The FTC's Increased Role in Regulating
Auto Advertising, Sales and Lease Practices

Comments of the Attorneys General of Alaska, Arizona, California, Colorado, Connecticut, Delaware, District of Columbia, Georgia,[1] Hawaii, Idaho, Illinois, Iowa, Maine, Maryland, Massachusetts, Minnesota, Mississippi, Missouri, Nevada, New Hampshire, New Jersey, New Mexico, New York, Ohio, Oregon, Pennsylvania, Rhode Island, Tennessee, Utah, Vermont, Washington, West Virginia

Project No. P104811

I. Introduction

The state Attorneys General listed above ("States" or "Attorneys General") offer these comments to the Federal Trade Commission ("FTC") in response to the FTC's request for input on consumer protection issues in connection with motor vehicle advertising, sales, and leases. *Public Roundtables: Protecting Consumers in the Sale and Leasing of Motor Vehicles, 76 Fed. Reg., No. 50 (March 15, 2011).*

The States enforce a variety of state and federal laws specifically relating to motor vehicles and state consumer protection laws of general application that also apply to auto sales, leases and advertising. In addition, the States receive and act on complaints from their consumer-constituents and are authorized more broadly to protect the public from financial and other harm in consumer transactions.

Next to their homes, motor vehicles are the most expensive items purchased by most Americans. Complaints to the States about motor vehicle dealer practices traditionally rank among the top complaint categories by quantity among all consumer complaints received annually. The States have long had motor vehicle advertising, sales and lease practices as consumer protection law enforcement priorities. Therefore, the States believe that the FTC's consideration of how to use its resources in this area would benefit from consideration of our suggestions stated herein.

While the Dodd-Frank Wall Street Reform and Consumer Protection Act ("Dodd-Frank") enhanced the FTC's existing authority over those practices, many of the states joining in this comment have participated with the FTC over the past several decades in joint investigations and enforcement actions relating to the FTC's long-held jurisdiction over certain practices relating to auto sales and advertising.

---

[1] With respect to Georgia, the Administrator of the Fair Business Practices Act, appointed pursuant to O.C.G.A. § 10-1-395, is statutorily authorized to undertake consumer protection functions for the State of Georgia. Hereafter, references to "the States" or "Attorneys General," as it pertains to Georgia, includes the Administrator of the Fair Business Practices Act.

The purpose of these comments is to urge the FTC to focus its resources on specific areas which we believe are of the greatest import in the marketplace – those practices that affect the most consumers, are the most prevalent or harmful, or which may target more vulnerable consumers. In other words, we believe that by following the recommendations contained herein, the FTC will be doing the most good for the greatest number of U.S. consumers.

We recommend that the FTC:[2]

1. Adopt rules and bring enforcement actions to deter "yo-yo sales," as described below.
2. Adopt a rule requiring that all advertised prices and price quotes for motor vehicles include all required non-governmental fees, and defining as a deceptive and unfair practice any representation by a dealer of a sales price or monthly payment amount which includes optional purchases or the cost of financing optional purchases without, in the same representation, disclosing that the quoted payment price includes optional purchases and financing costs, as applicable, and the nature and amount charged for each.
3. Adopt rules regulating rent-to-own and lease-to-own auto transactions.
4. Join with the state attorneys general in enforcement actions against false premise advertising practices.
5. Take action against dealers who fail to include in disclosed interest rates certain fees the dealers pay lenders in connection with subprime loans.
6. Bring enforcement actions against dealers who engage in deceptive and unfair practices in connection with yield spread premiums in auto loans.
7. Act against lenders which fail to comply with the FTC's Rule Concerning Preservation of Consumers' Claims and Defenses, more commonly known as the "Holder in Due Course Rule," 16 C.F.R. Part 433.

II. Practices that Warrant FTC Action

The following are listed in the order in which we recommend the FTC prioritize them.

1. *Spot Delivery – Yo-Yo Sales*.

