

**Summary of the Comments of the National Automobile Dealers Association (NADA)<sup>1</sup> on  
The Proposed Trade Regulation Rule for Motor Vehicle Dealers (Proposed TRR)  
Issued by the Federal Trade Commission (FTC) on July 13, 2022**

**Congress Should Require the FTC to Produce Data To  
Document Widespread Problems and Verify Proposed Solutions**

**In sum, the FTC must start over.** Unfair and deceptive acts or practices are reprehensible in any part of any vehicle advertising, sales or financing process, so state and Federal regulators – including the FTC - should continue to police the market. NADA would welcome the opportunity to examine new regulatory approaches that increase consumer awareness and dealer compliance without unduly burdening the sales process that currently generates overwhelming consumer satisfaction. However, the Proposed TRR does not provide a viable procedural or factual foundation for conducting a responsible rulemaking.

The Proposed TRR – which would upend the sales process for tens of millions of consumers annually and thousands of small businesses – is premature, legally deficient, factually inaccurate, and exceedingly confusing for consumers and dealers. Because of a rush to judgement, the FTC has not benefitted from essential stakeholder comment and has violated the FTC’s own rules, as well as numerous Federal statutes and the U.S. Constitution. Additionally, the Proposed TRR fails to provide any credible data of the widespread wrongdoing necessary to justify such a sweeping rule. To the contrary, an abundance of credible data demonstrate that consumers are highly satisfied. Finally, even if the flawed premise of the Proposed TRR were true, the FTC has failed to test the content and timing of the complex new consumer disclosures that, as proposed, would confuse consumers, conflict with current federal and state disclosures, and lengthen the sales process.

As detailed in the NADA comments summarized below, the FTC should withdraw the Proposed TRR, conduct data-driven due diligence, expand informal stakeholder outreach and formal notice and comment, thoroughly test the consumer impact of specific alternative approaches, and adhere to FTC regulations and all applicable federal laws before issuing a new proposed rule. Each of these steps is essential to create effective regulatory changes.

**Congress has not mandated this rulemaking.** Section 1029(d) of the Dodd-Frank Act authorized, *but did not require*, the FTC to issue the Proposed TRR. The legislative history of this provision includes a prescient observation from Senator Brownback of Kansas<sup>2</sup>:

“I want to emphasize that this specific provision was neither in the House or Senate bill and was not under consideration in either chamber. It was added by House-Senate conferees. Section 1029(d) was included without any evidence to justify its inclusion, or

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<sup>1</sup>NADA represents over 16,000 franchised automobile and truck dealerships in all 50 states who sell, finance, and lease new and used motor vehicles and engage in service, repair, and parts sales. This includes approximately 1,800 commercial truck dealerships. NADA members collectively employ 1.2 million people nationwide. A majority of NADA’s members meet the Small Business Administration’s definition of a small business.

<sup>2</sup>156 Cong. Rec. S5912, 105 (daily ed. July 15, 2010).

any debate for that matter. I do not support this provision, as I believe it invites the FTC to again engage in regulatory overreach. I am concerned that the removal of the well-established ``Magnuson-Moss" safeguards gives the FTC free rein to conduct fishing expeditions into any area of automotive finance it perceives as "unfair."

The present leadership of the FTC has promised that if Magnuson-Moss were repealed, they would use their new power prudently. I hope that this is the case, because we do not want to repeat the kind of excessive FTC regulation that occurred in the 1970s. For that reason, Congress must monitor the FTC very closely to ensure the vast power Congress will now bestow on this agency is not once again abused."

**The FTC's rush to judgment has curtailed the public comment necessary for responsible rulemaking.** The FTC's truncated 60-day comment process violated its own rules and other Federal laws specifically designed to foster vigorous notice and comment.

- The FTC's issuance of a *proposed* rule instead of an *advanced* notice of proposed rule (ANPRM) violates Section 1.10 of the FTC's procedural rules and triggers a violation of the Administrative Procedures Act. Dodd-Frank did not repeal Section 1.10, and neither has the FTC. To correct these violations, the FTC must start over with an ANPRM. (p. 19-22)
- The FTC violated the Paperwork Reduction Act, the Regulatory Flexibility Act (RFA), and various requirements of the Office of Management and Budget (OMB) at the White House which are designed to facilitate transparent regulatory analysis and protect *individuals and small businesses* from burdensome paperwork burdens. (p. 29-36)
- The FTC failed to list the Proposed TRR in the Unified Agenda of Regulatory and Deregulatory Actions, violating the RFA and OMB's E.O. 12866, reducing notice to the public. (p.36-38)
- Despite asking 49 open-ended questions in the Proposed TRR, the FTC summarily rejected NADA's request for additional time to respond to those questions. Notably, the Advocacy Office of the Small Business Administration supported the extension request as necessary to respond to the FTC's request for data, and the FTC has routinely granted similar extensions of time for rulemakings of far less economic significance. (p. 25)

