



UNITED STATES OF AMERICA
FEDERAL TRADE COMMISSION
WASHINGTON, D.C. 20580

THE CHAIRMAN

August 9, 2012

The Honorable Sam Graves
Chairman
Committee on Small Business
U.S. House of Representatives
2361 Rayburn House Office Building
Washington, D.C. 20515

Dear Chairman Graves:

This fifth annual report is made in accordance with Section 212(a)(6) of the amended Small Business Regulatory Enforcement Fairness Act ("SBREFA"). SBREFA requires agencies to publish guides to assist small entities in complying with rules that significantly affect them. The Federal Trade Commission ("Commission" or "FTC") has a longstanding and effective business education program,¹ and only a small fraction of our business compliance library is discussed in this report.

Since we submitted our fourth annual SBREFA report (which covered the time period from July 1, 2010, to July 1, 2011), the FTC has not issued any rule subject to Section 212 of SBREFA.²

Although there were no agency-issued rules subject to Section 212 during the reporting time period, the Commission did prepare business compliance materials relating to rules issued by the Federal Reserve Board (or the Board of Governors of the Federal Reserve System) as required by the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 ("the Dodd-Frank

¹ From FY2002 - FY2010, the FTC's "Compliance Assistance" under SBREFA was rated an "A" by the Small Business Administration's National Ombudsman. We anticipate the same grade when the National Ombudsman submits their FY2011 SBREFA Report for all agencies.

² Section 212 requires agencies to publish a "small entity compliance guide" for any new rule for which an agency is required to prepare a final regulatory flexibility analysis under section 3(a) of the Regulatory Flexibility Act, which is codified at 5 U.S.C. § 604.

³ See Debit Card Interchange Fees and Routing, Final Rule, 76 Fed. Reg. 43394 (July 20, 2011), and Interim Final Rule, 76 Fed. Reg. 43478 (July 20, 2011), available at <http://www.federalreserve.gov/newsevents/press/bcreg/20110629a.html>.

Act").³ Specifically, the Federal Reserve Board issued new regulations implementing the debit card interchange fee and routing provisions of the Dodd-Frank Act. The Federal Reserve Board published a Final Regulatory Flexibility Act Analysis along with these final regulations. The FTC has responsibility for enforcing these new requirements and regulations for payment card networks and certain other non-bank entities, such as non-federally chartered credit unions. These new rules took effect on October 1, 2011. The Commission released a Business Center publication, in both English and Spanish, on September 30, 2011, announcing these new rules on electronic payments.⁴ The FTC's "Business Center Blog" also posted a notice about the new rules. See "Businesses: New Rules for Electronic Payments Take Effect October 1st," FTC Bureau of Consumer Protection Business Center Blog.

Over the past year, the Commission also certified to the Small Business Administration that certain other final regulations issued will not have a significant economic impact on a substantial number of small business entities. Nonetheless, the Commission published a Final Regulatory Flexibility Act Analysis ("FRFA") along with these final regulations. We have either made available or are preparing updated compliance materials for each of these rulemakings although not required to do so by SBREFA. A few examples include –

- *Disclosure Requirements and Prohibitions Concerning Business Opportunities (Business Opportunity Rule)*, 16 C.F.R. 437: The Commission published a Final Rule amending the Business Opportunity Rule on December 8, 2011. 76 Fed. Reg. 76,816. The Rule was amended to broaden its scope to cover business opportunity sellers not covered by the interim Business Opportunity Rule, such as sellers of work-at-home opportunities, and to streamline and simplify the disclosures that sellers must provide to prospective purchasers. The Final Rule became effective on March 1, 2012. The Commission released an accompanying Business Center publication during November 2011.⁵

³ See Debit Card Interchange Fees and Routing, Final Rule, 76 Fed. Reg. 43394 (July 20, 2011), and Interim Final Rule, 76 Fed. Reg. 43478 (July 20, 2011), available at <http://www.federalreserve.gov/newsevents/press/bcreg/20110629a.html>.

⁴ See FTC, "New Rules On Electronic Payments Lower Costs For Retailers," which is available at the agency website (a copy is enclosed); see also FTC, "Nuevas Reglas Aplicables A Los Pagos Electronicos Bajan Los Costo De Los Comerciantes Minoristas," which is also available at the agency website (a copy is enclosed). This publication has also been made available in Chinese, Korean and Vietnamese. The publication informs businesses that accept credit or debit card payment about the requirements in the new rules on interchange fees for debit card transactions, minimum dollar amounts for credit card purchases, and the networks available on a debit card for routing transactions.

⁵ See "Selling a Work-at-Home or Other Business Opportunity? Revised Rule May Apply to You," which is available at the agency website (a copy is enclosed) along with a video, "The Business Opportunity Rule."

- *Risk Based Pricing Rule*: Following a public comment period, the Federal Trade Commission and the Federal Reserve Board published final changes to the Risk-Based Pricing Rule⁶ to require creditors to disclose credit score information to consumers when a credit score is used in setting or adjusting credit terms, effective August 15, 2011. 76 Fed. Reg. 41,602 (July 15, 2011). The Commission published guidance at the Business Center blog.⁷
- *Mortgage Acts and Practices-Advertising, 16 C.F.R. 321 (now at 12 C.F.R. 1014)*: The Commission published a final rule for MAP-Advertising on July 22, 2011, prohibiting misrepresentation in commercial communications regarding any term of a mortgage credit product and imposes certain recordkeeping requirements. 76 Fed. Reg. 43,826. The rule became effective on August 19, 2011.⁸ After careful consultation with the CFPB,⁹ the Commission published guidance at the Business Center blog.¹⁰

There have also been final rule actions where the Commission updated business compliance materials even where an FRFA was not prepared. One example is --

- *Mail or Telephone Order Merchandise Rule (Mail Order Rule), 16 C.F.R. 435*: The FTC retained the Mail or Telephone Order Merchandise Rule ("MTOR"). Based on previous MOTR proceedings and after reviewing public comments received regarding MTOR's overall costs, benefits, and regulatory and economic impact, the Commission concluded that the MTOR continues to benefit consumers and the MTOR's benefits outweigh its costs.¹¹ For clarity, the Commission reorganized the MTOR by alphabetizing the definitions at the beginning of the rule. The Commission also released an updated Business Guide to MOTR.¹²

⁶ These final rules reflect the new requirements in section 615(h) of the Fair Credit Reporting Act that were added by section 1100F of the Dodd-Frank Act.

⁷ See "Demystifying the art of the deal" (July 26, 2011) at the agency website. A copy is enclosed.

⁸ Pursuant to the Dodd-Frank Act of 2010, the rules formerly at 16 CFR part 321 were rescinded on April 13, 2012 (77 Fed. Reg. 2,203), and have been republished by the Consumer Financial Protection Bureau ("CFPB") at 12 CFR part 1014, "Mortgage Acts and Practices Advertising" (Regulation N).

⁹ On July 21, 2011, the "designated transfer date" set by the Department of Treasury, the Commission's authority to "issue guidelines" under the Omnibus Appropriations Act of 2009 transferred to the CFPB. Both the Commission and the CFPB have authority to bring law enforcement actions and seek civil penalties against specific categories of "nondepository covered persons" to enforce the rules promulgated under the Omnibus Appropriations Act, including this Final Rule. See Dodd-Frank Act §§ 1024, 1061, 1097. This includes mortgage lenders, brokers, and servicers, real estate agents and brokers, advertising agencies, home builders.

¹⁰ See "MAP-ing out new mortgage protections" at the FTC's website. A copy is enclosed.

¹¹ See 76 Fed. Reg. 60715 (September 30, 2011).

¹² See "A Business Guide to the FTC's Mail or Telephone Order Merchandise Rule" (September

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For many years, the FTC has had a highly effective program providing compliance assistance to small businesses.¹³ We plan to continue to refine and improve these efforts. If you have any questions, please contact Christian S. White, the Deputy General Counsel for Legal Counsel and Small Business Coordinator at the Commission, at (202) 326-2476.

Respectfully,

/signed/

Jon Leibowitz
Chairman

Enclosures

cc: The Honorable Mary L. Landrieu
Chairwoman
Committee on Small Business & Entrepreneurship
United States Senate
428A Russell Senate Office Building

2011) at the agency website. A copy is enclosed.

¹³ The Commission also considers the specific and unique circumstances of a case when enforcing business obligations. Section 223 of SBREFA (1996) required that agencies establish policies to reduce or waive penalties for small entities in appropriate circumstances. In 1997, the Commission issued a small business leniency policy statement that describes factors that may result in reduction or waiver of penalties. *See* 62 Fed. Reg. 16,809 (Apr. 8, 1997) (issuing policy); 62 Fed. Reg. 46,363 (Sept. 2, 1997) (responding to comment received). As such cases arise, the Commission considers these leniency factors whenever a civil penalty may be assessed against a small business.

In addition, and beyond SBREFA requirements, the Commission established corporate leniency policies for violations of the Textile and Wool Rules, 67 Fed. Reg. 71,566 (Dec. 2, 2002), the Funeral Rule (through the Funeral Rule Offender Program), and the Franchise Rule (through the Franchise Rule Alternative Law Enforcement Program) that have helped in fostering a more cooperative, less threatening regulatory environment for small entities. These policies have helped increase overall compliance with the rules while minimizing the burden on business of correcting certain minor or inadvertent errors that are not likely to injure consumers.

