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Federal Trade Commission
Office of the Secretary, Suite CC-5610,
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Washington, DC 20580
Via: electronicfilings@ftc.gov

Request for Rulemaking Concerning the Finality of a Car Purchase (Spot Delivery and Yo-Yo Financing)

The National Association of Consumer Advocates, the Consumer Federation of America, the Center for Responsible Lending, Consumers for Auto Reliability and Safety, the National Consumer Law Center, on behalf of its low-income clients, and U.S. PIRG respectfully request that the Federal Trade Commission (FTC or Commission) promulgate a rule requiring that a credit contract between a consumer and an auto dealer constitutes the final terms of a car sale. Under this proposal, the terms of the signed retail credit contract (also known as the retail installment sales contract-RISC) between the buyer and commercial seller of a car are treated as final, and would include a requirement that the consumer was fully approved for the credit terms in the contract before the signing, and that the credit terms in the contract remain effective whether or not the contract is or will be assigned to a third party. As discussed below, many sellers represent to car buyers that the sales transactions are complete with knowledge that the sales may actually be incomplete, causing costly additional negotiations and damage to buyers. The requested regulatory revisions would provide guidance to the auto retail sales industry with a bright line rule and bring clarity to help ensure that car buyers receive accurate, non-conflicting information regarding the final terms of the transaction.

The FTC has no formal regulation establishing an auto dealer's responsibilities regarding the finality of a car purchase. It has exclusive jurisdiction over car dealers that first extend credit to car buyers and then assign financing to third-party lenders. It is specifically authorized to issue a rule to curb unfair and deceptive practices relating to the sale, servicing, and leasing of motor vehicles.¹

Under this proposal, dealers would be required to include specific language in the credit contract that would protect both buyers and sellers, and ensure that all parties to a contract that sets forth the credit terms of a car sale can reasonably rely on the finality of those terms.

¹ 12 U.S.C. 5519(d).

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I. STATEMENT OF INTEREST

The National Association of Consumer Advocates (NACA) is a nationwide, non-profit organization of more than 1,500 private and public sector attorneys, legal services attorneys, law professors, law students, and non-attorney consumer advocates. NACA and its members' primary interest is the protection and representation of consumers. NACA's mission is to promote justice for all consumers and to provide a forum for information sharing among consumer advocates across the country. From its inception, NACA has focused on issues concerning unfair, deceptive, abusive and fraudulent practices by businesses that provide financial and credit-related services, including in auto sales. NACA follows developments in this area and consults with federal agencies that enforce laws that regulate this type of sale.

In 2021, NACA issued a survey to 115 advocates at private law firms, legal services and nonprofit organizations in 33 states about consumer experiences in auto transactions.² Notably, 63% of these advocates reported that in a four-year period covering 2016 – 2020, they had represented consumers with claims related to spot delivery or yo-yo financing.³ One of every three survey respondents cited spot delivery/yo-yo financing schemes as one of the most prevalent issues in their work. As a group, private consumer attorneys, named spot delivery/yo-yo financing schemes as one of the top three practices that causes the most systemic harm to consumers in the auto sales market.⁴

The Consumer Federation of America (CFA) is an association of nearly 300 non-profit consumer organizations that was established in 1968 to advance the consumer interest through research, advocacy, and education. CFA investigates consumer issues and behavior through surveys, focus groups, investigative reports, and analysis, and advances pro-consumer policies on various issues before federal and state legislatures, regulatory agencies and courts. CFA has a history of researching practices by auto dealers and manufacturers that harm consumers, and it has worked to promote policies and legislation which prioritize fairness in the auto marketplace for consumers.

Consumers for Auto Reliability and Safety (CARS) is a national, award-winning non-profit auto safety and consumer advocacy organization based in Sacramento and dedicated to preventing motor vehicle-related fatalities, injuries, and economic losses. CARS has successfully spearheaded enactment of numerous landmark laws in California and nationally to improve protections for America's new and used car buyers. The president of CARS was named to represent the public interest in regulatory negotiations with the auto industry regarding state auto lemon laws, and has been repeatedly invited by Congress to testify on behalf of the public interest regarding auto sales and financing policies. CARS also participated as a panelist in FTC workshops and a hearing convened by the Consumer Financial Protection Bureau regarding auto

² National Association of Consumer Advocates, *Online Survey: Consumer Harms in Auto Transactions Today*, January 2021, available at https://www.consumeradvocates.org/wp-content/uploads/2022/01/naca_survey_report_autotransactions_012021.pdf.

³ Id.

⁴ Id.

sales and financing practices, including discriminatory auto dealership "markups" and yo-yo financing.

The National Consumer Law Center (NCLC) is a non-profit national research and advocacy organization focusing on the legal needs of low-income, financially distressed, and elderly consumers. NCLC provides legal and technical consulting and assistance on consumer law issues to legal services offices, government attorneys, and private attorneys representing low-income consumers across the country. NCLC seeks to bring transparency and fairness to the markets for cars and car finance. Through its Working Cars for Working Families project, NCLC seeks to ensure that the lack of a car does not stand in the way of families' ability to become economically successful and to promote solutions to help car-ownership efforts assist struggling families to get a car.

The Center for Responsible Lending is a non-partisan, nonprofit research and policy advocacy organization working to promote financial fairness and economic opportunity for all, end predatory lending, and close the racial wealth gaps. CRL's expertise gives it trusted insight to evaluate the impact of financial products and policies on the wealth and economic stability of Asian, Black, Latino, rural, military, low-wage, low-wealth, and early-career workers and communities. CRL is an affiliate of Self-Help, one of the nation's largest nonprofit community development financial institutions. Our work leverages the strength of partnerships with national and local consumer and civil rights organizations.

U.S. PIRG is an advocate for the public interest. We speak out for a healthier, safer world in which we're freer to pursue our own individual well-being and the common good. U.S. PIRG serves as the federation of non-profit state Public Interest Research Groups, with member PIRGs and hundreds of thousands of citizen members across the country. U.S. PIRG and its affiliates have long had an interest in making markets fair and products safe for the consumers who use them. U.S. PIRG and the state PIRGs have conducted research into the sale of unsafe vehicles, advocated for passage of state new and used car lemon laws and documented how vehicle sales practices are fueled by unfair or deceptive add-ons that have driven consumers into record amounts of auto debt.

II. ACTION REQUESTED AND PROPOSED REGULATORY LANGUAGE

We recommend the following language for a rulemaking:

"A. Every consumer credit contract for the sale of a vehicle by a dealer shall include the following paragraph:

"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.”

- B. Regarding a consumer credit contract for the sale of a vehicle by a dealer, misrepresenting the credit contract as conditional after the consumer has signed it is an unfair and deceptive practice under 15 USC Section 45(a).”

