



May 4, 2010

Federal Trade Commission
Consumer Response Center
600 Pennsylvania Avenue, NW
Washington, DC 20580

Re: Complaint of Deceptive Advertising by General Motors Company

Dear Sir/Madam:

The Competitive Enterprise Institute (CEI) hereby requests that the FTC investigate a television advertising campaign by General Motors Company (GM) entitled "GM Repaid Government Loan Ahead of Schedule." In its ad, GM's Chairman and CEO, Ed Whitacre, declares that "we have repaid our government loan in full, with interest, five years ahead of the original schedule."

That claim gives the false impression that GM has used its own funds to pay back all the bailout money that it received from the federal government. *In fact, GM has only repaid a fraction of those funds—barely ten percent.* Moreover, GM apparently repaid its loan *by using other federal funds.*

GM's television ad states, in full, the following:

"I'm Ed Whitacre from General Motors. A lot of Americans didn't agree with giving GM a second chance. Quite frankly, I can respect that. We want to make this a company all Americans can be proud of again. That's why I'm here to announce we have repaid our government loan, in full, with interest, five years ahead of the original schedule. But there's still more to do. Our goal is to exceed every expectation you've set for us. We're putting people back to work: designing, building and selling the best cars and trucks in the world, with our 100,000 mile, 5-year Powertrain Warranty to guarantee the quality and the unmatched live-saving technology of OnStar, to help keep you safe. From new energy solutions to the designs of tomorrow, we invite you to take a look at the new GM."¹

¹ See <http://www.youtube.com/watch?v=SSNPFVLIWjI>. See also Kathleen Pender, *GM repays federal loan with government money*, San Francisco Chronicle, April 27, 2010, at D1 (available at <http://www.sfgate.com/cgi-bin/article.cgi?f=c/a/2010/04/26/BUS91D55HR.DTL>); Fox News, *GM Could Be in Hot Water With FTC Over Truth in Advertising*, April 23, 2010 ("General Motors is running ads on all the major networks this week claiming it has repaid its bailout from the taxpayers 'in full,'" featuring its "chairman and CEO," Ed Whitacre) (available at <http://www.foxnews.com/politics/2010/04/23/gm-hot-water-ftc-truth-advertising/>); see also Matthew Jaffe and Alice

In reality, however, GM used taxpayer money to make the repayment – specifically, government bailout money from the Troubled Asset Relief Program.² Thus, in the words of one commentator, GM “effectively hasn’t paid back anything.”³

Moreover, the “repayment” amounted to only a little over 10 percent of the money that the government put into GM to bail it out. Most of this government money has not been “repaid,” but rather temporarily converted into equity into GM. *But the federal government views all of this money as funds for which repayment is expected.* According to a recent Congressional Budget Office report (issued before GM’s announcement), “U.S. automotive companies—along with associated financing agents and parts manufacturers—have received a total of \$85 billion in commitments of TARP funds and have repaid \$3 billion of principal.”⁴ For GM specifically, the report states that “\$48 billion in financing is still outstanding.”⁵

Gomstyn, *GM Under Fire for ‘Misleading’ Bailout Ad*, ABC News, April 30, 2010 (available at <http://abcnews.go.com/Business/general-motors-fire-misleading-bailout-ad/story?id=10513568>) (saying that in GM’s ad, CEO “Whitacre boasts that it has repaid its ‘government loan in full, with interest, five years ahead of the original schedule,” and featuring a video replaying the commercial).

