

qualified trust by an interested party during the life of the trust, categorized as to the value of each asset;

(3) The report of the dissolution of the trust and a list of the assets of the trust at the time of the dissolution,

categorized as to the value of each asset;

(4) In the case of a blind trust, the lists provided by the independent trustee of assets placed in the trust by an interested party which have been sold; and

(5) The Certificates of Independence and Compliance.

(b) *Documents exempt from public disclosure requirements.* The following documents are exempt from the public disclosure requirements of § 2634.603 and also shall not be disclosed to any interested party:

(1) Any document (and the information contained therein) filed under the requirements of § 2634.408(a) and (c) of this subpart; and

(2) Any document (and the information contained therein) inspected under the requirements of § 2634.408(d)(4) of this subpart (other than a Certificate of Compliance).

#### § 2634.414 OMB control number.

The various model trust documents and Certificates of Independence and Compliance referenced in this subpart, together with the underlying regulatory provisions (and appendices A, B and C to this part for the Certificates), are all approved by the Office of Management and Budget under control number 3209-0007.

### Subpart E—Revocation of Trust Certificates and Trustee Approvals

#### § 2634.501 Purpose and scope.

(a) *Purpose.* This subpart establishes the procedures of the Office of Government Ethics for enforcement of the qualified blind trust, qualified diversified trust, and independent trustee provisions of title I of the Ethics in Government Act of 1978, as amended, and the regulation issued thereunder (subpart D of this part).

(b) *Scope.* This subpart applies to all trustee approvals and trust certifications pursuant to §§ 2634.405 and 2634.407, respectively.

#### § 2634.502 Definitions.

For purposes of this subpart (unless otherwise indicated), the term “trust restrictions” means the applicable provisions of title I of the Ethics in Government Act of 1978, subpart D of this part, and the trust instrument.

#### § 2634.503 Determinations.

(a) *Violations.* If the Office of Government Ethics learns that

violations or apparent violations of the trust restrictions exist that may warrant revocations of trust certification or trustee approval previously granted under § 2634.407 or § 2634.405, the Director may, pursuant to the procedure specified in paragraph (b) of this section, appoint an attorney on the staff of the Office of Government Ethics to review the matter. After completing the review, the attorney will submit findings and recommendations to the Director.

(b) *Review procedure.* (1) In the review of the matter, the attorney shall perform such examination and analysis of violations or apparent violations as the attorney deems reasonable.

(2) The attorney shall provide an independent trustee and, if appropriate, the interested parties, with:

(i) Notice that revocation of trust certification or trustee approval is under consideration pursuant to the procedures in this subpart;

(ii) A summary of the violation or apparent violations that shall state the preliminary facts and circumstances of the transactions or occurrences involved with sufficient particularity to permit the recipients to determine the nature of the allegations; and

(iii) Notice that the recipients may present evidence and submit statements on any matter in issue within ten business days of the recipient's actual receipt of the notice and summary.

(c) *Determination.* (1) In making determinations with respect to the violations or apparent violations under this section, the Director shall consider the findings and recommendations submitted by the attorney, as well as any written statements submitted by the independent trustee or interested parties.

(2) The Director may take one of the following actions upon finding a violation or violations of the trust restrictions:

(i) Issue an order revoking trust certification or trustee approval;

(ii) Resolve the matter through any other remedial action within the Director's authority;

(iii) Order further examination and analysis of the violation or apparent violation; or

(iv) Decline to take further action.

(3) If the Director issues an order of revocation, parties to the trust instrument will receive prompt written notification. The notice shall state the basis for the revocation and shall inform the parties of the consequence of the revocation, which will be either of the following:

(i) The trust is no longer a qualified blind or qualified diversified trust for any purpose under Federal law; or

(ii) The independent trustee may no longer serve the trust in any capacity and must be replaced by a successor, who is subject to the prior written approval of the Director.

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## FEDERAL TRADE COMMISSION

### 16 CFR Part 435

#### Mail or Telephone Order Merchandise Rule

**AGENCY:** Federal Trade Commission (“Commission” or “FTC”).

**ACTION:** Notice of proposed rulemaking.

**SUMMARY:** The FTC proposes amending the Mail or Telephone Order Merchandise Rule (“MTOR” or “Rule”) to respond to the development of new technologies and changed commercial practices. By doing so, the Commission seeks to accomplish four objectives: clarify that the Rule covers all Internet merchandise orders regardless of whether the buyer accesses the Internet through a telephone line, allow sellers to provide refunds and refund notices to buyers by any means at least as fast and reliable as first class mail, clarify sellers' obligations under the Rule for sales made using payment methods not specifically enumerated in the Rule, and require sellers to process any third party credit card refund within seven working days of a buyer's right to a refund vesting. Additionally, the FTC sets forth its interpretation of “demand drafts” as the functional equivalents of checks for purposes of the Rule.

**DATES:** Written comments must be received on or before December 14, 2011. Parties interested in an opportunity to present views orally, should submit a request to do so, and such requests must be received on or before December 14, 2011.

**ADDRESSES:** Interested parties may file a comment online or on paper, by following the instructions in the Request for Comment part of the **SUPPLEMENTARY INFORMATION** section below. Write “16 CFR Part 435—Mail or Telephone Order Merchandise” on your comment, and file your comment online at <https://ftcpublish.commentworks.com/ftc/MTORamendmentsNPRM>, by following the instructions on the Web-based form. If you prefer to file your comment on paper, mail or deliver your comment to the following address: Federal Trade Commission, Office of the

Secretary, Room H-113 (Annex N), 600 Pennsylvania Avenue, NW., Washington, DC 20580.

**FOR FURTHER INFORMATION CONTACT:** Jock Chung, (202) 326-2984, Attorney, Division of Enforcement, Bureau of Consumer Protection, Federal Trade Commission, Room M-8102B, 600 Pennsylvania Ave., NW., Washington, DC 20580, or Gregory Madden, (202) 326-2426, Attorney, Division of Enforcement, Bureau of Consumer Protection, Federal Trade Commission, Room M-8102B, 600 Pennsylvania Ave., NW., Washington, DC 20580.

**SUPPLEMENTARY INFORMATION:** The Commission finds that using expedited procedures in this rulemaking will serve the public interest. Expedited procedures will support the Commission's goals of clarifying and updating existing regulations without undue expenditure of resources, while ensuring that the public has an opportunity to submit data, views, and arguments on whether the Commission should amend the Rule. Because written comments should adequately present the views of all interested parties, the Commission is not scheduling a public hearing or workshop. However, if any person would like to present views orally, he or she should follow the procedures set forth in the **DATES, ADDRESSES, and SUPPLEMENTARY INFORMATION** sections of this document. Pursuant to 16 CFR 1.20, the Commission will use the procedures set forth in this document, including: (1) Publishing this Notice of Proposed Rulemaking; (2) soliciting written comments on the Commission's proposals to amend the Rule; (3) holding an informal hearing (such as a workshop), if requested by interested parties; (4) obtaining a final recommendation from staff; and (5) announcing final Commission action in a document published in the **Federal Register**. Any motions or petitions in connection with this proceeding must be filed with the Secretary of the Commission.

## I. MTOR Background

The Commission originally promulgated the Mail Order Rule in 1975 in response to complaints that many mail order sellers failed to ship ordered merchandise, failed to ship merchandise on time, or failed to provide prompt refunds for unshipped merchandise. The Commission issued the Rule pursuant to its authority under sections 5 and 18 of the Federal Trade Commission Act ("FTC Act"), 15 U.S.C.

