one and/or the other: Father, mother, son, daughter, wife, husband, brother or sister. In each such case, SBA shall make a determination that such ownership, such guaranty and the proceeds of such loan will substantially benefit the operating small concern.

* * * * *

(Catalog of Federal Domestic Assistance Programs No. 59.012, Small Business Loans.)

Susan Engeleiter,

Administrator.

[FR Doc. 89-20184 Filed 8-25-89; 8:45 am]

BILLING CODE 8025-01-M

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13 CFR Part 121

Small Business Size Standards; Revision; Correction

AGENCY: Small Business Administration.

ACTION: Final rule; correction.

SUMMARY: On March 31, 1989, the Small Business Administration (SBA) revised its regulations to set an explicit size standard of 500 employees for nonmanufacturers. A "nonmanufacturer" is a company offering to supply to the Federal Government an item which it does not itself manufacture. However, the subheadings of the size standards table for Division F—Wholesale Trade and Division G—Retail Trade can give the unintended impression that all retail and wholesale procurement contracts, including those for services, are included under the 500-employee nonmanufacturer standard. The regulations cover only contracts for supplies. Institutional food service, computer software and other service-type contracts are excluded from the nonmanufacturer's size standard. The final rule is corrected by adding the words "of supplies" to the subheadings of Division F and G.

EFFECTIVE DATE: August 28, 1989.

FOR FURTHER INFORMATION CONTACT: Gary M. Jackson, Director, Size Standards Staff, (202) 653-6373.

SUPPLEMENTARY INFORMATION: On March 31, 1989, SBA published a Final Rule (54 FR 13160) which established a size standard of 500 employees for nonmanufacturers. This rule applies only to contracts for supplies and not for construction or service contracts (as stated in the regulations in § 121.5(b)(2)). However, through misinterpretation of subheadings in Table 2 of the regulations, contracts for services with firms under Division F (Wholesale Trade) or Division G (Retail Trade) might be construed also to be covered. By adding the words "of supplies" to the center subheadings under both Divisions F and G, as set forth below, any erroneous impressions are avoided.

Accordingly, the subheadings of Division F—Wholesale and Division G—Retail Trade in Table 2 of §121.2(d)(2), which appeared as a final rule in the **Federal Register** on March 31, 1989 (54 FR 13163), are correctly revised as set forth below:

Division F—Wholesale Trade

(Not Applicable to Government Procurement of supplies. The nonmanufacturer size standard of 500 employees shall be used for purposes of Government Procurement of supplies.)

* * * * *

Division G—Retail Trade

(Not Applicable to Government Procurement of supplies. The nonmanufacturer size standard of 500 employees shall be used for purposes of Government Procurement of supplies.)

* * * * *

Dated: August 16, 1989.

Susan Engeleiter,

Administrator, U.S. Small Business Administration.

[FR Doc. 89-20188 Filed 8-25-89; 8:45 am]

BILLING CODE 8025-01-M

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 97

[Docket No. 25994; Amdt. No. 1407]

Standard Instrument Approach Procedures; Miscellaneous Amendments

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Final rule.

SUMMARY: This amendment establishes, amends, suspends, or revokes Standard Instrument Approach Procedures (SIAPs) for operations at certain airports. These regulatory actions are needed because of the adoption of new or revised criteria, or because of changes occurring in the National Airspace System, such as the commissioning of new navigational facilities, addition of new obstacles, or changes in air traffic requirements. These changes are designed to provide safe and efficient use of the navigable airspace and to promote safe flight operations under instrument flight rules at the affected airports.

DATES: *Effective:* An effective date for each SIAP is specified in the amendatory provisions.

Incorporation by reference—approved by the Director of the Federal Register on December 31, 1980, and reapproved as of January 1, 1982.

ADDRESS: Availability of matters incorporated by reference in the amendment is as follows:

For Examination—

1. FAA Rules Docket, FAA Headquarters Building, 800 Independence Avenue, SW., Washington, DC 20591;
2. The FAA Regional Office of the region in which the affected airport is located; or
3. The Flight Inspection Field Office which originated the SIAP.

For Purchase—

Individual SIAP copies may be obtained from:

1. FAA Public Inquiry Center (APA-200), FAA Headquarters Building, 800 Independence Avenue, SW., Washington, DC 20591; or
2. The FAA Regional Office of the region in which the affected airport is located.

By Subscription—

Copies of all SIAPs, mailed once every 2 weeks, are for sale by the Superintendent of Documents, U.S. Government Printing Office, Washington, DC 20402.

FOR FURTHER INFORMATION CONTACT: Paul J. Best, Flight Procedures Standards Branch (AFS-420), Technical Programs Division, Flight Standards Service, Federal Aviation Administration, 800 Independence Avenue, SW., Washington, DC 20591; telephone (202) 267-8277.

SUPPLEMENTARY INFORMATION: This amendment to part 97 of the Federal Aviation Regulations (14 CFR part 97) prescribes new, amended, suspended, or revoked Standard Instrument Approach Procedures (SIAPs). The complete regulatory description of each SIAP is contained in official FAA form documents which are incorporated by reference in this amendment under 5 U.S.C. 552(a), 1 CFR part 51, and § 97.20 of the Federal Aviation Regulations (FARs). The applicable FAA Forms are identified as FAA Forms 8260-3, 8260-4, and 8260-5. Materials incorporated by reference are available for examination or purchase as stated above.

The large number of SIAPs, their complex nature, and the need for a special format make their verbatim publication in the **Federal Register** expensive and impractical. Further, airmen do not use the regulatory text of the SIAPs, but refer to their graphic depiction on charts printed by publishers of aeronautical materials. Thus, the advantages of incorporation by reference are realized and publication of the complete description of each SIAP contained in FAA form document is unnecessary. The provisions of this amendment state the affected CFR (and FAR) sections, with the types and effective dates of the SIAPs. This amendment also identifies the airport, its location, the procedure identification and the amendment number.

This amendment to part 97 is effective on the date of publication and contains separate SIAPs which have compliance dates stated as effective dates based on related changes in the National Airspace System or the application of new or revised criteria. Some SIAP amendments may have been previously issued by the FAA in a National Flight Data Center (FDC) Notice to Airmen (NOTAM) as an emergency action of immediate flight safety relating directly to published aeronautical charts. The circumstances which created the need for some SIAP amendments may require making them effective in less than 30 days. For the remaining SIAPs, an effective date at least 30 days after publication is provided.

Further, the SIAPs contained in the amendment are based on the criteria contained in the U.S. Standard for Terminal Instrument Approach Procedures (TERPs). In developing these SIAPs, the TERPS criteria were applied to the conditions existing or anticipated at the affected airports. Because of the close and immediate relationships between these SIAPs and safety in air commerce, I find that notice and public procedure before adopting these SIAPs is unnecessary, impracticable, and contrary to the public interest and, where applicable, that good cause exists for making some SIAPs effective in less than 30 days.

The FAA has determined that this regulation only involves an established body of technical regulations for which frequent and routine amendments are necessary to keep them operationally current. It, therefore—(1) is not a "major rule under Executive Order 1229; (2) is not a "significant rule" under DOT Regulatory Policies and Procedures (44 FR 11034; February 26, 1979); and (3) does not warrant preparation of a regulatory evaluation as the anticipated impact is so minimal. For the same reason, the FAA certifies that this amendment will not have a significant economic impact on a substantial number of small entities under the criteria of the Regulatory Flexibility Act.

List of Subjects in 14 CFR Part 97

Approaches, Standard instrument, Incorporation by reference.

Issued in Washington, DC, on August 18, 1989.

Robert L. Goodrich,

Director, Flight Standards Service.

Adoption of the Amendment

Accordingly, pursuant to the authority delegated to me, part 97 of the Federal Aviation Regulations (14 CFR part 97) is amended by establishing, amending, suspending, or revoking Standard Instrument Approach Procedures, effective at 0901 g.m.t. on the dates specified, as follows:

PART 97—[AMENDED]

1. The authority citation for part 97 continues to read as follows:

Authority: 49 U.S.C. 1348, 1354(a), 1421, and 1510; 49 U.S.C. 106(g) (revised, Pub. L. 97–449, January 12, 1983; and 14 CFR 11.49(b)(2)).

§§ 97.23, 97.25, 97.27, 97.29, 97.31, 97.33, and 97.35 [Amended]

By amending: § 97.23 VOR, VOR/DME, VOR or TACAN, and VOR/DME or TACAN; § 97.25 LOC, LOC/DME, LDA, LDA/DME, SDF, SDF/DME; § 97.27 NDB, NDB/DME; § 97.29 ILS, ILS/DME, ISMLS, MLS, MLS/DME, MLS/RNAV; § 97.31 RADAR SIAPs; § 97.33 RNAV SIAPs; and § 97.35 COPTER SIAPs, identified as follows:

* * * *Effective September 21, 1989*

Parker, AZ—Avi Suquilla, VOR/DME–A, Amdt. 2
Coeur D'Alene, ID—Coeur D'Alene Air Terminal, VOR RWY 1, Amdt. 1
Fort Wayne, IN—Fort Wayne Muni/Baer Field, LOC BC RWY 23, Amdt. 7
Sulphur, LA—Southland Field, VOR DME–A, Orig.
Wiscasset, ME—Wiscasset, VOR/DME RWY 25, Orig.
Islip, NY—Long Island MacArthur, ILS RWY 24, Amdt. 1, Cancelled
Islip, NY—Long Island MacArthur, ILS RWY 24, Orig.
Salem, OR—McNary Fld, LOC/DME RWY 31, Amdt. 2
Salem, OR—McNary Fld, NDB RWY 31, Amdt. 18
Salem, OR—McNary Fld, ILS RWY 31, Amdt. 27
Sioux Falls, SD—Joe Foss Field, VOR or TACAN RWY 15, Amdt. 18
Sioux Falls, SD—Joe Foss Field, VOR/DME or TACAN RWY 33, Amdt. 9

* * * *Effective October 19, 1989*

Chicago, IL—Chicago Midway, NDB RWY 31L, Amdt. 12
Chicago, IL—Chicago Midway, ILS RWY 31L, Amdt. 3
Sterling Rockfalls, IL—Whiteside County Airport Joseph H. Bittorf Field, LOC BC RWY 7, Amdt. 4
Sterling Rockfalls, IL—Whiteside County Airport Joseph H. Bittorf Field, NDB RWY 7, Amdt. 4
Sterling Rockfalls, IL—Whiteside County Airport Joseph H. Bittorf Field, ILS RWY 25, Amdt. 9
Lafayette, IN—Purdue University, VOR–A, Amdt. 24
Portales, NM—Portales Muni, NDB RWY 2, Amdt. 2, Cancelled
Muleshoe, TX—Edward Warren Field, VOR/DME–A, Amdt. 1, Cancelled

* * * *Effective November 16, 1989*

Lakeland, FL—Lakeland Muni, VOR RWY 9, Orig.
Swainsboro, GA—Emanuel County, VOR/DME–A, Amdt. 1
Swainsboro, GA—Emanuel County, NDB RWY 13, Orig.
Salem, IL—Salem-Leckrone, NDB RWY 18, Amdt. 8
New Orleans, LA—New Orleans Intl (Moisant Field), LOC RWY 10, Orig.
New Orleans, LA—New Orleans Intl (Moisant Field), NDB RWY 10, Amdt. 23
New Orleans, LA—New Orleans Intl (Moisant Field), ILS RWY 10, Amdt. 29, Cancelled
Portland, ME—Portland Intl Jetport, RADAR–1, Amdt. 2
Jackson, MS—Hawkins Field, NDB RWY 16, Amdt. 5
Jackson, MS—Hawkins Field, ILS RWY 16, Amdt. 4
Greeneville, TN—Greeneville Muni, LOC RWY 5, Amdt. 3
Greeneville, TN—Greeneville Muni, NDB RWY 5, Amdt. 2
Lafayette, TN—Lafayette Muni, NDB RWY 19, Amdt. 2
Smithville, TN—Smithville Muni, NDB RWY 24, Amdt. 1
Waverly, TN—Humphreys County, VOR/DME–A, Amdt. 2
Waverly, TN—Humphreys County, NDB RWY 21, Amdt. 2
Snyder, TX—Winston Field, NDB RWY 35, Amdt. 1
Eagle River, WI—Eagle River Union, VOR/DME RWY 4, Orig.
Eagle River, WI—Eagle River Union, NDB RWY 22, Amdt. 4

The FAA published an Amendment in Docket No. 25970, Amdt. No. 1405 to part 97 of the Federal Aviation Regulations (VOL 54 FR No. 144 Page 31328; dated Friday, July 28, 1989, under § 97.27 effective September 21, 1989, which is hereby amended as follows:

Rescind:

Chickasha, OK—Chickasha Muni, NDB RWY 17, ORIG.
Bay City, TX—Bay City Muni, NDB RWY 13, AMDT. 2

[FR Doc. 89–20174 Filed 8–25–89; 8:45 am]

BILLING CODE 4910–13–M

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

14 CFR Part 1261

RIN 2700-AA82

AGENCY: National Aeronautics and Space Administration (NASA).

