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April 11, 2008

Donald S. Clark  
Office of the Secretary  
Federal Trade Commission  
600 Pennsylvania Avenue, NW  
Room H-135 (Annex N)  
Washington, DC 20580

Re: Online Behavioral Advertising Principles  
Comment

Dear Mr. Clark:

The American Academy of Child and Adolescent Psychiatry, the American Academy of Pediatrics, American Psychological Association, Benton Foundation, Campaign for a Commercial Free Childhood, Center for Digital Democracy (“CDD”), Children Now, and the Office of Communication of the United Church of Christ, appreciate the opportunity to comment on the Federal Trade Commission’s (“FTC” or “Commission”) proposed principles for industry self-regulation of online behavioral advertising (“Principles Statement”).<sup>1</sup>

As organizations concerned with online privacy and the effects that media have on youth, we are frequently involved in proceedings at the FTC, including the recent workshop on food

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<sup>1</sup> FED. TRADE COMM’N, ONLINE BEHAVIORAL ADVERTISING: MOVING THE DISCUSSION FORWARD TO POSSIBLE SELF-REGULATORY PRINCIPLES (2007) [hereinafter Principles], <http://www.ftc.gov/opa/2007/12/principles.shtm>.

marketing that the FTC held in July 2005. Indeed, many of our organizations participated at the FTC's town hall meeting on November 1-2, 2007, and the CDD has actively pursued issues of youth and online privacy, including filing two petitions for FTC action on this matter.<sup>2</sup> We are pleased that the FTC is moving forward on this issue and welcome the opportunity to contribute our expertise and analysis.

The FTC Staff proposed five principles to guide the development of self-regulation. The first principle is that a website that collects data for behavioral advertising should provide a clear, concise, consumer-friendly, and prominent statement informing users that data about their activities online are being collected in order to provide advertisements for products and services that are tailored to the users' interests. In addition, the statement should explain that users can choose whether or not to have their information collected. The second principle is that any company that collects and/or stores consumer data for behavioral advertising should provide reasonable security for those data. The third principle is that companies should retain data only as long as is necessary to fulfill a legitimate business or law enforcement need. The fourth principle is that before a company can use data in a manner materially different from promises the company made when it collected the data, it should obtain affirmative express consent from affected consumers. The fifth principle is that companies should only collect sensitive data for behavioral advertising if they obtain affirmative express consent from the consumer to receive such advertising. The staff requested "specific input on (1) what classes of information should be considered sensitive, and (2) whether using sensitive data for behavioral targeting should not be permitted, rather than subject to consumer choice."<sup>3</sup>

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<sup>2</sup> See Center for Digital Democracy & U.S. Public Interest Research Group, "Supplemental Statement in Support of Complaint and Request for Inquiry and Injunctive Relief Concerning Unfair and Deceptive Online Marketing Practices," Nov. 1, 2007, <http://www.ftc.gov/os/comments/behavioraladvertising/071112cdduspirg.pdf>.

<sup>3</sup> Principles, *supra* note 1, at 6.

While we generally support these proposed principles, our comments focus on the fifth principle concerning the treatment of sensitive information. The FTC's examples of sensitive information include information about health conditions, sexual orientation, and children's activities online. We agree that information about children's activities online should be considered sensitive and afforded special protection. For the reasons explained below, we believe that all data collected about the online activities of *persons under eighteen years of age* should be considered sensitive. We further urge that the Commission's guidelines prohibit the collection of such information.

#### **I. Behavioral Advertising Uniquely Impacts Children And Adolescents Because Of Their Lower Stages Of Development And Education.**

A recurring theme at the FTC town hall meeting was that although behavioral advertising raises privacy and security issues for all consumers, the concerns intensify when advertisers gather data on minors. Children and adolescents have more difficulty understanding privacy policies and are at a developmental disadvantage to give meaningful, informed consent to data collection.

At the same time, children and adolescents are increasingly attractive demographics for online advertisers. Youth have the highest percentage of internet access: 93 percent of Americans between twelve and seventeen years of age use the internet, 89 percent do so at least once a week, and 61 percent are online daily.<sup>4</sup> Children ages six to twelve spend approximately \$40 billion annually and influence \$200 billion more of family spending.<sup>5</sup> In 2003, adolescents spent \$175 billion, or \$103 per adolescent per week.<sup>6</sup> Moreover, marketers not only want to

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<sup>4</sup> AMANDA LENHART ET. AL., TEENS AND SOCIAL MEDIA, PEW INTERNET & AMERICAN LIFE PROJECT, TEENS AND SOCIAL MEDIA (2007), [http://www.pewinternet.org/pdfs/PIP\\_Teens\\_Social\\_Media\\_Final.pdf](http://www.pewinternet.org/pdfs/PIP_Teens_Social_Media_Final.pdf).