45 and 57a, to proscribe these deceptive and unfair acts or practices.<sup>1</sup>

A second proceeding, concluding in 1993, demonstrated that consumers who ordered merchandise by telephone experienced the same shipment and refund problems. Accordingly, the Commission amended the Rule to cover merchandise ordered by telephone, "including orders placed by facsimile machines or computers with telephone modems," and renamed the Rule the "Mail or Telephone Order Merchandise Rule."<sup>2</sup>

The MTOR prohibits sellers from soliciting mail or telephone order sales unless sellers have a reasonable basis to expect that they will be able to ship, after receipt of a properly completed order, the ordered merchandise within the time stated on the solicitation or, if no time is stated, within 30 days. The MTOR further requires a seller to seek the buyer's consent to the delayed shipment when the seller learns that it cannot ship within the time stated or, if no time is stated, within 30 days. If the buyer does not consent, the seller must promptly refund all money paid for the unshipped merchandise.<sup>3</sup>

## II. Proposed Amendments Due to Changing Conditions

The Commission can issue a notice of proposed rulemaking under the FTC Act if it has "reason to believe that the unfair or deceptive acts or practices

<sup>1</sup> *Federal Trade Commission: Part 435—Mail Order Merchandise: Promulgation of Trade Regulation Rule*, 40 FR 49492-94 (Oct. 22, 1975); *Federal Trade Commission: Part 435—Mail Order Merchandise: Promulgation of Trade Regulation Rule: Correction*, 40 FR 51582-597 (Nov. 5, 1975) ("Promulgation of Rule: Correction"). The Commission initiated the rulemaking in 1971 under section 6(g) of the FTC Act, 15 U.S.C. 46(g), and had substantially completed the rulemaking when Congress amended the FTC Act by adopting section 18, 15 U.S.C. 57a. By operation of law, the Mail Order Rule was then treated as having been promulgated under authority of section 18. See *United States v. JS&A Group, Inc.*, 547 F. Supp. 20, 23 (N.D. Ill. 1982); *United States v. Braswell, Inc.*, No. C 81-558 A, 1981 U.S. Dist LEXIS 15444, at \*8 (N.D. Ga. 1981). The Mail Order Rule took effect February 2, 1976.

<sup>2</sup> *Federal Trade Commission: Trade Regulation Rule; Mail or Telephone Order Merchandise: Final Trade Regulation Rule*, 58 FR 49096, 49097 (Sept. 21, 1993) ("Telephone Order Merchandise").

<sup>3</sup> The MTOR is consistent with the requirements of the Telemarketing Sales Rule ("TSR"), 16 CFR 310, but covers different practices. The MTOR covers post-purchase events, such as actions that a seller must take when it learns it cannot ship merchandise on time. The TSR, unlike the MTOR, also covers sales of services, and covers numerous pre-purchase practices, such as disclosures made before a customer consents to pay. The MTOR covers telemarketing sales that the TSR exempts, such as certain customer-initiated telephone calls made in response to a direct mail solicitation, 16 CFR 310.6(b)(6), and sales that do not involve telemarketing, such as mailorder or non-voice telephone (facsimile or Internet) sales.

which are the subject of the proposed rulemaking are prevalent." 15 U.S.C. 57a(b)(3). The Commission can find "unfair or deceptive acts or practices are prevalent" where: "(A) It has issued cease and desist orders regarding such acts or practices, or (B) any other information available to the Commission indicates a widespread pattern of unfair or deceptive acts or practices." *Id.* at 57a(b)(3)(A)-(B). The Commission has "wide latitude for judgment" in fashioning a remedy and need only show a "reasonable relationship" between the unfair or deceptive act or practice and the remedy. *American Fin. Servs. Ass'n v. FTC*, 767 F.2d 957, 988 (DC Cir. 1985) (quoting *Jacob Siegel Co. v. FTC*, 327 U.S. 608, 612-13 (1946)); see also *Telephone Order Merchandise*, 58 FR 49096, 49106.

On September 11, 2007, as part of its rule review process,<sup>4</sup> the Commission published a request for public comment,<sup>5</sup> which also served as an Advance Notice of Proposed Rulemaking.<sup>6</sup> In this Advance Notice of Proposed Rulemaking ("ANPR"), the Commission generally sought comment on the Rule's costs, benefits, and the continuing need for the Rule.<sup>7</sup> The Commission specifically sought comment on whether to propose amending the Rule to: (1) Clarify that it covers all Internet merchandise sales regardless of how buyers access the Internet (e.g., dial-up telephone modem, cable, or wireless); (2) allow sellers to provide refunds and refund notices by means at least as fast and reliable as first class mail; and (3) require sellers to provide cash, check, or money order refunds when buyers use any payment method other than credit.

After reviewing the comments received in response to the ANPR, and based on recent enforcement actions and complaints, the Commission finds that it has reason to believe that unfair

<sup>4</sup> The Commission reviews all its rules and guides periodically to ensure that they remain relevant. These periodic reviews seek information about the costs and benefits of the Commission's rules and guides as well as their economic and regulatory impact. The information obtained assists the Commission in identifying rules and guides that warrant modification or rescission.

<sup>5</sup> *Federal Trade Commission: Mail or Telephone Order Merchandise: Request For Public Comment*, 72 FR 51728 (Sept. 11, 2007) ("ANPR").

<sup>6</sup> 15 U.S.C. 57a(b)(2)(A).

<sup>7</sup> In a separate document published elsewhere in this **Federal Register**, the Commission publishes its determination retaining the Rule. In that document, the Commission is also making final, non-substantive technical amendments, placing the Rule's definitions at the beginning and alphabetizing the definitions. References in this document are to the Rule as reordered and redesignated in the final rule.

or deceptive acts or practices involving Internet sales are prevalent, notwithstanding the number of reliable Internet retailers. Consequently, the Commission proposes amending the Rule to address new technologies and commercial practices by: (1) Expressly covering all Internet merchandise orders, (2) allowing sellers to provide refunds and refund notices by any means at least as fast and reliable as first class mail, (3) clarifying sellers' obligations under the Rule for sales made using payment methods not specifically enumerated in the Rule, and (4) requiring sellers to provide refunds within seven working days where the buyer uses a third party credit card.<sup>8</sup> The Commission finds these proposed amendments are reasonably related to remedying unfair and deceptive acts or practices and ensuring that buyers receive timely delivery or timely refunds.

Finally, consistent with the Federal Reserve System's handling of demand drafts, the Commission announces its determination that "demand drafts" are the functional equivalent of checks and the Commission will treat them as such for purposes of the Rule.

#### A. Clarify Coverage of Internet Orders

The Commission expanded coverage of the Rule to include Internet orders when it amended the "telephone" definition in 1993.<sup>9</sup> At that time, to the extent consumers had access to the Internet, they typically accessed it through the telephone. Other means of accessing the Internet, however, are now widespread. In fact, from June 2000 to May 2011, American consumers largely switched from dial-up connections to broadband for Internet access.<sup>10</sup> The Commission's 2007 ANPR therefore sought comment on whether the Commission should clarify the Rule by amending it to expressly cover

<sup>8</sup> Even though the ANPR sought comment on only three potential amendments, the Commission now proposes four amendments to the MTOR. The additional proposed amendment responds to comments the FTC received.

<sup>9</sup> Section 435.1(f) defines "telephone" as "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." The Commission noted that rulemaking participants understood that the "telephone" definition was meant to "cover orders taken by mechanical means over the phone, orders placed by computers, and orders placed by fax transmission." *Telephone Order Merchandise*, 58 FR at 49113.

