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Via electronic filing: https://public.commentworks.com/ftc/2011copparulereview

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

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

Dear Secretary Clark:

The Interactive Advertising Bureau ("IAB") appreciates the opportunity to provide comments on the Federal Trade Commission's ("Commission") proposed amendments to the Children's Online Privacy Protection Rule ("Rule").[1] The IAB and its member companies are firmly committed to protecting children online. However, the IAB does not believe that the Rule requires amendment at this time and, as detailed below, we are concerned that the significant amendments proposed by the Commission will have negative effects for consumers and companies alike.

By expanding definitions of key terms such as "personal information" and "collection," and by crafting an unduly narrow definition of "support for internal operations," the cumulative effect of the proposed amendments to the Rule (collectively, the "Proposed Rule") would likely be to extend the reach of the Children's Online Privacy Protection Act ("COPPA") to routine advertising and analytics activities that do not involve behavioral targeting or individual contact; to create a more burdensome Internet experience for parents even as consumers demand simpler, more streamlined interactions; and ironically to compel entities to collect more data, not less, from children. These new compliance questions and burdens could limit companies' ability to provide online resources to children.

We encourage the Commission to rethink its approach and, given the importance and wide impact of this rulemaking proceeding, we suggest that any alternative proposal for amending the current Rule should be made available for public comment before going into effect.

[1] Proposed Rule and Request for Comment on the Children's Online Privacy Protection Rule, 76 Fed. Reg. 59804 (September 27, 2011).

I. INTRODUCTION

Founded in 1996 and headquartered in New York City, the IAB (www.iab.net) represents over 500 leading companies that actively engage in and support the sale of interactive advertising, including prominent search engines and online publishers. Collectively, our members are responsible for selling over 86% of online advertising in the United States. The IAB educates policymakers, consumers, marketers, agencies, media companies and the wider business community about the value of interactive advertising. Working with its member companies, the IAB evaluates and recommends standards and practices and fields critical research on interactive advertising. The IAB has led, with other prominent trade associations, the development and implementation of cross-industry self-regulatory privacy principles for online data collection.

The IAB believes that the existing COPPA Rule generally strikes a workable balance that protects both children's privacy and their access to engaging online resources. Although we are aware that some companies have been discouraged from offering children's online resources due to COPPA compliance concerns, others have been able to provide a variety of safe and fun activities for children. The Commission's active COPPA enforcement docket, including recent settlements involving the mobile environment, shows that the Rule has proven flexible enough for the Commission to enforce COPPA even as new services and technologies continue to evolve. Moreover, as discussed in Section III, since the Commission's prior review of the COPPA Rule, the IAB and other leading trade associations and companies have supplemented COPPA by developing and implementing a comprehensive and enforceable self-regulatory program for online data collection that includes specific provisions regarding children. Thus, we do not believe that it is necessary or desirable to amend the COPPA Rule at this time.

Furthermore, the IAB submits that the amendments put forward by the Commission would have substantial negative effects for parents, children, and companies alike. Our overarching concern is that the cumulative changes in the Proposed Rule could bring a wide range of activities, including online advertising and analytics activities, within the scope of COPPA for the first time. As detailed in Section IV, we do not believe that this outcome is warranted, workable, or within the Commission's statutory authority, and we anticipate that the Proposed Rule would likely reduce children's access to safe and engaging online activities by placing heavier compliance burdens on parents and companies. Following our discussion of the Proposed Rule's overall impact, we present in Section V numerous additional questions and concerns raised by specific aspects of the Proposed Rule.

