Section 5 of the FTC Act. Therefore, rescission is appropriate.

III. The Commission's Future Enforcement Policy

The rescission of the Guides does not leave the industry without guidance as to how to comply with the law. Moreover, it does not signal an FTC withdrawal from efforts to prevent deception in the labeling and advertising of these products. The rescission of the Guides does mean, however, that the FTC will no longer maintain detailed specifications for the feather and down industry.

In rescinding the Guides, the Commission directs the industry's attention to the principles of law articulated in the FTC's Deception Statement and pertinent Commission and court decisions on deception, both of which are generally applicable to all industries.[5] As articulated in the Deception Statement, the Commission ''will find deception if there is a representation, omission, or practice that is likely to mislead the consumer acting reasonably in the circumstances, to the consumer's detriment.''[6]

Applying these principles, and in the absence of further evidence of consumer interpretation of unqualified ''down'' claims, the Commission expects down content to reflect the use of appropriately calibrated, modern mass production techniques. The Commission understands that, at the present time, application of those production techniques should yield down content of more than 70% for products labeled ''down.'' With respect to percentage down claims, producers of down products generally have acknowledged that it is quite practicable, using present production methods, to produce down blend goods having a down content that is plus or minus 2–5% of a targeted number, rather than a 30% variation. Other aspects of down product composition addressed in the former Guides also should be governed by deception law, market forces, and the application of modern production techniques.

Rescission of the Guides should provide greater incentives for industry itself to create effective standards and develop methods of product differentiation. The Commission hopes that market forces will foster truthful labeling and advertising practices. Industry members are encouraged to be vigilant in monitoring both their own and their competitors' practices. If, in the future, deceptive practices prove to be a problem in this industry, further FTC enforcement actions may be warranted.

[5] *Cliffdale Associates, Inc., et al.,* 103 F.T.C. 110, 175 (including Deception Statement as Appendix) (1984).

[6] *Id.* at 176.

List of Subjects in 16 CFR Part 253

Advertising, Labeling, Filling Material, Trade Practices.

PART 253—[REMOVED]

The Commission, under authority of sections 5(a)(1) and 6(g) of the Federal Trade Commission Act, 15 U.S.C. 45(a)(1) and 46(g), amends Chapter I of Title 16 of the Code of Federal Regulations by removing part 253.

By direction of the Commission.

Benjamin I. Berman,

Acting Secretary.

[FR Doc. 98–22445 Filed 8–19–98; 8:45 am]

BILLING CODE 6750–01–P

FEDERAL TRADE COMMISSION

16 CFR Part 425

Trade Regulation Rule Regarding Use of Negative Option Plans by Sellers in Commerce

AGENCY: Federal Trade Commission.

ACTION: Final rule.

SUMMARY: The Federal Trade Commission (''FTC'' or ''Commission'') has completed its regulatory review of the Trade Regulation Rule regarding the Use of Negative Option Plans by Sellers in Commerce (''the Negative Option Rule'' or ''the Rule''). Pursuant to this review, the Commission concludes that the Negative Option Rule continues to be of value to consumers and firms, and is functioning well in the marketplace at minimal cost. This document summarizes and discusses the comments received in response to a request for public comment regarding the overall costs and benefits of the Rule, and announces the Commission's decision to retain the Rule in its present form. This document also announces several technical, non-substantive amendments to clarify the Rule and conform its language to amendments in the Federal Trade Commission Act (''FTC Act'').

EFFECTIVE DATE: August 20, 1998.

FOR FURTHER INFORMATION CONTACT: Edwin Rodriguez, Attorney, Federal Trade Commission, Washington, DC 20580, (202) 326–3147.

SUPPLEMENTARY INFORMATION:

Introduction

As part of a systematic review of its Rules and Guides, on March 31, 1997, the Commission solicited comments on whether there is a continuing need for the Negative Option Rule, 61 FR 15135. It also requested comments on the benefits and costs of the Rule to consumers and firms, and whether the Rule should be changed to increase its benefits or to reduce its costs or other burdens. The Commission sought comments about any abuses occurring in the promotion or operation of negative option plans that are not addressed by the Rule, and alternatives—such as consumers education, industry self-regulation, or rule amendment—for dealing with such abuses, including the benefits and burdens any change would have on industry and consumers. The Commission also sought comments on the effect on the Rule of changes in technology or economic conditions, such as the use of e-mail and the Internet. The Commission was also interested in learning about any overlap or conflict with other federal, state, or local laws or regulations.

The Commission received 19 comments in response to this request.[1]

[1] The comments have been filed on the Commission's public record as Document Nos. B21944500001, B21944500002, etc. The comments are cited in this notice by the name of the commenter, a shortened version of the comment number, and the relevant page(s) of the comment, e.g., DMA, #018, at 5. All written comments submitted are available for public inspection on normal business days between the hours of 8:30 a.m. to 5 p.m. at the Public Reference Room, Room 130, Federal Trade Commission, 6th St. and Pennsylvania Ave., NW, Washington, DC 20580. The commenters are: Jerome S. Lamet, Jerome S. Lamet & Associates (''Lamet''), #001; Stephen L. Bair, Book-of-the-Month Club, Inc. (''BOMC''), #002; A. Thomas Niebergall (''Niebergall''), #003; Joseph A. Greenberg, Professor of Education, George Washington University (''Greenberg''), #004; Owen R. Phillips, Professor of Economics, University of Wyoming (''Phillips''), #005; Charles Jacobina, Professor of Marketing, George Washington University (''Jacobina''), #006; Lydia Proctor, Ontario Ministry of Consumer and Commercial Relations (''Ontario''), #007; Robert L. Sherman, Direct Marketing Association (''DMA''), #008; William L. Oemichen, Administrator, Division of Trade and Consumer Protection, Wisconsin Department of Agriculture (''Wisconsin/ Agriculture''), #009; A Courtney Yell, Director/Chief Sealer, County of Bucks, Pennsylvania, Department of Consumer Protection/Weights & Measures (''Bucks County''), #010; Robert J. Posch, Jr., Vice President, Legal Affairs, Doubleday Direct (''Doubleday''), #011; James E. Doyle, Attorney General, State of Wisconsin Department of Justice (''Wisconsin AG''), #012; Barry Jay Reiss, Senior Vice President, Business & Consumer Affairs, Columbia House (''Columbia House''), #013; Clifton B. Knight, Jr., Senior Vice President, Business Affairs, BMG Direct, Inc. (''BMG''), #014; Mark T. Spriggs, Assistant Professor of Marketing, University of Oregon, and John R. Nevin, Grainger Wisconsin Distinguished Professor, School of Business, University of Wisconsin-Madison (''Spriggs & Nevin''), #015; Anne Darr, DeHart and Darr Associates, Inc. (''DeHart and Darr''), #016; Bruce A. Craig (''Craig''), #017; Mark Bressler

Continued

These included comments from consumers, industry members, state and local government representatives, and academicians. Below, the Commission explains how the Rule regulates negative option plans, summarizes and discusses the comments received, discusses the Rule's application to negative option plans advertised on the Internet and by other electronic means, and adopts technical, non-substantive amendments to the Rule.

