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Legal & Regulatory Group

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SUBMITTED ELECTRONICALLY

Federal Trade Commission
Office of the Secretary
600 Pennsylvania Avenue, N.W.,
Suite CC-5610
Washington, D.C. 20580
Electronic address: https://ftcpublic.commentworks.com/ftc/usedcarrulesnprm/

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

The National Automobile Dealers Association ("NADA") submits the following comments to the Federal Trade Commission ("FTC" or the "Commission") regarding its Supplemental Notice of Proposed Rulemaking ("SNPRM") in connection with its Used Motor Vehicle Trade Regulation Rule ("Used Car Rule" or "Rule") and the Rule's Buyers Guide ("Buyers Guide").

I. Background

In 2008, the FTC issued a notice as part of a periodic regulatory review of the Rule seeking comment on "a range of issues" but focusing on two specific questions: "whether a bilingual Buyers Guide would be useful or practicable," and whether changes should be made "to the Buyer's Guide [to] reflect the various types of [certified and other] warranties potentially available today."[1]

NADA submitted comments which addressed the two questions specifically posed by the Commission and the proposed amendments to the Guide, as well as several issues raised by other commenters.

After a thorough and lengthy review and analysis of the issues and several rounds of comments received, the FTC concluded that the Rule continues to benefit consumers and will be retained. In December, 2012 the FTC issued an NPRM setting forth proposed changes to the FTC's Used

[1] See http://www.ftc.gov/opa/2008/07/ucr.shtm.

Car Rule. The NPRM contained several changes, including the addition of a statement to the Buyers Guide advising consumers about the availability of vehicle history reports and directing consumers to an FTC web site for more information about those reports. In large part, the NPRM represented changes to the Buyers Guide intended to allow the Guide to more accurately serve its function as a dealer used car warranty disclosure document.

On November 28, 2014, however, the Commission issued the SNPRM which proposes substantial additional modifications to the proposal made in the NPRM "to address concerns raised by commenters," touching on issues unrelated to a dealer's used car warranty or warranty practices. These changes are largely unnecessary, unhelpful, and outside the scope of the Used Car Rule.

Among the proposed changes in the SNPRM, our comments will focus on three:

(1) The Addition of a "Vehicle History Checkbox." The first is the SNPRM proposal to amend the Used Car Rule to require that "dealers who have obtained a vehicle history report [("VHR")] on an individual vehicle indicate on the Buyers Guide that they have obtained such a report," and an additional requirement that the dealer that has "obtained" a VHR must "provide a copy of the report to consumers who request one."[2] This includes the addition of a new box ("Vehicle History Checkbox") on the Buyers Guide that dealers will be required to mark to indicate that they have obtained a vehicle history report, along with extensive disclosures about VHRs and other topics.[3] The proposed Vehicle History Checkbox states:

☐ *IF THE DEALER CHECKED THIS BOX, THE DEALER HAS A VEHICLE HISTORY REPORT AND WILL PROVIDE A 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.*

Regardless of whether the box is checked, the FTC recommends that you obtain a Vehicle History Report. 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. You will need the vehicle identification number (VIN) shown above to make the best use of the resources on this site.

(2) Revised "As-Is" Language. The second is the proposed modification of the Buyers Guide statement that describes the meaning of an ''As Is'' sale, with the stated intention of "clarify[ing] that ''As Is'' means that a dealer is offering the vehicle for sale without a warranty, *i.e.*, without any undertaking or promise by the dealer to be responsible for post-sale repairs to the vehicle." The proposed SNPRM "As-Is" language states:

☐ *AS IS—NO DEALER WARRANTY THE DEALER WILL NOT PAY FOR ANY REPAIRS. The dealer does not accept responsibility to make or to pay for any repairs*

[2] 79 Fed. Reg. 70804-05.
[3] The proposed amended Rule would not require dealers to obtain vehicle history reports and would not mandate a specific type of vehicle history report or designate a specific provider of the reports.

> *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.*
>
> ("SNRPRM 'As Is' Statement").

(3) Additional Spanish Language Disclosure. The third is a proposal to include a statement, in Spanish, on the face of the English language Buyers Guide advising Spanish-speaking consumers to ask for the Buyers Guide in Spanish if they cannot read it in English. The SNPRM proposal would require the following language to be placed on every Buyers Guide:

''*Si usted no puede leer este documento en ingles, pidale al concesionario una copia en español''*

Which translates to "If you are unable to read this document in English, ask your salesperson for a copy in Spanish."

The SNPRM containing these changes sought answers to over 30 questions (most with multiple subparts)[4] related to the proposals, seeking any available studies, data, surveys, and proposed language for review. This was issued with a brief 60-day deadline for comment, with comments originally due January 28, 2015. NADA was concerned that, after a six-plus year process, these proposed changes were materially different from those previously proposed and were being given a brief, 60-day period for public comment. NADA therefore sought a 90-day extension of time to respond. The Commission subsequently granted the request for extension of time for comment, with a 45 day extension and a revised deadline for comments of March 17, 2015. We appreciate the Commission's willingness to extend the time period for comment, but note that in submitting these comments, more time is needed to understand and analyze the effects of the proposed changes in the SNPRM.

II. The Vehicle History Checkbox Proposal Is Unnecessary, Outside the Scope of the Commission's Authority, and Would Lead to *Less* Information for Consumers.

NADA has serious concerns with each of the three proposed changes outlined above, but the proposed change with perhaps the broadest potential negative effect for consumers and dealers alike is the addition of the Vehicle History Checkbox, which is not only unnecessary and likely to be counterproductive, but is also outside the scope of the Commission's Magnuson-Moss Act ("Mag-Moss") statutory mandate.

a) The FTC Does Not Have Authority to Require the Vehicle History Checkbox on the Buyers Guide.

As outlined in greater detail in the memorandum at Exhibit A, the "Vehicle History Checkbox" proposal is outside of the Commission's authority under the Rule because is unrelated to "used car warranties and warranty practices." In brief, the statutory authority for, and the directive to

[4] *See* Exhibit B, which contains brief NADA responses to many of these questions.

create the Used Car Rule and the Buyers Guide stems from the Magnuson-Moss ("Mag-Moss") Act[5] which, among other things, directed the FTC to issue "a rulemaking proceeding dealing with *warranties and warranty practices* in connection with the sale of used motor vehicles," and "in addition [the FTC] may require disclosure that a used motor vehicle is sold without any warranty and specify the form and content of such disclosure." Moreover, the Commission has never before wavered from its position that the authority for the Used Car Rule is Mag-Moss. The Commission's SNPRM citation to Dodd-Frank and the FTC Act as the basis of the authority to revise the Buyers Guide in this case is inappropriate because the SNPRM is seeking to materially revise and add to the Used Car Rule. Its authority comes from Mag-Moss. As a result, (a) the Commission has exceeded its authority under Mag-Moss to issue rules related to used car dealer warranty and warranty practices because the "Vehicle History Checkbox" proposal is unrelated to "used car warranties and warranty practices;"[6] (b) the Dodd-Frank provision allowing for "streamlined" procedures to be applied as to certain dealers for FTC Section 5 rulemakings does not apply because this is not properly a Section 5 rulemaking, and; (b) the FTC must follow the appropriate Mag-Moss rulemaking procedures if it seeks to make the changes outlined in the SNPRM.

As a result, the Vehicle History Checkbox and the accompanying disclosure language should be removed. The remainder of our comment regarding the Vehicle History Checkbox is presented in the alternative.

Even if the Commission had authority to promulgate the Vehicle History Checkbox, and applied the appropriate Mag-Moss rulemaking procedures, serious concerns about the Vehicle History Checkbox proposal remain. To be clear, NADA and franchised dealers fully support the notion of making VHRs available to consumers who wish to have such information. Indeed, as discussed herein, the overwhelming majority of franchised dealers currently provide such reports today, and pay for those reports themselves. It is the context in which these reports are provided, and the level of information available to consumers about those reports that are of critical importance. The fundamental problem with the Vehicle History Checkbox is that is promotes potentially flawed and severely limited information to a prominence in consumers' minds that it does not deserve, and to a position in the contractual relationship between the consumer and the dealer that is completely improper. The result is that if adopted, consumers could be misled, and the added potential liability and burden it imposes on dealers will make them far less likely to obtain such reports at all.

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[5] 15 USC 2309(b) *Warranties and warranty practices involved in sale of used motor vehicles.* The Commission shall initiate within one year after January 4, 1975, a rulemaking proceeding dealing with warranties and warranty practices in connection with the sale of used motor vehicles; and, to the extent necessary to supplement the protections offered the consumer by this chapter, shall prescribe rules dealing with such warranties and practices. In prescribing rules under this subsection, the Commission may exercise any authority it may have under this chapter, or other law, and in addition it may require disclosure that a used motor vehicle is sold without any warranty and specify the form and content of such disclosure.

[6] The same is true for the remainder of the disclosure language within the Vehicle History Checkbox, none of which has anything to do with used car dealer warranties or warranty practices.

b) The Vehicle History Checkbox Would Make the Buyers Guide Less Accurate

As repeatedly noted in our previous comments as well as in numerous guidance and other documents issued by the Commission itself[7], the Buyers Guide is a used car dealer warranty disclosure document, and it works because it effectively discloses information that is accurate and complete. It is accurate and complete because it contains only information that the dealer knows, has control over, and thus gives rise to obligations to which the dealer can be contractually bound. The Buyers Guide is useful to consumers because they can rely on it, and to the extent that a dealer-provided used vehicle warranty is important to a consumer, the Buyers Guide allows consumers to shop among different dealers based on the warranty they provide.

While consumers may find some utility in the information provided in VHRs, and dealers provide VHRs to their customers to meet the demand from consumers for this information, it is important to understand that VHRs are unreliable and limited. This is not an indictment of the VHR providers, as they do not originate the data in the VHRs. They simply obtain, compile, and make the reports available. The reports are limited because they are only as good as the information available to the VHR providers and only as timely as the data providers can send the information and the VHR providers can incorporate and disseminate the information. Mistakes happen, delays happen, and vast amounts of relevant information never make it into the databases.

