September 24, 2012

Federal Trade Commission
Office of the Secretary
Room H-113 (Annex E)
600 Pennsylvania Ave., NW
Washington, DC 20580

RE: Comments of Application Developers Alliance, Supporting in Part and Opposing in Part the Commission's Proposed Rule Regarding the Childrens Online Privacy and Protection Act of 1998[1]

Dear Chairman and Commissioners,

On behalf of our membership of more than 10,000 app developers, app publishers, and stakeholders in the mobile app ecosystem, the Application Developers Alliance is pleased to submit comments expressing both support and concern regarding various components of the proposed revisions to the Federal Trade Commission ("FTC") rules implementing the Children's Online Privacy Protection Act of 1998 ("COPPA").

Background. The Application Developers Alliance (the "Alliance"), founded in January 2012, is an industry association that supports application developers as entrepreneurs, innovators and creators. The Alliance supports developers and the app ecosystem by: (i) promoting innovation and growth through collaboration, networking and education; (ii) delivering resources and support that enable developers to focus on their areas of expertise; and (iii) advocating for policies that promote developers' interests, including in the areas of data privacy and security, intellectual property, competition and innovation.

Many Alliance members are dedicated to providing high quality experiences and content – including educational tools, developmental aids, and entertainment – to children under the age of 13 (hereinafter referred to as "children"). For example, Alliance member Media Chaperone (www.mediachaperone.com), a Chicago-based startup with four employees, provides parents with a curated, child-friendly app platform. Media Chaperone provides its app partners with white-label parental notifications, social controls, and parent-approved purchasing and wallet functionality. Partners include Knowledge Adventure's Jumpstart.com, and Frima Studio, which has built games for Build-a-Bear and Nickelodeon.

Working independently or with a partner like Media Chaperone, app developers and publishers are committed to providing children with great tools and experiences, and to ensure that in doing so they are not violating children's privacy interests. App developers know their hard work –

[1] These comments are filed regarding the COPPA Rule Review, 16 CFR Part 312, Project No. P104503.

taking a great idea and turning it into a rewarding, job creating business – will be jeopardized if children and their information are not respected and protected.

Overview. In 1998 Congress mandated that online companies collecting information from and about children treat that information with respect and care. When passing COPPA, Congress made clear that mandating respectful and careful handling of children's data was not intended to deter or even diminish the continued production of high-quality online content for children. An early and enthusiastic sponsor, U.S. Senator Richard Bryan (D-NV), noted the importance of COPPA working "in a manner that preserves the interactivity of children's experience on the Internet and preserves children's access to information in this rich and valuable medium." Statement of Sen. Bryan, 144 Cong. Rec. at S11657 (Oct. 7, 1998).

COPPA was the right legislation at the time, and it remains a viable, enforceable and effective statute today. As Sen. Bryan predicted, COPPA has not inhibited the proliferation of content aimed at children. Rather, the law's clear boundaries and the Commission's clear implementing guidelines have helped parents feel comfortable allowing their children to enjoy online media and have also helped information collectors and handlers comply. It is the continuation of this balance – respect and care for children and simultaneously promoting creativity that benefits children – that is the foundation for the Alliance's comments on the proposed rule, and for the specific concerns we note and suggestions we offer.

1. The Alliance Supports the Fundamental Principles Underlying the Proposed Rule, But We Object to the Implementation of Those Principles

As a baseline premise, the Alliance reads this proposal as clarifying that mobile apps are covered by COPPA in the same manner and pursuant to the same requirements as traditional websites. The Alliance supports this principle, as we believe that developers and publishers of mobile apps, and their business partners, are obligated to respect and care for children's data just as are developers and publishers of online websites.

The Alliance is also generally comfortable with the Proposed Rule's imposition of responsibility and respect in association with mobile apps' use of persistent identifiers such as unique device identifiers ("UDID"). The Alliance offers only modest suggestions to this proposed rule.

Additionally, the Alliance appreciates the Commission's proposal that apps with "child-oriented content appealing to a mixed audience" have flexibility regarding their handling of consumer data. Permitting mixed audience sites to screen users' ages and segregate their data recognizes business reality (e.g., that great content often appeals to many different audiences), and this proposal will reduce developers' and publishers' costs without diminishing children's protection.

Of far greater import, the proposed rule largely seems focused on accomplishing an apparently straightforward goal: ensuring that careful handling of children's information is the responsibility of all participants in the economic value chain associated with content directed at children. This expanded view of COPPA is based on an accurate recognition that online content monetization is accomplished through a complex web of inter-related activities by many parties.

However, the proposal accomplishes this goal by imposing expensive (and perhaps impossible) compliance burdens and liability risks on many participants in the online and mobile content business. In its righteous pursuit of a worthy goal, the proposal runs roughshod over the traditional American legal standard for finding liability, which generally is imposed only on parties that: (a) are actors engaged in the relevant activity (i.e., collecting information from or about children); or (b) have clear knowledge of, or so clearly should have knowledge of the relevant activity that such knowledge can be legally imputed.

