24-60013

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

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NATIONAL AUTOMOBILE DEALERS ASSOCIATION and TEXAS AUTOMOBILE DEALERS ASSOCIATION,

Petitioners,

vs.

FEDERAL TRADE COMMISSION,

Respondent.

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On Petition for Review of a Final Trade Regulation Rule
of the Federal Trade Commission

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**BRIEF OF THE AMERICAN FINANCIAL SERVICES ASSOCIATION AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS**

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# CERTIFICATE OF INTERESTED PERSONS

1. No. 24-60013, *Nat'l Automobile Dealers Ass'n v. FTC*

2. The undersigned counsel of record certifies that the following persons and entities as described in the fourth sentence of Fifth Circuit Rule 28.2.1 have an interest in the outcome of this case. These representations are made in order that the judges of this Court may evaluate possible disqualification or recusal:

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[1] AFSA has no parent corporation, and no corporation owns 10% or more of its stock.

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## INTEREST OF AMICUS *CURIAE*

American Financial Services Association ("AFSA") supports Petitioners' challenge to the "Combating Auto Retail Scams Trade Regulation Rule" ("CARS") final rule of the Federal Trade Commission ("FTC") in Matter Number P204800, RIN 3084-AB72. Published in the Federal Register on January 4, 2024, the Rule regulates the advertising, sales, and financing of vehicles by auto dealers.

AFSA supports Petitioners' challenge to the Rule. Pursuant to another of FTC's rules, the Holder Rule, financial institutions[2] (including AFSA members) that purchase retail installment contracts from dealers may be held liable for dealers' noncompliance with the Rule. The FTC was required under the Administrative Procedure Act ("APA") to consider the costs imposed by the Rule on financial institutions as a result of potential Holder Rule liability. However, it did not do so. The Rule is therefore arbitrary and capricious and must be vacated.

### 1. Identity of *Amicus Curiae* and Its Interest in the Case

Founded in 1916, AFSA is the national trade association for the consumer credit industry and is committed to protecting access to credit and consumer choice. AFSA members provide consumers with many kinds of credit, including traditional installment loans, mortgages, direct and indirect vehicle financing,

[2] "Financial institution" is used herein to encompass both depository financial institutions and non-depository finance companies in the business of indirect financing.

payment cards, and retail sales finance. AFSA members and the credit products they offer are regulated under various state and federal statutory and regulatory schemes. AFSA members support reasonable regulation that protects consumers and allows markets to function, and they strive to ensure compliance with the various statutes and rules that apply to them.

As relevant here, AFSA represents the interests of financial institutions that, as acknowledged in the FTC's rulemaking analysis, finance approximately 70% of vehicle purchases nationwide by purchasing dealer-originated retail installment contracts (also known as indirect financing). The Rule will result in undue burdens and costs to financial institutions (and, ultimately, to consumers) as a result of increased regulation of auto sales transactions that financial institutions do not—and cannot—control. AFSA thus has a strong interest in ensuring that the Rule—which is arbitrary and capricious—is not enforced.

**2. Authority to File *Amicus Curiae* Brief; Author and Funding of Brief**

This brief is being submitted pursuant to Fed. R. App. P. 29 and Local Rule 29. All parties have consented to AFSA's filing an *amicus curiae* brief.

No counsel for any party authored any part of this brief and no person other than this *amicus curiae*, its members, or its counsel, made any monetary contribution to fund the preparation or submission of this brief.

## THE CARS RULE

1. The CARS Rule (the "Rule") creates an assortment of new requirements and prohibitions regarding misrepresentations, mandated disclosures, add-on product charges, and recordkeeping for dealers. *See* 16 C.F.R. Part 463. Violation of these new provisions is deemed "an unfair or deceptive act or practice" under the FTC Act § 5 (15 U.S.C. § 45(a)(1)). 16 C.F.R. § 463.1.

2. Under the Rule, dealers may not make any misrepresentation, "expressly or by implication, regarding Material information" for 16 specific categories. *Id.*, § 463.3. "Material" is defined as anything that is "likely to affect a person's choice of, or conduct regarding, goods or services." *Id.*, § 463.2(j). These prohibited misrepresentations range from the "costs or terms of purchasing, financing, or leasing," the nature of the transaction, information relating to a consumer's financing application, to "costs, limitation[s], benefit[s], or any other aspect of an Add-on Product or Service" and the "availability of any rebates or discounts that are factored into the advertised price but not available to all consumers." *Id.*, § 463.3(a), (b), (c), (d), and (g).

3. The Rule also prohibits misrepresentations in advertisements, such as statements about the "availability of Vehicles at an advertised price," "[w]hether consumer reviews or ratings are unbiased, independent, or ordinary consumer reviews or ratings of the Dealer or the Dealer's products or services[,]" and

whether the dealer is "affiliated with, endorsed or approved by, or otherwise associated" with the government. *Id.*, § 463.3(e), (k), (l). It also regulates representations about the use of the vehicle, including the vehicle's permitted location and whether a vehicle may be repossessed. *Id.*, § 463.3(n), (o).

