price or financing term of a specific vehicle. If this request is made in writing, the dealer's response and Offering Price must also be in writing.¹⁵

The State Attorneys General strongly support requiring dealers to disclose the Offering Price at the first point of contact with a consumer. The proposed pricing disclosure requirements are needed to deter unfair and deceptive pricing conduct. This is especially true in the current environment, where some dealers have been tacking on undisclosed, mandatory “market adjustment fees” to their advertised prices. Failing to disclose such fees in an advertised price is already forbidden under some states’ laws.¹⁶ As noted above, our offices have received complaints from consumers alleging that vehicle dealers are raising the price at the point of sale allegedly to account for market conditions. The proposed disclosure of an Offering Price would be consistent with protections that already exist under some state laws, help curtail this practice and prevent surprise adjustments when consumers attempt to complete a purchase. This increased transparency will deter unfair and deceptive pricing by giving consumers and scrupulous dealers a level playing field, which strengthens the market overall.

i. Offering Price Disclosures should be required in writing regardless of the form of the inquiry.

We urge the FTC to build upon the disclosure requirements by requiring that dealers disclose the Offering Price in writing in all circumstances. The three “triggers” set forth in the proposed Rule could be confusing to, or exploited by, dealers regarding when the Offering Price disclosure requirement is triggered. This confusion could result in some consumers receiving proper disclosures while others – particularly low-income and otherwise vulnerable consumers – do not.

Specifically, it may be difficult to understand and confirm when a dealer's obligation to provide the true Offering Price is triggered under the third scenario, which obligates dealers to state the Offering Price in response to a consumer inquiry about a specific vehicle or its price or financing terms. Such a consumer inquiry may be difficult to identify. Consequently, dealers may struggle to determine whether a triggering consumer inquiry has occurred, and consumers will struggle to confirm that later offers match a dealer's previously provided Offering Price. Law enforcement agencies may similarly struggle to prove that a dealer's obligation to provide the Offering Price was triggered in this scenario. For these reasons, the State Attorneys General recommend that the FTC provide additional guidance on what constitutes a consumer inquiry in order to curtail gamesmanship and, further, we urge the FTC to require that a dealer's disclosure be provided in writing regardless of the form of the consumer inquiry.

¹⁵ *Id.* at 42022-3.

¹⁶ Md. Code Ann., Trans. Art. § 15-313(c)(i); *see also* COMAR § 11.12.01.14(b)(2); 940 Code of Mass. Regs. § 5.02(3); 14 Ill.Admin.Code 475.310.

ii. *Offering Price disclosures should provide complete information on the cost to purchase or finance the sale or use of a motor vehicle.*

The proposed Rule defines the Offering Price as “the full cash price for which a dealer will sell or finance the motor vehicle to any consumer,” excluding only required government charges.¹⁷ We support this requirement but encourage the FTC to include anticipated government charges in the definition of Offering Price.¹⁸ Given that the required government charges are known to the dealers at the time they advertise a vehicle, there is no reason that such charges should be excluded from the advertised price. It is vital that the consumer know the true price of the vehicle at the beginning of the deal in order to effectively comparison shop for a vehicle and for financing.

B. *Disclosures for Add-on Products and Services*

Many vehicle transactions also include the offer or sale of Add-On Products or Services, and unscrupulous dealers have exploited the vehicle sales process to saddle consumers with unwanted Add-On Products and Services.¹⁹ In recognition of this fact, Section 463.4(b) requires disclosure of a list of all optional Add-Ons and the price of each Add-On (“Add-On List”) on any website, online service, or mobile application on which vehicles are offered for sale.²⁰ Advertisements presented in print, radio, or television would not be required to include the Add-On List, but instead would be required to direct consumers to a website, online service, or mobile application in order to access a copy of the Add-On List.²¹ Perhaps most importantly, section 463.4(c) would require dealers to disclose that optional Add-On Products or Services are not required and that a consumer can purchase or lease the vehicle without these Add-Ons.²²

We frequently hear from consumers who unknowingly purchase Add-On Products or Services as part of their motor vehicle purchase transactions, discovering these additional charges only after completing the purchase. Other consumers complain that they were aware of the Add-Ons, but that they believed them to be required in order to purchase the vehicle. These additional charges are often bundled into a consumer’s financed purchase, and may offer little benefit to consumers despite their significant cost.

