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.

financing companies.[351] Even if a consumer eventually learns the true total payment, or later learns that the terms being discussed are based on a previously undisclosed requirement that the consumer provide consideration, such as a down payment, the consumer cannot recover the time spent pursuing the offer that the consumer had expected.

The injury caused by the failure to disclose the total amount and consideration is not reasonably avoidable. As the Commission has observed previously, withholding total payment information enables dealers to focus consumers on the monthly payment amount in isolation. Under such circumstances, dealers may add unwanted, undisclosed, or even fictitious add-on charges more easily, since consumers may not notice the relatively small changes an add-on charge makes when secreted within a monthly vehicle payment, despite the fact that such hidden charges can cost a consumer more than a thousand dollars over the course of an auto financing or lease term.[352] The absence of information concerning the total of payments—which is within the sole control of the dealership—

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[351] Consumer Fin. Prot. Bureau, "Quarterly Consumer Credit Trends: Growth in Longer-Term Auto Loans" 7-8 (Nov. 2017), https://files.consumerfinance.gov/f/documents/cfpb_consumer-credit-trends_longer-term-auto-loans_2017Q2.pdf; *see also* Zhengfeng Guo et al., Off. of the Comptroller of the Currency, "A Puzzle in the Relation Between Risk and Pricing of Long-Term Auto Loans" 2, 4-5, 20 (June 2020), https://www.occ.gov/publications-and-resources/publications/economics/working-papers-banking-perf-reg/pub-econ-working-paper-puzzle-long-term-auto-loans.pdf (finding motor vehicle financing with six-plus-year terms have higher default rates than shorter-term financing during each year of their lifetimes, after controlling for borrower and loan-level risk factors).

[352] *See* Auto Buyer Study, *supra* note 25, at 14 ("[T]he dealer can extend the maturity of the financing to reduce the effect of the add-on on the monthly payment, obscuring the total cost of the add-on"); Auto Buyer Study: Appendix, *supra* note 66, at 229, 233 (Study participant 457481) (dealership pitching add-ons at the end of the negotiation, and in terms of consumer's monthly price); Auto Buyer Study: Appendix, *supra* note 66, at 701 (Study participant 437175) (dealership pitching add-ons in terms of monthly price); *see also* Complaint ¶¶ 12-19, *Fed. Trade Comm'n v. Liberty Chevrolet, Inc.*, No. 1:20-cv-03945 (S.D.N.Y. May 21, 2020) (alleging dealership included deceptive and unauthorized add-on charges in consumers' transactions); Complaint ¶¶ 21-28, *Fed. Trade Comm'n v. Ramey Motors,* No. 1:14-cv-29603 (S.D. W. Va. Dec. 11, 2014) (alleging dealer emphasized attractive terms such as low monthly payments but concealed substantial cash down payments or trade-in requirements); Complaint ¶¶ 38-46, *Fed. Trade Comm'n v. Billion Auto, Inc.*, No. 5:14-cv-04118-MWB (N.D. Iowa Dec. 11, 2014) (alleging dealer touted attractive terms such as low monthly payments but concealed significant extra costs).

also enables dealers to use claims regarding monthly payment amounts to falsely imply savings or parity between different offers where reduced monthly payments increase the total vehicle cost due to an increased payment term or annual percentage rate.

The injury to consumers from a lack of total payment information is not outweighed by benefits to consumers or competition from withholding this basic information. Instead, the burden of disclosing this information—which the dealer determines and can calculate upfront—is minimal for dealers who are already making representations about a monthly payment for a vehicle, especially when compared to the injury to consumers.

Regarding deception, as detailed in the NPRM and in this SBP, cost is one of the most material pieces of information for a consumer in making an informed purchasing decision.[353] Yet it can be difficult for consumers to uncover the actual costs, and their actual associated terms, for which a dealer will sell or lease 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 for a vehicle at other standard terms, and, in the absence of information to the contrary, that no down payment or other consideration is required. If instead, for example, a dealer advertises a low monthly payment based on an unexpectedly long financing term or unexpectedly high interest rate that results in a higher total payment than standard terms would have yielded,

[353] *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."); *Removatron Int'l Corp.*, 111 F.T.C. 206, 309 (1988) ("The Commission presumes as material express claims and implied claims pertaining to a product's . . . cost." (citing *Thompson Med. Co., Inc.*, 104 F.T.C. 648, 817 (1984)).

or based on an expected but undisclosed down payment or other consideration to be provided by the consumer, the consumer will be induced to visit the dealership based on a misimpression of what they reasonably expect the total payment to be.

If consumers knew that the true terms were beyond what was expected, or their transaction included charges for unwanted items, that would likely affect their choice to visit a particular dealership over another dealership. Thus, misleading consumers about cost information is material. A lack of total payment information therefore is likely to affect a consumer's decision to purchase or lease a particular vehicle and is material, and paying an increased total cost causes substantial consumer injury.

Thus, it is an unfair or deceptive act or practice for dealers to fail to disclose when making any representation about a monthly payment for any vehicle, the total amount the consumer will pay to purchase or lease the vehicle at that monthly payment after making all payments as scheduled, inclusive of assumed consideration. Further, this provision also addresses the misrepresentations prohibited by § 463.3—including misrepresentations regarding material information about the costs or terms of purchasing, financing, or leasing a vehicle—by requiring consumers to be provided with the total payment amount associated with any represented monthly payment amount. It also helps prevent dealers from failing to obtain the express, informed consent of the consumer for charges, as required by § 463.5(c).[354] To address these unfair or deceptive acts or practices, the Commission is requiring dealers to disclose, when making any representation about a monthly payment for any vehicle, the total amount the consumer will pay to purchase or lease the vehicle at that monthly payment after making all

[354] *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).

payments as scheduled, inclusive of assumed consideration. As with a vehicle's price, when cost information in the market is distorted or concealed—especially in document- and time-intensive vehicle 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 all of the comments that it received, the Commission is finalizing the required disclosure at § 463.4(d) largely as proposed, with the minor modifications of capitalizing the defined term "Vehicle," substituting a period for a semi-colon and the word "and" at the end of § 463.4(d)(1), and clarifying that the requirements of § 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)."

e) Monthly Payments Comparison

Proposed § 463.4(e) required dealers, when making any comparison between payment options that includes discussion of a lower monthly payment, to disclose that the lower monthly payment will increase the total amount the consumer will pay to purchase or lease the vehicle, if true. For the reasons discussed in the following paragraphs, the Commission is finalizing the required disclosure at § 463.4(e) 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(e) clarifying that the requirements in § 463.4(e) "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 institutional commenters supported such a provision, emphasizing that it would provide an appropriate amount of helpful information and help make the true terms of a car deal much clearer to consumers. Many individual commenters also stressed the need for the Commission's proposal:

- My car buying experience involving dealers has include [sic] many of the issues identified, such as: . . . Negotiating a 4 year loan with a known loan payment (did math prior to final steps). Presented paperwork with a similar but lesser monthly payment. Dealer had changed terms to 5 year loan without open disclosure. Happy to hear, "the bank gave you a better rate, you got a smaller payment," almost didn't catch what they'd done.[355]

- I have purchased about 10 new vehicles in my lifetime. . . . They prey on monthly payments as a tool, saying they can lower the monthly payment but not telling customers they added months or years to the term. Anything that forces them to be honest is a great justice for consumers![356]

- Sometimes, when you are in negotiations with a car dealer, they engage in deceptive practices by lowering your monthly payment amount without telling you how they lowered it. They may have increased your down payment or increased your interest rate or increased your term of the loan. This can lead [t]o much higher costs for the consumer. I had reached an agreement with a dealer to lower my monthly payments, but what they didn't tell me until I got into the F & I manager's office is that my deal [was] for 6 years, not 4, and they increased my interest rate.[357]

- . . . I was quoted a payment at 72 months with adding aftermarket warranty but come to find out they extended my term to 76 months in order to meet what I wanted to pay monthly. I did not find this out until after I bought the car. Very dishonest dealership. This last minute bait and switch has to stop.[358]

[355] Individual commenter, Doc. No. FTC-2022-0046-0141.
[356] Individual commenter, Doc. No. FTC-2022-0046-0985.
[357] Individual commenter, Doc. No. FTC-2022-0046-1652.
[358] Individual commenter, Doc. No. FTC-2022-0046-7569.

- I purchased a truck from a Tennessee truck dealer. After agreeing on a monthly payment of $920 for 72 months, I travelled to the dealership to complete the purchase, but the finance office changed the terms to 84 months with the same monthly payment, effectively adding $11,000 to their profit![359]

- I just want to walk in to a dealership, find a car that fits my needs and buy it. And what is up with these RIDUCULOUSLY [sic] long loan terms? 72 MONTHS? If someone cannot afford a car dealers shouldn't extend the loan, they should steer them to a more affordable car![360]

The Commission received numerous comments relating to the scope and terms of its proposed monthly payments comparison disclosure. A number of institutional and individual commenters urged the Commission to require that such disclosures uniformly be provided to consumers in writing. The Commission agrees with commenters that many monthly payment comparisons happen verbally, in the course of discussions with consumers. As proposed, the Commission's monthly payment comparison disclosure made clear that such discussions are covered, and that dealers would be required to inform consumers in the course of such discussions—"[w]hen making any comparison between payment options"—if a represented lower monthly payment will increase the total amount the consumer will pay to purchase or lease the vehicle. The Commission believes there are significant consumer benefits when such disclosures are made verbally, close in time to when monthly payment options are discussed. Given that car-buying and leasing transactions are already lengthy and paperwork-heavy, the Commission believes it must be judicious with any additional written disclosure requirements to avoid crowding out other disclosures or other important information. Accordingly, the Commission has determined not to modify § 463.4(e) from its original proposal in order

[359] Individual commenter, Doc. No. FTC-2022-0046-0115.
[360] Individual commenter, Doc. No. FTC-2022-0046-0050.

to mandate that the required disclosure always be made in writing. The Commission will continue to monitor the market for any further developments in this area and will consider whether to modify this or other Final Rule provisions in the future.

Some commenters, including consumer advocacy organizations, urged the Commission to adopt specific proposed language rather than a general disclosure requirement, or a requirement that this disclosure include the total amount the consumer will pay at the lower monthly payment under discussion. Regarding the proposal to require particular, uniform disclosure language, 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. The Commission currently lacks information to evaluate whether any particular form disclosure would effectively communicate the required information to consumers in a manner that in all circumstances obviates deceptive or unfair conduct. Moreover, regarding the proposal to require that the monthly payment comparison disclosure additionally require dealers to disclose the new total amount that the consumer will pay, the Commission emphasizes that part 463 will require such a disclosure without the need to modify this provision from the Commission's original proposal. As noted in the paragraph-by-paragraph analysis of § 463.4(d) in SBP III.D.2(d), the Commission is finalizing § 463.4(d), which requires dealers making any representation about a monthly payment for a vehicle to disclose the total amount the consumer will pay to purchase or lease the vehicle at a given monthly payment amount after making all payments as scheduled, inclusive of assumed consideration, largely as proposed. The monthly payment comparison discussions covered by § 463.4(e) are those that "include[]

discussion of a lower monthly payment." To the extent a dealer, in the course of such discussions, makes a representation "about a monthly payment for any Vehicle," § 463.4(d) will require the dealer to disclose the total amount the consumer will pay at that monthly payment amount.

Comments, including those from a number of dealership associations[361] and an individual commenter, characterized the Commission's proposal as burdensome and likely to lead to excessive disclosures while providing little additional assistance to consumers. In response, the Commission emphasizes the streamlined nature of proposed § 463.4(e). In its proposal, the Commission refrained from additional formal mandates in order to provide dealers with flexibility, within the bounds of the law, to provide this essential information—that a given lower monthly payment will increase the total amount the consumer will pay—including so that dealers already conveying this information in a non-deceptive manner may continue to do so.

Thus, after careful review of the comments, the Commission has determined to finalize § 463.4(e) largely as proposed. When making any comparison between payment options, expressly or by implication, directly or indirectly, that includes discussion of a lower monthly payment, the failure to disclose that the lower monthly payment will increase the total amount the consumer will pay to purchase or lease the vehicle, if true, is likely to mislead consumers regarding the total terms associated with the lower monthly payment amount. When a dealer elects to compare between different monthly payment options, if the lower monthly payment would result in a higher total transaction cost,

[361] As previously indicated, some such association commenters contended generally that the proposed total of payments disclosures at § 463.4(d) and (e) overlapped with the Truth in Lending Act or other laws. The Commission responds to this point in the context of the discussion of § 463.4(d), in SBP III.D.2(d).

discussion of this fact is necessary to prevent the comparison from being misleading. Absent this information, it is reasonable for a consumer who is presented with a monthly payment comparison to expect that the lower monthly payment amount would correspond to lower total transaction cost. This is because the opposite can only be true if the dealer has created a so-called "apples to oranges" comparison, in which an undisclosed element of the transaction—such as the length of the payment term, or the existence of a balloon payment—has not been kept constant across the two monthly payment scenarios being compared. Under such circumstances, without providing the consumer with further information, the dealer's claims regarding monthly payment amounts falsely imply saving or parity between different offers where reduced monthly payments increase the total vehicle cost. Thus, where a lower monthly payment amount represents a more expensive transaction, the dealer must, at a minimum, disclose this simple but counterintuitive fact to not deceive consumers.[362]

Furthermore, as explained in the NPRM and in the paragraph-by-paragraph discussion of § 463.4(d) in SBP III.D.2(d), cost is one of the most material pieces of information for a consumer in making an informed purchasing decision.[363]

Regarding unfairness, when making any comparison between payment options, expressly or by implication, directly or indirectly, that includes discussion of a lower

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[362] Depending on the circumstances, a dealer may need to take additional measures, such as disclosing the specific basis for any increase in total costs, or amount of any such increase, in order to avoid deceiving consumers.

[363] *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."); *Removatron Int'l Corp.*, 111 F.T.C. 206, 309 (1988) ("The Commission presumes as material express claims and implied claims pertaining to a product's . . . cost." (citing *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.'").

monthly payment, the failure to disclose that the lower monthly payment will increase the total amount the consumer will pay to purchase or lease the vehicle, if true, is likely to cause substantial injury to consumers who waste time and effort pursuing offers that are not actually available at the total payment amount they expect; 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 costs and greater risk of default associated with an unexpectedly lengthy loan term.

Furthermore, the injury caused by withholding this information is not reasonably avoidable by consumers. During negotiations, if dealers agree to a lower monthly payment, consumers have no reason to expect that this apparent "concession" in fact means an increased total vehicle cost due to an increased payment term or annual percentage rate. Under such circumstances, dealers can also add unwanted, undisclosed, or even fictitious add-on charges more easily, by increasing the payment term enough that including add-on charges would still result in a lower monthly payment as a "concession" to the consumer. The injury to consumers from a lack of price information is not outweighed by any benefits to consumers or competition from withholding this basic information. Instead, information about increased cost protects consumers from lost time and effort, and unexpected charges while increasing competition among dealers, who would be able to compete on truthful, standard terms. The costs of stating that the total payment has increased—which the dealer determines and can calculate upfront—are minimal for dealers that are already making representations about a monthly payment for a vehicle, especially when compared to the injury to consumers.

Thus, it is an unfair or deceptive act or practice for dealers to fail to disclose, when making any comparison between payment options, expressly or by implication, directly or indirectly, that includes discussion of a lower monthly payment, that the lower monthly payment will increase the total amount the consumer will pay to purchase or lease the vehicle, 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—by requiring consumers to be given accurate information that the total payment will increase when presented with a lower monthly payment. It also helps prevent dealers from failing to obtain the express, informed consent of the consumer for charges, as addressed by § 463.5(c), including charges relating to the financing or lease of a vehicle.[364] Thus, the Commission is requiring dealers to disclose, when making any comparison between payment options, expressly or by implication, directly or indirectly, that includes discussion of a lower monthly payment, that the lower monthly payment will increase the total amount the consumer will pay to purchase or lease the vehicle, if true. As with a vehicle's price, when cost information in the market is distorted or concealed—especially in document- and time-intensive vehicle 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 all of the comments that it received on this proposed provision, the Commission is finalizing the required disclosure at § 463.4(e) largely as proposed, with the minor modifications of capitalizing the defined

[364] *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).

term "Vehicle" additional language clarifying that the requirements in § 463.4(e) "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)."

E. § 463.5: Dealer Charges for Add-Ons and Other Items

1. Overview

Proposed § 463.5 prohibited motor vehicle dealers from charging for add-on products or services from which the consumer would not benefit; from charging consumers for undisclosed or unselected add-ons unless certain requirements were met; and from charging for any item unless the dealer obtains the express, informed consent of the consumer for the item.

In response to the NPRM, various stakeholder groups and individuals submitted comments regarding these proposed provisions. Among these were comments in favor of the provisions; comments that urged the Commission to include additional restrictions on add-on charges; and comments questioning or recommending against the proposed provisions.

After careful consideration of the comments, the Commission has determined to finalize § 463.5(a) and (c) without substantive modification and has determined not to finalize § 463.5(b) regarding undisclosed or unselected add-ons. The Commission also is making minor textual edits to the introductory language in § 463.5 for clarity and consistency: substituting "Federal Trade Commission Act" for "FTC Act"; adding "Covered" to "Motor Vehicle Dealer" to conform with the defined term at § 463.2(f) ("'Covered Motor Vehicle Dealer' or 'Dealer'"), and capitalizing "Vehicles" to conform with the defined term at § 463.2(e) ("'Covered Motor Vehicle' or 'Vehicle'").

In the following analysis, the Commission examines each proposed provision in § 463.5; the substantive comments relating to each provision; responses to these comments; and the Commission's final determination with regard to each proposed provision.

2. Paragraph-by-Paragraph Analysis of § 463.5

a) Add-ons that Provide No Benefit

Section 463.5(a) of the proposed rule prohibited motor vehicle dealers from charging for add-ons if the consumer would not benefit from such an add-on, including a pair of enumerated examples. For the following reasons, the Commission is finalizing this provision largely as proposed, with modifications to correct a misplaced hyphen; add the word "that" before "are duplicative of warranty coverage"; and capitalize the defined term "Vehicle" to conform with the revised definition at § 463.2(e). The Commission also is adding language to the end of § 463.5(a) clarifying that the requirements in § 463.5(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)." Relatedly, the Commission is finalizing the definition of the term "GAP Agreement," which is referenced in this provision and defined in § 463.2(h) of the Final Rule, substantively as proposed, with minor modifications to correct a misplaced period, substitute "Vehicle" for both "vehicle" and "motor vehicle" to conform with the revised definition at § 463.2(e), and remove an extraneous term—"insured's"—without changing the definition's operation.

Many commenters, including a number of industry participants and associations, stated that products that provide no benefit to the consumer should not be sold in

connection with the sale or financing of vehicles. Many commenters that supported the provision stated, *inter alia*, that the examples the Commission enumerated in this paragraph were obvious[365] and particularly helpful for less-experienced buyers who may be led to believe that a particular product or service would be beneficial.[366] Some individual commenters, for instance, noted that they had no way to confirm whether the "nitrogen-filled" tires they purchased with their vehicle actually had more nitrogen than naturally exists in the air, even though they were told the purchase of this service was mandatory.[367] At least one individual commenter described requesting to see the nitrogen tank after such a purchase and being denied by the dealer.

Examples of public comments about add-ons include the following:

- I would argue that this does not go far enough but it [is]a good start. As someone who is trying to purchase a new vehicle, there is a[n] endless supply of "perk packages" or "Family deals" that I "must purchase" if I would like to acquire a car from a dealer. These include a variety of dubious products such as insurance policies that pay out $3500 if your car is stolen (and can't be found) in the first 90 days of ownership, if your car is totaled by your insurance company in the first 90 days they'll pay $3500. Nitrogen in the tires (A $196 value). Vin Etching on the windows, plastic stickers on the door handles to prevent scratches. These items are a requirement to bundle with the vehicle and a deal that provides "over $7000 in value" for $2995. These tricks ignore the obvious, such as your car can not be both stolen (unrecovered) AND totaled so it's impossible to collect on both policies so the cumulative "value" of this package is overstated.[368]

- One of the latest scams is to force you to buy a $1000 gps unit so they can recover the car if you miss payments. This shouldn't be allowed.[369]

- Second vehicle I purchased had a $1650 "protection pkg" plus the usual nitrogen in the tires BS. This time I asked to be shown the nitrogen tank

[365] *See, e.g.*, Individual commenter, Doc. No. FTC-2022-0046-1608 at 6.
[366] *See, e.g.*, Comment of 18 State Att'ys Gen., Doc No. FTC-2022-0046-8062 at 9.
[367] *See, e.g.*, Individual commenter, Doc. No. FTC-2022-0046-0565.
[368] Individual commenter, No. FTC-2002-0046-0565.
[369] Individual commenter, No. FTC-2002-0046-4552.

> they fill the tires with, they refused saying due to insurance rules customers aren't allowed in the shop. I asked them to take off the paint and fabric protection charge also, they declined at first until I reminded them they just got the vehicle the night before and there was still plastic factory coverings on the seats and strips of plastic on the vehicles body protecting certain areas. This time they mumbled some excuse about the addendum added to the price is put on the vehicle as soon as it arrives and they hadn't had "time" to apply all the overpriced add[-]ons.[370]

- I'm a former carsalesperson [sic]. . . . Dealers should be banned from selling . . . special paints to protect from rust . . . . No coatings are added.[371]

- I worked at a Dodge/Ram dealership for three years at the make ready (carwash) department. When new vehicles arrived their tires were rarely deflated and then filled with nitrogen. It is my understanding that the manufacture initially paid for the nitrogen fill and the customer was later charged.[372]

- [O]ne of my previous purchases almost ended . . . with GAP that was so unnecessary, the lender called us a few days later after we already had the car and told us we'd be experiencing a lower monthly payment unless we wanted the price of the product back in a check because of the price we negotiated and the sizable down payment, it was impossible for GAP to ever be required.[373]

A number of individual commenters indicated they did not consider nitrogen tires a valuable purchase and expressed no desire to purchase them. Many commented that, when they informed their respective dealers that they did not want these add-ons, the dealers would represent, *inter alia*, that nitrogen tires were required by law, that their insurance premium would increase without the add-on, that new foreign vehicles coming into the country must have nitrogen-filled tires under the law, or that the consumer needed to purchase nitrogen tires to meet fuel economy standards.

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[370] Individual commenter, Doc. No. FTC-2022-0046-0854.
[371] Individual commenter, Doc. No. FTC-2022-0046-1393.
[372] Individual commenter, Doc. No. FTC-2022-0046-5493.
[373] Individual commenter, Doc. No. FTC-2022-0046-6816.

Other commenters supported this proposed provision while also recommending that the Commission broaden its scope to prohibit the sale of add-on products or services that provide only "minimal" benefit to consumers.[374] One such commenter, for instance, suggested the provision be expanded to prohibit dealers from charging for an add-on unless it provides a "substantial, material benefit" to consumers.[375] Another commenter contended that there are a number of add-ons not meeting such standards being sold in connection with the sale or financing of vehicles, including future servicing packages for vehicle tune-ups and oil changes that are sold to remote or out-of-State consumers who are exceedingly unlikely to return to the dealership for such services; tracking devices that are used almost exclusively for electronic repossession; and "vendor's single interest" or "VSI" insurance, which protects the financing entity, but not the consumer, in the event that the vehicle is damaged or destroyed.[376]

The Commission acknowledges the considerable consumer harm that results from the sale of such add-ons and notes that several provisions in the Rule it is finalizing will address misconduct related to these and other add-ons, including many of the practices described by those commenters recommending further action. For example, to the extent that dealers make misrepresentations about any benefit of an add-on, such conduct would violate § 463.3(b) of the Final Rule. Thus, were a dealer, for instance, to promote the sale of an add-on—such as a tracking device that is used almost exclusively for electronic repossession—based on its supposed benefit to the consumer, when the product primarily benefits another party, such conduct would violate the Rule even if the product otherwise

[374] *See, e.g.*, Legal Aid Just. Ctr., Doc. No. FTC-2022-0046-7833 at 3.
[375] Comment of Legal Action Chi., Doc. No. FTC-2022-0046-8097 at 10.
[376] *See also* Consumer Fin. Prot. Bureau, "What Is Vendor's Single Interest (VSI) insurance?" (Aug. 16, 2016), https://www.consumerfinance.gov/ask-cfpb/what-is-vendors-single-interest-vsi-insurance-en-731/.

provides an ancillary or marginal benefit to consumers. And if the add-on provided no benefit to the consumer and only a benefit to another party, § 463.5(a) would prohibit the dealer from charging the consumer for it. Further, to the extent that dealers charge for add-ons without express, informed consumer consent for the charge, such conduct would violate § 463.5(c).

The Commission recognizes that there may be significant consumer benefits from implementing additional restrictions on the sale of add-on products or services. However, without additional information on costs and benefits to consumers or competition associated with such restrictions, the Commission has determined not to implement such restrictions in this Final Rule. The Commission will continue to monitor the motor vehicle marketplace to gather additional information on this issue and will consider whether to modify or expand § 463.5(a) in the future, including on the basis of stakeholder experience with this provision and whether it effectively addresses unlawful conduct.

Commenters also urged the Commission to adopt a number of additional measures regarding the sale of such add-ons. A consumer advocacy organization, for instance, proposed that the Commission require dealers to list coverage limitations for add-ons that may overlap with a vehicle's warranty coverage, observing that consumers commonly are not aware of important limitations until the add-on, such as a warranty or service contract, is needed, and only then does the consumer learn the add-on does not provide the anticipated benefits. A State consumer protection agency recommended that the Commission require affirmative disclosures for the sale of add-ons that may provide

only "nominal" benefit, offering a list of what they characterized as such products for the Commission to consider in conjunction with this recommendation.

In response, the Commission notes that other provisions in part 463 address misconduct relating to these issues, including by prohibiting misrepresentations regarding material information about add-ons, by requiring disclosures about optional add-ons, and by requiring dealers to obtain the express, informed consent of the consumer for add-on charges. Thus, misrepresenting the coverage limitations of an add-on; making representations regarding an optional add-on without disclosing that it is not required and that the consumer can purchase or lease the vehicle without the add-on; and charging for an add-on under false pretenses or without the consumer's express, informed consent would violate other provisions the Commission is finalizing. The Commission is concerned that requiring additional disclosures may have the effect of reducing the saliency of key information in what is already a lengthy, paperwork-heavy transaction. Accordingly, the Commission has determined not to adopt additional such disclosure measures in this Final Rule.

In addition, at least one consumer protection agency commenter asked the Commission to consider deeming it an unfair or deceptive act or practice to sell any add-on product for a price greater than the value of the product itself. The Commission declines to restrict the sale of add-on products at a price higher than the value of the product itself, absent additional information, including information regarding the costs and benefits to consumers and competition of such a restriction.[377]

[377] One consumer attorney commenter requested that the Commission clarify that warranty disclaimers are not a valid defense to common law fraud and statutory consumer fraud, and that, if fraud is proven, warranty disclaimers are not an allowable defense to UCC actions. In response, the Commission notes that

A number of industry association commenters claimed the provision was vague and requested the Commission set forth how to calculate the loan-to-value ("LTV") ratio at which a GAP agreement would be non-beneficial, given that there could be fluctuation of the vehicle value in the future. Some suggested that the Commission adopt a presumption or safe harbor that dealers complying with an LTV calculation set by the Commission be deemed in compliance with the portion of the proposal related to GAP agreements.

Other industry association commenters argued against adopting a set LTV ratio as the basis for determining whether a consumer would benefit from a GAP agreement, claiming that the vehicle financing entity is best positioned to determine whether such an add-on would be beneficial. Relatedly, some industry association commenters contended that certain GAP agreements sold on a low-LTV loan, or that limit benefits based on a consumer's LTV ratio, could still provide additional benefits.

A financing association commenter contended that any final rule should not create rules around the calculation of the LTV ratio. Another financing group proposed that the Commission require dealers to provide disclosures that would inform consumers of any potential value gap between a vehicle's purchase price and its appraised value.

With regard to establishing LTV ratio parameters for the sale of GAP agreements, without further information from commenters regarding the costs and benefits of establishing a particular LTV ratio as the basis for determining whether a consumer would benefit from a GAP agreement, or a particular method for calculating the LTV ratio, and given the Commission's previously stated information saliency concerns about

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none of the provisions the Commission is finalizing state that warranty disclaimers are a defense to common law fraud or in UCC actions.

finalizing additional disclosures in an already lengthy transaction, the Commission has determined not to establish in this Final Rule a particular numeric threshold or calculation regarding the sale of GAP agreements to consumers, or to require additional associated disclosures. Regarding the benefits of certain GAP agreements, this provision restricts sales of GAP agreements where the consumer would not benefit. If there are benefits to the consumer, dealers must abide by other provisions in the Final Rule, including the requirements that the dealer represents the extent of those benefits accurately (§ 463.3(b)) and obtains express, informed consent from the consumer for the charges for this item (§ 463.5(c)).

The Commission also received some industry association comments claiming that each State imposes differing requirements as to coverage, disclosures, exceptions, and product terms of GAP agreements. One such commenter asked for guidance on how a bright-line, State-law rule on LTV ratios would interact with the FTC's proposal. Another such commenter requested the FTC reconcile different State-law approaches to the sale of GAP agreements, particularly regarding how this proposed provision would interact with a State law that, according to the commenter, only requires a dealer to have a reasonable belief that the customer may be eligible for a benefit. In response, the Final Rule does not disturb State law unless it is inconsistent with part 463, and then only to the extent of the inconsistency. Where, for example, State laws restrict the sale of GAP agreements if the LTV ratio for the transaction is below a certain threshold, or require that dealers have a "reasonable belief" that the GAP agreement would benefit the consumer, dealers in that State can, and must, comply with the State law and with the Rule. Pursuant to such State law, dealers would be prohibited from selling the product if the LTV ratio is below the

established threshold or if they do not reasonably believe the GAP agreement would benefit the consumer and, pursuant to the Final Rule, if the LTV ratio would result in the consumer not benefitting financially. To the extent there is an actual conflict between the Commission's Final Rule and a State law—and the Commission is skeptical that there is such a State law that explicitly allows for the sale of a product that does not benefit the consumer—the Commission refers commenters to § 463.9, which sets forth the Rule's relation to State laws.

With respect to the proposed definition of "GAP Agreement," an industry association commenter contended that the phrase "the actual cash value of the insured's vehicle in the event of an unrecovered theft or total loss" meant the value of the vehicle at some point in the future, and asserted that future vehicle values cannot be accurately determined at the time of sale. The proposed definition, however, did not prescribe how dealers must calculate a vehicle's cash value; rather, it explains that the term "GAP Agreement" means an agreement to indemnify a vehicle purchaser for any difference between such value, however determined, in the event of an unrecovered theft or total loss, and the amount owed, regardless of what that difference may be. Upon examination of this phrase, however, the Commission has determined to remove the term "insured's" because it is extraneous and does not affect the operation of this definition: with or without the term, the phrase describes the manner in which a qualifying GAP agreement determines the amount to indemnify a vehicle purchaser or lessee. In context in this definition, it is clear without the term "insured's" that the applicable "Vehicle" is the one covered by the GAP agreement. Omitting this unnecessary term thus avoids confusion without substantively changing this definition.

One industry association commenter argued that reference to "GAP insurance" should be removed from the definition of "GAP Agreement" because of 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."[378] As previously discussed with regard to the definition of "Add-on," however, commenters have provided no evidence that the proposed or Final Rule would invalidate, impair, or supersede State laws enacted for the purpose of regulating insurance. Rather than affecting any State's regulation of insurance, the Final Rule prohibits dealers from making misrepresentations regarding add-ons, from failing to disclose when add-ons are not required, and from charging for add-ons that provide no benefit or for which the consumer has not provided express, informed consent. The Commission therefore finalizes the definition of "GAP Agreement" largely as proposed in its NPRM with minor modifications to correct a misplaced period, substitute "Vehicle" for both "vehicle" and "motor vehicle" to conform with the revised definition at § 463.2(e), and remove an extraneous term—"insured's"—without changing the definition's operation.

While acknowledging that products or services that provide no benefit to consumers should not be sold, commenters including an industry association also argued that the Commission's proposed provision was vague and required more research. Some industry association commenters expressed concern regarding how the Commission would determine whether an item would not benefit the consumer. In response, the Commission provides the following information. Proposed § 463.5(a) included enumerated examples of add-ons from which consumers would not benefit: (1) nitrogen-

[378] 15 U.S.C. 1012(b).

filled tires that contain no more nitrogen than normally found in the air, and (2) products or services that do not provide coverage for the vehicle, the consumer, or the transaction, or are duplicative of warranty coverage for the vehicle, including a GAP agreement if the consumer's vehicle or neighborhood is excluded from coverage or the LTV ratio would result in the consumer not benefitting financially.[379] As these examples illustrate, determining that a consumer would not benefit from an add-on involves analyzing objective standards under the circumstances, such as whether the add-on provides benefits; whether the consumer is eligible to use the add-on; whether the add-on's coverage excludes the vehicle at issue; and whether the add-on is incompatible with the vehicle at issue. Thus, additional examples of add-ons that would be prohibited by this provision include the following: purported rust-proofing add-ons that do not actually prevent rust; purported theft-prevention or theft-deterrent add-ons that do not prevent or deter theft; and add-ons that the vehicle itself cannot support, including engine oil-change services for a vehicle, such as an electric vehicle, that does not use engine oil, or software or audio subscription services for a vehicle that cannot support the software or utilize the subscription.[380]

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[379] *See* Consumer Fin. Prot. Bureau, "Supervisory Highlights: Issue 19, Summer 2019" 3-4 (Sept. 2019), https://files.consumerfinance.gov/f/documents/cfpb_supervisory-highlights_issue-19_092019.pdf (finding instances in which auto lenders sold "a GAP product to consumers whose low LTV meant that they would not benefit from the product").

[380] *See, e.g.*, Shannon Osaka, "Electric vehicles are hitting a road block: Car dealers," Wash. Post (Nov. 9, 2023), https://www.washingtonpost.com/climate-solutions/2023/11/09/car-dealerships-ev-sales (describing a dealership salesperson offering an electric vehicle-buyer a plan for oil changes and an extended warranty for a gas-powered car); *see also* 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).

One association commenter argued that the phrase "nitrogen-filled tire related-products or services that contain no more nitrogen than naturally exists in the air" in proposed § 463.5(a)(1) would create a standard with which it may be impossible to comply because "no individual set of tires could have a higher total quantity of nitrogen than that in 'the air' that stretches around the planet."[381] This commenter requested that the Commission clarify to avoid this possible reading. Here, the Commission notes that the phrase does not prohibit such tires if they do not contain a "higher total quantity of nitrogen than that in the air"; instead, charging for a nitrogen-filled tire would fail by this standard if it contains "no more nitrogen than" the proportion that "naturally exists in the air."

One industry association commenter requested more explanation from the Commission regarding what would be considered "duplicative of warranty coverage" under proposed § 463.5(a)(2), while another contended that vehicle service contracts that overlap with a manufacturer's warranty may still provide additional, beneficial coverage, such as after the manufacturer's warranty expires. In response, the Commission notes that this provision prohibits the sale of warranties that are duplicative. A dealer may offer a warranty add-on that has some overlap in coverage with existing warranty coverage for the vehicle, but the add-on must provide additional protection. Moreover, other provisions of the Final Rule address misconduct relating to warranties, including by prohibiting misrepresentations regarding material information about any costs, limitation, benefit, or any other aspect of the warranty product or service. For example, under the Final Rule, a dealer may not mislead a consumer as to the benefits or conditions of the

[381] Comment of Competitive Enter. Inst., Doc. No. FTC-2022-0046-7670 at 6.

warranty, including amount or length of coverage (§ 463.3(b)). In addition, under § 463.5(c), the dealer must obtain the express, informed consent of the consumer for the charge for the warranty (§ 463.5(c)).

Other commenters, including an industry association, asserted that this proposed provision would cause dealers to stop offering beneficial products or services. The Commission notes that its proposal did not require such a result and emphasizes that this provision would prevent charges to consumers for products or services that provide them no benefit. To the extent that a prohibition against charging consumers for items that provide no benefit to the consumer may cause some dealers to discontinue offering beneficial products, consumers would be free to instead visit other dealerships or to seek the same or similar offerings from other providers. Dealers, of course, continue to be free under the Final Rule to offer beneficial add-ons to consumers—consistent with existing law and with other provisions of this Rule.

Some commenters, including industry associations and a dealership association, raised concerns about compliance administrability for this proposed provision in the case of products attached to a vehicle by manufacturers that may provide no benefit, questioning whether, if this proposal went into effect, dealers would be prohibited from charging for such products. In response, the Commission refers commenters to the definition of "Add-on" or "Add-on Product(s) or Service(s)" in § 463.2(a). Notably, "Add-on" is defined, in relevant part, as any "product(s) or service(s) not provided to the consumer or installed on the Vehicle by the Vehicle manufacturer . . ." Thus, if an add-on product or service is installed on the vehicle by the motor vehicle manufacturer, it falls outside the scope of this definition, and concomitantly, outside the scope of the provision

at § 463.5(a). Nonetheless, other provisions in the Final Rule address misconduct relating to this issue. For instance, as examined in additional detail in the discussion of § 463.4, in SBP III.D, the offering price for the vehicle would be required to incorporate the charges for any such items if the dealer requires the consumer to pay for them. In addition, as described in additional detail in the discussion of § 463.5(c), in SBP III.E.2(c), a dealer may not charge for any such item unless the dealer obtains the express, informed consent of the consumer for the charge.

