



March 7, 2016

Via Web

Office of the Secretary
Federal Trade Commission
Suite CC-5610 (Annex J)
600 Pennsylvania Avenue, NW
Washington, DC 20580

Re: Auto Buyer Consumer Survey
Project No. P154800

Dear Secretary:

The National Automobile Dealers Association (“NADA”)¹ submits the following comments in response to the Notice that the Federal Trade Commission (“FTC” or “Commission”) published in the *Federal Register* in the above captioned matter.² As explained in detail below, NADA offers these comments (i) to question the purpose and necessity of the consumer survey initiative that the Commission has announced in the Notice, and (ii) if the Commission decides to proceed with the consumer survey, to identify – and request that the Commission address – a series of concerns with the manner in which it plans to conduct the survey.

Description of Consumer Survey

The Notice states that the FTC plans to conduct a “qualitative survey of consumers who recently purchased an automobile and financed that purchase through a dealer” for the purpose of “inform[ing] the Commission about current consumer protections (sic) issues that may exist and that could be addressed through FTC action, including enforcement initiatives, rulemaking, or education.”³ The survey will be conducted by a survey research firm, which will produce a brief methodological report and other written report as requested by the FTC.

The respondents who will be surveyed are consumers who have (i) indicated that they are willing to participate in surveys but who have not participated in an in depth interview in the past year, (ii) purchased an automobile from a dealer in the previous six months and used financing

¹ NADA represents over 16,000 franchised dealers in all 50 states who (i) sell new and used cars and trucks; (ii) extend vehicle financing and leases to consumers that routinely are assigned to third-party finance sources; and (iii) engage in service, repair, and parts sales. Our members collectively employ over 1 million people nationwide. Most of our members are small businesses as defined by the Small Business Administration.

² 81 Fed. Reg. 780-783 (Jan. 7, 2016).

³ 81 Fed. Reg. at 780, 781.

offered or arranged by the dealer, and (iii) retained the documentation received as part of the transaction. The survey will involve in-person interviews that last approximately 90 minutes with 40 consumers (20 with prime credit scores and 20 with subprime credit scores) but may include interviews with 40 more consumers “if the FTC deems the additional interviews likely to be helpful.”⁴ The respondents will be racially diverse and include participants of both sexes.

The scope of the planned interviews is very broad and, “among other things,” will include: (i) the consumer’s experience in shopping for and choosing an automobile; (ii) the process of agreeing to a price for the automobile; (iii) the process of trading in the consumer’s old automobile, if applicable; (iv) the consumer’s experience in obtaining financing; (v) additional products or services the dealer may have offered; (vi) contacts between the consumer and the dealer after the purchase; and (vii) the consumer’s overall perception of the purchase experience.⁵ The survey questionnaire will be tested with “an initial sample of five in-person consumer interviews;” however, the questions that will be included are not identified. The interviews will conclude with the survey research firm reviewing the consumer’s documentation and “exploring the consumer’s understanding of that documentation.”⁶

The results of the survey “will not be generalizable to the U.S. population.” Nevertheless, the Commission “believes that they can provide useful insights into consumer understanding of the automobile purchasing and financing process at the dealership.”⁷

The Purpose and Necessity of the Survey

As noted above, the FTC states that it plans to initiate this effort to “inform the Commission about current consumer protections (sic) issues that may exist and that could be addressed through FTC action, including enforcement initiatives, rulemaking, or education.”⁸ However, this statement ignores the fact that – less than four years ago - the Commission concluded an extraordinarily broad and comprehensive examination of the same question and developed an in depth record that completely obviates the need for a further examination of this matter.

The examination that the Commission conducted was a series of motor vehicle roundtables that it held in three cities across the country (Detroit, Michigan; San Antonio, Texas; and Washington, D.C.) in 2011. In language nearly identical to the language in the instant notice, the FTC stated that the purpose of the motor vehicle roundtables was “to explore consumer protection issues pertaining to motor vehicle sales and leasing” and “to inform the Commission regarding what consumer protection issues, if any, exist that could be addressed through a possible rulemaking or other initiative.”⁹

⁴ 81 Fed. Reg. at 781.

⁵ Id.

⁶ Id.

⁷ Id.

⁸ Id.

⁹ 76 Fed. Reg. 14,014, 14,015 (Mar. 15, 2011).

