

**Before the
FEDERAL TRADE COMMISSION**

In the Matter of)	
)	
Magnuson-Moss Warranty Act Rule Review)	FTC Matter No. P114406
16 CFR Part 700)	

**COMMENTS OF THE
UNIFORM STANDARDS IN AUTOMOTIVE PRODUCTS COALITION**

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UNIFORM STANDARDS IN AUTOMOTIVE PRODUCTS COALITION COMMENTS

The Uniform Standards in Automotive Products Coalition (the “Coalition”)¹ appreciates this opportunity to provide comments in response to the Federal Trade Commission’s (“FTC” or “Commission”) request for comment released on August 23, 2011 (“Request for Comment”).² In the Request for Comment the FTC sought comment on its warranty-related Interpretations, Rules, and Guides (“Interpretations”) under the Magnuson-Moss Warranty Act (the “Act”). Specifically, the Coalition responds to the FTC’s invitation to address whether Section 700.10 of its Interpretations should be revised to improve the effectiveness of the Act’s tying prohibition.³ The Coalition submits that several minor modifications to Section 700.10 of the FTC’s Interpretations would greatly improve the effectiveness of the Act’s anti-tying rule.

While the Act and the FTC’s Interpretations have protected consumers from overt warrantor tying practices, the Interpretations have not evolved alongside industry practice. As a result, *de facto* tying practices have emerged that are not addressed by the FTC’s Interpretations, even though these practices are prohibited in nearly identical situations under the Clean Air Act. The Coalition submits that the intent behind the Act and the FTC’s Interpretations is to preclude arrangements that condition warranty coverage on the use of a specific product or service, regardless of whether the “tying” condition is made explicitly or implicitly. Within the automotive industry, explicit conditioning practices have been replaced by more subtle conditioning practices that produce the same ultimate effect: leveraging a warrantor’s bargaining

¹ These Comments are submitted on behalf of the USAP Coalition and other interested parties that support the Coalition’s Comments. The Coalition was formed to address the practice of warrantors directly or indirectly conditioning a product’s warranty coverage on the use of branded parts or services. The USAP Coalition is composed of the following members of the aftermarket parts industry: the Automotive Aftermarket Industry Association, the Automotive Maintenance and Repair Association, the Automotive Oil Change Association, Ashland Inc., Express Oil Change, LLC, the Independent Lubricant Manufacturers Association, and others. A full list of the USAP Coalition and signatories to these Comments is provided on Page 18. Not all signatories are members of the USAP Coalition.

² 76 Fed. Reg. 52596 (Aug. 23, 2011).

³ 76 Fed. Reg. at 52598.

power to generate a “tied” purchase of its products or those of a licensed producer. The Coalition notes as examples the rising prevalence of conditioning practices in the motor oil and automatic transmission fluid. Absent enhanced FTC protections under Section 102(c) of the Act, this trend is likely to continue.

The FTC has done an admirable job in policing impermissible conditioning practices and putting consumers on notice of their rights under the Act. In particular, the FTC’s recent Consumer Alert on Auto Warranties recognized the issue directly and provided helpful guidance to consumers. Following this development, the Coalition urges the FTC to make two simple clarifications to Section 700.10 of its Interpretations to better provide consumers with the protections discussed in the Consumer Alert and to bring the Act in line with the Clean Air Act:

- Amend Section 700.10(c) of Interpretations to include “indirect” conditioning practices, as is currently required under the Clean Air Act;
- Require automotive warranties to include a plain English anti-tying disclosure, similar to the disclosure already required of automotive warranties under the Clean Air Act, and modeled directly upon language approved by the FTC in its recent Consumer Alert on Automotive Warranties.

By making these modifications, the FTC will be providing consumers with more effective notice of their rights and the assurance that warranty coverage will not be denied improperly, in a manner consistent with the original intent of the Act.

INTRODUCTION

The Coalition believes that the Act and the FTC’s Interpretations have served a vital consumer protection role over the past 35 years, leveling the playing field between consumers and the manufacturers and suppliers of consumer products and directly enhancing consumer welfare by fostering vibrant after-market parts and services industries. However, as the Commission is aware, the FTC’s Interpretations have not been substantively updated since they were first released in late 1970’s. The Coalition submits that the FTC needs to update and clarify Section 700.10 of the Interpretations in order to account for the emergence of *de facto* warranty tying practices that have evolved over the past decades that threaten to roll back the original protections of the Act.

First, the Coalition urges the FTC to revise Section 700.10(c) of its Interpretations under the Act in order to clarify that warrantors may not directly *or indirectly* condition a product’s warranty coverage on the use of branded parts or services, unless that article or service is

provided without charge under the terms of the warranty. While the use of “direct” tying provisions in warranties is clearly prohibited by the Act, the FTC needs to make clear that warranty language that *creates the impression* that the use of a branded product or service is required in order to maintain warranty coverage is equally impermissible. The *in terrorem* effect of these ambiguous warranty provisions works to create a *de facto* tie in a manner recognized, and prohibited, under the Clean Air Act’s anti-tying provision. The FTC should clarify its Interpretations to more expressly indicate that indirect tying arrangements are also prohibited by the Act.

