

**Consumers for Auto Reliability and Safety
California Public Interest Research Group (CALPIRG)
Connecticut Public Interest Research Group (CONNPIRG)
Consumer Federation of America
Consumer Action
Consumer Attorneys of California
Consumer Federation of California
Consumer Watchdog
Consumers Council of Missouri
Consumers Union
Courage Campaign
Housing and Economic Rights Advocates (HERA)
International Association of Machinists and Aerospace Workers
National Association of Consumer Advocates
National Consumer Law Center¹
Maryland Consumer Coalition
Massachusetts Public Interest Research Group (MASSPIRG)
Public Good
Tennessee Citizen Action
Trauma Foundation
U.S. Public Interest Research Group (U.S.PIRG)
Virginia Citizens Consumer Council**

February 29, 2016

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

**Re: General Motors LLC - Consent Agreement, File No. 152-3101;
Jim Koons Management Company - Consent Agreement, File No. 152-3104; and
Lithia Motors, Inc. - Consent Agreement, File No. 152-3102**

Thank you for the opportunity to comment. We submit the following comments in response to the Federal Trade Commission's proposed settlements with General Motors, Jim Koons Management, and Lithia Motors. The proposed settlements attempt to address the practice of selling cars as "certified," or with the use of similar terms, in which cars are

¹ National Consumer Law Center, on Behalf of Its Low-Income Clients

advertised as thoroughly inspected and safe cars, despite the cars' having unrepaired safety recalls.

The FTC's intention to enforce laws against false advertising and unfair and deceptive acts and practices involving auto dealers' sales of unsafe, unrepaired recalled used cars, particularly vehicles advertised and sold as "certified," is laudable. This is an important public safety and consumer protection issue. While we applaud the Commission's decision to engage in this area, the proposed consent agreements would fail to protect consumers from false and misleading statements, unfair and deceptive trade practices, and – most importantly – unsafe cars. The consent orders should be amended to prohibit dealers from selling any "certified" vehicle to a consumer if it has unperformed safety recalls. The consent orders should not rely on mere disclosure of a safety defect at all, but it would be particularly harmful to rely on disclosures of open safety recalls when a vehicle is advertised as having passed an inspection, or being "certified," or safe.

Some car dealers, most notably AutoNation, the nation's largest new car dealership chain, have announced that they do not sell any recalled new or used vehicles, at wholesale or retail, unless the recall repairs have been performed.² However, other dealers, most notably CarMax, the nation's largest retailer of used cars, sell unrepaired recalled used cars to consumers, including vehicles they advertise as having passed a rigorous inspection, qualifying to be sold as "CarMax Quality Certified," and covered by express warranties. These sales pose a serious threat to public safety.

The FTC clearly has the authority to enforce laws – including prohibitions against unfair and deceptive acts and practices, false and misleading advertising, bait-and-switch, and violations of the Magnuson-Moss Warranty Act – against dealers who engage in such practices. We welcome the agency's enforcement of those laws. However, it is important that any FTC settlement be at least as protective as prevailing applicable laws across the nation.

On June 23, 2014, consumer groups petitioned the FTC to investigate and take enforcement actions to curb CarMax's sales of so-called "certified" used cars with unrepaired safety recalls. Because CarMax persists in selling large numbers of recalled vehicles with lethal safety defects, we continue to urge the FTC to curb CarMax and other dealers from endangering lives by engaging in such reckless practices.³

The proposed settlements would allow car dealers to sell "certified" vehicles, advertised as having passed rigorous inspections, if the dealers merely "disclose" to prospective car buyers the existence (or potential existence) of unrepaired safety recalls. Such settlements could unfortunately do more harm than good. They could perversely encourage even more unethical and unscrupulous car dealers to engage in reckless practices and play "used car roulette" with the public's safety.

According to the FTC's announcement of the settlements, "Under the proposed consent orders, which would remain in effect for 20 years, the companies are prohibited from

² AutoNation includes over 327 new car dealerships, and advertises that all its dealerships guarantee a "recall free" vehicle.

³ See reports issued by the CARS Foundation and CALPIRG Education Fund, CONNPIRG Education Fund, and MASSPIRG Education Fund, plus numerous news reports, documenting and describing CarMax's deceptive sales practices, posted here: <http://www.carsfoundation.org/>

claiming that their used vehicles are safe or have been subject to a rigorous inspection unless they are free of unrepaired safety recalls, **or unless the companies clearly disclose the existence of the recalls in close proximity to the inspection claims.** The proposed orders also would prohibit the companies from misrepresenting material facts about the safety of used cars they advertise.” [Emphasis added.]

The actual proposed consent orders go one step further and would allow dealers to merely disclose the possibility of a recall and tell consumers how they can investigate the possibility. Even worse, this language could just be added to every advertisement and certification without checking whether the car was subject to recall or not, or providing any information specific to an individual vehicle. Such a diffuse form of disclosure, appearing in generalized advertising, regardless whether an individual vehicle has an unrepaired recall or not, is virtually meaningless. It could also be easily dismissed by the claim, “we have to put that notice in all our ads, and on all our cars.”

