

PART 435-MAIL ORDER
MERCHANDISE

Sec.

435.1 The Rule.

435.2 Definitions.

435.1 The Rule

In connection with mail order sales in commerce, as "commerce" is defined in the Federal Trade Commission Act, it constitutes an unfair method of competition, and an unfair or deceptive act and practice for a seller:

(a)(1) To solicit any order for the sale of merchandise to be ordered by the buyer through the mails unless, at the time of the solicitation, the seller has a reasonable basis to expect that he will be able to ship any ordered merchandise to the buyer: (i) Within that time clearly and conspicuously stated in any such solicitation, or (ii) if no time is clearly and conspicuously stated, within thirty (30) days after receipt of a properly completed order from the buyer.

/* Paragraph a(1) provides the general rules that mailorder sellers must either ship within thirty days or CONSPICUOUSLY advise that the time period for an order is longer. */

(2) To provide any buyer with any revised shipping date, as provided in paragraph (b) of this section, unless, at the time any such revised shipping date is provided, the seller has a reasonable basis for making such representation regarding a definite revised shipping date.

(3) To inform any buyer that he is unable to make any representation regarding the length of any delay unless (i) the seller has a reasonable basis for so informing the buyer and (ii) the seller informs the buyer of the reason or reasons for the delay.

(4) In any action brought by the Federal Trade Commission, alleging a violation of this part, the failure of a respondent-seller to have records or other documentary proof establishing his use of systems and procedures which assure the shipment of merchandise in the ordinary course of business within any applicable time set forth in this part will create a rebuttable presumption that the seller lacked a reasonable basis for any expectation of shipment within said applicable time.

(b)(1) Where a seller is unable to ship merchandise within the applicable time set forth in paragraph (a) (1) of this section, to fail to offer to the buyer, clearly and conspicuously and without prior demand, an option either to consent to a delay in shipping or to cancel his order and receive a prompt refund. Said offer shall be made within a reasonable time after the seller first becomes aware of his inability to ship within the

applicable time set forth in paragraph (a)(1) of this section, but in no event later than said applicable time.

/* Here is the procedure which must be followed when an order is not shipped within the allowed time frame. */

(i) Any offer to the buyer of such an option shall fully inform the buyer regarding his right to cancel the order and to obtain a prompt refund and shall provide a definite revised shipping date, but where the seller lacks a reasonable basis for providing a definite revised shipping date the notice shall inform the buyer that the seller is unable to make any representation regarding the length of the delay.

(ii) Where the seller has provided a definite revised shipping date which is thirty (30) days or less later than the applicable time set forth in paragraph (a)(1) of this section, the offer of said option shall expressly inform the buyer that, unless the seller receives, prior to shipment and prior to the expiration of the definite revised shipping date, a response from the buyer rejecting the delay and cancelling the order, the buyer will be deemed to have consented to a delayed shipment on or before the definite revised shipping date.

(iii) Where the seller has provided a definite revised shipping date which is more than thirty (30) days later than the applicable time set forth in paragraph (a)(1) of this section or where the seller is unable to provide a definite revised shipping date and therefore informs the buyer that he is unable to make any representation regarding the length of the delay, the offer of said option shall also expressly inform the buyer that his order will automatically be deemed to have been cancelled unless (A) the seller has shipped the merchandise within thirty (30) days of the applicable time set forth in paragraph (a)(1) of this section, and has received no cancellation prior to shipment, or (B) the seller has received from the buyer within thirty (30) days of said applicable time, a response specifically consenting to said shipping delay. Where the seller informs the buyer that he is unable to make any representation regarding the length of the delay, the buyer shall be expressly informed that, should he consent to an indefinite delay, he will have a continuing right to cancel his order at any time after the applicable time set forth in paragraph (a)(1) of this section by so notifying the seller prior to actual shipment.

/* If a second delay to ship occurs you must receive an immediate refund or expressly agree to a refund. */

(iv) Nothing in this paragraph shall prohibit a seller who furnishes a definite revised shipping date pursuant to paragraph (b)(1)(i) of this section, from requesting, simultaneously with or at any time subsequent to the offer of an option pursuant to paragraph (b)(1) of this section, the buyer's express consent to a further unanticipated delay beyond the definite revised shipping date in the form of a response from the buyer specifically consenting to said further delay. Provided, however, that where

the seller solicits consent to an unanticipated indefinite delay the solicitation shall expressly inform the buyer that, should he so consent to an indefinite delay, he shall have a continuing right to cancel his order at any time after the definite revised shipping date by so notifying the seller prior to actual shipment.

