

That airspace extending upward from 700 feet above the surface within a 4.9-mile radius of Byron Airport.

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Issued in Los Angeles, California, on November 21, 1995.

James H. Snow,

*Acting Manager, Air Traffic Division,
Western-Pacific Region.*

[FR Doc. 95-29350 Filed 12-4-95; 8:45 am]

BILLING CODE 4910-13-M

FEDERAL TRADE COMMISSION

16 CFR Part 455

Regulatory Flexibility Act and Periodic Review of Used Motor Vehicle Trade Regulation Rule

AGENCY: Federal Trade Commission.

ACTION: Final rule.

SUMMARY: The Commission announces that its review of the Used Car Rule (the "Rule"), which was conducted pursuant to the Regulatory Flexibility Act ("RFA"), and the Commission's review program, has been completed. Having considered all of the issues raised during the comment period, the Commission is now issuing non-substantive amendments to the Rule. The Commission is making several minor grammatical changes to the Spanish language version of the Buyers Guide. Further, the Commission is amending the Rule to permit dealers to post Buyers Guides anywhere on a used vehicle, instead of requiring that they be posted on a side window, provided the Buyers Guide is conspicuously and prominently displayed and both sides can be easily read. Finally, the Commission is amending the Rule to allow dealers the option of obtaining a consumer's signature on the Buyers Guide, if accompanied by a disclosure that the buyer is acknowledging receipt of the Buyers Guide at the close of the sale.

DATES: The effective date of these non-substantive amendments will be January 4, 1996.

ADDRESSES: Requests for copies of the regulations and the notice of final, non-substantive amendments should be sent to Public Reference Branch, Room 130, Federal Trade Commission, 6th and Pennsylvania Ave., NW, Washington D.C. 20580.

FOR FURTHER INFORMATION CONTACT: George Brent Mickum IV, Attorney, Federal Trade Commission, Division of Enforcement, Bureau of Consumer Protection, Washington, D.C. 20580, (202) 326-3132.

SUPPLEMENTARY INFORMATION:

I. Introduction

On May 6, 1994, the Commission, in accordance with the RFA's requirements, and its own program to review all its rules and guidelines periodically, published a Notice in the Federal Register soliciting comments on the Rule.¹ The Notice solicited comments about the impact of the Rule generally, and whether it had had a significant economic impact on small entities,² and, if so, whether the Rule should be amended to minimize any such impact. The Notice also sought comment on certain proposed changes to the Rule.

The Commission received 26 comments in response to the Notice.³ These comments came from eight used car dealers;⁴ four Attorneys General;⁵ four consumer protection groups;⁶ three trade associations;⁷ one state government;⁸ one radio station;⁹ one national distributor of Buyers Guides;¹⁰

¹ 59 FR 23647 (May 6, 1994) ("the Notice").

² For the purpose of the RFA review, a "small entity" is a used motor vehicle dealer with less than \$11.5 million in annual sales, as defined by the Small Business Size Standards, 13 CFR 121.601.

³ The comments were placed on the public record under category 23 (Regulatory Flexibility Act Review Comments) of Public Record Docket No. P944202. References to the comments are made by means of the author and number of the comment and, when appropriate, the page of the comment. Two of the comments were consumer complaints that were inadvertently classified as comments. Although some comments were submitted shortly after the closing date of July 6, 1994, the Commission has included them in its analysis.

⁴ Chuck Gould, J.O.A. Motors Ltd., B-03; Anonymous South Carolina dealer, B-04; Karl Kroeger, K&K Auto Sales, Inc., B-05; F. Whalen, B-06; Kenny Loveless, Northside Auto Sales, B-09; Mike Zibura, B-10; Lee S. Maas, Sun-West Audi, B-18; Duane H. Wallace, Town & Country Chevrolet Oldsmobile Inc., B-26.

⁵ Alaska Attorney General, Bruce M. Botelho, B-01; Illinois Attorney General, Roland W. Burris, B-08; Iowa Attorney General, William L. Brauch, Assistant Attorney General, B-15; Washington Attorney General, Christine O. Gregoire, B-17.

⁶ National Coalition for Consumer Education ("NCCE"), Carol Glade, Executive Director, B-12; Office of Consumer Credit Commissioner, Richard R. Woodward, Examiner, B-16; National Consumer Law Center ("NCLC"), B-23; National Association of Consumer Agency Administrators ("NACAA"), Lawrence A. Breeden, President, B-25.

⁷ The National Independent Automobile Dealers Association ("NIADA"), B-07; the Texas Automobile Dealers Association ("TADA"), B-11; the National Automobile Dealers Association ("NADA"), B-19.

⁸ Michigan Department of State, Jeff Villaire, Director, Dealer Division, Bureau of Automotive Regulation, B-14.

⁹ WBBM Newsradio 78, Naomi Hood, Director, B-13.

¹⁰ Reynolds & Reynolds, Joe Hurr, Director, Automotive Forms Marketing, B-20.

one CPA firm that represents used car dealers;¹¹ and one consumer.¹²

II. The Regulation

The Commission promulgated the Used Car Rule under the authority of the Federal Trade Commission Act, 15 U.S.C. 41 *et seq.* ("FTC Act"), and the Magnuson Moss Warranty Act, 15 U.S.C. 2309, on November 19, 1984. 49 FR 45692 (1984). The Rule became effective on May 9, 1985.¹³ A violation of the Rule constitutes an unfair or deceptive act or practice under the FTC Act, and one who violates the Rule is subject to civil penalties of up to \$10,000 per violation.

The Used Car Rule is primarily intended to prevent and to discourage oral misrepresentations and unfair omissions of material facts by used car dealers concerning warranty coverage. The Rule provides a uniform method for written disclosure of warranty information on a window sticker called the "Buyers Guide." The Rule requires sellers to disclose on the Buyers Guide the basic terms and conditions of any warranty offered in connection with the sale of a used car, including the duration of coverage, the percentage of total repair costs to be paid by the dealer, and the exact systems covered by the warranty.

The Rule also requires certain other disclosures, including: a suggestion that consumers ask the dealer if a pre-purchase inspection is permitted; a warning against reliance on spoken promises that are not confirmed in writing; and a list of fourteen major systems of an automobile and the major problems that may occur in these systems. The Rule also provides that the Buyers Guide disclosures are incorporated by reference into the sales contract and govern in the event of an inconsistency between the Buyers Guides and the sales contract.

The public comments on the questions asked in the Notice and the additional information gathered during the reviews are discussed below.

III. Non-Substantive Amendments to Spanish Language Version of the Buyers Guide

In the Notice, the Commission proposed two non-substantive amendments to the Rule involving the

¹¹ Hundman & Woodward, Carl Woodward, C.P.A., B-21.

¹² Jay R. Drick, Esq., B-25. As indicated earlier, two of the comments were consumer complaints that were misclassified as comments. Warren and Irma Muncey, B-02; Sam A. Amato, B-22.

¹³ Two states, Wisconsin and Maine, subsequently petitioned the Commission and received exemptions pursuant to section 455.6 of the Rule.

Spanish language version of the Buyers Guide, Section 455.5 of the Rule. The Commission received three comments favoring the changes and none in opposition.¹⁴ The Commission has thus determined to adopt the proposed amendments.¹⁵ The first change is grammatical: the "As Is" ("Como Esta Sin Garantia") section of the Buyers Guide reads "El vendedor no asume ninguna responsabilidad por cualquier *las reparaciones * * **" (emphasis added). This language is amended to read: "El vendedor no asume ninguna responsabilidad por cualquier reparacion * * *". The second change appears in the "Warranty" ("Garantia") section of the Buyers Guide. The word "vendido" in the second full sentence is amended to "vendedor." Consequently, the sentence is also amended to read "Pida al *vendedor* una copia del documento * * *."

IV. Responses to the Federal Register Notice

Question One

Is there a continuing need for the Rule?

a. What benefits has the Rule provided to purchasers of the products or services affected by the Rule?

b. Has the Rule imposed costs on purchasers?

i. *Summary of Comments.* The comments from the eight dealers and the CPA firm (its clients are dealers) all favored rescinding the Rule. They stated that the Rule places an enormous burden on small businesses. Generally, these dealer comments¹⁶ and the CPA firm¹⁷ contended that the consumer benefit derived from the Rule was not justified by the cost of displaying the form, and that consumers pay no attention to the Buyers Guide. None of these comments provided any specific information in support of their contentions.

All of the other comments, including those from dealer trade associations, stated that the Rule is beneficial and that there is a continuing need for the Rule. Both NADA and NIADA reported that the Rule has helped avoid confusion regarding warranty coverage, and that the Buyers Guide is beneficial to both customers and dealers. Both NADA and NIADA stated that the costs

associated with the Rule seem to be reasonable.¹⁸

NCCE noted that because young people and consumers with limited resources are the major purchasers of used cars, objective, reliable, point-of-sale information is essential to an effective consumer decision. The comment stated that the FTC Used Car Rule provides information to consumers that assists them in making a wise and well informed decision, stimulates comparison shopping, and stimulates the competitive spirit of our free enterprise system.¹⁹ Michigan's Department of State noted that the longer the Rule is in place, the more the public becomes aware of issues regarding warranty coverage and extended service agreements.²⁰ NCLC and NACAA noted that the Rule allows consumers an opportunity to see what warranty protection is available and to compare warranty coverage among vehicles and dealers.²¹ The Iowa Attorney General noted that because motor vehicle designs are growing increasingly complex and repairs more expensive, warranty coverage is of increasing importance to motor vehicle purchasers.²² Consequently, the Rule provides the consumer with valuable information.

ii. *Discussion.* In the original rulemaking, the Commission found that "many used car dealers mislead consumers into believing that they have broad post-purchase warranty coverage when in fact consumers receive limited or no warranty protection * * *." In many cases dealers make verbal promises to repair defects after sale that are contradicted by final written contract terms * * *."²³ The Commission concluded that the "practices are pervasive and among the chief sources of complaints received by various consumer protection organizations around the country."²⁴

Although the trade associations asserted that some of the aforementioned problems have abated, other comments suggested that some of these problems continue to occur. Used car complaints continue to be among the most frequent type of complaints received by consumer protection groups across the country,²⁵ and the majority of

these organizations suggested amending the Rule in ways they contend would provide even more protection to consumers.