III. BACKGROUND AND SUPPORT

An auto purchase is the second largest financial transaction for millions of consumers, second only to buying a home. Car buyers primarily obtain financing for car purchases through dealers – “87% of buyers finance the car through the dealership,” making the dealer the original lender.⁵ Automobiles are the only regular major purchase that is financed primarily by the seller.⁶ In auto sales, the dealer usually assigns the credit contract, which it has negotiated with the buyer, to a third-party assignee, typically a bank, credit union, a finance company associated with a manufacturer, or a nonbank entity that purchases credit contracts. Many of these assignees then pool and sell rights to such credit contracts through the securitization process.

Consumer finance experts contend that a car purchase has become what is arguably “the most complicated transaction a consumer ever faces, even more so than a home purchase.”⁷ Certainty, transparency and clarity of sale terms, particularly the financing details, are crucial to facilitate a smooth, incident- and injury-free process for all parties in this seemingly complex process.

Historically, during a car purchase, buyers are asked to physically sign numerous documents, including a contract with credit terms, which includes the expected down payment, monthly payment, and interest rate, and are then permitted to drive off the lot with the purchased car. The stack of documents often includes a separate document (referred to in some places as the “spot delivery agreement”) that asserts the deal is not final until the credit terms disclosed on the credit contract and agreed to by the buyer are assigned to a third party. Now, many car dealers conduct the transaction on computers or other electronic devices, and some dealers give the consumer a flash drive with electronic documents on it. The credit contract and spot delivery agreement contradict each other in a material way – one appears to be final while another claims the transaction is incomplete until further action is taken.

While from the seller’s perspective the deal may not be final until it can complete the sale of the credit contract to an assignee on terms known only to it, consumers leave with their new car overwhelmingly believing that the transaction is complete. A credit contract’s typical terms support the conclusion that the transaction is complete and that buyers when they sign it, are

⁵ Levitin, Adam J., *The Fast and the Usurious: Putting the Brakes on Auto Lending Abuses*, 108 Georgetown Law Journal 1257, 1262 (April 17, 2020), available at <https://ssrn.com/abstract=3438528>.

⁶ Id.

⁷ Levitin, Adam J., at 1262.

bound by its terms. Yet, a signed credit contract along with a contradictory spot delivery agreement ensure that a buyer does not become a potential customer for other car sellers in the marketplace because the consumer naturally believes the transaction is complete. Car buyers are then surprised when days, weeks or even months later, the dealer summons them with demands to change the credit terms, change the purchased vehicle, or unwind the deal completely. To be clear, only the dealer can engage in these post contractual changes as the buyers are bound by the terms of the contract.

Auto sales are unique in commerce in that a seller can generate and execute a sales credit contract with discrete payment terms set out for the buyer and, deliver the product, but simultaneously intends to cancel the transaction and insist on return of the product if the seller's separate negotiation with a third-party does not result in the desired outcome for the seller. The yo-yo consequences on the buyer stemming from a dealer's repeated demands to change a signed contract cause serious financial harm and emotional distress to car buyers. Consumers have no power to influence a creditor or third-party assignee's willingness to agree to any terms the dealer may want when it attempts to sell the credit contract. Nor do consumers have any power over the dealership's willingness to comply with the credit contract, or what terms it may demand from any assignee.

As the Center for Responsible Lending reported in 2012, "(y)o-yo scams are possible because of the pervasive practice of conditioning finance contracts on the dealer's decision to accept, or reject, purchase offers from third parties."⁸ Particularly now in an era where the supply chain is reeling from the coronavirus pandemic and the auto sales markets is experiencing an ongoing inventory shortage,⁹ sellers may be motivated to abuse yo-yo schemes that harm consumers but that may beef up dealer profits.

A. Allegations in Recent Cases Show Misrepresentations and Deceptions of the Finality of Car Deals Harm Consumers

Below are summaries of allegations set forth in complaints filed in state courts and arbitration proceedings.

Heidi McGill v. Bob Moore Dodge Chrysler Jeep¹⁰ – In November 2020, Heidi McGill, an Oklahoma consumer, arrived at a dealership to buy a car. While there, after the dealer conducted a review of her credit history, Ms. McGill made a down payment on a new Dodge Charger, traded-in her old car, and took the Dodge Charger home. Ms. McGill alleged that she did not receive a copy of the contract at the time. She reported that the dealer told her that the bank it intended to sell her loan to was not available on the weekend.¹¹

⁸ Delvin Davis, *Deal or No Deal: How Yo-Yo Scams Rig the Game against Car Buyers*, (April 2012, available at <https://www.responsiblelending.org/other-consumer-loans/auto-financing/research-analysis/Deal-or-No-Deal-How-Yo-Yo-Scams-Rig-the-Game.pdf>).

⁹ Jane Ulitskaya, *Inventory Shortage Update: Should You Wait to Buy a Car?*, CARS.com, (Jan 13, 2022), available at <https://www.cars.com/articles/inventory-shortage-update-should-you-wait-to-buy-a-car-445723/>.

¹⁰ Complaint, *McGill v. Bob Moore Dodge Chrysler Jeep*, Dist. Ct. Oklahoma, Case CJ-2021-2872 (July 2, 2021) and Exhibit.

¹¹ *Id.*, at 1.

A week later, she returned to the dealer and was asked to sign a new set of documents with different financing terms. She was provided a copy of the contract with the new terms, but with pages missing. Seventeen days after she took the car home, the dealer asked her repeatedly for additional financial information including her W-2, and then demanded return of the car.¹² According to Ms. McGill, about 26 days after she took possession of the car, the dealer demanded a co-signer for the financing terms, indicating that the process was still not completed from the dealer's perspective.¹³ Ms. McGill alleged that the dealer allowed 10 other banks to review her credit during this time, lowering her credit score.¹⁴

About 31 days after she took possession of the car, Ms. McGill alleged the dealer told her that if no financial entity purchased her loan, then they will return some funds based on the value of her trade-in.¹⁵ She returned to the dealer and signed a third set of financing documents. Yet, around 37 days after taking possession of the vehicle, the dealer told her she would have to find her own financing, according to Ms. McGill. In response, she offered to return the Dodge Charger in return for her down payment and trade-in, which the dealer declined to do.¹⁶

Around 40+ days later, according to Ms. McGill, the dealer threatened to file a stolen vehicle report if the Dodge Charger was not returned. Ms. McGill returned the Charger the next day.¹⁷ The dealer refused to return the down payment unless she executed a release of all claims. McGill did not execute the release, and the dealer repossessed the Charger without filing for replevin.¹⁸

The deal included a signed Retail Installment Sale Contract setting forth the financing terms, as well as a "Spot Delivery Agreement" (signed with the same date), which stated the car purchase was conditional on the dealer finding a lending institution willing to purchase the Retail Installment Sales Contract.¹⁹ In her filed complaint against the dealer, Ms. McGill alleged breach of contract, fraud, fraudulent inducement, negligence, credit defamation, failure to accurately disclose loan terms, deceptive trade practices, intentional infliction of emotional distress, conversion, and wrongful repossession.²⁰

Justin Sacco v. Paradise Auto Center²¹ – Oregon consumer Justin Sacco went to Paradise Auto Center, an auto dealer, to purchase a car in mid-August 2020. According to Mr. Sacco, after a review of his credit history, the dealer selected a 2017 Mitsubishi Mirage to sell to Mr. Sacco. The dealer and Mr. Sacco agreed to a loan, a \$3,000 down payment, and signed a Retail Installment

¹² Id., at 2.