Another industry association commenter incorrectly stated that this provision was beyond the FTC's authority and correctly noted that the Commission has the authority to see that products are marketed and advertised fairly and honestly. As the commenter acknowledged, the Commission has the authority to address unfair and deceptive conduct; that is precisely what this provision does. Dealerships charging consumers for add-ons from which the consumers would not benefit is both a deceptive and unfair act or practice in violation of the FTC Act, as discussed in the following paragraphs. To address this deception or unfairness, the Commission is finalizing this provision with minor modifications, including one to correct a typographical error in the placement of a hyphen in a phrase in proposed § 463.5(a)(1). In the NPRM, the relevant phrase appeared as, "(1) Nitrogen-filled tire related-products or services"; in the Final Rule, the corrected phrase will now read as follows: "(1) Nitrogen-filled tire-related products or services." For clarity, the Commission is also adding the word "that" before "are duplicative of warranty coverage;" capitalizing the defined term "Vehicle" to conform with the revised definition at § 463.2(e); and adding language clarifying that the requirements of

§ 463.5(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)."

Dealerships charging consumers for add-ons from which the consumers would not benefit involves deceptive conduct. When a dealer charges consumers for add-ons that would not benefit the consumers, the dealer either (1) discusses the add-on charges or (2) is silent about these items. In the first scenario, if a dealer discusses add-on charges, consumers typically would not agree to pay such charges for additional products from which they could not benefit unless they are led to believe, directly or by omission, that these products would in fact be beneficial to them. Thus, the dealer would be misleading consumers, even in the event the dealer subsequently provides a disclaimer indicating the add-on would not benefit the consumer.[382] In the second scenario, it is reasonable for consumers to believe that the terms they have agreed to are what was negotiated, and do not include additional charges for optional, undisclosed items—particularly items that would not benefit the consumer. If a dealer charges consumers for such items under such circumstances, the dealer is misleading the consumer. Misleading consumers about cost information is material.[383] If consumers knew that a dealership was charging them for items from which they would not benefit, such knowledge likely would affect their

[382] *Removatron Int'l Corp. v. Fed. Trade Comm'n*, 884 F. 2d 1489, 1497 (1st Cir. 1989) ("Disclaimers or qualifications . . . 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.").

[383] *See, e.g.*, *Fed. Trade Comm'n v. Windward Mktg., Ltd.*, 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."); *Removatron Int'l Corp.*, 111 F.T.C. 206, 309 (1988) ("The Commission presumes as material express claims and implied claims pertaining to a product's . . . cost." (citing *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.'").

commercial choices, including whether to continue with, or ultimately consummate, the vehicle sale or financing transaction.[384]

Such charges are also unfair. When charges for any add-on accompany the already lengthy and complex car-buying process, it is difficult to obtain consent that is truly express and informed.[385] Rather than prohibiting all such charges or taking other measures, as specifically contemplated in the NPRM,[386] however, this provision focuses on charges for add-ons that would not benefit the consumer. Charges for add-ons that would not benefit the consumer can cost consumers thousands of dollars and significantly increase the overall cost to the consumer in the transaction, including by increasing the amount financed and total of payments, thereby increasing the risk the consumer will ultimately default on repayment obligations.[387] This injury is not reasonably avoidable by consumers when dealers are silent about such charges and simply include them in dense,

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[384] Even under a hypothetical scenario wherein a consumer understood an add-on would not benefit them but wanted to pay extra for the add-on anyway, in the case of an act or practice challenged by the agency as deceptive or unfair, "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).

[385] *See, e.g.*, Consumer Fin. Prot. Bureau, "Supervisory Highlights: Issue 19, Summer 2019" 3-4 (Sept. 2019), https://files.consumerfinance.gov/f/documents/cfpb_supervisory-highlights_issue-19_092019.pdf (describing findings, from supervisory examinations, of lenders selling GAP agreements to consumers whose low LTV meant that they would not benefit from the product: "By purchasing a product they would not benefit from, consumers demonstrated that they lacked an understanding of a material aspect of the product. The lenders had sufficient information to know that these consumers would not benefit from the product. These sales show that the lenders took unreasonable advantage of the consumers' lack of understanding of the material risks, costs, or conditions of the product.").

[386] *See, e.g.*, NPRM at 42030 (Question 33) ("In particular, the Commission is contemplating whether any final Rule should restrict dealers from selling add-ons (other than those already installed on the vehicle) in the same transaction, or on the same day, the vehicle is sold or leased."); *id.* (Question 38) (discussing proposed § 463.5(c) and asking "Does the proposal provide a meaningful way to obtain consent in an already disclosure-heavy transaction? If it would result in too many disclosures, what other measures could be taken to protect consumers from unauthorized charges?").

[387] *See, e.g.*, Complaint ¶¶ 25-28, *Fed. Trade Comm'n v. N. Am. Auto. Servs., Inc.*, No. 1:22-cv-01690 (N.D. Ill. Mar. 31, 2022).

lengthy contracts, as explained in detail in SBP II.B.2.[388] If a dealer instead describes what the charges are for, such a description either deceptively states or implies that the add-on would benefit the consumer, or acknowledges the add-on would not benefit the consumer, the latter of which would create "contradictory double meanings"[389] and, if discovered, would still result in the dealer wasting the consumers' time.[390] Further, there are no benefits to consumers or to competition from charging consumers for add-ons that would not benefit them. Moreover, charging for non-beneficial products is inconsistent with industry guidance,[391] and dealerships that profit from such sales place dealerships that do not at a competitive disadvantage. Thus, it is an unfair or deceptive act or practice for dealers, in connection with the sale or financing of vehicles, to charge for an add-on product or service if the consumer would not benefit from such an add-on product or service. This provision also serves to prevent misrepresentations prohibited by § 463.3 of the Final Rule, including misrepresentations regarding material information about the costs or terms of purchasing, financing, or leasing a vehicle, and about any costs,

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[388] *See, e.g.*, Auto Buyer Study, *supra* note 25, at 13-15, 17-18.

[389] *See Removatron Int'l Corp. v. Fed. Trade Comm'n*, 884 F. 2d 1489, 1497 (1st Cir. 1989) ("Disclaimers or qualifications . . . 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.").

[390] Even in the hypothetical scenario where some consumers could have avoided the injury because they understood that an add-on would not benefit them but wanted to pay extra for the add-on anyway, the dealer's conduct in selling non-beneficial add-ons would still be unfair because it substantially injures other consumers who do not wish to pay for items that would not benefit them and, as discussed in the SBP text, cannot reasonably avoid the harm, and no countervailing benefits outweigh the costs. *See FTC v. Amazon.com, Inc.*, 2016 U.S. Dist. LEXIS 55569, *15, *18-21 (W.D. Wash. Apr. 26, 2016) (finding unfairness even though some consumers could have avoided the charge). Additionally, consumers who truly wish to purchase add-ons that do not benefit them may still be able to do so directly from the add-on provider.

[391] *See* Nat'l Auto. Dealers Ass'n et al., "Voluntary Protection Products: A Model Dealership Policy" 5 (2019), https://www.nada.org/regulatory-compliance/voluntary-protection-products-model-dealership-policy (explaining that when determining which voluntary protection products to offer to customers, "the dealership should have confidence in the value that the product offers to customers," including that the dealership should understand "whether its coverage is already provided by another product being purchased by the customer," and stating "[i]t is essential that customers have a clearly defined path to receiving such benefits.").

limitation, benefit, or other aspect of an add-on. This provision further helps prevent dealers from failing to obtain express, informed consent for charges, as prohibited by § 463.5(c).[392]

b) Undisclosed or Unselected Add-ons

The Commission's proposed provisions relating to undisclosed or unselected add-on products or services, at § 463.5(b), prohibited dealers from charging for optional add-ons before undertaking certain measures. Specifically, proposed § 463.5(b)(1) prohibited dealers from charging for optional add-ons unless the dealers disclosed, and offered to consummate the transaction for, the cash price at which a consumer may purchase the vehicle without such add-ons. This proposed provision also required the consumer to decline to purchase the vehicle for the cash price without the add-on by means of a written declination, with date and time recorded, and signed by the consumer and a manager of the motor vehicle dealer. The proposed requirements of § 463.5(b)(1) applied before the dealer referenced any aspect of financing for a specific vehicle, aside from the offering price, or before consummating a non-financed sale. Proposed § 463.5(b)(2) required similar steps before charging for any optional add-on in a financed transaction, including that the dealer disclose, and offer to consummate the transaction for, a vehicle's cash price without optional add-ons plus the finance charge for such transaction, separately itemizing the components of the offer. This proposed provision also required a written, dated, time-stamped, and signed declination. Finally, proposed § 463.5(b)(3) required dealers to disclose the cost of the transaction, whether financed or not, without any optional add-ons, as well as the charges for the optional add-ons selected by the

[392] *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).

consumer, separately itemized. Each proposed provision required clear and conspicuous disclosure of specific information relating to optional add-ons and their associated costs.

As discussed in the following paragraphs, the Commission has determined not to finalize the proposed provisions at § 463.5(b) regarding undisclosed or unselected add-ons. Many commenters described the likely benefits of such proposed provisions, and a number of commenters indicated how such provisions would be feasible, including by reference to similar disclosure regimes already in effect at the State or local level. Commenters also credited the Commission's goals for such provisions.

However, other commenters opposed these proposed provisions, contending they would be burdensome and time-consuming. Others similarly expressed concern that, given the duration, complexity, and paperwork-heavy nature of motor vehicle sales and financing transactions, these provisions would not effectively resolve the problem of add-ons being sold without express, informed consumer consent.[393]

Having considered the comments, the Commission declines to include in this Final Rule the proposed provisions relating to undisclosed or unselected add-on products or services at § 463.5(b). The Commission notes that various commenters were concerned about the extent to which this proposal would add documents and time to the transaction. If finalized, this would have been the sole provision in the Final Rule that affirmatively requires the dealer and consumer, in all circumstances, to view and sign additional documentation during the purchase, finance, or lease process, in what is

[393] *See, e.g.*, Comment of Nat'l Consumer L. Ctr. et al., Doc. No. FTC-2022-0046-7607 at 30-31. Instead, advocates recommended that the Commission require a cooling-off period for add-ons, similar to that required by the Commission for door-to-door and other off-premises sales, 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. *Id.* This comment is addressed when discussing § 463.5(c) in SBP III.E.2(c).

already a document-heavy, time-consuming, and complicated transaction. The Commission further notes that, as a matter of existing law, dealers are already prohibited from engaging in misrepresentations regarding add-ons and from charging for add-ons without express, informed consent—conduct which the Final Rule prohibits as well. Accordingly, the Commission has determined not to include this provision in its Final Rule.

The Commission will continue to monitor the motor vehicle marketplace for issues pertaining to unselected or undisclosed add-ons, and will consider implementing additional measures in the future if it determines such measures are necessary to address deceptive or unfair practices relating to add-ons.

c) Any Item Without Express, Informed Consent

Section 463.5(c) of the proposed rule prohibited motor vehicle dealers, in connection with the sale or financing of vehicles, from charging consumers for any item unless the dealer obtains the express, informed consent of the consumer for the charge. Upon careful review and consideration of the comments, the Commission is finalizing this provision with one modification from its original proposal: the addition of language to the end of § 463.5(c) clarifying that the requirements in § 463.5(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), 463.4, and 463.5(a)." In addition, the Commission is finalizing the corresponding definition of "Express, Informed Consent," now at § 463.2(g).

Many commenters favored the proposed provision and expressed the need for such a provision. For example:

- In one instance a salesman who appeared busy and trying to help me efficiently navigate the process rushed me to sign a small paper, "just sign this quickly and we'll be on our way," I was told, without disclosure that they were selling me something that I did not want. I found it later and felt cheated.[394]

- They made me sign the sales bill on an electronic device, but the finance guy never pointed to me any number I was getting charge[d] for, and never pointed to me the total amount I was getting billed for. He seem[ed] to be in a hurry and he even told me he had people waiting for him to see. I think it was all planned to push the buyer to blindly sign the bill of sale without explaining anything because he was scrolling the electronic pages in a hurry and going straight to the sign box line. I thought I signed the agreed amount, I trust them, but, instead, they charge me for things I never agreed on. I went back to the dealer in less than 48 hours when I discovered the fraud and asked them to remove the extra fees they charged me for, they refused and they forced me to pay for it, I asked them and requested them to take the car back, they refused it again, at the end, they gave me a little bit of a discount, but, not compared to what I got charged for. . . .[395]

- I am an attorney in private practice in NY representing consumers for 33 years. It never ceases to amaze me how car dealers defraud honest trusting consumers substantial sums of money through various common deceptive and fraudulent practices ranging from altering documents, concealing documents, having consumers sign blank documents, lying about the material terms of the deal, altering the prices, adding on other contracts or items never discussed and selling vehicles with undisclosed damages and defects.[396]

- I have worked in the automotive business for many year[s]. I realize there are plenty of dealers around the US that have deceptive business practices, however this isn't the case for all dealers. I believe there can be laws that can be put in place to help prevent dealers from adding additional backend products without consent or knowledge.[397]

Others supported the proposed provision and urged the Commission to include additional measures, such as a thirty-day "cooling-off" period within which consumers would be able to receive a full refund for any add-ons. A number of commenters, including consumer advocacy organizations, contended that such an additional time frame to review, and potentially cancel, any add-ons would counter the high-pressure,

[394] Individual commenter, Doc. No. FTC-2022-0046-0794.
[395] Individual commenter, Doc. No. FTC-2022-0046-0671.
[396] Individual commenter, Doc. No. FTC-2022-0046-0073.
[397] Individual commenter, Doc. No. FTC-2022-0046-9917.

confusing environment of the dealership F&I office and undermine any efforts to misrepresent add-on charges and coverage. Such commenters also indicated that such a provision would allow consumers the opportunity to compare prices and providers, and ultimately help increase competition in the marketplace. A few individual commenters requested that the Commission provide a cooling-off period not only for add-ons, but for the full vehicle purchase, and a prohibition on charging non-refundable deposits.

The Commission agrees that a "cooling off" provision could offer consumers additional protection from unwanted add-ons; however, additional information would assist the Commission in evaluating the potential benefits of such a provision. Such information might include, for example, what length a cooling-off period would need to be in order to offer adequate protection to consumers and to competition, or how consumers would most effectively be made aware of such a cooling-off period in the course of the complicated, lengthy, and document-heavy vehicle sale or financing transaction. Such information would be particularly relevant given that, in the Commission's law enforcement experience, consumers have paid unauthorized charges on years-long contracts without learning of the charges.[398] Accordingly, the Commission will continue to monitor the market to determine whether, after adoption of this Rule, it appears that a cooling-off period or other measures would be warranted.

Other commenters, including consumer advocacy organizations, emphasized the importance of having disclosures and other documents available in the language used to negotiate the sale or lease. Here, the Commission notes that a dealer does not obtain the express, informed consent of the consumer if the consumer's assent to a charge is

[398] *See* discussion in SBP II.B.2.

ambiguous or based on a disclosure the consumer does not easily understand.[399] Thus, if a dealer uses one language during negotiations and a different language in its contracts, and the consumer does not understand and assent to the charges, the dealer is violating § 463.5(c). Furthermore, the Commission notes that the definition of "Express, Informed Consent" it is finalizing at § 463.2(g) requires, *inter alia*, a clear and conspicuous disclosure of what the charge is for and the amount of the charge, and the Commission's definition of "Clear(ly) and Conspicuous(ly)," at § 463.2(d)(5), requires disclosures to appear "in each language in which the representation that requires the disclosure appears."

Other commenters, including a consumer advocacy organization and a consumer protection agency, recommended the Commission prescribe additional requirements for obtaining express, informed consent for charges, such as boxes for signatures and date-and-time recordings, and a requirement that dealers comply with the E-Sign Act. Other commenters also discussed obtaining consent through electronic signatures. Commenters including consumer advocacy organizations, for instance, reported cases wherein documents that were signed and supposedly provided electronically to consumers, were never actually delivered to the consumer, or delivered days later. According to these commenters, some consumers would sign on a small signature pad where they could not see the terms of the document being signed. Other practitioner commenters reported that consumers' electronic signatures were applied to contracts with very different terms from what the consumers believed they were accepting. An individual commenter

[399] *See* § 463.2(g) (defining "Express, Informed Consent" to include an affirmative act communicating "unambiguous assent to be charged"); § 463.2(d) (defining "Clear(ly) and Conspicuous(ly)" to include a manner that is "easily understandable").

recommended that dealers be required to provide paper documents where requested and consumers be allowed to consent on paper documents only, noting that elderly consumers or those for whom English is a second language may have difficulty with electronic signatures. Another individual commenter expressed the view that anyone needing assistance understanding the sales price or disclosures should be provided independent legal counsel at the dealership's expense.

While the Commission agrees that additional measures to promote express, informed consent could reduce the incidence of unauthorized charges and aid with enforcement efforts, the Commission has determined not to include in this Final Rule provisions that would require new forms during the vehicle sale or financing transaction. This way, law-abiding dealers would not have to change their practices for obtaining express, informed consent. Thus, the Commission declines to add further requirements, including those involving signature boxes or date-and-time recordings. Regarding the E-Sign Act, nothing in the Rule modifies compliance obligations under this Act. Instead, the Final Rule requires that, regardless of whether any given signature may have been obtained through electronic or other means, the dealer must obtain the express, informed consent of the consumer to any item for which the dealer charges the consumer. Furthermore, the Commission notes that a dealer has not obtained express, informed consent if a dealer has consumers sign an electronic keypad without seeing and understanding the terms, or applies their electronic signatures on contracts with terms different from those to which the consumer agreed.[400] In such circumstances, the consumer has not demonstrated informed consent, or unambiguous assent to be charged,

[400] *See* § 463.2(g) (defining "Express, Informed Consent" to include requiring clear and conspicuous disclosures of what the charge is for and the amount of the charge).

including because the signatures are not in close proximity to clear and conspicuous disclosures regarding the charges.

Other commenters, including industry and dealership associations, claimed that the Commission did not provide enough information regarding what would constitute express, informed consent to charges, contending that additional detail was needed, or that the provision and associated definition of "Express, Informed Consent" were too vague. The Commission notes, however, that the phrase "Express, Informed Consent" is consistent with existing legal standards.[401] Commission enforcement actions over the years have challenged as deceptive or unfair the failure to get express, informed consent to charges, including in actions involving motor vehicle dealers and others:

- Rushing consumers through stacks of auto paperwork more than 60 pages deep and requiring over a dozen signatures, where the paperwork included charges for unwanted add-ons.[402]
- Double charging certain fees without consumers' knowledge or consent in highly technical documents presented at the close of a long financing process after an already lengthy process of selecting a vehicle and negotiating over its price.[403]
- Presenting consumers with preprinted sales and financing forms that included add-ons consumers had not requested, and rushing consumers through the closing process while directing them where to sign forms, including forms that were blank.[404]
- Charging consumers more for a product or service than they agreed to pay.[405]
- Charging consumers for more products than they requested.[406]

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[401] *See, e.g.*, *Fed. Trade Comm'n v. Amazon.com, Inc.*, 71 F. Supp. 3d 1158, 1163 (W.D. Wash. 2014).
[402] Complaint ¶¶ 24-25, 29-49, 76, *Fed. Trade Comm'n v. North Am. Auto. Servs., Inc.*, No. 1:22-cv-01690 (N.D. Ill. Mar. 31, 2022).
[403] Complaint ¶¶ 17-19, 44, *Fed. Trade Comm'n v. Liberty Chevrolet*, No. 1:20-cv-03945 (S.D.N.Y. May 21, 2020).
[404] Complaint ¶¶ 59-64, 91, *Fed. Trade Comm'n v. Universal City Nissan*, No. 2:16-cv-07329 (C.D. Cal. Sept. 29, 2016).
[405] *See, e.g.*, Complaint ¶¶ 29, 47, *Fed. Trade Comm'n v. Yellowstone Cap. LLC*, No. 1:20-cv-06023-LAK (S.D.N.Y. Aug. 3, 2020).
[406] *See, e.g.*, Complaint ¶¶ 11-14, 21, *Bionatrol Health, LLC*, No. C-4733 (F.T.C. Mar. 5, 2021).

- Cramming charges onto consumers' bills for services that the consumers did not request without the consumers' knowledge or consent.[407]

Courts have found the failure to obtain express, informed consent to be a violation of the FTC Act.[408] Other statutes and rules enforced by the Commission include express, informed consent requirements for consumer purchases,[409] and similar provisions have appeared in Commission orders resolving charges that motor vehicle dealers or other sellers have levied unauthorized charges on consumers.[410] In short, the prohibition in § 463.5(c) against charging consumers for products or services without their express, informed consent, and the corresponding definition of "Express, Informed Consent" in § 463.2(g) are consistent with existing law in articulating what motor vehicle dealers must do—and already should be doing.

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[407] *See, e.g.*, Complaint ¶¶ 8-9, 42, *Fed. Trade Comm'n v. T-Mobile USA, Inc.*, No. 2:14-cv-00967-JLR (W.D. Wash. July 1, 2014); Complaint ¶¶ 9, 49, *Fed. Trade Comm'n v. AT&T Mobility, LLC*, No. 1:14-cv-03227-HLM (N.D. Ga. Oct. 8, 2014).

[408] *See, e.g.*, *Fed. Trade Comm'n v. FleetCor Techs., Inc.*, 620 F. Supp. 3d 1268, 1333-38 (N.D. Ga. 2022); *Fed. Trade Comm'n v. Amazon.com, Inc.*, No. C14-1038-JCC, 2016 WL 10654030, at *8 (W.D. Wash. July 22, 2016); *Fed. Trade Comm'n v. Inc21.com Corp.*, 745 F. Supp. 2d 975, 1005 (N.D. Cal. 2010), *aff'd*, 475 F. App'x 106 (9th Cir. 2012).

[409] 15 U.S.C. 8402(a)(2), 8403(2) (Restore Online Shoppers' Confidence Act); 16 CFR 310.4(a)(7) (Telemarketing Sales Rule).

[410] The Commission has required express, informed consent provisions in orders against motor vehicle dealers and others. *See* Stipulated Order at Art. IV, *Fed. Trade Comm'n v. Passport Auto. Grp., Inc.*, No. 8:22-cv-02670-TDC (D. Md. Oct. 18, 2022); Stipulated Order at Art. II, *Fed. Trade Comm'n v. North Am. Auto. Servs., Inc*., No. 1:22-cv-01690 (N.D. Ill. Mar. 31, 2022) Stipulated Order at Art. II, *Fed. Trade Comm'n v. Liberty Chevrolet*, No. 1:20-cv-03945 (S.D.N.Y. May 22, 2020); Stipulated Order at Art. III, *Fed. Trade Comm'n v. Consumer Portfolio Servs*., No. 14-cv-00819 (C.D. Cal. June 11, 2014). Similarly, the Commission has required such provisions in orders in other contexts. *See, e.g.*, Stipulated Order at Art. III, *Fed. Trade Comm'n v. Yellowstone Cap. LLC*, No. 1:20-cv-06023-LAK (S.D.N.Y. May 4, 2021); Stipulated Order at Art. IV, *Fed. Trade Comm'n v. Prog. Leasing*, No. 1:20-cv-1668-JPB (N.D. Ga. Apr. 22, 2020); Decision and Order at Art. VI, *Bionatrol Health, LLC*, No. C-4733 (F.T.C. Mar. 5, 2021); Stipulated Order at Art. I.E, *Fed. Trade Comm'n v. BunZai Media Grp., Inc*., No. CV 15-4527-GW (PLAx) (C.D. Cal. June 27, 2018); Stipulated Order at Art. I, *Fed. Trade Comm'n v. T-Mobile USA, Inc*., No. 2:14-cv-00967-JLR (W.D. Wash. Dec. 19, 2014); Stipulated Order at Art. I, *Fed. Trade Comm'n v. AT&T Mobility, LLC*, No. 1:14-cv-03227-HLM (N.D. Ga. Oct. 8, 2014); Decision and Order at Art. I, *Google, Inc.*, No. C-4499 (F.T.C. Dec. 2, 2014); Consent Order, *Apple Inc.*, No. C-4444 (F.T.C. Mar. 27, 2014); *cf. Fed. Trade Comm'n v. Kennedy*, 574 F. Supp. 2d 714, 720-21 (S.D. Tex. 2008) (consumers charged without express, informed consent for web services could not reasonably avoid harm when told that websites were "free").

The Commission further notes that the proposed definition of "Express, Informed Consent" provided information regarding what was required by § 463.5(c): an affirmative act by the consumer 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 the following: (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. As is evident from this language, there must be an affirmative act that itself conveys the consumer's unambiguous assent to the specific charge: it must clearly and expressly communicate both that the consumer has been *informed* about the charge and *consents* to the charge. This act cannot be susceptible to alternative interpretations, *i.e.*, that the consumer meant to communicate something other than the consumer's authorization to be charged for the specific add-on or other item in question. For example, a consumer might ask, "how much would it cost to get the car with [a specific add-on]?" Such a statement does not convey unambiguous assent to be charged for the mentioned add-on; rather, it could merely convey curiosity, interest, or a desire to evaluate options. Similarly, if a consumer responds to a salesperson's description of an add-on by saying "OK," this response may merely confirm that the consumer had heard or understood information and does not indicate the consumer's unambiguous assent to purchase, let alone be charged for, such an item.

Relatedly, some commenters, including dealership associations, suggested that the addition, by the consumer, of a signature or set of initials, accompanied by a corresponding date can be partial evidence of an affirmative, or "Express," act. The

Commission notes that the extent to which these, or other, acts indicate "Express, Informed Consent" depends on circumstances and context. A consumer signing a lengthy document with pre-checked boxes does not, by itself, demonstrate express, informed consent. This is particularly so at the end of an hours-long transaction, at which point actions that, under other circumstances, may indicate assent are increasingly less likely to do so unambiguously, given that at the close of a transaction, consumers expect to be finalizing previously agreed-upon terms instead of discussing new products or services hours into the deal. For express, informed consent to be effective, the consumer must understand what a charge is for and the amount of the charge, including all costs and fees over the length of the payment period. A signed and dated document would not satisfy the requirement for express, informed consent, for example, if the consumer was directed to sign the final page of a contract or an electronic signature pad and the signed and dated document did not reflect the terms to which the consumer had agreed. In such cases, the signed and dated document does not represent the consumer's unambiguous assent to be charged, made after receiving, and in close proximity to, a clear and conspicuous disclosure of what the charges are for and the amount of the charges.

Some industry association commenters argued that the proposed definition was too prescriptive, and would require, for instance, video records to demonstrate compliance, or that the proposed language was overreaching, and requiring express, informed consent for every item on a contract would be complicated and time-consuming. The Commission notes again that, under current law, dealerships are already required to obtain consumers' express, informed consent to charges. If dealers are already obtaining such consent, as is required by law, they need not take additional steps, such as

by using a separate disclosure form or videos, or by spending additional time during the transaction to comply with this provision.

A dealership association commenter requested examples of recordkeeping and best practices evidencing oral disclosures that would satisfy the requirement to obtain express, informed consent. The express, informed consent requirement and definition require the disclosure to be made in *writing* in addition to orally for in-person transactions. Furthermore, under other provisions of the Rule, such as the definition of "Clear(ly) and Conspicuous(ly)" at § 463.2(d)(7), dealers are prohibited from contradicting information that is required to be disclosed; thus, for example, dealers' oral representations must be consistent with the written disclosure required for obtaining express, informed consent. Best practices for satisfying the requirement to obtain express, informed consent include presenting key information and finalizing actual terms early in the transaction—for example, by including full cost information, such as estimated taxes, costs of any selections made by the consumer, and any other components of cost, on dealer websites— and maintaining records that this was done. The Commission notes that, as a transaction progresses, consumers expect to be finalizing previously agreed-upon terms instead of discussing new charges and new products or services. In lieu of finalizing additional formal mandates in the Rule regarding recordkeeping and best practices evidencing express, informed consent, the Commission recognizes that industry members and other stakeholders will have significant room to develop self-regulatory programs and guidance tailoring these and other topics to the specifics of their business operations.

Some dealership association commenters expressed concern that such a provision would be inconsistent with State laws and would complicate the car buying experience. While the Commission is not aware of any laws that allow dealers to charge consumers without their express, informed consent, and thus is not aware of any inconsistences with this provision, § 463.9 of the Final Rule specifies what dealers must do in the case of actual conflicts with State law. State laws may provide more or less specific requirements—including requirements that provide greater protection—as long as they do not conflict with the Final Rule, as set forth in § 463.9. The Commission also notes that to the extent there is overlap with existing law, there is no evidence that duplicative prohibitions against deceptive and unfair conduct, including prohibitions against charging consumers without express, informed consent, have harmed consumers or competition.

Commenters, including an industry association, inquired whether the term "item," as used in this proposed provision, differed from the term "Add-on Product or Service" defined in § 463.2 of the Commission's proposal. The industry association also argued that requiring express, informed consent is beyond what is required under the Truth in Lending Act. The Commission responds as follows: Consistent with its plain meaning, the term "item" is broader than, and thereby encompasses, the term "Add-on Product(s) or Service(s)," which is limited by its definition in § 463.2 of the Final Rule.[411] As proposed, § 463.5 addressed "Dealer Charges for Add-ons and *Other Items*."[412] It did so in recognition of the fact that add-ons are one type of "item," but that "*Other Items*" for which a dealer might charge exist as well. Thus, as proposed, § 463.5 applied to charges

[411] *See* NPRM at 42046. The term "item" includes "a distinct part in an enumeration, account, or series" as well as "a separate piece of news or information." *See Item* (defs. 1, 3), Merriam-Webster.com Dictionary, https://www.merriam-webster.com/dictionary/item (last visited Sept. 14, 2023).
[412] *See* NPRM at 42046 (emphasis added).

generally, whether such charges were for an add-on or for another item. As previously discussed, charging consumers without their express, informed consent to the charge has long been an unfair or deceptive practice under the FTC Act. This has been the case regardless of what the charge is for. Accordingly, dealers already should be obtaining consumers' express, informed consent for charges, whether it is for an Add-on or any other item, regardless of what may be required under other laws.

Commenters, including this same industry association commenter, also questioned how a dealership would calculate "the amount of the charge . . . with and without the product or service" as would be required under proposed § 463.2(g)(2), as well as how this proposed provision would work in a non-financed transaction.[413] Conversely, an individual commenter stated that current F&I practices already routinely disclose the proposed charges with and without the product or service. The Commission notes that its proposed definition of "Express, Informed Consent" plainly required disclosure of the "amount of the charge, including, if the product 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."[414] The amount the dealer will charge the consumer over the period of repayment with the product or service is the total charge for that product or service. In the event the charge is for an optional product or service, the amount the dealer will charge the consumer without the product or service is zero; in the event the charge is for a non-optional item, the dealer's disclosure must clearly indicate as such. Regarding non-financed transactions, as with a financed transaction, the amount

[413] This commenter also contended that this provision would result in many disclosures when combined with proposed § 463.5(b). Comment of Nat'l Auto. Dealers Ass'n, Doc. No. FTC-2022-0046-8368 at 98-99. As discussed previously, the Commission declines to finalize proposed § 463.5(b).
[414] *See* NPRM at 42045.

the dealer will charge the consumer over the period of repayment with the product or service is the total charge for that product or service. If the period of repayment is such that full payment is due upon receipt of the vehicle, the amount required to be disclosed is the total charge for that product or service to be paid upon receipt of the vehicle. The amount the dealer will charge the consumer without the product or service, if it is optional, is zero; in the event the charge is for a non-optional item, the dealer's disclosure must clearly indicate such. Sharing this basic information with consumers—how much they will pay for the item and how much they will pay without it—addresses practices, such as hiding add-on charges, misrepresenting whether such charges are required in connection with the vehicle sale or financing transaction, or misrepresenting how such charges influence the total of payments for the transaction.

An industry association comment stated that, were the Commission's proposal to become final, the Commission would be able to obtain monetary relief from dealers for harmed consumers, and argued that Holder Rule protections for such consumers thus would be unnecessary.[415] Accordingly, it urged the Commission to modify its proposal to include a safe harbor for contract assignees, which it argued would be incapable of detecting deficiencies in sale or lease transactions, such as dealer misrepresentations or a lack of consumer consent, unless those deficiencies were apparent from the face of the contract. Here, the Commission emphasizes that no provision of the Final Rule changes the status quo regarding the responsibilities of assignees or other subsequent holders of motor vehicle financing under the Holder Rule. The Commission did not include, when enacting the Holder Rule, a safe harbor from liability for claims or defenses based on

[415] *See* Holder Rule, 16 CFR 433.2.

their capability of detection by such assignees or other subsequent holders, and the Commission does not believe on the basis of comments received in the course of this rulemaking that such a change would be warranted as a consequence of finalizing this Rule. The Holder Rule provides important protections for harmed consumers, even when there is law that allows the Commission or other law enforcers to obtain remedies for harmed consumers, including where the consumers are seeking recourse from, or defending themselves against, parties that have not been the subject of law enforcement actions.[416] Furthermore, while the Commission understands that dealers are often in the best position to ensure they have, in the first instance, obtained a consumer's express, informed consent for charges, there are steps an assignee or other subsequent holder of the consumer credit contract, such as a third-party financing entity, can take to address concerns about contracts obtained without express, informed consent. For example, if a financing entity receives complaints from consumers or others that specific charges were obtained without authorization or sees that charges for a particular item are occurring substantially more frequently at a given dealership than at others, the financing company can take steps to make sure the dealer is obtaining express, informed consent. Further, if a financing entity is concerned that a dealership may be acting in violation of the Final Rule, it may arrange its business relationships accordingly, including by altering or withdrawing its business from the dealership.[417]

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[416] *See* Holder Rule, 16 CFR 433.2; *see also* Fed. Trade Comm'n, Advisory Opinion Regarding F.T.C. Trade Regulation Rule Concerning Preservation of Consumers' Claims and Defenses (May 3, 2012), https://www.ftc.gov/system/files/documents/advisory_opinions/16-c.f.r.part-433-federal-trade-commission-trade-regulation-rule-concerning-preservation-consumers-claims/120510advisoryopinionholderrule.pdf (last visited Dec. 5, 2023).

[417] *See* Complaint ¶¶ 29-32, *Fed. Trade Comm'n v. Tate's Auto Ctr. of Winslow, Inc.*, No. 3:18-cv-08176-DJH (D. Ariz. July 31, 2018) (alleging a financing entity ceased business with Tate's Auto Center after concerns about loan falsification and substantial losses).

Another industry association commenter asked for clarification regarding the extent to which particular rules are necessary to obtain customer authorization for charges, thus reflecting what is already necessary under State or Federal law, as opposed to preventative measures that the Commission otherwise deems necessary. The Commission notes that this provision is consistent with the requirements of the FTC Act, which already prohibits charging consumers without express, informed consent, and is needed to address unfair and deceptive conduct. As the Commission set forth in its NPRM, the length and complexity of motor vehicle transactions has created an environment rife with deceptive and unfair conduct. Consumer complaints and the Commission's extensive law enforcement experience, among other sources, indicate that some dealers have added thousands of dollars in unauthorized charges to motor vehicle transactions, including for add-ons consumers had already rejected.[418] Such issues are exacerbated when, for example, preprinted dealer contracts automatically include charges for optional add-ons that the consumer has not selected; when dealers rush consumers through stacks of paperwork with buried charges after a lengthy process; when dealers misinform consumers that the documents they are signing represent agreed-upon terms; or when dealers ask consumers to sign blank documents.

Charging consumers without their express, informed consent causes substantial injury to consumers in the amount of the unauthorized charge. This injury is not reasonably avoidable when dealers do not clearly and conspicuously disclose to the consumer what the charge is for and the amount of the charge, since this information is within the unilateral control of the dealer. There are no countervailing benefits to

[418] *See* SBP II.B.2.

consumers or to competition that outweigh this injury. To the contrary, if all dealers obtained express, informed consent to charges, they would not lose business to dealers who do not do so.

Charging for an item without obtaining the consumer's express, informed consent is also a deceptive practice under Section 5 of the FTC Act.[419] When a dealer presents a consumer with whom the dealer has negotiated a finalized sale or financing contract, the dealer is representing that the contract includes only charges that were negotiated and to which the consumer agreed. If the dealer failed to obtain the consumer's express, informed consent, however, such a representation is false or misleading. It is also material: if consumers knew that they had not, in fact, authorized a charge that the dealer nonetheless included in their sales or financing contract, this information likely would have affected the consumers' willingness to continue to engage with the dealership, as well as consumers' willingness to select and pay for any such item. The express, informed consent requirement also serves to prevent the misrepresentations prohibited by § 463.3 of the Final Rule—including misrepresentations regarding material information about the costs or terms of purchasing, financing, or leasing a vehicle, and about any costs, limitation, benefit, or other aspect of an add-on.[420] The requirement also serves to prevent violations of the disclosure requirements in § 463.4 and the prohibition against charging for non-beneficial add-ons in § 463.5(a). By operation of the definition of "Express, Informed Consent" at § 463.2(g), this requirement reduces the likelihood that

[419] *See, e.g.*, *Fed. Trade Comm'n v. FleetCor Techs., Inc.*, 620 F. Supp. 3d 1268, 1334-39 (N.D. Ga. Aug. 9, 2022); *Fed. Trade Comm'n v. Inc21.com Corp.*, 745 F. Supp. 2d 975, 1001-03 (N.D. Cal. Sept. 21, 2010).
[420] *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).

dealers will fail to disclose what a given charge is for and the amount of the charge including all fees and costs to be charged to the consumer over the period of repayment with and without the charged item, thereby making the disclosures of information required by § 463.4 more likely. The same is true regarding the requirements of § 463.5(a): the requirement that dealers obtain informed and unambiguous assent to be charged for each product or service makes it less likely that dealers will charge consumers for items from which they would not benefit; consumers typically do not provide informed, unambiguous assent to be charged for additional products from which they could not benefit unless they are led to believe, directly or by omission, that these products would be beneficial.

