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PART III:

FEDERAL TRADE COMMISSION

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DISCLOSURE OF WRITTEN CONSUMER PRODUCT WARRANTY TERMS AND CONDITIONS, PRE-SALE AVAILABILITY OF WRITTEN WARRANTY TERMS, AND INFORMAL DISPUTE SETTLEMENT MECHANISMS

Rules, Regulations, Statements and Interpretations Under Magnuson-Moss Warranty Act

Title 16—Commercial Practices

CHAPTER I—FEDERAL TRADE COMMISSION

SUBCHAPTER C—RULES, REGULATIONS, STATEMENTS, AND INTERPRETATIONS UNDER MAGNUSON-MOSS WARRANTY ACT

PART 701—DISCLOSURE OF WRITTEN CONSUMER PRODUCT WARRANTY TERMS AND CONDITIONS

PART 702—PRE-SALE AVAILABILITY OF WRITTEN WARRANTY TERMS

I. History of the Proceeding. The Federal Trade Commission, pursuant to Title I, sections 109 and 110 of the Magnuson-Moss Warranty—Federal Trade Commission Improvement Act, Pub. L. 93-637 (15 U.S.C. §§ 2309, 2310), hereafter referred to as "the Act", has conducted a proceeding for the promulgation of two Rules, one setting forth the terms and conditions to be disclosed in written consumer product warranties, and another setting forth requirements for making written warranties available to consumers prior to sale.

Notice of this proceeding, including the proposed rules, was published in the FEDERAL REGISTER on July 16, 1975 (40 FR 29895 (1975)). The notice urged all interested persons to express their approval or disapproval of the proposed rules, or to recommend revisions thereof, and to give a full statement of their views, supplemented by all appropriate documentation. The documents supporting the proposed rules, and a report of the Commission staff discussing the proposed rules and the supporting documentation, were placed on the public record and made available for examination and copying.

Interested parties were thereafter afforded opportunity to participate in the proceeding through the submission of written data, views and arguments, and to appear and express their views orally and to suggest amendments, revisions, and additions to the proposed rules. A period of 60 days was allowed for submission of written comments on the proposed rules. Public hearings, as announced in the notice, were held in Washington, D.C., September 15–18, 1975; in Chicago, Illinois, September 22–25, 1975; in Los Angeles, California, September 29 through October 1, 1975; and in San Francisco, California on October 2, 1975. Every person who had expressed a desire to present his or her views orally at these hearings was accorded an opportunity to do so. The public record remained open thirty days following the hearings for receipt of any other written data, views or arguments.

Upon careful analysis and review of the written and oral comments, the Commission has made certain modifications to the proposed Rules published July 16, 1975. The rules, the rationale for the modifications, and the record relating thereto, are discussed within the Statement of Basis and Purpose appearing below as part of this notice. The modifications do not raise issues of law or fact which were not fully addressed in and supported by the record. Therefore the Commission is promulgating these rules without further invitation for comment on the modifications.

II. *Background.* (A) *The Magnuson-Moss Warranty Act.* Recognizing the need for minimum warranty protection for consumers, for consumer understanding of warranties, for assurance of warranty performance, and for better product reliability, the 93rd Congress passed the Magnuson-Moss-Federal Trade Commission Improvement Act,[1] which was signed into law on January 4, 1975.

An examination of the legislative history of the Act reveals the congressional intent in requiring the disclosure of written warranty terms and conditions. The statements of Messrs. Moss and Magnuson in introducing the warranty legislation, as well as the Senate Report accompanying the legislation, highlight the need for warranty disclosures.

Congressman Moss, stated:

> "The need for warranty reform has become apparent ever since the mid-sixties, when the Federal Trade Commission and the Senate Commerce Committee began investigating consumer product warranties.
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> . . . One of the most important effects of this bill will be its ability to relieve consumer frustration by promoting understanding and providing meaningful remedies. This bill should also foster intelligent consumer decisions by making warranties understandable. At the same time, warranty competition should be fostered since consumers would be able to judge accurately the content and differences between warranties and competing consumer products . . .
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> Perhaps one of the potentially most important and long range effects of this bill resides in its attempt to assure better product reliability. The bill . . . attempts to organize the rules of the warranty game in such a fashion as to stimulate manufacturers, for competitive reasons, to produce more reliable products. This is accomplished using the rules of the marketplace by giving the consumer enough information and understanding about warranties so as to enable him to look to the warranty duration of a guaranteed product as an indicator of product reliability."[2]

As further illumination on the background and need for the warranty legislation, and for disclosure of written warranty terms, the Senate report accompanying S. 356,[3] the Senate version of the warranty legislation, stated:

> For many years warranties have confused and misled the American consumer. A warranty is a complicated legal document whose full essence lies buried in myriads of reported legal decisions and in complicated State codes of commercial law. The consumer's understanding of what a warranty on a particular product means to him frequently does not coincide with the legal meaning.
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> This was not always the case. When the use of a warranty in conjunction with the sale of a product first became commonplace, it was typically a concept that the contracting parties understood and bargained for, usually at arms length. One could decide whether or not to purchase a product with a warranty and bargain for that warranty accordingly. Since then, the relative bargaining power of those contracting for the purchase of consumer products has changed radically. Today, most consumers have little understanding of the frequently complex legal implications of warranties on consumer products. Typically, a consumer today cannot bargain with consumer product manufacturers or suppliers to obtain a warranty or to adjust the terms of a warranty voluntarily offered. Since almost all consumer products sold today are typically done so with a contract of adhesion, there is no bargaining over contractual terms. S. 356 attempts to remedy some of the defects resulting from this gross inequality in bargaining power, and return the sense of fair play to the warranty field that has been lost through the years as the organizational structure of our society has evolved. The warranty provisions of S. 356 are not only designed to make warranties understandable to consumers, but to redress the ill effects resulting from the imbalance which presently exists in the relative bargaining power of consumers and suppliers of consumer products."[4]

Senator Magnuson's remarks in introducing S. 356 to the Senate also described the necessity for requiring disclosure of warranty terms and conditions:

> ". . . [W]arranties have for many years confused, misled, and frequently angered American consumers . . . Consumer anger is expected when purchasers of consumer products discover that their warranty may cover a 25-cent part but not the $100 labor charge or that there is full coverage on a piano so long as it is shipped at the purchaser's expense to the factory . . ."
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> ". . . [T]he bill is designed to promote understanding. Far too frequently, there is a paucity of information supplied to the consumer about what in fact is offered him in that piece of paper proudly labeled 'warranty.' Many of the most important questions concerning the warranty are usually unanswered when there is some sort of product failure. Who should the consumer notify if his product stops working during the warranty period? What are his responsibilities after notification? How soon can he expect a fair replacement? Will repair or replacement cost him anything? There is a growing need to generate consumer understanding by clearly and conspicuously disclosing the terms and conditions of the warranty and by telling the consumer what to do if his guaranteed product becomes defective or malfunctions. Presently the consumer only learns of the extent of his warranty coverage when his guaranteed product becomes defective or malfunctions and he is told that the guarantee in question does not cover the part that failed, or that the retailer does not handle the manufacturer's repair work, or that the guarantee does not cover labor costs and so forth."[5]

The Act, among other things, provides disclosure standards for written consumer product warranties. The Proposed Rule on Warranty Disclosures was based upon the disclosure requirements set forth in Section 102(a) of the Act. The Act also requires the Commission to prescribe rules to assure the availability of warranty information prior to the actual

[1] Magnuson-Moss Warranty-Federal Trade Commission Improvement Act, 15 U.S.C. 2301 *et seq.*

[2] 119 Cong. Rec. 972 (January 12, 1973) (remarks of Congressman Moss).

[3] Senate Comm. on Commerce, Report on S. 356, S. Rep. No. 93-151, 93d Cong., 1st Sess. (1973) [hereinafter referred to as "Senate Report"].

[4] *Id.*, at 6.

[5] 119 Cong. Rec. 968 (January 12, 1973) (remarks of Senator Magnuson).

pliers of consumer products."[4]

purchase. The Proposed Rule on Pre-Sale Availability of Written Warranty Terms was based on the authority given to the Commission in Section 102(b)(1)(A) of the Act.

(B) *FTC Guides Against Deceptive Advertising of Guarantees.* The items authorized for disclosure in written warranties in Section 102(a) of the Act are substantially the same as those which have been required by the Commission's *Guides Against Deceptive Advertising of Guarantees* (the "*Guides*"),[6] which codify the FTC case law concerning disclosure requirements for warranties. The *Guides*, applicable to both actual warranty documents and advertisements of warranties, enunciate the policy that in conjunction with any representation that a product is guaranteed there must be full and accurate disclosure of the terms, conditions, and limitations of such guarantee. As stated in the *Guides*, the representation must disclose the nature and extent of the guarantee, 16 CFR 239.1(a), the manner in which the guarantor will perform, 16 CFR 239.1(b), and the identity of the guarantor. The *Guides* also contain special provisions dealing with pro-rata adjustment of guarantees, "satisfaction or your money back" representations, lifetime guarantees, savings guarantees, and guarantees under which the guarantor does not or cannot perform. Since the Guides were promulgated in 1960, there have been well over 1,000 informal actions under them. The *Guides* have been cited in several cases and advisory opinions rendered by the Commission.[7]

With the proliferation of new products on the market and the increased use of product warranties as marketing devices in recent years, new problems in the area of warranties have arisen which necessitate a revision of the 1960 *Guides*. The steady influx of consumer complaint letters regarding warranties serves as further indication of the need to expand the *Guides* to encompass a wider range of warranty problems.[8]

(C) *House Interstate and Foreign Commerce Committee, Subcommittee on Commerce and Finance Staff Report On Consumer Product Warranties.* The staff of the House Interstate and Foreign Commerce Committee, Subcommittee on Commerce and Finance, at the direction of Chairman John E. Moss, published a study on September 17, 1974 concerning consumer product warranties currently being used in commerce.[9] The purpose of this study was to determine the effect of various government studies, including *The President's Task Force Report on Appliance Warranties and Service*[10] and the 1966 FTC investigation of automobile warranties, as well as voluntary action throughout the past decade on the quality of warranties for consumer products presently on the market. The staff of the House Commerce and Finance Subcommittee examined approximately 200 warranties from 51 American manufacturers. The products involved included household appliances, mobile homes, automobiles, television and radio receivers and stereo equipment. The Subcommittee staff found that no significant changes had occurred in warranty documents since 1969. According to the staff report:

"(A)ny actions taken on the part of manufacturers and trade associations to clean up these guarantees during the past five years appear to have had minimal results. These certificates, often marked 'WARRANTY' and printed on good quality paper with a fancy filigree border, in many cases serve primarily to limit obligations otherwise owed to the buyer as a matter of law. This is done by disclaimers and exemptions and by ambiguous phrases and terms. All too often the warranties shroud and effectively cover-up the obligations of the seller." [11]

The conclusion of Congressman Moss highlighted the need for action on warranties: "It is all but fraud when a guarantee declares in large print that the manufacturer is giving protection to the buyer and in the fine print attempts to take away common-law buyer protection." [12]

(D) *NBCCA and MACAP Reports.* The business community, too, has recognized the need to re-examine and reformulate current warranties. A report "Product Warranties: Business Guidelines to Meet Consumer Needs," written by the Sub-Council on Warranties and Guarantees of the National Business Council for Consumer Affairs [13] reflects the business community's own interest in straightforward warranty content. The Council, composed of over 100 business leaders, was established by former President Richard M. Nixon in 1971 for the purpose of advising the Federal government on consumer affairs. The Sub-Council's report represents an effort to assist the business community in re-examining its warranty policies and practices in the light of consumer expectations. It recommends action which businesses might take to improve warranty practices.

The Major Appliance Consumer Action Panel (MACAP), sponsored by the Association of Home Appliance Manufacturers (AHAM), the Gas Appliance Manufacturers Association (GAMA), and the National Retail Merchants Association (NRMA), has conducted two studies on warranties in the major appliance industry.[14] The first study, conducted in 1971–72, analysed seventy warranties voluntarily submitted by members of the industry. These were evaluated against recommended warranty guidelines drafted by the Panel.

A more extensive follow-up study, undertaken in 1973, elicited response from 106 companies. In the 1973 study, the Panel's evaluation criteria were drawn from the appliance industry's voluntary recommended guidelines, published by the three associations that sponsor MACAP. The 1973 study found that 75% of the appliance industry was in compliance with MACAP's guidelines. The same degree of compliance was cited in MACAP's 1971–72 study. Only 17 of the 106 warranties submitted fulfilled all the guidelines. The appliance industry's inability to meet even industry-established criteria for warranties, as evaluated by industry members, lends further support for the necessity for Commission action on warranty disclosure.

III. Disclosure of Written Consumer Product Warranty Terms and Conditions. The items required for disclosure by this Rule are material facts about product warranties, the non-disclosure of which constitutes a deceptive practice.

Numerous Commission decisions [15] have affirmed the principle that the failure to disclose material facts in circumstances where the effect is to deceive a substantial segment of the purchasing public is a violation of Section 5 of the Federal Trade Commission Act.[16]

In addition to these cases, the Commission's Octane Rule [17] and Light Bulb Labeling Rule [18] indicate that the failure to disclose facts which are essential to

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[6] *Guides Against Deceptive Advertising of Guarantees*, 16 CFR 239, adopted April 26, 1960.

[7] See, e.g. *Fingerhut Manufacturing Company, et al.*, 65 F.T.C. 751 (1964), *Consolidated Sewing Machine Co.*, etc. 71 F.T.C. 356 (1967), *Benrus Watch Company, Inc., et al.*, 64 F.T.C 1018 (1964), *Wilmington Chemical Corporation, et al.*, 69 F.T.C. 828 (1966), *Montgomery Ward Co., Inc.* 70 F.T.C. 52, *affirmed* 379 F. 2d 666 (7th Cir. 1967) *Scott Mitchell House, Inc., et al.*, 73 F.T.C. 523 (1968), Advisory Opinion No. 248 (1968), Advisory Opinion No. 100 (1966), Advisory Opinion No. 427 (1970).

[8] FTC Warranty Complaints Tabulation, FTC Correspondence Section, July 7, 1975.

[9] Staff of House Interstate and Foreign Commerce Comm., Subcomm. on Commerce and Finance, Report on Consumer Product Warranties (1974) ("House Subcomm. Staff Report").

[10] Task Force On Appliance Warranties and Service, The President's Task Force Report On Appliance Warranties and Services (1969).

[11] House Subcomm. Staff Report, *supra* note 9, at 30.

[12] Washington Post, Sept. 19, 1974, § B, at 16, col. 1.

[13] Sub-Council on Warranties and Guarantees of the National Business Counsel For Consumer Affairs Product Warranties: Business Guidelines to Meet Consumer Needs (1972) [hereinafter "NBCCA Report"].

[14] Major Appliance Consumer Action Panel, MACAP Analysis of Major Appliance Warranties (1971, 1973 ("MACAP Report").

[15] See cases cited in Statement of Basis and Purpose, Trade Regulation Rule for the Prevention of Unfair and Deceptive Advertising and Labeling of Cigarettes in Relation to Health Hazards of Smoking (1961), 23 Fed. Reg. 8324 (July 2, 1964) (hereinafter referred to as Cigarette Statement), at 8351–8352, nn. 73, 74 and 75.

[16] 15 U.S.C. 45.

[17] Statment of Basis and Purpose to accompanying Trade Regulation Rule on Posting of Minimum Octane Numbers on Gasoline Dispensing Pumps (hereinafter cited as Octane Rule) 1972, at 8: "Failure . . . to identify the gasoline . . . may constitute a *deception* and an unfair trade practice in that it fails to provide the consumer with a criterion to which he can relate the gasoline with engine requirements of his automobile."

[18] Statement of Basis and Purpose accompanying Trade Regulation Rule on Incandescent Lamp (Light) Industry; Failure to Disclose Lumens, Life Cost and Other Data ("the Light Bulb Rule") (1972).

the consumer's ability to make an informal purchasing decision is a deceptive practice. Likewise, the failure to disclose information about consumer product warranties which is material to the making of an intelligent and knowledgeable consumer choice is deceptive.

Under the "technical truth" rule,[19] a claim or representation which is literally true is found to be deceptive because of a failure to disclose material facts that qualify and explain the claim. The rationale behind this principle is that the deception stems from the false or misleading impression which is created in the mind of the consumer by virtue of the fact that the claim is removed from its proper context. The concern is with the truth as viewed by the consumer, rather than with the technical truth. As a further example of the application of this Rule, the Commission, in *Clinton Watch Co.*[20] held that it was a deceptive trade practice for the respondent watch manufacturer to advertise a "lifetime guarantee" without disclosing that there was a charge for warranty service. Likewise, the failure to disclose all conditions, limitations, and exclusions as to product warranties renders any affirmative claims about warranties deceptive. "To tell less than the whole truth is a well known method of deception."[21] By the same token, absolute silence on a material fact may be deceptive where the public assumes from this silence that a state of facts exists when, in fact, affirmative disclosure would reveal that these assumptions are unfounded. In such instances, the consumer's normal and reasonably foreseeable expectations are exploited, and a false or misleading impression is created.

The omission of any material terms or conditions from a warranty may prevent the intelligent use of the warranty as informational input into the consumer's purchasing decision, and may contribute to the generation of unrealistic consumer expectations about product reliability or efficacy. Thus, consumers may be induced to make purchases that they would not otherwise have made, with a resulting gap between anticipated and actual product and warranty performance.

Silence on the subject of product warranties and warranty terms can lead consumers to make erroneous assumptions and decisions. For example:

(1) In the absence of a disclosure as to the identity of the warrantor, the consumer might assume that the warrantor is the retailer, whereas in fact the warrantor might be the manufacturer.

(2) If a warrantor is silent as to which parts, components, characteristics or properties are covered by the warranty, the consumer might erroneously assume that warranty coverage is more extensive than it actually is.

(3) Silence as to the fact that limitations on implied warranties are unenforceable in certain states may erroneously lead consumers in such jurisdictions to assume that the warranty document states the full extent and limit of their warranty rights.

These examples illustrate some of the ways in which some warranty documents in their current form can have the capacity or tendency to mislead consumers. Affirmative disclosure of warranty terms will serve to eliminate deception by providing material facts, the absence of which could lead consumers into purchasing one product, instead of a competing item, on the basis of what is ostensibly a better, more extensive warranty, but which in fact provides more limited coverage and fails to fully disclose all of its conditions and limitations. A requirement of minimum uniformity in warranty disclosures should enable consumers to make valid and informed comparisons of warranties for similar products, and insofar as their purchasing decisions are influenced by such comparisons, better able to make educated buying choices.

IV. The Final Rule. 1. *§ 701.1 Definitions.* Except as discussed below, the definitions in the final Rule are those set forth in proposed Part 701. As the definitions used in Part 702 have been made to conform to the corresponding definitions in Part 701, the following discussion applies to both Parts.

The definitions given in the proposed Rule for "The Act", "written warranty", "implied warranty", "remedy", "supplier", and "binder" have not been modified. With the exception of the terms "The Act" and "binder", the definitions correspond to those used in the Act. No substantial comment was received as to the use of these definitions.

a. *"Consumer product", "consumer" and "seller".* Comments from Standard Oil Co. of Indiana, Mohasco Corporation and others concerning the definitions of "consumer product" and "consumer" stated that the proposed Rule did not deal adequately with the problem of industrial or commercial use of products normally used for personal, family, or household purposes.[22] Several comments including those of Toyota Motor Sales, and the National Sporting Goods Association, recommended that warranties extended to commercial or industrial users of consumer goods should be exempted from the requirements of the Act.[23] O. M. Scott and Sons claimed that the proposed Rule would have allowed industrial users to put consumer goods to commercial use and then to claim the benefits of warranty protection intended for consumers.[24]

For the purposes of these rules only, the definition of "consumer product" was amended by adding the following language: "Products which are purchased solely for commercial or industrial use are excluded solely for purposes of this Part". Paralleling this revision, the following underlined language was inserted in the definition of "consumer": "Consumer" means a buyer (other than for purposes of resale *or use in the ordinary course of the buyer's business* of any consumer product . . ."[25]

The definition of "seller" was revised as follows: " 'Seller' means any person who sells or offers for sale for purposes other than resale *or use in the ordinary course of the buyer's business* any consumer product."[26] This definition was changed to conform to the definition adopted for "consumer". It is not the Commission's intent to apply these rules to purely commercial users.

b. *"Warrantor".* Sears Roebuck and Co. ("Sears") suggested that the definition of "warrantor" be limited to those offering written warranties and not include those only obligated under implied warranties. As proposed, the definition of "warrantor" would have made a seller who did not offer a written warranty of his own, but who was obligated under an implied warranty by operation of law, a "warrantor," and thus subject to the duties of a "warrantor" as well as a "seller" under § 702.3.[27]

Exxon Co. and Engine Service Associates, Inc. commented on the addition of the language ". . . arising under state law . . . in connection with the sale by a supplier." in § 702.1(d).[28]

For the purposes of these rules, the definition of "warrantor" has been redrafted to include only persons who give or offer to give a written warranty. The Commission concluded that the Act's definition was overly broad for purposes of a rule concerning disclosures in written warranties.

c. *"On the face of the warranty."* Section 108 of the Act[29] and section 701.3(a)(7) of the final Rule require that any

[19] *P. Lorillard Co.* v. *FTC*, 186 F. 2d 52 (4th Cir 1950).

[20] 57 FTC 222, aff'd sub nom. *Clinton Watch* v. *FTC*, 291 F. 2d 838 (7th Cir. 1961).

[21] *P. Lorillard Co.* v. *FTC*, 186 F. 2d 52, 58 (4th Cir. 1950).

[22] (The Public Record is hereinafter cited as "R".) R 1-3-1, 11-12, O. M. Scott & Sons; R 1-3-1, 56, Mohasco Corp.; R 1-3-2, 678-79, Toyota Motor Sales, U.S.A., Inc.; R 1-3-2, 694, Standard Oil Co. Indiana; R 1-4-1, 21 National Sporting Goods Association; R 1-6, 156, Connecticut Citizen Research Group.

[23] R 1-3-1, 56, Mohasco Corp.; R 1-3-2, 678-79, Toyota Motor Sales, U.S.A., Inc.; R 1-4-1, 21, National Sporting Goods Association.

[24] R 1-3-1, 11, O. M. Scott & Sons.

[25] "Many products 'normally' bought by consumers are also purchased by industrial and commercial accounts for uses other than resale, i.e., they may be consumed entirely in the process of manufacture or indirectly become components in products for eventual resale, and so on. Much of the difficulty could be eliminated by inserting the underlined language as follows:

" 'Consumer' means a buyer (other than for purposes of resale or *other use in buyer's ordinary course of business*) . . ." R 1-3-2, 694, Standard Oil Co. (Indiana).

". . . (R)evise Section 701.1(h) so that it reads as follows: 'Consumer' means a buyer (other than for purposes or resale *or for purposes of use in its ordinary course of business*) . . ."

[26] "Similarly, the definition of 'seller' in § 702.1(e) should be revised as follows: 'Seller' means any person who sells or offers for sale for purposes other than resale *or other use in buyer's ordinary course of business* any consumer product." R 1-3-2, 695, Standard Oil Co. (Indiana).

[27] R 1-3-2, 657, Sears Roebuck & Co.

[28] R 1-3-2, 427, Exxon Company, U.S.A.; R 1-4-1, 226, Engine Service Association, Inc.

[29] Section 108(b) of the Act states that ". . . (implied warranties may be limited in duration . . . if such limitation . . . is set forth in clear and unmistakable language and prominently displayed on the face of the warranty."

mitations on the duration of implied arranties be disclosed "on the face of ıe warranty."

Section 104 of the Act requires that ı warrantor" offering a full warranty . . may not exclude or limit conseıential damages for breach of any writ·n or implied warranty on such prodct, unless such exclusion or limitation ɔnspicuously appears on the face of the arranty." [30]

The definition of "on the face of the arranty" was added to clarify the reıired location of disclosures under Secons 104(a)(3) and 108(b). The final ule provides:

"(i) On the face of the warranty ıeans—

(1) where the warranty is a single ıeet with printing on both sides of the ıeet, or where the warranty is comrised of more than one sheet, the sheet ɔ which the warranty text begins;

(2) where the warranty is included as art of a longer document, such as a use nd care manual, the page in such docment on which the warranty text egins."

The intent of this definition is to place nportant warranty information on page ne of the multipage warranty where it an easily be scanned by a reader reviewıg the designation(s). The "face" of a ne page, one sided document is evident.

2. § *701.3 Disclosure of Written warıanty terms. Scope of the Rule. "Actuıly Costing the Consumer More than 15.00."* Section 701.3 of the Proposed ule required a warrantor warranting consumer product "actually costing the ɔnsumer more than $5.00" to make the equired disclosures. The duties of the ller and the warrantor in proposed art 702 were also triggered by the $5.00 ıreshold. Comments on the Record [31] ıggested that the final rules raise the hreshold from $5.00 to a higher level.[32]

Two principal reasons were given for this suggestion:

(1) the cost of complying with the requirements of Parts 701 and 702 would be prohibitive in relation to the selling price of the product;[33] and the extra cost would force manufacturers to eliminate their warranty programs on the inexpensive items, and thus, the Congressional purpose of expanding the availability of warranties would be frustrated; [34] and

(2) since consumers rarely read warranties on relatively inexpensive items, requiring compliance with Part 701, thus increasing the length of the warranty, would further discourage the consumer from reading warranties prior to sale.[35]

The Commission has concluded that applying these rules only to products actually costing the consumer more than $15.00 would be in the public interest. Although the rules have been modified to eliminate unnecessary burdens, they will impose a compliance obligation. Although reasonable, this obligation is not a costless endeavor. The Commission is persuaded that existing disclosure and availability practices pertaining to inexpensive products, while far from perfect, have not caused substantial harm to the public. The need for warranty information before and after a purchase is affected by the cost of the product involved. Section 102(3) of the Act recognizes this fact. Faced with the possibility that compliance with these rules may result in a decision by warrantors not to offer written warranties, the Commission has concluded that, for these products, some warranty information is likely to be better than none at all. This conclusion is buttressed by the recognition that Section 5 of the Federal Trade Commission Act and Section 110 of this Act provide ample authority to deal with unfairness and deception in the warranty practices associated with inexpensive products. The Commission will not hesitate to use this authority where the public interest requires action.

The remaining question is whether the Act gives the Commission the authority to raise the $5.00 figure. Section 102(e) provides:

The provisions of this section apply only to warranties which pertain to consumer products actually costing the consumer more than $5.

In response to a request from the Commission staff, the National Consumer Law Center submitted that the Commission does not have the authority to raise the $5 figure.[36]

Generally, courts have held that an agency has wide discretion in interpreting a statute and that any agency decision should be given great deference by a reviewing court.[36a] *Red Lion Broadcasting* v. *FCC*, 395 U.S. 367, 381 (1969). The Court in *Red Lion* stated:

. . . Agency construction of a statute should be followed unless there are compelling indications that it is wrong.

Moreover, deference to agency discretion is particularly high where the interpretation involves the first implementation of the statute, in other words, the "setting up of the machinery".

When faced with a problem of statutory construction this court shows great deference to the interpretation given the statute by the officers or agency charged with its administration. . . . Particularly is this respect due when the administrative practice at stake 'involves a contemporaneous construction of a statute by the men charged with the responsibility of setting its machinery in motion, of making the parts work efficiently and smoothly while they are yet untried and new'. *Udall* v. *Tallman*, 380 U.S. 1, 16 (1964) citing in part *Power Reactor Co.* v. *Electricians*, 367 U.S. 396, 408 (1960)

The legislative intent and the public policy behind the Act make it clear that the Commission has the authority to raise the $5 figure.

There are two possible constructions of Section 102(e) of the Act. The first is that Congress intended affirmatively to *include* all consumer products costing $5 and above within the scope of the Act. The second is that Congress only wanted to *exclude* all consumer products below $5 from protection of the Act. In other words, paragraph (e) was intended to impose a limit on Commission authority to apply Section 102 to products below $5 but not to prohibit the Commission from exercising discretion to select a *higher* threshold. Under this interpretation, the products Congress intended to exclude would still be excluded by the higher figure set by the Commission.

The legislative history of the Act supports the latter interpretation. The most important evidence of the intent behind Section 102(e) is the Conference Committee Report. The Report section dealing with dollar limitations, speaks of "exclusion". The Report shows that Congress was concerned with what was excluded rather than with what was included.[37]

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[30] § 104(a)(3).

[31] The Public Record of this proceeding ɔnsists of 2546 pages of transcript from the ublic hearings (hereinafter cited as "Tr."), ve volumes of staff submissions including ıe staff report, R 215-47-1-2, Vols. 1-5 hereinafter cited as R 1-2), three volumes f comments from business, R 215-47-1-3, ols. 1-3 (hereinafter cited as R 1-3), two ɔlumes of comments from trade associaons, R 215-47-1-4, Vols. 1-2 (hereinafter ited as R 1-4), one volume of comments ·om individual consumers, R 215-47-1-5, hereinafter cited as R 1-5), one volume of ɔmments from consumer groups, R 215-47--6 (hereinafter cited as R 1-6), one volume f submissions from federal agencies and ıembers of Congress, R 215-47-1-7 (hereıafter cited as R 1-7), one volume of subıissions from state agencies and officials, . 215-47-1-8 (hereinafter cited as R 1-8), ne volume of submissions from academiians, R 215-47-1-9 (hereinafter cited as . 1-9), and one volume of Exhibits, R 215-7-1-13 (hereinafter cited as 1-13).

[32] R 1-3-1, 40-41, Purolator, Inc.; R 1-4-1, 93-584, American Apparel Manufacturers ɔciation (AAMA); R 1-3-3, 1114, Midland ɔperatives, Inc.; R 1-4-2, 691, Association f Home Appliance Manufacturers (AHAM); 1-4-2, 693, National Retail Merchants Asɔciation (NRMA).

[33] R 1-3-1, 38, Purolator, Inc.; R 1-4-1, 152, American Institute of Nail and Tack Manufacturers; R 1-4-1, 583, AAMA; R 1-3-3, 1114, Midland Cooperatives, Inc.; R 1-4-2, 693, NRMA.

[34] R 1-4-1, 152, American Institute of Nail and Tack Manufacturers; R 1-4-2, 691, AHAM; R 1-4-2, 693, NRMA.

[35] R 1-3-1, 38, Purolator, Inc.; R 1-3-3, 1114, Midland Cooperatives, Inc.; R 1-4-2, 693, NRMA.

[36] R 1-6, 160, National Consumer Law Center, Inc.

[36a] See also *In the Matter of Hollow Tree Lumber Company*, 91 N.L.R.B. 635 (1950). In that case the Board noted its long standing practice not to exercise its jurisdiction to the fullest extent possible under the authority delegated to it by Congress since such practice would better effectuate the purposes of their Act. The Board required that a certain dollar level be reached before they would invoke jurisdiction. Similarly here, the Commission would require a certain dollar level to be reached ($15) for implementation of the Act.

[37] H.R. Rep. No. 1589, 93d Cong. 2d Sess. 24 (1974):

"3. Dollar Limitations

Under the Senate bill, the labeling and designation provisions applied only to consumer products actually costing $5 or more. Any warrantor who was selling a consumer product costing less than $5 who used the full warranty designation would have been

Footnote continued on next page

Consequential use of the word "only" in section 102(e) indicates an intention to *exclude* those items under $5. If the Congress had opted for an "inclusion" approach it is likely that the statute would have read, "this section *shall* apply to *all* products actually costing more than $5."

The $15 figure was chosen in order to gain the benefits of raising the $5 figure outlined previously, without losing coverage of any significant consumer products.

Guenther Baumgart, on behalf of the Association of Home Applicance Manufacturers, pointed out that a $15 figure would still bring almost all portable appliances within the purview of the Act, stating:

"Assuming for a moment that the threshold limit was raised to $15.00 (our recommendation), we feel that it would encourage the protection of the consumer rather than removing such protection. At a $15.00 threshold limit all of the major portable appliances such as an automatic drip coffeemaker, rotisserie, electric skillet would still come within the purview of the Act. The portable appliances excluded from the Act would be such marginal items as a corn popper or bun warmer . . . By raising the threshold limit manufacturers would be encouraged to continue warranties on present marginal items." [38]

Accordingly, Parts 701 and 702 have been amended, raising the threshold amount which triggers the duties under those parts, to $15.00.

"In a single document". The proposed Rule required that the items of warranty information be disclosed "in a single document." Many comments by warrantors were received, citing the potential costs and other difficulties of a "single document" requirement. Westinghouse Electric Corporation, National Electrical Manufacturers Association ("NEMA"), and others said that it was normal for warranties to be printed on the front, back, or middle page of a use and care manual,[39] especially in the appliance industry.[40] The Waltham Watch Company and the National Association of Chain Drug Stores argued that the reprinting of such manuals, to conform with the single document rule, would be unreasonably costly.[41] NEMA also suggested that imprinting the warranty directly on the product [42] might not conform to a "single document" rule.

The Air Conditioning and Refrigeration Institute argued that if the warranty were required to be separate from the manual of operating instructions, it would be more likely to get lost, whereas a manual, which could contain the warranty, would more likely be retained and used by the consumer.[43]

Standard Oil suggested that, in some instances, it would be physically impossible to put all the specifications and standards referenced in the warranty in a single document.[44] They estimated that literal compliance with "the single document" rule would add approximately $192,500 in annual costs.[45]

These comments reflect a misapprehension of the purpose of the single-document language". "Single" does not equal "separate". The "single document" requirement does not preclude printing the warranty in a use and care manual, or directly on the product itself. It does require that all terms and conditions be presented in (at least) one location, as a coherent, easily assimilated statement.

PARTIES WHO CAN ENFORCE

701.3(a)(1) The identity of the party or parties to whom the written warranty is extended, if the enforceability of the written warranty is limited to the original consumer purchaser or is otherwise limited to persons other than every consumer owner during the term of the warranty;

Section 102(a)(2) of the Act authorizes the disclosure of "the identity of the party or parties to whom the warranty is extended." MACAP included a similar requirement in its 1971 guidelines for evaluating warranties, i.e., "a warranty should set forth to whom the warranty is extended." This guideline was dropped in the 1973 study. MACAP reasoned that the failure to state the "warrantee" would mean that any owner was covered by the subsequent warranty provisions, and therefore, that the warranty which does not make such a disclosure, while not meeting the guideline, would offer the broadest possible coverage with regard to this factor.[46]

The proposed Rule required the disclosure of "the identity of the party or parties to whom the warranty is extended, including, where applicable, any limitation on its enforceability by any party other than the first purchaser at retail." Comments submitted by Montgomery Ward, Sears, Proctor Silex and others followed the reasoning of the 1973 MACAP study; i.e., that the consumer would (properly) infer from the absence of words of limitation that the warranty would extend to anyone in possession during the warranty period.[47] The Carpet and Rug Institute (CRI) the Boating Industry Association (BIA), the National Retail Merchants Association (NRMA) and others argued that the disclosure should be required only when the warranty does not extend to the original purchaser [48] and all transferees during the period of the warranty.[49] NRMA also suggested that this paragraph refer only to the *written* warranty, to clarify that the warranty need not serve as a "treatise on privity." [50]

The National Association of Photographic Manufacturers recommended that the language "first purchaser at retail," used in the proposed Rule, be altered to read "original consumer purchaser", since the word "consumer" is clearly defined in § 701, and since the avoidance of the words "at retail" would prevent misinterpretations where the warranted consumer product was sold in wholesale or discount stores at prices below suggested list price.[51]

The final Rule incorporates the three recommendations discussed above. The Commission has concluded that the changes reflected in the final Rule would be consistent with consumer understanding and would simplify warranty language.

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subject to the full requirements in the bill. The House amendment *excluded* from the disclosure requirements of the bill products costing less than $5; it *excluded* from the designation requirements of the bill products costing less than $10. The minimum federal standard applicable to full warranties was not applicable to products costing less than $10, even in situations where warrantors of products costing less than $10, used the full warranty designation.

The conference substitute *excludes* from the disclosure requirements of the bill warranties on consumer products actually costing less than $5 and *excludes* from the designation requirements of the bill warranties on consumer products actually costing less than $10. However, the conference substitute provides that any warrantor giving a warranty characterized as a full warranty must comply with the minimum Federal standards set forth in section 104, no matter what the actual cost of the consumer product to which the warranty applies." [emphasis supplied].

[38] R 1-4-2, 691, AHAM.

[39] R 1-3-1, 1, Westinghouse Electric Corporation; R 1-4-1, 18, National Association of Chain Drug Stores; R 1-4-1, 90-91, National Electrical Manufacturers Association; R 1-4-1, 219, Air Conditioning and Refrigeration Institute; Tr. 1594-5, Waltham Watch Company.

[40] R 1-4-1, 18, National Association of Chain Drug Stores.

[41] "Ms. Berke: Our current regulations propose that the warranty be a single document set apart from any other information you might give on the products. Mr. Feinsmith: That is going to be very much more expensive then because if we can make it part of one document it cuts our costs by at least 50 percent." Tr. 1595, Waltham Watch Company; R 1-4-1, 18, National Association of Chain Drug Stores.

[42] R 1-4-1, 91, National Electrical Manufacturers Association.

[43] R 1-4-1, 219, Air Conditioning and Refrigeration Institute.

[44] "For example, the Amoco Oil Company tire warranty grants a replacement allowance based on depth of tread remaining. The allowances for each tire type are printed for dealers on four 8½ x 11 pages, and his instructions for the proper measurement of tread and adjustment of the tires require another four pages. The consumer is unlikely to require any of these pages himself especially since the value of the allowance changes from time to time." R 1-3-2, 696, Standard Oil Co. (Indiana).

[45] R 1-3-2, 697, Standard Oil Co (Indiana).

[46] R 1-2-2, 778, MACAP.

[47] R 1-3-2, 491, Montgomery Ward & Co., Inc.; R 1-3-2, 606, Proctor-Silex; R 1-3-2, 645, Sears, Roebuck and Co.; R 1-4-1, 564-65, Boating Industry Associations; R 1-4-1, 600, National Retail Merchants Association; R 1-3-2, 606, SCM Corporation.

[48] Note that under Sections 104(b)(4) and 101(3) of the Act, a warrantor offering a full warranty is precluded from limiting warranty coverage to the original purchaser.

[49] R 1-3-1, 126, Carpet and Rug Institute; R 1-3-2, 491, Montgomery Ward & Co., Inc.; R 1-3-2, 606 Proctor-Silex; R 1-3-2, 645, Sears Roebuck and Co.; R 1-4-1, 564-65, Boating Industry Associations; R 1-4-1, 600, National Retail Merchants Association; R 1-3-2, 606, SCM Corp.

[50] R 1-4-1, 601, National Retail Merchants Association.

[51] R 1-4-1, 198-99, National Association of Photographic Manufacturers, Inc.

WARRANTY COVERAGE

701.3(a)(2) A clear description and identification of products, or parts, or characteristics, or components or properties covered by and where necessary for clarification, excluded from the warranty.

Sections 102(a) (3) and (12) of the Act provide for the disclosure of "the product or parts covered" and "the characteristics or properties of the products or parts thereof, that are not covered by the warranty". The MACAP guidelines similarly require "the product or specific parts covered and against what".[52] The NBCCA report states that "written warranties should specify the extent of parts coverage."[53]

The *Guides* require that:

"In general, any guarantee in advertising shall clearly and conspicuously disclose—

(a) The nature and extent of the guarantee. This includes disclosure of (1) What product or part of the product is guaranteed, (2) What characteristics or properties of the designated product or part thereof are covered by, or excluded from, the guarantee . . ."[54]

A long line of FTC orders have required the disclosure of "the nature and extent of the guarantee and the manner in which the guarantor will perform."[55] Although none of these orders delineates the meaning of "the nature and extent of the guarantee" or "the manner in which the guarantor will perform," the *Guides* establish that this general language encompasses the characteristics or properties covered by or excluded from the guarantee, the duration of the guarantee, the guarantor's manner of performance, the product or part guaranteed, and the purchaser's obligations. Thus, there is support for including this paragraph on the basis of past Commission case law.

A consumer letter, illustrative of the problems which this paragraph is designed to solve, complained that the consumer's automobile warranty explicitly did not extend to "service items", but did not enumerate those items which were considered "service items" by the manufacturer; as a result, it did "not indicate that [the automobile manufacturer] is using this term in an extremely broad and uncommon sense so a . to exclude the myriad of items which would be included under other warranties using the same terminology".[56]

The proposed Rule required the disclosure of:

a clear description and identification of parts, characteristics, components and properties covered by, and excluded from the warranty.

Baldwin Piano, Sunbeam Corp. and many other participants found the words "characteristics" and properties" vague and urged deletion.[57] The final Rule amends the phrase containing these terms to read *"products,* or parts, or characteristics, or components or properties." The disjunctive language makes it ". . . clear that a warranty covering all defects in a product (which is a characteristic) must not also list every part, component, and property of the product covered. A reference to all defects in a product should include defects in all parts without a statement to that effect."[58] The addition of the word "products" uses the statutory language set forth in § 102(a)(3) of the Act,[59] as recommended by Ross, Hardies, O'Keefe, Babcock & Parsons ("Ross, Hardies"), SCM Corp., and Thermador.[60]

Warren Tool Corp., MACAP and NRMA and others suggested that warrantors be required to disclose either the items covered *or* those not covered by the warranty.[61] Gambles stated.

(T)he requirement could become rather cumbersome if the warrantor had to identify all the parts of a product not covered by the warranty if the warranty was limited to only one component or part of the product."[62]

"An example utilizing a major appliance can best show the problems which this provision would pose. Assume a product with two hundred parts carries a full one year warranty and thereafter a limited four year warranty on its major component. As drafted the regulation would require a detailed listing of 400 parts in the warranty text.

"For the full one year warranty period there would have to be a listing of each and every part contained in the product and an indication that those parts are covered by the warranty.

"The text of a limited portion of the warranty would have to indicate that the major component is covered and contain a listing of every other part as being excluded from that portion of the warranty. This is clearly unnecessary and unworkable and would only tend to confuse rather than enlighten even those consumers who would try to read and understand it."[63]

Toyota Motor Sales, the National Paint and Coatings Association, and the Southern Furniture Manufacturers Association (SFMA) stated that if a warrantor lists those items which are covered, those which are not listed should implicitly be excluded.[64]

The final Rule is similar to proposals submitted by Sears and NRMA.[65] Under this language the items not covered by the warranty need only be disclosed if the disclosure of what *is* covered is unclear, standing alone.

For example, a common warranty is one which covers all defects in material and workmanship. It should not be necessary to also include a list of all the possible causes of malfunctions of the product which would not be defects, e.g., misuse, abuse, externally caused casualties. . . . However, . . . if some part of the product covered by such a warranty were not covered as to a defect in that part, a clear statement that that part is excluded should be included in the warranty, e g , "This warranty covers defects in material or workmanship in this product (except in light bulbs)." Without the statement of exclusion in such a warranty, it would appear to cover more than it does.[66]

For ease of communication to consumers, it should not be necessary in all cases to enumerate every covered part if the warranty covers the entire product with the exception of one or two minor parts. In such instances, the following language would meet the requirements of § 701.3(a)(2). "XYZ Company warrants your [_____], except the [_____]."[67]

The Association of Home Appliance Manufacturers (AHAM), in their written submission, stated:

Practice in the appliance and other industries is to warrant a product against manufacturing defects and to list the exclusions, such as light bulbs in a refrigerator or damage from misuse, fire, flood and the like.[68]

The Rule is intended to permit this practice. Conversely, if the warranty covers only a few parts, or characteristics, the warranty might state: "This product is not warranted in any way except against rust" or "This warranty covers the drive shaft *only.*" A disclosure of the exclusions from the warranty accom-

[52] R 1-2-2, 779, MACAP.

[53] R 1-2-2, 821, National Business Council for Consumer Affairs.

[54] *Guides,* supra note 6, at § 239.1

[55] See, e.g., *In the Matter of General Transmission Corporation of Washington, et al,* 73 FTC 399 (1968); *In the Matter of Coleman Company, Inc.* 73 FTC 724 (1968); *In the Matter of Delco Carpets, Inc., trading as Delco Carpet Mills, Inc.,* 70 FTC 1706 (1966); *In the Matter of Midas, Inc, et al.,* 56 FTC 1564 (1960); *In the Matter of Comstock Chemical Co., Inc., et al.,* 56 FTC 33 (1959); *In the Matter of Stewart Auto Upholstering Co., et al.,* 59 FTC 1167 (1961); *In the Matter of Stern & Co., et al.,* 59 FTC 1418 (1961); *In the Matter of Fred B. Miller, et al.,* 56 FTC 1249 (1960); *In the Matter of Hilton Watch & Clock Co., Inc., et al.,* 61 FTC 742 (1963); *In the Matter of L. T. Baldwin,* 59 FTC 975 (1961).

[56] R 1-2-2, 729-31.

[57] R 1-3-1, 26, Baldwin Piano; R 1-3-1, 200, Ross, Hardies, O'Keefe, Babcock & Parsons; R 1-3-2, 366, Sunbeam Corp.; R 1-3-2, 607, SCM Corp.; R 1-3-2, 711, White Consolidated Industries; R 1-4-1, 220, Air Conditioners and Refrigeration Institute; R 1-4-1, 476-77, Association of Home Appliance Manufacturers; R 1-3-2, 606-07, SCM Corp.

[58] R 1-3-2, 646, Sears Roebuck & Co.

[59] "The *products* or parts covered" (emphasis added).

[60] R 1-3-1, 200, Ross, Hardies, O'Keefe, Babcock & Parsons; R 1-3-2, 607, SCM Corp; Tr. 2314, Thermador.

[61] R 1-3-2, 347, Gambles; R 1-3-2, 492, Montgomery Ward & Co.; R 1-3-3, 787, Warren Tool Corporation; R 1-4-1, 372-73, MACAP; R 1-4-1, 601, National Retail Merchants Association.

[62] R 1-3-2, 347, Gambles.

[63] R 1-3-2, 492, Montgomery Ward.

[64] R 1-3-3, 1103, Toyota Motor Sales, U S A., Inc.; R 1-4-1, 132, National Paint and Coatings Association; R 1-4-1, 316, Southern Furniture Manufacturers Association.

[65] "A clear description and identification of parts, characteristics, components and/or properties covered by and, where necessary for clarification, excluded from the warranty." R 1-3-2, 646, Sears Roebuck & Co.

". . . (P)ermit *either* a clear statement of what is covered or a clear statement of what is not covered, and . . . add that if there are ambiguities language sufficient to clarify any such ambiguities is required." R 1-4-1, 601, NRMA.

[66] R 1-3-2, 646, Sears Roebuck & Co.

