

**Supporting Statement For
Mail or Telephone Order Merchandise Rule
16 C.F.R. Part 435
(OMB Control No. 3084-0106)**

(1) Necessity for Collecting the Information

Under authority of the FTC Act, 15 U.S.C. § 41 *et seq.*, the Federal Trade Commission (“FTC” or “Commission”) promulgated the Mail Order Merchandise Trade Regulation Rule (the “MOR”), 16 C.F.R. Part 435, on October 22, 1975 (40 Fed. Reg. 49,492). The MOR became effective on February 2, 1976 (40 Fed. Reg. at 49,494). On September 21, 1993, the Commission amended the MOR under authority of Section 18 of the FTC Act, 15 U.S.C. § 57a, to include merchants who solicited orders for merchandise by telephone (including by telefax or by computer through the use of a modem), and renamed it the “Mail or Telephone Order Merchandise Rule” (the “MTOR” or “Rule”). 58 Fed. Reg. 49,096. The amended Rule took effect on on March 1, 1994. 58 Fed. Reg. at 49,123.

The MTOR implements Section 5 of the FTC Act, 15 U.S.C. § 45, and is designed to prevent interstate direct marketers from unilaterally changing the shipment time in a merchandise sales contract, a material term. Without the Rule, consumers would be faced with unexplained delays or failures of direct marketers to ship mail or telephone order merchandise, or failures to provide refunds for unshipped mail or telephone order merchandise.

The rulemaking record for the MOR -- which included, among other things, thousands of consumer complaints to state and federal authorities -- demonstrated that many merchants were failing to: (a) ship mail order merchandise to consumers in the time they promised or in the time consumers reasonably expected; (b) ship the merchandise at all; and/or (c) failing to provide prompt or full refunds for unshipped merchandise.

The MTOR rulemaking record demonstrated that, as merchants increasingly turned to the telephone for soliciting or taking orders for merchandise, the delayed shipment and refund problems of the mail order industry had migrated to this segment of the direct marketing industry. When the Commission issued the MTOR, it defined “telephone” and, by extension, “telephone order sales,” in a manner that would encompass direct sales through facsimile and the Internet.

The MTOR requires merchants to disclose to customers when shipment is delayed and, absent customer consent to delayed shipment, to refund customer payments for unshipped merchandise.¹ All notices of delay must afford consumers the means to exercise their options at

¹ Merchants must seek customer consent for delayed shipment if they cannot ship within the time initially stated or, if not stated, for delays exceeding 30 days after receiving a properly completed order from

(continued...)

Dated: January 2007

the merchant's expense. The MTOR also requires the merchant, without being asked, to cancel the order and make a full and prompt refund whenever (1) the merchant determines that it will never be able to ship the merchandise, (2) the merchant fails to provide a required notice of delay within the originally promised shipment time or within any revised shipment time, (3) the consumer exercises any cancellation option before the merchant ships, or (4) the merchant is unable to ship and the consumer fails to agree to delayed shipment within the time required for expressly agreeing to delay. When the MTOR requires the merchant to make a refund, it also requires disclosure of this fact, either by the act of making the refund itself (where the merchandise was paid for originally by cash, check or money order), or by notifying the consumer that any charge to the consumer's charge account will be reversed or that the merchant will take no action that will result in a charge.

The MTOR contains no recordkeeping requirements *per se*. However, it establishes a rebuttable presumption against merchants who lack documentary proof of mechanisms to assure timely shipments. Similarly, absent supportive records, it is presumed that a merchant has failed to comply with the Rule's requirements for timely delay option notices and refunds. See 16 C.F.R. §§ 435.1(a)(4) and 435.1(d).

