



BILLING CODE: 6750-01-S

FEDERAL TRADE COMMISSION

Agency Information Collection Activities; Proposed Collection; Comment Request

AGENCY: Federal Trade Commission (FTC or Commission).

ACTION: Notice.

SUMMARY: The FTC plans to ask the Office of Management and Budget (“OMB”) to extend for an additional three years the current Paperwork Reduction Act (“PRA”) clearance for information collection requirements contained in the Mail, Internet, or Telephone Order Merchandise Rule (MITOR). That clearance expires on May 31, 2019.

DATES: Comments must be received on or before **[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. Write “Paperwork Reduction Act: FTC File No. P072108” on your comment, and file your comment online at <https://www.regulations.gov> by following the instructions on the web-based form. If you prefer to file your comment on paper, mail your comment to the following address: Federal Trade Commission, Office of the Secretary, 600 Pennsylvania Avenue, NW, Suite CC-5610 (Annex J), Washington, DC 20580, or deliver your comment to the

following address: Federal Trade Commission, Office of the Secretary, Constitution Center, 400 7th Street, SW, 5th Floor, Suite 5610 (Annex J), Washington, DC 20024.

FOR FURTHER INFORMATION CONTACT: Jock Chung, 202-326-2984, Attorney, Enforcement Division, Bureau of Consumer Protection, 600 Pennsylvania Avenue, NW, Mail Drop CC-9528, Washington, DC 20580.

SUPPLEMENTARY INFORMATION:

Originally known as the Mail Order Merchandise Rule, the MITOR, 16 CFR Part 435 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. 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 renamed it the “Mail or Telephone Order Merchandise Rule.” In 2014, the Commission amended the Rule, effective December 8, 2014, to clarify that the Rule covers all Internet merchandise orders and permits flexibility in making refunds and refund notices, including refund obligations for non-enumerated payments. 79 FR 55615 (Sept. 17, 2014).

Generally, the MITOR 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.¹

Under the PRA, 44 U.S.C. 3501-3521, Federal agencies must get OMB approval for each collection of information they conduct or sponsor. “Collection of information” includes 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). The FTC is seeking renewed clearance for the information collection requirements associated with the Commission's rules and regulations under the MITOR (OMB Control Number 3084-0106).

Burden Estimates

Estimated total annual hours burden: 2,692,350 hours

In its 2016 PRA-related Federal Register Notices² 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.³ 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

¹ The MITOR does not impose a recordkeeping requirement *per se*. Title 16 CFR § 435.1(d) provides, however, 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. Merchants customarily keep records regarding their systems and procedures in the ordinary course of business, but 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).

² 81 FR 2860 (Jan. 19, 2016); 81 FR 21549 (Apr. 12, 2016).

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

adding the two products.

No substantive provisions in the Rule have been amended or changed since staff's 2016 submission to OMB. Thus, the Rule's disclosure requirements remain the same. Moreover, the Commission received no public comments 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 subject to the MITOR has increased. The most currently available data from the U.S. Census Bureau indicates that, between 2005 and 2016, the number of businesses subject to the MITOR grew from 15,924 to 37,206, or an average increase of 1,935 new businesses a year $[(37,206 \text{ businesses in 2016} - 15,924 \text{ businesses in 2005}) \div 11 \text{ years}]$.⁴ Assuming this growth rate continues in 2019 through 2022, the average number of established businesses during the three-year period for which OMB clearance is sought for the Rule would be 44,946:⁵

Year:	Established Businesses	New Entrants
2019-20	43,011	1,935

⁴ Conceptually, this might understate the number of new entrants. Given the virtually unlimited diversity of retail establishments, it is very unlikely that there is a reliable external measure; nonetheless, as in the past, the Commission invites public comment that might better inform these estimates. For example, many online marketplace sellers that use Amazon.com Inc's marketplace to sell to customers have agreements which provide that Amazon handles packaging and shipping the products to customers. Whether Amazon.com is also the entity responsible for sending customers delay notices when necessary could affect which entity is subject to MITOR disclosure requirements, Amazon or the individual marketplace seller.

⁵ As noted above, the existing OMB clearance for the Rule expires on May 31, 2019, and the FTC is seeking to extend the clearance for three years.

2020-21	44,946	1,935
2021-22	46,881	1,935
Average:	44,946	1,935

In an average year during the three-year OMB clearance period, staff estimates that established businesses and new entrants will devote 2,692,350 hours to comply with the MITOR [(44,946 established businesses x 50 hours) + (1,935 new entrants x 230 hours) = 2,692,350].

