



# South Carolina

## DEPARTMENT OF CONSUMER AFFAIRS

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**PROTECTING CONSUMERS SINCE 1975**

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September 12, 2022

### *Via Electronic Submission*

Federal Trade Commission  
Office of the Secretary  
600 Pennsylvania Ave., NW  
Suite CC-5610 (Annex C)  
Washington, D.C. 20580

**RE: Motor Vehicle Dealers Trade Regulation Rule-Rulemaking No. P204800**

Dear Chairwoman Khan:

The South Carolina Department of Consumer Affairs (“SCDCA”/“Department”) is pleased to offer comments in response to the Federal Trade Commission’s (“FTC” or “Commission”) Notice of Rulemaking Period in the above referenced matter.

SCDCA is South Carolina’s consumer protection agency. Established in 1974, SCDCA is responsible for the administration and enforcement of over 120 state and federal laws. A large part of our authority stems from Title 37 of the South Carolina Code of Laws, the Consumer Protection Code (the “Code”). The Code, among other purposes, is meant to further consumer understanding of the terms of credit transactions, foster competition among suppliers of consumer credit, and permit and encourage the development of fair and economically sound credit practices.<sup>1</sup> Further, it requires the Department to undertake activities to encourage business and industry to maintain high standards of honesty, fair business practices, and public responsibility in the production, promotion and sale of consumer goods and services.<sup>2</sup>

SCDCA supports the Commission’s efforts to collect information from the public and interested stakeholders on the Proposed Rule. We offer the comments below based upon our

<sup>1</sup> S.C. Code Ann. § 37-1-102(c)-(e)(2021).

<sup>2</sup> S.C. Code Ann. § 37-6-117(f) (2021).

ADMINISTRATOR	PUBLIC INFORMATION	CONSUMER ADVOCACY	LEGAL/ LICENSING	CONSUMER COMPLAINTS	ID THEFT UNIT	PROCUREMENT & ACCOUNTING
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experience regulating non-depository financial institutions, including motor vehicle dealers, and collecting and handling consumer complaints.<sup>3</sup>

### Discussion

The Commission is seeking information on how junk fees have impacted peoples' lives. The Department shares the Commission's concern of the increasing "fee economy." The Department is intimately aware of junk fees. The South Carolina Consumer Protection Code deals with, among other things, whether and how certain charges may be assessed and earned. As such, businesses often request SCDCA opine on the topic of fees.<sup>4</sup>

In 2016, DCA issued an interpretation finding payment processing fees a cost of doing business.<sup>5</sup> The Department concluded a business could take such costs into account when setting their interest rate; but if they chose not to absorb the cost, it would be deemed a finance charge. A similar interpretation was issued in 2017 regarding costs to process a lien or title through the South Carolina Department of Motor Vehicles' ("SCDMV") electronic system. The Department concluded the specific SCDMV-required fee is a permissible additional charge and may be passed on to the consumer in a credit transaction; however, fees assessed by a third party the dealer chooses to use to assist with the filing or fees for implementing their own in-house interface could not be. The Department also issued an interpretation in May 2016 on motor

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<sup>3</sup> SCDCA's Consumer Services Division processes and mediates written consumer complaints, seeking to find equitable solutions for the consumer and the business, including refunds, adjustments and credits to consumer accounts.

