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United States of America

IN THE UNITED STATES DISTRICT COURT

FOR THE CENTRAL DISTRICT OF CALIFORNIA

SOUTHERN DIVISION

UNITED STATES OF AMERICA, Plaintiff, v. AMDEN CORPORATION, a corporation, Defendant.	No. ~~SA~~ CV 02-3186 WMB CWx

CONSENT DECREE

WHEREAS plaintiff, the United States of America, has commenced this action by filing the Complaint herein; defendant has waived service of the Summons and Complaint; the parties have been represented by the attorneys whose names appear hereafter; and the parties have agreed to settlement of this action upon the following terms and conditions, without adjudication of any issue of fact or law, and without defendant admitting liability for any of the matters alleged in the Complaint;

THEREFORE, on the joint motion and stipulation of plaintiff and defendant, it is hereby ORDERED, ADJUDGED, and DECREED as follows:

1. This Court has jurisdiction of the subject matter and of the parties.

2. The Complaint states a claim upon which relief may be granted against the defendant under Sections 5(a)(1), 5(m)(1)(A), 13(b), and 16(a) of the Federal Trade Commission Act, 15 U.S.C. §§ 45(a)(1), 45(m)(1)(A), 53(b), and 56(a).

DEFINITIONS

3. For the purposes of this Consent Decree, the term "Rule" means the Federal Trade Commission's Trade Regulation Rule Concerning Mail or Telephone Order Merchandise, 16 C.F.R. Part 435, or as the Rule may hereafter be amended. A copy of the Rule is attached hereto as "Appendix A" and incorporated herein as if fully set forth verbatim.

CIVIL PENALTY

4. Defendant, its successors and assigns, shall pay to plaintiff a civil penalty, pursuant to section 5(m)(1)(A) of the Federal Trade Commission Act, 15 U.S.C. § 45(m)(1)(A), in the amount of twenty-eight thousand dollars ($28,000.00).

5. Defendant shall make the payment required by Paragraph 4 within five (5) days of the date of entry of this Consent Decree by electronic fund transfer in accordance with the instructions provided by the Office of Consumer Litigation, Civil

Division, U.S. Department of Justice, Washington, D.C. 20530, for appropriate disposition.

6. In the event of any default in payment, which default continues for ten (10) days beyond the due date of payment, the entire unpaid penalty, together with interest, as computed pursuant to 28 U.S.C. § 1961, from the date of default to the date of payment, will immediately become due and payable.

INJUNCTION

7. Defendant, its successors and assigns, and its officers, agents, servants, employees and attorneys, and all other persons in active concert or participation with it who receive actual notice of this Consent Decree by personal service or otherwise, are hereby enjoined from violating, directly or through any corporation, subsidiary, division or other device, any provision of the Rule, including but not limited to:

a. Failing to offer to the buyer, clearly and conspicuously and without prior demand, an option either to consent to a delay in shipping or to cancel the order and receive a prompt refund, as required by 16 C.F.R. § 435.1(b)(1); and

b. Failing to deem an order canceled and to make a prompt refund, as "refund" and "prompt refund" are defined in Sections 435.2(e)-(f) of the Rule, to buyers who are entitled to such refunds under 16 C.F.R. § 435.1(c).

COMPLIANCE

8. Defendant, its successors and assigns, shall, within thirty (30) days of the entry of this Consent Decree, provide a copy of this Consent Decree and the Business Guide to the Federal Trade Commission's Mail or Telephone Order Merchandise Rule (Jan. 1995) ("Business Guide") to each of its supervisory or managerial agents, servants, employees and attorneys who are engaged in defendant's mail, telephone, facsimile or Internet order sales business, secure from each such person a signed statement acknowledging receipt of a copy of this Consent Decree and Business Guide, and shall, within ten (10) days of complying with this paragraph, file an affidavit with the Associate Director, Division of Enforcement, Bureau of Consumer Protection, Federal Trade Commission, 600 Pennsylvania Ave., NW, Washington, D.C. 20580, setting forth the fact and manner of its compliance, including the name and title of each person to whom a copy of the Consent Decree and Business Guide has been provided.

9. For a period of five (5) years from the date of entry of this Consent Decree defendant, its successors and assigns, shall maintain and make available to the Federal Trade Commission, within seven (7) days of the date of receipt of a written request, business records demonstrating compliance with the terms and provisions of this Consent Decree.

10. Defendant, its successors and assigns, must notify the Associate Director, Division of Enforcement, Bureau of Consumer Protection, Federal Trade Commission, 600 Pennsylvania Ave., NW,

Washington, D.C. 20580, at least thirty (30) days prior to any change in defendant's business including, but not limited to, merger, incorporation, dissolution, assignment, sale resulting in the emergence of a successor corporation, creation or dissolution of a subsidiary or parent, or any other change which may affect defendant's obligations under this Consent Decree. *Provided, however,* with respect to any proposed change in the corporation about which defendant learns less than thirty (30) days prior to the date such action is to take place, defendant must notify the Commission's Associate Director for Enforcement as soon as practicable after obtaining such knowledge.

11. One hundred twenty (120) days after entry of this Consent Decree, defendant shall provide a written report to the Federal Trade Commission, sworn to under penalty of perjury, setting forth in detail the manner and form in which defendant has complied and is complying with this Consent Decree. This report must include and is not limited to:

a. a specimen copy of each delay option notice used for purposes of complying with any provision of the Rule, and a statement setting forth in detail the procedures in place and method for providing such notices to consumers in a timely fashion; and

b. a statement setting forth in detail defendant's procedures for providing prompt refunds to buyers pursuant to the Rule.

Defendant shall mail this written report to the Associate Director for Enforcement, Bureau of Consumer Protection, Federal Trade Commission, 600 Pennsylvania Ave., NW, Washington, D.C. 20580.

12. Defendant is hereby required, in accordance with 31 U.S.C. § 7701, to furnish to the Federal Trade Commission its taxpayer (employer identification) number, which will be used for purposes of collecting and reporting on any delinquent amount under this Consent Decree.

CONTINUING JURISDICTION

13. This Court will retain jurisdiction of this matter for the purposes of enabling any of the parties to this Consent Decree to apply to the Court at any time for such further orders or directives as may be necessary or appropriate for the interpretation or modification of this Consent Decree, for the enforcement of compliance therewith, or for the punishment of violations thereof.

JUDGMENT IS THEREFORE ENTERED in favor of plaintiff and against defendant, pursuant to all the terms and conditions recited above.

Dated this _____ day of _____, 2002.

_____
UNITED STATES DISTRICT JUDGE

The parties, by their respective counsel, hereby consent to the terms and conditions of the Consent Decree as set forth above and consent to the entry thereof. Defendant waives any rights that may arise under the Equal Access to Justice Act, 28 U.S.C. § 2412, amended by Pub. L. 104-121, 110 Stat. 847,. 863-64 (1996).

FOR THE UNITED STATES OF AMERICA:

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federal register

Tuesday
September 21, 1993

Part II

Federal Trade Commission

16 CFR Part 435
Mail or Telephone Order Merchandise; Final Trade Regulation Rule

Appendix A

FEDERAL TRADE COMMISSION

16 CFR Part 435

RIN 3084-AA19

Trade Regulation Rule; Mail or Telephone Order Merchandise

AGENCY: Federal Trade Commission.

ACTION: Final trade regulation rule.

SUMMARY: In order to correct unfair or deceptive acts or practices in the sale of telephone order merchandise, the Federal Trade Commission amends its Trade Regulation Rule "Mail Order Merchandise" (the "Mail Order Rule" or the "MOR") to include merchandise ordered by telephone; amends the MOR's definition of a "properly completed order" in credit sales of mail or telephone order merchandise to refer to the time sufficient information is received by the merchant from the consumer to process the order; and, in situations in which no shipment time is expressly represented, increases from 30 to 50 days the shipment and delay notification deadlines for orders accompanied by applications for credit. The Commission has deleted the MOR provisions creating rebuttable presumptions of non-compliance when sellers do not provide required notices or options in writing by first class mail, and do not provide a written, postage prepaid means for buyers to notify the seller regarding the decision to cancel. The title of the Trade Regulation Rule ("TRR") is now changed to "Mail or Telephone Order Merchandise," and the terms "telephone" and "mail or telephone sales" are defined.

The amended MOR requires merchants to possess a reasonable basis for any express shipment representation in soliciting the sale of telephone order merchandise and, if no time is represented, to have a reasonable basis for the implicit representation that shipment will be made within 30 days of the receipt of the consumer's properly completed order. In situations in which the merchant is unable to ship telephone order merchandise in the time expressly or implicitly represented, the amended MOR requires the merchant to notify consumers about the delay and to offer them the option of agreeing to the delay or obtaining a prompt refund. In situations in which the merchant fails to obtain the consumer's informed consent to delay or the consumer exercises the option of cancelling the order and obtaining a prompt refund, the amended MOR requires the merchant to deem the order cancelled and to make a prompt refund.

EFFECTIVE DATE: March 1, 1994.

ADDRESSES: Requests for copies of the TRR and the SBP should be sent to Public Reference Branch, room 130, Federal Trade Commission, Washington, DC 20580.

FOR FURTHER INFORMATION CONTACT: Joel N. Brewer, Division of Enforcement, Bureau of Consumer Protection, Federal Trade Commission, Washington, DC 20580, (202) 326-2967.

SUPPLEMENTARY INFORMATION: This notice contains the Statement of Basis and Purpose ("SBP") for the TRR, the Commission's determination that a Regulatory Analysis is unnecessary and the text of the TRR. Pursuant to Commission Rule 1.14(c), 16 CFR 1.14(c), this TRR shall be considered promulgated at 3 p.m. Eastern Standard Time ("EST") on the fourth day after this notice is published. In the event such day falls on a Saturday, Sunday or national holiday, the TRR shall be deemed promulgated at 3 p.m. EST on the following business day.

Trade Regulation Rule Concerning Mail or Telephone Order Merchandise Statement of Basis and Purpose and Regulatory Analysis

I. Introduction

A. Overview of the Rule

Since the MOR [1] was promulgated in 1975, buying by telephone has grown enormously. Although the number of telephone order transactions annually is still fewer than the number of mail order sales, the average telephone order sale is larger than the average mail order sale. Of the approximately $48 billion consumers spend each year for mail and telephone order merchandise, roughly half the value of these sales consists of merchandise ordered by telephone. Much of the business conducted by mail and telephone is conducted without difficulty. However, the record of this rulemaking establishes that many consumers encounter shipment delays, and that these delays are often lengthy. In some instances, the delays occur because the merchants lacked a reasonable basis for their express or implied shipment claims. In other instances, merchants who unexpectedly cannot ship on time fail to inform consumers adequately about the delays or fail to obtain their consent to the delays or to refund their money. In some cases, the merchants fail either to ship the telephone order merchandise or to make any refunds.

The record demonstrates that, in a significant number of transactions involving delayed shipment, merchants selling merchandise by telephone are misrepresenting, at the time of making shipment representations, that they possess and rely upon a reasonable basis for the representations. The record also demonstrates that, in a significant number of transactions, merchants are unilaterally altering a material term of the sales contract by changing the promised shipment time without the knowledge or consent of consumers. Finally, the record demonstrates that, in a significant number of transactions, although the consumers either did not agree to delayed shipment or they exercised their option to cancel the orders and obtain prompt refunds, merchants have failed to deem the orders cancelled and to make prompt refunds. In the proceedings relating to the adoption of the MOR, the Commission determined that such practices are unfair or deceptive within the meaning of section 5(a)(1) of the FTC Act, 15 U.S.C. 45(a)(1), in the context of mail order transactions, and it has concluded in this proceeding that these practices also harm consumers when committed by telephone order merchants. Further, the Commission finds that these practices have resulted in substantial consumer injury. To correct these unfair or deceptive acts or practices in the sale of telephone order merchandise, the Commission finds it necessary to amend the MOR.

The substantiation and notice requirements of the amended Rule will enable consumers purchasing merchandise by telephone to make informed purchases and cancellation decisions based on accurate and timely shipment information. By requiring merchants to substantiate their shipment representations, the amended Rule should discourage merchants from misrepresenting shipment times and implicitly misrepresenting that these shipment representations are substantiated. By measuring the time in which merchants must ship mail or telephone order merchandise from the time they receive sufficient information from consumers to process credit sales (rather than when they actually charge the accounts), the definition of a "properly completed order" in the amended Rule also will encourage merchants to provide appropriate and timely option notices to consumers

[1] The terms "Mail Order Rule" or "MOR" refer to the Trade Regulation Rule promulgated on October 22, 1975. The terms "amended Rule" and "amended MOR" mean the Rule issued today. Additionally, unless otherwise made clear by the context, any reference to the "TRR" is to the amended MOR issued today.

regardless of how they pay for the merchandise.[2]

The Commission has further amended the MOR to permit merchants who do not make express shipment claims to ship or perform the other actions required by the TRR within 50 rather than 30 days where orders are accompanied by consumer applications for credit to pay for their orders. Finally, the TRR defines "telephone" to include any direct or indirect use of the telephone to order merchandise, whether the telephone is activated by, or uses the language of, persons, machines, or both.

B. Historical Background

On September 28, 1971, the Commission initiated proceedings to adopt a trade regulation rule[3] under section 6(g) of the FTC Act, 15 U.S.C. 46(g). On January 4, 1975, after these proceedings were substantially completed, the Magnuson-Moss Warranty—Federal Trade Commission Improvement Act ("Magnuson-Moss Act") became effective.[4] Pursuant to section 202(c)(1) of the Magnuson-Moss Act, 15 U.S.C. 57a note, the Commission promulgated the MOR on October 22, 1975, in the same manner and with the same validity as if the statute had not been enacted.[5] It became effective on February 2, 1976, and has since then remained in full force and effect.

The instant rulemaking proceeding was conducted in accordance with section 18 of the FTC Act, 15 U.S.C. 57a. On October 27, 1988, the Commission published an Advance Notice of Proposed Rulemaking ("ANPR") to solicit comment on whether to initiate a proceeding to amend the MOR to include telephone order merchandise—or merchandise ordered by any other means—and to change the definition of a "properly completed order" for credit sales.[6] To obtain information about whether a preliminary regulatory analysis pursuant to section 22 of the FTC Act, 15 U.S.C. 57b–3, would be necessary, the Commission solicited comment on whether any of the Commission's proposed amendments would have an annual effect on the economy of $100,000,000 or more, would cause a substantial change in the cost of goods or services, or would have a substantial impact on the persons regulated.[7]

Thirty-four comments were filed. Three were from direct marketing or retail merchant trade associations,[8] five from business-to-consumer and business-to-business direct marketers,[9] two from advertising agencies and advertising media,[10] seven from state consumer protection agencies,[11] one from a charity,[12] one from a consumer association,[13] and 15 from individual consumers.[14] Generally, the comments supported extending the MOR to telephone order merchandise. The comments addressing the regulatory analysis questions suggested that any effects of the proposed amendments would be minimal.

On November 28, 1989, the Commission published a Notice of Proposed Rulemaking ("NPR").[15] In the NPR, the comments received in response to the ANPR were summarized. Based on those comments, the Commission determined that a regulatory analysis was unnecessary, and certified there would be no effect under the Regulatory Flexibility Act, 5 U.S.C. 605(b).[16] The Commission also announced that the issues involved were reasonably focused and straightforward, and therefore, pursuant to Commission Rule 1.20, 16 CFR 1.20, the Commission would employ a modified version of the rulemaking procedures provided for in the Rules, 16 CFR 1.13, consisting of a single NPR and utilizing the "no designated issues" format.[17] With the commencement of the rulemaking, Henry B. Cabell was designated as the Presiding Officer ("PO") in the rulemaking.[18]

The NPR announced that although the Commission intended to consider whether the MOR should be amended to include telephone order merchandise, it had determined not to consider, as proposed in the ANPR, extending the MOR to merchandise ordered by "other means," which would reach ordering technologies yet unknown. However, the Commission determined to solicit comment on whether to adopt a definition of telephone order merchandise that would include "any direct or indirect use of the telephone to order merchandise, regardless of whether the language of the sale is that of human beings, machines, or both."[19] This definition would reach orders placed by facsimile machines or computers with telephone modems.

In the NPR, the Commission also rejected the suggestion that its proposal to extend the MOR to telephone order merchandise should apply only to consumer transactions.[20] This suggestion was based on the incorrect assertion that the MOR does not cover business-to-business mail order transactions. See Part VII, A of this SBP. The Commission also announced that it would consider amending the definition of a "properly completed order" for credit orders to mean the time a merchant receives sufficient information to charge a buyer's account. Further, the Commission solicited information about whether to afford merchants greater flexibility in shipping credit orders accompanied by an application for credit.[21] Finally, the Commission requested comment on whether it should amend the rebuttable presumptions of non-compliance when first class mail was not used to provide delay and option notices.[22]

The NPR invited written comment by January 29, 1990. In response, 33 comments were received. Comments were received from four mail or telephone order merchants,[23] two contractors to mail and/or telephone order merchants,[24] two bank credit card

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[2] In this regard, the Commission has decided to delete §§ 435.1(b)(3)(i) and (ii), which created rebuttable presumptions of non-compliance where option notices were not provided in writing by first class mail, and where a written, postage prepaid means to reply to such notices was not provided.

[3] 36 FR 19092.

[4] Pub. L. 93–637, codified at 15 U.S.C. 57a et seq. and 15 U.S.C. 2301 et seq.

[5] 40 FR 31582; 16 CFR part 435.

[6] R011006–1, A–1, pp. 43448–49. The rulemaking record in this proceeding has been designated R011006 in the Commission's Public Reference Branch. A copy of the ANPR originally appearing in 53 FR 43448 is designated document A–1, and is filed in the first volume, labeled R011006–1. There are 20 categories "A—Q" for the materials in the rulemaking record. These are contained in volumes R011006–1 through R011006–4. Section 18(b)(2)(A) of the FTC Act, 15 U.S.C. 57a(b)(2)(A), and the Commission's Rules of Practice, 16 CFR 1.10, require publication of an ANPR.

[7] R011006–1, A–1, p. 43448. Sections 22(a) and (b)(1) of the FTC Act, 15 U.S.C. 57b–3(a), (b)(1), and the Commission's Rules of Practice, 16 CFR 1.11(b), require the Commission to determine whether a preliminary regulatory analysis is needed.

[8] R011006–B–1, B–1, B–25, and B–28.

[9] R011006–B–1, B–2 through B–5, B–27.

[10] R011006–B–1, B–6 and B–7.

[11] R011006–B–1, B–8, B–9, B–28 through B–32.

[12] R011006–B–1, B–10.

[13] R011006–B–1, B–24.

[14] R011006–B–1, B–11 through B–23, B–33, and B–34.

[15] R011006–1, A–2, pp. 49060–64. Section 18(b)(1)(A) of the FTC Act, 15 U.S.C. 57a(b)(1)(A), and the Commission's Rules of Practice, 16 CFR 1.11(a), require an NPR.

[16] R011006–1, A–2, pp. 49066–67.

[17] R011006–1, A–2, pp. 49069–69.

[18] R011006–1, A–3.

[19] R011006–1, A–2, p. 49063.

[20] Id. at 49063.

[21] Id.

[22] Id.

[23] Markson Science, Inc., R011006–2, D–1; Texas Instruments Inc., R011006–2, D–2; J.C. Penney Co., Inc. (Catalogue Division), R011006–2, D–3; and Barry J. Cutler, Esq., on behalf of unnamed mail order sellers, R011006–2, D–4.

[24] Leo Burnett Company, Inc., R011006–2, E–1 ("Burnett"); and Dahart and Dart Associates, Inc., R011006–2, E–2.

companies,[25] three trade associations of mail and/or telephone order merchants,[26] one consumer,[27] five consumer and public interest organizations,[28] fifteen state and local governments,[29] and one from a non-governmental third-party dispute mediator."[30] The Commission's staff submitted for the record reprints of published materials, copies of unpublished FTC consent decrees and reports of surveys.[31]

The NPR called for notifications of interest in questioning witnesses to be filed by January 12, 1990. In response, notifications were filed by MOAA, AARP, and by DMA. Thereafter, MOAA failed to provide the PO with sufficient information to enable him to compare the similarity or dissimilarity of its interests with the other parties that filed. Thus, the PO designated only AARP and DMA as interested persons.[32]

On March 28, 1990, Margaret Kuman, an expert offered by DMA, and Drs. Donald Cox and Thomas Maronick, experts offered by Commission staff, testified. On April 19, 1990, Eugene Kordahl, an expert also offered by Commission staff, testified. All witnesses were afforded the opportunity to make an opening presentation followed by cross-examination conducted by Commission staff or DMA. After the hearings, there was a rebuttal comment period, which closed on June 15, 1990. Drs. Maronick and Cox,[33] Mr. Kordahl,[34] Commission staff[35] and AARP[36] submitted rebuttal comments.

The evidentiary record of the rulemaking consists of all comments and other written materials placed in the rulemaking record by the PO, the hearing transcripts and exhibits, and the rebuttal comments. The Commission staff summarized and analyzed the record evidence and made recommendations to the Commission to amend the MOR. This document, known as the "Staff Report," was placed on the public record on July 18, 1991.[37] On August 30, 1991, the PO placed his report (the "PO's Report") on the public record.[38]

In general, the Staff and PO Reports contain similar findings and recommendations. Both Reports generally concluded that the evidence shows, as in the context of direct marketing by mail, that: (1) There are widespread merchant failures to ship telephone order merchandise in the time represented (or, if no time was represented, within a reasonable time); (2) these failures in the shipment of telephone order merchandise are frequently attributable to merchants' failing to have a reasonable basis for their shipment representations; and (3) merchants fail to obtain the consent of consumers to delays in the shipment of their telephone orders or to make refunds for unshipped or cancelled telephone order merchandise. Based on these findings, both Reports recommended extending the substantiation, option notice and refund provisions of the MOR to telephone order merchandise.

Both Reports also found that, with respect to merchandise purchased on credit, merchants commonly do not charge consumers' accounts until the time of shipment. (Under the definition of a "properly completed order" in the MOR, the operation of the Rule does not begin until the merchant charges the account.) To ensure that the Commission's amendments to the MOR reach all unfair or deceptive acts or practices identified in the rulemaking record, the Staff and PO's Reports recommended changing the definition of a "properly completed order" for credit sales to refer to the time the merchant receives the information needed from the consumer to charge the consumer's account, instead of the time the card is actually charged.[39] Both recommended that, when the merchant does not make an express shipment representation in soliciting consumers' orders, and the orders are accompanied by an application for credit to pay wholly or partially for the order, the merchant should have 50 days rather than 30 to ship or send option notices.

Both Reports recommended defining the term "telephone" to refer to "any direct or indirect use of the telephone to order merchandise, regardless of whether the telephone is activated by, or the language used is that of human beings, machines, or both." Neither recommended amending the MOR's rebuttable presumptions of non-compliance when the merchant fails to provide delay option notices by first class mail. Finally, the PO recommended defining "mail or telephone order sales." Although a new addition, the definition flowed from the evidence in the rulemaking record, and no one objected to it during the post-record comments. Staff subsequently concurred with the PO's recommendation that it be included in the TRR.[40]

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[25] Joint comment by Master Card International and Visa U.S.A., Inc., R011006–2, EE–1.

[26] DMA, R011006–2, F–1; the Mail Order Association of America, R011006–2, F–2 ("MOAA"); and the National Retail Merchants Association ("NRMA"), R011006–2, F–3.

[27] Andrew Levitt, R011006–2, G–1.

[28] New Opportunities for Waterbury, Inc., Human Service Center, R011006–2, GG–1; National Association of Consumer Agency Administrators, R011006–2, GG–2 ("NACAA"); National Consumers League, R011006–2, GG–3 ("NCL"); the American Association of Retired Persons, R011006–2, GG–4 ("AARP"); and the National Association of Attorneys General, R011006–2, GG–5 ("NAAG").

