[6750-01]

FEDERAL TRADE COMMISSION

WARRANTIES COMPLYING WITH MAGNUSON-MOSS WARRANTY ACT

Applicability of Certain Provisions of California State Law; Final Findings and Determination

AGENCY: Federal Trade Commission.

ACTION: Final findings and determination in the proceeding.

SUMMARY: Magnuson-Moss Warranty Act § 111 states the Federal scheme for the effect of Federal law on state warranty provisions. Paragraph (c)(1) provides that certain types of State provisions will be inapplicable to warranties complying with the Federal law. However paragraph (c)(2) preserves such provisions if the Commission finds they meet certain criteria stated in the Act. The State of California filed two applications under this paragraph. The Commission's determination on the applications is set forth below. The Commission's final determination includes an explanation of the scheme of § 111.

FOR FURTHER INFORMATION CONTACT:

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SUPPLEMENTARY INFORMATION: The California state provisions included in the application of July 1, 1975, are the following:

Civil Code Sections 1790-1795 (Song-Beverly Consumer Warranty Act)
Civil Code Section 1797
Commercial Code Section 2801
Health and Safety Code Sections 39156-39157
Vehicle Code Sections 9975, 34715

In addition, the State of California submitted a supplemental application, dated November 2, 1976, requesting consideration of the following provisions as amended by the 1976 Amendments to the Song-Beverly Act:

§§ 17904, 1791, 1793.3, 1793.6, 1794.1.

The Commission initially determined that the only provisions subject to § 111 (c)(1) were the following four sections of the Civil Code:

§ 1793.1(b) (disclosure of warrantor's repair facilities)
§ 1797.3 (mobile home warranty title)
§ 1797.3(d) (disclosure of warrantor's telephone number in mobile home warranties)
§ 1797.5 (posting of mobile home warranties)

It therefore initiated this rulemaking proceeding to determine if any of these provisions meet the requirements of § 111 (c)(2) for preservation.

The Commission also considered the supplementing application of November 2, 1976, and found that none of the provisions as amended are subject to § 111 (c)(1) of the federal Act.

FINDINGS AND DETERMINATIONS

I. HISTORY OF THE PROCEEDING

This proceeding was initiated by the Commission July 9, 1976, in response to an application filed by the State of California pursuant to the provisions of Title I, Section 111(c)(2), 15 U.S.C. 2311(c)(2), of the Magnuson-Moss Warranty-Federal Trade Commission Improvement Act, Pub. L. 93-637, 15 U.S.C. 2301, et seq., (1975) (hereinafter the "Warranty Act").

The initial notice of this proceeding, together with staff's analysis of the California state law provisions submitted with the application, was published in the FEDERAL REGISTER on July 9, 1976 (41 FR 28361). All interested persons were invited to file written data, views or arguments concerning this matter or to present such information orally at public hearings. A period of 60 days was allowed for submission of written comments. Public hearings, as announced in the notice, were held September 13-14, 1976, in Los Angeles, California, and September 20, 1976, in Washington, D.C., with Mr. John A. Gray, Attorney, Office of the Special Assistant Director for Rulemaking, Bureau of Consumer Protection, presiding. Every person who had expressed a desire to present his views orally at these hearings was accorded the opportunity to do so. The public record remained open for the receipt of written data, views or arguments until October 20, 1976.

Section 111(c) of the Warranty Act (15 U.S.C. 2311(c)), provides:

(c)(1) Except as provided in subsection (b) and in paragraph (2) of this subsection, a State requirement—

(A) which relates to labeling or disclosure with respect to written warrantics or performance thereunder;

(B) which is within the scope of an applicable requirement of sections 102, 103, and 104 (and rules implementing such sections); and

(C) which is not identical to a requirement of section 102, 103, or 104 (or a rule thereunder),

shall not be applicable to written warranties complying with such sections (or rules thereunder).

(2) If, upon application of an appropriate State agency, the Commission determines (pursuant to rules issued in accordance with section 109) that any requirement of such State covering any transaction to which this title applies (A) affords protection to consumers greater than the requirements of this title and (B) does not unduly burden interstate commerce, then such State requirement shall be applicable (notwithstanding the provisions of paragraph (1) of this subsection) to the extent specified in such determination for so long as the State administers and enforces effectively any such greater requirement.

Section 111(b), 15 U.S.C. 2311(b), provides:

(b)(1) Nothing in this title shall invalidate or restrict any right or remedy of any consumer under State law or any other Federal law.

(2) Nothing in this title (other than sections 108 and 104(a)(2) and (4)) shall (A) affect the liability of, or impose liability on, any person for personal injury, or (B) supersede any provision of State law regarding consequential damages for injury to the person or other injury.