The breadth of the Commission’s examination of these issues was enormous and included in-depth panel discussions on each of the following topics:

- 1) Understanding the Motor Vehicle Sale, and Credit Transaction, From Both Prime and Subprime Perspectives;
- 2) Interest Rates, Dealer Reserves, and Markups;
- 3) Payment and Locator Devices and Consumer Privacy;
- 4) Spot Delivery;
- 5) Contract Add-Ons;
- 6) Vehicle Title Problems and Dealer Bankruptcies;
- 7) Military Consumers and the Auto Sales and Financing Process;
- 8) The Online Auto Process for Military and Other Consumers;
- 9) Military Consumers, Sales Representations, and Financing Process Issues;
- 10) Military Consumer Complaints and Military Sentinel;
- 11) Military Consumers, Vehicle Title Problems, and Repossessions;
- 12) Financial Literacy and Capability for Military Consumers;
- 13) Special Programs to Enhance Consumers’ Financial Literacy;
- 14) Financial Literacy and New Approaches for Auto Sales and Financing;
- 15) Fair Lending – Interest Rates, Markups, and Payments;
- 16) Fair Lending – Compliance, Risk, and Liability;
- 17) Understanding the Motor Vehicles Leasing Process;
- 18) Misrepresentations and Other Consumer Protection Issues in Motor Vehicle Leasing;
- 19) Consumer and Business Education: What, If Anything, Is Needed and What Works?;
- 20) Which Practices, If Any, Cause Significant Harm to Consumers, and What Are Potential Solutions?; and
- 21) Which Practices, If Any, Are Widespread, and What Are Potential Solutions?

These panel discussions produced over 21 hours of oral testimony from 58 panelists (several of whom served on multiple panels) and more than 500 pages of written transcripts. The FTC selected the panelists from a diverse range of interests throughout the marketplace which, in addition to representatives of different segments of the auto industry, included:

(i) consumer group representatives from the Center for Responsible Lending, Consumer Federation of America, Consumers for Auto Reliability and Safety, National Consumer Law Center, and National Council of La Raza; (ii) representatives from the Department of Justice and Consumer Financial Protection Bureau; (iii) representatives of the Office of Attorney General and other state consumer protection agencies from Illinois, Iowa, Maine, and Texas; (iv) various military and civilian representatives of military service members; and (v) several plaintiffs’ attorneys. The record was further supplemented by 100 written comments that the Commission received through May 2012.¹⁰

In light of the foregoing, it is difficult to imagine how the Commission could have conducted a more comprehensive examination into issues that it now contends – less than four years after this process concluded – it needs to consider again. It is equally difficult to

¹⁰ The record developed during the motor vehicle roundtable process is available at <https://www.ftc.gov/policy/public-comments/initiative-369>.

comprehend what justification – from either a substantive or budgetary perspective – exists for revisiting topics that are all a subset of those listed above.

The Notice fails to address these matters. It does not cite complaint data or data from any other source that supports this redundant exercise.¹¹ Nor does the Notice acknowledge that, during the year-long motor vehicle roundtable process, the Commission repeatedly requested credible data demonstrating that prevalent abuses exist in the auto industry but received none.¹² While the Notice states that the “proposed survey will explore in more detail the experience of actual consumers who recently purchased and financed an automobile from a dealer,”¹³ it

¹¹ While offering no data to support the need for the proposed consumer survey, the FTC mentions some advertising enforcement actions it has taken against auto dealers since 2011 along with “a coordinated federal-state effort that yielded more than two hundred automobile actions for fraud, deception, and other illegal practices.” 81 Fed. Reg. at 780. This statement, which refers to “Operation Ruse Control,” omits the fact that, according to the Operation Ruse Control Chart of Actions that accompanied the press release announcing these actions, 69 of the them derived in Canada, several of them either did not involve enforcement actions or were pending when announced, many of them (including each of the FTC administrative actions that were listed as part of Operation Ruse Control) did not involve a finding or admission of a legal violation, and a significant number of actions involved entities other than auto dealers (e.g., auto manufacturer, auto shipment broker, multiple auto finance companies, multiple auto title lending companies, auto loan modification company, auto loan acceleration company, and multiple after-market providers). Indeed, one action that was included in this count was brought by the Department of Justice’s Antitrust Division against a Japanese parts manufacturer. Consequently, referencing “more than two hundred automobile actions for fraud, deception, and other illegal practices” as support for conducting consumer surveys that focus solely on consumer experiences with auto dealers is both hyperbolic and suggests a predisposition towards these issues. These concerns are further manifested by the Commission’s erroneous description of Operation Ruse Control in the April 2015 edition of *Penn Corner* as “252 enforcement actions... against *dishonest car dealers*” (emphasis added). See <http://content.govdelivery.com/accounts/USFTC/bulletins/fea7b5>.

