Before the
FEDERAL TRADE COMMISSION
Washington, DC 20580

COMMENTS

of the

DIRECT MARKETING ASSOCIATION, INC.
and
ASSOCIATION OF NATIONAL ADVERTISERS

on the

CHILDREN'S ONLINE PRIVACY PROTECTION RULE
Supplemental Notice of Proposed Rulemaking

COPPA Rule Review, 16 CFR Part 312
Project No. P104503

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I. Introduction

The Direct Marketing Association ("DMA") and the Association of National Advertisers ("ANA") appreciate the opportunity to provide these joint comments on the Federal Trade Commission's ("FTC" or "Commission") request for public comments on the Commission's supplemental proposal to amend the Children's Online Privacy Protection Rule (the "Rule" or "COPPA Rule").[1] Our associations have been leaders in children's privacy matters since before the passage of the Children's Online Privacy Protection Act of 1998 ("COPPA"), and we and our member companies are committed to ensuring that children enjoy safe online experiences.

The DMA (www.the-dma.org) is the world's largest trade association dedicated to advancing and protecting responsible data-driven marketing. Founded in 1917, the DMA represents thousands of companies and nonprofit organizations that use and support data-driven marketing practices and techniques. In 2012, marketers — commercial and nonprofit —will spend $168.5 billion on direct marketing, which accounts for 52.7 percent of all ad expenditures in the United States. Measured against total U.S. sales, these advertising expenditures will generate approximately $2.05 trillion in incremental sales. In 2012, direct marketing accounts for 8.7 percent of total U.S. gross domestic product and produces 1.3 million direct marketing employees in the United States. Their collective sales efforts directly support 7.9 million other jobs, accounting for a total of 9.2 million U.S. jobs.

Founded in 1910, the ANA (www.ana.net) leads the marketing community by providing its members with insights, collaboration, and advocacy. ANA's membership includes 450 companies with 10,000 brands that collectively spend over $250 billion in marketing communications and advertising. ANA strives to communicate marketing best practices; lead industry initiatives; influence industry practices; manage industry affairs; and advance, promote, and protect all advertisers and marketers.

The DMA and ANA continue to believe that the existing COPPA Rule strikes the right balance between children's online privacy and children's access to exciting online resources. We do not believe that amendments to the Rule are necessary at this time. However, we appreciate the Commission's ongoing tradition of engaging a broad spectrum of stakeholders in the agency's periodic reviews of the COPPA Rule, and we are pleased to continue our productive dialogue with the Commission in support of our shared goal of promoting children's safe online engagement.[2] Our comments below are informed by our members' experiences.

Our comments in this filing focus on the proposals contained in the Commission's Supplemental Notice of Proposed Rulemaking ("SNPRM") published on August 6, 2012. We note that the SNPRM leaves untouched many aspects of the Commission's Notice of Proposed Rulemaking published on September 27, 2011 (the "2011 NPRM"), including elements that

[1] Federal Trade Commission, Supplemental Notice of Proposed Rulemaking and Request for Comment, Children's Online Privacy Protection Rule, 77 Fed. Reg. 46643 (Aug. 6, 2012) (hereinafter "SNPRM").

[2] For over a decade, the DMA has actively participated in the FTC's workshops and rulemakings related to children's online privacy, most recently in the Commission's Request for Public Comment, Implementation of the Children's Online Privacy Protection Rule, 75 Fed. Reg. 17089 (Apr. 5, 2010) and Notice of Proposed Rulemaking and Request for Comment, Children's Online Privacy Protection Rule, 76 Fed. Reg. 59804 (Sept. 27, 2011) (hereinafter "2011 NPRM").

raised concerns documented in the DMA's previous comments on the 2011 NPRM. We continue to believe these concerns are significant and we are concerned that, if adopted, the current proposals could unnecessarily undercut vibrant Internet offerings in a manner that is not beneficial to children or consumer interests.

II. Executive Summary

In response to the concerns raised by commenters in response to the 2011 NPRM, the Commission has issued a modified proposal in its SNPRM. While we recognize and appreciate that the SNPRM is intended to address issues with the NPRM identified by commenters, the SNPRM still presents significant concerns. As indicated in the DMA's 2011 NPRM comments, the COPPA statute does not support extending "personal information" to clickstream data tied only to non-personal persistent identifiers, and such an extension would be technically unworkable. The SNPRM proposes new definitions of the key terms "operator" and "directed to children" in an attempt to cure these issues.

The modifications in the SNPRM would create new technical and practical challenges for affected companies. Overall, we are concerned that the cumulative proposals would impede companies' efforts to provide children with interactive online offerings. To address these legal and technical concerns, we propose below an alternative framework for the Commission's consideration that we believe expands the coverage of the Rule in areas sought by the Commission, stays within the scope of the statute, and would not undercut responsible Internet offerings for children and general audiences.

