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October 24, 2011

Submitted Electronically

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

<https://ftcpublishcommentworks.com/ftc/warrantyrulesanprm>

Re: Magnuson-Moss Warranty Act Rule Review, 16 C.F.R. Part 700, P114406

Dear Ms. Gans:

The Association of Home Appliance Manufacturers (AHAM) respectfully submits the following comments to the Federal Trade Commission (FTC or Commission) on its Magnuson-Moss Warranty Act Rule Review, 16 C.F.R. Part 700, P114406, 76 Fed. Reg. 52596 (Aug. 23, 2011).

AHAM represents manufacturers of major, portable and floor care home appliances, and suppliers to the industry. AHAM's more than 150 members employ tens of thousands of people in the U.S. and produce more than 95% of the household appliances shipped for sale within the U.S. The factory shipment value of these products is more than \$30 billion annually. The home appliance industry, through its products and innovation, is essential to U.S. consumer lifestyle, health, safety and convenience. Through its technology, employees and productivity, the industry contributes significantly to U.S. jobs and economic security. Home appliances also are a success story in terms of energy efficiency and environmental protection. New appliances often represent the most effective choice a consumer can make to reduce home energy use and costs.

The Commission sought comments on the economic impact of and the continuing need for a set of warranty-related Interpretations, Rules, and Guides (the Interpretations, Rules, and Guides) as well as their benefits to consumers and burdens on firms subject to their requirements. FTC posed several general and specific questions which AHAM addresses, by number, below.

I. General Questions for Comment

A. Question 2

The Commission sought comment on what benefits and costs the Interpretations, Rules, and Guides have had on businesses or firms that are subject to their requirements. In particular, FTC asked if any changes could be made to minimize burden or cost on regulated parties. FTC sought evidence to support proposed changes and an analysis of how the proposed changes would affect consumers and businesses.

There has been a literal explosion of consumer product class actions brought under the Magnuson-Moss Warranty Act (MMWA) during the past ten years. Typically, consumer product class actions impose on manufacturers and retailers wasteful defense costs, especially discovery expenses associated with collecting, processing, reviewing, and producing electronically stored information and documents. Those costs are ultimately passed down to consumers and, when such cases result in class settlements, the lawyers are typically the ones to benefit more than the class of consumers on whose behalf the suits were brought.

AHAM suggests that the following changes be made to the Interpretations, Rules, and Guides:

1. A provision should be added to 16 C.F.R. 701.3 providing that any warrantor or guarantor who satisfies the provisions set forth in the Rule is entitled to a presumption in any breach-of-warranty litigation that the subject warranty is not unconscionable, deceptive, or misleading.

Currently, in many legal proceedings, businesses that comply with the requirements set forth in 16 C.F.R. 701.3 are forced to defend against frivolous claims that their written warranties are unconscionable or misleading. There are hundreds of class-action lawsuits filed in this country every year that essentially ask a court to invalidate, reform, or modify the terms of a written warranty, after the sales in question, based on one or several product purchasers' after-the-fact allegations that the terms of the warranty are somehow unfair or unconscionable, regardless whether the manufacturer or retailer has complied with all applicable state and federal warranty laws. This is an unfortunate, added, and unnecessary cost of doing business in the United States today.

When it passed the MMWA, Congress intended to, among other things, 1) ensure that consumers could obtain complete information about the warranty terms that sellers or manufacturers offer in connection with the products they sell; 2) allow consumers to compare warranty coverage before buying a consumer product; and 3) encourage competition on the basis of warranty coverage so consumers can select the product that is right for them, individually. If a seller or manufacturer of a consumer product satisfies the provisions of the Rule, it should be entitled to a presumption that its warranty is not unconscionable, deceptive, or misleading. Such a presumption would not interfere with Congress's stated intent in passing the MMWA, would not harm consumers, would not discourage the filing of meritorious lawsuits (because a prevailing consumer would still be able to seek an award of attorneys' fees), and would provide justified protection to businesses, including small businesses, that comply with the MMWA and FTC's Interpretations, Guides, and Rules.

2. A provision should be added to 16 C.F.R. 701.3 stating that when a warrantor or guarantor limits the duration of a written warranty, the warranty will provide coverage for any defects covered under the warranty that manifest themselves during the written-warranty period, but the warranty does not cover any latent defect that may manifest itself after the written-warranty period has expired.