Second, the Coalition urges the Commission to implement measures under Section 700.10 of the Interpretations designed to provide consumers with timely knowledge of their rights under the Act. A simple and non-burdensome disclosure statement, drawn from the FTC’s recent Consumer Alert on Auto Warranties, and provided to consumers in automotive warranty documents, would ensure that consumers are aware of their rights under the Act without imposing a burden on warrantors or service providers.

I. BACKGROUND

The Coalition was formed to address the practice of warrantors directly or indirectly conditioning a product’s warranty coverage on the use of a branded part or service. While the Act prohibits explicit tying practices, the FTC’s Interpretation of the Act does not expressly take into account all of the warranty practices that have evolved in the modern marketplace that produce a tying effect to the detriment of consumers. As the Commission has recognized, tying arrangements restrain competition and harm consumers.⁴ In enacting Section 102(c) of the Act, Congress signaled “its intention to prohibit those tying arrangements imposed upon consumers by means of a penalty of loss of warranty coverage.”⁵ This provision and the FTC’s Interpretations prevents warrantors from imposing tying arrangements in a manner that restricts consumers’ purchase options regarding articles or services used in connection with the warranted product.⁶ However, since the Commission published its 1977 Interpretations of the Act, warranty practices have evolved in a manner that subverts the intent of Section 102(c). The Coalition

⁴ *In re Harmsco*, 41 Fed. Reg. 34368 (1976).

⁵ *Id.*

⁶ *See* Letter from Donald S. Clark, Secretary, FTC to Keith E. Whann, Esq., National Independent Automobile Dealers Association (Dec. 31, 2002).

believes that, as a part of this review, the FTC should clarify its Interpretations to account for these changes in circumstance.

In addition to the changed commercial landscape, consumers generally lack an awareness of their rights under the Act when pursuing a warranty claim, placing them at a decided disadvantage to the warranty service providers. Indeed, absent timely knowledge of their rights, consumers are bearing the burden of proof associated with many warranty claims. Though the Interpretations clearly state that a warrantor may deny warranty liability only where “the warrantor can demonstrate that the defect or damage was... caused [by the consumer’s use of articles or service not manufactured by the original equipment manufacturer],” in practice consumers are unaware that the Act requires that they be provided with proof of causation before a warranty claim can be properly denied. The Coalition believes that the FTC should clarify its Section 700.10 of the Interpretations so that any warranty-related documents provided to consumers contain conspicuous language that a warrantor is prohibited from denying liability where the warrantor cannot prove that the defect or damage was caused by the use of articles or services not manufactured by the original equipment manufacturer (“OEM”). The Coalition submits that this approach better reflects the appropriate allocation of the burdens of proof associated with warranty claims and provides consumers with proper notice of their rights under the Act.

II. THE EVOLUTION OF INDIRECT WARRANTY TYING ARRANGEMENTS

The Coalition, an ad-hoc group of aftermarket product manufacturers and service firms, has become aware of a growing number of instances in which product warranties are being indirectly conditioned upon the use of a named product or service to the detriment of consumers. When a party uses the leverage created by its sale of the original product to compel consumers to buy a second, tied product, competition may be harmed and the market upset with regard to the tied product or service. In the automotive warranty context consumers are especially vulnerable to such arrangements because of the growing complexity of modern automobiles and the fact that warranty coverage is predicated upon proper car maintenance. As a result, the average consumer relies on the warranty documents to determine service and repair requirements, leaving them vulnerable to statements that purport to require the use of a branded product or service under the possible penalty of loss of warranty coverage.

In recent years, manufacturers have begun introducing proprietary, branded replacement parts or consumables intended to be used solely with a particular product, such as a car or a printer, that a consumer has already purchased. In some cases, manufacturers suggest directly or indirectly to consumers that the use of the branded product is required in order to maintain warranty coverage for the original product. GM, for example, introduced its own proprietary engine oil specification, dexos™, for all 2011 and later models,⁷ and has provided in its owners manuals that its cars “require[] engine oil approved to the dexos specification.”⁸ Subaru has also introduced its own proprietary oil formulations that Subaru “requires” for its turbocharged vehicles.”⁹ A similar trend exists in the market for automatic transmission fluid (“ATF”). Nissan, for its part, has also issued warranties that purport to require a given transmission fluid or else risk damage that is not covered by Nissan’s warranty.¹⁰ As demonstrated by the attached claims, these conditioning policies are enforced, with consumer warranty claims being denied due to the use of a non-OEM branded ATF.¹¹ In the ink jet and toner cartridge market, manufacturers routinely blame printer damage on the use of remanufactured cartridges without first inspecting the printer. The International Imaging Technology Council, the trade association for printer cartridge re-manufacturers, routinely receives complaints from members that they have lost customers because OEM printer dealers claim that the use of aftermarket cartridges will void the printer warranty.¹²

⁷ See GM Dexos Information Center, www.gmdexos.com. (“To ensure you are using the right oil for your GM car, choose only authentic, licensed dexos™ oils. dexos™ is an exclusive trademark of General Motors. Only those oils displaying the green or blue dexos™ trademark and icon on the front label have been certified and licensed by GM as meeting the demanding performance requirements and stringent quality standards of the dexos™ specification.”). Screenshot provided as [Appendix A](#).

