OAR 137-020-0020 OFFICIAL COMMENTARIES (The Section references are noted for each commentary that follows). All deletions to existing commentary are [*bracketed and in italics*] and all new additional language is in **bold letters**. The sections titles are in unformatted plain text for ease of reading.

Motor Vehicle Price And Sales Disclosure

2. <u>Definitions</u>:

j. "Clear and Conspicuous"

OFFICIAL COMMENTARY: Each advertisement shall be evaluated for its overall impression. The public should not have to weigh each word, hunt for the hidden meaning of each statement, or search for inconspicuous disclaimers. Advertisements which place material disclosures in small print, inconspicuously buried at the bottom of the advertisement are not clear and conspicuous. If, on the other hand, the information does not materially change, limit or alter the offer being made, it can be placed at the bottom of an advertisement.

(4) In the case of radio advertising:

OFFICIAL COMMENTARY: 15 USC § 1667c(c) allows certain required lease disclosures to be given to a consumer in a radio advertisement by referring the audience to either a toll free telephone number or a written advertisement that appears in a publication in general circulation in the community served by the radio station on which such advertisement is broadcast. All lease advertisements on radio must include the following disclosures to comply with Oregon and Federal law:

1. That the transaction advertised is a lease;

2. The total amount of any initial payments required on or before consummation of the lease or delivery of the property, whichever is later;

3. The number, amounts, due dates or periods of scheduled payments, and the total of such payments under the lease; and

4. The capitalized cost (Oregon requirement).

Before advertising a motor vehicle lease on the radio, an advertiser should review 15 USC § 1667c in its entirety to ensure compliance with Oregon and Federal law. The toll free telephone number or written advertisement must include all other disclosures required by both OAR 137-020-0050 and 15 USC § 1667c.

(7) In the case of internet advertising:

OFFICIAL COMMENTARY: For more clarification and explanation regarding

internet advertising go to the Federal Trade Commission website titled "Dot Com Disclosures" at http://www.ftc.gov/bcp/conline/pubs/buspubs/dotcom/ .

l. "Dealer Title and Registration Document Preparation Service Fee"

OFFICIAL COMMENTARY: Oregon law and administrative rules permit dealers to act as DMV agents and dealers may elect to prepare, submit, or prepare and submit documents necessary to issue or transfer a certificate of title for a vehicle, register a vehicle or transfer registration of a vehicle, or issue a registration plate. For providing this service, dealers may charge a purchaser of a vehicle a fee for the preparation of those documents, not to exceed the amount established by DMV. Further, this fee is always negotiable, otherwise it could be classified as a tax. While a dealer has a right to prepare the DMV documents and charge the fee, the consumer may choose not to do business with a dealer who insists on charging a fee. Of course, the dealer can process the documents without charging a fee.

In addition to the Dealer Title and Registration Document Preparation Service Fee, dealers may offer consumers the option of electronically filing their title and registration documents using an integrator. Dealers may charge consumers an additional fee for this service, subject to any limitations established by DMV. Consumers must knowingly agree to pay the additional fee for this electronic filing service. If a consumer does not agree to pay the additional fee for the electronic filing service, a dealer may still electronically submit title and registration documents at no additional cost to the consumer.

s. "Negative equity"

OFFICIAL COMMENTARY: In layman's terms, if a consumer has negative equity on his or her vehicle it means the consumer owes more on the vehicle than it is actually worth. While the "true market value" of a vehicle may vary, it can be determined by using Kelly Blue Book or NADA Book values and the average sale price of the vehicle at regional vehicle auctions. While these publications are relevant they are not determinative. Depending upon the supply and demand for a given vehicle it could be worth more or less than its "book" value.

t. "Negative equity adjustment"

