

November 1, 2007

Office of the Secretary
Federal Trade Commission
Room H-135 (Annex K)
600 Pennsylvania Avenue NW
Washington, DC 20580

**16 CFR Part 435 Comment –
Mail or Telephone Order Merchandise Rule, Project No. P924214**

To Whom It May Concern:

As a student of Federal Administrative Law at the Florida State University College of Law in Tallahassee, I am required to analyze and file comment in an ongoing federal rulemaking. I have chosen to respond to your September 11, 2007 request for public comment on the Mail or Telephone Order Merchandise Rule (16 CFR Part 435), published at 72 Fed. Reg. 51728. Over the past few years, I have ordered several thousand dollars worth of merchandise over the Internet and through the mail. I strongly support consumers' rights regarding mail, telephone, and Internet order shopping, and I find the Rule to be a necessary and effective mechanism for holding sellers of merchandise to certain reasonable standard business practices with respect to the commercial channels governed by the Rule.

In reply to the specific questions raised in Part V of the Notice, I submit the following comments:

Question 2 - What costs has the Rule imposed on, and what benefits has the Rule provided to, purchasers of merchandise ordered by mail or telephone?

The Rule has provided a degree of security for consumers who order merchandise by mail or telephone (or over the Internet). By requiring sellers to ship merchandise within the promised time (or within 30 days, if no time is promised) and to contact buyers in the event of a delay, the Rule enables buyers to make better purchasing decisions and provides them with certain basic rights and expectations regarding the receipt of their merchandise.

In the absence of the Rule, buyers would have less information regarding the status of their purchases, as merchants would presumably be under no obligation to ship within their stated timeframe (or within 30 days, if it all). Also, merchants would

presumably be under no obligation to inform purchasers of delays, and purchasers would not be afforded the opportunity to cancel their orders in the event of a delayed shipment.

It is difficult to discern any costs that the Rule imposes on purchasers, except to the extent that the Rule compels certain communication between buyers and sellers (consent to a delayed shipment, etc.). If such communication is burdensome upon the purchaser in any way, it certainly offsets the burden created by remaining uninformed and uncertain about the status of the purchaser's shipment.

Question 4 - What costs or benefits would amending the Rule explicitly to cover all computer and Internet orders impose on or provide to consumers, merchants, mediation agencies, or state law enforcement agencies? If the Commission decides to propose such a change, how should it revise the text of the Rule?

I agree that new means of accessing the Internet that do not involve the use of a telephone line (wireless networks, cable modems, etc.) have blurred the Rule's coverage, but the blurring seems to me to be slight. The means of Internet access is not something that a merchant could really discover; that is, a merchant will not know whether a purchaser used a wireless network or a dial-up modem to place her order. Even if the merchant could discover such information, he could not reasonably argue that an order placed over a wireless network was somehow exempt from the requirements of the Rule. Amending the Rule would not seem to impose any new costs upon merchants that were not previously imposed by the Rule's March 1994 amendment. Amending the Rule seems to be appropriate in light of the contemporary dominance of Internet order shopping, but it would not really impose any new obligations or create any new rights that have not already been recognized for over a decade.

Regarding changes to the text of the Rule, I would suggest adding "Internet" to the Rule's title. Footnote 8 also suggests the use of the word "computer," but "Internet" is probably better, as there are now devices for accessing the Internet that are not "computers" in the traditional sense (i.e., an iPhone). The definitions section will need to be amended to reflect the various means of Internet ordering.

Question 14 - To what extent are the changes discussed in Part II of this notice either substantive or non-substantive?

To summarize my understanding of substantive/non-substantive rules, in Morton v. Ruiz, 415 U.S. 199 (1974), the Supreme Court of the United States described a

substantive rule as one that “affect[s] substantial individual rights and obligations.” Further, if an agency rule is not substantive, then it logically must be either an interpretive rule or a general statement of policy. Interpretive rules, also, may not add anything to existing rules.

It appears that the changes discussed in Part II(A) of the notice, if indeed implemented, would be interpretive rather than substantive. The Rule’s March 1994 amendment made it clear that Internet shopping was considered a form of telephone ordering for the purposes of the Rule. While there are now means of accessing the Internet that do not involve the use of a telephone line, no reasonable merchant could really argue that an Internet order placed through a wireless network or a cable modem is exempt from the requirements of the Rule, if they had any way of discovering such information at all. Changing the language of the Rule to expressly include Internet ordering does not seem to create any new rights or obligations that were not already established by the March 1994 amendment. The changes outlined in Part II(A) would merely make the preexisting fact that Internet ordering is within the ambit of the Rule more explicit.

The changes discussed in Part II(B) of the notice, if indeed implemented, might be substantive rather than interpretive. Unlike the changes outlined in Part II(A), the issue of debit card and demand draft payments was not addressed in any form in the Rule’s March 1994 amendment. Even if the next amendment to the Rule treats debit card and demand draft payments in the same manner as check payment methods (as discussed in the final paragraph of Part II(B)), it would still be adding something to the Rule that was not there before.

Finally, the changes discussed in Part II(C) of the notice, if indeed implemented, seem to be more interpretive than substantive. The Part II(C) changes appear only to give merchants greater flexibility in issuing refunds, and do not seem to create new duties or make preexisting duties more rigorous.

Respectfully submitted,

Paul T. Dearing