September 12, 2022

Submitted via www.regulations.gov

Acting Secretary April Tabor
Federal Trade Commission
600 Pennsylvania Ave NW
Suite CC-5610 (Annex C)
Washington, DC 20580

Re: **Public Comment: Motor Vehicle Dealers Trade Regulation Rule—Rulemaking, No. P204800**

Secretary Tabor:

The Service Contract Industry Council ("SCIC"), Guaranteed Asset Protection Alliance ("GAPA"), and Motor Vehicle Protection Products Association ("MVPPA"), collectively hereinafter referred to as the "Associations," appreciate the opportunity to jointly provide comments to the Federal Trade Commission ("FTC" or "Commission") regarding the proposed rule titled Motor Vehicle Dealers Trade Regulation Rule ("Proposed Rule").

The Proposed Rule would have an enormously adverse impact on the motor vehicle dealers, product providers and consumers in this sector of the economy and would constitute a significant change for stakeholders in this marketplace. Despite the enormity of the potential consequences of the Proposed Rule and many stakeholders' requests for an extension to comment period, the Commission regrettably allowed only 60 days for stakeholders to evaluate and prepare responses, thereby inhibiting the Associations' ability to gather necessary data and to provide a preferably more robust response.

Consumers have indicated that they do find value in voluntary protection products.[1] Consumers who cannot afford the expense of an unexpected costly vehicle breakdown.

[1] See Durkin, Thomas A., and Gregory Elliehausen (2017). \New Evidence on an Old Unanswered Question: Why Some Borrowers Purchase Credit Insurance and Other Debt Protection and Some Do Not," Finance and Economics Discussion Series 2017-122. Washington: Board of Governors of the Federal Reserve System, https://doi.org/10.17016/FEDS.2017.122., and "Consumers and Guaranteed Asset Protection ("GAP Protection") on Vehicle Loans and Sales-Financing Contracts: A First Look," by Thomas A. Durkin, Senior Economist, Board of Governors of the Federal Reserve System (retired), Gregory Elliehausen, Principal Economist, Board of Governors of the Federal Reserve System, and Thomas W. Miller, Jr., Professor and Jack R. Lee Chair in Financial Institutions and Consumer Finance, Mississippi State University, Senior Research Fellow, Consumers' Research, September 2021.

Consumers who without a vehicle would be unable to work or seek needed medical care. The very consumers the FTC purports to protect have found value and need voluntary protection products. Making voluntary protection products less available or more difficult to obtain will work contrary to the FTC's mission. These products provide real, tangible protection for those who do not have the financial wherewithal to readily replace a vehicle or payoff an auto loan balance upon a loss helping protect and avoid their financial and credit demise. As outlined below, the Proposed Rule would do more harm to consumers already at financial risk.

The Associations' comments herein present two primary themes for the Commission's consideration: first, that the implementation of the Proposed Rule would likely be considered arbitrary and capricious because the Commission lacks (or at least has not disclosed in the Notice of Proposed Rulemaking) a factual basis or reliable statistical analysis of the alleged concerns it seeks to address by the Proposed Rule; and second, that the Proposed Rule, if finalized as-is, would increase consumer harm by increasing the amount of time a consumer spends buying a car (contrary to the Commission's claim) and overwhelming the consumer in voluminous unnecessary paperwork. Moreover, there is no evidence that the Commission's cost-benefit analysis considered the likely negative impact of the Proposed Rule, if it were to be finalized as-is, on the availability and price of voluntary protection products (which the Proposed Rule refers to as "Add-Ons") to consumers who find significant value in them.

I. THE ASSOCIATIONS

The Associations submitting this request have extensive involvement in the motor vehicle industry, yet were not contacted or consulted during the drafting of the Proposed Rule. Had the Associations been consulted, they would have offered the Commission ample resources to evaluate the value proposition offered by voluntary protection products—both to consumers who have filed claims on their products and received more in benefits than the amounts they paid and to consumers who did not file claims but repeatedly buy voluntary protection products for the peace of mind they offer.

a. Service Contract Industry Council - SCIC

SCIC is a national trade association comprised of manufacturers, service contract providers, administrators, and retailers offering service contracts covering motor vehicles, homes, and consumer goods throughout the country. The association was established in 1991 and has collaborated with lawmakers and regulators around the country as well as the National Association of Insurance Commissioners ("NAIC") in the development of fair and comprehensive regulations governing the service contract industry. The SCIC played a significant role in the development of the Service Contract Model Act adopted by the NAIC, and has played a key role in the enactment of legislation in more than thirty-five states. The SCIC monitors state legislative and regulatory activities, contributes to relevant legislative and administrative proceedings, and educates businesses and consumers about the value and benefits of service contracts.

SCIC members include prominent companies that constitute a significant share of the service contract market and are key stakeholders in the voluntary protection product space.

b. Guaranteed Asset Protection Alliance - GAPA

GAPA is comprised of companies experienced in offering valued guaranteed asset protection waiver products throughout the country. GAPA members include insurance companies, lenders, and administrative services companies who, together, bring important products to market in a responsible and competitive way. Formed in 2006, GAPA's mission is to preserve the viability of its industry and promote fair and equitable legislation and regulation of its members and their products so that its members may continue to offer meaningful options to consumers who choose to purchase this protection.

GAPA has worked alongside interested parties as well as state regulators and legislators to pass legislation concerning the sale and offering of guaranteed asset protection ("GAP") waivers. Members of GAPA include several prominent automotive finance companies and administrators that represent a significant portion of the GAP waiver market.

c. Motor Vehicle Protection Products Association - MVPPA

MVPPA is a national trade association whose members represent the leading companies in the motor vehicle protection product industry offering vehicle protection products and service contracts covering tires and wheels, windshields, paintless dent repair, and motor vehicle keys and key fobs. MVPPA, formerly known as Ancillary Products Coalition, was created in 2007 to clarify the status of motor vehicle optional products and ensure that such products are sold in a consistent manner. The mission of MVPPA is to preserve the viability of the industries represented while promoting fair and equitable legislation and regulation of these valuable consumer products.

The members of MVPPA include providers, retailers, administrators, and insurers of motor vehicle optional products. MVPPA members account for a considerable amount of the voluntary protection product marketplace.

II. OVERVIEW OF MOTOR VEHICLE VOLUNTARY PROTECTION PRODUCTS

What the Commission refers to as "Add-Ons" in the Proposed Rule are more commonly called voluntary protection products in the marketplace, with such nomenclature consistent with the elective nature of the products which offer valuable protection. The Associations commend the Commission for policing the automobile sales marketplace for any contrary misrepresentation, such as in instances in which a bad-actor dealer misinforms a consumer that the purchase of a voluntary protection product is mandatory to consummate the automobile sale. The Proposed Rule's reference to these products as "Add-Ons" unnecessarily abandons industry-wide nomenclature that reinforces the appropriate voluntariness of the product being offered and may thus discourage consumers from investing in a product that would be valuable to them.

As is evident by each association's role and involvement in the motor vehicle industry, the Associations have interest in the substance and implications of the Proposed Rule. While the Commission only briefly touches on voluntary protection products and the sale of such to end consumers within the Proposed Rule, to fully understand the benefits and impact of such

products, it is important to discuss each product in turn. The specific regulation of each product varies by state, however, companies serving as provider or administrator for such products are generally subject to heightened regulatory scrutiny in terms of licensing, financial responsibility, and advertising and consumer contract disclosures.

a. Motor Vehicle Service Contracts

Traditional vehicle service contracts (“VSCs”) provide coverage for operational or structural failure due to defects in materials and workmanship or normal wear and tear and some incidental payment of indemnity benefits. Generally, coverage applies when the underlying motor vehicle experiences some form of operational or structural failure that is otherwise not excluded under the terms of the contract. VSCs that provide “core coverage” for the repair, replacement, or maintenance of a vehicle for the operational or structural failure of the vehicle due to a defect in materials, workmanship, or normal wear-and-tear can be analogized to an original equipment manufacturer (“OEM”) warranty. However, unlike an OEM warranty, a service contract is sold for separate consideration and is optional to the consumer as an extricable “add-on” from an underlying purchase of a motor vehicle (by comparison, the manufacturer’s warranty is included as part of the motor vehicle’s purchase price – i.e., sometimes referred to as part of the “basis of the bargain”). A VSC providing core mechanical coverage may commonly offer additional incidental indemnity benefits such as towing, emergency road service, and rental car reimbursement.

VSCs generally take a few different forms depending on the coverage that the consumer elects to purchase. Many VSCs mirror the OEM warranty provided on a vehicle but extend the term of the vital warranty coverage for an additional fee. Consumers also benefit from VSC coverage even while the OEM warranty is in effect because either 1) it covers additional items or parts not otherwise contemplated by the OEM warranty, or 2) it provides additional/incidental indemnity benefits which consumers can utilize even while receiving coverage under their OEM warranty. Other VSC coverage available to consumers is a tiered structure, meaning that the consumer can purchase from an a la carte menu which specific parts, components, or coverage levels that the consumer wants the VSC to cover. In total, forty-two states require providers of VSCs to establish compliance with their regulation, either in the form of licensure, demonstration of financial responsibility (which often takes the form of the provider securing a contractual liability insurance policy to back, or guarantee performance of, its VSC obligations to consumers), and filing of the VSC with that state for that state’s review and approval of VSC terms, or some combination of the three. Additionally, many creditors require their prior review and approval of the VSC form along with proof of the VSC provider’s financial responsibility for its performance of its contractual obligations (including verification of an in force contractual liability insurance policy along with the AM Best rating of the insurer providing this policy) before that creditor will provide its financing and approval of this both particular VSC form and the associated provider.

b. Guaranteed Asset Protection Waivers

A Guaranteed Asset Protection (“GAP”) waiver, a type of debt cancellation agreement, is a two-party contractual agreement wherein a creditor agrees for a separate charge to cancel or

waive all or part of amounts due on a borrower's finance agreement in the event of a total physical damage loss or unrecovered theft of a motor vehicle. A GAP waiver is structured as an addendum to a retail installment contract where the motor vehicle dealer is the initial creditor at the time of sale. When the retail installment contract, including the GAP addendum, is assigned, the subsequent assignee creditor is the only party obligated by the GAP waiver. While it is common for an administrator to be named on a GAP waiver, that administrator must truly only be facilitating portions of the GAP waiver such as refunds or claims. The administrator must not be obligated in any way under the terms and conditions of the GAP waiver to waive debt or provide any other benefit. Ultimately, as an addendum to the finance agreement, the GAP waiver and the waiving of debt is the obligation of the creditor.

Most dealer originated GAP programs utilize a contractual liability policy ("Policy"). The named insured on the Policy is the dealer as the initial creditor and any subsequent assignee creditor. The Policy typically insures the creditor for any amount the creditor is obligated to waive under a corresponding GAP waiver. Forty-two states statutorily authorize or recognize GAP waivers to be issued as noninsurance with varying degrees of regulation, including recordkeeping requirements, demonstrating financial responsibility, and/or GAP waiver form filings with state regulators. For the remaining states, there is no statute or regulation expressly authorizing GAP waivers as a non-insurance product, however, the governing state regulator has issued guidance indicating informal authorization via bulletins, memoranda, attorney general opinions, or informal correspondence. Additionally, many creditors require their prior review and approval of a GAP waiver form (including the Policy proving coverage for granted waivers along with the rating of the insurer providing the Policy) before that creditor will provide its financing and approval of both a particular GAP waiver form and the associated administrator.

c. Vehicle Protection Products

Separate and apart from VSCs and GAP waivers are other voluntary protection products, including: tire and wheel repair/replacement, windshield repair/replacement, paintless dent repair, lost or damaged key fob replacement, and vehicle protection products (concerning the motor vehicle's appearance of its paint and fabric as well as theft protection and theft recovery offerings). Tire and wheel products have been established as a specific type of VSC in which a consumer purchases coverage for the repair or replacement of the vehicle's tires and/or wheels following detrimental contact with a "road hazard" that damages the functionality or cosmetic appearance of the affected tire or wheel (or both). Many states have adopted specific definitions of "road hazard" in connection with expressly authorizing tire and wheel contracts for resulting damage that may include potholes, rocks, debris, metal parts, glass, plastic, curbs, or composite scraps. Windshield coverage repairs chips or cracks in, or provides for the replacement of, a windshield as a result of damage caused by a road hazard. The definition of "road hazard" adopted within a VSC law for tire and wheel applies here as well. Paintless Dent Repair ("PDR") provides for the removal of dents, dings, or creases on a motor vehicle that may be repaired using the process of paintless dent removal without affecting the existing paint finish and without replacing vehicle body panels, sanding, bonding, or painting. As technological improvements have enhanced the capability of key fobs, the cost of key fobs has increased, resulting in the

prevalence of products that provide for the replacement of key fobs which become inoperable, lost, or stolen. Most of the products recited in this paragraph (tire and wheel, windshield repair/replacement, paintless dent repair, and key fob replacement) are statutorily defined as VSCs and, therefore, providers of such products are subject to the same regulation previously described.

