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FEDERAL TRADE COMMISSION

16 CFR Part 435

RIN 3084-AB07

Mail or Telephone Order Merchandise Rule

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

ACTION: Final rule.

SUMMARY: The Commission adopts final amendments to its Trade Regulation Rule previously entitled “Mail or Telephone Order Merchandise,” including revising its name to “Mail, Internet, or Telephone Order Merchandise” (the “Rule”). The final Rule is based upon the comments received in response to an Advance Notice of Proposed Rulemaking (“ANPR”), a Notice of Proposed Rulemaking (“NPRM”), a Staff Report, and other information. This document contains the text of the final Rule and the Rule’s Statement of Basis and Purpose (“SBP”), including a Regulatory Analysis.

DATES: The provisions of the final Rule will become effective on December 8, 2014.

ADDRESSES: This document is available on the Internet at the Commission’s website, www.ftc.gov. The complete record of this proceeding is also available at that website.

FOR FURTHER INFORMATION CONTACT: Jock Chung, (202) 326-2984, Attorney, Division of Enforcement, Bureau of Consumer Protection, Federal Trade Commission, Room CC-9528, 600 Pennsylvania Ave, NW, Washington, DC 20580.

SUPPLEMENTARY INFORMATION: The final amendments modify the Rule in four ways. First, they clarify that the Rule covers all Internet merchandise orders, regardless of the method consumers use to access the Internet. Second, they permit refunds and refund notices by any

means at least as fast and reliable as first class mail. Third, they clarify sellers' refund obligations for orders using payment methods not specifically enumerated in the Rule ("non-enumerated payments"). Finally, they require sellers to process any third party credit card refunds by seven working days after a buyer's right to a refund vests.

Statement of Basis and Purpose

I. Background

The Rule prohibits sellers from soliciting mail, Internet, or telephone order sales unless they have a reasonable basis to expect that they can ship the ordered merchandise within the time stated on the solicitation or, if no time is stated, within 30 days. The Rule 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 promulgated the Mail Order Merchandise Rule in 1975 to ensure sellers either shipped mail-ordered merchandise on time or offered cancellations and refunds for merchandise.¹ In 1993, the Commission amended the Rule to cover merchandise ordered by telephone (including merchandise ordered through the Internet using telephone Internet access), and renamed it the Mail or Telephone Order Merchandise Rule.²

¹ 40 FR 51582 (Nov. 5, 1975).

² 58 FR 49096 (Sept. 21, 1993).

On September 11, 2007, as part of its rule review process,³ the Commission published a request for public comment,⁴ which also served as an ANPR.⁵ It then published an NPRM in 2011.⁶ In April 2013, Commission staff issued a Staff Report to the Commission.⁷

A. ANPR

The ANPR requested public comment on the costs, benefits and continuing need for the Rule. More specifically, it requested comment on the costs and benefits of amending the Rule to: (1) explicitly cover all Internet merchandise orders, (2) permit refunds and refund notices by any means at least as fast and reliable as first class mail, and (3) specify requirements for making refunds by means other than cash, check, money order or credit. After reviewing the comments, the Commission concluded that the benefits of the Rule outweighed its costs. Consequently, it took two actions on September 30, 2011. First, it retained the Rule with minor technical amendments.⁸ Doing so provided the public with the immediate benefit of the technical amendments. Second, it issued an NPRM with proposals that addressed the three specific issues detailed above.⁹

³ 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.

⁴ 72 FR 51728 (Sept. 11, 2007).

⁵ 15 U.S.C. 57a(b)(2)(A).

⁶ 76 FR 60765 (Sept. 30, 2011).

⁷ See Bureau of Consumer Protection, Staff Report to the Federal Trade Commission and Proposed Revised Trade Regulation Rule (16 CFR Part 435) (Apr. 2013) ("Staff Report"). The Staff Report is available at <http://www.ftc.gov/os/2013/04/130429mtorstaffreport.pdf>. The Commission published a notice in the Federal Register announcing the availability of, and seeking comment on, the Staff Report. See 78 FR 25908 (May 3, 2013).

