



## DEPARTMENT OF JUSTICE

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March 17, 2015

Federal Trade Commission  
Office of the Secretary  
600 Pennsylvania Avenue NW  
Suite CC-5610 (Annex A)  
Washington DC, 20580

Re: Used Car Rule Regulatory Review, 16 CFR part 455, Project No. P087604

Dear Secretary Donald S. Clark:

This comment is filed by the Oregon Attorney General and is joined by the Attorneys General of Arkansas, Connecticut, Hawaii<sup>1</sup>, Illinois, Iowa, Maine, Maryland, Massachusetts, Missouri, Mississippi, New York, Rhode Island, Utah and Vermont.

### Introduction

The State Attorneys General appreciate the opportunity to provide additional comments regarding the Federal Trade Commission's ("FTC") Used Motor Vehicle Trade Regulation Rule ("Used Car Rule"). Each of our offices is one of the primary state law enforcement officials who handle consumer complaints about used motor vehicle purchases and enforce laws designed to protect used motor vehicle purchasers. We long have considered the FTC as our partner in enforcing laws and regulations that protect America's consumers and applaud your successful history in adopting and enforcing the Used Car Rule.

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<sup>1</sup> Of the states listed, only Hawaii is not represented by its Attorney General. Hawaii is represented by its Office of Consumer Protection, an agency which is not part of the state Attorney General's Office, but which is statutorily authorized to undertake consumer protection functions, including legal representation of the State of Hawaii. For simplicity purposes, the entire group will be referred to as the "Attorneys General," and such designation, as it includes Hawaii, refers to the Executive Director of the State of Hawaii Office of Consumer Protection.

We are pleased that the current Supplemental Notice of Proposed Rulemaking (SNPRM) relating to the Used Car Rule:

- 1) Gives consumers the ability to see a vehicle history report that a dealer already has obtained;
- 2) Amends the explanation of what an “as is” sale means; and
- 3) Moves important information, such as the Non-Dealer Warranty boxes and the information about vehicle history reports, to the front of the Buyers Guide.

However, echoing the comments previously filed by certain Attorneys General, we again encourage the FTC to update the Used Car Rule to highlight whether a vehicle has a branded title. This change would make a significant difference in the lives of American consumers regarding one of the most expensive and important purchases they will ever make. We also ask that the FTC use the Rule to emphasize to consumers the importance of determining a vehicle’s recall status.

### Background

The used vehicle market continues to rapidly change. Data, such as recall information, vehicle history information, and reliability rankings, is more readily available to consumers and dealers than when the FTC first requested comments as part of its periodic review of the Used Car Rule. Although consumers now have more resources available to them when purchasing a used vehicle – particularly online – consumers are not always aware of these resources. For example, many consumers are unaware of available resources such as the National Motor Vehicle Title Information System’s (“NMVTIS”) website at [www.vehiclehistory.gov](http://www.vehiclehistory.gov) and the National Highway Traffic and Safety Administration’s (“NHTSA”) vehicle recall website at [www.safercar.gov](http://www.safercar.gov). There also is a potential gap between more financially-stable or tech-savvy consumers who bring their smartphones with them to a dealership and less sophisticated consumers or those that may be more vulnerable due to factors such as age, income, and limited English language proficiency.

Regardless, dealers will always have more information and professional expertise than the consumers buying vehicles from them. Recognizing that dealers are in a much stronger position than consumers to know the history of a vehicle, courts have accordingly imposed a greater duty on dealers to make accurate disclosures.<sup>2</sup>

Despite their knowledge, some dealers do not disclose certain vehicle history information, particularly whether the vehicle has a branded title. Perhaps even more troubling is that some dealers give misinformation to consumers to “explain” a title brand. For example, we are aware of instances of dealers allegedly telling consumers that they have inspected a vehicle and there is absolutely nothing wrong with it, but, they nonetheless are required to sell it as “salvaged” because the bumper was replaced. There are other instances of dealers selling vehicles to consumers as “parts only” but still providing the keys to drive the vehicle off the lot

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<sup>2</sup> See *Automobile Fraud*, 3d ed. 2007 and Supp., sections 2.6.2.1 and 4.8, Carolyn Carter, Jonathan Sheldon and John Van Alst, National Consumer Law Center, 2010.

and worse, getting the consumer “financed” (the dealer sells, or tries to sell, the retail installment contract).