No evidence was adduced during this review that contravenes the Commission's 1984 findings, and no persuasive reasons were advanced in the comments that would suggest that reconsideration is appropriate. The dealer comments favoring repeal of the Rule because it is burdensome are conclusory and contradicted by other comments. For example, Reynolds & Reynolds, a publisher of Buyers Guides, noted that the average cost of a Buyers Guide is 7.6 cents. It also noted that because the compliance costs are so small they are usually absorbed and rarely passed on to the purchaser.²⁶ Accordingly, because the Rule is achieving its objectives and is cost effective, the Commission is retaining the Rule.

Question Two

What changes, if any, should be made to the Rule to increase the benefits of the Rule to purchasers?

a. How would these changes affect the costs the Rule imposes on firms subject to its requirements?

The comments responding to this question are discussed category-by-category below.

A. Disclosing Defects

i. *Summary of Comments.* Many comments suggested general changes to the Rule to increase its effectiveness for consumers. Six comments recommended that the Rule require dealers to make written disclosure of known defects in all "As-Is" sales.²⁷ Texas's Consumer Credit Commissioner suggested amending the Rule to inform consumers that "As-Is" does not mean dealers can sell vehicles with material defects.²⁸

ii. *Discussion.* In the original rulemaking, after carefully considering the issue, the Commission decided not to require disclosure of known defects because it "concluded that the known

numerous consumer complaints. In surveys of NACAA members conducted in 1992 and 1993, auto sales were in the top five complaint categories. A report issued by the Council of Better Business Bureaus revealed that in 1993 auto sales problems were the fifth most frequent complaint made to BBBs nationwide. NAAG has also released 1993 statistics which list automobiles (including sales and service) as the third largest category of complaints." B-24 at 1.

²⁶ B-20 at 1.

²⁷ Alaska AG, B-01 at 1-2; Illinois AG, B-08 at 1; WBBM Newsradio, B-13 at 1; Michigan Department of State, B-14 at 1; Office of Consumer Credit Commissioner, B-16 at 1; NACAA, B-24 at 2-3.

²⁸ B-16 at 1.

¹⁴ NIADA, B-7 at 1; TADA, B-11 at 3; NACAA, B-24 at 3.

¹⁵ Dealers may use up existing stocks of the current version of the Spanish Buyers Guide.

¹⁶ B-05 at 1; B-06 at 1; B-09 at 1; B-18 at 1; B-26 at 1.

¹⁷ B-21. Henceforward, all references to the dealer comments will include this comment.

¹⁸ See, e.g., NIADA Comment, B-7 at 2.

¹⁹ B-12 at 1. The comment indicates that the Commission's objectives in promulgating the Rule have, in large part, been achieved.

²⁰ B-14 at 1.

²¹ NCLC, B-23 at 1; NACAA, B-24 at 1-2.

²² B-15 at 2.

²³ SBP, 49 FR 45692, 45702 (Nov. 19, 1984).

²⁴ *Id.*

²⁵ For example, NACAA's comment notes that "[a]uto sales consistently rank among the most

defects disclosure requirement will not provide used car buyers with a reliable source of information concerning a car's mechanical condition and that the provision would be exceedingly difficult to enforce."²⁹ The Commission determined that the warranty and "As-Is" disclosures—along with the warnings about spoken promises and the pre-purchase inspection notice—are effective remedies for the deceptive practices occurring in the used car industry.³⁰ No new information was provided in this review on whether provisions requiring disclosure of known defects provide substantial information benefits in practice, nor did the Commission staff's independent review of available information contradict this determination.³¹ The only pertinent evidence regarding this issue relates to Wisconsin's experience with its statute.

The SBP indicates that during the original rulemaking the Commission examined Wisconsin's experience with its used car rule, which requires dealers to inspect their cars and to disclose the results of the inspection. This examination revealed that 51% of Wisconsin consumers still ultimately experienced repair problems not identified at the time of purchase.³²

The Commission was aware of this information when it promulgated the Rule. There is no new evidence indicating that reliable information would be disclosed if such a provision were required or that efficient enforcement would be feasible. Based on the foregoing, the Commission has determined that changing its original position on defect disclosures is unnecessary.

B. Requiring Dealers To Keep Copies of the Buyers Guide and Requiring a Signature Line

i. *Summary of Comments.* Both NACAA and the Iowa Attorney General suggested amending the Rule to require dealers to obtain a consumer signature on the Buyers Guide to ensure receipt of the document, and to retain copies of the signed Buyers Guide.³³ Both

contended that enforcement of the Rule would be easier because the absence of a signed Buyers Guide in the dealer's records would create the inference that no Buyers Guide was provided. Further, the dealer copy would be evidence of the warranty disclosures that were made. On the other hand, NCLC suggested that some dealers already have consumers sign the back of the Buyers Guide at the close of the deal in an attempt to cover themselves for failing to post Buyers Guides in vehicles earlier as required by the Rule.³⁴ NCLC stated that such a requirement could undermine the intent of the Rule because signing a piece of paper, perhaps as part of signing a stack of papers at closing, does not prove that the Buyers Guide was posted on the vehicle, that the Buyers Guide was given to the consumer at an appropriate time, or that the buyer was apprised of the warranty terms.

ii. *Discussion.* In initially approving the form of the Buyers Guide, the Commission determined that "a uniform method of disclosure will alleviate confusion and possible deception which might result from inconsistent versions of the Buyers Guide." SBP at 45709. Consequently, the Rule does not allow dealers to modify the format of the Buyers Guide. In response to dealer requests, however, staff has informed dealers, through informal staff opinion letters, that staff was not likely to recommend enforcement actions against a dealer asking for a consumer's signature on the back of the Buyers Guide.

Allowing a signature to be obtained on the back of the Buyers Guide was permitted to assist dealers who wanted protection against consumer claims that they had failed to provide Buyers Guides, as required by law.³⁵ From the dealers' perspective, one effective way to document that a Buyers Guide was received by a consumer is to obtain the consumer's signature and keep a copy of the signed Buyers Guide in their files. Thus, there is now considerable incentive for dealers to obtain signatures. Requiring a signature to be obtained appears unnecessarily burdensome.

The Commission also notes that the presence or absence of a signature on a Buyers Guide, by itself, does little to ensure that the Buyers Guide will be posted as required by the Rule. There is

no benefit unless dealers also are required to keep signed copies, any omissions thereby demonstrating noncompliance. However, the Commission does not believe the benefits of a mandatory signing requirement along with a recordkeeping provision are likely to justify the costs those requirements would impose.³⁶

Dealers, however, may want to obtain signatures and maintain copies of the Buyers Guide in their files. The Commission staff's enforcement advice permits this, but such advice is not necessarily widely known. The Commission, therefore, is amending the Rule to allow an optional signature line on the back of the Buyers Guide. To ensure that the customer's signature is not misused, and to put dealers on notice that obtaining a signature does not satisfy all of the Rule's requirements, the optional signature line is permitted only when accompanied by language in immediate proximity to the line stating: "I hereby acknowledge receipt of the Buyers Guide at the closing of this sale."³⁷

C. Scope of the Rule

1. Private Sales

NIADA suggested that the FTC require that everyone display a Buyers Guide in any used motor vehicle that is advertised for sale.³⁸ This issue was thoroughly considered during the original rulemaking. As noted in the SBP, private parties generally do not offer warranties, and therefore, at least as to this issue, it is unlikely that there would be any misunderstandings. Also,

³⁶ The issue of requiring dealers to maintain copies of the Buyers Guide was considered in the original proceeding. In an effort to minimize the Rule's recordkeeping requirements, the Commission decided not to require dealers to maintain copies. The primary thrust of the Rule was to provide pre-sale information about warranty coverage and to ensure that a copy of the Buyers Guide was given to the purchaser. The Commission concluded the Rule would achieve these results without a recordkeeping requirement. Dealers, of course, are free to maintain whatever records they believe are appropriate, and many in fact do keep copies. Further, recent legislation amending the Paperwork Reduction Act requires agencies to attempt to reduce the paperwork burden associated with their regulations. Adding a recordkeeping requirement would constitute a new paperwork burden.

³⁷ Dealers are advised that the customer's signature will be viewed merely as an acknowledgment that the customer has received the Buyers Guide, which is only one of a dealer's duties under the Rule. The dealer is still responsible for ensuring that posting occurs when a vehicle is offered for sale. Further, the dealer has the responsibility to ensure that any warranty terms that the dealer and the buyer negotiate are reflected on the Buyers Guide, as required by section 455.3(a) of the Rule. This is a non-substantive amendment that does not require Magnuson-Moss rulemaking procedures, as specified in section 18 of the FTC Act, 15 U.S.C. 57a.

