

within the scope of that authority because it creates Class E airspace sufficient in size to contain aircraft executing instrument procedures for the Northway Airport and represents the FAA's continuing effort to safely and efficiently use the navigable airspace.

#### List of Subjects in 14 CFR Part 71

Airspace, Incorporation by reference, Navigation (air).

#### Adoption of the Amendment

In consideration of the foregoing, the Federal Aviation Administration amends 14 CFR part 71 as follows:

#### PART 71—DESIGNATION OF CLASS A, B, C, D, AND E AIRSPACE AREAS; AIR TRAFFIC SERVICE ROUTES; AND REPORTING POINTS

■ 1. The authority citation for 14 CFR part 71 continues to read as follows:

**Authority:** 49 U.S.C. 106(g), 40103, 40113, 40120; E.O. 10854, 24 FR 9565, 3 CFR, 1959–1963 Comp., p. 389.

##### § 71.1 [Amended]

■ 2. The incorporation by reference in 14 CFR 71.1 of Federal Aviation Administration Order 7400.9V, *Airspace Designations and Reporting Points*, signed September 9, 2011, and effective September 15, 2011, is amended as follows:

*Paragraph 6002 Class E airspace designated as surface areas.*

\* \* \* \* \*

##### AAL AK E2 Northway, AK [Revised]

Northway Airport, AK  
(Lat. 62°57'40" N., long. 141°55'41" W.)  
Northway VORTAC  
(Lat. 62°56'50"N., long. 141°54'46"W.)

Within a 4-mile radius of the Northway Airport, AK and within 2 miles each side of the 077° radial from the Northway Airport, AK extending from the 4-mile radius to 12.7 miles east of the Northway Airport, AK and within 3.1 miles each side of the 312° radial from the Northway VORTAC extending from the 4-mile radius to 11.4 miles northwest of the Northway Airport AK.

*Paragraph 6005 Class E airspace extending upward from 700 feet or more above the surface of the earth.*

\* \* \* \* \*

##### AAL AK E5 Northway, AK [Revised]

Northway Airport, AK  
(Lat. 62°57'40" N., long. 141°55'41" W.)

That airspace extending upward from 700 feet above the surface within an 8-mile radius of Northway Airport, AK and within 2 miles each side of the 077° radial from Northway Airport, AK extending from the 8-mile radius to 13.7 miles east of Northway Airport, AK and that airspace extending upward from 1,200 feet above the surface within a 66-mile

radius of Northway Airport, AK excluding the airspace east of 141°00'00" West longitude.

Issued in Anchorage, AK on September 23, 2011.

**Michael A. Tarr,**

*Manager, Alaska Flight Services.*

[FR Doc. 2011–25150 Filed 9–29–11; 8:45 am]

**BILLING CODE 4910–13–P**

#### FEDERAL TRADE COMMISSION

##### 16 CFR Part 435

##### Mail or Telephone Order Merchandise Rule

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

**ACTION:** Final rule amendments.

**SUMMARY:** The FTC announces it is retaining the Mail or Telephone Order Merchandise Rule (“MTOR” or “Rule”). Based on previous Rule proceedings and after reviewing public comments received regarding the Rule’s overall costs, benefits, and regulatory and economic impact, the Commission concludes that the Rule continues to benefit consumers and the Rule’s benefits outweigh its costs. For clarity, the Commission is reorganizing the Rule by alphabetizing the definitions at the beginning of the Rule.

**DATES:** *Effective Date:* September 30, 2011.

**ADDRESSES:** Requests for copies of the Final MTOR should be sent to: Public Reference Branch, Federal Trade Commission, 600 Pennsylvania Avenue, NW., Room 130, Washington, DC 20580. The complete record of this proceeding is also available at that address. Relevant portions of this proceeding, including the public comments received in response to the Advance Notice of Proposed Rulemaking are available at: <http://www.ftc.gov/os/comments/mailortelephoneorder/index.shtm> and the related News Release is available at: <http://www.ftc.gov/opa/2007/09/fyi07262.shtm>.

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

##### SUPPLEMENTARY INFORMATION:

##### I. Background

The MTOR prohibits sellers from soliciting mail or telephone order sales unless the sellers have a reasonable basis to expect that they will be able to

ship the ordered merchandise within the time stated on the solicitation, or, if no time is stated, within 30 days of receipt of an order. The MTOR further requires a seller to seek the buyer’s consent to the delayed shipment when the seller learns that it cannot ship within the time stated or, if no time is stated, within 30 days. If the buyer does not consent, the seller must promptly refund all money paid for the unshipped merchandise.