Thus, the Commission has determined to finalize proposed § 463.5(c), prohibiting dealers from charging a consumer for any item unless the dealer obtains the express, informed consent of the consumer for the charge, with the addition of language clarifying that the requirements in § 463.5(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), 463.4, and 463.5(a)." In addition, the Commission has determined to finalize its definition of "Express, Informed Consent," now at § 463.2(g), substantively as proposed.

F. § 463.6: Recordkeeping

Proposed § 463.6 required motor vehicle dealers to create and retain, for a period of twenty-four months from the date the record is created, all records necessary to demonstrate compliance with the Final Rule, including those in five enumerated paragraphs. This proposed section further provided that dealers may retain such records in any legible form, and in the same manner, format, or place as they may already keep

such records in the ordinary course of business, and that failure to keep all required records required will be a violation of the Rule. As examined in additional detail in the following analysis, several commenters supported the proposal; several urged the Commission to adopt broader recordkeeping requirements; and several other commenters argued that the proposed requirements were too broad. After careful consideration, the Commission has determined to adopt these recordkeeping requirements largely as proposed, with two conforming modifications to remove references to proposed provisions not adopted in the Final Rule; one typographical modification to include a serial comma for consistency; and minor textual changes to ensure consistency with the defined terms at § 463.2(e) and (f) by replacing "Motor Vehicle Dealer" with "Covered Motor Vehicle Dealer" or "Dealer," replacing "Motor Vehicle" with "Vehicle," and capitalizing "vehicle." In the following paragraphs, the Commission discusses each proposed recordkeeping requirement, the comments the Commission received on each such requirement as well as the Commission's responses to such comments, and the provisions the Commission is finalizing.

Section 463.6(a) of the proposed rule required motor vehicle dealers to create and retain, for a period of twenty-four months from the date the record is created, all records necessary to demonstrate compliance with the Final Rule, including (1) copies of materially different advertisements, sales scripts, training materials, and marketing materials regarding the price, financing, or lease of a motor vehicle that the dealer disseminated during the relevant time period; (2) copies of all materially different add-on lists and all documents describing such products or services that are offered to consumers; (3) copies of all purchase orders; financing and lease documents with the

dealer signed by the consumer, whether or not final approval is received for a financing or lease transaction; and all written communications relating to sales, financing, or leasing between the dealer and any consumer who signs a purchase order or financing or lease contract with the dealer; (4) records demonstrating that add-ons in consumers' contracts meet the requirements of § 463.5, including copies of all service contracts, GAP agreements, and calculations of loan-to-value ratios in contracts including GAP agreements; and (5) copies of all written consumer complaints relating to sales, financing, or leasing, inquiries related to add-ons, and inquiries and responses about vehicles referenced in § 463.4.

Proposed § 463.6(b) provided that a motor vehicle dealer may keep the required records "in any legible form, and in the same manner, format, or place as they may already keep such records in the ordinary course of business." This proposed paragraph also specified that failure to keep all records required under paragraph (a) of this section would be a violation of the Final Rule.

Many commenters, including State regulators, legal aid groups, consumer advocacy organizations, and individual commenters, endorsed the Commission's proposed rule generally, without criticism of its proposed recordkeeping requirements. In addition, one such association commenter expressly stated that it supported each of the proposed recordkeeping provisions, explaining that these proposed provisions were needed to address "bait and switch" tactics, provide evidence of whether required disclosures are made, and identify consumers harmed by illegal practices.[421] Here, the

[421] Comment of Nat'l Consumer L. Ctr. et al., Doc. No. FTC-2022-0046-7607 at 48-49; *see also* Comment of N.Y.C. Dep't of Consumer and Worker Prot., Doc. No. FTC-2022-0046-7564 at 6 (noting retention requirements are vital to investigations, particularly with respect to mandatory disclosures).

Commission notes that record retention requirements are necessary to preserve written materials that reflect the transactions between the dealer and purchasing consumers, and to assist the Commission to enforce its Rule by enabling it to ascertain whether dealers are complying with its requirements; to identify persons who are involved in any challenged practices; and to identify consumers who may have been injured. Such requirements are particularly important in the case of complicated, lengthy, and document-heavy vehicle sale or financing transactions, in which law violations may be more difficult for consumers and others to detect. Indeed, the Commission routinely includes recordkeeping requirements in its rules.[422]

Several commenters, including consumer advocacy organizations, consumer protection agencies, a group of State attorneys general, and individual commenters, urged the Commission to consider expanding the proposed twenty-four-month record retention period, noting that the contract period for most retail installment contracts is much longer than twenty-four months, and that State limitations periods for claims relating to the subject matter of the Commission's proposed rule often extend well beyond this proposed timeframe. Numerous such commenters, for instance, recommended a record retention period of the longer of seven years or the length of the consumer's financing contract.

The Commission understands that there would be benefits to a longer period, especially given that vehicle financing repayment terms are often far longer than twenty-four months, and that many dealers likely already maintain, in the ordinary course of business, the types of records set forth in proposed § 463.6. The Commission, however, is also mindful that other commenters raised concerns about the costs associated with

[422] *See, e.g.*, Telemarketing Sales Rule, 16 CFR 310.5; Business Opportunity Rule, 16 CFR 437.7.

record retention, including costs that would increase with any extension of the retention period. Rather than limiting the types of records to be maintained, and thus hampering the Commission's ability to ensure compliance with the Final Rule, the Commission has determined to adopt a retention period that is shorter than the time period of many motor vehicle financing contracts, in order to minimize burdens. In the event the Commission subsequently determines that a twenty-four-month retention period is insufficient to ensure compliance with this Rule, the Commission may consider other measures in the future.

In addition, a number of commenters, including consumer advocacy organizations, recommended additional provisions, including an explicit requirement to retain language-translated versions of required records, and a requirement to make retained records available to consumers upon request. Regarding language-translated versions of required records, § 463.6(a)(3), (a)(4), and (a)(5) require dealers to retain copies of "all" listed records, while § 463.6(a)(1) mandates that dealers retain "Materially different" copies of records. Thus, for the records listed in § 463.6(a)(3), (a)(4), and (a)(5), any translations are required to be retained; in the case of § 463.4(a)(1), the Rule requires materially different translations to be maintained.[423] The Commission therefore has determined not to add to the recordkeeping section of the Rule a standalone requirement to retain translated versions. The Commission will continue to monitor the marketplace to determine whether additional action or protections are warranted.

The Commission also declines to include in this Final Rule an additional requirement that dealers provide retained records to consumers upon request. Such a

[423] *See* § 463.2(j).

requirement may be beneficial; however, it is not clear to what extent dealers currently refuse to provide consumers with such records, and there is insufficient information in the rulemaking record to assess the impact of—or need for—such a modification of the existing requirement to retain and preserve materials in the Rule. The Commission will continue to monitor the motor vehicle marketplace, including issues relating to information access, to determine whether additional action or protections are warranted.

Other commenters—particularly auto industry participants—objected to the proposed recordkeeping requirements.[424] Several such commenters contended that the proposed requirements were new obligations that went beyond specific State recordkeeping requirements. Some dealership associations argued that existing State recordkeeping requirements are sufficient and that a Commission rule was unnecessary. One such commenter argued that the existence of overlapping, but different, State and Federal standards may make compliance difficult for motor vehicle dealers.

In response, the Commission notes that the recordkeeping requirement is necessary to ensure motor vehicle dealer compliance with the Final Rule, and therefore may have different requirements than State standards. To provide dealers with flexibility and to minimize burden, however, the proposed rule permitted dealers to retain records "in any legible form," including "the same manner, format, or place" in which records are

[424] One industry commentor questioned the utility of records in FTC actions. This commenter also stated that the FTC is not a supervisory agency and thus should not be seeking to create a records inspection scheme. As noted previously, recordkeeping requirements are necessary here to prevent unfair and deceptive practices by mandating preservation of written materials that reflect dealer transactions and to enable effective enforcement of the Rule. The Commission has the authority to prescribe rules for the purpose of preventing unfair or deceptive acts or practices. *See* 15 U.S.C. 57a(a)(1)(B). The Commission routinely includes recordkeeping requirements in rules, *see, e.g.*, Telemarketing Sales Rule, 16 CFR 310.5; Business Opportunity Rule, 16 CFR 437.7, and courts have ordered companies to maintain records in FTC orders, *see, e.g.*, Final Judgment at 20-21, *Fed. Trade Comm'n v. Elegant Sols., Inc.*, No. 8:19-cv-01333-JVS-KES (C.D. Cal., July 17, 2020); Order for Permanent Injunction and Monetary Judgment at 27-28, *Fed. Trade Comm'n. v. Consumer Defense, LLC*, No. 2:18-cv-00030-JCM-BNW (D. Nev. Dec. 5, 2019).

kept in the ordinary course of business. To the extent dealers have fashioned their ordinary record retention practices around State recordkeeping standards, the proposed rule thus allowed for record retention in the form required by State recordkeeping standards. Additionally, as discussed in the following paragraphs, the Commission is not finalizing recordkeeping requirements that dealers maintain Add-on Lists and Cash Price without Optional Add-ons disclosures and declinations, further reducing burdens.

One industry association commenter suggested that this requirement would increase risks of identity theft and raise privacy concerns. The Commission notes that many dealers already have obligations to retain customer records under State law.[425] Dealers are required to have systems in place to protect this information, given that the failure to adequately protect such information violates existing law, including Section 5 of the FTC Act and the Commission's Standards for Safeguarding Customer Information, also known as the Safeguards Rule.[426] Thus, to the extent the Final Rule requires dealers to collect personal information beyond that which they are already collecting, they should already have systems in place to protect such information.

Some commenters raised concerns about the requirement in proposed § 463.6(a)(1) to preserve, *inter alia*, materially different advertisements, sales scripts, and marketing materials. One such dealership association commenter argued that dealers should not be required to retain sales scripts, training materials, and marketing materials, while another dealership association commenter argued that dealers should not be

[425] *See, e.g.*, Va. Code sec. 46.2-1529 (requiring retention for five years of "all dealer records" regarding, among other things, vehicle purchases, sales, trades, and transfers of ownership).
[426] 15 U.S.C. 45; 16 CFR 314; *see also* Decision and Order, *LightYear Dealer Techs., LLC*, No. C-4687 (F.T.C. Sept. 3, 2019) (consent order); FTC Business Guidance, "FTC Safeguards Rule: What Your Business Needs to Know," https://www.ftc.gov/business-guidance/resources/ftc-safeguards-rule-what-your-business-needs-know (last visited Dec. 5, 2023).

required to maintain advertisements, positing that these materials are publicly available and could be requested from advertisers as concerns arise with respect to particular ads. Commenters including two dealership organizations argued that digital advertisements would be difficult to retain, with one such commenter urging the Commission to adopt an approach that would permit dealers to retain a representative example of a vehicle advertisement and the underlying data used to populate vehicle ads. The other such commenter suggested that the proposed recordkeeping requirement could be unduly burdensome because "all materials" related to its online inventory "could be deemed some version of materially different advertisements and marketing materials regarding price or financing of a motor vehicle." Another dealership organization commenter raised a similar concern about website listings and questioned whether the term "advertisement" includes television ads and email campaigns.

After considering these comments, the Commission has determined that the proposed recordkeeping requirements in § 463.6(a)(1) strike an appropriate balance by requiring the retention of materials needed to enable effective enforcement while only requiring such records to be retained for twenty-four months and in any legible form. Advertisements and marketing materials regarding the price, financing, or lease of a motor vehicle are critical to determining compliance with virtually every provision in the Final Rule, as they are often consumers' first contact in the vehicle-buying or -leasing process, and often contain key representations about pricing, payments, and other terms. Scripts and training materials are important evidence of a dealer's compliance program regarding the Final Rule's requirements, including of the information and instructions that dealership staff are given with respect to the areas that are addressed by the Final

Rule. Furthermore, regarding the contention that advertisements are available publicly or could be requested separately, a core purpose of the recordkeeping requirement is to ensure that disseminated representations are preserved for a sufficient period of time to allow for compliance concerns to be addressed. A compliance regime that, contrary to the Commission's proposal, allowed the destruction of advertisements after they have been publicly presented, or that requires the Commission to try to obtain materials from advertisers or third parties, would not serve this purpose.

With respect to the scope of advertisements that must be retained, the recordkeeping requirement does not differ with respect to the form of the advertisement, since the same enforcement concerns are raised regardless of whether an ad is presented in digital, hardcopy, email, audio, televised, or other format. The recordkeeping requirement does not require all advertisements to be retained, however, as § 463.6(a)(1) specifically includes the proviso that "a typical example of a credit or lease advertisement may be retained for advertisements that include different Vehicles, or different amounts for the same credit or lease terms, where the advertisements are otherwise not Materially different." Regarding the commenter's proposal to allow dealers to retain a "representative" example of an advertisement with digital data that can recreate different versions of the advertisement, this provision, as proposed, permitted dealers to preserve typical examples of advertisements in this manner so long as such records are already kept in in the ordinary course of business, capture all differences that would be material to consumers, and accurately show how the offers have been presented to consumers. Materially different website listings, television advertisements, and email campaigns must be preserved, consistent with the plain meaning of the terms used in the section.

With respect to proposed § 463.6(a)(2)'s requirement to maintain copies of all materially different add-on lists, an industry association commenter contended that retaining materially different add-on lists would be difficult, given the scope of the term "Add-on" and the consequent size of the list as well as its dynamic nature. One dealership association commenter argued that the proposed requirement to retain add-on lists was unnecessary, contending that concerns could be addressed as they arise, and requesting to replace this proposed requirement with a requirement to retain a master copy of each insurance product, service contract, or other add-on in the dealer's general business file. After carefully considering the comments, the Commission has determined not to finalize the proposed requirement at § 463.4(b) to disclose an add-on list, and consequently will not be finalizing the proposed requirement at § 463.6(a)(2) that dealers retain materially different add-on lists.

Several commenters, including industry associations, argued that certain of the proposed requirements to preserve written material, including written communications under proposed § 463.6(a)(3) and written consumer complaints, and inquiries and responses about vehicles referenced in § 463.4, under proposed § 463.6(a)(5), would be unduly burdensome. Generally, these commenters contended that the various ways consumers may communicate with dealers—including chat features on a dealer's website, e-mails and text messages with salespersons, and social media posts—would require the development of new and onerous preservation systems. A dealership organization commenter raised concerns about retaining text messages and emails, contending that salespeople may use their personal phones and email addresses, even if the dealership has policies against such use. One industry association commenter argued

that third parties might have records related to add-ons and that this provision should only apply to "complaints" relating to add-ons instead of "inquiries" relating to add-ons. One dealership association commenter argued that dealers should not be required to retain consumer complaints, contending it should be the businesses' decision whether to maintain such materials, and also arguing that the Rule should not require, under proposed § 463.6(a)(4), the preservation of materials such as pricing options presented to consumers, contending that such materials should be limited to the two parties to the agreement.

After considering these comments, the Commission has determined to finalize requirements to retain written materials under § 463.6(a)(3), (4), and (5), with a limiting modification to § 463.6(a)(4). These requirements are necessary to address unfair and deceptive practices by mandating that dealers preserve written materials that reflect the transactions between the dealer and purchasing consumers, and to assist the Commission in its enforcement of the Rule.[427] Such materials are particularly important given that the vast majority of consumers do not file a complaint, and with hidden charges, many consumers never know about the illegal conduct in the first place.[428] For instance, as explained in SBP II.B, a survey of one dealership group's customers showed that 83% of the respondents were subject to the dealer's unlawful practices related to add-ons. This equals 16,848 consumers—far more than the 391 complaints received against the dealer over the time period covered by the survey.

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[427] As noted previously, a dealership association commenter argued that dealers should not be required to preserve complaints and certain add-on materials, contending that it should be a business decision whether to retain such records. The Commission declines to substantively modify these requirements from the Commission's original proposal, given the importance of these materials in ensuring compliance with the other requirements of the Rule.

[428] *See* SBP II.B (discussing how complaints represent the tip of the iceberg in terms of actual consumer harm).

To minimize burden, as previously noted, the retention requirements are for a period of twenty-four months. Further, as stated previously, § 463.6(b) permits dealers to retain records "in any legible form," which could, for example, include using the backup and export features that already exist in many social media services, e-mail platforms, chat platforms, and text systems, instead of creating entirely new systems. Regarding dealers that use third parties to administer add-ons, commenters did not explain why they cannot access records related to add-ons from these parties.[429] Further, altering the language in the provision to apply to "complaints" rather than "inquiries" related to add-ons could invite arguments that consumer statements, such as, "Why was I charged for this add-on that I did not know about?" are not "complaints," but simply "inquiries." With respect to the use of salespeople's personal devices to conduct motor vehicle dealer activities, including the sale, financing, or leasing of vehicles, as with any business, dealers should ensure that their employees are communicating with consumers through appropriate channels that can be monitored and controlled by the dealership.

Some commenters, including an industry association and a dealership organization, also raised concerns about how to determine what would constitute "written consumer complaints" under proposed § 463.6(a)(5). For purposes of the Rule, the Commission refers commenters to the plain meaning of the terms used in the phrase, which terms are commonly used and understood.[430]

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[429] This is consistent with the Commission's prior enforcement order practice. *See, e.g.*, Stipulated Order at 25, *Fed. Trade Comm'n v. N. Am. Auto. Servs., Inc.*, No. 1:22-cv-0169 (N.D. Ill. Mar. 31, 2022) (requiring retention of "records of all consumer complaints and refund requests, whether received directly or indirectly, such as through a third party, and any response").

[430] The term "written" means "made or done in writing." *See Written*, Merriam-Webster.com Dictionary, https://www.merriam-webster.com/dictionary/written (last visited Dec. 5, 2023). The term "consumer" includes "one that utilizes economic goods." *See Consumer* (def. a), Merriam-Webster.com Dictionary, https://www.merriam-webster.com/dictionary/consumer (last visited Dec. 5, 2023). The term "complaint"

Two industry association commenters argued that the proposed requirement to retain written communications would be particularly burdensome for recreational vehicle dealers, contending that that this was particularly so given that many RV dealers are small businesses. In response, the Commission notes that, as explained in the paragraph-by-paragraph analysis of § 463.2(e) & (f) in SBP III.B.2(e) & (f), it has determined not to finalize the Rule with respect to dealers predominantly engaged in the sale, leasing, or servicing of RVs, but it will continue to monitor the marketplace to determine whether modifications or revisions may be warranted in the future.

Finally, one industry association commenter argued that the proposed recordkeeping requirements and costs were unwarranted given that the Commission has brought an average of fewer than four enforcement actions a year against motor vehicle dealers in the past decade. In response, the Commission notes that its experience indicates that the number of enforcement actions is not remotely reflective of the total violations of law in the auto marketplace. To uncover misconduct and bring actions, law enforcement agencies and officials often rely on complaints from affected parties. As previously discussed, however, consumer complaints typically represent just the "tip of the iceberg" in terms of actual violations, and the vast majority of consumers who are subjected to unlawful practices in this area may not realize they are being victimized.[431] Further, the Commission has limited law enforcement resources and jurisdiction over a broad range of commerce.[432] The number of actions it brings relating to motor vehicle

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includes an "expression of grief, pain, or dissatisfaction," "something that is the cause or subject of protest or outcry," and "a formal allegation against a party." *See Complaint* (defs. 1, 2a, 3), Merriam-Webster.com Dictionary, https://www.merriam-webster.com/dictionary/complaint (last visited Dec. 5, 2023).

[431] *See* SBP II.B.

[432] *See* 15 U.S.C. 45(a).

dealers—as with actions in any area—is necessarily limited by these resource constraints, even when there are ongoing, chronic problems that cause substantial consumer harm. Despite these constraints, the Commission and its law enforcement partners have taken significant action aimed at addressing unfair and deceptive practices in the motor vehicle marketplace, as explained in SBP II.C. Given that problems with bait-and-switch advertising, add-ons, and other aspects of vehicle-buying and -leasing have continued to be a source of consumer harm despite this action, additional measures are warranted. And the Commission has taken steps to minimize burden, including by declining to finalize the add-on list disclosure requirements in proposed § 463.4(b), as well as the itemized disclosures required in proposed § 463.5(b) and their corresponding proposed recordkeeping requirements. Moreover, the recordkeeping provisions permit dealers to retain records in any legible form, providing a flexible standard that permits the use of ordinary and standard forms of data and document retention.

The Commission adopts in the Final Rule recordkeeping requirements largely as they were set forth in the proposed rule, with two substantive modifications. After careful consideration, the Commission is removing the requirements to retain copies of add-on lists required by proposed § 463.6(a)(2) and records showing compliance with the cash price without optional add-ons disclosures and declinations required by proposed § 463.6(a)(4). These changes will reduce record creation and retention burdens for dealers. As previously described, the Final Rule also contains one typographical modification of adding a serial comma and conforming edits for consistency with the defined terms in § 463.2(e) and (f).

The Commission adopts these recordkeeping requirements to promote effective and efficient enforcement of the Rule, thereby deterring and preventing deception and unfairness. As discussed throughout this SBP, the rulemaking record, including the Commission's law enforcement experience, indicates that there are chronic problems confronting consumers in the motor vehicle sales, financing, and leasing process, which include advertising misrepresentations and unlawful practices related to add-ons and hidden charges.[433] The recordkeeping requirements in the Final Rule will assist the Commission in investigating and prosecuting law violations and help the Commission identify injured consumers for paying consumer redress. The recordkeeping requirements are flexible, allowing dealers to retain materials in any legible form, and are limited to a period of twenty-four months from the date the record is created. The recordkeeping requirements are consistent with, and similar to, the recordkeeping requirements in other Commission rules, as tailored to individual industries and markets.[434]

G. § 463.7: Waiver Not Permitted

Proposed § 463.7 prohibited waiver of the requirements of the Final Rule by providing that it constituted a violation of the Rule "for any person to obtain, or attempt to obtain, a waiver from any consumer of any protection provided by or any right of the consumer under" the Rule. Comments that addressed this proposed provision generally either supported it or expressed no opinion on it. Comments in support noted that the provision would help provide consistency in the protection it would provide to consumers

[433] Some enforcement actions have specifically alleged that a defendant failed to maintain documents required under a prior order with the FTC. Complaint ¶¶ 42-45, *Fed. Trade Comm'n v. Norm Reeves, Inc.*, No. 8:17-cv-01942 (C.D. Cal. Nov. 3, 2017) (alleging dealer failed to keep records of previous advertisements needed to demonstrate compliance with prior order); Complaint ¶¶ 32-35, *Fed. Trade Comm'n v. New World Auto Imports, Inc.*, No. 3:16-cv-22401 at (N.D. Tex. Aug. 18, 2016) (same).
[434] *See, e.g.*, 16 CFR 310.5 (Telemarketing Sales Rule); 16 CFR 437.7 (Business Opportunity Rule); 16 CFR 453.6 (Funeral Industry Practices Rule); 16 CFR 301.41 (Fur Products Labeling Rule).

and emphasized that it would prohibit unscrupulous dealers from causing consumers to sign away their rights. This proposed provision was modeled on a similar provision in the Mortgage Assistance Relief Services ("MARS") Rule, which was originally promulgated by the Commission and subsequently republished by the CFPB.[435] Moreover, at least one State has a similar waiver provision in its rule covering motor vehicle dealer practices.[436] The Commission concludes that this provision is necessary to prevent circumvention of the Rule, and, after review of the comments, adopts this prohibition as it was originally proposed.

H. § 463.8: Severability

Proposed § 463.8 provided that the provisions of the Final Rule "are separate and severable from one another. If any provision is stayed or determined to be invalid, it is the Commission's intention that the remaining provisions will continue in effect." This proposed provision was modeled on similar provisions in other rules, including the Commission's Telemarketing Sales Rule and the MARS Rule.[437] A number of commenters, including dealership associations, raised general concerns that the proposed provisions may be too integrated with each other for severability to be possible. Such commenters, however, did not provide examples of any such instances wherein they believed certain provisions could not remain in effect if other provisions were stayed or determined to be invalid. Upon consideration of the comments, the Commission concludes that severability is possible in the event any provision is stayed or determined

[435] *See* MARS Rule (Regulation O), 12 CFR 1015.8, previously published by the Commission at 16 CFR 322.1.
[436] *See, e.g.*, Wis. Admin. Code Trans. 139.09 (similar waiver prohibition clause in Wisconsin's Motor Vehicle Trade Practices rule).
[437] *See* MARS Rule, 16 CFR 322.8 (Commission Rule), 12 CFR 1015.11 (CFPB Rule); Telemarketing Sales Rule, 16 CFR 310.9.

to be invalid. The Rule the Commission is finalizing includes prohibitions against misrepresentations regarding material information (§ 463.3), required disclosures (§ 463.4), and prohibitions against charging for add-ons that provide no benefit or any item without express, informed consent (§ 463.5)—each of which dealers are capable of abiding by independently, as well as by the provisions that independently support their operation, including Authority (§ 463.1), Definitions (§ 463.2), Recordkeeping (§ 463.6), Waiver not permitted (§ 463.7), and Relation to State laws (§ 463.9). Thus, the Commission has determined to adopt this provision in the Final Rule as it was originally proposed.

I. § 463.9: Relation to State Laws

Proposed § 463.9 provided that the Rule does not supersede, alter, or affect "any other State statute, regulation, order, or interpretation relating to Motor Vehicle Dealer requirements, except to the extent that such statute, regulation, order, or interpretation is inconsistent with" the Rule, "and then only to the extent of the inconsistency." Proposed § 463.9 further provided that, for purposes of this provision, a State statute, regulation, order, or interpretation is not "inconsistent" if the protection such statute, regulation, order, or interpretation affords any consumer "is greater than the protection provided under" the Rule. After carefully considering the comments, the Commission adopts § 463.9 largely as proposed in the Final Rule.

Numerous State regulator commenters contended that the proposed rule would create a uniform baseline of protection that would complement State standards. A comment from a group of eighteen State attorneys general contended that many of the Proposed rule's requirements were similar to, or the same as, requirements that currently

exist under State laws or regulations, and highlighted the benefit to law enforcement from establishing a consistent Federal baseline while providing States with flexibility to impose heightened consumer protections.[438]

One municipal licensing entity commenter that expressed general support of the Commission's proposed rule also posited that the Commission should broaden proposed § 463.9 to expressly include municipalities. With respect to the applicability of the provision to municipalities, the Commission notes that State political subdivisions exercise delegated power of their State, and as such, § 463.9 applies to municipal standards as well.[439]

Other commenters, including dealership associations, referred generally to potential conflicts between the Commission's proposed rule and State laws, but such commenters typically did not point to any specific purported conflicts with State law. To the extent some such commenters argued that certain proposed provisions would conflict with State laws, such arguments are addressed in the SBP's corresponding paragraph-by-paragraph analysis of the relevant Rule provision. Generally, the Commission is not aware of State laws that allow dealers to make misrepresentations regarding material information; prohibit the disclosure of accurate information regarding a vehicle's offering price, optional vehicle add-ons, or total payment information; or permit dealers to charge consumers for add-ons that provide no benefit to the consumer or to charge for items without consumers' express, informed consent. To the extent there truly are conflicts, as

[438] Comment of 18 State Att'ys Gen., Doc. No. FTC-2022-0046-8062 at 11.
[439] *See City of Columbus v. Ours Garage & Wrecker Serv., Inc.*, 536 U.S. 424, 433 (2002) ("The principle is well settled that local governmental units are created as convenient agencies for exercising such of the governmental powers of the State as may be entrusted to them in its absolute discretion.") (quoting *Wis. Pub. Intervenor v. Mortier*, 501 U.S. 597, 607-08 (1991)).

discussed in the following paragraphs, § 463.9 establishes the framework for addressing any such inconsistencies.

Commenters including dealership associations also argued that existing State standards are sufficient and identified State requirements that the commenters argued would be redundant with, or superior to, one or more provisions in the Commission's proposed rule. To the extent the Rule prohibits conduct that is already prohibited by State laws, the Commission has not seen evidence that State and Federal standards prohibiting the same misconduct has harmed consumers or competition. Moreover, such overlap is indicative of dealers' ability to comply with the relevant provisions in the Rule. To the extent State laws have additional requirements that provide greater protections or are not otherwise inconsistent with part 463, dealers must continue to follow those laws.

Several dealership association commenters expressed concern regarding how to determine whether a State statute, regulation, order, or interpretation affords "greater protection" than a provision in the Commission's proposed rule. One such commenter, for example, raised concerns that proposed § 463.5(a) may conflict with a pending California bill that would prohibit the sale of GAP when a vehicle has less than a 70% loan-to-value ratio. An industry association commenter claimed that the Commission's proposed definitions of "Dealer or Motor Vehicle Dealer" would conflict with analogous State definitions. In response, the Commission emphasizes that § 463.9 would be triggered only if there were an actual inconsistency between State law and the Final Rule, and in the event of an inconsistency, the Rule only affects such State law to the extent of the inconsistency. The commenter examples did not present any such inconsistencies because it is possible to comply with both the cited State law examples and with the Final

Rule. For instance, a dealer operating in a State that prohibits the sale of a GAP agreement when a vehicle transaction involves a loan-to-value ratio below 70% would need to abide by the ratio set forth by State law and also by the Rule's prohibition against charging for the product if the consumer would not benefit from it. Similarly, notwithstanding a commenter's claims that the proposed rule's definition of "Dealer or Motor Vehicle Dealer" would conflict with analogous State standards, the commenter did not identify any actual conflicts; nevertheless, to the extent State and Federal standards cover independent areas or actors, each actor must comply with the standards—whether State, Federal, or both—under which the actor is covered.[440] Further discussion of how State laws interact with specific sections of the Rule are explained in the corresponding section-by-section analysis for the relevant sections.

Some such commenters also questioned whether more coordination with States and Federal agencies was needed, without explaining what coordination was needed. In any event, the Commission coordinates regularly with States and Federal counterparts.

Many commenters' concerns focused on the written disclosures proposed in § 463.5(b), which the Commission has determined not to include in this Final Rule. For instance, a substantial number of commenters, including industry associations, argued that proposed § 463.5(b) would have created different Federal and State requirements for written disclosures that would result in duplicative paperwork. A dealership association specifically argued that proposed § 463.5(b) may have conflicted with a State pre-contract disclosure requirement pertaining to six categories of add-ons because it would

[440] *See, e.g.*, *Pirouzian v. SLM Corp.*, 396 F. Supp. 2d 1124, 1131 (S.D. Cal. 2005) (reasoning that the more inclusive definition of "debt collector" under California law is not "inconsistent" with the Fair Debt Collection Practices Act because by "enlarging the pool of entities who can be sued" the State law offered greater protection).

have required an additional disclosure about a broader category of add-ons. An industry association similarly pointed to this State's pre-contract disclosure requirement as a reason that additional disclosures under this Rule, including those required by proposed § 463.5(b), could result in consumer confusion. At least four commenters, including industry associations and a dealership organization, argued that the proposed rule's requirement under § 463.5(b) to create new documentation may conflict with the "single document" requirements, in effect in many States, which mandate that the entire motor vehicle sale, financing, or lease agreement—including any add-on products or services—be within one document. As discussed in the paragraph-by-paragraph analysis of § 463.5 in SBP III.E.2, the Commission has determined not to finalize the written disclosures requirement under this provision.

After carefully considering the comments regarding proposed § 463.9, the Commission is finalizing this section largely as proposed, with one minor modification: the Commission is adding "Covered" to the term "Motor Vehicle Dealer" in § 463.9(a) to conform with the revised definition in § 463.2(f). Section 463.9 provides a uniform floor of protection with the Commission's Final Rule, while also permitting States to enact stronger protections, using a standard that has been applied in other laws and regulations for several decades.[441] This provision is necessary to address unfair and deceptive practices and to enable the Commission to enforce the Rule.

IV. Effective Date

The Final Rule becomes effective on July 30, 2024. One industry association

[441] *See, e.g.*, 10 U.S.C. 987(d)(1) (Military Lending Act); 15 U.S.C. 1692n (Fair Debt Collection Practices Act); 12 CFR 1006.104 (Regulation F); 15 U.S.C. 1693q (Electronic Funds Transfer Act); *see also* 21 U.S.C. 387p(a)(1) (Family Smoking Prevention and Tobacco Control Act).

commenter objected that the NPRM did not include an effective date or inquire into the timing for feasibly implementing the Rule. Another such commenter requested at least 18 months for stakeholders to prepare for Rule compliance, but did not explain why it would take 18 months to refrain from conduct that is already illegal, such as making misrepresentations. Rules are generally required to be published 30 to 60 days before their effective date, though in some circumstances, agencies may cite good cause for the rule to become effective sooner than 30 days from publication.[442] Given the significant harm to consumers and law-abiding dealers from deceptive or unfair acts or practices; and the fact that, for dealers already complying with the law, compliance with the Rule the Commission is finalizing should not be onerous; the NPRM did not propose or contemplate any additional delay. Nevertheless, after a review of comments, the Commission is providing dealers until July 30, 2024 to make changes to their operations, if needed, in light of the Rule's requirements.

V. Paperwork Reduction Act

On July 13, 2022, the Commission submitted the NPRM and an accompanying Supporting Statement to the Office of Management and Budget ("OMB") for review under the Paperwork Reduction Act ("PRA"), 44 U.S.C. 3501-3521. On July 29, 2022, OMB directed the Commission to resubmit its request when the proposed rule was

[442] *See* 5 U.S.C. 553(d) (requiring publication of a substantive APA rule "not less than 30 days before its effective date" except "as otherwise provided by the agency for good cause found and published with the rule"). Significant rules defined by Executive Order 12866 and major rules defined by the Small Business Regulatory Enforcement Fairness Act are required to have a 60-day delayed effective date. *See* E.O. 12866, 58 FR 51735 (Oct. 4, 1993); 5 U.S.C. 801(a)(3)).

finalized.[443]

The Commission is now submitting the Final Rule and a Supplemental Supporting Statement to OMB. The disclosure and recordkeeping requirements of the Rule constitute "collection[s] of information" for purposes of the PRA.[444] The associated burden analysis follows.[445]

In the NPRM, the Commission provided estimates and solicited comments regarding the proposed rule, including regarding (1) the proposed add-on list disclosure requirement; (2) the proposed cash price without optional add-ons disclosure requirement; (3) other proposed provisions prohibiting certain misrepresentations and requiring certain disclosures; (4) the proposed recordkeeping provisions; and (5) estimated capital and other non-labor costs. As previously discussed, after carefully reviewing the comments, the Commission has made certain changes to the relevant

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[443] OMB assigned the rulemaking control number 3084-0172 for PRA review purposes.

[444] 44 U.S.C. 3502(3); 5 CFR 1320.3(c).

[445] One commenter suggested the FTC did not comply with several provisions of the PRA, specifically those contained in 5 CFR 1320.5(a)(1)(iv), 1320.8(d)(1), 1320.11(a), 1320.11(b), and 1320.11(d). The commenter does not explain the basis for the purported deficiencies. These provisions generally relate to the submission of a collection of information to OMB, and solicitation and consideration of public comments. The FTC has complied with these provisions. The FTC submitted an Information Collection Request to Office of Management and Budget on July 13, 2022, concurrently with publication of the NPRM, in accordance with 5 CFR 1320.11(b). *See* Motor Vehicle Dealers Trade Regulation Rule, ICR 202202-3084-001, OMB 3084-0172, https://omb.report/icr/202202-3084-001. Because the FTC complied with this requirement, the collection of information proposed in the NPRM is not, as the commenter contends, subject to disapproval under 5 CFR 1320.11(d).

The Commission also did not violate 5 CFR 1320.5(a)(1)(iv) and 1320.11(a), providing for comments to be submitted to OMB, as the commenter contends. Those provisions are limited by 5 CFR 1320.8(d)(3), which provides that the agency need not direct comments to OMB "if the agency provides notice and comment through the notice of proposed rulemaking . . . for the same purposes as are listed under" 5 CFR 1320.8(d)(1). The Commission solicited comments in the NPRM on the subjects enumerated in 5 CFR 1320.8(d)(1), *see* NPRM at 42028-31, 42035-43, and it was not necessary for the Commission to also direct those same comments to OMB. The Commission thus did not violate 5 CFR 1320.5(a)(iv) or 1320.11(a).

Further, contrary to the commenter's assertion, the Commission demonstrated throughout the NPRM that the information collection-related requirements it embodies are necessary, offer utility and public benefit, and minimize burdens. *See, e.g.*, NPRM at 42027, 42043. Moreover, the Commission requested comments on the necessity, utility, benefits, and burdens of the proposed rule, *see* NPRM at 42028-31, 42035-43, and has further taken into consideration and addressed comments in this SBP.

provisions in the Final Rule. Specifically, the Commission has determined not to finalize requirements, pursuant to proposed § 463.4(b), that dealers disclose an add-on list or, pursuant to proposed § 463.5(b), that dealers refrain from charging for optional add-ons unless enumerated requirements relating to the vehicle's cash price without optional add-ons are met.