<sup>4</sup> *S.C. Dep't of Consumer Affairs, Admin. Interpretation No. 1.202(7)-7602* (as amended 11/3/78) ("origination fee" in addition to maximum finance charge is an excess charge); *S.C. Dep't of Consumer Affairs, Admin. Interpretation No. 2.110-8701* (1987) (in consumer credit sales of motor vehicles, bona fide charges for optional extended service contracts may properly be considered part of the amount financed); *S.C. Dep't of Consumer Affairs, Admin. Interpretation No. 3.109-8010* (1980) ("origination fee" or "discount points" subject to refund on prepayment); *S.C. Dep't of Consumer Affairs, Admin. Interpretation No. 3.201-8402* (1984) (clarification on permissible charges for revolving consumer loan accounts under the Consumer Protection Code); *S.C. Dep't of Consumer Affairs, Admin. Interpretation No. 3.202-7613* (1976) (appraisal fee is part of the finance charge and is not a permissible "additional charge"); *S.C. Dep't of Consumer Affairs, Admin. Interpretation No. 3.202-8303* (1983) (the Consumer Protection Code does not authorize a "release fee"); *S.C. Dep't of Consumer Affairs, Admin. Interpretation No. 3.202-8901* (1989) (A supervised licensed lender may not charge an annual fee in a revolving consumer loan transaction unless the loan agreement constitutes a lender credit card or similar arrangement. To so qualify, the card, the letter of credit or other credit confirmation should be identifiable as a credit card or similar arrangement.); *S.C. Dep't of Consumer Affairs, Admin. Interpretation No. 3.210-8109* (1981) (appraisal fee is part of the finance charge subject to rebate upon prepayment in full); *S.C. Dep't of Consumer Affairs, Admin. Interpretation No. 3.305-8601* (1986) (failure to file a maximum rate schedule leads to an 18% maximum annual percentage rate); *S.C. Dep't of Consumer Affairs, Admin. Interpretation No. 3.404-7510* (1975) (limitations on attorney's fees chargeable to defaulting debtor); *S.C. Dep't of Consumer Affairs, Admin. Interpretation No. 3.404-8003* (1983) (limitation on reasonable attorney's fees to 15% of unpaid debt after default does not apply to restricted loans); *S.C. Dep't of Consumer Affairs, Admin. Interpretation No. 3.404-8101* (1981) (Consumer Protection Code does not authorize insurance premium service companies to charge attorneys' fees). The preceding administrative interpretations are available for viewing at <https://consumer.sc.gov/business-resources/laws/administrative-interpretations>.

<sup>5</sup> See *S.C. Dep't of Consumer Affairs, Admin. Interpretation No. 3.109,503-1603* (2016) (Supervised Lenders' websites to collect payments on existing loans must be licensed; Lender may not impose a fee to accept payments). [https://consumer.sc.gov/sites/consumer/files/Documents/Business%20Resources%20Laws/Administrative%20Interpretations/Chapter%203/3.109%2C503-1603\\_Supervised\\_Loans\\_Location\\_Payment%20via%20Web.pdf](https://consumer.sc.gov/sites/consumer/files/Documents/Business%20Resources%20Laws/Administrative%20Interpretations/Chapter%203/3.109%2C503-1603_Supervised_Loans_Location_Payment%20via%20Web.pdf).



vehicle dealer advertising.<sup>6</sup> The Department concluded that motor vehicle dealers must sell a vehicle for the advertised price, regardless of whether a consumer mentions the price representation in the advertisement, unless a limited exception applies.

During the COVID-19 pandemic, the Department saw an increase in fees charged to consumers because of the pandemic's disruptive effect on the economy. Most recently, the Department has identified several concerns regarding motor vehicle dealers adding extra fees to the advertised price of vehicles, inflating official fees in the sales contracts, and using MSRP for used cars.<sup>7</sup> Specifically, dealers were drawing a consumer into their business based on an advertised price and subsequently informing the consumer that an additional fee would be added. The fee is often based on supply and demand (i.e., market adjustment fee) or for a required dealer add-on (refurbishment fee, security system, inspection fee). The Department also learned certain dealers inflated official fees when listing them on the consumer contract, adding "processing fees" to the total.

Failing to disclose all required fees—outside of standard official fees—hinders the consumer's ability to shop for a product/service. One business may seem more attractive to a consumer on its face due to an advertisement, when truly it is not an apples-to-apples comparison if one business advertises an all-in price while the other hides its fees until the consumer is ready to sign on the dotted line. Depending on when the consumer is notified of the additional fees/costs, the consumer may be in a position that seemingly prevents them from terminating the negotiations/ interactions and starting over with a new business. The lack of transparency also obstructs competition as businesses would be unaware of the bottom line set by their competitors.

