UNITED STATES OF AMERICA
FEDERAL TRADE COMMISSION
WASHINGTON, D.C. 20580

Office of the Secretary

June 13, 2016

Mr. Bradley T. Miller
Director, Legal and Regulatory Affairs
National Automobile Dealers Association
8400 Westpark Drive
McLean, Virginia 22102

Re: *In the Matter of Progressive Chevrolet Company and Progressive Motors, Inc.*
FTC File No. 142 3133 and Docket No. C-4578

Dear Mr. Miller:

Thank you for commenting on the Federal Trade Commission's proposed consent order in the above-referenced proceeding. The Commission has placed your comment on the public record pursuant to Rule 4.9(b)(6)(ii) of the Commission's Rules of Practice, 16 C.F.R. § 4.9(b)(6)(ii), and has given it serious consideration.

As we understand your comment, you express concern that the complaint and Part I.A. of the proposed consent order introduce uncertainty with respect to the legal standards governing the advertising of credit or lease offers. Additionally, your comment requests clarification as to why the proposed respondents' disclosures regarding credit score requirements in this matter were inadequate. Finally, your comment argues that a twenty-year consent order may be unduly burdensome or unwarranted.[1]

We believe the allegations in the complaint and provisions of the proposed order are set forth clearly. The complaint alleges that respondents disseminated an advertisement for vehicle leases that prominently touted offers of, among other things, "ZERO DOWN" and "Nothing Down," while placing in fine print that the offer did not include tax, title and fees, and, further, that the offer was limited to consumers with an 800 BEACON score or higher. As alleged in the complaint, the typical consumer does not have an 800 BEACON score or higher. Indeed, the complaint alleges that this required score was far from typical, because fewer than 20% of consumers would qualify. Further, the complaint alleges that the advertisement's fine print disclaimer regarding this restriction used technical jargon (BEACON score) known only to

[1] Your comment also poses a number of additional hypothetical examples of potential conduct and asks whether they would violate Section 5 of the FTC Act or the terms of the proposed order. In the instant proceeding, however, the Commission is considering only whether to accept the proposed complaint and order in this specific matter. Pursuant to Section 1.1(a) of the Commission's Rules of Practice, 16 C.F.R. § 1.1(a), any entity may request advice from the Commission with respect to a course of action that the requesting entity proposes to pursue. However, hypothetical questions will not be answered. 16 C.F.R. § 1.1(b).

industry members and that consumers would be unlikely to understand. However, the proposed complaint does not allege, as your comment suggests, that the language used in this disclaimer was, taken alone, deceptive.

Courts have long held that consumers interpret express claims, such as the ones at issue here, as applying to the typical consumer unless there is a sufficient qualification. *See, e.g., FTC v. Five Star Auto Club*, 97 F. Supp. 2d 502, 528 (S.D.N.Y. 2000) ("at the very least, it would have been reasonable for consumers to have assumed that the promised rewards were achieved by the typical Five Star participant"). Moreover, for many years the Commission has advised companies that, for qualifying claims to be effective, consumers must be able to understand them. Therefore, the Commission has advised companies to use clear language and syntax and to avoid legalese and technical jargon. *See, e.g., .com Disclosures: How to Make Effective Disclosures in Digital Advertising*, at p. 21 (March 2013), available at https://www.ftc.gov/tips-advice/business-center/guidance/com-disclosures-how-make-effective-disclosures-digital. Accordingly, as alleged in the complaint, respondents' disclaimer is insufficient to correct the deceptive net impression that consumers can lease the advertised vehicles at the down payment and monthly payment amounts prominently stated in the advertisements.

The proposed complaint, in Count I, alleges that the respondents violated Section 5(a) of the Federal Trade Commission Act, 15 U.S.C. § 45(a), by failing to disclose, and/or failing to disclose adequately, that typical consumers cannot qualify for the advertised terms. The complaint also alleges, in Count II, that respondents' leasing advertisements violated the Consumer Leasing Act (CLA) and Regulation M by failing to disclose or to disclose clearly and conspicuously required terms.

Part I.A. of the proposed order addresses Count I of the proposed complaint. It prohibits the respondents from representing the amount of any monthly payment, periodic payment, initial payment, or down payment, or the length of payment term, unless the representation is non-misleading and respondents "clearly and conspicuously" disclose all qualifications or restrictions on the consumer's ability to obtain the represented terms, including qualifications or restrictions based on the consumer's credit score. Importantly, the proposed order defines "clearly and conspicuously" to include, among other things, that a disclosure in a print advertisement be sufficient for an ordinary consumer to notice, read, and comprehend – requirements which the respondents' advertisement in this matter failed to meet, according to the complaint.

Additionally, the order requires that if a majority of consumers likely will not be able to meet a credit score qualification or restriction stated in the advertisement, respondents must clearly and conspicuously disclose that fact. As your comment suggests, "[a]n advertiser can advertise a credit offer even if 'few' or 'a minority' of consumers are likely to qualify, as long as the restrictions and qualifications are clearly and conspicuously disclosed." Whether particular restrictions and qualifications are clearly and conspicuously disclosed in a particular advertisement will depend on the overall net impression of the advertisement and is therefore fact specific. The proposed order reflects the fact that, frequently, Commission orders contain more definite language so as to ensure that particular respondents do not deceive consumers in the future. Thus, the Commission concludes that Part I.A. of the order is appropriate and tailored to addressing the allegations in Count I of the complaint.

With respect to the duration of the proposed order, in 1995 the Commission issued a *Statement of Policy* establishing and explaining the basis for a twenty-year sunset for its administrative orders in consumer protection matters. *See* 60 Fed. Reg. 42569 (Aug. 16, 1995). Further, the Commission concluded that "[o]nly in an exceptional case" would it adopt a shorter duration. *Id.* at 42573 n.18. We conclude that this matter, in light of respondents' allegedly unlawful conduct, does not warrant any deviation from the Commission's established practice in this regard.

Accordingly, the Commission has determined that the public interest would best be served by issuing the Decision and Order in this matter in final form without modification. The final Decision and Order and other relevant materials are available from the Commission's website at http://www.ftc.gov. It helps the Commission's analysis to hear from a variety of sources in its work, and we thank you again for your comment.

By direction of the Commission.

Donald S. Clark
Secretary