For retailers who have eBusiness lines, the Federal Trade Commission’s (“FTC”) new regulations will affect the way you do business. The amendments in 16 C.F.R. §435 went into effect December 8, 2014. Has your business made the necessary adjustments to comply?

The regulation prohibits sellers from soliciting mail, Internet, or telephone order sales unless they have a reasonable basis to expect that they can ship the ordered merchandise within the time stated on the solicitation or, if no time is stated, within thirty days. The regulation further requires a seller to seek the buyer’s consent to the delayed shipment when the seller learns that it cannot ship within the time stated or, if no time is stated, within thirty days. If the buyer does not consent, the seller must promptly refund all money paid for the unshipped merchandise. See 79 Fed. Reg. 55,615 (September 17, 2014) (to be codified at 16 C.F.R. §435).

The change in the definition to include Internet sales is no surprise. For example, in 1993, the predecessor rule to 16 CFR §435 called the Mail Order Merchandise Rule was amended from a 1975 version1 to cover telephone (including merchandise using telephone Internet ac-
cess) and it was renamed the Mail or Telephone Order Merchandise Rule. Now, under 16 C.F.R. §435, it is called the Mail, Internet or Telephone Order Merchandise Rule to clearly define Internet sales as an area of governance for the FTC.

Overview of the new requirements:
The changes were threefold: (a) the definition of the areas controlled by the FTC was expanded to clearly include Internet sales versus just mail or telephone sales; (b) the parameters related to a retailer’s advertised ship dates were clearly defined; and (c) the rules related to the timeliness of and content of refunds to customers were prescribed.

The most significant change for retailers to note relates to 16 C.F.R. §435.2 – this section discusses what retailers must now do regarding shipment dates of the ordered merchandise and changes thereto. As of December 8, 2014, it is an unfair trade practice for eBusinesses to fail to ship within the communicated ship date by date. This is because the FTC found that deceptive practices were still prevalent regarding Internet orders of merchandise. In addition, data showed that shipment dates are important to consumers and consumers rely on this information; therefore sellers should have a reasonable expectation of when they can ship ordered merchandise. If a seller lacks this reasonable basis (which it must prove by documentation), then it is considered deceptive and an unfair business practice.

The regulations require that the seller must ship by the stated shipment date and, if the seller provides no ship date, then the merchandise must ship within thirty days of the date the order is completed by the buyer. Next, if the communicated ship date is revised, eRetailers must provide a mechanism through which purchasers can cancel the order or agree to the revised shipment date. If the revised date changes, then orders are deemed canceled; unless, purchasers specifically agree to the further revised date. If the eRetailer cannot provide a revised date or the revised date is more than 30 days from the original ship date, the order is deemed canceled unless the purchaser specifically agrees to the continued delay. In addition, the purchaser must be informed that s/he has a continuing right to cancel the order at any time so long as the purchaser notifies the eRetailer of cancelation prior to actual shipment.

This new change poses major problems for eRetailers selling special order and often non-refundable, non-cancellable goods. This is because often times shipment dates are provided by the manufacturer of the merchandise and the eRetailers have little to no control of actual ship dates. The problem is exacerbated by the fact that many standard vendor agreements between eRetailers and manufacturers have “no cancelation” provisions if shipment dates change. Indeed, these agreements typically state that stated shipment dates are mere estimates and time is never of the essence. Keep in mind that eRetailer analytics prove that shorter ship dates result in sales conversion.

The new provision regarding refunds, and timeliness of refunds, 16 C.F.R. §435.1, is less likely to have a major impact. The new regulations modify the time within which sellers must provide refunds for third-party credit transactions (for example, Visa or MasterCard) from one billing cycle to seven (7) working days. However, for sellers who have their own credit cards, the rule remains the same – one billing cycle. The change for third party credit transactions should not cause any additional work because sellers already are required to comply with Regulation Z (12 CFR 1026.12(e)), which has a seven (7) working day refund period.

Next, the amendments permit more flexibility by allowing refunds to be consummated by any means that is at least as fast and reliable as first class mail for all payment methods. This change should provide sellers with the authority to deliver refunds by cheaper and more convenient means, if available, and thus provide buyers with quicker refunds. Moreover, for non-enumerated payment methods, the amendments address both the means and timing of refunds. The amendments provide alternative methods for making refunds when consumers pay by non-enumerated means: (1) sellers can always use cash, checks or money orders; or (2) they can use the same method as that used by the buyer. Sellers must provide refunds within seven working days when a buyer uses a non-enumerated payment method. These changes should simplify compliance for sellers.

So, what are some best practices for eRetailers trying to comply with the FTC’s amendments, including changing processes to provide all the required notices to purchasers? See top three tips below:

• Analyze your current process and policies relating to ship dates for Internet sales (as well as mail and telephone sales). Develop and implement a compliant process which provides the proper notifications to the purchasers and the proper consent options as well as the option to cancel orders.

• Review your vendor agreements to make sure your cancelation rights with manufacturers align with the rights of the purchaser. Vendor agreements should contain provisions that revised ship dates can result in cancelation of orders, and vendors/manufacturers will have to accept the return of products.

• Check your Terms of Use on your Internet sales pages and consider including a waiver of class actions for each purchaser.

It is unclear what exact liabilities and exposure may result from these amendments. Class action consumer litigation is a hot area for plaintiff’s attorneys. Now that shipment dates can be considered unfair business practices, these claims are likely to join other consumer protection claims around the nation. Therefore, without implementing the proper processes to assure compliance, these amendments will lead to another round of expensive litigation for eRetailers. Be sure to consult with your legal counsel and business partners.