

An informal docket may also be examined during normal business hours in the Airspace Branch, AEA-520, F.A.A. Eastern region, Federal Building #111, John F. Kennedy International Airport, Jamaica, New York 11430.

**FOR FURTHER INFORMATION CONTACT:** Mr. Francis T. Jordan, Jr., Airspace Specialist, Airspace Branch, AEA-520 F.A.A. Eastern Region, Federal Building #111, John F. Kennedy International Airport, Jamaica, New York 11430; telephone: (718) 553-4521.

**SUPPLEMENTARY INFORMATION:**

**Comments Invited**

Interested parties are invited to participate in this proposed rulemaking by submitting such written data, views, or arguments as they may desire. Comments that provide the factual basis supporting the views and suggestions presented are particularly helpful in developing reasoned regulatory decisions on the proposal. Comments are specifically invited on the overall regulatory, economic, environmental, and energy-related aspects of the proposal. Communications should identify the airspace docket number and be submitted in triplicate to the address listed above. Commenters wishing the FAA to acknowledge receipt of their comments on this notice must submit with those comments a self-addressed, stamped postcard on which the following statement is made:

"Comments to Airspace Docket No. 98-AEA-02." The postcard will be date/time stamped and returned to the commenter. All communications received on or before the closing date for comments will be considered before taking action on the proposed rule. The proposal contained in this notice may be changed in light of comments received. All comments submitted will be available for examination in the Rules Docket both before and after the closing date for comments. A report summarizing each substantive public contact with the FAA personnel concerned with this rulemaking will be filed in the docket.

**Availability of NPRMs**

Any person may obtain a copy of this Notice of Proposed Rulemaking (NPRM) by submitting a request to the Office of the Regional Counsel, AEA-7, F.A.A. Eastern Region, Federal Building #111, John F. Kennedy International Airport, Jamaica, NY 11430. Communications must identify the notice number of this NPRM. Persons interested in being placed on a mailing list for future NPRMs should also request a copy of

Advisory Circular No. 11-2A, which describes the application procedure.

**The Proposal**

The FAA is considering an amendment to Part 71 of the Federal Aviation Regulations (14 CFR Part 71) to amend the Class E airspace area at Philadelphia, PA. The ILS RWY 9R SIAP has been amended for the Philadelphia International Airport. Additional controlled airspace extending upward from 700 feet AGL is needed to accommodate the SIAP and for IFR operations at the airport. Class E airspace designations for airspace areas extending upward from 700 feet or more above the surface are published in Paragraph 6005 of FAA Order 7400.9E, dated September 10, 1997, and effective September 16, 1997, which is incorporated by reference in 14 CFR 71.1. The Class E airspace designation listed in this document would be published subsequently in the Order.

The FAA has determined that this proposed regulation only involves an established body of technical regulations for which frequent and routine amendments are necessary to keep them operationally current. Therefore, this proposed regulation—(1) is not a "significant regulatory action" under Executive Order 12866; (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. Since this is a routine matter that would only affect air traffic procedures and air navigation, it is certified that this proposed rule would not have 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 71**

Airspace, Incorporation by reference, Navigation (air).

**The Proposed Amendment**

In consideration of the foregoing, the Federal Aviation Administration proposes to amend 14 CFR part 71 as follows:

**PART 71—[AMENDED]**

1. The authority citation for part 71 continues to read as follows:

**Authority:** 49 U.S.C. 106(g), 40103, 40113, 40120; E.O. 10854; 24 FR 9565, 3 CFR, 1959-1963 Comp., p. 389.

**§ 71.1 [Amended]**

2. The incorporation by reference in 14 CFR 71.1 of Federal Aviation Administration Order 7400.9E, dated

September 10, 1997, and effective September 16, 1997, is proposed to be amended as follows:

*Paragraph 6005 Class E airspace areas extending upward from 700 feet or more above the surface of the earth.*

\* \* \* \* \*

**AEA PA E5 Philadelphia, PA [Revised]**

Philadelphia International Airport, PA (Lat 39°52'13" N., long 75°14'42" W.)

That airspace extending upward from 700 feet above the surface within a 10-mile radius of Philadelphia International Airport extending clockwise from the 095° bearing from the airport to the 225° bearing from the airport and within a 15-mile radius of Philadelphia International Airport extending from the 225° bearing from the airport clockwise to the 095° bearing from the airport, excluding the portions that coincide with the Berlin, NJ, Cross Keys, NJ, Wrightstown, NJ, Toughkenamon, PA, North Philadelphia, PA, and Wilmington, DE, Class E airspace areas.

\* \* \* \* \*

Issued in Jamaica, New York, on April 10, 1998.

**Franklin D. Hatfield,**

*Manager, Air Traffic Division, Eastern Region.*  
[FR Doc. 98-12041 Filed 5-5-98; 8:45 am]

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**FEDERAL TRADE COMMISSION**

**16 CFR Ch. I**

**Interpretation of Rules and Guides for Electronic Media; Request for Comment**

**AGENCY:** Federal Trade Commission.

**ACTION:** Notice. Request for public comments.

**SUMMARY:** The Federal Trade Commission ("Commission") seeks comment on its proposal to issue a policy statement regarding the applicability of its rules and guides to newer forms of electronic media, such as e-mail, CD-ROMs, and the Internet (hereinafter collectively referred to as "electronic media"). This **Federal Register** Notice (hereinafter "Notice") does not contain a proposed policy statement. This Notice is intended to provide a discussion of the issues that would be addressed in a future policy statement and to solicit public comment on these issues. The Commission believes that such a policy statement would (1) clarify the extent to which the Commission's rules and guides apply to representations disseminated through, and activities occurring on, electronic media; (2) provide guidance to the public as to how to comply with the Commission's rules and guides in

advertising products and services and conducting commercial activities using electronic media; (3) interpret certain terms in light of the use of electronic media and provide guidance regarding how electronic media could be used to comply with the affirmative disclosure requirements of the rules and guides; and (4) advise how disclosures required or recommended by the Commission's rules and guides should be made in advertising and other commercial transactions in electronic media. The Commission also solicits comment regarding interest in participating in or attending a workshop to discuss the issues raised in this Notice.

**DATES:** Comments must be submitted on or before July 7, 1998.

**ADDRESSES:** Written comments should be submitted to: Secretary, Federal Trade Commission, Room H-159, Sixth Street and Pennsylvania Ave., N.W., Washington, D.C. 20580. The Commission requests that the original comment be filed with five copies, if feasible. The Commission also requests, if possible, that the comment be submitted in electronic form on a computer disk. (Programs based on DOS or Windows are preferred. Files from other operating systems should be submitted in ASCII text format.) The disk label should identify the commenter's name and the name and version of the word processing program used to create the comment. Alternatively, the Commission will accept comments submitted to the following e-mail address <ElecMedia@ftc.gov>. All submissions should be captioned: "Interpretation of Rules and Guides for Electronic Media—Comment, FTC File No. P974102."

**FOR FURTHER INFORMATION CONTACT:** Laura J. DeMartino, Attorney, Federal Trade Commission, Sixth Street and Pennsylvania Ave., N.W., Washington, D.C. 20580, telephone (202) 326-3030, e-mail (for questions or information only) <Ldemartino@ftc.gov>.

**SUPPLEMENTARY INFORMATION:**

## I. Introduction

The Commission proposes issuing a policy statement in the future regarding the applicability of its rules and guides to electronic media. The Commission is using the term "electronic media" in this Notice to refer to the newer forms of electronic media, such as e-mail, CD-ROMs, and the Internet.<sup>1</sup> This Notice

<sup>1</sup> The Internet encompasses the World Wide Web as well as other electronic information-exchanging features, including "Telnet," "FTP" (File Transfer Protocol), and USENET newsgroups. The Commission is using the term the "Internet" to

does not contain a proposed policy statement. It is intended to provide a discussion of the issues that would be addressed in an expected policy statement and to solicit public comment on these issues. The purpose of the proposed policy statement would be to eliminate or reduce any uncertainty as to whether the Commission's rules and guides apply to electronic media.<sup>2</sup>

The proposed policy statement also would clarify how the rules and guides apply to these new media. Many of the Commission's rules and guides, for example, use terms that may be more commonly associated with print media. The Commission, however, believes these terms apply to electronic media. The proposed policy statement also would discuss the use of electronic media as a means of complying with some of the requirements or recommendations of the rules and guides.<sup>3</sup>

The unique features of electronic media present special challenges and opportunities for making disclosures effectively. The proposed policy statement, therefore, would provide guidance on how the Commission would evaluate whether disclosures in electronic media are clear and conspicuous. The Commission believes that such guidance will encourage voluntary compliance by industry and promote industry self-regulation. This Notice discusses the Commission's approach to achieve these goals, which would form the basis of a future policy statement.

