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UNITED STATES OF AMERICA
FEDERAL TRADE COMMISSION
NEW YORK REGIONAL OFFICE

COMMISSION AUTHORIZED

V890023

March 6, 1989

The Honorable Peter M. Sullivan
New York Assembly
Community Office
2 William Street
White Plains, New York 10601

Dear Mr. Sullivan:

The staff of the Federal Trade Commission is pleased to have the opportunity to respond to your request for comment on the Act of Dec. 29, 1988, ch. 784 N.Y. Laws ("the Act"), which becomes effective on April 1, 1989.¹ We are providing these remarks in response to your letter of December 28, 1988, suggesting that the New York State Legislature may consider amendments to this law during this legislative session. Our comment addresses several aspects of the new law that may adversely affect consumers. We would be pleased to offer additional assistance on any particular amendments that are offered.

The Act amends the New York General Business Law in several significant ways. First, the Act limits the methods automobile rental companies may employ in calculating base rental charges and in advertising those prices. Second, it alters the current methods of allocating the costs and risks of damage to (or theft of) a rental vehicle. Finally, it prohibits rental car companies from requiring renters to provide, during the term of the rental agreement or pending resolution of any dispute, any security, deposit, or payment for damage. We are concerned that parts of these provisions may result in increased costs to consumers who rent automo-

¹ These comments are the views of the staff of the New York Regional Office and the Bureau of Consumer Protection of the Federal Trade Commission. They are not necessarily the views of the Commission or any individual Commissioner.

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biles without providing significant benefits to the majority of automobile renters or to the public at large.

The Federal Trade Commission is charged with promoting competition and protecting consumers from unfair and deceptive commercial practices.² In fulfilling this mandate, the staff of the Federal Trade Commission often submits comments, upon request, to federal, state, and local governmental bodies to help assess the competitive and consumer welfare implications of pending policy issues. In enforcing the Federal Trade Commission Act, the Commission has gained considerable experience in analyzing the impact of various private and governmental restraints on competition and the costs and benefits to consumers of these restraints.

The Commission and its staff have considered other matters involving the car rental industry. The Commission recently commented on Guidelines prepared by the National Association of Attorneys General's Task Force on Car Rental Industry Advertising and Practices ("NAAG Guidelines").³ The advertising, pricing, and allocation of liability portions of the Act are very similar to portions of these NAAG Guidelines.

Pricing and Advertising Restrictions

The Act states that any fee that consumers generally must pay should be reflected in the total advertised price rather than being stated separately.⁴ This requirement, referred to as "bundling," apparently is directed toward

² See 15 U.S.C. § 41 et seq.

³ Letter from the Federal Trade Commission (Commissioner Strenio not joining) to Robert T. Stephan, Attorney General, Kansas (February 24, 1989). A copy is attached. The Guidelines will be further considered by the Attorneys General at their March meeting.

⁴ "A rental vehicle company shall not charge in addition to the rental rate, taxes and mileage charge, if any, any fee which must be paid as a condition of renting the vehicle, such as, but not limited to, required fuel or airport surcharges, nor any fee for transportation to the location where the rental vehicle will be delivered." Act of 1988, Pub. L. No. 784, § 396.z.10(a).

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preventing car rental firms from advertising base rental rates that do not reflect certain charges, such as fuel charges, surcharges, and airport access fees, that some consumers, at least in certain locations, must pay. We agree that it may be an unfair or deceptive act or practice for a company to fail to disclose unavoidable charges prior to taking reservations for rental cars. The bundling approach adopted by the Act, however, may be unnecessary to protect consumers from deception or unfairness. For instance, it is not clear why an advertisement stating the availability of a vehicle for "\$25 per day plus a \$12 fuel charge" -- apparently forbidden by the Act -- is more deceptive or unfair than an advertisement stating the rate as "\$37 for first day; \$25 for each succeeding day" -- which apparently would be acceptable under the Act. Nor is it clear that consumers would be misled as to the total cost of car and fuel by either advertisement. It is, of course, desirable that consumers have material information on rental prices before they sign a rental agreement. They can obtain that information from a variety of sources, however, including advertising, conversations when reserving a rental vehicle, and from the company representative at the rental counter.

Adoption of the requirement that any mandatory fee must be included in the total advertised price may reduce consumer welfare in several ways. This requirement may increase the cost of advertisements containing price information because the bundling requirement, coupled with differences in charges assessed by franchisees and in surcharges imposed by various airports, may make it difficult for some car rental companies to build these fees into nationally advertisable rates.⁵ This may result in reduced price promotion, and lead to higher prices. Since numerous economic studies have demonstrated that price advertising enhances competition and

⁵ The NAAG Car Rental Task Force recognized this possibility. National Association of Attorneys General, Task Force on Car Rental Industry Advertising and Business Practices, Preliminary Report (June 19, 1988) at 8.