While we do not believe that reputable dealers should be unduly burdened in order to account for the disreputable dealers (or salespeople), there are certain key pieces of information that are vital to consumers in making an informed purchasing decision. This information is not difficult for dealers to obtain and pass along to consumers. One such key piece of information is whether the vehicle had at some time been substantially damaged by collision or flood, as reflected in the vehicle’s past title history. This information is material to a consumer making an informed purchasing decision.

In comments filed by a group of Attorneys General with the FTC in 2008 and in supplemental comments filed by Attorneys General in 2009 and 2013, we urged the FTC to bring the Used Car Rule to its highest potential in protecting more consumers. As noted in these comments, we believe it is material to consumers whether the vehicle has been substantially damaged by collision or flood, as reflected in the vehicle’s past title history. Nothing over the past seven years has changed our view on this matter. We again urge the FTC to take this opportunity to amend the Used Car Rule to inform used motor vehicle buyers of this most vital information.

The Buyers Guide is posted on each vehicle on a dealer’s lot. Prospective buyers can see and read the information at any time and do not have to rely on the verbal representations – or misrepresentations – made by dealers. We urge the FTC to require a disclosure if a vehicle has a branded title and that such disclosure be prominently displayed on the Buyers Guide, as this is material information a consumer needs to know before making a purchase decision.

#### Proposed No Dealer Warranty Statement Will Confuse Consumers and Sellers

The FTC has made some significant and important changes to the no dealer warranty (“as is”) language on the Buyers Guide. The current Buyers Guide states in bold letters “AS IS – NO WARRANTY” and “WARRANTY.” The proposal to clarify that the boxes are for “NO DEALER WARRANTY” and “DEALER WARRANTY” represents a marked improvement over the current form, since other non-dealer warranties may apply. In addition, it is an improvement to disclose the existence of those third party warranties on the Buyers Guide. We wholeheartedly support the Buyers Guide disclosing whether there is a dealer warranty and whether any other warranties may also cover the vehicle.

However, we still have concerns about the Buyer’s Guide statement regarding the meaning and significance of a vehicle sold without a dealer warranty. The only meaning of selling a vehicle “as is” is that it is being sold without a warranty, not that the dealer is insulated from all liability. A dealer who sells a used vehicle without a dealer warranty still faces liability for concealing material defects or misrepresenting material facts. In short, an “as is” disclaimer or a disclaimer that the dealer is selling with “no dealer warranty” has no legal bearing on a dealer’s responsibility to disclose material defects and truthfully represent material facts.

Accordingly, the statement “THE DEALER WILL NOT PAY FOR ANY REPAIRS” wrongly conflates the lack of a warranty with no responsibility for repairs. While it is correct to state that the dealer is not providing a warranty and the dealer does not *agree* to pay for repairs, the dealer should pay for repairs – and can be ordered by a court to do so – if the dealer misrepresents the vehicle’s condition, conceals problems with the vehicle or its history, or engages in other misconduct.<sup>3</sup>

We remain particularly concerned about the proposed language because we have encountered numerous instances of dealers misusing the Buyer’s Guide to defend themselves against claims of deception or concealment concerning a vehicle’s negative history, defects, or problems the dealers know about, or reasonably should have known about, and which they had a duty to accurately disclose to consumers. In response to consumer complaints to our offices, dealers have contended that, because they sold the vehicle “as is,” the consumer has no legal right to complain about concealment, misrepresentation, or anything related to the sale.