The Rule's reasonable basis requirements and associated rebuttable presumptions are interpreted by prudent industry members as requiring merchants to keep records of at least the merchant's procedures for (1) estimating consumer demand for and securing adequate sources of supply for each item of merchandise offered for sale by mail, telephone, or the Internet, (2) receiving and fulfilling orders, (3) accurately recording information relating to each order, and (4) assuring that the merchant's usually automated communications with consumers about any changing fulfillment circumstances comply with the notice and refund provisions of the MTOR. Likewise, although there is no requirement that such records be maintained for any period, prudent merchants likely interpret the five-year limitation period under 28 U.S.C. § 2462 as the appropriate time for keeping these records for purposes of federal law.

(2) Use of the Information

The primary purpose of the Rule's disclosure requirements is to provide consumers timely information on the shipment status of their orders, and to afford them the power to consent to any changed shipment time or to rescind the contract and promptly obtain the return of their money. Using this information, consumers can seek alternative sources of the merchandise and make time-effective purchasing decisions. The purpose of the Rule's recordkeeping provisions is to enable merchants to demonstrate compliance with the Rule and, absent such substantiation, provide grounds for possible Commission enforcement action for non-compliance.

¹ (...continued)
the buyer or, regarding seller-financed orders, delays beyond 50 days thereafter. 16 C.F.R. § 435.1(a)(1)(i)-(ii).

(3) Consideration of the Use of Improved Information Technology to Reduce Burden

Information processing hardware and software implicitly can be a part of the “systems and procedures which assure compliance” alluded to by the rule’s rebuttable presumptions relating to judicial enforcement of the MTOR, 16 C.F.R. §§ 435.1(a)(4) and 435.1(d). Most merchants presently use -- or employ fulfillment houses that use -- advanced information processing technology to comply with the rule. In compliance with the Rule, most merchants record inventory and consumer order information in computers programmed to generate packing slips and address labels in time for shipment. For goods that computer systems identify as being on back order, the systems may also be programmed to generate rule-compliant delay notices or refunds within the times required by the Rule. Additionally, many merchants and fulfillment houses have acquired and integrated with their information processing technology bar code scanner capabilities that provide information in real time on the status of each order, from generating the packing slip to placing the order in the shipper’s hands. Thus, computerized records of order receipt and timely shipment or delay notification or refund are the merchant’s primary evidence of rule compliance.

Under the Commission’s rule review program, patterned loosely after the Regulatory Flexibility Act, 5 U.S.C. § 601 et seq., the Commission periodically solicits comments on ways to minimize the recordkeeping burden demonstrating rule compliance through the use of automated collection techniques and other forms of information technology. Under its first review of the MTOR (September 21, 1993), based on input from the direct marketing industry, the Commission eliminated provisions in the MOR creating rebuttable presumptions of non-compliance where the merchant uses means other than first class mail to provide rule-required delay option notices to consumers. By eliminating these presumptions the Commission indicated that it would facilitate the use by industry of other or more convenient means to provide notification, such as by telephone, 58 Fed. Reg. 49,096, 49,111-12. As Internet sales have grown, so too has the use of the Internet by businesses to provide these rule-required notifications to consumers.

The Commission has additionally solicited input on ways to reduce burden through its Paperwork Reduction Act-required notices to the public when seeking OMB clearance to collect information associated with the MTOR (see item #8 of this Supporting Statement). The instant submission is the latest example of that. Finally, consistent with the Government Paperwork Elimination Act, Pub. L. No. 105-277, Title XVII, 112 Stat. 2681-749, nothing in the Rule prescribes that disclosures be made, records filed or kept, or signatures executed, on paper or in any particular format that would preclude the use of electronic methods to comply with the Rule's requirements.

(4) Efforts to Identify Duplication

The MOR has been in effect since February 2, 1976, and the MTOR has been in effect since March 1, 1994. Throughout, FTC staff have worked closely with the industry. Staff attorneys practicing in this area verify that the disclosure and substantiation requirements of the rule do not duplicate any other requirements.

