



September 8, 2022

April Tabor
Acting Secretary of the Commission
Federal Trade Commission
Office of the Secretary
600 Pennsylvania Avenue NW, Ste. CC-5610
Washington, DC 20580

Re: Comment on the Notice of Proposed Rulemaking on the Motor Vehicle Dealers Trade Regulation Rule—Rulemaking, No. P204800

Dear Secretary Tabor:

The Office of Advocacy of the U.S. Small Business Administration (Advocacy) submits this letter in response to the Federal Trade Commission's (FTC) notice of proposed rulemaking (NPRM) on *Motor Vehicle Dealers Trade Regulation*.¹ The Office of Advocacy (Advocacy) is concerned about the potential economic impact of the proposed rule on small entities. Advocacy encourages the FTC perform an initial regulatory flexibility analysis to provide information about the economic impact of the proposed rule and to implement less costly alternatives.

Request for Extension of the Comment Period

On August 22, 2022, the Office of Advocacy submitted a request for extension of the comment period for this rulemaking. As noted in the letter, the proposed rule contained 49 questions that required extensive research by the industry. The small entities that will be required to comply with the regulation are in the best position to provide the FTC with information about the potential costs associated with the proposal, but the amount of time provided for the comments is insufficient. This information is crucial for determining the economic impact of the rule and for considering less costly alternatives as required by the Regulatory Flexibility Act (RFA). Advocacy reiterates the need for an extension of the comment period for this rulemaking and reserves the right to submit supplemental comments.

Advocacy Background

Advocacy was established pursuant to Pub. L. 94-305 to represent the views of small entities before federal agencies and Congress. Advocacy is an independent office within the U.S. Small

¹ 87 FR 42012, July 13, 2022.

Business Administration (SBA), so the views expressed by Advocacy do not necessarily reflect the views of the SBA or the Administration. The RFA,² as amended by the Small Business Regulatory Enforcement Fairness Act (SBREFA),³ gives small entities a voice in the rulemaking process. For all rules that are expected to have a significant economic impact on a substantial number of small entities⁴, federal agencies are required by the RFA to assess the impact of the proposed rule on small business and to consider less burdensome alternatives.

The Small Business Jobs Act of 2010 requires agencies to give every appropriate consideration to comments provided by Advocacy.⁵ The agency must include a response to these written comments in any explanation or discussion accompanying the final rule's publication in the Federal Register, unless the agency certifies that the public interest is not served by doing so.⁶ Advocacy's comments are consistent with Congressional intent underlying the RFA, that "[w]hen adopting regulations to protect the health, safety, and economic welfare of the nation, federal agencies should seek to achieve statutory goals as effectively and efficiently as possible without imposing unnecessary burdens on the public."⁷

The Proposed Rule

On July 13, 2022, the FTC published an NPRM in the Federal Register on Motor Vehicle Dealers Trade Regulation. The proposed rule relates to the sale, financing, and leasing of motor vehicles by motor vehicle dealers. The proposed rule would prohibit motor vehicle dealers from making certain misrepresentations in the course of selling, leasing, or arranging financing for motor vehicles; require accurate pricing disclosures in dealers' advertising and sales discussions; require dealers to obtain consumers' express, informed consent for charges; prohibit the sale of any add-on product or service that confers no benefit to the consumer; and require dealers to keep records of advertisements and customer transactions.

Advocacy is Concerned About the FTC's Treatment of the RFA in the NPRM

When an agency issues an NPRM, it is required to perform an initial regulatory flexibility analysis (IRFA) unless it can certify that the proposed rule will not have a significant economic impact on a substantial number of small entities.⁸ In the RFA section, the FTC states that it believes that the NPRM will not have a significant economic impact on small entities, although it will likely affect a substantial number.⁹ The FTC then lists different elements of an IRFA but states that it did not consider specific alternatives for small businesses.¹⁰ It also does not provide a description of the impact of the rule as required by section 603(a) of the RFA. Since the FTC did not consider alternatives, the document is not an IRFA.

² 5 U.S.C. § 601 et seq.

³ Pub. L. 104-121, Title II, 110 Stat. 857 (1996) (codified in various sections of 5 U.S.C. § 601 et seq.).

⁴ Under the RFA, "substantial number" refers only to those regulated small entities that will experience a significant economic impact as a result of the rule.

⁵ Small Business Jobs Act of 2010 (PL 111-240) § 1601.

⁶ Id.

⁷ Id.

⁸ See, 5 USC §605 (b).

⁹ 87 FR at 42035

¹⁰ Id. at 42035-42036.

The FTC Failed to Provide a Sufficient Factual Basis to Support Its Certification

Section 605 of the RFA allows an agency to prepare a certification in lieu of an IRFA, if the proposed rulemaking is not expected to have a significant economic impact on a substantial number of small entities. However, the certification must be supported by a factual basis. Advocacy asserts that the FTC's certification is not supported by a factual basis.