Although the dealers’ reliance on the Buyer’s Guide “as is” disclaimer as a shield against liability is without legal basis, most consumers do not know the fallacy of a dealer’s (or the dealer’s lawyer’s) assertion that simply because the consumer received a Buyer’s Guide, the consumer has given up all recourse. Further, sometimes small claims court judges unfamiliar with state Unfair and Deceptive Acts and Practices (“UDAP”) laws also fall prey to this subterfuge and rule in favor of dealers in consumer protection and fraud claims brought by consumers. While we understand that it is common parlance in the industry to use the term “as is” – particularly since that term has been on the Buyer’s Guide since it was promulgated in 1984 – it would be helpful for both dealers and consumers if this portion of the Buyer’s Guide focused only on whether a dealer is offering a warranty. To this end, we are concerned that the proposed Buyer’s Guide explanation about the lack of a dealer warranty gives credence to the erroneous legal positions.

We strongly encourage the FTC to adopt one of the following formulations of the “no dealer warranty” statement. Any of these formulations makes clear to both consumers and dealers that a “no dealer warranty” disclosure is not tantamount to a consumer release of liability for misrepresentation, concealment of material facts, or other dealer misconduct.

NO DEALER WARRANTY – THE DEALER IS NOT PROVIDING A WARRANTY. The dealer does not agree to fix problems with the vehicle after you buy it. However, you may have legal rights if the dealer concealed problems with the vehicle or its history. (“IA AG ‘As Is’ Statement”)

NO DEALER WARRANTY – THE DEALER IS NOT PROVIDING A WARRANTY. The dealer does not agree to pay for the vehicle’s repairs. But

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<sup>3</sup> See e.g., *Hanson-Suminski v. Rohrman Midwest Motors, Inc.*, 325 Ill. Dec. 461, 898 N.E.2d 194 (App. Ct. 1st Dist. 2008); *Miller v. William Chevrolet/Geo Inc.*, 326 Ill. App. 3d 642 (2001); *Tolz v. Continental DuPage Acura*, 236 Ill. App. 3d 891 (1992); *Hinds v. Paul’s Auto Werkstatt, Inc.*, 107 Or. App. 63, 810 P.2d 874 (1991); *Raye v. Fred Oakley Motors Inc.*, 646 SW2d 288 (Tex App 1983); *Gent v. Collinsville Volkswagen Inc.*, 116 Ill App3d 496, 72 Ill Dec 62 (1983).

you may have legal rights and remedies if the dealer misrepresents the vehicle's condition or engages in other misconduct. (Modified "NC AG 'As Is' Statement")

NO DEALER WARRANTY – THE DEALER IS NOT PROVIDING A WARRANTY. The dealer does not accept responsibility to make or to pay for any repairs to this vehicle after you buy it regardless of any oral statements about the vehicle. But you may have other legal rights and remedies for dealer misconduct. (Modified FTC "As Is" Statement)

The focus of the disclosure should be on the fact that the dealer is not providing a warranty, rather than the potentially confusing or misleading statements that the dealer is selling a vehicle "as is" or that it "will not pay for any repairs."

### Non-Dealer Warranty Boxes

We agree with the FTC's decision to move the Non-Dealer Warranty boxes to the front of the Buyers Guide. This change makes the information more noticeable and readily available to consumers. Additionally, we believe that the FTC could improve the format of the front side of the Buyer's Guide by making all of the boxes the same size. Whether a third party is offering a warranty is no less important to a consumer than if a dealer is offering a warranty, but the proposed format suggests just that. Although the current Buyers Guide has big check boxes for "AS IS –NO WARRANTY" AND "WARRANTY," the Non-Dealer Warranty box is not of equivalent size and prominence. Given that the proposed modifications to the Buyers Guide would provide additional material information to consumers, that information should be equally as visible.

The FTC should also consider that the proposed Buyers Guide may potentially conflate two distinct document types by giving the appearance that a service contract is a type of Non-Dealer Warranty. However, a service contract is not a warranty and the placement of the box could encourage dealers' use of terms such as "extended warranty," which can confuse consumers as to whether the vehicle actually has a warranty or has coverage under a service contract. We encourage the FTC to return to a format where the service contract box is flush with the other boxes and the notice about "Non-Dealer Warranties" is clearly separated from that of a service contract.