² Kathleen Pender, *GM repays federal loan with government money*, San Francisco Chronicle, April 27, 2010, at D1 (available at <http://www.sfgate.com/cgi-bin/article.cgi?f=/c/a/2010/04/26/BUS91D55HR.DTL>) (“GM repaid its government loan with other government money”); Gretchen Morgenson, *Repaying Taxpayers With Their Own Cash*, New York Times, May 2, 2010, at BU1 (“the company simply used other funds held by the Treasury to pay off its original loan.”) (available at <http://www.nytimes.com/2010/05/02/business/02gret.html>); Editorial, *GM’s Big Lie: Company Hasn’t Truly Repaid Loans*, Worcester Telegram & Gazette, April 27, 2010, at A11 (“GM ‘repaid’ a \$6.7 billion loan to the U.S. Treasury from bailout funds made available to the company through the Troubled Asset Relief Program, or TARP. That point has been confirmed by TARP inspector general Neil Barofsky. In other words, GM has essentially moved money from one bailout bucket to another. Not only has the company not paid back the loan with new earnings from better products, it effectively hasn’t paid back anything. . . The company lost over \$4 billion in the second half of 2009, and is still losing money in the early months of this year”) (available in Westlaw news database at 2010 WLNR 8763775); Editorial, *Like a Crook: GM’s Misleading Ad*, Manchester Union-Leader, April 28, 2010 (“GM repaid taxpayer money with taxpayer money”) (available at www.theunionleader.com/article.aspx?headline=Like+a+crook%3A+GM%27s+misleading+ad&articleId=bff22ef3-0dc8-44c5-93c1-db50879d018f); Editorial, *Government Motors Repayment Fraud*, Washington Times, April 26, 2010 at B2 (“General Motors Lost \$3.4 billion” just before running the ad; “GM specifically used funds it received from the Troubled Asset Relief Program to pay off the government loan.”) (available at <http://www.washingtontimes.com/news/2010/apr/23/government-motors-repayment-fraud>, and in Westlaw news database at 2010 WLNR 8619976); Editorial, *Geithner and GM Tell a Whopper*, Washington Examiner, May 3, 2010, at 2 (Whitacre’s statement that “We have repaid our government loans in full, with interest” is “a blatant misrepresentation”; “according to Neil Barofsky, inspector general for the Troubled Asset Relief Program . . . ‘the source of funds for these quality [debt] payments will be other TARP funds currently held in an escrow account’”) (www.washingtonexaminer.com/opinion/Geithner-and-GM-tell-a-whopper-92632519.html).

³ See Editorial, *GM’s Big Lie: Company Hasn’t Truly Repaid Loans*, Worcester Telegram & Gazette, April 27, 2010, at A11.

⁴ Congressional Budget Office, *Report on the Troubled Asset Relief Program – March 2010*, at 4-5 (available at <http://www.cbo.gov/ftpdocs/112xx/doc11227/03-17-TARP.pdf>) See also Tom Krisher, Associated Press, *General Motors to Repay \$6.7 Billion Government Loan Before June*, Contra Costa Times, April 20, 2010 (“The company has received a total of \$52 billion in U.S. government aid. . . Once the loans are paid back, GM would still owe \$45.3 billion to the government”) (available at http://www.contracostatimes.com/ci_14915765). See Michael O’Brien, *General Motors Promises to Repay Federal Loans Early Despite Large Losses*, The Hill, November 16, 2009 (“GM borrowed nearly \$50 billion from the federal government over the past year. Of that, \$6.7 billion remains on the

In the press release on its ad campaign, GM at least hinted at the fact that there was more government money involved here than just the loan, stating that the U.S. and Canadian governments “took equity stakes in the new company” and that the loan repayment “was an important first step.”⁶ The press release, however, nowhere indicated how small the repaid loan was in comparison to these government equity stakes.

But when it comes to GM’s ads, there is no mention whatsoever of this much larger portion of the federal government’s financing, or of the “first step” nature of GM’s loan repayment. All the public learns is that the government loan has been repaid, *period*. (“In full, with interest, five years ahead of the original schedule”.) Viewers will naturally think that this is the end of the story, when in fact there is still over \$40 billion “in financing still outstanding” (to use the words of the Congressional Budget Office).

The failure of GM’s ads to make this clear is deceptive. GM’s statements are “likely to affect a consumer’s choice or conduct regarding” its products.⁷ As one leading scholar on advertising law has noted, there is a “well established principle ... that advertisers be held responsible for implied, as well as express, misrepresentations.”⁸ In evaluating the truthfulness of ads, “the proper way to analyze [their] overall impact is to see the ads as consumers see them ... rather than the way they might be technically analyzed.”⁹

Most consumers would reasonably interpret GM’s ads as meaning both that GM has paid back all the money that it received from the government, and that those repayments were made with its own funds rather than with other government funds. Neither of these interpretations is accurate. While GM might argue that its ads are literally correct, they are deceptive within the meaning of the FTC Act because they leave a misleading impression with consumers.¹⁰

restructured company’s balance sheet in the form of loans; the rest was converted to stock held by the Treasury Department”) (available at <http://thehill.com/homenews/administration/68027-general-motors-vows-to-repay-loans-early-despite-large-losses>); Editorial, *Like a Crock: GM’s Misleading Ad*, Manchester Union-Leader, April 28, 2010 (“GM got more than \$50 billion in loans from Washington. Most of that money was converted to GM stock.”)