The Commission originally promulgated the Mail Order Rule (as the Rule was originally known) 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, ending 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 and renamed the Rule the “Mail or Telephone Order Merchandise Rule.”<sup>2</sup>

The Commission reviews all its rules and guides periodically to obtain information about their costs and benefits and their economic and regulatory impact. As part of this review process, the Commission published a request seeking public comments on the costs and benefits of the Rule and the continuing need for the Rule.<sup>3</sup> In

<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.*, 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).

<sup>3</sup> *Federal Trade Commission: Mail or Telephone Order Merchandise: Request For Public Comment*, 72 FR 51728 (Sept. 11, 2007). The Commission also sought public comments, assuming the Commission retained the Rule, on how it might change the Rule to reflect changes in technology and commercial

addition, the Commission suggested technical revisions reversing the order of MTOR sections 435.1 and 435.2 and organizing the Rule's definitions alphabetically. *Id.*

## II. Retention of the MTOR

The Commission received four comments, all identifying a continuing need for the Rule.<sup>4</sup> Two major trade associations representing direct marketers affected by the Rule, the National Retail Federation ("NRF")<sup>5</sup> and the Direct Marketing Association ("DMA"),<sup>6</sup> supported retaining the MTOR. According to NRF, the MTOR "creates explicit competition among retailers to minimize and validate shipping times for consumers' benefit." NRF at 2. NRF further stated that "[i]n short, the Rule is a well designed balance of competitive incentives that benefits retailers and their customers alike." *Id.* DMA strongly supported "the continued uniform FTC regulation of merchandise orders by mail, telephone, fax, computer, and the Internet." DMA at 2. DMA commented that the Rule has "been effective in enhancing consumer confidence in the growth of distance selling, which is critical to the development of electronic commerce," and that the Rule's requirements "make good business sense and are well-integrated into the business practices of our members." *Id.*

The Commission also received comments supporting the Rule from two individuals, Paul T. Dearing ("Dearing") and Oriyomi Nwokeji ("Nwokeji"). Dearing commented that the Rule provides buyers with "basic rights and expectations regarding the receipt of their merchandise" ordered by mail,

practices. *Id.* In a separate Notice of Proposed Rulemaking ("NPRM"), the Commission proposes amending the MTOR 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, such as debit cards; and (4) requiring sellers to provide refunds within seven working days where the buyer uses a third party credit card, such as Visa or MasterCard.

<sup>4</sup> All comments 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>5</sup> NRF identifies itself as the world's largest retail trade association with membership from all retailing formats and distribution channels (e.g., catalog, Internet). NRF at 1. NRF's membership comprises more than 1.6 million U.S. retail establishments with 2006 sales of \$4.7 trillion. *Id.*

<sup>6</sup> DMA is a global trade association 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.*

telephone, or the Internet. Dearing at 1. Similarly, Nwokeji commented that the Rule "safeguards the rights of \* \* \* customers" and is a "cautionary restraint against \* \* \* overzealous merchants." Nwokeji at 1. He also commented that "[c]onsumers need [the] MTOR" because it provides for prompt refunds and ascertainable shipment dates, thereby enhancing easy, fast, affordable, varied, and convenient shopping by mail or telephone. *Id.*

The Commission requested comments on the costs associated with the Rule, but none of the commenters identified any specific costs or burdens associated with complying with the Rule's requirements. This absence of comments identifying specific costs or burdens, coupled with the support for the Rule voiced by two major trade associations representing industry members, suggests that the Rule's benefits to industry members significantly outweigh its costs.<sup>7</sup> The Commission thus concludes there is a continuing need for the Rule.

