

**Before the
FEDERAL TRADE COMMISSION
Washington, D.C. 20580**

In the Matter of)	Impersonation SNPRM, R207000
)	
Trade Regulation Rule on Impersonation)	
of Government and Businesses)	Docket No. FTC-2023-0030
)	

COMMENTS OF THE CONSUMER TECHNOLOGY ASSOCIATION

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TABLE OF CONTENTS

I. THE COMMISSION SHOULD REVISE ITS MEANS AND INSTRUMENTALITIES PROPOSAL..... 2

A. The Means and Instrumentalities Proposal Should Be Limited to Actual Knowledge and to Goods and Services That Are Designed to Deceive..... 3

1. The Current Proposed Language is Vague and Will Create Confusion and Deter Innovation..... 3

2. An Actual Knowledge Requirement Will Promote Regulatory Predictability and More Effective Compliance..... 6

3. The Means and Instrumentalities Proposal Should Be Revised to Only Apply to Goods and Services That Are Inherently Misleading or Designed to Deceive..... 6

B. The Means and Instrumentalities Proposal Implicates the Communications Decency Act. 9

II. CTA SUPPORTS RULES TO PROHIBIT IMPERSONATION FRAUD, BUT THE RULE SHOULD NOT BE EXPANDED TO COVER INDIVIDUAL IMPERSONATION FRAUD WITH THE CURRENT MEANS AND INSTRUMENTALITIES PROPOSAL..... 10

III. THE COMMISSION SHOULD HOLD AN INFORMAL HEARING ON THE SNPRM AND SOLICIT ADDITIONAL PUBLIC INPUT BEFORE MOVING FORWARD WITH THE RULEMAKING..... 11

IV. CONCLUSION 12

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The Consumer Technology Association (“CTA”) submits this response to the Federal Trade Commission’s (“FTC” or “Commission”) Supplemental Notice of Proposed Rulemaking (“SNPRM”) to amend the agency’s newly adopted Rule on Impersonation of Government and Businesses (“Impersonation Rule” or “Rule”).¹ CTA is North America’s largest technology trade association. Our members are the world’s leading innovators—from startups to global brands—helping support more than 18 million American jobs. CTA owns and produces CES®—the most powerful tech event in the world. CTA supported the Commission’s adoption of its existing Impersonation Rule and was encouraged by the Rule’s inclusion of non-profit organizations in the definition of “business.”²

The SNPRM seeks comment on proposed amendments to the Impersonation Rule that would prohibit the impersonation of individuals, and would extend liability for violations of the Rule to companies that provide goods or services with knowledge or reason to know that those goods or services are used to commit impersonation fraud. CTA urges the Commission to

¹ *Trade Regulation Rule on Impersonation of Government and Business*, Supplemental Notice of Proposed Rulemaking, 89 Fed. Reg. 15072 (Mar. 1, 2024) (“SNPRM”).

² *Trade Regulation Rule on Impersonation of Government and Business*, Final Rule, 89 Fed. Reg. 15017, 15023 (Mar. 1, 2024) (“Impersonation Rule” or “Rule”).

reconsider and narrow this latter portion of the Proposed Rule relating to “means and instrumentalities” liability, Proposed 16 C.F.R. § 461.5 (the “Means and Instrumentalities Proposal” or “Proposal”), which is overly broad, vague, and open to subjective interpretation and enforcement. The Proposal would create liability risks for companies developing general purpose products and services that are *misused* by fraudsters in the course of impersonation scams. Adopting the Proposal as written would result in marketplace confusion and stifle cutting-edge innovation, in addition to implicating protections afforded by Section 230 of the Communications Act of 1934, as amended (“Section 230” or “Communications Decency Act”). The FTC should instead revise the Proposal to clarify that liability is limited to entities that provide goods or services *designed* to deceive or defraud with *knowledge* that those deceptive goods or services will be used to commit impersonation fraud.³

CTA generally supports a prohibition on the impersonation of individuals, but as explained below, cannot support the expansion of the Rule to a prohibition on individual impersonation fraud unless the Means and Instrumentalities Proposal is narrowed. Additionally, CTA is requesting a hearing and the opportunity to present its position orally, pursuant to Section 18(c) of the FTC Act, the Commission’s Rules, and the SNPRM.⁴

I. THE COMMISSION SHOULD REVISE ITS MEANS AND INSTRUMENTALITIES PROPOSAL.

The Commission should revise the language of the Means and Instrumentalities Proposal to clarify that it targets bad actors that are properly covered by “means and instrumentalities” precedent. The Proposal is currently crafted in a vague and overbroad manner that may lead to

³ See SNPRM, 89 Fed. Reg. at 15079, Question 7.