¹² See, e.g., the Commission’s Statement under “Roundtable Goals and Topics for Comment” in the FTC Notice announcing the motor vehicle roundtables (76 Fed. Reg. 14,014 – 14,017 (Mar. 15, 2011)): “Of particular interest is data and empirical evidence supporting comments provided in response to this request;” the comments of then-Associate Director of the FTC’s Division of Financial Practices Joel Winston at Panel 1 of the Detroit Roundtable: “And just to emphasize, what we’re going to be looking for throughout this session today and future sessions is as much empirical evidence as possible. We’ve all heard stories and anecdotes and individual cases where consumers were mistreated in one way or another. One of the real goals of this process is to find out how prevalent those practices are. So if there are any studies, any sort of empirical data – that’s something we’d be interested in seeing;” the comments of FTC Division of Financial Practices Attorney Carole Reynolds at Panel 4 of the Detroit Roundtable: “Does anyone have data on these practices occurring?;” the comments of FTC East Central Region Director John Miller Steiger at the conclusion of the Detroit Roundtable: “... And in order to get good useful answers, we need data. And I know you’ve heard that from us as a constant refrain, but we really do...;” the comments of then-FTC Division of Financial Practices Assistant Director Malini Mithal at Panel 1 of the San Antonio Roundtable: “To the extent we have any information about widespread practices, that would be helpful from the panelists” and “Has there been any kind of analysis of trends and complaints from military consumers or any kind of... statistics or any widespread practices that we have any information about?;” the comments of then-FTC Bureau of Consumer Protection Deputy Director Chuck Harwood at the beginning of the DC Roundtable: “We are especially interested in data and empirical information;” the comments of then-FTC Division of Financial Practices Attorney Robin Thurston at Panel 4 of the DC Roundtable: “And, again, if you have data or other indicators of how frequently these practices occur, that would be great;” and the comments of then-Acting Associate Director of the FTC’s Division of Financial Practices Reilly Dolan at the conclusion of the DC Roundtable: “... We are looking at whatever data we can get. And I will continue to say, please give us hard facts and data. That’s more persuasive than anecdotes.”

¹³ 81 Fed. Reg. at 781. It is not apparent what level of detail the Commission hopes to explore that was not covered during the motor vehicle roundtables by many of the FTC-selected panelists who are trained to examine every aspect of the auto purchasing and financing process and who presented extensive written as well as oral comments on the range of topics listed above.

overlooks the fact that credible *quantitative* surveys into this process have been conducted in recent years that found a high level of consumer satisfaction.¹⁴

The dearth of indicators of systemic problems in this area should be recognized by the Commission as reflective of a fully functioning marketplace and not as an imperative to attempt to fill the void. The fact that the Commission nonetheless is poised to move forward with this initiative, coupled with the concerns about the survey mechanics expressed below, invites cynicism into this process.

Concerns with the Mechanics of the Survey

In addition to NADA's concerns about the purpose and necessity of the survey, NADA also is concerned with how it will be conducted and analyzed and the very real possibility that the results it produces could serve to misinform – rather than inform – the Commission about “current consumer protections (sic) issues that may exist and that could be addressed through FTC action....”¹⁵ Consequently, NADA offers the following questions and comments concerning the survey mechanics.¹⁶

1) The qualitative nature of the survey

a. How will the Commission control for the effects of respondent fatigue?

There is sufficient time in a 90-minute structured quantitative survey to ask more than 200 questions. Questionnaires of this length will most likely breed survey respondent fatigue, causing respondents either not to answer questions or to answer them dismissively (quickly without thought), which will minimize the quality of information from the questionnaire.

¹⁴ See, e.g., Sabatini, J. (Jan. 18, 2016). Survey Says! What Our Car-Shopping Survey Revealed About Enthusiasts vs. Non-Enthusiasts. Retrieved from <http://blog.caranddriver.com/survey-says-what-our-car-shopping-survey-revealed-about-enthusiasts-vs-non-enthusiasts/> (80 percent of 4,977 respondents were “very satisfied” or “extremely satisfied” with their dealership experience). Syndicated studies also have addressed the experience of consumers who purchase vehicles from auto dealers and reflect similar results. One example is J.D. Power's 2015 U.S. Sales Satisfaction Index (SSI) Study (Nov. 12, 2015), which surveyed 27,831 consumers and found that (i) 80% of respondents rated their overall experience purchasing a new vehicle at a dealership as “truly exceptional” or “outstanding,” and (ii) 87% of respondents stated that they either definitely or probably will purchase or lease a vehicle in the future from the same dealer.