## III. Reorganizing the MTOR

The Commission also invited comments regarding reorganizing the Rule by: (1) Alphabetizing the definitions, and (2) placing the definitions before the Rule's substantive provisions. DMA stated that such a change would make the Rule easier to navigate, DMA at 4, and no commenters opposed the proposed reorganization. The Commission therefore amends the Rule as proposed.<sup>8</sup>

<sup>7</sup> Similarly, in 2009 and 2010, the Commission published its most recent estimates of the information collection burdens the Rule imposes on industry under the Paperwork Reduction Act, 44 U.S.C. secs. 3501–3521. See *Federal Trade Commission: Agency Information Collection Activities; Proposed Collection; Comment Request*, 74 FR 53500 (Oct. 19, 2009) and *Federal Trade Commission: Agency Information Collection Activities; Proposed Collection; Comment Request*, 75 FR 2142 (Jan. 14, 2010). The Commission did not receive any public comments on its MTOR cost estimates of annual labor costs of \$47,108,000 and annual non-labor costs of \$0 during 2010–2012. On February 16, 2010, OMB approved the Commission's estimates without change and authorized extension of the Rule's information collection requirements to February 28, 2013.

<sup>8</sup> The Commission is also correcting internal inconsistencies in the Rule language and punctuation at renumbered 435.1(c), (c)(1)–(2), (d)(1), (d)(2)(iii), (g)(1)–(2); 435.2(a)(1)(ii), (a)(3), (a)(3)(i), (b)(1)(iv), (b)(2), (b)(2)(ii), (c)(2); and 435.3(a)(1)–(3) (e.g., numbering the subordinate paragraphs for the definition of "Receipt of a properly completed order" as "(1)," "(2)," and "(3)") to conform the numbering with the other subordinate Rule paragraphs. These are technical corrections and do not change the Rule's substantive requirements. Although neither previously proposed by the Commission nor suggested by commenters, the Commission has also determined to delete 435.4, reciting the prior effective dates of the rule and its 1994 amendment,

Pursuant to the Administrative Procedure Act ("APA"), the Commission finds "good cause" for foregoing public comment because the rule amendments are technical and public comment is "unnecessary." 5 U.S.C. 553(b)(3)(B). In addition, because the rule revisions do not change the obligations of entities subject to the Rule, there is "good cause" for the revisions to take effect immediately. See 5 U.S.C. 553(d)(3).

## IV. The Commission Declines To Propose Changes Suggested by NRF

In its request for public comments, the Commission invited the public to suggest Rule changes. In response, NRF proposed amending the Rule to: (1) Allow sellers to substitute materially different merchandise from what the buyer ordered in certain circumstances, and (2) exempt sellers of custom-made or occasionally produced merchandise from the Rule's requirements. In the absence of any evidence supporting the need for NRF's suggested changes, and because the Commission has previously determined that these practices cause buyer injury, the Commission is not proposing the changes advocated by NRF.

### A. Unilateral Substitution of Materially Different Merchandise

NRF suggested that the Commission amend the Rule to permit sellers to substitute, without buyers' consent, merchandise that materially differs from what buyers ordered for: (1) "seasonal substitutions," and (2) "gifts with purchase" ("GWPs").

#### 1. Seasonal Substitutions

NRF suggested that the Commission amend the Rule to allow sellers to ship substitute merchandise without the buyer's prior express agreement to the substitution when there is: (1) Unanticipated demand during "a particular season for certain goods," and (2) "it may be too late for a customer who receives a delay notice to select another item." NRF at 6.

Substitution of materially different merchandise is a unilateral alteration of a material term of the sale.<sup>9</sup> In fact, the

as unnecessary. Likewise, the Commission is deleting the Freedom of Information Act, 5 U.S.C. 552, from the authority citation for the rules, as that statute does not authorize the rules, but merely requires generally that agencies publish their binding substantive regulations in the **Federal Register**.

<sup>9</sup> See A Business Guide to the Federal Trade Commission's Mail or Telephone Order Merchandise Rule, <http://business.ftc.gov/documents/bus02-business-guide-mail-and-telephone-order-merchandise-rule.pdf>, and DMA, January 2002.

Commission previously brought an action identifying substitution as violating the Rule. See *United States v. Smith d/b/a Salesco*, No. 01–10962 (C.D. Cal. 2001). Nothing in the record supports changing the Commission's approach. Thus, the Commission does not propose amending the Rule as NRF suggests.

## 2. Substitute Gifts With Purchase

NRF also suggested that the Rule permit unilateral substitutions when a seller: (1) Offers a specific GWP, (2) clearly discloses that the GWP supply is "limited," (3) has exhausted its GWP supply, and (4) wants to provide buyers with a GWP of equal or greater value than what it initially offered. NRF at 6.