II. Requirements of the Negative Option Rule

A. Negative Option Plans Covered by the Rule

The Commission issued the Negative Option Rule in 1973 to protect consumers from potentially unfair or deceptive acts or practices in the promotion and operation of prenotification negative option plans for the sale of goods, such as the failure to disclose in promotional materials the terms and conditions of membership.[2] The Commission promulgated the Rule under section 5 of the FTC Act, 15 U.S.C. 45, which declares unfair or deceptive acts or practices in or affecting commerce to be unlawful. The Rule became effective on June 7, 1974.[3]

The Rule regulates only a subset of all negative option sales—those made under ''prenotification negative option plans'' for the sale of goods. Because the Rule's coverage is often misunderstood, and because the comments recommend extending the Rule to other negative option selling techniques, or to the negative option sale of services, the Commission believes some prefatory discussion of negative option sales and the Negative Option Rule would be helpful.[4]

Broadly speaking, a ''negative option'' is any type of sales term or condition that imposes on consumers the obligation of rejecting goods or services that sellers offer for sale. A negative option allows a seller to interpret the failure of a consumer to reject goods or services as the acceptance of a sales offer, when, under traditional contract law, an affirmative response accepting the offer would be necessary. A consumer must agree to allow the seller to interpret his failure to reject goods or services as the acceptance of a sales offer. If the consumer has not agreed to this condition, the shipment of goods or the performance of services following the consumer's failure to reject the goods or services may be unlawful under unordered merchandise statutes and other laws, including Section 5 of the FTC Act.[5]

Pursuant to their agreement with consumers, sellers may make discrete, isolated negative option sales offers or periodic negative option offers as a part of a program or plan. Sellers also may make negative option offers incidentally, as a secondary part of a primary contract for some other good or service. In this context, sellers may make negative option offers at irregular intervals. Alternatively, sellers may make negative option offers as the primary object of the agreement with the consumer, for example, when a consumer subscribes to a negative option plan. By subscribing to a negative option plan, a consumer assumes the responsibility of affirmatively ''negating'' or rejecting all subsequent sales offers for goods or services made under the plan. Negative option plans usually involve the delivery of goods or services at regular intervals.

There are different types of negative option plans; for example, ''prenotification'' negative option plans and ''continuity'' negative option plans (which are more commonly referred to simply as continuity plans). Under prenotification plans, sellers and consumers agree that, for each sales offer, sellers will send consumers an announcement describing the goods or services offered, along with a prenotification form that subscribers can return to the sellers to reject the goods or services. Under continuity plans (also known by terms such as subscription shipments, library standing order arrangements, or annual series arrangements), subscribers agree, when they join or subscribe, to receive periodic shipments of goods or the performance of services without receiving prior announcements from sellers describing the goods or services, and without receiving prenotification forms.[6] Depending on the terms of the specific continuity or service sales plan, subscribers may have the right to return goods or reject services they decide they do not want.[7]

In the case of both prenotification negative option plans and continuity plans, sellers often market their plans by offering introductory goods or services on a trial basis. A consumer who fails to return the trail merchandise or who otherwise fails to cancel the subscription by the time the trial period expires often is automatically enrolled in the seller's plan.

(''Bressler''), #018; D.B. Mansion, (''Mansion''), #019. Three commenters submitted journal articles as comments. They are: Phillips, #005, Negative Option Contracts and Consumer Switching Costs, Southern Economic Journal, Vol. 60, No. 2 (October 1993); Spriggs & Nevin, #015, Negative Option Selling Plans: Current Forms Versus Existing Regulations, Journal of Public Policy & Marketing, Vol. 15, No. 2 (Fall 1996); and Craig, #017, Negative-Option Billing: Understanding the Stealth Scams of the '90s, Loyola Consumer Law Reporter, Vol. 7, No. 1 (Autumn 1994).

[2] Regulations Pertaining to the Use of Negative Option Plans (''Statement of Basis and Purpose'' or ''SBP''), 38 FR 4896.

[3] In 1986, the Commission conducted a review of the Negative Option Rule pursuant to section 610 of the Regulatory Flexibility Act, 5 U.S.C. 610, to determine the impact of the Rule on small entities. In a notice published on November 21, 1986, 51 FR 42087, the Commission announced the results of that review, concluding that ''there is a continued need for the Rule; there is no reason to believe that the Rule has had a significant economic impact on as substantial number of small entities; and the rule should not be changed.''

[4] Lamet, #001, stated at 1, that lawbook publishers have sent him publication updates without first sending him prenotification forms. He described this as a negative option abuse. Bucks County, #010, stated at 1, that sellers of yearly calendars who do not provide prenotification before shipping the calendars are violating the Negative Option Rule. If the legal publications and the calendars are sold by continuity plans, however, the Negative Option Rule would not regulate the sales and would consequently not require prenotification. As discussed below, the FTC Act and other laws protect consumers from potentially deceptive practices regarding continuity sales.

[5] 15 U.S.C. 45, See Part IV.B., *infra*, for a discussion of the prohibition against shipping unordered merchandise.

[6] A typical characteristic of continuity plans is that the goods sold often relate to a single topic (e.g., a book series about the Civil War) or are for items that are consumed or used up and need to be replaced periodically (e.g., hosiery). Because of these characteristics, costly returns are less likely. In contrast, prenotification plans often span a wide array of topics (one month a biography may be featured, another month a mystery). Because of the high cost of mailing goods to subscribers and allowing them to reject the goods they did not want, some sellers moved to sending ''announcements'' describing the goods they would be sending, along with forms that subscribers could return to reject the items—hence, the term ''prenotification.'' The Commission considered and rejected assertions that it should ban prenotification negative option plans as being inherently unfair. SBP, 38 FR at 4902–04.

[7] The Commission notes that the provision of services differs substantially in character from the selling of goods. In the sale of goods, consumers are likely to consider purchases, even if made as part of a continuity plan, as discrete occurrences. In some instances, services may be performed periodically or seasonally, for example, landscaping or pest control. But in many cases, consumers may likely expect that a given service—household security or cable television, for example—will continue uninterrupted until it is canceled. Whether services continue uninterrupted or are performed periodically, they are commonly regulated by service contracts or plans, which in the context of this Notice could be characterized as continuity plans for services.

Negative option techniques have been used in selling services. For example, a cable television provider may separate a channel from a group of channels previously offered as a ''bundle'' and offer the channel separately to cable subscribers using a negative option. Or a service provider—such as an Internet service provider—may make a free trial offer for a service that becomes an extended service contract unless the consumer exercises a negative option and expressly rejects the service contract when the free trial period expires. Service plans may also employ negative option contract renewal provisions.

