



Standing Up for the Little and Not-so-Little Guy

Federal Trade Commission (FTC) Focus on Protection of Small Businesses

June 30, 2020



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The Federal Trade Commission Act

- 15 U.S.C. Sec. 45(a)(1): Consumer Protection
 - “**unfair or deceptive acts or practices** in or affecting commerce” are unlawful.
- Unfair Act or Practice
 - An act or practice is unfair if it causes or is likely to cause **substantial injury to consumers** which is **not reasonably avoidable** by consumers themselves and **not outweighed by countervailing benefits to consumers**.
- Deceptive Practices
 - Involve a material representation, omission or practice that is likely to mislead a **consumer** acting reasonably in the circumstances.

FTC Consumer Protection

- Typically, the FTC reserved their UDAP authority for conduct that affects people who engage in transactions for personal or household purposes.
- Director Andrew Smith stated at an FTC Small Business Financing Forum that the FTC Act allows the Commission to address unfair and deceptive practices with respect to businesses.
- Unlike other federal regulators, the Commission is not restrained by whether the transaction is for personal, family, or household purposes.

Does the FTC have authority to so broadly define consumer?

- *FTC v. IFC Credit Corp.* (N.D. Illinois 2008)
 - The court determined that the term “consumer” includes businesses as well as individuals for Section 5 purposes.
 - Prior narrow use of the term consumer did not preclude the FTC from expanding its interpretation in the case.
 - The court looked to the FTC Act’s legislative history and public policy reasons to support the FTC’s interpretation.
- Compare the FTC Act to the Telemarketing Sales Rule, which doesn’t use the word consumer, but rather customer.
 - Customer is defined as “any person who is or may be required to pay for goods or services offered through telemarketing.”

Business-to-Business Protection

- The FTC has relied on its Section 5 authority to police business-to-business activities.
- Operation Main Street
 - In 2018, the FTC partnered with the BBB, two US Attorneys' Office, the New York Division of United States Postal Inspection Services, and eight state Attorneys General.
 - Brought 24 civil and criminal actions involving defendants who allegedly perpetrated scams against small businesses.
 - Scams included: unordered merchandise, imposter scams, scams involving robocalls, and scams involving fake invoices.

B2B Deception Cases

- *FTC v. Starwood Consulting, LLC*, Case No. 18-02368 (S.D. Texas July 2018)
 - FTC and Florida AG office brought an action against three companies and their CEO for Section 5 violations and Florida UDAP violations against small businesses – defined as consumers in the Complaint.
 - FTC alleged that defendants – who were not a part of or affiliated with any government agency or authority – sent mailers to businesses directing them to pay for posters and warned failure to comply with posting regulations would lead to fines.
 - Settlement with the FTC and Florida AG imposed judgments totaling more than \$8 million and permanently banned from sending unsolicited direct mail to consumers and misrepresenting themselves as a government agency.

B2B Deception Cases

- *FTC v. Production Media Co.*, Case No 20-00143 (D. Oregon Feb. 2020)
 - Two Oregon-based media production companies and their owner allegedly deceptively pitched “exclusive” advertising placements to small businesses and misled them about when the ads would be printed.
 - Solicited ad placements by phone and told businesses for a small fee they could place an advertisement in folders used by real estate offices and schools.
 - Folders with the ad were never printed, or printed only after complaining to the BBB or state AG and often included ads by more than one competitor.
 - Defendants typically did not issue refunds, relying on fine print in a form that contradicted the telephone solicitation.
 - Order bans the defendants from deceptive conduct and imposed a \$22.2 million judgment.

Size of the Business

- The FTC has vowed to protect small businesses from other businesses and scammers.
- Provides small businesses various guides to help protect them.
 - For example, FTC published guides called “Scams and Your Small Business”
- Small Business Administration definition of a small business varies by industry.
 - Size will depend on number of employees or average annual receipts.
- What constitutes a “small business” may be larger than we think.
 - There does not appear to be a clear size requirement for a business to be considered a small business that the FTC seeks to protect.
 - See e.g., *FTC v. FleetCor Technologies, Inc.*, Case No. 19-05727 (N.D. Ga. 2019)

FTC v. FleetCor Technologies, Inc.