Such a provision should be added because an express, limited warranty provided by a seller or manufacturer is meant to shift the risk from the consumer to the manufacturer or seller for defects that arise during the duration of the express warranty. Many claims brought in lawsuits, however, seek to expand or modify the express warranty's terms after the sale, and beyond the contractually-limited time period, to cover an alleged latent defect that manifests itself after the express-warranty period has expired.

It is well-established that express warranties are contractual in nature, and the parties to product warranties should be held to the terms of their bargain. This proposed rule change would not adversely affect consumers because consumers still would be entitled to the full benefit of their bargain as it relates to covered defects that arise during the express-warranty period. And, the proposed change would benefit businesses, including small businesses, by reducing the number of claims regarding defects or problems that arise after the express warranty has expired. In addition, this rule change would benefit both parties to the warranty because of the increased certainty it would provide regarding what is, or is not, covered by the express, limited warranty.

3. FTC should modify 16 C.F.R. 239 to allow for compliance with that section if the warranty is readily available on the warrantor's website. Accordingly, footnote 1 to section 239.2 should be modified to provide an additional example that states, for example: "The XYZ clothes washer is backed by our limited 1 year warranty. For complete details, see our website available at manufacturer.com/XYZclotheswasher/warranty."

Adding such a provision reflects the reality that many consumers, including the vast majority of consumers of durable goods, conduct pre-sale research using the internet. This proposed provision would not have an adverse effect on consumers because it simply directs the viewer of any consumer product advertisement to the appropriate place on the internet to view the terms of the warranty that applies to a specific product. In fact, this proposal would benefit consumers because consumers can view the terms of the warranty without having to physically travel to a store where the product is sold. Such a provision also would benefit businesses, including small businesses, because businesses would be able to provide the most current copy of any applicable warranty in a single online location without having to rely solely on third-party sellers or individual stores to maintain or update warranties that are provided with each product on the sales floor.

4. Footnote 2 to 16 C.F.R. 239.2 should also be modified to provide an additional example stating that: "The XYZ clothes washer is backed by our limited 1 year warranty. For complete details, see our website available at ["manufacturer.com/XYZclotheswasher/warranty"](http://manufacturer.com/XYZclotheswasher/warranty)."

The reasons for this proposed change are the same as those summarized above supporting the proposed change to footnote 1.

B. Question 6

FTC asked whether changes in technology, including but not limited to, the Internet and mobile technology, or economic conditions affect the need or purpose for the Interpretations, Rules, and Guides. FTC also asked whether and how the Interpretations, Rules, or Guides should be changed because of such developments.

There have been changes in technology that necessitate changes to the Interpretations, Rules, and Guides. These changes are outlined in our comments in Parts I.A.3, I.A.4, and II.B of these comments.

II. Specific Questions for Comment

A. Question 2

FTC sought comment on whether the Interpretations, Rules, or Guides should be amended to address service contracts.

The Interpretations, Guides, and Rules should not be amended to address service contracts. The Interpretations, Guides, and Rules already recognize that service contracts are different than warranties in that they generally do not form the basis of the bargain of purchasing a consumer product. In other words, a service contract is a separate document that creates rights and obligations between a seller of the service contract and the consumer who purchases that contract. It is separate and apart from the “sale” of the consumer product.

Expanding the Interpretations, Guides, and Rules to cover service contracts would too far extend the reach of the MMWA in a manner inconsistent with Congress’s intent in passing the MMWA, which was to 1) ensure that consumers could get complete information about the warranty terms that sellers or manufacturers offer in connection with the products they sell; 2) allow consumers to compare warranty coverage before purchasing a consumer product; and 3) encourage competition on the basis of warranty coverage so consumers can select the product that is right for them, individually.

In addition, expanding the Interpretations, Guides, and Rules to cover service contracts would place additional burdens on businesses, including small businesses, and courts as well, because it would likely create new federal causes of action for alleged breaches of service contracts, thus leading to the filing of additional lawsuits.

B. Question 3

The Commission asked if Rule 702 should be amended to specifically address making warranty documents accessible via online commerce.

Rule 702 should be amended to specifically address making warranty documents available via online commerce. Commerce has changed since the last amendment to Rule 702. With the increased use of the internet and the advent of “smart phones,” information is now available through the internet in a format that was not previously available. Rule 702 should be amended to reflect this reality.