As previously stated, the Negative Option Rule applies only to prenotification plans for the sale of goods. In promulgating the Rule, the Commission determined in its Statement of Basis and Purpose that it was in the public interest to prescribe regulations for the operation of prenotification negative option plans because various acts and practices associated with these plans were found to affect consumers adversely.[8] The Commission also stated that the Rule does not apply to negative option marketing arrangements under which marketers optionally tender merchandise to subscribers without previously sending a prenotification announcement. The Commission determined that negative option selling plans, such as continuity plans, subscription shipments, library standing order arrangements, or annual and series arrangements, in which subscribers agree to receive goods without prenotification of each shipment, warranted separate treatment by the Commission if and when consumer complaints justified Commission attention.[9]

B. Disclosures in Certain Kinds of Advertising

To ensure that consumers are not misled about the terms of these plans before they subscribe, the Rule requires sellers to disclose the material terms of the plans in ads that contain a means consumers can use to subscribe. The Rule requires that sellers disclose clearly and conspicuously the material terms of membership in any advertisement or other promotional material that provides a method the consumer may use to enroll in the plan, including the following disclosures: (i) The aspect of the plan (the negative option) that requires subscribers to notify the seller, in the manner provided for by the seller, if they do not wish to purchase a selection, and that failure to notify the seller signifies assent; (ii) any obligation assumed by subscribers to purchase a minimum quantity of merchandise; (iii) the right of contract-complete subscribers [10] to cancel their membership at any time; (iv) whether billing charges will include an amount for postage and handling; (v) a disclosure indicating that subscribers will be provided with at least ten days in which to mail any form to the seller to reject merchandise; (vi) that the seller will credit the return of any selections sent to a subscriber, and guarantee to the Postal Service or the subscriber postage to return such selections to the seller, when the subscriber does not have at least ten days in which to return the prenotification form to the seller; and (vii) the frequency with which the seller will send announcements and forms to the subscriber and the maximum number of announcements and forms the seller will send during a 12-month period.

C. Operation of Prenotification Negative Option Plans

The Rule also requires sellers to follow certain procedures in operating prenotification negative option plans for the sale of goods. Many prenotification negative option plans provide introductory offers to encourage consumers to become members. The Rule requires that a seller must ship any introductory and bonus merchandise due a subscriber within four weeks after receiving an order, unless it is unable to do so because of unanticipated circumstances beyond its control. In such an event, the seller may make an equivalent alternative offer, which the subscriber has the right to decline. Subscribers may then cancel their membership provided they return to the seller any introductory merchandise received.

Once a consumer becomes a subscriber, the Rule requires the seller to mail an announcement to the subscriber in advance identifying any merchandise the seller plans to send. The Rule also requires the seller to mail the subscriber a form, with the announcement, instructing the subscriber how to use the form to reject the merchandise. The form must tell the subscriber that the merchandise will be sent unless the subscriber tells the seller not to send it and must identify the date by which the subscriber must return or mail the form back to the seller. The Rule sets out timing provisions for the mailing of the announcements and forms. At a minimum, the seller must give a subscriber at least 10 days in which to return or mail a form to the seller. When the subscriber orders merchandise, either by failing to return the prenotification form or by affirmatively ordering a selection, the seller may not substitute merchandise for the specific merchandise ordered, unless the subscriber has expressly consented to the substitution.

Under certain circumstances (e.g., when the subscriber does not have at least 10 days to mail the prenotification form), a seller must credit the return of any selection sent to a subscriber for the full invoiced amount and pay for return postage. When the seller is aware that these circumstances exist, it must notify subscribers that they may return the merchandise with return postage guaranteed and receive a credit to their accounts. Finally, the seller must terminate promptly the membership of subscribers who request cancellation of membership in writing after fulfilling any minimum purchase obligation under the negative option agreement.

III. Summary of the Comments

A. Costs and Benefits of the Rule

Several comments state that the Rule establishes a balance between the needs of consumers and industry, benefiting both.[11] Ten of the 19 comments submitted support the Rule as is, without change.[12] Several comments state that the Rule has worked effectively in regulating prenotification negative option plans.[13] Eleven of the comments state that there is a continuing need for the Rule.[14] None of

[8] The Commission found that: (1) Marketers of prenotification negative option plans had failed to disclose adequately the provisions of such plans to the detriment of their subscribers; (2) subscribers had encountered difficulties in substantiating that they were not given adequate time to respond to the negative option notice supplied by the merchandiser; (3) marketers of prenotification negative option plans had delivered unordered or substituted merchandise in the place of merchandise specifically ordered by subscribers, without their subscribers' prior consent; (4) marketers of prenotification negative option plans had failed to honor proper cancellation notices from contract-complete subscribers and continued to send them merchandise; (5) subscribers had been dunned or billed for unordered merchandise, and sellers had failed to provide meaningful service to a large number of their subscribers in connection with complaints involving operations, particularly in regard to billing problems; and (6) marketers of prenotification negative option plans had operated their entire systems in such a manner as to place the burden for correcting ''errors'' on their subscribers. SBP, 38 FR at 4899–4902.

[9] Id. at 4908.

[10] ''Contract-complete subscriber'' refers to a subscriber who has purchased the minimum quantity of merchandise required by the terms of membership in a negative option plan.

[11] BMOC, #002, at 1; Jacobina, #006, at 1; DMA, #008, at 3; Columbia House, #013, at 2; BMG, #014, at 1, 2; DeHart and Darr, #016, at 1.

[12] Lamet, #001, at 1; BOMC, #002, at 1, 2; Niebergall, #003, at 1; Greenberg, #004, at 1; DMA, #008, at 3, 6; Doubleday, #011, at 1; Columbia House, #013, at 2; BMG, #014, at 1, 2; DeHart & Darr, #016, at 1, 3; Mansion, #019, at 1. Niebergall, #003, at 1, stated that full, first-class postage should not be required for the return of prenotification forms by consumers when the post-card rate would be sufficient. The Rule does not contain a first-class postage requirement. Consumers may return prenotification forms using any postage required by the U.S. Postal Service.

[13] BOMC, #002, at 1, 2; Greenberg, #004, at 1–2; Doubleday, #011, at 1; Wisconsin AG, #012, at 2; BMG, #014, at 2; DeHart & Darr, #016, at 1.

[14] Lamet, #001, at 1; BMOC, #002, at 1; Niebergall, #003, at 1; Greenberg, #004, at 1; DMA, #008, at 2; Doubleday, #011, at 1, 2; Wisconsin AG, #012, at 2, 3, 4; Columbia House, #013, at 1–2; BMG, #014, at 1, 2; Spriggs, #015, at cover letter p.1; DeHart and Darr, #016, at 1.

the comments suggest rescinding the Rule.