Where buyers order merchandise with a GWP, the GWP is a material part of the merchandise order. Indeed, in 1975 the Commission identified many complaints about unsent GWPs worth less than \$10 and rejected a suggestion that the Rule exempt such GWPs. *Promulgation of Rule: Correction*, 40 FR at 51594. Since then, the Commission has enforced the Rule against sellers for violations related to GWPs. *United States v. Iomega Corp.*, No. 98–00141C (D. Utah 1998); *United States v. Ralston Purina Co.*, No. 92–01088 (E.D. Mo. 1992); and *United States v. Del Monte Corp.*, No. 85–5213 (N.D. Calif. 1985).

The unilateral substitution of GWP merchandise violates the Rule. Nothing in the record indicates that prohibiting unilateral substitutions creates burdens on sellers that are not outweighed by the benefits to buyers. Thus, the Commission does not propose amending the Rule to permit sellers to substitute GWPs without buyers' prior express consent.

## B. Custom-Made Merchandise

NRF also suggested that the Commission amend the Rule to permit indefinite shipment representations for: (1) Custom-made or handcrafted merchandise; or (2) merchandise produced by the supplier occasionally within a given year. NRF at 7. NRF said that marketers of these items find it difficult to determine accurate shipment times and risk either overstating shipment time and unnecessarily discouraging sales, or understating shipment time and running afoul of the Rule. *Id.* NRF suggested distinguishing

these products from other merchandise by identifying them as "artisanal, custom, or infrequently produced." *Id.*

Manufacturers of made-to-order and customized merchandise made similar arguments while seeking exemption from the Rule during the original 1975 rulemaking proceeding. *Promulgation of Rule: Correction*, 40 FR at 51595. The Commission rejected their request, finding that "no industry spokesman explained persuasively why such merchandisers cannot affirmatively disclose the estimated shipping time in their solicitations." *Id.* NRF has not presented evidence of changed circumstances, and the Commission therefore does not propose such an exemption now.<sup>10</sup>

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

As explained above, these final amendments are purely technical and non-substantive in nature. They do not expand or otherwise substantively alter the Rule's requirements, and thus do not require notice and comment under section 18 of the FTC Act or the APA. See section 18(d)(2)(B) of the FTC Act, 15 U.S.C. 57a(d)(2)(B) (prescribing procedures for "substantive" amendments); APA, 5 U.S.C. 553(b)(B) (notice and comment not required where impracticable, unnecessary, or contrary to the public interest). Further, the Commission believes the amendments will have no economic or other impact on the economy, prices, or regulated entities or consumers. For these reasons, no regulatory analysis is required by section 22 of the FTC Act. See 15 U.S.C. 57b–3. For the same reasons, no regulatory flexibility analysis is required by the Regulatory Flexibility Act ("RFA"). See 5 U.S.C. 601(2), 604(a).

Under section 22 of the FTC Act, 15 U.S.C. 57b, the Commission must issue a 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 \$100,000,000 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. Because the Commission retains the MTOR as previously promulgated without making any

substantive change, it has determined that the amendments to the Rule will not have such effects on the national economy, on the cost of ordering merchandise by mail or telephone, or on covered parties or consumers.

The RFA, 5 U.S.C. 601–612, also does not require that the Commission conduct an analysis of the anticipated economic impact of the amendments on small entities. Section 605 of the RFA, 5 U.S.C. 605, provides that the agency need not perform the analysis normally required under the Act if the agency head certifies that the regulatory action will not have a significant economic impact on a substantial number of small entities, or where public notice and comment on the amendments is not required under the APA, see 5 U.S.C. 601(2), 604(a). The Commission certifies that amending the MTOR will not have a significant economic impact on a substantial number of small businesses, because the technical reorganization of the rules' provisions, as explained earlier, imposes no significant economic impact, if any, on small entities. As noted earlier, public notice is not required under the APA because the Commission has found "good cause" to forego that requirement. Accordingly, for these reasons, no regulatory analysis under the RFA is required.

## VI. Paperwork Reduction Act

The MTOR contains various information collection requirements for which the Commission has obtained clearance under the Paperwork Reduction Act ("PRA"), 44 U.S.C. 3501 *et seq.* (see note 6). As discussed above, the Commission amends the Rule by reorganizing it. The amendments do not impose any additional "collection of information" requirements. Consequently, the amendments will not affect the PRA burden associated with the Rule's requirements.

