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(g) This amendment becomes effective on January 13, 1997.

Issued in Burlington, Massachusetts, on December 4, 1996.

James C. Jones,

Acting Manager, Engine and Propeller Directorate, Aircraft Certification Service.

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FEDERAL TRADE COMMISSION

16 CFR Part 419

Trade Regulation Rule Concerning Games of Chance in the Food Retailing and Gasoline Industries

AGENCY: Federal Trade Commission.

ACTION: Repeal of rule.

SUMMARY: The Federal Trade Commission announces the repeal of the Trade Regulation Rule concerning Games of Chance in the Food Retailing and Gasoline Industries. The Commission has reviewed the rulemaking record and determined that due to changes in industry practices, the Rule no longer serves the public interest and should be repealed. This notice contains a Statement of Basis and Purpose for repeal of the Rule.

EFFECTIVE DATE: December 26, 1996.

ADDRESSES: Requests for copies of the Statement of Basis and Purpose should be sent to Public Reference Branch, Room 130, Federal Trade Commission, 6th Street and Pennsylvania Avenue N.W., Washington, D.C. 20580.

FOR FURTHER INFORMATION CONTACT: John M. Mendenhall, Federal Trade Commission, Cleveland Regional Office, Suite 520A, 668 Euclid Avenue, Cleveland, Ohio 44114, (216) 522-4210.

SUPPLEMENTARY INFORMATION:

Statement of Basis and Purpose

I. Background

The Commission promulgated the Trade Regulation Rule concerning Games of Chance in the Food Retailing and Gasoline Industries (Games of Chance Rule), 16 CFR Part 419, on August 16, 1969 (34 FR 13302). The

purpose of the Rule was to address abuses that were uncovered during Commission and Congressional investigation into the use of games of chance for promotional purposes in the food retailing and gasoline industries. In both industries, it appeared that the winning game pieces were being distributed in a manner not determined by chance but calculated to have maximum promotional impact. In order to prevent future abuses, the Rule required various pending-game and post-game disclosures, as well as certain procedures for operating a game of chance.

Pending-game disclosures included: (1) The number of prizes in each "category or denomination;" (2) the odds-of-winning each prize; (3) the number of retail outlets participating in the game; (4) the geographic area covered by the game; and (5) the end date. If the game extended beyond 30 days, the Rule required weekly updating of disclosures of the odds-of-winning and the number of prizes. Post-game disclosures included: (1) The list of winners and the amount or value of each prize; (2) the total number of game pieces distributed; (3) the number of prizes in each "category or denomination" that were made available; and (4) the number of prizes actually awarded. Procedural requirements included a hiatus between games; a prohibition against terminating a game prior to distribution of all game pieces; a prohibition against replenishing of game pieces or prizes during a game; and a three-year record-keeping requirement.

The Commission amended the Rule once in 1981. The amendments alleviated some reporting requirements, dropped certain requirements of the "winners list" provision, and shortened the required hiatus between games.¹

After the 1981 amendments, advertising and broadcasting trade associations filed a petition seeking exemption from the disclosure requirements for broadcast advertising of games. The petition asserted that games of chance could not be advertised in the broadcast media if full disclosures regarding prizes and odds of winning were required. In response to the petition, the Commission granted a temporary exemption from disclosure requirements for broadcast advertising.²

In a related action, the Commission issued an Advance Notice of Proposed Rulemaking (ANPR) to request comments about whether the

Commission should make the exemption permanent and whether to revise other aspects of the Rule.³ The commenters who responded to the ANPR consisted of members of the supermarket, gasoline, advertising, game promotion, and broadcasting industries, and lawyers with experience in representing such industries.