OFFICIAL COMMENTARY: Negative equity adjustments have become a common business practice in motor vehicle transactions. The practice is used when a consumer has negative equity in a trade-in and often is unable to qualify for financing without making a down payment. There are a number of possible reasons a dealer or broker wants to inflate the trade-in value on a vehicle with negative equity: (1) to make the consumer think (s)he is receiving more for his or her trade-in than it is actually worth; (2) to make it appear to a financial organization that the consumer is more creditworthy than is true; or, (3) to create a down payment from

trade-in equity when none exists. While a dealer is free to determine the actual cash value [ACV] on a vehicle taken as a trade-in, if the ACV exceeds the true market value it could be an indication that the dealer has engaged in a negative equity adjustment and be a reason for further scrutiny of the transaction.

u. "Offering price"

OFFICIAL COMMENTARY: Examples of correctly calculated offering prices **are** [*would be*] as follows:

1. [*(i)*] A car's MSRP is $10,000, license and registration are $100, undercoat is $100, dealer added options are $2,000 and the **Dealer** Title and Registration [*Processing*] **Document Preparation Service** fee is $50. **A finance company offers a $1,000 rebate to qualified consumers.** The offering price of the vehicle is $12,100.[*00.*] **The offering price cannot include the $50 service fee or the $1,000 rebate that is not available to all consumers without exception.**

2. [*(ii)*] A motorcycle's MSRP is $5,000, license and registration are $50, delivery, **assembly** and setup costs the dealer $250, custom accessories are $500 and the **Dealer** Title and Registration [*Processing*] **Document Preparation Service** fee is $50. The offering price of the vehicle is $5,750.00. The costs of delivery**, assembly** and setup[,] **and** all accessories [*or any other fees and costs*] must be included in **the offering price in** any advertisement or quoted **offering** price given [*for*] **during** the sales **negotiation** of [*any vehicle by the dealership*] **the motorcycle** and cannot be added in as fees or extras [*later*] **after the selling price of the motorcycle is agreed upon between the dealer and consumer. The advertised offering price does not need to include the license and registration or Dealer Title and Registration Document Preparation Service fee. While the dealer may now choose to prepare title and registration documents and may charge a fee for this service,** [*N*]nothing in this or any other rule requires a dealer to charge any Title and Registration **Document Preparation Service** [*Processing*] fee. **Whether the consumer will pay any fee for this service and if so its amount, up to the maximum allowed by law, is always negotiable between the consumer and the dealer.**

cc. "Spot Delivery"

OFFICIAL COMMENTARY: Spot delivery occurs when a consumer signs a purchase order, lease agreement or retail installment contract for a motor vehicle and the consumer takes delivery of the vehicle "on the spot," prior to the consumer being approved by a financial organization for the transaction.

ee. "Used vehicle"

OFFICIAL COMMENTARY: Vehicles that would be considered "used" include, but are not limited to:

1. [*(i)*] **New vehicles** [*Dealer demonstrators*] that are delivered to a consumer on a purchase order, lease agreement or retail installment contract or spot delivered, then subsequently returned to the dealer **for any reason, including but not limited to the** [due to an] inability to obtain financing; [*and*]

2. [*(ii)*] Demonstrators and company cars that have never been sold to a retail customer, but have been driven for purposes other than test drives or moving, including use by the dealer, the dealer's employees, the dealer's corporate officers or anyone else; and

3. [*(iii)*] All vehicles that have been driven more than the limited use necessary in moving or road testing a new vehicle prior to purchase or delivery to a consumer.

The intent[*ion*] of this definition is to conform the applicability of the rule to the maximum extent permitted by ORS 646.608 and Weigel v. Ron Tonkin Chevrolet Co., 298 OR 127, 690 P2d 488 (1984).

ff. "Vehicle identification number" or "VIN"

OFFICIAL COMMENTARY: Requiring the use of only the actual vehicle identification number or its last 6 numbers or characters in all advertising ensures positive identification of all advertised vehicles. Some deceptive advertisements have used fictitious stock numbers to advertise vehicles that did not exist. The implementation of this change will allow any consumer to identify a specific advertised vehicle at a dealership simply by looking in the vehicle's front window.