¹⁵ 81 Fed. Reg. at 781.

¹⁶ These questions and comments are consistent with the Office of Management and Budget's direction to agencies when designing and conducting a survey. See Office of Information and Regulatory Affairs, Office of Management and Budget, *Questions and Answers When Designing Surveys For Information Collections* 15-16 (2006) (“OMB Questions and Answers”) (“The quality of a survey design can be judged by the strategies that are taken to prevent, adjust for, and measure potential problems and sources of error in surveys. How well a survey is designed and conducted can lead to either more or less variance (or noise) or bias (or systemic errors) in results. Well-designed and conducted surveys anticipate potential problems and try to prevent or minimize the impact of different sources of error as much as possible. Additionally, good surveys make efforts to measure and adjust for errors that are not controlled. The best surveys are those that check and verify each step of the research process.... Agencies designing and conducting surveys need to consider all of the potential sources of errors and plan to adequately prevent, measure, and adjust for them. Conducting a high quality survey requires careful planning and sufficient resources to yield quality data that have practical utility for the agency. Agencies should carefully document and justify the adequacy of their survey methods in their ICRs [Information Collection Requests].”).

- b. What questions will be asked and how will the Commission control for the effects of interviewer influence?

A loosely structured, 90-minute qualitative survey must be strictly monitored to ensure the moderators/interviewers do not influence the discussion and the opinions of the respondents. A one-on-one interview of this length creates significant opportunity for discussion, which can produce responses that include the effects of social desirability (which implies that respondents answer questions to achieve consensus with the perceived view of the interviewer or the sponsors of the survey). This happens most often in responses to open-ended, attitudinal, and recall questions. The likelihood of this occurring is enhanced given the Notice's reference to potential problems that consumers may experience when purchasing and financing the purchase of an automobile.¹⁷ Consequently, the length and loose structure of the interview, coupled with the interviewer's inclination to search for problems, could lead to respondents providing answers that do not reflect their overall experience with the purchasing and financing process.¹⁸

- c. How will the Commission be aided by the anecdotal results that the survey will produce?

A 90-minute, loosely structured qualitative survey provides the Commission with a very limited ability to generalize and extrapolate from the answers of the 40 individuals. The results will provide impressions about some experiences, but it will not create a feel for the prevalence of practices or measures of perception with the consumers' experiences. This has little value and certainly does not comport with the FTC's repeated calls during the motor vehicle roundtables for credible data instead of anecdotes.¹⁹

2) The survey design

- a. How will the Commission control for the limitations imposed by the use of central location research facilities?

Although the Notice states that the study will ensure racial and gender diversification, it nonetheless lacks breadth. It is unclear whether it will take place at one location in each of 4 or 5 major metropolitan areas or whether all 40 interviews will occur in a single metropolitan area. There will be a cost and logistical preference to conduct the study at one location. Either way, the prospective sample will be highly recruited from one or only a few concentrated areas.

¹⁷ 81 Fed. Reg. at 780 ("Financing that is offered or arranged by dealers, however, can be a complicated, opaque process and potentially involve unfair and deceptive practices.").

¹⁸ See, Arkowitz and Lilienfeld, *Why Science Tells Us Not to Rely on Eyewitness Accounts: Eyewitness testimony is fickle and, all too often, shockingly inaccurate*, Scientific American (Jan. 1, 2010), available at <http://www.scientificamerican.com/article/do-the-eyes-have-it/> ("[P]sychologists have found that memories are reconstructed rather than played back each time we recall them. The act of remembering, says eminent memory researcher and psychologist Elizabeth F. Lotus of the University of California, Irvine, is "more akin to putting puzzle pieces together than retrieving a video recording." *Even questioning by a lawyer can alter the witness's testimony because fragments of the memory may unknowingly be combined with information provided by the questioner, leading to inaccurate recall.*" (internal citation omitted)(emphasis added)).

¹⁹ See Footnote 12.

Facilities tend to recruit respondents that have to travel no more than 30 to 60 minutes from the facility and, indeed, the Commission estimates 60 minutes of roundtrip travel time in its Paperwork Reduction Act (PRA) Burden Analysis.²⁰ To the extent that some perceived practices are more prevalent in one market than others, those practices will appear to have a much higher rate of occurrence than they do nationwide. In fact, because consumers in certain sections of metropolitan areas may have only interacted with a limited number of automobile dealership chains, there is a strong possibility that the sample will simply pertain to the practices of those dealership chains and not the industry as a whole.