Several comments address the benefits to consumers from prenotification negative option plans as a selling technique, as opposed to benefits arising from the Rule itself. Five comments state that negative option plans provide many benefits to consumers, including the opportunity to build a long-term relationship with sellers who provide a large array of product choices, greater accessibility to products and shopping convenience, and expert advice and recommendations about products.[15] One comment states that negative option contracts impose some costs on consumers, but nevertheless possess economic efficiency advantages over standard contractual relationships.[16]

Three comments state that the Rule does not impose any costs on purchasers.[17] Others state that the Rule protects consumers adequately by requiring their consent,[18] requiring disclosure of the terms and conditions of membership,[19] or providing guidelines for the operation of negative option plans.[20] One comment, however, recommends that the Commission establish a design standard, setting forth specific type-size requirements, to make the required negative option disclosures clearer and more conspicuous to consumers.[21]

Industry comments overwhelmingly support the Rule. They state that the Rule functions in the best interests of sellers by providing well-established, concrete guidance to industry that helps establish good business practices.[22] The Rule thereby contributes to consumer confidence in negative option marketing and allows sellers to establish continuing, repeat customers.[23] A few industry members state that the Rule enables them to establish national uniformity in marketing[24] and helps them avoid customer service problems because the disclosure requirements of the Rule educate consumers about the way prenotification negative option plans work.[25] Three comments state that the Rule imposes considerable costs on industry, for example, because of vagaries of delivery dates and deadlines.[26] These comments, however, do not recommend any changes to reduce costs; but instead, conclude that the Rule benefits industry and recommend that the Commission retain the Rule without any substantive change.[27] According to one comment, significantly weakening the Rule could lead consumers to lose confidence in negative option buying, which should not be desired by the FTC, consumers, or the businesses which service them.[28]

B. Recommendations To Expand the Rule To Cover Marketing Techniques Other Than Prenotification Negative Option Plans and To Cover Services

One comment recommends extending the Rule to cover continuity plans for goods, and requiring prenotification for each shipment made under a continuity plan.[29] Another comment states that continuity plans for goods should not be regulated in the same way that the Rule regulates prenotification plans, but that sellers using continuity plans should be required to disclose the material terms of membership before consumers subscribe.[30] One comment recommends amending the Rule to declare that billing for unordered merchandise is an unfair practice.[31]

Several comments state that the negative option sales techniques has been used in the sale of various services by some firms.[32] A few comments recommend expanding the Negative Option Rule to require that service providers notify consumers each time they intend to provide services, and notify consumers before they enroll consumers in service plans after a free trail period expires, and before they renew service contracts.[33]

None of the comments that support expanding the Rule addresses the costs that such changes to the Rule might impose on firms. Further, none submitted specific evidence (beyond a few examples) of the extent of any current abuses in the use of negative option plans not covered by the Rule or in the sale of services.

Some of the comments expressly oppose expanding the Rule, stating that negative option marketing techniques that are different from prenotification negative option plans should be addressed separately, such as through a cooperative education project with industry that could help educate the public about such techniques.[34] One comment notes that the Postal Reorganization Act (also referred to as the ''unordered merchandise statue''), 39 U.S.C. 3009, has already addressed some problems with negative option selling of products.[35]

C. Commission's Determinations

Based on the comments received and on other information, the Commission concludes that the Rule adequately balances the interests of both consumers and firms that are subject to it. It appears that the Rule is working effectively to protect consumers, without imposing significant costs on industry members, small or large. Based on the comments submitted, and other research and investigation performed by the Commission's staff regarding negative option marketing, the Commission has determined to retain the Rule in its present form.

First, the Commission has determined not to propose amending the Rule to specify a design standard for the required disclosures, as suggested by one commenter. The Commission believes that the performance standard in the Rule, which mandates ''clear and conspicuous'' disclosures, has worked

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[15] Jacobina, #006, at 1; DMA, #008 at 2; Doubleday, #011, at 1; BMG, #014, at 2; DeHart and Darr, #016, at 2.

[16] Phillips, #005, at 305, 309 (negative option plans impose two types of transactional costs on consumers—the cost of rejecting goods offered by a seller, and the cost of canceling membership in a negative option plan to end the product flow; despite these costs, ''negative option contracts, compared to positive option, are a more efficient means by which to accept or reject pieces of a product flow'' and are consequently weakly economically superior to positive option agreements).

[17] BOMC, #002, at 1; DMA, #008 at 2; BMG, #014, at 2.

[18] DMA, #008, at 2, 6; Wisconsin AG, #012, at 2.

[19] Greenberg, #004, at 1; DMA, #008, at 2; BMG, #014, at 1, 2; DeHart and Darr, #016, at 1.

[20] Greenberg, #004, at 1; DMA, #008, at 2, 6; Wisconsin AG, #012, at 2; Columbia House, #013, at 1; BMG, #014, at 1, 2; DeHart and Darr, #016, at 1.

[21] Bucks County, #010, at 1.

[22] BMOC, #002, at 2; DMA, #008, at 2, 5; Doubleday, #011, at 1; Columbia House, #013, at 1; BMG, #014, at 1; DeHart and Darr, #016, at 2.

[23] Jacobina, #006, at 1; DMA, #008, at 3; Doubleday, #011, at 1–2; Columbia House, #013, at 1; BMG, #014, at 1.

[24] Doubleday, #011, at 1.

[25] BMG, #014, at 1.

[26] DMA, #008, at 3; Columbia House, #013, at 1; BMG, #014, at 2.

[27] DMA, #008, at 3 (because the lifetime value of a repeat customer is so important to sellers, these costs will make this method of doing business worthwhile); Columbia House, #013, at 2 (Rule has achieved an acceptable and commendable balance between the needs and concerns of industry and the need to protect the public from unscrupulous and fraudulent practices); BMG, #014, at 2 (while the costs of compliance with the Rule are substantial in staff time, energy and dollars, the investment is worthwhile).

[28] Doubleday, #011, at 2.

[29] Wisconsin AG, #012, at 5–6.

[30] Wisconsin/Agriculture, #009, at 2.

[31] Wisconsin AG, #012, at 5.

[32] Phillips, #005, at 305; Ontario, #007, at 1; Wisconsin/Agriculture, #009, at 2; Bucks County, #010, at 1; Spriggs & Nevin, #015, at 227, Bressler, #018, at 1–2; Wisconsin AG, #012, at 1; Craig, #017, at 6. These comments state that negative option marketing has been used to sell cable television, Internet services, inside telephone wire maintenance, telephone call waiting, lawn care, pest control, home security, travel discount clubs, credit card protection programs, and other services.

[33] Wisconsin/Agriculture, #009, at 2; Bucks County, #010, at 1; Bressler, #018, at 1–2.

