

FTC STAFF  
ADVISORY OPINION  
OFFERS GUIDANCE  
ON "NEW" PRODUCTS

RETURNED CONSUMER ELECTRONICS PRODUCTS

On December 20, 2006, FTC's Division of Enforcement Bureau of Consumer Protection issued a staff advisory opinion concerning a Sony Electronics Inc. proposal. Under that proposal, Sony would like to resell, as "new," returned consumer electronics products when the company or its authorized vendor can reliably determine that the products have never been turned on and other particular conditions are met.

Many companies in the consumer electronics industry, like Sony, experience high return volumes. Historically, Sony's uniform practice has been to treat all opened and returned products as used. Accordingly, after inspection and servicing, these products are sold as "refurbished" at significantly discounted prices and include a 90-day limited warranty. In its request to FTC staff, Sony said that, since many of the returned products in fact have never been used, the current resale policy is costly to Sony. Sony would like to modify its practices by distinguishing between returned products that previously have been turned on and those that have not—with the latter category of products being eligible for resale as new, if specific criteria are met.

HOW COMPANY WOULD IMPLEMENT POLICY MODIFICATION

In its request, Sony said that it would implement the policy modification by having it or one of its authorized vendors:

- i. introduce reliable product packaging technologies that ensure an objective and verifiable process for identifying returned products that have never been turned on. . . ;
- ii. identify, from among the products returned by retailers to Sony or its authorized vendor, those that have never been turned on;
- iii. visually inspect those products that have not been turned on and reject any damaged products;
- iv. ensure that returned products that satisfy the first two conditions have all of their requisite parts, components, and manuals;
- v. repackage the returned products that meet the above conditions;
- vi. provide the same warranty for these returned products as for new products that have never been sold; and
- vii. return them to a retailer for sale as new products.”

Volume XXVII  
Issue 3  
February 5, 2007  
Page 29

DOES PROPOSED COURSE OF CONDUCT COMPLY WITH FTC ACT AND OTHER COMMISSION POLICY STATEMENTS?

Sony asked for the staff's opinion as to whether Sony's proposed course of conduct complies with the FTC Act and other Commission policy statements.

In its staff advisory opinion letter, James A. Kohm, Associate Director for Enforcement, noted that Section 5 of the FTC Act, which prohibits deceptive acts or practices, governs this issue. (See 15 U.S.C. Section 45.) The letter noted that FTC "has explored the concept of deception under Section 5 in two relevant policy statements." The staff's opinion letter continues:

"Our analysis begins with the Commission's 1969 Enforcement Policy on Merchandise Which Has Been Subjected to Previous Use on Trial Basis and Subsequently Resold as New. . . The 1969 Enforcement Policy concerned the then-prevalent business practice of selling, as new, products that previously had been used on a trial basis by prospective purchasers. . . In that policy statement, the Commission set out the broad principle that deception lies where a marketer '[fails] to disclose material facts relevant to a purchaser's decision to buy or not to buy.' . . . Because consumers have a preference for new or unused products, the Commission found that prior use was material to the purchase decision. . . . The Commission, therefore, concluded that the failure to disclose prior use was unlawful even where returned merchandise had been refurbished to 'good as new' condition. . . The Commission noted, however, that this policy applied only to products that in fact had been 'used,' as distinguished from products that had 'merely been inspected but not used.'

The Commission provided more specific guidance in its Policy Statement on Deception, appended to Cliffdale Assocs., Inc., 103 F.T.C. 110, 174 (1984). The Commission stated that it will find deception where a representation, omission or practice is likely to materially mislead a consumer acting reasonably under the circumstances. . . Materiality is a core element of deception. A misrepresentation or omission is material if it is 'likely to affect a consumer's choice of or conduct regarding the product,' and therefore, injures the consumer who may have otherwise made a different choice."

Volume XXVII  
Issue 3  
February 5, 2007  
Page 30

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CONSUMERS WOULD NOT BE DECEIVED

The FTC staff advisory opinion letter concluded that "Sony would be acting lawfully under Section 5 of the FTC Act in implementing its proposed program, as represented to Commission staff." FTC staff does not—

"believe that consumers would be deceived by Sony's resale of returned consumer electronics within the guidelines described above. As an initial matter, by limiting its program to products that have never been turned on, it appears that Sony would be reselling products that fall within the 'inspected but not used' category referenced in the 1969 Enforcement Policy. However, the analysis does not end there. The products, as a result of prior purchase, may carry defects upon return. For example, a returned product may never have been turned on, but nonetheless may be damaged or missing requisite parts and inserts. Sony's program appears comprehensive enough to avoid such defects and protect consumers from injury, thereby likely rendering the fact of prior purchase immaterial."

**NOTE:** This letter sets out the views of the staff of the Bureau of Consumer Protection, as authorized by the Commission's Rules of Practice. Those views are based on information provided to Commission staff by you. Staff have not engaged in independent factual investigation regarding the proposal. In accordance with Section 1.3(c) of the Commission's Rules of Practice and Procedure, 16 C.F.R. 5 1.3(c), this is a staff opinion only and has not been reviewed or approved by the Commission or by any individual Commissioner, and is given without prejudice to the right of the Commission later to rescind the advice and, where appropriate, to commence an enforcement action. In accordance with Section 1.4 of the Commission's Rules of Practice and Procedure, 16 C.F.R. 5 1.4, your request for advice, along with this response, will be placed on the public record.

LAWYER'S REFERENCE SERVICE

Letter from James A. Kohm, Associate Director for Enforcement, Division of Enforcement Bureau of Consumer Protection, to Christopher Smith, Esq. and Elaine Kolish, Esq., Sonnenschein, Nath & Rosenthal LLP, December 20, 2006.

Volume XXVII  
Issue 3  
February 5, 2007  
Page 31

See also:

*Commission's Enforcement Policy*

Commission's 1969 Enforcement Policy on Merchandise Which Has Been Subjected to Previous Use on Trial Basis and Subsequently Resold as New.

*Commission's Rules of Practice and Procedure*

Section 1.3(c) of the Commission's Rules of Practice and Procedure, 16 C.F.R. 5 1.3(c).

Section 1.4 of the Commission's Rules of Practice and Procedure, 16 C.F.R. 5 1.4.

*Decision*

Cliffdale Assocs., Inc., 103 F.T.C. 110, 174 (1984).

*FTC Act*

Section 5 of the FTC Act (15 U.S.C. Section 45).

*Request for Staff Advisory Opinion*

Request for a Staff Advisory Opinion by Christopher Smith, Esq. and Elaine Kolish, Esq., Sonnenschein, Nath & Rosenthal LLP to Donald S. Clark, Secretary, Federal Trade Commission, November 15, 2006.

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Volume XXVII  
Issue 3  
February 5, 2007  
Page 32