The limitations of the reports are widely known and accepted. Indeed, both of the two main Retail VHR providers themselves expressly disclaim any responsibility for the accuracy, reliability or completeness of the data and that they are free from errors or omissions.[8] In comments to the Commission, a number of commenters have criticized the quality and accuracy of Retail VHRs.[9] It is odd indeed to criticize dealers on the one hand for voluntarily providing this information to consumers, and then to turn around and demand that they provide this same information to consumers on the Buyers Guide.

Even when technically accurate, VHRs also contain information that could be misleading to consumers and is inappropriate for inclusion in a contract between the dealer and the consumer. For example, a VHR (that accurately reflects data provided by data sources) that contains a

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[7] *See, e.g.*, Aug. 9, 1996 FTC Press Release outlining a unanimous FTC letter to the California Air Resources Board denying a request for a conditional exemption to the Used Car Rule to add a smog index and other language on the front side of the Buyers Guide. In denying the request "the Commission said that the smog index is unrelated to the purpose of the Rule, which is to provide warranty information to purchasers of used vehicles and, thereby, to prevent deceptive warranty claims (found at https://www.ftc.gov/news-events/pressreleases/1996/08/ftc-denied-request-california-air-resources-board-arb-conditional). *See also* "Businessperson's Guide to Federal Warranty Law" (found at https://www.ftc.gov/tips-advice/business-center/guidance/businesspersons-guide-federal-warranty-law#Magnuson-Moss) noting that the purposes of Mag-Moss are to "improve[] consumers' access to warranty information; enable[] consumers to comparison shop for warranties; encourage[] warranty competition, and promote[] timely and complete performance of warranty obligations."

[8] *See* Exhibit C.

[9] *See e.g.*, comments submitted by Consumer Action, Consumers for Auto Reliability and Safety, Consumer Federation of America, Consumer Federation of California, National Consumer Law Center, U.S. Public Interest Research Group, and the Watsonville Law Center, November 19, 2008 at 5.

record that a vehicle was involved in an accident may contain information of interest to a consumer, but that information could also be misleading. That "accident" may have been serious, or insignificant, but the consumer (and the dealer) has no way to know. A scraped bumper may have been cosmetic damage only and been completely repaired, but it may appear in a similar fashion to a serious accident involving structural damage to the vehicle.

It could also be misleading in other ways. For example, a VHR that does not include a record of an accident that did, in fact occur may provide a false sense of security to consumers. While that same misplaced trust may exist today, once the VHR disclosure is required on the Buyers Guide many consumers will be likely to view the information differently given its place on a governmentally-required warranty disclosure document. The FTC's governmental imprimatur will have been placed upon it.

Retail VHRs also contain other information that is subjective and potentially misleading. For example, Carfax, the leading Retail VHR provider, includes a "price adjustment" on its reports. This adjustment purports to adjust the value of the used vehicle based upon the information in contained in the report. The methodology or basis for the adjustments are unclear[10] and such adjustments, given that they are not based on the car itself, but upon information provided by third parties, to another third party about a vehicle, are potentially problematic.

Dealers understand the limitations of the VHRs but they provide the reports to their customers because they understand that consumers may be interested in the information (or lack thereof) contained in those reports. However, dealers also understand the limitations of those reports, as should consumers. The bottom line is that the Vehicle History Checkbox will introduce inaccuracy and uncertainty into the Buyers Guide, severely undermining its utility and reliability and harming consumers and dealers.

c) The Vehicle History Checkbox is Unnecessary.

i. <u>VHRs Are Provided, and Paid For By Most Dealers Today</u>

There is also no need for the Vehicle History Checkbox because the overwhelming majority of franchised new car dealers already offer Carfax, AutoCheck, or similar reports to consumers with all the used cars they sell at retail. These reports have gained wide acceptance and recognition with the used car buying public, and in many markets, it is a standard part of used car transactions.

While is it difficult to determine with any certainty (because no one entity has perfect insight into their competitors' customers), it is our understanding based on conversations with the two major

[10] Carfax includes a disclaimer for the price adjustment tool that states: "*Accidents, service records, number of owners and many other history factors can affect a vehicle's value. The CARFAX Price Adjustment is a tool that analyzes millions of used car transactions to measure how the combination of all the information reported to CARFAX affects the value of a particular vehicle. The vehicle's retail book value plus the CARFAX Price Adjustment will give you a more accurate measure of the vehicle's value. Use this tool, along with a vehicle inspection and test drive, to make a better decision about your next used car*."

retail VHR providers (Experian's AutoCheck, and IHS Automotive's Carfax, together "Retail VHR Providers") that conservatively, in excess of 95% of franchised new car dealers are customers of one or both of the two Retail VHRs. Anecdotally, it is overwhelmingly clear that these dealers not only obtain these reports, they routinely share the Retail VHRs with their consumers. In fact, the primary reason that dealers engage the Retail VHR companies at all is to share the VHRs with their customers because they understand that a portion of their customers value this information, and just as in other aspects of their business, they must meet that consumer demand to remain competitive.

More concrete evidence of the widespread availability of Retail VHRs from dealers to consumers is found in the online used car shopping websites, which are one of the primary tools used to provide the VHRs to consumers. The overwhelming majority of used car shoppers use online tools to shop for used vehicles.[11] *All* of the major online used car shopping websites[12] include links on their sites to Retail VHRs. This means that any consumer who wishes to obtain a VHR on a particular vehicle can obtain one by simply clicking on a link. It is standard practice in the industry for a dealership to list their entire used vehicle inventory on these shopping sites (as opposed to some subset of the cars available for sale). And in the overwhelming majority of instances[13] a Retail VHR for all of the used vehicles listed on these shopping sites *are made available for "free" to any used car shopper.* In addition, almost all franchised used car dealers also have their own websites, list their used vehicle inventory on their own websites, and generally provide links to "free" VHRs on those websites.

In other words, today, for virtually all of the used cars available for sale through dealers, *any* consumer can obtain a *free* copy of a Retail VHR for *any* vehicle they are interested in, without even visiting the dealer.[14] Given these facts, the notion that an additional requirement should be placed on dealers to provide a written copy of such VHRs to consumers in connection with the vehicle purchase under the auspices of the Used Car Rule is superfluous, outdated, and given the complications it causes, counterproductive.

ii. <u>VHRs are Publicly Available and Thus Are Universally Available to All Consumers</u>

Not only are Retail VHRs routinely provided to car shoppers by dealers at no charge on almost every car, these VHRs and many others *are universally available to 100% of consumers today*. Anyone can go onto any number of websites (or call if they do not have internet access) and

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[11] One recent study has found that 79% of all shoppers use the internet to shop for used cars. (2014 Automotive Buyer Influence Study, commissioned by AutoTrader.com through IHS Automotive, released August 14, 2014).
[12] Including, but not limited to: www.cars.com, www.autotrader.com, www.edmunds.com, www.nadaguides.com, www.kbb.com, www.yahooautos.com, www.aolautos.com, www.ebaymotors.com, and www.msnautos.com.
[13] Again, it is difficult to obtain fully accurate numbers, but a review of these websites and many others reveals that all or virtually all of the franchised dealers and the majority of independent used car dealers who provide listings on these shopping websites also provide "free" VHRs to consumers.
[14] This fact leads to further practical difficulties with the SNPRM since many dealers may provide only online links to the VHRs, and may not obtain physical copies. This is discussed in greater detail below.

obtain a vehicle history report on their own at any time for any reason.[15] There is simply no reason whatsoever why any consumer who wishes to obtain this information cannot obtain it on their own as often as they like. Dealers do not have any access to these VHRs or any information contained in the VHRs that consumers cannot similarly access. The Retail VHRs market their products aggressively, and it is fair to say that most consumers are aware of the availability of Retail VHRs.

If consumers already routinely obtain VHRs, then it is unclear how the Vehicle History Checkbox benefits consumers. If however, consumers do not generally obtain VHRs today, the question is why not, and how does the Vehicle History Checkbox help consumers? To the extent that consumers do not obtain a Retail VHR on a used car they are shopping for today, it is most likely because they do not believe that the cost of the VHR is worth the information contained therein or that it does not contain relevant information. If so, then a requirement that dealers provide this information to everyone is contrary to those consumers' choices, especially given that the customer will pay for the costs of the VHRs either directly or indirectly.

The SNPRM does not explain why, as a threshold matter, dealers should be required to provide information to consumers that any consumer can easily and readily obtain on their own. No information or evidence has been provided to demonstrate that customers are not aware of the availability of this information, nor has it been shown how valuable consumers believe such information to be, or how often they find such information to be worth paying for.

Instead, the SPNRM states that the intended purpose of the Vehicle Checkbox Requirement is to "increase[] the likelihood that consumer (sic) would be aware of pertinent information in the dealer's possession."[16] That has never been the stated or implied purpose of the Used Car Rule, it is contrary to the express purpose and mandate of Mag-Moss[17] and it is unclear how that goal, even if met would be relevant to a consumer. That is especially true in the context of information that a consumer can easily and readily obtain if they so wish. Again, the goal of the Buyers Guide is to disclose dealer warranty information. Any information that is provided by the FTC should be relevant and confirmable information available to consumers in the proper context with the limitations and utility of any such information fully disclosed and explained.

In short, the Vehicle History Checkbox is a "solution" looking for a problem. Consumers can and do get this information today. Adding a requirement on the Buyers Guide is unnecessary and will be ineffective and counterproductive.

d. The Vehicle History Checkbox Would Make the Buyers Guide *Less* Effective For Consumers

The Vehicle Disclosure Checkbox would make the information on the Buyers Guide less effective not just because it is unnecessary and makes it less accurate, but also because the placement on the Buyers Guide would itself add additional confusion for consumers, who may

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[15] A "Google" search for "vehicle history report" results in 15,500,000 hits. See, https://www.google.com/?gws_rd=ssl#q=%22vehicle+history+report%22 (obtained March 9, 2015)
[16] 79 Fed. Reg. 70808.
[17] *See, e.g.,* n. 8.

be more likely to misunderstand the nature or quality of the information provided. A consumer who obtains a VHR from a third party will view that information in its proper context -- as an optional, third-party service provided by a commercial entity in the business of providing such reports. While consumers certainly could still be confused or misled as to the completeness or accuracy of the information contained in the VHRs, in that context[18] at least they understand that it is an optional, commercial report, provided by an independent third party.