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FOR THE CONSUMER

FEDERAL TRADE COMMISSION

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New Rules on Electronic Payments Lower Costs for Retailers

If your business accepts payment by credit or debit card, some new rules of the road may help you lower your costs. The rules, part of the Dodd-Frank Wall Street Reform and Consumer Protection Act, deal with interchange fees for debit card transactions, the discounts on the purchase price you may offer your customers when they pay in certain ways, minimum dollar amounts for credit card purchases, and the networks available on a debit card for routing transactions.

The New Rules

- **Interchange Fees for Debit Cards.** Beginning October 1, 2011, interchange fees for certain debit cards are capped at 21 cents plus 0.05% of the transaction value. If the issuer meets specific fraud prevention standards, the fee may go up a penny. The cap applies only to large issuers — banks and other card issuers with \$10 billion or more in assets (including assets of affiliates). The Federal Reserve Board keeps a list of institutions exempt from the cap, available at www.federalreserve.gov/paymentsystems/debitfees.htm.

Which fees aren't subject to the cap?

- Credit card fees.
- Fees for debit cards issued by smaller issuers.
- Fees associated with government benefit cards; with certain reloadable, general-use prepaid cards; with prepaid store cards; and with transactions at automated teller machines (ATMs).
- Other fees charged to the merchant by the acquirer that may be included in the merchant discount.

The Players and The Process

Every payment card transaction involves:

- the **cardholder**, who uses a debit or credit card to pay for a product or service.
- the **issuer**, which provides a payment card to a cardholder and usually maintains the cardholder's account.
- the **merchant**, which provides the product or service for a price.
- the **acquirer**, which provides payment card services to the merchant and maintains the merchant's account. Sometimes, the merchant or the acquirer may use a third-party processor for certain processing services.
- the **payment card network (PCN)**, which coordinates the information routing and money transfer between issuers and acquirers. PCNs may be debit card networks, credit card networks, or both.
- **interchange transaction fees**, which include fees established, charged, or received by a payment card network and paid by a merchant or an acquirer to compensate an issuer for its involvement in an electronic debit transaction.

Here's how the players interact:

A customer who wants to buy something presents his card to a merchant. The merchant generates an authorization request with a dollar amount and information from the customer's card. The request is routed electronically along a path like this:

Merchant → Acquirer (or Processor) → PCN → Issuer

The issuer gets the request, checks its file of active card accounts, and sends an electronic message authorizing or declining the transaction:

Issuer → PCN → Acquirer (or Processor) → Merchant

The authorization process usually takes seconds to complete. Then, the issuer posts a charge for the transaction to the customer's account, and the acquirer posts a credit for the transaction, minus fees, to the merchant's account. The amount deducted from the transaction value is known as the "merchant discount" and includes the interchange fee and other fees for processing the transaction.

- **Discounts to Customers.** A PCN cannot stop you from offering your customers a discount or another incentive for using a certain method of payment, as long as you offer it to all your customers and disclose the offer clearly and conspicuously. For example, you can offer your customers a discount or a coupon if they pay with cash or a debit card rather than a credit card. But the new rules do not address other PCN restrictions that may prevent you from offering discounts or similar incentives that vary based on the use of a card from a particular issuer or a particular PCN.

What's new about that? In the past, PCNs may have prohibited you from offering a discount to a customer who used one kind of payment — say, a debit card — rather than another, like a credit card.

A recent Department of Justice settlement also changed Visa and MasterCard rules that prevented merchants from offering consumers certain discounts, rewards, and information about card costs. For more information, read the DOJ news release at www.justice.gov/atr/public/press_releases/2010/262867.htm.

- **Minimum Dollar Amount for Credit Card Purchases.** A PCN cannot stop you from setting a minimum dollar amount for accepting credit cards for payment as long as the minimum is the same for all credit card issuers and PCNs, and isn't more than \$10.

What's new about that? PCNs sometimes prohibited merchants from refusing to accept a

credit card as payment if the customer's purchase didn't exceed a certain amount. For example, if you accepted credit cards at all, the PCNs or banks might have said you had to accept a credit card for even the most minimal purchases.

- **Network Availability and Routing for Debit Card Transactions.** Beginning October 1, 2011, PCNs and issuers can no longer dictate the network you use for processing debit card transactions among the networks available on a debit card. You (or your acquirer) may choose to route debit card payments in a way that reduces your costs. For example, you could arrange with your acquirer to have payments routed over the network available for that card that has the lowest interchange fee. By April 2012, you must be given a choice of processing debit card payments through at least two different networks for most electronic debit transactions. Many issuers already offer a choice.

What's new about that? Sometimes PCNs and issuers have restricted the networks available to merchants for routing transactions. For example, some PCNs and issuers had arrangements in which a debit card could be used on only a single debit card network or a set of affiliated debit card networks. In addition, in the past, PCNs and issuers — not merchants or acquirers — generally specified the network that would be used to process a transaction when multiple networks were available on a card.

Talk to your acquirer or processor about how you can take advantage of lower debit card interchange fees. Go over your invoice together to see how these and other fees are reflected in your monthly statement, and discuss what you can do to reduce them. And shop around; you may find a better deal.

The FTC works to prevent fraudulent, deceptive, and unfair practices in the marketplace and to provide information to businesses to help them comply with the law. The FTC and other government agencies will enforce various provisions of the Dodd-Frank Act, including the new rules governing debit card interchange fees and routing. For example, the National Credit Union Administration is responsible for enforcing the rule with respect to federally insured credit unions; the Office of the Comptroller of the Currency is responsible with respect to national banks and federal thrifts; the Federal Reserve Board is responsible with respect to state member banks; and the Federal Deposit Insurance Corporation is responsible with respect to state nonmember banks and state-chartered thrifts. The Federal Trade Commission is responsible for enforcement with respect to other entities not covered by the above regulators. If you have questions about these rules or comments about how financial institutions are implementing them, contact the FTC at paymentcard@ftc.gov. Remember that email is not secure, so don't include any confidential information.



Información de la FTC para Negocios

ftc.gov

FOR THE CONSUMER

FEDERAL TRADE COMMISSION

1-877-FTC-HELP

Nuevas reglas aplicables a los pagos electrónicos bajan los costos de los comerciantes minoristas

Si su negocio acepta pagos con tarjeta de crédito o débito, hay algunas nuevas reglas que pueden ayudarlo a bajar sus costos. Las reglas, que forman parte de la Ley Dodd-Frank de reforma financiera y de protección de los consumidores (Dodd-Frank Wall Street Reform and Consumer Protection Act en inglés), se ocupan de las comisiones de intercambio aplicables a las transacciones con tarjeta de débito, a los descuentos sobre el precio de compra que usted puede ofrecerles a sus clientes cuando pagan de determinadas maneras, a los montos mínimos establecidos para las compras con tarjeta de crédito, y a las redes disponibles para el enrutamiento de las transacciones con tarjeta de débito.

Las nuevas reglas

- **Comisiones de intercambio aplicables a las tarjetas de débito.** A partir del 1 de octubre de 2011, se establece un valor máximo para las comisiones o cargos de intercambio de ciertas tarjetas de débito que equivale a 21 centavos más el 0.05% del monto de la transacción. Si el emisor de la tarjeta cumple con estándares de prevención del fraude específicos, el cargo puede ascender a un centavo. El tope se aplica únicamente a los principales emisores de tarjetas — bancos y otras compañías emisoras de tarjetas con activos valuados en \$10 mil millones de dólares o monto superior (incluyendo los activos de sus afiliados). La Junta de la Reserva Federal posee una lista en inglés en www.federalreserve.gov/paymentsystems/debitfees.htm que contiene las instituciones que están exceptuadas de este tope.

Los participantes y el proceso

Cada transacción de pago con tarjeta comprende lo siguiente:

- El **titular de la tarjeta** (cardholder) que usa una tarjeta de débito o crédito para pagar un producto o servicio.
- El **emisor** (issuer), que le provee una tarjeta de pago a un titular de tarjeta y que generalmente es el que mantiene la cuenta del titular de la tarjeta.
- El **comerciante** (merchant), que provee el producto o servicio a un precio determinado.
- La **entidad adquiriente** (acquirer), que le provee al comerciante los servicios de pago con tarjeta y que mantiene la cuenta del comerciante. A veces, el comerciante o la entidad adquiriente pueden usar un procesador de terceros que se ocupa de ciertos servicios de procesamiento.
- La **red de pago con tarjeta** (payment card network o PCN por su sigla en inglés), que coordina el enrutamiento de la información y la transferencia de dinero entre los emisores y las entidades adquirientes. Las redes de pago con tarjeta pueden ser redes de tarjetas de débito, redes de tarjetas de crédito, o de ambas tarjetas.
- Las **comisiones o gastos de transacción de intercambio** (interchange transaction fees), que incluyen los cargos establecidos, cobrados o recibidos por una red de pago con tarjeta y que son pagados por un comerciante o por una entidad adquiriente para compensar a un emisor por su participación en una transacción electrónica de débito.

