



TECHNET
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INNOVATION ECONOMY

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Federal Trade Commission
Office of the Secretary
600 Pennsylvania Avenue, NW
Suite CC-5610
Washington, D.C. 20580

Re: Impersonation SNPRM, R207000

To Whom it May Concern:

TechNet appreciates the opportunity to provide comments on the Federal Trade Commission's (FTC) proposal to amend the trade regulation rule titled Rule on Impersonation of Government and Businesses (Impersonation Rule or Rule). While we generally support the FTC's ability to use its statutory authority to prohibit the impersonation of individuals, we believe the proposed rule imposes significant, vague, and subjective burdens on innovators, including those in the Artificial Intelligence (AI) space. Therefore, we urge the FTC to refine the Rule to help ensure the final rule correctly balances the costs and benefits for consumers and appropriately targets bad actors without unduly burdening innovative products and services.

TechNet is the national, bipartisan network of technology CEOs and senior executives that promotes the growth of the innovation economy by advocating a targeted policy agenda at the federal and 50-state level. TechNet's diverse membership includes dynamic American businesses ranging from startups to the most iconic companies on the planet and represents over 4.4 million employees and countless customers in the fields of information technology, artificial intelligence, e-commerce, the sharing and gig economies, advanced energy, transportation, cybersecurity, venture capital, and finance.

TechNet Comments

On February 15, 2024, the FTC announced new protections to combat AI impersonation of individuals following the finalization of its rule prohibiting government and business impersonation schemes. In this announcement, Chair Khan, joined by Commissioners Slaughter and Bedoya, stated that "the rise of generative AI technologies risks making [impersonation scams] worse by turbocharging scammers' ability to defraud the public in new, more personalized ways," and thus required the issuance of a supplemental notice of proposed rulemaking. The FTC further announced their intent to use means and instrumentalities liability to focus on "AI-enabled fraud," including to target

“upstream actors.” The FTC also made clear that it believed it had authority to make it “unlawful for a firm, such as an AI platform that creates images, video, or text, to provide goods or services that they know or have reason to know are being used to harm consumers through impersonation.” Finally, the FTC implied that such entities would have this knowledge, noting that “[f]raudsters are using AI tools to impersonate individuals with eerie precision.”

In an era of rapid technological advancement, federal policymakers are racing to address complex challenges posed by AI innovation. However, AI isn’t new. Millions of Americans have been using AI for years to navigate traffic, search the Internet, streamline research, edit documents, and discover new music. Due to recent advancements, AI is now being used to more accurately predict severe weather, protect critical infrastructure, defend against cyber threats, and accelerate the development of new medical treatments, including life-saving vaccines and ways to detect earlier signs of cancer. U.S. industry and policymakers must work together to establish sensible guardrails and continue investing in research to drive innovation and maintain America’s competitive edge in AI.

There is consensus among providers of online services that the misuse of their services to facilitate fraudulent activities is unacceptable and a clear violation of their terms of service. These providers use a variety of tools, including the removal of content and actions to address bad actors that intend to defraud users or third parties. These tools are enabled by Section 230 of the *Communications Decency Act* (Section 230), which provides a framework for interactive computer services to prevent the misuse of their services for unlawful ends such as fraud without facing liability.

While TechNet appreciates the FTC’s efforts to prohibit impersonation of individuals by mirroring the language of Section 5 of the *FTC Act*, the FTC’s proposed Rule is overly broad and could result in significant unintended consequences to the innovation economy by exposing companies to intermediary liability and creating confusion as to the relationship of the proposed rule with Section 230. As discussed in more detail below, we urge the FTC to add language to make clear that the proposed Rule’s prohibitions only apply to entities that themselves provide deceptive, false, or misleading claims or counterfeit items and possess actual knowledge that the deceptive representations, products, or goods will be used to commit impersonation fraud.

The FTC Should Limit “Means and Instrumentalities” Liability to an Actual Knowledge Standard

Means and instrumentalities liability under the *FTC Act* requires more than a showing that the respondent has “reason to know” that goods or services may be used to deceive consumers. Longstanding case law indicates that means and instrumentalities liability should require both actual knowledge and a “false or misleading representation” by the person accused of providing the means and instrumentalities of deception. We do not believe that this threshold is met merely when it is possible that a bad actor could utilize a service to deceive consumers.

