



FTC ENFORCEMENT ACTION ALLEGES MERCHANTS ARE CONSUMERS

Last month, the Federal Trade Commission filed a complaint and executed a stipulated order against First American Payment Systems and two companies that market First American's payment processing services. The FTC alleged that First American and its marketers violated the Federal Trade Commission Act ("FTCA") and the Restore Online Shoppers' Confidence Act ("ROSCA").

First American provides payment processing services to small businesses and sole proprietors to allow them to take credit and debit cards. The FTC alleged that First American tricked its merchants by (i) failing to disclose that First American's services would automatically renew unless terminated, (ii) failing to disclose the services have an early termination fee and (iii) improperly debiting merchants' bank accounts.

While the FTCA broadly regulates all commerce, the ROSCA prohibits certain sales practices for selling of goods or services to "consumers" over the internet. That the FTC alleged a violation of ROSCA's consumer protections in regard to business-to-business transactions shows the FTC's willingness to broaden the scope of consumer protection statutes.

Throughout the complaint, the FTC alleged the merchants were consumers. However, by the FTC's own allegation, First American's customers are small retailers, restaurants, nail salons and other small businesses, including some sole proprietorships. The FTC simply labels these businesses as consumers without addressing why these businesses should be protected like consumers. When adopting the order for relief to resolve the case, the district court used the term "merchant," which the court defined as "a consumer, including a person, corporation, or any other entity, that uses payment processing goods or services."

It is unclear under what circumstances the FTC believes a commercial entity or business is a consumer subject to the ROSCA. It is possible the FTC will apply consumer protection statutes to curb particularly egregious conduct. In this case, the FTC could have viewed certain aggravating factors as justifying an aggressive enforcement action. For example, the FTC alleged most First American customers had limited English proficiency and First American sales representatives would give presentations in a

language other than English that contradicted First American's English-only merchant agreement. The FTC may also treat business entities as "consumers" depending on the language of the applicable statutes. In this case, though the ROSCA regulates sales to consumers, the statute does not define the word "consumer"—unlike many other federal consumer protection statutes.

Business payment processors should take note of the enforcement action and the risk that the FTC may apply consumer protection statutes to transactions with small businesses, sole proprietorships and freelancers. Similarly, other businesses that seek to target small businesses, sole proprietors and freelancers as customers should note that they might have to comply with consumer protection laws. If you have any questions regarding the applicability of consumer protection statutes and other similar laws to transactions with small businesses, sole proprietorships and freelancers, do not hesitate to contact us. ☐

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