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Legal & Regulatory Group

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SUBMITTED ELECTRONICALLY

Federal Trade Commission
Office of the Secretary
Room H-135 (Annex H)
600 Pennsylvania Avenue, N.W., Washington, D.C. 20580
Electronic address: <https://secure.commentworks.com/ftc-UsedCarRuleReview> (CRT Docket No. 106)

Re: “Used Car Rule Regulatory Review, Matter No. P087604”

The National Automobile Dealers Association (“NADA”) submits the following comments to the Federal Trade Commission (“FTC” or the “Commission”) regarding its notice of request for public comment (“Notice”) on its Used Motor Vehicle Trade Regulation Rule (“Used Car Rule” or “Rule”).

I) INTRODUCTION

NADA represents over 19,000 franchised automobile and truck dealers who sell new and used motor vehicles, and engage in service, repair, and parts sales. Together our members employ in excess of 1.1 million people nationwide. Most of our members sell both new and used vehicles and therefore use the Used Car Rule Buyers Guide every day.

Dealers nationwide share the goal of accurate disclosure of used vehicle warranty information to consumers. The accurate disclosure of warranty coverage avoids confusion and results in more informed customers. The Used Car Rule Buyers Guide has for many years achieved this purpose. Both dealers and consumers rely on the Buyers Guide and any changes to the Guide should be approached with caution. However, as discussed below, the FTC should consider the adoption of a few minor modifications to the Buyers Guide that would enhance its status as a useful and accurate warranty coverage notice for prospective used vehicle purchasers.

II) SPECIFIC COMMENTS AND RESPONSES

(1) Is there a continuing need for the Rule? Why or why not?

The Rule has now been in force for well over twenty years, and it has become the standard for both used car dealers and used car shoppers and purchasers. As the Commission has noted, "[t]he FTC's Used Car Rule gives consumers critical information about who will pay for repairs when something goes wrong, and that's key to avoiding consumer confusion and dissatisfaction."¹ The Rule and the Buyers Guide continues to successfully provide this information through clear-cut, effective, and meaningful disclosures.

(2) What benefits has the Rule provided to consumers?

The Rule has provided and continues to provide used car purchasers with a standardized disclosure method that enables them to understand the warranty coverage on a particular used car, and to make an "apples-to-apples" comparison when shopping for a used vehicle.

(3) What modifications, if any, should be made to the Rule to increase its benefits to consumers?

The FTC should consider minor modifications to the Buyers Guide to allow used vehicle dealers to more fully and accurately disclose the wide array of warranties available in today's used car market. The draft revised Buyers Guides set out in Appendices A and B ("Revised Buyers Guides") of the July 2008 notice, reflect an improved disclosure method, and with certain limited revisions should be adopted.

(a) What evidence supports the proposed modifications?

Minor modifications to the Rule's Buyers Guide are warranted by the development and growth of warranty programs that did not exist when the Rule was adopted. For example, manufacturers now offer a variety of "Certified Pre-Owned" ("CPO") programs to consumers, which provide an array of warranty protections from a variety of sources. Most of the automobile manufacturers now offer CPO programs² on used vehicles made by that manufacturer, sold by that manufacturer's franchised dealers. These programs began in the early

¹ FTC Bureau of Consumer Protection Director Jodie Bernstein, Dec. 4, 1995, 9/18/08 at <http://www.ftc.gov/opa/1995/test/12/uc2.shtm>.

² Acura, Audi, Bentley, BMW, Buick, Cadillac, Chevrolet, Chrysler, Dodge, Ferrari, Ford, GMC, Honda, HUMMER, Hyundai, Infiniti, Jaguar, Jeep, Kia, Land Rover, Lexus, Lincoln, Mazda, Mercedes-Benz, Mercury, MINI, Mitsubishi, Nissan, Oldsmobile, Pontiac, Porsche, Saab, Saturn, Scion, Subaru, Suzuki, Toyota, Volkswagen, and Volvo all offer certified programs. Only Aston Martin, Bugatti, Isuzu, Panoz, Rolls-Royce, Lamborghini, Lotus, Maserati, and Maybach do not currently offer any certified pre-owned program. Source Edmunds.com, 9/18/08 at <http://www.edmunds.com/advice/cpo/articles/101200/article.html>.