In the NPRM, the Commission estimated that the disclosure and recordkeeping requirements would impact approximately 46,525 franchise, new motor vehicle and independent/used motor vehicle dealers in the U.S.[446] In the NPRM, the Commission explained that this figure was exclusive to automobile dealers, and invited comments regarding market information for dealers of other types of motor vehicles, such as boats, RVs, and motorcycles.[447] In response, one industry association commenter noted the absence of such other motor vehicle dealers from the Commission's estimate. Another commenter also noted the absence of such dealers in the estimate and argued that the Commission's estimate also erroneously included independent used motor dealers which the commenter contended do not perform any servicing work, but stated that the Commission's estimate was fairly accurate numerically. As discussed in the paragraph-by-paragraph analysis of § 463.2(e) in SBP III.B.2(e), the Commission has determined to expressly exclude "Recreational boats and marine equipment," "Motorcycles, scooters, and electric bicycles," "Motor homes, recreational vehicle trailers, and slide-in campers," and "Golf carts" from the Final Rule's definition of "Covered Motor Vehicle." Further, as examined in the paragraph-by-paragraph analysis of § 463.2(f) in SBP III.B.2(f), the plain meaning of the term "servicing" covers activities that are undertaken by

[446] NPRM at 42031.
[447] NPRM at 42031 n.154, 42036.

independent used car dealers.[448] Thus, the Commission bases its estimate of the entities covered by the Final Rule on the same North American Industry Classification System ("NAICS")[449] categories—"new car dealers" and "used car dealers"—as it did in the NPRM.[450] As with other figures in this section, the NAICS data assembled by the U.S. Census Bureau have been revised since the publication of the Commission's NPRM with more recent data. Based on these revisions, the Commission now estimates that the Final Rule's disclosure and recordkeeping requirements will impact approximately 47,271 franchise, new motor vehicle and independent/used motor vehicle dealers in the United States.[451]

The estimated overall annual hours burden for the Final Rule's collections of information is 1,595,085 hours. The estimated overall annual labor cost for the Final Rule's collections of information is $51,904,537. The estimated overall annual capital and other non-labor cost for the Final Rule's collections of information is $14,181,300.

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[448] *See also* Used Car Rule, 81 FR at 81668 (noting that the term "servicing" used in this same context "captures activities undertaken by essentially all used car dealers," including by preparing vehicles for sale by addressing any obvious mechanical problems and by undertaking the general industry practice of appearance reconditioning).

[449] NAICS is the standard used by Federal statistical agencies in classifying business establishments for the purpose of collecting, analyzing, and publishing statistical data related to the U.S. business economy. North American Industry Classification System, U.S. Census Bureau, https://www.census.gov/naics/.

[450] U.S. Census Bureau, "All Sectors: County Business Patterns, including ZIP Code Business Patterns, by Legal Form of Organization and Employment Size Class for the U.S., States, and Selected Geographies: 2019," https://data.census.gov/cedsci/table?q=CBP2019.CB1900CBP&n=44111%3A44112&tid=CBP2019.CB1900CBP&hidePreview=true&nkd=EMPSZES~001,LFO~001 (listing 21,427 establishments for "new car dealers," NAICS code 44111, and 25,098 establishments for "used car dealers," NAICS code 44112). *See* NPRM at 42031.

[451] U.S. Census Bureau, "All Sectors: County Business Patterns, including ZIP Code Business Patterns, by Legal Form of Organization and Employment Size Class for the U.S., States, and Selected Geographies: 2021," https://data.census.gov/table?q=CB2100CBP&n=44111:44112&tid=CBP2021.CB2100CBP&nkd=EMPSZES~001,LFO~001 (listing 21,622 establishments for "new car dealers," NAICS code 44111, and 25,649 establishments for "used car dealers," NAICS code 44112).

A. Add-on List Disclosures

Section 463.4(b) of the proposed rule required motor vehicle dealers that charge for optional add-on products or services to disclose clearly and conspicuously in advertisements and on any website, online service, or mobile application through which they market motor vehicles, and at any dealership, an itemized add-on list of such products or services and their prices. In the NPRM, the Commission estimated costs for the add-on list disclosure and solicited comments on its burden analysis.[452] One industry association made several arguments, including that the Commission underestimated the time and resources required because an add-on list can be lengthy, vary by vehicle and over time, and require working with several third parties. This commenter also argued that periodic revision of such lists would take more than the estimated one hour of clerical time per dealer, per year. The commenter, however, did not offer any specific estimates for such periodic revision activities.

As explained in the section-by-section analysis of § 463.4 in SBP III.D.2, after careful consideration, the Commission has determined not to finalize its proposed add-on list provision at § 463.4(b).

B. Disclosures Relating to Cash Price Without Optional Add-ons

Section 463.5(b) of the proposed rule required motor vehicle dealers that charge for optional add-on products or services to provide certain itemized disclosures regarding pricing and cost information without such add-ons. In response to the Commission's estimates with respect to this proposed provision, one industry association argued that the Commission did not provide adequate explanation of the assumptions it used to arrive at

[452] NPRM at 42032-33, 40235, 42040.

its cost estimates for this proposed provision, and contended that the Commission underestimated the costs associated with developing, printing, and presenting the proposed disclosures. This commenter also contended that the proposed requirement would have required significant training costs; that multiple forms would have been required for each motor vehicle transaction; and that aspects of the required disclosures would be duplicative of information already provided by dealerships in the ordinary course of business. The commenter estimated that developing a disclosure form for this proposed provision would cost dealers at least $750 and suggested that other attendant costs would be in the hundreds of millions or billions of dollars, without explaining how it arrived at such estimated figures.

As explained in the section-by-section analysis of § 463.5 in SBP III.E, after careful consideration, the Commission has determined not to include in this Final Rule the itemized disclosure provisions at proposed § 463.5(b). The Commission notes that imposing unauthorized charges—including charges buried in lengthy contracts or included in contracts that consumers are rushed through—is a violation of both the Final Rule's § 463.5(c) and of the FTC Act. The Commission will continue to monitor the market to determine whether additional steps are warranted to combat unauthorized charges for add-ons or other items in the motor vehicle marketplace.

C. Prohibited Misrepresentations and Required Disclosures

Section 463.3 of the Final Rule prohibits dealers from making any misrepresentation regarding material information about the categories enumerated in the section.

The provisions in this section have been adopted largely without modification from the NPRM, wherein the Commission estimated that any additional costs associated with the proposed misrepresentation prohibitions would be *de minimis*.[453] One industry association commenter argued that a bar on misrepresentations in the Final Rule would require increased training and compliance costs and result in longer transaction times and costs related to working with vehicle manufacturers about online advertisements. This section, however, does not require any additional disclosures or information collection. Thus, while dealers might elect to enhance their training and compliance,[454] refraining from making misrepresentations does not require additional training or compliance costs or transaction time. The Commission therefore affirms its prior estimate that any additional costs associated with the prohibitions in § 463.3 against making misrepresentations would be *de minimis*.

Section 463.4(a) of the Final Rule requires dealers to clearly and conspicuously disclose a vehicle's offering price in advertisements and other communications that reference a specific vehicle, or any monetary amount or financing term for any vehicle. "Offering Price" is defined in § 463.2(k) of the Rule 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." The information required by § 463.4(a) is necessary to address unfair or deceptive conduct associated with the failure to provide

[453] NPRM at 42033, 42039.

[454] The Commission produced and considered alternative cost estimate scenarios for the Rule provisions in its preliminary regulatory analysis, *see* NPRM at 42036-44, and its final regulatory analysis in Section VII. The Commission also invited comments on the accuracy of its PRA burden estimates, including the validity of the methodology and assumptions used, *see* NPRM at 42035. The Commission provides a single estimate per Rule provision for this separate Paperwork Reduction Act burden analysis in conformity with the PRA. *See* 44 U.S.C. 3506(c)(1)(A)(iv) (providing, for each collection of information, including those arising from rules published as final rules in the Federal Register, that agencies shall conduct a review that includes "a specific, objectively supported estimate of burden").

such price information and unfairly charging unexpected prices or for hidden items that can add hundreds or thousands of dollars to a vehicle sale.[455]

This provision is being adopted largely as proposed.[456] In response to the NPRM, one industry association commenter claimed there would be an average of three offering price disclosures per transaction, since, according to the commenter, consumers, on average discuss three specific motor vehicles per transaction. This commenter also contended that the number of required offering price disclosures would obligate dealers to incur additional training costs. As the Commission explained in its NPRM, vehicle pricing activities and representations are usually and customarily performed by dealers in the course of their regular business activities. While this provision may increase the importance of those activities, or alter when in the course of business they are undertaken, the Commission estimates that any additional attendant costs are *de minimis*.[457]

Section 463.4(d) of the Final Rule require 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, as well as the amount of consideration to be provided by the

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[455] Some commenters suggested that providing an Offering Price may be difficult due to pricing changes over time. As explained in SBP III.D.2(a), limited-time offers should be clearly disclosed as such. Advertising prices without disclosing material limitations that would mislead consumers is a deceptive or unfair practice.

[456] As stated in SBP III.B.2(k) and SBP III.D.2(a), the Commission is finalizing this Offering Price definition at § 463.2(k) largely as proposed, with a modification to clarify that dealers may, but need not, exclude required government charges from a vehicle's offering price. In addition, this definition in the Final Rule substitutes "Vehicle" for "motor vehicle" to clarify that the term is consistent with the revised definition of "'Covered Motor Vehicle' or 'Vehicle'" at § 463.2(e). The Commission also added 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)."

[457] *See* NPRM at 42033, 42039-40.

consumer if the total amount disclosed assumes the consumer will provide consideration. Section 463.4(e) of the Final Rule requires dealers, when making any comparison between payment options that includes discussion of a lower monthly payment to disclose, if true, that a lower monthly payment will increase the total amount the consumer will pay to purchase or lease the vehicle.

These provisions have been adopted largely as proposed.[458] In response to the Commission's estimates with respect to these proposed provisions, one commenter raised concerns that these disclosures would intrude on existing disclosures, and that any associated paperwork burden would be confusing, duplicative, and unnecessary. The commenter also argued that these disclosures would add time to the transaction process and require additional staff training. No commenters provided alternative estimates of the costs associated with this provision.

Failing to disclose information about the total of payments for a vehicle when representing monthly payment information is deceptive or unfair, as set forth in SBP III.D.2(d). Dealers already generate the required information during the normal course of business, and disclosing this total of payments information provides consumers with fundamental information that is readily available to the dealer when making representations regarding monthly payments, at which time such disclosures are required. Nevertheless, there may be upfront labor costs associated with developing procedures to provide these disclosures consistently at the appropriate point in the transaction and with

[458] These provisions in the Final Rule capitalize the defined term "Vehicle" to conform with the revised definition of "'Covered Motor Vehicle' or 'Vehicle'" at § 463.2(e). The Commission also substituted a period for a semi-colon and the word "and" at the end of § 463.4(d)(1), and added language to the end of § 463.4(d) and (e) clarifying that the requirements in these paragraphs "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)."

training employees. The Commission estimates such upfront costs as follows: 8 compliance manager hours per dealer on implementing a template disclosure script that contains the required information and on ensuring sales staff consistently deliver the disclosure at an appropriate time during the transaction, for an upfront hours burden of 378,168 (8 hours × 47,271). Applying labor cost-rates of $31.21 per hour yields $11,802,623.28 ($31.21 × 378,168 hours).[459] After a review of comments, the Commission is adding ongoing training costs. Specifically, the Commission estimates annual ongoing costs of 1 hour of training time for sales and related employees per year, for an annual hours burden of 417,110 (1 hour × 417,110 sales and related employees). Applying labor cost-rates of $29.43 per hour, the total estimated ongoing labor cost burden is $12,275,547.30 across the industry (417,110 sales and related employees × 1 hour × $29.43).

Further, § 463.4(c) of the Final Rule requires dealers that sell optional add-on products or services to disclose to consumers that these add-ons are not required, and that the consumer can purchase or lease the vehicle without these add-ons. This requirement has been adopted largely as proposed, and is necessary to address deceptive and unfair practices regarding these products or services, including misrepresentations that these products are required when they are not, and charging consumers for such products

[459] The estimates throughout this section have been updated with more recent data since the publication of the NPRM. Labor rates are based on new data from the Bureau of Labor Statistics. See U.S. Bureau of Labor Statistics, "May 2022 National Industry-Specific Occupational Employment and Wage Estimates NAICS 441100 - Automobile Dealers" (Apr. 25, 2023), https://www.bls.gov/oes/current/naics4_441100.htm. The number of dealerships has been updated to reflect new data from Census County Business Patterns. See U.S. Census Bureau, "All Sectors: County Business Patterns, including ZIP Code Business Patterns, by Legal Form of Organization and Employment Size Class for the U.S., States, and Selected Geographies: 2021," https://data.census.gov/table?q=CB2100CBP&n=44111:44112&tid=CBP2021.CB2100CBP&nkd=EMPSZES~001,LFO~001.

without the consumers' express, informed consent.[460] It requires a simple disclosure of information that is known to the dealer, and the Commission anticipates that the information collection burdens associated with this requirement is *de minimis*.[461]

Similarly, § 463.5(c) of the Final Rule requires dealers to refrain from charging consumers for any item unless the dealer obtains the express, informed consent of the consumer for the charge.[462] In response to the Commission's estimates with respect to these proposed provisions, some commenters generally discussed burdens, as addressed in the section-by-section analysis in SBP III, that they contended would accompany this proposed provision, but none provided sufficient detail for cost estimates. The Commission notes that this provision addresses the unfair or deceptive practice of charging consumers for items they do not know about or to which they have not agreed, or in amounts beyond those to which the consumer has agreed. As dealers must currently have policies in place to prevent charges without consent in order to comply with current law, the Commission anticipates that any burdens associated with this provision will be *de minimis*.[463]

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[460] This provision in the Final Rule capitalizes the defined term "Vehicle" to conform with the revised definition of "'Covered Motor Vehicle' or 'Vehicle'" at § 463.2(e). The Commission also added language to the end of § 463.4(c) clarifying that the requirements in this paragraph "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)."

[461] As with § 463.3, § 463.5(a) does not require any additional disclosures or information collection. Thus, while dealers might elect to enhance their training and compliance policies, or to take steps to document compliance with § 463.5(a), any such additional measures are not required by this provision.

[462] *See* SBP III.E.2(c).

[463] In its NPRM, the Commission noted that it anticipated this section would require dealers to provide readily available information to consumers in direct communications with customers, and that dealers complying with existing law have policies in place to prevent charges without consent, thereby estimating minimal additional resulting costs. *See* NRPM at 42033, 42036-44. The Commission did not receive comments discussing attendant burdens in sufficient detail for revised cost estimates, and thus affirms its prior estimate regarding additional costs associated with § 463.5(c).

D. Recordkeeping

Section 463.6 of the Final Rule requires dealers to create and retain, for a period of twenty-four months from the date the record is created, all records necessary to demonstrate compliance with the Rule, including with its disclosure requirements. This provision has been adopted with revisions to account for other changes in the Final Rule, as explained in SBP III.F.[464] These recordkeeping provisions are necessary to promote effective and efficient enforcement of the Rule, thereby deterring dealers from engaging in deceptive or unfair acts or practices.

In the NPRM, the Commission provided cost estimates and solicited comment on its recordkeeping burden analysis.[465] The Commission anticipated that dealers would incur certain incremental costs related to: (i) recordkeeping systems; and (ii) calculations of loan-to-value ratios for contracts with GAP agreements.

Several commenters, including industry associations, dealership organizations, and a dealership association, generally contended that the Commission underestimated the burdens of compliance relating to the changes dealers would need to make to their existing recordkeeping systems. These commenters, however, did not provide the Commission with alternative estimates regarding such burdens. As explained in the section-by-section analysis of the Recordkeeping section, § 463.6, in SBP III.F, this provision gives dealers the flexibility to retain materials in any legible form, including in the same manner, format, and place as they may already keep such records in the ordinary course of business. The Commission nonetheless has determined, in response to

[464] The Final Rule also contains one typographical modification to § 463.6—adding a serial comma—and minor textual changes to ensure consistency with the defined terms at § 463.2(e) and (f).
[465] NPRM at 42033-34, 42043.

comments, to revise its estimates regarding incremental storage expenses that may be associated with the recordkeeping requirements in the Final Rule, and, as provided in the capital and other non-labor costs discussion in the following paragraphs, the Commission is adding an estimate of incremental additional storage costs to its estimate.

Further, the Commission notes that its initial recordkeeping cost estimates were based on a proposal that required records regarding add-on list disclosures and cash price without optional add-on disclosures—records that the Rule the Commission is finalizing does not require dealers to retain. Given that the Commission is not finalizing these additional record-related requirements, the estimates provided in its NPRM may overestimate attendant costs resulting from the Rule's recordkeeping requirements. Notwithstanding this possibility, the Commission maintains its prior calculations of the time required to modify existing recordkeeping systems.[466] The Commission anticipates that it will take covered motor vehicle dealers approximately 15 hours to modify their existing recordkeeping systems to retain the required records for the 24-month period specified in the Rule. This yields a general recordkeeping burden of 709,065 hours annually (47,271 motor vehicle dealers × 15 hours per year).

The Commission anticipates that programming, administrative, compliance, and clerical staff are likely to perform the tasks necessary to comply with the recordkeeping requirements in § 463.6 of its Rule. In particular, the Commission estimates this 15-hour per-dealer labor hours burden to design, implement, or update systems for record storage and create the templates necessary to accommodate retention of all relevant materials, as

[466] In its NPRM, the Commission estimated costs to create and implement a loan-to-value calculation process. NPRM at 42034. Such costs are already accounted for in the Commission's estimates for the time required to modify existing recordkeeping systems, and thus are not separately itemized here.

follows: 8 hours of time for a programmer, at a cost-rate of $40.24 per hour; 5 hours of additional clerical staff work, at a cost-rate of $20.16 per hour; 1 hour of sales manager review, at a cost-rate of $80.19 per hour; and 1 hour of review by a compliance officer, at a cost-rate of $31.21 per hour.[467] Applying these cost-rates to the estimated per-dealer hours burden described previously, the total estimated initial labor cost burden is $534.12 per average dealership (($40.24 per hour × 8 hours) + ($20.16 per hour × 5 hours) + ($80.19 per hour × 1 hour) + ($31.21 per hour × 1 hour)), totaling $25,248,386.52 across the industry ($534.12 per average dealership × 47,271 dealerships).

The Commission also received comments regarding its cost estimates relating to the records of loan-to-value ratios for transactions that include GAP agreement sales. One industry association commenter argued that this recordkeeping requirement would also require additional training, that creating a loan-to-value calculator template for GAP agreements would be difficult given the variation of loan-to-value ratios, and that this recordkeeping requirement would lengthen the time to conduct vehicle sale or financing transactions.[468] No commenter provided alternative estimates of the costs associated with the Commission's proposed recordkeeping requirements.

As explained in the paragraph-by-paragraph analysis of § 463.5 in SBP III.E.2, the Commission is not mandating a particular LTV threshold or method of calculation, but rather requiring that dealers not charge a consumer for GAP agreements or other products or services if the consumer would not benefit from the product or service. The Commission anticipates that, to the extent dealers do not currently retain any materials

[467] Applicable wage rates are based on data from the Bureau of Labor Statistics. *See* U.S. Bureau of Labor Statistics, "May 2022 National Industry-Specific Occupational Employment and Wage Estimates NAICS 441100 - Automobile Dealers" (Apr. 25, 2023), https://www.bls.gov/oes/current/naics4_441100.htm.
[468] These arguments are addressed in the section-by-section analysis of § 463.5. *See* SBP III.E.

used to make such an assessment, dealers may incur certain additional costs. Specifically, the Commission anticipates that dealers will expend one minute per sales or financing transaction for a salesperson to perform the calculation contemplated by this requirement, at a cost rate of $28.41 per hour. The Commission estimates that covered motor vehicle dealers sell approximately 31,562,959 vehicles each year, and that approximately 17% of such sales include GAP agreements, for an estimated total of 5,444,502 covered vehicle sales.[469] While the number of motor vehicles sold will vary by dealership, this yields an average sales volume of 115 sales transactions per average dealership per year that include a GAP agreement (5,444,502 covered vehicle sales / 47,271 dealerships). This yields an estimated annual hours burden for all dealers of 90,742 hours (5,444,502 covered transactions × 1/60 hours). Applying the associated labor rates yields an estimated annual labor cost for all dealers of $2,577,980.22 (90,742 hours × $28.41 per hour).

E. Capital and Other Non-Labor Costs

The Commission anticipates that the Final Rule will impose limited capital and non-labor costs. The Commission presented estimates in the NPRM with respect to such costs and solicited comments on its burden analysis. Here, the Commission discusses its estimates for the capital and non-labor costs associated with the Rule's disclosure and recordkeeping requirements. While some commenters generally discussed burdens that

[469] In response to comments, the Commission has revised the number of transactions across the industry from the NPRM to exclude private party and fleet transactions. The estimated percentage of sales including GAP agreements is derived from data provided by an industry commenter. Comment of Nat'l Auto. Dealers Ass'n, Doc. No. FTC-2022-0046-8368 at 12.

they contended would accompany these proposed provisions, none provided any alternative cost estimates regarding capital and other non-labor costs.[470]

1. Disclosures

The Commission anticipates that the Rule's disclosure requirements will impose *de minimis* capital and other non-labor costs. As the Commission noted in the NPRM, dealers already have in place existing systems for providing sales- and contract-related disclosures to buyers and lessees, as well as to consumers seeking information during the vehicle-shopping process.[471] While the Final Rule's disclosure requirements may result in limited additions to the information that must be provided during the transaction process, depending on a dealer's current business operations, the Commission anticipates that these changes will not require substantial investments in new systems.[472] Further, many dealers may elect to furnish some disclosures electronically, further reducing total costs.[473]

The Commission previously estimated non-labor costs for providing disclosures in written or electronic form. This estimate was based on proposed § 463.5(b), which required written disclosures in all transactions in which dealers charge for optional add-ons. As discussed in the paragraph-by-paragraph analysis of § 463.5 in SBP III.E.2, the Commission has determined not to finalize the proposed provision at § 463.5(b). While some commenters generally discussed burden with respect to disclosure requirements

[470] One commenter claimed generally that the Commission underestimated these costs, referring to arguments the commenter made with respect to the Commission's burden analysis of specific disclosure and recordkeeping provisions. The Commission has responded to those arguments in the foregoing analysis, with the exception of recordkeeping storage costs, which are addressed in the following discussion.
[471] NPRM at 42034.
[472] *Id*.
[473] *Id*.

being finalized by the Commission, no commenter estimated non-labor costs associated with such requirements. The Commission estimates that the non-labor costs related to disclosures, which relate to fundamental information (the vehicle offering price, that optional add-ons are not required, and regarding the total amount to purchase or lease the vehicle), will be *de minimis*.

2. Recordkeeping

In the NPRM, the Commission observed that dealers already have in place existing recordkeeping systems for the storage of documentation they would retain in the ordinary course of business irrespective of the Rule's requirements.[474] Commenters including industry associations, a dealership organization, and a dealership association argued that the Commission underestimated the burdens associated with the Commission's proposed requirements to retain written communications, as well as the need to develop new systems to capture these materials. The Commission disagrees that the recordkeeping requirements in § 463.6 mandate the creation of new recordkeeping systems. As explained in the section-by-section analysis of § 463.6, this provision gives dealers the flexibility to retain materials in any legible form, including in the same manner, format, or place as they may already keep such records in the ordinary course of business.

The Commission is, however, revising its estimates regarding incremental storage expenses that may be associated with the recordkeeping requirements in the Final Rule to add such recordkeeping storage costs to its estimate. The Commission previously noted, and continues to believe, that dealers that store records in hard copy are unlikely to

[474] *Id.*

require extensive additional storage for physical document retention, and, due to the low cost of electronic storage options, that expanding electronic storage capacity would impose minimal costs.[475] The Commission also invited comments on estimated storage costs; while some commenters generally discussed burdens, as addressed in the section-by-section analysis of the recordkeeping requirements in § 463.6, that they contended would accompany the proposed provisions, the Commission did not receive any comments that provided estimates. The Commission nevertheless has conducted additional research, and now estimates that each dealer will need to spend approximately $300 per year in investment in additional IT systems and hardware for additional storage (either on premises or electronically) to retain records, the annual cost for which would be $14,181,300 for all covered dealers ($300 × 47,271 covered dealers).[476]

VI. Regulatory Flexibility Act

The Regulatory Flexibility Act ("RFA"), as amended by the Small Business Regulatory Enforcement Fairness Act of 1996,[477] requires an agency to provide an Initial Regulatory Flexibility Analysis ("IRFA") and Final Regulatory Flexibility Analysis ("FRFA") of any rule subject to notice-and-comment requirements,[478] unless the agency head certifies that the regulatory action will not have a significant economic impact on a

[475] NPRM at 42034-35.
[476] Our review of dealer transaction records suggests that a typical transaction generates 3.4 MB of data under the status quo. Given the average number of transactions per dealer, this suggests that storing all these records would require dedicated space of roughly 4.2 GB per year. With a two-year retention window, this corresponds to 8.4 GB of storage at any given time. We estimate that the (annual) amount budgeted here should be sufficient to maintain at least 1 TB of storage—either on premises or through a cloud storage vendor—which is sufficient for more than 100 times the data storage capacity necessary to retain all transaction files generated by a typical dealership in a year under the status quo. The Commission anticipates that this amount of data storage capacity will be more than sufficient to also allow for dealers to keep any necessary records of correspondence with consumers who ultimately do not complete transactions at the dealership.
[477] *See* Public Law 104-121 (1996).
[478] 5 U.S.C. 603(a), 604(a).

substantial number of small entities.[479] In the NPRM, the Commission provided an IRFA, stated its belief that the proposal will not have a significant economic impact on small entities, and solicited comments on the burden on any small entities that would be covered.[480] In addition to publishing the NPRM in the Federal Register, the Commission announced the proposed rule through press releases, social media posts, and blog articles directed toward businesses and consumers, as well as through other outreach,[481] in keeping with the Commission's history of small business guidance and outreach.[482]

The Commission thereafter received over 27,000 public comments, many of which identified themselves as being from small dealers, industry associations that represent small dealers, and employees of small dealers.[483] The Commission greatly

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[479] 5 U.S.C. 605(b).

[480] NPRM at 42035.

[481] *See, e.g.*, 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; Lesley Fair, "Proposed FTC Rule Looks Under the Hood at the Car Buying Process," Fed. Trade Comm'n Business Blog (June 23, 2022), https://www.ftc.gov/business-guidance/blog/2022/06/proposed-ftc-rule-looks-under-hood-car-buying-process; Alan S. Kaplinsky, A Close Look at The Federal Trade Commission's Proposed Rule for Motor Vehicle Dealers, with Special Guests Sanya Shahrasbi and Daniel Dwyer, Staff Attorneys, FTC Bureau of Consumer Protection, Division of Financial Practices, Consumer Finance Monitor (Aug. 11, 2022), https://www.ballardspahr.com/Insights/Blogs/2022/08/Podcast-The-FTCs-Proposed-Rule-Motor-Vehicle-Dealer-Guests-Sanya-Shahrasbi-and-Daniel-Dwyer.

[482] 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 Business Administration, "2013-2020 SBA Nat'l Ombudsman's Ann. Reps. to Cong.," https://www.sba.gov/document/report--national-ombudsmans-annual-reports-congress (providing reports from FY2013-FY2020); Letter from Joseph J. Simons, Chairman of the Federal Trade Commission, to Senator James Risch, Chairman of the Committee on Small Business and Entrepreneurship, U.S. Senate, and to Congressman Steve Chabot, Chairman of the Committee on Small Business, U.S. House of Representatives, https://www.ftc.gov/system/files/documents/reports/federal-trade-commission-rule-compliance-guides-small-businesses-other-small-entities-commission/tenth_section_212_report_to_congress_july_2016-june_2017_1_0.pdf (citing Commission's "A" rating for "Compliance Assistance" by the National Ombudsman from FY2002-FY2016).

[483] The Commission received 27,349 comment submissions filed in response to its NPRM. *See* Gen. Servs. Admin., Doc. No. FTC-2022-0046-0001, 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, 11,232 such comments have been posted publicly at www.regulations.gov. *Id.* (noting posted comments). Posted comment counts reflect the number of comments that the agency has posted to Regulations.gov to be publicly viewable. Agencies may choose to redact or withhold certain

appreciates, and thoroughly considered, the feedback it received from such stakeholders in developing the Final Rule; made changes from the proposed rule in response to such feedback; and will continue to engage with stakeholders moving forward to facilitate implementation of the Rule.

As previously discussed, after reviewing comments, the Commission has determined, as an alternative to finalizing the proposed rule in its entirety, to finalize a Rule that does not contain the proposed add-on list disclosure requirements at § 463.4(b), or the proposed disclosures and declinations pertaining to a vehicle's cash price without optional add-ons at § 463.5(b). Furthermore, as discussed in the paragraph-by-paragraph analysis of § 463.2(e) in SBP III.B.2(e), in response to public comments and after careful consideration, the Commission has determined to exclude recreational boats and marine equipment; motorcycles; and motor homes, recreational vehicle trailers, and slide-in campers from the Rule's definition of "Covered Motor Vehicle." After careful consideration of the comments and following its determination not to finalize the proposed rule in its entirety, the Commission is certifying that the Final Rule will not have a significant economic impact on a substantial number of small entities. In the following paragraphs, the Commission discusses comments from the public, as well as from the U.S. Small Business Administration Office of Advocacy ("SBA Advocacy"), and the reasons for the Commission's conclusion that the Rule will not have a significant economic impact on a substantial number of small entities.[484] Given, however, that the

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submissions (or portions thereof) such as those containing private or proprietary information, inappropriate language, or duplicate/near duplicate examples of a mass-mail campaign. Gen. Servs. Admin., Regulations.gov Frequently Asked Questions, https://regulations.gov/faq.

[484] The Office of Advocacy has emphasized that, while it is housed within SBA, it is an independent, stand-alone office that has its own statutory charter, leadership structure, and appropriations account. SBA

Commission believes that the vast majority of covered entities are small entities and provided an IRFA in the NPRM, in the interest of thoroughness, the Commission has also performed an FRFA, as described in SBP VI.B.2.

A. Significant Impact Analysis

1. Comments on Significant Impact

In the NPRM, the Commission stated its belief that the proposed rule would not have a significant economic impact on a substantial number of small entities, and invited comments.[485] Several commenters, including industry associations and a dealership

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Advocacy, "Background Paper: Office of Advocacy 2017-2020" 111-19 (Jan. 2021), https://advocacy.sba.gov/wp-content/uploads/2021/02/Background-Paper-Office-of-Advocacy-2017-2020-web.pdf; *see also* 15 U.S.C. 634a through 634g. SBA Advocacy's Chief Counsel is appointed from civilian life by the President, with the advice and consent of the Senate, and most of SBA Advocacy's professionals serve at the pleasure of the Chief Counsel. 15 U.S.C. 634a, 634d(1) (empowering Chief Counsel for Advocacy to employ and fix the compensation of additional staff personnel); SBA Advocacy, "Background Paper: Office of Advocacy 2017-2020" 95 (Jan. 2021), https://advocacy.sba.gov/wp-content/uploads/2021/02/Background-Paper-Office-of-Advocacy-2017-2020-web.pdf. SBA Advocacy does not circulate its work for clearance with the SBA Administrator, OMB, or any other Federal agency prior to publication. 15 U.S.C. 634f.

[485] An industry association commenter argued that the Commission did not make a formal Section 605(b) certification, publish the certification in the Federal Register, or provide the certification to the Chief Counsel for Advocacy of the Small Business Administration. This comment misunderstands the RFA. The RFA does not require certification when a rule is proposed. *See* 5 U.S.C. 605(b) (providing that the head of the agency may make the certification "at the time of publication of the final rule"). The Commission's NPRM stated its belief that the proposal would not have a significant economic impact on a substantial number of small entities, invited comment on this issue, and also provided an IRFA. The Commission has carefully reviewed the SBA's and others' comments, is making changes to the proposal, and is now publishing the Final Rule and making a formal certification, as is required by the RFA.
Although the Commission included the NPRM in its Fall 2022 Regulatory Agenda, and explained in its NPRM that the proposed rulemaking was not included in the Commission's Spring 2022 Regulatory Agenda because the Commission first considered the NPRM after the publication deadline for the Regulatory Agenda, *see* NPRM at 42031 n.153, the same commenter argued that the RFA and Executive Order 12866 required the Commission to include it in earlier Regulatory Agendas. As an initial matter, Executive Order 12866 does not apply to independent agencies such as the FTC. Regardless, as discussed in SBP II.C, Commission has engaged in a sustained effort over many years to engage with consumer and dealer groups, and other stakeholders, regarding the issues addressed in the Rule. *See supra* note 90. Neither the RFA nor Executive Order 12866 precludes the Commission from promulgating the Rule regardless of whether it was included in an earlier Regulatory Agenda (or even arguably could have been). Section 602(d) of the RFA explicitly provides that "[n]othing in this section precludes an agency from considering or acting on any matter not included in a regulatory flexibility agenda." *See Coastal Conservation Ass'n v. Locke*, No. 2:09-CV-641-FTM-29, 2011 WL 4530631, at *38 (M.D. Fla. Aug. 16, 2011), *report & recommendation adopted sub nom. Coastal Conservation Ass'n v. Blank*, No. 2:09-CV-

association, generally argued that the Rule would impose substantial economic burdens on small entities, and some suggested that small entities may be disproportionately burdened by the Rule given limited legal and compliance staff. No commenters provided comprehensive alternative empirical cost or revenue data that could be used to put costs in context. Commenters, including an industry association and SBA Advocacy, argued that the Commission did not provide a sufficient factual basis for, or analysis of, the effects on small entities, and that the proposed rule would be unduly burdensome for smaller motor vehicle dealers.[486] The comment from SBA Advocacy further argued that the Commission provided no information about the economic impact of the proposed rule on small entities, but noted that if the total estimated cost of $1,360,694,552 were divided by the number of dealers estimated in the NPRM (46,525), the cost would be roughly $29,000 per such dealer.[487] The comment from SBA Advocacy also argued that the Commission failed to include familiarization and training costs or costs that the Commission could not quantify, such as investments in additional IT systems and hardware.[488]

The Commission has considered these comments carefully and has taken them into account in setting forth the factual basis for the certification in SBP VI.A.2, including by modifying its analysis to add an estimate of familiarization and training

641-FTM-29, 2011 WL 4530544 (M.D. Fla. Sept. 29, 2011) (denying request for injunction based on allegation of noncompliance with 5 U.S.C. 602(d)). Similarly, Executive Order 12866 explicitly provides that it "does not create any right or benefit, substantive or procedural, enforceable at law or equity by a party against the United States," let alone one that would preclude adoption of the Rule. *See* E.O. 12866, 58 FR 51735, 51744 (Sept. 30, 1993); *see also Trawler Diane Marie, Inc. v. Brown*, 918 F. Supp. 921, 932 (E.D.N.C. 1995), *aff'd sub nom. Trawler Diane Marie, Inc. v. Kantor*, 91 F.3d 134 (4th Cir. 1996) (denying request to invalidate regulation based on allegation of noncompliance with Executive Order 12866).

[486] *See* Comment of SBA Advocacy, Doc. No. FTC-2022-0046-6664 at 3.

[487] Comment of SBA Advocacy, Doc. No. FTC-2022-0046-6664 at 3.

[488] Comment of SBA Advocacy, Doc. No. FTC-2022-0046-6664 at 3.

costs in response to such concerns.[489] The Commission notes, as SBA Advocacy did in its comment, that the NPRM estimated a total cost for the proposed rule of $1,360,694,552. This estimate was for costs over a ten-year time period. Thus, dividing this estimate by the number of affected dealers estimated in the NPRM yields a cost of roughly $29,000 per dealer over a ten-year period—or approximately $2,900 per year per dealer.[490] This figure—$2,900—is slightly more than the average gross profit described in the NPRM for a single vehicle sale by a new vehicle dealer, and less than half of the average gross profit described in the NPRM for a single vehicle sale by an independent used vehicle dealer.[491]

After carefully reviewing the comments, the Commission does not conclude that the Final Rule will impose a significant economic burden on a substantial number of smaller entities.[492] As described in SBP VI.A.2(b), the estimated economic impact of the Final Rule, controlling for firm size based on available census data, is less than or equal

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[489] After additional research, the Commission estimates that each dealer will need to spend approximately $300 per year on storage (either on premises or in the cloud) to store the records the Rule requires them to maintain. Based on a review of the transaction records the Commission has received from dealers through investigations, this amount is likely to be more than sufficient. Commission review suggests that a typical vehicle transaction generates 3.4 MB of data under the status quo. Given the average number of transactions per dealer, this suggests that storing all these records would require dedicated space of roughly 4.2 GB per year. With a two-year retention window, this corresponds to 8.4 GB of storage at any given time. The Commission estimates that the $300 annual amount budgeted here should be sufficient to maintain at least 1 TB of storage—either on premises or through a cloud storage vendor—which is sufficient for more than 100 times the data storage capacity necessary to retain all transaction files generated by a typical dealership in a year under the status quo. The Commission anticipates that this amount of data storage capacity will be more than sufficient to also allow for dealers to keep any necessary records of correspondence with consumers who ultimately do not complete transactions at the dealership.