These new proposals, moreover, are not supported by the statutory provisions of COPPA. The Commission's statutory interpretations in the SNPRM—like its 2011 NPRM—appear to be an effort to capture online behavioral advertising ("OBA") and other clickstream data under COPPA, even when data used for OBA purposes does not include any data currently defined as "personal information."[3] The DMA and ANA have taken a leading role in responsibly addressing appropriate practices surrounding the collection and use of clickstream data through the Digital Advertising Alliance, and we believe that self-regulation remains the best and most efficient way to address privacy concerns associated with online behavioral advertising—a subject that falls outside of the scope of COPPA, given the anonymous and passive nature of the data practices involved. If the Commission wishes to take regulatory action to capture additional practices than currently captured, it must be done within the bounds of the COPPA statute.

Our comments below also address our serious concerns regarding the Commission's definition of "directed to children" as applied to first party sites and services and the Commission's definition of "screen or user names." The complaints filed with the Commission regarding "invite a friend" and similar social sharing features on certain websites highlight the need for clarity regarding what uses of "screen or user names" would fall under any final rule.

Finally, we encourage the Commission to set an effective date that gives companies ample time to adapt to any new Rule, and urge the Commission to clarify explicitly that any new Rule will apply only to data gathered after that effective date.

[3] *See, e.g.*, SNPRM at 46648 (support for internal operations does not include OBA).

III. The Commission's Effort to Extend COPPA to Clickstream Data

A. Overview

The Commission has made clear its intent to capture non-personal persistent identifiers and clickstream data under COPPA when such data is used for OBA, even when it does not include data currently defined as "personal information."[4] To achieve this goal, the Commission has put forward several interrelated proposals. First, the SNPRM, like the 2011 NPRM, would define clickstream data as "personal information" even when it is tied only to non-personal persistent identifiers and not data that actually identifies an individual. As detailed in DMA's prior comments, this approach exceeds the Commission's statutory authority, creates insurmountable technical difficulties for sites and services, and runs counter to COPPA's goal of restricting data collection from children.

As the DMA's comments on the 2011 NPRM explained, defining such data as "personal information" also creates potential liability for sites and services that collect only non-personal data, such as an IP address or a random identifier stored in a cookie, and that now would have sufficient data to trigger COPPA liability, but not enough data to provide notice and obtain consent under the statute. Such potential liability is particularly unfair to the extent that it extends liabilities to third parties that may not necessarily determine or control whether they are receiving such data from a child-directed site or service.

To address the problems created by expanding "personal information," the SNPRM puts forward a framework for assigning COPPA liability between (1) first-party sites and services (by amending the definition of an "operator") and (2) third parties that collect data through such sites and services (by amending the definition of "directed to children"). However, as explained below, the new proposals in the SNPRM would introduce additional and significant technical difficulties and are not supported by the COPPA statute.

B. Proposed Definition of an "Operator"

The Commission proposes to make first parties responsible under COPPA for third parties' data collection activities that occur on first parties' sites or services, if personal information is collected "in the interest of, as a representative of, or for the benefit of" the first party.[5] The Commission intends this new proviso to capture any instance when a first party receives a benefit from its use of third-party services, including "benefits" in the form of content, functionality, or advertising revenue.[6]

As the SNPRM recognizes, this approach is a departure from the Commission's longstanding position on liability for third party practices. Since COPPA was enacted, the Commission has viewed data ownership or control as decisive factors in determining whether a site or service is an "operator" under COPPA.[7] Thus, a site or service is not an operator where it "merely acts as the conduit through which the personal information collected flows to another

[4] *See id.*; 2011 NPRM at 59807, 59812.
[5] SNPRM at 46644.
[6] *Id.*
[7] *Id.*

person or to another's Web site or online service[.]"[8] This approach has struck a workable balance by ensuring that first parties are not liable for the practices of third parties, where first parties do not control those practices or the data involved.

The Commission now seeks to reverse its longstanding position and to make sites and services liable for the practices of third parties. This proposal is not workable in today's online ecosystem. Sites and services may be aware that they are integrating third-party services, but they are not in a position to monitor or control the practices of these independent third parties.[9] The services that the Commission targets are generally designed so that they can be integrated seamlessly and without the need for a formal contract between the service and the site that incorporates it. This "frictionless" approach is built into today's Internet architecture and is a building block of the unprecedented market success of the Internet. The Commission's proposal would undermine this model because first parties, by necessity, would need to manage their liability risk by either (1) formalizing relationships with third parties where feasible or (2) eliminating such third parties from their sites and services. Either route creates significant burdens for operators and is aimed at solving a non-defined problem. This risk and burden would fall on an even broader group of companies given the Commission's proposed changes to defining first parties as "directed to children," which we discuss below.

By creating a powerful disincentive to integration of third-party services, the Commission would significantly disadvantage children's sites and services relative to others. Advertising business models support a wealth of free and low-cost resources for children online. The SNPRM would effectively discourage use of this business model. We are concerned that this could create an Internet future where children's online resources are both fewer in number, and less exciting and interactive, than they are today. Alternatively, sites and services may erect pay walls that would also hamper children's online engagement. Ironically, the likely consequence is that children will spend more time on sites and services that are not appropriate or designed for them. Moreover, a COPPA Rule that inhibits the integration of third-party services would disproportionately burden small businesses, which depend more heavily on third-party support and do not have resources to develop the same capabilities in-house.