ACTION: Final rule.

SUMMARY: NASA is amending 14 CFR part 1261, subpart 1261.1, by correcting the authority citation and by revising § 1261.102 to comply with Public Law 100-565 dated October 31, 1988.

EFFECTIVE DATE: August 28, 1989.

ADDRESS: Office of General Counsel, Code GG, NASA Headquarters, Washington, DC 20546.

FOR FURTHER INFORMATION CONTACT: Sara Najjar, 202/453-2465.

SUPPLEMENTARY INFORMATION: Public Law 100-565 was approved on October 3, 1988, which amends title 31 of the United States Code to increase from $25,000 to $40,000 the maximum that the United States may pay in settlement of a claim against the United States made by an officer or employee of the Government.

Because this rule is only technical in nature and corrects a statutory citation and revises a mandated dollar amount, it does not constitute a major rule for purposes of Executive Order 12291 and is not subject to the Regulatory Flexibility Act at 5 U.S.C. 601 et seq.

List of Subjects in 14 CFR Part 1261

Administrative practice and procedures, Claim, Dept collections, Administrative offset, Government employees, Pay administration, Personal property, Salary offset, Wages.

For reasons set out in the preamble, 14 CFR part 1261 is amended as follows:

PAST 1261—PROCESSING OF MONETARY CLAIMS (GENERAL)

1. The autority citation for 14 CFR subpart 1261.1 is revised to read as follows:

Authority: 31 U.S.C. 2371, et seq.

2. Section 1261.102 is revised to read as follows:

§ 1261.102 Maximum Amount.

From October 1, 1982, to October 30, 1988, the maximum amount that may be paid under the Military Personnel and Civilian Employees' Claim Act of 1964, as amended (31 U.S.C. 3721) is $25,000, and on or after October 31, 1988, the maximum amount is $40,000 (Pub. L. 100-565, 102 Stat. 2833, October 31, 1988).

Richard H. Truly,

Administrator.

[FR Doc. 89-20221 Field 8-25-89; 8:45 am]

BILLING CODE 7510-01-M

FEDERAL TRADE COMMISSION

16 CFR Part 424

Amendment to Trade Regulation Rule Concerning Retail Food Store Advertising and Marketing Practices

AGENCY: Federal Trade Commission.

ACTION: Final amendments to trade regulation rule.

SUMMARY: The Federal Trade Commission issues a final amendment to 16 CFR part 424, which is retitled Retail Food Store Advertising and Marketing Practices as amended. The trade regulation rule, as amended, requires retail food stores to have adequate stock to meet reasonable demand for items advertised for sale at specified prices unless the store publishes in the advertisement a clear and adequate disclosure that quantities are limited. Additionally, the amended rule provides that, even when stores do not publish a limited quantity disclaimer, it is not a violation of the rule, when unavailability of an advertised item does occur, if the store (1) ordered sufficient quantities of the item to meet reasonably anticipated demand; (2) offers a raincheck for the unavailable item; (3) offers a substitute for the unavailable item at the advertised price or at a comparable price reduction; or (4) offers other compensation at least equal to the advertised value.

This notice contains a Statement of Basis and Purpose for the amendments to the Rule, which incorporates a regulatory analysis, and the text of the Rule as amended.

EFFECTIVE DATE: August 28, 1989.

ADDRESS: Requests for copies of the Rule and the Statement of Basis and Purpose should be sent to the Public Reference Branch, Federal Trade Commission, 6th Street and Pennsylvania Avenue NW., Washington, DC 20580.

FOR FURTHER INFORMATION CONTACT: Walter Gross, Division of Service Industry Practices, Bureau of Consumer Protection, Federal Trade Commission, Washington, DC 20580, (202) 326-3319.

List of Subjects in Part 424

Retail food stores, Trade rules.

By direction of the Commission.

Donald S. Clark,

Secretary.

STATEMENT OF BASIS AND PURPOSE

I. Introduction

A. Overview of the Rule

The Commission promulgated the Retail Food Store Advertising and Marketing Practices Rule [1] in May, 1971 concluding that "on the basis of the entire public record * * * the issuance of the Trade Regulation Rule with respect to the unavailability and mispricing of advertised food and grocery products is required by that record, and is in the public interest." [2] The Rule required retail food stores to have every advertised item readily available for sale at or below the advertised price. If an advertised item was not available, the Rule required that grocers be able to document that they ordered and received sufficient quantities of the item to meet reasonably anticipated demand. The Rule permitted disclosures of some restrictions on availability, such as "Available only at stores featuring delicatessen departments." [3]

Between 1973 and 1978, the Commission entered nine cease and desist orders against food chains charged with failing to have advertised items available. Some of the complaints in these cases charged violations of the Rule; others charged that conduct in violation of the principles expressed in the Rule violated section 5 of the Federal Trade Commission Act.[4]

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[1] 16 CFR part 424 (hereinafter cited as "the Rule" or "the current Rule").

[2] 36 FR 8777 (hereinafter cited as "SBP").

[3] The Rule included an exception to the general availability requirement—a provision permitting "clear and conspicuous disclosure * * * as to all exceptions and/or limitations or restrictions with respect to stores, products or prices otherwise included within the advertisements." A 1975 staff interpretation of the Rule's disclosure provision concluded that advertisements containing a notice that supplies of a number of items available at each store location, would not excuse a retailer from the Rule's requirement that retailers must have sufficient quantities on hand to meet demand.

[4] *Food Fair Stores, Inc.*, 90 F.T.C. 491 (1977); *Fisher Foods, Inc.*, 90 F.T.C. 473 (1977); *Shop Rite Foods, Inc.*, 90 F.T.C. 500 (1977); *Kroger Co.*, 90 F.T.C. 459 (1977); *Mayfair Supermarkets, Inc.*, 87 F.T.C. 286 (1976); *Pacific Gamble-Robinson Co.*, 86 F.T.C. 1034 (1975); *Baza'r, Inc.*, 86 F.T.C. 1026 (1975); *The Great Atlantic and Pacific Tea Company, Inc.*, 85 F.T.C. 601 (1975); *Albertsons, Inc.*, 85 F.T.C. 500 (1975). Two additional Orders, *Safeway Stores, Inc.*, 91 F.T.C. 975 (1978), and *Fred Meyer, Inc.*, 87 F.T.C. 112 (1976) dealt only with mispricing.

The Commission is promulgating the amended Rule in order to reduce costs on the retail food industry that are passed along to consumers. The Commission has concluded that these costs, though difficult to measure precisely, exceed the benefits the original Rule may have provided to consumers. The Commission has also concluded that the amended Rule will not significantly reduce consumer protection because injury caused by such instances of unexpected unavailability as do occur will be substantially mitigated by the amended Rule's requirement that consumers be offered rainchecks or comparable substitute items.

B. Background of this Proceeding

In 1980, the Commission published[5] for comment A Study of Consumer Response to the Availability of Advertised Specials, which describes the results of a survey that was conducted for the Commission by an independent research organization, Market Facts, Inc.[6] The findings of the Market Facts Study suggested that consumers realize little, if any, benefit as a result of the Rule. Comments by various grocers on the published Study indicated that costs of complying with the Rule were far in excess of any benefits that had been identified.[7] On December 10, 1984, the Commission published an Advance Notice of Proposed Rulemaking ("ANPR").[8] The ANPR indicated that the Commission was seeking further information on the costs and benefits of the current Rule as well as comments on whether the Commission should repeal the Rule, amend it or make no change.[9] Comments received in response to both the ANPR and the staff's economic analysis indicated strong consumer opposition to repeal of the Rule. The staff subsequently recommended that the Commission reduce the costs imposed by the Rule by amending its provisions to allow grocers greater flexibility in disclosing in advertising when there are only limited quantities of advertised items and to permit additional defenses to unavailability.[10]

The Commission then published a Notice of Proposed Rulemaking ("NPR") on October 24, 1985.[11] The major amendments proposed in the NPR permitted grocers to (1) publish clear and adequate limited quantity disclosures in their advertising and (2) defend against instances of unavailability by demonstrating that they provide rainchecks, substitutions of items of comparable value or other compensation at least equal to the advertised value.

A ninety-day comment period on the NPR concluded on January 24, 1986. The Commission received 35 comments on the NPR, including two from industry trade associations, three from retail grocers, seven from state, federal and local government agencies, three from consumer groups and 20 from individual consumers.

On April 1 and 2, 1986, public hearings on the Rule were held in Washington, DC. Two parties, the Food Marketing Institute ("FMI"), a trade association representing approximately 1,500 wholesale and retail grocers, and Consumers Union, applied for and were granted designation as interested parties to participate in the hearings. Eight witnesses, four for the Staff and four for industry, testified at the hearings. Consumers Union decided not to present any witnesses, but did conduct cross-examination of both staff witnesses and industry witnesses.

In December, 1986, the staff published its Final Report, recommending, with one minor adjustment, the adoption of the proposed amendments.[12] In an accompanying statement, the Bureau Director indicated that he favored repealing the Rule because the record evidence demonstrated that retail food stores appear to have adequate incentives to avoid unavailability even without the presence of an FTC rule.[13] On January 20, 1987, the Presiding Officer published his Report, in which he recommended amendments to the Rule that deviated substantially from those that the Commission had initially proposed and staff had subsequently recommended in its Staff Report.[14] Twenty-one comments were received during a ninety-day comment period on both reports that ended on March 24, 1987: two from industry trade groups, one from a federal agency, three from state and local consumer agencies, one from an academic/staff consultant, one from the publisher of a newsletter for specialty dealers in the consumer electronics industry and thirteen from individual consumers.

On December 1, 1987, the Bureau of Consumer Protection forwarded its final recommendations to the Commission on this proposed rulemaking. Two members of the rulemaking staff favored amending the Rule, while one favored repeal. The Assistant Director for Service Industry Practices also favored amendment. The Bureau Director favored repeal as did the Bureau of Economics.[15] On April 19, 1988, after reviewing the rulemaking record as a whole, the Commission voted three to two to amend the Rule as the majority of the rulemaking staff had proposed.

II. Basis for Amended Rule

A. The Legal Standard for Amending the Rule

Section 18(d)(2) of the FTC Act states that "[a] substantive amendment to, or repeal of, a rule promulgated under subsection (a)(1)(B) shall be prescribed * * * in the same manner as a rule under such subsection." That section also provides that an amendment or repeal of a Section 18 rule shall be "subject to judicial review, in the same manner as" any other Section 18 rule. Section 18(e)(3) provides that a rule may be judicially reviewed under either a

[5] 45 FR 59634 (1980).

[6] Market Facts, Inc., A Study of Consumer Response to the Availability of Advertised Specials, (1979) R–B–1* (hereinafter cited as "Market Facts Study" or "Study").

*In this document, references made to material contained in the rulemaking record are made in the footnotes using the following abbreviations:

Tr.—The transcript of the hearings.

HX.—Exhibits presented and accepted into evidence at the hearings.

R.—Materials submitted by the Commission staff or interested parties as well as materials placed on the record at the direction of the Presiding Officer.

References to documents contained in the written ("R" portion) of the rulemaking record show the category in which the document was placed, the number of the document, and the internal page number of the document on which the cited reference appears. The reference number for the rulemaking record itself is 215–65.

[7] *See* Bureau of Consumer Protection, Federal Trade Commission, Retail Food Store Advertising and Marketing Practices: Final Staff Report to the Federal Trade Commission on Proposed Amended Trade Regulation Rule 7, 9 (1986) R–O–1, (hereinafter cited as "Staff Report" in text, "S.R." in notes).

