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Online Merchants Beware:The New FTC Rule on Internet, Mail, and Telephone Order Purchases

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The Federal Trade Commission (FTC) released a new version of the Mail or Telephone Order Merchandise Rule, 16 C.F.R. § 435, that directly impacts consumer purchases made via Internet, mail, telephone, or fax. The rule went into effect on December 8, 2014, just in time for holiday shopping, and expanded the FTC's previously issued rule to include all Internet orders, even those made through a mobile device (or through mobile apps).

In particular, the new rule "prohibits sellers from soliciting mail, Internet, or telephone order sales unless they have a reasonable basis to expect that they can ship the ordered merchandise within the time stated on the solicitation or, if no time is stated, within 30 days."

Importantly, this 30-day clock begins to run when the seller receives a properly completed order, not when payment clears. A "properly completed order" means that the consumer tendered or authorized full or partial payment in the proper amount and provided an order containing all the information needed by the seller to process and ship the order.

However, purchases in which a consumer is applying to the seller for in-house credit to pay for the merchandise in whole or in part gives the seller 50 days to ship an order, so as to allow extra time to process the credit application. As with purchases shipped under the 30-day rule, representations regarding shipment time for purchases financed in this manner must have a "reasonable basis" as well.

A "reasonable basis" means that the seller has information that, at the time of the communication regarding the shipping date, would satisfy a reasonable and prudent businessperson under the circumstances, acting in good faith, that the representation is actually true. In practical terms, this information and evidence will vary with the circumstances, but sellers should take into account anticipated demand, supply, the capacity of any fulfillment system, and recordkeeping for each

individual transaction. **MULTIPLE PROVISIONS**

The new rule provides that, in the event of any delays in shipment, the consumer must be given sufficient advance notice of the delay (ordinarily, as soon as the seller has notice of any delay in shipment), but no later than the date of the originally promised shipment. If no shipment time was promised, the consumer should be given notice of any delay within 30 days.

Sufficient advanced notice of any shipment delay is required so as to give consumers time to make a meaningful decision on whether to consent to the delay or request a refund. Of course, where a delay in shipment is expected, sellers always have the option of simply cancelling an order and sending a refund in lieu of seeking consumer consent to a delay. Sellers must have a "reasonable basis" for any new shipment date or any representation that the shipment date is unknown.

If the seller is unable to fulfill an order by the date promised, the new rule provides specific guidelines for notifying the consumer. Indeed, the first delay option notice to the consumer notice must include (1) a definite revised shipment date (or, if the revised shipment date is unknown, a statement to that effect); (2) being able to cancel the order and obtain a full and prompt refund; and (3) a way for the consumer to cancel the order at the seller's expense (e.g., prepaid reply mail or toll-free telephone number).

If the revised shipping date is unknown, the new rule states that the notice must include (1) the reason for the delay and in the event the consumer agrees to the indefinite delay; and (2) the option of cancelling the order any time before merchandise ships.

The new rule also requires buyer consent for delayed shipments. If the delayed shipment is 30 days or less after the original promised shipment date, the consumer's non- response to a first delay option notice may be treated as consent to the delay.

The best practice would be to make this inference clear in the delay option notice (e.g., "If we do not hear from you before shipment, we will assume you agree to this delay."). Delays of longer than 30 days require an automatic cancellation where the consumer does not respond to the notice. Sellers must issue a refund promptly for all money paid by the consumer for the unshipped merchandise.

If a seller is unable to ship a product by the revised shipping date, the seller must obtain explicit customer consent for any further delay in shipment, and the seller should issue a second delay option notice. The second delay notice should contain substantially similar information. Moreover, unlike a first delay option notice, consumer silence in response to a second delay notice cannot be inferred as consent to delay.

Under the new rule, sellers now have seven working days (as opposed to one billing cycle under the

previous rule), after a buyer's right to a refund vests, to process refunds for payments made through third-party credit cards (e.g., Visa or MasterCard) as well as payments made by cash, check, or money order. The period for refunding purchases made by first- party cards (e.g., where a seller itself issues the credit card) remains one billing cycle.

Refunds should be in the same method of payment as was tendered by the consumer, although, where a seller cannot issue a refund in the same method that payment was received, the refund may be made by cash, check, money order, or any means that is at least as fast and reliable as first class mail. This change will provide sellers with more flexibility in choosing cheaper and more convenient methods of delivering quicker refunds to consumers.

The new rule continues to be inapplicable to (1) subscriptions ordered for serial delivery (such as for magazines), though the initial shipment must be in compliance with this rule; (2) orders of seeds and growing plants; (3) orders made on a collect-on-delivery (COD) basis; and (4) transactions governed by the FTC's Negative Option Rule (such as book and music clubs). Further, the rule does not cover services.

PENALTY PHASE

The new rule also comes along with severe penalties for noncompliance. For example, the FTC has the power to sue a seller for injunctive relief and civil penalties of up to $16,000 per violation of the rule. Additionally, the seller may be required to redress consumers. State law enforcement agencies also may take action for violations of state consumer protection laws, where applicable.

Although sellers are not required under the new rule to keep records, the rule does place the burden of proving compliance on sellers. Failure to provide the FTC with records or documentary proof establishing the use of procedures assuring shipment of merchandise within the applicable time creates a rebuttable presumption that the seller lacked a reasonable basis for expecting it would be able to timely ship orders.

Thus, sellers should make advertised ship- ping representations clear and unambiguous. They also should verify that they are retaining documentary proof of the procedures used to assure that merchandise was shipped within the timeframe the rule requires in order to help refute any claim of noncompliance by the FTC or buyers.

Supporting documentation should provide substantiation for shipment representations, details on the seller's fulfillment system, and proof of adequate recordkeeping. The length of time for which sellers should keep these relevant documents varies, but best practices would dictate a minimum of five years because the statute of limitations on actions for civil penalties under this new rule is five years.

Finally, as a protective measure, sellers should check the statutes of limitations on any applicable state consumer protection laws where sellers plan on doing business, as such statutes may lengthen the period of time for which sellers should maintain supporting documentation. “Originally published in *Of Counsel: The Legal Practice and Management Report*, Vol. 34, No. 1, January 2015.”

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