## VII. 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 revising 16 CFR part 435 to read as follows:

### PART 435—MAIL OR TELEPHONE ORDER MERCHANDISE

- Sec.  
435.1 Definitions.  
435.2 Mail or telephone order sales.  
435.3 Limited applicability.

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

#### § 435.1 Definitions.

For purposes of this part:

<sup>10</sup> The Business Guide also says:

For backorders, the Rule provides only two [alternatives]: 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. *Id.*

<sup>10</sup> Moreover, creating an exemption based on the seller's designation of the product as "artisanal, custom, or infrequently produced" would invite evasion of the Rule.

(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.

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

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 this paragraph (a)(1)(ii).

(2) To provide any buyer with any revised shipping date, as provided in paragraph (b) of this section, unless, at the time any such revised shipping date is provided, the seller has a reasonable basis for making such representation regarding a definite revised shipping date.

(3) To inform any buyer that it is unable to make any representation regarding the length of any delay unless:

(i) The seller has a reasonable basis for so informing the buyer, and

(ii) The seller informs the buyer of the reason or reasons for the delay.

(4) In any action brought by the Federal Trade Commission, alleging a violation of this part, the failure of a respondent-seller to have records or other documentary proof establishing its use of systems and procedures which assure the shipment of merchandise in the ordinary course of business within any applicable time set forth in this part will create a rebuttable presumption that the seller lacked a reasonable basis for any expectation of shipment within said applicable time.

(b)(1) Where a seller is unable to ship merchandise within the applicable time set forth in paragraph (a)(1) of this section, to fail to offer to the buyer, clearly and conspicuously and without prior demand, an option either to consent to a delay in shipping or to cancel the buyer's order and receive a prompt refund. Said offer shall be made within a reasonable time after the seller first becomes aware of its inability to ship within the applicable time set forth in paragraph (a)(1) of this section, but in no event later than said applicable time.

(i) Any offer to the buyer of such an option shall fully inform the buyer regarding the buyer's right to cancel the order and to obtain a prompt refund and shall provide a definite revised shipping date, but where the seller lacks a reasonable basis for providing a definite revised shipping date the notice shall inform the buyer that the seller is unable to make any representation regarding the length of the delay.

(ii) Where the seller has provided a definite revised shipping date which is thirty (30) days or less later than the applicable time set forth in paragraph (a)(1) of this section, the offer of said option shall expressly inform the buyer that, unless the seller receives, prior to shipment and prior to the expiration of the definite revised shipping date, a response from the buyer rejecting the delay and cancelling the order, the buyer will be deemed to have consented to a delayed shipment on or before the definite revised shipping date.

(iii) Where the seller has provided a definite revised shipping date which is

more than thirty (30) days later than the applicable time set forth in paragraph (a)(1) of this section or where the seller is unable to provide a definite revised shipping date and therefore informs the buyer that it is unable to make any representation regarding the length of the delay, the offer of said option shall also expressly inform the buyer that the buyer's order will automatically be deemed to have been cancelled unless:

(A) The seller has shipped the merchandise within thirty (30) days of the applicable time set forth in paragraph (a)(1) of this section, and has received no cancellation prior to shipment; or

(B) The seller has received from the buyer within thirty (30) days of said applicable time, a response specifically consenting to said shipping delay. Where the seller informs the buyer that it is unable to make any representation regarding the length of the delay, the buyer shall be expressly informed that, should the buyer consent to an indefinite delay, the buyer will have a continuing right to cancel the buyer's order at any time after the applicable time set forth in paragraph (a)(1) of this section by so notifying the seller prior to actual shipment.

(iv) Nothing in this paragraph shall prohibit a seller who furnishes a definite revised shipping date pursuant to paragraph (b)(1)(i) of this section, from requesting, simultaneously with or at any time subsequent to the offer of an option pursuant to paragraph (b)(1) of this section, the buyer's express consent to a further unanticipated delay beyond the definite revised shipping date in the form of a response from the buyer specifically consenting to said further delay. Provided, however, that where the seller solicits consent to an unanticipated indefinite delay the solicitation shall expressly inform the buyer that, should the buyer so consent to an indefinite delay, the buyer shall have a continuing right to cancel the buyer's order at any time after the definite revised shipping date by so notifying the seller prior to actual shipment.

