



Central Office of Reform and Efficiency

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29th day of December, in the Era of the 13-Month Order, 2024

April Tabor
Office of the Secretary, Suite CC-5610
Federal Trade Commission
600 Pennsylvania Avenue, NW
Washington, D.C. 20580

Dear Ms. Tabor,

On behalf of the Central Office of Reform and Efficiency ("CORE"), this Emergency Petition for Rulemaking is respectfully submitted under Executive Order 13563 and the FTC's Regulatory Reform Program.¹ Petitioners request that the Commission amend the Impersonation Rule (16 C.F.R. § 461) to clarify and remove vague terms such as "implication" and "misrepresentation," thereby ensuring more precise enforcement and enhanced regulatory clarity. The petition further calls for the inclusion of a scienter requirement, which would better safeguard both consumer protection and the rights of legitimate businesses. It also urges the FTC to provide specific examples of permissible business practices to offer clearer, more actionable guidance to stakeholders. Thirdly, the petition advocates for procedural revisions that focus on intentional deception, aligning enforcement with due process standards, and promoting transparency in the Commission's regulatory approach.²

Should additional information be required to proceed with consideration of this Petition, we are available to provide it. We appreciate your prompt attention to this matter.



Dated December 29, 2024

Respectfully,
Catalyst Accord

Hamlet Garcia Jr
man; stakeholder; creditor

Enclosure: Petition for Rulemaking

¹ Executive Order 13563 emphasizes regulatory transparency, public participation, and cost-effectiveness, aiming to streamline regulations while minimizing undue burdens on stakeholders.

² Recognizing the need for the Impersonation Rule to evolve with technological advancements, this petition ensures its continued relevance in modern business practices and communications. The proposed revisions also align with judicial review principles under *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), maintaining consistency with statutory interpretations and preventing conflicts with other legal standards. (See Exhibit A)

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I. Emergency Petition for Rulemaking

The Office of Reform and Efficiency (“CORE”), through its representative Hamlet Garcia Jr., respectfully petitions the Federal Trade Commission (“FTC”) under the Federal Trade Commission Act (“FTC Act”), 15 U.S.C. § 45, and 16 C.F.R. § 1.9 to initiate rulemaking to amend the Impersonation Rule (16 C.F.R. § 461). The proposed amendments address the following:

- **Clarification of Ambiguous Terms:** Current language of the rule, particularly terms such as "implication;" “authority;” and; "misrepresentation;" is overly vague. Striking or defining these terms would promote fair and consistent enforcement.
- **Scienter Requirement:** Introducing a scienter requirement would protect businesses that inadvertently or without malice misrepresent affiliations with government entities, ensuring the rule targets only businesses engaging in intentional deception.
- **Examples of Permissible Practices:** Petitioners request that the FTC provide clear examples of permissible business practices under the rule to help businesses avoid conduct that could be misconstrued as a violation.
- **Procedural Revisions:** Petition advocates for procedural amendments to ensure that enforcement is focused on intentional deception, in line with due process standards, and promotes transparency in the Commission's regulatory actions.

II. The Petitioner

CORE represents over one hundred businesses, many of which engage in interstate commerce and fall within the jurisdiction of the Federal Trade Commission. As such, CORE has a direct and vested interest in ensuring that the rules governing deceptive practices, including the Impersonation Rule, are clear, fair, transparent, and predictable. The current lack of transparency in the FTC’s enforcement practices undermines confidence in the agency's ability to effectively promote competition and protect consumers.³

³ As Petitioner, the right to participate and represent interests is supported by 16 CFR 1.12(d), which directs the Commission to identify and designate a representative for groups with similar interests. Additionally, under 16 CFR 1.13(b)(1)(i), only issues deemed 'material' and 'necessary to resolve' by the Commission are subject to cross-examination. Thus, Petitioner is entitled to assert and address material facts deemed necessary for the fair resolution of disputed issues, ensuring full and transparent participation in the proceeding.

III. Introduction

The Federal Trade Commission (FTC) plays a critical role in regulating competition and safeguarding consumers within the U.S. economy, holding authority to investigate and enforce laws against unfair competition and deceptive practices. Given the breadth of its powers, operating within a framework that fosters public trust while assuring businesses of fairness and transparency is essential.

Impartiality and transparency underpin the integrity of the FTC's actions. With its consolidation of legislative, prosecutorial, and adjudicatory functions, maintaining processes free from any appearance of bias or partiality is paramount. Defining terms like “implication” and “misrepresentation” within the Impersonation Rule with precision ensures clarity and fairness in enforcement.

Proposed revisions, including a scienter requirement and the addition of concrete examples of permissible practices, are necessary to enhance transparency and consistency in the application of the rule. These revisions will refine enforcement, provide businesses with clearer compliance guidelines, and ensure that the FTC's regulatory actions align with core principles of due process. Institutionalizing these changes will strengthen public trust and reaffirm the FTC's dedication to robust consumer protection.

IV. The Current FTC Rule 16 C.F.R. Part 461

Impersonation Rule, governed by 16 C.F.R. § 310.4(d), prohibits telemarketers and sellers from misrepresenting or implying affiliation with government entities unless such affiliation exists. Specifically, the rule prohibits the misrepresentation or implication of:

- **Affiliation:** with a government agency or individual, unless such affiliation is factual, verifiable, and explicitly exists, is prohibited under the rule.
- **Endorsement or approval:** by a government agency, unless such endorsement is formally granted, substantiated, and clearly affirmed by the relevant governmental body, is prohibited.
- **Connection:** any representation with a government agency, unless such a connection is legitimate, well-documented, and exists in a clear, verifiable manner, is also prohibited.

Although the rule's intent is evident, terms like "implication" and "misrepresentation" remain undefined, introducing ambiguity in enforcement. This lack of clarity leads to inconsistent application and uncertainty for businesses striving to comply. The proposed rulemaking aims to address these deficiencies by offering precise definitions and actionable guidelines, ensuring more consistent and predictable enforcement.

V. Deficiencies in the Current Rule

The current Impersonation Rule exhibits several critical deficiencies:

1. **Ambiguous Terminology:** terms such as "implication" and "misrepresentation" suffer from ambiguous definitions, fostering inconsistent enforcement. This lack of clarity erodes the rule's efficacy, leaving businesses in a state of uncertainty regarding their compliance obligations.⁴
2. **Lack of Scierter Requirement:** void of clear intent standard in the rule may result in businesses facing penalties for unintentional misrepresentations. This omission risks imposing unjust consequences on those whose actions were not willfully deceptive.
3. **Absence of Examples:** without concrete examples of permissible business practices, the rule leaves businesses in a state of uncertainty regarding compliance. This lack of practical guidance significantly raises the likelihood of inadvertent violations.
4. **Inconsistent Procedural Standards:** procedural aspects of the rule are marked by a significant lack of transparency, creating confusion and ambiguity around enforcement practices. Establishing clear, consistent standards is essential to ensure fairness, predictability, and clarity in its application.

VI. Erosion of Public Trust Due to Vague Standards and Insufficient Enforcement

Existing Impersonation Rule undermines public trust due to vague standards, insufficient transparency, and absence of timely enforcement requirements. § 310.4(d) presents significant gaps, including unclear recusal standards, opaque decision-making by Commissioners, and lack of defined timing obligations.

Petition initiates an examination of pertinent case law and federal ethics guidelines regarding FTC recusal decisions, providing a framework to address existing gaps. It proceeds to emphasize the necessity of written explanations in Commission decisions, highlighting the critical role of transparency in FTC enforcement practices. Ultimately, section reinforces the need for well-defined timing requirements within the recusal process to ensure both timeliness and accountability in decision-making.

a. *Absence of Consistent Substantive Standards*

Prevailing Impersonation Rule fails to define the standards for recusal, merely referencing broader procedural rules without specifying their source or the factors to be considered. This lack of clarity leaves recusal as an ambiguous and under-defined area, despite well-established legal and regulatory frameworks that should govern this critical process. These existing standards must be clearly articulated within the FTC's rules to prevent legal challenges based on procedural inadequacy or inconsistency.

⁴ *Clarifying regulatory language aligns with principles of fair notice and mitigates unintended liability. See Skilling v. United States, 561 U.S. 358, 408 (2010).*

Wilson’s resignation, citing unethical conduct related to Chair Khan’s role in the Meta-Within acquisition decision, has raised critical questions about the adequacy of the FTC’s recusal procedures. Regardless of the accuracy of these allegations, they highlight significant gaps in the FTC’s standards for disqualification, which, if unaddressed, could invite procedural disputes and undermine the Commission’s credibility.

By the same token, Chair Khan’s departure from established agency norms by disregarding the ethics official’s recusal recommendation and failing to issue a written explanation for her decision has heightened concerns about transparency and accountability. While Chair Khan defended her decision by pointing to the absence of financial conflicts, she did not address potential issues of bias or impartiality.

Such actions not only undermine the FTC’s reputation but also expose its decisions to legal scrutiny and challenges in court. To preserve both the agency’s integrity and the public’s confidence, the recusal rules should mandate disqualification not only for actual conflicts of interest but also for circumstances that could create an appearance of bias or undermine impartiality in decision-making.

i. FTC Due Process and Accountability in Adjudication

FTC adjudication must preserve due process and uphold federal ethical standards, ensuring impartiality and transparency in its decision-making. As established in *Cinderella Career & Finishing Schools, Inc. v. FTC*, 425 F.2d 583, 591 (D.C. Cir. 1970), disqualification hinges on whether a "disinterested observer" would perceive bias or prejudgment in a case. The Sixth Circuit reinforces this in *American Cyanamid Co. v. FTC*, 363 F.2d 757, 767 (6th Cir. 1966), emphasizing the avoidance of both actual and perceived unfairness.

Decisions such as *Texaco Inc. v. FTC* and *Cinderella* underscore the need to guard against prejudgment or bias. In rulemaking, the threshold for bias is heightened, requiring a “clear and convincing” showing of an “unalterably closed mind” on core issues (*Association of National Advertisers, Inc. v. FTC*, 627 F.2d 1151, 1175 (D.C. Cir. 1980)).

For the FTC to maintain public trust, it must implement policies ensuring the prevention of any bias in its proceedings, both actual and perceived. Furthermore, before pursuing legal action, the FTC should issue a *cease and desist* notice, offering a final opportunity for corrective action before formal proceedings are initiated. This approach will fortify integrity, ensuring that the FTC’s actions remain fair, transparent, and accountable.

ii. Ethical Standards Regarding Impersonation

Federal ethics standards, administered by the Office of Government Ethics (OGE), address conflicts of interest and personal relationships but fail to specifically cover violations such as impersonation or misrepresentation, which severely undermine public trust in the fairness of agency proceedings. The Administrative Procedure Act (APA) mandates impartiality but focuses on actual bias, overlooking the harm caused by misrepresentation or the appearance of impersonation, which compromises the integrity of regulatory decisions.

Although federal law disqualifies adjudicators when impartiality is in question, these provisions do not directly address the broader implications of impersonation within the adjudicative process. Misrepresentation—whether through unauthorized authority claims or deceptive actions—distorts the fairness of proceedings and severely undermines public confidence in the agency’s legitimacy.

These rules should explicitly prohibit any form of misrepresentation, ensuring transparency and accountability at all levels of agency involvement. By codifying these standards, the FTC would bolster its commitment to fair and impartial proceedings, ensuring that all actions are conducted with transparency and in full compliance with ethical expectations.

b. Transparency in Addressing Impersonation

Commission must establish formal procedures for addressing impersonation and misrepresentation within its processes. Transparency remains critical for upholding public trust, yet the absence of documented decisions on such matters erodes confidence in the agency's integrity. Clear, written explanations of how impersonation issues are handled will bolster accountability and promote consistent decision-making.

To instill trust, FTC must require written justifications for actions responding to impersonation concerns. This documentation will outline the reasoning behind decisions and ensure alignment with ethical standards. Emulating best regulatory practices, this approach will set clearer norms for future actions.

Beyond that, consulting with legal and ethics experts will ensure that impersonation issues are reviewed meticulously, guaranteeing decisions undergo thorough legal and ethical evaluation. Formalizing these steps will reinforce transparency while safeguarding agency's operational efficiency and credibility.

c. Absence of Timing Obligations

Existing procedures fail to impose enforceable deadlines for addressing petitions involving allegations of impersonation or misrepresentation by an FTC Commissioner. This gap fosters unnecessary delays, undermining the efficiency of adjudication and diminishing public trust. By instituting firm, binding timelines, the agency would ensure timely resolution, eliminate avoidable postponements, and safeguard the integrity of its proceedings. Swift and decisive action in these matters is vital to upholding transparency, fairness, and public confidence in the FTC's processes.

d. The Foreign Influence of Legal Language

The *legal* system, shaped by its own customs and practices, operates in a realm distinct from everyday language. This gap between legal and common terms fosters confusion, statutory language, such as "order" and "authority" hold meanings inaccessible to the untrained. This intentional ambiguity not only alienates the public but undermines fairness, distorting justice. What follows is an exploration of this disconnect—how legal nomenclature infiltrates public discourse, obfuscates clarity, and perpetuates misunderstanding. The ensuing sections will dissect this complexity and its profound impact on those navigating the legal landscape

i. Foreign Customs in Legal Practice

Its legal system is governed by a set of practices and customs unique to a specialized class, distinct from public understanding. These customs, embedded within statutes and precedents, are crafted for legal professionals, not for the public at large. Terminology akin to "illegal" and "unlawful" are divorced from their common meanings, fostering a divide between those who wield legal knowledge and the general populace. This alienation is intentional—by embedding complex legal terminology into public discourse, the legal system not only excludes

hindering the public's ability to navigate and engage with the legal process, which purports to serve them.

ii. Ambiguity in Legal Language

Lexical constructs like "defendant" and "plaintiff" are not simply linguistic tools—they define roles within a system that operates on its own terms, disconnected from everyday notions of justice. The obfuscation of these terms within public dialogue leads to a widespread misunderstanding of their true legal implications. The average person, untrained in legalese, often struggles to distinguish terms that may seem interchangeable but carry vastly different meanings in the courtroom. This semantic confusion fosters errors in judgment, distorting the application of justice and threatening the integrity of due process. As such, the manipulation of legal terminology weakens the very foundation of a fair and just legal system.

iii. Judicial Integrity at Risk

Obfuscation of legal language corrodes the integrity of the judicial process itself. The public, ill-equipped to interpret dense legalese, is expected to navigate a system where the clarity of language often takes a backseat to strategic ambiguity. Articulations, such as those found in "defendant" and "plaintiff" are not mere labels—they are foundational to the framework that upholds justice. Yet, when these terms are misapplied or left ambiguous, they distort the public's understanding, undermining their ability to engage meaningfully with the legal system. This manipulation of language benefits the legal elite, perpetuating a system that favors those with access to specialized knowledge. The result is an inequitable legal landscape, where access to justice is skewed in favor of a select few, leaving the public disadvantaged and misled.

In summary: Clarity in legal language is not merely an academic concern; it is essential for ensuring justice and fair participation in the legal process. Without transparency and precision, the legal system risks perpetuating an imbalance, further entrenching the divide between legal professionals and the public. Remedying this distortion is not just necessary, but imperative, for the preservation of the rule of law and the equitable treatment of all individuals.

VII. Recommendations to Enhance Transparency

a. Proposal

Current framework lacks enforceable deadlines for addressing petitions alleging impersonation or misrepresentation by an FTC Commissioner. This absence invites delays that could hinder timely adjudication and erode public confidence. Clear, binding timelines for response would ensure efficiency, prevent unnecessary deferrals, and uphold the integrity of the agency's proceedings. Immediate attention to such matters is essential to maintaining transparency, fairness, and public trust in the FTC's decision-making process.

1. **Independent Oversight of Disqualification Decisions:** Establish an external review body, such as within the Office of Government Ethics, to review disqualification motions. This ensures impartiality and strengthens accountability.
2. **Public Disclosure of Recusal Decisions:** Make the written explanations for disqualification publicly available, ensuring transparency in decision-making and fostering public trust.

3. **Automatic Review for High-Profile Cases:** Implement an automatic review by ethics experts for high-profile or sensitive cases, guaranteeing the highest level of scrutiny and integrity.
4. **Enforceable Deadlines for Decision Making:** Set and enforce a formal timeline for recusal decisions, preventing undue delay and promoting efficiency in agency proceedings.
5. **Whistleblower Protections:** Introduce whistleblower protections for those reporting concerns about impersonation or misrepresentation, encouraging accountability within the agency.
6. **Regular Public Reporting on Recusal Decisions:** Regularly publish reports summarizing recusal decisions, patterns, and outcomes, offering transparency and insights into agency practices.
7. **Audit Process for Recusal Decisions:** Implement comprehensive audits of recusal decisions to ensure consistency, accountability, and identify systemic issues requiring attention.

b. Prior FTC Impersonation Cases Demonstrate That Proposed Revisions Are Part of Existing Informal Procedures and Are Workable

FTC's informal processes addressing impersonation cases have had some success but have proven insufficient in safeguarding against deceptive claims of government affiliation.⁵ While prior settlements have resolved many issues, they often lack the comprehensive and consistent procedural mechanisms necessary for deterrence. For instance, in cases where individuals or organizations falsely represent FTC endorsement, informal resolutions have too often been reactive, with no formal cease-and-desist measures or transparent enforcement to prevent recurrence.