From release fees to transaction fees to participations fees to courier fees, history has shown a desire of industries participating in the consumer credit marketplace to assess fees outside of an advertised price or cost. Generally, the Department believes any fees or charges should be disclosed explicitly and uniformly and such disclosure should be presented in a manner to create an informed buyer.

### **Selected Questions for Comment**

#### **General Questions**

***1. Does the proposed rule further the Commission's goal of protecting consumers from unfair or deceptive acts or practices in the motor vehicle marketplace? Why or why not?***

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<sup>6</sup> S.C. Dep't of Consumer Affairs, Admin. Interpretation No. 2.308-1602 (2016) available at: <https://consumer.sc.gov/sites/consumer/files/Documents/Business%20Resources%20Laws/Administrative%20Interpretations/2.308-1602%20Dealer%20Advertised%20Price.pdf>.

<sup>7</sup> See Memo Re: Misleading and Deceptive Motor Vehicle Dealer Practices (2/18/2022) available at <https://consumer.sc.gov/sites/consumer/files/Documents/Business%20Resources%20Laws/Business%20Education/MVDealerMisleading-DeceptivePracticesMemo.pdf>.



The Proposed Rule furthers the Commission's goal of protecting consumers. In some ways it is the least intrusive way to address the significant problems involved without unduly burdening the industry.

***2. Are there any unfair or deceptive acts or practices not addressed by the proposed rule that should be? For example, should there be additional provisions pertaining to leasing or provisions pertaining to interest rates or other financing terms?***

***4. Portions of the proposed rule contemplate additional disclosures in an already lengthy, confusing and disclosure-heavy but low-comprehension transaction. Would any of the additional proposed disclosures do more harm than good? If so, is there another measure that should be used to address the consumer protection concerns described herein?***

When widdled down to the items necessary to effectuate the sale of a motor vehicle, the amount of paperwork required by state and federal law is minimal. Buyer's orders are typically a single, one-sided page. Retail installment contracts with Truth in Lending Act (TILA) disclosures are typically two to three pages, front and back. Adding the disclosures set forth in this regulation would likely not create a large increase in the level of paperwork required. Setting the timing and presentation parameters for the disclosure should also help to carve out/ set apart the required documents from any additional items the dealer chooses to make a part of the transaction. Overall, the proposed disclosures will serve to create an educated and informed buyer- ensuring the dealer and the consumer are on the same page throughout the vehicle buying process.

***5. Should the Commission provide more detailed requirements regarding the content or form of any of the proposed disclosures?***

Creating model forms for industry use may ensure consistency, in turn helping consumers to compare vehicles and pricing more easily and take the guessing game out of proper compliance for the dealers.

#### **§ 463.2: Definitions**

***10. 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?***

The term "Add-on Products(s) or Service(s)" in §463.2(a) appears to describe add-ons for a new vehicle, while simultaneously making no distinction between new and used vehicle sales. This could be problematic as prior owners may have added parts or features, like bedliners, window tint, pinstripes, spoilers, running boards, sunroofs, or the like. When such vehicles are sold by a prior owner to a dealer and the dealer prepares to sell it, they should have no duty to detach such added features. Making lists of add-ons that include prior owner alterations as well as dealer originating add-ons would be unnecessarily confusing to buyers. Further, the price of the vehicle should already reflect such add-ons made by the prior owner. Under § 463.4(b), however, any price the dealer offers for such used vehicles will necessarily "directly or indirectly" charge for such add-ons not attributable to them. These concerns may be remedied relatively easily by



altering the definition to distinguish new and used vehicle sales, or limit the definition of add-ons in the used vehicle category to those added after the vehicle was sold by the prior owner.