Vehicle protection products ("VPPs") include a wide variety of products sold to prevent damage to or theft of a motor vehicle, including chemical appearance care products, window and body part etching, alarm systems, and Lojack and other satellite tracking systems. Statutory definitions of VPPs typically require that the following elements that must be present in order to qualify as a VPP: (a) a vehicle protection device, system, or service; (b) that is sold with a written warranty; (c) is installed on or applied to a vehicle; and (d) is designed to prevent loss or damage to a vehicle from a specific cause. There are two main types of VPPs: theft deterrent products and chemical appearance care products. Theft products are applied to a vehicle for the sole purpose of deterring theft of the vehicle or providing recovery assistance to the owner if the vehicle is stolen. Theft of the vehicle would be considered a failure of that product to perform as intended. Chemical appearance care products involve protective chemicals applied to the interior or exterior of a vehicle which are designed to protect the vehicle from damage. Under this framework, the warranty benefit provided with a VPP is deemed incidental or consequential to the underlying purchase of the tangible chemical applied to the vehicle. VPPs generally have separate state regulation apart from VSCs, with the regulatory framework of states varying among 1) regulation of both appearance and anti-theft products under the VPP statutory framework; 2) regulation of just anti-theft products under the VPP statute (with appearance care products being subject to Magnusson-Moss Warranty Act only); and 3) no separate VPP regulation, but both appearance and anti-theft products are offered under the federal Magnusson-Moss Warranty Act, and 4) regulation of VPP as insurance.

As is the case with VSCs and GAP waivers, many creditors require prior review and approval of optional products and VPPs along with proof that its provider is financially responsible for the performance of the contractual obligations and financially reliable (which can both be shown with verification of an in force contractual liability insurance policy along with the AM Best rating of the insurer providing this policy) before the creditor will provide its financing and approval of the optional product or VPP along with the associated provider.

There are certainly other motor vehicle voluntary protection products aside from VSC, GAP waiver, vehicle protection products, and VPP. These named products, however, represent the most commonly purchased by consumers. The lack of specific mention of other products in this public comment, including but not limited to prepaid maintenance agreements and excess wear and use waivers or products, does not mean that those voluntary protection products are not valuable additions offering additional protections to consumers, but rather in the interest of Commission's time, these items have only been included by reference.

III. THE PROPOSED RULE IS WITHOUT MERIT AND UNNECESSARY

a. The Proposed Rule lacks a sufficient factual basis for rulemaking under the Administrative Procedure Act.

A federal agency may not undertake a rulemaking under the Administrative Procedure Act ("APA") unless it has a sufficient factual basis to support the rulemaking.[2] Traditionally, the FTC and other agencies have undertaken quantitative studies or solicited industry feedback through data collections or other forums to determine whether the conditions within a market would be improved through rulemaking. But the Proposed Rule has arisen out of thin air. To the extent the Proposed Rule cites a handful of FTC enforcement actions concerning voluntary protection products, it is evidence that any sporadic abusive or deceptive behavior in the voluntary protection products marketplace is adequately addressed through enforcement. If the FTC's claim is that abusive and deceptive acts or practices are more ubiquitous in the sale of voluntary protection products, the Commission provides no reliable evidence for that claim. To the contrary, the Commission relies heavily on a qualitative study it published in 2020 despite the study's express admonition that:

> ". . . the study is qualitative and exploratory, with a sample of 38 in-depth interviews and associated purchase and financing documents. Because this is a qualitative study of a small, non-representative sample of consumers, the data generated are not useful for forming quantitative or generalizable conclusions."

A primary reliance on a thirty-eight-person qualitative study that the Commission itself acknowledges lacks statistical significance is an impermissible basis for rulemaking under the Administrative Procedure Act. The Commission should withdraw the rule and study the market (as it apparently seeks to do via almost fifty open-ended requests for comment buried in the Proposed Rule—the requests a testament that the Commission is ill-prepared for the Proposed Rule stage) in order to determine whether there is a factual basis to regulate in this area. If after adequate research and consideration the Commission determines further regulation is actually warranted, then it should commence rulemaking efforts in the most beneficial manner for all involved instead of hurriedly proceeding on the current path.

b. The Proposed Rule is arbitrary and capricious under the Administrative Procedure Act.

The Dodd Frank Wall Street Reform and Consumer Protection Act and the Federal Trade Commission Act require compliance with the APA. Under Section 706(2)(A) of the APA, a federal agency action cannot be arbitrary, capricious, or a clear abuse of discretion. The APA instructs courts to hold such unlawful and set aside agency action, findings, and conclusions that violate this standard. Many of the requirements recited in the Proposed Rule would have no clear basis or rationale tied to such standard. Take, for example, § 463.5 which would specify that dealers may not charge for voluntary protection products if the contract provides no benefit. The first question one may raise, of many questions related to such an arbitrary standard, is who is

[2] 15 U.S. Code § 57a(d)(1); 5 U.S. Code § 553

responsible for determining whether a consumer will receive a benefit by purchasing a voluntary protection product? Must dealers determine the exact odds that a consumer will file a claim under a service contract for the mechanical breakdown of their vehicle? What is the value of the peace of mind that consumers have when such protection is in place?

Consider this exact "no benefit" standard in the context of homeowners insurance: before an insurance agent can place insurance on a home, are they tasked with calculating the likelihood that a consumer will file a claim for fire or flood damage? No. The bedrock principle of insurance (as well as with voluntary protection products) is that consumers purchase it to hedge against the likelihood of the risk of experiencing an unexpected event that would otherwise be costly without such homeowner's insurance coverage in place. The Commission is not considering the true value and benefit that a consumer receives by knowing that they have a voluntary protection product in place to protect against the risk of a costly breakdown or failure.

It is helpful to consider what may be the seminal case for analyzing a federal agency's limitation on rulemaking, *Motor Vehicle Manufacturers Association v. State Farm Auto Mutual Insurance Co*.[3] In applying the narrow standard of the arbitrary and capricious review, the Court noted that an agency decision is arbitrary and capricious "…if the agency has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise."[4] The Proposed Rule would fail the arbitrary and capricious test in that it comprehensively fails to account for the benefits consumers derive from voluntary protection products and would establish unsupported standards which would make compliance with the Proposed Rule nearly impossible.

Examples of arbitrary standards are riddled throughout the Proposed Rule. With the Proposed Rule in its current form, the Commission is subjecting itself to litigation as many of the provisions lack a clear basis and rationale.

c. The Proposed Rule does not appreciate the value proposition of voluntary protection products to consumers and the likely impact of the Proposed Rule, if finalized, on the availability and cost of voluntary protection products.

The Commission's Proposed Rule substantially falls short of the requirements of Section 57a(d) of the FTC Act, which stipulates the requirements for the Commission to promulgate a rule, which must include:

(A) a statement as to the prevalence of the acts or practices treated by the rule;

(B) a statement as to the manner and context in which such acts or practices are unfair or deceptive; and

[3] 463 U.S. 29 (1983).
[4] *Id.* at

(C) a statement as to the economic effect of the rule, taking into account the effect on small business and consumers.[5]

While the Commission provides cursory support for the content of the Proposed Rule, it woefully fails to account for the detrimental impact on consumers. The primary reason consumers opt to purchase voluntary protection products when buying an automobile is for the financial security and peace of mind the products offer. While a minority of consumers who buy voluntary protection products are confident they will use the product (e.g., repair of leather seats after heavy use by children), a substantial population of consumers derive intangible value from knowing that if some problem were to occur, the financial responsibility would not lie with them. The net effect of the Proposed Rule's increase in costs for automobile dealers would likely be to pass those costs along to the consumer in the form of higher fees on voluntary protection products or, in some cases, to stop offering voluntary protection products altogether. A thorough economic analysis of the Proposed Rule would account for the loss of product offerings in the marketplace and for the higher fees consumers would pay were these products to remain available. Moreover, the Proposed Rule does not consider the intangible cost to consumers of the overwhelming confusion they will likely suffer if they are saturated with information that they do not want and cannot use (e.g., a list of the hundreds of variations of voluntary protection products a dealer may offer, some of which may not be available for the vehicle actually being purchased or through the creditor providing the financing).

d. The Proposed Rule exceeds the FTC's authority because it seeks to directly prevent the sale of products rather than to regulate unfair and abusive sales practices and behaviors.

The Proposed Rule would prohibit the sale of products that, in the view of the Commission, provide no "material benefit" to consumers. The Proposed Rule, however, cites no study or data to demonstrate when a consumer believes he or she has received a benefit. More importantly, however, under the FTC's authorizing statute, the FTC lacks authority to prevent the sale of a product when the seller is advertising the product without using an abusive or deceptive act or practice. The FTC has no plenary authority to take products off the market, but only to ensure that products are marketed and advertised fairly and honestly.

e. The proposed rule is duplicative of existing federal laws.

Given that much of the content of the Proposed Rule is already promulgated in laws and regulations at both the federal and state level, the Associations strongly oppose the Commission's sudden interest into publishing a rule that largely duplicates existing regulations.

For example, the Truth in Lending Act, which was the first major step by Congress to regulate consumer credit transactions. The Truth in Lending Act applies to virtually every form of consumer credit transaction or loan; from credit cards to home mortgages, and requires nationwide conformity in terms of disclosures, recordkeeping, and rescission rights. Regulation Z, which implements the Truth in Lending Act by regulation, requires uniform disclosures of

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[5] 15 U.S. Code § 57a(d).

critical elements of credit cost be provided to consumers in a clear and conspicuous manner before the consummation of the transaction. For a closed-ended credit transaction, which would include an automobile loan, these mandatory disclosures include, but are not limited to: the identity of the creditor making the disclosure, the amount financed (in accordance with the calculation method defined in Section 1026.18(b)), an itemization of the amount financed (which includes a breakdown of the total amount financed), the governing finance charge, the annual percentage rate and how it is calculated (including the effect of voluntary protection products), the payment schedule, the total of payments, the total sale price, late payment charges, and any prepayment provisions. Since this list is just some of the disclosures required by Regulation Z, it is clear federal laws already require a host of disclosures be made to consumers clearly and conspicuously in writing. Therefore, Section 463.4 of the Proposed Rule, which would require certain disclosures be made clearly and conspicuously is plainly duplicative of requirements stated in Regulation Z. Among other items, Regulation Z also has a record retention requirement in Section 1026.25. Regulation Z requires that creditors retain evidence of compliance for two years after the date disclosures are required to be made. Conversely, Section 463.6 of the Proposed Rule would require a twenty-four-month recordkeeping period from the date the record is created.

The Truth in Lending Act and Regulation Z promulgated thereunder are just two examples of overlapping federal laws that would coincide with the Proposed Rule. While there are other federal laws and regulations that govern vehicle sales, such as the Commission's own Used Car Rule, the Proposed Rule also duplicates the requirements within the dozens of state laws currently in effect.

f. The Proposed Rule would cause friction with state regulation of voluntary protection products.

There would be friction between this Proposed Rule and state laws governing voluntary protection products, which generally reserves regulatory authority and oversight to state insurance commissioners, departments of finance, and attorney generals. In positing that its Proposed Rule would ultimately help consumers, the Commission provides no support or analysis regarding the success of state regulatory regimes in regard to consumer protection. Instead, the Proposed Rule would usurp the authority of state officials that have long standing oversight of such products without the Commission demonstrating any basis that its Proposed Rule would provide a universal solution.