In its initial notice the Commission indicated that four provisions of the California laws submitted for Commission analysis would be affected by operation of § 111(c) of the Warranty Act, i.e., Sections 1793.1, 1797.3 and 1797.5 of the California Civil Code. That notice stated:

(1) Section 1793.1(b) of the Song-Beverly Consumer Warranty Act, while similar to disclosures required by 16 CFR § 701.3(a)(5) of the regulations implementing § 102 of the Warranty Act, is not identical to that requirement;

(2) The "Mobile Home Warranty" designation requirement of California Civil Code § 1797.3 is not identical to the provisions of § 103 of the Warranty Act;

(3) That part of § 1797.3(d) of the California Civil Code which requires disclosure of telephone numbers is not identical to the disclosure provided by 16 CFR 701.3(a)(5); and

(4) The pre-sale availability requirements of § 1797.5 of the California Civil Code are not identical to the requirements of 16 CFR Part 702 which also implements Warranty Act § 102.[1]

The purpose of this proceeding is:

to determine, pursuant to the California petition and the provisions of section 111(c)(2) of the Warranty Act (15 U.S.C. 2311(c)(2)), whether the above described State requirements afford protection to consumers greater than the requirements of the Warranty Act and do not unduly burden interstate commerce. If it is determined that a provision of the State law affords protection to consumers greater than the requirements of the Warranty Act and that such provision does not unduly burden interstate commerce, then the provision will be applicable to written warranties in compliance with the federal requirements to the extent specified in such determination for as long as the State of California administers and enforces effectively such greater requirement.

II. THRESHOLD ISSUES

As a general rule Federal and state consumer protection laws are read harmoniously and viewed as supplementing each other rather than being in conflict.[2] The courts have determined that Federal laws will preempt state consumer protection laws only when the state legislation frustrates the full effectiveness of the Federal law, or when compliance with both is a physical impossibility.[3]

The Congress, in its consideration of the Warranty Act, plainly recognized

[1] 41 FR 28362 (1976). It was noted that provisions (1), (3) and (4) would be affected only after the rules implementing section 102 of the Warranty Act are effective. *See* 40 Fed. Reg. 60168 (1975), 16 CFR Parts 701, 702. The Rules became effective as of Decem-

[2] See, e.g., *Double-Eagle Lubricants* v. *State of Texas*, 248 F. Supp. 515, 518 (1965); *Head* v. *New Mexico Board of Examiners*, 374 U.S. 424, 427, (1963).

[3] See generally *Perez* v. *Campbell*, 402 U.S. 632 (1971); *Florida Lime and Avocado Growers, Inc.* v. *Paul*, 373 U.S. 132 (1963); *Hines* v. *Davidowitz*, 312 U.S. 52 (1941).

these principles and expressed its intention in this area by including a section to deal with these matters—§ 111 entitled "Effect on Other Laws."

Section 111(c)[4] is the centerpiece for the preemption scheme established by Congress. It provides that state labeling and disclosure requirements which are within the scope of requirements of the Warranty Act provisions (§ 101, 103, or 104), or rules thereunder, governing warranty disclosures, designations and minimum standards, and which are not identical to those requirements, are inapplicable to warranties which meet the federal requirements.

Section 111(c)(2) provides a procedure whereby states may petition the Commission for permission to enforce state laws regarding written warranty labeling or disclosures which are not identical to the requirements of the Warranty Act and which would otherwise be rendered inapplicable to written warranties complying with Federal standards.

Section 111(b)[5] preserves all rights and remedies of consumers under state or other federal laws and state requirements directed at liability for personal injury or consequential damages.

During this proceeding numerous alternative interpretations for various sections were advanced. The Commission believes it is important to formulate a consistent interpretation of the section as a whole before proceeding to examine the specific issues raised by the California Application. The Commission has carefully considered the various interpretations and the history of the section. This discussion should give states, consumer groups and industry representatives a guide to the Commission's approach in interpreting this provision.[6]

The first issue concerns the scope of the exception provided for in paragraph (b). Specifically, does the phrase "right or remedy of any consumer" include rights under a state labeling or disclosure requirement?[7] In California for example, under the provisions of the Song-Beverly Act a consumer can maintain an action at law if he is injured by a failure to comply with that Act's requirements. If that Act contained a warranty disclosure provision—for example, that every written warranty contain the manufacturer-warrantor's telephone number—which was otherwise within the scope of § 111(c), would it be excluded from preemption because it is a consumer right?

Since one of the purposes of this legislation is to provide standards for disclosures in written warranties, Congress could not have intended for disclosure or labeling provisions to be automatically construed as consumer rights and preserved. Rather, the Commission believes that Congress established the procedure described in subparagraph (2) of § 111(c) as the proper means by which to determine future applicability of such disclosure and labeling provisions.[8]

Were it otherwise, the federal disclosure scheme would be completely frustrated. If, for example, a state disclosure or labeling requirement, preserved by operation of (b), were directly contradictory to the Federal rules, under the terms of (b) the normal preemption rules would not prevail, and the Federal provision, not the state provision, would fall.

The proviso in § 111(c) "except as provided in (b)" makes it absolutely clear that consumer rights and remedies under state law would never be affected by the Warranty Act. The proviso may have been intended to distinguish between a consumer right to information and a requirement to provide information in a particular form or manner (e.g., in the warranty document). It is even possible that the presence of the proviso in the final Act is due to a drafter's error. The scope of § 111 was limited by the Conference Committee to labeling and disclosure provisions. The House and Senate versions of the legislation would have included performance requirements in the preemption scheme. The proviso preserving consumer rights and remedies was contained in the House version. The Conference Committee took out references to performance requirements but it left in—perhaps to make it entirely clear—the provision that the Act would not affect consumer rights or remedies.

The phrase "right or remedy of any consumer" in § 111(b), therefore, does not include any right to a specific manner of disclosure or labeling of information.