4. The Rule also mandates that dealers make certain disclosures "Clearly and Conspicuously." *Id.*, § 463.4. "Clear[ly] and Conspicuous[ly]" means "in a manner that is difficult to miss (*i.e.*, easily noticeable) and easily understandable," and offers a list of specific methods based on the communication medium (*e.g.*, audio, visual, both). *Id.*, § 463.2(d). Dealers must "Clearly and Conspicuously" disclose: (1) the Offering Price, (2) that "Add-ons" are not required, (3) the "[t]otal of payments and consideration for a financed or lease transaction," and (4) that a "lower monthly payment will increase the total amount the consumer will pay to purchase or lease the Vehicle, if true." *Id.*, § 463.4(a), (c), (d), and (e). These disclosure requirements are triggered when a dealer makes a particular representation "expressly or by implication, directly or indirectly" relating to the required disclosure. *Id.*, § 463.5(a)(1), (2).

5. The Rule also prohibits dealers from charging for "Add-ons that provide no benefit." *Id.*, § 463.5(a). "Add-ons" mean "any product(s) or service(s) not provided to the consumer or installed on the Vehicle by the Vehicle manufacturer and for which the Dealer, directly or indirectly, charges a consumer

in connection with a Vehicle sale, lease, or financing transaction." *Id.*, § 463.2(a). However, "benefit" is not defined. Instead, the Rule provides a few examples of "Add-ons that provide no benefit": (1) "Nitrogen-filled tire-related products or services that contain no more nitrogen than naturally exists in the air" and (2) "Products or services that do not provide coverage for the Vehicle, the consumer, or the transaction or that 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." *Id.*, § 463.5(a)(1), (2).

6. To charge for "any item," the Rule requires that the dealer must obtain the consumer's "Express, Informed Consent[.]" *Id.*, § 463.5(c). "'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," that conveys that the consumer understands both "[w]hat the charge is for" and "[t]he amount of the charge," including any fees and costs over the repayment period. *Id.*, § 463.2(g)(1), (2). The Rule states that "signed or initialed document[s]" by themselves and "[p]rechecked boxes" are insufficient to demonstrate consent. *Id.*, § 463.2(g)(2)(i), (ii).

7. Finally, the Rule institutes specific recordkeeping requirements. *Id.*, § 463.6. Dealers generally must keep for two years copies of advertisements; sales scripts; training materials; marketing materials; purchase orders; financing and lease documents; written communications related to sales, financing, or leasing between the dealer and vehicle purchasers; service contracts; GAP Agreements and loan-to-value calculations in contracts including GAP Agreements; written consumer complaints relating to sales, financing, or leasing; inquiries related to Add-ons; and inquiries and responses about specific vehicles. *Id.*, § 463.6(a).

## **ARGUMENT**

The FTC failed to consider the substantial costs of the Rule on the auto finance industry, an industry inextricably intertwined with the sale of vehicles by dealers. These costs incurred by financial institutions will, in turn, be passed on to and borne by consumers. The FTC's failure to consider these costs makes the Rule arbitrary and capricious and, therefore, the Court must vacate the Rule.

The Rule reflects substantial FTC overreach that will impact the life cycle of an auto finance transaction—which is intertwined with the business of financial institutions' purchasing dealer-originated paper, or indirect retail installment contracts. Indirect financing is a three-party process, involving two separate, but related, transactions.

First, a consumer and a dealer negotiate and agree on the vehicle's price and enter into an agreement for the vehicle purchase. The consumer and dealer execute a retail installment contract that finances the purchase price and any voluntary protection products. The dealer is the original creditor and negotiates the financing terms with the consumer.

Second, the dealer communicates with one or more financial institutions to determine which one will purchase the completed retail installment contract. The financial institution that purchases the retail installment contract takes an assignment of the contract and commences servicing the contract until it is paid in full.[3]

Importantly, in the indirect financing model, the financial institution purchasing the retail installment contract is not present or involved when the dealer and consumer are negotiating the vehicle purchase or the terms of financing. Nor does the financial institution, as an entity distinct from the dealer, have control or right of control over the dealer during the sales and financing process. The Rule seeks to regulate the interactions between the dealer and consumer by imposing

[3] For further detail on indirect vehicle financing, see AFSA, Comment Letter on Proposed Rule on Small Business Lending Data Collection Under the ECOA, Docket No. CFPB-2021-0015 (Jan. 6, 2022), available at https://www.regulations.gov/comment/CFPB-2021-0015-1462.

burdensome requirements on dealers (including requirements that may be impossible for even dealers to determine have been satisfied).