Los participantes del proceso interactúan de la siguiente manera:

Un cliente que desea comprar algo le presenta su tarjeta al comerciante. El comerciante genera una solicitud de autorización con un monto en dólares y con la información de la tarjeta del cliente. Se efectúa el enrutamiento electrónico de la solicitud que sigue el siguiente recorrido:

Comerciante → Entidad adquiriente (o Procesador) → Red de pago con tarjeta → Emisor

El emisor de la tarjeta recibe la solicitud, coteja su archivo de cuentas de tarjetas activas, y envía un mensaje electrónico autorizando o denegando la transacción:

Emisor → Red de pago con tarjeta → Entidad adquiriente (o Procesador) → Comerciante

Por lo general, el proceso de autorización se completa en segundos. A continuación el emisor registra un cargo en la cuenta del cliente que equivale al monto de la transacción, y la entidad adquiriente registra un crédito por esa transacción en la cuenta del comerciante descontando los cargos aplicables. El monto deducido al valor de la transacción se conoce como la tasa de descuento comercial o “descuento del comerciante” e incluye la comisión de intercambio y otros cargos aplicables al procesamiento de la transacción.

¿Cuáles son los cargos que no están sujetos al tope?

- Los cargos por la tarjeta de crédito.
 - Los cargos por las tarjetas de crédito emitidas por emisores de menor volumen.
 - Los cargos relacionados con tarjetas de beneficios del gobierno; con ciertas tarjetas recargables prepagadas de uso general; con tarjetas prepagadas emitidas por tiendas; y con las transacciones efectuadas en terminales de cajeros automáticos.
 - Otros cargos que la entidad adquiriente le aplica al comerciante que pueden estar incluidos en el descuento del comerciante.
- **Descuentos para clientes.** Una red de pago con tarjeta no puede impedir que usted les ofrezca un descuento o algún otro incentivo a sus clientes por usar un determinado método de pago, a condición de que se los ofrezca a todos sus clientes y que lo informe de manera clara y destacada. Por ejemplo, usted puede ofrecerles un descuento o un cupón a sus clientes si le pagan al contado o con una tarjeta de débito en lugar de pagarle con una tarjeta de crédito. Pero las nuevas reglas no tratan otras restricciones de la red de pago con tarjeta que pueden impedir que usted ofrezca descuentos o incentivos similares que varíen de acuerdo al uso de una tarjeta de un emisor en particular o de una red de pago con tarjeta en particular.

¿Qué hay de nuevo sobre ese punto?

Anteriormente, las redes de pago con tarjeta solían prohibir que el comerciante le ofreciera un descuento a un cliente que usaba un tipo de medio de pago — digamos una tarjeta de débito — en lugar de otro medio, como por ejemplo una tarjeta de crédito.

Por medio de un reciente acuerdo de resolución del Departamento de Justicia también se modificaron las reglas de Visa y MasterCard que impedían que los comerciantes pudieran ofrecer ciertos descuentos, bonificaciones e información sobre los costos de la tarjeta a los consumidores. Para más información sobre este tema, vea el sitio web del Departamento de Justicia en www.justice.gov/atr/public/press_releases/2010/262867.htm

- **Monto mínimo en dólares para compras con tarjeta de crédito.** Una red de pago con tarjeta no puede impedirle que usted establezca un monto mínimo en dólares para aceptar pagos con tarjeta de crédito a condición de que el mínimo sea el mismo para todos los emisores de tarjeta de crédito y para todas las redes de pago con tarjeta, y que ese monto mínimo no sea superior a \$10.

¿Qué hay de nuevo sobre ese punto?

Anteriormente, las redes de pago con tarjeta a veces les prohibían a los comerciantes que se negaran a aceptar pagos con tarjeta de crédito si la compra del cliente no excedía un determinado monto. Por ejemplo, si usted aceptaba tarjetas de crédito, las redes de pago con tarjeta o los bancos podían decirle que usted tenía que aceptar un pago con tarjeta de crédito incluso para las compras del más mínimo valor.

- **Disponibilidad de la red y enrutamiento de transacciones con tarjeta de débito.** A partir del 1 de octubre de 2011, las redes de pago con tarjeta y los emisores ya no pueden imponerle cual es la red que usted tiene que usar para procesar las transacciones entre las

redes disponibles para una tarjeta de débito. Usted (o su entidad adquiriente) puede optar por canalizar los pagos con tarjeta de débito por un medio que le permita reducir sus costos. Por ejemplo, usted podría acordar con su entidad adquiriente que los pagos se canalicen a través de la red disponible para esa tarjeta que le ofrezca la comisión de intercambio más baja. Antes de abril de 2012, se le debe ofrecer la opción de procesar los pagos con tarjeta de débito de la mayoría de las transacciones de débito a través de por lo menos dos redes diferentes. Varios emisores ya están ofreciendo una opción.

¿Qué hay de nuevo sobre ese punto? En ocasiones, las redes de pago con tarjeta y los emisores restringían las redes disponibles para el enrutamiento de las transacciones de los comerciantes. Por ejemplo, algunas redes de pago con tarjeta y algunos emisores tenían acuerdos que establecían que una tarjeta de débito se podía usar únicamente en una única red de tarjetas de débito o en un grupo de redes de tarjetas de crédito afiliadas. Además, en el pasado las redes de pago con tarjeta y los emisores — no los comerciantes ni las entidades adquirientes — generalmente especificaban cuál era la red que se debía utilizar para procesar una transacción cuando había múltiples de redes disponibles para una tarjeta.

Hable con su entidad adquiriente o con su procesador para averiguar cómo puede beneficiarse con comisiones de intercambio más bajas para los pagos con tarjeta de débito. Revise su factura junto con su entidad adquiriente o procesador para ver cómo se reflejan estos y otros cargos en su resumen de cuenta mensual, y discuta cuáles son sus opciones para reducir esos costos. Busque y compare; puede que encuentre un trato más conveniente.

La FTC trabaja para prevenir las prácticas comerciales fraudulentas, engañosas y desleales en el mercado y para proveer información a los negocios para ayudarlos a cumplir la ley. La FTC y otras agencias gubernamentales implementarán y velarán por el cumplimiento de varias disposiciones de la Ley Dodd-Frank, incluyendo las nuevas reglas que rigen las comisiones de intercambio y el enrutamiento de las transacciones con tarjeta de débito. Por ejemplo, la Administración Nacional de Cooperativas de Crédito (National Credit Union Administration) es responsable de la implementación con respecto a las cooperativas de crédito aseguradas federalmente; la Oficina del Contralor de la Moneda (Office of the Comptroller of the Currency) se encarga de la implementación en lo que concierne a los bancos nacionales y entidades de ahorro federales; la Junta de la Reserva Federal (Federal Reserve Board) es responsable con respecto a los bancos de los estados miembro; y la Corporación Federal de Seguro de Depósito (Federal Deposit Insurance Corporation) se encarga de la implementación en lo que concierne a los bancos de estados no-miembros y entidades de ahorro instituidas estatalmente. La Comisión Federal de Comercio (Federal Trade Commission, FTC) es responsable de la implementación de las disposiciones en lo que respecta a otras entidades que no están cubiertas por los reguladores mencionados anteriormente. Si tiene alguna pregunta sobre estas reglas o algún comentario referido al modo en que las instituciones financieras las están implementando, establezca contacto con la FTC en paymentcard@ftc.gov. Recuerde que el correo electrónico no es un medio de comunicación seguro, así que no envíe información confidencial.





Federal Trade Commission
BCP Business Center

Businesses: New rules for electronic payments take effect October 1st

- By Lesley Fair
- September 30, 2011 - 10:10am

If you or your clients accept payment by credit or debit card, mark October 1st on your calendar. That's the day new rules go into effect that could help lower your costs. The rules, part of the Dodd-Frank Wall Street Reform and Consumer Protection Act, cover four areas that could affect the day-to-day operation of your business.

• **Interchange fees for debit card transactions.** There's a new cap in

place for some of the fees you pay when a customer pays with a debit card.

- **Discounts to customers.** Under the new rules, you'll have more freedom to offer your customers a discount for using a certain method of payment.
- **Minimum amount for credit card purchases.** The rule gives you more flexibility in setting a minimum dollar amount a customer has to spend before using a credit card to buy something.
- **Network availability and routing for debit card transaction.** You'll have more freedom to choose the network you use for processing debit card transactions. That means you can route debit card payments in a way that reduces your costs. There's more good news: By April 2012, you must be given a choice of at least two different networks for processing most electronic debit transactions.

Of course, you'll want to read up on the details. [New Rules on Electronic Payments Lower Costs for Retailers](#) (also available in [Spanish](#) and [Chinese](#)) offers more on how the new rules will affect your business.

Send it to your industry clients. Link to it from your webpage. Share it with professionals in your company's social network.

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Selling a Work-at-Home or Other Business Opportunity?

Revised Rule May Apply to You

If you sell business opportunities, take this opportunity to find out more about your compliance obligations. The Federal Trade Commission, the nation's consumer protection agency, has revised the Business Opportunity Rule to make it easier for people to get the information they need when they're thinking about buying a bizopp. What does that mean for your company? The Rule now covers a wider variety of business opportunities, so you might be covered even if you weren't covered before. In addition, the Rule streamlines and simplifies the disclosures you have to give prospective buyers.

