# Mail or Telephone Order Merchandise
# Staff Report to the Federal Trade Commission and
# Proposed Revised Trade Regulation Rule
# (16 CFR Part 435)

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This Report, as required by Section 1.13(f) of the Commission's Rules of Practice, 16 CFR 1.13(f), contains staff's analysis of the rule amendment record and its recommendations as to the form of the proposed final Mail, Internet, or Telephone Order Merchandise Rule. The Report has not been endorsed or adopted by the Commission. The Commission's final determination in this matter will be based upon the rulemaking record taken as a whole, including the Report and comment on the Report received during the 75-day period after the Report is placed on the public record.

Staff recommends that the Commission amend the Mail or Telephone Order Merchandise Rule (the "Rule") as the Commission previously proposed in its Notice of Proposed Rulemaking ("NPRM").[1] That proposal responds to new methods of accessing the Internet and making payments and refunds. Having gathered and analyzed comments based on an Advance Notice of Proposed Rulemaking ("ANPR")[2] and the NPRM, staff now recommends that the Commission amend the Rule to:

- Clarify that it covers all Internet merchandise orders, regardless of the method consumers use to access the Internet;
- Permit refunds and refund notices by any means at least as fast and reliable as first class mail;
- Clarify sellers' refund obligations for orders using payment methods not specifically enumerated in the Rule; and
- Require sellers to process any third party credit card refunds within seven working days of a buyer's right to a refund vesting.

This Report analyzes the rulemaking record to date, describes the proposed amendments, and recommends that the Commission amend the Rule as previously proposed.

[1] Federal Trade Commission: Mail or Telephone Order Merchandise Rule, Notice of Proposed Rulemaking, 76 FR 60765 (Sept. 30, 2011). Comments to the NPRM are available at http://ftc.gov/os/comments/mtoramendments.

[2] Federal Trade Commission: Mail or Telephone Order Merchandise, Request for Public Comments, 72 FR 51728 (Sept. 11, 2007). Comments to the ANPR are available at http://ftc.gov/os/comments/mailortelephoneorder.

## I. Background

The Commission promulgated the Mail Order Merchandise Rule in 1975 to require sellers to ship mail-ordered merchandise on time, or to offer order cancellations and refunds for merchandise not shipped on time.[3] In 1993, the Commission amended the Rule to cover merchandise ordered by telephone (including merchandise ordered through the Internet using telephone Internet access), and renamed it the Mail or Telephone Order Merchandise Rule.[4] In 2007, the Commission initiated a review of the Rule as part of its rule review process.[5] Pursuant to that review, the Commission has solicited public comment through an ANPR and an NPRM.

### A. ANPR

The Commission issued its ANPR on September 11, 2007.[6] The ANPR requested public comment on the costs, benefits, and continuing need for the Rule.[7] After reviewing the comments and previous Rule proceedings, the Commission concluded that benefits of the Rule

[3] Federal Trade Commission: Part 435 – Mail Order Merchandise, Promulgation of Trade Regulation Rule, 40 FR 51582 (Nov. 5, 1975).

[4] Federal Trade Commission: Trade Regulation Rule; Mail or Telephone Order Merchandise, Final Trade Regulation Rule, 58 FR 49096 (Sept. 21, 1993).

[5] Since 1992, the FTC has conducted a regular, systematic review of all its rules and guides on a rotating basis to ensure they are up-to-date, effective, and not overly burdensome.

[6] 72 FR 51728.

[7] 72 FR at 51730.

outweigh its costs. Consequently, on September 30, 2011, the Commission issued a Final Rule with minor technical amendments.[8]

The ANPR also requested public comment on the costs and benefits of amending the Rule to: (1) explicitly cover all Internet merchandise orders, (2) permit refunds and refund notices by any means at least as fast and reliable as first class mail, and (3) refer to payment by means other than the four enumerated means (cash, check, money order, or credit).[9] After reviewing the comments, the Commission concluded that the benefits of the proposed amendments outweigh their costs. Consequently, on September 30, 2011, the Commission issued an NPRM requesting public comment regarding further proposed amendments to the Rule.[10]

**B. NPRM**

The Commission received four comments in response to the ANPR.[11] These comments supported amending the Rule for the reasons set forth in the ANPR. In response, the NPRM proposed four amendments. First, it proposed amending the Rule to clarify that the Rule covers all Internet merchandise orders.[12] In view of the rulemaking record, including all four comments

[8] Federal Trade Commission: Mail or Telephone Order Merchandise Rule, Final Rule Amendments, 76 FR 60715 (Sept. 30, 2011). The amendments alphabetized the Rule's definitions, and placed the definitions before the substantive provisions.