<sup>5</sup> Tricia Bishop, *Sites aimed at preteens gaining in popularity*, CHI. TRIB., Apr. 8, 2007.

<sup>6</sup> See Press Release, Teenage Research Unlimited, Teens spent \$175 billion in 2003 (Jan. 9, 2004), [http://www.teenresearch.com/prview.cfm?edit\\_id=168](http://www.teenresearch.com/prview.cfm?edit_id=168).

influence children and adolescents' immediate purchases, but also seek to develop "brand loyalty" to retain these consumers later in life as part of a strategy known as "cradle-to-grave marketing."<sup>7</sup>

Children and adolescents are thus prime targets for behavioral advertising practices. However, the following evidence shows that these young consumers lack the capacity to make meaningful, informed decisions regarding the trade-off between privacy and online services.

**A. Children Under Thirteen Have Diminished Capacity To Distinguish Ads, Understand Their Purpose, And Comprehend Behavioral Advertising Practices.**

Social psychology has consistently identified the cognitive challenges that children face when evaluating advertisements. Studies show that young children cannot distinguish commercial and noncommercial content, view ads with skepticism, or understand the nature of persuasion.<sup>8</sup> The American Psychological Association's ("APA") Task Force on Advertising and Children recently compiled and reviewed the available research on advertising's effects on children.<sup>9</sup> The research shows that young children do not consistently discriminate between commercial and noncommercial content on television until at least age four or five.<sup>10</sup> On the internet, however, the increased blurring of boundaries between commercial and noncommercial material suggests that identifying advertising is a much more challenging task for young people. Consistent with this thesis, one study found that children ages six to twelve clicked on website ads much more frequently than adults, as they believed the ads were part of the site's content.<sup>11</sup>

The more important information processing skill involved in recognizing and defending against commercial persuasion is developing the ability to comprehend advertising's persuasive

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<sup>7</sup> See KATHRYN C. MONTGOMERY, GENERATION DIGITAL 30 (2007).

<sup>8</sup> See generally, DALE KUNKEL ET. AL., AM. PSYCHOL. ASS'N, REPORT OF THE APA TASK FORCE ON ADVERTISING AND CHILDREN (2004) [hereinafter APA Report].

<sup>9</sup> Id.

<sup>10</sup> Id. at 5-6.

<sup>11</sup> SHULI GILUTZ & JAKOB NIELSEN, USABILITY OF WEBSITES FOR CHILDREN (2002).

intent. On average, children do not comprehend persuasive intent in advertising at even the most basic level until at least eight years of age.<sup>12</sup> Because of the substantial research supporting these findings and others, the APA Task Force concluded that many marketing efforts directed toward young children “are fundamentally unfair . . . and therefore warrant governmental action to protect young children from commercial exploitation.”<sup>13</sup>

Indeed, the government has repeatedly acted to protect children from the dangers found in these studies. For instance, the Federal Communications Commission sets time limits for commercials during children’s programming, prohibits program-length commercials, requires clear separation between programming and advertisements, and prohibits host selling.<sup>14</sup> Federal law also restricts advertising of certain products whose consequences children cannot understand (*e.g.* 900 numbers).<sup>15</sup> Most recently, Congress passed the Children’s Online Privacy Protection Act (“COPPA”),<sup>16</sup> which offers additional protection for children on the internet.<sup>17</sup>

Behavioral advertising exacerbates the cognitive problems discussed above. As advertisers can better target children individually, the line between advertisement and content blurs further, making it more likely that children will not understand that website operators may have persuasive motivations.<sup>18</sup> Moreover, as the FTC has recognized in its COPPA

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<sup>12</sup> See APA Report, *supra* note 8, at 6; see also GEORGE COMSTOCK & ERICA SCHARRER, *MEDIA AND THE AMERICAN CHILD* (Academic Press 2007); BARRIE GUNTER, CAROLINE OATS, & MARK BLADES, *ADVERTISING TO CHILDREN ON TV: CONTENT, IMPACT, AND REGULATION* (Lawrence Erlbaum Assocs. 2005).