⁸ 76 FR 60715 (Sept. 30, 2011). The amendments alphabetized the Rule's definitions, and placed the definitions before the substantive provisions.

⁹ 76 FR 60765.

B. NPRM

The NPRM proposed four amendments. First, it proposed clarifying that the Rule covers all Internet merchandise orders by amending the Rule's name, coverage section, and the "order sales" definition.¹⁰ Second, it proposed allowing sellers the flexibility to use methods other than first class mail to deliver refunds and refund notices.¹¹ Third, it proposed clarifying sellers' obligations for orders using payment methods other than the four specified in the current Rule: cash, check, money order, or credit.¹² Finally, it proposed amending the Rule to require third party credit sale refunds within the same seven-working-day period as it proposed for non-enumerated payment refunds.¹³

In response, the Commission received four comments. Three supported the proposed amendments. One advocated eliminating the Rule, but did not address any of the proposed amendments.

C. Staff Report

Pursuant to the Rule amendment process announced in the NPRM, the Commission's Bureau of Consumer Protection issued the Staff Report in April 2013.¹⁴ The Staff Report explained the history of the Rule amendment proceeding, summarized the issues raised during the various notice and comment periods, and addressed comments received in response to the NPRM. It recommended that the Commission amend the Rule as proposed in the NPRM for the reasons set forth in the NPRM. Staff received no comments in response.

¹⁰ *Id.* at 60767-60768.

¹¹ *Id.* at 60768.

¹² *Id.* at 60768-60770.

¹³ *Id.* at 60770.

¹⁴ See Staff Report, available at <http://www.ftc.gov/os/2013/04/130429mtorstaffreport.pdf>. See n.7.

II. Analysis of the Amendments

To amend the Rule, the Commission must address: (1) the prevalence of the acts or practices addressed by the rule; (2) the manner and context in which the acts or practices are deceptive or unfair; (3) the economic effect of the rule, taking into account the effect on small businesses and consumers; and (4) the effect of the rule on state and local laws.¹⁵

A. Prevalence of Acts or Practices Addressed by the Rule

In the NPRM, the Commission cited evidence from commenters, consumer complaints, and law enforcement actions of shipment and refund failures for Internet orders of merchandise.¹⁶ This evidence demonstrates that deceptive and unfair practices remain prevalent in merchandise orders via the Internet.

B. Manner and Context in Which the Acts or Practices Are Deceptive or Unfair

A representation, omission, or practice is deceptive if it is material and likely to mislead a reasonable consumer.¹⁷ The Commission found when it amended the Rule that reasonable consumers expect that merchandise ordered by mail or telephone, including merchandise ordered over the Internet using a modem, will be shipped in the time expressly represented or, if no time is specified, within 30 days.¹⁸ The Commission further found that shipment time is important to consumers.¹⁹ Consequently, the Commission determined that shipment time claims imply that the seller has a reasonable basis for expecting that it can ship within that time. Such claims are

¹⁵ Rules of Practice, 16 CFR 1.14(a)(1)(i)-(iv). In addition, in accordance with 16 CFR 1.14(a)(1)(v), the regulatory analysis is provided at Section VI of this SBP.

¹⁶ 76 FR at 60767.

¹⁷ *Cliffdale Associates, Inc.*, 103 F.T.C. 110, 174 (1984).

¹⁸ 58 FR at 49105.

