

**Comments of the
National Consumer Law Center**
(on behalf of its low-income clients)

And

Consumers for Auto Reliability and Safety

And

Consumer Federation of America

And

Consumers Union

Regarding
Cooling-Off Rule Regulatory Review
16 C.F.R. § 429
Comment
Project No. P087109

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These comments are submitted by the National Consumer Law Center, on behalf of its low-income clients,¹ Consumers for Auto Reliability and Safety,² Consumer Federation of America,³ and Consumers Union⁴ in response to the Federal Trade

¹ The **National Consumer Law Center, Inc.** (“NCLC”) is a non-profit Massachusetts corporation, founded in 1969, specializing in low-income consumer issues, with an emphasis on consumer credit. On a daily basis, NCLC provides legal and technical consulting and assistance on consumer law issues to legal services, government, and private attorneys representing low-income consumers across the country. NCLC publishes a series of eighteen practice treatises and annual supplements on consumer credit laws, including Unfair and Deceptive Acts and Practices (7th ed. 2008). For 27 years, this manual has analyzed and reported on developments related to the Federal Trade Commission and state cooling-off period rules. NCLC attorneys have written and advocated extensively on all aspects of consumer law affecting low-income people, conducted training for tens of thousands of legal services and private attorneys on the law and litigation strategies to deal predatory lending and other consumer law problems, and provided extensive oral and written testimony to numerous Congressional committees on these topics. NCLC’s attorneys have been closely involved with the enactment of the all federal laws affecting consumer credit since the 1970s, and regularly provide comprehensive comments to the federal agencies on the regulations under these laws. These comments were written by Leah A. Plunkett and John W. Van Alst of NCLC.

² **Consumers for Auto Reliability and Safety** (“CARS”) is a credible, respected voice for the public interest, working to expose illegal practices, improve auto safety technology, and ensure that safe, seriously defective vehicles are recalled and fixed before people are hurt. CARS is also on the forefront of exposing illegal practices such as “lemon laundering” of hazardous vehicles across state lines. CARS has received numerous awards in recognition of its public interest work.

Commission's regulatory review of the Trade Regulation Rule Concerning Cooling-Off Period For Sales Made at Homes or at Certain Other Locations, 16 C.F.R. § 429 (hereinafter "Rule"). We support continuation of the Rule, as well as clarification and modification of certain provisions.

We see a strong continued need for the Rule due to on-going consumer vulnerability to the types of abuses which the Rule initially sought to prevent. In particular, we support continuation of the Rule in its current form with respect to the \$25.00 threshold for application of the Rule and the definition of "door-to-door sale" as one in which the "buyer's agreement or offer to purchase is made at a place other than the place of business of the seller" 16 C.F.R. § 429.0(a).

In order to ensure that the Rule is properly understood and applied, we support clarification of the following areas:

- The Rule's coverage of "rent-to-own" transactions.
- The Rule's coverage of services related to real property (such as foreclosure rescue scams).
- That a consumer who validly exercises his or her right of cancellation pursuant to the Rule does not owe the seller for any service the seller might have provided prior to the end of the three day period for cancellation.
- That a consumer covered by the Rule has an on-going right to cancel when the seller has failed to give proper notice of the cancellation right.

To further strengthen the Rule, we urge that it be modified in the following ways:

- Removal of the exemption for motor vehicle sales by dealers to consumers at temporary places of business, such as tent sales.
- Expansion of the Rule to cover all used car sales at any location.
- Expansion of the Rule to cover on-line payday lending.

These modifications are necessary due to the prevalence in these settings of the types of abuses against which the Rule originally sought to guard. In addition, we support the following modifications:

- Expansion of the Rule to prohibit arbitration agreements in transactions covered by the Rule.

³ **Consumer Federation of America** is a nonprofit association of some 300 nonprofit consumer organizations in the United States. Its mission is to advance consumers' interests through research, education and advocacy. For more information go to www.consumerfed.org.

⁴ **Consumers Union**, the nonprofit publisher of Consumer Reports magazine, is an organization created to provide consumers with information, education, and counsel about goods, services, health, and personal finance; and to initiate and cooperate with individual and group efforts to maintain and enhance the quality of life for consumers. Consumers Union's income is solely derived from the sale of Consumer Reports, its other publications, and from noncommercial contributions, grants, and fees. Consumers Union's publications carry no advertising and receive no commercial support.

- Expansion of the Rule to require inclusion of an independent contractual provision stating that the consumer has the right to cancel pursuant to the terms of the notice.
- Increasing the minimum font size for the notice requirement.

I. Continuation of the Rule⁵

A. The Abuses the Rule Was Established to Prevent Still Exist.

When the Rule was promulgated, the Federal Trade Commission (“FTC”) focused on responding to five categories of abuses in the door-to-door sales arena: “(1) [d]eception by the salesmen in getting inside the door; (2) high pressure sales tactics; (3) misrepresentation as to the quality, price, or characteristics of the product; (4) high prices for low-quality merchandise; and (5) the nuisance created by the visit to the home by the uninvited salesmen.” 37 Fed. Reg. 22937 (Oct. 26, 1972).