### **§ 463.3: Prohibited Misrepresentations**

***16. Should the Commission consider alternative approaches to address such problems, such as requiring retail installment sales contracts to include a clause prohibiting financing-contingent sales, prohibiting the dealer from transferring title to a trade-in vehicle or performing any repairs or reconditioning before a sale is final or requiring dealers to return trade-in, deposit, and fees, if financing is not approved? What would be the effect of such a requirement, and what costs and benefits would it entail? Are there data regarding the feasibility of finalizing vehicle financing at or before the time the retail installment sales contract is signed?***

More than twenty years ago, when on weekends or legal holidays credit reports could not be accessed, it made some sense to arrange some sort of contingency financing by which the sale could be preliminarily approved subject to credit approval and allow the buyer to take possession “on the spot.” These days, dealerships that are open on weekends or holidays have twenty-four hour computer access to applicants’ credit reports. It is true that even now on weekends or holidays, banks, finance companies and credit unions may not be open to give full and final financing approval, but scrupulous dealers have detailed guidelines from such creditors as to what customers can qualify for financing on particular terms. As often as not if there is a failure to get eventual approval under these guidelines, it is because of errors or inaccuracies for which the dealers are responsible.

Dealers’ interest in closing a contingent deal quickly should be realistically compared to prospective buyers’ harm in dealing with misrepresentations about their obligations to pay more or accept a higher interest rate than they agreed to, or their ability to get their trade-in or down payment returned, and the like. When that comparison is considered, it is not unreasonable to require dealers secure the financing, or alternatively “tote the note” instead of unraveling the deal. It is not unreasonable to have both parties bound by the contracts they sign rather than devising arcane contingencies to excuse the advantaged contract drafter.

If such a provision were considered too extreme, and the Commission sought to accommodate the limited situations where there are legitimate concerns that final credit approval is not available until the financier reopens, then the contractual contingency can be required to be disclosed *conspicuously*, and the contingency specifically limited to no more than forty-eight hours after the financier reopens with regular business hours. If the forty-eight hours is exceeded, the contract’s repayment terms are binding and the dealer can either accept payment under its terms or assign the obligation as is. That way, the continued validity of the contract is clear and not subject to contest.

***17. Proposed § 463.3(j) would prohibit misrepresentations regarding whether or when a dealer will pay off some or all of the financing or lease on a consumer's trade-in vehicle. Should there be additional protections here—for example, should there be a requirement that dealers pay off***



***outstanding financing or liens on a trade-in vehicle within a specified amount of time, or before selling the trade-in vehicle?***

When a prospective vehicle purchaser or lessee brings in a vehicle to trade, having the dealer set up the financing to payoff the lien for the trade-in is the typical, and very reasonable, expectation of the buyer. It may not be enough to simply forbid the dealer from specifically misleading the customer concerning whether the dealer will perform this task. In most situations trade payoff is an unwritten expectation of the parties even if it is not an explicit contractual obligation. Instead, if the buyer's credit or trade-in are evidently insufficient to support a deal, the dealer should clearly require additional down payment or other security or *specifically and conspicuously* disclose that it will *not* be responsible for paying off the lien and the buyer should sell the vehicle himself or make alternative arraignments. This disclosure could be made a part of the § 463.5 disclosures requiring the buyer's affirmative written acknowledgement by signature or initial. In addition, the failure to arrange the payoff of the trade in the absence of the buyer's affirmative written acknowledgement could likewise be deemed a violation of Section 5 (a) (1) of the FTC Act in itself.

**§ 463.5: Dealer Charges for Add-Ons and Other Items**

***32. Is the proposal adequate and appropriate to address consumer harms that occur with the sale of add-on products or services from which the consumer cannot benefit? Why or why not? How could the proposal be modified to better address such harms?***

The Department has seen add-ons for variously named and overpriced continuing service benefits (e.g., providing tune-ups or oil changes) which are sold to all buyers that do not affirmatively reject them. These customers include customers from out-of-state locations or other distant locations where it would make no sense to come back to the dealership for an oil change, as an example. The section as written would likely cover this.