[490] NPRM at 42013.

[491] As noted in the NPRM, new vehicle dealers averaged a gross profit of about $2,444 per new vehicle, and about $2,675 per used vehicle, and independent used vehicle dealerships had an average gross profit of more than $6,000 per vehicle. *See* NPRM at 42014 (citing 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) and Nat'l Indep. Auto Dealers Ass'n, "NIADA Used Car Industry Report 2020" at 21).

[492] Notably, while many industry commenters claimed that the burden of the Rule would be substantial, none provided data on revenue or profit.

to 0.27% of annual sales, 1.49% of the gross margin, and 4.12% of the gross margin minus operating expense for dealerships of all sizes.[493] The Commission further notes that, in response to comments from SBA Advocacy and others, the Paperwork Reduction Act analysis incorporates additional estimates for training and storage costs beyond those estimated in the NPRM.

2. Certification of the Final Rule

The Commission hereby certifies that the Final Rule will not have a significant economic impact on a substantial number of small entities.

As an initial matter, the Commission believes that a substantial number of small entities are covered by the Rule. New vehicle dealers (NAICS code 44111) are classified as small entities if they have an average of 200 or fewer employees, and used car dealers (NAICS code 44112) are classified as small entities if they have average annual revenues of $30.5 million or less.[494] Census data indicate that the vast majority of dealers classified into these NAICS codes are small entities.[495] There are approximately 47,271 covered

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[493] U.S. Census Bureau, "Annual Retail Trade Survey: 2021" (Dec. 15, 2022), https://www.census.gov/data/tables/2021/econ/arts/annual-report.html. Gross margin minus operating expenses was determined by deducting total 2021 operating expenses ($144,268 million) from 2021 gross margin ($226,118 million). Gross margin represents total sales less the cost of goods sold. Operating expenses include but are not limited to annual payroll, commissions, data processing, equipment, advertising, lease and rental payments, utilities, and repair and maintenance. *See Glossary*, U.S. Census Bureau, https://www.census.gov/glossary (last visited Dec. 5, 2023). Note that the operating expenses amount may include some costs—such as payments for deceptive advertising or commissions earned on unauthorized charges—that are not legitimate expenses. If these were excluded, the gross margin minus operating cost figures would be even lower than those described in the text.

[494] *See* North American Industry Classification System, U.S. Census Bureau, https://www.census.gov/naics/. These standards are determined by the Small Business Size Standards component of the NAICS, which is available at https://www.sba.gov/document/support-table-size-standards.

[495] The census report does not provide sufficient detail to provide a precise numerical estimate of the number of small entities covered by the Rule. The census data provide the number of dealers with fewer than 250 employees, and also provide revenue and gross margin figures for the motor vehicle dealers industry, without further breakdown. For that reason, the census data do not provide sufficient information to calculate the specific number of dealers that are small entities. Nor did commenters provide comprehensive alternative firm size data.

dealers in the United States, of which over 93% have fewer than 100 employees. Thus, while the Commission cannot determine the precise number of small entities affected by the Rule, census data suggest that the vast majority of covered dealers are small entities.

The Commission certifies that the Rule will not have a significant economic impact on a substantial number of small entities. The Commission has analyzed the costs of the Rule (1) based on industry averages and (2) accounting for dealer size based on the number of employees. Under either measure, the Rule will not have a significant economic impact on a substantial number of small entities.

a) Industry Averages

The Commission estimates a total cost for the Final Rule, at the scenario reflecting the Commission's highest cost estimates, of $1.075 billion to $1.270 billion over a ten-year period.[496] Using the highest end of this highest-cost scenario, the Rule will have an estimated cost of $1.270 billion over ten years using a 3% discount rate. This translates to an average estimated per-year cost of $127 million ($1.270 billion × 0.1). Census data show that, in 2021, automobile dealers had annual sales of $1.265 trillion, gross margin of $226.118 billion,[497] and gross margin minus operating expenses of

[496] The $1.075 billion figure was determined by summing the unrounded total highest estimated costs associated with the Final Rule's total of payments disclosure requirements ($246 million), offering price disclosure requirements ($46 million), requirements regarding certain add-ons and express, informed consent ($406 million), prohibitions on misrepresentations ($130 million), and recordkeeping requirements ($248 million), using a 7% discount rate. The $1.270 billion figure was determined by summing the unrounded total highest estimated costs associated with the Final Rule's total of payments disclosure requirements ($296 million), offering price disclosure requirements ($46 million), requirements regarding certain add-ons and express, informed consent ($475 million), prohibitions on misrepresentations ($157 million), and recordkeeping requirements ($296 million), using a 3% discount rate.

[497] U.S. Census Bureau, "Annual Retail Trade Survey: 2021, Sales" (Dec. 15, 2022), https://www2.census.gov/programs-surveys/arts/tables/2021/sales.xlsx (showing $1,264,635 million in estimated annual sales in 2021 for automobile dealers, NAICS code 4411); U.S. Census Bureau, "Annual Retail Trade Survey: 2021, Gross Margin" (Dec. 15, 2022), https://www2.census.gov/programs-surveys/arts/tables/2021/gm.xlsx (showing $226,118 million in estimated annual gross margin in 2021 for automobile dealers, NAICS code 4411); U.S. Census Bureau, "Annual Retail Trade Survey: 2021, Total

$81.850 billion. Discounting these numbers over a 10-year period using a 3% discount rate equates to average annual sales of $1.079 trillion, gross margin of $192.883 billion, and gross margin minus operating expenses of $69.820 billion. The estimated yearly cost of the Rule therefore is approximately 0.01% of annual sales ($127 million / $1.079 trillion), 0.07% of gross margin ($127 million / $192.883 billion), and 0.18% of gross margin minus operating expenses ($127 million / $69.820 billion) across the industry.[498]

b) Dealer Size Based on the Number of Employees

In addition to considering industry averages, the Commission has analyzed the cost of the Rule accounting for dealer size based on the number of employees. Certain costs are fixed (*i.e.*, remain the same regardless of the number of employees) while other costs scale with dealer size. We consider both (1) first-year compliance costs and (2) costs in subsequent years.

(1) First-year compliance costs. First-year compliance costs are the sum of: (1) upfront fixed costs; (2) one year of annual ongoing costs that are fixed; and (3) one year of annual ongoing costs that scale.

The Commission estimates the upfront fixed costs per dealer under the highest-cost scenario as follows: $963.44 to update policies and procedures to provide the offering price disclosure required by § 463.4(a) ((8 estimated pricing hours[499] × $80.19 per hour) + (8 estimated programming hours × $40.24 per hour)); $249.68 to design disclosures required by § 463.4(d) and (e) and inform associates of their obligations to

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Operating Expenses" (Dec. 15, 2022), https://www2.census.gov/programs-surveys/arts/tables/2021/exp.xlsx (showing $144,268 million in estimated annual operating expenses in 2021 for automobile dealers, NAICS code 4411).

[498] The calculations in this analysis were performed using unrounded inputs in order to maintain accuracy. Nevertheless, for ease of reference, such inputs have been rounded where they are described in the text.

[499] As used here, "pricing hours" means time spent by a sales and marketing manager reviewing dealership policies and procedures for determining the public-facing prices of vehicles in inventory.

provide these disclosures (8 estimated compliance manager hours × $31.21 per hour); $1,783.56 to cull add-ons with no consumer benefit from offerings, develop policies regarding when certain add-ons may or may not be sold, and create nonmandatory disclosures, in response to the requirements of § 463.5 ((16 estimated compliance manager hours × $31.21 per hour) + (12 estimated sales manager hours × $80.19 per hour) + (8 estimated programmer hours × $40.24 per hour)); and $534.12 to upgrade recordkeeping systems and create the templates necessary to accommodate retention of all relevant material under § 463.6 ((8 estimated programmer hours × $40.24 per hour) + (5 estimated clerical hours × $20.16 per hour) + (1 estimated sales manager hour × $80.19 per hour) + (1 estimated compliance manager hour × $31.21 per hour)). These figures total $3,530.80 per dealer.[500]

The Commission estimates the annual fixed ongoing costs per dealer for the first year under the highest-cost scenario as follows: $390.13 to conduct a heightened compliance review of public-facing representations to ensure compliance with § 463.3 (150 estimated documents per year × 5 estimated minutes of review per document × $31.21 per hour of compliance officer review); and $300 estimated for expanded storage to retain records required under § 463.6. These figures total $690.13 per dealer per year.

The Commission estimates annual ongoing costs that scale with dealer size based on number of employees as follows. The Commission estimates that annual costs that scale with dealer size are $76.86 per employee per year. Annual ongoing costs that scale with dealer size include: $26.53 per employee to provide the total of payments

[500] Applicable wage rates throughout this section are based on data from the Bureau of Labor Statistics. *See* U.S. Bureau of Labor Statistics, "May 2022 National Industry-Specific Occupational Employment and Wage Estimates NAICS 441100 - Automobile Dealers" (Apr. 25, 2023), https://www.bls.gov/oes/current/naics4_441100.htm.

disclosures required by § 463.4(d) and (e) (((417,110 sales & related employees × 1 estimated hour for training × $29.43 per hour) + (19,228,256 total covered transactions involving monthly payments or financing × (2/60 estimated disclosure hours per transaction × $28.41 per hour + $0.15 printing costs per disclosure))) / 1,257,877 total employees); $36.40 per employee for training and the delivery of a disclosure under a regime in which dealers choose to deliver an itemized disclosure to comply with § 463.5 (((417,110 sales & related employees × 1 estimated hour for training × $29.43 per hour) + ((10,343,319 new vehicle sales + 21,219,640 used vehicle sales) × (2/60 estimated disclosure hours per sale transaction × $28.41 per hour + $0.11 physical costs per disclosure))) / 1,257,877 total employees); and $13.93 per employee to generate and store calculations required to be retained under § 463.6 ((31,562,959 vehicle sales × 1/60 estimated hours per transaction × $28.41 per hour / 1,257,877 total employees) + (5,444,502 vehicle sales with GAP agreement × 1/60 estimated hours per transaction × $28.41 per hour / 1,257,877 total employees)).

Next, the Commission uses census data on the average number of employees at dealerships within different dealer size cohorts to determine the per-dealer cost for each dealer cohort.[501] Multiplying the estimated cost per employee ($76.86) by the average

[501] Based on 2021 census data, dealers with fewer than five employees have an average of 1.62 employees (34,616 employees at all dealerships with fewer than five employees / 21,356 dealers with fewer than five employees); dealers with 5-9 employees have an average of 6.50 employees (35,794 employees / 5,507 dealers); dealers with 10-19 employees have an average of 13.77 employees (52,852 employees / 3,837 dealers); dealers with 20-49 employees have an average of 33.62 employees (253,365 employees / 7,536 dealers); dealers with 50-99 employees have an average of 69.52 employees (423,351 employees / 6,090 dealers); dealers with 100-249 employees have an average of 140.31 employees (386,001 employees / 2,751 dealers); dealers with 250-499 employees have an average of 317.25 employees (57,105 employees / 180 dealers); dealers with 500-999 employees have an average of 580.56 employees (5,225 employees / 9 dealers); and dealers with 1,000 or more employees have an average of 1,913.60 employees (9,568 employees / 5 dealers). *See* U.S. Census Bureau, "All Sectors: County Business Patterns, Including ZIP Code Business Patterns, by Legal Form of Organization and Employment Size Class for the U.S., States, and Selected Geographies: 2021,"

number of employees within different dealer size cohorts yields annual ongoing scaled costs per dealer of: $124.59 per dealer with fewer than 5 employees ($76.86 × 1.62 employees); $499.59 per dealer with between 5 and 9 employees ($76.86 × 6.50 employees); $1,058.73 per dealer with between 10 and 19 employees ($76.86 × 13.77 employees); $2,584.18 per dealer with between 20 and 49 employees ($76.86 × 33.62 employees); $5,343.19 per dealer with between 50 and 99 employees ($76.86 × 69.52 employees); $10,784.88 per dealer with between 100 and 249 employees ($76.86 × 140.31 employees); $24,384.79 per dealer with between 250 and 499 employees ($76.86 × 317.25 employees); $44,623.26 per dealer with between 500 and 999 employees ($76.86 × 580.56 employees); and $147,085.08 per dealer with 1,000 or more employees ($76.86 × 1,913.60 employees).

Thus, the total first-year compliance costs based on dealer size are $4,345.51 ($3,530.80 + $690.13 + $124.59) per dealer with fewer than 5 employees; $4,720.51 ($3,530.80 + $690.13 + $499.59) per dealer with between 5 and 9 employees; $5,279.66 ($3,530.80 + $690.13 + $1,058.73) per dealer with between 10 and 19 employees; $6,805.11 ($3,530.80 + $690.13 + $2,584.18) per dealer with between 20 and 49 employees; $9,564.12 ($3,530.80 + $690.13 + $5,343.19) per dealer with between 50 and 99 employees; $15,005.80 ($3,530.80 + $690.13 + $10,784.88) per dealer with between 100 and 249 employees; $28,605.72 ($3,530.80 + $690.13 + $24,384.79) per dealer with between 250 and 499 employees; $48,844.18 ($3,530.80 + $690.13 + $44,623.26) per dealer with between 500 and 999 employees; and $151,306.01 ($3,530.80 + $690.13 + $147,085.08) per dealer with 1,000 or more employees.

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https://data.census.gov/table?q=CB2100CBP&n=44111:44112&tid=CBP2021.CB2100CBP&nkd=LFO~001.

To analyze the economic effect of the costs of the Rule by dealer size, the Commission compares per-dealer costs to per-dealer sales, gross margin, and gross margin minus operating expenses. The Commission does not have data on how sales, gross margin, and operating expenses are apportioned to dealerships based on the number of employees. Accordingly, the Commission assumes that sales, gross margin, and operating expenses are apportioned to dealerships *pro rata* with the number of employees. Dividing the 2021 industry-wide figures for annual sales ($1.265 trillion), gross margin ($226.118 billion), and gross margin minus operating expenses ($81.850 billion) by the total number of employees (1,257,877),[502] each employee represents an additional $1,005,372.54 in sales ($1.265 trillion / 1,257,877 employees), $179,761.61 in gross margin ($226.118 billion / 1,257,877 employees), and $65,069.96 in gross margin minus operating expenses ($81.850 billion / 1,257,877 employees). Multiplying these per-employee figures by the average number of employees of dealers within different size cohorts provides per-dealer sales, gross margin, and gross margin minus operating expenses for each cohort. For instance, dealers with fewer than 5 employees have estimated annual sales of $1,629,611.16 (1.62 employees × $1,005,372.54 sales per employee), annual gross margin of $291,376.10 (1.62 employees × $179,761.61 gross margin per employee), and annual per-dealer gross margin minus operating expenses of $105,472.17 (1.62 employees × $65,069.96 gross margin minus operating expenses per employee).

[502] Data on the number of employees comes from the 2021 census. *See* U.S. Census Bureau, "All Sectors: County Business Patterns, Including ZIP Code Business Patterns, by Legal Form of Organization and Employment Size Class for the U.S., States, and Selected Geographies: 2021," https://data.census.gov/table?q=CB2100CBP&n=44111:44112&tid=CBP2021.CB2100CBP&nkd=EMPSZES~001,LFO~001.

The Commission then divides first-year compliance costs by these figures to yield cost as a percentage of sales, gross margin, and gross margin minus operating costs. Applying this method to each of the dealer size cohorts, first-year compliance costs are equivalent to: 0.27% of annual sales ($4,345.51 / $1,629,611.16), 1.49% of gross margin ($4,345.51 / $291,376.10), and 4.12% of gross margin minus operating expenses ($4,345.51 / $105,472.07) for dealers with fewer than 5 employees; 0.07% of annual sales ($4,720.51 / $6,534,647.69), 0.40% of gross margin ($4,720.51 / $1,168,401.53), and 1.12% of gross margin minus operating expenses ($4,720.51 / $422,936.98) for dealers with 5-9 employees; 0.04% of annual sales ($5,279.66 / $13,848,305.89), 0.21% of gross margin ($5,279.66 / $2,476,090.91), and 0.59% of gross margin minus operating expenses ($5,279.66 / $896,293.27) for dealers with 10-19 employees; and less than one-half of one percent of the annual sales, gross margin, and gross margin minus operating expenses for the remaining categories of dealers.

(2) Costs in subsequent years. The estimated cost of compliance with the Rule drops after the first year, given the absence of upfront costs, which are not incurred after the first year. Compliance costs in subsequent years—which are limited to annual ongoing costs (both fixed and those that scale with dealer size)—are therefore a smaller percentage of annual sales, gross margin, and gross margin minus operating expenses, equal to less than two percent of these metrics for dealers of all sizes.[503]

[503] Average ongoing compliance costs after the first year equal: 0.05% of annual sales, 0.28% of gross margin, and 0.77% of gross margin minus operating expenses for dealers with fewer than 5 employees, and less than one-half of one percent of annual sales, gross margin, and gross margin minus operating expenses for the remaining categories of dealers.

The Commission does not find that these compliance costs represent a significant economic burden. The Commission therefore certifies that the Final Rule will not have a significant economic impact on a substantial number of small entities.

B. Initial and Final Regulatory Flexibility Analysis

The NPRM noted the Commission's belief that the proposed rule would not have a significant economic impact on small entities, but nevertheless examined the six IRFA factors, and invited comment on the proposed rule's burdens on small businesses. In the following paragraphs, the Commission discusses comments and then sets forth a FRFA.

1. Comments on the Initial Regulatory Flexibility Analysis

a) Description of the Reasons Why Action by the Agency Is Being Considered

The IRFA explained that the Commission proposed the Rule to address misleading practices and unauthorized charges to consumers during the vehicle buying or leasing process, and to deter dealer misconduct and remedy consumer harm. The Commission further noted that its law enforcement, outreach and other engagement in this area, and the hundreds of thousands of consumer complaints received by the FTC, indicated that dealership misconduct and deceptive tactics persisted despite Federal and State law enforcement efforts. In response, the comments from SBA Advocacy and one industry group argued that the number of complaints received by the Commission is insufficient to support a rulemaking given the total number of vehicle transactions in the United States.[504] Similarly, the industry group argued that the Commission has not filed

[504] Comment of SBA Advocacy, Doc. No. FTC-2022-0046-6664 at 6. SBA Advocacy also raised concerns that the proposal could make the buying process more cumbersome and confusing, noting that the proposal requires additional disclosures, and the proposal prohibited dealers from relying on a signed or initialed document, by itself, or prechecked boxes to establish express, informed consent. These arguments are

enough law enforcement actions against motor vehicle dealers to justify the proposal, and that, where it has brought enforcement actions, the Commission has managed to obtain redress for harmed consumers without the need for an additional monetary remedy. As explained in SBP II.B and in the section-by-section analysis of the recordkeeping requirements in § 463.6 in SBP III.F, consumer complaints represent the "tip of the iceberg" of actual misconduct, as many unlawful practices go undetected or unreported by consumers. Further, the Commission has taken significant action aimed at addressing law violations in the motor vehicle dealer marketplace, despite limited resources and a broad mandate to address unlawful practices across much of the nation's commercial

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addressed in the discussion of disclosures in §§ 463.4, 463.5 and the definition of "Express, Informed Consent" in § 463.2.

The industry group also argued that the number of complaints is overstated because it includes: (1) complaints that are not applicable to motor vehicle dealers or conduct addressed by the Rule, and (2) consumers who did not report a loss. This industry group also argued that the Commission failed to take notice of survey data indicating that the majority of consumers are satisfied with their vehicle purchases. *See, e.g.*, Cox Auto., "2021 Cox Automotive Car Buyer Journey Study" (2022) [hereinafter 2021 Cox Automotive Car Buyer Journey Study], https://www.coxautoinc.com/wp-content/uploads/2022/01/2021-Car-Buyer-Journey-Study-Overview.pdf. First, in the Commission's experience, complaints *understate* harm caused by unlawful conduct in a given category, notwithstanding any inclusion of complaints that may pertain to ancillary or related issues. *See* SBP II.B (discussing how complaints represent the tip of the iceberg in terms of actual consumer harm and citing case where prior to FTC action, there were 391 complaints about add-ons *and other issues* but survey results during the same period indicted that at least 16,848 customers were subject to unlawful practices related to add-ons alone). Moreover, the Commission's reported complaint numbers may be underinclusive of relevant complaints filed by consumers (e.g., complaints about vehicle financing issues may be filed under the "Banks and Lenders" category; vehicle repossession issues may be filed under the "Debt Collection" category; and complaints about deceptive online vehicle shopping may be filed under the "Online Shopping and Negative Reviews" category). With regard to consumers who did not report a loss, the Commission disagrees that such consumers were not harmed or that their experience is not relevant to the Rule. For example, many consumers experience a law violation or other harmful conduct, but choose not to consummate the transaction, including consumers who waste time pursuing misleading offers. Further, survey data indicating that a majority of customers are "satisfied" do not indicate whether those customers had hidden charges in their contracts and whether they ever became aware of such charges. Surveys cited by the Commission have identified situations where customers are unaware of add-on charges in their contracts; indeed, in one case, 79% of consumers were unaware of such charges. *See* SBP II.B (discussing hidden charges in auto contracts). Consumers might be satisfied with a purchase until they later learn they are paying for items they did not authorize, if they learn this at all. Further, "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).

activity,[505] and, particularly given the Supreme Court's 2021 ruling limiting the FTC's ability to obtain redress for consumers, it is difficult to get full redress for consumers.[506] Despite these Commission actions, as well as the hundreds of additional actions brought by other Federal and State regulators, the deceptive or unfair acts or practices addressed by the proposed rule persist.

b) Succinct Statement of the Objectives of, and Legal Basis for, the Proposed Rule

The objectives of the Rule and its legal basis, including the specific grant of rulemaking authority under Section 1029 of the Dodd-Frank Act, 12 U.S.C. 5519, were set forth in the IRFA.[507] The objectives and legal basis, and comments on these topics, additionally have been discussed throughout this SBP.

c) Description of and, Where Feasible, Estimate of the Number of Small Entities to Which the Proposed Rule Will Apply

In its IRFA, the Commission estimated that there were approximately 46,525 franchise, new motor vehicle, and independent/used motor vehicle dealers.[508] As

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[505] One industry group argued that the majority of the FTC's enforcement actions have pertained to deceptive advertising, and few have alleged unlawful conduct involving add-ons. The Commission agrees that many of its actions have alleged deceptive pricing. In focusing on certain actions that involved allegations that dealers placed unauthorized charges for add-ons, however, the commenter leaves out other unlawful conduct related to add-ons. Such conduct includes, for example, misrepresentations regarding the pricing of add-ons (Complaint ¶¶ 6-12, *TT of Longwood, Inc.*, No. C-4531 (F.T.C. July 2, 2015)), or failing to disclose that mandatory add-ons were included in the cost of credit (Consent Order ¶¶ 73-75, *Y King S Corp.*, CFPB No. 2016-CFPB-0001 (Jan. 21, 2016)). In addition, unauthorized charges are likely to go unnoticed by consumers, which can hamper enforcement efforts. *See, e.g.*, Auto Buyer Study, *supra* note 25, at 14 (describing several study participants who thought they had not purchased add-ons, or that add-ons were free, and only learned during the study that they were charged for add-ons).

[506] *See AMG Cap. Mgmt., LLC v. Fed. Trade Comm'n*, 141 S. Ct. 1341 (2021).

[507] NPRM at 42035.

[508] *Id.* at 42035. The Commission explained that, because of the relative size of the automobile market compared to other types of motor vehicle dealers, and the greater availability of relevant information for this market, its NPRM analysis exclusively considered automobile dealers. The Commission invited submissions of market information for other types of motor vehicles such as boats, RVs, and motorcycles that would allow expansion of the scope of its analysis. *See* NPRM at 42035-36.

discussed in the Paperwork Reduction Act analysis in SBP III.V, the Commission received comments from SBA Advocacy and others on this estimate, and the Commission has responded to those comments by making certain changes to the proposal in light of the comments received. The Commission has revised its estimate of covered dealers to 47,271 franchise, new motor vehicle, and independent/used motor vehicle dealers based on newly available NAICS data assembled by the U.S. Census Bureau.[509]

Regarding the estimate of the number of small entities affected by the Final Rule, as noted in the Certification of the Final Rule,[510] while the Commission cannot determine the precise number of small entities, the data the Commission does have reinforce the Commission's initial view that most covered entities are small entities.

d) Description of the Projected Reporting, Recordkeeping, and Other Compliance Requirements of the Proposed Rule

An industry association commenter argued that the Commission did not "accurately" lay out the proposed rule's projected requirements. The commenter did not provide an explanation of what it alleged to be inaccurate in the Commission's description. This comment notwithstanding, the NPRM described the proposed rule's projected requirements, including by elaborating on the proposed recordkeeping requirements and providing estimates regarding the anticipated recordkeeping time and resource obligations for programmers, clerical staff, sales managers, and compliance

[509] U.S. Census Bureau, "All Sectors: County Business Patterns, Including ZIP Code Business Patterns, by Legal Form of Organization and Employment Size Class for the U.S., States, and Selected Geographies: 2021," https://data.census.gov/table?q=CB2100CBP&n=44111:44112&tid=CBP2021.CB2100CBP&nkd=EMPSZES~001,LFO~001 (listing 21,622 establishments for "[n]ew car dealers," NAICS code 44111, and 25,649 establishments for "[u]sed car dealers," NAICS code 44112).

[510] *See* SBP VI.A.2.

officers.[511] The NPRM also provided a detailed description of the recordkeeping requirements for entities to be covered by the Rule.[512]

e) Duplicative, Overlapping, or Conflicting Federal Rules

An industry association commenter argued that the Commission failed to identify relevant Federal rules that may duplicate, overlap, or conflict with the proposal. This commenter's arguments that the proposed rule conflicts with Federal statutes are addressed in the section-by-section analysis in SBP III. Commenters provided no examples of actual conflicts between the proposals and Federal law. Further, there is no evidence that duplicative laws prohibiting misrepresentations or unfair acts or practices have harmed consumers or competition. Moreover, the additional remedies provided by the Final Rule will benefit consumers who encounter conduct that is already illegal and will assist law-abiding dealers that presently lose business to competitors that act unlawfully.

f) Description of Any Significant Alternatives to the Proposed Rule Which Accomplish the Stated Objectives of Applicable Statutes and Which Minimize Any Significant Economic Impact of the Proposed Rule on Small Entities

Statutory examples of "significant alternatives" include different requirements or timetables that take into account the resources available to small entities; the clarification, consolidation, or simplification of compliance and reporting requirements under the Rule for small entities; the use of performance rather than design standards; and an exemption from coverage of the Rule, or any part thereof, for small entities.[513] Comments from SBA

[511] NPRM at 42035; *see also id.* at 42033-34 (describing recordkeeping requirements and analyzing cost burden). To avoid duplicative or unnecessary analysis, the information required by the IRFA can be provided with or as part of any other analysis required by any other law. 5 U.S.C. 605(a).
[512] *See* NPRM at 42027, 42035 (enumerating records to be retained and time period for retention).
[513] *See* 5 U.S.C. 603(c)(1)-(4).

Advocacy and from a national industry association argued that the Commission did not set forth alternatives to the proposed rule.[514]

In its Regulatory Flexibility Act compliance guidance to Federal agencies, the SBA Office of Advocacy provides that, "[i]f an agency is unable to analyze small business alternatives separately, then alternatives that reduce the impact for businesses of all sizes must be considered."[515] As the Commission explained in its NPRM, it "envisioned and drafted this Rule mindful that most motor vehicle dealers are small entities," and drafted its proposal in the first instance to minimize economic impact on all motor vehicle dealers.[516] For example, the Rule prohibits conduct that already violates the FTC Act, but still takes steps to minimize burdens for dealers of all sizes, by, for example, allowing records to be kept in any legible form already kept in the ordinary course of business, and by limiting recordkeeping requirements to twenty-four months from the date the record is created despite the fact that motor vehicle financing terms are generally years longer than this period. Commenters generally appear to understand the relevant market in a similar manner. For instance, the possible alternatives raised by the comment from SBA Advocacy would apply uniformly to both large and small businesses. These alternatives included excluding vehicle dealers that do not sell automobiles, regardless of the size of the dealer, and creating a carve-out for banks and other financing companies that would cover multi-billion dollar institutions.[517] Comments

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[514] Comment of SBA Advocacy, Doc. No. FTC-2022-0046-6664.
[515] Off. of Advoc., U.S. Small Bus. Admin., "A Guide for Government Agencies: How to Comply with the Regulatory Flexibility Act" 39 (2017), https://advocacy.sba.gov/wp-content/uploads/2019/06/How-to-Comply-with-the-RFA.pdf.
[516] NPRM at 42036-37; *see also id.* at 42029-30 (indicating, in Questions for Comment 26.b, 28.a, & 30 that the Commission was considering alternative approaches).
[517] *See* Comment of SBA Advocacy, Doc. No. FTC-2022-0046-6664 at 4-6. As addressed in SBP III.C.2(a) and SBP III.E.2(c), in responding to a similar comment by financial institutions, the Final Rule does not

from SBA Advocacy and a national industry association also discussed the proposed rule's disclosure requirements in an industry-wide manner, not limiting their comments to businesses under any particular size threshold.[518] Nevertheless, the Commission has reviewed these comments carefully, has responded to comments on alternatives in the corresponding sections of its section-by-section analysis, and has determined to modify the definition of "Covered Motor Vehicle" at § 463.2(e) and not to finalize the requirements proposed in §§ 463.4(b) and 463.5(b).[519]

2. Final Regulatory Flexibility Analysis

Although the Commission is certifying that the Rule will not have a significant economic impact on a substantial number of small entities, the Commission has prepared the following FRFA with this Final Rule. In the following paragraphs, the Commission

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change the status quo regarding the responsibilities of contract assignees or other subsequent holders of motor vehicle financing under the Holder Rule, and the Commission declines to create a safe harbor for contract assignees where it did not previously exist.

Similarly, one comment recommended that the Commission add a rule provision authorizing an alternative compliance mechanism, stating that such a provision would aid not just smaller entities but larger entities as well. Under this alternative mechanism, independent accountability organizations could apply to the Commission for authorization to review and assess auto dealers' adherence to a set of rule compliance guidelines that would be created. *See* Comment of BBB Nat'l Programs, Doc. No. FTC-2022-0046-8452 at 1-3. This comment suggested that such an alternative compliance mechanism would have several benefits, including educating industry participants and allowing for industry oversight beyond the capacity of the FTC. The Commission agrees with the goals of educating stakeholders and maximizing resources used to ensure compliance with the Rule but notes that these goals can be furthered without adding alternate mechanisms with as-yet unknown guidelines, that may or may not be sufficient to protect consumers, to the Rule that the Commission is finalizing. The Commission notes that the Rule finalizes certain baseline protections that should already be in place under the law. The Commission encourages stakeholders, such as auto dealer trade associations, BBB, and others, to educate their members and the public about the Rule and encourage compliance, as such groups have done when issuing guidance on other aspects of the law.

[518] Comment of SBA Advocacy, Doc. No. FTC-2022-0046-6664 at 5-6; *see generally* Comment of Nat'l Auto. Dealers Ass'n, Doc. No. FTC-2022-0046-8368. The National Automobile Dealers Association also argues that the Commission should have considered whether to do a rule in the first instance. The NPRM provides a detailed explanation of why, more than a decade after Congress granted the FTC APA rulemaking authority with respect to motor vehicle dealers, and continued enforcement, outreach, and other initiatives, a rule is needed to address ongoing problems related to bait-and-switch tactics and hidden charges.

[519] Separately, the Commission notes that the NPRM identified and solicited comments on alternatives to every substantive requirement, including the areas specifically addressed by the commenters. *See, e.g.*, NPRM at 42028-30 (Q4-7, Q10, Q16, Q28, Q33, Q36-38); *id.* at 42040-41.

provides the information required for a FRFA: (1) a statement of the need for, and objectives of, the Rule; (2) a statement of the significant issues raised by public comments in response to the IRFA, including any comments filed by the Chief Counsel for Advocacy of the Small Business Administration in response to the proposed rule, the Commission's assessment and response, and any resulting changes; (3) a description of and an estimate of the number of small entities to which the Rule will apply or an explanation of why no such estimate is available; (4) a description of the projected reporting, recordkeeping, and other compliance requirements; and (5) a description of the steps the agency has taken to minimize the significant economic impact on small entities consistent with the stated objectives of applicable statutes, including a discussion of any significant alternatives for small entities.[520]

a) Statement of the Need for, and Objectives of, the Rule

The FTC issues this Final Rule to address deceptive and unfair acts or practices during the vehicle buying or leasing process, and to provide an additional enforcement tool to remedy consumer harm and assist law-abiding dealers. As detailed in SBP II.B.1, these deceptive and unfair practices include bait-and-switch tactics, such as dealers advertising deceptively low prices or other deceptive terms to induce consumers to visit the dealership, and charging such consumers additional, unexpected amounts, including after the consumers have invested significant time and effort traveling to, and negotiating at, the dealership premises. At present, consumers may never learn that they are paying substantial unexpected charges, given the complexity and length of the motor vehicle sale, financing, or lease transaction and its attendant contracts and other documents. Law

[520] 5 U.S.C. 604(a)(1)-(6).

enforcement, outreach and other engagement in this area, as well as the number of consumer complaints each year regarding motor vehicle dealer practices, indicate that unlawful conduct persists despite Federal and State law enforcement efforts.

b) Issues Raised by Comments, Including Comments by the Chief Counsel for Advocacy of the SBA, the Commission's Assessment and Response, and Any Changes Made as a Result

The comments regarding the IRFA are addressed in SBP VI.B, and the comments regarding the other provisions of the NPRM are discussed in the SBP's section-by-section analysis in SBP III. As noted, the Commission has made certain changes to the Rule after carefully reviewing the comments. These changes include modification of the definition of "Covered Motor Vehicle" at § 463.2(e), removal of the add-on list disclosure requirement in proposed § 463.4(b) and the requirements in proposed § 463.5(b), and removal of the corresponding recordkeeping requirements in proposed § 463.6(a)(2) and (a)(4).

c) Description and Estimate of the Number of Small Entities to Which the Final Rule Will Apply or an Explanation of Why No Such Estimate Is Available

The Final Rule applies to covered motor vehicle dealers, as defined in § 463.2(f), of covered motor vehicles at § 463.2(e): "any self-propelled vehicle designed for transporting persons or property on a public street, highway, or road," and, in light of comments received, excludes specific categories as detailed in § 463.2(e).[521] As explained in the Certification,[522] the Commission cannot determine the precise number of small entities to which the Final Rule applies, but census data indicate that the vast

[521] The Commission is authorized to prescribe rules with respect to 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, as defined in 12 U.S.C. 5519(a).
[522] *See* SBP VI.A.2.

majority of the estimated 47,271 dealers covered by the Rule are small entities according to the applicable U.S. Small Business Administrator's relevant size standards.

d) Description of the Projected Reporting, Recordkeeping, and Other Compliance Requirements

The Final Rule prohibits certain unfair or deceptive acts or practices and contains recordkeeping requirements. The Final Rule contains no reporting requirements.

The Final Rule requires covered motor vehicle dealers to clearly and conspicuously disclose the offering price of a vehicle in certain advertisements and in response to consumer communications. It also requires dealers to make certain other disclosures during the sale, financing, or leasing process. To enforce the Rule and prevent the unfair or deceptive practices prohibited by the Rule, the Rule further requires dealers to retain records necessary to demonstrate compliance with the Rule. Such records include advertising materials and copies of purchase orders and financing and lease documents. The Rule requires such records to be retained for a period of twenty-four months from the date they are created and provides that they may be kept in any legible form, and in the same manner, format, or place as they may already be kept in the ordinary course of business. Further details on these provisions are discussed throughout this SBP, including in the section-by-section analysis of the recordkeeping requirements in § 463.6, as well as in the preceding Paperwork Reduction Act analysis.

e) Description of the Steps the Commission Has Taken To Minimize the Significant Economic Impact on Small Entities Consistent with the Stated Objectives of Applicable Statutes

The Final Rule addresses certain unfair or deceptive acts or practices in motor vehicle sales, financing, and leasing. In drafting its NPRM, reviewing public comments, and modifying the Rule from its original proposal, the Commission has taken specific steps to avoid unduly burdensome requirements for small entities. The Commission believes that the Final Rule—including the prohibitions against making specific misrepresentations and against charging consumers for any item unless the dealer obtains the express, informed consent of the consumer for the charge—is necessary to protect consumers, including small-business consumers that purchase, finance, or lease motor vehicles. By addressing these practices, the Rule also will benefit competition by preventing law-abiding dealers, many of which are small businesses, from losing business due to unlawful practices by other dealers.

For each provision in the Rule, the Commission has attempted to reduce the burden on businesses, including small entities. For example, the Commission limited the number of disclosures that dealers are required to make under the Final Rule, and in response to comments, further limited such disclosures by determining not to finalize the disclosures in proposed §§ 463.4(b) and 463.5(b). Similarly, the Commission has limited the duration of the Rule's recordkeeping requirements to twenty-four months from the date the relevant record is created, even though this period is far shorter than the length of many financing contracts.