The breadth of these burden-sharing proposals and the liability and policing burdens they impose on parties that are not collecting and using children's individually identifiable information are clearly contrary to the statute's limitations and Congress' intent. Moreover, they are unsupported by economic or legal data demonstrating their need or even their reasonableness as solutions to relevant problems. For these reasons, the Alliance opposes many of the proposal's components.

2. The Proposed Definitions of "Operator" and of "Website or Online Service Directed to Children" are Unlawfully and Needlessly Overbroad, as they Would Impose Compliance Burdens and Potential Liability on App Developers and Publishers that Are Not Collecting or Handling Children's Data and that Are Incapable of Adequately Policing Their Partners

When Congress enacted COPPA it clearly and definitively created two classes of "operators" who would be subject to compliance obligations:

1. Content providers and partners whose obligation is limited because they are not directed at children and do not knowingly collect or obtain children's data; and,
2. Content providers and partners whose obligations are extensive because the content is directed at children and the provider and/or its partners are collecting children's individually identifiable data.

In the statute, and in the longstanding regulations, the line is clear, and small developers and publishers need not retain legal counsel simply to determine which side of the ledger one's business falls on.

The online and app publisher industries are built on a multi-party networked business model that relies on each party, e.g., content-delivery networks and advertising networks, being technically and legally responsible for its respective role in developing, distributing and monetizing content. Current regulations permit a content provider to legitimately monetize content directed at children without taking on the extensive COPPA-compliance obligations, by partnering with a COPPA-compliant partner, e.g., an advertising network.

Unfortunately, and without any justification, the current proposal turns this business model upside-down by triggering extensive COPPA-compliance obligations on children-directed apps and websites that explicitly do not collect or utilize children's information. This is clearly contrary to the statute, which explicitly focuses compliance obligations on entities that collect or

utilize children's information, not on those who merely partner with entities that collect and handle children's information.

The Proposed Rule provides no legal rationale for this extraordinary expansion of COPPA liability. It identifies neither a statutory basis for expanding the "operator" definition, nor even a theoretical gap in legal coverage that the expanded definition will close. Instead, in an effort to promote compliance by information collectors and their partners, the proposal requires information collectors' business partners to be supplemental police in extraordinarily intrusive (and likely impossible) ways. This is understandable from an absolutist protection perspective, but it is beyond the scope of the statute.

Additionally, the expanded "operator" definition is unnecessary. In a proposal that required more than a year to develop and thousands of words to explain, no instance is identified where COPPA violations went unpunished because the "operator" definition was too narrow. To the contrary, history illustrates that the Commission is already capable of responding to any company's COPPA violations by utilizing its existing, well-established enforcement authority under the current "operator" definition.

Moreover, as referenced above, thousands of app publishers have intentionally denied themselves the benefit of directly monetizing children's personally identifiable information. They have chosen to utilize their resources to develop great content, and to let partners help them monetize that content. In part, these app developers and publishers have made this choice because collecting and handling children's data internally would require them to take on liability risk and spend compliance resources that they do not have, and would needlessly complicate their business.

The practical impact of the proposed new "operator" definition would be to require that app developers and publishers:

a. redesign their interface and their back-end systems to carefully segment any COPPA-sensitive data they might inadvertently obtain from consumers; and
b. waste valuable resources on lawyers preparing internal COPPA compliance regimes, implementing those regimes, and auditing to ensure that business partners are COPPA-compliant.

By mandating that these content providers needlessly (and likely fruitlessly) police their partners, the FTC is essentially proposing to choke off monetization opportunities for tens of thousands of small advertiser-supported apps that do not have the resources or inclination to invest in COPPA compliance or COPPA policing. As a result, the proposed rule will needlessly put these app developers and publishers out of business, or incentivize them to abandon the children's market and redesign their offerings and direct them at teenagers or adults.

Similarly, by dramatically expanding the coverage of the "web site or online service directed to children" definition, the Proposed Rule makes app publishers' partners (e.g., advertising networks) liable for COPPA compliance merely because the app partner shares children's information with the partner. The rule would impose compliance burdens and liability risk on the non-collecting partner even if the app's information-sharing is unanticipated, completely

unknown, and/or contrary to the legal terms of their relationship.

Traditionally, COPPA liability for business partners has been triggered by actual knowledge that they were receiving children's data. Business partners have been covered by COPPA only if the website operator explicitly informs the partner that its content is directed at children, and if their partnership is specifically related to data collected from or associated with children. However, the proposed rule will effectively require data brokers, advertising networks and analytics firms to independently verify if a content partner is passing children's information, even if the content partner asserts otherwise. The Proposed Rule suggests that its adoption will not impose an affirmative duty to monitor, but rather is simply requiring data-handling companies to investigate "credible information" brought to their attention.[2] But the burden of determining whether any information is credible, rather than simply relying on the affirmation of business partners who are themselves risking substantial legal and financial liability if they misstate their practices, is redundant and unnecessary – if it is even possible. Essentially the Proposed Rule challenges practical and business reality and effectively ensures that apps' partners will incur liability only because the app violates COPPA.