(5) Efforts to Minimize Burden on Small Organizations

The rule's disclosure and substantiation requirements are designed to impose minimal burden on affected members of the industry, regardless of size. The Commission's 1986 Regulatory Flexibility Act review of the MOR found that, based on an industry-wide survey of direct marketers, nearly half of all small and large firms surveyed reported no incremental compliance costs and that an additional 27% reported compliance expenditures less than \$500 annually. Among affected entities, 81% of small businesses and 65% of large businesses reported that eliminating the MOR would not alter their business practices because "[m]ost mail order firms, large and small, feel the concept of the [Mail Order] rule is sound business practice that enhances the growth and development of a mail order business and they do not wish to have the Rule eliminated." 51 Fed. Reg. 1516, 1517 (1986). Moreover, when the Commission promulgated the MTOR on September 21, 1993, it found during its Regulatory Flexibility Act analysis of the proposed amendments to the MOR that the amended rule did not have a significant impact upon a substantial number of small entities, 58 Fed. Reg. 49,095, 49,118-20.

The Commission continues to examine this and other rules regularly to determine, among other things, whether new technology or changes in technology can be used to reduce regulatory burdens that the rule may impose. As previously stated, the Paperwork Reduction Act requires agencies to issue notices when seeking OMB clearance to collect information. These notices provide added means to explore ways to reduce burdens relating to a given collection of information.

(6) Consequences of Conducting the Collection Less Frequently

The substantiation requirements of the MTOR ensure that consumers are provided reliable shipment information in the merchant's solicitation of order sales and in required notifications of delay. The disclosure and refund requirements ensure that consumers are notified of delays and empowered to cancel orders and obtain prompt refunds in delayed shipment situations. To do less than this would circumvent the Rule's purpose.

(7) Circumstances Requiring Collection Inconsistent With Guidelines

The collection of information in the Rule is consistent with all applicable guidelines contained in 5 C.F.R. § 1320.5(d)(2).

(8) Consultation Outside the Agency

The Commission's staff have been in contact with interested industry members and trade associations since before the 1975 MOR rulemaking to the present. During the Regulatory Flexibility Act review of the Rule in the 1993 MTOR rulemaking, the Commission sought and received comments from the public regarding the benefits and burdens attributable to the rule, 58 Fed. Reg. 49,096, 49,118-120. Representatives of the industry have informed the Commission that the information collection burdens imposed by the MTOR have lessened over time as technology has improved. In the years since, in connection with its periodic PRA clearance requests for the Rule, FTC staff has sought public comment on the Rule's information collection requirements and on staff's estimates of paperwork burden associated with it. No comments were received in that regard. As a prelude to this request, the Commission again sought such public comment. Again, no comments were received.² Pursuant to the OMB regulations that implement the PRA (5 CFR Part 1320), the FTC is providing a second opportunity for public comment while seeking OMB approval to extend the existing paperwork clearance for the Rule.

(9) Payments and Gifts to Respondents

Not applicable. The Rule contains no provisions for payments or gifts to respondents.

(10) & (11) Assurances of Confidentiality/Matters of a Sensitive Nature

To the extent that the Commission collects information for law enforcement purposes under the Rule's aforementioned recordkeeping provisions, the confidentiality measures of Section 21 of the FTC Act, 15 U.S.C. § 57b-2, will apply.

(12) Estimated Burden/Associated Labor Costs

Estimated total annual hours burden: 3,083,000 hours (rounded up to the nearest thousand).

In its 2003 PRA-related Federal Register Notices³ and corresponding submission to OMB, FTC staff estimated that 53,600 established companies each spend an average of 50 hours per year on compliance with the Rule, and that approximately 1,800 new industry entrants spend an average of 230 hours (an industry estimate) for compliance measures associated with start-up.⁴

² See 71 Fed. Reg. 60,530 (October 13, 2006).

³ 68 FR 58683 (Oct. 10, 2003); 68 FR 74580 (Dec. 24, 2003).

