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Department of Justice

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By Electronic Mail

Federal Trade Commission
Office of the Secretary Room H-113 (Annex T)
600 Pennsylvania Avenue, NW
Washington, DC 20580

Re: Regulatory Review of the Used Motor Vehicle Trade Regulation Rule,
Project No. P087604

Dear Secretary Clark:

This comment is filed by Iowa Attorney General Tom Miller and is joined by the Attorneys General listed below, including the Attorneys General of: Arizona, Colorado, Connecticut, Georgia, Hawaii, Illinois, Indiana, Iowa, Kentucky, Maine, Maryland, Minnesota, Missouri, Nevada, New Mexico, New York, Oregon, Pennsylvania, Rhode Island, Tennessee, Vermont, and Washington.

Introduction

The State Attorneys General appreciate this opportunity to comment further on the Federal Trade Commission ("FTC" or "Commission") request for public comments regarding the Used Motor Vehicle Trade Regulation Rule ("Used Car Rule"), as published in the December 17, 2012 edition of the *Federal Register*. We also appreciate the Commission granting our request for a 30-day extension of the deadline to file these comments.

We have long considered the FTC as our partner in enforcing laws and regulations that protect America's consumers. We appreciate your successful history in adopting and enforcing the Used Car Rule. Over the years, a number of Attorneys General offices have participated with FTC staff in joint Rule enforcement efforts. However, based on the Commission's December 17, 2012 proposal, we remain concerned that the Commission is missing an opportunity to make a significant difference in the lives of American consumers regarding one of the most expensive and important purchases they will ever make. We respectfully request that the Commission reconsider its decision not to require vehicle title history information on the Buyer's Guide. In addition, we are troubled that the Commission's proposed change to the "as-is" warranty

disclosure statement required to appear in the Used Car Rule Buyer's Guides on all used vehicles may confuse and potentially even deprive consumers of vital information they need when making their purchasing decisions. In these comments we offer an alternative version of that statement that will serve to put consumers on notice regarding whether a warranty is offered or provided, but that will avoid buyer misunderstandings or misuse by unscrupulous dealers.

Background

Much has changed in the used vehicle marketplace in the four years since more than forty state and territorial attorneys general joined in written comments to the Commission as part of the periodic review of the Used Car Rule. The state with the most used vehicles sold in any given year, California, now requires dealers to post bright red stickers on vehicles with prior salvage titles giving consumers notice in stark language of the vehicle's prior salvage title history and it requires dealers to prominently disclose on all used vehicles search results from a check of the vehicle's title history in the federal government's database known as the National Motor Vehicle Title Information System ("NMVTIS"). The vast majority of states now submit data to NMVTIS, either by daily batch or in real time. NMVTIS has become a comprehensive and timely source of information about vehicle salvage history. In addition, vast numbers of used vehicles have been damaged by major storms over the past several years, with the most recent being the current estimate of over 250,000 vehicles damaged in Hurricane Sandy. While these vehicles should not return to the retail marketplace, many do, and consumers who unwittingly purchase them are placing themselves and their passengers at risk. The consumers are also undoubtedly paying far more for the vehicles than their true retail value.

Additionally, today more and more consumers are buying vehicles over the Internet. All too often, these vehicles are purchased sight-unseen. The consumer's purchase of a used vehicle over the Internet, especially sight-unseen, is in most cases a bad decision and the growth of Internet purchases further increases consumer susceptibility to deceptive and unfair conduct by dealers.

At the same time advances in technology have helped consumers become better equipped to review a vehicle's condition, safety, and history through various downloadable applications and Internet websites, including vehicle history services such as NMVTIS. While consumers are still at a disadvantage compared to the dealers who work in the used vehicle marketplace every day, if consumers have the means to take advantage of these new or improved technologies or services, they have the ability to be more savvy and thus to even the playing field when it comes to negotiating a used vehicle purchase.

