National Retail Federation®
The Voice of Retail Worldwide

November 16, 2012

Federal Trade Commission
Office of the Secretary
Room H-113 (Annex O)
600 Pennsylvania Ave., NW
Washington, DC 20580

Re: Fur Rules Review, Matter No. P074201

Dear Chairman Leibowitz:

Pursuant to a request published by the Federal Trade Commission ("FTC") in the Federal Register 77 Fed. Reg. 57043 (September 17, 2011), the National Retail Federation ("NRF") submits the following supplementary comments on behalf its member companies in the U.S. retail industry that sell fur products subject to the Fur Products Labeling Act ("Fur Act or Fur Rules") and its implementing regulations.[1]

NRF supports the Commission's decision to reject changes or alternatives in the Fur Products Name Guide for nyctereutes procyonoides or "Asiatic Raccoon" and the Commission's efforts to provide flexibility in the Fur Act and its regulations and to make them consistent with the Textile Fiber Products Identification Act ("Textile Act") and its regulations. The Commission should take even further steps, however, to modernize the guaranty process provided under the Fur Act. NRF set forth rationale and a roadmap for these changes in a February 2012 comment filed with the Commission in regard to the Textile Act. Given that the guaranty processes provided under for the Fur Act and the Textile Act require use of the same prescribed form, the Commission should consider these provisions together and modernize both laws consistently. NRF appreciates the opportunity to provide this comment and looks forward to being part of the discussion regarding these issues.

I. The Commission Should Provide Flexibility in the Guaranty Process

The retail business has changed significantly since the Fur Act was passed in 1951. Business is no longer conducted using paper purchase orders, invoices and contracts. Rather, retailing is an electronic business where computer screens and electronic documents serve to transact offers and acceptances. The guaranty process provided in the Fur Rules is an entirely paper process that no longer reflects how modern retailing works. NRF proposes the changes below to modernize this process while retaining the principles of the guaranty.

A. Addition of an Electronic Guaranty to the Separate Guaranty Section

Given that business is conducted electronically, the regulations should allow for a separate electronic guaranty. NRF proposes adding a subsection to 16 C.F.R. § 301.47 to define clearly the process by which

[1] *See* 15 U.S.C. § 69.

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a separate guaranty may be obtained. Section 2-204(4) of the Uniform Commercial Code provides an accepted framework for the negotiation of electronic agreements that can be adapted to the guaranty process as follows:[2]

> § 301.47 Form of separate guaranty
>
> The following is a suggested form of separate guaranties under section 10 of the Act which may be used by a guarantor…
>
> (2) *Electronic guaranty.* A separate guaranty may be made by the interaction of an electronic agent or an individual acting on behalf of the parties. A guaranty is made if the individual or electronic agent:
>
> (i) places an order with the guarantor via transmission of an electronic purchase order that requests goods subject to specific terms and conditions including, but not limited to, compliance with the Fur Products Labeling Act and its regulations; and
>
> (ii) in response to the purchase order, the individual or electronic agent acting on behalf of the guarantor confirms that the guarantor will fulfill the items and submits electronic confirmation of the same; and (iii) the guarantor fulfills the order and it is accepted by the purchaser.

To further account for the use of electronic communications in the ordering and fulfillment processes, it is necessary to add a definition of "electronic agent" to 16 C.F.R. § 301.1. We propose adding the following definition of "electronic agent" presently used in the Uniform Commercial Code:

> *Electronic agent* means a computer program or an electronic or other automated means used independently to initiate an action or respond to electronic records or performances in whole or in part, with or without review or action by an individual.[3]

NRF believes that these changes are non-controversial and well supported by state and federal law. As noted above, Article 2 of the Uniform Commercial Code provides a framework for these transactions that is already recognized and accepted. Specifically, section 2-211 of the UCC provides:

> **§ 2-211. LEGAL RECOGNITION OF ELECTRONIC CONTRACTS, RECORDS, AND SIGNATURES**
>
> (1) A record or signature may not be denied legal effect or enforceability solely because it is in electronic form.