As to substantive language, we agree with Center for Auto Safety's ("CAS") (3) at 3 comments that the sentence "[t]he manufacturer's original warranty has not expired on some components of the vehicle" is more accurate than "[t]he manufacturer's original warranty has not expired on the vehicle." Most, if not all, manufacturers no longer provide full 3 year/30,000 mile warranties. Rather, many provide limited warranties of different durations for different vehicle components. For example, the 2014 Ford Explorer new vehicle limited warranty includes the following coverage: 3 year/36,000 mile bumper to bumper, 5 year/60,000 mile powertrain, 5 year/60,000 mile safety restraint system, 5 year/unlimited mile corrosion (perforation only) and 5 year/100,000 mile power stroke diesel engine. For a new 2014 Cadillac, the limited warranty includes: 4 year/50,000 mile bumper to bumper, and 6 year/70,000 mile transferable powertrain.

For a new 2014 Honda Civic, the limited warranty includes: 3 year/36,000 mile basic coverage, 5 year/60,000 mile powertrain, 15 year/150,000 mile seat belts, and 5 year/no mile limit rust perforation. For a new 2014 Kia, the limited warranty includes: 5 year/60,000 mile basic coverage, 10 year/100,000 mile powertrain, and 5 year/100,000 mile anti-perforation warranty.<sup>4</sup> Given the variety among manufacturers in both breadth and duration of coverage, we urge the FTC to adopt the CAS's proposed language.

### Vehicle History and Title Information

As the Attorneys General have noted in previous comments, we believe that the greatest concern to used vehicle buyers is vehicle history. We applaud the FTC for proposing to add a box to the Buyers Guide that the dealer will check if it has obtained a vehicle history report and to require dealers to provide the report(s) to consumers upon request. We believe that the FTC should require a dealer to check this box if the dealer has obtained a vehicle history report, and not leave it to the dealers' discretion. [Question 1(a)]. Additionally, we believe that the FTC should enhance the disclosure of material information by adding a box that must be checked if the dealer *knows* that the vehicle has a branded title.

Under state and federal law, motor vehicle dealers that know of negative title information have a legal obligation to disclose it to consumers. Failing to disclose this material information violates every state UDAP statute. In addition, misrepresenting or failing to disclose negative title information to used vehicle buyers is unquestionably deceptive or unfair pursuant to the FTC Act.

The addition of a "branded" title checkbox would impose a minimal burden on dealers. In fact, the checkbox would provide an easy means for dealers to make already-required disclosures and it would be in a simple, uniform format that would be easily understandable to consumers. Consequently, we believe that any cost-benefit analysis clearly weighs in favor of providing this information.

The wholesale and retail value of a vehicle is greatly impacted by the prior salvage or damage history. Dealers are well aware of the importance of this information, which is why sellers at dealer auctions are required to announce title brands prior to sale. Failure to announce the vehicle title history at an auction usually provides for automatic rescission of the purchase.

Whether a vehicle has a title brand is information that factors heavily into a dealer's decision whether to make a purchase and how much to pay; likewise, this information is material to a consumer making a purchasing decision. A consumer contemplating a vehicle purchase is entitled to, and should receive, the same information regarding the vehicle's title as the dealer. Even from a dealer perspective, greater disclosure will help even the playing field with other dealers – no dealer who wishes to lawfully compete in the marketplace benefits from a market

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<sup>4</sup> This information, taken from Ford, Cadillac, Honda and Kia's websites on January 20, 2015, is used only for illustrative purposes and is not intended as a definitive statement on the actual coverage being provided by these manufacturers.

where dealers are not required to disclose known negative title brands or vehicle history information prior to sale.

