

C O R P O R A T E

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A L E R T

UPDATE: FUNDAMENTAL CHANGE TO U.S. WARRANTY LAW: CONSUMER WARRANTIES CAN SOON BE POSTED ONLINE

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Recent changes to the federal statute governing warranties on consumer products will make it easier and more cost-effective for consumer product manufacturers and suppliers to satisfy the federally-mandated warranty notification requirements. On September 24, 2015, President Obama signed into law the E-Warranty Act of 2015. The E-Warranty Act amends the Magnuson-Moss Warranty Act of 1975 (the “MMWA”) modernizing the warranty notification requirements. It allows manufacturers and suppliers of retail products to publish the terms and conditions of consumer product warranties online rather than including the terms and conditions with the products themselves. The Federal Trade Commission (“FTC”) was required to issue new rules no later than September 24, 2016 to reflect the terms of the E-Warranty Act. In accordance with this mandate, on May 24, 2016, the FTC published a notice of proposed rulemaking and request for comment, outlining its proposed changes to the federal regulations governing consumer warranties. The deadline for submitting comments was June 17, 2016. On September 6, 2016, the FTC announced its approval of the final amendments to the rules.

The E-Warranty Act

Although the E-Warranty Act augments the available methods of delivery of consumer product warranties, the substantive requirements of such warranties will remain the same. Thus, manufacturers and suppliers offering written warranties with their retail products will still be required to designate whether such warranties are “full” or “limited” and include those items of information already mandated by the FTC rules. The MMWA will also continue to prohibit manufacturers and suppliers from disclaiming implied warranties and using so-called “tie-in” provisions that require consumers to use additional branded products in conjunction with a covered product to preserve the availability of a warranty.

The E-Warranty Act is intended to address Congress’s findings that (i) both manufacturers and consumers often prefer the option of providing and receiving warranty information electronically or online, (ii) modernization of the warranty notification rules will allow the United States to better compete internationally, and (iii) the use of online warranties will allow for greater consumer access to information in an “environmentally friendly way” while providing manufacturers with

more flexibility in satisfying the warranty notification rules. See 15 U.S.C. §2302(b).

The warranty notification requirements of the MMWA are aimed at both protecting consumers from deceptive warranty practices and fostering retail competition. Consumer product manufacturers and suppliers are not obligated to offer written warranties with retail products. However, if they choose to do so, the MMWA requires that the terms and conditions of those warranties be provided “fully and conspicuously” and “in simple and readily understood language.” 15 U.S.C. § 2302(a). The FTC has the authority to enact rules related to the enforcement of the MMWA, including the manner and form in which information must be presented. The FTC rules require that written warranties contain certain items of information including, among other things, the products or parts covered, the period of coverage, how defective products will be replaced or repaired, and the means by which the consumer can contact the manufacturer or supplier for warranty service. See 16 C.F.R. § 701.3. Prior to passage of the E-Warranty Act, a manufacturer or seller of retail products costing more than \$15 was obligated to disclose warranty terms and conditions conspicuously on a single document either on the products or within the product packaging. Under the E-Warranty Act, manufacturers will be permitted to provide this information online.

Manufacturers and suppliers who opt to publish warranty terms and conditions online must do so in a “clear and conspicuous manner.” 15 U.S.C. § 2302(b). The E-Warranty Act requires the product, product packaging, or product manual to include a web address where the terms and conditions can be found. To protect less tech-savvy consumers, the E-Warranty Act also requires that a phone number, mailing address, or other reasonable non-Internet means by which consumers can access the warranty terms and conditions be provided. Additionally, in most cases, where the product is sold in a retail location, by catalog, or through door-to-door sales, retailers will still be required to make the terms and conditions available to

consumers prior to sale. Retailers will have the option of doing so by electronic means.

The Federal Trade Commission’s Final Rule Changes

On September 6, 2016, the FTC announced its approval of final rule amendments that are relatively narrow in scope, making minor adjustments to the FTC’s warranty regulations in order to effectuate the provisions of the E-Warranty Act. The FTC has amended the rules on Disclosure of Written Consumer Product Warranty Terms and Conditions (the “Disclosure Rule”) and Pre-Sale Availability of Written Warranty Terms (the “Pre-Sale Availability Rule”), found at 16 C.F.R. §§ 701 and 702, respectively. The Disclosure Rule establishes disclosure requirements for written warranties covered by the MMWA by specifying the terms of warranty coverage that must be disclosed as well as the manner and language of such disclosures. The Pre-Sale Availability Rule prescribes the methods by which suppliers and sellers must disclose written warranty terms prior to the sale of consumer goods. Under the new rules, warrantors and sellers will not be *required* to provide written warranties online or electronically, and the rule changes will not affect the obligations of those warrantors and sellers who decline to do so.