¹⁹ *Id.* at 49106.

therefore deceptive if the seller lacks a reasonable basis for the claims.²⁰

An act or practice is unfair if it causes substantial injury that is not outweighed by offsetting consumer or competitive benefits, and that consumers could not reasonably have avoided. The Commission determined, in promulgating and amending the Rule, that where a seller fails to notify a buyer of shipment delays, that seller unilaterally changes the terms of the contract.²¹ The Commission further found that unilaterally changing the contract causes substantial injury to consumers, who are unable to cancel their orders and purchase the merchandise more quickly elsewhere.²² Moreover, consumers are unable to reasonably avoid this injury, and the harm is not outweighed by any corresponding benefits to consumers or merchants.²³ Consequently, the Commission found that failure to offer refunds is unfair.²⁴

C. The Economic Effect of the Rule

During the Rule amendment proceeding, the Commission solicited comment on the economic impact of the Rule, as well as the costs and benefits of each proposed amendment. The record demonstrates that the final Rule's requirements will continue to protect consumers from unfair or deceptive shipment or refund claims, clarify the Rule's coverage and refund requirements for non-enumerated payments, and minimize sellers' costs, including costs for small businesses, by permitting flexibility in the means of transmission and form for refunds.

D. The Effect of the Rule on State and Local Laws

Section 435.3(b) of the final Rule continues to provide that the Commission does not intend to preempt action by state or local governments or supersede any provisions of any state or

²⁰ *Id.* at 49105-06.

²¹ *Id.* at 49106.

²² *Id.*

²³ *Id.*

²⁴ *Id.*

local laws, except to the extent that they conflict with the Rule. A law does not conflict with the Rule if it affords buyers equal or greater protection.

III. The Purposes and Descriptions of the Amendments

A. Clarify the Rule's Coverage

The amendments clarify that the Rule covers all Internet merchandise orders, regardless of the method consumers use to access the Internet. When the Commission amended the Rule in 1993 to cover Internet merchandise orders made through the telephone, it intended to cover all orders placed over the Internet,²⁵ which at that time required a telephone line to connect. Since that time, new methods of Internet access, such as cable access, have taken over the market. This leaves an ambiguity about the Rule's Internet coverage. To rectify this problem, the amendments expressly cover all Internet access, including orders placed over the Internet using shopping applications (known as "apps").

The final Rule does not cover face-to-face transactions in which a seller's representative merely receives product or inventory information through the Internet; in such instances, buyers do not order merchandise via the Internet.²⁶

The record indicates that explicitly covering all Internet order sales meets buyers' expectations that their legal protections are independent of their means of Internet access. Moreover, there is no reason to believe that buyers who access the Internet using a non-telephonic connection need less protection than those that do so via telephonic connection.²⁷ Amending the Rule in this manner also is consistent with the Commission's longstanding intent that the Rule

²⁵ 72 FR at 51729.

²⁶ It does, however, cover merchandise orders placed via the Internet, even if the buyer is in the seller's store at the time the buyer places the order. For example, the Rule covers a purchase where a buyer orders merchandise via the Internet using a smartphone while in the seller's store.

²⁷ 76 FR at 60767-60768.

address all Internet merchandise orders.²⁸ Furthermore, the amendment will not impose new costs on sellers, who cannot distinguish between Internet access methods in fulfilling customer orders and who already comply with the Rule for all Internet orders.²⁹

B. Timing and Method of Refunds

The Rule currently covers all payment methods, but only sets explicit requirements when buyers pay by cash, check, money order, or credit. Specifically, in these circumstances the Rule requires sellers to provide refunds within certain times, using certain methods, depending on how consumers originally paid. The amendments address the timing of refunds for third party credit transactions, the means of delivering refunds, and the timing and method for non-enumerated payment refunds.

First, the amendments alter the time within which sellers must provide refunds for third party credit transactions (*e.g.*, Visa or MasterCard) from one billing cycle to 7 working days. This change should not place any additional burden on sellers because they already must comply with Regulation Z, which has a 7 working day refund period.³⁰ The period for first party cards (*e.g.*, a retailer that itself issues the credit card, rather than a separate entity, such as a bank or finance company, that issues the credit card for the retailer)³¹ remains one billing cycle. The record provides no support for a policy change and Reg. Z does not set a specific time period for

²⁸ *Id.* See also 72 FR at 51729.

²⁹ *Id.* at 60768.

³⁰ See 12 CFR 1026.12(e). In this situation, the credit card issuer then has 3 working days after receipt of the refund to credit the account.