II. THE IAB SUPPORTS RETAINING THE STATUTORY AGE LIMIT AND ACTUAL KNOWLEDGE STANDARD

The IAB agrees with the Commission that COPPA appropriately defines a "child" as an individual younger than 13. As the Commission discusses, there are numerous factors that support COPPA's statutory age limit. Among these factors, the Commission notes that extending COPPA requirements to adolescents would be less effective, less

appropriate, and difficult to implement, and would potentially burden the constitutional rights of youth and adults.[2] The IAB believes that these arguments have added force in light of the fact that today's adolescents are "digital natives" who have come of age in an online environment and are accustomed to its benefits and risks.[3]

The IAB also shares the Commission's view that Congress appropriately established a strict actual knowledge standard for applying COPPA to websites and online services not directed to children, and we appreciate the Commission's reaffirmation that such operators are not required to investigate the ages of users for their "general audience" websites and services. In addition to providing more certainty than weaker standards,[4] the "actual knowledge" standard preserves operators' ability to offer services on an open and anonymous basis rather than requiring users to sign in.

As the Commission recognizes,[5] it is crucial to retain both the existing age limit and the actual knowledge standard to avoid extending the costs and burdens of COPPA compliance across the Internet.

III. SELF-REGULATION ADEQUATELY ADDRESSES ONLINE BEHAVIORAL ADVERTISING CONCERNS

The IAB, with other leading trade associations, has spearheaded the ongoing development and implementation, across the Internet advertising ecosystem, of comprehensive Self-Regulatory Principles for online data collection. The Self-Regulatory Principles for Online Behavioral Advertising ("OBA Principles") were issued in 2009 and recently supplemented with Self-Regulatory Principles for Multi-Site Data. Collectively, these Self-Regulatory Principles are now administered by the Digital Advertising Alliance ("DAA"). The Self-Regulatory Principles are already widely implemented across the online advertising industry, and are enforceable through longstanding and effective industry self-regulatory compliance programs.

The Commission has expressed the view that the Self-Regulatory Principles do not require parental consent for online behavioral advertising to children.[6] This statement does not reflect the Principles' application to children under 13. The Sensitive Data provision of the OBA Principles limits the collection and use of <u>any</u> data – not just data that are "personal information" as defined by COPPA – that can be associated with a particular computer or device for the purpose of engaging in online behavioral advertising where the entity collecting the data has actual knowledge the user is a child under 13.[7]

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[2] *Id.* at 59805.
[3] The term "digital natives" was coined by Mark Prensky.
[4] 76 Fed. Reg. at 59806.
[5] *Id.* at 59805, 59807.
[6] *Id.* at 59812-59813, n. 86.
[7] American Association of Advertising Agencies, Association of National Advertisers, Council of Better Business Bureaus, Direct Marketing Association, and Interactive Advertising Bureau, *Self-Regulatory Principles for Online Behavioral Advertising* at Principle VI.A (July 2009).

Through the Proposed Rule, the Commission seeks to bring online behavioral advertising activities within COPPA.[8] However, given the clarification discussed above and the lack of a clear record establishing that such a practice occurs,[9] the IAB believes that the Commission has not provided a sufficient basis for its Proposed Rule. We encourage the Commission to reconsider its effort to create unnecessary rules that would undermine existing and effective industry self-regulation.

IV. EXPANDING COPPA AS PROPOSED IS NOT WARRANTED, WORKABLE, OR WITHIN THE COMMISSION'S AUTHORITY

The IAB has numerous concerns about the approach in the Proposed Rule. Our overarching concern is the cumulative effect of the changes outlined in the Commission's proposal, which could be interpreted to bring virtually all online advertising and analytics activities, as well as other activities that use the same technologies, within the scope of COPPA. This result is effectuated throughout the Proposed Rule, most prominently in the Commission's proposal to redefine "personal information" to include, among other new data elements, persistent identifiers, geolocation information, and identifiers used to link activities across websites – even when not combined with any other data or used for online behavioral advertising. Because COPPA's actual knowledge standard does not apply to websites and online services that are directed to children, the Proposed Rule has the potential to impose the burdensome requirements of COPPA on a host of data practices, including first-party and contextual advertising practices, that take place on such child-directed websites and services. These practices benefit consumers by enabling the online industry to make engaging, interactive, and age-appropriate content available to children.