(2) Where a seller is unable to ship merchandise on or before the definite revised shipping date provided under paragraph (b)(1)(i) of this section and consented to by the buyer pursuant to paragraph (b)(1)(ii) or (iii) of this section, to fail to offer to the buyer, clearly and conspicuously and without prior demand, a renewed option either to consent to a further delay or to cancel the order and to receive a prompt refund. Said offer shall be made within a reasonable time after the seller first becomes aware of his inability to ship before the said definite revised date, but in no event later than the expiration of the definite revised shipping date:

Provided, however, That where the seller previously has obtained the buyer's express consent to an unanticipated delay until a specific date beyond the definite revised shipping date, pursuant to paragraph (b)(1)(iv) of this section or to a further delay until a specific date beyond the definite revised shipping date pursuant to paragraph (b)(2) of this section, that date to which the buyer has expressly consented shall supersede the definite revised shipping date for purposes of paragraph (b)(2) of this section.

(i) Any offer to the buyer of said renewed option shall provide the buyer with a new definite revised shipping date, but where the seller lacks a reasonable basis for providing a new definite revised shipping date, the notice shall inform the buyer that the seller is unable to make any representation regarding the length of the further delay.

(ii) The offer of a renewed option shall expressly inform the buyer that, unless the seller receives, prior to the expiration of the old definite revised shipping date or any date superseding the old definite revised shipping date, notification from the buyer specifically consenting to the further delay, the buyer will be deemed to have rejected any further delay, and to have cancelled the order if the seller is in fact unable to ship prior to the expiration of the old definite revised shipping date or any date superseding the old definite revised shipping date: Provided, however, That where the seller offers the buyer the option to consent to an indefinite delay the offer shall expressly inform the buyer that, should he so consent to an indefinite delay, he shall have a continuing right to cancel his order at any time after the old definite revised shipping date or any date superseding the old definite revised shipping date.

(iii) Paragraph (b)(2) of this section shall not apply to any situation where a seller, pursuant to the provisions of paragraph (b)(1)(iv) of this section, has previously obtained consent from the buyer to an indefinite extension beyond the first revised

shipping date.

(3) Wherever a buyer has the right to exercise any option under this part or to cancel an order by so notifying the seller prior to shipment, to fail to furnish the buyer with adequate means, at the seller's expense, to exercise such option or to notify the seller regarding cancellation. In any action brought by the Federal Trade Commission alleging a violation of this part, the failure of a respondent-seller:

(i) To provide any offer, notice or option required by this part in writing and by first class mail will create a rebuttable presumption that the respondent-seller failed to offer a clear and conspicuous offer, notice or option;

(ii) To provide the buyer with the means in writing (by business reply mail or with postage prepaid by the seller) to exercise any option or to notify the seller regarding a decision to cancel, will create a rebuttable presumption that the respondent-seller did not provide the buyer with adequate means pursuant to paragraph (b)(3) of this section.

Nothing in paragraph (b) of this section shall prevent a seller, where he is unable to make shipment within the time set forth in paragraph (a)(1) of this section or within a delay period consented to by the buyer, from deciding to consider the order cancelled and providing the buyer with notice of said decision within a reasonable time after he becomes aware of said inability to ship, together with a prompt refund.

(c) To fail to deem an order cancelled and to make a prompt refund to the buyer whenever:

(1) The seller receives, prior to the time of shipment, notification from the buyer cancelling the order pursuant to any option, renewed option or continuing option under this part;

(2) The seller has, pursuant to paragraph (b)(1)(iii) of this section, provided the buyer with a definite revised shipping date which is more than thirty (30) days later than the applicable time set forth in paragraph (a)(1) of this section or has notified the buyer that he is unable to make any representation regarding the length of the delay and the seller (i) has not shipped the merchandise within thirty (30) days of the applicable time set forth in paragraph (a)(1) of this section, and (ii) has not received the buyer's express consent to said shipping delay within said thirty (30) days;

(3) The seller is unable to ship within the applicable time set forth in paragraph (b)(2) of this section, and has not received, within the said applicable time, the buyer's consent to any further delay;

(4) The seller has notified the buyer of his inability to make shipment and has indicated his decision not to ship the merchandise;

(5) The seller fails to offer the option prescribed in paragraph (b)(1) of this section and has not shipped the merchandise within the applicable time set forth in paragraph (a)(1) of this section.

(d) In any action brought by the Federal Trade Commission alleging a violation of this part, the failure of a respondent-seller to have records or other documentary proof establishing his use of systems and procedures which assure compliance, in the ordinary course of business, with any requirement of paragraph (b) or (c) of this section will create a rebuttable presumption that the seller failed to comply with said requirements.

Note 1: This part shall not apply to subscriptions, such as magazine sales, ordered for serial delivery, after the initial shipment is made in compliance with this part.