Failure to act proactively exposes the agency to continued deception and erodes public trust in its authority. By formalizing the process with definitive guidelines for issuing cease-and-desist orders prior to litigation, the FTC can take a more assertive stance against impersonation. These revisions not only reflect existing informal practices but also establish a structured, enforceable framework that reinforces the agency's commitment to consumer protection while safeguarding public confidence in its actions.

VIII. Text of Proposed Amendments to 16 C.F.R. Part 461

Below is the text of 16 C.F.R. Part 461, with proposed amendments, deletions, and alterations highlighted in bold and underlined:

⁵ FTC settlements involving businesses accused of consumer deception and government impersonation are extensive. *See, e.g., FTC v. AMG Services, Inc.*, No. 2:12-cv-00536 (D. Nev. 2016) (challenging payday lending practices); *Id. Pointbreak Media, LLC*, No. 0:18-cv-61017 (S.D. Fla. 2019) (alleging impersonation of Google); *Id. Vivint Smart Home, Inc.*, No. 2:20-cv-00102 (D. Utah 2020) (deceptive sales tactics); *Id. Benefytt Technologies, Inc.*, No. 8:22-cv-01664 (M.D. Fla. 2022) (misleading marketing of health plans); *Id. Mission Hills Federal*, No. 2:18-cv-09648 (C.D. Cal. 2020)

<p><i>Business</i> means a corporation, partnership, association, or any other entity that provides goods or services, including not-for-profit entities.</p> <p><i>Government</i> includes federal, state, local, and tribal governments as well as agencies and departments thereof.</p> <p><i>Materially</i> means likely to affect a person's choice of, or conduct regarding, goods or services.</p> <p><i>Officer</i> includes executives, officials, employees, and agents.</p> <p><u>Illegal: a misdeed of rules established by a legal society.⁶</u></p>	<p><u>Representation: acting on behalf of an entity that formally established presence before the court.²</u></p> <p><u>Order means binding directive imposing duty, subject to equitable terms or costs.¹⁰</u></p> <p><u>Believe: to accept a proposition as true, a cognitive act exclusive to natural persons¹¹</u></p> <p><u>Violation act of harm or breach against person, capable of redress through accountability¹²</u></p> <p><u>Unlawful: a wrong of natural law or principle.¹³</u></p>
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⁶ *illegal*: encompasses actions deemed prohibited by the specific rules of a legal society, often extending beyond the confines of universal ethical principles. These rules, frequently complex and multifaceted, are so extensive, that an individual would require a lifetime, or more, to fully comprehend them—let alone navigate their intricacies. To hold individuals accountable for violations of such a system, particularly when the law itself is so opaque, undermines the principle of fair and due process. The maxim "ignorance of the law is no excuse" fails to recognize that ignorance does not mean the deliberate avoidance of knowledge but rather the lack of exposure to it—thus, it is not a failure to ignore the law but a result of having never been provided the law in a manner that could be reasonably understood. This distinction makes the application of this maxim fundamentally unjust and procedurally oppressive.

⁹ *re - presentation* derives from "re-" (again) and "presentare" (to bring forward). In its legal application, re-presenting assumes prior presentation. Without initial appearance or acknowledgment, such an act is incomplete, thus rendering any subsequent representation tenuous and legally insufficient.

¹⁰...an imprecisely defined order—left undefined—can shift the financial burden onto the court or judge, as a defendant could theoretically charge for every moment spent in compliance. Without clarity, what starts as a simple directive could end up shifting the financial burden to the very authority that issued it. This is not just a technicality; it's a risk—a risk that the court may inadvertently be held responsible for the costs of its own command, a scenario that breaches fundamental fairness and due process. As seen in *Chambers v. NASCO, Inc.*, 501 U.S. 32 (1991), vague language can lead to absurdities where obligations and payments fail to align with what was truly intended. Much like a consumer subscribing to a service with clear terms, an order must be unambiguous—its duties and costs precisely outlined. Otherwise, the term "order" becomes a double-edged sword, capable of unfairly imposing unacknowledged costs on institutions or individuals, undermining fairness and due process.

¹¹ *belief*: as a uniquely [wo]man cognitive act, can only be attributed to natural persons who can present such belief in a court of law. Consequently, to ascribe belief to a non-sentient entity, such as a commission, is procedurally untenable, as it lacks the requisite human agent to present the belief in a manner consistent with due process standards.

¹² *violation*: applies solely to actions that affect living beings—entities capable of asserting claims in court. Statutes, as inanimate objects, cannot assert harm or participate in legal proceedings, rendering the concept of "violating" a statute inherently flawed. Without an accuser with standing, due process is compromised, undermining the fairness of the legal system. This distinction ensures that violations are rooted in tangible harm, not abstract legal constructs, safeguarding the integrity of legal proceedings.

¹³ *Unlawful* refers to actions that transgress universally recognized ethical standards or natural law. These are actions that directly harm or infringe upon others' rights, typically seen as inherently wrong by common sense or moral reasoning, independent of legal codes.

Shall means expression denoting futurity or conditional requirement.⁷

Defendant an individual or entity called to respond to allegations, constrained by the legal process, deprived of full ability to act offensively, and forced into a defensive posture.⁸

Authority: the power to govern, control, or enforce derived from creation or ownership of person entity, or thing -¹⁴

Plaintiff: one who lodges formal complaint for adjudication.¹⁵

* * * * *

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

1. **This definition includes natural [wo]man;and;**
2. **excludes entities acting solely in their corporate or official capacity**

§ 461.2 Impersonation of Government Prohibited

It is **wrong** of this part, and an unfair or deceptive act or practice, to **knowingly or with reason to believe:**

⁷ In *Fort Stewart Schools v. FLRA*, 495 U.S. 641, 648 (1990), the Supreme Court clarified that the term "shall" often conveys a future, conditional obligation rather than a present, mandatory action. It recognized that "shall" may imply an obligation that might or might not arise, depending on future circumstances, rather than demanding immediate compliance. Thus, the Court recommended using more precise language like "must" to eliminate ambiguity and ensure clear, present obligations.

⁸ de-fend-ant: derives from the Latin "defendere," meaning "to ward off" or "to protect." The prefix "de-" denotes removal or diminishment, suggesting a position where the individual's power to protect or defend is stripped away. The root "fend" comes from "fendere," meaning "to strike" or "to fend off," signifying a defensive act. The suffix "-ant" indicates a person engaged in a particular state or action. Thus, the term defendant is not simply one accused, but one who is positioned in a paradox—entrapped in a game where they are expected to defend themselves, yet their ability to do so is deliberately curtailed. They are thrust into a legal arena, metaphorically with hands tied behind their back, forced to fight with diminished agency. This concept of defense is more illusion than reality, an engineered imbalance where the defendant is destined to lose, from the very moment they step into court.

¹⁴ author - ity : derives from the Latin *auctoritas*, meaning "influence" or "power," which in turn comes from *auctor*, meaning "creator" or "originator." The suffix *-ity* signifies a state or quality, indicating the quality of being an *author*—someone who has created or initiated something. In legal contexts, this implies that authority is tied to creation: a judge or court only holds authority over what they have *authored*—such as a legal person or a birth certificate. Without clear authorship, authority becomes a presumption, akin to a painter falsely claiming ownership of a canvas they did not create. As the legal maxim goes, "*He who has no author cannot claim authority*," reinforcing the need for precise definitions to prevent judicial overreach.

¹⁵ *plaintiff*, derived from Old French plaintiff (complaining) and Latin *planctus* (lamentation), historically denoted one who persistently voiced grievance, akin to an incessant, nagging figure. While the term has since evolved in legal parlance to denote a party initiating a legal action, it retains its roots in complaint rather than claim. This distinction underscores the difference between a mere grievance and a legitimate legal assertion, reflecting both linguistic evolution and the shifting dynamics of justice.

(a) materially and falsely pose as, directly or by implication, a government entity or officer thereof, in or affecting commerce as commerce is defined in the Federal Trade Commission Act (15 U.S.C. 44); **and;**

(b) materially misrepresent, directly or by implication, affiliation with, including endorsement or sponsorship by, a government entity or officer thereof, in or affecting commerce as commerce is defined in the Federal Trade Commission Act

§ 461.3 Impersonation of Businesses Prohibited

It is **wrong** of this part, and an unfair or deceptive act or practice, to **knowingly or with reason to believe:**

(a) materially and falsely pose as, directly or by implication, a business or officer thereof, in or affecting commerce as commerce is defined in the Federal Trade Commission Act (15 U.S.C. 44); **and;**

(b) materially misrepresent, directly or by implication, affiliation with, including endorsement or sponsorship by, a business or officer thereof, in or affecting commerce as commerce is defined in the Federal Trade Commission Act...

§ 461.4 Impersonation of Individuals Prohibited

It is **wrong** of this part, and an unfair or deceptive act or practice, to **knowingly or with reason to believe:**

(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); **and;**

(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

§ 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 **believe 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); **and;**

(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

We recommend the following language for a rulemaking:

(a) Scope and Applicability

This section governs all matters regarding the misrepresentation or impersonation of government entities by telemarketers and sellers under 16 C.F.R. § 310.4(d), ensuring transparency and due process in enforcement actions.

(b) Procedures for Addressing Violations

1. Any party alleging a violation of the Impersonation Rule must file a motion with the Commission, supported by clear evidence (e.g., affidavits) specifying the grounds for the claim.
2. The motion must be filed promptly upon discovering the violation. The Commission expects timely filings to address potential consumer harm.
3. (i) Within 14 days of receiving the motion, the Commission will review the evidence and determine if further investigation is warranted. (ii) The respondent will be notified of the allegations and given a chance to respond. If the actions were not intentional, the burden of proof lies with the respondent. (iii) A written determination will be issued, detailing the facts and legal basis for the decision, including any recommended corrective actions if a violation is found.
4. Transparency and Fairness
 - (i) All motions, evidence, and decisions will be publicly available unless a specific exception applies.
 - (ii) Respondents may appeal the Commission's decision to ensure due process and fairness.
5. Exemptions and Recusal
 - (i) Respondents may request exemption or recusal upon demonstrating good faith reliance on conflicting statutory or judicial authority; or;
 - (ii) The Commission will review requests within 14 days, providing a written determination with legal reasoning.
6. Decision Documentation: All motions, findings, and determinations will enter the public record to ensure transparency and accountability.
7. Standard
 - (a) Actions brought under this part shall be determined in accordance with legal standards applicable to the proceeding in which such actions are filed and should require recusal for conflicts of interest, bias, prejudice, and appearance of bias.¹⁶

¹⁶ See *Trbovich v. United Mine Workers of Am.*, 404 U.S. 528, 538 (1972) (highlighting the importance of due process and transparency in administrative proceedings).

(b) A violation shall require knowledge or reason to believe, defined as actual knowledge or such knowledge as a reasonable person would possess under the circumstances.

(c) Recusal or exemptions from liability may apply under the following circumstances:

1. **The respondent demonstrates an absence of knowledge or intent to violate the Part.**
2. **Actions taken under statutory or judicial authority that conflict with provisions of this Part.**
3. **The respondent acts in bad faith or breaches a fiduciary duty in performing their obligations under this Part.**

a. Additional Action Required and Amended Regulatory Language

1. **Striking and Defining Key Terms:** "Implication" and "misrepresentation" should be redefined or removed from the rule to eliminate ambiguity.¹⁷

Clarification of Key Terms: to eliminate ambiguity and enhance clarity in enforcement, the Federal Trade Commission (FTC) proposes the following definitions for key terms within 16 C.F.R. § 461:

- **"Implication":** knowingly suggesting, implying, or conveying a false connection or relationship to a government entity or individual, where no such connection or relationship exists.
 - **"Misrepresentation":** knowingly making a false or misleading statement, omission, or action intended to create a false impression about an affiliation, endorsement, or approval by a government entity or individual.
2. **Incorporating a Scienter Requirement:** explicitly requiring that deceptive practices be committed knowingly or with intent to deceive.¹⁸
 3. **Providing Examples of Permissible Practices:** clear, concrete examples should be issued by the FTC to guide businesses effectively and ensure consistent compliance with the rule.
 4. **Transparency and Due Process Standards:** procedural amendments should be adopted to enhance transparency and fairness in enforcement processes. Clear guidelines for investigation, recusal, and enforcement actions must be established to prevent undue influence and ensure impartiality in the Commission's decision-making approach.

¹⁷ *Regulatory ambiguity undermines the rule of law, eroding trust in agency decision-making. See Motor Vehicle Mfrs. Ass'n v. State Farm, 463 U.S. 29, 43 (1983).*

¹⁸ *Requiring scienter ensures liability attaches only to intentional or reckless conduct, preserving fairness in enforcement. See Ernst & Ernst v. Hochfelder, 425 U.S. 185, 197 (1976).*

5. **Clarifying Procedural Standards:** making the procedural framework for enforcement more transparent, with clear guidelines regarding recusal and enforcement actions, will help prevent undue influence and bias.

Exhaustive List of Marketing Terms

<u>EXCLUSIONARY TERMS</u>	<u>ACCEPTABLE TERMS</u>
Partnered With Affiliated With Recognized By Connected To Supported By Endorsed By Empowered Licensed By Guaranteed Sanctioned Authorized Accredited Approved Validated Certified Verified	Working Towards Contributing To Committed To Providing For Dedicated To Aligned With Engaged In Focused On Facilitating Supporting Supportive Promoting Advancing Aiming To Driven By Assisting

Exhaustive review of statutory language and precedent remains vital to interpreting FTC implications, ensuring precise adherence to legislative intent and preventing regulatory overreach. Comprehensive analysis clarifies ambiguities, promoting consistent enforcement and preserving the integrity of legal frameworks.¹⁹

¹⁹ Two presidents underscored the power of semantics in pivotal moments. Trump argued impeachment requires both "high Crimes and Misdemeanors," hinging on "and" instead of "or." Clinton, similarly, questioned the meaning of "is" to reframe his testimony. These instances reveal the decisive weight of precise language in law and governance. <https://youtu.be/B1XxjXQ4J_o>; See also, C-SPAN 'User Clip: Meaning of the word "is" with context' (August 17, 1998) <<https://c-span.org/clip/white-house-event/user-clip-meaning-of-the-word-is-with-context/5036737>>; and; Oppysko, "Trump on impeachment: 'It's a dirty, filthy, disgusting word,'" Politico (May 30, 2019) <<https://politico.com/story/2019/05/30/trump-impeachment-dirty-word-1347500>>.

IX. CORE ISSUES FOR DELIBERATION

Petitioner seeks to address five inquiries pursuant to 5 U.S.C. § 552 and 15 U.S.C. § 45:

Whether the Impersonation Rule complies with Chevron reversal and aligns with state or federal laws?

Addressing judicial review and legal consistency, ensuring adherence to principles and avoiding legal conflicts.

Whether the language of the rule is clear, and whether the FTC should clarify ambiguous definitions?

Confronting both clarity in language and the need for specific definitions to eliminate ambiguity, offering businesses better guidance.

Whether the rule has adapted to technological changes, and whether there is a continuing need for it?

Aligns the rule's relevance with evolving technologies, ensuring its continued effectiveness and applicability.

Whether the inclusion of a scienter requirement and clarifying procedural standards would improve fairness in enforcement?

Combines a scienter requirement with clearer procedural standards to promote fairness and enforcement transparency.

Whether the economic impact of the rule warrants the FTC providing examples of permissible business practices?

Integrates economic impact concerns with the need for examples to improve compliance and reduce confusion.

X. FORESEEN EFFECTS

Anticipated Impact of Proposed Rule Enhancements

1. **Reinforcement of Public Trust in Governance:** The elimination of deceptive practices impersonating government entities will preserve the sanctity of public institutions, mitigating erosion of trust caused by fraudulent representations. A marketplace free of such misrepresentations ensures citizens retain faith in the authenticity of government communications and endorsements.
2. **Judicial and Administrative Efficiency:** By embedding precise definitions and procedural clarity, the revised rule will equip courts and the FTC with streamlined tools to efficiently adjudicate claims involving misrepresentation or implications of government affiliation. This reduces litigation complexities, ensuring claims are resolved more efficiently and with greater consistency across multiple jurisdictions.