<sup>10</sup> During this period, the portion of U.S. households accessing the Internet through dial-up connections declined from 34 percent to 4 percent, and the portion using broadband increased from 3 percent to 60 percent. Broadband and Dial-up Adoption, 2000–2011, <http://pewinternet.org/Trend-Data/Home-Broadband-Adoption.aspx>.

merchandise ordered via the Internet regardless of the access method.<sup>11</sup>

All four responsive comments supported clarifying the Rule in this manner.<sup>12</sup> The Direct Marketing Association ("DMA")<sup>13</sup> commented that its own guidelines treat all Internet orders equally and its members follow those guidelines.<sup>14</sup> The National Retail Federation ("NRF")<sup>15</sup> also supported covering Internet orders regardless of means of access, provided that the order was placed through the "publicly accessible worldwide web." NRF at 3. Specifically, NRF's comments urged the Commission not to cover sales by retailers who use Internet connections within their stores only to provide information to sales representatives.<sup>16</sup> NRF at 3 n.1.

Two individual commenters also voiced support. Paul T. Dearing ("Dearing") commented that a merchant could not "reasonably argue that an order placed over a wireless network was somehow exempt from the requirements of the Rule."<sup>17</sup> He further noted that, given current practices, amending the Rule would not "impose any new obligations or create any new rights that have not already been recognized for over a decade." *Id.*

<sup>11</sup> In 2007, the Commission explained that it intended to "cover all Internet ordering, regardless of [buyers'] means of access \* \* \*." *ANPR*, 72 FR at 51729.

<sup>12</sup> Public comments received in response to the ANPR are available at: <http://www.ftc.gov/os/comments/mailortelephoneorder/index.shtm>. This document cites to these comments by indicating the short form for the commenter, e.g., "DMA" for the Direct Marketing Association, and the page of the comment.

<sup>13</sup> DMA is a global trade organization representing business and nonprofit organizations engaged in direct marketing. DMA at 1. DMA represents more than 3,600 companies in the U.S. and abroad, along with more than 200 nonprofit organizations. *Id.*

<sup>14</sup> DMA, <http://www.ftc.gov/os/comments/mailortelephoneorder/532289-00004.htm>, at 3.

<sup>15</sup> NRF identifies itself as the world's largest retail trade association with membership from all retailing formats and distribution channels (e.g., catalog sales, Internet sales). NRF, <http://www.ftc.gov/os/comments/mailortelephoneorder/532289-00003.htm>, at 1. NRF's membership comprises more than 1.6 million U.S. retail establishments with 2006 sales of \$4.7 trillion. *Id.* NRF includes a division for members with interests in merchandise distribution via the Internet, Shop.Org, that specifically joined NRF's comments. *Id.*

<sup>16</sup> The Commission notes that the MTOR does not presently cover transactions in which a seller's representative merely receives product or inventory information through a telephone, but the transaction with the buyer is conducted by means of media outside the Rule's scope (e.g., face-to-face transactions). Similarly, the proposed amendments to the MTOR would not cover transactions in which a seller's representative uses the Internet to receive product or inventory information, but where the buyer orders the merchandise by means outside of the Rule's scope.

<sup>17</sup> Dearing, <http://www.ftc.gov/os/comments/mailortelephoneorder/532289-00002.pdf>, at 2.

Oriyomi Nwokeji ("Nwokeji") commented that consumers and merchants do not consider access methods when processing Internet orders.<sup>18</sup>

These comments are consistent with publicly available data, consumer complaints, and enforcement actions. First, Internet sales accounted for 44 percent of the almost \$200 billion of 2007 non-store merchandise sales, indicating how common such purchases have become.<sup>19</sup> As noted, the overwhelming majority of these sales occur via broadband Internet access, not telephone dial-up.

Second, consumer complaints indicate that Internet merchandise buyers, regardless of the way they connect to the Internet, suffer from the unfair or deceptive acts or practices that prompted adoption of the Rule. The Internet Crime Complaint Center ("IC3")<sup>20</sup> reported that in 2009 almost 12 percent of the 336,655 Internet-related complaints that it received (approximately 40,000 complaints) related to "Non-Delivery of Merchandise/Payment."<sup>21</sup> Significantly, non-delivery represented almost 20 percent of the 146,633 complaints referred to local, State, and Federal law enforcement authorities for further investigation (approximately 29,000 referrals). *Id.* at 5.

While many Internet sellers are highly reliable, law enforcement actions<sup>22</sup> and

<sup>18</sup> Nwokeji, <http://www.ftc.gov/os/comments/mailortelephoneorder/532289-00001.htm>, at 1.

<sup>19</sup> U.S. Census Bureau, E-Stats, 2007 E-Commerce Multi-Sector Report, May 28, 2009, <http://www.census.gov/compendia/statab/2010/tables/10s1022.pdf>, tbl.1022 *Electronic Shopping and Mail-Order Houses—Total and E-Commerce Sales by Merchandise Line: 2006–2007*.

<sup>20</sup> IC3 is a joint operation of the National White Collar Crime Network and the Federal Bureau of Investigation. It serves as a clearinghouse for receiving, developing, and referring complaints regarding Internet crime.

<sup>21</sup> 2009 *Internet Crime Report*, at 2, Internet Crime Complaint Center, [http://www.ic3.gov/media/annualreport/2009\\_IC3Report.pdf](http://www.ic3.gov/media/annualreport/2009_IC3Report.pdf) (2010). IC3 defines this category as: "Non-Delivery of Merchandise (non-auction)—An incident in which the complainant bought something, but it never arrived." *Id.* app. II.

<sup>22</sup> IC3's report highlights two criminal prosecutions related to non-delivery of merchandise purchased on the Internet. *Id.* at 13. Additionally, several states have filed failure to deliver or untimely delivery cases for a variety of products sold through the Internet. Complaint for Injunctive Relief, Restitution, Civil Penalties and Other Relief, *Florida v. Lyne*, 16–2008–CA–2759 (Fla. Cir. Ct. Mar. 3, 2008); Complaint for Permanent Injunctive Relief, Civil Penalties and Other Relief, *Florida v. Showbiz Promotions, LLC*, 2009–CA–005681 (Fla. Cir. Ct. Apr. 9, 2009); Complaint for Injunctive and Other Relief, *People of State of Illinois ex. rel. Madigan v. United World Exchange*, No. 07CH16005 (Cook County Cir. Ct. June 18, 2007); Complaint for Injunctive and Other Relief, *People of State of Illinois v. Meyer*, No. 2007CH003506

IC3 data indicate that some Internet sellers fail to ship substantial numbers of Internet merchandise orders on time or at all.<sup>23</sup> Because of the proliferation of Internet access by cable, satellite, optical-fiber, and other non-telephonic means, many of these purchases undoubtedly involved access to the Internet using a means other than the telephone. Therefore, the Commission concludes that, although many Internet retailers are highly reliable, there is reason to believe that the merchandise shipment and refund problems are prevalent regardless of the means of Internet access. Explicitly covering all Internet order sales regardless of the means of access to the Internet is consistent with the Commission's longstanding intent to address all Internet merchandise orders.

Furthermore, because sellers cannot determine how buyers access their Web sites, sellers that comply with the Rule do not distinguish between access methods and comply with the Rule for all Internet orders. Thus, explicitly covering all Internet transactions provides clarity without imposing new costs on these sellers. Moreover, consumers have no reason to expect that their legal protections depend on how they access the Internet. Therefore, the Commission proposes amending the Rule's name, coverage section, and the "order sales" definition by inserting the word "Internet" where appropriate.

