

Comments to the Federal Trade Commission Regarding the Motor Vehicle Dealers Trade Regulation Rule

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Docket No. FTC-2022-0046-0001

On behalf of the Competitive Enterprise Institute (CEI), I respectfully submit the following comments in response to the Federal Trade Commission's (FTC) Notice of Proposed Rulemaking on its "Motor Vehicle Dealers Trade Regulation Rule." CEI is a Washington-based free-market public policy organization, founded in 1984, that studies the effects of regulations on job growth and economic well-being. Our mission is to advance the freedom to prosper for consumers, entrepreneurs, and investors.

At CEI, we support the rights of consumers to make choices in the marketplace without overreaching government bureaucracies limiting these choices, ostensibly "for their own good." We believe the government should punish deceptive claims, but otherwise leave consumers free to make their own choices among products and services.

My CEI colleagues and I have long stressed the crucial importance of the motor vehicle market in allowing Americans to better their lives. We have pointed to the role private automobiles played in social movements such as the Montgomery Bus Boycott in the 1950s.¹ Our founder and chairman emeritus Fred Smith, citing philosopher Loren Lomasky, has called the car (along with the computer and printing press) "one of the three most liberating technologies developed by mankind."²

A top priority for CEI is to advocate for public policy that maintains and improves the dynamism of the motor vehicle market to give Americans the opportunity to obtain vehicles needed for both work and family life. We agree with the FTC that the car-buying process is more cumbersome for consumers than it should be, and encourage private-sector innovation to simplify it and to improve financial inclusion.³

¹ Sam Kazman, "Cars and Civil Rights," Competitive Enterprise Institute, January 1, 1997, <https://cei.org/publication/cars-and-civil-rights/>.

² Fred Smith, "How Cars Saved the Montgomery Bus Boycott," *Forbes*, December 4, 2015, <https://www.forbes.com/sites/fredsmith/2015/12/04/rosa-parks-the-montgomery-bus-boycott-and-capitalism/?sh=449a86e36f49>.

³ Richard Morrison, "Tesla vs. the Auto Dealers: A Hilarious Update," Competitive Enterprise Institute blog, April 3, 2015, <https://cei.org/blog/tesla-vs-the-auto-dealers-a-hilarious-update/>.



However, we believe that much of the burden consumers face in obtaining cars today – in both costs and complexity – stems from federal and state regulation.⁴ The many mandates in the proposed rule will likely compound this problem by making the car purchasing process more time-consuming and more expensive.

Worse, the rule paternalistically limits consumer choices by demanding that auto dealers not just refrain from engaging in deceptive practices – which are already banned by federal law and which the FTC already polices through enforcement actions – but stop selling consumers products that the FTC deems to have “no benefit.”

Commissioner Wilson’s Cautionary Note Should Cause Closer Look at the Rule’s Unknowns

In her dissent on advancing this rule, Commissioner Christine Wilson noted some general precautions that regulators would be wise to heed before creating an extensive new regulatory framework:

Experience reveals that even when motivated by the best of intentions, regulatory schemes frequently fail to generate promised improvements for their intended beneficiaries. Instead, they tend to create market distortions that stifle innovation, increase costs and prices, and ultimately harm consumers.⁵

Specifically, Commissioner Wilson expressed concern that this rule “requires numerous disclosures related to offering price, add-ons, and monthly financing” that may be repetitive and create even more unnecessary paperwork for both motor vehicle dealers and consumers.⁶

With its cost estimated at \$1.4 billion by the FTC’s own economic analysis, the rule is the most expensive and economically significant regulation promulgated by the FTC on record, according to an analysis by the American Action Forum (AAF). Furthermore, there is good reason to believe that the costs of the rule are understated, its benefits are overstated, and its potential consequences have not been duly considered. AAF notes that “the proposed rule contains minimal quantitative assessments that federal agencies typically rely on to justify the need and cost of such comprehensive rulemakings.”⁷

The rule relies on extremely dated data to justify a regulatory framework of this magnitude. It cites feedback from consumers at public workshops the FTC convened more than five years ago in 2016 and

⁴ Sam Kazman, “First, Do No Harm to Motorists,” *OnPoint* No. 253, Competitive Enterprise Institute, June 12, 2007 <http://cei.org/sites/default/files/Sam%20Kazman%20-%20First,%20Do%20No%20Harm%20to%20Motorists.pdf>; Marlo Lewis, “Greenhouse Road To Ruin: Bad Regulations In Cali,” Competitive Enterprise Institute, May 13, 2002, https://cei.org/opeds_articles/greenhouse-road-to-ruin-bad-regulations-in-cali/

⁵ Dissenting Statement of Commissioner Christine S. Wilson, Motor Vehicle Dealers Trade Regulation Rule, Matter No. P204800, June 23 2022, https://www.ftc.gov/system/files/ftc_gov/pdf/P204800MotorVehicleNPRMWilsonStatement.pdf.