[67] R 1-3-2, 547-48, Nixon, Hargrave, Devans & Doyle; R 1-4-1, 476, Association of Home Appliance Manufacturers; R 1-4-1, 372, MACAP; R 1-3-2, 606-607, SCM Corp.

[68] R 1-4-1, 476, AHAM.

panied by a statement such as "all other [*parts*] are covered by this warranty" [68] would also satisfy the requirements of this paragraph.

WARRANTY PERFORMANCE

701.3(a)(3)

A statement of what the warrantor will do in the event of a defect, malfunction or failure to conform with the written warranty, including the items or services the warrantor will pay for or provide, and, where necessary for clarification, those which the warrantor will not pay for or provide;

Section 102(a)(4) of the Act authorizes the disclosure of "a statement of what the warrantor will do in the event of a defect, malfunction, or failure to conform with such written warranty—at whose expense—and for what period of time". The MACAP guidelines require the warrantor to state: "In case of a claim: Exactly what the warrantor will do and at whose expense." [70]

The *Guides* require the disclosure of:

The manner in which the guarantor will perform. This consists primarily of a statement of exactly what the guarantor undertakes to do under the guarantee. Examples of this would be repair, replacement, refund. If the guarantor or the person receiving the guarantee has an option as to what may satisfy the guarantee, this should be set out.[71]

Past FTC warranty orders have consistently required the disclosure of the manner in which the warrantor will perform. (See the discussion and citations in the explanation of section 701.3(a)(2), *supra*.)

The Commission has received a number of letters from consumers indicating the need for clarification in warranty documents as to what items or services the warrantor will and will not pay for or provide in the event of a failure defect or malfunction in the product.[72]

The proposed Rule required the disclosure of

a statement of what the warrantor will do to remedy a defect or malfunction in the product, or failure to conform with the written warranty, including but not limited to the items or services the warrantor will and will not pay for or provide.

Many industry comments were received to the effect that it would be unnecessarily verbose to require a statement reciting what the warrantor will not do in a warranty which clearly states what the warrantor will do.[73] Armstrong Cork Co. argued that compliance with this paragraph would unduly lengthen warranties, and that "a delineation of each conceivable item or service which will not be paid or provided would tax even the wildest imagination."[74]

The language adopted in this paragraph of the final Rule parallels that in section 701.3(a)(2), discussed *supra*. As suggested by Sears, a warrantor need only state what he will not do if the disclosure of what he will do, standing alone, is unclear.[75]

For example, if a warranty provides that the product will be replaced at no charge if the product is returned to the store, it should not be necessary to also recite that the product will not be repaired, or that the warrantor will not pay for travel expenses. The affirmative statement in such a warranty clearly states what the warrantor will do, and there is no implication that anything else will be done.[76]

The requirement of this sub-part could be satisfied by stating, for example: "We will pay for parts and service *only*;" or by disclosing the services which the warrantor will not perform, accompanied by a statement such as: "You must pay all other expenses incurred in obtaining repairs." [77]

A number of industry representatives objected to the use of the word "remedy" in the proposed Rule.[78] The language used in Section 102(a)(4) of the Act [79] was preferred. A warrantor is not required to "remedy" a product unless the applicable warranty is designated as a "full (statement of duration) warranty." The final Rule substitutes the statutory language, "in the event of" for the word "remedy."

WARRANTY DURATION

701.3(a)(4)

The point in time or event on which the warranty term commences, if different from the purchase date, and the time period or other measurement of warranty duration.

Section 102(a)(4) of the Act calls for the disclosure of "a statement of what the warrantor will do in the event of a defect, malfunction or failure to conform with such written warranty . . . and for what period of time." MACAP's guideline, requiring "the specific time for which the product or parts are covered" [80] was fulfilled by 95% of the warranties submitted in the 1973 study. The *Guides*, too, require the disclosure of "what is the duration of the guarantee". [81] The NBCCA report states that "written warranties should specify the specific duration of the warranty." [82]

Paragraph 701.3(a)(4) also requires the warrantor to specify the point in time (if other than the purchase date) when the warranty term begins. This is to ensure that the purchaser is informed as to whether the warranty terms starts to run immediately upon manufacture, purchase, delivery, or the date on which the product is first used. Several consumer letters illustrate the need for the disclosures required by this paragraph.[83]

The proposed Rule required the disclosure of:

The point in time or event on which the warranty term commences, and the time period or other measurements of duration for which the product and/or its parts, characteristics, components, or properties are warranted.

Montgomery Ward, Timex, and NRMA took the position that the consumer's normal expectation is that a warranty takes effect on the date of purchase. Therefore, the warrantor should be required to make a disclosure about the beginning of the warranty only when this is not the case.[84] The final Rule incorporates the language submitted by Montgomery Ward,[85] and requires that the commencement date of the warranty need only be disclosed "if different from the purchase date."

CONSUMER DUTIES

701.3(a)(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 obligation(s), 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 warrantor obligations, and/or a telephone number which consumers may use without charge to obtain information on warranty performance,

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[68] R 1-3-2, 366, Sunbeam Corp.; R 1-3-3, 921, Amana Refrigeration, Inc.

[70] R 1-2-2, 779, MACAP.

[71] *Guides, supra* note 6, at § 239.1(b).

[72] See, e.g. R 1-2-2, 735-36 (undisclosed charge for service call during warranty period); R 1-2-2, 737-38 (undisclosed charge for warranty service call and for delivering product to and from repair shop); R 1-2-2, 741 (undisclosed "check-out" fee for in-warranty inspection of defective product); R 1-2-2, 742-44 (undisclosed labor charge for in-warranty repairs).

[73] R 1-3-1, 7, Coleman Co.; R 1-3-1, 126, 130-32, Carpet and Rug Institute; R 1-3-2, 419, Armstrong Cork Company; R 1-3-2, 647, Sears Roebuck & Co.; R 1-3-3, 788, Warren Tool Corporation; R 1-4-1, 601, National Retail Merchants Association.

[74] R 1-3-2, 419 Armstrong Cork Company.

[75] See R 1-3-2, 647, Sears' suggested language: "A statement of what the warrantor will do to remedy a defect or malfunction in the product, or a failure to conform with the written warranty, including but not limited to the items or services the warrantor will pay for or provide, and, where necessary for clarification, what the warrantor will not pay for or provide."

[76] R 1-3-2, 647, Sears Roebuck and Co.

[77] R 1-4-1, 601 National Retail Merchants' Association.

[78] R 1-3-1, 57, Mohasco Corporation; R 1-3-2, 430-432, Defrees & Fiske; R 1-2-2, 545, Nixon, Hargrave, Devans & Doyle; R 1-4-1, 18-19, Nat'l Association of Chain Drug Stores, Inc.; R 1-4-1, 92 Nat'l Electrical Manufacturers Association; R-4-1, 220, Air Conditioning and Refrigeration Institute; R 1-4-1, 477, Association of Home Appliance Manufacturers.

[79] "A statement of what the warrantor will do in the *event of* a defect . . ." (emphasis added).

[80] R 1-2-2, 779, Major Appliance Consumer Action Panel.

[81] *Guides, supra* Note 6.

[82] R 1-2-2, 821, NBCCA.

[83] R 1-2-2, 746 (warranty expired one year prior to the time consumer had purchased the product); R 1-2-2, 748 (warranty did not disclose that it ran from the date of production of the appliance).

[84] R 1-3-2, 495, Montgomery Ward & Co., Inc.; R 1-3-3, 935, Timex Corp.; R 1-4-1, 602, National Retail Merchants Association.

[85] "The point in time or event on which the warranty terms commences, if different from the purchase date, and the time period or other measurements of duration for which the product and/or its parts, characteristics, components or properties are warranted." R 1-3-2, 490 Montgomery Ward & Co., Inc.

Section 102(a)(7) of the Act authorizes the disclosure of "the step-by-step procedure which the consumer should take in order to obtain performance of any obligation under the warranty, including the identification of any class of persons authorized to perform the obligations set forth in the warranty."

MACAP found that its analogous requirement, i.e., that the warranty state "in case of a claim: exactly what the consumer must do and at whose expense" [86] was the guideline most frequently not fulfilled in the 1973 study. According to MACAP, this guideline "requires that a warranty describe the steps the appliance owner should follow to obtain in-warranty service",[87] The NBCCA report states that "written warranties should specify "the obligations of the owner." [88]

The *Guides* require the disclosure of "what, if anything, anyone claiming under the guarantee must do before the guarantor will fulfill his obligation under the guarantee, such as return of the product and payment of service or labor charge." [89] The fact that not all warranties currently fully disclose all the requirements which must be fulfilled by consumers in order to obtain warranty performance is illustrated by several consumer complaints.[90]

The disclosures required by paragraph 701.3(a)(5) are intended to inform the consumer of the full extent of his or her obligations under the warranty, and to eliminate confusion as to the necessary steps which he or she must take in order to get warranty performance.

This sub-paragraph of this section also requires that the warrantor apprise the consumer of the persons or organizations authorized to perform warranty service. This provision conforms with recommendations in the NBCCA report that "written warranties should specify where warranty service can be obtained." [91]

The proposed Rule required the disclosure of:

A step-by-step explanation of the procedure which the purchaser should follow in order to obtain performance of any warranty obligation, including the persons or organizations authorized to perform warranty service, or a telephone number which consumers may use without charge from which such information may be obtained. This information shall include the name and address of any corporate officer or department responsible for the resolution of such matters, and/or any telephone number which consumers may use without charge for such purposes;

Many industry comments were received which stated that the number of service outlets or representatives were far too numerous to list in the warranty.[92] AHAM, in its written sunbmission stated that

(a) literal interpretation of the requirement . . . would require the listing of hundreds or thousands of persons or organizations in a warranty.[93]

Also, independent or other service outlets used by a warrantor change from time to time.[94] Thus, any listing of such outlets compiled when a product is manufactured and shipped could be out-of-date by the time the product is displayed or sold. AHAM noted that:

Frustration would inevitably result should a consumer read in a written warranty that the ABC Service Center will provide warranty service, only to find that ABC is no longer in business, through no fault of the warrantor, when a call for service is made.[95]

McGraw Edison Co., Sunbeam, Amana, and others claimed that the alternative of maintaining a telephone number which consumers can use without charge, from which such information could be obtained, would be too costly.[96] Many other negative comments from warrantors concerning the use of toll-free lines are included in the record.[97]

EIA stated that:

(P)ersons calling on such a line could not be expected to confine their inquiries to obtaining names of repairmen. Persons on the receiving end of such telephone lines would necessarily have to be well informed and skilled in handling complaints. . . . (T)here . . . would be insufficient profit margin of a toll free telephone service. . . . In many cases, the manufacturers have no control over, and in fact may not even know who is authorized to sell and repair their products.[98]

Nixon, Hargrave, Devans and Doyle, ("Nixon, Hargrave"), Colt Industries, and others suggested use of the language used in § 102(a)(7) of the Act, "person or class of persons." [99] The Air Conditioning and Refrigeration Institute and SCM recommended that the language "*types* of organizations" [100] be adopted.

The final Rule requires the disclosure of the "persons or *class of persons* authorized to perform warranty obligations". The final Rule would permit a warrantor to use language such as "any authorized [_____] dealer," [101] or "contact your local dealer for warranty service," [102] provided that consumers have ready access to a listing of authorized facilities. This may be accomplished by supplying a listing with the product, providing a source for such information in the warranty, or where a national service network is provided, through reference to a telephone directory.

Further industry comments received on the proposed Rule stated that the warrantor should not be required to include the name and address of a corporate officer responsible for the resolution of warranty complaints. Union Carbide Corporation suggested that this be deleted or at least changed to permit the name of any person in the warrantor's employ, and not just a corporate officer,[103] or any appropriate department.[104] The Gas Appliance Manufacturers Association (GAMA) argued that if disclosure of a *name* of a corporate officer were required, personnel shifts would necessitate the reprinting of the warranty.[105]

NRMA submitted that the name and address or the phone number of a warranty "referee" should only be required if such a disclosure is applicable to the warrantor.[106] GAMA and NEMA commented that the phrase "resolution of"

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[86] R 1-2-2, 789, Major Appliance Consumer Action Panel.

[87] R 1-2-2, 781, Major Appliance Consumer Action Panel.

[88] R 1-2-2, 821, National Business Council for Consumer Affairs.

[89] *Guides, supra* note 6, at § 239.1.

[90] R 1-2-2, 749 (warranty did not disclose that consumer was required to ship defective 18-foot boat back to factory and pay for shipping costs in order to get warranty performance); R 1-2-2, 751 (warranty did not disclose that a sales slip and validated certificate to indicate date of purchase were required for in-warranty service); R 1-2-2, 756 (undisclosed charge for postage and handling); R 1-2-2, 757 (undisclosed charge for warranty coverage).

[91] R 1-2-2, 821, NBCCA.

[92] R 1-4-1, 481, Association of Home Appliance Manufacturers; R 1-3-1, 312, Briggs & Stratton Corp.; R 1-3-2, 348, Gambles-Skogmo, Inc.; R 1-3-2, 368-369, Sunbeam Corp.; R 1-3-2, 383, Rockwell International; R 1-3-2, 546, Nixon, Hargraue, Devans & Doyle; R 1-3-2, 650, Sears, Roebuck & Co., R 1-3-3, 936, Timex Corp.; R 1-4-1, 184, Electronic Industries Association; R 1-3-1, 19-20, Walker Manufacturing, R 1-3-3, 846, General Electric Co.

[93] R 1-4-1, 481, AHAM.

[94] R 1-3-1, 342, Zenith Hearing Instrument Corp.; R 1-3-2, 348, Gamble-Skogmo, Inc.; R 1-3-2, 368-369, Sunbeam Corp; R 1-3-2, 546, Nivon, Hargrave, Devans & Doyle; R 1-3-2, 650, Sears, Roebuck & Co.; R 1-3-3, 936, Timex Corp.; R 1-4-1, 482, Association of Home Appliance Manufacturers; Tr. 2275, California State Electronics Association.

[95] R 1-4-1, 482-83, Association of Home Appliance Manufacturers.

[96] R 1-3-1, 171-172, McGraw Edison Co.; R 1-3-1, 201, Ross, Hardies, O'Keefe, Babcock & Parsons; R 1-3-0, 369, Sunbeam Corp.; R 1-3-3, 923, Amana Refrigeration, Inc.; R 1-3-3, 936, Timex Corp; R 1-4-1, 124, Automotive Parts & Accessories Association, Inc.; R 1-4-1, 481-82, Association of Home Appliance Manufacturers; Tr. 2316-17, John Schiewe, Ass't Vice President, Marketing and Product Manager, Thermador Wash-King.

[97] R 1-3-1, 134-135, CRI; R 1-3-1, 312, Briggs & Stratton Corp.; R 1-3-2, 348, Gamble Skogmo, Inc.; R 1-4-1, 39, National Association of Furniture Manufacturers, Inc; R 1-4-1, 184-186, EIA; R 1-3-3, 848, General Electric.

"A toll-free number to a remote location would be a duplication of a cost for General Electric in view of our well-identified local service facilities."

[98] R 1-4-1, 184-86, EIA.

[99] R 1-3-2, 419, Armstrong Cork Co; R 1-3-2, 546, Law firm of Nixon, Hargrave, Devans & Doyle, Washington, D.C.; R 1-3-2, 587, Colt Industries; R 1-3-3, 923, Amana Refrigeration, Inc; Tr. 1722, David V. Kahn, Attorney, Chicago, Illinois; R 1-3-3, 844, General Electric.

[100] R 1-4-1, 222, Air Conditioning and Refrigeration Institute; R 1-3-2, 61, SCM; R 1-3-3, 956-957, Whirlpool Corp.

[101] R 1-3-1, 8, The Coleman Co., Inc.; R 1-3-1, 342, Zenith Hearing Instrument Corp; R 1-4-1, 184, EIA.

[102] R 1-3-2, 348, Gamble-Skogmo, Inc. ("or contact your nearest _____ store"); R 1-3-2, 496, Montgomery Ward & Co., Inc; R 1-4-1, 184, EIA.

[103] R 1-3-1, 287, Union Carbide Corporation.

[104] R 1-3-1, 287, Union Carbide Corporation. See also R 1-3-2, 612, SCM.

[105] R 1-4-1, 26, Gas Appliance Manufacturers Association, Inc.

[106] R 1-4-1, 603, NRMA.

should be deleted since it implied that there was a dispute, which would not be the case when the warranty was extended.[107]

The final Rule deletes the words "resolution of such matters" and substitutes "the performance of warranty obligations." It provides three alternative means for the disclosure of how the consumer may contact the warrantor.

Armstrong Cork, Sears, NEMA, and Nixon, Hargrave stated that paragraph (a) of the proposed Rule, which required the disclosure of the "full name(s) and address(es) of the warrantor," overlapped with paragraph (h).[108] The substance of former paragraph (a) was incorporated as one of the three alternatives in section 701.3(a)(5) of the final Rule. The purpose of this disclosure is to provide an address which the consumer can use to communicate with the warrantor concerning warranty claims.[109] Such information need not be provided twice in the same warranty.

Section 102(a)(1) of the Act authorizes the Commission to require the disclosure of "the clear identification of the names and addresses of the warrantors". The MACAP guidelines similarly require the inclusion of "the name and address of the warrantor, on the same page as the body of the warranty."[110] The NBCCA report states that "written warranties should specify the identity of the warrantor."[111]

The *Guides* require the disclosure of "the identity of the guarantor," stating that:

> the identity of the guarantor should be clearly revealed in all advertising, as well as in any documents evidencing the guarantee. Confusion of purchasers often occurs when it is not clear whether the manufacturer or the retailer is the guarantor.[112]

A consumer complaint, indicating that the absence of the warrantor's address has been a problem, related that neither the warranty nor the package for a mattress cover, nor the cover itself disclosed the address of the warrantor. Thus, when the cover ripped, the consumer was unable to locate the warrantor so as to secure performance on the five-year warranty.[113] Another consumer stated, after having suffered considerable delay in having a hot water tank repaired,

> I honestly believe some of this confusion could have been eliminated if my warranty had spelled out exactly what department of the company warranty requests should be forwarded to. Maybe the FTC should require such information be included in warranty statements.[114]

The final Rule permits the warrantor to include such a department or an employee of the warrantor responsible for the performance of warranty obligations. The "corporate officer" language was dropped, in accordance with the comments discussed previously. It is not necessary to identify an individual in order to provide the consumer with proper access for obtaining warranty performance.

§ 701.3(a)(5) of the Rule also permits the warrantor to maintain a telephone number which consumers may use without charge. Use of such a device is not required. The purpose of the last sentence in section 701.3(a)(5) is to provide the consumer with a means for contacting the warrantor, and the use of any or all of the three alternatives set forth will satisfy this requirement.

Finally, it should be noted that the word "purchaser" has been replaced by the word "consumer," since the Rules define the word "consumer," and since the person invoking the warranty need not in fact be a "purchaser" of the product.[115]

INFORMAL DISPUTE SETTLEMENT MECHANISMS

701.3(a)(6)

Information respecting the availability of any informal dispute settlement mechanism elected by the warrantor in compliance with Part 703 of this subchapter;

Section 102(a)(8) of the Act authorizes the inclusion in warranties of "information respecting the availability of any informal dispute settlement procedure offered by the warrantor . . .". The Senate Report provides the rationale behind the analogous provision in the Senate version of the bill:

> . . . [T]he consumer should be notified of his ability to seek redress through . . . any informal dispute settlement mechanisms that the warrantor may offer. Furthermore, if the warrantor is required to inform the consumer of his rights in the event the warrantor fails to perform, the Committee believes that the warrantor will have greater incentive to perform as promised.[116]

As the NBCCA report states:

> [T]he consumer's need for warranty information continues and is more pronounced after the product has been purchased . . . some companies have begun to encourage consumers to make toll-free calls to a centralized location . . . In other cases, metropolitan consumer response offices have been established to serve these needs. However organized, some convenient means of obtaining information on the product . . . warranty should be available to consumers after sale.[117]

The proposed Rule required the disclosure of "(1) nformation respecting the availability of any informal dispute settlement procedure as specified in Part 703 of this subchapter." Mohasco Corp. and CRI stated that such information should be required only where such a procedure is offered or required by the warrantor, and not wherever a procedure is merely "available," regardless of whether or not the warrantor offers or requires it.[118] In order to clarify the intent of this section the language of this provision has been revised to read "mechanism elected by the warrantor in compliance with Part 703 of this subchapter."

LIMITATION ON IMPLIED WARRANTIES AND REMEDIES

701 3(a)(7)

Any limitations on the duration of implied warranties, disclosed on the face of the warranty as provided in Section 108 of the Act, accompanied by the following statement:

"Some states do not allow limitations on how long an implied warranty lasts, so the above limitation may not apply to you."

701 3(a)(8)

Any exclusions of or limitations on relief such as incidental or consequential damages, accompanied by the following statement, which may be combined with the statement required in sub-paragraph (7) above:

"Some states do not allow the exclusion or limitation of incidental or consequential damages, so the above limitation or exclusion may not apply to you."

Section 102(a)(6) of the Act provides for the disclosure of "exceptions and exclusions from the terms of the warranty." The MACAP guidelines require disclosure of "exceptions, disclaimers or exclusions with the same prominence as the affirmative statements in the body of the warranty."[119]

The Uniform Commercial Code, ("U.C.C.") which, with variations, is the law in the District of Columbia and in every state except Louisiana, provides, at §§ 2-314 and 2-315, that in a contract for sale certain warranties are implied by law. The implied warranties of merchantability (which encompasses the concept that goods must be fit for the ordinary purpose for which they are used) and fitness for a particular purpose (which may arise when a seller has reason to know the particular purpose for which the goods are required and that the buyer is relying on the seller's skill or judgment to furnish suitable goods) in certain circumstances may provide a buyer with broader protection and rights than a written warranty document.

Although the U.C.C. provides a procedure whereby such implied warranties may be disclaimed and excluded, several states have prohibited disclaimers or ex-

[107] R 1-4-1, 26, Gas Appliance Manufacturers Association, Inc.; R 1-4-1, 92-93, National Electrical Manufacturers Association.

[108] R 1-3-2, 418, Armstrong Cork Co.; R 1-3-2, 547, Law firm of Nixon, Hargrave, Devans & Doyle, Washington, D.C.; R 1-3-2, 644, Sears Roebuck and Co.; R 1-4-1, 91, National Electrical Manufacturers Association.

[109] R 1-3-1, 56 Mohasco Corporation.

[110] R 1-2-2, 779, MACAP Report (1973).

[111] R 1-2-2, 821, NBCCA Report.

[112] R 1-2-1, 269 *Guides*, at § 239.1(c). See also *In the Matter of Royal Audio Instruments, et al*, 66 FTC 989 (1964); *In the Matter of ADF Warehouse, Inc., et al*. 66 FTC 1267 (1964); *In the Matter of B. R. Page Company, et al*. 66 FTC 1319 (1964); *In the Matter of Universal Sewing Service, Inc., et al*. 54 FTC 643 (1957).

The address, as well as the name of the guarantor, has been required by the Commission. *In the Matter of World Wide Television Corporation, et al*. 66 FTC 961 (1961); *affirmed* 352 F. 2d 203 (3rd Cir. 1965). See also *In the Matter of Central Sewing Center, Inc., et al., d b a. Tri State Distributing*, (63 FTC 788 (1963)).

[113] R 1-2-2, 726 (consumer letter).

[114] R 1-5-, 524 (consumer letter).

[115] R 1-3-2, 546, Law firm of Nixon, Hargrave, Devans & Doyle, Washington, D.C.

[116] R 1-2-2, 167, Senate Report.

[117] R 1-2-2, 822, NBCCA Report.

[118] R-1-31-1, 57-58, Mohasco Corporation; R 1-3-1, 137-138, CRI.

[119] R 1-2-2, 780, MACAP Report (1973).

clusions and have made them legally unenforceable.[119] The use of disclaimers or exclusions of implied warranties, and limitations and exclusions of remedies under implied warranties in any state where such a clause or clauses are enforceable as written has the clear capacity and tendency to deceive purchasers in those states as to the true nature of their warranty rights and remedies. A consumer may reasonably be expected to believe that a warranty document states the full extent and limit of his warranty rights and remedies and rely on that belief. This reliance tends to eliminate attempts to determine whether such a written warranty states limitations, disclaimers or exclusions fully or correctly.

Paragraph (k) (1) of the proposed Rule provided that:

> "Where any such modification, limitation, or exclusion is unenforceable under applicable State law, that fact shall be disclosed in a manner which specifically names such jurisdictions."

This proposal elicited substantial industry opposition. Many warrantors claimed that this requirement was unduly onerous in that it would necessitate research of the case law in every state in which a product is offered for sale, often in all fifty states.[121] Many industry representatives noted that a constant monitoring and review of state law would be required in order to keep abreast of any modifications.[122] Warranties would have to be revised continuously and reprinted because of changes in state law.[123] Armstrong Cork argued that because state law is constantly changing, the warranty could "be incorrect by intervention of judicial act before the ink was dry. . . ."[124] North American Philips Corp. stated that this could cause ". . . confusion to the consumer because it would be impossible to avoid having different warranty cards being distributed at the same time because of the products that would be in the distribution pipeline whenever a change occurred."[125]

Another line of criticism challenged the Rule's imposition on warrantors of the duty to interpret uncertain unsettled state law.[126] Standard Oil of California stated that this could lead to "public confusion resulting from inconsistent and/or inaccurate monitoring and reporting of state law by various warrantors."[127] Warren Tool, the Electronic Industries Association (EIA), and others objected that this would require warrantors to advise consumers as to complex issues of law.[128]

The Association of Auto & Truck Recyclers (NATWA) argued that the Rule, "in effect, precludes many warrantors from modifying, limiting or excluding implied warranties or consequential damages, although the Act itself specifically allows these types of modifications, limitations or exclusions."[129] Others stated that compliance with this requirement would unduly lengthen warranties.[130]

The proposed Rule also required disclosure of "all modifications and limitations on implied warranties, and all exclusions of or limitations on relief such as incidental or consequential damages." Nixon, Hargrave noted that this language appeared to permit the modification of implied warranties,[131] prohibited by Section 108(a) of the Act.[132]

Paragraph (k) (2) of the proposed Rule required that "any limitation on or exclusion of consequential damages for breach of any written or implied warranty on the consumer product shall be disclosed on the face of the warranty, as provided in § 104 of the Act."

Mohasco, Briggs & Stratton Corp., Chrysler Corp., Nixon, Hargrave, and CRI argued that the Commission ignored the intention of Congress by imposing the requirement of stating exclusions or limitations on consequential damages on the face of the warranty on "limited" warranties.[133] The Act requires only that such disclosure be made on the face of "full" warranties.[133a]

In light of the substantial criticisms of paragraph (k) of the proposed Rule, the Commission has deleted this paragraph, and has substituted paragraphs 701.3(a) (7) and (8). The final Rule does not require that warrantors specifically name the jurisdictions in which limitations or exclusions are unenforceable under state law. It does require that the consumer be alerted to the possible inapplicability of limitations on the duration of implied warranties or exclusions or limitations of incidental or consequential damages in his or her jurisdiction by the use of brief, simple disclosures. These may be combined, if both are applicable, and may also be combined with the statement required by § 701.3(a) (9), discussed *infra*. These disclosures will not serve to unduly lengthen warranty statements and will put consumers on notice as to the possible inapplicability of paragraphs concerning limitations and exclusions in the warranty. The language used in paragraphs (a) (7) and (8) is

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[119] See, e.g.: § 2-312 *et seq.*, replaced by new Title Consumer Warranties, CALIF. CIVIL CODE ch. 1333, Stats. 1970. W. VA CODE, § 46-6-107 (supp. 1974). MASS. GEN LAWS ch. 106, § 106, § 2-316 A (supp. 1974). MD. Ann. Code, art. 95 B, § 2-316 (A) (Supp 1974). WASH. REV. CODE § 62 A. 2-316(4) (Supp. 1974). OREGON STAT. Ch. 413; §§ 72.8010-8200 (enacted Aug. 19, 1973). MAINE REV. STAT. ANN., Title 11, § 2-316(5) (Supp. 1974).

[121] R 1-3-1, 27, Baldwin Piano and Organ Co.; R 1-3-1, 41, Purolator, Inc.; R 1-3-1, 58, Mohasco Corporation; R 1-3-1, 71, Law firm of Guren, Merritt, Sogg & Cohen, Cleveland, Ohio; R 1-3-1, 81-82, Firestone Tire & Rubber Co.; R 1-3-1, 191 Association of Auto & Truck Recycles; R 1-3-1, 201-202, Bruce J. McWhirter, Attorney.; R 1-3-1, 288, Union Carbide Corp.; R 1-3-2, 356, Mark J. Lowenstein, Attorney; R 1-3-2, 408, Boise Cascade Corp.; R 1-3-2, 549-550, Law firm of Nixon, Hargrave, Devan & Doyle, Washington, D.C.; R 1-4-1, 125, Automotive Parts & Accessories Association, Inc.; R 1-4-1, 134, National Paint and Coatings Association, Inc.; R 1-3-3, 789, Warren Tool Corporation; R 1-4-1, 259, CRI; R 1-4-1, 478, Association of Home Appliance Manufacturers; Tr. 2047, Berkson, Counsel, Singer Sewing Machines.

[122] R 1-3-1, 27, Baldwin Piano and Organ Co; R 1-3-1, 58, Mohasco Corp.; R 1-3-1, 81-82, Firestone Tire & Rubber Co.; R 1-3-2, 356, Law firm of Altheimer & Gray, Chicago, Illinois; R 1-3-2, 370-371, Sunbeam Corp.; R 1-3-2, 408 Boise Cascade Corp.; R 1-3-2, 499, Montgomery Ward & Co., Inc.; R 1-3-2, 653, Sears, Roebuck and Co.; R 1-4-1, 134, National Paint and Coatings Association, Inc.; R 1-3-3, 789, Warren Tool Corporation; R 1-4-1, 282, Specialty Equipment Manufacturers Association; R 1-4-1, 259, CRI; R 1-3-3, 849, General Electric; Tr. 2047, Berkson, Counsel, Singer Sewing Machines.

[123] R 1-3-1, 27, Baldwin Piano & Organ Co.; R 1-3-1, 48-49, North American Philips Corp.; R 1-3-1, 172, McGraw-Edison Co.; R 1-3-1, 288, Union Carbide Corp.; R 1-3-2, 350-351, Standard Oil Co. of California; R 1-3-2, 356, Law firm of Altheimer & Gray, Chicago, Ill.; R 1-3-2, 370-371, Sunbeam Corp.; R 1-3-2, 384, Rockwell Intl.; R 1-3-2, 388, Scoville Housing Products Group; R 1-3-2, 408, Boise Cascade Corp.; R 1-3-2, 499, Montgomery Ward & Co., Inc.; R 1-3-2, 550, Law firm of Nixon, Hargrave, Devans & Doyle, Washington, D.C.; R 1-3-2, 653, Sears, Roebuck and Co.; R 1-3-3, 790, Warren Tool Corporation; R 1-4-1, 282, Specialty Equipment Manufacturers Association; R 1-4-1, 259, CRI; Tr. 2047, Berksen, Counsel, Singer Sewing Machines.

[124] R 1-3-2, 420, Armstrong Cork Co. See also R 1-3-2, 499, Montgomery Ward & Co., Inc.; R 1-3-2, 653, Sears, Roebuck and Co.; R 1-4-1, 222, Air Conditioning and Refrigeration Institute; R 1-4-1, Day, 186-187, Electronic Industries Association; R 1-3-2, 613, SCM; R 1-3-3, 849, General Electric Co.

[125] R 1-3-1, 48-49, North American Philips Corp.

[126] R 1-3-1, 8-9, The Coleman Co., Inc.; R 1-3-1, 22, The Coleman Co., Inc.; R 1-3-1, 202, Bruce J. McWhirter, Attorney, Chicago, Illinois; R 1-3-2, 392, Shell Oil Co.; "(T)his subsection requires a manufacturer, to make interpretive decisions as to the legal significance of judicial opinions in the various state courts when their legal significance may be unclear or open to dispute by intelligent and knowledgeable parties."; R 1-3-3, 924, Amana; R 1-4-1, 606 NRMA.

[127] R 1-3-2, 351, Standard Oil Co of California.

[128] R 1-3-1, 42, Purolator, Inc.; R 1-3-1, 288, Union Carbide Corp.; R 1-3-3, 790-791, Warren Tool Corporation; R 1-4-1, 186-187 EIA.

[129] R 1-3-1, 191, Association of Auto and Truck Recyclers. See also R 1-3-2, 612, SCM; R 1-3-3, 849, General Electric Co.

[130] See e.g., R 1-3-1, 202, Bruce J. McWhirter, Attorney, Chicago, Illinois; R 1-3-1, 313, Briggs & Stratton Corp., R 1-3-2, 653, Sears, Roebuck and Co.; R 1-4-1, 606, NRMA: Tr. 2047, Berkson, Singer Sewing Machines.

[131] R 1-3-2, 549, Law Firm of Nixon, Hargrave, Devans & Doyle, Washington, D.C.; R 1-3-3, 1035, General Motors Corp.

[132] "No supplier may disclaim or modify (except as provided in subsection (b) any implied warranty to a consumer with respect to a consumer product . . .".

[133] R 1-3-1, 59, Mohasco Corp.; R 1-3-1, 313, Briggs & Stratton Corp.; R 1-3-2, 474, Chrysler Corp.; R 1-3-2, 550, Law firm of Nixon, Hargrave, Devans & Doyle; R 1-4-1, 260-261, CRI.

[133a] "In order for a warrantor warranting a consumer product by means of a written warranty to meet the Federal minimum standards for warranty— . . . (3) such warrantor must not exclude or limit consequential damages for breach of any written or implied warranty on such product, unless such exclusion or limitation conspicuously appears on the face of the warranty." Section 104(a) (3).

similar to several proposals made on the record.[134]

The language "all modifications and limitations on implied warranties" has been changed to "any limitations on the duration of implied warranties," to eliminate any conflict with the requirements of Section 108.

The requirement that limitations on or exclusions of consequential damages be disclosed as provided in Section 104 of the Act has been deleted. Full warranties must of course comply with the applicable requirements of the Act.

Finally, the proposed Rule required that:

> Any modification, limitation, or exclusion, or any statement that such modification, limitation, or exclusion is unenforceable under applicable State law shall be set apart from the balance of the warranty by the use of type size larger than the body copy of the warranty, or by the use of all capital letters, or by underlining.

Although this paragraph has been deleted from the final Rule, such deletion should not be viewed as a tacit statement on the part of the Commission that limitations are not to be made conspicuously. Rather, in this instance, the Commission recognizes that some flexibility in making such disclosures may be necessary. The failure to make disclaimers conspicuous, as required by § 2-316 of the U.C.C., renders such disclaimers ineffective. The use of underlining, capital letters, or larger type size are examples of possible means of satisfying the statutory mandate of prominence and conspicuousness.[135]

DISCLOSURE OF THE WARRANTY RIGHTS

701.3(a)(9)

A statement in the following language:

> This warranty gives you specific legal rights, and you may also have other rights which vary from state to state.

Section 102(a)(9) of the Act authorizes the Commission to require the inclusion of a "brief, general description of the legal remedies available to the consumer."

The full and accurate disclosure of warranty terms is a major element in the warranty enforcement program created by the Act. The Act is designed to give individuals the information they need to enforce their warranty rights. To do this, the individual must have at least a threshold understanding of the legal significance of the warranty document.

If attempts by consumers to assert their warranty rights are to be made easier and encouraged, as Congress intended, written warranties must disclose information about the buyer's legal rights and remedies. As the record amply demonstrates, there is substantial room for improvement in the public's general understanding of buyer's rights and remedies. The Act recognizes the written warranty as the logical and efficient means of accomplishing this result. The warranty is, in the end, simply part of the agreement between buyer and seller. It is wholly proper that the terms and significance of the agreement be understood by the buyer as well as the seller. The free market economy depends upon adequately informed buyers to stimulate competition.

The proposed rule sought to achieve the goals described above without unduly lengthening the written warranty. The proposed rule required the disclosure of one of the statements below:

> This warranty gives you specific legal rights. You also have implied warranty rights. In the event of problem with warranty service or performance, you may be able to go to a small claims court, a State court, or a Federal district court.

or

> This warranty gives you specific legal rights. You also have implied warranty rights, including an implied warranty of merchantability which means that your product must be fit for the ordinary purposes for which such goods are used. In the event of a problem with wararnty service or performance, you may be able to go to a small claims court, a State court, or a Federal district court.

The proposed disclosures elicited substantial comment, both adverse and favorable. While some voiced a basic disagreement with the Act's basic goal of informing buyers of their rights and remedies, several lines of comment developed on the record. Westinghouse, Sunbeam, Shell Oil, Walker Manufacturing Co. and others expressed the concern that consumers would be encouraged to go to court, rather than trying the normal remedies outlined in the warranty, or dealing directly with the warrantor initially.[136] Sears argued that the proposed language "could mislead some consumers into the belief that they *must* resort to the courts to obtain any performance under the warranty."[137] Husky Oil Co., Guren, Merrit, Sogg & Cohen ("Guren, Merritt"), and others felt that inclusion of such a provision would encourage litigation[138] in already congested courts.[139] Lear Siegler, Inc. and National Association of Photographic Manufacturers argued that the disclosures were in conflict with the legislative intent of the Act to encourage informal settlements.[140]

North American Philips Corp., AHAM, and others claimed that the proposed statements would serve to confuse rather than inform consumers.[141] SCM Corp. stated:

> The implication of both versions of the specified statement is that judicial remedies are readily available without cost or difficulty to a consumer who is dissatisfied with warranty performance. The fact that jurisdictional requirements may bar an action in federal court, that federal or state court procedure must be followed, that an attorney may be necessary, and the fact that there may be costs to the consumer which may or may not be reimbursable at the end of the proceeding make the inclusion of the proposed statements unreasonable and misleading to consumers.[142]

AHAM, in its written submission, stated:

> Encouraged by a written warranty to seek redress in court, unable in many instances to find the proper court, and finding in most instances that the assistance of a lawyer is necessary, a dissatisfied purchaser would be rewarded only with disillusionment and frustration. Unfortunately, the frustration and disillusionment and resulting animosity would be directed against the warrantor. . . .[143]

General Mills Fun Group and Eddie Bauer commented that insertion of such statements would subject them to a barrage of questions from consumers as to their legal rights, and that answering such inquiries would increase their operating costs.[144] Westinghouse, Black and Decker, Sears, EIA and others expressed the view that these statements were appropriate for a consumer education campaign, but not for disclosure in warranties themselves.[145] Westbend Co., among others, argued that the nuances of implied warranties and legal rights could not adequately be explained to consumers in just five or six lines.[146] Zenith Radio

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[134] R 1-3-1, 27 Baldwin Piano and Organ Co. ("Some states do not permit limitations on the duration of an implied warranty and some states require warrantor to award incidental and consequential damages . . ."); R 1-3-1, 117, Ford Motor Co. ("Modifications, limitations or exclusions on implied warranties may be unenforceable in some states. . . ."); R 1-3-1, 501, Montgomery Ward (". . . The modification or limitation on implied warranties set forth in this warranty is unenforceable in some states. . . .")

[135] See R 1-3-3, 849, GE ("The provision describing how to make modifications, limitations, etc., conspicuous or prominent should if considered at all, be by way of example.")

[136] R-1-3-1, 2, Westinghouse Electric Corp.; R-1-3-2, 372, Sunbeam Corp.; R-1-3-2, 393, Shell Oil Co; R-1-3-2, 703, Standard Oil Co., (Indiana); R-1-4-1, 3-4, California State Electronics Association; R-1-4-1, 223, Air Conditioning and Refrigeration Institute; R-1-3-1, 19, Walker Manufacturing; R-1-3-3, 850, General Electric Co; Tr. 2276, Woolliscraft, California State Electronics Association.

[137] R-1-3-2, 655, Sears, Roebuck and Co; See also R-1-3-2, 724, Bose Corporation; R-1-3-3, Waltham Watch.

[138] R-1-3-1, 72, David A. Schaefer, Attorney, Cleveland Ohio; R-1-3-2, Zenith Radio Corp; R-1-3-2, 432, Henry J Underwood, Jr, Attorney, Chicago, Illinois, R-1-4-1, 93, National Electrical Manufacturers Assoc; R-1-4-1, 135, National Paint and Coatings Association, Inc.; Tr. 2048, Berkson, Counsel, Singer Sewing Machines.

[139] R-1-3-1, 97, Goodyear Tire & Rubber Company; R-1-3-1, 164, Lear Siegler, Inc.

[140] R-1-3-1, 165, Lear Siegler, Inc, R-1-4-1, 203, National Association of Photographic Manufacturers, Inc.

[141] R-1-3-1, 49, North American Philips Corp.; R-1-3-1, 313, Briggs & Stratton Corp; R-1-3-2, 393, Shell Oil Co; R-1-3-2, 655, Sears, Roebuck and Co.; Tr. 165, Ray Afflerbach, Executive Director, American Institute of Kitchen Dealers; R-1-4-1, 484, AHAM; R-1-4-1, 539, Motor & Equipment Manufacturers Association.

[142] R-1-3-2, 615, SCM. See also R-1-4-1, 135, National Paint and Coatings Association, Inc.

[143] R-1-4-1, AHAM.

[144] R-1-3-2, 456-457, General Mills; R-1-3-2, 463, Eddie Bauer.

[145] R-1-3-1, 2, Westinghouse Electric Corp.; R-1-3-1, 189 Black and Decker; R-1-3-2, Sears, Roebuck & Company; R-1-3-2, 703, Standard Oil Co. (Indiana); R-1-4-1, 27, GAMA; R-1-4-1, 125, Automotive Parts and Accessories Assoc., Inc.; R-1-4-1, 187, E.I.A.

[146] R-1-3-1, 79, West Bend Co.; R-1-3-1, 189, Black and Decker; R-1-3-3, 958, Whirlpool Corp.

Corp., Nutone Division, and others claimed that even the inclusion of the existing statements would unduly lengthen warranties.[147]

The need for some form of disclosure as to the consumer's legal rights is documented in the record.[148] Hershel Elkins, California Deputy Attorney General, in his testimony stated:

> . . . (T)he experience we have have indicates that consumers, if they have an occasion to look at their warranty . . . believe that that restricts their rights to go further. In fact, we have had individuals who have gone back to the sellers, and the sellers have said 'Look; take a look at your warranty. It says right here that this is the only protection you have.' And consumers often do not realize that they have other theories. They have implied warranty. There is also negligence even without warranties. There are all sorts of breach of contract theories which might be utilized; and that is not an end all . . .[149]

The final Rule does not require the disclosure of either of the two alternatives as proposed. Since the proceeding did show the need for some kind of disclosure concerning warranty rights, a brief general statement was adopted, which puts the consumer on notice that other rights might accrue to him or her, in addition to those cited in the warranty. The substance of the language used in this statement follows several suggestions offered in the written comments on paragraphs (k) and (l) of the proposed Rule.[150] By the use of such statement, suggests NRMA, the consumer can

> be informed generally of his or her contract, tort, and strict liability rights in a manner that suggests that further inquiry as to the nature of those rights might be fruitful, but without confusing or misleading as to the details.[151]

The Commission concluded that paragraph (a)(9) of the final rule can accomplish this task without imposing unreasonable burdens on warrantors. The warranty need not be a legal treatise. Indeed, the final rule should preclude such a result. However, the warranty must at least contribute to the buyer's understanding of its legal consequences. To require less could result in misleading the public by failing to negate the assumption (often incorrect) that the warranty sets forth the buyer's only recourse. The final rule will go far to correct this situation and will adequately implement the intent of Congress.

SEALS OF APPROVAL

7013(b)

Paragraph (a)(1)–(9) of this section shall not be applicable with respect to statements of general policy on emblems, seals or insignias issued by third parties promising remedial action with respect to a consumer product, which statements contain no representation or assurance of the quality or performance characteristics of the product, provided that (1) the disclosures required by paragraph (a)(1)–(9) are published by such third parties in each issue of a publication with a general circulation, and (2) such disclosures are provided free of charge to any consumer upon written request.

This paragraph was added to the final Rule in response to concerns expressed by *Parents* and *Good Housekeeping Magazines* that the proposed rule would force the elimination of "seal" programs.[152] It relieves these and other similar seal programs from having to set forth the disclosure requirements set forth in 701.3(a) in the actual seal itself. These disclosures must, however, be set forth in a publication. The required disclosures are thus the same for seal programs as for other warranties; only the medium for disclosure has been altered.

A specific provision for seal programs has been granted because of circumstances which the Commission believes are unique. First, third party seals are too small to contain the disclosures required by the rule and still remain legibly printed and readable by the consumer.[153] Also, magazines such as *Parents* and *Good Housekeeping* are not in the chain of distribution of products bearing the seal. They are merely third-party guarantors.[154] Finally, the public policy stated in 102(a) of the Act of "improving competition in the marketing of consumer products" would not be served by a rule which terminated seals of approval such as Parents and Good Housekeeping.[155] Whatever the merits of such programs, we do not choose to eliminate them at the stroke of a pen. The Commission has instructed its staff to monitor the impact of this exception and to recommend modifications if needed to protect the public.

OWNER REGISTRATION CARDS

701 4

When a warrantor employs any card such as an owners' registration card, a warranty registration card, or the like, and the return of the card is a condition precedent to warranty coverage and performance, the warrantor shall disclose this fact in the warranty. If the return of such card reasonably appears to be a condition precedent to warranty coverage and performance, but is not such a condition, that fact shall be disclosed in the warranty.

The disclosures required by this section are in accord with specific disclosures required by the Act. Section 102(a)(5) authorizes the disclosure of "[a] statement of what the consumer must do and the expenses he must bear." Section 102(a)(7) provides for the disclosure of "[t]he step-by-step procedures which the consumer should take in order to obtain performance of any obligation under the warranty . . ." Section 701.4 which requires the warrantor to disclose in the warranty document itself, the purposes for which the card is intended, is necessary in order to alert the consumer as to whether or not the return of the card is a precondition to warranty service or performance.

MACAP's 1973 evaluation of warranties notes that an increased number of companies stated in their warranties that the consumer was required to return a warranty registration card in order to have the warranty honored. A special questionnaire was sent to the 48 companies who included such a requirement to ascertain (1) whether in practice the return of the warranty registration card was required in order for the company warranty to be honored; (2) whether the warranty would be honored without the return of such card; and (3) whether there were other reasons why the return of such card was helpful to the company.[156] Twenty-eight of the thirty-two companies that responded to this inquiry replied that the warranty would be honored in practice even if the registration card was not returned. MACAP also found, in evaluating the comments of the responding companies, that there are a number of uses for warranty registration card information. The predominant uses were (1) verification of warranty status in dispute situations; (2) identification of the "original owner"; (3) identification of the product location for purposes of product modifications, product recall, and evaluation of the need for service centers and/or parts distributors; and (4) marketing or sales purposes. On the basis of this information, MACAP recommended that appliance warrantors who use such cards "candidly and clearly state the purpose of the card, if other

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[147] See e.g., R–1–3–1, 2, Westinghouse Electric Corp.; R–1–3–2, 388, Scovill Housing Products Group; R–1–3–2, 401, Zenith Radio Corp.