⁸ 2011 Chevrolet Impala Owners Manual, provided as [Appendix B](#). Also attached are equivalent pages from the 2011 Chevrolet Malibu Owners Manual (Emphasis supplied).

⁹ See Subaru Drive, http://drive.subaru.com/spr11_whatmakes.aspx (“Subaru requires Subaru Synthetic 0W-20 motor oil (or equivalent) for the new non-turbocharged engine in the 2011 Forester and requires Subaru Synthetic 5W-30 motor oil (or equivalent) for its 2011 turbocharged vehicles.”). A full screenshot of the (now-modified) Subaru website is provided as [Appendix C](#) (Emphasis supplied).

¹⁰ See Nissan Warranty, provided as [Appendix D](#), exhibit in *Green v. Goodyear Tire & Rubber Co.*, Case 10-C-15267-S4 (Ga. App. 2010) (“Using automatic transmission fluid other than Genuine NISSAN Matic K AFT will cause deterioration in driveability and automatic transmission durability, and may damage the automatic transmission, which is not covered by the NISSAN new vehicle limited warranty”).

¹¹ See [Appendix E](#).

¹² See Comments submitted by the International Imaging Technology Council.

The Coalition notes that the existing Interpretations or the Coalition’s proposed modifications to the Interpretations would not bar a manufacturer from *recommending* a particular brand or service to be used with a specific make or model of their cars. However, when the manufacturer employs language to suggests that warranty coverage directly or impliedly “requires” the use of a branded product or service, consumers are inappropriately being denied the freedom to select a product of their choosing and competition is harmed. Faced with such a choice a consumer is likely to use the “required” product in order to avoid the risk that they may later face potentially expensive repairs that may not be covered under their warranty, resulting in a “tie” created *via* warranty.

III. THE FTC’S INTERPRETATIONS SHOULD BE CLARIFIED TO PROTECT CONSUMERS FROM INDIRECT TYING ARRANGEMENTS

Among other things, the Act protects consumers by prohibiting the practice of conditioning warranty coverage on the use of a specific product or service.¹³ As the Supreme Court has noted, tying arrangements are harmful in two ways: foreclosing competing sellers from selling the “tied” product to purchasers and foreclosing purchasers’ access to other sources of supply for the tied product.¹⁴ In recognition of these harms, the Act was extended to prohibit tying practices by means of product warranties. Indeed, as the FTC itself has noted, the “clear purpose” of Section 102(c) of the Act was to “prohibit those tying arrangements imposed upon consumers by means of a penalty of loss of warranty coverage.”¹⁵ Specifically, Section 102(c) of the Act provides that:

No warrantor of a consumer product may condition his written or implied warranty of such product on the consumer’s using, in connection with such product, any article or service (other than article or service provided without charge under the terms of the warranty) which is identified by brand, trade, or corporate name; except that the prohibition of this subsection may be waived by the

¹³ 15 U.S.C. § 2302(c). A tying arrangement is “the sale or lease of one item (the tying product) on the condition that the buyer or lessee purchase a second item (the tied product) from the same source.” *Amerinet, Inc. v. Xerox Corp.*, 972 F.2d 1483, 1498 (8th Cir. 1992) (citations omitted), *cert. denied*, 506 U.S. 1080 (1993). When a party can use its market power in the tying product to force customers to buy the tied product, competition may be harmed and the market upset. *See Jefferson Parish Hosp. Dist. No. 2 v. Hyde*, 466 U.S. 2, 10 n. 14 (1984).

¹⁴ *See Northern Pacific Ry. Co. v. United States*, 356 U.S. 1, 6 (1958).

¹⁵ *In re Harmsco, Inc.*, 41 Fed. Reg. 34368, 34369 (1976).

Commission [upon an affirmative showing by the party requesting the waiver.]¹⁶

Thus, the Act's anti-tying provision explicitly forbids warrantors from imposing conditions that restrict consumers' purchase options with respect to products used in connection with a warranted product unless the manufacturer provides the service without charge or if the manufacturer applies for, and obtains, a waiver of the provision from the FTC after notice and comment.¹⁷ As discussed in detail below, the Act's tying prohibition has protected consumers from overt tying practices since 1975. However, as also discussed, the Act's legislative history and the FTC's own statements regarding the scope and purpose of Section 102(c) suggest that "indirect" tying arrangements were similarly intended to be prohibited under the Act. As such, the FTC should broaden Section 700.10 of its Interpretations to expressly include these "indirect" tying practices and bring the Interpretations in line with the Clean Air Act's anti-tying regulations which prohibits those arrangements.¹⁸

A. The Legislative History of Section 102(c) Clarifies That the Purpose of the Act Is Designed to Provide Consumers with the an Understanding of Their Warranty Rights and an Assurance of Warranty Performance

The overarching purpose of the Act was to remedy the imbalance that stems from the inequality in bargaining power between consumers and the manufacturers of consumer products. As explained in the Act's legislative history, the law was designed to provide consumers with a better understanding of their warranty rights and assure consumers of warranty performance.¹⁹ The legislative history also further explains the Act's anti-tying provision. Under the Act, for

¹⁶ 15 U.S.C. § 2302(c).

