



THE CHAIRMAN

FEDERAL TRADE COMMISSION

WASHINGTON, D.C. 20580

July 29, 2010

The Honorable Edward Markey
Chairman
Subcommittee on Energy and Environment
United States House of Representatives
Washington, D.C. 20515

Dear Chairman Markey:

Thank you for your recent letter communicating concerns about a report that formaldehyde-contaminated trailers previously provided by the Federal Emergency Management Agency (FEMA) to hurricane victims have been repurposed as living quarters for workers involved in the BP deepwater Horizon clean up. In particular, your letter indicates that FEMA, working with the General Services Administration (GSA), sold over 100,000 trailers through a public auction process. You indicate that as a prerequisite for sale of these trailers, GSA required that purchasers sign an agreement that the trailer would not be used for housing, that the purchasers post labels on the trailers stating "Not to be used for housing," and that the purchaser read documentation about the impacts of formaldehyde exposure. Despite these safeguards, a recent news article indicates that the purchasers have resold some of these trailers to workers without the required placards.

Based on these facts, you asked: 1) whether the resale of these trailers as housing constitutes a violation of Section 5 of the FTC Act; 2) if so, what actions, if any, the FTC is taking in response to this matter; 3) what remedies would be available under the FTC Act to those who purchase such trailers; and 4) what penalties would be applicable to the resellers.

The Commission has been directed by Congress to act in the interest of all consumers to prevent deceptive or unfair acts or practices in commerce, pursuant to the Federal Trade Commission Act, 15 U.S.C. §§ 41-58. In interpreting Section 5 of that statute, 15 U.S.C. § 45, the Commission has determined that a representation, omission, or practice is deceptive if it is likely to mislead consumers acting reasonably

under the circumstances; and if it is material, that is, likely to affect consumers' conduct or decisions with respect to the product at issue.¹ Section 5 of the FTC Act also provides that an act or practice is unfair if it causes or is likely to cause substantial injury that is not outweighed by countervailing benefits to consumers or to competition; and it is not reasonably avoidable by consumers themselves.²

In this particular case, the resellers may have engaged in unfair practices under Section 5 of the FTC Act if they failed to disclose the formaldehyde risk to purchasers.³ It also is possible that they engaged in deceptive practices under the FTC Act if they implied or stated that the structures were appropriate for housing. However, any definitive conclusion would require further investigation. If the sale of these trailers constitutes violations of Section 5 of the FTC Act, the Commission may seek a variety of remedies including equitable monetary relief, cease and desist orders, bans, and disclosure remedies. Civil penalties, however, would not be available. The remedy pursued would depend on the facts of the particular case.⁴

In determining whether to take enforcement or other action, however, the Commission considers a number of facts, including the type of violation alleged; the nature and amount of consumer injury at issue; the number of consumers affected; the likelihood of preventing future unlawful conduct and securing redress or other relief; and whether another agency is better situated to address the problem.

In this instance, the FEMA trailers were sold through actions conducted by GSA. At an April 28 hearing before the Subcommittee on Commerce, Trade and Consumer Protection, Steven Kempf, Acting Commissioner of GSA's Federal Acquisition Service,

¹ *Novartis Corp.*, 127 F.T.C. 580, 679 (1999), *aff'd and enforced*, 223 F.3d 783 (D.C. Cir. 2000); *Stouffer Foods Corp.*, 118 F.T.C. 746, 798 (1994); *Kraft, Inc.*, 114 F.T.C. 40, 120 (1991), *aff'd and enforced*, 970 F.2d 311 (7th Cir. 1992); *Removatron Int'l Corp.*, 111 F.T.C. 206, 308-09 (1988); *International Harvester Co.*, 104 F.T.C. 949, 1056 (1984); *Cliffdale Assocs.*, 103 F.T.C. 110, 164-65 (1984). See also generally *Federal Trade Commission Policy Statement on Deception*, appended to *Cliffdale Assocs.*, 103 F.T.C. at 174-83.

² Section 5(n) of the FTC Act, 15 U.S.C. § 45(n). The Commission previously relied on similar criteria to define the scope of its authority to prohibit unfair acts or practices pursuant to Section 5(a) of the FTC Act. See, e.g., *Orkin Exterminating Co.*, 108 F.T.C. 263, 362 (1986); *International Harvester Co.*, 104 F.T.C. at 1061. See also generally *Federal Trade Commission Policy Statement on Unfairness*, appended to *International Harvester Co.*, 104 F.T.C. at 1070-76.

³ Under the FTC Act, "Practices that have been found misleading or deceptive in specific cases include . . . sales of hazardous or systematically defective products or services without adequate disclosures." *Federal Trade Commission Policy Statement on Deception*, appended to *Cliffdale Assocs.*, 103 F.T.C. 110, 174 (1984).

⁴ See 15 U.S.C. §§ 53 & 57b; *FTC v. H.N. Singer, Inc.*, 668 F.2d 1107 (9th Cir. 1982).

stated that after learning of the formaldehyde levels, GSA in consultation with FEMA developed a certification statement to inform purchasers at the auctions of the potential formaldehyde levels, restrictions on the use of the trailers as housing, and the requirement that the purchaser pass along this information to a subsequent buyers of a trailer.⁵ At the same hearing, Acting Commissioner Kempf testified that violation of the certification statement and restrictions is subject to criminal penalties under federal law. He also testified that on March 2, 2010, GSA sent an email to purchasers of the trailers reminding them of the certification requirement and stating that potential violations would be investigated by to the GSA's Office of Inspector General. Finally, in response to questions from members, Acting Commissioner Kempf testified that the Inspector General could refer violations to the U.S. Attorney for prosecution. In light of GSA's ongoing efforts to address the potential criminal violations that have occurred in connection with reported resale and reuse of these trailers, it appears that a criminal action would likely yield the strongest remedy for consumers. However, FTC staff will continue to monitor the situation.

Thank you again for your letter. If you or your staff have any additional questions or comments or wish to share additional information, please feel free to contact me or have your staff contact Jeanne Bumpus, Director of our Office of Congressional Relations, at (202) 326-2946.

Very truly yours,



Jon Leibowitz

⁵ Statement of Steven Kempf, Acting Commissioner, Federal Acquisition Service, U.S. General Services Administration, before the Subcommittee on Commerce, Trade and Consumer Protection of the Committee on Energy and Commerce, US House of Representatives, April 28, 2010.