

## Dissenting Statement of Commissioner Christine S. Wilson

Motor Vehicle Dealers Trade Regulation Rule  
Matter No. P204800

June 23, 2022

Today the Commission votes to seek comment on a proposed Motor Vehicle Dealers Trade Regulation Rule. Experience reveals that even when motivated by the best of intentions, regulatory schemes frequently fail to generate promised improvements for their intended beneficiaries. Instead, they tend to create market distortions that stifle innovation, increase costs and prices, and ultimately harm consumers. For these reasons, I respectfully dissent.

Here, there is no question that our staff is motivated by the best of intentions. The FTC has brought scores of law enforcement actions attempting to curb deceptive or unfair practices in this industry, including deceptive pricing claims and undisclosed charges for add-ons. Staff also has conducted an industry study, worked extensively with industry trade associations to educate businesses on best practices, and engaged in consumer education about vehicle purchases. Despite this array of efforts that spans law enforcement, consumer and business education, and guidance on industry self-regulatory programs, unlawful practices persist.

The proposals in this Federal Register Notice generally are tied to the practices challenged in our law enforcement. Notably, the Commission has authority to promulgate this Rule under the Administrative Procedures Act (APA), and therefore does not need to demonstrate prevalence as would be necessary for a Rule proposed under Section 18 of the FTC Act (*i.e.*, a so-called Mag-Moss Rule). Nevertheless, the Notice sets forth a record of law enforcement that likely would satisfy a prevalence analysis. I commend staff on their careful approach to this proposed Rule.

Despite staff's meticulous analysis and drafting, I have concerns about this proposal. It prohibits deceptive practices but also requires numerous disclosures related to offering price, add-ons, and monthly financing. Although staff endeavored to tailor these provisions to the deceptive practices challenged in our cases, I anticipate unintended but negative consequences.

Several factors drive this concern. **First**, even APA rulemaking is cumbersome and lengthy, making it difficult to keep rules up to date.<sup>1</sup> Politically charged topics (as this one may be) impose even greater delays on rulemaking.<sup>2</sup> **Second**, historical experience demonstrates that complex regulatory frameworks stifle innovation, increase costs, raise prices, limit choice, and decrease output. For example, the intricate regulatory frameworks for the airline and railroad

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<sup>1</sup> One study found that the FTC takes more than five years, on average, to formulate a consumer protection rule. See Jeffrey S. Lubbers, *It's Time to Remove the 'Mossified' Procedures for FTC Rulemaking*, 83 GEO. WASH. L. REV. 1979 (2015), [https://digitalcommons.wcl.american.edu/cgi/viewcontent.cgi?article=2086&context=facsch\\_lawrev](https://digitalcommons.wcl.american.edu/cgi/viewcontent.cgi?article=2086&context=facsch_lawrev).

<sup>2</sup> The updates to the Contact Lens Rule generated significant interest from Congress and industry trade groups, for example, and took 5 years to complete. See Remarks of Christine S. Wilson for the Federalist Society at "The Future of Rulemaking at the FTC" Event, Hey, I've Seen This One: Warnings for Competition Rulemaking at the FTC (June 9, 2021), [https://www.ftc.gov/system/files/documents/public\\_statements/1591666/wilson\\_statement\\_back\\_to\\_the\\_future\\_of\\_rulemaking.pdf](https://www.ftc.gov/system/files/documents/public_statements/1591666/wilson_statement_back_to_the_future_of_rulemaking.pdf).

industries suppressed competition and harmed the very parties they were intended to benefit.<sup>3</sup> Ultimately, they were repealed on a bipartisan basis.<sup>4</sup> The FTC has its own experience with rules that limit competition: the FTC’s Care Labeling Rule has been criticized for excluding new competition in the form of wet cleaners that would compete with dry cleaners.<sup>5</sup> **Third**, attempts to narrowly tailor rules are frequently unsuccessful. Technologies and markets evolve in ways regulators are unable to predict, leading either to mission creep<sup>6</sup> – the expansion of regulatory regimes to address these unforeseen developments – or to ossification, given the opportunity cost of frequent updates to reflect emerging market realities.

Notably, the motor vehicle industry has benefitted from innovation in all areas – safety, performance, options, and sales.<sup>7</sup> For example, in the 1980s, GM created the Saturn project, introducing a then-revolutionary way to manufacture, market, and sell cars.<sup>8</sup> More recently, consumer car shopping has moved online with services that assist consumers in price negotiation and location of desired vehicles.<sup>9</sup> In addition, Tesla and Carvana have introduced sales models