The Disclosure Rule requires that any limitations on the duration of implied warranties must be disclosed “on the face of the warranty.” Under the existing rules, this has meant that where printed documents contain warranties, such as single sheet warranties or warranties included in product manuals, such disclosures are required to appear on the page where the warranty begins. To extend this disclosure requirement to the use of online warranties, the FTC is expanding the definition of the “on the face of the warranty” language such that “[w]here the warranty is on an Internet Web site or displayed electronically” the phrase will mean “in close proximity to the location where the warranty text begins.”

The remainder of the rule changes relate to the Pre-Sale Availability Rule. The existing rule imposes

certain duties on both sellers and warrantors to disclose the terms of written warranties prior to the sale of consumer goods. Generally, this means that sellers must make the text of any offered warranties available to consumers at the point of sale. See 16 C.F.R. § 703.2(b).

To effectuate the purposes of the E-Warranty Act, the new rules will allow warrantors to provide the written warranty terms “in an accessible digital format on the warrantor’s Internet Web site.” However, if a warrantor opts to go this route, the new rules will impose several additional obligations.

First, the warrantor will be required to inform consumers how to obtain warranty terms by clearly and conspicuously providing in the product manual or packaging: (i) the website where the warranty terms can be found, and (ii) the phone number, mailing address, or other non-Internet method for consumers to request a copy of the warranty terms. Second, the warrantor will be required to provide a hard copy of the warranty, free of charge, to any consumers or sellers who request such a copy via the above-referenced non-Internet channels. Third, the warrantor will need to ensure that the online warranty terms are clear and conspicuous and remain accessible at the provided Web address. Fourth, the warrantor must provide sufficient information, either with the product or on the website, to allow consumers to readily identify the online warranty terms that apply to the specific warranted product. As for sellers’ duties, where warrantors opt to provide online warranties, sellers (including door-to-door sellers) will be permitted to satisfy their obligation to provide pre-sale warranty terms by making them available “through electronic or other means.” This will presumably entail providing consumers with pre-sale access to the warranty terms via computer terminals or other electronic devices, such as tablets. The new rules also provide that sellers may request hard copies of the warranty terms from warrantors. This addresses the FTC’s expectation that not all sellers will have access to the Internet or electronic devices so as to be able to display the terms by electronic means.

In such cases, warrantors will still be obligated to provide sellers with hard copies of the online warranty terms which can then be passed on to consumers prior to sale.

Next Steps

The public comment period for the FTC’s proposed rule changes ended on June 24, 2016. Only a handful of comments were submitted, all of them generally supportive of the FTC’s efforts to implement the provisions of the E-Warranty Act. On September 6, 2016, the FTC announced approval on the final rule amendments. The new rules are to become effective sometime in early October, thirty days after publication in the Federal Register.

In sum, the FTC has approved modest rule changes to the consumer warranty regulations to give effect to the E-Warranty Act by allowing manufacturers and suppliers to provide the written terms of offered warranties online rather than with the products themselves. Under the new rules, however, warrantors will still be required to provide some information with the products themselves, namely Web addresses where consumers can find the full terms of the written warranties online. Additionally, the new rules, in accordance with the provisions of the E-Warranty Act, will require warrantors to provide non-Internet means through which both consumers and sellers can request hard copies of the warranty terms. Under the new rules, sellers will still be required to provide the full terms of such warranties prior to sale, whether in a retail, catalog, or door-to-door context. However, where suppliers or manufacturers opt to provide the warranties online, sellers will be entitled to provide the pre-sale warranties by electronic means if they choose to do so.

The E-Warranty Act is good for consumers as well as manufacturers, suppliers, and sellers. It makes warranty information easily accessible to the consumer and provides more flexibility and a competitive advantage to manufacturers, suppliers, and sellers. ♦

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