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UNITED STATES OF AMERICA
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Federal Trade Commission

WASHINGTON, D.C. 20580

Office of the Chair

December 12, 2023

Honorable James Comer
Chairman
Committee on Oversight and Accountability
2157 Rayburn House Office Building
Washington, D.C. 20515

Dear Chairman Comer:

I am writing in further response to your November 16, 2023, letter regarding the Federal Trade Commission's ("Commission") proposed Motor Vehicle Dealers Trade Regulation Rule. I wanted to let you know that the Commission has finished its review of the comments it received in response to the proposed rule. After considering comments carefully, the Commission has decided to finalize a rule that is narrower than what the Commission originally proposed. For example, as discussed in the attached final rule and accompanying statement of basis and purpose ("SBP"), the Commission is not finalizing provisions that would have required dealers that charge for add-on products and services to present consumers with additional documents at several points in the transaction and obtain consumer and dealer signatures on those documents. The Commission's analysis of these issues, and its responses to comments, are discussed in the attached SBP.

The final rule, now titled the Combating Auto Retail Scams Rule (the CARS Rule), focuses on scams that consumers, including military consumers, commented about. In addition to harming consumers, these scams harm honest dealerships that have to compete with others that do not advertise price accurately. The CARS Rule is authorized by provisions of the Dodd-Frank Act that permit the Commission to prescribe rules with respect to unfair or deceptive acts or practices by motor vehicle dealers pursuant to the Commission's authority under the FTC Act and the notice and comment procedures in Section 553 of the Administrative Procedure Act ("APA").¹

The CARS Rule curbs illegal bait and switch tactics and hidden, junk fees by prohibiting motor vehicle dealers from making certain material misrepresentations; requiring disclosure of the actual offering price, that consumers do not have to purchase optional add-ons, and if discussing monthly payments, information about total payment; prohibiting charges for junk items; and requiring dealers to charge only for items consumers know about and agree to buy. Dealers that already abide by these prohibitions and provide these disclosures, and keep records showing that, can continue their practices and compete on an even playing field.

¹ See 12 U.S.C. § 5519(d).

The SBP addresses a number of issues raised by your request for information. As described in detail in the SBP, the rule will address deceptive or unfair practices that have persisted despite law enforcement and educational efforts by the Commission and other regulators.

The SBP also addresses comments that the rule will overlap with statutes or regulations already administered by other federal agencies. In particular, the SBP notes that deceptive and unfair conduct prohibited by the CARS Rule is already illegal under the FTC Act, and that there is no evidence that duplicative laws prohibiting deception and requiring consent to charges has harmful consequences for consumers and competition. Further, commenters did not point to any true conflicts between the rule and other laws.

The accompanying statement of basis and purpose addresses the costs and benefits of the CARS Rule in detail. In response to comments, the Commission determined to omit certain provisions, as discussed above. This decision and the Commission's decision to narrow the scope of the rule to certain motor vehicles resulted in substantial revisions to the estimated costs of the rule. The Commission also revised its estimate of benefits, based on comments. After careful evaluation, the Commission expects the rule to save consumers nationwide more than \$3.4 billion and an estimated 72 million hours each year shopping for vehicles.

Sincerely,



Lina M. Khan
Chair
Federal Trade Commission

Enclosure: Combating Auto Retail Scams Trade Regulation Rule, Final Rule for publication.

cc: The Honorable Jamie Raskin, Ranking Member
House Committee on Oversight and Accountability

FEDERAL TRADE COMMISSION**16 CFR Part 463****RIN 3084-AB72****Combating Auto Retail Scams Trade Regulation Rule**

AGENCY: Federal Trade Commission.

ACTION: Final rule.

SUMMARY: The Federal Trade Commission (“FTC” or “Commission”) is issuing this Combating Auto Retail Scams Trade Regulation Rule (“CARS Rule,” “Rule,” or “Final Rule”) and Statement of Basis and Purpose (“SBP”) related to the sale, financing, and leasing of covered motor vehicles by covered motor vehicle dealers. The Final Rule, among other things, (i) prohibits motor vehicle dealers from making certain misrepresentations in the course of selling, leasing, or arranging financing for motor vehicles, (ii) requires accurate pricing disclosures in dealers’ advertising and sales communications, (iii) requires dealers to obtain consumers’ express, informed consent for charges, (iv) prohibits the sale of any add-on product or service that confers no benefit to the consumer, and (v) requires dealers to keep records of certain advertisements and customer transactions.

DATES: This rule is effective July 30, 2024.

ADDRESSES: Copies of this document are available on the Commission’s website, www.ftc.gov.

FOR FURTHER INFORMATION CONTACT: Daniel Dwyer or Sanya Shahrabi, Division of Financial Practices, Bureau of Consumer Protection, Federal Trade

Commission, 202-326-2957 (Dwyer), 202-326-2709 (Shahrasbi), ddwyer@ftc.gov, sshahrasbi@ftc.gov.

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I. Background

A. Statutory Authority

The Dodd-Frank Wall Street Reform and Consumer Protection Act (“Dodd-Frank Act”) was signed into law in 2010.¹ Section 1029 of the Dodd-Frank Act authorizes the FTC to prescribe rules with respect to unfair or deceptive acts or practices by motor vehicle dealers.² The FTC is authorized to do so under the FTC Act and in accordance

¹ Pub. L. 111-203, 124 Stat. 1376 (2010).

² 12 U.S.C. 5519(d). See 12 U.S.C. 5519(f)(1) and (2) for definitions of the terms “motor vehicle” and “motor vehicle dealer” under Section 1029 of the Dodd-Frank Act, respectively.

with Section 553 of the Administrative Procedure Act (“APA”).³ The grant of APA rulemaking authority set forth in Section 1029 of the Dodd-Frank Act became effective as of July 21, 2011—the designated “transfer date” established by the Treasury Department.⁴

B. Commission Actions Following the Dodd-Frank Act and the Rulemaking Process

Following enactment of the Dodd-Frank Act, the Commission published in the *Federal Register* a notice discussing its authority to prescribe rules with respect to unfair or deceptive acts or practices by motor vehicle dealers and announcing that it would be hosting a series of public roundtables to explore consumer protection issues pertaining to motor vehicle sales and leasing, including what consumer protection issues, if any, exist that could be addressed through a possible rulemaking.⁵ The Commission sought participation from regulators, consumer advocates, industry participants, and other interested parties and ultimately held three such public roundtables.⁶

³ See 12 U.S.C. 5519(a) (discussing the authority over “motor vehicle dealer[s] that [are] predominantly engaged in the sale and servicing of motor vehicles, the leasing and servicing of motor vehicles, or both”); 12 U.S.C. 5519(d) (“Notwithstanding section 57a of title 15, the Federal Trade Commission is authorized to prescribe rules under sections 45 and 57a(a)(1)(B) of title 15[] in accordance with section 553 of title 5, with respect to a person described in subsection (a).”); 5 U.S.C. 553. Because the Commission has authority to promulgate this Rule in accordance with the APA, it is not required to include a statement as to the prevalence of the acts or practices treated by the Rule under Section 18(d) of the FTC Act. Compare 12 U.S.C. 5519(d) and (a) (providing the FTC with APA rulemaking authority for purposes of Section 1029 of the Dodd-Frank Act), with 15 U.S.C. 57a(b)(3) (requiring a statement as to prevalence for certain rulemaking proceedings by the Commission under non-APA procedures), and 15 U.S.C. 57a(b)(1) (establishing that certain rulemaking proceedings by the Commission under non-APA procedures are subject to requirements in addition to those under the APA).

⁴ See 12 U.S.C. 5411(a).

⁵ 76 FR 14014, 14015 (Mar. 15, 2011).

⁶ See Fed. Trade Comm’n, “The Road Ahead: Selling, Financing & Leasing Motor Vehicles” (Apr. 12, 2011), <https://www.ftc.gov/news-events/events/2011/04/road-ahead-selling-financing-leasing-motor-vehicles> (providing materials from roundtable in Detroit, Michigan); Fed. Trade Comm’n, “The Road Ahead: Selling, Financing & Leasing Motor Vehicles” (Aug. 2, 2011), <https://www.ftc.gov/news-events/events/2011/08/road-ahead-selling-financing-leasing-motor-vehicles> (providing materials from roundtable in San Antonio, Texas); Fed. Trade Comm’n, “The Road Ahead: Selling, Financing & Leasing Motor Vehicles” (Nov. 17, 2011), <https://www.ftc.gov/news-events/events/2011/11/road-ahead-selling->

The Commission subsequently focused on enforcement and business guidance in the motor vehicle dealer marketplace. As discussed in SBP II.C,⁷ however, certain unfair and deceptive acts or practices have persisted, despite more than a decade of enforcement and education. Accordingly, on June 23, 2022, the Commission announced a Notice of Proposed Rulemaking (“NPRM”) addressing unfair or deceptive acts or practices by motor vehicle dealers.⁸ That notice was published in the Federal Register on July 13, 2022.⁹ The NPRM, among other things, proposed to (i) prohibit motor vehicle dealers from making certain misrepresentations, (ii) require accurate pricing disclosures, (iii) prohibit the sale of any add-on product or service that confers no benefit to the consumer, (iv) require express, informed consent for add-ons and other charges, and (v) impose certain recordkeeping requirements. The comment period for the NPRM closed on September 12, 2022.

In response to the NPRM and proposed rule, the Commission received more than 27,000 comments from stakeholders representing a wide range of viewpoints.¹⁰ These

financing-leasing-motor-vehicles (providing materials from roundtable in Washington, District of Columbia).

⁷ As used herein, references to the “Statement of Basis and Purpose” or “SBP” refer to the portions of this document that precede the regulatory text of the Final Rule. References to the “Rule,” “Final Rule,” or “CARS Rule” refer to the text in part 463—Combating Auto Retail Scams (“CARS”) Trade Regulation Rule. Because the Final Rule is narrower than the proposed Motor Vehicle Dealers Trade Regulation Rule in the NPRM, the Commission has modified the Rule title to reflect the more limited scope.

⁸ See Press Release, Fed. Trade Comm’n, “FTC Proposes Rule to Ban Junk Fees, Bait-and-Switch Tactics Plaguing Car Buyers” (June 23, 2022), <https://www.ftc.gov/news-events/news/press-releases/2022/06/ftc-proposes-rule-ban-junk-fees-bait-switch-tactics-plaguing-car-buyers>.

⁹ See Fed. Trade Comm’n, Notice of Proposed Rulemaking, Motor Vehicle Dealers Trade Regulation Rule, 87 FR 42012 (released June 23, 2022; published July 13, 2022) [hereinafter NPRM], <https://www.govinfo.gov/content/pkg/FR-2022-07-13/pdf/2022-14214.pdf>.

¹⁰ The Commission received 27,349 comment submissions filed online in response to its NPRM. See Gen. Servs. Admin., Dkt. No. FTC-2022-0046, Proposed Rule, Motor Vehicle Dealers Trade Regulation Rule (July 13, 2022), <https://www.regulations.gov/document/FTC-2022-0046-0001> (noting comments received). To facilitate public access, over 11,000 such comments have been posted publicly on Regulations.gov at <https://www.regulations.gov/document/FTC-2022-0046-0001/comment> (noting posted comments). As explained at Regulations.gov, agencies may choose to redact or withhold certain submissions (or portions thereof) such as those containing private or proprietary information, inappropriate language, or

stakeholders included numerous individual consumers who described deceptive practices during recent car purchases and many who discussed current or former military service and deceptive and predatory practices common near military installations.¹¹ Commenters also included dealerships and their employees, industry groups, consumer and community groups, and Federal and State lawmakers and law enforcement agencies. Many commenters, such as consumers, some dealers and dealer employees, consumer groups, and lawmakers and enforcers, were supportive of the proposed rule in whole or in part. Many of these commenters also urged the FTC to include additional protections for consumers and law-abiding businesses, while others, such as industry groups, dealers, and dealer employees, asked questions or criticized the proposal.¹² These comments and

duplicate/near duplicate examples of a mass-mail campaign. *See* Gen. Servs. Admin., Regulations.gov Frequently Asked Questions, Find Dockets, Documents, and Comments FAQs, “How are comments counted and posted to Regulations.gov?,” <https://www.regulations.gov/faq?anchor=downloadingdata> (last visited Dec. 5, 2023). The Commission has considered all timely and responsive public comments it received in response to its NPRM.

¹¹ *See, e.g.*, Individual commenter, Doc. No. FTC-2022-0046-4648 (“As a young Marine stationed in a military town I was taken advantage of by a dealership when purchasing my first car. It set me back financially for years. I know of many young military people who purchased vehicle[’s] and we[’re] instantly so far upside down after leaving the dealership with thousands of dollars in add on junk charges”); Individual commenter, Doc. No. FTC-2022-0046-0542 (“As a former member of the Military, the amount of scams and horror stories I have heard regarding young service members buying cars is absurd. . . . Someone shouldn’t have to do hours of research on how to buy a car so they don’t get taken advantage of.”); Individual commenter, Doc. No. FTC-2022-0046-0637 (“As a small business owner and active duty military member I have played the role of both a buyer, toiling for hours to just reach fair deals on vehicles, as well as that of an advocate for my Sailors who have been preyed upon by local dealerships. Nowhere else in our society do so many average citizens have to mentally prepare for a battle over fair pricing and treatment for something that is realistically a modern necessity.”); Individual commenter, Doc. No. FTC-2022-0046-9840 (“I can’t list the number of times I have either seen, or have stepped in a situation, where car dealers have either attempted to take, or have successfully taken, advantage of a young military member or their family by baiting and switching when it came to the price of a car, or stated that the price was one amount, only to be charged, and over-charged a higher amount. These dealers have even attempted to pull unethical tricks on me and my wife, even after they found out that I was a military member, a combat veteran, that was serving this great nation.”); Individual commenter, Doc. No. FTC-2022-0046-0845 (“Predatory practices like [bait-and-switch pricing] are common near military installations”).

¹² Industry commenters claimed that many of the areas covered by the proposed rule are already addressed in industry guidance. The Commission notes that, although industry guidance can provide helpful information to dealers, dealers who choose not to follow such guidance, or who engage in deceptive or unfair practices, subject their customers to significant harm. The Rule addresses such practices, thus protecting consumers and law-abiding dealers.

responses to comments are discussed primarily in the discussion of the Final Rule in SBP III.

The Commission notes that it has undertaken careful review and consideration of each of the comments it received in response to its NPRM. The Commission has dedicated the majority of its section-by-section analysis to descriptions of, and responses to, comments or portions thereof that were critical of the Commission's proposal or that urged the Commission to adopt additional requirements. Thus, to ensure that this document also reflects the many comments in the public record from stakeholders who supported the proposal as is, the Commission has excerpted a number of such comments in portions of its SBP.

II. Motor Vehicle Financing and Leasing

A. Overview of the Motor Vehicle Marketplace

For many consumers, buying or leasing a motor vehicle is essential, expensive, and time-consuming.¹³ Americans rely on their vehicles for work, school, childcare, groceries, medical visits, and many other important tasks in their daily lives.¹⁴ These vehicles have become increasingly costly: the average price of a new vehicle sold at a

¹³ Unless otherwise indicated, the terms "auto," "automobile," "car," "motor vehicle," and "vehicle," as used in this SBP and the Commission's final regulatory analysis, refer to "Covered Motor Vehicle" as defined in this part.

¹⁴ During 2017 to 2022, an average of 91% of American workers who did not work from home drove to work. See U.S. Census Bureau, "American Community Survey: Means of Transportation to Work by Selected Characteristics, 2022: ACS 1-Year Estimates Subject Tables" (2023), <https://data.census.gov/table?q=Commuting&tid=ACSST1Y2022.S0802> (reporting 110,245,368 workers 16 years and over who drove alone to work in a car, truck, or van, and 13,881,067 workers 16 years and over who drove by carpool to work in a car, truck or van, together accounting for 91% of the total of 136,196,004 workers 16 years and over who did not work from home); U.S. Census Bureau, "American Community Survey: Means of Transportation to Work by Selected Characteristics, 2021: 2017-2021 ACS 5-Year Estimates Subject Tables" (2022), <https://data.census.gov/table?q=Commuting&tid=ACSST5Y2021.S0802> (reporting 113,724,271 workers 16 years and over who drove alone to work in a car, truck, or van, and 13,340,838 workers 16 years and over who drove by carpool to work in a car, truck or van, together accounting for 91% of the total of 140,223,271 workers 16 years and over who did not work from home).

new car dealership in 2022 was more than \$46,000,¹⁵ while the average price of a used vehicle sold at such dealerships was more than \$30,000.¹⁶ By the second quarter of 2023, the average monthly payment for used cars reached \$533, and the average monthly payment for new cars reached \$741—both record highs.¹⁷ Vehicles are now many consumers’ largest expense—on a par with housing, child care and food, and accounting for 16% of the median annual household income before taxes.¹⁸ In 2022 alone, Americans spent more than \$720 billion on motor vehicles and vehicle parts.¹⁹

Given these costs, many consumers who purchase a motor vehicle rely on financing to complete their purchases. According to public reports, 81% of new motor vehicle purchases, and nearly 35% of used vehicle purchases, are financed.²⁰ By the first quarter of 2023, Americans had more than 107 million outstanding auto financing accounts and owed more than \$1.56 trillion thereon,²¹ making auto finance the third-largest source of debt for U.S. consumers, and the second-largest for U.S. consumers ages

¹⁵ Nat’l Auto. Dealers Ass’n, “NADA Data 2022” 7, <https://www.nada.org/media/4695/download?inline> (noting average retail selling price of \$46,287 for new vehicles sold by dealerships in 2022).

¹⁶ *Id.* at 10 (noting average retail selling price of \$30,736 for used vehicles sold by new-vehicle dealerships in 2022).

¹⁷ Lydia DePillis, “How the Costs of Car Ownership Add Up,” N.Y. Times (Oct. 6, 2023), <https://www.nytimes.com/interactive/2023/10/07/business/car-ownership-costs.html> (citing average monthly payment figures from TransUnion).

¹⁸ *Id.* (citing data from AAA and the U.S. Census Bureau).

¹⁹ Bureau of Econ. Analysis, “National Data: National Income and Product Accounts, Personal Consumption Expenditures by Major Type of Product” tbl. 2.3.5, <https://apps.bea.gov/iTable/?reqid=19&step=2&isuri=1&categories=survey#eyJhcHBpZCI6MTksInN0ZXBzIjpbMSwyLDNdLCJkYXRhIjpbWyJjYXRlZ29yaWVzIiwuU3VydmV5II0sWyJOSVBBX1RhYmxlX0xpc3QiLCI2NSJdXX0=> (last revised July 27, 2023) (listing estimated annual expenditure rates of between \$713.1 billion and \$737.1 billion in 2022).

²⁰ Melinda Zabritski, Experian Info. Sols., Inc., “State of the Automotive Finance Market Q4 2020” 5, <https://www.experian.com/content/dam/marketing/na/automotive/quarterly-webinars/credit-trends/2020-quarterly-trends/v2-2020-q4-state-automotive-market.pdf> (on file with the Commission).

²¹ Fed. Rsrv. Bank of N.Y., “Quarterly Report on Household Debt and Credit, 2023: Q1” 3-4 (May 2023), https://www.newyorkfed.org/medialibrary/interactives/householdcredit/data/pdf/HHDC_2023Q1; Fed. Rsrv. Bank of N.Y., “Data Underlying Report” on “Page 3 Data” and “Page 4 Data” tabs, https://www.newyorkfed.org/medialibrary/interactives/householdcredit/data/xls/HHDC_Report_2023Q1 (last visited Dec. 5, 2023) (listing number of open “Auto Loan” accounts and total outstanding balance in such accounts).

40 and over.²² Servicemembers have an average of twice as much auto debt as civilians—particularly young servicemembers, who generally require vehicles for transportation while living on military bases.²³ By the age of 24, around 20 percent of young servicemembers have at least \$20,000 in auto debt, which equates to nearly two-thirds of an enlisted soldier’s typical base salary at that age.²⁴

In addition to the expense, the process of buying or leasing a vehicle is often time-consuming and arduous. It can take several hours or days to finalize a transaction,²⁵ on top of the hours it can take, particularly in rural areas, to drive to a dealership.²⁶

Consumers may need to take time off work or arrange childcare, and families with a

²² Fed. Rsr. Bank of N.Y., “Quarterly Report on Household Debt and Credit, 2023: Q1” 3, 21 (May 2023), https://www.newyorkfed.org/medialibrary/interactives/householdcredit/data/pdf/HHDC_2023Q1; Fed. Rsr. Bank of N.Y., “Data Underlying Report” on “Page 3 Data” and “Page 21 Data” tabs, https://www.newyorkfed.org/medialibrary/interactives/householdcredit/data/xls/HHDC_C_Report_2023Q1 (last visited Dec. 5, 2023) (listing total “Auto Loan” debt balance compared to other product type categories).

²³ See Consumer Fin. Prot. Bureau, “Financially Fit? Comparing the Credit Records of Young Servicemembers and Civilians” 27 (July 2020), https://files.consumerfinance.gov/f/documents/cfpb_financially-fit_credit-young-servicemembers-civilians_report_2020-07.pdf.

²⁴ See Consumer Fin. Prot. Bureau, “Protecting Servicemembers from Costly Auto Loans and Wrongful Repossessions” (July 18, 2022), <https://www.consumerfinance.gov/about-us/blog/protecting-servicemembers-from-costly-auto-loans-and-wrongful-repossessions/>.

²⁵ 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 (July 2020) [hereinafter Auto Buyer Study], <https://www.ftc.gov/system/files/documents/reports/auto-buyer-study-lessons-depth-consumer-interviews-related-research/bcpreportsautobuyerstudy.pdf> (noting that the purchase transactions in the FTC’s qualitative study often took 5 hours or more to complete, with some extending over several days); Cf. Cox Auto., “2020 Cox Automotive Car Buyer Journey” 6 (2020) [hereinafter 2020 Cox Automotive Car Buyer Journey], <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); Cox Auto., “2022 Car Buyer Journey: Top Trends Edition” 6 (2023) [hereinafter 2022 Car Buyer Journey], <https://www.coxautoinc.com/wp-content/uploads/2023/01/2022-Car-Buyer-Journey-Top-Trends.pdf> (reporting average consumer time spent shopping for a vehicle at 14 hours, 39 minutes).

²⁶ For example, consumers have complained about going to a dealership based on an offer that the dealer refuses to honor only after they have spent hours driving there and additional time on the lot. See, e.g., Complaint ¶¶ 23-26, *Fed. Trade Comm’n v. N. Am. Auto. Servs., Inc.*, No. 1:22-cv-0169 (N.D. Ill. Mar. 31, 2022) (alleging that many consumers drive hours to dealerships based on the advertised prices; that test-driving and selecting a vehicle, and negotiating the price and financing terms, is an often hours-long process; and that, after this time, dealers falsely told consumers that add-on products or packages were required to purchase or finance the vehicle, even though they were not included in the low prices advertised or disclosed to consumers who called to confirm prices).

single vehicle may be forced to delay other important appointments due to the length of the vehicle-buying or -leasing process.

Most consumers—approximately 70%—finance vehicle purchases through a motor vehicle dealer,²⁷ using what is known as dealer-provided “indirect” financing.²⁸ This financing is typically offered through dealers’ financing and insurance (“F&I”) offices, which may also offer leasing and add-on products or services. In the dealer-provided financing scenario, the dealer collects financial information about the consumer and forwards that information to prospective motor vehicle financing entities. These financing entities evaluate this information and, in the process, determine whether, and on what terms, to provide credit.²⁹ These terms include the “buy rate”: a risk-based finance charge that reflects the interest rate at which the entity will finance the deal.³⁰ Dealers often add a finance charge called a “dealer reserve” or “markup” to the buy rate.³¹ Unlike the buy rate, the markup is not based on the underwriting risk or credit

²⁷ Unless otherwise indicated, the terms “dealer,” “dealership,” and “motor vehicle dealer” as used in this SBP and the Commission’s final regulatory analysis refer to “Covered Motor Vehicle Dealer” or “Dealer” as defined in this part.

²⁸ See Nat’l Auto. Dealers Ass’n, “Dealer-Assisted Financing Benefits Consumers,” <https://www.nada.org/autofinance/> [<https://web.archive.org/web/20220416131718/https://www.nada.org/autofinance/>] (Apr. 16, 2022) (noting that 7 out of 10 consumers finance through their dealership). This is also known as “dealer financing,” because consumers obtain financing through the dealer that partners with other entities in the financing process.

²⁹ Dealers often originate the contract governing the extension of retail credit or retail leases and then sell, or otherwise assign, these contracts to unaffiliated third-party finance or leasing sources, including such third parties the dealer may have contacted in the course of arranging dealer-provided “indirect” financing. See Consumer Fin. Prot. Bureau, “Automobile Finance Examination Procedures” 3 (Aug. 2019), https://files.consumerfinance.gov/f/documents/201908_cfpb_automobile-finance-examination-procedures.pdf.

³⁰ See Nat’l Auto. Dealers Ass’n, Nat’l Ass’n of Minority Auto. Dealers & Am. Int’l Auto. Dealers Ass’n, “Fair Credit Compliance Policy & Program” 2 (2015), <https://www.nada.org/media/4558/download?inline>. (defining “buy rate” as “the rate at which the finance source will purchase the credit contract from the dealer”).

³¹ See, e.g., *id.* at 1 n.4 & accompanying text.

characteristics of the applicant, and dealers retain the markup as profit.³² New vehicle dealers average a gross profit of about \$2,444 per vehicle,³³ more than half of which comes from the dealers' F&I offices. Independent used vehicle dealers averaged a gross profit of more than \$6,000 per vehicle, as of 2019.³⁴ While some used vehicle dealerships do not have a separate F&I office, more than half of such dealerships sell add-on products.³⁵

Six to eight percent of financed vehicle purchases use what is called "buy here, pay here" dealers.³⁶ In this scenario, consumers typically borrow from, and make their payments directly to, the dealership.

The remainder of financed vehicle transactions use what is commonly referred to as "direct" financing, provided by a credit union, bank, or other financing entity.³⁷ In this scenario, consumers typically receive an interest rate quote from the financing entity prior to arriving at a dealership to purchase a vehicle, and use the financing to pay for

³² *Id.* (describing this as the amount dealers earn for arranging financing, measured as the difference between the consumer's annual percentage rate ("APR") and the wholesale "buy rate" at which a finance source buys the finance contract from the dealer, and noting that finance sources typically permit dealers to retain the dealer participation).

³³ Nat'l Auto. Dealers Ass'n, "Average Dealership Profile" 1 (2020), <https://www.nada.org/media/4136/download?attachment> [<http://web.archive.org/web/20220623204158/https://www.nada.org/media/4136/download?attachment>] (June 23, 2022).

³⁴ Nat'l Indep. Auto. Dealers Ass'n, "NIADA Used Car Industry Report 2020" 21 (2020).

³⁵ *Id.* at 8, 10.

³⁶ Melinda Zabritski, Experian Info. Sols., Inc., "State of the Automotive Finance Market Q2 2020" 8 (2020), <https://www.experian.com/content/dam/marketing/na/automotive/quarterly-webinars/credit-trends/2020-q2-safm-final.pdf>

[<http://web.archive.org/web/20201106002015/https://www.experian.com/content/dam/marketing/na/automotive/quarterly-webinars/credit-trends/2020-q2-safm-final.pdf>] (Mar. 6, 2023).

³⁷ Consumer Fin. Prot. Bureau, "Automobile Finance Examination Procedures" 4 (Aug. 2019), https://files.consumerfinance.gov/f/documents/201908_cfpb_automobile-finance-examination-procedures.pdf.

their chosen vehicle.³⁸ Dealerships do not profit on the financing portion of the vehicle sale transaction when a consumer arranges financing directly.

Finally, consumers may choose to lease a vehicle from a dealership rather than purchase one. In this scenario, consumers may drive a vehicle for a set period of time—typically around three years³⁹—and for a certain maximum number of miles—typically 10,000-15,000 miles per year—in exchange for an upfront payment, a monthly payment, and fees before, during, and at the end of the lease, including for excess wear and usage over the mileage limit.⁴⁰ When consumers lease a vehicle, they do not own it, and they must return the vehicle when the lease expires, though they may have the option to purchase the vehicle at the end of the lease period. Nearly 27% of new vehicles are leased, as are just over 8% of used vehicles.⁴¹

³⁸ Consumer Fin. Prot. Bureau, “Consumer Voices on Automobile Financing” 5 (June 2016), https://files.consumerfinance.gov/f/documents/201606_cfpb_consumer-voices-on-automobile-financing.pdf.

³⁹ Melinda Zabritski, Experian Info. Sols., Inc., “State of the Automotive Finance Market Q4 2020” 26 (2020), <https://www.experian.com/content/dam/marketing/na/automotive/quarterly-webinars/credit-trends/2020-quarterly-trends/v2-2020-q4-state-automotive-market.pdf> [<http://web.archive.org/web/20210311174922/https://www.experian.com/content/dam/marketing/na/automotive/quarterly-webinars/credit-trends/2020-quarterly-trends/v2-2020-q4-state-automotive-market.pdf>] (Mar. 6, 2023).

⁴⁰ See Fed. Trade Comm’n, “Financing or Leasing a Car,” <https://www.consumer.ftc.gov/articles/0056-financing-or-leasing-car> (last visited Dec. 5, 2023) (“The annual mileage limit in most standard leases is 15,000 or less.”); Consumer Fin. Prot. Bureau, “What should I know about the differences between leasing and buying a vehicle?,” <https://www.consumerfinance.gov/ask-cfpb/what-should-i-know-about-the-differences-between-leasing-and-buying-a-vehicle-en-815/> (last visited Aug. 24, 2023) (“Most leases restrict your mileage to 10,000-15,000 miles per year.”).

⁴¹ Melinda Zabritski, Experian Info. Sols., Inc., “State of the Automotive Finance Market Q4 2020” 5 (2020), <https://www.experian.com/content/dam/marketing/na/automotive/quarterly-webinars/credit-trends/2020-quarterly-trends/v2-2020-q4-state-automotive-market.pdf> [<https://www.experian.com/content/dam/marketing/na/automotive/quarterly-webinars/credit-trends/2020-quarterly-trends/v2-2020-q4-state-automotive-market.pdf>] (Mar. 6, 2023).

B. Deceptive and Unfair Practices in the Motor Vehicle Marketplace

Section 5 of the Federal Trade Commission Act (“FTC Act”), as amended (15 U.S.C. 45), authorizes the FTC to address deceptive or unfair acts or practices in or affecting commerce, including in the motor vehicle marketplace.

An act or practice is deceptive if there is a representation, omission, or other practice that is likely to mislead consumers acting reasonably under the circumstances and is material to consumers—that is, it is likely to affect consumers’ conduct or decisions with regard to a product or service.⁴² Deceptive conduct can involve omission of material information, the disclosure of which is necessary to prevent the claim, practice, or sale from being misleading.⁴³

An act or practice is considered unfair under Section 5 of the FTC Act if: (1) it causes, or is likely to cause, substantial injury to consumers; (2) the injury is not reasonably avoidable by consumers; and (3) the injury is not outweighed by countervailing benefits to consumers or to competition.⁴⁴

In each of the past four years, the FTC received more than 100,000 complaints regarding motor vehicle sales, financing, service & warranties, and rentals & leasing.⁴⁵ This industry is also consistently at or near the top of private sources of consumer

⁴² See Fed. Trade Comm’n, “FTC Policy Statement on Deception” 2, 5, 103 F.T.C. 174 (1984) [hereinafter FTC Policy Statement on Deception] (*appended to Cliffdale Assocs., Inc.*, 103 F.T.C. 110, 183 (1984)), https://www.ftc.gov/system/files/documents/public_statements/410531/831014deceptionstmt.pdf.

⁴³ *Id.*

⁴⁴ 15 U.S.C. 45(n).

⁴⁵ See, e.g., Fed. Trade Comm’n, “Consumer Sentinel Network Data Book 2022” app. B3 at 85 (Feb. 2023) [hereinafter Consumer Sentinel Network Data Book 2022], https://www.ftc.gov/system/files/ftc_gov/pdf/CSN-Data-Book-2022.pdf (reporting complaints about new and used motor vehicle sales, financing, service & warranties, and rentals & leasing, collectively, of more than 100,000 in 2020, 2021, and 2022); Fed. Trade Comm’n, “Consumer Sentinel Network Data Book 2021” app. B3 at 85 (Feb. 2022) [hereinafter Consumer Sentinel Network Data Book 2021], https://www.ftc.gov/system/files/ftc_gov/pdf/CSN%20Annual%20Data%20Book%202021%20Final%20PDF.pdf (reporting complaints about new and used motor vehicle sales, financing, service & warranties, and rentals & leasing, collectively, of more than 100,000 in 2019, 2020, and 2021).

complaints.⁴⁶ Many of these complaints concerned deceptive or unfair acts or practices affecting U.S. consumers. Complaints about motor vehicle transactions are regularly in the top ten complaint categories tracked by the FTC.⁴⁷ For military consumers as well, auto-related complaints are among the top 10 complaint categories outside of identity theft.⁴⁸

Moreover, law enforcement experience shows that complaints are just the tip of the iceberg.⁴⁹ The Commission's recent enforcement action against a large, multistate dealership group is illustrative of this point in the motor vehicle marketplace: in that matter, the Commission received 391 complaints—about add-ons and other issues—over a several-month period prior to filing a complaint against the thirteenth largest dealership

⁴⁶ According to commenters, complaints to the Better Business Bureau about new and used auto dealers, when combined, have been either the first or second highest regarding any industry in the U.S. for the past twenty years. *See* Comment of Nat'l Consumer L. Ctr. et al., Doc. No. FTC-2022-0046-7607 at ii; *see also* Better Bus. Bureau, "BBB Complaint and Inquiry Statistics," <https://www.bbb.org/all/bbb-complaint-statistics> (last visited Dec. 5, 2023) (listing complaint statistics from 2010 through 2022, sorted by industry). In addition, for the past seven years annual surveys of State and local consumer protection agencies have reported that auto-related complaints were the top complaint received from consumers. *See* Comment of Nat'l Consumer L. Ctr. et al., Doc. No. FTC-2022-0046-7607 at 13; Consumer Fed'n of Am., "2022 Consumer Complaint Survey Report" 4-5 (May 2023), <https://consumerfed.org/wp-content/uploads/2023/05/2022-Consumer-Complaint-Survey-Report.pdf> ("For the seventh year in a row, auto sales, leases and repairs are the #1 complaint category. Consumers filed complaints about add-on products and services, bait and switch pricing, and mechanical condition issues.").

⁴⁷ *See* Consumer Sentinel Network Data Book 2021, *supra* note 45, at 8 (listing vehicle-related complaints as the seventh most common report category, outside of identity theft, in 2021); Consumer Sentinel Network Data Book 2022, *supra* note 45, at 8 (listing motor vehicle-related complaints as the fifth most common report category, outside of identity theft, in 2022).

⁴⁸ *See* Consumer Sentinel Network Data Book 2021, *supra* note 45, at 18 (listing vehicle-related complaints as the eighth most common complaint category for military consumers, outside of identity theft categories, in 2021); Consumer Sentinel Network Data Book 2022, *supra* note 45, at 18 (listing vehicle-related complaints as the ninth most common complaint category for military consumers, outside of identity theft categories, in 2022).

⁴⁹ *See, e.g., United States v. Brien*, 617 F.2d 299, 308 (1st Cir. 1980); *United States v. Offs. Known as 50 State Distrib. Co.*, 708 F.2d 1371, 1374-75 (9th Cir. 1983); Keith B. Anderson, Fed. Trade Comm'n, "Consumer Fraud in the United States: An FTC Survey" 80 (2004), <https://www.ftc.gov/sites/default/files/documents/reports/consumer-fraud-united-states-ftc-survey/040805confraudrpt.pdf> (staff report noting consumers who reported they were victims of fraud complained to an official source only 8.4 percent of the time, filing complaints with the BBB in 3.5 percent of incidents and to a Federal agency, including the FTC, in only 1.4 percent of cases).

group in the country by revenue as of 2020.⁵⁰ However, in a survey of the dealer's customers over the same time period, 83% of respondents—or at least 16,848 customers—indicated they were subject to the dealer's unlawful practices related to add-ons alone.⁵¹

Similarly, in other contexts where companies were charged with making misrepresentations or engaging in misconduct regarding add-on products, information obtained after filing has shown widespread harm far beyond the initial consumer complaint volumes reported prior to filing.⁵²

As examined in greater detail in the paragraphs that follow, consumers in the motor vehicle marketplace are confronted with chronic deceptive or unfair practices, including bait-and-switch tactics and hidden charges.⁵³

1. Bait-and-Switch Tactics

Advertisements for motor vehicles are often consumers' first contact in the vehicle-buying or -leasing process. Dealers utilize a variety of means to reach consumers,

⁵⁰ See Complaint, *Fed. Trade Comm'n v. N. Am. Auto. Servs., Inc.*, No. 1:22-cv-0169 (N.D. Ill. Mar. 31, 2022); see also WardsAuto, "WardsAuto 2020 Megadealer 100," <https://www.wardsauto.com/dealers/wardsauto-2020-megadealer-100-industry-force> (last visited Dec. 5, 2023) (listing Napleton Automotive Group as the 13th-ranked dealership group by total revenue).

⁵¹ Complaint ¶ 27, *Fed. Trade Comm'n v. N. Am. Auto. Servs., Inc.*, No. 1:22-cv-0169 (N.D. Ill. Mar. 31, 2022) (alleging that defendants buried charges for add-ons in voluminous paperwork, making them difficult to detect); see Press Release, Fed. Trade Comm'n, "FTC Returns Additional \$857,000 To Consumers Harmed by Napleton Auto's Junk Fees and Discriminatory Practices" (Nov. 20, 2023), <https://www.ftc.gov/news-events/news/press-releases/2023/11/ftc-returns-additional-857000-consumers-harmed-napleton-autos-junk-fees-discriminatory-practices>.

⁵² For example, in a recent action involving deceptive pre-approval claims, the FTC had received roughly 30 complaints about the company's pre-approval conduct in the five-year period prior to announcing its action. But in the five months following announcement of the action, more than 900 additional consumers came forward with complaints about the conduct. See Press Release, Fed. Trade Comm'n, "FTC Announces Claims Process for Consumers Harmed by Credit Karma 'Pre-Approved' Offers for Which They Were Denied" (Dec. 5, 2023), <https://www.ftc.gov/news-events/news/press-releases/2023/12/ftc-announces-claims-process-consumers-harmed-credit-karma-pre-approved-offers-which-they-were> ("[W]ithin five months of that announcement, the agency received nearly 900 more such complaints").

⁵³ While other issues exist in the motor vehicle sales, financing, and leasing space, including issues involving discrimination, financing application falsification, data privacy and security, and yo-yo financing, this Rule's core focus is on misrepresentations and add-on and pricing practices.

including social media and online advertisements, television and radio commercials, and direct mail marketing. New vehicle dealers spend an average of more than \$700 on advertising per vehicle sold⁵⁴—more than two-thirds of which goes toward online advertising.⁵⁵

The FTC has brought many law enforcement actions involving motor vehicle dealers' deceptive advertising and other unlawful tactics. Such actions have charged dealers with, *inter alia*, making misrepresentations regarding the price of a vehicle, the availability of discounts and rebates, the monthly payment amount for a financed purchase or lease, the amount due at signing, and whether an offer pertains to a purchase or a lease.⁵⁶ Other such actions have charged dealers with misrepresentations regarding whether the dealer or consumer is responsible for paying off "negative equity," *i.e.*, the outstanding debt on a vehicle that is being "traded in" as part of another vehicle purchase.⁵⁷ And in other FTC actions, some dealers have lured potential buyers through

⁵⁴ Nat'l Auto. Dealers Ass'n, "NADA Data 2022" 15, <https://www.nada.org/media/4695/download?inline> (listing average dealership advertising per new vehicle sold of \$718 in 2022, and \$602 in 2021).

⁵⁵ *Id.* at 16 (listing 68.2% of estimated advertising expenditures by medium as internet expenditures).

⁵⁶ *See, e.g.*, Complaint, *Timonium Chrysler, Inc.*, No. C-4429 (F.T.C. Jan. 28, 2014) (alleging dealership advertised internet prices and dealer discounts that were only available through rebates not applicable to the typical consumer); Complaint, *Ganley Ford West, Inc.*, No. C-4428 (F.T.C. Jan. 28, 2014) (alleging dealership advertised discounts on vehicle prices, but failed to disclose that discounts were only available on the most expensive models); Complaint, *Progressive Chevrolet Co.*, No. C-4578 (F.T.C. June 13, 2016) (alleging deceptive failure to disclose material conditions of obtaining the lease monthly payment in their online and print advertising); Complaint ¶¶ 38-46, *Fed. Trade Comm'n v. Tate's Auto Ctr. of Winslow, Inc.*, No. 3:18-cv-08176-DJH (D. Ariz. July 31, 2018) (alleging that company issued advertisements for attractive terms but concealed that the terms were only applicable to lease offers); Complaint ¶¶ 36-38, *United States v. New World Auto Imports, Inc.*, No. 3:16-cv-02401-K (N.D. Tex. Aug. 18, 2016) (alleging misrepresentation that terms were for financing instead of leasing); Complaint ¶¶ 85-87, *Fed. Trade Comm'n v. Universal City Nissan, Inc.*, No. 2:16-cv-07329 (C.D. Cal. Sept. 29, 2016) (alleging that dealerships claimed consumers could finance the purchase of vehicles with attractive terms and buried disclosures indicating that such terms were applicable to leases only).

⁵⁷ Complaint ¶¶ 82-84, *Fed. Trade Comm'n v. Universal City Nissan, Inc.*, No. 2:16-cv-07329 (C.D. Cal. Sept. 29, 2016) (alleging misrepresentation that dealer would pay off a consumer's trade-in when in fact consumers were still responsible for outstanding debt on trade-in vehicles); Complaint ¶¶ 17-19, *TXVT Ltd. P'ship*, No. C-4508 (F.T.C. Feb. 12, 2015) (alleging misrepresentation in leasing advertising that the dealership would pay off the negative equity of a consumer's trade in vehicle, when in fact, it was merely rolled into the financed amount for the consumer's newly financed vehicle).

financial incentives incidental to the purchase, such as deceptive promises of a valuable prize that is redeemable only by visiting the dealership.⁵⁸

Deceptive tactics can cause significant consumer harm and impede competition, competitively disadvantaging law-abiding dealers. When dealerships advertise prices, discounts, or other terms that are not actually available to typical consumers, consumers who select that dealership instead of others spend time visiting the dealership or otherwise interacting with the dealership under false pretenses.

2. Unlawful Practices Relating to Add-on Products or Services and Hidden Charges

Another key consumer protection concern is the sale of add-on products or services in a deceptive or unfair manner. Add-ons in connection with the sale or financing of motor vehicles include extended warranties, service and maintenance plans, payment programs, guaranteed automobile or asset protection (“GAP”) agreements, emergency road service, VIN etching and other theft protection devices, and undercoating. Individual add-ons can cost consumers thousands of dollars and can significantly increase the overall cost to the consumer in the transaction.⁵⁹ Moreover, in the past two years, dealers have substantially increased prices for these add-ons, notwithstanding that such products or services largely are not constrained by supply.⁶⁰

⁵⁸ See, e.g., Complaint ¶¶ 12, 17-19, *Traffic Jam Events, LLC*, No. 9395 (F.T.C. Aug. 7, 2020); Complaint ¶¶ 4, 7-9, *Fowlerville Ford, Inc.*, No. C-4433 (F.T.C. Feb. 20, 2014).

⁵⁹ See, e.g., Complaint ¶¶ 25, 27-28, *Fed. Trade Comm’n v. N. Am. Auto. Servs., Inc.*, No. 1:22-cv-0169 (N.D. Ill. Mar. 31, 2022).

⁶⁰ See Ben Eisen, “Car Dealer Markups Helped Drive Inflation, Study Finds,” *Wall St. J.*, Apr. 23, 2023, <https://www.wsj.com/articles/car-dealer-markups-helped-drive-inflation-study-finds-7c1d5a2d>; U.S. Bureau of Labor Statistics, “Automotive Dealerships 2019-2022: Dealer Markup Increases Drive New-Vehicle Consumer Inflation” (Apr. 2023), <https://www.bls.gov/opub/mlr/2023/article/automotive-dealerships-markups.htm>.

A significant consumer protection concern is consumers paying for add-ons without knowing about, or expressly agreeing to, these products or services.⁶¹ This type of payment packing has been a particular concern in the military community.⁶² The protracted and paperwork-heavy vehicle-buying or -leasing process can make it difficult for consumers to spot add-on charges, particularly when advertised prices or payment terms do not mention add-ons.⁶³ If consumers are financing or leasing the vehicle, they undergo a separate financing process after selecting a vehicle, which can include wading through a thick stack of dense paperwork filled with fine print.⁶⁴ For example, according to an FTC law enforcement action, consumers visiting one large dealership group were required to complete a stack of paperwork that ran more than sixty pages and required

⁶¹ See Nat'l Consumer L. Ctr., "Auto Add-ons Add Up: How Dealer Discretion Drives Excessive, Arbitrary, and Discriminatory Pricing" (Oct. 1, 2017), https://www.nclc.org/images/pdf/car_sales/report-auto-add-on.pdf; Adam J. Levitin, "The Fast and the Usurious: Putting the Brakes on Auto Lending Abuses," 108 Geo. L.J. 1257, 1265-66 (2020), https://www.law.georgetown.edu/georgetown-law-journal/wp-content/uploads/sites/26/2020/05/Levitin_The-Fast-and-the-Usurious-Putting-the-Brakes-on-Auto-Lending-Abuses.pdf (discussing "loan packing" as the sale of add-on products that are falsely represented as being required in order to obtain financing); Complaint ¶¶ 12-19, *Fed. Trade Comm'n v. Liberty Chevrolet, Inc.*, No. 1:20-cv-03945 (S.D.N.Y. May 21, 2020) (alleging deceptive and unauthorized add-on charges in consumers' transactions); Complaint ¶¶ 59-64, *Fed. Trade Comm'n v. Universal City Nissan, Inc.*, No. 2:16-cv-07329 (C.D. Cal. Sept. 29, 2016) (alleging deceptive and unauthorized add-on charges in consumers' transactions); Complaint ¶¶ 6, 9, *TT of Longwood, Inc.*, No. C-4531 (F.T.C. July 2, 2015) (alleging misrepresentations regarding prices for added features); see also Auto Buyer Study, *supra* note 25, at 14 ("Several participants who thought that they had not purchased add-ons, or that the add-ons were included at no additional charge, were surprised to learn, when going through the paperwork, that they had in fact paid extra for add-ons. This is consistent with consumers' experiencing fatigue during the buying process or confusion with a financially complex transaction, but would also be consistent with dealer misrepresentations.").