¹³ Id., at 3.

¹⁴ Id.

¹⁵ Id.

¹⁶ Id., at 3.

¹⁷ Id.

¹⁸ Id.

¹⁹ Documents are attached as Exhibits A and B.

²⁰ Id.

²¹ Complaint, *Sacco v. Paradise Auto Center, LLC*, Ore. Circuit Ct., Case No.: 20CV36597 (Oct.16, 2020) and Exhibit C.

Contract (RISC) containing the credit terms. Mr. Sacco signed all the papers that day and drove the car home. He returned to the dealer the next day and gave them the down payment.²²

Mr. Sacco reported that about two weeks after paying the down payment, Paradise called and told him that the bank did not approve the loan with the terms on the RISC and that he needed to return to the dealer. Mr. Sacco returned to the dealer on August 29, 2020 where they discussed new financing options. Mr. Sacco said that he and the dealer agreed to new credit terms.²³

Mr. Sacco alleged that about a month later, on September 25, 2020, Paradise called him and said that they could not get secure the financing and that he needed to return the car. He returned the car on the same day, but Paradise refused to return his down payment.²⁴ Consequently, he did not have sufficient funds for a down payment to purchase another car, lacked transportation to go to work, and lost wages as a result.

According to Mr. Sacco's filed complaint, the dealer allowed him to execute a purchase order and a retail installment contract (RISC) and to take possession of the car prior to Mr. Sacco's loan being approved by another financing entity.²⁵ Paradise offered to sell the motor vehicle to Mr. Sacco under a retail installment contract that is subject to an assignee's agreement to purchase the retail installment contract. Prior to offering or negotiating new financing terms in person, the dealer failed to return all items of value to Mr. Sacco. No assignee agreed to purchase the retail installment contract on the exact terms that the dealer and Mr. Sacco negotiated, and Paradise did not receive final approval for a purchase of the contract from another financing entity on terms acceptable to it. Mr. Sacco alleged that the dealer's conduct violated Oregon's unlawful trade practices law.²⁶

Estephania Palacios Gomez v. Low Price Auto LLC Db a Salem Auto Market²⁷ – On March 23, 2021, Oregon resident Ms. Estephania Palacios Gomez bought a 2012 Mercedes Benz C250 from Salem Auto, an auto dealer.²⁸ Ms. Gomez traded in her current car, paid a \$2,000 down payment, and agreed to pay additional funds in a deferred down payment. After applying the down payment, Salem Auto and Ms. Gomez agreed to a loan for the remaining amount, and signed a Retail Installment Contract (RISC) with the understanding that the dealer Salem Auto was to obtain financing for Ms. Gomez. Ms. Gomez signed all the purchase paperwork that day and drove the car home.²⁹

Ms. Gomez alleged that on or about June 2, more than two months after signing the original RISC and taking home the car, Salem Auto called Ms. Gomez and told her that it could not obtain

²² Id., at 2.

²³ Id., at 2-3.

²⁴ Id., at 3.

²⁵ Id., at 4.

²⁶ Id., at 4-5.

²⁷ Complaint, *Estephania Palacios Gomez v. Low Price Auto LLC Db a Salem Auto Market*, Ore. Circuit Ct., Case No.: 21CV37572 (Sept. 20, 2021) and Exhibits D and E.

²⁸ Id., at 2.

²⁹ Id.

financing for her and told her to come in to sign a new loan. Ms. Gomez returned to the dealer, and signed a new RISC.³⁰ According to Ms. Gomez, the dealer did not return the original down payment to her before entering into the new agreement, but it increased the price of the car by \$1,000. Ms. Gomez also reported that the dealer falsely represented the amount of her down payment.³¹ The parties signed the second RISC with the understanding that Salem Auto was to obtain financing from another entity for Ms. Gomez.³²

A month later, Ms. Gomez reported in her complaint that the dealer called and informed her that the second entity rejected the loan and that it was back with Salem Auto. Ms. Gomez asked if Salem Auto would carry the loan in house but the dealer refused. Ms. Gomez returned her key to the dealer and requested return of her down payment. Ms. Gomez made multiple requests for her down payment but the dealer refused to return it.³³

According to Ms. Gomez' filed complaint, the dealer allowed her to execute a purchase order and/or a retail installment contract and take the car home, prior to the credit terms being approved by a third-party financial entity.³⁴ The dealer offered to sell a motor vehicle to her under a retail installment contract which contains terms which conditioned the transaction on a lender's agreement to purchase the retail installment contract. No third-party entity agreed to purchase the RISC on the exact terms that Ms. Gomez and the dealer negotiated, and the dealer did not receive final approval of funding from any third-party lender within 14 days of Ms. Gomez taking the car home, as required under Oregon law.³⁵ Ms. Gomez alleged violations of Oregon's unfair trade practices law, fraudulent misrepresentations, and violations of the Truth in Lending Act.³⁶

Renee Galloway v. Priority Imports Richmond LLC,³⁷ – Virginia resident Renee Galloway, an African-American woman, went to Priority Imports Richmond (Priority), a car dealer, to make a deal on a Toyota Camry that she test-drove days earlier. After a dealer review of her credit history, Ms. Galloway reported an offer where she could buy the car on credit at 8.49% interest, with 72 payments of \$572.68 and a \$3,000 down payment.³⁸ She accepted the offer, signed documents to purchase the Camry on credit, and the down payment was withdrawn from her account.³⁹

Ms. Galloway and the dealer signed the electronic credit contract, specifically the retail installment sales contract.⁴⁰ The credit contract stated that it “is not contingent upon obtaining financing on terms which are satisfactory to the parties.” The contract was final and was not

³⁰ Id., at 3.

³¹ Id.

³² Id.

³³ Id., at 4.

³⁴ Id., at 5.

³⁵ Id.

³⁶ Id., at 6.

³⁷ Complaint, *Renee Galloway v. Priority Imports Richmond LLC*, E.D. Va., Case No. 3:19-cv-00209-JAG (May 8, 2019) and Exhibits F and G.

³⁸ Id., at 3.

³⁹ Id., at 3.

