



Office of the Secretary

UNITED STATES OF AMERICA
FEDERAL TRADE COMMISSION

WASHINGTON, D.C. 20580

The Honorable John D. Dingell
Ranking Member
Committee on Energy and Commerce
House of Representatives
Washington, DC 20515

Dear Congressman Dingell:

This responds to your letter of October 5, 2004, requesting the Commission's views on H.R. 2735, "The Motor Vehicle Owners' Right to Repair Act of 2003."

The FTC is a small agency with a big mission: to enhance consumer welfare and protect competition in most sectors of the economy. The FTC enforces the Federal Trade Commission Act¹ and other laws² that prohibit business practices that are anticompetitive, deceptive, or unfair to consumers, and seeks to do so without impeding legitimate business activity. The FTC also promotes informed consumer choice and public understanding of the competitive process. The Commission's work is critical in protecting and strengthening free and fair markets in the United States.

H.R. 2735 would require automobile manufacturers to make available to car owners and repairers the "information necessary to diagnose, service, or repair" vehicles, including all such information made available to franchised dealers. This legislation involves broad issues of the relations among automobile manufacturers, consumers, franchised dealers, and independent repair shops that have engendered substantial controversy and debate.

¹15 U.S.C. § 41.

²The agency has responsibilities under more than fifty federal laws. These include the Telemarketing and Consumer Fraud and Abuse Prevention Act (15 U.S.C. 6101 *et seq.*) and other laws authorizing the National Do-Not-Call Registry; the Controlling the Assault of Non-Solicited Pornography and Marketing Act (15 U.S.C. § 7701), the Fairness to Contact Lens Consumers Act (15 U.S.C. § 7601), and the Fair and Accurate Credit Transactions Act (Pub. L. No. 108-159, 117 Stat. 1952 (Dec. 4, 2003), codified at 15 U.S.C. § 1681 *et seq.*).

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Auto repair is undoubtedly an important issue for U.S. consumers. U.S. consumers spend almost \$200 billion annually to repair and maintain the two hundred million cars currently on the road.³ Consumers thus have a significant interest in the proper and efficient functioning of the markets involved in automobile repair and maintenance, consistent with safety and other quality standards. H.R. 2735 has a laudable goal: to ensure the competitiveness of auto service and repair aftermarkets, so that consumers have choices and can receive such services at competitive prices and quality. As a general matter, competition among repair facilities benefits consumers, and it appears that independent repair shops need certain information to be able to provide appropriate services. The bill attempts to facilitate the sharing of such information.

The Commission understands that a group of automotive trade associations has reached voluntary agreements to provide online factory service information to independent automobile repair shops. To the extent a suitable resolution can be obtained through a voluntary mechanism, it may be preferable to governmental intervention.

With respect to the legislation itself, certain complexities and ambiguities in the language of H.R. 2735, and possible unintended consequences associated with it, could create major difficulties in implementation. First, the bill contains ambiguities with respect to the scope of required information disclosure, the status of trade secrets and copyrighted or patented information, and whether the mandated disclosure must be made without charge. Apparently, the bill would require the FTC to review potentially massive quantities of documents and software and attempt to resolve highly technical and complex disputes that are beyond the agency's expertise. The breadth and complexity of this task and the potential for costly litigation arising out of disputes on these subjects pose significant difficulties for implementing this bill and risk substantial diversion of resources from other consumer protection and competition priorities.

Finally, we are concerned that the uniform rulemaking mandated in Section 6 may lack the flexibility necessary to avoid unnecessary disruption of existing markets for car repair and car repair information. Rather, a variety of formats and processes, evolving as needs and technologies change, may be more efficient and successful.

Potential Industry Solutions

The Commission understands that a sizeable group of automotive trade associations has formed a task group, the National Automotive Service Task Force, and has reached voluntary agreements for the provision of online factory service information to independent automobile repairers. The agreements are overseen and facilitated by this Task Force, which addresses specific complaints filed with it and also provides a forum for resolving broad issues of

³2003 Statistical Abstract of the U.S.

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information availability. We understand that associations of affected independent repair shops have expressed conflicting views on the adequacy of this approach and the need for legislation.

Self-regulatory programs, when successful, can address issues with greater speed and more flexibility than government regulation. That may be particularly true here where the groups would have much greater familiarity with automobile technology as it evolves than the FTC's attorneys and economists. If a suitable resolution can be obtained through the Task Force or similar mechanism, it may be preferable to governmental intervention.

