Consumer and Worker Protection

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Federal Trade Commission
Via Electronic Submission

Re: Motor Vehicle Dealers Trade Regulation Rule—Rulemaking, No. P204800

The New York City Department of Consumer and Worker Protection ("DCWP") commends the FTC for proposing rules related to the sale, financing, and leasing of motor vehicles. As the licensing authority for used car dealers in New York City, and the country's oldest municipal consumer protection agency, DCWP has a vested interest in the FTC's proposed rules and valuable expertise that can inform the FTC's consideration of its final rules.

New York City law requires all used car dealers to obtain a license from DCWP. Currently, there are approximately 500 licensed used car dealers operating in New York City. DCWP also enforces laws and rules specific to used car dealers and the New York City Consumer Protection Law, which prohibits all businesses in New York City from committing deceptive business practices.[1] During the last five years, DCWP has recovered over $1.8 million in restitution for used car consumers, and obtained civil penalties of over $4.8 million against dealerships.

Next to the purchase of a home, an automobile is the most expensive purchase most Americans make. It can be a complicated process in which the buyer is significantly disadvantaged in knowledge and experience. Automobile sales and financing are rife with tempting opportunities for dealers to profit at the expense of all but the most sophisticated of consumers. With the rise of interstate automobile sales enabled by the internet, robust nationwide regulation is needed now more than ever. DCWP offers the following comments.

General Questions for Comment

9. Should any final Rule address disclosures in other languages?

DCWP recommends that the FTC require dealers to provide consumers with disclosures in other languages. New York City mandates that copies of all sales contracts, documents incorporated or referenced therein, and all other documents to be signed or initialed by the consumer in the language used by such dealer to negotiate the sale of a used car. *See* NYC Code § 20-268.3. DCWP does its part to enable compliance with the law by making New York

[1] The "Dealers in Second-Hand Articles Law" is codified in subchapter 11 of chapter two of title 20 of the New York City Administrative Code ("NYC Code"). The "Dealers in Second-Hand Articles Rules" exist

City's required used-car disclosure forms available in English, Spanish, Arabic, Bengali, Chinese, French, Haitian Creole, Korean, Polish, Russian, and Urdu. These forms include New York City's Used Car Consumer Bill of Rights, Financing Disclosure, and New York City Used Car Cancellation Option.

The New York City Council also recently amended the City's Consumer Protection Law to declare it a deceptive trade practice to "[fail] to provide a complete and accurate translation of all documents, other than receipts, related to a consumer transaction conducted in a designated citywide language other than English …. provided that such transaction was predominantly negotiated in such language" NYC Code § 20-701(a)(10).[2]

These laws do not require dealers to do business in languages other than English, but ensure that if they choose to do so, oral non-English representations are consistent with the written terms of the agreement.

§ 463.3: Prohibited Misrepresentations

16. *Proposed § 463.3(h) and (i) would prohibit dealers from misrepresenting when the transaction is final or binding on all parties and from making misrepresentations about keeping cash down payments or trade-in vehicles, charging fees, or initiating legal process or any action if a transaction is not finalized or if the consumer does not wish to engage in a transaction. As indicated in this document, these proposed provisions are intended to curb problems with the spot delivery of vehicles while the financing for the vehicle remains contingent—problems sometimes referred to as ''yo-yo financing.'' Should the Commission consider alternative approaches to address such problems, such as, prohibiting the dealer from transferring title to a trade-in vehicle or performing any repairs or reconditioning before a sale is final or requiring dealers to return trade-in, deposit, and fees, if financing is not approved?*

Proposed § 463.3(h) and (i) are unlikely to achieve the stated purpose of curbing yo-yo financing abuses. The rule should not merely prohibit misrepresentations about when a transaction is final or binding on all parties. Instead, it should prohibit financing-contingent contracts outright, which New York City already does. NYC Code § 20-268.1(b) reads:

> No retail installment contract for the purchase of a second-hand automobile shall include a term rendering the contract voidable, subject to modification, or otherwise not binding upon a second-hand automobile dealer because of such dealer's inability or unwillingness to sell, assign or otherwise transfer the contract to a third party after execution of the sales contract.

in subchapter k of chapter two of title six of the Rules of the City of New York ("RCNY" or "Rules"). The Consumer Protection Law is codified in subchapter one of chapter five of title 20 of the NYC Code.