³¹ The credit agreement usually reveals who in fact is the card issuer.

these transactions.³²

Second, the amendments allow increased flexibility by permitting refund deliveries by any means that is at least as fast and reliable as first class mail for all payment methods. This change should provide sellers with the authority to deliver refunds by cheaper and more convenient means, if available, and thus provide buyers with quicker refunds.

Third, for non-enumerated payment methods, the amendments address both the means and timing of refunds. The amendments provide alternative methods for making refunds when consumers pay by non-enumerated means: (1) sellers can always use cash, checks or money orders; or (2) they can use the same method as that used by the buyer. Additionally, the amendments make clear that sellers must provide refunds within 7 working days when a buyer uses a non-enumerated payment method. These changes harmonize the rules for refunding enumerated and non-enumerated payments, thus simplifying compliance.

IV. Section-by-Section Analysis of Amendments to Part 435

A. Title of Part 435

The amendments insert the term “Internet” into the Rule’s title to clarify that it covers all sales in which the buyer has ordered merchandise via the Internet.

B. Section 435.1: Definitions

The final Rule begins with a list of defined terms in alphabetical order. The final Rule contains amendments to four of those definitions.

³² Reg Z requires that creditors (which includes sellers that are creditors, among others) must refund credit balances following specific timing requirements, in certain circumstances. This includes when a credit balance is on the account and a consumer makes a written request for a refund. 12 CFR 1026.11(a)(2). In the circumstances described, creditors must comply with Reg Z’s stricter timing requirements.

1. Section 435.1(a): Mail, Internet, or telephone order sales

Section 435.1(a), previously the definition for “Mail or telephone order sales,” is amended to become the definition for “Mail, Internet, or telephone order sales.” The term “via the Internet” is inserted to clarify that the final Rule covers all sales in which the buyer has ordered merchandise via the Internet.

2. Section 435.1(b): Prompt refund

Section 435.1(b) sets time periods and specifies transmission methods for making refunds. Section 435.1(b)(1) is amended by:

- Inserting a reference to Section 435.1(d)(2)(ii), which sets refund requirements for third party credit sales, *i.e.*, credit sales where a third party is the creditor. This reference requires sellers to send refunds for third party credit sales within seven working days of a buyer’s right to a refund vesting. Setting the same prompt refund requirements for third party credit sales and non-enumerated payment sales limits the need for sellers to distinguish between different types of card payments.
- Inserting a reference to new Section 435.1(d)(3), which sets refund requirements for non-enumerated payments. This reference requires sellers to send refunds for non-enumerated payments within 7 working days of a buyer’s right to a refund vesting, the same time period as for third party credit sales.
- Inserting “any means at least as fast and reliable as” before “first class mail” to permit sellers the flexibility to make refunds by alternate means.
- Inserting the following text to set the time period for a refund and permit a seller the flexibility to make refunds by alternate means where it has discovered that it cannot provide a refund by the same method as payment was tendered:

“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.”

Section 435.1(b)(2) sets time periods and specifies transmission methods for refunds for credit payments where the seller is the creditor. It is amended by inserting “any means at least as fast and reliable as” before “first class mail” to permit sellers the flexibility to make refunds by alternate means.

The final Rule deletes “to the buyer” from Sections 435.1(b)(1) and (2) and moves this text to the definition for Refunds, Section 435.1(d). This amendment consolidates the Rule’s specifications for refund recipients in the definition for Refunds, Section 435.1(d).

3. Section 435.1(c): Receipt of a properly completed order

Section 435.1(c) 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. It is amended by:

- Inserting “or other payment methods” to the list of payment methods. This amendment sets the starting point for calculating requirements for covered merchandise orders that use non-enumerated payments.
- Substituting “a payment by means other than cash or credit as” in place of “the check or money order” in Sections 435.1(c) and 435.1(c)(1). This amendment expands the previous requirement for sellers that receive notice of dishonored checks or money orders to include sellers that receive notice of dishonored

non-enumerated payments.

