

**FEDERAL TRADE COMMISSION**

**16 CFR Part 461**

**RIN 3084-AB71**

**Proposed Amendments to Trade Regulation Rule on Impersonation of Government and Businesses**

**AGENCY:** Federal Trade Commission

**ACTION:** Supplemental notice of proposed rulemaking; request for public comment.

**SUMMARY:** The Federal Trade Commission (FTC or Commission) requests public comment on its proposal to amend the trade regulation rule entitled Rule on Impersonation of Government and Businesses (Impersonation Rule or Rule) to revise the title of the Rule, add a prohibition on the impersonation of individuals, and extend liability for violations of the Rule to parties who provide goods and services with knowledge or reason to know that those goods or services will be used in impersonations of the kind that are themselves unlawful under the Rule. The Commission believes these changes are necessary and such impersonation is prevalent, based on all comments it received on the Rule and other information discussed in this document. The Commission now solicits written comment, data, and arguments concerning the utility and scope of the proposed revisions to the Impersonation Rule.

**DATES:** Comments must be received on or before [INSERT DATE 60 DAYS AFTER DATE OF PUBLICATION IN THE *FEDERAL REGISTER*].

**ADDRESSES:** Interested parties may file a comment online or on paper by following the instructions in the Comment Submissions part of the SUPPLEMENTARY INFORMATION section below. Write “Impersonation SNPRM, R207000” on your

comment and file your comment online at <https://www.regulations.gov>. If you prefer to file your comment on paper, mail your comment to the following address: Federal Trade Commission, Office of the Secretary, 600 Pennsylvania Avenue NW, Mail Stop H-144 (Annex I), Washington, DC 20580.

**FOR FURTHER INFORMATION CONTACT:** Claire Wack, [cwack@ftc.gov](mailto:cwack@ftc.gov), (202-326-2836).

**SUPPLEMENTARY INFORMATION:**

The Commission invites interested parties to submit data, views, and arguments on the proposed amendments to the Impersonation Rule and, specifically, on the questions set forth in Section VIII of this supplementary notice of proposed rulemaking (“SNPRM”). The comment period will remain open until [INSERT DATE 60 DAYS AFTER DATE OF PUBLICATION IN THE *FEDERAL REGISTER*]. To the extent practicable, all comments will be available on the public record and posted at the docket for this rulemaking on <https://www.regulations.gov>. If interested parties request to present their position orally, the Commission will hold an informal hearing, as specified in Section 18(c) of the FTC Act, 15 U.S.C. 57a(c). Any request for an informal hearing must be submitted as a written comment within the comment period and must include: (1) a request to make an oral submission, if desired; (2) a statement identifying the person's interests in the proceeding; and (3) any proposals to add disputed issues of material fact that need to be resolved during the hearing. See 16 CFR 1.11(e). Any comment requesting an informal hearing should also include a statement explaining why an informal hearing is warranted and a summary of any anticipated oral or documentary testimony. If the comment identifies disputed issues of material fact, the comment should

include evidence supporting such assertions. If the Commission schedules an informal hearing, either on its own initiative or in response to request by an interested party, the FTC will publish a separate document notifying the public pursuant to 16 CFR 1.12(a) (“initial notice of informal hearing”).

## **I. Background**

### *A. Trade Regulation Rule on Impersonation of Government and Business*

Published elsewhere in this issue of the *Federal Register* is the Commission’s final Trade Regulation Rule entitled “Rule on Impersonation of Government and Business,” promulgated under the authority of Section 18 of the FTC Act, 15 U.S.C. 57a(b)(2); the provisions of Part 1, Subpart B, of the Commission’s Rules of Practice, 16 CFR 1.7–1.20; and the Administrative Procedure Act (Impersonation Rule or Rule). This authority permits the Commission to promulgate, modify, or repeal trade regulation rules that define with specificity acts or practices that are unfair or deceptive in or affecting commerce within the meaning of Section 5(a)(1) of the FTC Act, 15 U.S.C. 45(a)(1). Promulgation of this Rule followed publication of an Advance Notice of Proposed Rulemaking (ANPR) on December 23, 2021,<sup>1</sup> and a Notice of Proposed Rulemaking on October 17, 2022 (NPRM).<sup>2</sup> On March 30, 2023, the Commission published an Initial Notice of Informal Hearing,<sup>3</sup> and on May 4, 2023, Chief Administrative Law Judge D. Michael Chappell presided over the informal hearing,<sup>4</sup> which was viewable live from the Commission’s website, <https://www.ftc.gov>. Because there were no disputed issues of material fact to resolve, the informal hearing included no cross examination or rebuttal submissions, and the presiding officer made no recommended decision. The final Impersonation Rule is published elsewhere in this issue of the *Federal Register*.

*B. Need for a Supplemental Notice of Proposed Rulemaking as to Impersonation of Individuals and Liability for Provision of Goods and Services Used in Impersonation Scams*

Based on the comments in response to the ANPR, NPRM, Notice of Informal Hearing, and Informal Hearing, as well as the Commission's history of enforcement and reports to the Commission from consumers and other sources, as discussed in Section V below, the Commission has reason to believe the deceptive or unfair impersonation of individuals and other parties not currently addressed by the Impersonation Rule is prevalent and taking comments on additional proposed provisions is in the public interest.

Additionally, as stated in the Statement of Basis and Purpose for the Rule, Question 6 of the NPRM asked for comments on whether the final rule should contain a prohibition against providing the means and instrumentalities for violations against government or business impersonation.<sup>5</sup> As summarized in this document, the Commission received more than 20 comments that expressly addressed this question, and many of the sentiments reflected in these comments were also echoed by several commenters that presented oral statements at the Informal Hearing.<sup>6</sup> Based upon the comments received in connection with the proposed provision regarding means and instrumentalities, the Commission decided that the specific provision warranted further analysis and consideration, and the Commission declined to adopt what was then proposed 16 CFR 461.4. Instead, the Commission stated it would continue to consider the issue, including soliciting additional comment. This SNPRM discusses the comments the Commission received on this proposed section. It also discusses how the comments submitted in response to the Commission's earlier requests for comment informed the

Commission’s current proposals to (1) rename the Impersonation Rule the “Rule on Impersonation of Government, Businesses, and Individuals;” (2) include a definition of “individual” in the Rule; (3) amend the Rule to include a prohibition of impersonation of individuals; and (4) extend liability to parties who provide goods and services with knowledge or reason to know that those goods or services will be used in impersonations of the kind that are themselves unlawful under the Rule, as amended. The Commission also poses specific questions for comment. Finally, the SNPRM provides the proposed amended text of the Rule.

## **II. Summary of Comments to ANPR**

The Commission published the ANPR on December 23, 2021, and took comments for 60 days. The Commission invited the public to comment on any issues or concerns the public believes are relevant or appropriate to the Commission’s consideration of the proposed rule and also posed 13 specific questions for the public.<sup>7</sup> Relevant to this SNPRM, the Commission solicited public comment on the prevalence and methods of impersonation of individuals or entities other than governments and businesses in interstate commerce and whether and how individuals and entities provide the means and instrumentalities used in the impersonation of government, businesses, and individuals.<sup>8</sup>

The Commission received 164 timely and unique comments in response to the ANPR, which are publicly available on this rulemaking’s docket at <https://www.regulations.gov/docket/FTC-2021-0077/comments>.<sup>9</sup> No commenter expressed the view that the Commission should not commence this rulemaking. Most comments—140—came from individual consumers. Ten comments were submitted by

businesses,<sup>10</sup> 11 by trade associations,<sup>11</sup> and three by government agencies.<sup>12</sup>

#### *A. Comments about the Impersonation of Individuals*

Seven commenters discussed the significant impact of impersonation of individuals or parties other than government or businesses. NAAG stated that State consumer protection agencies receive thousands of complaints annually regarding imposter scams that do not fit into government or business impersonation, for example grandparent or romance scams, and that “data from state consumer protection agencies suggests that these scams are only becoming more common.”<sup>13</sup> WMC Global, a cybersecurity company, listed executive impersonation, public figure impersonation, and political impersonation as categories of individual impersonation of which it is aware.<sup>14</sup> It identified Short Message Services (“SMS”), email, social media, and voice calls as primary methods used by impersonators in contacting consumers.<sup>15</sup>

In addition to those categories of impersonation of individuals, multiple individual commenters recounted their personal experience with impersonation of real or fictitious individuals. One individual commenter reported receiving a call from an individual falsely posing as her grandson and requesting bail money and stated, “it is very easy to give them a lot of money because they [] sound so true and reliable and all that and they are just taking money from elderly people hand over fist.”<sup>16</sup> Another consumer, identified as a victim to a romance scam, stated “I feel like nothing can be trusted anymore on the internet and victims are left picking up their pieces of their life and there is zero accountability in catching these crooks.”<sup>17</sup>

#### *B. Comments about the Means and Instrumentalities of Impersonation*

Six commenters addressed the Commission’s questions regarding individuals or

entities that provide the means and instrumentalities for impersonators to conduct such practices, and the goods and services those individuals or entities provide.