[9] 72 FR at 51730.

[10] 76 FR 60765.

[11] Dearing-ANPR, Direct Marketing Association ("DMA")-ANPR, National Retail Federation ("NRF")-ANPR, Nwokeji-ANPR. Within this Staff Report references to the comments responding to the ANPR are cited as: Name of the commenter-ANPR (*e.g.*, NRF-ANPR); references to the comments responding to the NPRM are cited as: Name of the commenter-NPRM (*e.g.*, Mueller-NPRM). A list of the ANPR and NPRM commenters, any abbreviations used to identify each, and the URL for these comments is attached as Attachment A.

[12] 76 FR at 60767-60768.

that supported clarifying the Rule's coverage, the NPRM proposed amending the Rule's name, coverage section, and the "order sales" definition by inserting the word "Internet" between "mail" and "telephone."

Second, the NPRM proposed amending the Rule to allow sellers the flexibility to use methods other than first class mail to deliver refunds and refund notices.[13] As two comments noted, other delivery methods are now available that are at least as fast and reliable as first class mail.[14]

Third, the NPRM proposed amending the Rule to clarify sellers' obligations for orders using payment methods other than the four specified in the current Rule: cash, check, money order, or credit.[15] The NPRM noted that two comments supported, and no comments opposed, such amendment.[16]

Fourth, the NPRM proposed amending the Rule to require third party credit sale refunds within the same seven-working-day period as it proposed for non-enumerated payment refunds.[17] This proposal addressed NRF's concern that sellers cannot distinguish third party credit card transactions (*e.g.*, Visa or MasterCard transactions) from some others, such as debit card

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[13] 76 FR at 60768.

[14] DMA-ANPR at 3-4, Nwokeji-ANPR at 2.

[15] 76 FR at 60768-60770.

[16] DMA-ANPR at 3, Nwokeji-ANPR at 2.

[17] 76 FR at 60770.

transactions.[18] Consequently, NRF stated, sellers cannot treat these transactions differently, and it therefore recommended that the Rule impose the same requirements on these transactions.

## II. Comments to the NPRM

The Commission received four comments in response to the NPRM. Three supported the proposed amendments.[19] NRF again supported extending the Rule to Internet orders, but did not address the other proposed amendments.[20] Kimberly Clampffer ("Clampffer") and Mary Kate Kott ("Kott") supported the proposed amendments. These comments are discussed in detail below in Sections III and IV.

Matthew Mueller ("Mueller"), by contrast, advocated eliminating the Rule, and did not address any of the proposed amendments. As analyzed in Section III, his comment misstated both the Rule's requirements and the Rule's impact on buyers and sellers.

The Commission announced in the NPRM that it is using expedited rulemaking procedures and that, because written comments should adequately present the views of interested

[18] NRF-ANPR at 4-5. NRF did not indicate, and there is no evidence on the record, that sellers have difficulty distinguishing seller-issued credit cards from other payment cards. Consequently, the NPRM did not propose amending the prompt refund period where the seller is a creditor.

[19] Clampffer-NPRM, Kott-NPRM, NRF-NPRM.

[20] NRF-NPRM at 3. NRF also requested clarification "that the mere fact that a sales associate uses the Internet in a customer's presence does not convert the transaction from a face-to-face transaction, outside the scope of the Rule, to an Internet order sale covered by the Rule." The Commission addressed this issue in footnote 16 of the NPRM. There it stated that the Rule "does not presently cover transactions in which a seller's representative merely receives product or inventory information through a telephone, but the transaction with the buyer is conducted by means of media outside the Rule's scope (*e.g.*, face-to-face transactions)." Footnote 16 further stated that the proposed amendments to the Rule would not cover transactions in which a seller's representative uses the Internet, but where the buyer orders the merchandise by means outside of the Rule's scope. 76 FR at 60767. Staff recommends that the Commission reiterate this guidance in the final Rule notice.

parties, it has not scheduled a public hearing or workshop.[21] The Commission further announced that it would proceed to receive a final recommendation from staff and announce final Commission action unless it received an informal-hearing request.[22] No one made such a request.