[29] Lacy H. Thornburg, Attorney General, State of North Carolina (by Darlene Graham, Assistant Attorney General), R011006–2, H–1; Michael A. Kelley, Director, California Department of Consumer Affairs, R011006–2, H–2 ("CaDCA"); Mary W. Heslin, Commissioner of Consumer Protection (Connecticut), R011006–2, H–3; Herschel T. Elkins, Senior Assistant Attorney General, Consumer Law Section (California Department of Justice), R011006–2, H–4; William E. McVey, Assistant Attorney General, Consumer Protection Division (Massachusetts Attorney General), R011006–2, H–5; Richard Cleland, Assistant Attorney General, Consumer Protection Division (Iowa Department of Justice), R011006–2, H–6; Adrian Spratt, Assistant Attorney General (New York), R011006–2, H–7; Barry W. Reid, Administrator, Office of Consumer Affairs (Georgia), R011006–2, H–8; Susan Grant, Director, Consumer Protection Division, Northwestern (Massachusetts) District Attorney's Office, R011006–2, H–9 ("NWMaDA"); Jane Wheeler, Assistant Attorney General, Consumer Protection Unit (Oklahoma), R011006–2, H–10; Tom F. Engelhardt, Director, Consumer Fraud and Antitrust Section, Office of the (North Dakota) Attorney General, R011006–2, H–11; Richard M. Kessel, Executive Director, New York State Consumer Protection Board, R011006–2, H–12; Donald J. Hanaway, Attorney General (Wisconsin) R011006–2, H–13; Rita Sena, Assistant Attorney General, (New Mexico), R011006–2, H–14; and Arthur R. Weiss, Deputy Attorney General, Chief, Consumer Protection Division (Kansas), R011006–2, H–15.

[30] Rhonda Klein Singer, Vice President and General Counsel, The Better Business Bureau of Metropolitan New York, Inc., R011006–2, I–1.

[31] R011006–B–1, B–35 to B–52.

[32] R011006–1, A–11. AARP was advised of its designation by telephone. During this conversation, AARP advised the PO that it would not participate in the hearing.

[33] R011006–2, M–1 and M–2.

[34] R011006–2, M–3.

[35] R011006–2, M–4.

[36] R011006–2, M–5.

[37] R011006–3, N–1.

[38] R011006–3, O–1.

[39] The PO suggested revising staff's proposed definition of a "properly completed order" slightly. Staff proposed including in the definition the words "authorization from the buyer to charge the buyer's account." The PO suggested "authorization from the buyer to charge an existing charge account of the buyer" to distinguish situations where consumers are applying for credit. PO Report, R011006–3, O–1, p. 54. Staff subsequently concurred with this revision. Final Staff Recommendations, R011008, Q–1, p. 1, n.2.

[40] R011008, Q–1, pp. 22–23. The PO also recommended the following technical changes: (1) placing the definition of "telephone" in the definitions portion of the amended Rule, rather than adding a new "note 8," as suggested by staff; (2) moving notes 1–6 to a new "limited applicability" portion (to be numbered § 435.3); (3) clarifying the "effective date of the rule" language (to be numbered § 435.4); (4) changing the pronouns "he" and "his" in the Rule to gender neutral language; and (5) changing the authority recitation at the end of the amended Rule to refer to both section 18(a) of the FTC Act (as amended) and the Administrative Procedure Act. During the post-record comment period, no one objected to these proposed changes, and staff included them in its final recommendations to the Commission. Id. at 21–22. Additionally, the Commission is today

Pursuant to the Commission's Rule of Practice, 16 CFR 1.13(h), on September 10, 1991, the PO invited post-record comments on the Staff and PO's Reports, and requests for the opportunity to make an oral presentation to the Commission.[41] The period for submitting post-record comments and requesting the opportunity to make oral presentations closed on October 25, 1991. Five post-record public comments on the Staff and the PO's Reports were timely received.[42] DMA and MOAA both requested the opportunity to make oral presentations to the Commission.

On October 6, 1992, the Commission placed the staff's summary of the post-record comments and its final recommendations on the rulemaking record,[43] and scheduled oral presentations.[44] On November 3, 1992, the Commission heard oral presentations by DMA and MOAA. On November 18, 1992, after considering the rulemaking record as a whole, the Commission tentatively adopted the TRR and directed staff to draft this SBP. On March 1, 1993, the Commission tentatively voted to delete the MOR's rebuttable presumptions favoring first class mail as the means for notifying consumers about delays an their cancellation rights, and business reply mail or a postage prepaid means for consumers to cancel their orders. The Commission directed staff to include these amendments in the SBP.

C. Industry Profile

The telemarketing industry has grown enormously since the adoption of the MOR in 1975, but estimates as to its size vary. One reason for the variance is that there is no settled definition of telemarketing. Accordingly, the Commission can only estimate the size of the telemarketing industry.

Based on the Annual Guide to Telemarketing, which periodically surveys the telemarketing industry,[45] Mr. Kordahl testified about trends in the telemarketing since 1985, as follows:

[In billions of dollars]

Year	1985	1989
Total Sales (Goods and Services)	$91	$196.
Business-to-business (Goods and Services)	73	161.
Business-to-consumer (Goods and Services)	18	35.

Mr. Kordahl also testified that, while in 1985 there were 80,000 in-house telemarketing operations, by 1989 there were 405,000 such operations. Further, while 4% of all businesses engaged in telemarketing in 1985, 10% engaged in telemarketing in 1989.[46] Based on the past growth of telemarketing, Mr. Kordahl predicted that, by 1995, 42% of all American businesses would be using telemarketing and that telephone sales of goods and services to businesses and consumers would reach $562 billion.[47]

The Commission believes that the growth of the industry is related to at least the following:

(1) Technological innovations, particularly the introduction in 1960 of a bulk discounted telephone call service called Wide Area Telephone Service ("WATS"), which opened the way for high-volume outbound (originated by the merchant) low cost long-distance calling, and the introduction in 1967 of "800" inbound (originated by the consumer) WATS service.[48]

(2) The increased acceptance of the telephone as a means of shopping. In this regard, Ms. Kuman, relying both on her telemarketing experience and a survey of consumer non-store shopping attitudes and behavior commissioned by American Telephone and Telegraph Communications ("AT&T"),[49] explained that consumers, particularly those who tend to value their time, find ordering by telephone convenient.[50]

(3) The willingness of consumers to use credit cards in telephone sales. For example, Eugene Kordahl testified:

> The growth of telemarketing is facilitated by the level of credit card penetration in any given culture, for without an easy method of payment, telemarketing to the consumer market is difficult. The U.S. leads all countries in credit card penetration, with 65% of U.S. households having some capability to order merchandise by telephone and pay for it by credit card.[51]

Citing the AT&T survey, Ms. Kuman noted that, although both users and non-users of 800 numbers reported they possessed credit cards, non-users were more cautious than users about ordering merchandise sight-unseen and paying for it by credit card.[52] Among users, 68% reported that the most frequent method of payment for 800 number orders was by credit card.[53]

The various surveys in the rulemaking record indicate that consumers who order by telephone tend to pay by credit card; consumers who order merchandise by mail tend to pay by check, money order, or cash.[54] For example, the AT&T survey reported that 81% of consumers who order by mail report that they most frequently pay by check.[55] A Market Facts survey, commissioned by FTC staff and conducted in 1985, reported similar results: 67.1% of mail orders were paid by check, and 5.6% were paid by cash; while 68.1% of telephone orders were paid by credit card. Similarly, the Opinion Research Corporation ("ORC") telephone survey, a nationally projectable probability sample, also commissioned by FTC staff, reported that 62.4% of the most recent mail orders were paid by check and 3.2% were paid by cash, while 69.5% of telephone orders were paid by credit card.[56]

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making two technical changes to the TRR's preamble as follows: (1) Amending the words "in commerce" to read "in or affecting commerce" to reflect the expansion of the FTC's jurisdiction in 1975 by section 201(a) of the Magnuson-Moss Act; and (2) changing the words "an unfair or deceptive act and practice" to read "an unfair or deceptive act or practice," to parallel the language of section 5(a)(1) of the FTC Act.

[41] 56 FR 46133–34. The term "post-record" refers to the period after the closing of the evidentiary record in the rulemaking proceeding on June 15, 1990. After that date, any submission that contained new evidence was placed in the FTC's non-rulemaking public record.

[42] Representing industry were DMA, MOAA, and the National Retail Federation, respectively, R011006–4, P–1, P–3, and P–7. Comments were also received from the Office of Consumer Affairs, Montgomery County (Maryland) Government, R011006–4, P–4, and NACAA, R011006–4, P–5. CaDCA attempted to file a comment approximately one month after the filing deadline, which the PO rejected as untimely.

[43] R011006–4, Q–1.

[44] 57 FR 45998.

[45] R011006–B–1, B–44, p. 19. Direct Marketing reported data that it extracted from the 1988 Guide to Mail Order Sales by Arnold L. Fishman of Marketing Logistics. Mr. Fishman collaborates with Mr. Kordahl in preparing the Annual Guide to Telemarketing, one of the principal studies Mr. Kordahl relied on in his testimony.

[46] Kordahl, R011006–2, HX–4, pp. 5–6.

[47] Id. He also estimated that 1.3 million U.S. corporations would use telemarketing, and employ 6.2 million persons.

[48] R011006–B–1, B–52, p. 98. See PO's Report R011006–3, 0–1, pp. 11–12, F.16. (In citing the PO's Report, "F" refers to "findings.")

[49] Five consumer or industry surveys were placed in the rulemaking record. An analysis of the surveys and their methodologies was prepared by the staff in the Staff Report, R011006–3, N–1, pp. 20–35. The analysis is based on the uncontradicted evidence in the rulemaking record.

[50] R011006–2, HX–1, p. 5.

[51] R011006–2, HX–4, p. 6. Similarly, according to a Market Facts survey of consumer behavior commissioned by AARP (the "second Market Facts survey"), 72% of Americans have at least one major credit card. R011006–2, GC–4, p. 23.

[52] Kuman, R011006–2, HX–1, p. 5.

[53] Kuman, R011006–2, Tr. 11; R011006–B–1, B–38, p. 13.

[54] Similarly, NACAA commented that the consumer protection agencies from which it obtained comments said that most telephone orders are paid by credit card, whereas most mail order purchases are paid by check or money order. R011006–2, GC–2, p. 2.

[55] R011006–B1, B–35, p. 4; B–36, p. 4.

[56] R011006–B–1, B–35, p. 4. Most of the charge activity reported by consumers in the AT&T survey involved so-called "national" charge cards such as bank cards (e.g., Visa, Mastercard) or travel and entertainment cards (e.g., American Express, Diners

Continued

According to Mr. Kordahl, in 1988, total telemarketing sales of goods and services to consumers and businesses was $170 billion.[57] Nineteen percent of this figure, or $32.4 billion, was composed of sales of goods and services to consumers.[58] Because the MOR—and the TRR issued today—apply to sales of merchandise and not services, Mr. Kordahl estimated the sales volume of goods to be 75% of this figure, or $24.3 billion.[59] Other data in the record support this estimate.[60]

II. Factual Basis for an Amended Rule

A. The Unfair or Deceptive Acts or Practices and Their Prevalence[61]

The evidence in the record includes results from relevant, methodologically sound surveys. This is the most direct evidence of the prevalence of the practices at issue. Survey evidence in this rulemaking indicates that the likelihood that merchandise will not be shipped within the time represented or, if no time is represented, within the time expected by consumers, is the same regardless of whether the merchandise is ordered by mail or by telephone. Similarly, survey evidence shows that the likelihood that delay notices will be untimely or incomplete and that refunds will be untimely are the same regardless of the method of ordering. Other evidence includes expert testimony and comments from state and local officials and others stating that the amendments are needed to address significant problems with telephone order sales.

Although merchants generally ship merchandise in a timely fashion, delays occur in a significant percentage of telephone sales. The ORC survey shows that 4.6% of consumers experienced delayed shipment of telephone order merchandise.[62] Further, the Commission finds that the length of these delays was often significant. According to expert testimony, delayed shipments of telephone order merchandise often occur because merchants lacked a reasonable basis for the express or implied shipment representations they made when they solicited the orders.[63] Further, the results of the ORC survey indicate that, in the case of telephone order merchandise, merchants who are unable to ship within the relevant time frame frequently fail to obtain the consumer's informed consent to the delay or to provide a refund.

The following parts describe the factual basis for the Commission's finding that the direct marketing practices addressed by the MOR also harm consumers when committed by telephone order merchants.

B. Evidence Regarding the Practices

1. Consumer Expectations About Shipment Time

Nearly all the consumers questioned in the ORC survey reported that they expected mail and telephone order merchandise to be shipped within a time certain. Dr. Cox's analysis of the survey results states that, of 211 mail order consumers, 194 reported some expected shipment date; of 66 telephone order consumers, 61 reported such an expectation.[64] Further, of 211 consumers who ordered or paid by mail, 117 reported that express shipment representations had been made. Of the 66 telephone order consumers, 38 reported express shipment claims had been made.[65]

Even where there were express representations, consumers formed expectations that differed somewhat from those representations.[66] But there was a close correlation between sellers' average express shipment representations and consumers' average shipment expectations for mail and telephone order merchandise. The average express shipment representation sellers made for mail orders was 29.96 days, while the average consumer expectation for shipment of such orders was 24.85 days. The average express shipment representation sellers made for telephone orders was 23.23 days, while the average consumer expectation for shipment for these telephone orders was 19.04 days.[67] These data suggest that telephone order merchants tend to promise faster shipment than mail order merchants, and that consumer expectations paralleled these representations.

Based on the foregoing, Dr. Cox calculated the number of consumers to whom no express shipment representations were made. Of 194 consumers who ordered or paid by mail and who reported some expected shipment date, 77 reported that no shipment representation had been made. When no shipment representation was made, the average consumer expectation of delivery was 20.72 days.[68] Of the 61 telephone order consumers who reported some shipment expectation, 23 reported receiving no express shipment representation. The expected shipment date in these cases was 10.71 days, almost half the expected shipment time for mail orders. Dr. Cox concluded from this that, to a statistically significant degree, when there is no express shipment representation, consumers expect telephone orders to be shipped faster than mail order merchandise.[69]

The record contains three views concerning consumers' shipment expectations for merchandise paid for

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Club), R011008–B–1, B–38, p. 13. But, this survey also shows approximately one-in-five telephone transactions involves a credit care issued by the merchant from which the merchandise was purchased.

[57] R011006–2, NX–4, p. 9.

[58] Id. at 9–10.

[59] Id. at 10.

[60] In the annual "Mail Order Top 250+" listing of the leading U.S. mail order companies, Direct Marketing reported that consumers spent $48 billion for mail and telephone order merchandise in 1988. R011006–B–1, B–44, p. 19; R011006–B–1, B–43, p. 46. These data, in conjunction with ORC survey data relating to the ratio of mail to telephone sales and the average size of telephone order sales, support a $24 billion sales volume estimate. The ORC survey indicated that the average mail order sale was approximately $70.00 compared to $140.00 for the average telephone order sale. R011008–B–1, B–35, p. 15. Accord comments from NACAA, R011006–2, GG–2, p. 3; and the attorneys general of California (R011006–2, H–4, p. 1), Massachusetts (R011006–2, H–5, p. 1), Georgia (R011006–2, H–8, p. 1), Oklahoma (R011008–2, H–10, p. 1), North Dakota (R011006–2, H–11, p. 2), and Wisconsin (R011008–2, H–13, p. 2). However, during the period of inquiry in the ORC survey—January through July 1987—almost twice as many consumers reported placing mail orders as telephone orders. Of 14,483 consumers contacted in the screener phase of the survey, 21.87% reported that they ordered most recently by mail, while 11.39% reported that they ordered by telephone. R011006–B–1, B–35, p. 5. Thus, measured in sales volume, half the $48 billion in sales reported by Direct Marketing or $24 billion, would comprise telephone order sales. Further, based on the ORC data and the annual sales figures reported by Mr. Kordahl and Direct Marketing, the Commission estimates that there were 343 million mail and 171 million telephone sales to consumers in 1988.

[61] Neither the statutory language nor the legislative history of the Magnuson-Moss Act suggests that in 1975 Congress intended to require the Commission to find as a pre-condition to rulemaking that acts or practices to be regulated are prevalent. Instead, the Act requires that the SBP include "a statement as to the prevalence of the prescribed acts or practices treated by the rule." 15 U.S.C. 57a(d)(1)(A). See Joint H.R. and S. Conf. Rep. No. 1408, 93rd Cong., 2d Sess., reprinted in 1974 U.S. Code Cong. & Admin. News 7764. See also infra n. 142.

[62] Compare R011008–B–1, B–35, p. 5, Tab. II with p. 8, Tab. 5. In his analysis, Dr. Cox defined the term "telephone order" to refer to persons who both ordered and paid by telephone. He accordingly treated all persons who ordered by telephone but paid by mail as having ordered by mail. Id. at 6. This produced a 4.6% delayed shipment result. However, the definition of "telephone order" adopted by the Commission today refers only to the method of ordering, not payment. The effect of this change would be to cause the telephone order cell in the ORC survey to be increased up to 6.8%. See R011006–4, Q–4, p. 6, n. 8.

[63] Kordahl, R011006–2, HX–4, pp. 15–16.

[64] R011006–B–1, B–35, p. 8, Tab. V.

[65] Id. at Tab. VI.

[66] For example, some sellers routinely ship faster than promised, leading consumers subsequently to expect that sellers will always ship faster.

[67] R011006–2, M–2, p. 10, Tab. VI.

[68] Id.

[69] R011006–2, M–2, p. 11.

by credit card. Dr. Cox's analysis of consumer shipment expectations indicated that, regardless of whether the merchant makes express or implied shipment representations, consumers expect purchases made by credit card to be shipped much more quickly than purchases paid for by other means.[70] NCL stated that its observations are that consumer expectations for mail and telephone order merchandise are basically the same and that, regardless of the payment method, consumers generally expect to receive merchandise in six to eight weeks.[71] In contrast, DMA and Ms. Kuman suggested that because consumers can defer paying, consumers placing credit orders may expect delivery less quickly than orders paid for in other ways.[72]

The survey data and other information in the rulemaking record do not support NCL's observations or DMA's contentions about similar or slower shipment expectations for credit card purchases.[73] For example, Ms. Kuman, relying on the AT&T survey noted that consumers who order merchandise by telephone (and normally pay by credit card) do so because of convenience and speedier delivery.[74] She also stated unequivocally that, based upon her extensive experience, "there is no reason to believe customers who order by telephone expect any less prompt shipments than their mail order counterparts."[75] Similarly, DMA suggested that, although consumer perceptions about shipment may not be accurate, "[i]t may be true that consumers subjectively expect speedier delivery of merchandise ordered on the basis of credit card authorization and by telephone than they do when other forms of payment and ordering are involved."[76]

Other comments also indicated that consumers expect shipment more rapidly when shopping by telephone rather than mail. For example, the Director of CaDCA reported that consumers expect shipment more quickly when ordering by telephone. Similarly, Burnett stated that customers who order by telephone and pay by means of credit card expect delivery "in the same or less time than those ordering by mail * * *."[77] NRMA believed that "many customers choose to order by telephone because, in many instances, it is faster and more efficient. Unlike mail orders, telephone orders can often be delivered within days after a customer makes his or her request."[78]

2. Industry Shipment Practices

a. Empirical and testimonial evidence. In response to the screener questionnaire, ORC survey respondents reported late delivery approximately 14 to 15% of the time for both mail and telephone order merchandise.[79] However, some consumers incorrectly perceived the delivery was late. In his analysis of the ORC results, Dr. Cox found that 8.8% of mail orders and 18% of telephone orders that consumers thought were late were, in fact, delivered within the time expressly represented by the merchant or within 30 days if no time was represented.[80] Moreover, timely and complete delay notifications were sent to 19.7% of the mail order consumers and to 34.2% of the telephone order consumers whose orders were shipped later than the originally promised date.[81] Some consumers also elected to cancel their orders and received timely and complete refunds. In establishing which consumers experienced inappropriate shipment delays, Dr. Cox excluded from his analysis those consumers inaccurately reporting delays, those who received appropriate delay notifications, and consumers who canceled their orders and received full and timely refunds.[82]

Dr. Cox first determined that of 211 mail and 66 telephone order consumers who reported that their most recent order was delayed, 7.1% of the mail order and 7.6% of the telephone order respondents received neither merchandise nor a refund.[83] Projecting these results to the national population, Dr. Cox concluded that at any given time, there is a 1.06% probability that mail order merchandise will not be delivered or that no refund will be made. At the same time, there is a 1.04% probability that telephone order merchandise will not be delivered or that no refund will be made.[84]

The survey also identified 36 telephone order consumers who received neither merchandise nor a refund within the time promised or, if no time was promised, within 30 days.[85] Of these telephone order consumers, 50% reported not receiving any first delay notice.[86] Of the telephone order consumers who received late shipments, another 15.8% received delay notices that would be considered incomplete under the MOR's requirements.[87] In

[70] Where an express shipment representation is made, the average credit card consumer expectation of delivery is 18.20 days. Where another form of payment is used, consumers expect delivery in 29.08 days. Where no shipment representations are made, the figures are 14.00 and 21.00 days respectively. R011006–2, M–2, p. 9, Tab. V.

[71] R011006–2, GG–3, p. 2.

[72] R011006–2, F–1, p. 12; HX–1, p. 15. DMA argued that staff and the PO improperly relied on Dr. Cox's analysis of the ORC survey, pointing to Dr. Cox's testimony that in his original analysis he did not analyze consumer expectations based on method of payment. However, Dr. Cox subsequently analyzed consumer expectations and their correlations with the method of payment in his rebuttal submission. See R011006–4, P–1, pp. 11, 13–14.

[73] This evidence includes the comments of Burnett (discussed *infra*), NWMaDA, and the Iowa Attorney General. See Staff Report, R011006–3, N–1, pp. 17–19, 41.

[74] R011006–2, HX–1, p. 5; see also R011006–2, Tr., pp. 8–9.

[75] R011006–2, HX–1, p. 9.

[76] R011006–B–1, B–1, p. 3. See also the ANPR comment of consumer William F. Pryor, who said: "One of the reasons for using the telephone to order is to reduce the delivery time. If I had known it would take 130 days, the order would not have been placed." R011006–B–1, B–33, p. 1.

[77] R011006–2, E–1, p. 2.

[78] R011006–B–1, B–26, p. 1. These and other opinions expressed by NRMA are endorsed by the American Retail Federation. R011006–B–1, B–25, p. 1.

[79] R011006–B–1, B–35, p. 5, Tab. III. These data are similar to the results of the FTC's 1985 Market Facts study (the "first Market Facts study") in which respondents stated that mail order merchandise was received late 19% of the time, compared to 18% for telephone order merchandise. R011006–B–1, B–36, p. 5.

[80] In situations in which no express shipment date was made, Dr. Cox used the MOR's implicit 30-day shipment representation to evaluate consumer reports. However, as noted supra, telephone order consumers in these situations except shipment much faster than mail order consumers. Thus, the use of the implicit 30-day shipment representation for telephone orders may have biased the results to understate the number of delays of these orders. Although consumers who ordered merchandise by telephone might have expected quite reasonably that the merchandise would arrive significantly faster than it did, because their orders arrived within 30 days, Dr. Cox did not treat these as delays. Thus, a disproportionately larger percentage of telephone order than mail order consumers were treated as incorrectly perceiving that their orders were late.