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[2] Section 2-204(4) of the UCC states:

> (4) Except as otherwise provided in Sections 2-211 through 2-213, the following rules apply:
>
> (a) A contract may be formed by the interaction of electronic agents of the parties, even if no individual was aware of or reviewed the electronic agents' actions or the resulting terms and agreements.
>
> (b) A contract may be formed by the interaction of an electronic agent and an individual acting on the individual's own behalf or for another person. A contract is formed if the individual takes actions that the individual is free to refuse to take or makes a statement, and the individual has reason to know that the actions or statement will:
>
> (i) cause the electronic agent to complete the transaction or performance; or
>
> (ii) indicate acceptance of an offer, regardless of other expressions or actions by the individual to which the electronic agent cannot react.

[3] *See* UCC § 2-211.

(2) A contract may not be denied legal effect or enforceability solely because an electronic record was used in its formation.

(3) This article does not require a record or signature to be created, generated, sent, communicated, received, stored, or otherwise processed by electronic means or in electronic form . . . .

Finally, the Electronic Signatures in Global and National Commerce Act ("E-SIGN")[4] recognizes and legitimizes electronic commerce. In simplest terms, E-SIGN provides that electronic documents and signatures have the same legal effect and are equally as valid as their paper equivalents. Moreover, every state has at least one law pertaining to the validity of electronic commerce.[5] The Fur Act should reflect these market changes as well by clearly stating how companies comply with the regulations through electronic means.

B. Remove the "Penalty of Perjury" Language From the Continuing Guaranty Provisions

NRF also recommends the revision of the continuing guaranty provisions in 16 C.F.R. § 301.48. This section presently requires a prescribed form stating that the products sold or delivered to the buyer are not and will not be misbranded nor falsely or deceptively advertised or invoiced under the provisions of the Fur Act. It further requires that the guarantor sign the document under penalty of perjury. However, the penalty of perjury language is inappropriate for agreements between private parties or agreements to do future acts. For the reasons explained below, it is completely incompatible with the concept of a continuing guaranty.

Section 16 C.F.R. § 301.48 was amended in 1983 in response to an option provided in 1976 in a section of the Judicial Code,[6] which modified the Code to allow documents that previously required notarization to be sworn under penalty of perjury.[7] The rationale behind the change was convenience, *i.e.*, a notary was not always available so swearing under penalty of perjury allowed attorneys to file documents without having to have them notarized.[8] Perjury language was only intended for documents filed with a court or agency and was only intended to replace a notary requirement. There is nothing in the Judicial Code to suggest that it was intended for documents between private parties. Incorporation of perjury language into a guaranty between private parties oversteps the intent of 28 U.S.C. § 1746.[9]

In addition, the "penalty of perjury" language is inappropriate in an agreement between private parties because perjury is a criminal charge. 18 U.S.C § 1621 defines perjury as:

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[4] 15 U.S.C. § 96.

[5] *See* National Conference of State Legislatures Website, available at: http://www.ncsl.org/issues-research/telecommunications-information-technology/uniform-electronic-transactions-acts.aspx (viewed November 9, 2012). Forty-seven states have adopted the Uniform Electronic Transactions Act (UETA). Washington, Illinois and New York have not adopted UETA, however, those states have statutes pertaining to electronic commerce.

[6] 28 U.S.C. § 1746.

[7] *See* 48 Fed. Reg. 12514 (March 25, 1983).

[8] H.R. REP. NO. 94-1616, at 1 (1976).

[9] *See* id. Statements in the House Report on 28 U.S.C. § 1746 only suggest that the replacement of perjury over notarization will be used in documents filed with a court. It does not contemplate use of the perjury language in documents exchanged between private parties. The statement of purpose reads: "The purpose of this legislation is to permit the use in Federal proceedings of unsworn declarations given under penalty of perjury in lieu of affidavits."

