

## Is Your Company Experiencing Shipping Delays Due to COVID-19?

If your company has been experiencing delays in shipping products to customers due to the COVID-19 pandemic, now is a good time to verify that your company has policies and procedures in place to ensure compliance with the Federal Trade Commission's Mail, Internet or Telephone Order Merchandise Rule (the "MITOR" or the "Rule"), a.k.a. the "30-day rule".

### What is MITOR and why should your company care about it?

The MITOR is a law that was originally passed by Congress in 1975 to go after catalogers and mail-order companies that would not have items in stock and keep customers' money indefinitely without issuing a refund. The law has since been updated to apply to online orders as well, and it has become one of the FTC's preferred tools when going after companies that have been accused by consumers of not shipping merchandise in a timely manner and not offering refunds.

The recent settlement between e-commerce fashion retailer, Fashion Nova, Inc. ("Fashion Nova") and the Federal Trade Commission ("FTC") should serve as a cautionary tale for those companies that are not currently in compliance with the Rule. Fashion Nova agreed to pay \$9.3 million to consumers to settle allegations that it did not properly notify consumers when it failed to timely ship products to consumers and illegally issued gift cards to consumers for merchandise that was never shipped. Fashion Nova's \$9.3 million settlement is the largest in the history of the MITOR, and should be viewed as a sign that the FTC will not shy away from enforcing this somewhat inconspicuous Rule.

With the shutdown of the U.S. economy due to the COVID-19 pandemic and stay-at-home orders being enforced across the country, many companies have become more reliant on the shipment of merchandise to their customers. Naturally, the surge in the volume of goods being shipped to consumers across the U.S. has caused delays in shipping and

companies need to make sure they are properly notifying consumers when they are unable to timely ship products.

### What does the Rule require your company to do?

If you are an e-commerce company or a company that fulfills a large volume of online orders, you will want to make sure that you are taking the following steps to remain compliant with the MITOR:

- **Don't make promises you can't keep.** Avoid making promises to a customer about the shipment date for their merchandise, if you believe there will be delays associated with shipping.
- **Reasonable Basis.** If you promise a specific shipment date, you must have a reasonable basis for making the representation, that factors in circumstances like delays in shipping caused by the COVID-19 pandemic. If you make no shipment statement, you must have a reasonable basis for believing that you can ship within 30 days ("30-day rule").
- **Offer customers an option if you cannot ship by the promised date.** If you are unable to ship merchandise to a customer by your advertised shipment date, you need to offer the customer an option to either (1) consent to a delay in shipping or (2) cancel their order and receive a prompt refund.
  - This offer must be clear and conspicuous;

and

- Made within a reasonable time after you become aware of your inability to ship the merchandise to the customer by the promised shipment date.
- **Simple mechanism for cancellation.** If the customer has the right to cancel an order, you must provide a simple mechanism for the customer to cancel their order.

## Best practices to ensure compliance with the Rule?

While the rule does not require companies to keep shipping records, it is in your companies' best interest to maintain an up-to-date recordkeeping system that will allow you to show regulators you are in compliance with the Rule. If a regulator audits your company's compliance with the Rule, the company should be able to provide the following:

- **Substantiation for the shipment representation.**
  - How is demand anticipated?
  - How is inventory monitored?
  - How is inventory acquisition coordinated with customer demand and order cancellation?
  - How are demand needs communicated?
- **Fulfillment System.**
  - How is the fulfillment system designed to meet the requirements of the Rule?
  - Are the delay option notices in compliance?
  - Does the customer's active or passive exercise of any cancellation option result in a prompt refund response?
- **Recordkeeping.**
  - Are adequate records kept for each individual order demonstrating:

- The date you received the order;
- The contents of and date you provided any delay option notice;
- The date you received any exercise of a cancellation option;
- The date of any shipment and the merchandise shipped; and
- The date of any refund and the merchandise for which the refund was made.
- If your company provides delay option notices by telephone, you will want to keep copies of the scripts being used by the customer service representatives.

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