We encourage the FTC to require dealers that have obtained a vehicle history report to provide it at no charge to a potential purchaser upon request. Further, we encourage the FTC to require that dealers obtain a NMVTIS report, which at least provides a basic minimum amount of material information.<sup>5</sup> NMVTIS data is offered to commercial vehicle history providers so that it may be included in their existing products.

We acknowledge that there are limitations to vehicle history reports,<sup>6</sup> including a report utilizing NMVTIS data;<sup>7</sup> however, these reports are the best means by which to determine whether a vehicle has a branded title. While dealers and consumers should not rely solely on a vehicle history report (even a report that includes NMVTIS data), it does provide critical information to a consumer making a purchasing decision.

Dealers should not be able to skirt the obligation to provide a potential purchaser a vehicle history report by discarding a report prior to the time the vehicle is sold. [Question 1(o)]. Additionally, if a dealer has obtained more than one vehicle history report, we encourage the FTC to require that all obtained vehicle history reports be provided to the consumer. [Questions 1(k)-(l)]. Although this may seem redundant, it is important because two vehicle history reports may show different information, depending on when each provider last updated the information in its report. Dealers always should produce the most recent report from each vehicle history report provider/vendor. Further, we discourage the FTC from potentially limiting the requirement that dealers provide the reports to consumers to only those reports containing negative information, as there is the potential for some abuse of that discretion; consumers will be best served by receiving all applicable vehicle reports obtained by the dealers and then evaluating the contents themselves. [Questions 1(t)-(u)]. We also encourage the FTC to place the burden on the dealer to offer the report, rather than on the consumer to request the report.

We believe that dealers should be allowed to offer to produce vehicle reports electronically, as this can be a cheaper and easier format. [Question 1(m)]. However, the choice to receive a vehicle history report electronically should be made by the consumer, not by the dealer. Not all consumers have access (or immediate access) to a computer or other device or want electronic access to the information. If vehicle history reports are provided electronically,

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<sup>5</sup> NMVTIS is a U.S. Department of Justice program that is intended to serve as a reliable source of title and brand history for motor vehicles. Entities such as junk yards, salvage yards, and insurance carriers are required to report specific information to NMVTIS; a failure to report is punishable by civil penalties. See [www.vehiclehistory.gov/nmvtix\\_faq.html](http://www.vehiclehistory.gov/nmvtix_faq.html).

<sup>6</sup> Information is not always readily available in a vehicle history report. Further, different vendors report different information. Unfortunately, it is still not uncommon for it to take six months to a year for an accident to be reported on a vehicle history report, which is often too late to be of any value to a consumer. The States all have received consumer complaints where a consumer discovers that a vehicle had prior damage from an undisclosed collision only when the consumer goes to purchase another vehicle, resulting in a much lower trade-in value and the realization (s)he overpaid for the vehicle.

<sup>7</sup> Not all states report to NMVTIS.

they should be provided in a format which affords the consumer the opportunity to save the report.

Deception or concealment of material fact in connection with past used vehicle history is misconduct that results in great harm to used car buyers. Consumers want to know the vehicle's history in order to determine: (1) whether they want to purchase the vehicle and (2) how much they are willing to spend to purchase this particular vehicle. A vehicle history report is a good tool for a consumer to use in order to make these decisions. A consumer will be able to weigh both the positive and negative information available about a vehicle, including mileage, odometer roll back, repair history, accident history, and the number of and type of previous owner(s). We view positive information to be any information that would prompt a consumer to pay more for this particular vehicle than the retail value of another vehicle of the similar year/make/model; correspondingly, negative information is any information that would prompt a consumer to pay less for this particular vehicle than the retail value of another vehicle of the similar year/make/model. [Question 1(t)-(u)].

In light of our view that (1) a dealer should provide – at no charge – vehicle history information already in the dealers' possession, (2) a dealer should obtain a NMVTIS report, (3) the Buyer's Guide should have a check box for a branded title, and (4) there should be greater emphasis on the importance of recall repairs, we suggest the following changes to the front of the Buyer's Guide:

Adding:

- BRANDED TITLE. See the NMVTIS report (which may be included in a Vehicle History Report) for information about the brand.