³⁸ B-7 at 3.

²⁹ *Id.* at 45712.

³⁰ *Id.*

³¹ For example, a literature search for economic research on "defects disclosures" turned up two titles, one an FTC working paper, the other a dissertation from a student at the University of Wisconsin. The two studies both use data from the 1970's (pre-Used Car Rule SBP) and neither finds a beneficial effect of the disclosures on the used car market.

³² During the rulemaking, the Commission considered the results of a study conducted in Wisconsin, involving surveys of both dealers and consumers. See, e.g., SBP at 45712.

³³ B-24 at 3; B-15 at 3-4.

³⁴ B-23 at 8-9.

³⁵ Although some dealers only give consumers the Buyers Guide at closing and do not post, Commission investigations reveal that some consumers claim that they were not provided with a copy of the Buyers Guide, when, in fact, they were.

enforcing the Rule in private sales would not be cost effective. NIADA offered no data that would contradict the findings in the SBP. Thus, the Commission has determined that a proceeding to amend the Rule to include private sales under the Rule is unnecessary.

2. Demonstrators

i. *Summary of Comments.* NADA suggested that Buyers Guides not be required on "demonstrator" vehicles, because such vehicles also are required to have a new car Monroney Label that cannot be removed until after the vehicle is sold at retail.³⁹ The purpose of the Monroney label is to provide consumers with the manufacturers' suggested retail price for the vehicle, and a list of the optional equipment that comes with the vehicle. NADA believes that the Buyers Guide, when combined with the Monroney Label, confuses customers without providing additional useful information. It stated that all demonstrators are covered by factory new vehicle warranties, and manufacturers require dealers to review the warranty coverage of new vehicles with the customer at the time of delivery.⁴⁰

ii. *Discussion.* "Demonstrator" vehicles are considered "used" under the Rule because they have been driven for purposes other than test driving or moving.⁴¹ However, for purposes of the Monroney Act they are "new" because they have not been titled.⁴² In promulgating the Used Car Rule, the Commission expressly rejected defining whether a vehicle is new by virtue of titling laws.⁴³ The Commission determined that the definition of a used vehicle should be consistent with the Commission's decision in *Peacock Buick, Inc.*⁴⁴ The *Peacock* order prohibits the defendants from "[r]epresenting * * * that any vehicle is new when it has been used in any manner, other than the limited use necessary in moving or road testing a vehicle prior to delivery of such vehicle to the customer."⁴⁵

³⁹ Under the Monroney Act, 15 U.S.C. 1231-33, new vehicles must display a document (called the Monroney Label) that contains the manufacturer's price, all optional equipment on the vehicle, the location of the dealer to whom the vehicle was shipped, and the Vehicle Identification Number of the car.

⁴⁰ B-19 at 2.

⁴¹ See 16 CFR 455.1(d)(2).

⁴² 15 U.S.C. 1231(d).

⁴³ In adopting the Rule, the Commission stated that "many states, for the purpose of titling laws, identify as 'new' vehicles for which title has not passed to a purchaser despite extensive use of the vehicle as a demonstrator model." SBP at 45707.

⁴⁴ 86 F.T.C. 1532 (1975).

⁴⁵ 86 F.T.C. at 1566.

Further, the rulemaking record reflected that used cars sold as demonstrators were subject to dealer oral misrepresentations. Thus, there was substantial justification on the record for including demonstrators within the scope of the Rule.⁴⁶ Consequently, the Commission defined a "used vehicle" as "any vehicle driven more than the limited use necessary in moving or road testing a new vehicle prior to delivery. * * *" ⁴⁷ In adopting this definition, the Commission was aware that the term would cover demonstrators, and that the definition was broader than the definition employed in some states, which rely on titling to determine whether a vehicle is used. Because of the Commission's prior consideration of this issue and the fact that the Monroney Label does not serve the purposes the Buyers Guide was designed to address, the Commission has determined that amending the Rule's coverage of demonstrators is unnecessary.

3. Salvage Vehicles

Iowa's Attorney General suggested that the Commission amend the Rule to cover sales of vehicles on salvage or equivalent certificates of title.⁴⁸ The Rule excludes from the definition of a "used vehicle" "any vehicle *sold only for scrap or parts (title documents surrendered to the State and a salvage certificate issued).*"⁴⁹ Addressing this issue in the SBP, the Commission stated:

Insofar as a vehicle is sold for its parts and not as an operating vehicle, there appears to be no need to provide consumers with the kind of information customarily used to evaluate an automobile as a means of personal transportation. Accordingly, the definition of "used vehicle" specifically excludes those cars sold only for salvage.⁵⁰

Although the Iowa AG's comment does not discuss the reasons why the Rule should be extended to include salvaged vehicles, the Commission is aware that the sale of salvaged vehicles is viewed as a problem in some parts of the country. This occurs because unscrupulous individuals take advantage of state laws that do not require titling documents to show that

a vehicle has been rebuilt from salvaged vehicles. These individuals obtain salvaged vehicles, restore them, and then transport them to a state that does not require the title to show that a vehicle has been salvaged. There, a clean title with no reference to the fact that a vehicle has been salvaged is obtained. The vehicle may then be taken to any state, even a state that requires a salvage disclosure, and be retitled and sold as a used vehicle without disclosing that it was a salvaged vehicle.

The Used Car Rule, however, only addresses warranty coverage, not the source of car parts, which is the underlying issue with vehicles rebuilt from salvaged parts. Even if the Rule were amended to require Buyers Guides for such vehicles, consumers still would not have information about the vehicle's history. Further, because the vehicle could be sold "As-Is" or with a limited warranty of short duration, a Buyers Guide is unlikely to provide the desired protection for individuals purchasing vehicles rebuilt from salvaged parts.

This problem is best addressed by the states or by federal legislation,⁵¹ and not by an amendment to the Rule. To the extent that consumers want or need to know that the vehicle they are purchasing is constructed from a salvaged vehicle or vehicles, the more appropriate and effective remedy would be uniform laws regarding the way salvage vehicles are required to be titled. For these reasons, the Commission has determined that it is unnecessary to amend the Buyers Guide to indicate that a vehicle has been salvaged.

4. Leased Vehicles

NCLC suggested that the Rule be amended to cover leased used vehicles.⁵² The comment, however, did not provide information indicating the leasing of used vehicles is particularly pervasive or fraught with the same types of problems the Commission found were associated with the sale of used cars. Other than NCLC's suggestion, there is no evidence on the record to suggest a need for the Commission to initiate a proceeding to amend the Rule. The Consumer Leasing Act, among other things, requires lessors to disclose in writing who is responsible for repairs and maintenance on the vehicle and

⁴⁶ See SBP at 45707. Demonstrators include dealer-licensed vehicles that can have thousands of miles on them. These vehicles have only the period of new car warranty coverage that remains on the vehicle at the time of purchase, not the full manufacturer warranty that comes with the purchase of a new car. Thus, consumers may wish to negotiate with the dealer for additional warranty coverage.

⁴⁷ 16 CFR 455.1(d)(2).

⁴⁸ B-15 at 3.

⁴⁹ 16 CFR 455.1(d)(2)(emphasis added).

⁵⁰ SBP at 45707.

⁵¹ The Final Report of the Motor Vehicle Title, Registration, and Salvage Advisory Committee, submitted by a Presidential Task Force on February 10, 1994, proposes federalizing the definition of a salvage vehicle to prevent the practice of allowing salvage vehicles to be retitled in states that do not require disclosure on the title certificate that a vehicle is a salvaged vehicle.

⁵² B-23 at 3.

whether warranties or service contracts are available.⁵³ Pursuant to that Act, if a warranty is offered the complete terms must be set forth in writing. The Commission's research into the market for used leased vehicles indicates that most used vehicles that are leased come with warranties. Thus, lessors are required to provide the same type of information required by the Used Car Rule (although not via a window sticker format). Accordingly, the Commission has determined that the suggested change is unnecessary.

D. Amend Language That the Buyers Guide Controls in the Event of a Discrepancy

i. *Summary of Comments.* NCLC suggested changing the language in Section 455.3(b) of the Rule, which incorporates the Buyers Guide into the written contract by reference and provides that the Buyers Guide controls in the event of any discrepancy. NCLC stated that the requirement that the Buyers Guide overrides any contrary provisions is too broad and might in some cases have the Buyers Guide override greater protections in the contract.⁵⁴ NCLC preferred language saying that if there are contrary provisions in the contract, the provision that offers the greatest warranty protection to the consumer is applicable.⁵⁵

ii. *Discussion.* The purpose of the disclosure in Section 455.3(b) is to provide consumers with protection by allowing information to be considered that might otherwise not be considered under contract law. Specifically,

By integrating the Buyers Guide within the "four corners" of the used car sales contract, the Commission intends that the Buyers Guide become part of the written agreement between buyer and seller, so that, in the event of disputes between buyers and sellers, the information on the Buyers Guide would fall outside the exclusions of the parol evidence rule of contract law.⁵⁶

The NCLC comment envisions a situation where, for example, a written contract offers a warranty but the Buyers Guide is marked "As-Is" and then incorporated into the contract, negating or overriding the warranty described in the contract. Because the Rule states that the Buyers Guide controls, the consumer could, theoretically, be without recourse. However, the Commission has never encountered this problem, most likely because the Buyers Guide, if conforming to the Rule, should

contain any extra protections set forth in the contract. In fact, the Rule places an affirmative duty on dealers to ensure that the Buyers Guide reflects the actual terms negotiated. Section 455.3(b) of the Rule states that the "information on the final version of the window form is incorporated into the contract * * *" (emphasis added),⁵⁷ and section 455.4 states that "[A]ny final warranty terms agreed upon * * * must be identified in the sales contract and summarized on the copy of the Buyers Guide given to the buyer."⁵⁸ Accordingly, there will be no conflict where the dealer complies with the Rule. Where the dealer does not, and the Buyers Guide contains the "As-Is" statement, there usually will be ample evidence that this was not a "final" Buyers Guide reflecting the terms negotiated.⁵⁹

For these reasons, the Commission has determined that action to amend the Rule in this regard is unnecessary.