⁵ Congressional Budget Office, *supra* note 4, at 5.

⁶ GM, *GM Pays Back Government Loans in Full, Announces Investment in Fairfax, Detroit Hamtramck*, April 21, 2010 (available at http://media.gm.com/content/media/us/en/news/news_detail.brand_gm.html/content/Pages/news/us/en/2010/Apr/04/21_fairfax).

⁷ FTC, *Policy Statement on Deception*, p. 5 (letter from Chairman James C. Miller III to the Hon. John D. Dingell, Oct. 14, 1983).

⁸ I. Preston, *The Federal Trade Commission’s Identification of Implications as Constituting Deceptive Advertising*, 57 U. Cincinnati Law Review 1243, 1248 (1989).

⁹ *Id.* at 1246.

¹⁰ See *Chrysler Corp. v. FTC*, 561 F.3d 357, 363 (D.C. Cir. 1977) (even if Chrysler’s “fuel economy” advertising claims were true of its autos with 6-cylinder engines, and were intended only to cover such autos, the ads were misleading where customers might perceive the claims to be applicable to other Chrysler small cars, even if any

In claiming that “we have repaid our government loan in full, with interest,” GM’s ads mislead consumers about whether the company has fully repaid what it received from taxpayers.

Many Americans are angry about GM’s bailout.¹¹ This has reduced their willingness to buy cars from GM.¹²

GM’s ads attempt to address that anger by misleadingly suggesting that it has paid back all the money it received from the government.¹³ Receiving bailouts at the expense of American taxpayers stuck at the very heart of GM’s image as an asset to America.¹⁴ Consumer purchasing decisions can easily be affected by such considerations, as the FTC has long recognized in prohibiting false claims that products are “Made in the U.S.A.”¹⁵ Indeed, the same buyers who

misleading impression was “unintentional”: “It is a well-settled principle that advertisements may be deceptive if they have a tendency and capacity to convey misleading impressions to consumers even though other non-misleading interpretations may be available”); *see also Koch v. FTC*, 206 F.2d 311 (6th Cir. 1953)(statement may be deceptive even if literally true); *Trans World Accounting v. FTC*, 594 F.2d 212 (9th Cir. 1979)(proof of actual deception is unnecessary if there is a tendency to deceive); *Heavenly Creations v. FTC*, 339 F.2d 7 (2d Cir. 1964).

¹¹ See Linda Lou, Tanya Mannes & Greg Gross, *Tax-Prottesting ‘Tea Parties’ Sweep Nation; 3,000 Rally at Sites Around the County*, San Diego Union-Tribune, April 16, 2009, at A1 (“About 1,000 who picketed in Oceanside had a range of reasons for attending but a common theme was anger at government bailouts of corporations, particularly AIG and General Motors”) (available in Westlaw news database at 2009 WLNR 7261981).

¹² See Jeff Ostrowski, *Ford Bounces Back, Declares \$1 Billion Profit; Automaker Credits Sales, Layoffs*, Palm Beach Post, Nov. 3, 2009, at 1A (“Many say Ford’s ability to survive without taxpayer aid has given it a competitive advantage over General Motors Corp. and Chrysler LLC, which took bailout money. ‘A lot of people appreciate that very, very much,’ said Greg Beshore, sales manager at Al Packer Ford West. ‘I’ve had a lot people come in front of me and say, . . . I’m glad you didn’t take the bailout money.’”) (2009 WLNR 22002103); Scott Stoddard, *Chevy Volt Won’t Make Money, But Still Key to Any GM Revival*, Investor’s Business Daily, June 22, 2009 (2009 WLNR 11789501) (car-buyers may avoid buying a new GM model because of “worries about GM’s viability or anger over its federal bailout”); *Fitch Upgrades Ford & Ford Credit to ‘B’; Outlook Positive*, Business Wire, April 29, 2010 (4/29/10 Bus. Wire 15:37:00) (“Ford has seen gains due to . . . General Motors . . . tied to” GM’s bailout).

