HUNTON & WILLIAMS LLP
2200 PENNSYLVANIA AVENUE, NW
WASHINGTON, D.C. 20037-1701

TEL 202 • 955 • 1500
FAX 202 • 778 • 2201

DAVID A. HIGBEE
DIRECT DIAL: 202 • 955 • 1957
EMAIL: dhigbee@hunton.com

HUNTON& WILLIAMS

October 24, 2011

VIA COURIER

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

Re: Magnuson-Moss Warranty Act Rule Review, 16 CFR Part 700, P114406

Dear Commissioners:

I appreciate the opportunity to submit the following comments pursuant to the notice published in 76 Fed. Reg. 52,596 (Aug. 23, 2011) ("Request for Comment") regarding the FTC's interpretations and rules related to the Magnuson-Moss Warranty Act ("Act").[1] These comments are focused on the anti-tying provisions of the Act, 15 U.S.C. § 2302(c), and Rule 700. Part I of the comments outlines the background and purpose of this submission; Part II explains a gap in the FTC's Interpretations, Rules and Guides, and proposes a solution.

I. Background and Purpose of Submission

The Magnuson-Moss Warranty Act ("Act"), 15 U.S.C. §§ 2301–2312, governs written warranties on consumer products. Among other things, it includes certain rules governing the content of written warranties (15 U.S.C. § 2302); it prescribes certain minimum standards for such warranties (15 U.S.C. § 2304); it includes rules pertaining to service contracts (15 U.S.C. § 2306); it restricts the disclaimer or modification of implied warranties (15 U.S.C. § 2308); and it provides certain remedies for consumer disputes (15 U.S.C. § 2310).

[1]The Request for Comment invited comments on the Federal Trade Commission's ("FTC" or "Commission") Interpretations of the Magnuson-Moss Warranty Act ("Interpretations" or "Rule 700"), Rule Governing Disclosure of Written Consumer Product Warranty Terms and Conditions ("Rule 701"), Rule Governing Pre-Sale Availability of Written Warranty Terms ("Rule 702"), Rule Governing Informal Dispute Governing Informal Dispute Settlement Procedure ("Rule 703") (together, the "Rules"), and Guides for the Advertising of Warranties and Guarantees ("Guides").

Pursuant to the Act, the FTC has promulgated the Interpretations, Rules, and Guides. The Interpretations, 16 C.F.R. Part 700, "represent the Commission's views on various aspects of the Act." 42 Fed. Reg. 36,112 (Jul. 13, 1977). Rules 701–703, 16 C.F.R. Parts 701–03, were enacted by exercise of the Commission's rulemaking authority under the Act, and address the disclosure of written warranty terms, the pre-sale availability of written warranty terms, and the minimum standard for informal dispute settlement mechanisms that consumers may be required by warrantors to use before filing suit under the Act. The Guides, 16 C.F.R. Part 239, contain recommendations for ensuring compliance with statutory obligations relating to deceptive advertising.

The Act specifically prohibits conditioning or "tying" arrangements that require consumers to use particular brands of complementary products in order to preserve their rights under a warranty. In particular, Section 102(c) of the Act, 15 U.S.C. § 2302(c), provides that "[n]o warrantor of a consumer product may condition his written or implied warranty of such product on the consumer's using, in connection with such product, any article or service (other than article or service provided without charge under the terms of the warranty) which is identified by brand, trade, or corporate name; except that the prohibition of this subsection may be waived by the Commission if [certain criteria are met]." 15 U.S.C. § 2302(c). This provision is supplemented by brief interpretative guidance at 16 C.F.R. § 700.10.

On August 23, 2011, the Federal Trade Commission ("FTC") published a Request for Comment at 73 Fed. Reg. 52,596 (Aug. 23, 2011). This notice provided a brief explanation of the history of the Act, Interpretations, Rules, and Guides, and it invited the submission of comments.