[2] "Designated citywide languages" are the top six limited English proficiency languages spoken by the population of New York City based on United States census data, and the top four limited English proficiency languages spoken by the population served or likely to be served by New York City municipal agencies that are not included in the other top six. *See* NYC Code § 23-1101.

Requiring retail installment contracts to include a clause prohibiting financing-contingent sales would be an even more effective way to prevent this practice because it would have the added benefit of informing consumers of the prohibition. DCWP endorses the April 29, 2022 Request for Rulemaking by the National Association of Consumer Advocates and other consumer advocates proposing the following rule:

> A. Every consumer credit contract for the sale of a vehicle by a dealer shall include the following paragraph:
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> *"BY PRESENTING THIS CONSUMER CREDIT CONTRACT TO A CONSUMER FOR SIGNATURE, THE DEALER AS CREDITOR AFFIRMS THAT THE CONSUMER HAS BEEN FULLY APPROVED FOR THE CREDIT THAT IS BEING EXTENDED. ANY TERMS THAT ASSERT THAT THIS CREDIT CONTRACT IS 'CONDITIONAL' OR 'NOT YET APPROVED' OR SIMILAR TO THAT EFFECT SHALL BE VOID AND UNENFORCEABLE. ONCE SIGNED BY THE CONSUMER, THIS CREDIT CONTRACT CANNOT BE WITHDRAWN BY THE DEALER WHETHER OR NOT THIS CREDIT CONTRACT IS ASSIGNED TO A THIRD PARTY."*

18. Are there any other common misrepresentations in the motor vehicle marketplace that are not adequately addressed by the proposed rule?

DCWP has recently brought enforcement actions against several dealers that have misrepresented their automobiles as "Certified Pre-Owned" ("CPO") without producing any kind of certification. Dealers make this misrepresentation because many consumers are willing to pay a premium for the reassurance that they are buying a quality car that will not require expensive repairs.[3] Consumer Reports estimates that CPO automobiles sell for $850 to $3,000 more than their non-CPO counterparts.[4] In addition, a Cars.com analysis of 200,000 late-model used cars found that CPO automobiles were advertised for an average of $1,017 more than the same models with no certification.[5] Although there is no national standard for CPO automobiles, they are considered to be in better condition, are subject to more rigorous inspections, have a clean history, and are backed by a special warranty.[6]

DCWP has seen two variations of the CPO misrepresentation. One is to simply claim that an automobile is CPO without reference to any particular standard, requirements, or warranty. The

[3] *See* J.D. Power N.A.D.A. Guides, *What is a CPO Car? CPO Cars vs Used Cars*, https://www.nadaguides.com/Cars/Certified-Pre-Owned/What-is-a-CPO-Car (last accessed Sept. 10, 2021); Kelley Blue Book, *A Guide to Certified Pre-Owned Cars*, https://www.kbb.com/certified-pre-owned/ (last accessed Sept. 10, 2021); Jon Linkov, Mike Monticello, Consumer Reports, *The Truth About Certified Pre-Owned Cars* (Aug. 3, 2021), https://www.consumerreports.org/used-cars/the-truth-about-certified-pre-owned-cars-a8333898965/; Kelsey Mays, Cars.com, *Are Certified Pre-Owned Cars Worth It?* (Aug. 31, 2020), https://www.cars.com/articles/are-certified-pre-owned-cars-worth-it-426164/.

[4] *See* Linkov, *supra.*

[5] *See* Mays, *supra.*

[6] *See J.D. Power, supra.; Kelley Blue Book, supra.*

other is to claim that an automobile is "manufacturer certified," or certified under some other specific program, when the automobile does not meet the criteria for that specific certification, or the dealer is not authorized to market cars as certified under that program. The FTC should deem it an unfair or deceptive practice to market automobiles as certified without both identifying the certification criteria and features, and providing documentation that the automobile meets such criteria and has such features.

24. Are there circumstances in which dealers should be required to make disclosures and contracts available in languages other than English?

The FTC should require that when automobile dealers conduct business in a language other than English, they must provide disclosures and contracts in the language used to negotiate the sale. As explained in response to Question #9, New York City law already requires this. *See* NYC Code §§ 20-268.3, 20-701(a)(10). These laws do not require dealers to do business in languages other than English, nor do they mandate translation services. They simply ensure that if a dealer chooses to do business in another language that oral non-English representations to buyers are consistent with the written terms of the agreement and disclosures.