<sup>13</sup> *Id.* at 22.

<sup>14</sup> See Children’s Television Programs, Report & Policy Statement, 39 Fed. Reg. 39,396 (Nov. 6, 1974); Children’s Television Obligations of Digital Television Broadcasters Report & Order, FCC 04-221, MM Docket No. 00-167 (Sept. 9, 2004).

<sup>15</sup> See *Teleline, Inc.*, 114 F.T.C. 399 (1991) (restricting advertising 900 numbers to children).

<sup>16</sup> 15 U.S.C. §§ 6501-6506 (2007).

<sup>17</sup> See, *e.g.*, 144 CONG. REC. 8482 (1998) (statement of Sen. Bryan) (explaining how the internet involves less parental involvement and greater vulnerability to exploitation and harm).

<sup>18</sup> See JEFF CHESTER & KATHRYN MONTGOMERY, *INTERACTIVE FOOD & BEVERAGE MARKETING: TARGETING CHILDREN AND YOUTH IN THE DIGITAL AGE* 31 (2007), <http://www.digitalads.org>.

enforcement,<sup>19</sup> children do not realize that websites collect personal information for advertising purposes. Behavioral advertising therefore presents a prime example of how children, because of their level of cognitive development, cannot understand and make meaningful choices concerning online data collection. The FTC must protect this vulnerable population from practices that consistent psychological evidence shows they cannot meaningfully comprehend.

**B. Adolescents Do Not Meaningfully Consent To Behavioral Advertising Because They Are Highly Susceptible To Peer Pressure And Often Are Unable To Consider And Mitigate The Consequences Of Their Behavior.**

Although adolescents are more sophisticated consumers than young children are, they face their own age-related vulnerabilities regarding privacy. Adolescents face enormous pressures to socially interact online—providing personal information in the process—and are less able to understand the potential long-term consequences from having their information available to advertisers, other individuals, and third-parties. First, individuals between the ages of thirteen and seventeen are developing their identity, seeking out friends and socializing.<sup>20</sup> In one survey, the Pew Internet & American Life Project found that “[o]ne of the major reasons why adolescents are such enthusiastic users of social network sites is that the sites give them opportunities to present themselves to a group of peers and then get feedback and affirmation.”<sup>21</sup>

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<sup>19</sup> See, e.g., *United States v. Industrious Kid, Inc.*, No. CV-08-0639 (N.D. Cali. filed Jan. 30, 2008) (involving a website directed to children that collected names, dates of birth, personal e-mail addresses, parents' e-mail addresses, gender, user-names and passwords prior to the site's providing notice to parents), available at <http://www.ftc.gov/os/caselist/0723082/080730cons.pdf>.

<sup>20</sup> See Seounmi Youn, *Teenagers' Perceptions of Online Privacy and Coping Behaviors: A Risk-Benefit Appraisal Approach*, 49 J. BROADCASTING & ELECTRONIC MEDIA 86 (2005); V.C. Strasburger & B.J. Wilson, *Children and Teenagers: Unique Audiences*, in CHILDREN, ADOLESCENTS, & THE MEDIA 1 (V.C. Strasburger & B.J. Wilson eds., 2002); AMANDA LENHART & MARY MADDEN, PEW INTERNET & AMERICAN LIFE PROJECT, TEENS, PRIVACY, & ONLINE SOCIAL NETWORKS 13 (2007), [http://www.pewinternet.org/pdfs/PIP\\_Teens\\_Privacy\\_SNS\\_Report\\_Final.pdf](http://www.pewinternet.org/pdfs/PIP_Teens_Privacy_SNS_Report_Final.pdf); Sandra Calvert, *Identity Construction on the Internet*, in CHILDREN IN THE DIGITAL AGE: INFLUENCES OF ELECTRONIC MEDIA ON DEVELOPMENT 57 (Sandra L. Calvert, Amy v. Jordan & Rodney B. Cocking eds., 2002); Crispin Thurlow & Susan McKay, *Profiling 'New Communication' Technologies in Adolescence*, 22 J. LANGUAGE & SOC. PSYCHOL. 94 (2003).

<sup>21</sup> See LENHART & MADDEN, *supra* note 20, at 13.