[81] R011006–B–1, B–35, p. 6, Tab. VI. The difference between these two numbers is not statistically significant at the ten percent level. To comply with the MOR, the merchant must provide the consumer with: (1) a definite revised shipment date, (2) an option to cancel the order and receive a prompt refund, and (3) a prepaid means for the consumer to exercise the option. The TRR issued today retains these requirements.

[82] See R011006–B–1, B–35, p. 6, Tab. IV; R011006–2, Tr. pp. 134–35.

[83] R011006–B–1, B–35, p. 12, Tab. VIII.

[84] R011006–B–1, B–35, p. 14, Tab. XI. The difference between 1.06% and 1.04% is not statistically significant. R011006–B–1, B–35, p. 10. In the discussion that follows, the term "refund" has the same meaning as it is given in the MOR. The term therefore includes removal of a charge from a customer's account or notification to a customer that no action will be taken that will result in a charge to the customer's account. See 16 CFR 435.2(c)(i) and (ii). This definition is retained in the TRR issued today.

[85] R011006–B–1, B–35, p. 6, Tab. V.

[86] Id. at Tab VIII.

[87] Id. Thus, in 65.8% of the transactions involving delayed shipments of merchandise ordered by telephone, sellers did not provide adequate notices

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comparison, 117 mail order consumers received neither merchandise nor a refund within the time promised or, if no time was promised, within 30 days.[88] Of these mail order consumers, 54.7% reported receiving no first delay notice, and an additional 24.8% received an incomplete delay notice.[89] Projecting these findings to the national population, Dr. Cox found that the risk of late shipment without proper or timely notification of delay is 5.01% for mail orders and 4.14% for telephone orders.[90]

Based on his knowledge of the industry, Mr. Kordahl's estimates of the risk telephone order merchandise would be delayed are similar to the ORC results. In his opinion there is a 2–3% risk of delay for telephone order merchandise ordered from merchants that have separate mail and telephone operations, and a 5–10% risk of delay for telephone order merchandise purchased from merchants that integrate their operations, i.e., where the merchant does not distinguish between orders received by telephone or by mail in processing orders. Combining these two delay rates and averaging them, he stated the "risk that merchandise ordered and paid for by telephone will be delayed is between 4.4% and 8.6%, or approximately 5% and 9%."[91]

He further stated that 3% to 4% of telephone sales involve express or implied (30-day) shipment representations that the merchant fails to substantiate.[92] He said that telephone order merchants provide appropriate delay notification more frequently than the ORC survey demonstrates. However, he also pointed out that his estimated violation rates were based, in part, on his experience with merchants whom he considered to be among the most reputable and that his "merchant universe" was not nationally projectable. Accordingly, he noted that he "would expect the ORC data, which are based on consumer experiences with the general universe of merchants, to show larger violation rates."[93]

In addition to determining how often there were inappropriate or unexcused shipment delays, Dr. Cox analyzed the length of the delays. Based on the reports of the consumers surveyed by ORC whose merchandise ultimately was received but not within the time expressly promised, or within 30 days if no time was promised,[94] Dr. Cox performed a frequency distribution analysis to determine how late the merchandise was when it finally arrived.[95] Dr. Cox analyzed each consumer's report of delay depending on whether the merchant made an express shipment claim or an implied 30-day shipment claim.[96] The frequency of late deliveries was as follows:

LATE DELIVERY BY METHOD OF ORDERING

	Weeks late[97]					
	1 to 2	3 to 4	5 to 6	7 to 8	8 plus	Total
Mail	14 (24)	12 (20.7)	9 (16)	5 (8.6)	TB (31)	58
Telephone	4 (23.5)	6 (35)	1 (6)	1 (6)	5 (29)	17

Based on these results, inappropriate or unexcused delays averaged 5 weeks for telephone merchandise, and 5.38 weeks for mail order merchandise.[98]

b. Other submissions.

Numerous state attorneys general submitted comments supporting the proposed amendments to cover telephone sales.[99] While many such comments did not provide detailed statistical or other empirical bases for their conclusions or assertions, the

that would allow consumers to make informed decisions about whether to agree to delays or request refunds.

[88] Id. at Tab. V.

[89] Id. at Tab. VIII.

[90] R011006–B–1, B–35, p. 14, Tab. XI. These differences are not statistically significant. Id. at 10.

[91] R011006–2, HX–4, p. 14. According to Mr. Kordahl, approximately 80% of merchants integrate their mail and telephone fulfillment operations. Id. at 11–12.

[92] Id. at 15.

[93] Id.; see also R011006–2, TX. 150–51.

[94] Originally, 155 subjects reported experiencing delay. In his rebuttal comment, Dr. Cox analyzed the experiences of those subjects who (1) ultimately received the delayed merchandise but who (2) had not consented previously to the delays. He accordingly excluded 20 of the 155 subjects who received no merchandise (and, in seven cases, no refund either) because they canceled their orders. He excluded another 20 who did not cancel and who, after six months, never received either merchandise or refunds. He also excluded 36 subjects who agreed to the delays. Finally, he excluded four subjects because their "don't know" responses to some questions made them impossible to classify. This left 75 transactions that he analyzed.

[95] R011006–2, M–1, pp. 5–6, Tabs. I and III. Because of the scales used in the survey protocol, these delays were expressed in two-week ranges on a five point scale, i.e., "1–2 weeks," "3–4 weeks," "5–6 weeks," "7–8 weeks," and "9+ weeks."

[96] See supra, n.80.

[97] "Weeks late" refers to the number of weeks the merchandise arrived later than it was promised in the merchant's solicitation of the order or, if no time was promised, later than 30 days. The numbers in parentheses indicate percentages.

[98] Staff Report, R011006–3, N–1, p. 38, n.75 and accompanying text. Staff's estimate entailed choosing the midpoints of the two-week ranges in Dr. Cox's analysis as the average delay period for the consumers in each range.

[99] See, e.g., Mass Atty. Gen., R011006–2, H–5, p. 1; Iowa Atty. Gen., R011006–2, H–8, p. 1. See also Okla. Atty. Gen., R011006–2, H–10.

Commission believes their comments are important because they represent the views of those who, on a daily basis, deal with consumer problems at the local level. When the Commission promulgated the MOR in 1975, it relied in large measure on state attorneys general and consumer groups' reports that the failure to deliver mail order merchandise was a major source of consumer complaints and consumed much of their resources.[100]

In this rulemaking, several state law enforcement agencies reported that the failure to deliver mail and telephone order merchandise is now a major source of the consumer complaints they receive.[101] Many of the state attorneys general also reported that telephone order merchandise complaints are increasing dramatically.[102] They indicated that amending the MOR to include telephone order merchandise would directly address problems generally experienced by consumers in their states or would facilitate state responses to these problems.[103] Several state attorneys general commented that their states adopted legislation that expressly covers the sale of telephone merchandise and that such legislation has had salutary effects.[104]

In addition to the state attorneys general, state consumer protection agencies submitted comments that overwhelmingly favor amending the MOR to include sales of telephone order merchandise.[105] Like the state attorneys general, state consumer protection agencies believe amending the MOR to include telephone order merchandise will directly address the problems they encounter, including non-deliveries, delays, delays without notice, and failures to provide refunds for telephone order merchandise.[106]

In addition to state and local agencies, consumer interest groups supported and commented extensively on the proposed amendments.[107] Businesses and trade associations that submitted comments, including Burnett,[108] Marketing Sciences, Inc.,[109] DMA,[110] MOAA,[111] MasterCard International and Visa U.S.A., Inc.,[112] expressed support for the proposed amendments for telephone sales. Most of the companies stated that providing consumers with timely and complete information about their orders and prompt refunds, if necessary, is simply good business practice. For example, MOAA stated that its members, 90% of whom receive orders by telephone, comply with the MOR by providing

[100] See, e.g., SBP, 40 FR 51582–83.

[101] For example, the New York Attorney General reported that mail and telephone order complaints constitute 41% of the complaints it handles. R011006–2, H–7, p. 1. The North Dakota Attorney General stated that 21% of its complaints are mail and telephone order merchandise complaints. R011006–2, H–11, pp. 1–2. The Pennsylvania Attorney General's Office reported that during the period 1985 to 1988, it experienced a 39% increase in complaints relating to mail and telephone order merchandise. R011006–B–1, B–8, p. 2.

[102] For example, the Iowa Attorney General reports that complaints involving telephone order merchandise, including complaints about delays in receiving telephone order merchandise far exceed complaints about mail order merchandise. R011006–2, H–6, p. 1. California's Attorney General commented that 60% of its complaints now involve telephone order merchandise. R011006–2, H–4, p. 1. Similarly, the Massachusetts Attorney General's Office stated that it has witnessed a steady increase in complaints related to telephone order merchandise, and that such complaints far outnumber complaints involving mail order merchandise. R011006–2, H–5, p. 1. Some of the telephone order merchandise complaints reported by the states include complaints about so-called "telemarketing fraud." Telemarketing fraud here appears to refer to merchandise that is offered but not shipped, or merchandise whose quality or value is materially misrepresented but is shipped. Both the NWMaDA and Iowa correctly believe that the proposed amendment would reach only the problem of unshipped telephone order merchandise. See R011006–2, H–5, p. 2; R011006–2, H–6, p. 1.

[103] The Iowa Attorney General's Office commented that a well-defined delivery rule will provide consumer protection agencies with an easily applied enforcement option. R011006–2, H–6, p. 1. The Kansas Attorney General reported problems because neither state law nor the MOR presently covers telephone sales. R011006–2, H–15, p. 2. North Carolina and Oklahoma also reported consumer problems with non-delivery and shipment delays with telephone order merchandise. R011006–2, H–1, p. 3, and R011006–2, H–10, p. 1.

[104] In response to mounting complaints, California amended its mail order statute to include telephone order merchandise, Bus. & Prof. Code 17538, 17538.3 (Ch. 337, stats. 1988), to make the statute "relevant to the entire mail-order marketplace today and for the foreseeable future." The California Attorney General's Office stated that the new legislation has benefited the public and has prevented some fraudulent operators from entering the California market. R011006–2, H–4, pp. 2, 8. Wisconsin's Attorney General also cited evidence that its telephone legislation benefits the state's consumers. R011006–2, H–13, p. 4. For example, during 1988, thirty-seven citizens received an average of over $100 each in satisfaction of their complaints concerning unshipped telephone order merchandise. Id. at 3. In 1984 New York extended its mail order statute to telephone order merchandise to reach "the growing telephone order market." New York Attorney General, R011006–2, H–7, pp. 1–2. See General Business Law 396–m (1985).

[105] See, e.g., NACAA, R011006–2, GG–2, p. 2. See also New Opportunities for Waterbury, R011006–2, GG–1, p. 1 (numerous complaints about delayed shipment without notice); Tennessee Division of Consumer Affairs, R011006–2, GG–2, p. 1 (delay, nondelivery, no notice, failure to provide refunds); State of Connecticut, Department of Consumer Affairs, R011006–2, H–3, p. 1 (nondelivery, delay and billing most common problems).

[106] For example, the New York State Consumer Protection Board and the CaDCA both supported extending the MOR to telephone order merchandise. They reported that complaints concerning mail and telephone order merchandise constitute a large percentage of their work. R011006–2, H–12, p. 1; R011006–2, H–2, p. 1. Much of CaDCA's comment was based on information from the state's leading case involving failure to ship mail and telephone order merchandise in a timely fashion. *California* versus *Dixon* (Santa Clara Superior Court No. 563321, judgment entered 1989). R011006–2, H–2, pp. 2, 5; R011006–3, N–1, at Appendix "B." When the *Dixon* case began, California's mail-order statute did not include telephone order merchandise. The *Dixon* court found that of 337 failures to ship merchandise timely, 176 or 53% arose from orders placed by telephone, which had an average dollar value of $281. The Georgia Office of Consumer Affairs stated that its most recent figures show that complaints involving unshipped or late telephone order merchandise exceed complaints about mail order merchandise. R011006–2, H–8, p. 1. Although the mail and telephone order complaints received by the Tennessee Division of Consumer Affairs comprise only 6% of that agency's total complaints, it favors the amendments because it considers them "necessary to gain some control over what is quickly becoming an uncontrollable industry." R011006–2, GG–2, p. 1.

[107] For example, AARP commented that "[e]xpansion of the Mail Order Rule to include all telephone and credit sales is essential * * * to redress widespread consumer harm in the fast-growing telemarketing industry." R011006–2, GG–4, p. 4. AARP reported that consumers are experiencing delay and refund problems with telephone order merchandise that are similar to the problems that led to the adoption of the MOR. *Id.* at 14. Many of the 1,000 consumer complaints it receives concern the failure of companies to provide late shipment information or refunds for mail and telephone order merchandise. Id. at 17. AARP also asserted that telephone order merchants often have no reasonable basis for shipment representations that are made, and that such merchants frequently fail to provide delay notices. Id. at 14.

[108] R011006–2, E–1, p. 1.

[109] R011006–2, D–1, pp. 1–2. While Marketing supported amending the MOR to include business-to-consumer sales by telephone, it did not agree that the Rule should include all business-to-business transactions. See Part VII, A of this SBP.

[110] R011006–2, F–1, p. 7.

[111] R011006–2, F–2, p. 2.

[112] R011006–2, EE–1. MasterCard International and Visa U.S.A., Inc. jointly noted that the problem of greatest concern to them is telemarketing fraud which results in losses of $200 million annually to financial institutions alone. They supported amending the MOR to include telephone sales because some telemarketing fraud consists of the failure to ship any merchandise at all and so could be reached by amending the MOR to include telephone sales. They also advocated that the Commission adopt the enforcement policy that any material misrepresentation of the identity or quality of merchandise results in a violation because it constitutes a failure to ship the advertised merchandise. R011006–2, EE–1, p. 4. The Commission did not solicit comments on this issue during this proceeding, and therefore will not address it here. The Commission notes, however, that it has previously held that it is an unfair or deceptive act or practice to ship merchandise that differs with respect to brand name, type, quantity, size, or quality from that represented in the advertising soliciting the sale. Star Office Supply Co., 77 F.T.C. 383 (1970). The Commission also has indicated that merchants who engage in these acts or practices with knowledge of the Star Office Supply decision are subject to civil penalties under section 5(m)(1)(B) of the FTC Act, 15 U.S.C. 45(m)(1)(B). See Synopsis of FTC Decisions Concerning Unordered Merchandise, approved July 9, 1980.

notices of delay and the option to cancel because it is good business to do so.[113]

3. Estimated Consumer Injury

Generally, with respect to sales of mail or telephone order merchandise the shipment of which is inappropriately delayed, although the number of business-to-consumer sales of telephone order merchandise is about half the number of mail order sales, the value of the average telephone order sale is approximately twice the value of the average mail order sale ($140 vs. $70).[114] On average, individual consumers who order by telephone and receive neither merchandise nor a refund experience greater harm than consumers who order by mail and receive the same treatment. As detailed supra, the likelihood that a consumer will receive neither merchandise nor a refund, or that merchandise will be delayed without a merchant having sent a proper delay notice, is about the same whether merchandise is ordered by mail or by telephone.

Specifically, the ORC survey indicates that there is a risk that neither merchandise nor a refund will be provided to consumers 1.06% of the time for mail orders and 1.04% of the time for telephone orders.[115] The average injury to consumers where no delivery is made is $44.40 for mail orders and $83.30 for telephone orders.[116] The survey further indicates that there is a 5.01% probability of shipment delay without adequate or timely notification of delay for mail order merchandise and a 4.14% probability for telephone order merchandise.[117] The average value of delayed mail order merchandise is $67.30; the average value of delayed telephone order merchandise is $185.45.[118]

As indicated supra, according to Direct Marketing, consumers spent approximately $48 billion for mail and telephone order merchandise in 1988. Telephone sales amounted to approximately $24.3 billion and mail order sales, $23.7 billion.[119] Based on the ORC survey finding that there is a 1.04% risk that telephone order merchandise will not be shipped, in 1988, consumers ordered telephone order merchandise worth $253 million that was not delivered. However, the actual out-of-pocket loss is probably less. According to Mr. Kordahl, 80% of telephone order merchants hold charges until they can ship, while 20% charge immediately.[120] Accordingly the Commission estimates that, in 1988, consumers paid $50.6 million for telephone order merchandise that was neither shipped nor refunded.[121] Consumers also lost the benefit of another $202.4 million worth of telephone order merchandise that was not shipped, but was not charged to their accounts. Although consumers' charge accounts were not debited, they lost the opportunity to order from more responsive merchants, and may have incurred costs to learn the status of their orders.[122]

Additionally, based on the ORC report finding that there is a 4.14% risk of untimely or inadequate notification of delay for telephone order merchandise, in 1988, the value of delayed telephone order merchandise for which there was an untimely or inadequate notification of delay was $1.006 billion. Based on the reported 5.01% risk of untimely or inadequate notification of delay for mail order merchandise, in 1988, the value of delayed mail order merchandise for which there was an untimely or inadequate notification of delay was $1.19 billion. Because consumers ultimately received this late mail and telephone order merchandise, their losses are essentially lost interest on "early" payments and opportunity costs.

Estimating the consumer injury resulting from this delayed merchandise involved first calculating the average delay reported by the ORC survey based on Dr. Cox's frequency distribution analysis of late delivery, as described supra.[123] Inappropriate or unexcused delays averaged 5 weeks for telephone merchandise and 5.38 weeks for mail order merchandise. Based on the loss of interest on these purchases at an annual interest rate of 12%, consumer losses of 1.15% for delayed telephone merchandise and 1.23% for delayed mail order merchandise are estimated. Thus, consumer losses from delayed telephone order merchandise, in 1988, totalled $11.57 million; at the same time, consumer losses from delayed mail order merchandise totalled $14.84 million.

III. Legal Basis for an Amended Rule

A. Rulemaking Authority

Section 5(a)(1) of the FTC Act, 15 U.S.C. 45(a)(1), declares unlawful "unfair or deceptive acts or practices in or affecting commerce." Section 18(a)(1)(B), 15 U.S.C. 57a(a)(1)(B), authorizes the Commission to prescribe "rules which define with specificity acts or practices which are unfair or deceptive acts or practices in or affecting commerce" and provides that "[r]ules under this subparagraph may include requirements prescribed for the purpose of preventing such acts or practices."

Although it was not promulgated through the procedures established by the Magnuson-Moss Act in 1975 and codified in section 18 of the FTC Act, by virtue of section 202(c) of the statute, the MOR has the same validity as a trade regulation rule under section 18.[124] It defines certain conduct as unfair or deceptive in the context of direct marketing by mail that the current record demonstrates is virtually identical to conduct occurring in the context of direct marketing by telephone.

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[113] R011006-2, F-2, pp. 1-2. MOAA explained that: "Catalog houses rely to a substantial extent upon repeat customers which requires the building of a customer base that trusts the seller. A failure to promptly notify customers of delayed shipments, or any other difficulties with orders, [can] only lead to disgruntled customers with a resulting loss of business." Id.

[114] See R011006-B-1, B-35, p. 15.

[115] Id., p. 14.

[116] Id.

[117] Id.

[118] Id. Combining the values of the unshipped with the late merchandise, the average value of unshipped and late mail order merchandise is $70; the average value of unshipped and late telephone order merchandise is $140. Id., p. 15.

[119] Kordahl, R011006-2, HX-4, pp. 9-10.

[120] R011006-2, M-3, pp. 6-7. The ORC survey selected respondents to participate in the follow-up survey only if they reported that they paid for the order upon ordering, and only if they did not receive all the merchandise within the time originally promised. R011006-B-1, B-35, Screener Q, S2 and S6. Although it is possible that participants in the survey interpreted the screener questions in a way that led to their responding to the follow-up survey only if the charges ultimately appeared on their credit card statements, it is also possible that some interpreted the screener questions to qualify them for the follow-up survey even though the charge ultimately did not appear on their credit card statements. The Commission has accordingly adopted the conservative approach of estimating consumer out-of-pocket losses to be only 20% of the total value of the unshipped merchandise documented by the ORC survey.

[121] Comparable mail order figures can be derived from these sources. Based on the ORC survey finding that there is a 1.06% risk that mail order merchandise will not be shipped, in 1988, consumers ordered mail order merchandise worth between $277 million and $289 million that was not delivered. Based on these figures, in 1988, consumers are estimated to have spent between $201 million and $210 million on mail order merchandise that was neither shipped nor refunded.

[122] See Hurnett, R011006-2, E-1, p. 2. According to the ORC survey, 31.7% of mail order purchases are paid by credit card. R011006-B-1, B-35, p. 4. Using Mr. Kordahl's estimate that 80% of merchants hold charges until shipment, the out-of-pocket costs to the 30% of consumers who order by mail and charge their orders should be adjusted downward by 80%. Although these consumers were not charged, they experienced the same opportunity losses as telephone order purchasers, as described supra.

[123] See supra n. 95 and accompanying text.

[124] See *U.S. v. JS & A Group, Inc.*, 716 F.2d 451, 455 (7th Cir. 1983).

Under section 18(e)(3)(A) of the FTC Act, 15 U.S.C. 57a(e)(3)(A), a trade regulation rule must be supported by "substantial evidence in the rulemaking record * * * taken as a whole."[125] The Commission believes that the MOR was appropriately supported when issued,[126] and the record of this proceeding includes reliable surveys, expert testimony, public comments and other evidence supporting the proposed amendments. The record contains little, if any, evidence contrary to the Commission's decision to extend the MOR to include telephone sales.[127]

B. Section 5(a)(1) Analysis

The Commission's analysis of the record is consistent with the policy statements it has issued on how it will construe the statutory language "unfair" or "deceptive"[128] and the Commission's findings supporting the promulgation of the MOR in 1975.[129] In determining what constitutes unfairness or deception, and particularly in determining what direct or implied representation an advertisement makes or what non-disclosed facts are material to consumers, the Commission may rely on extrinsic evidence, such as empirical data, or on its own expertise. *FTC* v. *Colgate-Palmolive Co.*, 380 U.S. 374 (1965); Simeon Management Corp., 87 FTC 1184, 1229–30 (1976), aff'd, 579 F.2d 1137 (9th Cir. 1976); Pfizer, Inc., 81 FTC 23, 58 (1972).

1. Deception

An express or implied performance claim capable of objective evaluation carries with it the implication that the merchant has, at the time of making the representation, such information as would under the circumstances satisfy a reasonable and prudent businessman, acting in good faith, that the representation is true. It is a basic tenet of Commission deception law that merchants should have such a "reasonable basis" for objective representations. The Commission has expounded this tenet on numerous occasions and reviewing courts have affirmed it.[130] More specifically, express or implied claims with respect to shipment time are claims of material fact for which the seller must have a reasonable basis. *Jay Norris, Inc.*, 91 FTC 751 at 860, order modified and aff'd, 598 F.2d 1244 (2d Cir.), cert. denied, 444 U.S. 980 (1979).

In issuing the MOR, the Commission relied on surveys and other evidence to determine, in the context of direct marketing by mail, that when no express shipment representation was made, consumers expected merchandise to be shipped within 30 days after a merchant's receipt of the consumer's properly completed order.[131] Since it would be unfair or deceptive for a merchant needing more than 30 days to ship to fail to correct this 30-day perception in offering mail order merchandise to the public,[132] the Commission determined that the merchant's silence about shipment time gave rise to an implied 30-day shipment representation.[133]

The Commission's determination to adopt the MOR was based upon numerous consumer and consumer protection agency complaints that merchandise failed to arrive within the time expected, namely, within the time expressly or implied represented by the merchant. It was also based on the testimony of industry members that merchants failed to substantiate their express and implied shipment representations in many of these late shipment situations. In light of the foregoing, the Commission determined that there was a widespread failure to substantiate express and implied shipment representations.[134]

In this rulemaking, empirical data show that, as in the context of direct marketing by mail, consumers expect that merchandise ordered by telephone will be shipped within at least 30 days when no shipment representation is made.[135] As with mail order transactions, the Commission has determined that the merchant's silence gives rise to an implied 30-day shipment representation, on the grounds that it would be unfair or deceptive for a merchant who needs more than 30 days to fail to correct the consumer's expectation in this regard.[136] As might be expected, the record evidence also shows that consumers expect telephone order merchandise to be shipped in the time expressly represented.