## III. Evidence on the Record

To amend a trade regulation rule, such as the MTOR, the Commission must employ the same procedures and apply the same standards of evidence required to promulgate a trade regulation rule.[23] Here, the rulemaking record contains sufficient evidence to support amending the Rule. All but one of the ANPR and NPRM comments supported amending the Rule, and none of these comments opposed any of the proposed amendments. These included comments from two industry groups representing millions of sellers.[24] Each directly addressed the potential effects, including benefits and costs, of the ANPR proposal. Additionally, public information about changing technologies, consumer complaints, and law enforcement actions supports amending the Rule as proposed.[25]

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[21] 76 FR at 60766

[22] *Id*.

[23] 15 U.S.C. 57a(d)(2)(B) states in relevant part "[a] substantive amendment to, or repeal of, a rule promulgated under [15 U.S.C. 57a(a)(1)(B)] shall be prescribed, and subject to judicial review, in the same manner as a rule prescribed under such subsection."

[24] *See* DMA-ANPR, NRF-ANPR, and NRF-NPRM. DMA is a global trade organization representing business and nonprofit organizations engaged in direct marketing, including more than 3,600 companies in the U.S. and abroad, and more than 200 nonprofit organizations. DMA-ANPR at 1. NRF states that it is "the world's largest retail trade association" and represents retailers operating more than 3.6 million U.S. establishments. NRF-NPRM at 1.

[25] 76 FR at 60767-60768.

Mueller submitted the only comment that opposed the Rule. This comment did not address any of the proposed amendments. Rather, he argued that the Rule favors the interests of buyers over sellers by allegedly requiring sellers to incur expenses to assure timely "deliveries" while preventing sellers from charging buyers the costs associated with these timely deliveries. He further argued that sellers are unable to pass these costs on to buyers, and that buyers would be unwilling to pay them if sellers could charge them.[26]

Mueller's comment contained several errors. The Rule sets shipment requirements, but does not set delivery requirements. Furthermore, nothing in the Rule prevents buyers and sellers from contracting for shipment periods or prices. The Rule operates only when sellers fail to ship within the time they state, or, if no time is stated, within 30 days of receipt of an order. If a seller wishes to ship later, it may contract to do so, and adjust its pricing accordingly. Mueller's comment does not provide any evidence that the Rule forces sellers to incur uncompensated costs, or that the Commission should reverse its previous finding that the Rule's benefits outweigh its costs.[27]

[26] Mueller-NPRM at 2-3.

[27] *See* 76 FR 60715.

## IV. The Purposes and Descriptions of the Proposed Amendments

### A. Clarify the Rule's Coverage

#### 1. Background

When the Commission amended the Rule in 1993 to cover Internet merchandise orders made through telephone Internet access, it intended to cover all Internet ordering.[28] However, there are now alternatives to dial-up telephone Internet access, such as cable and wireless Internet access.[29] Therefore, the ANPR requested comment on the costs or benefits of amending the Rule to explicitly cover all computer and Internet orders.[30]

This proposal garnered wide support. All the responsive comments supported amending the Rule to explicitly cover merchandise ordered via the Internet regardless of the access method.[31] DMA commented that its own guidelines treat all Internet orders uniformly, and its members follow those guidelines.[32] NRF concurred in this position.[33] Paul Dearing commented that a merchant could not "reasonably argue that an order placed over a wireless network was somehow exempt from the requirements of the Rule."[34] Furthermore, the NPRM noted that publicly available data confirms consumers have largely switched from dial-up to

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[28] 72 FR at 51729.

[29] *Id*.

[30] *Id*. at 51730.

[31] 76 FR at 60767.

[32] DMA-ANPR at 3.

[33] NRF-ANPR at 3. *But see* n. 20, *supra*.

[34] Dearing-ANPR at 2.

broadband Internet access.[35] It further noted that consumer complaints indicated that Internet buyers suffer from unfair or deceptive acts regardless of means of Internet access, and enforcement actions indicated that some Internet sellers fail to ship merchandise orders on time or at all.[36]

Explicitly covering all Internet order sales regardless of means of access would meet buyers' expectations that their legal protections are independent of their means of Internet access.[37] It also would be consistent with the Commission's longstanding intent that the Rule address all Internet merchandise orders.[38] Furthermore, the proposal would not impose new costs on sellers, who cannot distinguish between Internet access methods in fulfilling customer orders.[39]

**2. The record and staff recommendation**

NRF continued to support amending the Rule to clearly apply to "sales where a buyer has responded to a solicitation to order merchandise by mail, telephone or using the publicly available worldwide web."[40] Clampffer stated that "[a]s the retail sites expand on the [I]nternet, this rule will help provide guidance to retailers to provide the best customer service to potential buyers and

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[35] 76 FR at 60767-60768. *See* Broadband and Dial-up Adoption, 2000-2011, *http://pewinternet.org/Trend-Data/Home-Broadband-Adoption.aspx*.

