



**[BILLING CODE: 6750-01S]**

**FEDERAL TRADE COMMISSION**

**[File No. 152 3105]**

**West-Herr Automotive Group, Inc.; Analysis of Proposed Consent Order to Aid Public Comment**

**AGENCY:** Federal Trade Commission.

**ACTION:** Proposed Consent Agreement.

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**SUMMARY:** The consent agreement in this matter settles alleged violations of federal law prohibiting unfair or deceptive acts or practices. The attached Analysis to Aid Public Comment describes both the allegations in the draft complaint and the terms of the consent order -- embodied in the consent agreement -- that would settle these allegations.

**DATES:** Comments must be received on or before January 17, 2017.

**ADDRESSES:** Interested parties may file a comment at

<https://ftcpublic.commentworks.com/ftc/westherrconsent> online or on paper, by following the

instructions in the Request for Comment part of the **SUPPLEMENTARY INFORMATION**

section below. Write “In the Matter of West-Herr Automotive Group, Inc., File No. 152 3105 - Consent Agreement” on your comment and file your comment online at

<https://ftcpublic.commentworks.com/ftc/westherrconsent> by following the instructions on the

web-based form. If you prefer to file your comment on paper, write “In the Matter of West-Herr Automotive Group, Inc., File No. 152 3105 - Consent Agreement” on your comment and on the

envelope, and mail your comment to the following address: Federal Trade Commission, Office

of the Secretary, 600 Pennsylvania Avenue, NW, Suite CC-5610 (Annex D), Washington, DC

20580, or deliver your comment to the following address: Federal Trade Commission, Office of the Secretary, Constitution Center, 400 7th Street, SW, 5th Floor, Suite 5610 (Annex D), Washington, DC 20024.

**FOR FURTHER INFORMATION CONTACT:** Evan Zullo, (202) 326-2914), Attorney, Financial Practices Division, Bureau of Consumer Protection, Federal Trade Commission, 600 Pennsylvania Avenue, NW, Washington, DC 20580.

**SUPPLEMENTARY INFORMATION:** Pursuant to Section 6(f) of the Federal Trade Commission Act, 15 U.S.C. 46(f), and FTC Rule 2.34, 16 CFR § 2.34, notice is hereby given that the above-captioned consent agreement containing consent order to cease and desist, having been filed with and accepted, subject to final approval, by the Commission, has been placed on the public record for a period of thirty (30) days. The following Analysis to Aid Public Comment describes the terms of the consent agreement, and the allegations in the complaint. An electronic copy of the full text of the consent agreement package can be obtained from the FTC Home Page (for December 16, 2016), on the World Wide Web at:

<http://www.ftc.gov/os/actions.shtm>.

You can file a comment online or on paper. For the Commission to consider your comment, we must receive it on or before January 17, 2017. Write “In the Matter of West-Herr Automotive Group, Inc., File No. 152 3105 - Consent Agreement” on your comment. Your comment - including your name and your state - will be placed on the public record of this proceeding, including, to the extent practicable, on the public Commission Website, at <http://www.ftc.gov/os/publiccomments.shtm>. As a matter of discretion, the Commission tries to remove individuals’ home contact information from comments before placing them on the Commission Website.

Because your comment will be made public, you are solely responsible for making sure that your comment does not include any sensitive personal information, like anyone's Social Security number, date of birth, driver's license number or other state identification number or foreign country equivalent, passport number, financial account number, or credit or debit card number. You are also solely responsible for making sure that your comment does not include any sensitive health information, like medical records or other individually identifiable health information. In addition, do not include any "[t]rade secret or any commercial or financial information which . . . is privileged or confidential," as discussed in Section 6(f) of the FTC Act, 15 U.S.C. § 46(f), and FTC Rule 4.10(a)(2), 16 CFR § 4.10(a)(2). In particular, do not include competitively sensitive information such as costs, sales statistics, inventories, formulas, patterns, devices, manufacturing processes, or customer names.