[8] 49 FR 48059 (1984).

[9] *See* Joint Memorandum from the Bureau of Consumer Protection and the Bureau of Economics to the Federal Trade Commission, Staff Report on the Retail Food Store Advertising and Marketing Practices Trade Regulation Rule, 16 CFR part 424, (July 25, 1984) R–B–23 (hereinafter cited as "1984 Staff Memorandum").

[10] *See* Joint Memorandum from the Bureau of Consumer Protection and the Bureau of Economics to Federal Trade Commission, Retail Food Store Advertising and Marketing Practices Proposed Amendment of Trade Regulation Rule, (August 29, 1985) R–B–67 (hereinafter cited as "1985 Staff Memorandum").

[11] 50 FR 43224 (1985) R–A–3.

[12] S.R., *supra* n.7 at 7.

[13] *Id.* at Appendix E.

[14] Henry B. Cabell, Report of the Presiding Officer on Proposed Trade Regulation Rule: Retail Food Store Advertising and Marketing Practices (1987), R–P–1 (hereinafter cited as "P.O.R.").

[15] *See* Memorandum from William C. MacLeod, Director, Bureau of Consumer Protection, to the Commission (November 30, 1987). *See also* FTC Press Release, "Consumer Protection and Economics Directors Recommend Repealing Food Store Advertising Rule; Staff Sees Basis For Either Repealing or Amending Rule" (April 19, 1988).

substantial evidence standard or, in accordance with 5 U.S.C. 706(2)(A), an arbitrary and capricious standard. According to section 18(e)(3), all factual matters upon which the amendment is based should be supported by substantial evidence in the rulemaking record.

In addition to this statutory requirement, the Commission should "articulate a satisfactory explanation for its action including a rational connection between the facts found and the choice made." [16] Since the courts have noted that there is a presumption against changes to an existing course of action, the Commission should "supply reasoned analysis for the change beyond that which may be required when an agency does not act in the first instance." [17] If the Commission's decision to amend or repeal a rule is based upon factual findings, those findings should be supported by substantial evidence. If the decision to amend or repeal is based on policy grounds, the Commission should articulate its reasoning so that it is clear it is not acting arbitrarily or capriciously.

The Commission adopted the original Rule in 1971, on the basis of a record containing survey evidence that indicated overall unavailability rates of 11 percent of advertised items and overpricing rates of between 3.0 percent and 4.6 percent in the ten leading food chains.[18] The Commission's current rulemaking standards might require a more persuasive record before imposing an industry-wide Rule.[19] However, given that the Rule is in place, these same standards now require "a preponderance of substantial reliable evidence" in support of any proposed change to the Rule.

In the case of this rulemaking, the Commission has concluded that there is substantial evidence to support a finding that the costs of complying with the original Rule far outweigh its benefits. Moreover, the Commission believes that the amendments it has adopted will reduce these costs while serving to ensure that consumers will still be protected from losses associated with unavailability of advertised items.

B. The Benefits of the Original Rule

One means of determining the benefits of the Rule is to measure the extent to which it may have been effective in reducing unavailability of advertised specials that existed prior to the Rule and then to estimate the actual consumer dollars saved as a result of that reduction. The rulemaking record in this matter contains evidence on this issue in the form of retail food store unavailability surveys that were conducted before and after the Rule was promulgated, as well as academic research that permits the conversion of the differences in unavailability rates into consumer dollars. This section first compares pre-Rule and post-Rule survey rates of unavailability and then, using the findings from the academic research, estimates the maximum level of likely savings that consumers have realized as a result of the Rule.

A second means of determining consumer benefits is to survey consumers as to how the unavailability of advertised products affects them and how much they value availability of these products as compared with other attributes of retail grocery stores. Using the data from that survey of consumers regarding unavailability, a separate estimate of consumer benefits is generated.

1. Pre-Rule and Post-Rule Measures of Unavailability

a. Survey Rates of Unavailability. In 1967–68, as part of a larger study of food store selling practices conducted in Washington, DC and San Francisco, California, staff surveyed retail food stores' shelves for the presence of advertised items. [20] This survey indicated an average overall unavailability rate in the two metropolitan areas studied of 11 percent.[21] This study was the primary basis for promulgation of the original Rule.[22]

In contrast, the record evidence indicates that unavailability rates in the period after the Rule was promulgated have been cut in half. In 1973, Commission staff surveyed unavailability and mispricing of advertised items in 640 retail food stores of leading grocery store chains in 40 Standard Metropolitan Statistical Areas ("SMSA").[23] The overall average unavailability rate was 5.5 percent.[24]

A recent survey, conducted in the Borough of Manhattan of New York City by the Better Business Bureau of Metropolitan New York, Inc., in 1985, showed an unavailability rate (4.6%) consistent with previous post-Rule studies.[25] Only one study, which was conducted in New Jersey in 1980, showed post-Rule unavailability rates to be higher (6.8%) than rates found in the studies already mentioned.[26]

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[16] Motor Vehicle Manufacturer's Ass'n. v. State Farm Mutual Automobile Insurance Co., 463 U.S. 29, 42–43, 103 S.Ct. 2856, 2866–67 (1983).

[17] *Id.* at 2866.

[18] SBP, *supra* n. 2 at 8777–78.

[19] The Commission has indicated that before it will promulgate a Rule, it will first assure that the rulemaking record contains "a preponderance of substantial reliable evidence" in support of the Rule. Initially, it will require substantial evidence for the factual propositions underlying a determination that an existing practice is unfair or deceptive. Additionally, the Commission will consider the following questions in deciding to promulgate a Rule: (1) Is the act or practice prevalent? (2) Does a significant harm exist? (3) Will the proposed Rule reduce that harm? and (4) Will the benefits of the Rule exceed its costs? Statement of Basis and Purpose, Credit Practices TRR, 49 FR 7740 (March 1, 1984).

[20] Bureau of Economics, Federal Trade Commission, Economic Report on Food Chain Selling Practices in the District of Columbia and San Francisco 1 (1969) R–I–61 (hereinafter cited as "Market Basket Survey"). The survey covered an average of 65 advertised items in each of 137 stores in the Washington, DC and San Francisco sales areas.

[21] In Washington, DC, the staff found chain store unavailability rates to be 23 percent in low-income areas and 11 percent in high-income areas, with an overall rate of 14.4 percent. In San Francisco, where there was no such discrepancy between low-income and high-income areas, staff found an overall rate of six percent. Overall, a total of 11 percent of the items were found to be unavailable. It should be noted, however, that in this study, surveyors did not ask store personnel, as they did in later studies, about items they could not find on the shelves. Presumably, some items not found on the shelves may have been in the back of the store or located elsewhere in the sales area. This survey was criticized by industry members as being unsound methodologically. *See* S.R., *supra* n. 7 at 19, n. 41. While the failure to ask routinely for items not found on the shelves could have resulted in a slight overstatement of actual unavailability rates, it is unlikely that this oversight resulted in any substantial distortion of the results. In a similar study conducted by the Better Business Bureau of Metropolitan New York, Inc., surveyors did ask for items they could not find. Of the 480 items checked, only two out of 22 items not found on the shelves were in storage. Comment of Better Business Bureau of Metropolitan New York (1986) R–H–1 ("NYBBB 1986"). It does appear, however, that in order to account for differences between pre- and post-Rule methodologies, the overall pre-Rule unavailability rate should be adjusted slightly downward.

[22] SBP, *supra* n. 2 at 8777–78.

[23] Statement of Michael Lynch, Bureau of Economics, Federal Trade Commission, HX. 12, Exhibit 2 (1973 Commission Survey). Four stores from each of the four leading chains in each SMSA were picked at random. An item was considered unavailable if it could not be found anywhere in the sales area of the store and was not available on request from any part of the store not open to the public. *Id.*

[24] *Id.* Primarily on the basis of this survey, the Commission issued complaints against eleven supermarket chains alleging high unavailability rates in nine of them. *See* discussion *supra* at § II.A. An analysis of the unavailability rates contained in mandatory reports filed by the stores under orders as a result of these actions ("compliance reports"), submitted mostly in 1978 shows unavailability rates ranging from 0.3 percent to six percent and an average reported rate of 2.4 percent. However, because in many cases the order provisions requiring the surveys permitted the chain named in the order to determine the time and place of the surveys of its own stores, staff estimated that the true overall rates were closer to four percent. S.R., *supra* n. 7 at 21.

[25] S.R., *supra* n. 7 at 22.

[26] *Id.* at 22–23. A similar study conducted in 1978 by the same agency had found the overall

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On the basis of the comparison of pre-Rule and post-Rule survey rates, it appears that overall unavailability rates have been reduced by about 50 percent to current levels of about five percent since the Rule's promulgation. Although other factors, such as the introduction of computerized inventory records, may have served to reduce unavailability somewhat, evidence as to the measures that stores have taken to assure Rule compliance [27] leads the Commission to conclude that this reduction can be attributed primarily to the Rule and the resulting enforcement actions brought in the mid-seventies. Accordingly, benefits that may result from the original Rule can be measured in terms of the reduction in consumer losses from pre-Rule levels of unavailability of about 10 percent to post-Rule levels of unavailability of about five percent.

b. The Ferguson Study. [28] In 1980, academic researchers from the Marketing Department of the University of Alabama reported on a simulation study that estimated losses from unavailability of items featured in a typical retail food store ad. This research, referred to herein as the Ferguson Study, provides the basis for a direct measurement of Rule benefits by providing a basis for estimating an aggregate annual loss incurred by customers confronted with unavailability.[29]

The simulation technique used in the Ferguson Study permitted the researchers to calculate the losses incurred by consumers at various levels of unavailability.[30] Comparing losses generated by an unavailability level near that which existed prior to the Rule with losses generated by an unavailability level approximating the post-Rule unavailability level results in a new benefit per consumer of less than one cent per shopper per week.[31]

This estimate takes into account only the savings realized through the avoidance of trip losses ("the trip gain"), which are losses that result from the expense of wasted trips to retail outlets for advertised items that are unavailable. The price savings on advertised specials ("the savings gain")—which to the individual consumer shopping for that special may seem important—are not included in the benefits calculation because consumers in the aggregate do not actually realize a savings from the purchase of items on special. This is because grocers compensate for losses they incur from price reductions by increasing prices elsewhere or reducing services.[32]

2. The Consumer Survey Regarding Unavailability

A survey of consumer attitudes and perceptions of unavailability commissioned by the staff, the Market Facts Study,[33] addressed such issues as (1) the degree to which consumers experience unavailability, (2) the ability of consumers to take corrective action when they encounter unavailability, (3) the extent to which consumers consider unavailability to be a problem, and (4) the value consumers place on availability.[34] Consumer responses to these questions produced the following results:

—More than eight out of ten consumers have experienced at least occasional unavailability; a typical encounter usually results in the consumer either doing without the item, buying a comparable item at the regular price or going elsewhere to get the item. Most consumers indicated that they are not significantly inconvenienced by unavailability.

—Seven out of ten consumers have access to several stores that compete for their business by means of newspaper advertising.[35] of the more than half of the respondents who had encountered a store with "too few of its advertised items available," most would respond by either paying less attention to that store's advertising or shopping there less often.

—When asked to rank by importance various store attributes, consumers ranked availability of advertised items seventh out of 21 factors, behind quality of produce, quality of meat, overall price, amount of savings of advertised items, variety of items and friendly, helpful store personnel.

—Consumers report that they are willing to accept availability levels as low as 70 percent rather than experience either a one percent increase in prices, reduced savings on advertised specials, an increase in cashier overcharge mistakes, or a significant reduction in consumer services.[36]

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unavailability rate to be five percent. *Id.* However, little is known concerning the methodology used in either of these studies. For example, the methodology does not reveal whether shoppers asked store personnel for items that they could not find on the shelves.

[27] *See* discussion *infra* at section II.C.

[28] Ferguson, Mason and Wilkinson, Simulating Food Shoppers' Losses as a Result of Supermarket Unavailability, 11 Decision Sciences 535 (1980), R-I-40 (hereinafter cited as "the Ferguson Study").

