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

Re: Used Car Regulatory Review, 16 CFR Part 455, Project No. P087604
79 Fed. Reg. 70804 (Nov. 28, 2014)

Dear Sir or Madam:

I appreciate the opportunity to comment on the FTC's SNPRM on the Used Car Rule. I have been practicing law for over 40 years, having spent from 1974 – 1977 as a Staff Attorney at the Center for Auto Safety in Washington, D.C. For 12 years, I served on the Board of Directors of the Maryland Consumer Rights Coalition (www.marylandconsumers.org) and for 6 years, I served on the Board of Directors of the National Association of Consumer Advocates (www.consumeradvocates.org). For the last 32+ years, my law practice has been primarily devoted to representing consumers who have had problems with auto dealers and auto finance companies. As a result, I have the seen both the good and the missed opportunities of the Used Car Rule.

As a preliminary matter, though I offer comments on the FTC's SNPRM in the hope of helping strengthen the Used Car Rule, I believe it is a serious mistake to follow the SNPRM Vehicle History Approach now offered by the agency. Vehicle History Reports, on balance, probably do more harm than good. Partly as a result of ubiquitous advertising that makes consumers feel all they need is a CARFAX report before they buy a car, there is a real danger that Vehicle History Reports will cause consumers to drop their guard and not take other prudent measures, such as having a used vehicle inspected by an independent mechanic. Moreover, in the real world, many dealers use Vehicle History Reports in a cynical way, to advantage themselves and disadvantage consumers. These dealers do this, ironically, by promising transparency, assuring the customer they will provide a CARFAX as if they have nothing to hide but then withholding it until after all the deal papers have been signed, when virtually all consumers will feel it is too late to back out of a deal or even renegotiate the price. In the event a vehicle develops a problem, these dealers use a customer's signature on a Vehicle History Report as a "gotcha," transforming a supposed consumer tool into a headache. Rather than focusing consumer attention on requesting a copy of the dealer's Vehicle History Report, the FTC should educate consumers about the need to have a used vehicle inspected by an independent mechanic prior to purchase.

I. NMVTIS

To make the Used Car Rule relevant in the 21st century, the FTC has both an opportunity and a responsibility to take advantage of the recent stunning developments in technology. At significant cost to the federal government, the National Motor Vehicle Title Identification System ("NMVTIS") collects information about motor vehicles that is critical to every used car buyer. NMVTIS also facilitates easy and inexpensive access for both dealers and consumers. By going to www.vehiclehistory.gov and paying as little as .25 cents, it is possible to obtain reliable information on five key indicators of the quality and condition of any used vehicle: (i) date of last title and name of state titling agency, (ii) brand history applied by the state including "junk," "title" and "flood," (iii) odometer reading, (iv) total loss history, and (v) salvage history.[1]

It seems inconceivable that the FTC would not insist, via the Used Car Rule, that dealers provide such basic, essential and inexpensive information to prospective buyers as a matter of course as part of or as a supplement to the Buyer's Guide. Autocheck, CARFAX and other vehicle history providers are not now required to include this information (other than in California) and, indeed, do not have equal access to the underlying data; complete information on the critical items covered by NMVTIS is available only through NMVTIS. It is cold comfort to the consumer unwittingly stuck with a salvage, total loss vehicle to be told that vehicle history reports pick up most salvage titles. In today's world, there is no excuse for not assuring that such minimal but essential information is disseminated – in real time at the point of purchase – to every car buyer. I strongly urge the FTC to incorporate the NMVTIS data in the Buyer's Guide or mandate that every seller of a used vehicle provide the prospective purchaser with a NMVTIS report for the vehicle being sold, prior to the sale.[2]