#### B. Permit New Refund Delivery Options

The Commission proposes amending the Rule to allow sellers to deliver refunds "by any means at least as fast and reliable as first class mail." Currently, sellers must send refunds and charge reversal notices by first class mail. 16 CFR 435.1(b).<sup>24</sup> When the Commission promulgated the Rule, first class mail was the most reliable method of ensuring timely refunds. In the ANPR, the Commission requested comment on changing the first class

mail requirement in light of new refund methods, such as electronic transfer. ANPR, 72 FR at 51730.

In response, two commenters favored, and none opposed, amending the Rule to provide sellers with more flexibility when delivering refunds. DMA suggested amending the Rule to "embrace new practicable means of sending refunds." DMA at 3. It stated that such a change would advance the Rule's original intent of ensuring buyers receive refunds quickly without unduly burdening sellers. *Id.* at 3-4 (citing *Promulgation of Rule: Correction*, 40 FR at 51593.) Nwokeji commented that legal requirements should recognize technological changes, and suggested amending the Rule to permit refunds via electronic transfers and e-mail notification of charge reversals or refunds. Nwokeji at 2.

This proposed amendment would also harmonize the Rule with Regulation Z, which implements the Truth In Lending Act ("TILA"), 15 U.S.C. 1601 *et seq.* Regulation Z requires third party credit card refunds to occur "through the card issuer's normal channels for credit statements." 12 CFR 226.12(e)(1). The proposed amendment should eliminate potential inconsistency between the requirements of the Rule and Regulation Z when the card issuer's normal channel does not include first class mail.

Although DMA suggested that private couriers or electronic transfers are at least as fast and reliable as first class mail for providing refunds, the Commission's proposal does not identify specific permissible methods other than first class mail. DMA at 4. Instead the Commission proposes providing sellers flexibility to use any refund delivery method they can demonstrate is as fast and reliable as first class mail. This flexibility will allow sellers to incorporate new delivery methods in the future.

#### C. Clarify Sellers' Obligations for Sales Using Non-Enumerated Payment Methods

The Commission proposes amending the Rule to identify sellers's obligations for sales made using all payment methods. The Rule's "mail or telephone order sales" definition already explicitly covers all mail or telephone order sales "regardless of the method of payment." 16 CFR § 435.1(a).<sup>25</sup> However, the Rule's definitions tie sellers' shipment,

notification, and refund obligations to payment methods in just two categories: (1) Cash, check, or money order; or (2) credit.<sup>26</sup> Consequently, the Rule does not delineate sellers' obligations when buyers pay by methods not enumerated in the Rule, such as debit card, prepaid gift card, or payroll card payments.

To clarify sellers' obligations, the Commission suggested possible solutions and asked for comment in the ANPR. Below, the Commission describes: (1) The responsive comments, and (2) the Commission's proposed amendments.

##### 1. ANPR Comments

In the ANPR, the Commission sought comment to help identify the appropriate requirements for sales made using newly developed payment methods. ANPR, 72 FR at 51729. Specifically, the Commission asked "into which of the two categories [(1) cash, check, or money order; or (2) credit] the new payment methods best fall, or whether they should be placed in a third category." *Id.*

Two commenters supported, and none opposed, amending the Rule to delineate sellers' obligations.<sup>27</sup> DMA suggested amending the Rule to identify obligations for "new forms of payment, including, but not limited to, debit cards and demand drafts." DMA at 3. Nwokeji suggested that "[c]reating an expanded list [of payment methods] with open-ended options may be preferable; that way consumers and merchants are not trapped in a morass of administrative rigidity." Nwokeji at 2.

The commenters, however, expressed conflicting opinions about how to categorize payment methods that currently are not enumerated in the Rule ("non-enumerated methods"). DMA advocated placing demand drafts and debit card payments in the same category as cash, checks, or money orders because doing so would

<sup>26</sup> Under the "refund" definition, if the buyer paid by cash, check, or money order, the seller must send the buyer a refund by cash, check, or money order. 16 CFR 435.1(d). If the buyer paid by authorizing the seller to charge the buyer's charge account (*i.e.*, by credit), the seller must act to remove or reverse the charge. *Id.*

Under the "prompt refund" definition, the seller must send refunds by cash, check, or money order by first class mail within seven working days after a buyer's right to a refund vests. 16 CFR 435.1(d)(1) and (2)(iii); 16 CFR 435.1(b)(1). If the buyer paid by credit, the seller must send the charge reversal notice (*i.e.*, the refund) to the buyer by first class mail within one billing cycle of a buyer's right to a refund vesting. 16 CFR 435.1(d)(2)(i) & (ii); 16 CFR 435.1(b)(2).

<sup>27</sup> NRF did not oppose expressly identifying the Rule's obligations that apply when new payment methods are used, but as discussed below, did raise concerns about sellers' refund obligations triggered by the different payment methods. NRF at 3-4.

(Dupage County Cir. Ct. Dec. 28, 2007); Complaint for Declaratory Judgment, Injunctive Relief, Consumer Restitution, and Civil Penalty, *State of Ohio ex. rel. Cordray v. Decorate With Style, Inc. d/b/a USA Wallpaper*, Case No. 2009CV0885 (Ct. Common Pleas Erie County, Oct. 19, 2009).

<sup>23</sup> This is an unfair or deceptive practice, as the Commission indicated when it promulgated the initial Rule.

<sup>24</sup> Specifically, § 435.1(b) states that *Prompt refund* shall mean: 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; 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.

<sup>25</sup> Specifically, § 435.1(a) states:

*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.

appropriately treat them “in the same manner as check payment methods.” DMA at 3. In contrast, NRF recommended placing third party card payment methods, *i.e.*, payment methods where a party other than the seller issues the payment card, in the same category as credit card payments because sellers often cannot readily distinguish between debit and credit card transactions. NRF at 4. It stated that placing different requirements on debit card, payroll card, or third party gift card payments than on credit card payments would be “unnecessarily cumbersome” because it would force merchants to distinguish these payments from credit card payments in order to meet the Rule’s requirements. NRF at 5.

NRF therefore recommended that transactions appearing to sellers to operate as credit cards be subject to the same one billing cycle refund requirement as credit transactions. NRF argued that applying this requirement to payments by non-enumerated methods would not, as a practical matter, inconvenience buyers because “currently most customers’ [credit or debit] accounts are not debited for payment until merchandise is ready for shipping” to engender good customer relations, to simplify Rule compliance, and to avoid the need to process refunds. *Id.* Thus, according to NRF, in most instances where a merchant fails to ship merchandise there is no charge to reverse.

Nwokeji commented that the Rule should allow sellers flexibility. He suggested amending the Rule to require that “refunds be made in the manner in which payments were received with the exception of Western Union, MoneyGram, escrow, Paypal, gift card, or other universally accepted method of payment.” Nwokeji at 3–4. For these exceptions, he recommended refunds by check or, “if the merchant is likely to incur burdensome expense, the next best option \* \* \*.” *Id.*

## 2. FTC Proposal

Based on the comments, the Commission proposes amending the Rule to create explicit requirements for sellers when buyers use non-enumerated methods. Specifically, the Commission proposes creating a third payment category, distinct from both the “cash, check, or money order” category, and from the “credit” category. The proposal requires sellers to make prompt refunds of such payments by either reversing the payment or sending a cash, check, or money order refund within seven working days.