[34] DMA, #008, at 5; BMG, #014, at 2; DeHart and Darr, #016, at 2.

[35] DeHart and Darr, #016, at 2.

well. Although the Commission has used design standards in various contexts, there is no evidence that such a standard is necessary for promotional materials for prenotification negative option plans. The clear and conspicuous standard allows sellers greater flexibility when making the required disclosures, which is important in light of the varied promotional materials used by sellers who operate prenotification negative option plans.

Second, the Commission has determined not to propose expanding the Rule to apply to additional types of negative option marketing techniques, such as continuity plans, or to the sale of services. There is insufficient evidence that unfair to deceptive acts or practices are prevalent in the use of additional types of negative option marketing techniques or in the sale of services, and application of the Rule to these areas may not be justified. Requiring sellers to provide consumers with prenotification before each shipment of merchandise under continuity plans, or each performance of a service, or the continuation of a service, may be unwarranted or unnecessary. For example, in some cases continuity or service plans may distribute goods or perform services for which consumers do not reasonably expect prenotification before each instance of delivery or performance—e.g., the monthly shipment of volumes of an encyclopedia or a book series, or providing home security services.[36] In the case of services, consumers may normally expect that many services will continue uninterrupted until canceled. Requiring prenotification for each billing cycle of such service plans is unreasonable. Even when services are performed periodically or seasonally, prenotification before each performance of a service may not be necessary if consumers have been informed in advance about the material terms and conditions of the service contract.

If sellers adequately disclose the terms and conditions of continuity and service plans to consumers, and if consumers agree to these terms and conditions—including the receipt of merchandise or the performance of services without prenotification—it is unlikely that any consumer injury will result. The Commission has determined that, if there is inadequate disclosure and injury occurs, existing laws and regulations—such as the FTC Act, the unordered merchandise statute, and state consumer protection laws and regulations—provide adequate protections against unfair or deceptive negative option marketing practices that fall outside of the purview of the Negative Option Rule. As discussed in Part IV below, both the Commission and state Attorneys General have brought enforcement actions against marketers that have allegedly employed unfair or deceptive negative option marketing techniques, such as the failure to disclose clearly and conspicuously material facts about membership in continuity plans and other types of sales plans or clubs. The Commission will continue to take action on a case-by-case basis in any problem areas.

IV. Existing Alternatives to Expanding the Rule

A. The Federal Trade Commission Act

Section 5 of the FTC Act empowers the Commission to prohibit unfair or deceptive acts or practices in or affecting commerce. The Commission has promulgated trade regulation rules, such as the Negative Option rule, when it has found that unfair or deceptive acts or practices in specific industries were prevalent. For example, the systematic failure on the part of sellers to make clear and conspicuous necessary pre-purchase disclosures to consumers justified promulgation of the Negative Option Rule. But the Commission does not need to adopt a trade regulation rule to prosecute unfair or deceptive acts or practices. Rather, the Commission can prosecute such practices, for example, the failure clearly and conspicuously to disclose material facts about continuity plans, as unfair or deceptive acts or practices that violate section 5 of the FTC Act.[37]

Under the FTC Act, the Commission may seek administrative or federal district court orders against companies or individuals who engage in unfair or deceptive practices, prohibiting future violations, and providing other relief such as consumer redress, disgorgement of ill-gotten gains, consumer notification, and civil penalties, in some cases.[38] The Commission has pursued cases challenging alleged unfair or deceptive practices in the operation of continuity plans for both goods and services. For example, the Commission has challenged continuity plans under which merchandise was shipped without consumers' prior consent to receive the merchandise.[39] It has also required that promotional materials for continuity plans disclose clearly and conspicuously material facts about the plans—including the risks and obligations that subscribers assume by subscribing to them.[40] For example, the Commission has required sellers who use continuity plans to disclose the fact that consumers who become subscribers will receive shipments of goods or will be billed for services without further action by the consumer.[41] These cases illustrate the Commission's ability to prevent consumer injury associated with unfair or deceptive negative option practices without expanding the Negative Option Rule.

B. Unordered Merchandise

The Commission has also determined that there is no need to amend the Rule to prohibit billing for unordered merchandise, as recommended by one

[36] E.g., Wisconsin/Agriculture, #009, at 2 (no compelling need for regulation of contracts pursuant to which consumers make an up-front decision to purchase, such as newspaper and magazine subscriptions).

[37] In determining whether a practice is deceptive, the Commission must determine whether there is a misrepresentation, omission, or other practice, that misleads consumers acting reasonably in the circumstances and causes consumer injury. See Federal Trade Commission Policy Statement on Deception, appended to Cliffdale Assocs., Inc., 103 F.T.C. 110, 174–184 (1984); and Federal Trade Commission Policy Statement on Unfairness, appended to International Harvester Co., 104 F.T.C. 949, 1070–76 (1984).

[38] The Commission can seek civil penalties from companies that violate administrative orders issued against them by the Commission, and from companies not subject to previous administrative orders if they have actual knowledge that the Commission has determined in prior cases that certain acts or practices are unfair or deceptive and they engage in those acts or practices. 15 U.S.C. 45(l) and 45(m)(1)(B).

[39] See Synchronal Corp. 116 F.T.C. 1189, 1222 (1993) (consent order prohibited respondents from selling any product through a continuity program without first obtaining consumers' expressed consent).

[40] See FTC v. Hosiery Corp. of America, 3 Trade Reg. Rep. (CCH) ¶ 22,187 (E.D. Pa. 1984) (in connection with continuity plan for hosiery, federal district court consent decree required company to pay a $200,000 civil penalty and to make clear and conspicuous disclosure of conditions and obligations attendant upon acceptance of free introductory offer); Grolier, Inc., 91 F.T.C. 315, 454–55, 483 n.37, 497 (1978) (Commission found that promotional materials that did not tell consumers that they would receive a bulk shipment of books, rather than single volumes, failed to disclose a material fact about respondents' continuity plans; Commission ordered respondents to disclose conditions and terms of continuity plans, the method of sales or distribution and the subscriber risks and obligations); Crowell Collier & Macmillan, Inc., 82 F.T.C. 1292, 1305 (1973) (order required respondents to disclose clearly and conspicuously the conditions and terms of any program providing for the delivery of books or other products or services serially, at intervals, on an approval basis.)

[41] See Synchronal, 116 F.T.C. at 1222 (Commission ordered required the disclosure of all material terms and conditions of the continuity program, including the fact that periodic shipments of the product would be made without further action by the consumer, a description of the product included in each shipment, the approximate interval between each shipment, the billing procedure to be employed, the minimum number of purchases required under the program, if any, and a description of the terms and conditions under which and the procedures by which a subscriber may cancel further shipments).

commenter.[42] Section 3009(a) of the Postal Reorganization Act of 1970, 39 U.S.C. 3009, declares that mailing, and billing for, unordered merchandise constitutes a violation of section 5 of the FTC Act.[43] Under this standard, sellers, other than charitable organizations soliciting contributions, may not ship unordered merchandise to consumers unless the recipient has expressly agreed to receive it or unless it is clearly identified as a gift, free sample, or the like. In addition, sellers may not try to obtain payment for or the return of the unordered merchandise. Consumers who receive unordered merchandise are legally entitled to treat the merchandise as a gift.