¹⁷ In only a few instances have waivers been sought by warrantors under the waiver exception, but none have been granted. *See In re Sohmer and Co.*, 41 Fed. Reg. 17821 (1976); *In re Harmsco*, 41 Fed. Reg. 34368 (1976); *In re Coleman*, 43 Fed. Reg. 1991 (1978). In denying these applications the FTC consistently applied a very strict test.

¹⁸ *See* 40 CFR § 86.1780-99(a)(4)(iii) (prohibiting manufacturers from "provid[ing] directly or indirectly in any communication to the ultimate purchaser or any subsequent purchaser that the coverage of a warranty under the Clean Air Act is conditioned upon use of any part, component, or system manufactured by the manufacturer or a person acting for the manufacturer or under its control, or conditioned upon service performed by such persons."); *see also* 42 U.S.C. § 7541(c)(3)(B) (warrantors "shall not include any condition on the ultimate purchaser's using, in connection with such vehicle or engine, any component or service... which is identified by brand, trade, or corporate name").

¹⁹ *See Skelton v. General Motors Corp.*, 500 F. Supp 1181, 1189 (N.D. Ill. 1980); S. Rep. No. 93-151, 93d Cong., 1st Sess. 6 (1973); *see also* 119 Cong. Rec. 29,489-90 (1973) (remarks of Sen. Dole); 117 Cong. Rec. 39,609 (1971) (remarks of Sen. Magnuson).

example, “no automobile manufacturer may condition his warranty of an automobile on the use of a named motor oil or on the use of its own automobile parts unless he shows that any other motor oil or automobile parts which are available will not function properly and will not give equivalent performance[.]”²⁰ The legislative history thus clarifies that conditioning of any sort is prohibited unless the warrantor makes a showing that the tying product will not function properly absent the use of a particular product.

B. The FTC Has Recognized That Section 102(c) Should Account for Practices that Extend Beyond the Four Corners of a Warranty Document

In implementing the Act, the FTC engaged in a rulemaking to provide guidance in interpreting the statute that ultimately produced the existing Interpretations. On July 18, 1975, the FTC issued its Implementation and Enforcement Policy of the Act to assist warrantors in complying with the Act.²¹ In that document, the FTC further discussed the purpose of the tying provision of Section 102(c) of the Act, stating that “the provision applies to any such conditions expressed in the written warranty *or enforced by the warrantor or his designated representatives in performing duties pursuant to the warranty.*”²²

In 1977, the FTC issued its final Interpretations of Magnuson-Moss Warranty Act.²³ The *Federal Register* statement accompanying the Interpretations explained the Interpretations and the reasons for modifying its proposed draft rules. In that document, the FTC clarified that “Section 102(c) prohibits tying arrangements in warranties that *effectively restrict the consumer's ability to choose* among competing brands of products or services that can be used in conjunction with the warranted product.”²⁴ Thus, the FTC indicated that tying arrangements that “effectively restrict” consumer choice were prohibited, rather than only those warranties that *expressly* restrict consumer choice. However, the recognition that a tying arrangement may be created by

²⁰ H.R. Rep. No 93-1107 at 36-37 (1974).

²¹ 40 Fed. Reg. 25721 (1975).

²² *Id.* at 25723, ¶ 10 (emphasis supplied).

²³ 42 Fed. Reg. 36112 (July 13, 1977). On August 16, 1976 the FTC released its Proposed Interpretation of Magnuson-Moss, including the predecessor to the modern Section 700.10. Indeed, the proposed rules are the same as those that currently exist, with the exception of the elimination of proposed rule 700.10(d) and a slight modification to 700.10(a). However, beyond the release of proposed rules for comment, no guidance on the tying rule is offered. 41 Fed. Reg. 34654 (Aug. 16, 1976).

²⁴ *Id.* at 36114 (emphasis supplied).

means other than overtly within the four corners of the warranty document has not been officially incorporated into the FTC's Interpretations.

