

Concurring Statement of Commissioner Julie Brill

Federal Trade Commission Trade Regulation Rule Concerning Cooling-Off Period for Sales Made at Homes or at Certain Other Locations (the “Cooling-Off Rule”)

January 6, 2015

Today, the Commission announces that it has amended the Commission’s Cooling-Off Rule.¹ Through this action, the Commission retains the exclusionary limit for some “door-to-door” sales, but raises it for others. I write separately to voice my strong support for retaining the exclusionary limit for sales in consumers’ homes; to note my skepticism, based on the record before us, of the need to raise the exclusionary limit for sales in a seller’s transient location; and, as a result, to strongly encourage states to engage in detailed fact finding about their own local conditions before raising any exclusionary limits under their own state cooling-off laws and rules.

The Cooling-Off Rule was designed to prevent unfair and deceptive practices in sales that occur outside a seller’s permanent place of business.² The Cooling-Off Rule uses the nomenclature “door-to-door” sales to describe the sales that it covers, and includes within the definition of “door-to-door” sales both sales in a consumer’s home as well as sales at a seller’s transient location.³ Sales in consumers’ homes and at a seller’s transient location have long raised consumer protection concerns, as some sellers employ deceptive and unfair practices, including high pressure sales tactics; misrepresenting the quality of goods; and placing inappropriate roadblocks to obtaining refunds, including simply disappearing before the

¹ *Trade Regulation Rule Concerning Cooling-Off Period for Sales Made at Homes or at Certain Other Locations*, 16 C.F.R. 429.

² *Id.*; see also, *Cooling-Off Period for Door-to-Door Sales, Trade Regulation Rule and Statement of Its Basis and Purpose*, 37 FR 22933, 22937 (Oct. 26, 1972).

³ 16 C.F.R. 429.0 (a) (definition of “Door-to-Door Sale”).

consumer realizes that he or she has been scammed.⁴ The Cooling-Off Rule's primary mechanism for protecting consumers from such unscrupulous sales tactics is to give consumers who purchase in these locations three business days to cancel sales of \$25 or more.⁵ Under the Cooling-Off Rule, covered sellers must provide consumers with written and oral notice of this right to cancel.⁶

The \$25 exclusionary limit established in the Cooling-Off Rule has not changed since the Rule was first promulgated in 1972. In January 2013, following completion of a regulatory review of the Rule, the Commission sought public comment on a proposal to raise the exclusionary limit for all sales that qualify as "door-to-door sales" from \$25 to \$130, to account for inflation since the Rule was issued.⁷ As further explained in the January 2013 Federal Register Notice, the Commission derived the \$130 figure by calculating inflation using the U.S. Department of Labor's Consumer Price Index for all-urban consumers ("CPI-U").⁸

The Commission received thirty-three comments in response to its proposal to raise the exclusionary limit to \$130 for all "door to door" sales. As discussed more fully below, four

⁴ See *Cooling-Off Period for Door to Door Sales, Trade Regulation Rule and Statement of Its Basis and Purpose*, 37 FR at 22937 ("The complaints of consumers regarding door-to-door salesmen fall within five basic headings. These are: (1) Deception by salesmen in getting inside the door; (2) high pressure sales tactics; (3) misrepresentation as to the quality, price, or characteristics of the product; (4) high prices for low-quality merchandise; and (5) the nuisance created by the visit to the home by the uninvited salesmen").

⁵ 16 C.F.R. 429.1(a).

⁶ 16 C.F.R. 429.1(a), (b), (e).

⁷ The Commission initiated the regulatory review in 2009, seeking public comment to determine whether the rule should be retained, modified, or rescinded. *Trade Regulation Rule Concerning Cooling-Off Period for Sales Made at Homes or at Certain Other Locations*, Request for Public Comment, 74 FR 18170 (Apr. 21, 2009). After the Commission decided to retain the Rule, it sought public comment on a proposal to an increase of the exclusionary limit. *Trade Regulation Rule Concerning Cooling-Off Period for Sales Made at Homes or at Certain Other Locations*, Proposed Rule Amendment, Request for Public Comment, 78 FR 3855 (Jan. 17, 2013).