⁶² Consumers for Auto Reliability and Safety, Comment Letter on Motor Vehicle Roundtables, Project No. P104811 at 2-3 (Apr. 1, 2012), https://www.ftc.gov/sites/default/files/documents/public_comments/public-roundtables-protecting-consumers-sale-and-leasing-motor-vehicles-project-no.p104811-00108/00108-82875.pdf (citing a U.S. Department of Defense data call summary that found that the vast majority of military counselors have clients with auto financing problems and cited "loan packing" and yo-yo financing as the most frequent auto lending abuses affecting servicemembers).

⁶³ Complaint ¶¶ 17-19, *Fed. Trade Comm'n v. Liberty Chevrolet, Inc.*, No. 1:20-cv-03945 (S.D.N.Y. May 21, 2020); Complaint ¶ 60, *Fed. Trade Comm'n v. Universal City Nissan, Inc.*, No. 2:16-cv-07329 (C.D. Cal. Sept. 29, 2016); Carole L. Reynolds & Stephanie E. Cox, Fed. Trade Comm'n, "Buckle Up: Navigating Auto Sales and Financing" (2020) [hereinafter Buckle Up], <https://www.ftc.gov/reports/buckle-navigating-auto-sales-financing>.

⁶⁴ See, e.g., Buckle Up, *supra* note 63, at 10-11 (noting the long, complex transaction process); Complaint ¶¶ 23-28, *Fed. Trade Comm'n v. N. Am. Auto. Servs., Inc.*, No. 1:22-cv-01690 (N.D. Ill. Mar. 31, 2022) (same).

more than a dozen signatures.⁶⁵ This paperwork can include hidden charges for add-on products or services, causing consumers to purchase those add-ons without knowing about or agreeing to them, or without knowing or agreeing to their costs or other key terms.⁶⁶ Unscrupulous dealers are able to slip the often considerable additional costs for these items past consumers unnoticed and into purchase contracts through a variety of

⁶⁵ Complaint ¶ 24, *Fed. Trade Comm'n v. N. Am. Auto. Servs., Inc.*, No. 1:22-cv-01690 (N.D. Ill. Mar. 31, 2022); see also Buckle Up, *supra* note 63, at 10-11.

⁶⁶ Complaint ¶¶ 25, 27, 29-32, *Fed. Trade Comm'n v. N. Am. Auto. Servs., Inc.*, No. 1:22-cv-01690 (N.D. Ill. Mar. 31, 2022); see also Complaint ¶¶ 17-19, *Fed. Trade Comm'n v. Liberty Chevrolet, Inc.*, No. 1:20-cv-03945 (S.D.N.Y. May 21, 2020); Dale Irwin, Slough Connealy Irwin & Madden LLC, Comment Letter on Public Roundtables: Protecting Consumers in the Sale and Leasing of Motor Vehicles, Project No. P104811, Submission No. 558507-00060 (Dec. 29, 2011), <https://www.regulations.gov/comment/FTC-2022-0036-0051> (consumer protection lawyer noting “payment packing” among problems “that cry out for scrutiny and regulation”); Michael Archer, Comment Letter on Public Roundtables: Protecting Consumers in the Sale and Leasing of Motor Vehicles, Project No. P104811, Submission No. 558507-00041 at 3 (Aug. 6, 2011), <https://www.regulations.gov/comment/FTC-2022-0036-0014> (workshop panelist stating, “I have seen cases wherein the dealer uses financing to pack in extra costs or to wipe out trade-in value.”); Dawn Smith, Comment Letter on Public Roundtables: Protecting Consumers in the Sale and Leasing of Motor Vehicles, Project No. P104811, Submission No. 558507-00027 (July 27, 2011), <https://www.regulations.gov/comment/FTC-2022-0036-0043> (“Confusing or misleading sales terms[.] Extra fees was [sic] added at the time of purchase and to this day I still do not understand what the fee was for; it made the payment higher.”); Carrie Ferraro, Legal Servs. of N.J., Comment Letter on Public Roundtables: Protecting Consumers in the Sale and Leasing of Motor Vehicles, Project No. P104811, Submission No. 558507-00061 (Dec. 29, 2011), <https://www.regulations.gov/comment/FTC-2022-0036-0059> (citing “[d]ealers engage[d] in packing” as an example of the common consumer complaints of car-sales-related fraud received by LSNJ’s legal advice hotline); Rosemary Shahan, Consumers for Auto Reliability and Safety, Comment Letter on Public Roundtables: Protecting Consumers in the Sale and Leasing of Motor Vehicles, Project No. P104811, Submission No. 558507-00069 at 3 (Jan. 31, 2012), <https://www.regulations.gov/comment/FTC-2022-0036-0069> (noting that “[m]any common auto scams do not generate complaints in proportion to how pervasive or costly the practices are, simply because the consumers generally remain unaware they have been scammed,” including as a result of “[l]oan packing”); Mary W. Sullivan, Matthew T. Jones & Carole L. Reynolds, Fed. Trade Comm’n, “The Auto Buyer Study: Lessons from In-Depth Consumer Interviews and Related Research,” Supplemental Appendix: Redacted Interview Transcripts at 525 (2020) [hereinafter Auto Buyer Study: Appendix], <https://www.ftc.gov/system/files/documents/reports/buckle-navigating-auto-sales-financing/bcpstaffreportautobuyerstudysuppappendix.pdf> (Study participant 169810: consumer had “additional items” charges on contract that consumer could not identify); *id.* at 730, 740-42 (Study participant 188329: dealer did not tell consumer about GAP or service contract but consumer was charged \$599 and \$1950 for those add-ons, respectively); Press Release, N.Y. State Att’y Gen., “A.G. Schneiderman Announces Nearly \$14 Million Settlement with NYC and Westchester Auto Dealerships for Deceptive Practices that Resulted in Inflated Car Prices” (June 17, 2015), <https://ag.ny.gov/press-release/2015/ag-schneiderman-announces-nearly-14-million-settlement-nyc-and-westchester-auto> (“This settlement is part of the [New York] attorney general’s wider initiative to end the practice of ‘jamming,’ unlawfully charging consumers for hidden purchases by car dealerships.”).

means, including by not mentioning them at all,⁶⁷ or by focusing consumers' attention on other aspects of the complex transaction, such as monthly payments, which might increase only marginally with the addition of prorated add-on costs, or may even be made to decrease if the financing term is extended.⁶⁸ This type of conduct can target immigrants, communities of color, and servicemembers.⁶⁹ In other instances, dealers might wait until late in the transaction to mention add-ons, and then do so in a misleading manner. For example, participants in an FTC qualitative study on consumers' car-buying

⁶⁷ Under the Truth in Lending Act ("TILA") and its implementing Regulation Z, required add-on products or services must be factored into the APR and the finance charge disclosed during the transaction. *See* 15 U.S.C. 1605, 1606, 1638; 12 CFR 226.4, 226.18(b), (d), (e), and 226.22. It is legally impermissible for dealers to include charges for such products in a consumer's contract without disclosing them. *See, e.g.,* Complaint ¶¶ 57-60, *Fed. Trade Comm'n v. Stewart Fin. Co. Holdings, Inc.*, No. 1:03-CV-2648 (N.D. Ga. Sept. 4, 2003) (alleging violations for failure to include the cost of required add-on products in the finance charge and annual percentage rate disclosed to consumers).

⁶⁸ *See, e.g.,* Buckle Up, *supra* note 63, at 6; Fed. Trade Comm'n, Military Consumer Financial Workshop, Panel 1, Tr. 19:25-41 (July 19, 2017), <https://www.ftc.gov/news-events/events-calendar/military-consumer-workshop>; Fed. Trade Comm'n, "The Road Ahead: Selling, Financing & Leasing Motor Vehicles," Public Roundtable, Session 2, Tr. at 40-41 (Aug. 2 2011), <https://www.ftc.gov/news-events/events/2011/08/road-ahead-selling-financing-leasing-motor-vehicles> (noting that optional products and services are often already included in the monthly payment prices advertised or quoted); Christopher Kukla, Ctr. for Responsible Lending, Comment Letter on Public Roundtables: Protecting Consumers in the Sale and Leasing of Motor Vehicles, Project No. P104811, Submission No. 558507-00071 at 10 (Feb. 1, 2012), <https://www.regulations.gov/comment/FTC-2022-0036-0068> (discussing how dealers conceal packing by expressing an increase in price in terms of monthly payment); Att'ys General of 31 States & DC, Comment Letter on Public Roundtables: Protecting Consumers in the Sale and Leasing of Motor Vehicles, Project No. P104811, Submission No. 558507-00112 at 5 (Apr. 13, 2012), <https://www.regulations.gov/comment/FTC-2022-0036-0124> (discussing the "age-old auto salesperson's trick" of quoting monthly payment prices without disclosing that the quote includes the cost of optional items that the customer has not yet agreed to purchase).

⁶⁹ *See, e.g.,* Complaint ¶¶ 9, 26, *Fed. Trade Comm'n v. Liberty Chevrolet, Inc.*, No. 1:20-cv-03945 (S.D.N.Y. May 21, 2020) (charging defendants with discriminating on the basis of race, color, and national origin by charging higher interest rates and inflated fees); Press Release, N.Y. State Att'y Gen., "Attorney General James Delivers Restitution to New Yorkers Cheated by Auto Dealership" (Nov. 17, 2020), <https://ag.ny.gov/press-release/2020/attorney-general-james-delivers-restitution-new-yorkers-cheated-auto-dealership> (dealership targeted Chinese speakers for unlawful payment packing or "jamming"); Military Consumer Financial Workshop, Tr. 19:21 (July 19, 2017), <https://www.ftc.gov/news-events/events/2017/07/military-consumer-workshop> (panelist discussing servicemembers experiencing payment packing); *see also* Fed. Trade Comm'n, "Staff Perspective: A Closer Look at the Military Consumer Financial Workshop" 2-3 (Feb. 2018), https://www.ftc.gov/system/files/documents/reports/closer-look-military-consumer-financial-workshop-federal-trade-commission-staff-perspective/military_consumer_workshop_-_staff_perspective_2-2-18.pdf (explaining the unique situation of servicemembers whose steady paychecks make them attractive customers for dealers, while having no or minimal credit history, meaning they qualify for less advantageous credit terms and higher interest rate financing).

experiences cited situations where dealers waited until the financing stage to mention add-ons, after consumers believed they had agreed on terms, and even though many add-ons have nothing to do with financing and were not mentioned at all during the sales process or when prices were initially negotiated.⁷⁰ According to FTC enforcement actions, dealers also have represented that add-ons are required when in fact they are not,⁷¹ have misrepresented the purported benefits of add-ons, and have failed to disclose material limitations.⁷²

Indeed, as previously noted, in a recent FTC enforcement action, the Commission cited a survey finding that 83% of consumers from the named dealers were charged for

⁷⁰ See, e.g., *Buckle Up*, *supra* note 63, at 6 (observing that the introduction of “add-ons during financing discussions caused several participants’ total sale price to balloon from the cash price”); *id.* at 9 (observing that, for most consumers in the study, “add-ons did not come up until the financing process, if at all, after a long car-buying process and at a time when the consumer often felt pressure to close the deal”); *id.* (noting that most study participants’ contracts included add-ons charges, but that many “were unclear what those add-ons included, and sometimes did not realize they had purchased any add-ons at all”); *id.* at 7 (explaining situations where the consumer reached the financing office after negotiating with the sales staff and were then told that the agreed upon price was not compatible with key financing terms—for example, a promised rebate or discount could not be combined with an advertised interest rate).

⁷¹ Complaint ¶¶ 12-19, *Fed. Trade Comm’n v. Liberty Chevrolet, Inc.*, No. 1:20-cv-03945 (S.D.N.Y. May 21, 2020) (alleging deceptive and unauthorized add-on charges in consumers’ transactions); Complaint ¶¶ 59-64, *Fed. Trade Comm’n v. Universal City Nissan, Inc.*, No. 2:16-cv-07329 (C.D. Cal. Sept. 29, 2016) (alleging deceptive and unauthorized add-on charges in consumers’ transactions); Complaint ¶¶ 6, 9, *TT of Longwood*, No. C-4531 (F.T.C. July 2, 2015) (alleging misrepresentations regarding prices for added features); see also *Auto Buyer Study*, *supra* note 25, at 14.

⁷² Complaint ¶¶ 4-14, *Nat’l Payment Network, Inc.*, No. C-4521 (F.T.C. May 4, 2015) (alleging failure to disclose fees associated with financing program; misleading savings claims in advertisements); Complaint ¶¶ 4-13, *Matt Blatt Inc.*, No. C-4532 (F.T.C. July 2, 2015) (alleging failure to disclose fees associated with financing program; misleading savings claims); *Buckle Up*, *supra* note 63, at 10 (noting that some *Auto Buyer Study* participants did not fully understand material aspects of extended warranties or service plans they purchased and “were surprised to discover during the interview that their plans had unexpected limitations” or that “they had to pay out-of-pocket for repairs or services that were not covered”; for example, one “consumer purchased a ‘Lifetime’ maintenance plan, only to discover later that he received a one-year plan that covered periodic oil changes”). Cf. Consent Order ¶¶ 10-16, *Santander Consumer USA, Inc.*, CFPB No. 2018-BCFP-0008 (Nov. 20, 2018) (finding that defendant sold GAP product allegedly providing “full coverage” to consumers with loan-to-value ratios (“LTVs”) above 125%, when in fact coverage was limited to 125% of LTV).

add-on products or services that they did not authorize or as a result of deceptive claims.⁷³

One participant in an FTC qualitative study of consumers' car-buying experiences summed up these issues during an interview after having purchased a vehicle.⁷⁴ The consumer purchased a \$2,000 service contract that the dealer falsely said was free, and a \$900 GAP agreement that the dealer falsely said was mandatory. The consumer only learned about these purchases during the study interview. This consumer remarked:

I feel I've been taken advantage of, to be honest with you. Even though I thought that I was getting a great deal with the interest rate, but I know [sic] see that they're also very sneaky about putting stuff on your paperwork. They only let you skim through the paperwork that you have to sign and they just kind of tell you what it is. This is this, this is that, this is this, and then you just sign it away. You're so tired, you're so worn down, you don't want to be there no more. You just want to get it done and over with. They take advantage of that. Yes, they still play this friendly card, you know, thank you for your business card kind of thing. Like I said, they never lose. They never lose.⁷⁵

Similarly, in response to the Commission's Notice of Proposed Rulemaking, thousands of commenters described issues they faced when purchasing, financing, or leasing a vehicle. Many comments the Commission received in support of the NPRM were from self-identified military consumers

⁷³ Complaint ¶ 27, *Fed. Trade Comm'n v. N. Am. Auto. Servs., Inc.*, No. 1:22-cv-01690 (N.D. Ill. Mar. 31, 2022).

⁷⁴ The study is described in the Commission's reports: Auto Buyer Study, *supra* note 25, and Buckle Up, *supra* note 63. Some industry commenters critiqued the FTC's reliance on this qualitative study. The Commission notes that the study provides helpful qualitative insight from consumer interviews regarding their recent motor vehicle purchases and is one of the many sources the Commission has considered, including consumer complaints, enforcement actions, outreach and dialogue with stakeholders and consumer groups, among others, as described in this SBP and in the NPRM.

⁷⁵ Auto Buyer Study: Appendix, *supra* note 66, at 130 (Study participant 152288); *see also id.* at 202-03 (Study participant 180267: dealership included a charge for GAP in the final paperwork but not in retail sales contract); *id.* at 296 (Study participant 146748: consumer learned during interview with FTC that consumer purchased GAP: "maybe they're just throwing that in there without telling you").

and dealership employees. Examples of supportive comments include the following:

- As a young Marine stationed in a military town I was taken advantage of by a dealership when purchasing my first car. It set me back financially for years. I know of many young military people who purchased vehicle[]s and we[]re instantly so far upside down after leaving the dealership with thousands of dollars in add on junk charges Please make it more difficult for dishonest dealers like these to financially burden young Americans and Americans of any age for that matter.⁷⁶
- Imagine going to a restaurant franchise and order[ing] a burger and fries for \$10 and the franchise employees say[,] ‘Sorry that will be \$25 dollars, there is a \$10 restaurant adjustment price due to market conditions and \$5 for us to place and document your order.’ You would walk away without hesitation because that would [be] absolutely ridiculous. Yet, dealerships are allowed to do exactly that IT IS TIME TO CHANGE AND PROTECT CONSUMERS[.]⁷⁷
- As in many other areas, it is the vulnerable in our society who are probably most affected by such deceptive practices. . . . Sadly, it is often these very people who desperately need a dependable, affordable car for transportation to work, school, shopping, or medical care. To entice, pressure, or trick people into buying a car that is more than they can afford sets them up for financial failure, not only in possibly having a needed car repossessed, but in long-term damage to their credit. . . . In closing, I would be extremely happy to see rules such as those described above enacted, and don’t think these could come a day too soon. It’s a step in the right direction for the protection of the consumer.⁷⁸
- None of us working here at the dealership in sales benefit from [unfair and deceptive practices]. We cringe as much as every customer and have to show up to work every[]day and hope we are not forced to screw someone with these BS products I would hope when [t]he regulators are making their decisions, they understand the positive implications this would have for dealership employees both financially and mentally.⁷⁹
- Generally, I’m not a person in favor of government regulation. However, as a potential customer and cash buyer, I feel there is certainly a need to bring car dealers back into check. I’m just looking for a more honest and transparent process. I don’t want to be taken advantage of. I certainly

⁷⁶ Individual commenter, Doc. No. FTC-2022-0046-4648.

⁷⁷ Individual commenter, Doc. No. FTC-2022-0046-0016.

⁷⁸ Individual commenter, Doc. No. FTC-2022-0046-1216.

⁷⁹ Individual commenter, Doc. No. FTC-2022-0046-3615.

don't want my family members or [s]oldiers to be taken advantage of. Therefore, I feel it is in the best interest of future customers to support this regulation.⁸⁰

- I cannot stress enough my support for these new rules. Currently, dealerships across the US, including the one I work for, have made the car buying process needlessly confusing, expensive, and frustrating by engaging in false advertising and hidden add-on products.⁸¹
- I can tell you after many years of car buying I have NEVER walked out of a dealership feeling good. Even worse, I've never purchased a car feeling like I fully understood what I was getting. . . . Looking forward to seeing the change happen SOON!⁸²
- When I buy a gallon of milk from the store, the price is written next to the milk. When I go pay, I pay the price advertised next to the milk. Would it be OK if I go up to pay and that gallon of milk had anywhere between 1% and 1,200% markup depending on the day, what you look like, what you drove to the store in, if you're a man or a woman?⁸³
- We ended up having to drive 3 hours to the [vehicle we] wanted. Upon arriving to pick[]up the car we were told there was a [\$]4300 increase over MSRP. We were told if we didn't take it they had someone else waiting to purchase it. We needed the car and didn't have time to hunt down another one so ended up purchasing it. Very disappointed in the long and awful process.⁸⁴
- The worst is dealing with car dealers. You never know what the real price is on a vehicle until you spend a few hours with them. Mandatory add[-] on[]s, market availability surcharges, doc fees that vary from dealer to dealer. . . . Then dealing with the finance manager who tr[ie]s to sell you everything you don't[]need. They high pressure the consumer on purchasing extend[ed] warranties. There needs [to be] some sort of policing [of] these unscrupulous car dealers to protect the buyers.⁸⁵
- This is a good start to making car purchasing a better experience. . . . I remember looking at a Lexus and being told by the dealership, the only one in the state, that [S]cotchguard and undercoating were mandatory and they refused to sell any vehicles without them. There were two Acura dealerships in town and one of them included 'free' lifetime oil changes

⁸⁰ Individual commenter, Doc. No. FTC-2022-0046-7366.

⁸¹ Individual commenter, Doc. No. FTC-2022-0046-3693.

⁸² Individual commenter, Doc. No. FTC-2022-0046-3678.

⁸³ Individual commenter, Doc. No. FTC-2022-0046-1479.

⁸⁴ Individual commenter, Doc. No. FTC-2022-0046-1878.

⁸⁵ Individual commenter, Doc. No. FTC-2022-0046-0825.

that I didn't learn about until negotiating the price and had already spent two hours in negotiations. All of these services/price adjustments were not disclosed at the start of the negotiation and were only revealed either in the manager's office or when the purchase agreement was presented to me by the salesperson. After spending time on the test drive and negotiating the price, it felt that these last minute price adjustments were being revealed that late in the process so that I wouldn't leave.⁸⁶

- Please enact and enforce these regulations to protect vulnerable consumers from predatory business practices enjoyed by dealers. Our family experienced such practices when trying to purchase a vehicle in early 2022. It was only after five hours at the dealership that we discovered the dealer had added on a \$3000 market adjustment and \$3100 in other add-ons (nitrogen-filled tires, LoJack, paint protection) to MSRP. This raised the price by about \$6000 and caused us to use extra PTO over that week to find a new vehicle at a price within our budget. Greater transparency in the car-buying process is desperately needed to protect vulnerable consumers—who usually lack any bargaining power—against power dealer networks and their special interest groups⁸⁷

C. *Law Enforcement and Other Responses*

The Commission has taken action to protect consumers from deceptive and unfair acts or practices in the motor vehicle marketplace. As noted in the NPRM, the Commission has brought more than 50 auto law enforcement actions;⁸⁸ led two law

⁸⁶ Individual commenter, Doc. No. FTC-2022-0046-4833.

⁸⁷ Individual commenter, Doc. No. FTC-2022-0046-1690.

⁸⁸ Complaint, *Fed. Trade Comm'n v. Rhineland Auto Ctr., Inc.*, No. 3:23-cv-00737 (W.D. Wis. Oct. 24, 2023); Complaint, *Fed. Trade Comm'n v. Passport Auto. Grp., Inc.*, No. 8:22-cv-02670-GLS (D. Md. Oct. 18, 2022); Complaint, *Fed. Trade Comm'n v. N. Am. Auto. Servs., Inc.*, No. 1:22-cv-01690 (N.D. Ill. Mar. 31, 2022); Complaint, *Traffic Jam Events, LLC*, No. 9395 (F.T.C. Aug. 7, 2020); Complaint, *Fed. Trade Comm'n v. Liberty Chevrolet, Inc.*, No. 1:20-cv-03945 (S.D.N.Y. May 21, 2020); Complaint, *Federal-Mogul Motorparts LLC*, No. C-4717 (F.T.C. May 12, 2020); Complaint, *LightYear Dealer Techs., LLC*, No. C-4687 (F.T.C. Sept. 3, 2019); Complaint, *Fed. Trade Comm'n v. Passport Imports, Inc.*, No. 8:18-cv-03118 (D. Md. Oct. 10, 2018); Complaint, *Fed. Trade Comm'n v. Tate's Auto Ctr. of Winslow, Inc.*, No. 3:18-cv-08176-DJH (D. Ariz. July 31, 2018); Complaint, *Cowboy AG, LLC*, No. C-4639 (F.T.C. Jan. 4, 2018); Complaint, *Fed. Trade Comm'n v. Norm Reeves, Inc.*, No. 8:17-cv-01942 (C.D. Cal. Nov. 3, 2017); Complaint, *Asbury Auto. Grp., Inc.*, No. C-4606 (F.T.C. Mar. 22, 2017); Complaint, *CarMax, Inc.*, No. C-4605 (F.T.C. Mar. 22, 2017); Complaint, *West-Herr Auto. Grp., Inc.*, No. C-4607 (F.T.C. Mar. 22, 2017); Complaint, *Fed. Trade Comm'n v. Volkswagen Grp. of Am., Inc.*, No. 3:16-cv-01534 (N.D. Cal. Jan. 31, 2017); Complaint, *Fed. Trade Comm'n v. Uber Techs., Inc.*, No. 3:17-cv-00261 (N.D. Cal. Jan. 19, 2017); Complaint, *Gen. Motors LLC*, No. C-4596 (F.T.C. Dec. 8, 2016); Complaint, *Jim Koons Mgmt. Co.*, No. C-4598 (F.T.C. Dec. 8, 2016); Complaint, *Lithia Motors, Inc.*, No. C-4597 (F.T.C. Dec. 8, 2016); Complaint, *Fed. Trade Comm'n v. Universal City Nissan, Inc.*, No. 2:16-cv-07329 (C.D. Cal. Sep. 29, 2016);

enforcement sweeps, including one that involved 181 State enforcement actions;⁸⁹ published two reports on a qualitative study of consumer experiences while purchasing motor vehicles; and held workshops with various stakeholders to discuss the motor vehicle marketplace.⁹⁰

Complaint, *United States v. New World Auto Imports, Inc.*, No. 3:16-cv-02401-K (N.D. Tex. Aug. 18, 2016); Complaint, *Progressive Chevrolet Co.*, No. C-4578 (F.T.C. June 13, 2016); Complaint, *BMW of N. Am., LLC*, No. C-4555 (F.T.C. Oct. 21, 2015); Complaint, *United States v. Tricolor Auto Acceptance, LLC*, No. 3:15-cv-3002 (N.D. Tex. Sept. 15, 2015); Complaint, *JS Autoworld, Inc.*, No. C-4535 (F.T.C. Aug. 13, 2015); Complaint, *TC Dealership, L.P.*, No. C-4536 (F.T.C. Aug. 13, 2015); Complaint, *Matt Blatt Inc.*, No. C-4532 (F.T.C. July 2, 2015); Complaint, *TT of Longwood, Inc.*, No. C-4531 (F.T.C. July 2, 2015); Complaint, *Fin. Select, Inc.*, No. C-4528 (F.T.C. June 2, 2015); Complaint, *First Am. Title Lending of Ga., LLC*, No. C-4529 (F.T.C. June 2, 2015); Complaint, *City Nissan Inc.*, No. C-4524 (F.T.C. May 4, 2015); Complaint, *Jim Burke Auto., Inc.*, No. C-4523 (F.T.C. May 4, 2015); Complaint, *Nat'l Payment Network, Inc.*, No. C-4521 (F.T.C. May 4, 2015); Complaint, *TXVT Ltd. P'ship*, No. C-4508 (F.T.C. Feb. 12, 2015); Complaint, *Fed. Trade Comm'n v. Regency Fin. Servs., LLC*, No. 1:15-cv-20270-DPG (S.D. Fla. Jan. 26, 2015); Complaint, *United States v. Billion Auto, Inc.*, No. 5:14-cv-04118-MWB (N.D. Iowa Dec. 11, 2014); Complaint, *Fed. Trade Comm'n v. Ramey Motors, Inc.*, No. 1:14-cv-29603 (S.D. W. Va. Dec. 11, 2014); Complaint, *Fed. Trade Comm'n v. Consumer Portfolio Servs., Inc.*, No. 14-cv-00819 (C.D. Cal. May 28, 2014); Complaint, *Nissan N. Am., Inc.*, No. C-4454 (F.T.C. May 1, 2014); Complaint, *TBWA Worldwide, Inc.*, No. C-4455 (F.T.C. May 1, 2014); Complaint, *Bill Robertson & Sons, Inc.*, No. C-4451 (F.T.C. Apr. 11, 2014); Complaint, *Paramount Kia of Hickory, LLC*, No. C-4450 (F.T.C. Apr. 11, 2014); Complaint, *Fed. Trade Comm'n v. Abernathy Motor Co.*, No. 3:14-cv-00063-BRW (E.D. Ark. Mar. 12, 2014); Complaint, *Fowlerville Ford, Inc.*, No. C-4433 (F.T.C. Feb. 20, 2014); Complaint, *Infiniti of Clarendon Hills, Inc.*, No. C-4438 (F.T.C. Feb. 20, 2014); Complaint, *Luis Alfonso Sierra*, No. C-4434 (F.T.C. Feb. 20, 2014); Complaint, *Mohammad Sabha*, No. C-4435 (F.T.C. Feb. 20, 2014); Complaint, *Norm Reeves, Inc.*, No. C-4436 (F.T.C. Feb. 20, 2014); Complaint, *Ganley Ford West, Inc.*, No. C-4428 (F.T.C. Jan. 28, 2014); Complaint, *Timonium Chrysler, Inc.*, No. C-4429 (F.T.C. Jan. 28, 2014); Complaint, *Courtesy Auto Grp., Inc.*, No. 9359 (F.T.C. Jan. 7, 2014); Complaint, *Franklin's Budget Car Sales, Inc.*, No. C-4371 (F.T.C. Oct. 3, 2012); Complaint, *Fed. Trade Comm'n v. Matthew J. Loewen*, No. 2:12-cv-01207-MJP (W.D. Wash. July 13, 2012); Complaint, *Key Hyundai of Manchester, LLC*, No. C-4358 (F.T.C. May 4, 2012); Complaint, *Billion Auto, Inc.*, No. C-4356 (F.T.C. May 1, 2012); Complaint, *Frank Myers AutoMaxx, LLC*, No. C-4353 (F.T.C. Apr. 19, 2012); Complaint, *Ramey Motors, Inc.*, No. C-4354 (F.T.C. Apr. 19, 2012); Complaint, *Fed. Trade Comm'n v. Hope for Car Owners, LLC*, No. 2:12-cv-00778-GEB-EFB (E.D. Cal. Mar. 27, 2012); Complaint, *Fed. Trade Comm'n v. NAFSO VLM, Inc.*, No. 2:12-cv-00781-KJM-EFB (E.D. Cal. Mar. 27, 2012); Complaint, *Fed. Trade Comm'n v. Stewart Fin. Co. Holdings, Inc.*, No. 1:03-CV-2648 (N.D. Ga. Sept. 4, 2003); Complaint, *Pacifico Ardmore, Inc.*, No. C-3920 (F.T.C. Feb. 7, 2000).

⁸⁹ Operation Steer Clear and Operation Ruse Control, brought with State law enforcement partners around the nation and Canada, encompassed 252 enforcement actions. See Press Release, Fed. Trade Comm'n, "Multiple Law Enforcement Partners Announce Crackdown on Deception, Fraud in Auto Sales, Financing and Leasing" (Mar. 26, 2015), <https://www.ftc.gov/news-events/press-releases/2015/03/ftc-multiple-law-enforcement-partners-announce-crackdown>.

⁹⁰ For example, the FTC has held public workshops: (1) in conjunction with the National Highway Traffic Safety Administration to examine the consumer privacy and security issues posed by automated and connected motor vehicles, see Fed. Trade Comm'n, "Connected Cars: Privacy, Security Issues Related to Connected, Automated Vehicles" (June 28, 2017), <https://www.ftc.gov/news-events/events-calendar/2017/06/connected-cars-privacy-security-issues-related-connected>; (2) to explore competition and related issues in the U.S. motor vehicle distribution system including how consumers and businesses may

As discussed in the NPRM, the Commission's law enforcement partners have also brought actions addressing unfair, abusive, and deceptive practices in the motor vehicle industry. For example, the Consumer Financial Protection Bureau ("CFPB") has taken action against third-party motor vehicle financing entities in matters that raise similar, and sometimes identical, claims of deceptive and unfair acts or practices as have been at issue in FTC enforcement actions.⁹¹

be affected by State regulations and emerging trends in the industry, *see* Fed. Trade Comm'n, "Auto Distribution: Current Issues & Future Trends" (Jan. 19, 2016), <https://www.ftc.gov/news-events/events-calendar/2016/01/auto-distribution-current-issues-future-trends>; (3) on military consumer financial issues, including automobile purchases, financing, and leasing, *see* Fed. Trade Comm'n, "Military Consumer Workshop" (July 19, 2017), <https://www.ftc.gov/news-events/events-calendar/military-consumer-workshop>; and (4) through a series of three roundtables on numerous issues in selling, financing, and leasing automobiles, *see* Fed. Trade Comm'n, "The Road Ahead: Selling, Financing & Leasing Motor Vehicles" (Apr. 12, 2011), <https://www.ftc.gov/news-events/events-calendar/2011/04/road-ahead-selling-financing-leasing-motor-vehicles>; Fed. Trade Comm'n, "The Road Ahead: Selling, Financing & Leasing Motor Vehicles" (Aug. 2, 2011), <https://www.ftc.gov/news-events/events-calendar/2011/08/road-ahead-selling-financing-leasing-motor-vehicles>; Fed. Trade Comm'n, "The Road Ahead: Selling, Financing & Leasing Motor Vehicles" (Nov. 17, 2011), <https://www.ftc.gov/news-events/events-calendar/2011/11/road-ahead-selling-financing-leasing-motor-vehicles>; *see also* Consumers for Auto Reliability and Safety, Comment Letter on Motor Vehicle Roundtables, Project No. P104811, at 6 (Apr. 1, 2012), https://www.ftc.gov/sites/default/files/documents/public_comments/public-roundtables-protecting-consumers-sale-and-leasing-motor-vehicles-project-no.p104811-00108/00108-82875.pdf (stating that the Director of the Navy-Marine Corps Relief Society in San Diego indicated before the California Assembly Committee on Banking and Finance that "the number one issue they are confronted with is used car dealers who are taking advantage of military personnel"). These events, and others, have included speakers representing consumers, dealers, regulators, and other industry stakeholders.

⁹¹ The CFPB has brought at least 23 enforcement actions involving motor vehicles, financing, or add-on products or services. *See* Consent Order ¶¶ 3, 13-57, *Toyota Motor Credit Corp.*, CFPB No. 2023-CFPB-0015 (Nov. 20, 2023) (finding auto lender engaged in unfair or abusive acts or practices by making it unreasonably difficult for consumers to cancel unwanted add-ons; failing to ensure consumers received refunds of payments they had made for certain add-ons that had become void and worthless; and failing to provide refunds owed to consumers who canceled their vehicle service agreements); Complaint ¶¶ 75-104, *CFPB v. USASF Servicing, LLC*, No. 1:23-cv-03433-VMC (N.D. Ga. Aug. 2, 2023) (alleging auto loan servicer illegally disabled and repossessed consumers' vehicles, wrongfully double-billed consumers, misapplied payments, and failed to ensure refunds of unearned GAP premiums to which consumers were entitled); Consent Order ¶¶ 7-33, *TMX Finance LLC*, CFPB No. 2023-CFPB-0001 (Feb. 23, 2023) (finding auto lender understated and inaccurately disclosed the finance charge and annual percentage rate on loans and unfairly charged borrowers for a product that provided no benefit); Complaint ¶¶ 33-135, 171-226, *CFPB v. Credit Acceptance Corp.*, No. 1:23-cv-00038 (S.D.N.Y. Jan. 4, 2023) (alleging indirect auto lender misrepresented key terms of loans provided to subprime and deep-subprime consumers and substantially assisted dealers in the deceptive sale of add-on products); Consent Order ¶¶ 7-22, *Wells Fargo Bank, N.A.*, CFPB No. 2022-CFPB-0011 (Dec. 20, 2022) (finding bank incorrectly applied borrowers' auto loan payments, erroneously assessed fees and interest, wrongly repossessed borrowers' vehicles, and failed to ensure borrowers received refunds of unearned GAP fees at early payoff); Consent Order ¶¶ 4-55, *Hyundai Capital America*, CFPB No. 2022-CFPB-0005 (July 26, 2022) (finding auto finance company

In addition, States have engaged in enforcement actions alleging similar dealer misconduct in the motor vehicle dealer marketplace, and have implemented legislative and regulatory measures to address corresponding consumer protection issues. With regard to law enforcement, State regulators and Attorneys General have participated in law enforcement sweeps with the FTC, and have filed hundreds of actions alleging unlawful conduct by motor vehicle dealerships across the country.⁹² Furthermore, with

furnished inaccurate information about consumers to credit reporting agencies); Consent Order ¶¶ 4-14, *3rd Generation, Inc.*, CFPB No. 2021-CFPB-0003 (May 21, 2021) (finding subprime auto loan servicer charged interest on late payments of fees without the knowledge or consent of consumers); Consent Order ¶¶ 8-50, *Santander Consumer USA Inc.*, CFPB No. 2020-BCFP-0027 (Dec. 22, 2020) (finding auto finance company provided inaccurate records to credit reporting agencies); Consent Order ¶¶ 11-52, *Nissan Motor Acceptance Corp.*, CFPB No. 2020-BCFP-0017 (Oct. 13, 2020) (finding auto finance company misrepresented financing extension agreements, repossessions, and limitations to consumer bankruptcy protections); Consent Order ¶¶ 8-22, *Lobel Fin. Corp.*, CFPB No. 2020-BCFP-0016 (Sept. 21, 2020) (finding auto-loan servicer unfairly charged delinquent consumers add-on charges in the form of Loss Damage Waiver premiums); Consent Order ¶¶ 6-30, *Santander Consumer USA Inc.*, CFPB No. 2018-BCFP-0008 (Nov. 20, 2018) (finding auto finance company sold GAP to consumers with LTV over 125%, misrepresenting that such consumers would be fully covered with total loss); Consent Order ¶¶ 27-39, *Wells Fargo Bank, N.A.*, CFPB No. 2018-BCFP-0001 (Apr. 20, 2018) (finding bank imposed duplicative or unnecessary forced-placed auto loan insurance on consumers); Consent Order ¶¶ 12-23, *Toyota Motor Credit Corp.*, CFPB No. 2016-CFPB-0002 (Feb. 2, 2016) (finding auto finance company engaged in discriminatory pricing markup for motor vehicle financing, without regard to creditworthiness); Consent Order ¶¶ 73-75, *Y King S Corp.*, CFPB No. 2016-CFPB-0001 (Jan. 21, 2016) (finding used car dealer failed to disclose mandatory add-ons as financing charges); Consent Order ¶¶ 12-51, *Interstate Auto Grp., Inc.*, CFPB No. 2015-CFPB-0032 (Dec. 17, 2015) (finding dealership and financing company reported information they knew or had reasonable cause to believe was inaccurate to credit reporting entities, harming consumer credit); Consent Order ¶¶ 7-90, *Westlake Servs., LLC*, CFPB No. 2015-CFPB-0026 (Sept. 30, 2015) (finding indirect auto financing entity used illegal debt collection tactics); Consent Order ¶¶ 8-23, *Fifth Third Bank*, CFPB No. 2015-CFPB-0024 (Sept. 28, 2015) (finding discrimination against loan applicants in credit applications based on characteristics such as race and national origin); Consent Order ¶¶ 9-24, *Am. Honda Fin. Corp.*, CFPB No. 2015-CFPB-0014 (July 14, 2015) (same); Consent Order ¶¶ 4-60, *DriveTime Auto. Grp., Inc.*, CFPB No. 2014-CFPB-0017 (Nov. 19, 2014) (finding buy-here-pay-here dealership made harassing debt collection calls and provided inaccurate credit information to credit reporting agencies); Consent Order ¶¶ 4-37, *First Investors Fin. Servs. Grp., Inc.*, CFPB No. 2014-CFPB-0012 (Aug. 20, 2014) (finding auto financing company provided inaccurate records to credit reporting agencies); Consent Order ¶¶ 7-27, *Ally Fin. Inc.*, CFPB No. 2013-CFPB-0010 (Dec. 20, 2013) (finding auto lender engaged in discriminatory pricing); Consent Order ¶¶ 14-29, *U.S. Bank Nat'l Ass'n*, CFPB No. 2013-CFPB-0004 (June 26, 2013) (finding bank failed to properly disclose all the fees charged to participants in the companies' Military Installment Loans and Educational Services auto loans program, and misrepresented the true cost and coverage of add-on products financed along with the auto loans); Consent Order ¶¶ 10-22, *Dealers' Fin. Servs., LLC*, CFPB No. 2013-CFPB-0004 (June 26, 2013) (finding financing company made deceptive statements regarding the cost of add-on products and the scope of coverage of the vehicle service contract).

⁹² Operation Steer Clear and Operation Ruse Control, brought with State law enforcement partners around the nation and Canada, encompassed 252 enforcement actions. See Press Release, Fed. Trade Comm'n,

regard to legislative and regulatory efforts, at least four States have enacted consumer protection measures relating to pricing or add-ons by motor vehicle dealers.⁹³ For example, to “ensure that dealers do not add in hidden or undisclosed costs after the price for a vehicle has been advertised,” Oregon promulgated a rule that requires dealerships to state an “offering price” that is the actual offer and amount the consumer can pay to own the vehicle, excluding only taxes and other specific items.⁹⁴ California and Wisconsin have similarly enacted laws that make it unlawful for dealerships to advertise a total price without including additional costs to the purchaser outside the mandatory tax, title, and registration fees.⁹⁵ Other States, such as Indiana, have enacted codes that prohibit the sale of add-ons in certain circumstances.⁹⁶

The Commission and its law enforcement partners also regularly provide business guidance and consumer education regarding the motor vehicle marketplace. The Commission has compiled its motor vehicle business guidance into a portal on its website, with links to guidance documents, frequently asked questions, and legal resources.⁹⁷ Likewise, the Commission provides a webpage for consumers to learn more

“Multiple Law Enforcement Partners Announce Crackdown on Deception, Fraud in Auto Sales, Financing and Leasing” (Mar. 26, 2015), <https://www.ftc.gov/news-events/press-releases/2015/03/ftc-multiple-law-enforcement-partners-announce-crackdown>. Separately, the California Attorney General’s office sued a dealership chain under State consumer protection laws for deceiving consumers about add-on product charges and misrepresenting consumers’ income on credit applications; the alleged practices specifically targeted low-income consumers with subprime credit. Complaint ¶¶ 37-86, *People v. Paul Blanco’s Good Car Co. Auto Grp.*, No. RG-19036081 (Cal. Super. Ct. Sept. 23, 2019).

⁹³ See, e.g., Cal. Veh. Code 11713.1(b), (c); Or. Admin. R. 137-020-0020(3)(c); Wis. Admin. Code Trans. 139.03(3); Ind. Code 24-4.5-3-202.

⁹⁴ Or. Admin. R. 137-020-0020(3)(c); Official Commentary, Or. Admin. R. 137-020-0020(3)(c).

⁹⁵ Cal. Veh. Code 11713.1(b), (c); Wis. Admin. Code Trans. 139.03(3).

⁹⁶ Ind. Code 24-4.5-3-202(3)(e)(ix) (prohibiting the sale of any GAP coverage when the LTV is less than 80%); Cal. Civ. Code 2982.12(a)(5)(B) (prohibiting the sale of any GAP waiver in three scenarios, including when the amount financed for the vehicle exceeds the amount covered by the GAP waiver).

⁹⁷ See Fed. Trade Comm’n, Business Guidance, “Automobiles,” <https://www.ftc.gov/business-guidance/industry/automobiles> (last visited Dec. 5, 2023).

about buying, financing, and leasing motor vehicles.⁹⁸ Several States have published similar such guidance manuals for motor vehicle dealers,⁹⁹ while others have provided online consumer education resources.¹⁰⁰

While some commenters stated that existing Federal and State efforts are sufficient, recent Commission and partner actions indicate that misconduct has persisted despite prior law enforcement and other efforts, and despite the NPRM's detailed description of chronic problems relating to bait-and-switch tactics and hidden add-on and other charges. For example, in a recent enforcement action, filed after publication of the NPRM, the Commission charged several auto dealer locations in an auto dealership group with misrepresenting the price of vehicles. According to the complaint, the dealers advertised one price to lure consumers to their dealerships, then charged them hundreds to thousands of dollars more than the advertised price by tacking on bogus extra fees for inspection, reconditioning, preparation, and certification.¹⁰¹ The action also addressed the practice of dealers charging Black and Latino consumers these fees more often and in higher amounts.¹⁰²

⁹⁸ See Fed. Trade Comm'n, "Buying and Owning a Car," <https://consumer.ftc.gov/shopping-and-donating/buying-and-owning-car> (last visited Dec. 5, 2023).

⁹⁹ See, e.g., Ill. Sec'y of State Police, Dealer Handbook (Apr. 2022), https://www.ilsos.gov/publications/pdf_publications/sos_dop66.pdf; Wis. DOT – Div. of Motor Vehicles, Motor Vehicle Salesperson Manual – 2020, <https://wisconsindot.gov/Documents/dmv/shared/salesmanual-20.pdf>; Enf't Div. of the Tex. Dep't of Motor Vehicles, Motor Vehicle Dealer Manual (2017), https://www.txdmv.gov/sites/default/files/body-files/Motor_Vehicle_Dealer_Manual.pdf.

¹⁰⁰ See, e.g., Cal. Dept. of Just., "Buying and Maintaining a Car," <https://oag.ca.gov/consumers/general/cars> (last visited Dec. 5, 2023); Fla. Highway Safety & Motor Vehicles, "Buying from a Licensed Dealer," <https://www.flhsmv.gov/safety-center/consumer-education/buying-vehicle-florida/buying-licensed-dealer> (last visited Dec. 5, 2023); Or. Dep't of Just., "Buying a Vehicle," <https://www.doj.state.or.us/consumer-protection/motor-vehicles/buying-a-vehicle/> (last visited Dec. 5, 2023).

¹⁰¹ Complaint ¶ 17, *Fed. Trade Comm'n v. Passport Auto. Grp., Inc.*, No. 8:22-cv-2670 (D. Md. Oct. 18, 2022).

¹⁰² *Id.* ¶ 18. Recent actions outside the auto marketplace, even in transactions that may not be as complex and time consuming as motor vehicle transactions, further illustrate unfair and deceptive practices related to advertising, add-ons, and hidden charges. In one such action, the court noted "the realities of the disparate

Multiple actions by partners since publication of the Commission’s NPRM have involved auto add-ons. The Commission and the State of Wisconsin alleged that a dealership group, its current and former owners, and its general manager deceived consumers by tacking on hundreds or even thousands of dollars for add-ons without those consumers’ authorization or by leading the consumers to believe the add-ons were mandatory, and doing so disproportionately more frequently with American Indian customers.¹⁰³ The CFPB and the New York State Office of the Attorney General alleged that a subprime auto lender knew or recklessly disregarded that dealers were tricking borrowers into purchasing add-on products without their knowledge or consent and had incentivized such behavior.¹⁰⁴ In addition, the Commonwealth of Massachusetts has brought two recent cases involving unfair add-on pricing practices.¹⁰⁵ In one such case, Massachusetts emphasized the dynamics of auto transactions that frequently lead to

bargaining power” between the corporate defendant and its customers, adding that customers “might have believed the [add-on] fees were mandatory,” and “might not have had the time” to negotiate or complain about them. *Fed. Trade Comm’n v. FleetCor Techs., Inc.*, 1:19-cv-5727, 2022 WL 3350066, at *13 (N.D. Ga. Aug. 9, 2022) (granting the Commission’s motion to exclude the defendant’s expert testimony); *see also Fed. Trade Comm’n v. FleetCor Techs., Inc.*, 620 F. Supp. 3d 1268, 1337 (N.D. Ga. 2022) (finding on summary judgment that (1) defendants did not tell consumers about fees at sign-up; (2) disclosures about fees in contractual documents were inadequate; and (3) defendants failed to get consent to add-on charges); *id.* at 1334 (concluding that defendants had “charged a slew of fees that: were never discoverable to customers [and] were obscured by undecipherable language”); Complaint ¶¶ 41-43, *Fed. Trade Comm’n v. Harris Originals of NY, Inc.*, No. 2:22-cv-4260 (E.D.N.Y. July 20, 2022) (alleging that a jewelry company charged military consumers for add-on products without their consent or under false pretenses); Complaint ¶¶ 61-73, *Fed. Trade Comm’n v. Benefytt Techs., Inc.*, No. 8:22-cv-1794 (M.D. Fla. Aug. 8, 2022) (alleging illegal add-on charges by healthcare companies); Complaint ¶¶ 1-4, *Fed. Trade Comm’n v. First Am. Payment Sys., LP*, No. 4:22-cv-654 (E.D. Tex. July 29, 2022) (alleging that a payment processing company misrepresented the terms and costs of its services, resulting in unexpected and unauthorized fees); Fed. Trade Comm’n, Notice of Proposed Rulemaking, Trade Regulation Rule on Unfair or Deceptive Fees, 88 FR 77420, 77435-37 (released Oct. 11, 2023; published Nov. 9, 2023), <https://www.govinfo.gov/content/pkg/FR-2023-11-09/pdf/2023-24234.pdf>.

