

FEDERAL TRADE COMMISSION**Agency Information Collection Activities; Submission for OMB Review; Comment Request**

AGENCY: Federal Trade Commission.

ACTION: Notice.

SUMMARY: The information collection requirements described below will be submitted to the Office of Management and Budget ("OMB") for review, as required by the Paperwork Reduction Act ("PRA") (44 U.S.C. 3501–3520). The Federal Trade Commission ("FTC" or "Commission") is seeking public comments on its proposal to extend through January 31, 2010 the current OMB clearance for information collection requirements contained in its Mail or Telephone Order Merchandise Trade Regulation Rule ("MTOR" or "Rule"), 16 CFR part 435. That clearance expires on January 31, 2007.

DATES: Comments must be filed by December 12, 2006.

ADDRESSES: Interested parties are invited to submit written comments. Comments should refer to "Mail or Telephone Order Merchandise Trade Regulation Rule: FTC File No. R511929," to facilitate the organization of comments. A comment filed in paper form should include this reference both in the text and on the envelope and should be mailed or delivered, with two complete copies, to the following address: Federal Trade Commission, Room H 135 (Annex J), 600 Pennsylvania Ave., NW., Washington, DC 20580. Because paper mail in the Washington area and at the Commission is subject to delay, please consider submitting your comments in electronic form, (in ASCII format, WordPerfect, or Microsoft Word) as part of or as an attachment to e-mail messages directed to the following e-mail box: paperworkcomment@ftc.gov. However, if the comment contains any material for which confidential treatment is requested, it must be filed in paper form, and the first page of the document must be clearly labeled "Confidential."¹

The FTC Act and other laws the Commission administers permit the collection of public comments to consider and use in this proceeding as appropriate. All timely and responsive

¹ Commission Rule 4.2(d), 16 CFR 4.2(d). The comment must be accompanied by an explicit request for confidential treatment, including the factual and legal basis for the request, and must identify the specific portions of the comment to be withheld from the public record. The request will be granted or denied by the Commission's General Counsel, consistent with applicable law and the public interest. See Commission Rule 4.9(c), 16 CFR 4.9(c).

public comments will be considered by the Commission and will be available to the public on the FTC Web site, to the extent practicable, at <http://www.ftc.gov>. As a matter of discretion, the FTC makes every effort to remove home contact information for individuals from the public comments it receives before placing those comments on the FTC Web site. More information, including routine uses permitted by the Privacy Act, may be found in the FTC's privacy policy at <http://www.ftc.gov/ftc/privacy.htm>.

FOR FURTHER INFORMATION CONTACT:

Requests for additional information should be addressed to Joel N. Brewer, Attorney, Division of Enforcement, Bureau of Consumer Protection, Federal Trade Commission, 600 Pennsylvania Avenue, NW., Washington, DC 20580, (202) 326–2967.

SUPPLEMENTARY INFORMATION: Under the Paperwork Reduction Act ("PRA"), 44 U.S.C. 3501–3520, Federal agencies must obtain approval from OMB for each collection of information they conduct or sponsor. "Collection of information" means agency requests or requirements that members of the public submit reports, keep records, or provide information to a third party. 44 U.S.C. 3502(3); 5 CFR 1320.3(c). As required by section 3506(c)(2)(A) of the PRA, the FTC is providing this opportunity for public comment before requesting that OMB extend the existing paperwork clearance for the regulations noted herein.

The FTC invites comments on: (1) Whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility; (2) the accuracy of the agency's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used; (3) ways to enhance the quality, utility, and clarity of the information to be collected; and (4) ways to minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, e.g., permitting electronic submission of responses. All comments should be filed as prescribed in the **ADDRESSES** section above, and must be received on or before December 12, 2006.

The Mail or Telephone Order Merchandise Trade Regulation Rule ("MTOR" or "Rule"), 16 CFR part 435, was promulgated in 1975 in response to

consumer complaints that many merchants were failing to ship merchandise ordered by mail on time, failing to ship at all, or failing to provide prompt refunds for unshipped merchandise. A second rulemaking proceeding in 1993 demonstrated that the delayed shipment and refund problems of the mail order industry were also being experienced by consumers who ordered merchandise over the telephone. Accordingly, the Commission amended the Rule, effective on March 1, 1994, to include merchandise ordered by telephone, including by telefax or by computer through the use of a modem (e.g., Internet sales), and the Rule was then renamed the "Mail or Telephone Order Merchandise Rule."

Generally, the MTOR requires a merchant to: (1) Have a reasonable basis for any express or implied shipment representation made in soliciting the sale; (2) ship within the time period promised and, if no time period is promised, within 30 days; (3) notify the consumer and obtain the consumer's consent to any delay in shipment; and (4) make prompt and full refunds when the consumer exercises a cancellation option or the merchant is unable to meet the Rule's other requirements.

The notice provisions in the Rule require a merchant who is unable to ship within the promised shipment time or 30 days to notify the consumer of a revised date and his or her right to cancel the order and obtain a prompt refund. Delays beyond the revised shipment date also trigger a notification requirement to consumers. When the MTOR requires the merchant to make a refund and the consumer has paid by credit card, the Rule also requires the merchant to notify the consumer either 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.

Burden Statement

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

In its 2003 PRA-related **Federal Register** notices² 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

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

measures associated with start-up.³ Thus, the total estimated hours burden was 3,094,000 hours, rounded up to the nearest thousand [(53,600 established companies × 50 hours) + (1,800 new entrants × 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,⁴ 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 58,550.⁵

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 × 50 hours) + (675 new entrants × 230 hours)], rounded to the nearest thousand.

This may overstate the total number of hours spent on MTOR compliance.

³ Most of the estimated start-up time relates to the development and installation of computer systems geared to more efficiently handle customer orders.

⁴ 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.

⁵ 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 × 5 years)) + (54,500 businesses in 2002 + (675 new entrants per year) + (675 new entrants per year × 6 years)) + (54,500 businesses in 2002 + (675 new entrants per year × 7 years))] ÷ 3 years.

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 associated with Rule compliance may not constitute "burden" under the PRA.⁶ Nevertheless, staff continues to conservatively assume that the time devoted to compliance with the Rule by existing and new companies remains unchanged.

Estimated labor costs: \$53,829,000 (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 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

⁶ Staff recognizes that, since the FTC's previous PRA submission to OMB for the Rule, many businesses have upgraded the information management systems they need in order 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 maintain records and 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).

payroll during the three-year period for which OMB clearance is sought for the Rule would be \$17.46 per hour.⁷ 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 approximately \$53,829,000 (3,083,000 hours × \$17.46/hr), rounded to the nearest thousand. Relative to direct industry sales, this total is negligible.⁸

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.

William Blumenthal,

General Counsel.

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

⁸ 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.