



UNITED STATES OF AMERICA
FEDERAL TRADE COMMISSION
WASHINGTON, D.C. 20580

Division of Enforcement
Bureau of Consumer Protection

December 20, 2006

Christopher Smith, Esq. and Elaine Kolish, Esq.
Sonnenschein, Nath & Rosenthal LLP
1301 K Street, NW
Suite 600, East Tower
Washington, DC 20005-3364

Dear Mr. Smith and Ms. Kolish:

This letter responds to your request on behalf of your client, Sony Electronics Inc. ("Sony"), for a staff advisory opinion regarding Sony's proposal to resell, as "new," returned consumer electronics products when the company or its authorized vendor can reliably determine that the products have never been turned on and other particular conditions are met. This advisory opinion is based on the information that you have provided to us in your letter of November 15, 2006. All references to facts regarding your proposal are based on your representations; we have not conducted an independent investigation, or otherwise verified the information that you provided.

You note that Sony, as well as other companies in the consumer electronics industry, experience high return volumes.¹ Sony's uniform practice has been to treat all opened and returned products as used. As a result, following inspection and servicing, these products are sold as "refurbished" at significantly discounted prices and include a 90-day limited warranty. You state that, because many of the returned products in fact have never been used, the current resale policy comes at a substantial financial cost to the company. Sony proposes modifying its practices by distinguishing between returned products that previously have been turned on and those that have not,² with the latter category of products being eligible for resale as new, if specific criteria are met.

¹ Consumer electronics products sold by Sony include video products (DVD players/recorders, digital cameras, camcorders, televisions, and combination TV/VCR or TV/DVD players), computers (desktop and notebook PCs and related equipment), video game systems, audio products (desktop, component and portable devices), cell phones, portable digital assistants, and vehicle electronics.

² Sony would regard a product as having been "turned on" if electrical power had been applied to any of the product's circuitry.

You state that Sony would implement the policy modification by having it or one of its authorized vendors:

- i. introduce reliable product packaging technologies that ensure an objective and verifiable process for identifying returned products that have never been turned on.³
- ii. identify, from among the products returned by retailers to Sony or its authorized vendor, those that have never been turned on;
- iii. visually inspect those products that have not been turned on and reject any damaged products;
- iv. ensure that returned products that satisfy the first two conditions have all of their requisite parts, components, and manuals;
- v. repackage the returned products that meet the above conditions;
- vi. provide the same warranty for these returned products as for new products that have never been sold; and
- vii. return them to a retailer for sale as new products.

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

Section 5 of the FTC Act, which prohibits deceptive acts or practices, governs the issue. 15 U.S.C. § 45. The Commission has explored the concept of deception under Section 5 in two relevant policy statements.

Our analysis begins with the Commission's 1969 Enforcement Policy on Merchandise Which Has Been Subjected to Previous Use on Trial Basis and Subsequently Resold as New. 34 Fed. Reg. 176-77. The 1969 Enforcement Policy concerned the then-prevalent business practice of selling, as new, products that previously had been used on a trial basis by prospective purchasers. *Id.* at 176. In that policy statement, the Commission set out the broad principle that deception lies where a marketer "[fails] to disclose material facts relevant to a purchaser's decision to buy or not to buy." *Id.* Because consumers have a preference for new or unused products, the Commission found that prior use was material to the purchase decision. *Id.* The Commission, therefore, concluded that the failure to disclose prior use was unlawful even where

³ Some of these technologies include internal chips or clocks with the ability to indicate whether a product has been turned on; and tamper-evident tape, seals, or labels affixed to AC plugs, connectors, or battery compartments.

returned merchandise had been refurbished to "good as new" condition. *Id.* at 177. The Commission noted, however, that this policy applied only to products that in fact had been "used," as distinguished from products that had "merely been inspected but not used." *Id.*

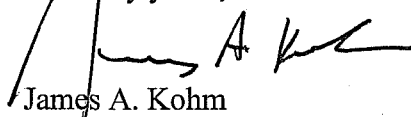
The Commission provided more specific guidance in its Policy Statement on Deception, appended to *Cliffdale Assocs., Inc.*, 103 F.T.C. 110, 174 (1984). The Commission stated that it will find deception where a representation, omission or practice is likely to materially mislead a consumer acting reasonably under the circumstances. *Id.* at 176. Materiality is a core element of deception. A misrepresentation or omission is material if it is "likely to affect a consumer's choice of or conduct regarding the product," and therefore, injures the consumer who may have otherwise made a different choice. *Id.* at 182-83.

Pursuant to the guidance provided by these policy statements, we do not believe that consumers would be deceived by Sony's resale of returned consumer electronics within the guidelines described above. As an initial matter, by limiting its program to products that have never been turned on, it appears that Sony would be reselling products that fall within the "inspected but not used" category referenced in the 1969 Enforcement Policy. However, the analysis does not end there. The products, as a result of prior purchase, may carry defects upon return. For example, a returned product may never have been turned on, but nonetheless may be damaged or missing requisite parts and inserts. Sony's program appears comprehensive enough to avoid such defects and protect consumers from injury, thereby likely rendering the fact of prior purchase immaterial. Therefore, we believe Sony would be acting lawfully under Section 5 of the FTC Act in implementing its proposed program, as represented to Commission staff.

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

We appreciate your taking the time to write to us.

Sincerely yours,



James A. Kohm

Associate Director for Enforcement