A "spot delivery" is the common practice of dealers negotiating sale prices and financing terms with consumers, but then sending the consumers home with the vehicle prior to obtaining firm lending offers under the negotiated terms. The retail installment contract lists the dealer as the creditor in the consumer loan.

The term, "yo-yo sale" refers to frequent abusive post-sale conduct by dealers in connection with a "spot delivery" when the dealer is unable to obtain financing for the

---

[2] These priorities reflect the consensus of the states following a review of information compiled by the states. They do not necessarily represent the list or ordering of priorities within each individual state joining in these comments.

consumer under terms at least as favorable for the consumer as the terms previously negotiated with the dealer. The problem has been so prevalent that states have enacted laws and adopted regulations and enforcement statements specifically limiting the practice.[3] Examples of dealer misconduct in yo-yo sales include:

- Selling or otherwise disposing of the consumer's trade-in vehicle making it impossible to put the consumer back in the position the consumer was in prior to the transaction.
- Offering to return the value of the consumer's trade-in as part of an unwinding of the deal but offering far less than what the purchase agreement and retail installment contract list as the trade-in credit given by the dealer to the consumer.
- Upselling the consumer by convincing the consumer to agree to terms and conditions that are more expensive for the consumer than originally negotiated but which result in greater profit for the dealer.
- Coercing the consumer to return the purchased vehicle through false claims that it constitutes theft for the consumer to fail to return the vehicle.
- Filing a theft report with local law enforcement when the consumer refuses to return the vehicle.

Oregon's law is one example of what state laws addressing this practice have required:

- If a lender does not agree to finance the vehicle on the agreed-upon terms within 14 days of the buyer taking possession of the vehicle, the buyer must return the vehicle and the seller must return the trade and down payment. The buyer may be liable for excessive damage and wear and tear and, in some cases, mileage charges. OR. Rev. Stat. § 646A.090;

- OAR 137-020-0020(3)(x), (y) and (z) further clarify ORS 646A.090: a dealer must have a reasonable basis to believe a consumer can qualify for the terms of financing before spot delivering a vehicle. A dealer must inform a consumer of the right to unwind the deal before negotiating new terms.

We recommend that the FTC adopt administrative rules to deter yo-yo sales as follows:

1) Require dealers to retain consumers' trade-in vehicles until financing is approved.
2) Preclude dealers from threatening to repossess or repossessing vehicles in a manner that does not comply with state law and from threatening to file or filing a theft or other police report due to the consumer's refusal to return the vehicle to the dealership if financing is not approved.

[3] Alaska Stat. § 45.25.610; Arizona Rev. Stat. Ann. § 44-1371; 2010 Arkansas Code § 23-112-316; Colorado Rev. Stat. § 6-1-708; 815 Illinois Comp. Stat. § 505/2C (not limited to motor vehicles); Nevada Rev. Stat. § 482.554; New Hampshire Rev. Stat. 361-A:10-b; Oregon Revised Statute (ORS) 646A.090; Utah Code Ann. §§ 41-3-401 (sales), 41-3-401.5 (leases); Virginia Code Ann. § 46.2-1530; Washington Rev. Code § 46.70.180.

3) Bar dealers from charging consumers for mileage or wear and tear or for any other reason pending approval of financing.
4) Require dealers to offer consumers either a complete unwinding of the deal or seeking credit under other terms, with the consumer having the choice to decide which of the two alternatives to accept, and barring dealers from making any representations to the contrary concerning the consumers' obligations or rights.
5) Bar dealers from retaining portions of down payments or deposits when a deal falls through.
6) Require dealers to disclose to consumers that if the first finance agreement is rejected, the consumer has the right to walk away from the deal and has no obligation to the dealer.
7) Prior to completing a spot delivery, require dealers to clearly disclose to consumers that financing has not been finalized and the responsibilities and potential consequences for consumers in a spot delivery.