The Commission cites "changes in technology" as a reason for its expansive new approach.[10] In fact, the Commission's proposal aims largely at automated collection technologies – such as cookies – that already existed when COPPA was enacted. The Commission's June 1998 report to Congress on "Privacy Online," discussed the use of cookies and other online data collection technologies for online data collection,[11] and the privacy technologies of these technologies were actively debated in Congress and the Commission at that time. Yet the COPPA statute, by design, is limited to "personal information" and does not reach the types of anonymous data that are used for advertising purposes and do not allow online contacting of an individual.

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[8] Federal Trade Commission, 1999 Statement of Basis and Purpose to the COPPA Rule, 64 Fed. Reg. 59888, 59891 (Nov. 3, 1999).

[9] Many third-party services are offered pursuant to standard terms and conditions that are accepted as "clickwrap" agreements, rather than negotiated contracts. As a result, first parties frequently have little or no ability to seek specific terms from third parties.

[10] SNPRM at 46644.

[11] Federal Trade Commission, "Privacy Online: A Report to Congress" (June 1998).

To provide legal support for its proposal, the Commission points to COPPA's definition of an "operator" as a person "on whose behalf" personal information is collected and maintained. The Commission acknowledges that legislative history offers no support for its expansive interpretation of the phrase "on behalf of," but contends that its interpretation is justified by the "plain and common" meaning of the phrase and by the Commission's own prior positions in unrelated rulemaking proceedings.[12] These sources provide scant support for the Commission's broad proposed reading of the statute.[13]

The Commission's commentary interpreting its proposed language raises further concern, particularly with regard to the Commission's views on the phrase "for the benefit of." The Commission intends that *any benefit to* an operator, in the form of content, revenue, or functionality, could trigger liability.[14] But the phrase "for the benefit of," especially as an interpretation of the term "on behalf of," implies that a person is primarily motivated or working to benefit another, even if there is also some benefit to the actor. The Commission goes beyond the plain meaning of the phrase "for the benefit of" by removing the element of intent or motivation that gives the phrase its meaning.

Third-party behavioral advertising networks do not act "for the benefit of" their first party clients because such networks generally are not motivated, or at least not primarily, by a desire to benefit first parties. Rather, the prevailing ad network business model involves collecting anonymous data across unrelated websites and services, for the ad network's *own purposes* in serving offers on behalf of advertisers. Thus, operators of first party sites do not control the data collected for behavioral advertising purposes. The fact that the business model provides a benefit to publishers, in the form of revenue, should not be confused with the concept of acting "for the benefit of" publishers. Likewise, social plug-ins collect data that is controlled by the social network, not the sites where the plug-in may be integrated.

In sum, the SNPRM would impose liability risks on first parties that are not in a position to control compliance by independent entities. Third-party behavioral advertising networks are independent actors that maintain control of the data they collect. Compelling first parties to assume liability for the activities of these independent third parties is not technically feasible, supported by the statute, or a desirable policy outcome. We urge the Commission to maintain its longstanding position that an operator can be liable under COPPA for another entity's data practices only if the operator owns or controls the data.

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[12] SNPRM at 46644.

[13] The lone judicial opinion cited by the Commission for its proviso comes from a context that bears no resemblance to the scenario of a website that integrates and receives revenue from a third-party advertising network: namely, a securities case in which a company not only retained and paid a third party for the purpose of providing a professional opinion to the company, but then effectively adopted this opinion by distributing it to shareholders. *Madden v. Cowen & Co.*, 576 F.3d 957 (9th Cir. 2009). Unlike the advertising networks and social plug-ins that the SNPRM attempts to bring within COPPA, this case fits the traditional model of a "service provider" working for the benefit of another.

[14] SNPRM at 46644.

C. Proposed Definition of "Directed to Children" for Third Parties

In tandem with the Commission's new approach to first party COPPA duties, the Commission proposes that third parties should be independently responsible under COPPA if they "know or have reason to know" they are collecting "personal information" from a site or service that is directed to children.[15] While the Commission has previously suggested that third parties could fall under COPPA,[16] the Commission's proposed expansion of "personal information" under the 2011 NPRM and the SNPRM would fundamentally alter the impact of this position by creating potential COPPA liability even where a site or service collects limited and non-personal data that is not currently defined as "personal information." As the DMA and others explained in the prior round of comments, this will have the effect of exposing to COPPA liability a range of third-party services that have been designed in a privacy-sensitive manner to capture limited non-personal data.

We therefore agree with the Commission that the "strict liability standard … is unworkable for advertising networks or social plug-ins because of the logistical difficulties such services face in controlling or monitoring which sites incorporate their online services."[17] We note that these logistical difficulties do not exist under the current COPPA Rule, which provides powerful incentives for third parties to avoid collecting personally identifiable data. The SNPRM's proposed "know or have reason to know" standard is intended to overcome these difficulties.