Under the Negative Option Rule, shipments sent to subscribers of prenotification negative option plans are not considered unordered merchandise because subscribers have agreed to receive shipments of merchandise unless they reject them by returning prenotification forms.[44] Shipping goods to consumers who have not expressly agreed to take on the obligation of rejecting goods by means of a prenotification form, however, violates the prohibition against sending unordered merchandise.[45] Similarly, shipments sent to subscribers of continuity plans are not considered unordered merchandise because subscribers to these plans agree to receive the shipments. Sending goods other than those a continuity plan subscriber has agreed to receive, however, is prohibited.[46] Cases brought by the Commission indicate that sellers who use prenotification negative option plans or continuity plans to sell goods may not unilaterally impose a negative option, requiring consumers to reject goods offered for sale; consumers must agree to such a term, so that the shipping of goods without this consent constitutes the shipping of unordered merchandise. The cases show that the unordered merchandise statute and section 5 of the FTC Act provide adequate authority for the Commission to protect consumers from unordered merchandise.

C. Negative Option Marketing of Services and Unordered Services

A few of the comments stated that the Negative Option Rule should be amended to apply to services.[47] As with product sales techniques not covered by the Rule, the Commission can bring enforcement actions against those who use unfair or deceptive acts or practices to promote, sell or bill for services. For example, the Commission has brought enforcement actions against companies that bill consumers for unordered services[48] and companies that use negative options to enroll consumers automatically in service plans upon the expiration of free trial offers, without disclosing this material condition clearly and conspicuously to consumers.[49] The Commission will continue to monitor the marketplace to identify problem areas and bring enforcement actions when appropriate.

Regarding cable television channel subscriptions, which some of the comments mentioned as an area in which negative option selling has been used,[50] some states have brought legal action to challenge potentially deceptive negative option practices. In this area, the Cable Television Consumer Protection and Competition Act of 1992 (''Cable Act of 1992'')[51] provides protections by prohibiting negative option billing for ''any service or equipment that the subscriber has not affirmatively requested by name,'' and by directing the Federal Communications Commission (''FCC'') to issue implementing regulations. No evidence has been submitted to the FTC to indicate that the Cable Act of 1992 and the FCC's regulations are not sufficient to protect consumers from unfair or deceptive acts or practices in the use of negative option marketing techniques in connection with the sale of cable television services.[52]

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[42] Wisconsin AG, #012, at 5.

[43] See 35 FR 14328 (1970). In a notice published on January 31, 1978, 43 FR 4113, the Commission stated that the standard under section 5 of the FTC Act was not limited to unordered merchandise sent by U.S. mail. The Commission explained that it might, for example, prosecute as a violation of section 5 a nonmail shipment of merchandise that fails to meet the standard of 39 U.S.C. 3009.

[44] The Negative Option Rule provides, however, that all shipments the seller sends to a subscriber—except for the first—after the seller receives written notice that a subscriber who has met his minimum purchase obligation wishes to cancel his membership, is considered unordered merchandise.

[45] E.g., Hachette Book Group USA, Inc, No. 39CV00116 (D. Conn. 1994) (settlement in which FTC charged that defendants failed to notify consumers that they would receive yearbooks or supplements unless they returned a mail cancellation card, failed to obtain consumers' agreement to return cancellation cards if they did not want the merchandise, and mailed merchandise and bills to consumers who had not placed orders); Standard Reference Library, Inc., 77 F.T.C. 969, 976 (1970) (consent order prohibited respondents from representing that consumers' failure to return rejection cards or take any affirmative action to prevent the shipment of merchandise constituted a request to receive merchandise where consumers had not agreed to take on that obligation).

Spriggs & Nevin, #015, at 228, expressed concern that sellers that enter into contracts with consumers may include provisions in their contracts allowing them to make negative option offers to consumers as a part of the contract even though the primary subject matter of the contract is not related to the negative option offers. In some cases, consumers may agree to receive the secondary negative option offers because they have no choice but to do so if they wish to receive the goods or services that are part of the primary agreement. The Commission believes that such practices must be evaluated on a case-by-case basis to determine whether they are unfair or deceptive.

[46] E.g., Field Publications Ltd. Partnership, No. H–90–932 PCD (D. Conn. 1990) (settlement in which FTC charged that Field shipped unordered books to subscribers who had agreed to receive another series of books as part of a continuity plan; settlement required Field to pay a $175,000 civil penalty).

[47] Wisconsin/Agriculture, #009, at 2; County of Buck, #010, at 1; Wisconsin AD, #012, at 5. Ontario, #007, stated at 1–2, that Ontario has considered amending its Consumer Protection Act to provide safeguards against the deceptive negative option marketing of services. See also Dennis D. Lamont, Negative Option Offers in Consumer Service Contracts: A Principled Reconciliation of Commerce & Consumer Protection, UCLA Law Review, Vol. 42, No. 5 (June 1995).

[48] Southwest Marketing Concepts, Inc., No. H–97–1070 (S.D. Tex. May 29, 1998) (consent decree, settling claim that company billed for unordered advertising, prohibited defendants from making false or misleading representations in connection with the sale, distribution, marketing or sponsorship of any advertisement); Image Sales & Consultants, Inc., No. 1:97CV0131 (N.D. Ind. filed Jun. 9, 1998) (same); The Century Corp., No. 1:97CV0130 (N.D. Ind. Apr. 8, 1998) (same); Dean Thomas Corp., No. 1:97CV0129 (N.D. Ind. Jan. 19, 1998) (same); AKOA, Inc., No. CV 97–7084 (LGB) (C.D. Cal. Mar. 17, 1998) (consent decree prohibited company from billing for unordered computer repair service contracts); Travel World International, Inc., No. 88–113–CIV–FTM–15C (M.D. Fla. Nov. 2, 1989) (consent decree prohibited defendants from using negative option billing for renewals or initial purchases of any travel club membership, vacation certificate, travel service, contract for vacation services, or any other product or service); Trade Union Courier, 51 F.T.C. 1275, 1299–1300 (1955) (litigated order; newspaper billed for ads without prior authorization); A&R Agency, 86 F.T.C. 103 (1975) (consent order; same).

[49] America Online, Inc., C–3787; Prodigy Servs. Corp., C–3788; CompuServe, Inc., C–3789 (March 16, 1998) (consent orders required online service providers, when offering a ''free trial'' with automatic membership enrollment or renewal upon the expiration of the free trial period, to disclose clearly and prominently any obligation to cancel after the free trial period to avoid charges, and to provide at least one reasonable means of canceling, to prevent enrollment or renewal).