4. Section 435.1(d): Refunds

Section 435.1(d) prescribes payment methods for refunds. As amended, it also prescribes the recipients for refunds.

Section 435.1(d)(1) specifies refund requirements for cash, check, or money order payments. It is amended by inserting “sent to the buyer.” This moves the requirement that sellers send refunds for this type of payment to the buyer from Section 435.1(b)(1).

Section 435.1(d)(2) specifies refund requirements for credit sales. It is amended by:

- Inserting “sent to the buyer” into Section 435.1(d)(2)(i) to specify the recipient for refunds where the seller is a creditor. This moves the requirement that sellers send refunds for credit payments where the seller is a creditor to buyers from Section 435.1(b)(2).
- In Section 435.1(d)(2)(ii), deleting “a copy of” and inserting “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.” This amendment now makes explicit the previously implicit requirement that sellers must send a credit memorandum or the like to the third party creditor.³³ It also moves the requirement that sellers send refunds to buyers for credit payments where a third party is the creditor from Section 435.1(b)(2).
- In Section 435.1(d)(2)(iii), adding “sent to the buyer.” This moves the requirement

³³ 76 FR at 60770 n. 35. The Rule previously required the seller to send the buyer “a copy of an appropriate credit memorandum or the like to the third party creditor,” which implicitly required the seller to send an original credit memorandum to the third party creditor.

that sellers send refunds to the buyer for credit sales where partial payment is made by cash, check, or money order from Section 435.1(b)(1).

Section 435.1(d)(3) is a new section that specifies refund requirements for non-enumerated payment sales. It permits sellers to use the same payment method as the buyer to refund non-enumerated payments when that is the simplest or cheapest means available. In addition, where appropriate, sellers can make refunds by cash, check, or money order. This provides 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).

Section 435.1(d)(3)(iii) specifies that where a seller has not yet accessed a buyer's funds, a seller can simply notify the buyer that it has cancelled the order.

C. Section 435.2 The Rule

The title and preamble to Section 435.2 and preamble to Section 435.2(a)(1) are amended by inserting "Internet" and "via the Internet" to clarify that the Rule covers all Internet merchandise orders.

V. PAPERWORK REDUCTION ACT

The Rule 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 Rule on April 15, 2013, effective through April 30, 2016.

As discussed above, the Commission is making a limited number of amendments designed to clarify the Rule and provide sellers with methods for satisfying the Rule's refund requirements.

As described above, to the extent that the amendments expand the Rule's coverage, they do so in a way that will not result in significantly higher costs because sellers generally have already aligned their practices with the amendments.³⁴

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

VI. REGULATORY ANALYSIS AND REGULATORY FLEXIBILITY ACT REQUIREMENTS

Under Section 22 of the FTC Act, 15 U.S.C. 57b-3, 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 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 determined that the final 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 record indicates that sellers already treat Internet orders in the same manner as mail or telephone orders and that they do not charge buyers until the time of shipment, so the amendments generally will not require sellers to alter their behavior and would not impose additional costs on most sellers. As noted in the Paperwork Reduction Act discussion above, the Commission estimates each business affected by the final Rule will likely incur only minimal compliance costs, if any.

³⁴ 76 FR 60772.

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 amendments on small entities. The purpose of a regulatory flexibility analysis is to ensure that an agency consider the impacts on small entities and examine 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 amendments will not have a significant economic impact upon small entities, although it may affect a substantial number of small businesses. Specifically, the amendments are limited and designed to clarify the Rule and define for sellers how to satisfy the Rule’s refund requirement. In the Commission’s view, the amendments will 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 amendments expand the Rule’s coverage, they do so in a way that will not result in significantly higher costs because sellers generally have already aligned their practices with the amendments in the final Rule. Specifically, expanding the Rule to clarify its application to all Internet merchandise orders will not result in significantly higher costs as the record indicates that sellers currently treat all Internet orders as being subject to the Rule. 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. For the same reason, requiring refunds for third party credit sales within 7 working days should not have a significant impact on small entities. Therefore, based on available information, the Commission believes

that the final Rule will not have a significant economic impact on a substantial number of small businesses, and this document serves as notice to the Small Business Administration of the agency's certification of no significant impact.