In support of its proposed changes, the Commission contends, in part, that the distinction between personally identifiable information ("PII") and non-PII is eroding.[10] But the Commission's need to create a new exception for certain data when used for "support for internal operations," which does not exist for other forms of "personal information" covered by the Rule, demonstrates the significant operational and policy differences between PII and the types of identifiers that are generally used for advertising or analytics purposes. The COPPA regime is not designed or suitable for such broad application. Moreover, the IAB is concerned that the Commission's endorsement of a broad definition of the term "personal information" would set a precedent that could later be transferred to other areas of privacy law or policy, with further unintended and negative consequences.

As discussed below, we believe that this proposed expansion of COPPA obligations is not warranted, workable, or within the Commission's authority. The proposed exception for "support for internal operations," discussed in the following

[8] *See, e.g.*, 76 Fed. Reg. at 59812.
[9] 76 Fed. Reg. at 59812 n. 86 (stating that it is "unclear" from the current record whether operators are directing online behavioral advertising to children, and noting that industry members have informed Commission staff that they do not believe this is occurring).
[10] 76 Fed. Reg. at 59811 n. 68.

section, does not address these concerns and is too narrow to serve its intended purpose. For all of these reasons, we encourage the Commission to rethink its approach and to issue a modified proposal for public comment.

Extending COPPA to online advertising exceeds the Commission's statutory authority and is not consistent with COPPA's intent. COPPA grants authority to the Commission to define an "identifier" as "personal information" only if the identifier "permits the physical or online contacting of a specific individual[.]"[11] The Proposed Rule is not consistent with the plain language of this provision or with COPPA's legislative history.[12]

Persistent identifiers such as IP addresses, customer numbers in cookies, and device identifiers permit the delivery of content and advertising to a device, not personal contact of a specific individual. A device may be used by many individuals, and these numeric identifiers alone do not provide any basis to identify which individual is using a device or to present content to one user rather than other users. The Commission cites only three commenters (out of a total of 70 public comments filed) in support of this significant redefinition of "personal information,"[13] and none of the cited comments provide evidence or an explanation – because no such evidence or explanation exists – of how any one of these numeric identifiers, *standing alone*, could be used to contact an identified individual.

The same issue arises with the proposed new "catch-all" category of "an identifier that links the activities of a child across different websites or online services." The IAB is concerned that this term is both broad and vague. The Commission states that this term is intended to capture data collection "for the purposes of either online profiling or delivering behavioral advertising to that child"[14] but the text of the proposed regulation does not include this limitation and the term "online profiling" is not defined. The Commission does offer a definition of "online behavioral advertising," but this commentary merely generates confusion because it differs from the definition used in the Self-Regulatory Principles for Online Behavioral Advertising.[15] This provision also does not include any exception for internal operations, even though the same identifier used across websites could also be used for internal purposes within a single website, online service, or family of affiliated offerings.

Likewise, geolocation information standing alone is not sufficient to identify a specific individual or to allow personal or direct contact with an individual. Geolocation information, which may be obtained through several technologies, could include information such as country, region, city, postal/ZIP code, street name, latitude and

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[11] 15 U.S.C. § 6501(8).
[12] Senator Bryan, COPPA's author, caused a section-by-section analysis of the legislation to be printed in the Congressional Record, which emphasizes that "contact" includes "attempts to communicate *directly* with a *specific, identifiable individual*" and does not include "information that cannot be linked by the operator to a specific individual". Cong. Rec. S11657 (October 7, 1998) (emphasis added).
[13] 76 Fed. Reg. at 59811 n. 77.
[14] 76 Fed. Reg. at 59812.
[15] 76 Fed. Reg. at 59812 n. 84.

longitude, and time zone. Proposed new paragraph (j), which would add the general term "geolocation information" as a type of "personal information," is therefore substantially broader than paragraph (b) of the current Rule, which is limited to a full "home or other physical address *including* street name *and* name of a city or town."[16] Indeed, the Commission intends that the new term "geolocation information" could include a street name and city alone, or other equivalent data. Without an address or other additional data to identify a household or individual, a street name and city could encompass a large geographic area and as many as 1,000 households. For example, Sepulveda Boulevard, in the Los Angeles area, is over 40 miles long.