[36] *See 2009 Internet Crime Report*, Internet Crime Complaint Center, *http://www.ic3.gov/media/annualreport/2009_IC3Report.pdf* (2010).

[37] 76 FR at 60767-60768.

[38] *Id.*

[39] *Id.* at 60768.

[40] NRF-NPRM at 3. *See* NRF-ANPR at 2-3.

will help to eliminate fraud with sellers who are not providing goods or refunds to buyers."[41] Kott stated that "[f]or those who purchase merchandise via mail, telephone, or [I]nternet, the proposed changes will help to structure the seller's guidelines. . . ."[42] No other NPRM comment addressed this proposed amendment.

Commenters supported amending the Rule to clarify that it covers all Internet order merchandise sales.[43] The comments noted that this amendment would not add costs to sellers.[44] Based on this record and the Commission's previous analysis, staff recommends amending the Rule as proposed by inserting the word "Internet" between "mail" and "telephone" in the Rule's name, coverage section, and "order sales" definition.[45]

[41] Clampffer-NPRM at 2.

[42] Kott-NPRM at 1.

[43] *See* Dearing-ANPR at 3, DMA-ANPR at 3, NRF-ANPR at 2, Nwokeji-ANPR, Clampffer-NPRM, Kott-NPRM, NRF-NPRM at 3.

[44] *See* Dearing-ANPR at 3, DMA-ANPR at 3, NRF-ANPR at 3, Nwokeji-ANPR, 76 FR at 60768.

[45] Staff recommends that the final Rule notice state that the term "Internet" is not limited to the World Wide Web, and includes, for example, shopping applications ("apps") that use the Internet but are not web-based.

### B. Flexibility for Prompt Refund Means

#### 1. Background

Sections 435.1(b)(1) and (2) of the Rule require sellers to send prompt refunds by first class mail. The ANPR noted that industry may have developed other means of sending refunds that are as fast and reliable as first class mail, and it requested comment on the costs and benefits of amending the rule to permit refunds by alternative means.[46]

Two comments supported providing sellers with more flexibility when delivering refunds. DMA suggested that amending the Rule to permit new means of sending refunds would advance the Rule's original intent of ensuring buyers receive refunds quickly without unduly burdening sellers.[47] Oriyomi Nwokeji commented that legal requirements should recognize technological changes.[48]

The NPRM described these supportive comments, and also noted that such an amendment would harmonize the Rule with Regulation Z, 12 CFR Part 1026.[49] Regulation Z requires that third party credit card refunds occur through "the card issuer's normal channels for credit

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[46] 72 FR at 51729-51730.

[47] DMA-ANPR at 3-4.

[48] Nwokeji-ANPR at 2.

[49] 76 FR at 60770. The NPRM cited Regulation Z at 12 CFR Part 226. After the Commission issued the NPRM, the Bureau of Consumer Financial Protection republished Regulation Z at 12 CFR Part 1026. Bureau of Consumer Financial Protection: Truth in Lending (Regulation Z), Interim Final Rule with Request for Public Comment, 76 FR 79768 (Dec. 22, 2011).

statements."[50] Consequently, the NPRM proposed amending the definition of "Prompt refund" to permit prompt refunds by any means at least as fast and reliable as first class mail.[51]

### 2. The record and staff recommendation

In her NPRM comment, Clampffer noted that "[i]n this day and age and with technology continuing to grow, there are many different ways for a seller to supply a refund that [are] as fast if not faster than first class mail," and supported the proposed amendment.[52] No other NPRM comment addressed this proposal.

Based on this record and the Commission's previous analysis, staff recommends amending the definition of "Prompt refund" in the Rule, 16 CFR 435.1(b)(1) and (2), to permit refunds to be made "by any means at least as fast and reliable as first class mail," as proposed in the NPRM.

