Federal Trade Commission

Office of the Secretary

600 Pennsylvania Avenue NW

Mail Stop H–144 (Annex J)

Washington, D.C. 20580

Submitted electronically at <https://www.regulations.gov>

Re: **Notice of Proposed Rulemaking, Federal Trade Commission; Unfair or**

**Deceptive Fees, 2023-24234, 88 Fed. Reg. 77420 Unfair or Deceptive Fees,**

**R207011 (11/09/2023);**

Ladies and Gentlemen,

The National Independent Automobile Dealers Association (“NIADA”) appreciates the opportunity to submit comments to the Federal Trade Commission (“FTC” or “Commission”) on the Proposed Trade Regulation Rule on Unfair or Deceptive Fees (the “Proposed Rule”).

Certainly, we can respect the FTC’s continued diligence in seeking to protect consumers from unfair or deceptive fees. However, in this instance, we submit that the FTC’s attempt to provide clarity and guidance on unfair or deceptive fees to the marketplace unfortunately has created more ambiguity for both the automotive industry and consumers, is too broad and general to provide guidance as to whether any specific fees are “unfair” or “deceptive,” and is duplicative and redundant as to existing state and federal laws that would prohibit unfair or deceptive fees. The Proposed Rule seeks to make advertisements and hidden or misleading fees “doubly” prohibited pursuant to the Proposed Rule. NIADA and its members urge the Commission to withdraw the Proposed Rule.

**Background**

NIADA is the national trade association representing the interests of the used motor vehicle industry comprised of more than 27,000 licensed used car dealers. NIADA's members – totaling more than 13,000 – include independent automobile dealers, unaffiliated with any franchise, that sell used vehicles wholesale, retail, and buy here pay here dealers.

Since 1946, NIADA has been the voice of used car dealers in Washington, D.C. Coupled with its state association affiliates across the country, NIADA’s grass-roots framework provides a dual layer of advocacy unmatched in the used motor vehicle industry.

NIADA members are profoundly interested in the FTC’s Proposed Rule. The Proposed Rule is too broad and general and thus does not appropriately define whether any specific fees are “unfair” or “deceptive,” and is duplicative and redundant as to existing state and federal laws that would prohibit unfair or deceptive fees. The Proposed Rule expands the conduct that can lead to potential liability and creates substantially more risk for NIADA members that could face enforcement actions for conduct that would otherwise not ordinarily be considered unfair or deceptive but for these uncertainties. NIADA and its members urge the FTC to withdraw the Proposed Rule.

**Comments to Proposed Rule**

NIADA members understand the FTC’s desire to prohibit unfair or deceptive practices relating to fees for goods or services, specifically, misrepresenting the total costs of goods and services by omitting mandatory fees from advertised prices, and misrepresenting the nature and purpose of those fees. The FTC finds these unfair or deceptive practices relating to fees to be prevalent based on prior enforcement. If finalized, the FTC will be able to pursue civil penalties and consumer redress for unfair or deceptive practices covered by the rule against a “Business.”

A “Business” would be defined as “an individual, corporation, partnership, association, or any other entity that offers goods or services, including, but not limited to, online, in mobile applications, and in physical locations.” Motor vehicle dealers that must comply with 16 CFR part 463, requiring motor vehicle dealers to disclose the full cash price for which a dealer will sell or finance the motor vehicle to any consumer, and prohibiting motor vehicle dealers from making misrepresentations, are exempted from the definition of ‘‘Business’’ for all purposes under the Proposed Rule’s Part 464, Rule on Unfair or Deceptive Fees.

The Proposed Rule would create significantly increased ambiguity in that the terms “fees” and “charges” are not defined in the Proposed Rule. For example, do the terms “fees” and “charges” include all finance charges that a consumer buyer(s) may pay over the term of a financed transaction if they were to finance their purchase of a motor vehicle via a retail installment sales contract? Further, the Proposed Rule creates ambiguity in that the terms “Government Charges” and “Total Price” do not describe how a dealer should treat sales or excises taxes that would be due on the purchase of a motor vehicle. In some states, the state or local government may impose a sales or excise tax on the purchase of a motor vehicle; but such charge is not imposed on the consumer in the sales or financing transaction. In other states, a motor vehicle dealer may collect such sales or excise tax from the consumer on behalf of the state or local government and remit the taxes to the state or local taxing authority. Neither of these definitions nor the prohibitions of §§ 464.2 or 464.3 address how an entity should treat sales or excise taxes, and are thus patently deficient.

