

**Consumers for Auto Reliability and Safety
Consumer Action
National Association of Consumer Advocates
National Consumer Law Center, on Behalf of Its Low-Income Clients
U.S. Public Interest Research Group**

March 17, 2015

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

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

These comments are submitted by the National Consumer Law Center on behalf of its low-income clients, by Consumers for Auto Reliability and Safety, by the National Association of Consumer Advocates, by Consumer Action, and by U.S. Public Interest Research Group in response to the Supplemental Notice of Proposed Rulemaking (SNPRM) published in the Federal Register on November 28, 2014, regarding the Used Motor Vehicle Trade Regulation Rule. Together these organizations represent millions of consumers across the nation.

The improvement and enforcement of the Rule is vitally important to protect the public from deceptive auto sales. These sales cost consumers across the country billions of dollars each year, and place fair and transparent dealers at a competitive disadvantage. Deceptive auto sales place unsafe vehicles on the road that endanger lives.

We appreciate the efforts the FTC has made to address problems we previously commented on regarding the initial Proposed Rulemaking, which was seriously and fundamentally flawed. We note, for example, that the SNPRM would no longer require important disclosures to be provided on the back of the Used Car Buyers Guide, where they would not have been visible to prospective car buyers, and that efforts have been made to improve the “as is” disclosures.

However, the new proposal remains flawed, and would still perpetuate the ability of unscrupulous auto dealers to deceive used car buyers in a number of important respects.

I. The FTC Should Require Dealers to Obtain Vehicle History Information and Provide It to the Buyer.

The SNPRM proposal would require dealers who have obtained a vehicle history report to

indicate that fact in a box on the Buyer's Guide, and to provide a copy to consumers upon request. The proposal fails to require dealers to obtain a vehicle history report and fails to ensure that any report that is disclosed meets any sort of minimum standard.

The SNPRM proposal allows dealers to elect whether or not to obtain a vehicle history report, even though the costs are minimal and the potential value to the consumer is significant. Instead, the decision whether or not to obtain a report is left to the dealer's discretion, and is voluntary.

A. The FTC's approach will hinder enforcement and make evasion easy

The lack of any requirement to obtain a report is troubling in and of itself. It also, as a practical matter, makes enforcement much more difficult.

If dealers were required to obtain a report with minimum standards it would be easy to determine whether a dealer is complying. Without such a requirement, there will be significant investigation and enforcement difficulties, and evasion will be difficult or impossible to detect.

The FTC may be unaware of the multiple ways in which dealers acquire cars and the means they have of avoiding disclosure where the history report contains negative information like title brands or accident history. Dealers who want to avoid the SNPRM can have their buyers or brokers purchase used cars at auctions where it is the auction that pulls the vehicle history report and not the dealer. If the auction pulls the vehicle history report, under the SNPRM, has the dealer "obtained" the vehicle history report? Vehicle history providers like Carfax or Experien's Autocheck presumably would have no record of a dealer obtaining the report.

Even more confounding are recent developments in dealer software. For example, dealers who purchase vehicles either at live or online auto auctions may have access to vehicle history reports via software provided by a third party. For a demonstration of this, view the short video at <http://www.vauto.com/used-car-software/genius-labs-apps/auctiongenius/> . Under the SNPRM, where a third party such as the very popular, widely used vAuto software company pulls a vehicle history report, has the dealer "obtained" a vehicle history report for purposes of the Used Car Rule? Again, there may be no record to show that the selling dealer has obtained a vehicle history report. Many other software providers – like Reynolds & Reynolds -- can be used to obtain vehicle history reports that cannot be traced to selling dealers.

This problem could be partly addressed – but only partly -- if the rules were to say a dealer must disclose whether it obtained a vehicle history report or if anyone acting for its interests, whether an employee, broker, software company or other third party, obtained access to a vehicle history report on the vehicle offered for sale. Still, the FTC and local law enforcement officials will be hard-pressed to verify the accuracy of the dealer's representations, because the vehicle history provider's records are unlikely to show whether the information reached the dealer.