Consumers today are no less vulnerable to these abuses than they were at the Rule’s inception. The aftermath of one of our country’s worst tragedies, Hurricane Katrina, makes this all too evident. Desperate homeowners seeking to rebuild after Katrina were routinely victimized by home repair contractors who made promises they had no intention of keeping, stole the homeowners’ money, and performed substandard work—or none at all. The magnitude of this problem may be seen by comparing the number of complaints about home repair contractors made to the Louisiana Attorney General’s office the year before Katrina—150—to the number made in the two years after the storm—upwards of 6,000.⁶ While we can’t know the details of each situation, it is safe to say that many of the arrangements entered into between these struggling homeowners and predatory home repair contractors fell under the Rule’s scope. As the Texas Attorney General’s Office warns the public, “[d]oor-to-door sales are especially common in areas that have been hit hard by storms, where nearly every house needs some kind of clean-up or repair.”⁷

However, door-to-door sales are not confined to the aftermath of disaster. “In many neighborhoods, door-to-door sales are still a fairly common occurrence.”⁸ While vacuum cleaners or encyclopedias may be sold door-to-door less frequently than in the past, today’s door-to-door sales involve new and more expensive products and services with an even higher potential for abuse. Low-income or non-English-speaking neighborhoods are frequently targeted. For instance, during the subprime mortgage lending frenzy, lenders would go to the homes of families in these neighborhoods to sell

⁵ The comments in this section respond to Questions 1 and 3 in the FTC’s Request for Public Comment.

⁶ See National Consumer Law Center, Avoiding Home Repair Fraud: Lessons from Hurricane Katrina 1 (Nov. 2008), available at http://www.consumerlaw.org/issues/katrina/content/Katrina_Repair_Fraud_NCLC_11-08.pdf.

⁷ Attorney General of Texas, Door-to-Door Sales (Apr. 22, 2008), available at http://www.oag.state.tx.us/consumer/door_to_door.shtml.

⁸ *Id.*

them loan packages that they could not afford.⁹ Continuation of the Rule is thus necessary to protect consumers, especially when their circumstances render them vulnerable.

B. The \$25.00 Threshold Should Be Maintained, Regardless of Inflation.

In the marketplace, low-income consumers are uniquely vulnerable. When originally setting the \$25.00 or above threshold, part of the FTC's rationale was that it would give consumers "the benefits of the cooling-off provision if it really is needed—in cases where they have over-extended themselves financially." 37 Fed Reg. 22946 (Oct. 26, 1972). Low-income consumers often don't have enough money even for necessities, so transactions involving \$25.00 or more represent a significant amount.¹⁰ The number of people and families in this type of situation, where each financial decision can have serious and potentially devastating consequences, is increasing.¹¹ Because transactions of or over \$25.00 can easily result in financial over-extension for so many consumers, the Rule's current threshold should be maintained and not be adjusted for inflation.

C. The Current Definition of Door-to-Door Sales Should Be Maintained.

The definition of a "door-to-door sale" as occurring "at a place other than the place of business of the seller" should be preserved. 16 C.F.R. § 429.0(a). In promulgating the Rule, the FTC identified the "dominant characteristic" of this type of sale as "personal contact in a nonbusiness [sic] setting." 37 Fed. Reg. 22936 (Oct. 26, 1972). This characteristic remains at the core of the risk posed to consumers. As the Texas Attorney General cautions consumers: "[t]he most important thing to remember is that, when a person comes to your door selling something, you don't know who the person is or where you would be able to find him if the deal goes wrong."¹² The same risk—of not being able to locate a salesperson later on—exists anytime a deal is consummated away from the seller's place of business. The current definition of "door-to-door sale" remains necessary to protect consumers from this and other risks.

II. Clarification of the Rule¹³

A. The Rule Covers "Rent-to-Own" Transactions.

"Rent-to-own" businesses are thriving. What these businesses offer consumers is "much like a subprime mortgage for pull-out sofas and television sets"—in other words, a

⁹ See Pete Carey, The Harsh Side of the Housing Boom, San Jose Mercury News, Mar. 16, 2007.

¹⁰ See Erik Eckholm, More Homeless Pupils, More Strained Schools, N.Y. Times, Sept. 6, 2009, at A1 (describing a family who runs out of money for proper food by the second half of the month and is still facing eviction from their \$475.00/month rented trailer).

¹¹ See U.S. Census Bureau: 2.6 More Americans Pushed Into Poverty in 2008, Sci. Letter, Sept. 22, 2009 (reporting that "almost 40 million Americans now live in poverty").

¹² Attorney General of Texas, *supra* note 7.

¹³ The comments in this section respond to Question 4 in the FTC's Request for Public Comment.

rotten deal.¹⁴ The consumer makes weekly payments to rent a product with the stated goal of eventual ownership. The result is often that the consumer winds up paying an exorbitant amount—far more than the product is actually worth—and might well lose the product due to a missed payment.¹⁵ These businesses are known to target low-income consumers.¹⁶

Fortunately, when a “rent-to-own” transaction is consummated away from the seller’s place of business, it should be covered by the Rule. The Rule covers leases and rentals of consumer goods with a purchase price of \$25.00 or more. 16 C.F.R. § 429.0(a). The \$25.00 plus price can be paid “under single or multiple contracts.” *Id.* Thus a “rent-to-own” transaction where the total amount paid will be over \$25.00 would be covered by the Rule, even if the weekly payment amount may be less than \$25.00.