¹³ See Chrissie Thompson, *Whitacre Ad Pushes ‘New GM’*, Automotive News, April 26, 2010, at 6 (“Ed Whitacre, CEO of General Motors Co., returned to TV last week to say GM has repaid loans to U.S. and Canadian governments – while acknowledging the public’s anti-bailout anger”) (available at 2010 WLNR 8834673).

¹⁴ See David Nicklaus, *GM Faces a Long Road Back to Profitability*, Bloomington Pantagraph, June 14, 2009, at E5 (“Will consumers buy what GM is selling? Some of its most loyal customers – the buy-American crowd – may be angry about the taxpayer bailout”) (available in Westlaw news database at 2009 WLNR 11522687). GM CEO Whitacre’s statement in the ad that “We want to make this a company all Americans can be proud of again” is aimed squarely at such consumers.

¹⁵ *Colgan v. Leatherman Tool Group.*, 38 Cal.Rptr.3d 36, 53 (Cal. App. 2006) (FTC “has long prohibited claims that a product was ‘Made in U.S.A.’ unless the product advertised was wholly of domestic origin”), *citing* FTC, *Made in USA’ and Other U.S. Origin Claims*, 62 Fed. Reg. 63756 (Dec. 2, 1997); *Windsor Pen Corp.*, 64 F.T.C. 454, 1964 WL 72844 (“a substantial portion of the purchasing public has a preference for said articles of domestic origin”).

prize “Made in the U.S.A.” cite concerns about GM’s bailout at taxpayer expense in explaining why they buy cars from Ford, the American automaker that did not receive a federal bailout.¹⁶

GM’s ads also leave the false impression that it is on the road to profitability, since it is now able to pay off its debts. (In public statements, GM deliberately sought to reinforce that impression by linking the “repayment” to increased sales of two cars produced by GM.¹⁷)

In reality, however, GM used taxpayer money to make the repayment -- government bailout money from the Troubled Asset Relief Program -- and it was still losing money at the time of the advertisement.¹⁸

This false impression matters to consumers, and affects their purchasing decisions, because a profitable automaker, unlike an automaker that goes out of business, can provide replacement parts for an automobile that a consumer purchased. And unlike a bankrupt automaker, it can be counted on to make good on its warranties.¹⁹

GM’s ads are widely perceived as misleading, as newspapers,²⁰ ABC,²¹ and Fox News²² have noted. Commentators have specifically cited the ads as a violation of the FTC Act.²³

¹⁶ Jeff Ostrowski, *Ford Bounces Back, Declares \$1 Billion Profit; Automaker Credits Sales, Layoffs*, *Palm Beach Post*, November 3, 2009, at 1A (“Many say Ford’s ability to survive without taxpayer aid has given it a competitive advantage over General Motors Corp. . . . ‘A lot of people appreciate that very, very much,’ said Greg Beshore, sales manager at Al Packer Ford West. ‘I’ve had a lot people come in front of me and say, “No. 1, I’m going to buy American, and No. 2, I’m glad you didn’t take the bailout money.”’”).

¹⁷ See Gretchen Morgenson, *Repaying Taxpayers With Their Own Cash*, *New York Times*, May 2, 2010, at BU1 (“G.M. trumpeted its escape from the program as evidence that it had turned the corner in its operations. ‘G.M. is able to repay the taxpayers in full, with interest, ahead of schedule, because more customers are buying vehicles like the Chevrolet Malibu and Buick LaCrosse,’ boasted Edward E. Whitacre Jr., its chief executive”); Fox News, *GM Could Be in Hot Water With FTC Over Truth in Advertising*, April 23, 2010 (quoting Inspector General Barofsky noting that “a lot of people overlook” that GM’s “repayment” “isn’t from earnings,” but rather “from another pool of TARP money,” and Senator Charles Grassley noting that “‘TARP loans were not repaid from money GM is earning selling cars, as GM and the administration have claimed in their speeches, press releases and television commercials’”) (available at <http://www.foxnews.com/politics/2010/04/23/gm-hot-water-ftc-truth-advertising/>).