This submission is intended to make the Commission aware that, as currently written and enforced, the Interpretations and Rules fail to protect consumers from certain kinds of *de facto* tying conduct prohibited under the Act: that is, conduct that may fall short of explicit "conditioning" conduct but that has the same effect on consumers. By way of illustration, examples of such conduct include:

> (a) making "recommendations" that a product be used with a branded complement, when such recommendation would lead a reasonable consumer to conclude that his or her warranty would not or might not apply if a non-branded complement were used; and

(b) making statements about the validity of a warranty in the event that a product is used with an alternative to the branded complement that would lead a reasonable consumer to conclude that his or her warranty would not or might not apply if a non-branded complement were used.

II. General Comments

A. *De Facto* Tying

As noted above, 15 U.S.C. § 2302(c) prohibits a warrantor of a consumer product from "condition[ing] his written or implied warranty of such product on the consumer's using, in connection with such product, any article or service [unless provided without charge] which is identified by brand, trade, or corporate name" unless the Commission waives this prohibition. This "anti-tying" provision prohibits the "use of a product warranty in such a way [that] it may induce purchase of a separate branded article[.]" Federal Trade Commission Advisory Opinion, 87 F.T.C. 1437 (Feb. 27, 1976). It is intended to "improv[e] competition by improving consumer choice[.]" *McGarvey v. Penske Automotive Group*, 2011 WL 1325210, at *7 (D.N.J. Mar. 31, 2011).

Tying—a familiar concept under the antitrust laws—is not confined to technical or formal "condition[ing]." It includes situations in which the requisite coercion or conditioning is more subtle: for example, where the supplier intentionally creates an impression or understanding that consumers of the tying product must also purchase the tied product. *See, e.g., Tic-X-Press, Inc. v. Omni Promotions Co. of Georgia*, 815 F.2d 1407, 1416–17 (11th Cir. 1987) (finding prohibited tie where "no promoter had ever requested permission to use another [supplier of the tied service], notwithstanding the approval clause [in their contract that allowed them to do so], because *they understood through years of dealing* with TOPCOL and using the Agreement that they were required to use [the tied service provided by the supplier of the tying product]") (emphasis added).

This is as true under the Act as it is under the antitrust laws. For example, a cellphone supplier, AT&T Wireless, violated the Act when it sold warranted cellphones that worked only on the AT&T network and then refused to assist its customers in reprogramming the phone to work on another network. *See Beckermeyer v. AT&T Wireless*, 2004 WL 2480599 (Pa. Com. Pl., Oct. 22, 2004). Although the cellphone warranties were not formally conditioned on using the cellphones with the AT&T network, the court held that the Act was violated because customers would be forced, as a *practical* matter, to violate the "ordinary

purpose" criterion of the supplier's implied warranty of merchantability in order to use the cellphone with a different network. In particular, the court stated that AT&T Wireless' "connection of the warranty to a branded service" violated § 2302. *Id.* at *3. *See also* Informal Staff Advisory Opinion Letter dated December 21, 2010, from Lois C. Greisman to Aaron M. Lowe and others, 3 (specifically inviting comments in this proceeding regarding "misinform[ation]" and "misleading" statements about consumers' warranty rights under the Act). And the Commission has recognized that the tying prohibition under the Act is concerned with effects, not formal distinctions: "Section 102(c) prohibits tying arrangements in warranties that *effectively restrict* the consumer's ability to choose among competing brands of products or services that can be used in conjunction with the warranted product." 42 Fed. Reg. 36,112, 36,114 (Jul. 13, 1977) (emphasis added).

The FTC's Interpretations and/or Rules should expressly state that *de facto* tying—that is, conduct that would lead a reasonable consumer to believe that his or her warranty coverage is or may be conditional upon the use of an article or service which is identified by brand, trade, or corporate name—violates the Act, even if warranty coverage is not as a matter of legal form expressly "condition[al]" upon the use of such an article or service. The current relevant language, found in Rule 700.10(a) at 16 C.F.R. § 700.10(a), makes no mention of implied or indirect tying arrangements, leaving a gap in the FTC's interpretive guidance. As a result, a manufacturer consulting Rule 700 may not understand that the Act prohibits implied or other misleading statements that could lead a reasonable consumer to believe he or she must purchase a branded product in order to preserve his or her warranty rights.

