Federal Trade Commission, *Trade Regulation Rule on Impersonation of Government and Businesses: Supplemental notice of proposed rulemaking; request for public comment*

Comments of the Software & Information Industry Association

April 29, 2024

The Software & Information Industry Association ("SIIA") appreciates the opportunity to provide these comments in response to the supplemental notice of proposed rulemaking and request for public comment on the trade regulation rule on impersonation of government and businesses, issued by the Federal Trade Commission ("Commission") on March 1, 2024.[1]

SIIA is the principal trade association for companies in the business of information. Our nearly 400 members include companies reflecting the broad and diverse landscape of the information economy, including digital content providers and users in academic publishing, education technology companies, software developers, cloud service providers, financial information firms, and companies that host platforms used by billions of people worldwide.

SIIA supports the Commission's proposed extension of the impersonation rule to individuals. We nonetheless remain concerned that the proposed liability scheme for "means and instrumentalities" is overbroad and would lead to unintended consequences. To address this issue, we urge the Commission to clarify that means and instrumentalities liability only applies to entities that have actual knowledge that goods or services designed to deceive or defraud are or may be used in impersonation scams.

1. The Commission Should Extend the Impersonation Rule to Individuals

On March 1, 2024, the Commission published a final rule making it an unfair or deceptive act or practice to impersonate a government entity, government official, business, or business officer.[2] The SNPRM proposes to expand the rule to cover the impersonation of individuals. Specifically, proposed section 461.4 would make it an unfair or deceptive act or practice to "materially or falsely pose as, directly or by implication, an individual" or "materially misrepresent, directly or by implication, affiliation with, including endorsement or sponsorship by, an individual."[3]

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[1] Federal Trade Commission, *Trade Regulation Rule on Impersonation of Government and Businesses: Supplemental notice of proposed rulemaking; request for public comment*, 89 Fed. Reg. 15072 (Mar. 1, 2024) ("SNPRM").

[2] Federal Trade Commission, *Trade Regulation Rule on Impersonation of Government and Businesses: Final rule*, 89 Fed. Reg. 15017 (Mar. 1, 2024) ("Final Rule").

[3] SNPRM, 89 Fed. Reg. at 15083.

We support the Commission's proposal to extend the prohibition to individuals. We believe this rule will fill a gap identified by commentators and in the SNPRM preamble. We also appreciate the care taken by the Commission in drafting proposed section 461.4 to mirror the language of sections 461.2 (government impersonation) and 461.3 (business impersonation).

2. The Commission Should Tailor Means and Instrumentalities Liability to Avoid Unintended Consequences on Legitimate Business Activity, Protect Consumers, and Align with Law and Policy

We recognize the Commission's interest in creating "means and instrumentalities" liability to cover "those who assist and facilitate violations"[4] and we appreciate that the Commission has addressed the need for a scienter standard to mitigate against "imposing strict liability against innocent and unwitting third-party providers."[5] Yet the rule as proposed will lead to a host of unintended consequences that will put "innocent and unwitting third-party providers" at risk of liability, deter legitimate commercial activity, create impossible (or extremely costly) compliance challenges, make it harder to weed out unlawful impersonation, and both stifle online speech and allow harmful online speech to run rampant.

In addition, despite the Commission's good faith efforts, we believe the proposed rule goes past the line that separates "means and instrumentalities" liability from indirect liability, which the Commission acknowledges is not authorized by Sections 5 and 18 of the FTC Act.[6]

A. <u>The Commission Should Require Actual Knowledge for Means and Instrumentalities Liability</u>

The proposed rule contains a constructive knowledge standard that will lead to significant ambiguity and confusion and create enormous barriers to compliance. The proposed rule makes it an unfair or deceptive act or practice for a person to provide goods or services if the person has "knowledge or reason to know" that the goods or services will be used to perpetrate unlawful impersonation.[7] The phrase "reason to know" at common law, means information from which a person of ordinary intelligence, or of the superior intelligence which such person may have, would infer that the fact in question exists or that there is such a substantial chance of its existence that, if exercising reasonable care with reference to the matter in question, his action would be predicated upon the assumption of its possible existence."[8]

[4] SNPRM, 89 Fed. Reg. at 15077.

