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

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Re: Comment: "kidSAFE Safe Harbor Proposal P-135418"

Greetings:

The Federal Trade Commission ("Commission") has asked for public comment on the proposed Safe Harbor *kidSAFE+* Seal Program submitted by consultants at Samet Privacy, LLC ("Samet"), and intended to ensure compliance with the Children's Online Privacy Protection Act ("COPPA"), 15 U.S.C. §§ 6501-6508 through the Children's Online Privacy Protection Rule ("COPPA Rule"). I write to submit comments on **three** concerns with this proposed Seal Program. I submit these comments in my own capacity as a data protection attorney with over 15 years experience devoted to information security, technology, and online child safety.

In the application now before the Commission, Samet must demonstrate whether its *kidSAFE+* Seal Program ("Program") provides "the same or greater protections for children" under 13 as those contained in COPPA. Under 16 CFR § 312.11 (b)(2)-(3), Samet must also show that its proposed Safe Harbor Seal Program has:

- An effective, mandatory mechanism for the **independent** assessment of subject operators' compliance with the self-regulatory program guidelines. At a minimum, this mechanism must include a comprehensive review by the safe harbor program, to be conducted not less than annually, of each subject operator's information policies, practices, and representations. The assessment mechanism required under this paragraph can be provided by an **independent** enforcement program, such as a seal program; and
- Disciplinary actions for subject operators' non-compliance with self-regulatory program guidelines. This performance standard may be satisfied by:
 - (i) Mandatory, public reporting of any action taken against subject operators

by the industry group issuing the self-regulatory guidelines;

- (ii) Consumer redress;
- (iii) Voluntary payments to the United States Treasury in connection with an industry-directed program for violators of the self-regulatory guidelines;
- (iv) Referral to the Commission of operators who engage in a pattern or practice of violating the self-regulatory guidelines; or
- (v) Any other equally effective action.

Samet's Program, however, comes short of these regulatory standards.

First, Samet's written program materials are structured in a way that fails to adequately describe the standards set out by the COPPA Rule. Instead, Samet's Program uses short, incomplete, and often vague declarations (i.e., Sections 6-11) to direct its clients on COPPA compliance, and then inserts numerous small-print endnotes elaborating on the legally-required detail that website operators must follow to comply with COPPA. This endnote-centric model is not effective. And it is difficult to see how it offers the same or greater protections for children under 13 as those contained in COPPA, since it will likely result in website operator confusion and oversimplification on the legally-prescribed steps necessary under COPPA.

Second, Samet's Program lacks an adequate enforcement mechanism for violations. In particular, Section 11 of the Program applies only to "material violations" defined in Endnote 80 to mean,

"any severe or repeated violations of these Certification Rules or other significant breaches of consumer safety or privacy. This will be determined on a case-by-case basis on the sole discretion of [Samet]."

This "material violations" standard does not exist in 16 CFR § 312.9. It is, therefore, unlikely to offer the "same or greater protection for children" under 13 as those contained in the COPPA Rule.

Along these lines, one of Samet's enforcement mechanisms (Section 11(c)) for potential Program violators includes "increases in membership fees." That means that any time one of Samet's clients violates federal law, Samet stands to profit from those violations. Profiting from your client's misdeeds, however, is not what COPPA envisioned. And this type of self-serving disciplinary action – "*because you fail to comply with COPPA, I will charge you more fees*" – is not included in section 16 CFR § 312.11. Both of these should, therefore, be eliminated from Samet's proposed Program before the Commission further considers approval.

The Commission should also seriously examine the potential conflicts of interest that private consultants like Samet face when taking enforcement action against their own clients. The COPPA Rule currently requires that Safe Harbor programs use “effective incentives for subject operators’ compliance with the guidelines.”¹ As more entrepreneurs and consulting firms seek to establish COPPA Safe Harbor programs, however, a serious question about the integrity of the COPPA Safe Harbor program arises for the Commission. Can these entities truly function independently? What are the real-world impacts for consultants taking adverse actions against their own clients? And how likely are they to impose enforcement actions objectively?

Finally, Samet’s materials explain that “as a fast-growing safety certification service,” it offers clients two types of seals: “kidSAFE” and “kidSAFE+.” And while both seals are designed to promote basic safety guidelines, only the “kidSAFE+” seal is intended to inform parents and consumers that a website operator complies with the specific legal requirements imposed by COPPA.

In practice, this means that only **one** – almost unnoticeable – character (“+”) in Samet’s seal distinguishes those website operators that adhere to a legally-compliant COPPA program from those that merely offer “basic safety guidelines.” This is highly likely to cause marketplace confusion among parents seeking to distinguish between website operators that comply with COPPA and those that do not.

The COPPA Safe Harbor Program is about marketplace credibility and accountability. Indeed, Congress enacted COPPA in direct response to industry’s failure to follow responsible marketing and data collection practices online. This failure affected those users too young to understand the consequences of sharing sensitive personal information about themselves in an online environment. The Commission should, therefore, require Samet to take concrete steps to avoid marketplace confusion, and re-design its COPPA-compliant seal to sufficiently distinguish it from others it may offer its commercial clients before further considering approval.

To close, I extend my thanks to the Commission for all that it does to protect consumers and children online. Through its leadership and enforcement efforts, the Internet continues to grow into a better place for the global community to enjoy. If I can help in any way, please let me know.

Respectfully submitted,

¹ 16 C.F.R. § 312.10(b)(3).