1990's, after the Rule was enacted, and have grown steadily since then.³ One recent study reveals that sales of certified used cars have increased 46 percent since 2000.⁴

Under CPO programs, manufacturers generally “certify” used vehicles that are within a pre-determined age and mileage range. Dealers are required to inspect these vehicles, and if they pass, they become eligible for CPO warranty coverage. These programs vary widely however, in their application and conditions. For example, under some certified programs the original manufacturer’s warranty is simply extended, while under others, the “certified” warranty is separate and becomes effective only after the original manufacturer’s warranty expires. Some certified programs are administered by the manufacturers directly, some are offered through the manufacturers, but administered by third parties, and yet others are offered directly by third parties. Manufacturers also routinely modify their certified programs based on market conditions and customer satisfaction concerns. As a result, dealers are faced with an ever-changing set of varied rules and programs.

As discussed below, under the current “all or nothing” Buyers Guide optional disclosure for manufacturer’s warranties, there is simply no way to accurately disclose these certified warranties. The proposed Revised Buyers Guides generally address these shortcomings by allowing dealers the ability to more accurately disclose these new types of warranties.

(b) How would these modifications affect the costs the Rule imposes on businesses, and in particular on small businesses?

Because the current Buyers Guide is so well-established and accepted by dealers and consumers alike, changes should be made sparingly. Of course, any changes to the Buyers Guide will involve commensurate training and compliance costs. Simple, minor modifications that increase the Guide’s clarity and accuracy will minimize these new dealer costs and burdens. In addition, if the Commission provides clear guidance regarding their expectations under the proposed Revised Buyers Guides, and complete instructions for completing those Guides, any such costs and disruptions will be further minimized.

(c) How would these modifications affect the benefits to consumers?

The modifications reflected in the proposed Revised Buyers Guides would increase the accuracy of the disclosures provided in the Buyers Guide, using the same, basic standardized form used today. Consumers want to know what warranties are offered, and these small changes would aid in meeting that goal. It is important that the format of the Buyers Guide be maintained, and the changes as limited as possible, to avoid consumer confusion.

B. Specific Issues

³ “CPO vehicles are selling at a growth rate of around 21% per year.” Source kbb.com, 9/18/08, at <http://www.kbb.com/kbb/advice/CertifiedPreOwnedFAQ.aspx?r=426073710325928000>

⁴ Source J.D. Power and Associates.

(1) Should the Used Car Rule be modified to permit used motor vehicle dealers the option of using a Buyers Guide that combines both the English and Spanish language versions of the Buyers Guide into a single bilingual document?

The Used Car Rule should be modified to allow dealers the *option* to use a bilingual version of the Buyers Guide in a single document should they believe it would result in more effective disclosures for prospective purchasers in their market. Any such modification should make it clear that the use of a bilingual document is optional, and that dealers can continue to comply with the Rule by providing a copy of the form in Spanish when transactions are conducted in Spanish.

(4) The Rule permits dealers who opt to disclose an unexpired manufacturer's warranty to add the following statement to the Buyers Guide below the FULL/LIMITED WARRANTY boxes in the SYSTEMS COVERED/DURATION section:

MANUFACTURER'S WARRANTY STILL APPLIES. The manufacturer's original warranty has not expired on the vehicle. Consult the manufacturer's warranty booklet for details as to warranty coverage, service location, etc.

Separately and beneath that statement, in states that permit "as is" sales, dealers may add:

The dealership itself assumes no responsibility for any repairs, regardless of any oral statements about the vehicle. All warranty coverage comes from the unexpired manufacturer's warranty.