We urge the FTC to clarify that, in addition to the requirement that dealers provide written disclosures and obtain written consumer consent before the purchase of any Optional Add-Ons as detailed in Section 463.5(b)(1-2), dealers also are obligated, pursuant to the misrepresentation and disclosure provisions in Sections 463.3 and 463.4 of the proposed Rule, to clearly disclose any mandatory Add-Ons and whether those Add-Ons are required in order to obtain offered financing.

¹⁷ *Id.* at 42022.

¹⁸ The anticipated required government charges can be calculated by presuming an in-state motor vehicle purchaser.

¹⁹ Notice at 42016-7, discussing law enforcement investigations and actions, including actions concerning unfair or deceptive sales of Add-On Products and Services.

²⁰ *Id.* at 42023.

²¹ *Id.*

²² *Id.*

C. *Financing Disclosures*

Given the expense of motor vehicles, most consumers will need financing in order to purchase or lease a motor vehicle. Section 463.4(d) requires dealers to disclose the total of payments when quoting monthly payment amounts to a prospective buyer or lessee.²³ Section 463.4(e) would complement subsection (d), by requiring dealers to inform consumers in the instance when a lower monthly payment actually will increase the total amount the consumer will pay.²⁴ The State Attorneys General support these disclosure requirements. We frequently hear from consumers, especially low-income consumers, who find themselves stuck in very expensive contracts because of poorly disclosed offers of lower monthly payments. Often, dealers advertise lower monthly payments as a tactic to entice consumers into expensive contracts, without disclosing the true cost of the loan or length of the contract. Consumers, who may have limited options for purchasing vehicles, may prioritize keeping the monthly loan payment within their budgets. When material loan terms are not clearly disclosed, these consumers can end up experiencing significant financial loss when the term of the loan outlasts the useful life of the vehicle.

IV. Add-ons and Other Items Should be Empirically of Value to the Consumer and Optional.

Section 463.5 of the proposed Rule prohibits dealers from marketing or charging consumers for any non-beneficial Add-On Products, or charging consumers for Optional Add-Ons without disclosing necessary information and obtaining the consumer's Express-Informed Consent for the charge.²⁵ The State Attorneys General enthusiastically support these provisions. As stated in the Notice, many dealers offer Add-On Products and Services from which consumers derive no benefit. Adding on these products can also often make a financed purchase unaffordable to consumers, particularly those forced to purchase their automobiles in the subprime market.

These dealers earn significant profits from such sales at the expense of consumers and also disadvantage honest dealers.²⁶

A. *Non-beneficial Add-ons*

Section 463.5(a) would prohibit dealers from marketing or selling Add-On Products or Services that do not confer any benefit to consumers.²⁷ As the FTC astutely observed, but for a dealer's deceptive conduct, no consumers would agree to purchase Add-Ons that they could not benefit from.²⁸ The FTC noted that states such as Indiana, Colorado and South Carolina have already enacted legislation to curb deception in the sale of Guaranteed Auto or Asset Protection, or GAP, insurance.²⁹ Section 463.5(a) would build upon that existing prohibition, affording this protection to consumers nationwide and extending its reasonable scope to the marketing or selling of any Add-On Product or Service.³⁰ Examples of the specious products and services that

²³ *Id.* at 42024.

²⁴ *Id.*

²⁵ *Id.* at 42025-7.

²⁶ *Id.* at 42025-6.

²⁷ *Id.*

²⁸ *Id.* at 42026.

²⁹ *Id.* at n.139.

³⁰ *Id.* at 42026.

underscore the need for such regulation include, but are not limited to, rustproofing products that do not prevent rust, nitrogen-filled tires that contain no more nitrogen than that which is naturally in the air, and GAP insurance with hidden restrictions that exclude a consumer's vehicle or neighborhood.³¹

The State Attorneys General support the prohibition of marketing, offering, and/or selling non-beneficial Add-Ons. Consumers, especially those with less experience purchasing motor vehicles, are often falsely led to believe that certain products or services would be beneficial. To improve the efficacy of this provision, the State Attorneys General suggest providing additional guidance on what constitutes a "benefit" and whether a subjective or objective test is to be adopted for the purpose of making this determination. The State Attorneys General also suggest clarifying the extent of a dealer's obligation to conduct its own due diligence to verify whether an Add-On is beneficial.