The issue of Commission guidance and public input on electronic media issues arose during the Commission's review of the Trade Regulation Rule Pursuant to the Telephone Disclosure and Dispute Resolution Act of 1992 ("900-Number Rule"), 16 CFR part 308.<sup>4</sup> During a public workshop on the 900-Number Rule, workshop participants suggested that the Commission conduct a separate proceeding that would

encompass the Internet and proprietary online services, such as America Online and Prodigy.

<sup>2</sup> Some traditional forms of electronic media, such as television and radio, have been used for advertising and marketing purposes for years. This Notice is not intended to affect the requirements of the Commission's rules and guides for television or radio advertisements.

<sup>3</sup> Other federal agencies, such as the U.S. Securities and Exchange Commission, also have considered whether new technology may be used to comply with the laws they enforce, and have issued interpretive guidance and rule amendments to clarify these issues and assist industry. See, e.g., 60 FR 53458 (Oct. 13, 1995); 61 FR 24652 (May 15, 1996).

<sup>4</sup> 62 FR 11749 (Mar. 12, 1997) (soliciting comment, *inter alia*, on whether the 900-Number Rule's disclosure requirements are adequate for Internet advertisements).

address the issue of making clear and conspicuous disclosures on the Internet and provide an opportunity for all interested parties to submit comments.<sup>5</sup> Accordingly, the Commission has determined to publish this notice and seek public comment from all interested parties on the Commission's proposed policy statement. The Commission believes that public comment will be helpful because of the challenging issues presented by electronic media and the pace at which technological developments are occurring.<sup>6</sup>

## A. Background

### 1. Technological Advances

Significant technological advances in recent years are dramatically changing the global marketplace. With approximately 62 million people in the United States having access to the Internet, it is becoming an increasingly popular medium for advertising goods and services and for conducting commercial transactions.<sup>7</sup> It is estimated that businesses spent \$906.5 million for advertising on the Internet in 1997.<sup>8</sup> Advertisements on the World Wide Web ("Web"), the graphical segment of the Internet, often contain "pages" which may contain text, pictures, video, sound, interactive graphics, or a combination of all of these features.<sup>9</sup>

<sup>5</sup> Transcript of the Workshop on the 900-Number Rulemaking (Day 2, June 20, 1997), Volume 2, pp. 559-579. The transcript is available in the Public Reference Room, Room 130, of the Commission and on the Commission's Web site <<http://www.ftc.gov>>. Some commenters stated that the Commission's determination regarding how clear and conspicuous disclosures should be made in Internet advertisements pursuant to the 900-Number Rule would have broad implications for all Internet advertisements. Therefore, it was argued that all interested parties, and not simply those persons interested in the 900-Number Rule, should have notice of the review of this issue and the opportunity to submit comments. *Id.*

<sup>6</sup> The Commission recognizes the usefulness of maintaining a dialogue with the public regarding these issues in order to benefit both consumers and industry. See Commission staff report, *Anticipating the 21st Century: Consumer Protection Policy in the New High-Tech Global Marketplace*, p. 7 (May 1996) (summarizing testimony presented during hearings regarding the need for a continuing dialogue).

<sup>7</sup> IntelliQuest Information Group, Inc. (Feb. 5, 1998) <<http://www.intelliquest.com>> (number of users as of the fourth quarter, 1997).

<sup>8</sup> Internet Advertising Bureau (Apr. 6, 1998) <<http://www.iab.net/news/breaksource.html>>.

<sup>9</sup> A "Web site" is a collection of linked electronic "pages." The main "page" within the Web site is often referred to as a "home page," from which links are provided to electronic pages within the overall Web site. Frequently, the home page or other pages within the site will provide links to other Web sites as well. This linkage is possible because the Web allows users to navigate or transfer from one electronic document to another—in actually viewing files stored on various

Consumers are able to purchase goods or services directly over the Internet.<sup>10</sup> Businesses also use CD-ROMs to disseminate information about their products to consumers. In addition, businesses use e-mail and facsimiles to communicate directly with consumers.

## 2. The Commission's Role in the New Marketplace

The Commission believes that the use of this new technology should be encouraged. The Internet provides consumers and businesses with access to a global marketplace. Consumers have instant access to a large amount of information and a greater array of products and services. These newer forms of electronic media also provide businesses with different ways of advertising, selling goods, and communicating with customers. At the same time, the use of this new technology for commercial activities raises consumer protection concerns.<sup>11</sup> The Commission agrees with the statement by the Interagency Working Group on Electronic Commerce, that "[i]n order to realize the commercial and cultural potential of the Internet, consumers must have confidence that the goods and services offered are fairly represented, that they will get what they pay for, and that recourse or redress is available if they do not."<sup>12</sup> As a result, the Commission believes that enforcement of consumer protection laws is necessary to ensure the vitality and viability of the Internet as a new marketplace.<sup>13</sup>

computers—through the use of electronically coded links called hypertext.

<sup>10</sup> Estimates of online sales vary dramatically. One survey, however, estimates that as of the fourth quarter, 1997, 37.2 million users were shopping online and 10.5 million users were purchasing online. IntelliQuest Information Group, Inc. (Feb. 5, 1998) <<http://www.intelliquest.com>>.

<sup>11</sup> The Commission examined consumer protection issues raised by technological developments during hearings in November 1995. The Commission staff report on the hearings describes the technological developments, the challenges faced by law enforcement agencies to address consumer protection issues without stifling the use of new technology, and various proposed strategies for resolving consumer protection concerns. Commission staff report, *Anticipating the 21st Century: Consumer Protection Policy in the New High-Tech Global Marketplace* (May 1996).

<sup>12</sup> A Framework for Global Electronic Commerce, p. 17 (July 1, 1997) <<http://www.whitehouse.gov/WH/New/Commerce>>. "Truthful and accurate advertising shall be the cornerstone of advertising on all media, including the Internet." *Id.* at 16.

<sup>13</sup> See Commission staff report, *Anticipating the 21st Century: Consumer Protection Policy in the New High-Tech Global Marketplace*, pp. 27, 30–31 (May 1996). The Commission already has brought a number of cases against companies engaged in unfair or deceptive practices on the Internet. See, e.g., *Global World Media Corp.*, Docket No. C–3772 (Oct. 17, 1997) (alleged false claims about an herbal supplement in advertising on the Internet and other

## 3. Legal Authority

This Notice addresses the applicability of certain rules and guides issued pursuant to section 5 of the Federal Trade Commission Act ("FTC Act"), 15 U.S.C. 45(a), and other statutes enforced by the Commission to electronic media. Section 5 of the FTC Act gives the Commission broad authority over the advertising and marketing of products and services through its prohibition on "unfair or deceptive acts or practices in or affecting commerce." The Commission has issued policy statements to provide guidance on how it evaluates whether acts or practices are "unfair or deceptive" under section 5 of the FTC Act and on how it will enforce the legal requirement that advertisers possess a reasonable basis for objective claims about their products and services.<sup>14</sup>

The Commission rules addressed in this Notice prohibit specific unfair or deceptive acts or practices and "may include requirements prescribed for the purpose of preventing such acts or practices."<sup>15</sup> The Commission may initiate civil actions, seeking civil penalties, against any person who violates a rule "with actual knowledge or knowledge fairly implied on the basis of objective circumstances that such act is unfair or deceptive and is prohibited by such rule."<sup>16</sup> The Commission also promulgates rules pursuant to specific Acts of Congress.<sup>17</sup> The remedies available to enforce these rules vary.

media); *FTC v. Audiotex Connection, Inc.*, CV–97–0726 (E.D.N.Y. filed Feb. 13, 1997) (Internet Web site program allegedly disconnected consumer's access provider without consent or adequate disclosure and re-connected computer to an international access provider that billed consumers over \$2 per minute); *FTC v. Fortuna Alliance, L.L.C.*, Civ. No. C96–799M (W.D. Wash. filed May 23, 1996) (alleged illegal pyramid investment scheme marketed on the Internet); *FTC v. Brandzel*, 96C 1440 (N.D. Ill. filed Mar. 13, 1996) (computer memory chips advertised on the Internet allegedly were paid for but not delivered in violation of section 5 of the FTC Act and the Mail or Telephone Order Merchandise Rule, 16 CFR part 435).

<sup>14</sup> Federal Trade Commission Policy Statement on Deception, *appended to Cliffdale Associates, Inc.*, 103 F.T.C. 110, 174 (1984) (hereinafter "*Deception Statement*"); Federal Trade Commission Policy Statement on Unfairness *appended to International Harvester Co.*, 104 F.T.C. 949 1070 (1984) (superseded by 15 U.S.C. 45(n)); Federal Trade Commission Policy Statement Regarding Advertising Substantiation, 48 FR 10471 (Mar. 11, 1983).