To explain its proposed "reason to know" standard, the Commission offers in commentary that companies would be liable if "credible information" is "brought to their attention[.]"[18] From a practical standpoint, the Commission's commentary raises a host of unanswered questions. As noted, whether a site or service is "directed to children" is a multi-factor legal analysis. The SNPRM provides no guidance regarding *who* could provide such credible information or *how* information must be brought to a company's attention in order to trigger liability. For example, may a third party ad network be liable under COPPA if a concerned father posts on a help page about his personal opinion that a site where the network serves ads is "directed to children"? What if the concerned father emails an employee at the company who is not involved in compliance?

More broadly, we are concerned that the uncertainties and risks outlined above will have a chilling effect that discourages companies from beneficial involvement with other companies' sites or services, undermining the interrelated architecture of today's Internet and the ability of companies to offer innovative digital resources and content for children. For example, an app platform should not have a "reason to know" that an app is "directed to children" solely because the market reviews the app for compliance with the market's terms of service. COPPA should not become a disincentive for reputable app platforms to provide access to children's online resources. Likewise, companies that offer social plug-ins will face great uncertainty about their potential COPPA liability, despite the fact that many plug-ins are from social networking

[15] SNPRM at 46644-46645.
[16] SNPRM at 46645.
[17] *Id.*
[18] *Id.* The Commission's source or authority for this standard is unclear.

services that age-screen users at the outset and therefore know that all users are 13 or older, regardless of where the plug-in is installed.

These are only a few examples of the technical questions that the SNPRM raises, but does not answer, about the potential extent of COPPA liability under the Commission's proposal. We are concerned that such uncertainty would have a detrimental chilling effect on the resources offered for children and on companies' willingness to collaborate with each other in providing such resources. Faced with these questions, companies would likely respond by curtailing their offerings for children or limiting their innovation in the children's market.

In addition, the SNPRM raises legal questions under both the COPPA statute and the Constitution. We submit that COPPA does not support the creation of a "know or have reason to know" standard within the "directed to children" definition, because the statute does not include a scienter requirement for this category of sites. Instead, the "directed to children" category of sites and services is subject to strict liability for any personal information that is collected from children by operators, because an operator's intentional choice to "direct" its offerings to children was intended to serve as a proxy for knowledge that its users are exclusively or overwhelmingly children under 13. Viewed in context, the absence of a scienter requirement for the "directed to children" category likely reflects, not an intent to capture sites without actual knowledge of users' ages, but a policy judgment that an explicit scienter requirement for this category would create an unnecessary hurdle to enforcement. This standard for sites "directed at children" recognizes that in the operation of a site directed to children under 13, knowledge that its users are children can be imputed to the operator. In scenarios where third parties passively collect data through cookies, there is not a parallel whereby knowledge that users are under 13 can be imputed to those third party collectors of information.

Viewing this category in conjunction with COPPA's "actual knowledge" standard for general audience sites, it is evident that COPPA's statutory scheme exclusively targets the *intentional* collection of personal information from *individuals known to be children*. COPPA does not cover, nor is it intended to cover, every instance when personal information may be collected from a child online. The statute clearly permits that unintentional or inadvertent collection of personal information from individuals *not known to be children* may continue on general audience sites. For over a decade, this approach has struck a workable balance between the goal of protecting children's online privacy, on the one hand, and the need to ensure seamless Internet operations on the other. We are not aware of any evidence that the existing framework in this area is not working.

The Commission's "know or have reason to know" standard is an effort to make third-party services "operators" under COPPA even if they have no knowledge that a specific user is a child and are not operating a service that is designed for children. This effort goes beyond the careful balance that exists in the COPPA statute. The services that the SNPRM targets are providing the same general services across the Internet to all their publisher clients. This activity has the same characteristics as collecting personal information from a user under 13 on a general audience website without knowledge. The Commission's proposal would create an illogical result whereby COPPA captures third-party anonymous clickstream data where the third party does not know it is collected from a child under 13, but it does not capture individually

identifiable information like full names, addresses, or phone numbers or other "personal information" (as currently defined) of a child under 13 collected without knowledge.

In addition to lacking statutory support, the "know or have reason to know" standard raises constitutional concerns. The SNPRM's "know or have reason to know" standard is borrowed from tort and agency law.[19] In that context, the expression is intended to be used with respect to "existent facts."[20] As the cases cited by the Commission indicate, the question of whether a person has "reason to know" about potential liability then turns, in essence, on whether the person has a fair opportunity to become aware of the triggering fact.[21]

The "reason to know" standard would lose its meaning if applied in the COPPA context, rendering the Commission's proposal unconstitutionally vague. Whether a site or service is "directed to children" is not an unequivocal fact. Either currently or as proposed in the SNPRM, determining whether a site or service is "directed to children" is a complex legal analysis that requires an observer to weigh numerous factors. We submit that it is impossible for companies to have fair notice of potential liability, when such liability turns not on an existent fact about an unrelated company, but on a subjective judgment about the degree to which that company's site or service is "likely to attract" children (as drafted in the SNPRM).