The record of this rulemaking proceeding shows that a significant number of consumers do not receive telephone order merchandise within the time expressly or impliedly represented in the advertising soliciting telephone sales. Specifically, the ORC survey shows that 4.6% of the time consumers experience delayed shipment of telephone order merchandise.

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[125] Substantial evidence" means "such relevant evidence as a reasonable mind might accept as adequate to support conclusion." *Consolidated Edison Co. v. Labor Board*, 305 U.S. 197, 229 (1938); *see Consumers Union of U.S. v. FTC*, 801 F.2d 417, 422 (D.C. Cir. 1986) (Scalia, J.). The courts, however, have sustained agency action if it is supported by substantial evidence, even if the record also contains substantial evidence supporting the opposite conclusion. *Consolo v. Federal Maritime Commission*, 383 U.S. 607, 620 (1966). The Commission has previously indicated that where factual propositions underlying the determination that an act or practice is unfair or deceptive are both supported and contradicted by the evidence, the Commission would base its determination on a "preponderance" of reliable evidence. SBP for the Credit Practices TRR, 49 FR 7740, 7742 (March 1, 1984). See also SBP for the Sale of Used Motor Vehicles TRR, 49 FR 45692, 45708 (Nov. 19, 1984).

[126] *Cf. U.S. v. JS & A Group, Inc.*, 716 F.2d 451 (7th Cir. 1983); *U.S. v. Braswell, Inc.*, 1981–2 Trade Cas. (CCH) ¶ 64,325 (N.D. Ga. 1981).

[127] However, two participants contended that the TRR should not be applicable to all business-to-business transactions. See part VII, A of this SBP. Additionally, although comments and testimony were submitted in opposition to the proposal to amend the definition of a "properly completed order" in credit sales for the reasons discussed in part IV of this SBP, the Commission does not find this evidence reliable. Reliable evidence was offered supporting this change and, accordingly, a preponderance of reliable evidence supports amending the definition.

[128] Commission letter of October 14, 1983, to Hon. John D. Dingell, Chairman, Subcommittee on Oversight and Investigations, appendix to Cliffdale Associates, 103 F.T.C. 110, 174 (1984). Commission letter of December 17, 1980, to Hon. Wendell H. Ford and Hon. John C. Danforth, appendix to International Harvester Co., 104 F.T.C. 949, 1070 (1984).

[129] See SBP, 40 FR 51582 (Nov. 5, 1975). The Commission notes that in the instant rulemaking the MOR was generally regarded as a successful regulation, and no participant suggested that the MOR was no longer necessary or should be rescinded. See, e.g., R011006–B–1, B–1, p. 2.

[130] See, e.g., Fedders Corp., 85 FTC 36, 64 (1975), 529 F.2d 1398, 1400–01 (2d Cir.), cert. denied, 429 U.S. 818 (1976); National Dynamics, 82 FTC 488 (1972), 492 F.2d 1333 (2d Cir.), cert. denied, 419 U.S. 993 (1974); Pfizer, Inc., 81 FTC 23 (1972); Firestone Tire & Rubber Co., 81 F.T.C. 398 (1972), 481 F.2d 246 (6th Cir.), cert. denied, 414 U.S. 1112 (1973). Such claims may be either express or implied. Removatron International Corp., 884 F.2d 1489 (1st Cir. 1989). See also Thompson Medical Co., 104 FTC 648, 821–29, and FTC Policy Statement Regarding Advertising Substantiation, Appendix to Thompson Opinion, 104 FTC 839, 791 F.2d 1989, 194–96 (D.C. Cir. 1986), cert. denied, 479 U.S. 1086 (1987). The requirement that performance claims that are material and capable of evaluation must be substantiated can be justified on either a deception rationale, as in National Dynamics, 82 FTC at 549–50, or on an unfairness rationale, as in Pfizer, 81 FTC at 64.

[131] SBP, 40 FR 51582, 51587 (Nov. 5, 1975).

[132] The Commission has broad authority to define unfair or deceptive acts or practices. *Sperry & Hutchinson Co. v. FTC*, 405 U.S. 233 (1972); *National Petroleum Refiners v. FTC*, 482 F.2d. 672 (D.C. Cir. 1973), *cert. denied*, 415 U.S. 951 (1974).

[133] SBP, 40 FR 51582, 51587 (Nov. 5, 1975). The Commission did not find that consumers had any single expectation regarding shipment time. Instead, the Commission found that consumer expectations varied, ranging, at the extremes, from a few days to months. Finding that few consumers expected shipment to take more than 30 days, the Commission decided in its discretion to use a 30-day period for implied shipment representations.

[134] *Id.*

[135] The Commission agrees with the PO's finding that consumers tend to expect faster shipment when they order by telephone than when they order by mail, particularly when no express shipment claims are made in soliciting the order. PO's Report, R011006–3, O–1, pp. 18, 73, conclusion 8.

[136] See also part IV, discussion of § 435.1(a)(1)(ii), infra.

According to Eugene Kordahl, an industry expert, in a substantial number of these late shipment situations merchants would not have had a reasonable basis for their shipment representations.

Finally, as in the context of direct order sales by mail, shipment representations in the sale of telephone order merchandise are material. The record shows that shipment time is particularly important to consumers who order merchandise by telephone. Further, in promulgating the reasonable basis requirements for shipment representations in the MOR (16 CFR 435.1(a)), the Commission has already determined that shipment claims are material to consumers.

2. Unfairness

In promulgating the MOR, the Commission determined that the merchant's failure to notify a buyer that shipment would not be made in the time originally promised was an unfair or deceptive act or practice. The Commission reasoned that:

> Where the seller is not able to make shipment within the applicable time he is, in effect (1) rejecting the buyer's offer by making a counteroffer, (2) seeking to alter the contract, or (3) in breach of contract. If the seller simply remains silent and ships the merchandise late or merely notifies the buyer of delay without offering the opportunity to cancel * * * the seller is attempting to impose upon the buyer a contract far different from the one the buyer thought he was entering into.[137]

In the MOR rulemaking, the Commission adopted the notification and refund provisions based on its determination that there was a widespread failure of merchants who were unable to ship within the time originally promised to obtain the consumer's informed consent to delay, or to make a prompt refund when that consent was not obtained. Specifically, §§ 435.1 (b) and (c) regulate the conduct of the seller after the consumer's offer to buy the merchandise as advertised (including the express or implied shipment terms), has been accepted by the seller.

In this rulemaking, the record demonstrates that telephone order merchants fail to notify consumers in a timely and appropriate fashion about delays and to seek consumers' consent to delays about 4.1% of the time, and fail to ship or make refunds ever about 1.04% of the time. As with mail order sales, if a seller remains silent and ships the merchandise late or merely notifies the buyer of delay without offering the opportunity to cancel, the seller is unilaterally changing the terms of the contract. The Commission holds that these acts are unfair because they cause substantial injury that consumers cannot reasonably avoid, and the practices are not outweighed by countervailing benefits to consumers or competition.

The Commission recognizes that some participants in this proceeding contend that buyers are not injured when sellers do not charge consumers' accounts prior to shipping or do not charge them at all if the merchandise is not shipped. In fact, the record shows that in a substantial number of transactions, sellers do not charge consumers' accounts until they ship the merchandise.[138] However, in issuing the MOR the Commission expressed its disagreement with the premise that consumers who have not "prepaid" are not injured, and does so again today.[139]

All consumers who face delays and who are unable to cancel their orders are the victims of unfair practices. Even when consumer accounts have not been charged, consumers incur opportunity and transaction costs. For example, consumers who have ordered from merchants who have not shipped their merchandise on time and have not provided them with revised shipping dates and the option to cancel, may lose the opportunity to purchase their merchandise more quickly elsewhere. They also may incur costs to learn the status of their orders.

Further, consumers who order by telephone reasonably rely on the merchant's shipment representations and assume that the merchant will fulfill the contract as agreed rather than unilaterally changing or breaching the contract. Consequently, they cannot reasonably avoid the injury from sellers' failures to disclose appropriate and timely delay information.

Finally, the harm to consumers is not outweighed by any corresponding benefits to consumers or merchants. There is no reason to believe that there are legitimate benefits to merchants from unilaterally changing contract terms or breaching contracts or that consumers benefit through lower prices or better quality from such practices. Indeed, unsatisfactory experiences can deter consumers from ordering by telephone from other merchants who would ship on time or properly notify them of delays. Thus, the harm to consumers also can harm competition. Prompt shipment and timely, proper notifications of delay are low cost, good business practices that encourage repeat sales.

3. Remedies

Section 18(a)(1)(B) of the FTC Act, 15 U.S.C. 57a(a)(1)(B), authorizes the Commission, in addition to issuing rules defining unfair or deceptive acts or practices, to include in its rules "requirements prescribed for the purpose of preventing such acts or practices." In fashioning any such remedy for unfair or deceptive acts or practices, the Commission must show a "reasonable relationship" between the remedy and the practice.[140] After carefully examining the record, the Commission has determined to amend the MOR to include telephone order sales. The record shows that the same types of abuses and practices that led to the MOR occur with telephone sales.

In so concluding, the Commission considered that the empirical evidence on the record showed that the rates of non-delivery, late shipments, and improper delay notifications for telephone and mail order transactions are comparable. Because direct order merchandise sales are currently regulated if they are conducted by mail, the Commission weighed whether under these circumstances it would be in the public interest to cover such direct order sales if they are transacted by telephone. The Commission addressed this issue in the course of conducting a four-part analysis to determine whether a rule is in the public interest.[141] This analysis addresse the following questions:

(1) Is the act or practice prevalent?

(2) Does significant harm exist?

(3) Will the proposed rule reduce that harm? and

(4) Will the benefits of the rule exceed its costs? [142]

[137] SBP, 40 FR 51582 at 51589 (Nov. 5, 1975). In addition to being an unfair act or practice, the merchant's failure to disclose in its solicitation of the sale that its practice is to unilaterally change shipment times in backorder situations is deceptive.

[138] The record also shows that in a significant number of cases, accounts are charged pre-shipment. Part II of this SBP contains estimates of the economic injury from failures to ship or provide refunds at all and from unauthorized delays.

[139] See SBP, 40 FR 51582 at 51594 (Nov. 5, 1975).

[140] *FTC v. National Lead Co.*, 352 U.S. 419, 428–29 (1957); *Jacob Siegel Co. v. FTC*, 327 U.S. 608 (1946). This standard is applicable to section 18(a) rulemaking. *American Optometric Ass'n v. FTC*, 626 F.2d 896, 911 n.8 (D.C. Cir. 1980).

[141] See SBP for the Credit Practices Rule, 49 FR 7702 (1984) and SBP for the Used Car Rule, 49 FR 45692 (1984).

[142] See SBP for the Credit Practices Rule, 49 FR at 7742 (1984) and SBP for the Used Car Rule, 49 FR at 45703 (1984). As required by section 18(d)(1)(A) of the FTC Act, 15 U.S.C. 57a(d)(1)(A), elsewhere in this SBP the Commission discusses the prevalence of the unfair or deceptive acts or practices documented by this rulemaking. See supra n.81 and accompanying text. Although the Commission believes that these questions should be asked and, to the extent possible, answered in every

For the reasons discussed below, the Commission has determined that amending the MOR to encompass telephone orders is in the public interest. First, the record demonstrates that the acts or practices under consideration occur in a significant number of transactions.[143] Although the numerical percentage of affected transactions is low, this percentage involves a large number of transactions, involving millions of dollars of sales. In addition to the empirical evidence in the record, the comments of state and local officials as well as other consumer complaint handling organizations reported that telephone sales related complaints are numerous and growing, and that these amendments are needed to address telephone sales problems.[144]

Second, the Commission finds that reliable record evidence, as detailed in part II, B, 3 of this SBP, shows that these practices cause significant harm to consumers individually and generally.

Third, the Commission is persuaded that the amendments will reduce this harm because they directly address the practices at issue. Although telephone order merchants may understand that they have duties under section 5(a)(1) of the FTC Act to make truthful and substantiated shipment claims and to fulfill contract obligations, their understanding of how to fulfill these duties may be imperfect.[145] By requiring merchants, through requirements that are enforceable by civil penalties and restitution orders, to have a reasonable basis for their express or implied shipment claims and requiring them to send option notices or prompt refunds when they cannot ship on time, the amended MOR should substantially deter the unfair or deceptive acts or practices at issue.

In reaching this conclusion, the Commission considered the argument that the empirical data showing similar problem rates for both mail and telephone sales might mean that the amendments would not be effective in reducing the harm. However, the existence of similar levels of compliance or non-compliance with the law by an uncovered segment of the industry does not mean the amendments are unnecessary where, as here, the rate of non-compliance by the uncovered segment results in significant and widespread consumer injury. Moreover, for the reasons discussed supra in this part of the SBP, the Commission has determined that adoption of the amendments likely will be effective in reducing the harm caused by the uncovered industry segment. Additionally, as discussed in part II, B, 2, b, of this SBP, numerous participants in the rulemaking, including state law enforcement officials, stated that telephone sales complaints are increasing and outstripping mail order complaints.[146]

The Commission gives significant weight to the views of state law enforcement officials who, like the Commission, confront consumer problems on a daily basis.[147] Indeed, in response to the burgeoning number of telephone-related complaints, some states have amended state mail order laws to include telephone sales. Agencies in these states suggested that these laws have been effective in deterring telephone merchants from engaging in the sorts of deceptive and unfair direct marketing practices addressed by the MOR.[148] The Commission's own experience is that merchants have increasingly engaged in the MOR's unfair or deceptive acts or practices in the sale of telephone order merchandise.

In recent years, the Commission has obtained consent decrees resolving allegations that telephone order merchandise was not timely shipped and that appropriate delay notices or refunds were not provided. For example, in *United States* v. *Network Marketing*, the Court, pursuant to section 5(a)(1) of the FTC Act, 15 U.S.C. 45(a)(1), entered a consent decree requiring the defendants to handle every order for telephone order merchandise as though it were an order for mail order merchandise and thus to comply with the MOR.[149] Thereafter, similar orders were obtained against mail and telephone order merchants in *United States* v. *Grabowski*,[150] and *FTC* v. *Rattner*.[151]

Nothing in the record suggests that the problems could be more efficiently addressed by case-by-case prosecution rather than by regulation. Indeed, in the absence of the MOR, the rate of problems pertaining to telephone and mail order merchandise could be much higher. The rulemaking record for the MOR demonstrated that problems associated with the industry were widespread.

The Commission's Regulatory Flexibility Act review of the MOR in 1986, based on the Damans national probability survey of small and large businesses, indicated that industry believes the MOR benefits consumers and businesses in terms of better customer relations.[152] The comments submitted in response to the ANPR and the NPR in this rulemaking also strongly support the conclusion that the MOR has been beneficial for consumers.[153]

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rulemaking, on the basis of the best evidence reasonably available. It has consistently recognized there is room for variation in the specific answers that would justify issuance of a rule depending on the circumstances of each particular rulemaking. See 49 FR at 7742, n.4; 49 FR at 45703, n.177.

[143] See Part II, B of this SBP, supra.

[144] *Id.* at 2, b.

[145] The courts have upheld the Commission's requirement that a mail order merchant who made false and unsubstantiated shipment claims prior to the issuance of the MOR must comply with "large portions" of the MOR. See *Jay Norris Corp.*, 91 FTC at 850–51. Although the Commission could proceed in a case-by-case fashion to require telephone order merchants to comply with the provisions of the MOR as well, it is more efficient to amend the MOR to apply to telephone sales.

[146] See, *e.g.*, R011006–2, H–5, p. 1 (the Massachusetts Attorney General's Office described a steady increase in telemarketing complaints so that telephone merchandise complaints now far outnumber mail order complaints). See also R011006–2, H–6, pp. 1, 3 (Office of the Iowa Attorney General) ("[T]elemarketing is an open invitation to the many predators in the marketplace who would profit by defrauding others. This trend of abuse is unlikely to abate anytime soon and will undeniably expand."); R011006–2, H–8, p. 1 (Georgia Office of Consumer Affairs); R011006–2, H–9, p. 3 (District Attorney for the Northwest District of Massachusetts); R011006–2, H–10, p. 1 (Office of the Oklahoma Attorney General); and R011006–2, H–11, p. 2 (North Dakota Attorney General) ("The number of telephone order complaints is increasing relative to the number of mail order complaints * * * * [P]hone order merchants are in greater need of regulation than mail order merchants.").

[147] Additionally, the comments of the state law enforcement officials report experiences that are more current than the ORC survey. The fieldwork for the survey was completed in 1987.

[148] The Wisconsin Attorney General notes that its interpretation of its mail order law to cover telephone orders has had measurable consumer benefits. R011006–2, H–13, p. 2. See also comment of State of New York, Department of Law, R011006–2, H–7, pp. 1–2. The New York legislature, cognizant of the growing telephone market, amended its mail order law in 1984 to cover telephone ordered merchandise. For the text of the amendment and New York Attorney General's description of its provisions, see R011006–2, B–1, B–49. The California Attorney General reports that his state's telephone legislation has prevented some fraudulent telemarketing operators from entering the California marketplace. R011006–2, H–4, p. 2. The comment added that, although there were some barriers to entry into telephone merchandising by fraudulent operators, "We have not noticed any barriers to legitimate business or any appreciable addition of costs." Id.

[149] 86 Civ. 8927 (RJW) (S.D.N.Y. 1986), R011006–B–1, B–50.

[150] B–89–376 (WWE) (D. Conn. 1989), R011006–B–1, B–51.

[151] H–90–3217 (S.D. Tex. 1990). See Appendix B of Staff Report, R011006–3, N–1.

[152] 51 FR 1516 (1986). Comments by industry members in the rulemaking indicate that they believe the MOR's requirements embody good business practices which lead to consumer repeat purchase behavior. See, e.g., comment of MOAA, R011006–2, F–2, p. 2.

[153] "The [MOR] has served as a valuable mechanism in protecting consumers from unacceptable delay, and, at the same time, has imposed minimal compliance costs on the industry." Comment of AARP, R011006–2, GG–1, p. 4.

Although there are still violations and a continuing need for FTC enforcement efforts, this rulemaking record indicates that the MOR is beneficial.

Although the effects of the proposed amendments cannot be quantified precisely, the Commission concludes that the amendments to include telephone sales will further deter the unfair or deceptive acts or practices defined in the MOR that harm consumers. The TRR will clarify the obligations of telephone order merchants under section 5 of the FTC Act.[154] Further, the amendments ensure that current voluntary compliance with the requirements of the TRR continues.[155] In addition, the threat of possible prosecution and of the award of civil penalties should also deter conduct that is harmful to consumers. Amending the MOR to include telephone sales also will allow the Commission to apply uniform enforcement standards and remedies to both mail and telephone transactions of sellers. Often sellers do business by both means. Presently, nonconforming practices by a merchant may injure both consumers who shop by telephone and by mail, but only the mail order transactions subject the merchant to civil penalties. Thus, the Commission cannot even-handedly pursue equally injurious practices. The efficiencies from uniform standards will facilitate additional investigations and enforcement actions, which will benefit consumers.

In addition, comments from state attorneys general and state consumer protection agencies indicate that the proposed amendments will facilitate enforcement efficiency at the state level. These organizations reported difficulties in addressing unfair or deceptive acts or practices of telephone order merchants due to the MOR's failure to cover telephone order merchandise.[156]

Finally, the Commission finds that the benefits of the rule will exceed its costs. As has been noted, the proscriptions against unfair or deceptive acts or practices in section 5(a)(1) of the FTC Act, 15 U.S.C. 45(a)(1), would require that telephone order merchants possess a reasonable basis for shipment claims, obtain the consumer's informed consent to shipment delays, and make prompt refunds when the consumer does not consent to these delays. The amendments set forth a clear standard of conduct by which telephone order merchants may comply with section 5 of the FTC Act when unanticipated shipment delays occur. Many merchants already voluntarily comply with the MOR's requirements for their telephone orders, either because they view the requirements as sound business practice or because they consider it efficient to use the same notice, cancellation and refund practices for their telephone and mail order operations.[157] For these merchants, the telephone amendments to the MOR should impose few, if any, additional costs. Based on the record evidence, the Commission does not believe that compliance expenditures for telemarketing firms would exceed the usual and customary costs of good business practices, while the concomitant benefits to both consumers and industry members are likely to be substantial.[158]

Information provided by state law enforcement officials and consumer protection agencies indicated that state legislation extending coverage to telephone order merchandise has caused no perceptible barriers to the formation of new businesses, nor has it caused existing telemarketing firms to incur any significant new costs. California amended its mail order legislation in 1986 to include telephone order merchandise. CaDCA stated it was unaware of "any change in the cost or price of goods and services used by consumers or businesses as a result of the amendments to the [California] statute."[159] CaDCA also commented that, as a result of the state's telephone order amendment, merchant recordkeeping will be simplified, ultimately resulting in lower merchant costs.[160] The California Attorney General's office agreed with the CaDCA comment, stating that it is "not aware that barriers to entry into business have increased under the amended statute, or that costs or benefits to mail and telephone order merchants in California have changed."[161] Similarly, Wisconsin's Attorney General reported no evidence of any detrimental business effects from Wisconsin's interpretation of its mail order statute to reach telephone orders.[162]

Thus, it appears that the amendments will impose few, if any, additional costs on merchants or consumers. However, the Commission believes that these amendments will provide consumers with considerable benefits. First, the amendments will clarify the rights of consumers (and the obligations of merchants) when ordering by telephone. Both parties will know that the merchant must ship orders in the time promised, and that when the merchant cannot ship in time, it must notify the consumer and inform the consumer of the consumer's option to cancel the order. Thus, educating consumers about their rights will be simplified.[163]

Second, the amendments are likely to benefit industry members by increasing consumer confidence in the industry, thereby promoting the growth of the direct marketing industry. MOAA commented, for example, that catalog houses rely to a "substantial extent" on repeat customers, and that failure to comply with the Rule in the sale of either mail or telephone order merchandise frustrates repeat purchases.[164]

Third, as discussed previously, the amendments create uniform standards that will permit the Commission to monitor the industry and prosecute

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[154] For example, Mr. Kordahl testified that: Businesses prefer to operate in a climate of certainty, where they know what is expected of them. * * * [T]here is a value to both merchant and consumer when, at each stage in the process of retailing telemarketed goods, both have the same understanding about what is supposed to be done and when it is supposed to be done. R011006–2, HX–4, p. 20.

[155] In this regard, the Commission notes, for example, that DMA ethics guidelines encourage DMA members to comply with the MOR when shipping prepaid merchandise ordered by telephone. R011006–B–1, B–39, p. 3; R011006–2, HX–1, p. 3.

[156] The North Carolina Attorney General's Office, CaDCA, and NWMaDA all reported difficulties in enforcing consumer protection laws against unfair or deceptive telemarketing practices due to the lack of federal regulation of telephone order transactions. R011006–2, H–1, p. 3; R011006–2, H–2, p. 4. The NWMaDA also noted that because the telemarketing field is growing so rapidly, consumers can expect more problems of the type addressed by the amendments to the MOR as well as increased telephone fraud and deception. R011006–2, H–9, pp. 2–3. The Kansas Attorney General's Office argued that amending the MOR will facilitate the state's law enforcement activities. R011006–2, H–15, p. 2. The Director of the Consumer Fraud and Antitrust Section of the North Dakota Attorney General's Office contended that in 1989 the failure of the MOR to cover telephone sales caused his office to take a less aggressive stance in some cases than it otherwise would have been inclined to do. R011006–2, H–11, p. 3.

