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June 15, 2009

By Electronic Mail
Federal Trade Commission/Office of the Secretary
Room H-135 (Annex H)
600 Pennsylvania Avenue, N.W.
Washington, D.C. 20580

RE: Used Car Rule Regulatory Review, Matter No. P087604

The Attorneys General join in this comment in response to those submitted by the National Automobile Dealers Association ("NADA") and the National Independent Automobile Dealers Association ("NIADA"). We stand by the comments we filed with the Commission November 19, 2008. Contrary to our views, the NADA and NIADA contend that the FTC should not amend the Used Car Rule to require dealers to disclose vitally important used vehicle history information on vehicle Buyer's Guides. We strongly disagree.

To summarize, NADA and NIADA argue that requiring the disclosure of vehicle history information on Buyer's Guides is beyond the scope of the FTC's Rule, that obtaining the information is too difficult for dealers, in part, because auto title brands are inconsistent across states, that the disclosures are covered in existing state laws, that compliance would be too expensive for dealers, and because there is no safe harbor for disclosures that turn out to have been inaccurate through no fault of the dealers. Their comments miss the mark.

NAAG's Comments were well within the Scope of the Rule

The basic purpose of the Used Car Rule is to give consumers material information, presale, about the warranty available on a vehicle. NAAG's comments recognize that the Rule

permits dealers to opt to disclose the availability of an unexpired manufacturer's warranty on a vehicle. Our comments directly addressed the relevance of vehicle history information to whether any remainder of the manufacturer's warranty truly is available in that manufacturers void warranties for vehicles with prior salvage histories.

In addition, in its request for public comments the Commission specifically sought input on the continuing need for the Rule and its economic impact, and the effect of the Rule on deception in the used car market. NAAG's comments responded to that request by urging the Commission to broaden the Rule to require dealers to post information that is more material to used vehicle buyers than warranty information, and that is vehicle history information. Nothing impacts the retail value of a vehicle more than prior salvage or damage history. The Rule does not presently significantly deter deception in used vehicle sales because it does not address vehicle history information.

We support the FTC's choice to use the Rule review period to more broadly consider the impact of the Rule and other steps the Commission might take to more effectively protect the retail marketplace against deceptive and unfair practices. Sales practices concerning auto warranties are certainly within the scope of Section 5 of the FTC Act, 15 U.S.C. section 45, but so are other used motor vehicles sales practices. Consumer losses to salvage and damage fraud are substantial.

Posting vehicle history information on Buyer's Guides is well within the capacity of used auto dealers.

NADA argues that creating a national used auto history disclosure requirement would be "virtually impossible." NIADA argues that such a change would be "drastic." Importantly, though, NIADA admits the obvious point that vehicle history information is a material fact and, therefore, must be disclosed under state unfair and deceptive acts and practices laws. Those laws, of course, are modeled on the Federal Trade Commission Act. The NADA admits that consumers need accurate, real time information about vehicle histories. Therefore, the FTC

should be guided by the fact that industry agrees with law enforcement agencies and consumer advocates on the substantial materiality of this information.

In addition, both NADA and NIADA referenced the availability of services such as the federal government's National Motor Vehicle Title Information System ("NMVTIS") and private services that offer vehicle history information to used auto dealers. But both NADA and NIADA expressed concern about the potential liability faced by dealers for relying on these sources of vehicle information to complete a Buyer's Guide disclosure only to have the information turn out to be inaccurate. That is a legitimate concern, but a very different issue from whether dealers can obtain vehicle history information. There are several sources, including vehicle titles (when available), state motor vehicle record databases, NMVTIS, private services such as Carfax and Autoheck, auction announcements, and manufacturer records. The information is there and dealers have greater access to it than do consumers.

Further supporting the availability of this information is the fact that the Wisconsin Buyer's Guide has required this disclosure for many years and its dealers have not found it "nearly impossible" to comply. NADA says this is not important because Wisconsin dealers only have to learn Wisconsin brands and have greater access to title information than dealers in some other states. Without addressing the accuracy of that statement, it misses the point. NADA also argues that title information is not always accurate or easy to understand. But, whatever information the dealer can reasonably obtain should be required to be disclosed. The fact that some dealers may be better able to obtain vehicle history information than others or that a data source might not always be complete or accurate might always be the case. *What matters is that the Rule be amended to require dealers to disclose on the Buyer's Guide the information they know or reasonably should know.*

The Wisconsin Department of Transportation's comments are telling. They urge national expansion of the Wisconsin approach. They recognize that dealers appreciate being required to give this information on the Buyer's Guide because it protects them when a consumer later

asserts the information was not supplied. It creates a permanent record of the disclosure and that is good for dealers and consumers. It helps create a more fair and equitable marketplace.

