Behind the FTC's new 'truth-in-shipping' regulation

Richard B. Newman *is an Internet marketing compliance, regulatory defense and eCommerce law attorney at Hinch Newman LLP focusing on advertising and digital media matters. He can be reached at (212) 756-8777 or* rnewman@hinchnewman.com.

If your company takes orders over the by telephone, by mail or online, the U.S. Federal Trade Commission's Mail, Internet, or Telephone Order Merchandise Rule (formerly known as the Mail or Telephone Order Merchandise Rule), imposes certain obligations if the merchandise cannot be shipped on time.

In 1975, the FTC promulgated the Mail Order Merchandise Rule to ensure sellers either shipped mail ordered merchandise on time or offered cancellations and refunds. In 1993, amendments were made by the agency to cover merchandise ordered by telephone (including merchandise ordered through the Internet using telephone Internet access), and renamed it the Mail or Telephone Order Merchandise Rule.

Pursuant to the rule, mail and telephone-based retailers must have a reasonable basis to expect that they can ship orders to customers within the advertised time frame, or within 30 days if no specific representation is made. The rule also requires that when the promised shipping time cannot be met, a retailer must obtain a purchaser's consent to a shipping delay or refund payment for the unshipped merchandise.

In 2007, the FTC sought public comment on the costs, benefits and continuing needs for the rule. More specifically, it requested comment on the costs and benefits of amending the rule to address changes in technology and commercial practices. After reviewing the comments, the FTC concluded that the benefits of the rule outweighed its costs

Based upon a review of the comments received, in October 2011 the FTC proposed amendments to the rule that would: (a) clarify that the rule covers all orders placed over the Internet, regardless of the method consumers use to access the Internet, and change the name of the rule to the Mail, Internet, or Telephone Order Merchandise Rule; (b) revise the rule to allow sellers to provide refunds and refund notices to buyers by any means that is at least as fast and reliable as first-class mail; (c) clarify sellers' obligations when buyers use payment methods not specifically enumerated in the rule, such as debit cards or prepaid gift cards; and (d) require that refunds be made within seven working days for purchases that were made using third-party credit. For credit sales where the seller is the creditor the refund deadline would remain one billing cycle.

In April 2013, the FTC issued a staff report recommending that the agency approve the proposed amendments. The FTC subsequently adopted the proposed amendments as part of its systematic review of the economic and regulatory impact of all of the agency's rules and guides.

Shipment time is important to consumers and shipment time claims imply that the seller has a reasonable basis for expecting that it can ship within that time. Such claims are therefore deceptive if the seller lacks a reasonable basis for the claims. Where a seller fails to notify a buyer of shipment delays, that seller unilaterally changes the terms of the contract.

The FTC has found that unilaterally changing the contract causes substantial injury to consumers, who are unable to cancel their orders and purchase the merchandise more quickly elsewhere. Moreover, consumers are unable to reasonably avoid this injury, and the harm is not outweighed by any corresponding benefits to consumers or merchants. Consequently, the FTC found that failure to offer refunds is unfair.

During the rule amendment proceeding, the FTC solicited comment on the economic impact of the rule, as well as the costs and benefits of each proposed amendment. Ultimately, the FTC concluded that the final rule's requirements will continue to protect consumers from unfair or deceptive shipment or refund claims, clarify the rule's coverage and refund requirements for non-enumerated payments, and minimize sellers' costs, including costs for small businesses, by permitting flexibility in the means of transmission and form for refunds.

The rule currently covers all payment methods, but only sets explicit requirements when buyers pay by cash, check, money order or credit. Specifically, in these circumstances the rule requires sellers to provide refunds within certain times, using certain methods, depending on how consumers originally paid. The amendments address the timing of refunds for third-party credit transactions, the means of delivering refunds, and the timing and method for non-enumerated payment refunds.

As set forth above, the amendments alter the time within which sellers must provide refunds for third-party credit transactions (e.g., Visa or MasterCard) from one billing cycle to seven working days. Also as indicated above, the period for first-party cards (e.g., a retailer that itself issues the credit card, rather than a separate entity, such as a bank or finance company, that issues the credit card for the retailer) remains one billing cycle.

Amendments allowing sellers to provide refunds and refund notices to buyers by any means that is at least as fast and reliable as first-class mail are intended to promote increased flexibility and convenience to sellers, as well as quicker refunds to consumers.

For non-enumerated, alternative consumer payment methods, the amendments address both the means and timing of refunds. Sellers can always use cash, checks or money orders, or they can use the same method as that used by the buyer. Additionally, the amendments make clear that sellers must provide refunds within seven working days of a buyer's right to a refund vesting when a buyer uses a non-enumerated payment method, the same time period as for third-party credit sales. These changes harmonize the rules for refunding enumerated and non-enumerated payments, thus simplifying compliance.

The commission estimates that each business affected by the final rule will likely incur only minimal compliance costs, if any, because most retailers have already aligned their practices in many respects with the requirements of the amendments to the final rule. For the most part, sellers already treat Internet orders in the same manner as mail or telephone orders. Moreover, defining the timing and method of refunding non-enumerated payment methods should not have a significant cost impact on small entities because sellers typically do not access buyer funds until merchandise shipment, and thus there are only a limited number of refunds issued. For the same reason, requiring refunds for third-party credit sales within seven working days should not have a significant impact on small entities.

The amendments expressly cover all Internet access, including merchandise orders placed over the Internet using shopping applications. The effective date is Dec. 8, 2014 - just in time for the holiday shopping season.

Contact the author for more information about the amendments and applicable exemptions to the rule.

Richard B. Newman *is an Internet marketing compliance, regulatory defense and eCommerce law attorney at Hinch Newman LLP focusing on advertising and digital media matters. He can be reached at (212) 756-8777 or* rnewman@hinchnewman.com.

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