(2) Where a seller is unable to ship merchandise on or before the definite revised shipping date provided under paragraph (b)(1)(i) of this section and consented to by the buyer pursuant to paragraph (b)(1)(ii) or (iii) of this section, to fail to offer to the buyer, clearly and conspicuously and without prior demand, a renewed option either to consent to a further delay or to cancel the order and to receive a prompt refund. Said offer shall be made within a reasonable time after the seller first becomes aware of its inability to ship

before the said definite revised date, but in no event later than the expiration of the definite revised shipping date.

Provided, however, that where the seller previously has obtained the buyer's express consent to an unanticipated delay until a specific date beyond the definite revised shipping date, pursuant to paragraph (b)(1)(iv) of this section or to a further delay until a specific date beyond the definite revised shipping date pursuant to paragraph (b)(2) of this section, that date to which the buyer has expressly consented shall supersede the definite revised shipping date for purposes of paragraph (b)(2) of this section.

(i) Any offer to the buyer of said renewed option shall provide the buyer with a new definite revised shipping date, but where the seller lacks a reasonable basis for providing a new definite revised shipping date, the notice shall inform the buyer that the seller is unable to make any representation regarding the length of the further delay.

(ii) The offer of a renewed option shall expressly inform the buyer that, unless the seller receives, prior to the expiration of the old definite revised shipping date or any date superseding the old definite revised shipping date, notification from the buyer specifically consenting to the further delay, the buyer will be deemed to have rejected any further delay, and to have cancelled the order if the seller is in fact unable to ship prior to the expiration of the old definite revised shipping date or any date superseding the old definite revised shipping date. Provided, however, that where the seller offers the buyer the option to consent to an indefinite delay the offer shall expressly inform the buyer that, should the buyer so consent to an indefinite delay, the buyer shall have a continuing right to cancel the buyer's order at any time after the old definite revised shipping date or any date superseding the old definite revised shipping date.

(iii) Paragraph (b)(2) of this section shall not apply to any situation where a seller, pursuant to the provisions of paragraph (b)(1)(iv) of this section, has previously obtained consent from the buyer to an indefinite extension beyond the first revised shipping date.

(3) Wherever a buyer has the right to exercise any option under this part or to cancel an order by so notifying the seller prior to shipment, to fail to furnish the buyer with adequate means, at the seller's expense, to exercise such option or to notify the seller regarding cancellation.

(4) Nothing in paragraph (b) of this section shall prevent a seller, where it

is unable to make shipment within the time set forth in paragraph (a)(1) of this section or within a delay period consented to by the buyer, from deciding to consider the order cancelled and providing the buyer with notice of said decision within a reasonable time after it becomes aware of said inability to ship, together with a prompt refund.

(c) To fail to deem an order cancelled and to make a prompt refund to the buyer whenever:

(1) The seller receives, prior to the time of shipment, notification from the buyer cancelling the order pursuant to any option, renewed option or continuing option under this part;

(2) The seller has, pursuant to paragraph (b)(1)(iii) of this section, provided the buyer with a definite revised shipping date which is more than thirty (30) days later than the applicable time set forth in paragraph (a)(1) of this section or has notified the buyer that it is unable to make any representation regarding the length of the delay and the seller:

(i) Has not shipped the merchandise within thirty (30) days of the applicable time set forth in paragraph (a)(1) of this section, and

(ii) Has not received the buyer's express consent to said shipping delay within said thirty (30) days;

(3) The seller is unable to ship within the applicable time set forth in paragraph (b)(2) of this section, and has not received, within the said applicable time, the buyer's consent to any further delay;

(4) The seller has notified the buyer of its inability to make shipment and has indicated its decision not to ship the merchandise;

(5) The seller fails to offer the option prescribed in paragraph (b)(1) of this section and has not shipped the merchandise within the applicable time set forth in paragraph (a)(1) of this section.

(d) In any action brought by the Federal Trade Commission, alleging a violation of this part, the failure of a respondent-seller to have records or other documentary proof establishing its use of systems and procedures which assure compliance, in the ordinary course of business, with any requirement of paragraph (b) or (c) of this section will create a rebuttable presumption that the seller failed to comply with said requirement.

#### § 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.

By direction of the Commission.