While the obligations of the Rule are imposed on dealers, and financial institutions are not involved or even present during the vehicle sale, the FTC failed to deal with the real-world negative consequences of the Rule upon the auto finance industry. Specifically, the FTC failed to contend with valid concerns about the negative impact of the Rule and its extension to financial institutions via the Holder Rule. The Holder Rule allows consumers to assert claims or defenses based on the dealer's conduct against the financial institution. In its rulemaking, the FTC recognizes the large part that indirect financing plays in the auto sales ecosystem, and that financial institutions will, in turn, have obligations arising from the Rule.[4] However, the FTC refused to carve out financial-institution liability under the Holder Rule. It did not adequately evaluate the Rule's costs because it failed to consider the costs on financial institutions. Under the APA, the failure to consider these costs makes the Rule arbitrary and capricious.

The FTC received comments expressing concerns about the Rule's harmful impact: financial institutions, which may be faced with claimed liability under the Rule by virtue of the Holder Rule, will be unable to confirm a dealer's compliance with the Rule within the four corners of the retail installment contract. The FTC

[4] *See* CARS Rule, 89 Fed. Reg. 590, 592-93, 613, 654 (Jan. 4, 2024).

rejected these concerns, refusing to limit financial-institution liability under the Holder Rule to violations apparent on the face of the contract. Because the FTC declined to adopt such a carve out, financial institutions face significant compliance costs if they aim to limit potential Holder Rule liability for dealer violations of the Rule.

Many financial institutions have robust dealer oversight programs. Even with these programs and expanding them in light of the Rule, financial institutions face a nearly impossible challenge under the Rule. Whether a dealer has complied with the Rule with respect to any single transaction will likely ultimately boil down to a "he-said, she-said" factual question. Determining compliance would be a fact and transaction heavy inquiry and, ultimately, only the two parties—the dealer and consumer—would have knowledge about what was said or represented during the vehicle's sale and financing. Even with such knowledge, it could be difficult to confirm compliance since the Rule prohibits misrepresentations by "implication," suggesting an impossible standard for determining whether there was in fact a misrepresentation. An aggressive, consumer-friendly regulator like the Consumer Financial Protection Bureau ("CFPB") may err on the side of a consumer's allegations (as has often been the experience of those subject to the CFPB's authority) and hold the financial institution liable using either its supervisory or enforcement authority.

The Rule will inevitably increase court litigation against dealers and, in turn, financial institutions, which will impose substantial costs and consume scarce resources to defend claims. While a factfinder may determine that a dealer engaged in no misconduct, or if it did, that the financial institution is not liable, it will cost the financial institution time and resources to defend the claim. Multiplied by the millions of transactions that occur each year, the threatened drain on financial institutions, and ultimately, consumers, is overwhelming. These are the kinds of costs that the FTC should have considered but did not.

Most critically, the costs of compliance, enforcement, and litigation borne by financial institutions under the Rule will ultimately harm the consumer by increasing the cost of credit and reducing the availability of credit. In pricing credit offered to consumers, financial institutions undertake a calculation of costs, including compliance, litigation, and enforcement costs. The greater these costs, the higher the cost of credit and/or the more likely a financial institution will extend financing to only the more creditworthy consumers. Moreover, a financial institution may restructure its business relationship with its dealers or decide to forgo some dealership relationships altogether, resulting in fewer dealers or fewer dealers offering financing, resulting in less consumer choice and, potentially, consumer harm.

As part of its rulemaking, the FTC conducted a cost-benefit analysis to justify the Rule. But that analysis is fatally flawed: it ignores entirely the costs to financial institutions and thus, indirectly, the costs to consumers. Therefore, the Rule is arbitrary and capricious under the APA and must be vacated.

## I. The Rule is Arbitrary and Capricious Because the FTC Failed to Consider the Rule's Costs to Financial institutions, Costs Ultimately Borne by Consumers.

Under the APA, reviewing courts must "hold unlawful and set aside" agency actions that are "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law[.]" 5 U.S.C. § 706(2)(A). The reviewing court must ensure that an agency "examine[d] the relevant data and articulate[d] a satisfactory explanation for its action including a 'rational connection between the facts found and the choice made.'" *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) (citation omitted). Review under the arbitrary-and-capricious standard "is 'not toothless'"; instead "it has serious bite." *Wages and White Lion Investments, L.L.C. v. FDA*, 16 F.4th 1130, 1136 (5th Cir. 2021) (citation omitted).

"[A] regulation is arbitrary and capricious if the agency failed to consider an important aspect of the problem," which "includes, of course, considering the costs and benefits associated with the regulation." *Chamber of Commerce v. SEC*, 85 F.4th 760, 777 (5th Cir. 2023) (quotation omitted).) "[S]erious flaw[s]" in the cost-benefit analysis "render the resulting rule unreasonable and warrant vacatur on arbitrary and capricious grounds." *Window Covering Mfrs. Ass'n v. CPSC*, 82 F.4th 1273, 1288 (D.C. Cir. 2023).

