



UNITED STATES OF AMERICA
Federal Trade Commission
WASHINGTON, D.C. 20580

Bureau of Consumer Protection

Richard Revesz
Administrator
Office of Information and Regulatory Affairs
Office of Management and Budget
725 17th Street, NW
Washington, DC 20503

Re: Emergency Clearance Request under the Paperwork Reduction Act

Dear Mr. Revesz:

I am the Associate Director for the Division of Advertising Practices at the Federal Trade Commission (“FTC”), and I oversee the FTC’s responsibilities under the Federal Cigarette Labeling and Advertising Act (“Act”). The FTC is submitting an emergency clearance request for authority under the Paperwork Reduction Act to collect information from manufacturers or importers of cigarettes in accordance with the Act. *See* 15 U.S.C. § 1333(c)(1) (2006 ed.). The Act tasks the FTC with reviewing the statutorily mandated rotation of warnings on cigarette labels and advertising, and requires the FTC to collect certain information.

The Act sets forth certain warnings that are required to appear on cigarette packaging and advertising.¹ *See* 15 U.S.C. § 1333. The Act requires cigarette manufacturers and importers to rotate these warnings on a quarterly basis. *See id.* However, under certain circumstances, manufacturers and importers with sales below a specified threshold can apply for equalization with respect to the rotation of the warnings on their packaging—meaning that they only need to display the statutorily prescribed warnings an equal number of times over the course of a year—instead of rotation “with respect to a brand style of cigarettes.” *See* 15 U.S.C. § 1333(c)(1) and (c)(2). Regardless of whether a manufacturer or importer chooses to apply for equalization, it must submit a plan, which is subject to the FTC’s approval and must establish how the manufacturer or importer plans to comply with the statutory labeling and advertising (if it intends to engage in advertising) requirements. *See* 15 U.S.C. § 1333(a).

Manufacturers and importers may apply for equalization if “(i) the number of cigarettes of such brand style sold in the fiscal year of the manufacturer or importer preceding the submission of the application is less than one-fourth of 1 percent of all the cigarettes sold in the United States in such year, and (ii) more than one-half of the cigarettes manufactured or imported by such manufacturer or importer for sale in the United States are packaged into brand styles which meet the requirements of clause (i).” *See* 15 U.S.C. § 1333(c)(2)(A). Additionally,

¹ The Act distinguishes between outdoor billboards and other advertising, with slightly different wording for the required warning statements. *Compare* 15 U.S.C. § 1333(b), *with* 15 U.S.C. § 1333(c).

as part of this application, the manufacturer or importer must include “a plan describing how the manufacturer plans to achieve equalization within the twelve-month period.” *See* 15 U.S.C. § 1333(c)(2)(B). If the FTC approves the application for equalization, that approval is valid for one year from the date of the approval. *See* 15 U.S.C. § 1333(c)(2)(C). A manufacturer or importer that has received approval for quarterly rotation of the warnings on its packages does not need further approval from the Commission unless it intends to add new brands or brand styles to its previously-approved plan. Similarly, approval for an advertising plan does not expire, although the manufacturer or importer will need additional approval for new brands, types of advertising, or sizes of advertising formats.

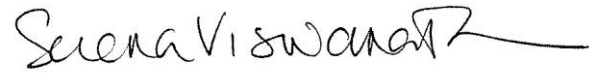
We recently became aware that the FTC never obtained OMB clearance for this statutorily prescribed information collection. However, we believe that, in this instance, the FTC’s failure to obtain PRA clearance is of no consequence. First, since there is a statutory provision that requires the collection of the information, a failure to obtain PRA clearance does not preclude the assessment of a penalty under the statute. *See* 5 C.F.R. § 1320.6(e). Second, for the same reason, the failure to obtain a PRA clearance does not excuse noncompliance with the requirement. *See e.g., U.S. v. Ionia Management S.A.*, 498 F. Supp. 2d 477, 489 (D. Conn. 2007).

Nonetheless, the FTC requests a 180-day emergency clearance to be able to continue to collect the information pursuant to the FTC’s statutory mandate. During the 180-day emergency clearance period, the FTC will work to establish a regular clearance submission. Because, as described above, the FTC’s failure to obtain PRA clearance for this statutorily mandated information collection is of no consequence, and any delay preventing the agency from collecting the information could have a detrimental impact on national health and safety, the FTC is also seeking OMB’s approval to waive the need for the Federal Register Notices otherwise required by 5 C.F.R. §§ 1320.5(a)(1)(iv) and 1320.13(d) prior to publication and implementation of this disclosure.

Special circumstances exist that require an emergency clearance pursuant to 5 C.F.R. § 1320.13(a). First, without the information, the FTC is unable to determine whether cigarette manufacturers and importers are complying with the statutory requirements for cigarette packaging. For this reason, any interruption in the FTC’s ability to carry out its statutory mandate will likely result in public harm. *See* 5 C.F.R. § 1320.13(a)(2)(i). Second, because the FTC is already collecting the information in accordance with its statutory mandate, “[t]he use of normal clearance procedures is reasonably likely to . . . disrupt the collection of information.” *See* 5 C.F.R. § 1320.13(a)(2)(iii). Finally, the collection of information is needed prior to the expiration of established time periods and is essential to the mission of the agency. *See* 5 C.F.R. § 1320.13(a)(1).

Please feel free to contact Franziska Schroder at (202) 660-8508 or via email at fschroder@ftc.gov if you have any questions.

Respectfully,

A handwritten signature in black ink that reads "Serena Viswanathan" followed by a long, horizontal flourish.

Serena Viswanathan
Associate Director