By allowing dealers the option of selling unsafe vehicles advertised as passing a rigorous inspection and qualifying to be sold as “certified” with a contradictory “disclosure,” the proposed settlements would protect unscrupulous, reckless auto dealers instead of consumers. The proposed settlements would also be contrary to existing federal and state consumer protection laws and the well-established public policy of protecting the public from unsafe, recalled products, including vehicles.

An impact of the proposed settlements would be to encourage a highly dangerous form of false, deceptive, and misleading advertising, even fraud. The settlements may also give unscrupulous dealers a new defense, in the case of injury or death, potentially shifting liability onto their victims, and allowing dealers to claim the used car buyers had “assumed the risk.”

If finalized, the agency's proposal could also give unethical dealers a new, unprecedented federal “safe harbor” for selling unsafe, defective “certified” used vehicles, allowing them to argue that they were in full compliance with the terms of the settlements with GM, Lithia, and Koons, potentially undermining existing consumer protection laws.

Instead of finalizing the proposed settlements in their current form, at the very least the FTC's settlements should recognize as an unfair and deceptive trade practice, any advertisement or representation that a used car with an unrepaired safety recall is “safe,” or “certified” or similar term; has passed an inspection; is worth more than other vehicles; has a warranty; or is in good condition, or merchantable.

**The proposed settlements are unprecedented
and contrary to existing law and well-established public policy**

The proposed settlements are unprecedented. There is no consumer product where a federal agency explicitly allows retailers to sell the product subsequent to the issuance of a safety recall, with or without “disclosure,” unless the product has been repaired to make it safe. To the contrary, under the Consumer Product Safety Act, sales of used goods that have been recalled, such as cribs, toys with lead paint, lawnmowers, and other consumer products are strictly prohibited.

The proposed settlements, if confirmed, would set a new, harmful precedent. Imagine if pharmacies were allowed to sell recalled medicines or drugs, or grocery stores to sell beef tainted with E. coli, or eggs with Salmonella, while advertising that all their products had passed “rigorous inspections” and qualified to be sold as “certified.” The public needs, expects, and deserves better protection than that.

The proposals also fail to recognize that the safety of individual used car buyers is not all that is at stake. Unlike many other consumer products, operating a vehicle involves risks to the broader public, including pedestrians, bicyclists, passengers, and everyone who shares the roads. Allowing dealers to sell unrepaired recalled cars – with or without “disclosure” – would place not only the owners and their passengers at risk, but pose a serious threat to others. There is a strong public interest in ensuring that all new and used vehicles are safe to operate on public roads, regardless what an individual car buyer, however well-informed, may choose. Types of vehicle safety defects that have led to safety recalls, where others' lives are placed at risk, include:

- Faulty brakes
- Loss of steering
- Axles that break
- Wheels that fall off
- Transmissions that slip out of “park,” so cars slide downhill
- Hoods that fly up and obscure vision
- Windshield wipers that fail and cause a loss of visibility
- Ignition switches that cause a loss of power steering and brakes
- Sticking accelerator pedals
- Failures to protect against hacking and remote control of steering or braking
- Drive shafts that separate from the axles
- Catching on fire
- Fuel leaks that cause carbon monoxide poisoning

Recognizing this risk, many states and localities have laws that specifically prohibit dealers from selling unsafe used vehicles, even when they have not been recalled. For example, Massachusetts requires that dealers warrant that all used cars they sell for over \$700 are safe to operate on the roads.⁴ New York City requires dealers to certify that the vehicles they offer for sale are “roadworthy.”⁵ California prohibits dealers from selling vehicles that fail to comply with all applicable Federal Motor Vehicle Safety Standards.⁶

⁴ Massachusetts' Used Vehicle Warranty Law, G.L. c. 90, § 7N ¼ (General Laws chapter 90, section 7 N ¼)

⁵ New York City's Department of Consumer Affairs Launches Investigation into the Sale of Unrepaired Recalled Used Cars, Aggressively Protecting New Yorkers from Potentially Fatal Defects. News Release issued July 30, 2014. “Fortunately, City law, which DCA enforces, requires dealers to certify that their vehicles are 'roadworthy,' and prohibits dealers from misleading consumers as to the safety of their vehicles. Under City Law, a car with recalled parts that are unrepaired is not deemed to be roadworthy.” Posted at: http://www1.nyc.gov/assets/dca/downloads/pdf/media/Media_News_PR073014.pdf

Also, New York Vehicle and Traffic Law Sec. 417 codifies the U.C.C. “warranty of merchantability,” as to automobiles, by creating the concept of a “warranty of serviceability”, requiring that a used car be delivered “in a condition . . . to . . . satisfactory and adequate service upon the public highway”. *Armstrong v. Boyce*, 135 Misc 2d 148 (NY City Ct., 1987). VTL 417 requires used car dealers to inspect vehicles and to deliver a certificate to buyers stating that the vehicle is “in condition and repair to render, under normal use, satisfactory and adequate service upon the public highway at the time of delivery”. This warranty of serviceability goes beyond the implied warranties of the U.C.C. and is non waivable. *Dato v. Vatland*, 36 Misc 2d 636 (Dist. Ct. Nassau 1962) *Dato v. Vatland*, supra, *Winsley v. Spitzer Motor Sales, Inc.*, 12 Misc 2d 56, See also *Mc Cormack v. Lynn Imports*.