The next issue concerns the scope of the preemption scheme itself. Section 111(c)(1) lists three elements which a state requirement must meet to be within the scope of this section. These requirements are in the conjunctive; all must be found for a requirement to be within the scope of the section.[9]

First, the state requirement must relate to "labeling or disclosure with respect to written warranties or performance thereunder. It is the Commission's view that the phrase "with respect to written warranties or performance thereunder" in § 111(c)(1)(A) was intended to modify the phrase "which relates to labeling or disclosure." Thus we interpret the clause to mean that state requirements which relate strictly to warranty performance, and which do not involve warranty labeling or disclosure of terms, are outside the scope of § 111(c). In other words, we read this clause as dealing with state requirements which relate to labeling or disclosure with respect to written warranties, and with state requirements which relate to labeling or disclosure with respect to performance under written warranties.

This construction is supported by the legislative history of this section. While the scope of this provision, as proposed in both houses, extended to labeling disclosure and "other requirements"[10] or "other matters,"[11] this latter language was dropped in the Conference Committee. No explanation for this is provided in the Conference Report but it may be inferred that Congress intended that the scope of this section should extend only to labeling and disclosure provisions.

Second, the state requirement must be within the scope of § 102, 103, or 104 (or rules thereunder). Section 102 of the Warranty Act authorized Commission promulgation of FTC regulations governing disclosure of written warranty terms and conditions of consumer product warranties. A rule has been promulgated pursuant to the statutory mandate establishing requirements for warrantors for disclosing written warranty terms and conditions. Thus, a state requirement would be within the scope of the Federal requirement if it requires disclosure of terms in a written warranty in a manner different from the Federal rules or if it requires disclosure of additional terms in the warranty.[12] The Commission has also promulgated a rule establishing requirements for pre-sale availability of warranty terms. A state

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[4] See Part I, supra.

[5] See Part I, supra.

[6] Ordinarily, the views of the agency charged with implementing a statute are accorded great weight. See *Red Lion Broadcasting* v. *FCC*, 395 U.S. 367, 381 (1969); *Udall* v. *Tallman*, 380 U.S. 1, 16 (1964).

[7] During the course of this proceeding the State of California took the position that state requirements concerning written warranty disclosures and labeling can provide consumer rights within the meaning of paragraph (b). See Testimony of Herschel Elkins, Deputy Attorney General, State of California, Transcript pp. 46–50 (Tr. 46–50). See also Statement of Center for Auto Safety, Record pp. 118–124 (R. 118–124), and Testimony of Dennis Kavanagh, Counsel, Golden State Mobilehome Owners League, Inc., Tr. 15.

[8] It should be remembered too that this statute was passed prior to the recent Supreme Court decision recognizing a First Amendment "right" to commercial information. See *Virginia State Board of Pharmacy* v. *Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 96 Sup. Ct. 1817 (1976).

[9] The legislative history of the Warranty Act indicates that the House version of § 111(c)(1) was adopted in the Act. From a reading of that section it appears clear that § 111(c)(1)(A), (B), and (C) were meant to be conjunctive, and the absence of an "and" between subparagraphs (A) and (B) is merely the result of a normal grammatical process. See also University of Chicago Press "A Manual of Style," § 5.64 (12 ed., 1969) and the comments of the Center for Auto Safety, R. 127–128, and National Consumer Law Center, R. 114–115.

But see Statement of J. C. Penney Co., R. 150. Penney's contended that:

[T]he staff analysis relies upon a conjunctive construction at the end of section 111(c)(1)(A), thus inferring the presence of a nonexistent "and" and substitutes the inferred "and" for the semicolon which actually appears. Penney disagrees with this interpretation and believes that the presence of the semicolon further established a Congressional intent to preserve uniformity of written warrany requirements.

Penney's would place a nonexistent "or" between the clauses, which the Commission believes would be contrary to the legislative intent.

[10] S. 356, 93d Cong., 1st Sess., § 113(b) (1973).

[11] H.R. 7917, 93d Cong., 2nd Sess., § 111(c)(A) (1973).

[12] 16 CFR Part 701.

requirement would be within the scope of this requirement if it establishes written warranty pre-sale availability requirements different from or in addition to those of the federal rule.[13] Sections 103 and 104 create a labeling scheme for warranties.[14] These sections divide the universe of warranties into two types—i.e., those which meet the Federal minimum requirements for a warranty ("full" warranties) and those which do not ("limited" warranties). The Commission has stated that these designations must appear clearly and conspicuously as a caption or prominent title of the warranty.[15] A state requirement would be within the scope of these provisions if it imposed a warranty designation requirement different from the Federal scheme or if it attempted to alter the standards for qualifying for the Federal "full" warranty designation.

Finally, the state requirements must be different from the Federal requirement.

If all the conditions above are met, then the state requirement will be rendered inapplicable to written warranties complying with the provisions of the Warranty Act section or rules thereunder. Thus § 111(c) does not in fact preempt state provisions; it merely renders them inapplicable to warranties which meet the Federal requirements.

Further, subparagraph (2) of § 111(c) provides for a procedure whereby such state requirements can be made applicable even to warranties meeting Federal regulations. A State may apply to the Commission for this determination. In reaching this determination, the Commission must consider whether the state requirement in question affords protection to consumers greater than the requirements of the Warranty Act and does not unduly burden interstate commerce.

The questions of greater protection and undue burden are complex issues requiring careful analysis. They can only be answered on a case-by-case basis. The Commission believes the proponent of the state requirement has the burden of showing that the requirement provides more protection to consumers than the Federal requirement. Likewise, persons viewing the state requirement as unduly burdensome have an obligation to support, by more than mere conclusory statements and unsupported allegation, their contentions with respect to a requirement's burdensomeness.