NAAG asserted impersonators “often use other companies’ products and services to execute their scams,” such as “marketing companies, call centers, attorneys, third-party mailing services, payment processors, lead list providers, remote offices . . . [d]ating websites, and social media . . . .”<sup>18</sup> It also addressed the Commission’s question regarding the circumstances under which the provision of means and instrumentalities should be considered deceptive or unfair, opining that “when an entity provides substantial assistance or support to impersonators and knows or should have known that their products [or] services are being used in a fraudulent impersonation scheme, that company could also be held liable under the proposed impersonation rule.”<sup>19</sup>

Apple, Inc., submitted a comment urging the Commission to adopt a rule targeting bad actors and their “facilitators” that are engaging in impersonation fraud without stifling legitimate business activity.<sup>20</sup> Apple stated that impersonators who have obtained stolen gift cards use gray markets<sup>21</sup> to sell the items purchased with those cards, making it harder for consumers to detect the fraud.<sup>22</sup> Apple stated that gray markets are primary “means and instrumentalities” that impersonators use to conduct their scams.<sup>23</sup> Microsoft stated that scammers typically rely on payment processors to receive money from victims of impersonation scams.<sup>24</sup> They also utilize affiliate marketing services to advertise to consumers through malicious ads and pop-up windows.<sup>25</sup> Erik M. Pelton & Associates (“EMP&A”), a trademark law firm in Virginia, identified several types of entities that may provide the means and instrumentalities for trademark scammers, including landlords providing office space, mail services, the U.S. Postal

Service, “various banks and payment processing services,” and domain registrars and website hosting services that host bad actors’ websites.<sup>26</sup> EMP&A also stated that provision of these goods and services “should be considered deceptive or unfair following a procedure for putting service providers on notice of the fact that they are unwittingly enabling scammers . . . If scammers are denied these means and instrumentalities, it will become difficult for the scams to be profitable and hopefully they will cease operation.”<sup>27</sup>

USTelecom, a trade association representing the broadband technology industry, recommended liability for “individuals or entities that provide the means and instrumentalities for impersonators . . . such as how the FTC has used the [Telemarketing Sales Rule] against robocall enablers,” but noted that the proposed rule “should make clear that liability . . . requires proof of knowledge of such fraud or conscious avoidance of it, consistent with FTC precedent and [Telemarketing Sales Rule] and Section 5 jurisprudence.”<sup>28</sup>

Somos, Inc., which manages registry databases for the telecommunications industry, similarly encouraged the “[p]rosecution of . . . those knowingly aiding and abetting” impersonated toll-free numbers.”<sup>29</sup>

### **III. Summary of Comments to NPRM**

The Commission published the NPRM on October 17, 2022.<sup>30</sup> In the NPRM, the Commission concluded that there is reason to believe that impersonation of government, businesses, and their officials or agents is prevalent.<sup>31</sup> The Commission identified no disputed issues of material fact based on the comment record; explained its considerations in developing the proposed rule; solicited additional public comment



thereon, including posing specific questions designed to assist the public in submitting comment; and provided interested parties the opportunity to request to present their positions orally at an informal hearing.<sup>32</sup> Finally, the NPRM set out the Commission's proposed regulatory text.

The Commission received 78 comments in response to the NPRM from a diverse group of individuals, industry groups and trade associations, consumer organizations, and government agencies.<sup>33</sup> The majority of comments generally supported the rule as proposed in the NPRM, but some comments raised concerns and recommended specific modifications or additions to the proposed rule.

#### *A. Comments about Individual Impersonations*

The Commission received six comments in response to the NPRM that specifically addressed the impersonation of individuals or entities other than government and businesses. A group of Rutgers Law School students urged inclusion of a prohibition on impersonation of individuals and cited an Elder Fraud Report issued by the Federal Bureau of Investigation, stating that “victims over 60 of confidence fraud and romance scams have steadily increased by approximately 30% since 2019.”<sup>34</sup> AIM, the European Brands Association, and the Recording Industry Association of America (“RIAA”), also provided comment in support of inclusion of a prohibition on impersonating individuals.<sup>35</sup> The American Association of Retired Persons (“AARP”) strongly urged the inclusion of a prohibition on impersonation of individuals or entities other than governments and businesses, noting that romance scams, which “rely on the criminal making the target believe they are in a trusted love relationship to steal from them,” resulted in losses reported to AARP of over \$500 million in 2021 (which the AARP

believed to be “a vast undercount” of harm).<sup>36</sup> AARP additionally stated that its Fraud Watch Helpline received more than 100,000 calls “ranging from targets who report scams they avoided, consumers trying to determine if something is legitimate, and from victims and their family members.”<sup>37</sup>

The Electronic Privacy Information Center and other consumer and privacy advocacy organizations strongly urged the Commission to include impersonations of individuals in the rule.<sup>38</sup> The Electronic Privacy Information Center noted that “the actual number of reported losses from romance and other familial scams are not as high as those reported to be caused by the government and business imposters,” but because of the “personal nature” of individual impersonation scams, “it is highly likely that many fewer victims of these scams actually make reports to government and other agencies about the devastating losses they have suffered.”<sup>39</sup> Finally, NCTA – The Internet and Television Association (“NCTA”) noted that its member companies “have seen an increase in sophisticated ‘RES IP’ scams to impersonate customers online and route traffic through their home networks and residential IP addresses.”<sup>40</sup>

*B. Comments about the Means and Instrumentalities of Impersonation*

Twenty-two comments expressly addressed Question 6 of the NPRM, which asked whether the final rule should contain a prohibition against providing the means and instrumentalities for violations against government or business impersonation.<sup>41</sup> Most of the commenters expressed support for the inclusion of a means and instrumentalities provision, some with modification, while two expressed concerns with the inclusion of such a prohibition.

Of the commenters supporting inclusion of a means and instrumentalities prohibition, three of the commenters encouraged the Commission to finalize the text of the proposed rule without modification.<sup>42</sup> These comments argued that inclusion of means and instrumentalities liability would help combat impersonation schemes perpetrated by foreign-based scammers that are outside of U.S. court jurisdiction but obtain services from U.S.-based entities such as payment processors and internet service providers.<sup>43</sup>

Most commenters who addressed Question 6 of the NPRM expressed their support for means and instrumentalities liability but recommended certain modifications. Some expressed concerns that the proposed language could be read too broadly.<sup>44</sup> Others expressed concern that without a specific scienter or knowledge requirement, the proposed provision runs the risk of imposing strict liability against third parties who supply goods or services with no knowledge that those goods or services would be used in the commission of unlawful impersonations.<sup>45</sup> Accordingly, several commenters urged the Commission to clarify the scope of means and instrumentalities liability or explicitly include a knowledge requirement in the final rule provision.<sup>46</sup>

For example, the Consumer Technology Association (“CTA”), a trade association representing the U.S. consumer technology industry, stated that the Commission’s explanation and examples of the “means and instrumentalities” provision in the NPRM, which seem to limit its applicability, are “not squarely reflected in the text of the proposed rule.”<sup>47</sup> CTA urged the FTC to limit the bounds of “means and instrumentalities” in the text of the rule “to entities that have knowledge or consciously avoid knowing that they are making representations being used to commit impersonation

fraud.”<sup>48</sup> Somos, in its comment, supported the inclusion of a means and instrumentalities provision, but added that “those involved must knowingly be aiding and abetting the impersonation fraud.”<sup>49</sup>

USTelecom urged the Commission to “adjust the proposed language in § 461.4 to codify the requirement that the person *has knowledge or reason to expect* it is providing the means and instrumentalities” (emphasis in original).<sup>50</sup> USTelecom argued that such modification would “help to avoid confusion about the new rule’s scope and application with regards to intermediaries that, by no fault of their own and by nature of the services they offer, were unintentional conduits for impersonation fraud.”<sup>51</sup> EMP&A similarly stated that it supported adding “that the party *must have known or should have known* that it was providing a means or instrumentality to facilitate a scam” because without such modification “parties could be held liable even if they had no intention to facilitate the scam.”<sup>52</sup>

The American Bar Association Section of Intellectual Property Law argued that “there should be an explicit requirement that parties at least knew or should have known that they were providing the means or instrumentalities” for unlawful impersonation, and suggested that the Commission could “explicitly include the language referenced in the [NPRM] from *Shell Oil Co.*, 128 F.T.C. 749 (1999)—acting with ‘knowledge or reason to expect that consumers may possibly be deceived as a result.’”<sup>53</sup>

CTIA, an industry group that represents the U.S. wireless communications industry, argued that the NPRM would make liable parties “providing means and instrumentalities to another entity only where the resulting fraud is a predictable consequence of those actions” and that “the proposed rule will appropriately target those actors with malicious

intent, while avoiding ‘unduly burdening or stifling legitimate business activities,’ or punishing ‘an innocent entity whose ordinary course of work brought it – unknowingly – into contact with a bad actor.’”<sup>54</sup>

Other commenters argued that inclusion of a scienter requirement is a necessary but insufficient modification of the proposed language to impose means and instrumentalities liability. For example, NCTA argued that “liability requires both providing *deceptive* means and instrumentalities, e.g., providing false or misleading claims or counterfeit items, and *actual* knowledge that the deceptive representations or goods will be used to commit impersonation violations.”<sup>55</sup> Likewise, M3AAWG advocated that, in addition to a “knowledge or reason-to-know test,” primary liability under the NPRM’s proposed section 461.4 should also require that the provision of such means and instrumentalities be done willfully or in bad faith, and with clear intent and specific knowledge.<sup>56</sup>

A few commenters urged the Commission to adopt a final rule that explicitly recognizes specific or defined “means and instrumentality” violations perpetrated in connection with impersonation frauds, such as the use of legal process documents,<sup>57</sup> manipulated media technologies (i.e., deepfakes),<sup>58</sup> or failure to disclose WHOIS data.<sup>59</sup>

Two commenters expressed broad concerns with the proposed language of the means and instrumentalities prohibition in the NPRM. First, the Americans for Prosperity Foundation (“AFPF”) stated that the proposed rule, as drafted, “fails to provide regulated parties with constitutionally adequate notice of required or prohibited conduct, particularly with respect to the proposed ‘means and instrumentalities’ prohibition.”<sup>60</sup> AFPF argued that the proposed provision as proposed is untethered to the Commission’s authority under Section 5 as, in AFPF’s view, it neither required the Commission to

prove any of the elements of deception nor contained a scienter requirement.<sup>61</sup> AFPP suggested that the Commission “not only tether violations to Section 5’s text . . . , but also define with specificity the universe of prohibited conduct . . . [and] also revise the proposed rule to make clear that only conduct that a reasonable person would know is fraudulent or dishonest may be subject to civil penalties.” AFPP requested a supplemental NPRM or an additional 30 days of comment and additionally requested the Commission hold an informal public hearing to receive additional public input.<sup>62</sup> Second, William MacLeod cited concerns that the proposed rule left “unresolved questions of how the Commission would apply” the proposed means and instrumentalities provision.<sup>63</sup> Mr. MacLeod stated his belief that the rulemaking process would benefit from “an opportunity for interested parties to exchange ideas” and accordingly requested a hearing.<sup>64</sup>

#### **IV. Summary of Comments in Response to Notice of Hearing and Statements at Hearing**

On March 30, 2023, the Commission published an Initial Notice of Informal Hearing.<sup>65</sup> In response to the Notice of Informal Hearing, the Commission received 28 comments, which are publicly available on this rulemaking’s docket at <https://www.regulations.gov/docket/FTC-2023-0030/comments>, including 13 requests to make oral statements.<sup>66</sup> One comment in response to the Notice of Informal Hearing was relevant to this SNPRM, and eight commenters at the informal hearing provided testimony relevant to this SNPRM.