Part VIII of the FTC notice is entitled "Questions Concerning the Proposed Modifications of the Rule. In Part VIII, question 1p, the FTC asks commenters to identify barriers to effective enforcement of the proposal to make vehicle history reports available to a buyer. The difficulties described above will create major barriers to enforcing the rule if the FTC retains the SNPRM's voluntary approach.

B. The FTC should not condition the duty to provide a report on the buyer's request

The problems caused by giving the dealer discretion about whether to obtain a vehicle history report are compounded by the SNPRM's proposal to require the dealer to give the report to the buyer only upon the buyer's request. By conditioning the requirement for the dealer to provide a copy of the report upon the consumer's making a request, the FTC inadvertently opens up a loophole for a dealer to deny a copy of the report to the buyer, and then claim (falsely) that the consumer failed to request one, or opted not to take one that was offered. Since it would be difficult or impossible for the car buyer to prove that he or she had requested a report, which would most likely be done verbally, this provision would be little more than a trap for consumers. Alternatively, rather than relying on consumers' inability to prove they requested the form, many dealers will likely develop a form, one of the many they push in front of tired customers after the main deal documents have been signed, reciting that the dealer provided them with an opportunity to request a vehicle history report that was available at no charge and the customer voluntarily declined the opportunity.

C. The SNPRM's failure to set minimum standards for the content of vehicle history reports creates a reverse incentive that will harm consumers.

To the extent dealers elect to obtain reports, there is nothing in the proposal that requires the use of a report that includes vital information that is up to date, such as data about total loss vehicles or safety recalls. Because there is no standard whatsoever for the source or comprehensiveness of the report, it would allow dealers to obtain more than one report, and cherry-pick one that is more favorable to them – which may conceal important information about the vehicle's condition from prospective car buyers.

Indeed, without minimum standards, there is a real danger that over time, vehicle history providers, either currently existing providers or new entities, will cater to dealers looking to push bad cars on unsuspecting consumers. In a race to the bottom, these new providers may offer dealers vehicle history reports that fail to disclose all of the adverse facts that other providers include. In fact, it appears that some large vehicle history report providers create reports that include NMVTIS data where required (such as relevant California transactions) but do not include that data in other reports purchased by consumers from the same data provider.

The SNPRM proposal creates a reverse incentive to build reports that misinform consumers by using very limited data sets. Minimum standards are needed.

D. The FTC's approach will not work in practice.

The FTC's approach of urging consumers to obtain vehicle history reports is also impractical. It is not adapted to the realities of the used car market, and in particular does not take into account the needs of low-income buyers of used cars.

If a dealer is required to provide a vehicle history report for each car, then it will have to pay for just one report for each car. If, however, the burden is placed on consumers, a consumer who wants to be a careful shopper and look at a number of cars will have to purchase a vehicle history report for each one, as will the next consumer who looks at those cars, and the next, and the next. Not only is this approach wasteful, but it means that low-income consumers will be at an enormous disadvantage because the cost of obtaining vehicle history reports on a large number of cars will be unaffordable. While Carfax currently offers unlimited reports for 60 days at a charge of \$54.99 and Autocheck offers

unlimited reports for 30 days at a charge of \$44.99, these sums are beyond reach for many shoppers. It is also generally necessary to have a credit card in order to obtain a vehicle history report, while many used car buyers lack access to credit or prefer to use cash or other types of payment for their transactions.

Moreover, consumers need to see vehicle history reports when they are on a used car lot looking at cars. Yet many consumers will be unable to access the information at that point because of the very real digital divide. If a consumer has access to the internet only at home or at work, the consumer will have to record all the VINs for all the vehicles he or she is considering, obtain the vehicle history reports later, and then return to the lot to see if the vehicles are still there. Few consumers are likely to follow an approach that is so inefficient and impractical.

E. The FTC should require dealers to give vehicle history reports to all buyers.

Rather than the proposal found in the SNPRM, the Commission should require dealers to obtain a report that includes up-to-date data vehicle history information from the National Motor Vehicle Information System (NMVTIS), and provide it to the potential buyer along with a full disclosure of the limits of the data. Such a Rule would be consistent with the comments we previously submitted and the comments submitted by the National Salvage Vehicle Reporting Program as part of this request for comments.

