

whether warranties or service contracts are available.<sup>53</sup> Pursuant to that Act, if a warranty is offered the complete terms must be set forth in writing. The Commission's research into the market for used leased vehicles indicates that most used vehicles that are leased come with warranties. Thus, lessors are required to provide the same type of information required by the Used Car Rule (although not via a window sticker format). Accordingly, the Commission has determined that the suggested change is unnecessary.

*D. Amend Language That the Buyers Guide Controls in the Event of a Discrepancy*

i. *Summary of Comments.* NCLC suggested changing the language in Section 455.3(b) of the Rule, which incorporates the Buyers Guide into the written contract by reference and provides that the Buyers Guide controls in the event of any discrepancy. NCLC stated that the requirement that the Buyers Guide overrides any contrary provisions is too broad and might in some cases have the Buyers Guide override greater protections in the contract.<sup>54</sup> NCLC preferred language saying that if there are contrary provisions in the contract, the provision that offers the greatest warranty protection to the consumer is applicable.<sup>55</sup>

ii. *Discussion.* The purpose of the disclosure in Section 455.3(b) is to provide consumers with protection by allowing information to be considered that might otherwise not be considered under contract law. Specifically,

By integrating the Buyers Guide within the "four corners" of the used car sales contract, the Commission intends that the Buyers Guide become part of the written agreement between buyer and seller, so that, in the event of disputes between buyers and sellers, the information on the Buyers Guide would fall outside the exclusions of the parol evidence rule of contract law.<sup>56</sup>

The NCLC comment envisions a situation where, for example, a written contract offers a warranty but the Buyers Guide is marked "As-Is" and then incorporated into the contract, negating or overriding the warranty described in the contract. Because the Rule states that the Buyers Guide controls, the consumer could, theoretically, be without recourse. However, the Commission has never encountered this problem, most likely because the Buyers Guide, if conforming to the Rule, should

contain any extra protections set forth in the contract. In fact, the Rule places an affirmative duty on dealers to ensure that the Buyers Guide reflects the actual terms negotiated. Section 455.3(b) of the Rule states that the "information on the final version of the window form is incorporated into the contract \* \* \*" (emphasis added),<sup>57</sup> and section 455.4 states that "[A]ny final warranty terms agreed upon \* \* \* must be identified in the sales contract and summarized on the copy of the Buyers Guide given to the buyer."<sup>58</sup> Accordingly, there will be no conflict where the dealer complies with the Rule. Where the dealer does not, and the Buyers Guide contains the "As-Is" statement, there usually will be ample evidence that this was not a "final" Buyers Guide reflecting the terms negotiated.<sup>59</sup>

For these reasons, the Commission has determined that action to amend the Rule in this regard is unnecessary.

*E. "AS-IS" Version of the Buyers Guide May Be Depriving Consumers of Oral or Implied Warranty Rights Under UCC or State Law*

i. *Summary of Comments.* NCLC recommended that the Commission clarify use of the word "warranty," as used on the Buyers Guide. The comment notes that, under the UCC, oral express warranties may be given in an individual transaction, notwithstanding that written warranties are not provided.<sup>60</sup> Consequently, NCLC believed that the term "As-Is No Warranty" on the Buyers Guide is confusing, because, pursuant to the Rule's definition, the term "No Warranty" only means no written warranty.<sup>61</sup> Therefore, NCLC contended

<sup>57</sup> Section 455.3(a) states that the dealer must provide the buyer with a Buyers Guide containing all of the disclosures required by the Rule, "and reflecting the warranty coverage agreed upon."

<sup>58</sup> SBP at 45711 (emphasis added).

<sup>59</sup> Other documents generated in used car sales transactions also would be pertinent to a decision whether a Buyers Guide reflects the "final version" of the deal negotiated between the buyer and the dealer. For example, the Warranty Disclosure Rule requires that consumers be given written information regarding warranty terms and coverage. It also provides that written warranty terms become "part of the basis of the bargain between the supplier and the buyer . . ." 16 CFR section 701.1(c)(2). Thus, if warranty documents are considered part of the contract, and a Buyers Guide indicates that a vehicle was sold "As-Is," the warranty documents would appear to be evidence that the Buyers Guide did not reflect the final deal, and the language in section 455.3(b) of the Rule would not be controlling.

<sup>60</sup> B-23 at 2.

<sup>61</sup> Under the Rule, "warranty" means "any undertaking in writing, in connection with the sale by a dealer of a used vehicle, to refund, repair, replace, maintain or take other action with respect to such used vehicle and provided at no extra charge beyond the price of the used vehicle." NCLC noted that the definition is very similar to the one

the "As-Is No Warranty" notice on the Buyers Guide could conflict with UCC protections and mislead consumers into believing that any express oral warranty is voided when the dealer provides an "As-Is No Warranty" Buyers Guide.<sup>62</sup> Moreover, NCLC contends that a dealer might make oral warranties which are recognized by state law, but later use the "As-Is No Warranty" language on the Buyers Guide as evidence that no oral warranties had been offered.

NACAA similarly stated that:

In many jurisdictions, oral or written representations (other than [those found on] the "Buyers Guide") are enforceable. To remedy this conflict, the [R]ule should be changed to say that while dealers may not make any statements or take any actions that would be contrary to the disclosures required in §§ 455.2 and 455.3, the "Buyers Guide" may not be used to disclaim any rights that consumers may be able to assert under state or local law\* \* \*.<sup>63</sup>

In addition, NCLC stated that the warranty section of the Buyers Guide should be changed. The comment pointed out that a warranty, as defined in § 455.1(d)(5), is an undertaking in writing to refund, repair, replace, maintain, or take other action with respect to the vehicle.<sup>64</sup> NCLC noted, however, that the form language written on the Guide speaks only in terms of repair. It does not appear to allow any option of refund, replacement, maintenance, or other action. NCLC suggested that the Buyers Guide be changed to reflect that these as well as other remedies are options.<sup>65</sup>

As a corollary to the foregoing discussion, several comments contended that the most frequently used version of the Buyers Guide—having only "AS-IS-NO WARRANTY" and "WARRANTY" designations—encourages dealers to sell cars without warranties. This version of the Buyers Guide provides dealers with two choices, either to give an express written warranty or to sell the car "As-Is" (with no express or implied warranties). An alternate "Implied Warranties Only" Buyers Guide is provided for in § 455.2(b)(ii) for use in those states that prohibit "As-Is" sales.

that appears in the Magnuson-Moss Warranty Act, 15 U.S.C. 2301(6)(B). See SBP at 45709 ("These subsections define the terms 'warranty,' 'implied warranty,' and 'service contract' in a manner which conforms to the definitions of those terms in the Magnuson-Moss Warranty Act").

<sup>62</sup> According to NCLC, the UCC allows dealers to disclaim implied warranties (i.e., sell a vehicle "As-Is" and still make statements about the car that create oral express warranties). B-23 at 2.

<sup>63</sup> B-24 at 2.

<sup>64</sup> B-23 at 8-9.

<sup>65</sup> *Id.*

<sup>53</sup> 15 U.S.C. 1667 *et seq.*; see also 12 CFR 213.

<sup>54</sup> B-23 at 2.

<sup>55</sup> *Id.*

<sup>56</sup> SBP at 45710.