[157] According to CVN Companies, Inc., a company that provides sales solicitation services for the telemarketing industry, merchants who accept orders by both mail and telephone use the same fulfillment and backorder procedures whether an order is received by mail or telephone. R011006–B–1, B–4, p.1, and procedures to keep the customer informed on the status of their orders. Id. At 2. Accordingly, CVN concluded that the amendments should not pose any additional burden on the direct marketing industry.

[158] See comment of AARP, R011006–2, GG–4, p. 41.

[159] R011006–2, H–2, pp. 2 and 6 R011006–B–1, B–9, p. 2.

[160] R011006–2, H–2, p. 6.

[161] Id.; R011006–2, H–4, p. 2; see also New York Attorney General , R011006–2, H–7, pp. 1–3. New York also amended its mail order statute to include telephone orders in the face of little, if any, opposition from the telemarketing industry. Id.

[162] R011006–2, H–13, p. 4.

[163] See comment of NCL, R011006–B–1, B–24, p. 2. FTC staff spends considerable time advising consumers of their rights and addressing consumer complaints.

[164] R011006–2, F–2, p. 2.

violations more efficiently, which will in turn benefit consumers and competition. Currently, investigations of mail order merchants who also sell merchandise by telephone are more complicated and lengthy because FTC staff must determine the volume of both mail and telephone ordered merchandise. This is necessary because civil penalties can be based only on mail order transactions, even though the telephone order transactions also cause harm.[165] Further, the amendments will facilitate Commission efforts to seek consumer redress, where appropriate, regardless of the ordering method, under section 19 of the FTC Act, 15 U.S.C. 57b. Currently, the Commission must seek redress for consumers who order by telephone under section 13, 15 U.S.C. 53, by asking the courts to use their equitable powers. In contrast, for MOR violations, the Commission is authorized to seek redress under section 19(b), 15 U.S.C. 57b(b), which explicitly confers jurisdiction on the federal courts "to grant such relief as the court finds necessary to redress injury to consumers * * * resulting from the rule violations * * *."

In addition, the amendment could aid states' enforcement efforts where FTC rules are incorporated by reference into state law or are relied on for guidance in enforcing state law. For example, in voicing support for the amendments, the Iowa Consumer Protection Division stated that the application of clear standards to require deliveries within the a certain time frame would prove helpful. "Having a well-defined delivery rule will provide consumer protection agencies with an enforcement option which is easily applied, and may therefore serve to diminish the widespread damage caused by telemarketing fraud."[166]

Although the Commission cannot precisely quantify all the costs and benefits of the proposed amendments, the rulemaking record supports its finding that the costs will be small. Balanced against any such additional costs are the benefits to consumers, businesses and law enforcement agencies of adopting the proposed amendment. Therefore, the Commission concludes that the benefits of the amendments will exceed their costs.

Overall, the Commission finds that it is in the public interest to extend the present substantiation, delay option notice, and refund regulations for mail order sales to include telephone order sales. The specific amendments incorporating telephone sales are discussed in part IV of this SBP.

4. Economic Effect

Section 18(d)(1)(C) of the FTC Act, 15 U.S.C. 57a(d)(1)(C), requires that the Commission's SBP include a statement as to the economic effect of these amendments. This discussion is set out in the Commission's analysis of its determination that no regulatory analysis is required. See part V, B of this SBP, infra.

5. Conclusion

The original MOR defined each of the following acts or practices as an unfair or deceptive act or practice in or affecting commerce in violation of section 5(a)(1) of the FTC Act, 15 U.S.C. 45(a)(1):

- The failure of a merchant to have a reasonable basis for any express shipment representation in soliciting the sale of the merchandise and, if no time is represented, the failure to have a reasonable basis for the implicit representation that shipment will be made within 30 days of the receipt of the consumer's properly completed order.
- In situations in which the merchant is unable to ship the merchandise in the time expressly or implicitly represented, the failure of the merchant to notify consumers about the delay and to offer them the option of agreeing to the delay or obtaining a prompt refund.
- In situations in which the merchant fails to obtain the consumer's informed consent to delay or the consumer exercises the option of cancelling the order and obtaining a prompt refund, the failure of the merchant to deem the order cancelled and to make a prompt refund.

The record of this proceeding demonstrates that the acts or practices addressed by the MOR respecting direct marketing in the context of mail order sales harm consumers when engaged in by telephone merchants. The evidence discussed in part II, B, (1) of this SBP demonstrates that consumers expect shipment of telephone order merchandise within the time merchants expressly represent in soliciting the sales or, in the absence of any express shipment representation, within 30 days. These express or implied shipment representations are material to consumers. The evidence discussed in part II, B, (2) of this SBP demonstrates that in a significant number of cases the merchandise is not shipped within the time expressly or impliedly represented. Often in these situations the merchant initially lacked a reasonable basis for the shipment representation soliciting the sale of telephone order merchandise. The evidence discussed in part II, B, (2) of this SBP demonstrates that in a significant number of cases merchants delay shipment beyond the time expressly or impliedly represented without the knowledge or consent of consumers. They either do not notify consumers of delays at all or, if they do, they do not inform consumers as to the nature or extent of delay, or request the consumer's consent to the delay, or afford the consumer the opportunity to cancel the order and obtain a prompt refund. Finally, the evidence discussed in part II, B, (2) of this SBP demonstrates that in a significant number of cases merchants who fail to obtain the consumer's consent to delays beyond the time expressly or impliedly represented fail to deem the order cancelled and to promptly refund the consumer's money. The evidence discussed in part II, B, (3) of this SBP demonstrates that these practices cause significant harm to consumers.

After weighing the various considerations discussed in this part of the SBP, the Commission has determined that it is in the public interest to adopt the TRR.

IV. Section-by-Section Analysis

This part describes each amended section, the options considered, if any, and, where appropriate, provides guidance concerning the provisions.

Section 435.1(a)(1)

This section contains the substantiation requirements for shipment representations sellers make when soliciting orders and in providing revised shipment dates. The Commission has amended this section so that its requirements now apply to merchandise ordered by telephone as well as by mail. The Commission's reasons for amending this provision are set forth in part III, B of this SBP.

Section 435.1(a)(1)(ii)

For purposes of § 435.1(a)(1)(ii), concerning implied shipment representations, the Commission considered but rejected adopting a shorter period than 30 days for telephone orders. Because the record shows that consumers to whom no express shipment representations are made and who pay by credit card expect shipment more rapidly than consumers who pay by other means, a shorter time period for implied shipment representations for telephone orders

[165] Staff Report, R011006-3, N-1, p. 72.

[166] R011006-2, H-6, p. 1. Although the TRR issued today is not, strictly speaking, a "delivery" rule, for the most part, requiring merchants to substantiate their shipment representations and either obtain consumers' informed consent to delayed shipments or to refund their money should ensure prompt delivery.

could be appropriate. In the interest of uniformity, however, the Commission rejected that alternative. As in the MOR proceeding, where the record showed that consumer expectations were not uniform, the Commission finds that although some consumers may expect faster shipment, few consumers would expect shipment to take longer than 30 days. Therefore, the Commission has determined to use this time period for telephone orders too.

The Commission also has amended § 435.1(a)(1)(ii) by adding a proviso giving sellers 50, rather than 30, days to perform the actions required by this part, where they have made no express shipment representations and have received orders accompanied by applications for credit to pay for the ordered merchandise. The Commission has determined that this additional time to process credit applications is consistent with consumer expectations and industry needs.

In the NPR, the Commission suggested three alternative proposals for affording merchants time to process credit applications, of which the 50-day proposal was one. The proposals were initially posited as amendments to the definition of a "properly completed order." Ultimately, the Commission determined instead to add a proviso to the end of the substantiation provision, § 435.1(a)(1)(ii). Two of the three alternatives were given no further consideration because of lack of interest by participants.[167] In contrast, many comments favored the proposal to amend the definition of a "properly completed order" to refer to the merchant's receipt of the charge information, but to permit an additional 20 days to process charges accompanied by credit applications. (This proposal is similar to California law.)[168]

Proponents of the "California rule" noted that in the absence of any shipment representation in solicitations for orders, consumers who order merchandise at the same time they apply for credit do not expect shipment as quickly as consumers whose credit is established.[169] For example, the Iowa Attorney General reported that consumers generally expect delivery to take longer when an application for credit is part of the ordering process.[170] DMA agreed, pointing out that it is natural for consumers to expect perhaps two weeks for the application to be processed before the 30-day clock would begin to run.[171]

Other comments also contended that if an order is accompanied by a credit application, the definition of a "properly completed order" should allow a seller additional shipment time. For example, Burnett noted that while larger merchants have "on-line" capabilities to check the credit-worthiness of applicants within an estimated five business days, smaller businesses may require up to 15 business days, or approximately 20 calendar days.[172] DMA also commented that the technological disparity between larger and smaller merchants is particularly serious in dealing with new credit applications.[173]

Other comments opposed allowing any additional time when orders are accompanied by credit applications.[174] For example, AARP contended that allowing additional time to process orders was unnecessary. Reasoning that, because the ECOA requires creditors to respond within 30 days of receipt of a completed credit application,[175] and many creditors complete credit checks more expeditiously than 30 days, AARP stated that initial applications for credit should never expand shipment time beyond 30 days.[176]

Nothing in the rulemaking record suggests that consumers believe that credit approval and order fulfillment necessarily occur simultaneously. Indeed, common experience suggests the opposite, i.e., that in the ordinary course of business, credit has to be approved before consumers can trade on it. In the context of mail or telephone order sales, they similarly would expect their credit applications to be processed and approved before fulfillment of their orders.

The Commission finds that in the absence of any express shipment representation, consumers generally expect a merchant to take more time than normal where an order is accompanied by an application for credit. The record evidence indicates that the time needed by businesses to establish consumer credit is approximately 20 calendar days.[177] In view of consumer expectations and industry requirements in this regard, the Commission has determined that, in this limited "credit application" circumstance, sellers should have an extra 20 days to fulfill the requirements of the amended Rule when soliciting orders based on an implied 30-day shipment claim.

In contrast there is ample rulemaking evidence that, when merchants make express shipment representations, consumers expect shipment within the time expressly represented.[178] There is no evidence regarding consumer perceptions where express shipment representations are made in advertising and the merchant also offers the credit to pay for the order. But, if a merchant makes shipment time an affirmative sales point, it is reasonable for consumers to expect that the merchant will comply with the sales representation. This is particularly true where a merchant can easily correct an incomplete or ambiguous shipment representation by simply adding words to the effect that the consumer should allow additional time for processing credit applications.[179]

It is well settled that a merchant will be held liable for any reasonable interpretation of advertising that is misleading, even though other non-misleading interpretations are possible

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[167] Specifically, the Commission considered (but rejected) amending the definition to refer to the time of the merchant's receipt of the charge information: (1) Only for third-party credit situations (e.g., where the consumer uses a bankcharge or travel and entertainment card), and (2) for all charge situations, but permitting an additional two weeks or other reasonable time (rather than an extra 20 days) in credit application situations. R011006–1, A–2, p. 49086.

[168] The California statute provides: When a buyer makes an initial application for an open-end credit plan, as defined in the Federal Consumer Credit Protection Act [15 U.S.C. 1602], at the same time the goods or services are ordered, and the goods or services are to be purchased on credit, the person conducting the business shall have 50 days, rather than 30 days, to perform the actions specified in this section. Bus. & Prof. Code 17538 (c).

[169] For example, NRMA suggested that the Commission provide an additional period consistent with the so-called "California rule." R011006–3, F–3, p. 3. See also R011006–2, H–2, p. 4. NRMA also suggested that, in order to achieve "consistency" with the Equal Credit Opportunity Act ("ECOA"), 15 U.S.C. 1691(d), the Commission consider 30 instead of 20 extra days for shipment. R011006–3, F–3, p. 4. NRMA apparently reasons that because the ECOA affords the merchant 30 days to notify consumers of its disposition of their credit applications, a merchant needs 30 days to process them. However, as discussed *infra*, the record does not support this.

[170] R011006–2, H–6, p. 2.

[171] R011006–2, F–1, p. 14.

[172] R011006–2, E–1, p. 2; accord MOAA, R011006–2, F–2, p. 8; Cutler, R011006–2, D–4, p. 2.

[173] R011006–2, F–1, p. 15.

[174] State of Georgia's Office of Consumer Affairs, R011006–2, H–6, p. 2. Accord NCL, R011006–2, GG–3, p. 3.

[175] 15 U.S.C. 1691(d) (unless extended by Fed. Res. Bd. regulation).

[176] R011006–2, GG–4, pp. 24, 54. On the other hand, AARP suggested that where merchants represent that shipment shall be made in less than 30 days, applications for credit should extend the period to the full 30 days permitted by the ECOA. R011006–2, GG–4, p. 54.

[177] Burnett, R011006–2, E–1, p. 2. Accord MOAA, R011006–2, F–2, p. 8; Cutler, R011006–2, D–4, p. 2.

[178] See, *e.g.*, Cox, R011006–2, M–2, pp. 8–11.

[179] As Georgia Office of Consumer Affairs observed: "If there is some reason that credit card orders take longer to process, then at the time of purchase, the consumer should be given a delivery date that takes this delay into consideration." R011006–2, H–6, p. 2.

or even likely.[180] Accordingly, the Commission finds that any express shipment representation that does not say otherwise reasonably will convey to consumers that the merchant has factored the credit processing time into the fulfillment time. Further, the Commission concurs with staff and the PO and finds that a merchant who offers credit and makes unqualified express shipment representations will violate the TRR if it lacks substantiation for being able to ship orders within the time represented.

Sections 435.1(b) (1) and (2)

These sections describe a merchant's obligation when it is unable to ship merchandise within the applicable time as set forth in § 435.1(a). By virtue of the amendment to paragraph (a), the notification obligations of paragraph (b) now apply to merchants who are unable to ship merchandise ordered by telephone within the time expressly or implicitly represented.

One advantage of ordering by telephone is that the seller may be able to give the buyer more up-to-date information about the availability of an item and when it would be shipped. DMA and MOAA were concerned that this information might be construed as a first option notice with a revised shipping date under § 435.1(b)(1), and that any subsequent revision to the shipping date would have to be in the form of a second option notice under § 435.1(b)(2).[181] Second notices pursuant to § 435.1(b)(2) must notify the consumer that the order will be automatically canceled unless the consumer expressly agrees to the delay; by contrast, first notices pursuant to § 435.1(b)(1) must inform the consumer that the consumer will be deemed to consent to the delay unless the consumer cancels and requests a prompt refund.

The Commission finds that when the seller, in the course of taking the order, supplies shipping information modifying the express or implied shipment representation in the solicitation of the order, and this information is communicated clearly and conspicuously and agreed to by the consumer, it will be considered part of the sales negotiations and not a delay notice under the TRR. The shipping time agreed to in these sales negotiations, rather than the time originally referred to in the solicitation, would be the time referred to in paragraph (a)(1) of § 435.1 of the TRR. Like the PO, however, the Commission is concerned that some merchants might deceptively advertise fast shipment to lure consumers into calling in orders, and then routinely negotiate for a longer shipment period than advertised.[182] The Commission agrees with the PO that merchants engaging in such practices would violate the TRR's requirement that merchants possess a reasonable basis for their express or implied shipment claims at the time of the solicitations.[183]

Section 435.1(b)(3)

The Commission has amended §§ 435.1(b)(3) (i) and (ii) of the MOR by deleting subparts (i) and (ii). These parts establish, in any action to enforce the Rule, rebuttable presumptions of non-compliance when first class mail is not used to provide notification or delay to consumers, or when business reply or postage prepaid mail is not used to provide consumers a way of exercising their options at the merchant's expense.

In originally promulgating these sections, the Commission stated: "By establishing this presumption the Commission is providing guidance and is not preventing sellers from providing other means which are of equal or superior efficacy to the means prescribed by the Rule."[184] Comments submitted in response to the ANPR, however, suggested that these presumptions were unnecessary and burdensome. Accordingly, in the NPR the Commission solicited comment on whether to change them. Specifically, the Commission invited submissions about whether other mechanisms "can be demonstrated to insure that (consumers) are provided with intelligible information that are given meaningful opportunities to exercise their options" to cancel or to consent to delayed shipment.[185]

Although there is no empirical evidence that the first class mail rebuttable presumptions have inhibited notification of delay by telephone, some industry participants nevertheless contended that the presumptions inherently made use of other notification means less desirable and burdensome to industry.[186] According to DMA, the use of the telephone as a means of solicitation, as well as a means of ordering and providing customer service, clearly has reached the point where it must be considered of equal or superior efficacy to that of other media.[187] Thus, DMA commented that the MOR should be modified to create a presumption in favor of compliance when delay notices are given by telephone. DMA believed there was no objective reason to treat a delay notice given by telephone differently from one sent by first class mail, and that it is in the interest of sellers and buyers to allow sellers to provide information in the manner they believe is the most effective.[188]

MOAA commented that telephone communication is more rapid (allowing instantaneous contact, 24 hours a day, on a year-round basis), more convenient and less time consuming.[189] It also maintained that consumers may more easily exercise their cancellation options over the telephone.[190] Additionally, MOAA stated that merchants prefer giving delay information by telephone because it eliminates the "hiatus period" that exists when mail is used to provide notice.[191]

Some consumer groups and state consumer protection agencies opposed modifying the first class mail presumptions on the grounds that: (1) The information required by 435.1(b) is too difficult to communicate by telephone; and (2) any change in the first class mail presumptions would make enforcement more difficult. For example, AARP contended that telephone notification shifts the merchant's burden to consumers: "Under the present Rule, mail-order customers receive hands-on information

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[180] See e.g., *National Comm'n on Egg Nutrition* v. *FTC*, 570 F.2d 157, 161 n.4 (7th Cir. 1977), cert. denied, 439 U.S. 821 (1978); *Murry Space Shoe Corp.* v. *FTC*, 304 F.2d 270, 272 (2d Cir. 1962); *Rhodes Pharmacal Co.* v. *FTC*, 208 F.2d 382, 387 (7th Cir. 1953), aff'd, 348 U.S. 940 (1955); Ford Motor Co., 87 FTC 756, 794–95 (1976).

[181] R011006–4, P–1, p. 14 and P–3, p. 13.

[182] PO's Report, R011006–3, Q–1, p. 60.

[183] Id., p. 61, F.151.

[184] SBP, 40 FR 51582, 51597 (Nov. 5, 1975).

[185] R011006–1, A–2, p. 49067.

[186] Early comments seemed to favor amending the presumptions to give telephone notifications the same status as first class mail notifications, whereas later comments favored deleting the presumptions. For example, after recommending adding telephone notification to the first class mail presumptions, MOAA later favored eliminating the presumptions altogether. Compare MOAA, R011006–2, F–2, p. 2 (the Commission should modify the existing TRR to permit merchants to give and to receive required notices by telephone) with oral presentation of David Todd, Esq. on behalf of MOAA ("We believe there should be no presumptions, positive or negative, with respect to either mail or telephone notices"), R011006–4, Q–3, p. 28–29 (Nov. 3, 1992).

[187] R011006–2, F–1, p. 10; see also MOAA, R011006–2, F–2, p. 3.

[188] R011006–2, F–1, pp. 9–10. DMA's expert witness, Margaret Kuman, stated that telephone notice is the most effective means of communicating backorder information and the need for additional time to ship. R011006–2, HX–1, pp. 11–12.

[189] R011006–2, F–2, pp. 6–7. The Commission notes there is also evidence on the record that telephone notification could be less costly than first class mail notifications. See Kordahl, R011006–2, HX–4, pp. 21–22.

[190] Id.

[191] Id.

that can be carefully considered, retained and responded to in a deliberate fashion." [192] With telephone notification, consumers must remember all of the information the seller provides, including an 800 number to call the seller back at some later time to cancel the order or to agree to late shipment, or make an immediate decision concerning cancellation during the initial phone call.

Some state attorneys general and consumer protection agencies commented that the Commission should retain the MOR's first class mail presumptions in the amended Rule because of the difficulty of otherwise proving that the notice was adequate. For example, the New York Attorney General's office stated: "We strongly urge that notification of delay continue to be required by first class mail. The option of telephone notification would present a substantial evidentiary hurdle for consumers and enforcement agencies." [193] During her testimony, DMA's expert Margaret Kuman agreed that in the hands of an unscrupulous merchant, a system of telephone notification may pit the possibly uncertain memory of a consumer against the apparently complete records of a dishonest merchant.[194] The rulemaking staff and the PO, although agreeing that the telephone could be an effective means of providing option information, observed that notification by first class mail also aids enforcement by preserving, in documents consumers can retain, a record of precisely what was communicated by the merchant. If the notice was defective, it could later be used by law enforcement agencies to prove non-compliance. Accordingly, both staff and the PO recommended retaining the first class mail presumptions.[195]

In contrast, the Bureau of Economics ("BE") staff recommended deleting the presumptions.[196] BE staff contended that the presumptions favoring first class mail are anachronistic and that the record showed that telephone notification can be superior to mail notification because of its interactive nature. Further, telephone notification may be accomplished more quickly and at lower cost. Finally, BE staff believed that law enforcement concerns about deleting the presumptions can largely be addressed by more intensive scrutiny of records of "systems and procedures" a merchant should maintain to overcome the rebuttable presumptions of non-compliance under § 435.1(d).

After reviewing the rulemaking record, the Commission concludes that no means of providing delay notification should be subject to presumptive invalidity.[197] Eliminating the first class mail presumptions removes any bias against telephone notification or other classes of mail. Merchants may not choose, without being concerned about having to overcome a presumption in any enforcement action, whatever means they believe best will achieve the requirements of the TRR to afford prompt, reliable, and intelligible notification of delay and the means for exercising, at no cost to the consumer, any cancellation option.[198] The Commission's decision to repeal the first class mail rebuttable presumptions should not, however, be viewed as a relaxation of the TRR's requirements that the seller must notify the consumer "clearly and conspicuously" of delay "within a reasonable time after the seller first becomes aware of its inability to ship," as required by § 435.1(b)(1). Nor should it be construed in any way that would frustrate the requirements of § 435.1(c) that the seller must, whenever appropriate, make a "prompt refund."

For example, a reasonable and prudent merchant acting in good faith and considering the use of third class mail will want to consider whether bulk mail, and the possibly longer time frame needed for delivery of such mail, will satisfactorily achieve the TRR's requirements to provide notice "within a reasonable time after the seller first becomes aware of its inability to ship." Further, in providing notices by whatever means, sellers should consider whether the buyers will receive them in sufficient time so that the options provided are still meaningful. For example, if notices were to reach buyers only shortly before the new revised shipping date listed in the notice or on that day, consumers would not realistically have an option to consent to the delay or to receive a prompt refund. The timing of the receipt of the option notice would have decided this question for them. Similarly, merchants who choose to use telephone notification will want to ensure that their systems are designed to satisfy the TRR's requirement in § 435.1(b)(1) "to offer *the buyer*" the option to consent to a delay or to cancel the order and receive a prompt refund. (Emphasis supplied.)

The Commission also notes that, although it is eliminating the first class mail rebuttable presumptions, other presumptions remain. Under §§ 435.1(a)(4) and 435.1(d), a merchant's failure to have "records or other documentary proof establishing its use of systems and procedures" that ensure compliance in the ordinary course of business with the various provisions of the TRR will give rise to a rebuttable presumption of non-compliance.[199]

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[192] R011006–2, GG–4, p. 37. See also NCL, R011006–2, GG–3, p. 2 (the League strongly urges the Commission to require that consumers receive timely written notice of their right to cancel or to consent to delayed shipment; it is important for consumers to be able to document in writing the terms of any agreement to which they are a party).