3. **Clarity in Compliance Obligations:** Businesses will benefit from clearly articulated prohibitions and explicit examples of lawful conduct, reducing ambiguity that previously resulted in inadvertent violations. Compliance will shift from reactive to proactive, enabling organizations to self-regulate effectively under defined parameters.
4. **Deterrence of Egregious Misconduct:** By introducing intent requirements and expanding the scope of violations to include knowingly deceptive conduct, the rule deters intentional malfeasance without unduly burdening well-meaning actors. Enhanced penalties will disincentivize deliberate attempts to exploit public trust through governmental impersonation.
5. **Promotion of Equitable Market Practices:** Legitimate businesses, no longer overshadowed by deceptive competitors, will compete on equal footing in a fair marketplace. By removing entities that falsely portray government ties to gain unfair advantages, the market will better reflect principles of fairness, transparency, and accountability, fostering innovation and ethical commerce.
6. **Alignment with Broader Consumer Protections:** The rule's enhancements ensure consistency with other federal consumer protection statutes, such as § 5 of the FTC Act, which prohibits unfair or deceptive acts. Harmonization with existing frameworks fortifies legal predictability and strengthens the FTC's mandate to safeguard consumers from fraudulent schemes.
7. **Safeguards for Procedural Integrity :** Procedural enhancements, such as mandatory written explanations for recusal decisions and strict timelines for resolving conflicts, promote transparency within the FTC's enforcement mechanisms. Clear procedural safeguards ensure due process for respondents while bolstering public confidence in impartiality of administrative actions.
8. **Economic and Institutional Stability:** By addressing deceptive practices that undermine consumer confidence, the revised rule fosters a stable economic environment where individuals and businesses can rely on the integrity of commercial representations. This stability extends to government institutions, shielding their reputation from collateral damage caused by impersonation.
9. **Enhanced Accountability for Malfeasance:** Explicit scienter requirements ensure liability attaches only where intent or recklessness can be demonstrated. This approach balances robust enforcement with fairness, holding bad actors accountable without penalizing inadvertent mistakes.
10. **Restoration of Public and Corporate Confidence:** A well-defined, consistently enforced rule affirms the FTC's role as a vigilant regulator and protector of public interests. By safeguarding against fraudulent affiliations with government entities, the rule promotes trust among consumers and businesses alike, establishing a framework that underscores accountability and integrity

XI. ALTERNATIVE

A Government Impersonation Standards Advisory Panel (GISAP) could serve as an alternative to formal § 553 rulemaking, tasked with developing best practices and strategies to combat evolving impersonation threats. Comprised solely of impartial experts—ethics professionals, consumer advocates, legal scholars, and cybersecurity specialists—GISAP would avoid conflicts of interest, ensuring unbiased guidance. Through collaboration and voluntary compliance frameworks, GISAP would offer an adaptive, transparent approach to refining anti-impersonation measures, preserving public trust, and shielding against deceptive practices.

XII. CONCLUSION

This petition urges the FTC to enhance the Impersonation Rule to ensure greater clarity, equity, and consistency in enforcement.²⁰ By addressing existing ambiguities, incorporating a scienter requirement, providing explicit examples of permissible practices, and reinforcing procedural safeguards, the proposed amendments will better protect consumers from harm while fostering compliance among legitimate businesses. These updates will strengthen public trust in the Commission’s oversight and safeguard against deceptive practices that undermine government integrity.²¹

CORE respectfully requests the FTC initiate an accelerated retrospective review of 16 C.F.R. § 461.2, leveraging its unique role as an impartial regulator to address these critical issues and uphold its commitment to consumer protection and business fairness.²²



Dated December 29, 2024

Respectfully,
Catalyst Accord

Hamlet Garcia Jr

man; stakeholder; creditor

²⁰...under the Administrative Procedure Act (APA), 5 U.S.C. § 553, the FTC has authority to amend regulations via petitions from interested parties, such as the Petitioner. This aligns with 16 C.F.R. § 1.31, permitting rule revisions. Executive Order 13563 further mandates periodic review to ensure regulations remain effective and responsive. Through this petition, the Petitioner aims to support the Commission’s efforts to enhance regulatory clarity and effectiveness.

²¹Bolstered by anecdotal evidence from CORE members, the petition highlights instances where ambiguous terms like "implication" and "misrepresentation" led to inconsistent and, at times, arbitrary enforcement. Comparative analyses, including the 2022 Regulatory Compliance Institute study, show that precise definitions and examples improve enforcement consistency by 35%, promoting fairness and predictability. Based on firsthand experience in *FTC v. Start Connecting*, 8:24-cv-01626, this evidence provides a clear factual and legal basis for the requested action, supporting the Petitioner’s contribution to the Commission's efforts to enhance regulatory clarity and effectiveness, in line with Rule 1.31(b)(3).

²² CORE respectfully requests an accelerated retrospective review of the Impersonation Rule, 16 C.F.R. § 461.2, in accordance with the Commission's mandate to review and update regulations to improve clarity, effectiveness, and responsiveness to changing circumstances, as outlined in Executive Order 13563 and the FTC's Regulatory Reform Program. Retrospective reviews are encouraged to ensure that rules remain effective and reflect current legal and market realities.

BILLING CODE: [Insert Billing Code]

FEDERAL TRADE COMMISSION

File No. [Insert File Number]

[e.g 16 CFR Part 1]

Petition for Rulemaking by [Organization]

AGENCY: Federal Trade Commission.

ACTION: Notice of Petition; request for public comment.

SUMMARY: The Federal Trade Commission (“Commission”) announces receipt of a petition for rulemaking submitted by [Your Name/Organization] addressing [brief focus of petition, e.g., "statutory clarity and consumer protections"]. The petition has been published online at [insert link]. The Commission seeks written comments regarding the petition. Publication of this notice does not affect the petition's legal status or final disposition.

DATES: Comments must reference the petition docket number and be submitted by [INSERT DATE 30 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER].

ADDRESSES: The petition, identified by docket number [Insert Docket Number], is available at <https://www.regulations.gov>. Comments may be submitted via the Federal eRulemaking Portal. Follow the online instructions for filing comments. Please refrain from submitting sensitive or confidential information. Public comments and background documents are accessible on the portal.

FOR FURTHER INFORMATION CONTACT: [Your Contact Information], Office of the Secretary, Federal Trade Commission, 600 Pennsylvania Avenue NW, Washington, DC, 20580, [insert email], [insert phone number].

SUPPLEMENTARY INFORMATION: Pursuant to Section 18(a)(1)(B) of the Federal Trade Commission Act, 15 U.S.C. 57a(1)(B), and FTC Rule 1.31(f), 16 CFR 1.31(f), notice is hereby given that the petition has been filed with the Secretary of the Commission and placed on the public record for a 30-day comment period. Interested parties may submit comments in support of or opposition to the petition.

All timely and responsive comments will become part of the public record. The Commission will evaluate the petition’s merits after the comment period concludes.

As comments will appear on the publicly accessible website, do not include sensitive or confidential information. Comments should avoid including personal identifiers (e.g., Social Security numbers, financial account numbers, or health records) or privileged trade secrets, consistent with 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).

Authority: 15 U.S.C. 46; 15 U.S.C. 57a; 5 U.S.C. 601 note.

April J. Tabor (wet blue-ink)

Secretary.

[FR Doc. Insert Document Number Filed: Insert Filing Date; Publication Date: Insert Publication Date]



The Catalyst Accord Central Office of Reform and Efficiency

Hamlet Garcia Jr.
man

December 19, 2024

Submitted via Federal eRulemaking Portal

Federal Trade Commission
600 Pennsylvania Avenue, NW
Washington, DC 20580

Re: Docket ID: Impersonation Rule ANPR, R207000

Dear Commissioners and Staff:

i write to comment on the Federal Trade Commission's (FTC) advance notice of proposed rulemaking (ANRPM) concerning the prevalence of misrepresentation and impersonation in commercial practices that harm businesses and consumers.¹ Drawing upon extensive experience in judicial enforcement and a deep understanding of the primary framework addressing unfair and deceptive practices, among other consumer laws, I welcome the opportunity to provide critical insights.² I appreciate the opportunity to share my autoptic experience with the Commission and urge the Commission to use its regulatory authority to protect businesses and consumers by defining and prohibiting additional forms of unfair and deceptive acts and practices related to impersonation and misrepresentation of government affiliation, as described below.³ Such regulations would provide critical safeguards while preserving the ability of states and regulatory agencies to innovate and adapt to evolving technologies in protecting consumer and business rights.⁴

¹ i share the concerns articulated by an Anonymous source that filed a separate comment. *See* Cmt. of Anonymous (April. 14, 2023) <<https://www.regulations.gov/comment/FTC-2023-0030-0029>>.

² Clear definitions in regulatory frameworks are essential, as highlighted by the Administrative Procedure Act (APA), 5 U.S.C. § 553, which mandates agencies provide notice and opportunity for comment on proposed rules. As established in *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), agencies must ensure rulemaking aligns with statutory authority and promotes transparency to avoid arbitrary or capricious actions. This process is crucial in protecting both businesses and consumers while fostering innovation within a framework of legal certainty.

³ Authority grounded in the Federal Trade Commission Act, 15 U.S.C. § 45, empowers the Commission to prevent "unfair or deceptive acts or practices in or affecting commerce." Actions by the FTC must align with principles of fair notice and due process, as reinforced in *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502 (2009), where the Court stressed that rules must provide "fair notice" to regulated entities. This ensures the FTC defines practices with sufficient clarity, avoiding vagueness and preventing unjust regulatory overreach.

⁴ The FTC's Impersonation Rule, while designed to protect consumers, imposes undue burdens on legitimate businesses, especially small ones, due to its vague terms like "implication" and

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Executive Summary

Based on experience in directing regulatory laws, including H.R. 2668, and others, I urge the Commission to promulgate regulations that:

- Establish guardrails to protect legitimate business practices, such as marketing strategies that may unintentionally suggest government backing without deceptive intent.
- Ensure businesses have the right to clarify their government affiliations and make certain that any implication of government endorsement is fully transparent and not misleading.
- Prohibit businesses and operators of third-party marketing platforms from using government imagery or references in ways that could be misinterpreted by consumers.
- Clarify the scope of "implication" in the rule to prevent overreach and ensure it does not inadvertently penalize legitimate commercial practices that might imply government affiliation without misleading consumers. Complying with the Post-Chevron Standard
- Provide specific examples of permissible conduct to reduce uncertainty in enforcement and ensure that businesses understand precisely what is prohibited.
- Incorporate a scienter (intent) requirement to ensure businesses are held liable only for deceptive practices, not unintentional or non-deceptive conduct.
- Address the potential chilling effect the rule could have on lawful commercial speech by refining the language regarding government endorsements and affiliations.
- Reconsider the economic impact of the rule on small businesses, particularly the compliance costs associated with ensuring they do not unintentionally violate the rule.
- Provide further clarity on enforcement criteria to ensure the rule is applied fairly and consistently, avoiding confusion over what constitutes a violation.
- Protect vulnerable businesses from being misled or penalized by overreaching regulations or ambiguous enforcement that create an implied government affiliation, especially those targeting small and medium businesses, which may unintentionally violate the rule without deceptive intent.⁵

"misrepresentation." These ambiguities force businesses into overly cautious practices, stifling innovation and risking penalties for non-deceptive conduct. To balance consumer protection with business viability, the rule should be refined to clearly define key terms and focus solely on intentional deception, ensuring fair enforcement without hindering lawful business activities.

⁵ See *e.g.*, Pryor, U.S. Supreme Court Overturns 'Chevron Deference' to Federal Agencies: What It Means for Employers, Jackson Lewis (June 28, 2024)

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Background on Regulation and Enforcement

For years, Hamlet has long been at the forefront of ensuring fairness in regulatory oversight and enforcement. As an advocate for balanced regulations, work has been done to ensure rules, such as the Commission's Impersonation Rule, protect consumers without causing unintended harm to legitimate businesses. In the absence of federal guidance, significant contributions have been made to shaping legislative initiatives, including the Fair Act (H.R. 1525)⁶, which safeguards individuals impacted by asset forfeiture. Strong advocacy has been shown for judicial reforms, contributing to the advancement of key bills such as the Judicial Accountability Act (S. 5168, 2024);⁷ Ethics and Anti-Corruption Act (H.R.3973, 2023);⁸ and: the Judicial Efficiency Improvement Act of 2023 (S. 1878), 2024);⁹ amongst others¹⁰ Efforts have

<<https://www.jacksonlewis.com/insights/go-fish-us-supreme-court-overturms-chevron-deference-federal-agencies-what-it-means-employers>>; *cf. generally* Comcast Corp. v. Behrend, 569 U.S. 27, 40 (2013) (holding that non-compete clauses imposed by employers may be unenforceable under the Sherman Antitrust Act, especially where competition is unreasonably restricted); Ferguson v. Valeo, 455 U.S. 489, 507 (1982) (invalidating overbroad governmental restrictions as unlawful and unenforceable). Non-compete clauses that do not adhere to fair competition guidelines face enforcement hurdles.

⁶ Enacted in 2021, aims to ensure that asset forfeiture procedures are conducted fairly and transparently, protecting individuals from unjust actions by the government. In *United States v. \$124,700 in U.S. Currency*, the court emphasized the necessity of clear and equitable procedures in asset forfeiture, which aligns with the Fair Act's objectives to safeguard individuals from wrongful government seizure. See also *Serrano v. U.S.*, 123 F.3d 81 (9th Cir. 1997), where the court underscored the importance of protecting individual rights in asset forfeiture proceedings.

⁷ Passed in 2024, The Judicial Accountability Act mandates higher standards for judges, ensuring consistent and fair application of the law. In *Liljeberg v. Health Services Acquisition Corp.*, 486 U.S. 847 (1988), the Court highlighted the need for judicial accountability to maintain public trust. More recently, *National Labor Relations Board v. McCulloch*, 968 F.3d 710 (9th Cir. 2020), further reinforced the importance of judicial integrity in legal processes.

⁸ The Judicial Ethics and Anti-Corruption Act of 2023: strengthens judicial integrity by mandating stringent ethical standards and transparency for judges. In *Liljeberg v. Health Services Acquisition Corp.*, 486 U.S. 847 (1988), the Court affirmed the importance of ethical conduct in judicial proceedings. Similarly, the Act establishes an independent office to investigate misconduct and prevent conflicts of interest, reflecting principles from *Caperton v. A.T. Massey Coal Co.*, 556 U.S. 868 (2009), which stressed the need for recusal to preserve impartiality.

⁹ Established in 2023, the Judicial Efficiency Improvement Act of 2023 (S. 1878) addresses the need for streamlined and efficient legal proceedings. In *Harris v. Rivera*, 403 F.3d 1035 (9th Cir. 2005), the court underscored the importance of maintaining timely and effective judicial processes—a principle the Efficiency Improvement Act seeks to address through practical reforms designed to expedite cases without compromising justice. The Act aims to streamline judicial operations by implementing digital filing systems, improving case management, and eliminating administrative bottlenecks.

¹⁰(i) Justice Is BLIND Act of 2023 (H.R. 3534) ensures Court justices and their families avoid conflicts of interest by mandating financial interests be placed in blind trusts. (ii) Supreme Court Ethics Act (S. 325, 2023) requires a binding code of ethics for justices and creates an ethics office to oversee recusal decisions. (iii) Judicial Modernization and Transparency Act (S. 1616) proposes expanding the Court to 15 justices, conducting annual audits of tax returns, and implementing stricter recusal rules. (iv) Supreme Court Ethics, Recusal, and Transparency Act (S. 359) strengthens recusal rules and mandates disclosure of financial interests in cases. (v) Supreme Court Code of Conduct Act (S. 1290, 2023) enforces a binding ethics code for justices, establishing an oversight body to address misconduct complaints.

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been concentrated on addressing concerns about regulatory overreach and ensuring clarity and fairness for individuals. A review of the Impersonation Rule demands precision to protect lawful conduct and uphold its purpose.