The Rule should be clarified to make this coverage evident to consumers by adding “rent-to-own” to the list of transactions set forth in 16 C.F.R. § 429.0(a) and 16 C.F.R. § 429.0(b). Such a clarification would be consistent with the FTC’s long-standing concern with having the Rule provide protection against the “many forms of door-to-door sales to the poor who live in these areas [the inner-city].” 37 Fed. Reg. 22936 (Oct. 26, 1972).

B. The Rule Covers Services Related to Real Property.

The Rule does not cover transactions “[p]ertaining to the sale or rental of real property.” 16 C.F.R. § 429.0(a)(6). However, transactions involving services related to real property should be covered (provided they meet the Rule’s other criteria, such as the \$25.00 threshold and being entered into through a door-to-door sale). Therefore, such services as help with mortgage modification, mortgage loan brokerage, and foreclosure rescue fall under the category of “consumer services” because they are “primarily for personal, family, or household purposes.” 16 C.F.R. § 429.0(b).

It is essential that coverage of such services be clarified. They are almost always ploys to take advantage of consumers, and they are “popping up at an alarming rate nationwide.”¹⁷ Sellers may represent themselves as administering a government or government-approved mortgage modification program. They may also offer to rescue consumers from foreclosure by representing the consumer in negotiations with the lender. While the details may vary, the seller’s goal is the same: to gain possession of the consumer’s money and/or home without providing any actual service to the consumer.¹⁸

¹⁴ For Just A Few Dollars, A Big TV and Years of Debt, N.Y. Times, Feb. 2, 2008, at B1.

¹⁵ *Id.*

¹⁶ For instance, “Rent-A-Center is a chain of more than 3,200 stores that sell and rent appliances and furniture for no money down, to people with no credit. Here in New York, it has 38 stores. The list of addresses is as precise as a census map in pinpointing the poor and nearly poor of the city. They are not competing with Best Buy.” *Id.*

¹⁷ U.S. Dep’t. Treasury, Consumer Advisory: OCC Consumer Tips for Avoiding Mortgage Modification Scams and Foreclosure Rescue Scams, Apr. 21, 2009, *available at* <http://www.occ.treas.gov/ftp/ADVISORY/2009-1.pdf>.

¹⁸ *Id.*

Sellers are known to identify consumers through foreclosure notices and then to “approach their targets in person.”¹⁹ These consumers are uniquely vulnerable. Not only are they being approached by a salesperson in their own home, but they are terrified of losing that home. Consumers must be made fully aware that the Rule protects them in this situation.²⁰

C. The Rule Does Not Require Payment for Services Rendered During the Cooling-Off Period If the Right to Cancel Is Properly Exercised.

The Rule allows the consumer to cancel a door-to-door sales transaction before “midnight of the third business day after the date of this transaction.” 16 C.F.R. § 429.1(a).²¹ Upon cancellation, the consumer has a legal obligation to return any goods. However, it is not possible to return services that the seller may have chosen to provide prior to the expiration of the three day period. The Rule imposes no such requirement. Indeed, the FTC has stated that “in non-emergency situations the seller should properly bear the risk of cancellation if he elects to perform before expiration of the cooling-off period.” 37 Fed. Reg. 22947 (Oct. 26, 1972). To require the consumer to reimburse the seller for services performed during the cooling-off period would allow the seller to defeat the consumer’s right to cancel by starting work immediately. Thus it should be made clear through in the FTC’s Statement of Basis and Purpose for the Rule that a consumer who validly exercises his or her right of cancellation pursuant to the Rule does not owe the seller for any service the seller elected to perform during the cooling-off period.

D. The Rule Gives Consumers A Continuing Right to Cancel.

The Rule makes it an “unfair and deceptive act or practice” for the seller to fail to provide the consumer with proper notice of her or his right to cancel the transaction within the cooling-off period. 16 C.F.R. § 429.1. It is also unfair and deceptive for the seller to refuse to honor a consumer’s validly exercised right to cancel. 16 C.F.R. § 429.1(g). Therefore, in a situation where the seller has failed to provide the complete legally required notice, the consumer should have a continuing right to cancel. That is, the consumer should be allowed to cancel until three days have elapsed since the consumer first received proper notice of the right to cancel. Failing to allow the consumer to do so would constitute an unfair and deceptive act or practice on the part of the seller because the consumer would be barred from exercising her or his right.

Courts have consistently interpreted the cooling-off period laws of many states as including this continuing right. Many state statutes even make this right explicit.²² If no

¹⁹ *Id.*

²⁰ Currently, the FTC has an open rulemaking proceeding on loan modification scams more broadly. 74 Fed. Reg. 26130-38 (June 1, 2009).

²¹ These comments do not pertain to an emergency situation in which the buyer has waived her or his right of cancellation pursuant to 16 C.F.R. § 429.0(a)(3).