Petitioners identify significant flaws in the FTC's analysis of the costs imposed by the Rule. For example, the FTC failed to acknowledge that costs "would likely be passed through to consumers, exerting upward pressure on automobile prices." Petitioners' Opening Brief ["Pet-Brf."] at 44. And they identify failings with the FTC's assumptions regarding the number of times a particular cost would be imposed. *Id.*, at 45-47. The flaws in the FTC's analysis are then further magnified by its failure to consider the costs imposed on financial institutions by virtue of their role in the auto finance marketplace.

Although the FTC acknowledged the instrumental role of financial institutions in the motor vehicle marketplace, it failed to consider the costs imposed on financial institutions—and, consequently, the costs that will be borne by consumers—because of the Rule. Because the FTC "duck[ed] serious evaluation of the costs that could be imposed upon companies from use of the rule[,]" the FTC's actions were arbitrary and capricious. *See Bus. Roundtable v. SEC*, 647 F.3d 1144, 1152 (D.C. Cir. 2011).

In the Rule, the FTC discussed how consumers finance vehicle purchases and the financing entities involved. 89 Fed. Reg. 590, 592. It recognized that 81%

of new motor vehicle purchases and nearly 35% of used vehicle purchases are financed, and about 70% of consumers finance through dealer-provided "indirect" financing. *Id.*, at 592-93 (citations omitted). In indirect financing, "the dealer collects financial information about the consumer and forwards that information to prospective motor vehicle financing entities[,]" which in turn "determine whether, and on what terms, to provide credit." *Id.*, at 593 (citations omitted). The FTC thus recognized that the indirect financing entities play a significant role in the majority of vehicle purchases.

The FTC also recognized that financial institutions will have to take steps to ensure dealer compliance, including potentially "altering or withdrawing its business from the dealership" if the financial institution is "concerned" the dealer may violate the Rule. *Id.*, at 654. Likewise, the FTC acknowledged that law enforcement partners such as the CFPB have taken action against financial institutions "in matters that raise similar, and sometimes identical, claims of deceptive and unfair acts or practices as have been at issue in FTC enforcement actions." *Id.*, at 599.

But despite the apparent recognition of the impact on financial institutions, the FTC's cost-benefit analysis was bereft of any consideration of financial institutions'—and consequently, consumers'—increased costs associated with ensuring such compliance and rearranging their business practices. The FTC's proffered cost-benefit analysis of the Rule focused solely on the dealer's increased costs, such as dealer labor costs associated with preventing prohibited misrepresentations and charges, dealer costs in complying with pricing and financing disclosure requirements, and dealer recordkeeping costs. *Id.*, at 681-88. However, the FTC's cost-benefit analysis does not consider the costs to the rest of the vehicle sales ecosystem: the costs borne by financial institutions and, ultimately, by consumers.

Thus, the Court should vacate the Rule.

## II. Costs That the FTC Failed to Consider—Increased Compliance, Litigation, and Enforcement Costs—are Significant and Material.

The FTC neglected to consider the significant compliance, litigation, and enforcement costs imposed on financial institutions by the Rule, which will ultimately be borne by consumers. By virtue of the Holder Rule, financial institutions may face liability for the dealer's alleged violations, through CFPB enforcement or actions by private litigants or state attorneys general. To limit these potential liabilities, financial institutions will have to undertake additional compliance efforts or suffer risk of greater liability. And, even then, a financial institution may still be unable to avoid liability given that compliance cannot be determined within the four corners of the retail installment contract. These compliance efforts come at a cost, which may lead to higher financing costs for consumers and, potentially, the inability of certain consumers to obtain financing.

Thus, the FTC failed to consider a critical aspect of the problem—the costs to financial institutions and, by extension, to consumers. This failure renders the Rule arbitrary and capricious.

### A. The Holder Rule May be Used to Hold Financial Institutions Improperly Accountable for Alleged Dealer Violations of the Rule.

In 1975, the FTC promulgated the Holder Rule, officially titled "Preservation of Consumers' Claims and Defenses" (also known as the Holder in Due Course Rule or the Holder Rule). The Holder Rule, 16 C.F.R. Part 433, preserves consumers' rights to assert the same legal claims and defenses against the purchaser of their credit contract as they could assert against the original seller.

As part of the Holder Rule, consumer credit contracts originated using the indirect financing model must include the following clause:

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

16 C.F.R. § 433.2. FTC guidelines provide that the Holder Rule "appl[ies] to all claims or defenses connected with the transaction, whether in tort or contract." Guidelines on Trade Regulation Rule Concerning Preservation of Consumers' Claims and Defenses, 41 Fed. Reg. 20022, 20024 (May 14, 1976).