⁶ California Vehicle Code Section 24007 (a)(1): “No dealer or person holding a retail seller's permit shall sell a new or used

Fourteen states mandate that dealers must provide express warranties on used vehicles, or prohibit the sale of used vehicles “As Is” or with a disclaimer of implied warranties. In addition, California prohibits dealers from selling any “certified” used cars, or cars advertised using a term similar to “certified,” “As Is.” In those states, used car buyers benefit from the implied warranty that the vehicles are merchantable, and would “pass without objection in the trade.” No vehicle that is being recalled for an unrepaired safety recall is “without objection in the trade.” In fact, a safety recall is the very epitome of an “objection in the trade,” where the manufacturer itself has openly acknowledged the unsafe, defective condition of the vehicle. Such practices would also violate state laws prohibiting unfair and deceptive acts and practices and implied warranties that the vehicle is merchantable, as well as other laws mentioned above.

Auto dealers themselves have acknowledged that it is currently illegal for them to sell unsafe vehicles to the public. For example, “Potamkin, a General Motors dealer in New York, has a written policy requiring its employees to fix recalled vehicles before selling them to the public, according to John Bruno Jr., a general sales manager at one Potamkin location. ‘If there are any open recalls, we get them taken care of as fast as possible,’ Mr. Bruno said, adding that it was ‘illegal and irresponsible’ to do otherwise.”⁷

Such practices would also be in violation of a whole body of case law and common law. Carlos Solis was a used car buyer in Texas who was killed by an unrepaired recalled Takata air bag in his Honda, purchased at a used car dealership that failed to get the safety recall repairs performed. A low-speed collision led the air bag in his car to explode with excessive force, spewing shrapnel into his neck, and causing him to bleed to death. “Even while there’s no [specific] regulatory requirement for dealerships to conduct repairs on recalled [used] vehicles or parts, it doesn’t get them off the hook for lawsuits over injuries or deaths,” said Robert Ammons, the Solis family attorney. We agree with Ammons that, as he said, “They have a common law duty to exercise ordinary care for the safety of consumers.”⁸

Indeed, all fifty states have statutes or common law doctrines that prohibit businesses, including auto dealers, from engaging in conduct that either negligently or willfully causes personal injury or wrongful death. Any dealer who engages in such practices faces significant potential liability including actual, compensatory, and punitive damages, as well as possible criminal prosecution for acts that are willful or malicious.

The “disclosure” element of the FTC’s proposal would also be counter to prevailing public policy that has garnered widespread bi-partisan support. Just last year, the U.S. Congress did not pass proposed legislation, backed by the National Automobile Dealers Association, that would have allowed dealers to rent or loan new or used recalled vehicles with “disclosure.” That provision, initially included in a larger bill, did not even get a single

vehicle that is not in compliance with this code and departmental regulations adopted pursuant to this code, unless the vehicle is sold to another dealer, sold for the purpose of being legally wrecked or dismantled, or sold exclusively for off-highway use.” Section 24011: “Whenever a federal motor vehicle safety standard is established under federal law (49 U.S.C. Sec. 30101 et seq.), no dealer shall sell or offer for sale a vehicle to which the standard is applicable...unless: (a) The vehicle or equipment conforms to the applicable federal standard.”

⁷ “New York Imposes a Used Car Repair Rule,” New York Times, July 29, 2015. Posted at:

<http://www.nytimes.com/2014/07/30/business/new-york-city-imposes-a-used-car-repair-rule.html>

⁸ “Fatal Houston Fender Bender Shows Shortcomings of Recalls,” *Washington Post / Bloomberg*, February 2, 2015. Posted at: <http://washpost.bloomberg.com/Story?docId=1376-NJ0A6F6K50Z401-59E375CVPS8NI2ITBNEAFKJNJC>.

hearing.⁹ Instead, it was removed and Congress enacted the Raechel and Jacqueline Houck Safe Rental Car Act, to **prohibit** rental car companies (including car dealers) with fleets of 35 rental / loaner vehicles or more from renting or selling recalled cars unless the safety recall repairs have been performed. That legislation, which takes effect in June of this year, makes it violation of federal law, enforceable by the National Highway Traffic Safety Administration, to engage in such practices.

In 2015, the legislatures in California and New Jersey also rejected similar “disclosure” legislation, which the dealers sought in order to eviscerate existing consumer protections and to insulate themselves from liability in the event of deaths or injuries caused by their deceptive sales of defective used cars. The legislature in Virginia also recently rejected a similar attempt to legalize dealers' sales of recalled vehicles with “disclosure,” which would have granted them immunity, shifting liability onto their victims.

“Disclosure” is inadequate to protect consumers from unsafe recalled used cars

The federal Department of Transportation's National Highway Traffic Safety Administration (NHTSA), the nation's premier auto safety agency, as well as Secretary of Transportation Anthony Foxx, have repeatedly called upon auto dealers to ensure that all cars they sell – both new and used – are safe and free from unrepaired safety recalls.