3. Violations:

a. Mandatory Posting of Offering Price

OFFICIAL COMMENTARY: This rule requires every dealer who advertises an offering price for a motor vehicle in any media to post the advertised offering price on the vehicle in a clear and conspicuous manner.

c. Offering Price

OFFICIAL COMMENTARY: The purpose of this rule **is** to ensure that dealers are not able to add in hidden or undisclosed costs after the price for a vehicle has been advertised or negotiated with a consumer. Examples of potential violations [*would be*] **are** as follows:

1. [*(i)*] A [*dealer*] **vehicle is** advertised[*s*] or offer**ed**[*s*] for sale at the dealership [*a vehicle*] for $10,000[*.00*]. After the consumer accepts the dealer's offer and agrees to purchase the vehicle, the dealer learns that the consumer has a poor credit history. The lending company charges the dealer a premium of $500 to accept the retail installment contract. The dealer then tries to add this $500 to the contract with the consumer as a "loan fee." This practice is unlawful. [*In order to cover this cost of doing business the*

dealer must include that $500 in the offering price of any advertisement or posted or negotiated price at the dealership.] ;

2. [*(ii)*] A [*dealer*] **person** advertises a vehicle for $20,000 in the local newspaper. The vehicle has $1,500 worth of after-market accessories on the vehicle. When the consumer arrives at the dealership and wants to purchase the vehicle, the salesperson tells the consumer that the price is $21,500 with the added accessories. This practice is unlawful. If the dealer wants reimbursement for these options, the dealer must include that amount in any advertised price;[.] **and**

3. A motorcycle dealer charges $350 to setup and assemble a motorcycle. This amount must be included in any offering price advertised and cannot be noted only by disclosure at the bottom of the advertisement with the use of an asterisk. Further, any price displayed on the motorcycle or price quoted during negotiations must include this amount in any offering price quoted to a consumer.

f. Unconscionable Add-on Pricing

OFFICIAL COMMENTARY: While the average consumer knows that a motor vehicle is a negotiated price item, many would expect that the cost of extended service contracts, protective coating products, credit life insurance or other additional products are sold at fixed non-negotiable prices. Some unscrupulous dealers and brokers, however, have charged as much for these products as they can, based upon the susceptibility of the customer. Unfortunately, sometimes the most vulnerable consumers, such as those with problems such as illiteracy, a physical infirmity, a mental handicap, an inability to understand the English language or other limitations, are charged well in excess of the fair market value.

This rule does not limit a dealer's ability to mark up or down the selling price of a product or service in the normal course of business. This includes offering special discounts to repeat customers or volume discounts to purchasers of large quantities of products or services.

l. False Representations Regarding Financing or Goods

OFFICIAL COMMENTARY: Due to many changes in the motor vehicle industry, lower profit margins on the actual motor vehicle transaction have caused dealers and brokers to focus more on higher profits in the sale of additional goods, accessories, services, products or insurance. This rule ensures a consumer is not misled into purchasing anything other than the motor vehicle, without the consumer's informed knowledge and consent.

Nothing in this rule prohibits a dealer from ensuring that a consumer has motor vehicle insurance required by law or according to the terms of financing in order to protect the collateral financed. No person, however, can make false statements regarding any requirement to purchase products or services.

This rule does not prohibit dealers from adding accessories, which enhance the value and marketability of a vehicle to some of their inventory, and include them in the offering price of the vehicle. If a dealer adds high profit after-market products, including but not limited to paint protector, door edge guards and glass etching, which do not correspondingly increase the actual cash value of the vehicle, such practice would be carefully scrutinized as a possible violation of this rule.