E. "AS-IS" Version of the Buyers Guide May Be Depriving Consumers of Oral or Implied Warranty Rights Under UCC or State Law

i. *Summary of Comments.* NCLC recommended that the Commission clarify use of the word "warranty," as used on the Buyers Guide. The comment notes that, under the UCC, oral express warranties may be given in an individual transaction, notwithstanding that written warranties are not provided.⁶⁰ Consequently, NCLC believed that the term "As-Is No Warranty" on the Buyers Guide is confusing, because, pursuant to the Rule's definition, the term "No Warranty" only means no *written* warranty.⁶¹ Therefore, NCLC contended

⁵⁷ Section 455.3(a) states that the dealer must provide the buyer with a Buyers Guide containing all of the disclosures required by the Rule, "and reflecting the warranty coverage agreed upon."

⁵⁸ SBP at 45711 (emphasis added).

⁵⁹ Other documents generated in used car sales transactions also would be pertinent to a decision whether a Buyers Guide reflects the "final version" of the deal negotiated between the buyer and the dealer. For example, the Warranty Disclosure Rule requires that consumers be given written information regarding warranty terms and coverage. It also provides that written warranty terms become "part of the basis of the bargain between the supplier and the buyer . . ." 16 CFR section 701.1(c)(2) Thus, if warranty documents are considered part of the contract, and a Buyers Guide indicates that a vehicle was sold "As-Is," the warranty documents would appear to be evidence that the Buyers Guide did not reflect the final deal, and the language in section 455.3(b) of the Rule would not be controlling.

⁶⁰ B-23 at 2.

⁶¹ Under the Rule, "warranty" means "any undertaking in writing, in connection with the sale by a dealer of a used vehicle, to refund, repair, replace, maintain or take other action with respect to such used vehicle and provided at no extra charge beyond the price of the used vehicle." NCLC noted that the definition is very similar to the one

the "As-Is No Warranty" notice on the Buyers Guide could conflict with UCC protections and mislead consumers into believing that any express oral warranty is voided when the dealer provides an "As-Is No Warranty" Buyers Guide.⁶² Moreover, NCLC contends that a dealer might make oral warranties which are recognized by state law, but later use the "As-Is No Warranty" language on the Buyers Guide as evidence that no oral warranties had been offered.

NACAA similarly stated that:

In many jurisdictions, oral or written representations (other than [those found on] the "Buyers Guide") are enforceable. To remedy this conflict, the [R]ule should be changed to say that while dealers may not make any statements or take any actions that would be contrary to the disclosures required in §§ 455.2 and 455.3, the "Buyers Guide" may not be used to disclaim any rights that consumers may be able to assert under state or local law* * *.⁶³

In addition, NCLC stated that the warranty section of the Buyers Guide should be changed. The comment pointed out that a warranty, as defined in § 455.1(d)(5), is an undertaking in writing to refund, repair, replace, maintain, or take other action with respect to the vehicle.⁶⁴ NCLC noted, however, that the form language written on the Guide speaks only in terms of repair. It does not appear to allow any option of refund, replacement, maintenance, or other action. NCLC suggested that the Buyers Guide be changed to reflect that these as well as other remedies are options.⁶⁵

As a corollary to the foregoing discussion, several comments contended that the most frequently used version of the Buyers Guide—having only "AS-IS-NO WARRANTY" and "WARRANTY" designations—encourages dealers to sell cars without warranties. This version of the Buyers Guide provides dealers with two choices, either to give an express written warranty or to sell the car "As-Is" (with no express or implied warranties). An alternate "Implied Warranties Only" Buyers Guide is provided for in § 455.2(b)(ii) for use in those states that prohibit "As-Is" sales.

that appears in the Magnuson-Moss Warranty Act, 15 U.S.C. 2301(6)(B). See SBP at 45709 ("These subsections define the terms 'warranty,' 'implied warranty,' and 'service contract' in a manner which conforms to the definitions of those terms in the Magnuson-Moss Warranty Act").

⁶² According to NCLC, the UCC allows dealers to disclaim implied warranties (i.e., sell a vehicle "As-Is" and still make statements about the car that create oral express warranties). B-23 at 2.

⁶³ B-24 at 2.

⁶⁴ B-23 at 8-9.

⁶⁵ *Id.*

⁵³ 15 U.S.C. 1667 *et seq.*; see also 12 CFR 213.

⁵⁴ B-23 at 2.

⁵⁵ *Id.*

⁵⁶ SBP at 45710.

To remedy the problem, NCLC suggested that the Buyers Guide be revised to include an "Implied Warranties Only" section on the "As-Is" version of the Buyers Guide.⁶⁶ If this revision were adopted, the Buyers Guide would give dealers the option of checking one of three boxes: "As-Is No Warranty," "Implied Warranties Only," and "Warranty." The comments contended that most consumers do not know that implied warranties are available as a form of legal redress.⁶⁷ If all versions of the Buyers Guide contained an "Implied Warranties Only" provision, or at least alerted consumers that implied rights exist, consumers would be on notice that they may be forsaking possible legal redress to which they would otherwise be entitled but for the dealer's decision to sell the vehicle "As-Is." Consumers then might attempt to negotiate a better warranty agreement with the dealer than an "As-Is" deal. Also, some dealers might even choose to offer implied warranties rather than use "As-Is" sales if they were given an easy choice and did not have to use a special form or make a substitution on the form. If their only choice is "As-Is" or an express warranty, NCLC contends, dealers nearly always choose to sell vehicles "As-Is."⁶⁸

Washington's Attorney General asserted that the Rule should only allow use of the "Implied Warranties Only" version of the Buyers Guide, because, given the choice to sell with a warranty or "As-Is," dealers opt simply to check off the "As-Is" provision. The Washington State Attorney General stated that the "As-Is" provision may provide an unintended shield for some unscrupulous dealerships that fail to use required procedures for disclaiming implied warranties under Washington contract law. The comment stated that Washington consumers are not generally aware that, under Washington law, their waiver of the implied warranty of merchantability must be knowing and voluntary. Warranty terms or the absence of implied warranties must be the subject of explicit negotiations between the parties (written disclaimers are not enough). The Rule does not

disclose preconditions to a valid disclaimer of implied warranties peculiar to Washington State Law.⁶⁹

ii. *Discussion.* The Buyers Guide focuses on written warranties because during the rulemaking the Commission found that oral promises made during used car sales were frequently contradicted by the written documents, and that the parol evidence rule operated to exclude the admissibility of oral promises contradicted by a written contract.⁷⁰ In the SBP, the Commission recognized that "As-Is" purchases could operate to exclude other contractual rights. The Commission stated that:

consumers purchasing "as-is" but relying on contradictory oral promises are stripped of the protection afforded by either express or implied warranties and, at the same time, have no legal recourse against the dealer because prior or contemporaneous oral statements that contradict final written contract terms are generally not legally binding.⁷¹

To address this problem, the Commission sought to put consumers on notice that they should be wary of oral promises. Immediately under the words "Buyers Guide," on both forms of the Buyers Guide, is the following language: "IMPORTANT: SPOKEN PROMISES ARE DIFFICULT TO ENFORCE. ASK THE DEALER TO PUT ALL PROMISES IN WRITING. KEEP THIS FORM." In addition, the "As-Is" box contains the following statement: "YOU WILL PAY ALL COSTS FOR ANY REPAIRS. The dealer assumes no responsibility for any repairs regardless of any oral statements about the vehicle." The warnings on the Buyers Guide and its admonition to put all promises in writing help consumers by giving them information they can use to ensure they have enforceable rights. Thus, the changes suggested by NCLC (e.g., to revise the "As-Is No Warranty" title to "As-Is No Written Warranty") are not necessary. Such changes could lead to more uncertainty and disputes about warranty coverage. The Commission continues to advise that consumers get any promises in writing, rather than trying to prove later that a dealer orally promised to make repairs.

NCLC also suggested that the Buyers Guide be revised to reflect that options other than repair are available. However, repair is the most common remedy offered by dealers. Dealers, of course, are free to offer other options on the Buyers Guide, if they choose. Further, the Buyers Guide does not take the place of the warranty documents

that dealers must provide pursuant to rule 701. The Buyers Guide refers to these documents in the "Warranty" box on the Buyers Guide: "ASK THE DEALER FOR A COPY OF THE WARRANTY DOCUMENT FOR A FULL EXPLANATION OF WARRANTY COVERAGE, EXCLUSIONS, AND THE DEALER'S REPAIR OBLIGATIONS."

NCLC also suggested reformatting the Buyers Guide to include "As-Is," "Implied Warranties Only," and "Warranty" sections on the same Buyers Guide. The purpose would be to increase consumer awareness of implied warranty rights and the likelihood that implied warranty rights could be negotiated. There is no evidence that suggests, however, that including "Implied Warranties Only" as a third option on the Buyers Guide would encourage consumers to negotiate for warranty coverage more than they presently do, as NCLC suggests. Nor is there any evidence that supports the assertion that dealers would choose this option over the "As-Is" option if it were displayed on the Buyers Guide.