NHTSA has made the same call relative to rental cars. In a letter to U.S. Senators Claire McCaskill and Barbara Boxer, NHTSA warned of the hazards inherent in allowing the rentals of unrepaired recalled vehicles with “disclosure,” as had been proposed by the Alliance of Automobile Manufacturers. The same points apply regarding dealers' sales of used cars. According to NHTSA:

“The [Alliance of Auto Manufacturers'] Proposal allows vehicles subject to recall to be rented if consumers acknowledge and consent to the risks and dangers of the defect. **A consumer...usually is not in an informed position to understand the nature and extent of a defect or noncompliance.** The consumer is therefore put in the position of quickly choosing between risking their safety and their ability to fulfill the purpose of the trip as planned. The agency believes it is unreasonable to place the burden on the consumer in this context or to expect that rental car companies and their employees could adequately educate a consumer on the risks and dangers of the defective vehicle.”¹⁰

We concur with NHTSA. We also fully agree with the testimony of Julie Menin, Commissioner, New York City Department of Consumer Affairs, before the New York City Council on Consumer Affairs:

“Consumers purchasing used cars have an expectation, grounded in law, that the car they are sold is safe and does not have a dangerous defect that could cause serious harm, injury, or even death...We anticipate that the industry will urge the Council to simply require disclosure of a vehicle's recall status prior to sale, an approach which we think is inadequate to protect the lives of consumers who buy cars,

⁹ S. 1732, Section 4209, Introduced by Senators Thune, Fischer, and Moran, 114th Congress, 2015.

¹⁰ Letter to U.S. Senators McCaskill and Boxer from David Friedman, Deputy Administrator, National Highway Traffic Safety Administration, November 5, 2014.

as well as those who use the roads.”¹¹

According to a scientifically researched report cited by *Pro Publica* and the *New York Times*, disclosure is ineffective in complex transactions such as purchasing a car: “We are doing disclosure as a regulatory move all over the board,” says Adam J. Levitin, a law professor at Georgetown, “The funny thing is, we are doing this despite very little evidence of its efficacy....it really works only when things are simple. As soon as transactions become complex, disclosure starts to stumble. Buying a car, for instance, turns out to be several transactions: the purchase itself, the financing, maybe the trade-in of an old car and various insurance and warranty decisions. These are all subject to various disclosure rules, but making the choices clear and useful has proved nigh impossible...”¹²

As consumer groups stated in comments submitted to the FTC in response to the FTC's Supplemental Notice of Proposed Rulemaking regarding the Used Motor Vehicle Trade Regulation Rule:

“Regarding safety recalls in particular, the Commission can and should play an important role in protecting the public from unsafe recalled used cars. However, it is important to note that 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. ***No amount or type of disclosure regarding a vehicle under safety recall is sufficient to substitute for the dealer's existing duty under various state laws to deliver a vehicle that is free from known safety defects that have led the manufacturer to issue a safety recall.***”¹³

In essence, the proposals could require consumers – if they do happen to see the disclosures and actually read them – to make life-or-death decisions, sometimes under pressure, with little time to deliberate, on the basis of incomplete information. For example, someone who reads that a car has a defect involving the floor mat may conclude that is not safety-related, and would present a low risk, without realizing that the floor mat defect could cause the car to suddenly accelerate out of control to speeds of 120 mph or more. Indeed, the proposed consent agreement would allow a disclosure that there may or may not be an unrepaired safety recall on the vehicle for sale. The consumer on the car lot, being pressured to sign a purchase contract, might not have the technology to even research if there is an unrepaired recall, on the spot. The dealer does – yet the proposed settlement agreement does not even require the dealer to take that simple step.

The proposals also seemingly do not account for the terrible, but very real, possibility that consumers may purchase a vehicle with the intent to have it repaired, only to be injured or killed before they have an opportunity to have the repairs performed. Some consumers have been killed within days or even hours of being sold or loaned an unsafe car. A tragic

¹¹ Testimony of Julie Menin, Commissioner, New York City Department of Consumer Affairs, before the New York City Council on Consumer Affairs, October 28, 2014. Posted at: <http://www1.nyc.gov/assets/dca/downloads/pdf/partners/Advocacy-Used-Car-Sales-102814.pdf>

¹² The Trouble with Disclosure: It Doesn't Work,” by Jesse Eisenberg, published by Pro Publica in cooperation with the New York Times (February 11, 2015).

¹³ Consumers for Auto Reliability and Safety, National Association of Consumer Advocates, and National Consumer Law Center on behalf of its low-income clients. Submitted to the FTC on March Used Car Regulatory Review, 16 CFR Part 455, Project No. P087604 79 Fed. Reg. 70804 (Nov. 28, 2014). (Emphasis added.)

example that illustrates how hazardous these products are, even when a recall has not yet been issued: the Saylor / Lastrella Lexus crash in San Diego that led to the massive Toyota sudden acceleration recall. Car dealer Bob Baker's Lexus dealership near San Diego gave CHP Officer Mark Saylor a Lexus loaner car while his new Lexus was at the dealership for routine maintenance. Mr. Saylor then picked up his wife, Cleofe Lastrella, their daughter Mahala (age 13), and his brother-in-law Chris Lastrella, and they headed to a sporting event. Due to a defect that caused the vehicle to accelerate out of control, the Lexus reached speeds of 120 mph, and collided with another vehicle at an intersection, injuring the driver of a Ford SUV. Then the Lexus soared over an embankment and crashed, bursting into flames. Mark Saylor, his wife, their daughter, and his brother-in-law all perished within hours after the dealer handed Mark Saylor the keys to the defective loaner Lexus.¹⁴

