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, 1060, 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 703.2(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, 1014 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

[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.

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[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.[32] The Report suggested that items specified for disclosure by the Act were not intended to be mandatory or exclusive.[33]

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.[34]

General comments on Section 703.2(b) varied widely with consumer representatives generally favoring even more extensive warranty disclosures[35] and a few industry representatives favoring modification[36] or exclusion of disclosures to avoid lengthening the warranty document.[37] 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.[38]

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.[39]

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.[40]

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.[41] 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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[32] 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).

[33] *Id.*

[34] R 1-2-3, 934, Staff Report.

[35] *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).

[36] *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).

[37] *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.

[38] *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.

[39] R 1-2-3, 934.

[40] *Id.*

[41] 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.[50]

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.[51] 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.[52] 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.[53]

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.[54] Armstrong Cork Company commented that such an easy and simple procedure might increase frivolous claims.[55] 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.[56]

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

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[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).

[50] 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.

[51] *TR* 1469. American Arbitration Association noted that: . . . the burden of investigation is kept to a minimum. [S]taff investigation may be manageable."

[52] R 1-4-1, 383, MACAP.

[53] R 1-4-1, 503, AHAM.

"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.[32]

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.[33] 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.[34] 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.[35] 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 recquired by Paragraph (c) in the written warranty or in an operations manual as both reasonable and desirable.[36]

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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[32] R 1-2-3, 1183, Senate Report.

[33] R1-2-3, 948, Staff Report.

[34] *Id.*

[35] 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".

[36] *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 1-8, 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.[67]

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.[70] 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.[71]

Christopher Wheeler, Center for the Study of Responsive Law, offered the most detailed explanation for the necessity of media advertising.[72] Wheeler stressed that advertising would be the only certain way to ensure Mechanism visibility.[73] He recommended that warrantors be required to engage in media advertising at a cost of at least 1 percent of gross sales[74] since companies routinely spend up to 25 percent of their gross sales in product advertising.[75] Wheeler found the proposed requirements too general to be enforced.[76]

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, 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.

[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).

[67] 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."

[69] *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).

[70] R 1–6, 58, Center for the Study of Responsive Law.

[71] *See, e.g.*, R 1–8, 147, Joseph P. Thomas, Executive Director, Wisconsin Governor's Council for Consumer Affairs felt media advertising would create increased awareness of the entire warranty system.

[72] R 1–6, 56–57, Center for the Study of Responsive Law.

[73] *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."

[74] *Id.* at 57.

[75] *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."

[76] *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.[45] Consumer representatives noted that some consumers may have valid reasons for not contacting a retailer or warrantor upon experiencing a dispute.[46]

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.[47] Comments indicated that consumers, frustrated and discouraged by this shuttling process, sometimes drop their complaints, thus leaving some disputes unsolved.[48]

(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.[49]

Two comments suggested that the Commission promulgate rules for warrantor internal complaint-handling procedures.[50] 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.[51] 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.[52] By keeping track of complaints referred to a warrantor, the Mechanism would thus minimize consumer drop-out.[53] 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.[54]

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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[45] TR 1647, Professor Lawrence Feldman, University of Illinois, Chicago.

[46] *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.

[47] R 1–6, 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 1–5, 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.

[48] *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).

[49] *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.

[50] *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).

[51] *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.

[52] *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. . . ."

[53] *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.

[54] *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.[84] The provision engendered little consumer comment. MACAP favored the provision as a statement of good intent by the warrantor.[85] Industry comments on the provision were generally unfavorable.[86] One industry comment suggested that the provision is burdensome since warrantors have no clear way of determining whether consumers are satisfied.[87] The provision could thus discourage warrantors from incorporating Mechanisms.[88] It was noted that frivolous claims sometimes arise and the necessity of forwarding such complaints could increase costs to the Mechanism and warrantors.[89]

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.[90] 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.[91] Aksen suggested the written denial of a warranty dispute would provide the Mechanism with a firm basis to begin investigatory work on the dispute.[92]

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.[93] 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.

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[84] R 1-2-3, 954.

[85] 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).

[86] *But see*, R 1-3-1, 290, Union Carbide Corporation (suggested that the phrase "immediately forward" be changed to "promptly forward").

[87] R 1-4-1, 506, AHAM; R 1-4-1, 48, NAPM.

[88] R 1-3-1, 63-64, Mohasco.

[89] TR 1302, Indianapolis, Indiana Better Business Bureau; R 1-4-1, 96, NEMA; TR 84-85, Council of Better Business Bureaus.

[90] 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.

[91] TR 1482-1485, American Arbitration Association.