By placing the VHR requirement on the governmentally-required Buyers Guide, and including the contextual language within the Vehicle History Checkbox that cites the FTC's websites, the SNPRM will be putting the governmental consumer protection "seal of approval" on the VHR, which will cause many to be confused as to the nature of the VHR. In other words, a consumer who may not be aware of or understand what a VHR is may be misled into thinking that the VHR is more than it really is.

Indeed the SNPRM itself includes descriptions of VHRs that are not accurate, stating that a VHR can disclose whether "a vehicle was free from damage or mechanical flaws"[19] and that "[VHRs] could reveal hidden damage or mechanical defects that NMVTITS was not designed to detect."[20] This is simply not accurate. No retail or other VHR that we are aware of includes any information about mechanical flaws or whether a vehicle is free from damage. Instead, the VHR will simply report if a vehicle has an accident that is in the subset of databases that VHR provider has access to. A VHR is *not "designed to detect" anything*. It is what it is, a compilation of third party information about the sales, service, and reported accident history of a specific vehicle – no more and no less. If the SNPRM is unclear about this distinction, we are concerned that consumers will be even more confused.

This will leave dealers in an impossible position of explaining the limitations of a governmentally-required document that they are providing to the consumer. While dealers face this issue today, and must explain to consumers about the limitations of VHRs, it is vastly different where the federal government has directed the production of a document to a consumer. As a result, to the extent vehicle history services are mentioned or alluded to at all, we believe the FTC should include a disclaimer that (in addition to including the extensive disclaimer outlined below) fully explains the limitations of such services, the potential for inaccurate or outdated results, and the limited degree to which consumers should rely on any such report. The disclaimer should also note that the data is provided by independent third parties, and is not endorsed, or certified as accurate by the FTC or any other governmental entity.

The FTC's model credit score disclosure exception notice under the Risk Based Pricing Rule is instructive in this regard. It requires dealers (and other financial institutions) to provide third party information in the form of a credit score, to a consumer.[21] The FTC's model form notice contains nearly two additional pages of carefully worded disclosures and disclaimers to explain

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[18] The fact is that numerous lawsuits are routinely brought against dealers, VHR providers, and others based on the accuracy or contents of the VHRs, despite the lengthy disclaimers (see Ex. C) in the reports and by dealers.
[19] 79 Fed. Reg. 70808.
[20] *See id*.
[21] *See, e.g.*, 75 Fed. Reg. 2782.

and provide context to consumers about the credit score, and how they can learn more about what credit scores are and what they mean. Those disclosures are required in a context where consumers are generally aware that it is a third party providing the score, not the dealer.

It is important to note that the third party credit score information is required to be provided in that case because, unlike VHRs, consumers did not have ready access to the credit score information, and no access at all to the contextual information that helps explain the relative status of their credit score. Contrast that with VHRs, which, as outlined herein, are universally available and consumers have full and complete access to all of the same information a dealer has. The same reasoning does not apply here.

We are aware of no other federal regulatory obligation that requires such disclosure of third party information without extensive disclaimers about the source and nature of the information, and how consumers can learn more. If the Vehicle History Checkbox is on the Buyers Guide, such disclaimers along with the disclaimers listed in detail below must be included on the Buyers Guide.

e. The Addition of the Proposed Vehicle History Checkbox Will Make Vehicle History Reports *Less* Widely Available To Consumers.

The bottom line is that dealers will be far less willing to obtain and provide Retail VHRs if the Vehicle History Checkbox requirement is included is the Buyers Guide because its inclusion raises a substantial risk that either (a) dealers will be held to have made a written warranty about a vehicle based on the contents of a third-party VHR, or (b) that the VHR will be deemed to be incorporated by reference into the sales contract as a required disclosure on the Buyers Guide. While consumers will continue to be able to purchase Retail VHRs on their own, we believe it will be less likely that consumers will be willing to obtain a report if they are required to pay the cost themselves (the costs of the Retail VHRs currently range from $19.99 to $39.99 or more per report).[22]

First, the Commission must make it clear that the provision of a VHR to a consumer pursuant to the Vehicle History Checkbox does *not* create or give rise to any warranty promise or obligation by the dealer. While the SNPRM does not seem to suggest that the presence of the Vehicle Disclosure Checkbox or the provision of the VHR will affect the warranty offered by the dealer, it remains unclear. What is clear is that consumers will be likely to believe that, given the nature and purpose of the Buyers Guide, the VHR and the information contained therein *is* related to the warranty offered by the dealer. This is not only inaccurate, but it is inconsistent with federal and state law that allows dealers the option to offer a vehicle "As-Is," and prohibits the Commission from requiring that a dealer offer a warranty on a used vehicle.[23]

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[22] The pricing options vary, with slightly higher prices (lower on a per report basis) for multiple or unlimited reports. *See e.g.*, Carfax.com; autocheck.com.

[23] *See* "Businessperson's Guide to Federal Warranty Law" found at https://www.ftc.gov/tips-advice/business-center/guidance/businesspersons-guide-federal-warranty-law#Magnuson-Moss.

Second, the Commission must make it clear that the VHR is *not* part of the sales contract by including a disclaimer (discussed in greater detail below) that must be on the Buyers Guide itself. As a dealer warranty disclosure document, the Buyers Guide is required to be incorporated into the sales contract between the dealer and the consumer.[24] Inclusion in the contract makes sense when the Buyers Guide is exclusively a warranty disclosure document because it contains only information that the dealer knows and can control – what warranty a dealer is offering on a specific vehicle. It makes no sense where the Buyers Guide includes information that the dealer cannot control. Dealers will not wish to include incomplete, potentially misleading information in their sales contract. It would lead to confusion and unnecessary potential liability for the dealer. This is especially true where the VHR contains purported vehicle valuation amounts (see discussion of "price adjustment" *supra*). The potential effect of inclusion of such subjective information that is intended as contextual guidance only, in the sales contract is vast and could potentially do great harm and engender tremendous confusion.

Moreover, dealers simply should not be required to include information from a third party that they do not control, cannot confirm, and cannot change into their sales contracts. And if they are, we believe that, current competitive pressures aside, many of them will choose not to obtain or have anything to do with VHRs. While each dealer would make that decision individually, as an organization that provides regulatory guidance to dealers, we would feel obliged to highlight the risk that obtaining a VHR would raise for dealers.

In addition, the recordkeeping and paperwork burden that is sure to accompany this requirement will make it onerous and undesirable for dealers to obtain VHRs. Again, while the SNPRM does not propose any specific record-keeping requirements in connection with the Vehicle History Checkbox, it does seek comments on whether "the Commission [should] require dealers to create and to maintain records when they obtain or view vehicle history reports [and, i]f so, what recordkeeping should the Commission require and for what length of time should dealers be required to maintain the records?"[25]

NADA opposes the imposition of any such recordkeeping requirement on dealers or VHR providers. The notion that a dealer must somehow make a record whenever they "view" or "obtain" a "vehicle history report" is so nebulous as to be virtually impossible. Indeed, what is the ultimate purpose of such a recordkeeping requirement? It cannot be to provide information to consumers about a vehicle (much less warranty-related information.) It can only be an effort to ensure technical compliance with the Vehicle History Checkbox requirement by dealers – did the dealer "check the box" when they were supposed to? Any such efforts do nothing to aid in getting relevant information to consumers, and indeed do nothing to stop any bad actors that may wish not to comply.

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[24] 16 CFR 455.3(b) states "(b) Incorporated into contract. The information on the final version of the window form is incorporated into the contract of sale for each used vehicle you sell to a consumer. Information on the window form overrides any contrary provisions in the contract of sale. To inform the consumer of these facts, include the following language conspicuously in each consumer contract of sale: The information you see on the window form for this vehicle is part of this contract. Information on the window form overrides any contrary provisions in the contract of sale."

[25] 79 Fed. Reg. 70815.

That is because a bad actor who is willing to commit common law fraud by intentionally hiding negative information about a vehicle from a the used car shopper today would not likely be dissuaded from such actions by a Vehicle History Disclosure requirement or a requirement to keep records of the VHRs that dealer obtains. Instead, any such requirements will only fall on the vast majority of dealers that are seeking to comply with the law, and provide relevant information to consumers. It will only be those dealers who seek to comply, who inadvertently fail to check a box, or fail in a recordkeeping requirement, who will face penalties under the proposed requirements. The vast majority of dealers who operate honestly will lose, as will consumers who will ultimately pay any additional costs incurred, and have less access to information than they do today.

We believe, for all the reasons outlined above, that the Vehicle History Checkbox requirement would be counterproductive. If however, the final rule contains a requirement to make disclosures regarding vehicle history reports, the checkbox concept should be abandoned. Instead, the text should state:

"*The dealer may have obtained a commercial vehicle history report that may contain information from title records, salvage yards, and insurance companies. It may also include salvage, repair, accident, and prior ownership history. You can ask the dealer if you wish to obtain a copy of the report from the dealer, or for more information about how to obtain a commercial vehicle history report yourself. There may be a charge associated with the provision of that report to you by the dealer*."

This would still need to be accompanied by the broad disclaimer language in Section III below. However, the benefit of this approach is that it notifies consumers of the existence of this information, rather than seeking to somehow "catch" dealers who may withhold information or fail to check a box. The goal is to improve information available to the consumer (who may already have obtained a VHR) and not to unnecessarily burden the dealer or somehow add an additional trick box for dealers who do not obtain such reports. This approach also has the benefit of limiting the potential confusion created by the inherent governmental "approval" in the checkbox approach. This language is more neutral, and will therefore lead to less unreasonable reliance on the VHR by the consumer.

f. There is no Evidence That Dealers Fail to Provide Information about Known Title Brands, and Even if They Did, The Checkbox Is a Counterproductive Answer.