Comments such as the Washington Attorney General's indicated a desire to alert consumers that implied warranties exist. Others suggested adding language that categorically states that implied warranties are unavailable in "As-Is" sales.⁷² The "Warranty" section of the Buyers Guide contains the following language: "UNDER STATE LAW, 'IMPLIED WARRANTIES' MAY GIVE YOU EVEN MORE RIGHTS." The existing language alerts consumers that the other option to an "As-Is" sale is one with a warranty, and that, along with an express warranty, the buyer may receive even more rights (implied warranties) under state law. Similarly, amending the "As-Is" portion of the Buyers Guide to state that implied warranties are never available in an "As-Is" transaction would likely create confusion in states such as Washington, where implied warranties must be knowingly waived.⁷³ Further, such language would misstate the law when a service contract is sold with a vehicle.⁷⁴

Although some consumers are not aware that implied warranties are available under state laws, many states permit "As-Is" sales and do not require disclosures or preconditions to such sales. The problem presented by the

⁶⁶ NCLC also suggested amending the "As-Is" box on the Buyers Guide to include language that made clear that an "As-Is" sale precludes implied warranties. B-23 at 5.

⁶⁷ An implied warranty of fitness indicates that a car "is reasonably fit for and adapted to the purposes for which it was purchased, i.e., a vehicle that will carry a driver and passenger with reasonable safety, efficiency and comfort." *Berg v. Stromme*, 79 Wn.2d 184, 195, 484 P.2d 380 (1971). The *Berg* court uses the word fitness interchangeably with merchantability.

⁶⁸ B-23 at 8.

⁶⁹ B-17 at 2.

⁷⁰ See UCC 2-202.

⁷¹ SBP at 45698 (footnote omitted).

⁷² NCLC, B-27 at 5.

⁷³ See also discussion relating to Part IV, Question 5, *infra*.

⁷⁴ The Buyers Guide states: "IF YOU BUY A SERVICE CONTRACT WITHIN 90 DAYS OF THE TIME OF SALE, STATE LAW 'IMPLIED WARRANTIES' MAY GIVE YOU ADDITIONAL RIGHTS."

Washington Attorney General is somewhat unique insofar as it pertains to implied warranties, and might be addressed more effectively under state law. For the foregoing reasons, the Commission has determined to take no action on the suggested change.

F. Private Right of Action

i. *Summary of Comments.* NCLC and Jay Drick suggested that the Commission create a private right of action for violation of the Rule.⁷⁵ NCLC noted that currently, a consumer has a cause of action for violations of the Magnuson-Moss Warranty Act, but no equivalent cause of action for violations of the Rule.⁷⁶ These comments suggested that the Rule state that a violation of the Rule is a violation of the Magnuson-Moss Act, which affords a private legal remedy in both state and federal courts. NCLC stated that, if necessary, the language of the Magnuson-Moss Warranty Act could be amended to make this clear. According to these comments, a private right of action for violation of the Rule would increase dealers' accountability for violating the Rule.⁷⁷

ii. *Discussion.* The actual value of a private cause of action for buyers against dealers for violating the Used Car Rule is unclear. It would be difficult for consumers to prove and quantify the injury or damages sustained as a consequence of a Rule violation for failing to post a Buyers Guide or for some other violation of the Rule.⁷⁸ In enforcing compliance with the Rule, the Commission has relied on injunctions and civil penalties to stop violations and provide deterrence.

Even if a private right of action would be useful, the Commission has no apparent authority to create one. There is no private right of action for violation of any FTC rule promulgated under the Magnuson-Moss Act. In addition, federal courts consistently have held

that there is no private remedy under the FTC Act.⁷⁹

For the foregoing reasons, the Commission is taking no action on the recommendation.

Questions Three, Four, Seven, Eight, Nine, and Eleven

Questions 3, 4, 7, 8, and 9 all deal generally with the costs and burdens that may be associated with the Rule. Consequently, they are addressed together to avoid repetition. Question 11 is also included in this section because it deals with the number of small firms that are affected by the Rule.

Question Three

What significant burdens or costs, including costs of compliance, has the Rule imposed on firms subject to its requirements?

a. Has the Rule provided benefits to such firms?

Question Four

What changes, if any, should be made to the Rule to reduce the burdens or costs imposed on firms subject to its requirements?

a. How would these changes affect the benefits provided by the Rule?

Question Seven

What significant burdens or costs, including costs of compliance, has the Rule imposed on small firms subject to its requirements?

a. How do these burdens or costs differ from those imposed on larger firms subject to the Rule's requirements?

Question Eight

To what extent are the burdens or costs that the Rule imposes on small firms similar to those that small firms would incur under standard and prudent business practices?

Question Nine

What changes, if any, should be made to the Rule to reduce the burdens or costs imposed on small firms?

a. How would these changes affect the benefits of the Rule?

b. Would such changes adversely affect the competitive position of larger firms?

Question Eleven

How many used car dealers have under \$11.5 million in annual sales?

i. *Summary of Comments.* No comment furnished any information about how many dealers have sales under \$11.5 million, which is how a small used motor vehicle dealer is defined by the Small Business Administration. Based on the Commission's experience in conducting inspections and investigations, the Commission believes that the overwhelming majority of independent used car dealers have annual sales under \$11.5 million, and thus are small entities for purposes of the RFA analysis. Franchised dealers that sell used cars, in contrast, are likely to have annual sales in excess of \$11.5 million, but their sales figures would include new car as well as used car sales.

Only a few comments addressed whether changes to the Rule—short of rescinding the Rule altogether⁸⁰—would reduce the costs imposed on small and large firms. TADA contended that requiring a Spanish Buyers Guide to be posted on every used vehicle in addition to the English Buyers Guide, where sales are conducted in Spanish, is burdensome to dealers, and it therefore recommended that dealers be permitted to provide a Spanish Buyers Guide to the consumer only when the transaction is being consummated.⁸¹ NIADA suggested that the burdens related to compliance are greater for small dealerships because larger dealerships have more personnel to assist in the preparation and processing of paperwork related to car sales.⁸²

⁸⁰ For example, two comments from independent dealers contended that the Rule and the posting requirement place an unnecessary burden on dealers. They stated the Rule creates extra, and unneeded, steps in processing a vehicle sale transaction. No quantification for the assertion was provided, however. B-03 at 1, B-26 at 1. One of the dealers also noted that virtually every car in his area is sold "As-Is" and that most consumers in the area are aware of the practice. Instead of posting Buyers Guides, he suggested posting one large sign on the lot stating: "Unless a specific warranty is provided in writing, all used vehicles for sale at this dealership are sold As-Is; the buyer will pay all costs for any repairs." B-03 at 2.

⁸¹ B-11 at 2. TADA asserted that in cities with large Spanish-speaking populations where dealers conduct a large percentage of sales in Spanish, the Rule requires each vehicle to have two Buyers Guides, one in English and another in Spanish.

⁸² B-7 at 2. NIADA noted that filling out the Buyers Guide and attaching it to the car is just another part of the logging-in procedure. With

⁷⁵ B-23 at 1-2, B-25 at 1 (a consumer and attorney).

⁷⁶ B-23 at 1.

⁷⁷ B-23 at 1-2, B-25 at 1. Mr. Drick contends the rule should allow for enforcement by private attorneys in state courts. B-25 at 1.

⁷⁸ Consumers who have disputes with dealers about warranties generally already have recourse to the courts to resolve their disputes, and such disputes normally will involve resolving who should be responsible for making repairs. For example, section 110(d) of the Warranty Act allows consumers to bring suits on their own behalf for a warrantor's failure to honor warranties or service contracts, or to comply with any other obligation under the Act. Under the law, actions generally will be brought in state courts. If a complaint alleges at least \$50,000 in damages the action may be filed in federal court.

⁷⁹ The Circuit Court for the District of Columbia, in *Holloway v. Bristol-Myers Corp.*, 485 F.2d 986, 988-89 (D.C. Cir. 1973), and other federal courts have held there is no implied private right of action under the FTC's franchise disclosure rules. In *Freedman v. Meldy's Inc.*, 587 F. Supp. 658, 662 (E.D. Pa. 1984), the court reached its decision despite the FTC's contention that the courts should recognize private rights of action under the Franchise Rule. Citing Justice Rehnquist's opinion in *Cannon v. University of Chicago*, 441 U.S. 677, 718 (1978), the *Freedman* court stated: "Congress may, if it wishes, give effect to the apparent desire of the FTC that private rights of action be afforded litigants under 16 CFR §§ 436.1-438.10. The FTC may express, as it has, its opinion that private rights of action should be provided, but the Commission's opinion cannot supplement or supply the requisite Congressional intent." 587 F. Supp. at 662.