In its final Interpretations, codified at 16 C.F.R. Part 700, the FTC provided its official guidance to Section 102(c). Particularly relevant is Section 700.10(c), which reads:

No warrantor may condition the continued validity of a warranty on the use of only authorized repair service and/or authorized replacement parts for non-warranty service and maintenance. For example, provisions such as, "This warranty is void if service is performed by anyone other than an authorized 'ABC' dealer and all replacement parts must be genuine 'ABC' parts," and the like, are prohibited where the service or parts are not covered by the warranty. These provisions violate the Act in two ways. First, they violate the section 102(c) ban against tying arrangements. Second, such provisions are deceptive under section 110 of the Act, because a warrantor cannot, as a matter of law, avoid liability under a written warranty where a defect is unrelated to the use by a consumer of "unauthorized" articles or service. This does not preclude a warrantor from expressly excluding liability for defects or damage caused by such "unauthorized" articles or service; nor does it preclude the warrantor from denying liability where the warrantor can demonstrate that the defect or damage was so caused.²⁵

Thus, the FTC's interpretation of Section 102(c) attempts to delineate a dual standard of prohibited and permissible practices. First, as clearly established in the statute, a warrantor may not condition warranty coverage on the use of a branded product. However, the Interpretations added the corollary that a warrantor may exclude liability for damages caused by the use of "unauthorized" products under certain conditions. Thus, the Interpretations attempt to set forth a bright line between conditioning warranty coverage on the use of a branded product and the ability to disclaim warranty coverage for damage *caused by* the use of a non-OEM products, a framework that remains the state of the law.²⁶ However, manufacturers have seized upon this distinction to implement indirect conditioning practices. That is, manufacturers know that language that even suggests that warranty coverage *may be* conditioned upon the use of a particular product will be interpreted by the reasonable consumer as a *requirement*, given the

²⁵ 16 C.F.R. § 700.10.

²⁶ See Letter from Lois C. Greisman, Associate Director, Bureau of Consumer Protection, FTC to Aftermarket Industry Association, the Automotive Oil Change Association and the Tire Industry Association (December 12, 2010).

use of certain language. They then use ambiguity to compel consumer to choose between either using the “tied” product or bearing the risk that any later problems that even *might be* related to a functionally equivalent substitute product may not be covered under warranty. Either way the conditioning effect is the same. The FTC’s statements regarding tying suggest that the FTC considers these types of indirect conditioning to be unreasonable, but there is currently no language in the Interpretations that expressly precludes such conduct. As discussed below, however, the Clean Air Act provides a model for an expanded approach to conditioning practices that would cover these arrangements and better protect consumers.

C. The Clean Air Act’s Tying Provision and Implementing Rules Provide Consumers with Better Protection and Should Be Used as a Model to Update the Interpretations

A more comprehensive approach to anti-tying policy already exists elsewhere in Federal law. Indeed, the Clean Air Act and regulations promulgated by the EPA under that statute have an anti-tying provision nearly identical to Section 102(c) of the Act, but with required disclosures designed to prevent tying arrangements. Further, regulations under the Clean Air Act prohibit conditioning arrangements that are created either directly or indirectly.

The Clean Air Act explicitly requires manufacturers to furnish each new motor vehicle or motor vehicle engine with a written emissions warranty that includes instructions for the proper maintenance and use of the vehicle or engine by the ultimate purchaser.²⁷ The Clean Air Act requires vehicle makers to provide two emissions-related warranties -- a product warranty and a performance warranty. The product warranty requires the vehicle manufacturer to warrant that the vehicle is designed, built and equipped so that it conforms with emissions requirements. However, the performance warranty requires the vehicle maker to warrant that the vehicle will comply with applicable emissions requirements as tested under state vehicle emissions inspection programs for a specified warranty period. However, the performance warranty is conditioned on the vehicle being properly maintained and operated.

Under the Clean Air Act, vehicle manufacturers are required to provide the purchaser with written maintenance instructions, but the law provides that these instructions:

[S]hall not include any condition on the ultimate purchaser's using, in connection with such vehicle or engine, any component or

²⁷ See 42 U.S.C. § 7541.

service... which is identified by brand, trade, or corporate name...
[unless a waiver is granted by the EPA].²⁸

This language is nearly identical to the anti-tying provision present in Section 102(c) of the Act. However, in recognition of the fact that conditioning practices may be accomplished either directly or indirectly, the EPA takes a broader approach than the FTC's current formal Interpretations in two major ways. Under the Clean Air Act, warrantors are required to provide disclosure of the consumer's repair rights in a manner not provided for under the Act²⁹ and are prohibited from suggesting, directly or indirectly, that warranty coverage is predicated upon the use of a particular branded product or service.³⁰

First, the Clean Air Act itself requires that the emission warranty and accompanying written instructions for the proper maintenance and use of the vehicle or engine by the ultimate purchaser "shall provide in boldface type on the first page of the written maintenance instructions notice that maintenance, replacement, or repair of the emission control devices and systems may be performed by *any* automotive repair establishment or individual using any automotive part" that complies with the applicable regulations.³¹ In this fashion the Clean Air Act strives to put consumers on notice that the use of any establishment or any compliant part will not void the warranty. No similar requirement exists under the Act or the FTC's Interpretations.