The American Bankers Association urged adoption of the means and instrumentalities provision without requesting any modifications.<sup>67</sup> However, the other commenters who

addressed the means and instrumentalities provision expressed concern that the proposed language in the NPRM did not explain the circumstances under which the Commission would apply that prohibition. Some suggested alternative language imposing a scienter requirement to narrow the scope of this provision.<sup>68</sup>

In addition to his request to make an oral statement at the hearing, William MacLeod expressed in his comment to the Notice of Informal Hearing his concern that the proposed means and instrumentalities prohibition in the NPRM did not include any knowledge standard and requested that the final rule “explain the definitions and limitations of [means and instrumentalities] as the Commission intends to apply it.”<sup>69</sup> In his oral testimony at the informal hearing, Mr. MacLeod reiterated his request for further clarification that “providing the means and instrumentalities doesn’t ... automatically expose everyone involved, from the actors to the ISPs to civil penalties. People unaware of a fraud should not face massive liability for it.”<sup>70</sup>

The CTA expressed strong support for the NPRM but also concern that the prohibition on providing means and instrumentalities did not “include a knowledge requirement and could be misinterpreted to impose strict liability” on unwitting third parties.<sup>71</sup>

USTelecom requested that the Commission clarify “that liability for providing the means and instrumentalities of the illegal impersonation only attaches when a person has knowledge or reason to expect it is providing such a means and instrumentalities,” so there is no confusion regarding the liability of “unknowingly unintentional conduits for impersonation fraud.”<sup>72</sup>

Neil Chilson, a senior research fellow at the Center for Growth and Opportunity at Utah State University, also requested that the prohibition against providing means and instrumentalities include a knowledge requirement for liability.<sup>73</sup>

The Voice on the Net Coalition (“VON”), an internet communication trade association, urged that the means and instrumentalities provision be modified to require knowledge before liability is imposed.<sup>74</sup> VON further asserted that the “liability standard should be based on knowledge and the lack of action to prevent fraudulent activity by upstream providers or customers.”<sup>75</sup>

NCOMPAS, which represents communications and technology companies offering broadband video and data offerings, also urged a liability standard “based on knowledge and the lack of action to prevent fraudulent activity by upstream providers for customers.”<sup>76</sup>

NCTA urged the Commission to “explicitly incorporate the fundamental elements of both actual knowledge and deception” into any final rule imposing means and instrumentalities liability.<sup>77</sup> NCTA also urged that the final rule’s application of means and instrumentalities liability only apply where “inherently deceptive means and instrumentalities” are provided.<sup>78</sup>

#### **V. Reasons for the Proposed Amendments to the Impersonation Rule**

The Commission believes the proposed amendments set out in this SNPRM will improve its ability to combat impersonation fraud and could provide significant benefits to those harmed by impersonators, while strengthening deterrence against such fraud in the first instance. Further, the Rule as amended would not impose new burdens on honest individuals or businesses.



### *A. Need for and Objectives of the Proposed Amendments to the Impersonation Rule*

The Commission's objective for proposing these amendments to the Rule is to more effectively and efficiently redress consumers harmed by impersonation schemes and to more effectively address the types of unlawful impersonation affecting consumers.

#### *1. Accessing Monetary Relief*

The Commission described in the ANPR and summarized in the NPRM how the 2021 U.S. Supreme Court decision in *AMG*<sup>79</sup> changed the legal landscape and made it significantly more difficult for the Commission to obtain monetary relief, including consumer redress.<sup>80</sup> Post-*AMG*, the Commission must rely in large part on Section 19 of the FTC Act, which provides two paths for consumer redress. On the first path, following issuance of a complaint by the Commission, agency staff must litigate the case before an Administrative Law Judge through the agency's administrative process, leading to the Commission's issuance of a Final Decision.<sup>81</sup> Following any reconsideration of the Commission's final decision and any subsequent appeal to a federal Court of Appeals, the Commission must then file a new case in federal district court and establish that the defendant engaged in fraudulent or dishonest conduct.<sup>82</sup>

With a rule in effect, the Commission may avail itself of the second, shorter, path and directly seek consumer redress through a federal court action.<sup>83</sup>

Thus, this SNPRM's proposed amendments covering impersonation of individuals<sup>84</sup> and those who with knowledge provide the means and instrumentalities to others to engage in impersonation of business, government, or individuals would allow the Commission to proceed more efficiently and effectively to protect consumers and obtain monetary relief. Because the Commission can seek civil penalties for rule violations, the proposed should

rule also should achieve better deterrence against bad actors.<sup>85</sup>

*2. Impersonation of Individuals and Other Entities Not Covered by Government and Businesses Impersonation Rule*

This SNPRM proposes to prohibit the deceptive impersonation of individuals and would address conduct that is prevalent and harmful.<sup>86</sup> Extending the Rule to cover impersonation of individuals, real or fictitious, will allow the Commission to more effectively remedy harm caused to consumers by romance scams, *e.g.*, scammers posing as individuals interested in a romantic relationship to extract money or sensitive information from consumers.<sup>87</sup> The SNPRM also would provide a way to remedy other relationship-based scams, such as grandparent scams where scammers pose as a grandchild in need of immediate financial assistance in an attempt to extract money from the consumers.<sup>88</sup>

Since issuance of the ANPR in December 2021, the FTC has received thousands to tens of thousands of complaints each quarter from consumers concerning romance scams or family and friend impersonations.<sup>89</sup> According to data from complaints submitted to the Commission, the median dollar loss of consumers targeted by romance or family and friend impersonation ranged from \$1,850 to \$2,400 and \$614 to \$800, respectively, in the quarters since publication of the ANPR.<sup>90</sup> These types of impersonation scams have a significant impact on older consumers as well. As noted in the Commission's 2021-2022 "Protecting Older Consumers" report, in 2021 the highest aggregate dollar losses reported by older adults were in the romance scam category, with a total reported loss of \$213 million.<sup>91</sup> Further, the individual losses caused by romance scams are outsized compared to other types of scams reported by older consumers, including other impersonation

scams: the reported individual dollar loss by adults age 60 and over for romance scams was \$5,100, compared to \$658 for all fraud reports by consumers in that age group.<sup>92</sup> In the Commission’s 2022-2023 “Protecting Older Consumers” report, the Commission found that “[r]eported losses to romance scams by older adults increased 13%, topping the record levels seen in 2021.”<sup>93</sup>

The revisions regarding impersonation of individuals proposed in this SNPRM will allow the Commission to more effectively redress and protect consumers targeted by impersonation scams. Further, the SNPRM is designed to deter the perpetrators of such scams by exposing them to greater and more immediate monetary liability, including civil penalties.

### *3. Means and Instrumentalities*

The SNPRM’s proposed means and instrumentalities provision<sup>94</sup> would allow the Commission to more fully provide redress for those consumers who have been targeted by any impersonation scam where a party knew or had reason to know that the goods and services they provided will be used for the purpose of impersonations in violation of the Rule. The Commission took into consideration those comments in response to the NPRM that urged the proposed means and instrumentalities provision be revised to include a knowledge component and clarify the scope of the provision. Accordingly, this SNPRM proposes § 461.5, “Provision of Goods or Services for Unlawful Impersonation Prohibited,” to clarify that “means and instrumentalities” liability attaches where a party provides goods and services used in impersonation in violation of the Impersonation Rule, and where that party has knowledge or reason to know that the goods or services the party provides will be used in impersonations of the kind that are themselves unlawful

under the Rule.<sup>95</sup>

As with other Rule provisions this SNPRM's proposed § 461.5 is designed to deter the perpetrators of such scams by exposing them to greater and more immediate monetary liability, including civil penalties.<sup>96</sup>

*B. Overview and Scope of Proposed Amendments to the Impersonation Rule*

The Commission proposes four revisions to the Impersonation Rule in this SNPRM. Each proposed revision will be discussed in order. First, because amendment of the Rule as proposed by the SNPRM would prohibit impersonation of individuals as well as businesses and government, the SNPRM proposes to change the title of the Rule to read "Rule on Impersonation of Government, Businesses, and Individuals."

Second, this SNPRM proposes to add a definition of "Individual" in § 461.1 to mean "a person, entity, or party, whether real or fictitious, other than those that constitute a business or government under this Part." The Commission proposes this definition of "individual" to make clear the type of impersonation that is prohibited by § 461.4.