NADA stated that the Rule is meeting the objectives of the law and is not a substantial burden on small dealers.⁸³ Iowa's Attorney General noted that the costs associated with Rule compliance are minimal and are passed on to the consumer.⁸⁴ However, Iowa's comment also stated that larger firms are better able to absorb the costs of compliance. Reynolds & Reynolds noted that the costs of compliance include the costs of the form and the time required to fill them out properly. These costs differ from small firms to large firms because a larger firm most likely can take advantage of volume purchases and afford a computer to print out the form, while a smaller dealer would be more likely to purchase Buyers Guides in smaller quantities and fill them out by hand.⁸⁵

The majority of the comments that responded to these questions, however, contended that the burdens or costs associated with compliance are minimal.⁸⁶ For example, Reynolds & Reynolds reported that used car dealers can purchase Buyers Guides for an average cost of 7.6 cents.⁸⁷ While Reynolds & Reynolds believes the costs are so minimal that they are not passed along to the consumer, NIADA stated that they are.⁸⁸

Two comments from Attorneys General addressed whether the burdens and costs of the Rule would be similar to those incurred under ordinary and prudent business practice. The Iowa Attorney General noted that the Used Car Rule imposes no costs other than those a prudent dealer would incur regardless of the Rule.⁸⁹ The Washington Attorney General stated that the burdens or costs should be similar to those that would be incurred by prudent businesses.⁹⁰

In terms of benefits, Iowa's Attorney General noted that the Rule has undoubtedly benefited both the manufacturers and dealers by fostering

regard to the differing costs between large and small firms, the trade association noted that both size firms need to fill out a certain number of forms for each vehicle they sell. The larger dealers have more employees to do the job.

⁸³ B-19 at 1.

⁸⁴ B-15 at 6.

⁸⁵ B-20 at 2.

⁸⁶ See, e.g., B-20 at 1.

⁸⁷ B-20 at 1. See also NIADA, B-07 at 2. Buyers Guides may be purchased in packets of 250 for \$21.00.

⁸⁸ *Id.* NIADA also noted that labor costs are associated with compliance, but did not quantify those costs.

⁸⁹ B-15 at 6.

⁹⁰ B-17 at 4. But stricter compliance with Washington law on the disclaimer of implied warranties could increase the costs of repair or recision to dealers who market unmerchantable vehicles.

competition regarding warranty coverage.⁹¹ The comments generally suggested that the Rule also has eliminated many disputes regarding oral representations made by dealers concerning warranty coverage.⁹² For example, Reynolds & Reynolds noted that the Rule removes the question as to whether or not a specific vehicle has a warranty.⁹³ Compliance with the Rule virtually assures that consumers are aware of available warranty coverage, and therefore consumers are significantly protected against dealer misrepresentations.⁹⁴

ii. *Discussion.* Based on the information obtained in response to the Notice, the Commission has concluded that the costs and burdens associated with Rule compliance are not substantial. Although the costs or burdens of complying with the Rule may be marginally greater on smaller dealers that have fewer employees than larger dealerships, the costs associated with compliance are still quite small. The cost for Buyers Guides averages 7.6 cents per form, and other costs associated with the Rule (i.e., filling out the Buyers Guide and posting them), although not quantified, were represented as minimal and reasonable. At the same time, the comments contended that there are benefits from Rule compliance. Accordingly, the Commission has determined that no changes are needed to reduce the costs of the Rule on small businesses.

Further, although compliance with the Rule may be more burdensome and costly to dealers who frequently conduct sales transactions in Spanish, TADA's proposed solution (elimination of the requirement to post Spanish Buyers Guides) contravenes the Commission's rationale for the posting requirement.⁹⁵ Providing a Buyers Guide at the time of sale is insufficient to protect against the unfair and deceptive practices the Rule was designed to deter. By requiring posting, the Rule affords buyers an opportunity to comparison shop. Accordingly, the

⁹¹ B-15 at 4.

⁹² See NIADA Comment, B-7 at 4-5.

⁹³ B-20 at 1.

⁹⁴ B-15 at 4.

⁹⁵ The Commission originally considered requiring Buyers Guides to be translated into several dozen languages. However, "[t]he evidence in the [rulemaking] record indicates that, besides English, Spanish is the language most frequently used during used car sales transaction." SBP at 45711 (footnote omitted). Thus, the Rule requires the window form and the content disclosures to be in Spanish, if the sale is conducted in Spanish. Dealers who conduct transactions in both English and Spanish may post both versions of the Buyers Guide.

Commission has decided to take no action.

Question Five

Does the Rule overlap or conflict with other federal, state, or local laws or regulations?

i. *Summary of Comments.* In terms of "overlap," NCLC stated: There really is no overlap with state consumer protection laws (unfair and deceptive acts and practices statutes) because not all states' laws cover all violations of the Used Car Rule. The Used Car Rule itself merely effectuates a claim under a deceptive practices act in some states, by declaring certain conduct to be unfair or deceptive, which may then be prohibited by the state law.⁹⁶

NIADA stated, however, that there may be possible overlap with Texas's Deceptive Trade Practices Act.⁹⁷ Iowa's Attorney General noted that the Rule overlaps with the Iowa Consumer Fraud Act, Iowa Code 714.16, to the extent that the Consumer Fraud Act requires that sellers of merchandise not fail to disclose material facts with the intent that others rely on the omission.⁹⁸ Although the two overlap, Iowa believed it presents no problem to either the Commission or the State of Iowa in the enforcement of the Rule or the Iowa Consumer Fraud Act.⁹⁹

Alaska's Attorney General believed there is a "gap" in the Rule that has been addressed in state court decisions.¹⁰⁰ TADA noted that the Rule's definition of a "used vehicle" and the State of Texas's definition cause problems because the Commission's definition of "used vehicle" is much broader than that of some states, including Texas.¹⁰¹ According to TADA this causes confusion and misunderstanding as to when a vehicle is required to display a Buyers Guide.¹⁰²

NACAA stated that the Rule conflicts with some state laws by providing that the language in the Buyers Guide overrides contrary provisions in the contract of sale.¹⁰³ The Washington

⁹⁶ B-23 at 5.

⁹⁷ B-07 at 5.

⁹⁸ Warranty coverage on a motor vehicle is considered to be a material fact under Iowa law.

⁹⁹ B-15 at 5.

¹⁰⁰ The "gap" relates to the Rule's failure to require dealers to disclose known defects. The AG asserts that the common law of most states requires disclosure. See, e.g., *Patton v. McHone*, 822 S.W.2d 608 (Tenn. App. 1991). B-01 at 1.

¹⁰¹ See also discussion at Part IV, Question 2, B, 2-3, *supra*, regarding the difference between the Rule's definition of a "used vehicle," and the state law definitions.

¹⁰² B-11 at 2.

¹⁰³ B-24 at 2, citing section 455.3(b) of the Rule. NACAA also contended that the provision may be used by dealers to disclaim promises of greater warranty protection in oral or written form. This

State Attorney General's Office also noted that the Commission's "As-Is" version of the Buyers Guide does not accurately reflect Washington contract law on valid disclaimer of implied warranties, thus creating a conflict.¹⁰⁴

ii. *Discussion.* The comments indicated that to the extent there is any overlap between the Rule and state law, it is generally not a significant problem. The "conflict" noted by the Washington Attorney General has been addressed by the Commission staff in correspondence with the Attorney General. As was explained in the staff's letter, the purpose of the posted Buyers Guide is to show consumers what warranty coverage a dealer is offering. The Rule also requires the dealer to provide the buyer with a copy of the Buyers Guide showing the final warranty coverage agreed to. If, under Washington State law, an "As-Is" sale has not been properly consummated, the final version of the Buyers Guide should note that the car is being sold with implied warranties.¹⁰⁵ Because the Used Car Rule does not conflict with state consumer protection statutes in any significant way, there is no need for Commission action.

Questions Six and Ten

Since the Rule was issued, what effects, if any, have changes in relevant technology or economic conditions had on the Rule?

How many used vehicles (as defined by Section 455.1(d)(2) of the Rule) are sold annually in the United States?

i. *Summary of Comments.* The number of used cars sold annually is much larger now than when the Rule was promulgated.¹⁰⁶ Based on information NADA submitted, franchised dealerships accounted for nearly 10 million used car sales in 1993 (9,836,800) and NIADA reported another 16 million sales were made by independent dealers. NIADA's information indicated that 25.9 million used vehicles were sold by independent and franchised dealers in 1992.¹⁰⁷

issue was addressed in the discussion at Part IV, Question 2, E, *supra*.

¹⁰⁴ B-17 at 3. See also discussion at Part IV, Question 2, E, *supra*.

¹⁰⁵ See staff Opinion Letter to Robert F. Manifold, Division Chief, October 12, 1989.

¹⁰⁶ In the original rulemaking, the Commission noted that in 1979, "two of every three cars sold in the United States were used. Consumers in that year spent \$66.7 billion, including the value of trade-ins in purchasing 18.5 million used cars from all sources." SBP at 45695.

¹⁰⁷ B-7, see attachment to comment entitled "Used Car Sales." Other sources indicate that the dollar amount of used car sales covered by the Rule reached \$281.5 billion in 1993 and \$289.2 billion in 1994. See Used Gold Reference Guide, Chapter

Franchised dealers report that the biggest part of both their profit and their volume is coming from their used, not new, vehicle sales. "New car dealers sold more used vehicles than new for the first time in 1989, and since then relative used-car volume has grown steadily."¹⁰⁸

NIADA noted that economic conditions within the industry have improved, but was unable to quantify whether the changed conditions have had an impact on the Rule. Other comments noted changes in the relevant technology and/or economic conditions that may have affected the Rule. For example, NCLC noted a significant increase in the leasing of new and used cars in support of its recommendation that Buyers Guides be posted on leased vehicles. NCLC also pointed to the proliferation of computers and copying machines within the industry, concluding this should make it easier for dealers to comply with the Rule.¹⁰⁹ Reynolds & Reynolds noted that many computer systems have the ability to print the form for a dealer, thereby reducing time/energy demands upon dealers to fill out the Buyers Guide.¹¹⁰ Another comment noted that car manufacturers have done a better job of conveying warranty information and covered systems to dealers.¹¹¹

The Iowa Attorney General noted that since vehicles are more complex than ever, repair costs have increased. The Washington Attorney General noted that both the demand for and price of used vehicles have been driven up because new cars are becoming increasingly expensive.¹¹² Thus, warranty coverage is more important to consumers than ever before, and the need for the Rule is greater than in the past.¹¹³ Similarly, most of the comments said there was a continuing need for the Rule because of the size of the industry.

ii. *Discussion.* The economic changes in the industry—the growth in used car sales, the increased prices of used cars,¹¹⁴ and the rising cost of repairs—make warranty coverage an important consideration in a sales transaction. The changes addressed in the comments demonstrate that the reasons for promulgating the Rule continue to exist.