- b. How will the Commission control for characteristics of the survey respondents that may not be representative of the consumer population at large?

Central location research facilities are very often used for specialized qualitative research. The facilities often maintain lists of willing research participants, and they recruit from this list for many of their studies. As a result, the list is very confined, and the respondents are likely to be more sensitive to the nuances of issues brought up during the session than the population at large. Consequently, it is difficult to generalize beyond the experiences of the few people who are surveyed.

- c. How will the Commission control for different attitudinal and experiential responses that occur over different periods of time?

The survey respondents must have purchased and financed an automobile in the past six months. Six months is a long recall period to ask about nuances of the purchase and financing experience. Consumers recalling the experience in the past 30 days will have very different levels of recall, saliency, and emotion compared to consumers whose purchase experience occurred almost a half year before the interview.²¹ This calls into question the consistency of the survey's attitudinal and experiential responses.

3) The survey analysis

- a. How will the Commission ensure that the survey analysis includes all of the key analytical variables?

How the survey research firm analyzes the 40 interviews is critical. There are several key analytical variables that should be considered beyond simply the race and sex of the consumer and whether the consumer has a prime or subprime credit score. (Examples of other key analytical variables include the age of the consumer, whether the vehicle purchased is new or used, and the amount financed.) A sample size of 40 respondents will yield too little information

²⁰ 81 Fed. Reg at 782.

²¹ See Woocher, *Did Your Eyes Deceive You? Expert Psychological Testimony on the Unreliability of Eyewitness Identification*, 969, 982 (1977) (“Even if someone accurately perceived an event, its representation in the observer’s memory would not remain intact for very long. People forget both quickly and easily. The phenomenon of forgetting what once has been perceived and encoded in memory, known as ‘retroactive inhibition,’ is one of the earliest and most consistent findings of cognitive psychology. Simply put, the more time that has elapsed since the perception of some event – and, therefore, the more intervening occurrences that must be stored in memory – the poorer a person’s memory is of that event....”).

to accurately analyze or compare the experiences of these subgroups or to ensure the respondents reflect the experiences of the population at large.

It is essential that the Commission keep in mind that the market it is attempting to examine consisted last year of the sale of 13.4 million new vehicles from franchised dealers to consumers²² and 27.9 million used vehicles from franchised and independent dealers to consumers.²³ Consequently, the Commission plans to survey one consumer for every 1,000,000 vehicle sales from dealers to consumers. While the Commission acknowledges that its planned qualitative survey will not produce results that are generalizable to the U.S. population, it nonetheless must ensure that the survey's sample size is sufficient to "yield quality data that have practical utility for the agency."²⁴

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In light of the foregoing concerns, NADA requests that the Commission reconsider the necessity of pursuing this initiative. If the Commission nonetheless decides to move forward, NADA requests that the Commission provide far greater transparency concerning the consumer survey process it will employ,²⁵ including by –

- (i) providing answers to the full range of questions and concerns raised above;
- (ii) prior to any data collection, publishing and making available for comment the full study design plan for the consumer survey;
- (iii) identifying the scope of – and the pre-set review criteria that will be applied to – the "review [of] the consumer's documentation,"²⁶
- (iv) identifying the pre-set criteria the FTC will apply in determining whether to exercise the option to interview 40 consumers beyond the initial 40 consumers who will be interviewed "if the FTC deems the additional interviews likely to be helpful,"²⁷
- (v) publishing and making available for comment the full "methodological report, or other written report as requested by the FTC,"²⁸ and
- (vi) identifying the additional stages, if any, of this initiative that the Commission will conduct and whether the public will have an opportunity to comment on them.

²² WardsAuto and National Automobile Dealers Association.

²³ National Automobile Dealers Association.

²⁴ OMB Questions and Answers, *supra* Footnote 16, at 16.

²⁵ *Id.* ("Agencies should be transparent and report in their ICRs the methods they plan to use, what is known about the different sources of error, and the impact of the error on the analytical results.")

²⁶ 81 Fed. Reg. at 781.

²⁷ *Id.*

²⁸ *Id.*

Thank you for the opportunity to comment on this matter. Please contact me if we can provide further information that would be useful to the Commission.

Sincerely,

Paul D. Metrey
Vice President, Regulatory Affairs