What's covered. The Business Opportunity Rule applies to commercial arrangements where a seller solicits a prospective buyer to enter into a new business, the prospective purchaser makes a required payment, and the seller – expressly or by implication – makes certain kinds of claims. Examples of what's covered by the Rule include work-at-home opportunities like envelope stuffing or craft assembly where the seller offers to buy back merchandise from the bizopp buyer. Also covered: opportunities where a seller says it will help the buyer set up or run the business – for example, by providing the buyer with customers, accounts, or locations to sell products or services. Consult the Rule to find out if the opportunity you're selling is within the definition.

What's required. If a transaction falls within the Rule, a seller has three key legal responsibilities:

1. You have to give the buyer a one-page Disclosure Document. And you have to provide this document seven days before the prospective buyer signs a contract or pays any money for the business opportunity.

2. If you make an earnings claim, you have to give the prospective buyer a separate document that says across the top **EARNINGS CLAIM STATEMENT REQUIRED BY LAW**.
3. You have to comply with general truth-in-advertising principles, including avoiding deceptive practices. The Rule spells out a list of some “dos” and “don’ts.”

The Disclosure Document

At least seven days before prospective buyers sign a contract or pay any money for a business opportunity, you have to give them a one-page Disclosure Document that lists five key pieces of information. To keep things simple for you and the buyer, you must use the standard form. It’s attached and it’s available at business.ftc.gov/businessopportunitydisclosure.

What do you have to disclose on that form?

- **Identifying Information**. You have to list your company’s name, business address, and phone number; the sales person’s name; and the date you gave the document to the prospective buyer.
- **Legal Actions**. You have to disclose whether your company or certain key personnel have been the subject of civil or criminal actions involving misrepresentation, fraud, violation of the securities laws, or any unfair or deceptive practices – including violation of any FTC rule – within the past ten years. If the answer is yes, you have to attach a list of the actions to the Disclosure Document.
- **Cancellation or Refund Policy**. You have to check a box to say if you have a cancellation or refund policy. If you do, you have to attach to the Disclosure Document a statement describing your policy.

- **Earnings**. You have to check a box to say if you’ve stated – or implied – how much money a prospective buyer can earn. If you have, you must attach an Earnings Claim Statement to the Disclosure Document.
- **References**. On the Disclosure Document, you have to list contact information for at least 10 people who have bought a business opportunity from your company. If more than 10 people have bought a bizopp, you may list the 10 who live closest to the prospective buyer. If fewer than 10 people have bought the bizopp, you have to list everyone. Also, you have to update the list every month, until 10 people have bought the bizopp. In addition, the Disclosure Document must say clearly and conspicuously: “If you buy a business opportunity from the seller, your contact information can be disclosed in the future to other buyers.”

A few more things about the Disclosure Document: The prospective buyer has to sign, date, and return the form to you. You have to make sure you’ve attached any other documents the Rule requires. You have to update the form every quarter. And if you promote your business opportunity in a language other than English, the one-page Disclosure Document – along with the required disclosures – must be in that language. The Spanish-language form is attached and it’s available at business.ftc.gov/businessopportunitydisclosure. Furthermore, if you tell a prospective buyer something in person, in an email, over the phone, or in any other ad or promotion, make sure it doesn’t contradict what you say in your written disclosures. It’s illegal to make contradictory oral and written statements – and it just creates confusion.

The Earnings Claim Statement

If you make a claim expressly or by implication about how much money a person can earn from your business opportunity, you have to put the claim in writing. Furthermore, it's illegal to make an earnings claim unless you have written materials on hand that back up what you're saying. You have to make those materials available to a prospective buyer or to the FTC if they ask for them.

If you make an earnings claim, you have to give the prospective buyer a separate document that clearly says across the top **EARNINGS CLAIM STATEMENT REQUIRED BY LAW**. What has to be on that document?

- The name of the person making the claim and the date;
- The specifics of the claim;
- The start and end date those earnings were achieved;
- The number and percentage of your buyers who got at least that result;
- Any information about the buyers who got those results that might vary from prospective buyers – for example, where they're located; and
- A statement that prospective buyers can get written proof for your earnings claims if they ask for it.

What about earnings claims made online, on TV or in newspapers, or in other media? The Rule is clear: You must have written proof on hand that supports your representations, and you have to disclose certain information when you're making the claim – for example, the start and end dates the earnings were achieved and the number and percentage of your buyers who got at least that

result. What if you make general statements about earnings or talk about the performance statistics in the industry? You'll need to have written proof on hand showing that the results for the opportunity you're selling are at least as good. Read the Rule for the specifics.

What if the information you previously provided to a prospective buyer in the Earnings Claim Statement substantively changes? You have an obligation to let the prospective buyer know what those changes are, in writing, before the prospective buyer signs a contract or pays you any money. And like the Disclosure Document, if you promote your business opportunity in a language other than English, your Earnings Claim Statement has to be in that language, too.

Avoid Illegal Practices

The Rule puts down in black and white what's always been the case: It's illegal to engage in deceptive or unfair practices in the promotion, marketing, or sale of any business opportunity. For example, don't say anything orally or in other paperwork that contradicts information in your one-page Disclosure Document or your Earnings Claim Statement.

The Rule lists other clear "dos" and "don'ts." For example:

- Don't include anything in your Disclosure Document or Earnings Claim Statement other than what the Rule specifically allows.
- Don't mislead people about what other buyers have earned, what they might earn, or how much help you'll give them. Remember: Under the law, it is illegal to deceive people expressly or by implication. Even if what you say is literally truthful, it still could be deceptive in context. For example, a claim can be misleading if relevant information is left

out or if the claim implies something that's not true.

- Don't tell people they'll have exclusive territories if that's not the case. Be truthful in explaining the likelihood of finding locations, outlets, or customers.
- If you hold someone out as a successful buyer of your business opportunity, you have to clearly disclose if you've paid them or have some other relationship to them.
- Don't tell people you're offering them a job if what you're really doing is selling them a business.

The Rule also requires you to keep certain records and make them available to the FTC for three years. Examples of what you need to keep: each buyer's signed disclosure receipt, all executed written contracts, and substantiation supporting your earnings claims. Read the Rule for details on your record keeping obligations. The Rule generally exempts business opportunities that meet the definition of a "franchise," but check the Rule to see if that applies to you.

The FTC works for the consumer to prevent fraudulent, deceptive, and unfair practices in the marketplace and to provide information to businesses to help them comply with the law.

To file a complaint or to get free information on consumer issues, visit www.ftc.gov or call toll-free, 1-877-FTC-HELP (1-877-382-4357); TTY: 1-866-653-4261. Watch a video, *How to File a Complaint*, at www.ftc.gov/video to learn more. The FTC enters consumer complaints into the Consumer Sentinel Network, a secure online database and investigative tool used by hundreds of civil and criminal law enforcement agencies in the U.S. and abroad. For free compliance resources, visit the Business Center, www.business.ftc.gov.

Opportunity to Comment

The National Small Business Ombudsman and 10 Regional Fairness Boards collect comments from small businesses about federal compliance and enforcement activities. Each year, the Ombudsman evaluates the conduct of these activities and rates each agency's responsiveness to small businesses. Small businesses can comment to the Ombudsman without fear of reprisal. To comment, call toll-free 1-888-REGFAIR (1-888-734-3247) or go to www.sba.gov/ombudsman.



DISCLOSURE OF IMPORTANT INFORMATION ABOUT BUSINESS OPPORTUNITY

Required by the Federal Trade Commission, Rule 16 C.F.R. Part 437

Name of Seller:

Address:

Phone:

Salesperson:

Date:

[Name of Seller] has completed this form, which provides important information about the business opportunity it is offering you. The Federal Trade Commission, an agency of the federal government, requires that [Name of Seller] complete this form and give it to you. However, the Federal Trade Commission has not seen this completed form or checked that the information is true. **Make sure that this information is the same as what the salesperson told you about this opportunity.**

LEGAL ACTIONS: Has [Name of Seller] or any of its key personnel been the subject of a civil or criminal action involving misrepresentation, fraud, securities law violation, or unfair or deceptive practices, including violations of any FTC Rule, within the past 10 years?

YES → *If the answer is yes, [Name of Seller] must attach a list of all such legal actions to this form.*

NO

CANCELLATION OR REFUND POLICY: Does [Name of Seller] offer a cancellation or refund policy?

YES → *If the answer is yes, [Name of Seller] must attach a statement describing this policy to this form.*

NO

EARNINGS: Has [Name of Seller] or its salesperson discussed how much money purchasers of this business opportunity can earn or have earned? In other words, have they stated or implied that purchasers can earn a specific level of sales, income, or profit?

YES → *If the answer is yes, [Name of Seller] must attach an Earnings Claims Statement to this form. Read this statement carefully. You may wish to show this information to an advisor or accountant.*

NO

REFERENCES: In the section below, [Name of Seller] must provide you with contact information for at least 10 people who have purchased a business opportunity from them. If fewer than 10 are listed, this is the total list of all purchasers. **You may wish to contact the people below to compare their experiences with what [Name of Seller] told you about the business opportunity.**

Note: If you purchase a business opportunity from [Name of Seller], your contact information can be disclosed in the future to other potential buyers.

