

## Complaint

## IN THE MATTER OF

**OSF HEALTHCARE SYSTEM  
AND  
ROCKFORD HEALTH SYSTEM****COMPLAINT AND FINAL ORDER IN REGARD TO ALLEGED  
VIOLATIONS OF SECTION 5 OF THE FEDERAL TRADE COMMISSION  
ACT AND SECTION 7 OF THE CLAYTON ACT**

*Docket No. 9349; File No. 111 0102*

*Complaint, November 17, 2011 – Decision, April 13, 2012*

This case addresses the \$218.7 million acquisition by OSF Healthcare System of Rockford Health System. The complaint alleges that the acquisition, if consummated, would violate Section 5 of the Federal Trade Commission Act and Section 7 of the Clayton Act by significantly reducing competition in the markets for general acute-care inpatient hospital services and primary care physician services in Winnebago and Boone counties and the northeast portion of Ogle County, Illinois. The order dismisses the Administrative Complaint without prejudice because Respondents have announced that they are abandoning the proposed affiliation, and have withdrawn the Hart-Scott-Rodino Notification and Report Forms filed for the proposed transaction.

*Participants*

For the *Commission: Katherine Ambrogi, Richard Cunningham, Ken Field, Jeremy Morrison, Paul Nolan, Nancy Park, Kaj Rozga, Samuel Sheinberg, and Sarah Swain.*

For the *Respondents: Alan Greene, Hinshaw & Culbertson LLP; Jeffrey Brennan and David Marx, McDermott, Will & Emery.*

**COMPLAINT**

Pursuant to the provisions of the Federal Trade Commission Act, and by virtue of the authority vested in it by the Act, the Federal Trade Commission (“Commission”), having reason to believe that Respondents OSF Healthcare System (“OSF”) and Rockford Health System (“RHS”), having executed an affiliation agreement (the “Acquisition”) which if consummated would violate Section 7 of the Clayton Act, as amended, 15 U.S.C. § 18, and it appearing to the Commission that a proceeding by it in

## Complaint

respect thereof would be in the public interest, hereby issues its complaint pursuant to Section 11(b) of the Clayton Act, 15 U.S.C. § 21(b), stating its charges as follows:

**I.****NATURE OF THE CASE**

1. OSF's acquisition of RHS's assets (the "Acquisition") would substantially lessen competition for critical health care services in the Rockford, Illinois area. By ending decades of competition between OSF and RHS that has benefitted the community, the Acquisition threatens to increase total health care costs and reduce the quality of care and range of health care choices for employers and residents in the Rockford region.

2. The Acquisition, by Respondents' own admission, is a merger to duopoly for general acute-care inpatient hospital services in the Rockford region. The Acquisition will eliminate vigorous competition between OSF and RHS, and leave the Rockford region with only one other competitor for general acute-care inpatient hospital services: SwedishAmerican Health System ("SwedishAmerican").

3. The Acquisition also will eliminate important competition for primary care physician services in the Rockford region by combining two of the three largest physician groups, and will leave SwedishAmerican as the only other large hospital-employed physician group competitor in Rockford.

4. The Acquisition will create a single dominant health system in the Rockford region, with the combined OSF/RHS controlling 64% of the general acute-care inpatient hospital services market and over 37% of the market for primary care physician services. The Acquisition will leave just two firms, OSF and SwedishAmerican, controlling 99.5% of the general acute-care inpatient hospital services market and 58% of the market for primary care physician services.

5. The Acquisition is presumptively unlawful under the relevant case law and the U.S. Department of Justice and Federal Trade Commission Horizontal Merger Guidelines ("Merger

## Complaint

Guidelines”) because of the extraordinarily high post-acquisition market shares and concentration levels in the market for general acute-care inpatient hospital services in the Rockford region. The likelihood of anticompetitive effects arising from the Acquisition, including increased reimbursement rates stemming from the creation of a dominant health system, is independently supported and confirmed by evidence from sources including health plans, local employers and physicians, third party hospitals, and the merging parties themselves.

6. Rockford region employers and their employees would bear the costs – either directly or through higher health insurance premiums, co-pays, and other out-of-pocket health care expenses – of the rate increases likely to result from the Acquisition. Such health care cost increases force employers to reduce or eliminate health insurance benefits, force families to drop their health insurance altogether, and force some patients to delay or forego medical care that they can no longer afford.

7. The Acquisition also would diminish the quality of care, range of health care choices, patient experience, and access to care for Rockford region residents by ending decades of important non-price competition between OSF and RHS, and by reducing the incentive for OSF and SwedishAmerican to compete aggressively post-acquisition.

8. The price and non-price competition eliminated by the Acquisition would not be replaced by other providers. SwedishAmerican is the only other hospital that meaningfully competes for Rockford region patients, and significant barriers to entry and expansion, including regulatory requirements and substantial up-front costs, prevent new hospitals from entering the market.

9. The fact that the merged entity would still face at least some competition from one meaningful competitor, SwedishAmerican, is not sufficient to render the Acquisition lawful under Section 7. This conclusion is compelled by the antitrust laws – which condemn more than just mergers to monopoly – and also by the market realities in the Rockford region. Specifically, after the Acquisition, the merged system will be a virtual “must-have” for health plans seeking to offer

## Complaint

insurance to Rockford employers and employees. This fact – and the greater leverage the merged firm will enjoy as a result – stems from the inability of commercial health plans after the Acquisition to offer an attractive provider network without contracting with the combined system.

10. Health plans must offer at least two of the Rockford hospitals to be marketable to local residents. As a result, every major health plan network in the Rockford region includes two, but not all three, of the Rockford hospitals. After the Acquisition, no health plan could continue to offer a multi-hospital network in Rockford without facing the substantially higher rates that will be demanded by the merged OSF and RHS.

11. The Acquisition also increases the incentive and ability for the only remaining competitors in Rockford, SwedishAmerican and OSF, to engage in anticompetitive coordinated behavior. Such coordination could include directly or indirectly sharing sensitive information related to commercial health plan contracts and negotiations, or it could involve deferring competitive initiatives that otherwise would benefit the Rockford community.

12. Unless prevented, the Acquisition will substantially lessen competition and greatly enhance Respondents' market power. The Acquisition's likely anticompetitive effects will directly increase health care costs for Rockford residents, as well as lower the quality of care that they receive. Respondents' speculative efficiency and quality-of-care claims are insufficient to offset the significant anticompetitive harm likely to result from the Acquisition.

**II.****BACKGROUND****A.****Jurisdiction**

13. OSF and RHS are, and at all relevant times have been, engaged in commerce or in activities affecting commerce, within

### Complaint

the meaning of the Clayton Act. The Acquisition constitutes an acquisition under Section 7 of the Clayton Act.

### B.

#### Respondents

14. Respondent OSF is a not-for-profit health care system incorporated under and by virtue of the laws of Illinois. OSF is headquartered in Peoria, Illinois. OSF owns and operates six acute care hospitals in Illinois, and a seventh hospital in northwestern Michigan. In Rockford, OSF operates St. Anthony Medical Center (“OSF St. Anthony”), which has 254 licensed beds and serves the Rockford region. OSF also owns and operates OSF St. Anthony’s employed physician group, OSF Medical Group (“OSFMG”), which employs approximately physicians in the Rockford region. During fiscal year 2010, OSF generated \_\_\_\_\_ in operating revenue, with OSF St. Anthony generating approximately \_\_\_\_\_ of that total.

15. Respondent RHS is a not-for-profit health care system incorporated under and by virtue of the laws of Illinois. RHS is headquartered in Rockford, Illinois. RHS owns and operates one acute care hospital, Rockford Memorial Hospital (“Rockford Memorial”), which is located in Rockford, Illinois and serves the Rockford region. Rockford Memorial has 396 licensed beds. RHS also owns and operates Rockford Health Physicians (“RHPH”), which employs approximately \_\_\_\_\_ physicians in the Rockford region. During fiscal year 2010, RHS generated \_\_\_\_\_ in operating revenue.

### C.

#### Employers and Health Plans

16. Competition between hospitals occurs in two “stages.” In the first stage, hospitals compete to be selected as in-network providers by health plans. To become an in-network provider, a hospital engages in bilateral negotiations with the health plan. Hospitals benefit from in-network status by gaining access to the health plan’s members as patients. Health plans seek to create provider networks with geographic coverage and a scope of

## Complaint

services sufficient to attract and satisfy employers and their employees. One of the critical terms that a hospital and a health plan agree upon during a negotiation is the reimbursement rates that the health plan will pay to the hospital when the health plan's members obtain care at the hospital's facilities or from its employed physicians.

17. Fully-insured employers and their employees pay premiums, co-pays, and deductibles in exchange for access to a health plan's provider network and for insurance against the cost of future care. The costs to employers and health plan members are inextricably linked to the reimbursement rates that health plans negotiate with each health care provider in their provider network. Self-insured employers have access to their health plan's network and negotiated reimbursement rates but assume all risk for the costs of care provided to their employees. Self-insured employers must pay the entirety of their employees' health care claims and, as a result, they immediately and fully incur any hospital rate increases. Therefore, regardless of whether an employer is fully-insured or self-insured, its health plan acts as its agent – and by extension acts on behalf of its employees – in creating provider networks that offer convenience, high quality of care, and negotiated reimbursement rates.

18. In the second stage of competition, hospitals and their employed physicians compete with other in-network providers to attract patients. Health plans typically offer multiple in-network hospitals with similar out-of-pocket costs and those hospitals compete in this second stage to attract patients by offering better services, amenities, convenience, quality of care, and patient satisfaction than their competitors offer.

**D.****The Acquisition**

19. Under the terms of the affiliation agreement signed on January 31, 2011, OSF will acquire all operating assets of RHS and become the sole corporate member of RHS. OSF will hold reserve powers over the governance and operations of RHS. OSF's reserve powers will grant it control and ultimate authority over all significant business decisions of RHS, including strategic

## Complaint

planning, operating and capital budgets, large capital expenditures, and significant borrowing and contracting.

**E.****Prior Holding by District Court of Illinois and Seventh Circuit Court of Appeals that Merger of Two Rockford Hospitals Would Violate the Antitrust Laws**

20. The United States District Court for the Northern District of Illinois, Western Division (“District Court”) found in 1989 that the proposed merger of Rockford Memorial and SwedishAmerican violated Section 7 of the Clayton Act. After holding a full trial on the merits, the District Court issued a permanent injunction to stop the merger and the U.S. Court of Appeals for the Seventh Circuit, in a decision written by Judge Posner, affirmed the District Court’s finding of liability and upheld the permanent injunction.

21. In the 1989 case, the District Court defined a relevant geographic market identical to the market alleged in this Complaint. The District Court also defined a relevant product market – general acute-care hospital inpatient services – identical to a market alleged in this Complaint. In fact, the District Court described a market structure, levels of market concentration, and entry conditions in the earlier case that are strikingly similar to those alleged in this Complaint and, on that basis, concluded that the merger of two Rockford hospitals would “produce a firm controlling an undue percentage share of the relevant market, thus increasing the likelihood of market dominance by the merged entity or collusion.”

22. Following a full hearing on the merits, and on facts very similar to the facts alleged in this case, the District Court issued a permanent injunction blocking the merger of two of the three Rockford hospitals. Given that the only meaningful difference between the 1989 merger and the Acquisition is the re-shuffling of the parties to the transaction, the District Court’s ruling in 1989 informs this Court’s assessment under Section 7 of the Clayton Act of this proposed merger of two of the three Rockford hospitals.

Complaint

**III.****THE RELEVANT SERVICE MARKETS****A.****General Acute-Care Inpatient Services Market**

23. The Acquisition threatens substantial harm to competition in the market for general acute-care inpatient hospital services sold to commercial health plans (“general acute-care services”). General acute-care services encompass a broad cluster of medical and surgical diagnostic and treatment services that include an overnight hospital stay, including, but not limited to, many emergency services, internal medicine services, and surgical procedures. It is appropriate to evaluate the Acquisition’s likely effects across this entire cluster of services, rather than analyzing each inpatient service independently, because the group of services is offered to Rockford region residents by the same set of competitors and under similar competitive conditions.

24. The general acute-care services market does not include outpatient services (those not requiring an overnight hospital stay) because such services are offered by a different set of competitors under different competitive conditions. Further, health plans and patients could not substitute outpatient services for inpatient services in response to a price increase. Similarly, the most complex and specialized tertiary and quaternary services, such as certain major surgeries and organ transplants, also are not part of the relevant cluster of services because they generally are not available in the Rockford region, are offered by a different set of suppliers under different competitive circumstances, and are not substitutes for general acute-care services.

25. The District Court defined the same general acute-care services market in its 1989 opinion, which was upheld by the Seventh Circuit.

## Complaint

**B.****Primary Care Physician Services**

26. The Acquisition also threatens substantial competitive harm in the market for primary care physician services provided to commercially-insured adults. This market encompasses services offered by physicians practicing in internal medicine, family practice, and general practice. This relevant market does not include physician services provided by pediatricians because they typically treat only patients eighteen years old and younger. This relevant market also excludes physician services provided by obstetricians and gynecologists (“OB/GYN”) because those services generally complement, rather than substitute for, general primary care physician services.

**IV.****THE RELEVANT GEOGRAPHIC MARKET**

27. The relevant geographic market in which to analyze the effects of the Acquisition in the general acute-care inpatient hospital services market is no broader than the geographic market defined by the District Court in its 1989 opinion: an area encompassing all of Winnebago County, essentially all of Boone County, the northeast portion of Ogle county, and single zip codes in McHenry, DeKalb, and Stephenson counties (referred to by the District Court as the “Winnebago-Ogle-Boone” market). Today, as was the case in 1989, this relevant geographic market accounts for 87% of the inpatient admissions of the merging parties. Notably, and in contrast to other previous hospital mergers, the precise contours of the relevant geographic market do not alter in any meaningful way the number of competitors, the market share statistics, or the ultimate conclusion that the Acquisition is likely to lead to competitive harm.

28. The appropriate geographic market is determined by examining the geographic boundaries within which a hypothetical monopolist for the services at issue could profitably raise prices by a small but significant amount.

## Complaint

29. Rockford region residents have a clear preference for obtaining hospital care and primary care physician services locally. As a result, health plans must include hospitals and primary care physicians from the Rockford region in their provider networks in order to meet their members' needs. Patients do not and would not go to hospitals or primary care physicians outside of the Rockford region in response to rate increases within the region. Thus, a hypothetical monopolist that controlled all of the hospitals or all of the primary care physicians in the Rockford region could profitably increase rates by at least a small but significant amount.

30. In the ordinary course, OSF and RHS treat only their Rockford counterparts as meaningful competitors, and both hospitals focus their competitive efforts on providers located in Rockford. OSF and RHS define their primary service areas Patient draw data maintained in the ordinary course by both OSF and RHS indicates that nearly all of their inpatients originate from the Winnebago-Ogle-Boone area.

31. The relevant geographic market in which to analyze the market for primary care physician services provided to commercially-insured adults is similarly no broader than the Winnebago-Ogle-Boone area defined by the District Court in 1989, and may be significantly more narrow. Patients are no more willing to travel to obtain primary care services than they are to obtain acute-care inpatient hospital services. Indeed, because patients generally obtain primary care services much more frequently than acute inpatient hospital services, their preference for access to local providers is significantly stronger.

Complaint

V.

**MARKET STRUCTURE AND THE ACQUISITION'S  
PRESUMPTIVE ILLEGALITY**

A.

**General Acute-Care Inpatient Services Market**

32. The Acquisition will reduce the number of general acute-care hospital competitors in the Rockford region from three to two, creating a duopoly of OSF and SwedishAmerican.<sup>1</sup>

33. The Acquisition is presumptively unlawful by a wide margin under the relevant case law and the Merger Guidelines because it would significantly increase concentration in the already highly concentrated market for general acute-care services in the Rockford region.

34. OSF's post-Acquisition market share in the general acute-care services market will be 64% (as measured by patient days), easily surpassing levels held to be presumptively unlawful by the Supreme Court. Moreover, the Acquisition would leave just two hospitals, OSF and SwedishAmerican, in control of 99.5% of the Rockford region market for general acute-care services.

35. As described in the Merger Guidelines, the standard for measuring market concentration is the Herfindahl-Hirschman Index ("HHI"). A merger or acquisition is likely to create or enhance market power, and is presumed illegal, when the post-acquisition HHI exceeds 2500 points and the acquisition would increase the HHI by more than 200 points. Here, the general acute-care services market concentration levels drastically exceed

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<sup>1</sup> The only other provider within the relevant geographic market, Rochelle Community Hospital ("Rochelle"), is located in Rochelle, Illinois, a small community 30 miles (over 40 minutes driving time) south of Rockford. As the District Court held previously, and the evidence continues to show, Rochelle is not competitively relevant to Rockford and its three hospitals. Rochelle's market share in the Rockford region is less than one half of one percent. It is a 25-bed critical access facility that offers a very limited range of services, is prohibited by the state from expanding its capacity, and serves its immediate community almost exclusively.

## Complaint

these thresholds. The Acquisition would, as shown below, increase the HHI from 3319 to 5351, a change of 2032 points.

36. In its 1989 decision, the District Court found that the merger of two Rockford hospitals resulting in concentration figures similar to those resulting from this Acquisition “would produce a firm controlling an undue percentage share of the relevant market, thus increasing the likelihood of market dominance by the merged entity or collusion.” Notably, the Rockford region is even more concentrated today than it was in 1989, due to the lack of new hospital entry, the closure of one hospital, and the acquisition of another by SwedishAmerican.