If you want the Commission to give your comment confidential treatment, you must file it in paper form, with a request for confidential treatment, and you have to follow the procedure explained in FTC Rule 4.9(c), 16 CFR § 4.9(c).<sup>1</sup> Your comment will be kept confidential only if the FTC General Counsel, in his or her sole discretion, grants your request in accordance with the law and the public interest.

Postal mail addressed to the Commission is subject to delay due to heightened security screening. As a result, we encourage you to submit your comments online. To make sure that the Commission considers your online comment, you must file it at <https://ftcpublic.commentworks.com/ftc/westherrconsent> by following the instructions on the

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<sup>1</sup> In particular, the written request for confidential treatment that accompanies the comment must include the factual and legal basis for the request, and must identify the specific portions of the comment to be withheld from the public record. *See* FTC Rule 4.9(c), 16 CFR § 4.9(c).

web-based form. If this Notice appears at <http://www.regulations.gov/#!home>, you also may file a comment through that website.

If you file your comment on paper, write “In the Matter of West-Herr Automotive Group, Inc., File No. 152 3105 - Consent Agreement” on your comment and on the envelope, and mail your comment to the following address: Federal Trade Commission, Office of the Secretary, 600 Pennsylvania Avenue, NW, Suite CC-5610 (Annex D), Washington, DC 20580, or deliver your comment to the following address: Federal Trade Commission, Office of the Secretary, Constitution Center, 400 7<sup>th</sup> Street, SW, 5<sup>th</sup> Floor, Suite 5610 (Annex D), Washington, DC 20024. If possible, submit your paper comment to the Commission by courier or overnight service.

Visit the Commission Website at <http://www.ftc.gov> to read this Notice and the news release describing it. The FTC Act and other laws that the Commission administers permit the collection of public comments to consider and use in this proceeding as appropriate. The Commission will consider all timely and responsive public comments that it receives on or before January 17, 2017. You can find more information, including routine uses permitted by the Privacy Act, in the Commission’s privacy policy, at <http://www.ftc.gov/ftc/privacy.htm>.

### **Analysis of Proposed Consent Order to Aid Public Comment**

The Federal Trade Commission (“FTC” or “Commission”) has accepted, subject to final approval, an agreement containing a consent order from West-Herr Automotive Group, Inc. The proposed consent order has been placed on the public record for thirty (30) days for receipt of comments by interested persons. Comments received during this period will become part of the public record. After thirty (30) days, the FTC will again review the agreement and the comments received, and will decide whether it should withdraw from the agreement and take appropriate

action or make final the agreement's proposed order.

The respondent is a car dealership that sells used motor vehicles. According to the FTC complaint, discussed further below, respondent has represented that used motor vehicles it sells have been subject to rigorous inspection, including for safety issues, but has failed to disclose adequately that some of these vehicles are subject to open recalls for safety issues. Federal law currently does not prohibit car dealers from selling used vehicles subject to open safety recalls; Congress and some states are considering legislation that would do so. The Commission, however, can take action under the FTC Act to prohibit companies from making claims that mislead consumers about safety-related and other material issues. Further, the FTC can take such action in addition to (and entirely independent of) any private rights of action consumers themselves can bring under state law. This proposed action thus does not replace or alter any state laws or legislative proposals; rather, it offers additional protections beyond those afforded under other such laws, as they exist now or may be amended.

More specifically, the complaint in this matter alleges the respondent has posted advertisements on the website [www.westherr.com](http://www.westherr.com) regarding the advantages of buying from West-Herr that have made the following representations: "Each vehicle goes through a rigorous multi-point inspection with our factory trained technicians. The service department grades each vehicle, and only the highest quality vehicles make it to our lots. ... Only about 40% of the vehicles we take in on trade meet our standards. What happens to the other 60%? They get wholesaled (about 250 per week) at our auction, to other dealers in the area."

Even though it makes such claims, the respondent has allegedly advertised on its websites numerous used vehicles that were subject to open recalls for safety issues. In numerous instances, when the respondent allegedly advertised used vehicles that are subject to open recalls

for safety issues, it provided no accompanying clear and conspicuous disclosure of this fact. The proposed complaint alleges that this failure to disclose constitutes a deceptive act or practice under Section 5 of the FTC Act.

