January 23, 2019

Colorado Motor Vehicle Dealer Board
Colorado Department of Revenue
Enforcement Division – Auto Industry
P.O. Box 173350
Denver, CO 80217-3350

Dear Board members:

We write on behalf of a coalition of nonprofit consumer-advocacy and public-interest organizations, including **the Center for Public Interest Law at the University of San Diego, the Center for Responsible Lending, Consumer Federation of America**, **Justice Catalyst**, **the National Consumer Law Center,** and **U.S. Public Interest Research Group**. With this letter, we hope to draw the Board's attention to a discrete way in which the Board's actions may be encouraging a particularly abusive tactic by automotive dealers, harming Colorado consumers.

The basic issue has to do with DR 2434, the state-mandated form that dealers must use for every sale. As required by state law, this form includes a "yo-yo provision" disclosing what will happen should financing for the sale fall through (or the dealer otherwise decide to back out of the deal) and the consumer have to return the car. But the form also contains language that goes beyond what state law requires—and that undermines Colorado's broader efforts to curb yo-yo abuses. This language requires the consumer to pay daily rental and mileage fees to the dealer starting from when the car was delivered to the consumer, rather than when the consumer was told that she'd have to return the car.

We respectfully request that the Board reconsider the retroactive-fee language as a policy matter and amend the language so that fees do not begin until the consumer is made aware that she has to return the car. At a minimum, we hope that the Board will put the issue on the agenda for an upcoming meeting, and we encourage the Board to study the effects of the retroactive-fee language and the problems caused by yo-yo clauses and retroactive fees more broadly. This language is especially troubling given that the Board is controlled by members who actively participate in the same market that it regulates. *See N.C. State Bd. of Dental Exam'rs v. FTC*, 135 S. Ct. 1101 (2015) (authorizing antitrust suit against state board controlled by market participants). Because Colorado's Attorney General has previously emphasized the importance of curtailing yo-yo abuses and has authority to enforce state consumer-protection and antitrust laws, we are providing a copy of this letter to Attorney General Weiser.

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A. Background on yo-yo provisions

What is a yo-yo scam? If a consumer agrees to buy a car from a dealership and then drives the car off the lot, you might think that the car is hers. But all too often that's not the case. Despite the fact that "automated systems can provide credit approvals for most consumers" within minutes, many car dealers don't obtain final approval for the financing when the sale is negotiated, opting instead to make what's known as a "spot delivery." Peter Valdez-Dapena, *The 'yo-yo' car sale trap*, CNN/Money, Sept. 14, 2004, https://goo.gl/qSbP7G; *see also* Delvin Davis & Joshua M. Frank, *Car Trouble: Predatory Loans Burden North Carolina Consumers, Ctr. for Responsible Lending*, at 5 (Apr. 2009), https://goo.gl/7pssGr ("A dealer is usually able to arrange a financing decision with automated technology in less than 30 minutes of the consumer entering the showroom.").

A "spot delivery" refers to "the common practice of dealers negotiating sale prices and financing terms with consumers, but then sending the consumers home with the vehicle prior to obtaining firm lending offers under the negotiated terms." Comments of the Attorneys General of 31 States & the District of Columbia, *The FTC's Increased Roles in Regulating Auto Advertising, Sales and Lease Practices* 2, https://goo.gl/nFxzyD. Spot deliveries are common even though the dealer is typically the originating creditor for the sale and "can always find a buyer for the installment loan" (just not always at a healthy profit). NAT'L CONSUMER LAW CTR., AUTOMOBILE FRAUD 101 (2018), www.nclc.org/library. By using a spot delivery, dealers can "back out of the deal" if they cannot "sell the loan paper at a large enough profit." *Id.*

Spot deliveries are particularly attractive to unscrupulous dealers because they facilitate yo-yo schemes. A yo-yo scheme is when a dealer "sends the customer off the lot driving the newly purchased car only to call the customer back several days later to say (sometimes untruthfully) that financing could not be arranged at the original terms and the consumer must sign new documents at a higher interest rate or other worse terms." John W. Van Alst, *Fueling Fair Practices*, NAT'L CONSUMER LAW CTR. 7 (2009). Yo-yo schemes allow dealers to extract additional profit, often from unsuspecting consumers, by later threatening to cancel the transaction if additional terms are not met. The trick is to "make the consumer believe the deal is final so that the consumer does not consider purchasing a different car elsewhere." Delvin Davis, *Deal or No Deal: How Yo-Yo Scams Rig the Game against Car Buyers*, CTR. FOR RESPONSIBLE LENDING, at 2 (Apr. 2012).