[5] SNPRM, 89 Fed. Reg. at 15077.

[6] SNPRM, 89 Fed. Reg. at 15077.

[7] SNPRM, 89 Fed. Reg. at 15083.

[8] *See* Restatement (2d) of Agency section 9 and comment d.

Even assuming that the Commission intends to adopt the common law definition, there is simply no way for a company to effectively monitor compliance at scale.

First is the concern around burden, which bears directly on the ability of companies to comply with the proposed rule. Consider online services, such as social media platforms. Our members frequently receive millions of complaints about posted content. A constructive knowledge standard would require to make an impossible, Hobson's choice. On the one hand, platforms could seek to comply with the rule by augmenting their content moderation and trust & safety activities to monitor and evaluate in real time the substance of billions of user-generated posts each day to distinguish between unlawful impersonation and protected speech. The costs of this effort would be astronomical, and would yield at best uncertain results. Alternatively, platforms could scale back voluntary content moderation, customer service and enforcement efforts to avoid an insinuation that they had "reason to know" that particular pieces of user-generated content violated the anti-impersonation rule. While this approach may prove practicable from a resourcing perspective, it would leave consumers of online services less well-off overall.

Second, the same tools that can be used to do harm are also used to create a variety of expressive works. It is impossible for our members to determine which of these impersonations are unlawful and which are constitutionally protected. The fact that they were alerted to these unlawful uses could create liability for them.

Third, in either case, the rule creates unnecessary privacy risks and haphazard enforcement risks for users. To ensure compliance with the proposed rule, platforms would have to both verify the identity of users and evaluate the content of user-generated content, requiring them to gather much more information about users than they currently do—an effort that would, by definition, increase security and privacy risks around consumers' personal data—and conduct a subjective, fact-specific analysis of each user communication.[9] As with other categories of speech such as hate speech, we doubt that even detailed guidance from the Commission would ameliorate this challenge or prevent malicious actors from finding ways to avoid detection.

Finally, the proposed rule lacks any protection for those platforms or other "means and instrumentalities" that have systems in place to prevent the misuse of goods and services for unlawful ends and/or take steps to act to address the dissemination of improper content once they have actual knowledge.

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[9] Indeed, there are numerous real-world examples in which a mismatch between a user's online identity and their real-life identity does not constitute impersonation, for example: an author who uses a pseudonym; an online avatar; or an artwork or AI-generated image of a real or a fictitious person. Moreover, many online scams—such as the "romance scams" highlighted by the Commission (SNPRM, 89 Fed. Reg. at 15078) –involve acting under false pretenses—which may or may not involve impersonation—to gain another's trust. That sort of fraud may in some instances be covered by the proposed rule, but in others may not.

In part 2(D) of this submission, we suggest changes to the test of proposed section 461.5 to address these concerns.

B. The Commission Should Limit Means and Instrumentalities Liability to Goods and Services Designed to Defraud

To its credit, the Commission concedes that "Section 5 and 18 of the FTC Act, which authorize this Rule, contain no [aiding and abetting or assisting and facilitating liability] authorizing language."[10] As the Supreme Court has made clear, aiding and abetting liability extends beyond persons who engage, even indirectly, in a proscribed activity; aiding and abetting liability reaches persons who do not engage in the proscribed activities at all, but who give a degree of aid to those who do."[11] By creating liability based on a "reason to know" standard, the rule runs well outside the scope of the Commission's statutory authority.

The cases relied on by the SNPRM are unavailing. The "long line of case law"on which the Commission relies, to a one, all involve instances where the defendant *actively participated* in the fraudulent conduct by placing deceptive goods or services into the marketplace.[12] In this context, however, the tools themselves are content agnostic. The creators of these tools have no more placed "in the hands of another a means of consummating a fraud or competing unfairly," than the maker of a ball point pen has aided and abetted check kiting. Something more than the mere provision of a tool capable of misuse is required. Ironically, this requirement of "something more" is in fact the position staked out by the Commissioners in announcing the proposed rule. Chair Khan, for example, stated that the means and instrumentalities portion of the rule would focus on tools "designed" to enable impersonation fraud.[13] Inclusion of such a scienter requirement that requires that goods or services designed

[10] SNPRM, 89 Fed. Reg. at 15077.