As previously noted, the Commission does not believe the Final Rule imposes a significant economic impact on a substantial number of small entities. Nonetheless, the

Commission has taken care to avoid extensive requirements related to form. For example, the Commission does not specify the form in which records required by the Final Rule must be kept. Moreover, the Rule's disclosure requirements do not mandate specific font sizes. In sum, the Commission has worked to minimize any significant economic impact on small businesses.

VII. Final Regulatory Analysis Under Section 22 of the FTC Act

A. Introduction

The Federal Trade Commission (FTC) is finalizing a Rule to address unfair or deceptive acts or practices by covered motor vehicle dealers when engaging with consumers who are shopping for covered motor vehicles. The Rule contains several provisions targeted at addressing price-related deception and unfairness for consumers with respect to purchasing, leasing, and financing new and used motor vehicles. The Final Rule prohibits misrepresentations regarding material information about certain aspects of motor vehicles and motor vehicle financing. The Final Rule also mandates certain disclosures about vehicle price, payments, and add-ons, while prohibiting charges for add-on products and services that would not benefit the consumer or for any item unless the dealer obtains the express, informed consent of the consumer for the charge.

Section 22 of the FTC Act, 15 U.S.C. 57b-3, requires the Commission to issue a final regulatory analysis when publishing a final rule. The final regulatory analysis must contain (1) a concise statement of the need for, and objectives of, the final rule; (2) a description of any alternatives to the final rule which were considered by the Commission; (3) an analysis of the projected benefits, any adverse economic effects, and any other effects of the final rule; (4) an explanation of the reasons for the determination

of the Commission that the final rule will attain its objectives in a manner consistent with applicable law and the reasons the particular alternative was chosen; and (5) a summary of any significant issues raised by the comments submitted during the public comment period in response to the preliminary regulatory analysis, and a summary of the assessment by the Commission of such issues.

As discussed previously, the FTC issues this Final Rule to address deceptive and unfair acts or practices during the vehicle buying or leasing process, and to provide an additional enforcement tool to remedy consumer harm and assist law-abiding dealers. These deceptive and unfair practices include bait-and-switch tactics, such as dealers advertising deceptively low prices or other deceptive terms to induce consumers to visit the dealership; and charging such consumers additional, unexpected amounts, including after the consumers have invested significant time and effort traveling to, and negotiating at, the dealership premises. At present, consumers may never learn that they are paying substantial unexpected charges, given the complexity and length of the motor vehicle sale, financing, or lease transaction and its attendant contracts and other documents. Law enforcement, outreach, and other engagement in this area, as well as the number of consumer complaints each year regarding motor vehicle dealer practices, indicate that unlawful conduct persists despite Federal and State law enforcement efforts.

In response to public comments, the Commission considered and made a number of revisions from the proposed rule, which in turn have necessitated revisions to the regulatory analysis, resulting in this final regulatory analysis.[523] The most significant

[523] These revisions and alternatives the Commission considered are described in detail in the Commission's Statement of Basis and Purpose, as is the Commission's explanation why the Final Rule will attain its objectives in a manner consistent with applicable law.

revisions to the proposed rule impacting the regulatory analysis are the removal of proposed §§ 463.4(b) (requiring the disclosure of add-on lists) and 463.5(b) (requiring various itemized disclosures relating to undisclosed or unselected add-ons). As a result of the Commission's determination not to finalize these sections of the proposed rule, costs and benefits associated with those provisions have been excluded from the final regulatory analysis. The Commission also has made revisions in response to public comments, the availability of newer data, the identification of additional relevant data, and the application of newer scholarly research. The final regulatory analysis thus builds upon the preliminary regulatory analysis, while incorporating several updates:

- The analysis of consumer time savings has been revised in response to public comments and changes following the NPRM.

- A section quantifying the reduction in deadweight loss resulting from the Rule has been added, based upon recent research that allows the Commission to quantify both how dealer markups will respond to price transparency and how new and used vehicle quantities will respond to changes in price.

- Training costs have been added for some provisions in response to public comments.

- Information systems costs have been added to the Recordkeeping section in response to public comments, based on estimates of how much data would be required and the cost of cloud or on-premises data storage.

- Wages used to monetize labor costs have been updated to reflect new data from the Bureau of Labor Statistics.

- The number of dealers has been updated to reflect new data from Census County Business Patterns.

- The number of transactions subject to the Rule has been revised in response to public comments, and the Commission's identification of

additional data sources that can be used to exclude private party and fleet transactions.

The Final Rule contains requirements in the following areas:

1. Prohibited misrepresentations;
2. Required disclosure of offering price in certain advertisements and in response to inquiry;
3. Required disclosure of total of payments for financing and leasing transactions;
4. Prohibition on charging for add-ons in certain circumstances;
5. Requirement to obtain express, informed consent before any charges; and
6. Recordkeeping.

In the following analysis, we describe the anticipated impacts of the Final Rule. Where possible, we quantify the benefits and costs and present them separately by provision. If a benefit or cost is quantified, we indicate the sources of the data relied upon. If an assumption is needed, the text makes clear which quantities are being assumed.

A period of 10 years is used in the baseline scenario because FTC rules are generally subject to review every 10 years.[524] Quantifiable aggregate benefits and costs across three different sets of assumptions are summarized as the net present value over this 10-year time frame in Table 1.1. Quantifiable benefits include time savings from a more efficient shopping and sales process and a reduction in deadweight loss, both of which ultimately result from greater transparency under the Rule. Quantifiable costs primarily reflect the resources expended by automobile dealers in developing the systems

[524] *See* Fed. Trade Comm'n, Notification of Intent to Request Public Comment, Regulatory Review Schedule, 87 FR 47947 (Aug. 5, 2022), https://www.govinfo.gov/content/pkg/FR-2022-08-05/pdf/2022-16863.pdf.

necessary to comply with the provisions of the Rule. In addition, we expect additional benefits and costs that we are presently unable to quantify. Among the unquantified benefits are time savings that accrue to individuals who abandon vehicle transactions entirely; additional time savings on activities that individuals engage in digitally under the status quo; reductions in deadweight loss resulting from direct price effects in the markets for used vehicles or vehicle add-ons; and the benefit of reduced stress, discomfort, and unpleasantness experienced by motor vehicle consumers under the status quo. Among the unquantified costs would be any potential reductions in consumer information resulting from changes in dealers' policies regarding marketing and advertisements. The discount rate reflects society's preference for receiving benefits earlier rather than later; a higher discount rate is associated with a greater preference for benefits in the present. The present value is obtained by multiplying each year's net benefit by a discount factor a number of times equal to the number of years in the future the net benefit accrues.[525]

[525] While whole calendar years are used here for ease of reference, this analysis estimates costs and benefits over a ten-year period running from the Rule's effective date. For the purposes of discounting, the Commission assumes that any upfront costs or benefits occur immediately upon the effective date of the Rule and are therefore not discounted. The Commission further assumes that ongoing costs and benefits occur at the end of each period, such that even ongoing costs/benefits that occur in year 1 are discounted.

Table 1.1—Present Value of Net Benefits (in millions), 2024-2033

	Low Estimate		Base Case		High Estimate	
	3% Discount Rate	7% Discount Rate	3% Discount Rate	7% Discount Rate	3% Discount Rate	7% Discount Rate
Benefits						
Time Savings	$7,463	$6,145	$14,926	$12,290	$24,036	$19,790
Deadweight Loss Reduction	$568	$468	$1,298	$1,069	$2,307	$1,899
Total Benefits	**$8,031**	**$6,613**	**$16,224**	**$13,359**	**$26,343**	**$21,690**
Costs						
Finance/Lease Total of Payments Disclosure	$296	$246	$296	$246	$117	$98
Offering Price Disclosure	$46	$46	$46	$46	$0	$0
Prohibition re: Certain Add-ons & Express, Informed Consent	$475	$406	$475	$406	$147	$128
Prohibition on Misrepresentations	$157	$130	$157	$130	$0	$0
Recordkeeping	$296	$248	$296	$248	$296	$248
Total Costs	**$1,270**	**$1,075**	**$1,270**	**$1,075**	**$559**	**$474**
Net Benefits	**$6,761**	**$5,538**	**$14,954**	**$12,284**	**$25,784**	**$21,216**

Note: "Low Estimate" reflects all lowest benefit estimates and high cost scenarios and "High Estimate" reflects all highest benefit estimates and low cost scenarios. "Base Case" reflects base case benefit estimates and high cost scenarios. Not all impacts can be quantified; estimates only reflect quantified costs and benefits.

B. Estimated Benefits of Final Rule

In this section, we describe the beneficial impacts of the Rule, by (1) providing quantitative estimates where possible, (2) identifying quantitative benefits that cannot be estimated at this time due to a lack of data, and (3) describing benefits that can only be assessed qualitatively. The benefits cut across multiple areas addressed by the Rule and

these benefits are impossible to identify separately by area. As a result, we enumerate the benefits of the Rule not by provision, but by category.

1. Consumer Time Savings When Shopping for Motor Vehicles

Several provisions of the Rule would benefit consumers by saving them time as they complete motor vehicle transactions. Required disclosures of relevant prices and prohibitions of misrepresentations, *inter alia*, would save consumers time when shopping for a vehicle by requiring the provision of salient, material information early in the process and eliminating time spent pursuing misleading offers. The Commission's enforcement record shows that consumer search and shopping is sometimes influenced by unfair or deceptive advertising that draws consumers to a dealership in pursuit of an advertised deal, only to find out at some point later in the process (if at all) that the advertised deal is not actually available to them.[526] This bait-and-switch advertising has the effect of wasting consumers' time traveling to and negotiating with unscrupulous dealerships, time which would otherwise be spent pursuing truthful offers in the absence of deception and unfairness. If consumers are faced with hard constraints on their time or other resources, this wasted time may mean that they are unable to find the deal that best fits their needs and preferences. Additionally, motor vehicle consumers frequently begin the process of shopping for a motor vehicle (e.g., by visiting a dealership in response to an ad or initiating negotiations in response to a quoted price that is incomplete) and then later abandon the nascent transaction entirely when additional information is revealed. In these instances, consumers do not purchase or lease a vehicle at all. The Rule would also save consumers time by avoiding these abandoned transactions. However, because the

[526] *See* SBP II.B-C.

Commission has been unable to identify data to determine the quantity of such abandoned transactions and the amount of time spent pursuing them, this benefit remains unquantified in the analysis.

Obviously, many consumers end up purchasing and leasing vehicles under the status quo—either because full revelation of prices and terms still results in a mutually beneficial transaction or because full revelation never occurs and consumers are deceived into completing a transaction that is not mutually beneficial. These consumers also spend additional, unnecessary time discovering information that dealers would be required to disclose earlier once the Rule is in effect. The Commission expects the Rule's required disclosures and prohibitions against misrepresentations to improve information flows and consumer search efficiency, including but not limited to, addressing the influence of deception and unfairness on consumer search and shopping behavior.

The Commission's preliminary analysis estimated that the proposed rule would allow consumers to spend 3 fewer hours completing each motor vehicle transaction and result in (quantifiable) overall time savings valued at between $30 billion and $35 billion. In this final regulatory analysis, the Commission takes into account the effects of revisions to the proposed rule and additional data, addresses industry comments, and employs an alternative analytical approach with a sensitivity analysis. This sensitivity analysis reflects a "high-end" estimate that consumers will save as many as 3.3 hours per completed transaction; a "base case" estimate—representing the most likely scenario—that consumers will save 2.05 hours per transaction; and a possible "low-end" savings estimate of 1.02 hours. Using a 7% discount rate, these time savings estimates result in a

range of between $6.1 billion and $19.8 billion in total savings, with a base case of $12.3 billion.

In its preliminary analysis, the Commission relied on results from the 2020 Cox Automotive Car Buyer Journey study, which showed that consumers spent roughly 15 hours researching, shopping, and visiting dealerships for each motor vehicle transaction.[527] Based on the proposed rule provisions prohibiting misrepresentations and requiring price transparency, the Commission assumed each consumer who consummated a vehicle transaction would spend 3 fewer hours shopping online, corresponding with dealerships, visiting dealer locations, and negotiating with dealer employees. The 3 hours corresponded to 20% of an average consumer's time spent on such activities in 2019 (pre-COVID).

The Commission received a number of comments emphasizing the unnecessary time consumers must spend to ascertain the price and terms when attempting to consummate a vehicle transaction. One group of commenters, for example, asserted that "[t]he most important factor for consumers purchasing a vehicle is its price, yet the price is almost impossible to ascertain without spending hours at the dealership."[528] Another group of commenters provided a compilation of numerous consumer complaints, including many that described consumers spending hours at a dealership trying to ascertain the final price and terms of the transaction.[529] The improved information flow

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[527] NPRM at 42037 & n.180.

[528] Comment of Am. for Fin. Reform et al., Doc. No. FTC-2022-0046-7607.

[529] Comment of Consumer Reps. et al., Doc. No. FTC-2022-0046-7520 at 3, 11, 12, 16, 38 (including story from Illinois consumer describing "[spending] about 4 hours at the dealership while the salesman kept changing the terms of the deal . . . ."; story from Connecticut consumer describing how, "[a]fter nearly three hours of paperwork . . . I was finally presented with the official bill to pay the balance. The price was now higher than the original adjusted sticker."; story from New Jersey consumer describing how, "[a]fter 4 hours of negotiations . . . I finally got nearly the same price as the verified offer [for the vehicle] but about

under the Final Rule will provide quantifiable benefits for consumers by reducing or eliminating this unnecessary need to spend time penetrating opaque pricing and terms, and will provide qualitative benefits by reducing frustration and stress in the car buying process.

Some industry commenters questioned the appropriateness of the data and assumptions used to quantify the time savings benefit. A number of industry association commenters argued that the 15-hour figure did not represent a reasonable base from which time savings attributable to the Rule could be derived. One such commenter criticism asserted that the publication from which it was sourced only surveyed consumers who used the internet during research and shopping and therefore could not be representative of the time spent by consumers who do not use the internet. Still other commenters noted that additional data from the same organization were available. The Commission disagrees that the 15-hour estimate is an unreasonable base from which to derive time savings from the Rule. While the Cox Automotive Study acknowledges only internet users were surveyed, the study also indicates its "[r]esults are weighted to be representative of the buyer population."[530] Also, while more recent data were available at the time of the analysis for the NPRM, those data were from an extraordinary period (the COVID-19 pandemic). The Commission expects that the data used for the preliminary analysis are more representative of consumer experiences over the analysis window than the more recent data. While not dispositive, the limited data available since the NPRM

$1000 less on my trade-in[ ](that was also part of the verified offer). The [dealer] also added on Accessories 'other products' [of] $474.00 . . . ."; story from Texas consumer describing how "[t]he [dealership] finance manager kept me there for two hours, and said the deal was done. I went to get my wife, when we got back the price had gone up $3,000.00.").

[530] 2020 Cox Automotive Car Buyer Journey, *supra* note 25, at 1.

was published bears this hypothesis out. In the 2021 Cox Automotive Car Buyer Journey Study, consumers spent roughly 12-and-a-half hours researching, shopping, and visiting dealerships for each motor vehicle transaction.[531] In contrast, in the 2022 Car Buyer Journey study, consumers spent roughly 14-and-a-half hours researching, shopping, and visiting dealerships for each motor vehicle transaction.[532] This admittedly short trend suggests that the COVID-19 pandemic had a significant effect on motor vehicle shopping, reducing the amount of time the typical consumer spent on these activities, and that time spent on these activities has already rebounded to previous levels.[533]

Another industry association commenter suggested that the figure included categories of time use that could not conceivably be affected by the proposed rule, such as online research into vehicle features, and that attention should be restricted to time spent shopping. The Commission finds that several provisions in the Rule clearly have the potential to reduce time spent across most categories covered by the 15-hour figure, including the largest category ("Researching and Shopping Online"). This category of time use would include comparing listed vehicle prices across dealerships that, under the Rule, would be transparent and comparable in a way that they were not in the status quo, thus saving consumers time.

Some commenters also noted that the total base of transactions reported in the preliminary analysis appeared to overstate the number of transactions to which the proposed rule would apply. First, commenters asserted that the 62.1 million transactions

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[531] *See* 2021 Cox Automotive Car Buyer Journey Study, *supra* note 504, at 16.
[532] *See* 2022 Car Buyer Journey, *supra* note 25, at 6.
[533] Interestingly, consumer satisfaction with the car buying process, as measured by this same survey, was highest during the COVID-19 pandemic when the time spent on research, shopping, and visiting dealerships was lowest, and has since dropped back to pre-pandemic levels. 2022 Car Buyer Journey, *supra* note 25, at 5.

double-counted new vehicle leases in the data source from which it was obtained (2019 National Transportation Statistics, Table 1-17). Second, commenters asserted that the number included private party transactions that would be entirely unaffected by the proposed rule. Finally, commenters argued that the transactions number contained wholesale and fleet transactions, where the amount of time spent researching, shopping, and visiting dealers is likely to be substantially different relative to a household consumer.

The Commission has verified that the source data were revised to fix the erroneous double-counting of leases between the time they were accessed by the Commission for the drafting of the preliminary analysis and the time that comments were received. The final analysis uses the revised data. In addition, in response to comments that private party transactions should be excluded from the analysis, the Commission is revising its analysis. Additional data would be necessary to quantify any time savings benefits for wholesale and fleet transactions. Accordingly, the Commission has excluded all transactions occurring through non-retail channels from the final analysis.[534]

A number of comments raised concerns about the foundations of the 3-hour time-savings assumption. One industry organization noted that the Cox Automotive study cited in the NPRM does not itself address the proposals in the NPRM (which the survey, of

[534] When the transaction volume from the preliminary analysis is applied to the Commission's current methodology and sensitivity analysis, time savings under the Final Rule ranges from a high-end of $35 billion to a low-end of $11 billion, with a base case of $22 billion (assuming a 7% discount rate). In comparison, the preliminary analysis computed savings under the proposed rule as approximately $31 billion (also assuming a 7% discount rate). The residual difference in base case savings is attributable to less time saved per transaction—partially explained by additional provisions in the NPRM that the Commission is not finalizing—as well as updates to the underlying wages used to monetize the consumer time savings.

course, predated) and does not estimate time savings.[535] Another organization expressed confusion as to whether the assumption was intended as a flat 3-hour time savings or a 20% time savings, asserting that dynamism in automotive retailing will likely lead to evolution in the total amount of time spent shopping.

While the Commission believes its 3-hour time-saving assumption in the NPRM remains reasonable, the Commission has conducted additional analyses, the results of which demonstrate the positive net benefits of the Rule even when applying more conservative assumptions around time savings and adjusting for the removal of certain proposed provisions from the NPRM.[536] Using recent figures from Cox Automotive's Car Buyer Journey 2019 study, the Commission notes that consumers who do various activities in the vehicle buying process digitally ("digital consumers") save time at the dealership relative to those who do not ("non-digital consumers").[537] The Commission's

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[535] This same organization commissioned a study that was recently released asserting the proposed rule would lead to an increase in consumer transaction time. This survey, however, had numerous methodological shortcomings rendering its results unreliable. For example, the survey presented each respondent at the outset with a leading statement telling them the 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." 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" 34-36 (2023), https://www.cargroup.org/wp-content/uploads/2023/05/CAR-Report_CFR-Part-463_Final_May-2023.pdf (introductory instructions on the survey instrument sent to respondents). Moreover, the survey started with a sample size of 60 dealers (*id.* at 7) in an industry with an estimated 46,525 dealers, NPRM at 42,031 & n.154, but only 40 dealers actually completed responses to many key questions (*id.* at 29). The survey does not describe how these 40-60 dealers were chosen. Although the survey estimates that the proposed rule would require consumers to spend additional time on motor vehicle transactions, this conclusion is based on the responses of just 40 dealers and included no consumers. *Id.* at 29-32. Moreover, the survey report attributed much of this estimated increase to proposed rule provisions that are not in the Final Rule. *Id.* at 25.

[536] In fact, the sensitivity analysis in Table 2.3 of this final regulatory analysis presents a range of reasonable estimates for time savings that includes the 3-hour time-saving assumption from the preliminary analysis in the NPRM.

[537] Cox Auto. et al., "Car Buyer Journey 2019" (2019) [hereinafter Car Buyer Journey 2019], https://www.coxautoinc.com/wp-content/uploads/2019/06/2019-Car-Buyer-Journey-Study-FINAL-6-11-19.pdf. While Cox Automotive has released subsequent Car Buyer Journey studies, none of these subsequent studies quantify time savings from shopping digitally. In addition, to the extent that shoppers

revised base case time savings calculation assumes that only the fraction of consumers who are not currently shopping digitally will experience time savings, and that these savings will be proportional to the time savings found in the Car Buyer Journey 2019 study for digital consumers.[538] Because the Commission expects the provisions of the Rule to emulate some of the time-saving features of completing these activities digitally, the time savings benefits of the Rule are assumed to be a proportion of the time saved by status quo digital consumers, with the proportion determined by how closely the status quo digital shopping experience is expected to resemble the shopping experience for all consumers once the Rule is in effect. Additionally, because these numbers only reflect time saved at the dealership of purchase, we assume that these same consumers will also save time on these activities to the extent that they are initiated at dealerships visited prior to the dealership at which they purchase ("non-purchase dealerships"). Based on 2020 data from Cox Automotive, the average consumer visits 1 non-purchase dealership for each transaction.[539] Table 2.1 documents both the fraction of consumers performing activities digitally under the status quo and the time saved at the dealership by these consumers on each activity.

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compensate by spending more time at home on these activities, these time savings should be reduced to reflect *net* time savings from performing these activities digitally. We believe that the nature of performing these activities digitally vs. at the dealership suggests these offsets should be small.

[538] The 2020 Cox Automotive Digitization of End-to-End Retail study reports the fraction of consumers who are already engaging in various activities online under the status quo. Cox Auto., "Digitization of End-to-End Retail" (2021) [hereinafter Digitization of End-to-End Retail], https://www.coxautoinc.com/wp-content/uploads/2021/01/2020-Digitization-of-End-to-End-Retail-Study-FINAL.pdf. While the activities listed across studies do not match perfectly, we map the activity categories to the closest corresponding activity in the other study and, in our final analysis, exclude from the time savings calculation the percentage of transactions corresponding to the fraction of consumers already engaging in that activity online. While it is likely that consumers shopping digitally under the status quo will also experience some additional time savings under the Rule, there is insufficient data to estimate this marginal savings and so we leave this benefit unquantified in the analysis.

[539] 2020 Cox Automotive Car Buyer Journey, *supra* note 25, at 15 (noting an average of 2.2 dealerships visited among new car buyers).

Table 2.1—Completing Activities Digitally

Activity	% of Consumers Digital (2020 Digitization)	Time Saved at Dealership (2019 Journey)
Negotiating the Purchase Price	20%	43 minutes
Select F&I Add-Ons	18%	33 minutes
Discussing and Signing Paperwork	13%	45 minutes
Get a Trade-In Offer	31%	26 minutes

Source: Car Buyer Journey 2019 and Digitization of End-to-End Retail.

Based on the description of these activities and the anticipated effects of the Rule, our base case estimates assume that non-digital consumers will save an amount of time negotiating a vehicle purchase price equal to the amount of time saved by those negotiating purchase price digitally under the status quo (43 minutes). For non-digital consumers, it is currently time-consuming to obtain comparable price quotes from dealerships. Many dealerships will not initiate price negotiations in earnest without a competing price quote in writing, which can only be obtained by visiting a dealership for the non-digital consumer. Mandating offering price disclosures—which are comparable across dealerships by definition—early in the shopping process will emulate the price discovery function of negotiating prices online, in which comparable price quotes can be obtained (with effort) via email.[540]

The Commission anticipates that the impact of the Rule on time spent selecting F&I add-ons and discussing and signing paperwork will be moderate. In our base case estimates, non-digital consumers will save an amount of time doing these activities equal

[540] Shoppers who negotiate purchase price digitally under the status quo will likely also obtain time savings from mandatory offering price disclosures, corresponding to the time and effort they put into contacting and exchanging email with dealerships. We lack sufficient data on the time spent on these activities to quantify these benefits, however.

to the half the amount of time saved by those doing these activities digitally under the status quo (33 × 0.5 = 16.5 minutes and 45 × 0.5 = 22.5 minutes, respectively). Time saved selecting add-ons flows primarily from the prohibitions on various misrepresentations, the mandatory disclosures regarding whether add-ons are required, and the prohibition on charging for add-ons under certain circumstances.[541] Time saved discussing and signing paperwork also flows from the prohibitions on various misrepresentations, several disclosures mandated by the Rule, and the prohibition on charging for items without express, informed consent.[542] For non-digital consumers, considerable time must be spent at the dealership both closely reviewing paperwork (e.g., to ensure that unwanted optional add-ons are not being added to the transaction; to ensure that the financing terms, including monthly payments, total payments, and term length, are as expected; and to confirm that terms in the contract generally conform to what was discussed) and waiting for sales and F&I staff at the dealership to consult with managers and revise paperwork as needed. Digital consumers, however, may have access outside the dealership to add-on menus where they can select their desired F&I products affirmatively without worry that dealership staff will misrepresent the products or pressure them into selecting something unwanted. In addition, digital consumers may receive and review paperwork before arriving at the dealership. This way, any necessary revisions can be performed by the dealership asynchronously so that the consumer is free to spend that time as they wish instead of being stuck in an F&I office. The noted Rule provisions will give consumers confidence that the add-on options presented to them are

[541] *See* §§ 463.3(a), (b), & (f); 463.4(c); and 463.5(a) & (c). The Commission notes that time savings would likely be higher in this category had it determined to finalize proposed § 463.4(b), which would have required disclosure of an add-on list.
[542] *See* §§ 463.3; 463.4(c), (d), & (e); and 463.5(c).

non-deceptive and the contract paperwork they are asked to review will not yield any unpleasant surprises. As a result, on average they will neither need to engage in such close scrutiny of their contract documents, nor spend as much time waiting for dealership staff to speak to managers or make changes as the first draft will be more likely to conform to their expectations.[543]

The Commission assumes that the Rule will likely not assist consumers much (if at all) in reducing time spent obtaining a trade-in offer. In our base case estimates, we assume non-digital consumers will not save additional time on obtaining a trade-in offer under the Rule. There are various provisions in the Rule that touch trade-in offers made by dealerships[544] and may increase consumer confidence in dealer contracts as discussed previously. In addition, trade-in values are an important piece of transaction pricing, so greater price transparency may save consumers time on the trade-in aspect of transactions that involve them. There is a concern, however, that dealers may spend more time trying to extract maximum value out of any given trade-in opportunity once the Rule is in effect. Because the Commission believes that greater transparency in vehicle pricing and add-ons will lead to reduced markups on these products (*see* "Reductions in Deadweight Loss"), it is possible that dealers will attempt to make up these lost profits by maximizing trade-in margins, which may lead to increased time spent on negotiations. Since we do not have sufficient data to determine the balance of these two effects, we assume in the base case that they offset. In sensitivity analyses where we explore alternative assumptions, note that time savings from this activity only apply to the roughly 50% (by

[543] Again, status quo digital shoppers will likely obtain time savings on these activities as well, to the extent that their paperwork will also be less likely to require close scrutiny and revisions. We lack sufficient data on the time spent on these activities to quantify these benefits, however.
[544] *See* §§ 463.3(i) & (j); 463.4(d).

one estimate) of vehicle purchase transactions at dealerships where consumers trade in a vehicle.[545]

Finally, data from the 2021 Cox Automotive Car Buyer Journey Study reveal that consumer time spent at non-purchase dealerships is roughly 82% of the time spent at the dealership of purchase.[546] Additionally, the average consumer visits 1 non-purchase dealership for each transaction, so under the dual assumptions that (1) the proportions of time spent at dealerships across these activities is consistent across purchase and non-purchase dealerships and (2) the noted time savings are constant as a fraction of time spent, we multiply the time savings numbers by this ratio to obtain the additional time saved at non-purchase dealerships.

Proceeding as in the preliminary analysis, we assume that motor vehicle purchase, financing, and lease transactions will be stable at the 2019 level of 57.9 million transactions per year.[547] As discussed previously, the final analysis excludes private party, fleet, and wholesale transactions. According to Edmunds Automotive Industry Trends 2020, 19.3% of new vehicle sales in 2019 were fleet sales.[548] This fraction of the 17.1 million new vehicle sales and leases in the data are excluded from the analysis. An Automotive News article from January 2023 (citing data from Cox Automotive) states

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[545] *See* Progressive, "Consumers embrace online car buying," http://www.progressive.com/resources/insights/online-car-buying-trends/ (last visited Dec. 5, 2023).
[546] *See* 2021 Cox Automotive Car Buyer Journey Study, *supra* note 504, at 16 (noting total time of 2:09 spent "Visiting Other Dealerships/Sellers" and total time of 2:37 spent "With the Dealership/Seller Where Purchased").
[547] *See* U.S. Dep't. of Transp., Off. of the Sec'y of Transp., Bureau of Transp. Stat., "National Transportation Statistics 2021, 50th Anniversary Edition" 21 (2021), https://www.bts.dot.gov/sites/bts.dot.gov/files/2021-12/NTS-50th-complete-11-30-2021.pdf (Table 1-17).
[548] *See* Edmunds, "Automotive Industry Trends 2020" 7 (2020), https://static.ed.edmunds-media.com/unversioned/img/industry-center/insights/2020-automotive-trends.pdf.

that 48% of all used vehicle sales occurred outside of the retail channel.[549] As with new vehicle sales, this fraction of the 40.8 million used vehicle transactions in the data are excluded from the analysis. Adding up the covered transactions (35 million)[550] and applying the time savings calculated from the base case assumptions, we anticipate that the Rule will generate a total time savings of more than 72 million hours per year. According to the Bureau of Labor Statistics Occupational Employment Statistics, the average hourly wage of U.S. workers in 2021 was $29.76, and recent research suggests that individuals living in the U.S. value their non-work time at 82% of average hourly earnings.[551] Thus, the value of non-work time for the average U.S. worker would be $24.4 per hour. As a result, our final analysis refines the estimate to a present value of between $12.3 billion and $14.9 billion as described in Table 2.2, which translates to savings of roughly $1.75 billion per year.[552]

[549] *See* Auto. News, "Used-vehicle volume hits lowest mark in nearly a decade" (Jan. 13, 2023), https://www.autonews.com/used-cars/used-car-volume-hits-lowest-mark-nearly-decade (estimating 19,100,000 of used vehicle sales in the year 2022 occurred within the retail channel). The same Automotive News source reports a total used vehicle sales number of approximately 40 million for 2019. *Id.* The conclusions of the analysis are robust to using this total figure instead.

[550] A recent report by the Center for Automotive Research estimates that there approximately 43 million non-fleet, non-private party sales in 2019 based on privately sourced data. 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" 5 (2023), https://www.cargroup.org/wp-content/uploads/2023/05/CAR-Report_CFR-Part-463_Final_May-2023.pdf. While this would result in a savings estimate approximately 22% higher, the Commission relies on its analysis of the publicly available data described herein.

[551] Daniel S. Hamermesh, "What's to Know About Time Use?" 30 J. Econ. Survs. 198, 201 (2016), https://onlinelibrary.wiley.com/doi/epdf/10.1111/joes.12107.

[552] Note that we assume only one consumer is involved in each transaction; to the extent that multiple members of a household may visit dealerships for each transaction, these calculations are likely to underestimate the total time savings.

Table 2.2—Estimated Benefits of Time Savings for Completed Transactions

		2024-2033
Completed Transactions		
Avg. minutes saved at dealership of purchase / other dealers (by activity)[a]		
Negotiating the Purchase Price		34 / 28
Select F&I Add-Ons		14 / 11
Discussing and Signing Paperwork		20 / 16
Get a Trade-In Offer		0 / 0
Hours saved per transaction		2.05
Number of covered vehicle transactions per year[b]		34,986,253
Value of time for vehicle-shopping consumers[c]		$24.40
Abandoned Transactions		***Unquantified***
Total Quantified Benefits (in millions)	**3% discount rate**	**$14,926**
Total Quantified Benefits	**7% discount rate**	**$12,290**

Note: Benefits have been discounted to the present at both 3% and 7% rates.
[a] Averages are across all retail transactions; transactions where consumers performed activity digitally under the status quo will have a time savings of 0 for that activity.
[b] For total volume, National Transportation Statistics Table 1-17. For retail/non-fleet fraction, Edmunds Automotive Industry Trends 2020 (for new vehicles), *supra* note 548548, and Cox Automotive via Automotive News (for used vehicles), *supra* note 549549.
[c] BLS Occupational Employment Statistics (May 2022) and Hamermesh (2016)

Due to the uncertainty surrounding how the Rule will translate into time savings for consumers and to which activities it will most strongly apply, we explore a range of alternative assumptions regarding what fraction of the documented time savings digital consumers experience will be received by non-digital consumers under the Rule. In our low-end scenario, we assume that the Rule will result in half the consumer time savings of the base case. In our high-end scenario, we assume that all the time savings experienced by digital consumers under the status quo—including time saved getting a trade-in offer—will be received by non-digital consumers under the Rule. The low-end

assumptions correspond to a total time savings of more than 35.85 million hours per year while the upper bound assumptions correspond to a total time savings of more than 115.47 million hours per year. The results of this analysis are presented in Table 2.3. Importantly, over the whole range of these alternative assumptions we find that benefits exceed costs. In fact, holding other benefit and cost estimates constant, the time savings generated by the Rule could be *de minimis* and the implied benefits would still exceed the costs. While there are some activities in the car buying process that the Rule may not affect (e.g., test driving vehicles, etc.), the data discussed suggest that there is ample room for the Rule to eliminate unnecessary time across various activities. And even though digital consumers spend less time on these activities, results across several studies suggest that this reduction in time leads to a better experience for consumers.[553]

[553] *See* Car Buyer Journey 2019, *supra* note 537, at 9 (Consumers who negotiate (88% vs. 64%) and complete paperwork online (74% vs. 65%) are more satisfied with their dealership experience.); 2022 Car Buyer Journey, *supra* note 25, at 22 ("More [financing] steps completed online = higher satisfaction & less time at the dealership"); Cox Auto., "Cox Automotive Car Buyer Journey Study: Pandemic Edition" 22 (2021), https://www.coxautoinc.com/wp-content/uploads/2021/02/Cox-Automotive-Car-Buyer-Journey-Study-Pandemic-Edition-Summary.pdf ("Heavy Digital Buyers were the Most Satisfied").

Table 2.3—Sensitivity Analysis of Time Savings

		Low End	Base Case	High End
Avg. minutes saved at dealership of purchase / other dealers (by activity)[a]				
Negotiating the Purchase Price		17 / 14	34 / 28	34 / 28
Selecting F&I Add-Ons		7 / 6	14 / 11	27 / 22
Discussing and Signing Paperwork		10 / 8	20 / 16	39 / 32
Get a Trade-In Offer		0 / 0	0 / 0	18 / 15
Hours saved per transaction[b]		1.02	2.05	3.3
Total Quantified Benefits (in millions)	**3% discount rate**	**$ 7,463**	**$14,926**	**$24,036**
Total Quantified Benefits	**7% discount rate**	**$ 6,145**	**$12,290**	**$19,790**

Note: Benefits have been discounted to the present at both 3% and 7% rates.
[a] Averages are across all retail transactions; transactions where consumers performed activity digitally under the status quo will have a time savings of 0 for that activity.
[b] Time savings for "Get a Trade-In Offer" assumed to be zero for lease transactions or sales without trade-ins (estimated at 50%).

2. Reductions in Deadweight Loss

The status quo in this industry features consumer search frictions, shrouded prices, deception, and obfuscation. As a result, dealers likely charge higher prices for a number of products and services than could be supported once the Rule is in effect. Recent research suggests that when consumers are able to observe prices for vehicles before visiting dealerships—as is intended by the Rule—prices and dealer profits are likely to fall.[554] When not accompanied by changes in quantity (due to a fixed supply of

[554] Marco A. Haan et al., "A Model of Directed Consumer Search," 61 Int'l J. Indus. Org. 223, 223-55 (2018), https://doi.org/10.1016/j.ijindorg.2018.09.001; José Luis Moraga-Gonzalez et al., "Consumer Search and Prices in the Automobile Market." 90 Rev. Econ. Stud. 1394-1440 (2023), https://doi.org/10.1093/restud/rdac047.

