



FEDERAL TRADE COMMISSION
Chicago Regional Office

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COMMISSION AUTHORIZED

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November 3, 1989

Mr. Thomas L. Gais
Wisconsin Department of Transportation
Dealer Section
Room 806
P.O. Box 7909
Madison, WI 53707-7909

Dear Mr. Gais:

The staff of the Federal Trade Commission's Chicago Regional Office and Bureau of Competition are pleased to have this opportunity to respond to your request for public comments regarding proposed changes to the Wisconsin Department of Transportation (the "Department") regulations concerning automobile dealers and automobile sales.¹ We believe that the regulations would likely raise the prices that Wisconsin consumers pay for new and used cars, reduce competition by limiting innovative automobile marketing methods, and deprive consumers of the savings that they could realize through such marketing methods.

INTEREST AND EXPERIENCE OF THE STAFF OF THE FEDERAL TRADE COMMISSION

Our interest in this legislation stems from the Commission's mandate to enforce the consumer protection and antitrust laws of the United States. The Federal Trade Commission is charged with promoting competition and protecting consumers from unfair methods of competition and unfair or deceptive acts or practices.² In fulfilling this mandate, the staff of the Federal Trade Commission often submits comments, upon request, to federal, state, and local governmental bodies to help assess the implications for competition and consumers of pending policy issues. In enforcing the Federal Trade Commission Act, the Commission has gained substantial experience in analyzing the

¹ These comments represent the views of the staff of the Federal Trade Commission's Chicago Regional Office and Bureau of Competition and do not necessarily represent the views of the Commission or any individual Commissioner.

² See 15 U.S.C. § 41 et seq.

impact of both private and governmental restraints on competition.

During recent years, the Commission has been involved in issues relating to restrictions that might tend to limit alternative types of retailing beneficial to consumers. The Commission has addressed the competitive implications of time and place restrictions in various retail markets. For example, the Commission has promulgated a Trade Regulation Rule on Ophthalmic Services to eliminate restraints on the commercial practice of optometry.³ The Commission has also addressed restrictions occurring in the auto industry. For example, the Commission recently ruled that automobile dealers in the Detroit area violated the antitrust laws by agreeing to limit their hours of operation.⁴ In addition, the Commission staff has conducted and published economic research concerning automobile marketing.⁵

The Commission staff has commented on Wisconsin legislation that would have amended the state's fair dealership law to make it difficult for a grantor of dealerships to terminate dealers in response to changes in demand for products or to improve distribution systems.⁶ The Commission staff also recently commented on Illinois legislation that would have strengthened market area restrictions on franchised automobile dealerships and that would have extended those restrictions to manufacturer-

³ See Trade Regulation Rule on Ophthalmic Practice, 54 Fed. Reg. 10285 (March 13, 1989). (The rule bans restrictions on the practice of optometry such as limitations on branch offices, prohibitions on lay associations, prohibitions on commercial locations and bans on trade names).

⁴ Detroit Auto Dealers Ass'n, Inc., FTC Docket 9189 (February 22, 1989). (The Commission decided that an agreement by area dealerships limiting hours of operation limited competition.)

⁵ See Robert P. Rogers, The Effect of State Entry Regulation on Retail Automobile Markets, Federal Trade Commission, Bureau of Economics Staff Report (January 1986). (The Report concluded that state laws restricting the number of automobile dealers in a given area were costly to consumers.)

⁶ Letter from Jeffrey I. Zuckerman, Director, FTC Bureau of Competition, to the Honorable William P. TeWinkle, Wisconsin Senate (February 19, 1988).

franchised auto service centers.⁷ The Commission staff also commented on proposed Illinois legislation that would have prohibited brokers from selling new and used cars and that would have expanded Illinois's dealer licensing provisions.⁸ We have also submitted comments on Illinois legislation that would have prohibited car dealers from holding sales outside of their local markets,⁹ and on other states' legislative initiatives concerning automobile sales.¹⁰

SUMMARY OF THE PROPOSED RULES

The proposed rules affect two areas of current regulation: first, car sales held away from a dealer's licensed premises (known variously as off-premises sales, off-site sales or tent sales)¹¹ and, second, car dealer licensing. The off-site sales provisions prohibit a dealer from participating in more than three sales per year at sites more than twenty miles away from

⁷ Letter from C. Steven Baker, Director, Chicago Regional Office of the Federal Trade Commission, to the Honorable James R. Thompson, Governor of Illinois (September 8, 1989). Governor Thompson amendatorily vetoed the provisions of the legislation relating to car dealerships and automobile service centers.

⁸ Letter from C. Steven Baker, Director, Chicago Regional Office, to the Honorable Aldo A. DeAngelis, Illinois Senate (March 21, 1989). That legislation was vetoed.