²² *See, e.g., Reynolds v. D & N Bank*, 792 F. Supp. 1035, 1038-39 (E.D. Mich. 1992) (explaining that consumers had continuing right to cancellation under state cooling-off statute because seller had not given proper notice of cancellation); *In re Johnson*, 239 B.R. 255, 259 (Bankr. D.R.I. 1999) (noting that the state

continuing right were provided, the seller could deprive the consumer of her or his right to cancel simply by failing to provide the legally required notice. It should be made clear that sellers will not be permitted to so easily vanquish consumer rights under the Rule. This clarification could be obtained by inserting a statement into the Rule at 16 C.F.R. § 429.1 that the consumer's right to cancel continues until three days have elapsed since the consumer first received proper notice of the right to cancel.

III. Modification of the Rule²³

A. The Exemption For Motor Vehicle Sales at Temporary Locations²⁴ Should Be Removed.

Currently, the Rule exempts from its coverage “sellers of automobiles, vans, trucks or other motor vehicles sold at auctions, tent sales or other temporary places of business, provided that the seller is a seller of vehicles with a permanent place of business.” 16 C.F.R. § 429.3(a). This exemption for the sale of motor vehicles away from the seller's permanent place of business, as well as for the sale of arts and crafts at a fair,²⁵ is in part because the FTC did not initially consider these scenarios when promulgating the Rule.²⁶ Upon later consideration in 1988, the FTC concluded that:

There is no indication that consumers are lured to these sales settings [auto auctions and arts and crafts fairs] by subterfuge. Consumers know the purpose for going to an auction and that is to buy a car . . . [and] [t]o the extent that certain problems occur at auto sales, they typify the same problems that may occur at transactions at the seller's place of business and are addressed by other Commission rules, e.g., the Used Car Rule and Guides on Bait and Switch, or state laws, e.g., prohibitions of “As is Sales.”

53 Fed. Reg. 45458 (Nov. 10, 1988).

Unfortunately, in the face of the unscrupulous practices frequently employed in motor vehicle sales today, this rationale does not hold. The exemption should be removed. (This recommendation does not apply to auctions held at permanent sites;

statute has separate provisions for the time restrictions on the cooling-off period based on whether or not notice was properly given).

²³ The comments in this section respond to Questions 4, 8, 14, 15, and 16 in the FTC's Request for Public Comment.

²⁴ There are many different types of temporary locations at which dealers sell motor vehicles to consumers. Depending on the state, these may include, but not be limited to, tent sales, dealer-run auctions open to the public, and the street or other public spaces. See National Consumer Law Center, *Automobile Fraud* §§ 2.6.4.2-3 (3d. ed. 2007 & Supp. 2009); *Unfair and Deceptive Acts and Practices* § 7.4.15 (7th ed. 2008).

²⁵ We are not, at this time, taking issue with the arts and crafts exemption.

²⁶ “Sales at arts and crafts shows and sales of automobiles at auctions do not appear to have been contemplated by the Commission as these transactions were not referenced in the Commission's Statement of Basis and Purpose for the Rule.” 53 Fed. Reg. 45458 (Nov. 10, 1988).

however, the next recommendation set forth in Section III.B applies to the sale of all used cars, whether at a permanent location or not.) Consumers at temporary sales events are vulnerable to the abuses the Rule was designed to prevent. They may be lured to the sale by deception on the part of the seller, an abuse the Rule seeks to curb.

For instance, an organization called “Your Area Dealer’s Association” put on a tent sale at a mall in Hanover, Pennsylvania. Many consumers were deceived into thinking that local car dealers were behind the sale because Hanover has an association called the “Hanover Area Dealers Association.” Instead, the sale was being put on by a seller outside of Hanover who had used his company to register the name “Your Area Dealer’s Association.” While the seller did have a permanent place of business elsewhere, he did not hold the sale under the name of that physical business location. In a message broadcast on an electronic sign set up by local dealers, residents were advised to beware: “[t]ent leaves so does your service.”²⁷

This is one of the main dangers posed to consumers by temporary sales: they may not be able to track down the seller after the sale ends. The fact that the seller has a permanent place of business somewhere—potentially under a different name, as described above—does not mean that the consumer will necessarily have been advised of how to reach the seller or in fact be able to do so. The Rule does not require the dealer to identify its permanent place of business or even to use that business name. Indeed, the Rule does not require that the permanent place of business be located in the same state.

Consumers at temporary sales events are also particularly susceptible to high-pressure sales tactics and misrepresentations. The chaotic, often unregulated, nature of these events creates a sense of urgency, as does the very limited time for which they are generally held. Consumers’ time to reflect and ability to comparison shop is severely limited. Sellers create conditions that do not facilitate reasoned decision-making to take advantage of consumers. Temporary sales events, such as tent sales, may well give rise to even more extreme instances of unfair sales pressures than a door-to-door sale.

This is evident in the experience of a retired high school art teacher in his seventies. Upon seeing a tent sale taking place around Cincinnati, he became interested and stopped in. As he browsed, he was flipped from one salesperson to another—a common high-pressure car sales tactic, which will be discussed further below—until he signed an agreement to get a car. The terms were outrageous and had not been properly represented to him. He would be leasing the car, which he hadn’t understood, and if he ultimately wanted to buy it, he would have had to pay twice the Manufacturer’s Suggested Retail Price. The seller had a permanent place of business, so it was not covered by the Rule.²⁸

²⁷ Heather Faulhefer, Hanover Car Dealers Protest Traveling Tent Sale, Evening Sun, Sept. 26, 2008, available at http://www.eveningsun.com/ci_10565896.