7, p. 3, CNW Marketing Research, Bandon, Oregon, 1994.

¹⁰⁸ *Id.*

¹⁰⁹ B-23 at 5.

¹¹⁰ B-20 at 2.

¹¹¹ *Id.*

¹¹² B-17 at 3.

¹¹³ B-15 at 5.

¹¹⁴ According to CNW Marketing Research, the average sales price for a used car sold by a franchised dealer was \$11,820, and \$6,835 for an independent dealer, in 1994.

At the same time, the comments noted that technological changes have made it easier for dealers to comply with the Rule.

Question Twelve

Should the Rule's requirement that the Buyers Guide be posted in a side window of a used vehicle, as set forth in Section 455.2(a)(1) of the Rule, be modified to allow posting in a different location (for example, in the rear window of a pickup truck or other vehicle without side rear windows), as long as the Buyers Guide is conspicuous and both sides may be readily viewed?

i. *Summary of Comments.* The comments generally supported modifying the Rule as suggested. NADA recommended that the Rule afford some flexibility in the placement of the guide, allowing it to be placed elsewhere than in a side window. NCCE suggested that enforcement focus on the availability and accessibility of the information "and not on the trivial aspects of the regulation such as location of the information."¹¹⁵

One consumer protection group noted that if there are no side rear windows, the Buyers Guide should be placed in the front window.¹¹⁶ One Attorney General supported the modification, noting that the Rule should allow for dealers to post the Buyers Guides in the rear windows of pick-up trucks and other vehicles lacking side rear windows to offer the dealers some flexibility.¹¹⁷ The Michigan Secretary of State supported the amendment permitting the posting of Buyers Guides in other than the side window as long as the guide is prominently displayed and both sides can be readily viewed by a purchaser.¹¹⁸ Other comments also supported the proposed modification of the Rule.¹¹⁹

ii. *Discussion.* The Commission is amending the Rule to delete the side window posting requirement.¹²⁰ Dealers instead will be required to post Buyers Guides prominently and in plain sight anywhere on the vehicle as long as both sides are accessible. This amendment affords dealers greater flexibility in posting Buyers Guides on all vehicles, not just pickup trucks or vehicles without side windows. For example,

¹¹⁵ B-12 at 2.

¹¹⁶ B-23 at 6-7.

¹¹⁷ B-15 at 5.

¹¹⁸ B-14 at 1.

¹¹⁹ B-17 at 5, B-19 at 2, B-20 at 2.

¹²⁰ Because this amendment does not change the substantive rights afforded by the Rule or significantly affect the obligations of dealers, the Commission has concluded that section 18, 15 U.S.C. 57a, rulemaking proceedings are unnecessary to issue this amendment.

dealers could hang Buyers Guides from the rear view mirror or place them under the windshield wipers or hang them from exterior side view mirrors. These options allow consumers to view the Buyers Guide easily. Putting Buyers Guides in glove boxes or on the floor or in the trunk will not satisfy the requirement that the Buyers Guide be in plain sight and conspicuous.

Question Thirteen

What changes to the format of the Buyers Guide should be considered in order to reduce compliance costs or burdens? Would such changes have any detrimental effect on the benefits provided by the Rule? Is there any empirical or other evidence to support opinions that such changes would or would not have a detrimental effect on benefits?

i. *Summary of Comments.* Some comments recommended that the Buyers Guide should be maintained in its present form.¹²¹ Others stated that the format of the Buyers Guide should be changed, but none provided empirical evidence in support of their assertions. For example, Reynolds & Reynolds suggested allowing the Buyers Guide to be merged with other required forms. It stated that the Buyers Guide could be combined with the state lemon laws and refund rights acts forms. The result would be a form with larger dimensions. While the combined form would be higher priced, the overall cost of complying with the multiple laws would be lowered.¹²²

Both NADA and NIADA recommended that the Rule allow some flexibility in the format requirements of the Buyers Guide.¹²³ Specifically, NIADA suggested that reducing the size requirement of the Buyers Guide to 7" x 5" would be useful because it would minimize the window blockage in compact cars and pickup trucks, and thus reduce what it termed a driving safety hazard.¹²⁴ NIADA contended that

the present Buyers Guide contains much empty space "that could be eliminated without destroying the eye catching qualities it now has."¹²⁵ NIADA also suggested putting the dealer's name and address on the front of the Buyers Guide so that the entire form could be easily filled in using an office computer printer. In addition it suggested that the language "RECEIPT OF ORIGINAL COPY ACKNOWLEDGED" and a signature line be placed on the front of the Buyers Guide.

NCLC, along with Iowa Attorney General,¹²⁶ opposed changing the format of the Buyers Guide, stating:

It is important to keep the Buyers Guide at its current size and not to make it smaller. It must be prominent in order to be noticed by consumers so that the buyer can negotiate with the dealer over the terms on the Buyers Guide and know exactly what is provided in terms of warranties. Some of the type on the back of the Buyers Guide, indicating systems to check, is already very small.¹²⁷

ii. *Discussion.* The Commission has decided not to modify the present size or format of the Buyers Guide. The only argument for reducing the size of the Buyers Guide is that the current size of the Buyers Guide may present a safety hazard during test drives. It is difficult to imagine that dealers would forego the option of temporarily removing Guides during test drives, if a true safety hazard existed. However, if such a hazard existed, it seems unlikely that reducing the dimensions of the Buyers Guide to 5" x 7" would significantly lessen the hazard. The Commission's amendment to allow conspicuous posting anywhere in the vehicle is likely to better address this issue than reducing the size of the Buyers Guide.

The Commission requested empirical evidence to support any proposed modifications to the size or format because, during the original rulemaking proceeding, considerable effort was expended to design a form that communicates information effectively to consumers. To evaluate the effectiveness of the Buyers Guide during the rulemaking, a series of copy comprehension tests were conducted. According to the SBP for the Rule, the results of the copy testing were incorporated into the final design of the Buyers Guide that the Commission adopted in May 1981.¹²⁸ Although the

some commenters claim that removing Buyers Guides for test drives and re-posting them afterwards is burdensome.

¹²⁵ *Id.*

¹²⁶ B-15 at 7.

¹²⁷ B-23 at 4.

¹²⁸ SBP at 45709. The Commission announced the earlier version of the rule in 46 FR 41328 (1981). The 1981 Buyers Guide included information about

copy testing was done on prior versions of the Buyers Guide, which differed from the Buyers Guide now in use, those comprehension tests were relevant to the design of the revised format the Commission adopted in 1984. Based on those tests, certain changes to the Buyers Guide were implemented which carried through to the current version.¹²⁹

Further, the size of the Buyers Guide was the subject of comments filed in response to the Commission's July 31, 1984 Federal Register Notice soliciting comment on a Baseline Study of the Rule and the Commission's tentative decision to adopt a revised rule. For example, NADA requested that the size of the form be reduced from 12 inches high by 7 1/4 inches wide to 6 x 8 inches. Following its review, the Commission concluded that the format and type size required by the Rule would easily fit onto a 7 1/4 x 11 sheet. Therefore, to avoid unnecessary costs, the Commission revised the Rule to require a form no smaller than 11 inches high by 7 1/4 inches wide. The Commission rejected NADA's proposal to reduce the form to the 6 x 8 size because the type sizes required by the Rule would have to be reduced to fit on the smaller sheet, making the Buyers Guide difficult to read. The final Rule the Commission published required a Buyers Guide no smaller than 11 inches high by 7 1/4 wide.¹³⁰

Under these circumstances, the Commission has determined not to change the format of the Buyers Guide without copy testing or other reliable information showing that a reduced or revised Buyers Guide would be as easy to read and comprehend as the current Buyers Guide. For example, taking out the white space, as NIADA suggests, could reduce the effectiveness of the Buyers Guides. The empty space on the Buyers Guide was planned to make information stand out and to avoid making the form a jumble of information. For the same reasons, the Commission is also rejecting the suggestion that the format of the Buyers Guide be modified to incorporate other required forms.¹³¹

the condition of major mechanical and safety systems of the car, which the Commission decided to omit in 1984.

¹²⁹ For example, based on the testing, the Commission increased the type size of the warning against relying on spoken promises, and prefaced it with the bold-face heading, "Important."

¹³⁰ 16 CFR 455.2(a)(2).

¹³¹ Recent Commission research also suggests that the consolidation of labels may result in information overload. See Report to Congress by the Federal Trade Commission, Study of a Uniform National Label for Devices that Dispense Fuel to Consumers, pp. 27-30 (Oct. 1993).