[148] Tr. 738, Goldberg ("the deaf community like many other minority communities does not really know that they have legal rights"); Tr. 1290, Kaufman, Assistant Attorney General, State of Illinois ("I think . . . if you said to 100 [people] on the street, 'what is an implied warranty?'; I don't think they would be able to answer your question."); Tr. 234–1–42, Max Factor, Deputy City Attorney, Los Angeles, California ("701.3(k) & (l) . . . is one of the hearts of the statute . . . That is telling the consumers what their rights are."); Tr. 2391, Julian D. Rhine, Assistant District Attorney, San Francisco, California ("I don't think the consumer is really aware of his right.").

[149] Tr. 2032, Elkins.

[150] R–1–3–1, 288, Union Carbide Corp., (". . . (T)his section should . . . include a generally stated requirement that warranties must include a statement that consumers may have implied warranty rights in addition to the rights provided by the written warranty."); R–1–3–2, 501, Montgomery Ward ("This warranty gives you specific legal rights. You also have implied warranty rights . . ."); R–1–3–3, 849, 6E ("This warranty gives you specific legal rights. You may also have implied warranty rights which vary from state to state . . ."); R–1–3–1, 49, North American Phillips Corp. ("This warranty gives you specific legal rights. Because of pertinent statutes in your state you may have additional rights . . ."); R–1–4–1, 608, NRMA ("This warranty gives you specific legal rights, and you may also have other rights, which vary from state to state.").

[151] R–1–4–1, 608, National Retail Manufacturers Association.

[152] R–1–3–1, 292–301, Good Housekeeping Magazine, R–1–3–3, 1051, Arent, Fox, Kintner, Plotkin & Kahn.

[153] R–1–3–1, 292–301, Good Housekeeping Magazine, Tr. 403, Parents Magazine.

[154] R–1–3–1, 296, Good Housekeeping Magazine, Tr. 395–96, Parents Magazine.

[155] R–1–3–1, 1050, Arent, Fox, Kintner, Plotkin & Kahn.

[156] R–1–4–1, 434, Major Appliance Consumer Action Panel.

than or in addition to registration of the product to assure warranty service." [157]

The NBCCA report lends further support to MACAP's recommendation as to warranty registration cards The report states:

registrations on consumer usage may be reasonable but should be used only when the restriction has a real purpose. For example, consumers should not be misled to believe that mailing a registration card is necessary precondition to obtaining the benefits of a warranty. In sum, any restriction or other obligation imposed upon the consumer should be clearly defined and carefully explained in the material available to the consumer at the time of purchase.[158]

The practice of stating that the card is a prerequisite to warranty coverage and performance, even where this is never enforced, may chill the assertion and exercise of warranty rights. Some purchasers may not request warranty service if they did not return the card in the prescribed period of time, because of the mistaken (although logical) belief that the warranty accurately states the warrantor's intentions.

Furthermore, a requirement, that a purchaser complete and return a warranty registration card appears to be unenforceable under Section 2-313 of the U.C.C. An express warranty must be "a basis of the bargain", or part of the actual sales transaction. According to the House Subcommittee Staff Report,

most warranties and warranty registration cards appear to be of the type that are packaged with the product. . . . This discovery often takes place at home, long after the actual sales transaction has been completed. Thus, the requirement of filling out and returning a warranty registration card in order to obtain full warranty protection . . . is likely to be held invalid by most courts.[159]

The House Subcommittee Staff states further that

some of the warranties that had these cards did not expressly require that the cards be filled out and returned, but instead state to 'please' do so. However, the fact that it is labeled 'Warranty Registration Card' and is attached to the warranty can nevertheless convey the idea that the card is needed to validate the warranty . . . (M)ost of these cards appear to be clearly for the benefit of the manufacturer—to obtain marketing information . . . Questions seeking this kind of information can pose a threat to privacy, especially if it is given under the mistaken notion that the buyer will obtain full warranty protection by doing so.[160]

This section of the Rule is intended to eliminate the deception inherent in the situation where a warrantor purports to condition warranty protection upon a timely return of the registration card, while in fact using such cards solely for marketing or other purposes.

The original proposal had also required a disclosure in the warranty of the purpose for which a card was used, if the return of such card was not a condition precedent to warranty coverage.[161] NEMA, AHAM, SCM, and others argued against including a statement about an unrelated subject (e g., market research) in an already lengthy warranty.[162] Cox, Langford, and Brown stated that "(s)uch a requirement may encourage manufacturers to condition their warranties on the return of such cards, and therefore reduce the protection given to consumers." [163] Sears claimed that "(s)uch a disclosure in the warranty may even mislead consumers into believing that since the disclosure is in the warranty that the card must have something to do with the warranty." [164]

This requirement has been modified in the final Rule, which requires disclosure only if the card is or reasonably appears to be required for warranty performance. The strictures of Section 5 of the Federal Trade Commission Act, 15 U.S.C. 45, are adequate to deal with any other deceptive uses of non-warranty related cards.

PARAGRAPHS DELETED FROM THE PROPOSED RULE

701.3(a) Section 701.3(a), which required the disclosure of "the full name(s) and address(es) of the warrantor(s)", has been incorporated as an alternative in paragraph 701.3(a)(5). (See discussion of paragraph 701.3(a)(5), *supra.*)

701.3(e) Paragraph 701.3(e) of the proposed Rule required the disclosure of:

The period of time, stated in terms of hours, business days or days, within which, after notice of a defect, malfunction, or failure to conform with the warranty, the warrantor will perform any obligations under the warranty.

This provision evoked much negative comment from warrantors. Many industry representatives stated that the warrantor could not control the length of time within which warranty obligations could be performed because of the use of independent contractors, such as retail dealers.[165] Other warrantors claimed that they could not control the length of time because of problems in securing parts or supplying replacement parts.[166] CRI, EIA, NRMA and many others argued that requiring the inclusion of such a time period would not be helpful to consumers because it would lead warrantors to set long, maximum times for performance, representing the most extreme cases.[167] Montgomery Ward, General Electric, and others stated that averages could not be obtained [168] and would not be useful even if they could be derived.[169]

Many warrantors cited the variables which make setting a time for performance exceedingly difficult. In different

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[157] R-1-4-1, 436, Major Appliance Consumer Action Panel.

[158] R-1-2-2, 818, National Business Council for Consumer Affairs.

[159] R-1-2-1, 57, House Subcommittee Staff Report.

See *Koellmer v. Chrysler Motors, Corp.* 6 Conn. Cir. 478, 8UCC Rep. Serv. 668 (1970). A properly worded disclaimer clause contained in the operator's manual for a new truck was held ineffective by a Connecticut court because the manual was delivered after the sale had been consummated.

[160] R-1-2-1, 57, House Subcomm Staff Report.

[161] Section 701.4(b)(2) of the proposed Rule stated:

"If the return of such card is not a condition precedent to warranty coverage, the warrantor shall clearly and conspicuously disclose in the warranty document the purpose for which such card is utilized. In such instance, the warrantor shall not designate the card as 'warranty registration card', but shall appropriately label or title the card according to the purpose or purposes for which it is intended, e g., 'marketing research card', or 'product safety registration card'."

[162] R-1-3-1, 3, Westinghouse Electric Corporation; R-1-3-1, 172, McGraw-Edison Company, R-1-3-1, 314, Briggs and Stratton Corporation; R-1-3-2, 502, Montgomery Ward and Co.; R-1-3-2, 704, Standard Oil Company; R-1-4-1, 28, Gas Appliance Manufacturers Association; R-1-4-1, 93-94, National Electrical Manufacturers Association; R-1-4-1, 222, Air Conditioning and Refrigeration Institute; R-1-4-1, 488, Association of Home Appliance Manufacturers; R-1-3-2, 617, Proctor-Silex Corporation.

[163] R-1-3-2, 713, White Consolidated Industries, Inc.

[164] R-1-3-2, 657, Sears, Roebuck and Company.

[165] R-1-3-1, 7, Colemen Co., Inc.; R-1-3-1, 14, Engineering Products Co.; R-1-3-1, 96-97, Goodyear Tire and Rubber Co.; R-1-3-1, 188, Black & Decker Tool Co.; R-1-3-1, 204, Ross, Hardies, O'Keefe, Babcock & Parsons; R-1-3-1, 311, Briggs and Stratton Corp.; R-1-3-1, 341-342, Zenith Hearing Instrument Corp.; R-1-3-2, 366-67, Sunbeam Corporation; R-1-3-2, 382-83, Rockwell International; R-1-3-2, 386-87, Nutone Division, R-1-3-2, 392, Shell Oil Company; R-1-3-2, 407-8, Boise Cascade Corporation; R-1-3-2, 425-26, Exxon Company, U S A.; R-1-3-2, 446, J. I. Case Co; R-1-3-2, 438, Outboard Marine Co., R-1-3-3, 934-35, Timex Corp.

[166] See, e.g., R-1-3-1, 19, Walker Manufacturing, R-1-3-1, 96-97, Goodyear Tire & Rubber Co.; R-1-3-2, 347-48, Gamble-Skogmo, Inc; R-1-3-2, 366-67, Sunbeam Corp.; R-1-3-2, 382-83, Rockwell International; R-1-3-2, 466, J J. Case Co.; R-1-3-2, 493-95, Montgomery Ward & Co., Inc.; R-1-3-2, 675, Beatrice Foods Co.; R-1-3-3, 1023-26, General Motors Corp.; R-1-4-1, 123-124, Automotive Parts and Accessories Association, Inc.; R-1-4-1, 199-200, National Association of Photographers Manufacturers, Inc.; R-1-4-1, 215-16, Texas Automobile Dealers Association.

[167] See, e g., R-1-3-1, 126-27, Carpet and Rug Institute; R-1-3-1, 188, Black and Decker Power Tools Co.; R-1-3-2, 347-48, Gamble-Skogmo, Inc.; R-1-3-2, 382-83, Rockwell International; R-1-3-2, 392, Shell Oil Co; R-1-3-2, 466, J. I. Case Co.; R-1-32, 458, Outboard Marines, Co.; R-1-3-2, 548, Nixon, Hargrave, Devans & Doyle; R-1-3-2, 647-49, Sears, Roebuck and Co.; R-1-3-3, 921-22, Amana Refrigeration, Inc.; R-1-3-3, 934-35, Timex Corp.; R-1-4-1, 19, National Association of Chain Drug Stores; R-1-4-1, 145-46, National Association of Bedding Manufacturers; R-1-4-1, 199-200, National Association of Photographic Manufacturers; R-1-4-1, 183-184, Electronics Industry Association; R-1-4-1, 597, National Retail Merchants Association.

[168] R-1-3-2, 493-95, Montgomery Ward & Co; R-1-3-2, 548, Nixon, Hargrave, Devans, & Doyle; R-1-4-1, 123-24, Automotive Parts & Accessories Association; R-1-3-3, 847, General Electric Corp.

[169] R-1-3-2, 493-95, Montgomery Ward & Co; R-1-3-3, 955-56, Whirlpool Corp.; R-1-3-3, 847, General Electric Corp.

areas, a different service organization or differing backlog may account for a variation in the amount of time needed for performance of obligations.[170]

A compelling argument, directed at the effects of the insertion of the proposed language, was presented by Thomas W. Clark, Director of Marketing Services of Bang & Olufsen of America, Inc. ("B & O A"). In his testimony he stated:

> . . . (L)arge manufacturers could use their sheer size to gain a competitive edge. . . . (M)any of B & O A's authorized service stations repair a great many different brands. A large manufacturer whose products represent, for instance, 30–40 percent of a repair facility's business has the economic power to promise consumers a three-day repair period and force the repair facility to honor it at the expense of one such as B & O A whose products represent less than one percent of the facility's business. The ultimate result of this provision could well be to reduce competition in the market place, a result directly contrary to the interest of the consumer it is meant to "protect".[171]

This paragraph was proposed because consumer complaints had indicated that securing timely repairs under warranty was a major problem. If the consumer were apprised at the outset of the period of time within which the warrantor would perform any warranty obligations, he or she would be better able to differentiate among similar warranties for competing products, and any false expectations as to time for repairs could be dispelled. However, although the problem of obtaining timely warranty performance which motivated the inclusion of this paragraph is serious, the Commission, having reviewed the record, is of the opinion that the insertion of this paragraph in this Rule is not the appropriate means for addressing this problem. Because warrantors might be encouraged, on the basis of the inclusion of such a provision, to set and operate under a longer time for repair than currently exists in practice, the best interest of the consumer would be served by deletion of this requirement.

701.3(g) Section 701.3(g) of the proposed Rule required the disclosure of

> any requirement or duty which must be fulfilled by the purchaser as a condition precedent to securing warranty performance, including any expenses which must be borne by the purchaser.

Of the comments which were received concerning this paragraph, most were directed at the interrelation and overlap between paragraphs (g) and (h) of the proposed Rule.[172] The Commission has determined that the information disclosures called for in (g) are fully addressed by § 701.3(a) (3) and (5) of the final Rule. The information required by those sub-paragraphs includes disclosure of all responsibilities which the consumer must perform in order to obtain warranty performance. Therefore, paragraph (g) was deleted from the final Rule.

701.3(j) Paragraph (j) of the proposed Rule required the disclosure of

> any limitations on the time of day or days of the week during which the warrantor will perform his warranty obligations if such performance is not available Monday through Saturday, 9:00 a m to 6:00 p m local time

This paragraph spawned a deluge of negative comments from warrantors. Many warrantors stated that they provided for too many service facilities to specify the working hours of each in the warranty.[174] Others, such as The Coleman Co. and Kohler Co., claimed to have no control over the hours during which warranty service is available.[175] Others simply did not know the hours that their services were open for business.[176] Baldwin Piano, Altheimer & Gray, and SFMA complained that since different stores had different hours, warrantors would have to determine the ultimate destinations of their products and would be forced to print several different warranties.[176] Sunbeam, Chrysler Corp. and others stated that the hours for service establishments changed frequently, making compliance with this paragraph difficult.[177] CRI, Sears, Questor Corp., and others claimed that this paragraph would force servicers to conform to the same hours, exceeding the Commission's authority under Section 102(a).[178] Other industry representatives stated that the hours set forth in the proposed paragraph were not consonant with those of most businesses.[179]

This paragraph was inserted in the proposed Rule because it was felt that the consumer should know whether or not a warrantor's service hours were more limited than those normally offered by others in the same or similar line of business. This information could play a part in the consumer's purchasing decision.

The Record is replete with comments stressing that the inclusion of this paragraph would lead to voluminous warranties, and that the servicers would be forced to conform to the same hours. Therefore, although the Commission feels that this paragraph might have provided useful information to consumers, it has decided that the public interest is best served by its deletion, since the language as originally proposed would have created a disincentive for the setting of flexible hours.

701.3(m)

Paragraph (m) of the proposed Rule required that the warranty contain:

> If the terms "Life", "Lifetime", or words of similar meaning are used to indicate the duration of a warranty, a clear and conspicuous disclosure of the life referred to.

Although this paragraph does not appear in the final Rule, the disclosure which it requires, i.e., that of the life referred to, is required by Section 701.3 (a)(4), which requires the disclosure of the duration of the warranty. Further-

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[170] R–1–3–1, 188, Black & Decker Power Tools; R–1–3–2, 166–67, Sunbeam Corp., R–1–3–2, 493–95, Montgomery Ward & Co.; R–1–3–2, 675, Beatrice Foods Co.; R–1–3–3, 921–22, Amana Refrigeration, Inc.; R–1–3–3, 1023–26, General Motors Corp.; R–1–3–3, 1069, Argosy Manufacturing Co.; R–1–3–3, 846, General Electric Corp; Tr. 2315–16, John Schiewe, Assistant Vice President, Marketing and Product Manager, Thermador Waste-King.

[171] Tr. 1989–90, B & O A.

[172] R–1–3–2, 649, Sears, Roebuck and Co.; R–1–4–1, 38, National Association of Furniture Manufacturers; R–1–4–1, 73, National Retail Merchants Association; R–1–3–1, 312, Briggs & Stratton Corp; R–1–3–3, 936, Timex Corp.; R–1–3–2, 611, Proctor-Silex Corp.

[173] R–1–3–1, 14, Engineering Products Co; R–1–3–1, 58, Mohasco Corp.; R–1–3–1, 76, Kohler Co.; R–1–3–1, 78, West Bend Co; R–1–31, 164, Lear Siegler, Inc; R–1–3–1, 188, Black & Decker Tool Co; R–1–3–1, 201 Ross, Hardies, O'Keefe, Babcock & Parsons; R–1–3–1, 256–57, Arthur, Dry & Kalish; R–1–3–1, 342, Zenith Hearing Instrument Corp; R–1–3–2, 384, Rockwell International; R–1–3–2, 447, J. I. Case, Inc.; R–1–3–2, 548–49, Nixon, Hargrave, Devans & Doyle, R–1–3–3, 936, Timex Corp.; R–1–3–3, 1028, General Motors Corp.; R–1–4–1, 132, National Paints & Coatings Association; R–1–4–1, 227, Engine Service Association, Inc.; R–1–4–1, 281–82, Specialty Equipment Manufacturers Association; R–1–3–1, 201, Ross, Hardies, O'Keefe, Babcock & Parsons; Tr. 2046–47, Daniel Berkson, Corporate Counsel, Singer Sewing Machines.

[174] R–1–3–1, 5, Coleman Co; R–1–3–1, 76, Kohler Co.; R–1–3–1, 127–128, Carpet and Rug Institute; R–1–3–1, 164, Lear Siegler, Inc, R–1–3–2, 348, Gamble-Skogmo, Inc.; R–1–3–2, 384, Rockwell International; R–1–3–2, 387–88, Nutone Division; R–1–3–2, 392, Shell Oil Co.; R–1–3–2, 438, Outboard Marine Co.; R–1–3–2, 425–26 Exxon Company; R–1–4–1, 40, National Association of Furniture Manufacturers; R–1–4–1, 124, Automotive Parts & Accessories Association, Inc.; R–1–4–1, 222, Air Conditioning and Refrigeration Institute; R–1–4–1, 567, Boating Industries Association; R–1–3–3, 789, Warren Tool Corp.; R–1–4–1, 281–82, Specialty Equipment Manufacturers; R–1–3–3, 848, General Electric Corp.; Tr. 2316–17, John Schiewe, Assistant Vice President, Marketing and Product Manager, Thermador WasteKing.

[175] R–1–3–3, 936, Timex Corp.; R–1–3–1, Carpet and Rug Institute; R–1–3–3, 789, Warren Tool Corp.

[176] R–1–3–1, 27, Baldwin Piano and Organ Co.; R–1–3–2, 355, Altheimer & Gray; R–1–3–3, 789–90, Warren Tool Co.

[177] R–1–3–1, Association of Auto & Truck Recyclers; R–1–3–1, 256–57, Arthur, Dry & Kalish; R–1–3–2, 369, Sunbeam Corporation; R–1–3–2, 651–52, Sears Roebuck and Co; R–1–4–1, 202, National Association of Photographic Manufacturers; Tr. 2046–7, Daniel Berkson, Singer Sewing Machine; R–1–3–2, 497–98, Montgomery Ward and Co., Inc.

[178] R–1–3–1, 128, Carpet and Rug Institute; R–1–3–1, 335, Questor Corp.; R–1–3–2, 369, Sunbeam Corp.; R–1–3–2, 651–52, Sears Roebuck and Co.; R–1–4–1, 567, Boating Industry Association; Tr. 2316–17, John Schiewe, Vice President, Thermador WasteKing.

[179] R–1–3–1, 68, Mohasco Corp.; R–1–3–2, 369, Sunbeam Corp.; R–1–3–2, 419–20, Armstrong Cork Co.; R–1–3–2, 432, Defrees & Fisher; R–1–3–2, 447, J. I. Case; R–1–3–2, 548–49, Nixon, Hargraves, Devans & Doyle, R–1–3–2, 723, Bose Corp.; R–1–3–3, 923, Amana Corp.; R–1–3–3, 1028, General Motors Corp; R–1–4–1, 202, National Association of Photographic Manufacturers; R–1–4–1, 227, Engine Service Association, Inc.; R–1–4–1, 74, National Retail Merchants Association; R–1–3–3, 1070, Airstream and Argosy Inc.; R–1–3–3, 957, Whirlpool Corp.; Tr. 2275–6, H. G. Woolliscraft, California State Electronics Association; Tr. 2316–17, John Schiewe, Vice President, Thermador WasteKing; R–1–3–2, 497–98, Montgomery Ward and Co.

more, Section 103(a)(1) of the Act requires a warrantor offering a "full" warranty to disclose the duration of the warranty in the warranty designation.[180]

It should also be noted here that the Commission still retains its jurisdiction over unfair and deceptive warranty practices under Section 5 of the Federal Trade Commission Act.[181]

Past Commission orders have required the disclosure of the lifetime referred to by the warrantor giving a lifetime guarantee. In *Matter of Burstein-Applebee Company, et al.*, 69 F.T.C. 16 (1966), respondent retailer advertised that their wristwatches were "guaranteed for life", whereas in fact such watches were not guaranteed for the life of the purchaser. The Commission ordered the respondent to cease and desist from

> Using the word 'Lifetime' or any other term of the same import to refer to any guarantee which is not for the duration of the life of the purchaser or original user without clearly and conspicuously disclosing the life to which such reference is made; or representing, in any manner, that the duration of a guarantee is other than respondents are able to establish is the fact.

See also *In the Matter of Solmica, Inc., et al.* 66 F.T.C. 566 (1964), *In the Matter of Fingerhut Manufacturing Company, et al.* 657 F.T.C. 751 (1964). A warrantor choosing a "lifetime" duration must thus disclose the lifetime referred to in the warranty, and must recognize that the warranty obligation cannot be revoked or modified so long as the measuring "life" continues.

A separate Rule provision on lifetime warranty duration is unnecessary. The final Rule requires a simple and readily understandable disclosure of warranty duration. Standing alone, the word "lifetime" does not meet this requirement.

OTHER COMMENTS

Virginia Knauer, Director of the Office of Consumer Affairs for the Department of Health, Education, and Welfare testified that "the proposed rule on disclosure of warranty terms will cause warranties to be lengthened in verbiage, which could in turn cause key facts to be submerged in information clutter unless the presentation of such facts is highlighted through rules or guidelines for presentation." [182] Professor Laurence Feldman, of the University of Illinois, commented that the proposed Rule "fails to recognize, as Shakespeare did that 'They are stick that surfeit with too much, as they that starve.' " [183] Many others cited the need for a requirement of some type of standardized format and headings,[184] because of the potential length of warranties complying with the requirements set forth in Part 701.

The Commission recognizes the need for warranties to be simple, understandable, and concise. The final Rule has been simplified and streamlined to accomplish that result. The Commission does not believe that the final rule will contribute to the evils of undue length and complexity. It is not prepared, on the basis of the record, to impose a standardized format on all consumer product warranties.

V. Pre-Sale Availability of Written Warranty Terms. Section 102(b)(1)(A) of the Act directs the Federal Trade 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."

Consumer product warranties are not always made available to the consumer prior to the sale of the product. Instead, the terms and conditions of the warranty are often available only after the sale has been consummated and the package opened or product delivered. A consumer complaint regarding a wristwatch warranty illustrates the types of problem which may arise with respect to prepackaged consumer products: "The buyer is instructed that while the watch is 'guaranteed', there is a 'service charge' of $2.75 for repairs during the warranty period. This information is not known prior to purchase, and due to the type of packaging of this item, the existence of a charge for any warranty service is not known until the sale is completed." [185]

If the warranty is in fact only available after the sale, the use of the warranty as an informational input in the consumer's purchasing decision and as a tool for making product comparisons is precluded. Furthermore, it may be argued that an express warranty undisclosed prior to sale is inoperative. Section 2-313 of the U.C.C. requires that an express warranty be "a basis of the bargain," or part of the actual sales transaction. Accordingly, the enforceability of a warranty, the existence of which the purchaser is made aware only subsequent to the actual sales transaction has been completed, would be questionable. The House Subcommittee Staff Report, found that only two of the 51 participating manufacturers offered warranties which were actually designed to be part of the actual sales contract.[186]

The other warranties examined appear to be of the "prepackaged" variety—the type packaged with the product resulting often in the buyer not being aware of the terms of the warranty, or its existence, until he or she gets home and opens the box containing the product. In such instances, it is questionable whether the prepackaged warranty would be a basis of the bargain.[187]

Congressman Bob Eckhardt, a member of the Conference Committee on S. 356,[188] addressed the issue of pre-sale availability of warranty information:

> We require the FTC to write rules to assure the availability of warranty information prior to the actual purchase. The consumer should be able to base his/her decision to buy on the quality of the warranty as well as factors such as the cost and the appearance of the product. It is unfair for a consumer to learn only after arriving home and unpacking a sealed carton that what was said to be a full 5-year warranty does not cover costs of labor and parts. There are those who argue that in the case of such 'packaged warranties,' the consumer could legally challenge the effectiveness of the warranty. . . . This, I think, is true but it is an inadequate solution. There are only a handful of consumers who know that such a challenge could be made and even less of them with the financial resources and personal energy to make it, especially when a product costs only, say $30. Furthermore, we think it is an unfair burden to impose on the individual consumer. That is why we require the FTC to prescribe rules to assure availability of warranty information.[189]

Availability of warranty terms prior to sale is important for consumers in light of the increasing trend toward the sale of service contracts, particularly for major appliances. The scope and duration of the written warranty must form a significant element in the careful consumer's decision whether, or at what point in time, to sign a service contract.

That warranty information is currently either unavailable or difficult to procure at point of sale is illustrated by an informal survey undertaken by the Consumer Affairs Department in Detroit, Michigan.[190] Some of the findings of the survey indicated that

> In no case . . . was a copy of the full warranty available for inspection. 'The warranty comes packed in the box' was the regular response. . . . The information available on lower cost appliances was significantly less than that experienced with major appliances. In no instance did a salesperson offer any information and in no case was a copy of the written warranty available . . . In general the results of this survey confirm the need for and the validity of the proposed rules . . .[191]

Like findings resulted from a similar endeavor by *Home Furnishings Daily.*

In each instance, no information was volunteered, and when this reporter did get

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[180] "If the written waranty meets the Federal minimum standards for warranty . . ., then it shall be conspicuously designated a 'full (*statement of duration*) warranty'."

[181] 15 U.S.C. 45 (1970).

[182] Tr. 7, Knauer.

[183] R-7-1-9, 13, Laurence P. Feldman, Ph.D.

[184] R-1-3-3, 970, Amana Refrigeration, Inc.; R-7-1-6, 3, Council on Aging for Southeastern Vermont; R-7-1-6, 12-13, Texas Public Interest Research Group; R-7-18, 150-153, Wisconsin Dept. of Justice; Tr. 21-2 Knauer; Tr. 774-77, Zweibel; Tr. 1327-1328 Jeffries; Tr. 2131 Drury; Tr. 2218-19 Powell.

[185] R1-2-2, 761, Letter from (*consumer*) to Virginia Knauer, referred to FTC, February 25, 1974.

[186] House Subcom. Staff Report, *supra* note 9, at 13.

[187] *Id.*

[188] R 1-2-2, 877, Address by Congressman Bob Eckhardt, Gas Appliance Manufacturers Association Warranty Workshops, in Boca Raton, Florida, April 8, 1975.

[189] *Id.* at 882-883.

[190] R-1-8, 74-76 ("Several staff members went 'shopping' in various stores for a selected group of products. Products shopped for were automatic washing machines, color television sets and vacuum cleaners. . . . The shoppers were instructed to ask about the product and see what, if any, information was offered by a salesperson. Once the sales 'pitch' was concluded the shoppers were instructed to ask further questions about the warranty, ask to see it in writing. . . . The stores selected . . . included two major . . . department stores, two appliance chain stores, an independent appliance dealer and a national chain department store carrying its own brand of appliances.")

[191] R-1-8, 74.

answers to questions, data was often vague. Frequently, salesmen said warranty information was contained in instruction manuals, however, no instruction manuals were readily available. Only two lines . . . had warranty information on the front of refrigerators.[102]

Trying to get warranty information on a refrigerator was likened to "trying to defrost the North Pole with an ice pick."[102a]

Both of these informal surveys indicate that warranty data is currently difficult to obtain or unavailable at present.

SCOPE OF THE RULE

§ 702.3(a) Duties of the Seller

Section 702.3(a) of the proposed Rule required the seller to

> . . . maintain a binder or a series of binders in each department in which any consumer product with a written warranty is offered for sale, containing copies of the warranties for the products sold in such department.

The proposal of a binder system as the means for making warranties available to consumers prior to sale met with considerable opposition. Many complaints were received from retailers concerning the logistics and the expense of setting up and maintaining a binder system.[103] Virginia Knauer and Robert Sprouse, President of Sprouse-Reitz, among others, stated that the binder system was inconvenient for consumers to use, that it was not consonant with normal consumer buying patterns, and that consumers would not make the effort to use it.[104] George Zweibel of DC Neighborhood Legal Services and J. T. Church of Roses Stores Inc. suggested that the use of only one set of binders would be insufficient to serve consumers' needs.[105] The specter of consumers fighting to get to the warranty binders was also raised.[106]

There was no substantial record support from consumers or consumer groups for the use of the binder system as initially proposed.

A major and repeated concern voiced in an overwhelming number of comments was the inflexibility of the proposed rule.[107] The failure of the Commission to take cognizance of the range of retail establishments which would fall under the aegis of the proposed Rule was cited by NRMA, American Retail Federation ("ARF"), and others.[108] ARF stated:

> The retailers affected . . . encompass the full range of merchants from the small, independent specialty store to the large, traditional multidepartment store . . . In the larger multi-department stores the heavy volume of customers and the vast quantities of consumer products carried and sold each day make the use of warranty binders simply impractical. In high volume discount and self-service stores, these problems are magnified by lack of sales personnel required to keep the binders updated and by the fast turnover of consumer products frequently sold on a 'one-time' basis only.[109]

Other comments as to the inflexibility of the proposed rule, including those of Montgomery Ward, noted that the Commission had failed to recognize the variety of products encompassed by the Rule.[200] Similarly, it was argued that the proposed scheme failed to take into account the "many different ways that consumer products are sold."[201] Furthermore, ARF claimed that "(t)he merger of *seller* and *warrantor* in the case of private brand retailers . . . has . . . been overlooked by the Commission staff."[202]

The final Rule heeds the retailers' cry for greater flexibility. It provides the seller with four alternative means by which warranties can be made available to prospective buyers prior to sale. The seller must, as a minimum, employ one of the means cited, but may use any additional means desired. It should be noted that only the "text" of the warranty need be disclosed, rather than the actual warranty document.

702.3(a)(1)(i) "clearly and conspicuously displaying the text of the written warranty in close conjunction to each warranted product;"

The idea of displaying the warranty with the product being offered for sale was suggested or endorsed by Hook Drugs, Georgia Retail Association, SCM, F. W. Woolworth Co. ("Woolworths"), and others as a viable means for pre-sale warranty disclosures.[203]

This sub-paragraph substantially incorporates the language suggested in the statement submitted by the American Retail Federation.[204]

702.3(a)(1)(ii)

Maintaining a binder or series of binders which contains(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 such 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 buyer's attention; or

(B) make the binders available to prospective buyers on request, and place signs reasonably calculated to elicit the prospective

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[102] Schwartz, Diana, "Warranty Data Difficult to Get in N.Y. HFD Shopper Finds," *Home Furnishings Daily*, November 5, 1975, at 15 col. 2.

[102a] *Id.*

[103] See, e.g. Tr. 446–47, Church ("The binder rule would require using square footage in a nonvolume way and would drive up square footage cost . . . In addition to space costs, the binders themselves would represent a significant cost . . .

In our stores 10 departments sell warranted products. In the hardware department we sell about 50 items under warranty. That department, therefore, would require at least three identical warranty books. The cost per store would be $33. To supply all hardware departments would cost $8 811. In our music and electronics department we sell more than 70 warranted items. For such a department I would estimate customer convenience requiring four sets of binders with two volumes per set The cost per department would be $72, with a total cost for all departments running to $19,224. In the appliance departments, where more than 80 warranted items are sold, the total cost of three sets of warranty books per store would be $15,219. To maintain the notebooks, including clerical time used in writing manufacturers for copies of warranties, filing, and updating the warranty book, we estimate will cost 2,000 man-hours per year at the minimum wage rate of $2.10 per hour, for a total labor cost of $4,200. In addition to the foregoing costs, there will be the cost of replacement of binders and protective coverings. We estimate that if the binders were in fact used, they would have to be replaced at least once a year.

Therefore, to give effect to the rule, Rose's Stores would have an additional annual cost in excess of $200,000 per year. While those not familiar with retailing might consider this a small cost, the reality is that no cost is small, and most cost must be passed along to the customers in the prices they pay for goods."); TR 1865, Danners; TR. 2106–7, Sprouse; R1–3–3, 1099–1101, City Products.

[104] See, e.g. TR 11–12, Knauer ("We fear that a binder volume of warranties set apart from the price, specifications, and product itself, will not facilitate value comparisons . . . (T)he binder proposal does not take into consideration existing, long standing, and not easily altered consumer purchasing habits. Consumers will not be rapidly convinced (if at all) that they should run back and forth between display area and location of warranty binder . . ."); TR 2103–4, Sprouse ("The buying habits of customers are . . . varied . . . They definitely do not come to pore over books filled with various warranties . . . It is not until a major appliance is being purchased that warranty information comes into play. And for those customers, . . . requiring them to consult binders to get information they need will not please nor help them. Because they will serve as a disincentive to their getting the information they should have.")

[105] See, e.g. TR. 781, Zweibel; TR. 445, Church.

[106] TR. 22, Knauer.

[107] R–1–3–1, 244, JC Penney; R–1–4–1, 58, NRMA; R–1–3–2, 358, S. S. Kresge; R–1–3–2, 439, Outboard Marine; R–3–2, 505, Montgomery Ward; R–1–3–2, 658, Sears, Roebuck; R–1–4–1, 109, Wyoming Retail Assn.; R–1–4–1, 213, American Retail Federation; R–1–4–1, 568–569, Boating Industries Assn.

[108] See, e.g. R–1–4–1, 57, NRMA; R–1–4–1, 212–213, ARF.

[109] R–1–4–2, 676–677, ARF.

[200] See, e.g. R–1–3–2, 505–506, Montgomery Ward; R–1–4–1, 58, NRMA; R–1–4–1, 212, ARF; R–1–4–2, 677–678, ARF.

[201] R–1–3–2, 658, Sears.

[202] R–1–4–2, 678–679, ARF.

[203] See, e.g. R–1–4–1, 58, NRMA ("a washing machine warranty could be tied to the agitator or taped to the top of the washtub . . . A toaster warranty could be taped to the display table . . ."); R 1–3–2, 505, Montgomery Ward ("The major appliance store or department would in most cases choose to place the warranty with the floor model . . ."); TR 291, Kelly; TR 2463, Evans; R 1–4–1, 25, GAMA; R 1–6, 11, Tex PIRG; R 1–5, 253, Consumer; R 1–3–1, 4 Hook Drugs; R 1–3–1, 77, Seeman Co.; R 1–3–1, 86, Georgia Retail Assn.; TR 1879, Danners.

[204] R 1–4–2, 680, ARF ("displaying each such warranted product accompanied by the terms of the written warranty").

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.

Some retailers such as Woolworths, Sears, and Montgomery Wards acknowledged that there were instances in which the binder might be the only or the best means for making pre-sale warranty disclosures.[205]

The language in the final Rule is substantially similar to that suggested in the written comments submitted by Sears and Roebuck.[206]

This sub-paragraph requires that the binders be maintained either in the department where the warranted product is sold, or in a location which provides the prospective buyer with ready access to the binders. Gambles, in its written submission, noted that "(w)hile the provision that binders be kept on a departmental basis is reasonable in the case of large retail outlets where it would be a burden on the customer to require that he or she go to one specific location in the store to find the binders, there are many small retail outlets which may have merchandise laid out by department, yet are small enough so that one complete set at a single location in the store would suffice." [207]

Thus, in such instances, it would be permissible to place the binders in a location other than in the departments in which the products are being sold.

The final Rule also affords the seller who elects to utilize the binder system a choice of either prominently displaying the binders, for example, at an appropriate counter, or making them available on request. If the latter alternative is chosen, a prominent notice or series of notices must alert the prospective buyer's attention to the existence of the binders and the means for obtaining access to them.[208]

The requirement that the binder be indexed is intended to maximize the ease with which the consumer can locate and compare the warranties contained in the binder for a particular type of product.

The seller is given latitude both to determine the kind of system to use for compiling the warranty information, and to decide whether to organize such a system according to warrantor or product.

Also, part of the seller's duty to maintain the binder includes keeping the binder current. If a new warranted product is introduced, the warranty for that product must be placed in the binder in the appropriate indexed section. If a new model is introduced, the warranty for such model must appear in the binder. If a new warranty supersedes a prior warranty, the old warranty must be removed from the binder.

702.3(a)(1)(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;

Seeman Co., Fieldcrest Mills and others suggested that the warranties be printed on or otherwise attached to the product containers.[209] If the warrantor elects to do this, the retailer may then display the package in a manner which makes the warranty clearly visible to prospective buyers.

The language adopted in this paragraph is derived from that suggested in several of the written submissions.[210]

702.3(a)(1)(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 product to which the notice applies.

Walker Manufacturing Co., National Tire Dealers and Retreaders Association, and others suggested that signs containing the warranty text be used in lieu of binders.[211] ARF stated that "private brand warrantors frequently use a common warranty for broad categories of products. Where this is done, warranty terms can be conveniently disclosed at point of sale by use of common signs located in closed proximity to the warranted products." [212] Accordingly, this alternative has been included in the final Rule. The language used is substantially derived from language suggested by ARF and Sears.[213]

702.3(a)(2)

Not remove or obscure any warranty disclosure materials provided by a warrantor, except:

(i) where such removal is necessary for store window displays, fashion shows, or picture taking; or

(ii) where the seller otherwise through means provided for in sub-paragraph (1) above, makes the terms of the warranty information available to the consumer.

The proposed Rule required that the seller "(n)ot remove or obscure any warranty information disclosure materials attached to a warranted consumer product by a warrantor."

The revised sub-paragraph in the final Rule provides two exceptions which allow the seller to remove warranty information. First, if the product is part of a store window display or a fashion show, or is being photographed, it need not bear any warranty information. This exception is permitted on the theory that warranty information will be available for the particular product in the department in which it is offered for sale.

Second, if the seller elects to make the warranty information available to the consumer by some means other than that provided by the warrantor, the seller may remove the information provided, so long as the alternate means complies with section 702.3(a)(1).

The language used in this provision is substantially drawn from that suggested by the ARF.[214]

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[205] TR 2464, Evans ("In some areas we may . . . have to have a binder. For example in our jewelry department . . . The warranties that are involved in items such as that, we agree we would have to have them in a binder.") R 1-3-2, 662, Sears ("In a particular product situation, the use of binders may be found by a retailer to be the most feasible method of compliance."); R-1-4-1, 58, NRMA ("Binders could be used where no display option is workable, e.g. for products . . . which are inaccessible because they are locked in a display case."); R 1-3-2, 505, Montgomery Ward ("a binder or similar device might be utilized for the availability of the warranties in the camera department."); R 1-4-2, 677-678, ARF.

[206] See R 1-3-2, 663, Sears:

"Maintain a binder or a series of binders in the store or each department in which any consumer product with a written warranty is offered for sale which contains copies of warranties for the products sold in the store or department. Such binders shall be prominently entitled "Warranties" or other similar title which clearly identifies the binder. Such binders 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 or by adding new warranties as appropriate. The seller shall make the binder available to consumers on request, and shall place signs in prominent locations in the store or department advising consumers of such availability."

[207] R 1-3-2, 345, Gambles.

[208] See suggestion in R 1-3-2, 505-506, Montgomery Ward ("If the latter method of availability is utilized for [binders] the consumer would be told by means of a clear and conspicuous notice where in the department those terms are available.")

[209] R-1-3-1, 77, Seeman Co.; R-1-3-1, 86, Georgia Retail Association; R-1-3-1, 339, Fieldcrest Mills; R-1-4-1, National Association of Chain Drug Stores, Inc. ("NACDS").

[210] R-1-3-2, 663, Sears ("Display any consumer product with a written warranty which is packaged and on which package the terms of the written warranty are disclosed in a clear and conspicuous manner so that such warranty disclosures are clearly visible to consumers at the point of sale"); R-1-4-2, 681, ARF ("displaying any packaged consumer product on which package the terms of the written warranty are disclosed in a clear and conspicuous manner so that such disclosures are available to the consumer").

[211] R-1-3-1, 19, Walker Manufacturing; R-1-4-1, 101 National Tire Dealers and Retreaders; R-1-3-2, 659, Sears ("Warranties common to a line of merchandise could be disclosed on one sign prominently displayed near the display of such merchandise").

[212] R-1-4-2, 679, ARF.

[213] R-1-4-2, 681, ARF ("in those departments where a single warranty applies to many consumer products, placing a common notice in close proximity to those products disclosing the terms of that written warranty, provided, however, that it is clear to which consumer products the common notice applies"); R-1-3-2, 663, Sears ("Placing a sign in close proximity to the display of any warranted products . . . which sign . . . clearly discloses the terms of the written warranty and is visible to consumers at the point of sale; provided that nothing shall require a separate sign . . . on each warranted product on display if common signs . . . clearly identify the products to which the warranty terms disclosed thereon apply").

[214] R-1-3-2, 681, ARF "Not reasonably remove or obliterate any warranty information disclosure materials accompanying a war-

DUTIES OF THE WARRANTOR

(1) Under the proposed Rule, the seller was requested to

upon specific written or oral request from a prospective consumer, promptly provide a copy of each written warranty requested.

Much negative comment was received concerning this requirement. North American Philips Corp., CRI, and NRMA argued that the phrase "make available" used in the Act did not "contemplate that the written warrantor must 'provide' the full text of written warranties to each consumer who seeks to obtain it. Rather, the term 'make available' connotes 'availability for inspection', with delivery being required only if inspection is impossible." [215]

GAMA, NEMA, EIA, J. C. Penney Co. ("Penneys"), and others claimed that such a requirement was superfluous if warranties were available at point of sale.[216]

National Association of Catalog Showroom Merchandisers expressed the concern that "this rule invites harassment or predatory competition because someone could request 10,000 warranties with a single letter." [217]

Several warrantors submitted estimates of what compliance with this provision would cost them. Air Conditioning and Refrigeration Institute stated:

The cost of doing this includes much more than paper and printing. This includes making sure that the product is properly identified so that a copy of the applicable warranty can be provided. (This may require correspondence or telephone calls to make sure that the correct product, even down to the model number, has been specified.) Even if there are no special problems with product designation or identification, it would probably cost a manufacturer somewhere between fifty cents and one dollar to identify the product, locate the pertinent warranty, and mail it to a consumer.[218]

In view of the aforementioned comments, the Commission has decided that it would be in the public interest to eliminate this requirement.

The final Rule requires the warrantor to "provide sellers with warranty materials necessary for such sellers to comply with the requirements set forth in paragraph (a) of this section" and to "provide catalog, mail order, and door-to-door sellers with copies of written warranties necessary for such sellers to ranties necessary for such sellers to comply with the requirements set forth in paragraphs (c) and (d) of this section."

These paragraphs obligate the warrantor to provide the seller with the materials necessary to make the required pre-sale warranty disclosures to consumers. In the event that the warrantor does not deal directly with the seller or does not know who the sellers will ultimately be, the warrantor must distribute sufficient quantities of the required pre-sale materials through normal distribution channels to insure receipt by sellers.

The final Rule gives the warrantor four alternative means by which warranty materials may be provided to sellers in order for such sellers to comply with Section 702.3(a). The warrantor must, as a minimum, use one of these means, but may use any combination of the means listed or any additional means desired. The alternatives correspond to the four alternatives set forth in Section 702.3(a), under "Duties of the Seller."

702.3(b)(1)(i)(A)

Providing a copy of the written warranty with every warranted consumer product;

This sub-paragraph parallels that in Section 702.3(a)(1)(i), which allows the seller to display the warranty text in close conjunction to the product, and that in 702,3(a)(1)(ii), which allows the seller to maintain a binder containing copies of the warranties for warranted consumer products being offered for sale.

Olin Corporation, Montgomery Ward, NRMA, and many others stated that the Commission should have specifically required that the warranty accompany the product.[220]

The language used in this paragraph follows that suggested in the written statement submitted by ARF, NRMA and Montgomery Ward.[220]

702.3(b)(1)(i)(B)

Providing a tag, sign, sticker, label, decal or other attachment to the product, which contains the full text of the written warranty;

This sub-paragraph tracks that in 702.3(a)(1)(i), which permits the seller to display the warranty text in close conjunction to the product.

702.3(b)(1)(i)(C)

Printing on or otherwise attaching the text of the written warranty to the package, carton, or other container if that package, carton or other container is normally used for display purposes. If the warrantor elects this option, a copy of the written warranty must also accompany the warranted product;

This sub-paragraph parallels 702.3(a)(1)(ii) which allows the seller to display the package of any product on which the warranty text is disclosed.

If the warrantor elects to print or otherwise attach the warranty to the package, a copy of the written warranty must also accompany the product. This is to ensure that the consumer will not inadvertently discard the package on which the warranty is printed, and, thus be left without a copy of the warranty in his or her possession.[221]

702.3(b)(1)(i)(D)

Providing a notice, sign, or poster disclosing the text of a consumer product warranty. If the warrantor elects this option, a copy of the written warranty must also accompany each warranted product.

This sub-paragraph corresponds to that of 702.3(a)(1)(iv), which permits the seller to post a sign disclosing the text of the warranty.

If the warrantor chooses to provide such a sign, a copy of the written warranty must also accompany the product. This is to ensure that the consumer has a copy of the written warranty which he or she may retain to refer to in the event of a product failure, defect, or malfunction.

The proposed Rule required the warrantor to

clearly and conspicuously disclose any applicable warranty designation(s) contained in the written warranty for the product, and the following statement:

The retailer has a copy of the complete warranty on this product. Ask to see it.

(i) By means of a tag, sign, sticker, label, decal or other attachment to the product; and

(ii) By printing such disclosure on the principal display panel of the package, carton or other product container.