It is a fundamental principle of due process that a regulation should be voided for vagueness if it "fails to provide a person of ordinary intelligence fair notice of what is prohibited, or is so standardless that it authorizes or encourages seriously discriminatory enforcement. … [A] regulation is not vague because it may at times be difficult to prove an incriminating fact but rather because it is unclear as to what fact must be proved."[22] Under the Commission's proposal, liability for third parties would turn on whether an unrelated site or service is "directed to children." This is not a "fact" that can be clearly proved, but a subjective and indeterminate conclusion. As a result, potentially regulated third-party services would not have sufficient notice to know when COPPA applies to them and to adapt their behavior accordingly.[23]

If the Commission proceeds with the proposed standard, we encourage the Commission to clarify explicitly that a third party, such as an advertising network, would not "know or have reason to know" that a first party site or service is "directed to children" based on a third party's interactions with a first party client in the ordinary course of providing the third party's services.

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[19] SNPRM at 46645 n. 18.
[20] Restatement (Second) of Torts § 12 cmt. A.
[21] SNPRM at 46645 n. 18. *See, e.g.*, *Novicki v. Cook*, 946 F.2d 938 (D.C. Cir. 1991) (company executive had no "reason to know" where nothing in the record indicated that he acquired relevant information while misconduct was still occurring); *Alf v. Donley*, 666 F.Supp.2d 60 (D.D.C. 2009) (finding no basis to conclude that an official had "reason to know" of misconduct where he did not personally participate).
[22] *Federal Communications Comm'n et al. v. Fox Television Stations, Inc. et al.*, 567 U.S. ___, slip op. at 12 (2012) (quoting *United States* v. *Williams*, 553 U. S. 285, 304 (2008)).
[23] *Id.*

D. Proposed Definitions of "Persistent Identifiers" and "Support for Internal Operations"

The SNPRM would define "persistent identifiers" as "personal information" if they "can be used to recognize a user over time, or across different Web sites or online services, where such persistent identifier is used for functions other than or in addition to support for the internal operations of the Web site or online service."[24] This definition provides greater clarity than the 2011 NPRM by collapsing the two previously-proposed data elements into a single element. In other respects, however, the Commission's proposal continues to need further refinement.

1. "Persistent Identifiers"

As explained in our prior comments, defining non-personal persistent identifiers as "personal information" would exceed the Commission's statutory authority. In setting the limits of that authority, Congress specified that the Commission may only define an "identifier" as "personal information" if such identifier "permits the physical or online contacting of a specific individual[.]"[25] The DMA explained at length in its prior comments why, as a technical matter, non-personal persistent identifiers such as IP addresses, cookie identifiers, and device identifiers do not by themselves permit the contacting of a specific individual.

The Commission's effort to extend COPPA to data that does not, standing alone, permit the contacting of a specific individual is also technically unworkable. As noted above and in our prior comments, this approach would place sites and services in a quandary. The current practice of many sites and services, especially integrated third-party services, is to collect non-personal persistent identifiers in order to avoid requiring children to submit personally identifiable information. Under the SNPRM, such sites and services would be collecting sufficient data to trigger COPPA liability, but not enough data for parental notice and consent to comply with COPPA. These sites and services would face an unappealing choice: either restrict their services or collect additional data from children. Either option would undermine the policy goal of providing privacy-sensitive yet engaging online resources for children.

We are also concerned that, by expanding the term "personal information", the Commission's proposal would have unintended effects on how other privacy laws, regulations, and self-regulatory frameworks are interpreted. "Personal information" and similar terms are used in a variety of privacy regimes to determine what data is covered by applicable restrictions. By expanding this term to cover data that does not identify or permit the contacting of any specific individual, the Commission would create a troubling precedent for similarly broad interpretations of other privacy frameworks.

The Commission's modified language in the SNPRM does not address these fundamental legal and technical flaws in the Commission's 2011 NPRM approach. Indeed, the SNPRM creates new concerns because it would cover any identifier that "can be" used for multi-site data collection, even if such identifier is not being used across sites or services. This unnecessarily sweeps in first-party data activities within their own sites or services.

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[24] SNPRM at 46647.
[25] Children's Online Privacy Protection Act of 1998, Sec. 1302 (8).

2. "Support for Internal Operations"

We recognize that the Commission intends to alleviate the concerns outlined above by providing the "support for internal operations" exception to the designation of persistent identifiers as "personal information." However, the "support for internal operations" exception needs additional refinement to avoid sweeping in legitimate and routine data practices.

The SNPRM's redefinition of this exception is an improvement over the 2011 NPRM because it explicitly identifies additional practices as "support for internal operations." However, the definition is still too narrow and would limit companies' ability to provide many of the features that Internet users value and enjoy today – without having to sign in or provide additional personal information. If the Commission moves forward with defining non-personal persistent identifiers as "personal information," it is essential that this exception be broad enough to provide continued incentives for companies to provide features that use non-personal persistent identifiers instead of individual identifiers.

The exception should be broad enough to cover, in the Commission's words, all data practices that are "sufficiently accepted or necessary for public policy reasons" that notice and choice need not be provided.[26] To that end, we urge the Commission to clarify that "support for internal operations" includes the following purposes: performing core business functions other than "maintaining the functioning" of the site or service itself, such as payment and delivery functions; safeguarding and defending intellectual property; ensuring legal and regulatory compliance; protecting against fraud or security threats to any person or entity;[27] and additional analytical activities that are not explicitly covered by the proposed definition, such as analytics regarding usage of a site or service and performance-based marketing.