In another tragic case, Lara Gass was killed by a defective GM ignition switch just three days after her father texted her that he had received a safety recall notice about the vehicle from General Motors. According to the *New York Times*, “Ms. Gass, 27, was killed after crashing into a tractor-trailer on her way to work as an intern for a federal judge. She died three days after the official recall notice from General Motors arrived in the mail. It was the third recall on the car, a white 2006 Saturn Ion; this time the problem was a defective ignition switch that could shut off power and disable the power steering, brakes and air bags.”¹⁵

Another reason “disclosure” is an entirely inadequate approach is that it will lack vitally important information. For example, there is a 15-year limit on when manufacturers have to cover the cost of safety recall repairs. A disclosure of an unrepaired recall is likely to lead consumers to believe that a repair is available at the manufacturer's expense, only to find out later that they would have to pay out of pocket for repairs they may not be able to afford. A consumer who, like many used car buyers, has limited income, is likely to end up stuck with an unsafe vehicle.

In addition, some consumers may be led to believe they can readily obtain repairs, only to discover – after purchase – that no repair parts are available, or the manufacturer has not devised a fix, leaving them stuck with an unsafe vehicle. Due to shortages of repair parts and qualified automotive technicians, it may be months before a recalled vehicle can be repaired and safe to operate. For example, repairs for vehicles with recalled Takata air bags that explode with excessive force and spray shrapnel, blinding people or causing them to bleed to death, may not be available for many months, or even years.

Adding to the public's confusion – car dealers themselves, including members of Congress, downplay the risks posed by recalled vehicles and lead the public to believe that they do not have to worry about recalled cars when they shop at an auto dealership. During debate over the federal Raechel and Jacqueline Houck Safe Rental Car Act on the House floor, two members of Congress who are auto dealers stated the following:

US Rep. Mike Kelly (R, PA): “There is not a single person in our business that would ever put one of our owners in a defective car or a car with a recall... There is none of us

¹⁴ NBC News: “CHP Officer, Family killed in crash. A 911 call made minutes before the accident said the car's accelerator was stuck.” <http://www.nbcsandiego.com/news/local/CHP-Officer-Family-Killed-in-Crash-56629472.html>

¹⁵ “After a G.M. Recall, a Fiery Crash,” *New York Times*, September 25, 2014. Posted at: http://www.nytimes.com/2014/09/26/business/after-a-gm-recall-a-fiery-crash-and-a-payout.html?_r=0

in our business that would ever put any of our owners in an unsafe car.”¹⁶

US Rep. Roger Williams (R, TX): “Auto dealers, much like us here in Washington, D.C., have a reputation to uphold. No auto dealer in his right mind would loan a vehicle to his customers that is unsafe to drive or operate.”¹⁷

At two legislative hearings in Sacramento, representatives of CarMax who testified regarding safety legislation denied that the company sells recalled cars without getting the recall repairs done. Then they proceeded to contradict their own testimony.¹⁸

Recently, the President and CEO of the Virginia Automobile Dealers Association told the *Daily Press* in Richmond that “The vast majority of recalls are for minor things.”¹⁹ That claim is irresponsible, misleading, and false, including regarding the safety recalls with which the proposed settlements deal. According to NHTSA, “All safety recalls resulting from defects present an unreasonable risk to safety, and we believe it is inappropriate to suggest that some defects are not risky enough to require repair. For the safety of the motoring public, all recalled vehicles should be fixed promptly.”²⁰

Dealers are in the best position to investigate if there is an unrepaired safety recall and have it repaired.

Dealers are generally in a better position to ensure that safety recall repairs are performed than individual consumers. Just as creditors under the Holder Rule are in a better position to police the market, car dealers, who are licensed professionals in the business of selling cars, are in a better position to ensure that safety recall work is performed before they sell a used car.

Many consumers live a long distance from the closest dealership of a particular make. They may also have difficulty getting time 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 particularly significant hardships and costs, such as gasoline and lost wages, if they attempt to have their vehicles repaired at a franchised car dealership.

Putting the burden of repairing safety defects primarily onto consumer purchasers is both unfair and inefficient. Dealers are in a better position than consumers to determine if any

¹⁶ U.S. Rep. Kelly, a car dealer, speaking on the Floor of the U.S. House of Representatives, in favor of a loophole to exempt auto dealers from the Raechel and Jacqueline Houck Safe Rental Car Act, November 4, 2015. (From Official Transcript.)

¹⁷ U.S. Rep. Williams, a car dealer, speaking on the Floor of the U.S. House of Representatives, in favor of a loophole to exempt auto dealers from the Raechel and Jacqueline Houck Safe Rental Car Act, November 4, 2015. (From Official Transcript.)

¹⁸ Videotaped testimony of CarMax representatives presented before the California Assembly Business and Professions Committee on July 12, 2015: <https://www.youtube.com/watch?v=oLYzsEjNAS0> and on June 17, 2014: <https://www.youtube.com/watch?v=Njvig59E7h8>

¹⁹ “Sudden disagreement: Is Car Bill Good for Consumers, or Bad?” Daily News, Richmond, Virginia, February 6, 2016.