Dealers are not ignorant of the meaning of the various auto title brands. Their livelihood depends on understanding this information.

Dealers know that salvage or damage histories destroy vehicle values. They specifically require accurate disclosures of this information from customers regarding trade-ins on vehicle purchase agreement forms. They do not hesitate to sue other dealers who sold them vehicles at auction and omitted to disclose salvage or damage history information or consumers who lie about or fail to disclose negative vehicle history information about trade-ins.[1] Of course NIADA and NADA are correct that states do not use uniform terminology to describe negative history information. But, as noted above, dealers have a tremendous financial incentive to know and understand state title brands.

Dealers can only be held liable for misrepresenting or failing to disclose what they know or reasonably should know about vehicle histories.

Nothing in NAAG's comments suggested that dealers should be required to fully describe to buyers the meaning of every title brand of every state. We suggested they be required to disclose vehicle history information, not institute a consumer education program. Courts have long held auto dealers to a higher standard than their customers when it comes to disclosing vehicle history information. Courts rightly have recognized that dealers are in much stronger positions than consumers to know the history of a vehicle and have rightly imposed a greater duty on them to make accurate disclosures. (*See, Automobile Fraud*, 3rd Ed, sections 2.6.2.1 and 4.8, Carolyn Carter, Jonathan Sheldon and John Van Alst, National Consumer Law Center, 2007.)

NADA and NIADA, unsurprisingly, do not wish for their member dealers to be subjected

[1] See the attached example – paragraph 8 of page 2 of the model purchase agreement sold by the Iowa Automobile Dealers Association to many Iowa dealers wherein it provides, "[i]f we find out that you made any misrepresentation about the trade-in, then you will pay us three times our actual damages as a result of the misrepresentation, plus our costs of collection and attorneys' fees."

to a new source of potential liability. But, NAAG's suggestion that dealers be required to include vehicle history information on Buyer's Guides does not create any new duty. NIADA's comments rightly noted that dealers face UDAP liability for deception and omissions regarding disclosures of this information to potential buyers. Requiring this information be posted on the Buyer's Guide simply suggests another mode of performing what NIADA admits is an existing legal duty. And if that duty applies under state UDAP's, by definition, it also applies under the FTC Act.

Finally, nothing prevents the FTC from ensuring any amendment to the Rule is both effective and fair by providing in a revised Rule a limitation of liability for disclosures the dealers did not know, and reasonably could not know were inaccurate. For example, Iowa's auto damage disclosure law provides that dealers cannot be held liable for false information provided to them by a prior owner which they pass along to their buyers unless they knew or reasonably should have known that the information supplied to them was wrong. (Iowa Code section 321.69(8).)

Having to include vehicle history information on Buyer's Guides will not impose substantial costs on auto dealers.

Wisconsin dealers have faced this requirement for many, many years. No one has asserted that Wisconsin dealers have incurred substantial compliance costs or that average Wisconsin used vehicle prices sold by dealers exceed the average prices in other states. Assertions of cost increases are without basis and are belied by actual experience.

The Used Car Rule amendment suggested by NAAG is meant to complement and support, but not supplant, other federal or state auto salvage and damage disclosure requirements.

The industry comments accurately note that a number of states impose various damage disclosure requirements. However, it does not appear that any of them, other than Wisconsin, require posting the information on the vehicle itself on the Buyer's Guide or elsewhere prior to the sale. The FTC's overriding charge in consumer protection is to act to deter fraud and unfair

practices. As in many other areas, the jurisdiction of the states and the FTC overlap in the area of used auto sales. NADA and NIADA are wrong to, in essence, urge the FTC to not even consider what it can do to address the most harmful deceptive conduct in the used vehicle marketplace. Urging the Commission to "leave it to the states" because that is the way it has always been done is not persuasive. Urging the Commission to wait for Congress to impose a disclosure requirement is asking for something that may never come to pass. While we wait, consumers continue to incur large losses and unwittingly may be placing their families in danger by transporting them in vehicles that may be unsafe. The FTC can and should act now. Thank you, once again, for considering our views on this matter of vital importance to America's car buying public.

Very truly yours,

Tom Miller
Attorney General of Iowa

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Attorney General of Arizona

Dustin McDaniel
Attorney General of Arkansas

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CONTRACT TERMS AND CONDITIONS

In this contract, the words "we," "us" and "our" refer to the dealer-seller. The words "you" and "your" refer to the buyer and the co-buyer, if any.

1. CASH SALE. You agree to buy the vehicle described on the front of this document for cash. This is not a credit sale and this document is not a credit document. If you obtain financing to purchase the vehicle, you will be required to sign documents which comply with applicable federal and state laws. If you obtain financing to purchase the vehicle, there will be a fee for filing the lien on the title. This fee may be paid to either the dealer or to the lending institution from whom you obtain financing.