Additionally, the Proposed Rule is written so broadly that it would implicate many products that are directly regulated by state departments of insurance. To the extent that these products are regulated by state departments of insurance, the Commission fails to acknowledge how its Proposed Rule may run afoul of the McCarran-Ferguson Act. This is further support that the Commission's "one size fits all" positioning of the Proposed Rule is a poor approach; at a minimum, the Commission should review the basis for, and effect of, the Proposed Rule in conjunction with other federal and state laws.

As discussed herein, the model acts published by the National Association of Insurance Commissioners for VSCs, GAPA for GAP waivers, and MVPPA for VPPs, which have been adopted in substantially similar versions in majority of states, have many overlapping requirements with what is stated in the Proposed Rule. This includes disclosing the purchase price of the voluntary protection product to consumers, disclosing the voluntary nature of the transaction, and requiring separate recordkeeping methods. Additionally, providers are subject to heightened regulation and are constantly under regulatory scrutiny. Most states require VSC providers obtain a license from the state insurance commissioner do business as a service contract provider and demonstrate financial responsibility (oftentimes via an insurance policy issued by qualified insurance companies). Several states even require the VSC terms be filed for review and approval by the regulator. For GAP waivers and VPP, most states require creditors and warrantors respectively, be covered by an insurance policy to ensure promises made within the contract to consumers are upheld. GAP waivers and VPPs also are subject to filing requirements in certain states. Regulators of voluntary protection products also monitor consumer complaints which is an additional source of oversight. Overall, these voluntary protection products are already well regulated at the state level.

In addition to regulatory requirements for providers of voluntary protection products, states have their own regulation of motor vehicle dealers via licensing and ongoing compliance requirements. Florida, for example, requires that applicants seeking a motor vehicle dealer license provide proof of completing a pre-licensing dealer training course unless otherwise exempted. Such course includes training in titling and registration of motor vehicles, laws relating to unfair and deceptive trade practices, laws relating to financing regarding buy-here/pay-here operations, and other information that will promote good business practices as determined by the Florida Department of Highway Safety and Motor Vehicles. Thus, many of the Proposed Rule provisions already exist at the state level. Further, to the extent state law and the Proposed Rule conflict, it would only add to the confusion encountered by both consumers and dealers – contrary to the stated intent of the Proposed Rule.

g. The Proposed Rule Disregards Dealer-Advisor Role

Not only is the Proposed Rule unnecessary since it would duplicate many requirements already stated in federal and state law, it also would restrict credibility of motor vehicle dealers and their representatives. States largely recognize the important role a dealer has as an advisor to the consumer during the vehicle buying process. While consumers do their own independent research regarding the vehicle buying process, they also rely on dealers to answer questions about the functionality and performance of vehicles at the dealership. Consumers recognize that part of the job of dealer representatives is to understand the specific needs of the consumers, to know the specifications of any given vehicle in the lot, and to provide helpful insight into various aspects of the vehicle that may not otherwise be common knowledge. Similarly, the dealer provides an advisor role with respect to voluntary protection products: the dealer is able to discuss with the consumer the purpose of a particular voluntary protection product and how that product may best meet an expressed consumer need or concern.

Instead of recognizing the advisor role of dealer representatives, the Proposed Rule instead is demeaning, reducing the credibility of dealer representatives and essentially equivocating their job duties to nothing more than an order taker, requiring no specialty skill or knowledge. The Proposed Rule is an affront to the value and expertise hundreds of thousands of dealer representatives provide consumers.

Given that the Proposed Rule would be duplicative of existing federal and state laws, diminishes the professional expertise and role of dealers, and would violate the APA's standards on arbitrary, capricious, and abuse of discretion, the Associations strongly argue that the Proposed Rule would provide no meaningful benefit and should not be promulgated in final form.

IV. ANALYSIS OF PROPOSED RULE WITH COMMENTS EMBEDDED

If the Proposed Rule continues in the rulemaking process, the Associations raise several points for consideration by the Commission. In this section, the Proposed Rule is incorporated as drafted by the Commission. Each provision of the Proposed Rule is placed in bold type. The Associations seek to illustrate the issues and shortcomings of the Proposed Rule as drafted by noting specific sections that would ultimately do more harm than good.

a. § 463.1 Authority

This part is promulgated pursuant to Section 1029 of the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010, 12 U.S.C. sec. 5519(d). It is an unfair or deceptive act or practice within the meaning of Section 5(a)(1) of the Federal Trade Commission Act (15 U.S.C. sec. 45(a)(1)) to violate any applicable provision of this part, directly or indirectly, including the recordkeeping requirements which are necessary to prevent such deceptive acts or practices and to enforce this part.

b. § 463.2 Definitions

(a) "Add-on" or "Add-on Product(s) or Service(s)" means any product(s) or service(s) not provided to the consumer or installed on the vehicle by the motor vehicle manufacturer and for which the Motor Vehicle Dealer, directly or indirectly, charges a consumer in connection with a vehicle sale, lease, or financing transaction.

Associations Comment: The industry commonly utilizes the term "voluntary protection products" to generally reference motor vehicle service contracts, GAP waivers, and vehicle protection products. To align with industry publications and state law more closely, the Associations recommend that "Add-on" or "Add-on Product(s) or Service(s)" within the Proposed Rule be revised to "Voluntary Protection Product", when referring to these type of products[6]. "Add-on" product is simply too broad of terminology in the context of motor vehicles. Most overseas manufacturers ship vehicles to the United States only partially assembled. Dealers then assemble the remaining portions of the vehicle at the dealership and add on or install other equipment ordered by the consumer. There is a distinction between equipment that has been added on to the vehicle by the dealer which goes to the underlying function of the vehicle versus

[6] As contrasted with those offerings added to motor vehicles by dealers or distributives – ex., special wheels, lighting packages, sound systems, towing packages, etc.

a protective product that provides additional coverage to the consumer. Changing the term to "voluntary protection product" would align the FTC's efforts to terminology that is widely used in the marketplace, thus address the potential for new consumer confusion about automotive sales and product offerings..

The Associations also recommend that the definition be revised to specify that it only applies to sales made at the "point of vehicle purchase." Indirect charges should be removed from the provision to prevent confusion. There are several "indirect" charges in the vehicle transaction that may not be represented as a specific line item in the finance agreement but do contribute to the underlying amount financed. Take, for example, the inclusion of one year of Sirius XM radio with the purchase of a vehicle. While the fee for the commercial radio service would not be separately itemized, it would be built into the underlying value of the vehicle and indirectly included in the overall transaction. Within the context of the broad scope of the term "Add-on," one could reasonably conclude a disclosure requirement for even the most mundane aspects of the vehicle purchasing process, such as the cost of a cup of coffee provided to the consumer by the dealer during the vehicle purchase process without charge. Given that at some point, the dealer is paying for the coffee out of the profits received on vehicle sales, would the dealer be expected to include this charge in disclosures? As is clearly evident, the provision is broad as currently drafted and would unnecessarily include charges for which dealers and consumers would otherwise not account.

Additionally, the Associations posit that the definition of "Add-on" and "Add-on Product(s) or Service(s)" as drafted would put independent programs not associated with a vehicle manufacturer at a disadvantage. As the language reads currently, any product or service provided or installed by the motor vehicle manufacturer would be exempt from classification as a voluntary protection product. This would put any third-party program that is not the motor vehicle manufacturer itself at a distinct disadvantage that could only be described as unfair and anti-competitive.

It would be difficult for the dealer to willingly agree to offer voluntary protection products by third party providers (not a vehicle manufacturer) if the sale and offering were to be subject to the onerous requirements discussed in the Proposed Rule, including: the Add-on List, obtaining overly documented express, informed consent, and securing signed declinations from consumers versus a dealer offering voluntary protection products that are offered by the vehicle manufacturer and therefore not subject to the heightened scrutiny, processes and record keeping requirements the Proposed Rule enumerates. It is commonsense that the dealer will choose to offer consumers those products provided by a provider that would result in less technical and resource intensive requirements. This would result in a de facto clear advantage for motor vehicle manufacturers and could lead to a monopolized market that would not serve the interests of consumers.

This very scenario goes against the mission of the FTC, which is: "Protecting consumers and competition by preventing anticompetitive, deceptive, and unfair business practices through law enforcement, advocacy, and education without unduly burdening legitimate business activity." The Proposed Rule would be anticompetitive in and of itself as its clear preferential

treatment of vehicle manufacturers would stifle competition. The FTC has not provided any sort of explanation as to why a voluntary protection product offered by vehicle manufacturers differs in any way from the same offering by a third-party provider. The consequence to this type of preferential treatment would undoubtedly result in smaller companies being driven out of the marketplace in favor of larger vehicle manufacturers and could ultimately result in a monopolistic control of the voluntary protection product industry by a small number of large companies.

Given the impact that the Proposed Rule would have on small businesses since it clearly favors large vehicle manufacturers, the Associations suggest that the Commission conduct a thorough study of the proposed policy in compliance with the Small Business Regulatory Enforcement Fairness Act (SBREFA) before any portion of the Proposed Rule is promulgated. For a country that lauds "the American dream," its government and corresponding agencies should enact and enforce policy that fosters small businesses (here, third party providers), instead of unduly restricting their activities and creating unfair barriers in the marketplace in favor of large corporations (here, vehicle manufacturers).

If the goal for the Proposed Rule is consumer protection, then all voluntary protection products should be subject to the same scrutiny. Ultimately, the Associations recommend the following language for the definition: (a) "Voluntary Protection Product" means any optional product(s) or service(s) for which the Motor Vehicle Dealer directly charges a consumer in connection with a vehicle sale, lease, or financing transaction at the point of vehicle purchase. This does not include items actually installed on the vehicle in conjunction with certain vehicle upgrades, such as, but not limited to, winter tires, stereo, or backup camera.

(b) "Add-on List" means an itemized list of all optional Add-on Products or Services for which the Motor Vehicle Dealer, directly or indirectly, charges consumers. The Add-on List must Clearly and Conspicuously disclose each such optional Add-on and the price of each such Add-on. If the Add-on price varies, the disclosure must include the price range the typical consumer will pay instead of the price.

Associations comment: Requiring motor vehicle dealers to compile and publish a list of available voluntary protection products and corresponding prices would ultimately cause more confusion than clarity during the finance and insurance negotiation process and would result in reduced competition in the marketplace.

The Commission suggests that the price list for voluntary protection products include the price range consumers would be expected to pay to purchase coverage, however, when pricing out various voluntary protection products taking into consideration relevant factors such as the make and model of a vehicle, year, mileage, and MSRP/Kelley Blue Book value, the price of such voluntary protection products varies greatly. For example, there is an actuarially supportable basis that a GAP waiver providing coverage for a 2022 Lamborghini Urus, with a MSRP of $225,000, would cost more than a GAP waiver providing coverage for a 2022 Kia Rio, which has a MSRP of $16,150. The price differential is under the simple premise of the coverage afforded: if a consumer made a claim under a GAP waiver for the Lamborghini Urus, the creditor is likely waiving a deficiency balance much greater than what that creditor would be waiving for the

deficiency balance on the Kia Rio. The coverage afforded under the GAP waiver directly impacts the price of such GAP waiver, therefore resulting in vast pricing ranges based on details of the underlying vehicle benefitting from such coverage. Thus, a GAP waiver could range in price to a consumer from $1,250 to $7,500. Having this type of range stated on the price list would not provide any meaningful benefit to consumers since the values are broadly different. On the contrary, the price range will undoubtedly cause consumer confusion and distrust during the negotiation process.

This scenario is not unique to GAP waiver, but likewise applies to vehicle service contracts and vehicle protection products. Luxury vehicles naturally require more expensive replacement parts and components. A service contract which covers a luxury vehicle provides repair and/or replacement coverage for that vehicle's components, systems, and parts. Additionally, like kind quality parts are generally less available for luxury vehicles than more standard vehicles in the marketplace. The price of a service contract varies based on several factors, including the type of vehicle covered, the specific plan and coverage level selected by the consumer, and the term of the service contract. Additionally, not all VSCs and VPPs are available for each consumer as oftentimes there are eligibility requirements based on the vehicle type. Presenting a consumer with a price list which features hundreds of line items, half of which are not even available to a consumer based on eligibility of vehicle type, is not only confusing but may be alleged to be deceptive or misrepresentative of the offering.