## C. Clarify Seller's Refund Obligations for Non-Enumerated Payments

### 1. Background

The Rule covers mail or telephone orders "regardless of the method of payment." However, it sets specific sellers' shipment, notification, and refund obligations only when buyers pay by cash, check, money order, or credit. The ANPR noted that other payment methods have been developed, such as debit cards, and that the Rule does not delineate sellers' obligations when buyers use these payment methods.[53] The ANPR requested comment on the costs and benefits of amending the Rule to refer to payment by means other than cash, check, money order, or

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[50] 12 CFR 1026.12(e)(1)

[51] 76 FR at 60773-60774.

[52] Clampffer-NPRM at 2.

[53] 72 FR at 51729.

credit.[54] It also requested comment on what shipment, notification, and refund obligations the Commission should propose when buyers pay with other methods.[55]

Two comments to the ANPR supported, and none opposed, amending the Rule to delineate sellers' obligations for orders using non-enumerated payment methods.[56] NRF, however, stated that sellers often cannot readily distinguish between debit and credit card transactions, and that placing different requirements on these transactions would be "unnecessarily cumbersome."[57] NRF therefore recommended that both credit and debit card transactions be subject to the same one billing cycle refund requirement.[58]

Based on these comments, the NPRM proposed amending the Rule to create explicit requirements for sellers when buyers use non-enumerated methods.[59] The proposed amendments would revise the definitions for "Receipt of a properly completed order," "Refund," and "Prompt refund" to set shipment and notification requirements for non-enumerated payments, and to require sellers to make prompt refunds for non-enumerated payments by either reversing the payments or sending cash, checks, or money orders within seven working days.[60] The proposed amendments would permit sellers to use the same payment method as the buyer to refund such payments when that is the simplest or cheapest means available. This would allow sellers to

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[54] *Id*. at 51730.

[55] *Id.*

[56] 76 FR at 60768.

[57] NRF-ANPR at 4-5.

[58] *Id*.

[59] 76 FR at 60769.

refund card payments without inquiring whether the buyer used a credit card or debit card.[61] Alternatively, sellers could make refunds by cash, check, or money order.[62] These amendments would permit flexibility where refunding by: (1) the original payment method is not possible, such as where value cannot be returned to the buyer's prepaid gift card, or (2) cash, check, or money order is cheaper or easier than refunding by the original method.

**2. The record and staff recommendation**

In its NPRM comment, NRF did not specifically discuss this amendment. Staff interprets this lack of comment as indicating that the proposed amendment addresses the concerns NRF expressed in its ANPR comment. Clampffer's comment noted that "[b]uyers' experiences with refunds will differ depending on the payment that is used to purchase the goods from the seller," and generally agreed with all of the proposed amendments.[63] Kott stated that the proposed amendment embraces "gift cards and debit cards, which are so commonly used in this day and age," and would set "specific guidelines for sellers, which in turn makes online purchases more convenient for buyers."[64] No other comment addressed this proposed amendment.

These comments support the NPRM's analysis that the proposed amendments would clarify the Rule's requirements while imposing little burden on, and increasing flexibility for, sellers. Based on this record, staff recommends amending the Rule's definition of "Receipt of a

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60 *Id.*

61 *Id.* at n. 29.

62 *Id.* at 60769.

63 Clampffer-NPRM at 1.

64 Kott-NPRM at 1.

properly completed order," 16 CFR 435.1(c) and (c)(1), to refer to "other payment methods" and to "payment by means other than cash or credit." Staff further recommends amending the Rule's definition of "Refund," 16 CFR 435.1(d), to add a paragraph, 16 CFR 435.1(d)(3), that specifies refund requirements where the buyer tendered payment for the unshipped merchandise by any means other than those enumerated in 16 CFR 435.1(d)(1) (*i.e.*, by cash, check, or money order) or 16 CFR 435.1(d)(2) (*i.e.*, by credit). Additionally, staff recommends amending the Rule's definition of "Prompt refund," 16 CFR 435.1(b)(1), to add a reference to 16 CFR 435.1(d)(3). Finally, staff recommends amending the Rule's definition of "Prompt refund," 16 CFR 435.1(b)(1), to specify the requirements for a seller that cannot provide a refund by the same payment method used by the buyer, such as a non-refundable gift card.[65]

### D. Alter the Third Party Credit Prompt Refund Period

#### 1. Background

In its ANPR comment, NRF stated that sellers cannot distinguish third party credit card payments from some non-enumerated payments, such as debit card, payroll card, or third party gift card payments. Therefore, different prompt refund Rule requirements for these different types of payments would unnecessarily burden sellers.[66] To address this issue, the NPRM proposed amending the Rule to require prompt refunds for third party credit card payments within the same seven-working-day period as for non-enumerated payments.[67]

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[65] The recommended amendment would require the prompt refund be made by cash, check, or money order within seven working days of the date on which the seller discovers it cannot provide a refund by the same method as payment was tendered.