We support the SNPRM's proposal that "serving" contextual advertising constitutes "support for internal operations." In light of today's business practices, this exception should be understood to encompass a constellation of legitimate data practices associated with non-behavioral advertising including, for example, statistical reporting, optimization, frequency capping and similar metrics, performance tracking, and logging for various administrative purposes.

We also suggest that the list of "internal operations" provided in the regulation should be illustrative, rather than exhaustive. An exhaustive list is likely to have unintended consequences, especially because this approach does not provide companies with flexibility as technologies evolve. It is therefore likely that the regulation would hinder innovation and restrict beneficial operations in ways that are not foreseeable at this time.

Finally, it is unclear when third-party services would be considered "internal" for the purpose of this definition. We submit that data practices conducted by a first party or its third-

[26] SNRM at 46648 n. 44. Accordingly, we believe that the exception should encompass first party data sharing where the first party controls, is controlled by, or is under common control with other sites or services.
[27] The language proposed in the SNPRM refers only to protecting the security or integrity of the user, site, or service. SNPRM at 46648.

party service provider (including for non-behavioral advertising purposes) should be considered "internal" to the first party. This approach supports the collaborative architecture of today's Internet. A contrary position would discourage the use of third-party services.

IV. Suggested Alternative Framework to Address Clickstream Data

As explained above, the Commission's SNPRM is not compatible with today's Internet architecture and business models and is not supported by the COPPA statute. If the Commission wishes to address OBA and social plug-ins through regulation, any amendments must be within the bounds of the COPPA statute. Moreover, they should not create incentives for additional data collection from children or inhibit companies from offering children's online resources. To meet these goals, we urge the Commission to adopt the following alternative approach to addressing clickstream data within the limits of the COPPA statute:

- The "support for internal operations" exception should cover an expanded and non-exhaustive list of routine business practices as described above. Refining this critical exception will ensure that routine and desirable business practices can continue, while still extending COPPA to cover data that is collected or used for OBA purposes.

- As discussed above, third parties collecting non-personal persistent identifiers tied to anonymous clickstream data do not fall within what was intended as "directed to children." Such third parties are not intentionally targeting their services to children so it cannot be assumed that they know that users are children. This activity has the same characteristics as collecting personal information from a user under 13 on a general audience website without knowledge.

- Instead, the Commission should clarify that a third party that collects non-personal persistent identifiers on another site or service, and does not collect any other data currently defined as "personal information," has "actual knowledge" that it is collecting "personal information" from a child, but only in the following situations:

    - If the third party combines non-personal persistent identifiers with data that is currently defined as "personal information" or

    - If the third party offers age-based advertising segments that target children under 13. This constitutes knowledge that the audience is composed of children under 13.

- Third parties' use of non-personal persistent identifiers to collect anonymous clickstream data should not be covered by COPPA except in these cases. Social plug-ins should fall within this proposal to the extent they are engaged in conduct as a third party in the same way as an ad network. This is consistent with the treatment of general audience sites under COPPA as outlined above.

- For the same reasons, first party sites and services should not be liable under COPPA for the activities of unrelated, independent operators on their properties. Consistent with the Commission's longstanding position, such liability should be limited to cases when a first

party is acting through a third-party service provider and the first party retains ownership or control of the data.

We submit that this framework addresses OBA and social plug-in practices in a manner that, unlike the Commission's proposal, is faithful to the COPPA statute and is technically feasible.

V. Additional Concerns Raised by the SNPRM

A. Proposed Definitions of "Directed to Children" for First Parties

The SNPRM would retain the COPPA Rule's longstanding multi-factor analysis of when a site or service is directed to children, but would add a new set of standards for applying these factors. Specifically, the Commission proposes that a site or service is "directed to children" when it (a) knowingly targets a primary audience of children, (b) is "likely to attract" a primary audience of children, or (3) is "likely to attract" a "disproportionately large percentage" of children in its audience.[28]

With regard to the last two of these new categories, we are concerned that the Commission's proposed "likely to attract" standards are vague and provide little guidance to operators. The current COPPA Rule turns on whether a site or service is "targeted to children[,]"[29] which implies an intent on the part of an operator to appeal to a child audience. Under the existing definition, an operator can control whether it is making an effort to target its offering to children. The SNPRM, in contrast, focuses on the abstract likelihood that a site will appeal to children. While an operator may be able to control some factors that contribute to this likelihood, the proposal leaves open the troubling possibility that a site or service could fall under COPPA even if an operator has made no special effort to appeal to children. For example, a site directed to teenagers may unintentionally and unknowingly attract a disproportionate number of children, and thereby fall under COPPA. Another concern is that a site or service's COPPA status could shift, potentially rapidly, as content evolves over time. For example, a site that is not intentionally directed to children but appeals to a mixed audience could be considered "directed to children" if it features a cartoon character on its home page one week, but not the next week when the home page content has changed. These issues are compounded by the fact that even a portion of a site or service could fall under COPPA.[30] The examples above illustrate the unpredictable and shifting risks of liability that would arise under the SNPRM, which would be at odds with to the statute's focus on sites and services that are "*directed* to children," and raises constitutional questions as discussed above.