[11] *Cent. Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A.*, 511 U.S. 164, 176 (1994) (refusing to find aiding and abetting liability for private cause of action under rule 10(b)(5)); *see also Mertens v. Hewitt Assocs.*, 508 U.S. 248, 262 (1993) (refusing to extend liability under ERISA to non-fiduciary despite non-fiduciary's knowledge of breach of duty).

[12] *See, e.g., In re Shell Oil Co.*, 128 F.T.C. 749, 763 (1999) (Shell used a third party to disseminate misleading information that Shell developed); *C. Howard Hunt Pen Co. v. FTC*, 197 F.2d 273, 278 (3d Cir. 1952) (defendants mislabeled products sold by others). Similarly, the case relied on by the Commission in its discussion accompanying the Final Rule for the proposition of "establish[ing] primary liability in the absence of privity between the defendant and the deceived persons," *FTC v. Moore*, No. 5:18-cv-01960 (C.D. Cal. Filed Sept. 13, 2018), involved a seller of fake financial documents. Final Rule, 89 Fed. Reg. at 15023 ("The Commission is not aware of any other rule, whether issued pursuant to section 18 or [Administrative Procedures Act] rulemaking authority, that identifies a means and instrumentalities violation.").

[13] SNPRM, 89 Fed. Reg. at 15077; Statement of Chair Lina M. Khan, Joined by Commissioners Slaughter and Bedoya, Regarding the Final Rule on the Trade Regulation Rule on Impersonation of Government

to deceive would avoid creating a specter of liability for all kinds of companies engaged in legitimate commercial conduct, ranging from providers of online services, such as social media platforms, but also countless other companies engaged in developing software, tools, and technologies, and providing services such as online storage space. In addition, amending the proposed rule in this manner will avoid penalizing those companies that adopt strong compliance programs to monitor user-generated content and/or ways in which their technologies are used by downstream actors.[14]

C. The Commission's Proposal for Means and Instrumentalities Liability is Inconsistent with the First Amendment

In addition, the expansive approach taken to means and instrumentalities liability runs against the First Amendment's protection of speech. While there is no First Amendment right to engage in fraud, or even in deceptive commercial speech, the rule opens any business up to prosecution if the tools are used for expressive speech that "materially and falsely" poses as an individual. Outside of the commercial speech context, such statements receive First Amendment protection.[15] As written, the proposed rule would raise fundamental First Amendment concerns relating to vagueness, overbreadth, and discrimination among speakers and content.[16] We believe it unlikely that the proposed rule in its current form would survive a First Amendment challenge.[17]

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and Businesses, at 2 (Feb. 15, 2024) (available at https://www.ftc.gov/system/files/ftc_gov/pdf/r207000impersonationrulelmkstmt.pdf).

[14] Although the Commission claims, without support, that the proposed rule "would not impose new burdens on honest individuals or businesses," this is not accurate: the proposed rule places affirmative obligations on developers, platforms, and others to police the use of legitimate products, services, and tools by malicious actors. SNPRM, 89 Fed. Reg. at 15076.

[15] *See United States v. Alvarez*, 567 U.S. 709, 723 (2012) ("Were the Court to hold that the interest in truthful discourse alone is sufficient to sustain a ban on speech, absent any evidence that the speech was used to gain a material advantage, it would give government a broad censorial power unprecedented in this Court's cases or in our constitutional tradition. The mere potential for the exercise of that power casts a chill, a chill the First Amendment cannot permit if free speech, thought, and discourse are to remain a foundation of our freedom.").

[16] *See, e.g., Sorrell v. IMS Health Inc.*, 564 U.S. 552, 570 (2011); *Rosenberger v. Rector & Visitors of Univ. of Va.,* 515 U.S. 819, 828 (1995); *see also, generally,* E. Volokh, Freedom of Speech and Information Privacy: The Troubling Implications of a Right to Stop People from Speaking About You, 52 Stan. L. Rev. 1049, 1081 (2000).