The FTC Provides No Information about the Economic Impact of the Proposed Action on Small Entities in the RFA Section

In the RFA section, the FTC states that the Commission believes that the amendments will not have a significant economic impact on small entities.¹¹ The FTC does not provide information to support that claim. In fact, the FTC does not provide specific information about the economic impact on small entities at all. However, in other parts of the preamble, the FTC provides some cost information. For example, Table 1.1 assumes a cost of \$1,360,694,552.¹² If that number is divided by 46,525, the number of entities stated in the RFA section,¹³ the cost is roughly \$29,000 per entity. These costs do not include familiarization and training costs. The FTC also fails to include multiple types of costs that they admit they cannot quantify, such as investments in additional IT systems and hardware. Advocacy contends that the costs could be significant.

Advocacy encourages the FTC to perform threshold analyses to determine whether the costs associated with the proposal are significant. If they are not, Advocacy encourages the FTC to provide support for its conclusion that the rulemaking will not have a significant economic impact. If the threshold analysis indicates that there is a significant economic impact, Advocacy encourages the FTC to publish an IRFA outlining the costs associated with the rulemaking.

As noted above, the FTC did not consider alternatives to reduce the economic impact on small entities. As such, the FTC cannot go forward with final regulatory flexibility analysis (FRFA) until it publishes an IRFA for public comment.¹⁴ In addition, if an IRFA and FRFA are required, the FTC must publish a compliance guide along with the final rule.

The FTC's Estimation of the Number of Small Entities Impacted Is Inaccurate

In the RFA section, the FTC states that there are 46,525 franchise, new motor vehicle, and independent/used motor vehicle dealers in the United States. However, the FTC does not indicate the number of small entities among that total. FTC's current estimate of the number of affected small businesses is the total number of establishments in NAICS code 4411 (Automobile Dealers) from the County Business Patterns dataset. The FTC omits the other industries referenced in the definition of motor vehicles, which would fall under NAICS code 4412 (Other Motor Vehicle Dealers). Advocacy encourages the FTC to provide specific information about the

¹¹ 87 FR at 42035.

¹² *Id.* at 42036.

¹³ *Id.* at 42035.

¹⁴ *See, Southern Offshore Fisheries v. Daley*, 995 F. Supp. 1411 (M.D. Fla. 1998).

number of small entities that will be required to comply with the rulemaking as required by the RFA.

The Definition of Motor Vehicle Is Overly Broad and Vague

Section 463.2 (j) of the proposed rule defines a motor vehicle as:

(1) Any self-propelled vehicle designed for transporting persons or property on a street, highway, or other road; (2) Recreational boats and marine equipment; (3) Motorcycles; (4) Motor homes, recreational vehicle trailers, and slide-in campers, as those terms are defined in §§ 571.3(b) and 575.103(d) of title 49, Code of Federal Regulations, or any successor thereto; and (5) Other vehicles that are titled and sold through Dealers.¹⁵

The language defining the scope of the proposal is overly broad, vague, and confusing. For example, does the proposed rule include electric bicycles, all-terrain vehicles, go-carts, scooters, golf carts, and snowmobiles? They are all vehicles that can be used to transport a person or property on a street, highway, or other road. Advocacy encourages the FTC to specifically state the types of motor vehicles that are included in the proposal.

Advocacy further asserts that there is no reasonable explanation for the proposal to apply to any vehicle besides automobiles. The information provided in the preamble for the most part refers to studies about behavior observed in the sale of automobiles. There is no indication that the FTC has done sufficient research on the practices of dealers of recreational vehicles, boats, motor homes or any other vehicles. The FTC states that they receive thousands of complaints a year about dealership misconduct but has not offered any evidence that this is a prevailing problem outside of automobile dealerships.¹⁶ As such, the inclusion of anything besides an automobile may be deemed arbitrary and capricious under the Administrative Procedure Act.

Furthermore, the Marine Retailers Association has told Advocacy that boats are high end luxury items that have a different business model from automobile sales.¹⁷ Unlike an automobile, a boat is not a necessity. As such, the consumer has more bargaining power. Advocacy submits that dealers of vehicles other than automobiles may have a different business model as well.

Finally, in the Joint Statement of Chair Lina M. Khan, Commissioner Noah Joshua Phillips, Commissioner Rebecca Kelly Slaughter, and Commissioner Alvaro M. Bedoya, the Commissioners stated:

¹⁵ *Id.* at 42045.

¹⁶ The FTC has several footnotes throughout the document to support its claim that unfair and deceptive practices are a problem in dealerships. However, the footnotes refer to automobiles.

¹⁷ Email from Chad Tokowicz, Government Relations Manager, Marine Retailers Association of the Americas, August 30, 2022.

“The Commission has voted today to release a Notice of Proposed Rulemaking to address unfair and deceptive practices in *car* sales. *Cars* are vital for Americans....” (Emphasis added.)¹⁸

The definition provided in the NPRM goes beyond the stated intent of the Commissioners. Advocacy encourages the FTC to limit the scope of the rulemaking to car dealerships as indicated in the Joint Statement of the Commissioners.

