Federal Trade Commission

Office of the Regional Director

26 Federal Plaza, 22nd Fl.
New York, New York 10278
(212) 264-1200

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James J. Barry, Jr., Director
New Jersey Division of Consumer Affairs
1100 Raymond Boulevard, Room 504
Newark, New Jersey 07102

COMMISSION AUTHORIZED
V880062

Dear Mr. Barry:

We are pleased to respond to your notice inviting comments on the New Jersey Division of Consumer Affairs' (the "Division's") proposed rule entitled "Advertising and Sale of New Merchandise."[1] The proposed rule would proscribe the advertising or selling of any merchandise as "new" when, in fact, it is not "new merchandise" as defined in the rule.[2] We support the Division's effort to ensure that the term "new" is not misused to cause consumer injury. We wish to note, however, that the proposed rule prohibits all merchandise that has been "returned" from being sold as "new." In this respect, the proposed rule may be overly broad, in some instances prohibiting non-deceptive competitive activity and thereby possibly injuring consumers.

The Federal Trade Commission staff's interest in the Division's proposal stems from the Commission's general statutory obligations to promote competition and to prevent unfair or deceptive advertising and marketing practices. As you may know, the Federal Trade Commission is a law enforcement agency charged with prosecuting violations of Section 5 of the Federal Trade Commission Act, which prohibits, among other things, unfair or deceptive practices in or affecting commerce.[3] In implementing its responsibilities, the FTC staff has developed considerable expertise in understanding the role of advertising and labeling in providing consumers with reliable product information.

In addition, the staff has specific experience with the use of the term "new." For example, the Commission has

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

[2] 20 N.J. Reg. 2247 (Sept. 6, 1988) (to be codified at N.J. Admin. Code tit. 13, § 13:45A-11.1).

[3] 15 U.S.C. § 45 et seq.

promulgated a Trade Regulation Rule that governs the sale of used motor vehicles. The Rule and the staff interpretation provide that a demonstrator car--meaning a vehicle that, although never sold to a retail customer, has been driven, whether by the dealer's corporate officers, the dealer's employees, or anyone else--is considered to be a used vehicle.[4] Similarly, in its Guides for the Household Furniture Industry,[5] the Commission maintains that members of the industry should not make any direct or indirect representations that an industry product is "new" unless that product has not been used and is composed entirely of unused materials and parts.[6]

Proposed New Jersey rule 13:45A-11.1 states that it shall be unlawful for any person to advertise or sell any merchandise as "new merchandise" when that merchandise has been "previously owned, leased, used, damaged, repaired, returned, operated, or used as a floor model or demonstrator or in any other similar manner." In the statement that accompanies the text of the proposed rule in the September 6, 1988 New Jersey Register,[7] the Division notes that it has received numerous complaints concerning businesses--most frequently sellers of automobiles and furniture--that have advertised or sold as "new,"

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[4] See Trade Regulation Rule; Sale of Used Motor Vehicles, 16 C.F.R. Part 455 (1988) and 53 Fed. Reg. 17661 (1988), respectively. Prior to adopting the Used Car Rule the Commission conducted a two-year rulemaking proceeding. The evidence amassed during the proceeding, and reflected in a 600-page staff report (Bureau of Consumer Protection, Federal Trade Commission, Sale of Used Motor Vehicles (1978)), established that purchasers of vehicles regarded prior use or repair as material to their purchase decisions, that passing off of used or repaired vehicles as new tended to deceive and injure consumers, and that such passing off was sufficiently prevalent to warrant regulation.

[5] 16 C.F.R. Part 250 (1988).

[6] Section 250.8 of the Commission's Guides for the Household Furniture Industry further states that in connection with the sale of furniture that has the appearance of being new but contains used materials or parts, such as springs, latex foam rubber stuffing, or hardware, members of the industry should conspicuously disclose that fact. Section 250.9 delineates use of the terms "floor sample," "demonstration piece," "trade-in," and "discontinued."

[7] 20 N.J. Reg. 2247 (Sept. 6, 1988).

products that have been "previously owned, leased, used, etc." The proposed rule, according to the Division, "will be beneficial to consumers since 'new merchandise' is defined to assure a uniform understanding of that term by both buyer and seller and to prevent deceptive representations."

The adoption of carefully delineated measures to prevent the misuse of the term "new" may benefit consumers. For example, representations that returned products are new may at times injure consumers. Some products can be purchased, and then abused or otherwise devalued in a way not readily apparent, and then returned to the seller. If a returned product having a non-apparent flaw then was sold to another customer as "new," that consumer would have suffered economic harm (and perhaps, in some instances, faced the risk of physical injury) as a result of that misrepresentation.[8] Accordingly, insofar as consumers are being injured by the deceptive use of the term "new" in any particular business context, the use of the term in that business context may be an appropriate subject of regulation.