<b>GENERAL ACUTE-CARE INPATIENT SERVICES</b>		
<b>Hospital/System</b>	<b>Pre-Acquisition Market Share</b>	<b>Post-Acquisition Market Share</b>
SwedishAmerican	35.6%	35.6%
RHS	34.3%	
OSF	29.6%	63.9%
Rochelle	0.5%	0.5%
<b>Pre-Acquisition HHI</b>		3319
<b>Post-Acquisition HHI</b>		5351
<b>HHI Increase</b>		2032

**B.****Primary Care Physician Services Market**

37. The Acquisition will reduce the number of hospital-employed physician groups from three to two in the Rockford region, and leave the remainder of the market highly fragmented with small independent physician practices. Under the relevant case law and the Merger Guidelines, the Acquisition raises

## Complaint

significant competitive concerns in the primary care physician services market.

38. The Acquisition will result in a concentrated primary care physician services market with few significant competitors. Based on the best currently-available data, OSF's post-Acquisition market share will exceed 37%. Post-Acquisition, the two remaining hospitals, OSF and SwedishAmerican, will control 58% of the primary care physician services market in the Rockford region.

39. Under the Merger Guidelines, a merger or acquisition potentially raises significant competitive concerns that warrant scrutiny when the post-merger HHI exceeds 1500 points and the merger or acquisition increases the HHI by more than 100 points. Here, the post-Acquisition HHI in the primary care physician services market exceeds these levels by a wide margin, with an increase of 696 points to 1925. The HHI figures for the primary care physician services market are summarized in the table below.

<b>PRIMARY CARE PHYSICIAN SERVICES*</b>		
<b>Hospital/System</b>	<b>Pre-Acquisition Market Share</b>	<b>Post-Acquisition Market Share</b>
SwedishAmerican	20.4%	20.4%
OSFMG	19.9%	37.4%
RPH	17.5%	
University of Illinois	7.3%	7.3%
Others**	4.0%	4.0%
Independent***	30.9%	30.9%
<b>Pre-Acquisition HHI</b>		1229
<b>Post-Acquisition HHI</b>		1925
<b>HHI Increase</b>		696

## Complaint

\* Due to limitations in the preliminarily-available data, the primary care physician market shares and HHIs have been calculated on the basis of full-time-equivalent physicians practicing in a geographic market comprising Winnebago, Boone, and Ogle counties, which has a slightly different scope than the geographic market defined by the District Court in 1989.

\*\* includes several small and mid-size physician groups

\*\*\* all independent physicians are treated as individual providers in HHI calculations

**VI.****ANTICOMPETITIVE EFFECTS****A.****Loss of Price Competition And the Increased Bargaining Leverage of OSF**

40. The Acquisition will end decades of significant competition between Respondents and will increase Respondents' ability and incentive to unilaterally demand higher reimbursement rates from commercial health plans.

41. Today, the three Rockford hospitals are close and vigorous competitors in the markets for general acute-care services and primary care physician services. There is nearly complete overlap in the service areas of OSF, RHS, and SwedishAmerican. Rockford region residents and, by extension, the health plans that represent them, consider all three Rockford hospitals as close substitutes for one another due to their proximity and similar scope of services. Residents benefit from the competition between the three hospitals.

42. Rockford residents strongly prefer to have a choice of where they receive their health care services. As a result, every major health plan serving the Rockford region features a provider network with two of the three local hospitals as preferred providers. While health plans and their members might prefer to have access to all three Rockford hospitals, the hospitals

## Complaint

43. Currently, the three Rockford hospitals must compete vigorously – often through a competitive bidding process – to be included in each health plan’s provider network. Due to the similarity and close substitutability of the three Rockford hospitals, health plans today believe

As a result, the three Rockford hospitals compete for just two spots in each health plan’s network, each hospital being forced to provide competitive rates or else risk exclusion from a health plan’s network.

44. Nothing about the Acquisition will change the high value and importance that Rockford residents place on being able to choose their doctors and hospitals. Residents will continue to demand health plan provider networks that include at least two of the three Rockford hospitals, as they have for decades.

45. After the Acquisition, no health plan will be able to offer its members access to more than one of the Rockford hospitals without first agreeing to whatever terms the merged OSF and RHS may demand. As a result, the merged system will become even more important to health plans serving the Rockford region and thus become a virtual “must have.” Health plans will no longer be able to play the three Rockford hospitals against one another. They will have to choose between contracting only with SwedishAmerican, which would restrict their members’ choices and options, or accepting significantly higher reimbursement rates demanded by the newly dominant OSF.

46. Any increase in rates ultimately will be borne by the employers and residents of Rockford through increased insurance premiums and health care costs. The majority of commercially insured patients in the Rockford region are covered by health plans that are self-insured by their employers. Self-insured employers pay the full cost of their employees’ health care claims and, as a result, they immediately and directly bear the full burden of higher rates charged by hospitals or physicians. Fully-insured employers also are inevitably harmed by higher rates, because health plans pass on at least a portion of hospital rate increases to these customers.

## Complaint

47. Employers, in turn, will pass on their increased health care costs to their employees, in whole or in part. Employees will bear these costs in the form of higher premiums, higher co-pays, reduced coverage, or restricted services. Some Rockford region residents will forgo or delay necessary health care services because of the higher costs, and others may drop their insurance coverage altogether.

48. OSF could also exercise its newly acquired market power after the Acquisition by preventing health plans from including SwedishAmerican in their provider networks. The effect would be to eliminate entirely the ability of Rockford residents who want access to either OSF or RHS from also utilizing SwedishAmerican without incurring higher out-of-network costs. In Peoria, a market south of Rockford where OSF is already a self-acclaimed [REDACTED] OSF has successfully leveraged its market position to

49. Respondents' documents created in the ordinary course of business indicate that the managed care strategies of the parties encourage [REDACTED] with the ultimate goal to [REDACTED] and become a [REDACTED] system to health plans. Party executives concede that one motivation for the Acquisition was

50. Although SwedishAmerican will continue to act as a meaningful competitor in the Rockford region, the presence of SwedishAmerican will not prevent a post-Acquisition exercise of market power by OSF – whether it is in the form of a rate increase or exclusionary conduct. Because Rockford residents demand health plan networks that offer at least two Rockford hospitals, a network comprised exclusively of SwedishAmerican would be highly undesirable to employers and thus unlikely to have commercial success. Recent history confirms this: virtually every attempt by a health plan to market a provider network consisting of just one Rockford hospital – including one exclusive to SwedishAmerican – has failed.

51. The Acquisition also will significantly increase OSF's ability to unilaterally increase rates for primary care physician

### Complaint

services. Hospitals and health plans engage in bilateral negotiations to create networks of physicians much like they do to create networks of hospitals. Similar competitive factors dictate the outcomes of negotiations over physician services as dictate the outcomes of negotiations over hospital services. As is the case with the three Rockford hospitals, Rockford residents consider the primary care physician groups of the three local hospitals as close substitutes for each other. Therefore, the Acquisition will strengthen OSF's bargaining leverage against health plans when it is negotiating the terms of including OSFMG and RHPH physicians in the health plans' provider networks.

### **B.**

#### **The Acquisition will Reduce Competition Over Quality, Service, and Access**

52. Residents of the Rockford region have benefitted from decades of competition between OSF and RHS to improve the quality of care, increase the scope of services, and expand access to care in the Rockford region. The Acquisition would end this important non-price competition between OSF and RHS and reduce the quality, convenience, and breadth of services local residents would otherwise enjoy.

53. After decades of Respondents' self-described all three Rockford hospitals today offer convenient access to a broad range of high quality clinical services. And despite the costs incurred to invest in new technologies and improve the quality of care over the years, all three Rockford hospitals have been, and continue to be, financially stable organizations with positive operating performances and substantial cash reserves.

54. RHS, described as a \_\_\_\_\_ and \_\_\_\_\_ when it comes to expanding its services or improving its technology, repeatedly spurred OSF and SwedishAmerican to respond by upgrading their own offerings. The Acquisition would eliminate RHS as an independent competitor in the Rockford region and would thereby eliminate a competitive force behind much of the innovation and expansion that has benefitted local residents over the years.

## Complaint

**C.****The Acquisition Will Increase the Incentive and Ability to Coordinate**

55. The Acquisition also will diminish competition by enabling and encouraging OSF and its sole remaining competitor in the Rockford region, SwedishAmerican, to engage in coordinated interaction.

56. As the Seventh Circuit held in affirming the Commission's divestiture order in a prior hospital merger matter: "[t]he fewer the independent competitors in a hospital market, the easier they will find it, by presenting an unbroken phalanx of representations and requests, to frustrate efforts to control hospital costs."

57. According to the Merger Guidelines, coordination need not rise to the level of explicit agreement. It may involve a "common understanding that is not explicitly negotiated[.]" or even merely "parallel accommodating conduct not pursuant to a prior understanding."

58. The market structure and competitive dynamics in the Rockford region today are materially unchanged since the District Court found in 1989 that a merger of two of the Rockford hospitals would facilitate the likelihood of collusion among the two remaining hospital competitors. The acquisition of RHS by OSF, the latest proposed merger to duopoly in the Rockford region, is no less likely to result in coordinated interaction.

59. OSF and SwedishAmerican would have the incentive and ability to coordinate their managed care contracting strategies post-Acquisition, for example, by communicating confidential information related to health plan negotiations, either by directly contacting each other or by otherwise signaling their intentions. The two remaining hospitals could also defer competitive initiatives, such as adding amenities or expanding services, which would otherwise benefit Rockford residents. Indeed, Respondents' ordinary course documents suggest that

## Complaint

**VII.****ENTRY BARRIERS**

60. Neither hospital entry nor expansion by the sole remaining hospital competitor will deter or counteract the Acquisition's likely harm to competition in the relevant service markets.

61. New hospital entry or significant expansion in the Rockford region is unlikely to occur because Illinois' Certificate of Need ("CON") statute requires an extensive application process in order to construct a hospital, add acute care beds or new clinical services to an existing hospital, or to purchase medical equipment above a capital threshold. The CON approval process is focused on the number of hospital beds per capita; the process does not contemplate or permit consideration of antitrust or competition concerns. Based on the most recent findings of the Illinois Health Facilities and Services Review Board responsible for reviewing CON applications, any request to construct a new acute care hospital in the Rockford region is likely to be denied because the board does not believe Rockford needs any additional beds.

62. Even if new hospital entry did occur in the Rockford region, such entry would not be timely because it would take at least two to five years from the planning stages to opening doors to patients. New entry is also unlikely to be sufficient to deter or counteract the anticompetitive effects of the Acquisition because a new hospital would need to be able to replicate and offer a broad cluster of general acute-care inpatient services comparable to those offered by OSF and SwedishAmerican.

63. New primary care physician entry is unlikely because most physicians in Rockford are already employed by one of the three hospitals. Further, the number of independent primary care physicians is declining because hospitals offer stability and generous benefits, while self-managing a private physician practice is costly and time-consuming. As a result, there has been very little to no entry of independent primary care physicians into the Rockford region in the last several years.

## Complaint

64. New competition from currently-employed Rockford physicians who leave to open a private practice is unlikely to occur, and in any event would not be timely to deter or prevent competitive harm, in part because all three Rockford hospitals require their employed physicians to ■■■■■

**VIII.****EFFICIENCIES**

65. Respondents' alleged benefits of the Acquisition fall well short of the substantial, merger-specific, well-founded, and competition-enhancing efficiencies that would be necessary to outweigh the Acquisition's significant harm to competition in Rockford. No court ever has found, without being reversed, that efficiencies rescue an otherwise illegal transaction. Relevant case law indicates that "extraordinary" efficiencies are required to justify an acquisition, such as this one, with vast potential to harm competition.

66. The alleged efficiencies are unfounded and unreliable. Respondents have refused to answer questions or reveal underlying data and analysis in support of their claims on the grounds that such material was prepared under the direction of antitrust counsel in anticipation of litigation, and thus constitutes attorney work product. The made-for-litigation efficiency claims, therefore, were unambiguously "generated outside of the usual business planning process." Even an analysis based on the information available to date reveals that Respondents' efficiency claims are speculative, exaggerated, and contradicted by the testimony of party executives.

67. Many of the alleged efficiencies also are not merger-specific because they could be accomplished unilaterally without any merger or acquisition, or through an affiliation with an alternative purchaser. The same litigation consultants who generated the estimates of the savings that may result from the Acquisition produced two separate reports detailing ■■■■■ that RHS and OSF could accomplish on their own.

## Complaint

68. Any claim that the Acquisition is necessary for the parties to survive or continue to compete as full-service independent hospitals is speculative and unsupported by market realities. In fact, RHS and SwedishAmerican made similar claims to the District Court in 1989, and

Despite their repeated dire predictions, OSF, RHS, and SwedishAmerican have continued to compete successfully over the course of the last two decades and, today, each remains a financially stable, full-service hospital providing high-quality care to the community.

**IX.****VIOLATION****COUNT I - ILLEGAL ACQUISITION**

69. The allegations of Paragraphs 1 through 68 above are incorporated by reference as though fully set forth.

70. The Acquisition, if consummated, would substantially lessen competition in the relevant markets in violation of Section 7 of the Clayton Act, as amended, 15 U.S.C. § 18.

**NOTICE**

Notice is hereby given to the Respondents that the seventeenth day of April, 2012, at 10 a.m. is hereby fixed as the time, and Federal Trade Commission offices, 600 Pennsylvania Avenue, N.W., Room 532, Washington, D.C. 20580 as the place, when and where an evidentiary hearing will be had before an Administrative Law Judge of the Federal Trade Commission, on the charges set forth in this complaint, at which time and place you will have the right under the Federal Trade Commission Act and the Clayton Act to appear and show cause why an order should not be entered requiring you to cease and desist from the violations of law charged in the complaint.

You are notified that the opportunity is afforded you to file with the Commission an answer to this complaint on or before the fourteenth (14<sup>th</sup>) day after service of it upon you. An answer in which the allegations of the complaint are contested shall contain

## Complaint

a concise statement of the facts constituting each ground of defense; and specific admission, denial, or explanation of each fact alleged in the complaint or, if you are without knowledge thereof, a statement to that effect. Allegations of the complaint not thus answered shall be deemed to have been admitted.

If you elect not to contest the allegations of fact set forth in the complaint, the answer shall consist of a statement that you admit all of the material facts to be true. Such an answer shall constitute a waiver of hearings as to the facts alleged in the complaint and, together with the complaint, will provide a record basis on which the Commission shall issue a final decision containing appropriate findings and conclusions and a final order disposing of the proceeding. In such answer, you may, however, reserve the right to submit proposed findings and conclusions under Rule 3.46 of the Commission's Rules of Practice for Adjudicative Proceedings.

Failure to file an answer within the time above provided shall be deemed to constitute a waiver of your right to appear and to contest the allegations of the complaint and shall authorize the Commission, without further notice to you, to find the facts to be as alleged in the complaint and to enter a final decision containing appropriate findings and conclusions, and a final order disposing of the proceeding.

The Administrative Law Judge shall hold a prehearing scheduling conference not later than ten (10) days after the answer is filed by the Respondents. Unless otherwise directed by the Administrative Law Judge, the scheduling conference and further proceedings will take place at the Federal Trade Commission, 600 Pennsylvania Avenue, N.W., Room 532, Washington, D.C. 20580. Rule 3.21(a) requires a meeting of the parties' counsel as early as practicable before the pre-hearing scheduling conference (but in any event no later than five (5) days after the answer is filed by the Respondents). Rule 3.31(b) obligates counsel for each party, within five (5) days of receiving the Respondents' answer, to make certain initial disclosures without awaiting a discovery request.

## Complaint

**NOTICE OF CONTEMPLATED RELIEF**

Should the Commission conclude from the record developed in any adjudicative proceedings in this matter that the Acquisition challenged in this proceeding violates Section 7 of the Clayton Act, as amended, the Commission may order such relief against Respondents as is supported by the record and is necessary and appropriate, including, but not limited to:

1. If the Acquisition is consummated, divestiture or reconstitution of all associated and necessary assets, in a manner that restores two or more distinct and separate, viable and independent businesses in the relevant markets, with the ability to offer such products and services as OSF and RHS were offering and planning to offer prior to the Acquisition.
2. A prohibition against any transaction between OSF and RHS that combines their businesses in the relevant markets, except as may be approved by the Commission.
3. A requirement that, for a period of time, OSF and RHS provide prior notice to the Commission of acquisitions, mergers, consolidations, or any other combinations of their businesses in the relevant markets with any other company operating in the relevant markets.
4. A requirement to file periodic compliance reports with the Commission.
5. Any other relief appropriate to correct or remedy the anticompetitive effects of the transaction or to restore RHS as a viable, independent competitor in the relevant markets.

**IN WITNESS WHEREOF**, the Federal Trade Commission has caused this complaint to be signed by its Secretary and its official seal to be hereto affixed, at Washington, D.C., this 17<sup>th</sup> day of November, 2011.

By the Commission.

Final Order

**ORDER DISMISSING COMPLAINT**

On November 17, 2011, the Federal Trade Commission issued the Administrative Complaint in this matter, having reason to believe that Respondents OSF Healthcare System (“OSF”) and Rockford Health System (“RHS”) had executed an affiliation agreement which, if consummated, would violate Section 7 of the Clayton Act, as amended, 15 U.S.C. § 18. Complaint Counsel and Respondents have now filed a Joint Motion to Dismiss Complaint, which states that the Respondents are abandoning the proposed affiliation, and have withdrawn the Hart-Scott-Rodino Notification and Report Forms they filed for the proposed transaction.<sup>1</sup>

The Commission has determined to dismiss the Administrative Complaint without prejudice, as the most important elements of the relief set out in the Notice of Contemplated Relief in the Administrative Complaint have been accomplished without the need for further administrative litigation.<sup>2</sup> In particular, Respondents have announced that they are abandoning the proposed affiliation, and have withdrawn the Hart-Scott-Rodino Notification and Report Forms filed for the proposed transaction. As a consequence, the Respondents would not be able to effect the proposed transaction without filing new Hart-Scott-Rodino Notification and Report Forms.