⁴⁰ Id., at 4.

conditional on other terms. Under the dealer's signature, the credit contract stated that the dealer "sells and assigns (the credit contract) to Toyota Motor Credit Corporation."⁴¹

Ms. Galloway stated that beginning two weeks after the transaction, the dealer contacted her and falsely told her that she needed to return to sign additional documents regarding the credit transaction. to complete the purchase of the Camry.⁴² She returned to the dealer to do so, and was then told that the signed credit contract was not valid. She asserted in her filed complaint that the dealer lured her back to "force her to either pay more money for the Camry or buy a different car."⁴³ Ms. Galloway returned the car keys and left the dealership without her Camry. So that she would have a car to drive, she then agreed to a second transaction.

The dealer did not record transfer of title or the registration of the lien for the financing with Virginia DMV. Ms. Galloway asserted that the dealer intentionally misrepresented that it had assigned its rights in the contract to a financing company and never intended to provide the Camry on the unconditional terms shown in the credit contract. The dealer, she said, falsely represented its intent to sell the Camry to Ms. Galloway for the terms shown in the credit contract.

Ms. Galloway asserted in her complaint a fraudulent scheme by the dealer against her that violated the federal Truth In Lending Act (TILA), the federal Equal Credit Opportunity Act (ECOA), and the 42 U.S.C. § 1983. The dealer's actions, according to the complaint, also violated the Virginia Consumer Protection Act (VCPA) and the Uniform Commercial Code, and constituted fraud and conversion.⁴⁴ After Ms. Galloway filed her lawsuit, the dealer compelled arbitration even though the arbitration clause prohibited the award of punitive damages in arbitration. The arbitration decision is currently on appeal to the Fourth Circuit.

There is no way to reconcile the statements in the first credit contract with how the dealer treated the transaction. As an intended assignee, the financing company would likely claim that it only buys such electronic credit contracts which are fully final and unconditional when they are signed. The form electronic credit contracts are assigned and do not allow for modifications by a separate physical document signed in ink which is not electronically associated with the credit contract.

Additional allegations as experienced by Virginia residents⁴⁵:

i) A Virginia consumer pursued claims against in arbitration against a Ford dealership. After driving home with a car and believing a car sale was completed, the consumer reported receiving a notice from the financing company telling him that the credit had been denied. The consumer was confused and thought the deal was canceled. Attached is the electronic credit contract,

⁴¹ Id., at

⁴² Id., at 7, 14.

⁴³ Id., at 7.

⁴⁴ Galloway, at 1.

⁴⁵ Exhibits H-K attached.

which was an unconditional extension of credit, that the dealership used when it sold the car to the consumer, as well as the standard delivery form that the dealership also uses. The “Permissive Vehicle Use Agreement And/Or Addendum to Proposed Installment Sale Agreement or Lease” states that the transaction is conditional. The statements in the delivery form that the dealer is merely granting the consumer use of the dealer’s car while credit is pending, and the credit contract’s unconditional terms are inconsistent and cannot be reconciled. The standard delivery form shows how the dealer considered the transaction conditional while at the same time attempting to sell an unconditional credit contract to an assignee.

ii) A Virginia consumer filed a demand for arbitration against a Chevrolet dealership alleging that after signing a credit contract and completing a transaction to buy a car, he was contacted by the dealer and ordered to return the car to the dealership. He asserted that he was threatened with arrest if he did not return the car. He reported that he was then told that his financing had not been approved. Attached is the credit contract that the dealer used when it sold a Dodge Challenger to the customer. It states that the dealer had assigned the credit contract. The transaction also included a standard delivery form that the dealership uses. This “Addendum to Retail Installment Sale Contract/Lease and Buyer’s Order Conditional Delivery Agreement” states the transaction is conditional on it being assigned. In this transaction, the form was paired with a fully endorsed credit contract that represented it had already been assigned. The statements in the standard form with the statement that the credit contract had already been assigned are irreconcilable. The standard delivery form used by this multi-state dealer shows how the dealer considers the credit transaction conditional on assignment while at the same time telling the customer the credit contract is fully completed.

B. Yo-yo Sales Eviscerate Efficacy of Critical Federal Law Requirements, Including Credit Terms and Mileage Disclosures, and Civil Rights Protections

An FTC rule addressing yo-yo sales would complement and underscore existing federal laws that apply to the sale of a vehicle, including the Truth in Lending Act, the Federal Odometer Act, and the Equal Credit Opportunity Act. The current state of allowing dealers to void a contract if they cannot find a third-party finance company to purchase a credit contract invites abuses and obstructs the protections and public interest purposes of these federal policies.

1. TILA Disclosure Requirements are Illusory in Conditional Credit Contracts

Consumers’ reasonable reliance on the accuracy of credit terms in the original sales contract is supported by the protections in the federal Truth in Lending Act (TILA).⁴⁶ Congress has affirmatively stated:

⁴⁶ 15 U.S.C. § 1601 et seq.

"It is the purpose of this subchapter to assure a meaningful disclosure of credit terms so that the consumer will be able to compare more readily the various credit terms available to him and avoid the uninformed use of credit..."⁴⁷

TILA's purpose is particularly important in the context of auto sales where payment terms are typically the most prominent and consumer-reviewed aspect of a contract to buy a car. Yet, TILA's mission to require proper credit disclosures is completely suppressed when the financing terms negotiated, agreed to, and signed by the buyer are not actually final from the original creditor's (the dealer's) point of view. The evisceration of disclosures and transparency of consumer credit transactions required under TILA is one of the most fundamental and harmful consequences of the conduct this proposal seeks to address.⁴⁸

It remains one of the FTC's important duties to ensure the integrity of requirements under certain consumer financial protection laws, such as those in TILA. In 2010, when Congress passed the Dodd Frank Wall Street Reform and Consumer Protection Act in response to the 2007-2008 financial crisis and created a brand-new federal agency, the Consumer Financial Protection Bureau (CFPB), to oversee the vast financial services market, the FTC retained enforcement authority of numerous financial services laws, including the Truth in Lending Act and Regulation Z. As the FTC has said: "... the [Dodd-Frank] Act gave the Commission the authority to enforce any CFPB rules applicable to entities within the FTC's jurisdiction, which include most providers of financial services that are not banks, thrifts, or federal credit unions."⁴⁹

In annual letters to the CFPB, the FTC reported its enforcement of TILA disclosure requirements in the auto sales market. In 2018, it charged auto dealer Tate's Auto with unlawful practices in its sale, leasing, and financing of cars, including violations of TILA disclosure requirements. The complaint charged Tate's Auto with allegedly deceiving consumers about the terms of financing, and failing to disclose required credit terms, including terms of repayment and annual percentage rate, in advertisements.⁵⁰ It is clear that the FTC has an ongoing interest and obligation to combat deceptive auto dealer practices, including when they directly and inherently violate TILA disclosure requirements.

The only way TILA disclosures are an effective tool for comparison shopping is if the disclosures represent the terms of credit the consumer is actually being offered and that the dealer intends to provide to the buyer. The proposal here will allow TILA disclosures to accomplish their

⁴⁷ 15 U.S.C. Sec. 1601(a).