2. WARRANTY DISCLAIMER. *YOU UNDERSTAND THAT THE VEHICLE IS SOLD "AS IS" WITH ALL FAULTS AND THAT WE MAKE NO WARRANTY OF MERCHANTABILITY AND NO WARRANTY THAT THE VEHICLE IS FIT FOR ANY PARTICULAR PURPOSE,* unless we provide you with a written warranty or service contract within 90 days from the date of this contract. If we do so, any implied warranty will last only as long as the limited written warranty. This provision does not affect any warranties which may be provided by the vehicle manufacturer. If there is a manufacturer's warranty on the vehicle you are buying, we are not a party to it and it is not a part of this contract. The manufacturer's warranty is between you and the manufacturer.

3. YOUR FAILURE OR REFUSAL TO ACCEPT DELIVERY. If you refuse or fail to accept delivery of the purchased vehicle, we may keep your cash deposit as liquidated damages. If you had a trade-in, we may sell the trade-in and keep any part of the selling price which we need to reimburse us for losses which we incurred because you did not take delivery.

4. FAILURE OR DELAY OF DELIVERY. We are not liable for failure to deliver or delay in delivery of the purchased vehicle if the failure or delay is due, in whole or in part, to any cause beyond our control or without our fault or negligence. We are not liable to you for any consequential damages, damages to property, damage for loss of use, loss of time, loss of profits, or income or any other incidental damages arising out of the sale or use of the purchased vehicle.

5. DEALER'S REMEDIES. If you fail to perform all of the terms and conditions of this contract, we may exercise any right or remedy granted by law as well as the other remedies described in this contract.

6. ADDITIONAL DOCUMENTS. You agree to sign any other documents which are required to transfer title to the trade-in vehicle or the purchased vehicle, including odometer statements, damage disclosure statements, and powers of attorney.

7. ATTORNEYS' FEES. If you default on this contract, you will pay us our costs and attorneys' fees and late charges in addition to our damages.

IF YOU HAVE A TRADE-IN:
If you are trading another vehicle as part of the price of the vehicle purchased, you agree to the following additional terms.

8. YOUR WARRANTY OF TITLE TO TRADE-IN. You must provide us with your vehicle title, correctly assigned to us. You promise that the trade-in vehicle is your property free and clear of any liens or encumbrances except as noted on the front of this contract and that all taxes and registration fees are currently paid. If we are put to any expense with respect to unpaid taxes or registration fees, you will reimburse us upon demand. If we find out that you made any misrepresentation about the trade-in, then you will pay us three times our actual damages as a result of the misrepresentation, plus our costs of collection and attorneys' fees.

9. AMOUNT DUE ON TRADE-IN. The "Trade-In Balance Owed" on the front of this contract was provided by your lienholder. If the balance is incorrect due to the fault of the lienholder, the error will be treated as a mutual mistake of fact. In other words, if you owe more money on your trade-in, you will pay us the difference or you can rescind the contract by returning the vehicle. If you owe less, we will pay (or credit) you.

10. REAPPRAISAL OF TRADE-IN. If you do not deliver the trade-in to us until the purchased vehicle is delivered to you, then we may reappraise the trade-in at the time that you deliver it to us and the new appraisal will determine the allowance to be made on the vehicle purchased. If the reappraisal is lower than the original appraisal, you may cancel this contract provided you do so before you take delivery of the purchased vehicle and surrender the trade-in.

IF YOU ARE BUYING A NEW VEHICLE:
If you are buying a new vehicle, you agree to the following additional terms.

11. MANUFACTURER'S PRICE REVISION ON NEW VEHICLE. If you are buying a new vehicle which we do not have in stock at the time you order it and if the manufacturer changes our price of the vehicle model or body type you ordered between the time we signed this contract and the time we delivered the vehicle to you, we have the right to change the price to you. However, if you do not agree to the changed price, you may cancel this contract. If you cancel the contract, we will return your trade-in to you, if it has not already been sold so long as you pay for the cost of reasonable repairs and storage fees. If we have sold your trade-in, we will pay you the amount we received for the trade-in less a selling commission of 15% and any expenses which we incurred in reconditioning, repairing, insuring, storing and selling the vehicle.

12. MANUFACTURER'S CHANGE OF THE MODEL AND BODY OF THE NEW VEHICLE. If you are buying a new vehicle and if the manufacturer changes (or discontinues) the model, design, chassis, accessories, body type or parts of the vehicle which you ordered, we will have no obligation to make the same or similar change to the vehicle you ordered either before or after we deliver the vehicle to you.