Third, proposed § 461.4, "Impersonation of Individuals Prohibited," prohibits the impersonation of individuals in connection with commerce, as commerce is defined in the Federal Trade Commission Act (15 U.S.C. 44). This provision mirrors the existing prohibitions in §§ 461.2 and 461.3, prohibiting impersonation of government and businesses, respectively. Those provisions themselves borrowed from existing rules and statutory definitions.<sup>97</sup> As detailed in Section V.A.2. of this document, consumer complaints and the Commission's experience, as well as the comments and other evidence cited herein, are replete with examples of impersonation of individuals. The proposed prohibition in § 461.4 would cover unlawful conduct by persons who

misrepresent that they are or are affiliated with an individual, as defined in § 461.1, including but not limited to: (1) calling, messaging, or otherwise contacting a person or entity while posing as an individual or affiliate thereof, including by identifying an individual by name or by implication; (2) sending physical mail through any carrier using addresses, identifying information, or insignia or likeness of an individual; (3) creating a website or other electronic service or social media account impersonating the name, identifying information, or insignia or likeness of an individual; (4) creating or spoofing an e-mail address using the name of an individual; (5) placing advertisements, including dating profiles or personal advertisements, that pose as an individual or affiliate of an individual; and (6) using an individual's identifying information, including likeness or insignia, on a letterhead, website, e-mail, or other physical or digital place.<sup>98</sup>

Fourth, proposed § 461.5, "Provision of Goods or Services for Unlawful Impersonation Prohibited," makes it unlawful to provide goods or services with knowledge or reason to know that those goods or services will be used in impersonations of the kind that are themselves unlawful under the Rule. The NPRM proposed a similar provision, which referred to "means and instrumentalities," but lacked a requirement to prove "knowledge or reason to know." This SNPRM proposes modified language based on comments to the ANPR, NPRM, the informal hearing and the Commission's experience, which support the addition of the above-mentioned knowledge requirement.

As described in Section III.B., above, many commenters expressed concern or requested modification of the means and instrumentalities provision proposed in the NPRM. Some supportive commenters stated that the provision could be read too broadly.<sup>99</sup> Other commenters argued that without a scienter or knowledge requirement, the proposed rule

provision runs the risk of imposing strict liability against innocent and unwitting third-party providers.<sup>100</sup> Accordingly, several commenters urged the Commission to clarify the scope of means and instrumentalities liability or explicitly include a knowledge requirement in the final rule provision.<sup>101</sup>

The Commission has carefully considered the comments and all concerns and proposals expressed in them. As noted in the NPRM, some commenters suggested that the Commission impose liability on a broader set of actors, namely those who assist and facilitate violations.<sup>102</sup> The Telemarketing Sales Rule (“TSR”) imposed assisting-and-facilitating liability, a form of indirect liability authorized by the TSR’s authorizing statute.<sup>103</sup> Sections 5 and 18 of the FTC Act, which authorize this Rule, contain no such authorizing language.

However, a long line of case law describes a form of direct liability for a party who, despite not having direct contact with the injured consumers, “passes on a false or misleading representation with knowledge or reason to expect that consumers may possibly be deceived as a result.”<sup>104</sup> In other words: “One who places in the hands of another a means of consummating a fraud or competing unfairly in violation of the Federal Trade Commission Act is himself guilty of a violation of the Act.”<sup>105</sup>

Accordingly, the Commission proposes, in § 461.5, expressly to impose liability on those who provide goods or services with knowledge or reason to know that those goods or services will be used in impersonations of the kind that are themselves unlawful under the Rule.

### *C. The Rulemaking Process*

The Commission can decide to finalize this supplemental proposed rule if the rulemaking

record, including the public comments in response to this SNPRM, supports such a conclusion. The Commission may, either on its own initiative or in response to a commenter's request, engage in additional processes, which are described in 16 CFR 1.12 and 1.13. If the Commission on its own initiative decides to conduct an informal hearing, or if a commenter files an adequate request for such a hearing, then a separate notice will issue under 16 CFR 1.12(a). Based on the comment record and existing prohibitions against impersonation of government and businesses under Section 5 of the FTC Act, the Commission does not here identify any disputed issues of material fact necessary to be resolved at an informal hearing. The Commission may still do so later, on its own initiative or in response to a persuasive showing from a commenter, *i.e.*, in response to data or other evidence demonstrating that there is a genuine, bona fide dispute over material facts that will affect the outcome of the proceeding.<sup>106</sup>

## **VI. Paperwork Reduction Act**

In addition to the requirements of Section 22, the Commission must provide in any NPRM the “information required by the Regulatory Flexibility Act, 5 U.S.C. 601–612, and the Paperwork Reduction Act, 44 U.S.C. 3501–3520, if applicable.” 16 CFR 1.11(c)(4).

The Paperwork Reduction Act requires the Commission to engage in additional processes and analysis if it proposes to engage in a “collection of information” as part of the proposed rule. 44 U.S.C. 3506. The Commission states that this SNPRM contains no collection of information.

## **VII. Preliminary Regulatory Analysis**

Under Section 22 of the FTC Act, the Commission, when it publishes any NPRM, must

include a “preliminary regulatory analysis.” 15 U.S.C. 57b-3(b)(1). The required contents of a preliminary regulatory analysis are (1) “a concise statement of the need for, and the objectives of, the proposed rule,” (2) “a description of any reasonable alternatives to the proposed rule which may accomplish the stated objective,” and (3) “a preliminary analysis of the projected benefits and any adverse economic effects and any other effects” for the proposed rule and each alternative, along with an analysis “of the effectiveness of the proposed rule and each alternative in meeting the stated objectives of the proposed rule.” 15 U.S.C. 57b-3(b)(1)(A)–(C). This SNPRM already provided the concise statement of the need for, and the objectives of, this proposal in Item V.A above. It addresses the other requirements below.

*A. Reasonable Alternatives and Anticipated Costs*

The Commission believes that the benefits of proceeding with these proposals will significantly outweigh the costs, but it welcomes public comment and data (both qualitative and quantitative) on any benefits and costs to inform a final regulatory analysis. Critical to the Commission’s analysis is that these proposed amendments to the Rule would allow for monetary relief to victims of impersonations of individuals and also for the imposition of civil penalties against violators. Such results will provide benefits to consumers, as well as to the agency and its mission, without imposing any costs on consumers. It is difficult to quantify with precision all the benefits that would arise from amending the Impersonation Rule to include a prohibition on impersonation of individuals, but they can be described qualitatively.

Consumers have reported 152,696 instances of family and friend impersonation and associated total losses of approximately \$339 million from 2019 through 2023.<sup>107</sup> For



romance scams, from 2019 through 2023, consumers reported being defrauded of roughly \$4.978 billion in 307,370 incidents.<sup>108</sup> In 2022, older adults reported a 13% increase in losses to romance scammers, surpassing the record losses reported in 2021.<sup>109</sup> Adopting the proposed amendments may make some of the losses experienced by future victims recoverable through consumer redress and also allow for the imposition of civil penalties.<sup>110</sup>

While providing the means and instrumentalities for such scams is already illegal under Section 5, civil penalties cannot be imposed without the proposed amendments. Adopting the proposed amendments may also have a deterrence effect on impersonation scams and those providing the means and instrumentalities for such scams. Deterring plainly illegal conduct is challenging. Scholarship on deterrence suggests that the potential severity of consequences, such as civil penalties, is less likely to influence behavior than the perceived likelihood of detection and punishment.<sup>111</sup> Still, a rule that makes it less likely that impersonators and those providing the means and instrumentalities for such scams get to keep their ill-gotten gains and more likely that they have to pay civil penalties can have deterrence effects, whatever their magnitude. And the publicity around any eventual amendments to the Rule could have the salutary effect of complementing the Commission's consumer education work by elevating public awareness of these prevalent forms of fraud, which could increase how often they are detected and reported.

#### *B. Regulatory Flexibility Act—Initial Regulatory Flexibility Analysis*

The Regulatory Flexibility Act requires the Commission to prepare and make available for public comment an “initial regulatory flexibility analysis” (“IRFA”) in connection with any NPRM. 5 U.S.C. 603. An IRFA requires many of the same components as

Section 22 of the FTC Act and the Paperwork Reduction Act. The IRFA must furthermore contain, among other things, “a description of and, where feasible, an estimate of the number of small entities to which the proposed rule will apply.” 5 U.S.C. 603(b)(3). This and other requirements do not apply, however, whenever “the agency certifies that the rule will not, if promulgated, have a significant economic impact on a substantial number of small entities.” 5 U.S.C. 605(b).

The Commission certifies that the SNPRM will not have a significant economic impact on a substantial number of honest, small entities, and this document serves as notice to the Small Business Administration of the Commission’s certification. Because the deceptive impersonation of individuals is already prohibited by Section 5 of the FTC Act, and Section 5 similarly makes unlawful providing the means and instrumentalities for a violation of Section 5 of the Act, the SNPRM would not change the state of the law in terms of what is legal and what is illegal. Furthermore, the proposed amendments to the Rule would impose no recordkeeping requirement and would not create or impose any compliance costs. The main changes arise for entities violating Section 5 through the impersonation of individuals and by providing the means and instrumentalities for impersonations that would be unlawful under the Rule if this SNPRM is finalized as drafted. Adoption of the proposed amendments to the Rule would make such conduct a Rule violation in addition to being a Section 5 violation. Such violators would no longer be immune from civil penalties for a first offence and could be ordered by a federal court to pay significant civil penalties and to provide redress to their victims. Adoption of the proposed amendments could, therefore, constitute a significant economic impact for law violators, but it is unlikely to affect a substantial number of small entities or individuals

otherwise not engaging in conduct prohibited by Section 5 or the SNPRM. The Commission believes that the vast majority of small entities and individuals do not deceptively impersonate individuals or knowingly provide goods and services used in impersonating government, businesses, or individuals in a manner that would be unlawful under the provisions set out in this SNPRM. Furthermore, the Commission does not consider those small entities that are violating existing law to be among those Congress protected in enacting the additional procedural protections for small entities when agencies consider rulemaking.