Despite the changes in the used vehicle marketplace, some things remain the same. Some dealers continue to defraud consumers in connection with used vehicle sales. In our comments filed with the Commission in 2008, and reiterated in our supplemental comments filed in 2009, we noted that the Used Car Rule falls short of its

potential to protect many more consumers because it lacks the one piece of information that, over and above everything else, is material to a used vehicle buyer – whether the vehicle had once been substantially damaged by collision or flood, as reflected in the vehicle’s past title history. Nothing over the past four years has changed our view on this matter. We were concerned to learn that the Commission will not take this opportunity to amend the Used Car Rule to provide this most vital information to American used vehicle buyers.

Your proposal is especially worrisome in that it is clear that the Used Car Rule “Buyer’s Guide” is one of the most prominent disclosures of material information that buyers of any merchandise receive in the United States. Over the years we have found that the Buyer’s Guide is far more effective than Truth in Lending Act disclosures, odometer mileage disclosures, and other written disclosures, because the Buyer’s Guide itself is posted on the vehicles on dealer lots for consumers to view *prior* to visiting with any salesperson. Indeed, many prospective buyers see and can read the warranty disclosure page of the Buyer’s Guides while shopping the lot even if the dealership is closed.

We can think of only a handful of examples of disclosures in the American marketplace that carry this great degree of prominence. Buyer’s Guide disclosures are at least as prominent as nutrition labels on food products, new motor vehicle “Monroney” labels, and cleanliness ratings that many local governments require to be publicly posted at restaurants. The prominence of the Buyer’s Guide disclosures sends an unambiguous and clear message to American vehicle buyers – *this is the most important information you need to know about this vehicle and about this purchase*. We therefore strongly urge that the Commission reconsider its proposal that omits this powerful consumer buying tool as a means of disclosing negative title information.

**Proposed As-Is Disclosure Misstates State Laws and
Confuses Consumers and Sellers**

We¹ must strongly highlight our very strong concerns about the Commission’s proposal to change the language of the Buyer’s Guide statement concerning the meaning and significance of a vehicle sold “as-is.” The only meaning of selling a vehicle “as-is,” is that it is being sold without a warranty. A dealer who sells a used car “as-is” still faces liability for concealing material defects or misrepresenting material facts. *See, Totz v. Continental DuPage Acura*, 236 Ill. App. 3d 891, (1992); *Hinds v. Paul’s Auto Werkstatt, Inc.*, 107 Or. App. 63, 810 P.2d 874 (Oregon 1991); *Miller v. William Chevrolet/Geo Inc.*, 326 Ill. App. 3d 642 (2001). An “as-is” disclaimer has no legal bearing on a dealer’s responsibility to disclose material defects.

¹ As to several of the states joining these Comments, “as-is” sales are not permissible under state law. Therefore, the following states should not be considered as joining the references in these Comments to the “as-is” statement: Arizona, New Mexico, and New York.

The current required Buyer's Guide statement concerning "as-is" sales states:

YOU WILL PAY FOR ANY REPAIRS. The dealer assumes no responsibility for any repairs regardless of any oral statements about the vehicle.

The FTC proposes to revise that statement to read:

THE DEALER WON'T PAY FOR ANY REPAIRS. The dealer is not responsible for any repairs, regardless of what anybody tells you.

While on first glance, the statements appear to be somewhat similar, they are in fact quite different. The current "as-is" statement expresses the dealer's *choice* not to offer a warranty through the phrase, "the dealer assumes no responsibility." Conversely, the proposed new statement is declarative, as if a statement of applicable law – "[t]he dealer is not responsible." Therefore, we believe that the proposed new statement would actually be an inaccurate statement of the law. A dealer can be held legally "responsible" for repairs to a vehicle if the dealer makes false statements to a consumer about the vehicle's condition or title/damage history. Indeed, dealers also are legally responsible if they fail to disclose material information of that sort (*e.g., Totz v. Continental DuPage Acura* and *Hinds v. Paul's Auto Werkstatt, Inc.*) or prior rental use (*e.g., Miller v. William Chevrolet/Geo*). We believe that the "regardless of what anybody tells you" phraseology could even cause a consumer to doubt his or her attorney's correct advice that the dealer is, in fact, responsible for repairs in circumstances involving such misrepresentation or omissions.