Significant Ambiguities in H.R. 2735

With respect to H.R. 2735 itself, the Commission is concerned about a number of unclear or unsettled issues in the legislation. First, Section 3 of the bill would require automobile manufacturers to provide to repair shops and vehicle owners, as well as the FTC, the "information necessary to diagnose, service, or repair" the manufacturer's vehicles. Such information could cover a vast and greatly varied range of subjects and materials. Further, Section 3(a) lists certain types of information included in the disclosure requirement, and one of the listed items specifies disclosure of "other information of any kind *used* to diagnose, service, repair, activate, certify, or install any motor vehicle equipment." This language appears to broaden the scope of the disclosure requirement, and it is unclear how far the requirement would extend. For example, to the extent that automobile manufacturers provide training that explains how to use diagnostic software or tools, would all such training be considered "information necessary" or "information . . . used" to diagnose, service, or repair the vehicle? These types of questions can be difficult and contentious, and the Federal Trade Commission would have no basis on which to determine the answers.

Also, some portions of the bill indicate an intention that manufacturers not be required to disclose information that constitutes "trade secrets." Section 3(a)'s statutory mandate for disclosure, however, does not create an exclusion for trade secrets.

Further, simply excluding trade secrets unambiguously from Section 3(a)'s disclosure mandate would not resolve the difficulties. Section 3(b)(1) would apparently put the FTC in the position of reviewing potentially massive amounts of highly technical information on an ongoing basis to determine whether particular information is entitled to trade secret protection. The FTC is not equipped to perform such a function. It is a law enforcement agency, not a document screening agency, and has no analogous ongoing document review responsibilities in other industries. Nor does the FTC otherwise have a governmental need for such materials as might other agencies, such as the Environmental Protection Agency (for emissions system information), or the National Highway Traffic Safety Administration (for safety-related information). In addition, even with FTC participation, genuine disputes about disclosure would surely result in litigation, which would likely embroil the FTC in extensive and costly litigation between manufacturers and repair firms over the status of the information. Resources devoted to making initial disclosure determinations and defending them would come at the expense of other consumer protection and competition programs at the FTC.

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Moreover, the bill does not address potential questions about copyright or patent protections that may apply to the necessary information. Section 3(b)(2), for example, would require manufacturers to disclose to independent repair shops all information provided to franchised dealers, but it is not clear what effect this requirement would have on copyright or patent protections applicable to the information. Federal laws generally do not require companies to share proprietary information. This bill does not make clear whether information provided to dealers that is protected by copyright or patent, or that constitutes trade secrets, would be exempt from mandatory disclosure to other repair shops. In particular, unless Section 3(b)(2) is intended to remove any trade secret protection from information provided to dealers, Section 3(b)(1), as noted, would likely entangle the FTC in a massive and highly technical document and software review program for which the FTC is not equipped.

Finally, it is unclear whether the bill requires the provision of information at no cost. Currently, it appears that automobile manufacturers may recoup the costs of developing diagnostic tools and software and other information by charging substantial sums for the information, sometimes in the thousands of dollars, to both franchised dealers and independent repair shops. As the Committee knows, automobile repair can require highly complex and continuously upgraded computer software programs, as well as other specialized tools, and the development of these diagnostic tools and software is expensive. It is unclear whether or how consumers would be affected if automobile manufacturers were not able to charge for such information. If, on the other hand, manufacturers could continue to charge for the information, the Commission might well be faced with complaints that the charges were so high as effectively to preclude independent shops and car owners from obtaining the information. Yet if the Commission were supposed to mandate “reasonable” prices, that would require price regulation, a result generally undesirable in and of itself and one requiring detailed regulatory systems as to which the Commission has no expertise.

In sum, the ambiguities of the bill would create significant controversies about what information must be disclosed as “necessary to diagnose, service, or repair a vehicle,” whether information may be exempt from disclosure as a trade secret, the effect of copyright or patent protection, and whether and how much manufacturers may charge for information that must be disclosed. The FTC is not well-suited to resolve these controversies.

Concerns about Mandatory Development of Uniform Rules

Section 6 of the bill also would require the Commission to issue rules setting forth a uniform method for making the repair information available. More flexible discussions involving parties with intimate knowledge of their own needs, such as those of the current industry task force, could well lead to a variety of appropriate formats and processes for disclosure without the need for regulation setting a uniform method. Given the volume and complexity of the data in question, a one-size-fits-all approach may well introduce some costs and inefficiency to the existing processes. Any governmental intervention here would require

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great care to avoid unnecessary impact on existing markets for information about vehicle repair. We are concerned with the possibility that a mandatory, uniform approach could result in higher costs and more problems than would a more flexible, discretionary approach.

We appreciate your consideration of our views.

By direction of the Commission.

Donald S. Clark
Secretary of the Commission

cc: The Honorable Joe Barton, Chairman
Committee on Energy and Commerce

The Honorable Cliff Stearns, Chairman
Subcommittee on Commerce, Trade, and Consumer Protection

The Honorable Janice D. Schakowsky, Ranking Member
Subcommittee on Commerce, Trade, and Consumer Protection