In the SNPRM, the FTC criticizes NMVTIS at 79 FR 70806 because its reports may not provide accurate information with respect to some vehicles. **If the FTC believes that it cannot be a party to disseminating reports that fail to provide accurate information as to some vehicles, it will have to withdraw any proposal that facilitates disseminating Vehicle History Reports to consumers.** Not only do Autocheck and CARFAX acknowledge material gaps in their reports in the disclaimers that accompany every Vehicle History Report they issue, but the literature is replete with complaints from auto industry participants that Vehicle History Reports are badly flawed. Problems stem from a variety of well-known causes: delay between the time of an adverse event and the time it is reported in a form that reaches the providers of Vehicle History Reports, the time it takes Vehicle History providers to make the event available to its subscribers, the failure or refusal of all states and all insurance companies or others with relevant information to make information available to Vehicle History Report providers, etc. *See*, for example, the articles attached as Exhibits A, B and C and the CARFAX email response to a consumer whose Vehicle History Report failed to disclose large amounts of front-end

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[1] *See* http://www.experian.com/automotive/automotive-autocheck-nmvtis.htmlnoting, noting that

[2] Currently, though Vehicle History providers like Autocheck and CARFAX have access to NMVTIS, they have refused to include those results in their reports. The FTC can and should require Vehicle History Report providers to include NMVTIS data. This would be part of a minimum "standard setting" exercise described below in Part IV of these comments.

damage, attached as Exhibit D. Additional information on the significant problems with commercially available Vehicle History Reports is found in the anti-trust lawsuit filed by hundreds of auto dealers against CARFAX[3] and in a class action lawsuit brought against CARFAX in Ohio.[4]

II. CONSUMERS WILL BE MISLED IF THE FTC ELEVATES VEHICLE HISTORY REPORTS AS PROPOSED.

The greatest danger in the FTC's Vehicle History Approach is the misimpression it would convey to the car buying public. By highlight the importance of asking for a Vehicle History Report where one is available and recommending one be obtained, the FTC would inevitably be placing its stamp of approval on these reports. But as seen above, these reports are incomplete, misleading and badly flawed. If provided to car buyers, these reports convey an illusory, false sense of security. They lull customers into believing they need nothing else.

As the FTC, state Attorneys Generals and consumer advocates have known for quite some time, the single best thing a consumer can do is have a used vehicle inspected by an independent mechanic before deciding whether to buy it (or negotiate the terms of purchase). It is deeply disappointing that the agency does not make this basic point the centerpiece of its Buyer's Guide revision. I urge the FTC to reconsider.

III. TWO ESSENTIAL ADDITIONS TO THE VEHICLE HISTORY APPROACH

I urge the FTC not to implement the Vehicle History Approach (and give my recommended approach in the next section). But if it does, it is **essential** that the agency make it clear on the Buyer's Guide that Vehicle History Reports may not include all accidents and other adverse events. If it fails to do so, it will become a partner with private companies in misleading the public.

To address this urgent concern, I ask the FTC to amend the language in its SNPRM by adding the words in brackets:

> IF THE DEALER CHECKED THIS BOX, THE DEALER HAS A VEHICLE HISTORY REPORT AND WILL PROVIDE A [FREE] COPY TO YOU UPON REQUEST. The Vehicle History Report may contain information from title records, salvage yards, and insurance companies. It may also include salvage, repair, accident and prior ownership history. **[Be cautious, however, as Vehicle History Reports do not contain information about all accidents or other adverse events and may not be up-to-date.]**

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[3] *Maxson Auto Enterprises, Inc. v. CarFax, Inc.*, Case 13-CV-02680 (AJN) (USDC S.D. N.Y. 2013)

[4] Edward B. West v. CarFax, Inc., Court of Appeals, 11th Appellate District, Trumbell County, Ohio, Court of Appeals No. 2008-T-0045, Court of Common Pleas No. 2004 CV 1898.

If, as proposed, the FTC intends to recommend that buyers obtain a Vehicle History Report, it also should recommend that the buyer have the vehicle inspected by an independent mechanic. To do so, it need only add a few words to its proposed sentence [new language is in brackets]

> Regardless of whether the box is checked, the FTC recommends that you obtain a Vehicle History Report [and have the vehicle inspected by an independent mechanic.]