m. Payment Price Packing

OFFICIAL COMMENTARY: This rule addresses the practice that is commonly referred to as "packing," or the "presumptive sale." "Packing" is the deceptive practice of misrepresenting monthly payments or total cost of a vehicle to consumers during auto sales and lease negotiations in order to surreptitiously facilitate the sale of additional automobile related goods, accessories, services, products or insurance. Consumers are entitled to be dealt with in a fair and non-deceptive manner during negotiations to buy or lease a motor vehicle, including the right to receive timely, accurate and non-misleading information about the cost of the vehicle and all related goods, accessories, services, products or insurance they are buying or leasing. Some dealers have used "packed" payment schemes and poor disclosures to trick consumers into believing that services such as credit insurance, vehicle service contracts, chemical protection, and security devices are included or provided "free" in the purchase or lease agreement; or that they are discounted when they are not. Others have quoted monthly payments calculated upon interest rates far in excess of what they believe will be the final interest rate or simply add an extra $40 or more to the monthly payment than what is needed to cover the price of the vehicle. They use this inflated quote in order to build in some "legroom" to later add other optional products and services to the transaction with the extra cost hidden or appearing lower to the consumer. Because the monthly payment doesn't increase and because the consumer believes the products are "free" or discounted, most consumers don't object when the products are included in the final contract.

o. Disclosure of Material Nonconformities and Defects

OFFICIAL COMMENTARY: Unless explicitly disclosed prior to sale or lease, a motor vehicle that is offered for sale or lease to the public is represented, either directly or by implication, to be roadworthy when it is sold, to have an unbranded title and to have no undisclosed material defects. The dealer is in a superior position to inspect and determine the condition of a vehicle prior to marketing the vehicle. It is an easy matter, through a number of industry and internet sources, for a dealer or broker to review a vehicle's title, damage and ownership history. The intent of this rule is to conform its applicability to the maximum extent permitted by ORS 646.608 and the holding in State ex rel. Redden v. Discount Fabrics, Inc., 289 Ore. 375, 615 P.2d 1034 (1980): "Under the terms (of the Unlawful Trade Practices Act) a defendant is liable for misrepresentations made negligently, without evidence that it was attended by either conscious ignorance or reckless indifference to its truth or

falsity, whereas evidence that a misrepresentation was made negligently is insufficient in an action for common law fraud. In other words, the term "wilful," as defined by § 646.605..., requires no more than proof of ordinary negligence by a defendant in not knowing, when it should have known, that a representation made by him was not true." ORS 646.608 (2) states: A representation under subsection (1) of this section or ORS 646.607 may be any manifestation of any assertion by words or conduct, including, but not limited to, a failure to disclose a fact.

This rule does not change the existing laws regarding warranties on used vehicles nor does it place any new requirements on dealers or brokers. Dealers and brokers should understand, however, that simply because they comply with the FTC "As-Is" rule it does not relieve them of their obligation to disclose material defects they knew or should have known about. A dealer is not required to guarantee, warranty or represent that a used vehicle will not have any mechanical problems or undetected material defects once the vehicle is sold. Further, a dealer need not create an exhaustive list of every ding, paint scratch, fabric tear or discoloration clearly visible upon inspection by an average consumer.

q. False Statement of Broker Fees

OFFICIAL COMMENTARY: Brokers are a fiduciary of a consumer on whose behalf they have agreed to negotiate the purchase or lease of a vehicle. Unlike a dealer, a broker is not engaging in an "arm's length" transaction. Brokers market their services to act in the consumer's best interest. They are in an agency relationship. The consumer has a right to rely on that relationship. For example, a broker who tells a consumer that the broker may be receiving compensation from a dealer as part of the transaction, when the funds for that payment were part of the total amount paid by the consumer as part of the purchase or lease, is misrepresenting the nature of the transaction and making a false statement as to the source of the funds the broker will be receiving. The correct disclosure would be that the broker has added its fee to the price which it negotiated with the seller on behalf of the consumer.

While ORS 822.047 does not require the broker to initially disclose the amount of its profit, once the broker undertakes to act on behalf of a consumer, or do anything that could cause a consumer to believe the broker is acting on the consumer's behalf, the dealer or broker may no longer engage in self-dealing, but must act in the consumer's best interest. Further, if a customer asks what the fee is for the service, the broker may not misrepresent the amount of the fee being charged. In no case may the broker misrepresent the nature of the charge, the amount of the fee or in what way the fee for the broker's service is paid.

r. Disclosure of Dealer/Broker Status

OFFICIAL COMMENTARY: It is well established in law that a broker is in a fiduciary relationship with its client. Fiduciary duties can be grouped into three

categories: (1) Duty of Loyalty. A fiduciary must act in accordance with the interests of the beneficiary, and not his own interests; (2) Duty of Candor. A fiduciary must not withhold information from the beneficiary, particularly with respect to the fiduciary's dealings with the beneficiary; and (3) Duty of Care. A fiduciary must act with some degree of care with respect to the beneficiary. This is usually formulated as a duty to exercise the care that an ordinarily prudent person would in similar circumstances.