It should be noted that U.S. Supreme Court decisions interpreting the Commerce Clause (U.S. Const., Art. I, § 8, cl. 3) have established that only undue and discriminatory burdens are forbidden by the Commerce Clause.[16] The Commission believes these decisions set forth the basic criteria for determining whether a State requirement constitutes an "undue burden on interstate commerce" for purposes of subparagraph (2) of § 111(c).

One final point should be added to this analysis. Warrantor and industry commentators throughout this proceeding argued that the purpose of the Warranty Act was to preserve uniformity of warranties—i.e., to ensure that nationwide manufacturer-warrantors would not have to comply with a multiplicity of State laws on the subject. They base their contentions on the Committee Reports[17] published before the Conference Committee changed § 111. The purpose of the Act, however, is to provide minimum disclosure and content standards for warranties.

The Commission believes that Congress rejected the idea of uniformity of warranties as the major purpose of § 111(c) when it limited its scope to labeling and disclosure requirements. It also rejected the idea of uniformity of disclosure requirements as predominant when it rejected the Senate's absolute preemption scheme and substituted the House version which provides for a savings procedure for such State laws. While uniformity of warranty documents is a goal of § 111, therefore, it is by no means the predominant goal.

As noted herein, because of the comments received during this proceeding and re-examination of the legislative history of the Warranty Act, the Commission has made slight changes in its analysis of § 111 since publication of the initial notice. One additional point should be made in this regard. As discussed above, the Commission is now convinced that the legislative history of § 111 supports the conclusion that the section was meant to apply only to written warranty labeling and disclosure requirements and not to substantive warranty performance requirements. Therefore, the earlier analysis of several sections which were declared exempt from preemption, either because they contained performance requirements identical to those of § 104 or because they constituted consumer rights or remedies, would instead be considered outside the scope of this section because they do not involve written warranty labeling or disclosure. More specifically, see the discussion in staff's analysis, published with the initial notice, concerning California Civil Code §§ 1793.2 to 1793.5 and 1797 to 1797.4.

III. CONSIDERATION OF STATE REQUIREMENTS

A. Disclosure of repair facilities. Section 102 of the Warranty Act mandates that the Commission promulgate rules requiring full disclosure of written warranty terms and conditions. The Commission has carried out this directive by promulgating 16 CFR Parts 701, 702 which became effective December 31, 1976.

Section 701.3(a)(5)[18] of the Commission's regulations implementing §102 requires that a written warranty contain the mailing address of the warrantor or the person responsible for performance of warranty obligations.

Section 1793.1(b)[19] of the California Civil Code provides that a warrantor who maintains service and repair facilities in California must disclose the location of such facilities by one of three

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[13] 16 CFR Part 702. Note that other rules are authorized by § 102; as they are promulgated, additional state rules may fall within their scope.

[14] Section 104 appears to be a group of substantive provisions and in fact is entitled "Federal Minimum Standards For Warranty." However, the fact that no warrantor need meet these requirements, but must merely choose a "designation" or label depending on whether he meets them, makes those requirements merely part of the labeling scheme established in § 103.

[15] FTC Magnuson-Moss Warranty Act Implementation and Enforcement Policy, 40 Fed. Reg. 25721 (June 18, 1975); Interpretations of Magnuson-Moss Warranty Act 16 CFR Part 700, 42 Fed. Reg. 36112 (July 13, 1977).

[16] See, e.g., *Huron Portland Cement Co.* v. *Detroit*, 362 U.S. 440, 443–444 (1960); *Breard* v. *City of Alexandria*, 341 U.S. 622, 640–641 (1951); *Dean Milk Co.* v. *City of Madison*, 340 U.S. 349, 354 (1951).

[17] S. Rep. No. 93–151, 93rd Cong., 1st Sess. (1973); H.R. Rep. No. 93–1107, 93rd Cong., 2nd Sess. (1973).

[18] CFR § 701.3(a) entitled "Written warranty terms" provides, in pertinent part:

"(a) Any warrantor warranting to a consumer by means of written warranty • • • shall clearly and conspicuously disclose in a single document in simple and readily understood language, the following items of information:

• • • • •

"(5) A step-by-step explanation of the procedure which the consumer should follow in order to obtain performance of any warranty obligation, including the persons or class of persons authorized to perform warranty obligations. This includes the name(s) of the warrantor(s), together with: the mailing address(es) of the warrantor(s), and/or the name or title and the address of any employee or department of the warrantor responsible for the performance of warranty obligations, and/or a telephone number which consumers may use without charge to obtain information on warranty performance • • •"

[19] "(b) Every manufacturer, distributor, or retailer making express warranties and who elects to maintain service and repair facilities within this state pursuant to the provisions of this chapter shall:

"(1) At the time of sale, provide the buyer with the name and address of each such service and repair facility within this state; or

"(2) At the time of sale, provide the buyer with the name and address and telephone number of the service and repair facility central directory within this State, or the toll-free telephone number of a service and repair facility central directory outside this state. It shall be the duty of the central directory to provide, upon inquiry, the name and address of the authorized service and repair facility nearest the buyer; or

"(3) Maintain at the premises of retail sellers of the warrantor's consumer goods a current listing of such warrantor's authorized service and repair facilities, or retail sellers to whom the consumer goods are to be returned for service and repair, whichever is applicable, within this state. It shall be the duty of every retail seller provided with such a listing to provide, on inquiry, the name, address, and telephone number of the nearest authorized service and repair facility, or the retail seller to whom the consumer goods are to be returned for service and repair, whichever is applicable."

methods. The warrantor may (1) give the buyer a list showing the name and address of each such repair facility; or, (2) give the name, address and telephone number of the repair facility central directory within the state or toll free number; or (3) maintain at the seller's premises a list of authorized service facilities. In the latter instance, it is the duty of the seller to provide the name, address and telephone number of the nearest repair facility upon request.