Consumers sometimes use the Holder Rule as a mechanism to try to hold a financial institution liable for alleged dealer misconduct. Although the Holder Rule itself does not provide a private right of action, plaintiffs use the Holder Rule as a vehicle to pursue state-law claims against financial institutions for dealer conduct. For example, consumers have sued financial institutions under the Holder Rule for issues regarding the vehicle's condition. *Hernandez v. Apple Auto Wholesalers of Waterbury LLC*, No. 3:17-CV-1857 (VAB), 2022 WL 4593104, at *2, *13 (D. Conn. Sept. 30, 2022). Financial institutions have faced liability for the dealer's failure to pay the trade-in price the dealer contracted to pay. *In re Beal*, No. 19-50053-RLJ13, 2019 WL 5057942, at *2 (Bankr. N.D. Tex. Oct. 8, 2019).

In *Pyskaty v. Wide World of Cars, LLC*, a court denied summary judgment to the financial institution on the consumer's UCC warranty claims and common-law fraud related to the vehicle's condition. *See* No. 15 CIV. 1600 (JCM), 2019 WL 917153, at *12-*13 (S.D.N.Y. Feb. 25, 2019). Similarly, in *Harold v. TMC Enterprises, LLC*, a court held that the consumer stated a claim against the financial institution for violations of state consumer statutes, federal law, and common-law fraud based upon alleged misrepresentations made by the dealer. *See* No. 6:16-CV-00025, 2016 WL 6069023, at *3-*7 (W.D. Va. Oct. 17, 2016).

This is merely a small sampling of the types of cases that a consumer may bring. There are undoubtedly many more Holder Rule claims against financial institutions, as many never make it to court because they settle quickly or proceed to private arbitration.

Of course, financial institutions reasonably dispute asserted liability under state law in affirmative actions via the Holder Rule. For example, in *LaBarre v. Credit Acceptance Corp.*, 175 F.3d 640 (8th Cir. 1999), the court held that state law should be used to determine what claims can be brought under the Holder Rule against assignees and related financial institutions. *Id.*, at 644. The court held that state law permitted seller-related claims only as a *defense*, not as an affirmative claim and therefore affirmed the dismissal of the consumer's affirmative state-law claims against the dealer's assignee. *Id. See also Pescia v. Auburn Ford-Lincoln Mercury*, 68 F. Supp. 2d 1269 (M.D. Ala. 1999) (construing FTC Holder Notice to nullify holder-in-due-course status, but holding that there still must be independent state grounds for holder's liability), *aff'd without op. sub nom*. *Pescia v. Ford Motor Credit Corp.*, 16 F.4th 1130 (11th Cir. 2001).

The mere existence of potential claims under the Holder Rule, and the increased possibility of claims engendered by the Rule, causes significant costs for financial institutions. Defending against state-law claims made under the Holder Rule is costly, even if the financial institution ultimately prevails.

And potential exposure and damages threatened by Holder Rule litigation is increasing for financial institutions. The Holder Rule limits the consumer's recovery to the amounts paid under the contract. 16 C.F.R. § 433.2. However, this circumscribed potential exposure has improperly been expanded under recent FTC opinions and court decisions. A 2022 FTC advisory opinion declares that "the Holder Rule does not prevent state law from providing costs or attorneys' fees against loan holders."[5] Likewise, the California Supreme Court recently held that the Holder Rule does not limit the amount of attorneys' fees that a consumer can recover under state fee-shifting statutes for claims arising from dealer conduct against the financial institution holding their retail installment contracts. *Pulliam v. HNL Auto. Inc.*, 293 Cal. Rptr. 3d 649, 666 (Cal. 2022). When consumer lawyers stand to gain fees in a fee-shifting case, the prospect of fee recoveries drives the filing of inconsequential claims and substantially increases the cost and risks of litigation.

Despite commenters' requests, the FTC refused to carve out liability under the Holder Rule for financial institutions. *See* 89 Fed. Reg., at 613. Commenters requested the FTC to limit the liability of financial institutions under the Holder

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[5] *FTC Issues Advisory Opinion on the Holder Rule and Attorneys' Fees and Costs*, FTC (Jan. 20, 2022), available at https://www.ftc.gov/news-events/news/press-releases/2022/01/ftc-issues-advisory-opinion-holder-rule-attorneys-fees-costs

Rule to claims that are apparent on the face of the contract. *Cf.* 15 U.S.C. § 1641(a) (limiting liability of a financial institution assignee under TILA to disclosure violations apparent on the face of document). As noted, a dealer could unintentionally violate the Rule in different ways, including the requirement to obtain "Express, Informed Consent" from consumers for any item charged to the consumer, including add-on (voluntary) products. The Rule only defines what does *not* meet the "Express, Informed Consent" standard: a signed document by itself does not constitute such consent. Therefore, it is impossible for a financial institution to determine whether the dealer's disclosures were sufficient and the dealer properly obtained consent under the Rule.