²⁰ U.S. Senate Report 113-253, Raechel and Jacqueline Houck Safe Rental Car Act, S. 921. Posted at: http://thomas.loc.gov/cgi-bin/cpquery/?&sid=cp113o52F7&r_n=sr253.113&dbname=cp113&&sel=TOC_3436&

outstanding safety recalls exist for cars they are purchasing for resale, and to either repair them (if they are a franchisee), or take those cars to a franchised dealership for repair. According to the Government Accountability Office, only approximately 70% of recalled vehicles are repaired. According to NHTSA, an average of 25% of recalled vehicles are left unrepaired every year. So once they leave the dealer's lot, the likelihood of their being repaired plummets significantly – increasing the risk to owners, their passengers, and the general public.

Instead of putting their customers' lives at risk, dealers have a number of other options available, particularly when they buy a car that is under recall. They can factor in the repair efforts required, and the availability of repair parts, at the time they consider purchasing a car. Some dealers may choose not to purchase recalled vehicles unless the repairs have been performed. Those dealers who elect to acquire unsafe recalled cars may sell them on the wholesale market to other dealers, auto auctions, or wholesalers, or 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.

Sales of unrepaired recalled “certified” vehicles is inherently deceptive, even with “disclosure”

Because of the way auto manufacturers and dealers advertise and promote “certified” vehicles, they create reasonable expectations that the vehicles are safe and free from unrepaired safety defects. Recent nationwide polling found that a whopping 92% of respondents agreed that when a car is advertised by a dealer as having passed a 125-point inspection, they would expect it to be safe.²¹

Further confirming the polling results, automotive experts at Edmunds.com write that “CPO doesn't stand for 'Car Perfection Opportunity.' But it's hard to fault consumers for thinking that it might. Every advertisement would have you believe that a CPO vehicle is just like new....To be a CPO car, a vehicle needs to meet specific age and mileage requirements. It then must go through a thorough inspection at the dealership. If a car passes, it gets an extended limited warranty and will carry a higher price than a non-CPO model. Many people feel comfortable in paying that premium, though, because of the peace of mind a CPO program gives them.”²²

Nationwide polling also shows that 89% of respondents agree that “It is deceptive when a dealer advertises that a car was thoroughly inspected and qualified to be sold as a 'certified' car, but fails to repair a safety recall defect.” Fully 75% percent also agree that when car dealers advertise that cars were thoroughly inspected and qualified to be sold as 'certified,' they should have to actually fix any safety recall defects. Only twenty-one percent agreed dealers should be able to engage in such practices if they merely “disclose” the existence of the defect.

²¹ Nationwide polling conducted by Public Policy Polling and commissioned by the Consumers for Auto Reliability and Safety Foundation. Survey of 554 registered voters. Conducted Feb. 16 – 17, 2016. Posted at: http://carconsumers.org/pdf/National_certified_usedcar_safety_recall_poll_results_2016.pdf

²² “Certified Pro-Owned Cars: A Reality Check,” Edmunds.com, February 10, 2015. Posted at: <http://www.edmunds.com/car-buying/certified-pre-owned-cars-a-reality-check.html>

Further evidence: “Michelle Krebs, senior analyst for AutoTrader.com, said a survey of car shoppers last fall showed that consumers are willing to pay a premium of around \$2,000 for a CPO vehicle, and the top three reasons were 'peace of mind,' the warranty and affordability (compared with a new vehicle). 'Clearly, what they think they're getting is peace of mind. They recognize they are getting a vehicle that is certified to a certain level of quality and condition,' she said.”²³

Adding to the level of deception, dealers charge consumers extra for “certified” cars. If consumers were fully aware of the risks posed by the safety defects, they might not buy the car at all. However, they are tricked into paying a substantial premium (often over \$1000) and led to believe they are purchasing a superior product that has passed a rigorous inspection and is not only safe, but also worth more than a non-certified vehicle.

Yet another level of deception: many claims made about “certified” vehicles include specific, detailed representations about the individual components that have passed a professional inspection. Dealers commonly list parts and systems such as brakes, safety restraints, and other components. When any of those listed components or systems are defective and subject to a safety recall, it is unfair and deceptive for the dealer to claim the vehicle passed an inspection and qualified to be sold as “certified.”

Some manufacturers also make specific claims regarding the overall safety of “certified” vehicles sold under their brand that are totally inconsistent with the vehicle's having an unrepaired safety recall. For example, BMW advertises on its website:

“Every BMW vehicle considered for certification must undergo a comprehensive inspection process by a BMW trained Technician. Systems and components are checked, ranging from engine performance, to the operation of the glovebox. **Particular attention, of course, is devoted to safety-related items, from tire tread depth, to seatbelt function, to the operation of the brake lights. Everything must perform according to BMW specifications.** In addition, all scheduled maintenance is brought up to date.” [Emphasis added]

Ford advertises vehicles that qualify to be sold as “certified” with the following claims:

“Ford factory-trained dealer technicians go through each vehicle, performing a rigorous 172-point inspection, including obtaining a CARFAX[®] Vehicle History Report.™ Any part(s) that doesn't meet our standards is replaced with a factory-authorized part. For added peace of mind, each vehicle comes with comprehensive limited warranty coverage and powertrain limited warranty coverage backed by Ford Motor Company.*
*See your dealer for warranty coverage details.”