When representing a consumer, a broker acts as an agent for the consumer and is in a fiduciary relationship with the consumer. As such, a broker occupies a position of such power and confidence with regard to the property of another that the law requires brokers to act solely in the interest of the person whom they represent and in good faith. In Oregon, only one type of dealer license is required, whether the licensee acts as a dealer or broker. This can lead to confusion by a consumer. If the consumer believes that the person the consumer contacted was a broker, the consumer expects that person to act in the consumer's best interest. Brokers have an obligation to ensure that the consumer knows what the broker's business status is in relation to the transaction and whether the consumer is dealing with it as a broker or a dealer. Some non-franchised dealers have added to the confusion by simultaneously advertising that they are new and used vehicle dealers and brokers. Such advertising places the burden upon such a business to ensure it clearly discloses in what capacity it is dealing with the consumer.

Sometimes this relationship can be confusing to the consumer. If a consumer first contacts a dealer who does not have a vehicle in its own inventory that the consumer wishes to buy or lease, and the dealer agrees to find, negotiate or arrange the purchase or lease of a specific vehicle for the consumer from a third party, a broker relationship may be created. If the dealer, without placing any obligations on the consumer, finds the desired vehicle, purchases it and places it into the dealer's own inventory, the dealer may thereafter negotiate and sell or lease the vehicle to the consumer and still remain a dealer. However, a dealer may become a broker under several circumstances, including, but not limited to the following: the dealer places a contractual or monetary obligation on the consumer in order to arrange or negotiate the purchase or lease of the vehicle; the dealer makes any statement which could cause an average consumer to believe the dealer was acting as an agent of the consumer (such as saying the dealer would negotiate the best price for the transaction); or the dealer arranges the transaction for the consumer through another dealer and receives any compensation from the consumer or other dealer.

t. <u>Illusory or Deferred Down-Payments - Hold Check Agreements</u>

OFFICIAL COMMENTARY: This rule addresses appropriate disclosure in accordance with the single document rule (ORS 83.020), Regulation Z, specifically 12 CFR §226.2(a)(18), and Regulation M. It also ensures that the actual nature and terms of any deferred payment made on a purchase or lease of a motor vehicle are clearly disclosed on not only the purchase order, lease agreement and retail

installment contract, but also on any credit application.

Sometimes when a consumer does not have sufficient funds, which may be required as a down payment from a financial organization, a dealer will request a promissory note or a post-dated check from a consumer. It is not uncommon for the check to be drawn on an account with insufficient funds at the time it is written. The promissory note or check is then listed as a down payment on a purchase order, lease agreement, retail installment contract and/or the credit application without disclosing the actual form of the payment to the potential lender. This makes it falsely appear that the consumer has paid a sum certain at the time of the transaction when the dealer or broker has not yet received those funds. Often the consumer also gives the dealer or broker explicit instructions not to deposit the check until some date in the future. This may be done in order to make the consumer appear more creditworthy than his or her actual financial status would substantiate.

Then, not only is the consumer required to make future monthly payments on the motor vehicle, the consumer is also under the burden of paying additional future payments for a check or promissory note that the consumer may or may not be able to afford. A dealer or broker might also cash the check earlier than agreed upon, or as directed by the consumer, causing the consumer's account to be overdrawn and damaging the consumer's credit. Listing a deferred payment on a credit application as a down payment, without disclosing its actual terms and conditions, is fraud upon the financial organization, which bases its decisions on the information supplied by the dealer or broker. It is not uncommon to later find the consumer in default on the loan, which may not have been approved had honest information been disclosed on the credit application.

u. Yield Spread Premium Disclosure

OFFICIAL COMMENTARY: This rule is only applicable when a dealer or broker arranges financing for a consumer buying or leasing a motor vehicle and charges a fee or yield spread premium.