[29] The Study researchers generated the data on shopper losses by simulating a year's worth of typical shopping transactions at a supermarket believed to be representative in terms of size and sales volume. The design of the simulation model was based on previously obtained information about management's stocking policies, store sales volume, the number and size of transactions, customer demographics, shopping patterns, and customer and management responses to unavailability. The items purchased in the simulation were derived from an actual advertisement of the supermarket, typical of the number and variety of items featured in the weekly grocery advertising of that market. The Ferguson loss calculation does not take into account the time and aggravation expended by shoppers encountering unavailability because of the difficulty in quantifying such factors. *Id.* at 544 n. 7.

[30] To obtain the weekly per shopper gain, the average gain for each transaction in the simulation is multiplied by the average number of weekly transactions made by an average shopper (1.5). *See* Progressive Grocer, 48th Annual Report of the Grocery Industry (1981), R-I-55. The resulting per week gain ($0.008) is then converted to an annual figure by multiplying the average number of supermarkets in 1980 (28,680) times the average number of customers per supermarket (about 4000) as reported in Progressive Grocer, 49th Annual Report of the Grocery Industry, 5 (1982), R-B-42. This result is then multiplied by the average gain per week per shopper and converted to 1985 dollars (see below) to produce an annual figure of $48 million.

All benefits and costs estimates are converted to 1985 dollars using the consumer price index in order to make them comparable to each other. The conversion formula follows:

Amount Year Y Dollars = (Amt in Year X Dollars) (CPI of Year Y) divided by (CPI of Year X).

[31] *See* S.R., *supra* n. 7 at 80–82. The Presiding Officer criticized the omission of savings gains and the justification therefor. He concluded that "Staff has averaged away the benefits for the individual consumer." P.O.R., *supra* n. 14 at 100. However, these individual consumer gains are not as significant as critics may think. First, the more that individual shoppers exclusively shop for bargains, the more other shoppers will have to absorb increased prices. The benefit to those individual shoppers thus becomes a loss to the other shoppers and the net benefit is still zero. Second, it is unlikely that many consumers actually save substantial sums on the yearly food budget by shopping specials.

[32] *See* S.R., *supra* n. 7 at 80–81. The savings gain per shopper per week is approximately 2.6 cents.

[33] *Supra* n. 6.

[34] The Study is based on a sample taken from a universe of 65,000 households comprising the Market Facts Mail Panel, demographically balanced to represent U.S. consumers and the U.S. population as a whole. The sample was chosen randomly from a universe of all panel members. The sample consisted of 3,036 households, each of which was mailed a questionnaire with instructions that it should be completed by the household member who does at least half of the shopping, to insure that it was completed by the most experienced shopper. Questionnaires were returned by 2,563 respondents, representing an 84 percent response rate.

[35] The study also found that consumers regularly read food store advertising and most of them pay some attention to featured items in those ads.

[36] The Study also reported that consumers generally were unwilling to give up any other store attributes—some arguably much lower in value than a one percent price hike—to assure higher availability rates. For example, generally, it was more important to consumers to maintain the same level of items advertised than to have them available 70, 80, 90 or even 100 percent of the time;

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In light of the findings of the Market Facts Study, that, in general, consumers do not object to availability going as low as 70 percent, then even a decrease to the 90 percent pre-Rule levels would not appear to pose a major problem. Moreover, the Market Facts Study indicates that while most consumers have experienced unavailability of advertised items, they have alternative food stores available to them and would switch to them if their regular store had too few of its advertised items available. Under the circumstances, therefore, the Commission concludes that the Market Facts Study indicates that, in general, the Rule has provided relatively small benefits to most consumers.

3. Conclusion

Based on the two studies relied on in assessing Rule benefits, the Commission finds that the measurable benefits to consumers under the Rule are less than one cent per week per shopper and, in the aggregate, range no higher than $48 million per year for all supermarket shoppers. Consumers may also realize additional—albeit unquantifiable—benefits, inasmuch as the Rule's assurance of availability saves consumers the aggravation expended when an advertised product proves unavailable.[37]

C. The Costs of the Original Rule

According to the record evidence, most food retailers feel compelled to take precautions that they would otherwise not take in the ordinary course of business to avoid inadvertent violations of the Rule. They take extraordinary measures to ensure that they have sufficient inventory of advertised items on hand to satisfy the last customer on the last day of the sale. These measures include maintaining inventory cushions over and above what is needed to meet reasonably anticipated demand, performing additional checks of retail shelves, and creating and maintaining records of their cumulative monitoring activities. These measures result in costs to the food retailers that are attributable solely to the Rule. This section analyzes the direct costs of these efforts. Evidence of the magnitude of these costs is provided by estimates from five separate supermarket chains.[38] In addition, the Commission staff's own independent analysis of the costs produced by investing in excess inventory, using data from the Ferguson Study, is also set forth. This independent analysis, developed by Michael Lynch, a staff economist in the FTC's Bureau of Economics, generally supports the supermarket chains' estimates of inventory costs.[39]

For purposes of this analysis, industry cost data are broken down into four expense categories: (1) Increased inventories to reduce unavailability ("inventory costs"); (2) extra internal monitoring of shelf stock and back room inventories to reduce ordering and pricing errors ("monitoring costs"); (3) compiling and monitoring extra records to prove compliance ("recordkeeping costs"); and (4) extra legal advice and consultation as well as extra monitoring by outside auditors and the like ("legal and survey costs").[40] The Table at Appendix A to this statement breaks out cost data (stated in 1985 dollars) by source and expense category.

1. Inventory Costs

The record indicates that one of the more costly measures that stores use to avoid inadvertently violating the Rule is to purchase and stock more inventory of advertised products than they realistically expect to sell. This measure results in both the cost of investing in (or carrying) excess inventory [41] ("inventory investment costs") and the monetary loss that stores incur when the excess inventory in perishables, *e.g.*, meat and produce, spoils or is reduced below cost for quick sale before it spoils ("spoilage and distress costs").[42]

As staff's independent analysis of inventory costs demonstrates,[43] the cost of stocking inventory cushions in perishable items can be extremely high. This is because these products have a very limited shelf life and, if not sold quickly, will spoil and must be discarded at a total loss. In order to reduce losses from spoilage, grocers attempt to sell excess inventory in perishables below their costs to move them quickly ("distress selling"). The extent to which grocers incur losses from spoilage or distress selling constitutes a second type of cost attributable to the perceived need to stock inventory cushions for advertised items. Staff estimates from industry figures that these costs range from $1,697 to $6,789 per store annually.[44]

2. Monitoring Costs

Monitoring costs represent the labor cost of having in-store personnel and supervisory personnel perform extra checks to see that advertised items are in stock and priced correctly.[45] As a

consumers also placed more value in having 80 percent of regularly stocked non-advertised items available than 100 percent of advertised items. Market Facts Study, *supra* n. 6 at 24.

[37] *See supra* n. 29. *See also infra* at section II.D where the Commission concludes that the magnitude of the unquantified transactional costs are *de minimis*

[38] All per store cost figures have been converted to 1985 dollars. *See supra* no. 30.

[39] *See* Statement of Michael Lynch, Bureau of Economics, Federal Trade Commission, Exhibit 13 (1986) HX-12, R-LL-1.

The industry cost data includes data submitted by the Food Marketing Institute (FMI) on behalf of three supermarket chains, identified in the record only as Company A, Company B, and Company C, and data submitted separately by Safeway, Inc., Kroger Stores, Inc. and Albertsons, Inc. However, a number of factors indicate that Safeway is Company A in FMI's submission. *See* S.R., *supra* n. 7 at 92. Thus they are treated as one ("Company A/Safeway") for purposes of this analysis.

Although the retail food industry alleged that their costs were indeed incremental costs attributable solely to Rule compliance, some commenters were skeptical that the chains could demonstrate successfully their basis for distinguishing alleged incremental costs from costs incurred in the ordinary course of doing business. The Presiding Officer also believed that the industry cost data were not reliable. P.O.R., *supra* n. 14 at 97. Staff, however, carefully probed industry witnesses at the hearings to determine the methodologies the chains used to identify and quantify their costs. *See* S.R., *supra* n. 7 at 111-112. In some instances, staff recalculated cost components of some stores that it believed to be based upon erroneous accounting principles. *Id.* at 98-99 and 101-102.

In the Commission's opinion, industry witnesses provided generally objective criteria for their costs, and each chain that submitted cost figures for the record demonstrated that it had an objective basis from which it estimated incremental Rule compliance costs. As adjusted by staff, the figures may be relied upon to support a finding as to the magnitude of costs to the industry for Rule compliance.

[40] S.R., *supra* n. 7 at 93.

[41] When retailers purchase extra inventory for advertised items that they do not expect to sell during the sales periods, they either have to borrow the money or invest capital that otherwise would be earning money for them. Either the amount of interest paid for the loan or the amount of money that stores could realize had that capital been invested at prevailing interest rates represents the inventory investment cost to the retailer. Of course, except for perishables that spoil or that are reduced below cost for quick sale, stores eventually will sell the excess inventory at the normal profit margin. For that reason the amount of money actually borrowed or invested is not a cost to the stores because ultimately they will recoup that expenditure. However, the fact that grocers eventually will earn a profit on the excess inventory does not offset the lost interest. Retailers, as long as they remain in business, must invest continually in new inventory cushions for their weekly advertising specials. Accordingly, they always will have an amount of capital tied up in excess inventory; even as they are recouping capital previously invested, they are investing new capital. Thus, the loss of interest on the average amount of capital invested in the excess inventory cushion represents the retailer's inventory investment cost.

[42] These costs varied widely (from $356 per store to $4,778 per store) and some were subject to controversy. *See* discussion in S.R., *supra* n. 7 at 97-103 for an explanation of how they were derived.

[43] *See infra* at section II.D. *See also* testimony of Michael Lynch, Staff Economist, Bureau of Economics, Tr. at 298-301.

[44] *See* S.R., *supra* n. 7 at 95.

[45] *Id.* at 107-08.

matter of good business practice, food retailers regularly monitor inventory levels to ensure that they have adequate stock. In order to ensure Rule compliance, however, they make these checks more often than would be required in the regular course of business.[46] Staff estimates from industry figures that annual per store monitoring costs ranged from $2,268 to $8,830.

3. Recordkeeping Costs

Recordkeeping costs are the costs food retailers incur to develop and compile records to show that they ordered and had delivered sufficient quantities of advertised items to meet reasonably anticipated demand in order to defend themselves against any charges that they violated the Rule. Food retailers indicated that recordkeeping costs exist at both the store level where these records are developed and at the central office level where the records generally are compiled and stored. Staff estimates from industry figures that annual recordkeeping costs ranged from $52 to $2,312 per store.

4. Legal and Survey Costs

This cost category includes the cost of legal services used in connection with Rule compliance or defense (the legal costs). It also includes the cost of audits of Rule compliance by independent firms that some stores retain (the survey costs). Staff estimates from industry figures that such costs ranged from $12 to $249 annually.[47]

5. Indirect Costs

The indirect costs of the Rule are mainly opportunity costs, *i.e.*, costs that are the result of the lost opportunities from action not taken. These indirect costs may occur because the threat of penalties resulting from a Rule violation may inhibit some types of food store advertising. As a result, food stores may advertise fewer items, run fewer specials or change the types of products they advertise. For example, food stores may advertise new products less often because demand for them may be hard to predict. They may be reluctant to advertise produce or other perishables, because at the end of the sale period, unsold items may spoil or need to be sold at distress prices. They may restrict their advertising of items with limited demand, such as ethnic items, because all stores would have to carry the item regardless of the segmented demand. They may advertise directly delivered items, such as beer and soft drinks, less often because deliveries from many independent suppliers are more difficult to coordinate than deliveries from the store's warehouse. They also may advertise less frequently items available in limited quantity, such as products on "deal", because they may not be able to guarantee quantities sufficient to meet demand. While these costs are real, they are not readily quantifiable and thus are not included in the cost-benefit calculation.[48]

D. Cost/Benefit Comparison

On the basis of the various estimates of costs of Rule compliance as compared with the estimates of maximum benefits under the Rule, the Commission concludes that the costs of complying with this Rule greatly exceed the benefits. Depending upon which food retailers' cost figures are used and assuming benefits of a magnitude indicated by the Ferguson Study, the record indicates that the costs imposed by the Rule exceed its benefits by ratios that range from over 2½ to one to nearly eight to one.[49] If the sum of the averages for each cost category is used, the ratio of costs to benefits is more than five to one.[50] Moreover, staff's independent analysis of the data used in the Ferguson Study demonstrates that the costs of reducing survey rates of unavailability by investing in excess inventory can result in costs that exceed benefits by an overwhelming margin.[51]

As previously noted, there are both benefits and costs, indirect in nature and difficult to quantify, that are not included in the cost benefit calculation.[52] On the benefits side of the equation are unquantified "transactional costs," or costs in the form of wasted time and frustration that result when an advertised item is unavailable.[53] On the cost side are the "indirect costs" of lost information, *e.g.*, information lost as a result of food retailers' avoiding advertising of certain categories of products—meat, produce, new products, etc.—because it may be difficult to accurately predict demand for them or assure adequate inventories.[54]

Record evidence indicates that savings from avoiding transactional costs are *de minimis*. Both the Market Facts Study and the Ferguson Study indicate that the overwhelming majority of consumers who have encountered unavailability report minimal inconvenience as a result. In the Ferguson Study, 83 percent of shoppers who encountered unavailability indicated that they did not experience significant inconvenience.[55] Likewise, the independent surveys supporting the Market Facts findings revealed that 74 percent of shoppers who encountered unavailability experienced little or no inconvenience (44 percent reported none), while only three percent reported "great inconvenience."