¹⁰³ Complaint ¶¶ 3-5, 11-18, 33-43, 48-51, *Fed. Trade Comm’n v. Rhinelander Auto Ctr., Inc.*, No. 3:23-cv-00737 (W.D. Wis. Oct. 24, 2023).

¹⁰⁴ Complaint ¶¶ 128-30, *CFPB v. Credit Acceptance Corp.*, No. 1:23-cv-38 (S.D.N.Y. Jan. 4, 2023).

¹⁰⁵ Complaint ¶ 3, *Massachusetts v. Jaffarian’s Serv., Inc.*, No. 2277-cv-881 (Mass. Super. Ct. Sept. 15, 2022); Assurance of Discontinuance ¶¶ 7-9, *In re Hometown Auto Framingham, Inc.*, No. 2384-cv-116 (Mass. Super. Ct. Jan. 17, 2023).

deceptive and unfair practices, particularly with respect to add-ons, noting that add-on products “are often sprung on consumers in the final steps of completing a transaction” after “multiple rounds of negotiation on the price of a car and/or car financing.”¹⁰⁶

Efforts to combat deceptive and unfair practices in the motor vehicle industry since the NPRM have gone beyond enforcement actions. The CFPB announced that it uncovered several unlawful practices through supervisory examinations, including auto loan servicers charging for add-ons that provide no benefit to the consumer¹⁰⁷ and failing to ensure consumers received refunds for add-on products that no longer offered any benefits.¹⁰⁸ In addition, the State of California enacted new legislation that regulates a particular type of add-on product—GAP agreements.¹⁰⁹ A press release introducing the legislation cited concerns about unfair practices in the sale of GAP agreements, stating that this add-on has little value and is often targeted at consumers with lower incomes and subprime credit.¹¹⁰ California’s law requires several disclosures related to GAP agreements, including disclosures pertaining to their financed cost and informing

¹⁰⁶ Complaint ¶ 5, *Massachusetts v. Jaffarian’s Serv., Inc.*, No. 2277-cv-881 (Mass. Super. Ct. Jan. 17, 2023).

¹⁰⁷ Consumer Fin. Prot. Bureau, “Supervisory Highlights: Issue 24, Summer 2021” 3-4 (June 2021), https://files.consumerfinance.gov/f/documents/cfpb_supervisory-highlights_issue-24_2021-06.pdf (finding servicers added and maintained unnecessary collateral protection insurance (CPI) when consumers had adequate insurance and thus the CPI provided no benefit to the consumers, and also when consumers’ vehicles had been repossessed even though no actual insurance protection was provided after repossession).

¹⁰⁸ Consumer Fin. Prot. Bureau, “Supervisory Highlights: Issue 28, Fall 2022” 4-5 (Nov. 2022), https://files.consumerfinance.gov/f/documents/cfpb_supervisory-highlights_issue-28_2022-11.pdf (finding consumers paid off their vehicle financing early but servicers failed to ensure consumers received refunds for unearned fees related to add-on products which no longer offered any possible benefit to consumers after payoff).

¹⁰⁹ Cal. Civ. Code 2982.12.

¹¹⁰ Press Release, Off. of the Att’y Gen. of Cal., “Attorney General Bonta and Assemblymember Maienschein Announce Legislation to Strengthen Protections for Car Buyers” (Feb. 16, 2022), <https://oag.ca.gov/news/press-releases/attorney-general-bonta-and-assemblymember-maienschein-announce-legislation>.

consumers that such products are optional.¹¹¹ The law also prohibits the sale of GAP agreements that will not actually cover consumers' debt.¹¹²

Despite the array of actions by the Commission and its partners, unfairness and deception continue in the motor vehicle marketplace, including (1) deceptive or unfair sales and advertising tactics and (2) hidden charges, particularly with respect to add-on products or services. To address the harm these issues inflict on consumers and on law-abiding dealers, the Final Rule, in general:

- Prohibits dealers from making misrepresentations regarding material information, including about the cost of the vehicle, the financing terms, and the availability of rebates or discounts;
- Requires dealers to disclose the offering price of the vehicle—its full cash price, provided that dealers may exclude required government charges; that optional add-ons are not required; the total of payments for the vehicle when making a representation about monthly payment; and that a discussed lower monthly payment will increase the total amount the consumer will pay, if true;
- Prohibits dealers from charging for add-on products or services that provide no benefit to the consumer; and
- Requires dealers to obtain express, informed consent from the consumer for any charge.

As discussed in the section-by-section analysis in SBP III and in response to comments, the Commission is declining to finalize certain provisions proposed in the NPRM, including the provision that dealers must disclose a list of prices for all optional add-on products or services, and the provision that dealers must obtain certain signed declinations from consumers prior to charging for optional add-on products or services. The Commission also is finalizing the defined terms “Covered Motor Vehicle” and

¹¹¹ Cal. Civ. Code 2982.12.

¹¹² *Id.*

“Covered Motor Vehicle Dealer” to reflect edits to narrow the scope of these definitions compared to the scope of the terms “Motor Vehicle” and “Motor Vehicle Dealer” in the NPRM.

III. Section-by-Section Analysis

The following discussion provides a section-by-section analysis that states the provisions proposed in the NPRM, and discusses the comments received, the Commission’s responses to comments, and the provisions adopted in the Final Rule.¹¹³

A. § 463.1: Authority

Section 463.1 states that the Final Rule is promulgated pursuant to Section 1029 of the Dodd-Frank Act, and that it is an unfair or deceptive act or practice within the meaning of Section 5(a)(1) of the FTC Act to violate, directly or indirectly, any provision of the Final Rule, including the recordkeeping requirements, which are necessary to prevent such unfair or deceptive acts or practices and to enforce this Rule.¹¹⁴ The prohibition against violating any applicable provision “directly or indirectly” applies to each section of part 463. As discussed in SBP I.A, Section 1029 authorizes the FTC to prescribe rules under Sections 5 and 18(a)(1)(B) of the FTC Act with respect to motor vehicle dealers predominantly engaged in the sale and servicing of motor vehicles, the

¹¹³ Regarding the thousands of comments received, the Commission notes that many commenters raised similar concerns or addressed overlapping issues. To avoid repetition, the Commission has endeavored to respond to issues raised in similar comments together. Responses provided in any given section apply equally to comments addressing the same subject in the context of other sections. Moreover, throughout the SBP, the Commission discusses justifications for the Final Rule that are informed by its careful consideration of all comments received, even where that discussion is not linked to a particular comment.

¹¹⁴ The proposed authority provision in the NPRM omitted the second reference to “unfair” acts or practices with regard to the proposed recordkeeping requirements; the Final Rule consistently refers to both “unfair” and “deceptive” acts or practices together.

leasing and servicing of motor vehicles, or both.¹¹⁵ The Final Rule defines with

¹¹⁵ One industry group argued that the proposed rule violated the APA because it did not comply with the FTC's rule requiring publication of an Advance Notice of Proposed Rulemaking ("ANPR"), 16 CFR 1.10. Section 1.10, however, like the rest of subpart B of part 1 of the Commission's Rules of Practice, applies only to "proceedings for the promulgation of rules as provided in section 18(a)(1)(B) of the Federal Trade Commission Act." 16 CFR 1.7. The ANPR requirement in Section 1.10 implements Section 18(b)(2) of the FTC Act, which requires an ANPR when the Commission promulgates rules under the procedures set forth in that section. In this case, the FTC is acting under statutory authority under Section 1029(d) of the Dodd-Frank Act, *see* NPRM at 42031, which authorizes the Commission to promulgate rules using the APA's informal notice-and-comment procedure, *see* 5 U.S.C. 553, notwithstanding the additional procedural requirements set forth in Section 18. Accordingly, this rulemaking is governed by subpart C of part 1 of the Commission's Rules of Practice, which "sets forth procedures for the promulgation of rules under authority other than section 18(a)(1)(B) of the FTC Act." 16 CFR 1.21. Neither subpart C nor the APA requires publication of an ANPR.

This is consistent with Commission practice in prior notices to issue or amend regulations, including with the Made in USA Labeling Rule, the Children's Online Privacy Protection Act Rule, and the Telemarketing Sales Rule. *See, e.g.*, Fed. Trade Comm'n, Notice of Proposed Rulemaking, Made in USA Labeling Rule, 85 FR 43162 (July 16, 2020), <https://www.govinfo.gov/content/pkg/FR-2020-07-16/pdf/2020-13902.pdf> (issuing original notice of proposed rulemaking that was not preceded by an advance notice of proposed rulemaking); Fed. Trade Comm'n, Notice of Proposed Rulemaking, Children's Online Privacy Protection Rule, 64 FR 22750 (Apr. 27, 1999), <https://www.govinfo.gov/content/pkg/FR-1999-04-27/pdf/99-10250.pdf> (same); Fed. Trade Comm'n, Notice of Proposed Rulemaking, Telemarketing Sales Rule, 60 FR 8313 (Feb. 14, 1995), <https://www.govinfo.gov/content/pkg/FR-1995-02-14/pdf/95-3537.pdf> (same); Fed. Trade Comm'n, Notice of Proposed Rulemaking, Telemarketing Sales Rule, 78 FR 41200 (July 19, 2013), <https://www.govinfo.gov/content/pkg/FR-2013-07-09/pdf/2013-12886.pdf> (issuing notice of proposed rulemaking for rule amendment that was not preceded by an advance notice of proposed rulemaking); Fed. Trade Comm'n, Proposed Rule, Children's Online Privacy Protection Rule, 76 FR 59804 (Sept. 27, 2011), <https://www.govinfo.gov/content/pkg/FR-2011-09-27/pdf/2011-24314.pdf> (same); Fed. Trade Comm'n, Notice of Proposed Rulemaking, Telemarketing Sales Rule, 74 FR 41988 (Aug. 19, 2009), <https://www.govinfo.gov/content/pkg/FR-2009-08-19/pdf/E9-19749.pdf> (same); Fed. Trade Comm'n, Notice of Proposed Rulemaking, Children's Online Privacy Protection Rule, 70 FR 2580 (Jan. 14, 2005), <https://www.govinfo.gov/content/pkg/FR-2005-01-14/pdf/05-877.pdf> (same); Fed. Trade Comm'n, Notice of Proposed Rulemaking, Telemarketing Sales Rule, 69 FR 67287 (Nov. 17, 2004), <https://www.govinfo.gov/content/pkg/FR-2004-11-17/pdf/04-25470.pdf> (same); Fed. Trade Comm'n, Notice of Proposed Rulemaking, Telemarketing Sales Rule, 69 FR 7330 (Feb. 13, 2004), <https://www.govinfo.gov/content/pkg/FR-2004-02-13/pdf/04-3287.pdf> (same); Fed. Trade Comm'n, Notice of Proposed Rulemaking, Telemarketing Sales Rule, 67 FR 4492 (Jan. 30, 2002), <https://www.govinfo.gov/content/pkg/FR-2002-01-30/pdf/02-1998.pdf> (same); Fed. Trade Comm'n, Notice of Proposed Rulemaking, Children's Online Privacy Protection Rule, 66 FR 54963 (Oct. 31, 2001), <https://www.govinfo.gov/content/pkg/FR-2001-10-31/pdf/01-27390.pdf> (same). This is also true of regulation amendments pursuant to the authority under which this Final Rule is promulgated—that which Congress granted to the Commission under Section 1029 of the Dodd-Frank Act, 15 U.S.C. 5519, pertaining to motor vehicle dealers. *See, e.g.*, Fed. Trade Comm'n, Notice of Proposed Rulemaking, Used Motor Vehicle Trade Regulation Rule, 77 FR 74746, 74748 (Dec. 17, 2012), <https://www.govinfo.gov/content/pkg/FR-2012-12-17/pdf/2012-29920.pdf> ("Because the Dodd-Frank Act authorized the Commission to use APA procedures for notice and public comment in issuing or amending rules with respect to motor vehicle dealers, the FTC will not use the procedures set forth in Section 18 of the FTC Act, 15 U.S.C. 57a, with respect to these proposed revisions to the Used Car Rule and the Used Car Buyers Guide. Accordingly, the Commission is publishing this Notice of Proposed Rulemaking pursuant to Section 553 of the APA."); *see also* Fed. Trade Comm'n, Notice of Proposed Rulemaking, Privacy of Consumer Financial Information Rule Under the Gramm-Leach-Bliley Act ("Privacy Rule"), 84 FR 13150 (Apr. 4, 2019), <https://www.govinfo.gov/content/pkg/FR-2019-04-04/pdf/2019-06039.pdf>

specificity certain unfair or deceptive acts or practices; the Final Rule provisions are also “prescribed for the purpose of preventing such acts or practices.”¹¹⁶

B. § 463.2: Definitions

1. Overview

The proposed rule included definitions for the following terms: “Add-on” or “Add-on Product(s) or Service(s)”; “Add-on List”; “Cash Price without Optional Add-ons”; “Clearly and Conspicuously”; “Dealer” or “Motor Vehicle Dealer”; “Express, Informed Consent”; “GAP Agreement”; “Government Charges”; “Material” or “Materially”; “Motor Vehicle”; and “Offering Price.” In the definition-by-definition

(issuing notice of proposed rulemaking for rule amendment that was not preceded by an advance notice of proposed rulemaking).

This same commenter argued the FTC had not complied with the “Principles of Regulation” enumerated in Section 1(b) of Executive Order 12866. *See* Comment of Nat’l Auto. Dealers Ass’n, Doc. No. FTC-2022-0046-8368 at 34-36 & n.123; E.O. 12866 3(b) (defining “Agency” to mean an authority of the United States “other than those considered to be independent regulatory agencies”). This provision of the Executive Order does not apply to independent agencies such as the FTC. Regardless, the Commission did take into account the principles set forth in Section 1(b), as is evident throughout the NPRM. *See, e.g.*, NPRM at 42015-17 (identifying problems in the marketplace); *id.* at 42028-42031 (soliciting comments on alternative approaches); *id.* at 42036-42044 (assessing costs and benefits).

The same commenter also argued that the Commission’s denial of its request to extend the comment period prejudiced the commenter’s ability to collect and provide data pertaining to the proposed rule and was inconsistent with the Commission’s grant of extensions in other rulemakings. As described in its letter, the Commission also received requests opposing an extension of the comment period. *See* Letter, Fed. Trade Comm’n, “Duration of the Public Comment Period in Matter No. P204800” (Aug. 23, 2022), https://www.ftc.gov/system/files/ftc_gov/pdf/Matter%20No.%20204800%20-%20Letter%20re%20Extension%20for%20publication.pdf. In the letter, the Commission noted its ongoing engagement with stakeholders on issues relating to the sale, financing, and lease of motor vehicles, since before its 2011 Federal Register notice inviting stakeholder feedback on these issues and continuing since that time. *See* Fed. Trade Comm’n, Public Roundtables: Protecting Consumers in the Sale and Leasing of Motor Vehicles, 76 FR 14,014 (Mar. 15, 2011), <https://www.federalregister.gov/documents/2011/03/15/2011-5873/public-roundtables-protecting-consumers-in-the-sale-and-leasing-of-motor-vehicles>. The Commission determined that a sixty-day comment period, along with an additional twenty days following the public announcement and release of the NPRM and prior to its publication in the Federal Register, provided meaningful opportunity to comment. *See also* Steven J. Balla, “Public Commenting on Federal Agency Regulations: Research on Current Practices and Recommendations to the Administrative Conference of the United States” App. A (2011), <https://www.acus.gov/sites/default/files/documents/Consolidated-Reports-%2B-Memoranda.pdf> (reporting data from a pool of 703 comment periods associated with actions by dozens of Federal agencies, and finding that the average duration of comment periods for proposed agency actions was 38.7 days, and 45.1 days for actions that are economically significant).

¹¹⁶ 15 U.S.C. 57a(a)(1)(B) (the Commission “may include requirements prescribed for the purpose of preventing” unfair or deceptive acts or practices).

analysis in SBP III.B.2, the Commission discusses each definition proposed in the NPRM, relevant comments that are not otherwise addressed in the discussion of the corresponding substantive provisions of the Final Rule, and the definition the Commission is finalizing.

2. Definition-by-Definition Analysis

a) Add-on or Add-on Product(s) or Service(s)

The proposed rule defined “Add-on” or “Add-on Product(s) or Service(s)” as “any product(s) or service(s) not provided to the consumer or installed on the vehicle by the motor vehicle manufacturer and for which the Motor Vehicle Dealer, directly or indirectly, charges a consumer in connection with a vehicle sale, lease, or financing transaction.” This term appeared in the following definitions and substantive provisions of the rule proposal: the definitions of “Add-on List” and “Cash Price without Optional Add-ons”; the Prohibited Misrepresentations provision at proposed § 463.3(b); the add-on list disclosure provision at proposed § 463.4(b); the requirement to disclose that add-ons are not required at proposed § 463.4(c); the prohibition against charging for add-ons that provide the consumer no benefit at proposed § 463.5(a); and the proposed provision relating to undisclosed or unselected add-ons at § 463.5(b). As discussed in the following paragraphs, in response to stakeholder comments, the Commission declines to finalize certain of these provisions; in the Final Rule, this term appears in paragraph (a) of the Prohibited Misrepresentations section (§ 463.3); the Disclosure Requirements provision in paragraph (c) of § 463.4; and the provision in § 463.5(a) titled “Dealer Charges for Add-ons and Other Items” and subtitled “Add-ons that provide no benefit.”

For the following reasons, the Commission adopts the definition of “Add-on” or “Add-on Product(s) or Service(s)” largely as proposed, with conforming modifications to reflect changes to the defined terms “‘Covered Motor Vehicle’ or ‘Vehicle’” and “‘Covered Motor Vehicle Dealer’ or ‘Dealer’” as described in more detail in the discussion of § 463.2(e) and (f), in SBP III.B.2(e) and (f).

The Commission received several comments relating to the scope of its proposed definition for “Add-on” or “Add-on Product(s) or Service(s).” Industry association and other commenters recommended that the Commission broaden the definition to include manufacturer-provided products or services, expressing concern that exclusion of such products or services would put other companies that provide such items at a competitive disadvantage. Products or services provided by manufacturers, however, are already covered by several provisions of the Final Rule. Under the substantive provisions the Commission is finalizing, dealers are prohibited from making misrepresentations regarding material information, including about the “costs or terms of purchasing, financing, or leasing a Vehicle” (§ 463.3(a)); must disclose the vehicle’s true “Offering Price,” which includes any amounts dealers charge for items already installed or provided by the manufacturer (§§ 463.4(a) and 463.2(k)); and are required to obtain “Express, Informed Consent” for charges for any item (§§ 463.5(c) and 463.2(g)). The additional substantive add-on-specific provisions¹¹⁷ address harms associated with products or services not provided to the consumer or installed on the vehicle by the motor vehicle manufacturer. Commenters did not provide evidence that the proposed provisions covering manufacturer-provided products or services would be insufficient to address

¹¹⁷ §§ 463.3(b), 463.4(c), 463.5(a).

consumer harm. Accordingly, the Commission has determined not to include manufacturer-provided products or services within this defined term. The Commission will continue to monitor this issue to determine whether additional action is warranted.

One individual commenter expressed concern that, under the Commission’s proposed definition, dealers could raise the price of a vehicle by advertising additional products or services, such as “free lifetime benefits” with the vehicle, and that dealers could mislead consumers by charging more for the vehicle based on a supposedly “free” add-on.¹¹⁸ The Commission notes that the Rule the Commission is finalizing contains several provisions relating to this concern. For example, dealers are prohibited from making misrepresentations under § 463.3, including misrepresentations regarding “costs, limitation, benefit, or any other aspect” of add-ons.¹¹⁹ Furthermore, dealers are required to disclose a vehicle’s offering price, which must include charges for required add-ons; this disclosure will allow consumers to know the true price of the vehicle and comparison shop before selecting and visiting a particular dealership.¹²⁰

Several dealership association commenters expressed concern that the proposed definition was too broad, contending that it might apply to hundreds of items and include fees, such as a processing or document fee, that a dealer charges a consumer. As discussed in SBP III.B.2(b), III.D.2(b), and III.E.2(b), upon careful review of comments, including comments regarding the breadth of this requirement, the Commission has determined not to finalize the provision that would have required listing all optional add-ons—the “Add-on List” definition and the associated requirement that dealers disclose

¹¹⁸ Individual commenter, Doc. No. FTC-2022-0046-7445 at 10-11.

¹¹⁹ § 463.3(b) (emphasis added).

¹²⁰ See §§ 463.2(k) (defining Offering Price), 463.4(a) (requiring disclosure of Offering Price); see also § 463.3(p) (prohibiting misrepresentations regarding the disclosures required by the Final Rule).

such a list—as well as proposed § 463.5(b) relating to undisclosed or unselected add-ons.¹²¹ The remaining substantive provisions that use the term “Add-ons” prohibit misrepresentations (§ 463.3(b)); require dealers to disclose, if true, that add-ons are not required (§ 463.4(c)); and prohibit charges for add-ons that provide the consumer no benefit (§ 463.5(a)). The law already prohibits misrepresentations, regardless of the product or service at issue; dealers that offer consumers additional products or services are already required to ask consumers if they want such products, rather than suggesting that such products or services are mandatory, when they are not; and any hardship associated with refraining from charging for products or services that provide consumers no benefits are outweighed by the harms to consumers and competition from permitting this practice, as explained in the analysis of § 463.5(a).

Commenters including an industry association suggested limiting the definition to products or services sold at the “point of vehicle purchase” to clarify that indirect charges, such as the inclusion of a one-year subscription to a satellite radio service, need not be separately itemized.¹²² The industry association commenter suggested that, as proposed, the definition would include charges for which dealers and consumers “would otherwise not account.”¹²³ The Commission has determined not to finalize the add-on list and form requirements in proposed §§ 463.4(b) and 463.5(b). For the provisions being finalized, excluding subscription charges, or including only items added to the vehicle at the “point of vehicle purchase,” would narrow the definition of “Add-on” and the corresponding requirements in a manner that would allow for deceptive or unfair

¹²¹ See NPRM at 42044, 42046 (proposed §§ 463.2(b), 463.4(b), 463.5(b)).

¹²² Comment of Serv. Cont. Indus. Council, Guaranteed Asset Prot. All., & Motor Vehicle Prot. Prods. Ass’n, Doc. No. FTC-2022-0046-8113 at 13-14.

¹²³ *Id.* at 13.

practices, including by allowing dealers to represent a price that is not the offering price, or to deceptively state that add-ons are required. In the example provided by the commenter, if the satellite radio subscription service is mandatory, it needs to be included in the offering price of the vehicle, as required by § 463.4(a) of the Final Rule; if it is not mandatory, the dealer needs to disclose, when making any representations about the service, that it is not required under § 463.4(c). Further, regardless of whether such a product or service is mandatory or optional, dealers must follow other aspects of the Final Rule, including by not making any misrepresentations about the subscription under § 463.3 and by obtaining the express, informed consent of the consumer for the associated charges under § 463.5(c).

Another industry association commenter contended that add-ons sold in the marine industry are typically different than those offered in the context of automobile sales and described in the NPRM. While all motor vehicle dealers must refrain from engaging in deceptive or unfair conduct relating to add-ons, the Commission is excluding recreational boats and marine equipment from the Final Rule's definition of "Covered Motor Vehicle" or "Vehicle," as discussed in additional detail in the definition-by-definition analysis of § 463.2(e) in SBP III.B.2(e).

An industry association commenter and comments from a number of dealership associations noted that certain State laws already regulate the sale of add-ons, including, for example, laws in many States that regulate vehicle sales contracts or deceptive sales practices generally or that regulate insurance products. To the extent that the Final Rule's add-on provisions may duplicate State law, commenters have provided no evidence that any such duplication in the provisions that incorporate this defined term—which prohibit

misrepresentations, require disclosures in the event add-ons are not required, and prohibit charges for add-ons from which the consumer would not benefit—will harm consumers or competition. Moreover, the Final Rule provides additional remedies that will benefit consumers who encounter conduct that is already illegal under State or Federal law, including by adding a mechanism for the Commission to redress consumers injured by a dealer’s violation of the rule, and will assist law-abiding dealers that presently lose business to competitors that act unlawfully. Under the Final Rule, State laws may provide more or less specific requirements as long as such requirements are not inconsistent with part 463, as set forth at § 463.9, and in the event of an inconsistency, the Rule only affects such State law to the extent of the inconsistency.¹²⁴

A few dealership association commenters expressed concern that the proposed definition of “Add-on Products or Services” would include insurance-related products, such as credit life and credit disability insurance, and as such, could implicate the McCarran-Ferguson Act’s reverse-preemption of certain Federal laws that “invalidate, impair, or supersede” State laws enacted “for the purpose of regulating the business of insurance.”¹²⁵ Commenters have provided no evidence that the Rule will invalidate, impair, or supersede State laws enacted for the purpose of regulating the business of insurance.¹²⁶ To the contrary, the Final Rule addresses deceptive or unfair conduct—it prohibits dealers, *inter alia*, from making misrepresentations regarding material information about add-ons, from failing to disclose when add-ons are not required, and

¹²⁴ See, e.g., *English v. Gen. Elec. Co.*, 496 U.S. 72, 79 (1990).

¹²⁵ See 15 U.S.C. 1012(b).

¹²⁶ See *Union Labor Life Ins. Co. v. Pireno*, 458 U.S. 119, 129 (1982) (setting forth test for whether an activity constitutes the “business of insurance”); *Humana Inc. v. Forsyth*, 525 U.S. 299, 307-08 (1999) (establishing criteria for whether a Federal law operates to “invalidate, impair, or supersede” State law).

from charging for add-ons from which the consumer would not benefit. Nor has the Commission been presented with evidence that the Rule's other substantive provisions (prohibiting misrepresentations; requiring disclosures of a vehicle's offering price and about total of payments; and requiring consumers' express, informed consent before charging them) invalidate, impair, or supersede State laws enacted for the purpose of regulating insurance.¹²⁷

A number of industry and dealership association commenters contended that, as proposed, this definition may extend to products or services that are provided by the manufacturer but that are installed by a distributor of motor vehicles, or alternatively, by the dealer, at the instruction of the manufacturer. Relatedly, a State governmental association commenter expressed concern that the proposed definition could create confusion with regard to the sale of used vehicles, where a prior owner of a vehicle may have added a product to the vehicle. The commenter contended that a motor vehicle dealer selling the used vehicle may be unaware of the added product, and further, that listing any such items may confuse buyers.

To the extent the commenters' concerns stem from the proposed provisions related to add-on lists and proposed § 463.5(b)'s provisions related to separate disclosures, the Commission is not finalizing those provisions. Under the provisions being finalized, if a product is provided to the dealer by the manufacturer or another entity, and a consumer chooses to have the product installed and pay for it, the dealer

¹²⁷ The Supreme Court has refused to interpret the McCarran Ferguson Act to invalidate Federal law when applied to remedy a misrepresentation and undo the harm caused by alleged deception. *See SEC v. Nat'l Sec., Inc.*, 393 U.S. 453, 462 (1969). Moreover, lower courts have rejected precisely the concern raised by the commenter about credit life insurance. *See Fed. Trade Comm'n. v. Dixie Fin. Co.*, 695 F.2d 926, 930 (5th Cir. 1983) (McCarran Ferguson Act does not preclude FTC investigation of "whether the sale of insurance is a precondition to the arrangement of credit"); *Fed. Trade Comm'n v. Mfrs. Hanover Consumer Servs., Inc.*, 567 F. Supp. 992, 94 (E.D. Pa. 1983) (same).

may install it and charge for it, as long as the dealer complies with the provisions of the Final Rule, including by disclosing that the product is not required and by obtaining the consumer's express, informed consent for the charge. If the manufacturer requires the dealer to install the product or if the dealer chooses to install the product, and the dealer requires any consumer to pay charges for it, the amount of the charge must be included in the vehicle's offering price, and the dealer must comply with other aspects of the Final Rule, including the express, informed consent requirement. Relatedly, regarding used vehicles, if a prior owner of such a vehicle installed an add-on, and the dealer that subsequently sells such a vehicle requires any consumer to pay charges for the add-on, the amount of those charges must be included in the vehicle's offering price and the dealer must comply with other aspects of the Final Rule, including the express, informed consent requirement at § 463.5(c). If, alternatively, the dealer does not require any consumers to pay for the pre-installed add-on, then the dealer does not have to add that amount to the vehicle's offering price, and there is no charge for that add-on for which the dealer must obtain express, informed consent. Thus, the definition of "Add-on" and the Rule requirements being finalized address deceptive or unfair price and add-on disclosures and hidden charges without requiring dealers to list or itemize charges that they do not impose on consumers. For the reasons explained in this section, the Commission is finalizing the definition of "Add-on" or "Add-on Product(s) or Service(s)" largely as proposed, with conforming modifications to reflect changes to the defined terms "'Covered Motor Vehicle' or 'Vehicle'" and "'Covered Motor Vehicle Dealer' or 'Dealer'" as described in more detail in the discussion of § 463.2(e) and (f), in SBP III.B.2(e) and (f).

b) Add-on List

The NPRM proposed defining the term “Add-on List,” which appeared in the associated Add-on List disclosure provision at proposed § 463.4(b), as well as in the recordkeeping provision at proposed § 463.6(a)(2). Based on the following, the Commission has determined not to include this definition in its Final Rule.

Several commenters supported the substantive add-on list proposal and its associated definition, and commenters including consumer advocacy organizations urged the Commission to finalize additional related restrictions or disclosures, such as requiring add-on prices to be fixed and non-negotiable, or requiring a distinct add-on list for each vehicle sold. Other commenters, including dealership associations, raised concerns that, as proposed, the add-on list definition could impose significant economic burdens on dealerships for a disclosure that, in some circumstances, might be too voluminous to be optimally meaningful to consumers, or permit price ranges that could be too broad to prevent abuses and effectively inform consumers.

After careful consideration, and in light of the concerns raised by commenters, the Commission has determined not to include the add-on list disclosure provision at proposed § 463.4(b) or the recordkeeping provision at proposed § 463.6(a)(2) in its Final Rule, and therefore will not include a definition of the term “Add-on List” in its Final Rule. Here, as elsewhere, the Commission remains committed to promoting fair, non-deceptive, and competitive markets for consumer products and services; it will continue to monitor the marketplace for add-on-related acts or practices that are unfair or deceptive, and will evaluate whether to propose additional measures pertaining to such products and services.

c) Cash Price Without Optional Add-ons

The NPRM proposed defining the term “Cash Price without Optional Add-ons,” which appeared in the proposed provision addressing undisclosed or unselected add-ons at § 463.5(b). Based on the following, the Commission is declining to finalize this definition.

A number of commenters favored the proposed provision and definition, and several, including consumer advocacy organizations, urged the Commission to include additional requirements, such as requiring the proposed disclosure documents associated with this proposed definition to be available in different languages, while others, including a dealership association, raised concerns that the definition and relevant provision were burdensome or confusing for dealers.

As explained in additional detail in SBP III.E.2(b) with respect to § 463.5(b), in light of commenter concerns that the proposed provision using this term would increase costs for legitimate dealers and add to the time and paperwork for consumers in an already lengthy, paperwork-heavy transaction, the Commission has elected not to include a Cash Price without Optional Add-ons disclosure requirement in its Final Rule. Thus, after careful consideration, and in light of the concerns raised by commenters, the Commission has determined not to include a definition of “Cash Price without Optional Add-ons” in its Final Rule.

d) Clearly and Conspicuously

The proposed rule defined the term “Clearly and Conspicuously” as “in a manner that is difficult to miss (*i.e.*, easily noticeable) and easily understandable,” including in all of seven enumerated ways, listing proposed requirements for “any communication that is

solely visual or solely audible,” “[a] visual disclosure,” “[a]n audible disclosure,” and “any communication using an interactive electronic medium,” and providing, *inter alia*, that such disclosures “must use diction and syntax understandable to ordinary consumers and must appear in each language in which the representation that requires the disclosure appears” and “must not be contradicted or mitigated by, or inconsistent with, anything else in the communication.” Based on the following, the Commission is finalizing this definition largely as proposed, with a modification to clarify that the definition applies whether the term appears as an adjective or an adverb, by adding the parentheses in the following manner to the defined term: “Clear(ly) and Conspicuous(ly).”

Some consumer advocacy organization commenters favored the Commission’s proposed definition while also suggesting that the Commission include a provision requiring translation of any deal consummating documents, including buyer’s orders and retail installment sales contracts, into the language in which the negotiations were conducted. This issue, however, is addressed by § 463.5(c) of the Rule, which requires express, informed consent for each item charged.¹²⁸ As explained in additional detail in the paragraph-by-paragraph analysis of § 463.5(c) in SBP III.E.2(c), if a deal-consummating document is provided in a language that the consumer does not understand, and the document’s contents are not otherwise clearly understood by the consumer, then the consumer is in no position to give unambiguous assent to the charges described therein. The Commission therefore has determined not to add such a provision to its “Clear(ly) and Conspicuous(ly)” definition. However, the Commission will continue to monitor the marketplace and determine whether further language

¹²⁸ The language requirements, as they relate to obtaining express, informed consent, are further explained in the discussion of § 463.5(c) in SBP III.E.2(c).

requirements or additional measures are warranted to address deceptive or unfair practices—particularly those that target or otherwise disproportionately impact language-minority communities.

Commenters, including consumer advocacy organizations, expressed concern that proposed § 463.2(d)(5) may be read to apply only to certain disclosures with triggering representations and only to disclosures that are in writing. These commenters also requested that the Commission incorporate into its Final Rule the FTC’s policy statement regarding foreign language advertising and sales materials, which is separately codified at 16 CFR 14.9.¹²⁹ In response, the Commission notes that to be clear and conspicuous, the disclosure must be “easily understandable,” as stated in the definition. If a disclosure is being made in a language the consumer does not understand, it does not meet this requirement. Further, the disclosures highlighted by the commenters are indeed subject to the language requirements of § 463.2(d)(5), which requires that disclosures “appear in each language in which the representation that requires the disclosure appears.” With regard to the offering price disclosure in § 463.4(a)(1), the applicable “representation that requires the disclosure” is the “advertisement that references . . . a specific Vehicle”; thus, for example, if an advertisement that references a specific vehicle is in Spanish, the offering price disclosure must also be in Spanish. Similarly, in § 463.4(a)(2), the applicable representation that requires the disclosure is an “advertisement that represents . . . any monetary amount or financing term for any Vehicle.” In § 463.4(a)(3), the applicable representation is “any communication . . . that includes a reference . . .

¹²⁹ 16 CFR 14.9 is an enforcement policy statement that provides information to advertisers about clear and conspicuous disclosures in foreign language advertisements and sales materials, including ensuring the language of the disclosure matches the language in the publication. *See* 16 CFR 14.9.

regarding a specific Vehicle, or any monetary amount or financing term for any Vehicle.” In § 463.4(c) and (d), “any representation” regarding an add-on product or service or a monthly payment for any vehicle, respectively, triggers the language requirement of § 463.2(d)(5). The monthly payments comparison disclosure in § 463.4(e) is required when there is a “comparison between payment options . . . that includes discussion of a lower monthly payment.” Thus, the language requirements in § 463.2(d)(5) apply.

In response to this concern regarding the applicability of § 463.2(d)(5) to disclosures that are not in writing, the Commission notes that its use of the word “appear” in § 463.2(d)(5) incorporates common meanings, such as “to show up,” “to come into existence,” or “to become evident or manifest,” which cause this provision to apply whether the representation requiring the disclosure appears visually, orally, or otherwise.¹³⁰ Where the Commission instead intended a provision to be limited to a visual disclosure, as in § 463.2(d)(2), the Rule states so explicitly.

In response to the request that the Commission incorporate into this Rule its policy statement regarding foreign language advertising and sales materials, separately codified at 16 CFR 14.9, the Commission emphasizes that the enforcement statement sets out what is already impermissible under current law and is consistent with the requirements the Commission is finalizing. To the extent dealers take actions that are inconsistent with Commission statements about such law, they are risking enforcement proceedings by the Commission or others. Accordingly, the Commission has determined

¹³⁰ See *Appear* (defs. 1b, 4, 6), Merriam-Webster.com Dictionary, <https://www.merriam-webster.com/dictionary/appear> (last visited Dec. 5, 2023); see also Order ¶¶ 2-3, *Asbury Auto. Grp., Inc.*, No. C-4606 (F.T.C. Mar. 22, 2017) (identical usage in definition provision); Order ¶ 2, *Lithia Motors, Inc.*, No. C-4597 (F.T.C. Dec. 8, 2016) (same); Order ¶¶ 2-3, *Jim Koons Mgmt. Co.*, No. C-4598 (F.T.C. Dec. 8, 2016) (same).

not to add to the Rule further requirements regarding foreign language advertising. The Commission will continue to monitor the market to determine whether further action is warranted.

Industry association commenters raised concerns about how the Commission's proposed definition interacts with other Federal laws, such as Regulations Z and M, which implement the Truth in Lending Act and the Consumer Leasing Act, respectively, and contended that it conflicts with a clear and conspicuous definition in Commodity Futures Trading Commission regulations.¹³¹ Industry and dealership association commenters contended that State advertising standards already address what constitutes "clear and conspicuous" advertising and provide guidance on disclosures, such that the FTC's proposal will cause confusion or possible conflict with State law.

The Commission's definition of "Clear(ly) and Conspicuous(ly)" is not inconsistent with the existing Federal legal requirements raised by these commenters. Dealers can comply with these laws to the extent they apply as well as with the requirements that follow from the Commission's definition. Regarding State law, commenters did not provide examples of actual conflicts. Further, to the extent there is truly an inconsistency between the operation of the Commission's definition and any State law, the Commission notes that the definition is based on decades of Commission experience policing deceptive and unfair conduct; addresses harmful practices including those related to hidden disclosures and charges; and that § 463.9 of the Final Rule sets out the Rule's relation to State laws.

¹³¹ 17 CFR 162.2.

Other industry association commenters also contended that the proposed definition of “Clearly and Conspicuously” would be overly broad and challenging for compliance, but did not explain why or suggest alternative language. In addition, some dealership association commenters requested more guidance to understand the definition. The Commission’s definition spells out, in seven subparts, what clear and conspicuous means, using simple terms that provide additional information about how dealers can make a disclosure in a manner that is easily understandable and easily noticeable to the consumer. The definition elaborates basic, common-sense principles, including that visual disclosures be in a size that consumers will easily notice and that audible disclosures be in a volume, speed, and cadence such that consumers will easily hear it. Thus, for example, disclosures in an illegible font, or that consumers cannot hear, are not clear and conspicuous. The Commission also notes that it did not mandate specific fonts, volumes, or other prescriptive measures. Thus, dealers have the flexibility to determine the best way to meet the definition’s requirements for their consumers under the circumstances.

A dealership association commenter contended that the proposed definition does not include a reasonableness standard and may be interpreted as prohibiting any limitations and exclusions, given the requirement in proposed § 462.3(d)(7) that a disclosure must not be contradicted or mitigated by or inconsistent with anything else in the communication. The commenter further asked whether a statement such as “with approved credit” would impermissibly mitigate an offer of low financing under this proposed definition.¹³² The Commission responds as follows. The standard is an objective

¹³² Comment of Ohio Auto. Dealers Ass’n, Doc. No. FTC- 2022-0046-6657 at 4.

one, evaluated from the perspective of a reasonable consumer.¹³³ The definition does not prohibit all advertising that contains limitations and exclusions, but it does provide that if dealers are advertising offers that are limited in some way, they may not misrepresent such offers. Thus, if a dealer presents consumers with an unqualified representation of low financing terms, those terms must be available to typical consumers. Alternatively, a dealer may offer low financing terms to consumers with particular credit characteristics if that requirement is presented in a manner that does not deceive reasonable consumers. For example, a dealer may offer “0% annual percentage rate (APR) for consumers with a credit score above 800.” By contrast, it would be deceptive if the dealer offered “0% APR,” and then separately disclosed in fine print that such terms are only available to consumers with a credit score above 800, because the qualifying disclosure is inconsistent with an offer of “0% APR” that contained no limitations and thus indicated that 0% APR is available to the typical consumer regardless of credit score.¹³⁴ Further, the Commission notes that to qualify as clear and conspicuous, “disclaimers or qualifications in any particular ad are not adequate to avoid liability unless they are sufficiently prominent and unambiguous to change the apparent meaning of the claims and to leave an accurate impression. Anything less is only likely to cause confusion by creating contradictory double meanings.”¹³⁵

¹³³ See FTC Policy Statement on Deception, *supra* note 42, at 2-5.

¹³⁴ Complaint ¶¶ 5-7, *Progressive Chevrolet Co.*, No. C-4578 (F.T.C. June 13, 2016) (alleging ads touting attractive terms deceptively failed to disclose high credit score requirement).

¹³⁵ *Removatron Int'l Corp. v. Fed. Trade Comm'n*, 884 F.2d 1489, 1496-97 (1st Cir. 1989); *see also Fed. Trade Comm'n v. Brown & Williamson Tobacco Corp.*, 778 F.2d 35, 42-43 (D.C. Cir. 1985) (finding that a disclosure in virtually illegible form, placed in an inconspicuous corner of Barclay advertisements, did not eliminate deception); *see Fed. Trade Comm'n v. Cap. Choice Consumer Credit, Inc.*, 2003 U.S. Dist. LEXIS 29086, at *5 (S.D. Fla. June 2, 2003) (finding that, where advertisements promised a general purpose credit card, such as VISA or MasterCard, “fine print on reverse side” of ad clarifying that the credit card was a “merchandise card and not a major bank card” was inadequate to modify net impression);

Lastly, another dealership association commenter asked how the proposed definition translates to visual, audible, and electronic media disclosures and expressed concern about subjectivity, characterizing the terms “easily” understood and “unavoidable” within the proposed definition as subjective and open to different interpretations, particularly in the context of websites and internet promotions. Here, the Commission declines to mandate more prescriptive language regarding, for example, font sizes, what volumes are to be used, and where exactly the language should appear on a website, such as on an overlay with mandated color, size, and location.¹³⁶ As courts¹³⁷ have recognized, whether a disclosure is clear and conspicuous is an objective standard rather than a subjective one. While more prescriptive language would provide additional objective criteria, the Commission is concerned such language might constrain dealers from determining the best way to meet the definition’s requirements for their consumers under the circumstances involved, and might require dealers that are already making clear and conspicuous disclosures to change their existing disclosure materials.

Fed. Trade Comm’n v. Cyberspace.com LLC, 453 F.3d 1196, 1200 (9th Cir. 2006) (rejecting defendant’s argument that truthful fine print notices on reverse side of checks, invoices, and marketing inserts cured deception that check/invoice was a refund rather than offer for services); *Fed. Trade Comm’n v. Alcoholism Cure Corp.*, No. 3:10-cv-266-J-34JBT, 2011 WL 13137951, at *51 (M.D. Fla. Sept. 16, 2011) (finding that “not MD” disclaimers were inadequate to dispel net impression regarding professional qualifications of defendant and other employees as advertised); *Fed. Trade Comm’n v. Wash. Data Res.*, 856 F. Supp. 2d 1247, 1274-75 (M.D. Fla. 2012) (rejecting defendants’ argument that retainer agreement contained sufficient disclaimer to dispel a misrepresentation about whether a home loan was guaranteed).

¹³⁶ The Commission has included such requirements elsewhere. *See, e.g.*, Order ¶ 6, *United States v. Sunkey Publ’g, Inc.*, No: 3:18-cv-1444-HNJ (N.D. Ala. Sept. 6, 2018).

¹³⁷ *See, e.g.*, *Palmer v. Champion Mortg.*, 465 F.3d 24, 28 (1st Cir. 2006) (applying an objective standard in evaluating Truth in Lending Act claim regarding clear and conspicuous disclosure); *Smith v. Check-N-Go of Ill., Inc.*, 200 F.3d 511, 515 (7th Cir. 1999) (same); *Zamarippa v. Cy’s Car Sales, Inc.*, 674 F.2d 877, 879 (11th Cir. 1982) (same); *Bustamante v. First Fed. Sav. & Loan Ass’n*, 619 F.2d 360, 364 (5th Cir. 1980) (same); *see also Herrera v. First N. Sav. & Loan Ass’n*, 805 F.2d 896, 900 (10th Cir. 1986) (resolving question of clear and conspicuous disclosure under Truth in Lending Act as a legal, rather than factual, matter); *Dixey v. Idaho First Nat’l Bank*, 677 F.2d 749 (9th Cir. 1982) (same).

The Commission reiterates that the definition of “Clear(ly) and Conspicuous(ly)” elaborates basic, common-sense principles, such as requiring visual disclosures in a size consumers can see and audible disclosures in a volume they can hear. Regarding the requirement that Internet disclosures be unavoidable, this language requires evaluating an objective standard—whether or not consumers could have avoided the disclosure. In addition, the disclosure must be easily noticeable and easily understandable, as set forth expressly in the definition. Disclosures that do not meet this standard include those that are buried in other text, including as illustrated by many FTC actions against dealers.¹³⁸ Regarding the requirement that disclosures be “easily” noticeable and understandable, the standard is also an objective one, evaluated from the perspective of a reasonable consumer. Determining how reasonable consumers are likely to respond may be resolved on the basis of the advertisement, context, or disclosure itself, or based on extrinsic evidence, such as consumer complaints.¹³⁹ To this end, as noted previously, the definition enumerates in seven subparts the meaning of clear and conspicuous using simple terms that provide additional guidance on how dealers may make disclosures that are easily understandable and easily noticeable to the consumer.

After carefully considering the comments, the Commission adopts § 463.2(d) with a modification to clarify, through the addition of parentheses—“Clear(ly) and

¹³⁸ Complaint ¶¶ 6-14, *Jim Burke Auto., Inc.*, No. C-4523 (F.T.C. May 4, 2015); Complaint ¶¶ 6, 9, *TT of Longwood, Inc.*, No. C-4531 (F.T.C. July 2, 2015); Complaint ¶ 13, *City Nissan Inc.*, No. C-4524 (F.T.C. May 4, 2015); Complaint ¶¶ 17-19, *Fed. Trade Comm’n v. Liberty Chevrolet, Inc.*, No. 1:20-cv-03945 (S.D.N.Y. May 21, 2020); Complaint ¶¶ 4-9, 12-15, 18-20, *Billion Auto, Inc.*, No. C-4356 (F.T.C. May 1, 2012) (alleging false ads promising to pay off consumers’ existing motor vehicle debt and failing to disclose legally required financing and leasing terms); *see also* Complaint ¶¶ 57-60, *Fed. Trade Comm’n v. Stewart Fin. Co. Holdings, Inc.*, No. 1:03-CV-2648 (N.D. Ga. Sept. 4, 2003) (alleging violations for failure to include the cost of required add-on products in the finance charge and annual percentage rate disclosed to consumers).