### **VIII. Request for Comments**

Members of the public are invited to comment on any issues or concerns they believe are relevant or appropriate to the Commission's consideration of the SNPRM. The Commission requests that factual data or other evidence on which the comments are based be submitted with the comments, particularly if a commenter intends to dispute an issue of fact material to this rulemaking.<sup>112</sup> In addition to the issues raised above, the Commission solicits public comment on the specific questions identified below. These questions are designed to assist the public and should not be construed as a limitation on the issues on which public comment may be submitted.

#### **Questions**

- (1) Should the Commission amend the Impersonation Rule to include a prohibition of impersonation of individuals? Why or why not?
- (2) Please provide comment, including relevant data, statistics, consumer complaint information, or any other evidence, on proposed §§ 461.4 and 461.5. Regarding each provision, please include answers to the following questions:

- (a) How prevalent is the act or practice the provision seeks to address?
- (b) What is the provision's impact (including any benefits and costs), if any, on consumers, governments, and businesses, both those existing and those yet to be started?
- (c) What alternative proposals should the Commission consider?
- (3) Does the Rule, if amended as proposed by the SNPRM, contain a collection of information?
- (4) Would the Rule, if amended as proposed by the SNPRM, have a significant economic impact on a substantial number of small entities? If so, how could it be modified to avoid a significant economic impact on a substantial number of small entities?
- (5) The SNPRM proposes including in the amended Impersonation Rule a two-part prohibition against impersonation of individuals in § 461.4. Is this prohibition clear and understandable? Is it ambiguous in any way? How if at all should it be improved?
- (6) For purposes of prohibiting impersonation of individuals, should the Commission define "individual" to mean "a person, entity, or party, whether real or fictitious, other than those that constitute a business or government under this part"? Is this definition clear and understandable? Is it ambiguous in any way? How if at all should it be improved?
- (7) The SNPRM proposes including in the amended Impersonation Rule a two-part prohibition in § 461.5 against providing goods or services with knowledge or reason to know that those 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). Should the Rule be revised to contain this prohibition against providing goods or services with knowledge or reason to know that those goods or services will be used to unlawfully impersonate a government, business, or individual? Why or why not? Is the standard “know or have reason to know,” which reflects current law, sufficiently clear and understandable? Is it ambiguous in any way? How, if at all, should it be improved?

## **IX. Comment Submissions**

You can file a comment online or on paper. For the Commission to consider your comment, we must receive it on or before [INSERT DATE 60 DAYS AFTER DATE OF PUBLICATION IN THE *FEDERAL REGISTER*]. Write “Impersonation NPRM, R207000” on your comment. Your comment—including your name and your state—will be placed on the public record of this proceeding, including, to the extent practicable, on the website <https://www.regulations.gov>.

Because of the agency’s heightened security screening, postal mail addressed to the Commission will be subject to delay. We strongly encourage you to submit your comments online through the <https://www.regulations.gov> website. To ensure that the Commission considers your online comment, please follow the instructions on the web-based form.

If you file your comment on paper, write “Impersonation SNPRM, R207000” on your comment and on the envelope, and mail your comment to the following address: Federal Trade Commission, Office of the Secretary, 600 Pennsylvania Avenue NW, Suite

CC-5610 (Annex I), Washington, DC 20580. If possible, please submit your paper comment to the Commission by overnight service.

Because your comment will be placed on the public record, you are solely responsible for making sure that your comment does not include any sensitive or confidential information. In particular, your comment should not contain sensitive personal information, such as your or anyone else's Social Security number; date of birth; driver's license number or other state identification number or foreign country equivalent; passport number; financial account number; or credit or debit card number. You are also solely responsible for making sure your comment does not include any sensitive health information, such as medical records or other individually identifiable health information. In addition, your comment should not include any "[t]rade secret or any commercial or financial information which . . . is privileged or confidential"—as provided in Section 6(f) of the FTC Act, 15 U.S.C. 46(f), and FTC Rule 4.10(a)(2), 16 CFR 4.10(a)(2)—including, in particular, competitively sensitive information such as costs, sales statistics, inventories, formulas, patterns, devices, manufacturing processes, or customer names.

Comments containing material for which confidential treatment is requested must be filed in paper form, must be clearly labeled "Confidential," and must comply with FTC Rule 4.9(c), 16 CFR 4.9(c). In particular, the written request for confidential treatment that accompanies the comment must include the factual and legal basis for the request and must identify the specific portions of the comment to be withheld from the public record. *See* FTC Rule 4.9(c). Your comment will be kept confidential only if the General Counsel grants your request in accordance with the law and the public interest.

Once your comment has been posted publicly at <https://www.regulations.gov>—as legally required by FTC Rule 4.9(b), 16 CFR 4.9(b)—we cannot redact or remove your comment, unless you submit a confidentiality request that meets the requirements for such treatment under FTC Rule 4.9(c), and the General Counsel grants that request.

Visit the FTC website to read this document and the news release describing it, and visit <https://www.regulations.gov/docket/FTC-2023-00XX> to read a plain-language summary of the proposed rule. The FTC Act and other laws that the Commission administers permit the collection of public comments to consider and use in this proceeding as appropriate. The Commission will consider all timely and responsive public comments it receives on or before [INSERT DATE 60 DAYS AFTER DATE OF PUBLICATION IN THE *FEDERAL REGISTER*]. For information on the Commission’s privacy policy, including routine uses permitted by the Privacy Act, see <https://www.ftc.gov/site-information/privacy-policy>.

#### **X. Communications by Outside Parties to the Commissioners or Their Advisors**

Under Commission Rule 1.18(c)(1), 16 CFR 1.18(c)(1), the Commission has determined that communications with respect to the merits of this proceeding from any outside party to any Commissioner or Commissioner advisor will be subject to the following treatment: written communications and summaries or transcripts of all oral communications must be placed on the rulemaking record. Unless the outside party making an oral communication is a member of Congress, communications received after the close of the public-comment period are permitted only if advance notice is published in the Weekly Calendar and Notice of “Sunshine” Meetings.

#### **XI. List of Subjects in 16 CFR Part 461**

Consumer protection, Impersonation, Trade Practices.

## **XII. Proposed Amendments to Impersonation Rule, 16 CFR Part 461**

For the reasons set forth in the preamble, the Federal Trade Commission proposes to amend part 461 of 16 CFR Chapter I as follows:

### **Part 461—Rule on Impersonation of Government, Businesses, and Individuals**

1. The authority citation for part 461 continues to read as follows:

Authority: 15 U.S.C. 41-58.

2. Revise the heading of part 461 to read as set forth above.

3. In § 461.1, add the definition of “individual” in alphabetical order to read as follows:

#### **§ 461.1 Definitions.**

\* \* \* \* \*

*Individual* means a person, entity, or party, whether real or fictitious, other than those that constitute a business or government under this Part.

\* \* \* \* \*

4. Add § 461.4 to read as follows:

#### **§ 461.4 Impersonation of Individuals Prohibited.**

It is a violation of this part, and an unfair or deceptive act or practice to:

- (a) materially and falsely pose as, directly or by implication, 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, an individual, in or affecting commerce as commerce is defined in the Federal Trade Commission Act (15 U.S.C. 44).



5. Add § 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 goods or services with knowledge or reason to know that those 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).

By direction of the Commission.

**April J. Tabor,**

*Secretary.*

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<sup>1</sup> Fed. Trade Comm'n, ANPR: Trade Regulation Rule on Impersonation of Gov't and Businesses, 86 FR 72901 (Dec. 23, 2021) ("ANPR"), <https://www.federalregister.gov/documents/2021/12/23/2021-27731/trade-regulation-rule-on-impersonation-of-government-and-businesses>.

<sup>2</sup> Fed. Trade Comm'n, Notice of Proposed Rulemaking: Trade Regulation Rule on Impersonation of Government and Businesses, 87 FR 62741 (Oct. 17, 2022) ("NPRM"), <https://www.federalregister.gov/documents/2022/10/17/2022-21289/trade-regulation-rule-on-impersonation-of-government-and-businesses>.

<sup>3</sup> Fed. Trade Comm'n, Initial notice of informal hearing; final notice of informal hearing; request for public comment and speakers, 88 FR 19024 (Mar. 30, 2023), <https://www.federalregister.gov/documents/2023/03/30/2023-06537/trade-regulation-rule-on-impersonation-of-government-and-businesses> ("Informal Hearing Notice").

<sup>4</sup> A copy of the transcript of the May 4, 2023 Informal Hearing is available at [https://www.ftc.gov/system/files/ftc\\_gov/pdf/impersonationruleinformalhearingtranscript.pdf](https://www.ftc.gov/system/files/ftc_gov/pdf/impersonationruleinformalhearingtranscript.pdf). References to the transcript from the May 4, 2023 Informal Hearing are cited herein as: Name of commenter, May 2023 Tr at page no. (e.g., Doe, May 2023 Tr at #). A copy of the transcript of the Informal Hearing and the

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comments submitted in response to this hearing can be found at: <https://www.regulations.gov/docket/FTC-2023-0030/document>.

<sup>5</sup> See Section III.D. of the SBP of the Impersonation Rule published elsewhere in this edition of the *Federal Register*; NPRM, 87 FR at 62750.

<sup>6</sup> See <https://www.regulations.gov/docket/FTC-2023-0030/comments>.

<sup>7</sup> ANPR, 86 FR 72901.

<sup>8</sup> *Id.* at 72904.