The proposed order is designed to prevent the respondent from engaging in similar deceptive practices in the future. Part I prohibits the respondent from representing that used motor vehicles it offers for sale are safe, have been repaired for safety issues, or have been subject to an inspection for issues related to safety unless the used motor vehicles are not subject to any open recalls for safety issues or the respondent discloses, clearly and conspicuously, in close proximity to such representation, any material qualifying information related to open recalls for safety issues. Part II is a provision that orders the respondent to notify consumers who purchased from it a used motor vehicle between July 1, 2013 and June 30, 2015 that some of the used vehicles it sold during this time had been recalled for safety issues which weren't repaired as of the date they were sold. The notice also must specify how consumers can check whether the vehicle is subject to an unrepaired recall at the National Highway Traffic Safety Administration's website, <https://vinrcl.safercar.gov/vin/>. This website also provides information on how to get a vehicle fixed if it is subject to an open recall.

Parts III through VII of the proposed order are reporting and compliance provisions. Part III requires the respondent to maintain for five years, and produce to the Commission upon demand, any relevant ads and associated documentary material. Part IV is an order distribution provision. Part V requires the respondent to notify the Commission of corporate changes that may affect compliance obligations. Part VI requires the respondent to submit a compliance report to the Commission 60 days after entry of the order, and also additional compliance reports within 10 business days of a written request by the Commission. Part VII "sunset" the order

after twenty years, with certain exceptions.

The purpose of this analysis is to aid public comment on the proposed order. It is not intended to constitute an official interpretation of the complaint or proposed order, or to modify in any way the proposed order's terms.

## **Statement of the Federal Trade Commission Concerning Auto Recall Advertising Cases<sup>1</sup>**

**December 15, 2016**

Unrepaired auto recalls pose a serious threat to public safety. Car manufacturers and the National Highway Traffic Safety Administration have recalled tens of millions of vehicles in each of the last several years for defects that pose significant safety risks to consumers. In 2015, for example, recalls affected 51 million vehicles nationwide.<sup>2</sup> And defects that have been the subject of recalls have led to severe injuries and even death for many consumers. Federal law requires that all new cars sold in the United States be free from recalls, but it does not prohibit auto dealers from selling used cars with open recalls. As a result, absent a change in law, neither NHTSA nor any other federal agency has the authority to ban the sale of used cars that have open recalls across the industry.

Section 5 of the Federal Trade Commission Act, however, enables the Commission to stop car sellers from engaging in false or misleading advertising practices that mask the existence

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<sup>1</sup> In the Matters of General Motors Company, File No. 1523101; Jim Koons Management Company, File No. 1523104; Lithia Motors, Inc., File No. 1523102; CarMax, Inc., File No. 1423202; West-Herr Automotive Group, Inc., File No. 1523105; and Asbury Automotive Group, Inc., File No 1523103.

<sup>2</sup> Gordon Trowbridge, National Highway Traffic Safety Administration, *U.S. Department of Transportation launches new public awareness campaign*, Jan. 21, 2016, [https://www.nhtsa.gov/About-NHTSA/Press-Releases/nhtsa\\_launches\\_safe\\_cars\\_save\\_lives\\_campaign\\_01212015](https://www.nhtsa.gov/About-NHTSA/Press-Releases/nhtsa_launches_safe_cars_save_lives_campaign_01212015).

of open recalls, and we are committed to doing just that. As part of this effort, the Commission is issuing final orders against General Motors Company, Jim Koons Management Company, and Lithia Motors, Inc. and announcing proposed orders against CarMax, Inc., West-Herr Automotive Group, Inc., and Asbury Automotive Group, Inc. In these enforcement actions, the Commission is challenging what we allege are deceptive advertising claims by these companies that highlight the rigorous inspections they perform on their used cars, but fail to clearly disclose the existence of unrepaired safety recalls.