Further, the proposed revised "as-is" statement will be abused by dealers. State attorneys general have encountered numerous instances of dealers misusing the Buyer's Guide to defend themselves against claims of deception or concealment in connection with negative vehicle history, defects, or problems the dealers knew about, or reasonably should have known about, and which they had a duty to accurately disclose to consumers. Dealers, and even their attorneys, have responded to consumer complaints to our offices claiming that because the dealers sold the vehicle "as-is," the consumer has no legal right to complain about concealment, misrepresentation or, indeed, about anything relating to the sale. Dealers rely on the Buyer's Guide "as-is" disclaimer as a shield against liability.

Legally, of course, that argument is invalid. As stated above, dealers may be held liable for unfair and deceptive acts and practices and omissions of material fact regardless of an "as-is" disclaimer. However, most consumers do not know that and, therefore, simply give up rather than challenge the dealer's statement or contact law enforcement or a private attorney. It is sometimes akin to pulling teeth to get a dealer or his attorney to understand or admit that having given an "as-is" disclaimer does not absolve the dealer of liability for any and all acts and omissions. Receiving an "as-is" disclaimer is not equivalent to a car buyer signing a general release of liability. Unfortunately, sometimes small claims court judges unfamiliar with state Unfair and Deceptive Acts and Practices ("UDAP") laws fall prey to this subterfuge and rule in favor of dealers in consumer

protection and fraud claims brought by consumers. To avoid compounding this problem, we strongly recommend that the Commission withdraw its proposal to change the language. In fact, our offices would rather see the entire rule rescinded than see the Commission retain the proposed new “as-is” statement.

Because we are also concerned that the current Buyer’s Guide “as-is” statement is subject to consumer misunderstanding and dealer misuse we further recommend that the Commission consider adopting an entirely new “as-is” statement. A new statement should make clear to both consumers and dealers that an “as-is” disclosure is not tantamount to a consumer release of liability for misrepresentation or concealment of material facts. We offer the following as an example of a statement that we believe accomplishes that goal and we urge its serious consideration as the statement to be adopted by the Commission.

THE DEALER IS NOT PROVIDING A WARRANTY. The dealer does not agree to fix problems with the vehicle after you buy it. But, you may have legal rights if the dealer concealed problems with the vehicle or its history.

Adding Vehicle Title Information to the Buyer’s Guide

As to the issue we believe to be of greatest concern to used vehicle buyers – vehicle history – we urge the Commission to adopt a requirement that the Buyer’s Guide contain a box for a dealer to check if the dealer knows that the vehicle’s current title contains certain information. The draft Buyer’s Guide segment attached to this Comment displays this box and disclosure statement directly below the warranty disclosure boxes. It incorporates the Commission’s proposed suggestion that the buyer go to the FTC’s website for further information about vehicle history checks. The FTC’s suggestion, if implemented, would be helpful but, without at least the minimum information that would be disclosed by checking the box we propose, it does not directly convey the negative title information that it is the dealer’s legal obligation to disclose.

Under state and federal law, motor vehicle dealers that know of negative title information have a legal obligation to disclose it to consumers. Failing to do so violates every state UDAP statute. In addition, misrepresenting or omitting to disclose this material piece of information to used vehicle buyers is unquestionably a deceptive or unfair act pursuant to the FTC Act.

The Dodd-Frank Act gave the Commission enhanced authority to act against deceptive and unfair practices by motor vehicle dealers. This grant of authority was a compromise enacted in lieu of the new Consumer Financial Protection Bureau having jurisdiction over auto dealers. The review of the Used Car Rule is the Commission’s first post-Dodd-Frank regulatory act in connection with this new authority. Yet, we respectfully submit that the Commission’s proposal fails to adequately address the one example of used motor vehicle market misconduct that results in more harm to used car buyers than any other – deception or concealment of material fact in connection with past

used vehicle history.

