

FEDERAL TRADE COMMISSION

16 CFR Part 461

RIN 3084-AB71

Trade Regulation Rule on Impersonation of Government and Businesses

AGENCY: Federal Trade Commission.

ACTION: Initial notice of informal hearing; final notice of informal hearing; request for public comment and speakers.

SUMMARY: The Federal Trade Commission has proposed a trade regulation rule entitled “Rule on Impersonation of Government and Businesses,” which would prohibit the impersonation of government, businesses, or their officials. In response to the notice of proposed rulemaking, a commenter requested an informal hearing. The informal hearing will be conducted virtually on May 4, 2023, at 1 p.m. Eastern Time, and the presiding officer will be the Commission’s Chief Administrative Law Judge, D. Michael Chappell.

DATES: Requests to speak at the informal hearing and any documentary submissions must be received by April 14, 2023. The informal hearing will be conducted virtually at 1 p.m. eastern time on May 4, 2023.

ADDRESSES: Interested parties may file a documentary submission online or on paper by following the instructions in the Submissions part of the SUPPLEMENTARY INFORMATION section below. Write “Impersonation Informal Hearing, R207000” on your documentary submission and file it online at <https://www.regulations.gov>.

FOR FURTHER INFORMATION CONTACT: Christopher E. Brown, cbrown3@ftc.gov, 202-326-2825.

SUPPLEMENTARY INFORMATION:

Following public comment on an advance notice of proposed rulemaking, 86 FR 72901, the Federal Trade Commission (“Commission” or “FTC”) proposed a Trade Regulation Rule on Impersonation of Government and Businesses as described in a notice of proposed rulemaking (“NPRM”), 87 FR 62741. Comments on the NPRM were accepted for 60 days, and 78 comments were posted to the docket at <https://www.regulations.gov>.¹

I. The Request for an Informal Hearing

As the NPRM noted, if “interested parties request to present their position orally, the Commission will hold an informal hearing, as specified in section 18(c) of the FTC Act, 15 U.S.C. 57a(c).”² The opportunity to make an oral statement at an informal hearing is afforded by section 18 of the Federal Trade Commission Act, 15 U.S.C. 57a, and reflected in the Commission’s Rules of Practice, 16 CFR 1.11(e).

The FTC Act provides that “an interested person is entitled to present his position orally or by documentary submission (or both).”³ It also provides that, “if the Commission determines that there are disputed issues of material fact it is necessary to resolve,” then an interested person is further entitled “to present such rebuttal submissions and to conduct . . . cross-examination.”⁴

The Commission’s Rules of Practice elaborate on how an interested person makes such a request. First, any NPRM issued under section 18 of the FTC Act must include an “explanation of the opportunity for an informal hearing and instructions for submissions relating to such a

¹ See Fed. Trade Comm’n, Trade Regulation Rule on Impersonation of Government and Businesses, <https://www.regulations.gov/docket/FTC-2022-0064/comments>.

² Fed. Trade Comm’n, Notice of Proposed Rulemaking: Trade Regulation Rule on Impersonation of Government and Businesses, 87 FR 62741, 62741 (Oct. 17, 2022), <https://www.federalregister.gov/documents/2022/10/17/2022-21289/trade-regulation-rule-on-impersonation-of-government-and-businesses>.

³ 15 U.S.C. 57a(c)(2)(A).

⁴ *Id.* 57a(c)(2)(B).

hearing.”⁵ Second, the “Commission will provide an opportunity for an informal hearing if an interested person requests to present their position orally.”⁶ The Commission can also hold an informal hearing on its own initiative.⁷ Third, any request for an informal hearing “must include: (1) A request to make an oral submission, if desired; (2) A statement identifying the interested person’s interests in the proceeding; and (3) Any proposals to add disputed issues of material fact beyond those identified in the notice.”⁸

One comment, timely submitted by William MacLeod, makes such a request: “I request an opportunity for interested parties to air their concerns at a hearing.”⁹ Mr. MacLeod does not expressly request to make an oral submission,¹⁰ but that requirement in the Rules of Practice is conditional (“if desired”), and the Commission will welcome an oral statement from him and from any other interested persons who request to make one in the manner described below. Mr. MacLeod identifies his interests in the proceeding as desiring that “additional analysis” will aid in developing “an appropriately tailored rule.” He states that his views “are those of the author and do not necessarily reflect the views of” anyone else.¹¹ Mr. MacLeod discusses issues relating to the language of the proposed rule and the applicable legal standard. He does not raise or propose to add any disputed issues of material fact.¹²

The Commission finds that Mr. MacLeod’s comment represents an “adequate request”¹³

⁵ 16 CFR 1.11(b)(6).

⁶ *Id.* 1.11(e).

⁷ *See id.*

⁸ *Id.*

⁹ William MacLeod, Cmt. on NPRM, at 2 (Dec. 16, 2022), <https://www.regulations.gov/comment/FTC-2022-0064-0078>.