¹³⁹ *See* FTC Policy Statement on Deception, *supra* note 42, at 2-5 (describing application of reasonable consumer standard).

Conspicuous(ly)”—that the definition applies whether the term is used as an adjective or adverb. Consistent with the Commission’s experience addressing unfair or deceptive conduct, the Commission has defined the term “Clear(ly) and Conspicuous(ly)” to include disclosures that are easily understandable and easily noticeable, while also providing dealers with additional information on how to meet those requirements.¹⁴⁰

e) Motor Vehicle (finalized as “Covered Motor Vehicle’ or ‘Vehicle’”)

The proposed rule defined the term “Motor Vehicle” as “(1) any self-propelled vehicle designed for transporting persons or property on a street, highway, or other road; (2) Recreational boats and marine equipment; (3) Motorcycles; (4) Motor homes, recreational vehicle trailers, and slide-in campers, as those terms are defined in §§ 571.3(b) and 575.103(d) of title 49, Code of Federal Regulations, or any successor thereto; and (5) Other vehicles that are titled and sold through Dealers.” The Commission has determined to finalize the definition with the modifications discussed in the following paragraphs.

The Commission received several comments regarding the substance and scope of this proposed definition. A number of industry association commenters requested that certain vehicle types, including marine vehicles, motorcycles, RVs, and other recreational vehicles be excluded from coverage. These commenters contended that the dealerships that sell such vehicles function differently from automobile dealerships, and that recreational vehicles are discretionary, rather than essential, purchases. After careful

¹⁴⁰ See, e.g., Decision and Order, *JS Autoworld, Inc.*, No. C-4535 (F.T.C. Aug. 13, 2015); Decision and Order, *Nat’l Payment Network, Inc.*, No. C-4521 (F.T.C. May 4, 2015); Decision and Order, *Matt Blatt Inc.*, No. C-4532 (F.T.C. July 2, 2015); Decision and Order, *Ganley Ford West, Inc.*, No. C-4428 (F.T.C. Jan. 28, 2014).

consideration, the Commission is excluding recreational boats and marine equipment; motorcycles; and motor homes, recreational vehicle trailers, and slide-in campers from the definition of “‘Covered Motor Vehicle’ or ‘Vehicle.’” Moving forward, the Commission will continue to monitor for unfair and deceptive practices to determine whether further action is warranted to protect consumers, through law enforcement, a future rulemaking, or other measures. The Commission notes that no dealer may misrepresent material terms; deceive customers about prices, add-ons, or payments; charge for products that provide no benefit; or charge consumers without express, informed consent. To the extent that dealers engage in such conduct, they are in violation of the FTC Act.

Another commenter contended it was unclear whether all-terrain vehicles, go-carts, snowmobiles, scooters, electric bicycles, and golf carts were covered by the proposed definition. In response, the Commission has modified the first enumerated subpart of the definition to refer only to vehicles designed for use on a “public” street, highway, or road, and to expressly exclude scooters, electric bicycles, and golf carts. The definition of “‘Covered Motor Vehicle’ or ‘Vehicle’” in the Final Rule does not cover all-terrain vehicles, go-carts, or snowmobiles because such vehicles are not designed for use on a “public” street, highway, or road.¹⁴¹

A number of industry association commenters claimed that the proposed definition conflicts with definitions of motor vehicle under various State laws, and one such commenter requested that, rather than finalize a definition of “Motor Vehicle,” the Commission defer to the definitions promulgated by each State’s department of motor

¹⁴¹ According to the National Highway Traffic Safety Administration, “Public road means any road under the jurisdiction of and maintained by a public authority and open to public travel.” 23 CFR 1300.3.

vehicles. The commenters did not explain how the Rule's definition may actually conflict with any laws, or how any alleged duplication would harm consumers or competition. To the extent that States have broader or narrower definitions, it is not clear why motor vehicle dealers covered by the Rule cannot comply with the Rule's provisions and applicable State laws. Moreover, the Final Rule provides additional remedies that will benefit consumers who encounter conduct that is already illegal under State or Federal law, including by adding a mechanism for the Commission to redress consumers injured by a dealer's violation of the rule, and will assist law-abiding dealers that presently lose business to competitors that act unlawfully. Section 463.9 provides further discussion of State laws.

Thus, after careful consideration of the comments, the Commission is finalizing the definition of "Motor Vehicle" with modifications, including adding the word "Covered" to the definition to reflect the fact that the definition is narrower than the term "Motor Vehicle" in the NPRM and adding "or Vehicle" to the definition to clarify that all references in the Rule to the term "Covered Motor Vehicle" and "Vehicle" refer to the defined term.

f) Dealer or Motor Vehicle Dealer (finalized as "'Covered Motor Vehicle Dealer' or 'Dealer'")

The proposed rule defined the term "Dealer" or "Motor Vehicle Dealer" as "any person or resident in the United States, or any territory of the United States, that (1) Is licensed by a State, a territory of the United States, or the District of Columbia to engage in the sale of motor vehicles; (2) Takes title to, holds an ownership interest in, or takes physical custody of motor vehicles; and (3) Is predominantly engaged in the sale and servicing of motor vehicles, the leasing and servicing of motor vehicles, or both." Based

on the following, the Commission is finalizing this definition in the Final Rule with modifications for clarity.

Many stakeholders commented in support of the proposed rule and expressed no concern over this definition. Other commenters expressed views that the Commission examines in the following paragraphs.

A few industry association commenters contended that parts of the proposed definition may have captured certain financial entities, such as financial entities that maintain licenses to engage in the sale of motor vehicles, and requested that the Commission make clear that any rule does not apply to such entities. In response, the Commission notes that only entities that meet all three components of the definition are covered “Dealers.” Thus, an entity that maintains an applicable license to engage in the sale of Covered Motor Vehicles but is not, for example, predominantly engaged in the sale or leasing of motor vehicles would not be a covered “Dealer.”

Another industry association commenter similarly requested a “carve-out” from any definition of “Dealer” for trusts and trusts’ investors.¹⁴² This commenter asserted that trusts and their investors do not satisfy two of the definition’s components and did not describe how any part of the definition creates concerns or is unclear. The Commission reiterates that if an entity meets the three parts of the “Covered Motor Vehicle Dealer” definition, then it is covered; if an entity does not meet these three parts, it is not covered. The Commission sees no benefit to adding language stating that entities that do not meet the definition are not covered.

¹⁴² Comment of Structured Fin. Ass’n, Doc. No. FTC-2022-0046-7646 at 3.

Other commenters, including vehicle association commenters, claimed that dealerships specializing in RV, marine, motorcycles, and other recreational vehicles, including certain high-end recreational vehicles,¹⁴³ should be excluded from coverage, generally contending that such dealerships operate differently from automobile dealerships, and that these types of vehicles are used for different purposes than are automobiles. As explained in the section-by-section analysis of the definition of “Covered Motor Vehicle” in SBP III.B.2(e), after considering stakeholder comments, the Commission is removing marine, motorcycle, RV, and certain other vehicles from the definition in § 463.2(e), and to reflect this change, finalizing the defined term as “Covered Motor Vehicle or ‘Vehicle,’” thereby excluding from the Final Rule entities who otherwise would have qualified as “Dealers” solely based on their sale and servicing, or leasing and servicing, of such vehicles. The Commission underscores that, regardless of the definition of “Covered Motor Vehicle” under the Final Rule, unfair and deceptive practices remain unlawful under the FTC Act. The Commission will continue to monitor all vehicle markets to determine whether additional action is warranted to protect consumers.

Some dealership association commenters argued that, under the Commission’s proposal, this definition exempted dealers subject to the jurisdiction of the CFPB. Other such commenters similarly contended that, under the proposal, used car dealers that do not engage in extensive post-sale repairs do not “service” vehicles or that do not have separate service departments may have been excluded from coverage, contending further

¹⁴³ The Marine Retailers Association of the Americas requested that transactions in excess of \$70,000 be excluded from coverage, as an alternative to excluding marine transactions altogether. *See* Comment of Marine Retailers Ass’n of the Ams., Doc. No. FTC-2022-046-9291 at 4.

that excluding such dealers would put other dealers at a competitive disadvantage. Contrary to these commenters' assertions, the definition does not contain such exclusions. By its plain terms, the definition applies to dealers that meet its three enumerated components. Nowhere does the definition limit coverage of dealers based on CFPB jurisdictional considerations. Likewise, the definition does not condition coverage on whether a dealership has a service department or include any other requirement or limitation beyond those enumerated in § 463.2(f). By its plain meaning, the term "servicing" covers, for instance, "checking and repairing a vehicle, machine, etc. to keep it in good condition."¹⁴⁴ As the Commission has previously stated, the term "servicing" "captures activities undertaken by essentially all used car dealers."¹⁴⁵ Thus, the definition does not place dealers with separate servicing departments at a competitive disadvantage, and the Commission need not remove the term "servicing of motor vehicles" from the Final Rule.

One such commenter further contended that the proposed definition did not cover certain entities, including certain direct sellers or manufacturers or others not licensed in a particular State, or lenders who offer add-on products such as GAP agreements and debt suspension products. As previously discussed, the Final Rule applies to all dealers that meet the three parts of this definition.¹⁴⁶ To the extent that the definition does not

¹⁴⁴ The Oxford Advanced American Dictionary defines "servicing" as "the act of checking and repairing a vehicle, machine, etc. to keep it in good condition"; *see also* 15 U.S.C. 5519(b)(3) (referring to "the sale, financing, leasing, rental, repair, refurbishment, maintenance, or other servicing of motor vehicles, motor vehicle parts, or any related or ancillary product or service").

¹⁴⁵ Used Motor Vehicle Trade Regulation Rule ("Used Car Rule"), 81 FR 81664, 81667 (Nov. 18, 2016).

¹⁴⁶ *See* 12 U.S.C. 5519(a), (f).

apply to specific entities, this reflects the scope and bounds of the rulemaking authority Congress delegated to the Commission under the Dodd-Frank Act.¹⁴⁷

Finally, some industry and dealership association commenters posited that the proposal conflicted with Federal and State law or duplicated the regulatory authority of State enforcement agencies. These commenters did not provide information regarding how duplicative laws prohibiting misrepresentations, requiring disclosures, or prohibiting charges for items that would not benefit the consumer or for items without express, informed consent would create harmful consequences, and the Commission is not aware of any laws that allow such conduct by those that the Rule defines as “Covered Motor Vehicle Dealer[s].” Moreover, the Final Rule provides additional remedies that will benefit consumers who encounter conduct that is already illegal under State or Federal law, including by adding a mechanism for the Commission to redress consumers injured by a dealer’s violation of the Rule, and will assist law-abiding dealers that presently lose business to competitors that act unlawfully. To the extent the Rule may overlap with State law, dealers can comply with these laws and also with the requirements that follow from the operation, in the Rule, of the Commission’s definition. To the extent there is

¹⁴⁷ Section 1029(d) of the Dodd-Frank Act defines “motor vehicle dealer” as “any person or resident in the United States, or any territory of the United States, who— (A) is licensed by a State, a territory of the United States, or the District of Columbia to engage in the sale of motor vehicles; and (b) takes title to, holds an ownership in, or takes physical custody of motor vehicles.” 15 U.S.C. 5519(f)(2). Parts (A) and (B) of this definition are identical to parts (1) and (2) of the definition of “Covered Motor Vehicle Dealer” or “Dealer” in the Final Rule.

Section 1029(d) of the Dodd-Frank Act states that the Commission “is authorized to prescribe rules under sections 5 and 18(a)(1)(B) of the Federal Trade Commission Act in accordance with section 553 of title 5, United States Code, with respect to a person described in subsection (a).” 15 U.S.C. 5519(d). Section 1029(a) in turn, provides the CFPB “may not exercise any rulemaking, supervisory, enforcement or any other authority . . . over a motor vehicle dealer that is predominantly engaged in the sale and servicing of motor vehicles, the leasing and servicing of motor vehicles, or both.” 15 U.S.C. 5519(a). The last clause is identical to part (3) of the definition in the Final Rule.

Several commenters requested that the Commission allow consumers to buy vehicles directly from manufacturers. Nothing in the Rule prohibits consumers from doing so.

truly an inconsistency between the provisions of the Final Rule and a State law, § 463.9 sets out the Rule's relation to State laws.

Thus, after careful consideration of the comments, the Commission is finalizing the definition of "'Covered Motor Vehicle Dealer' or 'Dealer'" with modifications for clarity. The definition in the Final Rule incorporates the phrase "including any individual or entity" to confirm that the term "person," like all undefined terms in this part, is used according to its ordinary meaning and includes individuals and corporate entities and adds the word "Covered" to the definition to reflect the narrowed scope of "Covered Motor Vehicle."¹⁴⁸

g) Express, Informed Consent

The proposed rule defined the term "Express, Informed Consent" as "an affirmative act communicating unambiguous assent to be charged, made after receiving and in close proximity to a Clear and Conspicuous disclosure, in writing, and also orally for in-person transactions" of "(1) What the charge is for" and "(2) The amount of the charge, including, if the charge is for a product or service, all fees and costs to be charged to the consumer over the period of repayment with and without the product or service." The proposed rule also included in this definition three examples of what does not

¹⁴⁸ See, e.g., *Person*, Black's Law Dictionary (11th ed. 2019) (defining "person" to include "[a] human being" and "[a]n entity (such as a corporation) that is recognized by law as having most of the rights and duties of a human being."); *Person*, Merriam-Webster.com Dictionary, <https://www.merriam-webster.com/dictionary/person> (last visited Dec. 5, 2023) (defining "person" to include "human" and "one (such as a human being, a partnership, or a corporation) that is recognized by law as the subject of rights and duties"); see also 12 U.S.C. 5481(19) (Dodd-Frank Act statutory authority for the Final Rule defining "person" as "an individual, partnership, company, corporation, association (incorporated or unincorporated), trust, estate, cooperative organization, or other entity"); 1 U.S.C. 1 (Dictionary Act defining "person" to include "corporations, companies, associations, firms, partnerships, societies, and joint stock companies, as well as individuals"). The application of covered motor vehicle dealer and dealer to entities also is consistent with these terms' use in the NPRM and commenter understanding of these terms in the course of public comment.

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.” In both the NPRM and in the provisions the Commission is finalizing, this definition is used exclusively in § 463.5(c). As such, comments regarding the definition are examined in the discussion of that provision in SBP III.E.2(c). As stated therein, the Commission is finalizing this definition substantively as proposed.

h) GAP Agreement

The proposed rule defined the term “GAP Agreement” as “an agreement to indemnify a vehicle purchaser or lessee for any of the difference between the actual cash value of the insured’s vehicle in the event of an unrecovered theft or total loss and the amount owed on the vehicle pursuant to the terms of a loan, lease agreement, or installment sales contract used to purchase or lease the vehicle, or to waive the unpaid difference between money received from the purchaser’s or lessee’s motor vehicle insurer and some or all of the amount owed on the vehicle at the time of the unrecovered theft or total loss.” The proposed definition also noted that this included “products or services otherwise titled ‘Guaranteed Automobile Protection Agreement,’ ‘Guaranteed Asset Protection Agreement,’ ‘GAP insurance,’ or ‘GAP Waiver[.]’” This term appeared in two sections of the rule proposal: in the provision regarding dealer charges for add-ons from which the consumer would not benefit at proposed § 463.5(a), and in the recordkeeping provision at proposed § 463.6(a)(4). Comments regarding the proposed definition are examined in the discussion of § 463.5(a) in SBP III.E.2(a). As stated therein, the Commission is finalizing this definition substantively as proposed, with

typographical modifications to correct a misplaced period in the original proposal and a modification removing the extraneous term “insured’s” from the phrase “actual cash value of the insured’s Vehicle.” In addition, the Final Rule capitalizes the defined term “Vehicle” to conform with the revised definition of “Covered Motor Vehicle” or “Vehicle” at § 463.2(e).

i) Government Charges

The proposed rule defined “Government Charges” as “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.” This term appeared in two provisions of the rule proposal: in the proposed definition of “Offering Price” at § 463.2(k), which pertains to the proposed offering price disclosure provision at § 463.4(a); as well as in the proposed provision relating to undisclosed or unselected Add-ons at § 463.5(b). As explained in further detail in the paragraph-by paragraph analysis of § 463.5(b) in SBP III.E.2(b), the Commission has determined not to finalize § 463.5(b), and as such will refrain from examining this proposed definition in relation to that provision. Comments regarding the proposed definition are examined in the discussion of § 463.4(a) in SBP III.D.2(a). As stated therein, the Commission is finalizing this definition substantively as proposed, with a typographical modification to include a serial comma for consistency.

j) Material or Materially

The proposed rule defined “Material” or “Materially” as “likely to affect a person’s choice of, or conduct regarding, goods or services.” This term appeared in the prohibited misrepresentations provisions at § 463.3(b) and (g), and in the recordkeeping

provision at § 463.6(a). As described in detail in the section-by-section analysis of § 463.3 in SBP III.C, the Final Rule modifies the introductory paragraph of § 463.3 from the Commission's original proposal to add the word "Material," such that the Commission's materiality standard applies to all subparts of § 463.3. The Final Rule accordingly removes the word "Material" from § 463.3(b) and (g) so as to avoid duplication. Based on the following, the Commission is finalizing this definition, now at § 463.2(j), substantively as proposed.

A dealership association commenter noted that the proposed definition did not use the term "significance," and asserted that "Material" information should be significant and not "rooted in personal preference."¹⁴⁹ The Commission notes that this definition adopts the meaning of the term as articulated through decades of enforcement actions¹⁵⁰ instead of using a different term such as "significance," and does not use the term "personal preference" or rely on "personal preference" any more than the phrase "likely to affect" or "significant" does. Thus, the Commission is finalizing this definition substantively as proposed.

k) Offering Price

The proposed rule defined "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." This term appeared in two provisions of the rule proposal: in the proposed offering price disclosure provision at § 463.4(a), as well as in the proposed

¹⁴⁹ Comment of Ga. Auto. Dealers Ass'n, Doc. No. FTC-2022-0046-10806 at 4.

¹⁵⁰ See FTC Policy Statement on Deception, *supra* note 42, at 1-2, 5; see also *Fed. Trade Comm'n v. Fleetcor Techs., Inc.*, 620 F. Supp. 3d 1268, 1303 (N.D. Ga. 2022); *Fed. Trade Comm'n v. Crescent Pub. Grp., Inc.*, 129 F. Supp. 2d 311, 321 (S.D.N.Y. 2001); *Thompson Med. Co., Inc.*, 104 F.T.C. 648, 816 (1984).

provision relating to undisclosed or unselected add-ons at § 463.5(b). As explained in further detail in the paragraph-by-paragraph analysis of § 463.5(b) in SBP III.E.2(b), the Commission has determined not to finalize § 463.5(b), and as such, will refrain from examining this proposed definition in relation to that provision. Comments regarding the proposed definition are examined in the discussion of § 463.4(a) in SBP III.D.2(a).¹⁵¹ As stated therein, the Commission is finalizing this definition largely as proposed, with a modification to clarify that dealers may, but need not, exclude required government charges from a motor vehicle's offering price. In addition, the definition in the Final Rule substitutes "Vehicle" for "motor vehicle" to clarify that the term conforms with the revised definition of "'Covered Motor Vehicle' or 'Vehicle'" at § 463.2(e).

C. § 463.3: Prohibited Misrepresentations

1. General Comments

The proposed rule set forth prohibitions against certain misrepresentations by motor vehicle dealers. Based on the following, the Commission has determined to finalize these prohibitions, with minor revisions.

The following paragraphs discuss comments relating to § 463.3 generally and Commission responses to such comments, followed by comments relating to each paragraph of § 463.3 and Commission responses to such comments.

The NPRM proposed prohibiting dealers from making any misrepresentation, expressly or by implication, regarding specific listed categories. The Commission received many comments regarding this proposal, including comments supporting such a

¹⁵¹ Some commenters, including certain industry associations, requested that the Rule include additional definitions, including for the terms "charged," "item," "discount," "rebate," "trade-in value," and "online service." In response, the Commission notes that for terms not defined in the Rule, the plain meaning of the terms apply.

provision, comments urging the Commission to broaden the provision, and comments urging the Commission to limit or forgo the provision.

Thousands of commenters expressed support for the proposed rule.¹⁵² Many of these commenters specifically expressed concern about misleading advertisements and deceptive pricing. Many individual commenters cited examples of such conduct from their own experiences purchasing or leasing vehicles, and many commenters with experience operating or working for a dealership shared their observations or experiences. For example:

- I have been looking for a car at MSRP and most dealers['] websites will list it at that price. [T]hen when you drive there the[y] will say well there is a market adjustment from 5,000 to 20,000 dollars. [N]ow . . . you need a car and have wasted 3-4 hours and picked out what you thought was your next car.¹⁵³
- I am currently in discussions with two dealerships for a new car. Both assure me there is absolutely no dealer markup, come to find out they are adding 3/5k of “mandatory” add-ons respectively once I get in the door.¹⁵⁴
- The last vehicle I purchased 2 years ago was a nightmare. Drove 5 hrs[.] to a dealer in Southern California. I called the dealer and confirmed the price on their website was what I was going to pay. When I arrived there, they had a list of \$2500 [i]n additional charges that were not disclosed when I called and before I started driving. Purchasing a vehicle shouldn't be such a stressful process.¹⁵⁵
- Most recently I started looking myself for a new lease, and looked at the RAV 4 prime. Went to my local dealer after seeing an ad on their site for \$450 a month. Not only did they not honor the deal, but wouldn't even discuss that it was on their own site. I was told the SE model was [\$5000] over MSRP and the XSE was [\$8000] over.¹⁵⁶

¹⁵² See Motor Vehicle Dealers Trade Regulation Rule, Comment Docket, <https://www.regulations.gov/document/FTC-2022-0046-0001/comment>.

¹⁵³ Individual commenter, Doc. No. FTC-2022-0046-0036.

¹⁵⁴ Individual commenter, Doc. No. FTC-2022-0046-0099.

¹⁵⁵ Individual commenter, Doc. No. FTC-2022-0046-0906.

¹⁵⁶ Individual commenter, Doc. No. FTC-2022-0046-1878.

- I have contacted 10 different car dealerships in the past month looking to purchase a new or used SUV. 9 out of the 10 dealerships I contacted online or visited in-person in California changed or lied about the online advertised price of the vehicle I was inquiring about or said the car was sold or not available and tried to sell me a more expensive vehicle.¹⁵⁷
- Once I was led to the F&I office I was told that I HAD to buy a \$995 paint protection product that I didn[']t want or need. I asked to see the contract for this product which clearly stated in bold letters ‘ACCEPTANCE OF THIS CONTRACT IS VOLUNTARY AND DOES NOT AFFECT THE FINANCING OF THE VEHICLE’ I pointed this out to the salesman and told him that I didn’t want this product[.] [H]e looked me in the eyes with my wife present and said “You have to buy it[.]”¹⁵⁸
- At the dealership, the salesman offered a price of \$38,000, over \$8,000 more than the advertised price. When I challenged the extra cost, he said the advertisement included every possible rebate and discount and no one could receive them together (some were exclusionary with other discounts).¹⁵⁹
- While there are good honorable dealerships, far too many play games. Rarely is the price of [a] car advertised online or via mail EVER the actual price. Far too often in the F&I office the finance manager tries to [gloss] over add[-]ons that they just arbitrarily added on without telling you OR state I cannot get your loan approved without an extended warranty as an example I experienced. . . . I worked for a Toyota dealership many years ago and left the industry because it made me sick seeing the games played taking advantage of people. Change is needed and sooner than later.¹⁶⁰
- I work as a salesperson at a local Nissan dealership. . . . Currently, dealerships across the US, including the one I work for, have made the car buying process needlessly confusing, expensive, and frustrating by engaging in false advertising and hidden add-on products. While these practices are very unscrupulous, they are incredibly effective at what they are designed to do: drive revenue for the store. If these regulations are passed, they would certainly take a significant toll on my personal finances. But the longer I work in my position, the more I realize that no

¹⁵⁷ Individual commenter, Doc. No. FTC-2022-0046-3686.

¹⁵⁸ Individual commenter, Doc. No. FTC-2022-0046-4752.

¹⁵⁹ Individual commenter, Doc. No. FTC-2022-0046-5580.

¹⁶⁰ Individual commenter, Doc. No. FTC-2022-0046-2378.

one should be allowed to engage in such exploitative conduct in the course of running a business.¹⁶¹

- I am in the auto industry and work at a very transparent and honest dealership. I think most of these rules are great. I hear horror stories about honest people seeing a car advertised for one price, only to be told there are additional a[d]d-ons and markups once they arrive. I think this is unfair. I'm also shocked every time I hear about a dealership charging for mandatory window etching and nitrogen filled tires. I even know of reputable dealerships that add GPS tracking and theft recovery devices to every new car, even though these cars come with GPS theft recovery from the manufacturer. Stopping these practices will help restore consumers' faith in car dealerships, save them money, and lead to a more honest and ethical industry. . . .¹⁶²

Other commenters expressed support for transparent pricing generally, stating, for example:

- A consumer should be able to see a price, walk into a dealership, and pay that price. Plain and simple, just like ANY OTHER RETAILER."¹⁶³
- If I walk into Best Buy and see a price they HAVE to sell it to me for that price or cheaper. These rules are long over due.¹⁶⁴
- I believe if they advertise a car, it should be available for sale—at the advertised price—just as a supermarket can't advertise a price for something they don't have, or add a 'coupon redemption fee' to it. I believe these rules are an extremely reasonable approach to a long-standing problem and urge you to adopt them.¹⁶⁵
- I used to work in the retail auto industry and these proposed rules will help everyone (including the dealers who are fighting them). Consumers will benefit from the transaction transparency, and over the long term even the shady dealers will benefit by treating consumers fairly and developing long term relations.¹⁶⁶

¹⁶¹ Individual commenter, Doc. No. FTC-2022-0046-3693.

¹⁶² Individual commenter, Doc. No. FTC-2022-0046-4959.

¹⁶³ Individual commenter, Doc. No. FTC-2022-0046-0017.

¹⁶⁴ Individual commenter, Doc. No. FTC-2022-0046-0034.

¹⁶⁵ Individual commenter, Doc. No. FTC-2022-0046-0005.

¹⁶⁶ Individual commenter, Doc. No. FTC-2022-0046-1935.

- These regulations would be the best thing to happen for consumer protection since the Mo[n]roney Label. I not only have had to navigate and negotiate erroneous fees at dealers, but I've also worked at dealers whose transparency and forthrightness put them at a disadvantage. Many dealers advertise vehicles that can not [sic] be purchased or leased at the advertised price due to deceptive adverts either not disclosed or in a print so fine it can't be read. Please pass this ruling. My grandma shouldn't have to pay more than someone else just because she's not a good negotiator.¹⁶⁷

Consumer advocacy organization commenters and individual commenters urged the FTC to include additional specific provisions in § 463.3, including a prohibition against misrepresentations regarding the safety, mechanical or structural condition, odometer reading, or history of a vehicle. Similarly, commenters including a municipal regulator urged the Commission to specifically prohibit misrepresentations regarding certification of used vehicles, citing enforcement actions it brought against dealers that misrepresented used vehicles as “certified pre-owned” or “manufacturer certified.” The FTC takes seriously deception relating to the safety or condition of a vehicle and the practice of charging consumers more based on false claims or reassurances.¹⁶⁸ Depending on the claim made by the dealership and the specific facts at issue, deceptive conduct in either of these areas may be covered by the enumerated misrepresentation paragraphs the

¹⁶⁷ Individual commenter, Doc. No. FTC-2022-0046-10441.

¹⁶⁸ See, e.g., Complaint, *CarMax, Inc.*, No. C-4605 (F.T.C. Mar. 22, 2017) (alleging Defendants misled consumers by representing that the used motor vehicles Defendants sold had been subject to rigorous inspection but omitting important safety information about recalls); Complaint, *West-Herr Auto. Grp., Inc.*, No. C-4607 (F.T.C. Mar. 22, 2017) (alleging Defendants failed to disclose, or disclose adequately, that used motor vehicles it sold were subject to open recalls for safety issues); Complaint, *Asbury Auto. Grp., Inc.*, No. C-4606 (F.T.C. Mar. 22, 2017) (alleging deceptive failure to disclose material information about the safety of used motor vehicles sold by Defendants); Complaint ¶¶ 20-24, *Fed. Trade Comm'n v. Passport Imports, Inc.*, No. 8:18-cv-03118 (D. Md. Oct. 10, 2018) (alleging Defendants misled consumers by mailing “Urgent Recall” notices that were similar to and had the same color scheme as notices manufacturers are required by the U.S. Department of Transportation’s NHTSA to use when sending information about vehicle recalls, even though in the “vast majority of instances” the recipients’ cars were not subject to an open recall).

Commission is finalizing, such as by § 463.3(a) if it relates to the terms of the purchase, lease, or financing. The FTC will continue to monitor dealer misrepresentations to determine whether additional action is needed.

In addition, a number of credit union commenters requested that the Commission explicitly address misrepresentations involving dealers' refusal to accept outside financing to purchase a vehicle. These commenters cited several examples of consumers being told that they could not use outside financing, that they would not receive a lower interest rate from an outside financial institution, or that a particular interest rate was the best rate the consumer can get. The Rule already covers such conduct. For example, § 463.3(a) of the Rule, which prohibits dealers from misrepresenting the cost or terms of financing a vehicle, covers these and other misrepresentations regarding financing, including the availability of outside or "indirect" financing terms, or the costs of such financing as compared to those of any dealer-provided financing.

Two individual commenters posited that any language prohibiting misrepresentations should explicitly include the word "omissions," in order to ensure that dealers do not sneak in additional costs without consumers' consent or understanding. The Commission appreciates this concern, and notes that the Rule has many provisions prohibiting such misconduct, including the required disclosures regarding price, add-ons, and total amount of payments in § 463.4 of the Final Rule, as well as the requirement in § 463.5(c) to obtain consumers' express, informed consent before charging for any items.

Other commenters, including dealership associations, individual commenters, and a United States Representative, questioned whether certain of the proposed misrepresentation provisions were duplicative of other laws, such as the Truth in Lending

Act (“TILA”), the Consumer Leasing Act (“CLA”), or State regulations, and in some instances whether compliance with State regulations should act as a safe harbor. The Commission notes that another statute—the FTC Act—already prohibits misrepresentations in or affecting commerce, and to the extent there is duplication between the FTC Act and other existing statutes pertaining to deception, there is no evidence that duplicative misrepresentation prohibitions have harmed consumers or competition.¹⁶⁹ The Commission further notes that the Final Rule provides additional remedies that will benefit consumers who encounter conduct that is otherwise already illegal under Federal law, and will aid law-abiding dealers that lose business to competitors that act unlawfully.¹⁷⁰ State laws may provide more or less specific requirements as long as those requirements are not inconsistent with part 463, as set forth in § 463.9, and in the event of an inconsistency, the Rule only affects such State law to the extent of the inconsistency. Because dealers are already prohibited from engaging in “deceptive acts or practices” under the FTC Act, dealers should be able to comply with these provisions without the need for a safe harbor.

¹⁶⁹ One commenter expressed concern that the prohibited misrepresentations would cause dealerships to provide less information, because discussing pricing and quotes would result in providing further documentation for every conversation. However, as the FTC Act already prohibits misrepresentations, and given that pricing and financing information are among the most salient aspects of a consumer’s shopping for a vehicle, the Commission considers it unlikely that § 463.3 would result in less information or the creation of additional documentation.

¹⁷⁰ Under Section 19(a)(1) of the FTC Act, the Commission may sue in Federal district court “any person, partnership, or corporation” that “violates any rule under [the FTC Act] respecting unfair or deceptive acts or practices.” 15 U.S.C. 57b(a)(1). Where such liability is found, under Section 19(b) a court may “grant such relief as [it] finds necessary to redress injury . . . resulting from the rule violation,” including the “rescission or reformation of contracts, the refund of money or return of property, [or] the payment of damages.” *Id.* 57b(b).

A few commenters requested that the Rule go further in providing remedies, including by allowing for a private right of action to enforce Rule violations. The Commission notes that, depending on State law, consumers may be able to use State statutes that prohibit unfair or deceptive practices to challenge conduct that violates this Rule.

There is nothing in the FTC Act or this Rule that would preclude consumers from exercising any such legal rights under State law. The Commission will continue to monitor the market to determine whether additional steps are needed.

Industry association commenters also claimed that the prohibited misrepresentation proposal ignored the materiality prong of the Commission's deception standard, and further observed that some of the prohibited misrepresentations in the proposed rule explicitly included a materiality requirement,¹⁷¹ while others did not. As the NPRM made clear, the Commission's proposed misrepresentation section, at § 463.3, addressed misrepresentations that are all material.¹⁷² The Commission need not explicitly specify materiality in its description of these misrepresentations; indeed, the Commission has long considered certain categories of information, express claims, and intended implied claims to be presumptively material.¹⁷³ Nevertheless, rather than using the term "Material" in certain individual enumerated paragraphs, the Commission has determined to modify the introductory text of § 463.3 from the Commission's original proposal in order to specifically prohibit misrepresentations regarding material information about the enumerated paragraphs. As such, the Commission is also removing what would otherwise be redundant references to the term "Material" within paragraphs (b) and (g) of § 463.3.

A national dealership association incorrectly asserted that this section is problematic because there is no requirement that the representation or omission be material or be viewed from the perspective of a consumer acting reasonably under the circumstances. As adopted in the final rule, this section adds the term "Material," stating that it is an unfair or deceptive practice for any motor vehicle dealer to make any misrepresentation, expressly or by implication, regarding material information about the

¹⁷¹ See NPRM at 42045 (proposed § 463.3(b), (g)).

¹⁷² NPRM at 42019.

¹⁷³ FTC Policy Statement on Deception, *supra* note 42, at 5 & nn.47-55.

specific categories enumerated in § 463.3.¹⁷⁴ The Commission is not aware of situations where dealers have made misrepresentations expressly or by implication regarding material information about these specific categories that are not deceptive or unfair, nor did commenters describe any such situations.

The Commission further notes that, by the terms of this section, a court must find that the dealer made an express or implied misrepresentation regarding material information for § 463.3 to be violated. For an express or implied misrepresentation regarding material information to be made in violation of the FTC Act and this Rule, there must be a representation that misleads consumers acting reasonably under the circumstances regarding material information. Whether such a representation has occurred depends on the facts. In the case of implied representations, whether a representation has occurred is often evident from an examination of the representation itself, including, for example, an evaluation of the document in which a representation is made, the juxtaposition of language in that document, the nature of the representation, and the nature of the transaction.¹⁷⁵ In other situations, extrinsic evidence that it is reasonable for consumers to reach the implied representation may be helpful, such as consumer testimony, surveys, or other reliable evidence of consumer interpretation.¹⁷⁶

¹⁷⁴ The Final Rule prohibits misrepresentations in specific categories. In contrast, some FTC rules go further by prohibiting misrepresentations of “any material aspect” of the transaction. *See, e.g.*, Mortgage Assistance Relief Services Rule, 16 CFR 322.3(b); Telemarketing Sales Rule, 16 CFR 310.3(a)(2)(x).

¹⁷⁵ FTC Policy Statement on Deception, *supra* note 42, at 2 (*citing Am. Home Prods.*, 98 F.T.C. 136, 374 (1981), *aff’d*, 695 F.2d 681, 687 (3d Cir. 1982) (evaluation of the entire document); *Warner Lambert*, 86 F.T.C. 1398, 1489-90 (1975), *aff’d* 562 F.2d 749 (D.C. Cir. 1977), *cert. denied*, 435 U.S. 950 (1978) (juxtaposition of phrases); *Firestone Tire & Rubber Co.*, 81 F.T.C. 398, 456 (1972), *aff’d*, 481 F.2d 246 (6th Cir.), *cert. denied*, 414 U.S. 1112 (1973) (nature of the claim); *see also Kraft, Inc. v. Fed. Trade Comm’n*, 970 F.2d 311, 319 (7th Cir. 1992) (“Commission may rely on its own reasoned analysis to determine what claims, including implied ones, are conveyed in a challenged advertisement, so long as those claims are reasonably clear from the face of the advertisement.”).

¹⁷⁶ FTC Policy Statement on Deception, *supra* note 42, at 2 n.8.

For example, if a dealer offers discounted coffee for customers who visit its dealership before 10 a.m. and honors that offer, but makes no representations, expressly or by implication, about discounted cars, the dealer will not have violated § 463.3(d), which prohibits express or implied misrepresentations regarding rebates and discounts, even if a consumer holds an unreasonable belief that the offer was for discounted cars. On the other hand, if a dealership's advertisement depicts a car with a consumer standing next to it holding a cup of coffee, and states, "10% discount available before 10 a.m.," such an advertisement can convey several representations that may mislead reasonable consumers,¹⁷⁷ including that the car is available at a 10% discount.

Commenters including industry associations opined on the term "implied," contending for example that the idea that a misrepresentation can be implied is overly broad, and a dealership association commenter expressed concern that the inclusion of "implied" creates too much uncertainty. As has been recognized under the law for decades, however, representations can mislead consumers, even without making express claims.¹⁷⁸ Take, for example, an advertisement that shows a picture of a new sedan for sale. Even if the advertisement does not expressly state that consumers could use the

¹⁷⁷ The interpretation or reaction does not have to be the only one; when a seller's representation conveys more than one meaning to reasonable consumers, one of which is false, the seller is liable for the misleading interpretation. See FTC Policy Statement on Deception, *supra* note 42, at 3. Further, an interpretation will be presumed reasonable if it is the one the respondent intended to convey. *Id.*

¹⁷⁸ The FTC's Policy Statement on Deception and scores of FTC cases make clear that both express and implied claims can be deceptive. See, e.g., *ECM Biofilms, Inc. v. Fed. Trade Comm'n*, 851 F.3d 599 (6th Cir. 2017) (affirming Commission's finding that an additive manufacturer's unqualified biodegradability claim conveyed an implied claim that its plastic would completely biodegrade within five years); *POM Wonderful LLC*, No. C-9344 (F.T.C. Jan. 10, 2013) (Opinion of the Commission), *aff'd as modified*, *POM Wonderful, LLC v. Fed. Trade Comm'n*, 777 F.3d 478 (D.C. Cir. 2015) (finding that company's advertisements would reasonably be interpreted by consumers to contain an implied claim that POM products treat, prevent, or reduce the risk of certain health conditions and for some ads that these effects were clinically proven); *Kraft, Inc. v. Fed. Trade Comm'n*, 970 F.2d 311 (7th Cir. 1992) (affirming finding of deception where Kraft ads juxtaposed references to the milk contained in Kraft singles and the calcium content of the milk, the combination of which implied that each Kraft single contained the same amount of calcium as five ounces of milk).

vehicle to drive at speeds higher than 25 miles per hour, there is an implied representation that a product is fit for the purposes for which it is sold.¹⁷⁹ Thus, limiting the Rule to prohibit only express misrepresentations would significantly hamper its usefulness to consumers.

One industry association commenter further argued that the proposed rule created a new deception standard that ignored intent and reliance. This argument, however, misstates the law, which does not require intent¹⁸⁰ or reliance¹⁸¹ to establish deception.

Thus, the Commission is finalizing the introductory paragraph of § 463.3 largely as proposed, with a modification stating that it applies to misrepresentations regarding material information. For consistency with other parts of the Rule, the Commission is also removing the shorthand “FTC Act” that appeared in parentheses after “the Federal Trade Commission Act” in the introductory paragraph of the proposed rule. For clarity and consistency with the revised definition of “Covered Motor Vehicle Dealer” (at § 463.2(f) and discussed in SBP III.B.2(f)), the Commission is adding the word “Covered” to “Motor Vehicle Dealer” in the introductory paragraph. Finally, without changing any substantive requirements for covered entities, the Commission is adding the following sentence to the end of § 463.3: “The requirements in this section also are

¹⁷⁹ FTC Policy Statement on Deception, *supra* note 42, at 2; *Int’l Harvester Co.*, 104 F.T.C. 949, 1057-58 (1984).

¹⁸⁰ *See Fed. Trade Comm’n v. Freecom Commc’ns*, 401 F.3d 1192, 1202 (10th Cir. 2005) (“Because the primary purpose of § 5 is to protect the consumer public rather than punish the wrongdoer, the intent to deceive the consumer is not an element of a § 5 violation.”).

¹⁸¹ *See Fed. Trade Comm’n v. Figgie Int’l, Inc.*, 994 F.2d 595, 605-06 (9th Cir. 1993) (holding that Section 19 of the FTC Act does not require proof of individual consumer reliance; rather, there is a “presumption of actual reliance” that arises once the Commission has proved that a defendant made material misrepresentations, that they were widely disseminated, and that consumers purchased the defendant’s product).

prescribed for the purpose of preventing the unfair or deceptive acts or practices defined in this part, including those in §§ 463.4 and 463.5.”

The Commission examines each paragraph of § 463.3, including by examining related comments and Commission responses to those comments. The Commission then discusses the corresponding provisions of the Final Rule.

2. Paragraph-by-Paragraph Analysis of § 463.3

a) The Costs or Terms of Purchasing, Financing, or Leasing a Vehicle

Proposed § 463.3(a) prohibited misrepresentations regarding the cost or terms of purchasing, financing, or leasing a vehicle. The Commission is finalizing this provision largely as proposed, with the minor modification of capitalizing the defined term “Vehicle” to conform with the revised definition at § 463.2(e) (explained in SBP III.B.2(e)). As previously discussed, the addition of “material” to the introductory paragraph of § 463.3 will apply to this paragraph and to all paragraphs of § 463.3 that follow.

A number of commenters expressed support for this proposed provision, contending, *inter alia*, that it would level the playing field for car buyers and address unfair and deceptive practices related to financing terms and conditions.

The Commission received a number of industry association comments requesting that the Commission clarify the operation of proposed § 463.3(a), including for example, by clarifying whether it would require dealers to discuss all purchase, finance, or lease terms, or whether it would require dealers to read aloud all the terms of the buyer’s order and finance or lease agreement. Dealership association commenters expressed a related concern that this proposed provision lacked specific guidance on dealer compliance.

To begin, misrepresentations regarding “costs or terms of purchasing, financing, or leasing a vehicle” refer to the ordinary plain meaning of the words used in the provision.¹⁸² Second, as the language in the introductory paragraph of § 463.3 makes clear, its paragraphs—including paragraph (a) of § 463.3—prohibit misrepresentations regarding material information. By its terms, this paragraph requires no particular affirmative disclosures, whether written or oral; rather, this paragraph obligates dealers to refrain from misrepresentations regarding material information about the costs or terms of purchasing, financing, or leasing a vehicle.¹⁸³

The Commission received comments from industry associations requesting that the Final Rule provide a safe harbor from liability stemming from dealers’ violations of the Rule to vehicle credit contract assignees, who take or receive these contracts subject to all claims and defenses consumers could assert against the dealer under the Commission’s Trade Regulation Rule Concerning Preservation of Consumers’ Claims and Defenses, also known as the “Holder Rule.”¹⁸⁴ The Rule, however, does not create

¹⁸² Examples of “costs or terms of purchasing, financing, or leasing a vehicle” include, among other things, express or implied representations regarding a vehicle’s total cost, down payments, interest rates, repayment schedules, the price for added features, other charges, certainty or finality of terms, and the availability of discounts. The Commission has brought numerous enforcement actions where, for example, dealers have misrepresented the total price a consumer could pay for vehicles, or concealed a required down payment or other restrictions on the offer. *See, e.g.,* Complaint ¶¶ 10-11, *Fed. Trade Comm’n v. Liberty Chevrolet, Inc.*, No. 1:20-cv-03945 (S.D.N.Y. May 21, 2020) (alleging false ads stating a certain price but charging consumers higher prices); Complaint ¶¶ 38-46, *Fed. Trade Comm’n v. Tate’s Auto Ctr. of Winslow, Inc.*, No. 3:18-cv-08176-DJH (D. Ariz. July 31, 2018) (alleging false ads touting attractive terms but concealing (i) ads were for lease offers only and required substantial initial payment, (ii) discounts were subject to material limitations, or (iii) other legally required disclosures); Complaint ¶¶ 7-16, *Cowboy AG, LLC*, No. C-4639 (F.T.C. Jan. 4, 2018) (alleging false ads touting attractive terms, but concealing substantial down payments, offers were for leases and not purchases, material eligibility restrictions, and other legally required disclosures).

¹⁸³ Some commenters repeat this and similar questions, regarding what types of disclosures are required, through provision (o); the same response applies—provisions (a) through (o) do not affirmatively require particular disclosures. As with all misrepresentations prohibited by the Rule, and under Section 5 of the FTC Act, misrepresentations are barred whether they are made expressly or by implication.

¹⁸⁴ *See* Trade Regulation Rule Concerning Preservation of Consumers’ Claims and Defenses, 16 CFR 433.2 [hereinafter Holder Rule].

liability for these entities under the Holder Rule where it did not previously exist; the Rule addresses conduct that is unfair or deceptive under the FTC Act. When enacting the Holder Rule, the Commission did not include a safe harbor or exceptions involving any specific deceptive or unfair conduct, and the Commission declines to do so through this Rule.

A comment from a motor vehicle industry association argued that this provision would likely be inapplicable, or less impactful, with regard to RV sales because the RV industry rarely offers leases, if at all, and because RV sales are usually not financed through RV manufacturer-controlled financing companies. To the extent that specific provisions do not apply to specific entities, such provisions do not impose any obligations upon those entities. Nevertheless, as explained in the analysis of the “Covered Motor Vehicle” definition, § 463.2(e), the Commission is excluding recreational vehicle dealers from the definition of “Covered Motor Vehicle.”

After carefully considering the comments, the Commission is finalizing paragraph (a) of § 463.3 with the minor modification of capitalizing “Vehicle.” This provision prohibits misrepresentations regarding “[t]he costs or terms of purchasing, financing, or leasing a Vehicle.” Misrepresentations of the price, discounts, or other terms are likely to cause consumers to waste time pursuing unavailable or inapplicable offers and to spend more money on a vehicle rather than undergoing the hours-long process to begin the vehicle search and shopping process anew at another dealership. Prohibiting these

misrepresentations will save consumers time and money and ensure that dealers compete on a level playing field.¹⁸⁵

b) Any Costs, Limitation, Benefit, or Any Other Aspect of an Add-on Product or Service

Proposed § 463.3(b) prohibited misrepresentations concerning any costs, limitation, benefit, or any other material aspect of an add-on product or service. Section 463.3(b) of the Final Rule adopts this provision without substantive modification. As described in detail in SBP III.C.1, the Commission is modifying § 463.3 from the Commission's original proposal to include the term "Material" in the introductory paragraph rather than in paragraphs (b) or (g) of § 463.3. Section 463.3(b) of the Final Rule therefore deletes reference to the term "Material."