[193] R011006–2, H–7, p. 3. See also R011006–2, H–3, p. 5; H–6, p. 3; H–8, p. 2; H–9, p. 3; H–11, pp. 2–3.

[194] Kuman, R011006–2, Tr. 70–71. However, Ms. Kuman also challenged the idea that consumers have their written notices, Tr. 70. Nevertheless, copies of facially defective written notices that were retained by consumers have been used to establish MOR violations. Staff Report, R011006–3, N–1, p. 106, n. 146.

[195] Staff Report, R011006–3, p. 107; PO's Report, R011006–3, pp. 57–60.

[196] Final Recommendations of Gerard Butters and Lisa Daniel, R011006–4, Q–1 (May 28, 1992).

[197] The Commission considered, but rejected, an alternative proposal raised by the rulemaking staff at the November 18, 1992 Commission meeting. At that time, staff suggested amending the presumptions to apply only to first notices involving indefinite delays or delays of more than 30 days and to second notices. Staff's theory was that for these notices the information required by the Rule is more complicated and that the writing and first class mail presumptions would be especially useful for such notices, and less necessary for other notices. At the Commission's request, the staff provided a memorandum describing the record evidence about how often the different types of notices are used and the costs associated with this proposal. The staff concluded that the evidence on the costs or benefits of treating various notices differently was inconclusive and continued to recommend retaining the rebuttable presumptions. R011006–4, Q–4. BE staff submitted a memorandum indicating that it continued to support repeal of the presumptions. While agreeing that the information required by the MOR (and to be required by the amended MOR) for certain notices is complicated, BE staff argued that carefully prepared scripts and well trained staff could intelligibly communicate the required information to consumers. R011006–4, Q–5. For the reasons set forth *infra*, the Commission is rescinding these presumptions.

[198] The Commission notes that one objection to deleting the rebuttable presumptions was that it places a burden on consumers to record and retain information, such as the seller's telephone number, to exercise any of the continuing cancellation options. If, at the time the seller offers the option, it also reminds the consumer that the seller's toll-free number is contained in its catalogs or other promotional materials, the availability of such information to the consumer could be a factor the Commission would consider in determining whether the cancellation option had been meaningfully provided. Of course, in discharging its obligation to provide a prepaid means of exercising any cancellation option, a merchant cannot assume that consumers retain any promotional materials or, if they do, that the information in them is sufficiently clear and conspicuous to satisfy the merchant's obligations.

[199] In any enforcement action, § 435.1(a)(4) of the amended Rule creates a rebuttable presumption of non-compliance if a seller fails to document the existence of systems and procedures to ensure shipment of merchandise within the time expressly or impliedly represented in the advertising that solicited the sale; § 435.1(d) creates a rebuttable presumption of non-compliance if a seller fails to

Thus, under these provisions, merchants still will have the duty to demonstrate that they have systems and procedures in place that ensure compliance with the TRR. However, the presumptions do not impose any particular recordkeeping requirements. The Commission, therefore, considers inapposite DMA's comment that because telephone notifications are widely used at present, "as long as a merchant can demonstrate that systems are in place to assure compliance with the Rule, the Commission should not require onerous and unduly burdensome recordkeeping requirements." [200] The Commission is retaining §§ 435.1 (a) (4) and (d) unchanged.

The Commission expects that prudent industry members will keep records concerning their systems and procedures to rebut these presumptions in any action to enforce the TRR, particularly if they choose to use a telephone system for notification. Two industry experts commented in this proceeding on the types of records that would be either readily available or reasonable records for sellers to maintain for telephone notification systems. Although the Commission is not incorporating these suggestions into the TRR or according them preferential treatment, such records would provide useful documentation of compliance in an investigation, particularly where the merchant relied on telephone notification.

For example, Margaret Kuman testified that sellers providing telephone notifications can use a system such as Call Detail Recording, which would have much the same reliability as records of written notices. This system would indicate the script that was used (a counterpart to the text of a letter) and a record that the message was transmitted (counterpart to the record that the first class mail notice was sent). This would consist of a chronological computerized record of all calls made by the merchant, including the number from which the call was made, the called number, and how long the conversation lasted.[201] Staff's expert, Eugene Kordahl, also believed that telephone notification procedures should include a written or computer record of each contact, the identity of the parties contacted, and the results of the contact.[202]

Section 435.1(c)

This section describes when and under what circumstances sellers must provide refunds. Because of the amendments to paragraph (a) of the rule, the refund provisions of paragraph (c) now apply to telephone sales. No specific amendments to paragraph (c) were needed to accomplish this change.

Section 435.1(d)

This section states that the "failure of a respondent-seller to have records or other documentary proof establishing its use of systems and procedures which assure compliance, in the ordinary course of business, with any requirement of paragraph (b) or (c) of this section will create a rebuttable presumption that the seller failed to comply with said requirement." No changes have been made to this section. This presumption applies to telephone sales as well as mail order sales because of the amendments to paragraph (a).

Section 435.2 (a) and (b)

The Commission has amended § 435.2 by adding a definition of "mail or telephone sales" in paragraph (a) and a definition of "telephone" in paragraph (b). The PO had recommended that the Commission add the definition of "mail or telephone sales" to avoid any uncertainty about the scope of the amendments and the coverage of the TRR. This definition derives from the common understanding of what a mail order sale is (the distinction being, how the order is placed, not how it is solicited).[203]

The definition of "telephone" is the same definition that the Commission published for comment in the NPR. The NPR proposed defining "telephone" to refer "to any direct or indirect use of the telephone to order merchandise, regardless of whether the telephone is activated by, or the language used is human or machine, or both."[204] Comments opposing this amendment suggested that the Commission adopt a narrow definition to avoid discouraging the commercial development of other alternatives.[205] However, none of these comments elaborated on this point. There is nothing more than conjecture in the record to suggest that adopting the proposed definition of "telephone" will stifle or inhibit technological advancement.[206]

Because winning consumer confidence is a key ingredient in the success of any commercial innovation, the Commission does not agree that requiring merchants to ship in a timely manner, to make refunds, or to obtain the consumer's informed consent to shipping delays will discourage the development of innovative ordering technologies that use the telephone. Further, the majority of the record comments addressing the question supported the adoption of the definition.[207] The comments favored an amendment that would clearly "cover orders taken by mechanical means over the phone, orders placed by computers, and orders placed by fax transmission." [208]

Nothing in the record suggests that consumer expectations with respect to the timing of shipment would vary depending on how the telephone is activated or whether the language used for ordering is that of human beings, machines, or both. The Commission accordingly adopts the definition of "telephone," as proposed in the NPR.

Section 435.2(d) [209]

The Commission has determined that it is in the public interest to amend the MOR's definition of a "properly completed order" for credit sales. This definition provides the key to measuring when the time period for shipment begins, i.e., a merchant must ship or perform other required actions within 30 days (or another time if specified) of

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document the existence of systems and procedures to ensure compliance with §§ 435.1(b) (the delay option provisions) or § 435.1(c) (the refund provisions).

[200] R011006–2, F–1, p. 11; see also Kuman, R011006–2, HX–1, p. 11, and NRMA, R011006–2, F–3, p. 4.

[201] R011006–2, HX–1, p. 11.

[202] R011006–2, HX–4, p. 23. Mr. Kordahl also recommended that telephone operators work from a prepared script as opposed to providing information extemporaneously.

[203] PO's Report, R011006–3, C–1, p. 77. See also Final Staff Recommendations, R011006–4, Q–1, pp. 22–23. As the staff noted, the rulemaking participants understood the change to § 435.2(a) proposed in the NPR to be in accord with the PO's definition. Moreover, none of the post-record comments objected to this definition.

[204] R011006–1, A–2, p. 49062. In the ANPR the Commission had proposed an even broader definition of "telephone." However, based on comments received in response to the ANPR, the Commission proposed the narrower definition in the NPR. See part I. B of this SBP for additional information on this point.

[205] MOAA, R011006–2, F–2, pp. 11–12. See also NRMA, R011006–2, F–3, p. 3. The National Retail Federation repeated this argument in its post-record comment, R011006–4, F–7, p. 4.

[206] To the extent that, at some future time, the definition can be demonstrated to have some adverse effect on developing technologies that incorporate the telephone, an aggrieved person may petition the Commission, pursuant to section 18(g) of the FTC Act, 15 U.S.C. 57a(g), for an exemption from the TRR.

[207] Burnett, R011006–2, E–1, p. 1; see also NCL, R011006–2, GG–3, p. 3; Attorney General of North Dakota, R011006–2, H–11, p. 1; CaDCA, R011006–2, H–2, p. 8.

[208] R011006–2, H–6, p. 3 (Iowa Attorney General's Office); see also R011006–2, H–2, p. 1 (CaDCA).

[209] Paragraph (c), defining "shipment," is unchanged. Similarly, the definitions of "refund," "prompt refund," and "time of solicitation" in paragraphs (a) through (g) are unchanged.

receipt of a properly completed order. For credit orders, the MOR defines "properly completed order" as "the time at which the seller charges the buyer's account."[210] The amended Rule now defines the term, in these situations, to refer to the time the seller receives "authorization from the buyer to charge an existing account,"[211] rather than when the account is charged.

The amendment is not intended to affect when sellers process charges. Sellers still have the discretion to process charges when they choose. The amendment merely provides that the TRR's requirements are triggered at the same time as sales paid for by cash, check, or money order.

In the NPR, the Commission solicited comment on whether, with respect to credit transactions, it should amend the definition of a "properly completed order" to refer to the time a merchant receives sufficient information from the consumer to charge the consumer's account instead of referring to the time the merchant actually charges the account. This issue previously had been considered. When the Commission promulgated the MOR, representatives of the mail order industry contended that charge sales differ from cash, check, or money order sales. They stated that when the merchant fails timely to ship merchandise paid by cash, check, or money order, the consumer experiences a direct out-of-pocket loss. On the other hand, they contended that as long as the merchant does not process the charge, the order has not been "prepaid" and the consumer is not injured by untimely shipment of merchandise. The Commission disagreed, stating that because "all consumers are injured when a seller lacks a reasonable basis for his shipment representations," it is appropriate to impose the same requirements on credit sales as sales paid by cash, check, or money order.[212] The Commission indicated that in these transactions, all consumers who encounter these business practices, regardless of whether they pay by credit or otherwise, are injured by being unable "to cancel the order and obtain, where applicable, a refund or credit adjustment."[213] The Commission believed, however, that there had been insufficient opportunity to comment on a definition of a "properly completed order" that reflected this determination.[214] Thus, although the Commission found that abuses could occur in all mail order credit sales, the rule only applied to credit sales in prepaid situations, i.e., where the seller charges the account prior to shipment.

Because mail orders predominantly are paid for by check, money order, or cash, the MOR's disparate treatment of mail orders that are charged has not been a very significant issue. However, by amending the MOR to include telephone orders, the number of credit transactions affected by a "payment received" rule for credit cards becomes very substantial.[215] For example, while 20% to 30% of consumers pay for their mail orders by credit card, approximately 70% of consumers who order by telephone pay by credit card.[216] Further, the evidence in the record indicated that merchants generally do not charge a buyer's account until they are ready to ship. Thus, without amending the MOR's definition of a "properly completed order," amending the MOR to include telephone sales would result in the Rule's requirements being triggered upon receipt of the order for between 70% and 80% of mail order sales and for only 30% of telephone order sales.

Participants have suggested that, to amend the definition, the Commission must affirmatively show that merchants are purposely refraining from debiting charge accounts to avoid complying with the Rule.[217] However, as a matter of law, the Commission is not required to show improper intent to reach all instances of unfair or deceptive practices.[218]

Some participants argued against this amendment on the grounds that consumers are not injured by delays when their accounts have not been charged.[219] In here testimony, Ms. Kuman suggested that the existing definition causes no pecuniary injury to consumers as long as their credit cards are not charged because, until then, there is neither an obligation to pay nor any accruing finance charges, interest, or late charges.[220] However, the Commission has already determined that injury can occur in those circumstances because consumers can incur considerable opportunity and transaction costs.[221]

Some participants also suggested that when a merchant is silent about shipment time, a consumer who charges an order may not be injured because the consumer may expect that it will take the merchant longer to ship than when the consumer pays by cash, check or money order. Thus, they contended that because a merchant's silence gives rise to an implicit representation that shipment will take longer than orders paid for in other ways, changing the definition of a properly completed order would not address or cure any unfair or deceptive act or practice.

However, this position is contradicted by other evidence in the record. For example, Ms. Kuman testified that consumers prefer telephone ordering because of speed of delivery. Coupled with the fact that the predominant method of payment for telephone orders is credit card, she agreed that it is logical to suppose that consumers who order by credit card expect shipment as fast as anyone else.[222] Burnett, a company with extensive experience in the field of advertising and its interpretation by consumers, also commented that: "Our experience is

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[210] 16 CFR 435.2(b)(1). In contrast, where payment in the proper amount is by cash, check, or money order, receipt of a properly completed order is defined by § 435.2(b)(2) as the time the seller receives the payment and all information needed to process the order. Thus, unless a seller says otherwise in soliciting the consumer's order, the MOR does not permit a seller to wait until a buyer's check "clears" before the MOR's shipment or delay notification requirements start to run.

[211] 16 CFR 435.2(d). Section 435.2 of the original MOR was renumbered to reflect the addition of two new definitions.

[212] SBP, 40 FR 51582 at 51594 (Nov. 5, 1975).

[213] Id. Additionally, the distinction industry draws between charge sales and sales paid by check is not very clear. Logically, the industry argument would support distinguishing payment by a check that the merchant deposits immediately, from payment by a check that the merchant does not deposit immediately. The MOR makes no such distinction and the Commission has heard no complaints from industry because it fails to do so.

[214] Id.

[215] This is not to say that extending the MOR to telephone order sales without changing the definition of properly completed order would not benefit consumers. For example, in the *Dixon* case (involving shipment failures by a mail and telephone-order merchant) credit accounts were billed immediately. R011006–2, H–2, p. 3 (CaDCA).

[216] See discussion *supra*, Part I, C. (3) of this SBP.

[217] See Kuman, R011006–2, HX–1, p. 18.

[218] Intent to deceive is not a required element for a Section 5 violation. *Doherty, Clifford, Steers & Shenfield, Inc.* v. *FTC*, 392 F.2d 921, 925 (6th Cir. 1968); *Montgomery Ward & Co., Inc.* v. *FTC*, 379 F.2d 666, 670 (7th Cir. 1967); *Gimbel Bros., Inc.* v. *FTC*, 116 F.2d 378, 379 (2d Cir. 1941). In the event a respondent were to violate an FTC order, lack of willfulness or intent is no defense to an action for civil penalties. *United States* v. *Beatrice Foods Co.*, 493 F.2d 1259, 1273 (8th Cir. 1974), *cert. denied*, 420 U.S. 961 (1975); *United States* v. *J.B. Williams Co., Inc.*, 354 F. Supp. 521, 530 (S.D.N.Y. 1973).

[219] For example, Ms. Kuman said that "[b]ecause credit transactions put the customer into the position of being able to delay payment, it may be that he or she is thus less likely to expect quick delivery." R011006–2, HX–1, p. 15. See also DMA's comment, R011006–2, F–1, p. 12; and its post-record comment R011006–4, P–1, p. 11.

[220] R011006–2, HX–1, p. 17.

[221] SBP, 40 FR 51582 at 51594 (Nov. 5, 1975). As Burnett noted.

Consumers will not have use of the ordered item, may forego ordering the item from more responsive, conveniently located or non–mail/phone order sellers, and may occur costs associated with learning the status of their pending orders if they are induced to deal with a seller who has no reasonable basis for shipping within the time promised. R011006–2, E–1, p.–2.

[222] Kuman, R011006–2, Tr. 12.

that consumers believe that items ordered by telephone, and paid for by credit card, will be fulfilled by sellers in the same or less time than those items ordered by mail and paid for by check or money order.[223]

This record indicates that consumer expectations regarding shipment are keyed to when the seller receives the consumer's payment authorization and other information necessary to process the order, not to some uncertain date known only to the seller and entirely within the seller's control, i.e., the date the seller charges the consumer's account. For example, based on the ORC survey, Dr. Cox concluded, "[w]hen no shipment representation is made, consumers who * * * pay by credit card expect shipment significantly faster than consumers who pay by other means.[224]

The participants agreed that where sellers make express shipment representations, the seller's performance should be judged based on the time the seller receives the order, and not when the consumer's account is charged. Ms. Kuman, for example, couched her argument about consumer expectations only in terms of implicit shipment representations. She testified that "[n]aturally, for merchants who set forth a specified time period for shipment, shipment must be made within the time period."[225] DMA took the same position.[226] Based on the ORC survey, Dr. Cox concluded that consumers expect shipment within the general time frame expressly represented by the merchant regardless of whether they pay by credit or any other means.[227]

Consumer expectations about delay when merchants do not make express claims also are keyed to when the consumers reasonably expected the seller to have received their orders, unless they are told otherwise. There is no indication that sellers inform buyers that when they do not make express shipment claims, shipment performance is timed from when buyers' accounts are charged. The Commission's amendment makes the rule consistent with consumer expectations about how shipment time is measured.

Some industry members also opposed changing the existing definition on the grounds that it would impose burdens on the industry and on consumers. These suggestions appear to have been based, in part, on a misperception of how the changed definition would operate. Additionally, some suggested that changing the definition would lead to different (and presumably costly) behavior by prudent business persons.

For example, DMA suggested that amending the definition might impose new burdens on the industry and harm consumers. Specifically, Ms. Kuman noted that, when a seller learns that a buyer does not qualify for a credit sale (e.g., the consumer has exceeded a credit limit), the seller would need to inform the consumer. This might be difficult to accomplish quickly, and would use part of the seller's shipment time.[228] Because the change in the definition would start the 30-day "clock" immediately upon receipt of a consumer's name, address, and account number, she also posited that a prudent seller would obtain credit authorization from the merchant's bank immediately to determine whether to proceed with the transaction, and then again when shipping and debiting the account.[229] Ms. Kuman contended that obtaining credit approval twice would be an undue burden on business.[230]

She also speculated that the possible shortening of the 30-day shipment period when buyers did not initially qualify for credit would lead sellers to debit customers' accounts as soon as they did qualify.[231] This would adversely affect consumers and businesses, she claimed, because consumers would be charged before their merchandise was shipped and sellers would suffer the ill-will of consumers whose charges appear on their statements before their merchandise arrived.[232]

In making this argument, DMA assumes that if the consumer initially does not qualify for credit, the intervening time it takes to obtain credit approval (i.e., the time it takes the consumer either to reduce his or her indebtedness below the spending limit and qualify for a charge on the original charge card, or the time it takes to place a qualifying charge on another charge card) is subtracted from the 30-day shipment time.[233] This is incorrect. DMA and Ms. Kuman acknowledged that the proviso at the end of § 435.2(d) (originally numbered § 435.2(b) in the MOR) states, in pertinent part:

> That where the seller receives notice that * * * *the buyer does not qualify for a credit sale, "receipt of a properly completed order" shall mean the time at which* * * * (iii) *the seller receives notice that the buyer qualifies for a credit sale.* (Emphasis added.)[234]

DMA contended, however, that it is not clear from the proviso that when the merchant receives notice that the buyer qualifies for a credit sale, the merchant still has 30 days to ship.[235]

The merchant's obligation to ship, and the pertinent time period for shipment, commences upon "receipt of a properly completed order."[236] The

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[223] R011006–2, E–1, p. 2. See also Andrew Levitt, R011006–2, G–1, p. 1.

[224] R011006–2, M–2, p. 11. For consumers who charged mail or telephone orders and received no express shipment representations, the ORC survey shows that the average consumer who charged his order expected shipment within 14 days while the average consumer who paid any other way expected shipment within 21 days. *Id.* p. 9. Further, NWMaDA reported that "advertisements often urge the consumer to call and use their credit cards . . . to assure faster delivery." R011006–2, GG–2, p. 2. See also R011006–2, H–6, p. 2 (Iowa Attorney General).

[225] R011006–2, HX–1 at 16.

[226] R011006–2, E–1, p. 10. FTC staff has taken a similar position. See, e.g., informal staff opinion letter from Raymond L. Rhine to Ms. Tracy White, File R511928 (Doc. No. 435–11 (Aug. 11, 1989). In situations where there is an express representation, the time of receipt of the order is the only practical benchmark against which to measure whether, in soliciting the consumer's order, the merchant has met its substantiation requirements. A different measurement would make an express shipment representation—and the implied representation that the merchant possesses and relies upon a reasonable basis for it—meaningless.

[227] Consumers who charged mail or telephone orders and to whom express shipment representations were made generally expected shipment within that time. These consumers reported that while the shipment representations to them averaged 22.89 days, their average shipment expectation was 18.2 days. Likewise, persons to whom express shipment representations were made and who paid by other means reported that while the shipment representation to them averaged 34.19 days, their average shipment expectation was 29.08 days. R0–11006, M–2, pp. 9–11.

[228] Because DMA conceded that it was appropriate to require merchants to ship within the time they expressly represent, R011006–2, HX–1, p. 16, its arguments against the change in definition focus on the operation of the amended Rule in situations in which the merchant makes no express shipment representation.

[229] Unless stated otherwise, the terms "authorization" and "initial authorization" in this portion of the SBP refer to the merchant's practice of obtaining credit authorization from the merchant's bank that the consumer is credit worthy. If the merchant's bank authorizes the charge, a hold is placed on the consumer's credit card account for the amount of the transaction, usually for a designated period of 30 days. If the charge is authorized by the bank and the corroborating sales draft is placed in the private payment network within the designated period, the merchant is assured that the charge will be honored. Thus, it is in the merchant's interest to obtain the initial authorization from the bank before beginning the process of fulfilling the consumer's order. See AARP, R011006–2, GC–4, pp. 25–26.

[230] R011006–2, HX–1, p. 16.

[231] Id. at 17–18.

[232] Id.; Kuman, R011006–2, Tr. 49–50.

[233] R011006–2, HX–1, p. 17.

[234] Kuman, R011006–2, Tr. 54–55.

[235] R011006–4, P–1, p. 13.

[236] The TRR mentions a "properly completed order" only in situations in which no express shipment representation is made and the so-called "30-day rule" applies. However, by implication, the Commission regards the definition of a "properly completed order" as also triggering the shipment clock in express shipment representation situations. Thus, assuming that the merchant expressly represents only that it will ship "in 6 weeks," the 6-week shipment clock does not begin to run until

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proviso at the end of § 435.2(d) means that where the buyer does not qualify for a credit sale, the order is *not* a "properly completed order" until the merchant receives notice that the buyer qualifies for a credit sale. Under this proviso, as with checks that are dishonored, when consumers do not qualify for credit, the 30-day "clock" stops running and is automatically reset when the merchant learns that the buyer qualifies for the credit sale. The resetting of the clock gives sellers 30 days to ship from the time the clock is reset.[237]

DMA's other argument is that the definition change will cause sellers to obtain authorization twice (at the time the order is received and when it is shipped), which will be burdensome. However, the record indicates that this is already a common practice. For example, Mr. Kordahl commented that businesses usually obtain authorization at the outset, and if there are delays in shipping the merchandise, again at the time of shipment.[238] Thus, the amendment is unlikely to affect the authorization practices of many sellers.