Amending the Vehicle History Report statement to:

- IF THE DEALER CHECKED THIS BOX, THE DEALER HAS A VEHICLE HISTORY REPORT AND WILL PROVIDE A COPY TO YOU AT NO CHARGE. The Vehicle History Report may include salvage, repair, accident and prior ownership history.

Regardless of whether the box is checked, the FTC recommends that you obtain a Vehicle History Report.

**YOUR VEHICLE MAY BE SUBJECT TO A RECALL AND REPAIRS MAY NOT HAVE BEEN PERFORMED.** For information on how to obtain a Vehicle History Report, how to search for safety recalls, and other topics, visit the Federal Trade Commission at [ftc.gov/usedcars](http://ftc.gov/usedcars). You will need the vehicle identification number (VIN) shown above to make the best use of the resources on this site.

The proposed statement that directs consumers to the [ftc.gov/usedcars](http://ftc.gov/usedcars) website is helpful for consumers, though we are concerned about its potential usefulness for those consumers

without internet access while viewing a vehicle. We applaud that the statement points them to a website where they can get additional information about vehicle history reports, how to search for safety recalls, and other topics; though, as stated above, we encourage the FTC to include a stronger statement about the importance of a vehicle's recall status and the advisability of a consumer obtaining this information from dealers or other resources. As consumers start to see this website publicized, hopefully they will utilize it as a resource both before and during the buying process.

### Conclusion

We commend the FTC for many of its proposed edits to the Buyers Guide. However, we encourage the FTC to make additional changes so as to more effectively inform consumers as to what they are in fact purchasing.

In summary, we ask that the FTC:

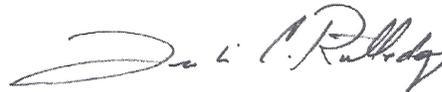
- 1) Keep the check box for if a dealer has obtained a vehicle history report and further require that dealers provide to consumers, at no charge, the most recent report from each vehicle history report provider/vendor;
- 2) Require dealers to check a box if the dealer knows that the vehicle has or will have a branded title and obtain a NMVTIS report or a vehicle history report utilizing NMVTIS data;
- 3) Amend the explanation of what a "no dealer warranty" sale means;
- 4) Keep the non-dealer warranty boxes and the information about vehicle history reports on the front side of the Buyers Guide;
- 5) Improve the formatting so that all of the boxes are the same size and equally visible;
- 6) Add a warning about the possibility of an open recall on the vehicle; and
- 7) Keep separate the disclosures for warranties and service contracts.

Thank you very much for your consideration of our comments.

Sincerely,



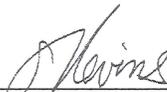
Ellen Rosenblum  
Oregon Attorney General



Leslie Rutledge  
Arkansas Attorney General



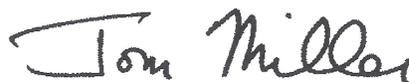
George Jepsen  
Connecticut Attorney General



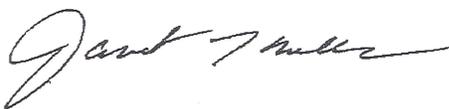
Stephen H. Levins  
Executive Director  
State of Hawaii, Office of Consumer Protection



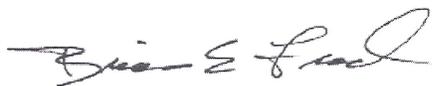
Lisa Madigan  
Illinois Attorney General



Thomas J. Miller  
Iowa Attorney General



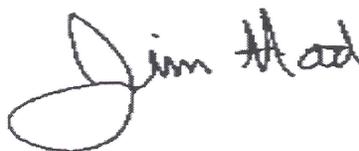
Janet T. Mills  
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Rhode Island Attorney General

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Sean Reyes  
Utah Attorney General

Handwritten signature of William H. Sorrell in cursive script.

William H. Sorrell  
Vermont Attorney General