	<u>Name</u>	<u>State</u>	<u>Telephone Number</u>		<u>Name</u>	<u>State</u>	<u>Telephone Number</u>
1.				6.			
2.				7.			
3.				8.			
4.				9.			
5.				10.			

Signature: _____

Date: _____

By signing above, you are acknowledging that you have received this form. This is not a purchase contract. To give you enough time to research this opportunity, the Federal Trade Commission requires that after you receive this form, [Name of Seller] must wait at least seven calendar days before asking you to sign a purchase contract or make any payments.

For more information about business opportunities in general: Visit the FTC's website at www.ftc.gov/bizopps or call 1-877-FTC-HELP (877-382-4357). You can also contact your state's Attorney General.

DIVULGACIÓN DE INFORMACIÓN IMPORTANTE SOBRE OPORTUNIDAD DE NEGOCIO

Formulario requerido por la Comisión Federal de Comercio (FTC)

Regla 16 de la Parte 437 del Código de Regulaciones Federales

Nombre del Vendedor:

Domicilio:

Teléfono:

Representante de Ventas:

Fecha:

[Nombre del Vendedor] completó el presente formulario y en el mismo le suministra información importante sobre la oportunidad de negocio que le está ofreciendo. La Comisión Federal de Comercio (*Federal Trade Commission*, FTC), una agencia del gobierno federal, le requiere a la compañía [Nombre del Vendedor] que complete el presente formulario y que se lo entregue a usted. Pero la FTC no ha visto este formulario completado por la compañía ni ha verificado que la información indicada sea veraz. **Asegúrese de que la información contenida en el presente formulario coincida con lo que le dijo el representante de ventas respecto de esta oportunidad.**

ACCIONES LEGALES: ¿La compañía [Nombre del Vendedor] o alguno de los principales miembros de su personal ha sido sujeto de una acción civil o penal, que involucre falsedad, fraude, infracción de las leyes de títulos y valores, o prácticas desleales o engañosas, incluyendo infracciones de las Reglas o Normas de la FTC, dentro de los 10 últimos años?

SI → Si la respuesta es afirmativa, [Nombre del Vendedor] debe adjuntar al formulario una lista completa de dichas acciones legales.

NO

POLÍTICA DE CANCELACIÓN O REINTEGRO: ¿Ofrece [Nombre del Vendedor] una política de cancelación o reintegro?

SÍ → Si la respuesta es afirmativa, [Nombre del Vendedor] debe adjuntar al formulario una declaración con la descripción de dicha política.

NO

INGRESOS: ¿La compañía [Nombre del Vendedor] o alguno de sus representantes de ventas ha manifestado la cantidad de dinero que pueden ganar o que han ganado los compradores de esta oportunidad de negocio? ¿Dicho en otras palabras, han expresado de manera explícita o implícita que los compradores pueden alcanzar un nivel específico de ventas, o ganar un nivel específico de ingresos?

SÍ → Si la respuesta es afirmativa, [Nombre del Vendedor] debe adjuntar a este formulario una Declaración de los Ingresos Proclamados. Lea esta declaración atentamente. Puede que desee analizar esta información con un asesor o contador.

NO

REFERENCIAS: En esta sección del formulario, [Nombre del Vendedor] debe listar la información de contacto de por lo menos 10 personas que le hayan comprado una oportunidad de negocio. Si le suministran los datos de menos de 10 personas, es porque ésa es la lista completa de todos los compradores. **Puede que desee comunicarse con las personas listadas a continuación para comparar sus respectivas experiencias con lo que le dijo [Nombre del Vendedor] sobre la oportunidad de negocio que le está ofreciendo.**

Nota: Si usted compra una oportunidad de negocio de [Nombre del Vendedor], podrá divulgarse su información de contacto a otros posibles compradores.

<u>Nombre</u>	<u>Estado</u>	<u>Número de Teléfono</u>	<u>Nombre</u>	<u>Estado</u>	<u>Número de Teléfono</u>
1.			6.		
2.			7.		
3.			8.		
4.			9.		
5.			10.		

Firma: _____

Fecha: _____

Por medio de su firma, usted acusa recibo del presente formulario. Esto no es un contrato de compra. La Comisión Federal de Comercio (FTC) establece que con el fin de concederle el tiempo necesario para que usted investigue esta oportunidad, [Nombre del Vendedor] debe esperar un mínimo de siete días naturales o corridos a partir de la fecha en que le entregue este formulario antes de pedirle que firme un contrato de compra o que efectúe un pago.

Para más información sobre oportunidades de negocio en general: Visite el sitio Web de la FTC www.ftc.gov/bizopps o llame al 1-877-FTC-HELP (877-382-4357). Usted también puede establecer contacto con el Fiscal General de su estado de residencia.



Federal Trade Commission
BCP Business Center

Demystifying the art of the deal

- By Kate White
- July 26, 2011 - 5:11pm

As businesses executives have noticed, recent changes in the credit laws reflect a move toward more transparency. For example, it's generally lawful to factor a consumer's credit history into your decision about what rate to offer them. But last year, the FTC and Federal Reserve Board shed a little more light on that process by implementing the Risk-Based Pricing Rule.

The Rule requires companies to let consumers know when — based on their credit reports — they're being offered credit terms that are less favorable than most other customers. How does that work? If someone is shopping, say, for a car and the dealer uses their credit report to decide to offer them a 12% APR when most of the dealer's other customers are

offered 7%, the dealer has to give them a risk-based pricing notice. The notices let consumers know there might be something amiss in their credit report that's preventing them from getting the best deal. The Rule also entitles them to a free copy of their credit report.

These notices are useful, but they were missing one key piece of information: a credit score. That has just changed. As of July 21, 2011, if your company uses a credit score in the determination of who's eligible for favorable credit terms — and who isn't — that risk-based pricing notice now must include the consumer's credit score and additional information about that score.

The new provision builds in some flexibility for businesses. You can choose to comply with the Rule simply by giving all consumers who apply for credit a copy of their credit score. It makes sense. If a less-than-impressive credit score is part of the reason an applicant didn't get the deal others got, they're entitled to know that, to learn more about why their score is what it is, and to fix any mistakes that may be putting a crimp in their credit.

In the long run, the new provision is a net plus for businesses, too. When consumers see how a compromised credit score hits them in the pocketbook, they may be more likely to manage their credit better, keep their accounts current, and take other steps to boost that score. And aren't those the kind of efforts most businesses want to encourage in their customers? For more information, check out the amendments to the Rule.

0 Comments | [Commenting Policy](#)



Federal Trade Commission
BCP Business Center

MAP-ing out new mortgage protections

- By Lesley Fair
- July 28, 2011 - 1:30pm

It's called the MAP Rule — and it will help chart the course for people in the market for a mortgage by banning deceptive claims about mortgages in advertising and other commercial communications. If you're in the mortgage business, it's worth your time to find out more about the rules of the road.

Following up on new laws, the FTC asked for public comment last year on a proposed rule aimed at curbing deceptive practices in mortgage advertising. After reviewing what people had to say, the FTC issued the Mortgage Acts and Practices – Advertising Rule, which will take effect on August 19, 2011. The Rule is designed to create a level playing field for legitimate businesses to compete in the mortgage marketplace.

Does the Rule apply to your business? Yes, if you advertise mortgages and your company is within the FTC's jurisdiction. That covers mortgage lenders, brokers, and servicers, real estate agents and brokers, ad agencies, home builders, lead generators, rate aggregators, and the like. No, if you work for a bank, thrift, federal credit union, and other entity outside the FTC's jurisdiction.

The MAP Rule lists 19 examples of prohibited deceptive claims ranging from misrepresentations about fees, costs, and interest rates to unsubstantiated representations about a homeowner's ability to refinance a mortgage. The Rule parallels the FTC Act's long-standing ban on false and misleading claims and will allow the FTC to seek appropriate relief — including civil penalties against violators.

The Consumer Financial Protection Bureau and state law enforcers also may bring actions to enforce the Rule. The FTC's rulemaking authority for the Rule has been transferred to the CFPB as of July 21, 2011, but the FTC, the CFPB, and the states all will have authority to enforce it.

0 Comments [Commenting Policy](#)



**A Business Guide to the
Federal Trade Commission's**

**MAIL OR TELEPHONE
ORDER MERCHANDISE RULE**

September 2011

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Introduction

To help you plan and operate your business, the Federal Trade Commission ("FTC") staff in cooperation with the Direct Marketing Association (DMA) has prepared this booklet about the FTC's Mail or Telephone Order Merchandise Trade Regulation Rule (the "Rule"). The Rule's requirements are explained in plain English. This discussion is followed by a question and answer section. The Rule itself is reprinted at the end of this booklet.

What Does the Rule Cover?