⁴ 15 U.S.C. § 57a(c); SNPRM, 89 Fed. Reg. at 15072.

subjective determinations with respect to its proposed “reason to know” standard. Adopting this standard could have broad and sweeping implications for a variety of technologies and businesses. For example, it could lead to unintended consequences, including potentially stifling general purpose artificial intelligence (“AI”) tools that have a wide range of beneficial uses, even if – like virtually every technology through the ages – they can be misused by bad actors.⁵ Additionally, the current breadth of the Means and Instrumentalities Proposal implicates protections afforded by Section 230.⁶

A. The Means and Instrumentalities Proposal Should Be Limited to Actual Knowledge and to Goods and Services That Are Designed to Deceive.

1. The Current Proposed Language is Vague and Will Create Confusion and Deter Innovation.

CTA is concerned that the broadly worded language in the Means and Instrumentalities Proposal, including the “reason to know” standard, could be interpreted to create a broad liability threshold that threatens to sweep in legitimate business activities. In particular, by basing potential liability on a “reason to know” of misuse, without requiring a close connection to actual deceptive activity, the Proposal leaves companies developing innovative, general use products without guidance on what kind of misuse of their products could be considered a legal violation.⁷

⁵ SNPRM, 89 Fed. Reg. at 15083.

⁶ 47 U.S.C. § 230.

⁷ For example, it could have a chilling effect on voice preservation technologies for individuals with accessibility challenges or illnesses like ALS. See Jon LaPook, *How artificial intelligence is helping ALS patients preserve their voices*, CBS News (July 12, 2023), <https://www.cbsnews.com/news/artificial-intelligence-als-patients-preserve-voice-lou-gehrigs-disease>.

As a result, companies will be deterred from creating innovative products that have many beneficial uses for consumers, based on a risk of misuse.⁸

History has proven the dangers of regulating the tool rather than the underlying conduct. Forty years ago, the Supreme Court, in its landmark *Betamax* decision, rejected Hollywood’s efforts to have videocassette recorders (“VCRs”) banned as illegal products over fears they could be misused.⁹ In siding with innovation, the Court ensured that consumer electronics manufacturers could go forward without the fear of liability, and a resulting multi-billion-dollar pre-recorded media industry continues to produce countless benefits for consumers and Hollywood studios alike.

The potential subjectivity and unpredictability of that standard also implicates due process concerns. Companies have a right to fair notice of new regulatory obligations so that they may develop compliance measures, and this concern is heightened where civil penalties may be imposed.¹⁰

⁸ The risk that a new Rule provision would be broadly interpreted is not hypothetical. For example, in a recent blog post, the FTC’s Office of Technology discussed potential liability for “the AI companies releasing tools that have the *potential for misuse*.” FTC’s Office of Technology, *Approaches to Address AI-enabled Voice Cloning*, FTC Technology Blog (Apr. 8, 2024), <https://www.ftc.gov/policy/advocacy-research/tech-at-ftc/2024/04/approaches-address-ai-enabled-voice-cloning> (emphasis added).

⁹ See *Sony Corp. of America v. Universal City Studios, Inc.*, 464 U.S. 417 (1984).

¹⁰ *Fed. Comm’n v. Fox TV Stations, Inc.*, 567 U.S. 239, 253 (2012) (“A fundamental principle in our legal system is that laws which regulate persons or entities must give fair notice of conduct that is forbidden or required.”); *Christopher v. SmithKline Beecham Corp.*, 132 S. Ct. 2156, 2167 (2012) (agencies should provide regulated entities fair warning of prohibited or required conduct); *FTC v. Wyndham Worldwide Corp.*, 799 F.3d 236, 251 (3d Cir. 2015) (“Courts appear to apply a more stringent standard of notice to civil regulations than civil statutes: parties are entitled to have ‘ascertainable certainty’ of what conduct is legally required by the regulation.”).