<sup>15</sup> 15 U.S.C. 57a(a)(1)(B). The Commission is empowered to promulgate rules which define with specificity unfair or deceptive acts or practices when it has reason to believe that certain unfair or deceptive acts or practices are prevalent. *Id.*

<sup>16</sup> 15 U.S.C. 45(m)(1)(A). The Commission also may seek redress for consumers. 15 U.S.C. 57b(a)(1).

<sup>17</sup> For example, the Energy Policy and Conservation Act, 42 U.S.C. 6201, *et seq.*, as amended, requires the Commission to prescribe rules for energy consumption and efficiency

The Commission's guides are "administrative interpretations of the laws administered by the Commission" and are intended to assist the public in voluntarily complying with the law (e.g., by providing guidance on how to avoid unfair or deceptive acts or practices).<sup>18</sup> Although guides do not have the force and effect of law, failure to comply with them may result in corrective action under applicable statutory provisions (e.g., a proceeding pursuant to section 5(a) of the FTC Act).<sup>19</sup>

## B. Scope of the Proposed Policy Statement

The proposed policy statement would address those rules and guides issued by the Commission that solely pertain to consumer protection issues.<sup>20</sup> These rules and guides are listed in the Appendix. Other consumer protection rules and guides will not be addressed in this proceeding.<sup>21</sup> These rules and guides either may not apply to electronic media or contain provisions that preclude uniform treatment in a

labeling of certain appliances. See Rule Concerning Disclosures Regarding Energy Consumption and Water Use of Certain Home Appliances and Other Products Required Under the Energy Policy and Conservation Act ("Appliance Labeling Rule"), 16 CFR part 305.

<sup>18</sup> 16 CFR 1.5. Section 18(a)(1)(A) of the FTC Act authorizes the Commission to issue "interpretative rules and general statements of policy with respect to unfair or deceptive acts or practices in or affecting commerce." 15 U.S.C. 57a(a)(1)(A).

<sup>19</sup> 16 CFR 1.5.

<sup>20</sup> The Commission is not addressing antitrust issues or the Guides for Advertising Allowances and Other Merchandising Payments and Services, 16 CFR part 240, in this Notice. Further, this Notice does not address the Commission's rules of practice, 16 CFR parts 1–4. Other issues relating to the use of electronic media generally, such as privacy and electronic payment technologies, are being examined in different proceedings. See 62 FR 10271 (Mar. 6, 1997) (regarding previous Commission workshops on consumer information privacy issues and children's online privacy); 62 FR 19173 (Apr. 18, 1997) and 62 FR 29392 (May 30, 1997) (discussing public meetings held by the interagency Consumer Electronic Payments Task Force on consumer issues raised by emerging electronic money and payment technology).

<sup>21</sup> Rule and Regulations Under the Hobby Protection Act (16 CFR part 304); Regulations under the Comprehensive Smokeless Tobacco Health Education Act of 1986 (16 CFR part 307); Test Procedures and Labeling Standards for Recycled Oil (16 CFR part 311); Unfair or Deceptive Advertising and Labeling of Cigarettes in Relation to the Health Hazards of Smoking (16 CFR part 408); Care Labeling of Textile Wearing Apparel and Certain Piece Goods (16 CFR part 423); Rule Concerning Cooling-Off Period for Sales Made at Homes or at Certain Other Locations (16 CFR part 429); Funeral Industry Practices Rule (16 CFR part 453); Ophthalmic Practice Rules (16 CFR part 456); Rules, Regulations, Statements of General Policy or Interpretation and Exemptions Under the Fair Packaging and Labeling Act (16 CFR parts 500–503); and Procedures for State Application for Exemption from the Provisions of the Fair Debt Collection Practices Act (16 CFR part 901).

policy statement and need to be examined separately. The Commission also is not addressing regulations issued by the Federal Reserve Board and enforced by the Commission.<sup>22</sup>

In addition, the Commission is currently reviewing certain rules and guides as a part of its ongoing regulatory review process.<sup>23</sup> In some of these reviews, the Commission is examining, among other things, the effect of new technology on the provisions of those rules and guides.<sup>24</sup> Comments regarding specific amendments to those rules and guides should be submitted in the course of those particular reviews. To the extent that the broad policy issues addressed in this Notice impact on those rules or guides, however, interested persons also should submit comments in this proceeding. For example, if a rule or guide under review requires or recommends that disclosures be clear and conspicuous (which will be addressed in the context of electronic media in this proposal), commenters should provide a submission in this proceeding even if they have already commented in the other review.

This Notice and the proposed policy statement also are not intended to address all of the substantive issues specific to certain rules or guides that may arise because of the use of electronic media. For example, this Notice addresses the applicability of the Guides Concerning Use of Endorsements and Testimonials in Advertising ("Endorsement Guides"), 16 CFR part 255, to electronic media and proposes factors the Commission would use to evaluate the effectiveness of disclosures that accompany endorsements in electronic media.

<sup>22</sup> Regulation B, 12 CFR part 202; Regulation E, 12 CFR part 205; Regulation M, 12 CFR part 213; Regulation Z, 12 CFR part 226. The Federal Reserve Board has issued an interim rule amending Regulation E and proposed rules amending Regulations B, E, M and Z regarding the use of electronic disclosures for matters covered by those Regulations. 63 FR 14528, 14538, 14548, 14552, 14555 (Mar. 25, 1998).

<sup>23</sup> In 1992, the Commission implemented a regulatory reform program to assess, at least once every ten years, the continued need and usefulness of its rules and guides and revise or, as necessary, rescind outdated rules and guides. See 63 FR 1802 (Jan. 12, 1998). To date under this program, the Commission has reviewed 19 guides of which it has repealed 15, and 28 rules of which it has repealed 13. Many of the retained rules and guides have been amended to reduce compliance burdens while still achieving their intended purpose.

<sup>24</sup> See 900-Number Rule, 16 CFR part 308, 62 FR 11749 (Mar. 12, 1997); Rule Regarding the Use of Negative Option Plans by Sellers in Commerce, 16 CFR part 425, 62 FR 15135 (Mar. 31, 1997); Rule Regarding Disclosure Requirements and Prohibitions Concerning Franchising and Business Opportunity Ventures, 16 CFR part 436, 62 FR 9115 (Feb. 28, 1997).

Developments in electronic media, however, may raise new issues unique to the Endorsement Guides regarding what is—or is not—an "endorsement." The Commission will address issues that are unique to a particular rule or guide on a case-by-case basis or during the regular review of the rule or guide.

The Commission does not consider the issuance of this proposal, or any future policy statement that may result from this proceeding, to constitute either a new rule or a substantive amendment of its current rules. The policy statement would not create any new rights, duties, obligations, or defenses, but instead would clarify the rights, duties, obligations, or defenses that currently exist pursuant to the rules and guides. Further, the Commission would retain its discretion for determining how to proceed in particular cases. The Commission will follow the rulemaking procedures required to substantively amend a rule, if such amendments are necessary to extend a particular rule's coverage to electronic media. Additionally, this proposal or any future policy statement will not affect the Commission's jurisdiction.<sup>25</sup>

### C. Public Workshop

To assist in developing its proposed enforcement policy statement, the Commission is soliciting comment from all interested parties regarding the issues raised in this Notice. The Commission also seeks comment as to the advisability of convening a public workshop to discuss the issues raised in this Notice. A workshop would afford Commission staff and interested parties a further opportunity to discuss issues related to the applicability of the Commission's rules and guides to electronic media. The workshop would not be intended to achieve a consensus among participants, or between participants and Commission staff, with regard to any issue raised in this Notice. Persons interested in attending or participating in such a workshop are requested to notify Commission staff in the comment submitted in response to this proposal. If the Commission decides to convene a public workshop, it will announce the date, time and location of the workshop in a separate Notice in the **Federal Register**.

<sup>25</sup> See 15 U.S.C. 44, 45(a)(2); Section 2 of the McCarran-Ferguson Act, 15 U.S.C. 1012(b)

## II. Proposals for an Enforcement Policy Statement

### A. The Applicability of Rules and Guides to New Forms of Electronic Media

One objective of the proposed policy statement would be to reduce any uncertainty regarding whether specific Commission rules and guides apply to electronic media. The Commission's rules and guides generally address representations made about certain products or services<sup>26</sup> and other commercial activities.<sup>27</sup> The proposed policy statement would clarify that (1) rules and guides that apply to representations generally without reference to, or limitation on, the medium used to disseminate them apply equally to representations disseminated through electronic media; and (2) rules and guides that specify how or where representations are disseminated are broad enough to apply to representations disseminated through electronic media.