Thus, financial institutions are likely to face claims asserting liability based on alleged dealers' violations of the Rule via the Holder Rule. Although they could argue against such liability, financial institutions cannot assume their arguments will prevail.

Accordingly, as a consequence of the Holder Rule and the fundamental structure of the industry, the Rule expands regulatory requirements upon and potential liability of a financial institution arising from a dealer's noncompliance with the Rule.

### B. Financial Institutions Will be Unable to Confirm Dealer Compliance With the Rule Based Upon the Retail Installment Contract Alone.

Under the Rule, dealers—and by virtue of the Holder Rule, financial institutions—may be held liable for a variety of alleged misconduct. The type of prohibited misconduct includes oral or written statements and representations made during a vehicle's sale and financing.

For example, the Rule requires dealers to disclose the "Offering Price"—a newly defined term creating a new category of required disclosures over and above the panoply of existing required disclosures under federal and state laws. The "Offering Price" must be disclosed to the customer in any advertisements and certain communications that reference a specific vehicle. 16 C.F.R. § 463.4(a). The Rule defines "Offering Price" as the full cash price for which a dealer will sell or finance the vehicle to any consumer, excluding government charges. While the financial institution may be able to deduce from the face of the retail installment contract that disclosures required by the Truth-in-Lending Act or state law are satisfied, the financial institution has no way of knowing whether the dealer's advertisements and communications with the consumer properly disclosed the "Offering Price."

The Rule similarly declares that assorted misrepresentations that a dealer could make to a consumer—expressly or by implication—are per se "unfair or deceptive act[s] or practice[s]" that give rise to liability under the FTC Act, including misrepresentations about costs and financing, the availability of certain vehicles or rebates, the independence of consumer reviews of the dealer, and the potential for repossessions. 16 C.F.R. § 463.3. Many of these misrepresentations will be oral (and even if written, they may not be included within documentation sent to the financial institution), leaving financial institutions unable to determine dealer compliance but potentially liable for noncompliance. And, as the FTC notes, buying a vehicle takes time and typically involves back-and-forth oral conversations between a dealer and consumer. In imposing broad disclosure requirements such as identifying the "Offering Price," the Rule generates a greater risk of error and potential liability. And, as Petitioners note, these costs are significant, given the number of times dealers will have to provide the disclosure. *See* Pet-Brf. at 45-46.

As noted, dealers are also tasked under the Rule with obtaining "Express, Informed Consent" from consumers for any item that is charged to the consumer, including add-on (voluntary) products. 16 C.F.R. § 463.5. This consent requires an "affirmative act" by the consumer "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[.]" *Id.*, § 463.2(g). The Truth-in-Lending Act already requires disclosure of charges that are imposed, including voluntary products, in a financed transaction. The Rule adds unnecessary additional disclosures and paperwork, thus increasing the time and cost involved in the transaction.

And, as described above, the Rule's requirements for obtaining consent are decidedly unclear. "A signed or initialed document, by itself" "does not constitute Express, Informed Consent[.]" *Id.*, § 463.2(g)(2)(i). Thus, financial institutions, which are not present during these transactions, cannot confirm whether a dealer is obtaining this unduly vague and undefined consent for items that a consumer purchases and is charged for. This puts financial institutions in an untenable situation.

The Express, Informed Consent requirement substantially modifies the current way of doing business and will require perhaps impossible revisions to the standard course of business for auto financing.

The Rule also makes it a violation for dealers to charge for "[a]dd-ons that provide no benefit." *Id.*, § 463.5(a). The FTC does not define "benefit." Instead, it merely lists two examples of items that provide no benefit, including "[n]itrogen-filled tire-related products or services that contain no more nitrogen than naturally exists in the air" and "[p]roducts or services that do not provide coverage for the Vehicle, the consumer, or the transaction or that are duplicative of warranty coverage for the Vehicle[.]" *Id.*, § 463.5(a)(1), (2). The inquiry will not be whether the product generally provides a benefit, but whether the specific product provides a benefit to the consumer purchasing it. Although a voluntary product may generally provide a benefit, for various reasons that the financial institution may not know, the specific product may not be of value to that consumer.

This sort of subjective, fact-intensive inquiry of whether a voluntary product provides a benefit will turn on the particular circumstances of each consumer and product—facts that a financial institution will be unable to determine from the face of the retail installment contract—but for which it, again, may ultimately be liable.