AARP suggested that DMA's double authorization burden argument may be predicated on DMA's belief that merchant liability for a charge may be affected if a merchant is required to provide a delay notice before the transaction is finally approved. Thus, merchants will want to charge consumer accounts prior to shipment to protect themselves. AARP's comment provided information supporting its conclusion that, if the merchant sends a delay notice to a customer after the merchant obtains an initial authorization, the merchant will not be adversely affected.[239] Specifically there is no reason to believe: (1) Authorization will be revoked; or (2) credit will be denied when the corroborating documents are processed through the private payment network; or (3) chargebacks will occur after a consumer's account is debited.[240] The Commission agrees that there is no reason to believe that harm to the industry occurs if sellers obtain initial credit authorizations, and then send option notices when they unexpectedly cannot ship as promised.

Finally, as noted previously, the definition change does not regulate when the merchant charges the consumer's account. The Commission doubts that the amendment would "induce" merchants to charge buyers' accounts upon the receipt of orders, as DMA suggested. The practice of holding charges until the time of shipment is widespread. As many as 80% of businesses are estimated to hold charges until they can ship the merchandise.[241] For example, MOAA commented that its members (who are very large businesses) generally delay charging a customer's account until an order is shipped.[242]

This practice appears to be a result of private contractual rules governing the credit industry.[243] MasterCard and Visa's joint comment regarding their rules for participating merchants explain how they encourage holding charges until shipment:

> [U]nder the MasterCard and VISA rules, when a cardholder uses a credit card to purchase goods, a merchant may not submit the credit card sales draft resulting from that transaction into the VISA or MasterCard system until the merchant has delivered the goods to the cardholder. The MasterCard and VISA rules further provide that a credit card sales draft must be submitted into the VISA or MasterCard system within a specified period of time (five calendar days for VISA transactions; three bank business days for MasterCard transactions) after the goods are delivered.[244]

It thus appears that any merchant who immediately places a sales draft in the private payment network before shipment breaches these private contractual rules. Finally, the record reflects that merchants are reluctant to incur consumer ill will by charging their accounts prematurely.[245] For these reasons, the Commission disagrees that changing the definition of a "properly completed order" will induce sellers to debit customers' accounts upon receipt of their orders.

Another issue raised by comments in conjunction with amending the definition of a "properly completed order" was whether the "information needed" to process the order would be defined to include the initial credit authorization by the merchant's bank.[246] DMA and MOAA commented that credit authorization should be included as part of the "information needed" to process the order, so that the 30-day "clock" would not start running until the initial bank authorization had been obtained. Further, Ms. Kuman suggested that if the initial credit authorization were necessary to make an order "properly completed," it would largely remedy the so-called "ticking clock" problem she identified, i.e., the loss of shipment time occasioned when a consumer proves to be not creditworthy.[247] On the other hand, many businesses and business representatives, consumers, and consumer protection and state agencies who supported amending the definition indicated that the information sellers need to process orders does not necessarily include the bank's initial credit authorization.[248]

As discussed supra, those opposing the amendment may not have fully considered the implications of the TRR provision denying "properly completed" status to an order accompanied by a check that is dishonored or a charge that is disqualified. As the PO noted, the reason for making bank authorization a part of the definition would be to protect the merchant in situations in which the consumer's credit is not adequate. However, this protection is already afforded the merchant by the proviso at the end of § 435.2(d), which

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the merchant receives a "properly completed order," and, in situations where the buyer's check or money order is dishonored or the buyer does not qualify for the credit sale, the proviso in § 435.2(d) would permit the merchant to ship 6 weeks after it receives notice that the buyer's check or money order has been honored or the buyer qualifies for the credit sale, or the buyer tenders cash in the proper amount.

[237] Staff Report, R0–11006–4, N–1, pp. 85–88; PO's Report, R011006–4, O–1, pp. 42–43.

[238] R011006–2, HX–5, pp. 1–2. Mr. Kordahl noted that experts in the management of credit chargebacks recommend authorizing every transaction and then re-authorizing backorders before shipment. R011006–2, M–3, Appendix "A," p. 26.

[239] R011006–2, M–5, p. 5. In support of its comment, AARP produced a Federal Reserve System staff memorandum to the Consumer Advisory Council entitled "Use of Credit Cards in Telemarketing" (Sept. 20, 1989), Id. Appendix A. It also produced a form BankCard Merchant Agreement, Id. Appendix C. AARP also cited an interview with Gerri Detweiler of Bankcard Holders of America, R011006–2, GG–4, p. 54 (Jan. 26, 1993).

[240] R011006–2, M–5, p. 54 (interview with Gerri Detweiler of Bankcard Holders of America); Appendix A (Federal Reserve System staff memorandum to the Consumer Advisory Council entitled "Use of Credit Cards in Telemarketing;" Appendix C (form BankCard Merchant Agreement).

[241] R011006–2, M–3, pp. 5–7.

[242] R011006–2, F–2, p. 8.

[243] See PO's Report finding that: "This practice is followed not so much for the consumers' benefit but to prevent chargebacks by the banks. It is expected that this practice will be followed more frequently in the future because VISA has changed its rules to reward merchants who seek authorization, make deposits, and ship, all within ten calendar days." R011006–3, O–1, p. 46, F.115.

[244] R011006–2, EE–1, Attachment p. 2.

[245] Kordahl, R011006–2, M–3, p. 7, n.5.

[246] The NPR did not solicit comment on this particular issue. However, the suggestion and comments follow from the proposed change in the definition, and the Commission has therefore decided to address the issue here.

[247] R011006–2, HX–1, p. 17. See also DMA, R011006–2, F–1, p. 12; and MOAA, R011006–2, F–2, p. 8.

[248] R011006–3, O–1, p. 7. These include: Markson Science, Inc., R011006–2, D–1, p. 2; Barry Cutler, R011006–2, D–4, p. 5; Burnett, R011006–2, E–1; NWMaDA, R011006–2, GG–2, p. 2; Montgomery County, Maryland, R011006–2, GG–2, pp. 1–2; NCL, R011006–2, GG–3, p. 3; AARP, R011006–2, GG–4, pp. 49–52; CaDCA, R011006–2, H–2, p. 4; Iowa Department of Justice, R011006–2, H–6, p. 2; Georgia Office of Consumer Affairs, R011006–2, H–8, p. 2; and, the New York State Consumer Protection Board, R011006–2, H–12, pp. 1–2.

stops the shipment clock if there is a denial of credit.[249]

Accordingly, nothing would be gained by having the clock start only after the seller's receipt of the bank's authorization. On the contrary, this could cause further shipment delays, to the ultimate injury of consumers. As with shipment times, merchants can control when they seek initial authorization from the merchant's bank. Thus, merchant delay in seeking authorization, whether intentional or not, would delay starting the 30-day "clock," and continue the uncertainty the amendment seeks to eliminate.[250]

Moreover, the Commission believes that the industry proposal would continue an unjustified disparity in the MOR's treatment of cash, check, and credit card transactions. Notice that a check has "cleared" is not part of the "information needed" to process an order under the MOR. If anything, the merchant's processing of credit card payments ensures payment (through the initial authorization procedure) as fast as, or faster than, the merchant's processing of the consumer's check. The speed of payment should increase as merchants use automated equipment more. AARP submitted a very detailed comment, which the Commission finds persuasive, indicating that there is virtually no time difference between credit card transaction transmittals and check clearance times.[251] By not including an initial credit authorization within the definition of a properly completed order, the Commission assures that orders are treated alike regardless of how they are paid.[252]

Similarly, the Commission disagrees with DMA that changing the definition of a "properly completed order" will have any significant adverse impact on small businesses. DMA had urged the Commission to be sensitive to the impact that the change in the definition of a "properly completed order" would have on small businesses, as compared to larger ones having direct access through computers to banks and other institutions.[253] Larger firms can process credit transactions much faster than those that must rely on manual preparation of credit documents. Similar disparities are experienced by firms that accept applications for credit. Larger firms have direct computer access to credit services while smaller ones do not.

However, the rulemaking record reflects that all businesses, including small ones, are increasingly availing themselves of electronic draft capture technology.[254] The record also reflects that merchants who process charges manually experience virtually the same 5-day clearance time for charges as they do for checks.[255] Thus, the new definition of a "properly completed order" will cause the merchant who processes credit orders no more delay in verifying or securing payment than merchants subject to the MOR experience in processing checks.[256]

In conclusion, in adopting the original definition, the Commission was necessarily concerned only with its effect on mail order sales. Because few mail order transactions were paid by credit card, it was not in the public interest to prolong the rulemaking to permit additional comment on this point. In this rulemaking, the Commission has now afforded interested parties the opportunity to comment fully on its proposal to treat credit sales the same as all other sales.[257] No persuasive evidence was adduced to indicate that circumstances have so changed that the Commission's original finding—that consumers are harmed regardless of the method of payment for the merchandise—was incorrect. Moreover, in this rulemaking, the only meaningful justification for distinguishing credit from other sales, i.e., the hypothesis that consumers who pay by credit would expect shipment to take longer than consumers who pay by other means, was not supported by the evidence.

Further, the Commission's decision to amend the MOR to include telephone sales alters the public interest considerations because of the widespread consumer practice of paying for telephone order merchandise by credit card. The record also indicates that, in delay situations, sellers generally do not process charges until they are ready to ship. Thus, amending the MOR to include telephone transactions would not regulate effectively most telephone sales if the current definition were retained.[258] In preventing unfair or deceptive acts or practices, the Commission may "effectively close all roads to the prohibited goal * * *."[259] Based on the rulemaking record as a whole, the Commission finds it is in the public interest to amend the definition of a "properly completed order" in the MOR to require charge orders to be considered properly completed upon receipt of the consumer's authorization to charge the account (along with all the other information from the consumer needed by the merchant to process the order).

Section 435.3—Limited Applicability

This section consists of six notes that previously appeared at the end of

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[249] PO's Report, R011006–3, O–1, pp. 42–43.

[250] NWMaDA, R011006–2, GG–2, p. 2. MOAA, recognizing that a merchant could suspend operation of the amended Rule's requirements indefinitely by not obtaining the credit authorization from the merchant's bank, suggested that an order should be deemed properly completed when initial authorization is received or ten days after a buyer has supplied complete information to a merchant, whichever happens sooner. R011006–2, F–2, p. 9. The rulemaking record provides no basis for introducing any additional delay into the 30-day period provided by the TRR. Given the consumer expectations documented in this proceeding, and given the fact that charge orders can be processed as fast as orders paid for in other ways, any act or practice of holding a charge order more than 30 days without obtaining the consumer's informed consent thereto is unfair or deceptive. See Staff Report, R011006–3, N–1, pp. 90–95; Final staff Recommendations, R011006–4, Q–1, p. 12.

[251] R011006–2, GG–4, pp. 32–33. To process charge slips manually, rather than electronically, takes about 5 days. Similarly, under the Expedited Funds Availability Act, 12 U.S.C. 4001 et seq. (1987), funds for most checks become available, at the latest, by the fifth business day. AARP's conclusion was shared by Mr. Cutler, who, reporting the experiences of his clients, said, "our experience shows that the time to process [third-party credit] orders is the same as for cash orders." R011006–2, D–4, p. 5.

[252] Under the TRR amendments adopted today, the consumer's authorization to the merchant to charge the consumer's account would be included as part of the information necessary to properly complete an order, while the initial authorization of the merchant's bank would not.

[253] R011006–4, P–1, p. 14.

[254] According to VISA, by December 1989, 64.9% of its sales drafts were captured electronically. For direct marketers who do not have electronic capture capabilities, telephone approval is commonplace. R011006–2, GG–4, pp. 25–26; Staff Report, R011006–3, N–1, p. 93.

[255] See AARP, R011006–2, GG–6, 24–25, 32–33.

[256] Staff Report, R011006–3, N–1, p. 94; PO's Report, R011006–3, O–1, p. 43.

[257] The Commission notes that an agency need not base its amendment of an existing rule on new evidence or changed circumstances. *Center for Science in the Public Interest* v. *Dep't of Treasury*, 797 F.2d 995 (D.C. Cir. 1986) (citations omitted). However, if it chooses to change an existing rule, it must "examine the relevant data and articulate a satisfactory explanation for its action." *Motor Vehicle Mfrs. Assoc.* v. *State Farm Mutual Ins. Co.*, 463 U.S. 29, 43 (1983). While an agency that seeks to revoke an existing rule carries

> [t]he burden * * * to justify the change from the status quo[,] that justification need not consist of affirmative demonstration that the status quo is wrong; it may also consist of demonstrating, on the basis of careful study, that there is no cause to believe that the status quo is right, so the existing rule has no rational basis to support it.

Center for Auto Safety v. *Peck*, 751 F.2d 1336, 1349 (D.C. Cir. 1985) (citations omitted).

[258] Of course, changing the definition also affects the approximately 20% of mail orders that are charged. There is no evidence that any of the participants in the rulemaking failed to understand that the proposed change in the definition of "properly completed order" would affect both telephone-order sales and mail order sales that are paid for by credit card.

[259] *FTC* v. *Ruberoid Co.*, 343 U.S. 470, 473 (1952). See also *FTC* v. *National Lead Co.*, 352 U.S. 419 (1957); *Jacob Siegel Co.* v. *FTC*, 327 U.S. 608 (1946).

§ 435.1(d). These notes describe what transactions the rule does not apply to, a statement that the Commission does not intend to preempt state law that is not inconsistent with this rule, and a savings clause. The text has not been changed.

Section 435.4—Effective Date of the Rule

This section consists of a note that previously appeared at the end of § 435.1(d). It has been revised to indicate when the amendments to the rule become effective. When the Commission tentatively adopted the amendments to the MOR on November 18, 1992, it announced that they would take effect 100 days after publication of the SBP in the **Federal Register.** However, the Commission has received requests to postpone the effective date of the amendments to avoid their becoming effective during the peak end-of-year selling season for most direct marketers. To provide business with an adequate opportunity to design and test any changes in their fulfillment procedures, the Commission has determined that the effective date will be March 1, 1994.

V. Regulatory Analysis

Under section 22 of the FTC Act, 15 U.S.C. 57b–3, the Commission must issue a final regulatory analysis in conjunction with the publication of a final rule.[260] The term "rule" does not include any amendment to a rule unless the Commission concludes: (1) That the proposed amendment will have an impact on the national economy of over $100,000,000; (2) that it will cause a substantial change in the cost or price of goods and services used by particular industries, which are supplied extensively in particular geographic regions, or which are acquired in significant quantities by the Federal, State or local governments; or (3) that the amendment will have a significant impact on the persons regulated or on consumers. For the reasons discussed infra, the Commission concludes that the proposed amendments to the MOR will have none of these effects. Accordingly, the Commission finds that no regulatory analysis is required by the FTC Act for the amendments issued today.

Under the Regulatory Flexibility Act, 5 U.S.C. 604, which addresses the effect of regulation on small businesses, the Commission must prepare and make available for public comment a final regulatory flexibility analysis at the time the Commission promulgates a final rule. This analysis must contain: (1) A succinct statement of the need for, and the objectives of, the rule; (2) a summary of the issues raised by the public comments in response to an initial regulatory flexibility analysis and the Commission's disposition of these issues; and (3) a description of each of the significant alternatives considered by the Commission to minimize any significant impact on small entities.[261] Alternatively, the Chairman can certify that the rule will not have a significant economic impact on a substantial number of small entities.[262] For the reasons discussed infra, the Commission is certifying that the amendments to the MOR adopted today will not have a significant impact on a substantial number of small entities, and therefore, a final regulatory flexibility analysis is unnecessary.

A. Background

Based on comments received in response to the ANPR and other relevant information, the Commission announced in the NPR its determination that the proposed amendments would not have an annual effect on the national economy of $100,000,000 or more; would not cause a substantial change in the cost or price of goods or services used extensively by particular industries, or supplied extensively in particular geographic regions, or acquired in significant quantities by the federal government or by state or local governments. The Commission also concluded that the proposed amendments would not have a significant negative impact upon persons subject to regulation or consumers. Accordingly, the Commission determined that neither the amendment to the MOR to include telephone order merchandise nor the proposed amendment to the definition of a "properly completed order" warranted a preliminary regulatory analysis under section 22(b)(1) of the FTC Act, 15 U.S.C. 57b–3(b)(1).

Similarly, the Commission determined that the amendments would not, if promulgated, have a significant economic impact on a substantial number of small entities. Thus, under the Regulatory Flexibility Act the Commission was not obligated to prepare an initial regulatory flexibility analysis. When the Commission made this determination, the Chairman certified this to the Chief Counsel for Advocacy of the Small Business Administration.

However, in the NPR, the Commission invited comment on its determinations regarding both statutes. It also specifically invited comment on the costs, benefits, and other effects of the proposed amendments, and, in particular, on the costs that could be incurred by small entities if the proposed amendments were adopted.[263] The comments the Commission received did not contradict the Commission's determinations that the proposed amendments would not warrant a regulatory analysis or a regulatory flexibility analysis.

B. Analysis of the Amendments' Economic Effect

1. Amending the MOR to Include Telephone Sales

As previously discussed, the Commission estimates that, in 1988, consumers paid $50.6 million for telephone order merchandise that was neither shipped nor refunded.[264] At the same time, consumers lost the benefit of another $202.4 million worth of telephone order merchandise that was not shipped, but was not charged to their accounts. Although consumers' charge accounts were not debited, these consumers were deprived of the use of the ordered merchandise and lost the opportunity to order merchandise from more responsive merchants. They also may have incurred costs associated with learning the status of their orders. Additionally, the Commission estimates that in 1988, consumer losses from delayed telephone order merchandise totalled $11.57 million.[265]

The Commission also has determined that the MOR's existence has had a positive effect on both mail and

[260] As previously indicated, this part of the SBP also contains the Commission's estimates of the economic effect of the amendments. In this regard, the Commission is not required "to undertake a full scale economic investigation" prior to promulgating the amendments. Otherwise FTC proceedings would be inordinately delayed and relief to the consuming public would be denied. Instead, the Commission is required to consider the economic impact of the rule and "to summarize its best estimate of the impact." H.R. Rep. No. 1107, 93rd Cong., 2d Sess., reprinted in 1974 U.S. Code Cong. & Admin. News 7729.

[261] Id. "Small entity" is defined by the Small Business Administration in the Small Business Size Standards, 13 C.F.R. part 121. Under the current version of this regulation, catalog and mail order houses with annual receipts less than $12.5 million are small entities.

[262] 5 U.S.C. 605(b).

[263] R011006–1, A–2, p. 49066–67.

[264] See supra n.121 and accompanying text. Comparable mail order figures are derived as follows: In 1988, consumers spent between $207 million and $210 million on mail order merchandise that was neither shipped nor refunded, and they lost the benefit of between another $78 million and $79 million worth of mail order merchandise that, while not charged, was not shipped.

[265] Comparable losses for delayed mail order merchandise were $14.64 million. See discussion in part II, A, 3 of this SBP.

telephone order sales, because many merchants using telephone already voluntarily comply with the MOR, which reduces injury that might otherwise occur. To the extent that there is already considerable voluntary compliance, the costs to business of complying with the amended Rule will be correspondingly reduced. Additionally, to the extent that there is such voluntary compliance, it enhances consumer confidence in mail and telephone order merchants, and repeat sales of mail and telephone order merchandise. Because of industry's support for amending the MOR to cover telephone sales, it is also difficult to conclude that there could be significant costs to them.[266] Further, for the most part the direct marketing industry did not contend that the amendments to the MOR would be costly or burdensome to implement.[267] Consumers also will benefit from increased efficiency in federal and state law enforcement resulting from uniform regulation of mail and telephone orders.

Additionally, as previously explained, the Commission found that amending the MOR to include telephone order merchandise is in the public interest. In sum, the Commission concluded that:

(1) The ORC and other survey data, the expert testimony, and the comments submitted by industry, the attorneys general and consumer protection agencies all indicate that the acts or practices addressed by the MOR cause significant harm to consumers when engaged in by telephone order merchants. Further, nothing in the record suggests that the problems could be more efficiently addressed by case-by-case prosecution alone rather than by regulation.

(2) Analysis of the prevalence of telephone order problems and the nature of the injuries sustained by consumers indicates that the consumer harm is significant, whether measured solely in terms of the monetary injury to individual consumers or in terms of the injury to consumers overall.

(3) The amendments are likely to reduce the harm the Commission identified because they:

(a) Replace the general duty under section 5(a)(1) of the FTC Act, 15 U.S.C. 45(a)(1), to make truthful and substantiated shipping claims with rules that specifically define a merchant's obligations, which should ensure that voluntary compliance continues, as well as improve compliance by clarifying any uncertainty merchants have about their obligations;

(b) Are enforceable by civil penalties, which should have a deterrent effect and result in greater compliance; and

(c) Will allow the Commission and the states to apply uniform enforcement standards more efficiently, which will facilitate enforcement.

(4) The benefits of the amendment will exceed its costs. Many merchants already voluntarily comply with the MOR's requirements for their telephone orders because they view the requirements as sound business practice.[268] Thus, there will be little if any incremental cost to merchants or consumers of merchants complying with the amended MOR.

Further, the Commission had previously determined that the costs of complying with the MOR are small. Specifically, in the Damans survey, which was conducted in conjunction with the Commission's Regulatory Flexibility Act Review of the MOR, the Commission evaluated financial and other effects of the MOR on small businesses by comparing cost data for both large and small firms (some of which also sold telephone order merchandise).[269] The survey indicated that almost half of all small and large firms surveyed reported no incremental costs as a result of having to comply with the MOR, and that compliance expenditures of less than $500 were reported by an additional 27%.[270] Of all large and small mail and telephone order merchants surveyed, 81% of small and 65% of large businesses reported that elimination of the MOR would not alter their business practices of notifying consumers of delays.

The survey report concluded: "Most mail order firms, large and small, feel the concept of the 30-day 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."[271] Accordingly, it appears that because most businesses generally do not distinguish between their mail and telephone order operations, the costs of extending the MOR to telephone sales would amount to little more than the small costs businesses incur in complying with the MOR generally. Balanced against the small additional costs are the benefits of increased enforcement efficiency, among other things.

2. Amending the Definition of a "Properly Completed Order"

DMA submitted the principal comment concerning the economic effects of this amendment:

(1) It contended that the amendment will impose additional costs by causing sellers to seek credit authorization twice. However, the rulemaking record indicates that most prudent merchants already seek authorization twice in backorder situations. Accordingly, it is impossible to identify additional costs that might arise from the hypothetical possibility that the change in the definition of a properly completed order would induce merchants to seek a charge authorization more than once in a delay situation.

(2) DMA also contended that the proposed change will induce merchants to debit consumers' accounts before shipment. The rulemaking record suggests such conduct would be limited. Presently, 80% of merchants hold charges in delay situations until shipment. Moreover, this practice is growing because of bank card issuer rules and incentives they provide to encourage merchants to process orders quickly and to refrain from debiting before shipment. Moreover, merchants receive better bank interchange rates when charges are held until shipment.[272] Additionally, the record suggests that merchants believe that debiting a consumer's account before shipment tends to incur consumer ill will and to affect consumer repeat purchase behavior. In short, the record provides little reason to conclude that

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[266] Final Recommendations of Gerard Butters and Lisa Daniel, R011006–4, Q–1, p. 2 (May 28, 1992).

[267] The only exceptions concerned the definitions of "telephone" and a "properly completed order," and the inclusion of business-to-business transactions in the TRR. The comments regarding the definition of "telephone" expressed concern that the definition would inhibit the development of future ordering technologies. However, the Commission does not find this unsupported argument persuasive. As to the definition of a "properly completed order," the Commission discusses the comments and the alleged costs of the amendment in part IV, in its analysis of § 435.2(d). The Commission determined that the cost arguments were unpersuasive. Moreover, to the extent there are costs attributable to the amendment to the definition of a "properly completed order," the Commission believes that the costs are outweighed by the consumer benefits that will accrue. This issue is also discussed infra in subpart C of this Part of the SBP. The issue regarding business-to-business transactions is addressed in part VII. A of the SBP.