The Commission received a number of comments expressing support for prohibiting misrepresentations about add-ons, including comments that requested specific additional add-on-related misrepresentation prohibitions. For example, an auto dealer commenter expressed support for prohibiting misrepresentations about whether or not a car has add-ons already installed. Consumer advocacy organization commenters

¹⁸⁵ The National Automobile Dealers Association commissioned a survey, released in May of 2023, that asserted the Commission's proposed rule would lead to an increase in consumer transaction time. Edgar Faler et al., Ctr. for Auto. Rsch., "Assessment of Costs Associated with the Implementation of the Federal Trade Commission Notice of Proposed Rulemaking (RIN 2022 – 14214), CFR Part 463" (2023), https://www.cargroup.org/wp-content/uploads/2023/05/CAR-Report_CFR-Part-463_Final_May-2023.pdf. This survey was released more than seven months after the closure of the comment period for the notice of proposed rulemaking on September 12, 2022, and is not part of this rulemaking record. These facts notwithstanding, the Commission observes that each respondent to this survey was presented with a leading statement at the beginning of the survey asserting, *inter alia*, that the proposed rule would impose "new duties [that] are expected to create additional monitoring, training, forms, and compliance review responsibilities as well as a modification of record keeping systems and coordination with outside IT and other vendors" and "increase the time of a motor vehicle transaction, inhibit online sales, limit price disclosures, and increase customer confusion and frustration." *Id.* at 34, 36 (introductory instructions on the survey instrument sent to respondents). In addition, this survey did not explain its selection process or criteria for the 60 dealers it surveyed, nor why only 40 such dealerships provided fully completed survey responses. Moreover, the survey report attributed much of this estimated increase to proposed rule provisions that the Commission is not finalizing.

recommended that the Commission include a new paragraph in § 463.3 prohibiting misrepresentations regarding the consumer's right to cancel add-on products or services. This provision, however, already covers such conduct: It prohibits misrepresentations regarding material information about any costs, limitation, benefit, or any other aspect of an add-on product or service. "Material" means likely to affect a consumer's conduct or choices.¹⁸⁶ A consumer's right to cancel is likely to affect the consumer's conduct regarding an add-on product or service. Thus, § 463.3(b) includes representations about a consumer's right to cancel an add-on product or service.

A number of dealership association commenters argued that the language used in this provision is vague or confusing. The terms "Material" and "Add-on Product or Service," however, are specifically defined in § 463.2. The remaining terms in this provision are commonly used and can be understood according to their plain meaning.¹⁸⁷ The NPRM examined misrepresentations regarding the coverage and costs of add-ons, and enforcement actions by the Commission and other agencies have documented many instances of such misrepresentations.¹⁸⁸ Examples of the type of conduct prohibited

¹⁸⁶ See FTC Policy Statement on Deception, *supra* note 42, at 2, 5; see also *Fed. Trade Comm'n v. Crescent Publ'g Grp., Inc.*, 129 F. Supp. 2d 311, 321 (S.D.N.Y. 2001).

¹⁸⁷ E.g., *Cost*, Cambridge Dictionary, <https://dictionary.cambridge.org/us/dictionary/english/cost> ("Cost" is defined as "the amount of money needed to buy, do, or make something"); *Limitation*, Cambridge Dictionary, <https://dictionary.cambridge.org/us/dictionary/english/limitation> ("Limitation" is defined as "something that controls or reduces something"); *Benefit*, Cambridge Dictionary, <https://dictionary.cambridge.org/us/dictionary/english/benefit> ("Benefit" is defined as "a helpful or good effect, or something intended to help").

¹⁸⁸ See, e.g., Complaint ¶¶ 26-27, 70-71, *Fed. Trade Comm'n v. N. Am. Auto. Servs., Inc.*, No. 1:22-cv-01690 (N.D. Ill. Mar. 31, 2022) (alleging deceptive and unauthorized add-on charges; unfair discrimination against minority consumers); Complaint ¶¶ 12-19, *Fed. Trade Comm'n v. Liberty Chevrolet, Inc.*, No. 1:20-cv-03945 (S.D.N.Y. May 21, 2020) (alleging deceptive and unauthorized add-on charges in consumers' transactions); Complaint ¶¶ 59-64, *Fed. Trade Comm'n v. Universal City Nissan, Inc.*, No. 2:16-cv-07329 (C.D. Cal. Sept. 29, 2016) (deceptive and unauthorized add-on charges in consumers' transactions); Complaint ¶¶ 4-14, *Nat'l Payment Network, Inc.*, No. C-4521 (F.T.C. May 4, 2015) (alleging failure to disclose fees associated with financing program; misleading savings claims in advertisements); Complaint ¶¶ 4-13, *Matt Blatt Inc.*, No. C-4532 (F.T.C. July 2, 2015) (alleging failure to disclose fees associated with

include misrepresenting whether add-ons are required in order to purchase or lease a vehicle, including by representing that such charges are required when in fact they are not, or misrepresenting that advertised prices do not include fees beyond routine taxes and fees only to subsequently require the purchase of add-ons; misrepresenting what is, or is not, covered by, among others, an extended warranty, service or maintenance plan, or GAP agreement;¹⁸⁹ and misrepresenting that consumers have provided express, informed consent to be charged for add-ons.

Commenters including a number of motor vehicle dealership associations requested that the Commission clarify how extensive disclosures would need to be to satisfy this provision. One such commenter requested that the Commission explain what conduct would be required under this paragraph, and expressed concern that, if the paragraph required disclosures, such a requirement would affect the length of the transaction. Another industry association commenter suggested that, in the event dealers provide consumers with a verbal or written disclosure stating that such products have costs, limitations, or benefits, and stating information about other material aspects, the Commission modify its proposal to shift to consumers the burden of proving any relevant dealer misrepresentation. An individual commenter expressed support for applying § 463.3(a) and (b) to dealer advertisements of free lifetime benefits programs and requiring dealers to make disclosures about any costs, limitations, benefits, or any other

financing program; misleading savings claims). *Cf.* Consent Order ¶¶ 10-16, *Santander Consumer USA, Inc.*, CFPB No. 2018-BCFP-0008 (Nov. 20, 2018) (finding defendant sold GAP product allegedly providing “full coverage” to consumers with loan-to-value ratios (“LTVs”) above 125%, when in fact coverage is limited to 125% of LTV).

¹⁸⁹ *See, e.g.*, Consumer Fin. Prot. Bureau, “Supervisory Highlights: Issue 12, Summer 2016” 5 (June 2016), https://files.consumerfinance.gov/f/documents/Supervisory_Highlights_Issue_12.pdf (finding that one or more auto lenders deceptively advertised the benefits of their GAP agreement products, leaving the impression that these products would fully cover the remaining balance of a consumer’s loan in the event of vehicle loss when, in fact, the product only covered amounts below a certain loan to value ratio).

aspect of an add-on product or service. The Commission notes that paragraphs (a) and (b) of § 463.3 already apply to free lifetime benefits programs. Regarding disclosures, the Commission is concerned about including additional disclosure requirements beyond the few areas included in the Rule, or shifting the burden to consumers to hunt for and decipher disclosures, given that the auto finance and lease process is already lengthy, complex, document-heavy, and dense. Accordingly, as discussed in regard to § 463.3(a), these provisions do not mandate set disclosures or allow for disclosures to be used as a shield when there are misrepresentations to consumers; rather, they prohibit express or implied misrepresentations.¹⁹⁰

Several dealership association commenters pointed to State laws that, they contended, may already prohibit misrepresentations about add-ons or may otherwise protect consumers. As discussed previously, to the extent there may be duplication between the provisions the Commission is finalizing and other laws, there is no evidence that duplicative misrepresentation prohibitions have harmed consumers or competition. Moreover, the Final Rule provides additional remedies that will benefit consumers who encounter conduct that is already illegal under State or Federal law and will assist law-abiding dealers that presently lose business to competitors that act unlawfully. Under § 463.9, States may provide more or less specific requirements relating to motor vehicle dealers so long as those requirements are not inconsistent with part 463, and in the event of an inconsistency, the Rule only affects such State law to the extent of the inconsistency.

¹⁹⁰ It is well-settled that, if one makes a claim that, absent additional information, would mislead a consumer acting reasonably under the circumstances about a material fact, such conduct would violate the law. See FTC Policy Statement on Deception, *supra* note 42, at 2; *Int'l Harvester Co.*, 104 F.T.C. 949, 1057-58 (1984).

Based on a review of the comments and the responses discussed, the Commission adopts paragraph (b) of § 463.3 without substantive modification. As discussed in SBP III.C.1, the Commission has determined to modify the introductory paragraph of § 463.3 from the Commission's original proposal so that each paragraph of § 463.3 prohibits misrepresentations regarding material information. As such, the Commission is finalizing a version of § 463.3(b) that removes what would otherwise be redundant explicit reference to the term "Material." This provision prohibits misrepresentations regarding "[a]ny costs, limitation, benefit, or any other aspect of an Add-on Product or Service." Misrepresentations regarding add-ons are likely to affect a consumer's conduct, including the consumer's decision to purchase the product or service.

c) Whether Terms Are, or Transaction Is, for Financing or a Lease

Proposed § 463.3(c) prohibited misrepresentations regarding whether the terms are, or the transaction is, for financing or a lease. Upon review and consideration of public comments, the Commission is finalizing paragraph (c) of § 463.3 without modification from the Commission's original proposal.

A few industry association and individual commenters posited that this proposed provision was unnecessary, either because other statutes or regulations, including TILA and some State regulations, address this issue, or because vehicle manufacturers already monitor such misrepresentations. As noted in SBP III.C.1, even given the possibility of overlap between this provision and existing Federal or State law, there is no evidence that duplicative misrepresentation prohibitions have harmed consumers or competition. Further, given that the conduct covered by this provision is already unlawful under the

FTC Act and may duplicate other laws, or be prohibited by manufacturer rules, it should not be difficult to follow this provision.¹⁹¹

Accordingly, after careful consideration, the Commission adopts paragraph (c) of § 463.3 as proposed. Misrepresentations regarding whether terms are, or a transaction is, for financing or a lease are likely to affect a consumer's conduct, including by causing consumers to enter into a monetary transaction for a product they do not want, or, if the true circumstances are revealed prior to consummation of the transaction, to waste time traveling to, and potentially spending hours at, the dealership.

d) The Availability of Any Rebates or Discounts that are Factored into the Advertised Price but Not Available to All Consumers

Proposed § 463.3(d) prohibited misrepresentations concerning the availability of any rebates or discounts that are factored into the advertised price but not available to all consumers. Upon review and consideration of public comments, the Commission is finalizing paragraph (d) of § 463.3 without modification from the Commission's original proposal.

Comments in support of this proposed provision, including those from a group of State attorneys general and from two United States Senators, generally contended that the proposed provision would increase the transparency of the purchase transaction by requiring dealers to be honest when they advertise the availability of discounts.

¹⁹¹ The FTC has alleged that misrepresentations that particular terms are available for financing or for a lease violate the FTC Act. *See* Complaint ¶¶ 38-39, *Fed. Trade Comm'n v. Tate's Auto Ctr.*, No. 3:18-cv-08176-DJH (D. Ariz. July 31, 2018) (alleging false ads touting attractive terms but concealing ads were for lease offers only); Complaint ¶¶ 10, 13, *TC Dealership, L.P.*, No. C-4536 (F.T.C. Aug. 13, 2015) (same); Complaint ¶¶ 9-12, *Cowboy AG, LLC*, No. C-4639 (F.T.C. Jan. 4, 2018) (same); Complaint ¶¶ 36-38, *United States v. New World Auto Imports, Inc.*, No. 3:16-cv-02401-K (N.D. Tex. Aug. 18, 2016) (alleging misrepresentation that terms were for financing instead of leasing); Complaint ¶¶ 28-37, 44, *Fed. Trade Comm'n v. Universal City Nissan, Inc.*, No. 2:16-cv-07329 (C.D. Cal. Sept. 29, 2016) (alleging advertisements with key terms that were not generally available).

An individual commenter suggested that the Commission modify proposed § 463.3(d) to require dealers to disclose all representations regarding rebates or discounts in writing, in a clear and conspicuous manner. The Commission notes this paragraph prohibits misrepresentations regardless of the medium. Further, this paragraph focuses on misrepresentations; disclosures regarding price, add-ons, and total of payments are addressed in the discussion of § 463.4, as is a discussion of why the Commission has determined not to include additional disclosure requirements in this Final Rule. The same commenter also requested that the Final Rule text include examples of situations where discounts or rebates may not be available. The Commission describes examples here rather than adding them to the Final Rule text, as it would be difficult to anticipate all such examples and the text would become unwieldy. Examples include where an advertised rebate or discount applies only to the most expensive version of a particular vehicle make and model or is only available to consumers with high credit scores.

The Commission received comments from a dealership association and an individual commenter asking for additional detail about proposed § 463.3(d), pointing to a State regulation that includes disclosures and asking which types of rebates the provision covers. Here, the Commission notes that, as the language in § 463.3(d) states, this provision applies to “*any* rebates and discounts” advertised by dealers, and is not limited to any particular type of rebate or discount.¹⁹² The terms in this provision may be interpreted according to their plain meaning, as they are commonly used and understood.¹⁹³ Additionally, the language of this provision, the NPRM, and Commission

¹⁹² Section 463.3(d) (emphasis added).

¹⁹³ See, e.g., *Rebate*, Cambridge Dictionary, <https://dictionary.cambridge.org/us/dictionary/english/rebate> (last visited Dec. 5, 2023) (defining “rebate” as “an amount of money that is returned to you, especially by

enforcement actions provide further context. In proposing § 463.3(d) to specifically address the availability of discounts and rebates, the Commission included additional language (“that are factored into the advertised price but not available to all consumers”) to describe the manner in which such misrepresentations often occur: a dealer represents an advertised price which includes a discount or rebate that is not generally available to consumers.¹⁹⁴ The NPRM’s discussion of proposed § 463.3(d) described both a scenario in which a dealer advertised a rebate or discount separately, and one in which rebates or discounts are factored into the advertised price but the rebates and discounts are not available to a typical consumer. The conduct in either such scenario would violate this provision and, depending on the circumstances, may violate other provisions the Commission is finalizing, such as paragraph (a) of § 463.3. Enforcement actions cited in the NPRM provide further illustration of deceptive practices involving rebates and discounts.¹⁹⁵ The Commission declines to add additional requirements, such as disclosure

the government, for example when you have paid too much tax” or “an amount of money that is paid back to you after you have paid too much”); *Discount*, Cambridge Dictionary, <https://dictionary.cambridge.org/us/dictionary/english/discount> (last visited Dec. 5, 2023) (“[A] reduction in the usual price”).

¹⁹⁴ See NPRM Section IV.C, 87 FR at 42020 (proposed § 463.3(d) prohibited misrepresentations concerning “[t]he availability of any rebates or discounts that are factored into the advertised price but not available to all consumers,” and the NPRM explained “[w]hen dealers advertise rebates and discounts, or offer prices that factor in such rebates and discounts, but in fact those rebates and discounts are not available to the typical consumer, but only a select set of customers, such conduct induces the consumer to select and transact with the dealer under false pretenses”).

¹⁹⁵ See, e.g., Complaint ¶¶ 6-13, *Jim Burke Auto., Inc.*, No. C-4523 (F.T.C. May 4, 2015) (alleging promises of prices and discounts not generally available to consumers); Complaint ¶¶ 6, 9, *TT of Longwood, Inc.*, No. C-4531 (F.T.C. July 2, 2015) (alleging promises of prices and discounts not generally available to consumers); Complaint ¶¶ 8-9, *JS Autoworld, Inc.*, No. C-4535 (F.T.C. Aug. 13, 2015) (alleging false ads touting prices but concealing discounts with material eligibility limitations); Complaint ¶¶ 7-9, *TC Dealership, L.P.*, No. C-4536 (F.T.C. Aug. 13, 2015) (alleging false ads touting attractive prices but concealing discounts were subject to material eligibility limitations and trade-in requirement); Complaint ¶¶ 4-5, *Timonium Chrysler, Inc.*, No. C-4429 (F.T.C. Jan. 28, 2014) (alleging dealership advertised internet prices and dealer discounts but failed to disclose consumer would have to qualify for multiple rebates not generally available to them); Complaint ¶¶ 4-5, *Ganley Ford West, Inc.*, No. C-4428 (F.T.C. Jan. 28, 2014) (alleging dealership advertised discounts on vehicle prices, but failed to disclose discounts were only available on the most expensive models).

requirements, to its Final Rule, given the already lengthy, complex, and document-heavy nature of auto transactions.

A number of dealership association commenters contended that the proposed paragraph would prohibit dealers from displaying beneficial information to consumers or would prohibit dealers from advertising rebates and incentives of limited availability. In addition, commenters including one such dealership association requested that the Commission adopt an approach the commenter contended is used in some States: allowing dealers to display, below the advertised sales price, a rebate or incentive that is not available to all purchasers. Moreover, a number of industry association and dealership association commenters argued that the proposed paragraph was more stringent than, and inconsistent with, the Commission's prior articulation of the deception standard, further noting the existence of Commission orders that prohibit defendants from representing that a price, discount, rebate, or other incentive is available, unless it is in fact available to all or unless a defendant provides a clear and conspicuous disclosure of any qualifications or restrictions. Section 463.3(d) prohibits misrepresentations; it does not prohibit a dealer from advertising, in a truthful manner, rebates or discounts with limitations. Thus, this paragraph allows for the representation of limited offers, as long as such representation is truthful, and any limitations are clear and conspicuous to consumers. The paragraph is also consistent with the Commission's prior enforcement order practice in this area, which both prohibits misrepresentations regarding rebates and prohibits representations regarding rebates without disclosing any material qualifications or restrictions.¹⁹⁶ The paragraph simply contains one of these prohibitions but not the second.

¹⁹⁶ See, e.g., Decision and Order, *Timonium Chrysler, Inc.*, No. C-4429 (F.T.C. Jan. 28, 2014).

A dealership association commenter expressed concern that this proposed provision would penalize dealers if consumers were to confuse a rebate or discount offered for one vehicle with a vehicle that does not contain such an offer. As under current law, dealers are prohibited under § 463.3(d) from both express and implied misrepresentations. If, for example, a dealer states or implies that a discount is available on several types of vehicles when, in truth, the discount is only available on one such type of vehicle, such conduct would violate this paragraph. If, alternatively, the dealer does not state or imply that a discount is available for several types of vehicles, and offers a discount for one type of vehicle, this conduct would not violate this paragraph, as long as the dealer makes no other express or implied misrepresentations.

After careful review of the comments, the Commission is adopting paragraph (d) of § 463.3 as proposed. When dealers advertise rebates or discounts in a misleading manner, including when such rebates or discounts are not available to the typical consumer, or apply only to the most expensive versions of the make and model,¹⁹⁷ such conduct induces consumers to select and transact with the dealer under false pretenses.¹⁹⁸

¹⁹⁷ See Complaint ¶¶ 4-5, *Ganley Ford West, Inc.*, No. C-4428 (F.T.C. Jan. 28, 2014) (alleging false ads touting price discount but concealing offer was limited to certain high-end models).

¹⁹⁸ See Complaint ¶¶ 8-9, *JS Autoworld, Inc.*, No. C-4535 (F.T.C. Aug. 13, 2015) (alleging false ads touting prices but concealing discounts with material eligibility limitations); Complaint ¶¶ 7-9, *TC Dealership, L.P.*, No. C-4536 (F.T.C. Aug. 13, 2015) (alleging false ads touting attractive prices but concealing discounts were subject to material eligibility limitations and trade-in requirement); Complaint ¶ 14, *TXVT Ltd. P'ship*, No. C-4508 (F.T.C. Feb. 12, 2015) (alleging false ads failed to disclose that it would match consumers' income tax refunds only up to \$1,000); Complaint ¶¶ 4-5, *Timonium Chrysler, Inc.*, No. C-4429 (F.T.C. Jan. 28, 2014) (alleging false ads touting pricing and discounts but concealing material qualifications and restrictions); Complaint ¶¶ 6, 9, *TT of Longwood, Inc.*, No. C-4531 (F.T.C. July 2, 2015) (alleging promises of prices and discounts not generally available to consumers); Complaint ¶¶ 6-13, *Jim Burke Auto, Inc.*, No. C-4523 (F.T.C. May 4, 2015) (alleging promises of prices and discounts not generally available to consumers); see also Auto Buyer Study, *supra* note 25, at 8 ("A number of [study] participants were attracted by promotional offers in ads that they did not qualify for, but did not realize that they did not qualify until they got to the dealer. Some did not learn that they did not qualify until they got to the financing stage of the transaction.").

e) The Availability of Vehicles at an Advertised Price

Proposed § 463.3(e) prohibited misrepresentations regarding the availability of vehicles at an advertised price. Upon reviewing the comments pertaining to this provision, the Commission is finalizing paragraph (e) of § 463.3 largely as proposed, with the minor modification of capitalizing the defined term “Vehicles.”

One individual commenter recommended that proposed § 463.3(e) be expanded to prohibit certain specific misrepresentations about advertised vehicle availability, including whether any specific vehicle is already reserved for another consumer; whether the availability is subject to a requirement that the consumer pay a deposit; and regarding the amount of time until the vehicle becomes available. Another individual commenter recommended that the Rule require disclosure of how long each vehicle has been in the dealer’s inventory, to prevent dealers from misrepresenting that a vehicle recently became available. Here, the Commission notes that, to the extent any such misrepresentations regarding the availability of vehicles were made with express or implied reference to the price of the vehicle, each would be prohibited by § 463.3(e).¹⁹⁹ Furthermore, to the extent such misrepresentations included reference to the subject of another paragraph of § 463.3, they would be prohibited by the Final Rule. For example, if an advertisement were to make a claim about the monthly payment for a specific vehicle, but the vehicle is not actually available, it would be covered under the bar against misrepresentations regarding costs or terms in paragraph (a) of § 463.3. In addition, under

¹⁹⁹ The commenter also expressed concern about misrepresentations regarding the refundability of deposits and recommended that the Commission include language in § 463.3(e) addressing this issue. Because representations and practices regarding the refundability of deposits are related to the costs or terms of purchasing, financing, or leasing a vehicle, this issue is covered by § 463.3(a). Thus, the Commission declines to adopt the commenter’s recommendation.

the Final Rule, dealers are also subject to disclosure requirements under § 463.4, including the requirement at § 463.4(a) to disclose the vehicle's offering price in any advertisement that references a specific vehicle, or any monetary amount or financing term for any vehicle. And if a dealer discloses the offering price for a vehicle, but the vehicle is not available to consumers, § 463.3(e) applies. Beyond this, the Commission will continue to monitor whether other misrepresentations regarding availability are being made without reference to price, or to the subject of another paragraph of § 463.3, to determine whether additional action is warranted.

The Commission received comments from a number of dealership associations and individuals requesting that the Final Rule limit dealers' responsibility for unanticipated delays, or otherwise expressing concern about how dealers would be able to comply with this proposed provision. One industry association commenter stated that unanticipated delays could result from factors beyond the reasonable control of the dealer, such as shipping or production issues. Other dealership association commenters contended that, because of supply chain disruptions, adjustments to inventory and other information may not always be displayed on a retailer's website instantaneously.

As is the case under current law, under this provision, dealers may not make claims about the availability of vehicles at an advertised price without a reasonable basis at the time the claims are made.²⁰⁰ Objective claims about products or services represent,

²⁰⁰ FTC Policy Statement on Deception, *supra* note 42, at 1 n.5 ("Advertising that lacks a reasonable basis is also deceptive.") (citing *Firestone Tire & Rubber Co.*, 81 F.T.C. 398, 451-52 (1972) (additional citations omitted)); *see Fed. Trade Comm'n v. US Sales Corp.*, 785 F. Supp. 737, 748 (N.D. Ill. 1992) ("Apart from challenging the truthfulness of an advertiser's representations, the FTC may challenge the representation as unsubstantiated if the advertiser lacked a reasonable basis for its claims."); *see also Fed. Trade Comm'n v. Am. Screening, LLC*, 4:20-CV-01021-RLW (E.D. Mo. July 14, 2022) (granting summary judgment for the FTC upon finding that American Screening's claim that its COVID-19 protective equipment was available and would ship quickly was false and lacked a reasonable basis); *Fed. Trade Comm'n v. John Beck*

explicitly or by implication, that an advertiser has a reasonable basis to support those claims.²⁰¹ Consumers would be less likely to be affected by claims for products and services if they knew the advertiser did not have a reasonable basis for believing them to be true.²⁰² If a dealer has a reasonable basis to make a claim about the availability of vehicles at the time the claim is made, the dealer would not be in violation of the provision if a vehicle later becomes unavailable because of circumstances that a dealer could not reasonably anticipate or control.

A few dealership association commenters claimed that promulgation of § 463.3(e) would cause regulatory confusion because State guidelines or rules already address issues about the availability of vehicles, including, for example, by requiring dealers to note the location of the vehicle.²⁰³ As described in SBP III.C.1, States may provide more or less specific requirements relating to motor vehicle dealers so long as those requirements are not inconsistent with part 463, and in the event of an inconsistency, the Rule only affects

Amazing Profits, LLC, 865 F. Supp. 2d 1052 (C.D. Cal. 2012) (finding that the defendants' representations were unsubstantiated in violation of Section 5, because Defendants conceded that during the time period in which their infomercial was aired they did not have evidence supporting their representations that consumers who purchased their product would be able to earn money easily and because survey results revealed that less than one percent of consumers actually generated any revenue or profits); *Fed. Trade Comm'n v. Elegant Sols., Inc.*, 8:19-cv-01333-JVS-KES (C.D. Cal., July 6, 2020) (finding that defendants made false or unsubstantiated representations, including representing that consumers would be enrolled in a repayment plan that may be forgiven after a specific number of years even though there were no Federal loan forgiveness programs with those repayment terms).²⁰¹

²⁰¹ Fed. Trade Comm'n, "FTC Policy Statement Regarding Advertising Substantiation," (appended to *In re Thompson Med. Co., Inc.*, 104 F.T.C. 648, 839 (1984)); *Fed. Trade Comm'n v. John Beck Amazing Profits, LLC*, 865 F. Supp. 2d 1052, 1067 (C.D. Cal. 2012).

²⁰² Fed. Trade Comm'n, "FTC Policy Statement Regarding Advertising Substantiation," (appended to *In re Thompson Med. Co., Inc.*, 104 F.T.C. 648, 839 (1984)); see *Fed. Trade Comm'n v. Am. Screening, LLC*, 4:20-CV-01021-RLW (E.D. Mo., July 14, 2022) (granting FTC's motion for summary judgment and finding that Defendants' representations that it had protective equipment in stock and would ship it to consumers within seven to ten business days were material to consumers seeking such equipment during a global pandemic).

²⁰³ This provision would not prohibit dealers from advertising a vehicle with limitations on availability in a truthful manner, such that any limitations are clear and conspicuous to the consumer. For example, dealers should not affirmatively represent that a vehicle is available on its lot without a reasonable basis that the vehicle is on the lot or without clearly and conspicuously noting that the vehicle will be made available after transfer from an affiliate's lot.

such State law to the extent of the inconsistency. To the extent there are actual inconsistencies, § 463.9 is clear that this Rule’s prohibition against misrepresentations controls.

After careful consideration of the comments, the Commission is adopting paragraph (e) of § 463.3 largely as proposed, with the minor modification of capitalizing the defined term “Vehicles.” This paragraph prohibits dealers from promoting low prices for specific vehicles, but then later misrepresenting, among other things, that the advertised vehicle is no longer available or no longer available at the advertised price. Such misrepresentations are likely to induce consumers to waste their time traveling to a particular dealership to pursue a specific offer on a specific vehicle when the offer or vehicle itself may not actually be available.

f) Whether Any Consumer Has Been or Will Be Preapproved or Guaranteed for Any Product, Service, or Term

Proposed § 463.3(f) prohibited misrepresentations regarding whether a consumer has been or will be preapproved or guaranteed for any product, service, or term. Upon reviewing public comments, the Commission is finalizing paragraph (f) of § 463.3 without modification from the Commission’s original proposal.

One dealership association commenter recommended that compliance with a State law that prohibits certain misleading statements, such as “we finance anyone” and “no credit rejected” and similar statements, should function as a safe harbor against liability under this proposed paragraph.²⁰⁴ Yet, while compliance with the State law cited may require dealers to refrain from using certain frequently misleading statements, as

²⁰⁴ Comment of Tex. Auto. Dealers Ass’n, Doc. No. FTC-2022-0046-8102 at 21; see 43 Tex. Admin. Code 215.247(2) (2023).

described by the commenter, that law does not generally prohibit all misrepresentations regarding material information about consumer preapprovals or guarantees; even if it did, there is no evidence that duplicative laws prohibiting misrepresentations harm consumers or competition, and no evidence of benefits to consumers or competition in allowing one such law to act as a safe harbor against another such law. Further, given that current law already prohibits deceptive conduct generally, dealers should be able to comply with the Commission's Rule, which provides further protections for consumers and law-abiding dealers. Thus, the Commission declines to adopt the recommended safe harbor.

Therefore, after careful consideration, the Commission is finalizing paragraph (f) of § 463.3. Misrepresentations regarding preapproval or guarantees for a product, service, or term—as with misrepresentations about availability and price, described previously—are likely to impact consumers' conduct with regard to motor vehicle sales, financing, or leasing transactions, including by inducing consumers to waste time pursuing illusory offers.

g) Any Information on or About a Consumer's Application for Financing

Proposed § 463.3(g) prohibited dealers from misrepresenting any material information on or about a consumer's application for financing. After carefully reviewing public comments, the Commission is adopting paragraph (g) of § 463.3 without substantive modification. As with § 463.3(b), the only adopted modification is the deletion of the term "Material," which nonetheless applies to the operation of each of the

misrepresentation paragraphs in § 463.3, including paragraph (g), through the addition of the term in the introductory paragraph of § 463.3.

The Commission received a number of comments regarding this provision, including comments that expressed support for prohibiting misrepresentations about a consumer's application for financing.

A credit union commenter requested that, in addition to this proposal, the Commission consider implementing a requirement to clearly and conspicuously disclose any potential financing limitations prior to vehicle purchase negotiations, contending that such a measure would better enable consumers to choose a motor vehicle dealer and financing option that best serves their needs. To the extent a dealer misrepresents a consumer's financing options or limitations, including prior to or during the process of selling, leasing, or arranging financing for a vehicle, such conduct is prohibited by this provision, and depending on the circumstances, may also violate other provisions of the Rule. For example, as discussed in this paragraph-by-paragraph analysis, § 463.3(a) of the Final Rule prohibits misrepresentations regarding the cost or terms of financing a vehicle; this prohibition includes misrepresentations about available vehicle financing. Furthermore, this provision pertains to misrepresentations; comments pertaining to proposed disclosures regarding price, add-ons, and total of payments are examined in the Commission's discussion of § 463.4, wherein the Commission explains its determination not to finalize any additional disclosure requirements not included in its NPRM.

An individual commenter, while expressing support for regulation of such misrepresentations, also noted concern for the "grave consequences of falsifying information on a customer's application for financing," and urged the Commission to

consult with other law enforcement agencies to further address such problems.²⁰⁵ The Commission appreciates the concern and the seriousness of falsifying information on a consumer's application for financing, and coordinates regularly with other law enforcement agencies regarding areas of shared jurisdiction and responsibility, including motor vehicle sales and financing. The Commission will continue to monitor financing application falsification issues to determine whether any additional action, beyond § 463.3(g), is needed.

A number of dealership association commenters contended that the proposed language was vague and did not adequately explain the type of behavior this paragraph would prohibit. Relatedly, some dealership association commenters contended that this provision lacked specific guidance about what a motor vehicle dealer must or must not disclose. This provision, however, utilizes terms which are commonly used and understood, and which may be interpreted according to their plain meaning. Read together with the introductory paragraph of § 463.3, § 463.3(g) prohibits misrepresentation . . . regarding material information about “[a]ny information on . . . a consumer’s application for financing.” By its terms, this prohibition includes any misrepresentations of material information on a financing application. For example, dealers would make misrepresentations in violation of this provision by including, on a consumer’s application that is submitted to a third-party financing institution, consumer income information that is different from what the consumers have stated to the dealer that the consumers actually earn, or by representing a different down payment amount than the amount the consumer has actually provided, or by misrepresenting that the

²⁰⁵ Individual commenter, Doc. No. FTC-2022-0046-7445 at 12.

vehicle is being sold or leased with certain add-on products.²⁰⁶ Moreover, as described in detail with regard to other paragraphs of § 463.3, this provision does not require any particular affirmative disclosures, instead obligating dealers to refrain from certain misrepresentations.

One dealership association commenter questioned whether a dealer would be held responsible for a customer's false statement about his or her income. If a consumer falsely states they have a higher income, that consumer would not be misled into thinking he has a higher income. If, however, a consumer's application falsely states a higher income because a dealer has altered the information, that consumer would be misled into thinking that the application they are signing accurately reflects the information the consumer provided, and § 463.3(g) would be violated. Additionally, if a dealer advises a consumer to include other sources of payment as income or advises the consumer to list a higher income in other ways, such conduct may mislead the consumer into thinking that it is proper to calculate income for auto retail installment contracts in a particular way, and there may be a violation of § 463.3(g).

After careful review and consideration of the comments, the Commission adopts paragraph (g) of § 463.3 without substantive modification, prohibiting misrepresentations regarding material information about any information on or about a consumer's application for financing. It is likely to affect a consumer's choices if the consumer knows a dealer is misrepresenting the consumer's income, or other aspects of financing

²⁰⁶ See Complaint ¶¶ 18-36, *Fed. Trade Comm'n v. Tate's Auto Ctr. of Winslow, Inc.*, No. 3:18-cv-08176-DJH (D. Ariz. July 31, 2018); Consumer Fin. Prot. Bureau, "Supervisory Highlights: Issue 30, Summer 2023" 5 (July 2023), https://files.consumerfinance.gov/f/documents/cfpb_supervisory-highlights_issue-30_2023-07.pdf (finding that dealers "fraudulently included" in financing documents add-ons, such as undercoating, that were not actually present on the vehicle, creating "improperly inflated loan amounts" that caused consumers to pay improper additional interest).

applications. If, for example, a consumer knew the truth—that the dealer is inflating the consumer’s income such that the consumer would not otherwise obtain financing for a particular vehicle—the consumer might opt to finance a less expensive car, rather than risking repossession. Material misrepresentations on consumers’ financing paperwork are also likely to cause consumers substantial injury, including by causing them to take on debt beyond that which the financing company would have approved, and increasing the risk of repossession and harmful consequences to consumers’ credit. Consumers cannot avoid the injury from dealers misrepresenting the information consumers provide them, and this practice provides no countervailing benefits to consumers or competition.

- h) When the Transaction Is Final or Binding on All Parties, &*
- i) Keeping Cash Down Payments or Trade-in Vehicles, Charging Fees, or Initiating Legal Process or Any Action If a Transaction Is Not Finalized or If the Consumer Does Not Wish To Engage in a Transaction*

Proposed § 463.3(h) prohibited dealers from misrepresenting when the transaction is final or binding on all parties. Proposed § 463.3(i) prohibited dealers 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. After careful review and consideration of the comments, the Commission is finalizing paragraphs (h) and (i) of § 463.3 with the minor modification of capitalizing the defined term “Vehicles” in § 463.3(i) to conform with the revised definition at § 463.2(e).

Some commenters, including a group of State attorneys general and consumer advocacy organizations, generally supported prohibiting misrepresentations about when the transaction is final or binding on all parties but urged the Commission to include

additional requirements or prohibitions. For instance, several commenters, including consumer advocacy organizations and individual commenters, requested that the Commission add to its Final Rule a provision requiring dealers to include, in every consumer credit contract, a finality clause stating that the transaction is final as soon as the consumer credit contract is signed, or alternatively, a provision requiring dealers to include in retail installment contracts a clause prohibiting financing-contingent sales. Commenters including a group of State attorneys general recommended that the Commission require any dealer that does not ultimately secure financing under previously presented terms to unwind the transaction, return any down payment in full, and return any traded-in vehicle. Such commenters also recommended that the Commission implement restrictions, such as requiring dealers to be reasonably certain that a consumer will qualify for quoted financing terms; requiring a written disclosure that the consumer must sign advising the consumer that financing is not final; or setting a short deadline by which the dealer must either arrange financing or cancel the transaction. Other commenters, including a State consumer protection agency, also supported requiring the contractual contingency to be disclosed conspicuously and limiting the contingency to a short period of time. A number of these commenters, including consumer advocacy organizations, provided examples of how spot delivery transactions can harm consumers.

The provision's prohibitions and requirements address many of these commenters' concerns regarding spot delivery and yo-yo financing. Spot delivery and yo-yo financing refer to situations where a dealer delivers a vehicle to a consumer on the spot before the financing or leasing has been finalized, leads a consumer to believe that

the transaction is final, and then later directs the consumer to return the vehicle and engages in certain tactics, such as failing to return the consumer's trade-in vehicle while refusing to honor the finance or lease transaction, or pressuring the consumer to enter into a new transaction.²⁰⁷ Paragraphs (h) and (i) of § 463.3 prohibit misrepresentations regarding the finality of the transaction and return of down payments and trade-in vehicles. Under these provisions, if a consumer is under the impression that the transaction is final, and the dealer subsequently causes the consumer to return the vehicle to the lot because the transaction was not final, or the dealer takes or threatens to take possession of the vehicle but refuses to return the down payment or trade-in vehicle, the dealer has violated either § 463.3(h), by misrepresenting the finality of the transaction, or § 463.3(i), by falsely representing, expressly or by implication, that the dealer has a legal

²⁰⁷ Complaint ¶¶ 67-72, *Fed. Trade Comm'n v. Universal City Nissan, Inc.*, No. 2:16-cv-07329 (C.D. Cal. Sept. 29, 2016); *State ex rel. Dewine v. Dads Car Lot Inc.*, No. 13-cv-4036, 2014 BL 468717, at *1 (Ohio Com. Pl. June 6, 2014) (finding defendant violated State consumer sales practices act by including "spot delivery" document that allowed defendant to keep "all funds on deposit"); Att'ys Gen. of 31 States & D.C., Comment Letter on Public Roundtables: Protecting Consumers in the Sale and Leasing of Motor Vehicles, Project No. P104811, Submission No. 558507-00112 at 4 (Apr. 13, 2012), https://www.ftc.gov/sites/default/files/documents/public_comments/public-roundtables-protecting-consumers-sale-and-leasing-motor-vehicles-project-no.p104811-00112/00112-82927.pdf (recommending, among other rules aimed at deterring yo-yo sales, FTC adopt rules that would require dealers to disclose the consumer's "right to walk away" if financing is rejected and, in the context of spot delivery, to disclose financing has not been finalized as well as the responsibilities and potential consequences for consumers); Legal Aid Just. Ctr., Comment Letter on Public Roundtables: Protecting Consumers in the Sale and Leasing of Motor Vehicles, Project No. P104811, Submission No. 558507-00066 at 26, 29 (Jan. 30, 2012), https://downloads.regulations.gov/FTC-2022-0036-0062/attachment_2.pdf (explaining that in a yo-yo sale the dealer misrepresents to the consumer that credit has been finalized, when in fact the dealer treats the sale as contingent, retaining the ability to call off or seize the vehicle later; a "yo-yo case can result in substantial distress to the person who has been tricked"; and "[t]he harm to the marketplace occurs when the consumer believes a credit sale has been completed and stops shopping for a car on credit"); Nat'l Consumer L. Ctr., "In Harm's Way—At Home: Consumer Scams and the Direct Targeting of America's Military and Veterans" 41 (May 2003), https://filearchive.nclc.org/special_projects/military/report-scams-facing-military.pdf (listing "Spot Delivery" or "yo-yo sales" among scams commonly aimed at military members).

basis to keep the down payment or trade-in vehicle in the event the transaction is not finalized, or both.²⁰⁸

Regarding the recommendation to include a requirement that dealers be reasonably certain that consumers will qualify for quoted financing terms, the Rule the Commission is finalizing already contains several provisions in addition to § 463.3(h) and (i) that address this conduct. For example, the Rule prohibits misrepresentations regarding material information about the costs or terms of financing (§ 463.3(a)), or about whether any consumer has been or will be preapproved or guaranteed for any product, service, or term (§ 463.3(f)). As explained in the paragraph-by-paragraph analysis of § 463.3(e) in SBP III.C.2(e), existing law requires dealers to have a reasonable basis for their claims. Objective claims about products or services represent, explicitly or by implication, that an advertiser has a reasonable basis to support those claims.²⁰⁹ Thus, to avoid misrepresentation, dealers must reasonably believe that consumers will qualify for quoted financing terms, or that the transaction will be finalized on the terms presented, in order to represent such terms to consumers.

Regarding additional provisions that would require certain contractual measures, such as finality clauses or prohibitions against financing-contingent sales, the Commission is concerned that requiring specific contract provisions would obligate

²⁰⁸ See *Orkin Exterminating Co., Inc.*, 108 F.T.C. 263 (1986), *aff'd sub nom. Orkin Exterminating Co. v. F.T.C.*, 849 F.2d 1354 (11th Cir. 1988) (finding that defendant's practice of unilaterally raising consumers' annual renewal fees where the consumers' contracts contained a "lifetime guarantee" as to the amount of the fee was unfair under Section 5 of the FTC Act); see also First Amended Complaint ¶¶ 59-61, *Fed. Trade Comm'n v. BF Labs, Inc.*, No. 4:14-cv-00815 (W.D. Mo. May 14, 2015) (alleging as unfair defendants' practice of unilaterally failing to provide paid-for services while refusing to refund consumers' upfront payments).

²⁰⁹ Fed. Trade Comm'n, "FTC Policy Statement Regarding Advertising Substantiation," (appended to *In re Thompson Med. Co., Inc.*, 104 F.T.C. 648, 839 (1984)); *Fed. Trade Comm'n v. John Beck Amazing Profits, LLC*, 865 F. Supp. 2d 1052, 1067 (C.D. Cal. 2012).

dealers that are not engaged in spot delivery to change their contracts even though their customers do not experience harm stemming from spot delivery practices. Before requiring any such changes, the Commission has determined to continue to monitor the market to evaluate whether additional steps are warranted.²¹⁰

Some commenters, including dealership associations, requested that the Commission clarify how dealers could document compliance with these proposed provisions, such as how dealers could establish that appropriate disclosures had been made. One such commenter, for instance, asked whether written agreements required by State law were sufficient to satisfy the requirements of these provisions. As noted elsewhere in this paragraph-by-paragraph analysis of § 463.3 in SBP III.C.2, these provisions do not require any particular affirmative disclosures, instead obligating dealers to refrain from certain misrepresentations. Section 463.6 discusses records dealers need to keep to demonstrate compliance with the requirements of the Final Rule, and enumerates five such categories of records, including copies of finance and lease documents signed by the consumer, whether or not final approval is received for a financing or lease transaction. The Commission declines to include in this Final Rule additional requirements regarding any specific documents dealers must keep in order to demonstrate compliance with § 463.3(h) or (i).

One individual commenter requested that the Commission include in the CFR the examples of harmful conduct related to yo-yo financing that it published in the NPRM.²¹¹ The Commission has determined that each such example describes conduct that violates

²¹⁰ On May 31, 2023, the Commission received a petition for rulemaking under 16 CFR 1.31 regarding yo-yo financing. Petition for Rulemaking Concerning the Finality of a Car Purchase (Yo-Yo Financing), Doc. No. FTC-2023-0035-0002. The Commission will address this petition separately.

²¹¹ See NPRM at 42020-21. Individual commenter, Doc. No. FTC-2022-0046-9469 at 5-6.

this rulemaking. Rather than adding them to the text of the Final Rule, the Commission repeats those examples in this paragraph-by-paragraph analysis of § 463.3(h) and (i), in order to avoid voluminous modifications to the Rule text itself.

Commenters including a dealership association asserted that the issue of when a contract is final or binding is one of State law, and thus it is within the purview of each State to determine when a contract is final or binding, arguing that § 463.3(h) therefore should be removed from the Final Rule. Another such commenter contended that even courts experienced in contract interpretation have difficulty determining when an agreement is final, and that dealers therefore are likely to transgress this prohibition in proposed § 463.5(h) accidentally. This provision, however, requires that a dealer's express or implied representations regarding material information be truthful, which is consistent with current law and with the Commission's authority to prohibit unfair or deceptive acts or practices. Moreover, under § 463.9, this Rule does not affect State law pertaining to contracts so long as State law is not inconsistent with part 463, and in the event of an inconsistency, the Rule only affects such State law to the extent of the inconsistency.²¹² In the case of § 463.3(h), for example, an inconsistency would include State law allowing material misrepresentations regarding whether transactions are final; the Commission is unaware of any such law. Further, to the extent dealers are concerned they may transgress this prohibition because courts have had difficulty interpreting their contracts, then, as they should be doing under current law prohibiting misrepresentations,

²¹² One commenter questioned whether this section would prohibit a dealer from retaining a down payment on a special order vehicle where the customer refuses to take delivery of the vehicle. Comment of Minn. Auto. Dealers Ass'n, Doc. No. FTC-2022-0046-8670 at 10. Sections 463.3(h) and (i) prevent misrepresentations, including misrepresenting that a dealer can keep a down payment when a dealer does not have a legal basis to do so. If the dealer does not make a misrepresentation, this provision would not be violated.

dealers should carefully consider the net impression they are conveying with the language they use, both in their contracts and in the context in which these contracts are presented, as such language may confuse consumers as well.

Several dealership association commenters claimed that State law already prohibits misrepresentations about spot delivery transactions or otherwise protects consumers in such transactions. One such commenter asserted that Massachusetts law prohibits spot deliveries, and cautioned the FTC not to create uncertainty with its Rule such that one might think spot deliveries are allowed in Massachusetts. Another such commenter asked whether this provision applies in addition to State law or instead of it. Other commenters, including consumer advocacy organizations, asserted that less than half of the States have statutes, regulations, or administrative pronouncements about yo-yo transactions; that there are significant variations in such law from State to State; and that State regulation often does not provide sufficient protections for consumers. As described throughout the paragraph-by-paragraph analysis of § 463.3 in SBP III.C.2, State law may provide more or less specific requirements than those under the Final Rule as long as those requirements are not inconsistent with part 463, and in the event of an inconsistency, the Rule only affects such State law to the extent of the inconsistency. As for any States that prohibit spot delivery, such prohibitions are consistent with the provisions of this Rule. Finally, as to whether additional provisions are warranted to protect consumers, the Commission will continue to monitor the market to make this determination.

Commenters including an industry association contended that the Commission should not take action to disrupt spot delivery transactions to consumers, stating that

there may be reasons to keep down payments even when consumers are not permitted to keep the vehicle, or claiming that although abusive spot deliveries have occurred, they are not a systemic problem in the marketplace. The Commission, however, need not show that abusive spot deliveries are systemic in order to finalize these provisions barring misrepresentations.²¹³ Further, these misrepresentation prohibitions do not alter requirements under current law prohibiting dealers from making express or implied misrepresentations.