If the FTC fails to require dealers to obtain and provide vehicle history reports, it will be passing by a highly cost-effective opportunity to reduce fraud and protect lives. It will also be failing to take advantage of a government initiative—the NMVTIS system—that is ideally designed for this purpose.

As part of a rule requiring dealers to obtain and provide vehicle history reports, the FTC should determine the best and most efficient method for the reports to be communicated to consumers. Posting the report on each car in the lot would be ideal, as then consumers would be able to review the reports while viewing cars on the lot, without having to make a special request to the salesperson. However, in their current format, these reports are often several pages long. The FTC could mandate a specific, condensed format, as it has done with the Buyers Guide itself, and require that to be posted on the car. Or it could require the full report to be posted on the car in a plastic, waterproof pouch, and provide, as it does for the Buyers Guide, that the report can be removed for any test drive. There are probably other options that would also be efficient and inexpensive, and that would ensure that potential buyers saw the information. The dealer would then be required to provide a copy of the report to whatever consumer bought the car.

F. If the FTC retains the SNPRM’s approach, it should make improvements.

As discussed above, the rule proposed by the SNPRM would both compromise consumer protections and make enforcement more difficult. If, despite these problems, the Commission retains the approach proposed in the SNPRM, it should revise the rule.

First, the Commission should require dealers to make it clear to consumers that the vehicle history report will be provided to the shopper without charge. Unsophisticated consumers may be reluctant to ask for a report because they cannot afford any additional money. Clarifying this issue for consumers could be done by amending the language on the Buyers Guide by adding the word “free” as

shown below in [brackets]:

IF THE DEALER CHECKED THIS BOX, THE DEALER HAS A VEHICLE HISTORY REPORT AND WILL PROVIDE A [FREE] COPY TO YOU UPON REQUEST.

Second, the Commission should require a disclosure about the limitations of vehicle history reports. While we believe that vehicle history reports can convey useful information to car buyers, we continue to be very concerned about the way these reports have been over-promoted to consumers, particularly in the extensive television advertising conducted by CarFax in many parts of the country. Those ads consistently drive home one message: if you want to know if a car you are thinking of buying has been in an accident, you need a CarFax report. While there are small print disclaimers that CarFax reports do not pick up all accidents, etc., the company's TV advertising is much more powerful and overwhelms the asterisks or footnotes.

If the FTC does not make it clear to car buyers in the Buyer's Guide that vehicle history reports may not include all accidents and other adverse events, it will unwittingly become a partner in conveying misleading information to the public. We therefore believe it is essential for the FTC to add appropriate language to the Buyer's Guide, along the following lines [new language is in brackets]:

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

II. The FTC Should Prohibit Sale of Used Vehicles That Have Open Safety Recalls.

A second serious flaw in the SNPRM is its failure to require dealers to determine whether there are open safety recalls on a used vehicle, and to prohibit the sale of such vehicles until the repairs are made. The rule should place the affirmative duty on dealers to check the National Highway Traffic Safety Administration's VIN-lookup tool or the manufacturer itself for any open safety recalls prior to selling a used car to a consumer, and to ensure that any recall repairs have been performed prior to delivery to a consumer. This is vitally important for the safety of not only used car buyers, but also their families, other passengers, and drivers who share the roads.

The SNPRM proposes to include generic language in the Buyers Guide, referring the consumer to a yet-to-be-built FTC website that will have information about how the consumer can look up open recalls. The generic language does not even use the word "recall." This is a wholly ineffective approach to a serious issue.

Even if the Buyers Guide language were improved it would be the wrong approach. No amount or type of disclosure regarding a vehicle under safety recall is sufficient to substitute for a duty to perform the safety repairs before delivering the vehicle to the consumer. It is already a violation of various state laws for dealers to sell unsafe recalled used cars to consumers. For example, such practices may violate laws against committing fraud, engaging in unfair or deceptive acts or practices,

violating express and/or implied warranties, or being criminally negligent. Requiring a dealer only to disclose the existence of an open safety recall would fly in the face of this duty.