[92] *Id.* at 1485

[93] 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.[105]

The provision engendered few comments on the public record.[106] 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.[107]

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.[108]

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.[109]

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.[110] Two industry representatives indicated that the requirements was superfluous,[111] and noted that good faith would always depend on the goodwill of the warrantor.[112] Two comments indicated that the provision as proposed seeed incorrectly to imply that decisions of the Mechanism were binding on the warrantor.[113] One comment suggested that the Rule include a prima facie "good faith" defense for warrantors in FTC or possible court actions.[114]

Consumer representatives commented that the provision as written was too general to permit effective enforcement.[115] 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.[116] One consumer representative suggested that a warrantor be obliged to abide by 85% of all decisions made by the Mechanism.[117] However, another consumer representative noted that consumers may submit groundless complaints.[118]

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-

[105] R 1-2-3, 955-957, Staff Report.

[106] *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).

[107] R 1-2-3, 957-958, Staff Report.

[108] TR 16, Virginia Knauer, Office of Consumer Affairs, HEW. *But, see*, R 1-4-1, 506, AHAM (provision unnecessary).

[109] 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.

[110] *See, e.g.*, R 1-3-2, 379, Alcan Building Products; R 1-4-1, 96-97, NEMA.

[111] *See, e.g.*, R 1-4-1, 83, NRMA; R 1-4-1, 49, NAFM.

[112] *See, e.g.*, TR 648, NRMA.

[113] *See, e.g.*, R 1-3-1, 63, Mohasco; R 1-3-1, 578, Quarles & Brady, Milwaukee, Wisconsin.

[114] TR 353, Warranty Review Corporation.

[115] *See, e.g.*, TR 2525, San Francisco Bar Committee on Consumer Rights; R 1-6, 53, Center for the Study of Responsive Law.

[116] *See, e.g.*, TR 2525, San Francisco Bar Committee on Consumer Rights.

[117] R 1-6, 53, Center for the Study of Responsive Law.

[118] 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, NAPM; *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".

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[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, 283, 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

[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 698, Cleveland Citizen Action Movement.
[149] TR 35, CFA (annually); TR 698, 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, 507-08, AHAM; TR 126-127, MACAP; TR 1225-1226, Whirlpool.
[151] R 1-2-3, 1429, 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, 388, MACAP.
[176] R 1-2-3, 973, Staff Report.
[177] R 1-4-1, 388.
[178] R 1-8, 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."[188]

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,[189] 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, CBBB; 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 1–6, 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 1–8, 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 1–3–3, 928 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 128–129, 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; TR 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-

[216] R 1-6, 76.
[217] R 1-4-1, 97-98.
[218] R 1-4-1, 97-98; R 1-3-1, 200, 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, SCM; 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, 58-59, 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.[226] As the Staff Report makes clear,[227] 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.[228] 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.[229] 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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[226] TR 17, Virginia Knauer, Office of Consumer Affairs, HEW; TR 260–261, NCL.

[227] R 1–2–3, 993.

[228] TR 91–92, CBBB; TR 1466–1467, AAA.

[229] 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),[287] 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.[288]

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.[289]

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.[290] 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.[291] 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.[292]

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.[293] The practice is widely considered to be a natural and logical extension of complaint handling,[294] 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,[295] 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 [296]

(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

[287] Former Section 703.6(a) (3), (4), (7), (8) and (9), respectively.

[288] R 1-4, 394-395, Major Appliance Consumer Action Panel; R 1-4-1, 308-309, Furniture Industry Consumer Advisory Panel.

[289] 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.

[290] 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.

[291] R 1-2-3, 998.

[292] 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*.

[293] R 1-2-3, 998, Staff Report.

[294] *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.

[295] 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*.

[296] 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.[250] A considerable range of opinion was presented on the confidentiality issue under Section 703.8(b). The Commission rationable 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 (c) 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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[250] *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.

[254] TR 1521, Better Business Bureau, Chicago, Illinois; TR 1469-1470, American Arbitration Association.

[255] *See, e.g.*, R 1-6, 63-64, Christopher Wheeler; and the discussion relating to opposition to the confidentiality provision, *infra*.

[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 1-4-1, 87, National Retail Merchants Association; R 1-3-1, 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.[285] Because of general support and acceptance among consumer representatives and existing dispute handling organizations,[286] 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.[287]

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.[288] 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.
703.1 Definitions.
703.2 Duties of warrantor.

MINIMUM REQUIREMENTS OF THE MECHANISM

703.3 Mechanism organization.
703.4 Qualification of members.
703.5 Operation of the mechanism.
703.6 Recordkeeping.
703.7 Audits.
703.8 Openness of records and proceedings.

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.

[285] R 1–2–3, 381, Alcan Building Products; R 1–3–1, 291, Union Carbide Corporation; Tr 437, Electronic Industries Association.

[286] 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."

[287] 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).

[288] *See, e.g.*, R 1–2–3, 1805, PICAP; 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.

Effective: July 4, 1976.

Promulgated by the Federal Trade Commission December 31, 1975.

VIRGINIA M. HARDING,
Acting Secretary.

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