IV. THE IOWA ATTORNEY GENERALS' APPROACH AVOIDS ONE PROBLEM WITH VEHICLE HISTORY REPORTS, BUT NEEDS TWEAKING; TOGETHER WITH THE A.B. 1215 APPROACH AND ADVICE TO SEEK INSPECTION BY AN INDEPENDENT MECHANIC, CONSUMERS WILL BE BETTER PREPARED TO BUY A USED VEHICLE

Of all the approaches mentioned in SNPRM, the least objectionable is that suggested by the Iowa Attorney General on behalf of twenty-two colleagues. It avoids endorsing Vehicle History Reports. Unfortunately, it does little to convey how serious a problem exists if a box is checked indicating the presence one of the multiple brands that would be identified on the Buyer's Guide under that Iowa AG approach. Without further explanation of the significance of a check mark in the box provided, consumers may very well be puzzled or perhaps even confused into believing the check mark is something positive, that the car in question has a good status as a "brand." Large swaths of the American think of companies Coca-Cola or Walmart when they see the word "brand" and have positive connotations associated with a "brand." I therefore recommend that the FTC assure sufficient language is added to the Buyer's Guide to alert the prospective buyer to the negative consequences of a checkmark in the Iowa AG box. One way would be to add the words: **CAUTION: THIS CHECKMARK MEANS THE VEHICLE HAS EXPERIENCED SIGNIFICANT PROBLEMS.** Another would be to add: **IF THIS BOX IS CHECKED, BE SURE THE VEHICLE IS INSPECTED BY A MECHANIC OF YOUR CHOOSING BEFORE PURCHASE.**

When the NMVTIS information advocated in the AB 1215 approach is combined with the tweaked Iowa A.G. approach, along with cautioning consumers to have used vehicles inspected by independent mechanics before purchase, the FTC will materially assist consumers in making good decisions.

V. THE FTC MUST CONFRONT THE POTENTIAL FOR DEALERS TO USE VEHICLE HISTORY REPORTS TO COMMIT FRAUD

Some car dealers have turned Vehicle History Reports into an instrument of fraud. In Maryland, Leon Davis went to a high-end used car dealer. He asked whether the Mercedes he was about to pay more than $40,000 for had been in an accident. He was told no, the car had not been in an accident. To buttress that statement, the dealer provided Mr. Davis with a CARFAX report that had no report of accident damage. What Mr. Davis did not know was that when the dealer bought the car at a Manheim auto auction, the seller announced the vehicle had unibody damage. This announcement enabled the dealer to obtain the car for a lower price that reflected its damage history. What Mr. Davis did not know, but what the dealer did know, was that

CARFAX did not record and disclose on its Vehicle History Reports any announcements at the Manheim auction of unibody damage. This enabled the dealer to maximize its profit on the vehicle and stick Mr. Davis with damaged goods that had not been properly repaired.

Dealers have superior knowledge of the auto industry and are wise about the differences in different Vehicle History Reports. This dealer knew that he could present his customer with a "clean" CARFAX report (and presumably knew, too, that Autocheck did report the unibody damage announcement, something Mr. Davis learned only when he tried to sell his problem-laden car at CarMax, which provided him with an Autocheck report disclosing the announced unibody damage).

If the FTC decides to go forward with the proposal in its SNPRM, it should require dealers to provide customers with copies of **all** Vehicle History Reports it has obtained. This will somewhat mitigate a dealer's ability to pick-and-choose among the least-bad reports it has available.

This, however, does **not** solve the problem. Dealers will have incentives to purchase Vehicle History Reports only from providers whose reporting of adverse information is weakest. If the FTC adopts its SNPRM proposal, it is inevitable that new Vehicle History providers will be born, companies that will cynically find reasons to exclude important information – if challenged -- on grounds such as "could not confirm major damage to right front end" or "report of salvage history was muddled." These new, opportunistic companies will be able to undercut premium prices charged by Vehicle History Report providers such as Autocheck and CARFAX. They will easily be able to make up in volume the profits they otherwise might miss if they do not charge prices comparable to those of the first-tier providers.[5]

VI. THE FTC MUST ESTABLISH MINIMUM STANDARDS FOR VEHICLE HISTORY REPORTS

Given these concerns about the potential for fraud or abuse, if the FTC proceeds with its Vehicle History approach, it is essential that the agency establish minimum standards for a qualifying or an acceptable Vehicle History Report. An acceptable Vehicle History Report would include:

1. all NMVTIS data
2. odometer readings
3. open safety recalls
4. accident data
5. disclosure of all prior non-consumer vehicle use (registration as a rental car, police car, taxicab, driver's education, racing, commercial fleet use)

[5] These concerns only point out the built-in advantage of NMVTIS. Its information cannot be compromised, diluted or sugar-coated.