Nevertheless, there is a fine line between products or services that provide *no* benefit at all and those that may provide nominal benefit at a vast markup. Consumer Reports lists a number of examples of motor vehicle add-ons vehicle buyers should never pay for<sup>8</sup>, including:

- (1) paint sealant,
- (2) rustproofing (*Consumer Reports indicates rust problems for new vehicles is now nearly non-existent. In addition, dealer applied rustproofing may inhibit rather than enhance the manufacturers' treatments, particularly if it involves drilling holes*),
- (3) fabric protection, and
- (4) VIN Etching (*modern vehicles typically have tracking services for theft. Even for vehicles that do not, etching provides almost no real benefit. Stolen vehicles are reported to National Motor Vehicle Title Information System and VINs and other identifying*

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<sup>8</sup> Consumer Reports. *Don't Bother Buying These New Car Add-Ons* [Video]. <https://www.consumerreports.org/video/view/money/news/5445505068001/dont-bother-buying-these-new-car-add-ons/> (last accessed September 12, 2022).



*numbers are embedded in various places on vehicles. Windows, however, are among the most easily removed parts.)*

The Department recommends an affirmative disclosure concerning add-ons stating add-ons may be available at more competitive prices, if desired.

***39. Should the Commission identify other practices that do not, in themselves, constitute Express, Informed Consent? Why or why not?***

To assist with compliance and the act effectuating the Commission's goal of requiring express, informed consent, it might be helpful to describe what *would* be involved with, and what does constitute, express, informed consent. One possibility is: (1) an individual itemization of each separate element of add-on product or service, (2) with an indication of what the product is, (3) a simple language explanation of its function if the initial description is a trade name or otherwise does not describe the function, (4) the cost attributed to that particular add-on, and (5) boxes for an indication that item is accepted or rejected, to be time and date recorded with the signature or initial of the consumer.

**§ 463.6: Recordkeeping**

***43. Is the 24-month record retention period appropriate? Why or why not? If not, what period is appropriate? and***

***44. What are the current record retention policies and practices of dealers with respect to the records specified in proposed § 463.6?***

The Department applauds the Commission's proposal to require recordkeeping for advertisements. The Commission may wish to consider extending the recordkeeping requirement beyond two years. In South Carolina, the S.C. Consumer Protection Code, where actions for consumer credit excess charges, including closing fees not included in the advertised price, are subject to refund and potential penalties not less than one year from the scheduled or accelerated maturity of the obligation under S.C. Code Ann. § 37-6-202 (3). In a time of scarcity and higher prices for financed automobiles, terms of seventy-two months are not unusual. It is unusual, however, for buyers to know immediately that they have been overcharged by the amount of a closing fee required by law to be included in the advertised price, because if they knew that during the sale they likely would have sought to purchase from a different dealer.

South Carolina law also specifically provides that forcing non-manufacturer installed add-ons and services in new vehicle sales or using misleading or deceptive advertisements are both, by definition unfair or deceptive practices.<sup>9</sup> As such, they are actionable for double actual damages and attorney fees, or in the case where the jury finds malicious action, treble damages and attorney fees.<sup>10</sup> Courts are also allowed to find that contracts or parts of contracts in violation of Chapter

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<sup>9</sup> See S.C. Code Ann. § 56-15-40 (E) (1) and (3).

<sup>10</sup> See S.C. Code Ann. § 56-15-110 (1) and (3).



15 of Title 56 are against public policy and void.<sup>11</sup> The limitation period for such actions is a minimum of four years after the cause of action accrues.<sup>12</sup>

The statutes of limitations examples above exceed the current twenty-four month proposed recordkeeping period. We would recommend extending the record retention requirements to better suit the timeframe for which violations may be litigated.

Conclusion

We hope the Commission finds the information provided beneficial as it determines the most beneficial. We commend the Commission for the work and effort put into this process and appreciate the opportunity to comment. Should you have any questions pertaining to our comments, please feel free to contact me at 803-734-4233.

Best,

Carri Grube Lybarker, Esq.

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<sup>11</sup> See S.C. Code Ann. § 56-15-130.

<sup>12</sup> See S.C. Code Ann. § 56-15-120.