Specifically, the following changes should be made to Rule 702:

1. The definition included in section 702.2(c)(1) should be modified to include internet sales.
2. Rule 702 should be amended to state that a seller has complied with the requirements of section 702.3 if such seller furnishes the written warranty upon request prior to sale by placing signs reasonably calculated to elicit the prospective buyer’s attention in prominent locations in the store or department advising prospective buyers of the availability of warranties on the warrantor’s website.
3. Subsection (3) to Rule 702.2(c) should be amended to state as follows:

Any seller who offers for sale to consumers consumer products with written warranties by means of the internet may satisfy the provisions of this Section by clearly and conspicuously disclosing on its website the full text of the written warranty.

All of the changes described in points one through three above reflect the fact that many consumers buy products over the internet, as well as conduct pre-sale research over the internet. These changes would not adversely affect consumers because it simply directs the viewer of any product advertisement to the place on the internet where the consumer can view the warranty terms that apply to a specific product. In fact, the changes will likely benefit consumers because consumers can view the terms of the warranty without having to physically travel to a store where the product is sold. The proposed changes would also benefit businesses, including small businesses, because businesses would be able to provide the most current copy of any applicable warranty in a single online location without having to rely solely on third-party sellers or individual stores to maintain or update warranties that are provided with each product on the sales floor.

C. Question 4

FTC asked if the informal dispute settlement mechanism requirements of Rule 703 should be changed and, if so, what changes should be made.

The informal dispute settlement mechanism of Rule 703 should be changed. As noted in the FTC's request for comment, "few warrantors have such a requirement," but for those that do, "[a] threshold question for many state lemon lawsuits is whether the IDSM complies with Rule 703 and thus whether the consumer must use the specified IDSM or may proceed directly to a court action."

The procedures prescribed in Rule 703 are difficult to follow and to implement. Accordingly, the procedure for creating such a mechanism should be simplified so it is more easily and widely implemented by warrantors. Such a change would benefit consumers, businesses, and courts by streamlining the dispute resolution procedure and, thereby, reducing the burden on state and federal courts of adjudicating some warranty disputes, as many more could be handled through informal, but structured, proceedings.

In addition, Rule 703.5(j) provides that the mechanism shall not be "legally binding on any person." (*See* 16 C.F.R. 703.5(j)). This provision should be deleted as it creates disincentives for manufacturers or sellers to create a mechanism in the first instance and leads to wasted and duplicative efforts in cases between consumers and manufacturers or sellers.

Further, there is a split in the federal circuit courts of appeals regarding whether the FTC's interpretation of the MMWA as barring mandatory pre-dispute binding arbitration of written warranty claims is a valid statutory interpretation. Although the text of the MMWA does not specifically address the validity of pre-dispute mandatory binding arbitration, Congress expressly delegated rulemaking authority under the statute to the FTC. (*See* 15 U.S.C. § 2310(a)(2)). Per this authority, the FTC construed the MMWA as barring pre-dispute mandatory binding arbitration provisions covering warranty agreements and issued a rule prohibiting judicial enforcement of such provisions with respect to consumer claims brought under the MMWA. (*See* 16 C.F.R. § 703.5).

In a recent decision, the Ninth Circuit Court of Appeals upheld the FTC's interpretation of the MMWA as a reasonable construction of the statute, but noted that the Fifth Circuit and Eleventh Circuit Courts of Appeal have concluded otherwise.¹ The Fifth and Eleventh Circuits concluded that the MMWA does not overcome the Federal Arbitration Act's presumption that courts should enforce arbitration agreements, including consumer arbitration agreements.² In the interests of both consumers and businesses, the FTC should modify Rule 703.5(j) to eliminate this conflict in federal law, to reduce the burdens and costs imposed on federal courts in

¹ *See Kolev v. Euromotors W./The Auto Gallery et al.*, No. 09-55963, 2011 WL 4359905 (9th Cir. Sept. 20, 2011).

² *See Walton v. Rose Mobile Homes LLC*, 298 F.3d 470, 474, 478 (5th Cir. 2002); *Davis v. S. Energy Homes, Inc.*, 305 F.3d 1268, 1273, 1279 (11th Cir. 2002).

resolving wasteful and unnecessary breach-of-warranty lawsuits, and to facilitate cost-effective pre-suit resolutions of consumers disputes.

AHAM appreciates the opportunity to submit these comments on the FTC's Magnuson-Moss Warranty Act Rule Review and would be glad to further discuss this matter should you request.

Respectfully Submitted,

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Jennifer Cleary
Director, Regulatory Affairs