(a) What benefits, if any, does the method permitted by the Rule for disclosing unexpired manufacturer's warranties provide consumers?

While the Rule was originally intended and designed to require the appropriate disclosure of the nature and extent of dealer used vehicle warranties, this method also allows dealers the option of disclosing if manufacturer warranties still apply to used vehicles.

(b),(d) What burdens does the method permitted by the Rule for disclosing unexpired manufacturer's warranties impose on consumers/businesses?

The current method is limited by the fact that it is not always apparent on a given vehicle whether the "Manufacturer's Warranty Still Applies" and what that may mean. The current method allows for the inclusion of the language above -- dealers may not deviate at all from that language. This "all or nothing" disclosure could be more efficiently provided in a check box, which could be added to the pre-printed form (and which is included in the proposed Revised Buyers Guides).

In addition, the current "all or nothing" approach often constrains dealers from adequately disclosing the full range of warranties available, and can lead to dealer and consumer confusion. For example, the current method does not allow for disclosure of manufacturer certified used car warranties, since it explicitly refers to the "manufacturer's original warranty."

As discussed above, certified used car warranties can vary widely in how they are offered and implemented. Some may simply extend the original manufacturer's warranty, but many do not. Even those programs that do simply extend the original warranty may not be disclosed under the current method since the disclosure refers to the original "manufacturer's warranty booklet for details." In short, there is no provision under the current method for disclosing certified warranties, whether provided by the manufacturer or a third party.

Certified programs aside, the current method is also potentially problematic because used car dealers often do not know whether a manufacturer's warranty still applies. The original manufacturer warranties vary widely in length, transferability, application, and effect. While franchised new car dealers may be familiar with the warranty programs offered by their manufacturers, they are often less familiar with other manufacturer's programs, and even if they were aware of the details of those programs, they may not have access to information needed to determine whether the manufacturer's warranty applies. For example, a Ford dealer may take a used Honda in trade from a consumer. That vehicle may be within the required mileage limits for the original Honda warranty to apply, but to be certain whether it applies, the Ford dealer needs to know the Honda "in service" date of the vehicle. Dealers often simply do not have access to that information. In addition, there are a variety of restrictions and conditions in the manufacturers' warranties. For example, some manufacturers' warranties transfer from the original purchaser of the vehicle to any subsequent purchaser and some do not. The dealer would not only need to know about all such restrictions, they would also need a way to determine whether the consumer was the original owner of the vehicle. There is no practical way for any used car dealer to be aware of such restrictions and how they apply to any given vehicle.

In addition, the language under the current approach stating that "the manufacturer's warranty still applies" is problematic because there are a number of reasons, outside of the control or knowledge of the dealer, why the original manufacturer's warranty may not "apply" even though it has not technically expired. For example, if the vehicle has been damaged, or has not been properly maintained, the manufacturer may deny warranty coverage, even though the vehicle is within the mileage and date limitations. As a result, stating that "the manufacturer's warranty still applies" could be inconsistent with the language stating that the "original warranty has not expired."

In addition, many manufacturers' warranties are tiered, with different mileage and date limits for different vehicle systems. For example, a manufacturer may offer a 3-year, 36,000 mile "bumper-to-bumper" warranty, along with a 5-year, 100,000 mile "powertrain" warranty. Under the current "all or nothing" approach, a used vehicle that is 4 years old, with 60,000 miles may qualify for a portion of the original manufacturer's warranty, and there is no adequate way under the current method to disclose the existence of a portion of the manufacturer's original warranty.

The end result is that as a practical matter, many dealers cannot access all the information needed to determine whether a manufacturer's warranty applies. Faced with this prospect, many dealers elect not to make a manufacturer warranty coverage disclosure except in those limited circumstances where they can be absolutely certain that the warranty still applies.

(f) Should the Rule provide an option to use a similar method for disclosing other warranties that are included in the price of the used vehicle, such as manufacturer's certified used car warranties and warranties provided by other third parties? If so, why, and how? If not, why not?