In addition, each provider of an acceptable Vehicle History Report should be required to disclose on a website up-to-date information that accurately summarizes (i) the sources of information provided on the Vehicle History Report, (ii) the sources of information to which the provider does not have access, and (iii) an accurate explanation of the average time it takes the provider to obtain and republish information from key sources after the adverse event occurs. This will enable the marketplace to sort out the best providers of Vehicle History Reports while allowing competition and different price points. By requiring minimum standards, the FTC assures that there will be no race-to-the-bottom by companies seeking to make quick profits by making shoddy Vehicle History Reports available to dealers who do not want their customers to know the adverse history of a vehicle.

VII. THE FTC MUST CLARIFY WHAT IT MEANS TO "OBTAIN" A VEHICLE HISTORY REPORT AND PLAN FOR EFFECTIVE ENFORCEMENT

The SNPRM proposes that dealers check a box to disclose whether they have obtained a Vehicle History Report. The SNPRM also reflects the agency's concern about enforcing this requirement (Question 1p in Part VIII).

This is not as simple as it may first appear. Dealer have many ways of acquiring the information on a Vehicle History Report without actually purchasing one directly from a company like Autocheck or CARFAX. There are at least three areas of concern.

First, dealers buy millions of cars every year at auto auctions. It is typical for an auto auction to make Vehicle History Reports available to dealers who want to bid on vehicles going through the auction lanes. The dealer does not necessarily obtain a copy of the Vehicle History Report but has access to its information. I do not believe the FTC or law enforcement personnel could readily determine if a given dealer "obtained" a Vehicle History Report acquired through an auto auction.

Second, with advances in technology in the 21st century, most Vehicle History Reports are obtained via Dealer Management Solution ("DMS") software companies. These include such large companies as Reynolds & Reynolds, ADP, DealerTrack, vAuto, Dominion Dealer Solutions, ProMax, etc. Again, it is unclear whether the FTC or law enforcement personnel could readily determine if a given dealer "obtained" a Vehicle History Report acquired via a DMS company or other software provider.

Third, dealers may have agents or brokers purchase vehicles for their inventory. The agent or broker may have pulled a Vehicle History Report but not provide a copy to the dealer.

If the FTC goes forward with its proposed treatment of Vehicle History Reports, it needs to lay down clear rules which define what it means to "obtain" a Vehicle History Report. As previously stated, it must establish minimum standards for those reports to prevent cherry-picking. And it needs a plan for enforcement that takes into consideration the varied ways that dealers acquire information from Vehicle History Reports.

VIII. SAFETY RECALLS

The FTC should prohibit dealers from selling used vehicles with open safety recalls. By definition, a car with an open safety recall is unsafe to drive. It is unmerchantable. It exposes the driver and others on the road to a real risk of serious injury or death. If the FTC allows unsafe vehicles to be sold, it would abdicate its responsibility to act in the public interest.

IX. IMPROVING THE DEFINITION OF "AS IS"

The SNPRM's proposed definition of "As Is" is a step in the right direction. Unfortunately it still tends to mislead car buyers into believing they are without a remedy if the dealer has engaged in some conduct that, under applicable state law, gives rise to a remedy. In virtually all states, a dealer who induces a customer to purchase a used vehicle by fraud can be held accountable even in the face of an "as is" clause. The FTC's definition of "As-Is" would be improved if it read as follows:

AS IS – NO DEALER WARRANTY
DEALER DENIES ANY RESPONSIBILITY FOR ANY REPAIRS NEEDED. But you may have legal rights and remedies for dealer misconduct.

I submit this revised definition does not mislead consumers; instead, it accurately conveys both the dealer's denial of repair responsibility while informing consumers there may be ways to challenge dealer misconduct despite the dealer's denial of responsibility.

Thank you for this opportunity to comment.

Sincerely,

Mark H. Steinbach
Of Counsel

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