16-CFR Part 435 --- Mail or Telephone Order Merchandise

COMES NOW, AN INTERESTED PERSON, PURSUANT TO 5 U.S.C. 553(c), AND HEREBY REQUESTS, FROM THIS COMMISSION, AN OPPORTUNITY TO BE HEARD.

The Federal Trade Commission (FTC) proposes to retain the "Mail or Telephone Order Merchandise Rule" (MTOR) based, supposedly, on its computation of the relevant costs and benefits. According to the FTC, the MTOR

> prohibits sellers from soliciting mail or telephone order sales unless the sellers have a reasonable basis to expect that they will be able to ship the ordered merchandise within the time stated on the solicitation, or, if no time is stated, within 30 days of receipt of an order. The MTOR further requires a seller to seek the buyer's consent to the delayed shipment when the seller learns that it cannot ship within the time stated, or, if no time is stated, within 30 days. If the buyer does not consent, the seller must promptly refund all money paid for the unshipped merchandise.

The FTC issued this rule in 1975, pursuant to its authority under sections 5 and 18 of the Federal Trade Commission Act (FTC Act), 15 U.S.C. 45 & 57(a), "to proscribe these deceptive and unfair acts or practices." This rule, it is said, was a "response to complaints that many mail order sellers failed to ship merchandise on time, or failed to provide prompt refunds for unshipped merchandise."[1]

The FTC is now soliciting comments respecting the MTOR in order to "obtain information about [its] costs and benefits and their economic and regulatory impact." Two "major trade associations," the National Retail Federation (NRF) and the Direct Marketing Association (DMA), have already contributed comments supporting the retention of the MTOR. These two associations basically argue that the rule (1) minimizes transaction costs (by creating competitive uniformity) and (2) creates proper market incentives (by enhancing consumer confidence). Other sundry individual comments suggest that the rule provides buyers with "basic rights and expectations regarding the receipt of their merchandise," and that it is a "cautionary restraint against ... overzealous merchants." Interestingly, there has been no discussion of the relevant costs associated with the continued use of the MTOR.

I would like to come in now to protest the retention of this rule for reasons that are strictly *economic*. First of all, the FTC is not correct in its characterization of the problem. For

[1] This rule was subsequently expanded in 1993 to include business transactions conducted via telephone.

economics-related problems, it is never correct to approach the problem with presumptions such as, How can I prevent this "harm" from happening? (in this case, seller-delivery predation). This is because economic problems are never *really* unilateral. The source of every economic problem traces back invariably to some *interpersonal* conflict. Therefore, the question should instead be, How do we prevent the greater harm?[2]

I believe it is a mistake when comments use language like "buyer rights" and "overzealous merchants." This sort of talk does not allow us to consider things on a *truly* cost-benefit basis. Now, the Commission has itself expressly stated that it intends to approach this issue on a cost-benefit basis. Taking the Commission on their word, then, I would suggest that we try candidly to look at the problem "economically." Whatever rights buyers may inherently have, or however rapaciously zealous merchants actually are, the truth is that, if it costs more than it is worth to think and act in this way, then it just doesn't make sense "economically." The costs outweigh the benefits (to put it in cost and benefit terms). I would therefore submit to this honorable Commission that the reason why we haven't seen any discussion of costs yet is because the comments so far have not correctly characterized the problem.[3]

Armed as we are now with "economic" minds, we can now more properly entertain other alternative considerations. For example, it may very well be that buyers are simply unwilling to comply with the transactional conditions imposed by sellers in a competitive market. After all, if buyers want expedited delivery guarantees, then they have but to pay for them. The regulatory imperatives imposed upon sellers by this rule are nowhere justified in economic terms. I would suggest that, as a general proposition, the fact that buyers do not enter voluntarily into contractual arrangements specifying the very conditions the MTOR has created, is because it simply does not make any economic sense. Let me put it this way, If you, as a buyer, do not like transacting without certain time-specific delivery guarantees, then seek comfort in the knowledge that it would cost you more than it is worth to you to purchase that guarantee, for, otherwise, would you not do it?[4] Remember, our purported approach here is cost-benefit. We can't have

---

[2] Basically, when it comes to economics, it is never appropriate to cast blame. As Nobel Laureate Ronald H. Coase himself put it, "The question is commonly thought of as one in which A inflicts harm on B and what has to be decided is: how should we restrain A? But this is wrong. We are dealing with a problem of a reciprocal nature. To avoid the harm to B would inflict harm on A. The real question that has to be decided is: should A be allowed to harm B or should B be allowed to harm A? The problem is to avoid the more serious harm." Coase, "The Problem of Social Cost," Journal of Law and Economics, 1960.

[3] The most immediate cost here, to take just one example, is the expense sellers are forced to incur in assuring time-specific deliveries without any offsetting relief coming from the buyer's end in the form of higher prices charged. This is a tremendous cost, and the FTC should, I think, take this problem very seriously.

[4] The wording of this statement was stolen from Dr. Carl Dahlman. The exact statement is, "If you do not like the smell of the air, seek comfort in the knowledge that it would cost you more than it is worth to you to do away with the stench, for, otherwise, would you not do it?" Dahlman, "The Problem of Externality," Journal of Law and Economics, 1979.

everything, and it "costs" to have what we do have.[5]

Now, finally, and somewhat alternatively, I would propose to this honorable Commission that it consider yet another error of characterization. In actual fact, these mail and telephone order time regulations are not *really* proper cost-benefit problems. In other words, the regulations at issue here are not designed to correct some "market" or "economic" imbalance. Indeed, these regulations concern *only* the terms of exchange between specific parties. In effect, we are doing nothing more than privileging the "interests" of buyers over those of sellers without any real economic justification. Cost-benefit analysis, in the purely economic context, refers to certain "institutional" barriers impeding efficient trade. The only barrier at issue here are the interests of the other transacting party. The market in this case is already established; all that is left are the specific terms of the sales contract.

Accordingly, it is my contention that by intervening at this stage, the Commission has done nothing but privilege buyers at the tremendous expense of economic inefficiency. The honorable Commission should therefore cast out this superfluous rule, and thereby save this Country a great deal of expense. At the very least, the FTC should, I think, make very clear, pursuant to its "interpretive rules" power under 5 U.S.C. 553(b)(A), just what it means by "cost-benefit" analysis.

Submitted on the 14 of October, 2011,

Matthew George Mueller, B.S., Economics,
University of Missouri, School of Law

[5] The perceptive (and persistent) critic might at this stage say, Sure, buyers can offer to pay all they want for these services, but "overzealous merchants" can just refuse to provide them. That seems to make sense, right? Wrong. What critics of this sort fail to appreciate is that the decision to forgo a benefit (however small) is itself a cost to the decision-maker. Therefore, it does not make sense to refuse a service if what is being offered for it is less than the disutility that would be incurred in providing it. For this reason, I believe that the Commission has erred in placing this issue under the "deceptive and unfair acts and practices" category. There is nothing deceptive or unfair about forgoing an inefficient exchange. If it was efficient, then it would have already occurred (and no regulation would be necessary).