B. Requirements for the Sale of Optional Add-ons

Section 463.5(b) prohibits dealers from charging for Optional Add-Ons without consent, misrepresenting Optional Add-Ons as required, or changing price information.³² In particular, Section 463.5(b)(1) would require dealers to disclose – and offer to sell the vehicle – for a Cash Price without Optional Add-Ons, which must include an itemization of the Offering Price, any discounts, rebates, or trade-in valuation, and required government charges.³³ For financed transactions, dealers must also disclose, in itemized format, the Cash Price without Optional Add-Ons plus the finance charge, factoring in cash down payment or trade-in valuation.³⁴ Under both subsections, the dealer must first obtain and retain a written confirmation, signed by the consumer and a manager, that the dealer has disclosed the Cash Price without Optional Add-Ons and the consumer has declined to purchase the vehicle at that price.³⁵ To avoid consumer confusion, the dealer may not present the Cash Price without Optional Add-Ons alongside other written materials.³⁶ Lastly, proposed Section 463.5(b)(3) would require a dealer to disclose, in itemized format, the cost of any optional Add-Ons selected by the consumer before charging for them.³⁷

The State Attorneys General support requiring disclosure and express, informed consumer consent before dealers can charge for Optional Add-Ons. We receive many complaints from consumers who mistook Optional Add-Ons as required or confused the dealer's offered price as the Cash Price without Optional Add-Ons. Similarly, a recent joint enforcement action brought by Illinois and the FTC alleged that 83 percent of buyers from certain dealerships were charged for Add-Ons without authorization or as a result of deception.³⁸ Requiring dealers to provide a Cash Price without Optional Add-Ons that separately itemizes discounts and trade-in valuation, among others, will ameliorate consumer confusion and the attendant opportunity for deceptive

³¹ *Id.*

³² *Id.* at 42026.

³³ *Id.*

³⁴ *Id.*

³⁵ *Id.*

³⁶ *Id.*

³⁷ *Id.*

³⁸ *FTC and People of the State of Ill. v. North American Automotive Services, Inc.*, Civil Action No. 1:22-cv-01690 (Northern District of Illinois) (March 31, 2022).

exploitation. Further, while these requirements are clear, the State Attorneys General suggest that the FTC provide examples of practices that would constitute “presenting the cash price together with other written materials” in violation of this provisions.

C. Express Informed Consent Requirement

Section 463.5(c) prohibits dealers from charging for any items without consumers’ Express, Informed Consent for the charge.³⁹ Express, Informed Consent is defined in Section 463.2 as “an affirmative act communicating unambiguous assent to be charged, made after receiving and in close proximity to a Clear and Conspicuous disclosure...”⁴⁰ The definition also contains a non-exhaustive list of examples of methods that do not satisfy this requirement, such as mere signatures, preprinted checkboxes, and agreements obtained from unfair and deceptive practices.⁴¹

The State Attorneys General agree with the FTC’s conclusion that consumers are vulnerable to unfair or deceptive charges in complex and lengthy motor vehicle transactions. As noted in the Notice, FTC orders and judicial decisions have required Express, Informed Consent.⁴² Codifying this requirement would afford consumers greater protection and decrease any alleged ambiguity for dealers.

V. Recordkeeping

To assist the FTC in assessing whether dealers comply with the proposed Rule, Section 463.6 requires dealers to keep certain types of records for a period of 24 months.⁴³ These records would include all materially different advertising, sales, training, and marketing materials regarding price, financing, or leasing terms; all materially different copies of Add-Ons; consumer transaction documents; disclosure and Add-On compliance records; consumer complaints and inquiries; and others records to demonstrate compliance with the proposed Rule.⁴⁴

The State Attorneys General agree with the FTC’s conclusion that recordkeeping is critical to ensure and assess compliance. However, the State Attorneys General suggest extending the period of recordkeeping to at least the length of the contract. In practice, most contracts related to the leasing and financing of motor vehicles last longer than 24 months, usually between four to seven years. Throughout, and even after the contract is executed, the transaction may be subject to disputes or legal actions, including those concerning the condition of the vehicle or its repossession, which would require access to the underlying records. Requiring dealers to retain these records for a period equivalent to the term of the loan is beneficial to all parties in settling these disputes. Further, since many records are kept electronically, an enhanced recordkeeping requirement should not create undue burden on dealers.

³⁹ Notice at 42026-7.