The bottom line for consumers is that the way manufacturers and dealers advertise and promote “certified” used cars is completely at odds with their having unrepaired safety defects. In terms of public perception and well-founded consumer expectations, the two are contradictory and mutually exclusive. Anytime a dealer sells a “certified” car, it must be safe,

²³ “Certified pre-owned car buyers pay for peace of mind,” *Chicago Tribune*, March 18, 2015.

and free from unrepaired safety recalls.

Allowing sales of recalled used cars with “disclosure” would particularly harm vulnerable consumers

While existing laws apply to all dealers and all car buyers, if the FTC were to allow dealers to sell unsafe recalled cars with “disclosure,” that would expose particularly vulnerable used car buyers to being targeted for sales of cars with lethal safety defects. Typically, car sales involve verbal exchanges between sales personnel and car buyers, and sometimes the conversation is in a language other than English. Dealers also often advertise in other languages on TV and radio. If a dealer touts its “rigorous inspections” and “certified” status in advertising in the car buyer's native language, and salespersons make similar claims in the same language, disclosing the existence of an unrepaired safety recall in writing, in English only, would be unfair and deceptive. Even if the disclosures were in the same languages as the ads and verbal claims, selling “certified” cars with unrepaired safety recalls would be still be inherently deceptive, for the reasons provided above.

The proposed settlements would particularly jeopardize the safety of consumers who are not proficient in reading legalistic English, who are illiterate, or who are recent immigrants, young people, first-time car buyers, or active duty military personnel and their families who have been stationed overseas, and all consumers who may have missed the news headlines about safety defects and recalls.

The inadequacy of “disclosure” in the context of an auto sale is demonstrated by the experience of a Sergeant in the Army stationed at Fort Bragg, North Carolina. In 2015, she told Consumers for Auto Reliability and Safety that she bought a GM car from the CarMax store near the base, believing it would be safe. She had been stationed in Korea for two years, so had missed all the news headlines about the GM ignition switch defect, and was unaware how hazardous the defect was. She saw the recall notice, which was presented to her after she had selected the car, and thought because she was of relatively small stature, she did not need to worry about bumping the key with her knee. She was unaware that in some cases just driving over a pothole was enough to cause the ignition to switch into “off” mode, causing the power brakes and steering to fail, and the air bag to deactivate. She was unaware how many people – many of them young women – had been killed by that defect. She also did not realize she could get the car repaired for free, at the local GM dealership, and assumed she could not afford the repair, so had delayed getting it fixed.

Written disclosures are also subject to being overridden by verbal representations made by salespersons who lack the training and expertise necessary to inform car buyers about the risks involved, and who have a conflict of interest due to their being paid to make a sale.

Low-income consumers and car buyers with credit problems would be particularly vulnerable. It is common practice for dealers to steer consumers with damaged credit into purchasing a certain vehicle, telling them that it is “the only one on the lot” they qualify to buy. The proposed settlements would enable unscrupulous dealers to discriminate regarding who they target to purchase unrepaired recalled cars, warning some verbally about the hazards, while verbally downplaying the risks when selling the cars to others – with fatally flawed written “disclosures.”

Another potential level of deception: some dealers provide a vehicle history report that informs buyers about the condition of the car – or so they claim. That type of detailed third-party information tends to be viewed as impartial and authoritative, and gives the impression the dealer is being open and transparent, but it is subject to abuse and can add to the deception, defeating any benefit from the “disclosure.”

For example, CarMax touts the fact it provides a vehicle history report with each car it sells. However, CarMax chooses to provide AutoCheck reports generated by Experian, which often tend not to include safety recall information (unlike Carfax, which often tends to capture safety recall data.) Instead, AutoCheck gives green checkmarks to indicate that many other aspects of the car's history passed without any red flags, but often gives unrepaired recalled vehicles unqualified approval with a summary that says “no problems detected.” That gives the false impression the car has no problems, when AutoCheck simply failed to capture unrepaired safety recalls. This practice gives consumers a false sense of security that a particular car is free from any serious problems, and in particular free from unrepaired safety recalls.

Last December, CarMax sold a 2012 Jeep Grand Cherokee with three unrepaired safety recalls to an auto safety advocate in Massachusetts. It was under recall because it was prone to catching on fire, had faulty brakes, and was prone to intermittent stalling in traffic, without warning. Yet the AutoCheck report failed to mention any of the safety recalls, and instead indicated that the vehicle had “0 problems.”²⁴

The proposed settlements would be worse than existing practices in much of the industry

Typically, auto manufacturers who have “certified” programs prohibit their franchised dealers from selling unrepaired recalled cars as “certified.” Those provisions are in their franchise agreements and also in the criteria established by the manufacturers for vehicles to qualify to be sold with the manufacturer's brand and limited express warranty.

In an effort to improve compliance with federal laws prohibiting dealers from selling unrepaired recalled new cars, Chevrolet has instituted a structure of rewards and penalties. According to *Automotive News*, “Chevy is...adding a penalty to dealers that deliver a new vehicle that is subject to an open safety recall, a move that likely comes in light of GM's massive ignition switch recall from last year.”²⁵ That is a commendable step for an auto manufacturer to take, and should be encouraged by the FTC, rather than undermined by allowing sales of unrepaired recalled used cars with “disclosure” by GM's and its dealers' competitors, such as CarMax.

