



[Billing code: 6750-01-S]

## FEDERAL TRADE COMMISSION

### Agency Information Collection Activities; Proposed Collection; Comment Request

**AGENCY:** Federal Trade Commission.

**ACTION:** Notice.

**SUMMARY:** The information collection requirements described below will be submitted to the Office of Management and Budget (“OMB”) for review, as required by the Paperwork Reduction Act (“PRA”). The FTC seeks public comments on its proposal to extend through February 28, 2016, the current OMB clearance for information collection requirements contained in its Mail or Telephone Order Merchandise Trade Regulation Rule (“MTOR” or “Rule”). That clearance expires on February 28, 2013.

**DATES:** Comments must be received by [insert date 60 days after date of publication in the FEDERAL REGISTER].

**ADDRESSES:** Interested parties may file a comment online or on paper, by following the instructions in the Request for Comments part of the SUPPLEMENTARY INFORMATION section below.

**FOR FURTHER INFORMATION CONTACT:** Requests for additional information should be addressed to Jock Chung, Attorney, Division of Enforcement, Bureau of Consumer Protection, Federal Trade Commission, 600 Pennsylvania Avenue, N.W., Washington, DC 20580, (202) 326-2984.

#### **SUPPLEMENTARY INFORMATION:**

*Proposed Information Collection Activities*

Under the Paperwork Reduction Act (“PRA”), 44 U.S.C. 3501-3520, federal agencies must get OMB approval for each collection of information they conduct, sponsor, or require. “Collection of information” means agency requests or requirements to submit reports, keep records, or provide information to a third party. 44 U.S.C. 3502(3); 5 CFR 1320.3(c). As required by section 3506(c)(2)(A) of the PRA, the Federal Trade Commission (“FTC”) is providing this opportunity for public comment before requesting that OMB extend the existing PRA clearance for the information collection requirements associated with the Commission's rules and regulations under the Mail or Telephone Order Merchandise Trade Regulation Rule (“MTOR”), 16 CFR Part 435 (OMB Control Number 3084-0106).

The FTC invites comments on: (1) whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility; (2) the accuracy of the agency's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used; (3) ways to enhance the quality, utility, and clarity of the information to be collected; and (4) ways to minimize the burden of the collection of information on those who are to respond. All comments must be received on or before [insert date 60 days after date of publication in the FEDERAL REGISTER].

The MTOR was promulgated in 1975 in response to consumer complaints that many merchants were failing to ship merchandise ordered by mail on time, failing to ship at all, or failing to provide prompt refunds for unshipped merchandise. A second

rulemaking proceeding in 1993 demonstrated that the delayed shipment and refund problems of the mail order industry were also being experienced by consumers who ordered merchandise over the telephone. Accordingly, the Commission amended the Rule, effective on March 1, 1994, to include merchandise ordered by telephone, including by telefax or by computer through the use of a modem (e.g., Internet sales), and the Rule was then renamed the “Mail or Telephone Order Merchandise Rule.”

Generally, the MTOR requires a merchant to: (1) have a reasonable basis for any express or implied shipment representation made in soliciting the sale (if no express time period is promised, the implied shipment representation is 30 days); (2) notify the consumer and obtain the consumer’s consent to any delay in shipment; and (3) make prompt and full refunds when the consumer exercises a cancellation option or the merchant is unable to meet the Rule’s other requirements.<sup>1</sup>

The notice provisions in the Rule require a merchant who is unable to ship within the promised shipment time or 30 days to notify the consumer of a revised date and his or her right to cancel the order and obtain a prompt refund. Delays beyond the revised shipment date also trigger a notification requirement to consumers. When the MTOR requires the merchant to make a refund and the consumer has paid by credit card, the Rule also requires the merchant to notify the consumer either that any charge to the consumer’s charge account will be reversed or that the merchant will take no action that

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<sup>1</sup> The MTOR does not impose a recordkeeping requirements *per se*. 16 CFR § 435.1(d) provides that, in an action for noncompliance, the absence of records that establish that a respondent-seller uses systems and procedures to assure compliance will create a rebuttable presumption that the seller was not compliant, but the MTOR does not require a compliant seller to maintain any records. Merchants customarily keep records regarding their systems and procedures in the ordinary course of business,

will result in a charge.