After careful consideration of the recommendations and record, the Commission has determined to finalize paragraphs (h) and (i) of § 463.3 largely as proposed, with the minor modification of capitalizing the defined term “Vehicles” in § 463.3(i). The Commission notes, however, that it has significant concerns about consumer harm due to yo-yo financing and will continue to examine these issues even as it finalizes these prohibitions against certain misrepresentations. Misrepresentations about when the transaction is final or binding on all parties, as well as about keeping down payments or trade-in vehicles, charging fees, or initiating legal process or any action, are likely to affect consumer conduct, including regarding whether to enter into a new transaction with less beneficial terms for the consumer, and are likely to mislead consumers.

- i) Keeping Cash Down Payments or Trade-in Vehicles, Charging Fees, or Initiating Legal Process or Any Action If a Transaction Is Not Finalized or If the Consumer Does Not Wish To Engage in a Transaction*

Proposed § 463.3(i) is discussed with § 463.3(h).

²¹³ See SBP I.A, n.3.

j) Whether or When a Dealer Will Pay Off Some or All of the Financing or Lease on a Consumer's Trade-in Vehicle

Proposed § 463.3(j) prohibited misrepresentations regarding whether or when a motor vehicle dealer will pay off some or all of the financing or lease on a consumer's trade-in vehicle. The Commission is finalizing paragraph (j) of § 463.3 largely as proposed, with minor modifications—substituting “Dealer” for “Motor Vehicle Dealer” and capitalizing “Vehicle”—to conform with the revised definitions of “‘Covered Motor Vehicle’ or ‘Vehicle’” and “‘Covered Motor Vehicle Dealer’ or ‘Dealer’” at § 463.2(e) and (f).

The Commission received several comments in response to this paragraph, including from individual commenters who expressed support for prohibiting dealers from misrepresenting whether they would pay off outstanding balances remaining on a trade-in vehicle.²¹⁴ Other commenters, including an industry association and dealership associations, requested that the Commission limit dealer responsibility under this provision for unanticipated delays stemming from circumstances beyond a dealer's reasonable control, arguing that proposed § 463.3(j) made no exception for unanticipated delays such as a previous financing source declining to accept a payoff or refusing to release the vehicle title after receiving a payoff.²¹⁵ The Commission notes that, as is the case under current law, under this provision, dealers are not permitted to make claims

²¹⁴ See, e.g., Individual commenter, Doc. No. FTC-2022-0046-3770 (“I agree that these changes need to take place. No one should have to pay what was owed on a trade in after the dealership said they would pay off the trade in . . .”).

²¹⁵ For example, commenters stated that occasionally the previous finance or lease source will not provide a timely payoff for a traded vehicle or will refuse to accept a payoff claiming more money is due; or a previous finance or lease source may accept a payoff, but will refuse to credit its former customer's account and release the title promptly. In addition, an industry association commenter requested that the Commission narrow this prohibition to specifically address the fact patterns giving rise to it that the Commission sets forth in the NPRM, and, in so doing recognize that it is in a dealer's business interest to pay off the existing loan quickly so that the vehicle can be more easily and quickly retailed.

about whether or when they will pay off some or all of the financing or lease on a consumer's trade-in vehicle if the truth of those claims depends on circumstances outside their control and the dealer does not possess a reasonable basis for such claims.²¹⁶

An individual commenter contended that requiring additional disclosures about this provision would confuse the consumer.²¹⁷ This provision, however, does not necessitate any affirmative disclosures from dealers. Instead, it prohibits dealers from misleading consumers about whether or when they will pay off some or all of the financing or lease on a consumer's trade-in vehicle.

One State consumer protection agency commenter requested that the Commission require, in situations where a buyer's credit information or trade-in vehicle are evidently insufficient to support a deal, that the dealer require additional down payment or other security, or affirmatively disclose that the dealer is not responsible for paying off liens.²¹⁸ Without further information on the costs and benefits of such a proposal, the Commission declines to add such requirements to this Final Rule. The Commission notes, however, that the Rule prohibits dealers from misleading consumers regarding when trade-in vehicles have negative equity and from otherwise failing to obtain the consumer's express, informed consent prior to charging the consumer for any item, including any amounts associated with trading in a vehicle. The Commission will continue to monitor this area to determine whether any such additional measures are warranted to protect consumers or competition.

²¹⁶ See paragraph-by-paragraph analysis of § 463.3(e) in SBP III.C.2(e) (discussing deception and reasonable basis).

²¹⁷ See Individual commenter, Doc. No. FTC-2022-0046-7905 at 1.

²¹⁸ See Comment of State of S.C. Dep't of Consumer Affs., Doc. No. FTC-2022-0046-7891 at 6.

The Commission also received a number of comments from dealership associations arguing that existing State and Federal laws address dealers' obligations in connection with informing consumers how much each consumer is responsible for financing. The Commission notes that commenters presented no actual conflicts between this provision and other laws, and to the extent duplicative laws prohibit misrepresentations in this area, the Commission has not observed harmful consequences to consumers or competition. Further, as noted elsewhere in the section-by-section analysis, State laws may provide more or less specific requirements as long as those requirements are not inconsistent with part 463, under § 463.9, and in the event of an inconsistency, the Rule only affects such State law to the extent of the inconsistency.

After carefully considering the comments, the Commission is finalizing this provision with the two minor modifications to conform with the defined terms "'Covered Motor Vehicle' or 'Vehicle'" and "'Covered Motor Vehicle Dealer' or 'Dealer.'" This provision prohibits dealers from making misrepresentations about paying off the financing or lease on a trade-in vehicle. Such conduct includes misrepresenting to consumers who trade in a vehicle that the dealer will pay off any outstanding balance owed on the trade-in vehicle when the consumer purchases a vehicle from the dealer. For example, when such a dealer takes a trade-in, if the dealer remits payment to the entity to whom the trade-in payment is owed, as consumers would expect, but also adds this payment to the amount the consumer owes on the vehicle the consumer is purchasing from the dealer, the consumer is the party that has ultimately paid off the trade-in amount, contrary to the impression made by the dealer. This provision also prohibits dealers that are going out of business from representing expressly or by implication that

they will pay off liens if they do not, in fact, pay off the liens, or do not pay them off in a timely manner. Such misrepresentations are likely to affect a consumer's choice to visit a particular dealership or select a particular vehicle.

k) Whether Consumer Reviews or Ratings Are Unbiased, Independent, or Ordinary Consumer Reviews or Ratings of the Dealer or the Dealer's Products or Services

Proposed § 463.3(k) prohibited misrepresentations about whether “consumer reviews or ratings are unbiased, independent, or ordinary consumer reviews or ratings of the Dealer or its products or services.” Upon careful review and consideration of the comments, the Commission is finalizing paragraph (k) of § 463.3 with one technical clarification to replace “its” with “the Dealer’s.” The Rule’s requirements apply to all individuals and entities that meet the definition of “Dealer.”

An individual commenter recommended that the Commission modify this provision to include language explicitly prohibiting dealers from creating, editorializing, modifying, or removing consumer reviews.²¹⁹ Here, the Commission notes that if such acts or practices would result in reviews that are not independent or do not otherwise reflect ordinary consumer experience, they already would violate this provision. For example, if a dealer created a positive review, edited or modified negative reviews to make them sound positive, or removed negative reviews while keeping positive reviews, such practices would violate this provision.

²¹⁹ Individual commenter, Doc. No. FTC-2022-0046-2364 (“Many favorable ([i.e.] 5 star) Dealer reviews I have read appear suspect with generic, similar wording (or no wording at all) seemingly provided to offset lower Dealer ([i.e.] 1 star) ratings. I recommend that for [§ 463.3(k)] the following (or similar) be appended: Additionally, consumer reviews may not be created, editorialized, modified or removed by any Dealer or third party acting at the direction of any Dealer. Consumer reviews should be modifiable or removable by the originating author.”).

A few individual commenters recommended that the Rule include additional provisions related to consumer reviews, including a requirement for the creation of an online database for consumer reviews and complaints about dealerships, and a requirement for dealers to post consumer reviews online and in the dealership location. The Commission notes that while some reviews are available online, additional information could assist consumers, and the Commission will consider whether such measures are needed as it continues to monitor the marketplace, including after the Rule goes into effect.

Several dealership associations asked what type or format of reviews or ratings would be covered by this proposed provision. As proposed, § 463.3(k) applied to all reviews or ratings, in any format or wherever displayed, that are likely to mislead consumers as to whether such reviews or ratings are unbiased, independent, or ordinary consumer reviews or ratings. Relatedly, industry and dealership associations contended that the language used in the proposed provision was vague and confusing, and requested that the Commission further define the phrase, “unbiased, independent, or ordinary consumer reviews or ratings.” To begin, the operative terms in this phrase are commonly used and understood and may be interpreted according to their plain meaning without further definition. Moreover, the Commission has, for decades, provided information and guidance on avoiding deception through the use of endorsements, testimonials, and online reviews.²²⁰ Enforcement actions by the Commission have documented examples

²²⁰ See, e.g., Fed. Trade Comm’n, Notice of Proposed Rulemaking, Trade Regulation Rule on the Use of Consumer Reviews and Testimonials, 88 FR 49364 (July 31, 2023) (to be codified at 16 CFR 465), <https://www.govinfo.gov/content/pkg/FR-2023-07-31/pdf/2023-15581.pdf>; Fed. Trade Comm’n, Guides Concerning Use of Endorsements and Testimonials in Advertising, 16 CFR 255; Fed. Trade Comm’n, “FTC’s Endorsement Guides: What People are Asking,” <https://www.ftc.gov/business->

of the types of misrepresentations that would be covered by this provision.²²¹ For example, dealerships and their employees have posted positive, five-star online reviews that falsely purport to be objective or independent.²²² As these sources make clear, a person who is unbiased, independent, and an ordinary consumer would be someone who was not paid or given something of value to write a review and who has no employment or familial relationship or other unexpected material connection to the dealership.²²³

An industry association commenter expressed concern that this proposed provision did not appear to be limited to misrepresentations that may occur when a dealership, and not an unrelated third party, affirmatively publishes consumer reviews. To the extent an independent third party that does not have a material connection with the dealership makes any such claims, those claims would not be covered by this provision. This provision concerns situations where there is such a relationship between the third party and the dealer. For example, if a dealer were to pay a third party or consumer to

guidance/resources/ftcs-endorsement-guides-what-people-are-asking; Fed. Trade Comm'n, "Soliciting and Paying for Online Reviews: A Guide for Marketers," <https://www.ftc.gov/business-guidance/resources/soliciting-paying-online-reviews-guide-marketers>; Fed. Trade Comm'n, "Disclosures 101 for Social Media Influencers," <https://www.ftc.gov/business-guidance/resources/disclosures-101-social-media-influencers>.

²²¹ See Complaint ¶¶ 73-78, *Fed. Trade Comm'n v. Universal City Nissan, Inc.*, No. 2:16-cv-07329 (C.D. Cal. Sept. 29, 2016); see also Fed. Trade Comm'n, Notice of Proposed Rulemaking, Trade Regulation Rule on the Use of Consumer Reviews and Testimonials, 88 FR 49364, 49371-75 (July 31, 2023) (to be codified at 16 CFR 465), <https://www.govinfo.gov/content/pkg/FR-2023-07-31/pdf/2023-15581.pdf> (discussing such enforcement actions).

²²² See Complaint ¶¶ 73-78, *Fed. Trade Comm'n v. Universal City Nissan, Inc.*, No. 2:16-cv-07329 (C.D. Cal. Sept. 29, 2016).

²²³ One commenter conducted a study of Google reviews of U.S. car dealerships from April 2008 to September 2022. The commenter found by examining a 2% sample of these reviews that consumers gave on average 4.47 stars out of 5 stars and made several other conclusions about consumer satisfaction with the auto transaction experience based on that methodology. Comment of Inst. for Regul. Analysis & Engagement, Doc. No. FTC-2022-0046-10164 at 2-5. The Commission notes that, consistent with its enforcement experience, there is no guarantee that those reviews are a genuine reflection of consumer experience. Moreover, the Commission notes that oftentimes consumers do not realize that they have been charged without their authorization. See SBP II.B. Thus, such a study that relies on Google star ratings is not conclusive of consumer experience.

post positive reviews that misrepresent their status as unbiased, independent, or ordinary consumer reviews, the dealer would be violating this provision.²²⁴

One industry association commenter contended that the Consumer Review Fairness Act²²⁵ already prohibits the conduct covered by this provision. The Consumer Review Fairness Act makes it illegal for businesses to have form contracts that disallow or restrict consumers from posting negative reviews. Section 463.3(k) prohibits misrepresentations regarding the authenticity of consumer reviews generally. These provisions are not in conflict, and as discussed in SBP III.C.1, to the extent the provision creates any duplication, the Commission has seen no harm to consumers or competition from duplicative prohibitions of deceptive conduct.

Whether reviews or ratings about a seller or the seller's products or services are from unbiased, independent, or ordinary consumers is material to consumers' decision-making because a consumer is more likely to interact with a particular dealership if the dealership has positive reviews or ratings from unbiased, independent, or ordinary consumers. Thus, after careful review of all the comments, the Commission is finalizing paragraph (k) of § 463.3 without substantive modification from the Commission's original proposal.

²²⁴ See § 463.1 ("It is an unfair or deceptive act or practice within the meaning of Section 5(a)(1) of the Federal Trade Commission Act (15 U.S.C. 45(a)(1)) to violate any applicable provision of this part, directly or indirectly . . .").

²²⁵ See 15 U.S.C. 45b.

- l) Whether the Dealer or Any of the Dealer's Personnel or Products or Services Is or Was Affiliated with, Endorsed or Approved by, or Otherwise Associated with the United States Government or Any Federal, State, or Local Government Agency, Unit, or Department, Including the United States Department of Defense or its Military Departments*

Proposed § 463.3(l) prohibited misrepresentations that “the Dealer or any of its personnel or products or services is or was affiliated with, endorsed or approved by, or otherwise associated with the United States government or any Federal, State, or local government agency, unit, or department, including the United States Department of Defense or its Military Departments.” Upon careful review and consideration of the comments, the Commission is finalizing paragraph (l) of § 463.3 with one technical clarification to replace “its” with “the Dealer’s.” The Rule’s requirements apply to all individuals and entities that meet the definition of “Dealer.”

One individual commenter recommended that the Commission additionally prohibit dealers from “causing any person to impersonate a police officer for any purpose.”²²⁶ The commenter contended that such a prohibition would address a common yo-yo financing tactic, wherein dealers exert pressure on consumers to return vehicles by calling the consumers on the phone, falsely claiming to be police officers, and falsely representing that there is a warrant for the consumers’ arrest or that the dealer has reported the consumers’ vehicles as stolen. The Commission is likewise concerned about such conduct, and notes that it would be covered by the language in this paragraph, which applies broadly to misrepresentations of affiliation with, endorsement or approval by, or association with “any Federal, State, or local government agency, unit, or department,”

²²⁶ Individual commenter, Doc. No. FTC-2022-0046-7445 at 17.

including State or local police officials.²²⁷ By misrepresenting police involvement in potential vehicle repossession, such conduct would also violate paragraph (o) of § 463.3 of the Final Rule.

A number of dealership association commenters contended that some States address this type of deception.²²⁸ As noted in response to similar commenter contentions regarding other proposed provisions, the Commission has seen no harm to consumers or competition from duplicative misrepresentation prohibitions, and overlap between the Commission's Rule provisions and existing law is indicative of dealers' ability to comply with these provisions. Moreover, including such a provision in the Final Rule additionally benefits consumers who encounter such conduct, and aids law-abiding dealers that otherwise lose business to competitors that act unlawfully. Further, § 463.9 discusses part 463's relation to State laws.

A dealership association commenter claimed that many dealerships in the commenter's State work with military personnel to promote charitable causes, and questioned whether a banner listing a dealership at a charitable military event would be considered a misrepresentation that the dealership is "associated" with the military.²²⁹ Here, the Commission notes that a banner that conveys true participation in a charitable military event, and does not deceptively represent an affiliation with, endorsement or

²²⁷ The Commission discussed government impersonation scams in its Notice of Proposed Rulemaking for a Trade Regulation Rule on Impersonation of Government and Business. *See* 87 FR 62741 (Oct. 17, 2022). The Commission observed, *inter alia*, "ongoing widespread fraud schemes in which scammers impersonate law enforcement or government officials in attempts to extort money or steal personally identifiable information." *See id.* at 62742 (citing announcements on March 7, 2022, and May 20, 2022, by the Federal Bureau of Investigation and the Social Security Administration's Office of the Inspector General, in coordination with other Federal law enforcement agencies, respectively).

²²⁸ One commenter further opined that "the Department of Defense has itself dealt with this situation in the case of military lending and sales." Comment of Kan. Auto. Dealers Ass'n, Doc. No. FTC-2022-0046-4510 at 7.

²²⁹ Comment of N.C. Auto. Dealers Ass'n, Doc. No. FTC-2022-0046-11223 at 9.

approval by, or association with the military, would not violate this provision. The Commission's law enforcement practice provides further guidance on this point: the Commission's many enforcement actions alleging misrepresentation of government affiliation provide examples of the types of conduct that would violate this provision.²³⁰

Representations about whether a seller or any of its personnel, products, or services is or was affiliated with, endorsed or approved by, or otherwise associated with the government are likely to affect consumers' conduct. Consumers are more likely to visit a dealership and select a vehicle or product if they believe that a specific dealer or a dealer's personnel, products, or services have been approved by a government entity. The Commission thus adopts paragraph (l) of § 463.3 without substantive modification from the Commission's original proposal.

m) Whether Consumers Have Won a Prize or Sweepstakes

Proposed § 463.3(m) prohibited misrepresentations about whether consumers have won a prize or sweepstakes. Upon careful review and consideration of the comments, the Commission is finalizing paragraph (m) of § 463.3 without modification from its original proposal.

Comments from dealership associations contended that some States or municipalities address this type of deception. As discussed in SBP III.C.1, the

²³⁰ See, e.g., Complaint ¶¶ 5-6, 9-11, 14, *Traffic Jam Events, LLC*, No. 9395 (F.T.C. Aug. 7, 2020) (alleging auto marketer misrepresented that it provided COVID-19 stimulus relief to consumers); Complaint ¶¶ 14-26, *Fed. Trade Comm'n v. Ponte Invs., LLC*, No. 1:20-cv-00177 (D.R.I. Apr. 17, 2020) (alleging misrepresentation of government affiliation by company that impersonated the U.S. Small Business Administration with business names "SBA Loan Program" and "SBA Loan Program.com" and claimed to help businesses obtain access to coronavirus relief programs administered by the agency); Complaint ¶¶ 24-36, *Fed. Trade Comm'n v. DOTAuthority.com, Inc.*, No. 0:16-cv-62186 (S.D. Fla. Sept. 13, 2016) (alleging defendants misrepresented affiliation with U.S. Department of Transportation by claiming to be the "Compliance Unit" of "DOTAuthority" and providing a telephone number with a Washington, D.C. area code).

Commission has not seen harm to consumers or competition from multiple prohibitions against misrepresentations. Furthermore, any significant overlap between the Commission's Rule provisions and existing law is indicative of dealers' ability to comply with these provisions. Finally, § 463.9 discusses part 463's relation to State laws.

Misrepresentations about whether consumers have won a prize or sweepstakes harm consumers by inducing consumers to choose and transact with a particular dealership under false pretenses. Thus, the Commission adopts paragraph (m) of § 463.3 without modification from the Commission's original proposal.

n) Whether, or Under What Circumstances, a Vehicle May Be Moved, Including Across State Lines or Out of the Country

Proposed § 463.3(n) prohibited misrepresentations regarding whether, or under what circumstances, a vehicle may be moved, including across State lines or out of the country. Upon careful review and consideration of the comments, the Commission is finalizing paragraph (n) of § 463.3 largely as proposed, with the minor modification of capitalizing the word "State," as well as the defined term "Vehicle" to conform with the revised definition at § 463.2(e).

The Commission received comments including from dealership associations arguing that proposed § 463.3(n) would pose issues for dealers who must comply with limitations imposed by manufacturers or distributors on the export of new motor vehicles. These commenters requested clarification about liability under this provision in the event dealers communicate any such export limitations to consumers or take other steps to prevent the export of new vehicles. Section 463.3(n), however, does not prohibit dealers from accurately and non-deceptively communicating whether, or under what

circumstances, a vehicle may be moved—it instead prohibits representations that mislead consumers about this information.

Commenters including a dealership association objected to this proposed provision by asserting that a State or insurance company may prescribe, and the parties to a contract may agree upon, whether a leased or purchased vehicle may be driven to a particular area. This provision, however, does not prevent parties from discussing and agreeing to whether a vehicle may be moved. Instead, § 463.3(n) prohibits misrepresentations about whether, or under what circumstances, a vehicle may be moved, including regarding any liens or other restrictions that would prevent or hinder consumers' ability to move the vehicle beyond certain boundaries. Furthermore, interaction with State laws is explained in the section-by-section analysis of § 463.9.

Representations about whether, and under what circumstances, a consumer may move a vehicle are material as they are likely to affect a reasonable consumer's decision to purchase a vehicle, including decisions of military consumers who may frequently need to move.²³¹

Based on a review of the comments and for the reasons previously discussed, the Commission is finalizing paragraph (n) of § 463.3 largely as proposed, with the minor modification of capitalizing "State" and the defined term "Vehicle."

²³¹ See, e.g., Fed. Trade Comm'n, "The Road Ahead: Selling, Financing, & Leasing Motor Vehicles," Public Roundtable, Panel 1: Military Consumers and the Auto Sales and Financing Process, Remarks by Hollister K. "Holly" Petraeus, Dir., Off. of Servicemember Affs., CFPB, Tr. at 11 (Aug. 2, 2011), https://www.ftc.gov/system/files/documents/public_events/52654/080211_ftc_sess1.pdf ("[S]ervicemembers don't always realize if they buy and finance a car here in the U.S., they can't take it out of the country unless they have a letter of permission from the lienholder to do so. And some of the lienholders won't give that permission. . . . [W]e [heard from] a JAG in Germany saying, 'I see a number of people who end up having to do what you would call "voluntary repossession" on their car because they bought this car, they're excited about it, and . . . the person who made them the loan didn't say "Oh, by the way, if you go overseas, we're not gonna let you take it with you.'" And . . . sometimes, they'll find that their warranty is no good overseas, either.'").

o) Whether, or Under What Circumstances, a Vehicle May Be Repossessed

Proposed § 463.3(o) prohibited misrepresentations regarding whether, or under what circumstances, a vehicle may be repossessed. After careful review and consideration of the comments, the Commission is finalizing paragraph (o) of § 463.3 with the minor modification of capitalizing the defined term “Vehicle” to conform with the revised definition at § 463.2(e).

A number of commenters, including consumer advocacy organizations and a group of State attorneys general, expressed concern about electronic disablement of vehicles, including through the use of starter interrupt devices, which are sometimes utilized for vehicle repossession. Many of these commenters expressed concern about the potential for harm to consumers if such devices are activated without regard to the location or operational state of the vehicle, and recommended that the Commission restrict their use. Alternatively, one such commenter recommended that the Commission add a provision to part 463 that would require dealers to disclose any such technology, obtain the consumer’s express, informed consent to its use, and limit its use to one time, not to exceed 30 days, once a consumer is in default. Finally, the comment from a group of State attorneys general recommended that the Commission require additional disclosures any time a starter interrupt device is installed, provide advance notice to consumers prior to activating such devices, and enable consumers to restart their vehicles in emergency or unsafe situations.²³²

²³² Comment of 18 State Att’ys Gen., Doc. No. FTC-2022-0046-8062 at 13.

The Commission recognizes the potential for abuse with regard to vehicle disablement technology.²³³ It is already illegal under Section 5 of the FTC Act to engage in deception, including regarding vehicle disablement technology, and to unfairly cause substantial injury to consumers, such as by disabling a vehicle while it is being operated on the highway.²³⁴ This provision will further provide protection for consumers from unfair or deceptive conduct surrounding the repossession of vehicles. Moving forward, the Commission will continue to monitor the motor vehicle marketplace for developments in this area to determine whether additional restrictions are warranted.

A number of dealership association commenters contended that this provision would inhibit dealers from making representations about their lawful rights to repossess vehicles, positing that, upon making any such representations, this provision might require dealers to carry out repossessions without exception or risk violating this provision. This provision, however, does not prevent dealers from providing accurate information to consumers about when a vehicle can, or will, be repossessed. Even where dealers have a lawful right to repossess a vehicle, current law, as well as this provision, prohibit dealers from misrepresenting whether or when they may take such action. Current law, including at the Federal level, imposes some such restrictions in this regard:

²³³ See, e.g., Complaint ¶¶ 10-21, *CFPB v. USASF Servicing, LLC*, No. 1:23-cv-03433-VCN (N.D. Ga. Aug. 2, 2023); Consumer Fin. Prot. Bureau, “Supervisory Highlights: Issue 28, Fall 2022” 6-7 (Nov. 2022), https://files.consumerfinance.gov/f/documents/cfpb_supervisory-highlights_issue-28_2022-11.pdf (finding that, in certain instances, auto servicers engaged in unfair acts or practices by activating vehicle disabling devices in consumers’ vehicles when consumers were not past due on payment, contrary to relevant contracts and disclosures, including by causing the devices to sound late payment warning beeps and by preventing consumers from starting their vehicles).

²³⁴ See 15 U.S.C. 45; see also, e.g., *Int’l Harvester Co.*, 104 F.T.C. 949, 1064-67 (1984) (finding that manufacturer’s failure to adequately disclose that its tractors had a serious safety hazard constituted unfair conduct, where the hazard caused serious injury to a small number of consumers, consumers could not have reasonably avoided the harm because the respondent did not adequately disclose the serious risk, and the cost of the respondent disclosing the risk was very small in relation to the substantial injury).

for example, the Servicemembers Civil Relief Act prohibits repossession of vehicles during a servicemember's period of military service without a court order, as long as the servicemember either placed a deposit for the vehicle or made at least one installment payment on the contract before entering military service.²³⁵ This provision prevents dealers from representing that they may repossess military consumers' vehicles under such circumstances. However, dealers may still accurately and non-deceptively inform a consumer about the circumstances under which a vehicle can be repossessed or when the dealer may take action. In providing consumers with such information, however, dealers must refrain from representing, including by implication, that repossession is likely when in truth it is not.

After considering the comments, the Commission is finalizing paragraph (o) of § 463.3 largely as proposed, with the minor modification of capitalizing the defined term "Vehicle." This provision prohibits dealers from making misrepresentations regarding material information about repossession of a vehicle. Information about whether, or under what circumstances, a vehicle may be repossessed is likely to affect consumers' conduct, including by impacting military consumers' conduct regarding which payments to prioritize while serving our country.

p) Any of the Required Disclosures Identified in this Part

Proposed § 463.3(p) prohibited misrepresentations of any of the required disclosures identified in this part. As the Commission noted in its NPRM, this was including but not limited to representations that limit or contradict the required

²³⁵ See 50 U.S.C. 3952(a).

disclosures.²³⁶ Upon careful review and consideration of the comments, the Commission is finalizing paragraph (p) of § 463.3 as proposed.

The Commission received a dealership association comment that contended generally that the proposed prohibited misrepresentations in this provision were already addressed in State statutes and regulations, and asserted that such State measures should suffice given that, according to the commenter, State regulators are more readily available to the public. As discussed in SBP III.C.1, the Commission has seen no harm to consumers or competition from duplicative prohibitions of deceptive conduct, and commenters did not cite State laws that permit misrepresentations or otherwise present a possible conflict with the Rule. Moreover, the Final Rule provides additional remedies that will benefit consumers who encounter conduct that is already illegal under State or Federal law, including by adding a mechanism for the Commission to redress consumers injured by a dealer's violation of the rule, and will assist law-abiding dealers that presently lose business to competitors that act unlawfully. Furthermore, State laws may provide more or less specific requirements, as long as those requirements are not inconsistent with part 463, and in the event of an inconsistency, the Rule only affects such State law to the extent of the inconsistency. Accordingly, the Commission adopts this provision without modification from its original proposal.

The Commission hereby determines it is an unfair or deceptive act in violation of the FTC Act for any dealer to make any misrepresentations, expressly or by implication, regarding material information about the subjects set forth in the paragraphs of § 463.3. Such misrepresentations are likely to cause consumers to waste significant time

²³⁶ NPRM at 42022.

or money beyond what dealers led them to believe would be necessary to purchase or lease a vehicle. Thus, these misrepresentations are material and are likely to cause substantial injury to consumers. This injury is not reasonably avoidable by consumers themselves because information about the truth or falsity of the dealer's misrepresentations is within the control of the dealer, and there are no countervailing benefits to consumers or to competition from the illegal practice of making misrepresentations. Further, these provisions also serve to help prevent dealers from failing to make disclosures required by § 463.4, and from charging for add-ons that provide no benefit and from failing to obtain express, informed consent for charges, as required by § 463.5, including by prohibiting misrepresentations regarding costs and terms.²³⁷ To reflect this, and without changing any substantive requirements for covered entities, the Commission is adding the following sentence to the end of § 463.3: "The requirements in this section also are prescribed for the purpose of preventing the unfair or deceptive acts or practices defined in this part, including those in §§ 463.4 and 463.5." Thus, this Rule requires dealers to refrain from making material misrepresentations about the topics enumerated in § 463.3. The prohibitions contained in § 463.3 help protect consumers from deceptive representations and promote the ability of honest dealers to compete on honest terms.

D. § 463.4: Disclosure Requirements

1. Overview

The proposed rule included five disclosure requirements for motor vehicle dealers regarding certain pricing and financing information (in proposed § 463.4(a) through (e)).

²³⁷ See 15 U.S.C. 57a(a)(1)(B) (the Commission "may include requirements prescribed for the purpose of preventing" such unfair or deceptive acts or practices).

These provisions proposed to require dealers to disclose a vehicle's offering price; an add-on list with each optional add-on for which the dealer charges consumers and the price of each such add-on; that such add-ons are not required and that the consumer can purchase or lease a vehicle without the add-ons; and information about a vehicle's total of payments when making certain representations about monthly payments.

In its NPRM, the Commission specifically requested comments regarding key aspects of the proposed disclosures. In response, various stakeholder groups and individuals provided comments regarding the proposed provisions. In this section, the Commission discusses the comments, responses to the comments, and any changes made to this section based on the comments.

The Commission received many comments in favor of its proposal, including from consumer groups, financial services groups, dealerships and dealership employees, individual consumers, and others. These comments supported the proposed disclosures as addressing bad actors and unlawful practices in the automotive marketplace while promoting transparency, reducing consumer confusion, and refraining from inhibiting consumer choice or materially increasing the time or paperwork required.

A number of such comments, however, urged the Commission to adopt additional disclosures, both in the areas covered by its proposal and elsewhere. Regarding disclosures covered in the proposal, for example, commenters suggested more detailed requirements, including regarding specific disclosure language and specific placement of disclosures. The Commission agrees with commenters that key information affecting pricing, add-ons, and costs must be disclosed clearly and conspicuously to consumers in order to address consumer deception and unauthorized charges during the motor vehicle

buying and leasing process. To provide flexibility for dealers and room for disclosures to be made in a manner that is clear and conspicuous to consumers in particular circumstances, however, the Commission declines to include additional prescriptive language about the form of such disclosures. Further, the Commission emphasizes that, in accordance with the provision being finalized at § 463.3(p), any material misrepresentations regarding the disclosures in the Final Rule violate Section 5 of the FTC Act²³⁸ and part 463.

The additional disclosures recommended by commenters included, *inter alia*: a disclosure regarding the installation and use of any electronic disabling devices; a disclosure explaining the fees certain lenders may charge to accept a consumer's loan application; a disclosure of the invoice price, or the price a dealer paid the manufacturer for the vehicle; a disclosure of any potential value gap between a vehicle's price and its appraised value; a disclosure, prior to purchase negotiations, of any potential financing limitations imposed by the dealer; a disclosure of credit characteristics relied upon by the dealer and certain terms; a disclosure that, as with a mortgage loan settlement statement, itemizes all the elements of the sale for car purchases;²³⁹ and disclosure signage in dealership showrooms or on sales desks explaining that add-ons are not required. As for

²³⁸ 15 U.S.C. 45.

²³⁹ Comment of Or. Consumer Just., Doc. No. FTC-2022-0046-8492 at 4; *cf.* Individual commenter, Doc. No. FTC-2022-0046-0144 (recommending the disclosed offering price separately list MSRP, markup, all fees, and add-on costs); Comment of Legal Aid Just. Ctr., Doc. No. FTC-2022-0046-7833 at 2 (“[D]ealers should be required to verbally disclose and explain in a language the customer understands the material terms of the contract [sic] (including APR, total number of monthly payments required, etc.) *before* customers sign[] the contract and receive the customers’ consent that they understand these terms. After this verbal disclosure, a consent form should be required. This form should be provided in the language preferred by the customer, and should ensure that the customer was provided with accurate and agreed-upon terms prior to signing.”); Individual commenter, Doc. No. FTC-2022-0046-1641 (“Mortgage lenders are required to give a borrower a disclosure document prior to closing to show all costs and expenses; car dealers should have to do the same thing.”).

disclosures in additional areas, the Commission recognizes that vehicle purchase and lease transactions are lengthy and document-heavy, and while consumers may benefit from additional information, each additional disclosure requirement could increase the cost to comply with part 463 and would risk crowding out the information in the Commission's proposed disclosures. Accordingly, the Commission has determined not to expand § 463.4 of this Final Rule to include additional disclosures.²⁴⁰ The Commission will continue to monitor the marketplace to evaluate the efficacy and sufficiency of the present disclosures.

In addition, the Commission received a number of comments requesting that it publish forms for the disclosures proposed in this section. These comments requested either that the use of such forms be required or that the Commission provide a "safe harbor" from liability under part 463 for dealerships that utilize them.²⁴¹ The Commission did not receive, in the course of public comment, evidence sufficient to conclude that uniform formatting for the delivery of such disclosures would be necessary to make them effective. Nor has the Commission received evidence to establish that mandating use of a particular form disclosure would obviate deceptive and unfair conduct in all circumstances. For example, forms that were required or that provided a "safe harbor" from liability could be presented (1) with other elements that are distracting or confusing, (2) with information that modifies or contradicts the form disclosures, (3) with

²⁴⁰ In addition to the disclosures noted, a few commenters requested additional provisions to address concerns regarding transparency in pricing, including related to interest rates, and that the Rule require dealers to maintain a fiduciary relationship to customers. The Commission recognizes the concerns regarding pricing transparency and deceptive conduct related to pricing, and will continue to monitor such issues, including after this provision (§ 463.4(a), offering price disclosure) and the misrepresentation provisions (§ 463.3) are in effect.

²⁴¹ Comment of Nat'l Auto. Dealers Ass'n, Doc. No. FTC-2022-0046-8368 at 104, 122; Comment of Ohio Auto. Dealers Ass'n, Doc. No. FTC-2022-0046-6657 at 6, 9; *see* Comment of Compliance Sys., Doc. No. FTC-2022-0046-7836 at 1.

instructions, discouragement, or time pressure that causes consumers not to review the forms or that makes such review impracticable or impossible, or (4) through the use of forms that are pre-completed in whole or in part, to the extent this makes the information therein easy for consumers to miss. The end result of such an approach would be to enable deception while also making such deception more difficult to detect. Accordingly, the Commission declines to mandate particular disclosure forms as a requirement across all transactions or to shield against liability even where dealers otherwise engage in deceptive or unfair conduct. The Commission also notes that, because it is not mandating particular disclosure forms, dealers that are already complying with the law will avoid additional compliance costs associated with using a new form, and all dealers will have the flexibility to convey the disclosures in a manner that is clear and conspicuous under the particular circumstances of their transactions.

The Commission also received comments that expressed opposition to this section. Some individual commenters argued that the required disclosures were unduly extensive, prescriptive or untested, or that the substance of these disclosures is already conveyed to consumers before the consummation of the transaction. In response, the Commission stresses that this section is limited in both its scope and its requirements. Each of the disclosures in § 463.4 is focused on one key category of information: vehicle price, add-on optionality, or total of payments. This section requires the clear and conspicuous disclosure of this information but does not include prescriptive requirements. So, for example, a written disclosure would have to be in a size that stands out, but a specific font or font size is not mandated, nor are the specific terms or format used, nor are any particular uses of capitalization, punctuation, ink color, or paper color

or size. The proposal refrained from additional formal mandates in order to provide dealers with flexibility, within the bounds of the law, to provide this essential information, including so that dealers already conveying this information in a non-deceptive manner may continue to do so. Accordingly, the Commission also finds that testing of these requirements is unnecessary. Furthermore, each of the disclosure requirements being finalized addresses the unfair or deceptive act or practice of withholding essential information from consumers or presenting such information to them in a deceptive manner. After reviewing comments, including those that contended the proposal was not prescriptive enough, the Commission concludes that this is the correct approach, and as such, has determined not to adopt any additional specifications dictating the form or manner in which the disclosures must be presented to consumers. Here, as elsewhere, the Commission will continue its long track record of working to assist with legal compliance.²⁴² Further, for dealers already conveying this information clearly and conspicuously, complying with this provision should not be burdensome.

Other commenters, including an industry association, contended that these disclosures would have the effect of limiting the products and services consumers are offered or otherwise restrict lawful sales practices. In response, the Commission reiterates that this section focuses on one of the most foundational pieces of information regarding

²⁴² Each year since FY2002, the Small Business Administration's Office of the National Ombudsman has rated the Federal Trade Commission an "A" on its small business compliance assistance work. *See* U.S. Small Bus. Admin., "National Ombudsman's Annual Reports to Congress," <https://www.sba.gov/document/report--national-ombudsmans-annual-reports-to-congress> (providing reports from FY2013-FY2020); Letter from Edith Ramirez, Chairwoman, Fed. Trade Comm'n, to Senator David Vitter, Chairman, Comm. on Small Bus. and Entrepreneurship at 1 (Nov. 16, 2015), https://www.ftc.gov/system/files/documents/reports/federal-trade-commission-rule-compliance-guides-small-businesses-other-small-entities-commission/eighth_section_212_report_to_congress_july_2014-june_2015.pdf (citing Commission's "A" rating for "Compliance Assistance" by the Nat'l Ombudsman from FY2002-FY-2014).

the sale of vehicles, add-ons, and financing: their cost. Dealers already providing this information in a non-deceptive manner will need to make minimal, if any, changes to their disclosure practices. The Commission has seen no evidence that disclosing cost information has caused dealers to cease offering products.

Some commenters, including dealership associations, contended that the presence of some State standards in this area makes Federal regulation unnecessary or contradictory. In response, the Commission notes that it drew from several State statutory and regulatory provisions in formulating its proposal, and it observes that the existence and functioning of such standards demonstrates the practicability of such disclosure measures. Dealers can comply with any State laws requiring the same conduct as well as this section. Similarly, to the extent a State requires additional disclosures regarding vehicle price, add-ons, or total of payments, nothing prevents dealers from providing those disclosures as well as those required under § 463.4 so long as the State disclosures are not inconsistent with part 463. To the extent there is truly a conflict between this section and State law, § 463.9 provides that part 463 will govern, but only to the extent of the inconsistency, and only if the State statute, regulation, order, or interpretation affords consumers less protection than does the corresponding provision of part 463. Moreover, a number of States do not have existing standards in the areas covered by this part; in such States, the Commission's disclosures will operate as a key safeguard.

Other commenters, including an industry association, argued that requiring disclosures would increase the time and paperwork for consumers to buy or lease a vehicle. In response, the Commission notes that the section includes requirements for the disclosure of salient, material information early in the process, thus eliminating the time

consumers would otherwise spend pursuing misleading offers—time which can then be spent pursuing truthful offers in the absence of deception. These measures will further allow consumers to compare dealerships in advance based on truthful terms; thus, dealerships will earn business based on the actual terms offered, and not lose business to dealers who compete by omitting or hiding actual terms. Moreover, the disclosures required by this section are limited to key information affecting pricing, add-ons, and total of payments, needed to address consumer deception and unauthorized charges during the vehicle-buying and leasing process, and are required to be in writing only where the dealer is responding to written consumer communications or already providing consumers with representations in writing.²⁴³ As explained in detail in the paragraph-by-paragraph analysis of § 463.4(e) in SBP III.D.2(e), in order to avoid any additional written disclosure requirements, the Commission is declining to mandate that its required disclosures be made in writing in every instance.

An industry association commenter argued that the proposed disclosure requirements in § 463.4 of the NPRM violate the First Amendment. This commenter contended that the proposed disclosures constituted compelled speech; that they would be subject to intermediate judicial scrutiny were they to be challenged in court; and that, in the event of such a challenge, the Commission's actions would fail to satisfy that standard of scrutiny, or a less stringent one.

The Commission first addresses the applicable First Amendment standard of review for this rulemaking effort in the event of a judicial challenge. If so challenged, the

²⁴³ See § 463.4(a) (stating that Offering Price must be disclosed in writing if the communication with the consumer, or the dealer's response, is in writing); § 463.4(c), (d), (e) (requiring that disclosures be in writing if the dealer's associated representation is in writing).

disclosures in § 463.4 would not be subject to intermediate judicial scrutiny, but instead to the less rigorous review standard set forth in *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626, 651 (1985). When, as is the case here, a regulation “impose[s] a disclosure requirement rather than an affirmative limitation on speech,” and is “directed at *misleading* commercial speech,” *Zauderer* governs.²⁴⁴

Under that standard, a commercial speaker’s rights “are adequately protected as long as disclosure requirements are reasonably related to the State’s interest in preventing deception of consumers.”²⁴⁵ In *Zauderer*, the Court upheld a rule requiring attorneys who advertised on a contingency-fee basis to disclose that clients who did not prevail in litigation might nevertheless be liable for significant costs.²⁴⁶ The Court found that “the possibility of deception is [] self-evident” when an advertisement discloses only one type of charge (fees) without mentioning another (costs).²⁴⁷ In upholding the challenged rule as reasonable, the Court emphasized that the rule merely mandated disclosure of “purely factual and uncontroversial information about the terms under which . . . services will be available,” and that the “constitutionally protected interest in *not* providing [such] information . . . is minimal.”²⁴⁸

As in *Zauderer*, § 463.4 requires only “purely factual and uncontroversial information about the terms under which [commercial goods or services] will be available.”²⁴⁹ These material facts include the offering price of the motor vehicle; that add-on products or services are not required and the consumer can purchase or lease the

²⁴⁴ *Milavetz, Gallop & Milavetz, P.A. v. United States*, 559 U.S. 229, 249 (2010) (emphasis original).

²⁴⁵ *Zauderer v. Off. of Disciplinary Couns.*, 471 U.S. 626, 651 (1985).

²⁴⁶ *Id.* at 652.

²⁴⁷ *Id.* at 652-53.

²⁴⁸ *Id.* at 651.

²⁴⁹ *See id.* at 651.

vehicle without the add-on, if true; the total amount the consumer will pay to purchase or lease the vehicle and, if that amount assumes the consumer will provide consideration, the amount of such consideration; and when a lower monthly payment will increase the total amount the consumer will pay to purchase or lease the vehicle. As in *Zauderer*, any “constitutionally protected interest” a motor vehicle dealer might have “in *not* providing [this] factual information . . . is minimal.”²⁵⁰

Courts applying *Zauderer* have repeatedly affirmed the constitutionality of regulations requiring disclosures of complete information about the cost of a purchase, which are similar to the required disclosures in § 463.4. For example, courts upheld a regulation requiring schools to “disclose the ‘total cost’ of . . . tuition, fees, books, and supplies for its programs,” finding that this information was “purely factual and uncontroversial.”²⁵¹ In another instance, a court upheld under *Zauderer* a rule requiring airlines to prominently disclose the “total, final price” of airfare, finding it was “reasonably related to the government’s interest in preventing deception of consumers.”²⁵² In yet another case, a court upheld a rule requiring hospitals to disclose their rates to consumers, finding they were “‘factual and uncontroversial’ and directly relevant to ‘the terms under which [hospitals’] services will be available’ to consumers.”²⁵³ The disclosure provisions the Commission is finalizing in § 463.4, like the provisions upheld in these cases, merely require factual and uncontroversial

²⁵⁰ *Zauderer v. Off. of Disciplinary Couns.*, 471 U.S. 626, 651 (1985) (emphasis original).

²⁵¹ *Ass’n of Priv. Sector Colls. & Univs. v. Duncan*, 110 F. Supp. 3d 176, 199 (D.D.C. 2015), *aff’d*, 640 F. App’x 5 (D.C. Cir. 2016).

²⁵² *Spirit Airlines, Inc. v. U.S. Dep’t of Transp.*, 687 F.3d 403, 412-15 (D.C. Cir. 2012) (internal brackets omitted).

²⁵³ *Am. Hosp. Ass’n v. Azar*, 983 F.3d 528, 540 (D.C. Cir. 2020) (quoting *Zauderer v. Off. of Disciplinary Couns.*, 471 U.S. 626, 650-651 (1985)).

disclosures to provide consumers with accurate and timely pricing and financing information as they consider motor vehicle purchases and leases.²⁵⁴

As discussed, *Zauderer* applies here because § 463.4 would “impose a disclosure requirement rather than an affirmative limitation on speech.”²⁵⁵ The Commission notes, however, that disclosure requirements in § 463.4 likewise would pass muster even if, as the commenter suggested, they were evaluated under the intermediate scrutiny standard formulated in *Central Hudson Gas & Electric Corp. v. Public Service Commission of New York*, 447 U.S. 557 (1980), and subsequent cases applying that standard.²⁵⁶ As an initial matter, *Central Hudson* applies not to *disclosure requirements*, such as those the commenter challenges, but to *affirmative limitations* on speech.²⁵⁷ The *Central Hudson* test requires restrictions on lawful, non-misleading speech to satisfy three remaining criteria. First, there must be a substantial governmental interest in the restriction; second, the restriction must directly advance that interest; and third, the restriction may not be more extensive than necessary to advance the interest.²⁵⁸ Under the *Central Hudson* test, it is not necessary that “the manner of restriction is absolutely the least severe that will achieve the desired end.”²⁵⁹ Rather, there merely must be a “‘fit’ between the [restriction’s] ends and the means chosen to accomplish those ends—a fit that is not

²⁵⁴ Further, as explained in the paragraph-by-paragraph analysis of § 463.4 in SBP III.D.2, the failure to disclose this information is itself a deceptive or unfair practice.

²⁵⁵ *Milavetz, Gallop & Milavetz, P.A. v. United States*, 559 U.S. 229, 249 (2010).

²⁵⁶ The commenter attributes the intermediate scrutiny test to *Pagan v. Fruchey*, 492 F.3d 766, 771 (6th Cir. 2007), though it was in fact formulated by the Supreme Court in *Central Hudson*.

²⁵⁷ *Milavetz, Gallop & Milavetz, P.A. v. United States*, 559 U.S. 229, 249 (2010).