⁸ See 78 FR at 3869, n.69 ("The average value of the CPI-U for 2010 was 218.056, while the average value for 1972 was 41.8.... Dividing 218.056 by 41.8 gives a value of 5.217 and multiplying this figure by \$25 gives a value of \$130.43. Rounding down to \$130 yields the proposed new minimum dollar amount").

commenters supported a blanket increase of the exclusionary limit to \$130.⁹ The vast majority of commenters – twenty-eight – opposed the proposed blanket increase to \$130. These twenty-eight commenters cited a variety of reasons for their opposition. Most of them expressed general concerns about the need for protections against high pressure and predatory sales practices.¹⁰ The Massachusetts Attorney General, the California Consumer Affairs Association, and several chapters of the Better Business Bureau (“BBB”) cited serious concerns about deceptive and high pressure sales tactics by traveling salespeople for transactions well under \$130.¹¹ Some commenters stated that, while the price of goods and services may have risen with inflation, \$25 is still a significant amount of money for consumers.¹²

⁹ The Direct Selling Association (“DSA”) and Mike Shaw Auto Group, as well as two individual commenters supported an increase in the exclusionary limit. DSA stated that, because of inflation, the Rule now covers lower cost items that it was not originally intended to cover. It also cited concerns regarding the compliance costs for sellers of lower cost goods. DSA Comment at 2-3. Mike Shaw Auto Group suggested that the amount be rounded up to the nearest \$50. Mike Shaw Auto Group Comment at 1. Another commenter suggested that the amount be raised to \$200 to account for future inflation, while the remaining commenter expressed support for the FTC’s proposed increase. BELO KELLAM [sic] Comment at 1, Susan Rothacker Comment at 1.

¹⁰ Some commenters raised general concerns about deceptive practices. *See, e.g.*, Frances Goff Comment at 1 (opposed to raising the minimum based on the persistence of dishonest sales tactics). Others raised more specific concerns, such as sellers who target senior citizens, or predatory sales practices in multilevel marketing. Six commenters raised concerns with multilevel marketing organizations (“MLMs”), whose start-up kits can easily cost below the FTC’s proposed threshold. For example, Stacie Bosley, an economist and assistant professor at Hamline University, commented on the role of “urgency” in multilevel marketing recruitment and stated that the rapid rise in MLMs since the establishment of the Rule is a new development suggesting that the exclusionary limit should remain unchanged. Stacie Bosley Comment at 1-2.

¹¹ The Massachusetts Attorney General, for instance, stated that \$25 was not an insignificant amount, especially in door-to-door sales where economically disadvantaged individuals and senior citizens are often targeted in their homes. Massachusetts AG Comment at 1-2. The California Consumer Affairs Association (“CCAA”) similarly believes that increasing the Cooling-Off Rule’s minimum to \$130 would remove crucial safeguards to reduce abusive sales practices by door-to-door sellers, who often target senior citizens, new immigrants, and low-income families. CCAA Comment at 1. Several BBB chapters expressed concern that a raise in the threshold to \$130 would eliminate needed protections for most door-to-door sales, including those that target vulnerable consumers at home. BBB of Southern Colorado Comment at 1; BBB of North Alabama Comment at 1; BBB of Louisville, Kentucky Comment at 1; BBB of Utah Comment at 1.

¹² *See, e.g.*, Susanna Perkins Comment at 1, noting that “most US households have seen their incomes stagnate.”

After consideration of commenters' concerns, the Commission today has decided to (1) retain the \$25 limit for door-to-door sales made at a buyer's residence, and (2) amend the Rule to increase the limit from \$25 to \$130 for sales that occur at transient locations.

I fully support the retention of the \$25 exclusionary limit for sales in consumers' homes. While the expansion of Internet marketing has changed the business model of many direct sales companies, door-to-door sales continue to be a concern, especially for consumers who are the targets of aggressive, high pressure, or deceptive sales tactics in their own homes. AARP and the BBB have identified in-home door-to-door sales as being among the top scams targeting senior citizens.¹³ The BBB continues to receive consumer complaints about door-to-door sales of magazines, cleaning products, meat, photography services, and cosmetics – all items that typically fall below \$130.¹⁴ In 2013, the BBB received over a thousand complaints concerning door-to-door magazine sales alone.¹⁵ As consumers continue to be approached in their homes with offers for products under \$130, the Commission correctly recognizes the significance that lawmakers, advocates, and consumers place on retaining the \$25 limit for sales that occur in consumers' homes. I am not persuaded, however, of the need to raise the exclusionary limit for transient sales. The four commenters who supported an increase in the exclusionary limit – the Direct Selling Association (“DSA”), Mike Shaw Auto Group, and two other individual commenters – did not distinguish between in-home and transient sales, and lodged only general

¹³ Sid Kirchheimer, *6 Common Door-to-Door Scams*, AARP BULLETIN, Oct. 29, 2012, <http://www.aarp.org/money/scams-fraud/info-10-2012/common-door-to-door-scams.html>; *BBB Warns of Scams That Target Seniors*, BETTER BUSINESS BUREAU SERVING WISCONSIN, May 7, 2014, <http://www.bbb.org/wisconsin/news-events/news-releases/2014/05/bbb-warns-of-scams-that-target-seniors/>.