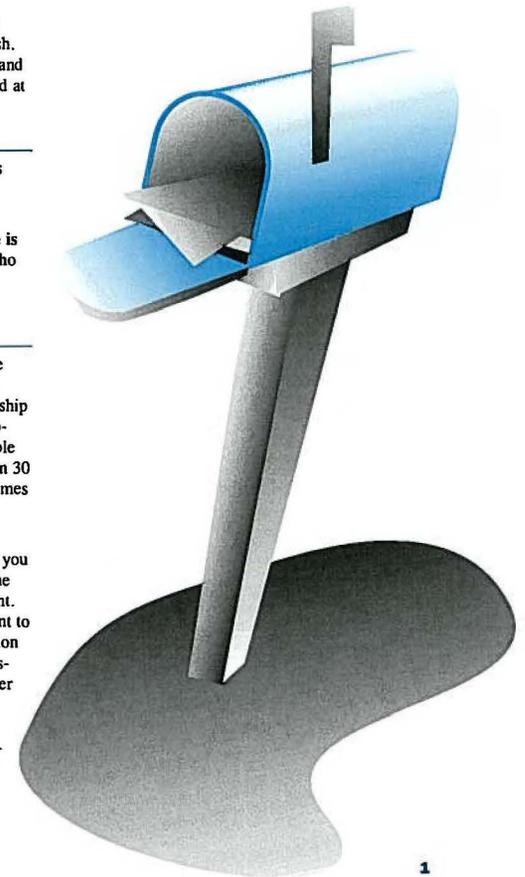
It applies to most goods a customer orders from the seller by mail, telephone, fax, or on the Internet.

It does not matter how the merchandise is advertised, how to customer pays, or who initiates the contact

What is the Mail or Telephone Order Rule?

The Rule requires that when you advertise merchandise, you must have a reasonable basis for stating or implying that you can ship within a certain time. If you make no shipment statement, you must have a reasonable basis for believing that you can ship within 30 days. That is why direct marketers sometimes call this the "30-day Rule."

If, after taking the customer's order, you learn that you cannot ship within the time you stated or within 30 days, you must seek the customer's consent to the delayed shipment. If you cannot obtain the customer's consent to the delay—either because it is not a situation in which you are permitted to treat the customer's silence as consent and the customer has not expressly consented to the delay, or because the customer has expressly refused to consent—you must, without being asked, promptly refund all the money the customer paid you for the unshipped merchandise.



How to Comply With the Rule

The following information will help you comply with the Rule.

What You Should Know Before You Make a Shipment Representation

When you offer to sell merchandise, you must have a "reasonable basis" for:

- any express or implied shipment representation, or
- believing you can ship within 30 days of receipt of an order—if you make no shipment representation or if the shipment representation is **not clear and conspicuous**.

Whenever you *change* the shipment date by providing a delay notice, you must have a "reasonable basis" for:

- the new shipment date, or
- any representation that you *do not know* when you can ship the merchandise.

When you take orders by telephone, you may choose to provide prospective customers with updated shipment information. This may differ from what you said or implied about the shipment time in your advertising. The updated shipment information you provide on the telephone supersedes any shipment representation you made in the advertising. You also must have a reasonable basis for the updated shipment representation.

"Reasonable basis" means that the merchant has, at the time of making the representation, such information as would under the circumstances satisfy a reasonable and prudent businessperson, acting in good faith, that the representation is true.

The evidence you need to demonstrate the reasonableness of your shipment representations varies with circumstances. The following, however, is important:

- Anticipated demand. Is the demand for each advertised item reasonably anticipated?

- Supply. For each advertised item, is there a sufficient inventory on hand or adequate sources of supply to meet the anticipated demand for the product?
- Fulfillment system. For all promotions in the relevant sales seasons, can the fulfillment system handle the cumulative anticipated demand for all products?
- Recordkeeping. Are adequate records kept of the key events (*see* section headed "Why You Should Keep Records" for a list of key events) in each individual transaction to ensure that items can be shipped within the applicable time, as established by the Rule?

Remember: Whether you make a shipment representation or rely on the 30-day rule, your advertising should be unambiguous about when you will ship.

What You Must Know Before Making Shipment Representations in Sales Involving Credit Applications

If your customers apply to you to establish an in-house new credit account or increase an existing credit line to pay for the merchandise they order, the Rule provides the following:

- If you make no shipment representation when you solicit the order, you are allowed 50 (instead of 30) days to ship the order. The extra 20 days is to enable you to process the credit application. If you wish to use this provision of the Rule, you must have a reasonable basis to believe you can ship in 50 days.

- If you do make a shipment representation when you solicit the order, you must have a reasonable basis for being able to ship in that time, regardless of whether the order is accompanied by an application for credit or extension of a credit line. You are presumed to have factored in the time needed to process the credit application or to have qualified your shipment representation appropriately.

When Your Fulfillment Or Other Obligations Begin ("Properly Completed" Orders)

The "clock" on your obligation to ship or take other action under the Rule begins as soon as you receive a "properly completed" order. An order is properly completed when you receive the correct full or partial (in whatever form you accept) payment, accompanied by all the information you need to fill the order. Payment may be by cash, check, money order, the customer's authorization to charge an existing account (including one you have created for the customer), the customer's application to you for credit to pay for the order, or any substitute for these transactions that you accept.

It is irrelevant when you post or deposit payment, when checks clear, or when your bank credits your account. The clock begins to run when you receive a properly completed order.

Note, however, that if a customer's check is returned or a customer is refused credit, the Rule stops the shipment clock. It is reset at day one when the customer gives you *cash*, the customer's check is *honored*, or you *receive notice* that the customer *qualifies* for credit. At this point, you may take the amount of time you originally stated to fulfill the order.

What You Must Do if You Learn You Cannot Ship on Time

When you learn that you cannot ship on time, you must decide whether you will ever be able to ship the order. If you decide that you cannot, you must promptly cancel the order and make a full refund.

If you decide you can ship the order later, you must seek the customer's consent to the delay. You may use whatever means you wish to do this—such as the telephone, fax, mail, or email—as long as you notify the customer of the delay reasonably quickly. The customer must have sufficient advance notification to make a meaningful decision to consent to the delay or cancel the order.

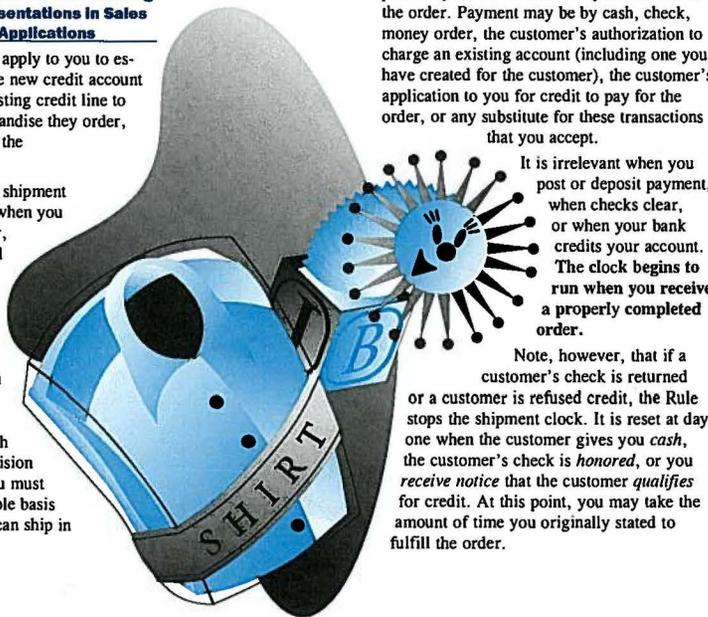
Some businesses adopt internal deadlines that are earlier than those set by the Rule to ensure that their delay notices give all customers a meaningful opportunity to consent to the delay. If businesses fail to ship or give delay notifications by their internal deadlines, they automatically cancel the orders and make refunds.

In any event, no notification to the customer can take longer than the time you originally promised or, if no time was promised, 30 days. If you cannot ship the order or provide the notice within this time, you must cancel the order and make a prompt refund.

What a First Delay Option Notice Must Say

In seeking your customer's consent to delay, the first delay notice you provide to the customer (the "delay option" notice) must include:

- a definite revised shipment date or, if unknown, a statement that you are unable to provide a revised shipment date;
- a statement that, if the customer chooses not to wait, the customer can cancel the order and obtain a full and prompt refund; and
- some means for the customer to choose to cancel at your expense (*e.g.*, by providing a postage prepaid reply card or toll-free telephone number).



- the following information when you cannot provide a revised shipping date:
 - the reason for the delay, and
 - a statement that, if the customer agrees to the indefinite delay, the customer may cancel the order any time until you ship the merchandise.

If your first delay option notice provides a definite revised shipping date of 30 days or less, you must inform customers that their non-response will be treated as a consent to the delay.

Thus, your delay option notice might look something like this:

We will be unable to ship the merchandise listed above until [date 30 days or less later than original promised time]. If you don't want to wait, you may cancel your order and receive a prompt refund by calling our toll-free customer service number, (800) 555-1234. If we do not hear from you before we ship the merchandise to you, we will assume that you have agreed to this shipment delay.

(Many merchants add clarifying language such as "Remember, if you want the merchandise, don't call.")

If your first delay option notice provides a definite revised shipping date of more than 30 days or states that you do not know when you will be able to ship, you must tell your customers that if they do not respond, the order will be cancelled automatically within the originally promised time plus 30 days.