EPA's regulations under Section 207 of the Clean Air Act also explicitly prohibit manufacturers from "provid[ing] *directly or indirectly in any communication* to the ultimate purchaser or any subsequent purchaser that the coverage of a warranty under the Clean Air Act is conditioned upon use of any part, component, or system manufactured by the manufacturer or a person acting for the manufacturer or under its control, or conditioned upon service performed by such persons."³² By including "indirect" conditioning practices within the definition of prohibited tying practices, the Clean Air Act protects consumers against a broader class of

²⁸ 42 U.S.C. § 7541(c)(3)(B).

²⁹ *Id.*

³⁰ *See* 42 U.S.C. § 7541(c)(3)(B); 40 CFR § 86.1780-99(a)(4)(iii).

³¹ 42 U.S.C. § 7541(c)(3)(A) (emphasis supplied).

³² 40 CFR § 86.1780-99(a)(4)(iii) (emphasis supplied).

warrantor practices than the current interpretation of the Act.³³ The language also extends protection beyond the four corners of the warranty document and into the “real world,” more clearly prohibiting the kind of “hard sell” marketing practices that have a conditioning effect upon reasonable consumers. A clear prohibition of indirect warranty tying arrangements would lead to clearer warranty language for consumers, relating to them in plain English what actually is, and what is not, covered under warranty, un-obscured by warrantor legalese that may generate sales of the OEM’s own parts or services. By more expressly addressing these kinds of subtle conditioning tactics, the Clean Air Act and EPA’s implementing regulations provide consumers with a greater clarity regarding their warranty rights. This assures them of warranty performance regardless of the use of non-branded products and precluding the anti-competitive effect of such practices.

IV. THE FTC SHOULD UPDATE SECTION 700.10 OF THE INTERPRETATIONS BASED ON THE ANTI-TYING PROVISIONS OF THE CLEAN AIR ACT

The Coalition believes that the FTC’s Interpretations should be updated to bring the Interpretations into line with the Clean Air Act. First, the Coalition requests that the FTC clarify its Interpretations to more explicitly account for communications that both directly and indirectly suggest that warranty coverage is or may be conditioned upon the use of a branded product or service, as currently required under the Clean Air Act.³⁴ Second, the Coalition recommends that the FTC require disclosure of consumer rights in written automobile warranties in a manner similar to the requirement under the Clean Air Act.³⁵

A. The FTC’s Interpretations Should be Updated to Account for Indirect Conditioning Practices, As Is Currently Required by the Clean Air Act

As discussed in Section III above, the Act and the Clean Air Act share a common anti-tying provision. However, the EPA’s regulations under Section 207 of the Clean Air Act prohibit warrantors from “provid[ing] *directly or indirectly in any communication* to the ultimate

³³ *Accord* 42 U.S.C. § 7541(c)(3)(B) (prohibiting manufacturers from “directly or *indirectly* distinguishing between service performed by the franchised dealers of such manufacturer or any other service establishments with which such manufacturer has a commercial relationship, and service performed by independent automotive repair facilities with which such manufacturer has no commercial relationship” unless a waiver is granted by the [EPA].”) (emphasis supplied).

³⁴ 40 CFR § 86.1780-99(a)(4)(iii).

³⁵ 42 U.S.C. § 7541(c)(3)(A).

purchaser or any subsequent purchaser that the coverage of a warranty under the Clean Air Act is conditioned upon use of any part, component, or system manufactured by the manufacturer or a person acting for the manufacturer or under its control, or conditioned upon service performed by such persons.”³⁶ Section 700.10(c) of Interpretations should be amended to prohibit warrantors from providing directly or indirectly in any communication to the consumer that warranty coverage is conditioned upon use of any article or service which is identified by brand, trade, or corporate name, unless that product or service is provided for free.³⁷

The FTC should determine that the use of certain language, in particular, raises a presumption that the warrantor is indirectly communicating that the coverage of a warranty under the Act is conditioned upon the use of a branded product. For example, statements that provide or imply that the use of a branded product or service is “required,” or equivalent statements, in order to maintain warranty coverage should be prohibited. The Coalition’s proposed modifications of the language of Section 700.10(c) to account for these practices closely tracks the Clean Air Act regulations and language derived directly from the FTC’s Consumer Alert on Auto Warranties stating the rights of consumers under the Act.³⁸ By clarifying the Interpretations in this manner, warrantors will be dissuaded from inappropriately implying or communicating that a named product or service is “required” in order to maintain warranty coverage.

If a warrantor desired to use the word “require” without raising a presumption of indirect tying, they could do so by applying to the FTC for a waiver. The FTC could issue a waiver for the use of the word “require” provided the warrantor satisfies the Commission that the warranted product will function properly only if the article or service so identified is used in connection with the warranted product, and the Commission finds that such a waiver is in the public interest. By clarifying the Interpretations in this manner, warrantors will be dissuaded from using the

³⁶ 40 CFR § 86.1780-99(a)(4)(iii) (emphasis supplied).