To effectuate these requirements, the Commission proposes amending the definitions for: “Receipt of a properly completed order,” “Refund,” and “Prompt Refund.”

### a. “Receipt of a Properly Completed Order”

The current “receipt of a properly completed order” definition establishes the starting point for calculating the time by which sellers must ship orders, notify consumers of shipment delays, offer to cancel orders, or make refunds. 16 CFR 435.1(c). Specifically, the Rule times these obligations from the point when the buyer tenders payment “in the form of cash, check, money order, or authorization from the buyer to charge an existing charge account.” *Id.* The Commission proposes amending this definition to expressly include other payment methods that are not enumerated in the Rule. The proposed amendment would add that a seller also has receipt of a properly completed order when the buyer tenders payment by “other payment methods.” The amended definition would establish a clear starting point for calculating the time by which sellers must ship or take other action, regardless of the method of payment.

### b. “Refund”

The current “refund” definition prescribes the payment method for refunding cash, check, or money order sales (§ 435.1(d)(1)), and for credit sales (§ 435.1(d)(2)).<sup>28</sup> The Commission proposes amending this definition to establish the payment method sellers can use to refund sales made with other methods of payment.<sup>29</sup> The proposed amendment would require sellers to refund such payments by reversing the transaction or, where appropriate, by cash, check, or money order.<sup>30</sup>

<sup>28</sup> The present “refund” definition provides that: (1) Where the seller is the creditor, a seller can make a refund by sending “an account statement reflecting the \* \* \* absence of any remaining charge”; and (2) where a third party is the creditor, a seller can make a refund by sending “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.” 16 CFR 435.1(d)(2)(i)–(ii).

<sup>29</sup> After considering the comments, the Commission no longer proposes requiring that all non-enumerated payment method refunds be made by cash, check, or money order. Requiring debit card, payroll card, or gift card payment refunds to be made by cash, check, or money order would require sellers to distinguish between electronic payment methods in order to process refunds in accordance with the Rule. NRF commented sellers cannot readily do so. The Commission’s proposal therefore avoids placing this additional burden on sellers.

<sup>30</sup> For some payment methods, regulations or contractual obligations may require sellers to

Alternatively, if sellers have not yet accessed the buyers’ funds, they must notify the buyers that they have not done so, will not do so, and have cancelled the orders.

Under this proposal, sellers would be able to use the same payment method as the buyer to refund non-enumerated payments when that is the simplest or cheapest means available.<sup>31</sup> For example, sellers could reverse debit card payments without distinguishing them from credit card payments. This addresses NRF’s concerns about the costs and burdens of making such a determination.

In addition, where appropriate, sellers could make refunds by cash, check, or money order. This would provide flexibility where refunding: (1) By the original payment method is not possible (*e.g.*, because the buyer has closed his or her debit card account, or value cannot be returned to the buyer’s prepaid gift card); or (2) by cash, check, or money order is cheaper or easier (*e.g.*, refunding by wire payment would require a seller to pay wire fees).<sup>32</sup>

Finally, where a seller has not yet accessed a buyer’s funds, a seller could simply notify the buyer that it has cancelled the order. This provision tracks an existing, similar provision dealing with credit sales. 16 CFR 435.1(d)(2)(ii).

### c. “Prompt Refund”

The “prompt refund” definition sets the time frames and identifies the recipients for prompt refunds of cash, check, money order, and credit purchases.<sup>33</sup> Sellers must refund cash, check, or money order refunds within seven working days after a buyer’s right to a refund vests. For credit sales, sellers

reverse transactions rather than issue refunds by cash, check, or money order. The proposed amendments do not override such requirements.

<sup>31</sup> The proposed amendment provides that, when sellers provide refunds using the same non-enumerated payment method as the buyer, “refund” shall mean instructions sent to the entity that transferred payment to the seller instructing that entity to return to the buyer the amount tendered in the form tendered and a statement sent to the buyer setting forth the instructions sent to the entity, including the date of the instructions and the amount to be returned to the buyer.

Proposed 16 CFR 435.1(d)(3)(i).

<sup>32</sup> Contrary to NRF’s recommendation, the Commission does not propose requiring that sellers refund purchases made with non-enumerated payment methods in the same manner as they refund credit payments, by reversing such transactions. Some non-enumerated payments, such as certain gift card payments, cannot be reversed, and some non-enumerated payments may be expensive to reverse.

<sup>33</sup> The Rule covers all sales “regardless of the method of payment” and all sellers have an obligation to provide a “prompt refund” within a reasonable time frame regardless of the buyer’s payment method. 16 CFR 435.1(a).

must provide a refund within one billing cycle. The definition does not specify the time frames or recipients for refunds for non-enumerated payment method purchases.<sup>34</sup>

The Commission proposes amending the “prompt refund” definition to require sellers to send refunds for transactions using non-enumerated methods within seven working days of a buyer’s right to a refund vesting.<sup>35</sup> Proposed 16 CFR 435.1(b)(1) and (d)(3). Under the proposed amendment, when a seller learns that it cannot provide a refund using the buyer’s payment method, it must send a cash, check, or money order refund within seven working days.<sup>36</sup>

The proposed amendment provides clarity, while imposing little burden on sellers. Technological improvements make it easier for sellers to process refunds within seven working days.<sup>37</sup> The proposal to permit prompt refunds by means at least as fast and reliable as first class mail will permit sellers to take advantage of these faster technologies. Moreover, when payment is made by credit or debit card, sellers generally delay charging buyers’ accounts until shipment to avoid processing refunds. NRF at 5. Such a seller satisfies its refund obligation by sending a notice informing the buyer that the seller has cancelled the order and will not request payment.

#### D. Require Third Party Credit Sale Refunds Within Seven Working Days

The Commission proposes further amending the “prompt refund” definition to require sellers to provide refunds within seven working days to buyers who purchased with third party credit cards (e.g., Visa, MasterCard, or

American Express cards).<sup>38</sup> In addition to the obvious benefit for consumers, the proposed amendment would also benefit sellers in two ways.

First, harmonizing the treatment of credit card sale orders and sales by non-enumerated methods would provide simplicity for sellers. NRF commented on the difficulty of distinguishing credit sales from a number of other non-enumerated methods, such as debit card payments. NRF at 4–5. The proposed amendment addresses this problem by setting the same refund deadline for third party credit sales as for non-enumerated methods, thereby limiting the need to distinguish between different types of card payments.

Second, the seven working day time frame is consistent with current credit card regulations and business practices. Regulation Z requires that sellers make third party credit card refunds within seven business days.<sup>39</sup> 12 CFR 226.12(e)(1). Therefore, the proposed change should have limited impact on sellers. Moreover, to avoid costs associated with high chargeback rates, sellers have economic incentives to process refunds immediately. For example, Visa advises merchants to process refunds “as quickly as possible, preferably the same day as the credit transaction is generated” to prevent chargebacks.<sup>40</sup>

The proposed amendment, however, recognizes that the Rule places greater obligations on a seller creditor<sup>41</sup> than on a seller using a third party creditor (e.g., Visa). A seller creditor must remove a charge within the time allotted by the Rule. A seller using a third party creditor need only send timely notice to that third party. Therefore, shortening the seller creditors’ refund period to seven days would create an additional burden, which the Commission declines to propose at this time.<sup>42</sup> However, the

FTC seeks comment on whether seller creditors should also be subject to the seven working day refund deadline.