The indirect costs of limited information about items specially reduced in price are also minor. Indeed, if specials are not advertised, consumers may not realize the savings available had they known about and purchased those items at reduced prices. However, these "savings gains" do not affect the cost-benefit calculus inasmuch as grocers must raise other prices or reduce services to compensate for these price reductions.[56] Thus, the actual loss in

[46] *Id.* at 107, n. 283.

[47] *Id.* at 109–10.

[48] *See infra* at section II.D, where the Commission concludes that these costs are *de minimis*.

[49] Staff estimated maximum direct benefits under the Rule to be $48 million per year. The lowest overall estimate of annual costs (based on the submission of the only grocery store chain that did not attempt to estimate its inventory costs) was approximately $132 million when extrapolated industrywide. On the high side of the range are costs extrapolated to the industry at about $370 million. Even selecting the lowest costs in each category and extrapolating their total to an industrywide figure results in costs of about $126 million per year.

[50] Staff estimated that the total of the averages for all cost categories is approximately $319 million, or, converted to a per customer per week basis, 5.3 cents. To obtain the per customer per week cost, the industrywide cost per year was divided by the number of supermarket shoppers in 1980, 114.7 million, *see* S.R., *supra* n. 7 at 82, n. 231, and then divided by the 52 weeks in a year. As previously noted, the maximum benefit was estimated by staff to be only 0.8 cents per customer per week.

[51] From the raw data supporting the Ferguson Study, staff used the annual demand levels generated by the Study to project annual costs of inventory cushions for a store that chooses to invest in extra inventory in amounts sufficient to lower unavailability from pre- to post-Rule levels. *See* S.R., *supra* n. 7 at 104–05. Carrying inventories at two standard increments above the normal level reduces survey unavailability rates from a level approximating the pre-Rule level to that approximating the post-Rule level. Such a practice results in inventory investment costs on a per store basis (in 1985 dollars) of $639 and spoilage/distressing costs of $29,045. These reductions would produce benefits of only $1149. *Id.* at 104–07.

As staff notes, the figures as generated should not be considered *actual* costs of a typical store, however, since actual costs depend upon *all* strategies that an individual chain might adopt to achieve Rule compliance. These figures are based upon reliable data, however, and confirm that the inventory figures produced by industry are reasonable cost estimates.

[52] The Presiding Officer claimed that the existence of both costs and benefits that could not be quantified rendered the entire cost-benefit analysis unreliable P.O.R., *supra* n. 14 at 53.

[53] *See supra* n. 29.

[54] *See* discussion *supra* at § II.C.5.

[55] HX. 5 at 8.

[56] *See* discussion *supra* at § II.D.

this respect is limited to the information itself, not the savings to be gained from knowing it. Thus, for example, the loss occasioned by a grocer's failure to advertise a new breakfast cereal at a reduced introductory price is the information that a new product exists, not the savings to be realized from purchasing it.

After considering all of the options for correcting this imbalance, including repeal of the Rule, the Commission has concluded that amending the Rule as proposed will substantially reduce costs while preserving the benefits that accrue to consumers from increased availability.

E. Legal Basis for Amending the Rule

As previously noted, the basis for amending the Rule is the record evidence that the cost of complying with the Rule substantially exceeds the benefits. Given this basis for action, the Commission is adopting measures that should substantially mitigate or eliminate the compliance costs. There is also substantial evidence in the current rulemaking record that, under the Commission's deception standard, failing to have adequate supplies of advertised products on hand in sufficient quantities to meet reasonably anticipated demand is deceptive.[57]

The Commission's deception standard requires that there be a representation, omission or practice that is material and likely to mislead consumers acting reasonably under the circumstances.[58] Certainly, there is little dispute that a retail food store ad listing items on sale at specified prices is a material representation. What remains to be determined, therefore, is whether the record contains substantial evidence that consumers who shop for items featured in the ad and find them unavailable are reasonably misled.

The Market Facts Study contains substantial evidence that would provide a basis for concluding that failing to have sufficient quantities of advertised items on hand to meet anticipated demand misleads many consumers. The Study indicates that a substantial portion of the public (34%) expect that grocers will not run out of advertised goods unless there are qualifications or limitations as to their availability expressed in the ad.[59] Moreover, according to the same study, 30 percent of consumers consider it very important and an additional 48 percent find it somewhat important that they be able to find all advertised items on the last day of a sale.[60] The Market Facts Study also found that 87 percent of consumers actually experienced unavailability in recent years even when post-Rule unavailability levels of five rather than ten percent were believed to prevail.[61] More significantly, at this same post-Rule level, 56 percent of consumers found a store that had levels of unavailability that they considered too high.[62]

In summary, the Commission concludes that there is substantial evidence in the current record that unavailability of advertised items would constitute a deceptive practice.[63] The amendments that the Commission is promulgating, therefore, retain basic protection against deception while eliminating the need for grocers to adopt costly compliance measures against the possibility of inadvertent unavailability of advertised items.

III. Section-by-Section Analysis

A. Introduction

The Rule as amended contains two new provisions that should reduce the costs imposed by the original Rule significantly. Both of the amendment proposals are intended to relieve any uncertainty about Rule compliance, by making explicit the steps that a grocery food retailer can take to defend against a charge of unavailability.

B. Disclosure Amendment: Section 424.1 Unfair or Deceptive Practices [64]

This section sets out the basic requirement of the Rule that stores have in stock and readily available for sale the items that they advertised. The major change in the section from the original Rule is its allowance for a broader use of limited availability disclosures in advertising. Specifically, if the ads disclose that supplies of the advertised product are limited or available for sale only at some outlets, § 424.1 creates an exception to the requirement that stores have in stock the items that they advertise. Under this exception, as long as an advertisement covered by the Rule contained a clear and adequate disclosure of limited availability, the food retailer would not violate the Rule by failing to have adequate supplies of the advertised product on hand during the entire duration of the sale period. The disclosure would have to specify, however, whether the limitation on availability was the result of limited quantities or limited outlets. This disclosure provision is adapted from the Commission's Guidelines Against Bait Advertising [65] and is intended (1) to emphasize that under the amended Rule, food retailers still will not be permitted to engage in bait advertising and (2) to ensure that consumers will not be deceived about the availability of

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[57] This does not mean that grocers are expected to meet a 100 percent availability standard. Even the original Rule indicated that it "will consider * * * all circumstances surrounding non-delivery of advertised products which were actually ordered in quantities sufficient to meet reasonably anticipated demands, but were beyond the advertisers' control."

[58] Cliffdale Associates, Inc., 103 F.T.C. 110, 164–65 (1984).

[59] Market Facts Study, *supra* n. 6 at Table 16.

[60] *Id.* at Table 9. This notion that advertisers have on hand sufficient quantities of advertised merchandise to meet reasonably anticipated demand is not unique to the Rule. It is a direct extension of principles expressed in the Commission's Guides Against Bait Advertising (16 CFR 238.3(c)) as well as decision in litigated cases. *See, e.g., The Great Atlantic and Pacific Tea Company, Inc.*, 85 F.T.C. 601 (1975).

The Market Facts findings that 34 percent of consumers expect 100 percent availability can also be reasonably read as a statement that they expected greater than 90 percent availability. Unfortunately, the survey did not allow consumers to choose levels between 90 percent and 100 percent availability. Consumers responding to the survey were asked to indicate how many items out of ten advertised that they expected to find at the store. Consumers who typically shop in a market that features weekly advertising of over 200 items per store may have selected ten out of ten items only because they expected more than 90 percent availability. Expecting more than 90 percent is not unrealistic, particularly in an environment where at the time of the survey the average availability rate may have been 95 percent.

This evidence could also reasonably be interpreted to mean that these consumers do not expect that grocers who run out of stock of advertised items should necessarily be punished for violating laws against deception unless they are unwilling, when unavilability occurs, to offer rainchecks or substitute items, as the amended Rule would require. According to this analysis, it is not unreasonable for consumers to expect—in the absence of disclaimers—that compensation will be offered in cases when unavailability does occur.

[61] *Supra* n. 6 at 29.

[62] *Id.*

[63] This discussion is not meant to exhaust the possible instances in which unqualified retail food store advertising might be found deceptive. That determination would be affected by the number of factors that go beyond an analysis of the average level of unavailability. There are possible instances in which much lower average levels of unavailability might still be deceptive to consumers, as where a store substantially under-orders turkeys featured in advertisements placed just before Thanksgiving. The fact that the store may have in stock all of the other items it advertises would not prevent the Commission from examining whether consumers were, in fact, deceived by the ad.

[64] This section first defines the unfair or deceptive practice that the amended Rule addresses as, basically, advertising products for sale at a stated price when the advertised products are not in stock and readily available to customers during the effective period of the advertisement. This satisfies the requirement of the Second Circuit Court of Appeals decision in Katharine Gibbs School, Inc. v. FTC, 612 F. 2d 658 (1979), that the Commission define with specificity in the rule itself the unfair or deceptive acts or practices that the rule prohibits.

[65] 16 CFR 283.3(c) (1986).

advertised items when availability is limited.

At the same time, by allowing grocers greater latitude to advertise items with limited availability, the disclosure amendment should eliminate the costs associated with the current Rule's discouraging advertising of items in limited supply (such as closeout specials, seasonal products and special purchase items), products of interest only in certain neighborhoods and those items with particularly high carrying costs (such as perishables). The amendment should encourage food retailers to disseminate more information to consumers and increase the number of advertised specials on a variety of products, to the benefit of both consumers and food retailers. Moreover, since the cost savings realized through this amendment would be reflected in reduced prices or improved services or both, consumers would realize an additional benefit from the amendment.[66]

C. Defenses: Section 424.2

This section sets out the four defenses to a Rule violation that excuse any failure of a store to have in stock the items they advertise. The first defense—that the advertised products were ordered in adequate time for delivery in quantities sufficient to meet reasonably anticipated demand—is based on a defense to unavailability that was included in the original Rule. Unlike the original Rule, the amended Rule does not require that stores maintain records demonstrating that the order had been made. This defense recognizes that there may be situations where the failure to have advertised items in stock was beyond the store's control.

The amended Rule provides three additional defenses against a charge of unavailability for grocers who offer consumers appropriate alternative compensation—a raincheck, a substitute item of comparable value or other compensation at least equal to the value of the advertised item—for the unavailable item.[67]

By allowing food retailers to offer a raincheck or comparable value substitute when they run out of an advertised item, the amendment should eliminate virtually all of the nonproductive costs associated with compliance efforts under the current Rule.[68] Stores can abandon the overkill measures of stocking excessive inventory or performing duplicative shelf inspections and opt for far less costly measures of providing rainchecks and substitutions which many if not most of them already provide in the ordinary course of doing business. As in the case of the disclosure amendment, the benefit of lowered costs of compliance can then be passed on to consumers.[69] Additionally, by providing for an offer of compensation equal to that of the advertised savings in the event of unavailability, the amendment seeks to ensure that consumers will not be denied the benefit of any bargain advertising on which they relied in making their shopping choice.[70]

IV. Alternatives Considered

A. Maintain the Status Quo

The Commission could choose to take no action and leave the current Rule in place. For all of the reasons already set out in this statement, a majority of the Commission believes that the costs of complying with the original Rule greatly exceed its benefits. The Rule imposes costly burdens on grocers in the form of investment in unnecessary inventory and excessive monitoring and recordkeeping costs. These costs are ultimately passed along to consumers in the form of higher prices or reduced services. Savings that have been realized by consumers are principally the result of reduction in the number of unsuccessful trips made to purchase items that are not in stock. These savings, or benefits, are only a small fraction of the costs that the Rule imposes.