²⁸ Attorney Ronald Burdge of the Burdge Law Office Co., L.P.A., in Dayton, Ohio, described this situation to NCLC.

As this story demonstrates, other rules and state statutes cannot be relied upon to guarantee the consumer time to investigate properly a purchase made at a tent sale or other temporary sale event, far from the madding crowd. The right of cancellation following a purchase of a motor vehicle sale at a temporary location is thus an essential protection for the consumer²⁹—just as it has been found to be for virtually all other sales transacted away from a seller’s regular place of business. The exemption set forth in 16 C.F.R. § 429.3(a) should be removed. But if the exemption is retained, it should be modified to require the seller to inform the consumer in writing of the name of and contact information for its permanent place of business and to permit the seller only to hold temporary sales within 30 miles of its permanent place of business.

B. The Rule Should Be Expanded to Cover Used Car Sales at Any Location.

There is growing recognition around the country that major, essential consumer decisions involving a high risk of abuse—whether from a door-to-door sale or other circumstances—require the consumer to have time to make a reasoned decision. This is the case with home mortgages, as well as motor vehicle sales. We are suggesting that the Rule be extended to cover the sale of used cars at any location.

This development would be consistent with the trend toward allowing consumers more time for reflection on their most important purchases before they are consummated. Under the Truth In Lending Act, a consumer has a three day cancellation right for any loan transactions secured by a home (other than a purchase money mortgage).³⁰ In addition, the Mortgage Disclosure Improvement Act of 2008 places new obligations on creditors regarding early disclosures for any “closed-end loan secured by a consumer’s dwelling.”³¹ Absent an emergency, the loan may not be consummated until at least the seventh business day after these disclosures have been mailed or delivered.³² Consumers are thus protected from creditor pressure and able to make a thoughtful, reasoned decision about mortgages. They should be afforded no less when buying a used car.

California has recognized the importance of giving consumers time to reflect on the purchase of a used car. Unfortunately, the implementation of this important principle has not in fact protected consumers. California’s Car Buyers Bill of Rights allows car dealers to charge for a two-day right to cancel the purchase of a used car from the dealer. Cal. Veh. Code § 11709.2. In 2007, less than a year after the bill’s passage, “[m]ost auto dealers ha[d] already found ways to undermine it.”³³ Tactics include conditioning sale of the cancellation option on the consumer’s written agreement that the dealer gets to decide whether the car qualifies for a refund should the consumer bring it back or

²⁹ Some states offer additional protections to consumers buying motor vehicles at temporary locations. The proposed modification of the Rule—by removing the exemption—would establish a protective floor for consumers, not supplant any state protections that might exceed the Rule’s purview.

³⁰ See National Consumer Law Center, Truth In Lending § 6.1 (6th ed. 2007 & Supp. 2008).

³¹ See National Consumer Law Center Reports, Consumer Credit and Usury Edition 26 (Vol. 27, May/June 2009).

³² *Id.*

³³ Consumers for Auto Reliability and Safety and Consumer Action, Looking Under the Hood: A Preliminary Report on California’s Car Buyers Bill of Rights 2 (Mar. 7, 2007).

misrepresenting the amount dealers can charge for the return option.³⁴ The so-called cancellation “right” has been rendered meaningless; indeed, in some cases it is employed to mislead consumers into thinking they cannot rescind, even if they were defrauded, unless they obtained the return option up front.

By contrast, many European countries afford consumers meaningful periods for reflection and cancellation of certain transactions. In some countries, car sales come under the scope of this right. For instance, a consumer in France has a seven day right to cancel a car purchased on credit.³⁵ This right appears not to be widely used. One survey found that only 1.29% of consumers did so.³⁶ This suggests that the very existence of the right deters bad behavior on the part of the dealers and encourages fair sales. Cancellation is reserved for those serious situations in which there is no other recourse.

The European Union is in the process of guaranteeing a strong cancellation right for consumers in all of its member countries. A recent European Union directive gives consumers 14 days to withdraw from essentially any transaction based on credit for any reason. Council Directive 2008/48/EC, art. 14, 2008 O.J. (L 133/66) (EC). It appears as if cars purchased on credit—which most are³⁷—are included. Member states are required to incorporate this directive into national law by 2010. *Id.* at art. 27. Consumers will have the right to the time they need to make reasoned decisions about their purchases, which is particularly important with respect to major transactions, such as buying a car.

For most people, a car is essential for daily life.³⁸ Without a reliable and safe vehicle, they will be unable to attend school, go to work, visit the doctor, and carry out other crucial activities. In addition, for most people, a car is their second most expensive purchase, after a home.³⁹ The stakes couldn’t be higher for consumers: their need is great, as is the amount of money they will spend. Car loans generally last for at least five years—sometimes as long as eight—with the result that “Americans today take nearly two years longer to pay off car loans than they did 30 years ago”⁴⁰

³⁴ *Id.* at 3.

³⁵ See Article L311-15 C. civ.