For the foregoing reasons, the Commission has determined that the public interest warrants dismissal of the Administrative Complaint in this matter. The Commission has determined to do so without prejudice, however, because it is not reaching a decision on the merits. Accordingly,

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<sup>1</sup> See Joint Motion To Dismiss Complaint (April 12, 2012), at <http://www.ftc.gov/os/adjpro/d9349/index.shtm>.

<sup>2</sup> See, e.g., *In the Matter of Omnicare, Inc.*, Docket No. 9352, Order Dismissing Complaint (Feb. 22, 2012), at <http://www.ftc.gov/os/adjpro/d9352/120223omnicareorder.pdf>; *In the Matter of Thoratec Corporation and HeartWare International, Inc.*, Docket No. 9339, Order Dismissing Complaint (August 11, 2009), at <http://www.ftc.gov/os/adjpro/d933.90811thoatecorder.pdf>; *In the Matter of CSL Limited and Cerberus-Plasma Holdings, LLC*, Docket No. 9337, Order Dismissing Complaint (June 22, 2009), at <http://www.ftc.gov/os/adjpro/d9337/090622commorderdismisscomplaint.pdf>.

Final Order

**IT IS ORDERED THAT** the Administrative Complaint in this matter be, and it hereby is, dismissed without prejudice.

By the Commission.

## Complaint

## IN THE MATTER OF

**FRANK MYERS AUTOMAXX, LLC**CONSENT ORDER, ETC. IN REGARD TO ALLEGED VIOLATIONS OF  
SECTION 5 OF THE FEDERAL TRADE COMMISSION ACT

*Docket No. C-4353; File No. 112 3206*  
*Complaint, April 19, 2012 – Decision, April 19, 2012*

This consent order addresses Frank Myers AutoMaxx, LLC's advertising of the purchase, financing, and leasing of its motor vehicles. The complaint alleges that respondent has represented that when a consumer trades in a used vehicle in order to purchase another vehicle, respondent will pay off the balance of the loan on the trade-in vehicle such that the consumer will have no remaining obligation for any amount of that loan, but does not. The consent order prohibits the respondent from misrepresenting that it will pay the remaining loan balance on a consumer's trade-in vehicle such that the consumer will have no obligation for any amount of that loan and any other material fact relating to the financing or leasing of a motor vehicle.

*Participants*

For the *Commission*: Gregory A. Ashe and Robin Thurston.

For the *Respondent*: Matthew Bryant and Casey Otis,  
Hendrick Bryant Nerhood & Otis, LLP.

**COMPLAINT**

The Federal Trade Commission, having reason to believe that Frank Myers AutoMaxx, LLC, a limited liability corporation ("Respondent"), has violated provisions of the Federal Trade Commission Act ("FTC Act"), and, it appearing to the Commission that this proceeding is in the public interest, alleges:

1. Frank Myers AutoMaxx, LLC, is a North Carolina limited liability corporation with its principal place of business at 4200 N. Patterson Ave., Winston Salem, NC, 27105. Respondent offers automobiles for sale.

2. The acts or practices of Respondent alleged in this complaint have been in or affecting commerce, as "commerce" is defined in Section 4 of the FTC Act, 15 U.S.C. § 44.

## Complaint

3. Since at least September 2009, Respondent has disseminated or caused to be disseminated advertisements regarding the purchasing and financing of its automobiles.

4. Respondent's advertisements include, but are not necessarily limited to, video advertisements posted on the website YouTube.com, copies of which are attached as Exhibits A through E. These advertisements include the following statements:

- a. "We'll pay off your trade no matter what you owe!" (Exhibit A (DVD containing 7/6/11 capture of YouTube advertisement "Winston-Salem Car Dealer Wants You To Have A Nicer, Newer Car" at 0:18-0:23)).
- b. "You're driving a car you hate, but you owe more than it's worth; no problem. When you buy any certified car, we'll pay of your trade, regardless of what you owe." (Exhibit B (DVD containing 7/14/11 capture of YouTube advertisement "'Common Sense Ain't So Common' says Tracy Myers of Frank Myers Auto Maxx" at 0:11-0:19)).
- c. "We'll pay off your current loan no matter how much you owe." (Exhibit C (DVD containing 7/6/11 capture of YouTube Advertisement "Frank Myers Auto - Biz Is Booming Trade-In Event in Winston-Salem, NC 27105" at 0:13-0:16)).
- d. "Uncle Frank wants to pay [your trade] off in full, no matter how much you owe!" (Exhibit D (DVD containing 7/6/11 capture of YouTube Advertisement "HATE Your Car? STOP Making Payments - Frank Myers Auto in Winston-Salem, NC 27105" at 0:06-0:10)).
- e. "We'll pay off your lease or loan, in full, no matter how much you owe." (Exhibit E (DVD containing 7/6/11 capture of YouTube Advertisement "'Snow Blows!' exclaims a Winston-Salem, NC used car dealer" at 0:14-0:18)).

## Complaint

**VIOLATION OF THE FEDERAL TRADE COMMISSION  
ACT****Count I: Misrepresentation of Financing Terms**

5. Through the means described in Paragraph 4, Respondent has represented expressly or by implication that, when a consumer trades in a used vehicle in order to purchase another vehicle, Respondent will pay off the balance of the loan on the trade-in vehicle such that the consumer will have no remaining obligation for any amount of that loan.

6. In truth and in fact, in numerous instances, when a consumer trades in a used vehicle with a loan balance that exceeds the vehicle's value (*i.e.* the trade-in has negative equity) in order to purchase another vehicle, Respondent will not pay off the balance of the loan on the trade-in vehicle such that the consumer will have no remaining obligation for any amount of that loan. Instead, Respondent sometimes requires the consumer to pay the amount of the negative equity at the time of the sale.

7. Therefore, the representation set forth in Paragraph 5 of this Complaint was, and is, false or misleading.

8. The acts and practices of Respondent as alleged in this complaint constitute deceptive acts or practices in or affecting commerce in violation of Section 5(a) of the FTC Act.

**THEREFORE**, the Federal Trade Commission, this nineteenth day of April, 2012, has issued this complaint against Respondent.

By the Commission.

## Decision and Order

**DECISION AND ORDER**

The Federal Trade Commission having initiated an investigation of certain acts and practices of Respondent named in the caption hereof, and Respondent having been furnished thereafter with a copy of a draft complaint which the Bureau of Consumer Protection proposed to present to the Commission for its consideration and which, if issued by the Commission, would charge Respondent with violation of the Federal Trade Commission Act; and

Respondent, its attorney, and counsel for the Commission having thereafter executed an agreement containing a consent order (“consent agreement”), an admission by Respondent of all the jurisdictional facts set forth in the aforesaid draft complaint, a statement that the signing of the agreement is for settlement purposes only and does not constitute an admission by Respondent that the law has been violated as alleged in such complaint, or that the facts as alleged in such complaint, other than jurisdictional facts, are true, and waivers and other provisions as required by the Commission’s Rules; and

The Commission having thereafter considered the matter and having determined that it had reason to believe that Respondent has violated the Act, and that a complaint should issue stating its charges in that respect, and having thereupon accepted the executed consent agreement and placed such consent agreement on the public record for a period of thirty (30) days for the receipt and consideration of public comments, now in further conformity with the procedure prescribed in § 2.34 of its Rules, the Commission hereby issues its complaint, makes the following jurisdictional findings, and enters the following order:

1. Respondent Frank Myers AutoMaxx, LLC, is a North Carolina limited liability corporation with its principal office or place of business at 4200 N. Patterson Ave., Winston Salem, North Carolina, 27105.
2. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of Respondent, and the proceeding is in the public interest.

Decision and Order

**ORDER****DEFINITIONS**

For the purposes of this order, the following definitions shall apply:

- A. “Advertisement” shall mean a commercial message in any medium that directly or indirectly promotes a consumer transaction.
- B. “Material” shall mean likely to affect a person’s choice of, or conduct regarding, goods or services.
- C. “Motor vehicle” shall mean
  - 1. any self-propelled vehicle designed for transporting persons or property on a street, highway, or other road;
  - 2. recreational boats and marine equipment;
  - 3. motorcycles;
  - 4. motor homes, recreational vehicle trailers, and slide-in campers; and
  - 5. other vehicles that are titled and sold through dealers.

**I.**

**IT IS ORDERED** that Respondent, directly or through any corporation, subsidiary, division, or other device, in connection with any advertisement to promote, directly or indirectly, the purchase, financing, or leasing of automobiles, in or affecting commerce, shall not, in any manner, expressly or by implication

- A. Misrepresent that when a consumer trades in a used motor vehicle (“trade-in vehicle”) in order to purchase another motor vehicle (“newly purchased vehicle”), Respondent will pay any remaining loan balance on the trade-in vehicle such that the consumer will have

## Decision and Order

no remaining obligation for any amount of that loan;  
or

- B. Misrepresent any material fact regarding the cost and terms of financing or leasing any newly purchased vehicle.

**II.**

**IT IS FURTHER ORDERED** that Respondent and its successors and assigns shall, for five (5) years after the last date of dissemination of any representation covered by this order, maintain and upon request make available to the Federal Trade Commission for inspection and copying:

- A. All advertisements and promotional materials containing the representation;
- B. All materials that were relied upon in disseminating the representation; and
- C. All tests, reports, studies, surveys, demonstrations, or other evidence in their possession or control that contradict, qualify, or call into question the representation, or the basis relied upon for the representation, including complaints and other communications with consumers or with governmental or consumer protection organizations.

**III.**

**IT IS FURTHER ORDERED** that Respondent and its successors and assigns shall deliver a copy of this order to all current and future principals, officers, directors, and managers, and to all current and future employees, agents, and representatives having responsibilities with respect to the subject matter of this order, and shall secure from each such person a signed and dated statement acknowledging receipt of the order. Respondent shall deliver this order to current personnel within thirty (30) days after the date of service of this order, and to future personnel within thirty (30) days after the person assumes such position or responsibilities.

## Decision and Order

**IV.**

**IT IS FURTHER ORDERED** that Respondent and its successors and assigns shall notify the Commission at least thirty (30) days prior to any change in the corporation(s) that may affect compliance obligations arising under this order, including but not limited to a dissolution, assignment, sale, merger, or other action that would result in the emergence of a successor corporation; the creation or dissolution of a subsidiary, parent, or affiliate that engages in any acts or practices subject to this order; the proposed filing of a bankruptcy petition; or a change in the corporate name or address. *Provided, however,* that, with respect to any proposed change in the corporation about which Respondent learns less than thirty (30) days prior to the date such action is to take place, Respondent shall notify the Commission as soon as is practicable after obtaining such knowledge. Unless otherwise directed by a representative of the Commission in writing, all notices required by this Part shall be emailed to [Debrief@ftc.gov](mailto:Debrief@ftc.gov) or sent by overnight courier (not U.S. Postal Service) to: Associate Director for Enforcement, Bureau of Consumer Protection, Federal Trade Commission, 600 Pennsylvania Avenue, NW, Washington, DC, 20580. The subject line must begin: FTC v. Frank Myers AutoMaxx.

**V.**

**IT IS FURTHER ORDERED** that Respondent and its successors and assigns, within sixty (60) days after the date of service of this order, shall file with the Commission a true and accurate report, in writing, setting forth in detail the manner and form of their own compliance with this order. Within ten (10) days of receipt of written notice from a representative of the Commission, they shall submit additional true and accurate written reports.

**VI.**

This order will terminate on April 19, 2032, or twenty (20) years from the most recent date that the United States or the Federal Trade Commission files a complaint (with or without an accompanying consent decree) in federal court alleging any

## Analysis to Aid Public Comment

violation of the order, whichever comes later; *provided, however*, that the filing of such a complaint will not affect the duration of:

- A. Any Part in this order that terminates in less than twenty (20) years;
- B. This order's application to any Respondent that is not named as a defendant in such complaint;
- C. This order if such complaint is filed after the order has terminated pursuant to this Part.

*Provided, further*, that if such complaint is dismissed or a federal court rules that Respondent did not violate any provision of the order, and the dismissal or ruling is either not appealed or upheld on appeal, then the order will terminate according to this Part as though the complaint had never been filed, except that the order will not terminate between the date such complaint is filed and the later of the deadline for appealing such dismissal or ruling and the date such dismissal or ruling is upheld on appeal.

By the Commission, Commissioner Ohlhausen not participating.

### **ANALYSIS OF CONSENT ORDER TO AID PUBLIC COMMENT**

The Federal Trade Commission ("FTC") has accepted, subject to final approval, an agreement containing a consent order from Frank Myers AutoMaxx, LLC. The proposed consent order has been placed on the public record for thirty (30) days for receipt of comments by interested persons. Comments received during this period will become part of the public record. After thirty (30) days, the FTC will again review the agreement and the comments received, and will decide whether it should withdraw from the agreement and take appropriate action or make final the agreement's proposed order.

## Analysis to Aid Public Comment

The respondent is a motor vehicle dealer. The matter involves its advertising of the purchase, financing, and leasing of its motor vehicles. According to the FTC complaint, respondent has represented that when a consumer trades in a used vehicle in order to purchase another vehicle, respondent will pay off the balance of the loan on the trade-in vehicle such that the consumer will have no remaining obligation for any amount of that loan. The complaint alleges that in fact, when a consumer trades in a used vehicle with negative equity (*i.e.* the loan balance on the vehicle exceeds the vehicle's value) in order to purchase another vehicle, respondent does not pay off the balance of the loan on the trade-in vehicle such that the consumer will have no remaining obligation for any amount of that loan. Instead, the respondent may require the consumer to pay for the negative equity in cash at the time of sale. The complaint alleges therefore that the representation is false or misleading in violation of Section 5 of the FTC Act.

The proposed order is designed to prevent the respondent from engaging in similar deceptive practices in the future. Part I of the proposed order prohibits the respondent from misrepresenting that it will pay the remaining loan balance on a consumer's trade-in vehicle such that the consumer will have no obligation for any amount of that loan. It also prohibits misrepresenting any other material fact relating to the financing or leasing of a motor vehicle.

Part II of the proposed order requires respondent to keep copies of relevant advertisements and materials substantiating claims made in the advertisements. Part III requires that respondent provide copies of the order to certain of its personnel. Part IV requires notification of the Commission regarding changes in corporate structure that might affect compliance obligations under the order. Part V requires the respondent to file compliance reports with the Commission. Finally, Part VI is a provision "sunsetting" the order after twenty (20) years, with certain exceptions.

The purpose of this analysis is to aid public comment on the proposed order. It is not intended to constitute an official interpretation of the complaint or proposed order, or to modify in any way the proposed order's terms.

## Complaint

## IN THE MATTER OF

**RAMEY MOTORS, INC.**

CONSENT ORDER, ETC. IN REGARD TO ALLEGED VIOLATIONS OF SECTION 5 OF THE FEDERAL TRADE COMMISSION ACT, THE TRUTH IN LENDING ACT, AND REGULATION Z

*Docket No. C-4354; File No. 112 3207  
Complaint, April 19, 2012 – Decision, April 19, 2012*

This consent order addresses Ramey Motors, Inc.'s advertising of the purchase and financing of its motor vehicles. The complaint alleges that respondent has represented that when a consumer trades in a used vehicle in order to purchase another vehicle, respondent will pay off the balance of the loan on the trade-in vehicle such that the consumer will have no remaining obligation for any amount of that loan, but does not. In addition, the complaint alleges violations of the Truth in Lending Act and Regulation Z for failing to disclose certain costs and terms when advertising credit. The consent order prohibits the respondent from misrepresenting that it will pay the remaining loan balance on a consumer's trade-in vehicle such that the consumer will have no obligation for any amount of that loan or any other material fact relating to the financing or leasing of a motor vehicle.

*Participants*

For the *Commission*: Gregory A. Ashe and Robin Thurston.

For the *Respondent*: Johnnie E. Brown, Pullin, Fowler, Flanagan, Brown & Poe, PLLC.

**COMPLAINT**

The Federal Trade Commission, having reason to believe that Ramey Motors, Inc., a corporation ("Respondent"), has violated provisions of the Federal Trade Commission Act ("FTC Act") and the Truth in Lending Act ("TILA"), and it appearing to the Commission that this proceeding is in the public interest, alleges:

1. Respondent is a West Virginia corporation with its principal place of business at Route 460 East, Princeton, WV, 24720. Respondent offers automobiles for sale.

## Complaint

2. The acts or practices of Respondent alleged in this complaint have been in or affecting commerce, as “commerce” is defined in Section 4 of the FTC Act, 15 U.S.C. § 44.

3. Since at least July 2010, Respondent has disseminated or has caused to be disseminated advertisements promoting the purchase, financing, and leasing of its automobiles.

4. Respondent’s advertisements include, but are not necessarily limited to, advertisements posted on the website YouTube.com, copies of which are attached as Exhibits A through C. These advertisements include the following statements:

- a. “Ramey will pay off your trade no matter what you owe. . . . Even if you’re upside down, Ramey will pay off your trade.” (Exhibit A (DVD containing 7/6/11 capture of YouTube Advertisement “2010 Toyota of Princeton Pay Off Trade Event Princeton West Virginia” at 0:08-0:12)).
- b. “Even if you’re upside down, Ramey will pay off your trade.” (Exhibit B (DVD containing 7/14/11 capture of YouTube advertisement “2010 Ramey Chrysler Jeep Dodge Pay Off Trade Event Princeton WV” at 0:19-0:23)).
- c. “Ramey will pay off your trade no matter what you owe.” (Exhibit C (DVD containing 7/14/11 capture of YouTube advertisement “2010 Ramey Chevrolet Pay Off Trade Event Princeton WV” at 0:07-0:11)).