When a dealer or broker arranges vehicle financing for a consumer it often charges a fee or adds points to the buy-rate charged by the financial organization. This mark-up to the cost of financing may cost consumers thousands of dollars over the term of a loan or lease.

Without disclosure, many consumers are unaware that the dealer or broker is making a profit for arranging the consumer's financing. Many consumers believe that the dealer or broker is getting them the best rates for which they qualify. This rule gives the consumer the most basic information regarding costs incurred when the consumer finances his or her transaction through a dealer or broker.

Subsection (2) of this paragraph addresses an unlawful practice known as "rate

packing." The dealer runs the credit of a prospective buyer and knowing the buyer's credit score, calculates the monthly payment using an interest rate that is excessivly more than what the consumer's credit score credit would qualify for and often much higher than what the financial organization would be willing to allow on a point yield premium. Once the deal is closed, the dealer has effectively left plenty of "legroom" in the deal for finance personnel. Finance personnel will then drop the rate down to the maximum rate the financial organization allows for a point yield premium, usually 2 or 3 points, and include additional products or insurance in the deal with the consumer not aware the cost was added to the price of the vehicle. The customer is then presented with expensive options or service contracts "for only a few extra dollars per month" or "for no extra charge."

v. Misleading or Deceptive Tying Requirements

OFFICIAL COMMENTARY: A tying arrangement is one in which a person conditions the sale or financing of one product to the purchase of another product. This rule makes it clear that a person may not falsely represent that the person will not or cannot sell or finance a motor vehicle without the consumer purchasing additional items when in fact the person does sell or finance vehicles in the course of its business without such requirements in each and every transaction.

This rule does not prohibit a dealer from requiring or ensuring that a consumer has purchased motor vehicle insurance as may be required by law or the terms of a purchase order or lease agreement.

y. Misrepresentation Regarding Failure to Finance

OFFICIAL COMMENTARY: This rule addresses the unlawful business practice commonly known as "yo-yo financing" or "bushing." In a yo-yo transaction, a dealer quotes the consumer finance terms that are not yet accepted by a financial organization in order to get the consumer to take delivery of the vehicle "on the spot." Later when the dealer either cannot get the quoted terms funded or cannot make the expected profit from added points, the dealer tells the consumer that the deal did not go through and that the dealer needs to rewrite the transaction on terms usually less favorable to the consumer.

It is a common practice of dealers and brokers to quote financing terms that include an undisclosed yield spread premium when they spot deliver a vehicle. When a dealer engages in the practice of unwinding a transaction even though the consumer is qualified for the original quoted terms, simply so the dealer can add interest points or make more profit, it is one of the most egregious forms of the yo-yo scam. If there is a financial organization that will fund the quoted rate, simply because the rate is not low enough to allow the dealer or broker to add a yield spread premium, that will never justify the dealer or broker unwinding the transaction.

A dealer or broker either knows, or has the ability to find out, prior to the time it

spot delivers a motor vehicle and quotes finance terms: the available buy-rates, the consumer's credit history, and the consumer's credit score. Dealers who "spot deliver" motor vehicles are in fact the originating creditors extending the finance terms to the consumer. In today's credit market, a dealer can almost always find a financial organization that will accept the transaction. The only question is whether the dealer will take a loss, break even or make a profit on the financing.

The primary targets of this rule are dealers and brokers who offer terms and availability of financing without having a good faith basis based upon the consumers' credit worthiness, simply to have the consumer accept spot delivery. This rule should deter brokers or dealers from knowingly quoting rates to consumers — which they know the consumer will not be approved for — simply to get the consumer to take delivery of the vehicle.

