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SUBMITTED ELECTRONICALLY

Federal Trade Commission
Office of the Secretary
Room H-135 (Annex H)
600 Pennsylvania Avenue, N.W., Washington, D.C. 20580
Electronic address: www.regulations.gov (CRT Docket No. 106)

Re: “Used Car Rule Regulatory Review, Matter No. P087604

The National Independent Automobile Dealers Association (“NIADA”) submits the following comments to the Federal Trade Commission (“FTC” or the “Commission”) regarding its notice of request for public comment (“Notice”) on its Used Motor Vehicle Trade Regulation Rule (“Used Car Rule” or “Rule”). These comments supplement those previously submitted by NIADA on November 19, 2008.

I. COMMENTS

In reviewing the comments submitted by various interest groups and individuals, it appears there is a developing effort to expand the Used Car Rule far beyond its original scope. When first enacted, the Rule was limited to providing information about the availability and extent of any warranties on used motor vehicles. To the extent the FTC elects to update the Rule to deal with developments related to warranty programs that did not exist when the Rule was first adopted, NIADA supports such change. In the last twenty-five years, certified used motor vehicle and third party warranty programs have been developed without a corresponding change in the format or content of the Used Car Buyer’s Guide. Similarly, a need has developed in some states to include systems covered and a time duration when only implied warranties apply to a used vehicle sale. Limited changes to the Rule and Guide to accommodate these issues that relate to the original intention of the Rule are needed.

However, any drastic change requiring a dealer to disclose damage, defect or title history information on the Guide is unwarranted and will, if adopted, lead to increased costs for dealers and consumers and to the necessity for changes to what has become long-standing state law affecting disclosure of certain information in used motor vehicle transactions.

In the years since the adoption of the Rule and implementation of the Guide, dealers have spent significant time and resources in developing policies and procedures to comply with the FTC requirements. They have become familiar with how to complete the Guide and how to structure a transaction with the Guide as part of the paperwork for the purchaser. In that same period, states have developed their own laws and administrative regulations to address numerous issues including those related to damage disclosure, repair history, salvage/flood damage and title brand issues. Generally, these matters have been dealt with under a state’s Unfair and Deceptive Acts and Practices Acts (UDAP). Making the types of disclosures noted above will, in

addition to changing the Guide, also require dealers to make specific disclosures on forms used in a sales transaction and each of those disclosures and forms will have to be properly integrated into the purchase contract. At a minimum, the types of damage, repair and title history issues noted are considered material facts affecting a consumer transaction, such that the information must be disclosed under the UDAP statute. Such Acts permit rescission of transactions or recovery of multiple damages resulting from dealer violations and the recovery of attorney fees. Depending on the extent of the conduct, UDAP statutes also permit pursuit of class actions. These laws and cases interpreting them have developed for over twenty years. To radically change the landscape of what information must be on what forms and when certain disclosures must be made will require reworking of dealership forms, practices and procedures, placing an inordinate cost on the dealers while, at the same time, exposing them to significant legal costs by being made the guarantors of information over which they have no control.

Various constituencies urge a requirement that some type of vehicle history report be noted on the Guide and also seem to suggest that dealers be obligated to check NMVTIS. The shortcoming in this entire advocacy is that no one offers the dealer a safe harbor when providing the information. No one should dispute that any history database, whether private or government operated, has the limitation that it is only as good as the data in it, i.e. if the data has not been acquired or uploaded into a system, then a dealer cannot report the information. Without a safe harbor regarding the limitations of any type of report, then the dealer, in essence, becomes the guarantor that the report contains all correct and relevant information about a particular vehicle. Imposing this type of reporting requirement into the FTC Buyer's Guide will force every dealer selling used motor vehicles to run a history report and/or NMVTIS check every day for every used vehicle in inventory hoping that each daily report contains completely up to date information about each vehicle and that such information is accurate. Such a procedure invariably sets up the dealer to fail. Since any such report would be deemed a material statement under state UDAP statutes, the dealer would be automatically liable for providing false or incomplete information. This is not a burden that should be imposed on any dealer.

The foregoing observations become even more critical when it is understood that the proposed expansion of the Rule and Guide will include not only information from governmental agencies but also from private third parties. Who is to guarantee the content and accuracy of the information in any report and who will be responsible for any misreporting? Under the current suggestions, the dealer who posts the information in the window of a vehicle offered for sale is the one who will be liable because that dealer will be charged with having made a false or misleading, unfair or deceptive statement to a consumer.

In this same context, advocates of revamping the Rule advocate sweeping changes concerning reporting of the remaining or balance of manufacturer warranties. Those advocates assert, "Dealers can readily learn whether the warranty applies." Comments, National Association of Attorneys General, November 19, 2008, p. 10. While this may be true of a new (franchised) motor vehicle dealer for the line make(s) that dealer is authorized to sell, it is conversely untrue for new motor vehicle dealers for line makes they are not franchised to sell and is totally untrue for independent (non-franchised) used motor vehicle dealers. These last two categories of dealers do not have access to manufacturer databases that reveal warranty history on vehicles of a particular line/make of vehicle. Also, these latter two types of dealers cannot just call up a manufacturer or competing dealer of a particular line/make of vehicle and ask what warranty history is on a vehicle and if any balance of manufacturer's warranty remains or if the warranty has been cancelled for any reason. Imposing a warranty disclosure requirement with which a dealer automatically cannot comply is unwarranted.

Some advocates argue that Wisconsin and Maine have provided additional information on the Guide. However, when the Rule was enacted, forty-eight states elected to follow the federal model and, in the intervening twenty-plus years, have developed statutes, administrative regulations and case law based on that model. Wisconsin and Maine were exceptions granted years ago when those two states alone chose to go a different route. To now elevate one exception and make it the rule ignores what the other forty-eight states have done. Overhauling the Rule and Guide will obligate the vast majority of states to change their laws and regulations and force dealers to change their practices and procedures that have kept them in compliance for years.

NIADA opposes any major modification to the Rule and Guide that requires reporting of additional information concerning damage history, defect history, salvage/flood history and title history or brands. Such excessive change is unwarranted in a process that was intended to reveal information about warranties on used motor vehicles. It is also unnecessary when the change would result in chaos in the industry.

If there is to be any change in the Rule and Guide regarding any history information, it should be no more than a check box on the form indicating the dealer did check whatever "history" is required, i.e. Carfax, AutoCheck, or NMVTIS. However, in order to avoid unnecessary compliance and regulatory enforcement problems for dealers, any new procedure should be imposed only after a fully functional reporting system is in place and it must provide a safe harbor for dealers who report information compiled by others.

On behalf of the NIADA, I would like to thank the FTC for the opportunity to comment with respect to this matter, and for the FTC's consideration of our comments. Please feel free to contact me if I can provide additional information that would be useful in your inquiry going forward.

Sincerely,

/s/

Keith Whann
NIADA General Counsel