Persistent identifiers and geolocation information therefore are readily distinguishable from home addresses and telephone numbers, which are singled out in COPPA because of the risk that sexual predators could locate children by physically going to an address or calling a number. Cookies, in particular, can easily be filtered or deleted through the use of browser settings. Most importantly, these identifiers and geolocation information are not personally identifying unless they are combined with other data. The Commission asserts that the rise of portable devices means that "operators now have a better ability to link a particular individual to a particular computing device."[17] But the Proposed Rule would affect identifiers and geolocation information even when not combined with any other information. Without additional data, there is no realistic way to link a persistent IP address, cookie data, or device identifier back to a specific individual or to use such identifiers to contact an individual. A company that uses persistent identifiers for browsers has no more "contact" with a specific, named visitor than a company that places an advertisement in a children's magazine has "contact" with a specific child subscriber. The technologies targeted in the Proposed Rule therefore do not meet the COPPA standard of permitting online contact with a specific individual.

Finally, to the extent that the Commission's proposals are designed to apply COPPA requirements to online advertising, the IAB believes that such an effort would not be in keeping with the primary intent of COPPA. In 1998, the Commission raised safety concerns associated with children's online activity in its report to Congress entitled *Privacy Online: A Report to Congress*, which found that "online services and bulletin boards are quickly becoming the most powerful resources used by predators to identify and contact children."[18] Senate appropriators were also active on child online safety issues in 1997 and 1998, holding repeated hearings and initiating a significant funding

[16] 16 C.F.R. § 312.2 (emphasis added). In commentary on the Proposed Rule, the Commission states the view that "any geolocation information that provides precise enough information to identify the name of a street and city or town is covered already" under paragraph (b) of the current Rule, which is restated from the COPPA statute. This statement appears to assume that Congress intended the clause "including street name and name of a city or town" to provide an illustrative example of a "home or other physical address." The IAB believes that a more natural reading is that this clause was intended to clarify that only a *full* address, which includes street and city name along with other information, constitutes "personal information."

[17] 76 Fed. Reg. at 59812.

[18] Federal Trade Commission, Privacy Online: A Report to Congress (1998), *available at* http://www.ftc.gov/reports/privacy3/history.shtm.

increase to address such issues. Senator Gregg, the Chairman of the relevant subcommittee, noted in connection with these efforts that the "first line of defense from abuse of the Internet is obviously parental involvement, parental knowledge, and the education of children as to the threat."[19] It was with this backdrop of wanting to protect children from predators that the Children's Online Privacy Protection Act of 1998 was introduced and enacted.

The Proposed Rule could reduce children's access to safe and engaging online resources. The likely result of the technical hurdles posed by the Proposed Rule, which are explained below, would be a significant reduction in rich online content tailored for children. Many websites and online services have been able to design business models and features that do not trigger the existing Rule, such as by minimizing and anonymizing their data collection from children and by deriving revenue from advertising that does not rely on "personal information" as currently defined. The Proposed Rule could bring many of these business models and features within the scope of COPPA for the first time. Faced with the costs and difficulties of implementing the Proposed Rule, companies may need to reduce the interactivity or features of their offerings. Alternatively, many companies could choose to stop providing online resources for children, especially if they could no longer rely on advertising support. To the extent that children's services become less engaging, less available, or prohibitively burdensome for the parents who must consent, the Proposed Rule could also drive children toward other online locations that do not have COPPA's parental controls in place. It would not serve children's interests to restrict their access to or ability to participate in fun and educational online material that is safe and tailored to children.

