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

**RE: In the Matter of CarMax, Inc., File No. 142 3202 – Consent Agreement  
In the Matter of Asbury Automotive Group, Inc. File No. 152 3103 – Consent Agreement  
In the Matter of West-Herr Automotive Group, Inc., File No. 152 3105 – Consent Agreement**

Thank you for the opportunity to comment on these proposed Consent Agreements. While these comments are directed specifically to the proposed Consent Order with CarMax, the same concerns underlie all three of the proposed agreements.

CarMax has an extensive, sophisticated website on which it advertises motor vehicles for sale: [www.CarMax.com](http://www.CarMax.com). Included for each vehicle is a link that takes customers to the NHTSA website containing safety recall information. Indeed, the CarMax website automatically pre-populates the Vehicle Identification Number of the car into the NHTSA database – all that is required to access the database is for the customer to check a box that demonstrates the consumer is not a robot.

Using CarMax's website, I found a significant number of used vehicles it offers for sale have unrepaired, open safety recalls. Some of the vehicles offered for sale have the most serious hazards to life and limb that have yet been seen. Yet under the FTC's proposed Consent Order, CarMax would still be allowed to advertise these vehicles had been rigorously inspected so long as CarMax also discloses that its vehicles offered for sale "may" be subject to unrepaired recalls.

This is particularly puzzling because the FTC itself recognizes this is unacceptable. In its December 15, 2016 Statement of the Federal Trade Commission Concerning Auto Recall Advertising Cases, at footnote 4, the FTC states that an advertising claim highlighting a dealer's rigorous inspection of its cars may be misleading where it "states a car *may* be subject to a recall (or otherwise implies it does not know the recall status) but in fact knows the car is actually subject to an open recall." (emphasis in original).

By any reasonable standard, CarMax in fact knows which of its vehicles offered for sale is actually subject to open safety recalls and hazardous to drive. This information is contained in or accessible through its very own website. I frankly do not understand why the FTC would enable CarMax to pretend it does not have the same information available to prospective customers on its website. If the FTC grants final approval to its proposed Consent Order with CarMax, it would grant CarMax a license to engage in the kind of “willful blindness” never before recognized by the agency or by dozens if not hundreds of courts across the country.

One other brief comment: the FTC has written extensively about what is required to make an advertisement or disclosure “clear and conspicuous.” For example, its January 30, 2015 proposed Consent Order with First American Title Lending of Georgia, LLC provides in pertinent part: “Nothing contrary to, inconsistent with, or in mitigation of the disclosure shall be used in any advertisement or promotion.”

A fair reading of the proposed Consent Orders here would enable car dealers selling vehicles with open recalls to advertise “rigorous inspections” that suggest to prospective customers they need have no concerns as to whether a car is safe to drive. Allowing this kind of positive advertising is contrary to, inconsistent with, and in mitigation of the weak disclosure that a car *may* have an unrepaired safety defect.<sup>1</sup>

I urge the FTC to reconsider each of these proposed Consent Orders.

Sincerely,

/s/

Mark H. Steinbach  
Of Counsel

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<sup>1</sup> CarMax spends an enormous sum on television advertising aimed at making it THE place to go for an honest and transparent car purchase experience. Those ads make it all the more likely that unsuspecting consumers will feel no need to click through on its website to check for safety recalls when CarMax has done such a superb job conveying the message there is no need to do so.