³⁷ A proposed modification of the updated 16 C.F.R. § 700.10(c) has been provided as Attachment A.

³⁸ See Federal Trade Commission, Consumer Alert: Auto Warranties, Routine Maintenance, and Repairs: Is Using the Dealer a Must? (July 2011) (“Consumer Alert on Auto Warranties”) (“The Magnuson-Moss Warranty Act makes it illegal for companies to void your warranty or deny coverage under the warranty simply because you used an aftermarket or recycled part.”).

word “require” but will not be prohibited from doing so, provided that they can demonstrate that their product will only operate properly if the identified product is used.

B. The FTC Should Require Similar Anti-Tying Disclosures As Those Required Under the Clean Air Act for Automotive Warranties

As noted above, the Clean Air Act requires warrantors of automobiles to “provide in boldface type on the first page of the written maintenance instructions notice that maintenance, replacement, or repair of the emission control devices and systems may be performed by any automotive repair establishment or individual using any automotive part.” that complies with the applicable regulations.³⁹ Thus, consumers are clearly informed of their rights in a manner that dispels the confusion that may be created by a warrantor’s use of language that suggests that only branded or recommended products may be used in connection with the warranty. The Coalition urges the Commission to address this issue by incorporating the protections of the Clean Air Act into Section 700.10 of the Interpretations.

Unlike most consumer products, car manufacturers are already required to provide a written emissions warranty to purchasers, complete with the anti-tying provision stated in bold print. Providing a conspicuous anti-tying provision directly within the four corners of the warranty document would not entail an additional burden upon automobile warrantors and would preclude consumer confusion by providing conspicuous notice of their rights under the Act. The Coalition proposes that the following language, derived directly from the FTC’s own Consumer Alert on Warranties,⁴⁰ be added to Section 700.10: provided in boldface type on the first page of a written automotive warranty “Warranty coverage cannot be denied unless the warrantor or service provide can demonstrate that the defect or damage was caused by the use of unauthorized articles or services.”⁴¹

The FTC’s Consumer Alert on Auto Warranties succinctly restated the proper protections afforded consumers under the Act. Indeed, many of the Coalition members have actively distributed the Consumer Alert on Warranties to customers. The proper question is how to provide this information to consumers in the most efficient manner and at a time when it is most likely to make a material difference to the consumer. The Coalition submits that the time at

³⁹ 42 U.S.C. § 7541(c)(3)(A).

⁴⁰ Consumer Alert on Auto Warranties.

⁴¹ Proposed 16 C.F.R. § 700.10(d) has been provided as [Attachment B](#).

which information about the protections under the Act is most relevant is when a warranty claim is being considered by a consumer. In attempting to procure maintenance or product service, the average consumer is likely to consult his or her Owners Manual or written warranty, where they would see the mandated disclosure language. By providing notice to consumers in this manner, will make it less likely that a direct or indirect attempt at conditioning will be accepted by the consumer at face value and will help ensure that any denial of warranty coverage is not predicated merely upon the use of a “non-OEM” product or service.

This plain English explanation of consumer and warrantor rights under the Act would provide consumers with notice of their rights in a timely fashion and provide warrantors with a ready explanation for denial of coverage in the event that an aftermarket part or service was, in fact, the cause of the damage. Simply mandating conspicuous disclosure of the language contained in the Commission’s Consumer Alert would not substantively change existing law in any way, other than to provide consumers with clear and timely notice of their existing rights.⁴²

C. The FTC Should Require that Proof Supporting Denied Warranty Claims Be Provided to the Consumer In Writing

Under Section 700.10(c) of the current Interpretations, if it wishes to deny warranty coverage by claiming that an “non-OEM” part or service caused the damage or defect for which the consumer seeks warranty service, the burden is *on the warrantor* to demonstrate that it was the non-OEM part that caused that damage or defect.⁴³ The Commission recently reaffirmed this understanding in a Consumer Alert on Warranties, in which it stated that the “the manufacturer or dealer must show that the aftermarket or recycled part caused the need for repairs before denying warranty coverage.”⁴⁴ However, in practice a warranty claim denial is often provided orally, making challenges to the underlying reason for the denial difficult. This is only compounded by the fact that many consumers are not fully aware of their rights under the Act and are therefore unlikely to realize that a warranty claim cannot be denied unless the

⁴² We recognize that the addition of the additional disclosure may require a minor amendment to 16 C.F.R. 701.3(a).

⁴³ See 16 C.F.R. 700.10(c).

⁴⁴ Consumer Alert on Warranties at 1-2.

manufacturer or dealer can first “show that the aftermarket or recycled part caused the need for repairs.”

Since the manufacturer is already required to have proof of causation before denying a claim in these situations, the Commission should simply require that any denial of warranty coverage be accompanied by a written statement explaining why the warranty coverage was denied, with a copy of the test results or other evidence the manufacturer or dealer is relying on to substantiate its claim that “the aftermarket part or recycled part caused the need for repairs.”⁴⁵ This requirement would merely formalize the existing substantiation requirement for warranty claim denials. However, its impact would be to shift the burden of proof off of the consumer, where it currently rests in practice, and place it back on the service provider, as envisioned by the Act and the Interpretations.