³⁶ See CERCA (European Council for Motor Trades and Repairs), Opinion on The Proposal For A European Directive on Consumer Credit 2-3, available at http://www.cecra.eu/en/pdf/position_papers/Others/cecraopiniononeuropeandirectiveonconsumercredit.pdf.

³⁷ This has implicitly been recognized by the European Commissioner for Consumer Protection, who stated that the landmark consumer credit directive “is about consumers being able to make better informed choices when they take out credit loans—to pay for a family wedding, a washing machine or a new car.” Meglena Kuneva, European Commissioner for Consumer Protection, Speech at the European Parliament on Consumer Credit (Jan. 15, 2008), available at <http://europa.eu/rapid/pressReleasesAction.do?reference=SPEECH/08/11&format=HTML&aged=0&language=EN>.

³⁸ John W. Van Alst, National Consumer Law Center, Fueling Fair Practices: A Road Map to Improved Public Policy for Used Car Sales and Financing 6 (2009), available at <http://www.consumerlaw.org/issues/auto/content/report-fuelingfairpractices0309.pdf>.

³⁹ See David Phillips, Keeping Old Car Is the New Way to Go, Detroit News, Mar. 25, 2009, available at <http://www.detroitnews.com/article/20090325/OPINION03/903250325/1149/rss26/Keeping+old+car+is+the+new+way+to+go> (referring to the car as “the second-most expensive purchase in our home”).

⁴⁰ Robert Schoenberger, Need A Car Loan? How Does 6 or 8 Years Sound?, Seattle Times, Mar. 21, 2008, available at http://seattletimes.nwsourc.com/html/motoring/2004295831_carloans21.html.

Consumers are thus extremely vulnerable in these transactions. Dealers know this and seek to exploit consumers' weakness. Tactics falling squarely within the categories of abuse that formed the rationale the Rule abound wherever cars are sold—especially used cars, for which there is a long history of particularly unfair and deceptive practices.⁴¹

Many types of misrepresentations are made to consumers. This occurs frequently when the dealer arranges the loan for the consumer. Not only will the loan be with the consumer for a significant period of time, but the consumer may well be paying an inflated interest rate in any loan arranged by the dealership. Dealers often receive an undisclosed kickback from the lender by placing “the consumer in less favorable financing than the consumer qualifies for, and split[ting] the extra profit with the lender.”⁴² In order to be on equal footing with the dealers, consumers need the Rule's right to cancel. The Cooling-Off period would afford them the opportunity to shop around for financing after getting an offer from a dealer, and it would incentivize the dealer to make a good deal up front so as not to lose the sale to a more fair-minded competitor.

Dealers also exert control over consumers in other ways besides loan negotiations. High pressure sales tactics, a category of abuse that the Rule aims to address, are rampant. Dealers intentionally place consumers in a vulnerable position so that their decision-making will be impacted. “Often dealers force the consumer to stay at the dealership for long periods of time by keeping the potential trade-in, keeping the consumer's driver's license, or other ruses.”⁴³ Tactics such as these create conditions equivalent—if not worse—to a salesperson accosting a consumer in her or his home. The consumer becomes a captive audience; as in the home, he or she “cannot end the discussion by leaving.” 37 Fed. Reg. 22938, n. 41 (Oct. 26, 1972). In addition, dealers often employ the “turnover system, where a series of sales personnel are used to wear down a consumer.”⁴⁴

High pressure sales tactics may be used by dealers of both new and used cars; however, used car sales carry a heightened risk of misrepresentations being made by the dealer, as well as the dealer charging a much higher price than the used car is worth. Low-income consumers are especially vulnerable to dealer abuses in the used car market. “Most used cars purchased by low-income families are sold ‘As Is.’ Such cars often require repair soon after purchase. Often the cost of the repairs is more than the consumer can afford or even exceeds the value of the car.”⁴⁵ In addition, the dealer may know about serious problems with the car but not inform the consumer. Consumers may put their safety and that of others at risk if they buy and drive an unsafe car.

⁴¹ See generally National Consumer Law Center, Unfair and Deceptive Acts and Practices § 7.4 (7th ed. 2008).

⁴² Fueling Fair Practices, *supra* note 38 at 8.

⁴³ *Id.* at 7.

⁴⁴ Unfair and Deceptive Acts and Practices, *supra* note 41 at 7.3.1.

⁴⁵ Fueling Fair Practices, *supra* note 38 at 8.

These days, a common—and dangerous—scenario is the flood-damaged car sold without disclosure of this serious systemic defect. This type of misrepresentation is a growing national problem; “[f]rom 2002 to 2006, the number of cars that were involved in floods or had major water damage and were put back on the road . . . doubled.”⁴⁶ Low-income consumers thus wind up in a far worse position than they were when they may have had no car: they owe money for a loan on a car that may be essentially worthless.⁴⁷ Having the Cooling-Off period would allow consumers to investigate properly the safety and true value of any used car before the purchase is completely finalized.