The estimated PRA burden per merchant to comply with the MITOR is likely overstated because much of the estimated time burden for disclosure-related compliance would arguably be incurred even absent the Rule. Over the years, industry trade associations and individual witnesses have consistently taken the position that providing consumers with notice about the status of their orders fosters consumer loyalty and encourages repeat purchases, which are important to marketers' success. In recent years, the demands of the Internet's online marketplace and its leading retailers such as Amazon.com, Walmart.com, and Ebay.com have driven many businesses to upgrade the information management systems to track and ship orders more effectively.⁶ These upgrades were primarily prompted by the industry's need to deal with growing consumer demand for merchandise that is timely shipped. Accordingly, most companies now provide updated order information of the kind required by the Rule in their

⁶ Brian Baskin, "Amazon's Free Shipping Pushes Small Retailers, Delivery Firms to Compete," The Wall Street Journal, Apr. 8, 2017, *available at* <https://www.wsj.com/articles/amazons-free-shipping-pushes-small-retailers-delivery-firms-to-compete-1491649203>.

ordinary course of business to meet consumer expectations regarding timely shipment, notification of delay, and prompt and full refunds.⁷

Estimated labor costs: \$63,862,542

FTC staff derived labor costs by applying appropriate hourly cost figures to the burden hours described above. According to the most recent data available from the Bureau of Labor and Statistics,⁸ the mean hourly income for workers in sales and related occupations was \$23.72/hour. The bulk of the burden of complying with the MITOR 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 MITOR compliance during the three-year period for which OMB approval is sought would be approximately \$63,862,542 (2,692,350 hours x \$23.72/hr.). Relative to direct industry sales, this total is negligible.⁹

⁷ 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).

⁸ See Table 1, National employment and wage data from the Occupational Employment Statistics survey by occupation, May 2017, at <https://www.bls.gov/news.release/ocwage.t01.htm>.

⁹ Considering that sales for "electronic shopping and mail order houses" grew from \$295 billion in 2011 to \$434 billion in 2015 (according to "Estimated Annual U.S. Retail Trade Sales – Total and E-commerce: 1998-2015," available at <https://www.census.gov/data/tables/2015/econ/arts/annual-report.html>, staff estimates the annual mail, Internet, or telephone sales to consumers in the three-year period for which OMB clearance is sought will average \$607 billion. Thus, the projected average labor cost for MITOR compliance by existing and new businesses for that period would amount to 0.01% of sales.

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 mail, Internet, and 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 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

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.

You can file a comment online or on paper. For the FTC to consider your comment, we must receive it on or before **[INSERT DATE 60 DAYS AFTER DATE OF PUBLICATION]**

IN THE *FEDERAL REGISTER*]. Write “Paperwork Reduction Act: FTC File No. P072108” on your comment. Postal mail addressed to the Commission is subject to delay due to heightened security screening. As a result, we encourage you to submit your comments online, or to send them to the Commission by courier or overnight service. To make sure that the Commission considers your online comment, you must file it through the <https://www.regulations.gov> website by following the instructions on the web-based form. Your comment -- including your name and your state -- will be placed on the public record of this proceeding, including, including the <https://www.regulations.gov> website. As a matter of discretion, the Commission tries to remove individuals’ home contact information from comments before placing them on www.regulations.gov.

If you file your comment on paper, write “Paperwork Reduction Act: FTC File No. P072108” on your comment and on the envelope, and mail your comment to the following address: Federal Trade Commission, Office of the Secretary, 600 Pennsylvania Avenue, NW, Suite CC-5610 (Annex J), Washington, DC 20580, or deliver your comment to the following address: Federal Trade Commission, Office of the Secretary, Constitution Center, 400 7th Street SW, 5th Floor, Suite 5610 (Annex J), Washington, DC 20024. If possible, submit your paper comment to the Commission by courier or overnight service.

Because your comment will be placed on the publicly accessible FTC Website at www.regulations.gov, you are solely responsible for making sure that your comment does not include any sensitive or confidential information. In particular, your comment should not include any sensitive personal information, such as your or anyone else’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, such as medical records or other individually identifiable health information. In addition, your comment should not include any "trade secret or any commercial or financial information which . . . is privileged or confidential" – as provided by 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) – including in particular competitively sensitive information such as costs, sales statistics, inventories, formulas, patterns, devices, manufacturing processes, or customer names.

Comments containing material for which confidential treatment is requested must be filed in paper form, must be clearly labeled "Confidential," and must comply with FTC Rule 4.9(c). In particular, the written request for confidential treatment that accompanies the comment must include the factual and legal basis for the request, and must identify the specific portions of the comment to be withheld from the public record. See FTC Rule 4.9(c). Your comment will be kept confidential only if the General Counsel grants your request in accordance with the law and the public interest. Once your comment has been posted publicly at www.regulations.gov, we cannot redact or remove your comment unless you submit a confidentiality request that meets the requirements for such treatment under FTC Rule 4.9(c), and the General Counsel grants that request.

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 <https://www.ftc.gov/site-information/privacy-policy>.

Heather Hipsley,

Deputy General Counsel.

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