#### 1. Rules and Guides That Apply to Representations Generally

Many rules and guides are not limited to any media or mode of dissemination. Rather, they apply generally to representations or any form of advertising.

*Example 1:* The Guides for the Jewelry, Precious Metals, and Pewter Industries ("Jewelry Guides"), 16 CFR 23.0(c), apply to "claims and representations about industry products included in labeling, advertising, promotional materials, and all other forms of marketing \* \* \*."

*Example 2:* The Guides for Select Leather and Imitation Leather Products ("Leather Guides"), 16 CFR 24.2(g), state that disclosures should be made "in all advertising of such products irrespective of the media used."

*Example 3:* The Rule Concerning Deceptive Advertising as to Sizes of Viewable Pictures Shown by Television Receiving Sets ("TV Picture Size Rule"), 16 CFR 410.1, addresses "designations" used to refer to television picture sizes without specifying how or where the designation is made (e.g., orally, in television advertisements, in print advertisements, etc.).

For this category, the plain language of each rule and guide applies to

<sup>26</sup> See, e.g., Guides for the Use of Environmental Marketing Claims, 16 CFR part 260 (addressing environmental claims made about products and services).

<sup>27</sup> See, e.g., Rule Concerning the Preservation of Consumers' Claims and Defenses, 16 CFR part 433 (requiring that consumer credit contracts contain certain provisions).

representations and claims in any medium, including electronic media. The policy statement would merely clarify that when a rule or guide does not limit how covered representations are communicated to consumers, how advertising is disseminated, or where commercial activities occur, the provisions of the rule or guide apply to such activities in electronic media.<sup>28</sup>

## 2. Rules and Guides Referencing Specific Modes of Communication

Some rules and guides specify where or how representations or other information are disseminated, e.g., referring to "written" advertisements or "direct mail promotional materials," or specifying that information needs to be provided to others "in writing."

*Example 1:* The disclosure obligations of the Telemarketing Sales Rule, 16 CFR part 310, are triggered when consumers call telemarketers in response to direct mail solicitations (unless certain disclosures appear in the direct mail solicitation).<sup>29</sup> The term "direct mail solicitations" is not defined in the Rule. (See, discussion at II. B. 2.)

*Example 2:* The Rule Concerning Labeling Requirements for Alternative Fuels and Alternative Fueled Vehicles ("Alternative Fuels Rule"), 16 CFR 309.11, 309.13, requires industry members to certify the fuel rating of certain alternative fuels when they transfer fuel to anyone who is not a consumer.<sup>30</sup> The Rule states that certifications may be made by delivery ticket, or by a letter or "written statement."

As discussed in greater detail below, the Commission believes that these

<sup>28</sup>The Mail and Telephone Order Merchandise Rule ("Mail Order Rule"), 16 CFR part 435, applies to orders for merchandise made using certain media, such as the telephone. The Mail Order Rule defines the term "telephone" broadly, so that the Rule covers orders placed by facsimile or by computer through telephone modems. 16 CFR 435.2(b). Thus, this Rule expressly encompasses electronic media because information is transmitted over the telephone infrastructure. Another provision of the Mail Order Rule states that mail or telephone order sales occur regardless of "the method used to solicit the order." 16 CFR 435.2(a). Thus, the Rule covers any means of soliciting orders, including those solicitations via electronic media.

<sup>29</sup>During the promulgation of the Telemarketing Sales Rule, the Commission stated that it did not have sufficient information to justify coverage of online services under the Rule's requirements, and thus, this Rule does not apply to transactions conducted entirely on the Internet. 60 FR 30406, 30411 (June 8, 1995). Any modification to this general coverage will be handled separately, if needed.

<sup>30</sup>The Rule also requires labels to be placed on fuel dispensers and on alternative fueled vehicles. Since these requirements do not raise concerns regarding the use of electronic media, they are not addressed in this Notice.

illustrated specifications include the use of electronic media and that such inclusion is consistent with the intention of rules and guides containing such specifications. Moreover, in certain instances, it may be beneficial for firms to use electronic media to comply with the requirements of the rules and guides. Thus, it is proposed that the policy statement would clarify that those rules and guides apply equally to electronic media.

## B. Interpretation of Terms Used in Rules and Guides

The Commission's rules and guides use certain terms that may be more commonly used in a paper-based context. With the increasing use of computers, the meaning of such terms already has evolved to take into account new technologies. The proposed policy statement would clarify that the Commission interprets these terms in light of the use of new technologies so that industry members understand their obligations under the Commission's rules and guides.

### 1. The Terms "Writing," "Written" and "Printed"

Many of the Commission's rules and guides use the terms "writing," "written," or "printed" with reference to certain documents.<sup>31</sup> For example, the Appliance Labeling Rule, 16 CFR 305.4(d), states that it is unfair or deceptive to make any representation "in writing (including a representation on a label) or in any broadcast advertisement," with respect to energy use or efficiency of certain products, unless the product has been tested in accordance with the Rule.<sup>32</sup> Neither the Rule nor the enabling statute, the Energy Policy and Conservation Act, defines the term "in writing." The Appliance Labeling Rule also requires that certain disclosures be made in catalogs, which are defined as "printed material which contains the terms of sale, retail price, and instructions for ordering, from which a retail consumer can order a covered product." 16 CFR 305.2(m), 305.14. The Rule does not define the term "printed."

With the use of new technology, the terms "writing," "written," and "printed" are not merely associated with communications on paper. The proposed policy statement would clarify

<sup>31</sup>The rules and guides discussed in this section are used as examples and not as an exhaustive list of the rules and guides that use the described terms.

<sup>32</sup>This provision simply restates section 323(c) of the Energy Policy and Conservation Act, 42 U.S.C. 6201, which states that such representations are considered unfair or deceptive acts or practices in violation of the FTC Act.

that, when used in the Commission's rules and guides, the terms "written," "writing," and "printed" refer to information that is capable of being preserved in a tangible form and read, as opposed to an oral statement that is intangible and transitory. As with information presented on paper, consumers using electronic media can read the information and preserve it for possible later review either by printing it on paper, saving it on disk, or by some other means.

Using this interpretation, the Appliance Labeling Rule's substantiation requirements for energy efficiency representations made "in writing \* \* \* or in any broadcast advertisement" would apply to representations in electronic media that are capable of being preserved and read, such as representations on CD-ROMs or on the Internet. Further, the Commission would interpret the Rule's definition of catalog ("printed material") to include any material that is capable of being preserved in tangible form and read, and that also meets the remainder of the Rule's definition (e.g., from which a retail consumer can order a covered product).

The Commission solicits comment on its proposed interpretation of the terms "written," "writing," and "printed" that apply to the use of electronic media. The Commission seeks information on whether the interpretation adequately reflects the understanding of the terms and the underlying purpose of the rules and guides that use them, and accounts for technological developments.

### 2. The Term "Direct Mail"

The understanding of other terms also has evolved with the advent of new technology. The concept of "mail," for example, is understood to encompass electronic mail through the Internet as well as traditional mail delivery.<sup>33</sup> Some of the Commission's rules and guides refer to "direct mail," in the context of direct mail solicitations. For example, the Telemarketing Sales Rule, 16 CFR 310.6(e), applies to telephone calls initiated by consumers in response to "direct mail solicitations," unless specified information is disclosed in the solicitation.<sup>34</sup>

Where the Commission's rules or guides refer to "direct mail," the

<sup>33</sup>Traditional mail includes mail delivered by the United States Postal Service as well as by private mail carriers.

<sup>34</sup>The Rule always applies to consumer telephone calls in response to direct mail solicitations for certain types of products and services, regardless of the disclosures made in the solicitation. See 16 CFR part 310 for the full text of the Rule.

proposed policy statement would state that the term refers to private communications, *i.e.*, traditional mail as well as electronic communications that are individually addressed and capable of being received privately. This interpretation would clarify that direct mail includes those communications that are directed to particular individuals, such as facsimiles or e-mail, but not directed to the public at large, as are Internet bulletin boards.<sup>35</sup>

E-mail, for example, requires that the sender address the message to individual recipients' e-mail addresses (which is true even if the sender addresses a single e-mail to multiple individuals at their personal e-mail addresses) and is capable of being received privately by the recipients. Therefore, telemarketers or sellers who send individually addressed e-mail that provides a telephone number for consumers to call may be subject to the provisions of the Telemarketing Sales Rule, 16 CFR part 310.

The Commission solicits comment regarding whether its proposed interpretation of the term "direct mail" adequately reflects the understanding of the term and appropriately encompasses the electronic equivalents of "direct mail." The Commission also solicits comment on whether targeted advertising on the Internet should be considered as the electronic equivalent of "direct mail." For example, some Internet advertisers track users' interests through their click patterns or use of search terms. These advertisers may then target advertisements to a particular user. Although this advertising appears on a Web site, which generally may be considered to be a public forum, the targeted advertisement is addressed to a particular user's computer and is capable of being received privately by that user.