Based upon comments received in response to the ANPR and the staff's analysis, the Commission published its Notice of Proposed Rulemaking (NPR).⁴ The major proposals of the NPR were to amend the Rule to: (1) drop certain disclosures in advertising and promotional materials; (2) raise the threshold for winners lists disclosures to prizes of \$50.00 and over; (3) permit replenishment of prize game pieces; and (4) drop the waiting period required between games. In 1995, the Presiding Officer re-opened the record for additional comments, particularly regarding whether there was a continuing need for this Rule.⁵

The Commission received seven comments in response to the NPR and seven in response to the 1995 request for additional comments. These commenters included members of the advertising, broadcasting, game promotion, and game user industries.⁶ A number of these commenters urged rescission of the Rule, stating that it discriminated unfairly against certain types of retailers and that there was no record of abuse to justify retaining the Rule.⁷ Others urged retention of a modified Rule in order to protect consumers from possible deception.⁸ Finally, some commenters stated that if the Commission were to retain the Rule, it should be expanded to include other

³ 48 FR 265 (Jan. 4, 1983).

⁴ 53 FR 39103 (Oct. 5, 1988).

⁵ 60 FR 38474 (July 26, 1995).

⁶ Those filing comments on the NPR included: The Promotion Marketing Association of America, Inc.; CBS; Leo Burnett Company, Inc.; Association of Retail Marketing Services; Incentive Federation, Inc.; Producers Alliance on Rulemaking; and the Food Marketing Institute. No prospective witness filed a request to testify at a hearing, and the Presiding Officer therefore issued a Notification of Cancellation of Public Hearings and Rebuttal Period. 53 FR 39103 (1988). Parties responding to the 1995 notice re-opening the record included: the Food Marketing Institute; the Minnesota Service Station and Convenience Store Association; the National Association of Broadcasters; the National Association of Convenience Stores; The Promotion Marketing Association of America, Inc.; Society of Independent Gasoline Marketers of America; and Triplex Marketing, Inc.

⁷ Those urging rescission included: the Food Marketing Institute; the National Association of Convenience Stores; Society of Independent Gasoline Marketers of America; and The Promotion Marketing Association of America, Inc.

⁸ Producer's Alliance on Rulemaking; Triplex Marketing, Inc.; and the Minnesota Service Station and Convenience Store Association.

¹ 16 CFR 419.1(e), -(f) (1995); 46 FR 36840 (July 16, 1981).

² 48 FR 1046 (Jan. 10, 1983).

industries in order to remove the discriminatory effect against grocery stores and gasoline stations.⁹ As with the response to the ANPR, the Commission received no comments from any public interest groups, government agencies or consumers.

The Final Staff Report¹⁰ and the Presiding Officer's Report¹¹ on the proposed rulemaking both recommended rescission of the Rule. The reports were placed on the public record and public comments were invited.¹² No public comments were received on the reports and their joint recommendation to the Commission to rescind the Games of Chance Rule. The reasons for repeal of the Rule, as set forth in these two reports, are summarized below.

II. Basis for Repeal of Rule

The Commission has determined to repeal the Games of Chance Rule based on an analysis of the rulemaking record. The Commission bases its rescission on the following reasons:

1. In the 27 years since the Rule was promulgated, there have been no enforcement actions for violations of the Rule. It appears that the abuses that prompted adoption of this Rule have largely disappeared.

2. The Rule has become outdated. It covers only a limited sector of retail businesses that use games of chance in their promotions. During the 1960s, grocery stores and gasoline stations were the primary users of games. Today, however, businesses not covered by the Rule, such as fast food restaurants and soft drink bottlers, use games of chance as much as, or even more often than, those that are covered by the Rule. Generally, even businesses that are not covered voluntarily make some of the more important required disclosures, such as the prizes offered and the odds of winning them.

3. The Rule may have an adverse effect on businesses that must comply with all of the Rule's requirements, but are competing with other firms that are not regulated by the Rule. In recent years, the distinctions between types of retailers have become blurred. Many stores other than traditional grocery

stores now sell food items, and grocery stores often sell prepared food like restaurants. Thus, although various retailers sell food, only grocery stores must incur costs to comply with the Rule. This disparity in treatment could be addressed by expanding the Rule to cover all retailers using games of chance. There is, however, no evidentiary basis in the record for expansion.