<sup>9</sup> While the docket lists 169 comments, four of these were submitted by AVIXA, Inc. (“Audio Visual and Integrated Experience Association,” collectively “AVIXA ANPR Cmts.”) and two by the National Association of Attorneys General (“NAAG,” collectively “NAAG ANPR Cmts.”), accounting for four total duplicates, while one comment was untimely filed eight months after the close of comments and only said “no.” See AVIXA ANPR Cmts., <https://www.regulations.gov/comment/FTC-2021-0077-0089>, <https://www.regulations.gov/comment/FTC-2021-0077-0085>, <https://www.regulations.gov/comment/FTC-2021-0077-0126>, <https://www.regulations.gov/comment/FTC-2021-0077-0128>; NAAG ANPR Cmts., <https://www.regulations.gov/comment/FTC-2021-0077-0152>, <https://www.regulations.gov/comment/FTC-2021-0077-0164>; Lucy Chen, Cmt. on ANPR (Oct. 21, 2022), <https://www.regulations.gov/comment/FTC-2021-0077-0171>.

<sup>10</sup> See Pub’rs Clearing House, Cmt. on ANPR (Feb. 8, 2022), <https://www.regulations.gov/comment/FTC-2021-0077-0008>; YouMail Inc., Cmt. on ANPR (Feb. 22, 2022), <https://www.regulations.gov/comment/FTC-2021-0077-0148>; WMC Global, Cmt. on ANPR (Feb. 22, 2022), <https://www.regulations.gov/comment/FTC-2021-0077-0154> (“WMC ANPR Cmt.”); DIRECTV, LLC, Cmt. on ANPR (Feb. 23, 2022), <https://www.regulations.gov/comment/FTC-2021-0077-0167>; Somos, Inc., Cmt. on ANPR (Feb. 23, 2022), <https://www.regulations.gov/comment/FTC-2021-0077-0162> (“Somos ANPR Cmt.”); Microsoft Corp., Cmt. on ANPR (Feb. 22, 2022), <https://www.regulations.gov/comment/FTC-2021-0077-0135> (“Microsoft ANPR Cmt.”); Apple, Inc., Cmt. on ANPR (Feb. 23, 2022), <https://www.regulations.gov/comment/FTC-2021-0077-0159> (“Apple ANPR Cmt.”); Cotney Attorneys & Consultants, Cmt. on ANPR (Feb. 22, 2022), <https://www.regulations.gov/comment/FTC-2021-0077-0140>; Erik M. Pelton & Associates, Consultants, Cmt. on ANPR (Feb. 22, 2022), <https://www.regulations.gov/comment/FTC-2021-0077-0156> (“Pelton ANPR Cmt.”); Informa PLC, Cmt. on ANPR (Feb. 22, 2022), <https://www.regulations.gov/comment/FTC-2021-0077-0166>.

<sup>11</sup> See Exhibitions & Conferences Alliances, Cmt. on ANPR (Feb. 15, 2022), <https://www.regulations.gov/comment/FTC-2021-0077-0009>; AVIXA, Inc., Cmt. on ANPR (Feb. 17, 2022), <https://www.regulations.gov/comment/FTC-2021-0077-0085> (“AVIXA ANPR Cmt.”); Experiential Designers & Producers Association, Cmt. on ANPR (Feb. 16, 2022), <https://www.regulations.gov/comment/FTC-2021-0077-0073>; Association of Equipment Manufacturers, Cmt. on ANPR (Feb. 23, 2022), <https://www.regulations.gov/comment/FTC-2021-0077-0168>; The American Apparel & Footwear Association, Cmt. on ANPR (Feb. 22, 2022), <https://www.regulations.gov/comment/FTC-2021-0077-0141>; NCTA – The Internet & Television Association, Cmt. on ANPR (Feb. 23, 2022), <https://www.regulations.gov/comment/FTC-2021-0077-0169>; USTelecom, Cmt. on ANPR (Feb. 23, 2022), <https://www.regulations.gov/comment/FTC-2021-0077-0160> (“USTelecom ANPR Cmt.”); International Housewares Association, Cmt. on ANPR (Feb. 22, 2022), <https://www.regulations.gov/comment/FTC-2021-0077-0144>; National Association of Broadcasters, Cmt. on ANPR (Feb. 22, 2022), <https://www.regulations.gov/comment/FTC-2021-0077-0146>; CTIA, Cmt. on ANPR (Feb. 23, 2022), <https://www.regulations.gov/comment/FTC-2021-0077-0161>; Consumer Tech. Ass’n, Cmt. on ANPR (Feb. 17, 2022), <https://www.regulations.gov/comment/FTC-2021-0077-0091>.

<sup>12</sup> See Broward Cnty., Fla., Cmt. on ANPR (Feb. 16, 2022), <https://www.regulations.gov/comment/FTC-2021-0077-0075>; NAAG, Cmt. on ANPR (Feb. 23, 2022), <https://www.regulations.gov/comment/FTC-2021-0077-0164> (“NAAG ANPR Cmt.”); Nat’l Ass’n of State Charity Officials (“NASCO”), Cmt. on ANPR, at 1 (Feb. 22, 2022), <https://www.regulations.gov/comment/FTC-2021-0077-0165>.

<sup>13</sup> NAAG ANPR Cmt. at 8.

<sup>14</sup> WMC ANPR Cmt. at 4.

<sup>15</sup> WMC ANPR Cmt. at 4.

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- <sup>16</sup> See Barbara Lay Cmt. on ANPR (Feb. 18, 2022), <https://www.regulations.gov/comment/FTC-2021-0077-0109>.
- <sup>17</sup> See Mai Huynh Cmt. on ANPR (Feb. 22, 2022), <https://www.regulations.gov/comment/FTC-2021-0077-0155>.
- <sup>18</sup> NAAG ANPR Cmt. at 8.
- <sup>19</sup> *Id.* at 10.
- <sup>20</sup> Apple ANPR Cmt.
- <sup>21</sup> Gray markets “allow consumers to sell physical and digital goods at a discounted price. Impersonators who have obtained stolen gift card funds utilize gray markets to sell items purchased with those funds to other consumers who may be unaware of the fraudulent source of the items they are purchasing.” *Id.*
- <sup>22</sup> *See id.*
- <sup>23</sup> *Id.*
- <sup>24</sup> Microsoft ANPR Cmt. at 6.
- <sup>25</sup> *See id.*
- <sup>26</sup> *See* Pelton ANPR Cmt. at 6-7.
- <sup>27</sup> *Id.* at 6-7.
- <sup>28</sup> USTelecom ANPR Cmt. at 3-4.
- <sup>29</sup> Somos ANPR Cmt. at 3, 5.
- <sup>30</sup> NPRM, 87 FR 62741.
- <sup>31</sup> *See id.* at 62741-42.
- <sup>32</sup> *Id.* at 62750.
- <sup>33</sup> Fed. Trade Comm’n, Trade Regulation Rule on Impersonation of Government and Businesses, <https://www.regulations.gov/docket/FTC-2022-0064/comments>.
- <sup>34</sup> Suhkvir Singh/Rutgers Law School Students, Cmt. on NPRM at 1 (Nov. 22, 2022), <https://www.regulations.gov/comment/FTC-2022-0064-0019> (internal citation omitted).
- <sup>35</sup> AIM, the European Brands Association, Cmt. on NPRM (Dec. 13, 2022), <https://www.regulations.gov/comment/FTC-2022-0064-0041> (“AIM NPRM Cmt.”); Recording Industry Association of America, Cmt. on NPRM (Dec. 16, 2022), <https://www.regulations.gov/comment/FTC-2022-0064-0064> (“RIAA NPRM Cmt.”).
- <sup>36</sup> AARP, Cmt. on NPRM at 2 (Dec. 14, 2022), <https://www.regulations.gov/comment/FTC-2022-0064-0043>.
- <sup>37</sup> *Id.* at 2.
- <sup>38</sup> Electronic Privacy Information Center, National Consumer Law Center, National Consumers League, Consumer Action, Consumer Federation of America, National Association of Consumer Advocates, and U.S. PIRG, Cmt. on NPRM at 5 (Dec. 16, 2022), <https://www.regulations.gov/comment/FTC-2022-0064-0070> (“EPIC NPRM Cmt.”).
- <sup>39</sup> *Id.* at iv-v.
- <sup>40</sup> NCTA - The Internet and Television Association, Cmt. on NPRM at 8 (Dec. 16, 2022), <https://www.regulations.gov/comment/FTC-2022-0064-0071> (“NCTA NPRM Cmt.”).
- <sup>41</sup> *See* 87 FR 62750; *see also* United States Patent and Trademark Office, Cmt. on NPRM (Dec. 2, 2022), <https://www.regulations.gov/comment/FTC-2022-0064-0026> (“USPTO NPRM Cmt.”); Anonymous, Cmt. on NPRM (Dec. 9, 2022), <https://www.regulations.gov/comment/FTC-2022-0064-0033> (“0033 NPRM Cmt.”); AIM NPRM Cmt.; Erik M. Pelton & Associates, PLLC, Cmt. on NPRM (Dec. 14, 2022), <https://www.regulations.gov/comment/FTC-2022-0064-0045> (“Pelton NPRM Cmt.”); NetChoice, Cmt. on NPRM (Dec. 15, 2022), <https://www.regulations.gov/comment/FTC-2022-0064-0053> (“NetChoice NPRM Cmt.”); Messaging, Malware and Mobile Anti-Abuse Working Group, Cmt. on NPRM (Dec. 15, 2022) <https://www.regulations.gov/comment/FTC-2022-0064-0051> (M3AAWG NPRM Cmt.); Consumer Technology Association, Cmt. on NPRM (Dec. 16, 2022) <https://www.regulations.gov/comment/FTC-2022-0064-0063> (“CTA NPRM Cmt.”); NCTA NPRM Cmt.; American Society of Association Executives, Cmt. on NPRM (Dec. 16, 2022), <https://www.regulations.gov/comment/FTC-2022-0064-0057> (“ASAE NPRM Cmt.”); International Trademark Association, Cmt. on NPRM (Dec. 15, 2022) <https://www.regulations.gov/comment/FTC-2022-0064-0054> (“INTA NPRM Cmt.”); Somos NPRM Cmt.; CTIA, Cmt. on NPRM (Dec. 16, 2022) <https://www.regulations.gov/comment/FTC-2022-0064-0066> (“CTIA NPRM Cmt.”); U.S. Copyright Office, Cmt. on NPRM (Dec. 16, 2022)