Pointing consumers to one comprehensive price list is unhelpful and confusing and may set the stage for allegations of misrepresentation. To properly reflect all available voluntary protection products for each vehicle listing undoubtedly would result in a list of hundreds of products which is sure to overwhelm consumers and cause substantial confusion. For example, consider a key fob repair or replacement offering. According to a 2019 article by Consumer Reports, the cost to replace key fobs ranges between as low as $50 to as high as $400 depending on the brand.[7] Additionally, it costs between $50 to $100 to program the replacement fob to work with the underlying vehicle. Due to digital encryption, key fobs for European cars and SUVs are typically the most expensive. Based on this information, it makes sense to price coverage for key fob repair or replacement based on the cost of such replacement fob. This in turn indicates that there are justifiable reasons why a key fob program varies greatly in price based on the vehicle make and model (key fobs for domestic vehicles are generally cheaper) and term of the agreement (naturally the risk of the key fob needing to be repaired or replaced is greater the longer the duration of the coverage). To account for all pricing considerations for a key fob only contract in one price list, several line items would be necessary. The same applies for tire and wheel coverage, where certain vehicles have varying requirements for tires and wheels which drives up costs. Further, consider the complexity of a service contract where a comprehensive pricing matrix would be required to reflect the vehicle make, model, year, deductible, maximum miles selected, and maximum months selected. A service contract pricing matrix has broad ranges and hundreds of price points, suggesting a posted list either by price range or individual price

[7] Mike Monticello, *How to Replace Your Car's Key Fob*, Consumer Reports, May 4, 2019, https://www.consumerreports.org/car-maintenance/how-to-replace-your-car-key-fob-a4802255222/.

points would simply be meaningless to consumers. Each voluntary protection product has several price points attributed to such coverage; multiply this by each voluntary protection product available to consumers and the result is a portfolio of line items for voluntary protection products that will simply overwhelm consumers.

If a consumer purchases a luxury vehicle and seeks a voluntary protection product to provide coverage for such vehicle, the consumer is likely going to be perplexed and feeling slighted if the dealer quotes such voluntary protection product on the high end of the published price list range. The consumer will likely think the dealer is being deceitful or driving up the overall cost of the transaction for personal gain given the price list range. Accordingly, a consumer may argue that such price list constitutes misrepresentation on the part of the dealer. A dealer's compliance with this requirement could result in greater scrutiny and allegations of deceptive practices in other realms.

Aside from the voluntary protection price list being overwhelming, confusing and potentially deceptive, it would also restrict bundle pricing. Many providers offer a reduced price of voluntary protection products if purchased alongside other coverage. This bundle concept is to the benefit of the consumer since they obtain full coverage under the terms of the voluntary protection product, but at a reduced price. This type of bundling benefit is commonly seen in other markets: bundling saves money when purchasing a meal at a fast-food restaurant versus standalone menu items; bundling saves money when consumers purchase certain consumables online through vendors; bundling saves money when purchasing insurance coverage for home, automobile, and marine. There are countless examples where bundling is common and provides a distinct benefit to consumers. The voluntary protection product market is no different. Requiring the price list recite all variations of price of voluntary protection products would inhibit a dealer's ability to bundle certain products at a reduced price as it is nearly impossible to capture all variations of a bundle, much less present it in a manner that is digestible by a consumer. A single bundle can have dozens of variations based on choices selected by the consumer. Generally, consumer choice is highly valued, however, in disclosing all relevant price options for a single bundle to preserve and encourage consumer choice, the price list will simply be overwhelming with hundreds of entries. This would ultimately result in fewer options for a consumer to choose from or an exhaustive price list that is unwieldy and unnecessarily complex.

The voluntary protection price list will stifle competition. Not all lenders and providers offer the same coverage under voluntary protection products. Some providers may offer standalone windshield or key fob replacement while others may only include this coverage in the context of more comprehensive vehicle service contract coverage. Since the dealers are responsible for drafting and maintaining the price list, dealers would be disincentivized from offering several variations of coverage since it is more work for the dealer overall. Instead, the dealer would be impliedly encouraged to offer and include the fewest options possible to avoid additional research and drafting for the price list. In turn, this would reduce the options presented to consumers and restrains competition among providers.

Finally, the Associations request that indirect charges be removed from the definition for purposes previously stated.

(c) "Cash Price without Optional Add-ons" means Offering Price, plus required Government Charges, minus any discounts, rebates, or trade-in valuation amounts, and excludes optional Add-ons.

(d) "Clearly and Conspicuously" means in a manner that is difficult to miss (i.e., easily noticeable) and easily understandable, including in all of the following ways:

(1) In any communication that is solely visual or solely audible, the disclosure must be made through the same means through which the communication is presented. In any communication made through both visual and audible means, such as a television advertisement, the disclosure must be presented simultaneously in both the visual and audible portions of the communication even if the representation requiring the disclosure is made in only one means.

(2) A visual disclosure, by its size, contrast, location, the length of time it appears, and other characteristics, must stand out from any accompanying text or other visual elements so that it is easily noticed, read, and understood.

Associations comment: The requirements pertaining to visual disclosures are subjective and therefore difficult to interpret for purposes of compliance. What one consumer may consider "easily noticed," may be considered by another consumer as difficult to read. The Commission would need to more clearly recite what is expected for visual disclosures. As drafted, this standard will lead to confusion within the industry which will ultimately cause consumer confusion.

(3) An audible disclosure, including by telephone or streaming video, must be delivered in a volume, speed, and cadence sufficient for ordinary consumers to easily hear and understand it.

Associations comment: The requirements pertaining to audible disclosures are subjective and therefore difficult to interpret for purposes of compliance. What one consumer may consider it "easily" understood may be considered by another consumer as insufficient cadence. The Commission would need to more clearly recite what is expected for audible disclosures.

(4) In any communication using an interactive electronic medium, such as the Internet or software, the disclosure must be unavoidable.

Associations comment: The requirements pertaining to disclosures made on interactive electronic mediums are subjective and therefore difficult to interpret for purposes of compliance. The term "unavoidable" is incredibly subjective and open to varying interpretations. Especially in the context of Internet web sites and promotions conveyed therein, the language as drafted currently leads to uncertainty in what is required. For example, consider a vehicle manufacturer and the considerable sums the manufacturer invests in its website, which includes listings for vehicles, services, and voluntary protection products. As the provision is currently drafted, the manufacturer would be required to edit its landing page to have an "unavoidable" disclosure present, even though the overall purpose of the website is designed to market and sell motor vehicles. There is only one landing page for websites and as such landing pages are considered

valuable real estate since it is the consumer's first exposure to the website. Placing a disclosure on the landing page would be out of context and make no sense in relation to the consumer visiting the website to purchase a motor vehicle. If, however, the manufacturer does not place the disclosure on its landing page and instead it is located on a separate page selected through a menu, then there is an argument that the disclosure is now avoidable since the consumer did not have to click through to avoid the message. This does not consider if an electronic ad clicks through to a specific vehicle listing with voluntary protection product offered. Oftentimes promotions specifically identify vehicles eligible for discounts and when a consumer clicks on such a promotion, the link brings the consumer directly to the vehicle listing. In that instance, every vehicle listing for a particular promotion on the website would need to include such disclosure. This unavoidable standard is a slippery slope and provides no meaningful guidance as to how parties can comply. In short, the term unavoidable would imply that the disclosure would need to be on the landing page in addition to every vehicle listing page, and anything less would be subject to litigation. The Commission needs to more clearly recite what is expected for disclosures made on interactive electronic mediums.

(5) The disclosure must use diction and syntax understandable to ordinary consumers and must appear in each language in which the representation that requires the disclosure appears.

(6) The disclosure must comply with these requirements in each medium through which it is received.

(7) The disclosure must not be contradicted or mitigated by, or inconsistent with, anything else in the communication.

(e) "Dealer" or "Motor Vehicle Dealer" means any person or resident in the United States, or any territory of the United States, that (1) is licensed by a State, a territory of the United States, or the District of Columbia to engage in the sale of motor vehicles; (2) takes title to, holds an ownership interest in, or takes physical custody of motor vehicles; and (3) is predominantly engaged in the sale and servicing of motor vehicles, the leasing and servicing of motor vehicles, or both.

(f) "Express, Informed Consent" means an affirmative act communicating unambiguous assent to be charged, made after receiving and in close proximity to a Clear and Conspicuous disclosure, in writing, and also orally for in-person transactions, of the following: (1) what the charge is for; and (2) the amount of the charge, including, if the charge is for a product or service, all fees and costs to be charged to the consumer over the period of repayment with and without the product or service. The following are examples of what does not constitute Express, Informed Consent: (i) a signed or initialed document, by itself, (ii) prechecked boxes, or (iii) an agreement obtained through any practice designed or manipulated with the substantial effect of subverting or impairing user autonomy, decision-making, or choice.

Associations comment: The definition of express, informed consent raises substantial questions and areas of ambiguity. The first issue arising from the definition concerns disclosure

of "the amount of the charge, including, if the charge is for a product or service, all fees and costs to be charged to the consumer over the period of repayment with and without the product or service." It is unclear if this provision would include interest due and payable over the course of the finance agreement, or if this would only require the price of the voluntary protection product be disclosed. At the very least, we suggest this definition be revised to clarify that only charges known at the time of sale are required to be disclosed and the disclosure does not include interest attributed to the voluntary protection products. Currently, the charges to disclose present as unwieldy and difficult to calculate.

Further, having to account for each individual charge, including interest attributable to each voluntary protection product purchased, adds to the time spent during the finance and insurance negotiation process and would therefore increase the time attributed to the overall transaction. Further still, there are some charges, such as deductibles actually paid by the consumer, charges for late payments, amounts excluded by contract terms, cancellation fees, etc. that are simply not known or defined at the time of sale of the voluntary protection products. These types of unique offerings and unknown charges at the time of sale would pose issues in the context of the current wording of the definition of Express, Informed Consent.

Given that dealers are simply not aware of all charges a consumer may pay given the variability of contract terms, the Associations respectfully request the definition be revised in part as follows: (2) the amount of the charge, including, if the charge is for a product or service, all fees and costs to be charged at the time of sale to the consumer with and without the product or service. Without this revision, dealers could unintentionally violate the Proposed Rule, resulting in an indeterminable amount of litigation attributed to the lack of clear metrics provided by the Commission in the Proposed Rule. The Commission notes several times throughout its Supplementary Information on the Proposed Rule how long the vehicle buying process is for consumers. Adding additional processes that the dealer must include would only increase the time associated with such vehicle purchases.

Another issue with the definition concerns examples of what is not express, informed consent. Contrary to any common sense or typical classification, signed or initialed documents (by themselves) are not considered express, informed consent. For example, a dealer presents a consumer with a document disclosing, "I give express, informed consent for the purchase of this voluntary protection product," and the consumer executes the form. Under the Proposed Rule, this seemingly would not qualify. How a signed document would not constitute express, informed consent seems puzzling and contrary to other industry and basic financing norms. The banking industry, for example, utilizes simple signature requirements for bank accounts and related documents. The insurance industry is similar: a consumer can easily go online and check a box incorporating an electronic signature and in the next minute have insurance coverage on their vehicle. The Commission's definition of express, informed consent implies that these signatures utilized in other standard contractual contexts would not be sufficient and instead relies on subjective guidelines to define what express, informed consent is not without any basis or explanation. The Commission cites its own case precedents as being the authority for the definition of express, informed consent without giving any additional insight into how and why

this definition has developed over the years other than simply that the FTC has often required such provisions. This type of circular argument presented by the Commission is arbitrary at best and lacks justifiable reason.

(g) "GAP Agreement" means an agreement to indemnify a vehicle purchaser or lessee for any of the difference between the actual cash value of the insured's vehicle in the event of an unrecovered theft or total loss and the amount owed on the vehicle pursuant to the terms of a loan, lease agreement, or installment sales contract used to purchase or lease the vehicle, or to waive the unpaid difference between money received from the purchaser's or lessee's motor vehicle insurer and some or all of the amount owed on the vehicle at the time of the unrecovered theft or total loss, including products or services otherwise titled "Guaranteed Automobile Protection Agreement," "Guaranteed Asset Protection Agreement," "GAP insurance," or "GAP Waiver".