[17] In addition, the proposed rule will also introduce confusion with existing liability protections related to intermediaries that host speech under Section 230 of the Communications Act.

D. Based on the Foregoing, the Commission Should Make Adjustments to the Proposed Rule as Follows

The problems with the rule, however, are eminently fixable. To avoid exceeding the Commission's statutory and constitutional authority, we propose that the Commission modify the text of Section 461.5 as follows (changes in **bold**):

> § 461.5 Means and Instrumentalities: Provision of Goods or Services for Unlawful Impersonation Prohibited.
>
> It is a violation of this part, and an unfair or deceptive act or practice to provide **to another** goods or services **designed to deceive or defraud** with knowledge ~~**or reason to know**~~ that those **deceptive** goods or services will be used to:
>
> (a) materially and falsely pose as, directly or by implication, a government entity or officer thereof, a business or officer thereof, or an individual, in or affecting commerce as commerce is defined in the Federal Trade Commission Act (15 U.S.C. § 44); or
>
> (b) materially misrepresent, directly or by implication, affiliation with, including endorsement or sponsorship by, a government entity or officer thereof, a business or officer thereof, or an individual, in or affecting commerce as commerce is defined in the Federal Trade Commission Act (15 U.S.C. § 44).[18]

E. The Commission Should Pursue Additional Process to Inform the Public and Seek Public Feedback Prior to Promulgating a Means and Instrumentalities Liability Rule

We request that the Commission engage in further analysis of the means and instrumentalities liability rule. This would include:

Renewing the preliminary regulatory analysis. The Commission should revisit the SNPRM's analysis to more accurately reflect the potential costs of the rule and the value of consumer losses associated with impersonation. The Commission conducted no analysis of the costs associated with the rule yet claims "the benefits…will significantly outweigh the costs."[19] It did not assess, for example, the costs that companies will incur from monitoring and detection; increased costs associated with adjudication of disputes involving possible impersonation; and

[18] As an alternative to the changes suggested here, SIIA proposes to amend the first paragraph of proposed section 461.5 as follows: "It is a violation of this part, and an unfair or deceptive act or practice to provide goods or services with knowledge ~~**or reason to know**~~ **after receiving notice** that **a specific individual intends to use** those goods or services ~~**will be used**~~ to:".

[19] SNPRM, 89 Fed. Reg. at 15078.

increased prices to consumers for online services and technological tools likely to result from increased compliance costs. These are likely to be extensive. On the benefits side, as noted above, the Commission's calculations include victim losses from scams that may fall outside the proposed anti-impersonation rule, including certain "romance" scams and scams directed to older Americans. The bare bones and deficient regulatory analysis opens the Commission to challenge under the arbitrary and capricious standard set out in the Administrative Procedures Act.[20]

Holding an informal hearing. The Commission held a hearing ahead of issuing the Final Rule but did not hold a new hearing ahead of issuing the SNPRM. Although the Commission had previously proposed a means and instrumentalities provision that was not adopted in the Final Rule, the text of the current proposed rule differs materially from that earlier proposal. Moreover, disputed issues of material fact remain. Among these are the following:

- Whether the Commission has accurately estimated the costs associated with the proposed rule.
- Whether the means and instrumentalities provision would impose an affirmative obligation on companies to address misuse of goods and services and, if so, costs associated with implementing additional compliance programs or efforts to address potential misuse.
- Whether the means and instrumentalities provision will impede the development of technologies that have positive societal benefits but could be misused to enable impersonation.

Because the proposed rule would have significant consequences across the economy, and because there are clear disputed issues of material fact, it seems appropriate for the Commission to hold another informal hearing and ensure it has received and considered public feedback before advancing the rule.

3. Conclusion

SIIA thanks the Commission for its work to protect American consumers from fraud and for considering our views in this rulemaking process. We would welcome the opportunity to answer any questions that the Commission may have. Please direct questions to Chris Mohr, President (cmohr@siia.net) or Paul Lekas, SVP, Head of Global Public Policy & Government Affairs (plekas@siia.net).

[20] 5 U.S.C. 706(2)(A).