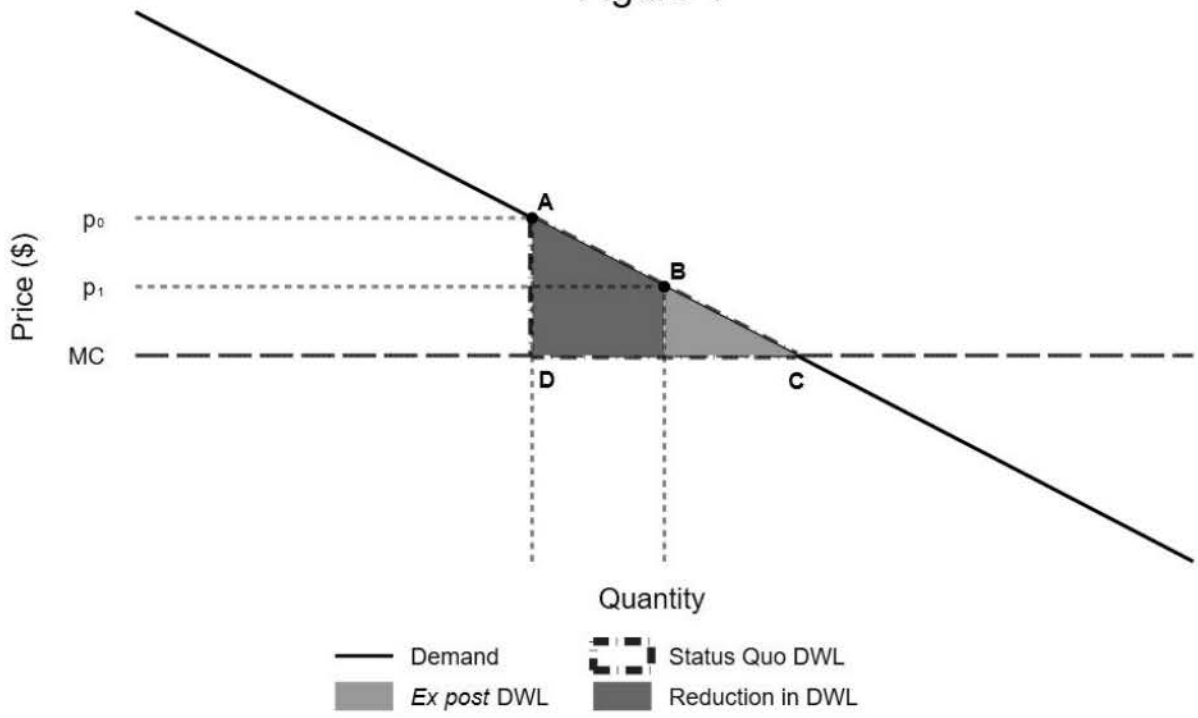
the good), price adjustments serve to transfer welfare from one side of the market (e.g., dealers) to the other (e.g., consumers), which typically have no net effect on the outcome in a regulatory analysis.[555] A decrease in vehicle prices, however, will likely also lead to an increase in the number sold as the supply is not fixed. As a result, this quantity expansion effect unambiguously increases welfare by reducing the deadweight loss that occurs when firms can charge prices that are marked up over marginal costs.

3. Framework

When a policy reduces the price of a good—either through a reduction in firm costs or, as in this case, a reduction in firm market power—the quantity of the good sold will typically increase. If a distortion exists in the market causing the product in question to be sold at a price above the marginal (social) cost of production (e.g., a tax, an externality, or a markup enabled by market power), this quantity expansion has the effect of reducing deadweight loss in that market. In the simple case where there is one good subject to the policy and that good has no close substitutes or complements, this welfare effect can be easily illustrated as in Figure 1.

[555] *See* Off. of Mgmt. & Budget, Exec. Off. of the President, "Circular A-4" 38 (2003), https://www.transportation.gov/sites/dot.gov/files/docs/OMB%20Circular%20No.%20A-4_0.pdf: "A regulation that restricts the supply of a good, causing its price to rise, produces a transfer from buyers to sellers. The net reduction in the total surplus (consumer plus producer) is a real cost to society, but the transfer from buyers to sellers resulting from a higher price is not a real cost since the net reduction automatically accounts for the transfer from buyers to sellers." To the extent any price changes caused by the Rule result in transfers to consumers from dealers who were in violation of existing laws, such transfers would be consistent with the agency's mission of providing redress to injured consumers and its history of doing so in enforcement actions.

Figure 1



The solid line reflects the demand for the good, where some quantity is purchased at a market price of p_0 (point A), which is higher than marginal costs (MC). Because of this wedge between price and marginal costs, there is a reduction in welfare relative to the outcome where prices equal marginal costs; this deadweight loss is illustrated on the graph by the bordered triangle (ACD). Holding everything else constant, when prices fall from p_0 to p_1, this deadweight loss is reduced to some extent. Part of this increase in welfare will go to consumers, and part will go to producers.

Imagine that this graph depicts the market for new automobiles. The Final Rule will increase price competition, thus reducing market power and shifting prices closer to marginal costs in the new automobile market. If this market satisfied the criteria for the simple case described herein (i.e., no close substitutes or complements), the only data we would need to estimate this change in total welfare would be the predicted change in

price, the predicted change in quantity (which can be calculated from an estimate of the slope or elasticity of the demand curve for new vehicles), and some information or assumption about the shape of the demand curve between points A and B. Of course, the new automobile market is closely linked to the used automobile market, so this simple picture does not capture the entire story.

When a good has a close substitute (like used versus new vehicles), a price decrease for that good will cause demand for the related good to decrease. Also, in the case of automobiles, there is a long-run link between the new and used vehicle markets as a new vehicle purchased today becomes a potentially available used vehicle tomorrow. These linkages between the markets will dampen the demand response to any given price change in the primary market. In practice, this means that our estimates of the responsiveness of new vehicle purchases to price changes (i.e., the price elasticity of demand for new vehicles) will overstate the change in quantity resulting from a change in prices, because such estimates typically assume that all other prices remain constant. In addition, if there are distortions present in the market for related goods (i.e., used vehicles are also sold at a markup over marginal costs) only examining the welfare effect in the primary market will understate the total welfare effect, as there will be an analogous reduction in deadweight loss in the market for the related good. These linkages between markets for related goods become difficult to explain graphically. However, we have included in the technical appendix an algebraic derivation of the total welfare effect in new and used vehicle markets resulting from the finalization of the Rule. The resulting formula requires estimates of seven parameters in order to compute the welfare effect: two “policy elasticities” that reflect the responsiveness of quantities of new and used

vehicles sold to a change in prices in the new vehicle market after all adjustments have occurred in both markets, two baseline markups that represent the differences between prices and marginal costs for new and used vehicles, two quantities that reflect the aggregate costs of all new and used vehicles sold under the status quo, and the predicted change in prices due to the Rule.

4. Estimation

To obtain "policy elasticities" we reference a U.S. Environmental Protection Agency report titled "The Effects of New-Vehicle Price Changes on New- and Used-Vehicle Markets and Scrappage" ("EPA Report").[556] In this report, the authors "developed a theoretical model of the relationships between new- and used-vehicle markets, scrappage, and total vehicle inventory" that allows for simulation of prices and quantities in these markets. The model is calibrated using a range of demand elasticity estimates from a review of the relevant literature on auto markets. The resulting simulations examine the long-run "steady state" of vehicle inventories and demand, accounting for cross-market demand effects as well as the endogenous supply of used vehicles resulting from changes in demand for new vehicles in previous periods. Importantly, among the outputs of their simulations are the "policy price elasticities" required by our welfare change formula. Our base case estimates of deadweight loss reduction use the long-run policy price elasticities that result from calibrating the model with the EPA Report's intermediate values for the aggregate new vehicle and outside option demand elasticities, but we explore sensitivity to other calibration scenarios.

[556] Assmt. & Standards Div., Ofc. of Transp. & Air Quality, U.S. Env't Prot. Agency, "The Effects of New-Vehicle Price Changes on New- and Used-Vehicle Markets and Scrappage" (2021), https://cfpub.epa.gov/si/si_public_file_download.cfm?p_download_id=543273&Lab=OTAQ.

To obtain baseline estimates of new-vehicle markups, we refer to a recent paper entitled "The Evolution of Market Power in the US Automobile Industry" by Paul Grieco, Charles Murry, and Ali Yurukoglu.[557] The authors specify a model of the U.S. new car industry to explore trends in concentration and markups. The authors find that markups in the industry have been falling over time generally, but have been fairly stable since the early 2000s.[558] As our baseline, we use their most recent estimate of industry markups, which was 15% in 2018.[559] While this estimate reflects markups over production costs by manufacturers and not markups over wholesale prices paid by dealers, it is the wedge between retail price and production cost that matters for welfare. As we are unaware of any publicly available data measuring used-vehicle markups, we explore two alternatives that we believe reflect the limiting cases: (1) used vehicles have no markup and (2) used-vehicle markups are the same as new-vehicle markups.

We obtain both quantities of new- and used-vehicles sold as well as average prices from National Transportation Statistics, Table 1-17. As before, we exclude private party, fleet, and wholesale transactions. This exclusion is likely to bias our estimate of the total welfare effect downward because, unlike the time savings benefits of the Rule which may be restricted to dealer-consumer transactions, the price effects of the Rule are likely to carry over to private party and fleet transactions. Using these aggregate figures along

[557] *See* Paul L. E. Grieco et al., "The Evolution of Market Power in the US Automobile Industry" (2022), mimeo.
[558] Paul L. E. Grieco et al., "The Evolution of Market Power in the US Automobile Industry" 19 (2022), mimeo.
[559] Paul L. E. Grieco et al., "The Evolution of Market Power in the US Automobile Industry" 19 (2022), mimeo.

with an estimate of baseline markups, we estimate the aggregate cost of new- and used-vehicles sold in 2019.[560]

Finally, based on the academic literature on search costs in the automobile market, the Rule is expected to reduce prices of new vehicles by reducing the markup that dealers are able to charge over marginal costs. We have identified two papers that empirically estimate the effect of price transparency or reduced search frictions on auto markups by specifying a structural model of the new-vehicle market, estimating the structural parameters, and then conducting counterfactual simulations where search frictions are reduced. Murry and Zhou (2020) simulate a full information counterfactual in the Ohio automobile market where search frictions are eliminated entirely and find that markups are reduced by $333.[561] Moraga-Gonzalez et al. (2022) simulate a counterfactual in the Dutch automobile market where prices are observed prior to costly consumer search (i.e., visiting dealerships) and find that markups are reduced from 40.52% to 32.59%.[562] For our base case estimates, we use the smaller Murry and Zhou (2020) estimate, primarily because their model is estimated using U.S. data consistent with our setting. However, we note that Moraga-Gonzalez et al. offers evidence to suggest that significantly larger changes in markups may result from the Rule.

Using these parameters obtained from the literature in combination, we implement the formula for the change in total welfare given in the technical appendix. For each market—new and used—the formula multiplies the policy price elasticity by the

[560] Aggregate cost of good i is equal to $(1 - \mu_i) \times p_i \times Q_i$, where $\mu_i, p_i,$ and Q_i are the markup, price, and quantity sold of good i, respectively.
[561] Charles Murry & Yiyi Zhou, "Consumer Search and Automobile Dealer Colocation," 66 Mgmt. Sci. 1909-1934 (2020), https://doi.org/10.1287/mnsc.2019.3307.
[562] José Luis Moraga-Gonzalez et al., "Consumer Search and Prices in the Automobile Market," 90 Rev. Econ. Stud. 1394-1440 (2022), https://doi.org/10.1093/restud/rdac047.

percent change in price to get the percent change in quantity, and then multiplies this by the aggregate markup (as given by the price-cost markup[563] at baseline times the aggregate cost of baseline transactions) to get the approximate change in total welfare per year. As an example, our base case estimate assumes a policy price elasticity of new-vehicle demand of -0.25, a policy price elasticity of used-vehicle demand (with respect to new-vehicle price) of -0.04, and used car markups equal to new car markups (15%), resulting in the following calculation:

$$\frac{dW(\theta)/d\theta}{\mu} = X_N \tau_N \hat{\varepsilon}_{NN} \frac{d\tau_N/d\theta}{1+\tau_N} + X_U \tau_U \hat{\varepsilon}_{UN} \frac{d\tau_N/d\theta}{1+\tau_N}$$

$$= 18\% \times \$334{,}115{,}569{,}664 \times -0.25 \times -1\% + 18\% \times \$371{,}555{,}893{,}248 \times -0.04 \times -1\%$$

$$= \$152{,}143{,}550 \text{ per year}$$

This annual reduction in deadweight loss is then applied to each year of the 10-year analysis period and discounted to the present to yield the total benefit. We highlight this base case (bolded in Table 2.4) but explore several scenarios that vary along two dimensions: (1) the "policy elasticity" of new- and used-vehicle demand with respect to the change in price and (2) the existence of baseline markups in the used-vehicle market. In Table 2.4, baseline markups for used vehicles vary across columns while the relevant policy price elasticities vary across rows: Scenario A corresponds to new-/used-vehicle elasticities of -0.14 and 0.01, Scenario B corresponds to new-/used-vehicle elasticities of -0.17 and -0.04, Scenario C corresponds to new-/used-vehicle elasticities of -0.23 and -0.10, and Scenario E corresponds to new-/used-vehicle elasticities of -0.39 and -0.12.

[563] The baseline new vehicle markup estimate of 15% is defined as the ratio of the price-cost margin to unit price, i.e. $(p_i - MC_i)/p_i$, and is sometimes referred to as the Lerner index. With knowledge of either price or marginal cost, this can be rearranged to express the price-cost markup, i.e. $(p_i - MC_i)/MC_i$, which is used in the formula referenced here.

Table 2.4—Reduction in Deadweight Loss (in millions), 2024-2033

	No used-vehicle markups		Symmetric markups	
Scenario	**Total @ 3% discount**	**Total @ 7% discount**	**Total @ 3% discount**	**Total @ 7% discount**
A	$ 617	$ 508	$ 568	$ 468
B	$ 749	$ 617	$ 945	$ 778
C	$ 1,014	$ 835	$ 1,504	$ 1,238
D	$ 1,102	$ 907	**$ 1,298**	**$ 1,069**
E	$ 1,719	$ 1,415	$ 2,307	$ 1,899

Note: Benefits have been discounted to the present at both 3% and 7% rates. Scenarios correspond to those in Table 7-2 of "The Effects of New-Vehicle Price Changes on New- and Used-Vehicle Markets and Scrappage." New-vehicle demand elasticities range from -0.4 (Scenarios A, B, and C) to -0.8 (Scenario D) to -1.27 (Scenario E). Outside option elasticities vary from 0 (Scenario A) to -0.05 (Scenarios B and D) to -0.14 (Scenarios C and E). New/Used cross-price elasticities are set such that substitution away from new vehicles flows almost entirely to used-vehicles, with only small effects on the total number of vehicles. All scenarios hold scrappage elasticity fixed at -0.7.

5. Benefits Related to More Transparent Negotiation

An additional, albeit difficult to quantify, benefit is the reduction in discomfort and unpleasantness that consumers associate with negotiating motor vehicle transactions under the status quo. According to the 2020 Cox Automotive Car Buyer Journey study, filling out paperwork, negotiating vehicle price, and dealing with salespeople are three of the top four frustrations for consumers at car dealerships.[564] Once the Rule is in effect, all three of these issues will be mitigated somewhat by the transparency facilitated by the Rule's required disclosures and the time that consumers spend shopping and negotiating motor vehicle transactions will be less stressful. While we expect an increase in social welfare through this channel, due to a lack of data allowing this more qualitative benefit

[564] 2020 Cox Automotive Car Buyer Journey, *supra* note 25, at 37.

to be translated into a quantitative gain, these benefits are left unquantified in the analysis.

C. Estimated Costs of Final Rule

In this section, we describe the costs of the Rule provisions as enumerated in SBP VII.A, provide quantitative estimates where possible, and describe costs that we can only assess qualitatively. Some industry commenters questioned the appropriateness of the data and assumptions used in the NPRM, including the discussion of costs in the preliminary regulatory analysis. The Commission used a variety of data sources in its calculations for the NPRM and in the Rule, including wage data from the Bureau of Labor Statistics Occupational Employment Statistics, establishment counts from U.S. Census County Business Patterns, transaction counts from National Transportation Statistics, and breakdowns of motor vehicle transactions (e.g., by financing, GAP agreement, F&I add-ons) from numerous industry sources. Where such data was not available (e.g., regarding time devoted to compliance tasks), the Commission made assumptions based on a review of previous regulatory analyses that featured similar requirements, with adjustments made based on our understanding of the particulars of motor vehicle dealer operations.[565]

Throughout this section, the cost of employee time is monetized using wages obtained from the Bureau of Labor Statistics Industry-Specific Occupational Employment and Wage Estimates for Automobile Dealers.[566] This is valid under the

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[565] *See, e.g.*, Off. of the Sec'y, Dep't of Transp., Dkt. No. DOT-OST-2010-0140, "Enhancing Airline Passenger Protections II - Final Regulatory Analysis" (Apr. 20, 2011), https://www.regulations.gov/document/DOT-OST-2010-0140-2046.

[566] Applicable wage rates for the Commission's preliminary regulatory analysis, which was published in its NPRM, were based on data from the Bureau of Labor Statistics' May 2020 National Industry-Specific

assumption that the opportunity cost of hours spent in compliance activities is hours spent in other productive activities, the social value of which is summarized by the employee's wage.[567] To the extent that these activities can be accomplished using time during which employees would otherwise be idle under the status quo, our estimates will overstate the welfare costs of the Rule.

1. Prohibited Misrepresentations

In its preliminary analysis, the Commission presented two scenarios that estimated the costs associated with the Rule provisions prohibiting misrepresentations. First, as all the misrepresentations prohibited by the Rule are material and therefore deceptive under Section 5 of the FTC Act, one scenario assumed that all motor vehicle dealers are compliant with Section 5 under the status quo and will therefore conduct no additional review.

The second scenario allowed for costs incurred by firms because of the enhanced penalty associated with violating the Rule (relative to a *de novo* violation of Section 5 of the FTC Act) under the assumption that dealers may expend additional resources to ensure compliance. This "heightened compliance review" scenario assumed that each of the 46,525 dealers would have a professional spend 5 additional minutes reviewing each public-facing representation (assumed to be 150 per year on average). At a labor rate of

Occupational Employment and Wage Estimates for NAICS industry category 441100—Automobile Dealers, which is available at https://www.bls.gov/oes/2020/may/oes_nat.htm. Labor rates in the present analysis have been updated based on data from the Bureau of Labor Statistics' May 2022 National Industry-Specific Occupational Employment and Wage Estimates for NAICS industry category 441100—Automobile Dealers, which is available at https://www.bls.gov/oes/current/naics4_441100.htm.

[567] This assumption would hold, for example, if both the product and labor markets in this industry were competitive.

$26.83 per hour for compliance officers employed at auto dealers, this cost was estimated to be $15.6 million per year.

The Commission received comments about the appropriateness of the data and assumptions used to estimate the cost of complying with this provision of the Rule. The most specific criticism contended that the number of documents dealers would need to review would be "several times" the 150 assumed and that review would require at least 15 minutes per document because "dealers typically do not fully control the advertising platforms they use given the direct involvement of the vehicle OEMs . . . and that of other third parties. Also, many dealers, and especially small business dealers do not employ internal compliance officers or attorneys who could conduct marketing reviews."[568]

As there is scant empirical evidence provided for these assertions, the Commission's preliminary estimates remain unchanged (with the exception of updates to more recent data where available). However, we have conducted a sensitivity analysis in which all labor hours in the base case analysis are increased by an order of magnitude, in keeping with the spirit of the comments discussed; *see* SBP VII.G. As can be seen in the results from that analysis, the Rule clearly still generates net benefits for society.

[568] Comment of Nat'l Auto. Dealers Ass'n, Doc. No. FTC-2022-0046-8368 at 299-300.

Table 3.1—Estimated Compliance Costs for Prohibited Misrepresentations

			2024-2033
Scenario 1—No Review			
No Cost			$0
Total Cost			**$0**
Scenario 2—Heightened Compliance Review			
Number of dealers[a]			47,271
Number of documents per dealer per year			150
Minutes of review per document			5
Cost per hour of review			$31.21
Total Cost	**3% discount rate**	**$**	**157,310,579**
Total Cost	**7% discount rate**	**$**	**129,526,073**

Note: In scenarios with ongoing expenses, costs have been discounted to the present at both 3% and 7% rates.
[a] County Business Patterns 2021, NAICS Code 4411 (Automobile Dealers, used and new)

2. Required Disclosure of Offering Price in Advertisements and in Response to Inquiry

The Rule requires all dealers to disclose an offering price in any advertisement that references an individual vehicle or in response to any consumer inquiry about an individual vehicle. For this provision, the Commission's preliminary analysis presented two cost scenarios for dealers when complying with the Rule. First, because dealers already price all vehicles in inventory under the status quo, one scenario assumed that there would be no additional cost of complying with this provision. This scenario assumes that the initial pricing and any subsequent re-pricing of vehicles in inventory would take no (or minimal) additional time under the Rule.

As with the prohibition on misrepresentations, the second scenario considers the enhanced penalty associated with violating the Rule and allows for costs given that

dealers may expend additional resources to ensure that the prices they disclose conform to the Rule's definition of offering price, thus minimizing the risk of penalties should they fail to conform to that definition. The latter scenario assumed that, in the first year under the Rule, each of the 46,525 dealers would have a sales and marketing manager spend 8 hours reviewing their policies and procedures for determining the public-facing prices of vehicles in inventory. In addition, each dealer would employ a programmer for 8 hours to update any automated systems that need to be updated in accordance with these new policies and procedures. At labor rates of $63.93 per hour and $28.90, respectively, this cost was estimated at $34.5 million. Both scenarios assume that, once calculated, the time required to train employees to include prices in response to consumer inquiries about specific vehicles will either be negligible or be subsumed by training costs included under other provisions. Finally, the time required to deliver the disclosures is also negligible, as prices are already typically disclosed in advertisements and in interactions with consumers under the status quo; the Rule just requires the price to conform to a specific definition.

Some commenters raised issues with the assumptions regarding the time and resources necessary to determine compliant prices as well as deliver the required disclosures. The comments asserted that vehicle prices change frequently in response to market conditions, which would make it difficult to ensure that offering prices are accurate. Additionally, comments disputed the notion that delivery of the information to consumers in accordance with the Rule's provisions would not be costly, in terms of employee time and consumer time. One comment suggested that "there would be an average of three Offering Price disclosures based there [sic] being an average of three

dealer-customer discussions regarding three specific motor vehicles, per transaction,"[569] asserting that the frequency of these disclosures would have implications for the cost estimates that had not been considered in the preliminary analysis.

If indeed the Rule required significant additional employee time spent per transaction, that would have implications for the cost estimates. However, as previously discussed, it is the understanding of the Commission that virtually all dealer-customer discussions regarding specific motor vehicles that occur under the status quo already include time devoted to a discussion of the vehicle's price. The only change under the Rule is that, within that price discussion an offering price (as defined by the Rule) must be provided. The cost of determining this price is included under the second scenario in our preliminary analysis, and sensitivity to the specific assumptions of that scenario have been explored in the Appendix. The results from our analysis indicate that the Rule generates net benefits for society under a wide range of plausible assumptions about the inputs to our cost calculations.

Commenters also raised concerns about the potential for behavioral adjustment by dealerships, choosing to refrain from advertising individual vehicles or responding to consumer inquiries about specific vehicles and thus increasing consumers' costs of search. The Commission, however, has not been presented with compelling evidence that dealers will forego competition with other dealers on price, choosing instead to default to advertising a focal price (such as MSRP). Indeed, the Commission's offering price disclosure requirement is similar to existing requirements in a number of States, and the Commission is not aware of any such behavioral adjustments (e.g., eliminating prices

[569] Comment of Nat'l Auto. Dealers Ass'n, Doc. No. FTC-2022-0046-8368 at 300.

from advertisements, refusing to respond to consumer inquiries, etc.) having occurred in those States. As a result, the Commission's preliminary estimates remain unchanged (with the exception of updates to more recent data where available).

Table 3.2—Estimated Compliance Costs for Offering Price Disclosures

	2024
Scenario 1—No Review	
No Cost	$0
Total Cost	**$0**
Scenario 2—Calculation of Offering Price	
Number of dealers[a]	47,271
Pricing hours per dealer	8
Cost per hour of pricing	$80.19
Programming hours per dealer	8
Cost per hour of programming	$40.24
Total Cost	**$ 45,542,772**

[a] County Business Patterns 2021, NAICS Code 4411 (Automobile Dealers, used and new)

3. Disclosure of Add-on List and Associated Prices

In the NPRM, the proposed rule would have required all dealers to disclose an itemized menu of all optional add-on products and services along with prices, or price ranges, on all dealer-operated websites, online services, and mobile applications as well as at all dealership locations. Various commenters expressed concern that the add-on list requirement would have been too complex and potentially confusing, as discussed in the paragraph-by-paragraph analysis in SBP III.D.2(b). As a result, the Commission has determined not to finalize § 463.4(b) of the proposed rule. While the preliminary analysis estimated compliance costs between approximately $42 million and $43 million for the disclosure of add-on lists and associated prices, those costs are not included in the final analysis.

4. Required Disclosure of Total of Payments for Financing/Leasing Transactions

The Rule requires all dealers to disclose, when representing a monthly payment, the total of payments for the financing or leasing contract. In addition, in any comparison of two payment options with different monthly payments, the dealer is required to disclose that the option with the lower monthly payment features a higher total of payments (if true).

The Commission's preliminary analysis presented two cost scenarios, corresponding to different methods by which dealers may choose to comply with the Rule. In the first scenario, we assumed that dealers would incur a one-time, upfront cost of both designing the required disclosures and informing associates of their obligations to provide the disclosures. Importantly, ongoing costs on a per transaction basis were assumed to be negligible, reflecting a compliance regime where dealers already generate the required information during the normal course of business and must only convey it to consumers at an appropriate point in the transaction. In the second scenario, we assumed that dealers incur an additional ongoing cost per financed or leased transaction in order to communicate the required disclosures to consumers in writing, reflecting a compliance regime where dealers find it necessary to maintain a documentary record of compliance with the Rule.[570]

The upfront costs (and total costs under Scenario 1) of complying with this provision as estimated by the preliminary analysis were limited to 8 hours spent by a

[570] While disclosures of this nature are already required to be present in the financing contract by the Truth in Lending Act (TILA), the Rule would change the timing of a subset of those disclosures. As a result, the dealer may have to develop and deliver a separate document in the event that the standard TILA disclosure has not yet been generated at the point where disclosure is required under the Rule.

compliance manager (at a rate of $26.83) on the creation of a template disclosure script that contains the required information and informing sales staff of their obligations to deliver the disclosure at an appropriate time during the transaction. This cost was estimated at $10 million.

The preliminary estimates of additional ongoing costs—as in Scenario 2—included 2 minutes of sales associate time per financed/leased transaction (at a rate of $21.84) spent on the process of populating and delivering a printed version of the disclosure, with $0.15 per disclosure spent on printing costs. The total additional cost under this scenario is estimated at $213.4 to $249.5 million.

Comments from industry groups asserted that the preliminary analysis underestimated training costs and that it would be difficult to determine the total of payments for financing prior to knowing the details of the transaction. One comment contended that "these mandates . . . necessarily would involve significant annual training requirements for new employees given that . . . the average dealer experiences an annual sales consultant turnover rate of 67%."[571] The comment further asserted that dealers cannot determine the total cost of a financing or leasing agreement without knowing the terms for which consumers qualify and what terms they want. The comment argued that as a result, only the scenario with costs incurred on a per transaction basis should be considered. Finally, the comment argued that the per-transaction costs in Scenario 2 are too low, both because the Commission underestimates the time required to deliver, discuss, and review disclosures and because multiple disclosures would have to be made per transaction (as terms are changed).

[571] Comment of Nat'l Auto Dealers Ass'n, Doc. No. FTC-2022-0046-8368 at 301.

These comments misunderstand the Commission's analysis with respect to the costs of complying with this provision. Scenario 1 does not anticipate that the dealer presents a consumer with the total of payments for a financing or leasing contract at the outset of the transaction. It requires only that, at the point where the dealer engages in discussions regarding different monthly payments for financing or leasing arrangements, the information that must be disclosed (i.e., the total of payments and a comparison of these totals across differing monthly payments) is already available to the dealer under the status quo. The only additional cost incurred per transaction would be the delivery of this information to the consumer (the determination of which is contemplated in the costs estimated under Scenario 1).

With respect to the comment regarding insufficient allowance for training costs in light of employee churn in the industry, the Commission has determined this to be a valid critique of the preliminary analysis. As a result, the final regulatory analysis includes an additional ongoing cost for both Scenarios. This ongoing cost includes training for sales staff and budgets 1 hour of training for each of the 417,110 sales and related employees across the industry, at an (average) cost of $29.43 per hour. The resulting additional ongoing costs in both scenarios amounts to $12.3 million per year. Further, as discussed in a previous section, the final analysis excludes private party, fleet, and wholesale transactions.[572] The remainder of the Commission's preliminary estimates remain unchanged (with the exception of updates to more recent data where available). Concerns

[572] Without cross-tabulations of fleet sales and sales involving financing, we assume that these are independent such that the fraction of covered transactions involving financing is equal to the fraction of covered transaction times the fraction of financed transactions.

about underestimates of the time required to review disclosures on a per-transaction basis are addressed by the Commission's sensitivity analyses conducted in the Appendix.

Table 3.4—Estimated Compliance Costs for Financing Costs

		2024 only	2024-2033
Scenario 1—Creation of disclosure and training only			
Upfront costs			
Number of dealers		47,271	
Compliance manager hours per dealer		8	
Cost per hour of disclosure creation		$31.21	
Subtotal		**$ 11,802,623**	
Ongoing costs			
Number of sales and related employees[a]			417,110
Training hours per employee			1
Cost per hour of training			$29.43
Subtotal	**3% discount rate**		**$ 104,712,908**
	7% discount rate		**$ 86,218,307**
Scenario 1—Total Cost	**3% discount rate**		**$ 116,515,532**
	7% discount rate		**$ 98,020,931**
Scenario 2—Disclosures per transaction			
Covered new vehicle sales per year[b]			10,343,319
% New vehicle sales involving financing[c]			81%
Covered used vehicle sales per year			21,219,640
% Used vehicle sales involving financing			35%
Covered new vehicle leases per year			3,423,294
Total transactions involving monthly payments/financing			19,228,256
Disclosure minutes per transaction			2
Cost per hour of disclosure			$28.41
Printing cost per disclosure			$ 0.15
Subtotal	**3% discount rate**		**$ 179,930,957**

Table 3.4—Estimated Compliance Costs for Financing Costs

Total Cost	**7% discount rate**	**$ 148,151,196**
	3% discount rate	**$ 296,446,489**
	7% discount rate	**$ 246,172,126**

Note: In scenarios with ongoing expenses, costs have been discounted to the present at both 3% and 7% rates.
[a] Bureau of Labor Statistics Industry-Specific Occupational Employment and Wage Estimates for NAICS Code 441100 - Automobile Dealers, May 2021
[b] For total volume, National Transportation Statistics Table 1-17. For retail/non-fleet fraction, Edmunds Automotive Industry Trends 2020 (for new vehicle) and Cox Automotive via Automotive News (for used vehicles).
[c] Melinda Zabritski, Experian Info. Sols. Inc., "State of the Automotive Finance Market Q4 2020"

5. Prohibition on Charging for Add-ons that Provide No Benefit

The Rule prohibits dealers from charging for add-on products or services from which the targeted consumer would not benefit. Compliance with this provision will require dealers to develop policies and transaction-level rules about when consumers can be charged for add-on products and services. The Rule as proposed in the NPRM also would have included additional provisions relating to add-ons that have not been finalized. These included a prohibition on charging for optional add-on products or services unless dealership employees made a number of disclosures at various points before finalizing a transaction. This provision would have required each dealer to design form disclosures, create a system for populating these forms, train their sales staff on the disclosure requirements, and provide the disclosures in writing, with the appropriate information filled in, to each consumer prior to completing the transaction.

The Commission's preliminary analysis relating to the cost of complying with these disclosure requirements budgeted for 8 hours of compliance manager time (at a cost of $26.83 per hour) and 4 hours of sales manager time (at a cost of $63.93 per hour) to design disclosure forms, and an additional 8 hours of programmer time (at a cost of $28.90) to create a system to populate these forms. The preliminary analysis also

budgeted for 2 minutes of sales associate time (at a rate of $21.84 per hour) and $0.11 in printing/electronic delivery costs per disclosure, with the number of disclosures determined by the fraction of transactions involving optional add-ons and/or financing.

In response to numerous comments, the Commission has determined not to finalize the proposal in § 463.5(b), which would have required the delivery of written disclosures and acknowledgement via signature of those disclosures by consumers. Various commenters were concerned that the add-on disclosures would add documents and time to the transaction. In response to these comments, the Commission has determined to omit what would have been the only provision affirmatively requiring the dealer and consumer to review additional documentation during a transaction. As a result, while the preliminary analysis estimated compliance costs between approximately $883 million and $1 billion for the disclosure of total costs for cash and financed transactions with optional add-on products, the cost estimate in the final analysis is on the order of one-tenth to one-half of the preliminary estimate (depending on the scenario).

As a result, the Commission has substantially revised the cost analysis in this section. First, the Commission assumes that each dealer will employ 8 hours of compliance manager time (at a rate of $31.21) and 8 hours of sales manager time (at a rate of $80.19) in the first year under the Rule, to cull add-ons with no value from their offerings and develop policies regarding when certain add-ons may or may not be sold. Second, the Commission budgets for 1 hour of training per year for each of the 417,110 sales and related employees across the industry, to apprise them of these policies and their obligations under the Rule. Finally, the Commission includes a second cost scenario in which dealers will choose to deliver one itemized disclosure to each customer before

the finalization of each transaction. Although this is not required under the Final Rule, dealers may wish to have documentation of compliance with the provisions of the Rule. As in the preliminary analysis, the Commission assumes that each dealer will employ 8 hours of compliance manager time and 4 hours of sales manager time creating this disclosure and 8 hours of programmer time creating a system to populate these forms when provided inputs by sales staff. The same occupational wage data have been used, but the rates have been updated to match the most recent data available. We further assume, as in the preliminary analysis, that sales staff will spend 2 minutes per disclosure (at a rate of $28.41 per hour) updating, printing, and delivering these forms to consumers and that the physical costs of delivering the disclosure are roughly $.11 per disclosure.[573] Finally, as discussed in a previous section, the final analysis excludes private party, fleet, and wholesale transactions.

Table 3.5—Estimated Compliance Costs for Prohibition on Certain Add-ons

	2024 only	2024-2033
Scenario 1— Policies and Training Only		
Upfront costs		
Number of dealers	47,271	
Compliance manager hours per dealer	8	
Cost per hour of compliance manager	$31.21	
Sales manager hours per dealer	8	
Cost per hour of sales manager	$80.19	
Subtotal	**$ 42,127,915**	

[573] The physical costs are $.15 per paper disclosure and $.02 per electronic disclosure, assuming that 27% are made electronically. This assumption is informed by a consumer survey that indicates 73% of consumers with motor vehicles prefer to receive registration renewal notices by mail as opposed to electronically. *See* Consumer Action, "Your opinion wanted: Paper vs. electronic bills, statements and other communications" 4 (2018-2019), https://www.consumer-action.org/downloads/Consumer_Action_Paper_v_electronic_survey.pdf (showing that 1800 of 2456 respondents who owned and needed to periodically register a motor vehicle preferred mail notices).

Table 3.5—Estimated Compliance Costs for Prohibition on Certain Add-ons

Ongoing costs			
Number of sales and related employees			417,110
Training hours per employee			1
Cost per hour of training			$29.43
Scenario 1—Subtotal	**3% discount rate**	**$**	**146,840,824**
	7% discount rate	**$**	**128,346,223**
Scenario 2—Disclosure creation and delivery			
Number of dealers		47,271	
Compliance manager hours per dealer		8	
Cost per hour of compliance manager		$31.21	
Sales manager hours per dealer		4	
Cost per hour of sales manager		$80.19	
Programmer hours per dealer		8	
Cost per hour of programmer		$40.24	
Subtotal		**$ 42,182,750**	
Disclosure delivery (per transaction)			
New vehicle sales per year			10,343,319
Used vehicle sales per year			21,219,640
Minutes per disclosure			2
Cost per hour of disclosure			$28.41
Physical costs per disclosure			$ 0.11
Subtotal	**3% discount rate**	**$**	**285,904,302**
	7% discount rate	**$**	**235,407,319**
Scenario 2—Total Cost	**3% discount rate**	**$**	**474,927,875**
	7% discount rate	**$**	**405,936,291**

Note: In scenarios with ongoing expenses, costs have been discounted to the present at both 3% and 7% rates.

6. Requirement to Obtain Express, Informed Consent Before Any Charges

The Rule requires dealers to obtain express, informed consent before charging any consumer for any product or service in association with the sale, financing, or lease of a vehicle. Because we presume that all dealers who are complying with the law currently have policies in place to prevent charges without consent, we assume that there will be no additional costs imposed by this provision.

7. Recordkeeping

The Final Rule requires dealers to retain records of all documents pertaining to Rule compliance. These recordkeeping requirements include:

- Copies of all materially different marketing materials, sales scripts, and training materials that discuss sales prices and financing or lease terms.
- Records demonstrating that all add-ons charged for meet the requirements stated in the Rule, including calculations of loan-to-value ratios in contracts including GAP agreements.
- Copies of all purchase orders, financing and lease contracts signed by the consumer (whether or not final approval is received), and all written communications with any consumer who signs a purchase order or financing or lease contract.
- Copies of all written consumer complaints, inquiries related to add-ons, and inquiries and responses about individual vehicles.

Most of these documents are already produced in the normal course of business under the status quo, or the costs of creating them have already been accounted for in previous sections. In its preliminary analysis, the Commission assumed that each dealer would incur an upfront cost, employing 8 hours of programmer time, 5 hours of clerical time, 1 hour of sales manager time, and 1 hour of compliance officer time, at hourly rates of $28.90, $18.37, $63.93, and $26.83, respectively, in order to upgrade their systems and

create the templates necessary to accommodate retention of all relevant materials. The Commission also assumed that each dealer would employ 1 additional minute of sales staff time per transaction to populate forms and store relevant materials.