Not all transactions in which a credit application is not approved are a scams. Sometimes a customer does not have strong enough credit to quality for the most attractive financing offers, has a change in financial circumstances or has provided incomplete or false information on the credit application.

z. Anti-Bushing Rule

OFFICIAL COMMENTARY: This rule clarifies the Oregon "bushing" statute, ORS 646.877, so that dealers and brokers clearly understand its requirements. This statute gives both dealers and consumers specific rights when it is necessary to unwind a spot delivery transaction. While the statute clearly states "the seller shall return to the buyer all items of value received from the buyer as part of the transaction," many dealers do not actually give the consumer the down payment and trade-in back before they try and get the consumer to sign a new contract. Many dealers and brokers do not even have the down payment or trade-in readily available when they inform the consumer that the consumer needs to enter into a new contract. Simply offering to return the items of value and having a consumer agree to rescind the prior deal is not in compliance with the statue. The consumer has an absolute right to walk away from the deal if the original offer is not going to be honored. Without having actual possession of the trade-in and down payment, the seller has the ability to pressure a consumer into entering into a less favorable contract and has an uneven bargaining position. This rule makes it clear that dealers or brokers must in fact return the down payment and trade-in before they try and get the consumer to keep the vehicle and enter into a new contract. Anything less violates the statute and this rule.

aa. Unlawful Negative Equity Adjustment

OFFICIAL COMMENTARY: Both federal and Oregon law prohibit the practice of negative equity adjustments. On April 6, 1998, the Board of Governors of the Federal Reserve System (the Federal Reserve) published, as a final rule, revisions to the Official Staff Commentary to Regulation Z, 12 C.F.R. Part 226, Supplement I-

Official Staff Commentary. *See* 63 Fed. Reg. 16669. The revisions to the Federal Reserve's Official Staff Commentary to Regulation Z became effective March 31, 1998. Compliance with the Official Staff Commentary became mandatory on October 1, 1998.

The final rule states, in part: Under Regulation Z, the term "down payment" refers to an amount paid to a seller to reduce the "cash price" in a credit sale transaction. Comment 2(a)(18)-3 gives guidance on how a creditor discloses the down payment if a trade-in is involved in the sale and if the amount of an existing lien exceeds the value of the trade-in. The comment clarifies that creditors should disclose the down payment as zero and not a negative amount. The comment addresses a credit sale and financed down payment treated as a single transaction; it does not affect creditor's ability to disclose them as two transactions.

63 Fed. Reg. 16669. Section 2(a)(18)-3 of the Official Staff Commentary provides:

> **3. *Effect of existing liens.* In a credit sale, the "down payment" may only be used to reduce the cash price. For example, when the existing lien on an automobile to be traded in exceeds the value of the automobile, creditors must disclose a zero on the down payment line rather than a negative number. To illustrate, assume a consumer owes $10,000 on an existing automobile loan and that the trade-in value of the automobile is only $8,000, leaving a $2,000 deficit. The creditor should disclose a down payment of $0, not -$2,000.**

Several states, including Oregon, specifically permit negative equity to be included in the amount financed or principal balance of a retail installment contract and mandate that negative equity appear as an other amount financed, not as a component of the cash price or down payment. Chapter 83 of the Oregon Revised Statutes sets forth the requirements and limitations for every retail installment contract and mandates where negative equity must be disclosed on the contract and does not allow negative equity adjustments to be made to the cash sale price.

First, Oregon law defines the applicable terms:

ORS 83.010(1) "Cash sale price" means the price for which the seller would have sold or furnished to the buyer, and the buyer would have bought or obtained from the seller, the goods or services which are the subject matter of a retail installment transaction, if the sale had been a sale for cash. The cash sale price may include any taxes, registration and license fees and charges for transferring vehicle titles, delivery, installation, servicing, repairs, alterations or improvements.

ORS 83.010(4) "Principal balance" means the cash sale price of the goods or services which are the subject matter of a retail installment contract less the

amount of the buyer's down payment in money or goods or both, plus the amounts, if any, included therein, if a separate identified charge.