We believe that if the Rule provided such an option, it would be an improvement in terms of disclosure, but we believe that an alternate approach, such as that put forth in the proposed Revised Buyers Guides would be superior. The use of pre-printed, "check the box" options in the Buyers Guide would facilitate clearer and more effective disclosures

(6) Should the Rule require dealers to indicate whether a manufacturer's warranty applies and provide information about the scope of that coverage? Why or why not? Should disclosure of manufacturer's warranties be optional as the Rule currently provides? Why or why not?

The Rule should allow for, but not mandate, the disclosure of manufacturer warranties. Dealers will elect to make such disclosures when they can do so accurately for the benefit of prospective purchasers. As discussed above, each manufacturer has its own program, and those programs change all the time. The myriad different restrictions, limitations, conditions, and terms of the various manufacturers' warranties make it difficult for any dealership used vehicle department to make informed disclosures in all cases. Since the purpose of the Rule is to give consumers accurate information about vehicle warranties, it would be inappropriate to mandate potentially inaccurate disclosures.

The approach taken in the proposed Revised Buyers Guide may provide a logical solution, depending on the details and the Commission's expectations regarding its use. The proposed Revised Buyers Guides include a category for "Non-Dealer Warranties" and a sub-category for "No Information Provided." If this category is intended to cover the scenario where a dealer believes that a manufacturer or other warranty may apply, but cannot confirm that information, that would allow consumers to be aware of potential warranty coverage, without putting dealers in the impossible position of having to disclose something they do not know with certainty. The Commission would need to clarify that the dealer has no way to confirm this information, perhaps via a disclaimer on the Buyers Guide. The Revised Buyers Guide should be modified to include the following language:

"A manufacturer or other warranty may apply to this vehicle. The dealer makes no representation regarding any non-dealer warranty or other coverage on this vehicle. Please consult the warranty booklet or other materials, or contact the manufacturer for details."

Moreover, detailed guidance should be provided on this solution, with examples, to avoid confusion and enable dealers to complete the form appropriately.

(8) Examples of revised Buyers Guides that provide a different method to disclose manufacturer's warranties and third-party warranties that are included in the price of the used car are attached as Appendices A and B. . . .

(a) Should the Rule be revised to permit dealers to disclose unexpired manufacturer's warranties, manufacturer's used car warranties, and other used car warranties as shown in Appendices A and B?

For all of the reasons detailed above, the Rule should be modified to allow for such disclosure. The new disclosure category "Non-Dealer Warranties" set out in the proposed Revised Buyer's Guides generally meets that goal. However, the following suggested revisions will make the new disclosures even clearer and more meaningful:

(1) The first sub-category under "Non-Dealer Warranties" should be changed to read:

"MANUFACTURER'S WARRANTY MAY STILL APPLY. All of a portion of the manufacturer's warranty may not have expired on this vehicle. Consult the warranty booklet for details as to warranty coverage, expiration, service location, etc."

Alternatively, the first box should be kept as written, with the language above added as an additional box that the dealer can check.

(2) Because dealers are not always aware of the exact nature of the manufacturer's "certified" program, the second sub-category under "Non-Dealer Warranties" should be changed to read:

"MANUFACTURER'S USED CAR WARRANTY OR OTHER COVERAGE APPLIES"

(3) As proposed, it is unclear whether the language stating "Consult the warranty booklet for details as to warranty coverage, expiration, service location, etc." applies to all of the three first sub-categories under "NON-DEALER WARRANTIES" or only to the third sub-category. Thus, the following modifications are suggested:

(a) Because used vehicles taken in trade by dealers often no longer have the warranty booklet with them, insert the following language under the first sub-category "Manufacturer's Warranty Still Applies" (and, if added per 1(b) above, to the additional sub-category that a "Manufacturer's Warranty *May* Still Apply"):

"Consult the warranty booklet, or contact the manufacturer for details as to warranty coverage, expiration, service location, etc."