¹⁴ See BETTER BUSINESS BUREAU, 2013 COMPLAINT AND INQUIRY STATISTICS, U.S. STATISTICS SORTED BY INDUSTRY, available at <http://www.bbb.org/globalassets/local-bbbs/council-113/media/complaint-stats/us-stats-industry-2013.pdf>; see also Massachusetts AG Comment at 2.

¹⁵ BETTER BUSINESS BUREAU, 2013 COMPLAINT AND INQUIRY STATISTICS, U.S. STATISTICS SORTED BY INDUSTRY (reporting 41,851 consumer inquiries and 1,149 consumer complaints concerning door-to-door magazine sales).

complaints about the rule, including that, due to inflation, the Rule now covers lower cost items that it was not originally intended to cover.¹⁶ With respect to the auto sales that the Mike Shaw Auto Group might be concerned about, the Cooling-Off Rule already exempts auto tent sales and other sales in transient locations.¹⁷ The only commenter who mentioned specific concerns about the \$25 exclusionary limit for transient sales did so in response to the Commission’s 2009 Federal Register Notice seeking comments on whether to retain the rule, raising a concern about transient sales as they relate to perishable food items.¹⁸ This commenter suggested that sellers of food items in transient locations be exempted from the Cooling-Off Rule, similar to the Rule’s exemption for arts and crafts shows.¹⁹ I believe the concerns of this commenter could have been addressed in a more targeted and effective manner just as the commenter suggested, through an exemption from the federal rule sales of perishable items. Some states take this approach, and exclude perishable items from coverage of its cooling-off rule.²⁰

In contrast, among those commenters who opposed the increase in the exclusionary limit, some specifically raised concerns about transient sales.²¹ As for the remaining commenters who objected to an increase in the exclusionary limit, it is not clear whether they were raising

¹⁶ DSA Comment at 2-3; Mike Shaw Auto Group Comment at 1; BELO KELLAM [sic] Comment at 1; Susan Rothacker Comment at 1.

¹⁷ 16 C.F.R. 429.3(a) (exempting from the rule “sellers of automobiles, vans, trucks or other motor vehicles sold at auctions, tent sales or other temporary places of business, provided that the seller is a seller with a permanent place of business).

¹⁸ Fabian Seafood Company Comment at 1 (June 13, 2009).

¹⁹ In addition to the exclusion for motor vehicle tent sales, the federal Cooling-Off Rule also excludes “sellers of arts or crafts sold at fairs or similar places.” 16 C.F.R. 429.3(b).

²⁰ *See, e.g.*, N.M. STAT. ANN. § 57-12-21(C)(2) (New Mexico’s cooling-off rule’s definition of covered consumer goods and services are those “other than perishable goods or agricultural products”).

²¹ Two commenters who opposed the increase in the exclusionary limit specifically referenced concerns about transient sales. *See* Rochelle Mezzano Comment at 1 (citing concern about the difficulty in obtaining recourse from transient sellers who do not honor the Cooling-Off Rule based on her experience in purchasing an item while on a cruise ship); Alan Lunin Comment at 1 (citing concern that \$25 is a significant amount of money for consumers who can be targeted “anywhere, including outside the grocery store or inside church”).

concerns about only in-home sales, or both in-home and transient sales. Many of them employed the term “door-to-door sales” in discussing their concerns.²² However, these commenters could simply (and correctly) have been employing the federal rule’s definition of “door-to-door” sales, which incorporates both in-home sales and sales in transient locations under the umbrella of “door-to-door” sales,²³ rather than attempting to limit their concerns to in-home sales.

As the Commission correctly notes in today’s Federal Register Notice of its decision, the federal Cooling-Off Rule does not preempt state laws or rules to the extent that such rules are not “directly inconsistent” with the federal Cooling-Off Rule.²⁴ More protective state laws – those that have lower exclusionary limits, no exclusionary limits, or broader coverage of the types of sales that qualify for the cooling-off period and notice requirements of their rules – are not “directly inconsistent” with the federal rule, and so are not preempted.²⁵

Indeed, states have long had their own cooling-off rules that in many cases provide consumers with protections greater than those provided by the federal rule. Forty-nine states and the District of Columbia have a state cooling-off rule.²⁶ Some states, like Arizona,²⁷ North

²² See Mike A. Jacques-O’Gorman Comment at 1-2; Adam Offenbecker Comment at 1; Gowen Consulting Comment at 1.

²³ See *supra* note 3.