B. Repeal the Rule

Another alternative that the Commission considered was to repeal the Rule and handle individual instances of deceptive advertising of unavailable products on a case-by-case basis. If the Rule were repealed, food retailers should be able to avoid all of the costs that they now incur as a result of the

[66] Many members of the retail grocery industry who commented on the proposed amendments felt that this section allows grocers greater flexibility in deciding whether to use limited availability disclosures. They noted that the availability of such disclosures gives retailers opportunities to convey useful information and pass on valuable savings to consumers on a variety of products, the advertising of which is restricted by the stringent availability and disclosure requirements of the current Rule. *See, e.g.*, Comment of the Food Marketing Institute 9 (1985) R–B–56 ("FMI 1985"); Saldin, Tr. 190, 191. Specifically, those who favored the amendment believed that it will encourage food retailers to increase the number and type of products advertised and offer more specials on such products. *See, e.g.*, FMI 1985 at 9; Comment of National Grocers Association 3 (1986) R–E–2 ("NGA 1986"); Saldin, Tr. 190, 191; Comment of Albertson's, Inc. 2 (1986) R–D–2 ("Albertson's 1986"). Secondly, industry representatives supported the fact that the disclosure amendment gives retailers the discretion to use general disclosures in limiting availability, noting that retailers need the flexibility to decide whether to use general or specific disclosures, claiming that the circumstances that prevail when an ad is published are sometimes difficult to predict at the time that the commitment is made to run the ad. *See, e.g.*, Comment of Food Marketing Institute 6–7 (1986) R–E–1 ("FMI 1986"); Comment of the Kroger Co. 2–3 (1986) R–D–3 ("Kroger 1986"); Saldin, Tr. 201, 204.

[67] This policy, it is argued, is well accepted by consumers. *See, e.g.*, Statement of Dr. Timothy Hammonds, Senior Vice President, Food Marketing Institute 5 (1986), HX. 8; FMI 1985, *supra* n. 66 at 11, 12; Hicks, Tr. 255–256. Evidence of consumer acceptance of rainchecks as a remedy for unavailability is on the record. The Market Facts Study found that 60 percent of the consumers questioned felt rainchecks constituted a satisfactory remedy in the case of unavailability. Market Facts, *supra* n. 6 at 32–33. Similarly, a 1980 study conducted by the National Association of Supermarket Shoppers indicated that 67 percent of the respondents found rainchecks to be a sufficient remedy when an advertised item is unavailable. Comment of the National Association of Supermarket Shoppers, Attachment 2 at 6 (1980) R–B–55 ("NASS Survey"). And finally, a 1976 study of consumer behavior with respect to rainchecks by Wilkinson *et al.*, found that 82 percent of shoppers who received rainchecks redeemed them. Moreover, 83 percent of this group indicated they were able to redeem their rainchecks on their first return trip to the store. The remainder of the respondents indicated that no more than two trips were necessary to redeem the raincheck. Statement of Dr. J. B. Wilkinson, Associate Professor of Marketing, University of Akron, at Exhibit 6, 156–57 (1986) HX.

[68] Industry commenters noted that the availability of such a defense would eliminate most of the overkill costs imposed by the Rule's strict availability requirements—in particular the burdensome costs attributable to both over-ordering of inventory and recordkeeping. *See, e.g.*, Statement of Dean Hicks, Vice President, The Kroger Co. at 1, 2 (1986) HX. 8; Hammonds, HX. 1 at 4.

[69] *See, e.g.*, Albertson's 1986, *supra* n. 66 at 1.

[70] Industry representatives emphasized that the amendment achieves a balance between the need to reduce the excessive compliance costs associated with the current Rule and the need to preserve consumer benefits realized under the Rule. *See, e.g.*, FMI 1986, *supra* n. 66 at 1; Comment of Safeway Stores, Inc., 2 (1986) R–D–1 ("Safeway 1986"). They also noted that in permitting such defenses, the proposed Rule would encourage a "sound, pro-consumer business practice," by reinforcing the already well-established policy among grocery retailers of offering the types of compensation provided for in the amendment in the event an advertised item is unavailable. As support for this point, the Food Marketing Institute cited a 1982 survey of its members to determine what type of compensation grocers offer in the event of unavailability, noting that all 341 retailers responding to the survey—regardless of size—had established a policy or program to handle out-of-stocks for advertised items, the most common being issuance of rainchecks (95%), an offer of substitute merchandise (75%) and a combination of a raincheck and substitute offer (48%).

The amended Rule also allows food retailers to offer "other compensation at least equal to the advertised value" whenever advertised items subject to the rule are unavailable. This contemplates that, when reduced price specials are involved, rather than offer rainchecks or substitutions, the retailer might choose to reduce the customer's total bill by the difference between the regular price and the advertised price. Alternatively, under this provision, the retailer might choose to provide the customer with savings coupons for comparable products that, when redeemed, would produce a similar savings gain to the customer.

Rule's requirements. Consumers would ultimately benefit to the extent that these costs are no longer passed along to them. Consumers would also benefit from being able to receive more information through advertising about the availability of reduced price specials on products that food retailers do not regularly feature under the current Rule either because they are available in limited quantities or because it is difficult for food retailers to predict demand for them. Increasing the flow of price information to consumers should lower the time costs of shoppers, encourage competition and lower the prices of these goods.

In the Rule's absence, however, food retailers might lack clear guidance on what standards the Commission would use in enforcing the general prohibition on deceptive advertising. In the face of this uncertainty, advertisers might continue to incur some of these costs, for example, by ordering excessive inventory or maintaining records that they would not maintain in the ordinary course of business, costs that would ultimately be passed along to consumers.

Additionally, repeal of the Rule might encourage some food retailers to take advantage of the elimination of specific regulation in the area and engage in practices that are intended to deceive the public since the immediate threat of civil penalties would have been eliminated. While existing market forces would probably hold the number of such perpetrators down, repeal of the Rule might remove a deterrent factor and tempt unscrupulous grocers to risk the reduced consequences of deceptive claims.

Amending the Rule as proposed would eliminate virtually all of the costs of complying with the current Rule and impose no significant new costs.[71] While there are differences in costs savings between amendment and repeal, they are so small as to be *de minimis*. Moreover, the Rule as amended provides the certainty that food retailers may need in order to avoid inadvertent law violations. It also retains the deterrent impact of civil penalties for rule violations. In effect, it reduces costs almost as much as repeal of the Rule would while retaining the positive advantages of having a rule in place. Accordingly, the Commission believes that amending the Rule is preferable to repealing it.

C. Modify the Amendments

Several comments that were received on the proposed amendments contained suggestions for modifying them in ways that the commenters believed would either make them more helpful to consumers or foreclose food retailers from taking advantage of what were perceived to be overly broad exceptions to liability. Additionally, the Presiding Officer recommended several modifications to the proposed amendments to bring about the same result. This section sets forth those suggested modifications and the Commission's conclusions regarding them.

1. Modifications to the Disclosure Amendment

Limited quantity disclosures are intended to provide food retailers with a means for advertising products that may not be available in quantities sufficient to satisfy anticipated demand, and for which rainchecks or substitutions are not possible or practical. A single clear and adequate limited quantity disclaimer applicable to all items featured in an ad serves as a defense to liability under the Rule for unavailability of any single featured item, and relieves the food retailer of any obligation to give out rainchecks or otherwise compensate consumers for the unavailable item. Although it may not be deceptive to use general disclaimers for advertised products that the grocer can readily restock, neither would such action promote informed consumer choice or customer convenience.[72] Such broad general disclaimers fail to inform consumers which items truly were limited in quantity and which were in plentiful supply.

The Presiding Officer recommended a rule amendment that requires that a limited quantity disclosure accompany each individual item to which it applies.[73] Although this approach eliminates the opportunity for grocers to use broad general disclaimers for everything advertised and may be of some value to consumers, there is no evidentiary basis in the record for adopting it. While broad general disclaimers are not as helpful or informative to consumers as more specific ones, there is no evidence that the public is deceived by them. Trade Regulation Rules can only be imposed if they are reasonably necessary to prevent unfairness or deception. Likewise, fencing-in measures may be included in such Rules only if the record demonstrates a likelihood that without them consumers will be deceived or misled.[74] No such record exists here, so the Presiding Officer's proposal cannot be justified.[75] As long as consumers are informed that not all products may be in sufficient supply to meet actual demand, they are on notice that there is some risk of unavailability at that particular store. They will be likely to include that factor among the variables they consider when deciding where to shop. Since it would not generally be deceptive to advertise in this manner, there is no justification for attempting to curtail such advertising through modifying the amendment.

Several commenters also urged adoption of a specific numeric quantity requirement to discourage grocers from using limited quantity disclaimers where their supply of an advertised item is extremely low.[76] Under such a requirement, the food retailer would have to disclose the minimum quantity of items available at each store for any advertised item that was subject to a minimum quantity disclaimer. The Commission has decided not to promulgate such a provision because it would impose costly impediments to using limited quantity disclaimers for

[71] One of the assumptions fundamental to the Commission's decision to propose amending the Rule was that the amendments would eliminate virtually all of the industry compliance costs. This assumption has been confirmed by the industry representatives who participated in the Rulemaking. *See* Testimony of Dr. Timothy Hammonds, Senior Vice President, FMI, Tr. at 11, 20–21.

[72] Evidence in the rulemaking record indicates that the larger supermarkets are able to replenish exhausted inventories for most products several time a week, if not daily. *See* Hammonds, Tr. 45, 73–74. Consequently, it does not appear that these stores need to make limited quantity disclosures except in certain exceptional situations such as seasonal closeouts or special purchases. Spokespersons for two leading grocery chains testified, moreover, that limited quantity disclosures would be appropriate only in the limited circumstances described above. *See* Saldin, Tr. 190–191; Hicks, Tr. 243–45, 260–261. One grocer went so far as to say he saw no reason for using limited quantity disclosures for items that a store regularly stocks. *See* Hicks, Tr. 260. Thus, even without a restriction on limited quantity disclosures in an amended rule, it does not appear necessary or likely that retailers will uniformly use the disclosure option for all item advertised.

[73] P.O.R., *supra* n. 14 at 115.

[74] Katharine Gibbs School, Inc. v. FTC, 612 F.2d 658 (2d Cir. 1979), *reh'g denied*, 627 F.2d 758 (2d Cir. 1980).

[75] This approach would not permit grocers any flexibility to use a general disclaimer in circumstances that would not hamper customer convenience. For example, such a requirement might discourage grocers from advertising end-of-season closeout sales or other groups of specials that are indeed available only in limited quantities. Such promotions may feature several items, all of which are limited to supplies on hand. Grocers may wish to run special advertising or highlight a portion of more general advertising to promote such sales. In such circumstances, a single clear and adequate disclosure that is clearly applicable to a readily identifiable set or subset of items would fully inform consumers. Requiring that a disclaimer accompany each item advertised would likely restrict consumers' opportunities to learn of such specials.