This section of the Federal regulations concerns disclosures of the location of the warrantor or the person responsible for warranty performance. The State of California, for the protection of consumers in that state, has established a similar requirement that the location of repair facilities be disclosed, but the disclosure required is more comprehensive than that prescribed by the Federal regulations.

At the hearing on this matter it was also brought out by the State of California that so long as the required information is presented (or is available) at the time of sale it need not be disclosed in the written warranty itself.[20] A reading of the statute confirms that nowhere does the provision require a disclosure in the written warranty itself, although inclusion in the warranty is one way to comply.

As discussed above, the scope of Warranty Act § 102 and the regulations promulgated thereunder extends only to information that is required in a written warranty. As the California State provision does not mandate written warranty terms or disclosures, it is not within the scope of Warranty Act § 102 or the regulations promulgated thereunder.

The Commission concludes therefore that § 1793.1(b) of California's Civil Code is not a warranty requirement within the scope of § 111 of the Warranty Act and thus is not subject to preemption.

B. *Mobile home warranty title requirement.* Section 103[21] of the Warranty Act requires that a warrantor clearly and conspicuously designate, or label, its warranty either "full (statement of duration) warranty" or "limited warranty." Section 1797.3[22] of the California Civil Code requires a written warranty to be given in connection with the sale of mobile homes, and requires this warranty to be entitled "Mobilehome Warranty."

The Commission in its Final Interpretations, 16 CFR 700.6(a), 42 FR 36112 (July 13, 1977), stated that the "full" and "limited" designations provided by the Act "are the exclusive designations permitted under the Act, unless a specific exception is created by rule." The Commission also stated that the appropriate designation "should appear clearly and conspicuously as a caption, or prominent title," to the warranty. The Commission intended to ensure that readers would focus in the first instance on the status of the warranty with respect to the Federal minimum standards for warranties. The California requirement, which would lead consumers to focus instead on the product being warranted, is inconsistent with this goal.

The state provision thus is a labeling provision within the scope of a requirement of § 103 of the Warranty Act, and not identical to it. It is therefore subject to the provisions of § 111(c) of the Act. The provision may be preserved, however, under paragraph (c)(2) of that section if it affords consumers greater protection than the Federal requirement and does not unduly burden interstate commerce. California Deputy Attorney General Herschel Elkins testified that many mobile homes are now sold with a number of separate warranties on different portions of the home, and that consumers are frequently confused as to the coverage of a particular warranty. He stated that preservation of the state provision would assist consumers in knowing just what the warranty covers.[23] However, a statement of what the warranty covers must in any event appear in the warranty. The Commission finds that this state provision does not afford the necessary greater protection to consumers. Therefore it shall not be applicable to warranties which comply with the Federal rule.

C. *Telephone number requirement.* Section 701.3(a)(5)[24] of the rules implementing Warranty Act § 102 requires disclosure of the mailing address where consumers may obtain information on warranty performance; however, disclosure of a telephone number which consumers may use to obtain such information is optional. Section 1797.3 of the California Civil Code requires that the mobile home warranty mandated therein contain the address and phone number of where to mail or deliver written notices of defects.[25]

This state provision is within the scope of a requirement of a rule promulgated under § 102 of the Warranty Act, since it requires certain information to appear in the warranty itself. Further, it is not identical to the Federal requirement, and is therefore subject to preemption under § 111(c) of that Act. The provision may be preserved, however, under paragraph (a)(2) of that section if it affords consumers greater protection than the Federal requirement and does not unduly burden interstate commerce.

The state requirement compels the use of a telephone system for receiving consumer grievances. Warrantors who do not presently have such a system would be required to install one. The National Retail Merchants Association[26] stated that the requirement would therefore be a burden. However, such a requirement affords significantly greater protection to consumers than the Warranty Act which *has no such requirement.*[27] *The consumer* has a fast and convenient method of communication with the warrantor. The consumer can make personal contact with the responsible party, and can receive an immediate response. Any burden imposed on the warrantor is outweighed by the benefit to the consumer of having this communication system available.

For those warrantors who presently have a way of handling consumer complaints by telephone, listing the telephone number in the warranty is merely a slight inconvenience. While the burden could be greater on nationwide warrantors if other states were to impose a similar requirement,[28] it is hardly an undue burden within the meaning of § 111(c)(2) of the Warranty Act.

It must be noted that industry representatives offered absolutely no data to establish the burdensomeness of this requirement.

The Commission therefore concludes that this requirement provides consumers greater protection than the Warranty Act requirement and will not unduly burden interstate commerce. Furthermore, the state has made an adequate showing that it has the capability to enforce this provision. According to the remarks of the Deputy Attorney General, California's Attorney General has authority under common law principles as well as under California Civil Code § 3369 to bring actions against companies engaging in unlawful and unfair business practices.[29] The state requirement will therefore continue to be applicable to warranties complying with the Magnuson-Moss Warranty Act and regulations thereunder.