While not specifically outlined in the SNPRM, we must presume that, given the universal availability of VHRs, that the only plausible reason for inclusion of the Vehicle History Checkbox is a misguided effort to fight a perceived "practice among used vehicle dealers of obtaining vehicle history reports and failing to disclose title brands or other significant problems documented in those reports."[26] While we agree that accurate title information is, and should be

[26] 79 Fed. Reg. 70815.

important to consumers, we do not agree – and no data has been provided to demonstrate - that this practice is widespread or that the Vehicle History Checkbox is a solution that makes sense.

First, for all the reasons outlined herein, we believe that the overwhelming majority of used car transactions include a disclosure of a VHR. Second, a failure to disclose a material fact to a car purchaser would likely be considered fraudulent under state law in every state in the United States today. The Vehicle Checkbox Requirement would add absolutely nothing to what is prohibited under current law except to require a dealer to provide a report containing potentially unreliable information to a consumer. Third, if this were a widespread problem, and we do not believe it is, the answer is to make reliable, real-time title information available to consumers electronically, not to impose an unnecessary outdated paper-based solution that provides consumers with information of uncertain accuracy containing a governmental "stamp of approval." As outlined in our prior comments, NADA has long supported efforts to modernize databases such as NMVTIS, and efforts to make real-time access to title information available to consumers.

Lastly, and perhaps most importantly, there is no logical reason for a failure to disclose material information to a car purchaser to be anything more than a rare practice, if it does happen. Dealers make their living off of their reputations, and intentionally engaging in activity that would be fraudulent under state law is not likely to be a practice that is sustainable. There are reasons why both automobile manufacturers and dealers are required to be licensed in every state, and one reason is that policymakers see the benefit in having established, accountable businesses that are available when problems do arise. Dealers make multi-million dollar investments in facilities, training, equipment, and personnel, and there is simply no logical reason why a licensed franchised dealer would hide material information from a used car purchaser and incur the tremendous liability and reputational harm that this would entail, despite allegations or anecdotal suggestions otherwise.

g. Dealers May Need to Charge Consumers for Provision of the Retail VHRs.

It should be obvious, but we must note that although the VHRs are generally available to consumers at no charge through these online platforms or at the dealerships, they are of course, not actually "free." The Retail VHR companies incur tremendous expense obtaining[27], managing, and presenting the data in the VHRs. And dealers, in turn, if they choose, pay substantial sums to the Retail VHR providers for a license that allows them to obtain the VHRs for their own use and in some cases, the broader license that allows them to provide the VHR information to consumers. It is *dealers* who generally pay for these reports today, and while the pricing models vary, they often pay each time a report is "obtained." Consumers can obtain a report on their own, but they must pay for those reports.

[27] It is our understanding that most if not all of the state DMV's sell much of the customer registration, accident, sales, and other data contained in the VHRs to the Retail VHR providers and others. *See, e.g.*, http://www.local10.com/news/Florida-Makes-63M-Selling-Drivers-Info/3078462 ; http://www.cleveland.com/open/index.ssf/2010/07/ohio_collects_millions_selling.html.

Dealers that choose to provide VHRs to their consumers must, of course, eventually attempt to recoup those costs, which can result in higher prices for consumers. While dealers generally do not charge directly for VHRs today, to the extent the final rule contains the Vehicle Checkbox Requirement or similar obligation for dealers, it should be clear that dealers are not prohibited from charging consumers directly for those reports. This is especially important given the uncertainty in the SNPRM regarding the number and timing of the reports a dealer would be required to provide. For example, if a dealer were required to provide a copy to a VHR to every customer who requested one, that would be far more expensive than an obligation to provide one copy to a vehicle purchaser. The same would, of course, be true if a dealer had an obligation to pull reports from more than one VHR provider, or to pull updated reports on vehicles. With an estimated 42 million used cars purchased in the United States last year[28], the additional direct costs to consumers could be substantial if the dealers were to recover even a portion of the current VHRs costs.

h. The Vehicle History Checkbox Would Require Dealers to Share Licensed Data with Consumers

The Vehicle Checkbox Requirement also assumes that the dealer is, in all instances, capable of or permitted to share a VHR it obtains with a consumer. As discussed, the information contained in Vehicle History Reports is not information that the dealer owns, it is generally licensed from a third party that the dealer pays pursuant to a license agreement. Dealers do not control the terms of those license agreements, many of which have restrictions on sharing licensed data with third parties. A requirement that dealers share a third party's licensed data with a third party may be in violation of the dealer's license agreement with the VHR provider.

Presumably, the SNPRM would not require dealers to seek to amend their contracts. However, the Commission must clarify what dealers should do if they obtain a VHR, but their contract does not allow them to share the VHR with any third party.

III. The Vehicle History Checkbox Must Be Removed, Or A Comprehensive Disclaimer Included *on the Buyers Guide*

In short, the Vehicle History Checkbox should be removed or the goal of providing relevant information to consumers will be undermined. If it is not, the only other solution would be for the Buyers Guide to be amended to include a comprehensive disclaimer. This disclaimer must be on the Buyers Guide itself for several important reasons. First, because the Buyers Guide alone is incorporated into the sales contract, the disclaimer must also be on the Buyers Guide to ensure that the consumer obtains the relevant disclaimers. In addition, a number of states have a "single document rule" that applies to motor vehicle sales and requires generally that all agreements in a motor vehicle retail installment transaction be contained within a single

[28] With an estimated 30 million purchased through a dealer, the remaining 12 million sold as private sales.

document.[29] As a result, a dealer may be unable under state law to obtain a separate disclaimer, without which the VHR could not practically be provided.

That Buyers Guide disclaimer must contain, at a minimum, the following information:

(a) That all of the information in the VHR comes from a third party, not the dealer;

(b) The VHR is provided for informational purposes only, and it may not be accurate or timely;

(c) The dealer is not responsible for the accuracy, completeness or relevance of any of the information contained in the VHR;

(d) The dealer is only required to obtain one copy of a VHR, and the dealer is not responsible in any way for any changes in the information contained in the VHR since the time that VHR was obtained;

(e) The dealer makes no warranties at all related in any way with respect to the information contained in the VHR, or the vehicle to which the VHR applies;

(f) The VHR has nothing to do with any warranty that the dealer is offering;

(g) The VHR does not obligate the dealer in any way;

(h) The consumer may be required to pay a fee to obtain a copy of a VHR from the dealer;

(i) The VHR is not part of the sales contract.

To clarify this last point, the language currently required to be in the sales contract must be amended. It currently states:

> *"The information you see on the window form for this vehicle is part of this contract. Information on the window form overrides any contrary provisions in the contract of sale."*[30]

It should be amended to state:

> *"The information you see on the window form for this vehicle is part of this contract. Information on the window form overrides any contrary provisions in the contract of sale. Any vehicle history or other information provided by dealer on or in connection with the window form that comes from a third party ("Vehicle History Information") is not part of the contract. Dealer is not responsible for and makes no promises or representations of any kind with respect to Vehicle History Information."*

The Commission must also clarify, in no uncertain terms that the provision of a VHR is unrelated to the warranty commitment (if any) made by the dealer and does not obligate the

[29] Eighteen states currently have a single document rule that applies to motor vehicle retail installment sales. These state laws have varying requirements, but generally require that disclosures in a vehicle sales contract be made on a "single document."
[30] 16 CFR 455.3(b).

dealer in any way to refund, repair, replace, maintain or take other action with respect to such used vehicle.

IV) Other Concerns With the SNPRM Proposals

There are a number of other practical concerns and questions with the Vehicle History Checkbox requirement as proposed in the SNPRM. (Many additional concerns and issues are addressed in NADA's responses to the SNPRM's questions in Exhibit B.)

(a) What is a "Vehicle History Report"?

"Vehicle History Report" is not defined in the SNPRM, but it must be clearly defined. Is it only written reports? If not, does it include oral representations made by the consumer who traded their car to the dealer? Are reports accessed electronically "written"? Include any written representations? We do not have any answers to these and other questions, but many problems are readily apparent without a clear and exhaustive definition.

The SNPRM notes that "Vehicle history information is available from a variety of public and private sources. These sources include state titling agencies (e.g., departments of motor vehicles (''DMVs'')), the National Motor Vehicle Title Identification System (''NMVTIS''), and commercial vehicle history providers, such as CARFAX and Experian's AutoCheck."[31]

NADA would urge the Commission to define "Vehicle History Report" as "a third-party report available from the following public or private sources: (a) state titling agencies (e.g., departments of motor vehicles (''DMVs'')); (b) the National Motor Vehicle Title Identification System (''NMVTIS''), or (c) commercial vehicle history providers, such as Polk Automotive's CARFAX, Experian's AutoCheck, or other commercial third party engaged in the business of providing vehicle history reports to the public."

(b) Other Questions

There are a number of other difficult questions that would need to be answered definitively before the Vehicle History Checkbox could be implemented. We do not have the answers to these questions, and would need more time to investigate and understand the different ways that dealer and consumers currently operate and how the VHR agreements work to make any recommendations with respect to these issues.

- When has a dealer "obtained" a VHR?

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- When does a dealer "have" a VHR?

- Does the dealer have to both "obtain" and "have" a VHR in order for the box to be checked?

- If a dealer provides a copy of a VHR to a consumer, can it be held responsible for failure to check the box? If so, why?

- Has a dealer "obtained" or does a dealer "have" a copy of a VHR when a copy of it is available to the dealer electronically?
    - Does the dealer have to view it?
    - What if they only view it online?
    - Does the dealer have to have a physical copy?

- If a dealer makes a copy available to the consumer on its own website or a third party website, but has not viewed or printed a copy, have they "obtained" it?

- What if a dealer obtains or has more than one VHR?

- How often must a dealer obtain a VHR if they obtain one? (In other words, how recent must the VHR that is provided to a consumer be?)