⁴⁸ See, Christopher V. Langone & Joel D. Dabisch *Have You Been "Spotted"? Recognizing and Attacking One of the Most Widespread Automobile Dealer Abuses*, 12 Loy. Consumer L. Rev. 108 (2000), available at <http://lawecommons.luc.edu/lclr/vol12/iss2/2>.

⁴⁹ Letter from the Federal Trade Commission to the Consumer Financial Protection Bureau, responding to the CFPB's request for information concerning the FTC's enforcement activities related to compliance with Regulation Z (the Truth in Lending Act or TILA); Regulation M (the Consumer Leasing Act or CLA); and Regulation E (the Electronic Fund Transfer Act or EFTA), May 13, 2020, available at https://www.ftc.gov/system/files/documents/reports/ftc-enforcement-activities-related-compliance-regulation-z-truth-lending-act-regulation-m-consumer/cfpb_tila_report_2019final_document_word5_13_20.pdf.

⁵⁰ Letter from the Federal Trade Commission to the Consumer Financial Protection Bureau, at 3, May 30, 2019, available at https://www.ftc.gov/system/files/documents/reports/ftc-enforcement-activities-related-compliance-regulation-z-truth-lending-act-regulation-m-consumer/cfpb_2018_report_re_tila_and_cla_and_efta.pdf.

purposes because the car dealer as the original creditor must truthfully and finally represent the terms in the signed credit contract.

“With one hand, the dealership goes through all of the machinations of creating a binding sales contract: securing personal information from the consumer in order to conduct a credit check and to ascertain what terms would be acceptable to the consumer, shopping the package around in a process that can take hours until the moment when the representative emerges from the back room saying, “We have a deal,” then having the consumer sign the RISC with the terms from the “deal.” But with the other hand, the dealership undoes that deal with the Spot Delivery Agreement. TILA was expressly designed to promote the informed use of credit by ensuring that creditors make meaningful disclosures of the terms upon which they will extend credit, which purpose requires that courts liberally construe the statute in favor of the consumer. This purpose is, in short, frustrated by using a Spot Delivery Agreement in the manner present here to rescind the terms of and undermine the disclosures made in the RISC.”⁵¹

2. Yo-yo Practices Interfere with the Federal Odometer Act Purposes

The Motor Vehicle Information and Cost Savings Act (“Odometer Act”), according to its legislative history, states that the Act “makes it unlawful for any person to transfer ownership of a vehicle unless that person enters on a form prescribed by the Secretary or as prescribed by state law, the mileage said motor vehicle has been operated.”⁵²

In 1986, Congress amended the Odometer Act to require that the odometer disclosure be made in one place only: on the title to the vehicle.⁵³ One purpose of the amendment was “to preserve records that are needed for the proper investigation of possible violations of the Motor Vehicle Information and Cost Savings Act and any subsequent prosecutorial, adjudicative or other action.”⁵⁴ Also, “[t]he central purpose of [the statute] is to make the title document the sole vehicle for odometer disclosures, thereby completing a years-long movement among the States toward the use of the title for disclosure.”⁵⁵ Disclosure on the title was required because “using a separate document for odometer disclosure, which had been common in the early days of the Federal odometer law, had been shown to be too vulnerable to abuse.”⁵⁶ In the 1986 amendment, Congress gave the Odometer Act a second “central purpose” by requiring the title document to be the only place for the disclosure under the Act.

Requiring the odometer disclosures on the titles creates records that can be used in prosecuting federal odometer act crimes, and allows car dealers to use title documents in the chain of title to

⁵¹ *Salvagne v. Fairfield Ford, Inc.*, 794 F. Supp. 2d 826, 834 (S.D. Ohio 2010).

⁵² 49 U.S.C. §§ 32701-32711. S. Rep. No. 92-413, reprinted in 1972 U.S.C.C.A.N., 3960, 3971.

⁵³ S. Rep. No. 99-47, at 1-2 (1986), reprinted in 1986 U.S.C.C.A.N., 5620, 5621.

⁵⁴ 49 C.F.R. § 580.2.

⁵⁵ See Supplementary Information to 1991 Final Rule, 56 Fed. Reg. 47,681, 47,684 (1991).

⁵⁶ *Id.*

check the odometer disclosures from previous sales.⁵⁷ Furthermore, requiring the odometer disclosure on the title protects the buyer by providing that person information about the odometer disclosures from previous transfers.⁵⁸

Whether paying cash or having signed a credit contract, when a consumer drives a car off a dealer's lot using any license plate tags other than official dealer tags, the consumer should be treated as the car's owner. Before doing so, the dealer is required to make the official federal odometer disclosure on the document assigning title, and the consumer is to sign that document acknowledging receipt of the disclosure. In states that allow the consumer to leave with the car after signing a credit contract, the dealer may later simply revoke it if it is ultimately unsatisfied with the deal, and they will refuse to sign and provide title documents to the consumer until the sale of the credit contract is completed.

Such a practice means that the consumer was not presented with the title document to sign at the time of the purchase and the official federal odometer disclosure was not made on the document assigning title.⁵⁹ When these yo-yo practices occur, it is as if the 1986 amendments never happened. For deals that are then completed from the dealer's perspective, dealers employ various tactics, many of them in violation of the federal Odometer Act, to later make the title record appear as if a proper disclosure had been made on the title document at the time the consumer signed the original credit contract and first drove the car off the lot. For many deals canceled by the dealer, odometer disclosures related to the transaction do not appear in the title records.

Compliance with the federal Odometer Act is simple at the time a car dealer intends to make a consumer the owner of the car. Because dealers that engage in these practices may not intend to make the consumer the owner of the car until the dealer is certain that the credit transaction is one it can either sell or is willing to honor, the instant proposal will help dealers comply with the Odometer Act. When the dealer is certain that the transaction is ready, the dealer can prepare the credit contract for signature; after the consumer signs, the dealer can immediately sign the title document over to the buyer, and properly make the odometer disclosure.

3. The Equal Credit Opportunity Act's Anti-Discrimination and Notice Protections are Frequently Violated

The Equal Credit Opportunity Act (ECOA) bans discrimination in credit transactions, and applies to any extension of credit⁶⁰ It prohibits discrimination on the basis of race or color, religion, national origin, sex, marital status, age, income derived from any public assistance program, or the applicant's exercise, in good faith, of any right under the Consumer Credit Protection Act. Among other things, ECOA requires a creditor to notify the credit applicant of actions taken,

⁵⁷ See e.g. *United States v. Townsend*, 796 F.2d 158, 161 (6th Cir. 1986) and see *Oettinger v. Lakeview Motors*, 675 F. Supp. 1488, 1495 (E.D. Va. 1988).