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<https://www.regulations.gov/comment/FTC-2022-0064-0067> (“USCO NPRM Cmt.”); USTelecom – The Broadband Association, Cmt. on NPRM (Dec. 16, 2022) <https://www.regulations.gov/comment/FTC-2022-0064-0067> (“USTelecom NPRM Cmt.”); Exhibitions & Conference Alliance, Cmt. on NPRM (Dec. 16, 2022) <https://www.regulations.gov/comment/FTC-2022-0064-0060> (“ECA NPRM Cmt.”); RIAA NPRM Cmt.; American Bar Association Intellectual Property Law Section, Cmt. on NPRM (Dec. 16, 2022) <https://www.regulations.gov/comment/FTC-2022-0064-0061> (“ABA-IPL NPRM Cmt.”); Americans for Prosperity Foundation, Cmt. on NPRM (Dec. 16, 2022) <https://www.regulations.gov/comment/FTC-2022-0064-0062> (“AFPF NPRM Cmt.”); ZoomInfo Technologies LLC, Cmt. on NPRM (Dec. 16, 2022) <https://www.regulations.gov/comment/FTC-2022-0064-0079> (“Zoom NPRM Cmt.”); American Bankers Association, Cmt. on NPRM (Dec. 16, 2022) <https://www.regulations.gov/comment/FTC-2022-0064-0080>; Coalition for Online Accountability, Cmt. on NPRM (Dec. 16, 2022) <https://www.regulations.gov/comment/FTC-2022-0064-0074> (“COA NPRM Cmt.”); William MacLeod, Cmt. on NPRM (Dec. 16, 2022) <https://www.regulations.gov/comment/FTC-2022-0064-0078> (“MacLeod NPRM Cmt.”); Cindy Brown et. al, Cmt. on NPRM (Dec. 16, 2022) <https://www.regulations.gov/comment/FTC-2022-0064-0077> (“Brown NPRM Cmt.”).

<sup>42</sup> USPTO NPRM Cmt. at 10; USCO NPRM Cmt. at 8; RIAA NPRM Cmt. at 3.

<sup>43</sup> USPTO NPRM Cmt. at 10; USCO NPRM Cmt. at 8; RIAA NPRM Cmt. at 3.

<sup>44</sup> 0033 NPRM Cmt.; ABA-IPL NPRM Cmt. at 2; Zoom NPRM Cmt. at 1.

<sup>45</sup> ABA-IPL NPRM Cmt. at 1-2; NetChoice NPRM Cmt. at 2; USTelecom NPRM Cmt. at 2.

<sup>46</sup> NetChoice NPRM Cmt. at 2; CTA NPRM Cmt.; ASAE NPRM Cmt. at 1; INTA NPRM Cmt.; Somos NPRM Cmt.; CTIA NPRM Cmt. at 7; USTelecom NPRM Cmt. at 2; ECA NPRM Cmt. at 3; ABA-IPL NPRM Cmt. at 3; Zoom NPRM Cmt. at 2; ABA NPRM Cmt. at 3.

<sup>47</sup> CTA NPRM Cmt. at 7.

<sup>48</sup> *Id.*; *see also* ASAE NPRM Cmt.

<sup>49</sup> Somos NPRM Cmt. at 2.

<sup>50</sup> USTelecom NPRM Cmt. at 2.

<sup>51</sup> USTelecom NPRM Cmt. at 2.

<sup>52</sup> Pelton NPRM Cmt. at 3 (emphasis in original).

<sup>53</sup> ABA-IPL NPRM Cmt. at 3.

<sup>54</sup> CTIA NPRM Cmt. at 7.

<sup>55</sup> NCTA NPRM Cmt. at 2.

<sup>56</sup> M3AAWG NPRM Cmt. at 10.

<sup>57</sup> Brown NPRM Cmt. at 8.

<sup>58</sup> M3AAWG NPRM Cmt. at 3.

<sup>59</sup> COA NPRM Cmt. at 3; M3AAWG NPRM Cmt. at 4-5. “WHOIS data” is a commonly used Internet record listing that identifies who owns a domain and how to contact them.

<sup>60</sup> AFPF NPRM Cmt. at 2.

<sup>61</sup> AFPF NPRM Cmt. at 5-6.

<sup>62</sup> *Id.* at 8.

<sup>63</sup> MacLeod NPRM Cmt. at 2.

<sup>64</sup> *Id.*

<sup>65</sup> Informal Hearing Notice, 88 FR 19024.

<sup>66</sup> Because this informal hearing was the first held in several decades, the Commission allowed interested parties to request the opportunity to make an oral comment in response to the Notice of Informal Hearing as well as the NPRM. However, the Commission noted that in the future it may limit oral statements to those who requested to make an oral statement in response to the NPRM, as provided for in the Rules of Practice. *Id.* at 19025 n.24.

<sup>67</sup> American Bankers Association, May 2023 Tr at 39-40.

<sup>68</sup> *See* CTA, May 2023 Tr at 16; MacLeod, May 2023 Tr at 27; USTelecom, May 2023 Tr at 30; Chilson, May 2023 Tr at 34; VON, May 2023 Tr at 36; INCOMPAS, May 2023 Tr at 42, 44; NCTA, May 2023 Tr at 51-52.

<sup>69</sup> William MacLeod, Cmt. on Informal Hearing Notice at 7 (Apr. 14, 2023) <https://www.regulations.gov/comment/FTC-2023-0030-0019>.

<sup>70</sup> MacLeod, May 2023 Tr at 27.

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<sup>71</sup> CTA, May 2023 Tr at 16.

<sup>72</sup> USTelecom, May 2023 Tr at 30.

<sup>73</sup> Chilson, May 2023 Tr at 34.

<sup>74</sup> Voice on the Net Coalition, May 2023 Tr at 36.

<sup>75</sup> *Id.* at 36.

<sup>76</sup> INCOMPAS, May 2023 Tr at 42, 44.

<sup>77</sup> NCTA, The Internet & Television Assoc., May 2023 Tr at 51.

<sup>78</sup> *Id.* at 51-52.

<sup>79</sup> *See AMG Cap. Mgmt., LLC v. FTC*, 141 S. Ct. 1341, 1352 (2021).

<sup>80</sup> *See* ANPR, 78 FR at 72902 & n.24 (discussing *AMG Cap. Mgmt.*); NPRM, 87 FR at 62746.

<sup>81</sup> In July 2023 the Commission amended its rules of practice for adjudicative proceedings. *See* 88 FR 42872 (July 5, 2023). Following those amendments, administrative law judges presiding over an administrative hearing issue a recommended decision, rather than an initial decision as previously issued. *Id.* at 42873. The Commission then automatically reviews the decision and either affirms in full or rejects, in whole or in part, and issues its own decision, which is final. *Id.* These rule changes do not impact the requirements under Section 19.

<sup>82</sup> *See* 15 U.S.C. 57b(a)(2) (“If the Commission satisfies the court that the act or practice to which the cease and desist order relates is one which a reasonable man would have known under the circumstances was dishonest or fraudulent, the court may grant relief.”).

<sup>83</sup> *Compare* 15 U.S.C. 57b(a)(1) (rule violations), *with id.* 57b(a)(2) (Section 5 violations).

<sup>84</sup> As noted in the NPRM, the Commission’s Telemarketing Sales Rule, Mortgage Assistance Relief Services Rule, and R-Value Rule expressly prohibit deception by way of impersonation and allow for direct pursuit of Section 19 remedies in federal court, including civil penalties and consumer redress, in specific contexts. However, the Impersonation Rule does not reach individuals.

<sup>85</sup> NPRM, 87 FR at 62749.

<sup>86</sup> *See, e.g., Protecting Older Consumers 2021-2022*, Federal Trade Commission at 32 (Oct. 18, 2022), available at [https://www.ftc.gov/system/files/ftc\\_gov/pdf/P144400OlderConsumersReportFY22.pdf](https://www.ftc.gov/system/files/ftc_gov/pdf/P144400OlderConsumersReportFY22.pdf).

<sup>87</sup> *See, e.g., Protecting Older Consumers 2022-2023*, Federal Trade Commission (Oct. 18, 2023) at 30-31, available at [https://www.ftc.gov/system/files/ftc\\_gov/pdf/p144400olderadultsreportoct2023.pdf](https://www.ftc.gov/system/files/ftc_gov/pdf/p144400olderadultsreportoct2023.pdf); Federal Trade Commission, *What to Know About Romance Scams* (Aug. 2022), available at <https://consumer.ftc.gov/articles/what-know-about-romance-scams>; Federal Bureau of Investigation, *Scammers Defraud Victims of Millions of Dollars in New Trend in Romance Scams*, Alert No. I-091621-PSA (Sept. 16, 2021), available at <https://www.ic3.gov/Media/Y2021/PSA210916>.

<sup>88</sup> *See, e.g., AARP, Grandparent Scams* (updated Sept. 30, 2022), available at <https://www.aarp.org/money/scams-fraud/info-2019/grandparent.html>; Federal Trade Commission, *Don’t Open Your Door To Grandparent Scams*, Consumer Alert (Apr. 13, 2021), available at <https://consumer.ftc.gov/consumer-alerts/2021/04/dont-open-your-door-grandparent-scams>.

<sup>89</sup> Federal Trade Commission, *Fraud Reports*, Tableau Public, available at [https://public.tableau.com/app/profile/federal.trade.commission/viz/FraudReports/Subcategories Over Time](https://public.tableau.com/app/profile/federal.trade.commission/viz/FraudReports/Subcategories%20Over%20Time) (filtered to display: Complaint Source - All; Timeframe - Quarters; Category - Imposter Scams; View – Table; Year-Quarter – 2022, Q1 through 2023, Q4 selected; Subcategory – (All)) (last visited February 2024).