¹⁸ See Editorial, *GM’s Big Lie: Company Hasn’t Truly Repaid Loans*, *Worcester Telegram & Gazette*, April 27, 2010, at A11; Editorial, *Like a Crock: GM’s Misleading Ad*, *Manchester Union-Leader*, April 28, 2010; Editorial, *Government Motors Repayment Fraud*, *Washington Times*, April 26, 2010 at B2.

¹⁹ See *U.S. v. Blocker*, 104 F.3d 720, 730-31 (5th Cir. 1997) (fraudulent to suggest to insurance policyholders that an insurance company had “surplus capital” when company was actually in “hazardous financial condition”).

²⁰ See, e.g., Editorial, *GM’s Big Lie: Company Hasn’t Truly Repaid Loans*, *Worcester Telegram & Gazette*, April 27, 2010, at A11; Editorial, *Like a Crock: GM’s Misleading Ad*, *Manchester Union-Leader*, April 28, 2010; Gretchen Morgenson, *Repaying Taxpayers With Their Own Cash*, *New York Times*, May 2, 2010, at BU1.

²¹ Matthew Jaffe and Alice Gomstyn, *GM Under Fire for ‘Misleading’ Bailout Ad*, *ABC News*, April 30, 2010 (available at <http://abcnews.go.com/print?id=10513568>) (“‘GM has built ‘a slick marketing campaign’ that constitutes ‘a lie to the American people,’ Rep. Darrell Issa, R-Calif., and Rep. Jim Jordan, R-Ohio, wrote in a letter Thursday to GM CEO Ed Whitacre. . . . ‘We are concerned that GM, under your leadership, has come dangerously close to committing fraud’ . . . Under questioning from Republican Sen. Susan Collins of Maine, who called the ad

A prompt investigation by the FTC would serve the American public on this issue of major consumer and taxpayer importance. It would also discourage other beneficiaries of government bailouts from falsely misrepresenting their status.

Please contact us if there is any additional information that we can provide.²⁴

Respectfully submitted,

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'very misleading,' Treasury Secretary Timothy Geithner conceded at a Senate hearing on Thursday that some in his department are also concerned about the GM commercial. But Treasury has maintained that GM's loan repayment is 'good news' despite the fact that the money used to repay the loan stemmed from the government.”).

²² Fox News, *GM Could Be in Hot Water With FTC Over Truth in Advertising*, April 23, 2010 (available at <http://www.foxnews.com/politics/2010/04/23/gm-hot-water-ftc-truth-advertising/>) (“a top Senate Republican has accused GM of misleading taxpayers about the loan repayment, saying the struggling auto giant was able to repay a \$6.7 billion bailout loan only by using other bailout funds in a special escrow account. Iowa Sen. Chuck Grassley's charge was backed up by the inspector general for the bailout,” who “told Fox News, as well as the Senate Finance Committee, that General Motors used bailout money to pay back the federal government. ‘It appears to be nothing more than an elaborate TARP money shuffle,’ Grassley, the ranking Republican on the Senate Finance Committee, said in a letter Thursday to Treasury Secretary Timothy Geithner. . . . ‘TARP loans were ‘repaid’ with other TARP funds in a Treasury escrow account. The TARP loans were not repaid from money GM is earning selling cars, as GM and the administration have claimed in their speeches, press releases and television commercials”).

²³ See, e.g., Michael Patrick Leahy, “General Motors and CEO Whitacre Violate FTC ‘Truth in Advertising Laws’ With Debt Repayment Claims,” April 27, 2010 (<http://michaelpatrickleahy.blogspot.com/2010/04/general-motors-and-ceo-whitacre-violate.html>); see also Fox News, *GM Could Be in Hot Water With FTC Over Truth in Advertising*, April 23, 2010 (<http://www.foxnews.com/politics/2010/04/23/gm-hot-water-ftc-truth-advertising/>)

²⁴ GM’s website lists its general consumer contact information as: General Motors Company, P.O. Box 33170, Detroit, Michigan 48232-5170, 1-800-551-4123.