And, as more adolescents seek out identity formation on the internet, it becomes incredibly difficult to resist the peer pressure to interact online and thus divulge personal information.<sup>22</sup>

Moreover, adolescents are highly prone to experimentation and risk-taking, and it is often difficult to warn them about the consequences of such activities.<sup>23</sup> In a recent study, a researcher surveyed adolescents to measure their susceptibility to and strategies for dealing with perceived risk from online advertising.<sup>24</sup> The author concluded that “given teenagers’ tendencies toward risk taking and experimentation, it is not surprising that teenagers focus more on benefits that marketers may offer, instead of potential risks posed by the loss of privacy.”<sup>25</sup> Thus, differences in adolescents’ development make them more willing to forgo learning about or protecting against behavioral advertising practices (*e.g.* by reading a privacy policy or deleting cookies) in order to more quickly and freely access websites and socially interact.

These factors help explain the different conceptions of privacy that adults and adolescents have—what Dr. Larry Ponemon called the “privacy age gap” at the Commission’s town hall meeting.<sup>26</sup> Studies show that adolescents do care about privacy,<sup>27</sup> though their actions do not always show it.<sup>28</sup> The studies described above present substantial evidence that adolescents are

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<sup>22</sup> See LARRY D. ROSEN, *ME, MYSPACE, AND I* 15 (2007) (describing how “[b]eing on MySpace is almost a given for teens these days” and citing testimonials from adolescents, including: “I am on [MySpace] because everyone I know is on” and “If you aren’t MySpacing then you are a loser”).

<sup>23</sup> See Youn, *supra* note 20; Strasburger & Wilson, *supra* note 20; Kathryn Greene et. al., *Targeting Adolescent Risk-Taking Behaviors: The Contributions of Egocentrism and Sensation-Seeking*, 23 J. ADOLESCENCE 439 (2000).

<sup>24</sup> See Youn, *supra* note 20.

<sup>25</sup> *Id.* at 104. See also Ben Gervey & Judy Lin, *Obstacles on the Internet*, ADVERTISING AGE, April 17, 2000 (describing how adolescents view collection of personal information as a positive trend, so long as they are given a choice and benefit for their loss of privacy).

<sup>26</sup> See FTC Town Hall, Session 5, at 7.

<sup>27</sup> See, *e.g.*, JOSEPH TUROW & LILACH NIR, ANNENBERG PUBLIC POLICY CENTER, *THE INTERNET AND THE FAMILY* 26 (2000) (finding that 63 percent of adolescents are nervous with websites having information about them), <http://www.annenbergpublicpolicycenter.org/NewsDetails.aspx?myId=41>.

<sup>28</sup> See Youn, *supra* note 20, at 104-105 (describing how adolescents do not seek out information on privacy transactions); LENHART & MADDEN, *supra* note 20; TUROW & NIR, *supra* note 27, at 28 (comparing the types of information that adolescents and parents are willing to disclose in exchange for certain benefits).

at a developmental disadvantage when assessing privacy implications and therefore cannot meaningfully consent to behavioral advertising.

### **C. Privacy Policies Are Difficult To Understand For The Average Consumer and Nearly Impossible For Children And Adolescents To Comprehend.**

In addition to children and adolescents' difficulties in understanding and consenting to behavioral advertising, online data collection practices are largely invisible because of websites' complex, technical, and lengthy privacy policies. First, it is not always easy to locate privacy policies.<sup>29</sup> Second, as town hall participants from all interested sectors discussed, many privacy policies are difficult to understand, requiring in some cases a graduate-level degree to read.<sup>30</sup> A 2004 study measured the required reading levels for the top fifty U.S. websites' privacy policies and found that the average policy required a college education, only three were accessible to persons with a high school degree, and 53 percent were beyond the grasp of 56.6 percent of the internet population.<sup>31</sup> Consumer surveys have made similar findings: only 47 percent of adults say privacy policies are easy to understand and 86 percent believe that laws forcing privacy policies to follow a standard format will effectively protect information.<sup>32</sup> Moreover, because privacy policies often contain vague, ambiguous, or conflicting wording, they may not successfully convey the information that consumers need.<sup>33</sup>

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<sup>29</sup> Agnes Nairn & Dowsiri Monkogol, *Children and Privacy Online*, J. DIRECT DATA & DIGITAL MARKETING PRACTICE 294 (2007).

<sup>30</sup> See generally FTC Town Hall, Session 6.