⁶ *Ibid.*

⁷ Dan Goldbeck, “FTC Needs to Run Those Numbers Again,” American Action Forum, September 9, 2022, <https://www.americanactionforum.org/print/?url=https://www.americanactionforum.org/insight/ftc-needs-to-run-those-numbers-again/>.

2017 and at three FTC roundtables held more than a decade ago in 2011. Much has happened in the motor vehicle market since then. As Commissioner Wilson noted, there are now online services “that assist consumers in price negotiation and location of desired vehicles,” and “sales models that obviate the need to enter a dealership at all.”⁸ The antiquity of the FTC’s consumer data and the rapid innovations to empower consumers since that time makes it all the more disappointing that the FTC did not even issue a Request for Information before it proposed this rule, as is standard for other agencies when considering a rule of this magnitude.

The FTC also did not leave enough time in the comment process for members of the public to review and perform their own analyses of the costs and benefits of the rule. Several commenters requested extending the 60-day comment period to give adequate time for them to produce such data and to conduct research to answer the FTC’s extensive set of 49 questions for commenters.

In its letter asking for comments to be extended, the National Auto Dealers Association, which represents 16,000 auto and truck dealers across the United States, noted that “any attempt to provide the Commission with meaningful data, information, and perspective on these massive inquiries will require considerably longer than the 60-day comment period set forth.”⁹ Yet the FTC refused reasonable requests to extend its deadline to accommodate this needed gathering of data.

Rule’s Paternalistic Prohibitions Stifle Consumer Choice in Auto Market and Likely Exceed the FTC’s Authority

In addition to mandating voluminous disclosures of questionable benefit to consumers, the rule also contains specific prohibitions that sharply limit consumers’ choices to purchase products and services they deem beneficial. These prohibitions also likely exceed the FTC’s statutory authority, which allows it only to ban practices that are deceptive or meet a strictly limited definition of “unfair.”

On the first page of the rule’s text, the FTC proposes to “prohibit the sale” from auto dealers “of any add-on product or service that confers no benefit to the consumer.”¹⁰ Later on, Section 463.5 of the rule mandates that “a dealer may not charge for an add-on product or service if the consumer would not benefit.”¹¹

Yet the FTC does not say how it exactly it will determine whether a consumer would “benefit” from an add-on product or service. The rule places initial responsibility on auto dealers, who will be required “to have a transaction level system for identifying consumers who will not benefit or, in some cases, predicting the potential consumer benefit from particular add-on products and services.” The rule admits there will be a “welfare costs” for some consumers that are “difficult to quantify,” as “such a

⁸ Dissenting Statement of Commissioner Christine S. Wilson.

⁹ “Request for Extension to Comment Period,” National Auto Dealers Association, Motor Vehicle Dealers NPRM, File No. P204800, <https://www.regulations.gov/comment/FTC-2022-0046-0019>.

¹⁰ Federal Trade Commission, ““Motor Vehicle Dealers Trade Regulation Rule,” Federal Register, Vol. 87, No. 133 (July 13, 2022), p. 42012, <https://www.federalregister.gov/documents/2022/07/13/2022-14214/motor-vehicle-dealers-trade-regulation-rule>.

¹¹ *Ibid.*, p. 42046.



system is likely to falsely identify some transactions as non-beneficial for the consumer.”¹² Since dealers will always be considering whether the FTC will judge a service or product as beneficial, many will likely err on the side of caution, which would impose further welfare costs on consumers who are denied the services and products that they believe would be beneficial.

This paternalistic edict runs counter to the central tenets of both democracy and capitalism, as it denies consumers a choice over specific products and services supposedly for his or her own good. It elevates what my colleague Iain Murray and others have called the “rule of experts” over the choices of American citizens.¹³ It also runs counter to the stated aims of President Biden and FTC leadership, who list *expanding* choices for consumers as one of the reasons why they support widening the scope of antitrust law.¹⁴ (My organization disagrees this broadening of antitrust would have this effect and warn that it will stifle innovation.¹⁵)

Another important concern is that this edict likely exceeds the FTC’s statutory authority. The Federal Trade Commission Act charges the FTC with policing “unfair or deceptive acts or practices in or affecting commerce.”¹⁶ In 1994, Congress limited the term “unfair” to only cover an act or practice that “causes or is likely to cause substantial injury to consumers which is not reasonably avoidable by consumers themselves and not outweighed by countervailing benefits to consumers or to competition.”¹⁷

A dealer charging for a product or service that merely has “no benefit” – according to the FTC – does not meet the law’s definition of either a “deceptive” or “unfair” act that the FTC is empowered to prohibit. Even if it could ever be determined definitively that there was *zero* benefit to the consumer for a given sale of a product, the transaction by itself would not be deceptive, unless there were a related deceptive practice associated with selling the product. If that were the case, the FTC’s existing authority to police deception would be enough to forbid the transaction.