⁴⁰ *Id.* at 42045.

⁴¹ *Id.*

⁴² *Id.* at 42027.

⁴³ *Id.*

⁴⁴ *Id.*

VI. Waiver and Preemption

Section 463.7 of the proposed Rule specifies that dealers may not obtain a waiver of any part of the Rule. The State Attorneys General support this prohibition. As entities that enforce consumer protection laws, the State Attorneys General believe that consistency benefits consumers, as well as the overall marketplace. The proposed Rule would help standardize a floor for fair dealing in motor vehicles sales throughout the country. We do not believe the proposed Rule – or our suggested enhancements – would impose an undue burden on motor vehicle dealers, as many of these requirements are similar or the same as many requirements that already exist under state laws or regulations.⁴⁵

The State Attorneys General also take the opportunity to comment on preemption. As detailed in Section 463.9, the proposed Rule rightly sets a floor for conduct, while allowing consumers to continue to benefit from state laws that provide greater protections, as increased protections do not constitute an inconsistency between state and federal law.⁴⁶ The State Attorneys General commend the FTC for acknowledging the complementary role that state and federal laws and regulations play in bringing greater fairness and competition to the motor vehicle marketplace. State Attorneys General often conduct multi-state investigations and enforcement actions and, therefore, support having a consistent baseline to allow our collective resources to bring redress to more consumers.

VII. Additional Areas for Comment

The State Attorneys General also take this opportunity to address additional areas for comment raised in the Notice.

A. *Prohibiting misrepresentations will not curtail the unfair consumer harm caused by yo-yo sales.*

Sections 463.3(h) and 463.3(i) of the proposed Rule aim to regulate the industry practice of “spot deliveries” or “yo-yo” sales by prohibiting misrepresentations as to the finality of a transaction or its financing. The FTC can and should go farther to prevent this unfair and deceptive practice. Dealers, rather than consumers, have superior information regarding the financing terms and buy rates that their partners will ultimately accept. Therefore, we posit that it is unfair or deceptive for a dealer to refuse to return a consumer’s deposit or trade-in based on the dealer’s failure to adequately price the proposed transaction, misleading a consumer about the availability of financing, or mere desire to renege on the deal. The State Attorneys General urge the FTC to consider an outright ban on the practice of allowing consumers to leave the dealership with a vehicle before the transaction’s financing is finalized and assigned.

In the alternative, the State Attorneys General recommend that the FTC promulgate stronger requirements or prohibitions to severely curtail yo-yo sales. Several states have already enacted laws to this effect that, for example, require the dealer to be reasonably certain that a consumer will qualify for any quoted financing terms, require a written disclosure that the

⁴⁵ See 815 ILCS 505/2; 14 ILL. ADMIN. 475.310; 14 ILL. ADMIN. 475.580; See generally 37 Pa. Code § 301.1, *et seq.*, Pennsylvania *Automotive Industry Trade Practices*; 940 Code of Regulations § 5.00 *et seq.*, Massachusetts Motor Vehicle Regulations; Md. Code Ann., Transp. § 15-313; Md. Code Ann., Transp. § 15-311.1

⁴⁶ Notice at 42047.

consumer must sign advising the consumer that their financing is not final, or set a short deadline by which the dealer must either arrange financing or cancel the deal.⁴⁷ Should the FTC continue to permit the practice of spot delivery it should follow the lead set by these states and require any dealer that does not ultimately secure financing under previously presented terms to unwind the deal, return any down payment in full, and return any traded-in vehicle.⁴⁸

B. Timeframe for dealers to pay off liens and leases

Similarly, to ensure consumers are not surprised by charges after completion of a vehicle transaction, the State Attorneys General encourage the FTC to consider setting a time limit for dealers to pay off any lien on a traded-in vehicle. Requiring dealers to timely satisfy a lien on a trade-in protects consumers from being forced to make payments for a vehicle they no longer own or possess. When a dealer fails to ensure timely satisfaction of the outstanding loan, the consumer must continue to make payments on both the vehicle the consumer traded-in and the vehicle the consumer just purchased or leased, or risk having their credit severely damaged. In addition, ensuring timely satisfaction of liens on traded-in vehicles protects vehicle dealers from unknowingly purchasing a vehicle from another dealer subject to an undisclosed and unsatisfied lien.

