



Rosemary Shahan
14-5-3

Consumers for Auto Reliability and Safety

June 26, 2014

Clerk of the Board
Air Resources Board
1001 I Street
Sacramento, CA 95814

Re: Comments on proposed amendments to the Enhanced Fleet Modernization Program

Consumers for Auto Reliability and Safety (CARS) appreciates the opportunity to comment regarding the Air Resources Board's proposed amendments to the Enhanced Fleet Modernization Program. Overall, the proposal represents a flexible approach that we hope will help create a more effective program, in accordance with the goals of SB 459 (Pavley).

We agree with the recommendations made by Next Generation regarding increased fuel efficiency standards for all replacement vehicles, in order to further enhance emissions reductions and also maximize economic benefits to program participants.

We appreciate the staff's determination that "consumer protection is essential to ensuring that the program benefits are realized by the participants,"¹ and agree that for the program to succeed, it must earn the public trust. As the proposal states, "Simply increasing incentive amounts as a means to increase participation by low-income motorists is nullified if the target audience does not believe participation to be personally beneficial."² It should be a basic tenet of each of the programs operating under the auspices of the Air Resources Board, and funded by Californians, that consumers will not be harmed by participating in the program, either by being sold an unsafe vehicle, or suffering economic harm.

Therefore, it is extremely disappointing and a major flaw in the proposal that it fails to establish even the most basic criteria for terms of the transactions, or for vehicles to be eligible as replacement vehicles. For example, no vehicle should be subject to an unrepaired federal safety recall. Attached is a list of criteria that CARS recommends that the ARB consider and adopt. This list was provided to staff on March 26, 2014.

Because some have proposed partnering with CarMax as a supplier of replacement vehicles, because CarMax sells all of its used cars as so-called "CarMax Quality Certified" vehicles that have supposedly passed a rigorous "125+ point inspection," also attached is a petition CARS and 10 other major national consumer organizations filed on June 14 with the Federal Trade Commission, seeking

- 1 Air Resources Board Staff Report: Initial Statement of Reasons for Proposed Rulemaking, Proposed Amendments to the Enhanced Fleet Modernization Program, page 14.
- 2 Ibid, page 10.

an investigation and enforcement actions against CarMax over its deceptive and misleading advertising. As the petition states, CarMax fails to ensure that safety recalls are performed prior to selling used cars to consumers. The New York Times recently reported that "CarMax, the nation's largest seller of used cars, offers a "Certified Quality Inspection," which does not include fixing [safety] recalls."³

More information about the petition, including links to news reports by the Los Angeles Times, New York Times, Wall Street Journal, Detroit News, and many other news organizations are available online and on CARS' website.

It is also important to note that the U.S. Department of Transportation has recommended to Congress that car dealers be prohibited from selling recalled used cars to consumers, as part of the Administration's proposal to Congress regarding the federal highway bill.

In sum, in order for the program to succeed, it is important for the Air Resources Board to establish minimum criteria to ensure that consumers are protected, and not harmed, by participating in the program.

Thank you again for your consideration of our views.

Sincerely,

A handwritten signature in black ink that reads "Rosemary Shahan". The signature is written in a cursive, flowing style.

Rosemary Shahan
President

3 "Recalled Used Cars Roam Roads as Legislation Stalls," New York Times, front page, May 9, 2014, by Rachel Adams and Christopher Jensen. (Emphasis added.)

EFMP Program

Proposed Consumer Protections

In order to sustain the effectiveness and credibility of the program, build consumer confidence that the program provides owners of high-emitting vehicles with a viable alternative sufficient to motivate consumers to voluntarily take advantage of the opportunities presented, and ensure that taxpayer dollars are not wasted due to fraud or other abuses, basic consumer safeguards are necessary.

Loans / pricing / transaction

Each of the provisions proposed by ARB regarding loans would benefit consumers and has merit. In addition, CARS proposes that the ARB consider:

Restricting dealer markups on loans to \$150 per transaction – fair compensation for assigning retail installment contracts to a third party lender – to help reduce the risk of price-gouging on loans or a discriminatory impact

See: <http://www.consumerfinance.gov/newsroom/cfpb-and-doj-order-ally-to-pay-80-million-to-consumers-harmed-by-discriminatory-auto-loan-pricing/>

Prohibition against dealers charging in excess of the “fair market value.” This is necessary in order to reduce the risk of dealers “swallowing” the value of the vouchers or price-gouging, denying car buyers any benefit and misusing taxpayer funds.