The sale of such an item also does not meet the law’s definition of “unfair,” given the 1994 statutory language limiting that term to acts that cause “substantial injury” to consumers under certain

¹² *Ibid.*, p. 42041.

¹³ Iain Murray, “Democratic Capitalism: Why Political and Economic Freedom Need Each Other,” *Profiles in Capitalism* No. 4, Competitive Enterprise Institute, October 2019, <https://cei.org/sites/default/files/Iain%20Murray%20-%20Democratic%20Capitalism.pdf>; John Samples, “Bucking Up the People’s Branch,” *Law & Liberty*, August 7, 2015, <https://lawliberty.org/forum/bucking-up-the-peoples-branch/>.

¹⁴ The White House, “Executive Order on Promoting Competition in the American Economy,” July 9, 2021, <https://www.whitehouse.gov/briefing-room/presidential-actions/2021/07/09/executive-order-on-promoting-competition-in-the-american-economy/>; Nancy Scola, “Lina Kahn Isn’t Worried About Going Too Far,” *New York*, October 27, 2021 <https://nymag.com/intelligencer/article/lina-khan-ftc-profile.html>; Federal Trade Commission, “Bureau of Competition,” accessed September, 11, 2022, (“The antitrust laws promote the interests of consumers; they support unfettered markets and result in lower prices and more choices.”), <https://www.ftc.gov/about-ftc/bureaus-offices/bureau-competition>.

¹⁵ Jessica Melugin, “When Antitrust Is Anti-Consumer,” *National Review*, June 22, 2021, <https://www.nationalreview.com/2021/06/when-anti-trust-is-anti-consumer/>.

¹⁶ 15 U.S.C. Sec. 45(a)(1)

¹⁷ 15 U.S.C. Sec. 45(n).



conditions. A consumer buying a product that lacks benefits – or rather that the FTC says lacks benefits – does not by itself cause “substantial injury” to that consumer.

This rule’s “no benefit” edict harkens back to the FTC’s paternalistic, overreaching crusades of the 1970s, such as seeking a near-total ban on television advertisements aimed at children.¹⁸ Such actions alarmed members of Congress from both parties, and led a 1978 *Washington Post* editorial that described the FTC as a “national nanny.”¹⁹ Congress responded by delaying FTC appropriations and authorization several times in the 1970s and 1980s, and -- as mentioned -- eventually limiting the FTC’s authority for going after an “unfair act.”²⁰ The FTC should not return to these misguided paternalistic crusades, which ultimately take its focus away from preventing actual fraud and deception in the market.

FTC’s Restrictions on Nitrogen-Filled Tires Ignores Praise for Products from Experts

The FTC further extends its paternalism in the rule by placing severe restrictions on products from dealers that are popular with the vehicle-buying public and praised by many independent experts.

The rule inexplicably focuses on auto dealers’ sale of nitrogen-filled tires, even though it does not reference any enforcement cases or complaints regarding these products. It proposes an unworkable restriction on the sale of these products that may effectively ban them, despite experts hailing their benefits in areas such as driver safety and conservation of resources.

For decades, race-car drivers and owners of high-performance vehicles have opted to fill their tires with pure nitrogen, rather than ambient air that is a mixture of about 78 percent nitrogen, 21 percent oxygen, and 1 percent other gases and water vapor. Drivers of these vehicles have found that purging oxygen and water vapor in favor of a pure concentration of nitrogen results in better performance and endurance of their tires. In recent years, both auto dealers and service shops – including the automotive department at Costco stores²¹ – have begun offering this service to those with ordinary cars. While the average driver may not face the high speeds and stressful scenarios of a NASCAR or Formula 1 racetrack, many experts believe they could still benefit significantly from nitrogen-filled tires.

Popular Mechanics, for instance, states that “there are several compelling reasons to use pure nitrogen in tires,” including tire pressures that remain more constant and a reduction in corrosion that is frequently caused by the oxygen and water vapor in ordinary air.²² The Carolinas chapter of the auto club AAA, AAA Carolinas, gave the practice similar kudos in an article in its member magazine, citing a

¹⁸ J. Howard Beales, “The FTC’s Use of Unfairness Authority: Its Rise, Fall, and Resurrection,” lecture, The Marketing and Public Policy Conference, Washington, D.C., May, 30, 2003, <https://www.ftc.gov/news-events/news/speeches/ftcs-use-unfairness-authority-its-rise-fall-resurrection>.