In Illinois, dealers are required to remit payment to the lienholder of a traded-in vehicle within 21 days of the sale.⁴⁹ The problems that result when dealers fail to timely payoff lienholders is exacerbated if a dealership goes out of business, leaving consumers on the hook for any outstanding payments for a vehicle they no longer possess. Because of the damage caused by dealers going out of business without fulfilling agreements to pay off the balance of the consumer's liens on traded-in vehicles, Illinois enacted legislation to provide relief to qualified consumers trapped in this situation.⁵⁰ We encourage the FTC to set a time limit for dealers to pay off the lien on any traded-in vehicle to protect consumers and ensure a fair marketplace.

C. Starter Interrupt Devices

The FTC asks for comment on starter interrupt devices. The State Attorneys General would support disclosure requirements related to starter interrupt devices. Such devices are the subject of consumer complaints, and their potential for abuse is high. Many lenders offer these devices to consumers with limited or poor credit. These devices give the lender the ability to disable the vehicle when a consumer misses a payment. The practical effect of this is enormous. We have heard complaints from consumers who have found themselves stranded, far away from home, without the ability to restart their vehicle. The devices may also provide the lender with GPS location data for the vehicle, allowing them to remotely track it, presumably, in order to repossess it. State law provides consumers with certain rights regarding the repossession of a motor vehicle.⁵¹ Yet starter interrupt devices can operate as an end-run around these protections, allowing lenders to disable, track, and repossess a vehicle, sometimes without the due process protections to which consumers are entitled under state law.

⁴⁷ See OR. ADMIN. R. 137-020-0020(3)(x); Md. Code Ann., Transp. § 15-311.3.

⁴⁸ See 815 ILCS 505/2C; Md. Code Ann., Transp. § 15-311.3.

⁴⁹ See 815 ILCS 505/2ZZ.

⁵⁰ See 625 ILCS 5/5-102.7

⁵¹ Md. Code Ann., Com. Law §§ 12-1021; 12-624 through 627; Mass. Gen. Laws c. 255B, §§ 20A- 20B.

At a minimum, the State Attorneys General would like to see required disclosures any time a starter interrupt device is installed. These disclosures should notify the consumer that the vehicle will be turned off when a payment is late, that the shutoff may constitute a repossession triggering the requirements under state law for repossessing a vehicle, and detailing the consumer rights regarding the repossession. The State Attorneys General also encourage the FTC to require that dealers and/or lenders provide consumers with advance notice prior to shutoff that includes notice of the conditions consumers need to meet to avoid shutoff, and the ability to restart the cars in an emergency or unsafe situation. The FTC should also bar the dealer and/or lenders from selling consumer data or tracking a consumer unless a repossession is taking place; and require the dealer and/or lenders to destroy any consumer GPS information after a repossession, return of a starter interrupt device, or satisfaction of the loan.

VIII. Conclusion

The undersigned State Attorneys General thank the Federal Trade Commission for the opportunity to provide this comment on the Notice of Proposed Rulemaking concerning the proposed Motor Vehicle Dealers Trade Regulation Rule regarding the sale, financing, and leasing of motor vehicles by motor vehicle dealers. As demonstrated by the large volume of comments already submitted by consumers and their advocates, there is a large demand for federal regulation to increase transparency, fairness and true competition in new and used vehicle sales. Based upon the proposed Rule, we are hopeful that the final rule, once enacted, will enhance protections for consumers and ensure a more competitive and equitable marketplace.

Respectfully submitted,



Rob Bonta
California Attorney General



Philip J. Weiser
Colorado Attorney General



William Tong
Connecticut Attorney General



Kathleen Jennings
Delaware Attorney General



Karl Racine
District of Columbia Attorney General



Stephen H. Levins, Executive Director
State of Hawaii, Office of Consumer Protection



Kwame Raoul
Illinois Attorney General



Tom Miller
Iowa Attorney General



Brian Frosh
Maryland Attorney General



Maura Healey
Massachusetts Attorney General



Keith Ellison
Minnesota Attorney General



Matthew J. Platkin
Acting New Jersey Attorney General



Hector Balderas
New Mexico Attorney General



Letitia James
New York Attorney General



Ellen F. Rosenblum
Oregon Attorney General



Josh Shapiro
Pennsylvania Attorney General



Peter F. Neronha
Rhode Island Attorney General



Bob Ferguson
Washington Attorney General