It is our view that the FTC should act to establish a national baseline of protection for consumers regarding the practices set forth above. Where this is accomplished through the adoption of rules, the FTC should make clear that any rules adopted to deal with the abuses in these areas do not preempt state laws that are more protective of consumers.

In addition to adopting the rules as urged above, we also respectfully suggest that the FTC bring enforcement actions against auto dealers who routinely engage in deceptive or unfair practices in connection with allowing consumers to take vehicles sold to them contingent on the dealer being able to assign the finance agreement.

There are situations where a spot delivery is not an abusive practice – where sending the consumer home with the vehicle without assignment of the retail installment contract is not deceptive or unfair. This might include a sale late on a Saturday when the dealership is about to close for the weekend. The dealer may wish to accommodate the consumer's desire to complete the sale that day. In doing so, the dealer may offer a contract including a clause that provides that the sale is contingent upon the dealer assigning the lending agreement under the terms stated in the retail installment contract and that the consumer has the right to unwind the deal entirely if the dealer is not able to do so within a certain number of days (a reasonable number, say three) from the date of the retail installment contract.

However, it is difficult to find a more abusive practice in the context of auto sales and financing than a yo-yo sale, a practice which gives a dealer an extraordinarily unfair advantage over a consumer – and which distorts the marketplace and hurts competitors almost as much as it hurts consumers. We strongly urge the FTC to consider our recommendations in this area.

2. *Payment Packing*.

"Payment packing" is an age-old auto salesperson's trick of quoting monthly payment prices under financing plans to consumers that include the cost of optional items that the customer has not yet agreed to purchase and without disclosing to the customer that the monthly payment quote includes such optional purchases. The optional items might include credit insurance, payment GAP insurance, rustproofing, window etching of VINs, the purpose of which is supposedly to deter auto theft, service contracts, and other optional items the sale of which generally results in much higher profit margins for dealers.

The consumer who agrees to purchase based on the quoted monthly payment may never be told that he or she is purchasing an optional item, but merely told to "sign here, and sign here" agreeing to the optional purchases while visiting with the finance clerk but not understanding that the purchases were optional. This practice is deceptive. States have acted against the practice.[4] We urge the FTC to join us in taking enforcement actions against dealers shown to engage in a pattern of this deceptive conduct.

In addition to the above optional items, in recent years dealers have been substantially increasing "documentary fees" they charge car buyers and lessees. These fees are often in the hundreds of dollars per transaction. The fees supposedly are intended to reimburse the dealer for costs incurred in completing paperwork. However, any fees imposed for completing paperwork relating to consumer credit are finance charges under TILA and must be disclosed as such. This deters dealers from charging separately for credit-related services. Therefore, generally only fees that relate to items other than credit are separately imposed as "documentary fees," including for services such as titling the vehicle for the consumer. Some states ban the separate charging of these fees by requiring that all advertised and quoted prices include any such fees.[5] A minority of states directly regulate the fees by capping them and otherwise regulating them.[6]

Where not banned or regulated, the fees often come as complete surprises to consumers, and are not disclosed until well after the dealer and consumer agree on a sales price for

---

[4] Two Ohio administrative rules apply to the practice, including:

(1) Exclusions and Limitations in Advertisements Rule, Ohio Admin. Code 109:4-3-02(A); and
(2) Advertisement and Sale of Motor Vehicles Rule, Ohio Admin. Code 109:4-3-16(B)(5) and (B)(21) In addition, Oregon regulations, OAR 137-020-0020(3)(j) and (m), prohibit presumptive packing and require disclosure of the "extras" on the purchase agreement.

[5] Alaska Stat. Sections 45.25.440, 45.25.460; In addition, the Georgia Governor's Office of Consumer Protection has issued the Auto Advertising and Sales Practices Enforcement Policies, effective since 1989, that expressly require advertised prices to state the total purchase price of the vehicle, excluding only those fees collected on behalf of the government.

