STRUCTURED FINANCE ASSOCIATION

September 12, 2022

Via Electronic Submission

Sanya Shahrasbi and Daniel Dwyer
Federal Trade Commission, Office of the Secretary
600 Pennsylvania Avenue, NW, Suite CC-5610 (Annex C)
Washington, DC 20580

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

Dear Ms. Shahrasbi and Mr. Dwyer:

The Structured Finance Association[1] ("SFA") appreciates the opportunity to respond to the Federal Trade Commission ("FTC") Notice of Proposed Rulemaking, "Motor Vehicle Dealers Trade Regulation Rule" (the "Proposed Rule").[2] SFA is a member-based, trade-industry group encompassing all sectors of the securitization market, which currently finances $220 billion in auto loans and leases.[3] SFA and its members are supportive of the objective of the FTC to protect consumers from illegal or deceptive practices. However, we have significant concerns, as summarized below, that the Proposed Rule may have unintended consequences on the cost of funding available to auto lenders in the securitization market.

Securitization is an essential component in the auto-lending ecosystem. It allows financial institutions to offer loans to more consumers and at lower interest rates than would be possible absent securitization. The Proposed Rule and accompanying explanation may present unintended consequences for the securitization market—and could result in higher borrowing costs for consumers—as they do not account for the Proposed Rule's possible effects on this market. In its current form, the Proposed Rule risks exposing securitization investors to liability as a result of compliance failures that they cannot meaningfully control, and for which they have not contractually agreed to bear. In addition, the Proposed Rule's vague commands will force market participants to spend more on compliance-related due diligence.

[1] SFA is a member-based, trade industry advocacy group focused on improving and strengthening the broader structured finance and securitization market. SFA provides an inclusive network for securitization professionals to collaborate and, as industry leaders, to drive necessary changes, to be advocates for the securitization community, to share best practices and innovative ideas and to educate industry members through conferences and other programs. Further information can be found at www.structuredfinance.org.
[2] 87 Fed. Reg. 42,012 (July 13, 2022). Citations to the text of the Proposed Rule will reference the proposed Code of Federal Regulations citation, in 16 C.F.R. part 463.
[3] SFA Research market compilation

As we explain below, the FTC should introduce language into the Proposed Rule that will assure the securitization market that enforcement by the FTC or others will not unduly disturb the careful risk allocation that investors have bargained for in these securitizations. The FTC also should account for the additional due diligence costs that the Proposed Rule certainly will require. These suggested changes are essential to ensure the continued availability of low-cost credit for consumer auto purchases.

Background on Securitization

Broadly, securitization is the pooling of assets entitled to receive regular cash flows—such as mortgages, lease payments, credit card receivables, or, as in this case, auto loans and leases—into one legal entity, often a trust (the "Trust"), which is then the legal owner of record for those individual assets. The Trust then issues securities to investors, the interest and principal payments on which are funded by the cash flows payable in respect of the assets owned by the Trust. These investors include asset managers, pension plans, university endowments, and other financial institutions seeking exposure to safer, fixed income instruments.

A robust and liquid securitization market provides many benefits to the economy, including facilitating efficient access to capital markets, minimizing issuer-specific limitations on the ability to raise capital, monetizing illiquid assets, diversifying funding sources, investor bases and transaction structures, and lowering interest rates for borrowers.

Given the large sums at issue in securitizations, market participants expend significant resources in conducting due diligence on the origination and underwriting practices of the sponsor, issuer, or originator including compliance risk. Complementing this up-front risk mitigation, securitization transactions involve a complex set of interconnected agreements that allocate risk of non-payment on the underlying assets, including (and depending on the nature of the underlying financial assets) master loan purchase agreements, trust agreements, administration agreements, servicing agreements, and/or pooling and servicing agreements. These risk arrangements undergird market expectations, allowing participants to assess the risk that they bear in connection with any particular securitization transaction. This certainty is essential to the functioning secondary market for auto loans, allowing original lenders to serve more consumers, and at lower prices, than they otherwise could.

During this past decade, however, government actions disrupted these expectations in private-label residential mortgages, pushing liability down to the Trusts and investors who have no control over the alleged law violations. Specifically, in the government's 2012 consent judgments with six of the nations' largest mortgage servicers, the servicers agreed to forgive principal for billions in loans that the servicers lacked authority to forgive under the securitization agreements. As a result, the Trusts and investors bore the brunt of the expense of that action, when they had nothing to do with the violations and had no role in negotiating the settlement.[4]

Significant, Unintended Consequences on Securitization Trusts & Investors

SFA fully appreciates the importance of protecting consumers from unscrupulous practices, and understands that the FTC's goal in publishing the Proposed Rule is to address unfair and deceptive practices it has identified in the course of its enforcement work. However, in drafting the Proposed Rule, it appears that the FTC did not consider the potential effects of the Proposed Rule on the securitization market, potentially disrupting the market's carefully-crafted risk allocations that allow consumers to obtain lower-cost credit.

At the outset, the FTC should clarify explicitly that the Trusts and their investors would not be proper defendants in any enforcement action under the (finalized) Proposed Rule. It would not seem possible to name a Trust or its investors based on the Proposed Rule's text, which applies only to "Dealers" or "Motor Vehicle Dealers," defined as any person in the U.S. that, among other things, is "licensed by a State, a territory of the United States, or the District of Columbia to engage in the sale of motor vehicles," and "is predominantly engaged in the sale and servicing of motor vehicles, the leasing and servicing of motor vehicles, or both."[5] Trusts and investors do not satisfy either of these necessary elements. Indeed, naming a Trust or the investors in enforcement actions would be improper, given how far removed they are from any interactions with consumers. But because another governmental agency recently has inappropriately allowed direct liability (including fines) to Trusts—and therefore pension plans, 401k plans and other American savers—based on vicarious liability, the market would benefit from absolute clarity, either from an express carve-out in the definition of "Dealer or Motor Vehicle Dealer".