**Burden Statement:**

**Estimated total annual hours burden:** 1,764,390 hours

In its 2009-2010 PRA-related Federal Register Notices<sup>2</sup> and corresponding submission to OMB, FTC staff estimated that established companies each spend an average of 50 hours per year on compliance with the Rule, and that new industry entrants spend an average of 230 hours (an industry estimate) for compliance measures associated with start-up.<sup>3</sup> Thus, the total estimated hours burden was calculated by multiplying the estimated number of established companies x 50 hours, multiplying the estimated number of new entrants x 230 hours, and adding the two products.

No substantive provisions in the Rule have been amended or changed since staff's prior submission to OMB.<sup>4</sup> Thus, the Rule's disclosure requirements remain the same. Moreover, no public comments were received regarding the above-noted estimates; thus, staff will apply them to the current PRA burden analysis.

Since the prior submission to OMB, however, the number of businesses engaged in the sale of merchandise by mail or by telephone has changed. Data from the U.S.

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however; consequently, their retention of these documents does not constitute a "collection of information" under OMB's regulations that implement the PRA. *See* 5 CFR 1320.3(b)(2).

<sup>2</sup> 74 FR 53500 (Oct. 19, 2009); 75 FR 2142 (Jan. 14, 2010).

<sup>3</sup> Most of the estimated start-up time relates to the development and installation of computer systems geared to more efficiently handle customer orders.

<sup>4</sup> As part of the systematic review of all Commission rules, on September 30, 2011, the FTC published a Federal Register Notice concluding that the Rule continued to benefit consumers and would be retained. 76 FR 60715. For clarity, the Commission reorganized the Rule by alphabetizing the definitions at the beginning of the Rule. That amendment did not impose any additional "collection of information" requirements.

Census Bureau<sup>5</sup> indicates that between 2000 and 2008 the number of businesses subject to the MTOR grew from 11,800 to 21,900, or an average increase of 1,263 new businesses a year  $[(21,900 \text{ businesses in } 2008 - 11,800 \text{ businesses in } 2000) \div 8 \text{ years}]$ .<sup>6</sup> Assuming this growth rate continued in 2009 through 2012, and continues in 2013 through 2016, the average number of established businesses during the three-year period for which OMB clearance is sought for the Rule would be 29,478.<sup>7</sup>

Year:	Established Businesses	New Entrants
2013	28,215	1,263
2014	29,478	1,263
2015	30,741	1,263
Average:	29,478	1,263

In an average year during the three-year OMB clearance period, staff estimates that established businesses and new entrants will devote 1,858,000 hours, rounded to the nearest thousand, to comply with the MTOR  $[(29,478 \text{ established businesses} \times 50 \text{ hours}) + (1,263 \text{ new entrants} \times 230 \text{ hours}) = 1,764,390]$ .

<sup>5</sup> See Table 1048, "Retail Trade--Establishments, Employees, and Payroll," U.S. Census Bureau, "County Business Patterns," July 2009 ([www.census.gov/compendia/statab/2012/tables/12s1048.xls](http://www.census.gov/compendia/statab/2012/tables/12s1048.xls)).

<sup>6</sup> Conceptually, this might underestimate the number of new entrants in that it does not factor in the possibility that established businesses from an earlier year's comparison might have exited the market preceding the later year of measurement. Given the virtually unlimited diversity of retail establishments, it is very unlikely that there is a reliable external measure of such exit; nonetheless, as in the past, the Commission invites public comment that might better inform these estimates.

<sup>7</sup> As noted above, the existing OMB clearance for the Rule expires on January 31, 2013, and the FTC

The estimated PRA burden per merchant to comply with the MTOR is likely overstated. The mail-order industry has been subject to the basic provisions of the Rule since 1976 and the telephone-order industry since 1994. Thus, businesses have had several years (and some have had decades) to integrate compliance systems into their business procedures. Moreover, arguably much of the estimated time burden for disclosure-related compliance would be incurred even absent the Rule. Industry trade associations and individual witnesses have consistently taken the position that compliance with the MTOR is widely regarded by direct marketers as being good business practice. Providing consumers with notice about the status of their orders fosters consumer loyalty and encourages repeat purchases, which are important to direct marketers' success. Accordingly, the Rule's notification requirements would be followed in any event by most merchants to meet consumer expectations regarding timely shipment, notification of delay, and prompt and full refunds. Thus, it appears that much of the time and expense associated with Rule compliance may not constitute "burden" under the PRA.<sup>8</sup>

**Estimated labor costs:** \$31,830,000 (rounded to the nearest thousand)

FTC staff derived labor costs by applying appropriate hourly cost figures to the

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is seeking to extend the clearance through January 31, 2016.