One industry commenter contended that the proposed rule would impose substantial and costly recordkeeping mandates, citing primarily the various channels through which dealers would be required to capture and retain communications. The Commission believes the recordkeeping requirements strike an appropriate balance, requiring the retention of materials needed to allow effective enforcement while being mindful of dealer burden. In addition, the recordkeeping requirements are similar to analogous requirements in other Commission disclosure rules, as tailored to individual industries and markets.[574]

As such, the Commission's final analysis retains its preliminary estimates—appropriately updated where more recent data were available—with a few changes. First, we made adjustments to the cost estimates associated with the required loan-to-value calculations for all transactions with GAP agreements. Based on a comment from one industry group, we revised down the share of covered new and used vehicle sales with a GAP agreement to 17%.[575] As in the preliminary analysis, for these transactions sales staff will spend an additional minute to generate and store the relevant calculations. As discussed in a previous section, the final analysis excludes private party, fleet, and wholesale transactions. In addition, the expansion of the volume of records that dealers

[574] 16 CFR 310.5 (Telemarketing Sales Rule); 16 CFR 437.7 (Business Opportunity Rule); 16 CFR 453.6 (Funeral Industry Practices Rule); 16 CFR 301.41 (Fur Products Labeling).
[575] Comment of Nat'l Auto. Dealers Ass'n, Doc. No. FTC-2022-0046-8368 at 12 n.43 (indicating 15.3% (18.2%) for new (used) vehicles). These rates were weighted by transactions counts to calculate an overall rate of 17%.

are required to retain and manage will likely require investment in additional IT systems and hardware, which was left unquantified in the preliminary analysis. After additional research, the Commission estimates that each dealer will need to spend approximately $300 per year on storage (either on premises or in the cloud) to house the records that the Rule requires them to maintain. Based on a review of the transaction records we have received from dealers through investigations, this amount is likely to be more than sufficient for compliance.[576]

[576] Our review of dealer transaction records suggests that a typical transaction generates 3.4 MB of data under the status quo. Given the average number of transactions per dealer, this suggests that storing all these records would require dedicated space of roughly 4.2 GB per year. With a two-year retention window, this corresponds to 8.4 GB of storage at any given time. We estimate that the (annual) amount budgeted here should be sufficient to maintain at least 1 TB of storage—either on premises or through a cloud storage vendor—which is sufficient for more than 100 times the data storage capacity necessary to retain all transaction files generated by a typical dealership in a year under the status quo. The Commission anticipates that this amount of data storage capacity will be more than sufficient to also allow for dealers to keep any necessary records of correspondence with consumers who ultimately do not complete transactions at the dealership.

Table 3.6—Estimated Compliance Costs for Recordkeeping

		2024 only	2024-2033
Updating systems			
Number of dealers		47,271	
Programming hours per dealer		8	
Cost per hour of programming		$40.24	
Clerical hours per dealer		5	
Cost per hour of clerical work		$20.16	
Sales manager hours per dealer		1	
Cost per hour of sales manager review		$80.19	
Compliance manager hours per dealer		1	
Cost per hour of compliance review		$31.21	
Subtotal		**$ 25,248,387**	
Hardware and Storage (per year)			
Number of dealers			47,271
Cost of hardware/storage			$300
Recordkeeping (per transaction)			
Number of covered motor vehicle sales			31,562,959
% of sales with GAP agreement[a]			17%
Number of motor vehicle sales with GAP agreement			5,444,502
Sales staff minutes per transaction			1
Cost per hour of recordkeeping			$28.41
Subtotal	**3% discount rate**	**$**	**270,444,391**
Subtotal	**7% discount rate**	**$**	**222,677,967**
Total Cost	**3% discount rate**	**$**	**295,692,777**
Total Cost	**7% discount rate**	**$**	**247,926,354**

Note: In scenarios with ongoing expenses, costs have been discounted to the present at both 3% and 7% rates.

[a] Comment of Nat'l Auto. Dealers Ass'n, Doc. No. FTC-2022-0046-8368 at 12 n.43.

D. Other Impacts of Final Rule

As the status quo in this industry features consumer search frictions, shrouded prices, deception, and obfuscation, dealers likely charge higher prices for a number of products and services than could be supported once the Rule is in effect. SBP VII.B discussed the Commission's expectation that prices are likely to adjust in response to the transparency facilitated by the Rule, and quantified the benefits that result when vehicle quantities increase in response to a more transparent and less deceptive equilibrium. The price changes in the new vehicle market discussed in SBP VII.B will also have the effect of transferring $3.4 billion per year from dealers whose conduct under the status quo would not have complied with the Rule to consumers. In addition, other prices may be impacted by the Rule, such as used vehicle prices and add-on prices. As we have insufficient data to predict these price effects, neither the transfers associated with these potential price changes nor the resulting quantity adjustments and deadweight loss reductions are quantified in the current analysis. Finally, it may be the case that enhanced transparency of the Rule leads to *fewer* of certain types of transactions relative to the status quo. Recent evidence suggests that price shrouding of the kind that is prevalent in the motor vehicle market results in consumers spending more than they would otherwise.[577] We expect that this phenomenon may extend especially to the motor vehicle add-on market, where the Commission has compiled substantial evidence that individuals frequently inadvertently purchase add-ons that they did not want and ultimately will not

[577] *See* Tom Blake et al., "Price Salience and Product Choice," 40 Mktg. Sci. 619-36 (2021), https://doi.org/10.1287/mksc.2020.1261.

use.[578] While much of this effect may ultimately be transfers, we reiterate that to the extent they represent transfers from dishonest dealers to consumers, this may be considered a benefit of the Rule.

In addition, deceptive practices by dishonest dealers lead consumers to engage with those dealers instead of honest dealerships. Once the Rule is in effect, some business that would otherwise have gone to dealers using bait-and-switch tactics or deceptive door opening advertisements will now go to honest dealerships. Again, assuming that the costs of the firms are similar, any one-for-one diversion of sales from one set of businesses to another is generally characterized as a transfer under OMB guidelines. However, in this case, it would represent a transfer from the set of dishonest dealers to honest dealers, which may weigh differently if profits from law violations are not counted towards social welfare in the regulatory analysis.

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[578] *See* Nat'l Consumer Law Ctr., "Auto Add-ons Add Up: How Dealer Discretion Drives Excessive, Inconsistent, and Discriminatory Pricing" (Oct. 1, 2017), https://www.nclc.org/images/pdf/car_sales/report-auto-add-on.pdf; 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); 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*, 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.").

E. Conclusion

The Commission has attempted to catalog and quantify the incremental benefits and costs of the provisions included in the Final Rule. Extrapolating these benefits over the 10-year assessment period and discounting to the present provides an estimate of the present value for total benefits and costs of the Rule, with the difference—net benefits—providing one measure of the value of regulation.

Using our base case estimates, the present value of quantified benefits for consumers from the Rule's requirements over a 10-year period using a 7% discount rate is estimated at $13.4 billion. The present value of quantified costs for covered motor vehicle dealers of complying with the Rule's requirements over a 10-year period using a 7% discount rate is estimated at $1.1 billion. This generates an estimate of the present value of quantified net benefits equal to $12.3 billion using a discount rate of 7%. Using the best (or worst) case assumptions discussed in the preceding analysis results in net benefits of $21.2 billion (or $5.5 billion) using a discount rate of 7%.

Given that we expect unquantified benefits to outweigh unquantified costs for this Rule, this regulatory analysis indicates that adoption of the Rule would result in benefits to the public that outweigh the costs.

Present Value of Net Benefits (in millions), 2024-2033

	Low Estimate		Base Case		High Estimate	
	3% Discount Rate	7% Discount Rate	3% Discount Rate	7% Discount Rate	3% Discount Rate	7% Discount Rate
Benefits						
Time Savings	$7,463	$6,145	$14,926	$12,290	$24,036	$19,790
Deadweight Loss Reduction	$568	$468	$1,298	$1,069	$2,307	$1,899
Total Benefits	**$8,031**	**$6,613**	**$16,224**	**$13,359**	**$26,343**	**$21,690**
Costs						
Finance/Lease Total of Payments Disclosure	$296	$246	$296	$246	$117	$98
Offering Price Disclosure	$46	$46	$46	$46	$0	$0
Prohibition Re Certain Add-ons & Express, Informed Consent	$475	$406	$475	$406	$147	$128
Prohibition on Misrepresentations	$157	$130	$157	$130	$0	$0
Recordkeeping	$296	$248	$296	$248	$296	$248
Total Costs	**$1,270**	**$1,075**	**$1,270**	**$1,075**	**$559**	**$474**
Net Benefits	**$6,761**	**$5,538**	**$14,954**	**$12,284**	**$25,784**	**$21,216**

Note: "Low Estimate" reflects all lowest benefit estimates and high cost scenarios and "High Estimate" reflects all highest benefit estimates and low cost scenarios. "Base Case" reflects base case benefit estimates and high cost scenarios. Not all impacts can be quantified; estimates only reflect quantified costs and benefits.

F. Appendix: Derivation of Deadweight Loss Reduction

The derivation of the formula for the reduction in deadweight loss from the Rule follows from "Sufficient Statistics Revisited" by Henrik Kleven.[579] In the source article, the wedge between costs and prices is tax rates, but here we consider producer markups; the fundamental principles are unchanged. We have a mass of consumers i with utility function $u^i\left(x_0^i, x_N^i, x_U^i\right)$ over new cars, used cars, and the numeraire (good 0) who face the following budget constraint:

$$\sum_j (1 + \tau_j^i) x_j^i = Y^i$$

given markups τ_j^i for good j and consumer i and income Y^i for consumer i. Pre-markup prices are normalized to one so x_j^i is the cost of consumer i's purchase of good j. Total profits from the consumption of consumer i are $T^i = \sum_j \tau_j^i \, x_j^i$.

Define a policy to be evaluated as θ. Total welfare is defined as:

$$W(\theta) = \int_i v^i(\theta) \, di + \mu \int_i T^i(\theta) \, di$$

Here, $v^i(\theta)$ is the indirect utility function for consumer i, so the first term is consumer surplus and the second term is producer surplus, while μ is the value of a dollar of profit. The change in welfare from policy θ, translated into dollars by dividing by μ, is:

$$\frac{dW(\theta)/d\theta}{\mu} = \int_i \frac{dT^i}{d\theta} - \frac{\partial T^i}{\partial \theta} di$$

[579] *See* Henrik J. Kleven, "Sufficient Statistics Revisited." 13 *Annual Rev. Econ.* 515-38. (2021), https://doi.org/10.1146/annurev-economics-060220-023547.

The first term is the total effect on profit from the reform and the second term is the "mechanical" effect; assuming quantities stay constant, how much profits will fall if the policy goes into effect. We can rewrite this as follows:

$$\frac{dW(\theta)/d\theta}{\mu} = \int_i \left[\sum_{j=0}^{J} \tau_j^i x_j^i \frac{d \log x_j^i}{d\theta} \right] di$$

Where $\frac{d \log x_j^i}{d\theta}$ is labelled the "policy elasticity" for good j and consumer i with respect to policy θ. We make the following additional assumptions/simplifications:

1. The outside good is priced at cost.
2. All consumers face the same markups so $\tau_k^i = \tau_k$.
3. For simplicity, all elasticities are assumed to be cost share-weighted averages of individual effects, so $X_j = \int_i x_j^i$ and $\epsilon_{jk} = \int_i \epsilon_{jk}^i \frac{x_j^i}{X_j}$.

As a result, the welfare change from the Auto Rule (θ) is:

$$\frac{dW(\theta)/d\theta}{\mu} = X_N \tau_N \frac{d \log X_N}{d\theta} + X_U \tau_U \frac{d \log X_U}{d\theta}$$

Assuming that the Rule affects only markups for new vehicles, we can rewrite the "policy elasticities" as a product of a price elasticity and the elasticity of price with respect to the Rule, as follows:

$$\frac{dW(\theta)/d\theta}{\mu} = X_N \tau_N \hat{\varepsilon}_{NN} \frac{d\tau_N/d\theta}{1+\tau_N} + X_U \tau_U \hat{\varepsilon}_{UN} \frac{d\tau_N/d\theta}{1+\tau_N}$$

where $\hat{\varepsilon}_{jk} = \frac{d \log X_j}{d \log(1+\tau_k)}$ is the long-run "policy price elasticity" of demand for good j w.r.t. the price of good k, including the effects that a price change has on the prices of related goods. The formula accounts for demand feedback effects between the new and used car markets but assumes no dynamics in the path from the policy to the long-run

steady-state. Computing this formula requires estimates of seven parameters: two "policy price elasticities" that reflect the responsiveness of quantities of new and used vehicles sold to a change in prices in the new vehicle market after all adjustments have occurred in both markets, two baseline markups that represent the differences between prices and marginal costs for new/used vehicles, two quantities that reflect the aggregate cost of all new/used vehicles sold under the status quo, and the predicted change in prices due to the Rule. Calibration of these parameters is discussed in the main text.

G. Appendix: Uncertainty Analysis

While the main text uses alternative assumptions to explore sensitivity to a number of discrete scenarios, in this appendix we allow variation in most of the assumptions that underlie our model. This Monte Carlo analysis procedure allows us to more fully characterize the uncertainty around our central estimate of net benefits, under the assumption that our basic model is specified correctly. Most of the assumptions in our analysis refer to amounts of time, either amounts of time dealerships employees must spend on a compliance task or amounts of time that consumers save on various activities related to the automobile shopping process. Deviations for these assumptions are centered on the parameters used in the main text. Elsewhere, as with assumptions regarding fractions or proportions, our base case is often an extreme case (i.e., 0 or 1). In these cases, deviations are typically not centered on the base case and are allowed to vary across the whole range as dictated by the parameter. Still, we can expect the average results from this sensitivity analysis to be similar to the result in the main text. The object of interest here is the distribution of estimates, which indicates the expected variation in

net benefits if the true parameters deviate from our predictions (with errors of the form modeled).

For most assumptions, we draw from a symmetric, triangular distribution around the base case assumption with a specified upper and lower bound. In this distribution, the probability of drawing particular parameter value increases linearly from the lower bound to the base case assumption before decreasing linearly to the upper bound, such that the area inscribed by the triangle is equal to 1. We emphasize this distribution because it is a parsimonious way to incorporate variation in parameter values over a finite range and incorporates our preferred estimates as the most likely outcome. For a few parameters where we think it is appropriate to de-emphasize the main estimate parameter, we draw from a uniform distribution. Importantly, all draws are independent; there is no correlation between the deviations drawn in any given Monte Carlo trial. An additional sensitivity analysis considers a situation where our errors across all labor time parameters are correlated; specifically, that all of our estimates of the time required for compliance tasks are 1/10th of the true time required.

To incorporate uncertainty in time savings benefits to consumers, we allow the time saved by digital consumers to vary by up to ten minutes more or less than the main analysis parameters. The share of these time savings received by non-digital consumers under the Rule is modeled as uniformly distributed between zero (no savings) and one (savings equivalent to what digital consumers receive in the status quo).

Table A.1—Alternative Parameters: Benefits of Time Savings for Completed Transactions

	Base Case	Monte Carlo		
Parameter	**Parameter Value**	**Modeled Distribution**	**Distribution Lower Bound**	**Distribution Upper Bound**
Price Negotiation Time Savings	43	Triangular	33	53
Add-on Negotiation Time Savings	33	Triangular	23	43
Paperwork Time Savings	45	Triangular	35	55
Trade-In Negotiation Time Savings	26	Triangular	16	36
Fraction of Price Time Savings Under Rule	1.0	Uniform	0	1
Fraction of Add-on Time Savings Under Rule	0.5	Uniform	0	1
Fraction of Paperwork Time Savings Under Rule	0.5	Uniform	0	1
Fraction of Trade-In Time Savings Under Rule	0.0	Uniform	0	1

For the deadweight loss reduction component of benefits, we explore sensitivity only to baseline used-vehicle markups, allowing them to vary from 0 to the baseline new-vehicle markup of 15%. In the main text, we explore a number of scenarios for deadweight loss reduction corresponding to greater and lesser demand elasticities as well.

The following tables describe the distributions we model for cost parameters in the simulation exercise. All cost parameters are assumed to be drawn from triangular distributions. The tables follow the same order as the discussion in the main text.

Table A.2—Alternative Parameters: Costs of Misrepresentation Prohibition Compliance

	Base Case	Monte Carlo		
Parameter	**Parameter Value**	**Modeled Distribution**	**Distribution Lower Bound**	**Distribution Upper Bound**
Document Review Minutes	5	Triangular	0	10
Documents Reviewed	150	Triangular	100	200

Table A.3—Alternative Parameters: Costs of Offering Price Disclosures

	Base Case	Monte Carlo		
Parameter	**Parameter Value**	**Modeled Distribution**	**Distribution Lower Bound**	**Distribution Upper Bound**
Template Creation Sales Manager Hours	8	Triangular	4	12
Template Creation Web Developer Hours	8	Triangular	4	12

Table A.5—Alternative Parameters: Costs of Financing Disclosures

	Base Case	Monte Carlo		
Parameter	**Parameter Value**	**Modeled Distribution**	**Distribution Lower Bound**	**Distribution Upper Bound**
Disclosure Creation Compliance Manager Hours	8	Triangular	4	12
Disclosure Training Hours	1	Triangular	0	2
Disclosure Delivery Time Minutes	2	Triangular	0	4
Printing Costs	0.15	Triangular	0.10	0.20

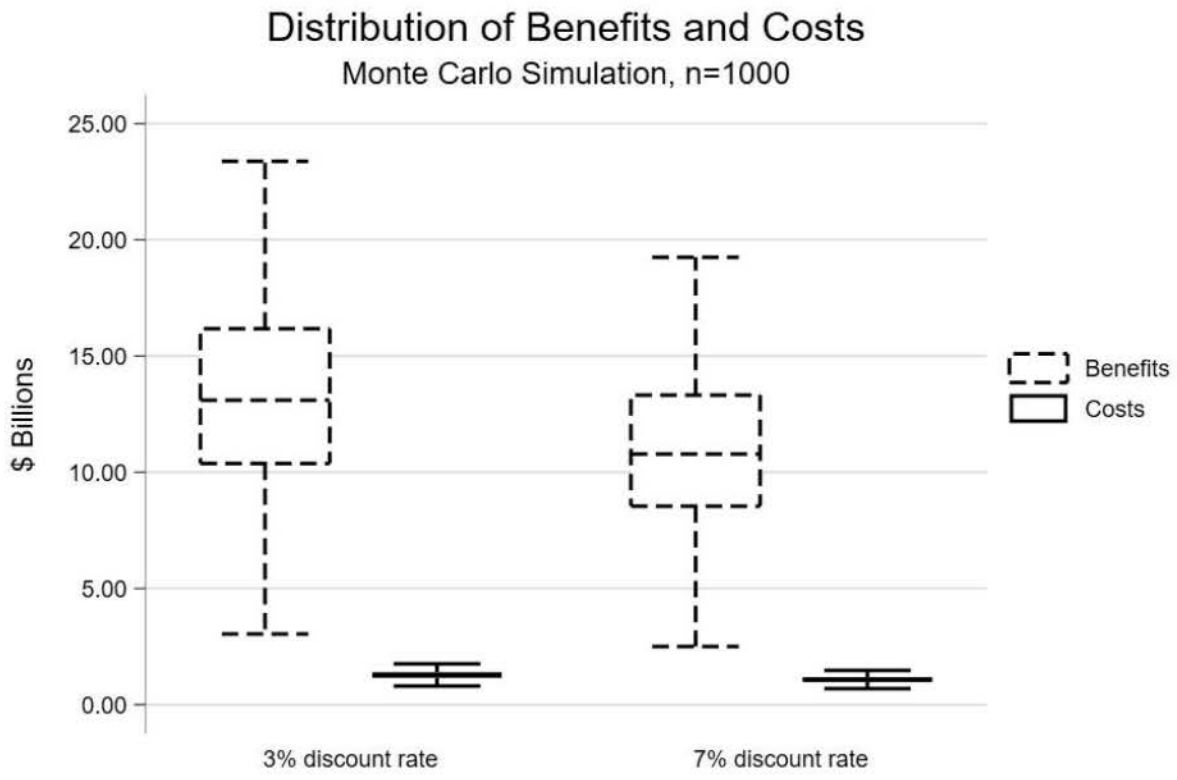
Table A.6—Alternative Parameters: Costs of Itemized Disclosures

	Base Case	Monte Carlo		
Parameter	**Parameter Value**	**Modeled Distribution**	**Distribution Lower Bound**	**Distribution Upper Bound**
Electronic Disclosure Share (Scenario 2 only)	0.27	Triangular	0.04	0.50
Upfront Sales Manager Hours (Scenario 1)	8	Triangular	4	12
Upfront Compliance Manager Hours (Scenario 1)	8	Triangular	4	12
Disclosure Training Hours (Scenario 1)	1	Triangular	0	2
Disclosure Creation Sales Manager Hours (Scenario 2 only)	4	Triangular	2	6
Disclosure Creation Compliance Manager Hours (Scenario 2 only)	8	Triangular	4	12
Disclosure Creation Web Developer Hours (Scenario 2 only)	8	Triangular	4	12
Disclosure Delivery Minutes (Scenario 2 only)	2	Triangular	0	4
Printing Costs (Scenario 2 only)	0.15	Triangular	0.10	0.20
Electronic Disclosure Costs (Scenario 2 only)	0.02	Triangular	0	0.04

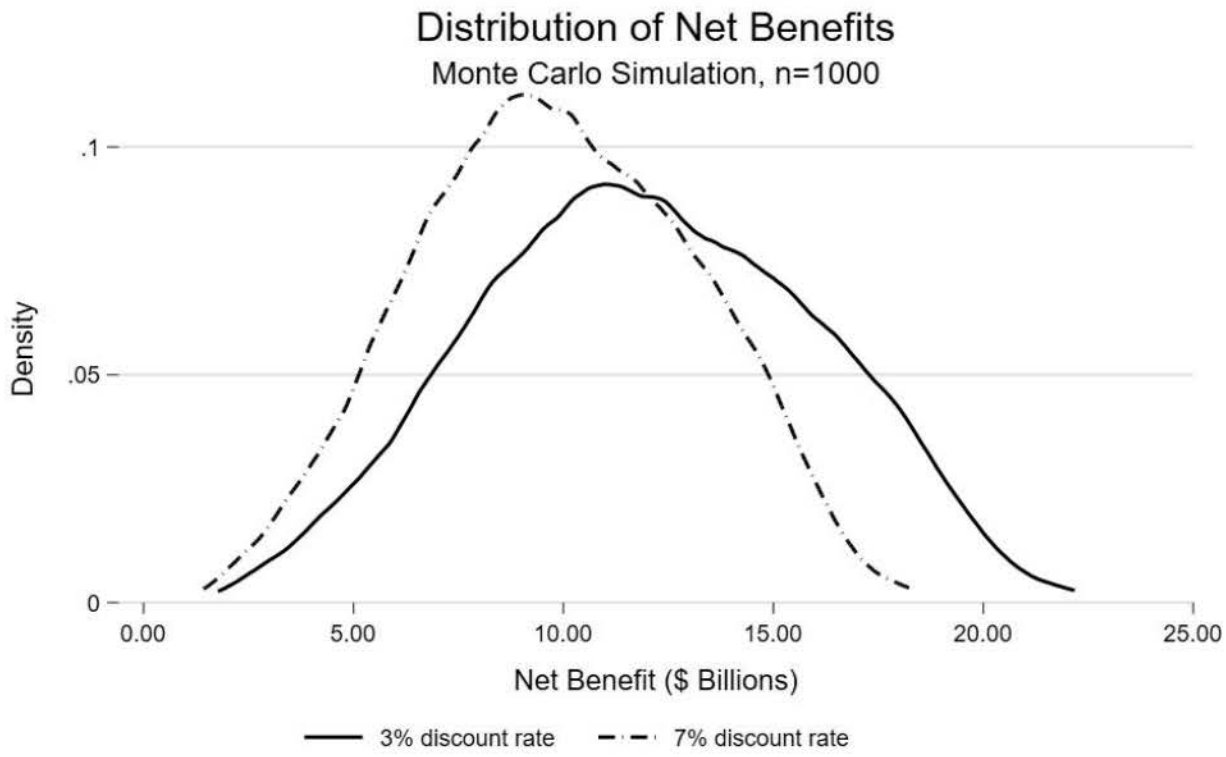
Table A.7—Alternative Parameters: Recordkeeping Costs

	Base Case	Monte Carlo		
Parameter	**Parameter Value**	**Modeled Distribution**	**Distribution Lower Bound**	**Distribution Upper Bound**
GAP Sales Share	0.17	Triangular	0.07	0.27
GAP Sale Minutes	1	Triangular	0	2
Upfront Web Developer Hours	8	Triangular	4	12
Upfront Clerical Hours	5	Triangular	2	8
Upfront Sales Manager Hours	1	Triangular	0	2
Upfront Compliance Manager Hours	1	Triangular	0	2
IT Hardware Costs	300	Triangular	100	500

We simulate 1,000 scenarios drawing from these parameter distributions, recording the costs and benefits of each potential outcome. The distribution of costs and benefits is plotted in the following table for discount rates of 3% and 7%.



Differencing the costs and benefits from each simulation iteration yields a distribution of net benefits under the various parameter draws. We again plot this distribution under 3% and 7% discount rates.



This exercise finds heterogeneity in net benefits under the alternative parameter distributions, but the Rule still yields positive net benefits in all simulated outcomes.

Finally, to examine the sensitivity of the net benefits conclusions to the possibility of systematic underestimating of labor costs, we calculate costs and benefits in a scenario where all labor costs turn out to be ten times larger than the parameter values in the main text. All non-labor hours costs (including benefits hours, wage rates, and prevalence counts) are unchanged in this analysis.

Table A.8—Present Value of Net Benefits (in millions), Labor Costs X 10, 2024-2033

	Base Case	
	3% Discount Rate	**7% Discount Rate**
Benefits		
Time Savings	$14,926	$12,290
Deadweight Loss Reduction	$1,298	$1,069
Total Benefits	**$16,224**	**$13,359**
Costs		
Prohibition on Misrepresentations	$1,573	$1,295
Offering Price Disclosure	$455	$455
Finance/Lease Total of Payments Disclosure	$2,743	$2,279
Prohibition re: Certain Add-ons & Express, Informed Consent	$4,471	$3,830
Recordkeeping	$1,868	$1,583
Total Costs	**$11,111**	**$9,443**
Net Benefits	**$5,114**	**$3,916**

Note: "Base Case" reflects base case benefit estimates and high cost scenarios with ten times the labor costs as in the main analysis. Not all impacts can be quantified; estimates only reflect quantified costs and benefits.

VIII. Other Matters

Pursuant to the Congressional Review Act (5 U.S.C. 801 *et seq*.), the Office of Information and Regulatory Affairs designated this Rule as a "major rule," as defined by 5 U.S.C. 804(2).

LIST OF SUBJECTS for PART 463

Consumer protection, Motor vehicles, Reporting and recordkeeping requirements, Trade practices.

For the reasons stated in the preamble, the Federal Trade Commission adds part 463 to subchapter D of Title 16 of the Code of Federal Regulations as follows:

PART 463—COMBATING AUTO RETAIL SCAMS TRADE REGULATION RULE

Authority: 15 U.S.C. 41 *et seq.*; 12 U.S.C. 5519.

Sec.

§ 463.1 Authority.

This part is promulgated pursuant to Section 1029 of the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010, 12 U.S.C. 5519(d). 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, including the recordkeeping requirements which are necessary to prevent such unfair or deceptive acts or practices and to enforce this part.

§ 463.2 Definitions.

(a) "Add-on" or "Add-on Product(s) or Service(s)" means any product(s) or service(s) not provided to the consumer or installed on the Vehicle by the Vehicle manufacturer and for which the Dealer, directly or indirectly, charges a consumer in connection with a Vehicle sale, lease, or financing transaction.

(b) [Reserved]

(c) [Reserved]

(d) "Clear(ly) and Conspicuous(ly)" means in a manner that is difficult to miss (i.e., easily noticeable) and easily understandable, including in all of the following ways:

(1) In any communication that is solely visual or solely audible, the disclosure must be made through the same means through which the communication is presented. In any communication made through both visual and audible means, such as a television advertisement, the disclosure must be presented simultaneously in both the visual and audible portions of the communication even if the representation requiring the disclosure is made in only one means.

(2) A visual disclosure, by its size, contrast, location, the length of time it appears, and other characteristics, must stand out from any accompanying text or other visual elements so that it is easily noticed, read, and understood.

(3) An audible disclosure, including by telephone or streaming video, must be delivered in a volume, speed, and cadence sufficient for ordinary consumers to easily hear and understand it.

(4) In any communication using an interactive electronic medium, such as the Internet or software, the disclosure must be unavoidable.

(5) The disclosure must use diction and syntax understandable to ordinary consumers and must appear in each language in which the representation that requires the disclosure appears.

(6) The disclosure must comply with these requirements in each medium through which it is received.

(7) The disclosure must not be contradicted or mitigated by, or inconsistent with, anything else in the communication.

(e) "Covered Motor Vehicle" or "Vehicle" means any self-propelled vehicle designed for transporting persons or property on a public street, highway, or road. For purposes of this part, the term Covered Motor Vehicle does not include the following: (1) Recreational boats and marine equipment; (2) Motorcycles, scooters, and electric bicycles; (3) Motor homes, recreational vehicle trailers, and slide-in campers; or (4) Golf carts.

(f) "Covered Motor Vehicle Dealer" or "Dealer" means any person, including any individual or entity, 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 Covered Motor Vehicles; (2) Takes title to, holds an ownership interest in, or takes physical custody of Covered Motor Vehicles; and (3) Is predominantly engaged in the sale and servicing of

Covered Motor Vehicles, the leasing and servicing of Covered Motor Vehicles, or both.

(g) "Express, Informed Consent" means 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 the following: (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 following are examples of what does not constitute Express, Informed Consent: (i) A signed or initialed document, by itself; (ii) Prechecked boxes; or (iii) An agreement obtained through any practice designed or manipulated with the substantial effect of subverting or impairing user autonomy, decision-making, or choice.

(h) "GAP Agreement" means an agreement to indemnify a Vehicle purchaser or lessee for any of the difference between the actual cash value of the 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 Vehicle insurer and some or all of the amount owed on the Vehicle at the time of the unrecovered theft or total loss, including products or services otherwise titled "Guaranteed Automobile Protection Agreement," "Guaranteed Asset Protection Agreement," "GAP insurance," or "GAP Waiver."

(i) "Government Charges" means 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.

(j) "Material" or "Materially" means likely to affect a person's choice of, or conduct regarding, goods or services.

(k) "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.

§ 463.3 Prohibited misrepresentations.

It is a violation of this part and an unfair or deceptive act or practice in violation of Section 5 of the Federal Trade Commission Act for any Covered Motor Vehicle Dealer to make any misrepresentation, expressly or by implication, regarding Material information about the following:

(a) The costs or terms of purchasing, financing, or leasing a Vehicle.

(b) Any costs, limitation, benefit, or any other aspect of an Add-on Product or Service.

(c) Whether the terms are, or transaction is, for financing or a lease.

(d) The availability of any rebates or discounts that are factored into the advertised price but not available to all consumers.

(e) The availability of Vehicles at an advertised price.

(f) Whether any consumer has been or will be preapproved or guaranteed for any product, service, or term.

(g) Any information on or about a consumer's application for financing.

(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.

(j) Whether or when a Dealer will pay off some or all of the financing or lease on a consumer's trade-in 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.

(*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.

(m) Whether consumers have won a prize or sweepstakes.

(n) Whether, or under what circumstances, a Vehicle may be moved, including across State lines or out of the country.

(o) Whether, or under what circumstances, a Vehicle may be repossessed.

(p) Any of the required disclosures identified in this part.

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.

§ 463.4 Disclosure requirements.

It is a violation of this part and an unfair or deceptive act or practice in violation of Section 5 of the Federal Trade Commission Act for any Covered Motor Vehicle Dealer to fail to make any disclosure required by this section, Clearly and Conspicuously.

(a) *Offering Price.* In connection with the sale or financing of Vehicles, a Vehicle's Offering Price must be disclosed:

(1) In any advertisement that references, expressly or by implication, a specific Vehicle;

(2) In any advertisement that represents, expressly or by implication, any monetary amount or financing term for any Vehicle; and

(3) In any communication with a consumer that includes a reference, expressly or by implication, regarding a specific Vehicle, or any monetary amount or financing term for any Vehicle. With respect to such communications:

(i) The Offering Price for the Vehicle must be disclosed in the Dealer's first response regarding that specific Vehicle to the consumer; and

(ii) If the communication or response is in writing, the Offering Price must be disclosed in writing.

The requirements in this paragraph (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).

(b) [Reserved]

(c) *Add-ons not required.* When making any representation, expressly or by implication, directly or indirectly, about an Add-on Product or Service, the Dealer must disclose that the Add-on is not required and the consumer can purchase or lease the Vehicle without the Add-on, if true. If the representation is in writing, the disclosure must be in writing. The requirements in this paragraph (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).

(d) *Total of payments and consideration for a financed or lease transaction.*

(1) When making any representation, expressly or by implication, directly or indirectly, about a monthly payment for any Vehicle, the Dealer must 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 representation is in writing, the disclosure must be in writing.

(2) If the total amount disclosed assumes the consumer will provide consideration (for example, in the form of a cash down payment or trade-in valuation), the Dealer must disclose the amount of consideration to be provided by the consumer. If the representation is in writing, the disclosure must be in writing.

The requirements in this paragraph (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).

(e) *Monthly payments comparison.* When making any comparison between payment options, expressly or by implication, directly or indirectly, that includes discussion of a lower monthly payment, the Dealer must disclose that the lower monthly payment will increase the total amount the consumer will pay to purchase or lease the Vehicle, if true. If the representation is in writing, the disclosure must be in writing. The requirements in this paragraph (e) 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).

§ 463.5 Dealer charges for Add-ons and other items.

It is a violation of this part and an unfair or deceptive act or practice in violation of Section 5 of the Federal Trade Commission Act for any Covered Motor Vehicle Dealer, in connection with the sale or financing of Vehicles, to charge for any of the following.

(a) *Add-ons that provide no benefit.* A Dealer may not charge for an Add-on Product or Service if the consumer would not benefit from such an Add-on Product or Service, including: (1) Nitrogen-filled tire-related products or services that contain no more nitrogen than naturally exists in the air or (2) Products or services that do not provide coverage for the Vehicle, the consumer, or the transaction or that are duplicative of warranty coverage for the Vehicle, including a GAP Agreement if the consumer's Vehicle or neighborhood is excluded from coverage

or the loan-to-value ratio would result in the consumer not benefiting financially from the product or service.

The requirements in this paragraph (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).

(b) [Reserved]

(c) *Any item without Express, Informed Consent.* A Dealer may not charge a consumer for any item unless the Dealer obtains the Express, Informed Consent of the consumer for the charge. The requirements in this paragraph (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), 463.4, and 463.5(a).

§ 463.6 Recordkeeping.

(a) Any Covered Motor Vehicle Dealer subject to this part must create and retain, for a period of twenty-four months from the date the record is created, all records necessary to demonstrate compliance with this part, including the following records:

(1) Copies of all Materially different advertisements, sales scripts, training materials, and marketing materials regarding the price, financing, or lease of a Vehicle, that the Dealer disseminated during the relevant time period; *Provided that* a typical example of a credit or lease advertisement may be retained for advertisements that include different Vehicles, or different amounts for the same credit or lease terms, where the advertisements are otherwise not Materially different;

(2) [Reserved]

(3) Copies of all purchase orders; financing and lease documents with the Dealer signed by the consumer, whether or not final approval is received for a financing or lease transaction; and all written communications relating to sales, financing, or leasing between the Dealer and any consumer who signs a purchase order or financing or lease contract with the Dealer;

(4) Records demonstrating that Add-ons in consumers' contracts meet the requirements of § 463.5, including copies of all service contracts, GAP Agreements and calculations of loan-to-value ratios in contracts including GAP Agreements; and

(5) Copies of all written consumer complaints relating to sales, financing, or leasing, inquiries related to Add-ons, and inquiries and responses about Vehicles referenced in § 463.4.

(b) Any Dealer subject to this part may keep the records required by paragraph (a) of this section in any legible form, and in the same manner, format, or place as they may already keep such records in the ordinary course of business. Failure to keep all records required under paragraph (a) of this section will be a violation of this part.

§ 463.7 Waiver not permitted.

It is a violation of this part for any person to obtain, or attempt to obtain, a waiver from any consumer of any protection provided by or any right of the consumer under this part.

§ 463.8 Severability.

The provisions of this part are separate and severable from one another. If any provision is stayed or determined to be invalid, it is the Commission's intention that the remaining provisions will continue in effect.

§ 463.9 Relation to State laws.

(a) *In General.* This part will not be construed as superseding, altering, or affecting any other State statute, regulation, order, or interpretation relating to Covered Motor Vehicle Dealer requirements, except to the extent that such statute, regulation, order, or interpretation is inconsistent with the provisions of this part, and then only to the extent of the inconsistency.

(b) *Greater protection under State law.* For purposes of this section, a State statute, regulation, order, or interpretation is not inconsistent with the provisions of this part if the protection such statute, regulation, order, or interpretation affords any consumer is greater than the protection provided under this part.

By direction of the Commission.

April J. Tabor,

Secretary.