To clarify the proper scope of the Act's prohibitions, the following (or similar) language would be appropriate for inclusion in the Interpretations in the place of the current 16 C.F.R. § 700.10 (a):

> 16 C.F.R. § 700.10 (a) (as proposed): Section 102(c) prohibits tying arrangements that condition coverage under a written warranty on the consumer's use of an article or service identified by brand, trade, or corporate name unless that article or service is provided without charge to the consumer. This includes conduct that would lead a reasonable consumer to believe that coverage under a written warranty is or may be conditioned on the use of the branded article or service.

Alternatively, a new paragraph under 16 C.F.R. § 700.10 could be added to read:

> 16 C.F.R. § 700.10 (d) (proposed): The Act prohibits conduct that would lead a reasonable consumer to believe that coverage under a written warranty is or may be conditioned on the use of a branded article or service. This includes, but is not limited to, (i) making misleading or deceptive statements about warranty coverage, and (ii) recommending that a particular brand of article or service be used with the product covered by the warranty, when such recommendation would lead a reasonable consumer to believe that the use of a different article or service might void the warranty.

Such language, which embraces *de facto* or implied, indirect tying as well as formal, express or direct tying, would be consistent with the approach taken by the Environmental Protection Agency in its anti-tying regulation promulgated pursuant to the Clean Air Act ("CAA"). In particular, 40 C.F.R. § 86.1780-99(a)(4)(iii) provides that a manufacturer of a "covered vehicle or engine" under the CAA may not "*provide directly or indirectly in any communication to the ultimate purchaser or any subsequent purchaser* that the coverage of a warranty under the Clean Air Act is conditioned upon use of any part, component, or system manufactured by the manufacturer or a person acting for the manufacturer or under its control, or conditioned upon service performed by such persons." (Emphasis added.) The FTC should take the same approach in its rulemaking under the Act (and the EPA's wording would be an acceptable alternative to the language suggested above).

For the reasons stated above, *de facto* tying is already prohibited under the Act, but the amendment of the Interpretations and/or Rules to explicitly prohibit such conduct would deter warrantors from engaging in this harmful conduct. It would also help consumers to recognize and report warranty tying in the marketplace. Failure to address such conduct would perpetuate the status quo, in which suppliers in a variety of industries engage in *de facto* warranty tying practices that harm customers, limit competition, and make it harder for consumers to understand and insist upon their statutory rights.

B. Case Study: *De Facto* Tying in the Motor Vehicle Lubricant Industry

A good example of *de facto* tying by a supplier is currently evident in the motor oil industry. (Ironically, this very market was discussed in Congress during the passage of the Act: "[N]o automobile manufacturer may condition his warranty of an automobile on the use of a named motor oil or on the use of its own automobile parts unless he shows that any other motor oil or automobile parts which are available will not function properly and will not give equivalent

performance characteristics in the automobile."[2]) This section describes certain current practices in these markets, in order to illustrate the consumer harm caused by *de facto* tying practices.

1. Background: The Motor Vehicle Lubricant Industry

Motor vehicle lubricants are produced by a number of manufacturers; some significant suppliers include ExxonMobil, Valvoline, Chevron, ConocoPhillips, Shell, and BP Castrol. In addition to the original "factory fill" motor oils that are included with new vehicles, motor oils reach consumers in two principal ways. First, such oil is supplied by a range of oil change service providers, including automobile dealers, tire, brake, and muffler providers, general repair garages, and "quick lube" centers. Second, for consumers who choose to change their own oil, such motor oil is generally purchased at retail locations such as auto parts stores or general merchandise stores.

Technical standards for the composition and performance of motor vehicle engine oil are promulgated by the American Petroleum Institute ("API"). The current standard is known as API SN Resource Conserving, also known as ILSAC GF-5. For the majority of consumer vehicles, any engine oil that meets ILSAC GF-5 in the appropriate viscosity grade will provide adequate engine performance and protection.

2. General Motors' dexos™ Program

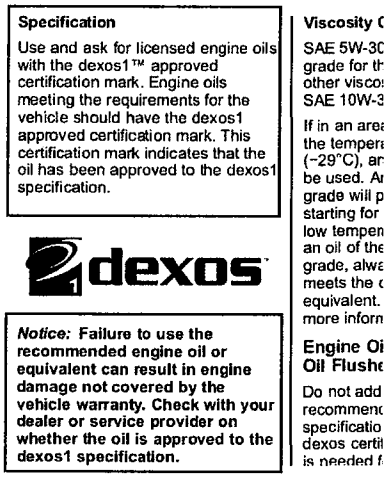
General Motors has recently mounted a determined effort to persuade its customers to use only a GM licensed brand of motor oil in the GM vehicles they purchase. The manner in which the program is implemented raises particular concerns for consumers.