### C. Financial Institutions Would Incur Costs Attempting to Ensure Dealer Compliance With the Rule.

The Rule jeopardizes financial institutions' ability to rely on the contents of the retail installment contract and a consumer's signature—upending a longstanding, time-honored policy of contracting. They may no longer assume that a consumer's signature indicates that a consumer consented to a particular charge. They cannot presume that a voluntary product provides a benefit to the consumer simply because the consumer chose to purchase it. And they are in the dark as to any alleged representations the dealer may have made, unprotected by written representations by a customer that could otherwise disprove such misconduct.

As a result, financial institutions will have to take additional steps to try to limit potential liability for any purported dealer misconduct. For example, this may include revising dealer agreements to obligate dealers to provide additional documents or other information. As noted, financial institutions and dealers are distinct entities. They contract with each other to establish a relationship in which a financial institution will purchase retail installment contracts from time to time. There are 47,271 dealerships across the country. 89 Fed. Reg. at 661. Negotiating and amending each and every dealer agreement will require significant resources. And, ultimately, a financial institution may decide to reduce the number of dealership partners to reduce this burden or to reduce oversight responsibilities. Dealers in turn would have fewer financing options to tap for consumers, as financial institutions shrink the dealership partners with which they do business. Fewer financing options at a dealer will hurt competition and increase the cost of credit to consumers or reduce the availability of credit.

When financial institutions purchase retail installment contracts and "onboard" the consumer, they often initiate communication with the consumer allowing the financial institution to establish a line of communication and confirm certain terms of the agreement, including the purchase of voluntary products. The Rule will require financial institutions to update their onboarding training and policies and procedures to train their customer service representatives how to potentially discern noncompliance with the Rule by a dealer. Even then, however, a financial institution may not sufficiently limit its exposure to claims and potential liability under the Rule.

Financial institutions may also have to consider whether to expand oversight to dealer advertisements. This would be no small undertaking—if even possible—given the dynamic nature of vehicle marketing and the fact that financial institutions have no control, or right of control, over a dealer.

Ultimately, any financial institution wishing to limit Holder Rule liability must expend considerable resources to attempt to ensure dealer compliance with the Rule's extensive requirements, resulting in costs imposed on consumers and consumer harm. The FTC, however, ignored these costs entirely. Thus, its analysis is intrinsically flawed under the APA's standards, and the Rule must be set aside.

### D. Financial Institutions Would be Forced to Defend Against Litigation Arising Under State UDAP/UDAAP Statutes on the Basis of the Rule.

Violations of the Rule are deemed unfair or deceptive acts or practices under FTC Act § 5. 16 C.F.R. § 463.1. Various state laws permit private litigants and state attorneys general to sue an entity for an alleged violation of FTC § 5. These laws thus generate additional litigation and enforcement against financial institutions based on a dealer's violation of the Rule.

At present, every state has enacted a statute that prohibits at least some categories of unfair or deceptive practices (known as "UDAP," unfair or deceptive acts or practices, or "UDAAP," unfair, deceptive, and abusive acts and practices).[6] *See, e.g.*, Cox, *Strategies of Public UDAP Enforcement*, 55 Harv. J. on Legis. 37, 42-43 (2018); Silverman, *State Attorney General Enforcement of Unfair or Deceptive Acts and Practices Laws: Emerging Concerns and Solutions*, 65 U. Kan. L. Rev. 209, 211-12 (2016). States give state agencies (often the state attorney general) and individual consumers the authority to enforce these provisions. Cox, *supra*, at 43; Silverman, *supra*, at 214. Many of these state statutes either expressly incorporate FTC § 5 or consider it persuasive.[7]

The ability of states and private litigants to potentially use state law to asserts claims under FTC § 5 thus may make any violation of the Rule also actionable under state law. Accordingly, the Rule significantly increases the potential for litigation.

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6 The CFPB has identified a number of UDAP/UDAAP laws of general applicability that allow state or local agencies to bring actions against practices that allegedly injure consumers, many of which also authorize private suits by consumers and other persons. *See* Registry of Nonbank Covered Persons Subject to Certain Agency and Court Orders [Proposed Rule], 88 Fed. Reg. 6088, 6107 & Appendix A to Part 1092 – List of State Covered Laws (Jan. 30, 2023).

7 *See, e.g.*, Mont. Code Ann. § 30-14-104(1); N.H. Rev. Stat. Ann. § 358-A:13; Ohio Rev. Code Ann. § 1345.02; 6 R.I. Gen. Laws Ann. § 6-13.1-3; S.C. Code Ann. § 39-5-20(b); Tenn. Code Ann. § 47-18-115; Tex. Bus. & Com. Code Ann. §§ 17.46, 17.49; Vt. Stat. Ann. tit. 9, § 2453; W. Va. Code Ann. § 46A-6-101. *See also Commonwealth by Creamer v. Monumental Props., Inc.*, 329 A.2d 812 (Pa. 1974) (considering decisions under FTC Act for guidance in interpreting state consumer protection statute).