(b) Many of the manufacturers' CPO programs do not include "warranty booklets." Thus, under the second sub-category, "Manufacturer's Used Car Warranty Applies," include the following language:

"Consult the warranty materials or contact the manufacturer for details as to warranty coverage, expiration, service location, etc."

(c) Under the third sub-category, "Other Used Car Warranty Applies," include the following language:

“Consult the warranty materials for details as to warranty coverage, expiration, service location, etc.”

(g) Does stating “AS IS” - NO DEALER WARRANTY (See Appendix A) instead of AS IS - NO WARRANTY make the Buyers Guide more clear and understandable to consumers? Why or why not?

We believe that stating “AS IS – NO DEALER WARRANTY” makes the Buyers Guide clearer and more understandable and furthers the goal of providing more accurate information to the consumer. For the reasons outlined above, under the current method, there are likely to be instances where a dealer is forced to check “AS-IS,” even in situations where the vehicle may have some outstanding non-dealer warranty coverage. By checking a box indicating that there is no *dealer* warranty on the vehicle, misunderstandings about the applicability of non-dealer warranties would be limited.

(h) Is checking the box marked “AS IS” - NO DEALER WARRANTY to indicate that a dealer does not offer its own warranty clear and understandable to consumers when a dealer also checks one or more of the boxes indicating that a NON-DEALER WARRANTY from someone other than the dealer applies? Why or why not?

The “no dealer warranty” language makes this situation much clearer when only non-dealer warranty coverage is applicable.

(i) Does stating, “THE DEALER WILL NOT PAY ANY COSTS FOR ANY REPAIRS” (See Appendix A), instead of “YOU WILL PAY ALL COSTS FOR ANY REPAIRS” to explain “AS IS” – NO DEALER WARRANTY make the Buyers Guide in Appendix A more clear and understandable to consumers? Why or why not?

Again, this proposed change makes the Buyers Guide clearer and more understandable because, as noted above, there may be cases where dealers will check this box even when a vehicle may have some non-dealer warranty coverage. Absent this change, prospective purchasers may not understand that, in some cases, repair costs may be covered under a non-dealer warranty.

(j) Does adding the statement “FROM THE DEALER” help show that the boxes marked IMPLIED WARRANTIES ONLY and DEALER WARRANTY apply only to warranties that may, or may not, be offered by the dealer? If so, why? If not, why not? If not, how could the format and/or wording be improved?

The addition of this statement is helpful to clarify what is covered and by whom. Additional “FROM THE DEALER” language should be included in the same font size and type as “IMPLIED WARRANTIES ONLY” and “DEALER WARRANTY,” and should also be included in the “as-is” form.

(9) Does the statement “IMPLIED WARRANTIES ONLY” and accompanying text clearly disclose that the dealer offers no express warranty? If not, how could the disclosure be made clearer?

While this language is generally clear, it could be made even clearer as follows:

“IMPLIED WARRANTIES ONLY - DEALER OFFERS NO EXPRESS WARRANTIES”

III) GUIDANCE NEEDED

Both dealers and consumers will benefit from clarity in the use and meaning of the Revised Buyers Guide. If the proposed Revised Buyers Guide were to be adopted, the following should be clarified:

1. May the dealer check more than one box under “Non-Dealer Warranty”?

As discussed above, many manufacturer CPO programs provide warranty coverage in addition to the original manufacturer’s warranty. Therefore, in some instances, both the “manufacturer’s warranty” and the “manufacturer’s used car warranty” sub-categories would apply. Take the example of a certified 2007 model year used vehicle with 10,000 miles. It has a manufacturer’s original 3-year, 36,000 mile bumper-to-bumper warranty, which still applies for the next two years or 26,000 miles, and the CPO warranty will become effective after that time. To accurately reflect the warranty available on that vehicle, the dealer should check both the first and the second box under “Non-Dealer Warranty.” Would the Commission allow for multiple boxes to be checked?