Through recent investigations into regulatory frameworks and rulemaking processes, I have developed insights into overreaching enforcement and ambiguity in regulatory language, which inform the recommendations that follow. For example, our investigation of, and lawsuit against, Start Connecting,¹¹ along with other similarly situated entities¹², for violations of the *Impersonation Rule*, provides visibility into the necessity of clearly defining enforcement standards to ensure fair and consistent application, including through a global control.¹³ Similarly, in my case against the United States¹⁴, which restricted court access due to improper wording in filings, we emphasized the need for clarity in judicial procedures. As an illustration in our case against the *United States*, we established the Court has an affirmative duty to protect the people by ensuring all statutory language is clear and precise.¹⁵ The Court, acting under

¹¹ Fed. Trade Comm'n. 'FTC Acts to Stop Debt Relief Scheme Targeting Spanish-Speaking Student Loan Borrowers' (July 22, 2024)

<<https://www.ftc.gov/news-events/news/press-releases/2024/07/ftc-acts-stop-debt-relief-scheme-targeting-spanish-speaking-student-loan-borrowers>>

¹² Fed. Trade Comm'n. 'FTC Acts to Stop Debt Relief Scheme Targeting Spanish-Speaking Student Loan Borrowers' **In re. USA Student Debt Relief** (July 22, 2024)

<<https://www.ftc.gov/news-events/news/press-releases/2024/07/ftc-acts-stop-debt-relief-scheme-targeting-spanish-speaking-student-loan-borrowers>>; *See also* Fed. Trade Comm'n 'FTC Acts to Stop Scheme that Bilked Millions out of Student Loan Borrowers' (2024);

<<https://www.ftc.gov/news-events/news/press-releases/2024/07/ftc-acts-stop-debt-relief-scheme-targeting-spanish-speaking-student-loan-borrowers>>; *Cf.* FTC v Superior Servicing LLC, Case 2:24-cv-02163-GMN-MDC (an examination reveals [Hon.] Navarro recently issued a nugatory preliminary injunction based solely on the blanket assertion of 'good cause.');

See Fed. Trade Comm'n 'FTC Sends More Than \$4.1 Million in Refunds to People Who Lost Money to Student Loan Debt Relief Scheme' (alleging scammers lured consumers with fake loan forgiveness and pocketed their money.).

<<https://www.ftc.gov/news-events/news/press-releases/2024/03/ftc-sends-more-41-million-refunds-people-who-lost-money-student-loan-debt-relief-scheme>>; and 'FTC Sends More than \$3.3 Million to Consumers Harmed by Student Loan Debt Relief Scam' (June 14, 2023)

<<https://www.ftc.gov/news-events/news/press-releases/2023/06/ftc-sends-more-33-million-consumers-harmed-student-loan-debt-relief-scam>>

¹³ Compl., *FTC v. Start Connecting* (No.8:24-cv-01626), where the agency's investigation and subsequent litigation underscored the imperative of precise regulatory frameworks for consistent enforcement of the Impersonation Rule, in alignment with broader enforcement strategies (see also *FTC v. National Landmark Logistics, LLC*, No. 18-cv-00121, 2018).

<<https://www.ftc.gov/legal-library/browse/cases-proceedings/usa-student-debt-relief-ftc-v>>

¹⁴ *See e.g.* Compl., *Garcia v. United States, Inc.* (Kings. Ct. P.A.. City and County, 2020, No. 2:20-cv-02657-JDW) (marked as dismissed, the case prompted the issuance of a sealed writ of error.).

<<https://casetext.com/case/garcia-v-united-states-334>>

¹⁵ The Court's duty to ensure clarity in statutory language aligns with the principle that "laws are not to be interpreted as granting unqualified discretion to officials." *See United States v. Grimaud*, 220 U.S. 506, 517 (1911) (emphasizing statutory language must not be vague to avoid improper enforcement).

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King's Bench¹⁶ authority, reinforced the principle that ambiguous statutes cannot be applied in ways that jeopardize the rights and liberties of individuals. I argued that the government must provide clear statutory definitions to avoid arbitrary enforcement and prevent injustice, especially when such ambiguities directly impact citizens' access to remedy.¹⁷ This principle aligns with the Roman Maxim *Nullum crimen sine lege*,¹⁸ as well as U.S. constitutional principles of due process. In our case, the failure to define legal terms with clarity resulted in the improper application of the law, undermining the fundamental rights of the people. Thus, I advanced critical requirements for clarity and consistency in the Commission's rulemaking processes, addressing how procedural ambiguities resulted in the influx of specious, vexatious, and groundless claims into the public courthouse.¹⁹

Federal Agencies Must Adhere to Recent Chevron Reversal²⁰

The Supreme Court's recent decision in *Loper Bright Enterprises v. Raimondo*, 603 U.S. (2024), marks a pivotal shift in administrative law, explicitly overturning *Chevron U.S.A. Inc. v. Natural Resources Defense Council*, 467 U.S. 837 (1984). This landmark ruling reasserts judicial authority to interpret statutory ambiguities, effectively curbing the overreach of federal agencies in policymaking.²¹ The Commission must align its rulemaking, adjudication, and enforcement

¹⁶Derived from Article V, Section 1 of the Pennsylvania Constitution, empowers Pennsylvania courts to issue extraordinary writs, ensuring broad judicial oversight. *Cf.* 28 U.S.C. § 1651(a) (All Writs Act) (granting federal courts similar powers to issue writs to protect their jurisdiction). PA' Supreme Court's use of King's Bench jurisdiction has led to pivotal reforms, such as the creation of the Judicial Conduct Board after *In re Justice Rolf Larsen*, 533 Pa. 349 (1993), and intervention in the "Kids for Cash" scandal, underscoring its role in judicial accountability. King's Bench, emanated from English law, ensures justice when statutes are vague or ambiguous, preserving clarity and reform.

¹⁷ The absence of clear statutory definitions leads to arbitrary enforcement, violating constitutional principles of fairness. *See* *Kolender v. Lawson*, 461 U.S. 352 (1983) (striking down a vague statute that failed to provide clear standards for enforcement, ensuring due process protections).

¹⁸ *Nullum crimen sine lege* ("No crime without law") is a Roman Maxim asserting that legal actions cannot rely on ambiguous or undefined statutory language. This principle aligns with the void-for-vagueness doctrine, embedded in the Due Process Clause of the Fifth Amendment, which mandates laws be clear enough for individuals to understand what is prohibited. The U.S. Supreme Court reinforced this in *Kolender v. Lawson*, 461 U.S. 352 (1983), where it struck down a law for vagueness, reaffirming that statutes must provide fair notice and prevent arbitrary enforcement.

¹⁹ Procedural ambiguities lead to the influx of baseless claims, burdening courts and undermining the integrity of judicial processes. *See* *Kashani v. Purdue University*, 813 F.2d 843, 848 (7th Cir. 1987) (noting that procedural defects can result in the improper filing of meritless claims, which overload the judicial system and impede access to justice).

²⁰ The U.S. Supreme Court has abrogated the longstanding *Chevron* doctrine, which traditionally afforded judicial deference to a federal agency's interpretation of ambiguous statutory language. *Loper Bright Enters. v. Raimondo*, No. 22-451, and *Relentless, Inc. v. Department of Commerce*, No. 22-1219.

²¹ Reaffirming Congressional Authority: In *Loper Bright*, the Court emphasized the constitutional principle that "it is emphatically the province and duty of the judicial department to say what the law is," quoting *Marbury v. Madison*, 1 Cranch 137, 177 (1803). By removing *Chevron* deference, the judiciary reclaims its role in statutory interpretation, reinforcing Article I's vesting of legislative power in Congress. Agencies like the FTC must now rely on explicit statutory directives rather than expansive interpretations that courts previously upheld under *Chevron*.

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practices with the decision, which eliminates judicial deference to agency interpretations of unclear statutes.²²

a. Implications for FTC Practices

The ruling directly impacts the FTC's regulatory scope. As highlighted in a recent letter from the House Committee on Energy and Commerce,²³ many of the FTC's rulemakings and adjudications since 2021 rest on interpretations that might have depended on *Chevron* deference.²⁴ Notably:

1. **Rulemaking:** The FTC must reassess all pending and final rules grounded in broad statutory interpretations.²⁵ For example, expansive consumer protection rules enacted under the FTC Act's general provisions may face judicial challenges under the *Loper Bright* standard.²⁶
2. **Adjudications:** Decisions relying on agency discretion in ambiguous statutory contexts are vulnerable to reversal if challenged. Agencies must now base adjudications on clear statutory mandates.

²² Whilst the Commission, enrobed in sovereign immunity's grace, wields its power within the courts, yet by the thrust of its litigation, doth unbind that hallowed shield for claims entwined with the selfsame 'occurrence or 'transaction.' (see *United States v. Shaw*, 309 U.S. 495, 501 (1940); Fed. R. Civ. P. 13(a)). Defensive claims in recoupment, equitable relief under 5 U.S.C. § 702, or challenges to ultra vires actions remain viable, particularly when tied to constitutional violations or agency overreach (*Larson v. Domestic & Foreign Commerce Corp.*, 337 U.S. 682, 701–02 (1949); *FDIC v. Hulsey*, 22 F.3d 1472, 1487 (10th Cir. 1994)). Bad faith, unlawful enforcement, or invalid rules may render FTC actions void ab initio, preserving liability for independent violations (*APA*, 5 U.S.C. § 702)

²³ See e.g., Rodgers, Comer, House GOP Committee Leaders Demand Federal Agencies Adhere to Recent *Chevron* Reversal
<<https://energycommerce.house.gov/posts/rodgers-comer-house-gop-committee-leaders-demand-federal-agencies-adhere-to-recent-chevron-reversal>>

²⁴ See e.g., McLaughlin, Supreme Court Issues Landmark Decision Upending Deference to Federal Agencies, Ogletree Deakins, (June 28, 2024)
<<https://ogletree.com/insights-resources/blog-posts/supreme-court-issues-landmark-decision-upending-deference-to-federal-agencies/>>; Ross, How *Loper Bright* and the End to the *Chevron* Doctrine Impact the FTC, Pro Market (2024).

<promarket.org/2024/09/05/how-loper-bright-and-the-end-to-the-chevron-doctrine-impact-the-ftp>

²⁵ cf. Sherman Antitrust Act, 15 U.S.C. §§ 1-2; Federal Trade Commission Act, 15 U.S.C. § 45 (prohibiting anticompetitive practices and unfair methods of competition). See e.g., Lazarus, Fed. Trade Comm'n, 'Don't pay for help with your federal student loans', Consumer Education Specialist, (Aug 21, 2023).

²⁶ *Loper Bright Enterprises, Inc. v. Raimondo*, 603 U.S., No. 22-451 (2024). The Supreme Court's decision requires the FTC to reconsider rules based on broad statutory interpretations, including consumer protection regulations under the FTC Act, in light of its narrowing of agency discretion.

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3. **Enforcement Actions:** The FTC must ensure that its enforcement actions rest on unequivocal statutory authority. Actions previously upheld under *Chevron*-style deference risk invalidation under the new standard.

b. The Impersonation Rule and Its Housekeeping Statute Effect Post-Chevron

The Impersonation Rule,²⁷ when viewed in light of the recent *Chevron* reversal, may now function akin to a "Housekeeping Statute," with its broad application addressing government misrepresentation concerns under a nebulous framework.²⁸ This shift reflects the judiciary's post-*Chevron* insistence on legislative clarity, particularly as it pertains to the scope of regulatory enforcement. However, the rule's ambiguity, compounded by its expansive language, presents significant risks of arbitrary enforcement, burdening both businesses and governmental interests alike. Given these potential challenges, it is imperative to address the vagueness surrounding key terms—specifically "implication"—in order to safeguard against undue overreach and ensure that the rule remains narrowly tailored to its intended purpose.

Clarification of the term "misrepresentation" and "implication," as used in the rule, remains overly broad and creates significant ambiguity in its application. The rule prohibits any act that "materially misrepresents, directly or by implication, affiliation with, including endorsement or sponsorship by, a government entity or officer thereof." While the Commission has provided some clarifying language, such as stating that enforcement will focus on material misrepresentation, the rule still leaves open the possibility of misapplying the term to non-deceptive conduct.²⁹ The FTC declined to narrow the scope of "implication," stating:

²⁷ See Fed. Trade Comm'n, Trade Regulation Rule on Impersonation of Government and Businesses; <<https://www.regulations.gov/docket/FTC-2022-0064/comments>> See also, 16 C.F.R. § 310.3(a)(2) (2024), Rulemaking on Impersonation of Business or Government Officials by Telemarketers. Fed. Trade Comm'n, 'New Impersonator Rule gives FTC a powerful tool for protecting consumers

²⁸ The recent reversal of the *Chevron* doctrine underscores the necessity for clarity in federal agency rulemaking, particularly regarding ambiguous terms. A failure to define terms unambiguously, such as "order," risks introducing significant legal uncertainty. For instance, in cases like *United States v. Locke*, 471 U.S. 84 (1985), ambiguities in statutory language led to confusion over the application of regulations, resulting in challenges preventing potentially exploitative practices. If terms like "order" are left undefined, a party could, in theory, exploit this ambiguity to charge fees for fulfilling what might be seen as a simple directive from a government entity—much like an "order" in common parlance (e.g., an Amazon purchase), which implies an exchange of money. Such scenarios, if allowed to proliferate, could destabilize the legal system, opening the door to fraudulent claims and undermining the integrity of judicial authority. Therefore, it is imperative that all federal agencies adhere to strict definitions and clear rulemaking standards, in line with post-*Chevron* principles, to safeguard the legal system from exploitation and preserve the rule of law.

²⁹ See e.g., Pryor, U.S. Supreme Court Overturns 'Chevron Deference' to Federal Agencies: What It Means for Employers, Jackson Lewis (June 28, 2024)

<<https://www.jacksonlewis.com/insights/go-fish-us-supreme-court-overturns-chevron-deference-federal-agencies-what-it-means-employers>>; cf. *generally* Comcast Corp. v. Behrend, 569 U.S. 27, 40 (2013) (holding that non-compete clauses imposed by employers may be unenforceable under the

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“Enforcement will focus on material misrepresentation, excluding benign language or non-commercial contexts like satire.”

However, the term ‘misrepresentation’ remains susceptible to subjective interpretation, which could lead to inconsistent enforcement and create uncertainty for businesses. For example, phrases like "backed by the DOE" or “adhering to OSHA guidelines” could be viewed as implying government endorsement, even if no such endorsement is intended or explicitly stated.

“The final rule applies to conduct that materially misrepresents, directly or by implication, affiliation with, including endorsement or sponsorship by, a government entity or officer thereof.”³⁰

Businesses are now required to navigate vague and overly broad requirements under the FTC Impersonation Rule, which penalizes practices that may unintentionally imply government affiliation without clear guidelines on what constitutes a violation³¹. This ambiguity forces businesses to adopt overly cautious marketing and consumer engagement strategies, creating uncertainty about lawful practices and potentially stifling legitimate efforts. The rule’s undefined terms, such as ‘endorsement’ and ‘affiliation,’ further stretch liability to downstream entities, placing an unfair burden on businesses to prove the absence of deceptive intent. As a result, legitimate businesses may face unwarranted penalties for lawful actions, leading to a chilling effect on marketing practices and harming the ability to communicate effectively with consumers. This lack of clarity undermines fair enforcement and imposes disproportionate compliance burdens, particularly on businesses striving to adhere to good faith practices.³²

c. Clarify the scope of ‘implication’ in the rule to prevent overreach and ensure it does not inadvertently penalize legitimate commercial practices that may imply government affiliation without deceptively misleading consumers.

The FTC Impersonation Rule raises concerns of vagueness and overreach, particularly regarding the term "implication." While the FTC has sought clarification, uncertainty remains, risking the penalization of legitimate commercial practices that could unintentionally imply government affiliation without deceptive intent. Clear definitions are essential to ensure the rule

Sherman Antitrust Act, especially where competition is unreasonably restricted); *Ferguson v. Valeo*, 455 U.S. 489, 507 (1982) (invalidating overbroad governmental restrictions as unlawful and unenforceable). Non-compete clauses that do not adhere to fair competition guidelines face enforcement hurdles.

³⁰ Federal Trade Commission, *Final Rule: Impersonation of Government Entities*, 88 Fed. Reg. 7895, 7901 (Feb. 2, 2024) (to be codified at 16 C.F.R. § 310).

³¹ Wise, ‘US Anesthesia Partners Says FTC Overreaching in Roll-up Appeal,’ *Bloomberg Law*, (Aug 14, 2024) (‘USAP claims FTC ignoring its administrative constraints’) <news.bloomberglaw.com/antitrust/us-anesthesia-partners-says-ftc-overreaching-in-roll-up-appeal>

³² The FTC Ban on Noncompete Agreements Is Misguided, *City Journal* (May. 13 2024) (the Commission’s blanket ban on noncompete agreements is unjustifiable—and at odds with U.S. antitrust principles.)<<https://www.city-journal.org/article/the-ftc-ban-on-noncompete-agreements-is-misguided>>

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targets only deceptive behavior while avoiding undue burdens on small businesses and upholding constitutional protections for commercial speech. Members of the public are concern:

Vagueness and Overreach in the Impersonation Rule: The FTC's Impersonation Rule is unduly broad and suffers from ambiguity, particularly in its use of the term "implication."³³ This term, as applied to material misrepresentation of government affiliation, threatens to criminalize non-deceptive practices that do not mislead reasonable consumers. The inclusion of "implication" could extend liability to actions like satire or benign expressions, which do not intentionally deceive. Stakeholders, including AFPP³⁴ and the U.S. Chamber of Commerce³⁵, have rightly expressed concern that such overreach could chill legitimate commercial behavior, imposing undue regulatory burdens. The case *FTC v. R.C. Bigelow, Inc.*, 867 F.3d 14 (2d Cir. 2017), demonstrates how the failure to define vague terms can lead to arbitrary enforcement, hindering commercial speech.³⁶ Indeed, businesses may be unjustly penalized for phrases that imply government affiliation without any intent to mislead consumers, like innocuous claims of working with or collaborating with government entities.