<sup>31</sup> Carlos Jensen & Colin Potts, *Privacy Policies as Decision-Making Tools: An Evaluation of Online Privacy Notices*, Proceedings of ACM Conference on Human Factors in Computing Systems: Vienna, Austria, CHI 471-78 (2004), available at <http://www-static.cc.gatech.edu/grads/j/Carlos.Jensen/Publications/p471-jensen.pdf>. See also JOSEPH TUROW, LAUREN FELDMAN & KIMBERLY MELTZER, ANNENBERG PUBLIC POLICY CENTER, OPEN TO EXPLOITATION: AMERICAN SHOPPERS ONLINE AND OFFLINE 7 (2005) (finding that the best predictor for whether people understand data collection is education, with only 36 percent of high school graduates able to accurately answer questions about online privacy, 45 percent of college graduates, and 51 percent of consumers with a graduate degree or more), <http://www.annenbergpublicpolicycenter.org/NewsDetails.aspx?myId=31>.

<sup>32</sup> TUROW, FELDMAN & MELTZER, *supra* note 31, at 3.

<sup>33</sup> Zizi Papacharissi & Jan Fernback, *Online Privacy and Consumer Protection: An Analysis of Portal Privacy Statements*, 49 J. BROADCASTING & ELECTRONIC MEDIA 259 (2005) (analyzing the efficacy of privacy statements).

These findings apply with special force to children and adolescents, who have less education and are less likely to make the effort to read privacy policies.<sup>34</sup> Many areas of the law recognize that minors are at a disadvantage when it comes to reading, understanding, and consenting to legal documents. For instance, a common law doctrine in contract law makes agreements that minors enter into “voidable”—that is, because minors cannot consent to contracts as meaningfully as adults can, they may cancel any contracts they enter into.<sup>35</sup> Another example is COPPA, where Congress mandated parental notification and approval of certain data collection by websites because young children cannot read privacy policies.<sup>36</sup>

Thus, not only do children and adolescents face difficulties understanding and meaningfully consenting to behavioral advertising practices based on their levels of development, they face additional hurdles from the complex and confusing language in privacy policies.

## **II. FTC Action Is Appropriate And Necessary.**

### **A. Consumers’ Inability To Meaningfully Consent To Behavioral Advertising Creates Market Deficiencies That Constitute Unfair Or Deceptive Practices.**

The FTC has consistently recognized the importance of free and informed consumer consent in information collection cases and has indicated its willingness to step in when free market decisions are unjustifiably hindered.<sup>37</sup> The Commission’s four core principles of online

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<sup>34</sup> See Sections I.A. and I.B., *supra*.

<sup>35</sup> See 5 RICHARD A. LORD, WILLISTON ON CONTRACTS § 9:5 (4th ed. 2007).

<sup>36</sup> Moreover, even when COPPA applies, privacy policies are not always easy for parents to read. See JOSEPH TUROW, ANNENBERG PUBLIC POLICY CENTER, PRIVACY POLICIES ON CHILDREN’S WEBSITES: DO THEY PLAY BY THE RULES? (2001) (finding that privacy policies at half of the most commonly-accessed children’s websites took college students experienced with privacy issues over nine minutes to read through); Nairn & Monkogol, *supra* note 29 (concluding that privacy policies for children’s websites in the UK—including some U.S.-based sites—are rarely understandable for children).

<sup>37</sup> See Fed. Trade Comm’n., Commission Statement of Policy on the Scope of Consumer Unfairness Jurisdiction, appended to *In re Int’l Harvester Co., Inc.*, 104 F.T.C. 949 (1984), (explaining that the FTC employs its unfairness jurisdiction “not to second-guess the wisdom of particular consumer decisions, but rather to halt some form of seller behavior that unreasonably creates or takes advantage of an obstacle to the free exercise of consumer decisionmaking”), available at <http://www.ftc.gov/bcp/policystmt/ad-unfair.htm>; Fed. Trade Comm’n, Deception

privacy protection (notice, choice, access, security) reflect this policy of requiring free and informed consumer consent,<sup>38</sup> as do the advertising industry's stated goals.<sup>39</sup>