If so, the question then becomes whether such disclosure aids consumers in determining what warranty coverage applies to that vehicle. Alternatively, the language in the second box could state: “*Manufacturer’s Used Car Warranty Applies (in addition to, or in place of any Manufacturer’s Warranty that may remain on the vehicle),*” or something similar to reflect the fact that the vehicle is covered under a manufacturer’s CPO warranty. This alternative would allow dealers to check only one box, and give prospective purchasers accurate warranty coverage information.

2. What should the dealer do if they cannot determine whether the Manufacturer’s Warranty still applies?

For all of the reasons detailed above, the Commission should clarify that the dealer is not required to disclose Non-Dealer warranties. Disclosures under this portion of the Revised Buyers Guide should be optional, for use in situations where a dealer is confident that a Non-Dealer Warranty applies.

3. What should the dealer do when only a portion of the Manufacturer’s Warranty still applies?

As discussed above, many manufacturers' warranties are tiered, and offer a range of warranty protection on new vehicles. As a result, when a used vehicle is offered for sale, only a portion of the manufacturer's original warranty may apply. For example, a new vehicle may include a 3-year, 36,000 mile "bumper-to-bumper" warranty, as well as a 5-year, 100,000 "powertrain" warranty. Therefore, if that vehicle is offered for sale as a used vehicle when it is 4 years old, having 50,000 miles, only a portion of the manufacturer's original warranty applies.

Given the current "all or nothing" manufacturer's warranty disclosure language, many dealers are likely to be reluctant to disclose that any manufacturer's warranty still applies if prospective purchasers could be confused by such a disclosure. One concern is that if consumers are told that there is a remaining manufacturer's warranty, they may assume that means a "bumper-to-bumper" warranty. The Commission should clarify what dealers should disclose in such a circumstance and how they should make that disclosure – both under the current method as well as under the Revised Buyers Guide.

4. What is the distinction between the "Dealer Warranty" and "Other Used Car Warranty Applies"?

We believe that the Commission should clarify the intent and proper use of the third box under "Non-Dealer Warranties" – "Other Used Car Warranty Applies." Many "certified" programs are actually offered by third parties, not manufacturers. Is this box intended to be used in any instance where used vehicle coverage is provided by a third party? The Commission should clarify how this differs from warranty coverage provided "by" the dealer, but guaranteed by a third party. Is the distinction based on who pays for the repairs? Who guarantees the repairs? If a dealer pays a third party for a service contract, but the protection is included in the price of the vehicle, should they check this box? We believe that this box is needed and useful, but could lead to confusion. The Commission should also fully explain when checking this box is appropriate, whether it should be used in conjunction with other boxes, including examples.

5. When should a dealer check the "No Information Provided" box?

Clarification should also be provided regarding the anticipated use of the "No Information Provided" box on the proposed Revised Buyers Guide. The Commission should explain to dealers the intended purpose of this box, and indicate when checking this box would be appropriate, including examples. In addition, if the Commission clarifies that this box is intended for use where a dealer has reason to believe, but is not certain, that a non-dealer warranty applies, then a disclaimer such as the one set forth above should be included on the Buyers Guide. Doing so would provide consumers with as full a disclosure of warranty coverage as possible and would encourage them to take additional steps to investigate potential warranty coverage.

IV) CONCLUSION

The Used Car Rule and the Buyers Guide have assisted both dealers and prospective purchasers alike. While consumers are very well served by the current Rule, the minor modifications discussed above should enhance the Rule's benefits.

NADA appreciates the opportunity to comment on this matter, and looks forward to working with the Commission in its efforts to improve and update the Buyers Guide. We would respectfully request the opportunity to address any issues beyond those specifically addressed in the Notice should they be raised via comment or otherwise. Please feel free to contact us if we can provide additional information that would be useful in your inquiry going forward.

Sincerely,

Bradley T. Miller

Associate Director, Legal and Regulatory Affairs