



UNITED STATES OF AMERICA
FEDERAL TRADE COMMISSION
WASHINGTON, D.C. 20580

Division of Marketing Practices

November 6, 2009

Stephen F. Ruffino
Gibney Anthony & Flaherty LLP
665 Fifth Avenue
New York, NY 10022

Dear Mr. Ruffino:

This letter responds to your request for a staff advisory opinion regarding compliance with the Magnuson-Moss Warranty Act (“Act”), 15 U.S.C. §§ 2301-2312, and the Commission’s rules promulgated under that Act. You seek guidance on the Act’s application to your client’s one-year “Service Warranty.” According to your letter, your client provides this service warranty after a consumer has purchased one of your client’s consumer products and subsequently has had that product serviced through one of your client’s dealers or service centers. Specifically, you ask whether this service warranty is a “written warranty” as that term is defined in the Act. Based on the information you provide in your letter, and after considering the purposes of the Act, it is the staff’s opinion that the service warranty you describe is not a “written warranty” under the Act or the Commission’s rules.

Your Client’s Course of Conduct and Proposal

In your letter you indicate that your client imports and distributes a line of high-end consumer products. In connection with the sale of these products, your client offers from the date of sale a Full Two-Year Warranty. This Full Two-Year Warranty provides that in the event of a malfunction arising within the warranty period, your client will remedy any defects at no cost to the consumer.

After the expiration of the Full Two-Year Warranty period, consumers may choose to purchase additional maintenance and service for the product in what you refer to as “Factory Service.” This Factory Service requires that the consumer take the product to an authorized dealer or service center for service. You indicate that this service can often entail a full overhaul of the product.

After the completion of this service, your client issues a one-year “Service Warranty” on the serviced product, pursuant to which your client promises to remedy any defects at no cost to the consumer for one year from the date of service. You indicate that there is no additional cost for this Service Warranty.

Your client intends to revise its Service Warranty, but would like more flexibility in drafting the text of the document. Therefore, you seek guidance on whether this Service Warranty, which accompanies the serviced consumer product, is a “written warranty” as defined in the Act.

The Warranty Act and Rules

The Act and Commission rules impose duties on warrantors that make written warranties on consumer products.¹ Under the Act, a “written warranty” is defined as either:

(A) any written affirmation of fact or written promise *made in connection with the sale* of a consumer product by a supplier to a buyer which relates to the nature of the material or workmanship and affirms or promises that such material or workmanship is defect free or will meet a specified level of performance over a specified period of time, or

(B) any undertaking in writing *in connection with the sale* by a supplier of a consumer product to refund, repair, replace, or take other remedial action with respect to such product in the event that such product fails to meet the specifications set forth in the undertaking,

which written affirmation, promise, or undertaking becomes *part of the basis of the bargain* between a supplier and a buyer for purposes other than resale of such product.

15 U.S.C. § 2301(6) (emphasis added). The Commission rules incorporate this definition of a written warranty.²

The Act and rules specifically distinguish between a written warranty and a “service contract.” A service contract is defined as a “contract in writing to perform, over a fixed period of time or for a specified duration, services relating to the maintenance or repair (or both) of a consumer product.” 15 U.S.C. § 2301(8). The Commission rules expand on the distinction between a service contract and a written warranty, providing that a written warranty “must be ‘part of the basis of the bargain,’ ” meaning that it “must be conveyed at the time of sale of the consumer product and the consumer must not give any consideration beyond the purchase of the consumer product in order to benefit from the agreement.” 16 C.F.R. § 700.11(b).

¹ The term “consumer product” means “any tangible personal property which is distributed in commerce and which is normally used for personal, family, or household purposes (including any such property intended to be attached to or installed in any real property without regard to whether it is so attached or installed).” 15 U.S.C. § 2301(1).

² See 16 C.F.R. §§ 701.1(c); 702.1(c); 703.1(c). As acknowledged in your letter, your client’s Full Two-Year Warranty is a “written warranty” under the Act and Commission rules.

Discussion

After considering the plain language of the Act and the purposes of the statute, it is the staff's opinion that the service warranty you describe would not be a "written warranty" under the Act.

First, the plain language of the Act provides that a "written warranty" must be part of the basis of the bargain and must be made "in connection with the sale" of a consumer product. 15 U.S.C. § 2301(6). Your client's "service warranty," however, is provided to consumers *after* they have purchased the consumer product and therefore forms no part of the basis of the bargain.

Second, the purposes of the Act would not be furthered by a determination that your client's service warranty is a written warranty under the Act. In passing the Act, it was Congress's intent that consumers receive clear and complete information about warranty coverage prior to sale; that consumers understand fully what to expect in the event of a consumer product failure or malfunction; and that manufacturers compete on the basis of warranty coverage. 15 U.S.C. § 2302(a). It is the staff's opinion that these purposes have little application in the context of your client's service warranty.

You indicate in your letter that your client's Full Two-Year Warranty fully complies with the Act. Accordingly, consumers have presumably received complete information about warranty coverage prior to sale and understand what to expect in the event of product failure or malfunction. Therefore, the first two purposes of the Act are served by the provision of the Full Two-Year Warranty. A determination that your client's service warranty is a written warranty would do little to further these purposes because the consumer has already received information regarding warranty coverage and would have been able to use that information in making a purchasing decision. Similarly, a determination that the service warranty is not a written warranty would not impact competition on the basis of warranty coverage because the consumer has already purchased the consumer product.³

³ Moreover, the staff's conclusion that your client's service warranty is not a written warranty is not altered by 16 C.F.R. § 700.1(h), which addresses warranties on replacement parts. Specifically, Rule 700.1(h) provides that "warranties on replacement parts and components used to repair consumer products are covered; warranties on services are not." Rule 700.1(h) is intended to address "aftermarket" replacement products that are purchased by consumers, and merely indicates that where a written warranty covers *both* parts and services, it is covered by the Act. See Curtis R. Reitz, *Consumer Product Warranties Under Federal and State Laws* § 13.06 (2d ed. 1987). This provision, however, does not impact the meaning of a "written warranty" under the Act, nor does it alter the "basis of the bargain" test.

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Conclusion

Based on the plain text of the Act, which requires that a “written warranty” form part of the basis of the bargain of the original sale, and because designating your client’s service warranty a “written warranty” would do little to advance the purposes of the Act, it is the staff’s opinion that the service warranty you describe would not be a written warranty under the Act.

The opinions and conclusions expressed in the foregoing discussion are those of Commission staff only and are not attributable to, nor binding on, the Commission itself or any individual Commissioner. I hope this discussion is helpful to you. If you have any further questions, please do not hesitate to contact me at (202) 326-2505.

Sincerely,

Allyson Himelfarb
Investigator/Magnuson-Moss
Program Coordinator