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lowers prices,⁶ we suggest caution in imposing any requirements that may discourage price advertising.⁷

Lessor Liability

The Act also makes significant changes in the allocation of the risk that a rental vehicle will be damaged or stolen. The Act requires car rental companies, as an integral (and therefore not separately billable) part of every rental transaction, to assume responsibility for losses in excess of \$100 in most situations,⁸ and prohibits the

⁶ See, e.g., Schroeter et al., Advertising and Competition in Routine Legal Service Markets: An Empirical Investigation, 36 J. Indus. Econ. 49 (1987); Cleveland Regional Office and Bureau of Economics, Federal Trade Commission, Improving Consumer Access to Legal Services: The Case for Removing Restrictions on Truthful Advertising, Federal Trade Commission Staff Report (1984); Kwoka, Advertising and Price and Quality of Optometric Services, 74 Am. Econ. Rev. 211 (1984); Cady, An Estimate of the Price Effects of Restrictions on Drug Price Advertising, 14 Econ. Inquiry 493 (1976); Benham, The Effects of Advertising on the Price of Eyeglasses, 15 J. L. & Econ. 337 (1972).

⁷ Besides potentially discouraging price advertising, the Act may lead to consumers' rentals at some locations subsidizing rentals at other locations. For example, if rental agencies are forced to bundle airport access fees into their national base rental fee, customers renting automobiles near airports that have no such fees (such as the three metropolitan New York City airports) will, in effect, subsidize those renting automobiles near airports that do.

⁸ Section 396-z.3 provides that an "authorized driver" -- defined as "(i) the person to whom the vehicle is rented if a licensed driver; (ii) such person's spouse or child if licensed and at least eighteen years of age; (iii) such person's employee, employer or co-worker if engaged in business activity with the renter and if a licensed driver; (iv) any person who operates the vehicle during an emergency situation; or (v) any licensed driver expressly listed on the rental agreement as an authorized driver" -- may be held liable (in excess of \$100) only for damage or loss caused intentionally by an authorized driver; resulting from an
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offering of a separate Collision Damage Waiver ("CDW").⁹ In practical effect, legislative restriction of the offering of a distinct CDW product is tantamount to mandating that car rental companies bundle CDW coverage into every car rental transaction.¹⁰ Any legislatively imposed bundling requirement will restrict consumer choice among CDW-like coverages of rental cars,¹¹ resulting in some consumers having to bear

⁸(...continued)

authorized driver's willful or wanton misconduct, intoxication or drug use; or that occurs while an authorized driver is participating in an organized speed racing competition, carrying persons or property for hire, or committing a felony or other criminal act in which the damage or loss is caused by the criminal activity. Act of 1988, Pub. L. No. 784, § 396-z.3.

Our reading of the Act leaves us uncertain as to the applicability of Section 396-z.3 to an unauthorized driver or to a renter that permits an unauthorized person to drive the vehicle. The legislature may wish to adopt appropriate clarifying amendments.

⁹ The Act further provides that "no rental vehicle company shall . . . agree for a charge, to waive any claims against an authorized driver for any damage to, or loss of, the rental vehicle" Act of 1988, Pub. L. No. 784, § 396-z.5. As the Act is presently constituted, the CDW sales ban exposes most consumers only to \$100 of uninsured risk. If, however, the Act were amended to permit, by contract or otherwise, the allocation to consumers of greater liability for damage to rental vehicles, we think the CDW sales ban would unnecessarily impose substantially greater hardship on some consumers.

¹⁰ Hereinafter we refer to measures that would restrict the offering of a distinct CDW product as "CDW-bundling" measures, in recognition of their practical effect.

¹¹ These options include purchasing no insurance and assuming the full risk ("going naked"), purchasing CDW, relying on personal automobile liability insurance that extends to rented cars, and using coverage provided by a third party such as a credit card provider. Initially, credit card providers extended these benefits to holders of
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greater costs, primarily in the form of higher base prices, than they otherwise might have incurred to cover the accident and theft losses statutorily shifted to the rental car companies. Recent news reports suggest that this may be happening to some consumers in at least one state. A recent article in The New York Times regarding adoption of CDW-bundling legislation in Illinois said:

[C]ar-rental companies have raised their rates in Illinois, where the ban on collision waivers took effect Jan. 1. Hertz raised its prices by 8 percent in Illinois and by 2.5 to 5 percent elsewhere in anticipation of a decline in waiver sales to American Express's 22.1 million cardholders. Alamo and Budget have also followed Hertz's lead by raising prices in Illinois, but no other major company has raised prices across the board.¹²

Moreover, a Hertz spokesman has also indicated that "the company's rates will go up about 8%, or \$3 to \$4 per day for rentals in New York" as a result of the Act.¹³

Our analysis of the CDW issue comes to a different conclusion from that reached in the NAAG Guidelines.¹⁴

¹¹(...continued)
their "prestige" cards, such as "gold," "platinum," and corporate cards. Recently, however, American Express extended rental car damage coverage to its basic "green" card. Other credit card companies are expected to follow suit. The Record, Jan. 15, 1989, at B2, col. 2.