The advertisements are accompanied by small, typically illegible text. In one of the advertisements, the text appears to state that the negative equity will be included in any new loan. In at least one of the advertisements, the text is completely illegible. To the extent there are any disclosures, they appear in small, illegible print for a short period of time.

5. Respondent also has disseminated or has caused to be disseminated advertisements promoting credit sales and other extensions of closed-end credit in consumer credit transactions, as

## Complaint

the terms “advertisement,” “closed-end credit,” “credit sale,” and “consumer credit” are defined in Section 226.2 of Regulation Z, 12 C.F.R. § 226.2, as amended, on the website YouTube.com, copies of which is attached as Exhibits B and D. These advertisements include the following statements:

- a. “New 2010 Dodge Caliber . . . \$249 per mo” (Exhibit B at 0:14-0:15).
- b. “New 2010 Ram 1500 . . . \$283 per mo” (*id.* at 0:19-0:20).
- c. “0% financing available” (Exhibit D (DVD containing 8/12/11 capture of YouTube advertisement “Labor Day Sales Event Ramey Auto Group Princeton WV” at 0:16-0:18)).

The disclosures required by Regulation Z, if provided, are not clear and conspicuous because they appear in small, blurred print for a short period of time.

**VIOLATION OF THE FEDERAL TRADE COMMISSION  
ACT**

**Misrepresentation of Financing Terms**

6. Through the means described in Paragraph 4, Respondent has represented expressly or by implication that, when a consumer trades in a used vehicle in order to purchase another vehicle, Respondent will pay off the balance of the loan on the trade-in vehicle such that the consumer will have no remaining obligation for any amount of that loan.

7. In truth and in fact, in many instances, when a consumer trades in a used vehicle with a loan balance that exceeds the vehicle’s value (*i.e.* the trade-in has negative equity) in order to purchase another vehicle, Respondent will not pay off the balance of the loan on the trade-in vehicle such that the consumer will have no remaining obligation for any amount of that loan. Instead, Respondent includes the amount of the negative equity in the loan for the newly purchased vehicle.

## Complaint

8. Therefore, the representation set forth in Paragraph 6 of this Complaint was, and is, false or misleading in violation of Section 5(a) of the FTC Act, 15 U.S.C. § 45(a).

**VIOLATIONS OF THE TRUTH IN LENDING ACT AND  
REGULATION Z**

9. Under Section 144 of the TILA and Section 226.24(d) of Regulation Z, advertisements promoting closed-end credit in consumer credit transactions are required to make certain disclosures if they state any of several terms, such as the monthly payment (“TILA triggering terms”). In addition, the rate of the finance charge must be stated as an “annual percentage rate” using that term or the abbreviation “APR.” 15 U.S.C. § 1664; 12 C.F.R. § 226.24(c).

10. Respondent’s advertisements promoting closed-end credit, including but not necessarily limited to those described in Paragraph 5, are subject to the requirements of the TILA and Regulation Z.

**Failure to Disclose or Disclose Clearly and Conspicuously  
Required Credit Information**

11. Respondent’s advertisements promoting closed-end credit, including but not necessarily limited to those described in Paragraph 5, have included TILA triggering terms, but have failed to disclose or disclose clearly and conspicuously, additional terms required by the TILA and Regulation Z, including one or more of the following:

- a. The amount or percentage of the downpayment.
- b. The terms of repayment, which reflect the repayment obligations over the full term of the loan, including any balloon payment.
- c. The “annual percentage rate,” using that term, and, if the rate may be increased after consummation, that fact.

## Decision and Order

12. Therefore, the practices set forth in Paragraph 11 of this Complaint have violated Section 144 of the TILA, 15 U.S.C. § 1664, and Section 226.24(d) of Regulation Z, 12 C.F.R. § 226.24(d), as amended.

**Failure to State Rate of Finance Charge as Annual Percentage Rate**

13. Respondent's advertisements promoting closed-end credit, including but not necessarily limited to those described in Paragraph 5, have stated a rate of finance charge without stating that rate as an "annual percentage rate" using that term or the abbreviation "APR."

14. Therefore, the practices set forth in Paragraph 13 of this Complaint have violated Section 144 of the TILA, 15 U.S.C. § 1664, and Section 226.24(c) of Regulation Z, 12 C.F.R. § 226.24(c).

15. The acts and practices of Respondent as alleged in this complaint constitute deceptive acts or practices in or affecting commerce in violation of Section 5(a) of the FTC Act and violations of the Truth in Lending Act and Regulation Z.

**THEREFORE**, the Federal Trade Commission, this nineteenth day of April, 2012, has issued this complaint against Respondent.

By the Commission.

**DECISION AND ORDER**

The Federal Trade Commission having initiated an investigation of certain acts and practices of Respondent named in the caption hereof, and Respondent having been furnished thereafter with a copy of a draft complaint which the Bureau of Consumer Protection proposed to present to the Commission for

## Decision and Order

its consideration and which, if issued by the Commission, would charge Respondent with violation of the Federal Trade Commission Act (“FTC Act”) and the Truth in Lending Act (“TILA”); and

Respondent, its attorney, and counsel for the Commission having thereafter executed an agreement containing a consent order (“consent agreement”), an admission by Respondent of all the jurisdictional facts set forth in the aforesaid draft complaint, a statement that the signing of the agreement is for settlement purposes only and does not constitute an admission by Respondent that the law has been violated as alleged in such complaint, or that the facts as alleged in such complaint, other than jurisdictional facts, are true, and waivers and other provisions as required by the Commission’s Rules; and

The Commission having thereafter considered the matter and having determined that it had reason to believe that Respondent has violated the FTC Act and the TILA, and that a complaint should issue stating its charges in that respect, and having thereupon accepted the executed consent agreement and placed such consent agreement on the public record for a period of thirty (30) days for the receipt and consideration of public comments, now in further conformity with the procedure prescribed in § 2.34 of its Rules, the Commission hereby issues its complaint, makes the following jurisdictional findings, and enters the following order:

1. Respondent, Ramey Motors, Inc., is a West Virginia corporation with its principal place of business at Route 460 East, Princeton, WV, 24720.
2. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of Respondent, and the proceeding is in the public interest.

## Decision and Order

**ORDER****DEFINITIONS**

For the purposes of this order, the following definitions shall apply:

- A. “Advertisement” shall mean a commercial message in any medium that directly or indirectly promotes a consumer transaction.
- B. “Clearly and conspicuously” shall mean as follows:
  - 1. In a print advertisement, the disclosure shall be in a type size, location, and in print that contrasts with the background against which it appears, sufficient for an ordinary consumer to notice, read, and comprehend it.
  - 2. In an electronic medium, an audio disclosure shall be delivered in a volume and cadence sufficient for an ordinary consumer to hear and comprehend it. A video disclosure shall be of a size and shade and appear on the screen for a duration and in a location sufficient for an ordinary consumer to read and comprehend it.
  - 3. In a television or video advertisement, an audio disclosure shall be delivered in a volume and cadence sufficient for an ordinary consumer to hear and comprehend it. A video disclosure shall be of a size and shade, and appear on the screen for a duration, and in a location, sufficient for an ordinary consumer to read and comprehend it.
  - 4. In a radio advertisement, the disclosure shall be delivered in a volume and cadence sufficient for an ordinary consumer to hear and comprehend it.
  - 5. In all advertisements, the disclosure shall be in understandable language and syntax. Nothing contrary to, inconsistent with, or in mitigation of

## Decision and Order

the disclosure shall be used in any advertisement or promotion.

- C. “Consumer credit” shall mean credit offered or extended to a consumer primarily for personal, family, or household purposes.
- D. “Material” shall mean likely to affect a person’s choice of, or conduct regarding, goods or services.
- E. “Motor vehicle” shall mean
  - 1. any self-propelled vehicle designed for transporting persons or property on a street, highway, or other road;
  - 2. recreational boats and marine equipment;
  - 3. motorcycles;
  - 4. motor homes, recreational vehicle trailers, and slide-in campers; and
  - 5. other vehicles that are titled and sold through dealers.

**I.**

**IT IS ORDERED** that Respondent, directly or through any corporation, subsidiary, division, or other device, in connection with any advertisement to promote, directly or indirectly, the purchase, financing, or leasing of automobiles, in or affecting commerce, shall not, in any manner, expressly or by implication:

- A. Misrepresent that when a consumer trades in a used motor vehicle (“trade-in vehicle”) in order to purchase another motor vehicle (“newly purchased vehicle”), Respondent will pay any remaining loan balance on the trade-in vehicle such that the consumer will have no remaining obligation for any amount of that loan; or

## Decision and Order

- B. Misrepresent any material fact regarding the cost and terms of financing or leasing any newly purchased vehicle.

**II.**

**IT IS FURTHER ORDERED** that Respondent, directly or through any corporation, subsidiary, division, or other device, in connection with an advertisement to promote, directly or indirectly, any extension of consumer credit, in or affecting commerce, shall not in any manner, expressly or by implication:

- A. State the amount or percentage of any down payment, the number of payments or period of repayment, the amount of any payment, or the amount of any finance charge, without disclosing clearly and conspicuously all of the following terms:
  - 1. The amount or percentage of the down payment;
  - 2. The terms of repayment; and
  - 3. The annual percentage rate, using the term “annual percentage rate” or the abbreviation “APR.” If the annual percentage rate may be increased after consummation of the credit transaction, that fact must also be disclosed; or
- B. State a rate of finance charge without stating the rate as an “annual percentage rate” or the abbreviation “APR,” using that term.
- C. Fail to comply in any respect with Regulation Z, 12 C.F.R. § 226, as amended, and the Truth in Lending Act, as amended, 15 U.S.C. §§ 1601-1667.

**III.**

**IT IS FURTHER ORDERED** that Respondent and its successors and assigns shall, for five (5) years after the last date of dissemination of any representation covered by this order, maintain and upon request make available to the Federal Trade Commission for inspection and copying:

## Decision and Order

- A. All advertisements and promotional materials containing the representation;
- B. All materials that were relied upon in disseminating the representation; and
- C. All tests, reports, studies, surveys, demonstrations, or other evidence in their possession or control that contradict, qualify, or call into question the representation, or the basis relied upon for the representation, including complaints and other communications with consumers or with governmental or consumer protection organizations.

**IV.**

**IT IS FURTHER ORDERED** that Respondent and its successors and assigns shall deliver a copy of this order to all current and future principals, officers, directors, and managers, and to all current and future employees, agents, and representatives having responsibilities with respect to the subject matter of this order, and shall secure from each such person a signed and dated statement acknowledging receipt of the order. Respondent shall deliver this order to current personnel within thirty (30) days after the date of service of this order, and to future personnel within thirty (30) days after the person assumes such position or responsibilities.

**V.**

**IT IS FURTHER ORDERED** that Respondent and its successors and assigns shall notify the Commission at least thirty (30) days prior to any change in the corporation(s) that may affect compliance obligations arising under this order, including but not limited to a dissolution, assignment, sale, merger, or other action that would result in the emergence of a successor corporation; the creation or dissolution of a subsidiary, parent, or affiliate that engages in any acts or practices subject to this order; the proposed filing of a bankruptcy petition; or a change in the corporate name or address. *Provided, however,* that, with respect to any proposed change in the corporation about which Respondent learns less than thirty (30) days prior to the date such action is to take place,

## Decision and Order

Respondent shall notify the Commission as soon as is practicable after obtaining such knowledge. Unless otherwise directed by a representative of the Commission in writing, all notices required by this Part shall be emailed to [Debrief@ftc.gov](mailto:Debrief@ftc.gov) or sent by overnight courier (not U.S. Postal Service) to: Associate Director for Enforcement, Bureau of Consumer Protection, Federal Trade Commission, 600 Pennsylvania Avenue, NW, Washington, DC, 20580. The subject line must begin: FTC v. Ramey Motors.

**VI.**

**IT IS FURTHER ORDERED** that Respondent and its successors and assigns, within ninety (90) days after the date of service of this order, shall file with the Commission a true and accurate report, in writing, setting forth in detail the manner and form of their own compliance with this order. Within thirty (30) days of receipt of written notice from a representative of the Commission, they shall submit additional true and accurate written reports.

**VII.**

This order will terminate on April 19, 2032, or twenty (20) years from the most recent date that the United States or the Federal Trade Commission files a complaint (with or without an accompanying consent decree) in federal court alleging any violation of the order, whichever comes later; *provided, however*, that the filing of such a complaint will not affect the duration of:

- A. Any Part in this order that terminates in less than twenty (20) years;
- B. This order's application to any Respondent that is not named as a defendant in such complaint;
- C. This order if such complaint is filed after the order has terminated pursuant to this Part.

*Provided, further*, that if such complaint is dismissed or a federal court rules that Respondent did not violate any provision of the order, and the dismissal or ruling is either not appealed or upheld on appeal, then the order will terminate according to this Part as

## Analysis to Aid Public Comment

though the complaint had never been filed, except that the order will not terminate between the date such complaint is filed and the later of the deadline for appealing such dismissal or ruling and the date such dismissal or ruling is upheld on appeal.

By the Commission, Commissioner Ohlhausen not participating.

**ANALYSIS OF CONSENT ORDER TO AID PUBLIC  
COMMENT**

The Federal Trade Commission (“FTC”) has accepted, subject to final approval, an agreement containing a consent order from Ramey Motors, Inc. The proposed consent order has been placed on the public record for thirty (30) days for receipt of comments by interested persons. Comments received during this period will become part of the public record. After thirty (30) days, the FTC will again review the agreement and the comments received, and will decide whether it should withdraw from the agreement and take appropriate action or make final the agreement’s proposed order.

The respondent is a motor vehicle dealer. The matter involves its advertising of the purchase and financing of its motor vehicles. According to the FTC complaint, respondent has represented that when a consumer trades in a used vehicle in order to purchase another vehicle, respondent will pay off the balance of the loan on the trade-in vehicle such that the consumer will have no remaining obligation for any amount of that loan. The complaint alleges that in fact, when a consumer trades in a used vehicle with negative equity (*i.e.* the loan balance on the vehicle exceeds the vehicle’s value) in order to purchase another vehicle, respondent does not pay off the balance of the loan on the trade-in vehicle such that the consumer will have no remaining obligation for any amount of that loan. Instead, the respondent includes the amount of the negative equity in the loan for the newly purchased vehicle. The complaint alleges therefore that the representation is false or

## Analysis to Aid Public Comment

misleading in violation of Section 5 of the FTC Act. In addition, the complaint alleges violations of the Truth in Lending Act (“TILA”) and Regulation Z for failing to disclose certain costs and terms when advertising credit.

The proposed order is designed to prevent the respondent from engaging in similar deceptive practices in the future. Part I of the proposed order prohibits the respondent from misrepresenting that it will pay the remaining loan balance on a consumer’s trade-in vehicle such that the consumer will have no obligation for any amount of that loan. It also prohibits misrepresenting any other material fact relating to the financing or leasing of a motor vehicle.

Part II of the proposed order addresses the TILA allegations. It requires clear and conspicuous TILA/Regulation Z disclosures when advertising any of the relevant triggering terms with regard to issuing consumer credit. It also requires that if any finance charge is advertised, the rate be stated as an “annual percentage rate” using that term or the abbreviation “APR.” In addition, Part II prohibits any other violation of TILA or Regulation Z.

Part III of the proposed order requires respondent to keep copies of relevant advertisements and materials substantiating claims made in the advertisements. Part IV requires that respondent provide copies of the order to certain of its personnel. Part V requires notification of the Commission regarding changes in corporate structure that might affect compliance obligations under the order. Part VI requires the respondent to file compliance reports with the Commission. Finally, Part VII is a provision “sunsetting” the order after twenty (20) years, with certain exceptions.

The purpose of this analysis is to aid public comment on the proposed order. It is not intended to constitute an official interpretation of the complaint or proposed order, or to modify in any way the proposed order’s terms.

Complaint

IN THE MATTER OF

**BILLION AUTO, INC.**

CONSENT ORDER, ETC. IN REGARD TO ALLEGED VIOLATIONS OF SECTION 5 OF THE FEDERAL TRADE COMMISSION ACT, THE TRUTH IN LENDING ACT, THE CONSUMER LEASING ACT, REGULATION Z, AND REGULATION M

*Docket No. C-4356; File No. 112 3209  
Complaint, May 1, 2012 – Decision, May 1, 2012*

This consent order addresses Billion Auto, Inc.'s advertising of the purchase, financing, and leasing of its motor vehicles. The complaint alleges that respondent has represented that when a consumer trades in a used vehicle in order to purchase another vehicle, respondent will pay off the balance of the loan on the trade-in vehicle such that the consumer will have no remaining obligation for any amount of that loan, but does not. In addition, the complaint alleges violations of the Truth in Lending Act and Regulation Z for failing to disclose certain costs and terms when advertising credit. The complaint also alleges a violation of the Consumer Leasing Act and Regulation M for failing to disclose the costs and terms of certain leases offered. The consent order prohibits the respondent from misrepresenting that it will pay the remaining loan balance on a consumer's trade-in vehicle such that the consumer will have no obligation for any amount of that loan or any other material fact relating to the financing or leasing of a motor vehicle.

*Participants*

For the *Commission*: Gregory A. Ashe and Robin Thurston.