By requiring that manufacturers and dealer provide consumers with the evidence they rely on to show causation, consumers would have a written record with which to challenge any improper denial of coverage. As a result, consumers will be better able to protect their rights under the Act and warrantors and service providers will be deterred from denying claims improperly. It should be noted that this requirement would impose no new or additional cost on manufacturers and dealers. They would simply be required to provide consumers with a copy of the documentation they should already have in hand.⁴⁶

⁴⁵ This recommended provision has analogues in other federal law. Under the Equal Credit Opportunity Act, for example, if a consumer has been denied credit, the law requires notification of the denial in writing, along with the specific reason for the denial of credit. 15 U.S.C. § 1691 *et seq.*; 12 C.F.R. § 202.9(a).

⁴⁶ Additional protection should be afforded by requiring that any such written denial be accompanied by a conspicuous disclaimer that warranty coverage cannot be conditioned upon the use of a branded product and that a denial of warranty coverage for use of an aftermarket part or service requires proof of damage by the denying party.

CONCLUSION

The Coalition urges the FTC to update Section 700.10 of its Interpretations of the Act to account for the evolution of tying practices. The recommendations set forth by the Coalition would protect consumers from *de facto* tying practices that would otherwise be impermissible under the Act, as well as under the Clean Air Act. The FTC should implement these suggested modifications in order to protect consumers from indirect tying practices, especially in the automotive industry. By making these updates, the FTC will be providing consumers with a better understanding of their rights and limit the use of warrantor tying practices.

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**USAP COALITION MEMBERS AND ADDITIONAL
SIGNATORIES TO THESE COMMENTS**

Alliance of Automotive Service Providers
Ashland Inc.
Automotive Aftermarket Industry Association
Automotive Maintenance and Repair Association
Independent Lubricant Manufacturers Association
Automotive Oil Change Association
International Imaging Technology Council
Specialty Equipment Market Association
Petroleum Marketers Association of America
Express Oil Change, LLC
Consumer Electronics Association
Tire Industry Association
Service Station Dealers of America and Allied Trades
Washington Maryland Delaware Service Station and Automotive Repair Association
Independent Garage Owners of North Carolina
Tire Dealers of Western Pennsylvania
Service Station Dealers of Greater New York, Inc.
Alliance of Automotive Service Providers of Missouri
Missouri Tire Industry Association
Service Station and Repair Shop Association of Central New York
Gasoline and Automotive Service Dealers Association
Gasoline and Repair-Shop Association of New York
Repair Shop and Gasoline Dealers of New York
Service Station and Repair Shop Operators of Upstate New York
North Carolina Tire Dealers Association
Chesapeake Automotive Business Association
New Jersey Gasoline, C-Store, and Automotive Association
Tennessee Tire Dealers Association
New England Tire & Service Association
Petroleum Retailers and Auto Repair Association of Western Pennsylvania
Georgia Tire Dealers Association
Coalition for Auto Repair Equality
Alliance of Automotive Service Providers of Pennsylvania
Texas Petroleum Marketers and Convenience Store Association

ATTACHMENT A

PROPOSED REVISIONS TO 16 C.F.R. 700.10(C)

No warrantor may condition, **directly or indirectly in any communication to the ultimate purchaser or subsequent purchaser,** the continued validity of a warranty on the use of only authorized repair service and/or authorized replacement parts for non-warranty service and maintenance. For example, provisions such as, “This warranty is void if service is performed by anyone other than an authorized ‘ABC’ dealer and all replacement parts must be genuine ‘ABC’ parts,” and the like, are prohibited where the service or parts are not covered by the warranty. These provisions violate the Act in two ways. First, they violate the section 102(c) ban against tying arrangements. Second, such provisions are deceptive under section 110 of the Act, because a warrantor cannot, as a matter of law, avoid liability under a written warranty where a defect is unrelated to the use by a consumer of “unauthorized” articles or service. This does not preclude a warrantor from expressly excluding liability for defects or damage caused by such “unauthorized” articles or service; nor does it preclude the warrantor from denying liability where the warrantor can demonstrate that the defect or damage was so caused. **However, no warrantor may provide or imply in any warranty language, or by any actions or statements of the warrantor or its designated representatives, that warranty coverage may be denied simply because the consumer used an aftermarket part (including motor oils or other automotive lubricants), a recycled part, or an aftermarket service.**

ATTACHMENT B

PROPOSED 16 C.F.R. 700.10(D)

Any warrantor providing a warranty to a consumer in connection with a motor vehicle shall clearly disclose that warranty coverage cannot be denied due to the use of an aftermarket part (including motor oils or other automotive lubricants), a recycled part, or an aftermarket service unless the warrantor or service provider can demonstrate that the defect or damage was caused by the use of such part or service.