[76] *See e.g.*, Comment of Consumers Union 7 (1986), R–H–3 ("CU 1986").

any purpose and consequently frustrate the function of the amendment to increase the advertising of limited quantity items that are not now advertised. Furthermore, such disclosures would not be informative to consumers because stores are likely to understate the minimum quantity available and because consumers would not know how quickly the supply would be exhausted.[77] Finally, they are unnecessary because possible abuses of the Rule's exception for less specific disclosures can be addressed through section 5 of the FTC Act.[78]

Some commenters also suggested that disclaimers concerning availability limited to certain outlets be more specific than the amendment would require. They said that a disclosure declaring only that advertised products are "not available at all stores" does not sufficiently inform consumers of the store locations where such items may be unavailable.[79] The Commission believes, however, that requiring grocers to list all store locations where a particular product can be found (or, in the alternative, where it cannot be found) would consume too much costly advertising space. The current Rule restricts limited outlet disclaimers to notifying consumers of limited availability either by a common location or by a common characteristic, *e.g.*, "not available at stores in Maryland," or "available only in stores with delicatessen departments." However, there was no evidence presented during the rulemaking hearings that consumers are harmed if grocers clearly disclose that "not all items are available at all stores." Consumers confronting that disclaimer are put on notice that certain items may not be carried at all stores and they can call ahead if availability of a particular item is important to their decision as to where to shop.[80]

2. Modifications to the Defenses Amendment

This amendment permits food retailers to defend against a charge of unavailability by offering any one of the alternative forms of compensation, and thereby relieves the food retailer of the obligation to demonstrate that he or she ordered sufficient quantities to meet reasonably anticipated demand. Some commenters recommended modifying the proposed Rule to incorporate a minimum stocking requirement as a pre-condition to the raincheck or comparable value substitute defenses. They argued that this modification would protect consumers against potentially deceptive advertising and assure reasonable levels of availability, while significantly reducing the recordkeeping and inventory costs associated with meeting the "last unit of demand" under the current Rule.[81] Similarly, the Presiding Officer's substitute amendment would impose a proviso that the offer of rainchecks or substitutions would constitute a valid defense only in situations where the food retailer ordered sufficient quantities of the unavailable item to meet reasonably anticipated demand. His revision explicitly deletes the requirement for recordkeeping by the food retailer.[82]

Making the new defenses in an amended Rule conditional upon first ordering or having in stock sufficient quantities to meet reasonably anticipated demand or imposing some other minimum stocking requirement preserves the need for food retailers to continue to overstock and perform monitoring and recordkeeping over and above that which is done in the ordinary course of business. The mere fact that the Presiding Officer's recommendation would remove the specific documentation requirement in the current Rule does not remove entirely the burdens imposed by the Rule. Under his suggested modification, grocers may still reasonably perceive the need to continue some or all of the costly measures they are currently employing or in order to avoid the risk of civil penalty liability.[83] Moreover, other costs could increase whenever the requirement resulted in stores having ordered more inventory than they could sell. The result would be at least a partial frustration of the goal of the proposed amendments—lowering the cost of complying with the Rule. Mandating such pre-conditions to the availability of the raincheck and substitution defenses, then, cannot be justified either to prevent deception—since rainchecks and substitutions will serve as acceptable substitutes for and incentives against unavailability—or to reduce costs.

Finally, such requirements would have the likely effect of imposing costs on an industry that the record evidence demonstrates already has incentives to stock as much inventory of advertised merchandise as is necessary to meet demand. There has never been any evidence to suggest that food retailers engage in systematic and deliberate understocking of advertised items.[84] Nevertheless, there is at least the concern on the part of some commenters that, but for the Rule, some grocers would indeed engage in a form of bait and switch advertising, *i.e.*, advertising attractive prices for items that they knew they did not have in sufficient quantities to meet the anticipated demand. The proposed amendments do not relieve grocers from liability for stockouts that are the result of deliberately understocking advertised items without disclosing that quantities are limited. As the Commission has already observed, such behavior will subject food retailers to liability through administrative or injunctive proceedings under section 5 of the FTC Act. Bait advertising, as defined in the Commission's Guides Against Bait Advertising, would still be actionable under section 5 regardless of whether rainchecks or substitutions were offered.

The amendment gives food retailers, rather than consumers, both the right to choose the form of alternative compensation when an advertised item is unavailable, and the right to determine what constitutes a comparable substitute. Some comments noted that, depending upon the particular circumstances surrounding the purchase, the consumer may have a preference for one type of compensation and should not be forced to accept an undesirable alternative to the advertised item.[85] Other commenters pointed out that allowing food retailers to choose the type of compensation provides them opportunities to substitute lower quality

[77] Stores might avoid disclosing their best estimate of actual quantity for fear of inadvertently overstating it.

[78] The Commission agrees that grocers should not use general limited quantity disclaimers to disguise severely restricted quantities of merchandise that will only satisfy the first few customers who seek the items. The amended Rule does not preclude an action for unfair and deceptive advertising under Section 5 of the FTC Act for engaging in such a practice. If there are grocers who may be tempted to employ such tactics, they would still be in violation of Section 5 of the FTC Act for engaging in bait advertising and subject to a Commission enforcement action.

[79] *See, e.g.*, CU 1986, *supra* n. 76 at 7. *See also* Comment of Public Voice for Food and Health Policy 3 (1986) R–H–2 ("Public Voice 1986").

[80] Disclosing more detailed information, such as listing the locations that carry a particular item may well benefit consumers. But the record does not provide a basis for concluding that such a requirement is necessary to prevent unfairness or deception. Stores should recognize the benefits of disclosing that information voluntarily rather than risk annoying potential customers.

[81] *See* CU 1986, *supra* n. 76 at 6.

[82] P.O.R., *supra* n. 14 at 114–18. *See also id.* at 107.

[83] *See* Comment of Sullivan, FMI, R–Q–17 at 8.

[84] *See* 1985 Staff Memorandum, *supra* n. 10 at 4. *See also* 1984 Staff Memorandum, *supra* n. 9 at 9–15.

[85] *See, e.g.*, Comment of California Department of Justice, 3 (1985) R–I–76 ("California 1985"); Comment of the Alaska Office of the Attorney General 3 (1986) R–J–7 ("Alaska 1986"); Comment of Public Voice for Food and Health Policy 3 (1986) R–H–2 ("Public Voice 1986").

items for the advertised items in order to increase profits.[86]

In view of these concerns, these commenters suggested modifying the amendment to allow consumers the option of choosing the preferable method of compensation, and in the case of a substitute, the option to decide what constitutes a "comparable" substitute.[87] The Presiding Officer's modified rule would require that, where the unavailable item was one that was regularly stocked, the customer would be given the opportunity to elect to receive a raincheck over any other compensation that the food retailer might offer.[88]

The Commission does not believe that a requirement that the customer have an option between a raincheck and a store designated substitute is necessary. Industry spokespersons were unanimous in indicating that customer satisfaction is the ultimate goal whenever unavailability of advertised products arises; thus, when a customer expresses a preference for a raincheck or substitute item, store managers do their best to accommodate the customer.[89] Given the highly competitive nature of the grocery industry and the considerable and uncontroverted record testimony that stores are motivated to satisfy their customers, there is no reason to doubt this contention. It would appear, therefore, that one-on-one negotiation between the customer and the store is the best means for settling the matter when the customer prefers that the store exercise its raincheck policy instead of its substitution policy.

Another modification suggested by some commenters would require that any food retailer relying on the raincheck defense must reorder the item in question promptly [90] and notify customers when it is again in stock.[91] The Presiding Officer would impose a "reasonable time" requirement for food retailers' redeeming rainchecks.[92]

Such a requirement would be burdensome and complicate Rule compliance.[93] Use of vague terms such as "reasonable time" or "promptly" does not provide needed regulatory certainty in order for food retailers to know when they must resort to extraordinary compliance measures and when they can avoid them. Moreover, there is convincing record evidence that the great majority of supermarket shoppers are able to redeem their rainchecks on the next regular visit to the market.[94] Furthermore, representatives of the grocery industry testified that most supermarkets are able to replenish supplies for most products, if not on a daily basis, certainly within the week.[95] Accordingly, there does not appear to be a need for elaborate standards governing the issuance and redemption of rainchecks. Such requirements, if imposed, would add to the costs without appreciably improving the benefits. Consumers who might have to make a special trip to redeem a raincheck can always call ahead to make sure that the rainchecked item has been restocked.

V. Other Matters

A. Cost-Benefit Analysis

In this section the Commission considers the projected benefits and effects of the amended Rule that it is promulgating.

1. Effect on Consumers

Consumers are likely to benefit from the amended Rule in two principal ways. First, any savings in compliance costs that food retailers realize from this Rule are likely to be passed along to them.[96] Second, by allowing stores to advertise limited-quantity bargain items, the amended Rule permits consumers to receive more price and product information than they received under the original Rule.

More importantly, the amended Rule should not reduce consumer protection. The Market Facts study indicates that the great majority of consumers can and do punish stores if they consistently have too few items available to satisfy demand. This, in conjunction with the Rule's continued requirement that stores have in stock the items that they advertise, should provide substantial incentives to stock those items in adequate quantities. Accordingly, it is unlikely that unavailability levels will rise to any significant degree. What should be eliminated, however, are the excess monitoring and inventory costs that stores pass along to consumers.[97]

2. Effect on Industry Members

Substituting the requirements of the amended Rule for those of the original Rule should result in a substantial net gain for food retailers.[98] The

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[86] *See, e.g.*, Comment of George Washington University National Law Center 10–11 (1985) R–B–59 ("GWU 1985").

[87] *See, e.g.*, Alaska 1986, *supra* n. 85 at 3; Comment of United Food and Commercial Workers International Union AFL–CIO & CLC 3 (1985) R–B–54; Comment of Suffolk County 1 (1985) R–I–80, Comment of the United States Office of Consumer Affairs 3 (1985) R–B–51. *See also* Wilkinson and Mason, Dissatisfaction and Complaining Behavior as a Result of Unavailable Advertised Food Specials, 31 J. of Consumer Policy 43, 49 (1979), R–I–39 (only 63 percent of those shoppers offered a substitute accepted it, with 44 percent of these indicating that the reason for turning down the substitute offer was that it was not comparable in value to the unavailable advertised item).

[88] P.O.R., *supra* n. 14 at 116.

[89] Hammonds, Tr. 50; Hicks, Tr. 255, 259.

[90] Alaska 1986, *supra* n. 85 at 3.

[91] Comment of Vermont Attorney General 5, (1986) R–J–6 ("Vermont 1986").

[92] P.O.R., *supra* n. 14 at 116.

[93] *See, e.g.*, Hammonds Statement, *supra* n. 67, at 7.

[94] *See, e.g.*, Ferguson Study, *supra* n. 28 at 545, Figure 2, n. d; Market Facts Study, *supra* n. 6 at 32.

[95] *See, e.g.*, Hammonds, Tr. 73–74; Saldin, Tr. 251.

[96] With regard to savings passed along, it is unlikely that they will be significant to many individual consumers. The annual costs of complying with the original rule were only a few cents, per consumer, per week. However, average annual savings for all shoppers are more significant, exceeding the maximum estimate of consumer benefits by more than $250 million.

[97] The Commission has also taken into consideration how amending this Rule might affect the poor and the elderly. These groups, it is argued, lack the mobility of the general public to punish stores that have high levels of unavailability by shopping elsewhere, and must stretch limited budgets by searching for and buying advertised grocery specials. *See* Comment of New York City Department of Consumer Affairs (1985), R–Q–20. The staff noted, however, that the current Rule may not benefit the poor any more than any other class of shopper. *See*, Final Staff Memorandum to the Commission, September 4, 1987, at 16. The Market Facts Study indicates that the poor are, in fact, less cost conscious with respect to grocery purchases than the average shopper, and, furthermore, that they do not encounter unavailability any more often than other groups. (*Supra* n. 4 at 39.)

On the other hand, record evidence with regard to the shopping habits of the elderly shows that this group is indeed more cost conscious than other shoppers and, therefore, more likely than others to shop for advertised specials. Additionally, they are less likely than others to encounter unavailability, reflecting, perhaps, more diligent efforts to follow-up after finding shelf stock depleted. They are, however, equally as likely as others to find stores with too few items available and considerably less likely than others to shop elsewhere as a consequence. (*Id.* at 38–39.)

Nevertheless, staff noted that rainchecks should serve as adequate substitutes when the elderly encounter unavailability, and, since their immobility locks them into their regular market for shopping advertised specials, they will not have to make special trips to redeem them. Additionally, staff noted that, in most cases, the elderly will be able to rely on shoppers in their regular markets to keep grocers alert to inventory levels lest they lose those more mobile shoppers to competitors. *See* Final Staff Memorandum, *supra* at 16–17.