⁹ Letter from John M. Peterson, Director, Chicago Regional Office Trade Commission, to the Honorable Woods Bowman, Illinois House of Representatives (April 24, 1987). That legislation was vetoed.

¹⁰ See Letter from Mark Kindt, Director, Cleveland Regional Office, to the Honorable Dick Posthumus, Michigan Senate (September 29, 1988); letter from Paul Davis, Director, Atlanta Regional Office, to the Honorable Gwen Margolis, Florida Senate (March 29, 1988); letter from the Paul Davis, Director, Atlanta Regional Office, to the Honorable David C. Waldrop, Jr., South Carolina House of Representatives (March 21, 1988); letter from Marcy Tiffany, Director, Los Angeles Regional Office, to the Honorable Richard Katz, California State Assembly (January 29, 1988); letter from Jim Moseley, Director, Dallas Regional Office, to the Honorable William P. Clements, Jr., Governor of Texas (June 1, 1987).

¹¹ Proposed Rule amending Wis. Admin. Code § Trans 138.08 and creating Wis. Admin. Code §§ Trans 138.02 and 138.09.

the dealer's licensed premises¹² and prohibit a dealer from offering more than five vehicles at any such sale.¹³

Under current law, all sellers of new or used cars in Wisconsin, including car rental fleet dealers such as Hertz or Avis, must be licensed. The dealer licensing provisions of the proposed rules would broadly define the types of car sales activities for which a license is required.¹⁴ Despite the fact that those who actually sell the cars and transfer title at off-site sales are licensed dealers, the proposed rules would require that other businesses offering additional services connected with car sales, such as credit unions that sponsor sales and buying clubs that arrange car purchase terms for their members, also obtain automobile dealer licenses.¹⁵

¹² Proposed Rule, Section 6, creating Wis. Admin. Code § Trans 138.08 (2) (a); Section 7 amending Wis. Admin. Code § Trans 138.08 (3) to become Wis. Admin. Code § Trans 138.08 (2) (e). Recreational vehicle ("RV") sales are treated similarly under the proposed rules although dealers are allowed to participate in six off-site RV sales per year. Section 8 creating Wis. Admin. Code § Trans 138.08 (3) (c). We are unaware of the reason for treating automobile and RV sales differently.

¹³ Section 6 creating Wis. Admin. Code § Trans 138.08 (2) (a).

¹⁴ Section 5 creating Wis. Admin. Code §§ Trans 138.02 (1) through (4), (6) through (8), and (10) through (18) (definitions). These definitions are then applied in the proposed rule requiring that motor vehicle dealers be licensed. Section 6 creating Wis. Admin. Code § Trans 138.025.

¹⁵ See Section 5 creating Wis. Admin. Code §§ Trans 138.02 (1) through (4), (6) through (8), and (10) through (18) (definitions) (especially proposed Wis. Admin. Code §§ Trans 138.02 (8), (13), and (14)). These definitions are applied in Section 6 creating Wis. Admin. Code § Trans 138.025 (motor vehicle dealer license requirements and exceptions). For example, licenses would probably be required for credit unions, buying clubs, and other providers of car sale services because, under proposed Wis. Admin. Code § Trans 138.025 (1), a license is required to provide "services intended to aid the sale of motor vehicles," as defined in proposed Wis. Admin. Code § Trans 138.02 (14). Other proposed definitions when applied to the proposed provisions that specify who must obtain dealer licenses would likewise require that these entities be licensed as car dealers. The licensing exceptions in proposed Wis. Admin. Code § Trans 138.025 would probably not change this result.

AUTOMOBILE MARKETING METHODS

Various techniques can be used to assist consumers in finding licensed automobile dealers willing to sell at discounts. One source is credit unions that sponsor automobile sales conducted through licensed dealers.¹⁶ The credit unions encourage these sales to obtain opportunities to provide automobile financing. Since cars are sold in volume, the credit unions can obtain substantial savings for their members.¹⁷ Finally, credit union sponsored fleet sales may in some cases stimulate business for existing dealerships.¹⁸

Car rental companies, such as Hertz and Avis, are a primary source of automobiles for sales conducted on credit union premises. The fleet dealers are seeking a means of selling their used rental cars. Low overhead sales offered in conjunction with credit unions enable fleet dealers to turn over their inventories efficiently.

Innovative marketing techniques may in some cases provide cost savings and services for consumers. For example, consumers who purchase used cars at fleet sales may be able to obtain benefits that may not be available to other used car purchasers. Cars purchased at fleet sales generally carry a 12-month or

¹⁶ A credit union representative familiar with these kinds of sales indicated that an individual credit union generally sponsors no more than one sale per year.