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[20] Testimony of Herschel Elkins, Deputy Attorney General, State of California, Tr. pp. 57-58, 60-62. *See also* Statement of Center for Auto Safety R 116 n. 2 and R 117 n. 5.

[21] Warranty Act § 103, 15 U.S.C. § 2303, provides in pertinent part:

"(a) Any warrantor warranting a consumer product by means of a written warranty shall clearly and conspicuously designate such warranty in the following manner, * * *:

"(1) If the written warranty meets the Federal minimum standards for warranty set forth in section 104 of this Act, then it shall be conspicuously designated a 'full (statement of duration) warranty.'

"(2) If the written warranty does not meet the Federal minimum standards * * *, then it shall be conspicuously designated a 'limited warranty.'

[22] "The mobilehome warranty from the manufacturer or dealer to the buyer shall be set forth in a separate written document entitled 'Mobilehome Warranty.' * * *"

[23] Testimony of Herschel Elkins, Deputy Attorney General, State of California, Tr. 66.

[24] *See* note 16, *supra.*

[25] Section 1797.3 provides that a written warranty be delivered to the buyer of a mobile home at the time the contract for sale is signed and that the warranty contain certain terms. Term (d) provides that "the address and telephone number of where to mail or deliver written notices of defects shall be set forth in the document."

[26] R 167.

[27] *See* Testimony of Dennis Kavanagh, General Counsel, Golden State Mobilehome Owners League, Inc., Tr. 11-12; Testimony of Herschel Elkins, Deputy Attorney General, State of California, Tr. 66-68.

[28] *See* Statements of Champion Home Builders Co., R 145; Fleetwood Enterprises, Inc., R 137; Skyline Corp., R 130.

[29] *See* Testimony of Herschel Elkins, Deputy Attorney General, State of California, Tr. 51-54; and *People* v. *Arthur Murray*, 238 (CA 2d) 333, 348-349; *People* v. *Superior Court*, 9 (CA 3d) 283, 287.

D. *Pre-sale availability requirement.* Section 102(b)(1)(A) of the Warranty Act authorizes the Commission to prescribe rules "requiring that the terms of any written warranty on a consumer product be made available to the consumer (or prospective consumer) prior to the sale of the product to him." A rule implementing this provision was promulgated by the Commission and became effective December 31, 1976.[30] The rule requires that warrantors' written warranties be made available to consumers prior to sale by one of four methods.[31] This requirement may be met by displaying the warranty in close conjunction with the product, by maintaining copies of warranties in a binder available to the consumer, by displaying the product's package if the warranty appears on it, or by posting a sign containing the warranty. Section 1797.5 [32] of the California Civil Code requires that mobile home dealers display in the area where sales contracts are signed, a notice stating the existence of a one-year warranty and a sample copy.

This State provision is a requirement within the scope of a rule promulgated under § 102 of the Warranty Act. Further, it is not identical to the Federal requirement and is therefore subject to preemption under § 111(c) of that Act. The provision may be preserved, however, under paragraph (c)(2) of that section if it affords consumers greater protection than the Federal requirement and does not unduly burden interstate commerce.

National Retail Merchants Association asserted that this State provision appears to offer less protection than the Federal regulations because it does not require that the warranty itself be displayed.[33] However, the representative of the State of California disagreed with this interpretation and stated that copies of warranties must be posted.[34]

The provision therefore differs from the Federal requirement in two ways. First, the State provision requires posting of the text of the warranty, whereas the Federal rule permits, as an alternative to posting the text, the use of a binder which is calculated to attract shoppers' attention or whose availability is announced by similarly conspicuous signs. Second, the State provision requires the display of the warranty in the area where sales contracts are signed, while the Federal options regarding posting of the warranty require it to appear where the warranted products are displayed. In the mobile home industry, the functions of product display and contract signing are likely to be performed in separate areas. Thus, compliance with the State provision will not be sufficient compliance with the Federal rule, and vice versa. Preservation of the state method of presale availability will therefore entail for sellers separate compliance with the State and Federal provisions. The Commission is not convinced that posting a copy of the warranty in the area for contract signing, where consumers may well never go until their purchase decision has already been made, provides greater protection than posting signs announcing the availability of warranties in the display area. The Commission feels the extra burden on sellers of providing two sets of pre-sale materials is not justified by such benefit to consumers as this state provision may give. The State provision will therefore not be applicable to warranties which comply with the Federal rule. It should be noted, however, that the Commission does not here make any determination of whether a state provision mandating one of the four Federal options would meet the requirements for preservation in § 111(c)(2).

IV. FINDINGS

In view of the above stated conclusions, the Commission makes the following findings pursuant to its authority under the Warranty Act and specifically under 15 U.S.C. 2311(c)(2):

(1) California Civil Code § 1793.1(b), which requires that warrantors maintaining service and repair facilities in California disclose the location of such facilities, is not a state requirement within the scope of § 111(c) of the Warranty Act and thus is not subject to preemption under that section.

(2) California Civil Code § 1797.3, which requires that the state-mandated mobile home written warranty be entitled "Mobilehome Warranty," does not afford protection to consumers greater than the requirements of the Warranty Act, 15 U.S.C. 2301, et seq., and regulations thereunder, and therefore shall not be applicable to warranties complying with that Act.