[66] NRF-ANPR at 5.

[67] 76 FR at 60769-60770. As described above, the third proposed amendment will set the prompt refund period for non-enumerated payments at seven working days. The third and

### 2. The record and staff recommendation

NRF's comment to the NPRM did not discuss this proposed amendment; again staff interprets this silence as indicating that the proposed amendment addresses the concerns NRF expressed in its ANPR comment. Kott stated that the proposed amendment would "help to clarify the seller's obligation with processing any third party credit card refunds."[68] No other comment addressed this proposed amendment.

Based on this record and the Commission's previous analysis that the proposed amendment would benefit consumers, avoid burdens to sellers,[69] and harmonize the Rule with Regulation Z, staff recommends amending the Rule's definition of "Prompt refund," 16 CFR 435.1(b), by moving the reference to 16 CFR 435.1(d)(2)(ii) from 16 CFR 435.1(b)(2) to 16 CFR 435.1(b)(1).

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fourth proposed amendments would set the prompt refund period to seven working days for all payments except payments where the seller is a creditor.

[68] Kott-NPRM at 1.

[69] The NPRM noted that sellers have economic incentives to make credit card refunds promptly to avoid chargeback fees. 76 FR at 60770. It also noted that Regulation Z, 12 CFR 226.12(e)(1) [subsequently republished at 12 CFR 1026.12(e)(1); *see* n. 49], already requires sellers to make credit card refunds within seven business days. Therefore, the amendment would not impose new burdens on sellers. 76 FR at 60770.

## V. Comments

Staff welcomes comment on this Report and the proposed Final Rule during the next 75 days, as provided by the Commission's Rules of Practice, 16 CFR 1.13(h). Interested parties should file comments in accordance with the following instructions.

### A. Request for Comment

You can file a comment online or on paper. For the Commission to consider your comment, we must receive it on or before July 15, 2013. Write "16 CFR Part 435 - Mail or Telephone Order Merchandise" on your comment. Your comment – including your name and your state – will be placed on the public record of this proceeding, including, to the extent practicable, on the public Commission Website, at http://www.ftc.gov/os/publiccomments.shtm. As a matter of discretion, the Commission tries to remove individuals' home contact information from comments before placing them on the Commission Website.

Because your comment will be made public, you are solely responsible for making sure that your comment doesn't include any sensitive personal information, such as anyone's Social Security number, date of birth, driver's license number or other state identification number or foreign country equivalent, passport number, financial account number, or credit or debit card number. You are also solely responsible for making sure that your comment doesn't include any sensitive health information, such as medical records or other individually identifiable health information. In addition, don't include any '[t]rade secret or any commercial or financial information which is obtained from any person and which is privileged or confidential," as provided in Section 6(f) of the FTC Act, 15 U.S.C. 46(f), and FTC Rule 4.10(a)(2), 16 CFR

4.10(a)(2). In particular, don't include competitively sensitive information such as costs, sales statistics, inventories, formulas, patterns, devices, manufacturing processes, or customer names.

If you want the Commission to give your comment confidential treatment, you must file it in paper form, with a request for confidential treatment, and you have to follow the procedure explained in FTC Rule 4.9(c), 16 CFR 4.9(c).[70] Your comment will be kept confidential only if the FTC General Counsel, in his or her sole discretion, grants your request in accordance with the law and the public interest.

Postal mail addressed to the Commission is subject to delay due to heightened security screening. As a result, we encourage you to submit your comments online. To make sure that the Commission considers your online comment, you must file it at https://ftcpublic.commentworks.com/ftc/mtorstaffreport,by following the instruction on the web-based form. If this Notice appears at http://www.regulations.gov/#!home, you also may file a comment through that website.