We also note that courts consistently agree with our view. When courts have decided to impose means and instrumentality liability, courts have also emphasized that the respondent had actual knowledge that it is providing a good or service that deceives customers. In limited cases, the FTC has imposed a “knowledge or reason to expect” standard coupled with a scienter requirement when such knowledge was directly tied to “pass[ing] on a false or misleading representation.” In *Shell Oil*, the FTC explained that for means and instrumentalities liability to apply, the respondent must be “the originator of deceptive claims.”¹

We believe that an overly broad rule that imposes liability for merely providing the means and instrumentalities for impersonation scams without actual knowledge or intent to deceive would have the unintended consequence of deterring legitimate commercial activity. A final rule should prohibit means and instrumentalities that are themselves misleading and penalize companies when they have *actual* knowledge that the means and instrumentalities they create will be used in impersonation scams.

Therefore, TechNet urges the FTC to refine the proposed rule accordingly. While we appreciate that the FTC includes a knowledge standard for the means and instrumentalities provision, the FTC has also introduced ambiguity by expanding liability beyond evidence of actual knowledge. The FTC proposes to define an unfair or deceptive act or practices as the provision of “goods or services with knowledge or reason to know” that goods or services will be used to commit impersonation fraud.

However, by failing to define “reason to know,” the FTC creates significant uncertainty for providers of innovative technology services. A “reason to know” standard allows the FTC to question compliance practices after the fact, and we believe civil penalties should not be imposed on the grounds of a highly fact-specific inquiry into the effectiveness of efforts to either monitor or investigate improper use of goods or services for impersonation fraud. The current text exposes companies to the possibility of civil penalties for the misuse of their goods or services by bad actors.

To prevent unintentional harms to the broader innovation economy, we strongly urge the FTC to clarify the scope of “know or reason to know” to an actual knowledge standard.

The Commission Should Clarify that Means and Instrumentalities Liability Only Applies Where Goods or Services are Designed to Defraud

We also urge the FTC to further refine the rule so that it bars only means and instrumentalities that are inherently misleading or designed to deceive. This approach allows the FTC to focus on fraudsters without stifling legitimate business activities. We believe that companies should not be subject to civil penalties simply because scammers repurpose legitimate and useful tools and technologies for nefarious purposes.

¹ Federal Trade Commission Decisions Volume 128 (July – December 1999)

As the NPRM and SNPRM note, Section 5 and 18 of the *FTC Act* do not provide for assisting-and-facilitating liability. The reason is clear: companies should not be held liable for the bad acts of others. While TechNet appreciates the FTC’s efforts to propose language to capture direct liability for a party, who despite not having direct contact with a victim of impersonation fraud, “passes on a false or misleading representation with knowledge or reason to expect that consumers may possibly be deceived as a result,” the text of the proposed rule goes much further and does not align with the intent articulated in the SNPRM and by the Commission in announcing the proposed amendments.

Specifically, Chair Khan, in her statement announcing the proposed amendments with Commissioners Bedoya and Slaughter, stated that liability would apply to a “developer who knew or should have known that their AI software tool designed to generate deepfakes of IRS officials would be used by scammers to deceive people about whether they paid their taxes. Ensuring that the upstream actors best positioned to halt unlawful use of their tools are not shielded from liability will help align responsibility with capability and control.” However, the proposed rule is not merely limited to goods or services that are designed to defraud. Instead, the proposed rule applies to goods or services that are misused for impersonation, if the provider of the goods or services had a reason to know it could be used for impersonation generally.

The approach signaled by the proposed rule runs counter to longstanding case law, which makes clear that liability should result from a company’s own actions, such as a company’s own deceptive representations.² A rule that does not require the active participation of a company in an impersonation scam leaves open the possibility that companies could be subject to enforcement actions for their unwitting provision of legitimate goods or services to bad actors, which has the potential to significantly stymie continued innovation in emerging technologies such as AI. In addition, such a rule could unintentionally penalize companies that establish compliance programs to address misuse of their technology, since it could expose them to liability because of an expansive knowledge standard.

Therefore, TechNet recommends amending the language in § 461.5 to read as follows:

§ 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 other** goods or services **intended to be used for the purpose of deceiving or defrauding with actual** knowledge ~~or reason to know~~ that those **deceptive** goods or services will be used **by a specific individual** 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

² Shell Oil

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).

In addition, to avoid undermining the protections afforded by Section 230 of the *Communications Decency Act*, we urge the FTC to clarify that the liability envisioned in the SNPRM has “no effect on the protections provided in Section 230 of the *Communications Act of 1934* (47 U.S.C. § 230).”

The FTC Fails to Consider the Costs Associated with Implementation of the Means and Instrumentalities Provision

Under the *Administrative Procedure Act*, courts are directed to declare unlawful and set aside agency regulations that are “arbitrary” and “capricious.” Agency rules are “arbitrary and capricious” when policy judgments, reasoning, or asserted factual premises of actions are so unreasonable as to be arbitrary. As currently proposed, the costs of imposing means and instrumentalities liability, for both consumers and companies, far outweigh any benefits from the rule.

