

United States Senate

WASHINGTON, DC 20510

September 12, 2022

The Hon. Lina M. Khan
Chair
Federal Trade Commission
600 Pennsylvania Avenue, NW
Washington, DC 20580

Dear Chairwoman Khan:

We are writing in opposition to the Federal Trade Commission's (FTC) "Motor Vehicle Dealers Trade Regulation Rule," published in the Federal Register on July 13, 2022. This proposed rule would fundamentally change the way that vehicles are retailed in America. If implemented, this proposal would confuse customers, lengthen the transaction time to purchase a vehicle, limit consumer choice, increase paperwork, and mandate burdensome new recordkeeping requirements on small businesses. More troubling, the FTC appears not to have done any consumer testing to ascertain whether its new regulatory regime would work in practice.

Given the extensive reach of this proposed rule, we seek responses to the following requests for information in order to better understand both the scope of this proposed rule and the FTC's rationale for its proposal:

1. The proposed rule lists 49 questions for which it seeks comment from the public. Some questions (e.g., "What economic burdens would be imposed on dealers if the Rule proposal were adopted?") ask for basic information that ordinarily would be gathered by issuing an Advance Notice of Proposed Rulemaking.
 - a. Why did the FTC choose not to first issue an Advanced Notice of Proposed Rulemaking to gather basic data before issuing a Notice of Proposed Rulemaking (NPRM)?
 - b. Is it the FTC's position that the comments received during this period to these numerous questions will be able to be fully addressed in the final rule without fundamentally changing the scope of the rule?
2. The FTC Act states: "The Commission shall not propose or promulgate a rule which was not listed on a regulatory agenda unless the Commission publishes with the rule an explanation of the reasons the rule was omitted from such agenda."¹ In footnote 153 of the pre-publication version of this proposed rule posted on the FTC's website on June 23, the Commission states that the NPRM was not included in the FTC's *Fall 2021* Regulatory Agenda "because the Commission first considered this notice after the publication deadline for the Regulatory Agenda." However, in footnote 153 of the Federal Register version of this proposal published less than a month later, it states that the NPRM was not included in the FTC's *Spring 2022* Regulatory Agenda "because the Commission first considered this

¹ 29 U.S.C. §57b-3(d)(4)

notice after the publication deadline for the Regulatory Agenda.”² The Spring 2022 regulatory agenda was announced on June 21 by the White House,³ and the FTC’s Regulatory Review Schedule was published by the Federal Register on August 5.⁴

- a. Please explain how a proposed rule of this magnitude could miss two consecutive Regulatory Agenda publication deadlines.
 - b. How many other contemplated rules in the last ten years has the FTC omitted from its Regulatory Agenda because of missed publication deadlines?
 - c. Is it the FTC’s view that 29 U.S.C. §57b-3(d)(4) is complied with as long as the FTC states *any* reason for an omission from the Regulatory Agenda – including one that contradicts a previous reason – or does the reason have to be valid to comply with the statute?
 - d. Given there is only a two-day difference between the pre-publication of the Spring 2022 regulatory agenda and the FTC’s pre-publication of this proposed rule, was any new evidence presented to the FTC during that two-day window to prompt the pre-publication of this proposal? If not, how long had this proposal been under consideration prior to pre-publication?
 - e. The FTC’s Regulatory Review Schedule from August 5 does not list this proposed rule as “currently under review” despite this proposed rule being published in the Federal Register on July 13. Please explain the decision to omit this proposed rule from the Regulatory Review Schedule.
3. Did the FTC consult with the Federal Reserve Board, which has rule writing authority regarding automotive financing under the Truth in Lending Act, or any other agency or department with regulatory or enforcement authority over motor vehicle dealers before issuing this proposal? If not, why not?
 4. What consultations did the FTC have with the Consumer Financial Protection Bureau before issuing this proposal?
 5. Please provide a list of acts this proposed rule seeks to address that are not already illegal, or that the FTC is powerless to bring an enforcement action on.
 6. The proposed rule relies extensively on the record from the Motor Vehicle Roundtables that the FTC conducted in 2011-12 as a justification for this proposal. However, no regulations were proposed by the FTC using these roundtables as a basis until now, a decade later. As the automotive market has changed dramatically since that time, and especially since the onset of the pandemic—
 - a. What new facts were recently uncovered in the record of the 2011-12 roundtables that your predecessors missed which justify this proposal?
 - b. Does the FTC believe any of the information for which this proposal is now based on is outdated based on shifting business practices?
 7. The proposed rule also relies extensively on a qualitative study conducted by the FTC in 2017 of 38 Washington, D.C. area participants that was published in 2020.