The "likely to attract" standards are also impractical because sites and services have no effective way to measure audiences to determine if they are "directed to children." The Commission's 2011 NPRM confirmed that "[t]he Commission's experience with online audience demographic data in both its studies of food marketing to children and marketing violent entertainment to children shows that such data is neither available for all Web sites and online

[28] SNPRM at 46646.
[29] 16 C.F.R. § 312.2.
[30] 15 U.S.C. § 6501(10).

services, nor is it sufficiently reliable, to adopt it as a *per se* legal standard."[31] Even without a *per se* legal standard, sites and services would have little ability to determine whether they are subject to COPPA. More accurate audience measurement would require additional data collection, contrary to the goal of COPPA.

The SNPRM's new category of sites and services that would be "directed to children" due to a "disproportionately large" child audience raises additional concerns. The Commission evidently intends this new definition to reach "mixed audience" sites and services.[32] The Commission acknowledges that, to date, where a site "merely was likely to attract significant numbers" of children, the Commission was likely to proceed with an enforcement action only if it could show that the operator had "actual knowledge" of collecting personal information from users known to be children.[33] These two categories are not, as the commentary suggests, merely different varieties of sites "directed to children."[34] This commentary raises a concern that the SNPRM would eliminate the element of "actual knowledge" that is statutorily required for liability where a site or service is not, in fact, "directed to children."

In addition, it is unclear what level of disproportion may trigger this standard, leaving companies without clear guidance on how to comply with the proposed rule. We expect that the SNPRM's definition, if finalized, would bring many sites and services within the reach of COPPA for the first time even if, as discussed above, they have made no effort to target their offerings to children. This is a significant concern given the proposed expansion of "personal information," which could trigger COPPA obligations even if a mixed audience site or service collects very limited non-personal data and therefore is not focused on COPPA or other privacy compliance issues. Such an expansion of COPPA's scope is not warranted, workable, or in keeping with COPPA's statutory scheme.

If the Commission retains the "disproportionately large" category in any final Rule, we strongly encourage the Commission to ensure that it does not capture additional sites and services that are not currently "directed to children" and that sites and services will not unwittingly or unintentionally become subject to COPPA liability. It would also be helpful for the Commission to reiterate the continued importance of the multi-factor evaluation that remains part of the SNPRM's definition of a site or service that is "directed to children." These factors play an important role in limiting liability for sites and services that are not intentionally targeting a child audience.

In addition to this new definition, the SNPRM would add a proviso to the definition that creates compliance options for sites with a disproportionately large child audience. Rather than complying with COPPA with respect to all users, such sites would have the option of age screening all users and then obtaining parental consent only with respect to users who identify themselves as children.[35] We are sympathetic to the Commission's goal of exploring new COPPA compliance models. However, because of the "disproportionately large" standard could

[31] 2011 NPRM at 59814.
[32] SNPRM at 46646.
[33] SNPRM at 46645-46646.
[34] *Id.*
[35] SNPRM at 46646.

function as described above to extend the reach of COPPA to operators that are not currently covered, this proviso could effectively force many general audience websites to age-screen users for the first time. This could fundamentally transform consumers' experience of the Internet by creating new age-screening barriers across the Internet. The Commission does not identify any evidence indicating that this is necessary to protect children, nor has the Commission offered any analysis of how its proposals cumulatively will impact general audience websites, particularly those targeted at teenagers. As the Commission recognized in its 2011 NPRM, burdening the right of teenagers and adults to access online information and engage in online speech raises First Amendment concerns.[36]

If the Commission retains its proposed new compliance framework in any final rule, it should be refined to address more effectively the issues identified by the Commission, namely the burdens created by requiring sites and services that are "directed to children" to treat all users as children.[37] A better framework would be to allow all sites or services that are "directed to children" (maintaining the current scope of that category) to utilize the Commission's age screening approach. This framework could be established under COPPA through at least two possible methods: (1) by extending the exception proposed in the SNPRM to all sites and services that are "directed to children," rather than a subset of those sites and services; or (2) by modifying the requirements that apply to sites and services that are "directed to children."

The first method would merely extend the scope of the Commission's discretionary proposal in the SNPRM. In the SNPRM, the Commission seeks to establish an exception to the definition of a "website or online service directed to children" for a subset of such sites and services, which would allow them to age-screen users and then selectively carry out COPPA obligations for those users who are under 13.[38] If the Commission concludes that it has such authority, then it can equally rely on that authority to extend this alternative compliance option to any site or service that is "directed to children."

The second method recognizes that the COPPA statute does not require sites and services that are "directed to children" necessarily to treat all users as children. The statute states only that a site or service "directed to children that collects personal information from children" should meet certain requirements.[39] The prevailing approach has been for sites and services "directed to children" to treat all users as children. We believe that the Commission therefore can within its statutory discretion clarify in the COPPA Rule that a site or service that is "directed to children" has a minimum obligation to determine which of its users are children (unlike a general audience site or service), but subsequently is required to comply with COPPA only when the site or service actually "collects personal information from children" as stated in the statute.

