



Overview:

Companies must understand how their product/service access and use policies impact the freedom of individuals and groups to publicly voice diverse viewpoints, operate businesses and nonprofits consistent with a wide array of beliefs, and participate equally in the marketplace. While it's common for companies to require customers/users to comply with certain standards as a condition of using their products and services (e.g., prohibiting certain illegal or unethical practices such as using a product/service to commit fraud or violate intellectual property rights) businesses must guard against including terms that could be used to unduly restrict stakeholders' speech or expressive activity.

Relevant Policies or Practices:

Any policy or requirement that conditions access/use of a product or service on adherence to certain standards of conduct or speech. Depending on the company and industry, this might include:

- terms of use/service,
- content moderation policies/guidelines,
- e-commerce marketplace seller guidelines/standards,
- algorithmic system use policies,
- ad content policies, and
- ad targeting policies,
- risk avoidance/risk mitigation/identifying and managing social risks or impacts/social risk/systemic risk policies,
- code of ethics,
- human rights policy.

Risk Factor(s):

Policies that could be used to condition/restrict use of a product or service for unreasonably broad, undefined reasons.

Steps to Identify and Mitigate Risk:

Eliminate unclear or imprecise restrictions on what customers or users can say or do.

Unclear: A term is unclear if it (1) is so vague that an individual of ordinary intelligence is forced to guess at its meaning, or (2) invites arbitrary and discriminatory enforcement due to a grant of unfettered discretion or lack of objective standards. Terms that lack clarity and grant broad discretion threaten free speech because they have the potential to become a means of suppressing particular viewpoints.

Imprecise: A term is imprecise if it fails to narrowly target the specific harmful activity it is designed to prohibit. Imprecise terms imperil free speech because they risk prohibiting substantial amounts of speech beyond the harmful activity that the regulation aims to prohibit.



Avoiding unclear and imprecise language will significantly reduce the risk of enforcing terms of service (TOS), content moderation policies, and other similar policies in a manner that undermines freedom of expression. The table below provides guidance to help companies avoid terms that pose a serious risk of suppressing speech and/or expressive activity.

Good TOS/Content Policy	Bad TOS/Content Policy
<ul style="list-style-type: none"> • Uses precise terms with common meanings known to average persons. • Uses precise terms that target the specific harmful activity. • Avoids subjective terms that could apply to a customer's/seller's/ creator's/user's religious or ideological views on matters of public concern. 	<ul style="list-style-type: none"> • Uses terms that would require average person to guess at their meaning. • Uses imprecise terms that allow speech that is not the target of the policy to be swept up in its prohibition. • Uses subjective terms that could apply to a customer's/seller's/creator's/ user's religious or ideological views on matters of public concern.

TOS/Content Policy Examples (next page)

Key:

Text with ~~strikethrough~~ and **highlighted in yellow** = Original verbiage that is unclear and/or imprecise.

Text **highlighted in green** = Verbiage added or changed to improve or clarify original text.

Text NOT highlighted and without ~~strikethrough~~ = Acceptable verbiage.

 = Policy contains unacceptable verbiage.

 = Acceptable policy.



We don't sell certain content including content that ~~we determine is hate speech~~, promotes the abuse or sexual exploitation of children, contains pornography, glorifies rape or pedophilia, ~~or advocates terrorism, or other material we deem inappropriate or offensive.~~

<https://www.amazon.com/gp/help/customer/display.html?nodeId=201995150>



You may not use the PayPal service for activities that:

.... 2. relate to transactions involving ... (f) ~~the promotion of hate~~, violence, racial ~~or other forms of discriminatory conduct~~, ~~other forms of intolerance that is discriminatory~~ or the financial exploitation of a crime,

<https://www.paypal.com/us/webapps/mpp/ua/acceptableuse-full>



3. Code of Conduct.

a. By agreeing to these Terms, you're agreeing that, when using the Services, you will follow these rules:
.... vii. Don't engage in activity that is harmful to you, the Services or others (e.g., transmitting viruses, stalking, posting terrorist or violent extremist content, ~~communicating hate speech~~, or advocating violence against others).

<https://www.microsoft.com/en-us/servicesagreement#serviceslist>



We prohibit content that makes violent threats against an identifiable target. Violent threats are declarative statements of intent to inflict injuries that would result in serious and lasting bodily harm, where an individual could die or be significantly injured, e.g., "I will kill you."

<https://help.twitter.com/en/rules-and-policies/hateful-conduct-policy>



Dehumanizing individuals or groups by calling them subhuman, comparing them to animals, insects, pests, disease, or any other non-human entity.

<https://support.google.com/youtube/answer/2801939?hl=en#zippy=%2Cother-types-of-content-that-violates-this-policy>

The below table includes terms that are inherently subjective and prone to overbroad application, such that any use of these terms in a company's policies, regardless of definition, poses a significant danger to customer's/seller's/creator's/user's freedom of expression and freedom of religion or belief (FoRB).



Unclear/Imprecise Terms

Bias
Bigotry
Controversial
Dangerous speech
Denigrating
Degrading
Demeaning
Derogatory
Discriminatory (speech)
Disinformation
Disrespectful
Discourteous
Extreme/Extremism/Extremist
Excessive
Fake News
*False/Fraudulent
Gratuitous
Gross exaggeration
Good taste
Hate group
Hate speech
Hateful/Hateful conduct

Harm
*Inaccurate
Incendiary
Inflammatory
Infringing
Insensitive
Indecent
Intolerance/Intolerant
Misinformation
*Not credible
Objectionable
Offensive
Over the line
*Questionable
Unacceptable
*Unsubstantiated claims
*Generally accepted practices of the Internet community
**Social/reputational risk/harm
**Brand damage/brand damaging activities
Violates or harms public order or morals

*These terms may be acceptable if they refer to commercial activity or describe product/service offerings.

**Social risk and brand damage policies are not per se unclear or imprecise, however they can be used to restrict expression if not carefully defined.

Disclaimer: The information contained in this document is general in nature and is not intended to provide, or be a substitute for, legal analysis, legal advice, or consultation with appropriate legal counsel. You should not act or rely on information contained in this document without seeking appropriate professional advice. By printing and distributing this document, Alliance Defending Freedom, Inc. is not providing legal advice, and the use of this document is not intended to constitute advertising or solicitation and does not create an attorney-client relationship between you and Alliance Defending Freedom or between you and any Alliance Defending Freedom employee. For additional questions, call Alliance Defending Freedom at (800) 835-5233.