[98] All of the food retailers that addressed the effect of amendment on their compliance costs agreed that the amendments would reduce these costs significantly. Hammonds, Tr. 21; Kroger Cost Item Chart (1986) HX. 9A, R–LL–1; Saldin, Tr. 173, 218–219. Nevertheless, while food retailers agreed that the proposed amendments would substantially reduce costs, they emphasized that they prefer repeal. *See* FMI 1986, *supra* n. 66, at 9; Comment of the Kroger Co., by Arthur L. Ferguson, Senior Counsel, at 3 (1985) R–B–63; Comment of Albertson's, Inc. 2–3 (1985) R–B–52; Safeway 1986, *supra* n. 70, at 1–2.

amendments would eliminate or reduce over-ordering of advertised items because grocers could (1) offer rainchecks or adequate compensation if demand exceeded what they reasonably expected and (2) use disclosures of limitations on ad items to avoid carrying excessive inventories. Thus, the amendments would allow grocers to eliminate or reduce substantially the costs associated with carrying extra inventories.

Moreover, excess recordkeeping and monitoring costs could be eliminated under the amendments. Instead of conducting audits and compiling records to prove Rule compliance, grocers could use, under the amended rule, a limited quantity disclosure or a raincheck or substitute item policy as a defense to a Rule violation.

A reduction in the number and types of items advertised is an indirect cost of the restrictions imposed by the current Rule. The amendments may also reduce this cost by eliminating the disincentive to advertise items that are in limited supply. For example, grocers could advertise close-outs and other items available in limited supply if they either disclosed the limitation or offered rainchecks or other adequate compensation if supplies ran out.

Although grocers would incur the costs of administering raincheck and substitution policies, the evidence indicates that the need to keep customers satisfied leads many stores to do so in any event. The Food Marketing Institute survey indicates that 94 percent of those grocers surveyed already have a raincheck policy in effect and 75 percent have a substitution policy.[99] Since these policies currently are not defenses to Rule violations, grocers would not use them if they were not cost-effective.[100] Finally, although grocers would incur the cost of ensuring that proper disclosures were made, they would likely incur these costs whether the Rule were repealed or amended.

3. Effect on Small Businesses

The amended Rule should reduce the burdens on small businesses as well as major grocery chains.[101] There is, to be sure, a greater burden the more that a store advertises and the greater the variety of products in the store's inventory. Smaller food retailers are not likely to advertise as frequently as the larger grocery chains. Furthermore, when the smaller food retailers do advertise, they are not likely to feature hundreds of products in their ads. Thus, small businesses are likely to have incurred burdens under the original Rule that are proportional to their size. The same is likely to be true for the amended Rule.

The Small Business Association, however, recommended that grocery stores with ten or fewer employees be completely excluded from coverage under the amended Rule, noting that the difference in compliance costs for the very small grocery store presents an excellent argument for making a regulatory distinction between the two.[102] While this suggestion may have merit, there is little or no evidence on the record as to what the effect of such an exclusion might be.

4. Effect on State Law

Amending the Rule may have some impact on state enforcement of unavailability laws.[103] In approximately half of the states, interpretations of section 5(a)(1) of the FTC Act are considered in interpreting state law.[104] Even in jurisdictions where such is not the case, state courts may look to FTC interpretations on their own initiative. It is also likely that pressure will be exerted on legislatures to bring state law into line with the amended FTC Rule. In a few additional jurisdictions, state law provides that acts or practices that are subject to and comply with rules and regulations or statutes enforced by the FTC or other federal agencies are exempt from state enforcement.[105]

Some states have filed comments that note this outcome and seek to avoid it.[106] The Commission believes, however, that since this Rule, as amended, should result in a net consumer benefit and eliminate costs that are now passed on to consumers, it is appropriate that the defenses that it contains should extend to state and local enforcement to the extent that state or local law requires.

B. Final Regulatory Analysis

The final regulatory analysis [107] of this Rule amendment has been integrated into the Statement of Basis and Purpose, as allowed by statute.[108]

Accordingly, title 16, part 424 of the Code of Federal Regulations is revised to read as follows:

PART 424—RETAIL FOOD STORE ADVERTISING AND MARKETING PRACTICES

Sec.
424.1 Unfair or deceptive acts or practices.
424.2 Defenses.

Authority: 88 Stat. 2193, as amended: 15 U.S.C. 57a(a)(1)(B).

§ 424.1 Unfair or deceptive acts or practices.

In connection with the sale of offering for sale by retail food stores of food, grocery products or other merchandise to consumers in or affecting commerce as "commerce" is defined in section 4 of the Federal Trade Commission Act, 15 U.S.C. 44, it is an unfair or deceptive act or practice in violation of section 5(a)(1) of the Federal Trade Commission Act, 15 U.S.C. 45(a)(1), to offer any such products for sale at a stated price, by means of an advertisement disseminated in an area served by any stores which are covered by the advertisement, if those stores do not have the advertised products in stock and readily available to customers during the effective period of the advertisement, unless the advertisement clearly and adequately discloses that supplies of the advertised products are limited or the advertised products are available only at some outlets.

§ 424.2 Defenses.

No violation of § 424.1 shall be found if:

(a) The advertised products were ordered in adequate time for delivery in quantities sufficient to meet reasonably anticipated demand;

(b) The food retailer offers a "raincheck" for the advertised products;

(c) The food retailer offers at the advertised price or at a comparable price reduction a similar product that is at least comparable in value to the advertised product; or

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[99] FMI 1985, *supra* n. 66, at 12.

[100] The small percentage of grocers who currently do not have either of these policies in effect would incur only a one time start-up cost in addition to their small ongoing administrative costs. *See* Hammonds, Tr. 34–35.

[101] *See, e.g.*, Hammonds, Tr. 77, 78; Comment of U.S. Small Business Administration at 1, 3, 5 (1986), R–J–2.

[102] *Id.*

[103] *See* 1985 Staff Memorandum, *supra* n. 10 at 28–29.

[104] *Id.*

[105] *Id.*

[106] A number of government officials expressed the general concern that any modification of the Rule could have serious implications for state and local laws, which make specific exceptions or create defenses based on the Rule. *See, e.g.*, Vermont 1986, *supra* n. 91 at 1–2; Comment of Iowa Department of Justice, Attachment at 4 (1986), R–J–4.

[107] The statute requires that the analysis contain (1) a statement of the need for and objectives of the rule; (2) a summary of the issues raised by public comments, a summary of the agency's assessment of such issues, and a statement of the changes made in the rule as a result of those comments; and (3) a description of the significant alternatives to the rule considered and the reasons for rejecting each alternative. 5 U.S.C. 604.

[108] 5 U.S.C. 605(a).

(d) The food retailer offers other compensation at least equal to the advertised value.

Dissenting Statement of Commissioner Calvani

I dissent from the Commission's decision today to amend the Retail Food Store Advertising and Marketing Practices Trade Regulation Rule (the Unavailability Rule). The Commission has acknowledged today that the original Unavailability Rule is not justified, and approved amendments designed to lower its costs to grocers. However, in my view, common sense tells us that in the highly competitive grocery store business, where consumers return week after week to the same store, any supermarket that frustrates its customers through unavailability of advertised items will not long keep those customers. In other words, it is clear to me that existing market forces adequately police unavailability, and that, therefore, no Federal Trade Commission rule is necessary, amended or otherwise. The Commission's action today to retain even an amended Unavailability Rule does not conform to common sense.

Statement of Commissioner Andrew J. Strenio, Jr., Retail Food Store Advertising and Marketing Practices Rule

Although revising the "Unavailability Rule" has a certain intuitive appeal, there is insufficient evidence on the record to conclude that these changes will result in net consumer benefits. Accordingly, I could not support amending the Rule in this manner. However, now that the step has been taken, it is to be hoped that experience will bear out the optimistic expectations of the Commission majority.

[FR Doc. 89-20166 Filed 8-25-89; 8:45 am]

BILLING CODE 6750-01-M

SECURITIES AND EXCHANGE COMMISSION

17 CFR Part 240

[Rel. No. 34-27160; File No. S7-3-89]

Sales Practice Requirements for Certain Low-Priced Securities

AGENCY: Securities and Exchange Commission.

ACTION: Final rule.

SUMMARY: The Commission is adopting Rule 15c2-6, which imposes sales practice requirements on broker-dealers who recommend purchases of certain low-priced, non-NASDAQ over-the-counter securities to persons who are not established customers. Such broker-dealers are required to make a documented suitability determination regarding the purchaser, and to obtain the purchaser's written agreement to the first three purchases of these securities. The Commission is taking this action in response to the widespread incidence of misconduct by some broker-dealers in connection with transactions in low-priced securities.

EFFECTIVE DATE: January 1, 1990.

FOR FURTHER INFORMATION CONTACT: Robert L. D. Colby, Chief Counsel, (202) 272-2844, or Dan Gray, Attorney, (202) 272-2848, Division of Market Regulation, Securities and Exchange Commission, 450 Fifth Street NW., Mail Stop 5-1, Washington, DC 20549.

SUPPLEMENTARY INFORMATION:

I. Executive Summary

The Commission is adopting Rule 15c2-6 ("Rule") to regulate the sale practices of broker-dealers active in the market for low-priced, non-NASDAQ over-the-counter ("OTC") securities. As a means reasonably designed to prevent fraud, the Rule makes it unlawful for a broker-dealer to sell a security subject to the Rule ("Designated Security") to, or to effect the purchase of a Designated Security by, any person unless (1) the transaction is exempt under paragraph (c) of the Rule, or (2) prior to the transaction, the broker-dealer has (i) approved the purchaser's account for transactions in Designated Securities, and (ii) received written agreement to the transaction from the purchaser. In approving an account for transactions in Designated Securities, a broker-dealer must obtain sufficient information from the purchaser to make an appropriate suitability determination, provide the purchaser with a written statement setting forth the basis of the determination, and obtain a signed copy of the suitability statement from the purchaser.

The scope of the Rule is limited in order to exclude transactions that are less likely to be subject to fraudulent, high pressure sales practices. Application of the Rule is limited to transactions in Designated Securities, which are defined as non-NASDAQ OTC equity securities whose issuers have less than $2,000,000 in net tangible assets. In addition, exemptions are provided in paragraph (c) of the Rule for: (1) Transactions in which the price of the security is five dollars or more; (2) transactions in which the purchaser is an accredited investor or an established customer of the broker-dealer; (3) transactions that are not recommended by the broker-dealer; and (4) transactions by a broker-dealer who is not a market maker in the Designated Security that is the subject of the transaction, and whose sales-related revenue from transactions in Designated Securities does not exceed five percent of its total sales-related revenue from transactions in securities.

II. Introduction

In Securities Exchange Act Release No. 26529 (February 8, 1989), 54 FR 6693 ("Release 34-26529"), the Commission published for comment proposed Rule 15c2-6 ("Proposed Rule") under the Securities Exchange Act of 1934 ("Exchange Act"),[1] which would have required written customer agreement to, and a documented suitability determination for, certain recommended transactions in equity securities that are not registered on a national securities exchange or authorized for quotation in the NASDAQ system, and whose issuers do not meet certain minimum financial standards. These securities are quoted primarily in the "pink sheets," which are daily listings of dealers published by the National Quotation Bureau.[2] Many are low-priced securities commonly referred to as "penny stocks." The Commission has undertaken a concerted campaign to reduce fraud and manipulation in the market for these securities, including the creation of a Penny Stock Task Force to coordinate the Commission's enforcement, regulatory, and educational efforts in this area.[3] As a part of this effort, the Commission published the Proposed Rule to address the widespread incidence of misconduct by some broker-dealers in connection with transactions in low-priced securities. In particular, the Proposed Rule was intended to prevent the indiscriminate use by broker-dealers of fraudulent, high pressure telephone sales campaigns to sell such securities to unsophisticated investors.

The Commission solicited comment on the general design of the Proposed Rule, and whether it was likely to address the targeted broker-dealer misconduct without imposing undue burdens on broker-dealers and issuers. The Commission was particularly concerned with the effect of the Proposed Rule on small business capital formation, and invited comment on whether its requirements would, in practice, impede the public offering of the securities of small businesses, or reduce liquidity in the secondary market for such securities. Conversely, the Commission sought comment on whether the Proposed Rule would have the intended effect of providing greater

[1] 15 U.S.C. 78a-78jj.

[2] The formal name of this quotation system is the National Daily Quotation Service.

[3] *See* SEC News Release, Remarks of David S. Ruder, Chairman, U.S. Securities and Exchange Commission, Before the Twenty-First Annual Rocky Mountain State-Federal-Provincial Securities Conference, Denver, Colorado, Penny Stock Manipulation and the Small Investor (October 21, 1988) ("Chairman's Remarks").