[6] Ark. Code Ann. Sect. 23-112-317; Cal. Veh. Code Sect. 11713.1; 815 Ill. Comp. Stat. Ann. 375/11.1; La. Rev. Stat. Ann. Sect. 6:969.18; Md. Code Ann., Transp. Sect. 15-311.1; Mich. Comp. Laws Ann. Sect. 492.113; Mo. Ann. Stat. Sect. 301.558; Ohio Rev. Code Ann. Sect. 1317.07; 63 Pa. Cons. Stat. Ann. Sect. 818.27a; S.D. Codified Laws Sect. 54-3A-1; Wash. Rev. Code Ann. Sect. 46.70.180(2); Oregon Rev. Stat. Sect. 822.043 and OAR 735-150-0055 (capped at $75 or $100).

the vehicle. Some dealers deceive consumers by misrepresenting the fees, directly or implicitly, as government-imposed fees. Nearly all dealers who charge the fee require the customer to pay the fee, unless state law mandates that the fee be optional. Most dealers use purchase agreements that include the fee pre-printed on the contract. In addition to being deceptive, the separate imposition of these fees is anticompetitive. Dealers who advertise higher prices may, ultimately, charge lower prices than those of competitors whose advertising shows lower purchase prices for the same year, make and model vehicles but which fail to include a several-hundred-dollar documentary fee in the advertised price.

We urge the FTC to consider adopting an administrative rule requiring that all advertised prices and price quotes for motor vehicles include all required fees, other than those mandated by government. Such a rule would make it clear that a fee is considered a "required fee" if all or nearly all customers have paid the fee over the prior twelve calendar months.

Again, while some states have been active in enforcing state laws directly addressing the practice, it is our view that deterrence of this deceptive practice nationally would be greatly enhanced through FTC enforcement actions and through adoption of the rule suggested above.

3. *Rent to Own/Lease to Own Transactions*.

The inability under current economic conditions to find financing for consumers with lower credit scores, combined with stricter state laws governing buy-here, pay-here used car dealers, has fostered significant growth in the rent-to-own, lease-to-own auto trade. The problems with which those of us in consumer protection are so familiar in connection with rent-to-own offers for furniture, appliances and electronics are magnified in used car transactions, including the imposition of a variety of fees that, had they been calculated and included in the finance charge required to be disclosed to consumers, would often push the effective interest rate well above any state interest rate cap.

In other words, offering a used car via a rent-to-own transaction offers a great way for a dealer intent on maximizing profit to dispose of a vehicle to a credit-challenged consumer without having to disclose the full cost of credit. In addition, it also means consumers are not protected by the laws that govern credit transactions generally rendering inapplicable laws that protect against unlawful repossessions without prior notice.[7]

Some states have enacted laws to regulate motor vehicle rent-to-own transactions, going so far as to ban them in connection with motor vehicle transactions.[8] However, a newer form of transaction, generally referred to as "lease-to-own" is being promoted. These

[7] For example, Iowa Code §§ 537.5110-5111 require creditors to give consumer-debtors notice of a 20-day right to cure a default at least once in a 365-day period prior to taking action to repossess collateral in consumer credit transactions, including credit transactions in connection with motor vehicle purchases.

[8] For example, the definition of "personal property" in Iowa Code § 537.3604 effectively bars rent-to-own transactions involving motor vehicles.

transactions are constructed to avoid application of laws limiting rent-to-own transactions by setting longer contract terms, taking them outside the definition of a rent-to-own transaction. However, lease-to-own transactions are no less abusive than rent-to-own transactions. These are not your father's auto leases. They also are not akin to leasing a new motor vehicle.

Both rent-to-own and lease-to-own transactions prey on subprime consumers, offering them the purchase of a lower-value vehicle, often in poor condition and with what equate to extraordinarily high credit charges. They do it in a way that hides the true cost of the credit, making shopping and comparing credit terms virtually impossible.

