

June 11, 2009

VIA ELECTRONIC TRANSMISSION TO:

<http://secure.commentworks.com/ftc-UsedCarRuleReopen>

Federal Trade Commission
Office of the Secretary
Room H-135 (Annex H)
600 Pennsylvania Avenue, NW
Washington, DC 20580

Re: Used Car Regulatory Review, Matter No. P087604

Dear Sir or Madam:

We are pleased to present this comment in response to the Commission's notice of April 30, 2009, reopening the public comment period with respect to the Used Motor Vehicle Trade Regulation Rule, 16 CFR Part 455 (the "Used Car Rule" or the "Rule"). We comment in particular on Question A.(13), which invited input on the Rule based on technological changes.¹ We offer this comment on behalf of a client that is engaged in the business of marketing and selling used motor vehicles on a multi-state basis and that is making increasing use of the Internet to sell vehicles.

The Rule requires used motor vehicle dealers to make certain specified disclosures on the "Buyers Guide" that dealers are required to display on used cars they offer for sale. Pursuant to the 1995 amendments to the Rule, dealers are permitted to display the Buyers Guide anywhere on a vehicle, so long as the Buyers Guide is displayed prominently and both sides of it are readily readable. Thus, as the Rule is currently drafted, the only way dealers are allowed to make the required disclosures is by physically affixing a printed copy of the Buyers Guide to the vehicle.

We believe that this manner of disclosure does not take into account the realities of the modern used car marketplace. When the Rule was adopted in the 1980s, dealers were selling vehicles as they had been doing since the early days of the automobile. They used print and broadcast media to bring consumers onto dealership premises where the sales were made. In the last decade, however, dealers increasingly use the Internet and other means of electronic communication to

¹ Question A.(13) asks: "What modifications, if any, should be made to the Rule to account for changes in relevant technology or economic conditions? What evidence supports the proposed modifications?"

facilitate the flow of information with the consumer. Accordingly, we strongly support revising the Rule to give dealers the option of providing the Buyers Guide to consumers in electronic form. Specifically, we advocate updating the Rule to expressly permit dealers to provide the Buyers Guide to consumers either by posting a copy of it on their websites (so that, by clicking on a link in an online vehicle listing, the consumer can view the Buyers Guide associated with that particular vehicle), or by e-mailing the Buyers Guide associated with a particular vehicle to the consumer in response to an inquiry received from the consumer with respect to that vehicle.

The Internet is now a major force, both in the general retail marketplace and in the marketplace for new and used motor vehicles. Indeed, in the most recent edition of *E-Stats*, the U.S. Census Bureau's annual estimate of e-commerce activity in key sectors of the U.S. economy, the Bureau reported that from 2002 to 2007, retail e-sales increased at an average annual growth rate of 23.1 percent, compared with 5.0 percent for total retail sales. The Bureau further reported that 19 percent (\$24 billion) of retail e-sales in 2007 were made by Motor Vehicles and Parts Dealers.²

Other evidence demonstrates that consumers are increasingly turning to the Internet to conduct research on, and to consummate remote purchases of, used motor vehicles:

- In its *US Online Automotive Forecast, 2007 to 2012*, Forrester Research reports the following findings and predictions:
 - “Internet-generated used car sales will grow to 5.6 million in 2012 [representing 11.3 percent of total used car sales] from 4.1 million in 2007 [representing 9.0 percent of total used car sales]... Web-site managers' efforts to offer used car buyers more complete information than they have previously are the primary driver of growth in Internet-generated sales.”³
 - “Direct online used car sales will rise from 1.4 million in 2007 [representing 3.0 percent of total used car sales] to 2.1 million in 2012, when they will represent over four percent of all used car sales. The increasing number of dealerships using online classifieds to sell their used car inventory – and, consequently, the increasing availability of used vehicle inventory online – drives the growth of

² U.S. Census Bureau *E-Stats* 2007 E-Commerce Multi-sector Report, released May 28, 2009, available at <http://www.census.gov/eos/www/2007/2007reportfinal.pdf> (last visited May 28, 2009).