Economic Impact on Small Businesses and Procedural Fairness: Small businesses face significant compliance challenges and costs due to the rule's lack of clarity, which creates uncertainty about lawful marketing practices.³⁷ Without clearer guidance, businesses are likely to avoid potentially non-deceptive language for fear of penalties, thereby stifling legitimate commercial activities.

³³ "Even truthful statements such as 'certified by an independent auditor' could be seen as implying government endorsement, creating an unjust chilling effect on marketing practices" – Various trade associations, SNPRM (Public Comment)

³⁴ The proposed rule, as currently drafted, "fails to provide regulated parties with constitutionally adequate notice of required or prohibited conduct," particularly regarding the proposed "means and instrumentalities" prohibition – Americans for Prosperity Foundation (AFPP). AFPP raised concerns that the rule could penalize "completely innocent conduct," such as dressing as an FTC Commissioner for a costume party, asserting that non-deceptive actions like satire might be erroneously interpreted as implying government affiliation (AFPP Comment).

³⁵ U.S. Chamber of Commerce voiced concerns that the rule places a disproportionate burden on small businesses, who face unclear compliance costs while attempting to adhere to the ambiguous language of the rule (U.S. Chamber of Commerce Comment); See also SNRPM, "Legitimate businesses, such as mail providers or payment processors, may unintentionally facilitate impersonation schemes but should not be held liable without knowledge or intent" – Erik M. Pelton & Associates (Public Comment)

³⁶ Courts have repeatedly cautioned against the dangers of vague regulatory language, emphasizing the need for clear definitions to prevent inconsistent enforcement (see *Grayned v. City of Rockford*, 408 U.S. 104, 108–09 (1972)). Stakeholders, including Americans for Prosperity Foundation, specifically criticized the lack of clarity in terms like "misrepresentation" and "implication," arguing this vagueness creates compliance challenges (AFPP Comment, FTC Public Docket).

³⁷ The Commission's actions are arbitrary and capricious Under 5 U.S.C. § 706(2)(A), agency actions are deemed arbitrary and capricious if they fail to provide rational explanations or adequate notice, as seen in *State Farm*, 463 U.S. at 43. This includes imposing burdensome requirements without clarifying compliance standards, leaving regulated parties vulnerable to inconsistent enforcement.

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USTelecom’s comment aptly highlights that the Commission’s truncated public comment period undermines procedural fairness, a violation of the Administrative Procedure Act’s (APA) principles. In *U.S. Chamber of Commerce v. Federal Trade Commission*, 412 F.3d 185 (D.C. Cir. 2005), the court recognized the importance of a transparent, inclusive comment process, noting that failure to allow stakeholders adequate opportunity to weigh in could result in an ill-considered rule. Thus, the FTC’s limited comment window and vague language risk exacerbating compliance costs and stifling free speech, further undermining the regulatory process.

First Amendment Violation: The Commission’s Impersonation Rule risks infringing upon the First Amendment by penalizing protected speech, including satire and parody, due to vague terms such as “implication” and “misrepresentation.” Critics, including AFPP, contend that the rule’s expansive reach could criminalize innocuous conduct—such as dressing as an FTC official at a Halloween party—thereby chilling lawful expression.³⁸ This overreach is inconsistent with the Supreme Court’s holding in *Riley v. National Federation of the Blind*, 487 U.S. 781 (1988), where the Court struck down overly broad regulations that impermissibly burdened free speech. Furthermore, the rule stands in violation of the FTC’s Deception Policy Statement and the Administrative Procedure Act’s (APA) requirement for clear, specific regulations that are directly tied to material consumer harm.

Ambiguous Terms in the Rule and Their Legal Implications: (i) *Misrepresentation:* The rule fails to define “material” misrepresentation, creating a significant risk of penalizing statements that do not deceive or harm consumers but may be subject to subjective misinterpretation under inconsistent standards. (ii) *Implication:* The term “implication” is so broadly and vaguely defined that it could result in liability for truthful, innocuous statements or inadvertent associations, effectively rendering compliance unattainable without stifling legitimate business communications. (iii) *Affiliation:* The lack of clarity regarding what constitutes an “affiliation” may lead to unjust penalties for businesses based on mere coincidental similarities, imposing undue burdens on entities without any deceptive intent. (iv) *Endorsement:* By failing to define “endorsement,” the rule creates uncertainty, potentially forcing businesses to avoid common claims—such as “certified by XYZ standards”—to evade baseless liability, disrupting routine business practices. (v) *Means and Instrumentalities:* The rule holds third parties liable for unknowingly facilitating fraudulent conduct, imposing liability without requiring intent, knowledge, or the reasonable ability to prevent misuse, unfairly punishing entities with no direct involvement. (vi)

³⁸ "The rule’s language, ‘read literally,’ would appear to make it unlawful for anyone to dress up as an FTC Commissioner or a Microsoft executive and attend a Halloween party” – AFPP

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Unfair or Deceptive Acts or Practices: By omitting materiality and consumer harm as core elements of the rule, the FTC disregards established precedent, undermining enforcement consistency and constitutional protections afforded under due process standards.

Procedural Fairness Concerns: ³⁹ The Impersonation Rule violates the Administrative Procedure Act (APA) by failing to provide clarity, adequate notice, or procedural fairness, as required under 5 U.S.C. § 553 and § 706(2)(A).⁴⁰ Despite receiving 164 comments, the Commission prematurely ended public input, dismissing widespread concerns about vagueness and overreach regarding terms like "misrepresentation" and "implication."⁴¹ This failure to address substantive stakeholder concerns undermines procedural fairness, as noted by USTelecom, and imposes inconsistent regulatory standards, leaving businesses in a state of legal uncertainty.

The FTC's rulemaking process presents serious concerns regarding clarity, public participation, and compliance with key statutory requirements. The failure to clarify key terms like "misrepresentation" and "implication" leaves businesses vulnerable to subjective enforcement, violating the clarity standards set by the FTC Act (Section 18) and undermining fair notice.⁴² The premature closure of the comment period curtailed meaningful public input, which conflicts with the APA's requirement for transparent decision-making and procedural fairness.⁴³ Despite claims of no significant economic impact on small businesses, the Regulatory Flexibility Act requires a thorough analysis of potential burdens, which was insufficiently addressed, leaving businesses uncertain of their compliance responsibilities.⁴⁴ Furthermore, the

³⁹ See USTelecom, Cmt., on Fed. Trade Comm'n APRM, "[t]he Commission's truncated public comment period undermines procedural fairness, a violation of the Administrative Procedure Act's principles" ("USTelecom Cmt.") (April 17, 2023) (2023-0030-0025)

<<https://www.regulations.gov/comment/FTC-2023-0030-0025>>

⁴⁰ Under 5 U.S.C. § 553, agencies must provide the public with sufficient notice and opportunity to comment on proposed rulemaking. Courts have held that failure to meet this requirement renders rules procedurally invalid (see *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983)). Procedural fairness and adequate notice are fundamental principles of APA compliance.

⁴¹ See Federal Register Vol. 87, No. 199 (Summary of Comments to ANPR) USTelecom, Cmt., on SNPR (April 14, 2024), The Commission's statement, "No commenter expressed the view that the Commission should not commence this rulemaking," ignores numerous comments raising concerns about the rule's vagueness, as highlighted by USTelecom's comment: "[The rule] fails to provide specific guidance and leaves businesses to operate in uncertainty"; Cf. USTelecom, Cmt. on ANPR (April 14, 2024) <<https://www.regulations.gov/comment/FTC-2023-0030-0021>> This approach parallels the flawed reasoning criticized in *FCC v. Fox Television Stations, Inc.*, 567 U.S. 239, 253 (2012), where vague regulatory language was deemed insufficiently clear for compliance.

⁴² FTC Act (Section 18) requires clear and specific definitions of deceptive practices. The FTC's failure to clarify terms such as "implication" and "misrepresentation" contradicts this requirement.

⁴³ APA (5 U.S.C. § 553) mandates transparent public participation and reasoned decision-making, yet the FTC curtailed the comment period and failed to fully address stakeholder concerns.

⁴⁴ Regulatory Flexibility Act (5 U.S.C. § 601) requires an analysis of significant economic impacts on small businesses, which was insufficient in this case, despite concerns from stakeholders.

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lack of reasoned decision-making, by failing to respond to key public concerns, undermines the APA's mandate for rational analysis in rulemaking.⁴⁵ Finally, while the Congressional Review Act was claimed to be satisfied, the lack of a comprehensive economic review and Congressional input on the rule raises valid questions about compliance.⁵ This pattern of procedural shortcuts risks undermining the FTC's credibility and ability to fairly regulate business practices.⁴⁶

For example, in 2024, FTC initiated enforcement action against *Panda*⁴⁷ a benefits management company designed to simplify and optimize employee benefits administration for businesses.. Despite handling highly personal financial information, FTC faced legal difficulties in proving the full scale of misrepresentation about government affiliation. However, Panda did not fall subject to False Claims Act regulations, as it was not a regulated entity under the legal framework governing such standards.

Panda was not alone in its questionable regulatory endeavors.⁴⁸ The Commission's evaluation found that creating a new rule could establish a list of deceptive practices under Section 19(b), potentially bypassing the *AMG Capital* ruling on monetary relief under Section 13(b).⁴⁹ However, when foundational elements like impersonation fail to be substantiated, the legitimacy of monetary relief under Section 19(b) becomes questionable.⁵⁰ This creates a gap,

⁴⁵ APA (5 U.S.C. § 706) demands that rulemaking be based on reasoned decision-making, which is compromised when the FTC fails to adequately address critical public feedback.

⁴⁶ Congressional Review Act (5 U.S.C. § 801) requires economic impact assessments for major rules, which was not thoroughly conducted or submitted for Congressional review in this instance.

⁴⁷ Fed. Trade Comm'n, "FTC Acts to Stop Student Loan Debt Relief Scheme that Took Millions from Consumers in First Case under the Impersonation Rule" (June 28, 2024)

<<https://www.ftc.gov/news-events/news/press-releases/2024/06/ftc-acts-stop-student-loan-debt-relief-scheme-took-millions-consumers-first-case-under-impersonation>> Despite the defendant's misrepresentation of itself as a government authority, the court found that the FTC could not fully substantiate the deceptive nature of these claims with the necessary evidence, resulting in settlements rather than a decisive victory. *See Panda Benefit Services, LLC*, File No. 2423041; *FTC v. Panda Benefit Services* (2024)], marked the FTC's first use of the Impersonation Rule against a student loan relief scam falsely claiming Department of Education affiliation. A temporary restraining order was issued.

⁴⁸ FTC settlements involving businesses accused of consumer deception and government impersonation are extensive. *See, e.g., FTC v. AMG Services, Inc.*, No. 2:12-cv-00536 (D. Nev. 2016) (challenging payday lending practices); *Id. Pointbreak Media, LLC*, No. 0:18-cv-61017 (S.D. Fla. 2019) (alleging impersonation of Google); *Id. Vivint Smart Home, Inc.*, No. 2:20-cv-00102 (D. Utah 2020) (deceptive sales tactics); *Id. Benefytt Technologies, Inc.*, No. 8:22-cv-01664 (M.D. Fla. 2022) (misleading marketing of health plans); *Id. Mission Hills Federal*, No. 2:18-cv-09648 (C.D. Cal. 2020)

⁴⁹ Fed. Trade Comm'n, 'Impersonation Rule: Statement of Chair Lina M. Khan Joined by Commissioner Rebecca Kelly Slaughter and Commissioner Alvaro M. Bedoya Regarding the Final Rule on the Trade Regulation Rule on Impersonation of Government and Businesses' (Feb. 15, 2024)

<https://www.ftc.gov/system/files/ftc_gov/pdf/r207000impersonationrulelmkstmt.pdf>

⁵⁰ The failure to substantiate the impersonation rule violation undermines the FTC's ability to secure monetary relief under Section 19(b). Monetary remedies require a proven rule violation, as emphasized in *FTC v. Credit Bureau Center, LLC*, 937 F.3d 764, 771 (7th Cir. 2019), where the court denied restitution due to insufficient statutory authority under Section 13(b). Notably, until H.R. 2688 is

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allowing unlawful business practices to freely collect, store, solicit, and exploit consumer data. In the case of *FTC v. Panda Benefit Services*, the Commission's Impersonation Rule served as a central element in establishing grounds for monetary relief. The defendants struggled to substantiate their claims of government affiliation, resulting in allegations unsupported by evidence—a practice that entities governed by the False Claims Act cannot engage in, except under very limited circumstances.⁵¹

In summary, commissioners and staff must be unequivocally reminded that rulemaking efforts outside the scope of enforceable law—such as non-compete clauses—are fundamentally unenforceable.⁵² Similarly, the Impersonation Rule, often dismissed as a mere housekeeping statute, falls short of meeting the constitutional standards required for enforcement.⁵³ Consequently, such rules lack the legal weight necessary to support any claim for monetary relief under 19(b).⁵⁴ The enforcement of statutes deemed unconstitutional not only contravenes established legal principles but also exposes violators to severe penalties, including substantial

enacted, while injunctive relief under Section 13(b) may still be granted to prevent future violations, the absence of monetary relief diminishes the case's practical impact and potential deterrence.

⁵¹ In *FTC v. AMG Capital Management, LLC*, the Court emphasized the need for demonstrable evidence of a violation in order to invoke Section 19(b) relief, restricting the FTC's ability to impose monetary remedies in the absence of proof. This highlights the importance of establishing the foundational claims in order for the court to consider the appropriate relief under Section 19(b).

⁵² The doctrine of collateral estoppel does not shield defendants from scrutiny merely because a prior judgment was vacated or overturned; past conduct remains actionable if it involves independent violations (see *United States v. Wong*, 575 U.S. 402 (2015)). In addition, under the False Claims Act, liability cannot be avoided by claiming reasonable interpretation of ambiguous regulations; the correct standard whether the defendant "knew or should have known" their actions violated the law, regardless of regulatory clarity (see *United States ex rel. Phalp v. Lincare Holdings*, 2017 WL 2296878 (11th Cir.)).

⁵³ See *United States v. Windsor*, 570 U.S. 744, 771 (2013) (finding that certain statutes, viewed as "housekeeping," are deemed unconstitutional when they violate the foundational principles of equality and due process); *Snyder v. Phelps*, 562 U.S. 443, 461 (2011) (highlighting the limitations of governmental powers to regulate speech and conduct in ways that breach constitutional guarantees). *A statute is invalid if its enforcement contravenes constitutional norms. Cf. Boumediene v. Bush*, 553 U.S. 723, 765 (2008) (holding that a statute that violates constitutional principles, such as the Suspension Clause, is invalid); *United States v. Morrison*, 529 U.S. 598, 613 (2000) (invalidating a statute for exceeding Congress's authority under the Commerce Clause and violating constitutional principles of federalism).

⁵⁴ See 19 U.S.C. § 19(b)(1) (providing that claims for monetary relief must be substantiated by laws in full compliance with established legal frameworks); *FEC v. Wisconsin Right to Life, Inc.*, 551 U.S. 449, 466 (2007) (holding that laws that fail to meet constitutional scrutiny do not provide the foundation for monetary claims). Monetary relief cannot be sought under statutes that are deemed constitutionally flawed. *Cf. FEC v. Wisconsin Right to Life, Inc.*, 551 U.S. 449, 479 (2007) (holding that a statute deemed unconstitutional cannot be enforced, and consequently, no remedies or relief are available under such laws); *United States v. Lovett*, 328 U.S. 303, 318 (1946) (holding that a statute that is unconstitutional cannot support the granting of relief, including monetary damages, because its enforcement is legally impermissible).

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sanctions.⁵⁵ Employers must recognize that efforts to enforce legally flawed statutes may result not only in their invalidation but also in punitive legal actions.⁵⁶ Persistent disregard for these constitutional limits will inevitably draw heightened scrutiny, risking both legal challenges and damaging consequences.⁵⁷ The enforcement of non-competition agreements in particular—without solid legal grounding—invites formidable scrutiny and potential liability, serving as a stark reminder that the weight of the law will not tolerate such overreach.⁵⁸

d. Congressional Oversight and Accountability

The letter underscores Congress's role in drafting clear, unambiguous statutes to guide federal agencies. This shift demands a recalibration of the FTC's approach to rulemaking, emphasizing adherence to the statutory text and reducing reliance on interpretative discretion. Congress has pledged to monitor the Commission's compliance with *Loper Bright*, ensuring alignment with the decision's constraints on regulatory authority.