Although the SNPRM asserts that the Means and Instrumentalities Proposal is no broader than existing regulatory requirements and applicable case law under Section 5 of the FTC Act,¹¹ it is worded more broadly than how courts have traditionally interpreted the “means and instrumentalities” standard. The explanation and example of the “means and instrumentalities” provision in the Notice of Proposed Rulemaking (“NPRM”) appropriately suggest that the FTC intends to limit its applicability to those entities with knowledge that the representations they provide are used in impersonation fraud.¹² In its discussion of this part of the Proposed Rule, the NPRM pointed to entities that do not have direct contact with a consumer but that make representations that are passed on to the consumer as deceptive representations. For example, the NPRM discussed how a person fabricating “official-looking Internal Revenue Service [(“IRS”)] Special Agent identification badges for sale” could be liable.¹³ The bad actor in this example has actual knowledge, and the product is specifically designed to deceive or defraud consumers. However, the “reason to know” standard represents a notable departure from this standard. Instead, the Proposal potentially sweeps more broadly to target companies developing general purpose products or services or products with affirmative public interest benefits that are far removed from the actual fraud.

¹¹ SNPRM, 89 Fed. Reg. at 15077.

¹² See *Trade Regulation Rule on Impersonation of Government and Businesses*, Notice of Proposed Rulemaking, 87 Fed. Reg. 62741, 62,747 (Oct. 17, 2022) (“NPRM”) (quoting *Shell Oil Co.*, 128 F.T.C. 749 (1999)) (“[T]he case law [under Sections 5 and 18 of the FTC Act] describes a form of direct liability for a party who . . . ‘passes on a false or misleading representation with knowledge or reason to expect that consumers may possibly be deceived as a result.’”).

¹³ *Id.*

2. An Actual Knowledge Requirement Will Promote Regulatory Predictability and More Effective Compliance.

The Commission should amend its Means and Instrumentalities Proposal to make clear that the Impersonation Rule only applies to entities that have *actual knowledge* that their products or services are used for impersonation fraud. This knowledge standard avoids the possibility of imposing liability on companies even if they do not know that their general-purpose products or services are being used to further an impersonation scam. Such a standard will allow legitimate companies to rely on clear rule text, coupled with applicable Commission guidance, to promote compliance.

3. The Means and Instrumentalities Proposal Should Be Revised to Only Apply to Goods and Services That Are Inherently Misleading or Designed to Deceive.

Additionally, the Means and Instrumentalities Proposal should be crafted to only apply to goods and services that are *designed to deceive or defraud*, as this construction would allow the FTC to focus on true bad actors without chilling legitimate commerce. As both the NPRM and the SNPRM rightly note, Sections 5 and 18 of the FTC Act do not provide for assisting-and-facilitating liability, meaning that entities and individuals cannot be held directly liable for the acts of others.¹⁴ Case law clearly supports this conclusion, and clarifies that legitimate companies cannot face the possibility of civil liability under the FTC Act merely because fraudsters manipulated their innovative services to perpetrate scams.¹⁵ Instead, such companies

¹⁴ SNPRM, 89 Fed. Reg. at 15,077; NPRM. *See also Regina Corp. v. FTC*, 322 F.2d 765, 768 (3rd Cir. 1963).

¹⁵ *See Shell Oil Co.*, 128 F.T.C. 749, 763-64 (1999) (statement of Chairman Pitofsky and Commissioners Anthony and Thompson) (finding that respondent—through another company that disseminated the respondent’s misrepresentations—provided misleading information about the properties of its products, which it encouraged its customers to use in advertising and promotional materials that deceived consumers about the benefits of the product); *C. Howard*

must actively participate in some way in the scam to be liable under a means and instrumentalities theory.¹⁶

Revising the Means and Instrumentalities Proposal to only apply to goods and services designed to mislead or deceive also makes the provision reflect the intent of the SNPRM, as articulated by FTC. Specifically, in a joint statement with FTC Commissioners Bedoya and Slaughter, Chair Khan stated that under the SNPRM’s approach, “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.”¹⁷ Currently, however, the Means and Instrumentalities Proposal applies more broadly to general purpose goods and services that are *misused* for impersonation, rather than designed for impersonation, provided that the company offering that good or service has a “reason to know” of that potential misuse.

Notably, many emerging technologies that could potentially be used for impersonation also offer important benefits to society. For example, generative AI can be used to provide real-time language translation over video and text and can provide quick video narration using a

Hunt Pen Co. v. FTC, 197 F.2d 273, 278 (3d Cir. 1952) (finding that defendants made false representations that pen points were made of 14-karat gold, but in fact, the products were merely gold plated when they stamped and inscribed pen points with statements indicating that the product was made of genuine 14-karat gold and provided manufacturers and assemblers with the means of deceiving the public about the quality of the pen points).

¹⁶ *Waltham Watch Co. v. FTC*, 318 F.2d 28, 32 (7th Cir. 1963).