We urge the FTC to consider adopting administrative rules regulating rent-to-own and lease-to-own auto transactions. The rules would require disclosures of certain uniformly-defined terms to consumers, including converting the charges to an effective interest rate akin to the open end credit examples that are now required by federal law showing how much interest a consumer would pay were he to make only minimum monthly payments on credit card balances.

4. *False Premise Auto Advertising and Sales Practices*.

We urge the FTC to consider joining the states in bringing law enforcement actions against companies that engage in deceptive and unfair auto advertising promotions we refer to as "false premise."[9] These involve companies which sell their services, primarily to new car dealers, to help them promote sales of used vehicles.

The companies sell ad packages, comprising media promotional pieces, plus signage at the dealership. Quite often they supply personnel to supplant or supplement dealer sales and financing staff. The sales are usually promoted as "events" and sometimes occur at places other than the dealer's usual place of business, such as a vacant lot or department store parking lot. The solicitations falsely represent or imply that the seller is some entity other than the dealership offering its inventory for sale. The promotional pieces often tout other "false premises," such as falsely representing that the sale is of a fleet of vehicles including repossessed vehicles, those purchased from bankrupt companies or individuals when, in fact, the vehicles are merely those that have been included in the dealer's used inventory for some time and were purchased through the normal course of business from auctions or as trades.

---

[9] September, 2006 Assurance of Voluntary Compliance obtained by ten states against Gunning & Associates Marketing of Milford, Ohio; *State of Iowa ex rel. Miller v. Smart Automotive Group, LLC and Bernard E. Burst III*, 10/25/2010 Consent Judgment, Iowa District Court for Polk County, Equity No. CD65395; 8/15/2007 Maryland AG settlement with Team Velocity, Inc.: http://www.oag.state.md.us/Press/2007/081407.htm; 10/29/2007 Wash. AG settlement with Level 10 Marketing: http://www.atg.wa.gov/pressrelease.aspx?&id=18348; 1/24/2008 Wash. AG settlement with Automotive Consultant Group: http://www.atg.wa.gov/pressrelease.aspx?&id=18818; 5/6/2008 Maine AG settlement with Level 10 Marketing: http://www.maine.gov/tools/whatsnew/index.php?topic=AGOffice_Press&id=55343&v=article; 8/19/2010 Idaho AG settles with an ID dealer and Gunning & Associates: http://www.ag.idaho.gov/media/newsReleases/2010/nr_08192010.html

The advertising pieces also often misrepresent that the recipient of a mailer has "won" a prize that he or she may collect by visiting the dealership, and such prizes might include a car, if the key mailed to the consumer starts the vehicle. The use of scratch-off cards in mailers that show every recipient matching at least two sets of numbers and, therefore, "winning" some "prize" is present in nearly every one of these sales events, with nearly all recipients "winning" the least valuable "prize." In fact, the "prizes" most recipients "win" are of very little value, such as a chance to spin a prize wheel to win trinkets or low value coupons, $1 lottery tickets, "gold" coins, and other such items. The goal with the scratch-off cards is to trick the consumer into coming to the sales "event" in the false belief they may have won something of great value.

In addition, the advertising often misrepresents the terms and conditions of vehicles sold under financing, including referencing repayment terms that are less expensive than are available on any of the vehicles included in the sale, such as understating required downpayments or monthly payments.

The advertising may also violate the Consumer Leasing Act by failing to clearly and conspicuously disclose that the listed terms are for vehicle leases, not for financed purchases. It may also violate TILA by using "trigger" terms, such as the amount of a monthly payment, without clearly and conspicuously disclosing the other required disclosures.

Often, the degree of deceptive and unfair practices to which consumers are exposed at the sales "events" exceeds that present in the deceptive advertising. We urge the FTC to join us in taking law enforcement action against agencies that promote such "false premise" auto sales to help dealers move their used car inventories, and to deter auto dealers from relying on such ruses to lure unsuspecting consumers to sales "events" that are almost certain to result in a worse deal for the consumer than if the consumer had visited the dealer at some point in time other than during the sales "event."