If you file your comment on paper, write "16 CFR Part 435 - Mail or Telephone Order Merchandise" on your comment and on the envelope, and mail or deliver it to the following address: Federal Trade Commission, Office of the Secretary, Room H-113 (Annex N), 600 Pennsylvania Avenue, NW, Washington, DC 20580. If possible, submit your paper comment to the Commission by courier or overnight service.

Visit the Commission Website at http://www.ftc.gov to read this Notice and the news release describing it. The FTC Act and other laws that the Commission administers permit the

[70] In particular, the written request for confidential treatment that accompanies the comment must include the factual and legal basis for the request, and must identify the specific portions of the comment to be withheld from the public record. *See* FTC Rule 4.9(c), 16 CFR 4.9(c).

collection of public comments to consider and use in this proceeding as appropriate. The Commission will consider all timely and responsive public comments that it receives on or before July 15, 2013. You can find more information, including routine uses permitted by the Privacy Act, in the Commission's privacy policy, at http://www.ftc.gov/ftc/privacy.htm.

Upon completion of the comment period, the staff will make final recommendations to the Commission about the Rule. If the Commission adopts the proposed revised Rule as recommended by the staff, or alternatively, determines to make changes to the proposed revised Rule, it will publish in a future Federal Register notice the final text of the Rule, statement of Basis and Purpose on the Rule, and an announcement of when the revised Rule will become effective.

### B. Communications to Commissioners and Commissioner Advisors by Outside Parties

Pursuant to Commission Rule 1.18(c)(1), the Commission has determined that communications with respect to the merits of this proceeding from any outside party to any Commissioner or Commissioner advisor shall be subject to the following treatment. Written communications and summaries or transcripts of oral communications shall be placed on the rulemaking record if the communication is received before the end of the comment period on the Staff Report. They shall be placed on the public record if the communication is received later. Unless the outside party making an oral communication is a member of Congress, such communications are permitted only if advance notice is published in the Weekly Calendar and Notice of "Sunshine" Meetings.[71]

[71] *See* 15 U.S.C. 57a(i)(2)(A), 45 FR 50814 (1980), 45 FR 78626 (1980).

## VI. Conclusion

Staff has analyzed the rulemaking record and finds that the comments provide evidence supporting the proposed amendments. Consequently, staff recommends that the Commission amend the Rule in the manner that the Commission proposed in the NPRM.

ATTACHMENT A

**Cited ANPR and NPRM Commenters**

| **ANPR Comments** | |
|---|---|
| **Name** | **Comment Available at:** |
| Dearing, Paul | http://ftc.gov/os/comments/mailortelephoneorder/532289-00002.pdf |
| Direct Marketing Association, Inc. ("DMA") | http://ftc.gov/os/comments/mailortelephoneorder/532289-00004.pdf |
| National Retail Federation ("NRF") | http://ftc.gov/os/comments/mailortelephoneorder/532289-00003.pdf |
| Nwokeji, Oriyomi | http://ftc.gov/os/comments/mailortelephoneorder/532289-00001.htm |

| **NPRM Comments** | |
|---|---|
| **Name** | **Comment Available at:** |
| Clampffer, Kimberly | http://ftc.gov/os/comments/mtoramendments/00004-81877.pdf |
| Kott, Mary Kate | http://ftc.gov/os/comments/mtoramendments/00003-81869.pdf |
| Mueller, Matthew | http://ftc.gov/os/comments/mtoramendments/00002-80745.pdf |
| National Retail Federation ("NRF") | http://ftc.gov/os/comments/mtoramendments/00005-82098.pdf |

ATTACHMENT B

**Rule Amended as Proposed**

**PART 435 -- MAIL, INTERNET, OR TELEPHONE ORDER MERCHANDISE**

Sec.

435.1 Definitions.

435.2 The rule.

435.3 Limited applicability.

**Sec. 435.1 Definitions.**

For purposes of this part:

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

(b) *Prompt refund* shall mean:

(1) Where a refund is made pursuant to paragraph (d)(1), (d)(2)(ii), (d)(2)(iii), or (d)(3) of this section, a refund sent to the buyer by any means at least as fast and reliable as 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. Provided, however, that where the seller cannot provide a refund by the same method payment was tendered, *prompt refund* shall mean a refund sent in the form of cash, check, or money order, by any means at least as fast and reliable as first class mail, within seven (7) working days of the date on which the seller discovers it cannot provide a refund by the same method as payment was tendered;

(2) Where a refund is made pursuant to paragraph (d)(2)(i) of this section, a refund sent to the buyer by any means at least as fast and reliable as 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.