Yo-yo schemes are effective for both psychological and economic reasons. Psychologically, they take advantage of a phenomenon called "loss aversion," which recognizes that "changes that make things worse (losses) loom larger [in our minds] than improvements or gains" of an equivalent amount. Daniel Kahneman et al., *Anomalies: The Endowment Effect, Loss Aversion, and Status Quo Bias*, 5 J. Econ. Persp. 193, 199 (1991). Because of loss aversion, many people will pay more to keep an item than they would pay to acquire it in the first place. That is especially true of a car—the most expensive purchase most people make aside from their homes. Once a consumer drives off with a car, she is likely to become attached to it, telling friends and family about it, and is especially vulnerable to manipulation. Moreover, many

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consumers do not understand their rights and "never think to do anything other than renegotiate the purchase agreement." Valdez-Dapena, *The 'yo-yo' car sale trap*.

Economically, yo-yo schemes allow dealers, in their initial negotiations with consumers, to offer "any interest rate, even low teaser rates they knowingly may not be willing or able to honor," thereby enticing the consumer into signing a contract "without any significant risk" to the dealer. Davis, *Deal or No Deal*, at 4. The dealer can press its economic advantage further by forcing the consumer to give up more than just the car if a new deal cannot be reached. This can happen in a couple of different ways. The dealer can "refuse to return the consumer's trade-in vehicle or the consumer's down payment" if the consumer is unwilling to renegotiate a deal. *Id.* Or the dealer can achieve the same effect by charging fees for using the car. If the fees are retroactive to the date the consumer drove the car off the lot, rather than when she became aware that she had to return the car, the consumer may already owe the dealer hundreds or even thousands of dollars when the dealer gives her the bad news. "Under the mounting pressure of the situation, many consumers agree to the new loan terms." *Id.*

To measure the prevalence of yo-yo schemes and their different permutations, the Center for Responsible Lending (or CRL) has surveyed five professional organizations working with over 2,100 consumers facing auto-finance-related issues. *See* Delvin Davis, *Deal or No Deal: How Yo-Yo Scams Rig the Game against Car Buyers*, CTR. FOR RESPONSIBLE LENDING (Apr. 2012). Although this survey was conducted several years back, it still gives us a helpful glimpse into the practice.

In the survey, more than a quarter of the consumers (590) said they'd experienced a yo-yo scam. *Id.* at 1. These consumers faced various high-pressure tactics to agree to a more expensive loan: more than half were told that their trade-in or down payment would not be returned, while a little under half were told they would be charged either a rental, usage, or restocking fee for the time they had the car. *Id.* at 6 fig.3. These consumers could either agree to a new deal that would cost them more to repay, or they'd be forced to part with something of value (their down payment, trade-in vehicle, or fees) in addition to returning the car.

Faced with the Hobson's choice of losing money now or losing it later, roughly three-quarters of those who experienced a yo-yo scam renegotiated an arrangement on the dealer's terms. They "wound up with new financing at a higher interest rate," or with a cheaper car than the one they originally purchased, or both. *Id.* at 7 fig.4. The other quarter ended up not buying a car from the dealer at all—meaning that they may have also lost their down payment or trade-in vehicle, or owed fees.

As bad as this is, it is notable that, unlike in Colorado, rental or mileage fees are typically imposed only if the consumer does not immediately return the vehicle after being told that the deal is off, and only for the *additional* days that the consumer keeps the car. The one yo-yo provision in the addendum to the CRL study that involved fees, for example, reads as follows:

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> If Jerry's Ford does not receive approval from a financial institution to finance the Agreement on terms acceptable to Jerry's Ford . . . Customer will, upon written or oral notice from Jerry's Ford, return the Vehicle within twenty-four hours, in the same condition as when delivered, normal wear expected. If the Customer complies, any down payment and/or trade-in will be returned to the Customer and the Agreement shall be rescinded.
>
> **If the Vehicle is not returned within twenty-four hours of the notice, the Customer agrees to pay Jerry's Ford for the use of the Vehicle computed as follows:** $75.00 per day or part thereof during which the Vehicle **remained in the Customer's possession**, and $20 for every mile driven. Customer also agrees to pay Jerry's Ford any cost incurred in repairing damage to the Vehicle which occurred while in the Customer's possession, or of reconditioning or recovering the Vehicle.

Id. at 17. Although this contract is from 2002, it provides a helpful data point for what a typical fee-based yo-yo provision might look like. And again, unlike in Colorado, fees are not retroactive in this model form.

Colorado's efforts to curb yo-yo abuses. With so many possibilities for abuse, it's no wonder that law enforcement, consumer advocates, and industry groups alike have criticized spot deliveries and yo-yo schemes. As the Attorneys General of 31 states and the District of Columbia put in a 2011 letter, "it is difficult to find a more abusive practice in the context of auto sales and financing than a yo-yo sale, a practice which gives the dealer an extraordinarily unfair advantage over a consumer—and which distorts the marketplace and hurts competition almost as much as it hurts consumers." Comments of the Attorneys General of 31 States, at 4.