Honda recently issued a memo to its franchised dealers, warning them regarding Honda vehicles with recalled Takata air bags. According to *Automotive News*, Honda said that “Dealerships would be responsible for any claims stemming from selling an unrepaired car from the affected population. 'Should an unrepaired vehicle result in any claim because of the

²⁴ AutoCheck report for Jeep Cherokee purchased by auto safety advocate Sean Kane at CarMax in Attleboro, MA. Posted at: http://carconsumers.org/pdf/CarMax_MA_Sean_Kane_Jeep_AutoCheck_report.pdf

²⁵ “Chevrolet ties recalls with dealer incentive program,” *Automotive News*, January 5, 2016.

required recall repair, the dealership will be solely responsible to the claimant, and will be required to defend and indemnify American Honda for any resulting claims,' Honda said in the memo."²⁶

When the manufacturers themselves do not allow the sales of "certified" cars with unrepaired recalls, at a minimum the FTC should adhere to that standard, and not lower its standards to permit sales of so-called "certified" cars by dealers such as CarMax, whose practices are dangerously deceptive, and which sells a high volume of recalled vehicles with lethal safety defects.

Beyond the scope of these individual settlements, the FTC should prohibit dealers from selling any cars with unperformed safety recalls

The consent agreements that are the subject of these comments deal specifically with the sale of certified pre-owned cars touted as safe. Certainly the Commission should not allow dealers to sell any car with an unperformed safety recall in such a manner and should amend the consent agreements accordingly. Beyond these individual agreements, the FTC should prohibit the sale by a dealer of any car with an unperformed safety recall as unfair.

The FTC's 1994 Reauthorization Act defines those unfair practices that the FTC can declare unlawful as those "likely to cause substantial injury to consumers which is not reasonably avoidable by consumers themselves and not outweighed by countervailing benefits to consumers or to competition."²⁷

The Senate Report providing extensive legislative history of this provision states:

"Consumer injury may be 'substantial' under this section if a relatively small harm is inflicted on a large number of consumers or if a greater harm is inflicted on a relatively small number of consumers. In accordance with the FTC's December 17, 1980, letter, substantial injury is not intended to encompass merely trivial or speculative harm. In most cases, substantial injury would involve monetary or economic harm or **unwarranted health and safety risks**."²⁸ (emphasis added)

The unwarranted safety risks posed by the sale of cars with unperformed safety recalls would cause enormous harm to consumers, not only with no benefit to consumers or the market, but at great cost to the nation.

"According to preliminary estimates from the National Safety Council, 38,300 people were killed on U.S. roads in 2015. In addition, 4.4 million were seriously injured ... said Deborah A.P. Hersman, NSC president and CEO, 'Driving a car is one of the riskiest activities any of us undertake in spite of decades of vehicle design improvements and traffic safety advancements.'"²⁹

²⁶ "Honda warns dealerships of liability as it widens airbag recall," Automotive News, February 3, 2016, posted at: <http://www.autonews.com/article/20160203/OEM11/160209921/honda-warns-dealerships-of-liability-as-it-widens-airbag-recall>

²⁷ The Federal Trade Commission Act Amendments of 1994, Pub. L. No. 103-312 § 9, adding a new 15 U.S.C. § 45(n) (Aug. 26, 1994).

²⁸ Sen. Rep. No. 130, 103d Cong., 2d Sess. 12 (1994), reprinted in 1994 U.S.C.C.A.N. 1787-1788. See also H. Conf. Rep. No. 617, 103d Cong., 2d Sess. 11 (1994), reprinted in 1994 U.S.C.C.A.N. 1797.

²⁹ "Motor Vehicle Deaths Increase by Largest Percent in 50 Years," National Safety Council News Release issued February 27, 2016.

“Motor vehicle crashes cost employers \$60 billion annually in medical care, legal expenses, property damage, and lost productivity. They drive up the cost of benefits such as workers’ compensation, Social Security, and private health and disability insurance. In addition, they increase the company overhead involved in administering these programs. The average crash costs an employer \$16,500. When a worker has an on-the-job crash that results in an injury, the cost to their employer is \$74,000. Costs can exceed \$500,000 when a fatality is involved.”³⁰

According to NHTSA, “Motor vehicle crashes impose a staggering human and economic toll in the United States. The price tag for crashes comes at a heavy burden for Americans at \$871 billion in economic loss and societal harm. This includes \$277 billion in economic costs – nearly \$900 for each person living in the United States based on calendar year 2010 data – and \$594 billion in harm from the loss of life and the pain and decreased quality of life due to injuries”³¹

Thank you again for the opportunity to comment. Should the Commissioners or FTC staff have any questions regarding these comments, please contact Rosemary Shahan, President of Consumers for Auto Reliability and Safety, for further information.

³⁰ “Guidelines for Employers to Reduce Motor Vehicle Crashes,” White Paper issued by the Occupational Safety and Health Administration (OSHA), National Highway Traffic Safety Administration (NHTSA) and Network of Employers for Traffic Safety (NETS). Posted at: https://www.osha.gov/Publications/motor_vehicle_guide.pdf

³¹ “The heavy toll of crashes in the U.S.” U.S. Department of Transportation. Posted at: <https://www.transportation.gov/fastlane/heavy-toll-motor-vehicle-crashes>