

**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). 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 (September 21, 1993). The amended Rule took effect 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 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
(continued...)

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*. It establishes, however, 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. §§ 435.2(a)(4) and 435.2(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. Merchants customarily keep such records in the ordinary course of business, however; consequently, their retention of these documents does not constitute a "collection of information" under OMB's regulations that implement the Paperwork Reduction Act ("PRA"). *See* 5 C.F.R. 1320.3(b)(2).

(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 Rule's recordkeeping

¹ (...continued)
initially stated or, if not stated, for delays exceeding 30 days after receiving a properly completed order from the buyer or, regarding seller-financed orders, delays beyond 50 days thereafter. 16 C.F.R. § 435.2(a)(1)(i)-(ii).

provisions enable merchants to demonstrate compliance with the Rule and, absent such substantiation, provide grounds for possible Commission enforcement action for non-compliance.

(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 rebuttable presumptions regarding judicial enforcement of the MTOR, 16 C.F.R. §§ 435.2(a)(4) and 435.2(d). Most merchants currently use -- or employ fulfillment houses that use -- advanced information processing technology to comply 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.* (“RFA”), 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. In its first review of the MTOR (September 21, 1993), the Commission, in response to input from the direct marketing industry, eliminated provisions in the MOR that created 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 sought input on ways to reduce burden through its PRA-required notices to the public when seeking OMB clearance to collect information associated with the MTOR (see item #8 of this Supporting Statement). Finally, consistent with the Government Paperwork Elimination Act, Pub. L. No. 105-277, Title XVII, 112 Stat. 2681-749, apart from notifications concerning “prompt refunds” (16 C.F.R. § 435.1(b)), 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.²

(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 RFA 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." See 51 Fed. Reg. 1516, 1517 (Jan. 14, 1986). Moreover, in promulgating the MTOR, the Commission found during its related RFA analysis of the proposed amendments to the MOR that the amended Rule would not have a significant impact upon a substantial number of small entities. See 58 Fed. Reg. at 49,118-20.

As part of an ongoing review of its rules, the Commission continues to examine the MTOR to determine, among other things, whether new technology or changes in technology can be used to reduce regulatory burdens that the Rule may impose.

(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

² On September 30, 2011, the Commission issued a Notice of Proposed Rulemaking (76 Fed. Reg. 76 FR 60,765) regarding, among other things, alternatives to notifications by U.S. mail of "prompt refunds." Currently, FTC staff is reviewing public comments received.

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

Commission staff have been in contact with interested industry members and trade associations since before the 1975 MOR rulemaking to the present. During the RFA 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. See 58 Fed. Reg. at 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.

Based on a review of comments received to the 2007 Advance Notice of Proposed Rulemaking, 72 Fed. Reg. 51,728 (Sept. 11, 2007), on September 30, 2011, the FTC published a Federal Register Notice concluding that the Rule continued to benefit consumers and was being retained. 76 Fed. Reg. 60,715. For clarity, the Commission reorganized the Rule by alphabetizing the definitions at the beginning of the Rule.³

Also on September 30, 2011, in a separate Federal Register Notice, the Commission issued a Notice of Proposed Rulemaking seeking comment on, among other things, possible changes to the Rule to: clarify that the Rule covers all orders placed over the Internet; revise the Rule to allow sellers to provide refunds and refund notices to buyers by any means at least as fast and reliable as first-class mail; clarify sellers' obligations when buyers use payment methods not spelled out in the Rule, such as debit cards or prepaid gift cards; and require that refunds be made within seven working days for purchases that are made using third-party credit, such as Visa or MasterCard cards. 76 Fed. Reg. 60,765. The comment period ended on December 14, 2011. Staff has reviewed the comments and anticipates sending a recommendation to the Commission by the middle of 2013.

In connection with the instant PRA clearance request, the FTC sought public comment on the Rule's information collection requirements and on the associated estimates of PRA burden. See 77 Fed. Reg. 64,994 (October 24, 2012). No comments were received. Pursuant to the

³ The 2011 amendments did not impose any additional "collection of information" requirements. Consequently, the amendments did not affect the PRA burden associated with the Rule's requirements.

OMB regulations that implement the PRA (5 C.F.R. 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 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: 1,764,390 hours.

In its 2009-2010 PRA-related Federal Register Notices⁴ and corresponding submission to OMB, FTC staff estimated that established companies each spend an average of 50 hours per year on compliance with the Rule, and that new industry entrants spend an average of 230 hours (an industry estimate) for compliance measures associated with start-up.⁵ Thus, the total estimated hours burden was calculated by multiplying the estimated number of established companies x 50 hours, multiplying the estimated number of new entrants x 230 hours, and adding the two products.

No substantive provisions in the Rule have been amended or changed since staff's prior submission to OMB.⁶ Thus, the Rule's disclosure requirements remain the same. Moreover, no public comments were received regarding the above-noted estimates; thus, staff will apply them to the current PRA burden analysis.