⁵⁸ See Supplementary Information to Proposed Revisions of Odometer Disclosure Requirements, 52 Fed. Reg. 27,022, 27,025, July 17, 1987.

⁵⁹ See, Capt. Tom Wallace, *Spot Delivery Car Sales*, Feb. 28, 2012, available at <https://jag.navylive.dodlive.mil/News/News-View-Page/Article/2614346/spot-delivery-car-sales/>.

⁶⁰ 15 U.S.C. §§ 1691-1691f and 12 CFR Part 1002.

including “adverse actions” or counteroffers, related to their credit applications.⁶¹ In addition, ECOA’s prohibition against discrimination applies to disparate treatment as well as disparate impact, which does not require intentional discrimination.⁶²

The FTC has a strong interest in ensuring ECOA compliance “regarding most non-bank financial service providers” in the marketplace.⁶³ In 2020, the FTC settled ECOA claims against a car dealership for unlawfully discriminating “on the basis of race, color, and national origin when acting as a creditor for vehicle financing.”⁶⁴ Auto industry sites also note the importance of ECOA compliance in car sales transactions.⁶⁵

Credit contracts in car sales that are not treated as final impede proper enforcement and compliance with ECOA requirements. When a dealer misrepresents that a buyer’s application for credit was approved for the terms shown on the credit contract but the dealer actually did not intend to make credit available to the buyer on those terms, this action frustrates the dealer’s obligation to comply with ECOA, and deprives the buyer of the protections provided under the anti-discrimination statute. When a dealer unilaterally cancels the credit terms in a credit contract that the buyer believed to be final and binding, the dealer also often fails to give proper notice to the buyer of the “adverse action,” as is required under the law.⁶⁶ The yo-yo aspect of these transactions leaves open the wide possibility of failure to comply with ECOA by appropriately notifying the consumer each time of why their application was denied.

4. State Laws That Attempt to Regulate Yo-Yo Sales Face Difficulties and Hamper Enforcement of Existing Federal Laws

Some states have laws that seek to regulate specific yo-yo abuses that result from allowing dealers to have consumers sign credit contracts and then leave the dealership with the cars, while the credit terms actually are not yet finalized in the dealer’s eyes.⁶⁷

In Oregon, for example, if a dealer does not receive final approval of a third-party agreeing to purchase the signed credit contract within 14 days of delivering the car, the law states that a consumer can unwind the deal.⁶⁸ Among other things, Oregon prohibits selling the trade-in vehicle before getting final approval of funding to protect the buyer.

⁶¹ 12 C.F.R. § 202.9.

⁶² Levitin, Adam J., at 1296.

⁶³ Federal Trade Commission, *FTC Staff Provides Annual Letter to CFPB On 2021 Equal Credit Opportunity Act Activities*, Feb. 23, 2022, available at <https://www.ftc.gov/news-events/news/press-releases/2022/02/ftc-staff-provides-annual-letter-cfpb-2021-equal-credit-opportunity-act-activities>.

⁶⁴ Complaint, *FTC v. Liberty Chevrolet, Inc. d/b/a Bronx Honda*, S.D.N.Y., Case No. 20-CV-3945, May 21, 2020, available at https://www.ftc.gov/system/files/documents/cases/bronx_honda_complaint_0.pdf.

⁶⁵ See, <https://www.totaldealercompliance.com/equal-credit-opportunity-act.html>

⁶⁶ See, e.g. *Tyson v. Sterling Rental, Inc.*, 836 F.3d 571, 579 (216)(dealer admitting to never giving ECOA notices even when it decides to cancel credit contracts if an assignee refuses to participate in the transaction); See, also *Galloway v. Priority Imports Richmond LLC* referenced in the summaries of allegations in Section A above. See, also, Adam G. Taub, *Yo-Yo Sales: The Predatory Practice of Unscrupulous Car Dealers*, available at <https://higherlogicdownload.s3.amazonaws.com/MICHBAR/3b217bd2-fb65-46ff-86c0-ea1a7b303b13/UploadedImages/pdfs/SpotDeliveryArticle.pdf>.

⁶⁷ See, e.g.: Nevada Rev. Stat. § 482.554; New Hampshire Rev. Stat. 361-A:10-b; Oregon, ORS 646A.090; Utah Code Ann. §§ 41-3-401 (sales), 41-3-401.5 (leases); Washington Rev. Code § 46.70.180.

⁶⁸ Oregon, ORS 646A.090.

The state of Nevada uses a uniform state Retail Installment Sales Contract where the dealership has a unilateral 20-day right of rescission. Under Nevada's law, for example, it is a deceptive trade practice for a dealership, after exercising its unilateral right of rescission, to fail to return any down payment or other consideration in full, including, returning a trade-in vehicle; and to knowingly make a false representation to the customer that the customer must sign another contract for the sale of the vehicle on less favorable terms.⁶⁹

In Oklahoma, the "Spot Delivery Agreement" is considered a "prelude" to transfer of ownership. The form is approved by a state agency, and it includes terms, such as giving the consumer the right to terminate the contract if the finance contract has not been assigned within 20 days; requiring that the dealer retain the trade-in vehicle in storage, until everything is completed; and requiring that the dealer provide a copy of all signed contracts prior to vehicle delivery.⁷⁰ The consumer is asked to acknowledge the following statement "I understand the purpose for signing this spot delivery form is that, as of this date, my loan has not been approved."⁷¹ This assertion creates confusion because every consumer who is financing their car is asked to sign this contract, including customers who have been informed that they are approved.

As consumer advocates in some of these states have noted, despite efforts by state governments, not only do frequent violations of these laws continue unabated, the fundamental issue and consequences still exist. That is, when a consumer signs the RISC with a dealer, consumers believe they have already received financing and will make payments to the assignee on the credit contract or RISC. Meanwhile, even under these anti-yo-yo state statutes, consumers are summoned back to the dealership days, weeks, and even months after the original credit contract was signed because the dealer insists on changing the terms.

C. Signed Credit Contract in Car Purchase Being Treated by One Party as Not Final is Unfair And Deceptive

With exceptions for certain entities such as banks, Congress directed and empowered the FTC to prevent persons, corporations, and partnerships from using unfair methods of competition in or affecting commerce and unfair or deceptive acts or practices in or affecting commerce.⁷² Consumers who enter into credit contracts with dealers to buy a car are inherently subject to unfair and deceptive practices because the transactions can be unilaterally changed or canceled by the dealer. As the examples above show, spot delivery and the accompanying yo-yo financing techniques together constitute an unfair and deceptive practice, which can escalate into abusive conduct and fraud.

⁶⁹ Nevada, NRS 482.554.

⁷⁰ 47 OS §563 F, *OMVC Required Criteria for Spot Delivery Agreements or Forms Used by Dealers for Deliveries of Vehicles Pending Final Approval*, available at <https://apps.ok.gov/omvc/documents/1%20pg%20Sp%20Del%20Criteria.pdf>.

