wiley

ALERT

FTC Seeks Comment on Proposed Rule Prohibiting Impersonation Scams

September 21, 2022

On September 15, 2022, the Federal Trade Commission (FTC) issued a Notice of Proposed Rulemaking (NPRM) to promulgate a "Rule on Impersonation of Government and Businesses," which would prohibit the impersonation of government agencies, businesses, or their officials. The NPRM follows an Advance Notice of Proposed Rulemaking (ANPR), which solicited public comments on whether and how the FTC should address impersonation scams, including potential liability for entities that provide the "means and instrumentalities" to facilitate the impersonation of businesses and government (see our recap of the ANPR here). The NPRM takes the next step in the FTC's trade regulation rule process and proposes rules that would prohibit the impersonation of government, businesses, or their officials, which the FTC believes will "substantially improve its ability to combat the most prevalent impersonation fraud" and potentially "strengthen deterrence against this fraud in the first instance." Comments on the FTC's NPRM are due 60 days after publication in the Federal Register, and a summary of the item is provided below.

Background

The NPRM explains that comments the FTC received in response to the ANPR reinforced the notion that the impersonation of government agencies, businesses, and their officials or agents is increasingly prevalent. As both the ANPR and NPRM highlight, business impersonation scams are widespread and cause an "enormous amount of financial harm to the public," with consumers reporting losses of $852 million in 753,555 business impersonation incidents from January 1, 2017 through September 30, 2021. The NPRM notes that since then, consumers have reported another 96,341 incidents of business impersonation in the fourth quarter of 2021 and 79,057

Authors

Kevin G. Rupy
Partner
202.719.4510
krupy@wiley.law

Kathleen E. Scott
Partner
202.719.7577
kscott@wiley.law

Stephen J. Conley
Associate
202.719.4572
sconley@wiley.law

Practice Areas

FTC Regulation

incidents in the first quarter of 2022.

Though Section 5 of the FTC Act makes government and business impersonation unlawful, the FTC's proposed rule would allow the Commission to seek civil penalties against the violators and obtain monetary redress for victims of impersonation incidents. One of the FTC's objectives in issuing the NPRM is to expand the remedies available to the FTC to combat impersonation and fraud. The proposed rule will also allow the FTC to create a "shorter path" for enforcement actions in light of the *AMG Cap. Mgmt., LLC v. FTC* decision and provide for additional remedies against violators.

Overview and Scope of Proposed Rule

The NPRM's proposed rule would prohibit impersonating government entities and would cover a wide variety of conduct by persons who misrepresent that they are affiliated with a government agency or government official. Prohibited activity would include sending mail using government addresses or impersonating a government seal. The proposed rules would also prohibit impersonating businesses, and the NPRM identifies a broad set of activities that would be considered unlawful conduct, such as creating an email address impersonating a business, placing advertisements that pose as a business against search queries for business services, and using a business's mark on a physical or digital place without authorization.

Treatment of "Means and Instrumentalities." The NPRM also proposes a rule that would make it unlawful to provide the "means and instrumentalities" to facilitate impersonation of government agencies and businesses. The FTC declines to impose assisting-and-facilitating liability in the proposed rule because Section 5 and Section 18 of the FTC Act do not expressly authorize this type of indirect liability. Instead, the NPRM focuses on 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," even if the party does not have direct contact with injured consumers.

As an example, the NPRM explains that a person who fabricates an IRS Special Agent identification badge for sale would violate the prohibition against providing the "means and instrumentalities" for impersonation. According to the NPRM, though the person does not impersonate an IRS Special Agent, he or she provides the means and instrumentalities for others to do so.

Treatment of Non-Profit Businesses. The proposed rule's definition of a "business" that cannot be impersonated includes not-for-profit entities. Though the FTC's jurisdiction allows the Commission to sue a corporation only when it is "organized to carry on business for its own profit or that of its members," an entity organized for profit might impersonate a charity. Thus, the FTC's proposed rule also prohibits impersonation of non-profit entities.

Request for Comment

The NPRM seeks comment on eight specific questions pertaining to the proposed rule.

Questions 1-3 – General Considerations. The first series of questions asks whether the FTC should finalize the proposed rule and what changes should be made. The agency also seeks input on data and evidence that would demonstrate the prevalence and economic impact of impersonation schemes and whether the proposed rule contains a collection of information.

Question 4 – Economic Impact. The NPRM asks whether the proposed rule would have a significant economic impact on a substantial number of small entities and, if so, how to modify the proposed rule.

Question 5 – Language of Proposed Rule. The fifth question in the NPRM seeks input on the clarity of the proposed rules. It asks whether the proposed rule's one-sentence prohibitions against impersonation of government and impersonation of businesses are clear and understandable.

Question 6-8 – Scope of Proposed Rule. The final series of questions seeks input on whether a final rule should include the proposed rule's prohibition against providing the "means and instrumentalities" to commit business or government impersonation. The NPRM also asks whether the final rule should apply to impersonations of non-profit organizations. Finally, the FTC asks whether the proposed rule should be expanded to address the impersonation of individuals or entities other than government agencies and businesses in interstate commerce.

***

The NPRM's possible impact on the regulatory landscape for impersonation fraud is broad. In addition to the brands facing impersonation, the FTC's NPRM could impact a variety of service providers, including providers of ancillary services such as analytics providers, payment processors, and related services. Given the possibility for the FTC to exercise its enforcement power over entities that provide the "means and instrumentalities" for impersonation, stakeholders offering communications and payment platforms should follow this NPRM closely.

For more information about the FTC's new NPRM, please contact one of the authors listed on this alert.

Kelly Laughlin, a Law Clerk at Wiley Rein LLP, contributed to this alert.