Generally speaking, these questions must be answered by making it as simple and straightforward as possible for dealers to obtain and provide VHRs to consumers, or dealers will likely not be willing to accept the additional risk and liability of obtaining a VHR at all.

Dealers should never be required to obtain or provide more than one report. Any additional requirement would be wasteful and unnecessary. Dealers should only be deemed to have or "obtained" a VHR if they obtain a physical copy. In today's world, most of the information is provided online, and to "punish" a dealer who offers this information to its customers online by making them responsible for providing (and deeming them to have "obtained") a physical copy, whether they have or not, is counterproductive and another huge disincentive for dealers who are trying to provide this information today.

In our view, these practical questions, and the difficulty in imposing clear, simple rules for dealers are among the main reasons why the SNPRM approach is unworkable and likely to produce less information for consumers. In a world where dealers already provide VHRs to consumers, and where it is a violation of current law to withhold material information to

consumers that a dealer knows, the Vehicle History Checkbox is a solution that will only ensure that consumers are given less information and are less well protected than they are today.

V) The Proposed "As-Is" Language Is Unnecessary and Unhelpful

The SNPRM also contains a proposal to change the language accompanying the box a dealer that is not offering any warranty on the car – and "As-Is" sale. The proposed language states:

> ☐ *AS IS—NO DEALER WARRANTY THE DEALER WILL NOT PAY FOR ANY REPAIRS. 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.*
> (''SNRPRM 'As Is' Statement'').

There should be one and only one goal in including this language, and that is to explain to consumers that the dealer is not offering any warranty on the used vehicle. That is all. This proposed language is generally helpful in this regard with the exception of the utterly gratuitous, unnecessary language at the end, which states "[b]ut you may have other legal rights and remedies for dealer misconduct."

This statement has apparently been added to address concerns that the proposed changes in the NPRM somehow misled customers into believing that they did not have any legal remedies against dealers who committed fraud. Apparently, it was the language in the NPRM "As-Is" statement that stated "regardless of what anybody tells you." The SNPRM language does not address these concerns; it instead adds an unnecessary additional layer of confusion for consumers.

If the concern is the "regardless of what anybody tells you" language, then simply remove that language, but do *not* add overbroad, unrelated, and unnecessary language about "misconduct." What is the "misconduct" that this is referring to? Is it *any* misconduct? Is it related to potential product liability? Misconduct related to oral warranty promises? Not only is this unclear and unnecessary, the fact that "misconduct" is referred to at all, tars dealers with the broad implication that they are engaged in "misconduct" because they are offering a used vehicle "as-is" and without a warranty. That makes no sense and is contrary to Mag-Moss and state law. This statement has nothing to do with the warranty provided by the dealer, and does nothing to help consumers understand the one thing this is meant to convey – *that the dealer is not offering a warranty on the car, period*.

Our suggestion would be to not change the As-Is language at all, but to continue to use the Existing As-Is language. It is unclear why it was changed in the first place. However, if the

Commission feels that a change for clarification sake is needed, one alternative that would make more sense would be to use the Existing As-Is explanatory text with the SNPRM As-Is capitalized text. Therefore it would state:

- ☐ AS IS—NO DEALER WARRANTY THE DEALER WILL NOT PAY FOR ANY REPAIRS. The dealer assumes no responsibility for any repairs regardless of any oral statements about the vehicle.

We need to keep in mind that the goal of this language is to clarify and explain. The SNPRM language does not clarify, it confuses and denigrates an entire class of market participants without any basis for doing so. There are a number of ways this could be stated without the gratuitous "misconduct" language above, and we urge the Commission to remove it.

VI) The SNPRM Spanish Language Statement Unfairly Broadens the Duties of Dealers With Respect to Spanish-Speaking Consumers

One of the other proposed changes in the SNPRM that must be clarified is the inclusion "in Spanish, on the face of the English language Buyers Guide advising Spanish-speaking consumers to ask for the Buyers Guide in Spanish if they cannot read it in English."[32] The current Used Car Rule requires dealers who "conduct a used car transaction in Spanish" to "post a Spanish language Buyers Guide on the vehicle before [they] display or offer it for sale.[33]" While the SNPRM by its terms does not change that,[34] we are concerned that the inclusion of this language may greatly and unfairly broaden the obligation on dealers.

Currently, the Rule requires that dealers use Spanish language versions of the Buyers Guide and make Spanish contract disclosures related to the Buyers Guide only when conducting used car sales in Spanish. That makes sense because where a dealer conducts a transaction in Spanish, they have demonstrated the ability to understand and therefore make disclosures in Spanish. However, the proposed change could be viewed as requiring all dealers to provide, and therefore be bound by, a Spanish language version of the Buyers Guide to any customer who requests one. This would be true whether the dealer conducted the transaction in Spanish or not, indeed whether anyone at the dealership speaks or understands Spanish at all.

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[32] 79 Fed. Reg 70805.

[33] Accordingly, the proposed revised English Buyers Guide in this NPR includes, in Spanish, the following statement: ''If you are unable to read this document in English, ask your salesperson for a copy in Spanish'' (''Si usted no puede leer este documento en ingles, pidale al concesionario una copia en español'').

[34] *Id. at* 70817. § 455.5 Spanish language sales. (a) If you conduct a sale in Spanish, the window form required by § 455.2 and the contract disclosures required by § 455.3 must be in that language. You may display on a vehicle both an English language window form and a Spanish language translation of that form. Use the translation and layout for Spanish language sales in Figures 4, 5, and 6.

The additional burden this would create should not be underestimated. There are likely thousands, if not tens of thousands of dealers around the country that do not conduct transactions in Spanish, do not speak or understand Spanish, and thus do not even have Spanish language Buyers Guides available. This language would, at the least, require all of these dealers to obtain and make Spanish language versions of the Buyers Guide available upon request. This is expensive and time consuming.

Given that the Buyers Guide is required to be incorporated into the contract, that could result in a situation where a business is being required to undertake contractual obligations (or at least has arguably made contractual and/or warranty-related promises) in a language they do not speak or understand. That is unfair and simply cannot be the intent or purpose of the proposed change.

The final rule should remove that requirement in its entirety, or, at the least clarify:

(a) That the dealer is not required to conduct the transaction in Spanish or any other language;
(b) That the Spanish language version of the Buyers Guide, if provided pursuant to such a request is for informational purposes only, and is *not* incorporated into the sales contract;
(c) That a dealer who provides a standard Spanish language version of the Buyers Guide based on a consumer request:
    1. is not liable for the contents of that Buyers Guide;
    2. is not bound by the contents of that Buyers Guide;
    3. is required to provide only a blank, boilerplate version of the Spanish language Buyers Guide, with no vehicle or warranty information included.

VII) Conclusion

The Buyers Guide is a useful tool that aids consumers in their used vehicle purchases by allowing them to compare used car dealer warranty offerings. It has worked well for several decades because it does one important thing, and it does it accurately, completely, and in a legally binding way. Anything that dilutes the Buyers Guide by introducing unclear, inaccurate, non-binding, and non-warranty information – even if intended to help, will ultimately harm consumers. While dealers clearly share the goal of ensuring that relevant, accurate information is provided to used car shoppers (they pay for and provide VHRs today), the Buyers Guide is not the appropriate platform for such disclosures. At the end of the day, the Vehicle History Checkbox proposal in the SNPRM is not only unnecessary, but it will lead to fewer customers obtaining that information, and that will benefit no one.

We hope that the Commission will also clarify the Spanish language disclosure and the “As-Is” language to make the disclosures clearer and more accurate, remove any unnecessary and

unhelpful language, and make it clear that dealers are not required to conduct transactions in Spanish, or include Spanish language documents in their sales contracts.

We appreciate the Commission's multi-year effort, and while we understand the desire to finalize this process, we urge the Commission to carefully revisit these latest proposals. They are important, and could have wide-ranging negative effects on consumers and dealers.

Thank you for the opportunity to comment, we look forward to working with the Commission in its efforts on the Buyers Guide. Please feel free to contact us if we can provide additional information that would be useful in your efforts going forward.

Sincerely,

/s/

Bradley T. Miller

NADA Legal and Regulatory Affairs

EXHIBIT A

WILMERHALE

MEMORANDUM

Date March 17, 2015

To Federal Trade Commission
Office of the Secretary

From D. Reed Freeman, Jr.
WilmerHale

Re **Used Car Rule Regulatory Review, 16 CFR Part 455, Project No. P087604**

The Federal Trade Commission ("FTC" or "Commission") has proposed amending the Used Car Trade Regulation Rule, 16 C.F.R. Part 455 *et seq.*, ("Used Car Rule" or "Rule"), to require, among other things, that dealers indicate on the Buyers Guide whether they have obtained a vehicle history report, and, if so, to require the dealers to provide a copy of the report to consumers who request it. (Overall, "the amendment"). Used Motor Vehicle Trade Regulation Rule, 79 Fed. Reg. 70804 (proposed Nov. 28, 2014).

There are two fundamental problems with the Commission's proposal. First, the proposed amendment exceeds the Commission's authority under the Magnuson Moss Warranty Act ("Mag-Moss") to promulgate rules regarding warranties and warranty practices in connection with the sale of used motor vehicles. 15 U.S.C. § 2309(b). Second, the proposed amendment will apply—if at all—to only a subset of the used car dealers covered by the Used Car Rule. This is because the Commission has used Administrative Procedures Act ("APA") rulemaking procedures provided for by the Dodd-Frank Wall Street Reform and Consumer Protection Act ("Dodd-Frank"), 12 U.S.C. § 5519, for the proposed amendment rather than the procedures for substantive amendments or new rulemaking under the Commission's unfair and deceptive acts and practices authority, as set out in 15 U.S.C. §§ 45(a)(1) and 57a. Because Dodd-Frank's permission for the FTC to amend the Used Car Rule under APA rulemaking proceedings applies only to a subset of dealers covered by the Rule, the amendment must fail as a whole. Otherwise, it will create a split regime in which the proposed amendment will apply to some dealers covered by the Rule but not to others. The Commission surely does not intend this result.