**The FTC's procedural failures will adversely affect a major sector of the economy.** The nation's franchised dealers alone generate 18% of national retail sales, and the Proposed TRR would affect tens of millions of consumer purchases each year. As such, this rule presents major questions that must be vetted thoroughly during notice and comment, especially since Congress has not mandated this rule or provided any statutory guardrails to guide the FTC. (p. 40)

**The FTC's unilateral action has triggered other violations of law.**

- The Proposed TRR seeks to regulate insurance products, which violates the McCarran-Ferguson Act. Only the States can regulate insurance products. (p. 39-40)
- The Proposed TRR violates the Truth In Lending Act (TILA). The FTC's mandated disclosures would directly conflict with TILA disclosures, which have effectively conveyed key information to consumers for decades. The Federal Reserve Board issues TILA regulations, so the FTC should have coordinated with the Fed *before* issuing the Proposed

TRR to address the significant interplay between TILA and the new FTC mandates. (p. 64-70)

- The Proposed TRR is unconstitutional. The mandated disclosures would compel commercial speech, which violates the First Amendment of the U.S. Constitution. (p. 119-121)

**The FTC has failed to document widespread problems in auto retailing.** Nothing in the Proposed TRR provides quantitative evidence of the prevalent misconduct necessary to support a rule of this magnitude. The FTC’s stereotypical assertions to the contrary are inaccurate.

- The national field hearings conducted in 2011-12 did not generate credible evidence of widespread problems. During the hearings senior FTC officials repeatedly requested *credible evidence of prevalence*, but the hearing record contains no such data. (p. 42-45)
- The FTC has misrepresented the statistical significance of the “FTC Study” frequently cited in the Proposed TRR as indicative of general problems in the market. Page 4 of the study states, “Because this is a qualitative study of a small, non-representative sample of consumers, *the data generated are not useful in forming quantitative or generalizable conclusions.*” (Emphasis added.) Even worse, the FTC study is deeply flawed as a qualitative tool and, according to a third-party critique, “intermingles research findings from other studies with observations in the study . . . in a manner that misleads the reader to feel that the observation is a significant finding.” (p. 45-52)
- The FTC references to “over 100,000 consumer complaints” are neither accurate nor indicative of systemic problems. The FTC has neither verified these complaints nor categorized them to exclude service and repair complaints (likely in the tens of thousands) and other complaints not covered by the Proposed TRR. More egregious, the complaints include data from Australia, Canada, and Mexico. Even if accurate, these complaints would not establish prevalence, because 100,000 is less than ¼ of 1% of the 45 million new and used vehicles sold annually. (p. 49- 52)
- The FTC has exaggerated the number and relevancy of the enforcement actions cited in the Proposed TRR. (p. 53)
  - The 54 *FTC enforcement actions* cited as support do not establish prevalence:
    - 16 did not even involve motor vehicle dealers and are irrelevant;
    - Only 3 were related to “add-on” products;
    - 18 concerned violations of Truth In Lending and Regulation Z disclosures already addressed under current law;
    - 5 concerned disclosures related to unrepaired safety recalls, and
    - 4 were related to failure to pay off the lien on a trade in.
  - Similarly, the reference to “other law enforcement actions” is inflated with 69 actions brought in Canada, multiple actions against non-dealers, and state actions that have no relationship to the activity the FTC seeks to regulate.
- In sum, rather than providing quantitative evidence of widespread activity, like the flawed FTC study, the preamble to the Proposed TRR intermingles inconclusive cites and inflated numbers to create the aura of quantitative legitimacy.

**Credible data demonstrate widespread consumer satisfaction in auto retailing.** The following third parties validate overwhelming customer satisfaction with the sales experience. (p. 14-18)

- The Institute for Regulatory Analysis and Engagement analyzed of over 300,000 randomly selected Google reviews of 11,000 dealerships across all 50 states and found the average overall rating was 4.47 on a 5-star scale, approximately 80% of the reviews awarded the dealership a full 5-star rating, and the average rating has grown steadily over time, increasing from 4.25 in 2015 to 4.54 in 2022.
- J.D. Power’s 2021 U.S. Sales Satisfaction Index (SSI) Study (a quantitative, annual survey of 35,387 consumers which provides a comprehensive analysis of the new-vehicle purchase experience from the customer perspective) found sales satisfaction remains at 789 points (on a 1,000-point scale).
- The 2021 Cox Automotive Car Buyer Journey Study (a quantitative, annual survey of 2,976 consumers) shows that 75% of new car buyers are highly satisfied with their dealership experience. When combining both moderately satisfied and highly satisfied customers satisfaction percentage increases to 91%.
- DealerRater.com collected just over 8 million customer reviews of dealers from 2021-2022, and 7.5 million (93.7%) were positive and 500,000 (only 6.3%) were negative.
- DealerRater.com received over 3 million consumer reviews from January 1, 2019 to August 17, 2022, and only 12,730 (0.3%) mentioned “bait and switch” and only 745 (0.02%) mentioned extra fees, junk fees or surcharges.
- Consumers and Guaranteed Asset Protection (“GAP Protection”) on Vehicle Loans and Sales-Financing Contracts: A First Look is a study conducted by three financial experts, including a current and former Federal Reserve Board economist. Analyzing data from a representative national survey completed by The Survey Research Center of the University of Michigan, the authors found that “[m]ore than 90 percent of GAP purchasers report that buying GAP is a good idea and that they would buy it again.” More importantly, only about 1 percent of the surveyed purchasers indicated dissatisfaction with their choice.