(c) *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, authorization from the buyer to charge an existing charge account, or other payment methods, 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 a payment by means other than cash or credit as 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:

(1) The seller receives notice that a payment by means other than cash or credit in the proper amount tendered by the buyer has been honored;

(2) The buyer tenders cash in the proper amount; or

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

(d) *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 sent to the buyer 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, an appropriate credit memorandum or the like to the third party creditor which will remove the charge from the buyer's account and a copy of the credit memorandum or the like sent to the buyer that includes the date that the seller sent the credit memorandum or the like to the third party creditor and the amount of the charge to be removed, 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 sent to the buyer.

(3) Where the buyer tendered payment for the unshipped merchandise by any means other than those enumerated in paragraph (d)(1) or (2) of this section:

(i) Instructions sent to the entity that transferred payment to the seller instructing that entity to return to the buyer the amount tendered in the form tendered and a statement sent to the buyer setting forth the instructions sent to the entity, including the date of the instructions and the amount to be returned to the buyer; or

(ii) A return of the amount tendered in the form of cash, check, or money order sent to the buyer; or

(iii) A statement from the seller sent to the buyer acknowledging the cancellation of the order and representing that the seller has not taken any action regarding the order which will access any of the buyer's funds.

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

(f) *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.

(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.

**Sec. 435.2 The Rule.**

In connection with mail, Internet, 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:

ATTACHMENT B

(a)(1) To solicit any order for the sale of merchandise to be ordered by the buyer through the mail, via the Internet, 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 fifty (50) days, rather than thirty (30) days, to perform the actions required in this paragraph (a)(1)(ii).

(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 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.

(4) 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 any 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 paragraph (b) or (c) of this section will create a rebuttable presumption that the seller failed to comply with said requirement.

ATTACHMENT B

**Sec. 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 Prenotification Negative Option Plans," 16 CFR 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.

ATTACHMENT C

**Redline of Proposed Amendments**

**PART 435 -- MAIL, INTERNET, OR TELEPHONE ORDER MERCHANDISE**

Sec.

435.1 Definitions.

435.2 The rule.

435.3 Limited applicability.

**Sec. 435.1 Definitions.**

For purposes of this part:

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

(b) *Prompt refund* shall mean:

(1) Where a refund is made pursuant to paragraph (d)(1), (d)(2)(ii), ~~or~~ (d)(2)(iii), or (d)(3) of this section, a refund sent to the buyer by any means at least as fast and reliable as 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. Provided, however, that where the seller cannot provide a refund by the same method payment was tendered, *prompt refund* shall mean a refund sent in the form of cash, check, or money order, by any means at least as fast and reliable as first class mail, within seven (7) working days of the date on which the seller discovers it cannot provide a refund by the same method as payment was tendered;

(2) Where a refund is made pursuant to paragraph (d)(2)(i) ~~or (ii)~~ of this section, a refund sent to the buyer by any means at least as fast and reliable as 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.

(c) *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, or other payment methods, 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 a payment by means other than cash or credit as ~~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:

(1) The seller receives notice that a payment by means other than cash or credit in ~~check or money order for~~ the proper amount tendered by the buyer has been honored;

(2) The buyer tenders cash in the proper amount; or

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

(d) *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 sent to the buyer 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 and a copy of the credit memorandum or the like sent to the buyer that includes the date that the seller sent the credit memorandum or the like to the third party creditor and the amount of the charge to be removed, 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 sent to the buyer.

(3) Where the buyer tendered payment for the unshipped merchandise by any means other than those enumerated in paragraph (d)(1) or (2) of this section:

(i) Instructions sent to the entity that transferred payment to the seller instructing that entity to return to the buyer the amount tendered in the form tendered and a statement sent to the buyer setting forth the instructions sent to the entity, including the date of the instructions and the amount to be returned to the buyer; or

(ii) A return of the amount tendered in the form of cash, check, or money order sent to the buyer; or

(iii) A statement from the seller sent to the buyer acknowledging the cancellation of the order and representing that the seller has not taken any action regarding the order which will access any of the buyer's funds.

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**Sec. 435.2 The Rule.**

In connection with mail, Internet, 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 mail, via the Internet, 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 fifty (50) days, rather than thirty (30) days, to perform the actions required in this paragraph (a)(1)(ii).

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