Finally, Oregon law specifies the contents, sequence and location of the required disclosures in the contract:

ORS 83.030 Contents of contract. The retail installment contract shall contain the names of the seller and the buyer, the place of business of the seller, the residence or other address of the buyer as specified by the buyer and a description or identification of the goods sold or to be sold, or services furnished or rendered or to be furnished or rendered. The contract also shall contain the following items, which shall be set forth in the sequence appearing below; however, additional items may be included to explain the calculations involved in determining the balance to be paid by the buyer:

(1) The cash sale price of each item of goods or services;

(2) The amount of the buyer's down payment, identifying the amounts paid in money and allowed for goods traded in;

(3) The difference between subsections (1) and (2) of this section;

(4) The aggregate amount, if any, included for insurance, specifying the type or types of insurance and the terms of coverage;

(5) The aggregate amount of official fees;

(6) The principal balance, which is the sum of subsections (3), (4) and (5) of this section;

* * * * *

There is no question but that the state and federal laws clearly contemplate the disclosure of negative equity. The use of a "negative equity adjustment" is sometimes referred to as "creative financing." The reality is that the practice consists of committing fraud in reporting to a financial organization regarding the true value of the trade-in and misrepresenting the actual amount of the down payment made in order to get financing on the new transaction.

The recent California case of <u>Reta Thompson v. 10,000 RV Sales, Inc.,</u> 130 Cal.App.4th 950, 979; 31 Cal. Rptr. 3d 18. (Ct. App. 2005) succinctly explained why this practice is unlawful:

> **"Although financing properly disclosed negative equity is permissible under the [California Automobile Sales Finance Act] ASFA and Regulation Z, it is not permissible to include the over-allowance in the cash price of a vehicle. This interpretation of the ASFA is consistent with its remedial purpose of protecting consumers from inaccurate and unfair credit practices through full and honest disclosures. Allowing a dealer to include over-allowances on trade-in vehicles in the cash price of vehicles being purchased adversely affects consumers who are funded long-term loans for which they otherwise may not qualify and which they may not be able to afford. Additionally, this**

> **practice negatively impacts lenders who extend credit for sales misrepresented to them based on fictitious values of vehicles being financed. As the evidence at trial showed, lenders cannot determine fraud from the face of a contract when the numbers have been manipulated. Finally, and of no less import, enforcing the ASFA's disclosure requirements protects dealership competitors who are at a disadvantage if they quote a true trade-in value rather than an inflated one. Requiring a meaningful disclosure of credit terms both protects consumers and enhances fair business competition. (15 U.S.C. § 1601(a))."**

Oregon law, as well as Regulation Z, permit the financing of prior credit balances on trade-in vehicles as long as the amount financed is clearly and separately disclosed and properly identified. (*See,* Official staff interpretation, 12 C.F.R. § 226.18(c) (Supp. I 2005).) To engage in any negative equity adjustment not only violates Oregon Revised Statutes Chapter 83 disclosures and Regulation Z, but is a violation of the Oregon Unlawful Trade Practices Act in several sections which make it unlawful when a dealer or broker:

> **"Makes false or misleading representations concerning credit availability or the nature of the transaction or obligation incurred; or**
>
> **Makes false or misleading representations of fact concerning the offering price of, or the person's cost for real estate, goods or services."**

This rule requires that a consumer be clearly informed that the negative equity in his or her trade-in has been added to his or her purchase or lease. Compliance with this rule will eliminate those situations where a consumer believes (s)he has purchased a vehicle at one price, only to discover after closer examination of the deal documents that the negative equity has been added to the cost of the new transaction. The consequences are enormous. The added cost of financing can add up to thousands of extra dollars for a consumer, plus makes it even harder to trade-in the new vehicle at a later date because the negative equity on the new vehicle is even more than the original trade-in.

This rule creates no new law. It simply states that dealers and brokers must now obey the laws that have been in effect for over 5 years. All of the published purchase agreements and retail installment contracts printed and distributed by the different Oregon dealer associations added a disclosure line for negative equity after the changes to Regulation Z became effective. The time has come that they be used honestly in every transaction.