**Donald S. Clark,**  
Secretary.

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## DEPARTMENT OF LABOR

### Employment and Training Administration

#### 20 CFR Part 655

RIN 1205-AB61

#### Wage Methodology for the Temporary Non-Agricultural Employment H-2B Program; Postponement of Effective Date; Impact on Prevailing Wage Determinations

**AGENCY:** Employment and Training Administration, Wage and Hour Division.

**ACTION:** Guidance.

**SUMMARY:** The Department of Labor (Department) recently postponed the effective date of the Wage Methodology for the Temporary Non-agricultural Employment H-2B Program Final Rule, January 19, 2011 (the Wage Rule), to November 30, 2011, due to pending legal challenges, pursuant to the Administrative Procedure Act. This document provides guidance to the employers who have received supplemental wage determinations based on the new prevailing wage methodology set forth in the Wage Rule, as to the prevailing wages that would apply before and after the new effective date of November 30, 2011.

**DATES:** This guidance is effective September 30, 2011.

**FOR FURTHER INFORMATION CONTACT:** For further information contact William L. Carlson, Ph.D., Administrator, Office of Foreign Labor Certification, ETA, U.S. Department of Labor, 200 Constitution Avenue, NW., Room C-4312, Washington, DC 20210; Telephone (202) 693-3010 (this is not a toll-free number). For further information on Wage and Hour, contact Mary Ziegler, Director, Division of Regulations, Legislation, and Interpretation, Wage and Hour Division, U.S. Department of Labor, 200 Constitution Avenue, NW., Room S-3510, Washington, DC 20210; Telephone (202) 693-0071 (this is not a toll-free number). Individuals with hearing or speech impairments may access the telephone number above via TTY by calling the toll-free Federal Information Relay Service at 1-800-877-8339.

**SUPPLEMENTARY INFORMATION:** The Department published the Wage Rule on January 19, 2011, 76 FR 3452. The Wage Rule revised the methodology by which we calculate the prevailing wages to be paid to H-2B workers and United States (U.S.) workers recruited in connection with a temporary labor certification

used in petitioning the Department of Homeland Security to employ a nonimmigrant worker in H-2B status. The Department originally set the effective date of the Wage Rule for January 1, 2012. However, due to a court ruling that invalidated the January 1, 2012 effective date of the Wage Rule,<sup>1</sup> we issued a Notice of Proposed Rulemaking (NPRM) on June 28, 2011, which proposed that the Wage Rule take effect 60 days from the date of publication of a final rule resulting from the NPRM. 76 FR 37686, June 28, 2011. After a period of public comment, we published a Final Rule on August 1, 2011, which set the new effective date for the Wage Rule of September 30, 2011 (the Effective Date Rule).

Both the Wage Rule and the Effective Date Rule recently were challenged in two separate lawsuits<sup>2</sup> seeking to bar their implementation. In consideration of the two pending challenges to the Wage Rule and its new effective date, and the possibility that the litigation will be transferred to another court,<sup>3</sup> the Department issued a final rule published in the **Federal Register** on September 28, 2011, postponing the effective date of the rule from September 30, 2011, until November 30, 2011, in accordance with the Administrative Procedure Act, 5 U.S.C. 705.

In anticipation of the September 30, 2011 effective date, the Office of Foreign Labor Certification issued supplemental wage determinations based on the new prevailing wage methodology set forth in the Wage Rule for approximately 3,500 previously certified H-2B applications. However, in light of our recent decision to postpone the effective date of the Wage Rule until November 30, 2011, any employer who has received a supplemental H-2B prevailing wage determination in anticipation of the September 30, 2011 effective date is not required to pay, and the Department's Wage and Hour Division will not enforce, the wage provided in that supplemental prevailing wage determination for any work performed beginning September 30, 2011 through November 29, 2011 by H-2B workers or U.S. workers recruited in connection with the H-2B

<sup>1</sup> *CATA v. Solis*, Dkt. No. 119, 2011 WL 2414555.

<sup>2</sup> See *Louisiana Forestry Association, Inc., et al. (LFA) v. Solis, et al.*, Civil Docket No. 11-1623 (WD LA, Alexandria Division); and *Bayou Lawn & Landscape Services, et al. (Bayou) v. Solis, et al.*, Civil Docket No. 11-445 (ND FL, Pensacola Division).

<sup>3</sup> On September 19, 2011, the plaintiffs in the *CATA* litigation moved to intervene in the *LFA* litigation, and also moved to transfer venue over the litigation to the Eastern District of Pennsylvania, the court in which the *CATA* case remains pending.