[36] 2011 NPRM at 59805.
[37] SNPRM at 46645 (finding merit in comments to this effect).
[38] SNPRM at 46646.
[39] 15 U.S.C. 6502(b).

B. Proposed Definition of "Screen or User Names"

The Commission's 2011 NPRM proposed to consider "screen or user names" as "personal information" under COPPA even if a screen or user name does not reveal an individual's email address. The SNPRM modifies this proposal so that screen or user names would be "personal information" only if they function as "online contact information." The term "online contact information" would be defined, under the 2011 NPRM, as an identifier that "permits direct contact with a person online" including instant messaging identifiers.

This modification is a step in the right direction, but further clarification is needed. In proposing this modification, the Commission explains that it has "long supported the data minimization purposes behind operators' use of screen and user names in place of individually identifiable information" and did not intend to limit uses for these purposes.[40] However, the new proposal continues to undercut the use of screen and user names for minimization purposes within a single offering or a family of sites and services.

For example, operators currently use screen and user names for "filtered chat" or "monitored chat," leader boards, profile pages, and similar features on children's sites to provide interactivity without allowing children to reveal personal details. The Commission recognized in modifying the "100% deletion" standard in its 2011 NPRM that "[c]hildren increasingly seek interactive online environments where they can express themselves, and operators should be encouraged to develop innovative technologies to attract children to age-appropriate online communities while preventing them from divulging their personal information. Unfortunately, Web sites that provide children with only limited communications options often fail to capture their imaginations for very long."[41] Sites and services also may use screen or user names as a way to deliver "push" notifications to users without allowing responses. The Commission's proposal, as currently drafted, could eliminate operators' existing incentives to utilize screen or user names, in these and other ways, in order to avoid asking children for other personal details.

Moreover, the SNPRM does not clearly permit the use of screen and user names across families of affiliated sites and services. This result may be unintentional, because commentary in the SNPRM states that "the Commission is persuaded of the benefits of utilizing single sign-in identifiers across sites and services, for example, to permit children seamlessly to transition between devices or platforms via a single screen or user name."[42] However, we are concerned that this commentary would not be sufficient to preserve such uses of screen or user names, where the regulatory language is ambiguous.

We encourage the Commission to clarify its proposal with respect to screen and user names by reinstating the "support for internal operations" exception (if revised as discussed above).

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[40] SNPRM at 46646.
[41] 2011 NPRM at 59808.
[42] SNPRM at 46646.

VI. Regulatory Requirements and Need for Adequate Transition

Adopting the proposals put forward to date by the Commission would cause upheaval in the online ecosystem. It is likely that a large number of companies would fall under COPPA for the first time under the amendments contemplated by the Commission, even if our alternative proposal is incorporated. The SNPRM does not provide specific support for the Commission's estimate, under the Paperwork Reduction Act, that the proposed amendments will affect an additional 500 existing operators and an additional 125 new operators per year in the next three years. While we do not have access to precise numbers, we believe based on the feedback of our members that the number of affected companies will greatly exceed the Commission's estimates. Moreover, the Commission's Regulatory Flexibility Act analysis is presently not supported by adequate evidence and information, as the Commission recognizes.[43]

We are concerned, in addition, that the burden on those existing operators is also underestimated. For example, depending on the scope of the final Rule to be made in connection with the "operator," "personal information" and "internal operations" definitions as discussed above, an operator may have to spend far more than 20-60 hours in assessing the COPPA compliance of the multiple parties and technologies involved in rendering each webpage to assess whether they are collecting anonymous data through persistent identifiers and using it for any secondary purpose outside of the "internal operations" of a first party site (e.g. standard software updates, platform improvements, etc.). Similarly, the issues around screen names that allow online contact and tell-a-friend functionality may require substantial redevelopment time and resources.

We believe that the combined impact of the 2011 NPRM and SNPRM on the business community would be very significant, and we encourage the Commission to obtain and provide additional support for its required regulatory analyses before issuing any final amendments to the Rule.

In addition, in light of the numbers of companies involved and the significant changes contemplated, it is essential for the Commission to provide adequate time for companies to adapt to any final Rule. To this end, we encourage the Commission to set an effective date that gives companies a realistic time period in which to assess how the final Rule applies to their operations and to take any necessary compliance steps. We also ask the Commission to remain flexible in its compliance expectations as long as it is apparent that industry as a whole is working diligently to come into compliance. For example, an enforcement grace period may well be appropriate.

Finally, we ask the Commission to make clear that any new Rule will apply only to data collection *after* the effective date set for the new Rule. As detailed above, the contemplated proposals would bring numerous companies, and many business practices, within COPPA for the first time. It simply would not be feasible for companies to apply COPPA duties to previously-collected data.

[43] SNPRM at 46649.

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We thank you for the opportunity to contribute comments and look forward to continuing our productive dialogue with the Commission on this matter and the important issue of children's online safety. Please do not hesitate to contact us if you have any questions regarding these comments.