[50] Phillips, #005, at 304; Ontario, #007, at 1; Wisconsin/Agriculture, #009, at 2; Wisconsin AG, #010, at 1–2; Spriggs & Nevin, #015, at 227; Craig, #017, at 6–8.

[51] Pub. L. No. 102–385, 106 Stat. 1460 (codified in scattered sections of 47 U.S.C.). See 47 U.S.C. 543(f) for prohibition against negative option billing for cable television.

[52] Time Warner Cable v. Doyle, 66 F.3d 867 (7th Cir. 1995) (FCC regulations pursuant to the Cable Act of 1992 permit a limited range of negative option billing and preempt state consumer protection statutes prohibiting negative option billing to extent they interfere with the execution of the FCC's rate rules); Time Warner Entertainment Co. v. Federal Communications Comm'n, 56 F.3d 151, 192–96 (D.C. Cir. 1995) (Cable Act of 1992 does not explicitly prohibit states from enforcing negative option billing regulations; issue whether Act preempts state negative option consumer protection laws insofar as they affect rate regulation is a factual question peculiar to the state law at issue).

D. State Laws

The states also enforce consumer protection laws that protect consumers against unfair or deceptive negative option marketing techniques or other marketing techniques that may not be covered by the Commission's Negative Option Rule.[53] Like the FTC Act, many of these state statutes include general, and far-ranging, prohibitions against unfair or deceptive acts or practices.[54] As evidenced by cable television and other cases, states are actively enforcing these state statutes.[55] The dual system of state and federal consumer protection laws should help limit the proliferation of deceptive negative option marketing techniques.

E. Industry Self-Regulation

Finally, industry self-regulation may provide an additional mechanism to police deceptive negative option marketing techniques that are not covered by the Commission's Rule. It is in the interest of the direct marketing industry to have products and services meet the consumer's expectations so that a company can establish a long-standing relationship with the consumer. The Direct Marketing Association, recognizing that consumers misled by direct marketing promotions may be reluctant to respond to such promotions in the future, has established a process for handling complaints about ethical business practices. Examples of matters handled by DMA's Committee on Ethical Business Practices include an offer made for a continuity program in which material details of the offer were not as conspicuous as other parts of the offer.[56]

V. The Negative Option Rule and New Technologies

Because many companies that operate negative option plans are now posting promotional materials on the Internet to solicit membership, the Commission solicited comment on the effect of changes in technology on the Rule, including the use of e-mail and the Internet. The Commission received five comments on this issue.[57] The comments stated that subscribers to prenotification negative option plans can now order or reject merchandise by telephone, e-mail, and the Internet, rather than by returning prenotification forms by mail.[58] The comments also stated that the Rule is ''media neutral'' or easily adaptable to these technologies.[59]

The Negative Option Rule covers all promotional materials that contain a means for consumers to subscribe to prenotification negative option plans, including those that are disseminated through newer technologies, such as the Internet, e-mail, or CD–ROM.

Promotional materials posted on the Internet, distributed via e-mail, or on CD–ROM must therefore, make all the disclosures required by the Rule in a clear and conspicuous manner. Sellers that operate prenotification negative option plans using these technologies must also comply with all other Rule requirements. The Commission is currently considering issues related to the Internet and other new technologies with respect to the Negative Option Rule, as well as other Commission rules and guides, including the factors it would consider in evaluating the effectiveness of advertising disclosures. The Commission will provide more information about the Rule's application to these new technologies at a later date.

VI. Technical, Non-Substantive Amendments to the Rule

The Commission has determined to adopt technical, non-substantive amendments to the Negative Option Rule. First, the Commission deletes the Note after section 425(b)(5). The Note simply referenced a separate proposed trade regulation rule involving billing practices arising out of the administration of customer accounts by credit card issuers and other retail establishments. That proposed rule was indefinitely postponed, and then withdrawn when it was superseded by the Fair Debt Collection Practices Act, 91 Stat. 874, 15 U.S.C. 1692–1692o, as amended. The reference is therefore obsolete. Second, the Commission amends two paragraphs of Section 425.1 of the Rule by changing references to ''in commerce'' to read ''in or affecting commerce'' to conform the language of the Rule with the current language of section 5 of the FTC Act, 15 U.S.C. 45, and by changing references to ''an unfair method of competition and an unfair to deceptive act or practice'' to ''an unfair or deceptive act or practice'' to conform the language of the Rule to the language of section 18 of the FTC Act, 15 U.S.C. 57a. Finally, the Commission amends the title of the Rule to read ''Use of Prenotification Negative Option Plans'' to make the title more accurately describe the Rule's coverage.

Because these amendments are purely technical and non-substantive, they are exempt from the rulemaking procedures specified in section 18 of the FTC Act.[60] Further, because the amendments simply delete an obsolete and unnecessary Note, conform the language of the Rule to the FTC Act, and clarify the Rule's coverage in the title of the Rule, the Commission has determined that notice and comment are unnecessary under the Administrative Procedure Act (''APA''). The Commission, therefore, has omitted notice and comment for good cause as provided by section 553(b)(B) of the APA, 5 U.S.C. 553(b)(B). The amendments are effective today. Because the amendments are technical, and non-substantive, section 553(d) of the APA, 5 U.S.C. 553(d), which requires publication or service of a substantive rule not less than 30 days before its effective date, does not apply.

VII. Regulatory Flexibility Act

Because these amendments are exempt from the notice and comment provisions of section 553(b) of the APA, the Regulatory Flexibility Act (''RFA''), 5 U.S.C. 601 *et seq.*, does not apply. Nevertheless, the Commission has considered whether the amendments could have any effect on small entities. These technical, non-substantive amendments do not change the substantive requirements of the Rule in any manner, and do not impose any new requirements on sellers, large or small. Accordingly, this notice does not

[53] DMA, #008, at 4, commented that state negative option laws are sometimes inconsistent with the Commission's Negative Option Rule. DMA therefore proposed making the Rule preempt inconsistent state laws.

The Rule does not preempt state laws that regulate negative option marketing except to the extent that such laws directly conflict with the provisions of the Rule. Laws that provide consumers greater protection than that provided by the Rule do not necessarily conflict with the Rule even if they are inconsistent. Doubleday, #011, noted at 1, that the effectiveness of the Commission's Negative Option Rule has helped avoid a proliferation of conflicting state laws.

[54] Pennsylvania Consumer Protection Law, 73 P.S. 201–1, et seq.; Indiana Deceptive Consumer Sales Act, Ind. Code 24–5–0.5–1, et seq.; Texas Deceptive Trade Practices-Consumer Protection Act, Texas Bus. & Comm. Code Ann. 17.41, et seq.