The Proposed Rule is not workable. Today's Internet is an interdependent ecosystem in which multiple parties collaborate to produce a seamless experience for users. The cumulative effect of the changes in the Proposed Rule is that COPPA obligations could apply to multiple categories of entities across this complex ecosystem. Even when limited to the subset of websites and online services that are directed to children or have actual knowledge that they are collecting information from children, such a change would have far-reaching consequences and would impose tremendous technical difficulties and compliance costs on businesses that are not fully foreseeable. For example, among the unanswered questions raised by the Proposed Rule are:

- How should a third party that places a cookie on a website determine if a specific website is "directed to children" within the meaning of COPPA, especially since a website could change at any time? Providers of third party services on websites or online applications, such as advertising services or additional content, are not in a position to perform the complex multi-factor analysis required to assess whether specific publishers are offering services "directed to children" that might trigger COPPA obligations. Moreover, it would not be fair to expose third party service providers to liability based on this type of analysis, since such providers cannot control the content that may be offered by a publisher.

[19] Hearing of the Commerce, Justice, State and the Judiciary Subcommittee of the Senate Appropriations Committee, "FY '99 Appropriations for Proposal to Prevent Child Exploitation on the Internet" (March 10, 1998).

- How should an entity that places only a randomly assigned numeric identifier in a cookie make contact with parents? It is not possible for such an entity to distinguish between multiple users of a website or online service to obtain notice and consent under COPPA (if needed), since persistent identifiers do not require users to authenticate themselves.
- If a browser has once visited a website that is "directed to children," should an entity thereafter fulfill COPPA requirements for any websites visited by that browser in the same session or future sessions?
- How should such an entity satisfy COPPA's provisions on parental access and deletion rights for data that is not individually identifiable or otherwise meaningful to consumers? These provisions would pose a particular challenge for third party providers, which generally have a limited ability to determine whether a person seeking access actually has the right to access the data.

The Proposed Rule would likely compel entities to collect more data from children. Advertising, analytics, and other supporting activities generally rely on IP addresses, numeric identifiers stored in cookies, and device identifiers. Under the Proposed Rule, the COPPA obligation to obtain parental consent would apply if even a single data element of these types is collected. Because these identifiers do not permit the "contacting" of an individual, the Proposed Rule could force entities involved in these activities to find a way to collect additional information that is sufficient both to contact the parent and to identify the child when contacting the parent. To illustrate, a service provider that helps a website personalize its content using only a random numeric identifier stored in a cookie could, under the Proposed Rule, need to develop a mechanism to obtain child users' first names and their parents' e-mail addresses. (As discussed further below, it is unclear from the Proposed Rule whether personalization and a host of other common activities would fall within the definition of "internal operations.") The Commission acknowledges in its discussion of the actual knowledge standard that minimizing data collection was a goal of COPPA.[20] To the extent that the Proposed Rule would compel operators to find new ways to contact individuals and collect information for the sole purpose of fulfilling COPPA requirements, it would undermine this core statutory goal.

The Proposed Rule is burdensome for parents. The Proposed Rule would negatively affect parents' and children's online experiences by expanding the instances when consent is required while constricting possible consent methods. The Proposed Rule appears to contemplate that each data "collector" would be independently required to comply with COPPA. The Proposed Rule also appears to require consent for a variety of beneficial data uses, such as personalizing content for children, that enhance the website experience but may not be strictly "necessary to maintain the technical functioning" of a site. (Please see Section IV below for further discussion of the proposed "support for internal operations" exception.) The Proposed Rule could therefore result in a barrage of parental consent requests, per each website or service a child visits. Parents would likely find such repeated requests annoying and confusing,

[20] 76 Fed. Reg. at 59806.

and ultimately may become less attentive to them. In addition, as discussed below, the Proposed Rule would make it more difficult for parents to respond to such requests. In fact, the Proposed Rule would create a more burdensome Internet experience for parents even as consumers are growing more comfortable with online systems and more desirous of simple, streamlined interactions.

The Proposed Rule could favor certain business models over others. The cumulative changes in the Proposed Rule would likely make it more difficult for entities to partner with each other in offering websites or online services for children, and particularly to work with third party advertising networks or other service providers to obtain revenue to support their offerings. The IAB is therefore concerned that the Proposed Rule would favor business models that do not use such service providers, while disfavoring others. Small publishers would be disadvantaged because they often must rely on third parties to handle advertising and other support services.