Automotive sales and finance transactions are subject to a comprehensive, time-tested federal disclosure regime, as well as additional broad state regulatory oversight and disclosure requirements. The Proposed Rule is duplicative and redundant as to existing federal and state law that would prohibit unfair or deceptive fees. Motor vehicle dealers are required under the Truth in Lending Act (TILA), which was enacted May 29, 1968, and its implementing regulation, Regulation Z, 12 CFR § 1026, to disclose information to consumers regarding the fees and costs of a financed transaction. Further, the Proposed Rule sets up impermissible and contradictory potential conflicts with existing rules and regulatory structures under state and federal law, such as the TILA and the Consumer Leasing Act as well as proposed new rules, including the Combating Auto Retail Scams (CARS) Rule (currently stayed) which seeks to address these same issues in a variety of ways. The Commission must explain within the Proposed Rule how any restrictions on motor vehicle dealers resulting from the Proposed Rule would be affected by these other existing federal and state legal obligations. Additionally, in the event the CARS Rule becomes effective, motor vehicle dealers that are subject to the CARS Rule should be explicitly exempt from the Proposed Rule.

The Proposed Rule would impose a rule on conduct that is already generally impermissible. If an advertised or charged “fee” is unfair or deceptive, it is currently prohibited under the FTC Act Section 5. As noted in the Proposed Rule, the Commission has brought various enforcement actions against a variety of companies (and warned many others) under existing authority. The Proposed Rule seeks to make such advertisements and hidden or misleading fees “doubly” prohibited pursuant to the Proposed Rule. The reason cited for the “need” to make such conduct doubly impermissible is to provide the Commission with monetary penalty authority related to such conduct. The Commission’s desire for monetary penalty authority over a practice that is already impermissible under current law is not a legally adequate basis for the issuance of a trade regulation rule, particularly when the authority for monetary penalties is already delineated within the FTC’s penalty offense authority, found in Section 5(m)(1)(B) of the FTC Act, 15 U.S.C. § 45(m)(1)(B).

Finally, the Proposed Rule provides general questions for comment, including whether the Commission should finalize the Proposed Rule as a final rule and whether having an exclusion for motor vehicle dealers from the proposed definition of a “Business” is in order (otherwise, such dealers arguably must comply with 16 CFR 463 which may require motor vehicle dealers to disclose the full cash price for which a dealer will sell or finance the motor vehicle to any consumer, and prohibiting motor vehicle dealers from making amorphous, undefined “misrepresentations”). The Commission should not finalize the Proposed Rule as a final rule for the reasons set forth above. Should the Commission proceed with finalizing the Proposed Rule as a final rule, it must keep the exclusion for motor vehicle dealers from the definition of a “Business.” Further, if the Commission proceeds with finalizing the Proposed Rule as a final rule, the Commission should not finalize the Proposed Rule until the CARS Rule is effective. Otherwise there would be a disparity between the effective date of this Proposed Rule and the CARS Rule, leaving motor vehicle dealers that would otherwise be exempt from the Proposed Rule having to comply with the Proposed Rule (now finalized) until such time as the CARS Rule was effective.

**Conclusion**

In summary, motor vehicle dealers are already subject to extensive federal and state laws, rules and regulations that address disclosure of fees and services in sales and credit transactions and have been for many decades. If those rules need to be amended, that should be done by the regulatory agencies in joint rule making by amending Regulation Z and/or Regulation M. Adding another layer of complexity to motor vehicle dealers results in inconsistency, redundancy, and confusion.

NIADA appreciates the opportunity to comment on the Proposed Rule and urges the Commission to withdraw the Proposed Rule for the reasons described above. We are happy to discuss these comments with the FTC in greater detail.

Sincerely,



Jeff Martin, Chief Executive Officer  
National Independent Automobile Dealers Association