

CENTER FOR AUTO SAFETY

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August 25, 2016

Mr. Preet Bharara, US Attorney
Southern District of New York
One St. Andrews Plaza
New York, NY 10007

Dear Mr. Bharara:

The Center for Auto Safety (“CAS”) calls on your Office to act to preserve the integrity of the Office’s authority under the Deferred Prosecution Agreement (“DPA”) reached with GM on September 16, 2015, which provides for the Independent Monitor to “Review and assess the adequacy of GM’s current procedures for addressing known defects in certified pre-owned vehicles.”¹ In a proposed consent agreement with General Motors,² the Federal Trade Commission (“FTC”) would emasculate Section 15(a)(4) of the DPA by allowing vehicles with open recalls to be sold in GM’s certified pre-owned (“CPO”) program.³

The core of the FTC’s proposed order is that if GM represents that the used vehicles it advertises or markets are safe, have been repaired for safety issues, or have been subject to a rigorous inspection, then the used vehicles may not be subject to open safety recalls, ***unless it discloses clearly and conspicuously and in close proximity to the representation any qualifying information related to open safety recalls, including the fact that its used vehicles may be subject to an open safety recall and how consumers can determine whether an individual vehicle is subject to an open safety recall.*** In the Matter of General Motors LLC, Agreement Containing Consent Order, Section I (A). Thus, the Proposed Order would allow GM to market and advertise and its dealers to sell open recall vehicles in its CPO program, so long as the disclosures described above in bold italics are made in GM’s relevant advertisements. There is no bigger known defect than an open safety recall.

There is no place in a CPO program for vehicles with open recalls which endangers the life of anyone who buys such a vehicle. In the absence of an overlapping FTC consent order, the Independent Monitor could make recommendations to ban sale of such vehicles unless the safety defect is remedied, pursuant to Section 15 of the DPA. It may be possible that Independent Monitor recommendations would be made and adopted requiring more of GM regarding recalled CPO vehicles than the FTC Order, but this would be an untenable situation for several reasons. First, the Order’s presence would create a natural tendency for the Monitor’s recommendations to be weaker than if they were made on a clean slate. Second, the terrible precedent of the terms of the FTC GM order would already have been irrevocably established. In addition, the FTC order would have a duration of 20 years, while the DPA will last for only three years, with the possibility of extending to four. We see nothing in the DPA that would prevent GM from backsliding to policies taking advantage of what the FTC Order allows.

¹ DPA Section 15 (a)(4).

² In the Matter of General Motors, LLC, FTC File Number 152-3101, announced January 28, 2016. The proposed order and accompanying documents are available at <https://www.ftc.gov/enforcement/cases-proceedings/152-3101/general-motors-llc-matter>.

³ We have confirmed with Independent Monitor Bart Schwartz’s team that the proposed FTC order overlaps the Fourth area of the Independent Monitor’s authority under the DPA: to “[r]eview and assess the adequacy of GM’s current procedures for addressing known defects in certified pre-owned vehicles.”

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CAS and many other advocacy groups and individual advocates filed timely comments critical of the proposed GM consent agreement⁴ and similar proposed agreements, announced on the same day, with two dealership chains concerning their in-house CPO programs.⁵ Consumer advocates also voiced their opposition to the proposed orders in meetings with FTC Staff and Commissioners. On July 14, 2016, New York Senator Charles Schumer joined four other senators in writing to the FTC and the National Highway Traffic Safety Administration, asking the agencies to work together to redraft the proposed GM order and dealer orders.⁶ Despite all this opposition, however, it appears the FTC Staff is not backing down from the proposed orders and that approval by the Commissioners may be imminent.

We, therefore, call on your office⁷ to promptly step in and request the Commission to put the proposed GM order on hold so that the Independent Monitor's team has a full opportunity, with a clean slate, to review, assess, and make recommendations regarding GM's procedures for addressing the known defects of open recalls in certified pre-owned vehicles.⁸ This is the time to show how the DPA can benefit consumers.⁹

Very truly yours,



Clarence M. Ditlow
Executive Director

⁴ The comments are listed with links at <https://www.ftc.gov/policy/public-comments/initiative-638>.

⁵ In the Matter of Jim Koons Management Company, FTC File Number 152-3104, proposed order and accompanying documents at <https://www.ftc.gov/enforcement/cases-proceedings/152-3104/jim-koons-management-company-matter>; In the Matter of Lithia Motors, FTC File Number 152-3102, proposed order and accompanying documents at <https://www.ftc.gov/enforcement/cases-proceedings/152-3102/lithia-motors-inc-matter>.

⁶ The letter and related press release are at <https://www.blumenthal.senate.gov/newsroom/press/release/blumenthal-schumer-markey-nelson-durbin-ftc-settlements-allowing-used-car-dealers-to-advertise-cars-with-unrepaired-recalls-as-safe-are-anti-consumer-and-anti-safety>.

⁷ The Independent Monitor's team has indicated any action regarding the FTC's proposed GM consent order needs to come from your office, not from them.

⁸ We note that besides its traditional CPO program <http://www.gmcertified.com/>, GM now has the Factory Pre-owned Collection <http://www.factorypreownedcollection.com/>, which also offers certified pre-owned vehicles covered by the DPA and the proposed FTC order.

⁹ After the Independent Monitor has completed work on these issues, any proposed FTC consent order on this subject should reflect the Monitor's recommendations.