The purpose of this paragraph in the proposed Rule was to notify the consumer that warranties were available for examination upon request from the retailer, since there was no requirement that the binders be conspicuously displayed. Rather, they were only to be made available upon request. Under the final Rule, the warranties must either be conspicuously displayed on the product package, or in close conjunction to the warranted products. If a binder is used, it must either be conspicuously displayed, or a notice as to its availability posted conspicuously.

Thus, this paragraph has been eliminated from the final Rule, as it is no longer necessary as a means to inform the consumer of warranty availability.

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ranted consumer product by a warrantor, except:

(i) where such removal is necessary for store window displays, fashion shows, or such other promotional purposes; or

(ii) where the seller otherwise, through means provided for in paragraph (1) above, makes the terms of the warranty information available to the consumer."

[215] R-1-4-1, 65, NRMA. See also R-1-3-1, 50, North American Philips Corp. ("The Act provids in Section 102(b)(1)(d) only that written warranties be 'made available' prior to the sale of the product. As written, the proposed rules go far beyond this requirement."), R-1-3-1, 150, CRI.

[216] R-1-3-1, 118, Ford Motor Co.; R-1-3-2, 458, General Mills; R-1-4-1, 28, GAMA; R-1-4-1, 95, NEMA; R-1-4-1, 187, EIA.

[217] Tr. 285, Kelley, National Association of Catalog Showrooms.

[218] R-1-4-1, 223-24 Air Conditioning & Refrigeration Institute. See also R-1-4-1, 28-9, GAMA; Tr. 2204-5 Dunbar.

[219] See, e.g., R-1-3-1, 16, Olin Corp.; Tr. 740, Goldberg, Student Legal Action Group; R-1-9, 17, Feldman, University of Illinois; R-1-3-2, 506, Montgomery Ward; R-1-4-1, 58 NRMA.

[220] R-1-4-2, 681, ARF ("Provide a copy of the warranty with every consumer product."); R-1-4-1, 60, NRMA ("The written warrantor shall accompany each product with a copy of its written warranty."); R-1-3-2, 508, Montgomery Ward ("Provide a copy of the warranty with every consumer product.").

[221] See Tr. 750, Goldberg: "I have . . . seen many instances with respect to pens, lighters, other devices like that where the warranty . . . is printed on the packaging. You open up the package and the warranty goes with it. . . . Very few consumers will save the wrapping . . . and call the manufacturer to task if it is defective."

702.3(b)(2)

Sub-paragraph (1) of this paragraph (b) shall not be applicable with respect to third parties issuing statements of general policy on emblems, seals or insignias promising replacement or refund if a consumer product is defective, which statements contain no representation or assurance of the quality or performance characteristics of the product; provided that (i) the disclosures required by 701.3(a)(1)-(9) are published by such third parties in each issue of a publication with a general circulation, and (ii) such disclosures are provided free of charge to any consumer upon written request.

This sub-paragraph has been added in response to concerns expressed by magazines such as *Parents'* and *Good Housekeeping* that, under the present structure of their respective "seal" programs, they would be unable to comply with the presale availability requirements set forth in the proposed Rule.[222]

This sub-paragraph therefore exempts such "seal" programs from the duties set forth in Section 702.3(b)(1). This specific exemption for such "seal" programs has been inserted for several reasons. Under the structure of the "seal" programs, the magazine merely authorizes the use of the "seal." It does not know if the seal is in fact used by the manufacturer or not. The seal may be used on only certain models, or on certain sizes, or in some parts of the country only. Therefore, there is no way of their knowing on what products the seal must be made available.[223]

Furthermore, because they are not in the chain of distribution, these publications have no way of knowing the identity of the retailers who are selling the products bearing its seal, even if the publication knew what products carried the seal.[224]

The Rule does require, however, that the publication make all disclosures within the magazine itself, and that it provide the consumer with a copy of the warranty, free of charge, at his or her request. The requirement or providing of a free copy of the warranty is necessary since the consumer would otherwise have no opportunity to read the warranty prior to the sale of a product bearing the seal unless he or she purchased the magazine containing the necessary disclosures. In all other pre-sale situations contemplated by the final Rule, the consumer can see the warranty at no cost. Thus, this requirement was inserted so as to provide the consumer with an equal opportunity to examine the warranty without incurring any expenses.

CATALOG AND MAIL ORDER SALES

Examination of the catalogs of several major catalog companies has revealed that such catalogs do publish product warranties.[225] However, the companies do not always include in their catalogs the specific warranties covering each product that carries a warranty. This problem is compounded by the fact that catalogs often advertise satisfaction guarantees as well as specific product warranties. Therefore, the purchaser may not be apprised of the specific warranty for the product purchased until he or she actually receives the item. This may serve to confuse the potential purchaser, for it is often unclear whether the mail order company's satisfaction guarantee replaces, supplements, or complements the specific product warranty. Many consumers have no other encounter with a mail order seller than an advertisement seen on television or in the back of a magazine. Therefore, if the requirement of making warranties available to consumers prior to purchase is to be met, it must apply to mail order advertisements and solicitations. It is important that the consumer know, prior to ordering products through the mail, whether such products have written warranties, and if so, the nature of such warranties.

This sub-paragraph is intended to eliminate the situation where the purchaser receives his or her first notification of the specific product warranty upon receipt of the ordered merchandise. Rather, the consumer will be able to examine the complete warranty prior to purchase, and will be able to use it to make a purchase decision.

The proposed Rule contained separate sections, setting forth the duties of catalog sellers and the duties of mail order sellers. Montgomery Ward and Mail Order Association of America ("MOAA") noted the overlap between these two paragraphs, and suggested that the two paragraphs be consolidated.[226] This suggestion has been adopted in the final Rule, with the definition of "catalog and mail order sales" provided as follows:

"Catalog or mail order sales", means any offer for sale, or any solicitation for an order for a consumer product with a written warranty, which includes instructions for ordering the product which do not require a personal visit to the seller's establishment.

The proposed Rule had defined "catalog" as "any multi-page solicitation, flier, or brochure distributed to consumers in which more than one consumer product is offered for sale."

A "mail order seller" was one who offered for sale to consumers "a consumer product with a written warranty by means of direct mail solicitation or by means of an advertisement, in any medium, which includes instructions for ordering the product."

Montgomery Ward stated that these definitions, as written in the proposal, would encompass circulars, which are not catalogs, which "are intended to offer merchandise to the consumer at the advertised price which must be purchased at our stores. . . . The written warranties will be available for . . . inspection at the store."[227] The primary distinction between circulars and catalog/mail order sales, stated MOAA, was that the latter should cover "only those printed materials which include instructions for ordering the product without personally visiting a seller's retail establishment."[228] Thus, the language suggested by Montgomery Ward, to wit "which includes instructions for ordering the product which do not require a personal visit to the seller's establishment"[229] was incorporated into the final Rule.

It was also suggested by MOAA that the final Rule clarify that catalog and mail order sellers do not have the same duties as sellers covered by Section 702.3(a).[230] Accordingly, the language suggested in the statement of the American Retail Federation,[231] to wit:

Duties of the seller. Except as provided in paragraphs (c)-(d) of this section, the seller of a consumer product with a written warranty shall . . .

was adopted.

The proposed Rules had required the disclosure, in close conjunction to the warranted products of:

(i) The warranty designation of each such product, and

(ii) That the written warranty is available free on request, and the address where such warranty can be obtained.

Beatrice Foods, NRMA and others recommended the deletion of the requirement that warranty designations be included in catalogs and mail order solicitations, as being impractical, unnecessary, or unduly burdensome.[232] NRMA stated that:

. . . (a) retailer may prefer not to discuss warranties at all, and the designation requirement therefore introduces an unwanted factor. Space and time are at a premium in all advertising, and the retailer should be free to use its time and space in what it considers the most effective method . . . Furthermore, requiring disclosure of warranty designation(s) will fall discriminately on interstate retailers, because designations may vary

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[222] R-1-3-1, Howrey and Simon for Good Housekeeping; Tr. 396, Parents

[223] R-1-3-1, 298, Howrey & Simon for Good Housekeeping; Tr. 398, Parents.

[224] R-1-3-1, 298, Howrey & Simon for Good Housekeeping.

[225] R-1-2-2, 402 (memorandum to file from Charles A. Taylor, III, Esq., May 13, 1975).

[226] See, e.g., R-1-3-2, 508, Montgomery Ward; R-1-3-2, 554, Law Firm of Nixon, Hargrave, Devans, & Doyle; R-1-3-2, 662, Sears; R-1-4-1, 62, NRMA.

[227] R-1-3-3, 733, Franklin Stores. See also, R-1-3-3, 853, General Electric ("This necessarily includes such traditional advertising formats as newspaper supplements or stuffers."); R-1-3-2, 508; R-1-3-2, 554, Nixon, Hargrave, Devans & Doyle; R-1-4-1, 647, MOAA; R-1-4-1, NRMA.

[228] R-1-4-1, 647, MOAA.

[229] R-1-3-2, 511, Montgomery Ward: "'Catalog or mail order' means an offer to sell or a solicitation for an order for a consumer product covered by a written warranty containing sufficient directions or instructions to order the merchandise *without personally visiting a seller's establishment.*" (emphasis added);

R-1-4-1, 650, MOAA: "'Catalog' means any multi-page solicitation, flier, or brochure distributed to consumers in which more than one consumer product is offered for sale and which includes instructions for ordering the product *without personally visiting a seller's retail establishment*" (emphasis added).

[230] R-1-4-1, 647, MOAA.

[231] R-1-4-2, 683, ARF.

[232] R-1-3-1, 253, Giant Food, Inc.; R-1-3-1, 1070, Airstream & Argosy; R-1-3-2, 677, Beatrice Foods; R-1-4-1, 63, NRMA.

from one state to another, depending on the availability of certain remedies . . . For retailers which do business in more than one state, specifying such complexities in each advertisement or catalog would take up an undue amount of space . . . Moreover, a single product may be burdened with numerous disclosures, all of which must be 'clear and conspicuous.' [233]

Nutone Division stated that "if a catalogue includes a copy of the complete warranty for the products which are described therein, it would not be necessary to show the warranty designation and the address which a free copy of the warranty can be obtained on each page. . . ." [234] Sears said: "The warranty statement could be provided on one page and references to it could be set forth where the products are displayed." [235] Direct Mail & Marketing Association ("DMMA"), National Association of Photographic Manufacturers and others suggested that a single location in the catalog or solicitation contain warranty information, and that catalog and mail order sellers be permitted to refer consumers to such page or pages.[236] Gambles and Eddie Bauer suggested that the catalog seller be given the option of either printing the entire warranty or warranties covering the merchandise being offered for sale, or mailing the disclosure as to the availability of warranties and responding to warranty requests from consumers.[237]

In view of these submissions, the final Rule has been changed to require that mail order or catalog sellers

clearly and conspicuously disclose in such catalog or solicitation in close conjunction to the description of warranted product, or in an information section of the catalog or solicitation clearly referenced, including a page number, in close conjunction to the description of the warranted product, either:

(A) the full text of the written warranty; or

(B) that the written warranty can be obtained free upon specific written request, and the address where such warranty can be obtained. If this option is selected, such seller shall promptly provide a copy of any written warranty requested by the consumer.

DMMA, MOAA, NRMA and Montgomery Ward stated that the warrantor should be required to supply the catalog or mail order sellers with copies of warranties, so as to enable such sellers to comply with the requirements set forth in this sub-paragraph.[238] Accordingly, section 702.3(b)(2) requires warrantors to "provide catalog, mail order. . . . sellers with copies of written warranties necessary for such sellers to comply with the requirements set forth in paragraph(s) (c) . . . of this section."

[233] R-1-4-1, 63-4, NRMA.

[234] R-1-3-2, Nutone Division.

[235] R-1-3-2, 662, Sears.

[236] R-1-3-2, 389, Nutone Division; R-1-3-2, 491, Montgomery Ward; R-1-4-1, 207, National Association of Photographic Manufacturers; R-1-4-1, 647, MOAA; R-1-4-1, 10, NRMA; Tr. 949-50, Daly, DMMA.

[237] R-1-3-2, 346, Gambles; R-1-3-2, 466, Eddie Bauer.

[238] R-1-3-2, 490, Montgomery Ward; R-1-4-1, 65, NRMA; R-1-4-1, 647, MOAA; Tr. 951, Daly, DMMA.

DOOR-TO-DOOR SALES

The proposed rule stated:

any seller who offers for sale to consumers a consumer product with a written warranty by means of door-to-door sales shall, prior to any sales transaction, present the consumer with a copy of the written warranty which the consumer may retain even if no purchase is made.

(2) Door-to-door-sale means a sale of consumer products in which the seller or his representatives personally solicits the sale, including those in response to or following an invitation by a buyer, and the buyer's agreement to offer to purchase is made at a place other than the place of business of the seller.

Herschel Elkins and Harvey Freed suggested that the language "prior to any sales transaction" was unduly vague,[239] and Sears stated that it could be construed as "requiring the warranty to be provided to consumers before any sales presentation is made, regardless of whether there is any possibility of a sale being made." [240] Dutterer's of Manchester Corp. pointed out that a distinction needed to be drawn between "prospecting for an *appointment* at the door" and the actual commencement of the sale process in the home, when the representative has returned to comply with a preset appointment; only during the latter instance should the written warranty be presented.[241] Accordingly, the final Rule uses the langauge "prior to the consummation of the sale."

Some of the comments submitted by industry representatives also disclosed the need for a definition of the term "consumer" for purposes of this section. Field Enterprises ("Field") stated: ". . . (T)here are many circumstances in which either the insubstantial nature of the seller's contact, or the express or implied unwillingness or inability of the person contacted to enter into a sales transaction, would justify the sales representative's concluding that the person contacted is not a 'consumer' or 'prospective consumer' for purposes of the Act. Unfortunately, proposed Section 702(3)(e)(1) . . . offers no criteria . . . To resolve this ambiguity . . . the Commission should define 'consumer' for purposes of Section 702.3(e) to include only individuals solicited by a door-to-door seller who either indicates sufficient interest in the seller's product or maintain sufficient contact with the seller for the seller reasonably to conclude that the individual solicited is interested in purchasing the product.[242]

In light of these comments, the Commission has changed the word "consumer" to "prospective buyer", and has adopted the definition suggested by Field Enterprises, and endorsed by the Direct Selling Association ("DSA").

any individual solicited by a door-to-door seller to buy a consumer product who indicates sufficient interest in that consumer product or maintains sufficient contact with the seller for the seller reasonably to conclude that the person solicited is considering purchasing the product.[243]

DSA and Field also argued in some of the comments that the proposed Rule discriminated against door-to-door sellers.[244] Fixed location sellers as opposed to door-to-door sellers, were not required under the proposed Rule to provide consumers with copies of warranties but merely to make copies available for the consumer's inspection. Also, fixed location sellers as well as catalog and mail order sellers were only required to make warranties available upon request under the proposed Rule.

The final Rule adopts portions of the language proposed by Field,[245] and endorsed by DSA,[246] and seeks to equalize the duties of the door-to-door seller with those imposed on other sellers.

The final Rule requires the door-to-door seller to "disclose the fact that the sales representative has copies of the warranties for the warranted products being offered for sale which may be in-

[239] Tr. 2025, Elkins; Tr 2524, Freed.

[240] R-1-3-2, Sears; See also, R-1-4-1, 290, DSA; R-1-4-1, 290, DSA.

[241] R-1-3-3, 756, Dutterer's of Manchester Corp.

[242] R-1-3-3, 802, Field; R-1-4-1, 290, DSA.

[243] R-1-3-3, 809, Field; Tr. 759, DSA.

[244] R-1-4-1, 287-89, DSA; R-1-3-3, 805-808 Field.

[245] R-1-3-3, 808-9, Field: "(e) *Door-to-door sales.*

(1) This subsection contains the rules applicable to door-to-door sellers under this Part.

(2) Any seller who offers for sale a consumer product with a written warranty by means of door-to-door sales to individuals shall, prior to the completion of any sales transaction:

(A) Disclose to consumers in a manner permitted by paragraph (3) of this subsection (e):

(i) The written warranty designation of each product;

(ii) The fact that the sales representative has in his possession copies of the warranties for the products, and that these copies may be inspected by the consumer at his request at any time during the course of a sales presentation; and

(iii) The fact that a copy of the written warranty may be obtained for the consumer to retain free on request, and the means by which such a copy may be obtained (including the address where such warranty may be obtained, if it is to be made available by mail);

(B) Ensure that each of its sales representatives carries with him a copy of each warranty for each product offered for sale, and cause such copies to be kept up-to-date in the manner required of other sellers with respect to binders under subsection (a);

(C) Provide a copy of any written warranty requested by the consumer, either by mailing or otherwise delivering to the consumer a separate document containing such warranty or by setting forth in a copy of any sales contract actually entered into with the consumer a clear and conspicuous statement of the warranty;

(3) The disclosure required by paragraph (2)(A) of this subsection (e) may be made either (A) orally or (B) clearly and conspicuously in writing, on the page containing the description of the warranted product, in any flier or brochure distributed to consumers which they are permitted by the seller to retain.

(4) For the purposes of this subsection (a): (A) "door-to-door sale" means [present definition in section 702.3(e)(2)]".

[246] Tr. 759, DSA.

spected by the prospective buyer at any time during the sales presentation. Such disclosure shall be made orally and shall be included in any written materials shown to prospective buyers."

The duty corresponds to that required of other sellers. Sales representatives need only disclose the fact that they have copies or the warranties for the warranted products being offered for sale, which may be inspected by the prospective buyer.

Finally, DSA recommended that the final Rule clarify that door-to-door sellers are to be governed by this section only, and not by other sections governing other sellers.[247] Section 702.3(a) of the final Rule accomplishes this purpose.[248]

VI. *Effective Date of the Rules.* Section 112(b) of the Act states:

> Section 102(a) shall take effect 6 months after the final publication of rules respecting such section; except that the Commission, for good cause shown, may postpone the applicability of such sections until one year after such final publication in order to permit any designated classes of suppliers to bring their written warranties into compliance with rules promulgated pursuant to this title.

The Commission has given careful consideration to requests by affected parties that a reasonable length of time be allowed to afford them opportunity to come into conformity with the provisions of the Rules.[249] Montgomery Ward submitted that:

> Catalog sellers will have to revise the media. Many catalog pages are 'locked in' six months before publication and changes after that date are extremely expensive. Since the sellers cannot 'set' their catalog until warrant(ors) of products listed in their catalogs have finalized the warranties, one year after publication is a minimum time for compliance by catalog sellers.[250]

The Commission recognizes the special problems concerning lead time for publications of catalog sellers. It is also aware that the revisions in warranties, packaging, and related materials necessitated by the final Rules may affect literally billions of pieces of paper. Furthermore, the Commission may promulgate other related Rules with respect to written warranties within the next six months. It is not the intent of the Commission to have warrantors incur unnecessary expenses in having to reprint their warranties multiple times in order to come into compliance with the successive promulgation of warranty rules.

For these reasons the Commission believes that a delay of the effective date of the Rule is necessary. Accordingly, Parts 701 and 702 will become effective one year after the date of promulgation.

[247] R-1-4-1, 291, DSA.

[248] "(a) *Duties of the seller.* The seller, *except as provided in paragraphs (c)-(d) of this Section,* of a consumer product with a written warranty shall": (emphasis supplied).

[249] R-1-3-2, 511-13, Montgomery Ward; Tr. 286, Friedman, National Association of Catalog Showroom Merchandisers, Tr. 951, Daly, Direct Mail/Marketing Association.

[250] R-1-3-2, 513, Montgomery Ward

The Commission has now considered all matters of fact, law, policy and discretion, including the data, views, and arguments presented on the Record by interested parties in response to the Notices, as prescribed by law, and has determined that the adoption of the Trade Regulation Rule and its Statement of Basis and Purpose set forth herein is in the public interest.

Accordingly, the Commission hereby adopts the foregoing Statement of Basis and Purpose, and hereby amends Title 16 of CFR, Chapter 1, Subchapter G, Rules, Regulations, Statements and Interpretations under the Magnuson-Moss Warranty Act, by adding new parts 701 and 702 as follows:

PART 701—DISCLOSURE OF WRITTEN CONSUMER PRODUCT WARRANTY TERMS AND CONDITIONS

Sec.
701.1 Definitions.
701.2 Scope.
701.3 Written warranty terms.
701.4 Owner registration cards.

AUTHORITY: 15 U.S.C. 2302 and 2309.

§ 701.1 Definitions.

(a) "The Act" means the Magnuson-Moss Warranty Federal Trade Commission Improvement Act, 15 U.S.C. 2301, *et seq.*

(b) "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. Products which are purchased solely for commercial or industrial use are excluded solely for purposes of this Part.

(c) "Written warranty" means—(1) 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

(2) 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.

(d) "Implied warranty" means an implied warranty arising under State law (as modified by secs. 104(a) and 108 of the Act) in connection with the sale by a supplier of a consumer product.

(e) "Remedy" means whichever of the following actions the warrantor elects:
(1) repair,
(2) replacement, or
(3) refund; except that the warrantor may not elect refund unless: (i) the warrantor is unable to provide replacement and repair is not commercially practicable or cannot be timely made, or
(ii) the consumer is willing to accept such refund.

(f) "Supplier" means any person engaged in the business of making a consumer product directly or indirectly available to consumers.

(g) "Warrantor" means any supplier or other person who gives or offers to give a written warranty.

(h) "Consumer" means a buyer (other than for purposes of resale or use in the ordinary course of the buyer's business) of any consumer product, any person to whom such product is transferred during the duration of an implied or written warranty applicable to the product, and any other such person who is entitled by the terms of such warranty or under applicable State law to enforce against the warrantor the obligations of the warranty.

(i) "On the face of the warranty" means—(1) where the warranty is a single sheet with printing on both sides of the sheet or where the warranty is comprised of more than one sheet, the page on which the warranty text begins;
(2) where the warranty is included as part of a larger document, such as a use and care manual, the page in such document on which the warranty text begins.

§ 701.2 Scope.

The regulations in this part establish requirements for warrantors for disclosing the terms and conditions of written warranties on consumer products actually costing the consumer more than $15.00.

§ 701.3 Written warranty terms.

(a) Any warrantor warranting to a consumer by means of a written warranty a consumer product actually costing the consumer more than $15.00 shall clearly and conspicuously disclose in a single document in simple and readily understood language, the following items of information: (1) The identity of the party or parties to whom the written warranty is extended, if the enforceability of the written warranty is limited to the original consumer purchaser or is otherwise limited to persons other than every consumer owner during the term of the warranty;

(2) A clear description and identification of products, or parts, or characteristics, or components or properties covered by and where necessary for clarification, excluded from the warranty;

(3) A statement of what the warrantor will do in the event of a defect, malfunction or failure to conform with the written warranty, including the items or services the warrantor will pay for or provide, and, where necessary for clarification, those which the warrantor will not pay for or provide;

(4) The point in time or event on which the warranty term commences, if different from the purchase date, and the time period or other measurement of warranty duration;

(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;

(6) Information respecting the availability of any informal dispute settlement mechanism elected by the warrantor in compliance with Part 703 of this subchapter;

(7) Any limitations on the duration of implied warranties, disclosed on the face of the warranty as provided in Section 108 of the Act, accompanied by the following statement:

Some states do not allow limitations on how long an implied warranty lasts, so the above limitation may not apply to you.

(8) Any exclusions of or limitations on relief such as incidental or consequential damages, accompanied by the following statement, which may be combined with the statement required in sub-paragraph (7) above:

Some states do not allow the exclusion or limitation of incidental or consequential damages, so the above limitation or exclusion may not apply to you.

(9) A statement in the following language:

This warranty gives you specific legal rights, and you may also have other rights which vary from state to state.

(b) Paragraph (a)(1)—(9) of this Section shall not be applicable with respect to statements of general policy on emblems, seals or insignias issued by third parties promising replacement or refund if a consumer product is defective, which statements contain no representation or assurance of the quality or performance characteristics of the product; provided that (1) the disclosures required by paragraph (a)(1)—(9) are published by such third parties in each issue of a publication with a general circulation, and (2) such disclosures are provided free of charge to any consumer upon written request.

§ 701.4 Owner registration cards.

When a warrantor employs any card such as an owner's registration card, a warranty registration card, or the like, and the return of such card is a condition precedent to warranty coverage and performance, the warrantor shall disclose this fact in the warranty. If the return of such card reasonably appears to be a condition precedent to warranty coverage and performance, but is not such a condition, that fact shall be disclosed in the warranty.

PART 702—PRE-SALE AVAILABILITY OF WRITTEN WARRANTY TERMS

Sec.
702.1 Definitions.
702.2 Scope.
702.3 Pre-sale availability of written warranty terms.

AUTHORITY: 15 U.S.C. 2302 and 2309.

§ 702.1 Definitions.

(a) "The Act" means the Magnuson-Moss Warranty Federal Trade Commission Improvement Act, 15 U.S.C. 2301, *et seq.*

(b) "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). Products which are purchased solely for commercial or industrial use are excluded solely for purposes of this Part.

(c) "Written warranty" means—(1) 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

(2) 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.

(d) "Warrantor" means any supplier or other person who gives or offers to give a written warranty.

(e) "Seller" means any person who sells or offers for sale for purposes other than resale or use in the ordinary course of the buyer's business any consumer product.

(f) "Supplier" means any person engaged in the business of making a consumer product directly or indirectly available to consumers.

(g) "Binder" means a locking binder, notebook, or similar system which will provide the consumer with convenient access to copies of product warranties.

§ 702.2 Scope.

The regulations in this part establish requirements for sellers and warrantors for making the terms of any written warranty on a consumer product available to the consumer prior to sale.

§ 702.3 Pre-sale availability of written warranty terms.

The following requirements apply to consumer products actually costing the consumer more than $15.00: (a) *Duties of the seller.* Except as provided in paragraphs (c)–(d) of this section, the 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 such 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 buyer's 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 product to which the notice applies;

(2) Not remove or obscure any warranty disclosure materials provided by a warrantor, except:

(i) where such removal is necessary for store window displays, fashion shows, or picture taking; or

(ii) where the seller otherwise, through means provided for in subparagraph (1) above, makes the terms of the warranty information available to the consumer.

(b) *Duties of the warrantor.* (1) A warrantor who gives a written warranty warranting to a consumer a consumer product actually costing the consumer more than $15.00 shall:

(i) Provide sellers with warranty materials necessary for such sellers to comply with the requirements set forth in

A step-by-step explanation of the
ure which the consumer should
in order to obtain performance
warranty obligation, including the
s or class of persons authorized
orm warranty obligations. This in-
the name(s) of the warrantor(s),
er with: the mailing address(es)
warrantor(s), and/or the name or
nd the address of any employee or
ment of the warrantor responsi-
the performance of warranty ob-
ns, and/or a telephone number
consumers may use without
to obtain information on war-
performance;
Information respecting the avail-
of any informal dispute settle-
mechanism elected by the war-
in compliance with Part 703 of
bchapter;
Any limitations on the duration of
d warranties, disclosed on the face
warranty as provided in Section
the Act, accompanied by the fol-
statement:

states do not allow limitations on
ng an implied warranty lasts, so the
limitation may not apply to you.

Any exclusions of or limitations
lief such as incidental or conse-
al damages, accompanied by the
ing statement, which may be com-
with the statement required in
ıragraph (7) above:

states do not allow the exclusion or
ion of incidental or consequential
es, so the above limitation or exclu-
ay not apply to you.

A statement in the following lan-
:

warranty gives you specific legal
and you may also have other rights
vary from state to state.

Paragraph (a)(1)—(9) of this
n shall not be applicable with re-
to statements of general policy on
ms, seals or insignias issued by
parties promising replacement or
d if a consumer product is defective,
statements contain no representa-
r assurance of the quality or per-
nce characteristics of the product;
ed that (1) the disclosures required
ragraph (a)(1)—(9) are published
ch third parties in each issue of a
ation with a general circulation,
2) such disclosures are provided
of charge to any consumer upon
n request.

4 Owner registration cards.

en a warrantor employs any card
as an owner's registration card, a
nty registration card, or the like,
he return of such card is a condi-
precedent to warranty coverage and
mance, the warrantor shall disclose
act in the warranty. If the return
h card reasonably appears to be a
tion precedent to warranty cover-
nd performance, but is not such a
tion, that fact shall be disclosed in
arranty.

PART 702—PRE-SALE AVAILABILITY OF WRITTEN WARRANTY TERMS

Sec.
702.1 Definitions.
702.2 Scope.
702.3 Pre-sale availability of written warranty terms.

AUTHORITY: 15 U.S.C. 2302 and 2309.

§ 702.1 Definitions.

(a) "The Act" means the Magnuson-Moss Warranty Federal Trade Commission Improvement Act, 15 U.S.C. 2301, *et seq.*

(b) "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). Products which are purchased solely for commercial or industrial use are excluded solely for purposes of this Part.

(c) "Written warranty" means—(1) 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

(2) 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.

(d) "Warrantor" means any supplier or other person who gives or offers to give a written warranty.

(e) "Seller" means any person who sells or offers for sale for purposes other than resale or use in the ordinary course of the buyer's business any consumer product.

(f) "Supplier" means any person engaged in the business of making a consumer product directly or indirectly available to consumers.

(g) "Binder" means a locking binder, notebook, or similar system which will provide the consumer with convenient access to copies of product warranties.

§ 702.2 Scope.

The regulations in this part establish requirements for sellers and warrantors for making the terms of any written warranty on a consumer product available to the consumer prior to sale.

§ 702.3 Pre-sale availability of written warranty terms.

The following requirements apply to consumer products actually costing the consumer more than $15.00: (a) *Duties of the seller.* Except as provided in paragraphs (c)–(d) of this section, the 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 such 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 buyer's 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 product to which the notice applies;

(2) Not remove or obscure any warranty disclosure materials provided by a warrantor, except:

(i) where such removal is necessary for store window displays, fashion shows, or picture taking; or

(ii) where the seller otherwise, through means provided for in subparagraph (1) above, makes the terms of the warranty information available to the consumer.

(b) *Duties of the warrantor.* (1) A warrantor who gives a written warranty warranting to a consumer a consumer product actually costing the consumer more than $15.00 shall:

(i) Provide sellers with warranty materials necessary for such sellers to comply with the requirements set forth in

paragraph (a) of this section, by the use of one or more by the following means:

(A) Providing a copy of the written warranty with every warranted consumer product; and/or

(B) Providing a tag, sign, sticker, label, decal or other attachment to the product, which contains the full text of the written warranty; and/or

(C) Printing on or otherwise attaching the text of the written warranty to the package, carton, or other container if that package, carton or other container is normally used for display purposes. If the warrantor elects this option a copy of the written warranty must also accompany the warranted product; and/or

(D) Providing a notice, sign, or poster disclosing the text of a consumer product warranty.

If the warrantor elects this option, a copy of the written warranty must also accompany each warranted product.

(ii) Provide catalog, mail order, and door-to-door sellers with copies of written warranties necessary for such sellers to comply with the requirements set forth in paragraphs (c) and (d) of this section.

(2) Sub-paragraph (1) of this paragraph (b) shall not be applicable with respect to statements of general policy on emblems, seals or insignias issued by third parties promising replacement or refund if a consumer product is defective, which statements contain no representation or assurance of the quality or performance characteristics of the product; provided that (i) the disclosures required by 701.3(a)(1)–(9) are published by such third parties in each issue of a publication with a general circulation, and (ii) such disclosures are provided free of charge to any consumer upon written request.

(c) *Catalog and Mail Order Sales.* (1) For purposes of this paragraph:

(i) "Catalog or mail order sales", means any offer for sale, or any solicitation for an order for a consumer product with a written warranty, which includes instructions for ordering the product which do not require a personal visit to the seller's establishment.

(ii) "Close conjunction" means on the page containing the description of the warranted product, or on the page facing that page.

(2) Any seller who offers for sale to consumers consumer products with written warranties by means of a catalog or mail order solicitation shall:

(i) clearly and conspicuously disclose in such catalog or solicitation in close conjunction to the description of warranted product, or in an information section of the catalog or solicitation clearly referenced, including a page number, in close conjunction to the description of the warranted product, *either:*

(A) the full text of the written warranty; or

(B) that the written warranty can be obtained free upon specific written request, and the address where such warranty can be obtained. If this option is elected, such seller shall promptly provide a copy of any written warranty requested by the consumer.

(d) *Door-to-door sales.* (1) For purposes of this paragraph:

(i) "Door-to-door sale" means a sale of consumer products in which the seller or his representative personally solicits the sale, including those in response to or following an invitation by a buyer, and the buyer's agreement to offer to purchase is made at a place other than the place of business of the seller.

(ii) "Prospective buyer" means an individual solicited by a door-to-door seller to buy a consumer product who indicates sufficient interest in that consumer product or maintains sufficient contact with the seller for the seller reasonably to conclude that the person solicited is considering purchasing the product.

(2) Any seller who offers for sale to consumers consumer products with written warranties by means of door-to-door sales shall, prior to the consummation of the sale, disclose the fact that the sales representative has copies of the warranties for the warranted products being offered for sale, which may be inspected by the prospective buyer at any time during the sales presentation. Such disclosure shall be made orally and shall be included in any written materials shown to prospective buyers.

Effective: December 31, 1976.

Promulgated by the Federal Trade Commission December 31, 1975.

VIRGINIA M. HARDING,
Acting Secretary.

[FR Doc.75-34894 Filed 12-30-75;8:45 am]

PART 703—INFORMAL DISPUTE SETTLEMENT MECHANISMS

Promulgation of Rule

THE PROCEEDINGS

The Federal Trade Commission, pursuant to Title I, Sections 109 and 110 of the Magnuson-Moss Warranty—Federal Trade Commission Improvement Act, Pub. L. 93-637 (15 U.S.C. §§ 2309, 2310), hereafter referred to as the "Act", has conducted a proceeding for the promulgation of a Rule setting forth minimum requirements for the implementation and operation of any informal dispute settlement mechanism incorporated into the terms of a written warranty subject to the Act.

Notice of this proceeding, including a proposed Rule, was published in the FEDERAL REGISTER of July 16, 1975 (40 FR 29895). The Notice urged all interested persons to express their approval or disapproval of the proposed Rule, or to recommend revisions thereof, and to give a full statement of their views, supplemented by all appropriate documentation. In addition, the Notice highlighted certain issues or provisions of the proposed Rule that were believed to be important in the successful establishment or operation of informal dispute settlement mechanisms. The documents supporting the proposed Rule, and a report of the Commission staff discussing the proposed Rule and the supporting documentation, were placed on the public record and made available for examination and copying.

Interested parties were thereafter afforded opportunity to participate in the proceeding through the submission of written data, views and arguments, and to appear and express their views orally and to suggest amendments, revisions, and additions to the proposed Rule. A period of 60 days was allowed for submission of written comments on the proposed Rule. Public hearings, as announced in the Notice, were held in Washington, D.C., September 15–18, 1975, in Chicago, Illinois; September 22–25, 1975, in Los Angeles, California; September 29 through October 1, 1975; and in San Francisco, California, on October 2, 1975. Every person who had expressed a desire to present his or her views orally at these hearings was accorded an opportunity to do so. The public record remained open for thirty days following the hearings for receipt of any other written data, views or arguments.

Upon careful analysis and review of the written and oral comments, the Commission has made certain modifications to the proposed Rule published on July 16, 1975. The Rule, the rationale for the modifications, and the Record relating thereto, are discussed within the Statement of Basis and Purpose appearing below as part of this Notice. The modifications do not raise issues of law or fact which were not fully addressed in the Proceeding. Therefore with good cause the Commission is promulgating this Rule without further invitation for comment on the modifications. The full text of the Rule follows the Statement of Basis and Purpose.

STATEMENT OF BASIS AND PURPOSE

I. Overview of the Act. Section 110 (a)(2) of the Magnuson-Moss Warranty—Federal Trade Commission Improvement Act, P.L. 93-637 (15 U.S.C. 2310) directs the Federal Trade Commission to prescribe rules setting forth minimum standards for any informal dispute settlement mechanism which is incorporated into the terms of a written warranty subject to the Act.

Section 110 (a)(1) of the Act begins with a broad statement of Congressional policy:

> Congress hereby declares it to be its policy to encourage warrantors to establish procedures whereby consumer disputes are fairly and expeditiously settled through informal dispute settlement mechanisms.

Section 110(a)(2) provides:

> The Commission shall prescribe rules setting forth minimum requirements for any informal dispute settlement procedure which is incorporated into the terms of a written warranty to which any provision of this title applies. Such rules shall provide for participation in the procedure by independent or governmental entities.

Under Section 110(a)(4) the Commission may review the operation of any dispute settlement procedure, resort to which is stated in a written warranty to be a pre-requisite to the consumer pursuing a legal remedy under Section 110 of the Act. In addition, any interested person may file a written complaint with the Commission and cause the Commission to conduct such a review. If the Commission finds that the procedure or its implementation, is not in compliance with minimum requirements prescribed by the Commission, then under Section 110(a)(4) the Commission may take appropriate remedial action under this Act, or any other provision of law. Section 110(b) of the Act states that failure by any person to comply with any requirement imposed on such person by the Act, or by a Rule thereunder, shall be a violation of Section 5(a)(1) of the Federal Trade Commission Act (15 U.S.C. 45(a)(1)), thus making available the Commission's injunctive and other powers.

Under Section 110(a)(3), if a warrantor incorporates a complying dispute settlement mechanism into the terms of the written warranty, and the warrantor requires that the consumer resort to the mechanism before pursuing any rights or remedies under Section 110, then the consumer may not commence a civil action under Section 110(d) (except for the limited purpose of establishing the representative capacity of a class of plaintiffs), without first seeking redress through the mechanism.

Section 110(d) permits any consumer damaged by reason of the failure of any supplier, warrantor, or service contractor to comply with any obligation under the Act, or under a written or implied warranty, or service contract, to bring suit in either a State court, or federal district court (specific jurisdictional requirements are imposed on federal district court actions). This Section also permits a consumer who prevails in a legal action to recover costs and expenses, including reasonable attorney fees.

When read together with Section 110(d), Section 110(a)(3) might be construed as requiring a consumer to resort to warrantor's complying informal dispute settlement mechanism before pursuing *any* legal rights or remedies. However, Section 111(b)[1] and the Conference Report[2] make clear that the consumer would be free to pursue alternate state or federal rights or remedies whether or not warrantor has incorporated a complying mechanism into the terms of his written warranty.

Thus the proper reading of Sections 110(a)(3) and 110(d) is that the consumer would be required to resort to warrantor's complying mechanism only when pursuing rights or remedies newly created by Section 110(d), such as the class action under Section 110(d)(3), attorney fees under Section 110(d)(2), or, by reference, any right or remedy newly created by Title I of the Act (or Rules thereunder) relating to written or implied warranties, service contracts, or other obligations.

Section 110(e) and the legislative history of the Act, indicate that Congress envisioned mechanisms as a warrantor's opportunity to cure a possible breach of warranty in lieu of other opportunities:

Section 110(e) states:

> No action (*other than . . . an action . . .* to which *subsection (a)(3)* [an informal dispute settlement mechanism] *applies*) [Emphasis added] may be brought under subsection (d) for failure to comply with any obligation under any written or implied warranty or service contract, unless the person obligated under the warranty or service contract is afforded a reasonable opportunity to cure such failure to comply.

The Conference Report states:

> A consumer might not bring an action for failure of a supplier to comply with his obligations under Title I or under a warranty or service contract on a consumer product *with respect to which no informal dispute settlement mechanism was available* unless the person obligated under the warranty or service contract had been afforded a reasonable opportunity to cure the breach. (Emphasis added)[3]

Thus an informal dispute settlement mechanism incorporated into the terms of a written warranty, may operate in lieu of a warrantor's right to an opportunity to cure, and a consumer may proceed directly to warrantor's dispute settlement mechanism without affording warrantor an opportunity to cure under subsection (e). (For reasons of fact and policy, the Rule makes clear that warrantors may encourage, though not require, consumers to seek redress from a warrantor directly,[4] and it appears that most consumers do contact the seller or warrantor directly.)[5]

Section 110 does not require warrantors to establish complying informal mechanisms for resolution of consumer warranty disputes. Rather, the legislative policy, set out in Section 110(a)(1), is to "encourage" warrantors toward that end. The Section requires only that if a warrantor incorporates an informal mechanism into the terms of a written warranty, then the mechanism, and its implementation, must comply with minimum requirements to be prescribed by Federal Trade Commission Rules.

It should be noted that the incorporation of a complying mechanism into the terms of a written warranty would not relieve a warrantor of other obligations under this Act, or under other provisions of law, to proceed fairly and expeditiously in non-mechanism complaint handling, or in complaint handling through an informal dispute settlement mechanism not incorporated into the terms of a written warranty. In other words, by incorporating a mechanism into a written warranty, the warrantor undertakes obligations in addition to, not in lieu of, obligations under existing law.

II. General Basis for the Rule. Section 110 of the Act requires that warranty disputes referred to informal dispute settlement mechanisms are to be resolved "fairly and expeditiously." Section 110(a)(2) requires that the Commission rule provide for participation by independent or governmental entities. Section 110(a)(4) contemplates that the rule will contain requirements to facilitate monitoring of Mechanisms by the Commission and interested persons. The legislative scheme of "encouraging" warrantors to voluntarily bear the cost of establishing informal mechanisms necessitates a careful analysis of costs or other disincentives that might result from the Commission rule. Beyond these general contours, the Act and the legislative history, including the Conference Report[6] and the Senate[7] and House[8] Reports, are largely silent as to the precise form, procedures and other requirements that the Commission must prescribe.

Accordingly, the Commission has relied on a variety of secondary legislative and other sources, including the following: Studies of existing intra-company and third-party complaint handling mechanisms; charters, audits and reports of current industry-sponsored informal dispute settlement mechanisms; interviews with consumer affairs professionals, including persons presently engaged in resolving consumer complaints; analyses of consumer warranty complaints received by the Commission; and other sources. The nature and general implications of these materials for this rule are presented briefly below.[9]

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[1] Nothing in this title shall invalidate or restrict any right or remedy of any consumer under State law or any other Federal law. 15 U.S.C. § 2311(b)(1).

[2] Of course, if a consumer chooses to seek redress without utilizing the provisions of Section 110, section 111(b) preserves all *alternative* avenues or redress, and utilization of any informal dispute settlement mechanism would then not be required by any provision of this Act. (Emphasis added) Conference Report [to accompany S. 356], S. Report No. 93-1408, 93rd Cong. 2d Sess. (1974) (Hereafter cited as R 1-2-3, 2060, Conference Report.) [Note: R 1-2-3, 1060, and similar designations in this Statement, refer to volume and page numbers in the Public Record of this proceeding. The designation TR (page number) refers to the transcript of the Public Hearing of this proceeding.]

[3] R 1-2-3, 1060, Conference Report.

[4] Section 702.2(d).

[5] See R 1-2-3, 2256, Mason and Himes, *An Exploratory Behavioural and Socio-Economic Profile of Consumer Action About Dissatisfaction with Selected Household Appliances*, 7 Journal of Consumer Affairs, (1973); R 1-2-3, 2953, Steele, *Fraud Dispute and the Consumer—Responding to Consumer Complaints*, 123 U. Pa. L. Rev. (1975); R 1-2-3, 2186, Diamond, Ward and Faber, "Consumer Problems and Consumerism—An Analysis of Calls to a Consumer Hot Line," Marketing Science Institute, December, 1974.

[6] R 1-2-3, 1074 Conference Report.

[7] R 1-2-3, 116 Senate Committee on Commerce, Report on S. 356, S. Report No. 93-151, 93d, 1st Sess. (1973). [hereinafter referred to as the Senate Report]

[8] R 1-2-3, 1077, House Report [to Accompany HR 7917], H. Report, No. 93-1107, 93d Cong., 2d Sess., (1974) [hereinafter referred to as the House Report].

[9] The specific Rule provisions (including modifications) are predicated on the conclusions or implications drawn from the statutory language and history, from the extensive Record compiled following publication of the proposed Rule, and from the array of source material cited. The rationale for specific Rule provisions and modifications is discussed in the section by section analysis in part IV, below.

Extensive discussions of current warrantor mechanisms employed to handle consumer complaints can be found in a 1973 Conference Board Report [10] and a 1972 report entitled "Initiatives in Corporate Responsibility" prepared for the Senate Committee on Commerce.[11] Both reports illustrate the wide variety of forms and procedures of in-house consumer affairs programs currently sponsored by warrantors. These generally reflect inherent differences in products, in distribution and in warranty service patterns. For example, while large appliances are traditionally serviced at the consumer's residence, automobiles are customarily serviced at dealerships. Small appliances are often taken to a service center or returned to the factory for repair or servicing. Among these, and even within product classes, warranty performance modes may vary considerably.[12] While warrantors may in some instances authorize local dealers to make repair or replacement decisions, in other instances warrantors will rely only on zone or factory personnel to authorize service or replacement. Occasionally authority may be divided. Under any of these systems there may be considerable confusion among consumers as to where to turn for warranty performance authorization. Instances have been reported in which the confusion has apparently been exploited by warrantors to avoid warranty performance altogether.[13]

The Conference Board Report cited a number of illustrations in which improved company complaint handling actually brought a reduction in the incidence of consumer complaints. For example, within five years after Whirlpool substantially revamped its complaint handling practices, complaints dropped from nine per thousand products sold, to only two per thousand—in spite of the fact that complaint ratios for other appliance companies were rising during this period.[14]

Nonetheless, the Conference Board Report indicated that consumer complaints, involving both warranted and unwarranted products, are not always handled fairly and expeditiously by warrantors or retailers. Delays or failure to handle complaints may be due to two factors:

(1) Some companies evidently place little or no importance in handling such complaints.

A recent report prepared for the Senate Committee on Commerce describing consumer affairs programs offered by major U.S. corporations found that replies to the Committee's questionnaire indicated that some corporations were unfavorable to the idea of initiating such programs.[15]

The Conference Board found some companies openly hostile to the idea of instituting consumer affairs programs and cited a number of companies' attitudes toward such programs as "public relations facelifting", activities rather than honest attempts to remedy consumer problems.[16]

(2) The mere existence of manufacturer complaint-handling mechanisms does not in itself guarantee fair and expeditious settlement of warranty disputes.