²⁵⁸ *See Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm’n of N.Y.*, 447 U.S. 557, 566 (1980). Although the Supreme Court in *Central Hudson* treated the question whether regulated speech is truthful and non-misleading as one of four criteria, it has alternately treated this question as a threshold inquiry, after which the three remaining criteria are evaluated. *See Fla. Bar v. Went For It, Inc.*, 515 U.S. 618, 623-24 (1995). Because the government is “free to prevent the dissemination of commercial speech that is false, deceptive, or misleading,” *Zauderer v. Off. of Disciplinary Couns.*, 471 U.S. 626, 638 (1985), if a challenged restriction fails this threshold inquiry, *Central Hudson* does not apply.

²⁵⁹ *Bd. of Trs. of State Univ. of N.Y. v. Fox*, 492 U.S. 469, 480 (1989).

necessarily perfect, but reasonable.”²⁶⁰ In other words, the restriction should be “one whose scope is ‘in proportion to the interest served.’”²⁶¹

The disclosure provisions the Commission is finalizing in § 463.4 satisfy these criteria. First, the disclosure provisions serve a substantial governmental interest by requiring motor vehicle dealers to provide accurate terms, and in particular, accurate pricing information, in advertising and sales discussions.²⁶² As the Supreme Court has made clear, the government’s “interest in ensuring the accuracy of commercial information in the marketplace is substantial.”²⁶³ And as explained in the paragraph-by-paragraph analysis of § 463.4 in SBP III.D.2, the disclosure requirements set forth there are aimed at ensuring that consumers receive accurate pricing information and other material transaction terms, and that dealers refrain from the unfair or deceptive act or practice of failing to provide this information.²⁶⁴ The required disclosures directly advance, “fit” reasonably with, and are proportionate to, their intended ends of prohibiting and preventing unfair or deceptive conduct in motor vehicle transactions. They prevent dealers from luring consumers to dealerships with unfair or deceptive advertising tactics, from padding prices with unwanted add-on products or services, and from misdirecting consumers about the true cost of a vehicle through discussions of monthly payment amounts. The disclosure requirements effectively “impose[] no burden on speech other than requiring [motor vehicle dealers] to disclose the

²⁶⁰ *Id.* (citation omitted).

²⁶¹ *Id.* (quoting *In re R.M.J.*, 455 U.S. 191, 203 (1982)).

²⁶² NPRM at 42012.

²⁶³ *Edenfield v. Fane*, 507 U.S. 761, 769 (1993).

²⁶⁴ Nothing could be more directly relevant to accurate pricing than disclosure of the actual price itself. *See Spirit Airlines, Inc. v. U.S. Dep’t of Transp.*, 687 F.3d 403, 415 (D.C. Cir. 2012) (substantial governmental interest “is clearly and directly advanced by a regulation requiring that the total, final price be” prominently disclosed).

total price consumers will have to pay. This the First Amendment plainly permits.”²⁶⁵

After careful consideration of the comments, the Commission has determined to finalize the introductory paragraph of § 463.4 and certain of the disclosure requirements included in its NPRM, with some minor textual changes. The introductory paragraph of the NPRM proposed that it would be “a violation of this part and an unfair or deceptive act or practice in violation of section 5 of FTC Act for any Motor Vehicle Dealer to fail to make any disclosure required by this section, Clearly and Conspicuously.” The Commission is finalizing this paragraph with the minor textual changes of capitalizing “Section 5” and substituting “Federal Trade Commission Act” for “FTC Act” for clarity and conformity with other parts of the Rule. The Commission is also adding the word “Covered” to the defined term “Covered Motor Vehicle Dealer” to conform with the revised definition at § 463.2(f), discussed in SBP III.B.2(f).

The Commission is finalizing the specific disclosure requirements proposed at § 463.4(a), (c), (d), & (e), with modifications noted in the paragraph-by-paragraph analysis in SBP III.D.2(a), III.D.2(c), III.D.2(d), & III.D.2(e).

In the paragraphs that follow, the Commission discusses the disclosure

²⁶⁵ *Id.* Further, the Commission has taken into account prior enforcement work and other initiatives. *See* NPRM at 42022-25 (explaining rationale behind disclosure requirements and extensively citing prior enforcement experience and record evidence); *see also Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525, 555 (2001) (“We do not . . . require that empirical data come accompanied by a surfeit of background information. We have permitted litigants to justify speech restrictions by reference to studies and anecdotes . . . or even . . . based solely on history, consensus, and simple common sense.” (internal quotation marks and alterations omitted)); *Fla. Bar v. Went For It, Inc.*, 515 U.S. 618, 628, (1995) (same); *Burson v. Freeman*, 504 U.S. 191, 211 (1992) (finding speech restrictions justified even under strict scrutiny based on a “long history, a substantial consensus, and simple common sense”); *Milavetz, Gallop & Milavetz, P.A. v. United States*, 559 U.S. 229, 251 (2010) (“When the possibility of deception is as self-evident as it is in this case, we need not require the State to conduct a survey of the public before it may determine that the advertisement had a tendency to mislead.” (internal quotation marks and alterations omitted)); *Am. Hosp. Ass’n v. Azar*, 983 F.3d 528, 540 (D.C. Cir. 2020) (finding reasonable relationship between rule and governmental interests where “the Secretary, relying on complaints from consumers, studies of state initiatives, and analysis of industry practices, reasonably concluded that the rule’s disclosure scheme will help the vast majority of consumers”).

requirements proposed in the NPRM, the comments relating to the specific disclosures, responses to the comments, and the disclosure requirements adopted in § 463.4.

2. Paragraph-by-Paragraph Analysis of § 463.4

a) Offering Price

The offering price disclosure provision in proposed § 463.4(a) required dealers to disclose a vehicle's offering price in advertisements that reference a specific vehicle or represent a monetary amount or financing term for any vehicle, as well as upon receipt of a consumer communication about a specific vehicle or any monetary amount or financing term for any vehicle. The Commission proposed defining "Offering Price," in § 463.2(k), as "the full cash price for which a Dealer will sell or finance the motor vehicle to any consumer, excluding only required Government Charges." The Commission also proposed defining the term "Government Charges," then in § 463.2(h), to mean "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." For the reasons discussed in the following paragraphs, the Commission is finalizing the offering price disclosure provision at § 463.4(a), as well as the corresponding "Offering Price" and "Government Charges" definitions in § 463.2 (finalized at § 463.2(k) and (i), respectively), largely as proposed. The Commission is including a modification to the offering price definition to clarify that dealers may, but need not, exclude required government charges from a motor vehicle's offering price, and is substituting "Vehicle" for "motor vehicle" to conform with the revised definition at § 463.2(e), discussed in SBP III.B.2(e). Additionally, the Commission is including a typographical modification to the "Government Charges" definition to include a serial

comma for consistency. The Commission also is capitalizing the defined terms “Vehicle” throughout, in its singular, plural, and possessive forms, and is adding language to the end of § 463.4(a) clarifying that the requirements in § 463.4(a) “also are prescribed for the purpose of preventing the unfair or deceptive acts or practices defined in this part, including those in §§ 463.3(a) & (b) and 463.5(c).”

The Commission received a significant number of comments on its proposed offering price disclosures. Many commenters supported the Commission’s proposal to require dealers to provide uniform, comprehensive, and accurate pricing information. These commenters noted, *inter alia*, that despite laws generally prohibiting unfair or deceptive acts or practices, present market conditions fail to balance the “playing field” of information between consumers and motor vehicle dealers, allowing dealers to take advantage of consumers by hiding information about pricing, imposing surprise price increases, or using pricing advertising tactics that systematically deceive consumers.²⁶⁶ Many consumers also underscored the need for the proposed disclosure requirements. Commenters in support noted, for instance:

- Buying a car has always been a horrible experience for me. The endless driving to dealerships who advertise vehicles for a sale price only to find that the vehicle does not exist, or the price advertised for the specific vehicle is not what they had posted. The salespersons['] tactics, always attempting to put you in a vehicle based on a car payment, along with dancing around the simple question of the actual out the door price of the vehicle. . . . It is such a shame that the dealerships just do not give the customer the price of the vehicle without them wanting to start a “folder” and take all of your information, a copy of your drivers license, ect [sic] . . . Please regulate the automobile dealerships, especially now when it seems they are at their worst with these ridiculous add on fees (paint and upholstery protector, ect [sic] which was not added at the manufacturer) along with adjustments on top of the MSRP.²⁶⁷

²⁶⁶ See, e.g., Comment of Nat’l Consumer L. Ctr. et al., Doc. No. FTC-2022-0046-7607 at 17-20.

²⁶⁷ Individual commenter, Doc. No. FTC-2022-0046-6649.

- Buying a car in the US is now akin to what I used to do in the Army: Before going into the dealership, I have to spend hours conducting “intelligence prep of the battlefield” to understand the tactics the dealership’s sales and finance & incentives staff will throw at me. . . . It has been made increasingly worse by dealerships that advertise a false price to entice a buyer but “bait-and-switch” with Additional Dealer Mark-Ups (ADM), and bogus fees and charges for supposedly dealer-installed items tha[t] the consumer doesn’t want in the first place. . . . Unless the FTC passes this proposed rule, things will get worse before they get better.²⁶⁸
- Though I am not usually a fan of adding layers of governmental regulations to what should be a simple transaction, there definitely needs to be a change in what is allowed in the car buying process. . . . As consumers we should not have to spend hours reading tiny print in obscure sections of a website in order to validate a posted price. The price should not be elevated at the last minute in a hidden line item such as a mandatory detailing package or service plan you do not want or need to the tune of thousands of dollars. . . . We should not have to spend hours at a dealer and go through mounds of paperwork with a fine tooth comb in order to simply see the ACTUAL price of the vehicle. It is a ridiculous ploy to confuse people into purchasing things they do not want or need.²⁶⁹
- I have been trying to buy a new car for the last two years but with unexpected costs I am not able to have a clear written contract on the car and its pricing. I have contacted several dealers in my area and many of them have issues that prevent me from committed [sic] to buying from them. This ranges from them not being able to give me a written sheet of the cost of the car, fees, ect [sic] showing me how much I will be paying in the end. . . . Most of the dealerships I spoke to would not give me a sales sheet of the vehicle I want to purchase to show me how much I will be paying in total. I would have to put a down payment and just trust them over the phone. If I can’t get it in writing it is hard to commit to a down payment I could lose.²⁷⁰
- Vehicles are typically the second largest purchase made by people. Given the choices available according to respective needs/wants, purchasing a vehicle should be the same as going to any other mass-market retailer and picking that appliance with a set price. So why do we need to haggle or

²⁶⁸ Individual commenter, Doc. No. FTC-2022-0046-6225.

²⁶⁹ Individual commenter, Doc. No. FTC-2022-0046-6089.

²⁷⁰ Individual commenter, Doc. No. FTC-2022-0046-6656.

expend additional intellectual and emotional bandwidth towards ensuring that the transaction is as initially stated? There are instances where I'd rather be back conducting combat operations in Iraq than go through the dealer process, as it incenses me that this corrupt way of doing business is given a free pass. . . . If you are a reputable and honest dealership, then there should be no worry; it will be business as usual.²⁷¹

- Think of us, the car buying public. We are mad as hell. Please start fixing this crooked business model where nobody even knows what they are supposed to be paying.²⁷²
- As a consumer, I fully support this new proposed rules update. The dealership experience has been an anxiety provoking event everytime [sic] I attempt to purchase a car. I have multiple friends and family that all report shady practices, bait and switch, and up charging at point of sale during their car buying process. Please pass these regulations!²⁷³
- I am writing in FULL support of the FTC rules and regulations. . . . Buyers deserve to know Out the door prices and not be hassled by nonsensical add-ons for the dealership's benefit. People should feel comfortable and excited to buy their 1st car rather than the dread I feel.²⁷⁴
- We find the vehicle we came to see and see a sticker beside the manufacture[r] one with added prices. These typically include car alarms, VIN etching, protection packages, floor mats, market adjustment, etc. We go to purchase the vehicle now and they say that none of these can be removed from the price of the car (even though they advertised them without them at a much lower price). We attempt to negotiate them off and find out their [sic] is an additional addon like reconditioning fee. We fail at getting the price of the vehicle down to the advertised price and leave.²⁷⁵
- I have financed all of my cars, and the total cost for the vehicle has always been hidden, either physically or through the dealer trying to move focus onto other numbers such as the monthly payment. Since monthly payments will vary due to credit history, down payments, interest rates, taxes, and more, it is not an effective tool for measuring a deal. \$300 a month could be a great deal on one car, and a horrible deal on another. I

²⁷¹ Individual commenter, Doc. No. FTC-2022-0046-5238.

²⁷² Individual commenter, Doc. No. FTC-2022-0046-5227.

²⁷³ Individual commenter, Doc. No. FTC-2022-0046-5228.

²⁷⁴ Individual commenter, Doc. No. FTC-2022-0046-5219.

²⁷⁵ Individual commenter, Doc. No. FTC-2022-0046-0900.

would greatly benefit from the proposal[']s provision to clearly list and advertise the price of the car without additional add[-]ons. It would greatly reduce the work of finding the right car at the right dealership. In each of the 3 cases, I have gone to multiple dealers, wanting to purchase a specific vehicle on their lot, and walked away because of the hidden costs being added to the price of the car.²⁷⁶

- I work as a salesperson at a local Nissan dealership. . . . Currently, dealerships across the US, including the one I work for, have made the car buying process needlessly confusing, expensive, and frustrating by engaging in false advertising and hidden add-on products. While these practices are very unscrupulous, they are incredibly effective at what they are designed to do: drive revenue for the store. If these regulations are passed, they would certainly take a significant toll on my personal finances. But the longer I work in my position, the more I realize that no one should be allowed to engage in such exploitative conduct in the course of running a business. . . . Good, ethical dealers will not have to make any changes if these rules are put into place. I also happen to know that several of the comments in opposition to the proposed regulations are solicited by dealerships and their management. The dealership group I work for, for example, sent out a company-wide email encouraging employees to post comments on this site in opposition to these rules. But there's no question: The American people want these regulations. They need these regulations. The only ones that don't want them are crooked auto dealerships across the US. It's been far too long that such dealerships have run amuck with underhanded sales practices and deception. I would urge the FTC to stand strong against . . . dealership groups[]or any lobbyists and get these rules passed! I know there will be stiff resistance but it's of the utmost importance to good dealerships, transparent salespeople, and, most importantly, the average American consumer!²⁷⁷

A number of commenters supported the offering price disclosure requirement and associated definitions; some expressed support while urging additional protections. A number of commenters, including consumer advocacy organizations as well as individual commenters, requested that the Commission require a vehicle's offering price to include additional items, such as charges for add-ons attached to the vehicle when it is offered,

²⁷⁶ Individual commenter, Doc. No. FTC-2022-0046-6490.

²⁷⁷ Individual commenter, Doc. No. FTC-2022-0046-3693.

and charges for add-ons required by the dealer to be sold with the vehicle; to exclude rebate information, including rebates contingent upon the use of a certain financing company or upon qualifying for any other rebate; and to prohibit the exclusion of certain charges, including the advertisement of an offering price that factors out a down payment amount.²⁷⁸

To begin, the Commission notes that by the terms of the proposed “Offering Price” definition, the only charges a dealer was permitted to exclude from a vehicle’s offering price were required *government* charges. Thus, under the proposal, if a dealer were to charge any consumer for a preinstalled add-on, or require any consumer to pay for an add-on to purchase or finance the vehicle, then the charges for such add-ons would be required to be included in the vehicle’s offering price.²⁷⁹ In addition, while the proposed provision did not prevent dealers from presenting consumers with accurate and non-misleading additional information, including terms of limited availability, the required offering price disclosure needed to remain clearly and conspicuously presented to consumers, and could not be based on discounts or rebates that are not available to “any consumer,” including rebates contingent upon the use of a certain financing company or upon qualifying for any other rebate. Similarly, under the proposal, if the dealer required a down payment amount to sell or finance the vehicle, the offering price could not factor out such an amount.

²⁷⁸ A number of these commenters further requested that the term “Offering Price” include additional dealer fees that are known to the dealer at the time they are advertised and imposed by the dealer rather than a government entity. These requests are addressed in the discussion of the Commission’s definition of “Government Charges” in SBP III.B.2(i).

²⁷⁹ If a dealer does not require any consumer to pay for an add-on, current law, as well as provisions in this Rule, require dealers to refrain from deception in this regard. *See, e.g.*, § 463.3(a), (b) (prohibiting material misrepresentations regarding the costs or terms of purchasing, financing, or leasing a vehicle, as well as any costs, limitation, benefit, or any other material aspect of add-ons); § 463.4(c) (requiring disclosures regarding optional add-ons).

With respect to the proposed definition of “Government Charges,” which is used in the definition of “Offering Price,” a number of consumer advocacy organization commenters contended the definition should be narrow to accomplish the Commission’s goal of ensuring that consumers have access to accurate pricing information before they enter a dealership, emphasizing that only charges that are imposed by, and payable to, a government entity should be permitted to be excluded from a vehicle’s offering price, and that document fees that some States allow dealers to charge should not be excluded from the offering price. The Commission notes that, as proposed, the term “Government Charges” is limited to those charges “imposed by a Federal, State or local government agency, unit, or department.” The Commission specified in this proposed definition that such charges need be “imposed by” a government entity rather than, for instance, having merely been “authorized by” or “allowed by” such an entity. This language does not reach charges that are authorized by a government entity but not required, since such charges have not been “imposed”²⁸⁰ by the government. This distinction therefore excludes from the definition of “Government Charges” fees, such as dealership document preparation fees that State or local law does not require consumers to pay. Furthermore, the definition of “Offering Price” at § 463.2(k) permits only “required” government charges to be excluded from a vehicle’s offering price. Thus, charges the government does not require consumers to pay, but allows the dealer to charge or to pass along to the consumer, such as document fees, must be included in the disclosed offering price if the dealer requires such charges of any consumer.

²⁸⁰ See, e.g., *Impose*, Cambridge Advanced Learner’s Dictionary & Thesaurus, <https://dictionary.cambridge.org/us/dictionary/english/impose> (“to officially force a rule, tax, punishment, etc. to be obeyed or received”).

Relatedly, an individual commenter suggested that the Commission delete the phrase “inspection or certification costs” from the definition of “Government Charges” in order to avoid confusion about the status of inspection or certification charges that “are NOT imposed by the Government,” as well as explicitly state in the definition that the term does “not include dealer document or document processing fees (“doc fees”), or electronic titling and registration fees, which are not imposed by the Government.”²⁸¹ Regarding the phrase “inspection or certification costs,” such costs that are *not* “imposed” by the government are excluded from the definition of “Government Charges,” as the plain language makes clear. Similarly, as noted, dealer document or document processing fees and any other fees that are not imposed by the government are excluded from the definition, as the plain language states.

Some commenters, including a group of State attorneys general, likewise recommended that a vehicle’s offering price include “anticipated” or “estimated” government charges.²⁸² The Commission agrees that consumers would benefit from knowing this information early on in their shopping experience, and notes that dealers are permitted under this Final Rule to provide additional, truthful information along with a vehicle’s offering price. Rather than requiring that anticipated government charges be included in the offering price, the Commission is modifying the definition from its original proposal to make clear that dealers need not exclude any such charges from the offering price. The Commission will evaluate whether the definition, as finalized, as well

²⁸¹ Individual commenter, Doc. No. FTC-2022-0046-7445 at 15-16.

²⁸² See, e.g., Comment of 18 State Att’ys Gen., Doc. No. FTC-2022-0046-8062 at 7; Comment of Consumer Att’ys & Advocs., Doc. No. FTC-2022-0046-7695 at 2-3 (requesting that the vehicle’s offering price include “an estimate of government fees and charges such as sales tax and registration based on the dealer’s location”).

as its associated disclosure, effectively address deceptive and unfair market conduct, and will consider future modifications as market practices evolve.

Thus, the Commission is finalizing a definition of “Offering Price” that clarifies that dealers may, but need not, exclude required government charges from a vehicle’s offering price that meets the requirements of § 463.2(k). In particular, the Commission is finalizing a definition of “Offering Price” that removes the phrase “excluding only” and adds the phrase “provided that the Dealer may exclude only” in its place. The definition also substitutes “Vehicle” for “motor vehicle” to conform with the revised definition of “Covered Motor Vehicle” or “Vehicle” at § 463.2(e), such that the definition reads as follows: “Offering Price means the full cash price for which a Dealer will sell or finance the Vehicle to any consumer, provided that the Dealer may exclude only required Government Charges.”

Other commenters, including consumer advocacy organizations, proposed additional requirements to the disclosure at § 463.4(a): prescribing formatting, posting, and presentation requirements for offering price information, such as attaching a written offering price to each vehicle, providing written offering price information in response to consumer communications regardless of whether the communications are written, and requiring offering price to be the most conspicuous piece of information displayed to consumers. Regarding the manner in which the offering price must be presented, the Commission proposed that all disclosures under § 463.4, including the offering price disclosure, be presented clearly and conspicuously. As previously discussed, the proposed disclosure provisions were directed at addressing unlawful conduct while providing dealers with flexibility to present such disclosures in a manner that is clear and

conspicuous to their consumers under the particular circumstances. Thus, the Commission has determined not to adopt further formatting, posting, or presentation requirements for its offering price disclosure.

Some commenters, including consumer advocacy organizations and a consumer protection agency, proposed that the Commission adopt an additional requirement providing that dealers must accept an offer from a buyer of the offering price. In response, the Commission notes that, under its proposal, if a dealer were requiring any consumer to pay a price that was higher than the disclosed offering price, or adding other conditions—such as requiring the use of a particular finance company or the purchase of an add-on—to obtain the vehicle at the offering price, such practices would violate part 463, including the offering price provision, which requires disclosure of the full cash price for which the dealer will sell or finance the vehicle to any consumer,²⁸³ and the related requirement the Commission is finalizing under § 463.3(p), which prohibits misrepresentations regarding the required disclosures in part 463.²⁸⁴

An individual commenter proposed that the Commission adopt additional requirements requiring dealers to itemize and disclose each sub-component of the offering price, including any applicable document fee. The Commission notes that it has not been presented with any evidence that the benefits of such additional disclosure

²⁸³ See § 463.2(k) (defining “Offering Price” as “the full cash price for which a Dealer will sell or finance the Vehicle to any consumer, provided that the Dealer may exclude only required Government Charges”).

²⁸⁴ Some commenters described situations in which a dealer may decline to sell or finance a vehicle to a particular consumer, including due to legal requirements, irrespective of whether the dealer otherwise intends to honor its offering price disclosures. These situations include, for example, a consumer who presented identity theft indicia under the Commission’s Red Flags Rule, 16 CFR 681; a consumer on the Specially Designated Nationals List maintained by the Office of Foreign Assets Control; a consumer who cannot produce the required proof of insurance or license to complete the transaction; or a consumer who is abusive or violent at the dealership. The Commission’s offering price provision is a pricing disclosure; it will not otherwise alter the status quo on whether a given sale or financing transaction must be consummated.

requirements outweigh the costs to consumers and competition. The Commission may consider additional such restrictions or additional guidance in the future, based on stakeholder experience with part 463 and whether it effectively remediates unlawful conduct.

Other individual commenters proposed that the Commission impose limitations on the price of the vehicle—for example, prohibiting dealers from charging more than MSRP for the vehicle—or prohibit or limit particular charges, such as dealer fees, document fees, and destination charges. The Commission notes that several Rule provisions will prohibit hidden charges and deception related to pricing, including § 463.4(a) (offering price disclosure) and § 463.3(a) (prohibition against misrepresenting the costs or terms of purchasing, financing, or leasing a vehicle). Before including additional provisions, the Commission will continue studying the market, including after the Rule is in effect, to determine whether additional steps are needed.

Other commenters opposed the offering price disclosure and related definitions. Commenters including an industry association contended that, by defining “Offering Price” in § 463.2(k) as the price “for which a Dealer will sell or finance the motor vehicle to any consumer,” the Commission would prohibit dealers from changing vehicle prices as market conditions change, thereby making vehicle pricing less dynamic than under current industry practice.

Section 463.4 and the offering price definition in § 463.2(k), however, do not alter the current status quo on pricing accuracy or pricing changes. Consistent with the law, the offering price—as with a presently advertised price—must be truthful and non-misleading. If the offering price is only available for a certain period of time, the

advertisement must convey that fact clearly and conspicuously, and if it is no longer available, the dealer must cease advertising the offering price.²⁸⁵

Some commenters expressed a related concern that the Commission's offering price disclosure requirement could require dealers to change their practices when an advertised vehicle is no longer available. For example, one industry commenter asked whether, under such circumstances, a dealer would somehow be obligated to sell some other vehicle to that consumer at the offering price. Here, the offering price disclosure requirement does not alter the status quo: Under § 463.4(a), as under current law, if an offer is limited to a particular period of time, the offer must convey that fact, and once a price is no longer available, the dealer must cease advertising that price. Regarding which vehicles to sell at an advertised offering price, under the Commission's proposal, the dealer must disclose the offering price for the vehicles advertised. If the dealer charges a different price, then the dealer has not disclosed the offering price for which the dealer will sell or finance the vehicle, and the dealer has misrepresented the price of the vehicle, in violation of several provisions, including §§ 463.3(b) & (p) and 463.4(a). For example, if a dealer conveys that all vehicles of a certain nature or in a certain category are available at a particular offering price, but charges a higher offering price for any vehicle of that nature or in that category, the dealer has violated the Rule.

Other comments, including from a member of Congress and from dealership associations, raised concerns that the Commission's proposal would limit dealers from advertising rebates, discounts, or incentives of limited availability, including when

²⁸⁵ As is the case under current law, under part 463, any qualifying information necessary to prevent deception regarding a material fact must be conveyed clearly and conspicuously. *See* FTC Policy Statement on Deception, *supra* note 42, at 1 n.4, 4.

qualifications for such rebates, discounts, or incentives are identified in the advertising, further contending that such a result would contradict prior FTC practice. Relatedly, commenters including an industry association questioned whether the Commission's proposal prohibited dealers from advertising additional vehicle prices, contending that such a result would conflict with the longstanding obligation under Federal law to disclose a vehicle's Manufacturer's Suggested Retail Price, or MSRP. The Commission notes, however, that the offering price disclosure requirement does not prevent dealers from presenting accurate and non-misleading additional information, including terms of limited availability, so long as the required offering price disclosure remains clearly and conspicuously presented to consumers.²⁸⁶ If, however, a dealer's disclosure were to give consumers a net pricing impression that is contrary to that which is actually available, then the disclosure would violate § 463.4(a), and the related requirement under § 463.3(p).²⁸⁷

Some commenters, including dealership associations, generally concluded the Commission's proposed offering price definition, or its associated disclosure provision, were unnecessary, confusing, burdensome, or likely to hinder comparison shopping.

²⁸⁶ A number of dealership associations expressed a related concern that the Commission, through its offering price proposal, was somehow seeking to restrict competition between dealers to being only about the price of vehicles. The associations described other areas, beyond vehicle price, by which dealerships currently distinguish themselves (e.g., their range of products and services; their service availability; the convenience of their locations; and the nature of their sales staffing and process). In response, the Commission notes that it has long recognized the importance of protecting competition across both price and quality metrics, including providing consumers with truthful, nondeceptive advertising. *See, e.g., Cal. Dental Ass'n v. Fed. Trade Comm'n*, 526 U.S. 756, 766-68 (1999) (affirming Commission exercise of law enforcement authority against industry guidelines that unlawfully restricted both price advertising and advertising relating to the quality of dental services). As noted, the offering price disclosure requirement does not prevent dealers from presenting accurate and non-misleading additional information, including information about any such distinguishing characteristics, so long as the offering price is presented clearly and conspicuously.

²⁸⁷ For reference, § 463.3(p), which the Commission is finalizing, *see* SBP III.C.2(p), prohibits dealers from making material misrepresentations regarding "[a]ny of the required disclosures" under the Final Rule.

Some commenters, for instance, contended that their respective States already prohibit misrepresenting price terms, rendering the Commission's proposal redundant. The Commission notes, however, that a simple disclosure of the offering price, using the same definition across States, addresses multiple issues, including: the promotion of prices based on dealer discounts, rebates, or other price reductions when such benefits are in fact subject to hidden or undisclosed restrictions that render them unavailable to typical customers; the concealment or omission of additional dealer charges, such as for document preparation fees, amounting to several hundred dollars; the advertisement of a price without disclosing material limitations or additional charges required by the dealer that are fixed and thus can be readily included in the price at the outset; and the inducement to pursue pricing offers that are not actually available or to pay more for a vehicle due to inadequate or nonexistent disclosures. Moreover, this disclosure and the associated definitions should produce the corollary benefit of increasing price competition among dealers, who will be able to compete on truthful, standard terms.²⁸⁸ The Commission also concludes that the claim that its offering price disclosure requirement would limit comparison shopping appears to follow from the mistaken notion that the offering price disclosure prohibits dealerships from conveying accurate additional information to consumers, including information about rebates, discounts, or other limited-availability incentives.

Relatedly, some dealership association commenters contended there are areas of overlap, or potential conflict, with State law. Pursuant to § 463.9 of part 463, where it is possible for dealers to comply with both State law and the provisions of this regulation,

²⁸⁸ See NPRM at 42023.

or where State law affords greater consumer protection, part 463 will not displace existing State pricing or disclosure regimes. This addresses many of the commenters' concerns about State law. Some dealership associations, for instance, contend that their respective States require dealers to separately disclose a dealer document fee and not represent that the fee is required by the State, or that they allow dealers, with certain limitations, to incorporate rebates into an advertised price. Regarding document fees, dealers can simultaneously comply with part 463, which requires document fees to be included in the offering price unless they are "required" government charges, and with State law that permits but does not require document fees to be excluded from a vehicle's advertised price, or that requires disclosure of the amount of the document fee and that such a fee is not required by the State, by disclosing the offering price and any additional State-required information, such as the amount of the dealer document fee. Similarly, regarding rebates, in addition to the offering price, dealers may provide consumers with additional pricing information, including regarding rebates or other incentive pricing, so long as the offering price remains clear and conspicuous, and any additional information is truthful and non-misleading and otherwise complies with part 463 and existing law.

Another dealership association commenter urged the Commission to consider using an existing definition, including a State-law definition of "sales price" or the definition of "cash price" under the Truth in Lending Act's Regulation Z, in lieu of its proposed offering price definition.²⁸⁹ The Commission notes that its offering price definition overlaps substantially with the commenter's suggested State-law "sales price" definition, which, according to the commenter, requires that a vehicle's advertised price

²⁸⁹ Comment of Tex. Auto. Dealers Ass'n, Doc. No. FTC-2022-0046-8102 at 29-30.

be one at which “the dealer must be willing to sell the motor vehicle . . . to any retail buyer”; which “must” include certain additional charges that are fixed and thus can be readily included in the price at the outset, including “[d]estination and dealer preparation charges”; and which permits only certain categories of costs and charges to be excluded.²⁹⁰ Based on the commenter’s description, unlike the Commission’s definition, this State-law definition permits the exclusion of fees “allowed” by law or those which the law has “prescribed.”²⁹¹ Again, the Rule permits only charges that the government *requires* the consumer to pay to be excluded from a vehicle’s offering price, by defining “Offering Price” to allow only “required Government Charges” to be excluded. This difference from the State law described by the commenter, however, creates no conflict—a dealer governed by that State law will be able to comply with both requirements by disclosing an offering price that excludes only required government charges and includes allowable government charges.

Similarly, commenters have not demonstrated any actual conflicts between the proposed offering price definition and TILA’s definition of “cash price.”²⁹² Dealers can comply with both requirements by disclosing an offering price that excludes only required government charges. And the Rule’s definition addresses specific unfair and deceptive conduct in the auto marketplace. Were offering prices to exclude additional categories, the resulting disclosure provision at § 463.4(a) would permit dealers to lure consumers to dealership lots based on a price that is not actually the price the dealer would require the consumer to pay, a result that would require consumers to spend time

²⁹⁰ *Id.*; see also 43 Tex. Admin. Code 215.250(a), (b) (2023).

²⁹¹ Comment of Tex. Auto. Dealers Ass’n, Doc. No. FTC-2022-0046-8102 at 29-30; see also 43 Tex. Admin. Code 215.250(b)(3) (2023).

²⁹² See 12 CFR 226.2(a)(9).

traveling to the dealership and time on the lot to attempt to discover the true price, and that would place dealerships that choose to advertise the price truthfully at a competitive disadvantage.

Relatedly, commenters including an industry association contended that no additional regulation of pricing or credit and lease advertising was necessary beyond that provided by existing practice or by the Truth in Lending Act, the Consumer Leasing Act, and their implementing Regulations Z and M, and relatedly, that the Commission's offering price disclosure requirement duplicated, modified, or ignored such existing law. The disclosure requirement, however, is consistent with these existing legal obligations and does not disturb them; dealers can and should make the disclosures required under TILA and other laws as well as the offering price disclosure required by the Final Rule. The provision requires dealers to disclose simple and highly material pricing information under certain circumstances.²⁹³ Providing consumers with accurate and timely pricing and financing information is critical, especially in the context of motor vehicle sales.²⁹⁴

Several commenters requested modifications to limit or expand the proposed definition of "Government Charges," or clarification regarding this term's application to certain fees. For example, commenters, including a dealership association, urged the Commission to modify this proposed definition to include charges that are "allowed to be

²⁹³ The industry association commenter further contended that this provision would apply to dealers based on whether they have a service department, but this is incorrect, as explained in the analysis of the definition of "'Covered Motor Vehicle Dealer' or 'Dealer'" in SBP III.B.2(f).

²⁹⁴ See, e.g., Buckle Up, *supra* note 63, at 5 (noting consumer confusion about how the vehicle price they were offered was determined and that consumers did not understand they could negotiate price); *id.* at 9 (observing add-on products or services, which typically increase a vehicle's purchase price, were "the single greatest area of confusion" in the study); Att'y's Gen. of 31 States & DC, Comment Letter on Public Roundtables: Protecting Consumers in the Sale and Leasing of Motor Vehicles, Project No. P104811, Submission No. 558507-00112-1 at 5-6 (Apr. 13, 2012), https://www.ftc.gov/sites/default/files/documents/public_comments/public-roundtables-protecting-consumers-sale-and-leasing-motor-vehicles-project-no.p104811-00112/00112-82927.pdf.

charged but not required or imposed by a Federal, State, or local government agency, unit, or department.”²⁹⁵ One such commenter provided the example of certain registration and title charges, which it described as “not necessarily imposed or mandatory fees” and for which “the amount may vary, depending on the county” and the dealership, and within a governmentally determined range.²⁹⁶ Regarding registration and title charges, to the extent such charges are required by a government agency, unit, or department, then they fall within the “Government Charges” definition as charges “imposed by” such agency, unit, or department. If, however, there are title, registration, or other fees, beyond any title and registration fees required by the government, that dealers are allowed, but not required, to charge, such fees do not fall within the “Government Charges” definition, and to the extent a dealer imposes such allowable charges on any consumer, such fees must be included in the offering price. Were the Commission to categorize such allowed, but not required, amounts as “Government Charges,” dealers would be allowed to exclude them from a vehicle’s offering price but then require consumers to pay them anyway, thereby allowing dealers to lure consumers to their lots based on a price that is not actually the price the dealer would require the consumer to pay—a fact that consumers would not learn until they have spent time traveling to the dealership and time on the lot, if they learn this fact at all.²⁹⁷ Further, under such circumstances, dealerships that choose to advertise the price truthfully would be at a competitive disadvantage. The Commission therefore declines to finalize the definition with such a modification.

²⁹⁵ Comment of Tex. Auto. Dealers Ass’n, Doc. No. FTC-2022-0046-8102 at 14.

²⁹⁶ *Id.*

²⁹⁷ Indeed, as the Commission also noted in its NPRM, an entity that induces the first contact through false or misleading representation is liable under the FTC Act, regardless if the buyer later becomes fully informed. *See, e.g., Resort Car Rental Sys., Inc. v. Fed. Trade Comm’n*, 518 F.2d 962, 964 (9th Cir. 1975); *Fed. Trade Comm’n v. Gill*, 71 F. Supp. 2d 1030, 1046 (C.D. Cal. 1999), *aff’d*, 265 F.3d 944 (9th Cir. 2001).

Commenters, including a number of dealership associations, contended there were burdens associated with the Commission's offering price disclosure requirement, claiming it would cause dealers to require documenting every contact with a consumer in which a specific vehicle was mentioned, thereby lengthening the sales process and increasing the recordkeeping burden. Comments regarding recordkeeping requirements, including records that must be created and maintained under this Rule, are addressed in the section-by-section analysis of § 463.6. Here, the Commission notes that accurate pricing communication is already required by law. Section 463.4(a) does not require a complex or lengthy disclosure, is based on similar provisions already in operation in certain States,²⁹⁸ will operate as a key safeguard in States without such provisions, and, as discussed in the following paragraphs, addresses deceptive and unfair conduct. Further, this offering price requirement will save consumers time when shopping for a vehicle by requiring the provision of salient, material information early in the process and eliminating time otherwise spent pursuing misleading offers. For dealers already disclosing accurate pricing information upfront, this provision allows them to compete on an even playing field.

Another industry association commenter contended that, by requiring offering price to be disclosed when an advertisement references a specific vehicle or represents a monetary amount or financing term "by implication," the Commission's disclosure requirement could apply to advertisements that merely list a dealer's website, on which

²⁹⁸ For example, California and Wisconsin have similarly enacted laws that make it unlawful for dealerships to advertise a total price without including additional costs to the purchaser outside the mandatory fees such as tax, title, and registration fees. Cal. Veh. Code 11713.1(b), (c) (2023); Wis. Admin. Code. Trans. 139.03(3) (2023). In Louisiana, the advertised price must be the full cash price for which a vehicle will be sold to any and all members of the buying public. La. Admin. Code tit. 46, pt. V, 719 (2023).

specific vehicles and their prices appear. Under the Commission’s proposal, an advertisement that does not expressly reference a specific vehicle or expressly refer to a monetary amount or financing term would not do so “by implication” solely by referring to a website, document, or other destination where such information may otherwise be available, absent evidence that the net impression of a reasonable consumer is that the advertisement implicitly references such terms.²⁹⁹ The phrasing in the Commission’s requirement—“expressly or by implication”—refers to the nature of the claims conveyed by a dealer’s advertisement (*i.e.*, whether such claims are made expressly or by implication). For more than three decades, the Commission has explained express and implied claims as follows:

Express claims directly state the representation at issue. Implied claims are any claims that are not express. They range on a continuum from claims that would be “virtually synonymous with an express claim through language that literally says one thing but strongly suggests another to language which relatively few consumers would interpret as making a particular representation.”³⁰⁰

This same industry association commenter contended that its aforementioned concerns—that the disclosure requirement would prohibit dynamic pricing, and that the requirement would extend to advertisements simply by virtue of their referencing a dealer’s website—would together cause dealers to curb their pricing representations in advertising, either by limiting such representations to a vehicle’s MSRP or by factoring out pricing altogether. As previously discussed, these concerns appear to misunderstand either existing legal requirements or the fact that an offering price disclosure would operate consistent with those requirements. The Commission’s requirement simply

²⁹⁹ See FTC Policy Statement on Deception, *supra* note 42, at 2, 5 (describing the Commission’s “net impression” standard for determining the meaning of an advertisement).

³⁰⁰ *Kraft, Inc.*, 114 F.T.C. 40, 120 (1991) (quoting *Thompson Med. Co., Inc.*, 104 F.T.C. 648, 788 (1984), *aff’d*, 791 F. 2d 189 (D.C. Cir. 1986), *cert. denied*, 479 U.S. 1086 (1987)).

requires dealers to disclose an offering price and does not alter the current status quo on pricing accuracy. To the extent there is a concern that requiring accurate pricing information limits dealers to advertising MSRP or forgoing advertising pricing information altogether, such concerns apply equally under current law—including in States with pricing disclosure requirements that resemble the Commission’s offering price disclosure requirement. The Commission, however, has not been presented with evidence suggesting that dealers will not want to distinguish themselves from other dealers on price, and will instead default to advertising a price that is offered by all of their competitors.

Another concern raised by this same industry association commenter was that, by requiring an offering price “in the Dealer’s first response” to a consumer communication that references a specific vehicle or a monetary amount or financing term for any vehicle, the requirement would prohibit dealers from explaining the offering price and why it is being provided, and that as a result, consumers may understand the offering price to be non-negotiable. Under § 463.4, however, dealers continue to be permitted to communicate accurate additional information, including the availability of discounts or the dealer’s willingness to negotiate, as long as the offering price disclosure remains clear and conspicuous.

The same industry association commenter asserted that mandating the disclosure of the offering price in connection with “any communication with a consumer” would result in excessive and non-responsive disclosures. The commenter provided the example of a consumer who contacts a dealership to ask whether the dealership has “a silver [Ford] F-150 in stock,” arguing that the Commission’s proposal would require the dealer

to respond with offering price information for each of the numerous (in the commenter's example, 40) silver F-150 vehicles the dealer has in stock. To begin, if the entire communication simply asks, "Do you have a silver Ford F-150 in stock?," it does not concern a "specific vehicle"; it concerns a group of vehicles—silver Ford F-150s—and, under § 463.4, the dealer is not required to disclose an offering price, so long as the dealer's reply does not reference either (1) a specific vehicle or (2) a monetary amount or financing term for *any* vehicle, whether a specific vehicle or a group of vehicles.³⁰¹ If, however, the dealer chooses to respond by discussing a specific vehicle—whether by describing that vehicle, referring to a stock or VIN number, or using other means—the dealer is required to disclose the offering price for that specific vehicle. If the dealer chooses to respond by discussing several specific vehicles, the offering price disclosure requirement applies for each such vehicle. Finally, the offering price disclosure requirement applies if the dealer's response references a monetary amount or financing term, such as a down payment or monthly payment amount, for a specific vehicle or a group of vehicles. This requirement applies only to the dealer's first response regarding the specific vehicle. It does not apply to subsequent communications about that specific vehicle.

The failure to disclose a vehicle's offering price in an advertisement or other communication that references a specific vehicle, or a monetary amount or financing term for any vehicle, is likely to cause substantial injury to consumers who waste time and effort pursuing offers that are not actually available or end up paying more for a vehicle than they expected or being subject to hidden charges.

³⁰¹ See *Any* (def. 1), Merriam-Webster.com Dictionary, <https://www.merriam-webster.com/dictionary/any> (defining "any" as "one or some indiscriminately of whatever kind").

Buying or leasing a vehicle is time-consuming and often the most expensive purchase a consumer makes without knowing the actual price of the product at the outset. Consumers can spend hours driving to a dealership.³⁰² Once at the dealership, it can then take several hours to days to finalize a transaction³⁰³ before the consumer learns the price of the vehicle. And many consumers never learn the true price at all; part of the finalization process includes signing dense paperwork, where information regarding the price of the vehicle and charges for other items is easily obscured, especially if consumers are not provided with baseline price information around which to anchor the lengthy, dense discussions and process. When consumers are not provided with such price information, they are susceptible to hidden charges such as “junk fees” or unnecessary add-ons that can cost consumers thousands of dollars and significantly increase their overall expense.³⁰⁴ These hidden charges substantially injure consumers by increasing their total cost as well as their debt burden in the many instances where vehicle purchases are financed.³⁰⁵

³⁰² See, e.g., Complaint ¶¶ 23-26, *Fed. Trade Comm’n v. N. Am. Auto. Servs., Inc.*, No. 1:22-cv-01690 (N.D. Ill. Mar. 31, 2022) (alleging that many consumers drive hours to dealerships).

³⁰³ See, e.g., Auto Buyer Study, *supra* note 25, at 15 (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); *Cf.* 2020 Cox Automotive Car Buyer Journey, *supra* note 25, at 6 (reporting average consumer time spent shopping for a vehicle at 14 hours, 53 minutes, including 1 hour, 49 minutes visiting dealerships/sellers).

³⁰⁴ See Nat’l Consumer L. Ctr., “Auto Add-Ons Add Up: How Dealer Discretion Drives Excessive, Arbitrary and Discriminatory Pricing” (2017), https://www.nclc.org/wp-content/uploads/2022/09/auto_add_on_charts.pdf; Complaint ¶¶ 25, 27-28, *Fed. Trade Comm’n v. N. Am. Auto. Servs., Inc.*, No. 1:22-cv-01690 (N.D. Ill. Mar. 31, 2022) (alleging defendants charged thousands of consumers hundreds to thousands of dollars each for unauthorized add-ons, totaling in aggregate over \$70 million since 2017); Complaint ¶¶ 59, 61, *Fed. Trade Comm’n v. Universal City Nissan, Inc.*, No. 2:16-cv-07329 (C.D. Cal. Sept. 29, 2016) (alleging unauthorized add-on charges costing thousands of dollars).

³⁰⁵ According to public reports, 81% of new motor vehicle purchases, and nearly 35% of used vehicle purchases, are financed. See Melinda Zabritski, Experian Info. Sols., Inc., “Automotive Industry Insights: Finance Market Report Q4 2020” at 4, <https://www.autofinancenews.net/wp-content/uploads/2021/03/2020-Q4-Auto-Finance-News-Industry-Pulse.pdf>.

Moreover, the consumer injury caused by the lack of price information is not reasonably avoidable. The dealer has sole control over pricing information and the timing of when it is provided to consumers. Even if the consumer learns of the price of the vehicle before finalizing the transaction, the consumer has already spent time and effort traveling to the dealer, on the dealership lot, and in the financing office, and for many, the immediate need for the vehicle for work, school, childcare, groceries, medical visits, and other vital household reasons makes it infeasible to start the process anew at a different dealership. Further, during the lengthy vehicle-buying process and in complex, dense paperwork, it is especially easy to hide or alter price information or include hidden charges when consumers are not provided with baseline price information around which to anchor the discussion of vehicles, monetary amounts, or financing terms.³⁰⁶

The injury to consumers from a lack of price information is not outweighed by benefits to consumers or competition from withholding this basic information. Instead, upfront information about the offering price protects consumers from lost time and effort, supracompetitive prices, and unexpected charges while increasing price competition among dealers, who should be able to compete on truthful, standard terms. The costs of providing price information—which the dealer determines and can calculate upfront—are minimal for dealers that are already advertising a specific vehicle, monetary amount, or financing term, especially when compared to the injury to consumers.

³⁰⁶ See, e.g., Complaint ¶¶ 17-19, 44, *Fed. Trade Comm'n v. Liberty Chevrolet, Inc.*, No. 1:20-cv-03945 (S.D.N.Y. May 21, 2020) (dealers inflated the car price on paperwork in the middle of the sale without the consumer's knowledge or authorization, a practice they internally referred to as adding "air money"); Complaint ¶¶ 24-27, *Fed. Trade Comm'n v. N. Am. Auto. Servs., Inc.*, No. 1:22-cv-01690 (N.D. Ill. Mar. 31, 2022) (alleging that defendants buried charges for add-ons in voluminous paperwork, making it difficult to detect).

Thus, the failure to disclose a vehicle's offering price in an advertisement or other communication that references a specific vehicle, or a monetary amount or financing term for any vehicle is an unfair practice.

The Commission notes that § 463.4(a)(1) & (a)(2) affects only dealers that are already advertising about specific vehicles or monetary amounts or financing terms; it does not affect businesses that do not expend funds on advertising specific vehicles, monetary amounts, or financing terms. The Commission will continue to monitor the market to assess whether this approach is sufficient to address the harms associated with a lack of price and charge information. If not, the Commission will revisit whether additional measures are necessary, such as requiring price information in all advertising, requiring total charge estimates, or prohibiting charges for additional items along with a vehicle sale.