Nevertheless, we urge the Division to consider whether the proposed rule's broad applicability and uniform definition of "new" also may have an adverse effect on the important and useful role retailers' return policies have in the marketplace and may be particularly prejudicial to mail-order companies and their patrons. For example, a department store may now permit a consumer to purchase a garment to be tried on at the consumer's home and returned to the store if the garment does not fit properly or otherwise does not suit the purchaser. Such a return policy may be practicable because returned garments in "new" condition can be reintroduced to the store's inventory and resold as "new." If, as a result of the adoption of the proposed rule, the department store could not resell returned garments as "new," it well might determine, as a matter of practical economics, either to: (a) increase the prices of its merchandise to cover the costs of keeping "brand-new" merchandise separate from "returned-new" merchandise and to recover any depreciation that results from the sale of "returned-new" merchandise at reduced prices, or (b) abolish the liberal return policies that consumers

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[8] For example, some cosmetic products can be adulterated easily, whether intentionally or inadvertently. Because such adulteration may be undetectable, return and resale of such cosmetic products may pose a substantial health hazard in addition to a risk of economic injury, to consumers.

value. Either outcome could diminish consumer welfare.[9]

The possible adverse effects caused by the rule's treatment of returned merchandise might be magnified for mail-order sellers. Retail store customers can try on garments in the stores' dressing rooms prior to making a purchase decision. Based on our discussion with Division staff, we understand that under the proposed rule, merchandise that is tried on at the store but not purchased can, in many instances, still be marketed as "new." Mail-order customers cannot try on garments prior to purchase. If they are not satisfied, they must return the garment to the seller. The proposed rule, however, appears to prohibit the seller from reselling the garment as "new." Since customers cannot try on garments from mail-order sellers prior to purchase, the return rate for mail-order sellers might be higher than for retail stores. Thus, the increase in costs (and ultimately prices) associated with the rule's treatment of returned merchandise might be proportionately higher for mail-order sellers than for retail merchants, reducing the competitive viability of an alternative shopping mode.[10]

Consumers are likely to be aware of stores' liberal return policies. An ordinary consequence of those policies--and one that consumers well may understand--is that previously sold goods that remain in "new" condition may be resold as "new." Consumers who purchase garments from merchants offering liberal return policies may, in many instances, be motivated to do so by the very existence of a liberal return policy. In order to avail themselves of such a policy, they may be willing to purchase goods in "new" condition, irrespective of whether those garments

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[9] It might be argued that consumers would be better off if "brand-new" merchandise were distinguishable from "returned-new" merchandise, and that they would be willing to pay a price premium for "brand-new" merchandise. Yet, merchants generally are free to make this distinction now (for an exception, see the Used Car Rule, 16 C.F.R. Part 455). The fact that merchants rarely make this distinction may indicate that consumers, in many markets, do not prefer "brand-new" merchandise enough to cover the merchants' costs of distinguishing it from "returned-new" merchandise.

[10] Further, if mail-order sellers chose to abandon liberal return policies, instead of imposing offsetting general price increases, mail-order purchasers might be deprived entirely of the ability to try on garments prior to being irrevocably committed to their purchase.

were "previously owned, . . . used, . . . [or] returned." Accordingly, there may be no benefits to offset the costs of depriving consumers of merchants' liberal return policies with respect to goods, such as clothing, that seem unlikely to be returned with a concealed quality defect.[11]

In sum, we support the Division's effort to ensure that misuse of the term "new" does not result in consumer injury. However, the Division may wish to limit regulation of use of the term "new" to those specific factual situations where evidence of consumer injury exists, and define "new" in a manner that protects consumers from unwitting purchase of devalued or debased merchandise without otherwise compromising consumers' ability to avail themselves of the benefits of liberal return policies and the convenience afforded by mail-order purchasing.

We hope that these remarks are helpful to the Division. Please do not hesitate to contact us if you have any questions or would like further information.

Sincerely,

Michael Joel Bloom
Regional Director

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[11] Clothes are but one example of merchandise that has little potential for being returned to a store with a concealed quality defect. Other examples include such diverse products as glassware, pots and pans, light fixtures, luggage, jewelry, picture frames, etc.

Some states have proscribed the representation of "used merchandise" as "new," but have expressly provided that "new merchandise" includes "merchandise previously sold but returned within a reasonable time by the consumer for full credit if such merchandise is not damaged or deteriorated." Wyo. Stat. § 40-12-105(a)(xii) (1987). See also Ohio Rev. Code Ann. § 109:4-3-08 (Baldwin 1988); R.I. Gen. Laws § 23-26-1(6) (1987); and W. Va. Code § 47-1A-2 (1987).