The Report noted:

> . . . (i)t would be an overstatement to assert that simply because a firm has a consumer affairs unit it has necessarily launched an effective customer relations effort—the facts are not always coincident.[17]

The consumer affairs professionals surveyed by the Conference Board agreed that consumer problems would result from the following complaint handling practices: delay in responding to complaints, attempts to shift the responsibility elsewhere, using form letter responses, failure to take corrective action to forestall additional complaints, alienating company personnel or dealers by promising action to consumers that could not be performed, and failure to explain why a complaint was unjustified.[18]

Studies examined by Staff, interviews with third-party complaint handling officials, and analysis of consumer complaints addressed to the Commission during the course of drafting the proposed Rule indicated that current corporate complaint handling mechanisms can and have operated to delay consumers from fair and expeditious settlement of warranty disputes.[19]

For example, a study published in the Winter, 1973 issue of the *Journal of Consumer Affairs* (which attempted to draw socio-economic profiles of consumers dissatisfied with household appliances) found respondents registering a large number of complaints before receiving satisfactory resolution:

> Approximately 48 percent complained only once, 23 complained twice, and almost 29 percent made three or more expressions of dissatisfaction before the matter was resolved to their satisfaction. Reasons for the multiple effort included a failure to take the appliance to the correct outlet in the channel for repair, shoddy workmanship in the initial repair process, disagreement over whether a given problem was covered by warranty, and disagreement as to which person in the distribution channel was responsible for the repairs.[20]

The Federal Trade Commission regularly receives correspondence from consumers complaining of unreasonable delays in remedying defects of warrantied products.[21] A number of these letters have been placed on the public record.[22] While the validity and prevalence of such complaints cannot be judged solely on the basis of Commission correspondence, two examples illustrate the potential for delay and frustration under current complaint handling practices in some companies.

A California consumer described thirty separate contacts with a dealer, factory representative and warrantor. Although promises to remedy the defect were made at a number of distributional levels, the consumer alleges that an apparent auto transmission defect has never been corrected. The consumer's log of repair attempts ends on this note:

> In conclusion ---------- (auto company) has sold me a new car with a warranty that they will not back up or honor. I don't feel I am asking much, just a new car that runs like a new one . . .[23]

Even a favorable small claims court judgment was unable to help one frustrated consumer with a defective bicycle purchased for nearly $150. Although the warrantor offered a lifetime written guarantee, ten days after purchase the bike developed hairline cracks in the frame. The dealer attributed the cracks to poor packaging and rough shipping practices by the warrantor. A month later, hairline cracks split the frame rendering the bike unsafe to ride. The dealer returned the bike to the supplier for inspection. Neither the dealer, the supplier nor the warrantor would refund the consumer's purchase price. A month later the consumer received a favorable judgment in small claims court ordering that the guarantee be honored. Due to

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[10] R 1-2-3, 2066, The Conference Board, "The Consumer Affairs Department: Organization and Functions," The Conference Board, Inc. (1973) (hereinafter referred to as the "Conference Board Report").

[11] R 1-2-3, 2294, Frank E. Moss, Chairman, Consumer Subcommittee, "Initiatives in Corporation Responsibility," Committee Print, Prepared for the use of the Senate Committee on Commerce, 92d Cong., 2d Sess. (1972) [hereinafter referred to as "Initiatives"].

[12] R 1-2-3, 2064-65. For an example of wide variation of warranty performance patterns with a single product, see Brin and Kestel, "Suppliers Aim to Curb Returns Abuse," *Home Furnishings Daily*, Monday, March 17, 1975.

[13] *See*, discussion in Part IV, *infra*, Sec. 703.2(d), Redress directly from the warrantor at 56.

[14] *Id.*

[15] R 1-2-3, 2075, Conference Board Report.

[16] R 1-2-3, 2295, "Initiatives".

[17] Id. at 2076.

[18] Id.

[19] R 1-2-3, 2953, Steele, *Fraud Dispute and the Consumer—Responding to Consumer Complaints*, 123 U. Pa. L. Rev. (1975); R 1-2-3, 2186, Diamond, Ward and Farber, "Consumer Problems and Consumerism, Analysis of Calls to a Consumer Hot Line", Marketing Science Institute, December, 1974; R 1-2-3, 2239, Kendall and Russ, *Warranty and Complaint Policies: An Opportunity for Marketing Management*, 39 Journal of Marketing, 36-43, (1975); R 1-2-3, 2247, C. K. Kendall and Frederick A. Russ, University of North Carolina, "Warranty Policies and Practices of Consumer Packaged Goods Manufacturers," (undated paper).

[20] R 1-2-3, 2256, Mason and Hines, Jr. *An Exploratory Behavioral and Socio-Economic Profile of Consumer Action About Dissatisfaction with Selected Household Appliances*, 7 Journal of Consumer Affairs 124 (1973).

[21] R 1-2-3, 1195, According to Catherine Abbott, FTC Correspondence Section, the FTC received approximately 2,172 warranty complaints from the period 5/7/74-5/7/75 (See FTC Warranty Complaints Tabulation, 5/7/74-5/6/75).

[22] R 1-5.

[23] R 1-2-3, 1215, Letter from [a consumer], Lancaster, Calif. to the FTC dated 11/28/74.

lack of jurisdiction the court could not levy execution on the judgment.[24]

III. General Conclusions and Implications for the Rule. The concerns expressed in the legislative history of the Act, in studies, interviews with consumer affairs professionals, and other sources referred to in the sections above, and in the Record compiled since publication of this proceeding, have included the following: frequent lack of clear avenues of redress; delays; absence of managerial commitment to complaint resolution; undue burdens placed on consumers, such as use of complicated forms and procedures; and unfulfilled promises to resolve complaints. The Commission has also recognized that despite these shortcomings, certain existing complaint handling mechanisms—third party and intracompany—have operated to resolve consumer complaints in a fair and expeditious manner.

The intent of the Act is to provide for fair and expeditious settlement of consumer warranty disputes, through informal mechanisms established voluntarily by warrantors. The Commission has determined that this legislative scheme is best implemented by a careful balancing of consumer and warrantor interests. The Rule is intended to establish a framework for fair and expeditions settlement of warranty disputes at cost levels acceptable to warrantors. The Commission's determination to minimize Mechanism costs stems from two major concerns: If costs are too high, warrantors may decline to incorporate Mechanisms; in any event costs will be passed through to consumers in the form of higher product prices. Moreover, the Rule is intended to avoid disruption of current complaint handling mechanisms wherever possible. Emphasis is on mechanism self-regulation bolstered by public review of mechanism self-regulation bolstered by public review of mechanism operations, with minimal direct Federal Trade Commission involvement.

The Rule will permit a wide variation in form and procedures among complying mechanisms, in recognition of the variety among effective complaint handling mechanisms currently in existence. The intent is to avoid creating artificial or unnecessary procedural burdens so long as the basic goals of speed, fairness and independent participation are met. Specific requirements of the Rule are intended to ensure the integrity of Mechanisms, facilitate the monitoring and enforcement obligations of the Commission, and encourage consumer review and participation.

The Rule contains provisions relating to duties of warrantors, organization of dispute settlement mechanisms, qualifications of members, procedures, recordkeeping, audits, and openness of records and proceedings to the public. A section by section analysis of the Rule, including modifications based on the Record compiled following publication of the proposed Rule, is presented as part IV of this Statement of Basis and Purpose.

IV. Section by Section Analysis. *SECTION 703.2—DUTIES OF WARRANTORS.*

INTRODUCTION

In accordance with Section 110 of the Act,[25] the Commission hereby sets forth minimum rules to be adhered to by warrantors incorporating an informal dispute settlement mechanism into the terms of a written warranty.

A detailed discussion of these duties can be found below. Within the framework of Congressional intent as expressed in Title I, Section 110 and legislative history preceding adoption of the Act as discussed, the Rule prescribes duties of the warrantor to ensure that, if a warranty complaint arises:

(1) consumers have access to the Mechanism;

(2) consumers realize the legal consequences flowing from the decision to utilize or not utilize the Mechanism; and

(3) the Mechanism is able to settle warranty disputes fairly and expeditiously.

The rule proscribes warrantors from incorporating an informal dispute settlement mechanism ("Mechanism") that fails to comply with the provisions of Sections 703 3–703.8 of this Rule. Additionally, those warrantors incorporating a complying Mechanism into a written warranty are required to include minimal information disclosing the availability of an informal dispute settlement mechanism to be placed at points likely to attract the attention of consumers experiencing problems with a warranted product. Under the proposed Rule, this information would appear: (1) on the face of the written warranty; and (2) in a separate section of materials accompanying the product, if applicable. Also, a provision in the proposed Rule requiring warrantors to provide information regarding the Mechanism to retailers for distribution to consumers has been revised to allow warrantors greater flexibility in publicizing the existence of the Mechanism. Comments which resulted in this change are discussed *infra* in this Statement within the Section entitled "Consumer Awareness."

In addition to disclosure requirements fashioned to ensure accessibility for consumers and consumer awareness of legal consequences flowing from a choice to use or not to use the Mechanism at the time warranty complaints occur, the Rule contains additional warrantor duties to ensure the Mechanism's ability to handle warranty disputes fairly and expeditiously.

DUTIES OF THE WARRANTOR

(a) The warrantor shall not incorporate into the terms of a written warranty a Mechanism that fails to comply with the requirements contained in §§ 703.3–703 8. This paragraph shall not prohibit a warrantor from incorporating into the terms of a written warranty the step-by-step procedure which the consumer should take in order to obtain performance of any obligation under the warranty as described in section 102(a)(7) of the Act and required by Part 701 of this subchapter.

The Staff Report accompanying Part 703 discussed provision 703.2(a) in terms of language contained in the Act:

Section 110(a)(1) of the Act states that:

> The Commission shall prescribe rules setting forth minimum requirements for *any informal dispute settlement procedure which is incorporated into the terms of a written warranty* to which any provision of this title applies. (Emphasis added.)

Thus any informal dispute settlement procedure incorporated by a warrantor into the terms of a written warranty is required by the Act to comply with minimum requirements prescribed by the Commission.[26]

The Staff Report indicated the interplay between Parts 701 and 703:

> The last sentence of Section 703.2(a) makes it clear, however, that the warrantor may use the warranty as a place to provide information to consumers as to what steps they must take to obtain warranty relief from the warrantor. This would include information as to the steps consumers must take and the person or department consumers must contact to obtain performance of warranty obligations. Such a step-by-step procedure is not considered to be an informal dispute settlement procedure, since a dispute does not arise until the consumer has attempted, and failed, to get warranty performance. Additionally, Section 102(a)(7) of the Act authorizes the Commission to require warrantors to include in written warranties this step-by-step procedure, and the Commission has proposed to require it under proposed Part 701.[27]

The Record does not reflect opposition to Section 703.2(a). The Association of Home Appliance Manufacturers (AHAM) commended the provision:

> We believe this section which prohibits reference to non-qualifying dispute mechanisms is sound. We commend especially the clarifying sentence which protects the warrantor's privilege to state the procedure a consumer should take to secure performance under warranty. However, to be consistent with our testimony under § 701.3(h) we urge the words "step-by-step" be eliminated, because they imply more than necessary detail.[28]

Ford Motor Company asked that the section be amended to clarify that the section applies only to warrantors offering complying informal dispute settlement mechanisms.[29]

Comments were received asking for clarification on inclusion of information regarding the existence of the Mechanism under Part 701 of the Rules.[30] It should be noted that under Section 701.2 (a) warrantors may include information regarding their own internal procedures for handling warranty disputes.

[24] R 1–2–3, 1223, Letter from [a consumer] to the Honorable Warren Magnuson, Chairman, Senate Commerce Committee dated 11/18/74.

[25] 15 U S C. § 2310.

[26] R 1–2–3, 930. Staff Report.

[27] *Id.*

[28] R 1–4–1, 502, Association of Home Appliance Manufacturers (AHAM).

[29] R 1–3–1, 120, Ford.

[30] *See, e g.*, R 1–3–1, 63, Mohasco; R 1–4–1, 45, National Association of Furniture Manufacturers (NAFM).

To prevent consumers from being misled into believing a Mechanism included under this provision complies with the Rule in Part 703 and must be used by the consumer, in certain instances, only complying Mechanisms can be included in the written warranty.

WARRANTY DISCLOSURE

(b) The warrantor shall disclose clearly and conspicuously at least the following information on the face of the written warranty:

Section 703.2(b) requires warrantors to disclose brief information on the face of the written warranty regarding the existence of a Mechanism, the name and address or name and telephone number of the Mechanism whereby consumers may register warranty complaints, a brief statement regarding the legal consequences flowing from a consumer's utilization or non-utilization of the Mechanism, as well as a reference to where more detailed information on the Mechanism could be found.

The Commission's authority to require warrantors to fully and conspicuously disclose information regarding the availability of a Mechanism and legal consequences stemming from a consumer's' utilization or non-utilization of a Mechanism is found in Title I, Section 102 of the Act.

The Senate Report on the Act stressed the Committee's belief that Mechanisms will only be useful if consumers realize they exist.[31] The Report suggested that items specified for disclosure by the Act were not intended to be mandatory or exclusive.[32]

The Staff Report indicated that.

Other proposed Rules stemming from the Act will require other kinds of disclosure on the face of the written warranty. Therefore, extensive disclosures within the warranty regarding the mechanisms are neither necessary nor appropriate. Instead, the proposed Rule requires warrantors to clearly and conspicuously disclose on the face of the written warranty brief items of information concerning the availability of the Mechanism and the legal implications stemming from a consumer's decision to utilize or fail to utilize the Mechanism. . . . Since the Mechanism, while offering warrantors an opportunity to cure, delays consumers from pursuing legal remedies under Title I of the Act, the Mechanism necessarily becomes an important basis for the consumer's decision to purchase a particular product. Thus brief information concerning the Mechanism should be located within the written warranty.[33]

General comments on Section 703.2 (b) varied widely with consumer representatives generally favoring even more extensive warranty disclosures [34] and a few industry representatives favoring modification [35] or exclusion of disclosures to avoid lengthening the warranty document.[36] However, most comments unfavorable to the provision simply suggested that the information could just as effectively be placed on the reverse side of the warranty.[37]

Comments from consumers cited the need for information regarding the Mechanism on the face of the warranty to ensure consumer access at the time of experiencing warranty disputes. The few industry comments on this provision failed to persuade the Commission that other disclosure modes, as provided in the Rule, were sufficient in themselves to fulfill one of the Rule's main purposes, that of ensuring access to the Mechanism at the time consumers experience warranty disputes. Comments on the public record indicate that Section 703.2(b) strikes a reasonable balance between consumer and warrantor interests.

(b)(1) a statement of the availability of the informal dispute settlement mechanism;

(2) the name and address of the Mechanism, or the name and telephone number of the Mechanism which consumers may use without charge;

The Staff Report accompanying proposed Part 703 indicated that Sections 703.2(b) (1) and (2) were included to ensure that information as to the availability of the Mechanism, its location and telephone number is available to consumers upon consulting a written warranty at the time of experiencing a warranty dispute. The Staff Report indicated that:

One of the concerns which led to the adoption of the Act was that consumers were not being given the information necessary for them to enforce their warranty rights. This is reflected in Senator Magnuson's remarks in introducing S. 356, the Senate version of the warranty legislation, to the Senate.[38]

The Staff Report noted that concern about consumers having sufficient information regarding dispute settlement Mechanisms is reflected in Section 102 (a)(8) of the Act, which states that the rules of the Commission may require inclusion in the written warranty of information regarding the Mechanism and a recital, if appropriate, that use was mandatory in some instances.[39]

The first two disclosures required by paragraph (b) are intended to meet this concern by providing consumers with information needed for redress of warranty rights.

General comments, both favorable and unfavorable, regarding Section 703.2(b) have been discussed *supra* in the introduction to this Section. However, only one comment dealt specifically with Section 703.2(b) (1) and (2). Victoria Special, Cook County State's Attorneys Office, Consumer Fraud Division, Chicago, noted that consumers would realize the existence of the Mechanism if they were given the name, address and possibly a toll-free telephone number disclosed in bold letters within the warranty document.[40] Thus Section 703.2(b) (1) and (2) appears to be a reasonable provision to ensure access to the Mechanism at the time a consumer consults his or her written warranty upon experiencing a warranty dispute.

LEGAL CONSEQUENCES

(b)(3) a statement of any requirement that the consumer resort to the Mechanism before exercising rights or seeking remedies created by Title I of the Act; together with the disclosure that if a consumer chooses to seek redress by pursuing rights and remedies not created by Title I of the Act, resort to the Mechanism would not be required by any provision of the Act;

As discussed in the Introduction to this Statement, *supra*, at Part I, Section 110(a)(3) of the Act provides that the consumer must resort to the Mechanism before commencing a civil action (other than a class action) under Section 110 (d) of the Act if:

(A) a warrantor establishes such a procedure,

(B) such procedure, and its implementation, meets the requirements of [FTC] rules, and

(C) he [the warrantor] incorporated in a written warranty a requirement that the consumer resort to such procedure before pursuing any legal remedy under this section respecting such warranty . . .

The third disclosure required by Paragraph (b)(3) merely incorporates the third requirement under Section 110(a)(3) of the Act into the Rule, as is contemplated by Section 102(a)(8) of the Act, quoted above. It states that Commission rules may require disclosure in the warranty of any requirement of the warrantor that the consumer must resort to the Mechanism.

The second clause of Section 703.2(b)(3) is designed to ensure that the consumer is not deceived into believing that prior resort to the Mechanism is required in all instances. As discussed in Part I of the Introduction to this Statement, the Act only allows the Mechanism to delay consumers seeking rights or remedies newly created by Title I of the Act.

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[31] R 1-2-3, 1183, Senate Committee on Commerce, Report on S. 356, S. Report No. 93-151, 93 Cong., 1st Sess. (1973) (Hereinafter the Senate Report).

[32] *Id.*

[33] R 1-2-3, 934, Staff Report.

[34] *See, e.g.*, R 1-8, 143, New York Office of Consumer Affairs (should be disclosed that use of Mechanism is free); TR 1443, Legal Aid Bureau, Chicago, Illinois; R 1-8, 94, Cook County State's Attorney Office, Chicago, Illinois (bold-face should be used in disclosure); R-1-4-1, 382, Major Applicance Consumer Action Panel (MACAP) (information could be better disclosed in warranty procedural guide).

[35] *See, e.g.*, R 1-4-1, 46, NAFM (clearly and conspicuously not necessary); R 1-3-1, 195, Stophel, Caldwell and Heggie (type face would be too small for readability); R 1-3-2, 577, Quarles and Brady (danger of microscopic type faces); R 1-3-3, 927, Webster, Kilcullen and Chamberlain, for Amana Refrigeration, Inc. (danger of unduly complicating warranty).

[36] *See, e.g.*, R 1-4-1, 209, National Association of Photographic Manufacturers, Inc. (warrantors should instead provide information to requesting consumers); R 1-3-2, 394, Shell Oil; R 1-3-2, 567, Eastman Kodak Company.

[37] *See, e g*, R 1-4-1, 81, NRMA (disclosure: "See Reverse Side for Warranty Information" desirable); R 1-3-2, 422, Armstrong Cork; TR 344, Warranty Review Corporation.

[38] R 1-2-3, 934

[39] *Id.*

[40] R 1-8, 94, Cook County States Attorneys Office, Chicago, Illinois.

This Rule provision requires that this be made clear to consumers.

Many comments addressed to 703.2(b)(3) treated possible interpretations of Section 110 (a) and (d) of the Act. Since 703.2(b)(3) deals merely with the disclosure that consumers may be obligated to use the Mechanism if they are seeking rights and remedies created by the Act, a discussion of these comments is not appropriate in the section. However, the Commission's interpretation of Sections 110 (a) and (d) of the Act can be found at Part I of the Introduction to this statement. Few comments were received on the Record regarding the warranty disclosures required by Section 703.2(b)(3) of the proposed Rule.

Industry comments were divided as to the value of the disclosure. Schwinn Bicycle Corporation supported the usefulness of the provision to warrantors in disclosing that in certain instances use of the Mechanism by consumers would be mandatory.[41] However, Whirlpool urged that disclosure of such information to consumers was unreasonably burdensome.[42]

Comments from consumers on the record stressed the importance of a simple and clearly worded disclosure to prevent consumers from thinking that they would be required in all instances to use a warrantor's Mechanism.[43]

Two consumer representatives suggested specific language that the Commission might prescribe to convey the importance of the information respecting mandatory and nonmandatory resort to the Mechanism by consumers without unduly confusing them.[44]

Comments from industry and consumer representatives indicating concern over mandatory or optional resort to a Mechanism by consumers have been discussed, *infra*, at "Redress Directly from the Warrantor." Briefly, industry representatives wished to clarify those instances in which consumers could be obligated to first use a Mechanism before going to court, since this possibility offered warrantors an inducement to incorporate Mechanisms into written warranties. On the other hand, consumer representatives were concerned that warrantors could mislead consumers into believing Mechanism use was compulsory in every instance. Thus, although few comments were received on Section 703.2(b)(3), concern reflected in the record over interpretation of 110 (a) and (d) of the Act leads the Commission to believe that Section 703.2(b)(3) of the Rule is both necessary and reasonable. If resort to the Mechanism by consumers is of mutual and material concern to consumers and warrantors, such information should be placed in the warranty.

Although two consumer representatives recommended specific language instead of the general disclosure requirement contained in the provision, the Commission finds the general requirement adequate. Specific language might add undesirable bulk to the written warranty. Additionally, "boiler-plate" language would not offer warrantors the flexibility of phrasing the disclosure in a simpler, more understandable manner than the disclosures suggested in the Record.

Thus the Commission expects that Section 703.2(b)(3) will allow warrantors flexibility in phrasing the disclosure requirement so long as the language employed is simple and understandable to consumers and would not tend to mislead consumers into thinking that resort to the Mechanism is mandatory when consumers are not seeking rights and remedies newly created by Title I of the Act.

§ 703.2(b)(4) Further Information

A statement, if applicable, indicating where further information on the Mechanism can be found in materials accompanying the product, as provided in § 703.2(c).

Although warrantors, under the above provision, would be free to attach the more detailed information provided for in Section 703.2(c) to the body of the written warranty, the Commission believes it is appropriate to allow the warrantor to include additional information important to consumers at another place, provided the consumer's attention is directed to that information. If the consumer consults his or her written warranty at the time a warranty complaint occurs, he or she will receive guidance as to where further information on the Mechanism can be found. This will enable the consumer to weigh the advantages and disadvantages of utilization or non-utilization of the Mechanism.

Studies point to the widespread industry practice of distributing product use and instruction booklets.[45] Under the final Rule, a warrantor need only indicate a page number or location within the booklet or other materials where additional information can be found, provided that if no use and instructions book or other suitable materials accompanied the product, the warrantor would be required to give the information specified in Section 703.2(c) in the written warranty.

The Commission has concluded that Section 703.2(b)(4) should be included as proposed in the final Rule. No comments, favorable or unfavorable, were received on the record respecting the above provision.

ADDITIONAL DISCLOSURES

(c) The warrantor shall include in the written warranty or in a separate section of materials accompanying the product, the following information:

(1) Either (i) a form addressed to the Mechanism containing spaces requesting the information which the Mechanism may require for prompt resolution of warranty disputes; or (ii) a telephone number of the Mechanism which consumers may use without charge;

(2) The name and address of the Mechanism;

(3) A brief description of Mechanism procedures;

(4) The time limits adhered to by the Mechanism; and

(5) The types of information which the Mechanism may require for prompt resolution of warranty disputes.

Provisions of Paragraph (c) of the final Rule are designed to ensure awareness of and access to the Mechanism at the time consumers experience difficulty with the resolution of warranty disputes and minimize consumer failure to utilize the Mechanism by simplifying procedures.

Paragraph (c) of the proposed Rule would provide consumers with one of two simple ways to register a warranty complaint—filling out a pre-addressed form or making a free telephone call. Warrantors could choose the least costly, most effective option best suited to their commercial needs and current complaint handling patterns.

Section 703.2 (c) (3) is a provision which was not included in the proposed Rule. The provision would require warrantors to provide consumers with a brief description of Mechanism procedures. The change reflects concerns expressed by consumer and industry representatives on the public record and is discussed in detail, *infra*, at § 703.2(c)(3).

(a) *Simplified Access and Procedures Section 703.2(c) (1) and (2).* Provisions of Section 703.2(c), designed to ensure consumer access to the Mechanism and simplify procedures for consumers registering warranty disputes, are consistent with Congressional intent expressed prior to passage of the Act. The Conference Report states that the purpose of informal dispute settlement mechanisms is to, "*simplify* and expedite the resolution of warranty disputes".[46] (Emphasis added)

Consumers affairs professionals interviewed by Commission staff members consistently cited the detrimental effect of complicated and protracted procedures on consumers with warranty and

[41] R 1-3-3, 840-841, Schwinn Bicycle Corporation (sound public policy from warrantor's point of view).

[42] R 1-3-3, 962, Whirlpool Corporation (would act as disincentive to warrantors to incorporate Mechanisms); *See, also*, R 1-3-1, 174, McGraw Edison Company (points consumers in direction of courts); R 1-4-1, 504, AHAM (detailed legal-technical alternatives will only confuse consumers).

[43] *See, e.g.*, R 1-6, 52, Center for the Study of Responsive Law; R 1-8, 76, Consumer Affairs Department, City of Detroit, Michigan.

[44] R 1-6, 52, Center for the Study of Responsive Law. The Center suggested the disclosure should state:

Presenting your complaint to (mechanism name) is *optional*. You can present your complaint to courts, to government agencies or to any other group or person, without presenting it to (mechanism name). Or, you can present your complaint to (mechanism name) and *also* present it to other people or other courts or agencies, either before or after (mechanism name) issues a decision. However, if you want to sue (name of warrantor) in certain kinds of lawsuits, you must present your complaint to (mechanism name) first, and wait for it to issue a decision.

See also: R 1-8, 77, The Consumer Affairs Department, City of Detroit, Michigan.

[45] *See:* R 1-2-3, 938, Staff Report.

[46] R 1-2-3, 2066, Conference Report [to accompany S. 356], S. Report No. 93-1408, 93rd Cong. 2d Sess. (1974).

non-warranty related complaints. Complicated forms, numerous levels required for complaint resolution, even writing a letter detailing a consumer complaint can cause some consumers to "drop-out" of the complaint-handling procedure.[47]

A study entitled, "Fraud, Dispute and the Consumer—Responding to Consumer Complaints," discussed the complaint process in terms of a continuum. Less formal procedures require the expenditure of fewer resources; more formal procedures, i.e., small claims court or a private suit, involve the expenditure of greater resources. The author suggested that at various points during this process, consumers reach a point where they "drop-out" of the process because resources expended become too large relative to the importance of the dispute to the consumer.[48] The requirement of either a pre-addressed form or a free telephone number for consumers to use in registering warranty complaints is designed to minimize this drop out.

The form could be as simple as a postcard. Various complaint handling mechanisms currently use postcards to notify the consumer at various points in the complaint procedure, to follow-up on the success or failure of attempts to remedy complaints and to obtain information from consumers necessary for settlement of disputes.[49]

If the consumer is able to provide the Mechanism, by using the spaces included on the form, with that information needed by the Mechanism to commence investigation of a dispute, the Mechanism will be able to begin settlement of consumer disputes more quickly and efficiently, thus minimizing costs that would accrue from further contacts with consumers necessary to obtain needed information.

Mailing a postcard or form is less burdensome and time consuming than writing a letter. Spaces for information which the Mechanism may require for investigation leading to settlement of a consumer's warranty dispute enable the consumer to anticipate the Mechanism's needs thereby simplifying and accelerating the Mechanism's complaint handling process. Of course, nothing contained in the Rule would prevent the consumer's writing a letter enclosing additional information regarding the dispute in lieu of the postcard. Burdens on the consumer would involve only the cost of a stamp and the effort of mailing the card or form. Thus, drop-out problems cited previously could be minimized.

The Commission has determined that costs incurred by the warrantor in providing such information would be reasonable. Since use and instruction materials are commonly provided consumers at the time of purchase, costs of forms or postcards would be one more item to be included in such materials. Printing costs for postcards do not seem great.[49a]

The Rule gives warrantors the option to include in lieu of such postcard a telephone number which consumers may use without charge to register warranty complaints.

Some companies already use toll-free numbers for consumers to register warranty complaints. The existence of such numbers enables consumers to register complaints speedily and conveniently.

The ease of using such numbers could minimize the possibility of consumer dropout. Such numbers would enable the Mechanism to handle complaints fairly and expeditiously, since the staff of the Mechanism could obtain necessary information for the Mechanism to commence settlement of the warranty dispute at the time of the telephone call.

In spite of the advantages of free telephone numbers in ensuring access to the Mechanism and accelerating the investigational process, they are costly; mandating them could unduly burden Mechanisms and thereby contravene Congressional intent to encourage warrantors to establish informal grievance settlement mechanisms. Therefore, the Rule provides Mechanisms with an option—pre-addressed forms—which is effective yet not as costly.

Section 703.2 (c)(1) and (2) engendered little comment on the public record regarding the need for consumer access to the Mechanism and simplified procedures for consumer utilization of the Mechanism upon the occurrence of a warranty dispute.

The American Arbitration Association agreed that a communication by postcard or telephone could cut Mechanism costs.[50] The Major Appliance Consumer Action Panel commented against attaching the the information required by Section 103.2(c) to the written warranty, recommending instead a "Warranty Procedural Guide" where all information regarding the Mechanism would be placed.[51] The Association of Home Appliance Manufacturers (AHAM) noted that most members of MACAP already directs consumers to the group in a manner similar to that required by the Rule.[52]

Two industry representatives suggested that the consumer need receive only a pre-addressed form which he/she could mail to the Mechanism in order to receive instructions on how to submit a complaint.[53] Armstrong Cork Company commented that such an easy and simple procedure might increase frivolous claims.[54] However, the likelihood of pre-addressed forms and toll-free telephone numbers increasing costs as a result of increased numbers of frivolous complaints appears remote.[55]

Section 703.2 (1) and (2) engendered few comments on the record and appear reasonable and desirable from the standpoint of ensuring easy access to the Mechanism at the time consumers experience warranty disputes. The provisions are promulgated as proposed.

Paragraph (c) now requires the warrantor to make four other disclosures to consumers: First, the name and address of the Mechanism must be separately disclosed. If the warrantor has utilized the form option, consumers who had utilized the form and then experienced a further complaint might not know where to address their complaint if they had misplaced their warranty. Even if the Mechanism possesses a free telephone number, some consumers might wish to write a letter instead of telephoning the Mechanism because of the complexity of the dispute.

Additionally, the warrantor must state the time limits adhered to by the Mechanism. Since the consumer retains the option to pursue other rights and remedies than those created under Title I of the Act, the consumer should be able to weigh the advantages of enduring the delay incurred in using the mandatory Mechanism against the advantages of

[47] R 1–2–3, 1225, Interview between Fred Waddell, Director, Consumer Affairs Department, American Association of Retired Persons, and Jill Deal, FTC, May 6, 1975; R 1–2–3, 1599, Interview between Donald P. Rothschild, Director, Consumer Protection Center, George Washington University Law Center, and Jill Deal, FTC, March 21, 1975; R 1–2–3, 1419, Interview between Christopher W. Wheeler, Center for the Study of Responsive Law, and Jill Deal, FTC, April 15, 1975.

[48] R 1–2–3, 2953, Steele, *Fraud Dispute and the Consumer—Responding to Consumer Complaints*, 123 *U. Pa. L. Rev.* (1975).

[49] R 1–2–3, 1799, The Direct Mail Marketing Association, uses postcards to notify consumers that action on their complaints has been taken. Interview with Ann Crouch Cole, DMMA, May 2, 1975 R 1–2–3, 1224, The Consumer Assistance Center of the American Association of Retired Persons utilizes postcards to follow-up on complaints. Response rate is great. Telephone Interview with Karen Blumenberg, GAC, AARP, April 6, 1975. R 1–2–3, 2294, Various warrantors utilize postcards at different stages of the complaint handling process. American Motors samples owner cards returned to gauge consumer satisfaction; Frank E. Moss, Chairman, Consumer Subcommittee, "Initiatives in Corporate Responsibility," Committee Print, Prepared for use of the Senate Committee Commerce, 92d Cong., 2d Sess. (1972)

[49a] R 1–2–3, 1224, Karen Blumenberg, CAC, AARP, stated that printing costs for similar cards amounted to $7.00/thousand when accomplished in-house; Telephone Interview between Karen Blumenberg, CAC, AARP and Jill Deal, FTC, 4/6/75; R 1–2–3, 1197, The FTC print shop estimates it would cost 2 cents per sheet which would contain 4 postcards.

[50] *TR* 1469. American Arbitration Association noted that: . . . the burden of investigation is kept to a minimum. [S]taff investigation may be manageable "

[51] R 1–4–1, 383, MACAP

[52] R 1–4–1, 503, AHAM.

[53] "Manual instructions ask consumers to:

1. Check plugs, fuses, instructions;

2. Check your dealer or the repair service he recommends;

3. Notify Mr. W. C. Blank, National Service Manager, XYZ Corp., Centerville, Ohio 6666 (or call 800–000–0000);

[54] *See, e.g.*, R 1–4–1, 81, NRMA (less expensive to use pre-addressed card for consumers' use in obtaining Mechanism information); R 1–4–1, 46, National Furniture Manufacturers Association (pre-addressed card for use in obtaining Mechanism information).

[55] R 1–3–2, 422, Armstrong Cork Company (encouraging frivolous claims might increase costs.)

[56] For a discussion of the possibility of an increase in frivolous complaints, see the discussion accompanying ¶ 703 3(a) *infra*. The section concludes that benefits resulting from increased consumer registration of legitimate warranty disputes outweigh the possibility of a small increase in nonlegitimate complaints.

pursuing remedies other than those created under Title I of the Act. Even those consumers unconcerned with seeking legal remedies should be informed of the time period for resolution by the Mechanism. Some consumers may possess defective products which require immediate repair. For example, a housewife with a broken dryer and a small baby may wish to weigh the cost of subscribing to a diaper service for a month because of the delay caused by a mechanism decision against the cost of an immediate repair call which will remedy the defect.

The warrantor must also list the types of information which the Mechanism may require for prompt resolution of warranty disputes. If the consumer has already mailed the optional form and experiences another warranty complaint, he or she should be aware of that information needed by the Mechanism so that he or she can include such information at the time of registering his or her complaint and thus ensure the Mechanism's ability to fairly and expeditiously settle warranty disputes.

If the consumer is provided with a telephone number which he or she may use without charge, the consumer should know of the information which the Mechanism requires for prompt resolution of the dispute prior to placing a call registering a complaint. For example, a consumer, noting such disclosures, would be able to determine such information as brand, model number, date of purchase and place of purchase thus expediting calls placed to the Mechanism. This could result in lower costs incurred by the Mechanism from use of such numbers and increased ability to handle disputes fairly and expeditiously.

Provision 703.2(c)(3) has been added to require the warrantor to disclose brief information regarding Mechanism procedures. It has been transferred to Section 703.2(c) primarily in response to adverse comments received on the record regarding § 703.5(b) discussed in detail, *infra*.

Proposed § 703.5(b) originally required that:

> (b) Upon notification of a dispute, the Mechanism shall immediately inform both the warrantor and the consumer of receipt of the dispute, and shall promptly supply the consumer with a description of the procedures and time limits adhered to by the Mechanism.

The Final Rule provision 703.5(b) now reads:

> (b) Upon notification of a dispute, the Mechanism shall immediately inform both the warrantor and the consumer of receipt of the dispute.

Under the final Rule, the burden of the Mechanism is reduced at the time of receipt of a dispute, since the Mechanism can now acknowledge receipt of a dispute, if it wishes, by dispatch of a postcard. The postcard could refer consumers to information regarding Mechanism time limits, procedures and types of information required from consumers either in the written warranty or separate materials accompanying the product.

The provision is a reasonable attempt to reduce administrative burdens on the Mechanism. Reducing such burdens would act to decrease costs thus posing an added incentive to warrantors to incorporate Mechanisms. Proposed provisions 703.2(c) (2), (3) and (4) have been incorporated into the final Rule as Section 703.2(c), (2), (4) and (5).

These subparagraphs appear to be a reasonable means for consumer to gain easy access to the Mechanism by the use of simplified procedures. Moreover, no adverse comment was addressed to these provisions on the Record. The addition of provision 703.2(c)(3) will give consumers additional information needed at the time of warranty disputes and will also eliminate a potentially costly notification step by the Mechanism.

b. *Consumer Awareness.* Paragraphs (c) and (d), providing easy access to the Mechanism and simplified procedures for filing complaints, are designed to ensure that the consumer will be aware of the existence of the Mechanism at the time when that information is important—at the time a warranty dispute arises. Paragraph (d) requires that:

> (d) The warrantor shall take steps reasonably calculated to make consumers aware of the Mechanism's existence at the time consumers experience warranty disputes.

Both paragraphs reflect concern expressed in the Senate Report which stressed that Mechanisms will be useful only if their existence is known.[56]

Although under the proposed Rule brief information regarding the existence of the Mechanism must be included on the face of the written warranty, studies on consumer complaint registration patterns and interviews with consumer affairs professionals indicated that more information is necessary so that consumers have information regarding Mechanism at points where they are likely to turn when a warranty complaint surfaces. Providing consumers with product use and instruction materials is a common industry practice.[57] The Staff Report indicated that a number of consumer affairs professionals have noted consumer tendencies to avoid reading use and instruction materials until a complaint arises.[58] While consumers might misplace a warranty or fail to consult it at the time of experiencing a product malfunction or defect, a larger number of consumers would be more likely to consult use and instructions materials in an effort to remedy the malfunction or determine the procedure for contacting the retailer or warrantor to remedy malfunctions or defects.

Thus, placing more detailed information regarding the Mechanism at a location where consumers would be likely to turn in case of a product malfunction or defect would serve as a valuable guide to consumers on procedures to follow for remedying such complaints. Reference to the location of more detailed information on the face of the written warranty serves to assure consumer access at the time of complaints. Consumers are thus provided with both brief and more detailed information at two points where they are likely to turn when a warranty problem surfaces.

The importance of consumer awarenes of the Mechanism was stressed in comments received on the record. Christopher Wheeler, from the Center for the Study of Responsive Law, testified to the need for Mechanism visibility and expressed doubt that the proposed Rule provisions would accomplish this purpose.[59] David Swankin, National Consumers League, stressed the importance of consumer awareness as a way to improve the general quality of dispute handling.

Few comments were received on the record concerning provisions of Paragraph 703.2(c) designed to ensure consumer access to the Mechanism at the time warranty disputes occur. Comments supported placing information required by Paragraph (c) in the written warranty or in an operations manual as both reasonable and desirable.[60]

The Commission has thus concluded that provisions of Paragraph (c) designed to ensure consumer awareness of the Mechanism at the time warranty disputes arise should be promulgated as proposed.

More extensive comments were received on the record concerning proposed Paragraph (d). The provision has been modified to require a warrantor to take

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[56] R 1-2-3, 1183, Senate Report.

[57] R1-2-3, 948, Staff Report.

[58] *Id.*

[59] R 1-6, p. 57, Center for the Study of Responsive Law, September 16, 1975. The Center noted that: Like a tree falling in the forest, if consumers do not know about this mechanism, it never exists".

[60] *See e.g.*, TR 225-226, Guenther Baumgart, AHAM, who noted that MACAP's ". . . [e]xperience has been that the most effective method is the appearance of the name and address of the panel in the instruction book. All the previous publicity, including a Johnny Carson Show plug one night and many consumer columnists—does not have nearly the effect from what I have observed from the simple information in the instruction book." *See also*, R 1-6, 99, Charlotte Pownell, Long Beach, California Department of Consumer Affairs noted that:

"A number of our consumers have been introduced to various arbitration mechanisms of industry (CRICAP, MACAP, Carpet Institute) through the mediation efforts of our agency. Our experience has been that, prior to being apprised of such mechanisms through our agency, our consumers, at least, has no knowledge of their existence. . . . The most logical method of disclosing an arbitration mechanism prior to the sale of a consumer product would be on the product packaging and in the operating manual of the product." See also: R 1-6, 36, National Consumer Law Center. *But, see*, R 1-4-1, 504, AHAM (urged deletion of that provision of former provision § 703.2(c)(3) providing for a disclosure of time limits adhered to by the Mechanism. AHAM found time limits for Mechanism decisions generally undesirable).

reasonable steps to make consumers aware of its Mechanism. Reasons for the modification are discussed *infra* in this section. The proposed provision would have required warrantors to provide to sellers and service centers the more detailed information regarding the Mechanisms required by Paragraph (c). Additionally, warrantors would have been required to take steps reasonably calculated to ensure that this information was provided to consumers requesting such information or registering warranty disputes. The provision was originally proposed in response to studies which showed that most consumers commence registration of a warranty or non-warranty complaint by what consumer affairs professionals term, "banging on the counter" of the warrantor's retailer or service center.[64] Proposed Paragraph (d) therefore required more detailed information to be provided at those places where warrantor's products are sold and serviced. In order to ensure that retailers and service centers provided the information to consumers requesting it or registering a warranty complaint, a requirement that a warrantor was required to take those reasonable steps calculated to *ensure* that such information would be distributed to such consumers was included. While it may have been difficult for a warrantor to police all retailers and service centers to ensure that such information was properly distributed, the warrantor was required to offer incentives to retailers and service centers that would maximize the possibility that such information would be duly distributed.

Suggestions that warrantors be required to engage in media advertising to publicize the existence of Mechanisms were rejected, because substantial costs involved might discourage warrantors from sponsoring Mechanisms, thereby frustrating Congressional intent.[65] The requirements in Paragraphs (c) and (d) were designed to work together to reach most consumers at the time when they most needed access to the Mechanism without placing an unreasonable financial burden on the Mechanism.

While the provisions of Paragraph (c) evoked little criticism on the record, Paragraph (d) was criticized by warrantors and consumer representatives alike. Warrantors criticized the provision as both unnecessary and unenforceable.[66]

The National Retail Merchants Association (NRMA), found the provision to be unnecessary. Retailers would provide this information to consumers in the interest of future goodwill whether or not the warrantor required retailers to give out such information.[66]

In contrast, consumer representatives commented that the provision was not stringent enough to fulfill its purpose of making consumers aware of the Mechanism's existence at the time warranty disputes occur.[68] A number of consumer representatives suggested that stickers should be attached to the product itself as a way of informing consumers about the Mechanism's existence at the time of warranty disputes.[69]

One group noted that signs should be posted at retailers and service centers as an additional way to inform consumers of the availability of the information.[67] provisions for not requiring warrantors Other groups criticized the proposed to engage in media advertising—a method they felt sure would result in consumer awareness of the Mechanism's existence.[68]

Christopher Wheeler, Center for the Study of Responsive Law, offered the most detailed explanation for the necessity of media advertising.[69] Wheeler stressed that advertising would be the only certain way to ensure Mechanism visibility.[70] He recommended that warrantors be required to engage in media advertising at a cost of at least 1 percent of gross sales[71] since companies routinely spend up to 25 percent of their gross sales in product advertising.[72] Wheeler found the proposed requirements too general to be enforced.[73]

Responding to warrantor and consumer criticism, the Commission has revised proposed provision 703.2(d) to require warrantors to take steps reasonably calculated to ensure consumer awareness of the Mechanism at the time warranty disputes occur. The change is designed to balance concerns expressed by industry and consumer representatives on the public record. First, it offers warrantors flexibility lacking in the proposed provision. The Commission is aware of general testimony on the public record regarding differing warrantor distribution and marketing methods. Some warrantors retain direct control over dealers or service centers by means of franchise agreements. This arrangement lends itself easily to provision of Mechanism information to retailers since the warrantor may require retailers to provide this information by including the requirement as a part of a dealer/warrantor agreement. Varying methods of warrantor control over product distribution and marketing fall between complete control over retailers and none at all. The opposite end of the spectrum is reflected by warrantors selling only to jobbers. Here, the warrantor effectively maintains no control over the final distribution of his product. Thus, proposed provision 703.2 (d) may have been possible for some warrantors to enforce but impossible for others and would not ensure maximum consumer awareness.

Warrantors with complete control over product distribution and marketing may wish to provide information to retailers for distribution to consumers; in contrast, a warrantor selling only to jobbers may wish to engage in media advertising to publicize the Mechanism's existence. From a public relations standpoint,

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[64] *See*, R 1-2-3, 2256, Mason and Himes, *An Exploratory Behavioural and Socio-Economic Profile of Consumer Action About Dissatisfaction with Selected Household Appliances*, 7 Journal of Consumer Affairs (1973). R 1-2-3, 2963, Steele, *Fraud Dispute and the Consumer—Responding to Consumer Complaints*, 123 U. Pa. L. Rev. (1975). R 1-2-3, 2186, Diamond, Ward and Faber, *Consumer Problems and Consumerism—An Analysis of Calls to a Consumer Hot Line*, Marketing Science Institute, December, 1974.

[65] R 1-2-3, 950, Staff Report.

[66] *See, e.g.*, R 1-2-1, 81 (unfair to retailers); R 1-4-1, 47 (lack of warrantor control over retailers).

[66] R 1-4-1, 82. *See, also*, R-1-3-3, 816. The Chicago Better Business Bureau commented that: 703.2(d) is . . . "very broad and unenforceable. It is our considered belief that this should be left to self-regulatory efforts and the Federal Trade Commission, where indicated. Responsible and capable warrantors will view their settlement procedures as a marketing factor and we will all benefit from this approach." *But, see*, TR 102-103, Dean Determan, Vice President, Council of Better Business Bureaus, who commented on the desirability, from CBBB's point of view, of placing the burden to provide such information on the retailer. However, Determan noted the impossibility of enforcing the provision.

But, *see also*, TR 170, Ray Afflerbach, National Association of Kitchen Dealers who commented that Section 703.2 (c) and (d) were sufficient to ensure consumer awareness.

[68] *See, e.g.*, R 1-6, 55, Center for the Study of Responsive Law, September 16, 1975; R-1, 165, Wisconsin Governor's Council for Consumer Affairs; TR 149, Shelby County Legal Services.

But see, TR 125, MACAP, who emphatically supported the proposed provision. The panel chairman commented that: "We contend that there ought to be some responsibility from the manufacturer to the dealer and the servicer and that the manufacturer ought to provide the people to whom he sells and the people to whom he gives the authority to deal as an authorized dealer."

R 1-6, 158, Connecticut Citizen's Research Group agreed with MACAP: "Particular stress should be put on the responsibility of large discount centers to make information concerning warranties and dispute mechanisms readily available."

[67] *See, e.g.*, TR 151-152, Shelby County Legal Services (cheaper for warrantors to provide stickers than providing the required information to retailers); R 1-6, 57-58, Center for the Study to Responsive Law, suggested that if the product were too small for a sticker, the FTC could grant an exception. *But, see*, R 1-6, 159, Brian Sullivan commenting for Connecticut Citizen Research Group, found stickers to be unnecessary at this time. (Warrantors will voluntarily take steps to make Mechanism known).

[67] R 1-6, 58, Center for the Study of Responsive Law.

[68] *See, e.g.*, R 1-8, 147, Joseph F. Thomas, Executive Director, Wisconsin Governor's Council for Consumer Affairs felt media advertising would create increased awareness of the entire warranty system.

[69] R 1-6, 56-57, Center for the Study of Responsive Law.