Precedents: definition of “fair market value” / “reasonable market value”

Civil Code Section 2982.7. (a) Any payment made by a buyer to a seller pending execution of a conditional sale contract shall be refunded to the buyer in the event the conditional sale contract is not executed.

(b) In the event of breach by the seller of a conditional sale contract or purchase order where the buyer leaves his motor vehicle with the seller as downpayment and such motor vehicle is not returned by the seller to the buyer for whatever reason, the buyer may recover from the seller either the fair market value of the motor vehicle left as a downpayment or its value as stated in the contract or purchase order, whichever is greater. The recovery shall be tendered to the buyer within five business days after the breach.

In CA, all “Buy Here Pay Here” dealers are currently required to disclose on the vehicle the “reasonable market value,” under AB 1534 (Wieckowski, 2012), based on data from nationally recognized car buying guides such as Kelly Blue Book.

Loan-to-value ratio: no more than 100%, including the amount of the voucher /rebate

Replacement Vehicle Condition

In addition to criteria regarding emissions benefits, prohibition against replacement vehicles that fail to meet basic criteria for safety and reliability, specifically:

1. Are under a federal safety recall, unless the safety recall repairs have been performed (existing Vehicle Code Section already prohibits dealers from selling used vehicles that fail to comply with Federal Motor Vehicle Safety Standards, which can trigger a safety recall, but existing law does not apply to vehicles that are being recalled due to defects that pose an "unreasonable risk to safety," such as the Toyota sudden acceleration defect, GM Cobalt ignition shut-off defect, or other life-threatening defects that lead to many auto safety recalls)

Note: dealers claim they cannot tell whether a vehicle is subject to a federal safety recall. However, NHTSA issued a rule that requires manufacturers to provide up-to-date, VIN-searchable safety recall info on their own websites (which nearly all of them have been doing for years). See *New York Times* report re NHTSA's safety recall data rule, which takes effect August 14, 2014:

http://wheels.blogs.nytimes.com/2013/08/15/new-federal-rule-requires-recall-information-to-be-searchable-by-v-i-n/?_php=true&_type=blogs&_r=0

2. Have been reported to the National Motor Vehicle Title Information System (NMVTIS) as a total loss, or with a title brand such as "lemon law buyback," "manufacturer buyback," "flood," "salvage," "junk," "non-repairable"
3. Sustained major frame or unibody damage, to the extent that it would not track properly, would provide compromised protection in a subsequent collision, or would render the warranty or extended service contract partially or entirely void
4. Have sustained damage to major electronic components due to flooding or immersion in water
5. Have an altered odometer (in addition to decreasing the value, an altered odometer usually voids the warranty or extended service contract, exposing the buyer to major, unanticipated out-of-pocket repair expenses)
6. Fail to pass smog test at time of sale

Replacement Vehicle Warranties

Prohibition against "AS IS" sales or displaying a Used Car Buyers Guide (required by the FTC on all used cars offered for sale by dealers) that indicates that the sale is "AS IS"

Requirement for dealer to provide a warranty that is at least as comprehensive as the warranties that "Buy Here Pay Here" dealers are required to provide under AB 1447 (Feuer, Statutes of 2010), including the provision in AB 1447 that if the dealer sells the vehicle while falsely representing that the sale is "AS IS," the warranty is still deemed to be in effect.

Minimum duration of warranties provided by the selling dealer, unless the remainder of the factory warranty is in effect for the same period:

Model year 2002 – 2005 – at least 6 months

Model year 2005 – 2010 – at least 12 months

Model year 2010 – newer – at least 24 months

Extended Service Contracts

No Extended Service Contracts that are partially or entirely void due to prior damage, lemon law history, altered odometer, or other pre-existing condition

No Extended Service Contracts that duplicate coverage provided by the dealer or manufacturer warranty

No charges for Extended Service Contract in excess of \$1000 or 10% of the purchase price of the car, whichever is less

Other types of insurance / advance payment products

No "soft" add-ons (such as "GAP insurance," theft-etch, fabric protection) in excess of \$1000 or 10% of the purchase price of the car without the add-ons, whichever is less (add-ons such as "free oil changes" usually contain limitations in the fine print that render them worthless, and are often offered by companies located outside California, making any enforcement illusory)

Program Oversight

Review and audit program vehicles and transactions to check for compliance, irregularities, or predatory practices

Provide a toll-free number for consumers who are using the program, accessible in multiple languages, where consumers can ask questions or complain / seek assistance; raise awareness about the toll-free number at dealerships and via avenues used to promote the program

Provide a separate toll-free number for whistleblowers who spot fraud or other predatory practices and offer protection and incentives for whistleblowers to report to the ARB

**Consumers for Auto Reliability and Safety
Center for Auto Safety
Consumer Action
Consumer Federation of America
Consumers Union
Courage Campaign
National Association of Consumer Advocates
National Consumer Law Center¹
National Consumers League
Trauma Foundation
U.S. Public Interest Research Group**

June 23, 2014

Edith Ramirez, Chairwoman
Federal Trade Commission
600 Pennsylvania Avenue, NW
Washington, DC 20580

Re: PETITION Seeking FTC Enforcement Action vs. CarMax, Inc.