(3) California Civil Code § 1797.3(d), which provides that telephone numbers be disclosed in a state-mandated mobile home written warranty, affords protection to consumers greater than the requirements of the Warranty Act, 15 U.S.C. 2301, et seq., and regulations thereunder, and does not unduly burden interstate commerce; therefore, this State requirement shall be applicable to warranties complying with the Magnuson-Moss Warranty Act for so long as the state administers and enforces effectively such greater requirement.

(4) California Civil Code § 1797.5, which provides that mobile home dealers display a notice stating the existence of a one-year warranty and a sample copy of such warranty, does not afford protection to consumers greater than the requirements of the Warranty Act, 15 U.S.C. 2301, et seq., and regulations thereunder, and therefore shall not be applicable to warranties complying with that Act.

V. LETTER OF NOTIFICATION TO APPLICANT

For further information, the Commission's letter of notification to the Attorney General of California is set forth:

FEDERAL TRADE COMMISSION,
OFFICE OF THE SECRETARY,
Washington, D.C.

HON. EVELLE J. YOUNGER,
Attorney General, State of California Department of Justice, 3580 Wilshire Blvd., Los Angeles Calif.
(Attention: Herschel Elkins, Deputy Attorney General).

DEAR MR. YOUNGER: The Commission has concluded the proceeding entitled "Determination of Applicability of California State Law to Warrantors Complying with the Magnuson-Moss Warranty Act."

Attached is a copy of the Notice to be published in the FEDERAL REGISTER concerning the Commission's final determination in this matter. Briefly, the Commission made the following findings pursuant to its authority under the Warranty Act and specifically under § 111(c)(2), 15 U.S.C. § 2311(c)(2):

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[30] 16 CFR Part 702.

[31] 16 CFR § 702.3(a) entitled "Pre-sale availability of written warranty terms" provides in pertinent part that:

"[T]he seller of a consumer product with a written warranty shall:

"(1) Make available for the prospective buyer's review, prior to sale, the text of such written warranty by the use of one or more of the following means:

"(i) Clearly and conspicuously displaying the text of the written warranty in close conjunction to each warranted product; and/or

"(ii) maintaining a binder or series of binders which contain(s) copies of the warranties for the products sold in each department in which any consumer product with a written warranty is offered for sale. Such binder(s) shall be maintained in each department, or in a location which provides the prospective buyer with ready access to such binder(s), and shall be prominently entitled 'Warranties' or other similar title which clearly identifies the binder(s). Such binder(s) shall be indexed according to product or warrantor and shall be maintained up to date when new warranted products or models or new warranties for existing products are introduced into the store or department by substituting superseding warranties and by adding new warranties as appropriate.

"The seller shall either:

"(A) display such binder(s) in a manner reasonably calculated to elicit the prospective buyers attention; or

"(B) make the binders available to prospective buyers on request, and place signs reasonably calculated to elicit the prospective buyer's attention in prominent locations in the store or department advising such prospective buyers of the availability of the binders, including instructions for obtaining access; and/or

"(iii) displaying the package of any consumer product on which the text of the written warranty is disclosed, in a manner such that the warranty is clearly visible to prospective buyers at the point of sale; and/or

"(iv) placing in close proximity to the warranted consumer product a notice which discloses the text of the written warranty, in a manner which clearly identifies to prospective buyers the products to which the notice applies."

Section 702.3(b) requires warrantors to make required materials available to sellers.

[32] "*Notice of warrant; display; posting.* Every dealer shall display a notice of reasonable size stating the existence of a one-year warranty and a sample copy of such warranty. The notice shall be posted in each area where purchase orders and conditional sales contracts are written."

[33] R. 168.

[34] Testimony of Herschel Elkins, Deputy Attorney General, State of California, Tr. 68.

(1) California Civil Code § 1793.1(b), which requires that warrantors maintaining service and repair facilities in California disclose the location of such facilities, is not a state requirement within the scope of § 111(c) of the Warranty Act and thus is not subject to preemption under that section.

(2) California Civil Code § 1797.3, which requires that the state-mandated mobile home written warranty be entitled "Mobile-home Warranty," does not afford protection to consumers greater than the requirements of the Warranty Act, 15 U.S.C. § 2301, et seq., and regulations thereunder, and therefore shall not be applicable to warranties complying with that Act.

(3) California Civil Code § 1797.3(d), which provides that telephone numbers be disclosed in a state-mandated mobile home written warranty, affords protection to consumers greater than the requirements of the Warranty Act, 15 U.S.C. § 2301, et seq., and regulations thereunder, and does not unduly burden interstate commerce; therefore, this State requirement shall be applicable to warranties complying with the Magnuson-Moss Warranty Act for so long as the state administers and enforces effectively such greater requirement.

(4) California Civil Code § 1797.5, which provides that mobile home dealers display a notice stating the existence of a one-year warranty and a sample copy of such warranty, does not afford protection to consumers greater than the requirements of the Warranty Act, 15 U.S.C. § 2301, et seq., and regulations thereunder, and therefore shall not be applicable to warranties complying with that Act.

Recently, you requested an additional hearing under the Warranty Act on recent amendments to the Song-Beverly Act. Specifically, you requested a Commission determination that 1790.4, 1791, 1793.3 and 1794.1 and the new Civil Code Section 1793.6, which went into effect January 1, 1977, afford protection to consumers greater than the requirements of the Warranty Act and do not unduly burden interstate commerce. However, since none of the amendments relate to labeling of or disclosures in written warranties, the Commission has determined that these provisions are outside the scope of § 111(c) of the Warranty Act and thus not subject to preemption under that section. The Commission believes, therefore, that a hearing on this matter is unnecessary.