In addition, the FTC has failed to adequately calculate and justify the cost of their proposed amendments to the Rule. Specifically, the FTC has not offered any cost-benefit analysis to determine whether the benefits of consumer access to a wide variety of goods and services — especially AI-enabled products — outweigh the risk that bad actors could misuse these products without the AI product providers’ actual knowledge that the particular output will be used for deceptive impersonation.

Furthermore, the substantial costs on innovation and harms to consumers are clear. Due to the broad scope of the proposed amendments to the Rule, companies will bear the burden of additional compliance costs simply to monitor the use of their legitimate products or services. Even more concerning is that the risk of civil penalties could discourage companies from introducing emerging technologies at the outset. This in turn will eliminate benefits for consumers and undermine America’s leadership in emerging technologies like AI.

Given the broad language of the proposed rule, the only way for legitimate businesses to avoid liability and penalties may be to refuse access to products that could be used by bad actors to impersonate real or fictitious people. That risk is particularly acute for companies innovating in the AI space because the FTC is explicitly exploring whether to make it “unlawful for a firm, such as an AI platform that creates images, video, or text, to provide goods or services that they know or have reason to know are being used to harm consumers through impersonation.”

The Supplemental Notice of Proposed Rulemaking is Procedurally Defective and Violates Due Process

Entities subject to proposed rules have a due process right to fair notice of rule requirements. The FTC must promulgate clear, unambiguous standards and provide notice of what is prohibited so that companies can effectively comply. Due process rights are heightened where civil penalties may be imposed. We believe an effective rule allows companies to predict how a proposed rule would apply to their conduct.

To add means and instrumentalities liability to the current rule, the FTC must comply with Magnuson-Moss rulemaking requirements, which includes publishing an advanced notice of proposed rulemaking. By proposing changes through a Supplemental Notice of Proposed Rulemaking, the FTC appears to be bypassing longstanding notice and comment procedures that afford the public proper notice. In addition, even though the SNPRM states that the rule is no broader than existing case law and obligations under Section 5 of the *FTC Act*, the statements of the FTC Commissioners indicating that the rule will hold upstream actors liable creates significant compliance uncertainty for companies. Thus, the FTC's use of the SNPRM process for this proposed Rule amendment is procedurally defective and violates due process.

The FTC Should Hold an Informal Hearing and Solicit Additional Public Input Before Finalizing the Additional Impersonation Rule Provisions

Due to the expanded scope of the FTC's proposed amendments to the Rule, we believe the FTC should hold an informal hearing and solicit additional public input before finalizing the additional Impersonation Rule provisions. The proposed Rule places significant compliance burdens on upstream actors to address the misuse of their products and services, conflicting with the FTC's position that the rule places no new obligations on companies and does not impose any compliance costs. An informal hearing will provide a venue for a thorough discussion of any unintended consequences imposed by the proposed amendments on innovation. Should the FTC hold an informal hearing, TechNet reserves the right to participate by presenting orally, as well as by submitting written comments.

Disputed Issues of Material Fact

The FTC has historically recognized the need to provide guardrails to protect consumers without undermining innovation. As discussed above, the proposed Rule in its current form will hold a wide variety of services — including AI developers — liable for the deceptive misrepresentations of third parties, even if those services did not make their own misrepresentation. We urge the FTC to examine the following disputed issues of material fact as they continue the rulemaking process:

1. Whether the means and instrumentalities provision imposes an affirmative obligation to address the misuse of tools, products, and services and the costs associated with such compliance programs.

2. Whether the means and instrumentalities provision will chill the development and deployment of legitimate tools that can be misappropriated for impersonation.

In developing a final rule for means and instrumentalities liability, we reiterate that the FTC should incorporate both an actual knowledge standard and a deception requirement. A more tailored version of means and instrumentalities liability will not only mitigate harms to individual consumers by targeting dishonest and fraudulent conduct but will also help foster continued innovation in emerging technologies like AI.

Conclusion

TechNet believes that a properly scoped rule would mitigate harms to individual consumers through rules targeting dishonest and fraudulent conduct that align with Section 5 of the *FTC Act*. In developing a final rule for means and instrumentalities liability, we urge the FTC to incorporate both an actual knowledge standard and a deception requirement. A more tailored rule will effectively prohibit impersonations of individuals, while allowing innovation and encouraging companies to implement strong compliance programs.

Thank you for your attention to our views on this matter. We appreciate the opportunity to submit comments and provide feedback on the FTC's proposal to amend the Impersonation Rule and stand ready to serve as a resource to you in your examination of this important issue.

Sincerely,



Carl Holshouser
Executive Vice President