² <https://www.federalregister.gov/documents/2022/07/13/2022-14214/motor-vehicle-dealers-trade-regulation-rule#footnote-153-p42031>

³ <https://www.whitehouse.gov/omb/briefing-room/2022/06/21/the-spring-regulatory-agenda/>

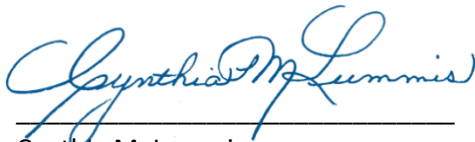
⁴ <https://www.federalregister.gov/documents/2022/08/05/2022-16863/regulatory-review-schedule>

- a. Why did the FTC not perform a quantitative study instead of relying on a qualitative study?
 - b. Does the FTC believe that 38 D.C.-area participants are representative of the entire nation's automotive market?
 - c. This study explicitly stated that it should not be used to draw quantitative, market-wide conclusions. Please explain why the FTC is ignoring its own admonition and using this study to draw quantitative, market-wide conclusions in this proposal.
8. The proposed rule seeks to regulate automobile dealers exclusively. However, the press release accompanying the proposal proclaimed that this regulation is necessary because of "over 50 motor vehicle-related" enforcement actions. Almost one-third of these enforcement actions involved entities that do not retail vehicles. Please explain why enforcement actions against entities that are not auto dealers, such as transportation network companies, are being used to justify a rule to further regulate auto dealers.
9. The proposed rule also relies on the FTC's consumer complaints database. How many of these complaints—
 - a. were verified?
 - b. are related to conduct by motor vehicle dealers that would be covered under this proposal?
10. Many provisions of this proposed rule impose requirements and limitations on the sale of "Add-on" products and services. "Add-on" products and services supposedly include items that dealers physically add to the vehicle after the dealer obtains it from the manufacturer (such as floor mats, towing packages, etc.) and products and services the dealer offers to protect a consumer's investment in the vehicle (such as extended service contracts, maintenance programs, GAP waiver, and the like). But the definition of "Add-ons" states that the term means any product for which the dealer charges in connection with a vehicle sales, leasing, or financing transaction and that is "not provided to the consumer or installed on the vehicle by the motor vehicle manufacturer." Factory direct sellers appear to be dealers under this proposal since they are licensed by a state to sell cars and meet the other requirements set described in the proposal.
 - a. If a direct seller adds (and charges for) an item such as a towing package to a vehicle at the request of a buyer or sells that buyer an extended service contract, would the FTC consider those products and services to be either installed or provided by the manufacturer, thereby taking them out of the definition of an "Add-on"?
 - b. If the answer is "yes", what is the public policy reason to allow the sale of these products and services by direct sellers to be outside the coverage of this proposed rule, but not when they are sold by franchised dealers?
 - c. Are there any other aspects of the proposed rule where direct sellers would be regulated differently than franchised dealers? If so, please explain.
11. The proposed rule assumes that it would save consumers 3 hours per transaction, saving consumers upwards of \$31 billion. The proposed rule also contains several new disclosure requirements that must be presented to consumers during the car buying process. Since the cost savings this proposal claims are primarily from the reduced time it will take for consumers to complete the process, does the FTC have estimates of how long these new disclosure requirements will add to the average transaction?

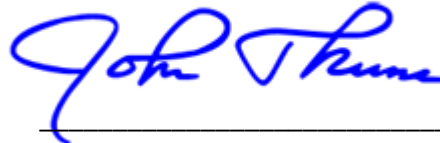
By the FTC's own analysis, the proposed rule would impose nearly \$1.4 billion in costs on dealers. At least part of these costs will be passed along to consumers in the form of higher prices, further adding to inflation, which is at its highest levels since 1982. Moreover, while the myriad of new duties and paperwork requirements along with their attendant costs mandated by this proposed rule are real, the savings, especially in absence of any consumer testing, may prove illusory.

We request that you send us complete responses to our questions by September 16. Additionally, we request a Senate Commerce, Science and Transportation staff briefing on the proposed rule this month. Thank you for your consideration.

Sincerely,



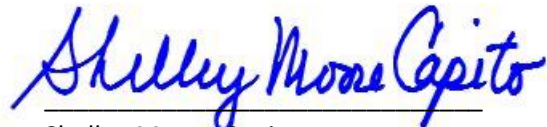
Cynthia M. Lummis
U.S. Senator



John Thune
U.S. Senator



Todd Young
U.S. Senator



Shelley Moore Capito
U.S. Senator



Mike Lee
U.S. Senator



Dan Sullivan
U.S. Senator

cc. Commissioner Noah Joshua Phillips
cc. Commissioner Rebecca Kelly Slaughter
cc. Commissioner Christine S. Wilson
cc. Commissioner Alvaro Bedoya