Due to shortages of repair parts and qualified automotive technicians, it may be months before a recalled vehicle can be repaired and made safe to operate. However, some consumers have been killed within days or even hours of being sold or loaned an unsafe, recalled car. Dealers are generally in a better position to ensure that safety recall repairs are performed than individual consumers. Many consumers live a long distance from the closest dealership of that particular make. They may also have difficulty getting time off from work or lose income in order to drive a vehicle to a new car dealership for repairs, and leave it there until the repairs have been performed. They often face significant transportation challenges or other practical barriers. Typically, new car dealers do not perform repairs on evenings or weekends. Low-income consumers who work in part-time and hourly-wage jobs face real hardships and significant costs, such as gasoline and lost wages, in attempting to have their vehicles repaired at a franchised car dealership.

Putting the burden of repairing safety defects on consumer purchasers is both unfair and inefficient. Dealers are in a better position than consumers to determine if any outstanding safety recalls exist for cars they are purchasing to resell and either perform the repairs or take the cars into a franchise dealership for repair. Instead of putting their consumers' lives at risk, dealers can factor in the repair efforts required at the time the dealer purchases the car. Non-franchise dealers who elect to acquire unsafe recalled cars may sell them on the wholesale market to other dealers or wholesalers, deliver them to a franchised dealer of that brand for repairs, or take other appropriate steps in order to ensure that the vehicles they offer for sale to the public are safe, prior to delivery to a consumer.

III. The Buyers Guide's Explanation of "As Is" Still Needs to Be Improved.

The current version of the "As Is" disclosure on the Buyers Guide reads:

AS IS – NO WARRANTY
YOU WILL PAY ALL COSTS FOR ANY REPAIRS. The dealer assumes no responsibility for any repairs regardless of any oral statements about the vehicle.

The original NPRM proposed to revise this language to read:

AS IS – NO WARRANTY
THE DEALER WON'T PAY FOR ANY REPAIRS. The dealer is not responsible for any repairs, regardless of what anybody tells you.

The SNPRM proposes to modify the Buyers Guide description of an "As Is" sale to read as follows:

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.

The current proposed language is an improvement over the language proposed in the original

NPRM, which would have given dealers a cloak for fraud. In particular, the current proposed language does not assert that “the dealer is not responsible,” but merely represents the *dealer’s* position: “the dealer does not accept responsibility....” It also informs consumers that they may have other legal rights and remedies.

However, the phrase “regardless of any oral statement” in the new proposed language is still likely to mislead consumers. It is likely to convey to consumers that the dealer has the right not to stand behind its oral statements about the vehicle. Yet, under most states’ laws, when the dealer has made statements about a vehicle’s condition, it no longer has the ability to decline to accept responsibility for repairs necessary to bring the vehicle up to that condition. It is imperative that nothing on the Buyer's Guide mislead consumers into believing there is nothing they can do if they are misled or damaged by the dealer, for the reasons we provided in our previous comments on the NPRM.

Incorporating the new language recommended in the SNPRM regarding other rights and remedies consumers may have and the original language we recommended, we now strongly recommend that the FTC require the following language regarding “As Is” sales:

AS IS – NO DEALER WARRANTY.
DEALER DENIES ANY RESPONSIBILITY FOR ANY REPAIRS AFTER SALE,
BUT YOU MAY HAVE OTHER LEGAL RIGHTS AND REMEDIES FOR DEALER
MISCONDUCT.

This language omits the troubling reference to oral statements. In addition, the language “dealer denies responsibility” expresses more clearly than the SNPRM’s “dealer does not accept responsibility” language that the statement represents only the dealer’s position. It includes the new, useful language proposed in the SNPRM regarding a consumer’s other rights and remedies.