To reduce the burden on businesses, the FTC should provide disclosures in different languages, which DCWP does for its mandated used-car disclosures.

§ 463.4: Disclosure Requirements

26. Proposed § 463.4(a) would require dealers to disclose the Offering Price in certain advertisements . . .. b. In particular, the Commission is contemplating whether it is necessary to prohibit advertising any price aside from the Offering Price to address concerns with unfairness and deception, including those described in this Document. Or, alternatively, should dealers be permitted to state in advertisements the Offering Price along with other offers that may be of limited applicability (provided the nature of the limited applicability is clearly disclosed)?

The FTC should require dealers to conspicuously disclose the Offering Price in all advertisements that include any price information, and require dealers to clearly identify the Offering Price as such. DCWP recommends going even further by requiring the Offering Price to be the most conspicuous price information displayed. It is a common deceptive practice for the most prominently displayed price to be the Offering Price minus a specified down payment. For example:

Selling Price	$67,539
Down Payment	$2,995
Finance For	**$64,544**

Frequently, the prominently displayed price is the price that dealers transmit to third-party websites such as Cargurus.com or Cars.com. The third-party websites will then display only the prominently displayed price (the "Finance For" price in the above example) without the actual Offering Price appearing at all.

26c. Would the mandatory disclosure of Offering Price where required ''crowd out'' other information in advertising formats where dealers pay for time or space?

Crowding out other information should not be a concern because an easy-to-understand Offering Price is the most fundamental information about the car, along with year, make and model.

28. Proposed § 463.4(b) would require dealers to disclose an Add-on List in certain circumstances. (multi-part question)

The FTC should require the proposed disclosures concerning add-on products with an unconditional requirement to disclose that add-on products are optional. NYC Code § 20-271(b)(2) requires dealers to display "the total selling price of any add-on product offered for sale by means of a sign at the point of display of the second-hand automobile for which such product is available for purchase or at each location within the dealer's place of business where any such product is offered for sale. Such sign shall inform consumers that the purchase of any add-on product is optional and that the purchase of an add-on product is not required to obtain financing."

Our consumer complaints have shown that it is routine for salespeople to tell consumers that the purchase of add-on products is required, even though the fine print on many of these add-on product agreements state otherwise. The purchase of add-on products should never be required. If an add-on product is a necessary component of a particular car, it should be included in the Offering Price. Otherwise, it is just a hidden fee. The FTC should accordingly strike the phrase "if true" from subsection (c) of proposed section 463.4.

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

§ 463.5(a) would prohibit dealers from marketing or selling an add-on product or service to a consumer who would not benefit from the add-on product or service in connection with the sale or financing of a vehicle.

34. The proposed rule would prohibit dealers from charging for non-beneficial add-ons, such as nitrogen-filled tires that contain no more nitrogen than naturally exists in the air, and GAP insurance that cannot be used by the consumer. Are there other add-ons for which dealers commonly charge that are similarly non-beneficial and should be specifically referenced in any final Rule?

DCWP has observed transactions in which the dealer has charged consumers thousands of dollars for illusory theft deterrent products. These products come with a Theft Deterrent System Certificate of Coverage. The theft deterrent coverage is supplemental and requires the buyer to have comprehensive insurance coverage, which already covers instances of theft. Theft deterrent coverage often accompanies the sale of nominal or illusory theft deterrent products such as VIN etching. Although we have not investigated the issue, DCWP suspects that dealers may sell these Theft Deterrent System Certificates of Coverage without any accompanying theft deterrent product.

The FTC should consider whether illusory theft deterrent products, and the accompanying theft deterrent coverage, are non-beneficial add-ons, particularly when the cost of the product (including finance charges) exceeds the deductible on the buyer's own comprehensive insurance coverage, or if the dealer arranges non-comprehensive insurance for the buyer.

The FTC should also deem it an unfair or deceptive act to sell any add-on product for a price (including finance charges) greater than the value of the product itself. For example, a couple who complained to DCWP were sold a vehicle service contract for $2,000, plus $591.36 of applicable taxes and finance charges. The maximum total benefit covered by the service contract was $2,000. Had DCWP not intervened, the couple would have paid nearly $600 more than they could possibly recover for any repairs under the service contract.