Regarding deception, price is one of the most material pieces of information for a consumer in making an informed purchasing decision.³⁰⁷ Yet, including as illustrated by the Commission's law enforcement efforts, it can be difficult for consumers to uncover the actual price for which a dealer will sell an advertised vehicle until visiting the dealership and spending hours on the lot. When an advertisement or other communication references a monetary amount or financing term, it is reasonable for a consumer to expect that those amounts and terms are available at other standard terms. If instead, for example, a dealer advertises a low monthly payment based on an unexpectedly long

³⁰⁷ See, e.g., *Fed. Trade Comm'n. v. Windward Mktg., Inc.*, 1997 WL 33642380, at *10 (N.D. Ga. Sept. 30, 1997) (“[A]ny representations concerning the price of a product or service are presumptively material.”); *Thompson Med. Co., Inc.*, 104 F.T.C. 648, 817 (1984); see also *Fed. Trade Comm'n v. Crescent Pub. Grp., Inc.*, 129 F. Supp. 2d 311, 321 (S.D.N.Y. 2001) (“Information concerning prices or charges for goods or services is material, as it is ‘likely to affect a consumer’s choice of or conduct regarding a product.’”).

financing term or an unexpectedly high interest rate that results in a higher price than standard terms would have, then the consumer is lured to the dealership based on a misimpression of what they reasonably expect the total price to be.

If a dealer advertises a specific vehicle, it is reasonable for a consumer to expect to learn the true offering price of the vehicle upon visiting the dealership. Consumers are misled when dealers misrepresent or otherwise obscure price information or charge for items beyond the advertised vehicle during the long and complex sales, financing, and leasing process.³⁰⁸

If consumers knew that the true price was beyond what was expected or that the prices and charges were for unwanted items, that would likely affect their choice to visit one dealership over another dealership. Thus, misleading consumers about price information is material. *See, e.g., Fed. Trade Comm'n v. Windward Mktg., Inc.*, No. Civ.A. 1:96-CV-615F, 1997 WL 33642380, at *10 (N.D. Ga. Sept. 30, 1997) (“[A]ny representations concerning the price of a product or service are presumptively material.” (citing *Removatron Int'l Corp.*, 111 F.T.C. 206, 309 (1988)); *Thompson Med. Co., Inc.*, 104 F.T.C. 648, 817 (1984)); *see also Fed. Trade Comm'n v. Crescent Pub. Grp., Inc.*,

³⁰⁸ Consumers who expect particular prices, based on the MSRP or Kelley Blue Book, are also misled when true pricing information is not disclosed upfront. *See, e.g.*, Individual commenter, Doc. No. FTC-2022-0046-1878 (“We ended up having to drive 3 hours to get the [vehicle we] wanted. Upon arriving to pickup the car we were told there was a 4300 increase over MSRP.”); Individual commenter, Doc. No. FTC-2022-0046-1690 (“It was only after five hours at the dealership that we discovered the dealer had added on a \$3000 market adjustment and \$3100 in other add-ons (nitrogen-filled tires, LoJack, paint protection) to MSRP.”). The average transaction price of a new vehicle exceeded the average manufacturer’s suggested retail price (MSRP) for twenty consecutive months between 2021 and 2023. *See Cox Auto.*, “After Nearly Two Years, New-Vehicle Transaction Prices Fall Below Sticker Price in March, According to New Data from Kelley Blue Book” (Apr. 11, 2023), <https://www.coxautoinc.com/market-insights/kbb-atp-march-2023/>; *see also Edmunds*, “8 Out of 10 of Car Shoppers Paid Above Sticker Price for New Vehicles in January, According to Edmunds” (Feb. 15, 2022), <https://www.edmunds.com/industry/press/8-out-of-10-of-car-shoppers-paid-above-sticker-price-for-new-vehicles-in-january-according-to-edmunds.html>; iSeeCars, “10 New Cars Priced the Highest Over MSRP, Even as Peak Pricing Eases” (Mar. 19, 2023), <https://www.yourerie.com/news/10-new-cars-priced-the-highest-over-msrp-even-as-peak-pricing-eases/> (finding the average new car price was 8.8% over MSRP).

129 F. Supp. 2d 311, 321 (S.D.N.Y. 2001) (“Information concerning prices or charges for goods or services is material, as it is ‘likely to affect a consumer’s choice of or conduct regarding a product.’”).³⁰⁹

Thus, it is an unfair or deceptive act or practice for dealers to fail to disclose the offering price in an advertisement or other communication that references, expressly or by implication, a specific vehicle or any monetary amount or financing term for any vehicle.

Furthermore, this provision also serves to prevent the misrepresentations prohibited by § 463.3—including misrepresentations regarding costs or add-ons—by requiring consumers to be told the true price of the vehicle in advertisements and other communications. It also helps prevent dealers from failing to obtain the express, informed consent of consumers for charges, as addressed by § 463.5(c).³¹⁰ Thus, the Commission is requiring dealers to disclose a vehicle’s offering price when advertising or otherwise communicating about a specific vehicle or monetary amount or financing term for any vehicle. This provision allows consumers to compare offers based on the same price terms and to select dealers that truly offer the lowest price rather than dealers that advertise deceptively low prices but charge more. When price information in the market is distorted or concealed—especially in document- and time-intensive vehicle

³⁰⁹ Even if some consumers were not misled by the failure to disclose the offering price, to show deception under the FTC Act, “the FTC need not prove that every consumer was injured. The existence of some satisfied customers does not constitute a defense” *Fed. Trade Comm’n v. Amy Travel Serv., Inc.*, 875 F.2d 564, 572 (7th Cir. 1989), *vacated in part on other grounds, Fed. Trade Comm’n v. Credit Bureau Ctr., LLC*, 937 F.3d 764 (7th Cir. 2019); *accord Fed. Trade Comm’n v. Stefanchik*, 559 F.3d 924, 929 n.12 (9th Cir. 2009).

³¹⁰ See 15 U.S.C. 57a(a)(1)(B) (the Commission “may include requirements prescribed for the purpose of preventing” unfair or deceptive acts or practices).

transactions—consumers are unable to effectively differentiate between sellers, and sellers trying to deal honestly with consumers are put at a competitive disadvantage.

For the foregoing reasons, and having considered the comments that it received on this proposed provision, the Commission is finalizing the offering price provision at § 463.4(a) with modifications to capitalize the defined term “Vehicle” in its singular, plural, and possessive forms, to correspond to the revised definition at § 463.2(e), and to add language clarifying that the provision is also prescribed for the purpose of preventing unfair or deceptive acts or practices defined in this Rule. The Commission is finalizing the corresponding “Offering Price” and “Government Charges” definitions in § 463.2 largely as proposed, with modifications to the “Offering Price” definition to conform with the defined term “Vehicle” and to clarify that dealers may, but need not, exclude required government charges from a vehicle’s offering price, and a typographical modification to the “Government Charges” definition to include a serial comma for consistency.

b) Add-on List

The Commission’s proposed add-on list disclosure provision (proposed § 463.4(b)) required the disclosure, both online and at each dealership, of a list of all optional add-ons for which the dealer charges consumers and the price of each such add-on.³¹¹ As proposed, if the price of the add-on varies based on the specifics of the transaction, the add-on list would have to include the range the typical consumer will

³¹¹ To the extent any add-on charges are required by a dealership, and thus are not optional, such charges would have to be included in the offering price, pursuant to §§ 463.2(k) and 463.4(a).

pay.³¹² Due to space constraints, dealer advertisements presented not online but in another format—such as in print, radio, or television—would not be required to include the add-on list, disclosing instead the website, online service, or mobile application where consumers can access the add-on list.³¹³

Many commenters, including consumer advocacy organizations, supported the proposal to require dealers to provide consumers with clear, accurate pricing information for add-on products or services altogether in one list. Some commenters raised concerns that, without significant modification, the Commission’s proposal to allow for the disclosure of price range information where the price of an add-on varies based on the specifics of the transaction would allow for significant abuses, including by permitting dealers to disclose ranges so broad they would be meaningless. Such commenters urged the Commission to modify its definition of “Add-on List” to require, where a price range is listed for a given add-on, the add-on list further indicate the low, median, and high prices charged to consumers for each such add-on over the preceding two years; or that the Commission require dealers to create individualized add-on lists for each vehicle sold, containing one fixed, non-negotiable price for each add-on. Relatedly, other commenters, including industry organizations, expressed concerns regarding the add-on

³¹² See NPRM at 42044 (noting, in the definition of “Add-on List” at proposed § 463.2(b) that “[i]f the Add-on price varies, the disclosure must include the price range the typical consumer will pay instead of the price”); see also *Fed. Trade Comm’n v. Five-Star Auto Club, Inc.*, 97 F. Supp. 2d 502, 528 (S.D.N.Y. 2000) (“at the very least it would have been reasonable for consumers to have assumed that the promised rewards were achieved by the typical Five Star participant”); Complaint ¶¶ 28-50, *Fed. Trade Comm’n v. Universal City Nissan, Inc.*, No. 2:16-cv-07329 (C.D. Cal. Sept. 29, 2016) (alleging unlawful deception where a dealer’s ads list prominent terms not generally available to consumers, including where those terms are subject to various qualifications or restrictions); Complaint ¶¶ 8-10, *Progressive Chevrolet Co.*, No. C-4578 (F.T.C. June 13, 2016) (alleging advertised offer was deceptive because the typical consumer would not qualify for the offer).

³¹³ Working in tandem, proposed § 463.4(b)(1) and (b)(2) would mean that dealers who engage in advertising and charge for optional add-ons must have a website, online service, or other mobile application by which to disclose an add-on list.

list proposal, including that the proposal to allow for price range information was vague or confusing, and that certain aspects of the proposed definition, including the scope of add-ons covered, as well as the requirement to keep such add-on lists updated, would impose extensive economic burdens.

After careful review of the comments, the Commission has determined not to finalize its proposed add-on list provision (proposed § 463.4(b)). Here, the Commission believes its proposal would benefit from further review and refinement. The Commission nevertheless emphasizes that, under existing law, dealers are prohibited from misrepresentations regarding material information about any costs, limitation, benefit, or any other aspect of an add-on, and from charging for add-ons without obtaining the express, informed consent of the consumer—conduct which the Final Rule prohibits as well, including in §§ 463.3(b) and 463.5(c). The Commission also emphasizes that, in addition to the Rule’s prohibitions, industry guidance and effective self-regulatory efforts can serve a role in helping prevent problematic dealer behavior in this area. The Commission will continue to monitor the motor vehicle marketplace for issues pertaining to add-ons and will consider implementing additional measures in the future if it determines such measures are warranted to address deceptive or unfair acts or practices related to add-on products or services.

c) Add-ons Not Required

For optional add-on products or services, the Commission’s proposed § 463.4(c) required dealers to disclose, when making any representation about an optional add-on, that the add-on is not required and the consumer can purchase or lease the vehicle without the add-on. For the reasons discussed in the paragraphs that follow, the

Commission is finalizing the required disclosure at § 463.4(c) largely as proposed. The Commission is capitalizing the defined term “Vehicle” to conform with the definition at § 463.2(e). The Commission also is adding language to the end of § 463.4(c) clarifying that the requirements in § 463.4(c) “also are prescribed for the purpose of preventing the unfair or deceptive acts or practices defined in this part, including those in §§ 463.3(a) & (b) and 463.5(c).”

A number of commenters, including a group of State attorneys general, supported this proposed requirement, contending that unscrupulous dealers have exploited the vehicle sales process to saddle consumers with unwanted add-on products or services, and that such a disclosure would importantly help consumers avoid discovering these additional charges only after completing the purchase, assenting to them because they believed the add-ons to be required in order to purchase the vehicle, or paying for them unknowingly because they never uncovered the charges. Many individual commenters also stressed the need for add-on disclosure requirements. For example:

- Salespeople such as myself are responsible for selling the car and all aftermarket/add-on products. This has put me in a unique position to see how these proposed regulations would impact automotive sales. I cannot stress enough my support for these new rules. . . . The payments calculated by management include add-ons, but the price of the add-ons and how they affect the payments are not shown. The add-ons “packed” in the first payment often include an extended warranty, GAP insurance, tire and wheel protection, an oil change package, a theft recovery device, and sometimes more depending on the situation.³¹⁴
- Car buying is one of the most miserable consumer experiences in existence. Frankly, I’m disappointed that this issue hasn’t been addressed decades ago. It’s well past time that the deceptive practices that car dealers use to manipulate and take advantage of customers is made illegal. What other business can legally lie about the price of the product that they sell,

³¹⁴ Individual commenter, Doc. No. FTC-2022-0046-3693.

and slip extra unwanted products into the deal that they don't reveal and won't remove upon request? These practices are arcane and unfair, especially considering the absurd cost of automobiles today. I wholeheartedly approve of what the proposed rules are attempting to accomplish. Please do not allow a powerful lobbying group to limit or change good legislation that benefits tens of millions of Americans who currently dread the car buying experience for far more reasons than just price.³¹⁵

- . . . I am not against business making a profit, in fact most Americans understand businesses need to make money too, however most dealers will not disclose additional costs to the purchaser until it is time to sign paperwork for purchase. Rather than simply being upfront with what their desired price is and how much they make from the sale rather they are fed lines about "common practices", [sic] "these are normal fees" or simply not being forthright about additional costs on items only installed on location at the dealerships to drive the price up. Even more insulting is when buyer[s] ask to have options removed from the vehicle dealers stall or flat out refuse to do so.³¹⁶
- It is about time something like this is brought up. This will have no effect on the honest dealers out there. . . . This will really help the consumer We will be able to compare apples to apples. You won't show up at the dealership with the lowest price only to find out that they have all these other fees that make them the least desirable of the choices. Also, adding stuff like pinstriping for large fees will come to an end. . . . I have no problem with a dealer making money. They are a business and have overhead. I have a problem when they try [to] gloss over everything they are trying to charge you for. This ruling needs to take effect. Anyone posting against it is someone working for a dealer. Like I mentioned before, if you are doing everything on the up and up, not only do you get good reviews and repeat business, but this ruling will not even effect [sic] you.³¹⁷
- I also agree that Enhanced Informed Consent in F & I office is necessary. One of my cohort was almost coerced into non-equivalent decision-

³¹⁵ Individual commenter, Doc. No. FTC-2022-0046-5268.

³¹⁶ Individual commenter, Doc. No. FTC-2022-0046-1365.

³¹⁷ Individual commenter, Doc. No. FTC-2022-0046-9883; *see also* Individual commenter, Doc. No. FTC-2022-0046-9632 ("I was told that GAP insurance was required to be included. . . . I [later] contacted and asked for copies of my contracts. On September 5 [the dealer] sent me an email with a credit contract attached. I am including it here. It says my monthly payment is over \$370. It also shows the cash price as close to \$17,000.00. I can also see it says the GAP is optional. I never saw this contract. I never signed this contract.").

making scenarios in the finance office with their car purchases. The finance officer flat out ask[ed] them, “did you want the 2 year, 30[,000] mile extended warrant[y], or the 4 year 50[,000] mile extended warranty?” The wife sat there and asked, “I’m confused. Do I HAVE to pick one of those?” Her husband said, “No, he’s trying to trick you into buying one. You don’t need any at all.” They then promptly threatened to walk out and the finance manager came out and did their paperwork without further conflict.³¹⁸

Several commenters offered support while also proposing that the Commission adopt additional measures to further ensure that consumers understand that optional add-ons are not required. One dealership group, for example, commenting in support of disclosures that optional add-ons are not required, recommended that dealers be required to include signage on their websites and in their showrooms or on their sales desks that set out both components of the Commission’s proposal: that add-ons are not required, and that consumers may purchase or lease the vehicle without add-ons. Other commenters, including a consumer protection agency and a consumer advocacy organization, suggested that the Commission modify the language in proposed § 463.4(c) to strike the “if true” language, asserting that all add-ons should be optional and not required to consummate the sale or lease of a vehicle. At least one individual commenter recommended that the Commission prohibit dealers from pre-installing add-ons.

In response to these comments, the Commission notes that, were it to require signage stating, generally, that add-ons are optional, or to strike the “if true” language from this disclosure, it would cause consumers to be presented with information that may not be accurate in all circumstances. Some add-ons might already be installed on the vehicle or otherwise required by the dealer. As explained in SBP III.D.2(a) with regard to

³¹⁸ Individual commenter, Doc. No. FTC-2022-0046-6816.

§ 463.4(a), charges for such add-ons must be included in the vehicle's offering price.³¹⁹ In such cases, representing that add-ons are categorically optional would mislead the consumer. Relatedly, by requiring that charges for mandatory items be included in the vehicle's offering price, the Final Rule allows dealers to customize the vehicles they are selling while protecting consumers by requiring dealers to disclose the offering price for such customized vehicles. Accordingly, the Commission declines to prohibit the practice of pre-installing add-ons in this Final Rule, but will continue to monitor the market to determine whether pre-installed add-ons require further regulation. At the same time, the Commission emphasizes that the protections contemplated here and elsewhere in this Final Rule prohibit dealers from obscuring price information and whether an add-on is optional, and further require dealers to obtain the express, informed consent of the consumer to charge a consumer for any add-on.

Additionally, several commenters indicated their support for the Commission's proposal while also recommending that the Commission consider further steps to protect consumers from deceptive or unfair practices pertaining to the inclusion of add-ons in consumer vehicle sales or leases. Some commenters, including a group of State attorneys general and a dealership association, requested that the Commission require dealers to disclose any mandatory add-ons and whether those add-ons are required in order to obtain financing, including by requiring such disclosure in an addendum sticker affixed to the motor vehicle. In response, the Commission notes that other provisions of the Final Rule prohibit misconduct in this area, including by requiring, at § 463.4(a), that charges

³¹⁹ In such cases, however, § 463.4(a) of the Final Rule requires these non-optional add-ons to be included in a vehicle's offering price; if the dealer requires the consumer to pay for them, they are part of the full cash price for which a dealer will sell or finance the vehicle to any consumer. *See* SBP III.D.2(a).

for such add-ons must be included in the vehicle's offering price. While consumers may benefit from repeated or additional disclosures, each additional disclosure requirement would increase both the cost to comply with the regulation and the risk of crowding out other important information. Given these risks, the Commission declines to include additional requirements regarding the content or form of its add-on disclosure at § 463.4(c). The Commission will continue to monitor the market to gather additional information on this issue and will consider whether to modify or expand this or other sections in the future based on stakeholder experience with this provision and whether it effectively halts unlawful conduct.

Other commenters, including consumer advocacy organizations and consumer attorneys and advocates, urged the Commission to adopt a thirty-day "cooling-off" period for the sale of vehicle-related add-ons, similar to that required by the Commission for door-to-door and other off-premises sales,³²⁰ which would grant consumers time to review the paperwork after the transaction, and to cancel unexpected or otherwise unwanted add-ons for a full refund. As explained in greater detail in the discussion of § 463.5(c), in SBP III.E.2(c), the Commission also has determined not to include in this Final Rule a "cooling-off" period in which add-on products or services may be canceled. In this regard, the Commission would benefit from additional information, including the length of time needed for such "cooling off" rights to be effective. The Commission may consider revisiting this decision in the future based on actual stakeholder experience with the provisions of the Final Rule and whether they effectively halt unlawful conduct.

³²⁰ See Rule Concerning Cooling-Off Period for Sales Made at Homes or at Certain Other Locations, 16 CFR 429.

Other commenters presented questions or critiques regarding this proposed disclosure. As with the Commission's proposed disclosures generally, some commenters, including an industry association and a dealership association, contended that existing requirements in a number of States to disclose that add-ons are optional make Federal regulation in this area unnecessary or contradictory. As described in detail in SBP III.D.1, the Commission first observes that the functioning of such standards demonstrates the practicability of its proposed disclosure that add-ons are not required. To the extent a State requires additional disclosures regarding add-ons, nothing prevents dealers from providing those disclosures as well as those required under part 463 so long as the State disclosures are not inconsistent with those required under part 463. To the extent there is truly an inconsistency between this part and State law, § 463.9 provides that part 463 will govern, but only to the extent of the inconsistency, and only if the State statute, regulation, order, or interpretation affords consumers less protection than does the corresponding provision of this part. Finally, a number of States do not have existing standards in this area; in such States, the Commission's disclosures operate as a key safeguard.

Commenters, including dealership associations, argued that dealers would develop and use an additional form to demonstrate compliance with this disclosure requirement, thereby burdening the vehicle sales and delivery process. The Commission begins by noting that any such steps are not required by part 463; on the contrary, the Commission structured this disclosure to provide dealers with flexibility, within the bounds of the law, to provide this essential information in a manner that is clear and conspicuous under the particular circumstances of their transactions. This requirement

does not require a complex or lengthy disclosure, is based on similar provisions already in operation in certain States,³²¹ and for dealers already disclosing accurate add-on information, this provision requires no significant additional burden.

When making a representation about an add-on product or service, the failure to disclose that the add-on is not required and the consumer can purchase or lease the vehicle without the add-on, if true, is likely to cause substantial injury to consumers who end up paying more for a vehicle sales or lease transaction than they expected by being subject to charges of which they are not aware or which they believe are required because they were never told they could decline the charges.

Absent this information, consumers cannot reasonably avoid the injury of being charged for these products because they are not aware that they have an option to begin with. When consumers are presented with motor vehicle transaction documents that include a variety of charges, it is difficult to detect any charges that are added to the contract beyond those that are required or have been agreed upon, especially in a stack of lengthy, complex, highly technical, and often pre-populated documents, at the close of a long sales, financing or leasing process after an already-lengthy process of selecting the vehicle and negotiating over its price or payment terms. Consumers cannot reasonably avoid charges of which they are unaware, or regarding which they do not know they have a choice.

³²¹ See, e.g., California Car Buyer's Bill of Rights, Cal. Civ. Code 2981 (requiring dealers to provide a written list of specified items purchased and their effect on monthly payments, including GAP, theft deterrent devices, and surface protection products); Minn. Stat. 59D.06(b) (requiring any person offering a GAP waiver to disclose that the waiver is not required for a consumer to buy or lease the vehicle); Wash. Rev. Code. 48.160.050(9) (mandating that GAP waivers disclose that "neither the extension of credit, the terms of the credit, nor the terms of the related motor vehicle sale or lease, may be conditioned upon the purchase of the waiver."); La. Stat. Ann. 32:1261(A)(2)(a) (declaring it unlawful for a dealer to require, as a condition of sale and delivery, for a consumer to purchase "special features, appliances, accessories, or equipment not desired or requested by the purchaser.").

The injury to consumers from a lack of information about add-on optionality is not outweighed by benefits to consumers or competition from withholding this basic information. Instead, information about the optional nature of these products or services protects consumers from lost time and effort, supracompetitive transaction costs, and unexpected charges while increasing competition among dealers, who are able to compete on truthful, standard terms. Moreover, the cost of providing this threshold information is minimal, especially when compared to the injury to consumers, and providing such information is consistent with existing industry guidance.³²²

This provision addresses deceptive conduct as well. Throughout the lengthy vehicle sales, financing, or leasing process, dealers often discuss various different charges at various different times. Such charges include charges the government requires the consumers to pay and financing costs. Dealers then often present consumers a total amount to pay that differs from the advertised or sticker price. Given that some additional charges are required, if a dealer also discusses charges for items that are not required, such as optional add-ons, it is reasonable for consumers to believe that charges for such items are required. In the course of a lengthy transaction involving extensive negotiations, dealers can obscure such products and their associated charges in dense paperwork. Moreover, the omitted information is highly material: if consumers knew that

³²² See Nat'l Auto. Dealers Ass'n et al., "Voluntary Protection Products: A Model Dealership Policy" 4 (2019), <https://www.nada.org/regulatory-compliance/voluntary-protection-products-model-dealership-policy> (stating dealerships should "prominently display to customers a poster stating that [add-on products or services] offered by the dealership are optional and are not required to purchase or lease a vehicle or obtain warranty coverage, financing, financing on particular terms, or any other product or service offered by the dealership. . .").

a particular optional add-on was not required to purchase the vehicle, it would likely affect their choice about whether to purchase the add-on.³²³

Thus, it is an unfair or deceptive act or practice for dealers to fail to disclose, when making a representation about an add-on product or service, that the add-on is not required and the consumer can purchase or lease the vehicle without the add-on, if true. Further, this provision also serves to prevent the misrepresentations prohibited by § 463.3—including misrepresentations regarding material information about the costs or terms of purchasing, financing, or leasing a vehicle, or about any costs, limitations, benefits, or any other aspect of an add-on—by requiring consumers to be told whether represented add-ons are optional. It also helps prevent dealers from failing to obtain the express, informed consent of the consumer for charges, as addressed by § 463.5(c).³²⁴ Thus, the Commission is requiring dealers to disclose, when making representations about add-ons, that the add-ons are not required and the consumer can purchase or lease the vehicle without the add-ons, if true.

For the foregoing reasons, and having considered all of the comments that it received on this proposal, the Commission is finalizing the required disclosure at § 463.4(c) largely as proposed, with the minor modifications of capitalizing the defined term “Vehicle” and clarifying that the requirements of § 463.4(c) also are “prescribed for the purpose of preventing the unfair or deceptive acts or practices defined in this part, including those in §§ 463.3(a) & (b) and 463.5(c).”

³²³ See, e.g., *Fed. Trade Comm’n v. Windward Mktg., Inc.*, 1997 WL 33642380, at *10 (N.D. Ga. Sept. 30, 1997) (“[A]ny representations concerning the price of a product or service are presumptively material.”); *Thompson Med. Co., Inc.*, 104 F.T.C. 648, 817 (1984); see also *Fed. Trade Comm’n v. Crescent Pub. Grp., Inc.*, 129 F. Supp. 2d 311, 321 (S.D.N.Y. 2001) (“Information concerning prices or charges for goods or services is material, as it is ‘likely to affect a consumer’s choice of or conduct regarding a product.’”).

³²⁴ See 15 U.S.C. 57a(a)(1)(B) (the Commission “may include requirements prescribed for the purpose of preventing” unfair or deceptive acts or practices).

d) Total of Payments and Consideration for a Financed or Lease Transaction

Section 463.4(d) of the Commission's proposed rule required dealers, when making any representation about a monthly payment for any vehicle, 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. If the total amount disclosed assumes the consumer will provide consideration, the proposed rule required dealers to disclose the amount of consideration to be provided by the consumer. For the reasons discussed in the following paragraphs, the Commission is finalizing the required disclosure at § 463.4(d) largely as proposed. The Commission is capitalizing the defined term "Vehicle" to conform with the definition at § 463.2(e), and making the minor grammatical correction of replacing the semicolon and the word "and" at the end of § 463.4(d)(1) with a period. The Commission also is adding language to the end of § 463.4(d) clarifying that the requirements in § 463.4(d) "also are prescribed for the purpose of preventing the unfair or deceptive acts or practices defined in this part, including those in §§ 463.3(a) and 463.5(c)."

A number of commenters, including consumer advocacy organizations, supported this proposed requirement, contending it would provide essential information to the consumer while not contributing to information overload, and noting the information to be disclosed would have been calculated by the dealer in the process of determining the proposed monthly payment. Many individual commenters also stressed the need for the Commission's proposal:

- Small businesses are a cornerstone of our economy. Automotive dealers, like other retailers, deserve to make a reasonable profit in order to

maintain their physical plants, to purchase inventory, and to pay their staff. That being said, some auto dealers have for years used misleading and often out-and-out deceptive sales tactics (i.e. lies) to generate sales. . . . Sometimes the unwary consumer may not even realize that the actual price differs from the quoted price, because the automobile finance agent speaks only in terms of monthly payments rather than the total cost. The consumer may not even realize that he or she has been “taken” until a friend with an amortization table runs the numbers.³²⁵

- At most dealerships, including the one I work at, when a customer asks to see figures on a car after a test drive, management goes out of their way to make sure the customer only sees the monthly payment. The typical numbers presented to the customer initially show the price of the car, the trade-in value, the down payment, and the monthly payment options in bold numbers at the bottom. The payments calculated by management include add-ons, but the price of the add-ons and how they affect the payments are not shown. . . . Compounding this issue of hidden add-ons is that salespeople are instructed to figure out the customer’s budget beforehand (e.g., \$450 per month). If the monthly payment with the car and add-ons comes out to be less than \$450 per month, management will often raise the price of the add-ons to get the payment to \$450 or even slightly above.³²⁶
- I wholeheartedly support the proposed regulation changes for car dealerships and the car buying process. As an average consumer who has bought 3 vehicles with financing and 2 without, I can see the obvious benefit these proposed regulations would have on the car buying process. The vast quantities of paperwork and add [-]ons make it easy for car dealers to switch things around to their benefit. I had one dealership . . . change the term of my auto loan from 72 to 84 months in the middle of reprinting the final sales sheet because of another obvious error in the first copy. In the midst of all the distractions and misdirection going on, [I] didn’t notice [‘]til[l] after the fact. I felt powerless and cheated³²⁷
- There is no reason that buying a car has to be a chore and so ambiguous on price. The dealer was also so twisted up on getting me to focus on the monthly payment and not the total price of the car and that is where they were able to sneak the price up. Practices like this are also why people have such a disdain for purchasing a new/used car.³²⁸

³²⁵ Individual commenter, Doc. No. FTC-2022-0046-1216.

³²⁶ Individual commenter, Doc. No. FTC-2022-0046-3693.

³²⁷ Individual commenter, Doc. No. FTC-2022-0046-5567.

³²⁸ Individual commenter, Doc. No. FTC-2022-0046-2176.

- I have experienced many of the “typical” tactics that one hears about when negotiat[ing] with an automobile dealership, like the salesperson always wanting to talk about the monthly payment and never the actual trade-in price and sales price. . . .I agree that the whole car buying process could be made easier and I see no reasons that any fair and honest car dealership would object to these proposed changes / rules as they, in my estimation are all things that a fair and honest car dealer should be doing anyway. The only car dealers that should be objecting to these new rules should be the unscrupulous dealers.³²⁹
- When buying a car dealers try to negotiate the monthly payment, so the actual total cost is hidden from the buyer until they get into the “financing office” where all kinds of unexpected add-ons are sprung on the consumer.³³⁰
- I am trying to buy a new car, from the factory, with no modifications or alterations, is it so much to ask for? The process of figuring out the price of the car is impossible. The sales people are all about the monthly payment, when I asked them what the car price is the answer is always what payment are you looking for.³³¹
- They only want to gain the amount you can be “comfortable” on your monthly payment so that they can stretch out the term and hammer you with hidden fees and other expenses you won[']t be able to see right away.³³²
- Dealerships always want you to come in so they can manipulate you into a car you can[']t afford and pay for things you don’t need by hiding them in a monthly payment.³³³
- If we had to do our grocery shopping the same way dealers want us to buy a car, most Americans would starve before sunset. “What kind of monthly payment are you looking for in a banana?” is a conversation I should never be forced to have³³⁴

³²⁹ Individual commenter, Doc. No. FTC-2022-0046-4034.

³³⁰ Individual commenter, Doc. No. FTC-2022-0046-4911.

³³¹ Individual commenter, Doc. No. FTC-2022-0046-5958.

³³² Individual commenter, Doc. No. FTC-2022-0046-8847.

³³³ Individual commenter, Doc. No. FTC-2022-0046-6405.

³³⁴ Individual commenter, Doc. No. FTC-2022-0046-3860.

One individual commenter requested that the Commission make clear that handwritten negotiation notes made by a dealer would trigger the requirement that this proposed disclosure be made in writing.³³⁵ In response, the Commission affirms such representations have been made “in writing,”³³⁶ and thus, where dealers represent a monthly payment in such notes, this provision requires them to provide the disclosures in § 463.4(d) in writing.

Other commenters, including industry associations and individual commenters, questioned whether the proposal would require a disclosure in every place a monthly payment appears on a dealer’s website, or otherwise would be difficult or infeasible given the frequency with which dealers provide consumers with monthly payment information, suggesting that such a requirement could either overwhelm consumers or dissuade dealers from providing monthly payment information, or arguing³³⁷ that the proposal overlapped with other laws such as the Truth in Lending Act or the Consumer Leasing Act. Regarding monthly payment amounts appearing more than once or in multiple places, the Commission notes that, as proposed, this section would require disclosure of the total purchase or lease amount for a vehicle including any assumed consumer-provided consideration, and only when making a representation about the vehicle’s monthly payment amount; it would not require a complex or lengthy disclosure. Consumers shop for vehicles and interact with online interfaces, and other advertising in many different ways; thus, it is important for this simple disclosure to accompany a

³³⁵ Individual commenter, Doc. No. FTC-2022-046-9469 at 6-7.

³³⁶ See, e.g., *Writing*, Black’s Law Dictionary (11th ed. 2019) (defining “writing” as “[a]ny intentional recording of words in a visual form, whether in handwriting, printing, typewriting, or any other tangible form that may be viewed or heard with or without mechanical aids.”); cf. Fed. R. Evid. 1001(a) (defining “writing” as letters, words, numbers, or their equivalent set down in any form”).

³³⁷ These association commenters made these contentions regarding the monthly payment disclosures at both § 463.4(d) and (e). The Commission responds to these contentions in this section.

monthly payment representation however a consumer might encounter it. Moreover, the Commission has taken into account existing disclosure obligations.³³⁸ Monthly payment amounts for motor vehicle sales or leases constitute so-called “triggering terms” under the Truth in Lending Act, the Consumer Leasing Act, and their implementing Regulations Z and M. As such, dealers currently providing such information, including on their websites or other online interfaces, are bound by existing laws that require providing consumers with additional terms in a clear and conspicuous way: in the case of vehicle credit transaction offers, this includes the terms of repayment, which reflect the repayment obligations over the full term of the loan;³³⁹ in the case of vehicle lease offers, this includes the number, amounts, and due dates or periods of scheduled payments under the lease.³⁴⁰ The Commission’s disclosure requirement takes into account these existing obligations, requiring, specifically: the total amount the consumer will pay to purchase or lease the vehicle at a represented monthly payment amount including any assumed consumer-provided consideration. Similarly, regarding the feasibility of providing this disclosure as often as dealers provide consumers with monthly payment information: once dealers choose to make a representation about a monthly payment, they are capable of disclosing a total of payments for the consumer based on the same inputs needed to arrive at that voluntary monthly payment representation.

The Commission further notes that, in the event a monthly payment is already being disclosed, the associated total of payment would be calculated with the same

³³⁸ One industry commenter, in expressing concern that § 463.4(d) and (e) may conflict with Regulations Z and M, questioned whether the FTC coordinated with the Federal Reserve Board. Several Senators similarly questioned whether the FTC consulted with the Federal Reserve Board, CFPB, or other agencies. Although the Commission cannot comment on specific interactions, it coordinates regularly with other Federal agencies, including the Federal Reserve Board and the CFPB.

³³⁹ See 12 CFR 1026.24(b), (d)(2)(ii).

³⁴⁰ See 12 CFR 1013.7(b), (d)(2)(iii).

financing or leasing estimates used to calculate the monthly payment. Dealers already must be prepared to calculate such a total to satisfy their obligations under TILA, the CLA, or their implementing regulations.³⁴¹

Regarding § 463.4(d)'s similarity to existing laws, as discussed previously, this provision is indeed consistent with other laws, and commenters have not indicated how providing truthful information about total payment amounts along with information they already provide about monthly payment amounts would unduly burden them or harm consumers, or how providing such information in writing before providing consumers with the contract, if they are already providing monthly payment information in writing prior to the contract, would do so.

Some dealership associations described certain elements of the proposal as vague or unclear, requesting that the Commission clarify its use of the term "by implication" with regard to a monthly payment, or alternatively, that the Commission omit the terms "any" (as it pertains to "any representation"), "by implication," and "indirectly" from the proposed disclosure provision.³⁴² Regarding the use of the term "by implication" with regard to a monthly payment, as discussed in the section-by-section analysis of § 463.3 in SBP III.C with respect to the prohibition on express or implied misrepresentations, the

³⁴¹ As is currently the case under Federal law and the Final Rule, the terms must be the terms available to the typical consumer. *See, e.g., Fed. Trade Comm'n v. Five Star Auto Club*, 97 F. Supp. 2d 502, 528 (S.D.N.Y. 2000) ("[A]t the very least it would have been reasonable for consumers to have assumed that the promised rewards were achieved by the typical Five Star participant."). This is consistent with prior FTC enforcement actions. *See, e.g., Complaint ¶¶ 48-53, 82-84, Fed. Trade Comm'n v. Universal City Nissan, Inc.*, No. 2:16-cv-07329 (C.D. Cal. Sept. 29, 2016) (alleging unlawful deception where a dealer's advertisements list prominent terms not generally available to consumers, including where those terms are subject to various qualifications or restrictions); *Complaint ¶¶ 8-10, Progressive Chevrolet Co.*, No. C-4578 (F.T.C. June 13, 2016) (alleging advertised offer was deceptive because the typical consumer would not qualify for the offer).

³⁴² One commenter requested clarification or deletion of "any," "by implication" and "indirectly" from § 463.4(c) and (e) for the same reasons it articulated with regard to § 463.4(d): that the terms are too vague. The explanation provided in the text pertains to these sections as well.

Commission notes that such language is consistent with longstanding law, and given that representations can mislead reasonable consumers even without making express claims, the provision could be rendered meaningless without it.³⁴³ Variations of the phrase “expressly or by implication” appear frequently in existing Commission guides and regulations,³⁴⁴ and implied claims are treated extensively in the longstanding FTC Policy Statement on Deception, which the Commission issued in 1983 to provide guidance to

³⁴³ The FTC Policy Statement on Deception and FTC cases make clear that both express and implied claims can be deceptive. *See, e.g., ECM Biofilms, Inc. v. Fed. Trade Comm’n*, 851 F.3d 599 (6th Cir. 2017) (affirming Commission’s finding that an additive manufacturer’s unqualified biodegradability claim conveyed an implied claim that its plastic would completely biodegrade within five years); *POM Wonderful LLC*, Doc. No. C-9344 (F.T.C. Jan. 10, 2013) (Opinion of the Commission), *generally aff’d by POM Wonderful, LLC v. Fed. Trade Comm’n*, 777 F.3d 478 (D.C. Cir. 2015) (finding that company’s advertisements would reasonably be interpreted by consumers to contain an implied claim that POM products treat, prevent, or reduce the risk of certain health conditions and for some ads that these effects were clinically proven); *Kraft, Inc. v. Fed. Trade Comm’n*, 970 F.2d 311 (7th Cir. 1992) (affirming finding of deception where Kraft advertisements juxtaposed references to the milk contained in Kraft singles and the calcium content of the milk, the combination of which implied that each Kraft single contained the same amount of calcium as five ounces of milk). Further, to be considered reasonable, the interpretation or reaction does not have to be the only one; when a seller’s representation conveys more than one meaning to reasonable consumers, one of which is false, the seller is liable for the misleading interpretation. *See* FTC Policy Statement on Deception, *supra* note 42, at 3. Further, an interpretation will be presumed reasonable if it is the one the respondent intended to convey. *Id.*

³⁴⁴ *See, e.g.,* Telemarketing Sales Rule, 16 CFR 310.3(a)(2) (prohibiting “[m]isrepresenting, directly or by implication, in the sale of goods or services” a list of ten categories of material information); 16 CFR 310.2(o) (defining “debt relief service” as any program or service “represented, directly or by implication, to renegotiate, settle, or in any way alter” certain terms); 16 CFR 310.5(a)(2) (requiring telemarketers to keep records of certain prize and prize-recipient information “for prizes that are represented, directly or by implication, to have a value of \$25.00 or more”); Business Opportunity Rule, 16 CFR 437.1(c) (defining a “(b)usiness opportunity” as a commercial arrangement in which, among other criteria, “[t]he seller, expressly or by implication, orally or in writing, represents that” it will provide, *inter alia*, business locations, outlets, accounts, or customers); Disclosure Requirements and Prohibitions Concerning Franchising, 16 CFR 436.1(e) (defining “(f)inancial performance representation” as any representation to a prospective franchisee that states, “expressly or by implication, a specific level or range” of sales, income, or profits); Military Credit Monitoring Rule, 16 CFR 609.3(e) (describing as prohibited materials those that “expressly or by implication” represent certain “interfering, detracting, inconsistent, and/or undermining” information); Rules and Regulations Under Fur Products Labeling Act, 16 CFR 301.14 (requiring an “unknown” origin disclosure when “no representations are made directly or by implication” regarding the origin of used furs); 16 CFR 301.18 (regulating the “passing off” of domestic furs as imported by prohibiting labeling, invoicing, or advertising that “represent[s] directly or by implication” that such furs have been imported); 16 CFR 301.43 (regulating the use of deceptive trade or corporate names by prohibiting any “representation which misrepresents directly or by implication” certain information); Power Output Claims for Amplifiers Utilized in Home Entertainment Products, 16 CFR 432.1(a) (defining the regulation’s scope when certain amplifier features or characteristics are “represented, either expressly or by implication, in connection with the advertising, sale, or offering for sale”).

the public on the meaning of deception.³⁴⁵ Furthermore, this language serves to help ensure that dealers may not avoid this disclosure requirement by making only implied reference to monthly payments, including by referring to a monthly payment amount that is not explicitly identified as such, or by referring to a regular periodic payment made on a different installment basis (e.g., a biweekly payment) to indirectly illustrate a consumer's monthly payment obligations.

These same reasons also counsel against deleting the terms “any” and “indirectly” from this proposed disclosure provision. To begin, one dealership association commenter suggested deleting these terms from the regulatory text, but did not explain the nature of its specific concern regarding its use of the term “any,” instead claiming generally that the terms with which the commenter took issue were “broad,” “vague,” and “imprecise.” As proposed, the Commission's total payments disclosure would be required when a dealer makes “any representation . . . about a monthly payment for any vehicle.” These disclosure circumstances are markedly similar to those under Regulation Z and Regulation M: Regulation Z requires the disclosure of additional payment terms when “any” of a number of terms is set forth, including “[t]he amount of *any* payment”;³⁴⁶ Regulation M similarly requires the disclosure of additional terms when “any” of a number of items is stated, including “[t]he amount of *any* payment.”³⁴⁷ The use of the term “any” is consistent with existing law, and thus is not confusing or impracticable. Furthermore, as with representations made “by implication,” the Commission has a longstanding practice of regulating representations made “indirectly” in the same manner

³⁴⁵ See FTC Policy Statement on Deception, *supra* note 42, at 2.

³⁴⁶ 12 CFR 1026.24(d) (emphasis added).

³⁴⁷ 12 CFR 1013.7(d) (emphasis added).

as those made directly,³⁴⁸ and it does so to help ensure that its requirements are effective and not easily avoided. The Commission thus declines to modify their usage in § 463.4(d).

Some commenters, including a dealership association, questioned whether the disclosure requirement would require dealers to obtain individuals' consumer reports before providing monthly payment information. In response, the Commission notes that § 463.4(d) does not alter the status quo regarding the information a dealer must have in order to represent a monthly payment amount. As previously discussed, this provision does not require disclosure of a monthly payment; instead, if a dealer chooses to represent a monthly payment amount, § 463.4(d) requires a corresponding disclosure of "the total amount the consumer will pay to purchase or lease the vehicle *at that monthly payment.*" As previously explained in detail, dealers are capable of disclosing a total of payments for the consumer based on such voluntary monthly payment representations. Furthermore, to the extent a dealer may be providing consumers with estimated monthly

³⁴⁸ See, e.g., Business Opportunity Rule, 16 CFR 437.6 (prohibiting "any seller, directly or indirectly through a third party" from engaging in certain prohibited practices); Credit Practices Rule, 16 CFR 444.2 (prohibiting as unfair "a lender or retail installment seller directly or indirectly" taking or receiving certain obligations from a consumer); 16 CFR 444.3 (prohibiting as deceptive "a lender or retail installment seller, directly or indirectly" misrepresenting cosigner liability, and prohibiting as unfair "a lender or retail installment seller, directly or indirectly" obligating a cosigner under certain circumstances); 16 CFR 444.4 (prohibiting as unfair the act or practice of "a creditor, directly or indirectly" levying or collecting certain late charges); Telemarketing Sales Rule, 16 CFR 310.3(a)(3) (prohibiting as deceptive the act or practice of "[c]ausing billing information to be submitted for payment, or collecting or attempting to collect payment for goods or services or a charitable contribution, directly or indirectly" without express verifiable authorization); 16 CFR 310.4(a)(7) (prohibiting as abusive the act or practice of "[c]ausing billing information to be submitted for payment, directly or indirectly, without the express informed consent of the customer or donor"); Mail, Internet, or Telephone Order Merchandise Rule, 16 CFR 435.1(f) (defining "Telephone" as "any direct or indirect use of the telephone to order merchandise . . ."); Preservation of Consumers' Claims and Defenses, 16 CFR 433.2 (prohibiting as an unfair or deceptive act or practice "for a seller, directly or indirectly" to take or receive a consumer credit contract which does not contain the Commission's "Holder Rule" provision); Prohibition of Energy Market Manipulation Rule, 16 CFR 317.3 (declaring "[i]t shall be unlawful for any person, directly or indirectly" to engage in certain energy market manipulation practices); Trade Regulation Rule Pursuant to the Telephone Disclosure and Dispute Resolution Act of 1992, 16 CFR 308.7(i) (declaring that regulated persons may not "report or threaten directly or indirectly to report adverse information" on a consumer report under certain circumstances).

payment information, the dealer may use the same assumptions used for estimating the monthly payment in order to determine the total of payments. Further, as is required under other law and this Rule, the dealer must refrain from deception, including by avoiding assumptions that the consumer would not reasonably expect or for which the consumer would not reasonably qualify.³⁴⁹

When making a representation, expressly or by implication, directly or indirectly, about a monthly payment for any vehicle, the failure to disclose the total amount the consumer will pay, inclusive of any consideration, to purchase or lease the vehicle at that monthly payment after making all payments as scheduled is likely to cause substantial injury to consumers who waste time and effort pursuing offers that are not actually available at reasonably expected terms; or who pay more for a vehicle sales or lease transaction than they expected by being subject to hidden charges or an unexpected down payment or trade-in requirement; or who are subject to the higher financing or leasing costs and greater risk of default associated with an unexpectedly lengthy loan or lease term. Moreover, when a consumer pays for his or her vehicle over a longer period of time, there is an increased likelihood that negative equity will result when the consumer needs or wants to purchase or lease another vehicle, because a vehicle's value tends to decline faster than the amount owed.³⁵⁰ Longer motor vehicle financing term lengths also have higher rates of default, potentially posing greater risks to both borrowers and

³⁴⁹ Importantly, as is the case under current law, a dealer may not mislead the consumer about the likelihood of qualifying for any particular credit or leasing terms in the course of providing this disclosure. Generally speaking, such deception is less likely where the dealer communicates to the consumer any assumptions it may have made, along with the basis for any such assumptions, in a manner in which the consumer understands this information.

³⁵⁰ Buckle Up, *supra* note 63, at 7.