[268] For example, Mr. Kordahl noted that businesses do not generally distinguish mail from telephone orders in their fulfillment operations, and that for these businesses, extension of the MOR to telephone order merchandise would not impose significant burdens on them. R011006–2, HX–4, pp. 11–12.

[269] R011006–B–1, B–37.

[270] Id. at 3–41, Tab. 3–34.

[271] Id. at 5, 3–37. The Commission adopted this finding in concluding its Regulatory Flexibility Act review of the MOR. Regulatory Flexibility Act Review of the Mail Order Rule, 51 FR 1516, 1517 (Jan. 14, 1986).

[272] See, e.g., PO's Report, R011006–3, O–1, p. 46, F.115.

amending the definition of a properly completed order will significantly increase business costs.

Finally, the Damens survey indicated that almost half of all small and large firms surveyed reported no incremental increase in costs as the result of having to comply with the MOR and reported only small compliance expenditures by a significant number of other small and large firms.[273] The compliance costs would include those related directly or indirectly to the MOR's definition of a "properly completed order" as it pertains to payment by check (the means most frequently used to pay for mail order merchandise). Therefore, changing the definition to treat checks and charges identically should involve little incremental cost to small businesses.[274]

VI. Effect on State and Local Laws

Section 435.3(b) of the amended MOR (originally, Note 5 of the MOR) relates to its preemptive effect. In the NPR, the Commission did not state that it was considering amending the preemption provision in the MOR, and in fact this provision has not been amended.

In § 435.3(b) the Commission explicitly preempts any provision of any state, municipal or local law, ordinance or regulation in the same regulatory area (*i.e.*, regulation relating to timely shipment of mail or telephone order merchandise or substantiation of shipment claims, appropriate and timely notification of delay, or appropriate and timely refund for unshipped mail or telephone order merchandise) that is inconsistent with the amended MOR to the extent such provision fails to provide buyers with rights equal to or greater than those rights provided them by the TRR. On the other hand, any state action that: (1) Is consistent with the TRR; (2) provides buyers greater rights than the TRR; or (3) imposes additional obligations or liabilities upon sellers, is not superseded.[275] Section 435.3(b) provides, however, that any state action that requires notification to the buyer of any right which is the same as a right created by the TRR, but does so in a language, form, or manner that is in any way different from that required by the TRR, is preempted as being in conflict with the TRR. Finally, this section contains a saving provision which preserves those parts of any state action that are not preempted.

It is well-established that federal law, including agency regulations, can expressly or impliedly supplant state law.[276] An administrative agency acting within its delegated authority can preempt state law by expressly saying so.[277] In adopting the amendments to the MOR, the Commission is exercising its delegated authority to define with specificity unfair or deceptive acts or practices under the FTC Act, and therefore may expressly supplant state law.

VII. Other Matters

A. Business-to-Business Sales

When it adopted the MOR the Commission found that "businessmen have encountered the same problems as the general public when dealing with distant mail order sellers * * *. [T]here is no compelling reason to treat them differently from other members of the consuming public."[278] In the NPR, the Commission indicated that its proposed amendments to the MOR would accordingly cover business-to-business telephone sales, and invited comment on this issue.[279]

The record reflects that businesses encounter the same problems as the general public when dealing with telephone order merchants. Mr. Kordahl testified that of 1988 sales of approximately $117.5 billion, approximately 5% of business-to-business sales, or between $470 million to $710 million, were delayed. He further testified that "[b]ased on my experience, the occurrence of shipment representations for which there was an inadequate factual basis, and of failures to provide timely or adequate notices of delay, were as frequent as their occurrence in business-to-consumer sales."[280] He stated that extending the MOR to telephone order merchandise would benefit primarily those businesses that purchase merchandise which they charge on bank credit cards.[281]

Markson Science, Inc. ("Markson") contended that while extending the MOR to credit card or cash telephone sales between businesses is appropriate, the rule should exempt transactions involving open accounts. It reasoned that in those transactions there are adequate protections for the parties.[282] Texas Instruments Inc. ("TI") opposed amending the MOR to include telephone sales between businesses because of the "impact on existing technology-based business practices, such as electronic order placement * * *."[283] The company contended that the amendment would cover the system presently in use at TI called Electronic Data Interchange ("EDI"), a system which allows for high speed delivery and for paperless transactions.[284]

Although Markson indicates that in certain transactions the contracts between businesses provide ample protection for non-timely or non-shipment problems, the evidence in this rulemaking does not indicate that adopting the TRR will alter this or place burdens on the industry.[285] Additionally, with respect to TI's concerns, the TRR does not require that information such as notification of delay be communicated by any particular means. Indeed, the elimination of the first class mail rebuttable presumptions arguably should facilitate the transmission of delay option notices and buyer responses directly by telephone or indirectly by EDI.[286] The parties also have offered no argument against the idea that, in any event, shipping information should be based on a

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[273] R011006–B–1, B–37. p. 3–43, Tab. 3–34.

[274] See also PO's Report, R011006–3, O–1, pp. 31–33. Apart from limited costs, changing the definition of a "properly completed order" will lead to better communications between merchants and consumers in delayed shipment situations. This in turn will improve prospects for repeat sales for small and large businesses alike. See Staff Report, R011006–3, N–1, pp. 120–21.

[275] This provision is similar to the provisions in a number of other TRR's, including, "Cooling-off Period for Door-to-Door Sales," 16 CFR part 429, Note 2(h); "Disclosure Requirements and Prohibitions Concerning Franchising and Business Opportunity Ventures," 16 CFR part 436, Note 2; "Credit Practices," 16 CFR 444.5(2); "Funeral Industry Practices," 16 CFR 453.9(b); and "Used Motor Vehicle Trade Regulation Rule," 16 CFR 455.6(a)(2).

[276] See, *e.g.*, *Schneidewind* v. *ANR Pipeline Co.*, 485 U.S. 293 (1988); *Fidelity Fed. Savs. & Loan Ass'n* v. *De la Cuesta*, 458 U.S. 141 (1982).

[277] *Schneidewind* v. *ANR Pipeline Co.*, 485 U.S. at 299–300 (1988); *Fidelity Fed. Savs. & Loan Ass'n* v. *De la Cuesta*, 458 U.S. at 152–54 (1982). See also *City of New York* v. *FCC*, 486 U.S. 57, 63–64 (1988).

[278] SBP, 40 FR 51582 at 51594 (Nov. 5, 1975).

[279] R011006–1, A–2, pp. 59063–64.

[280] R011006–2, HX–4, p. 31.

[281] Eight to 12% of business-to-business transactions—or $8.4 billion to $14.1 billion in 1988 sales—involve the use of bank credit cards. Id. at 27. CaDCA's comment provided a concrete example of how business-to-consumer and business-to-business transactions can involve similar problems. Reporting on the previously cited *Dixon* case, the state consumer protection agency stated that both consumers and businesses usually ordered computer software from the defendants by telephone and that in 95% of these telephone sales, purchases were charged on bank credit cards. In many cases, these orders were never shipped and there were no refunds made. R011006–2, H–2, pp. 1–2.

[282] R011006–2, D–1, p. 2.

[283] R011006–2, D–2, p. 1.

[284] Id. at 1–2.

[285] The record indicates that the costs of complying with the amendment for business-to-business transactions should be modest and similar to the costs of complying with business-to-consumer transactions.

[286] Further, these systems' remedial provisions make it unlikely that much of a Commission enforcement presence would be necessary in business-to-business transactions. See PO's Report, pp. 66–69.

reasonable basis or that changes in agreed shipment times not be made unilaterally by the merchant. The Commission has accordingly determined not to exempt business-to-business transactions from the TRR's coverage.

B. Other Proposals

Some comments proposed expanding or restricting the MOR in various other respects. For example, some participants suggested that the C.O.D. exemption in the MOR be expanded to include so-called sales "on approval,"[287] that the MOR be extended to third-party fulfillment houses,[288] that the amended MOR exempt "installed merchandise,"[289] and that the amended MOR exempt local retail sales.[290] The Commission rejects these proposals, in large part because (1) the public was afforded inadequate notice to ensure full participation by affected parties; and (2) the record as developed afforded little or no basis upon which to take action, including initiating additional rulemaking.[291]

VIII. Conclusion

The Commission has determined that the TRR issued today is in the public interest because it will deter the unfair or deceptive acts or practices currently existing in sales of merchandise by telephone. In formulating the TRR, the Commission has assessed the economic impact on consumers and businesses, particular small businesses, and determined that the benefits of the TRR, taken together, outweigh the costs.

List of Subjects in 16 CFR part 435

Mail order merchandise, Telephone order merchandise, Trade Practices.

Part 435 of title 16 of the Code of Federal Regulations is revised to read as follows:

PART 435—MAIL OR TELEPHONE ORDER MERCHANDISE

Sec.
435.1 The Rule.
435.2 Definitions.
435.3 Limited Applicability.
435.4 Effective Date of the Rule.

Authority: 15 U.S.C. 57a; 5 U.S.C. 552.

§ 435.1 The rule.

In connection with mail or telephone order sales in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, it constitutes an unfair method of competition, and an unfair or deceptive act or practice for a seller:

(a)(1) To solicit any order for the sale of merchandise to be ordered by the buyer through the mails or by telephone unless, at the time of the solicitation, the seller has a reasonable basis to expect that it will be able to ship any ordered merchandise to the buyer:

(i) Within that time clearly and conspicuously stated in any such solicitation, or

(ii) if no time is clearly and conspicuously stated, within thirty (30) days after receipt of a properly completed order from the buyer, Provided, however, where, at the time the merchandise is ordered the buyer applies to the seller for credit to pay for the merchandise in whole or in part, the seller shall have 50 days, rather than 30 days, to perform the actions required in § 435.1(a)(1)(ii) of this part.

(2) To provide any buyer with any revised shipping date, as provided in paragraph (b) of this section, unless, at the time any such revised shipping date is provided, the seller has a reasonable basis for making such representation regarding a definite revised shipping date.

(3) To inform any buyer that it is unable to make any representation regarding the length of any delay unless

(i) the seller has a reasonable basis for so informing the buyer and

(ii) the seller informs the buyer of the reason or reasons for the delay.

(4) In any action brought by the Federal Trade Commission, alleging a violation of this part, the failure of a respondent-seller to have records or other documentary proof establishing its use of systems and procedures which assure the shipment of merchandise in the ordinary course of business within any applicable time set forth in this part will create a rebuttable presumption that the seller lacked a reasonable basis for any expectation of shipment within said applicable time.

(b)(1) Where a seller is unable to ship merchandise within the applicable time set forth in paragraph (a)(1) of this section, to fail to offer to the buyer, clearly and conspicuously and without prior demand, an option either to consent to a delay in shipping or to cancel the buyer's order and receive a prompt refund. Said offer shall be made within a reasonable time after the seller first becomes aware of its inability to ship within the applicable time set forth in paragraph (a)(1) of this section, but in no event later than said applicable time.

(i) Any offer to the buyer of such an option shall fully inform the buyer regarding the buyer's right to cancel the order and to obtain a prompt refund and shall provide a definite revised shipping date, but where the seller lacks a reasonable basis for providing a definite revised shipping date the notice shall inform the buyer that the seller is unable to make any representation regarding the length of the delay.

(ii) Where the seller has provided a definite revised shipping date which is thirty (30) days or less later than the applicable time set forth in paragraph (a)(1) of this section, the offer of said option shall expressly inform the buyer that, unless the seller receives, prior to shipment and prior to the expiration of the definite revised shipping date, a response from the buyer rejecting the delay and cancelling the order, the buyer will be deemed to have consented to a delayed shipment on or before the definite revised shipping date.

(iii) Where the seller has provided a definite revised shipping date which is more than thirty (30) days later than the applicable time set forth in paragraph (a)(1) of this section or where the seller is unable to provide a definite revised shipping date and therefore informs the buyer that it is unable to make any representation regarding the length of the delay, the offer of said option shall also expressly inform the buyer that the buyer's order will automatically be deemed to have been cancelled unless:

(A) The seller has shipped the merchandise within thirty (30) days of the applicable time set forth in paragraph (a)(1) of this section, and has received no cancellation prior to shipment, or

(B) The seller has received from the buyer within thirty (30) days of said applicable time, a response specifically consenting to said shipping delay. Where the seller informs the buyer that it is unable to make any representation regarding the length of the delay, the buyer shall be expressly informed that, should the buyer consent to an indefinite delay, the buyer will have a continuing right to cancel the buyer's order at any time after the applicable time set forth in paragraph (a)(1) of this section by so notifying the seller prior to actual shipment.

(iv) Nothing in this paragraph shall prohibit a seller who furnishes a definite revised shipping date pursuant to paragraph (b)(1)(i) of this section, from requesting, simultaneously with or at any time subsequent to the offer of an option pursuant to paragraph (b)(1) of this section, the buyer's express consent to a further unanticipated delay beyond the definite revised shipping date in the form of a response from the buyer specifically consenting to said further

[287] DeHart and Darr, R011006–2, E–2.
[288] MOAA, R011006–2, F–2, pp. 4, 9–10.
[289] NRMA, R011006–2, F–3, pp. 4–5.
[290] NRMA, R011006–2, F–3, p. 5.
[291] See Staff Report, R011006–3, N–1, pp. 112–15; PO's Report, R011006–3, O–1, pp. 64–71.

delay. Provided, however, That where the seller solicits consent to an unanticipated indefinite delay the solicitation shall expressly inform the buyer that, should the buyer so consent to an indefinite delay, the buyer shall have a continuing right to cancel the buyer's order at any time after the definite revised shipping date by so notifying the seller prior to actual shipment.

(2) Where a seller is unable to ship merchandise on or before the definite revised shipping date provided under paragraph (b)(1)(i) of this section and consented to by the buyer pursuant to paragraph (b)(1) (ii) or (iii) of this section, to fail to offer to the buyer, clearly and conspicuously and without prior demand, a renewed option either to consent to a further delay or to cancel the order and to receive a prompt refund. Said offer shall be made within a reasonable time after the seller first becomes aware of its inability to ship before the said definite revised date, but in no event later than the expiration of the definite revised shipping date: Provided, however, That where the seller previously has obtained the buyer's express consent to an unanticipated delay until a specific date beyond the definite revised shipping date, pursuant to paragraph (b)(1)(iv) of this section or to a further delay until a specific date beyond the definite revised shipping date pursuant to paragraph (b)(2) of this section, that date to which the buyer has expressly consented shall supersede the definite revised shipping date for purposes of paragraph (b)(2) of this section.

(i) Any offer to the buyer of said renewed option shall provide the buyer with a new definite revised shipping date, but where the seller lacks a reasonable basis for providing a new definite revised shipping date, the notice shall inform the buyer that the seller is unable to make any representation regarding the length of the further delay.

(ii) The offer of a renewed option shall expressly inform the buyer that, unless the seller receives, prior to the expiration of the old definite revised shipping date or any date superseding the old definite revised shipping date, notification from the buyer specifically consenting to the further delay, the buyer will be deemed to have rejected any further delay, and to have cancelled the order if the seller is in fact unable to ship prior to the expiration of the old definite revised shipping date or any date superseding the old definite revised shipping date: Provided, however, That where the seller offers the buyer the option to consent to an indefinite delay the offer shall expressly inform the buyer that, should the buyer so consent to an indefinite delay, the buyer shall have a continuing right to cancel the buyer's order at any time after the old definite revised shipping date or any date superseding the old definite revised shipping date.

(iii) Paragraph (b)(2) of this section shall not apply to any situation where a seller, pursuant to the provisions of paragraph (b)(1)(iv) of this section, has previously obtained consent from the buyer to an indefinite extension beyond the first revised shipping date.

(3) Wherever a buyer has the right to exercise any option under this part or to cancel an order by so notifying the seller prior to shipment, to fail to furnish the buyer with adequate means, at the seller's expense, to exercise such option or to notify the seller regarding cancellation.

Nothing in paragraph (b) of this section shall prevent a seller, where it is unable to make shipment within the time set forth in paragraph (a)(1) of this section or within a delay period consented to by the buyer, from deciding to consider the order cancelled and providing the buyer with notice of said decision within a reasonable time after it becomes aware of said inability to ship, together with a prompt refund.

(c) To fail to deem an order cancelled and to make a prompt refund to the buyer whenever:

(1) The seller receives, prior to the time of shipment, notification from the buyer cancelling the order pursuant to any option, renewed option or continuing option under this part;

(2) The seller has, pursuant to paragraph (b)(1)(iii) of this section, provided the buyer with a definite revised shipping date which is more than thirty (30) days later than the applicable time set forth in paragraph (a)(1) of this section or has notified the buyer that it is unable to make any representation regarding the length of the delay and the seller

(i) Has not shipped the merchandise within thirty (30) days of the applicable time set forth in paragraph (a)(1) of this section, and

(ii) Has not received the buyer's express consent to said shipping delay within said thirty (30) days;

(3) The seller is unable to ship within the applicable time set forth in paragraph (b)(2) of this section, and has not received, within the said applicable time, the buyer's consent to and further delay;

(4) The seller has notified the buyer of its inability to make shipment and has indicated its decision not to ship the merchandise;

(5) The seller fails to offer the option prescribed in paragraph (b)(1) of this section and has not shipped the merchandise within the applicable time set forth in paragraph (a)(1) of this section.

(d) In any action brought by the Federal Trade Commission, alleging a violation of this part, the failure of a respondent-seller to have records or other documentary proof establishing its use of systems and procedures which assure compliance, in the ordinary course of business, with any requirement of paragraphs (b) or (c) of this section will create a rebuttable presumption that the seller failed to comply with said requirement.

§ 435.2 Definitions.

For purposes of this part:

(a) "Mail or telephone order sales" shall mean sales in which the buyer has ordered merchandise from the seller by mail or telephone, regardless of the method of payment or the method used to solicit the order.

(b) "Telephone" refers to any direct or indirect use of the telephone to order merchandise, regardless of whether the telephone is activated by, or the language used is that of human beings, machines, or both.

(c) "Shipment" shall mean the act by which the merchandise is physically placed in the possession of the carrier.

(d) "Receipt of a properly completed order" shall mean, where the buyer tenders full or partial payment in the proper amount in the form of cash, check, money order, or authorization from the buyer to charge an existing charge account, the time at which the seller receives both said payment and an order from the buyer containing all of the information needed by the seller to process and ship the order. Provided, however, That where the seller receives notice that the check or money order tendered by the buyer has been dishonored or that the buyer does not qualify for a credit sale, "receipt of a properly completed order" shall mean the time at which:

(i) The seller receives notice that a check or money order for the proper amount tendered by the buyer has been honored,

(ii) The buyer tenders cash in the proper amount, or

(iii) The seller receives notice that the buyer qualifies for a credit sale.

(e) "Refund" shall mean:

(1) Where the buyer tendered full payment for the unshipped merchandise in the form of cash, check or money order, a return of the amount tendered in the form of cash, check or money order;

(2) Where there is a credit sale:

(i) And the seller is a creditor, a copy of a credit memorandum or the like or an account statement reflecting the removal or absence of any remaining charge incurred as a result of the sale from the buyer's account;

(ii) And a third party is the creditor, a copy of an appropriate credit memorandum or the like to the third party creditor which will remove the charge from the buyer's account or a statement from the seller acknowledging the cancellation of the order and representing that it has not taken any action regarding the order which will result in a charge to the buyer's account with the third party;

(iii) And the buyer tendered partial payment for the unshipped merchandise in the form of cash, check or money order, a return of the amount tendered in the form of cash, check or money order.

(f) "Prompt refund" shall mean:

(1) Where a refund is made pursuant to paragraph (c)(1) or (2)(iii) of this section a refund sent to the buyer by first class mail within seven (7) working days of the date on which the buyer's right to refund vests under the provisions of this part;

(2) Where a refund is made pursuant to paragraph (c)(2) (i) or (ii) of this section, a refund sent to the buyer by first class mail within one (1) billing cycle from the date on which the buyer's right to refund vests under the provisions of this part.

(g) The "time of solicitation" of an order shall mean that time when the seller has:

(1) Mailed or otherwise disseminated the solicitation to a prospective purchaser,

(2) Made arrangements for an advertisement containing the solicitation to appear in a newspaper, magazine or the like or on radio or television which cannot be changed or cancelled without incurring substantial expense, or

(3) Made arrangements for the printing of a catalog, brochure or the like which cannot be changed without incurring substantial expense, in which the solicitation in question forms an insubstantial part.

§ 435.3 Limited applicability.

(a) This part shall not apply to:

(1) Subscriptions, such as magazine sales, ordered for serial delivery, after the initial shipment is made in compliance with this part.

(2) Orders of seeds and growing plants.

(3) Orders made on a collect-on-delivery (C.O.D.) basis.

(4) Transactions governed by the Federal Trade Commission's Trade Regulation Rule entitled "Use of Negative Option Plans by Sellers in Commerce," 16 CFR part 425.

(b) By taking action in this area:

(1) The Federal Trade Commission does not intend to preempt action in the same area, which is not inconsistent with this part, by any State, municipal, or other local government. This part does not annul or diminish any rights or remedies provided to consumers by any State law, municipal ordinance, or other local regulation, insofar as those rights or remedies are equal to or greater than those provided by this part. In addition, this part does not supersede those provisions of any State law, municipal ordinance, or other local regulation which impose obligations or liabilities upon sellers, when sellers subject to this part are not in compliance therewith.

(2) This part does supersede those provisions of any State law, municipal ordinance, or other local regulation which are inconsistent with this part to the extent that those provisions do not provide a buyer with rights which are equal to or greater than those rights granted a buyer by this part. This part also supersedes those provisions of any State law, municipal ordinance, or other local regulation requiring that a buyer be notified of a right which is the same as a right provided by this part but requiring that a buyer be given notice of this right in a language, form, or manner which is different in any way from that required by this part. In those instances where any State law, municipal ordinance, or other local regulation contains provisions, some but not all of which are partially or completely superseded by this part, the provisions or portions of those provisions which have not been superseded retain their full force and effect.

(c) If any provision of this part, or its application to any person, partnership, corporation, act or practice is held invalid, the remainder of this part or the application of the provision to any other person, partnership, corporation, act or practice shall not be affected thereby.

§ 435.4 Effective date of the rule.

The original rule, which became effective 100 days after its promulgation on October 22, 1975, remains in effect. The amended rule, as set forth in this part, becomes effective March 1, 1994.

By direction of the Commission.

Donald S. Clark,

Secretary.

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REASONS FOR SETTLEMENT

This statement accompanies the Consent Decree executed by defendant Amden Corporation. The Consent Decree enjoins defendant from violating the Mail or Telephone Order Merchandise Rule ("Rule"), 16 C.F.R. Part 435, with respect to merchandise ordered by mail or telephone, including merchandise ordered via the Internet. The Consent Decree requires the payment of a $28,000 civil penalty.

Pursuant to Section 5(m)(3) of the Federal Trade Commission Act, as amended, 15 U.S.C. § 45(m)(3), the Commission hereby sets forth its reasons for settlement by entry of a Consent Decree:

On the basis of the allegations contained in the Complaint, the Commission believes that the payment of $28,000 in civil penalties by the defendant Amden Corporation constitutes an appropriate amount on which to base the settlement. The amount of the penalty should assure compliance with the law by defendant and by others who engage in practices covered by the Mail or Telephone Order Merchandise Rule ("Rule"). Moreover, the provisions enjoining defendant from failing to comply with the Rule with respect to merchandise ordered by mail, telephone, or via the Internet should assure its future compliance with the law. Additionally, with the entry of the Consent Decree, the time and expense of litigation will be avoided.

For the foregoing reasons, the Commission believes that the settlement by the entry of the attached Consent Decree is justified and well within the public interest.