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<sup>3</sup> Christine S. Wilson & Keith Klovers, *The Growing Nostalgia for Past Regulatory Misadventures and the Risk of Repeating These Mistakes with Big Tech*, 8 J. ANTITRUST ENF’T. 10 (2019), <https://academic.oup.com/antitrust/article/8/1/10/5614371>; Remarks of Christine S. Wilson at British Institute of International and Comparative Law, *Remembering Regulatory Misadventures: Taking a Page from Edmund Burke to Inform Our Approach to Big Tech* (June 28, 2019), [https://www.ftc.gov/system/files/documents/public\\_statements/1531816/wilson\\_remarks\\_biiel\\_6-28-19.pdf](https://www.ftc.gov/system/files/documents/public_statements/1531816/wilson_remarks_biiel_6-28-19.pdf); Dissenting Statement of Christine S. Wilson on the Energy Labeling Rule, Comm’n Matter No. R611004 (Oct. 22, 2019), [https://www.ftc.gov/system/files/documents/public\\_statements/1551786/r611004\\_wilson\\_dissent\\_energy\\_labeling\\_rule.pdf](https://www.ftc.gov/system/files/documents/public_statements/1551786/r611004_wilson_dissent_energy_labeling_rule.pdf).

<sup>4</sup> See Remarks of Christine S. Wilson for the Federalist Society at “The Future of Rulemaking at the FTC” Event, *supra* note 2.

<sup>5</sup> *Id.* at 9.

<sup>6</sup> *Id.* at 8 (describing how ICC jurisdiction over railroads expanded to include other forms of transportation, including trucks, barges, and pipelines, as those industries grew to compete with railroads).

<sup>7</sup> See, e.g., McFadden, Christopher, *20+ Greatest Innovations and Inventions of Automobile Engineering: From the First Engine to Today*, INTERESTING ENGINEERING (Jun. 18, 2020), <https://interestingengineering.com/20-greatest-innovations-and-inventions-of-automobile-engineering-from-the-first-engine-to-today> (discussing the 20 greatest innovations in automobiles from the steam engine to internal combustion, including flashing turn signals, air bags, rear back-up cameras, GPS and connected cars).

<sup>8</sup> See Stern, Randy, *Historiography: A Different Kind of Car Company*, VICTORY & RESEDA (Jul. 25, 2020), <https://www.randystern.net/historiography-saturn/>.

<sup>9</sup> See, e.g., Howarth, Josh, *5 Important Auto Industry Trends (2022-2024)*, EXPLODING TOPICS (May 19, 2022), <https://explodingtopics.com/blog/auto-industry-trends> (noting that over 90% of car purchasers perform online research; 80% of buyers used third-party services to assist in purchasing a car in 2019; and Carvana’s sales grew 37% in 2020); Soucie, Hale, *NADA 2022: Top 3 Trends & Strategies To Watch*, EDIFICE AUTOMOTIVE MARKETING (Mar. 2022), <https://blog.edificeautomotive.com/nada-2022-top-3-trends> (noting continued increase in digital car buying).

that obviate the need to enter a dealership at all.<sup>10</sup> And sales practices will continue to evolve.<sup>11</sup> The market dynamism flowing from these innovations make it likely that an FTC rule will be incomplete even as it is finalized.

Stakeholder input on these potential concerns would be constructive. I would be interested in comments on the following issues:

1. Anticipated changes in the automobile marketplace with respect to technology, marketing, and sales, and whether it is possible to future-proof the proposed Rule so that it avoids inhibiting beneficial changes in these areas.
2. Insights into why deceptive practices persist in this industry and whether additional business education would assist businesses with compliance.
3. Avenues for consumer education to assist consumers with navigating these and other important financial transactions and decisions, including through improved financial literacy. How could state and local agencies support and amplify FTC consumer education efforts? To what extent is financial literacy taught in middle schools and high schools, and how effective are those efforts? What more could be done?
4. Potential negative consequences of, or costs attendant to, the Rule that the Commission may not have anticipated.

I encourage stakeholders to provide detailed comments on these questions, as well as on the issues in the Federal Register Notice. I look forward to reviewing the record as it develops. But for the reasons discussed above, I respectfully dissent.

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<sup>10</sup> Stenquist, Paul, *Why You Might Buy Your Next Car Online*, N.Y. TIMES, Jun. 21, 2022, <https://www.nytimes.com/2022/06/21/business/tesla-online-sales-dealerships.html?referringSource=articleShare> (discussing the Tesla online car buying system); Korn, Morgan, *More consumers are shopping online for cars. Can dealerships keep up?* ABC NEWS, Mar. 28, 2021, <https://abcnews.go.com/Business/consumers-shopping-online-cars-dealerships/story?id=76650042> (discussing increase in online shopping for cars, limited trips to dealerships to buy chosen vehicles, and solely online purchases through Carvana and Tesla).

<sup>11</sup> See, e.g., *The future of car buying: Omnichannel, personalized, and fun*, MCKINSEY & CO. (Sept. 2020), <https://www.mckinsey.com/~/media/McKinsey/Featured%20Insights/The%20Next%20Normal/The-Next-Normal-The-future-of-car-buying-vF>.