Whoever—

(1) having taken an oath before a competent tribunal, officer, or person, in any case in which a law of the United States authorizes an oath to be administered, that he will testify, declare, depose, or certify truly, or that any written testimony, declaration, deposition, or certificate by him subscribed, is true, willfully and contrary to such oath states or subscribes any material matter which he does not believe to be true; or

(2) in any declaration, certificate, verification, or statement under penalty of perjury as permitted under section 1746 of title 28, United States Code, willfully subscribes as true any material matter which he does not believe to be true; is guilty of perjury and shall, except as otherwise expressly provided by law, be fined under this title or imprisoned not more than five years, or both. This section is applicable whether the statement or subscription is made within or without the United States.

Thus, by definition, perjury requires that at the time a statement is made the person making the statement knows it to be untrue. The essence of the crime of perjury is a willful untruth, made under oath, in a material statement.[10] A statement is willfully untrue "only if it was untrue when made, and known to be untrue by the individual making it."[11] Further, a defendant's knowledge of the falsity of his statements at the time he gave them is essential to a perjury conviction.[12] It is incumbent upon the government to prove that a person accused of perjury had knowledge that his statements made under oath were false at the time that he made them.[13]

Other legal contexts also discredit the concept of liability based upon a future promise. For example, liability under the False Claims Act ("FCA") requires the relator to demonstrate that the defendant has certified compliance with a statute or regulation as a condition to government payment, yet knowingly failed to comply with such statute or regulation.[14] FCA liability does not attach when a defendant knowingly and falsely certified future compliance with a regulation. FCA liability requires that the government must have relied on a false or fraudulent claim for payment and actually have made payment which it otherwise would not have made but for the false or fraudulent claim.

Use of the "penalty of perjury" language on the guaranty forms is not appropriate because the signer is not attesting to the truth of the statement at the present time. The signer is attesting to the truth of labels and invoices yet to be created. Inclusion of the perjury language in the guaranty form goes well beyond the intended purpose of 28 U.S.C. § 1746 and introduces criminal elements into civil contracts. By criminalizing the guaranty, the FTC is converting a guaranty that Congress discussed into criminal exposure for a mistake on a label. However, only Congress can define the distinction between what is civil and what is criminal. The FTC does not have this power or authority.

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[10] United States v. Dowdy, 479 F.2d 213, 230 (4th Cir. 1973).

[11] United States v. Lighte, 782 F.2d 367, 373 (2nd Cir. 1986).

[12] United States v. Bronston, 453 F.2d 555, 560 (2nd Cir. 1971) (overturned on other grounds, 409 U.S. 352).

[13] United States v. Provinzano, 333 F.Supp. 255, 258 (E.D. Wis. 1971); citing United States v. Sweig, 441 F.2d 114, 117 (2d Cir. 1971).

[14] States. ex rel. Conner v. Salina Regional Health Center, 543 F.3d 1211 (10th Cir. 2008).

Moreover, we suggests changing the "prescribed" form language in 16 C.F.R. § 301.48 to a "suggested" form to provide some flexibility for parties to substantially adopt the form into current electronic processes without the obligation to revert to paper documents and signatures.

C. Addition of Language to Account for Foreign Vendors

Finally, the current separate and continuing guaranty provisions require that the seller/guarantor reside in the United States. To the extent that a guaranty cannot be obtained because the guarantor is not in the United States, we propose adding the following language applicable to those sections:

> Further, if it is not legally possible to obtain a guaranty at the time the buyer takes an ownership interest in a covered product, and (1) buyer does not embellish or misrepresent claims provided by the manufacturer about a covered product, and (2) the covered product is not sold by buyer as a private label product, then buyer shall only be liable for a violation of this section if it knew or should have known that the marketing or sale of the covered product would violate this section.

Given that major retailers rely on global supply chains, we strongly suggest that the FTC consider this provision to account for those suppliers who do not reside in the United States.

We appreciate the opportunity to submit these comments to the FTC and look forward to participating further in this rulemaking process. Any questions should be directed to me by phone at (202) 626-8104 or by email at autore@nrf.com.

Respectfully submitted,

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