In your most recent letter you also requested the Commission's opinion whether state enforcement of requirements determined to be excepted from the preemption section of the Warranty Act by § 111(b)(1) preserving consumer rights and remedies, is nevertheless barred by operation of the preemption provision. The Commission sees no reason why the state cannot enforce such requirements.

By direction of the Commission.

CAROL M. THOMAS,
Secretary.

Enclosure.

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By direction of the Commission.

Issued: October 4, 1977.

CAROL M. THOMAS,
Secretary.

[FR Doc.77-29035 Filed 10-3-77;8:45 am]

[6820-14]

GENERAL SERVICES ADMINISTRATION

[FPMR Temporary Reg. 41]

AGENCY PROCUREMENT REQUESTS FOR AUTOMATED DATA PROCESSING EQUIPMENT, SOFTWARE, MAINTENANCE SERVICES, AND SUPPLIES

General Services Administration Action

1. *Purpose.* This regulation temporarily suspends the requirement in § 1-4.1105 (b) for GSA to take action on an agency procurement request (APR) within 20 workdays.

2. *Effective date.* This regulation is effective September 23, 1977.

3. *Expiration date.* This regulation will continue in effect until March 31, 1978.

4. *Background. a.* The number of APR's received from Federal agencies over the past few months has increased significantly. At the same time, congressional interest has been expressed in many ADP procurements. Due to the increased workload, it has become more and more difficult for GSA to meet the prescribed 20 workday response time. The result has been that agencies have proceeded without a substantive GSA review. A continuing absence of these reviews is inconsistent with GSA's responsibilities under Section 111 of the Federal Property and Administrative Services Act of 1949, as amended (40 U.S.C. 759) (Pub. L. 89-306, the Brooks Act). Accordingly, it is desirable to prescribe an alternate procedure for use on an interim basis.

b. In view of the foregoing circumstances it is appropriate and necessary to suspend temporarily the requirement in § 1-4.1105(b) for GSA to take action on an APR within 20 workdays. GSA will make every effort to expedite its action on each APR. In view of the potential impact on fulfillment of agency needs, GSA will continue to seek an early, more satisfactory solution to this problem.

5. *Effect on other issuances.* Section 1-4.1105 is amended to read as follows:

§ 1-4.1105 GSA action on procurement requests.

• • • • •

(b) Expeditious action will be taken by GSA after receipt of full information from an agency involving a request for procurement as provided in § 1-4.1104. Agencies shall not proceed with the procurement until a delegation of authority has, in fact, been granted.

SEPTEMBER 23, 1977.

JAY SOLOMON,
Administrator of General Services.

[FR Doc.77-29101 Filed 10-3-77;8:45 am]

[6820-14]

[FPMR Temporary Reg. 42]

CHANGES IN THE SMALL BUSINESS ACT BY PUB. L. 95-89

1. *Purpose.* This regulation provides an interim implementation of Pub. L. 95-89, which amended the Small Business Act.

2. *Effective date.* This regulation is effective ————.

3. *Expiration date.* This regulation will continue in effect until canceled.

4. *Background.* Pub. L. 95-89, August 4, 1977, amended the Small Business Act. Title V—Procurement Assistance, of the public law expanded the authority of the Small Business Administration (SBA) to certify the responsibility of small business concerns for both purchases and sales, to establish priorities regarding the award of contracts to small business and labor surplus area concerns, and to prescribe procedures applicable to awards to small business concerns involving the Walsh-Healey Act.

5. *Agency action.* Agencies shall comply with the provisions of the Small Business Act, as amended by Public Law 95-89, when the provisions of the FPR are inconsistent with the provisions of the Act.

6. *Effect on other issuances.* a. To the extent that the provisions and clauses in the FPR are inconsistent with Pub. L. 95-89, the provisions of the Act apply. A formal amendment of the FPR which implements the Act will be issued as soon as possible.

b. The following provisions (not necessarily all inclusive) of the FPR are affected and will require modification:

(1) *Certificate of Competency program, § 1-1.708.* The FPR provisions which restrict SBA's authority to "capacity and credit" only are modified by the Act to grant SBA statutory authority to certify the competency of any small business concern with respect to all elements of responsibility, including but not limited to capability, competency, capacity, credit, integrity, perseverance, and tenacity.

(2) *Walsh-Healey Public Contracts Act, Subpart 1-12.6.* The FPR requirement that the contracting officer provide findings of ineligibility and supporting documentation to the Wage and Hour Division of the Department of Labor is modified by the Act with respect to small business concerns. SBA is authorized under the Act to dismiss findings of ineligibility or, where SBA concurs in the contracting officer's findings, SBA is required to refer the matter to the Department of Labor for final decision.

(3) *Procurement set-asides for small business, § 1-1.706, and Labor surplus area policies, § 1-1.802.* (a) The FPR priorities in carrying out set-aside programs are modified by the Act. Section 502(e) of the Act includes the following requirement:

(e) In carrying out labor surplus areas and small business set-aside programs, departments, agencies, and instrumentalities of the executive branch shall award contracts, and encourage the placement of subcontracts for procurement to the following in the manner and in the order stated:

(1) Concerns which are located in labor surplus areas, and which are also small business concerns, on the basis of a total set-aside.

(2) Concerns which are small business concerns on the basis of a total set-aside.