- FleetCor marketed payment cards, including fuel cards, principally to companies that operate vehicle fleets as a way to save money.
- The FTC alleged that FleetCor bilked hundreds of millions of dollars in hidden fees, harming tens of thousands of customers.
 - Complaint states that FleetCor’s advertisements represented that consumers will achieve specific savings despite knowing that many customers “including small- and medium-sized business customers” do not achieve these savings.
- Complaint alleged FleetCor and its CEO falsely told customer they would be protected from unauthorized charges and have no set up, transaction, or membership fees.

Small Business Financing

- The FTC has centered part of its focus on small business financing.
- In May 2019, the FTC hosted a forum on small business financing that examined trends and consumer protection issues in the marketplace.
 - Small business financing marketplace topics: (1) online lenders that offer loan or credit agreements that resemble traditional bank loans or lines of credit – accruing interest and requiring monthly payments over a set term; (2) finance providers that offer products with different features (e.g., flat fees instead of interests that require weekly or daily repayments); (3) higher-cost products allegedly offered to higher-risk businesses or owners with low credit scores.
- February 2020, FTC staff released a 12 page report on the May 2019 Forum.
- Focus on small business financing has continued during the coronavirus pandemic.

FTC Forum on Small Business Financing: Strictly Business – Staff Report

- The staff report on the Forum includes several staff cautions to small business finance providers and their service providers.
- Report emphasizes the FTC’s broad jurisdiction over commercial financing under the FTC Act and other laws that prohibit deceptive, unfair, and unlawful practices.
- Throughout the report, small business borrowers are referred to as “consumers.”
- Discussed the potential benefits of online lending.
- Discussed “consumer” protection concerns.

Cautions from Staff Report

- Remember that the FTC Act's prohibition against misleading claims applies to small business financing.
 - Consumer confusion possible in the small business financing marketplace.
- Focus on merchant cash advances and concerns.
 - *FTC v. RCG Advances, LLC* (SDNY 2020)
- Marketing and lead generation.
 - ISOs, brokers, and lead generators that market MCAs and other financing products should avoid potentially false or unsubstantiated advertising claims.
 - Finance providers should be aware their use of marketing intermediaries does not shelter them from FTC Act liability.

Small Business Financing

- *FTC v. RCG Advances, LLC*, Case No. 20-4432 (SDNY 2020)
 - Two NY based companies and several owners and officers allegedly violated Section 5 of FTC Act for deceptive business financing activities.
 - Targeted small businesses, medical offices, non-profit organizations, and religious organizations.
 - Deceived entities by misrepresenting terms of merchant cash advances and then using unfair collection practices.
 - Advertisements falsely claimed defendants' cash advances required no personal guaranty and financing required no upfront costs.
 - Allegedly used signed confessions of judgment required by contract to seize business and personal assets.
 - Threatened customers when payments weren't made.

Small Business Financing During COVID-19

- In May, the FTC and the SBA (Small Business Administration) sent joint warning letters to companies – including lead generators – about their claims of affiliation with SBA-administered programs for emergency relief.
- *FTC v. Ponte Investments, LLC*, Case No. 20-00177 (D.R.I. 2020)
 - Doing business as SBA Loan Program preying on small businesses that sought financial relief from the pandemic.
 - Claimed to make funds available to small businesses through federal legislation, but were not authorized to make or approve these loans.
 - Allegedly solicited applications for PPP loans via phone, email and website.
 - FTC alleged defendant violated Section 5 through misrepresentations about loans and misrepresentations concerning their government status.

More Warning Letters

- The FTC and SBA continue monitoring companies that may have falsely claimed an affiliation with the SBA or approved PPP lenders, or may have falsely represented that people can get PPP or other SBA loans by applying on their sites.
- On June 24, the FTC and SBA sent additional letters to six companies urging them to look at their marketing materials and remove deceptive or misleading statements.
- The FTC has looked at claims made both on the companies' websites and social media.

Small Business Protection During COVID-19

- FTC published a blog on Seven Coronavirus B2B Scams that businesses should keep an eye out for:
 - “Public Health” Scams
 - Government Check Scams
 - Business Email Scams
 - I.T. Scams
 - Supply Scams
 - Robocall Scams
 - Data Scams

Key Takeaways

- FTC may use their Section 5 authority to go after conduct that it otherwise could not with an expanded definition of consumer.
 - Could create a tension between consumer protection laws
- FTC's attention on small business financing products could be leading toward FTC investigations.
 - Staff Report may become basis for enforcement actions

Questions?



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Advertising is replete with copyright issues, but many of them are not intuitive. Do you include written text, photos, videos, or music in your marketing? Of course! Our practical discussion will help advertisers spot and address common copyright issues before problems arise.



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