For the *Respondent*: Jim McMahan, solo practitioner.

**COMPLAINT**

The Federal Trade Commission, having reason to believe that Billion Auto, Inc., a corporation ("Respondent"), has violated provisions of the Federal Trade Commission Act ("FTC Act"), the Truth in Lending Act ("TILA"), and the Consumer Leasing Act ("CLA"), and it appearing to the Commission that this proceeding is in the public interest, alleges:

1. Respondent is a South Dakota corporation with its principal office or place of business at 3401 West 41st Street,

## Complaint

Sioux Falls, SD, 57106. Respondent offers automobiles for sale and lease.

2. The acts or practices of Respondent alleged in this complaint have been in or affecting commerce, as “commerce” is defined in Section 4 of the FTC Act, 15 U.S.C. § 44.

3. Since at least May 2011, Respondent has disseminated or has caused to be disseminated advertisements promoting the purchase, financing, and leasing of its automobiles.

4. Respondent’s advertisements include, but are not necessarily limited to, an advertisement on its website [www.billionpayoff.com](http://www.billionpayoff.com), a copy of which is attached as Exhibit A (DVD containing 7/6/11 capture of [www.billionpayoff.com](http://www.billionpayoff.com)). This advertisement includes the following statements and depictions:

- a. **“We will pay off your trade NO MATTER how much you owe!”**
- b. “Credit upside down? Need a new car? Go to Billionpayoff.com. We want to pay off your car.” The advertisement depicts a car driving, inverts the video to depict the car upside down, and then depicts the car right-side up again.

5. Respondent also has disseminated or has caused to be disseminated advertisements promoting credit sales and other extensions of closed-end credit in consumer credit transactions, as the terms “advertisement,” “closed-end credit,” “credit sale,” and “consumer credit” are defined in Section 226.2 of Regulation Z, 12 C.F.R. § 226.2, as amended, on one of its websites, a copy of which is attached as Exhibit B (copy of 7/6/11 capture of <http://www.billionauto.com>). This advertisement includes the following statements:

- a. **“New Buicks starting at \$249 Mo.”**
- b. **“0% 72 Mo. Toyota Certified”**
- c. **“Toyota 2.9% Financing”**

## Complaint

d. **“2.9% Financing GMC”**

No additional information regarding the cost or terms of financing a vehicle appears on this website.

6. Respondent also has disseminated or has caused to be disseminated advertisements promoting consumer leases, as the terms “advertisement” and “consumer lease” are defined in Section 213.2 of Regulation M, 12 C.F.R. § 213.2, as amended, copies of which are attached as Exhibits C and D (online newspaper advertisements). Respondent’s advertisements promoting consumer leases contain the following statement:

**\$199** lease  
/mo.

The term “lease” appears in fine print. No additional information regarding the cost or terms of leasing a vehicle appears in these advertisements.

**VIOLATION OF THE FEDERAL TRADE COMMISSION  
ACT****Misrepresentation of Financing Terms**

7. Through the means described in Paragraph 4, Respondent has represented expressly or by implication that, when a consumer trades in a used vehicle in order to purchase another vehicle, Respondent will pay off the balance of the loan on the trade-in vehicle such that the consumer will have no remaining obligation for any amount of that loan.

8. In truth and in fact, in many instances, when a consumer trades in a used vehicle with a loan balance that exceeds the vehicle’s value (*i.e.* the trade-in has negative equity) in order to purchase another vehicle, Respondent will not pay off the balance of the loan on the trade-in vehicle such that the consumer will have no remaining obligation for any amount of that loan. Instead, Respondent includes the amount of the negative equity in the loan for the newly purchased vehicle.

## Complaint

9. Therefore, the representation set forth in Paragraph 7 of this Complaint was, and is, false or misleading in violation of Section 5(a) of the FTC Act, 15 U.S.C. § 45(a).

**VIOLATIONS OF THE TRUTH IN LENDING ACT AND  
REGULATION Z**

10. Under Section 144 of the TILA and Section 226.24(d) of Regulation Z, advertisements promoting closed-end credit in consumer credit transactions are required to make certain disclosures if they state any of several terms, such as the monthly payment (“TILA triggering terms”). In addition, the rate of the finance charge must be stated as an “annual percentage rate” using that term or the abbreviation “APR.” 15 U.S.C. § 1664; 12 C.F.R. § 226.24(c).

11. Respondent’s advertisements promoting closed-end credit, including but not necessarily limited to those described in Paragraph 5, are subject to the requirements of the TILA and Regulation Z.

**Failure to Disclose or Disclose Clearly and Conspicuously  
Required Credit Information**

12. Respondent’s advertisements promoting closed-end credit, including but not necessarily limited to those described in Paragraph 5, have included TILA triggering terms, but have failed to disclose or disclose clearly and conspicuously, additional terms required by the TILA and Regulation Z, including one or more of the following:

- a. The amount or percentage of the downpayment.
- b. The terms of repayment, which reflect the repayment obligations over the full term of the loan, including any balloon payment.
- c. The “annual percentage rate,” using that term, and, if the rate may be increased after consummation, that fact.

## Complaint

13. Therefore, the practices set forth in Paragraph 12 of this Complaint have violated Section 144 of the TILA, 15 U.S.C. § 1664, and Section 226.24(d) of Regulation Z, 12 C.F.R. § 226.24(d), as amended.

**Failure to State Rate of Finance Charge as Annual Percentage Rate**

14. Respondent's advertisements promoting closed-end credit, including but not necessarily limited to those described in Paragraph 5, have stated a rate of finance charge without stating that rate as an "annual percentage rate" using that term or the abbreviation "APR."

15. Therefore, the practices set forth in Paragraph 14 of this Complaint have violated Section 144 of the TILA, 15 U.S.C. § 1664, and Section 226.24(c) of Regulation Z, 12 C.F.R. § 226.24(c).

**VIOLATION OF THE CONSUMER LEASING ACT AND REGULATION M**

16. Under Section 184 of the CLA and Section 213.7 of Regulation M, advertisements promoting consumer leases are required to make certain disclosures if they state any of several terms, such as the amount of any payment ("CLA triggering terms"). 15 U.S.C. § 1667c, 12 C.F.R. § 213.7.

17. Respondent's advertisements promoting consumer leases, including but not necessarily limited to those described in Paragraph 6, are subject to the requirements of the CLA and Regulation M.

**Failure to Disclose or Disclose Clearly and Conspicuously Required Lease Information**

18. Respondent's advertisements promoting consumer leases, including but not necessarily limited to those described in Paragraph 6, have included CLA triggering terms, but have failed to disclose or disclose clearly and conspicuously additional terms required by the CLA and Regulation M, including one or more of the following:

## Decision and Order

- a. That the transaction advertised is a lease.
- b. The total amount of any initial payments required on or before consummation of the lease or delivery of the property, whichever is later.
- c. Whether or not a security deposit is required.
- d. The number, amount, and timing of scheduled payments.
- e. With respect to a lease in which the liability of the consumer at the end of the lease term is based on the anticipated residual value of the property, that an extra charge may be imposed at the end of the lease term.

19. Therefore, the practices set forth in Paragraph 18 of this Complaint have violated Section 184 of the CLA, 15 U.S.C. § 1667c, and Section 213.7 of Regulation M, 12 C.F.R. § 213.7.

20. The acts and practices of Respondent as alleged in this complaint constitute deceptive acts or practices in or affecting commerce in violation of Section 5(a) of the FTC Act, violations of the Truth in Lending Act and Regulation Z, and violations of the Consumer Leasing Act and Regulation M.

**THEREFORE**, the Federal Trade Commission, this first day of May 2012, has issued this complaint against Respondent.

By the Commission.

**DECISION AND ORDER**

The Federal Trade Commission having initiated an investigation of certain acts and practices of Respondent named in the caption hereof, and Respondent having been furnished thereafter with a copy of a draft complaint which the Bureau of

## Decision and Order

Consumer Protection proposed to present to the Commission for its consideration and which, if issued by the Commission, would charge Respondent with violation of the Federal Trade Commission Act (“FTC Act”), the Truth in Lending Act (“TILA”), and the Consumer Leasing Act (“CLA”); and

Respondent, its attorney, and counsel for the Commission having thereafter executed an agreement containing a consent order (“consent agreement”), an admission by Respondent of all the jurisdictional facts set forth in the aforesaid draft complaint, a statement that the signing of the agreement is for settlement purposes only and does not constitute an admission by Respondent that the law has been violated as alleged in such complaint, or that the facts as alleged in such complaint, other than jurisdictional facts, are true, and waivers and other provisions as required by the Commission’s Rules; and

The Commission having thereafter considered the matter and having determined that it had reason to believe that Respondent has violated the FTC Act, the TILA, and the CLA, and that a complaint should issue stating its charges in that respect, and having thereupon accepted the executed consent agreement and placed such consent agreement on the public record for a period of thirty (30) days for the receipt and consideration of public comments, now in further conformity with the procedure prescribed in § 2.34 of its Rules, the Commission hereby issues its complaint, makes the following jurisdictional findings, and enters the following order:

1. Respondent, Billion Auto, Inc., is a South Dakota corporation with its principal office or place of business at 3401 West 41st Street, Sioux Falls, South Dakota, 57106.
2. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of Respondent, and the proceeding is in the public interest.

## Decision and Order

**ORDER****DEFINITIONS**

For the purposes of this order, the following definitions shall apply:

- A. “Advertisement” shall mean a commercial message in any medium that directly or indirectly promotes a consumer transaction.
- B. “Clearly and conspicuously” shall mean as follows:
  - 1. In a print advertisement, the disclosure shall be in a type size, location, and in print that contrasts with the background against which it appears, sufficient for an ordinary consumer to notice, read, and comprehend it.
  - 2. In an electronic medium, an audio disclosure shall be delivered in a volume and cadence sufficient for an ordinary consumer to hear and comprehend it. A video disclosure shall be of a size and shade and appear on the screen for a duration and in a location sufficient for an ordinary consumer to read and comprehend it.
  - 3. In a television or video advertisement, an audio disclosure shall be delivered in a volume and cadence sufficient for an ordinary consumer to hear and comprehend it. A video disclosure shall be of a size and shade, and appear on the screen for a duration, and in a location, sufficient for an ordinary consumer to read and comprehend it.
  - 4. In a radio advertisement, the disclosure shall be delivered in a volume and cadence sufficient for an ordinary consumer to hear and comprehend it.
  - 5. In all advertisements, the disclosure shall be in understandable language and syntax. Nothing contrary to, inconsistent with, or in mitigation of

## Decision and Order

the disclosure shall be used in any advertisement or promotion.

- C. “Consumer credit” shall mean credit offered or extended to a consumer primarily for personal, family, or household purposes.
- D. “Consumer lease” shall have the same meaning as that term is defined in Section 213.2 of Regulation M, 12 C.F.R. § 213.2, as amended.
- E. “Material” shall mean likely to affect a person’s choice of, or conduct regarding, goods or services.
- F. “Motor vehicle” shall mean
  - 1. any self-propelled vehicle designed for transporting persons or property on a street, highway, or other road;
  - 2. recreational boats and marine equipment;
  - 3. motorcycles;
  - 4. motor homes, recreational vehicle trailers, and slide-in campers; and
  - 5. other vehicles that are titled and sold through dealers.

**I.**

**IT IS HEREBY ORDERED** that Respondent, directly or through any corporation, subsidiary, division, or other device, in connection with any advertisement to promote, directly or indirectly, the purchase, financing, or leasing of automobiles, in or affecting commerce, shall not, in any manner, expressly or by implication:

- A. Misrepresent that when a consumer trades in a used motor vehicle (“trade-in vehicle”) in order to purchase another motor vehicle (“newly purchased vehicle”), Respondent will pay any remaining loan balance on

## Decision and Order

the trade-in vehicle such that the consumer will have no remaining obligation for any amount of that loan; or

- B. Misrepresent any material fact regarding the cost and terms of financing or leasing any newly purchased vehicle.

**II.**

**IT IS FURTHER ORDERED** that Respondent, directly or through any corporation, subsidiary, division, or other device, in connection with an advertisement to promote, directly or indirectly, any extension of consumer credit, in or affecting commerce, shall not in any manner, expressly or by implication:

- A. State the amount or percentage of any down payment, the number of payments or period of repayment, the amount of any payment, or the amount of any finance charge, without disclosing clearly and conspicuously all of the following terms:
  - 1. The amount or percentage of the down payment;
  - 2. The terms of repayment; and
  - 3. The annual percentage rate, using the term “annual percentage rate” or the abbreviation “APR.” If the annual percentage rate may be increased after consummation of the credit transaction, that fact must also be disclosed; or
- B. State a rate of finance charge without stating the rate as an “annual percentage rate” or the abbreviation “APR,” using that term.
- C. Fail to comply in any respect with Regulation Z, 12 C.F.R. § 226, as amended, and the Truth in Lending Act, as amended, 15 U.S.C. §§ 1601-1667.

## Decision and Order

**III.**

**IT IS FURTHER ORDERED** that Respondent, directly or through any corporation, subsidiary, division, or other device, in connection with an advertisement to promote, directly or indirectly, any consumer lease, in or affecting commerce, shall not, in any manner, expressly or by implication:

- A. State the amount of any payment or that any or no initial payment is required at lease signing or delivery, if delivery occurs after consummation, without disclosing clearly and conspicuously the following terms:
1. That the transaction advertised is a lease;
  2. The total amount due at lease signing or delivery;
  3. Whether or not a security deposit is required;
  4. The number, amounts, and timing of scheduled payments; and
  5. That an extra charge may be imposed at the end of the lease term in a lease in which the liability of the consumer at the end of the lease term is based on the anticipated residual value of the vehicle; or
- B. Fail to comply in any respect with Regulation M, 12 C.F.R. § 213, as amended, and the Consumer Leasing Act, 15 U.S.C. §§ 1667-1667f, as amended.

**IV.**

**IT IS FURTHER ORDERED** that Respondent and its successors and assigns shall, for five (5) years after the last date of dissemination of any representation covered by this order, maintain and upon request make available to the Federal Trade Commission for inspection and copying:

- A. All advertisements and promotional materials containing the representation;

## Decision and Order

- B. All materials that were relied upon in disseminating the representation; and
- C. All tests, reports, studies, surveys, demonstrations, or other evidence in their possession or control that contradict, qualify, or call into question the representation, or the basis relied upon for the representation, including complaints and other communications with consumers or with governmental or consumer protection organizations.

**V.**

**IT IS FURTHER ORDERED** that Respondent and its successors and assigns shall deliver a copy of this order to all current and future principals, officers, directors, and managers, and to all current and future employees, agents, and representatives having responsibilities with respect to the subject matter of this order, and shall secure from each such person a signed and dated statement acknowledging receipt of the order. Respondent shall deliver this order to current personnel within thirty (30) days after the date of service of this order, and to future personnel within thirty (30) days after the person assumes such position or responsibilities.

**VI.**

**IT IS FURTHER ORDERED** that Respondent and its successors and assigns shall notify the Commission at least thirty (30) days prior to any change in the corporation(s) that may affect compliance obligations arising under this order, including but not limited to a dissolution, assignment, sale, merger, or other action that would result in the emergence of a successor corporation; the creation or dissolution of a subsidiary, parent, or affiliate that engages in any acts or practices subject to this order; the proposed filing of a bankruptcy petition; or a change in the corporate name or address. *Provided, however*, that, with respect to any proposed change in the corporation about which Respondent learns less than thirty (30) days prior to the date such action is to take place, Respondent shall notify the Commission as soon as is practicable after obtaining such knowledge. Unless otherwise directed by a representative of the Commission in writing, all notices required

## Decision and Order

by this Part shall be emailed to [Debrief@ftc.gov](mailto:Debrief@ftc.gov) or sent by overnight courier (not U.S. Postal Service) to: Associate Director for Enforcement, Bureau of Consumer Protection, Federal Trade Commission, 600 Pennsylvania Avenue, NW, Washington, DC, 20580. The subject line must begin: FTC v. Billion Auto.

**VII.**

**IT IS FURTHER ORDERED** that Respondent and its successors and assigns, within sixty (60) days after the date of service of this order, shall file with the Commission a true and accurate report, in writing, setting forth in detail the manner and form of their own compliance with this order. Within ten (10) days of receipt of written notice from a representative of the Commission, they shall submit additional true and accurate written reports.

**VIII.**

This order will terminate on May 1, 2032, or twenty (20) years from the most recent date that the United States or the Federal Trade Commission files a complaint (with or without an accompanying consent decree) in federal court alleging any violation of the order, whichever comes later; *provided, however*, that the filing of such a complaint will not affect the duration of:

- A. Any Part in this order that terminates in less than twenty (20) years;
- B. This order's application to any Respondent that is not named as a defendant in such complaint;
- C. This order if such complaint is filed after the order has terminated pursuant to this Part.

*Provided, further*, that if such complaint is dismissed or a federal court rules that Respondent did not violate any provision of the order, and the dismissal or ruling is either not appealed or upheld on appeal, then the order will terminate according to this Part as though the complaint had never been filed, except that the order will not terminate between the date such complaint is filed and the

## Analysis to Aid Public Comment

later of the deadline for appealing such dismissal or ruling and the date such dismissal or ruling is upheld on appeal.

By the Commission, Commissioner Ohlhausen not participating.

### **ANALYSIS OF CONSENT ORDER TO AID PUBLIC COMMENT**

The Federal Trade Commission (“FTC”) has accepted, subject to final approval, an agreement containing a consent order from Billion Auto, Inc. The proposed consent order has been placed on the public record for thirty (30) days for receipt of comments by interested persons. Comments received during this period will become part of the public record. After thirty (30) days, the FTC will again review the agreement and the comments received, and will decide whether it should withdraw from the agreement and take appropriate action or make final the agreement’s proposed order.