#### E. Demand Drafts as Check Payments

In the ANPR, the Commission sought comment on treating demand drafts as checks. In the context of the MTOR, a demand draft is a check created by the seller, with the buyer’s authorization and the buyer’s checking account number, without a physical signature.<sup>43</sup> As the Commission noted in the ANPR, demand drafts allow sellers access to buyers’ bank accounts in the same manner as traditional checks.<sup>44</sup> ANPR, 72 FR at 51729. Moreover, the Federal Reserve expressly identifies a document with the attributes of a demand draft as a “remotely-created check” subject to Federal Reserve Regulation CC governing the bank check clearing system. 12 CFR 229.2(fff); see also *Collection of Checks*, 70 FR at 71218. Thus, the Commission considers demand drafts to be checks, and refunds for payments made through demand drafts should be processed in the same manner as checks. Because the Rule already uses the term “check,” and the Commission’s interpretation clarifies but does not alter the substantive scope of that term, the Commission finds it unnecessary to amend the Rule further to reflect this interpretation.<sup>45</sup>

### III. Request for Comment

You can file a comment online or on paper. For the Commission to consider your comment, we must receive it on or before December 14, 2011. Write “16 CFR part 435—Mail or Telephone Order Merchandise” on your comment. Your

*credit-card-comparison-table* and <http://www.creditcards.com/credit-card-news/credit-card-industry-facts-personal-debt-statistics>. (2007 total retail store credit card sales \$138.8 million versus 2008 credit card sales of \$2.1 trillion, 2008 debit card sales of \$1.33 trillion, and combined 2008 credit and debit card sales of \$3.44 trillion.)

<sup>43</sup> Other terms used include “telechecks,” “preauthorized drafts,” and “paper drafts.” See *Federal Reserve System: Collection of Checks and Other Items by Federal Reserve Banks and Funds Transfers Through Fedwire and Availability of Funds and Collection of Checks: Final rule*, 70 FR 71218 (“*Collection of Checks*”), 71219, n.1. (Nov. 28, 2005).

<sup>44</sup> Due to the substantial potential for fraud with demand drafts, the Telemarketing Sales Rule prohibits the use of demand drafts unless the telemarketer obtains an express verifiable authorization (e.g., customer’s express written authorization or tape recorded oral authorization) from the consumer. 16 CFR 310.3(a)(3); see also “*Demand Draft Fraud*,” FTC Prepared Statement Before the House of Representatives Banking Committee, April 15, 1996.

<sup>45</sup> The Commission’s definition of “demand draft” as a check, if incorporated into the Rule as a formal amendment, would be an interpretive rule not subject to notice and comment requirements. See ANPR, 72 FR at 51728–29.

<sup>34</sup> The “prompt refund” definition references subsections of the “refund” definition that currently apply only to cash, check, or money order payments, or to credit payments. The prompt refund obligation is timed from the “receipt of a properly completed order.”

<sup>35</sup> The Rule currently requires the seller to send the buyer “a copy of an appropriate credit memorandum or the like to the third party creditor.” This requires the seller to send the original credit memorandum to the third party creditor, and does not set forth a time frame for sending the original. The Commission proposes clarifying the Rule by amending the “refund” and “prompt refund” definitions to explicitly require the seller to send the original to the third party creditor within seven working days. The Commission proposal further requires the seller to tell the buyer the date that the seller sent the original to the third party creditor and the amount of the charge to be removed.

<sup>36</sup> For example, if a seller cannot reverse a debit card payment because a buyer has closed his or her debit account, the seller must send a cash, check, or money order refund within seven working days.

<sup>37</sup> See Nwokeji at 2.

<sup>38</sup> As noted above, the Rule currently requires sellers to provide refunds for all credit sales within one billing cycle. 16 CFR 435.1(b)(2) and (d)(2).

<sup>39</sup> Section 226.12(e)(1) of Regulation Z states: “[w]hen a creditor other than the card issuer accepts the return of property or forgives a debt for services that is to be reflected as a credit to the consumer’s credit card account, that creditor shall, within 7 business days from accepting the return or forgiving the debt, transmit a credit statement to the card issuer through the card issuer’s normal channels for credit statements.”

<sup>40</sup> Preventing Chargebacks, [http://usa.visa.com/merchants/operations/chargebacks\\_dispute\\_resolution/preventing\\_chargebacks.html](http://usa.visa.com/merchants/operations/chargebacks_dispute_resolution/preventing_chargebacks.html).

<sup>41</sup> Seller creditors are merchants using their own store credit or charge cards.

<sup>42</sup> There is a huge disparity between the number of third party creditor and seller creditor transactions. Retailer credit cards where the retailer is the creditor appear to be less than 5 percent of total debit and credit card sales. See <http://www.creditcards.com/credit-card-news/retail-store->

comment—including your name and your state—will be placed on the public record of this proceeding, including, to the extent practicable, on the public Commission Web site, at <http://www.ftc.gov/os/publiccomments.shtm>. As a matter of discretion, the Commission tries to remove individuals' home contact information from comments before placing them on the Commission Web site.

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

If you want the Commission to give your comment confidential treatment, you must file it in paper form, with a request for confidential treatment, and you have to follow the procedure explained in FTC Rule 4.9(c), 16 CFR 4.9(c).<sup>46</sup> Your comment will be kept confidential only if the FTC General Counsel, in his or her sole discretion, grants your request in accordance with the law and the public interest.

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

may file a comment through that Web site.

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

Visit the Commission Web site at <http://www.ftc.gov> to read this Notice and the news release describing it. The FTC Act and other laws that the Commission administers permit the collection of public comments to consider and use in this proceeding as appropriate. The Commission will consider all timely and responsive public comments that it receives on or before December 14, 2011. You can find more information, including routine uses permitted by the Privacy Act, in the Commission's privacy policy, at <http://www.ftc.gov/ftc/privacy.htm>.

#### Questions

The Commission seeks comments on all proposed Rule changes. The Commission specifically solicits public comment on the costs and benefits to buyers and sellers of each of the proposals. In addition, the Commission solicits comments on the specific questions identified below. These questions are designed to assist the public and should not be construed to limit the issues about which the public may comment.

(1) In what ways, and to what extent, do buyers' experiences with untimely shipments, notices of delay, and refunds for merchandise ordered over the Internet through telephone connections resemble or differ from their experiences for merchandise ordered over the Internet through connections that use other means to access the Internet? What evidence supports your answer?

(2) In what ways, and to what extent, do buyers' experiences with untimely shipments, notices of delay, and refunds for merchandise ordered using payment methods not specifically enumerated in the Rule resemble or differ from their experiences for merchandise ordered using cash, check, money order, or credit? What evidence supports your answer?

(3) In the absence of express shipment representations, in what ways and to what extent do buyers' expectations with respect to shipment times or refunds for merchandise ordered using

payment methods not specifically enumerated in the Rule resemble or differ from their expectations for merchandise ordered using cash, check, money order, or credit? What evidence supports your answer?

(4) What usual or customary practices do sellers follow, and how much time do they need, to make a "prompt refund" through first class mail as required by the Rule? Would these practices and times differ for refunds made by methods other than first class mail? If so, how? If not, why not? What evidence supports your answer?

(5) What refund delivery means can sellers use that are at least as fast and reliable as first class mail? What are the costs and benefits of providing refunds by delivery means other than first class mail? What evidence supports your answer?

(6) Would the following amendments impose costs or confer benefits on buyers, especially small businesses? Would the amendments impose costs or confer benefits on sellers, especially small businesses? If so, how? If not, why not? What evidence supports your answers?