The Definition of Motor Vehicle Dealer Needs to Be Clarified

Section 463.2(e) of the proposed rule’s definition of dealer includes:

(3) is predominately engaged in the sale and servicing of motor vehicles, the leasing and servicing of motor vehicles, or both.”¹⁹

According to the American Financial Services Association (AFSA), some vehicle finance companies maintain licenses as Dealers in order to facilitate the sale of a leased vehicle to customers who decide to purchase the vehicle at the end of the leased term. The definition is confusing because the existing Used Motor Vehicle Trade Regulation Rule excludes banks and financial institutions.²⁰ Advocacy encourages the FTC to clarify that the definition of “dealer” does not include a bank or financial institution.

The Proposal Could Make the Buying Process More Cumbersome and Stifle Innovation

The proposal, while intended to provide the consumer with clarifying information, could make the buying process more cumbersome and confusing for consumers and interfere with progress. As noted in Commissioner Christine S. Wilson’s dissent, regulation can stifle innovation, increase costs, raise prices, limit choice, and decrease output.²¹

Also, as Commissioner Wilson states, the industry is rapidly evolving. Consumers can already purchase cars without walking into a physical dealership. Instead, a consumer can purchase a car online and have it delivered to their door. If in-person shopping becomes more cumbersome, more consumers may opt to shop online rather than visit a dealership. Such a decision would be harmful to small businesses that compete based on personal service and relationships and is potentially problematic for the consumer.

As the FTC acknowledges, purchasing a vehicle is a time-consuming process that involves paperwork. The dealer prepares it and the consumer reads it. The proposal requires additional disclosures that the business will need to prepare, and the consumer will need to review and provide consent. The additional disclosures may prolong the car buying process.

¹⁸ 87 FR at 42047.

¹⁹ 87 FR at 42045.

²⁰ 16 CFR § 455.1(d)(3).

²¹ 87 FR at 42047.

Furthermore, in accordance with section 463.2 (f), consent does not include (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.²² Removing those methods of consent may add additional paperwork and time to the process, which would not be good for consumers or small dealerships.

The FTC Does Not Provide Sufficient Information to Support a Rulemaking for Automobile Dealerships

The basis of this rulemaking is that deceptive practices are occurring at automobile dealerships. To support this assertion, the FTC states that the tens of thousands of complaints received by the FTC each year indicate that dealership misconduct and deceptive practices persist.²³ Advocacy submits that the FTC is making an incorrect assumption. While tens of thousands may seem like a large number of complaints, according to the National Automobile Dealers Association, 14.9 million light duty vehicles were sold to customers in the United States in 2021.²⁴ Even if you assume that the FTC received 99,000 complaints about deceptive practices in automobile and truck sales, less than one percent of consumers reported a problem. Advocacy asserts that less than one percent does not indicate a pervasive problem but rather the presence of bad actors. It is counterproductive to penalize the industry and its customers to regulate the activities of a few bad actors.

As noted above, if anything, the additional disclosures and requirements in the proposal may prolong the car buying process and create frustration for consumers. Rather than penalizing the industry, it may be more productive to educate consumers about the car buying process. The FTC should not go forward with this proposed rule until it has evidence to support its claim that deception is a pervasive problem in motor vehicle dealerships. In the meantime, the FTC could develop a plan to educate consumers. Doing otherwise may be seen as an abuse of discretion.

Safe Harbor

Section 463.3 of the proposed rule provides that misrepresentations relating to the costs or terms of purchasing, financing, or leasing a vehicle constitute unfair and deceptive acts or practices.²⁵ Misrepresentations of the costs, limitations, benefit, or any other material aspect of an Add-on Product or Service also constitute unfair and deceptive acts or practices.²⁶ Misrepresentations can be statements or omissions in either written or oral form.

As noted above, the proposal defines “dealer” in a manner that includes finance companies. The finance companies may not have knowledge of misrepresentations made by a salesperson or someone else at the dealership. As such, if the FTC maintains the proposed definition of dealer, Advocacy encourages the FTC to work with the industry to develop a safe harbor so that finance companies are not liable for activities of which they have no knowledge or control.

²² 87 FR at 42045.

²³ 87 FR at 42035.

²⁴ [NADA Data | NADA](#)

²⁵ 87 FR at 42045.

²⁶ *Id.*

Conclusion

As noted throughout this letter, the proposed rule, while well intended, is problematic. It is overly broad and may have a significant economic impact on a substantial number of small entities. Advocacy encourages the FTC to produce an IRFA, including less costly alternatives. Some less costly alternatives may be to clarify and exempt entities that were not intended by the Commission to be included in this rulemaking and to create a safe harbor to limit liability. Advocacy further encourages the FTC to determine if there is a way to target the bad actors rather than this rulemaking which targets an entire industry for behavior that impacts less than one percent of the market.

Thank you for the opportunity to comment on this important proposal and for your consideration of Advocacy's comments. If you have any questions regarding these comments or if Advocacy can be of any assistance, please do not hesitate to contact me or Jennifer Smith at (202) 839-5600.

Sincerely,

/s/

Major L. Clark, III
Deputy Chief Counsel
Office of Advocacy
U.S. Small Business Administration

/s/

Jennifer A. Smith
Assistant Chief Counsel
for Economic Regulation & Banking

Copy to: Dominic Mancini
 Deputy Associate Administrator