¹⁹ “The FTC As National Nanny,” *Washington Post*, March 1, 1978, <https://www.washingtonpost.com/archive/politics/1978/03/01/the-ftc-as-national-nanny/69f778f5-8407-4df0-b0e9-7f1f8e826b3b/>.

²⁰ Beales, “The FTC’s Use of Unfairness Authority: Its Rise, Fall, and Resurrection.”

²¹ “The Costco Advantage,” Costco, <https://tires.costco.com/CostcoAdvantage>.

²² Ezra Dyer and Stef Schrader, “Should You Really Put Nitrogen in Your Car Tires?” *Popular Mechanics*, August 31, 2021, <https://www.popularmechanics.com/cars/a3894/nitrogen-in-tires/>.



Clemson University study that found that tires filled with pure nitrogen maintained tire pressure significantly better than in tires inflated with regular air. The article argued that the tire preservation enabled by pure nitrogen also translates into environmental benefits such as better fuel economy and less tire waste.²³

An October 2021 *Consumer Reports* review was skeptical that nitrogen-filled tires were worth the cost for many consumers, but still acknowledged that they had some benefits, and concluded “there is nothing wrong with using nitrogen in passenger cars and trucks.”²⁴

Given that there are disagreements about the overall value of nitrogen-filled tires for passenger cars, but consensus that they provide drivers some benefits, there is no need for the FTC to include them in a rulemaking. Instead, it can simply utilize its existing authority to go after deceptive claims about these products. For instance, if an auto dealer or repair shop were to fill a consumer’s tire with regular air while charging for a fill with pure nitrogen, the FTC would clearly be able to commence an enforcement action against that dealer.

Instead, the rule would prohibit dealers from charging consumers for “nitrogen-filled tire related-products or services that contain no more nitrogen than naturally exists in the air.” That phrasing appears to create a standard for which it may be impossible to comply. “Air,” as defined by the Merriam-Webster Dictionary, is “the mixture of invisible odorless tasteless gases (such as nitrogen and oxygen) that surrounds the earth.”²⁵ Thus, no individual set of tires could have a higher total quantity of nitrogen than that in “the air” that stretches around the planet.

The prohibition as written would keep consumers from choosing a product that many automotive experts recommend as a tool to manage both costs and overall safety issues involved with a car. The FTC should remove this prohibition from the rule, or at the very least, clarify it so that it does not affect legitimate sales of nitrogen-filled tires.

Conclusion: Withdraw the Rule and Review Existing Regulations’ Effect on the Motor Vehicle Market

American drivers face many headwinds today with high gas prices, supply chain constraints, and inflation. This paternalistic rule, based on questionable cost and benefit assumptions, is the last thing they need. The rule’s prohibitions on dealer sales of products and services with “no benefits” is paternalistic and also likely exceeds the FTC’s statutory authority. For these reasons, the rule should be withdrawn.

To help consumers in the motor vehicle market, the FTC should continue to enforce general rules against fraud. It could also convene, pursuant to Commissioner Wilson’s suggestions for comments, a task force on avenues for changes in the motor vehicle market with respect to technology as well as

²³ “The Scoop on Nitrogen Tires vs. Air Tires,” *Go Magazine*, October 16, 2015,

<https://go.carolinas.aaa.com/expert-advice/car-care/the-scoop-on-nitrogen-tires-vs-air-tires-2/>.

²⁴ Jeff S. Bartlett, “Should You Use Nitrogen in Your Car Tires?” *Consumer Reports*, October 15, 2021,

<https://www.consumerreports.org/tire-buying-maintenance/should-you-use-nitrogen-in-car-tires-a6260003694/>.

²⁵ “Air,” Merriam Webster, <https://www.merriam-webster.com/dictionary/air>

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federal and state regulations that frustrate the vehicle purchasing process.²⁶ This could be structured similarly to the research and advocacy the FTC has conducted on the negative economic effects of state occupational licensing rules.²⁷

Thank you for this opportunity to present the views of the Competitive Enterprise Institute. If you or your staff should have any questions, please feel free to contact me by phone or email.

Sincerely,

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²⁶ Dissenting Statement of Commissioner Christine S. Wilson.

²⁷ "Selected Advocacy Relating to Occupational Licensing," Federal Trade Commission, accessed September 12, 2022, <https://www.ftc.gov/policy/advocacy-research/advocacy/economic-liberty/selected-advocacy-relating-occupational-licensing>.