For this reason, many states (including Colorado) have "attempted to limit this practice, without an outright prohibition." Val Alst, *Fueling Fair Practices*, at 13 n.22 (naming Colorado as a leader in reform). Since at least 2000, the state has specified that it is unlawful for an auto dealer to do any of the following:

- "guarantee[] to a purchaser or lessee of a motor vehicle" that he or she "has been approved for a consumer credit transaction if the approval is not final,"
- "sell[] or lease[] [a] vehicle that has been traded in before the purchaser or lessee has been approved for a consumer credit transaction . . . if the approval is a condition of the purchase or lease," or
- "[f]ail[] to return to the consumer any collateral or down payment tendered by the consumer conditioned upon a guarantee by a motor vehicle dealer . . . that a consumer credit transaction . . . has been approved if the approval was a condition of the sale or lease and if the financing is not approved and the consumer is required to return the vehicle."

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COLO. REV. STAT. § 6-1-708(1)(a)(I)–(III).

Previous Colorado Attorneys General have called for even tighter regulations. In 2011, for example, Republican Attorney General John Suthers joined the Attorneys General of 30 other states in urging the Federal Trade Commission (or FTC) to "[b]ar dealers from charging consumers for mileage or wear and tear or for any other reason pending approval of financing"—that is, until the consumer is made aware that financing has not been approved. Comments of the Attorneys General of 31 States, at 4. The letter he joined also recommended that the FTC "[b]ar dealers from retaining portions of down payments or deposits when a deal falls through," among many other proposed changes. *Id.*

As things stand today, auto dealers in Colorado may still engage in yo-yo financing. But state law mandates the disclosure of the terms of any yo-yo provision, to be implemented by Board regulation. *See id.* § 12-6-104(3)(k)(I)(E). We will now turn to this particular regulation.

B. The Board's regulation of yo-yo provisions

The key action that the Board has taken with respect to yo-yo provisions flows from the Board's statutory authority to "prescribe a form or forms to be used as a part of a contract for the sale of a motor vehicle" by any auto dealer. *Id.* § 12-6-104(3)(k)(I). The legislature has mandated that this form "shall include" certain information, *id.*, and that it "shall be mandatory for the sale of any motor vehicle." *Id.* § 12-6-104(3)(k)(III).

Among the information required by statute is a provision that governs spot deliveries. The statute provides that the form must include a statement "in bold-faced type" describing what will happen "in the event that financing cannot be arranged in accordance with the provisions stated in the contract, and the sale is not consummated." *Id.* § 12-6-104(3)(k)(I)(E). The statement must inform the purchaser that, in that scenario, fees will be imposed: he or she "shall agree to pay a daily rate and a mileage rate for use of the motor vehicle." This "daily rate and mileage rate shall be specified and agreed upon by the parties and entered in writing on the contract." *Id.* Given this language, it is theoretically possible that fees could be set to zero. But anecdotal evidence suggests that this rarely (if ever) happens.

The statutory language provides an end date for the imposition of fees under this provision: fees may be charged only "until such time as financing of the purchase price of such motor vehicle is arranged," or "until the purchase price is paid" in full. *Id.* Presumably, if the car is returned before either of these events, that would also have the effect of ending the fees. Further, the Board has promulgated a regulation limiting fees to ten calendar days after they begin. *See* 1 COLO. CODE REGS. § 205-1 (2017).

By contrast—and importantly—the statute does not specify a *starting* date for imposition of fees. But, in response to this statutory silence, the Board has included a provision in the required form that says:

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> "If financing is not arranged in accordance with your Contract and the sale is not consummated, you agree to pay $ _______ per day and $_______ per mile from **the date of delivery** until you return the vehicle to the Dealer. The amount you agree to pay per day and per mile is negotiable."

See DR 2434, Disclosures Required as Part of a Motor Vehicle/Powersports Vehicle Sale, https://goo.gl/NcDf7M (May 26, 2016 version).

Significantly, under this provision (which cannot be altered by dealers), these fees begin "from the date of delivery"—not the date the buyer is made aware that financing has not been arranged. This language is not required by statute. It stands in contrast to the example contract provided in the CRL study. And it's much less consumer-friendly: It eliminates the consumer's ability to avoid fees, and provides a considerable amount of leverage to the dealer who informs the buyer that financing has not been secured under the original terms of the agreement and wants to renegotiate the terms. If the buyer would lose hundreds of dollars or more by walking away from the deal, she will be more likely to agree to new (and potentially predatory) terms.

As a result, it seems likely that the Board's discretionary decision to mandate that rental fees begin on the date of delivery, rather than the date the consumer learns that financing has fallen through, has significantly harmed consumers. The Board should therefore change the language to have the fees imposed only after the consumer has been told that financing could not be obtained under the agreed terms.

We would appreciate the opportunity to discuss this matter further, and to have the Board address the issue at an upcoming meeting. You may contact Jon Taylor of Gupta Wessler PLLC at (202) 888-7566 or jon@guptawessler.com. We look forward to hearing from you.

Sincerely,

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