### 3. Use of Electronic Media To Comply With Affirmative Requirements

Some rules and guides require or recommend that businesses provide information in writing to another person. The Commission recognizes that it may be easier, more efficient and less costly for industry members to comply with various requirements by using electronic media. This is consistent with the Commission's intention that its rules and guides should not discourage the use of electronic media.

The Automotive Fuel Ratings, Certification and Posting Rule, 16 CFR

306.6, for example, requires that industry members certify the fuel's octane rating when they transfer fuel to anyone who is not a consumer.<sup>36</sup> The Rule permits industry members to do this in two ways: Members may include with each transfer, a delivery ticket or other paper such as an invoice or "any other written proof of transfer," or they may "(g)ive the person a letter or other written statement" that contains certain information. 16 CFR 306.6(a) and (b). With the Commission's interpretation of the term "written," described above, the transferor could deliver information in a form that is capable of being preserved in a tangible form and read. Thus, the transferor could use electronic media, such as e-mail or facsimile, to give the person "a letter or other written statement."<sup>37</sup>

The requirement that certain information should be provided to another person implies that such information actually be received by that person. Therefore, although it may be advantageous to use new technology to comply with affirmative requirements, industry members should be mindful of certain issues. For example, the requirement to give, mail, deliver or furnish information would not be met if the intended recipient does not have the technological capabilities of receiving or viewing the information. In certain circumstances, industry members may need to obtain the recipient's consent to deliver information by a certain electronic method, inform the recipient of any particular media applications needed to view the information, or deliver the information on paper. Because there may be technological difficulties that could impede the electronic delivery of information, it may be necessary for industry members to confirm that the recipient in fact received the information. Most facsimile machines routinely confirm when the facsimile has been successfully transmitted. Senders, for example, might require recipients to confirm receipt by return e-mail or verify in some manner the recipients' access to information posted on a Web site. The Commission seeks comment on what, if any, guidance is necessary regarding the use of electronic media to comply with affirmative disclosure requirements.

### 4. Other Terms

Where other terms are reasonably susceptible of being interpreted as

<sup>36</sup> As mentioned above, the Alternative Fuels Rule, 16 CFR part 309, contains a similar requirement.

<sup>37</sup> Even if electronic media is used to provide certain "written" information, the Rule's record-keeping requirements would continue to apply.

applying to, or occurring within the realm of, electronic media, the proposed policy statement would clarify that the terms are to be read broadly and inclusively so as to apply to electronic media. The Guides Against Bait Advertising ("Bait Advertising Guides"), 16 CFR 238.1, for example, advise that advertisements containing an offer to sell a product should not be published unless the offer is a bona fide effort to sell the advertised product. The Commission interprets the term "publish" to include information that is made available to the public in online catalogs or other Web pages.<sup>38</sup> The Commission solicits comment on this general proposal and whether there are additional terms that should be specifically addressed by the Commission in a policy statement.

### C. Clear and Conspicuous Disclosures in Electronic Media

The application of the Commission's rules and guides to electronic media advertising presents new issues regarding the evaluation of disclosures.<sup>39</sup> Many rules and guides contain disclosure requirements mandating or advising that disclosures be "clear and conspicuous." Numerous Commission precedents offer guidance on the meaning of the clear and conspicuous standard in traditional advertising media. Electronic media advertisements, however, incorporate both traditional and unique features that raise new issues in evaluating the effectiveness of disclosures. In proposing guidance in this area, the Commission is attempting to provide consumers with comprehensible disclosures to prevent deception, while not imposing undue burdens or restrictions on businesses in complying with the disclosure requirements.

#### 1. Disclosures Required or Advised by Rules and Guides

The rules and guides that contain disclosure requirements generally require or recommend that material information be disclosed to consumers to prevent deception, to ensure that consumers receive complete information regarding the terms of a transaction, or to further public policy goals. For example, the Endorsement Guides, 16 CFR 255.2, protect against

<sup>38</sup> This interpretation is consistent with the Guides' definition of the term "advertising" as including "any form of public notice however disseminated or utilized." 16 CFR 238, n. 1.

<sup>39</sup> The Commission discusses the Internet specifically in this section because the examples are most pertinent to disclosures on Web sites. The guidance proposed by the Commission below, however, also may be applicable to disclosures in other electronic media.

<sup>35</sup> Messages posted on Internet bulletin boards, however, may be considered to be advertising for the purposes of the Telemarketing Sales Rule, 16 CFR 310.6(e), and other rules and guides.

deception by advising that advertisers disclose what performance consumers can generally expect with a product when an endorsement is not representative of that performance. In addition, the Guides for the Advertising of Warranties and Guarantees ("Warranty Guides"), 16 CFR 239.2(a), provide for complete disclosure of warranty information by advising that if an advertisement mentions a product warranty, a disclosure should be made that consumers may review the complete details of the warranty prior to purchase at the place where the product is sold. The required energy efficiency disclosures in the Appliance Labeling Rule, 16 CFR 305.4, further the statutory policy goal of promoting energy conservation.

Some disclosures are required when a certain term, representation or claim (i.e., a "triggering representation") is made. The Leather Guides, 16 CFR 24.2, for example, advise that the term "leather" (the triggering term) be qualified when used to describe a product that is not composed in all substantial parts of leather. Other disclosure requirements may not be linked to a specific triggering term, but nonetheless are necessary to prevent deception, e.g., the Guides for the Rebuilt, Reconditioned and Other Used Automobile Parts Industry ("Used Auto Parts Guides") 16 CFR 20.1(b), advise that it is unfair or deceptive to offer for sale or sell used auto parts unless the fact that the parts are used is disclosed in advertising and on invoices. In other cases, rules and guides advise that information be disclosed to consumers prior to the completion of the transaction, e.g., the Credit Practices Rule, 16 CFR 444.3, requires that certain information be disclosed to a cosigner prior to becoming obligated.

## 2. The Clear and Conspicuous Standard in Traditional Media

In all cases the required or advised disclosures must be effectively communicated to consumers. To achieve this general performance standard, the Commission's rules and guides require that disclosures be "clear and conspicuous," using that term or other conceptually similar articulations.<sup>40</sup> The Commission views

<sup>40</sup> The following are examples of other articulations found in the Commission's rules and guides: "clearly, adequately, and conspicuously," "clearly, conspicuously, and non-deceptively," "adequate and non-deceptive" (Guides for the Nursery Industry ("Nursery Guides"), 16 CFR 18.8(b)); "sufficiently clear and prominent" (Jewelry Guides, 16 CFR 23.1 n.2); "of such conspicuousness and clarity" (Leather Guides, 16 CFR 24.2(g), and Guides for the Watch Industry, 16 CFR 245.3(o)); "clearly and adequately" (Tire

such terms as synonymous, and this Notice collectively refers to them as the "clear and conspicuous" standard. Other, more specific disclosure standards, such as "equally prominent," and "in close proximity to," are discussed below.

In order to determine whether the disclosure is effectively communicated, the Commission considers the disclosure in the context of all of the elements of the advertisement.<sup>41</sup> Ordinarily, a disclosure is clear and conspicuous, and therefore is effectively communicated, when it is displayed in a manner that is readily noticeable, readable and/or audible (depending on the medium), and understandable to the audience to whom it is disseminated.<sup>42</sup>

The Commission examines a number of factors to determine whether disclosures in traditional media (e.g., print, television, and radio) meet this general performance standard. Thus, in print or other visual media, the Commission may consider a disclosure's type size, placement, color contrast to background, duration, and timing, as well as the existence of any images that detract from the effectiveness of the message. In audio messages, such as those delivered over the radio, the Commission may examine the volume, cadence, and placement of a disclosure, as well as the existence of any sounds that detract from the effectiveness of the message.<sup>43</sup> In all media, the Commission

Advertising and Labeling Guides ("Tire Guides"), 16 CFR 228.14(b)(3); Bait Advertising Guides, 16 CFR 238.3(c); Retail Food Store Advertising and Marketing Practices Rule, 16 CFR 424.1); "of sufficient clarity and conspicuousness" (Guides for the Decorative Wall Paneling Industry ("Wall Paneling Guides"), 16 CFR 243.1(c)(4)); "legible and conspicuous" (Rules and Regulations Under Fur Products Labeling Act, 16 CFR 301.38(a)(1)); and "conspicuous" (Tire Guides, 16 CFR 228.11).