### E. The CFPB Would Likely Supervise Financial Institutions to Ensure They are Undertaking Efforts to Confirm Dealer Compliance and Undertake Enforcement Efforts.

The CFPB enforces the Holder Rule, among other rules it inherited from predecessor agencies. *See* 76 Fed. Reg. 43569, 43571 (July 21, 2011).[8] Given its current enforcement posture, the CFPB will undoubtedly assert that its Holder Rule authority enables it to hold financial institutions accountable for purported dealer misconduct under the Rule. Indeed, the FTC points to CFPB enforcement actions "in matters that raise similar, and sometimes identical, claims of deceptive and unfair acts or practices as have been at issue in FTC enforcement actions." 89 Fed. Reg. at 599 n.91 (detailing the CFPB's "23 enforcement actions involving motor vehicles, financing, or add-on products or services").

Further, the CFPB's auto finance examination procedures already require examiners to obtain and review "[d]ealer agreements, due diligence and monitoring procedures, and origination (lending or leasing) procedures."[9] CFPB examinations require supervised entities to expend considerable resources. Undoubtedly, the CFPB would examine financial institutions to ensure that their dealer agreements, due diligence and monitoring procedures, and origination procedures are regularly updated for compliance with the Rule.

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8 Available at https://www.gpo.gov/fdsys/pkg/FR-2011-07-21/pdf/2011-18426.pdf.

9 *Automobile Finance Examination Procedures*, CFPB, at 8 (updated Aug. 28, 2019), available at https://files.consumerfinance.gov/f/documents/201908_cfpb_automobile-finance-examination-procedures.pdf

The CFPB also recently proposed a rule that would require nonbank lenders (including auto finance companies) subject to certain federal and state enforcement orders to register such orders to be published in a public-facing registry.[10] This would include orders based on state law analogs to FTC § 5. In the proposed registry rulemaking, the CFPB notes that state laws regarding unfair, deceptive, and/or abusive acts and practices "are generally modeled after—or otherwise prohibit conduct similar to that prohibited by—FTC Act section 5" and the Consumer Financial Protection Act's comparable UDAAP law. 88 Fed. Reg., at 6098. The CFPB further concludes that "violations of State UDAP/UDAAP law in connection with the provision or offering of a consumer financial product or service are similarly highly probative of a heightened risk that UDAAP violations subject to the Bureau's jurisdiction have occurred or are occurring." *Id.* Assuming the Rule is enforced against financial institutions at the state level on the basis of a state UDAP analog or other broad statutory misrepresentation claim, the financial institution would have to register that order with the CFPB. This would likely trigger follow-on CFPB supervision or enforcement activities against financial institutions registering orders, resulting in additional costs for financial institutions.

[10] 88 Fed. Reg. 6088, available at https://www.federalregister.gov/documents/2023/01/30/2022-27385/registry-of-nonbank-covered-persons-subject-to-certain-agency-and-court-orders.

### F. The Rule Increases Costs to Consumers and Reduces the Availability of Credit.

The FTC's analysis points to purported anticipated consumer benefits from the Rule. *E.g.*, 89 Fed. Reg., at 674-79, 681 (citing consumer time savings and greater price competition as potential benefits). But the FTC's analysis ignores that the Rule causes increased costs of compliance, enforcement, and litigation to financial institutions, failing to consider those substantial costs. It also fails to account for the negative impact of those costs upon consumers. Given these increased costs, the Rule will harm consumers by increasing the cost of credit and reducing the availability of credit.

Financial institutions must assess the total cost they incur in purchasing and servicing dealer paper and price their offers to consumers accordingly. Compliance and legal costs are substantial factors for pricing. So a financial institution must make up for increased costs by passing them along to the consumer or extending financing only to the more creditworthy consumers. Financial institutions may also decide to restructure their dealership relationships, or reduce the number of relationships they have, in a way that could negatively impact consumer choice and availability of credit at dealerships.

The FTC's failure to consider these consumer harms dooms its analysis.

## CONCLUSION

Because the FTC failed to consider the costs the Rule imposes on the auto finance industry, and, consequently, the costs that will ultimately be borne by consumers, the Rule is arbitrary and capricious and must be vacated.

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Respectfully Submitted,

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## CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(g), I certify the following:

This brief complies with the type-volume limitation of Federal Rules of Appellate Procedure 32(a)(7)(B) and 29(a)(5) because this brief contains 6,497 words, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(f).

This brief complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type-style requirements of Federal Rule of Appellate Procedure 32(a)(6), because this brief has been prepared in a proportionately spaced typeface using Microsoft Word in 14-point Times New Roman font.

Dated: March 22, 2024

s/ Lisa M. Lawless
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## CERTIFICATE OF SERVICE

I hereby certify that on March 22, 2024, the foregoing brief was served on all parties or their counsel of record through the Court's electronic filing system.

Dated: March 22, 2024.

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