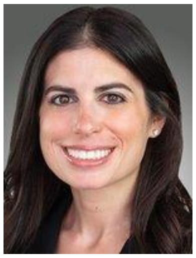
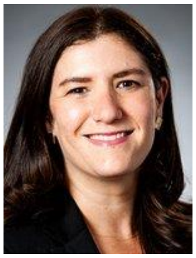
Fashion Nova Case Has Lessons For Retailers Amid Pandemic

By **Meredith Slawe, Corey Roush, Mira Baylson and Daniel Brewer**



Meredith Slawe

Corey Roush



Mira Baylson

Daniel Brewer

Retailers are working hard to satisfy customer demand for goods during this unprecedented health crisis. Many companies are adding capacity to accommodate customer orders through websites and mobile apps, and implementing heightened safety practices to protect employees, contractors and customers.

Due to shipping, logistics, transportation and supply chain challenges during this period, initial shipping estimates may be incorrect. Some retailers have elected to interpose shipping delay disclosures on their digital platforms in website banners or in the buy flow (and reinforced in order confirmations) to explain that goods may arrive later than expected.

Consumers have been largely receptive to this messaging. Of course, unanticipated issues can also arise where retailers cannot fill orders or where items get further back-ordered due to supplier and shipping issues.

Good customer service is always a best practice, but one company's $9.3 million settlement, announced on April 21, with the Federal Trade Commission — the largest settlement in the history of the Mail, Internet or Telephone Order Merchandise Rule (commonly referred to as the mail order rule) — is a good reminder for retailers operating during this challenging time, and beyond, that the law actually requires a certain level of customer service.

While this settlement pertains to alleged conduct that took place long before the pandemic swept the world, it reinforces the importance of having reasonable practices and accurate disclosures with respect to shipping estimates, back orders, and issuing proper refunds (or offering to issue refunds) to customers when orders cannot be filled or are substantially delayed.

The mail order rule, which was promulgated by the FTC in 1975 as part of its enforcement authority under the FTC Act, requires retailers to ship merchandise within 30 days unless they make express representations regarding different time frames; it also requires that businesses offer consumers a fair opportunity to consent to or reject delayed shipping speeds.

Where consumers elect to cancel their orders, they should receive refunds within seven working days. Companies deemed to violate the mail order rule may face fines of up to $43,280 per violation with no cap on aggregate civil penalties, as well as injunctive relief and consumer redress.

According to the FTC, Fashion Nova, a large fast fashion e-commerce retailer, allegedly touted its fast shipping speeds and charged consumers a premium for one- and two-day shipping at checkout. The FTC asserts in its complaint,[1] which was filed contemporaneously with the settlement, that:

- "In numerous instances after consumers submitted orders for merchandise on [the] website, [Fashion Nova] has not shipped one or more items of ordered merchandise to consumers. In numerous instances, such items were out of stock or [Fashion Nova] shipped merchandise that was materially different from what consumers ordered, such as merchandise that was a different size, damaged, or used."[2]
- "In numerous instances when [Fashion Nova] did not ship one or more items of ordered merchandise, [it] did not cancel the order and provide consumers a prompt refund. In numerous instances, [Fashion Nova], per company policy, instead issued consumers a gift card that could only be used on the Fashion Nova website in the amount charged for the unshipped merchandise."[3]
- "In numerous instances after consumers submitted orders for merchandise ... [Fashion Nova] has not physically placed ordered merchandise in the possession of a carrier in the time represented ... [and] has not offered the buyer ... an option either to consent to a delay in the shipment or to cancel the order and receive a prompt refund."[4]
- "In numerous instances when [Fashion Nova] has not offered the buyer the option to cancel the order or consent to a delay in shipment, [it] has not canceled the order and has not provided consumers with a prompt refund."[5]

The complaint also references that many consumers lodged complaints with the company directly as well as through social media channels and with the Better Business Bureau.[6] These complaints related to numerous orders that allegedly went unfilled without accompanying refunds, as well as orders that were refunded through the issuance of gift cards instead of the original form of payment.

The record $9.3 million settlement includes: (1) $2.26 million that will be directly returned to consumers in connection with receiving gift cards in lieu of refunds; (2) more than $7 million that will be allocated for consumers misled by shipping speeds; and (3) onerous injunctive relief.

In announcing the record settlement, the Bureau of Consumer Protection Director Andrew Smith reminded businesses that "[t]he same rules that we have enforced for nearly 50 years against catalogers and other mail-order companies also apply to online sellers .... Online retailers need to know that our Mail Order Rule requires them to notify customers in the event of shipping delays and offer the right to cancel with a full refund — not just a gift card or a store credit."

Shipping delays are inevitable in the ordinary course of business. During this exceedingly challenging time, there is a heightened risk of disruption before goods ever leave warehouses and distribution centers.

The Fashion Nova complaint and settlement demonstrate that the mail order rule, which has been on the books since 1975, has not been forgotten by the FTC and will be applied, where appropriate, against retailers with an online presence.

Moreover, the FTC may have a heightened focus on the mail order rule in the near term given the uptick in e-commerce engagement and a concern that businesses might take advantage of consumers (and their perception as to delays due to capacity issues) as a result of COVID-19.

Thus, retailers should take note of the rule's requirements[7] and check their policies and practices to ensure that:

- Representations about shipping speeds are reasonable under the circumstances and are adhered to.
- COVID-19-specific shipping statements are accurate, clear and conspicuous (and optimally interposed before a purchase is completed).
- Efforts to fulfill orders are undertaken consistent with any statements made by the retailer or in a reasonable time after receiving payment and required information if no representation is made (and in any event no later than 30 days if no statements of a shorter period are made).
- Orders that cannot be fulfilled are promptly canceled and refunds are made to the original form of payment (unless terms and conditions of the orders provide otherwise).
- Consent is obtained from consumers for shipping delays in accordance with the mail order rule (depending on whether it is an initial or subsequent delay) and a cancellation option is provided.
- Payments for expedited shipping should be refunded when there are shipping delays.
- Refunds are timely provided (within seven working days after orders are cancelled).

Not only are clear website disclosures and customer communications regarding potential delays in order processing and shipping due to COVID-19 a best practice to set customer expectations, such disclosures and communications may provide protection for businesses that are unable to satisfy promised shipping speeds.

Meredith C. Slawe and Corey W. Roush are partners, and Mira E. Baylson and Daniel E. Brewer are senior counsel, at Akin Gump Strauss Hauer & Feld LLP.

[1] Compl. for Permanent Injunction ¶¶ 12–13, FTC v. Fashion Nova, Inc., No. 20-3641 (C.D. Cal. Apr. 20, 2020).

[2] Id. ¶ 17.

[3] Id. ¶ 18.

[4] Id. ¶¶ 19–20.

[5] Id. ¶ 21.

[6] Id. ¶ 22.

[7] The FTC has a business guide to the Mail, Internet or Telephone Order available on its website at: https://www.ftc.gov/tips-advice/business-center/guidance/business-guide-ftcs-mail-internet-or-telephone-order.