¹² N.Y. Times, Jan. 7, 1989, § 1 at 52, col. 1.

¹³ N.Y. Daily News, Feb. 13, 1989, at 23.

¹⁴ The Guidelines make three alternative legislative proposals, two of which would irrevocably allocate most of the risk of damage to or loss of a rental car to the rental car company. The final legislative proposal would permit a rental car company to hold consumers liable for damages resulting from their negligence or intentional misconduct provided that the rental car company offered to sell to consumers a waiver at a regulated price related to the company's loss experience. See NAAG Guideline 3.1.

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According to the Guidelines, CDW sales are troubling in part because consumers lack adequate information and they encounter deception or high pressure at the rental counter.¹⁵ Where consumers suffer from insufficient or confusing information, remedies requiring the disclosure of more or better information often may resolve the problem. Therefore, providing consumers information on CDW may be more effective and less costly than requiring that CDW be sold in the rental bundle regardless of whether consumers want it.¹⁶

Accordingly, we believe that a legislature considering regulation of CDW ought first to determine whether information now conveniently available to consumers permits rational decisionmaking with respect to CDW. In the event that the legislature determines that currently available information is inadequate, it then ought to explore fully the efficacy of information-generating measures.¹⁷ On the other hand, if consumers are encountering unfair or deceptive marketing practices at some car rental counters, the most direct and efficient remedy may be law enforcement action against the offenders.

¹⁵ See generally NAAG Guideline 3.1 (c) and following discussion.

¹⁶ See Beales, Craswell & Salop, "The Efficient Regulation of Consumer Information," 24 J. of L. & Econ. 491 (1981).

¹⁷ The authors of the NAAG Guidelines state that they do "not believe that this [CDW] information gap can be filled by more disclosures" Comment to NAAG Guideline 3.1 (c). No explanation is offered for this belief. Nevertheless, if this conclusion is supported, traditional law enforcement efforts might be adequate to prevent deception or unfairness in the marketing of CDW. These alternatives are worth exploring in detail before concluding that mandated purchase of CDW is the proper solution to the problem of unwanted purchase of CDW.

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Prohibition of Security Requirements

Another provision of the Act states that no rental car company may require any security, deposit, or charge for damage, by credit card or otherwise, during the term of the rental agreement or pending resolution of any dispute.¹⁸ Thus, for example, under the Act a rental car company is prohibited from securing the lending of an automobile worth thousands of dollars through a "hold" on a consumer's credit card account, even if the hold were to be limited to the anticipated cost of the rental and the consumer manifested informed consent. This provision may increase the number of instances in which rental car companies are unable to obtain payment for car rentals or for damages for which the Act makes the renter responsible. Rental car companies may then have no recourse but to increase rental rates to cover any increase in unpaid charges, effectively requiring honest and careful consumers to bear debts incurred by less scrupulous and less careful persons.¹⁹

We note for your consideration that although the NAAG Task Force expressed concern regarding certain rental car companies' practices relating to deposits, credit card holds, and the like, the NAAG Guidelines would not bar these practices generally. The approach adopted in the NAAG Guidelines, instead, tends to focus on ensuring adequate disclosure of and consumer consent to deposit, credit card account hold, and similar rental car company requirements.²⁰ This approach, although not cost-free, entails fewer costs to consumers than would be imposed by the Act.

Conclusion

It is not clear that the Act will provide net benefits to consumers. We suggest additional consideration of the potential adverse effects of the requirements in the Act that

¹⁸ Act of 1988, Pub. L. No. 784, § 396-z.7.

¹⁹ Further, the proscription of security-taking, insofar as it may lead some drivers to conclude that they have a lesser financial stake in avoiding all harm to rental cars, may result in reduced care by some consumers.

²⁰ See, e.g., NAAG Guideline 3.4.

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some charges be bundled into base automobile rental fees. We also hope you will take into account the prospect that the changes in liability for damaged or stolen rental vehicles could mean, on balance, higher rental prices for consumers. Finally, we suggest that you consider whether it is advisable to shift to some consumers part of the losses that may be caused by other consumers, as may result from the provisions of the Act relating to the holding of security.

We hope that these comments will help you in your determination of whether the Act is likely to achieve the goal of protecting consumers and whether, or how, the New York General Business Law could be amended or revised in the present legislative session to serve the welfare of consumers and foster a competitive environment in the car rental industry.

We appreciate the opportunity to comment.

Sincerely,



Michael Joel Bloom
Director
New York Regional Office