³ Forrester Research, *US Online Automotive Forecast, 2007 to 2012*, originally published February 19, 2008, by JupiterResearch, page 5. “Internet-generated used car sales” are defined as sales in which consumers research prospective purchases and/or send requests for price quotations via the Internet before completing their transactions either online or off-line.

Internet-generated used car sales. The percentage of dealerships using online classifieds increased from 69 percent in 2005 to 79 percent in 2007.”⁴

- In a 2007 study, J.D. Power and Associates reported that Internet use surpassed all other shopping methods in locating the used vehicle a buyer ultimately purchased.⁵
- In a 2008 study, J.D. Power and Associates reported that the amount of time that used-vehicle buyers spent researching vehicles online increased by 18 percent from the previous year, growing from an average of 7.3 hours in 2007 to 8.6 hours in 2008, and that among used-vehicle buyers who used the Internet while shopping for their vehicle in 2008, 61 percent found the vehicle they ultimately purchased on the Internet.⁶
- According to Nielsen/NetRatings (March 2008), 12 million unique visitors shop on eBay Motors every month.⁷
- According to eBay Motors, which claims that over 3 million vehicles have been sold on its site since the site’s launch in 2000, a passenger vehicle sells on eBay Motors every 56 seconds.⁸
- Vendors that specialize in providing auto retailing software to new and used motor vehicle dealers are offering “digital document” options that enable dealers to generate and electronically deliver sales documents (including Buyers Guides) to customers who wish to purchase a vehicle online.⁹

As noted above, consumers are already using the Internet to purchase vehicles without personally visiting dealer premises. These consumers may never see the Buyers Guide before they commit

⁴ Forrester Research, *US Online Automotive Forecast, 2007 to 2012*, originally published February 19, 2008, by JupiterResearch, page 6. “Direct online used car sales” are defined as subsets of Internet-generated used car sales, occurring when consumers complete their research and take their first steps toward purchasing their vehicles by making financial commitments online.

⁵ *J.D. Power and Associates Reports: Among Used-Vehicle Buyers who Use the Internet, Online Shopping Leads More Buyers to Their Purchase Than Traditional Shopping Methods*, released October 25, 2007, available at <http://www.jdpower.com/corporate/news/releases/pressrelease.aspx?ID=2007254> (last visited June 2, 2009).

⁶ *J.D. Power and Associates Reports: Internet Shopping for Used Vehicles Becomes Increasingly Effective*, released December 11, 2008, available at <http://www.jdpower.com/corporate/news/releases/pressrelease.aspx?ID=2008267> (last visited June 2, 2009).

⁷ *eBay Motors Gets Local with Classified Ads for Used Cars*, released April 8, 2009, available at <http://investor.ebay.com/releasedetail.cfm?ReleaseID=377834> (last visited June 2, 2009).

⁸ *Three Millionth Vehicle Sold on eBay Motors*, released April 17, 2008, available at <http://investor.ebay.com/releasedetail.cfm?ReleaseID=306677> (last visited June 2, 2009).

⁹ See, e.g., http://www.autorevo.com/digital_delivery_documents.aspx and <http://www.ecarlist.com/products/software-highlights/digital-paperwork/> (last visited June 2, 2009).

to the purchase, or they may see only a blurry and unreadable image of the Buyers Guide if photos of the vehicle on the dealer's website happen to show the window on which the Buyers Guide is affixed. Updating the Rule to formally give dealers the option of providing the Buyers Guide to consumers electronically would extend the Rule's protections to consumers who shop online, helping to ensure that they are empowered to make better informed purchasing decisions.