Associations comment: Insurance is not subject to the Dodd-Frank Wall Street Reform and Consumer Protection Act, therefore, the Associations argue that reference to "GAP insurance" should be removed from this provision. Additionally, the McCarran-Ferguson Act of 1945 grants states the principal authority to regulate the business of insurance without interference from federal regulation, ensuring the preeminence of state regulation of the offering.

(h) "Government Charges" means all fees or charges imposed by a Federal, State or local government agency, unit, or department, including taxes, license and registration costs, inspection or certification costs, and any other such fees or charges.

(i) "Material" or "Materially" means likely to affect a person's choice of, or conduct regarding, goods or services.

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

Associations comment: The definition of motor vehicle proposed by the Commission is will directly conflict with state laws. Conflicting regulation will result in vast confusion within the industry, with providers and dealers unsure of which law to comply with. Additionally, funding rules are based on the type of collateral involved in a transaction. If collateral is considered a motor vehicle at the federal level but specifically does not meet the definition of motor vehicle at the state level, how do providers reconcile this conflict? The Associations strongly recommend that the Commission abandon the notion to create its own definition of motor vehicle and instead defer to state definitions already in existence. Therefore, the Associations recommend the definition of "Motor Vehicle" be revised as follows: "means the definition of motor vehicle as promulgated in each state's department of motor vehicle or equivalent laws." If the FTC disagrees with this definition, then the Associations request guidance on how to reconcile the resulting conflict of state and federal laws.

(k) "Offering Price" means the full cash price for which a Dealer will sell or finance the motor vehicle to any consumer, excluding only required Government Charges.

c. § 463.3 Prohibited Misrepresentations

It is a violation of this part and an unfair or deceptive act or practice in violation of Section 5 of the Federal Trade Commission Act ("FTC Act") for any Motor Vehicle Dealer to make any misrepresentation, expressly or by implication regarding:

Associations comment: The introductory sentence regarding misrepresentation is an overly broad statement with which it would be impossible for dealers to comply. Misrepresentation "by implication" is simply nonsensical. Misrepresentation is defined in the Oxford English Dictionary as the action or offense of giving a false or misleading account of the nature of something. Misrepresentation by implication is not possible to comprehend by the parties required to comply with the Proposed Rule. This implication standard is designed to make it impossible to stay within the safe harbor of activity for dealers. Instead, this loose and broad language would make any acts by a dealer subject to an arbitrary misrepresentation standard that would be impossible to defend and even more difficult to craft a policy around.

Consider the implications of the provision as drafted in terms of the "least sophisticated consumer" standard that courts often utilize in the context of the FTC bringing suit against companies for deceptive advertising ("In evaluating the tendency of language to deceive, the Commission should look not to the most sophisticated readers but rather to the least.", Exposition Press, Inc. v. F. T. C., 295 F.2d 869, 873 (2d Cir. 1961)). Dealers engaged in online sales would constantly be battling litigation just based on the non-existent legal threshold. Any consumer could allege misrepresentation by implication simply because there is no meaning behind the phrase. A dealer would be working with an impossible standard. Additionally, this provision should only apply to material misrepresentations to limit the applicability to innocuous occurrences. Thus, the introductory sentence should be revised to only include "expressly and intentionally" instances of "material" misrepresentation to curtail instances of bad actors alleging unproven "implications" that would be impossible to defend against.

(a) The costs or terms of purchasing, financing, or leasing a vehicle;

(b) Any costs, limitation, benefit, or any other Material aspect of an Add-on Product or Service;

Associations comment: By its nature, there are statements on coverages, benefits, exclusions, and limitations in every voluntary protection product on the market today. The same is true for banking and insurance policies, in which specific language on exclusions and statements of coverage are crucial for offering such policies. The manner in which this provision is currently drafted would require dealers to read through every line of every voluntary protection product contract with consumers as anything less could be alleged to be an implied misrepresentation in accordance with the Proposed Rule. This would undoubtedly take hours, again negatively contributing to the Commission's overarching goal of reducing the time spent by consumers during the vehicle purchase process. The Associations recommend that the section be revised to

clarify the extent of information, or lack thereof, that would constitute misrepresentation. One proposal is to add a conclusory sentence to this section as follows: "Motor Vehicle Dealers that provide consumers with a verbal or written disclaimer that costs, limitations, benefits, and other Material aspects of Add-on Product or Service exist is prima facie evidence that misrepresentation has not occurred unless a consumer can prove otherwise."

(c) Whether the terms are, or transaction is, for financing or a lease;

(d) The availability of any rebates or discounts that are factored into the advertised price but not available to all consumers;

(e) The availability of vehicles at an advertised price;

(f) Whether any consumer has been or will be preapproved or guaranteed for any product, service, or term;

(g) Any Material information on or about a consumer's application for financing;

(h) When the transaction is final or binding on all parties;

(i) Keeping cash down payments or trade-in vehicles, charging fees, or initiating legal process or any action if a transaction is not finalized or if the consumer does not wish to engage in a transaction;

(j) Whether or when a Motor Vehicle Dealer will pay off some or all of the financing or lease on a consumer's trade-in vehicle;

(k) Whether consumer reviews or ratings are unbiased, independent, or ordinary consumer reviews or ratings of the Dealer or its products or services;

(l) Whether the Dealer or any of its personnel or products or services is or was affiliated with, endorsed or approved by, or otherwise associated with the United States government or any Federal, State, or local government agency, unit, or department, including the United States Department of Defense or its Military Departments;

(m) Whether consumers have won a prize or sweepstakes;

(n) Whether, or under what circumstances, a vehicle may be moved, including across state lines or out of the country;

(o) Whether, or under what circumstances, a vehicle may be repossessed; and

(p) Any of the required disclosures identified in this part.

d. § 463.4 Disclosure Requirements

It is a violation of this part and an unfair or deceptive act or practice in violation of Section 5 of the FTC Act for any Motor Vehicle Dealer to fail to make any disclosure required by this Section, Clearly and Conspicuously:

(a) Offering Price. In connection with the sale or financing of vehicles, a vehicle's Offering Price must be disclosed:

(1) In any advertisement that references, expressly or by implication, a specific vehicle;

(2) In any advertisement that represents, expressly or by implication, any monetary amount or financing term for any vehicle; and

(3) In any communication with a consumer that includes a reference, expressly or by implication, regarding a specific vehicle, or any monetary amount or financing term for any vehicle. With respect to such communications:

(i) The Offering Price for the vehicle must be disclosed in the Dealer's first response regarding that specific vehicle to the consumer; and

(ii) If the communication or response is in writing, the Offering Price must be disclosed in writing.

(b) Add-on List. If a Dealer charges, directly or indirectly, for any optional Add-on Products or Services, an Add-on List must be disclosed:

(1) On each website, online service, or mobile application operated by or on behalf of the Dealer, and at each dealership; and

(2) If an advertisement is not presented on a website, online service, or mobile application, the Dealer must disclose the website, online service, or mobile application where the consumer can view the Add-on List.

Associations comment: The Associations seek clarification on the type of advertisement that this provision is referencing to better understand the extent of the proposed requirement. What does the Commission mean by "advertisement"? Is this requirement to disclose the voluntary protection product price list only if the underlying advertisement includes reference to a voluntary protection product, or would every advertisement by a motor vehicle dealer, which could simply just be a specific vehicle listing or broader vehicle promotion, not including voluntary protection products, prompt a disclosure related to the price list? If the latter, then this position by the Commission would have significant though seemingly unintended consequences.

For example, if a major vehicle manufacturer were to purchase a commercial slot to air during the Super Bowl, would the Commission expect a vehicle manufacturer simply promoting its brand to spend precious seconds of advertisement time directing consumers to its website for a voluntary protection product price list even though this offering is not even featured in the advertisement itself?

Additionally, directing consumers to one comprehensive price list is confusing and potentially harmful. To account for all vehicle listings and available voluntary protection products for each listing would result in a list of hundreds of products, which could cause more confusion as opposed to the dealer simply directing the consumer during the transaction to the available

voluntary protection products, tailored to that consumer's specific needs and vehicle type. The average consumer purchases anywhere from zero to three voluntary protection products in conjunction with the purchase of a vehicle. Providing the consumers with an extensive price list with various names for voluntary protection products would overwhelm customers and add unnecessary confusion to the overall process.

For example, there are various options available for each voluntary protection product. A service contract can provide underlying coverage at two different price points based on the deductible amount that the consumer chooses. This would result in two entries on the price list for the same service contract. Some service contracts also include tiered coverage, such as bronze, gold and platinum, with consumers electing which coverage best fits their needs. The extent of coverage elected impacts the price of the service contract. The price list would require that the price for each degree of coverage under the service contract be separately stated. Thus, while the price list may be seen as beneficial to consumers in theory, the ultimate product would result in hundreds of line-item entries that would be both overwhelming and lack significance.

Finally, the Associations request that indirect charges be removed from the definition for purposes previously stated.

(c) Add-ons not required. When making any representation, expressly or by implication, directly or indirectly, about an Add-on Product or Service, the Dealer must disclose that the Add-on is not required and the consumer can purchase or lease the vehicle without the Add-on, if true. If the representation is in writing, the disclosure must be in writing.

Associations comment: The Associations do not take issue with this requirement, but rather note that this is common practice today by industry participants either in direct compliance with state law requirements or best practices to prevent confusion. For example, GAPA has promulgated a Model Act that it utilizes as a legislative standard when the Association seeks to pass legislation in a state clearly authorizing GAP waivers. The Model Act promulgated by GAPA has the following disclosure requirement for GAP waivers: "Debt Waivers must disclose in writing and in clear, understandable language that is easy to read, the following:… (8) That neither the extension of credit, the terms of the credit, nor the terms of the related Motor Vehicle sale or lease, may be conditioned upon the Borrower's purchase of a Debt Waiver." This required disclosure which makes clear to the consumer that the purchase of the GAP waiver is optional has been adopted in most states, though examples of such are as follows:

1) *Alabama: Subject to Section 8-37-7, a creditor that offers a GAP waiver shall disclose, as applicable, in writing and in clear, understandable language that is easy to read, all of the following: … That neither the extension of credit, the terms of the credit, nor the terms of the related motor vehicle sale or lease, may be conditioned upon the purchase of the GAP waiver. Ala. Code § 8-37-5(6);*
2) *Maine: A waiver must disclose, as applicable, in writing and in clear, understandable language that is easy to read, the following: … That the extension of credit, the terms of credit and the terms of the related motor vehicle sale may not be conditioned upon purchase of the waiver. Me. Stat. tit. 10, § 1500-H(4)(H);*

3) *Texas: A debt cancellation agreement must state: … that purchase of a debt cancellation agreement is not required for the retail buyer to obtain an extension of credit and will not be a factor in the credit approval process. Tex. Fin. Code § 354.004(12);*
4) *Vermont: A creditor shall disclose in writing, such disclosures shall be conspicuous, readily understandable, and designed to call attention to the nature and significance of the information provided: … that neither the extension of credit, the terms of the credit, nor the terms of the related sale in the case of a motor vehicle or other good or service are to be conditioned upon the purchase of a debt protection agreement. Vt. Stat. Ann. tit. 8, § 10405(5)(A);*
5) *Washington: Guaranteed asset protection waivers must disclose, as applicable, in writing and in clear, understandable language that is easy to read, the following: … That neither the extension of credit, the terms of the credit, nor the terms of the related motor vehicle sale or lease, may be conditioned upon the purchase of the waiver…. Wash. Code § 48.160.050(9).*

While the above are just five examples of existing disclosures required in state statutes regulating GAP waivers, many states require the same or similar provision be stated in GAP waivers to inform consumers of the optionality of the agreement. Additionally, the National Association of Insurance Commissioners ("NAIC") Service Contract Model Act contains the following provision: "A person, such as a bank, savings and loan association, lending institution, manufacturer, or seller of any product, shall not require the purchase of a service contract as a condition of a loan or a condition for the sale of any property." This provision is codified in several state statutes governing service contracts:

1) *Hawaii: No person shall condition a loan or the sale of any property on the purchase of a service contract. Haw. Rev. Stat. § 481X-10(c);*
2) *New York: A person, including a bank, savings and loan association, lending institution, manufacturer or seller of any product, shall not require the purchase of a service contract as a condition of a loan or other extension of credit or a condition for the sale or other disposition of any property. N.Y. Ins. Law § 7906(c);*
3) *Nevada: No person may require the purchase of a service contract as a condition for the approval of a loan or the purchasing of goods. Nev. Rev. Stat. § 690C.220;*
4) *South Carolina: A person such as a bank, savings and loan association, lending institution, manufacturer, or seller of any product shall not require the purchase of a service contract as a condition of a loan or a condition for the sale of any property. S.C. Code Ann. § 38-78-60(C);*
5) *Wisconsin: A person, including a bank, savings and loan association, lending institution, manufacturer, or seller of any product, shall not require the purchase of a service contract as a condition of a loan or a condition for the sale of any property, except that a person buying or selling a home may condition the purchase or sale of the home on the seller's or buyer's procurement of a service contract that covers the home. Wis. Stat. § 616.58(3).*

While the above are just five examples of existing requirements in state statutes regulating service contracts, many states maintain the same or similar prohibition. All of this to demonstrate that there are existing safeguards in place. These state statutes speak to the requirement that the purchase of a voluntary protection product cannot be a condition for the purchase of property. While the Associations do not object to a statement that purchase of the voluntary protection product is not required, the Associations do request that reference to misrepresentations made "indirectly" be removed in order to combat confusion.