Evidence shows, however, that consumers often fail to act to protect their privacy and misunderstand online advertising practices. For instance, one study found that although 72 percent of participants said they were concerned with online privacy and 68 percent believed that privacy policies were important, only 23.7 percent said they were likely to read privacy policies on an initial visit, only 7.5 percent said they would likely read privacy policies on sites that do not explicitly ask for information, and only 7.5 percent said they would likely re-check privacy policies.<sup>40</sup> The same study also found that less than 35 percent of participants claimed to know what a "web bug" (a common tool for behavioral marketing) is, and of that group over 80 percent could not correctly identify what the technology did.<sup>41</sup> Similarly, although over 90 percent of participants claimed to know what cookies (another common behavioral advertising tool) are, nearly 85 percent of them incorrectly identified cookies' qualities and function.<sup>42</sup>

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Policy Statement (1983), appended to Cliffdale Assoc's, Inc., 103 F.T.C. 110 (1984) (explaining that the FTC will act when certain circumstances, such as misleading, illegible, or non-understandable fine print, are likely to deceive reasonable consumers), *available at* <http://www.ftc.gov/bcp/policystmt/ad-decept.htm>.

<sup>38</sup> See FED. TRADE COMM'N, *PRIVACY ONLINE: A REPORT TO CONGRESS* (1998) *available at* <http://www.ftc.gov/opa/1998/06/privacy2.shtm>; FED. TRADE COMM'N, *ONLINE PROFILING: A REPORT TO CONGRESS* (2000), *available at* <http://www.ftc.gov/os/2000/06/onlineprofilingreportjune2000.pdf>; Principles, *supra* note 1.

<sup>39</sup> See Direct Marketing Association, *Guidelines for Ethical Business Practice 20* (2007) ("notice about information practices on your Web site should be easy to find, read, and understand so that a visitor is able to comprehend the scope of the notice"), <http://www.the-dma.org/guidelines/EthicsGuidelines.pdf>; Network Advertising Initiative, *Self-Regulatory Principles For Online Preferences marketing by Network Advertisers*, [http://www.networkadvertising.org/pdfs/NAI\\_principles.pdf](http://www.networkadvertising.org/pdfs/NAI_principles.pdf) (last visited Feb. 8, 2007) (emphasizing the importance of notice and consent); Online Privacy Alliance, *Guidelines for Online Privacy Policies*, <http://www.privacyalliance.org/resources/ppguidelines.shtml> (last visited Feb. 8, 2007) ("An organization's privacy policy must be easy to find, read and understand").

<sup>40</sup> Carlos Jensen et. al., *Privacy Practices of Internet Users: Self-Reports Versus Observed Behavior*, 63 INT. J. HUM.-COMPUTER STUD. 203 (2005). See also FTC Town Hall, Session 6, at 2-4, 13-14 (on how consumers do not read privacy policies); FTC Town Hall, Session 3, at 25-30 (on how consumers care about privacy but do little to protect themselves).

<sup>41</sup> A web bug is a graphic on a web page, normally small and invisible, that allows advertisers to track and monitor visitors of that page by conveying information on the user back to the advertiser.

<sup>42</sup> Jensen et. al., *supra* note 40.

A 2003 national survey conducted by the Annenberg Public Policy Center had similar results: nearly 80 percent of respondents were nervous about online information collection and 65 percent said they knew how to protect themselves online. Nevertheless, only one quarter of respondents correctly identified the following statement as false: “When a website has a privacy policy, it means the site will not share my information with other websites and companies.” The survey’s authors concluded that online consumers “have a misplaced sense of confidence.”<sup>43</sup>

These studies suggest that market forces are not effectively providing consumers with the privacy protection they desire and that consumers may be “consenting” to the collection of information that they would not have consented to had they been adequately informed. The problem is even more acute with respect to children and adolescents because they generally lack the capacity, sophistication, judgment, and reading skills of adults. Therefore, even if the guidelines required affirmative consent from children and adolescents for the collection of information used in behavioral advertising, that consent would not be free and informed.<sup>44</sup> Because of this market failure, the Guidelines should prohibit the collection of data concerning children’s and adolescents’ online activities.

### **B. The FTC Has Additional Responsibility Under COPPA To Protect Children From Behavioral Advertising.**

Recognizing children’s inability to meaningfully consent to data collection practices, COPPA generally requires affirmative parental consent before websites collect personal information from children under the age of thirteen. When Congress passed COPPA in 1998 and

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<sup>43</sup> See TUROW, FELDMAN & MELTZER, *supra* note 31; JOSEPH TUROW, ANNENBERG PUBLIC POLICY CENTER, AMERICANS AND ONLINE PRIVACY: THE SYSTEM IS BROKEN 33 (2003) (“When consumers are unaware of the data flows that take place behind their screens, they cannot really engage in the [necessary] informed cost-benefit analyses”), <http://www.annenbergpublicpolicycenter.org/NewsDetails.aspx?myId=36>.