Our proposal dovetails with previous comments the Commission has received in connection with its review of the Used Car Rule since the comment period first opened on July 21, 2008. (*See, e.g.*, Comment Number 536945-00009, submitted by Glen Garvin of Dealer Specialties.¹⁰) With regard to a comment submitted by the National Independent Automobile Dealers Association that touches on the issue of online display of the Buyers Guide¹¹, we would note that while we agree with the proposition that it would be advantageous to dealers and consumers alike for a dealer to be able to post "an example" of its Buyers Guide on its website to highlight certain warranty programs offered by the dealer, we believe it would be even more beneficial for the dealer to have the option of posting (or otherwise electronically delivering) the *actual* Buyers Guide associated with a particular vehicle.

Revising the Rule to give dealers the option of providing the Buyers Guide to consumers electronically would also be in keeping with other Commission regulations that have been updated in recent years to specifically allow other required disclosures to be made electronically. (*See, e.g.*, 16 CFR § 436.2, allowing franchisors to furnish required disclosure documents to prospective franchisees via e-mail or Internet posting.)

A dealer who chooses to provide the Buyers Guide electronically should be given flexibility with regard to the method of its display in an online vehicle listing or its transmittal via e-mail, as long as the reference to the Buyers Guide is prominent.¹² Of course, prudent dealers may take additional measures to confirm receipt and review of the Buyers Guide, such as requiring a

¹⁰ Comment Number 536945-00009 notes: "With the anticipation of vehicle transactions moving more and more on-line driven, this FTC form should be available electronically and viewable on dealership listings. This would not be onerous on the dealership and provide the potential consumer valuable information in full disclosure."

¹¹ Comment Number 536945-00014 states in pertinent part:

Subsequent to the Rule's enactment, commerce has experienced an explosion of Internet advertising across the full spectrum of commerce...NIADA believes it would be advantageous to dealers and consumers for the dealer to be able to post "an example" of its Buyer's Guides along with its Internet advertising, e.g. to highlight "AS-IS," Dealer warranty, or certified programs. Having an example of what a Guide would look like for each category (not for each vehicle in inventory) would enable dealers to get valuable information to potential customers in preparation for a visit to the dealership. The Association believes providing an example Guide in this fashion is similar to the Magnuson-Moss Warranty Act pre-sale availability requirement where dealers must have a representative example of a warranty document available for customers to review prior to entering into a transaction to acquire a motor vehicle.

¹² *See, e.g., Dot Com Disclosures: Information About Online Advertising*, available at <http://www.ftc.gov/bcp/edu/pubs/business/e-commerce/bus41.pdf> (last visited June 2, 2009).

consumer to affirmatively click on a box that acknowledges receipt of the Buyers Guide and/or compelling the consumer to sign (with a pen or perhaps electronically) the Optional Signature Line on the Buyers Guide before the transaction is completed. Since the Internet will continue to evolve, and paperless transactions will increase over time, the Rule should not require consumers to execute in paper form Buyers Guides that are delivered electronically. Indeed, since Section 455.2(f) of the Rule does not currently require consumers to execute the Buyers Guide, there is no reason to mandate such a formality in the electronic context.

When the Commission opened the comment period, it expressed the belief “that this review is important to ensure that the Rule is appropriately responsive to any changes in the marketplace.”¹³ As discussed above, there have been profound changes in the vehicle sales marketplace and allowing dealers the option of providing the Buyers Guide to consumers electronically is a manifestly appropriate response. To an ever-greater extent, dealers are using the Internet to market and sell their vehicles. Consumers are likewise increasingly using the Internet to shop for and purchase vehicles; rather than using their shoes to “kick the tires,” consumers are increasingly employing their keyboards when making purchasing decisions. We thus respectfully submit that the Rule should expressly address and facilitate the electronic sales medium.

Very truly yours,

DOWNEY BRAND LLP

Jeffrey S. Galvin

cc: Corinne H. Gartner (Firm)

¹³ 73 Fed. Reg. 42,285, 42,286 (July 21, 2008).