¹⁷ Statement of Chair Lina M. Khan, Commissioner Kelly Slaughter & Commissioner Alvaro M. Bedoya, FTC, regarding the Final Rule on the Trade Regulation Rule on Impersonation of Government and Businesses, File No. R207000, at 2 (Feb. 15, 2024), https://www.ftc.gov/system/files/ftc_gov/pdf/r207000impersonationrulelmkstmt.pdf (emphasis added).

small audio sample of someone’s voice.¹⁸ Yet this same feature could be potentially misused by a fraudster. And given the “reason to know” standard, absent clarification, the Proposal could have the effect of punishing companies for monitoring and addressing concerning instances of misuse of a generally available, multi-purpose product. Similarly concerning is the impact the Proposal could have on innovative products or services used by individuals with disabilities. As written, the Means and Instrumentalities Proposal could stifle innovative developments if the mere knowledge by a company that its product could potentially be used to commit fraud will trigger civil liability.

Accordingly, CTA recommends the following revisions to the Means and Instrumentalities Proposal—

§ 461.5 Means and Instrumentalities: Provision of Goods or Services for Unlawful Impersonation Prohibited.

It is a violation of this part, and an unfair or deceptive act or practice to provide **to another** goods or services **designed to deceive or defraud** with knowledge ~~of~~ **reason to know** that those **deceptive** goods or services will be used to:

- (a) materially and falsely pose as, directly or by implication, a government entity or officer thereof, a business or officer thereof, or an individual, in or affecting commerce as commerce is defined in the Federal Trade Commission Act (15 U.S.C. § 44); or
- (b) materially misrepresent, directly or by implication, affiliation with, including endorsement or sponsorship by, a government entity or officer thereof, a business or officer thereof, or an individual, in or affecting commerce as commerce is defined in the Federal Trade Commission Act (15 U.S.C. § 44).

¹⁸ Falon Fatemi, *Why AI Is An Essential Partner For Audio*, Forbes (Jan. 9, 2024), <https://www.forbes.com/sites/falonfatemi/2024/01/09/why-ai-is-an-essential-partner-for-audio/?sh=10efe58797fd>.

B. The Means and Instrumentalities Proposal Implicates the Communications Decency Act.

The Means and Instrumentalities Proposal should be narrowed for an additional reason. As written, the Proposal would also implicate Section 230—47 U.S.C. § 230—which protects interactive computer service providers from liability in certain ways. *First*, Section 230(c)(1) generally states that such providers are not “treated as the publisher or speaker of any information provided” by a third party.¹⁹ *Second*, Section 230(c)(2) creates liability protection for users and providers of interactive computer services that moderate their content, immunizing them from liability for “any action voluntarily taken in good faith to restrict access to or availability of material that the provider or user considers to be obscene . . . or otherwise objectionable.”²⁰ Courts have applied both of these protections broadly,²¹ and have concluded that they apply to a wide array of entities, from Internet search engines,²² to online merchants,²³ to computer software providers,²⁴ and more.

¹⁹ See 47 U.S.C. § 230(c)(1) (“No provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider.”).

²⁰ *Id.* § 230(c)(2).

²¹ See, e.g., *Henderson v. Source for Pub. Data, L.P.*, 53 F.4th 110, 119 (4th Cir. 2022); *Klayman v. Zuckerberg*, 753 F.3d 1354, 1357 (D.C. Cir. 2014); *Universal Commc'n Sys., Inc. v. Lycos, Inc.*, 478 F.3d 413, 418 (1st Cir. 2007); *Blumenthal v. Drudge*, 992 F. Supp. 44, 51-52 (D.D.C. 1998).

²² *Bennett v. Google, LLC*, 882 F.3d 1163, 1167 (D.C. Cir. 2018).

²³ *Ratermann v. Pierre Fabre USA, Inc.*, 651 F.Supp.3d 657, 666 (S.D.N.Y. 2023).

²⁴ *Zango Inc. v. Kaspersky Lab, Inc.*, 568 F.3d 1169, 1173 (9th Cir. 2009).

Most laws and regulations that are inconsistent with these protections are barred by Section 230.²⁵ To the extent that the Means and Instrumentalities Proposal seeks to hold covered providers liable for third-party content created by bad actors, doing so may conflict with Section 230 protections. Accordingly, CTA encourages the Commission to narrow the Means and Instrumentalities Proposal as outlined above and avoid potential conflicts with Section 230.

II. CTA SUPPORTS RULES TO PROHIBIT IMPERSONATION FRAUD, BUT THE RULE SHOULD NOT BE EXPANDED TO COVER INDIVIDUAL IMPERSONATION FRAUD WITH THE CURRENT MEANS AND INSTRUMENTALITIES PROPOSAL.