(a) Amending the Rule to explicitly cover all merchandise orders placed over the Internet;

(b) Amending the "prompt refund" definition to permit sellers to deliver refunds by any means at least as fast and reliable as first class mail;

(c) Amending the "receipt of a properly completed order" definition to add that a seller has receipt of a properly completed order when the seller receives "authorization to access the buyer's funds by other payment methods."

(d) Amending the "refund" definition to require sellers, who accept payment for mail, Internet, or telephone merchandise orders by payment methods other than cash, check, money order, or credit, to make required refunds by the same method that payment was tendered; or by cash, check, or money order; or by sending a statement to the buyer acknowledging the cancellation of the order and representing that the seller has not accessed any of the buyer's funds;

(e) Amending the "prompt refund" definition to require sellers to make refunds by cash, check, or money order within seven working days of the date on which sellers discover they cannot provide a refund by the same method as the customer tendered payment for mail, Internet, or telephone merchandise orders made with non-enumerated payment methods;

(f) Amending the "prompt refund" definition to require sellers to make

<sup>46</sup> In particular, the written request for confidential treatment that accompanies the comment must include the factual and legal basis for the request, and must identify the specific portions of the comment to be withheld from the public record. See FTC Rule 4.9(c), 16 CFR 4.9(c).



refunds within seven working days of the date on which the buyer's right to a refund vests for mail, Internet, or telephone merchandise orders, other than credit orders where the seller is the creditor; and

(g) Amending the "prompt refund" definition to require sellers to make refunds within seven working days from the date on which the buyer's right to a refund vests for mail, Internet, or telephone merchandise orders, including credit orders where the seller is the creditor.

(7) What methods of payment other than check, cash, money order or credit do sellers accept as payment for mail, Internet, or telephone merchandise orders? For each of these payment methods, identify whether a seller can provide a refund in the form tendered? If so, how? If not, why not? What evidence supports your answer?

(8) When a purchase is made using a debit card, credit card, or prepaid card, to what extent do sellers delay accessing the buyer's assets to remove funds for payment until the merchandise is shipped? Do sellers delay accessing the buyer's funds when accepting any other payment method(s)? What evidence supports your answer?

(9) General Questions: To maximize the benefits and minimize the costs for buyers and sellers (including specifically small businesses), the Commission seeks views and data on the following general questions for all the proposed changes described in this document:

(a) What benefits would the proposed changes confer, and on whom?

(b) What paperwork burdens would the proposed changes impose, and on whom?

(c) What other costs or burdens would the proposed changes impose, and on whom?

(d) What regulatory alternatives to the proposed changes are available that would reduce the burdens of the proposed changes while providing the same benefits?

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

Pursuant to Commission Rule 1.18(c)(1), the Commission has determined that communications with respect to the merits of this proceeding from any outside party to any Commissioner or Commissioner advisor shall be subject to the following treatment. Written communications and summaries or transcripts of oral communications shall be placed on the rulemaking record if the communication is received before the end of the

comment period on the staff report. They shall be placed on the public record if the communication is received later. Unless the outside party making an oral communication is a member of Congress, such communications are permitted only if advance notice is published in the Weekly Calendar and Notice of "Sunshine" Meetings.<sup>47</sup>

#### V. Preliminary Regulatory Analysis and Regulatory Flexibility Act Requirements

Under Section 22 of the FTC Act, 15 U.S.C. 57b, the Commission must issue a preliminary regulatory analysis for a proceeding to amend a rule only when it: (1) Estimates that the amendment will have an annual effect on the national economy of \$100 million or more; (2) estimates that the amendment will cause a substantial change in the cost or price of certain categories of goods or services; or (3) otherwise determines that the amendment will have a significant effect upon covered entities or upon consumers. The Commission has preliminarily determined that the proposed amendments to the Rule will not have such effects on the national economy; on the cost of ordering merchandise by mail, telephone, or over the Internet; or on covered parties or consumers. The comments indicate that sellers already treat Internet orders in the same manner as mail or telephone orders, and do not charge buyers' debit cards until the time of shipment, so the proposed amendments would not require sellers to alter their behavior and would not impose additional costs on sellers. The Commission, however, requests comment on the economic effects of the proposed amendments.

The Regulatory Flexibility Act ("RFA"), 5 U.S.C. 601–612, requires that the Commission conduct an analysis of the anticipated economic impact of the proposed amendments on small entities. The purpose of a regulatory flexibility analysis is to ensure that an agency consider the impacts on small entities and examines regulatory alternatives that could achieve the regulatory purpose while minimizing burdens on small entities. Section 605 of the RFA, 5 U.S.C. 605, provides that such an analysis is not required if the agency

head certifies that the regulatory action will not have a significant economic impact on a substantial number of small entities.

The Commission believes that the proposed amendments to the Rule would not have a significant economic impact upon small entities, although it may affect a substantial number of small businesses. Specifically, the Commission is proposing a few limited amendments designed to clarify the Rule and defining for sellers how to satisfy the Rule's refund requirement. In the Commission's view, the proposed amendments should not have a significant or disproportionate impact on the costs of small entities that solicit orders for merchandise to be ordered through the mail, by telephone, or via the Internet. To the extent that the proposed amendments expand the Rule's coverage, the proposed amendments do so in a way that will not result in significantly higher costs because sellers generally have already aligned their practices with the proposed amendments. Specifically, expanding the Rule to clarify its application to all Internet merchandise orders will not result in significantly higher costs as the comments indicate that sellers currently treat all Internet orders as being subject to the Rule. Dearing at 2, DMA at 3, NRF at 3, Nwokeji at 1. Moreover, defining the timing and method of refunding non-enumerated payment methods should not have a significant cost impact on small entities because sellers typically do not access buyer funds until merchandise shipment, and thus there are only a limited number of refunds issued. NRF at 5. For the same reason, requiring refunds for third party credit sales within seven working days should not have a significant impact on small entities. Therefore, based on available information, the Commission certifies that amending the MTOR as proposed will not have a significant economic impact on a substantial number of small businesses.

Although the Commission certifies under the RFA that the proposed Rule would not, if promulgated, have a significant impact on a substantial number of small entities, the Commission has determined, nonetheless, that it is appropriate to publish an Initial Regulatory Flexibility Analysis in order to inquire into the impact of the proposed Rule on small entities. Therefore, the Commission has prepared the following analysis:

<sup>47</sup> See 15 U.S.C. 57a(i)(2)(A); *Federal Trade Commission: Oral Presentations Before the Commission and Communications With Commissioners and Their Staffs in Trade Regulation Rulemaking Proceedings: Proposed Rule*, 45 FR 50814 (1980); *Federal Trade Commission: Oral Presentations Before the Commission and Communications With Commissioners and Their Staffs in Trade Regulation Rulemaking Proceedings: Final Rules*, 45 FR 78626 (1980).



### A. Description of the Reasons That Action by the Agency Is Being Taken

In response to public comments, the Commission proposes amending the Rule to respond to the development of new technologies and changed commercial practices.

### B. Statement of the Objectives of, and Legal Basis for, the Proposed Rule

The objective of the proposed Rule is to clarify that the Rule covers all Internet merchandise orders, allow sellers to provide refunds and refund notices to buyers by any means at least as fast and reliable as first class mail, clarify sellers' obligations under the Rule for sales made using payment methods not specifically enumerated in the Rule, and require sellers to process any third party credit card refund within seven working days of a buyer's right to a refund vesting. Section 18(b)(3) of the FTC Act, 15 U.S.C. 57a(b)(3) provides the Commission with authority to issue a notice of proposed rulemaking where it has reason to believe that the unfair or deceptive acts or practices which are the subject of the proposed rulemaking are prevalent.