Background of the Proposed Amendments to the Used Car Rule.

The proposed amendment to the Used Car Rule stems from an FTC periodic regulatory review initiated in 2008. Used Motor Vehicle Trade Regulation Rule, 73 Fed. Reg. 42285 (request for comment July 21, 2008). On the basis of comments received in response to its regulatory

review, the Commission determined that there was a continuing need for the Rule, and in December 2012 issued a notice of proposed rulemaking setting forth proposed amendments to the Rule. Used Motor Vehicle Trade Regulation Rule, 77 Fed. Reg. 74746 (proposed Dec. 17, 2012). In instituting the rulemaking, the FTC asserted that it had the authority to use the streamlined rulemaking procedures under the APA, 5 U.S.C. § 553, in connection with this proceeding, as provided for by Dodd-Frank. On November 28, 2014, the Commission issued a supplemental notice of proposed rulemaking ("SNPRM") and request for comment. As it had previously, the Commission cited Dodd-Frank and the FTC Act as the legal bases for the amendments.

Statutory Authority for the Used Car Rule.

The statutory authority for the Used Car Rule originates in the Magnuson Moss Warranty Act of 1975 ("Mag-Moss"). Among other things, Mag-Moss directed the FTC to initiate "a rulemaking proceeding dealing with warranties and warranty practices in connection with the sale of used motor vehicles." 15 U.S.C. § 2309(b). Pursuant to this statutory directive, the FTC initiated rulemaking proceedings in 1976, and the final rule issued in 1984. Used Motor Vehicle Trade Regulation Rule, 41 Fed. Reg. 1089 (Jan. 6, 1976); Used Motor Vehicle Trade Regulation Rule, 49 Fed. Reg. 45692 (Nov. 19, 1984) (codified at 16 C.F.R. pt. 455). The Rule requires used car dealers to post a "Buyers Guide" on used vehicles indicating the warranty coverage, if any, for the vehicle.

The fundamental purpose of the Used Car Rule has been and remains "to prevent and discourage oral misrepresentations and unfair omissions of material facts by used car dealers *concerning warranty coverage*." Used Motor Vehicle Trade Regulation Rule, 49 Fed. Reg. 45692 (Nov. 19, 1984) (emphasis added); Used Motor Vehicle Trade Regulation Rule, 73 Fed. Reg. 42286 (July 21, 2008) ("The Used Car Rule is intended primarily to prevent oral misrepresentations and unfair omissions of material facts by used car dealers concerning warranty coverage."); Used Motor Vehicle Trade Regulation Rule, 60 Fed. Reg. 62195 (Dec. 5, 1995) ("The Used Car Rule is primarily intended to prevent and to discourage oral misrepresentations and unfair omissions of material facts by used car dealers concerning warranty coverage."); *see also* H.R. Rep. No. 93-1606, at 28-29 (1974) (rejecting Senate bill including detailed provisions relating to warranty practices in favor of narrow authority for a rule governing warranty disclosure).

The Proposed Vehicle History Report Amendment Exceeds the FTC's Rulemaking Authority Under the Magnuson Moss Warranty Act.

As a matter of law, "[r]egulations promulgated pursuant to rulemaking authority conferred by statute assume the force of law only to the extent consistent with the statutory scheme they were designed to implement." *United States v. Crystal Ford, Ltd.*, No. CIV. JH-87-1328, 1988 WL 108363, at *5 (D. Md. May 5, 1988) (quoting *Insurance Company of North America v. Gee*, 702 F.2d 411, 414 (2d Cir.1983)). "A regulation that exceeds the scope of its enabling statute is without the force of law." *Id.* (citing *NLRB v. Catholic Bishop of Chicago*, 440 U.S. 490 (1979) (NLRB acted outside scope of its jurisdiction); *SEC v. Sloan*, 436 U.S. 103 (1978) (SEC actions not authorized by statute); *see also Am. Fin. Servs. v. FTC*, 767 F.2d 957, 968 (D.C. Cir.1985) (court must reject administrative agency actions exceeding agency's statutory mandate)); *Atl.*

City Elec. Co. v. FERC, 295 F.3d 1, 8 (D.C. Cir. 2002) ("In the absence of statutory authorization for its act, an agency's action is plainly contrary to law and cannot stand.") (internal quotation and citations omitted).

In promulgating the proposed amendment to the Used Car Rule to add a statement on the Buyers Guide regarding vehicle history reports the Commission has exceeded its statutory authority under Mag-Moss to promulgate rules concerning warranties and warranty practices of used car dealers.[1]

A vehicle history report has nothing to do with "warranties and warranty practices." As such, the FTC's statutory authority for the Used Car Rule cannot support the proposed amendment. The Used Car Rule defines a warranty as, "any undertaking in writing, in connection with the sale by a dealer of a used vehicle, to refund, repair, replace, maintain or take other action with respect to such used vehicle and provided at no extra charge beyond the price of the used vehicle." 16 C.F.R. § 455.1(d)(5).[2] A vehicle history report says nothing of the dealer's obligation to refund, repair, replace, maintain or take action with respect to a used vehicle, nor does it concern dealers practices related thereto. Rather, the value of a vehicle history report, to the extent it is accurate, is its potential to shed some light on the maintenance, accident, and other history of a used vehicle. It is unconnected to used car dealer warranty coverage on the vehicle or used car dealer warranty practices.[3]

The Commission does not appear to claim that the proposed vehicle history report statement is even *related* to warranties or warranty practices. In the Commission's initial proposal to add a citation to the ftc.gov website for more information about vehicle history, the Commission

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[1] Congress, with the passage of the Magnuson Moss Warranty Act, specifically instructed the FTC to promulgate a rule about warranties and warranty practices of used car dealers. The fact that the Commission went outside the bounds of that directive in promulgating the initial rule in 1984 by adding the non-warranty related provision about a pre-purchase inspection opportunity notice does not excuse this plain legal error now; it merely compounds it. In addition, the pre-purchase inspection is merely a consumer notice, unlike the vehicle history report requirement in the SNPRM, which imposes a new affirmative duty on dealers unrelated to warranties. There can be no argument that the Commission's proposal here, to propose adding a statement on the Buyers Guide regarding vehicle history reports, exceeds its Mag-Moss rulemaking authority. To the extent that the Commission relies on its Section 5 unfair and deceptive acts and practices authority in adding non-warranty disclosures to the Buyers Guide, rulemaking must proceed under the FTC Act rulemaking requirements set out in 15 U.S.C. § 57a for the reasons discussed herein.

[2] Under the Magnuson Moss Warranty Act, a written warranty is defined as:

> (B) any undertaking in writing in connection with the sale by a supplier of a consumer product to refund, repair, replace, or take other remedial action with respect to such product in the event that such product fails to meet the specifications set forth in the undertaking, which written affirmation, promise, or undertaking becomes part of the basis of the bargain between a supplier and a buyer for purposes other than resale of such product.

15 U.S.C. § 2301(6)(B).

[3] Similarly, in 1996 the Commission denied a request from the California Air Resources Board for a conditional exemption to the Used Car Rule to add a smog index and other language on the front side of the Buyers Guide. In denying the request "the Commission said that the smog index is unrelated to the purpose of the Rule, which is to provide warranty information to purchasers of used vehicles and, thereby, to prevent deceptive warranty claims." *See* FTC Press Release, FTC Denied a Request from the California Air Resources Board (ARB) for a Conditional Exemption from the FTCs Used Car Rule (Aug. 8, 1996), https://www.ftc.gov/news-events/press-releases/1996/08/ftc-denied-request-california-air-resources-board-arb-conditional.

identified two purposes: "(1) Providing consumers with important pre-sale information about a vehicle they may purchase, and (2) diminishing the degree to which consumers must rely solely upon the selling dealer for information when they are shopping for used cars." Used Motor Vehicle Trade Regulation Rule, 77 Fed. Reg. 74755-56 (proposed Dec. 17, 2012).[4] These purported purposes are a broad expansion of the fundamental purpose of the Used Car Rule as previously identified by the Commission and as statutorily permitted by Mag-Moss. The fundamental purpose of the Used Car Rule, which the Commission reaffirmed when it initiated the 2008 regulatory review of the rule, is "to prevent oral misrepresentations and unfair omissions of material facts by used car dealers concerning warranty coverage." Used Motor Vehicle Trade Regulation Rule, 73 Fed. Reg. 42285, 42286 (July 21, 2008). The Buyers Guide achieves this purpose by providing dealer warranty information to consumers prior to sale and memorializing dealer warranty representations in writing. *See* National Automobile Dealers Association, Used Car Rule Regulatory Review Comments (March 13, 2013).

Mag-Moss statutory authority permits rulemaking only with respect to warranties and warranty practices of used car dealers.[5] Thus, the proposed vehicle history report amendment, which is clearly unrelated to warranties, cannot have the force of law under Mag-Moss. *See City of Arlington v. FCC*, 133 S.Ct. 1863, 1874 (2013) ("Where Congress has established a clear line, the agency cannot go beyond it …."); *Pharm. Research and Mfrs. of Am. v. U.S. Dep't of Health and Human Servs.*, --- F. Supp. 3d ---, 2014 WL 2171089 (D.D.C. 2014) (vacating HHS's final rule because rule exceeded Congress's specific delegation of rulemaking authority).

Dodd-Frank Cannot be Used to Apply the Proposed Amendment to All Used Car Dealers Subject to the Used Car Rule.

The Commission cites Dodd-Frank both as the basis for use of APA rulemaking procedures and as an authority for the proposed amendment (together with the FTC Act). However, Dodd-Frank's statutory grant of authority to use APA rulemaking procedures does not extend to *all* entities that are or could be subject to the Used Car Rule, it does not even apply to all used car dealers. The result is a proposed amended Rule that covers only a portion of the used car industry, which result the Commission cannot intend, and which is untenable for the industry as a whole.