⁴ 74 Fed. Reg. 53,500 (Oct. 19, 2009); 75 Fed. Reg. 2,142 (Jan. 14, 2010).

⁵ Most of the estimated start-up time relates to the development and installation of computer systems geared to more efficiently handle customer orders.

⁶ As part of the systematic review of all Commission rules, on September 30, 2011, the FTC published a Federal Register Notice concluding that the Rule continued to benefit consumers and would be retained. 76 Fed. Reg. 60,715. For clarity, the Commission reorganized the Rule by alphabetizing the definitions at the beginning of the Rule. That amendment did not impose any additional "collection of information" requirements.

Since the prior submission to OMB, however, the number of businesses engaged in the sale of merchandise by mail or by telephone has changed. Data from the U.S. Census Bureau⁷ indicates that between 2000 and 2008 the number of businesses subject to the MTOR grew from 11,800 to 21,900, or an average increase of 1,263 new businesses a year [(21,900 businesses in 2008 - 11,800 businesses in 2000) ÷ 8 years].⁸ Assuming this growth rate continued in 2009 through 2012, and continues in 2013 through 2016, the average number of established businesses during the three-year period for which OMB clearance is sought for the Rule would be 29,478:⁹

| Year: | Established Businesses | New Entrants |
|----------|------------------------|--------------|
| 2013 | 28,215 | 1,263 |
| 2014 | 29,478 | 1,263 |
| 2015 | 30,741 | 1,263 |
| Average: | 29,478 | 1,263 |

In an average year during the three-year OMB clearance period, staff estimates that established businesses and new entrants will devote 1,764,390 hours to comply with the MTOR [(29,478 established businesses x 50 hours) + (1,263 new entrants x 230 hours) = 1,764,390].

The estimated PRA burden per merchant to comply with the MTOR is likely overstated. 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. Moreover, 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. Providing consumers with notice about the status of their orders fosters consumer loyalty and encourages repeat purchases, which are important to direct marketers' success. Accordingly, 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. Thus, it appears that much of the time and expense

⁷ See Table 1048, "Retail Trade--Establishments, Employees, and Payroll," U.S. Census Bureau, "County Business Patterns," July 2009 at www.census.gov/compendia/statab/2012/tables/12s1048.xls.

⁸ Conceptually, this might understate the number of new entrants in that it does not factor in the possibility that established businesses from an earlier year's comparison might have exited the market preceding the later year of measurement. Given the virtually unlimited diversity of retail establishments, it is very unlikely that there is a reliable external measure of such exit; nonetheless, as in the past, the Commission invites public comment that might better inform these estimates.

⁹ As noted above, the existing OMB clearance for the Rule expires on February 28, 2013, and the FTC is seeking to extend the clearance through February 28, 2016.

associated with Rule compliance may not constitute “burden” under the PRA.¹⁰

Estimated annual labor costs: \$31,830,000 (rounded to the nearest thousand).

FTC staff derived labor costs by applying appropriate hourly cost figures to the burden hours described above. According to the most recent data available from the Bureau of Labor and Statistics,¹¹ the mean hourly income for workers in sales and related occupations was \$18.04/hour. The bulk of the burden of complying with the MTOR is borne by clerical personnel along with assistance from sales personnel. Staff believes that the mean hourly income for workers in sales and related occupations 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 approximately \$31,830,000 (1,764,390 hours x \$18.04/hr.), rounded to the nearest thousand. Relative to direct industry sales, this total is negligible.¹²

(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

¹⁰ Conceivably, in the three years since the FTC’s most recent clearance request to OMB for this Rule, many businesses have upgraded the information management systems needed to comply with the Rule and to track orders more effectively. These upgrades, however, were primarily prompted by the industry’s need 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 provide updated order information of the kind required by the Rule in their ordinary course of business. 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).

¹¹ See Table 1, National employment and wage data from the Occupational Employment Statistics survey by occupation, May 2011, at <http://www.bls.gov/news.release/pdf/ocwage.pdf>.

¹² Considering that sales for “electronic shopping and mail-order houses” grew from \$80 billion in 1998 to \$235.0 billion in 2009 (according to Table 1055 in the 2012 Statistical Abstracts; found on 12s1055-1.xls available at http://www.census.gov/compendia/statab/cats/wholesale_retail_trade/online_retail_sales.html), staff estimates the annual mail or telephone sales to consumers in the three-year period for which OMB clearance is sought will average \$305 billion. Thus, the projected average labor cost for MTOR compliance by existing and new businesses for that period would amount to 0.01% of sales.

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, including benefits and overhead costs, is \$270,000, which is based on the assumption that the Rule's enforcement will entail one full attorney/economist work-year (\$175,000), clerical and other support services (\$75,000), and overhead costs (\$20,000).

(15) Program Changes/Adjustments

The decrease in burden hours is a reflection of an adjustment to compensate for prior inadvertent counting of some direct marketers (i.e., door-to-door direct sales) in the estimated industry population. These types of sales are not covered by the MTOR.

(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.

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

Not applicable.