Dealers already frequently structure transactions so they are not in fact finalized when the consumer drives off the lot. However, dealers create this *de facto* right of cancellation only for themselves. This is done through a common scheme of misrepresentation known as the “yo-yo sale.” It works as follows:

[T]he dealer sends the customer off the lot driving the newly purchased car only to call the customer back several days later to say (sometimes untruthfully) that financing could not be arranged at the original terms and the consumer must sign new documents at a higher interest rate or other worse terms . . . Sometimes the dealer will have already sold the consumer’s trade-in or tell the consumer that the consumer will be responsible for extra charges and costs if the new, less desirable, terms are not accepted.⁴⁸

The dealer thus ensnares the consumer. The consumer wants to keep the car and feels powerless to do so on any other terms but the dealer’s. Indeed, the consumer may well be powerless in this situation. The dealer has structured the contract so that it can cancel if certain contingencies occur, but the consumer cannot.⁴⁹

In light of what we know about dealers’ abusive tactics in the used car market, consumers should be able to avail themselves of the Rule’s right of cancellation whenever they buy a used car from a dealer—no matter where the sale is consummated. The “certain problems” acknowledged by the FTC that arise with car sales, which are worse with respect to used cars, should not be allowed to flourish at any location. And the Rule’s right of cancellation is crucial for combating them.

C. The Rule Should Be Expanded To Cover On-Line Payday Lending.

Internet sales did not exist at the time the Rule was originally promulgated. This raises new questions about whether certain types of internet sales should fall under the

⁴⁶ Jeff Billington, Flood-Damaged Vehicles Reach Market: How to Avoid A Flood-Damaged Car, Tulsa World, Aug. 6, 2007.

⁴⁷ Fueling Fair Practices, *supra* note 38 at 8.

⁴⁸ *Id.* at 7.

⁴⁹ See Unfair and Deceptive Acts and Practices, *supra* note 41 at 7.3.9.

Rule's purview. One type of internet sale that should be covered by the Rule is the on-line payday loan industry.

This industry aggressively seeks to make personal contact with consumers by sending emails to them promising immediate loans, without always making clear that these are advertisements.⁵⁰ This practice may be seen as similar to the door-to-door salesperson's use of deception to gain entry into the home to make contact in a non-business setting—in this case, a consumer's personal email account. See 37 Fed. Reg. 22937 (Oct. 26, 1972). Once the consumer responds, he or she becomes mired in a debt cycle that is almost impossible to break. Payday lending typically works as follows:

Payday loans are small cash loans based on borrowers' personal checks held for future deposit or on electronic access to borrowers' bank accounts. Check-based loans of \$100 to \$500 or more cost triple-digit interest rates, typically 390% to 780% annual interest rates for two-week loans with \$15 to \$30 finance charges per \$100 loaned . . . Payday lenders entice cash-strapped consumers to write checks without funds on deposit and then use those checks to coerce repeat transactions or collections.⁵¹

Consumers accessing payday loans are generally low-income, in need of money for necessities, and without recourse to more regulated, legitimate lines of credit or loans. They are vulnerable to the misrepresentations made by payday lenders, who frequently do not make the actual cost of loans clear.⁵² Consumers who get payday loans online are particularly vulnerable.⁵³ These on-line providers typically do not make known their physical place of business, if any, or make clear any state where they purport to be licensed.⁵⁴ They are able to hold consumers captive—requesting repayment, harassing them—without giving consumers any meaningful way to interact with them. In this important regard, online payday lenders are essentially sellers that hold a sale at a temporary location—over the internet—and then disappear. The Rule should be modified to protect consumers in this new type of temporary sales event, just as it does with almost all others.

Due to increased state regulation, more and more payday lenders are operating on-line in an attempt to escape oversight.⁵⁵ Many states as well as the federal government are working hard to police them. For instance, the FTC and the State of Nevada just won a million dollar settlement against a related group of online payday

⁵⁰ Jean Ann Fox and Anna Petrini, Consumer Federation of America, Internet Payday Lending: How High-Priced Lenders Use the Internet to Mire Borrowers in Debt and Evade State Consumer Protections 19 (Nov. 30, 2004), available at http://www.consumerfed.org/pdfs/Internet_Payday_Lending113004.PDF.

⁵¹ *Id.* at 6.

⁵² *Id.* at 22-24.

⁵³ See E. Missouri and S. Illinois Better Business Bureau, Missouri Licenses Online Payday Lenders; Other States Are Clamping Down On Them (Sept. 8, 2009), available at <http://stlouis.bbb.org/article/missouri-licenses-online-payday-lenders-other-states-are-clamping-down-on-them-12321> (explaining that “the potential pitfalls for consumers who patronize online payday lenders are even greater” than for consumers who patronize payday lenders at physical locations).

⁵⁴ Internet Payday Lending, *supra* note 60 at 12-13.

⁵⁵ *Id.* at 6-8.

lenders who “operated from the United Kingdom and targeted consumers in the United States, who were misled into believing that the defendants operated from Nevada.”⁵⁶ Expanding the Rule’s coverage to include transactions with on-line payday lenders would be another powerful tool to combat this growing problem, this time in the hands of the individual consumer.

As practices on the internet evolve, it may well become necessary to expand the Rule to encompass other on-line transactions as well. Payday lending is currently the most glaring arena in which the abuses the Rule was designed to curb are running rampant. But others may soon follow. For instance, mortgage modification and foreclosure rescue scammers are known to be using email to contact people whose homes are being foreclosed upon.⁵⁷ These homeowners are vulnerable in the same ways that consumers of payday loans are. While we do not currently urge expansion of the Rule to cover any on-line transactions besides payday lending, additional expansion might well become necessary down the road.

