

**NetChoice Comment for the Record:
Federal Trade Commission (FTC)
Request for Comments
on Notice of Proposed Rulemaking
on Business and Government Impersonation Fraud,
December 15, 2022**

NetChoice is a trade association of leading internet businesses that promotes the value, convenience, and choice which internet business models provide to American consumers. Our mission is to make the internet safe for free enterprise and free expression. We also work to promote the integrity and availability of the internet on a global stage and are engaged on issues in the states, in Washington, D.C., and in international internet governance organizations.

While we applaud the Federal Trade Commission (FTC) for taking steps to defend consumers against the increasing number of scams online and offline that defraud and harm consumers, the proposed rules must be amended to avoid violations of free speech. In particular, we highlight the impact the proposed rule could have on online platforms and non-malicious users. With that in mind, we suggest that the FTC clarify what knowledge is required to ensure that such innocuous conduct and speech is not also penalized by the rule.

Various forms of fraud have been on the rise recently,¹ and it is wise for the FTC to combat the consumer harm that such fraud causes. Business impersonation can not only harm individual consumers but can also impact the reputation of entrepreneurs and the businesses impersonated. For these reasons, we applaud the FTC for seeking to address the harmful and malicious conduct, costing Americans billions of dollars each year.²

¹ Press Release, Federal Trade Commission, *New Data Shows FTC Received 2.8 Million Fraud Reports from Consumers in 2021* (Feb. 22, 2022), <https://www.ftc.gov/news-events/news/press-releases/2022/02/new-data-shows-ftc-received-28-million-fraud-reports-consumers-2021-0>

² *Id.*

Nonetheless, we are concerned about the type and extent of liability imposed and the impact that could have on online platforms and content moderation. The proposed rule prevents providing the “means and instrumentalities” to engage in impersonation. This could attach liability to any number of platforms that allow anonymous or pseudonymous speech because they may not verify the identity of each user. In this way, the proposed rule could actually require the collection of more data at the very time that the FTC has stated its concerns about privacy.³ This is particularly true without clarity on what knowledge a platform is required to have that impersonation is occurring or if strict liability applies. The explanation and examples in the NPRM suggest the “means and instrumentalities” rule is limited to those with knowledge that their services are being used or could be used for impersonation scams and records several comments from the Advance Notice of Proposed rulemaking phase that expressed similar concerns.⁴ Therefore, the actual text of the rule should reflect this same understanding in order to lessen concerns that the rule could be used against non-malicious parties.

Additionally, it is unclear whether the rule considers those accounts that post what is clearly parody or other transformative speech on a platform. Such a regulatory blindspot would result in wrongly attaching liability to innocent behavior. Moreover, it would diminish opportunities for anonymous and pseudonymous speech, which will particularly harm minority communities and those who for their safety and security need this long standing, historical protection for anonymity. Similar efforts by Congress to deny engaging in such First Amendment speech has attracted opposition to similar efforts in Congress even when well-intentioned.⁵

³ See Jennifer Huddleston, “NetChoice Comment for the Record: FTC Request for Comments on Advance Notice of Proposed Rulemaking on Commercial Surveillance and Data Security,” NetChoice, November 15, 2022. <https://netchoice.org/netchoice-comment-for-the-record-ftc-request-for-comments-on-advance-notice-of-proposed-rulemaking-on-commercial-surveillance-and-data-security/> for our comments on the current ongoing data privacy rulemaking process.

⁴Trade Regulation Rule on Impersonation of Government and Businesses, 87 Fed. Reg. 62741 (proposed October 17, 2022) (to be codified at 16 C.F.R. pt. 461).

⁵ See, e.g., Letter from Fight for the Future, et. al. to Senate Majority Leader Chuck Schumer et. al. (Nov. 28, 2022) <https://www.fightforthefuture.org/news/2022-11-28-letter-90-lgbtq-and-human-rights-organizations-oppose-kosa>; Matthew Lane, *Congress’ Kids Online Safety Act Puts Kids At Risk Through Fuzzy Language*, Techdirt (Sept. 8, 2022, 1:33 PM),

As with many recent FTC policies, the current proposal appears to have been rushed without adequate opportunity to raise concerns. The FTC should invite broader discussion of such unintended effects in order to resolve them to both protect the public and avoid negatively impacting the benefits of free expression online.

<https://www.techdirt.com/2022/09/08/congress-kids-online-safety-act-puts-kids-at-risk-through-fuzzy-language/>