<sup>41</sup> This approach is set out in the Commission's general policy on deception. "[T]he Commission will find deception if there is a representation, omission or practice that is likely to mislead the consumer acting reasonably in the circumstances to the consumer's detriment." *Deception Statement*, 103 F.T.C. at 176. In evaluating an advertisement or other promotional message, the Commission focuses not on the individual elements of the message in isolation, but on its "overall" or "net" impression. *Id.* at 175, n. 4. See also *American Home Products*, 98 F.T.C. 136, 374 (1981), *aff'd* 695 F.2d 681 (3d Cir. 1982).

<sup>42</sup> *Deception Statement*, 103 F.T.C. at 180-181, "Qualifying disclosures must be legible and understandable. In evaluating such disclosures, the Commission recognizes that in many circumstances, reasonable consumers do not read the entirety of an ad or are directed away from the importance of the qualifying phrase by the acts or statements of the seller."

<sup>43</sup> E.g., *Kraft, Inc.*, 114 F.T.C. 40, 124 (1991), *aff'd*, 970 F.2d 311 (7th Cir. 1992), *cert. denied*, 507 U.S. 909 (1993); *Thompson Medical Co.*, 104 F.T.C. 648, 797-98 (1984), *aff'd*, 791 F.2d 189 (D.C. Cir. 1986), *cert. denied*, 479 U.S. 1086 (1987); See also Commission consent orders in *European Body Concepts, Inc.*, Docket No. C-3590 (June 23, 1995);

further evaluates the language and syntax of the disclosure to determine whether it is likely to be understood by the relevant audience.

## 3. Special Issues in Electronic Media

Because the newer forms of electronic media transmit information in writing and through audio and visual messages, the same factors considered by the Commission in applying the clear and conspicuous standard in traditional media apply. The special attributes of advertising on electronic media, however, may call for additional guidance. Many Internet advertisements, for example, include scroll bars to maneuver down pages that usually exceed one screen in length. They also often include hyperlinks, both to other pages on a Web site as well as directly to other Web sites. On the Internet and in other electronic media, new graphics technologies create messages that scroll, blink, spin, pop-up, relocate, etc.

These unique features may require the Commission to give special consideration to certain factors in determining whether a disclosure is effectively communicated on electronic media.<sup>44</sup> As is true for any medium, the specific elements necessary to effectively communicate a disclosure may vary depending on the nature of the advertisement and the nature of the claim.<sup>45</sup> The focus on, or the weight given to, any specific factor will vary accordingly.

## 4. Factors Used To Evaluate Clear and Conspicuous Disclosures on Electronic Media

*a. Unavoidability.* The Commission believes that, to ensure effectiveness, disclosures ordinarily should be unavoidable by consumers acting reasonably. On the Internet or other electronic media, this means that consumers viewing an advertisement should necessarily be exposed to the disclosure in the course of a communication without having to take affirmative action, such as scrolling down a page, clicking on a link to other

*Eggland's Best, Inc.*, Docket No. C-3520 (Aug. 15, 1994).

<sup>44</sup> Certain rules and guides expressly include factors that are analyzed in determining the adequacy of a disclosure. For example, the Used Auto Parts Guides require that disclosures be "of such size or color contrast and so placed as to be readily noticeable." 16 CFR 20.1(b)(2). Such specific articulations are consistent with the general "clear and conspicuous" standard and would continue to inform the analysis of whether the disclosure is effectively communicated.

<sup>45</sup> For example, some e-mail messages or facsimiles may contain only text, while Web pages or CD-ROMs may contain text, graphics, video and audio.

pages, activating a "pop up," or entering a search term to view the disclosure.

*b. Access to Disclosures.* The Commission believes that in order to be effectively communicated, disclosures should remain accessible by consumers at all times during the communication. Therefore, after initially viewing a Web page that contains disclosures, a consumer who hyperlinks to another page should not be prevented from returning to the page containing the disclosures.

*c. Proximity and Placement.* Internet and other electronic media advertisements often include many pages and the length of each individual page can far exceed that of a traditional off-line page. Consumers may choose not to scroll completely through each page and not to link to each available page on the Web site, thus possibly missing important disclosures.

Based on its experience in evaluating disclosures in traditional media, the Commission believes that the effectiveness of disclosures is ordinarily enhanced by their proximity to the representation they qualify. This is especially important for disclosures that are made because of a triggering representation. For example, disclosures on the same screen as the triggering representation are likely to be more effective than those on separate screens. For those disclosures that are not required in response to a triggering representation, the disclosure nevertheless is likely to be more effective if it is proximate to relevant information.

The Commission also recognizes that electronic media offers new ways of placing claims in advertisements as compared to advertisements on paper. For example, some Web pages may use frames to separate the screen. Although a consumer may scroll down the Web page, a frame can remain constant on the side, top or bottom of the screen. The Commission solicits comment on whether consumers generally notice disclosures placed within a separate frame and the effectiveness of such placement as compared to disclosures that appear elsewhere on a Web page.

*d. Prominence.* Disclosures that are large in size and/or emphasized through a sharply contrasting color, and remain visible or audible for a sufficiently long duration, are likely to be more effective than those lacking such prominence. Electronic media affords new possibilities for adding to (or detracting from) the prominence of disclosures through animated graphics, graphics that facilitate segregating certain claims, and displays that remain on the screen for a long or indefinite duration.

Disclosures that are supported by new display technologies such as animation, or that are distinguished from (*i.e.*, not embedded within) surrounding text, such as within a border, may or may not be more prominent. The Commission solicits comment on whether these technologies, and other technologies unique to electronic media advertisements add to or detract from the prominence of disclosures.

*e. Non-Distracting Factors.* Even if a disclosure is large in size and long in duration, other elements of an advertisement may distract consumers so that they fail to notice, read, or listen to the disclosure. For example, Web pages may contain large flashing images, background sounds, or other items that are separate from the disclosure and may reduce the prominence of the disclosure. The Commission solicits comment on whether there are specific display technologies that distract consumers and reduce the effectiveness of disclosures.

*f. Repetition.* The repetition of a disclosure in conjunction with the claim that triggers it tends to enhance the likelihood of consumers noticing and understanding them. This is particularly relevant to Internet advertisements which can be extremely lengthy, with many and/or long Web pages.

*g. Audio and Visual Presentation.* Some electronic media advertisements contain both visual<sup>46</sup> and audio elements. The Commission believes that disclosures are likely to be more effective if they are presented in the same mode (audio or visual) in which a triggering or relevant claim is presented. In addition, research suggests that disclosures that are made in both visual and audio modes generally are more effectively communicated than disclosures made in either mode alone.<sup>47</sup> Therefore, the Commission also believes that the display of disclosures both visually and in audio, for those promotions that are presented in both modes, is likely to be more effective than disclosures in only one.

The Commission solicits comment on all of the factors set forth above. In

<sup>46</sup>The Commission is using the term "visual" in this Notice to include both static visual displays (*e.g.*, a fixed image) and non-static video displays (*e.g.*, moving video clips).

<sup>47</sup>Mariea Grubbs Hoy & Michael J. Stankey, *Structural Characteristics of Televised Advertising Disclosures: A Comparison with the FTC Clear and Conspicuous Standard*, J. Advertising, June 1993, at 47, 50; Todd Barlow & Michael S. Wogalter, *Alcoholic Beverage Warnings in Magazine and Television Advertisements*, 20 J. Consumer Res. 147, 151, 153 (1993); Noel M. Murray, et al., *Public Policy Relating to Consumer Comprehension of Television Commercials: A Review and Some Empirical Results*, 16 J. Consumer Pol'y 145, 164 (1993).

particular, the Commission solicits comment on (1) its underlying assumptions about consumer perceptions regarding Internet and other electronic media advertisements, (2) the discussion of the state of technology, including any existing or reasonably foreseeable technology that is not addressed in this Notice, and (3) the costs and benefits of applying the factors discussed above. The Commission also requests comment on specific questions listed in Part III, below.

## 5. Additional Specific Standards Contained in Rules and Guides

Some of the Commission's rules and guides specify in more detail the manner in which the disclosure should be made, instead of simply stating that the disclosure should be clear and conspicuous. In these instances, the underlying objective of the rule or guide is the same: the effective communication of the disclosure. Thus, the Commission intends to draw on the factors described above, as embellished by the specific requirements of the individual rule or guide, in evaluating compliance with the disclosure provisions of the rules and guides in advertising on electronic media.

For example, certain rules and guides specify a particular type-size in which the disclosure should appear or contain language such as "of equal size and conspicuousness," "of equal conspicuousness," and "more prominently."<sup>48</sup> The Commission proposes that these rules and guides be interpreted as requiring compliance with the general effective communication performance standard, as well as the specific size and prominence criteria listed in the rule or guide. Other rules and guides state that disclosures should be clear and conspicuous and in close conjunction or proximity to a designated claim.<sup>49</sup> The Commission will evaluate whether the disclosure is effectively communicated, following the factors described above, with a special focus on the placement of the disclosure.