For example, suppose you have a reasonable basis for being able to ship in 30 days and you

have chosen to make no shipment representation in your advertising. Within the 30 day period after you receive the customer's properly completed order you learn that you cannot ship in time and, although you believe you will be able to ship at some point, you don't know when. Your delay option notice to the customer might look something like this:

Because [explanation of backorder problem], we are unable to ship the merchandise listed above. We don't know when we will be able to ship it. If you don't want to wait, you may cancel your order and receive a prompt refund by calling our toll-free customer service number, (800) 555-1234.

If we do not hear from you and we have not shipped by [date 30 days later than original promised shipment time—in this example, 60 days after receipt of the properly completed order], your order will be cancelled automatically and your money will be refunded.

If you do not want your order automatically cancelled on [date 30 days later than original promised shipment time], you may request that we keep your order and fill it later. If you do request that we keep your order and fill it later, you still have the right to cancel the order at any time before we ship it to you. You may use our toll-free number, (800) 555-1234, either to request that we fill your order later or to cancel it.

Remember: You are required to explain the nature of the backorder problem only if you provide an indefinite revised shipment date. This explanation should be detailed enough to permit the customer to judge what the possible

length of the delay might be.

You also have the option of seeking your customer's affirmative agreement to the delay. In any event, you must indicate what will happen if the customer does not respond.

What Later Notices Must Say

If you cannot ship the merchandise by the definite revised shipment date included in your most recent delay option notice, before that date you must seek the consent of your customers to any further delay. You must do this by providing customers a "renewed" delay option notice. A renewed delay option notice is similar in many ways to the first delay option notice. **One important difference: the customer's silence may not be treated as a consent to delay.**

A renewed delay option notice must include:

- a new definite revised shipment date or, if unknown, a statement that you are unable to provide any date;
- a statement that, if the customer chooses not to wait, the customer can cancel the order immediately and obtain a full and prompt refund;
- a statement that, unless you receive notice that the customer agrees to wait beyond the most recent definite revised shipment date and you have not shipped by then, the customer's order automatically will be cancelled and a prompt refund will be provided; and
- some means for the customer to inform you at your expense (e.g., by providing a postage prepaid reply card or toll-free telephone number) whether the customer agrees to the delay or is cancelling the order.
- the following information when you cannot provide a new definite revised shipping date:
 - the reason for the delay, and
 - a statement that, if the customer agrees to the indefinite delay, the customer may cancel the order any time until you ship.

If you have provided an appropriate and timely delay option notice and the customer agrees to an indefinite revised shipment date, no additional delay notices are required.

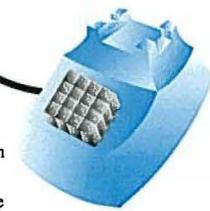
When You May Cancel an Order

Instead of seeking the customer's consent to delay, you can always cancel the order and send a refund. In that case, you must notify the customer and send the refund within the time you would have sent any delay notice required by the Rule.

When You Must Cancel an Order

You *must* cancel an order and provide a prompt refund when:

- the customer exercises any option to cancel before you ship the merchandise;
- the customer does not respond to your first notice of a definite revised shipment date of 30 days or less and you have not shipped the merchandise or received the customer's consent to a further delay by the definite revised shipment date;
- the customer does not respond to your notice of a definite revised shipment date of more than 30 days (or your notice that you are unable to provide a definite revised shipment date) and you have not shipped the merchandise within 30 days of the original shipment date;
- the customer consents to a definite delay and you have not shipped or obtained the customer's consent to any additional delay by the shipment time the customer consented to;
- you have not shipped or provided the required delay or renewed option notices on time; or
- you determine that you will never be able to ship the merchandise.



The following is one example of a delayed order scenario:

1. You have a reasonable basis to be able to ship the merchandise in 30 days. That being the case, you make no shipment representation in your advertising. When your prospective customer calls to place the order on July 1, nothing has happened to change your belief that you can ship in 30 days, so in accepting the order you provide no updated shipment information. You plan to ship the order by July 31.
2. On July 10, you realize you cannot ship by July 31. Within a few days (reasonably quickly so the customer has time to make a decision), you send a delay notice with a revised shipment date. Based on information such as customer demand for the merchandise and information you recently received from your suppliers, you reasonably believe that you will be able to ship 30 days from the original shipment date. The revised shipping date you provide in the delay notice is August 30, *i.e.*, 30 days from July 31. Your delay notice explains that, unless the customer tells you otherwise, you will assume that the customer is willing to wait for the merchandise until then.
3. Having heard nothing from the customer, on August 10 you realize that you will not be able to ship by August 30, so reasonably promptly you send a second delay option notice saying when you *now* reasonably believe you will be able to ship. The notice tells the customer that the order will be cancelled automatically on August 30 unless you have already shipped by then or the customer *expressly* tells you *not* to cancel.

6

How Quickly You Must Make a Refund

When you must make a Rule-required refund, the following applies:

- If the customer paid by cash, check, or money order, you must refund the correct amount by first class mail within seven working days after the order is cancelled.
- If the customer paid by credit, you must credit the customer's account or notify the customer that the account will not be charged, within one customer's billing cycle, after the order is cancelled.

How Much You Must Refund

If you cannot ship *any* of the merchandise ordered by the customer, you must refund the entire amount the customer "tendered," including any shipping, handling, insurance, or other costs. If you ship some, but not all, of the merchandise ordered, you must refund the difference between the total amount paid and the amount the customer would have paid, according to your ordering instructions, for the shipped items only.

For example, if you charge a flat fee for shipping and handling regardless of the total number or cost of the items ordered, you need not refund any shipping and handling charges if you ship *some* items. On the other hand, if your shipping and handling charges are indexed to the number of items or the dollar amount of the order, you can keep only those shipping and handling charges that are appropriate to the number or dollar amount of the items actually shipped.

When making Rule-required refunds, you cannot substitute credit toward future purchases, credit vouchers, or scrip.

When the order is paid for in whole or in part by proofs of purchase, coupons, or other promotional devices, you must provide "reasonable compensation" to the customer for the proofs of purchase plus any shipping, handling, or other charges the customer paid. (The circumstances of each promotion may affect what is deemed to be reasonable.)

Why You Should Keep Records

Although you are not required to keep records, an accurate, up-to-date recordkeeping system can help show that you are complying with the Rule. This is especially important because, in any action to enforce the Rule, if you cannot document your use of systems and procedures for complying, the Rule provides that you bear the burden of proving you do comply. Your documentation should provide answers to the following questions.

- Substantiation for shipment representations. How is demand anticipated? How is inventory monitored? How is inventory acquisition coordinated with customer demand and order cancellation? How are demand needs communicated to and met by buyers/suppliers/drop shippers?
- Fulfillment system. How is the fulfillment system designed to meet the requirements of the Rule? Are the delay option notices in compliance? Does the customer's active or passive exercise of any cancellation option result in a prompt refund response?
- Recordkeeping. Are adequate records kept for each individual order demonstrating the date you received the order; the contents of and date you provided any delay option notice; the date you received any exercise of a cancellation option; the date of any shipment and the merchandise shipped; the date of any refund and the merchandise for which the refund was made?

If you provide delay option notices by telephone, you may want to keep accurate records of the scripts you use. To help document your compliance with the Rule, you may find it useful to maintain a chronological record of all calls you make, including the number from which the call is made, the called number, the party contacted, and the duration of the contact.

Businesses often ask how long they should keep their records relating to Rule compliance. The statute of limitations on actions to enforce the Rule is three years for consumer

redress and five years for civil penalties. State statutes of limitations for individual customer or state actions are sometimes longer. Check the state laws where you plan to do business.

What the Rule Does Not Cover

The following sales are exempt from the Rule:

- magazine subscriptions (and similar serial deliveries), except for the first shipment;
- sales of seeds and growing plants;
- orders made on a collect-on-delivery basis (C.O.D.); and,
- transactions covered by the FTC's Negative Option Rule (such as book and music clubs).

The Rule also does not cover services, such as mail order photo-finishing. In the question and answer section that follows, you will notice other circumstances in which mail or telephone order merchandise may not be covered by the Rule.

Why You Should Comply with the Rule

Merchants who violate the Rule can be sued by the FTC for injunctive relief, monetary civil penalties of up to \$16,000 per violation (any time during the five years preceding the filing of the complaint), and consumer redress (any time during the three years preceding the filing of the complaint). When the mails are involved, the Postal Service also has authority to take action for problems such as non-delivery. State law enforcement agencies can take action for violating state consumer protection laws.

Apart from this, your failure to ship on time, or your failure to notify your customers promptly about delays and to obtain their consent to the delays, or your failure to make full and prompt refunds when your customers do not consent to delayed shipment, can adversely affect your business by discouraging repeat purchases. Accordingly, most businesses regard compliance with the Rule as simply good business practice.

7

Questions and Answers About the Rule

The FTC staff receives questions from mail or telephone order merchants who want to know how to comply with the Rule in certain circumstances. Provided below are commonly-asked questions and staff responses.

Using a Fulfillment House or Drop-Shipper

Q: Who is liable for Rule violations caused by a fulfillment house or drop shipper?