[70] *Id.*, Center for the Study of Responsive Law stated: "Experience with MACAP in some cities has shown that single broadcast descriptions of MACAP produce sudden and direct dispute referrals in large numbers. The Maryland State Home Improvement Commission discovered that media publicity of their existence and their action against a particular business led to a huge influx of complaints against that business."

[71] *Id.* at 57.

[72] *Id.* CSRL, Wheeler gave the Center's reasoning: ". . . if companies can routinely spend up to 25% of the gross sales in advertising the merits of their products, they can afford to spend 1 percent telling the consumer what to do should something go wrong with their product."

[73] *Id.* at 56.

some warrantors may want to publicize a Mechanism more than others. While some warrantors may elect to engage in widespread media advertising; others, because of budgetary considerations, may wish to utilize alternate avenues to create awareness. Salesmen may wish to provide point of sale material by means of posters or signs. Some warrantors may wish to use product stickers. Others may wish to publicize a Mechanism by participating in T.V. "talk" shows or providing materials for use by consumer columnists.

The new provision effectively deals with consumer representatives' criticism that provision of Mechanism materials to retailers would not sufficiently ensure consumer awareness. Many different avenues can now be utilized to ensure the level of awareness desired by these representatives. Criticism that the provision is unenforceable is addressed by a new provision under § 703.7(b)(1) which requires an impartial auditor to evaluate annually warrantors' efforts to make consumers aware of the Mechanism's existence. Warrantors incorporating a Mechanism will realize that to comply with the Rule they must publicize the Mechanism's existence and will be accountable annually for such efforts. Audit reports indicating a lack of reasonable efforts by the warrantor would provide the Commission with a means to enforce compliance with the Rule.

Thus, by offering warrantors flexible means of complying with provision 703.2(d) and permitting warrantors to engage in a variety of means to publicize the Mechanism's existence, the Commission has concluded that provision 703.2(d) creates a reasonable balance between warrantor and consumer interests. Objections to the unenforceability of the provision have been dealt with by the addition of an audit provision which will provide the Commission with information as to compliance or noncompliance. See, § 703.7(b)(1), *infra*. Warrantors will be able to balance cost and public relations considerations while adhering to a general requirement that will result in consumer awareness of the Mechanism.

REDRESS AVAILABLE DIRECTLY FROM THE WARRANTOR

Nothing contained in paragraphs (b), (c) or (d) of this section shall limit the warrantor's option to encourage consumers to seek redress directly from the warrantor as long as the warrantor does not expressly require consumers to seek redress directly from the warrantor. The warrantor shall proceed fairly and expeditiously to attempt to resolve all disputes submitted directly to the warrantor.

This provision has been modified to preserve a warrantor's option to encourage consumers to seek redress directly from the warrantor so long as he/she does not *expressly* require consumers to seek redress directly from the warrantor. The provision retains optional direct access to the Mechanism for consumers at any time during, prior to or after a warrantor's handling of the complaint.

The original provision read:

Nothing contained in paragraphs (b) (c) or (d) of this section shall limit the warrantor's option to encourage consumers to seek redress directly from the warrantor; but the warrantor shall clearly and conspicuously disclose that access to the Mechanism is available without restriction at a consumers option. The warrantor shall proceed fairly and expeditiously to attempt to resolve all disputes submitted directly to the warrantor.

The Staff Report noted the reasoning of the original provision:

Some warrantors may wish to minimize Mechanism costs by promptly handling disputes at the retail or corporate level to avoid referrals to the Mechanism. The proposed provision is not intended to discourage nor burden current legitimate attempts of warrantors to settle disputed complaints.

Some warrantors have internal complaint handling processes which require consumers to go through various levels during the course of settlement. For example, automobile warrantors sometimes ask consumers to go first to a dealer, then to a factory or regional representative, and then resort to the home office of the warrantor. It is possible that some number of consumers may elect to use a warrantor's process only to discover that the process involves shuttling back and forth between different corporate levels. An example of this is contained in a letter from a consumer to the FTC which describes thirty separate unsuccessful attempts to remedy a warranted auto transmission defect. The Proposed Rule requires the disclosure to the consumer that access to the Mechanism is available at any time at a consumer's option.

In order to prevent some consumers from electing in good faith to undergo a warrantor dispute settlement process which delays and frustrates rather than expedites dispute settlement, the proposed Rule included a general requirement that warrantor complaint handling mechanisms operate fairly and expeditiously. As indicated earlier this did not set a new standard, but merely incorporates the existing standard under Section 5(a) of the FTC Act.[74]

The above provision engendered extensive favorable and unfavorable comment on the public record. In response to such comments, discussed *infra* in this Section, the Commission has eliminated the provision requiring warrantors to clearly and conspicuously disclose that direct access to the Mechanism is always available at the consumer's option. However, the Commission has added a provision that would prohibit a warrantor from expressly providing that a consumer seek redress directly from a warrantor before proceeding to the Mechanism.

It should be noted that the reasoning behind the provision remains unchanged. The provision has been modified in light of the Act's purpose to encourage warrantors to adopt Mechanisms so that consumer warranty disputes can be settled fairly and expeditiously. Comments from industry representatives discussed below strongly indicated that warrantor interpretations of the proposed provision would dissuade warrantors from incorporating Mechanisms. Consumers would have experienced no benefits from a rule that created no Mechanisms for the settlement of warranty disputes. However, our original concerns over the possibility of consumer frustration and drop-out from internal warrantor complaint handling procedures are reflected by the maintenance of the provision allowing consumers direct access to the Mechanism at any stage of the complaint procedure.

(a) *Industry Comment Regarding Direct Access.* Industry representatives stressed that adoption of the proposed provision would discourage warrantors from incorporating Mechanisms.[75]

Many warrantors cited their present internal complaint handling procedures with pride.[76] Comments were received indicating that direct consumer access would result in atrophy of present warrantor complaint handling procedures and destroy desirable buyer-seller relationships.[77] A number of industry representatives requested that consumer use of internal complaint handling procedures be required before contact of the Mechanism.[78] Some warrantors and consumer representatives noted the desirability of encouraging direct buyer/seller contact.[79] A number of comments indicated that consumers already resort to the retailer/warrantor and would continue to do so in spite of the proposed Rule provision.[80] One comment noted

[74] R 1-2-3, Staff Report

[75] *See, e.g.*, TR 79, Dean Determan, Council of Better Business; R 1-3-1, 247, J C. Penney & Co.; TR 1245, Walker Manufacturing Co; TR 1752, General Electric; TR 2057, Singer Sewing Machine; TR 1210, Whirlpool Corporation; TR 609, Southern Furniture Manufacturers Association.

[76] *See, e.g*, TR 1772, General Electric; TR 1246, Walker Manufacturing Co.; TR 2474, Woolworth Company; TR 1215, Whirlpool Corporation; TR 2058, Singer Sewing Machine Corporation; R 1-3-2, 687, Bullock's, Northern California.

[77] *See, e.g.*, R 1-3-2, 687, Bullock's, Northern California; R 1-3-3, 815, Chicago. Better Business Bureau

[78] *See, e.g.*, R 1-3-2, 422, Armstrong Cork Co.; R 1-3-2, 433, Defries and Fiske, Chicago, Illinois; TR 610, Southern Furniture Manufacturer's Association; R 1-3-3, 962, Whirlpool Corporation; R 1-3-1, 247, J. C Penney & Co.

[79] *See, e.g.*, TR 1406, Schwinn Bicycle Corporation; TR 80-81, Council of Better Business Bureaus; TR 126, MACAP; TR 1314, Indianapolis, Indiana Better Business Bureau; R 1-6, 87, National Consumers League, TR 2056-2057, Singer Sewing Machine; R 1-3-1, 254, Giant Foods Corporation; TR 2151, Kit Manufacturing Company; TR 82, Council of Better Business Bureaus; TR 2197, Orange County, California, Office of Consumer Affairs; TR 2041, Herschel Elkins, Deputy Attorney General, State of California; TR 2137, "Consumer Newsletter".

[80] *See, e.g*, TR 2098, Legal Aid Foundation, Long Beach, California; TR 843-844, Professor Donald P. Rothschild, "Consumer Help", George Washington University, Washington, D C.; TR 1478, American Arbitration Association; R 1-4-1, 621, MACAP (indicated that out of 192 complaints received by MACAP during the week of September 22, 1975, 110 were referred to manufacturers. However, the comment did not indicate which consumers submitting complaints had already contacted the retailer); TR 96, Council of Better Business Bureaus (Vice President Determan indicated that 50% of those contacting the BBB, had already contacted the business); TR 2429, John Pound, San Francisco Consumer Action, testified that around 10 to 20% of consumers contacting his group had failed to contact the retailer/seller.

that such contacts are in the best interest of warrantors, retailers and sellers since the strongest impetus for redress of disputes stems from the good-will of both warrantors and retailers.[81] Consumer representatives noted that some consumers may have valid reasons for not contacting a retailer or warrantor upon experiencing a dispute.[82]

A common reason cited by consumer representatives fearing an express requirement that consumers resort first to in-house procedures was that consumers might be shuttled back and forth between different corporate levels.[83] Comments indicated that consumers, frustrated and discouraged by this shuttling process, sometimes drop their complaints, thus leaving some disputes unsolved.[84]

(c) *Alternatives Available Without Requiring Consumers To Directly Contact A Warrantor/Retailer.* Some comments suggested that alternative means were available to balance the desire of warrantors to utilize internal complaint handling procedures thus minimizing costs and still guard against consumers dropping out of the complaint handling process.[85]

Two comments suggested that the Commission promulgate rules for warrantor internal complaint-handling procedures.[86] Other comments indicated that the proposed provision did not bar warrantors from encouraging consumers to use internal complaint handling procedures before resorting to the Mechanism, noting that contacting the warrantor/seller is a natural tendency of consumers.[87] Consumer representatives commented that if the Mechanism received complaints from consumers who had not first contacted a retailer or a warrantor, nothing in the proposed Rule would prevent the Mechanism from referring such complaints to the warrantor for resolution.[88] By keeping track of complaints referred to a warrantor, the Mechanism would thus minimize consumer drop-out.[89] Administrative costs, including staff time and recordkeeping, result from monitoring such complaints.

However, such costs could be balanced against the desirability of minimizing consumer drop-out.[90]

CONCLUSION

In response to comments received on the public record regarding provision 703.2(d) requiring the warrantor to clearly and conspicuously disclose that direct access to the Mechanism is always a consumer option, the Commission has modified the provision. Warrantors need not disclose clearly and conspicuously that direct access is optional but may not expressly require consumers to resort to internal complaint handling procedures. Objections by warrantors that the proposed disclosure would destroy present complaint handling procedures, overburden the Mechanism, and result in added costs to warrantors and consumers, have been met by omitting the necessity for warrantors to clearly and con-

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[81] TR, 1647, Professor Lawrence Feldman, University of Illinois, Chicago.

[82] *See, e.g.,* TR 38, Cathleen O'Reilly, Consumer Federation of America, commented that some consumers may have had particularly frustrating prior experiences with a warrantor or seller and do not wish to repeat a meaningless process; TR 844, Professor Donald P. Rothschild, "Consumer Help", George Washington University, Washington, D.C., commented that some consumers may be hostile or embarrassed. Rothschild noted that some consumers are naturally hostile after discovering that a warrantied product is defective. Some consumers are unable to advocate their dispute. Rothschild gave senior citizens as an example of those easily frustrated and discouraged by attempts to remedy disputes through internal warrantor procedures; *See, also,* TR 1804, Consumer Fraud Division, Cook County State Attorney General's Office, Chicago, Illinois.

[83] R 1-3, 70, Center for the Study of Responsive Law, Christopher Wheeler noted that "run-arounds" by warrantors may not be a result of conscious policy, stating that:

"It is fundamental to understand that a perceived "run-around" is not always the result of conscious policy. Rather in a generic sense, it is the result of the franchiser-franchisee or manufacturer-dealer relationships which have come to dominate our market structure. Inherent in these relationships is the issue of accountability. Where the buck finally stops becomes a central, dominating question. Thus with even the best of complaint-handling intentions, sellers on occasion must send the consumer elsewhere in the corporate structure to get a decision on his claim."

TR 695, Cleveland Citizens Action Group; TR 937, Board of Freeholders of New Jersey; R 1-4-1, 505, AHAM (consumers would not undergo shuttling if they contacted MACAP). *See, also,* The record reflects comments from consumer representatives and consumers noting the occurrence of the shuttling process:

R 1-8, 101, Long Beach Department of Consumer Affairs (consumer with a defective dryer whose vain attempts to remedy the defect lasted over a year); TR 1805-1815, Ronald Rodriguez, a consumer who testified regarding lengthy attempts to remedy auto tire defects; TR 1910-11, Governor's Consumer Advocate's Office, State of Illinois. (auto dealer withholding warranty service from an uninformed Spanish speaking consumer); TR 1313-1326, John Czarnecki, a consumer commented that his attempts over a six month period at various corporate levels to remedy a water leak in a new Plymouth Duster had been unsuccessful; R 1-5, 185-86, Joseph R. Holzum, a consumer who testified regarding vain attempts to correct defects in 4 electric stoves over 5 years; R 1-6, 237, Ray Lindsey, Guadalajara, Mexico, a consumer who recounted unsuccessful efforts with his Ford dealer and factory representatives to correct front grill and window problems.

[84] *See, e.g.,* R 1-6, 71, Christopher Wheeler, Center for the Study of Responsive Law, noted that: ". . . consumers will drop out in rapid numbers as they find they are forced to proceed through one corporate layer after another. If the "run-around" is an inherent structural by-product of our present corporate structure, public policy should not exacerbate it. Public policy should bypass it"; R 1-8, 165, Governor's Council for Consumer Affairs, State of Wisconsin which noted that: "Granted, many consumers are very persistent, but our experience has been that it does not take many obstacles to discourage the consumer in pursuing a complaint . . . Some drop the complaints if they face the prospect of a long, involved dispute settlement procedure; others contact a government or independent consumer agency to intervene on their behalf, others do nothing;" Tr 852-853, Professor Donald P. Rothschild, George Washington University, Washington, D.C., "Consumer Help" who commented that even with extensive follow-up procedures, 9% of the 3800 consumers who complained to the Center in the past year dropped out with disputes unresolved. Rothschild noted that this was a very low figure. Rothschild noted that elderly persons are especially prone to dropping a complaint; R 1-4, 621, MACAP (The panel followed up on 107 referrals they had made to manufacturers in June, 1975. Only thirty-nine consumers responded to the Panel's request for information regarding the disposition of their complaint. Of those responding, 8% or 3 out of the 39, had made no attempts to contact the warrantor). *See, also:* TR 96, Council of Better Business Bureaus (Consumers can become discouraged if they contact the wrong person).

[85] *See, e.g.,* TR 1303, Indianapolis, Indiana, Better Business Bureau Director Ray Dearing suggested that the warrantor should notify its customer in writing stating the reason for the rejection. That same written notification could advise the customer that he can appeal the decision and set forth the steps necessary to initiate such appeal.

[86] *See, e.g.,* R 1-6, 91, National Consumers League; TR 112, Council of Better Business Bureaus.

But, see, TR 243-244, Center for the Study of Responsive Law, (supported the provision and disfavored the Commission's creation of a tiered system).

[87] *See, e.g.,* TR 843-844, Professor Donald P. Rothschild, "Consumer Help", George Washington University, Washington, D.C. (as a practical matter, consumers will always have to use in-house procedures); TR 34, Consumer Federation of America suggested what it considered to be a non-threatening disclosure method to be used if in-house procedures were optional:

"The law requires us to inform you of your right and the mechanism which will attempt complaint mechanism described above in paragraph such and such. We respect the right and the mechanism which will attempt to settle the dispute within 40 days. However, you may choose to first contact our own complaint department which has settled 85 percent of all complaints to the satisfaction of the customer within seven days at no expense to the customer. We encourage you to contact us first because we want to satisfy you in the fairest and fastest way possible."

See, also, R 1-6, 51-52, Center for the Study of Responsive Law

[88] *See, e.g.,* TR 855, Professor Donald P. Rothschild, "Consumer Help", George Washington University, Washington, D.C. (this procedure would aid fair and expeditious resolution of disputes); TR 706, Cleveland Citizens Action Council, ". . . the warrantor is free to encourage them to go through their own in-house procedure . . . [I]t probably saves money. . . ."

[89] *See, e.g.,* TR 851, Professor Donald P. Rothschild, "Consumer Help", George Washington University, Washington, D.C. (the University's "Consumer Help" program follows this procedure); TR 132, MACAP Panel Member, John Rose testified that although the Panel does not follow up on the complaint, the consumer is placed on the proper track.

[90] *See, e.g.,* R 1-4-1, 622, Comment of MACAP (10% savings in operating time by not tracking complaints); TR 853, Professor Donald Rothschild, "Consumer Help", George Washington University, Washington, D.C. (follow-up procedures initially created a cost burden on the "Consumer Help" program but the problem soon disappeared); TR 98, Council of Better Business Bureaus (costs would not increase by a significant amount).

spicuously disclose the direct access option. As a result of the modification, warrantors will thus be encouraged to incorporate Mechanisms as well as present in-house complaint handling procedures. With the establishment of these Mechanisms, consumers will be able to have warranty disputes settled fairly and expeditiously.

However, the Commission's initial provision allowing consumers direct access to the Mechanism has been retained in the final Rule. Strong consumer support for this provision can be found in the Record. Consumers may resort to the Mechanism at any time, thus minimizing the possibility that some consumers may be shuttled back and forth within a corporate structure and drop out with unresolved complaints. Possibilities of increased complaints over-burdening the Mechanism and increasing costs are minimized by the Mechanism's ability to refer complaints to warrantors for settlement while working within time constraints imposed by the Rule. Thus added protection to consumers against discouragement and drop-out has been provided. Moreover, warrantors are required to handle disputes fairly and expeditiously.

Thus, the Commission has concluded that the modification of the Rule is reasonable and necessary to ensure the balance of warrantor and consumer interests envisioned by Congress in the Act. The provision as promulgated maximally encourages warrantors to incorporate Mechanisms while utilizing present in-house complaint handling procedures but ensures that consumers do not drop out of a prolonged and complicated complaint handling procedure that would fail to settle warranty disputes fairly and expeditiously.

DISPUTES SUBMITTED DIRECTLY TO THE WARRANTOR

(e) Whenever a dispute is submitted directly to the warrantor, the warrantor shall, within a reasonable time, decide whether, and to what extent, it will satisfy the consumer, and inform the consumer of its decision. In its notification to the consumer of its decision, the warrantor shall include the information required in § 703.2 (b) and (c).

Section 703.2(e) deals with the warrantor's obligation to make a decision regarding a warranty dispute submitted directly to the warrantor within a reasonable time and notify the consumer of this decision. At the same time, the warrantor would provide information regarding the Mechanism required by Section 703.2 (b) and (c). The provision promulgated differs from the proposed version. The change reflects comment received on the record regarding the proposed provision's potential burdensomeness. As a result, the Commission has adopted an alternative frequently proposed on the record. The alternative provision reduces a warrantor's burdens to forward unresolved disputes to the Mechanism. However, the new provision ensures that consumers will receive notice of a warrantor's decision and necessary information allowing them to easily and quickly register their complaints with the Mechanism.

Section 703.2(e) originally provided that:

(e) Whenever the warrantor determines that a dispute submitted directly to it cannot be resolved to the consumer's satisfaction, the warrantor shall immediately refer the dispute to the Mechanism, together with any information which the Mechanism may require for prompt resolution of warranty disputes.

The Staff Report's reasoning for the original provision requiring warrantors to forward unresolved complaints to the Mechanism was that since the Mechanism served as the warrantor's opportunity to cure, he should be obliged to forward unresolved disputes to the Mechanism. Materials received from warrantors regarding such disputes could be used by the Mechanism to resolve these disputes within a shorter time, thus reducing the Mechanism's investigatory burden.[91] The provision engendered little consumer comment. MACAP favored the provision as a statement of good intent by the warrantor.[92] Industry comments on the provision were generally unfavorable.[93] One industry comment suggested that the provision is burdensome since warrantors have no clear way of determining whether consumers are satisfied.[94] The provision could thus discourage warrantors from incorporating Mechanisms.[95] It was noted that frivolous claims sometimes arise and the necessity of forwarding such complaints could increase costs to the Mechanism and warrantors.[96]

The alternative frequently suggested and adopted in the final Rule was that the warrantor should instead be obliged to notify the consumer of his decision in writing and provide information regarding Mechanism operations.[97] The most persuasive testimony on the desirability of this alternative was given by Gerald Aksen of the American Arbitration Association (AAA). Aksen cited to the AAA's experience with New York State's No-Fault Insurance Program. The program's uniform denial of claim form is sent to consumers upon the insurance company's decision to deny a claim. Upon receipt of the company's written refusal, the consumer fills out the simple form and mails it to the AAA to commence arbitration proceedings.[98] Aksen suggested the written denial of a warranty dispute would provide the Mechanism with a firm basis to begin investigatory work on the dispute.[99]

While reducing burdens on the Mechanism and warrantor which might discourage establishment of Mechanisms, the modified provision provides consumers with notice of the warrantor's decision respecting a dispute and information regarding the Mechanism. Moreover, written denial of a dispute will give the Mechanism a starting point from which to begin investigation.

ADDITIONAL WARRANTOR DUTIES

(f) The warrantor shall: (1) respond fully and promptly to reasonable requests by the Mechanism for information relating to disputes;

Paragraph (f) ensures a warrantor's good faith cooperation with the Mechanism he has elected to serve as his opportunity to cure. Since the Act specifies that the Mechanism shall settle warranty disputes fairly and expeditiously, the warrantor must assist the Mechanism in any reasonable ways that would help the Mechanism comply with the Rules. With the exception minor changes in language in 703.2(f), the provision has been adopted as proposed.

As proposed, paragraph 703.2(f)(1) provided that the warrantor respond fully and promptly to requests by the Mechanism for information. In the course of investigating and settling warranty disputes, the Mechanism might require additional information from the warrantor on various facets of the dispute. Under the proposed Rule, the Mechanism would have only 40 days from receipt of the dispute to decide the dispute. If a warrantor were to refuse to provide information necessary for the Mechanism's decision, the Mechanism could be delayed in settling a dispute and thereby fail to comply with the proposed Rule. Thus, good faith by the warrantor implies full and complete cooperation to requests made by the Mechanism for the purpose of settling warranty disputes. Minor changes have been effected in the wording of the section in response to comments received on the record. The word "reasonable" has been added to requests made by the Mechanisms to warrantors for information. Moreover, such requests must be related to disputes. The addition of these terms was suggested by comments stating that the provision in its original form might be burdensome and discourage some warrantors from establishing Mechanisms.[100] The Commission has concluded that changes in the language of Section 703.2(f)(1) are reasonable. The section now provides that the warrantor respond to reasonable requests by the Mechanism for information relating to the dispute.

[91] R 1-2-3, 954.

[92] R 1-4-1, 385, MACAP; *But, see,* R 1-6, 143, New York City Office of Consumer Affairs (opposed the original provision for forwarding the dispute without first obtaining the consumer's consent).

[93] *But see,* R 1-3-1, 290, Union Carbide Corporation (suggested that the phrase "immediately forward" be changed to "promptly forward").

[94] R 1-4-1, 506, AHAM; R 1-4-1, 48, NAFM.

[95] R 1-3-1, 63-64, Mohasco.

[96] TR 1302, Indianapolis, Indiana Better Business Bureau; R 1-4-1, 96, NEMA; TR 84-85, Council of Better Business Bureaus.

[97] TR 1302, Indianapolis, Indiana Better Business Bureau; R 1-3-3, 186, Chicago, Illinois Better Business Bureau; TR 85-86, Council of Better Business Bureaus.

[98] TR 1482-1485, American Arbitration Association.

[99] *Id* at 1485

[100] R 1-4-1, 48, NAFM; R 1-4-1, 82, NRMA R 1-3-1, 290, Union Carbide Corporation; *But, see,* R 1-4-1, 506, AHAM, (section unnecessary).

(f) (2) upon notification of any decision of the Mechanism that would require action on the part of the warrantor, immediately notify the Mechanism whether, and to what extent, warrantor will abide by the decision;

This provision has been promulgated as proposed. The Staff Report on the provision indicated that:

Failure of the warrantor immediately to notify the Mechanism whether and to what extent it will abide by the Mechanism's decision would again show a lack of good faith by the warrantor in the Mechanism it has elected as his right to cure. Under the proposed Rule, the warrantor will have known of the existence of the dispute and have had more than a month to consider its actions regarding a Mechanism decision. Under the proposed Rule, the Mechanism has 40 days to decide the dispute, obtain a decision from a warrantor as to whether the warrantor will abide by the decision, and notify the consumer of his decision. Were the warrantor to delay notification of the Mechanism of his decision, the Mechanism, operating as warrantor's right to cure, would fail to comply with the proposed Rule.

Failure to notify the consumer of the warrantor's intended actions would further delay consumers from seeking legal remedies created under Title I of the Act since passage of the 40 days ends warrantor's right to cure. Since the consumer has made a decision or been required to forebear suit in order to afford the warrantor a right to cure, further delays from the Mechanism because of warrantor failure to reply would be unreasonable.[101]

The provision engendered few comments on the public record.[102] The provision appears necessary to ensure the Mechanism's ability to comply with the Rule. Moreover, the Commission has concluded that since warrantors have elected to incorporate Mechanisms, it is reasonable to require warrantors to aid the compliance of their duly-incorporated Mechanisms by immediate notification as to a warrantor's decision to accept or reject a Mechanism decision.

(f) (3) perform any obligations it has agreed to.

Paragraph (f) (3) of the Rule is promulgated as proposed. The provision would require warrantors to perform any obligations agreed to. The warrantor is not bound to abide by the decisions of the Mechanism even though he has incorporated the Mechanism into the terms of the written warranty.

The rationale for the provision was indicated in the Staff Report:

While the warrantor may decide not to abide by some of the decisions of its duly incorporated Mechanism, upon its notification by the Mechanism and agreement to perform, fairness requires that the warrantor be bound to perform such agreed-to obligations.

At the time of notification, the warrantor was free to decide to abide or not to abide by the decision of the Mechanism. The Mechanism, compelled by the Rule to decide a warranty dispute within 40 days, must have already notified the consumer of the warrantor's decision to perform. Thus, assured by the Mechanism that the warrantor would perform, the consumer would have delayed seeking legal redress created under Title I of the Act. Failure of the warrantor to perform agreed-to obligations would mean that warranty disputes were not, in fact, settled fairly and expeditiously by the warrantor's Mechanism, would delay consumers from seeking legal remedies available after the 40 days had passed, and would show lack of good faith on the part of the warrantor.[103]

Only two comments were received on the proposal. Virginia Knauer, Office of Consumer Affairs, HEW, asked that the Commission require a warrantor to state in the warranty to what extent he/she agreed to abide by Mechanism decisions.[104]

The Commission promulgates Section 703.2(f)(3) as proposed and has determined from the Record that the provision requiring warrantors to perform obligations incurred as a result of incorporating a Mechanism is reasonable.

GOOD FAITH REQUIREMENT

(g) The warrantor shall act in good faith in determining whether, and to what extent, it will abide by a Mechanism decision.

Paragraph 703.2(g) imposes a general good faith requirement on warrantors with regard to determinations to abide by Mechanism decisions. It has been promulgated as proposed. The rationale for the provision was indicated in the Staff Report:

Warrantors can choose whether or not to incorporate a Mechanism into the terms of a written warranty as their opportunity to cure. Additionally, they may choose one of a number of different types of Mechanisms which suit their particular commercial needs and complaint handling patterns. Warrantor's incorporation of a particular Mechanism indicates that he, in good faith, considered that the particular Mechanism chosen would fairly and expeditiously settled warranty disputes involving his firm. Thus, since the warrantor has made a conscious choice to incorporate a particular Mechanism into the terms of his written warranty, he should act in good faith toward such a Mechanism and agree to abide by a substantial number of its decisions.

While the consumer is delayed from seeking legal remedies created under Title I of the Act because of mandatory utilization of the Mechanism, the warrantor has had the opportunity to decide both whether or not to incorporate a Mechanism and to choose among a variety of Mechanisms.

A warrantor's failure to act in good faith toward his chosen Mechanism would bar the Mechanism from settling warranty disputes fairly and expeditiously and serve only to delay and frustrate consumers from seeking legal remedies, thus contravening the basic purpose of the Act.[105]

Comments received on the record regarding the provision were mixed. Industry representatives indicated resistance to imposing a good faith requirement on warrantors but not consumers.[106] Two industry representatives indicated that the requirements was superfluous,[107] and noted that good faith would always depend on the goodwill of the warrantor.[108] Two comments indicated that the provision as proposed seeed incorrectly to imply that decisions of the Mechanism were binding on the warrantor.[109] One comment suggested that the Rule include a prima facie "good faith" defense for warrantors in FTC or possible court actions.[110]

Consumer representatives commented that the provision as written was too general to permit effective enforcement.[111] One comment suggested that in determining damages, a court be allowed to consider the fact that the warrantor had failed to abide by a decision he/she had agreed to.[112] One consumer representative suggested that a warrantor be obliged to abide by 85% of all decisions made by the Mechanism.[113] However, another consumer representative noted that consumers may submit groundless complaints.[114]

Comments received on the record regarding Section 703.2(g) have led the Commission to conclude that the provision fairly balances consumer and warrantor interests and is therefore promulgated as proposed. Since the warrantor has incorporated a Mechanism which delays consumers from seeking available legal remedies, it should be obliged to abide in good faith by decisions made by its incorporated Mechanism. However, a general "good faith" requirement rather than a percentage figure allows the warrantor not to comply with an occasional invalid decision. The decision to refrain from setting a percentage requirement connotes a reluctance to establish a figure that might encourage a minimum standard. Valid disputes might be rejected by some warrantors as exceeding the number required by percentage figures. Some warrantors may wish to commit themselves to abiding by 100% of Mechanism decisions. The Rule does not preclude this desirable possibility. Moreover, no workable alternatives were suggested on the record that would meet consumer criticisms regarding generality yet ensure that a percentage figure would not become a fixed minimum.

Consumer interests are preserved by the "good faith" requirement of acqui-

[101] R 1-2-3, 955-957, Staff Report.

[102] *See, e.g.*, R 1-4-1, 48, NAFM ("immediately" unnecessarily harsh); R 1-3-1, 290 Union Carbide ("promptly" not "immediately"); R 1-4-1, 506, AHAM (provision unnecessary).

[103] R 1-2-3, 957-958, Staff Report

[104] TR 16, Virginia Knauer, Office of Consumer Affairs, HEW. *But, see*, R 1-4-1, 506, AHAM (provision unnecessary).

[105] R 1-2-3, 958-959. A number of existing third-party complaint handling mechanisms cite a high rate of compliance by warrantors. AUTOCAP states that no auto dealer has ever refused to abide by the panel's decision. MACAP contends nearly 85% of decisions are complied with by warrantors. FICAP states that manufacturers generally go along with their decisions

[106] *See, e.g.*, R 1-3-2, 379, Alcan Building Products; R 1-4-1, 96-97, NEMA.

[107] *See, e.g.*, R 1-4-1, 83, NRMA; R 1-4-1, 49, NAFM.

[108] *See, e.g.*, TR 648, NRMA.

[109] *See, e.g.*, R 1-3-1, 63, Mohasco; R 1-3-1, 578, Quarles & Brady, Milwaukee, Wisconsin.

[110] TR 353, Warranty Review Corporation.

[111] *See, e.g.*, TR 2525, San Francisco Bar Committee on Consumer Rights; R 1-6, 53, Center for the Study of Responsive Law.

[112] *See, e.g.*, TR 2525, San Francisco Bar Committee on Consumer Rights.

[113] R 1-6, 53, Center for the Study of Responsive Law.

[114] TR 2432, San Francisco Consumer Action (10% of the inquiries submitted to SFCA are groundless).

escence in decisions by warrantors. As previously discussed, *supra*, at 77, consumer criticisms as to enforceability were not persuasive. Using audit reports to gauge compliance, the Commission will be able to proceed against warrantors not acting in "good faith" by employing the same methods used in dealing with FTC Act Section 5(a) actions.

COMPLIANCE WITH OTHER MECHANISM REQUIREMENTS

(h) The warrantor shall comply with any reasonable requirements imposed by the Mechanism to fairly and expeditiously resolve warranty disputes.

Paragraph (h) is a general requirement designed to enable the Mechanism to require warrantors to comply with any requirements imposed in the interest of fair and expeditious resolution of warranty disputes. Because of comments received on the record, the word "reasonable" has been added to those requirements which may be imposed by the Mechanism on warrantors. The provision was included to permit Mechanisms to provide for the particular needs that will arise with their establishment. Thus, the requirement provides for the possibility of miscellaneous housekeeping requirements or other needs of various Mechanisms. Few comments were received on the provision. One comment criticized the provision's openendedness and felt it might discourage warrantor establishment of Mechanisms since the Mechanism was implicitly free to impose any requirements on the warrantor.[115] To prevent the possibility of Mechanisms imposing unreasonable requirements on warrantors, the provision has been modified to require warrantors to comply with *reasonable* requirements of the Mechanism.

MINIMUM REQUIREMENTS OF THE MECHANISM

Minimum requirements for informal dispute settlement Mechanisms are set out in Sections 703.3–703.8. A warrantor is prohibited by Section 703.2(a) from incorporating a Mechanism into the terms of a written warranty which does not comply with these requirements.

The Staff Report states:

Sections 703.3–703.8 are designed to permit any form of Mechanism that can settle disputes fairly and expeditiously. General performance requirements are used whenever possible; detailed procedural and other requirements are only specified when necessary either to ensure fair and expeditious settlement of disputes or to allow the Commission to fulfill enforcement responsibilities.[116]

Much comment was directed to the general approach taken by the Commission as well as to specific provisions.

Comments were generally directed to the issue of whether the proposed Rule struck the appropriate balance between "general performance requirements" and "detailed procedural and other requirements." One consumer group strongly objected to many of the performance requirements.[117] Several other groups supported the balance of these requirements.[118]

On the other hand many warrantors and industry groups protested that the minimum requirements of the Mechanism were far too complex and costly.[119] In response to this criticism the Commission has made revisions in many of the provisions to eliminate burdens not essential to fair and expeditious settlement of disputes.

A few industry groups suggested that more flexibility should be built into the Rule by means of a Commission certification procedure which would be an alternative to the requirements of Sections 703.3 through 703.8.[120] These comments were unpersuasive. Maintaining a required certification procedure for any group desiring to be named as a Mechanism complying with Part 703 would be a great burden on the Commission. It would also place an unnecessary burden on prospective Mechanisms, since they would no doubt be required to make formal submissions of relevant procedural and other documents to the Commission. The Commission's role is to set out the minimum requirements for those interested in offering §110 Mechanisms, which it has done in Part 703. The Commission, through its staff, has in the past provided guidance for those bound by its Rules, and it will continue to do so in the future.

One final general suggestion was offered by the National Consumers League, which advocated that some of the specific provisions should be waived by the Commission if necessary to allow a government agency to set up a complying Mechanism.[121] Since the government agencies which expressed a willingness to be named as Mechanisms felt they could easily comply with all of the requirements,[122] a waiver provision is not included in the Rule.

703.3 MECHANISM ORGANIZATION, FUNDING AND STAFFING

(a) The Mechanism shall be funded and competently staffed at a level sufficient to ensure fair and expeditious resolution of all disputes, and shall not charge consumers any fee for use of the Mechanism.

This paragraph requires that the Mechanism must have sufficient staff and funds to perform all the functions required by other sections of the Rule within the prescribed time limits. The staff must be competent to gather the information necessary for a fair decision in each dispute. Competence includes knowing what information is necessary in each dispute and being able to get that information without placing undue burdens on the consumer. Some Mechanisms would require larger budgets and a different staff composition than others. For example, a Mechanism that actively engaged in mediation might cost more per dispute than a Mechanism that limited itself to gathering facts and deciding disputes. The higher costs of the first Mechanism would be due not only to the greater number of staff hours invested in each dispute but also to the need to hire staff persons who were qualified to perform the mediation function fairly.

Only a few comments were directed to the first portion of this paragraph. MACAP and AHAM (a MACAP sponsor) both praised the provision as written. MACAP felt that it "would give us more leverage with the sponsors in requesting funds as the need arises."[123] AHAM thought the rule was "admirable in its setting forth goals in such a way as to allow leeway in achieving the goals."[124]

Objections were received from NRMA and NAFM that it would be impossible to determine beforehand the amount of funds necessary to ensure fair and expeditious resolution of disputes, so this provision should be modified by a phrase such as "reasonably calculated".[125] The provision as written would require warrantors to initially fund the Mechanism at a level estimated to be sufficient. If it appeared at some later date that this amount was inadequate, the warrantors would have to increase the funding. As MACAP argued, Mechanisms need a clause such as this to use for leverage when requesting additional funds necessary to their operation from warrantors.[126] The weakening language suggested by NAFM and NRMA would greatly reduce this leverage and might harm the Mechanism's ability to handle all cases fairly and expeditiously. Therefore, the Rule was not changed.

[115] *See, e.g.*, TR 16, Virginia Knauer, Office of Consumer Affairs, HEW; R 1–3–1, 290, Union Carbide Corporation; R 1–4–1, 49, NAFM; *See also*, R 1–4–1, 96, NEMA (suggestion that the Mechanism be free to impose additional requirements on consumers). *But see*, R 1–4–1, 506, AHAM (opposed the requirement as superfluous).

[116] R 1–2–3, 961.

[117] R 1–6, 49–50, The Center for the Study of Responsive Law in its prepared testimony stated:

"One of the basic shortcomings of the proposed Rules is their generality. In section after section general goals have been substituted for clearly worded minimum standards. While such goals are thought to have the ostensible benefit of encouraging flexibility, they will have the unintended effect of creating confusion, misunderstanding and ultimately frustration for those who must respond to the rules as well as for those who must enforce them. Minimum standards, therefore, are needed to establish at least a baseline for performance."

[118] TR 2226, Long Beach Department of Consumer Affairs; TR 242, San Francisco Consumer Action.

[119] R 1–3–1, 73, Guren, Merritt, Sogg & Cohen; R 1–3–1, 289, Union Carbide; R 1–3–1, 402, Zenith; R 1–3–1, 720, Massey-Ferguson; R 1–3–1, 854, General Electric; R 1–3–1, 961, 963–64, Whirlpool; R 1–4–1, 31–32, GAMA; R 1–4–1, 79, NRMA; R 1–4–1, 189, EIA/CEG; R 1–4–1, 583, American Apparel Manufacturers Association.

[120] TR 87, CBBB; R 1–4–1, 356–57, NAHB.

[121] R 1–6, 89–90, National Consumers League.

[122] TR 2187–2188, Orange County Office of Consumer Affairs; TR 2225–2226, Long Beach Dept. of Consumer Affairs.

[123] R 1–4–1, 387.

[124] R 1–4–1, 507.

[125] R 1–4–1, 49; R 1–4–1, 83.

[126] R 1–4–1, 387.

The last clause of this paragraph prohibits the Mechanism from charging consumers any fee to use the Mechanism. This provision is not expressly required by the Act, although Section 110 speaks of Congressional policy to encourage *warrantors to establish* informal dispute settlement procedures, which implies that the funding of these procedures should be on the warrantor. The Conference Report [127] is silent on this point. The sole reference to this subject in the legislative history is found in the House Report,[128] which is relevant to interpretation of Section 110 of the Act, because the conferees adopted the House version of Section 110. The House Report states: "The rules prescribed by the FTC with respect to such informal dispute settlement procedures must also prohibit saddling the consumer with any costs which would discourage use of the procedure." [129] This indicates a legislative intent to prohibit placing burdens on the consumer which would cause the consumer to either drop out of the procedure or not enter the procedure at all.

The Rule does permit placing some costs on consumers. The burden is on the consumer to initially notify the Mechanism of the dispute, and the consumer must, under Section 703.5(c) provide the information needed by the Mechanism to fairly resolve the dispute. Additionally, under Section 703.5(c) the consumer must bear the cost of developing and submitting any rebuttal evidence. This might include the cost of consulting experts, taking photographs, getting statements from witnesses, and copying documents. Also, if the consumer wants copies of any Mechanism records relating to the dispute, under Section 703.8(d)(2), the consumer may be required to bear the cost.

Except for the cost of notifying the Mechanism and the cost of complying with reasonable requests for necessary information, all of the costs which the Rule allows to be placed on the consumer are voluntary costs, in that if the consumer decides not to bear them, the Mechanism will still render a decision. For example, although lack of rebuttal evidence may affect the decision, it will not effect the Mechanism's duty to render a decision. Also, the Mechanism will render a decision whether or not the consumer elects to pay for a copy of the file. This cost may discourage the consumer from pursuing other avenues of redress, but it will not affect the consumer's use of the Mechanism.

The Rule allows some voluntary costs while minimizing involuntary costs, because involuntary costs are ones that would cause consumers to either not utilize the Mechanism or to drop out before completion of the procedure. Involuntary costs are the costs to which the language of the House Report, quoted above, is directed.

As the Staff Report noted, existing informal dispute settlement mechanisms such as MACAP, FICAP, AUTOCAP, and BBB do not charge fees to consumers, and it is the general consensus of these groups that charging fees would discourage consumer use of Mechanisms.[130]

Numerous comments were directed to this clause on fees. They were fairly equally split between those who favored allowing fees and those who opposed it, with warrantors taking the former position and consumers the latter.

Many warrantors felt that the Mechanism should be allowed to charge a fee of $25 or less,[131] which the Mechanism would have discretion to refund.[132] The major purpose of the fee would apparently be to discourage consumers from bringing frivolous complaints to the Mechanism.[133] This idea was supported by only one consumer witness,[134] who also felt that charging a fee might discourage some frivolous complaints.

On the other hand, other consumer witnesses supported the idea of no fee to consumers.[135] Some asserted that a fee would deter consumer use of the Mechanism,[136] and some further felt that a fee would be unfair since the warrantor has the ability to force the consumer to use the Mechanism before pursuing certain other remedies.[137] Finally, the American Arbitration Association which currently charges fees for its arbitration services, stated that in view of the fact that Mechanism decisions would not be binding, it would be unfair to charge consumers a fee.[138]

In summary, warrantors favor a fee to discourage frivolous complaints and partially to defray the cost of the Mechanism. Consumer representatives oppose a fee because it would discourage many complaints, non-frivolous as well as frivolous. The Commission agrees that a fee would reduce the number of frivolous complaints, but also agrees with CBBB which stated: "Well, our view on this whole issue is that while you may end up with a few frivolous complaints by not charging, by and large you would discourage more complainants from coming in with the kind of disputes we handle if you did charge." [139] This, coupled with the facts that the warrantor can compel the consumer to use the Mechanism and that Mechanism decisions are not legally binding, mandates that no fee be charged to the consumer.

INDEPENDENCE OF THE MECHANISM

(b) The warrantor and the sponsor of the Mechanism (if other than the warrantor) shall take all steps necessary to ensure that the Mechanism, and its members and staff, are sufficiently insulated from the warrantor and the sponsor, so that the decisions of the members and the performance of the staff are not influenced by either the warrantor or the sponsor. Necessary steps shall include, at a minimum, committing funds in advance, basing personnel decisions solely on merit, and not assigning conflicting warrantor or sponsor duties to Mechanism staff persons.

This paragraph states the general requirement that the Mechanism must be organized so as to avoid the possibility that the decisions of the members or the actions of the staff (*e.g.*, information gathering, mediation) could be controlled or influenced by the warrantor or sponsor.

Two industry groups criticized the general approach taken by the first sentence of this paragraph. Both the National Association of Furniture Manufacturers (NAFM) and NRMA suggested deleting this provision arguing that it was unnecessary.[140] This is the only portion of the Rule dealing with staff performance. Since competence of staff is critical to the fair and expeditious handling of disputes, this provision remains unchanged.

Several comments requested clarification as to whether certain entities such as warrantor subsidiaries,[141] trade associations,[142] and law firms [143] could act as Mechanisms. As the Staff Report indicated, the Rule is not intended to specify the structure of the Mechanism. It states: "[Section 703.3(b)] is stated as a performance requirement so as not to exclude some forms of Mechanisms that might be capable of fairly and expeditiously settling disputes." [144] It further provides: "Two basic types of mechanisms are envisioned by the Act and by this Rule—mechanisms established by individual warrantors and mechanisms established by groups of warrantors." [145] These two sentences make it clear that the form of a Mechanism is unimportant. It can be totally supported by one warrantor (*e.g.*, a subsidiary of the warrantor), it can be supported by a group of warrantors (*e.g.*, a trade association), or it can be an independent organization that contracts with one or more warrantors to handle disputes (*e.g.*, a law firm). The important point is whether the Mechanism satisfies the performance requirement of "sufficiently insulated".

[127] R 1-2-3, 1036; Conference Report to accompany S. 356, S. Rep. No. 93-1408, 93rd Cong., 2d Sess. (1974).

[128] R 1-2-3, 1077, House Committee on Interstate and Foreign Commerce, Report to accompany H.R. 7917, H.R. Rep. No. 93-1107, 93d Cong., 2d Sess. (1974).

[129] R 1-2-3, 1116.

[130] R 1-2-3, 964.

[131] R 1-3-1, 165, Lear Siegler; R 1-3-3, 927-28, Amana; TR 63-64, NAHB; TR 831-832, Guren, Merritt, Sogg & Cohen; TR 1983-1984, Markel Electrical Products.

[132] R 1-3-3, 165; R 1-3-2, 378, Alcan Building Products; TR 63-64; TR 1983.

[133] R 1-4-1, 624-25, NAHB; TR 64-65; TR 831; TR 1480-1481, AAA.

[134] TR 2222-25, Long Beach Dept. of Consumer Affairs.

[135] R 1-6, 19, National Consumer Law Center; R 1-6, 158, Conn. Citizen Research Group; R 1-8, 148, Wis. Governor's Council for Consumer Affairs; TR 870-872, Donald P. Rothschild; TR 1480-1482, AAA; TR 2081-2082; 2102, Legal Aid Foundation of Long Beach; TR 2271, Calif. Citizens Action Council.

[136] R 1-6, 19; TR 871-872; TR 2102

[137] R 1-6, 19; TR 2081-2082.

[138] TR 1480-1482.

[139] TR 107-108.

[140] R 1-4-1, 50; R 1-4-1, 83.

[141] TR 349, Warranty Review Corp.

[142] R 1-3-3, 1106, Kit Manufacturing; R 1-4-1, 363, Specialty Equipment Manufacturers Assn.

[143] R 1-3-1, 51, North American Phillips.

[144] R 1-2-3, 965.

[145] R 1-2-3, 966.