IV. The Rule Should Define 50-50 Warranties as Deceptive.

The SNPRM proposes to retain the existing provision that allows the Buyers Guide to disclose a limited warranty for which the dealer pays a percentage of the labor and parts for the covered systems. As part of the Used Car Rule, the FTC should preclude these “50-50” warranties, *i.e.* warranties that are conditioned upon the consumer’s payment of a percentage such as 50% of the cost of the warranty work. Such warranties are inherently deceptive. What appears to be warranty coverage is in fact illusory, as the warrantor can recoup all of its costs for a given “warranty” repair simply by inflating its total charge for the repair so that the consumer’s portion covers the warrantor’s entire cost.

The FTC should define “50-50” warranties as deceptive. The Magnuson-Moss Act, 15 U.S.C. § 2310(c)(2), defines a deceptive warranty as one 1) that contains an affirmation, promise, description, or representation which would mislead a reasonable individual exercising due care, or 2) that uses a terms such as “guaranty” or “warranty,” if the terms and conditions so limit its scope and application as to deceive a reasonable individual.

50-50 warranties are deceptive under either of these tests. The promise of repair would deceive a reasonable person exercising due care, because the illusory nature of the warranty is hidden in its formula. Likewise, the terms and conditions of the warranty limit its scope and application: it allows the warrantor to raise the overall price of repairs so that the warranty provides no protection at all. This

deception is likely to deceive a reasonable individual.

In the alternative, the FTC should adopt an interpretation that a 50-50 warranty is a violation of the Magnuson-Moss Act's anti-tying provision where the consumer is required to pay a portion of the dealer's charge for parts or service as a condition of the warranty. 15 U.S.C. § 2302(c) provides:

No warrantor of any consumer product may condition his written or implied warranty of such product on the consumer's using, in connection with such product, any article or service (other than article or service provided without charge under the terms of the warranty) which is identified by brand, trade, or corporate name... .

The reason for this prohibition is clear. If a warrantor could condition a warranty on the consumer's purchase of other products or services, the warrantor would have the ability to make the warranty illusory. The warrantor could simply cover the costs of warranty service by charging artificially high prices for the tied product or service. Thus, allowing tying would enable warrantors to offer a warranty that in actuality provided no benefit to the consumer.

The application of this prohibition to used car 50-50 warranties is illustrated by one of the interpretations of the Magnuson-Moss Act adopted by the FTC: "Under a limited warranty that provides only for replacement of defective parts and no portion of labor charges, [the anti-tying provision] prohibits a condition that the consumer use only service (labor) identified by the warrantor to install the replacement parts."¹

A 50-50 warranty differs from this example in that it typically provides that the consumer is to pay half of the charge for labor and half of the charge for parts, instead of all of the charge for labor and none of the charge for parts. But the principle is identical. If the warrantor can charge whatever it wants for the parts and labor, and the consumer is required to pay half of that amount, then nothing prevents the warrantor from setting the consumer's share at the full cost of the "warranty" repairs.

In 1999, the FTC, in its review of its Magnuson-Moss rules, stated that 50-50 warranties "likely violate" the Magnuson-Moss anti-tying provision.² The FTC went on to state: "Since the consumer must pay a significant charge for parts and labor under these warranties, the warranties may violate section 102(c) by restricting the consumer's choices for obtaining warranty service."³

However, after consumers in Ohio sued low-end used car dealers for conditioning warranty service on the consumer's payment of half the cost of parts and labor, the FTC was approached by dealers seeking a retraction of this statement. In 2002, the FTC issued a letter disavowing its previous statement.⁴

We urge the FTC to return to the position suggested by its 1999 comments. The 2002 letter does not set forth a convincing rationale for holding that 50-50 warranties do not violate the anti-tying provision. Indeed, the 2002 letter recognizes that, unlike warranties that provide parts without charge but require the consumer to pay for labor, "in a 50-50 warranty the warranted repair work is not, as a practical matter, severable into two parts, one that the warrantor can perform and another part that

1 15 C.F.R. § 700.10(b).

2 64 Fed. Reg. 19,700, 19703 (Apr. 22, 1999).