<sup>44</sup> See JOSEPH TUROW, ANNENBERG PUBLIC POLICY CENTER, AMERICANS AND ONLINE PRIVACY: THE SYSTEM IS BROKEN 33 (2003) (“When consumers are unaware of the data flows that take place behind their screens, they cannot really engage in the [necessary] informed cost-benefit analyses”), <http://www.annenbergpublicpolicycenter.org/NewsDetails.aspx?myId=36>; Nairn & Monkogol, *supra* note 29 (explaining how meaningful privacy protection requires both knowledge and choice).

the FTC implemented it in 1999,<sup>45</sup> neither body could have appreciated the magnitude of today's behavioral advertising practices. Indeed, the FTC's Principles Statement acknowledged that the Commission was aware of an early form of behavioral advertising in 2000, but that the practice "has evolved considerably since that time."<sup>46</sup>

A key goal of the COPPA legislation was to minimize data collection about children.<sup>47</sup> COPPA requires parental consent when websites collect "personal information." The statute defines "personal information" as (A) a name, (B) a physical address, (C) an e-mail address, (D) a telephone number, (E) a Social Security number, (F) "any other identifier that the Commission determines permits the physical or online contacting of a specific individual," and (G) "information concerning the child . . . that the website collects online from the child and combines with an identifier described in this paragraph."<sup>48</sup>

Congress delegated to the Commission, through part (F), the authority to use its expertise and discretion to update the term, "personal information," as new online data-collection methods and threats to children's privacy develop. In its 1999 rule implementing COPPA, the Commission used its authority under part (F) to include persistent identifiers, such as customer numbers held in cookies, as "personal information" when those identifiers are associated with other individually identifiable information.<sup>49</sup> In other words, the rule appears to allow advertisers to collect unlimited amounts of data about a child, create a consumer profile, and target ads directly to the child—all without parental consent—so long as the child's name, e-mail address, etc. are not collected.

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<sup>45</sup> Children's Online Privacy Protection Rule, 64 Fed. Reg. 59,888 (Nov. 3, 1999).

<sup>46</sup> Principles, *supra* note 1, at 1.

<sup>47</sup> 144 CONG. REC. 8482 (1998) (statement of Sen. Bryan) ("there must be safeguards against the online collecting of information from children without a parent's knowledge or consent").

<sup>48</sup> 15 U.S.C. § 6501(8) (2007).

<sup>49</sup> 16 C.F.R. § 312.2 (2007); *see* 64 Fed. Reg. at 59,892 ("unless such identifiers are associated with other individually identifiable personal information, they would not fall within the Rule's definition of 'personal information.'").

Based on what the Commission has come to know about these advertising practices since the 1999 rule, the Commission should revisit and update its rule to reflect the emergence and pervasiveness of behavioral advertising. Using persistent identifiers (such as customer numbers held in cookies) to collect information to send individual children highly targeted ads clearly fits within part (F) of the statutory definition of “personal information,” even absent combination with a child’s name, e-mail address, etc.<sup>50</sup> The Commission must therefore update and clarify its rule to require parental consent before any such data collection occurs.

## CONCLUSION

Based on the preceding review of the relevant scientific studies and expert analyses, we ask that the FTC:

- (1) Recommend adoption of voluntary industry guidelines that define “sensitive data” to include the online activities of all persons under the age of eighteen and prohibit the collection of sensitive information for behavioral advertising purposes;
- (2) Monitor whether the industry is following these voluntary guidelines, and, if they are not, initiate a rulemaking proceeding to prohibit the collection of data concerning the activities of persons under the age of eighteen for behavioral advertising purposes;
- (3) Revisit and clarify its COPPA rule to require affirmative express consent from parents when advertisers collect information used to send individualized ads to children as part of behavioral advertising.

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<sup>50</sup> Indeed, limiting part (F) of the rule’s definition of “personal information” in this way is superfluous, as a cookie that includes a name, e-mail address, or other piece of individually-identifiable information would implicate the definition of “personal information” anyway, through parts (A)-(E) of the definition.

Respectfully Submitted,

/s/ Angela J. Campbell

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Dated: April 11, 2008