The Proposed Rule raises constitutional concerns. The U.S. Supreme Court recently ruled, in a case dealing with marketing uses of prescription data, that the creation and dissemination of information are speech for First Amendment purposes.[21] Heightened constitutional scrutiny of such speech is therefore warranted when the government imposes a burden based on the content of speech and the identity of the speaker.[22] Here, the Proposed Rule's distinction between data practices for internal operations, and the same data practices for other purposes, risks singling out advertising speech for greater burdens. To draw a content-based distinction that satisfies the First Amendment, the Commission must at least show that its Proposed Rule directly advances a substantial government interest and is drawn to achieve that interest.[23] The IAB does not believe that the Commission has met this burden.

The Commission has not identified any concrete harm to children that would justify extending COPPA as contemplated. The approach in the Proposed Rule appears motivated by concern about advertising, although it would sweep more broadly. To the extent that the Proposed Rule reflects a general concern on the Commission's part about advertising to children, the IAB submits that COPPA is not the appropriate vehicle to address this concern. Children are exposed to commercial messages in countless arenas, from television to the supermarket to public transportation. The issue of how to help children navigate today's commercial environment is an important one that deserves careful and comprehensive consideration. In the meantime, the Commission should not seek to single out online advertising for greater restrictions, particularly in the absence of clear constitutional and statutory authority.

"Personal information" should not include other items contemplated in the Proposed Rule. The Commission has requested input on whether the following should be defined as "personal information": (1) the combination of a birthdate, gender, and ZIP code, and (2) ZIP+4 codes. Based on the same concerns outlined above, the IAB believes

[21] *Sorrell v. IMS Health Inc.*, No. 10-779, slip op. at 15 (2011).
[22] *Id.*
[23] *Id.* at 16.

that these elements do not allow the "contacting" of a specific individual within the meaning of COPPA and should not be considered "personal information" for COPPA purposes.

V. CONCERNS REGARDING ADDITIONAL SPECIFIC ELEMENTS OF THE PROPOSED RULE

In addition to the overarching comments presented above, the IAB is concerned about specific elements of the Proposed Rule that would create compliance challenges and risks for companies seeking to offer online resources for children.

"Support for Internal Operations" Is Narrowly Defined. The Proposed Rule introduces a stand-alone definition of "support for the internal operations of the website or online service." This definition is the foundation for certain important exceptions under the Proposed Rule: a transfer of data for this purpose would not be a "disclosure" under COPPA and screen/user names or persistent identifiers used for this purpose would not be "personal information." As proposed, this term would be defined as "activities *necessary* to maintain the technical functioning" or to protect the security or integrity of the website or online service, or to fulfill a child's request, as long as data collected for these purposes is not used or disclosed for any other purpose.[24]

The existing Rule already recognizes "support for internal operations" as an exception to the definition of a "disclosure" under COPPA. However, the Proposed Rule would create new concerns by using the "support for internal operations" exception to mitigate the effect of an expanded definition of "personal information" in two locations. The IAB is concerned that the Proposed Rule would create a regime whereby a single type of "personal information" (e.g., a persistent identifier) could be treated differently under COPPA depending on the purpose for which it is collected. This type of use restriction is a novel interpretation of the COPPA statute.

In addition, the IAB is concerned that the proposed definition of "support for internal operations" is too narrow to serve its intended purpose. As the exception is currently drafted, the new definition of "personal information" is likely to have the unintended consequence of chilling beneficial data uses, because it is unclear how websites and online services should determine whether a specific data collection or use is "necessary" or not. The Commission's commentary creates additional potential for confusion because the proposed exception appears narrower, on its face, than the Commission's stated intent to cover all activities that "aid" functionality and "provide a good user experience."[25]

The Proposed Rule identifies certain examples of data uses that would constitute "support for internal operations,"[26] but offers no guidance on the treatment of other, equally widespread supporting activities. To identify just one example, the

[24] 76 Fed. Reg. at 59810 (emphasis added).
[25] 76 Fed. Reg. at 59809-59810.
[26] 76 Fed. Reg. at 59812.