⁷¹ *Motor Vehicle Delivery Agreement*, available at

<https://apps.ok.gov/omvc/documents/OMVC%20Sample%20Spot%20Delivery%20Form%20IAN2012.pdf>.

⁷² 15 U.S.C. § 45a.

In a yo-yo sale, the representations made to consumers, including the signing of the credit terms, lead them to believe a car deal is complete when, from the seller's perspective, the deal is not yet final and can be unilaterally changed. The key fact that the seller does not consider the deal as final is not adequately communicated to buyers before they drive off the car lot with their new cars. The fundamental misrepresentation that the deal is complete (when the seller does not consider it so) forces consumers into a "yo-yo" scenario where they are called back to the dealership lot several times with demands to provide more information, potentially pay more upfront, and to change financing terms that were set forth and agreed to in the original contract, or to give up the car completely.⁷³

A dealer conditioning a car sale on securing third-party credit while representing to a consumer that the purchase is final also consequentially restricts commerce. A dealer's decision to engage in yo-yo sales ensnares consumers into signing a credit contract that it later intends to change, but also ensures that buyers are stopped (due to the existence of the contract) from shopping for or comparing other credit terms from additional credit and financing entities, and dealers.

D. Well-Established "Holder Rule" is Model for Providing Notice of Final Terms in Car Sales' Credit Contracts

In 1975, the FTC issued the Holder Rule, formally known as the "Trade Regulation Rule Concerning Preservation of Consumers' Claims and Defenses," which preserves consumers' right to assert the same legal claims and defenses against anyone who purchases the credit contract, as they would have against the original seller of goods or services who originally provided the credit.⁷⁴ This would apply including if the seller assigns the contract or works with a third-party creditor who finances the sale. The Rule requires sellers that arrange for or offer credit to finance consumers' purchases to include the following Notice in their contracts:

ANY HOLDER OF THIS CONSUMER CREDIT CONTRACT IS SUBJECT TO ALL CLAIMS AND DEFENSES WHICH THE DEBTOR COULD ASSERT AGAINST THE SELLER OF GOODS OR SERVICES OBTAINED . . . WITH THE PROCEEDS HEREOF. RECOVERY HEREUNDER BY THE DEBTOR SHALL NOT EXCEED AMOUNTS PAID BY THE DEBTOR HEREUNDER.⁷⁵

The failure of sellers to include notice in credit contracts constitutes an unfair and deceptive practice under the Rule. The Rule provides a way for harmed or defrauded consumers to obtain relief and allows them to stop payment when the financed product turns out to be defective.

In 2015, the FTC sought public comment "on the overall costs and benefits, and regulatory and economic impact," of the Holder Rule.⁷⁶ The FTC noted in its 2019 confirmation of the Holder Rule, that every commenter, including state attorneys general, consumer and public interest

⁷³ See, e.g., Jeff Ehling, *Family's credit approval story serves as warning to other car buyers*, ABC13, available at <https://abc13.com/credit-approval-car-loan-financing-deals/27777/>.

⁷⁴ 16 CFR § 433.2.

⁷⁵ 16 CFR § 433.2.

⁷⁶ 80 Fed. Reg. 85018 (2015).

groups, financial institutions and auto dealer associations, supported maintaining it.⁷⁷ The FTC observed based on the comments that the Rule benefitted consumers, imposed no cost to consumers, and did not impose significant cost to business.⁷⁸

Similarly, amending contracts to include the written notice proposed in this petition would provide proper notice of the parties' obligations regarding the finality of a signed credit contract. It will impose an initial cost to comply, but the FTC can provide reasonable time and notice for compliance in order to alleviate the cost. The benefit of compliance with providing the contractual language and the language itself will far outweigh the costs for consumers, who would no longer face the financial and emotional costs of unfair and deceptive actions related to the unilateral changing or dismissal of terms in signed credit contracts.

IV. THE PROPOSAL'S ANTICIPATED IMPACT ON THE MARKET

A. The proposal would remove unfairness and deception from final aspects of car sale transactions.

1. The presentation of a credit contract to a consumer necessarily conveys to the consumer that the consumer has been approved for credit. This proposal would ensure that this representation is true.
2. Under the plain terms of a retail credit contract, auto dealers that present the credit contract and obtain the consumer's signature are the original creditors. Dealers facilitate their customers' signing of the credit terms, while carrying the view that the deal is not necessarily complete. The proposal would ensure that the creditor is providing accurate, complete and final terms at the time of the sale instead of conflicting information in the credit contract and spot delivery agreement.
3. This proposal will take a step towards ending the practice of dealers orally telling a consumer that they are approved for credit while also slipping a separate document in the paperwork stating the consumer has not yet been approved. The proposal would require that consumers are fully approved for the credit extended in the original contract and bring certainty to the marketplace.
4. With the growing percentage of electronic credit contracts, this proposal would ensure that an electronically signed credit contract is not substantially modified by a separate physical document that does not correspond with the electronic credit contract.

⁷⁷ 84 Fed. Reg. 18711 (2019).

⁷⁸ Id.

5. The proposal would discourage dealers from offering contracts that they ultimately are unwilling to honor, thereby enhancing competition among competing dealers and financing companies, as explained below, for the benefit of the marketplace.

B. The proposal would reward market participants.

1. It will place honest dealers, that do not misrepresent to buyers that a credit deal is final when it is not, on the same competitive footing with others who have used the practice to arbitrarily bind customers without accurate and adequate information needed to ensure a proper sale.

2. By ensuring that any credit contract once signed by the consumer must be treated as approved by the dealer, this proposal would encourage competition in the market, rewarding auto dealers who are able to more quickly determine whether a consumer's credit application is approved. In addition, it will promote competition among third-party assignees in the marketplace by rewarding those financing entities who can efficiently assure dealers that they will purchase a particular credit contract.

3. Compliance with the proposal promises to be straightforward with minimal cost. During the time the seller considers a buyer's credit application for final approval, the seller will simply refrain from presenting the credit contract for the buyer's signature, until the buyer is finally approved. Following a dealer's final decision to treat the credit transaction as fully approved, the dealer can obtain the consumer's signature to finalize the credit contract. The proposal would not decide when a dealer treats a credit contract as final. The dealer solely makes the decision to approve the credit terms and finalize the credit contract with buyers.

4. The auto industry has asserted that consumers "save money" when they finance through auto dealerships.⁷⁹ The instant proposal arguably would support the industry's claim as it would root out a deceptive practice in dealer-financed transactions that raises costs for buyers.

C. The proposal would confirm entities' roles and obligations in the market.

The proposal would hold sellers to their established roles as original creditors with rights and obligations in car sales. As the creditors to whom the credit contract is initially payable, dealers are sellers and original creditors of each sale. As the first creditor, dealers have certain legal obligations, including TILA disclosure requirements discussed above. Assignees of the credit terms are shielded from certain legal obligations because they are not the original creditors of the car sale. The proposal herein would help ensure that misrepresentations regarding an entity's obligations to a car buyer are eliminated, and that the ultimate purpose of TILA is accomplished. Further, it would eliminate confusion among car dealers who incorrectly argue "we did not originate the credit," and assignees who claim, "we are not the original creditors."