36. Proposed § 463.5(b) would prohibit a dealer from charging for optional add-ons unless the dealer first discloses the vehicle's Cash Price without Optional Add-ons and records that a consumer has declined to purchase the vehicle at that price. (multi-part question)

When a consumer purchases add-on products, and finances them, the cost of their car purchase can increase greatly. It is important for consumers to fully appreciate these increased costs. Observing side-by-side the Total Sale Price of a car with and without add-on products allows the consumer to see and appreciate their true cost. To that end, New York City passed a law in 2017 requiring dealers to provide consumers with a Financing Disclosure Form, which is attached as Exhibit A. *See* NYC Local Law 197 of 2017; NYC Code § 20-268.1(e)(2); 6 R.C.N.Y. § 2-106. New York City's form also requires dealers to show the monthly payment with and without add-on products. Finally, in an effort to shed light on dealer mark-ups on financing, New York City requires dealers to disclose the "lowest APR offered to buyer by any finance company for loan with the same term, number of payments, collateral, and down payment." DCWP recommends that the FTC adopt a similar form.

§ 463.6: Recordkeeping

§ 463.6 would require dealers to keep, for a period of 24 months, records necessary to demonstrate compliance with the proposed rule including all materially different advertisements, sales scripts, training materials, and marketing materials regarding vehicle price, financing, or leasing terms; all materially different copies of lists of add-on products and services; consumer transaction documents such as purchase orders, financing and leasing agreements (and related correspondence, including declination documents as required by proposed § 463.5(b)); records to show compliance with monthly payment disclosure and GAP sales requirements; and certain written consumer complaints and consumer inquiries.

43. Is the 24-month record retention period appropriate?

The 24-month period is too short, considering that most retail installment contracts have terms of five, six, or even seven years. Furthermore, it will unnecessarily shorten the time by which the FTC will be able to effectively investigate violations. New York City requires dealers to maintain records for six years. *See* NYC Code § 20-268.5.

47. What has been the experience of State and local law enforcement agencies with respect to record retention requirements? Have such requirements been useful?

Record retention requirements are vital to DCWP investigations, particularly with regard to enforcing mandatory disclosures.

§ 463.9: Relation to State Laws

48. Does any portion of the proposed rule duplicate, overlap, or conflict with any federal, state, or local laws or regulations?

Many of the proposed rules are similar to laws and rules already in place in New York City. The proposed rules may require New York City to amend some laws and rules to harmonize with the proposed FTC rules and terminology. Particularly, to prevent duplication of confusing disclosures, DCWP may need to amend its Financing Disclosure form (Exhibit A) to conform to the FTC's add-on product disclosures requirements in subsection (b) of proposed section 463.5.

DCWP is, however, concerned about the requirement in subdivision (iv) of subsection (b), which requires the FTC add-on disclosures to be presented "limited to the information required by this section, and [not] presented with any other materials." Subdivision (iv) could be read to prevent DCWP from including closely related and highly relevant information on the same document. DCWP recommends that the FTC provide states and municipalities with flexibility to include related and non-conflicting disclosures on the same document. For example, DCWP believes it would be clearer and more efficient for one document to disclose the information required by both NYC Code § 20-268.1(e)(2) and proposed FTC rule § 463.5(b). Subdivision (iv) could possibly be read to prevent those closely related disclosures from being presented in a single document.

DCWP further requests that the FTC's non-preemption clauses in proposed section 463.9 expressly include municipalities.

49. What has been the experience in states that have regulated unfair or deceptive conduct involving motor vehicles sales, leasing, and financing, including with respect to add-ons? How have any such regulations assisted with combatting unfair or deceptive conduct?

Since 2017, when New York City took legislative and regulatory action to curb abuses in the automobile sales and financing industry, DCWP has brought several significant enforcement actions against used car dealers who violated New York City's licensing and consumer protection laws. Five of these enforcement actions alleged a pattern and practice of selling cars for significantly more than their advertised prices. Other illegal practices commonly alleged in these actions included using fictious "suggested retail prices" or "MSRPs," misrepresenting cars as "certified pre-owned," concealing terms and conditions, surreptitiously adding expensive add-on products, executing retail installment contracts as a dealer other than the dealer making the sale, and predatory lending targeting Spanish-speaking communities.

These actions resulted in combined restitution and civil penalties of millions of dollars. DCWP is attaching to its comment the petitions in two of these matters as detailed examples of the practices DCWP has observed. *See* Exhibits B and C.

Respectfully Submitted,

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