<sup>48</sup> See, *e.g.*, Rule Concerning the Preservation of Consumers' Claims and Defenses, 16 CFR 433; Rules and Regulations Under the Textile Fiber Products Identification Act, 16 CFR 303.41(b); Jewelry Guides, 16 CFR 23.4; and Rule Concerning Power Output Claims for Amplifiers Utilized in Home Entertainment Products, 16 CFR 432.2.

<sup>49</sup> See, *e.g.*, Leather Guides, 16 CFR 24.2(g); Guides Against Deceptive Labeling and Advertising of Adhesive Compositions, 16 CFR 235.7; Wall Paneling Guides, 16 CFR 243.1(c)(4); Guides for the Household Furniture Industry, 16 CFR 250.1(b)(2); and Guide Concerning Use of the Word "Free" and Similar Representations, 16 CFR 251.1(c).

With respect to rules and guides that call for the placement of certain disclosures in a specific context, the Commission will consider interpreting the language in these rules and guides to permit alternate ways of disclosing information using electronic media, so long as the disclosure is effectively communicated to consumers and is consistent with the underlying objective of the rule or guide.<sup>50</sup>

Similarly, when rules and guides contain specific disclosure provisions that may not translate precisely to the Internet, the Commission proposes to interpret these requirements for Internet advertising in a manner that is consistent, to the extent possible, with both the requirements of the rule or guide and the underlying objective of effective communication.<sup>51</sup>

The Commission solicits comment on these approaches to applying specific standards in rules and guides to electronic media marketing, and whether additional guidance regarding the specific standards is necessary.

#### 6. Perspective of the Reasonable Consumer

In determining if representations or practices are deceptive, in any and all media, the Commission examines them from the perspective of a reasonable consumer. A representation or practice directed to a particular group, such as children, is evaluated from the perspective of a reasonable consumer within that group.<sup>52</sup> The same "reasonable consumer" standard applies

<sup>50</sup> For example, in the consent orders issued in *America Online, Inc.*, Docket No. C-3787, *Prodigy Services Corporation*, Docket No. C-3788, and *CompuServe, Inc.*, Docket No. C-3789, (Mar. 16, 1998), advertisements of a "free" offer must contain a disclosure directing consumers to the location where the terms and conditions of the offer can be found, and full disclosure of the terms, conditions, and obligations of the offer can occur during the online registration process, prior to consumers incurring any financial obligation.

<sup>51</sup> For example, the TV Picture Size Rule, 16 CFR 410.1, n. 2, prohibits the disclosure of required information in a footnote to which reference is made by an asterisk. Following the principles stated herein, this Rule would be interpreted as not allowing asterisked footnotes as well as their functional Internet equivalent—placing the disclosure in a separate location accessed by clicking on an icon or hyperlinking to a separate page. This is consistent with the Commission's proposal, discussed above, that disclosures should be unavoidable by consumers acting reasonably.

<sup>52</sup> *Deception Statement*, 103 F.T.C. at 175, 179. Some rules and guides define the relevant audience for analyzing the adequacy of disclosures, e.g., "purchasers or prospective purchasers," "purchasers and prospective purchasers . . . casually reading, or listening to, such advertising," and "prospective purchasers." See *Nursery Guides*, 16 CFR 18.2; *Leather Guides*, 16 CFR 24.2(g); and *Warranty Guides*, 16 CFR 239.2(b), respectively. Other rules and guides do not address the issue.

to disclosures required by the rules and guides in electronic media advertising.

### III. Request for Comments

The Commission solicits comments on the issues discussed in this Notice. Comments should, if appropriate, suggest specific alternatives to various proposals and indicate why alternative approaches would better serve the Commission's statutory mandate of protecting consumers against unfairness and deception. The Commission also seeks comment on the following specific questions:

#### *Applicability of Rules and Guides to Electronic Media*

1. Does the Commission's proposal to clarify the applicability of its rules and guides to electronic media provide adequate guidance to industry and to the public?

2. What are the costs and benefits to consumers of the Commission's proposed policy regarding the applicability of its rules and guides to electronic media?

3. What significant burdens or costs, including costs of compliance, would the proposed policy impose on firms subject to the provisions of a rule or guide? Would the proposed policy provide benefits to such firms?

a. What are the costs, burdens, and benefits of the proposed policy for small businesses in particular?

b. What changes should be made to the proposal to reduce the burdens or costs imposed on firms subject to the admonitions of the rules and guides?

c. How would these changes affect the benefits provided by the proposal?

#### *Interpretations of Terms*

4. Do the Commission's proposed interpretations of the terms "written," "writing," "printed," and "direct mail" provide adequate guidance to the public?

5. What are the costs and benefits of the proposed interpretations?

6. Do the Commission's proposed interpretations of the terms listed encompass all the newer forms of electronic media?

7. Are there more appropriate alternatives to the various interpretations of the terms proposed by the Commission? If so, please explain the alternative interpretation and the benefits of the alternative.

8. Does the Commission's discussion of "direct mail" adequately address the various new means of electronic communication, e.g., e-mail, facsimiles or list servers, and adequately account for the differences inherent in these various formats?

9. Should the Commission's interpretation of the term "direct mail" be limited to communications that are capable of being received privately? Should individually addressed communications posted on Internet Bulletin Boards or USENET groups be considered "direct mail"?

10. Should Web page or banner advertisements that are targeted to certain consumers on consumer preference information be characterized as "direct mail"? If so, are such advertisements adequately addressed by the Commission's proposed interpretation? To what extent should specific forms of online targeted marketing (e.g., push technology or consumer-selected "channels") be considered "direct mail"?

11. What issues, if any, need to be addressed by the Commission regarding the use of electronic media to deliver information required to be provided in writing by a rule or guide?

a. How should the Commission address those issues?

b. Under what circumstances, if any, should the Commission advise that information be provided on paper and not electronically?

12. Are there other terms in the rules and guides that should be specifically addressed by the Commission in the context of electronic media? If so, how should the terms be interpreted and why?

#### *Disclosures*

13. Do the proposed factors for evaluating disclosures provide adequate guidance to industry regarding making disclosures in electronic media?

14. What are the costs and benefits of applying the factors proposed by the Commission to evaluate disclosures required or recommended by the rules and guides?

15. To what extent will an individual consumer's Web browser or computer capabilities affect the format of an advertisement (e.g., Web page), and therefore, the format of a disclosure? Should the Commission advise that advertisers take these differences into account in designing their advertising to ensure that disclosures are clear and conspicuous?

16. What technologies exist to prevent or hinder consumers from accessing a disclosure after initially viewing it? What are the costs and benefits of advising against their use?

17. Are the Commission's underlying assumptions about consumers' perceptions with respect to Internet and other electronic media advertisements accurate? Are there surveys, copytests,

or other direct evidence of consumer behavior that will aid the analysis?

a. How do consumers behave in navigating through a Web site, reading e-mail or viewing a CD-ROM?

i. Do consumers generally scroll completely through Web pages or e-mail?

ii. Do consumers generally link to each available page on the Web site?

b. Under what circumstances are consumers more likely to examine the top of a Web page, rather than the middle or the bottom of a Web screen or page?

c. Are consumers more likely to notice information that is placed within a separate frame on a Web page or in other electronic media advertisements?

d. In what circumstances, if any, must a disclosure appear multiple times to be effectively communicated?

18. What features and technologies particular to advertising on electronic media enhance or detract from the prominence, and therefore the effectiveness, of a disclosure?

a. Do disclosures with graphical elements, such as pop-up features, animation, blinking, or borders surrounding disclosures, enhance or detract from the effectiveness of disclosures?

b. What features can appear in Internet advertisements that may distract consumers from noticing, reading, or listening to disclosures?

19. Could the interactive nature of the Internet present an opportunity to assure that disclosures are noticed and understood by the consumer (*i.e.*, could a consumer be required to click on an "Understood" button following the

disclosure before being permitted to link to other information)? What are the costs and benefits of using such features?

#### General

21. Are there new technologies that are not adequately addressed by the Commission's proposals? If so, how should these technological changes be addressed by the Commission?

22. Are there other issues that the Commission should address in clarifying the applicability of its rules and guides to electronic media?

By direction of the Commission.