Note 2: This part shall not apply to orders of seeds and growing plants.

Note 3: This part shall not apply to orders made on a collect-on-delivery (C.O.D.) basis.

Note 4: This part shall not apply to transactions governed by the Federal Trade Commission's Trade Regulation Rule entitled "Use of Negative Option Plans by Sellers in Commerce", 16 CFR Part 425.

Note 5: By taking action in this area, the Federal Trade Commission does not intend to preempt action in the same area, by any State, municipal, or other local government. This part does not annul or diminish any rights or remedies provided to consumers by any State law, municipal ordinance, or other local regulation, insofar as those rights or remedies are equal to or greater than those provided by this part. In addition, this part does not supersede those provisions of any State law, municipal ordinance or other local regulation which impose obligations or liabilities upon sellers, when sellers subject to this part are not in compliance therewith. This part does not supersede those provisions of any State law, municipal ordinance, or other local regulation which are inconsistent with this part to the extent that those provisions do not provide a buyer with rights which are equal to or greater than those rights granted a buyer by this part. This part also supersedes those provisions of any State law, municipal ordinance, or other local regulation requiring that a buyer be notified of a right which is the same as a right provided by this part but requiring that a buyer be give notice of this right in a language, form, or manner which is different in any way from that required by this part.

In those instances where any State law, municipal ordinance, or other local regulation contains provisions, some but not all of which are partially or completely superseded by this part, the provisions or portions of those provisions which have not been

superseded retain their full force and effect.

/* The regulation is a MINIMUM standard and states may set more stringent standards should they so desire. */

Note 6: If any provision of this part or its application to any person, partnership, corporation, act or practice is held invalid, the remainder of this part or the application of the provision to any other person, partnership, corporation, act or practice shall not be affected thereby.

Note 7: Section 435.1(a)(1) of this part governs all solicitations where the time of solicitation is more than 100 days after promulgation of this part. The remainder of this part governs all transactions where receipt of a properly completed order occurs more than 100 days after promulgation of this part.

For purposes of this part:

(a) "Shipment" shall mean the act by which the merchandise is physically placed in the possession of the carrier.

(b) "Receipt of a properly completed order" shall mean:

(1) Where there is a credit sale and the buyer has not previously tendered partial payment, the time at which the seller charges the buyer's account;

(2) Where the buyer tenders full or partial payment in the proper amount in the form of cash, check or money order, the time at which the seller has received both said payment and an order from the buyer containing all the information needed by the seller to process and ship the order.

Provided, however, that where the seller receives notice that the check or money order tendered by the buyer has not been dishonored or that the buyer does not qualify for a credit sale "receipt of a properly completed order" shall mean the time at which (i) the seller receives notice that a check or money order for the proper amount tendered by the buyer has been honored, (ii) the buyer tenders cash in the proper amount or (iii) the seller receives notice that the buyer qualifies for a credit sale.

(c) "Refund" shall mean:

(1) Where the buyer tendered full payment for the unshipped merchandise in the form of cash, check or money order, a return of the amount tendered in the form of cash, check or money order;

(2) Where there is a credit sale:

(i) And the seller is a creditor, a copy of a credit memorandum or the like or an account statement reflecting the removal or absence of any remaining charge incurred as a result of the sale from the buyer's account;

(ii) And a third party is the creditor, a copy of an appropriate credit memorandum or the like to the third party creditor which will remove the charge from the buyer's account or a statement from the seller acknowledging the cancellation of the order and representing that he has not taken any action regarding the order which will result in a charge to the buyer's account with the third party;

(iii) And the buyer tendered partial payment for the unshipped merchandise in the form of cash, check or money order, a return of the amount tendered in the form of cash, check or money order.

(d) "Prompt refund" shall mean:

(1) Where a refund is made pursuant to paragraph (c)(1) or (2)(iii) of this section a refund sent to the buyer by first class mail within seven (7) working days of the date on which the buyer's right to refund vests under the provisions of this part;

(2) Where the refund is made pursuant to paragraph (c)(2) (i) or (ii) of this section, a refund sent to the buyer by first class mail within one (1) billing cycle from the date on which the buyer's right to refund vests under the provisions of this part.

(e) The "time of solicitation" of an order shall mean that time when the seller has:

(1) Mailed or otherwise disseminated the solicitation to a prospective purchaser,

(2) Made arrangements for an advertisement containing the solicitation to appear in a newspaper, magazine or the like or on radio or television which cannot be changed or cancelled without incurring substantial expense, or

(3) Made arrangements for the printing of a catalog, brochure or the like which cannot be changed without incurring substantial expense, in which the solicitation in question forms an insubstantial part.

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