Here again, the Proposed Rule fails to state a legal or economic rationale for assigning liability to third parties for the data collection practices of their partners, and fails to appreciate the costs and practical challenges of the partner-policing burden. Moreover, in this instance, the app partner (such as the advertising network) might be accessing children's data because the app is passing it along, but the advertising network is not benefiting from this data because it is not categorizing or analyzing it as children's data. Thus, the Proposed Rule imposes liability risk and compliance costs on a partner that is not itself violating the law, and also is not realizing any economic benefit from its partner's alleged violations.

It would be a perverse result if the Commission's goal of enhancing children's protections effectively denied children and their parents free and low-cost high-quality entertainment and educational offerings that many apps provide. Yet, this will result if the proposed "operator" and "website or online service directed at children" definitions are modified as proposed. In every practical sense this would absolutely undermine Congress's twin goals of respecting children's information while also promoting the proliferation of child-friendly content.

3. Proposed "Reason to Know" Standard is so Vague that It Potentially Imposes COPPA Liability on General Audience Apps

In a manner that would extend the regulations even further from the Congress's focus on collectors and users of children's data, the application of the Commission's proposed "reason to know" standard on general audience apps[3] would effectively and unfairly impose COPPA liability merely because those apps inadvertently received children's data from their app

[2] Id. at 46645.

[3] Id. at 46445, 46449.

ecosystem partners. The cost to an app publisher of auditing its advertising and analytics partners dwarfs the resulting benefit to children, because an app that inadvertently receives children's information is not exploiting that information in harmful ways.

Here, again, the Proposed Rule provides no legal or economic rationale for imposing compliance and policing burdens on an innocent party based solely on the potential errors of its business partners. In this instance the operator is not even targeting children with its content or monetization efforts, which eliminates the benefit of the burden and demonstrates its infirmity. When an app or other operator is intended for general audiences and its partnership agreements are focused on general audience data, there is no justification for burdening that operator with COPPA obligations absent extraordinary documentation that something is very wrong.

Again, it is impractical to expect any app publisher – particularly small publishers – to verify that its partners are properly segregating children's data from general audience data. And an uncertain "reason to know" standard lends itself to factual subjective disputes that should not burden operators that clearly focus their business activity on general audiences.

4. Proposed Restrictions on Use of Persistent Identifiers Are Unnecessarily Strict

Persistent Identifiers, such as Unique Device Identifiers ("UDIDs") are commonly employed tools that help the entire app ecosystem function smoothly while generally protecting the information of the individual customer to which each persistent identifier corresponds . Persistent identifiers are vitally important to app publishers, platforms and consumers, and their use is consistent with longstanding Commission policy. Persistent identifiers help :

- Ensure that a user's data is tied only with that user's account.
- Apps fulfill consumer requests, and help apps connect consumers and platforms to ensure data requests are fulfilled accurately.
- Apps and platforms distinguish between people whose names are the same or substantially similar to other users' names, and thereby help prevent comingling of multiple users' data.

All of these uses are consistent with the Commission's longstanding policy goal (and the rational business goal) of protecting the privacy integrity of data sets containing personally identifiable information.

Because persistent identifiers provide the app ecosystem and consumers who use apps with substantial benefits, the Alliance is perplexed by the proposal to restrict the use of persistent identifiers to identify specific users across sites and over time, even under circumstances where the persistent identifiers themselves are not individually identifiable. Typically, apps do this to identify someone as a repeat visitor, to facilitate subsequent offerings of goods and services, to advertise to that user on other sites, and to avoid comingling different users' data if multiple people are using the same device.

This proposal will effectively require law-abiding apps to re-architect their systems and recode their apps to deter third-party abuses. The Commission fails to recognize that app developers and publishers are, of course, already opposed to third-party abuses of consumers and do not need further incentive to inhibit those abuses.

Rather than burdening law-abiding app developers and publishers in an effort to indirectly attack misuse of persistent identifiers, the Alliance urges the Commission to focus its enforcement efforts directly on intentional misuse of persistent identifiers. The Commission has effectively done this in the past, and we are confident that this is a more efficient and effective enforcement strategy.

Conclusion. The Alliance supports the goal of protecting children by ensuring that their information is respected and handled with the utmost care. To ensure that this is accomplished, the Alliance encourages the Commission to produce flexible, easily-implemented rules that recognize the dynamism of apps and the app ecosystem. The Alliance is eager to work with the Commission to accomplish this for the benefit of children, parents and the app industry that benefits the public by producing great educational, informational and entertainment apps.

As the Commission reviews comments, the Alliance urges the Commission adhere to Congress's intent, which is COPPA's foundation. COPPA liability should be triggered when an organization knowingly and intentionally collects children's data. Adhering to this foundational principle will ensure the continuing balance that Congress intended – between online entities' respect and care for children and their ability to simultaneously innovate and utilize their creativity to benefit children.

Sincerely,

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Jon Potter
President
Application Developers Alliance