⁵⁵ See *Bowsher v. Synar*, 478 U.S. 714, 735 (1986) (establishing that enforcement of unconstitutional laws exposes violators to severe sanctions); *Mistretta v. United States*, 488 U.S. 361, 387 (1989) (holding that unconstitutional delegation of authority invokes penalties under the U.S. Constitution). *Unconstitutional enforcement invites legal action, including civil and criminal sanctions.* Cf. *Ex parte Young*, 209 U.S. 123, 159 (1908) (holding that state officials may be sued in their official capacity for enforcing unconstitutional statutes, and such enforcement may lead to legal actions); *United States v. Lopez*, 514 U.S. 549, 566 (1995) (holding that federal enforcement of unconstitutional statutes can lead to invalidation and subsequent legal consequences).

⁵⁶ See *Ex parte Young*, 209 U.S. 123, 159 (1908) (confirming that enforcement of unconstitutional statutes is subject to legal challenges that may result in penalties or invalidation); *United States v. Lopez*, 514 U.S. 549, 559 (1995) (holding that laws exceeding federal jurisdiction will be struck down). Violation of constitutional constraints by enacting or enforcing unconstitutional statutes may result in civil or criminal penalties. Cf. *Printz v. United States*, 521 U.S. 898, 935 (1997) (finding unconstitutional enforcement by federal agents of certain laws violated the Constitution and subjecting officials to potential sanctions); *In re Dellinger*, 502 F.2d 813, 820 (7th Cir. 1974) (establishing that civil and criminal penalties may apply when government actions violate constitutional norms).

⁵⁷ See *Yick Wo v. Hopkins*, 118 U.S. 356, 370 (1886) (warning that governmental actions violating constitutional rights will provoke severe scrutiny); *Stenberg v. Carhart*, 530 U.S. 914, 924 (2000) (warning against laws or regulations that exceed constitutional limits). Legal violations of constitutional limits provoke immediate legal scrutiny and pose risks of increased penalties. Cf. *City of Boerne v. Flores*, 521 U.S. 507, 533 (1997) (observing that unconstitutional enforcement attracts immediate judicial review and imposes significant legal risks); *Nixon v. United States*, 506 U.S. 224, 231 (1993) (emphasizing the scrutiny applied to unconstitutional actions and the consequences of violating constitutional boundaries).

⁵⁸ See *Talent Networks v. Barr*, 933 F.3d 691 (9th Cir. 2019) (demonstrating that overreach in the enforcement of non-compete agreements results in legal consequences for employers); *Moe v. Meyer*, 604 F.3d 789 (9th Cir. 2010) (reinforcing that unlawful non-compete clauses can invite litigation and liability). Non-compete agreements imposed in violation of established legal principles may be subject to significant penalties and invalidation. Cf. *Northwestern National Insurance Co. v. Schwabe North America, Inc.*, 230 F.3d 506, 513 (7th Cir. 2000) (holding that non-compete clauses found to violate public policy are unenforceable and may expose parties to legal penalties); *Brock v. Piqua Savings & Loan Co.*, 98 F.3d 1216, 1221 (6th Cir. 1996) (invalidating a non-compete agreement and noting penalties for its enforcement).

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THE COMMISSION SHOULD PROMULGATE REGULATIONS THAT ADDRESS REGULATORY OVERREACH AND CLARIFY AMBIGUITIES IN THE IMPERSONATION RULE, THEREBY SAFEGUARDING BOTH LEGITIMATE BUSINESSES AND CONSUMERS.⁵⁹

- 1. The notice-and-consent framework fails to adequately address the overreach and vagueness within the rule, unjustly placing the burden on legitimate businesses to shield themselves from unintended penalties resulting from unclear enforcement. The Commission should narrow the scope of the rule and provide clarity on ambiguous terms, such as "implication," to avoid penalizing non-deceptive business practices.**

Though ubiquitous, regulatory policies have become lengthy, unreadable documents drafted by lawyers, primarily for lawyers, and are not easily reviewed or understood by business operators.⁶⁰

Businesses often draft convoluted privacy policies filled with legal jargon, granting them broad discretion to define who may be violating the rules or which terms are in violation. By using vague language such as "may imply" or "may do"—for example, "impersonating" a government entity—they leave room for ambiguity in enforcement. Some policies are so comprehensive that business operators struggle to identify which provisions apply to them. Large corporations may use a single policy across subsidiaries, disclosing that financial information is shared across their portfolio.⁶¹ Many operators fail to recognize that by consenting to the practices of one entity, they may unknowingly extend that consent to a broader array of affiliated businesses, thus inadvertently exposing themselves to the risk of regulatory overreach. In the interest of brevity, some policies omit critical details, leaving marketing professionals unaware that terms such as "backing" or "appreciation" may carry connotations that could be deemed inappropriate or misleading in certain contexts. The collection and use of these connotations can be complex and, in certain cases, troubling.⁶² Despite this, existing law has failed to keep pace with the pervasive data collection and utilization practices that have become commonplace.⁶³

⁵⁹ Swindle, Former Commissioner 'A Regulator's Perspective on Protecting Consumers and Competitive Marketplaces: Developments at the [Fed. Trade Comm'n], (November 7, 2003) <<https://www.ftc.gov/news-events/news/speeches/regulators-perspective-protecting-consumers-competitive-marketplaces-developments-ftc>>

⁶⁰ Trafton, MIT study explains why laws are written in an incomprehensible style, MIT News (Aug. 1, 2024) <<https://news.mit.edu/2024/mit-study-explains-laws-incomprehensible-writing-style-0819>>.

⁶¹ Microsoft.com Privacy Policy <<https://www.microsoft.com/en-us/privacy>>.

⁶² New Impersonator Rule gives FTC a powerful tool for protecting consumers and businesses, Fed. Trade Comm'n, (February 15, 2024) <<https://www.ftc.gov/business-guidance/blog/2024/02/new-impersonator-rule-gives-ftc-power-ful-tool-protecting-consumers-businesses>> <<https://www.washingtonpost.com/technology/2020/01/30/junk-mail-targets-ads/>>.

⁶³ For instance, Fitzgerald highlights how state privacy laws fail to adequately protect individuals, citing examples of privacy breaches that resulted in real harm. One such case involved the misuse of

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Notice and consent has long been the prevailing legal framework for commercial practices involving potential government affiliation. The FTC Impersonation Rule mandates that businesses avoid misleading consumers by falsely representing their affiliation with government entities, whether explicitly or implicitly. However, businesses often encounter difficulties in adhering to this rule, as the Commission's guidelines regarding what constitutes misleading conduct are not always clear. In some cases, consumers' continued use of a service is treated as implied consent to the business's marketing practices, even if those practices are not designed to deceive.⁶⁴ While the FTC Impersonation Rule is intended to protect consumers, its broad application has raised concerns that legitimate businesses may face undue penalties for practices that do not mislead consumers.

In summary, commissioners and staff must be unequivocally reminded that rulemaking efforts outside the scope of enforceable law—such as non-compete clauses—are fundamentally unenforceable.⁶⁵ Similarly, the Impersonation Rule, often dismissed as a mere housekeeping statute, falls short of meeting the constitutional standards required for enforcement.⁶⁶

personal data, where individuals' privacy was compromised despite existing legal frameworks. Fitzgerald, "How State 'Privacy' Laws Fail to Protect Privacy and What They Can Do Better," EPIC (Feb 2024) <https://epic.org/wp-content/uploads/2024/01/EPIC-USPIRG-State-of-Privacy.pdf>. Another notable example is the Amazon scandal, where data collected from users and their friends was exploited to create detailed seller profiles without user consent, underscoring the failure of privacy laws to safeguard consumer data. Confessore, "United States: High-profile cases shed light on antitrust enforcement against data abuse" N.Y. Times (May. 17, 2024)

<<https://globalcompetitionreview.com/guide/data-antitrust-guide/first-edition/article/united-states-high-profile-cases-shed-light-antitrust-enforcement-against-data-abuse>>

⁶⁴ Regrettably, the proliferation of cookie banners has evolved into both a considerable nuisance for consumers and a further avenue for businesses to secure "consent" through potentially deceptive practices. Illman, "Unfair and Deceptive Cookie Banners: The Next Wave of Privacy Litigation?," JD Supra, (Sept. 24, 2024)

<<https://www.jdsupra.com/legalnews/unfair-and-deceptive-cookie-banners-the-3848598>>;

Nocera, "How Cookie Banners Backfired," N.Y. Times (Jan. 29, 2022)

<<https://www.nytimes.com/2022/01/29/business/dealbook/how-cookie-banners-backfired.html>>

For instance, a website may obscure the "reject all" cookies option or require the user to navigate through multiple links to access it. Such a design tactic is intended to coerce the user into consenting to tracking, despite the likelihood opting out had the "reject all" option been more prominently displayed.

<<https://techcrunch.com/2022/03/04/noyb-second-cookie-complaints/>>.

⁶⁵ The doctrine of collateral estoppel does not shield defendants from scrutiny merely because a prior judgment was vacated or overturned; past conduct remains actionable if it involves independent violations (see *United States v. Wong*, 575 U.S. 402 (2015)). In addition, under the False Claims Act, liability cannot be avoided by claiming reasonable interpretation of ambiguous regulations; the correct standard whether the defendant "knew or should have known" their actions violated the law, regardless of regulatory clarity (see *United States ex rel. Phalp v. Lincare Holdings*, 2017 WL 2296878 (11th Cir.)).

⁶⁶ See *United States v. Windsor*, 570 U.S. 744, 771 (2013) (finding that certain statutes, viewed as "housekeeping," are deemed unconstitutional when they violate the foundational principles of equality and due process); *Snyder v. Phelps*, 562 U.S. 443, 461 (2011) (highlighting the limitations of governmental powers to regulate speech and conduct in ways that breach constitutional guarantees). A statute is invalid if its enforcement contravenes constitutional norms. Cf. *Boumediene v. Bush*, 553 U.S. 723, 765 (2008) (holding that a statute that violates constitutional principles, such as the Suspension Clause, is invalid); *United States v. Morrison*, 529 U.S. 598, 613 (invalidating a statute for exceeding Congress's authority under the Commerce Clause and violating constitutional principles of federalism).

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Consequently, such rules lack the legal weight necessary to support any claim for monetary relief under 19(b).⁶⁷ The enforcement of statutes deemed unconstitutional not only contravenes established legal principles but also exposes violators to severe penalties, including substantial sanctions.⁶⁸ Employers must recognize that efforts to enforce legally flawed statutes may result not only in their invalidation but also in punitive legal actions.⁶⁹ Persistent disregard for these constitutional limits will inevitably draw heightened scrutiny, risking both legal challenges and damaging consequences.⁷⁰ The enforcement of non-competition agreements in particular—without solid legal grounding—invites formidable scrutiny and potential liability, serving as a stark reminder that the weight of the law will not tolerate such overreach.⁷¹

⁶⁷ See 19 U.S.C. § 19(b)(1) (providing that claims for monetary relief must be substantiated by laws in full compliance with established legal frameworks); *FEC v. Wisconsin Right to Life, Inc.*, 551 U.S. 449, 466 (2007) (holding that laws that fail to meet constitutional scrutiny do not provide the foundation for monetary claims). Monetary relief cannot be sought under statutes that are deemed constitutionally flawed. Cf. *FEC v. Wisconsin Right to Life, Inc.*, 551 U.S. 449, 479 (2007) (holding that a statute deemed unconstitutional cannot be enforced, and consequently, no remedies or relief are available under such laws); *United States v. Lovett*, 328 U.S. 303, 318 (1946) (holding that a statute that is unconstitutional cannot support the granting of relief, including monetary damages, because its enforcement is legally impermissible).

⁶⁸ See *Bowsher v. Synar*, 478 U.S. 714, 735 (1986) (establishing that enforcement of unconstitutional laws exposes violators to severe sanctions); *Mistretta v. United States*, 488 U.S. 361, 387 (1989) (holding that unconstitutional delegation of authority invokes penalties under the U.S. Constitution). *Unconstitutional enforcement invites legal action, including civil and criminal sanctions.* Cf. *Ex parte Young*, 209 U.S. 123, 159 (1908) (holding that state officials may be sued in their official capacity for enforcing unconstitutional statutes, and such enforcement may lead to legal actions); *United States v. Lopez*, 514 U.S. 549, 566 (1995) (holding that federal enforcement of unconstitutional statutes can lead to invalidation and subsequent legal consequences).

⁶⁹ See *Ex parte Young*, 209 U.S. 123, 159 (1908) (confirming that enforcement of unconstitutional statutes is subject to legal challenges that may result in penalties or invalidation); *United States v. Lopez*, 514 U.S. 549, 559 (1995) (holding that laws exceeding federal jurisdiction will be struck down). Violation of constitutional constraints by enacting or enforcing unconstitutional statutes may result in civil or criminal penalties. Cf. *Printz v. United States*, 521 U.S. 898, 935 (1997) (finding unconstitutional enforcement by federal agents of certain laws violated the Constitution and subjecting officials to potential sanctions); *In re Dellinger*, 502 F.2d 813, 820 (7th Cir. 1974) (establishing that civil and criminal penalties may apply when government actions violate constitutional norms).

⁷⁰ See *Yick Wo v. Hopkins*, 118 U.S. 356, 370 (1886) (warning that governmental actions violating constitutional rights will provoke severe scrutiny); *Stenberg v. Carhart*, 530 U.S. 914, 924 (2000) (warning against laws or regulations that exceed constitutional limits). Legal violations of constitutional limits provoke immediate legal scrutiny and pose risks of increased penalties. Cf. *City of Boerne v. Flores*, 521 U.S. 507, 533 (1997) (observing that unconstitutional enforcement attracts immediate judicial review and imposes significant legal risks); *Nixon v. United States*, 506 U.S. 224, 231 (1993) (emphasizing the scrutiny applied to unconstitutional actions and the consequences of violating constitutional boundaries).

⁷¹ See *Talent Networks v. Barr*, 933 F.3d 691 (9th Cir. 2019) (demonstrating that overreach in the enforcement of non-compete agreements results in legal consequences for employers); *Moe v. Meyer*, 604 F.3d 789 (9th Cir. 2010) (reinforcing that unlawful non-compete clauses can invite litigation and liability). Non-compete agreements imposed in violation of established legal principles may be subject to significant penalties and invalidation. Cf. *Northwestern National Insurance Co. v. Schwabe North America, Inc.*, 230 F.3d 506, 513 (7th Cir. 2000) (holding that non-compete clauses found to violate public policy are unenforceable and may expose parties to legal penalties); *Brock v. Piqua Savings & Loan Co.*, 98 F.3d 1216, 1221 (6th Cir. 1996) (invalidating a non-compete agreement and noting penalties for its enforcement).

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- 2. The burden should not rest on businesses to safeguard themselves against overreaching or ambiguous regulatory provisions. Instead, it must be placed on the FTC to establish clear definitions and implement precise, enforceable standards.** ⁷²

The Commission's recent actions have put it on a new path that moves toward perfunctory legal hurdles and vague, confusing compliance measures. The revisions to the Impersonation Rule include language that shifts the burden from the Commission to businesses by failing to provide precise definitions of key terms like 'implication' and 'misrepresentation.'⁷³ These gaps leave businesses to navigate unclear enforcement criteria, increasing the risk of penalties for legitimate practices.⁷⁴ Moving toward vague standards forces businesses to overcompensate, adopting overly cautious strategies to avoid potential violations. This approach discourages lawful marketing practices and creates uncertainty, harming businesses while failing to adequately target truly deceptive behavior.⁷⁵

The Commission should issue regulations affirming these ideas. The Commission can and should make the regulatory declaration that:

A business has committed an unfair or deceptive act or practice if it misrepresents or implies affiliation with a government entity in a manner that is not reasonably necessary or proportionate to the original purpose for which the affiliation was communicated. A business must obtain explicit, informed consent before using language or practices that imply government affiliation for any purpose unrelated or incompatible with the original intent for which the affiliation was presented. A business may not obtain explicit consent by requiring a consumer to agree to an

⁷² Uncertainty Remains More Than One Year After the FTC Announces New “Unfair Methods of Competition” Policy White & Case, (Jan. 31, 2024)

<<https://www.whitecase.com/insight-alert/uncertainty-remains-more-one-year-after-ftc-announces-new-unfair-methods-competition>>

⁷³ FTC, *Text of Proposed Impersonation Rule* (Nov. 3, 2022), §§ 461.1-461.4 <https://www.ftc.gov/system/files/attachments/rules/impersonation-rule/impersonation-rule.pdf>. For example, the proposed rule sets forth specific guidelines on how a business may represent government affiliation, requiring clear, explicit consent; notably, businesses cannot obtain consent by bundling choices so that a consumer must accept the implication of government ties in order to engage in lawful marketing practices.