### C. Small Entities to Which the Proposed Rule Will Apply

Under the Small Business Size Standards issued by the Small Business Administration, Mail-Order Houses qualify as small businesses if their sales are less than \$ 35.5 million annually. The Commission estimates that the proposed Rule will not have a significant impact on small businesses because, according to comments, sellers already comply in many respects with the requirements of the proposed Rule. The Commission seeks comment and information with regard to the estimated number or nature of small business entities for which the proposed Rule would have a significant impact.

### D. Projected Reporting, Recordkeeping, and Other Compliance Requirements, Including Classes of Covered Small Entities and Professional Skills Needed To Comply

As explained earlier in this document, the proposed amendments will clarify that the Rule covers all Internet merchandise sales regardless of how buyers access the Internet, will allow sellers to provide refunds and refund notices by means at least as fast and reliable as first class mail, and will clarify sellers' obligations under the Rule for sales made using non-enumerated payment methods. The small entities potentially covered by these amendments will include all such entities subject to the Rule (e.g., for

purposes of the proposed amendment, entities selling merchandise ordered by mail, Internet, or telephone and paid for using non-enumerated payment methods). The professional skills necessary for compliance with the proposed amendments would include clerical personnel. The Commission invites comment and information on these issues.

### E. Duplicative, Overlapping, or Conflicting Federal Rules

The Commission has not identified any other Federal statutes, rules, or policies that would duplicate, overlap, or conflict with the proposed Rule. The Commission invites comment and information on this issue.

### F. Significant Alternatives to the Proposed Rule

The Commission has not proposed any specific small entity exemption or other significant alternatives, as the proposed amendments simply clarify the scope of the rule (i.e., Internet sales), provide additional compliance options (e.g., for refunds and refund notices), and require certain actions (e.g., refunds) consistent with the Rule's existing requirements. Under these limited circumstances, the Commission does not believe a special exemption for small entities or significant compliance alternatives are necessary or appropriate to minimize the compliance burden, if any, on small entities while achieving the intended purposes of the proposed amendments. Nonetheless, the Commission seeks comment and information on the need, if any, for alternative compliance methods that would reduce the economic impact of the Rule on small entities. If the comments filed in response to this Notice identify small entities that would be affected by the proposed Rule, as well as alternative methods of compliance that would reduce the economic impact of the proposed Rule on such entities, the Commission will consider the feasibility of such alternatives and determine whether they should be incorporated into the final Rule.

### VI. Paperwork Reduction Act

The MTOR contains various information collection requirements for which the Commission has obtained clearance under the Paperwork Reduction Act, 44 U.S.C. 3501 *et seq.* ("PRA"), Office of Management and Budget ("OMB") Control Number 3084-0106. OMB renewed 3-year PRA clearance for the MTOR on February 16, 2010, effective through February 28, 2013.

As discussed above, the Commission is proposing a limited number of amendments designed to clarify the Rule and provide sellers with methods for satisfying the Rule's refund requirement. As described above, to the extent that the proposed amendments expand the Rule's coverage, the proposed amendments do so in a way that will not result in significantly higher costs because sellers have already aligned their practices with the proposed amendments. Dearing at 2, DMA at 3, NRF at 3, Nwokeji at 1.

In the Commission's view, there are no additional "collection of information" requirements included in the proposed amendments to submit to OMB for clearance under the PRA. Consequently, the proposed amendments would not affect the PRA "burden" associated with the Rule's requirements.

### VII. Proposed Rule Language

#### List of Subjects in 16 CFR Part 435

Mail order merchandise, Telephone order merchandise, Trade practices.

For the reasons set out in the preamble, the Commission is proposing to amend 16 CFR part 435 as follows:

#### PART 435—MAIL, INTERNET, AND TELEPHONE ORDER MERCHANDISE

1. The authority citation for part 435 continues to read as follows:

**Authority:** 15 U.S.C. 57a.

2. Revise the heading of part 435 to read as set forth above.

3. Amend § 435.1 by revising paragraphs (a) through (d) to read as follows:

#### § 435.1 Definitions.

\* \* \* \* \*

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

(b) *Prompt refund* shall mean:

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

class mail, within seven (7) working days of the date on which the seller discovers it cannot provide a refund by the same method as payment was tendered;

(2) Where a refund is made pursuant to paragraph (d)(2)(i) of this section, a refund sent by any means at least as fast and reliable as first class mail within one (1) billing cycle from the date on which the buyer's right to refund vests under the provisions of this part.

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

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

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

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

(d) *Refund* shall mean:

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

(2) Where there is a credit sale:

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

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

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

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

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

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

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

\* \* \* \* \*

4. Amend § 435.2 by revising the introductory text of the section and the introductory text of paragraph (a)(1) to read as follows:

**§ 435.2 Mail or telephone order sales.**

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

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

\* \* \* \* \*

By direction of the Commission.

**Donald S. Clark,**  
*Secretary.*

[FR Doc. 2011-24354 Filed 9-29-11; 8:45 am]

**BILLING CODE 6750-01-P**

**SUSQUEHANNA RIVER BASIN COMMISSION**

**18 CFR Part 806**

**Review and Approval of Projects**

**AGENCY:** Susquehanna River Basin Commission.

**ACTION:** Notice of proposed rulemaking; reopening of comment period.

**SUMMARY:** The purpose of this document is to inform the public of an extension of the comment period for proposed rules of the Susquehanna River Basin Commission (Commission) as published in the **Federal Register** of July 13, 2011.

**DATES:** The deadline extension of the public comment period is November 10, 2011. Comments on the proposed rule published July 13, 2011 (76 FR 41154) may be submitted to the Commission on or before November 10, 2011.

**ADDRESSES:** Address all comments to Richard A. Cairo, General Counsel, Susquehanna River Basin Commission, 1721 North Front Street, Harrisburg, PA 17102-2391 or by e-mail to [rcairo@srbc.net](mailto:rcairo@srbc.net).

**FOR FURTHER INFORMATION CONTACT:** Richard A. Cairo, General Counsel, *telephone:* (717) 238-0423, ext. 306; *fax:* (717) 238-2436; *e-mail:* [rcairo@srbc.net](mailto:rcairo@srbc.net). Also, for further information on the proposed rules, visit the Commission's Web site at <http://www.srbc.net>.

**SUPPLEMENTARY INFORMATION:** The public is hereby advised that, at its regular business meeting on September 15, 2011, in Milford, New York, the Commission extended to November 10, 2011, the written comment deadline for proposed rules that appeared in 76 FR 41154-41157 July 13, 2011. This action to extend the public comment period and delay action on the proposed rules is based on the level of public interest indicated in the comments received thus far by the Commission.

**Authority:** Pub. L. 91-575, 84 Stat. 1509 *et seq.*, 18 CFR Parts 806, 807, and 808.

Dated: September 20, 2011.

**Thomas W. Beauduy,**  
*Deputy Executive Director.*

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**LIBRARY OF CONGRESS**

**Copyright Office**

**37 CFR Parts 201 and 202**

[Docket No. 2011-8]

**Discontinuance of Form CO in Registration Practices**

**AGENCY:** Copyright Office, Library of Congress.

**ACTION:** Notice of Proposed Rulemaking and request for comments.

**SUMMARY:** The United States Copyright Office is proposing to amend its