¹⁷ For example, in 1986, credit unions surveyed by the Illinois Credit Union League estimated that consumers paid an average of \$1,118 less for a used car at a credit union sponsored fleet sale than those consumers would have paid to a "conventional" used car dealer. The Michigan Credit Union League asserts an estimated average savings of \$900 per vehicle. Hertz Corporation asserts an estimated savings of approximately \$1,000 per car in 1987.

¹⁸ According to the Wisconsin Credit Union League, credit unions may offer special financing terms and rates for a fleet sale. Credit Unions may pre-approve members for the financing terms and typically keep these terms open for thirty days after a fleet sale. Consumers are given the option to purchase a car that was not available at the fleet sale from a dealership under the sale's financing terms. One credit union noted that, at a recent sale, approximately 92 members were pre-approved for the fleet sale. Approximately 42 of these members purchased a car at the fleet sale. Of the remaining 50 members, 15 exercised the option and purchased a car from a dealer.

12,000 mile power-train warranty.¹⁹ Other used cars may carry shorter term warranties or none at all. Some fleet dealers have national service networks through which consumers can have the purchased cars repaired.²⁰ In addition, some fleet dealers contract with local dealerships and automotive repair firms to perform service under these warranties.

Another innovative marketing technique, automobile buying clubs and referral services, provide consumers with additional opportunities to obtain substantial savings when purchasing cars. These services generally charge an annual membership fee and arrange new car purchases for members at guaranteed prices with participating dealers. An August 1988 survey of six automobile buying services by Changing Times magazine concluded that customers purchasing cars through these services would have realized substantial savings on each purchase, no matter which service was picked.²¹

OFF-SITE SALES RESTRICTIONS

The rules that the Department proposes to impose upon off-site automobile sales are likely to reduce the number of such sales and the number of vehicles available through such sales. If that occurs, consumers will be unable to realize the savings that otherwise might have been available without the proposed restrictions.

The Department's analysis of the proposed rule recognizes that off-premises sales have caused "no special, recurrent

¹⁹ Fleet dealers, like car dealerships, have an interest in maintaining good consumer relations in the communities in which they hold sales. Fleet dealers have an ongoing need to turn over their used rental car inventory and thus have an incentive to provide favorable services to consumers in order to insure a supply of customers. We understand that Hertz Corporation, for example, provides a 30-day warranty on mechanical problems in addition to the typical 12 month or 12,000 mile power-train warranty.

²⁰ A national network is especially valuable to a consumer who needs service work while travelling far from the place of purchase.

²¹ Taking the Hassle out of Car-Buying, Changing Times, August 1988, at 37.

consumer problems."²² Nevertheless, the Department is concerned that stricter off-premises sales restrictions may be necessary to prevent large, urban dealers from absorbing markets outside their permanent premises and hypothesizes that closing such markets to these dealers could encourage the establishment of permanent dealerships in smaller communities not currently served by permanent car dealerships.²³

The contemplated restrictions would eliminate car sales events in markets not served by permanent dealerships, depriving consumers in these markets of the opportunity to participate in such sales events locally. Off-site sales on credit union property or at other temporary locations may be held for several reasons. A fleet dealer such as a car rental company may need to hold such sales to turn over inventory. A traditional dealer may wish to hold an off-premises sale to reduce inventory of overstocked cars. An off-premises sale may also be desirable if customers are supplied to the seller -- such as credit union members at a credit union-sponsored sale. Off-premises sales provide a low-overhead mechanism for bringing sellers and customers together and the reduced overhead costs can result in savings for consumers. The advantages of selling cars in markets without permanent dealers may not be substantial enough to justify the costs associated with establishing and maintaining a permanent dealership in those markets. In addition, some communities are probably simply too small to support permanent dealerships, and temporary off-site sales may provide local consumers with a rare opportunity to purchase a less expensive automobile. Under the proposed rules, low overhead fleet sales would have to be held in areas served by permanent dealers. Consumers living in markets not served by permanent dealers would have to travel to outside markets to take advantage of the sales.

The proposed restrictions on off-premises sales may also reduce competition in some locales. Off-premises sales conducted by dealers from other markets may in some small communities provide the only effective competition to local dealers. Under the proposed rules, the local dealers would be insulated from this form of competition. As a result, Wisconsin consumers in these communities may face higher prices for new and used cars.

²² Notice of Hearing and Proposed Rule, Analysis Prepared by the Wisconsin Department of Transportation ("Analysis"), at 2.

²³ See Analysis, at 3.