¹⁰ *See generally id.*

¹¹ *Id.* at 2.

¹² *See generally id.*

¹³ NPRM, 87 FR at 42747.

and therefore will hold an informal hearing as described below.¹⁴ Because of Mr. MacLeod’s explicit request and the Commission’s resulting obligation to hold an informal hearing, the Commission issues this “initial notice of informal hearing.” 16 CFR 1.12(a). Under the Commission’s Rules of Practice, initial notices of informal hearing contain: the designation of the presiding officer; the time and place of the informal hearing; the “final list of disputed issues of material fact necessary to be resolved during the hearing, if any”; a list of interested persons who will make oral presentations; and certain other determinations when there are designated issues of material fact.¹⁵

II. Conduct of the Informal Hearing

The Commission’s Chief Presiding Officer designates the Commission’s Chief Administrative Law Judge, D. Michael Chappell, to serve as the presiding officer of the informal hearing.¹⁶ Chief Judge Chappell will conduct the informal hearing virtually using video conferencing at 1 p.m. eastern time on May 4, 2023. The informal hearing will be available for the public to watch live from the Commission’s website, <https://www.ftc.gov>, and a recording or

¹⁴ Because this is the first section 18 rulemaking held in several decades and comes after the first NPRM for a section 18 rule since the Commission’s July 2021 streamlining of its Rules of Practice, 86 FR 38542, it may be useful to stress a few points. Any request for an informal hearing should identify any disputed issues of material fact, need not be long, and should identify the requester’s interests in the proceeding. The Commission reserves the right to decline any request for participation that fails to disclose the requester’s identity and interest in the proceeding. Lawyers and others who act on behalf of clients or other individuals or entities should expressly identify those whom they are representing with an interest in the proceeding—or disclaim, as Mr. MacLeod did, that they are acting on behalf of any client. The request does not need to be made by a lawyer or with any special degree of formality. It is useful, although not required, to describe why the requesters think the informal hearing is warranted, how they would participate, and a summary of their expected testimony. A comment from Americans for Prosperity Foundation stated that the Commission “should” hold an informal hearing. While this language falls short of an explicit request, the Commission may elect on its own initiative to hold an informal hearing, and therefore, finds American Prosperity Foundation’s comment as further support to hold such a hearing in this matter. Ams. for Prosperity Found., Cmt. on NPRM, at 8 (Dec. 16, 2022), <https://www.regulations.gov/comment/FTC-2022-0064-0062> (“For the foregoing reasons, the FTC should hold an informal public hearing soliciting additional public input, extend the comment period for at least another 30 days, and substantially revise its proposed rule to ensure the final Impersonation Rule complies with the Constitution, Section 5, and the Deception Statement.”).

¹⁵ 16 CFR 1.12(a)(3).

¹⁶ See 16 CFR 1.13(a)(1) (“the initial notice of informal hearing must designate a presiding officer, who will be appointed by the Chief Presiding Officer.”). As of this publication, the Commission’s Chair is serving as Chief Presiding Officer under Commission Rule 0.8.” 16 CFR 0.8.

transcript of the informal hearing will be placed in the rulemaking record.

In a section 18 rulemaking proceeding, the NPRM must identify disputed issues of material fact, if any. After reviewing the comments, the Commission has identified no disputed issues of material fact necessary to be resolved at this informal hearing.¹⁷ In the NPRM, the Commission stated: “Based on the comment record and existing prohibitions against impersonation of government and businesses under Section 5 of the FTC Act, the Commission does not here identify any disputed issues of material fact necessary to be resolved at an informal hearing. The Commission may still do so later, on its own initiative or in response to a persuasive showing from a commenter.”¹⁸ The recent comment period did not identify any disputed issues of material fact. Comments about the construction and scope of the proposed rule raise issues of law and policy but no questions of “specific fact” that might warrant cross-examination and rebuttal submissions.¹⁹ As such, the Commission remains of the view expressed in the NPRM that no disputed issues of material fact are necessary to be resolved. Because of that, the informal hearing will include no cross examination or rebuttal submissions.²⁰ The Commission, however, has not determined whether, and if so in what form, to promulgate a final rule. Because there are no “disputed issues of material fact” to resolve at the informal hearing, the presiding officer of the hearing will make no recommended decision.²¹ His role is to preside over and ensure the orderly conduct of the informal hearing, including selecting the sequence in which oral statements will be heard, and then place the transcript and any additional written

¹⁷ See 16 CFR 1.11(b)(5).

¹⁸ NPRM, 87 FR at 62747.

¹⁹ 16 CFR 1.12(b)(1).

²⁰ *Id.* 1.12(b) (“Cross-examination and rebuttal submissions at an informal hearing are available only to address disputed issues of material fact necessary to be resolved.”).

