

## When Fast Fashion Slows Online Orders: Lessons Learned From \$9.3 Million FTC Settlement

April 24, 2020

### Key Points:

- On April 21, 2020 the FTC announced a record settlement of \$9.3 million with an online retailer in an action brought under the “Mail Order Rule.”
- The Mail Order Rule, which applies to online purchases, requires businesses to make certain disclosures and implement practices with respect to shipments of goods to consumers, order cancellations and refunds.
- Given that retailers may face delays in shipping, as well as challenges fulfilling orders, as a result of COVID-19, they should confirm that their existing practices comply with this Rule.

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 are often incorrect. Some retailers have elected to interpose shipping delay disclosures on their digital platforms in website banners or in the buy-flow to explain that orders 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 backordered 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, 2020) with the Federal Trade Commission (FTC)—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. 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 and backorders and issuing proper refunds (or offering to issue refunds) to customers when orders cannot be filled or are substantially delayed.

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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 represented “Fast Shipping” on banners and advertised “2 day shipping” in the U.S. to customers shopping online. Compl. for Permanent Injunction ¶¶ 12–13, *FTC v. Fashion Nova, Inc.*, No. 20-3641 (C.D. Cal. Apr. 20, 2020). The company also had multiple statements and images on various pages and in its website FAQs advertising its fast shipping. *Id.* ¶¶ 12–14. Moreover, the retailer touted its “Shipping Faster than Ever” in email marketing campaigns. *Id.* ¶ 15. The complaint states that many consumers selected and paid a premium for one and two-day shipping at checkout. *Id.* ¶ 16. The complaint then alleges that Fashion Nova engaged in a pattern of conduct inconsistent with its representations and that purportedly violated the Mail Order Rule. *Id.* ¶¶ 17–23. Specifically, the FTC asserts in the complaint, 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.” *Id.* ¶ 17.
- “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.” *Id.* ¶ 18.
- “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.” *Id.* ¶¶ 19–20.
- “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.” *Id.* ¶ 21.

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. *Id.* ¶ 22. 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 \$2.26 million that will be directly returned to consumers in connection with receiving gift cards in lieu of refunds and more than \$7 million that will be allocated for consumers misled by shipping speeds. The settlement

also includes onerous injunctive relief requiring Fashion Nova to: (i) make disclosures to consumers about shipping time frames; (ii) implement reasonable order cancellation methods for delayed shipments; and (iii) cease providing gift cards for orders that it never shipped. Significantly, the settlement also indicates that, unless a different shipping timeframe is clearly and conspicuously noted, Fashion Nova can only take orders for merchandise that Fashion Nova reasonably believes will be able to ship within *one day* after receiving the order.

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.” Fashion Nova defended its conduct, noting that—like many digital brands that have enjoyed significant success in recent years—shipping delays and other challenges “stemmed from exponential growth . . . which taxed our warehouse and IT systems.”

Shipping delays are inevitable in the ordinary course of business. There is a heightened risk of disruption before goods ever leave warehouses and distribution centers during this exceedingly challenging time. This 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 may be applied, where appropriate, against retailers with an online presence. Thus, retailers should take note of the Rule’s requirements<sup>1</sup> and check their policies and practices to ensure that:

- Representations about shipping speeds are reasonable under the circumstances and are adhered to.
- 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.
- Orders that cannot be fulfilled are promptly cancelled 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.
- 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.

<sup>1</sup> 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>.

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