⁴ Most of the estimated start-up time relates to the development and installation of computer systems geared to more efficiently handle customer orders.

Thus, the total estimated hours burden was 3,094,000 hours, rounded up to the nearest thousand [(53,600 established companies x 50 hours) + (1,800 new entrants x 230 hours)].

No provisions in the Rule have been amended or changed since staff's prior submission to OMB. Thus, the Rule's disclosure and recordkeeping requirements remain the same. Since then, however, the number of businesses engaged in the sale of merchandise by mail or by telephone has increased. Comparing data from the U.S. Department of Commerce 2002 Statistical Abstract with data from the 2006 Statistical Abstract,⁵ between 1999 and 2002 the number of businesses subject to the MTOR grew from 51,800 to 54,500, or an average increase of 675 new businesses a year [(54,500 businesses in 2002 - 51,800 businesses in 1999) ÷ 4 years]. Assuming this growth rate continues, the average number of established businesses during the three-year period for which OMB clearance is sought for the Rule would be 58,550.⁶

Conversely, based on the 2002 and 2006 Statistical Abstract data, FTC staff is reducing its estimate of new businesses per year from 1,800 to 675. Thus, staff estimates that the average number of affected entities during the three-year OMB clearance period will be approximately 59,225 (58,550 established companies + 675 new entrants).

Accordingly, staff estimates total industry hours to comply with the MTOR by then will be 3,083,000 hours [(58,550 established companies x 50 hours) + (675 new entrants x 230 hours)], rounded to the nearest thousand.⁷

This is a conservative estimate. Arguably much of the estimated time burden for disclosure-related compliance would be incurred even absent the Rule. Industry trade associations and individual witnesses have consistently taken the position that compliance with the MTOR is widely regarded by direct marketers as being good business practice. The Rule's notification requirements would be followed in any event by most merchants to meet consumer expectations regarding timely shipment, notification of delay, and prompt and full refunds.

⁵ *Comparing* Table 1000, "Retail Trade – Establishments, Employees and Payroll: 1999 and 2000," Statistical Abstract of the United States, 122nd edition, 2002, U.S. Department of Commerce, Economics and Statistics Administration, *with* Table 1015, "Retail Trade – Establishments, Employees and Payroll: 2000 and 2002," Statistical Abstract of the United States, 125th edition, 2006, U.S. Department of Commerce, Economics and Statistics Administration.

⁶ As discussed above, the existing OMB clearance for the Rule expires on January 31, 2007 and the FTC is seeking to extend the clearance through January 31, 2010. The average number of established businesses during the three-year clearance period was determined as follows: [(54,500 businesses in 2002 + (675 new entrants per year x 5 years)) + (54,500 businesses in 2002 + (675 new entrants per year x 6 years)) + (54,500 businesses in 2002 + (675 new entrants per year x 7 years))] ÷ 3 years.

⁷ Staff estimates that approximately 90% of the burden incurred by covered entities is due to compliance with the Rule's disclosure requirements, with the remaining burden attributed to compliance with the Rule's implicit recordkeeping requirements.

Providing consumers with notice about the status of their orders fosters consumer loyalty and encourages repeat purchases, which are important to direct marketers' success. Thus, it appears that much of the time and expense associated with Rule compliance may not constitute "burden" under the PRA⁸ although the above estimates account for it as such.

The mail-order industry has been subject to the basic provisions of the Rule since 1976 and the telephone-order industry since 1994. Thus, businesses have had several years (and some have had decades) to integrate compliance systems into their business procedures. Since staff's preceding PRA submission to OMB for the Rule, many businesses have upgraded the information management systems they need, in part, to comply with the Rule, and to track orders more effectively. These upgrades, however, were needed to deal with growing consumer demand for merchandise resulting, in part, from increased public acceptance of making purchases over the telephone and, more recently, the Internet.