(d) Total of payments and consideration for a financed or lease transaction.

(1) When making any representation, expressly or by implication, directly or indirectly, about a monthly payment for any vehicle, the Dealer must disclose the total amount the consumer will pay to purchase or lease the vehicle at that monthly payment after making all payments as scheduled. If the representation is in writing, the disclosure must be in writing; and

(2) If the total amount disclosed assumes the consumer will provide consideration (for example, in the form of a cash down payment or trade-in valuation), the Dealer must disclose the amount of consideration to be provided by the consumer. If the representation is in writing, the disclosure must be in writing.

(e) Monthly payments comparison. When making any comparison between payment options, expressly or by implication, directly or indirectly, that includes discussion of a lower monthly payment, the Dealer must disclose that the lower monthly payment will increase the total amount the consumer will pay to purchase or lease the vehicle, if true. If the representation is in writing, the disclosure must be in writing.

e. § 463.5 Dealer Charges for Add-ons and Other Items

It is a violation of this part and an unfair or deceptive act or practice in violation of Section 5 of the FTC Act for any Motor Vehicle Dealer, in connection with the sale or financing of vehicles, to charge for any of the following:

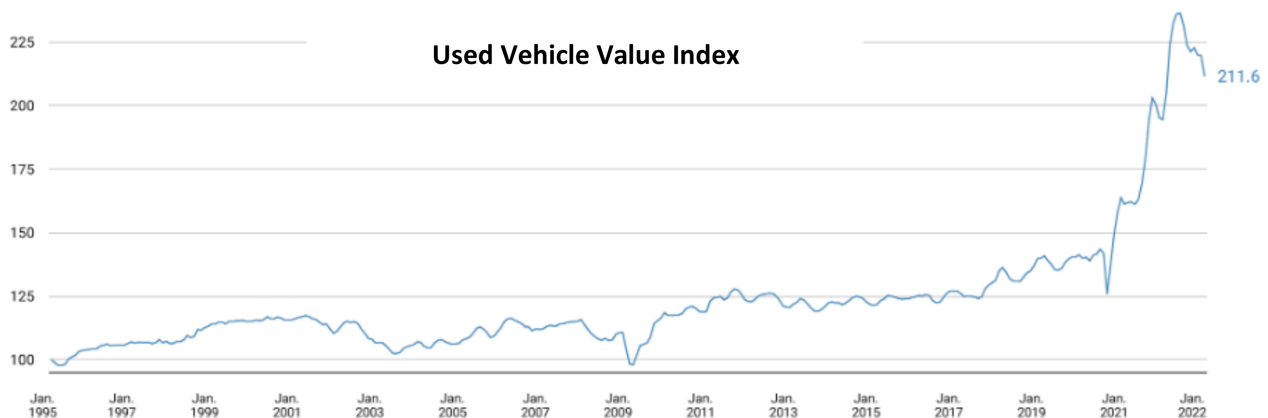
(a) Add-ons that provide no benefit. A Dealer may not charge for an Add-on Product or Service if the consumer would not benefit from such an Add-on Product or Service, including (1) nitrogen-filled tire related-products or services that contain no more nitrogen than naturally exists in the air, or (2) products or services that do not provide coverage for the vehicle, the consumer, or the transaction, or are duplicative of warranty coverage for the vehicle, including a GAP Agreement if the consumer's vehicle or neighborhood is excluded from coverage or the loan-to-value ratio would result in the consumer not benefiting financially from the product or service.

Associations comment: The Associations raise significant concern with this provision concerning voluntary protection products that "provide no benefit" as the provision is overly broad and is not indicative of coverage afforded within the industry. The Associations raise several points for consideration, each in turn.

With few exceptions, GAP waiver is widely available at point-of-vehicle purchase for vehicles, loan provisions and borrowers of all types - other than vehicle ineligibility such as use for commercial or racing purposes. The loan-to-value ratio is one of the strongest risk factors that is indicative of future exposure, and notably one of the very few controls available to industry to effectively manage this fluctuating risk over the term of each loan and thus a portfolio in total. Due to the importance of the loan-to-value ratio in helping assure a healthy GAP waiver market continues to be available to consumers, we respectfully request that the FTC not engage in tinkering with this key ratio in any manner.

*Nonetheless, the Proposed Rule would hold motor vehicle dealers in violation of the Act for offering products that "**would result in the consumer not benefiting financially**," (emphasis added). This provision of the Proposed Rule would ask the motor vehicle dealer to be able to predict the future. The GAP waiver benefit is generally the difference between the loan balance at time of loss, less the vehicle value.[8] For a GAP waiver, how is the motor vehicle dealer supposed to know the loan balance and vehicle value at some arbitrary point in the future?*

For example, vehicle values can fluctuate widely over time. According to the highly respected Mannheim Used Vehicle Value Index[9] (below), there were constant ups and downs over the past 20 years, and significant vehicle value corrections from 2002 to 2003, again in 2008 to



2009 (the Great Recession), and 2020 to 2021 (pandemic). And now, due to market factors and the supply chain, vehicle values have increased greatly – with notable dips -- poised for another significant correction. From this aggregated data, it is clear that vehicle values fluctuate and the fluctuations can occur at any time, outside the control of the consumer and the motor vehicle dealer. Moreover, consider that at the individual vehicle level, vehicle values can fluctuate more widely since aggregating data is similar to averaging a series of numbers – aggregating hides the peaks and valleys of individual observations, or in this case, wholesale vehicle values. The Proposed Rule would hold a motor vehicle dealer accountable for a potential future outcome, which is an untenable and inappropriate requirement.

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[8] As with any consumer contract, specific benefits are subject to the terms and conditions of the contract.
[9] Wholesale price chart as of August 2022, Cox Automotive®

Furthermore, the consumer view of GAP waivers suggests the market is functioning well. A 2021 academic study of consumer views on GAP waivers fielded by the highly regarded University of Michigan Survey Research Center[10] *found that:*

- *More than 90% of GAP waiver purchasers were very or somewhat satisfied with their purchase*
  - *Only about 1% of surveyed purchasers indicated dissatisfaction with their choice;*
- *About 90% of purchasers would purchase a GAP waiver again and recommend it to others.*
  - *"Recommend to others" is considered a net promoter score. According to Bain & Co., the source of the net promoter score system, a score…above 80% is world class.*[11]

Consumers overwhelmingly appreciate GAP waivers, would purchase them again and recommend them to others. These findings do not suggest that the GAP waiver offering to consumers is a widespread problem to address with new regulation such as this Proposed Rule.

GAP waivers may limit benefits based on a consumer's loan-to-value ratio, and if so, the typical limitation is 120% of the MSRP value for new vehicles or 120% of the Kelley Blue Book value for used vehicles. Loan-to-value ratios are utilized in GAP waivers to prevent moral hazard associated with consumers being incentivized to borrow amounts substantially in excess of the MSRP or equivalent value of a vehicle only to have those substantial amounts waived in the event of a claim. In most states, the loan-to-value ratio merely reduces the amount waived by the GAP waiver, however, in the event of a claim there is still a significant financial benefit that is being provided to the consumer through waiver of amounts up to 120% of the loan-to-value ratio.

It is helpful to consider an example of how the loan-to-value ratio limitation works in practice for GAP waivers, for instance: a consumer is interested in purchasing a new vehicle from the dealer. In connection with the transaction, the consumer trades in their used vehicle which has $10,000 in negative equity, which is rolled into the new finance deal. The value of the new vehicle is $40,000. The negative equity of the used vehicle combined with the cost of the new vehicle results in $50,000 amount financed for the purchase of the new vehicle, even though the new vehicle accounts for just 80% of the total amount financed. GAP waivers generally waive up to the difference between the consumer's total outstanding balance on the underlying finance agreement and the insurance settlement the consumer receives from their primary insurance carrier.

For purposes of illustration, assume a consumer suffers a covered total loss of the vehicle three weeks after the vehicle is purchased. The insurance company issues a settlement check for $36,000 (new vehicles depreciate soon after being driven off of the dealership lot), leaving the consumer with an outstanding balance of $14,000, only $4,000 of which is attributed to the new

[10] See "Consumers and Guaranteed Asset Protection ("GAP Protection") on Vehicle Loans and Sales-Financing Contracts: A First Look," by Thomas A. Durkin, Senior Economist, Board of Governors of the Federal Reserve System (retired), Gregory Elliehausen, Principal Economist, Board of Governors of the Federal Reserve System, and Thomas W. Miller, Jr., Professor and Jack R. Lee Chair in Financial Institutions and Consumer Finance, Mississippi State University, Senior Research Fellow, Consumers' Research, September 2021.

[11] Perceptive, "What is a good net promoter score (NPS)", July 2019.

vehicle. If the GAP waiver did not have any loan-to-value limitation, then the lienholder would be required to waive the entire outstanding balance of the amount financed that was not otherwise excluded due to terms of the GAP waiver, resulting in the lienholder waiving debt attributed not only to the new vehicle purchased by the consumer, but also the negative equity of the used vehicle. This would result in a $14,000 windfall for the consumer since they were able to take advantage of rolling the negative equity into the purchase of a new vehicle. If, however, the GAP waiver had a 120% loan-to-value limitation, then the GAP waiver would waive an outstanding balance up to that portion of the up to 120% of the MSRP of the new vehicle, thus waiving up to $48,000 of the outstanding balance on the finance agreement. In this scenario, after accounting for the insurance settlement provided to the consumer, the GAP waiver would waive the $4,000 attributed to the new vehicle and $8,000 of the vehicle that was traded in for a total amount waived of $12,000. As this example illustrates, the 120% loan-to-value cap does provide a cushion to consumers relative to the value of the vehicle that was traded in as the consumer would only owe the remaining $2,000 of the outstanding balance. If the contemplated loan-to-value restriction means that a GAP waiver cannot be sold, then the consumer would owe $14,000 in the event of total loss. This would make the consumer whole for their outstanding balance of the new vehicle that the GAP waiver was covering, but it would not fully waive the negative equity attributed to the previous used vehicle.

GAP waivers that provide an unlimited benefit without any limitation for loan-to-value ratios incentivize consumers to finance sums well in excess of the actual value of the new vehicle. If loan-to-value limitations were prohibited, the Commission can plainly see that this would result in unnecessary and unfair windfalls for consumers. Loan-to-value limitations are important to be able curtail moral hazard and disincentivize consumers from committing poor finance practices. Some consumers choose to not voluntarily purchase a new vehicle until they have less negative equity to account for in the amount financed. As illustrated, consumers are still being provided a clear benefit if a loan-to-value ratio is present in the GAP waiver. In the above example the consumer is better off paying the $2,000 difference with the GAP waiver with loan-to-value present as opposed to paying the $14,000 difference without the GAP waiver.