²⁴ See *Trade Regulation Rule Concerning Cooling-Off Period for Sales Made at Homes or at Certain Other Locations*, Rule Amendment, 80 FR 1329, 1331 (Jan. 9, 2015) (citing 16 C.F.R. 429.2).

²⁵ *Id.*

²⁶ Washington is the only state with no law or regulation providing a cooling-off rule, and so it relies entirely on the federal rule. Washington has laws in place that give consumers a right to cancel contracts for specific types of goods or services, including camping club and health club memberships, credit repair services, business opportunities, hearing aid purchases, retail installment plans, telemarketing sales, timeshare purchases, and vocational school enrollment. See *Consumer Issues A-Z: Cancellation Rights*, WASHINGTON STATE OFFICE OF THE ATTORNEY GENERAL, <http://www.atg.wa.gov/consumerissues/cancellationrights.aspx#DoorToDoorSales> (last visited Dec. 22, 2014).

²⁷ ARIZ. REV. STAT. ANN. § 44-5001.

Carolina,²⁸ and Illinois,²⁹ cover only sales in consumers' homes, with exclusionary limits ranging from zero to \$25. Most state laws cover both in-home sales and sales at transient locations, and once again these exclusionary limits range from zero to \$25.³⁰ New Hampshire, with \$150 minimum exclusionary limit, is the only state with a dollar limit above \$25.³¹

With respect to enforcement, states have been much more active in enforcing their state rules than has the Commission.³² This is no doubt due at least in part to the fact that the states are closer to consumers who suffer from many of the unscrupulous activities involving sales in the home and in transient locations.

Because I am not persuaded that the federal Cooling-Off Rule's long-standing \$25 exclusionary limit on transient sales should be raised to \$130, and because I find there is convincing evidence on the overall need to continue protecting consumers through cooling-off rules, I urge state policy makers, law enforcement officials, and regulators to *not* interpret

²⁸ N.C. GEN. STAT. ANN. §§ 25A-38, 39.

²⁹ 815 ILL. COMP. STAT. ANN. 505/2B.

³⁰ For instance, Alaska provides for a \$10 threshold and a five-day cooling-off period, ALASKA STAT. ANN. § 45.02.350; Vermont provides for a \$5 threshold, VT. STAT. ANN. tit. 9, § 2451a (exempting purchases of under \$25 where there is no contract or receipt); Oregon has no dollar limit, OR. REV. STAT. ANN. §§ 83.710, 720; and New York has a \$25 limit, N.Y. PERS. PROP. LAW § 426.

³¹ N.H. REV. STAT. ANN. § 361-B:1.

³² See, e.g., Second Am. Compl. at ¶¶ 11-16, 34-36, *State of West Virginia v. Quick Silver Restoration, LLC, et al.*, No. 14-C-1952 (W. Va. Cir. Ct. filed Nov. 6, 2014) (alleging that a roofing and home improvement company engaged in high pressure door-to-door solicitations that violated several consumer protection laws and regulations, including the state and federal cooling-off rules; Compl. at ¶ 1, *State of Vermont v. Terry*, No. 570-9-14 Wncv (Vt. Super. Ct. filed Sept. 24, 2014) (alleging that a door-to-door meat salesman violated the state's Consumer Protection Act by failing to notify consumers of their three-day right to cancel, misleading consumers regarding the price and guarantee on the meat, failing to disclose material information to the consumer, and selling meat without a required license); Compl., *Commonwealth of Virginia v. KLMN Readers Servs. Inc.*, No. CL13002796-00 (Chesapeake Cir. Ct. filed Nov. 25, 2013) (alleging that a door-to-door magazing company violated Viriginia's Consumer Protection and Home Solicitation Sales Acts) (default judgment granted Sept. 24, 2014). In contrast, the last time the Federal Trade Commission employed the federal Cooling-Off Rule in an enforcement action was nearly 15 years ago. Compl., *F.T.C. v. College Resource Mgmt., Inc. et al.*, No. 3-01CV0828-G (N.D. Tex. May 1, 2001) (alleging, *inter alia*, that a purported college financial services company violated Section 5 of the FTC Act and the Cooling-Off Rule in connection with its deceptive practices in financial aid sales seminars held at hotels or in banquet rooms).

today's amendment to the federal Cooling-Off Rule as a signal that they should follow suit and raise the exclusionary limit of their respective cooling-off rules for sales in transient locations. Indeed, the often highly localized nature of potentially deceptive practices involving sales in transient locations puts states in the best position to determine the wisdom of raising their own exclusionary limits for sales in transient locations. I strongly encourage any state that may consider following the course of action taken by the Commission today to engage first in a more focused effort to gather evidence about potentially unscrupulous activities involving transient sales in their jurisdictions.