3 *Id.*

4 Letter from the FTC to Keith E. Whann (Dec. 2, 2002), available at www.ftc.gov/os/2003/01/niadaresponseletter.htm.

another auto repair shop can perform.” In other words, a consumer who wishes to take advantage of a 50-50 warranty is bound--tied--to use of the warrantor’s services, and payment of the warrantor’s charges, whatever they may be.

For these reasons, the FTC should declare that 50-50 warranties are either deceptive, or that they violate the anti-tying provision of the Magnuson-Moss Act.

V. The Rule Should Improve the Disclosure Requirements for Manufacturer’s Warranties and Service Contracts.

We have several comments regarding the SNPRM’s proposals with respect to disclosure of manufacturer’s warranties and service contracts. First, the SNPRM proposes to continue in effect the existing Rule’s provision that allows but does not require dealers to check boxes to indicate the existence of “non-dealer warranties” such as unexpired warranties from the manufacturer. We urge the FTC to make this disclosure mandatory for unexpired manufacturer’s warranties.

The existence of an unexpired manufacturer’s warranty is very important to consumers. It adds significant value to a vehicle. More significantly from the point of view of consumer protection, it is a critical disclosure if the dealer is trying to sell the consumer a service contract or dealer warranty. A consumer who knows that the car is still subject to the manufacturer’s warranty will be armed with the information necessary to decline a duplicative product.

Second, we urge that the FTC clarify the formatting of the Buyers Guide’s section on service contracts, and require pricing information to be disclosed. The proposed Guide has a large heading entitled NON-DEALER WARRANTIES FOR THIS VEHICLE, followed by a heavy line above three potential check boxes regarding warranties. After a light line with no additional heading is a check box regarding service contracts. This arrangement implies that the service contract is one of a number of non-dealer warranties. This arrangement exacerbates the existing confusion between warranties and service contracts and what entity is entering into which agreement.

Rather than adding to the existing confusion regarding warranties and service contracts, the Guide should instead help make the transaction more transparent. To the extent a service contract is offered on the vehicle the Guide should at a minimum disclose the price of the service contract. In the interest of transparency and clarity it would be even better if the amount of the price retained by the dealer, the contact information for the administrator, and the identity of any reinsurance entity involved were also disclosed.

Third, as part of the Rule, the Commission should require the dealer to determine whether the vehicle is ineligible for warranty or service contract coverage because of prior damage. Otherwise, the disclosure on the Buyers Guide misinforms the consumer, contrary to the intent of the Rule.

Dealers are well-positioned to determine if an existing or provided warranty or service contract is valid or void due to prior damage. If dealers fail to determine this information, the disclosures made to the consumer can be inaccurate and misleading. The Rule should require dealers to determine the existence of any manufacturers' warranty and indicate if the car is covered or not, and whether the car is eligible for a service contract.

VI. The FTC Should Require the Statement That a Spanish Version Is Available to Appear on the Front Rather than the Back of the English-Language Buyers Guide.

The proposed rule continues in effect the existing rule's requirement that dealers provide Spanish-language Buyers Guides when they conduct business in Spanish, regardless of whether the consumer requests it. We support the continuation of this important protection.

The SNPRM also proposes to add a statement, in Spanish, on the English version of the Buyers Guide, that advises Spanish-speaking consumers that they can request a Spanish version. We support this proposal but suggest that the statement should appear on the front rather than the back of the Guide. In addition, we suggest that the FTC consider this alternate wording: "The dealer is required to give you this Guide in Spanish if it is conducting the sale in Spanish."

Conclusion

We appreciate the opportunity to comment on this important rule. While the rule is improved over the original NPRM, a number of aspects of the proposal fall far short of protecting consumers, and may actually perpetuate abusive and harmful practices upon used car buyers by unscrupulous car dealers. Our recommendations would substantially improve the effectiveness of the rule.

Contact for questions

Should the FTC have any questions regarding this submission, or wish to reply, please contact:

John W. Van Alst
Attorney, National Consumer Law Center®
7 Winthrop Square, 4th Floor
Boston, MA 02110
617-542-8010
jvanalst@nclc.org
www.nclc.org