**The FTC wants to regulate activity that is already illegal.** Other than a home purchase, a vehicle lease or purchase is the most heavily regulated, document-intensive acquisition that consumers make. The complex and confusing new consumer disclosures in the Proposed TRR would duplicate and conflict with the extensive body of existing state and federal laws, regulations, contractual obligations, and self-regulatory initiatives that protect consumers. (p. 56)

**The FTC has not tested the content or the timing of the new mandated disclosures with consumers.** The Proposed TRR would inject completely unfamiliar terms and mandate oral and written disclosures at different times in the sales process. Due to the novelty and complexity of the new disclosures, lawyers with years of experience in the field cannot agree on how dealers would comply, but one thing is certain – consumers will be confused and frustrated if the Proposed TRR were issued as a final rule. (p. 107-110)

- Before proceeding with a rule, the FTC must engage in extensive, quantitative consumer testing of alternatives to assess:
  - In consultation with the Federal Reserve, the relationship with TILA disclosures;
  - The interplay with state consumer protection disclosures;
  - The effect on online sales, the new consumer tax credits for electric vehicles and other aspects of the continually evolving retail sales process;
  - The different approaches necessary to reach across all demographic groups;
  - The specific content of oral and written disclosures that effectively enhance consumer understanding; and
  - The most appropriate time to deliver oral and written disclosures to maximize consumer understanding.
- Federal agencies, including the FTC, have conducted such testing for similar rules.
  - The FTC was part of a multiagency effort to create the model privacy notice disclosures under Gramm-Leach-Bliley. That effort involved quantitative testing of 1000 consumers to evaluate the form.
  - The Federal Reserve Board used extensive consumer testing to refine consumer disclosures about mortgage broker transactions. The Fed study details four iterations of consumer testing in four different geographic markets.
  - The FTC's Bureau of Economics conducted a "controlled experiment" with more than 500 hundred consumers to evaluate consumer disclosures proposed by the Department of Housing and Urban Development related to mortgage broker compensation. The controlled study evaluated alternative methods of disclosure.

**The FTC's flawed cost-benefit analysis inflates benefits and understates costs.** A third-party assessment states, "the proposed rule contains minimal quantitative assessments that federal agencies typically rely on to justify the need and cost of such comprehensive rulemakings." (p. 110-113)

- The FTC assumes without any analytical basis that the Proposed TRR will save consumers on average 3 hours of "car shopping" time. Then the FTC further assumes that time savings will translate into \$30 billion in consumer benefits. This time savings is the only benefit quantified in the Proposed TRR.
- The FTC's assumption of \$30 billion in time savings defies common sense. The Proposed TRR would mandate multiple new complex oral and written disclosures, more explanations, and more signatures on more documents, without reducing any current paperwork burdens. The new paperwork burdens would more likely increase, not reduce transactions times, which would eliminate the assumed time savings and benefits.
- The enormous recordkeeping requirements for dealers would be unprecedented for retail businesses. The retention of such exceedingly detailed records is more typical of what supervised financial institutions (not retailers) must retain.

**NADA has engaged extensively, including with the FTC, to improve dealer business practices and educate consumers and stands ready to continue those efforts.** NADA has developed templates that would help the FTC meet its obligation to consider less burdensome

alternatives to the overly prescriptive approach in the Proposed TRR. (p. 102, 116 – Attachment 21 and 22)

- *Fair Credit Compliance Policy & Program.* NADA, the National Association of Minority Automobile Dealers (NAMAD) and the American International Automobile Dealers Association (AIADA) created this program that fully adopts and expands on a compliance requirement contained in prior Department of Justice (DOJ) consent orders with motor vehicle dealers. Also, the program shares many elements of compliance requirements recently imposed by the FTC in consent orders with motor vehicle dealers. The American Bar Association has urged federal, state, local, territorial and tribal governments to use the program as a model for safe harbors against pricing discrimination claims for dealers that faithfully implement the program.
- *Model Dealership Voluntary Protection Products Policy.* Similarly, NADA, NAMAD, and AIADA have adopted a program that would address most of the concerns raised in the Proposed TRR about the purchase of additional products. This program could serve as the basis for a safe harbor program. The FTC cites the model policy five times approvingly in the Proposed TRR but nowhere indicates any consideration of the policy as a prudent alternative to the approach in the Proposed TRR.

**NADA urges to the FTC to withdraw the Proposed TRR and reengage all stakeholders with a process that examines potential new regulatory approaches that inform consumers without unduly burdening the effectiveness of current consumer disclosures and the efficiency of the continually evolving auto retailing process that generates millions of satisfied consumers.**