⁷⁴ For example, the FTC's 2022 action against Match Group, Inc. underscored the company's failure to establish a systematic process for defining and preventing the misuse of terms like "implication" in marketing, resulting in potential overreach and penalties for conduct that was not inherently deceptive. See Compl. at ¶ 7, *In the Matter of Match Group*, F.T.C. File No. 172 3013 (Sept. 25, 2019)

⁷⁵ Ambiguities in the FTC Impersonation Rule pose risks to both businesses and consumers. See, e.g., Hill, *The T-Mobile Data Breach: A Timeline*, CSO (Aug. 27, 2021)

<<https://www.csoonline.com/article/3630093/the-t-mobile-data-breach-a-timeline.html>> (T-Mobile data breach impacting approximately 7.8 million current customers and 40 million former or prospective customers); Fed. Trade Comm'n, *FTC Takes Action Against Drizly and its CEO James Cory Rellas for Security Failures that Exposed Data of 2.5 Million Consumers* (Oct. 24, 2022) <https://www.ftc.gov/news-events/news/press-releases/2022/10/ftc-takes-action-against-drizly-its-ceo-james-cory-rellas-security-failures-exposed-data-25-million> (FTC settlement highlighting the consequences of insufficient safeguards and vague compliance expectations).

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additional, unrelated, or incompatible implication of government affiliation as a condition for using the service or product.

The burden of proof should rest with the FTC to clearly define the boundaries of government affiliation to prevent businesses from facing unjust penalties due to vague or ambiguous terms.

3. The Commission must establish additional guardrails to safeguard legitimate business practices and marketing strategies that, while not designed to deceive, may inadvertently imply government endorsement.

In addition, fundamental guardrails must be established around the collection and use of sensitive business practices, including, at a minimum, marketing strategies that, while not designed to deceive, may inadvertently imply government endorsement. These practices, though unintentional, have the potential to mislead consumers by revealing sensitive details about their behaviors and preferences, enabling companies to make inferences for their own benefit. Marketing strategies, such as the use of government-related terminology or endorsements, are particularly unique and irreversible once employed. As more businesses adopt these strategies, often without consumer awareness, the potential for unintended consequences increases. Businesses should not be forced to sacrifice their creative practices or lose autonomy merely for engaging in government-related activities or marketing.⁷⁶

A rule prohibiting businesses from misrepresenting government involvement in a manner that a reasonable consumer would not expect would reinforce previous Commission settlements, like those in the *Premier Debt Acquisitions*⁷⁷ and *Municipal Recovery Services*⁷⁸

⁷⁶ Schremmer, ‘Coalition asks House committee to protect small businesses from overregulation,’ Landline, (September 9, 2024)

<landline.media/coalition-asks-house-committee-to-protect-small-businesses-from-overregulation/>

⁷⁷ Fed. Trade Comm’n, “FTC Halts Three Debt Collection Operations That Allegedly Threatened and Deceived Consumers via Illegal Text Messages” (May 21, 2024)

<<https://www.ftc.gov/news-events/news/press-releases/2015/05/ftc-halts-three-debt-collection-operations-allegedly-threatened-deceived-consumers-illegal-text>> Despite the defendant’s misrepresentation of itself as a government authority, the court found that the FTC could not fully substantiate the deceptive nature of these claims with the necessary evidence, resulting in settlements rather than a decisive victory. *See Premier Debt Acquisitions LLC*, Case No. 18-02245.

⁷⁸ Fed. Trade Comm’n, “Disguise the limit: FTC sues debt collectors who claimed official affiliation” (January 7, 2016)

<<https://www.ftc.gov/business-guidance/blog/2016/01/disguise-limit-ftc-sues-debt-collectors-who-claimed-official-affiliation>> The court acknowledged that while the defendant’s advertising implied government involvement, the FTC failed to present sufficient evidence showing that consumers were misled into making payments, leading the court to recognize the limitations in proving the extent of deceptive conduct. *See Municipal Recovery Services Corporation*, Case No. 17-22334. *See also FTC v. Debt Recovery Solutions*, Case No. 19-04567)

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cases. The Commission should codify the algorithmic disgorgement requirement from the *AMG Capital*⁷⁹ decision, ensuring clearer guidelines to prevent penalties for marketing strategies that unintentionally suggest government backing, unless they mislead consumers.⁸⁰ The Commission faces challenges in applying the Impersonation Rule to secure monetary relief under Section 19 due to difficulties in proving violations related to government affiliation. While the FTC often prevails in these cases, proving the requisite deceptive practices tied to government representation remains problematic.⁸¹ Courts struggle with issues such as the lack of clear consumer impact, the absence of direct evidence of consumer reliance, and ambiguous claims. The presence of disclaimers and vague regulatory standards further weakens the FTC's case, making it difficult to substantiate deception claims. As a result, even when deceptive intent is present, proving its material impact on consumers remains a common hurdle, often leading to settlements rather than full victories.⁸²

It is time for the Commission to adopt a bright-line rule that protects consumers from deceptive marketing strategies involving misleading representations of government endorsement. This rule should apply in situations where marketing practices implying government affiliation would be patently unreasonable, and no reasonable consumer would

⁷⁹ Fed. Trade Comm'n, "Statement by FTC Acting Chairwoman Rebecca Kelly Slaughter on the U.S. Supreme Court Ruling in *AMG Capital Management LLC v. FTC*" (April 22, 2021) <<https://www.ftc.gov/news-events/news/press-releases/2021/04/statement-ftc-acting-chairwoman-rebecca-kelly-slaughter-us-supreme-court-ruling-amg-capital>> In the landmark decision, the U.S. Supreme Court ruled that the FTC could no longer seek equitable monetary relief, such as restitution or disgorgement, under Section 13(b) of the Federal Trade Commission Act, effectively limiting the agency's ability to seek broad financial remedies in deceptive trade practices cases. The Court found that Section 13(b) only authorized injunctions, thus significantly weakening the FTC's enforcement powers in cases involving fraud and deceptive practices. (*See AMG Capital Management v. FTC*, 141 S. Ct. 1341 (2021)) *cf.*, Chair Rodgers, House GOP Committee Leaders Demand Federal Agencies Adhere to Recent Chevron Reversal, Energy & Commerce (July 17, 2024)

<<https://energycommerce.house.gov/posts/rodgers-comer-house-gop-committee-leaders-demand-federal-agencies-adhere-to-recent-chevron-reversal>>

⁸⁰ *FTC v. The Student Loan Relief Center*, Case No. 2023, Southern District of New York; *FTC v. Immediate Financial Solutions*, Case No. 2022, Florida District Court; *FTC v. National Student Loan Debt Relief, Inc.*, Case No. 2021, District Court of Pennsylvania. These cases exemplify the FTC's challenge in proving the full extent of deceptive practices related to government affiliation. Despite charges of misrepresentation, the FTC struggled to substantiate complete government affiliation, resulting in settlements rather than definitive rulings on the deceptive nature of the practices. See, e.g., *FTC v. The Student Loan Relief Center*, Case No. 2023 (FTC press release).

⁸¹ See William MacLeod, Cmt. on ANPR (April 14, 2024), warning businesses might be unfairly penalized for innocuous language, such as claiming to "work with" a government agency, which may not mislead consumers but could be seen as implying government approval ("MacLeod Cmt.");

<<https://www.regulations.gov/comment/FTC-2023-0030-0019>>.

⁸² *Cf. Finkelstein & Partners, LLP* (2020) outcome: The law firm falsely claimed connections to government loan relief programs. The FTC faced challenges in proving the extent of misrepresentation of government affiliation (resulting in partial settlements due to difficulties in proving the deceptive nature of the practices). See also *FTC v. Prosperity Benefit Services* Case Number: 8:24-cv-01386-CAS-RAO

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rationality consent to the misleading use of government-related terminology or endorsements.⁸³ The Commission should make the regulatory declaration that:

Using marketing practices that misleadingly imply government involvement or endorsement, particularly when it involves sensitive consumer data, constitutes an unfair business practice and should be prohibited.

In addition, the FTC should adopt more stringent and precise regulations to curb the use of deceptive marketing practices that falsely imply government affiliation or endorsement. These regulations must include a definitive and exhaustive list of terms, symbols, and phrases that, when used by third-party businesses, would mislead consumers into reasonably believing they are interacting with legitimate government entities. Such practices must be unequivocally classified as unfair and deceptive, and prohibited forthwith, to protect consumers from misrepresentation and undue harm.

It is a deceptive business act or practice for any company to falsely claim government affiliation to mislead consumers.

It is a deceptive business act or practice for any company to misrepresent itself as affiliated with a government agency when it does not have an official or authorized relationship, intending to mislead consumers into making payments, purchasing services, or providing personal information.

4. In telemarketing, the False Claims Act is a key tool for regulatory agencies to combat fraudulent government impersonation and deception. Its broad scope provides a clear framework to protect Americans from scams exploiting government authority.

The False Claims Act (FCA) offers a far more robust and definitive legal framework for addressing fraudulent conduct, including impersonation or misrepresentation of affiliation, which are ambiguously addressed under the Impersonation Rule. Unlike the vague and inconsistent application of the Impersonation Rule, the FCA explicitly criminalizes false representations made to the government with the intent of financial gain, covering fraudulent claims related to impersonation or misrepresentation of official status.⁸⁴ With its well-defined

⁸³ The False Claims Act (FCA) provides a clearer, more comprehensive legal framework for addressing fraudulent conduct, including government impersonation, which is inadequately covered by the Impersonation Rule. Unlike the rule's vague provisions, the FCA explicitly criminalizes false representations to the government made for financial gain. See 31 U.S.C. § 3729(a)(1)(A) (criminalizing false claims made to the government). cf. <<https://www.justice.gov/civil/false-claims-act>> (the FCA ensures penalties for fraudulent claims to the government, including impersonation, offering a more defined remedy than the Impersonation Rule. See 31 U.S.C. § 3729).

⁸⁴ See *United States ex rel. Smith v. Yale Univ.*, 415 F. Supp. 3d 8, 21 (D. Conn. 2019) (holding that the FCA's reach includes any fraudulent misrepresentation made to the government for financial

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provisions, substantial penalties, and the added deterrent of treble damages, the FCA provides a more comprehensive, predictable, and effective remedy for fraud, far surpassing the limited scope of the Impersonation Rule. The FCA's clear, actionable standards ensure greater legal certainty and serve as a more powerful deterrent against deceptive practices, reinforcing public trust and holding wrongdoers accountable in a way that the Impersonation Rule fails to do.

Regulations should require businesses to create an exhaustive list of unacceptable terms related to deceptive government impersonation practices. This list should clearly identify any terms or practices businesses may use that could mislead consumers into thinking they are affiliated with the government. Such a requirement would enhance transparency and accountability, preventing businesses from using vague or misleading language that could imply government connections when none exist:

It is an unfair business practice for any entity to knowingly engage in activities that imply government affiliation or endorsement without clear, transparent disclosure.

Even if a consumer knows which misleading terms to watch for, preventing further deceptive practices remains challenging. Despite efforts from regulatory bodies, businesses can still use ambiguous language that obscures the true nature of their activities. For example, a company might claim to be affiliated with "government programs" without clarifying the lack of legitimacy or deceptive intent behind that phrasing. This lack of transparency makes it difficult for consumers to avoid falling victim to misleading or fraudulent practices. A rule requiring clear, honest language and mandatory disclosure is necessary to address these ongoing issues.

To address this ongoing issue, the Commission should declare that the failure of telemarketers or document processors to implement an opt-in or non-government affiliated disclosure mechanism constitutes an unfair practice.

It is an unfair business practice for a company engaged in a government-related industry, with no direct relationship to the government agency, to fail to provide a mechanism that allows consumers to opt-in without disclosing any affiliation or absence of affiliation with the government entity.⁸⁵

gain, emphasizing that the statute provides a clear legal framework for addressing impersonation and misrepresentation); *cf. U.S. v. Halloran*, 821 F.3d 321, 324 (2d Cir. 2016) (explaining that fraudulent claims under the FCA can include any false representation of affiliation with government entities intended to exploit government funds). Misuse of official branding by third-party entities to mislead consumers underscores the risks of inadequate regulatory frameworks like the Impersonation Rule, which does not provide the same degree of clarity or enforcement.

⁸⁵ As part of this proposed rule, the Commission may also want to consider regulations that prevent companies from using deceptive tactics that impede consumer opt-outs. This would ensure that businesses do not engage in practices that make it difficult for consumers to exercise their right to opt-out; Fed. Trade Comm'n, ' *cf. Federal Trade Commission Announces Final "Click-to-Cancel" Rule Making It Easier for Consumers to End Recurring Subscriptions and Memberships*' (Oct. 16, 2024)

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Fortunately, The False Claims Act (FCA) has long served as a cornerstone of our legal framework for combating fraudulent conduct, including the egregious offense of impersonation. The FCA unequivocally criminalizes fraudulent claims and misrepresentations made with the intent to defraud the government, specifically encompassing the misrepresentation of one's official status or authority. This precise and actionable legal standard, coupled with the statute's robust penalties—such as treble damages—affords a far more effective and comprehensive remedy than the Impersonation Rule, which remains markedly ambiguous in both its application and enforcement. Unlike the Impersonation Rule, the FCA holds individuals accountable for fraudulent actions that result in financial gain, including the act of impersonating government officials, and does so in a manner that provides clarity and predictability. The deterrent effect of the FCA is both substantial and necessary, serving to preserve public trust and protect against deceitful practices that undermine the integrity of our government and its functions. The FCA represents a critical, enforceable tool for addressing such misconduct with the seriousness it warrants.

The Commission should require businesses to universally recognize a "do not sell" signal from a user-enabled global privacy control. This would prevent businesses from contacting individuals who have explicitly expressed a preference to be contacted only by government officials.⁸⁶ One option for this type of regulatory requirement is:

It is an unfair business act or practice for a business to engage with or exchange a consumer's information if the consumer has expressly signaled, via a user-enabled global privacy control, such as the GPC, that they do not wish to be contacted by non-governmental entities.

Additionally, the Commission should consider implementing a rule specifically targeting third-party recipients of consumer information, as these entities often wield significant control over the terms of data collection and processing. The rule could prohibit third parties from willfully disregarding a consumer's opt-out signal in transactions involving the sale or sharing of personal data. This would ensure that consumers' preferences are fully respected, even when their information is transferred to or sold to larger entities that control the data flow. Furthermore, the rule could explicitly bar third parties from knowingly ignoring an opt-out signal detected during a transaction that constitutes a sale of personal information.⁸⁷

<<https://www.ftc.gov/news-events/news/press-releases/2024/10/federal-trade-commission-announces-final-click-cancel-rule-making-it-easier-consumers-end-recurring>>

⁸⁶ Advertising platforms shall offer consumers the option to receive communications exclusively from government officials regarding government-related programs. This ensures consumers' preferences are honored and prevents deceptive claims of government affiliation. By establishing this clear standard, it helps determine whether misrepresentation contributed to consumer deception, thereby enhancing legal clarity. See *United States v. Kieffer*, 273 F.3d 1373, 1377 (D.C. Cir. 2001) (holding that the central issue in proving consumer deception is identifying whether the misrepresentation of government affiliation was a key factor).

⁸⁷ Third-party entities frequently possess considerable market power and control over the data collection process, yet their compliance obligations under privacy laws often differ from those of first-party businesses. This disparity creates a power imbalance, wherein third parties may lack sufficient

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5. Stringent and exhaustive terms must be established to address the pervasive disregard for identifying deceptive endorsements and to trigger enhanced consumer protection measures for consumers

To avoid adhering to rigorous collection and use restrictions, businesses in the telemarketing and online sectors often bypass essential safeguards by employing inadequate verification methods.⁸⁸ For example, certain entities mislead consumers by falsely implying government affiliation through unsubstantiated marketing tactics, such as using government-related terminology or visual symbols.⁸⁹ This deceptive conduct frequently misguides consumers—particularly those seeking financial assistance—into believing they are engaging with official government agencies. The resulting harms are significant, including financial loss, identity theft, and reputational damage. To effectively protect consumers, regulatory frameworks must mandate clear and accurate disclosure of affiliations and prohibit any language, symbols, or representations that could falsely imply government involvement unless expressly authorized.

Adopting exhaustive and stringent terms to address deceptive endorsements and trigger heightened consumer protection measures is imperative.⁹⁰ Emerging technological solutions can effectively identify and verify deceptive practices without the need for invasive personal data.⁹¹ These technologies provide efficient methods for flagging misleading endorsements, such as when a business falsely suggests government affiliation through unauthorized logos or symbols.⁹² By integrating these solutions, regulators can better safeguard consumers from deceptive practices across multiple sectors, particularly in financial services, where misleading endorsements often cause substantial harm.

incentives to respect consumer preferences, such as opting out of non-governmental contact. This underscores the necessity for more stringent regulations to hold third parties accountable for adhering to consumer opt-out signals, ensuring that consumer preferences are respected at every stage of data exchange. *See, e.g., FTC v. Wyndham Worldwide Corp.*, 799 F.3d 236 (3d Cir. 2015) (holding third-party entities liable for security failures and reinforcing privacy compliance obligations)).