The respondent is a motor vehicle dealer. The matter involves its advertising of the purchase, financing, and leasing of its motor vehicles. According to the FTC complaint, respondent has represented that when a consumer trades in a used vehicle in order to purchase another vehicle, respondent will pay off the balance of the loan on the trade-in vehicle such that the consumer will have no remaining obligation for any amount of that loan. The complaint alleges that in fact, when a consumer trades in a used vehicle with negative equity (*i.e.* the loan balance on the vehicle exceeds the vehicle’s value) in order to purchase another vehicle, respondent does not pay off the balance of the loan on the trade-in vehicle such that the consumer will have no remaining obligation for any amount of that loan. Instead, the respondent includes the amount of the negative equity in the loan for the newly purchased vehicle. The complaint alleges therefore that the representation is false or misleading in violation of Section 5 of the FTC Act. In addition, the complaint alleges violations of the Truth in Lending

## Analysis to Aid Public Comment

Act (“TILA”) and Regulation Z for failing to disclose certain costs and terms when advertising credit. The complaint also alleges a violation of the Consumer Leasing Act (“CLA”) and Regulation M for failing to disclose the costs and terms of certain leases offered.

The proposed order is designed to prevent the respondent from engaging in similar deceptive practices in the future. Part I of the proposed order prohibits the respondent from misrepresenting that it will pay the remaining loan balance on a consumer’s trade-in vehicle such that the consumer will have no obligation for any amount of that loan. It also prohibits misrepresenting any other material fact relating to the financing or leasing of a motor vehicle.

Part II of the proposed order addresses the TILA allegations. It requires clear and conspicuous TILA/Regulation Z disclosures when advertising any of the relevant triggering terms with regard to issuing consumer credit. It also requires that if any finance charge is advertised, the rate be stated as an “annual percentage rate” using that term or the abbreviation “APR.” In addition, Part II prohibits any other violation of TILA or Regulation Z.

Part III of the proposed order addresses the CLA allegation. It requires that the respondent clearly and conspicuously make all of the disclosures required by CLA and Regulation M if it states relevant triggering terms, including the monthly lease payment. In addition, Part III prohibits any other violation of CLA and Regulation M.

Part IV of the proposed order requires respondent to keep copies of relevant advertisements and materials substantiating claims made in the advertisements. Part V requires that respondent provide copies of the order to certain of its personnel. Part VI requires notification of the Commission regarding changes in corporate structure that might affect compliance obligations under the order. Part VII requires the respondent to file compliance reports with the Commission. Finally, Part VIII is a provision “sunsetting” the order after twenty (20) years, with certain exceptions.

*Analysis to Aid Public Comment*

The purpose of this analysis is to aid public comment on the proposed order. It is not intended to constitute an official interpretation of the complaint or proposed order, or to modify in any way the proposed order's terms.

## Complaint

## IN THE MATTER OF

**CVS CAREMARK CORPORATION**CONSENT ORDER, ETC. IN REGARD TO ALLEGED VIOLATIONS OF  
SECTION 5 OF THE FEDERAL TRADE COMMISSION ACT

*Docket No. C-4357; File No. 112 3210*  
*Complaint, May 3, 2012 – Decision, May 3, 2012*

This consent order addresses CVS Caremark Corporation's ("CVSC") marketing and sales of Medicare drug plans and Medicare Part D drugs. The complaint alleges that respondent, through its subsidiary RxAmerica, violated Section 5 of the FTC Act by representing that the prices of covered Medicare Part D prescription drugs, as posted on Plan Finder and on the websites of RxAmerica and other third parties from approximately 2007 until the end of 2008, were accurate estimates of the prices that beneficiaries would pay for those drugs at CVS and Walgreens, when the prices charged to RxAmerica beneficiaries who purchased their covered Part D generic drugs from CVS Pharmacy or Walgreens during the relevant time period were significantly higher – in some cases as much as ten times higher – than the prices posted on those websites. The consent order prohibits CVSC from misrepresenting the price or cost of Medicare Part D prescription drugs, or other prices or costs associated with Medicare Part D prescription drug plans.

*Participants*

For the *Commission: Malcolm Catt, Philip Eisenstat, Andrew Kushner, Ryan Mehm, Lisa Schifferle and Meredyth Smith Andrus.*

For the *Respondent: Robert Kidwell and Bruce Sokler, Mintz Levin; and Seth Silber, Wilson Sonsini.*

**COMPLAINT**

The Federal Trade Commission, having reason to believe that CVS Caremark Corporation (hereinafter, "CVSC" or "Respondent"), through its subsidiary RxAmerica, has violated the provisions of the Federal Trade Commission Act, and it appearing to the Commission that this proceeding is in the public interest, alleges:

1. Respondent is a Delaware corporation with its principal office or place of business at One CVS Drive, Woonsocket,

### Complaint

Rhode Island 02895. Respondent acquired Longs Drug Store Corporation (“Longs”) on October 30, 2008. Prior to October 30, 2008, RxAmerica LLC (“RxAmerica”) was a subsidiary entity of Longs.

2. The acts and practices of Respondent as alleged in this complaint have been in or affecting commerce, as “commerce” is defined in Section 4 of the Federal Trade Commission Act.

3. Respondent advertises, markets, promotes, offers to sell, sells and distributes its products and services throughout the United States, including Medicare drug plans (as approved in accordance with the Medicare Prescription Drug Improvement and Modernization Act, 42 U.S.C. § 1395w *et seq.*) and covered Medicare Part D drugs (as defined in 42 U.S.C. § 1395w-102(e)).

## **FACTS**

### **Background**

4. Medicare Part D is a prescription drug benefit for consumers with Medicare coverage, primarily senior citizens and persons with disabilities (“beneficiaries”). To obtain Part D benefits, beneficiaries must enroll in a Medicare drug plan administered by an insurer or other private company approved by the Centers for Medicare & Medicaid Services (“CMS”). Each such insurer or other private company is responsible for creating a network of pharmacies where beneficiaries can fill their prescriptions.

5. Respondent currently owns subsidiaries, including RxAmerica, offering multiple Medicare drug plans.

6. Beneficiaries initially sign up for a Medicare drug plan when they first become eligible for Medicare by age or disability. Every year during a period known as “open enrollment,” beneficiaries have an opportunity to enroll in a new Medicare drug plan or remain in the same plan for the following calendar year.

7. Medicare drug plans differ in cost and offer a variety of benefits. Beneficiaries generally have cost sharing obligations

## Complaint

until the total cost of their drugs reaches what is known as the coverage gap or “donut hole,” at which point the beneficiary pays the full cost of the drugs. If the beneficiary’s spending reaches a certain level, he exits the donut hole and enters a phase known as catastrophic coverage in which he is only responsible for paying a small copayment or coinsurance amount for each drug. Beneficiaries with low incomes are eligible for extra subsidies in the form of lower or no premiums, lower copayments or coinsurance, and coverage in the donut hole. 42 U.S.C. § 1395w-114.

8. Beneficiaries can shop for a Medicare drug plan by looking up plan benefits and drug costs on a provider’s website, by going onto CMS’ Medicare website and using the web-based tool known as Plan Finder, or by visiting other third-party websites where such information is posted. Every two weeks, Medicare drug plans are required by law to send their drug prices to CMS for posting on Plan Finder and to attest to the accuracy of those prices. Beneficiaries enter on Plan Finder the drugs they take and the pharmacy they use, and Plan Finder identifies potential Medicare drug plans based on information supplied to CMS by each Medicare drug plan.

9. Beneficiaries rely on the information posted on Plan Finder when selecting a Medicare drug plan because Plan Finder calculates the beneficiary’s estimated costs for any given plan and projects which plan will keep the beneficiary out of the donut hole the longest and which plan will have the lowest overall cost.

**RxAmerica Incident**

10. In 2007, RxAmerica owed money to CVS Pharmacy (a subsidiary of CVSC) and Walgreens. Rather than pay the pharmacies directly, RxAmerica instead decided to increase the reimbursement rate to those pharmacies for generic drugs purchased by plan beneficiaries. RxAmerica started reimbursing CVS and Walgreens at rates sometimes ten times as much as it was reimbursing other pharmacies for the same drugs. Because the total cost of a drug is comprised of the beneficiary’s copayment plus the pharmacy’s reimbursement rate, beneficiaries were adversely affected by this reimbursement structure, as described below.

### Complaint

11. The higher reimbursement rates were not reflected in the pricing data RxAmerica sent to CMS for posting on Plan Finder, nor were they included in the prices RxAmerica posted on its website or sent to third-party websites. Therefore, beneficiaries seeking a Medicare drug plan through Plan Finder (or on RxAmerica's website or third-party websites) during this period saw a set of estimates for prices of drugs at CVS and Walgreens that had no bearing on the actual prices charged at these pharmacies.

12. For example, during 2008, RxAmerica represented to beneficiaries through prices posted on Plan Finder, on its website, and on third-party websites, that the price of gabapentin 600mg, a generic drug used to treat epileptic seizures, at CVS was \$26.83. In reality, RxAmerica was paying CVS \$257.70, almost ten times that amount. Similarly, RxAmerica represented on its website, on third-party websites, and on Plan Finder, that the price of megestrol, a generic drug used to relieve breast cancer symptoms, at CVS was \$55.68, whereas RxAmerica actually was paying CVS \$305.89, more than five times that amount. In another example, during 2008, RxAmerica represented the price of omeprazole 20mg, a drug used to treat ulcers and gastroesophageal reflux disease, at Walgreens was \$22.04, whereas RxAmerica actually was paying Walgreens \$162.00, more than seven times that amount.

13. As a result of this reimbursement structure, many beneficiaries using CVS and Walgreens stores ran through their benefits coverage at faster rates than they would have based on the posted prices. Many beneficiaries, therefore, unexpectedly entered the donut hole and became responsible for the total cost of their prescription drugs, with no opportunity to change plans until the next calendar year. Further, when most beneficiaries filled a prescription at a CVS or Walgreens store, they would have paid only a copayment at the point of sale and may not have been aware of the pharmacy's reimbursement rate until they reached the donut hole.

14. In late 2007 and early 2008, RxAmerica beneficiaries harmed by this conduct began to complain to RxAmerica about the discrepancies between the prices listed on Plan Finder (as well

## Complaint

as on RxAmerica's website and third-party websites) and the prices at CVS and Walgreens stores.

15. RxAmerica became aware no later than January 2008 that its reimbursement methods were forcing some beneficiaries prematurely into the donut hole. Nonetheless, the discrepancy between the prices posted online and the actual reimbursement rates to CVS and Walgreens continued until at least November 2008.

16. Respondent's conduct injured many beneficiaries.

**VIOLATIONS OF THE FTC ACT**

17. Through the means described in Paragraphs 10 through 16, Respondent has represented, directly or indirectly, expressly or by implication, that the prices of covered Medicare Part D drugs at various pharmacies as posted on Plan Finder and on the websites of RxAmerica and other third parties, were accurate estimates of the prices that beneficiaries would pay for those drugs in those pharmacies.

18. In truth and in fact, the prices of covered Medicare Part D prescription drugs in various pharmacies as posted on Plan Finder and on the websites of RxAmerica and other third parties, were not accurate estimates of the prices that consumers would pay for those drugs in those pharmacies. Rather, the prices charged to consumers who purchased their covered Part D drugs from CVS or Walgreens, were significantly higher than the prices posted on those websites.

19. Therefore, the representations set forth in Paragraph 17 of this Complaint were, and are, false or misleading, and the making of such representations constitutes a deceptive act or practice in or affecting commerce in violation of Section 5(a) of the Federal Trade Commission Act, 15 U.S.C. § 45(a).

**THEREFORE**, the Federal Trade Commission this third day of May, 2012, has issued this Complaint against Respondent.

By the Commission.

## Decision and Order

**DECISION AND ORDER**

The Federal Trade Commission having initiated an investigation of certain acts and practices of the Respondent named in the caption hereof, and the Respondent having been furnished thereafter with a copy of a draft Complaint that the Bureau of Consumer Protection proposed to present to the Commission for its consideration and which, if issued by the Commission, would charge the Respondent with violation of the Federal Trade Commission Act, 15 U.S.C. § 41 et seq.;

The Respondent, its attorney, and counsel for the Commission having thereafter executed an Agreement Containing Consent Order (“Consent Agreement”), an admission by the Respondent of all the jurisdictional facts set forth in the aforesaid draft Complaint, a statement that the signing of said Consent Agreement is for settlement purposes only and does not constitute an admission by the Respondent that the law has been violated as alleged in such Complaint, or that the facts as alleged in such Complaint, other than jurisdictional facts, are true, and waives and other provisions as required by the Commission’s Rules; and

The Commission having thereafter considered the matter and having determined that it has reason to believe that the Respondent has violated the said Act, and that a Complaint should issue stating its charges in that respect, and having thereupon accepted the executed Consent Agreement and placed such Consent Agreement on the public record for a period of thirty (30) days for the receipt and consideration of public comments, and having duly considered the comments received from interested persons pursuant to section 2.34 of its Rules, now in further conformity with the procedure described in Commission Rule 2.34, 16 C.F.R. § 2.34, the Commission hereby issues its Complaint, makes the following jurisdictional findings and enters the following Order:

1. Respondent CVS Caremark Corporation is a Delaware corporation with its principal office or place of business at One CVS Drive, Woonsocket, Rhode Island 02895.

## Decision and Order

2. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of the Respondent, and the proceeding is in the public interest.

**ORDER****DEFINITIONS**

For purposes of this order, the following definitions shall apply:

- A. Unless otherwise specified, “Respondent” or “CVSC” means CVS Caremark Corporation, a corporation, its successors and assigns and its officers, agents, representatives, and employees.
- B. “Medicare Part D prescription drug” means a covered Part D drug, as defined in 42 U.S.C. § 1395w-102(e), that can only be obtained by means of a physician’s or other authorized health practitioner’s prescription and that is dispensed under a Medicare Part D prescription drug plan, as defined below.
- C. “Medicare Part D prescription drug plan” means Medicare Part D prescription drug coverage that is offered pursuant to a contract between the Centers for Medicare and Medicaid Services (CMS) and Respondent.
- D. “Medicare Part D” means “qualified prescription drug coverage” administered by the United States federal government pursuant to the Medicare Prescription Drug Improvement and Modernization Act (“MMA”), 42 U.S.C. § 1395w *et seq.*
- E. “Medicare Part D coverage gap” means the gap that occurs after a Medicare Part D beneficiary passes the initial coverage limit at which point the prescription drug plan does not cover any cost of prescription drugs until the beneficiary’s out of pocket costs reach a statutory threshold, pursuant to the MMA, 42 U.S.C. §

## Decision and Order

1395w-102(b). The gap is often referred to as the “donut hole.”

- F. “Plan Finder” means CMS’ online tool (available at [www.medicare.gov/find-a-plan](http://www.medicare.gov/find-a-plan)) used by beneficiaries to compare and select from among available Medicare Part D prescription drug plans in their area.
- G. “Beneficiary” means any Part D eligible individual as defined in 42 U.S.C. § 1395w-151(a)(4).
- H. “Enrollee” means any beneficiary enrolled in the RxAmerica prescription drug plans who was not eligible for a full low-income subsidy as set forth in 42 U.S.C. § 1395w-114(a)(1).
- I. “Commerce” shall mean as defined in Section 4 of the Federal Trade Commission Act, 15 U.S.C. § 44.
- J. The terms “and” and “or” in this order shall be construed conjunctively or disjunctively respectively as necessary, to make the applicable sentence or phrase inclusive rather than exclusive.

**I.**

**IT IS ORDERED** that Respondent, directly or through any corporation, partnership, subsidiary, division, trade name, or other device, and those persons in active concert or participation with them who receive actual notice of this order by personal service or otherwise, in connection with the marketing, advertising, promotion, distribution, offer for sale, sale or administration of Medicare Part D prescription drugs and Medicare Part D prescription drug plans, in or affecting commerce, shall not misrepresent, or assist others in misrepresenting, in any manner, expressly or by implication, the price or cost of Medicare Part D prescription drugs or other prices or costs associated with Medicare Part D prescription drug plans.

## Decision and Order

**II.**

**IT IS FURTHER ORDERED** that Respondent shall pay to the Federal Trade Commission the sum of \$5 million. This payment shall be made in the following manner:

- A. This payment shall be made by wire transfer made payable to the Federal Trade Commission, the payment to be made no later than five (5) days after the date that this order becomes final.
- B. In the event of default on any obligation to make payment under this order, interest, computed pursuant to 28 U.S.C. § 1961(a), shall accrue from the date of default to the date of payment.
- C. All funds paid to the Commission pursuant to this order shall be deposited into an account administered by the Commission or its agents to be used for equitable relief, including but not limited to consumer redress, and any attendant expenses for the administration of such equitable relief. In the event that direct redress to consumers is wholly or partially impracticable or funds remain after the redress is completed, the Commission may apply any remaining funds for such other equitable relief (including consumer information remedies) as it determines to be reasonably related to Respondent's practices alleged in the Complaint. Any funds not used for such equitable relief shall be deposited to the United States Treasury as disgorgement. Respondent shall have no right to challenge the Commission's choice of remedies under this Section. Respondent shall have no right to contest the manner of distribution chosen by the Commission. No portion of any payment under the judgment herein shall be deemed a payment of any fine, penalty, or punitive assessment.
- D. Respondent relinquishes all dominion, control, and title to the funds paid to the fullest extent permitted by law. Respondent shall make no claim to or demand

## Decision and Order

return of the funds, directly or indirectly, through counsel or otherwise.