¹²¹ Iowa Attorney General, B-15 at 7.

¹²² B-20 at 1. Reynolds & Reynolds suggested that additional information could be printed on the form (i.e., standard warranty coverage) in order to save dealers from having to fill out a new form for each vehicle. There is, however, no prohibition against pre-printing information on the Buyers Guide.

¹²³ The Rule requires that the Buyers Guide conform to the exact wording, type style, type size, and format specified by the Rule. See Section 455.2(a)(2) of the Rule. Among other things, the Rule specifies that the form must be printed on white stock no less than 11 inches high by 7 1/4 inches wide. NADA stated that while the Buyers Guide does an adequate job of communicating information to consumers, "[t]here needs to be more flexibility regarding the size, typeface, additions, etc. to the form."

¹²⁴ B-7 at 3. The Rule provides that Buyers Guides may be removed during test drives. But,

Further, the Commission is rejecting the suggestion to modify the Buyers Guide to include dealer information and a signature line on the front of the Buyers Guide. NIADA noted that computer pre-printing of the Buyers Guide requires turning the page over in order to print the information. The actual burden of having to turn over the Buyers Guide to pre-print the information is quite small. Further, dealers may use an ink stamp to put this information on the back side. Both of these methods—ink stamp or turning the Buyers Guide over and pre-printing the information—are inexpensive ways of complying with the Rule.¹³²

Question Fourteen

What changes to the format of the Buyers Guide should be considered in order to increase its benefits? What effect would such changes have on the costs or burdens imposed by the Rule? Is there any empirical or other evidence to support opinions that such changes would or would not increase costs or burdens?

i. *Summary of Comments.* One consumer suggested that the information be on one side only, and that a signature line be included so that the customer has a chance to read it and know he is entitled to a copy.¹³³ This consumer also suggested that the Buyers Guide be modified to have check boxes for the selling dealer to disclose whether or not the dealer has attempted to repair any item on the vehicle in any way, and a section for the dealer to list specifically what components or systems were found by the inspection to be in need of repair and yet were not repaired by the dealer, plus their anticipated costs.¹³⁴ NACAA noted that the Buyers Guide should be revamped to provide a checklist of symptoms and causes for auto problems, and state more strongly that consumers should have those items independently checked before committing themselves to a used car purchase.¹³⁵ Washington's Attorney General suggested that the Buyers Guide note that the Cooling-Off Rule does not apply to used car sales. Reynolds &

Reynolds suggested that a customer signature box be added to the form's back to ensure that the purchaser has received warranty information (or the lack thereof) and has acknowledged it.¹³⁶

ii. *Discussion.* The Commission has concluded that adding additional information to the Buyers Guide, such as a warning that the Cooling-Off Rule does not apply, is unnecessary.¹³⁷ The format of the present Buyers Guide achieves the Rule's objectives, and thus, for the reasons previously discussed throughout this notice, the Commission is leaving the format of the Buyers Guide essentially unchanged.¹³⁸

V. Regulatory Flexibility Act Review

Based on its review of the record, the Commission has concluded that the Rule has not had "a significant economic impact on a substantial number of small entities" affected by the Rule.¹³⁹ As previously discussed, the comments indicate that the costs associated with Rule compliance are minimal. The record also suggests that these costs generally would be borne by a reasonably prudent business anyway.

VI. Conclusion

The comments and the Commission's experience indicate that the Rule is working and achieving its objectives, while imposing only minimal costs on used car dealers. For the reasons discussed above, however, the Commission is amending the Spanish Buyers Guide and amending the Rule to permit dealers to post Buyers Guides prominently and in plain view in all used vehicles being offered for sale (rather than on a side window). The Commission also is amending the Rule to permit dealers to put a signature line on the back of the Buyers Guide, if accompanied by a specific disclosure.

List of Subjects in 16 CFR Part 455

Motor vehicles, Trade practices.

Authority: The Regulatory Flexibility Act, 5 U.S.C. 601 *et seq.* (1980).

Text of Amendments

For the reasons set forth in this document, pertinent sections of the Used Car Rule, 16 CFR Part 455, are amended as follows:

PART 455—[AMENDED]

The authority citation for part 455 continues to read as follows:

Authority: 88 Stat. 2189, 5 U.S.C. 2309; 38 Stat. 717 as amended; 15 U.S.C. 41 *et seq.*

2. Section 455.2(a)(1) is revised to read as follows:

§ 455.2 Consumer sales—window form.

(a) * * *

(1) The Buyers Guide shall be displayed prominently and conspicuously in any location on a vehicle and in such a fashion that both sides are readily readable. You may remove the form temporarily from the vehicle during any test drive, but you must return it as soon as the test drive is over.

* * * * *

3. Further, § 455.2 is amended by adding paragraph (f) to read as follows:

§ 455.2 Consumer sales—window form.

* * * * *

(f) **Optional Signature Line.** In the space provided for the name of the individual to be contacted in the event of complaints after sale, you may include a signature line for a buyer's signature. If you opt to include a signature line, you must include a disclosure in immediate proximity to the signature line stating: "I hereby acknowledge receipt of the Buyers Guide at the closing of this sale." You may pre-print this language on the form if you choose.

* * * * *

4. Further, the first page of the sample Spanish language Buyers Guide ("GUIA DEL COMPRADOR") appearing at the end of section 455.5 is revised to read as follows:

§ 455.5 Spanish language sales.

* * * * *

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¹³² The issue of obtaining consumer signatures was addressed earlier in this notice. See Part IV, Question 2, B, *supra*.

¹³³ Jay Drick, B-25 at 1-2.

¹³⁴ B-25 at 1.

¹³⁵ B-24 at 3.

¹³⁶ B-20 at 2.

¹³⁷ 16 CFR 429. The Cooling-Off Rule does not apply to the sale of vehicles, nor any other goods and services, offered at a seller's place of business. It also does not apply to sales of vehicles at auctions provided that the seller has a permanent place of business.

¹³⁸ See discussion at Part IV, Question 2, B, *supra*.

¹³⁹ 5 U.S.C. 603-605. The Commission received no information regarding the number of dealerships with annual sales of \$11.5 million or less. But, the Commission's experience is that most independent used car dealers have annual sales less than \$11.5 million and therefore are small entities for purposes of the RFA.

GUÍA DEL COMPRADOR

IMPORTANTE: Las promesas verbales son difíciles de hacer cumplir. Solicite al vendedor que ponga todas las promesas por escrito. Conserve este formulario.

MARCA DEL VEHÍCULO MODELO AÑO NÚMERO DE IDENTIFICACIÓN

NÚMERO DE ABASTO DEL DISTRIBUIDOR (Opcional)

GARANTÍAS PARA ESTE VEHÍCULO:

COMO ESTÁ—SIN GARANTÍA

USTED PAGARÁ TODOS LOS GASTOS DE CUALQUIER REPARACIÓN QUE SEA NECESARIA. El vendedor no asume ninguna responsabilidad por cualquier reparación, sean cuales sean las declaraciones verbales que haya hecho acerca del vehículo.

GARANTÍA

COMPLETA LIMITADA. El vendedor pagará el _____ % de la mano de obra y el _____ % de los repuestos de los sistemas cubiertos que dejen de funcionar durante el período de garantía. Pida al vendedor una copia del documento de garantía donde se explican detalladamente la cobertura de la garantía, exclusiones y las obligaciones que tiene el vendedor de realizar reparaciones. Conforme a la ley estatal, las "garantías implícitas" pueden darle a usted incluso más derechos.

SISTEMAS CUBIERTOS POR LA GARANTÍA:

DURACIÓN:

CONTRATO DE SERVICIO. Este vehículo tiene disponible un contrato de servicio a un precio adicional. Pida los detalles en cuanto a cobertura, deducible, precio y exclusiones. Si adquiere usted un contrato de servicio dentro de los 90 días del momento de la venta, las 'garantías implícitas' de acuerdo a la ley del estado pueden concederle derechos adicionales.

INSPECCIÓN PREVIA A LA COMPRA: PREGUNTE AL VENDEDOR SI PUEDE USTED TRAER UN MECÁNICO PARA QUE INSPECCIONE EL AUTOMÓVIL O LLEVAR EL AUTOMÓVIL PARA QUE ÉSTE LO INSPECCIONE EN SU TALLER.

VÉASE EL DORSO DE ESTE FORMULARIO donde se proporciona información adicional importante, incluyendo una lista de algunos de los principales defectos que pueden ocurrir en vehículos usados.

28 pt Triumvirate Bold caps

2 pt Rule

10/10 Triumvirate Bold c & lc
maximum line 38 picas

Hairline Rule

6/8 pt Triumvirate Bold caps

Hairline Rule

6/8 pt Triumvirate Bold caps

10 pt Triumvirate Bold caps

2 pt Rule

28 pt Box

24 pt Triumvirate Bold c & lc

10/10 Triumvirate Bold c & lc
maximum line 38 picas

1 pt Rule

28 pt Box

24 pt Triumvirate Bold c & lc

10/10 Triumvirate Bold c & lc
7 1/2 picas indent
on runovers

10/10 Triumvirate Bold caps

10/12 Hairline Rule

10/10 Triumvirate Bold c & lc
maximum line 38 picas

10/10 Triumvirate Bold caps
maximum line 38 picas

10/10 Triumvirate Bold c & lc
maximum line 38 picas

By direction of the Commission.

Donald S. Clark,
Secretary.

[FR Doc. 95-27553 Filed 12-4-95; 8:45 am]

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