4. The states are in a good position to control the activities of retailers operating games of chance because such retailers have a physical presence in the states where they do business. Many states traditionally have been involved in the oversight of games of chance and sweepstakes, particularly where such games may violate a state's public policy against commercial lotteries.

5. This rulemaking has generated very little interest, indicating a lack of importance of this Rule in today's marketplace.¹³ Significantly, no comments were filed in response to the recommendation of the Presiding Officer's Report and the Final Staff Report that the Commission repeal the Games of Chance Rule.

All of these reasons indicate that the Rule is outdated and no longer necessary to protect consumers. It appears that the costs of the Rule now outweigh its benefits. Should abuses recur in the future, both the Commission and the states can use case-by-case law enforcement to prosecute those engaging in unfair or deceptive practices in the use of games of chance.

III. Regulatory Flexibility Act

The Regulatory Flexibility Act (RFA), 5 U.S.C. 601-12, requires that the agency conduct an analysis of the anticipated impact of the repeal of the Rule on small businesses.¹⁴ The purpose of a regulatory flexibility analysis is to ensure that the agency considers the impact of a regulatory action on small entities and examines regulatory alternatives that could achieve the regulatory purpose while minimizing burdens on small entities. However, Section 605 of the RFA, 5 U.S.C. 605,

¹³ In fact, a survey conducted for the rulemaking staff by Opinion Research Corporation showed that generally consumers do not base shopping decisions on the use of games of chance by retailers. Opinion Research Corporation, Survey to Assess the Effectiveness of the Games of Chance Trade Regulation Rule (1987).

¹⁴ The RFA addresses the impact of rules on "small entities," defined as "small businesses," "small governmental entities," and "small [not-for-profit] organizations," 5 U.S.C. 601. The Games of Chance Rule does not apply to the latter two types of entities.

provides that such an analysis is not required if the agency head certifies that the regulatory action will not have a significant economic impact on a substantial number of small entities.

Because the Games of Chance Rule covers retail food stores and gasoline stations, it may affect a substantial number of small entities. However, repeal of the Rule will not have a significant economic impact upon such entities. Disclosures and record-keeping requirements that are eliminated may involve a small cost savings to such retailers, but the effect will not be significant. Grocery stores and gasoline stations using games of chance, however, will be able to continue making those disclosures deemed most important to their customers or that are required by state law. Moreover, the Commission is not aware of any existing federal laws or regulations that would conflict with repeal of the Rule. Therefore, based on available information, the Commission certifies that repeal of the Games of Chance Rule will not have a significant economic impact on a substantial number of small entities.

IV. Paperwork Reduction Act

The Games of Chance Rule imposes third-party disclosure and record-keeping requirements that constitute information collection requirements for which the Commission has obtained clearance under the Paperwork Reduction Act, 44 U.S.C. 3501 *et seq.*, Office of Management and Budget (OMB) Control Number 2084-0067. Accordingly, repeal of the Rule would eliminate any burdens on the public imposed by these disclosure and recordkeeping requirements.

List of Subjects in 16 CFR Part 419

Advertising, Foods, Gambling, Gasoline, Trade practices.

PART 419—[REMOVED]

The Commission, under authority of Section 18 of the Federal Trade Commission Act, 15 U.S.C. 57a, amends chapter I of title 16 of the Code of Federal Regulations by removing Part 419.

By direction of the Commission.

Donald S. Clark,

Secretary.

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⁹ E.g., the Food Marketing Institute.

¹⁰ Federal Trade Commission Staff, Final Staff Report to the Federal Trade Commission, Games of Chance in the Food Retailing and Gasoline Industries (1996).

¹¹ Federal Trade Commission Presiding Officer, Report of the Presiding Officer on a Trade Regulation Rule Proceeding: Proposed Amendment of the Games of Chance Trade Regulation Rule (1996).

¹² 61 FR 29039 (June 7, 1996).