- E. Respondent agrees that the facts as alleged in the Complaint filed in this action shall be taken as true without further proof in any bankruptcy case or subsequent civil litigation pursued by the Commission to enforce its rights to any payment or money judgment pursuant to this final order, including but not limited to a nondischargeability complaint in any bankruptcy case. Respondent further stipulates and agrees that the facts alleged in the Complaint establish all elements necessary to sustain an action pursuant to, and that this order shall have collateral estoppel effect for purposes of, Section 523(a)(2)(A) of the Bankruptcy Code, 11 U.S.C. § 523(a)(2)(A).
- F. In accordance with 31 U.S.C. § 7701, Respondent is hereby required, unless it has done so already, to furnish to the Commission its taxpayer identifying numbers, which shall be used for the purposes of collecting and reporting on any delinquent amount arising out of Respondent's relationship with the government.
- G. Proceedings instituted under this Section are in addition to, and not in lieu of, any other civil or criminal remedies that may be provided by law, including any other proceedings the Commission may initiate to enforce this order. Nothing in this order shall have precedential or preclusive effect as to any claim or issue asserted by any third party in any other proceeding.

**III.**

**IT IS FURTHER ORDERED** that Respondent shall, no later than thirty (30) days after the date of entry of this order, deliver to the Commission a list in the form of a declaration submitted under penalty of perjury in accordance with 28 U.S.C. § 1746, of (1) all RxAmerica Medicare Part D enrollees who purchased at least one

## Decision and Order

Medicare Part D generic prescription drug from Walgreens or CVS pharmacies, between June 1, 2007 and December 31, 2008.

- A. Respondent shall produce the list electronically in Excel, Access, or SQL and formatted to include (if available) in separate fields for each enrollee the following: (1) First Name, Middle Name, Last Name, Alias-Surname; (2) last known mailing address recorded as Address 1, Address 2, City, State, Zip Code and Country; (3) using a reasonable methodology provided to the Commission the total amount paid by the enrollee for prescription drugs, including but not limited to copayments, coinsurance, deductibles, and Medicare Part D coverage gap expenses; (4) the total amount the enrollee would have paid if his or her generic prescription drug purchases at CVS Pharmacy or Walgreens had been adjudicated at the RxAmerica MAC price applicable for the day the claim adjudicated instead of at the actual adjudicated price; this amount shall include but not be limited to copayments, coinsurance, deductibles, and Medicare Part D coverage gap expenses; (5) the difference between Subsection (3) and Subsection (4) in enrollee cost sharing amounts, including but not limited to copayments, coinsurance, deductibles, and Medicare Part D coverage gap expenses; and (6) if available, the enrollee's last known Telephone Number(s) and Email address(es). The list shall include identifying row header columns or any other identifying codes along with the supporting code key.
- B. In compiling the information required by Section IIIA, Respondent shall conduct a diligent search of records in its possession, custody, or control, including but not limited to computer files, sales records, invoices, complaints and correspondence. Respondent shall produce the list in an encrypted and secure fashion as directed by the Commission. Along with the list, Respondent shall specify the version of the software program used to create the list and Respondent must declare under penalty of perjury to its best knowledge, information and belief, that the list is true, accurate,

## Decision and Order

and complete. If Commission counsel requests further related information in writing, Respondent shall provide it within fourteen (14) days from the date of the request.

**IV.**

**IT IS FURTHER ORDERED** that Respondent shall, for five (5) years after the last date of dissemination of any representation covered by this order, maintain and upon request make available to the Federal Trade Commission for inspection and copying:

- A. All submissions to the Centers for Medicare & Medicaid Services containing representations regarding the price or cost of Medicare Part D prescription drugs or other prices or costs associated with Medicare Part D prescription drug plans;
- B. All representations regarding the price or cost of Medicare Part D prescription drugs or other prices or costs associated with Medicare Part D prescription drug plans;
- C. All Medicare Part D prescription drug plan pricing data compiled in accordance with CMS requirements and internal policies and procedures that was relied upon in disseminating representations set forth in Sections IV(A) and IV(B) regarding the price or cost of Medicare Part D prescription drugs or other prices or costs associated with Medicare Part D prescription drug plans;
- D. All pricing data for adjudicated claims and all complaints and any other communications with consumers or with governmental or consumer protection organizations that contradict, qualify, or call into question the representations set forth in Sections IV(A)-IV(C) of this order, or the basis relied upon for such representations; and
- E. All acknowledgments of receipt of this order obtained pursuant to Section V.

## Decision and Order

**V.**

**IT IS FURTHER ORDERED** that Respondent shall deliver copies of the order as directed below:

- A. Respondent shall deliver a copy of this order to all current and future subsidiaries, current and future principals, officers, directors, and managers, and to all current and future employees, agents, and representatives having responsibilities relating to the subject matter of this order. Respondent shall deliver this order to such current subsidiaries and personnel within thirty (30) days after service of this order, and to such future subsidiaries and personnel within thirty (30) days after respondent acquires the subsidiary or the person assumes such position or responsibilities.
- B. Respondent must secure a signed and dated statement acknowledging receipt of this order, within thirty (30) days of delivery, from all persons receiving a copy of the order pursuant to this Section.

**VI.**

**IT IS FURTHER ORDERED** that Respondent shall notify the Commission at least thirty (30) days prior to any change in the corporation that may affect compliance obligations arising under this order, including, but not limited to: a dissolution, assignment, sale, merger, or other action that would result in the emergence of a successor corporation; the creation or dissolution of a subsidiary, parent, or affiliate that engages in any acts or practices subject to this order; the proposed filing of a bankruptcy petition; or a change in the corporate name or address. *Provided, however,* that, with respect to any proposed change in the corporation(s) about which Respondent learns fewer than thirty (30) days prior to the date such action is to take place, Respondent shall notify the Commission as soon as is practicable after obtaining such knowledge. Unless otherwise directed by a representative of the Commission, all notices required by this Part shall be sent by overnight courier (not the U.S. Postal Service) to the Associate Director of Enforcement, Bureau of Consumer Protection, Federal Trade Commission, 600 Pennsylvania Avenue NW, Washington,

## Decision and Order

D.C. 20580, with the subject line *In the Matter of CVS Caremark Corp., FTC File No. 112 3210, Docket No. C-4357*. *Provided, however*, that in lieu of overnight courier, notices may be sent by first-class mail, but only if an electronic version of any such notice is contemporaneously sent to the Commission at [Debrief@ftc.gov](mailto:Debrief@ftc.gov).

**VII.**

**IT IS FURTHER ORDERED** that Respondent within sixty (60) days after the date of service of this order, shall file with the Commission a true and accurate report, in writing, setting forth in detail the manner and form of its compliance with this order. Within ten (10) days of receipt of written notice from a representative of the Commission, it shall submit an additional true and accurate written report.

**VIII.**

This order will terminate on May 3, 2032, or twenty (20) years from the most recent date that the United States or the Commission files a complaint (with or without an accompanying consent decree) in federal court alleging any violation of the order, whichever comes later; *provided, however*, that the filing of such a complaint will not affect the duration of:

- A. any Section in this order that terminates in fewer than twenty (20) years;
- B. this order's application to any respondent that is not named as a defendant in such complaint; and
- C. this order if such complaint is filed after the order has terminated pursuant to this Section.

*Provided, further*, that if such complaint is dismissed or a federal court rules that Respondent did not violate any provision of the order, and the dismissal or ruling is either not appealed or upheld on appeal, then the order as to Respondent will terminate according to this Section as though the complaint had never been filed, except that the order will not terminate between the date such complaint is filed and the later of the deadline for appealing

## Analysis to Aid Public Comment

such dismissal or ruling and the date such dismissal or ruling is upheld on appeal.

By the Commission, Commissioner Ohlhausen not participating.

**ANALYSIS OF CONSENT ORDER TO AID PUBLIC  
COMMENT**

The Federal Trade Commission has accepted, subject to final approval, a consent agreement from CVS Caremark Corporation (“CVSC”).

The proposed consent order has been placed on the public record for thirty (30) days for receipt of comments by interested persons. Comments received during this period will become part of the public record. After thirty (30) days, the Commission will again review the agreement and the comments received, and will decide whether it should withdraw from the agreement and take appropriate action or make final the agreement’s proposed order.

CVSC is a pharmacy services company that, among other things, markets and sells Medicare drug plans and Medicare Part D drugs. CVSC currently owns multiple subsidiaries, including RxAmerica, that offer Medicare Part D prescription drug plans. Medicare Part D is a prescription drug benefit for consumers with Medicare coverage, primarily seniors and persons with disabilities. To obtain Part D benefits, beneficiaries must enroll in a Medicare drug plan administered by an insurer or other private company approved by the Centers for Medicare & Medicaid Services (“CMS”). Beneficiaries can shop for a Medicare drug plan by looking up plan benefits and drug costs on a provider’s website, by going onto CMS’ Medicare website and using the web-based tool known as Plan Finder, or by visiting other third-party websites where such information is posted. Once enrolled, beneficiaries generally have cost sharing obligations until the total cost of their drugs reaches what is known as the coverage gap or

## Analysis to Aid Public Comment

“donut hole,” at which point the beneficiary pays the full cost of the drugs.

The Commission’s complaint alleges that CVSC, through its subsidiary RxAmerica, violated Section 5 of the FTC Act by misrepresenting that the prices of covered Medicare Part D prescription drugs, as posted on Plan Finder and on the websites of RxAmerica and other third parties from approximately 2007 until the end of 2008, were accurate estimates of the prices that beneficiaries would pay for those drugs at CVS and Walgreens. Rather, the prices charged to RxAmerica beneficiaries who purchased their covered Part D generic drugs from CVS Pharmacy or Walgreens during the relevant time period were significantly higher – in some cases as much as ten times higher – than the prices posted on those websites. As a result of this pricing discrepancy, many RxAmerica beneficiaries using CVS Pharmacy and Walgreens stores ran through their benefits coverage at faster rates than they would have based on the posted prices. Many beneficiaries, therefore, unexpectedly entered the donut hole and became responsible for the total cost of their prescription drugs, with no opportunity to change plans until the next calendar year.

To remedy the violations charged and to prevent CVSC from engaging in the future in practices similar to those alleged in the complaint, the proposed order contains injunctive provisions and a consumer redress program.

Section I of the proposed order prohibits CVSC from misrepresenting the price or cost of Medicare Part D prescription drugs, or other prices or costs associated with Medicare Part D prescription drug plans.

Section II of the proposed order requires CVSC, within five (5) days of the date the order becomes final, to pay the Commission \$5 million for consumer redress and administrative costs. This provision specifies that the Commission may apply any remaining funds after redress is completed for such other equitable relief as it determines to be reasonably related to CVSC’s practices alleged in the complaint. Any remaining funds not used for such equitable relief shall be deposited into the United States Treasury as disgorgement. Section III of the

## Analysis to Aid Public Comment

proposed consent order requires CVSC to produce certain information necessary for the Commission to administer consumer redress.

Sections IV through VIII of the proposed order are reporting and compliance provisions. Section IV requires CVSC to retain documents relating to its compliance with the order for a five (5) year period. Section V requires dissemination of the order now and in the future to all current and future subsidiaries, current and future principals, officers, directors, and managers, and to persons with responsibilities relating to the subject matter of the order. It also requires CVSC to secure a signed and dated statement acknowledging receipt of the order from all persons who receive a copy of the order pursuant to Section V. Section VI ensures notification to the Commission of changes in corporate status. Section VII mandates that CVSC submit a compliance report to the Commission within sixty (60) days, and periodically thereafter as requested. Section VIII is a provision “sunsetting” the order after twenty (20) years, with certain exceptions.

The purpose of this analysis is to facilitate public comment on the proposed order. It is not intended to constitute an official interpretation of the complaint or the proposed order, or to modify the proposed order’s terms in any way.

## Complaint

## IN THE MATTER OF

**KEY HYUNDAI OF MANCHESTER, LLC  
AND  
HYUNDAI OF MILFORD, LLC**

CONSENT ORDER, ETC. IN REGARD TO ALLEGED VIOLATIONS OF SECTION 5 OF THE FEDERAL TRADE COMMISSION ACT, THE TRUTH IN LENDING ACT, THE CONSUMER LEASING ACT, REGULATION Z, AND REGULATION M

*Docket No. C-4358; File No. 112 3204  
Complaint, May 4, 2012 – Decision, May 4, 2012*

This consent order addresses Key Hyundai of Manchester, LLC, and Hyundai of Milford, LLC's advertising of the purchase, financing, and leasing of their motor vehicles. The complaint alleges that respondents have represented that when a consumer trades in a used vehicle in order to purchase another vehicle, respondents will pay off the balance of the loan on the trade-in vehicle such that the consumer will have no remaining obligation for any amount of that loan, but do not. In addition, the complaint alleges violations of the Truth in Lending Act and Regulation Z for failing to disclose certain costs and terms when advertising credit and a violation of the Consumer Leasing Act and Regulation M for failing to disclose the costs and terms of certain leases offered. The consent order prohibits the respondents from misrepresenting that they will pay the remaining loan balance on a consumer's trade-in vehicle such that the consumer will have no obligation for any amount of that loan or any other material fact relating to the financing or leasing of a motor vehicle.

*Participants*

For the *Commission*: *Gregory A. Ashe* and *Robin Thurston*.

For the *Respondents*: *Robert C. Byerts*, *Bass Sox Mercer*.

**COMPLAINT**

The Federal Trade Commission, having reason to believe that Key Hyundai of Manchester, LLC, and Hyundai of Milford, LLC, corporations ("Respondents"), have violated provisions of the Federal Trade Commission Act ("FTC Act"), the Truth in Lending Act ("TILA"), and the Consumer Leasing Act ("CLA"), and it appearing to the Commission that this proceeding is in the public interest, alleges:

## Complaint

1. Respondent Key Hyundai of Manchester, LLC, (“Manchester”) is a Connecticut limited liability corporation with its principal office or place of business at 21 Hartford Turnpike, Vernon, CT, 06066. Manchester offers automobiles for sale and lease.

2. Respondent Hyundai of Milford, LLC, (“Milford”) is a Connecticut limited liability corporation with its principal office or place of business at 566 Bridgeport Ave., Milford, CT, 06460. Milford offers automobiles for sale or lease.

3. Respondents advertise their automobiles for sale or lease jointly. Both Respondents are responsible for disseminating or causing to be disseminated the advertisements referenced herein.

4. The acts or practices of Respondents alleged in this complaint have been in or affecting commerce, as “commerce” is defined in Section 4 of the FTC Act, 15 U.S.C. § 44.

5. Since at least March 2010, Respondents have disseminated or have caused to be disseminated advertisements promoting the purchase, financing, and leasing of their automobiles.

6. Respondents’ advertisements include, but are not necessarily limited to, advertisements posted on the website YouTube.com, copies of which are attached as Exhibits A through C. These advertisements include the following statements:

- a. “I want your trade no matter how much you owe or what you’re driving. In fact I’ll pay off your trade when you upgrade to a nicer, newer vehicle.” (Exhibit A (DVD containing 5/27/11 capture of You Tube advertisement “Pay off Your Trade Sales Event at Key Hyundai of Manchester CT and Key Hyundai of Milford CT” at 0:08-0:11)).
- b. “We’ll pay off your lease or loan no matter how much you owe.” (*Id.* at 0:25-0:30).
- c. “[W]e will pay off your trade no matter what you owe.” (Exhibit B (Print-out of text accompanying You

## Complaint

Tube advertisement “Pay off Your Trade Sales Event at Key Hyundai of Manchester CT and Key Hyundai of Milford CT”).

- d. “I’ll pay off your loan no matter what you owe.” (Exhibit C (DVD containing 7/14/11 capture of You Tube advertisement “Key Hyundai Drive Lucky March Sales” at 1:08-1:11)).

7. Respondents also have disseminated or have caused to be disseminated advertisements promoting credit sales and other extensions of closed-end credit in consumer credit transactions, as the terms “advertisement,” “closed-end credit,” “credit sale,” and “consumer credit” are defined in Section 226.2 of Regulation Z, 12 C.F.R. § 226.2, as amended, on the website YouTube.com, copies of which are attached as Exhibits B and D. These advertisements include the following statements:

- a. “We will get you into the car of your dreams, like a 2010 Hyundai Sonata with 0% financing for 72 months. For more information, visit us on the web at <http://keycars.com>.” (Exhibit B).
- b. “**2011 Hyundai Sonata \$199 Per Mo**” (Exhibit D (DVD containing 7/14/11 capture of You Tube advertisement “Key Hyundai April Sales Promotion” at 0:32-0:35)).
- c. “**2011 Hyundai Elantra \$149 Per Mo**” (*Id.* at 0:36-0:39).

No additional information regarding the cost or terms of financing a vehicle appears on this website.

8. Respondents also have disseminated or have caused to be disseminated at least one advertisement promoting consumer leases, as the terms “advertisement” and “consumer lease” are defined in Section 213.2 of Regulation M, 12 C.F.R. § 213.2, as amended, on their website, a copy of which is attached as Exhibit E (printout of 5/16/11 capture of web advertisement at 1). This advertisement includes the following statement:

## Complaint

**“Lease for only \$159 / MO\*”**

No additional information regarding the cost or terms of leasing a vehicle appears in this advertisement.

**VIOLATION OF THE FEDERAL TRADE COMMISSION  
ACT****Misrepresentation of Financing Terms**

9. Through the means described in Paragraph 6, Respondents have represented expressly or by implication that, when a consumer trades in a used vehicle in order to purchase another vehicle, Respondents will pay off the balance of the loan on the trade-in vehicle such that the consumer will have no remaining obligation for any amount of that loan.