[55] E.g., Hosiery Corp of America (multiple cites), e.g., No. CVOC9704299D (4th Judicial District of the State of Idaho, Ada County, Aug. 2, 1997) and No. 97–08373 (261st Judicial District of Travis County, Texas, July 23, 1997) (company signed Assurance of Discontinuance/Assurance of Voluntary Compliance settling allegations by eleven states that it failed to disclose clearly and conspicuously material conditions of free offer and continuity plan for hosiery).

[56] Case Report From The Direct Marketing Association's Committee on Ethical Business Practice, Vol. 1, No. 4 (December 1997).

[57] DMA, #008, at 5; Columbia House, #013, at 1; BOMC, #002, at 1–2; Doubleday, #011, at 1; BMG, #014, at 2.

[58] Columbia House, #013, at 1.

[59] BOMC, #002, at 1–2; DMA, #008, at 5; Doubleday, #011, at 1; Columbia House, #013, at 1; BMG, #014, at 2.

[60] 15 U.S.C. 57a(d)(2)(B), 16 CFR 1.15(b).

contain a regulatory analysis under section 604 of the RFA, 5 U.S.C. 604.

VIII. Paperwork Reduction Act

The Paperwork Reduction Act (''PRA''), 44 U.S.C. 3501 *et seq.*, requires government agencies, before promulgating rules or other regulations that require ''collections of information'' (i.e., recordkeeping, reporting, or third-party disclosure requirements), to obtain approval from the Office of Management and Budget (''OMB''), 44 U.S.C. 3502. The Commission currently has OMB clearance for the Rule's information collection requirements (OMB No. 3084–0104). The amendment will not impose any additional information collection requirements, so OMB approval is unnecessary.

List of Subjects in 16 CFR Part 425

Trade practices.

Text of Amendments

PART 425—USE OF PRENOTIFICATION NEGATIVE OPTION PLANS

1. The authority citation for part 425 continues to read as follows:

Authority: 15 U.S.C. 41–58.

2. The heading of Part 425 is revised to read as set forth above.

§ 425.1 [Amended]

3. In § 425.1, the Note following paragraph (b)(5) is removed.

4. Section 425.1 is amended by revising the introductory text of paragraphs (a) and (b) to read as follows:

§ 425.1 The rule.

(a) In connection with the sale, offering for sale, or distribution of goods and merchandise in or affecting commerce, as ''commerce'' is defined in the Federal Trade Commission Act, it is an unfair or deceptive act or practice, for a seller in connection with the use of any negative option plan to fail to comply with the following requirements:

* * * * *

(b) In connection with the sale or distribution of goods and merchandise in or affecting commerce, as ''commerce'' is defined in the Federal Trade Commission Act, it shall constitute an unfair or deceptive act or practice for a seller in connection with the use of any negative option plan to:

* * * * *

By direction of the Commission.

Benjamin I. Berman,

Acting Secretary.

[FR Doc. 98–22446 Filed 8–19–98; 8:45 am]

BILLING CODE 6750–01–M

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 721

[OPPTS–50632; FRL–5788–7]

RIN 2070–AB27

Significant New Uses of Certain Chemical Substances

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final rule.

SUMMARY: EPA is promulgating significant new use rules (SNURs) under section 5(a)(2) of the Toxic Substances Control Act (TSCA) for 73 chemical substances which were the subject of premanufacture notices (PMNs) and subject to TSCA section 5(e) consent orders issued by EPA. Today's action requires persons who intend to manufacture, import, or process these substances for a significant new use to notify EPA at least 90 days before commencing the manufacturing or processing of the substance for a use designated by this SNUR as a significant new use. The required notice will provide EPA with the opportunity to evaluate the intended use, and if necessary, to prohibit or limit that activity before it occurs. EPA is promulgating this SNUR using direct final procedures.

DATES: The effective date of this rule is October 19, 1998. This rule shall be promulgated for purposes of judicial review at 1 p.m. (e.s.t.) on September 3, 1998.

If EPA receives notice before October 19, 1998 that someone wishes to submit adverse or critical comments on EPA's action in establishing a SNUR for one or more of the chemical substances subject to this rule, EPA will withdraw the SNUR for the substance for which the notice of intent to comment is received and will issue a proposed SNUR providing a 30-day period for public comment.

ADDRESSES: Each comment or notice of intent to submit adverse or critical comment must bear the docket control number OPPTS–50632 and the name(s) of the chemical substance(s) subject to the comment. All comments should be sent in triplicate to: OPPT Document Control Officer (7407), Office of Pollution Prevention and Toxics, Environmental Protection Agency, 401 M St., SW., Rm. G–099, East Tower, Washington, DC 20460.

Comments and data may also be submitted electronically to: oppt.ncic@epa.gov. Follow the instructions under Unit X. of this document. No Confidential Business Information (CBI) should be submitted through e-mail.

All comments which contain information claimed as CBI must be clearly marked as such. Three sanitized copies of any comments containing information claimed as CBI must also be submitted and will be placed in the public record for this rulemaking. Persons submitting information on any portion of which they believe is entitled to treatment as CBI by EPA must assert a business confidentiality claim in accordance with 40 CFR 2.203(b) for each portion. This claim must be made at the time that the information is submitted to EPA . If a submitter does not assert a confidentiality claim at the time of submission, EPA will consider this as a waiver of any confidentiality claim and the information may be made available to the public by EPA without further notice to the submitter.

FOR FURTHER INFORMATION CONTACT: Susan B. Hazen, Director, Environmental Assistance Division (7408), Office of Pollution Prevention and Toxics, Environmental Protection Agency, Rm. E–531, 401 M St., SW., Washington, DC 20460, telephone: (202) 554–1404, TDD: (202) 554–0551; e-mail: TSCA-Hotline@epa.gov.

SUPPLEMENTARY INFORMATION:

Electronic Availability: Electronic copies of this document are available from the EPA Home Page at the **Federal Register**-Environmental Documents entry for this document under ''Laws and Regulations'' (http://www.epa.gov/fedrgstr/).

This SNUR will require persons to notify EPA at least 90 days before commencing manufacturing or processing a substance for any activity designated by this SNUR as a significant new use. The supporting rationale and background to this rule are more fully set out in the preamble to EPA's first direct final SNURs published in the **Federal Register** of April 24, 1990 (55 FR 17376). Consult that preamble for further information on the objectives, rationale, and procedures for the rules and on the basis for significant new use designations including provisions for developing test data.

I. Authority

Section 5(a)(2) of TSCA (15 U.S.C. 2604(a)(2)) authorizes EPA to determine that a use of a chemical substance is a ''significant new use.'' EPA must make this determination by rule after considering all relevant factors, including those listed in section 5(a)(2) of TSCA. Once EPA determines that a use of a chemical substance is a