²¹ *Id.* 1.13(d) (“The presiding officer’s recommended decision will be limited to explaining the presiding officer’s proposed resolution of disputed issues of material fact.”).

submissions received into the rulemaking record.²²

The Commission does not here publish a “list of the interested persons who will make oral presentations” at the informal hearing because no one, including Mr. MacLeod, made such a request in response to the NPRM.²³ The Commission, however, elects to offer here an additional opportunity for interested persons to request to make oral statements.²⁴ If no such requests are made, the presiding officer will state as much at the opening of the informal hearing and then close the hearing, placing any documentary submissions into the rulemaking record.

This initial notice of informal hearing also serves as the “final notice of informal hearing.”²⁵ A final notice of informal hearing is limited in its substance to matters that arise only when the Commission designates disputed issues of material fact: who will conduct cross-examination; whether any interested persons with similar interests will be grouped together for such purposes; and who will make rebuttal submissions.²⁶ Because cross-examination and submission of rebuttal evidence will not occur in this informal hearing, no separate final notice of informal hearing is necessary.

III. Making an Oral Statement or Documentary Submission

If you would like to make an oral statement, you should submit a comment on this rulemaking docket expressly requesting to make an oral statement. You must do so on or before April 14, 2023. Oral statements will be limited to five minutes, although they may be supplemented by documentary submissions as described below. Transcripts of the oral statements will be placed in the rulemaking record. Interested persons who timely request to

²² *See id.* 1.13(a), (c).

²³ *Id.* 1.12(a)(4).

²⁴ In the future, the Commission may limit oral statements to those who requested to make an oral statement in response to the NPRM, as provided for in the Rules of Practice.

²⁵ *Id.* 1.12(c).

²⁶ *See id.*

make an oral statement will be provided with instructions as to how to participate in the virtual hearing. Requesters who need assistance should indicate as much in their comment, and the Commission will endeavor to provide accommodations. Requesters without the computer technology necessary to participate in video conferencing will be able to participate in the informal hearing by telephone; they should indicate as much in their comments.

You can also file a documentary submission online. For the Commission to consider your documentary submission, you must file it on or before April 14, 2023. Write “Impersonation Informal Hearing, R207000” on your submission. Your documentary submission—including your name and your state—will be placed on the public record of this proceeding, including on the website <https://www.regulations.gov>. To ensure that the Commission considers your online documentary submission, please follow the instructions on the web-based form.

Because your documentary submission will be placed on the public record, you are solely responsible for making sure that it does not include any sensitive or confidential information. In particular, your documentary submission should not contain sensitive personal information, such as your or anyone else’s Social Security number; date of birth; driver’s license number or other state identification number or foreign country equivalent; passport number; financial account number; or credit or debit card number. You are also solely responsible for making sure your documentary submission does not include any sensitive health information, such as medical records or other individually identifiable health information. In addition, your documentary submission should not include any “[t]rade secret or any commercial or financial information which . . . is privileged or confidential”—as provided in Section 6(f) of the FTC Act, 15 U.S.C. 46(f), and Commission Rule 4.10(a)(2), 16 CFR 4.10(a)(2)—including, in particular, competitively sensitive information such as costs, sales statistics, inventories, formulas, patterns,

devices, manufacturing processes, or customer names.

Documentary submissions containing material for which confidential treatment is requested must be filed in paper form, must be clearly labeled “Confidential,” and must comply with Commission Rule 4.9(c), 16 CFR 4.9(c). In particular, the written request for confidential treatment that accompanies the documentary submission must include the factual and legal basis for the request and must identify the specific portions to be withheld from the public record. *See* Commission Rule 4.9(c). Your documentary submission will be kept confidential only if the General Counsel grants your request in accordance with the law and the public interest. Once your documentary submission has been posted publicly at <https://www.regulations.gov>—as legally required by Commission Rule 4.9(b), 16 CFR 4.9(b)—we cannot redact or remove it, unless you submit a confidentiality request that meets the requirements for such treatment under Commission Rule 4.9(c), and the General Counsel grants that request.

Visit the FTC website to read this document and the news release describing it. The FTC Act and other laws that the Commission administers permit the collection of documentary submissions to consider and use in this proceeding as appropriate. The Commission will consider all timely and responsive documentary submissions it receives on or before April 14. For information on the Commission’s privacy policy, including routine uses permitted by the Privacy Act, see <https://www.ftc.gov/siteinformation/privacypolicy>.

IV. Communications by Outside Parties to the Commissioners or Their Advisors

Under Commission Rule 1.18(c)(1), 16 CFR 1.18(c)(1), the Commission has determined that communications with respect to the merits of this proceeding from any outside party to any Commissioner or Commissioner advisor will be subject to the following treatment: Written communications and summaries or transcripts of all oral communications must be placed in the

rulemaking record. Unless the outside party making an oral communication is a Member of Congress, communications received after the close of the public-comment period are permitted only if advance notice is published in the Weekly Calendar and Notice of “Sunshine” Meetings.

By direction of the Commission.

April J. Tabor,
Secretary.