D. The Rule Should Prohibit Arbitration Agreements.

The use of consumer arbitration agreements is widespread in a range of transactions.⁵⁸ Sellers often use arbitration clauses not as an inexpensive way of resolving disputes but as a way of preventing practical vindication of consumer rights. Arbitration agreements typically limit the consumer’s rights, such as the right to seek class-wide relief, even in the arbitration proceeding. Recourse to class-wide relief “offers individuals with small claims their only realistic opportunity to receive justice.”⁵⁹ Even if a consumer wanted to pursue arbitration, he or she might be barred from doing so by the significant fees the arbitrators charge.⁶⁰ There is also growing awareness that companies may be employing arbitration firms biased in their favor as a means of ensuring that consumers never win any claims against them. Just a few months ago, the Minnesota Attorney General filed suit against the National Arbitration Forum (“NAF”), accusing them of having “misled consumers about its independence and hid its ties to the collection industry.”⁶¹ NAF quickly entered into a settlement, agreeing to cease its consumer arbitration work nationwide.⁶² Although NAF didn’t admit liability for the charges, its rapid withdrawal in the face of litigation suggests that it had not been playing by the rules.

Allowing arbitration agreements in the door-to-door sales context permits many sellers not to play by the rules either. The FTC has recognized the high potential for

⁵⁶ Press Release, Fed. Trade Comm’n, Internet Payday Lenders Will Pay \$1 Million to Settle FTC and Nevada Charges; FTC Had Challenged Defendants’ Illegal Lending and Collection Tactics (Sept. 21, 2009), available at <http://ftc.gov/opa/2009/09/cash.shtm>.

⁵⁷ See U.S. Dep’t. Treasury, *supra* note 17.

⁵⁸ National Consumer Law Center, Consumer Arbitration Agreements § 1.31 (5th ed. 2007 & Supp. 2008).

⁵⁹ *Id.* § 1.3.2.

⁶⁰ *Id.* § 1.3.6.

⁶¹ Nick Ferraro, Company Barred From Resolving Credit Disputes: A.G. Settles With Arbitration Business It Alleges Misled Consumers With Debt Issues, St. Paul Pioneer Press, July 20, 2009, at A5.

⁶² *Id.*

abuse inherent in door-to-door sales. Sellers may try to get away with that abuse by insulating themselves from liability through the use of arbitration clauses. Such insulation from liability constitutes an unfair and deceptive practice. *See* FTC Rule Concerning Preservation of Consumers' Claims and Defenses, 16 C.F.R. § 433.2. The Rule already prohibits confession of judgment clauses or the waiver of any of the consumer's rights under the Rule. 16 C.F.R. § 429.1(d). In order to ensure that sellers do not attempt to evade the prohibition on the waiver of any of the consumer's rights under the Rule, arbitration agreements should be added to 16 C.F.R. § 429.1(d) as explicitly forbidden in the door-to-door sales context.

E. The Rule Should Require Inclusion of an Independent Contractual Provision Stating That the Consumer Has the Right to Cancel Pursuant to the Terms of the Notice.

In order to afford consumers the fullest set of options through which to vindicate their rights under the Rule should a seller violate them, the Rule should be modified to require the seller to insert additional language in the contract providing the consumer with the right to cancel pursuant to the terms of the notice. The Cooling-Off Rule already requires that notice be included in the contract or furnished in duplicate with the contract. 16 C.F.R. §§ 429.1(a), (b). The Rule should mandate that under either option, an independent contractual provision also be inserted that provides the consumer with the right to cancel pursuant to the terms of the notice (however given). Consumers could then access the full range of options for redress available under contract law. The FTC has taken this step in other key areas. For instance, by requiring that the Holder Rule be part of the parties' contract documents, the FTC has ensured that consumers have a contractual right to enforce its provisions. 16 C.F.R. § 433.2.

Also, this modification would lend further support to the position that any violation of the Rule on the part of the seller is a violation of a state's Unfair and Deceptive Acts and Practices law. This could be emphasized by a note to the Rule.

F. The Minimum Font Size Requirement Should Be Increased.

Currently, the minimum font size requirement set forth in 16 C.F.R. § 429.1(a) is 10 points. This requirement was established at the time of the Rule's promulgation. 37 Fed. Reg. 22931 (Oct. 26, 1972). In light of the range of font options available with today's word-processing technology, 10 points has become on the small end of the options. One study of font size concluded that 11 to 14 point font should be used "regardless of your audience." Having a larger font is particularly important for older persons.⁶³ Therefore, we recommend increasing the required minimum font size to at least 12 point.

⁶³ Julia Kulla-Mader, In Search of the Perfect Font (final class project in pursuit of Master's Degree in Information Science, University of North Carolina at Chapel Hill) (last visited on Sept. 19, 2009), <http://www.unc.edu/~jkullama/inls181/final/font.html>.

In conclusion, we believe that the Rule should be continued, clarified, and modified in order to protect fully consumers from the abuses associated with door-to-door sales in the twenty-first century.