⁷⁹ National Automobile Dealers Association, *Dealer-Assisted Financing Benefits Consumers*, available at <https://www.nada.org/auto-financing/>.

This proposal would both ease and enhance the clarity of dealer compliance with applicable disclosure requirements as further explained below.

D. A bright line rule would facilitate exchange of accurate information in complex car sales transactions.

The proposal would facilitate transparency and clarity in the transfer of information under several laws and regulations, including:

- (i) Truth in Lending Act disclosures, including the length of time between the date credit is extended and the first payment period;
- (ii) Federal odometer disclosure requirements, requiring accurate disclosure of mileage upon transfer of ownership, including the date for the mileage recording;
- (iii) Insurance coverage, including the dates that a vehicle is no longer covered by the dealer's insurance;
- (iv) Warranty and/or service contract terms, including the dates such coverage begins; and
- (v) Tags and plates, title transfer and state registration.

This clear proposal would allow states to more easily regulate the sale and ease state processes for the transfer of vehicles. The bright line facilitates more straightforward flow of information regarding transfer of title, insurance requirements, mileage and odometer disclosures, commencement of warranty periods, and other legally significant events that occur in vehicle sales. Mere disclosure of “spot delivery” slipped into paperwork stating that a dealer may summon the consumer to change an agreement that the consumer previously had signed and believed was finalized, is not only insufficient, but these documents also incite future harm. As the FTC observed in its own 2020 survey, interviews, and study of car buyer experiences: “(s)ome consumers were unaware that they had signed forms describing spot delivery and potential cancellation.”⁸⁰

There is evidence that documents in some car sales transactions create a conflict in the agreed-upon terms, deceiving consumers as to the finality of the financing obligations, and ultimately the car sale. This proposal would make clear the identity of the actual owner of the car at any point, including during and immediately after the transaction. Currently, many car dealers cannot adequately answer the simple question: “who was the owner when the consumer drove the car off the lot?” because they believe the answer is determined by the future negotiation with a third-party assignee.

E. FTC's familiarity with spot delivery-related unfair, abusive and deceptive practices should spur a meaningful rule change.

⁸⁰ Federal Trade Commission, *Staff Report of the Bureau of Consumer Protection*, https://www.ftc.gov/system/files/documents/reports/buckle-navigating-auto-sales-financing/bcpstaffreportautofinancing_0.pdf at 12.

The FTC has long been familiar with the yo-yo phenomenon. More than a decade ago, in 2011, the FTC held a series of roundtables on the selling, financing and leasing of motor vehicles, where it heard and received data and information from experts and advocates about the harms and consequences following spot delivery agreements and yo-yo practices in auto sales.⁸¹

In 2018, the agency announced the mailing of more than 40,000 checks totaling more than \$3.5 million to consumers exposed to far-reaching deceptive and unfair sales and financing tactics, which included spot delivery and yo-yo schemes, by the California-based Sage Auto Group and its owners between 2014 and 2016.⁸² In its filed complaint against these sellers, the FTC alleged: “Even after consumers have signed a contract and driven the vehicles off Defendants’ lots, Defendants have used deceptive and unfair tactics to pressure consumers who have financed through Defendants to agree to different financing terms or have otherwise refused to honor the contract... Instead of negotiating terms a third-party financing company would accept, however, Defendants Glendale Nissan and Universal City Nissan have admitted that their dealerships have “approved deals to customers with risky credit before bank financing had been secured in order to increase their sales numbers....knowing that the dealership was not going to be able to secure bank financing on the offered terms.”⁸³

In a 2020 report on a study of car sales participants, which included interviews of car buyers, the FTC described buyers’ experiences reviewing and finalizing documents during a car sale transaction as being “long and complex,” while the car buyers’ review of financing documents was “rushed,” and most consumers “focused on the numbers filled in by the dealer representative.”⁸⁴ Notably, the report observed that “(s)ome participants in the qualitative study were surprised to learn that financing they expected to be final was not.”⁸⁵

CONCLUSION

A rule that requires dealers to include specific language in the credit contract, also known as the retail installment sales contract, would ensure that buyers and sellers as parties to a contract setting forth the credit terms of a car sale can reasonably rely on the finality of those terms. The language requiring the terms in the signed retail credit contract between the buyer and commercial seller of a car to be treated as final, would improve clarity and understanding for sellers and buyers in the car market.

Requirements that the consumer be fully approved for the credit terms in the contract before the

⁸¹ See, e.g. Public Roundtables: Protecting Consumers in the Sale and Leasing of Motor Vehicles, Project No. P104811 #00056, Dec. 29, 2011, <https://www.ftc.gov/policy/public-comments/comment-00056-0> and https://www.ftc.gov/sites/default/files/documents/public_comments/public-roundtables-protecting-consumers-sale-and-leasing-motor-vehicles-project-no.p104811-00066/00066-82564.pdf.

⁸² Federal Trade Commission, *FTC Returns More Than \$3.5 Million to Consumers Subjected to Deceptive and Unfair Sales and Financing Tactics by Los Angeles-Area’s Sage Auto Group*, Dec. 6, 2018, available at <https://www.ftc.gov/news-events/press-releases/2018/12/ftc-returns-more-35-million-consumers-subjected-deceptive-unfair>.

⁸³ Complaint, *Federal Trade Commission v. Universal City Nissan Inc.*, C.D. Cal., Case 2:16-cv-07329, at 22-23 (Sept. 29, 2016).

⁸⁴ FTC Staff Report, https://www.ftc.gov/system/files/documents/reports/buckle-navigating-auto-sales-financing/bcpstaffreportautofinancing_0.pdf at 10-11.

⁸⁵ *Id.*, at 12-13.

signing, and that the credit terms in the contract are final whether or not the contract is assigned to a third party are necessary to prevent systemic deception and abusive yo-yo practices. The revision would provide a bright line rule, facilitating precision in an often-complex process and ensuring that car buyers will receive accurate, non-conflicting information regarding the final terms of what is one of the largest market transactions for most consumers.

The FTC's use of its exclusive jurisdiction over car dealers and its specific authority to issue a rule to curb unfair and deceptive practices relating to the sale, servicing, and leasing of motor vehicles is appropriate and warranted in this instance.⁸⁶

If you have any questions or would like to discuss these issues further, please contact Christine Hines, Legislative Director, 1215 17th St NW, 5th Floor, Washington, DC 20036, at christine@consumeradvocates.org or (202) 452-1989. Thank you for considering our views.

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⁸⁶ 12 U.S.C. 5519(d).

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