Dear Chairwoman Ramirez:

The non-profit consumer organizations listed above submit this petition, seeking enforcement action by the Federal Trade Commission, to curb CarMax's deceptive advertising and sales practices, which endanger the lives of their customers, their families, other passengers, and everyone who shares the roads.

CarMax is the nation's largest retailer of used vehicles. According to CarMax, it has sold more than 4 million cars. CarMax advertises on its website, on television, in newspapers, and at its dealerships that each of the used vehicles it offers for sale are "CarMax Quality Certified" and has undergone a rigorous, "125+ point inspection."

However, CarMax fails to ensure that safety recalls are performed prior to selling used cars to consumers. The *New York Times* recently reported that "CarMax, the nation's largest seller of used cars, offers a "Certified Quality Inspection," **which does not include fixing [safety] recalls.**"²

It is inherently deceptive for an auto dealer to represent that its vehicles have passed a rigorous inspection, while failing to take even the most basic step of checking the vehicle's safety recall status in order to identify known safety defects that have triggered a federal safety recall, and ensuring that the safety recall repairs have been performed, prior to selling the vehicle to a consumer.

¹ On behalf of its low-income clients.

² "Recalled Used Cars Roam Roads as Legislation Stalls," *New York Times*, front page, May 9, 2014, by Rachel Adams and Christopher Jensen. (Emphasis added.)

CarMax's claims clearly go beyond mere puffery, and would very likely mislead even sophisticated car buyers into believing that they do not need to have the vehicles inspected by an independent automotive technician of their choice, or check them out themselves. The company even lists dozens of specific vehicle components that it supposedly checks prior to offering vehicles for sale, without revealing that they may be so defective, they are subject to a safety recall. It also claims that each car has been "renewed" prior to sale.

For example, CarMax advertises on its Website:

125+ point inspection

Experienced technicians put every vehicle through a rigorous Certified Quality Inspection—over 125 points must check out before it meets our high standards.

Every used car is renewed

CarMax cars undergo (on average) 12 hours of renewing—sandwiched between two meticulous inspections—for a car that doesn't look or feel used.

No cars with flood or frame damage

Not every car that looks good is good. We're confident in the safety and reliability of our vehicles because our technicians are trained to detect those with hidden damage.

Such claims are dangerously deceptive, since they tend to lull car buyers into a false sense of security regarding the safety of used vehicles CarMax is offering for sale to consumers.

It is all the more important for the FTC to act, and exercise its authority under the FTC Act to address false or deceptive advertising, since the National Highway Traffic Safety Administration (NHTSA) currently lacks authority over new and used car dealers, regarding sales of used cars that are subject to auto safety recalls. According to the U.S. Government Accountability Office (GAO), in its 2011 report to Congress:

"NHTSA cannot require used-car dealers, or franchised dealerships that sell used vehicles, to get the defect remedied prior to sale....With over 35 million used cars sold by used and franchised dealerships in the United States in 2009 alone, this could pose a significant risk to the safety of millions of vehicle drivers, and may have a negative impact on recall completion rates."³

While the U.S. Department of Transportation recently recommended to Congress, as part of its proposal regarding the GROW America Act, that Congress include a provision to prohibit dealers from selling recalled used cars to the public without fixing them first, that provision is likely to face stiff auto dealer opposition. In addition, CarMax, the California New Car Dealers Association, and independent auto dealers are opposing first-in-the-nation

³ United States Government Accountability Office: *Auto Safety: NHTSA Has Options to Improve the Safety Defect Recall Process*, Issued June 2011, page 40 (emphasis added).

legislation currently pending in California, SB 686, authored by California State Senator Hannah-Beth Jackson, that would prohibit auto dealers from selling used vehicles with unrepaired safety recalls to consumers.