5. *Failing to include subprime financing fees in disclosed financing charges*.

We urge the FTC to bring actions against dealers under the federal Truth in Lending Act ("TILA") for failing to include in disclosed interest rates and financing additional fees that lenders impose on the dealers in connection with some subprime auto loans and which the dealers pass along to consumers in the sale price. Dealers have been unlawfully passing along the charges in the prices charged for the vehicles, not calculating the fee as a finance charge and not including that charge in the interest rate the dealer discloses in the retail installment contract. In some instances this results in an actual finance charge exceeding a state rate cap. However, there is no question that this conduct violates TILA. The practice occurs when the consumer has a low credit score and does not qualify for traditional financing. Sometimes dealers are able to find lenders who will finance the sale, but only if the dealer pays what can amount to a hefty fee, usually ranging in the hundreds of dollars, to the lender in exchange for making the loan. FTC actions against perpetrators would greatly deter these violations.

III. Other Practices Which the FTC Might Act Against

1. ***Yield Spread Premiums*****.**

We urge the FTC to consider taking enforcement actions against auto dealers for engaging in deceptive advertising and other misrepresentations regarding yield spread premiums in connection with consumer loans that the dealer arranges to finance automobile purchases. "Yield spread premium" refers to the dealer obtaining a loan for a consumer at a particular interest rate, but representing to the consumer that the interest rate to be charged in the loan is at a higher rate, with the dealer retaining the money value of the difference between the two rates.

We urge the FTC to act against express or implied representations by a dealer that an interest rate to be imposed pursuant to an auto loan with a yield spread premium is:

- the same rate that the dealer obtained for the auto loan;
- the "lowest" available rate; or
- the best the dealer could obtain for the consumer.

2. ***FTC Holder in Due Course Rule Noncompliance*****.**

During the Roundtable discussions FTC representatives heard about the problems often faced by consumers when auto dealers close their businesses. This includes the dealer, prior to closing, failing to:

- pay off loans on a buyer's trade-in vehicle as required by the contract of sale;
- forward monies to state authorities received by the dealer through receipt of the proceeds of a consumer's purchase loan for tax, title and license fees owed by the consumer in connection with the purchase;
- forward monies to providers of motor vehicle service contracts, GAP insurance, and other third party-provided services received by the dealer through receipt of the proceeds of a consumer's purchase loan.

Attorneys General representatives commented at the Detroit Roundtable, on April 12, 2011, on the use by state law enforcement and licensing authorities of the proceeds of motor vehicle dealer bonds and state-required reimbursement funds to reimburse consumers who lose funds pursuant to the above-cited practices. Those same representatives recounted how some states do not require such bonds or reimbursement funds, or that the amounts of the bonds or funds are inadequate to provide full reimbursement for all injured consumers.

States have made use of the FTC Holder in Due Course Rule, 16 C.F.R. Part 433, in such circumstances to require lenders to reimburse affected consumers as the Rule requires that the financial institutions making the loans assume the dealer's liability as assignees of the debt from the dealer.

We urge the FTC to consider taking action against lenders which refuse to cooperate with requests made by state attorneys general that the lenders compensate consumers under the Holder in Due Course Rule in the event an out of business dealership violated applicable law in connection with a sale for which the lender provided financing.

IV. Conclusion

We congratulate the FTC for engaging in an open and collaborative process in publicly exploring problems American consumers face in the marketplace for motor vehicles and in discussing possible solutions. For most consumers, auto purchases are the most expensive purchases they make, other than purchasing their homes. For the most vulnerable consumers, who cannot afford to buy a home, auto purchases are likely the most expensive purchases they will ever make in their lives.

Given what is at stake, and given the prevalence of some harmful retail auto sales and lease practices, the Attorneys General joining in this comment welcome the FTC's enhanced authority and look forward to continuing our long-time working relationship with the FTC in this important area. Together, we can do even more to ensure a fair and competitive retail automobile marketplace.