The value proposition is not limited to GAP waiver, but rather exists for all voluntary protection products. Service contracts providing coverage for mechanical breakdown, tire and wheel damage caused by road hazard, and paintless dent repair if the vehicle suffers dents are all examples of valuable coverage being afforded to consumers that may not ultimately be utilized by such consumers if they do not experience harm or loss. As discussed previously, peace of mind is a great value to consumers at the time of purchase of voluntary protection products. Consumers that purchase such products recognize that they may not ultimately file a claim under such contracts, and indeed, many consumers would prefer to not experience such harm or loss that requires them to seek out the coverage purchased. That being said, consumers recognize that the coverage provided in voluntary protection products provides a benefit, if nothing more than assurance that their vehicle will be serviced if the claim is covered under the terms of the agreements. This peace of mind is not easily assigned a numerical value for purposes of calculating whether a benefit is provided under a voluntary protection product.

An additional objection raised by the Associations concerns the following provision: "products or services that…are duplicative of warranty coverage for the vehicle." The average manufacturer warranty on a new vehicle is 3 years or 36,000 miles. While service contracts sold during the vehicle transaction may appear to provide duplicative coverage as the manufacturer warranty, this is not the case. Service contracts often include coverage for mechanical or electrical breakdown of certain parts and components during the service contract term that may not be covered by the warranty and commonly are for a duration between 5 to 7 years for new vehicles and may go as high as 120,000 miles or more. While the manufacturer's warranty may be in place for the initial 3 years of the service contract term, the price of the service contract is reduced based on this primary warranty coverage and providers recognize that more claims will be filed in years 4-7 of the service contract than the initial 3 years. If a manufacturer sold a vehicle without a manufacturer's warranty, the service contract price would be substantially higher to account for the lack of warranty coverage available for the first 3 years. Service contracts also make clear that the manufacturer's warranty is the primary coverage that controls for items that qualify under such warranty and state insurance regulators have routinely approved of this offering because it is not duplicative.

Additionally, service contracts often include incidental benefits for various items related to the breakdown of the vehicle, such as emergency roadside assistance (concierge service offering gas or fluid delivery, towing, battery jump start, lock out service, and flat tire change), rental car reimbursement, and emergency lodging coverage. It is without question that these are valuable benefits afforded to consumers that would not otherwise be available. Some service contracts include coverage for tires and wheels, including if damage resulted from road hazards causing punctured tires and bent wheels, which is commonly excluded from manufacturer warranties. Other service contracts include coverage for normal wear and tear and cosmetic damage, which likewise are generally not included in a manufacturer's warranty. Simply put, the sweeping statement that service contracts cannot be duplicative of warranty coverage is not representative of the actual coverage provided in a service contract nor does it account for providers pricing the service contract coverage based on the presence of a manufacturer's warranty. The Associations seek clarification that such service contract coverage discussed herein is not considered duplicative coverage.

(b) Undisclosed or unselected Add-ons. A Dealer may not charge for any optional Add-on Product or Service unless the following requirements are met:

(1) Cash Price without Optional Add-ons.

(i) Disclosure. Before referencing any aspect of financing for a specific vehicle (aside from the Offering Price) or before consummating a non-financed sale, whichever is earlier, the Motor Vehicle Dealer must Clearly and Conspicuously disclose:

(A) The Cash Price without Optional Add-ons, separately itemizing the Offering Price, any discounts, any rebates, any trade-in valuation, and required Government Charges; and

(B) That the consumer can purchase the vehicle for the Cash Price without Optional Add-ons; and

Associations Comment: The Commission has failed to provide guidance on how this disclosure should appear to a consumer. Instead of affirmative guidance, the Commission relies on vague descriptors in the definition of clear and conspicuous which provides no meaningful insight. The Commission has also failed to provide any research on the various types of disclosures and associated efficacy of such disclosures that are currently being provided to consumers during vehicle purchase transactions. The FTC needs to conduct thorough research to determine whether current disclosures are adequately advising consumers of their options.

(ii) Declination. The consumer must decline to purchase the vehicle for the Cash Price without Optional Add-ons.

(iii) Form and signature. The Cash Price without Optional Add-ons disclosure and declination set forth in paragraphs (b)(1)(i)-(ii) must be in writing, date and time recorded, and signed by the consumer and a manager of the Motor Vehicle Dealer.

Associations comment: Requiring the signature of the manager of the motor vehicle dealer is an overreach and unnecessarily burdensome. If a manager is not present, does the Commission intend for all vehicle sales to be tolled until a manager is available? Or, if a manager is on site but there are six other consumers in the process of purchasing a vehicle, does the Commission expect the consumers to wait their turn in line until a manager becomes available to sign the document? How would this type of requirement be addressed in the context of online vehicle transactions? This type of requirement would only serve to extend the period of time that consumers spend during the vehicle purchase transaction, leading to consumer frustration and annoyance, and would neither make the transaction more efficient nor provide any additional consumer protection.

(iv) Presentation. The Cash Price without Optional Add-ons disclosure and declination set forth in paragraphs (b)(1)(i)-(ii) must be limited to the information required by this Section, and cannot be presented with any other written materials.

(2) Cash Price without Optional Add-ons in a financed transaction.

(i) Disclosure. Before charging for any optional Add-on in a financed transaction, the Motor Vehicle Dealer must Clearly and Conspicuously disclose:

(A) The total of the Cash Price without Optional Add-ons plus the finance charge, factoring in any cash down payment and trade-in valuation, and excluding optional Add-ons. This disclosure must separately itemize the Cash Price without Optional Add-ons, the finance charge, any cash down payment, and any trade-in valuation; and

(B) That the consumer can finance the vehicle for that total; and

(ii) Declination. The consumer must decline to purchase the vehicle for that total set forth in paragraph (b)(2)(i)(A).

Associations comment: While the Commission has framed this rulemaking process as protecting consumers, reducing confusion, and making the overall vehicle purchase process quicker, many of the provisions in the Proposed Rule would have the opposite effect. The consumer and dealer spend time negotiating terms of the vehicle purchase based on a myriad of factors, including the price of the vehicle, consumer's down payment, monthly payments, interest schedule, and purchase of voluntary protection products. This negotiation process can take time and energy from both parties involved. After the parties agree verbally to terms and then turn to the paperwork, it would be beyond confusing for a consumer to be presented a declination regarding the very terms that were just agreed to. Presentation of a declination letter immediately following the negotiation process would undoubtedly lead to consumer confusion and distrust with the dealer. Put another way, if a consumer negotiates a price of the vehicle at $38,000 and is immediately asked to sign a statement that they decline to purchase the vehicle for $38,000, how would this not be confusing? Consumers will become frustrated with the overall process if they believe that all of the time spent during negotiations was for naught. If a consumer is mistakenly led to decline voluntary protection product coverage during the process because of the confusing declination requirement, the consumer may not have the funds to repair their vehicle that would have otherwise been covered by a voluntary protection product.

(iii) Form and signature. The disclosure and declination set forth in paragraphs (b)(2)(i)-(ii) must be in writing, date and time recorded, and signed by the consumer and a manager of the Motor Vehicle Dealer.

Associations comment: As stated previously, the Associations believe that the requirement for a manager to sign the document places an unnecessary time burden on the vehicle purchasing process and does not serve the intended purpose of the Proposed Rule. Please see above for discussion and recommendation.

(iv) Presentation. The disclosure and declination set forth in paragraphs (b)(2)(i)-(ii) must be limited to the information required by this Section, and cannot be presented with any other written materials.

Associations comment: The Associations beg the question: what does "cannot be presented with any other written materials" mean in the context of a vehicle purchase transaction? The process to purchase a vehicle involves a notable amount of paperwork, largely due to other federal and state law disclosure requirements. For example, the Truth in Lending Act requires four disclosure items: 1) annual percentage rate; 2) finance charge; 3) amount financed; and 4) total of payments. Additionally, insurance documents and down payment information is exchanged as part of the process, all of which take the form of written materials. It is incomprehensible to not allow the presentation of the disclosure and declination be included with the remaining written materials for the vehicle transaction. If this were true, a dealer would not

be able to retain the necessary signature for the form during the process without blatantly circumventing other required documents.

Simply put, unless modified the provisions stipulated in the Proposed Rule seem designed to make consumers decline voluntary protection product coverage and would make it nearly impossible for dealers to comply with such requirements.

(3) Itemization of optional Add-ons. Before charging for any optional Add-on, the Motor Vehicle Dealer must separately itemize and Clearly and Conspicuously disclose:

(i) For a non-financed transaction:

(A) The Cash Price without Optional Add-ons;

(B) Charges for any optional Add-ons selected by the consumer, separately itemized; and

(C) The sum of the items set forth in paragraphs (b)(3)(i)(A) and (b)(3)(i)(B); or

(ii) For a financed transaction,

(A) The total described in paragraph (b)(2)(i)(A);

(B) Charges for any optional Add-ons selected by the consumer, separately itemized; and

(C) The sum of the items set forth in paragraphs (b)(3)(ii)(A) and (b)(3)(ii)(B).

(c) Any item without Express, Informed Consent. A Dealer may not charge a consumer for any item unless the Dealer obtains the Express, Informed Consent of the consumer for the charge.

Associations comment: As the Associations noted previously and in greater detail, the Associations object to the requirement to obtain express, informed consent in its current form in the Proposed Rule due to the definition of that term being purely subjective and ripe for prejudicial and inconsistent enforcement. Please see the section 463.2 Definitions.

f. § 463.6 Recordkeeping

(a) Any Motor Vehicle Dealer subject to this part must create and retain, for a period of twenty-four months from the date the record is created, all records necessary to demonstrate compliance with this part, including the following records:

(1) Copies of all Materially different advertisements, sales scripts, training materials, and marketing materials regarding the price, financing or lease of a motor vehicle, that the Motor Vehicle Dealer disseminated during the relevant time period; Provided that a typical example of a credit or lease advertisement

may be retained for advertisements that include different vehicles, or different amounts for the same credit or lease terms, where the advertisements are otherwise not Materially different;

(2) Copies of all Materially different Add-on Lists and all documents describing such products or services that are offered to consumers;

(3) Copies of all purchase orders; financing and lease documents with the Motor Vehicle Dealer signed by the consumer, whether or not final approval is received for a financing or lease transaction; and all written communications relating to sales, financing, or leasing between the Motor Vehicle Dealer and any consumer who signs a purchase order or financing or lease contract with the Motor Vehicle Dealer;

(4) Records demonstrating that Add-ons in consumers' contracts meet the requirements of Section 463.5, including copies of all service contracts, GAP Agreements and calculations of loan-to-value ratios in contracts including GAP Agreements; and the Cash Price without Optional Add-ons disclosures and declinations required by Section 463.5(b);

(5) Copies of all written consumer complaints relating to sales, financing, or leasing, inquiries related to Add-ons, and inquiries and responses about vehicles referenced in Section 463.4 of this part; and

Associations comment: The Associations raise a clarifying question: what is meant by "inquiries related to" voluntary protection products? This provision is extremely broad and requires revision. As currently drafted, dealers would need to maintain records of all questions posed from consumers related to voluntary protection products (price, term, exclusions, etc.), all claims requests and files, and all other miscellaneous topics. Additionally, the dealer would need to disclose all verbal and written communication since the Proposed Rule does not currently state the medium in which the communication took place.

It is also important to note that third party administrators are common for voluntary protection products. Administrators often administer the claims process on behalf of providers. Currently, the broad language in the provision could imply that the dealer should maintain a record of claims files of which they may not even be in possession of. The Associations strongly encourage that this provision be revised to the following to just account for substantive communication concerning consumer complaints: "Copies of all written consumer complaints relating to sales, financing, leasing, or voluntary protection products, and inquiries and responses about vehicles referenced in Section 463.4 of this part."