The Commission's reasons for choosing not to use this opportunity to deal more directly in the Used Car Rule with dealer deception or omissions regarding negative title history do not support its decision. On page 74749, the Commission writes that dealers object to having to disclose this information as they will face liability if they make an incorrect disclosure on the Buyer's Guide. Of course, as noted above, dealers already face liability under state UDAP statutes, under state laws specifically requiring disclosures, and under the FTC Act itself, for misrepresenting or omitting to disclose this information. Requiring dealers to check a box merely expressly requires dealers to engage in an act they are already required to perform. This suggested disclosure is in a very simple format and is based only on information the dealers know to be true. This requirement does not impose any new legal requirement – in fact it is a lower standard for disclosure than under many state UDAP statutes. It simply provides a common factual base of information for consumers to consider.

Requiring dealers to check a box of this nature would not be a radical action by the Commission. Indeed, since 1972 motor vehicle dealers have been required to check boxes on odometer mileage disclosure statements pursuant to federal law and regulations. Both the federal government and state attorneys general have had enforcement authority over that requirement for over 40 years. The used vehicle market has not been hurt at all by dealers having to make odometer mileage disclosures. In fact, the odometer law substantially benefits the used vehicle marketplace by ensuring that consumers have vital information they need to make informed choices among the myriad of used vehicles offered for sale by dealers.

Dealers benefit by having accurate vehicle mileage and history information. Legitimate dealers seldom want to buy a vehicle with a branded title or with a negative history. Indeed, sellers at dealer auctions are required to announce title brands *prior* to sale. Failure to announce the vehicle title history at an auction usually provides for automatic rescission of the purchase. As sophisticated buyers, dealers know that past damage and the attendant title brand substantially reduces a vehicle's wholesale and retail values. No dealer seeking to honestly sell a vehicle benefits from the government permitting the dealer's competitors to understate true used vehicle odometer mileage. Likewise, no dealer who wishes to vigorously compete in the retail used car marketplace benefits from a market where dealers do not have to disclose known negative title brands or vehicle history information.

Summary

In summary, we urge that the Commission:

- 1) Withdraw its proposal to change the Buyer's Guide explanation of the meaning of an "as-is" sale and adopt a revised "as-is" statement akin to what we propose herein.

2) Adopt our proposal to add a box on the Buyer's Guide for dealers to check in the event the dealer knows that the vehicle's current title includes information that the vehicle has been damaged or may be defective, such as a salvage, prior salvage, rebuilt, remanufactured, flooded, a repurchased Lemon, or similar title information.

Thank you very much for your consideration of our Comments.

Sincerely,

Tom Miller
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Arizona Attorney General

John Suthers
Colorado Attorney General

George Jepsen
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William H. Sorrell
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BUYERS GUIDE

IMPORTANT: Spoken promises are difficult to enforce. Ask the dealer to put all promises in writing. Keep this form.

VEHICLE MAKE MODEL YEAR VIN NUMBER

DEALER STOCK NUMBER (Optional)

WARRANTIES FOR THIS VEHICLE:

AS IS - NO WARRANTY

THE DEALER IS NOT PROVIDING A WARRANTY. The dealer does not agree to fix problems with the vehicle after you buy it. But, you may have legal rights if the dealer concealed problems with the vehicle or its history.

WARRANTY

- FULL LIMITED WARRANTY. The dealer will pay ____% of the labor and ____% of the parts for the covered systems that fail during the warranty period. Ask the dealer for a copy of the warranty document for a full explanation of warranty coverage, exclusions, and the dealer's repair obligations. Under state law, "implied warranties" may give you even more rights.

SYSTEMS COVERED:

DURATION:

If the dealer checked this box, it means that the title for this vehicle will carry one or more of the following brands: Salvage, Prior Salvage, Rebuilt, Remanufactured, Flood, Lemon Law, or a similar brand.

Before you buy this used vehicle:

1. Get information about its history. Visit the Federal Trade Commission at ftc.gov/used_cars. You will need the vehicle identification number (VIN), shown above, to make the best use of the resources on this site.
2. Ask the dealer if your mechanic can inspect the vehicle on or off the lot.

SEE OTHER SIDE for more about warranties and other information that applies to this vehicle.