<sup>8</sup> Conceivably, in the three years since the FTC's most recent clearance request to OMB for this Rule, many businesses have upgraded the information management systems needed to comply with the Rule and to track orders more effectively. These upgrades, however, were primarily prompted by the industry's need to deal with growing consumer demand for merchandise (resulting, in part, from increased public acceptance of making purchases over the telephone and, more recently, the Internet). Accordingly, most companies now provide updated order information of the kind required by the Rule in their ordinary course of business. Under the OMB regulation implementing the PRA, burden is defined to exclude any effort that would be expended regardless of any regulatory requirement. 5 CFR 1320.3(b)(2).

burden hours described above. According to the most recent data available from the Bureau of Labor and Statistics,<sup>9</sup> the mean hourly income for workers in sales and related occupations was \$18.04/hr. The bulk of the burden of complying with the MTOR is borne by clerical personnel along with assistance from sales personnel. Staff believes that the mean hourly income for workers in sales and related occupations is an appropriate measure of a direct marketer's average labor cost to comply with the Rule. Thus, the total annual labor cost to new and established businesses for MTOR compliance during the three-year period for which OMB approval is sought would be approximately \$31,830,000 (1,764,390 hours x \$18.04/hr.), rounded to the nearest thousand. Relative to direct industry sales, this total is negligible.<sup>10</sup>

**Estimated annual non-labor cost burden:** \$0 or minimal

The applicable requirements impose minimal start-up costs, as businesses subject to the Rule generally have or obtain necessary equipment for other business purposes, i.e., inventory and order management, and customer relations. For the same reason, staff anticipates printing and copying costs to be minimal, especially given that telephone order merchants have increasingly turned to electronic communications to notify consumers of delay and to provide cancellation options. Staff believes that the above requirements necessitate ongoing, regular training so that covered entities stay current

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<sup>9</sup> See Table 1, National employment and wage data from the Occupational Employment Statistics survey by occupation, May 2011, at <http://www.bls.gov/news.release/pdf/ocwage.pdf>.

<sup>10</sup> Considering that sales for "electronic shopping and mail-order houses" grew from \$80 billion in 1998 to \$235.0 billion in 2009 (according to Table 1055 in the 2012 Statistical Abstracts; found on 12s1055-1.xls available at [http://www.census.gov/compendia/statab/cats/wholesale\\_retail\\_trade/online\\_retail\\_sales.html](http://www.census.gov/compendia/statab/cats/wholesale_retail_trade/online_retail_sales.html)), staff estimates the annual mail or telephone sales to consumers in the three-year period for which OMB clearance is sought will average \$305 billion. Thus, the projected average labor cost for MTOR

and have a clear understanding of federal mandates, but that this would be a small portion of and subsumed within the ordinary training that employees receive apart from that associated with the information collected under the Rule.

*Request for Comments*

You can file a comment online or on paper. Write “Mail or Telephone Order Merchandise Trade Regulation Rule: FTC File No. R511929” on your comment. Your comment – including your name and your state – will be placed on the public record of this proceeding, including, to the extent practicable, on the public Commission Website, at <http://www.ftc.gov/os/publiccomments.shtm>. As a matter of discretion, the Commission tries to remove individuals’ home contact information from comments before placing them on the Commission Website.

Because your comment will be made public, you are solely responsible for making sure that your comment does not include any sensitive personal information, like 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 does not include any sensitive health information, like medical records or other individually identifiable health information. In addition, do not include any “[t]rade secret or any commercial or financial information which is . . . privileged or confidential,” as discussed 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, do not include competitively sensitive

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compliance by existing and new businesses for that period would amount to 0.01% of sales.

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). 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, the Commission encourages 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/MTORpra>, by following the instructions on the web-based form. If this Notice appears at <http://www.regulations.gov>, you also may file a comment through that website.

If you file your comment on paper, write “Mail or Telephone Order Merchandise Trade Regulation Rule: FTC File No. R511929” 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 J), 600 Pennsylvania Avenue, NW, Washington, DC 20580. If possible, submit your paper comment to the Commission by courier or overnight service.

Visit the Commission Website at <http://www.ftc.gov> to read this Notice. 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 [insert date 60 days after date of publication in the FEDERAL REGISTER]. 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>.

David C. Shonka,  
Acting General Counsel.

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