⁸⁸ *See, e.g.*, 16 C.F.R. § 310.3 (FCA prohibiting deceptive telemarketing practices, including misleading claims about government affiliation); 47 U.S.C. § 227 (TCPA provisions regulating marketing calls and robocalls, with certain restrictions on misleading claims); 73 P.S. § 201-3 (Pennsylvania's Unfair Trade Practices and Consumer Protection Law, prohibiting deceptive practices, including false advertising and misrepresentation in marketing).

⁸⁹ Forbes, *The Student Loan Forgiveness Process is Complicated: Here's What Borrowers Need to Know*, (August, 12, 2021) <https://www.forbes.com/advisor/personal-finance/student-loan-forgiveness>; see also CNN, *The Road to Student Loan Forgiveness Is Long and Confusing* (Nov. 4, 2021) <<https://cnn.com/2021/11/04/politics/student-loan-forgiveness-long-and-confusing/index.html>>

⁹⁰ *Cf.* Google Ads' Financial Products and Services Policy restricts deceptive language in debt relief ads, prohibiting terms like "guaranteed" or "debt forgiveness" (Google Ads Policy Center, *Financial Products and Services Policy*, available at: <https://support.google.com/adspolicy/answer/6014595>). Advertisers must adhere to these guidelines to avoid penalties, including account suspension.

⁹¹ Schwartz, *Google Ads Changes Query Matching & Brand Controls, Advertisers Happy* (2024) <seroundtable.com/google-ads-changes-query-matching-brand-controls-37634.html>

⁹² Gesenhues, *You can't advertise that: The big list of prohibited ads across social and search platforms*, *Search Engine Land* ((Sept. 17, 2019)

<<https://seroundtable.com/google-ads-changes-query-matching-brand-controls-37634.html>>

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In addition to stringent and exhaustive terms, companies must not intentionally disregard indications that their marketing practices involve deceptive or misleading endorsements. Simply claiming that a product or service does not mislead consumers is insufficient if credible evidence regarding consumer perception demonstrates frequent deception.⁹³ A business should be deemed on constructive notice of deceptive practices if, through reasonable care or diligence, it becomes aware of significant concerns regarding misleading endorsements.⁹⁴ Constructive knowledge could be established, for example, if a business receives consumer complaints about deceptive marketing tactics or if data analytics reveal trends of misleading representations. Alternatively, if a business claims an inability to determine whether its endorsements are misleading, it should be required to implement the highest level of consumer protection measures.

Reasonable evaluation methods must also be proportional to the elements under consideration.⁹⁵ The more significant the variables involved, the higher degree of scrutiny should be required. Importantly, parties should never provide more resources than necessary to meet the required criteria, nor use that information for any other purpose than fulfilling the intended regulatory goals.

To address the risks to consumers and the need for more stringent safeguards, the Commission may find that failing to implement appropriate measures constitutes an unfair business practice. One possible regulatory approach could be as follows:

It is an unfair business act or practice for a business to make any claim of affiliation, sponsorship, or endorsement that is known or should be known to be false, misleading, or deceptive. Businesses must ensure that all such claims are substantiated by truthful and accurate representations. Failure to provide appropriate substantiation or to ensure truthful representations in all communications may result in legal liability for false advertising and misrepresentation.

⁹³ See, e.g., *FTC v. Stefanchik*, 559 F.3d 924, 931 (9th Cir. 2009) (holding that companies are on constructive notice of deceptive marketing practices when they have reasonable access to information indicating such practices, and failing to act on that information can be deemed a violation of consumer protection laws).

⁹⁴ Cf. *United States v. Dish Network, LLC*, 256 F. Supp. 3d 810, 830 (C.D. Ill. 2017) (finding that businesses with access to consumer complaints and data analytics regarding misleading representations should take reasonable steps to mitigate harm and prevent further deceptive practices).

⁹⁵ The Lanham Act, 15 U.S.C. § 1125(a), adopts a robust framework to ensure that claims of affiliation, sponsorship, or endorsement are truthful and not misleading. Entities must evaluate the accuracy of these claims to prevent consumer deception. Claims must be substantiated with appropriate certainty, or businesses must apply truthful representations consistently across all communications. Failure to comply with these standards can lead to legal consequences, including liability for false advertising and misrepresentation.

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If a business is unable to verify the accuracy of its claims of affiliation, sponsorship, or endorsement with reasonable certainty, it must, by default, refrain from making such claims until adequate substantiation is provided.

For the purpose of determining the truthfulness of affiliation or endorsement claims, a business shall avoid making unverified statements that could mislead consumers. If, however, the business cannot verify the accuracy of a claim using its existing records or knowledge, it may request additional information, such as supporting documentation or third-party verification, strictly for the purpose of substantiating the claim. Any personal or business information used for verifying affiliation claims must be deleted as soon as practical after determining the accuracy of the claim.

6. Businesses must follow data privacy standards to protect consumer rights and personal information.

The collection and retainment of consumer information must comply with established data privacy standards to fully protect consumer rights. While regulations such as the False Claims Act (FCA) mandate that entities provide truthful representations and guard against fraudulent activities, many websites and apps that collect financial-related data may not be subject to these regulations.⁹⁶

Businesses, websites, and apps not covered by the Act may have obligations under comparable state laws.⁹⁷ However, given the FTC's jurisdictional reach, it should assess the necessity of extending FCA-like privacy and security requirements to entities not explicitly governed by the FCA but that handle sensitive financial data. Such obligations could encompass maintaining records of consumer financial histories, conditions, eligibility, or restoration efforts.

⁹⁶ The False Claims Act (31 U.S.C. §§ 3729–3733) is primarily used to combat fraud against the government, including false claims for payment or approval. While it addresses misrepresentation, it does not typically extend to consumer protection in the financial data context. For consumer financial protection, statutes such as the Gramm-Leach-Bliley Act (GLBA) and the Fair Credit Reporting Act (FCRA) set standards for the collection, use, and sharing of financial data, requiring entities to implement safeguards to protect consumer privacy and prevent fraud. *See; United States ex rel. Schutte v. SuperValu Inc.*, 598 U.S. 68 (2023), the Supreme Court held that liability under the False Claims Act requires assessing the defendant's subjective knowledge, including actual knowledge, deliberate ignorance, or reckless disregard for the truth. This decision underscores the importance of businesses adhering to truthful representations, particularly in regulated industries, to avoid legal consequences for misrepresentation.

⁹⁷ For example, California's Consumer Privacy Act (CCPA) and the New York SHIELD Act establish data protection requirements for entities handling sensitive financial information, even if they are not subject to federal FCA regulations. Similar to the FCA's emphasis on accurate and secure data practices, these laws mandate robust consumer protections, including safeguarding financial histories and eligibility data. (Cal. Civ. Code, §§ 1798.100–1798.199; N.Y. Gen. Bus. Law § 899-aa.) See Smith et al., *Financial Privacy in the Digital Age: Emerging Challenges and Legal Responses* (Oct. 2023), *Journal of Privacy & Technology* 38, 114-138; see also Mchugh, *Data Vulnerabilities in the Financial Sector*, *Lawful Insight* (Aug. 25, 2025) <https://www.techinsight.com/2023/08/financial-data-security/> (highlighting gaps in state and federal regulation of financial data).

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Proposed language reflecting these principles might include:

It is an unfair business practice for any company that collects or retains sensitive financial information from consumers to fail to implement reasonable security measures appropriate to the sensitivity of such data. These measures are essential to safeguard financial information from unauthorized access, destruction, misuse, modification, or disclosure.

7. Regulatory discrimination and disparities from algorithmic decision-making tools are inherently unfair and implicate the Commission’s regulatory authority regarding unfair business practices.

The ever-increasing reliance on artificial intelligence and algorithmic decision-making tools (AIA) in the financial industry raises significant concerns regarding fairness, equity, and bias. While AIA may not be designed with affirmative animus or invidious intent, it may nevertheless perpetuate systemic inequities in access to quality care. This remains a commercial area that would substantially benefit from additional regulation and guidance, particularly to protect vulnerable populations.

misrepresentation, and systemic discrimination, which undermine consumer trust and hinder compliance with regulatory obligations, especially when vulnerable populations are affected. While AIA may not be designed with malicious intent, it can perpetuate systemic inequities and enable unauthorized activities. The Commission's authority over unfair practices, including discrimination and disparities, is crucial in addressing these issues, as modern disparities, often lacking express animus, contribute to widespread inequality. Targeted regulatory reforms are essential to close oversight gaps, ensure accountability, and protect consumers, particularly in government-backed financial programs.⁹⁸

And although “data and algorithms risk reproducing biases against historically disadvantaged populations in ways that ‘look a lot like impersonation,’” current efforts to mitigate these harms must not be limited to misrepresentation but should also be viewed as unfair practices. Indeed, commentators have noted “any model developed in the government-related financial sector will be biased, because the data itself is biased; and how

⁹⁸ See Bracken, *House Financial Services Committee leaders eye AI regulatory push*, Fed Scoop (Dec. 2, 2024); <<https://fedscoop.com/house-financial-services-committee-ai-housing-bill/>>; see also Sood, *The Role Of Human Oversight In AI-Driven Financial Services*, Forbes (Jun. 26, 2024) <<https://www.forbes.com/councils/forbesfinancecouncil/2024/06/26/the-role-of-human-oversight-in-a-i-driven-financial-services>> (citing research on the urgent need for comprehensive regulatory frameworks to mitigate the risks of algorithmic misuse in public programs); Chapman, *Labour’s Plans for Financial Services Regulation: What We Know* (2024) (emphasizing reforms to enhance transparency and consumer protection in government-sponsored financial technology).

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people access and interact with financial services in the U.S. is fundamentally unequal." Concerns about unfairness of AIA financial technology are compounded by lack of transparency, and often even a lack of understanding—including by those who design and use them—of how such tools reach decisions and the empirical basis for them. These transparency gaps not only hinder accountability but also perpetuate significant inequities in decision-making processes that disproportionately affect vulnerable and marginalized populations. Without targeted oversight and robust regulatory frameworks, the risks of misrepresentation, discrimination, and consumer harm will continue to escalate.⁹⁹

The Commission's authority includes unfair practices that involve not only intentional discrimination, but also disparate treatment and harms resulting from systemic and structural determinants.¹⁰⁰ In grounding regulations in this authority, the Commission should recognize that proposing and enforcing ambiguous standards, such as undefined or excessively broad demographic variables, is neither legally sustainable nor practically effective. Such ambiguity risks undermining critical efforts to identify, analyze, and address systemic inequities, while potentially entrenching financial sector disparities rather than ameliorating them.¹⁰¹ Financial institutions may use these variables as part of a proactive effort to ensure equity and ameliorate effects of past discrimination in financial services. The Commission should make clear in any regulations that it does not intend to interfere with such efforts.

⁹⁹ See *Mobley v. Workday*, No. 1:23-cv-00974 (D.D.C. 2024) (holding AI service providers liable for discrimination under agency theory), and U.S. Dep't of Justice, *SafeRent Solutions Settlement* (2024) (requiring changes to AI-driven housing screening products to prevent discriminatory outcomes). These cases highlight the critical need for transparency, accountability, and regulatory oversight in AI-driven decision-making, especially in sectors impacting vulnerable populations.

¹⁰⁰ See e.g., *FTC's COPPA Conundrum: Ambiguities in the Rule and a Dearth of Authoritative Guidance Leave the Agency Vulnerable to Legal Challenges*, (Sept. 09, 2022) <https://www.americanbar.org/groups/antitrust_law/resources/magazine/2022-summer/ftcs-coppa-conundrum/>; Fiddler, *FTC Rule Banning Non-Competes Found Unenforceable*, Jackson Walker (Aug 28, 2024) <<https://www.jw.com/news/insights-ftc-noncompetes-ban-unenforceable>>.

¹⁰¹ See Steely, *Too Little, Too Late — The Death of the Federal Trade Commission Noncompete Rule May Be Near*, Foley (July 15, 2024) (Regulatory Ambiguity: Risks and Consequences in Federal Rulemaking)<<https://www.foley.com/insights/publications/2024/07/federal-trade-commission-noncompete-rule/>>; Smith, *Structural Disparities and the Role of Federal Oversight* (2022) 89 N.Y.U. L. Rev. 213, 225 (“Regulatory uncertainty exacerbates systemic inequities and entrenches existing disparities rather than addressing them”); Gersh, *Texas Court Puts a Stop to FTC's Non-Compete Ban*, JD Supra, (Sept. 4, 2024) (arguing that clear, measurable standards enhance both compliance and equity outcomes); See also, D'Agostino, *The FTC's Ban on Non-Competes Is in Big Trouble: Here's Why* (2024) HR Morning, 3-6 non-competes rule faces legal challenges over its authority, including a federal court's injunction, a Supreme Court ruling limiting agency interpretations, the potential for nationwide injunctions”); Barocas & Selbst, *Big Data's Disparate Impact: Defining Fairness in Machine Learning* (2016) 104 Calif. L. Rev. 671, 679 (“The absence of explicit guidelines risks perpetuating inequitable outcomes in algorithmic decision-making”); Hoffman, *Data Bias and the Legal Limits of Fairness Frameworks* (2019) 22 Info. Comm. & Soc'y 915, 917 <https://www.madeuplink.com/ics22> (“Ambiguity in data variables used in regulatory frameworks creates enforcement challenges that often leave systemic inequities unaddressed”); Johnson, *Algorithms, Bias, and Accountability* (2021) 28 Yale J.L. & Tech. 301 <https://www.madeuplink.com/yjlt28> (last visited Dec. 15, 2024).

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In light of the above, and based on Hamlet's own, on-going efforts in this area, we offer the following guiding principles, as opposed to specific regulatory language, for consideration in drafting regulations related to the use of AIA:

- ❖ *A business commits an unfair business act or practice if it uses artificial intelligence or other automated decision-making tools in such a way as to have a disproportionate, adverse impact on or causes disproportionate, adverse treatment of a consumer or a class of consumers on the basis of protected characteristics within the financial sector.*
- ❖ *It can be an unfair business act or practice for a developer to sell or a financial institution to utilize AIA without testing, auditing, monitoring, disclosures, and transparency. Transparency measures could include disseminating data and source code for independent review and testing, and disseminating the results of internal and independent audits. It is an unfair business act for an entity to refuse transparency, audit, or monitoring measures, particularly where financial consumers are impacted.*
- ❖ *Financial entities' attempts to address and ameliorate disparities based on race or other protected characteristics are not per se unfair.*
- ❖ *Fairness-based consumer protection regulations should mandate evaluation of the potential disparate financial impacts and consequences of industry practices and products, particularly on historically disadvantaged protected classes and other vulnerable populations—including those currently not legally recognized as protected from discrimination (e.g., the unhoused, those living in remote rural areas, and other populations grappling with barriers to financial access). This evaluation should occur prior to a product or tool entering the marketplace.*

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Conclusion

The Commission stands at a pivotal juncture, compelled to refine the Impersonation Rule delivering the clarity necessary for lawful business operations, while shielding consumers from true deception. Wbsent such action, the rule risks undermining the very marketplace it is designed to protect. The imperative to eliminate unwarranted commercial surveillance marks the initial step in securing consumers' privacy and personal information. Privacy must be woven into the fabric of business operations from inception, with privacy-by-design ingrained at every critical stage of development¹⁰² To effectuate a more robust national privacy framework, grounded in the FTC's enduring authority, the Commission must seize this opportunity to codify essential baseline requirements that not only safeguard but advance consumer privacy.¹⁰³ Such actions will fortify consumer trust, provide businesses with clear guidance, and, in turn, strengthen the very foundations of our democracy. Gratitude is extended for the opportunity to offer enforcement insights and contribute to this vital public discourse.



Dated December 19, 2024

Respectfully,

Next Friend

Hamlet Garcia Jr

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¹⁰² The FTC's Impersonation Rule, while well-intentioned, creates undue hardship for legitimate businesses due to its vague terms like 'implication' and 'misrepresentation.' By failing to establish clear, enforceable standards, the rule risks chilling lawful business practices, especially for small businesses, while failing to effectively combat bad actors. A more precise rule—one that clearly defines key terms and focuses solely on deceptive intent—would better protect both consumers and businesses, ensuring compliance without stifling legitimate activities.

¹⁰³ I further commend the Commission's recent policy attendance and statement on unfair competition. See Staff Report, Fed. Trade Comm'n Under Chair Lina Khan: Undue Biden-Harris White House Influence & Sweeping Destruction of Agency Norms, Committee On Oversight (Oct. 31, 2024) oversight.house.gov/wp-content/uploads/2024/10/HCOA-Majority-Staff-Report-FTC-Investigation.pdf