Of course, a Mechanism that is supported by a single warrantor will have to take special precautions to ensure sufficient insulation.

The second sentence of Paragraph (b) lists several steps which must be taken to insulate the Mechanism. The proposed Rule mentioned these steps but did not require them. No criticism was directed at these steps, and one consumer group argued that these three items were essential.[146] The Commission has concluded that these steps at a minimum are necessary elements of insulation. Therefore, the provision now makes them mandatory.

The rest of the comments relating to this paragraph came from consumer representatives who wanted more specificity as to necessary insulation. Several asserted that Mechanism staff should not be drawn from any of the warrantors' operating divisions[147] and should provide no service to warrantors other than dispute settlement.[148] The prohibition against "assigning conflicting warrantor or sponsor duties to Mechanism staff persons" adequately responds to this concern.

Two consumer groups proposed that the length of time which funds must be committed in advance should be specified.[149] Since the necessary time period might vary greatly among different forms of Mechanisms, the Rule does not specify it. Under the Rule adequacy of any time period will be judged by the "sufficient insulation" standard.

Other suggestions for specificity were as follows: Mechanism offices and staff totally separated from warrantor and sponsor offices and staff[150], two year term for members[151], tenured position for head of staff renewable every 3 years[152], and prohibition of Mechanism staff working for warrantors during the 3 years prior and the 3 years subsequent to Mechanism employment.[153] The Commission has declined to make such provisions mandatory for two reasons. First, there is great benefit in allowing innovation among Mechanisms, and not foreclosing any form of Mechanism that can fairly and expeditiously settle disputes. Second, there is insufficient support on the record that these items are essential to ensure fairness.

OTHER MECHANISM REQUIREMENTS

(c) The Mechanism shall impose any other reasonable requirements necessary to ensure that the members and staff act fairly and expeditiously in each dispute.

The Rule sets the general requirements that are needed for fair and expeditious settlement of disputes, but does not attempt to specify details, because the Commission recognizes that these may be different for each Mechanism. This paragraph places on the Mechanism the duty to specify the details necessary to ensure that the Mechanism, whatever its form, complies with the general requirements of this Rule. For example, the Mechanism will have to set rules governing budgeting, selection and assignment of personnel, and the operation of the information gathering (and mediation) and decision making processes. As long as these rules result in a Mechanism operation that complies with the other requirements of this Rule, this paragraph is satisfied.

Little comment was directed at this provision. MACAP gave it strong support.[154] One criticism was that it appeared to give the Mechanism unlimited authority to impose requirements on warrantors and sponsors.[155] To remedy this the word "reasonable" was added to modify "requirements", consistent with the Commission's intent in the proposed provision; and the paragraph was revised to apply only to "members and staff" rather than to "members, staff and warrantors", the language used in the proposed Rule.

SECTION 703.4 QUALIFICATION OF MEMBERS

Section 703.4 specifies the required characteristics of that person or those persons actually deciding a dispute. The Act requires the Commission to provide for participation in Mechanisms by independent or governmental entities. Section 703.4 sets the minimum requirements for this type of participation which are necessary for fair settlement of disputes.

INDEPENDENCE FROM PARTIES

(a) No member deciding a dispute shall be:

(1) A party to the dispute, or an employee or agent of a party other than for purposes of deciding disputes; or

(2) A person who is or may become a party in any legal action, including but not limited to class actions, relating to the product or complaint in dispute, or an employee or agent of such person other than for purposes of deciding disputes.

For purposes of this paragraph (a) a person shall not be considered a "party" solely because he or she acquires or owns an interest in a party solely for investment, and the acquisition or ownership of an interest which is offered to the general public shall be prima facie evidence of its acquisition or ownership solely for investment.

Paragraph (a) excludes those persons who either have or may have a direct interest in the dispute, and anyone directly related to those persons. The second part of Paragraph (a) is designed to exclude those persons who would have a direct interest in a class action or other type of legal action that might arise relating to the product or complaint in dispute. Warranty complaints may involve a generic problem with a product that could result in a class action or a legal action against persons other than the warrantor. For example, a generic problem in a warrantor's product could result in a class action by numerous consumers against the warrantor and all distributors and retailers of the warrantor's product. Section 703.4(a)(2) would exclude not only the warrantor and the initial consumer, but also all other consumers and all distributors and retailers of that particular product.

Only one witness criticized the total exclusion of parties from a role in decision-making. Alcan Building Products felt that the warrantor should have a one-third vote in any decision relating to one of its products.[156] Since relevant input will be received from the warrantor during the investigation and mediation phases of complaint handling, the Commission is not persuaded that the warrantor should be allowed additional input and a vote during the decision phase.

Paragraph (a) is intended only to exclude those persons with a direct interest in the dispute. Therefore, the last sentence indicates that persons holding a stock or other interest in a party which is held solely for investment are not intended to be excluded. The fact that the interest is publicly offered is prima facie evidence of its acquisition solely for investment. In cases where the interest is substantial or is used for control, or influence, the prima facie showing would be rebutted.

Differing viewpoints were presented on this provision. One trade association wanted this exception expanded to allow members to participate in a profit-sharing plan operated by the Mechanism or the warrantor.[157] On the other hand, several consumer representatives objected to any exception for stockholders,[158] and one went so far as to suggest that Paragraph (a) should be broadened to exclude families of stockholders. Finally, two industry representatives argued that stock ownership in a warrantor would not bias a member, so the provision was correct as written.[159] After considering all of the record comment, the Commission has determined that this provision strikes the appropriate balance.

INDEPENDENCE FROM COMMERCIAL INTEREST

(b) When one or two members are deciding a dispute, all shall be persons having no direct involvement in the manufacture, distribution, sale or service of any product. When three or more members are deciding a dispute, at least two-thirds shall be persons having no direct involvement in the manufacture, distribution, sale or service of any product. "Direct involvement" shall

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[146] R 1-6, 52, CSRL.

[147] R 1-5, 249-50, consumer, TR 16, Virginia Knauer, Office of Consumer Affairs, HEW; TR 155, Shelby County Legal Services Assn.

[148] TR 608, Cleveland Citizen Action Movement.

[149] TR 35, CFA (annually); TR 608, Cleveland Citizen Action Movement (6 months).

[150] Pro—R 1-6, 52-53, CSRL; TR 2095-2096, Legal Aid Foundation of Long Beach. Con—R 1-4-1, 607-08, AHAM; TR 120-1-7, MACAP; TR 1225-1226, Whirlpool.

[151] R 1-2-3, 1420, CSRL.

[152] *Id.*

[153] TR 35, CFA, TR 247 CSRL.

[154] R 1-4-1, 367.

[155] TR 16, Virginia Knauer, Office of Consumer Affairs, HEW.

[156] R 1-3-2, 380-81.

[157] R 1-4-1, 84, NRMA.

[158] R 1-6, 38, National Consumer Law Center (NCLC); TR 35-36, CFA; TR 154-155, Shelby County Legal Services Assn.; TR 2423, San Francisco Consumer Action.

[159] TR 230 E, AHAM; TR 364-365, Warranty Review Corp.

not include acquiring or owning an interest solely for investment, and the acquisition or ownership of an interest which is offered to the general public shall be prima facie evidence of its acquisition or ownership solely for investment. Nothing contained in this section shall prevent the members from consulting with any persons knowledgeable in the technical, commercial or other areas relating to the product which is the subject of the dispute.

(c) Members shall be persons interested in the fair and expeditious settlement of consumer disputes.

Section 110(a)(2) of the Act requires "participation in such procedure by independent or governmental entities". The Conference Report uses the terms "independent" and "consumer" interchangeably, and goes on to define independent entity as "one which is not under the control of any party to the dispute".[160] In addition the House Report states that these independent or governmental entities must be "completely impartial".[161] Paragraph (b) satisfies this legislative intent by requiring that at least two-thirds of the persons deciding a dispute shall be persons having no direct commercial interest.

Two witnesses supported the Rule's definition of independence—"no direct involvement . . .", because members should be "entirely free of industry control or influence"[162] and "industry domination" should not be allowed.[163]

Many of the witnesses were critical of the definition, because it either excluded too many persons or did not exclude enough. Some were of the opinion that the provision would not ensure that at least some members were concerned with the consumer's interests.[164] To remedy this without unduly hampering the process of selecting members, Paragraph (c) was added to the Rule. This provision is similar to requirements of some existing informal dispute settlement groups.[165] It sets a performance requirement which can be used by the Commission to ensure that the Mechanism members are protecting consumers' rights within the Mechanism.

Two consumer groups recommended a provision which would prohibit members from being employed by warrantors for a certain period of time prior to or subsequent to being members.[166] No other comments were received on this proposal, and the Commission finds that such a far-reaching prohibition as this is not necessary to ensure that members are persons who will decide fairly. Paragraph (c) achieves the same result without excluding countless people who might render excellent decisions.

Two comments recommended reducing the scope of the "direct involvement" definition by changing the word "product" to "consumer product"[167] or "products involved in the dispute".[168] Since the purpose of this provision is to minimize the Mechanism's producer bias, and not simply consumer producer bias, and even the appearance of producer bias,[169] these comments were unpersuasive.

One further comment came from the CBBB, which recommended use of a system similar to the one now in use to select arbitrators.[170] They allow the business and the consumer in each case to choose the arbitrator from a list that is sent out prior to the hearing. The list contains the names of a group of arbitrators together with information as to their backgrounds and affiliations. This system may be workable for disputes handled on a local level by a group such as the BBB, but imposing it as the only system on all types of Mechanisms does not appear to be warranted. The Rule does not prohibit a Mechanism from using this method to select members to decide a dispute from among the persons that satisfy the requirements of Section 703.4.

The requirement that two-thirds of the deciders be independent received a few comments ranging from one advocating total independence[171] to several proposing little or no independence.[172] None of the testimony convinced the Commission that it should alter the two-thirds requirement, which comports with the standards set by several existing mechanisms.[173]

In Paragraph (b), as in Paragraph (a), the intent is to exclude only those with a direct interest. Therefore, those holding an interest solely for investment are not deemed to have a direct commercial interest. For the same reasons as those stated in the discussion of Paragraph (a), the Commission has determined that this strikes the appropriate balance.

Some testimony indicated that the final sentence of Paragraph (b), which expressly allows the members to use consultants, is necessary for a fair decision in some disputes. Two industry witnesses complained that Paragraph (b) excludes from being members many persons whose technical expertise would be useful and possibly necessary to decide many disputes.[174] The "consultants" sentence ensures that expertise such as this will not be lost even though these persons will not have a vote in the decision-making process.

Section 703.5 Operation of the Mechanism

Sections 703.3 and 703.4 prescribe the general requirements for the organization of the Mechanism. Section 703.5, on the other hand, sets out the specific requirements which the Mechanism must satisfy each time it is notified of a dispute. This section is specific, but it continues the basic policy of the Rule which is in setting performance goals whenever possible, where such goals can be achieved by using whatever means the Mechanism finds most suited to its particular form of organization and complaint patterns.

WRITTEN PROCEDURES

(a) The Mechanism shall establish written operating procedures which shall include at least those items specified in the paragraphs (b)–(j) of this section. Copies of the written procedures shall be made available to any person upon request.

This paragraph requires that the Mechanism adopt a set of operating procedures which includes at least the items specified in the following paragraphs of Section 703.5. It is expected that these procedures will set out in detail the organization of the Mechanism and the means it will use to achieve the required performance goals. The procedures must also include the Mechanism's policies with respect to openness and confidentiality of records, as required in Section 703.8(b). These procedures must be in writing and copies must be provided to anyone upon request. This is to ensure that persons interested in using the Mechanism or reviewing its operation will be aware of how it is intended to operate.

No criticisms were directed at this provision and one existing mechanism indicated that the requirement was reasonable.[175]

NOTIFICATION OF PARTIES

(b) Upon notification of a dispute, the Mechanism shall immediately inform both the warrantor and the consumer of receipt of the dispute.

The specific step-by-step procedure for handling a dispute begins with this paragraph, which requires that the Mechanism acknowledge receipt of the dispute to both parties. As the Staff Report indicates, the purpose of this requirement is to reduce consumer dropout which may result from frustration over an unanswered complaint.[176]

This paragraph received little comment. MACAP again commented that this requirement was reasonable.[177] One state official felt it was important for the Rule to allow state or local consumer protection agencies to invoke the Mechanism on behalf of the consumer.[178] Paragraph (b) does not limit the persons from whom notification of a dispute may come. It may come from the consumer, the warrantor, or a representative of either party. The Mechanism must begin to exercise its duties when it receives notification from a responsible person acting on behalf of either party.

As proposed, this paragraph contained an additional clause which required the Mechanism to "supply to consumer with

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[160] R 1-2-3, 1059.
[161] R 1-2-3, 1116.
[162] R 1-4-1, 387-88, MACAP.
[163] TR 1443-1444, Chicago Legal Aid Bureau.
[164] R 1-3-1, 67, Mohasco; R 1-6, 157-58, Conn. Citizen Research Group; TR 708, Cleveland Citizen Action Movement.
[165] R 1-2-3, 1714, CRICAP; R 1-4-1, 387-88, MACAP.
[166] TR 35, CFA (3 years); TR 699, Cleveland Citizen Action Movement (5 years).
[167] R 1-3-2, 556, Nixon, Hargrave, Devans & Doyle.
[168] R 1-4-1, 84, NRMA.
[169] R-1-2-3, 969-70, Staff Report.
[170] TR 88-90, CBBB.
[171] TR 1443-1444, Chicago Legal Aid Bureau.
[172] TR 2251-2252, 2259, National Swimming Pool Institute; TR 2452-2453, Independent Auto Dealers of California.
[173] R 1-2-3, 970-71, Staff Report.
[174] R 1-4-1, 50, NAFM; TR 2146, Kit Manufacturing Co.
[175] R 1-4-1, 338, MACAP.
[176] R 1-2-3, 973, Staff Report.
[177] R 1-4-1, 338.
[178] R 1-3, 139, Attorney General of the State of Michigan.

a description of the procedures and time limits adhered to by the Mechanism" along with the acknowledgement. Two industry comments pointed out that the necessary information on the Mechanism will already be contained in the materials accompanying the product as required by Section 703.2(c) (3) and (4) and that the consumer's major interest at the time of dispute is obtaining a resolution rather than learning about procedures.[179] On the basis of the record, the Commission adopts this view and has, therefore, deleted this clause from Section 703.5(b).

INFORMATION GATHERING

(c) The Mechanism shall investigate, gather and organize all information necessary for a fair and expeditious decision in each dispute. When any evidence gathered by or submitted to the Mechanism raises issues relating to the number of repair attempts, the length of repair periods, the possibility of unreasonable use of the product, or any other issues relevant in light of Title I of the Act (or rules thereunder), including issues relating to consequential damages, or any other remedy under the Act (or rules thereunder), the Mechanism shall investigate these issues. When information which will or may be used in the decision, submitted by one party, or a consultant under § 703 4(b), or any other source tends to contradict facts submitted by the other party, the Mechanism shall clearly, accurately, and completely disclose to both parties the contradictory information (and its source) and shall provide both parties an opportunity to explain or rebut the information and to submit additional materials. The Mechanism shall not require any information not reasonably necessary to decide the dispute.

This paragraph places the burden on the Mechanism to gather all of the information necessary for a fair decision in each dispute. It is expected that the Mechanism will place some of this burden on the parties in the form of reasonable requests for information. The burden is, however, initially placed on the Mechanism and unreasonable requests will not be permitted. The provision goes on to list several items of information that might be relevant and, therefore, necessary for a fair decision. The items listed relate to duties of the warrantor and the consumer mentioned in the Act. The list is not intended to be exclusive. When any of these issues or any other issue relevant under the Act or the warranty is raised by the evidence, the Mechanism must investigate it. Finally, this paragraph requires the Mechanism to give the parties an opportunity to rebut any contradictory information which may be used in the decision.

MACAP stated that this provision was reasonable.[180] One witness went beyond this and asserted that proper investigation and development of a record is essential for Mechanism effectiveness.[181] Such a record not only increases the likelihood that any decision will be fair, but also encourages settlement by showing the parties that there are two sides to the dispute.[182]

Most of the critics of this paragraph as it was proposed did not object to the idea of an investigation requirement, but were concerned that the language used could be interpreted to place too great a burden on the Mechanism.[183] Only one witness found fault with the provision as a whole.[184] He felt that the information should be gathered and presented to the Mechanism by the parties as in any other adversary proceeding. As a practical matter, Mechanism decisions will be based on evidence submitted by the parties. However, the Mechanism is in the position of knowing what evidence has been submitted and what evidence is still necessary at any point in time, so the investigatory burden is placed initially on the Mechanism.

One witness complained that the provision was too general and the scope of the investigation was without limitation.[185] Other witnesses protested that the Mechanism should not have to undertake a major investigation of each case, but should have discretion to adjust the scope of the investigation to the significance of the issues.[186] The Rule does allow the Mechanism to vary the scope of the investigation from dispute to dispute. This provision only requires that the basic facts in each dispute be gathered from the parties and key witnesses (*e.g.*, retailer, service center). The Mechanism has discretion to go beyond that in any case and use extraordinary measures such as on-site inspection and expert testimony.

Paragraph (c) in the proposed Rule appeared to require the Mechanism actively to seek out issues such as number of repair attempts or unreasonable use of the product in every case. To reduce this burden the language was modified to make it clear that these issues must only be investigated if it appears from the evidence that they are involved in the dispute.

The sentence in this paragraph of the proposed Rule requiring disclosure of contradictory information was criticized, because it could be read to apply to every item of information whether or not it was to be used in the decision.[187] In response to this the phrase "which will or may be used in the decision" was added. Under this requirement, the Mechanism, when it receives contradictory information which it will not and does not use in the decision, need not disclose the information to the parties.

SETTLEMENT AND DECISION

(d) If the dispute has not been settled, the Mechanism shall, as expeditiously as possible but at least within 40 days of notification of the dispute, except as provided in paragraph (e) below: (1) render a fair decision based on the information gathered as described in paragraph (c) of this section, and on any information submitted at an oral presentation which conforms to the requirements of paragraph (f) of this section (A decision shall include any remedies appropriate under the circumstances, including repair, replacement, refund, reimbursement for expenses, compensation for damages, and any other remedies available under the written warranty or the Act (or rules thereunder); and a decision shall state a specified reasonable time for performance.); (2) disclose to the warrantor its decision and the reasons therefor; (3) if the decision would require action on the part of the warrantor, determine whether, and to what extent, warrantor will abide by its decision; and (4) disclose to the consumer its decision, the reasons therefor, warrantor's intended actions (if the decision would require action on the part of the warrantor), and the information described in paragraph (g) of this section. For purposes of this paragraph (d) a dispute shall be deemed settled when the Mechanism has ascertained from the consumer that: (1) the dispute has been settled to the consumer's satisfaction; and (2) the settlement contains a specified reasonable time for performance.

(e) The Mechanism may delay the performance of its duties under paragraph (d) beyond the 40 day time limit: (1) where the period of delay is due solely to failure of a consumer to provide promptly his or her name and address, brand name and model number of the product involved, and a statement as to the nature of the defect or other complaint; or (2) for a 7 day period in those cases where the consumer has made no attempt to seek redress directly from the warrantor

a. Settlement. The proposed Rule contained a separate paragraph dealing with settlement, which required the Mechanism to ratify any predecision settlement and disclose to the consumer the same information which must be disclosed when a decision is rendered. The purpose of the proposal was to "relieve the Mechanism from rendering decisions in matters that are no longer in controversy, while insuring that the consumer who settles receives equal treatment to that of the consumer who waits for a Mechanism decision."[189]

The paragraph as written received considerable adverse comment with no favorable comment to balance it. In addition to being characterized as a waste of energy,[190] the provision was objected to by warrantors because it would require them to admit liability by settling (since a ratified settlement would be admissible in court),[190] and by prospective Mechanisms because it would require them to ratify settlements with which they may not agree.[191]

Because of these strong comments, the proposed settlement provision was deleted. However, to ensure that consumers who elect to settle are not treated un-

[179] R 1-3-2, 578, Quarles & Brady; TR 437, NEA.

[180] R 1-4-1, 388, MACAP.

[181] TR 860-861, Donald P. Rothschild.

[182] *Id.*

[183] R 1-3-3, 768, CBBB; R 1-4-1, 50, NAFM; R 1-4-1, 84, NRMA; R 1-4-1, 97, NEMA; TR 1516, BBB of Chicago.

[184] R 1-3-1, 74, Guren, Merritt, Sogg & Cohen.

[185] R 1-4-1, 97, NEMA.

[186] R 1-3-3, 768, CBBB; R 1-4-1, 50, NAFM; R 1-4-1, 84, NRMA; TR 1516, BBB of Chicago.

[187] R 1-3-3, 769, CBBB; TR 1524-1525, BBB of Chicago.

[188] R 1-2-3, 977, Staff Report.

[189] R 1-3-1, 290, Union Carbide; R 1-3-1, 80, Quarles & Brady; TR 421-422, National Electronics Assn. (NEA).

[190] R 1-3-2, 422-23, Armstrong Cork; TR 1486-1487, AAA.

[191] TR 92, CBBB; TR 1517, BBB of Chicago.

fairly, the sentence defining settlement was added as the last sentence of Paragraph (d), which deals with decision-making. The clause merely specifies when a dispute will be considered settled for purposes of the Rule so as to relieve the Mechanism of its duty to reach a decision. This occurs when the Mechanism ascertains from the consumer that the dispute has been settled to the consumer's satisfaction and the settlement contains a specified reasonable time for performance. Under the revised provision the Mechanism is not required to disclose to the consumer the information contained in Section 703.5(g), but must still follow-up under Section 703.5(h) to see if performance has occurred. These modifications of the Rule reduce the burden on the Mechanism and meet the objections of both warrantors and Mechnisms, while continuing to fulfill the purpose of the settlement paragraph which was to provide sufficient protection for consumers who elect to settle.

b. Decision. The remainder of Paragraph (d) is virtually identical to Paragraph (e) of the proposed Rule. The first step required by this paragraph is for the members to render a decision. As the Staff Report states:

> A procedure culminating in anything less than a decision . . . would give no assurance of fair and expeditious settlement of disputes. It would provide no incentive to the warrantor to take action favorable to the consumer, because the Mechanism could not exert any pressure on the warrantor at any stage in the procedure. In addition it would be viewed with suspicion by consumers as a tool of the warrantor to delay redress of warranty rights.[182]

The Center for the Study of Responsive Law strongly supported the decision requirement:

> . . . [S]uch authority is important to both consumer and warrantor alike. Our study has found that one of the most frustrating aspects of the consumer complaint process is its inconclusiveness. Unless both parties go to Small Claims Court or agree to binding arbitration, there is no place in the system for a decision. Instead countless referrals, communications and discussions are encouraged, with no end points in sight. To reduce the frustrations inherent in this process, therefore, *decisions* are important. Finally, to adopt some other procedure would be to risk placing impossible burdens of enforcement on the FTC. What rules could one write to ensure that mediation and conciliation actually took place. Where rules can be kept simple and straightforward, they should be, and such is the case in this instance.[183]

The only objections to the decision requirement came from persons affiliated with the Better Business Bureau organization. Two witnesses asserted that the requirement was too rigid and should be revised to give the Mechanism discretion to refuse to handle certain types of cases (e.g., very complex disputes, disputes in which both warrantor and consumer agree to waive the Mechanism).[184] These arguments were unpersuasive. It would be unfair to allow the Mechanism to refuse to handle a complex case, when a Mechanism decision may be the only remedy which the consumer can feasibly pursue. Additionally, if an exception were created for cases in which the parties agreed to bypass the Mechanism and pursue other remedies such as binding arbitration, a Mechanism would have an avenue for leading consumers into remedies which might not operate fairly and which could take away consumers' right to bring their cases to court. Therefore, no exceptions were added to the Rule.

Paragraph (d) requires that a decision shall include all appropriate remedies. Several strenuous objections were received which questioned the appropriateness of giving the Mechanism broad authority to fashion relief.[185] These comments interpreted this clause as providing far more than was intended. The intent was to make clear that the Mechanism decision must include all relief which is available under the warranty or the Act and appropriate under the circumstances.

A further requirement in this paragraph is that the decision must specify a time within which performance is to occur, and that such time must be reasonable. As the Staff Report indicates: "An important part of any remedy is the time in which performance will occur. In a warranty dispute the length of time estimated by the warrantors for repair or replacement may be a major cause of the disagreement."[186] This provision was not criticized, and stands as proposed.

After reaching a decision, the Mechanism must determine whether, and to what extent, the warrantor will abide by the decision, and then must disclose this to the consumer along with further information specified in Section 703.5(g). One comment objected that requiring the Mechanism to ascertain the warrantor's intentions "appears to give the mechanism a continuing authority over a warrantor's activities, not contemplated by the Act."[187] This criticism is not well taken, because the provision does not give the Mechanism any additional authority over the warrantor. It merely requires the Mechanism to collect and pass along to the consumer information which the consumer needs to decide whether or not to proceed to court.

c. Time Limit. All of the duties placed on the Mechanism by Paragraph (d) must be completed within 40 days of notification to the Mechanism of the dispute. This requirement received vast and varied comment. Many consumer witnesses felt that 40 days is too long for a consumer to wait for resolution of a dispute, especially a consumer with a malfunctioning product and no funds to repair it.[188] They suggested periods ranging from 10 to 30 days as more appropriate. A few comments stated that the time period is reasonable.[189]

Industry comments were generally opposed to the time limit as too short (90 days was a suggested alternative),[190] or too inflexible (no set time limit was proposed by several witnesses).[191] The Commission recognizes that time limits place burdens on Mechanisms. However, time limits are necessary to ensure that disputes are handled expeditiously. After considering all of the evidence, the Commission is convinced that the 40 day requirement strikes a reasonable balance between consumers' needs for a speedy decision and Mechanisms' needs for sufficient time to effectively resolve disputes.

d. Time Limit Exceptions. Paragraph (e) describes two situations in which the Mechanism may take more than 40 days to reach a decision and notify the consumer. First, the Mechanism can extend the time for decision for the period of time caused by consumer failure to provide necessary information. To close a potential loophole in the clause as proposed, the final Rule specifies those items of information which are considered necessary. Second, the final Rule permits the Mechanism to delay for seven days where the consumer has not sought redress directly from the warrantor. This was added in response to criticisms of the "Nothing contained in . . ." clause which followed Section 703.2(d) in the proposed Rule. Industry witnesses indicated that allowing consumers direct access to the Mechanism would overburden the Mechanism and cause time delay.[192] The additional 7 days allowed by this clause is intended to ease that burden by giving the Mechanism and the warrantor sufficient extra time within which to investigate and mediate complaints. The Commission has decided that it is better to give the Mechanism the extra time here than it is to require the consumer to seek redress directly from the warrantor before going to the Mechanism.

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[182] R 1-2-3, 979-80.

[183] R 1-6, 73

[184] TR 90-92, CRBB; TR 1516-1517, BBB of Chicago.

[185] R 1-3-1, 65, Mohasco; R 1-3-2, 380, Alcan Building Products; R 1-3-2, 557 Nixon, Hargrave, Devans & Doyle; R 1-3-2, 27-28, CSRL; TR 992, CRI.

[186] R 2-3, 981.

[187] R 1-4-1, 51, NAFM.

[188] R 1-6, 159, Conn. Citizen Research Group; R 1-6, 46, New Mexico Atty. Gen.; TR 253-254, CSRL; TR 320-322, Center for Auto Safety; TR 1790, Cook Co. State Atty. Gen. Office, Consumer Fraud Div.; TR 2082-2083, Legal Aid Foundation of Long Beach; TR 2184-2185, Orange Co. Office of Consumer Affairs; TR 2399, San Francisco Asst. Atty. Gen.

[189] R 1-6 37, NCLC; TR 869, Donald P. Rothschild; TR 1472-1473, AAA.

[190] R 1-3-2, 423, Armstrong Cork; R 1-3-2, 579, Quarles & Brady; R 1-3-6, 926 Amana; R 1-4-1, 84-85, NRMA; R 1-4-1, 97, NEMA; TR 657-659, CRI.

[191] R 1-3-2, 394, Shell Oil; R 1-4-1, 50, NAFM; R 1-4-1, 673, NADA; R 1-6, 26-27, NCL; TR 25-26, Virginia Knauer; Tr 100-101, CBBB; TR 126-129, MACAP; TR 221-222, AHAM; TR 353-354, Warranty Review Corp.; TR 1468-1469, AAA.

[192] *See*, discussion of the last paragraph of Section 703.2(d), "Redress Available Directly From Warrantor," *supra*.

ORAL PRESENTATIONS

(f) The Mechanism may allow an oral presentation by a party to a dispute (or a party's representative) only if: (1) both warrantor and consumer expressly agree to the presentation; (2) prior to agreement the Mechanism fully discloses to the consumer the following information: (i) that the presentation by either party will take place only if both parties so agree, but that if they agree, and one party fails to appear at the agreed upon time and place, the presentation by the other party may still be allowed; (ii) that the members will decide the dispute whether or not an oral presentation is made; (iii) the proposed date, time and place for the presentation; and (iv) a brief description of what will occur at the presentation including, if applicable, parties' rights to bring witnesses and/or counsel; and (3) each party has the right to be present during the other party's oral presentation. Nothing contained in this paragraph (f) shall preclude the Mechanism from allowing an oral presentation by one party, if the other party fails to appear at the agreed upon time and place, as long as all of the requirements of this paragraph have been satisfied.

This paragraph sets strict limitations on the use of oral presentations by the parties. However, an oral presentation is an option which a Mechanism can offer to the parties if it desires, but this provision does not require that the Mechanism do so. If the Mechanism provides an opportunity for an oral presentation, it must satisfy certain requirements. First, no oral presentation may occur unless both parties agree to it. Second, before agreement the consumer must be informed of those facts that would affect his or her decision to agree. It must be disclosed that an oral presentation is completely optional, that the warrantor cannot appear unless the consumer agrees, and that the Mechanism will render a decision whether or not an oral presentation occurs. The proposed date, time, and place for the presentation and a description of the relevant procedures, rights, and duties must also be disclosed. Third, each party has the right to be present during the other party's oral presentation. The final sentence of this paragraph makes it clear that once the parties have agreed to an oral presentation, one party may be allowed to make a presentation whether or not the other party appears. This disclosure is not intended to override the Section 703.5(c) rebuttal requirement. If the party appearing presents new evidence, the other party must be contacted and given an opportunity to rebut (not necessarily in person) before a final decision can be made.

Several types of comments were received in regard to the discretionary nature of oral presentations. The Staff Report cites the following reason for leaving the decision up to the Mechanism.

It is recognized that several existing mechanisms operate at a national level and do all of their information gathering by telephone or mail. To require an opportunity for an oral presentation at a reasonable time and place would make it impossible for these mechanisms to achieve the expeditious settlement of disputes which is envisioned by Section 110(a) of the Act.[203]

[203] R 1-2-3, 986.

Support for this proposition was received from one of the existing mechanisms.[204]

Several witnesses suggested that an oral presentation should be allowed when the consumer requests [205], or when either party requests.[206] These comments did not adequately support the view that the right to an oral presentation is essential at this informal level of dispute settlement. Since the need to foster a variety of Mechanisms, including national ones, is greater than the need for oral presentations at the behest of the parties, the Commission has retained this provision.

Two comments argued that the Mechanism should be allowed to require the parties to appear before it and make oral presentations.[207] The Rule does not adopt this approach, because a required appearance and presentation might cause consumers to drop out of the Mechanism. The Staff Report states:

Preparing for an oral presentation could be costly, as it might involve interviewing witnesses or developing a statement or exhibits. Even if a consumer does not prepare for an oral presentation, there are costs involved in merely appearing at the appointed time and place. If a consumer is required to appear upon penalty of default, these costs are involuntary ones, and, as discussed at page 57 of this Report, saddling the consumer with them would contravene the legislative intent expressed in the House Report.[208]

One final proposal in this area was to allow the Mechanism to consult with the warrantor alone.[209] The need for this type of consultation during the decision-making process was not shown. It appears to be more appropriate during a mediation stage. The room for abuse and the possibility of unfair warrantor influence which this proposal would create, mandates that it not be adopted.

Several consumer representatives asserted that any oral presentation should be at a convenient time and place.[210] A requirement such as this is unnecessary, since the consumer can veto an oral presentation and presumably would do so if it were not at a convenient time and place. Additionally, since the Mechanism can elect not to allow oral presentations (and since the consumer can veto), there is no incentive for it to select an inconvenient time or place.

A few other witnesses commented on the clause relating to witnesses and counsel, which is merely a disclosure requirement. One person felt that the consumer should expressly be given the right to bring witnesses.[211] Another felt that use of counsel by the parties should be at the consumer's option.[212] Since the Commission has decided to make oral presentations optional with the Mechanism, and since the Rule is intended to allow many different forms of Mechanisms, the Commission does not find a basis for setting strict requirements for the conduct of oral presentations.

Finally, two trade associations complained that Paragraph (f)(2) requires the Mechanism to make certain disclosures to the consumer, but does not require it to make the same disclosures to the warrantor.[213] This criticism is not well taken. The Rule is written to contain sufficient protection for the consumer whose dispute is being handled by a Mechanism selected by the warrantor. Since the warrantor selects the Mechanism, the warrantor presumably can have the Mechanism built in similar protections for the warrantor.

DISCLOSURES TO CONSUMERS

(g) The Mechanism shall inform the consumer, at the time of disclosure required in paragraph (d) of this section that: (1) if he or she is dissatisfied with its decision or warrantor's intended actions, or eventual performance, legal remedies, including use of small claims court, may be pursued; (2) the Mechanism's decision is admissible in evidence as provided in section 110(a)(3) of the Act; and (3) the consumer may obtain, at reasonable cost, copies of all Mechanism records relating to the consumer's dispute.

This paragraph lists the disclosures that must be made to the consumer at the time he or she is notified of the Mechanism's decision and the warrantor's intended actions. The first item is the fact that all available legal remedies may now be pursued. Second is the fact that Section 110(a)(3) of the Act provides that the Mechanism's decision is admissible in evidence in a related civil action. The final item relates to the parties' right to access to the dispute file as required by Section 703.8(d).

No negative comments were directed to this notification requirement. One witness stressed the need to inform the consumer of the right to pursue further legal remedies, and the importance of mentioning avenues such as small claims court.[214] One other witness suggested that the Mechanism should also mention the possibility of binding arbitration.[215] If the Mechanism is aware of an arbitration program (or any other dispute settlement mechanism) that operates fairly, nothing in Paragraph (g) would prohibit it from providing this information to the consumer.

FOLLOW-UP

(h) If the warrantor has agreed to perform any obligations, either as part of a settlement agreed to after notification to the Mechanism of the dispute or as a result of a decision under paragraph (d), the Mechan-

[204] TR 129, MACAP, *See, also*, R 1-2-3, 1803, FICAP; R 1-2-3, 1707, CRICAP.

[205] R 1-3-2, 394, Shell Oil; R 1-6, 42, NCLC; R 2083-2084, Long Beach Legal Aid Foundation; TR 2421-2422, SFCA; TR 2526, San Francisco Bar Committee on Consumer Rights.

[206] TR 1442-1443, 1447-1449, Chicago Legal Aid Bureau.

[207] R 1-3-2, 579, Quarles & Brady; TR 262, NCL.

[208] R-1-2-3, 896.

[209] R 1-4-1, 391, MACAP; R 1-4-1, 512, AHAM.

[210] R 1-6, 42-43, NCLC; TR 152-153, Shelby County Legal Services Assn.; TR 276-277, NCL; TR 2084-2085, Long Beach Legal Aid Foundation.

[211] R 1-8, 143-44, Elinor Guggenheimer, New York City Office of Consumer Affairs.

[212] R 1-6, 42-43, NCLC.

[213] R 1-4-1, 51, NAFM; R 1-4-1, 85, NRMA.

[214] R 1-6, 75, CSRL.

[215] TR 92-93, CBBB.

ism shall ascertain from the consumer within 10 working days of the date for performance whether performance has occurred.

This paragraph requires the Mechanism to provide followup in every case in which the warrantor has promised some action to the consumer. In this way the Mechanism will be aware of each instance in which a warrantor has violated the Section 703.2(f)(3) requirement that the warrantor perform all agreed to obligations. The Mechanism will need this information to include in its records, indexes, and statistical compilations as required by Section 703.6.

Few comments were directed at this provision. The Center for the Study of Responsive Law felt that this was a very important requirement.

> It may be hard to believe, but regret[t]ably it is a fact that many complaint-handling mechanisms have no effective means for determining whether promised action was ever taken. Our studies have found that such mechanisms rely on the belief that if the promised service is not forthcoming, the consumer will re-contact the agency and inform them of the non-compliance. What actually happens, however, is that the consumer gives up and tries to live with his frustration . . .
>
> This requirement, therefore, is necessary to ensure that such mechanisms effectively handle complaints.[216]

Two industry representatives objected to the paragraph as inappropriate and unnecessary The National Electrical Manufacturers Association stated that it "places the mechanism in an enforcement role as an advocate for the consumer."[217] The provision does not have this effect It merely requires the Mechanism to determine whether or not performance has occurred, and to place this information in its records. Both NEMA and the other industry comment argued that the consumer should be expected to re-contact the Mechanism if performance has not occurred.[218] For the reasons stated by CSRL in its comment, quoted above, the Commission has determined that this provision is necessary to ensure that most instances of warrantor noncompliance will appear in the records of the Mechanism.

Paragraph (h) in the proposed Rule required that follow-up occur within 5 working days of the date for performance. In order to minimize any burden placed on the Mechanism by this provision, the time period has been extended to 10 working days. This would allow the Mechanism, for example, to provide the consumer with a postcard along with notification of decision with instructions to return it on the date specified for performance indicating whether or not performance had occurred. If the Mechanism did not receive the postcard back within a few days of the date for performance, then it would have to actively attempt to contact the consumer.

Two other comments suggested that the last word in this paragraph, "occurred", be changed to "commenced" or "begun", because it might be impossible for the warrantor to complete performance within 5 working days.[219] Such change is not necessary. This provision is not intended to imply that performance must be accomplished within a 10 day period. It is intended to require the Mechanism to follow-up within 10 working days of the date on which performance is to have been completed.

CONSUMER'S RIGHT TO PURSUE OTHER REMEDIES

(i) A requirement that a consumer resort to the Mechanism prior to commencement of an action under section 110(d) of the Act shall be satisfied 40 days after notification to the Mechanism of the dispute or when the Mechanism completes all of its duties under paragraph (d) of this section, whichever occurs sooner Except that, if the Mechanism delays performance of its paragraph (d) duties as allowed by paragraph (e), the requirement that the consumer initially resort to the Mechanism shall not be satisfied until the period of delay allowed by paragraph (e) has ended.

Section 110(a)(3) of the Act provides that under certain circumstances a warrantor may require a consumer to resort to the Mechanism before commencing an action under Section 110(d) of the Act. This paragraph provides that any requirement imposed by a warrantor is satisfied either 40 days after notification to the Mechanism of the dispute or when the Mechanism has completed its duties under Section 703 5(d) whichever is sooner. The last sentence of this provision contains two exceptions to this general rule, which correspond to the two exceptions to the 40 day requirement found in Section 703 5(e).

A few modifications were proposed but the Commission did not find the reasons to support them persuasive. One comment argued that a settlement between the consumer and warrantor should satisfy the requirement of resort to the Mechanism.[220] First, a consumer who has settled should have no need to proceed immediately to court. Second, if this were allowed, a consumer could agree to a settlement in bad faith merely as a device to bypass the Mechanism and go straight to court.

Another comment suggested that a requirement of initial resort to the Mechanism should not be satisfied until the time for performance has occurred.[221] This would be unfair to a consumer who was not satisfied with the decision and would serve no purpose but to unreasonably delay the consumer.

Finally, one comment proposed that a further exception to the 40 day period be included for "excusable failures" on the warrantor's part to provide necessary information.[222] As the discussion of Section 703.5 (d) and (e) indicates, the Commission has determined that 40 days is the maximum length of time a consumer should be delayed from going to court except in those cases where additional delay is caused by the consumer's inaction. If the consumer has provided the information specified in Section 703.5(e)(1), lack of information from the warrantor would not preclude the Mechanism from reaching a decision. If the warrantor does not provide any information, the Mechanism will merely decide in favor of the consumer (if the consumer has provided enough information to justify recovery).

LEGAL EFFECT OF MECHANISM DECISIONS

(j) Decisions of the Mechanism shall not be legally binding on any person. However, the warrantor shall act in good faith, as provided in § 703 2(g). In any civil action arising out of a warranty obligation and relating to a matter considered by the Mechanism, any decision of the Mechanism shall be admissible in evidence, as provided in section 110 (a)(3) of the Act.

This paragraph specifies the effect which a Mechanism decision shall have on the parties to the dispute. A decision shall not be legally binding on any person, however, the warrantor is obligated by Section 703 2(g) to act in good faith in deciding whether, and to what extent, it will abide by each decision. The last sentence of this provision is a restatement of a portion of Section 110(a)(3) of the Act which provides: "In any civil action arising out of a warranty obligation and relating to a matter considered in such a procedure, any decision in such procedure shall be admissible in evidence."

Several industry representatives contended that warrantors should be allowed to require consumers to resort to mechanisms whose decisions would be legally binding (e.g., binding arbitration).[223] The Rule does not allow this for two reasons. First, as the Staff Report indicates, Congressional intent was that decisions of Section 110 Mechanisms not be legally binding.[224] Second, even if binding Mechanisms were contemplated by Section 110 of the Act, the Commission is not prepared, at this point in time, to develop guidelines for a system in which consumers would commit themselves, at the time of product purchase, to resolve any difficulties in a binding, but nonjudicial, proceeding. The Commission is not now convinced that any guidelines which it set out could ensure sufficient protection for consumers.

Many consumer representatives stated that Mechanism decisions should be binding on the warrantor alone, because the warrantor is the party who has chosen the Mechanism as the forum for dispute resolution.[225] The Rule presently requires the warrantor to act in good faith in deciding whether, and to what extent, it will abide by Mechanism decisions. Thus an adverse Mechanism de-

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[216] R 1-6, 76

[217] R 1-4-1, 97-98.

[218] R 1-4-1, 97-98; R 1-3-1, 290, Union Carbide.

[219] R 1-4-1, 51, NAFM, R 1-4-1, 85-86, NRMA.

[220] R 1-8, 144, Elinor Guggenheimer, NY COCA.

[221] R 1-3-2, 556, Nixon, Hargrave, Devans & Doyle.

[222] R 1-4-1, 86, NRMA.

[223] Tr 66-68, NAHB; TR 809-811, 822, GCM, TR 833-834, Guren, Merritt, Sogg & Cohen, TR 1263-1264, Mirro Marine Division.

[224] R 1-2-3, 992; R 1-2-3, 1117, House Report.

[225] R 1-8, 77, Detroit Consumer Affairs Dept; TR 34-35, CFA; R 1-6, 58-60, CSRL; TR 708-710, Cleveland Citizen Action Movement.

cision will have a far greater impact on a warrantor than it will on a consumer. The Commission is not persuaded that making this impact on the warrantor even greater would benefit consumers more than it would discourage warrantors from adopting Mechanisms.

Two witnesses were concerned that the Rule as written would not allow the use of binding arbitration by the parties after the Mechanism had rendered a decision.[227] As the Staff Report makes clear,[228] there is nothing in the Rule which precludes the use of any other remedies by the parties following a Mechanism decision. The warrantor, the Mechanism, or any other group can offer a binding arbitration option to consumers who are dissatisfied with Mechanism decisions or warrantor intentions. However, reference within the written warranty to any binding, non-judicial remedy is prohibited by the Rule and the Act.

Others suggested that in some cases the warrantor and the consumer might want to agree to use a remedy such as binding arbitration instead of proceeding to the Mechanism.[229] Again, nothing in the Rule precludes the parties from agreeing to use some avenue of redress other than the Mechanism if they feel it is more appropriate. However, once the consumer or the warrantor notifies the Mechanism of the dispute, the Mechanism is required by Section 703.5(d) to proceed to a decision within the specified time limits.

SECTION 703.6—RECORDKEEPING

Section 703.6 states the minimum recordkeeping requirements to which a Section 110 Informal Dispute Settlement Mechanism must conform. The Section covers development and maintenance of individual dispute files, indexing, statistical summaries of Mechanism performance, and record retention requirements.

The Section is intended to facilitate fair, orderly and efficient complaint handling; recognition of industry-wide product or warranty performance problems; independent audit under Section 703.7 of the Rule; and review and monitoring by the Commission, and by interested persons pursuant to Section 110(a)(4) of the Act. Requirements have been set with a view to acceptable cost levels, and to the need to preserve the confidentiality of sensitive records. Wherever reasonable, recordkeeping practices consistent with the practice of existing complaint handling bodies were adopted.

The Commission staff rationale for the recordkeeping requirements initially proposed was set out at pp. 88–98 of the staff Report.[230] Following review of written and oral comment on the proposed Rule, the Commission has modified the recordkeeping requirements in certain respects. The modifications are treated in detail below. Certain of these will merely clarify the extent of recordkeeping obligations intended under the Rule as initially proposed.[230] Others are intended to reduce the recordkeeping obligations where the comment was persuasive that legislative and commission objectives could be achieved under less burdensome requirements.

Under the requirements relating to individual dispute files, reductions were achieved by elimination of certain requirements for preparation of summaries and fact descriptions.[231] Under the modifications, requirements would be met simply by the filing and retention of records otherwise prepared or collected in the normal course of dispute handling. Indexing requirements have been stated with more particularity.[232] Statistical summaries will be required semi-annually,[233] rather than monthly as initially proposed. Other modifications will be noted in the detailed discussion under each section.

There were numerous written and oral comments that either generally opposed[234] or generally supported[235] the recordkeeping requirements as proposed, including several relating to the feasibility of implementing the recordkeeping requirements as proposed.[236] Except as noted in the detailed discussion below, there was not a great deal of criticism (or support) with regard to particular recordkeeping provisions or subsections. There was a dearth of specific counter-proposals. In response to general objections many of the modifications reflect a decision by the Commission to effect a general or over-all reduction in the recordkeeping obligation. The Commission has determined that the requirements as set forth are sufficient to meet the fundamental recordkeeping objectives set out in the discussion *supra* at 138.