Accordingly, most companies now maintain records and provide updated order information of the kind required by the Rule in their ordinary course of business. Nevertheless, staff continues to conservatively assume that the time devoted to compliance with the Rule by existing and new companies remains unchanged from its preceding estimate.

Estimated labor costs: \$53,829,000, rounded to the nearest thousand.

Labor costs are derived by applying appropriate hourly cost figures to the burden hours described above. According to the 2002 and 2006 Statistical Abstract, average payroll for "electronic shipping and mail order houses," "direct selling establishments," and "other direct selling establishments" rose from \$14.41 per hour in 1999 to \$15.92 per hour in 2002, an increase of \$1.51 per hour over four years (\$15.92 per hour in 2002 - \$14.41 per hour in 1999), or an average of \$0.378 per year (\$1.51 increase over four years ÷ 4 years). Assuming average payroll continues to increase an average of \$0.378 per hour per year, the average payroll during the three-year period for which OMB clearance is sought for the Rule would be \$17.46 per hour.⁹ Because the bulk of the burden of complying with the MTOR is borne by clerical personnel, staff believes that the average hourly payroll figure for electronic shipping and mail order houses and direct selling establishments is an appropriate measure of a direct marketer's average labor cost to comply with the Rule. Thus, the total annual labor cost to new and established businesses for MTOR compliance during the three-year period for which OMB approval is sought would be

⁸ Under the OMB regulation implementing the PRA, burden is defined to exclude any effort that would be expended regardless of any regulatory requirement. 5 CFR 1320.3(b)(2).

⁹ The approximate payroll during the three-year clearance period was determined as follows: [(\$15.19 payroll in 2002 + (\$0.378 average increase per year x 5 years)) + (\$15.19 payroll in 2002 + (\$0.378 average increase per year x 6 years)) + (\$15.19 payroll in 2002 + (\$0.378 average increase per year x 7 years))] ÷ 3 years.

approximately \$53,829,000 (3,083,000 hours x \$17.46/hr.), rounded to the nearest thousand. Relative to direct industry sales, this total is negligible.¹⁰

(13) Capital and Other Non-labor Costs

Estimated annual non-labor cost burden: \$0 or minimal.

The applicable requirements impose minimal start-up costs, as businesses subject to the Rule generally have or obtain necessary equipment for other business purposes, i.e., inventory and order management, and customer relations. For the same reason, staff anticipates printing and copying costs to be minimal, especially given that telephone order merchants have increasingly turned to electronic communications to notify consumers of delay and to provide cancellation options. Staff believes that the above requirements necessitate ongoing, regular training so that covered entities stay current and have a clear understanding of federal mandates, but that this would be a small portion of and subsumed within the ordinary training that employees receive apart from that associated with the information collected under the Rule.

(14) Estimated Cost to the Federal Government

The estimated yearly cost to the Federal Government resulting from MTOR enforcement activities is \$266,223, which is based on the assumption that rule enforcement will entail one full attorney/economist work-year (\$174,000) and clerical and other support services (\$72,223). These salaries include a 22.7% benefit rate. Added to these salaries are estimated yearly overhead costs of \$20,000.

(15) Changes in Burden

The decrease in burden hours (from approximately 3,094,000 hours to approximately 3,083,000 hours) is solely a reflection of a decrease in the number of new businesses per year.

(16) Statistical Use of Information

There are no plans to publish for statistical use any information required by the Rule.

(17) Display of the Expiration Date for OMB Approval

Not applicable

¹⁰ Based on a \$9.775 billion average yearly increase in sales for “electronic shopping and mail-order houses” from 2000 to 2004 (according to the 2006 Statistical Abstract), staff estimates that total mail or telephone order sales to consumers in the three-year period for which OMB clearance is sought will average \$187.4 billion. Thus, the projected average labor cost for MTOR compliance by existing and new businesses for that period would amount to less than 0.029% of sales.

(18) Exceptions to the “Certification for Paperwork Reduction Act Submissions”

Not applicable.