(b) Any Motor Vehicle Dealer subject to this part may keep the records required by paragraph (A) of this Section in any legible form, and in the same manner, format, or place as they may already keep such records in the ordinary course of business. Failure to keep all records required under paragraph (A) of this Section will be a violation of this part.

g. § 463.7 Waiver Not Permitted

It is a violation of this part for any person to obtain, or attempt to obtain, a waiver from any consumer of any protection provided by or any right of the consumer under this part.

h. § 463.8 Severability

The provisions of this part are separate and severable from one another. If any provision is stayed or determined to be invalid, it is the Commission's intention that the remaining provisions will continue in effect.

i. § 463.9 Relation to State Laws

(a) In General. This part will not be construed as superseding, altering, or affecting any other State statute, regulation, order, or interpretation relating to Motor Vehicle Dealer requirements, except to the extent that such statute, regulation, order, or interpretation is inconsistent with the provisions of this part, and then only to the extent of the inconsistency.

(b) Greater protection under State law. For purposes of this Section, a State statute, regulation, order, or interpretation is not inconsistent with the provisions of this part if the protection such statute, regulation, order, or interpretation affords any consumer is greater than the protection provided under this part.

V. RESPONSES TO QUESTIONS POSED

In the interest of providing helpful and detailed insight in response to questions posed by the Commission within the limited time frame, the Associations are providing answers to only certain questions posed by the Commission.

a. Question 10 (Section 463.2: Definitions): Are the proposed definitions clear? Should any changes be made to any definitions? Should the scope of any of the proposed definitions be expanded or narrowed, and if so, why?

Associations comment: The Associations provided comments specific to the draft definitions of the Proposed Rule in § 463.2 Definitions. In short, the Associations believe several definitions need to be revised for clarification, unfair treatment of third-party providers compared to motor vehicle manufacturers, and onerous requirements serving no genuine benefit to consumers.

b. Question 33 (Section 463.5: Dealer Charges for Add-ons and Other Items): This provision is intended to prevent conflicting and otherwise deceptive representations, and to protect consumers without requiring additional disclosures in an already lengthy, disclosure-heavy process. Given these concerns, should additional restrictions be placed on all add-ons? In particular, the Commission is contemplating whether any final Rule should restrict dealers from selling add-ons (other than those already installed on the vehicle) in the same transaction, or on the

same day, the vehicle is sold or leased. Would such a provision better protect consumers without unduly burdening competition?

Associations comment: Section 463.5 of the Proposed Rule has several substantial issues and ultimately as drafted will not provide better protection to consumers. As the Associations' embedded comments indicate, the Associations have significant objections to many different provisions in the section, including a prohibition on duplicative coverage, loan-to-value ratios, and requiring written declinations causing confusion.

Additionally, the Commission's contemplation of restricting the sale of voluntary protection products will only serve to harm consumers who need the coverage the most, specifically low-income households without access to discretionary funds. The FTC's mission is to protect consumers; however, this type of policy will have the opposite effect. According to the 2022 Wealth and Wellness Index conducted on behalf of empower Retirement and Personal Capital, 47% of American could not manage an unforeseen expense of $500 without worry. Unfortunately, vehicle breakdowns and losses are costly and can commonly result in repair shop invoices or outstanding finance balances well in excess of $500. To deny consumers the ability to finance a voluntary protection product alongside their vehicle purchase would ultimately drive consumers into greater debt and financial hardship.

Without the ability to finance the voluntary protection product with the vehicle purchase, consumers will either have to elect to 1) pay for the product(s) in cash (which is uncommon) or put the price of the product on a credit card, which accumulates substantially higher interest over time, or 2) forego valuable coverage afforded by voluntary protection products and be forced to take on the risk of the vehicle experiencing a breakdown or loss. Consumers who can barely qualify/afford to finance a vehicle would be expected to pay a hefty repair bill in one lump sum payment in the instance of breakdown or be expected to pay for a replacement car in addition to any outstanding balance on the finance agreement of the totaled vehicle. For low-income households that cannot afford this type of expense, consumers may be forced to put large sums on their credit cards, be forced to quit their jobs for lack of transportation and/or be unable to take their children to school.

For example, consider a single mother who totals her vehicle and was not offered a GAP waiver. She finds herself owing over $6,000 on the totaled vehicle and cannot afford a replacement vehicle. Ultimately, the woman may have to quit her job due to lack of transportation. An unintended consequence of the Proposed Rule, but a possible result. The Commission's overreach in the name of consumer protection could have dire consequences that will only serve to the harm consumers who most need the financial protection the products provide.

Primary research[12] of over 1,000 consumers shows that 84% say they were offered information about one or more voluntary protection products when purchasing a vehicle from a full-service dealership. The most commonly reported motivation to purchase voluntary protection

[12] Sachs Media Group, August 2022.

products is to save money by covering the expense of unforeseen problems (49%), followed closely by peace of mind from having a financial safety net (48%).

Importantly, 70% of those who have bought a voluntary protection product prefer to do so at the time of the vehicle sale, and 80% indicated that the selection process for a voluntary protection product was not stressful. *Should a purchaser have buyer's remorse for this voluntary offering, there is generally a free look period during which the voluntary protection product can be cancelled for a full refund. In fact, the same consumer research shows approximately 30% of purchasers reported they ended up canceling it at some point during the term of protection, and 75% of these find the process to be easy and satisfying.*

As noted earlier, it's no surprise then that more than 90% of purchasers were very or somewhat satisfied with their purchase and about 90% of purchasers would purchase it again and recommend it to others.

With such a strong majority of consumers preferring the purchase of voluntary protection products at point of vehicle sale, favorable purchase perspectives and such a high repurchase propensity for themselves and recommending to others, it clearly demonstrates a favorable consumer perspective and again raises a significant question as to why the Proposed Rule is necessary.

c. The proposed Rule would also prohibit dealers from charging for GAP Agreements if the consumer's vehicle or neighborhood is excluded from coverage or the loan-to-value ratio would result in the consumer not benefitting financially from the agreement. Should any final Rule set forth how to calculate the loan-to-value ratio? If so, what should such a provision require?

Associations comment: As the Associations note, even when loan-to-value ratios are present in GAP waivers, the consumers are still provided a financial benefit. Additionally, oftentimes dealers are unaware of a specific exclusion that would deny a consumer coverage under the GAP waiver.

A good example of this is commercial use. Vehicles used commercially are subject to substantially more miles. Consumers do not always inform dealers of commercial use of the vehicle, either intentionally or unintentionally. In those instances, when the provider determines that the vehicle is used for commercial use, the consumer is informed of their ineligibility and providers often void the agreement and subsequently refund the consumer if void. If this is the case, the consumer is provided a sum of funds with the refund that can be used to pay down any repair invoice or loss.

Additionally, a formula regarding the loan-to-value ratio calculation is not necessary or desired. It is an industry recognized standard to divide the amount financed by the MSRP value of the vehicle to determine the loan-to-value ratio. The Commission promulgating its own standard will only lead to confusion.

d. Proposed Section 463.5(b) would prohibit a dealer from charging for optional add-ons unless the dealer first discloses the vehicle's Cash Price without Optional Add-

ons and records that a consumer has declined to purchase the vehicle at that price. Should the Commission consider means to require more affirmative engagement by consumers to consciously select add-on products and services? In particular, the Commission is contemplating whether any final Rule should require separating the purchase of add-ons from the vehicle sale or lease transaction, or permit consumers to cancel add-ons (that do not involve physical alteration to the vehicle) within a short time after the sale or lease transaction is concluded. What practical limitations might such additional requirements impose?

Associations comment: The Associations have significant concern in relation to the declination requirement in the Proposed Rule. The signed declination will cause substantial confusion in conjunction with the rest of the negotiation process. As is, the declination is written as a double negative. The consumer has already negotiated the price of the vehicle and interest rate. The declination will mislead the consumer into thinking the deal that they just negotiated on the vehicle is no longer valid by signing the disclosure.

Additionally, separating the purchase of voluntary protection products not only puts consumers in a difficult position in terms of financing the price of such products as part of the overall transaction as noted previously, but adds to the time associated for the transaction. The Commission notes the length of time consumers spend during vehicle purchase transactions and how it extends to consumers needing to take off time from work to conduct such transaction. By separating the purchase of voluntary protection products to another point in time, this would require the consumer taking additional time (and potentially additional time off work) in a separate instance which is in direct contradiction to the goals of the Proposed Rule. The Associations respectfully request such undue interruption in the purchase process not be included as the consequences far outweigh any benefits.

Finally, most state laws governing VSCs and GAP waivers require a free look period in which the consumer can cancel the agreement within a prescribed amount of time from the purchase date and receive a full refund. Many state laws therefore already contemplate the potential that a consumer may have second thoughts following their purchase and provide consumers the ability to change their mind without penalty. Thus, any federal rule requiring such would be duplicative and potentially conflicting with state law.

e. Does any portion of the proposed Rule duplicate, overlap, or conflict with any federal, state, or local laws or regulations?

Associations comment: The Proposed Rule would overlap, duplicate, and conflict with several federal and state laws. Each Association maintains a Model Act which guides legislative efforts when the industry seeks to codify regulation in a given state. In states where the Model Act is adopted or substantially adopted, a host of regulations govern providers. Many of these states require that providers obtain a license from a state regulator, demonstrate financial responsibility to back the obligations of the voluntary protection products, and require certain contractual disclosures and cancellation policies. Of note, the National Association of Insurance Commissioners Service Contract Model Act, GAPA Model Act and the SCIC Model Act ("Acts") all

provide free look periods to consumers which affords consumers the ability to cancel within a specified time period based on the time of delivery of the contract. This is also known within the industry as a "cooling off period." If consumers cancel within the predetermined amount of time and if they did not file any claims, then they receive a full refund of the product price. Therefore, the Model Acts and state laws governing voluntary protection products currently take into consideration the interests of a consumer who is perhaps having second thoughts on their purchase or deciding that the coverage was not needed. Beyond the free look period, the NAIC and SCIC Model Acts require that the products remain cancellable for a pro rata refund less claims paid and in some states, less an administrative fee to process the cancellation.

On the topic of federal laws currently in effect that provide overlapping regulation to the Proposed Rule, please consider the following:

- *Truth in Lending Act (Regulation Z) that already requires certain disclosures be made in a clear and conspicuous manner during the finance process. Dealers must already ensure that consumers are presented with clear written information about the terms of the finance agreement to comply with this regulation.*
- *The Gramm-Leach-Bliley Act has two rules, the Privacy Rule and the Safeguards Rule, which require dealers protect the privacy of consumers' information.*
- *The FTC's own Used Car Rule requires used car dealers to disclose certain information to consumers and prohibits unfair or deceptive practices, including posting a Buyer's Guide before offering a used vehicle for sale.*
- *Dealers are considered lenders, and therefore must comply with the Equal Credit Opportunity Act ("ECOA"). Under the ECOA, dealers cannot discriminate based on factors like race, color, religion, national origin, sex, marital status, or age when extending credit.*
- *The FTC's Bureau of Consumer Protection takes an active role in stopping unfair, deceptive and fraudulent practices currently by actively investigating companies, bringing lawsuits against those companies that break the law, and developing rules.*
- *Finally, the authorizing statute of the FTC, the Federal Trade Commission Act, is another manner in which the Commission is already regulating unfair or deceptive acts or practices affecting commerce.*

VI. CONCLUSION

Again, the Associations appreciate the opportunity afforded by the Commission to comment on the Proposal Rule. Although a longer comment period would have no doubt provided the Associations and others more time to aggregate data that would support positions contrary to the Commission's we observed two key areas that should cause great concern for continuing this effort altogether:

- The lack of statistically valid data to demonstrate the need for such a Proposed Rule; and

- The unnecessary duplication of an existing federal, state, and local regulatory framework already effectively and thoroughly governing these consumer transactions.

Despite these significant issues and the limited time constraint provided to commenters, should the Commission continue this initiative, we hope the Commission will take into consideration the Associations' feedback and reach out to industry and in particular those dealers who will be so greatly impacted. Dealers are already spending time and money to comply with the FTC's new Safeguards Rules which will become effective this December 9. We hope that the Commission better understands the value of voluntary protection products and the need to continue to make them available to consumers at the point of vehicle purchase.

We stand ready to assist should the Commission desire to discuss this Proposed Rule.

Respectfully submitted,

Tom Keepers

Executive Director

Guaranteed Asset Protection Alliance
Motor Vehicle Protection Products Association
Service Contract Industry Council