

ALERT

FTC Commences Rulemaking Targeting Business and Government Impersonation Fraud

December 20, 2021

On December 16, 2021, the Federal Trade Commission (FTC) voted 4-0 to issue an Advanced Notice of Proposed Rulemaking (ANPRM) to commence a rulemaking targeting rising business and government impersonation fraud. Critically, the ANPRM states that telephone calls and text messages, among other forms of communication, are often used in such impersonation scams. The ANPRM also specifically solicits comment on potential liability for entities that provide the “means and instrumentalities” for imposters to perpetrate scams. The ANPRM marks the first time that the agency has commenced a rulemaking using its newly streamlined Section 18 rulemaking authority. Comments on the FTC’s ANPRM are due on February 22, and a summary of the item is provided below.

Background

The ANPRM provides general background on government and business impersonation scams, noting that such scams take many forms, but that they generally involve “scammers pretending to be a trusted source who convinces their targets to send money or to disclose personal information.” The ANPRM explains how such scams are typically executed – “[b]usiness impersonators typically get consumers’ attention with emails, telephone calls, or text messages”; government impersonators typically assert “an air of authority to stage their scam, and they use all methods of communication to reach their targets.” Moreover, the ANPRM states that “these scammers sometimes threaten a target with severe consequences such as a discontinuation of benefits, enforcement of tax liability, and even arrest or prosecution.”

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FTC Regulation
Telecom, Media & Technology
The Telephone Consumer Protection Act (TCPA)

The ANPRM also highlights the increasing prevalence of impersonation scams. According to the FTC, reported losses from such impersonation scams between October 2020 and September 2021 are \$2 billion, which is up 85% over the previous year. The FTC notes that it believes that the rulemaking proceeding is necessary, in part, due to the U.S. Supreme Court's 2021 decision in *AMG Cap. Mgmt., LLC v. FTC*, which found that Section 13(b) of the FTC Act is not available for monetary relief (see our recap of the case here). For that reason, the ANPRM states that the FTC believes "a rule addressing certain types of unfair or deceptive acts or practices involving impersonation, including affiliation and endorsement, of government and businesses could help reduce the level of fraud in this area and serve as an additional deterrent for bad actors."

Objectives and Regulatory Alternatives to the ANPRM

The ANPRM asks several questions about the FTC's authority to promulgate an impersonation rulemaking, and how such a proceeding would fit into the agency's existing regulatory framework for addressing impersonation scams. Specifically, the ANPRM asks whether the agency should invoke its authority under Section 18 of the FTC Act - 15 U.S.C. § 57a - to address unfair or deceptive acts or practices involving impersonation fraud.

Section 18 of the FTC Act gives the agency the authority to promulgate "rules which define with specificity acts or practices which are unfair or deceptive acts or practices in or affecting commerce." The ANPRM proposes creating an impersonation rule that addresses: (1) impersonation of a government official or agency by a person or entity without the requisite authority to act on behalf of that official or agency; (2) impersonation of a business or its agents by a person or entity without authority to act on behalf of that business; and (3) entities that may provide the means and instrumentalities for these impersonators to operate. Accordingly, the item seeks comment on how such a rule would build on existing rules that may address impersonation fraud, including the FTC's Telemarketing Sales Rule and Mortgage Assistance Relief Services Rule.

Requests for Comment

The ANPRM seeks comment on 13 specific questions pertaining to the structure of a potential impersonation rule.

Questions 1-3 – Forms of Impersonation. The first three questions ask about the details of business and government impersonation, as well as the impersonation of individuals or entities other than governments and businesses. Specifically, all three questions inquire about the "types of communication and technology" used to facilitate such impersonations and relevant data sources relied on to demonstrate such impersonations.

Question 4 – Defining Impersonation Fraud. The fourth question asks about how the agency should define the term "impersonation," and the specific "claims, images, or symbols [that] are likely to give rise to the net impression of government or business impersonation."

Question 5 – Entities Providing 'Means and Instrumentalities.' Importantly, the fifth question asks whether certain individuals or entities "provide the means and instrumentalities for impersonators to conduct such practices." That is, the item seeks feedback on the types of goods and services that "significantly enable

impersonators to conduct such practices.” This is likely the most significant component of the FTC’s ANPRM, since it could identify a wide range of entities that commenters view as facilitating such impersonation.

Questions 6-7 – Consumer Injury and Enforcement Exceptions. Questions 6 and 7, meanwhile, ask about consumer injury, and the types of such injury. The ANPRM also asks whether there are circumstances in which such business or government impersonation actions would not be subject to FTC enforcement for being deceptive or unfair acts or practices.

Questions 8-10 – Existing FTC Rules and Regulations. Questions 8 to 10 focus on whether existing FTC laws and regulations adequately address impersonation scams, whether new regulations would be necessary, and how a potential rule would be developed.

Questions 11-13 – Consumer Education and Alternatives to Rulemaking. Finally, Questions 11, 12, and 13 solicit feedback on consumer education methods, alternatives to rulemaking, and whether other commercial acts or practices involving impersonation should be addressed in the proposed rulemaking.

In addition to brand holders that are being impersonated, voice service providers (including intermediate providers), text messaging providers, payment processors, gift-card providers, and other stakeholders offering online communications and payment platforms should pay close attention to this ANPRM, given the potential for the FTC to expand its enforcement authority over entities that provide the “means and instrumentalities” for such impersonation fraud to operate. Stakeholders seeking to engage the agency on the ANPRM will be able to file comments, which will be due on February 22, 2022 per the FTC’s December 23 Federal Register notice.

The regulatory landscape applicable to impersonation fraud impacts a broad range of entities. In addition to the brands themselves, the scope of the FTC’s ANPRM could also impact providers of voice and texting services, as well as providers of ancillary services, such as analytics providers, payment processors, and related services. As evidenced by the ANPRM, this regulatory environment is dynamic and changing in response to consumer and congressional pressure. The FTC and the Federal Communications Commission (FCC) have been expanding their oversight and broadening regulatory obligations across the private sector, while also bringing an increasing number of enforcement actions.

For more information about the FTC’s new ANPRM, please reach out to a member of our team. We have a deep and experienced bench on robocalling and robotexting, and FTC matters.