More specifically, we allege that the companies named in these actions touted the rigorousness of their car inspections by claiming, for example, to engage in a “172-point inspection and reconditioning,” an “exhaustive 160-checkpoint Quality Assurance Inspection,” or a “rigorous and extensive inspection.” Some of these inspected cars were subject to open recalls. We charge that the companies’ representations about their inspections, absent clear and conspicuous information about open recalls, were likely to mislead reasonable consumers into believing that the inspections included repairing open recalls. Therefore, the companies’ failure to disclose this information was deceptive.<sup>3</sup>

Our orders stop this deceptive conduct and provide important additional protections for consumers. First, the orders prohibit each company from making any safety-related claim about its vehicles unless (1) the vehicles are recall-free, or, alternatively, the company discloses clearly and conspicuously and in close proximity to the representation both that the vehicles may be

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<sup>3</sup> Under Section 5 of the FTC Act, “it can be deceptive to tell only half the truth, and to omit the rest. This may occur where a seller fails to disclose qualifying information necessary to prevent one of his affirmative statements from creating a misleading impression.” *See In re International Harvester Co.*, 104 F.T.C. 949, 1057 (1984).

subject to open recalls and how consumers can determine the recall status of a particular car, and (2) the claims are not otherwise misleading.<sup>4</sup>

This means that, if any car on the companies' lots is subject to an open recall, every time the companies make these types of inspection claims, they must prominently disclose that their cars may be subject to open recalls and tell consumers how to determine the recall status of specific cars. And they must provide this information wherever the inspection claims are made – in the showroom, on the lot, and in any TV, radio, or website ad that consumers may view before they even visit a car dealer.

Further, the orders require each company to warn consumers who recently purchased one of its used cars that the vehicle may have an open recall. The Commission can seek civil penalties for violations of these orders, and we will not hesitate to do so if we discover a violation.<sup>5</sup>

These enforcement actions will help empower consumers to make more informed and safer purchasing decisions in a market that, absent a change in federal law, continues to include cars subject to open recalls. Dealers that repair all of their cars can continue to make truthful claims that they are recall-free, and can benefit from the competitive advantages of doing so. Dealers that cannot, or do not, repair all of their cars must instead prominently disclose that the

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<sup>4</sup> For instance, a claim could still be misleading, even with the required disclosure, if a dealer represents that it inspected specific cars when it failed to do so, makes false oral statements to consumers that specific cars are free of recalls, or states a car *may* be subject to a recall (or otherwise implies it does not know the recall status) but in fact knows the car is actually subject to an open recall.

<sup>5</sup> See *U.S. v. New World Auto*, No. 16-cv-2401 (N.D. Tex. Aug. 22, 2016) (requiring auto dealers to pay civil penalties for violations of FTC order).

cars may have open recalls when they make certain safety-related claims, such as claims about comprehensive inspections. Dealers are therefore incentivized to repair open recalls in the cars they advertise. At the same time, dealers can continue conducting their inspection programs and truthfully advertising them, provided they prominently disclose that cars may be subject to open recalls and do not misrepresent the recall status or safety of their cars.<sup>6</sup>

Finally, we note that other laws, including state product safety, tort, and other consumer protection laws, provide important safeguards to consumers affected by defective cars. Of course, the Commission's orders do not affect the protections afforded by those laws. Rather, the Commission's orders provide independent protection for consumers, requiring that they be given information about open recalls before they purchase a used car.

Congress has been considering legislative proposals that would prohibit the sale of used cars with unrepaired recalls altogether, and we support efforts seeking to address this serious public safety issue. Although the Commission's enforcement actions against individual companies cannot substitute for legislative solutions, they provide important protections for consumers to help ensure that they can make informed and safer purchasing decisions in the used car marketplace.

By direction of the Commission.

Donald S. Clark  
Secretary.

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<sup>6</sup> Dealer inspection programs often involve checking that vital components of a car, like the brakes and drivetrain, are working properly and thus can provide important consumer benefits.

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