Under the program, General Motors: (1) created a new motor oil specification; (2) obtained a trademark for such specification under the "dexos™" brand name and distinctive logo; (3) charged license fees and royalties to motor oil manufacturers in exchange for the right to display the trademarked dexos™ brand name and logo on products meeting such specification; (4) recommended the use of only motor oils displaying the dexos™ brand name and logo in all of GM's 2011 and newer vehicles; and (5) made statements that would lead a reasonable consumer to believe that his or her warranty is or may be conditioned on the exclusive use of motor oils displaying the dexos™ brand and logo.

[2] H.R. Rep. No. 93-1107 (1974).

In general, motor oils that meet the dexos™ specification are significantly more expensive than non-synthetic motor oils that meet the GF-5 standard. This is because more expensive synthetic base oils and additives are generally needed in order to manufacture motor oils meeting the dexos™ specification. (In addition, except for dexos™ oil supplied by General Motors or an affiliate, a supplier of dexos™ oil must pay significant license fees and royalties to General Motors in order to use the dexos™ trademark.) The vast majority of GM vehicle owners—excepting those who drive high performance GM vehicles—simply do not need dexos™ motor oil for optimum engine performance or protection. Many such owners would likely prefer to use a cheaper but clearly adequate non-synthetic GF-5 motor oil if they believed that they could do so without jeopardizing their warranty coverage.

General Motors directs all its consumers, regardless of the GM car that they own, to "choose only authentic, licensed dexos™ oils."[3] And—most importantly for the purposes of this rulemaking—General Motors engages in conduct that would lead reasonable consumers to believe that their warranty coverage is or may be conditional upon use of dexos™ oil in the engine of their car. For example, the manual for the 2012 Buick LaCrosse reads as follows at page 10-11 (key portion highlighted in red):



Specification

Use and ask for licensed engine oils with the dexos1™ approved certification mark. Engine oils meeting the requirements for the vehicle should have the dexos1 approved certification mark. This certification mark indicates that the oil has been approved to the dexos1 specification.

dexos

Notice: **Failure to use the recommended engine oil or equivalent can result in engine damage not covered by the vehicle warranty. Check with your dealer or service provider on whether the oil is approved to the dexos1 specification.**

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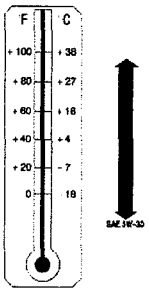
The same text can be seen in many other GM owners' manuals (including, for example, on pages 10-11 and 10-12 of the manual for the 2012 Cadillac CTS). Other pages in the manual

[3] *See* http://www.gmdexos.com/.

simply direct the consumer to use dexos™ oil, without qualification. For example, page 6-21 of the manual for the 2011 Buick Lucerne reads as follows (key portion highlighted in red):

Viscosity Grade

SAE 5W-30 is the best viscosity grade for the vehicle. Do not use other viscosity oils such as SAE 10W-30, 10W-40, or 20W-50.



Cold Temperature Operation: In an area of extreme cold, where the temperature falls below -29°C (-20°F), an SAE 0W-30 oil should be used. An oil of this viscosity grade will provide easier cold starting for the engine at extremely low temperatures. When selecting an oil of the appropriate viscosity grade, be sure to always select an oil that meets the required specification, dexos™. See "Specification" for more information.

Engine Oil Additives/Engine Oil Flushes

Do not add anything to the oil. The recommended oils with the dexos™ specification and displaying the dexos™ certification mark are all that is needed for good performance and engine protection.

Engine oil system flushes are not recommended and could cause engine damage not covered by the vehicle warranty.

What to Do with Used Oil

Used engine oil contains certain elements that can be unhealthy for your skin and could even cause cancer. Do not let used oil stay on your skin for very long. Clean your skin and nails with soap and water, or a good hand cleaner. Wash or properly dispose of clothing or rags containing used engine oil. See the manufacturer's warnings about the use and disposal of oil products.