A: The seller is. This is because the person soliciting the order, not the agent fulfilling it, is the seller under the Rule. The person soliciting the order can control—among other things—the shipment representations made in soliciting the sale and the choice of fulfillment houses. The seller can adjust the shipment representations to include the time needed to transmit orders to a fulfillment house and for the fulfillment house to respond.

However, staff considers the following circumstances when deciding whether to recommend an enforcement action:

- (1) whether the merchant made all reasonable efforts to prevent violations, including, *e.g.*,
 - contracting with the fulfillment house to require it to comply with the Rule (or, at least, require it to promptly inform the merchant of any problems that could involve the Rule);
 - “seeding” orders with the fulfillment house to monitor its fulfillment time; and
 - monitoring customer complaints for unusual surges.
- (2) whether the violations were genuinely unforeseeable and beyond the merchant’s control to prevent;
- (3) whether the merchant, from all objective circumstances, did not know and did not have reason to know of the violations when they occurred; and,

- (4) whether the merchant promptly took all reasonable steps to remedy the fulfillment, notification, or refund systems failures as soon as it discovered them, and to remedy any resulting customer injury.

“Bill-me” Orders; Sales On Approval

Q: We offer to ship merchandise ordered by mail or telephone and to bill the customer later. Are we covered by the Rule?

A: Whether the transaction is covered by the Rule depends on whether you bill as part of a credit arrangement made with the customer. For example, suppose you ship the merchandise under an arrangement where the customer has an open account or a charge account you have provided, and the customer authorizes you to charge the account. This is a credit sale and is covered by the Rule. The customer’s authorization to place a charge on the customer’s account meets the Rule’s test for coverage that the order is prepaid and thus properly completed when received by the merchant.

On the other hand, suppose you ship the merchandise along with an invoice payable upon receipt. This is not a credit or prepaid sale and is not covered by the Rule. Of course, if you are unreasonably slow in shipping the merchandise or do not ship in the time you promised, you could violate the FTC Act’s general prohibition against unfair or deceptive practices. In addition, in some instances, the customer may have the right under state law to refuse to accept the merchandise.

Q: Does the Rule cover sales on approval?

A: No. Sales on approval permit the prospective customer to return merchandise, usually after a “no obligation” or “free trial” period, even though it is exactly as represented in the merchant’s advertising. These sales do not require the customer to pay for the order until the merchandise is received and approved. Because the order is not prepaid with cash, check, money order, or

charge, it cannot be treated as the “receipt of a properly completed order”—which would trigger the Rule’s requirements.

Unordered Merchandise

Whether or not the Rule is involved, in any approval or other sale you must obtain the customer’s prior express agreement to receive the merchandise. Otherwise the merchandise may be treated as unordered merchandise. It is unlawful to:

- Send any merchandise *by any means* without the express request of the recipient (unless the merchandise is clearly identified as a gift, free sample, or the like); or,
- Try to obtain payment for or the return of the unordered merchandise.

Merchants who ship unordered merchandise with knowledge that it is unlawful to do so can be subject to civil penalties of up to \$16,000 per violation. Moreover, customers who receive unordered merchandise are legally entitled to treat the merchandise as a gift. Using the U.S. mails to ship unordered merchandise also violates the Postal laws.

Insurance Charges

Q: What are our responsibilities if we charge to insure delivery?

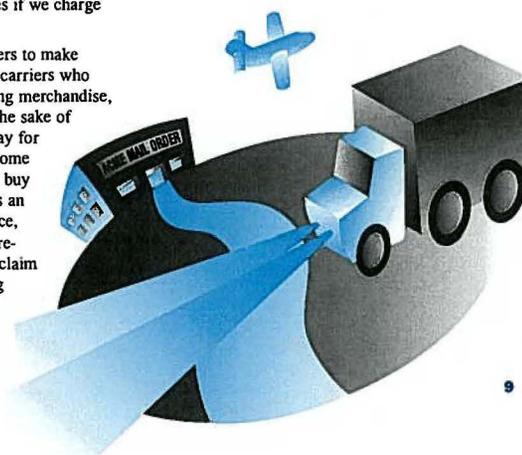
A: Instead of directing customers to make claims against the common carriers who may be responsible for losing merchandise, most merchants reship for the sake of customer satisfaction. To pay for these reshipment policies, some merchants ask customers to buy “insurance” or provide it as an option. By offering insurance, the merchant implicitly represents that it will honor any claim of nondelivery by providing prompt reshipment or, if reshipment is impossible, a prompt refund. It would be improper to collect fees from customers

for reshipment insurance and not respond promptly and appropriately to their bona fide claims of loss.

Substitutions

Q: If a customer orders an item which is back-ordered, can we substitute an item of similar or better quality without the customer’s consent?

A: For backorders, the Rule provides only two ways of responding to a properly completed order for mail or telephone order merchandise: obtain the customer’s agreement to delayed shipment or provide a full and prompt refund. Unless the customer expressly agrees to the substitution beforehand, you do not have the option of substituting merchandise that is materially different from your advertised merchandise. The term “materially different” means that the merchandise differs in some manner that is likely to affect the customer’s choice of, or conduct regarding, the merchandise. Any product feature would be deemed material if it is expressly mentioned or depicted in advertising. Differences in design, style, color, fabric, or promoted end use also would be deemed material.



Dry-testing

Q: We want to sell by mail or telephone a product that is not yet available. Does the Rule apply?

A: It depends. In an advisory opinion, the FTC told a publishing company that it could “dry-test” its merchandise as long as the following conditions were met:

- In promoting the merchandise, the merchant can make no suggestion that the merchandise will be shipped or that customers expressing an interest in it will receive it.
- In all promotional materials, the merchant must disclose all material aspects of the promotion, including the fact that the merchandise is only planned and may not be shipped.
- If any part of the promotion is later dropped, the merchant must notify subscribers of the fact within a reasonable time after soliciting their subscriptions.
- If, within a reasonable time after soliciting their subscriptions, the merchant has made no decision to ship the merchandise, it must notify subscribers of this fact and give them the opportunity to cancel and, where payment has been made, make a prompt refund.
- The merchant can make no substitutions of any merchandise for that ordered.

If these conditions are not met, the Rule applies.

Making Fast Shipment Representations

Q: We represent that we ship in 48 hours. In case of delay, when are we required to provide notification of delay?

A: Within 48 hours of receipt of the order.

Q: Can we say 48 hours “most of the time?”

A: If you represent that you ship in 48 hours most of the time, you will be required to ship or provide notification of delay in 48 hours *all* the time. The Rule requires you to ship in the time you say. If you say you ship in 48 hours “most of the time,” reasonable consumers will infer that you will ship *their* orders in 48 hours. Similarly, if you represent, “in-stock items ship immediately,” unless you tell consumer when they order that the item is *not* in stock, you will be required to ship, provide notification of delay, or cancel the order immediately.

Notice by Posting and E-Mail

Q: Can we send the delay option notice to the customer’s e-mail address?

A: Yes.

Q: Can we provide a delay option notice by posting it on the customer’s “order-status” page of our website?

A: If you provide a delay option notice, you must choose a way that is reasonably likely to provide all the required information within the time period required by the Rule. If the consumer doesn’t visit the order-status page until after she misses her order, you haven’t complied with the Rule’s requirements that the delay option notice be provided within the promised shipment time. Of course, posting on the customer’s order-status page can be an excellent way to back up notification by another means.

Qualifying 30-day or Other Shipment Representations

Q: In soliciting telephone orders we make no shipment representation, so the 30-day rule applies. In taking the order, the sales representative tells the customer that the merchandise will be shipped in 72 hours. Then we discover that the merchandise cannot be shipped in 72 hours, but can be shipped within 30 days. Do we have to get the customer’s agreement to a delay?

A: Yes. The shipment representation you make in negotiating the sale during the telephone call supersedes any express shipment representation you made in soliciting the order or, if you made no express shipment representation, the 30-day shipment time. Your compliance with the Mail or Telephone Order Merchandise Rule will be determined based upon the 72-hour shipment representation.

WHERE TO GO FOR HELP

For more information about the Mail or Telephone Order Merchandise Rule, contact the Federal Trade Commission. Visit ftc.gov; call toll-free 1-877-FTC-HELP; or write: Federal Trade Commission, Consumer Response Center, 600 Pennsylvania Avenue, N.W., Washington, DC 20580.

You also may want to contact relevant trade associations, such as the Direct Marketing Association. Contact the DMA’s Washington, DC office at: 202-955-5030; write: 1615 L Street, N.W., Suite 1100, Washington, DC 20036; or visit: www.the-dma.org.

Your local U.S. Postal Service or consumer protection agency may offer additional assistance. State and local governments also may have requirements with which you must comply. You should consult appropriate state agencies for information about laws that affect your business.

PART 435—MAIL OR TELEPHONE ORDER MERCHANDISE RULE

Sec.

435.1 Definitions.

435.2 The rule.

435.3 Limited applicability.

Sec. 435.1 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) *Prompt refund* shall mean:

(1) Where a refund is made pursuant to paragraph (d)(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 (d)(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.

(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, 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:

(1) The seller receives notice that a 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 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.

(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 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 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 § 435.2 (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 re-

sponse 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.

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.

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 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.



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