

receives, before placing those comments on the FTC Web site.

The Rule 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 Rule took effect on February 2, 1976. 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. 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; (2) ship within the time period promised and, if no time period is promised, within 30 days; (3) notify the consumer and obtain the consumer's consent to any delay in shipment; and (4) make prompt and full refunds when the consumer exercises a cancellation option or the merchant is unable to meet the Rule's other requirements.

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 Rule 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 will result in a charge.

Burden statement:

Estimated total annual hours burden: 3,094,000 hours (rounded up to the nearest thousand).

In its 2000 PRA notice and submission to OMB regarding the Rule, FTC staff estimated that 45,919 established companies each spend an average of 50 hours per year on compliance with the Rule, and that approximately 1,985 new industry entrants spend an average of 230 hours (an industry estimate) for compliance

measures associated with start-up.² 65 FR 77031 (December 8, 2000). Thus, the total estimated hours burden was 2,753,000 hours, rounded up to the nearest thousand [(45,919 × 50 hours) + (1,985 × 230 hours)].

No provisions in the Rule have been amended or changed since staff's prior submission to OMB. Thus, the Rule's disclosure and notification requirements remain the same. Since then, however, the number of businesses engaged in the sale of merchandise by mail or by telephone has increased. Based on the U.S. Department of Commerce 2002 Statistical Abstract,³ approximately 53,600 establishments are now subject to the Rule. The staff attributes much of this growth to brick-and-mortar retailers expanding into electronic shopping, and the continued entry of "dot.com" merchants into the retail industry.

Conversely, based on the 2002 Statistical Abstract data, staff is reducing its estimate of new businesses per year from 1,985 to 1,800. Thus, the current total of affected entities is approximately 55,400 (established and new businesses).

Accordingly, staff estimates total industry hours to comply with the MTOR is 3,094,000 hours [(53,600 × 50 hours) + (1,800 × 230 hours)].

This is a conservative estimate. 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. 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. Providing consumers with notice about the status of their orders fosters consumer loyalty and encourages repeat purchases, which are important to direct marketers' success. Thus, it appears that much of the time and expense associated with Rule compliance may not constitute "burden" under the PRA⁴ although the above estimates account for it as such.

² Most of the estimated start-up time relates to the development and installation of computer systems geared to more efficiently handle customer orders.

³ Statistical Abstract of the United States, 122nd edition, 2002, U.S. Department of Commerce, Economics and Statistics Administration, Table 1000, "Retail Trade—Establishments, Employees and Payroll: 1999 and 2000." This is the most recent edition currently available.

⁴ Under the OMB regulation implementing the PRA, burden is defined to exclude any effort that

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. Since staff's preceding PRA submission to OMB for the Rule, many businesses have upgraded the information management systems they need, in part, to comply with the Rule, and to track orders more effectively. These upgrades, however, were needed 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 maintain records and provide updated order information of the kind required by the Rule in their ordinary course of business. Nevertheless, staff continues to conservatively assume that the time devoted to compliance with the Rule by existing and new companies remains unchanged from its preceding estimate.

Estimated labor costs: \$51,825,000, rounded to the nearest thousand.

Labor costs are derived by applying appropriate hourly cost figures to the burden hours described above. According to the 2002 Statistical Abstract, average payroll for "electronic shipping and mail order houses," "direct selling establishments," and "other direct selling establishments" rose from \$14.41 per hour in 1999 to \$15.19 per hour in 2000, an increase of \$0.78 per hour. Assuming average payroll continued to increase \$0.78 per hour per year, average payroll in 2002 would have reached \$16.75 per hour. Because the bulk of the burden of complying with the MTOR is borne by clerical personnel, staff believes that the average hourly payroll figure for electronic shipping and mail order houses and direct selling establishments 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 in 2002 for MTOR compliance is approximately \$51,825,000 (3,094,000 hours × \$16.75/hr.). Relative to direct industry sales, this total is negligible.⁵

would be expended regardless of any regulatory requirement. 5 CFR 1320.3(b)(2).

⁵ Projecting sales for "electronic shipping and mail-order houses," "direct selling establishments," and "other direct selling establishments" (according to the 2002 Statistical Abstract) to all merchants subject to the MTOR, staff estimates that total direct sales to consumers in 2002 to have been \$124.88 billion. Thus, the labor cost for compliance by