Used oil can be a threat to the environment. If you change your own oil, be sure to drain all the oil from the filter before disposal. Never dispose of oil by putting it in the trash or pouring it on the ground, into sewers, or into streams or bodies of water. Recycle it by taking it to a place that collects used oil.

6-21

Similarly, page 11-7 of the manual for the 2011 GMC Acadia Denali reads as follows (key portion highlighted in red):

Recommended Fluids, Lubricants, and Parts

Recommended Fluids and Lubricants

Usage	Fluid/Lubricant
Engine Oil	The engine requires engine oil approved to the dexos specification. Oils meeting this specification can be identified with the dexos certification mark. Look for and use only an engine oil that displays the dexos certification mark of the proper viscosity grade. See *Engine Oil on page 10-8.*
Engine Coolant	50/50 mixture of clean, drinkable water and use only DEX-COOL Coolant.

The above statements leave the consumer with the distinct impression that use of motor oils displaying the dexos™ brand and logo is "require[d]" and must "always" be used, and in particular that it must be used to avoid voiding the consumer's warranty.[4] Additional statements are made on GM's dexos™ website:

> GM has found that using the wrong oil can affect engine performance and, in the worst case scenario, damage or harm the engine. Only licensed dexos™ products have been certified by GM to meet the dexos™ specification. Unlicensed products have not gone through GM's rigorous testing process, are not monitored for quality, and are not approved or recommended for use in GM vehicles. Unlicensed product quality and suitability for GM vehicles cannot be guaranteed and, therefore, use of unlicensed products may result in lower levels of performance and engine damage not covered under warranty.
>
> There are many authentic licensed dexos™ products readily available at retail outlets, service repair shops, quick lube operations, and GM service centers. dexos™ licensed

[4] In addition to the concerns raised under the Act's anti-tying provision, such conduct appears to present issues under 15 U.S.C. § 2302(a). That provision states that "any warrantor warranting a consumer product to a consumer by means of a written warranty shall, to the extent required by rules of the Commission, fully and conspicuously disclose in simple and readily understood language the terms and conditions of such warranty." The provision specifically contemplates that Commission rules could prescribe the use of "words or phrases that would not mislead a reasonable, average consumer as to the nature or scope of the warranty." 15 U.S.C. § 2302(a)(13). Language that suggests that warranty coverage is or may be conditioned upon the use of a branded article or service would appear hard to reconcile with this provision.

> products are easy to identify. Simply look for the dexos™ icon on the front label and the 11 digit alphanumeric dexos™ license number on the back label. Unless an oil package displays these two markings, the engine oil is not an authentic, licensed dexos™ product and is not recommended for use in GM vehicles.[5]

Further examples can be found online. For example, the web page of Bill Estes Chevrolet,[6] a Chevrolet dealer in Indianapolis, IN, expressly states that dexos™ oil is required to maintain warranty coverage (key portion highlighted in red):

GM Dexos

dexos

What is GM dexos?

- **GM dexos is General Motors' global engine oil specification!**
  - **It is the first common engine oil specification across all regions.**
- **2 specifications:**
  - **Spark ignited engines- dexos 1**
  - **Diesel engines- dexos 2**