Even when directed against the proper set of defendants, enforcement under the Proposed Rule could entail unwarranted shifting of risk down to Trusts and investors. Violations of the (finalized) Proposed Rule would allow the FTC to seek penalties under Section 19 of the FTC Act, which authorizes (among other things) the "rescission of contracts."[6] Although to our knowledge, the FTC has not ordered rescission of contracts in an auto case, the FTC often brought those cases in the context of the pre-*AMG*[7] enforcement program under Section 13(b)

---

[4] *See* Dep't of Justice, Federal Government and State Attorneys General Reach $25 Billion Agreement with Five Largest Mortgage Servicers to Address Mortgage Loan Servicing and Foreclosure Abuses (Feb. 9, 2012), https://www.justice.gov/opa/pr/federal-government-and-state-attorneys-general-reach-25-billion-agreement-five-largest.

[5] 16 C.F.R. § 463.2(e).

[6] 15 U.S.C. § 57b(b) ("Such relief may include, but shall not be limited to, rescission or reformation of contracts, the refund of money or return of property, the payment of damages, and public notification respecting the rule violation or the unfair or deceptive act or practice, as the case may be; except that nothing in this subsection is intended to authorize the imposition of any exemplary or punitive damages.")

[7] *FTC v. AMG Cap. Mgmt.*, 141 S. Ct. 1341 (2021).

of the FTC Act and may not have had the option to obtain contract rescission as a potential remedy. If the FTC intends to maintain this past practice—with monetary penalties as the principal non-conduct remedy—SFA would ask that the FTC clarify its intentions in the rule's text so that the Trust and investors are not exposed to liability beyond that for which they have bargained.

Similarly, there has been concern that simple violations of the Proposed Rule—even the preventative procedural rules related to add-on products[8]—could form the basis of a plaintiff suit seeking to avoid liability in private litigation. Trusts and investors have a keen interest in that outcome as a result of the Holder-in-Due-Course Rule, which generally allows customer defenses to run with the assignment of the contract, in this case to the Trusts.[9] To avoid this outcome to the extent practical, SFA would ask the FTC to clarify the extent to which particular rules are necessary to obtain customer authorization for charges—and thus would already be required under state/federal law—and which rules the FTC views as preventative measures necessary in light of lessons from its enforcement actions.

These potential liabilities increase the complexity, and cost of, due diligence in connection with securitization transactions. As noted above, substantial due diligence goes into every securitization transaction to ensure, among other things, compliance with relevant laws. But the Proposed Rule introduces a number of new features to auto purchases without clear guidance on compliance and without ever considering the potential compliance costs born in the securitization context.

Take for example the Proposed Rule's provisions regarding add-on products.[10] The Proposed Rule says that auto dealers cannot charge for an add-on "if the consumer would not benefit from such a [product],"[11] but provides no guardrails to assess whether an add-on product provided consumers with sufficient benefits to pass muster. The Proposed Rule does include one concrete example of a worthless product—the "nitrogen-filled tire"[12]—but it is not apparent what other red flags to look for when conducting due diligence.[13]

Similarly, while the Proposed Rule also includes the common-sense notion that consumers must provide "express-informed consent" prior to purchasing an add-on product,[14] the Proposed

[8] *E.g.*, 16 C.F.R. § 463.4 (proposed disclosure requirements); *id.* § 463.2(f)(2)(i) (a "signed or initialed document" is not "by itself" sufficient to establish that consumers provided express, informed consent to purchase an add-on product).
[9] *See generally*, 16 C.F.R. § 433.1, *et seq.*
[10] 16 C.F.R. § 463.5.
[11] *Id.* § 463.5(a).
[12] *Id.* § 463.5(a)(1).
[13] The Proposed Rule also addresses GAP insurance, but the examples there appear to require detailed analyses of the underlying GAP policy and the borrower's individual circumstances. *See* 16 C.F.R. § 463.5(a)(2).
[14] *Id.* § 463.5(c).

Rule says that a signed contract itself is not enough, without providing any explanation for what would be sufficient.[15]

The difficulties of ensuring compliance with these provisions will increase diligence costs that the FTC should consider in its cost-benefit calculation.

* * *

SFA does not believe that the FTC issued the Proposed Rule with the intention of affecting the securitization market. To avoid this unintended consequence—which could decrease borrower access to credit and raise the cost of borrowing for auto customers—SFA respectfully requests that the FTC take the actions outlined above. These measures will properly ensure that securitization Trusts and investors bear the risk that they contracted for, while continuing to uphold the intent of the Proposed Rule to protect consumers from unfair and deceptive auto dealer practices.

We thank the FTC for its consideration of our feedback and request, and we would welcome the opportunity to provide further input regarding this topic. If you have any questions about this matter, please do not hesitate to contact Kristi Leo, President, at 917.415.8999 or kristi.leo@structuredfinance.org.

Sincerely,

Kristi Leo
President, Structured Finance Association

[15] *Id.* § 463.2(f)(2)(i) ("The following are examples of what does not constitute Express, Informed Consent: (i) A signed or initialed document, by itself.").