CTA appreciates the Commission’s efforts to address impersonation fraud, which harms consumers, governments, business, non-profits, and individuals alike.²⁶ Indeed, CTA’s members, customers, and CTA itself have been victimized by impersonation fraud through email solicitation scams, website domain scams, and various other fraudulent schemes. Accordingly, CTA and its membership have a significant interest in putting a stop to impersonation fraud, which has targeted CES®. Consumers are often victimized by scammers impersonating trusted companies, and those companies—including CTA and its members—have their reputations injured by both convention/event space fraud and brand impersonation fraud.²⁷

CTA generally supports the SNPRM’s proposal to prohibit the impersonation of individuals, but it would not support such an expansion unless the Means and Instrumentalities

²⁵ See generally, 47 U.S.C. § 230(e).

²⁶ Comments of the Consumer Technology Association, Docket No. FTC-2021-0077, at 2 (filed Feb. 17, 2022) (“CTA ANPRM Comments”); Comments of the Consumer Technology Association, Docket No. FTC-2022-0064, at 1 (filed Dec. 16, 2022) (“CTA NPRM Comments”)

²⁷ CTA NPRM Comments at 3-5.

Proposal is sufficiently narrowed as discussed above.²⁸ CTA's members currently use a variety of tools, such as monitoring and removing violative content and acting to prevent individuals from attempting to defraud consumers. However, an expansive Means and Instrumentalities Proposal would, counterproductively, threaten to expand potential liability for companies that make good faith efforts to address impersonation fraud, but cannot eliminate all misuse of their products and services as a practical matter. Unless the Means and Instrumentalities Proposal is narrowed, expanding its coverage to prohibit the fraudulent impersonation of individuals would only exacerbate the problem. If the Proposal were narrowed, CTA agrees that expanding the Rule to prohibit the fraudulent impersonation of individuals would assist the Commission in combatting fraudulent conduct directly.

III. THE COMMISSION SHOULD HOLD AN INFORMAL HEARING ON THE SNPRM AND SOLICIT ADDITIONAL PUBLIC INPUT BEFORE MOVING FORWARD WITH THE RULEMAKING.

CTA has identified disputed issues of material fact that require resolution at an informal hearing. As explained above, the SNPRM's Means and Instrumentalities Proposal is vague and overbroad, and would impose burdens on innovation and legitimate business operations. CTA therefore disputes the assertion in the SNPRM that the "Rule as amended would not impose new burdens on honest individuals or businesses."²⁹ It will deter new products or services from being launched if there is a risk of misuse of the product or service outside of a company's ability to stop it. This will hamper America's standing as an AI leader and harm consumers by depriving them of innovative new technologies.

²⁸ SNPRM, 89 Fed. Reg. at 15079, Question 1.

²⁹ SNPRM, 89 Fed. Reg. at 15076.

Accordingly, for the reasons discussed in this comment, the Commission should hold an informal hearing to examine the impact that the Means and Instrumentalities Proposal will have on legitimate businesses and products, including the feasibility and costs of any technical measures that the Commission believes should be implemented to comply with a broad reading of the Proposal. CTA requests the right to participate in an informal hearing regarding the matters raised in this comment, by presenting orally and by documentary submission.³⁰ Further, CTA requests that it be permitted to present rebuttal submissions and cross examine witnesses pursuant to 15 U.S.C. § 57a(c)(2)(B) as to disputed issues of material fact.³¹ CTA's interest in this proceeding is further outlined on pp. 1-2 and 10-11 of this comment.

CTA identifies and proposes the following disputed issues of material fact, at a minimum—

- (1) Whether the Means and Instrumentalities Proposal imposes an affirmative obligation on companies to address the misuse of their products and services, and whether there are any costs associated with implementing compliance plans to satisfy this requirement.
- (2) Whether the Means and Instrumentalities Proposal will chill the development of new products and services that could be misused by fraudsters.
- (3) Whether the Means and Instrumentalities Proposal's liability framework is responsive to the known trends and evidence of online fraud.

IV. CONCLUSION

The Commission should revise its Means and Instrumentalities Proposal as outlined above. Doing so will give the Commission tools to target bad actors while giving legitimate companies predictable guidelines that will allow them to continue to bring innovative new products to consumers.

³⁰ 15 U.S.C. 57a(c); *see also* 16 C.F.R. § 1.11(e); SNPRM, 89 Fed. Reg. at 15072.

³¹ *See also* 16 C.F.R. §§ 1.12, 1.13(b)(2).

Respectfully submitted,

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