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[4] Notably, the Commission has been facing questions about whether the Buyers Guide should disclose vehicle defects and the mechanical condition since drafting the Rule. The Commission has continued to decline any such direct mechanical condition or defect disclosure requirement. *See* Used Motor Vehicle Trade Regulation Rule, 49 FR 45692, 45711-12 (Nov. 19, 1984) (rejecting known defects disclosure requirement on Buyers Guide because "the known defects disclosure requirement will not provide used car buyers with a reliable source of information concerning a car's mechanical condition …"); Used Motor Vehicle Trade Regulation Rule, 60 FR 62196-97 (Dec. 5, 1995) (declining to add defect disclosure requirement as there is no new evidence that reliable information would be disclosed if such a provision were required); Used Motor Vehicle Trade Regulation Rule, 77 FR 74756-59 (proposed Dec. 17, 2012) (declining to "reverse its long-held position" on inclusion of known defects/mechanical condition). Nonetheless, the vehicle history report statement would indirectly provide information potentially relevant to vehicle condition and defects.

[5] Moreover, the Commission has never wavered from its position that the authority for the Used Car Rule is Mag-Moss.

Pursuant to the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010, the FTC is authorized to prescribe *Section 5* rules related to unfair and deceptive acts and practices in accordance with the section 553 of APA. The authority to utilize these "streamlined" rulemaking procedures does not apply here for two important reasons. First, as described above this is a Mag-Moss rulemaking, not related to Section 5 unfair or deceptive acts or practices. Even if the Commission is not exceeding its authority under Mag-Moss as described above, it cannot bootstrap these "Section 5" rulemaking procedures onto a Mag-Moss rulemaking. Second, the SNPRM contains a rule that would apply to all dealers and other entities covered by this streamlined UDAP procedural authority, granted only with respect to those motor vehicle dealers who are excluded from the rulemaking authority of the Consumer Financial Protection Bureau ("CFPB") under Section 1029(a). Those excluded under Section 1029(a) are only those "motor vehicle dealer[s] that [are] *predominantly engaged in the sale and servicing* of motor vehicles …." 12 U.S.C. § 5519(a), (d) (emphasis added). A "motor vehicle dealer" is specifically defined under Dodd-Frank as "any person or resident in the United States, or any territory of the United States, who—(A) is licensed by a State, a territory of the United States, or the District of Columbia to engage in the sale of motor vehicles; and (B) takes title to, holds an ownership in, or takes physical custody of motor vehicles." 12 U.S.C. § 5519(f)(2). The Used Car Rule, however, applies far more broadly than only to such dealers; it applies to "any person or business which sells or offers for sale a used vehicle after selling or offering for sale five (5) or more used vehicles in the previous twelve months." 16 C.F.R. § 455.1(d)(3). There are many individuals and entities, including automobile dealers that meet the Used Car Rule threshold, but who are not "motor vehicle dealers" as defined by Dodd-Frank and/or are *not predominantly engaged in the sale and servicing of motor vehicles*.[6] Thus, the FTC's "streamlined" rulemaking authority under Section 1029(d) does not apply to those entities.

The Commission's use of Dodd-Frank's APA rulemaking procedures has at least two important implications. First, because the proposed Rule, as amended, is intended to apply broadly to *all* used car dealers as defined under the Used Car Rule, which includes a material number of individuals and entities for which the Mag-Moss rulemaking procedure is required, the rulemaking as a whole simply cannot be issued pursuant to the APA procedural standard permitted under Dodd-Frank. Any such amendment can only be promulgated under the higher procedural standard under Mag-Moss.[7]

Second, because the Commission chose the APA pathway for its rulemaking pursuant to Dodd-Frank, its streamlined procedural authority to promulgate rules only extends to dealers engaged in *the sale and servicing* of motor vehicles. Thus, while the Commission purports to apply the amended Rule to all used car dealers as defined under the Used Car Rule, instead the Commission would create—if the amendments are codified—a split regime whereby the

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[6] This would include not only non-dealers who meet the threshold, but also licensed used car automobile dealers who only sell cars and trucks, but do not service them. Firm numbers are not available, but on information and belief, this represents a material percentage of the non-franchised used car dealers in the United States.

[7] Section 109(a) of Mag-Moss, which specifies the procedures for rules promulgated under Title I of the Act, permits a hybrid rulemaking whereby the Commission must, in addition to following 5 U.S.C. § 553 procedures, conduct a mandatory hearing, retain a written transcript, provide an opportunity for review, and make a substantial evidence finding. At the very least, the FTC cannot go below the hybrid rulemaking threshold when amending the Used Car Rule.

amendments apply only to those motor vehicle dealers predominantly engaged in the sale and servicing of motor vehicles.[8]

If the Commission seeks to apply the proposed vehicle history report amendment to *all* used car dealers and other entities subject to the Used Car Rule, it must engage in rulemaking pursuant to the heightened procedural standard.

The Proposed Vehicle History Report Amendment to the Used Car Rule is a Change to the Mag-Moss Rule Subject to Proper Mag-Moss Rulemaking Procedures.

The proposed amendments to the Used Car Rule are Mag-Moss amendments and must proceed through appropriate rulemaking procedures.[9]

The vehicle history report statement amends the substance of the Buyers Guide to add a completely new disclosure requirement for dealers related to an issue outside the scope of the Mag-Moss statutory authority. It also requires those subject to the rule to provide a vehicle history report to the customer obtained by the dealer. Such a change is clearly substantive. The FTC admits substantiality by using the 5 U.S.C. § 553 APA rulemaking procedures in proposing its amendments instead of simply announcing the amendment. *See* 16 CFR § 1.15(b) (the FTC may make a non-substantive amendment to a rule by announcing the amendment in the Federal Register). Unfortunately, the FTC is mistaken about the appropriate set of rulemaking procedures it must use to amend the Used Car Rule.

For the reasons discussed above, APA procedures are not applicable. In light of Dodd-Frank's application to "motor vehicle dealer[s] … predominantly engaged in the sale and servicing of motor vehicles," a much narrower subset of entities than those subject to the Used Car Rule, it is clear that Dodd-Frank and Mag-Moss can only be read together consistently to allow APA

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[8] Moreover, it is questionable whether the FTC has even met APA standards for rulemaking for the proposed vehicle history report amendment. The Commission's conclusory statements that "consumers would benefit with improved knowledge about the availability of vehicle history information," Used Motor Vehicle Trade Regulation Rule, 77 Fed. Reg. 74746, 74765-66 (proposed Dec. 17, 2012), and that the vehicle history report disclosure requirement "will help prevent deception in the market for used vehicles," Used Motor Vehicle Trade Regulation Rule, 79 Fed. Reg. 70804, 70807 (Nov. 28, 2014), do not establish a record in the rulemaking proceeding that the failure to inform consumers that the dealer has obtained a vehicle history report or to provide the vehicle history report upon request is deceptive or otherwise remedies deceptive dealer practices.

[9] In 1995 the Commission issued non-substantive, technical amendments to the Used Car Rule without engaging in the formal or informal rulemaking procedures. The 1995 amendments included minor grammatical changes to the Spanish language Buyers Guide, permitted dealers to post the Buyers Guide anywhere on a used vehicle, instead of requiring that it be posted on a side window, provided the Buyers Guide is conspicuously and predominantly displayed and both sides can be easily read, and allowed dealers the option to obtain a consumer's signature on the Buyers Guide if accompanied by a disclosure that the buyer is acknowledging receipt of the Buyers Guide at the close of the sale. *See* Used Motor Vehicle Trade Regulation Rule, 60 FR 62195 (Dec. 5, 1995). Those changes, because they were to the Used Car Rule, should have proceeded under the appropriate Mag-Moss rulemaking procedures.

procedures only for new Section 5 rulemakings, not Mag-Moss amendments to the Used Car Rule.[10]

To make a substantive amendment to the Rule which will reach *all* used car dealers under the Rule, the Commission must proceed through the heightened Mag-Moss rulemaking procedures. 15 U.S.C. §§ 45, 57a(d)(2)(B); *see also* 16 C.F.R. § 1.15(a) (providing that the procedures for substantive amendment to or repeal of a rule are the same as for issuance thereof).

The FTC Failed to Use the Appropriate Rulemaking Procedures in Proposing the Vehicle History Report Amendment to the Used Car Rule.

The Used Car Rule was promulgated by the FTC pursuant to the statutory authority granted by the Magnuson Moss Warranty Act. However, Mag-Moss cannot serve as the statutory authority for the proposed vehicle history report amendment because the proposed vehicle history report amendment does not concern warranties and warranty practices—the only subjects for which rulemaking authority was conferred.

The FTC's proposed path to amendment to the Used Car Rule, Dodd-Frank, also fails. Dodd-Frank authority does not extend to all dealers under the Used Car Rule.

Ultimately, to add the vehicle history report disclosure to the Used Car Rule the FTC must follow appropriate FTC Act rulemaking procedures. 15 U.S.C. § 57a. The FTC has failed to do so here. As such, the proposed amendment cannot be implemented.

[10] To the extent the Commission claims it relied upon Mag-Moss and its Section 5 authority in drafting the initial Rule in 1984, the statutory grant of authority for the Rule was Mag-Moss, not Section 5, and the FTC cannot arbitrarily exceed that authority.

EXHIBIT B

SNPRM Questions Asked

NADA Responses in Bold

Questions Concerning the Proposed Modifications of the Rule

The Commission is seeking comment on various aspects of the proposed Rule and is particularly interested in receiving comment on the questions that follow. These questions are designed to assist the public and should not be construed as a limitation on the issues on which public comment may be submitted in response to this notice. Responses to these questions should cite the numbers and subsection of the questions being answered. For all comments submitted, please submit any relevant data, statistics, or any other evidence upon which those comments are based.