**Donald S. Clark,**

*Secretary.*

#### APPENDIX

Titles	CFR parts
Guides for the Nursery Industry .....	16 CFR 18
Guides for the Rebuilt, Reconditioned and Other Used Automobile Parts Industry .....	16 CFR 20
Guides for the Jewelry, Precious Metals, and Pewter Industries .....	16 CFR 23
Guides for Select Leather and Imitation Leather Products .....	16 CFR 24
Tire Advertising and Labeling Guides .....	16 CFR 228
Guides Against Deceptive Pricing .....	16 CFR 233
Guides Against Deceptive Labeling and Advertising of Adhesive Compositions .....	16 CFR 235
Guides Against Bait Advertising .....	16 CFR 238
Guides for the Advertising of Warranties and Guarantees .....	16 CFR 239
Guides for the Dog and Cat Food Industry .....	16 CFR 241
Guides for the Decorative Wall Paneling Industry .....	16 CFR 243
Guides for the Watch Industry .....	16 CFR 245
Guides for the Household Furniture Industry .....	16 CFR 250
Guide Concerning Use of the Word "Free" and Similar Representations .....	16 CFR 251
Guides for the Feather and Down Products Industry .....	16 CFR 253
Guides for Private Vocational and Home Study Schools .....	16 CFR 254
Guides Concerning Use of Endorsements and Testimonials in Advertising .....	16 CFR 255
Guides for the Law Book Industry .....	16 CFR 256
Guides Concerning Fuel Economy Advertising for New Automobiles .....	16 CFR 259
Guides for the Use of Environmental Marketing Claims .....	16 CFR 260
Rules and Regulations Under the Wool Products Labeling Act of 1939 .....	16 CFR 300
Rules and Regulations Under Fur Products Labeling Act .....	16 CFR 301
Rules and Regulations Under the Textile Fiber Products Identification Act .....	16 CFR 303
Rule Concerning Disclosures Regarding Energy Consumption and Water Use of Certain Home Appliances and Other Products Required Under the Energy Policy and Conservation Act.	16 CFR 305
Automotive Fuel Ratings, Certification and Posting .....	16 CFR 306
Trade Regulation Rule Pursuant to the Telephone Disclosure and Dispute Resolution Act of 1992 .....	16 CFR 308
Labeling Requirements for Alternative Fuels and Alternative Fueled Vehicles .....	16 CFR 309
Telemarketing Sales Rule .....	16 CFR 310
Deceptive Advertising as to Sizes of Viewable Pictures Shown by Television Receiving Sets .....	16 CFR 410
Retail Food Store Advertising and Marketing Practices .....	16 CFR 424
Use of Negative Option Plans by Seller in Commerce .....	16 CFR 425
Power Output Claims for Amplifiers Utilized in Home Entertainment Products .....	16 CFR 432
Preservation of Consumers' Claims and Defenses .....	16 CFR 433
Mail or Telephone Order Merchandise Rule .....	16 CFR 435
Disclosure Requirements and Prohibitions Concerning Franchising and Business Opportunity Ventures .....	16 CFR 436
Credit Practices Rule .....	16 CFR 444
Used Motor Vehicle Trade Regulation Rule .....	16 CFR 455
Labeling and Advertising of Home Insulation .....	16 CFR 460
Interpretations of Magnuson-Moss Warranty Act .....	16 CFR 700
Disclosure of Written Consumer Product Warranty Terms and Conditions .....	16 CFR 701
Pre-Sale Availability of Written Warranty Terms .....	16 CFR 702
Informal Dispute Settlement Procedures .....	16 CFR 703

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BILLING CODE 6750-01-P

## ENVIRONMENTAL PROTECTION AGENCY

### 40 CFR Parts 22 and 59

[FRL-6010-2]

RIN 2020-AA13

#### Reopening of Public Comment Period for Proposed Revisions of the Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties, Issuance of Compliance or Corrective Action Orders, and the Revocation, Termination or Suspension of Permits

**AGENCY:** Environmental Protection Agency (EPA).

**ACTION:** Proposed rule; reopening of comment period.

**SUMMARY:** EPA is reopening the comment period for the proposed rule entitled "Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties, Issuance of Compliance or Corrective Action Orders, and the Revocation, Termination or Suspension of Permits" that was published in the **Federal Register** of February 25, 1998. Several commenters requested additional time to analyze the proposed changes. In response, the Agency is reopening the comment period. The original comment period closed April 27, 1998.

**DATES:** Written comments must be submitted on or before June 5, 1998.

**ADDRESSES:** Comments should be submitted in writing to Enforcement and Compliance Docket and Information Center (2201A), Office of Enforcement and Compliance Assurance, Office of Regulatory Enforcement, U.S. Environmental Protection Agency, 401 M Street, SW, Washington, D.C. 20460 or via electronic mail to [crop-comments@epamail.epa.gov](mailto:crop-comments@epamail.epa.gov). Comments submitted on paper must be submitted in triplicate.

EPA will make available, both in paper form and on the internet, a record of comments received in response to this document. The official docket will be a paper record of all comments received in writing or by electronic mail. This record may be reviewed at room 4033 of the Ariel Rios Federal Building, 1200 Pennsylvania Avenue, N.W., Washington, DC 20044. Persons interested in reviewing the comments must make advance arrangements to do so by calling 202-564-2614. A reasonable fee may be charged by EPA

for copying docket materials. The Agency also will publish a copy of the official docket on the Office of Enforcement and Compliance Assurance's internet home page at <http://www.epa.gov/oeca/regstat2.html>. The Agency intends that this internet docket should duplicate the official paper record, however, if technological or resource limitations make it infeasible to include one or more comments on the internet docket, the internet docket will identify those comments available only in the official paper docket.

**FOR FURTHER INFORMATION CONTACT:** Scott Garrison (202-564-4047), Office Enforcement and Compliance Assurance, Office of Regulatory Enforcement (2248A), U.S. Environmental Protection Agency, Washington, D.C. 20460.

#### List of Subjects

##### 40 CFR Part 22

Environmental protection, Administrative practice and procedure.

##### 40 CFR Part 59

Environmental protection, Administrative practice and procedure, Rules governing hearings on field citations.

Dated: April 28, 1998.

**Eric V. Schaeffer,**

*Director, Office of Regulatory Enforcement, Office of Enforcement and Compliance Assurance.*

[FR Doc. 98-12034 Filed 5-5-98; 8:45 am]  
BILLING CODE 6560-50-P

## ENVIRONMENTAL PROTECTION AGENCY

### 40 CFR Parts 261 and 279

[FRL-5969-3]

#### Hazardous Waste Management System; Identification and Listing of Hazardous Waste; Recycled Used Oil Management Standards

**AGENCY:** Environmental Protection Agency (EPA).

**ACTION:** Proposed rule.

**SUMMARY:** Today's proposal would eliminate errors and clarify ambiguities in the used oil management standards. Today's proposal, if promulgated, would make clear when used oil contaminated with polychlorinated biphenyls (PCBs) is regulated under the used oil management standards and when it is not, that the requirements applicable to releases of used oil apply in States that are not authorized for the RCRA base program, that mixtures of

conditionally exempt small quantity generator (CESQG) wastes and used oil are subject to the used oil management standards irrespective of how that mixture is to be recycled, and that the initial marketer of used oil that meets the used oil fuel specification need only keep a record of a shipment of used oil to the facility to which the initial marketer delivers the used oil. Today's proposal would also amend three incorrect references to the pre-1992 used oil specifications in the provisions which address hazardous waste fuel produced from, or oil reclaimed from, oil bearing hazardous wastes from petroleum refining operations.

In the Final Rules section of today's **Federal Register**, the U.S. Environmental Protection Agency (EPA) is also publishing a parallel direct final rule containing identical amendments which will become effective unless relevant adverse comments are received in response to this rulemaking. For more information on the direct final rulemaking process, see the **SUPPLEMENTARY INFORMATION** section of this document.

**DATES:** Comments on this proposed rule must be received on or before June 5, 1998 and notice of intent to file adverse comments must be received on or before May 20, 1998.

**ADDRESSES:**

#### Intent To Submit Comments

Persons wishing to notify EPA of their intent to submit adverse comments on this action should contact Alex Schmandt by mail at Office of General Counsel (2366), U.S. Environmental Protection Agency, 401 M Street, SW, Washington, DC 20460, by phone at (202) 260-1708, by fax at (202) 260-0584, or by Internet e-mail at [schmandt.alex@epamail.epa.gov](mailto:schmandt.alex@epamail.epa.gov).

#### Submitting Comments

Commenters must send an original and two copies of their comments referencing docket number F-98-CUOP-FFFFF to: RCRA Docket Information Center, Office of Solid Waste (5305G), U.S. Environmental Protection Agency, 401 M Street, SW, Washington, DC 20460. Hand deliveries of comments should be made to the Arlington, VA, address below. Comments may also be submitted electronically through the Internet to: [rcra-docket@epamail.epa.gov](mailto:rcra-docket@epamail.epa.gov). Comments in electronic format should also be identified by the docket number F-98-CUOP-FFFFF. All electronic comments must be submitted as an ASCII file avoiding the use of special characters and any form of encryption.