<sup>90</sup> Federal Trade Commission, *Fraud Reports*, Tableau Public, available at [https://public.tableau.com/app/profile/federal.trade.commission/viz/FraudReports/ Subcategories Over Time](https://public.tableau.com/app/profile/federal.trade.commission/viz/FraudReports/Subcategories%20Over%20Time) (filtered to display: Complaint Source - All; Timeframe - Quarters; Category - Imposter Scams; View – Table; Year-Quarter – 2022, Q1 through 2023, Q4 selected; Subcategory – (All)) (last visited February 2024).

<sup>91</sup> *Protecting Older Consumers 2021-2022*, Federal Trade Commission (Oct. 18, 2022) at 32, available at [https://www.ftc.gov/system/files/ftc\\_gov/pdf/P144400OlderConsumersReportFY22.pdf](https://www.ftc.gov/system/files/ftc_gov/pdf/P144400OlderConsumersReportFY22.pdf).

<sup>92</sup> *Id.* at 29 n.104.

<sup>93</sup> *Protecting Older Consumers 2022-2023*, Federal Trade Commission (Oct. 18, 2023) at 31, available at [https://www.ftc.gov/system/files/ftc\\_gov/pdf/p144400olderadultsreportoct2023.pdf](https://www.ftc.gov/system/files/ftc_gov/pdf/p144400olderadultsreportoct2023.pdf). While the reported harm is significant, the actual amount of harm is likely significantly higher due to underreporting by consumers. *Id.* at 39-40.

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<sup>94</sup> “Means and instrumentalities” liability is a form of direct liability. *See, e.g., FTC v. Magui Publishers, Inc.*, No. Civ. 89-3818RSWL(GX), 1991 WL 90895, at \*14 (C.D. Cal. Mar. 28, 1991), *aff’d*, 9 F.3d 1551 (9th Cir. 1993) (“One who places in the hands of another a means or instrumentalities to be used by another to deceive the public in violation of the FTC Act is directly liable for violating the Act.”); *Regina Corp. v. FTC*, 322 F.2d 765, 768 (3rd Cir. 1963). “Means and instrumentalities” is distinct from “aiding and abetting” liability and “assisting and facilitating” liability, both of which are secondary forms of liability and not available to the Commission in this rulemaking. *See* Andrew Smith, Multi-party liability, FTC Business Blog (Jan. 29, 2021), <https://www.ftc.gov/business-guidance/blog/2021/01/multi-party-liability> (noting various legal theories used by the Commission to impose liability on additional parties where the primary target’s customers, vendors, or business partners were also engaged in misconduct).

The Commission observes that it does not always allege knowledge in complaints seeking to hold parties liable for providing the means and instrumentalities used in a Section 5 violation. *See, e.g., Amended Complaint for Permanent Injunction and Other Equitable Relief, FTC v. James D. Noland, Jr., et al.*, case no. 2:20-cv-00047-DWL (D. Az. Jan. 17, 2020); *Complaint for Permanent Injunction and Other Equitable Relief, FTC v. Cyberspy Software, LLC, et al.*, case no. 6:08-cv-01872-GAP-GJK (M.D. Fl. Nov. 5, 2008); *Complaint for Injunctive and Other Equitable Relief, FTC v. Five Star Auto Club, Inc., et al.*, case no. 99-civ-1693 (S.D.N.Y. March 8, 1999).

<sup>95</sup> The Commission notes that if adopted as final, the SNPRM’s proposed § 461.5 would not be the first trade regulation rule promulgated by the Commission that includes a “knew or had reason to know” requirement. For example, section 460.8 of the Labeling and Advertising of Home Insulation, R-value tolerances, prohibits non-manufacturers of home insulation to rely on R-value data provided by the manufacturer they “know or should know” is false or not based on proper tests. 16 CFR 460.8; *see also* 16 CFR 460.19(e) (non-manufacturers are liable only if they “know or should know that the manufacturer does not have a reasonable basis for the claim”); 16 CFR 436.7(d) (franchise sellers must notify prospective franchisees of any material changes “that the seller knows or should have known occurred”).

<sup>96</sup> NPRM, 87 FR at 62749.

<sup>97</sup> *See id.*

<sup>98</sup> These examples, which are the same as those articulated in connection with the prior rules (*see* Section III of the Statement of Basis and Purposes published elsewhere in this issue of the *Federal Register*), make clear that the use of voice cloning for purposes of impersonation is covered where its use satisfies the Rule’s prohibitions. Audio deepfakes, including voice cloning, are generated, edited, or synthesized by artificial intelligence, or “AI,” to create fake audio that seems real. *See* Khanjani, et. al., *How Deep are the Fakes? Focusing on Audio Deepfake: A Survey*, available at <https://arxiv.org/ftp/arxiv/papers/2111/2111.14203.pdf>.

<sup>99</sup> 0033 NPRM Cmt.; ABA-IPL NPRM Cmt. at 2; Zoom NPRM Cmt. at 1.

<sup>100</sup> ABA-IPL NPRM Cmt. at 1-2; NetChoice NPRM Cmt. at 2; USTelecom NPRM Cmt. at 2; *see also* CTA, May 2023 Tr at 16; VON, May 2023 Tr at 36; ABA, May 2023 Tr at 39-40; INCOMPAS, May 2023 Tr at 42.

<sup>101</sup> NetChoice NPRM Cmt. at 2; CTA NPRM Cmt.; ASAE NPRM Cmt. 1; INTA NPRM Cmt.; Somos NPRM Cmt.; CTIA NPRM Cmt. at 7; USTelecom NPRM Cmt. at 2; ECA NPRM Cmt. at 3; ABA-IPL NPRM Cmt. at 3; Zoom NPRM Cmt. at 2; ABA NPRM Cmt. at 3; *see also* CTA, May 2023 Tr at 16; MacLeod, May 2023 Tr at 27; USTelecom, May 2023 Tr at 30; Chilson, May 2023 Tr at 34; VON, May 2023 Tr at 36; INCOMPAS, May 2023 Tr at 42, 44; NCTA, May 2023 Tr at 51-52.

<sup>102</sup> *See supra*, n.94, n.95.

<sup>103</sup> *See* 15 U.S.C. 6102(a)(2) (“acts or practices of entities or individuals that assist or facilitate deceptive telemarketing”).

<sup>104</sup> *In re Shell Oil Co.*, 128 F.T.C. 749, 764 (1999) (statement of Chairman Pitofsky and Commissioners Anthony and Thompson, citing *Regina Corp. v. FTC*, 322 F.2d 765, 768 (3rd Cir. 1963)). *See also, e.g., FTC v. Five-Star Auto Club*, 97 F. Supp. 2d 502 (S.D.N.Y. 2000); *FTC v. Magui Publishers, Inc.*, No. Civ. 89-3818RSWL(GX), 1991 WL 90895, at \*14 (C.D. Cal. Mar. 28, 1991), *aff’d*, 9 F.3d 1551 (9th Cir. 1993); *supra* n.94.

<sup>105</sup> *C. Howard Hunt Pen Co. v. FTC*, 197 F.2d 273, 281 (3d Cir. 1952). *See also supra* n.94.

<sup>106</sup> In the context of an informal hearing, “disputed” and “material” are given the same meaning as in the standard for summary judgment. *See* Fed. Trade Comm’n, Initial notice of informal hearing; final notice of

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informal hearing; list of Hearing Participants; requests for submissions from Hearing Participants, 88 FR 85525, 85527 (Dec. 8, 2023), <https://www.federalregister.gov/documents/2023/12/08/2023-26946/negative-option-rule> (citing H.R. REP. No. 93-1107, 93d Cong., 2d Sess., reprinted in [1974] U.S. CODE CONG. & AD. NEWS 7702, 7728; *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986); *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986)).

<sup>107</sup> Federal Trade Commission, Fraud Reports, Tableau Public, available at [https://public.tableau.com/app/profile/federal.trade.commission/viz/FraudReports/Subcategories Over Time](https://public.tableau.com/app/profile/federal.trade.commission/viz/FraudReports/Subcategories%20Over%20Time) (filtered to display: Complaint Source - All; Timeframe - Years; Category - Imposter Scams; View – Table; Subcategory – (All)) (last visited February 2024).

<sup>108</sup> Federal Trade Commission, Fraud Reports, Tableau Public, available at [https://public.tableau.com/app/profile/federal.trade.commission/viz/FraudReports/Subcategories Over Time](https://public.tableau.com/app/profile/federal.trade.commission/viz/FraudReports/Subcategories%20Over%20Time) (filtered to display: Complaint Source - All; Timeframe - Years; Category - Imposter Scams; View – Table; Subcategory – (All)) (last visited February 2024).

<sup>109</sup> Protecting Older Consumers 2022-2023, Federal Trade Commission (Oct. 18, 2023), available at [https://www.ftc.gov/system/files/ftc\\_gov/pdf/p144400olderadultsreportoct2023.pdf](https://www.ftc.gov/system/files/ftc_gov/pdf/p144400olderadultsreportoct2023.pdf).

<sup>110</sup> While such relief could also be obtained with an existing rule, such as the TSR if applicable, by no means do all impersonation scams implicate an existing rule, and there is no reason to expect them all to do so in the future.

<sup>111</sup> See, e.g., Aaron Chalfin & Justin McCrary, *Criminal Deterrence: A Review of the Literature*, 55 J. Econ. Lit. 5 (2017), <https://doi.org/10.1257/jel.201411147> (reviewing twenty years of studies, albeit in criminal rather than civil context, and finding stronger evidence for deterrent effect of perceived risk of detection than for severity of punishment).

<sup>112</sup> See *supra* n.106 and accompanying text.