

Washington Attorney General is somewhat unique insofar as it pertains to implied warranties, and might be addressed more effectively under state law. For the foregoing reasons, the Commission has determined to take no action on the suggested change.

F. Private Right of Action

i. *Summary of Comments.* NCLC and Jay Drick suggested that the Commission create a private right of action for violation of the Rule.⁷⁵ NCLC noted that currently, a consumer has a cause of action for violations of the Magnuson-Moss Warranty Act, but no equivalent cause of action for violations of the Rule.⁷⁶ These comments suggested that the Rule state that a violation of the Rule is a violation of the Magnuson-Moss Act, which affords a private legal remedy in both state and federal courts. NCLC stated that, if necessary, the language of the Magnuson-Moss Warranty Act could be amended to make this clear. According to these comments, a private right of action for violation of the Rule would increase dealers' accountability for violating the Rule.⁷⁷

ii. *Discussion.* The actual value of a private cause of action for buyers against dealers for violating the Used Car Rule is unclear. It would be difficult for consumers to prove and quantify the injury or damages sustained as a consequence of a Rule violation for failing to post a Buyers Guide or for some other violation of the Rule.⁷⁸ In enforcing compliance with the Rule, the Commission has relied on injunctions and civil penalties to stop violations and provide deterrence.

Even if a private right of action would be useful, the Commission has no apparent authority to create one. There is no private right of action for violation of any FTC rule promulgated under the Magnuson-Moss Act. In addition, federal courts consistently have held

that there is no private remedy under the FTC Act.⁷⁹

For the foregoing reasons, the Commission is taking no action on the recommendation.

Questions Three, Four, Seven, Eight, Nine, and Eleven

Questions 3, 4, 7, 8, and 9 all deal generally with the costs and burdens that may be associated with the Rule. Consequently, they are addressed together to avoid repetition. Question 11 is also included in this section because it deals with the number of small firms that are affected by the Rule.

Question Three

What significant burdens or costs, including costs of compliance, has the Rule imposed on firms subject to its requirements?

a. Has the Rule provided benefits to such firms?

Question Four

What changes, if any, should be made to the Rule to reduce the burdens or costs imposed on firms subject to its requirements?

a. How would these changes affect the benefits provided by the Rule?

Question Seven

What significant burdens or costs, including costs of compliance, has the Rule imposed on small firms subject to its requirements?

a. How do these burdens or costs differ from those imposed on larger firms subject to the Rule's requirements?

Question Eight

To what extent are the burdens or costs that the Rule imposes on small firms similar to those that small firms would incur under standard and prudent business practices?

Question Nine

What changes, if any, should be made to the Rule to reduce the burdens or costs imposed on small firms?

a. How would these changes affect the benefits of the Rule?

b. Would such changes adversely affect the competitive position of larger firms?

Question Eleven

How many used car dealers have under \$11.5 million in annual sales?

i. *Summary of Comments.* No comment furnished any information about how many dealers have sales under \$11.5 million, which is how a small used motor vehicle dealer is defined by the Small Business Administration. Based on the Commission's experience in conducting inspections and investigations, the Commission believes that the overwhelming majority of independent used car dealers have annual sales under \$11.5 million, and thus are small entities for purposes of the RFA analysis. Franchised dealers that sell used cars, in contrast, are likely to have annual sales in excess of \$11.5 million, but their sales figures would include new car as well as used car sales.

Only a few comments addressed whether changes to the Rule—short of rescinding the Rule altogether⁸⁰—would reduce the costs imposed on small and large firms. TADA contended that requiring a Spanish Buyers Guide to be posted on every used vehicle in addition to the English Buyers Guide, where sales are conducted in Spanish, is burdensome to dealers, and it therefore recommended that dealers be permitted to provide a Spanish Buyers Guide to the consumer only when the transaction is being consummated.⁸¹ NIADA suggested that the burdens related to compliance are greater for small dealerships because larger dealerships have more personnel to assist in the preparation and processing of paperwork related to car sales.⁸²

⁸⁰ For example, two comments from independent dealers contended that the Rule and the posting requirement place an unnecessary burden on dealers. They stated the Rule creates extra, and unneeded, steps in processing a vehicle sale transaction. No quantification for the assertion was provided, however. B-03 at 1, B-26 at 1. One of the dealers also noted that virtually every car in his area is sold "As-Is" and that most consumers in the area are aware of the practice. Instead of posting Buyers Guides, he suggested posting one large sign on the lot stating: "Unless a specific warranty is provided in writing, all used vehicles for sale at this dealership are sold As-Is; the buyer will pay all costs for any repairs." B-03 at 2.

⁸¹ B-11 at 2. TADA asserted that in cities with large Spanish-speaking populations where dealers conduct a large percentage of sales in Spanish, the Rule requires each vehicle to have two Buyers Guides, one in English and another in Spanish.

⁸² B-7 at 2. NIADA noted that filling out the Buyers Guide and attaching it to the car is just another part of the logging-in procedure. With

⁷⁵ B-23 at 1-2, B-25 at 1 (a consumer and attorney).

⁷⁶ B-23 at 1.

⁷⁷ B-23 at 1-2, B-25 at 1. Mr. Drick contends the rule should allow for enforcement by private attorneys in state courts. B-25 at 1.

⁷⁸ Consumers who have disputes with dealers about warranties generally already have recourse to the courts to resolve their disputes, and such disputes normally will involve resolving who should be responsible for making repairs. For example, section 110(d) of the Warranty Act allows consumers to bring suits on their own behalf for a warrantor's failure to honor warranties or service contracts, or to comply with any other obligation under the Act. Under the law, actions generally will be brought in state courts. If a complaint alleges at least \$50,000 in damages the action may be filed in federal court.

⁷⁹ The Circuit Court for the District of Columbia, in *Holloway v. Bristol-Myers Corp.*, 485 F.2d 986, 988-89 (D.C. Cir. 1973), and other federal courts have held there is no implied private right of action under the FTC's franchise disclosure rules. In *Freedman v. Meldy's Inc.*, 587 F. Supp. 658, 662 (E.D. Pa. 1984), the court reached its decision despite the FTC's contention that the courts should recognize private rights of action under the Franchise Rule. Citing Justice Rehnquist's opinion in *Cannon v. University of Chicago*, 441 U.S. 677, 718 (1978), the *Freedman* court stated: "Congress may, if it wishes, give effect to the apparent desire of the FTC that private rights of action be afforded litigants under 16 CFR §§ 436.1-438.10. The FTC may express, as it has, its opinion that private rights of action should be provided, but the Commission's opinion cannot supplement or supply the requisite Congressional intent." 587 F. Supp. at 662.