Vehicle History Report Disclosures

1. The Commission proposes to amend the Rule by requiring dealers who have obtained a vehicle history report to check a box on a revised Buyers Guide indicating that they have a vehicle history report and will provide a copy of the report upon request.

a. Should the Commission require dealers who have obtained a vehicle history report to check a box indicating that the dealer has a vehicle history report and will provide a copy upon request? Why or why not?
No. See discussion above.

b. Do used vehicle dealers typically obtain vehicle history reports for vehicles that they offer for sale? How prevalent is this practice? How prevalent is the practice among franchise dealers? How prevalent is the practice among independent dealers? Provide any studies, surveys, or other data that support your answers.
Yes. See discussion above.

c. Do used vehicle dealers who obtain vehicle history reports typically make information from the reports available to consumers? If so, how? Do dealers make the reports available online? How prevalent is the practice among franchised used vehicle dealers of making vehicle history report information available to consumers? How prevalent is the practice among independent dealers? Provide any studies, surveys, or other data that support your answers.
Yes. See discussion above.

d. Would a proposed Rule requiring dealers to provide consumers with a copy of a vehicle history report that a dealer has obtained on a vehicle be more or less likely to prompt dealers to obtain vehicle history reports? Would dealers who currently obtain vehicle history reports be more or less likely to obtain the reports if the Commission requires dealers to provide copies to consumers of any reports that the dealers obtain? Why or why not?

It would make it *less* likely that dealers would provide such reports. See discussion above.

e. How prevalent is the practice among used vehicle dealers of obtaining vehicle history reports and failing to disclose title brands or other significant problems documented in those reports? How prevalent is the practice among franchised dealers? How prevalent is the practice among independent dealers? Would the proposed Rule requiring dealers to provide a copy of vehicle history reports that they have obtained reduce the prevalence of dealer failures to disclose information contained in vehicle history reports? Provide any studies, surveys, or other data that support your answers.

We do not believe it is prevalent for the reasons outlined above. To the extent the issue does exist, the proposed Rule would not address the issue.

f. Does the Buyers Guide box and accompanying text concerning vehicle history reports in Figures 1 and 2 clearly indicate to consumers that the dealer has obtained a vehicle history report and will provide a copy upon request? If not, identify alternative means to make the disclosure.

See discussion above.

g. Would the lack of a mark in the box concerning vehicle history reports clearly convey that the dealer has not obtained a vehicle history report and therefore is not required to provide a copy? If not, provide alternative ways in which a dealer could signify on the Buyers Guide that the dealer has not obtained a vehicle history report that it can provide upon request.

Why is the question whether the dealer has or has not obtained a VHR? That is irrelevant to a consumer. The contents of the VHR are what matter, not what information the dealer may have or not have.

h. Would the following statement on the proposed Buyer Guides in Figures 1 and 2 benefit consumers? Regardless of whether the box is checked, the FTC recommends that you obtain a Vehicle History Report. 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/used cars. You will need the vehicle identification number (VIN) shown above to make the best use of the resources on this site.

See National Automobile Dealers Association, Used Car Rule Regulatory Review Comments (March 13, 2013).

i. Will the SNPRM proposal to require that dealers who have obtained vehicle history reports indicate that they have the reports, and will provide copies upon request, make dealers more or less likely to obtain vehicle history reports, or have no impact on whether dealers obtain vehicle history reports?

It will make it far less likely that dealers will obtain VHRs. See discussion above.

j. Should the proposed Rule define the term ‘‘vehicle history report’’? If so, what should such a definition contain?

Yes, the Rule should clearly and comprehensively define "vehicle history report," and it should be limited to the currently available sources of data that consumers could obtain on their own from a third party, such as the Retail VHRs, NMVTIS and state DMVs. See discussion above.

k. Should the Commission require that dealers who have obtained multiple vehicle history reports provide copies of all the reports upon request? If not, why not?

No.

l. Should the Commission require that dealers who have obtained multiple reports provide only one report to consumers? If so, should dealers be required to provide consumers with the most recent report? If not, which report should dealers be required to provide?

Dealers should not be required to provide more than one report. This would only unnecessarily add to the cost to consumers.

m. Should the Commission permit dealers to provide consumers with electronic access to vehicle history reports as an alternative to providing consumers with printed reports? What mechanisms should dealers be permitted to use?

Yes, dealers routinely and widely make online links available to consumers. That availability is widely used by consumers and much more efficient and effective.

n. Should dealers be required to disclose the date(s) when they obtained vehicle history reports?

No, the date is disclosed on the face of VHRs, a date disclosure duty on dealers would be superfluous and is unnecessary.

o. Once a dealer views a vehicle history report, should the Commission require that that dealer make the report available to consumers for as long as the dealer possesses the vehicle to which it applies regardless whether the dealer discards the report before selling the vehicle?

See discussion above. Given that VHRs are universally available this requirement is unnecessary.

p. What barriers, if any, prevent effective enforcement of the proposed requirement that dealers indicate on the Buyers Guide whether they have obtained vehicle history reports? What measures could FTC staff take to detect violations of a requirement that dealers provide copies of vehicle history reports upon request? What records, if any, do suppliers of vehicle reports maintain that would demonstrate whether individual used vehicle dealers had previously viewed or obtained vehicle history reports on individual vehicles?

See discussion above. Why is the point of the Used Car Rule's Buyers Guide, which is a warranty disclosure document that has worked well for years, being transformed into a tool to be used to "enforce" against dealers? It is this "enforcement," and the concomitant recordkeeping requirements that will be one of the reasons that dealers will likely stop obtaining VHRs at all.

q. Should the Commission require dealers to create and to maintain records when they obtain or view vehicle history reports? If so, what recordkeeping should the Commission require and for what length of time should dealers be required to maintain the records?

No. See discussion above.

r. What are the costs, potential liabilities, and/or benefits to dealers of requiring dealers to disclose that they have obtained vehicle history reports? Once disclosed, what are the costs, potential liabilities, and/or benefits to dealers of providing copies of the reports to consumers?

See discussion above.

s. What are the costs and/or benefits to consumers of requiring dealers to disclose that they have obtained vehicle history reports? Once disclosed, what are the costs and/or benefits to consumers of requiring dealers to provide copies of the reports to consumers?

See discussion above.

t. What are the costs, potential liabilities, and/or benefits to dealers of requiring dealers to disclose that they have obtained vehicle history reports, and affirmatively provide such reports to consumers, only when the reports include negative information (rather than provide any obtained report upon request as proposed in the SNPRM Vehicle History Approach)? How should the Rule define negative information?

This approach is completely unworkable. "Negative" information is virtually impossible to define, is subjective, and is unhelpful to consumers.

u. What are the costs, potential liabilities, and/or benefits to consumers of requiring dealers to disclose that they have obtained vehicle history reports, and affirmatively provide such reports to consumers, only when the reports include negative information? (rather than provide any

obtained report upon request as proposed in the SNPRM Vehicle History Approach) How should the Rule define negative information?

Negative information is too subjective and speculative to define in any helpful way. In addition, putting dealers in a position of determining when a VHR contains "negative information" and when it does not, is inappropriate, and will do nothing to dissuade any of the few bad actors who intentionally fail to disclose such "negative information." The answer is not to impose a requirement that will put a onus on dealers to make subjective determinations about what may be "negative" and what may not.

v. The Commission also invites comments on the alternative approaches discussed in Section II of this SNPRM. Which, if any, of the following alternatives provides the most benefits to consumers? to dealers? Which, if any, of the following alternatives is the most costly or burdensome for dealers? Provide any data, surveys, or evidence
i. NPRM Vehicle History Approach
ii. SNPRM Vehicle History Approach
iii. AB 1215 Vehicle History Approach
iv. IA AG Vehicle History Approach
v. ADD Vehicle History Approach
vi. NC AG Vehicle History Approach

w. Provide any studies, surveys, or other data concerning the number or percentage of used vehicles sold or offered for sale with clean titles that should have title brands or other negative information shown in their vehicle history reports.

''As Is'' Statement on Buyers Guide

2. The Commission proposes changing the statement on the Buyers Guide that explains the meaning of an ''As Is'' sale. The Commission proposes: THE DEALER WILL NOT PAY FOR ANY REPAIRS. 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. (SNPRM ''As Is'' Statement)

a. Does the SNPRM ''As Is'' Statement clearly and accurately describe the meaning of ''As Is'' in a used vehicle sale in which dealers disclaim implied warranties? If not, provide alternative means to convey that information to consumers.
No, see discussion and suggested language above.

b. The Commission also invites comments on the following alternative descriptions of ''As Is'' proposed in the comments. Which, if any, of the following alternatives more clearly and accurately describes the meaning of ''As Is'' than the ''As Is'' statement proposed by the SNPRM? Provide any data, consumer surveys, or evidence that supports your comments:

i. AS IS—NO DEALER WARRANTY. DEALER DENIES ANY RESPONSIBILITY FOR ANY REPAIRS AFTER SALE (CARS ''As Is'' Statement)

ii. 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)

iii. THE DEALER WON’T PAY FOR REPAIRS. The dealer does not agree to pay for the vehicle’s repairs. But you may have legal rights and remedies if the dealer misrepresents the vehicle’s condition or engages in other misconduct. (NC AG ‘‘As Is’’ Statement)

iv. AS IS—NO WARRANTY. YOU WILL PAY ALL COSTS FOR ANY REPAIRS. Ask for all representations about the vehicle in writing. (East Bay ‘‘As Is’’ Statement)

See discussion and suggested language above.

Non-Dealer Warranties

3. The Commission proposes to amend the Rule by providing boxes on the front of the Buyers Guide to allow, but not require, dealers to indicate the applicability of non-dealer warranties including manufacturer and other third- party warranties. Does the proposed method of disclosure effectively convey to consumers that dealers may, but are not required, to disclose non-dealer warranties that are applicable to a vehicle?

4. Does the lack of a checkmark in any of the manufacturer or third-party warranty boxes effectively communicate that the dealer is not providing any information about whether a manufacturer or other third-party warranty applies?

5. Would check marks in multiple boxes effectively communicate that multiple third-party warranties apply?

6. Does the Buyers Guide statement that ‘‘[t]he manufacturer’s original warranty has not expired on the vehicle’’ effectively explain to consumers that an unexpired manufacturer’s warranty applies? Would the statement prompt consumers to seek additional information about the scope of coverage of the unexpired warranty?

EXHIBIT C

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