Under the National Traffic and Motor Vehicle Safety Act, auto manufacturers are mandated to recall vehicles that either 1) fail to meet a Federal Motor Vehicle Safety Standard, or 2) otherwise pose an "unreasonable risk" to safety. Most safety recalls fall within the second category. According to NHTSA, examples of defects that lead to safety recalls include faulty steering, brakes that fail, components that catch on fire, air bags that fail to inflate when needed in a crash, accelerators that stick, stalling in traffic, wheels that fall off, or axles that break.

Federal safety recalls are aimed at addressing serious safety defects, not defects unrelated to safety, "service campaigns," or emissions recalls. If a manufacturer believes that a recall is not justified, it can petition NHTSA not to require a recall or contest the issue in court. Typically, the manufacturers agree with NHTSA that the vehicles are unsafe and should be recalled, and "voluntarily" comply with the federal mandate.

According to the National Highway Traffic Safety Administration, which oversees vehicle safety recalls:

"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." – NHTSA Official Statement, issued April 4, 2011.

Therefore, we urge the FTC to investigate CarMax's advertising and sales practices and take all appropriate and necessary action in order to curb CarMax from selling unsafe, recalled used cars to the public. In addition to any other remedies or penalties that may be appropriate, we also urge the FTC to:

- Obtain VIN-specific information regarding the safety recall status of vehicles CarMax has already sold to the public, and release that information to the public
- Notify the owners of vehicles sold by CarMax that had safety recalls pending at the time of sale
- Enjoin CarMax from engaging in such irresponsible and reckless practices in the future

It is also important to note that under the National Traffic and Motor Vehicle Safety Act, auto manufacturers are required to provide safety recall repairs for FREE. It is also easy for dealers such as CarMax to check the safety recall status of used vehicles online, simply by checking the manufacturer's website, calling the manufacturer's toll-free number, or contacting a local dealer and providing the Vehicle Identification Number.

Last August 14, the National Highway Traffic Safety Administration issued a final rule that requires all auto manufacturers who produce more than 25,000 vehicles a year to provide safety recall data on their own Websites, searchable by VIN and updated at least every 7 days. That rule takes full effect this August 14, 2014.

Bottom line: there is absolutely no excuse for CarMax or other auto dealers not to

ensure that the used vehicles they sell to consumers are not ticking time-bomb cars with unrepaired safety recalls.

Thank you for your consideration of this petition. We hope that the FTC will act expeditiously, considering the serious threat CarMax's practices pose to public safety. Should you or the FTC's staff have any questions regarding this petition, please contact:

Rosemary Shahan
President
Consumers for Auto Reliability and Safety
1303 J Street, Suite 270
Sacramento, CA 95814

Respectfully submitted,

**Consumers for Auto Reliability and Safety
Center for Auto Safety
Consumers Union
Consumer Action
Consumer Federation of America
Courage Campaign
National Association of Consumer Advocates
National Consumer Law Center⁴
National Consumers League
Trauma Foundation
U.S. Public Interest Research Group**

⁴ On behalf of its low-income clients.

February 19, 2014

To: Interested Parties

Fr: Anzalone Liszt Grove Research

Re: California Voters Overwhelmingly Support Ban on Sale of Recalled Vehicles

A recent statewide poll of California likely voters finds overwhelming support for a ban on the sale of used cars that have been recalled, until they have been repaired.¹ Overall, 88% of California voters support such a proposal, with 78% doing so strongly.

Please tell me whether you support or oppose the following proposal:

Make it illegal for car dealers to sell used cars that have been recalled due to safety defects unless they get the car repaired first

78% Strongly Support / 88% Total Support

Robust support for this proposal extends across partisan, demographic and regional lines. It is backed by over four out-of-five Independents (88% support), Republicans (82%) and Democrats (91%), with over two-thirds of each of these voting blocs strongly in favor of it. Support also exceeds 80% in each region of the state.

SUPPORT FOR PROPOSAL BY AUDIENCE	STRONGLY SUPPORT	TOTAL SUPPORT
CALIFORNIA VOTERS OVERALL	78%	88%
Democrats	79%	91%
Independents	69%	88%
Republicans	68%	82%
Men	73%	87%
Women	82%	89%
White	77%	88%
Latino	82%	88%
Los Angeles Media Market	74%	87%
Sacramento-Stockton Media Market	71%	85%
San Francisco-Oakland Media Market	63%	88%

¹ These results are from a survey conducted by Anzalone Liszt Grove Research of 601 California likely 2014 voters. The survey was conducted September 30 – October 3, 2013. 20% of all interviews were conducted over cell phones, and interviews were conducted in both English and Spanish. The survey has a margin of error of +/- 4.0%.