PROPOSED DEALER LICENSING RULES

We are concerned that the licensing rules proposed by the Department may be overly broad and consequently may limit or eliminate the assistance that credit unions, buying clubs and other services provide consumers, in cooperation with dealers that already hold licenses. By statute, the State of Wisconsin requires that car dealers be licensed²⁴ and imposes various obligations on those licensed dealers. For example, a licensed car dealer must have a permanent car display and repair facility.²⁵ By extending the licensing requirements, the Department's proposed rule is likely to impose these obligations on credit unions and buying clubs. Since credit unions and buying clubs are not dealers in the usual sense (they only facilitate transactions between licensed car dealers and consumers), it would be difficult or impossible for them to obtain licenses. The costs of establishing and maintaining permanent display and repair facilities, necessary to obtain licenses under the proposed rule, may be so high that credit unions and buying services could no longer offer the car sales services that they now provide under current regulation.

The Department's proposed rule is intended to clarify and codify the Department's case-by-case decisions on whether specific businesses require dealer licenses²⁶ under the statutory definitions of "motor vehicle dealer."²⁷ The proposed licensing

²⁴ Wis. Stat. § 218.01 (2).

²⁵ Wis. Stat. § 218.01 (3) (bf).

²⁶ See Analysis, at 2.

²⁷ Wis. Stat. §§ 218.01 (1) (n) (definition of "motor vehicle dealer") and 218.01 (1) (o) (exceptions to definition of "motor vehicle dealer").

These provisions are specifically as follows:

§ 218.01 (1) (n): "Motor vehicle dealer" means any person, firm or corporation, not excluded by par. (o) who:

1. For commission, money or other thing of value, sells, exchanges, buys, rents with the option of purchase, offers or attempts to negotiate a sale or exchange of an interest in motor vehicles; or,

2. Is engaged wholly or in part in the business of selling motor vehicles, including motorcycles, whether or not such motor vehicles are owned by such person, firm or corporation.

(continued...)

rules are expansive and quite detailed. The proposed rules fall into two general categories: (1) a broad definition of the statutory term "negotiating," designed to encompass as dealers those persons, sometimes called "brokers," who negotiate car sales for third parties;²⁸ and (2) a broad enumeration of the types of activities that constitute "engag[ing] wholly or in part in the business of selling" cars, designed to require licenses of car sale sponsors, of intermediaries between sellers and buyers of cars, and of those who profit directly from car sales.²⁹ The rule would thus require licensing of many providers of car sales services who are not currently required to hold licenses, even though these providers may not negotiate the terms of the sale or transfer ownership in cars.

In addition to requiring licenses for credit unions that sponsor car sales, for buying clubs that arrange discount prices for their members, and for other providers of car sale services, the proposed licensing rules would impose many obligations on these organizations that do not relate to or arise from the services they provide. Thus, credit unions, which provide financing, and buying clubs, which pool car buyers, would be burdened with unnecessary and costly responsibilities such as acquiring and maintaining permanent showrooms and garages. We believe that requiring these service providers to comply with these obligations may not benefit consumers because such a requirement is likely to prevent credit unions, buying clubs and other businesses from providing valuable car sale services to consumers.

²⁷(...continued)

§ 218.01 (1) (o): The term "motor vehicle dealer" does not include:

1. Receivers, trustees, administrators, executors, guardians or other persons appointed by or acting under the judgment or order of any court; or
2. Public officers while performing their official duties; or
3. Employes of persons, corporations or associations enumerated in subds. 1 and 2, when engaged in the specific performance of their duties as such employes.
4. Sales finance companies or other loan agencies who sell or offer for sale motor vehicles repossessed or foreclosed by them under terms of an instalment contract, or motor vehicles taken in trade on such repossessions.

²⁸ Analysis, at 2.

²⁹ Analysis, at 3.

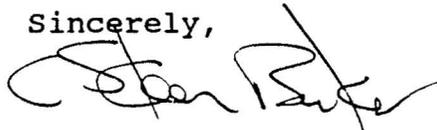
We recognize that the Department is bound by the state's statutory scheme and by the definitions provided by the legislature.³⁰ We merely suggest that any licensing rules be narrowly drawn to apply only to those businesses that actually operate as car sellers and to ensure that providers of related services, who do not actually sell cars, may continue to offer their valuable services to Wisconsin consumers.

CONCLUSION

Both the proposed licensing rules and the proposed off-site sales restrictions would likely eliminate credit union-sponsored fleet sales and other automobile marketing methods that may benefit Wisconsin consumers. The proposed rules would restrict the ability of licensed car dealers to conduct automobile sales through credit unions or buying clubs and to employ other innovative marketing techniques that may result in substantial savings to consumers. These rules may limit competition among automobile dealers and increase the prices that Wisconsin consumers pay for automobiles.

We appreciate this opportunity to comment.

Sincerely,



C. Steven Baker
Director
Chicago Regional Office

³⁰ See supra note 26, Wis. Stat. §§ 218.01 (1) (n) and 218.01 (1) (o).