Although the Commission certifies under the RFA that the amendments will not have a significant impact on a substantial number of small entities, the Commission has determined, nonetheless, that it is appropriate to publish a Final Regulatory Flexibility Analysis in order to address the impact of the final Rule on small entities. Therefore, the Commission has prepared the following analysis:

A. Need for and Objectives of the Amendments

Based upon the record, including public comments, the Commission is amending the Rule to respond to the development of new technologies and changed commercial practices.

The objective of the amendments 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 7 working days of a buyer's right to a refund vesting. The legal basis for the amendments is Section 18 of the FTC Act, 15 U.S.C. 57a, which authorizes the Commission to promulgate, modify, and repeal trade regulation rules that define with specificity acts or practices in or affecting commerce that are unfair or deceptive within the meaning of Section 5(a)(1) of the FTC Act, 15 U.S.C. 45(a)(1).

B. Significant Issues Raised in Public Comments

None of the comments disputed the Initial Regulatory Flexibility Analysis in the NPRM. The Small Business Administration did not submit comments.

C. Small Entities to Which the Amendments 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 amendments will not have a significant impact on small businesses because, according to the record, sellers already comply in many respects with the requirements of the amendments.

D. Projected Reporting, Recordkeeping, and Other Compliance Requirements, including Classes of Covered Small Entities and Professional Skills needed to Comply

The Rule currently does not have any reporting or recordkeeping requirements. The Commission does not anticipate the final Rule to have any additional reporting or record keeping requirements. As explained earlier in this document, the amendments clarify that the Rule covers all Internet merchandise sales regardless of how buyers access the Internet, allows sellers to provide refunds and refund notices by means at least as fast and reliable as first class mail, and clarifies sellers' obligations under the Rule for sales made using non-enumerated payment methods. The small entities potentially covered by these amendments include all such entities subject to the Rule. The professional skills necessary for compliance with the amendments include clerical personnel.

E. Significant Alternatives to the Final Rule

The Commission has not proposed any specific small entity exemption or other significant alternatives, as the 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 previous 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 Rule. Furthermore, the compliance alternatives incorporated into the Rule benefit all covered entities.

List of Subjects in 16 CFR Part 435

Internet order merchandise, Mail order merchandise, Telephone order merchandise, Trade practices.

For the reasons set forth in the preamble, the Federal Trade Commission revises 16 CFR part 435 to read as follows:

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

Sec.

435.1 Definitions.

435.2 Mail, Internet, or telephone order sales.

435.3 Limited applicability.

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

§ 435.1 Definitions.

For purposes of this part:

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

(b) *Prompt refund* shall mean:

(1) Where a refund is made pursuant to paragraph (d)(1), (d)(2)(ii), (d)(2)(iii), or (d)(3) of this section, a refund sent 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 acknowledging the cancellation of the order and representing that it has not taken any action regarding the order which will result in a charge to the buyer's account with the third party;

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

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

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

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

buyer; or

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

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

(f) *Telephone* refers to any direct or indirect use of the telephone to order merchandise, regardless of whether the telephone is activated by, or the language used is that of human beings, machines, or both.

(g) The *time of solicitation* of an order shall mean that time when the seller has:

(1) Mailed or otherwise disseminated the solicitation to a prospective purchaser;

(2) Made arrangements for an advertisement containing the solicitation to appear in a newspaper, magazine or the like or on radio or television which cannot be changed or cancelled without incurring substantial expense; or

(3) Made arrangements for the printing of a catalog, brochure or the like which cannot be changed without incurring substantial expense, in which the solicitation in question forms an insubstantial part.

§ 435.2 Mail, Internet, 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:

(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 Prenotification Negative Option Plans," 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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