10. In truth and in fact, in many instances, when a consumer trades in a used vehicle with a loan balance that exceeds the vehicle's value (*i.e.* the trade-in has negative equity) in order to purchase another vehicle, Respondents will not pay off the balance of the loan on the trade-in vehicle such that the consumer will have no remaining obligation for any amount of that loan. Instead, Respondents include some or all of the negative equity in the loan for the newly purchased vehicle.

11. Therefore, the representation set forth in Paragraph 9 of this Complaint was, and is, false or misleading, in violation of Section 5(a) of the FTC Act, 15 U.S.C. § 45(a).

**VIOLATIONS OF THE TRUTH IN LENDING ACT AND  
REGULATION Z**

12. Under Section 144 of the TILA and Section 226.24(d) of Regulation Z, advertisements promoting closed-end credit in consumer credit transactions are required to make certain disclosures if they state any of several terms, such as the monthly payment (“TILA triggering terms”). In addition, the rate of the finance charge must be stated as an “annual percentage rate” using that term or the abbreviation “APR.” 15 U.S.C. § 1664; 12 C.F.R. § 226.24(c).

## Complaint

13. Respondents' advertisements promoting closed-end credit, including but not necessarily limited to those described in Paragraph 7, are subject to the requirements of the TILA and Regulation Z.

**Failure to Disclose or Disclose Clearly and Conspicuously  
Required Credit Information**

14. Respondents' advertisements promoting closed-end credit, including but not necessarily limited to those described in Paragraph 7, have included TILA triggering terms, but have failed to disclose or disclose clearly and conspicuously, additional terms required by the TILA and Regulation Z, including one or more of the following:

- a. The amount or percentage of the downpayment.
- b. The terms of repayment, which reflect the repayment obligations over the full term of the loan, including any balloon payment.
- c. The "annual percentage rate," using that term, and, if the rate may be increased after consummation, that fact.

15. Therefore, the practices set forth in Paragraph 14 of this Complaint have violated Section 144 of the TILA, 15 U.S.C. § 1664, and Section 226.24(d) of Regulation Z, 12 C.F.R. § 226.24(d), as amended.

**Failure to State Rate of Finance Charge as Annual Percentage  
Rate**

16. Respondents' advertisements promoting closed-end credit, including but not necessarily limited to those described in Paragraph 7, have stated a rate of finance charge without stating that rate as an "annual percentage rate" using that term or the abbreviation "APR."

17. Therefore, the practices set forth in Paragraph 16 of this Complaint have violated Section 144 of the TILA, 15 U.S.C. §

## Complaint

1664, and Section 226.24(c) of Regulation Z, 12 C.F.R. § 226.24(c).

**VIOLATION OF THE CONSUMER LEASING ACT AND  
REGULATION M**

18. Under Section 184 of the CLA and Section 213.7 of Regulation M, advertisements promoting consumer leases are required to make certain disclosures if they state any of several terms, such as the amount of any payment (“CLA triggering terms”). 15 U.S.C. § 1667c, 12 C.F.R. § 213.7.

19. Respondents’ advertisements promoting consumer leases, including but not necessarily limited to those described in Paragraph 8, are subject to the requirements of the CLA and Regulation M.

**Failure to Disclose or Disclose Clearly and Conspicuously  
Required Lease Information**

20. Respondents’ advertisements promoting consumer leases, including but not necessarily limited to those described in Paragraph 8, have included CLA triggering terms, but have failed to disclose or disclose clearly and conspicuously additional terms required by the CLA and Regulation M, including one or more of the following:

- a. The total amount of any initial payments required on or before consummation of the lease or delivery of the property, whichever is later.
- b. Whether or not a security deposit is required.
- c. The number, amount, and timing of scheduled payments.
- d. With respect to a lease in which the liability of the consumer at the end of the lease term is based on the anticipated residual value of the property, that an extra charge may be imposed at the end of the lease term.

## Decision and Order

21. Therefore, the practices set forth in Paragraph 20 of this Complaint have violated Section 184 of the CLA, 15 U.S.C. § 1667c, and Section 213.7 of Regulation M, 12 C.F.R. § 213.7.

22. The acts and practices of Respondents as alleged in this complaint constitute deceptive acts or practices in or affecting commerce in violation of Section 5(a) of the FTC Act, violations of the Truth in Lending Act and Regulation Z, and violations of the Consumer Leasing Act and Regulation M.

**THEREFORE**, the Federal Trade Commission, this fourth day of May, 2012, has issued this complaint against Respondents.

By the Commission, Commissioner Ohlhausen not participating.

**DECISION AND ORDER**

The Federal Trade Commission having initiated an investigation of certain acts and practices of Respondents named in the caption hereof, and Respondents having been furnished thereafter with a copy of a draft complaint which the Bureau of Consumer Protection proposed to present to the Commission for its consideration and which, if issued by the Commission, would charge Respondents with violation of the Federal Trade Commission Act ("FTC Act"), the Truth in Lending Act ("TILA"), and the Consumer Leasing Act ("CLA"); and

Respondents, their attorney, and counsel for the Commission having thereafter executed an agreement containing a consent order ("consent agreement"), an admission by Respondents of all the jurisdictional facts set forth in the aforesaid draft complaint, a statement that the signing of the agreement is for settlement purposes only and does not constitute an admission by Respondents that the law has been violated as alleged in such complaint, or that the facts as alleged in such complaint, other

## Decision and Order

than jurisdictional facts, are true, and waivers and other provisions as required by the Commission's Rules; and

The Commission having thereafter considered the matter and having determined that it had reason to believe that Respondents have violated the FTC Act, the TILA, and the CLA, and that a complaint should issue stating its charges in that respect, and having thereupon accepted the executed consent agreement and placed such consent agreement on the public record for a period of thirty (30) days for the receipt and consideration of public comments, and having duly considered the comments received from interested persons pursuant to section 2.34 of its Rules, now in further conformity with the procedure prescribed in § 2.34 of its Rules, the Commission hereby issues its complaint, makes the following jurisdictional findings, and enters the following order:

1. Respondent Key Hyundai of Manchester, LLC, is a Connecticut limited liability corporation with its principal office or place of business at 21 Hartford Turnpike, Vernon, Connecticut, 06066.
2. Respondent Hyundai of Milford, LLC, is a Connecticut limited liability corporation with its principal office or place of business at 566 Bridgeport Ave., Milford, Connecticut, 06460.
3. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of the Respondents, and the proceeding is in the public interest.

**ORDER****DEFINITIONS**

For the purposes of this order, the following definitions shall apply:

- A. "Advertisement" shall mean a commercial message in any medium that directly or indirectly promotes a consumer transaction.

## Decision and Order

- B. “Clearly and conspicuously” shall mean as follows:
1. In a print advertisement, the disclosure shall be in a type size, location, and in print that contrasts with the background against which it appears, sufficient for an ordinary consumer to notice, read, and comprehend it.
  2. In an electronic medium, an audio disclosure shall be delivered in a volume and cadence sufficient for an ordinary consumer to hear and comprehend it. A video disclosure shall be of a size and shade and appear on the screen for a duration and in a location sufficient for an ordinary consumer to read and comprehend it.
  3. In a television or video advertisement, an audio disclosure shall be delivered in a volume and cadence sufficient for an ordinary consumer to hear and comprehend it. A video disclosure shall be of a size and shade, and appear on the screen for a duration, and in a location, sufficient for an ordinary consumer to read and comprehend it.
  4. In a radio advertisement, the disclosure shall be delivered in a volume and cadence sufficient for an ordinary consumer to hear and comprehend it.
  5. In all advertisements, the disclosure shall be in understandable language and syntax. Nothing contrary to, inconsistent with, or in mitigation of the disclosure shall be used in any advertisement or promotion.
- C. “Consumer credit” shall mean credit offered or extended to a consumer primarily for personal, family, or household purposes.
- D. “Consumer lease” shall have the same meaning as that term is defined in Section 213.2 of Regulation M, 12 C.F.R. § 213.2, as amended.

## Decision and Order

- E. “Material” shall mean likely to affect a person’s choice of, or conduct regarding, goods or services.
- F. “Motor vehicle” shall mean
1. any self-propelled vehicle designed for transporting persons or property on a street, highway, or other road;
  2. recreational boats and marine equipment;
  3. motorcycles;
  4. motor homes, recreational vehicle trailers, and slide-in campers; and
  5. other vehicles that are titled and sold through dealers.

**I.**

**IT IS HEREBY ORDERED** that Respondents, directly or through any corporation, subsidiary, division, or other device, in connection with any advertisement to promote, directly or indirectly, the provision of consumer credit, in or affecting commerce, shall not, in any manner, expressly or by implication:

- A. Misrepresent that when a consumer trades in a used motor vehicle (“trade-in vehicle”) in order to purchase another motor vehicle (“newly purchased vehicle”), Respondents will pay any remaining loan balance on the trade-in vehicle such that the consumer will have no remaining obligation for any amount of that loan; or
- B. Misrepresent any material fact regarding the cost and terms of financing or leasing any newly purchased vehicle.

**II.**

**IT IS FURTHER ORDERED** that Respondents, directly or through any corporation, subsidiary, division, or other device, in

## Decision and Order

connection with an advertisement to promote, directly or indirectly, any extension of consumer credit in or affecting commerce, shall not in any manner, expressly or by implication:

- A. State the amount or percentage of any down payment, the number of payments or period of repayment, the amount of any payment, or the amount of any finance charge, without disclosing clearly and conspicuously all of the following terms:
  - 1. The amount or percentage of the down payment;
  - 2. The terms of repayment; and
  - 3. The annual percentage rate, using the term “annual percentage rate” or the abbreviation “APR.” If the annual percentage rate may be increased after consummation of the credit transaction, that fact must also be disclosed; or
- B. State a rate of finance charge without stating the rate as an “annual percentage rate” or the abbreviation “APR,” using that term.
- C. Fail to comply in any respect with Regulation Z, 12 C.F.R. § 226, as amended, and the Truth in Lending Act, as amended, 15 U.S.C. §§ 1601-1667.

**III.**

**IT IS FURTHER ORDERED** that Respondents, directly or through any corporation, subsidiary, division, or other device, in connection with an advertisement to promote, directly or indirectly, any consumer lease, in or affecting commerce, shall not, in any manner, expressly or by implication:

- A. State the amount of any payment or that any or no initial payment is required at lease signing or delivery, if delivery occurs after consummation, without disclosing clearly and conspicuously the following terms:
  - 1. The total amount due at lease signing or delivery;

## Decision and Order

2. Whether or not a security deposit is required;
  3. The number, amounts, and timing of scheduled payments; and
  4. That an extra charge may be imposed at the end of the lease term in a lease in which the liability of the consumer at the end of the lease term is based on the anticipated residual value of the vehicle; or
- B. Fail to comply in any respect with Regulation M, 12 C.F.R. § 213, as amended, and the Consumer Leasing Act, 15 U.S.C. §§ 1667-1667f, as amended.

**IV.**

**IT IS FURTHER ORDERED** that Respondents and their successors and assigns shall, for five (5) years after the last date of dissemination of any representation covered by this order, maintain and upon request make available to the Federal Trade Commission for inspection and copying:

- A. All advertisements and promotional materials containing the representation;
- B. All materials that were relied upon in disseminating the representation; and
- C. All tests, reports, studies, surveys, demonstrations, or other evidence in their possession or control that contradict, qualify, or call into question the representation, or the basis relied upon for the representation, including complaints and other communications with consumers or with governmental or consumer protection organizations.

**V.**

**IT IS FURTHER ORDERED** that Respondents and their successors and assigns shall deliver a copy of this order to all current and future principals, officers, directors, and managers, and to all current and future employees, agents, and representatives having responsibilities with respect to the subject

## Decision and Order

matter of this order, and shall secure from each such person a signed and dated statement acknowledging receipt of the order. Respondents shall deliver this order to current personnel within thirty (30) days after the date of service of this order, and to future personnel within thirty (30) days after the person assumes such position or responsibilities.

**VI.**

**IT IS FURTHER ORDERED** that Respondents and their successors and assigns shall notify the Commission at least thirty (30) days prior to any change in the corporation(s) that may affect compliance obligations arising under this order, including but not limited to a dissolution, assignment, sale, merger, or other action that would result in the emergence of a successor corporation; the creation or dissolution of a subsidiary, parent, or affiliate that engages in any acts or practices subject to this order; the proposed filing of a bankruptcy petition; or a change in the corporate name or address. *Provided, however,* that, with respect to any proposed change in the corporation about which Respondents learn less than thirty (30) days prior to the date such action is to take place, Respondents shall notify the Commission as soon as is practicable after obtaining such knowledge. Unless otherwise directed by a representative of the Commission in writing, all notices required by this Part shall be emailed to [Debrief@ftc.gov](mailto:Debrief@ftc.gov) or sent by overnight courier (not U.S. Postal Service) to: Associate Director for Enforcement, Bureau of Consumer Protection, Federal Trade Commission, 600 Pennsylvania Avenue, NW, Washington, DC, 20580. The subject line must begin: FTC v. Key Hyundai.

**VII.**

**IT IS FURTHER ORDERED** that Respondents and their successors and assigns, within sixty (60) days after the date of service of this order, shall file with the Commission a true and accurate report, in writing, setting forth in detail the manner and form of their own compliance with this order. Within ten (10) days of receipt of written notice from a representative of the Commission, they shall submit additional true and accurate written reports.

## Analysis to Aid Public Comment

**VIII.**

This order will terminate on May 4, 2032, or twenty (20) years from the most recent date that the United States or the Federal Trade Commission files a complaint (with or without an accompanying consent decree) in federal court alleging any violation of the order, whichever comes later; *provided, however*, that the filing of such a complaint will not affect the duration of:

- A. Any Part in this order that terminates in less than twenty (20) years;
- B. This order's application to any respondent that is not named as a defendant in such complaint;
- C. This order if such complaint is filed after the order has terminated pursuant to this Part.

*Provided, further*, that if such complaint is dismissed or a federal court rules that Respondents did not violate any provision of the order, and the dismissal or ruling is either not appealed or upheld on appeal, then the order will terminate according to this Part as though the complaint had never been filed, except that the order will not terminate between the date such complaint is filed and the later of the deadline for appealing such dismissal or ruling and the date such dismissal or ruling is upheld on appeal.

By the Commission, Commissioner Ohlhausen not participating.

**ANALYSIS OF CONSENT ORDER TO AID PUBLIC  
COMMENT**

The Federal Trade Commission ("FTC") has accepted, subject to final approval, an agreement containing a consent order from Key Hyundai of Manchester, LLC, and Hyundai of Milford, LLC. The proposed consent order has been placed on the public record

## Analysis to Aid Public Comment

for thirty (30) days for receipt of comments by interested persons. Comments received during this period will become part of the public record. After thirty (30) days, the FTC will again review the agreement and the comments received, and will decide whether it should withdraw from the agreement and take appropriate action or make final the agreement's proposed order.

The respondents are motor vehicle dealers. The matter involves their advertising of the purchase, financing, and leasing of their motor vehicles. According to the FTC complaint, respondents have represented that when a consumer trades in a used vehicle in order to purchase another vehicle, respondents will pay off the balance of the loan on the trade-in vehicle such that the consumer will have no remaining obligation for any amount of that loan. The complaint alleges that in fact, when a consumer trades in a used vehicle with negative equity (*i.e.* the loan balance on the vehicle exceeds the vehicle's value) in order to purchase another vehicle, respondents do not pay off the balance of the loan on the trade-in vehicle such that the consumer will have no remaining obligation for any amount of that loan. Instead, the respondents include the amount of the negative equity in the loan for the newly purchased vehicle. The complaint alleges therefore that the representation is false or misleading in violation of Section 5 of the FTC Act. In addition, the complaint alleges violations of the Truth in Lending Act ("TILA") and Regulation Z for failing to disclose certain costs and terms when advertising credit. The complaint also alleges a violation of the Consumer Leasing Act ("CLA") and Regulation M for failing to disclose the costs and terms of certain leases offered.

The proposed order is designed to prevent the respondent from engaging in similar deceptive practices in the future. Part I of the proposed order prohibits the respondents from misrepresenting that they will pay the remaining loan balance on a consumer's trade-in vehicle such that the consumer will have no obligation for any amount of that loan. It also prohibits misrepresenting any other material fact relating to the financing or leasing of a motor vehicle.

Part II of the proposed order addresses the TILA allegations. It requires clear and conspicuous TILA/Regulation Z disclosures when advertising any of the relevant triggering terms with regard

## Analysis to Aid Public Comment

to issuing consumer credit. It also requires that if any finance charge is advertised, the rate be stated as an “annual percentage rate” using that term or the abbreviation “APR.” In addition, Part II prohibits any other violation of TILA or Regulation Z.

Part III of the proposed order addresses the CLA allegation. It requires that the respondents clearly and conspicuously make all of the disclosures required by CLA and Regulation M if it states relevant triggering terms, including the monthly lease payment. In addition, Part III prohibits any other violation of CLA and Regulation M.

Part IV of the proposed order requires respondent to keep copies of relevant advertisements and materials substantiating claims made in the advertisements. Part V requires that respondent provide copies of the order to certain of its personnel. Part VI requires notification of the Commission regarding changes in corporate structure that might affect compliance obligations under the order. Part VII requires the respondent to file compliance reports with the Commission. Finally, Part VIII is a provision “sunsetting” the order after twenty (20) years, with certain exceptions.

The purpose of this analysis is to aid public comment on the proposed order. It is not intended to constitute an official interpretation of the complaint or proposed order, or to modify in any way the proposed order’s terms.