INDIVIDUAL DISPUTE RECORDS

(a) The Mechanism shall maintain records on each dispute referred to it which shall include:

(1) Name, address and telephone number of the consumer;

(2) Name, address, telephone number and contact person of the warrantor;

(3) Brand name and model number of the product involved;

(4) The date of receipt of the dispute and the date of disclosure to the consumer of the decision;

(5) All letters or other written documents submitted by either party;

(6) All other evidence collected by the Mechanism relating to the dispute, including summaries of relevant and material portions of telephone calls and meetings between the Mechanism and any other person (including consultants described in § 703.4(b));

(7) A summary of any relevant and material information presented by either party at an oral presentation;

(8) The decision of the members, including information as to date, time and place of meeting, and the identity of members voting; or information on any other resolution;

(9) A copy of the disclosure to the parties of the decision;

(10) A statement of the warrantor's intended action(s);

(11) Copies of follow-up letters (or summaries of relevant and material portions of follow-up telephone calls) to the consumer, and responses thereto; and

(12) Any other documents and communications (or summaries of relevant and material portions of oral communications) relating to the dispute.

Section 703.6(a) establishes maintenance requirements with regard to records that would come into the Mechanism's possession in the normal course of its receipt, investigation and resolution of individual disputes pursuant to other sections of this Rule. The requirements support the general purposes of recordkeeping, discussed *supra*, at 138. In addition, the file, available to the parties to a dispute under Section 703.8(e), would provide a basis for any subsequent arbitration, legal or other proceedings following action by the Mechanism.

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[227] TR 17, Virginia Knauer, Office of Consumer Affairs, HEW; TR 260–261, NCL.

[228] R 1–2–3, 993.

[229] TR 91–92, CBBB; TR 1466–1467, AAA.

[230] R 1–2–3, 994–1004.

[230] *E.g.*, "relevant and material" has been added to certain sections to clarify that verbatim summaries or transcripts of telephone conversations would not be required. The comments underscored the possibility of a more onerous reading of these sections than had been intended. *See*, for example, TR 422, Electronic Industries Association, and TR 222, Association of Home Appliance Manufacturers.

[231] Proposed Section 703.6(a)(1), and Section 703.6(a)(1)(iv)–(vi).

[232] The general indexing requirement of proposed Section 703.6(b) has been deleted in favor of new Section 703.6(b), (c) and (d).

[233] Section 703.6(e), discussed *infra* at 149.

[234] Several representative comments: R 1–4–1, 357–358. National Association of Home Builders commented that the requirements would be costly and cumbersome, and would deter warrantors from establishing mechanisms; R 1–4–1, 394, Major Appliance Consumer Action Panel (complicated and redundant, noting particularly the requirement of a summary form); R 1–3–2, 626, Proctor-Silex, SCM Corporation (unnecessarily onerous and expensive); R 1–3–2, 579, Quarles & Brady (extremely burdensome); TR 831, Warranty Review Corporation (cumbersome . . . costly burden unnecessary to the main purpose of the Act); TR 831, Guren, Merritt, Sogg & Cohen (cost large enough to discourage the use of informal dispute settlement procedures); R 1–4–2, 672, National Automobile Dealers Association (too expansive for the average size dealer).

[235] TR 845 and following, Donald Rothschild; TR 246, Christopher Wheeler; TR 2434, John Pound, San Francisco Consumer Affairs Office (minimum essential even recognizing the cost factors); TR 2371, Max Factor, Office of the Los Angeles City Attorney; TR 1470, American Arbitration Association; TR 105, Council of Better Business Bureaus; TR 2149, Kit Manufacturing Company; TR 2492, Joe Garcia, California Department of Consumer Affairs.

[236] One common theme among those opposed to the recordkeeping requirements as proposed, was that the cost would deter warrantors from establishing informal dispute settlement procedures. *See*, footnote 234. The following comments reflect a contrary view: R 1–3–3, 766, Better Business Bureau, Chicago (stated that present recordkeeping system could be modified to conform to the new requirements with a minimum of difficulty); TR 1470, American Arbitration Association (records currently kept on all AAA cases include most of the basic information required by the proposed requirements); TR 863, Donald Rothschild (economies of scale); TR 363, Warranty Review Corporation (economies of scale).

The Section has been modified in certain respects. The proposed dispute summary form under former (a)(1), the fact description under former (a)(1)(iv), the statement under former (a)(1)(v), and the summary of follow-up action under former (a)(1)(vi) have all been deleted with a view to cost savings related to Mechanism staffing. The Commission's view is that the information in each instance would still be available in the file under new paragraph (a) in the form of raw documents collected or prepared by the Mechanism in the normal course of dispute handling. Conversely, requirements for preparation of summaries of phone conversations, oral presentations and the like have been retained, Section 703.6(a) (6), (7), (10), (11), and (12),[207] since there would be no other source of a written record for the file. This is consistent with the reported practices of a number of exising complaint handling mechanisms.[208]

Under the Rule, "relevance" remains the principal—and probably the least burdensome—criterion with regard to filing and retention of documents collected or prepared in the normal course of resolving individual disputes. However, the Commission has modified the record-keeping provisions relating to summaries of phone conversations and meetings, cited above, by inserting, as appropriate, "relevant and material." This, together with retention of "summaries", is intended to clarify that only those portions of oral transactions material to consideration of the dispute need be recorded; and then only in notation or summary form, rather than lengthy or verbatim transcriptions.[209]

The Commission does not expect that all of the types of records delineated in Section 703.6(a) would necessarily be involved in each dispute. The Commission recognizes that many disputes will be decided fairly on the basis of very abbreviated files. This would not obviate the need or requirement for orderly recording, filing, and retention of records as set out in the Rule. The guiding principle intended is that only those records necessary for full and fair determination of disputes be collected, assembled, and retained.

The words "the decision" in new Section 703.6(a)(4) (formerly Section 703.6(a)(1)(vii)) have been substituted for the term "resolution" to conform to usage in other parts of the Rule.[210] As indicated, the paragraphs have been renumbered as required by changes and deletions.

INDEXING REQUIREMENTS

(b) The Mechanism shall maintain an index of each warrantor's disputes grouped under brand name and subgrouped under product model.

(c) The Mechanism shall maintain an index for each warrantor as will show: 1) all disputes in which the warrantor has promised some performance (either by settlement or in response to a Mechanism decision) and has failed to comply, and 2) all disputes in which the warrantor has refused to abide by a Mechanism decision.

(d) The Mechanism shall maintain an index as will show all disputes delayed beyond 40 days.

Proposed Section 703.6(b) stated in general terms the requirement that a mechanism must index individual dispute files to facilitate identification and analysis of patterns of Mechanism and warrantor actions, and patterns of warrantor or industry complaints or product defects. Indexes were to be established based on a number of factors, including the anticipated needs of an auditor operating under Section 703.7. The Staff Report accompanying the proposed Rule indicated that records would probably be indexed by warrantor, product, type of complaint, final disposition and other categories.[211] The general requirements of the paragraph have been clarified by substitution of new Section 703.6(b), (c) and (d), which state the indexing requirements with more particularity. The paragraph had been objected to on the grounds of unnecessary burden or lack of clarity.[212]

Paragraph (b) now requires that disputes be indexed by warrantor's brand name and product model. Analysis of patterns of complaints is a current practice among existing dispute settlement mechanisms, and has formed the basis for mechanism recommendations regarding industrywide consumer problems.[213] The practice is widely considered to be a natural and logical extension of complaint handling,[214] since resolution of generic problems leads ultimately to a reduction in the number of individual complaints. The paragraph (b) indexing requirement is intended to recognize and preserve this important practice among dispute settlement mechanisms established under this Rule.

Paragraph (c) states indexing requirements relating to two key indicators of a warrantor's good faith participation in an informal settlement mechanism. Entries under the first category—warrantor failure to perform obligations agreed to—would raise a presumption of a Rule violation. Entries under the (c)(2) category—refusals by a warrantor to abide by Mechanism decision—would not raise such a presumption,[215] but would be relevant to review of warrantor performance by the Federal Trade Commission under Section 110(a)(4) of the Act, and the "good faith" requirement under Section 703.2(g) of the Rule.

Paragraph (d) requires maintenance of an index of disputes delayed beyond the 40 day time limit set out in Section 703.5(d). This requirement is intended to facilitate ease of initial determination by the Commission, and by an auditor under Section 703.7, as to whether a Mechanism is resolving disputes "expeditiously." A significant number of entries in this index category would be an indication that a Mechanism was not complying with the fundamental requirement of the Act to proceed expeditiously. That determination would be based ultimately, as would a determination of "fairness", on a review of the facts and circumstances in each case, or on a representative sample of cases, in which the Mechanism required more than 40 days to fulfill its obligations under Section 703.5(d) of the Rule.

The indexes required under Section 703.6 (b), (c) and (d) could be kept confidential by the Mechanism to the extent permitted under Section 703.8(b). For purposes of clarification indexes may be maintained in any convenient form, provided that the information required is readily ascertainable, and the underlying dispute files are available and clearly referenced.

STATISTICAL REPORTING REQUIREMENTS[216]

(e) The Mechanism shall compile semi-annually and maintain statistics which show the number and percent of disputes in each of the following categories:

(1) Resolved by staff of the Mechanism and warrantor has complied.

(2) Resolved by staff of the Mechanism, time for compliance has occurred, and warrantor has not complied;

(3) Resolved by staff of the Mechanism and time for compliance has not yet occurred;

(4) Decided by members and warrantor has complied,

(5) Decided by members, time for compliance has occurred, and warrantor has not complied;

(6) Decided by members and time for compliance has not yet occurred;

(7) Decided by members adverse to the consumer;

(8) No jurisdiction;

(9) Decision delayed beyond 40 days under § 703.5(e)(1);

(10) Decision delayed beyond 40 days under § 703.5(e)(2);

(11) Decision delayed beyond 40 days for any other reason; and

(12) Pending decision.

Paragraph (e) requires the Mechanism to compile, maintain and report statistics according to various status and final disposition categories. The statistical summary supports the functions

[207] Former Section 703.6(a) (3), (4), (7), (8) and (9), respectively.

[208] R 1-4, 394-395, Major Appliance Consumer Action Panel; R 1-4-1, 308-309, Furniture Industry Consumer Advisory Panel.

[209] A number of comments singled out preparation of summaries of telephone conversations as being particularly onerous: TR 422, Electronic Industries Association; R 1-3-3, 1075, Guren, Merritt, Sogg & Cohen, TR 222, Association of Home Appliance Manufacturers, and others.

[210] Sections 703.1(f), 703.2(f)(2), 703.4 (a) and (b), 703.5(c), 703.5(d) (1) and (2), 703.6(a) (8) and (9), 703.8(c) and others.

[211] R 1-2-3, 998.

[212] R 1-3-2, 579, Quarles & Brady, R 1-6, 53-54, Christopher Wheeler; R 1-4-1, 616, National Retail Merchants Association (not necessary for operation of Mechanism itself); TR 350, Warranty Review Corporation; and see generally Footnote 234, *supra*.

[213] R 1-2-3, 998, Staff Report.

[214] *Id.*; TR 23-24, Virginia Knauer, Office of Consumer Affairs, HEW; R 1-6, 53-54, Christopher Wheeler, R 1-2-3, 1804, Furniture Industry Consumer Advisory Panel; R 1-2-4, 1989-1991, Major Appliance Consumer Action Panel.

[215] R 1-3-2, 394, Shell Oil Company expressed the concern that the Commission would enforce the Rule based on pre-determined formulas regarding warrantor performance. No such presumptions are intended. *See* generally the discussion under the good faith requirement under Section 703.2(g), *supra*.

[216] Proposed as Section 703.6(d).

and activities described under indexing, and provides a basis for review by interested members of the general public. On the basis of the statistically reported performance, an interested person could determine to file a complaint with the Federal Trade Commission pursuant to Section 110(a)(4) of the Act, and thereby cause the Commission to review the bona fide operation of the dispute settlement mechanism. The accuracy of the compilations are to be verified by an auditor under Section 703.7(b)(3)(ii).

The statistical reporting requirements have been modified in certain respects. The paragraphs as proposed would have required monthly compilations. In response to comment on the record,[247] this requirement has been reduced to semi-annual compilations, in order to reduce the Mechanism's reporting burden.

Former Section 703.6(d)(1)(ix) (insufficient information) has been deleted as superfluous. Former paragraph (d)(1)(xi), "decision delayed beyond 40 days", has been broken down into the following three categories: New 703.6(e)(9) "delayed beyond 40 days under Section 703.5(e)(1)" (failure by consumer to provide information); (e)(10) "delayed beyond 40 days under Section 703.5(e)(2)" (Consumer seeks redress directly from the warrantor); (e)(11) "decision delayed beyond 40 days for any other reason." Former paragraph (d)(2) requiring computation of average time between referral to the Mechanism and final resolution has been deleted on grounds that it is burdensome to compute and of questionable value, particularly in light of new categories (e)(9), (10) and (11).

Section 703.8(a) requires that the statistical compilations under Section 703.6(e) shall be available to any person for inspection and copying. Records forming the basis of the statistics may be kept confidential to the extent permitted under other paragraphs of Section 703.8.

RECORD RETENTION

(f) The Mechanism shall retain all records specified in paragraphs (a)–(e) for at least 4 years after final disposition of the dispute.

The Commission has retained the four year requirement despite a number of recommendations that the retention period be reduced due to costs of storage.[248] The requirement is intended to support the Commission's monitoring obligations under Section 110(a)(4) of the Act, which might involve Commission analysis of Mechanism or warrantor action over an extended period. Records would be available to parties to disputes unresolved following Mechanism action, or in subsequent disputes arising out of an earlier transaction. The retention requirement would help to assure that the history and record of the dispute were preserved for a period equal to the general statute of limitations under the Uniform Commercial Code.[249] The Commission has no objection to storage of records by means of microfilm or any reasonable alternative to retention of raw files.

SECTION 703.7—AUDITS

Section 703.7 establishes requirements relating to independent audit of the Mechanism itself, and of the performance of participating warrantors. The proposed audit requirements elicited considerable comment. Opponents cited the presumed cost of an outside audit,[250] and counterproposals also reflected a concern with cost factors rather than opposition to the notion of an independent audit.[251] The general lack of opposition to an independent audit per se was reinforced by comment favoring the audit requirements as proposed.[252] The Commission has determined that the weight of the record clearly supports retention of the independent audit requirement. However, the requirement has been modified in several respects to reduce costs and clarify the minimum obligations.

ANNUAL AUDIT

(a) The Mechanism shall have an audit conducted at least annually, to determine whether the Mechanism and its implementation are in compliance with this part. All records of the Mechanism required to be kept under § 703.6 shall be available for audit.

Paragraph (a) is unchanged, since the record generally supported the idea of an annual audit. The "annual" requirement is discussed in the introductory portion, and in Footnote 251, *supra*. The Mechanism, under revised paragraph (b)(3), may direct its auditor to rely primarily on findings derived on the basis of direct contact with consumers who had utilized the Mechanism. The auditor would have access to all Mechanism records, without restriction, whatever the methodology. No date for completion of the report of the audit is specified; a Mechanism would be free to conduct the audit to coincide with its own budget or reporting cycle.

NATURE OF THE AUDIT

(b) Each audit provided for in paragraph (a) of this section shall include at a minimum the following:

(1) Evaluation of warrantors' efforts to make consumers aware of the Mechanism's existence as required in § 703.2(d); and

(2) Review of the indexes maintained pursuant to § 703.6 (b), (c), and (d); and

(3) Analysis of a random sample of disputes handled by the Mechanism to determine the following: (i) adequacy of the Mechanism's and other forms, investigation, mediation and follow-up efforts, and other aspects of complaint handling; and (ii) accuracy of the Mechanism's statistical compilations under § 703.6(e). (For purposes of this subparagraph "analysis" shall include oral or written contact with the consumers involved in each of the disputes in the random sample.)

In response to comments on the public record, a number of modifications have been made relative to the extent and methodology of the required audit. Proposed Section 703.7(b) would have required that the audit include a review of all aspects of Mechanism and warrantor performance subject to the Rule. and that the review would include, additionally, verification of a statistically valid sample of disputes decided by the Mechanism. Under the proposed Rule, it was envisioned that the auditor would rely primarily on exhaustive analysis of dispute files and other records, observations of dispute handling by mechanism staff and members, and exercise of a considerable degree of independent judgment as to how fairly and experitiously the Mechanism was operating. Verification of a statistically valid sample would have provided an additional check on the auditor's findings and conclusions.

The Commission has determined that the objectives of an independent audit may be realized at considerably less cost through substitution of requirements that state particular audit tasks and methodology. Section 703.7(b) states these minimum requirements.

Paragraphs (b)(1), (2) and (3)(ii) set forth specific audit tasks. Paragraph (b)(3)(i) repeats much of the general requirement relating to audit of Mechanism operation, as set out in proposed Section 703.7(b). However, as regards methodology, Paragraph (b)(3)(i) permits primary emphasis to be placed on analysis by the auditor of the experiences of a sample of consumers who have utilized a Mechanism. The paragraph states that "analysis" shall include oral or written contact with the consumers involved in each dispute in the sample. Performance of the audit obligations under both (b)(3)(i) and (ii) should probably include preparation of a questionnaire carefully structured to elicit information adequate to permit an in-

[247] R 1–4–1, 513, Association of Home Appliance Manufacturers (called for drastic reduction in frequency); TR 654, Furniture Industry Consumer Advisory Panel (currently issues quarterly reports); R 1–3–3, 928, Amana (quarterly).

[248] R 1–3–1, 290, Union Carbide Corporation (2 years); TR 222, Association of Home Appliance Manufacturers (2 years); TR 1520, Better Business Bureau, Chicago, Illinois (2 years); and others. *But see*, R 1–6, 75, Christopher Wheeler (four years essential to support follow-up consumer action, FTC enforcement, and outside research).

[249] Uniform Commercial Code, 2–725.

[250] R 1–4–1, 98, (C–8), National Electrical Manufacturers Association; TR 2058, Singer Sewing Machines; TR 171, Kitchen Dealers Association; TR 655, Furniture Industry Consumer Advisory Panel TR 440, Electronic Industries Association.

[251] R 1–4–1, 395, Major Appliance Consumer Action Panel (allow Panel Chairman to conduct audit according to a specified procedure; annual too frequent); R 1–4–1, 514, Association of Home Appliance Manufacturers (every three years); TR 171, Kitchen Dealers Association (spot checks only); R 1–3–1, 290, Union Carbide Corporation (delete in favor of direct review by FTC); TR 93, Council of Better Business Bureaus (permit substitution of alternative plan subject to FTC approval).

[252] TR 2149, Kit Manufacturing Company; TR 2492, California Department of Consumer Affairs; TR 1522, Better Business Bureau, Chicago, Illinois; TR 2174, Orange County Office of Consumer Affairs (but tighter format should be required); TR 2043, California Deputy Attorney General; TR 862, Donald Rothschild; TR 2541, San Francisco Bar Committee on Consumer Rights; TR 1470, American Arbitration Association; TR 201, Christopher Wheeler.

formed judgment as to the performance of the Mechanism, and the accuracy of the statistical summaries.

Paragraph (b)(3) requires analysis of a "random" sample, due to the costs and uncertainty that might have resulted under the proposed Section 703.7(b) requirement of a "statistically valid" sample. Nonetheless, the sample must be drawn so as to fairly reflect the operation and results of Mechanism action.

The auditor could base or supplement the analysis required under (b)(1) on the consumer contacts described under (b)(3)(i), though other generally accepted auditing methodology could be utilized. The requirements of paragraph (b)(2) would be met by reference by the auditor to the indexes, and to at least a sample of the files forming the basis of the indexes.

DISTRIBUTION OF AUDIT REPORT

(c) A report of each audit under this section shall be submitted to the Federal Trade Commission, and shall be made available to any person at reasonable cost. The Mechanism may direct its auditor to delete names of parties to disputes, and identity of products involved, from the audit report.

Access to audit information is intended to facilitate the public and FTC review functions set out in Section 110(a)(4) of the Act. To preserve the confidentiality of records as permitted under Section 703.8(b), this paragraph will permit a Mechanism to direct its auditor to omit from the report the identity of individual parties or products.

There were very few comments regarding paragraph (c), although several consumer representatives expressed opposition to the confidentiality provision.[253] A considerable range of opinion was presented on the confidentiality issue under Section 703.8(b). The Commission rationale for retaining the confidentiality provision is set out under that section.

SELECTION OF AUDITORS

(d) Auditors shall be selected by the Mechanism. No auditor may be involved with the Mechanism as a warrantor, sponsor or member, or employee or agent thereof, other than for purposes of the audit.

The independence requirement is in accord with generally accepted auditing standards, and with current practices of certain existing informal dispute mechanisms.[254] Comments raising cost objections to the independence requirement were noted in Footnote 251, *supra*.

SECTION 703.8 OPENNESS OF RECORDS AND PROCEEDINGS

Section 703.8 is intended to strike a balance between the warrantors' and Mechanism's need for confidentiality, and the competing need for public access and scrutiny of Mechanism operations that is implicit in Section 110(a)(4) of the Act. The Commission believes that the public "presence", and the right of interested persons to file complaints with the Commission under Section 110(a)(4) of the Act, will contribute to a heightened awareness by Mechanisms of the need for operation in conformance with the Rule. This should minimize the need for Commission monitoring under Section 110(a)(4) of the Act.

Under Section 703.8 statistical summaries and the annual audit report would be available to any interested person. Parties to disputes could inspect or obtain copies of their own dispute files. Auditors would have access to all Mechanism records. For all other purposes a Mechanism is permitted under the Section to maintain the confidentiality of its record. This Section, particularly the confidentiality provision, elicited considerable comment. For reasons explained below, the final Rule reflects only minor changes.

STATISTICAL SUMMARIES

(a) The statistical summaries specified in § 703.6(e) shall be available to any person for inspection and copying.

Paragraph (a) is unchanged. It is intended to support in a limited way the implicit requirement in Section 110(a)(4) of the Act relating to public review of Mechanism operation. Comment by some consumer representatives questioned whether the statistical summaries could meaningfully serve the public review function.[255] The Commission believes that summaries and the audit reports taken together will provide the opportunity for meaningful public review.

CONFIDENTIALITY

(b) Except as provided under paragraphs (a) and (e) of this section, and paragraph (c) of § 703.7, all records of the Mechanism may be kept confidential, or made available only on such terms and conditions, or in such form, as the Mechanism shall permit.

Paragraph (b) is essentially unchanged. Except for the statistical summaries, files available to parties, auditor access, and the audit report, all records of the Mechanism relating directly to settlement of disputes may be kept confidential.

There was considerable debate on this provision. The Commission believes that the record indicates that the requirements represent a fair balance between the warrantors' need for confidentiality, and the competing need for public access and scrutiny of Mechanism operations. Consumer representatives were generally opposed to any limitation on access to Mechanism records, for a variety of reasons.[256] Industry spokesmen generally voiced strong support for confidentiality of records, though several opposed the provision as written, apparently on the mistaken ground that participating warrantors and Mechanism sponsors would have no voice in Mechanism policy regarding discretionary release of records.[257] The Staff Report[258] stated that the Mechanism, and its sponsors and participating warrantors, could decide the terms and conditions of any disclosures not required by the Rule. The Commission reiterates its position that the Rule does not prohibit sponsor or warrantor involvement in formulation of the Mechanism's general policy regarding release of confidential records.

Based on the pre-publication investigation by the staff, the Commission is aware of the consensus among existing dispute settlement mechanisms that the identity of the parties and products involved in a dispute should not be disclosed to the general public.[259] The concern expressed was that the identities could be used by competitors or others to the detriment of a company engaged in good faith efforts to resolve disputes. Thus a warrantor who participated in an informal dispute settlement mechanism might be subjecting himself to possible disparagement, while non-participating warrantors would not be exposed to this possibility. Representatives of several existing mechanisms expressed the view that lack of confidentiality would operate as a strong disincentive to warrantor participation in informal dispute settlement.[260] The Commission believes that, on balance, the confidentiality provision as proposed should be retained. Disclosure of statistical summaries, audit reports and individual dispute files, should adequately supplement the Commission's *monitoring and enforcement* obligations under Section 110(a)(4) of the Act, without seriously compromising the confidentiality desired by warrantors.

RELEASE OF CONFIDENTIAL RECORDS

(c) The policy of the Mechanism with respect to records made available at the Mechanism's option shall be set out in the procedures under § 703.5(a); the policy shall be applied uniformly to all requests for access to or copies of such records.

Paragraph (c) received virtually no comment. It is unchanged. Should a Mechanism elect to make records available that could be held confidential under paragraph (b), then paragraph (c) would require the Mechanism to state generally in the written procedures required under Section 703.5(a), any terms or conditions relating to the availability of such records. The Mechanism would be re-

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[253] *See, e.g.*, R 1-6, 63-64, Christopher Wheeler; and the discussion relating to opposition to the confidentiality provision, *infra*.

[254] TR 1521, Better Business Bureau, Chicago, Illinois; TR 1469-1470, American Arbitration Association.

[255] *See, e.g.*, TR 2526, 2536, San Francisco Bar Committee on Consumer Rights, R 1-8, 144, Elinor Guggenheimer, New York City Department of Consumer Affairs.

[256] R 1-6, 106-107, Center for Auto Safety (value of precedent in deciding whether to pursue a claim; warrantor has access, therefore unfair to deny consumer access); TR 2526, 2536, San Francisco Bar Committee on Consumer Rights; R 1-8, 144, New York City Department of Consumer Affairs (usefulness to consumer agencies; part of FTC educational function); R 1-6, 61-62, Christopher Wheeler (important consumer purchasing information; research value).

[257] R 1-3-3, 841-42, Schwinn Bicycle Company; R 1-3-2, 541, Nixon, Hargrave, Devans & Doyle; R 1-4-1, 52, National Association of Furniture Manufacturers; R 1-4-4, 62, National Retail Merchants Association; R 1-6-6, 291, Union Carbide Corporation.

[258] R 1-2-3, 1004.

[259] *Id.*, at 1003.

[260] *Id.*, 1010.

quired to apply its policy, or terms and conditions, uniformly to all requests for access to such records. The purpose of these requirements is to insure that warrantors and consumers have equal knowledge and access to any such records.

OBSERVERS AT MEETINGS

(d) Meetings of the members to hear and decide disputes shall be open to observers on reasonable and nondiscriminatory terms. The identity of the parties and products involved in disputes need not be disclosed at meetings.

The meetings policy was objected to in several comments on grounds of impracticality, or that confidentiality permitted under paragraph (b) would be compromised.[201] Because of general support and acceptance among consumer representatives and existing dispute handling organizations,[202] the provision is unchanged. Under paragraph (d), interested persons would be permitted to observe meetings of the members hearing and deciding disputes. Merchanisms could not place any unreasonable or discriminatory limitations on attendance by observers, though the paragraph does not prohibit some limitations on the number of observers or frequency of open meetings. The Commission recognizes that the presence of observers may interfere to some degree with the primary Mechanism function of dispute handling.

The paragraph is intended to further support the public access and scrutiny functions implied in Section 110(a)(4) of the Act. To preserve confidentiality, the Mechanism would be permitted under the paragraph to take steps to avoid disclosure to observers of the identity of parties and products involved in disputes. In the event that parties to a dispute appeared personally, as provided in paragraph (f) of Section 703.5, then a Mechanism might reasonably exclude nonparty observers in the interest of confidentiality, since in any event the public scrutiny function would be served by the presence of the parties to the dispute.

AVAILABILITY OF DISPUTE FILES TO PARTIES

(e) Upon request the Mechanism shall provide to either party to a dispute:

(1) Access to all records relating to the dispute; and

(2) Copies of any records relating to the dispute, at reasonable cost.

Paragraph (e) is unchanged. Access by parties includes the dispute file described in Section 703.6(a). It does not include indexed information under paragraphs (b), (c) and (d), or any other records not available to the general public. There were few objections to this provision.[203] The need expressed by consumer representatives for access to dispute settlement records, and their opposition to confidentiality in any form, is discussed under paragraph (b), *supra*.

Access by a party to the records of his or her dispute is an essential internal check on the fairness of the Mechanism. Since the Mechanism is not required to operate "on the record" as required of the courts, access by parties must provide the same type of discipline. While the rule is far from imposing a constitutional due process standard on Mechanisms, access to the files of one's own case is a minimum fairness requirement. A party is entitled to know the basis on which a decision is made. Requests for access to dispute records will not burden the Mechanism because the cost may be imposed on the requesting party.

The right of a party to copy the dispute records will facilitate further pursuit of the dispute should the Mechanism decision fail to satisfy a party. The availability of the dispute file would avoid needless cost and duplication should the parties choose to pursue the matter further in arbitration, litigation, or some other forum. Section 110(a)(3) of the Act would make the decision of a dispute settlement mechanism admissible in evidence in a civil action arising out of a warranty obligation and relating to a matter considered by the Mechanism. The Act does not address the question of admissibility of Mechanism records relating to the dispute. Thus the admissibility of these records would be determined by a court.

DISCLOSURE OF MEMBER AND STAFF QUALIFICATIONS

(f) The Mechanism shall make available to any person upon request, information relating to the qualifications of Mechanism staff and members.

The Commission has added paragraph (f). The final audit provisions no longer require review by an auditor of staff and member qualifications under Sections 703.3 and 703.4, for reasons discussed supra, at 151–153. Thus there is no basis for review. Several existing dispute settlement mechanisms currently disclose biographical information in routine publications.[204] Mechanisms could satisfy the requirement through publication of the information in the materials required under Section 703.5(a), provided the materials were updated to reflect personnel changes.

Paragraph (g) relating to Federal Trade Commission access to Mechanism records has been deleted from the final Rule. The paragraph simply restated the implied condition of Section 110(a)(4) of the Act, which establishes the Commission's review and enforcement obligations. Proposed paragraph (g) was superfluous, since the Commission would have access to Mechanism records under the general grant of investigative powers in the Federal Trade Commission Act, 15 U.S.C. §§ 41 *et seq.*

PROMULGATION

The Commission has now considered all matters of fact, law, policy and discretion, including the data, views and arguments presented on the Record by interested parties in response to the Notice, as prescribed by law, and has determined that the promulgation of the Trade Regulation Rule and its Statement of Basis and Purpose set forth herein is in the public interest.

Accordingly, the Commission hereby promulgates the foregoing Statement of Basis and Purpose, and hereby amends Title 16 of CFR, Chapter 1, Subchapter G, Rules, Regulations, Statements and Interpretations under the Magnuson-Moss Warranty Act, by adding a new Part 703 as follows:

PART 703—INFORMAL DISPUTE SETTLEMENT PROCEDURES

Sec

AUTHORITY: 15 U.S.C. 2309 and 2310.

§ 703.1 Definitions.

(a) "The Act" means the Magnuson-Moss Warranty—Federal Trade Commission Improvement Act, 15 U.S.C. 2301, *et seq.*

(b) "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).

(c) "Written warranty" means: (1) 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

(2) 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.

[201] R 1–2–3, 381, Alcan Building Products; R 1–3–1, 291, Union Carbide Corporation; Tr 437, Electronic Industries Association.

[202] R 1–2–3, 1011, Staff Report; R 1–2–4, 1879, Frank McLaughlin, Office of Consumer Affairs, HEW; R 1–2–3, 1497, Chamber of Commerce of the U.S., "Fair Settlement of Just Claims."

[203] R 1–2–3, 66, Mohasco (defeats confidentiality of records submitted in good faith and under compulsion); R 1–4–1, 392–93, Major Appliance Consumer Action Panel (may impair contributions currently made by volunteer inspections); TR 1294, Consumer Fraud Division, Office of the Illinois Attorney General (confidential; may contain off the record admissions made to resolve a dispute; court, of course, would determine admissibility).

[204] *See, e.g.*, R 1–2–3, 1805, FICAP; R –1–2–4, 2054, MACAP.

(d) "Warrantor" means any person who gives or offers to give a written warranty which incorporates an informal dispute settlement mechanism.

(e) "Mechanism" means an informal dispute settlement procedure which is incorporated into the terms of a written warranty to which any provision of Title I of the Act applies, as provided in Section 110 of the Act.

(f) "Members" means the person or persons within a Mechanism actually deciding disputes.

(g) "Consumer" means a buyer (other than for purposes of resale) of any consumer product, any person to whom such product is transferred during the duration of a written warranty applicable to the product, and any other person who is entitled by the terms of such warranty or under applicable state law to enforce against the warrantor the obligations of the warranty.

(h) "On the face of the warranty" means: (1) if the warranty is a single sheet with printing on both sides of the sheet, or if the warranty is comprised of more than one sheet, the page on which the warranty text begins;

(2) if the warranty is included as part of a longer document, such as a use and care manual, the page in such document on which the warranty text begins.

§ 703.2 Duties of warrantor.

(a) The warrantor shall not incorporate into the terms of a written warranty a Mechanism that fails to comply with the requirements contained in §§ 703.3–703.8. This paragraph shall not prohibit a warrantor from incorporating into the terms of a written warranty the step-by-step procedure which the consumer should take in order to obtain performance of any obligation under the warranty as described in section 102(a)(7) of the Act and required by Part 701 of this subchapter.

(b) The warrantor shall disclose clearly and conspicuously at least the following information on the face of the written warranty: (1) a statement of the availability of the informal dispute settlement mechanism;

(2) the name and address of the Mechanism, or the name and a telephone number of the Mechanism which consumers may use without charge;

(3) a statement of any requirement that the consumer resort to the Mechanism before exercising rights or seeking remedies created by Title I of the Act; together with the disclosure that if a consumer chooses to seek redress by pursuing rights and remedies not created by Title I of the Act, resort to the Mechanism would not be required by any provision of the Act; and

(4) a statement, if applicable, indicating where further information on the Mechanism can be found in materials accompanying the product, as provided in § 703.2(c).

(c) The warrantor shall include in the written warranty or in a separate section of materials accompanying the product, the following information: (1) either (i) a form addressed to the Mechanism containing spaces requesting the information which the Mechanism may require for prompt resolution of warranty disputes; or (ii) a telephone number of the Mechanism which consumers may use without charge;

(2) The name and address of the Mechanism;

(3) A brief description of Mechanism procedures;

(4) The time limits adhered to by the Mechanism; and

(5) The types of information which the Mechanism may require for prompt resolution of warranty disputes.

(d) The warrantor shall take steps reasonably calculated to make consumers aware of the Mechanism's existence at the time consumers experience warranty disputes. Nothing contained in paragraphs (b), (c), or (d) of this section shall limit the warrantor's option to encourage consumers to seek redress directly from the warrantor as long as the warrantor does not expressly require consumers to seek redress directly from the warrantor. The warrantor shall proceed fairly and expeditiously to attempt to resolve all disputes submitted directly to the warrantor.

(e) Whenever a dispute is submitted directly to the warrantor, the warrantor shall, within a reasonable time, decide whether, and to what extent, it will satisfy the consumer, and inform the consumer of its decision. In its notification to the consumer of its decision, the warrantor shall include the information required in § 703.2 (b) and (c).

(f) The warrantor shall: (1) respond fully and promptly to reasonable requests by the Mechanism for information relating to disputes;

(2) upon notification of any decision of the Mechanism that would require action on the part of the warrantor, immediately notify the Mechanism whether, and to what extent, warrantor will abide by the decision; and

(3) perform any obligations it has agreed to.

(g) The warrantor shall act in good faith in determining whether, and to what extent, it will abide by a Mechanism decision.

(h) The warrantor shall comply with any reasonable requirements imposed by the Mechanism to fairly and expeditiously resolve warranty disputes.

Minimum Requirements of the Mechanism

§ 703.3 Mechanism organization.

(a) The Mechanism shall be funded and competently staffed at a level sufficient to ensure fair and expeditious resolution of all disputes, and shall not charge consumers any fee for use of the Mechanism.

(b) The warrantor and the sponsor of the Mechanism (if other than the warrantor) shall take all steps necessary to ensure that the Mechanism, and its members and staff, are sufficiently insulated from the warrantor and the sponsor, so that the decisions of the members and the performance of the staff are not influenced by either the warrantor or the sponsor. Necessary steps shall include, at a minimum, committing funds in advance, basing personnel decisions solely on merit, and not assigning conflicting warrantor or sponsor duties to Mechanism staff persons.

(c) The Mechanism shall impose any other reasonable requirements necessary to ensure that the members and staff act fairly and expeditiously in each dispute.

§ 703.4 Qualification of members.

(a) No member deciding a dispute shall be: (1) A party to the dispute, or an employee or agent of a party other than for purposes of deciding disputes; or

(2) A person who is or may become a party in any legal action, including but not limited to class actions, relating to the product or complaint in dispute, or an employee or agent of such person other than for purposes of deciding disputes. For purposes of this paragraph (a) a person shall not be considered a "party" solely because he or she acquires or owns an interest in a party solely for investment, and the acquisition or ownership of an interest which is offered to the general public shall be prima facie evidence of its acquisition or ownership solely for investment.

(b) When one or two members are deciding a dispute, all shall be persons having no direct involvement in the manufacture, distribution, sale or service of any product. When three or more members are deciding a dispute, at least two-thirds shall be persons having no direct involvement in the manufacture, distribution, sale or service of any product. "Direct involvement" shall not include acquiring or owning an interest solely for investment, and the acquisition or ownership of an interest which is offered to the general public shall be prima facie evidence of its acquisition or ownership solely for investment. Nothing contained in this section shall prevent the members from consulting with any persons knowledgeable in the technical, commercial or other areas relating to the product which is the subject of the dispute.

(c) Members shall be persons interested in the fair and expeditious settlement of consumer disputes.

§ 703.5 Operation of the Mechanism.

(a) The Mechanism shall establish written operating procedures which shall include at least those items specified in paragraphs (b)–(j) of this section. Copies of the written procedures shall be made available to any person upon request.

(b) Upon notification of a dispute, the Mechanism shall immediately inform both the warrantor and the consumer of receipt of the dispute.

(c) The Mechanism shall investigate, gather and organize all information necessary for a fair and expeditious decision in each dispute. When any evidence gathered by or submitted to the Mechanism raises issues relating to the number of repair attempts, the length of repair periods, the possibility of unreasonable use of the product, or any other issues relevant in light of Title I of the Act (or

rules thereunder), including issues relating to consequential damages, or any other remedy under the Act (or rules thereunder), the Mechanism shall investigate these issues. When information which will or may be used in the decision, submitted by one party, or a consultant under § 703.4(b), or any other source tends to contradict facts submitted by the other party, the Mechanism shall clearly, accurately, and completely disclose to both parties the contradictory information (and its source) and shall provide both parties an opportunity to explain or rebut the information and to submit additional materials. The Mechanism shall not require any information not reasonably necessary to decide the dispute.

(d) If the dispute has not been settled, the Mechanism shall, as expeditiously as possible but at least within 40 days of notification of the dispute, except as provided in paragraph (e) of this section: (1) render a fair decision based on the information gathered as described in paragraph (c) of this section, and on any information submitted at an oral presentation which conforms to the requirements of paragraph (f) of this section (A decision shall include any remedies appropriate under the circumstances, including repair, replacement, refund, reimbursement for expenses, compensation for damages, and any other remedies available under the written warranty or the Act (or rules thereunder); and a decision shall state a specified reasonable time for performance);

(2) Disclose to the warrantor its decision and the reasons therefor;

(3) If the decision would require action on the part of the warrantor, determine whether, and to what extent, warrantor will abide by its decision; and

(4) Disclose to the consumer its decision, the reasons therefor, warrantor's intended actions (if the decision would require action on the part of the warrantor), and the information described in paragraph (g) of this section. For purposes of this paragraph (d) a dispute shall be deemed settled when the Mechanism has ascertained from the consumer that: (i) the dispute has been settled to the consumer's satisfaction; and (ii) the settlement contains a specified reasonable time for performance.

(e) The Mechanism may delay the performance of its duties under paragraph (d) of this section beyond the 40 day time limit: (1) where the period of delay is due solely to failure of a consumer to provide promptly his or her name and address, brand name and model number of the product involved, and a statement as to the nature of the defect or other complaint; or

(2) For a 7 day period in those cases where the consumer has made no attempt to seek redress directly from the warrantor.

(f) The Mechanism may allow an oral presentation by a party to a dispute (or a party's representative) only if: (1) both warrantor and consumer expressly agree to the presentation;

(2) Prior to agreement the Mechanism fully discloses to the consumer the following information: (i) that the presentation by either party will take place only if both parties so agree, but that if they agree, and one party fails to appear at the agreed upon time and place, the presentation by the other party may still be allowed;

(ii) That the members will decide the dispute whether or not an oral presentation is made;

(iii) The proposed date, time and place for the presentation; and

(iv) A brief description of what will occur at the presentation including, if applicable, parties' rights to bring witnesses and/or counsel; and

(3) Each party has the right to be present during the other party's oral presentation. Nothing contained in this paragraph (b) of this section shall preclude the Mechanism from allowing an oral presentation by one party, if the other party fails to appear at the agreed upon time and place, as long as all of the requirements of this paragraph have been satisfied.

(g) The Mechanism shall inform the consumer, at the time of disclosure required in paragraph (d) of this section that: (1) if he or she is dissatisfied with its decision or warrantor's intended actions, or eventual performance, legal remedies, including use of small claims court, may be pursued;

(2) The Mechanism's decision is admissible in evidence as provided in section 110(a)(3) of the Act; and

(3) The consumer may obtain, at reasonable cost, copies of all Mechanism records relating to the consumer's dispute.

(h) If the warrantor has agreed to perform any obligations, either as part of a settlement agreed to after notification to the Mechanism of the dispute or as a result of a decision under paragraph (d) of this section, the Mechanism shall ascertain from the consumer within 10 working days of the date for performance whether performance has occurred.

(i) A requirement that a consumer resort to the Mechanism prior to commencement of an action under section 110(d) of the Act shall be satisfied 40 days after notification to the Mechanism of the dispute or when the Mechanism completes all of its duties under paragraph (d) of this section, whichever occurs sooner. Except that, if the Mechanism delays performance of its paragraph (d) of this section duties as allowed by paragraph (e) of this section, the requirement that the consumer initially resort to the Mechanism shall not be satisfied until the period of delay allowed by paragraph (e) has ended.

(j) Decisions of the Mechanism shall not be legally binding on any person. However, the warrantor shall act in good faith, as provided in § 703.2(g). In any civil action arising out of a warranty obligation and relating to a matter considered by the Mechanism, any decision of the Mechanism shall be admissible in evidence, as provided in section 110(a)(3) of the Act.

§ 703.6 Recordkeeping.

(a) The Mechanism shall maintain records on each dispute referred to it which shall include: (1) Name, address and telephone number of the consumer;

(2) Name, address, telephone number and contact person of the warrantor;

(3) Brand name and model number of the product involved;

(4) The date of receipt of the dispute and the date of disclosure to the consumer of the decision;

(5) All letters or other written documents submitted by either party;

(6) All other evidence collected by the Mechanism relating to the dispute, including summaries of relevant and material portions of telephone calls and meetings between the Mechanism and any other person (including consultants described in § 703.4(b));

(7) A summary of any relevant and material information presented by either party at an oral presentation;

(8) The decision of the members including information as to date, time and place of meeting, and the identity of members voting; or information on any other resolution;

(9) A copy of the disclosure to the parties of the decision;

(10) A statement of the warrantor's intended action(s);

(11) Copies of follow-up letters (or summaries of relevant and material portions of follow-up telephone calls) to the consumer, and responses thereto; and

(12) Any other documents and communications (or summaries of relevant and material portions of oral communications) relating to the dispute.

(b) The Mechanism shall maintain an index of each warrantor's disputes grouped under brand name and subgrouped under product model.

(c) The Mechanism shall maintain an index for each warrantor as will show: (1) All disputes in which the warrantor has promised some performance (either by settlement or in response to a Mechanism decision) and has failed to comply; and

(2) All disputes in which the warrantor has refused to abide by a Mechanism decision.

(d) The Mechanism shall maintain an index as will show all disputes delayed beyond 40 days.

(e) The Mechanism shall compile semi-annually and maintain statistics which show the number and percent of disputes in each of the following categories: (1) Resolved by staff of the Mechanism and warrantor has complied;

(2) Resolved by staff of the Mechanism, time for compliance has occurred, and warrantor has not complied;

(3) Resolved by staff of the Mechanism and time for compliance has not yet occurred;

(4) Decided by members and warrantor has complied;

(5) Decided by members, time for compliance has occurred, and warrantor has not complied;

(6) Decided by members and time for compliance has not yet occurred;

(7) Decided by members adverse to the consumer;

(8) No jurisdiction;

(9) Decision delayed beyond 40 days under § 703.5(e)(1);

(10) Decision delayed beyond 40 days under § 703.5(e)(2);

(11) Decision delayed beyond 40 days for any other reason; and

(12) Pending decision.

(f) The Mechanism shall retain all records specified in paragraphs (a)–(e) of this section for at least 4 years after final disposition of the dispute.

§ 703.7 Audits.

(a) The Mechanism shall have an audit conducted at least annually, to determine whether the Mechanism and its implementation are in compliance with this part. All records of the Mechanism required to be kept under § 703.6 shall be available for audit.

(b) Each audit provided for in paragraph (a) of this section shall include at a minimum the following: (1) evaluation of warrantors' efforts to make consumers aware of the Mechanism's existence as required in § 703.2(d);

(2) Review of the indexes maintained pursuant to § 703.6(b), (c), and (d); and

(3) Analysis of a random sample of disputes handled by the Mechanism to determine the following:

(i) adequacy of the Mechanism's complaint and other forms, investigation, mediation and follow-up efforts, and other aspects of complaint handling; and

(ii) Accuracy of the Mechanism's statistical compilations under § 703.6(e). (For purposes of this subparagraph "analysis" shall include oral or written contact with the consumers involved in each of the disputes in the random sample.)

(c) A report of each audit under this section shall be submitted to the Federal Trade Commission, and shall be made available to any person at reasonable cost. The Mechanism may direct its auditor to delete names of parties to disputes, and identity of products involved, from the audit report.

(d) Auditors shall be selected by the Mechanism. No auditor may be involved with the Mechanism as a warrantor, sponsor or member, or employee or agent thereof, other than for purposes of the audit.

§ 703.8 Openness of records and proceedings.

(a) The statistical summaries specified in § 703.6(e) shall be available to any person for inspection and copying.

(b) Except as provided under paragraphs (a) and (e) of this section, and paragraph (c) of § 703.7, all records of the Mechanism may be kept confidential, or made available only on such terms and conditions, or in such form, as the Mechanism shall permit.

(c) The policy of the Mechanism with respect to records made available at the Mechanism's option shall be set out in the procedures under § 703.5(a); the policy shall be applied uniformly to all requests for access to or copies of such records.

(d) Meetings of the members to hear and decide disputes shall be open to observers on reasonable and nondiscriminatory terms. The identity of the parties and products involved in disputes need not be disclosed at meetings.

(e) Upon request the Mechanism shall provide to either party to a dispute: (1) access to all records relating to the dispute; and

(2) Copies of any records relating to the dispute, at reasonable cost.

(f) The Mechanism shall make available to any person upon request, information relating to the qualifications of Mechanism staff and members.

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Promulgated by the Federal Trade Commission December 31, 1975.

VIRGINIA M. HARDING,
Acting Secretary.

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