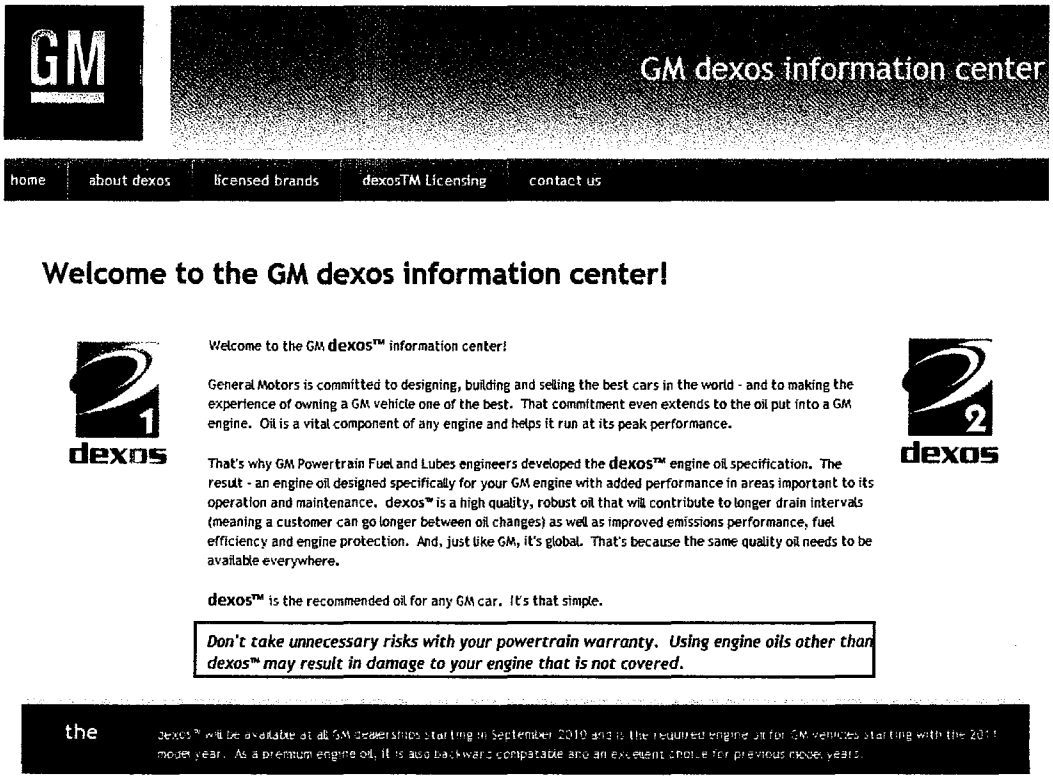
Why GM dexos?

- **GM is planning for the future.**
  - **All 2011 GM vehicles are required to take GM dexos or dexos approved engine oil to maintain their engine warranty. If you are unsure whether your oil is approved to dexos specifications, ask your service provider. Engine oils approved to GM dexos specification will show the dexos symbol on the container.**
  - **GM dexos is a new generation of oil specification, for a new generation of vehicles. It is a**

[5] *See* http://www.gmdexos.com/.

[6] http://www.billesteschevy.net/page/custom/en/GM-Dexos.

Finally, General Motors[7] very explicitly made the point in what appears to be a former version of the front page of the dexos™ information website (key portion highlighted in red), which is still available online:



The dexos™ program is described in these comments as an example only. This program is not the only example of its kind, nor is the motor oil industry the only one in which such conduct can be found. In particular, I am aware of similar conduct in markets for automatic transmission fluid, printer ink, and batteries. As the Commission is aware, improper tying conduct can be particularly harmful in the motor vehicle context: a concern reflected, for

[7] http://www.gmdexos.com/homeobsolete.html.

example, in the FTC's own July 2011 consumer alert "*Auto Warranties, Routine Maintenance, and Repairs: Is Using the Dealer a Must?*"[8]

Misleading statements such as those cited above may cause reasonable consumers to incorrectly believe that they must use branded products to preserve their warranties. Accordingly, they should be specifically prohibited in the Interpretations and/or Rules. *De facto* tying misleads consumers regarding the scope of their rights under their written warranty, limits competition among competing suppliers (in the above example, of motor vehicle lubricants), and violates both the language and the purpose of the Act's anti-tying prohibition.

C. Conclusion

De facto tying violates the letter and spirit of the Act, and—as the above demonstrates—the existing Interpretations and Rules have failed to prevent this practice from harming consumers. Adopting the language suggested above (or its functional equivalent) would inform suppliers that this conduct is prohibited, deter them from employing it, equip consumers with a clearer understanding of their rights, facilitate reporting of such conduct to the FTC, and protect the marketplace from the harmful effects of this conduct.

* * *

I hope these comments will be of use to the Commission as it enters the next phase of Magnuson-Moss rulemaking and enforcement.

Sincerely,

David A. Higbee
HUNTON & WILLIAMS LLP

[8] *See* http://www.ftc.gov/bcp/edu/pubs/consumer/alerts/alt192.shtm.