Commission's commentary on its Proposed Rule states that operators could use persistent identifiers for "serving" contextual advertisements without triggering COPPA.[27] However, serving advertisements (including contextual advertisements) also requires the use of such identifiers for other activities that are equally routine and necessary, including market analytics, frequency capping, fraud prevention, and reporting and analytics for billing purposes. The effect of the Proposed Rule is therefore at odds with the Commission's stated intent to allow contextual advertising to continue.

It is also unclear what entities may utilize the "support for internal operations" exception. On its face, the exception for "support for internal operations" appears limited to data uses within the same website or service that has collected a child's personal information. The Proposed Rule does not state whether the exception is available to third party service providers that work with publishers of websites or online services to provide advertising (including contextual advertising), additional content, or other services, to the extent that such third party providers may also be "operators" under COPPA. Smaller publishers are more likely to rely on such third party assistance, including assistance to obtain advertising support. The proposed definition also does not appear to allow room for operational data uses that may occur across families of affiliated websites. It is not uncommon for families of affiliated websites to share or centralize certain functions for greater cost or technical efficiency, using the types of technologies that would be considered "personal information" under the Proposed Rule.

In keeping with the Commission's prior recognition that many online data practices should not require consent,[28] the IAB suggests that the Commission should clarify the definition of "support for internal operations" to ensure that it covers the legitimate data practices that are routinely used to provide functionality and optimize user experiences for websites and online services. These practices include but are not limited to intellectual property protection; compliance, public purpose and consumer safety;[29] verification and fraud prevention (as well as authentication), such as the ability to sign into the same service across multiple platforms; billing or product or service fulfillment; advertising delivery and reporting; spam detection; data logging for site analytics, reporting, and optimization; market research and product development; personalization;[30] and first-party and contextual advertising activities (not limited to ad serving). This key term should also leave room for efficient collaboration among affiliates and online services. An appropriately tailored definition of this exception could address some of the concerns identified in Section IV above.

Lastly, as a technical matter, we note that subparagraph (g) of the proposed new definition of "personal information" includes the clause "or protection of the security or

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[27] 76 Fed. Reg. at 59812.

[28] Preliminary FTC Staff Report, *Protecting Consumer Privacy in an Era of Rapid Change: A Proposed Framework for Businesses and Policymakers* (2010) at 53-54.

[29] *Id.*

[30] "Personalization," which users increasingly expect from websites and online services, encompasses a wide range of features that make services more relevant, fun, and useful to consumers. Because the commentary on the Proposed Rule recognizes only "maintaining user preferences" as a form of "internal operations," it is unclear what personalization features would fit within this exception.

integrity of, the Website or online service".[31] We suggest deleting this clause, which appears to be redundant given that it is also included within the proposed "support for internal operations" term.

Proposed New Definition of "Collects or Collection" Is Vague. The Commission proposes that the definition of "collects or collection" should cover the online collection of personal information both when an operator mandatorily requires it and when an operator merely prompts or encourages a child to submit such information. These terms are vague and the Commission has offered no guidance regarding what activities by an operator might constitute "prompting" or "encouraging" sufficient to trigger COPPA compliance duties. For example, it is unclear whether merely presenting an interactive feature that is powered by a cookie, such as the countless buttons that are currently available through websites, could qualify as "prompting" the submission of personal information. Likewise, the Commission's proposal to include "all passive tracking of a child online," without reference to any specific technologies, is both broad and vague. The Proposed Rule would expand the scope of the Commission's enforcement abilities without providing clear instruction to industry about the Commission's expectations. The IAB is concerned that this proposed definition would thereby create a substantial chilling effect on the online publishing and advertising industries.

Disclosure of All Data Collectors in Privacy Policies. For websites and online services covered by COPPA, the Proposed Rule would require privacy policies to show the name and contact information of each "operator" collecting data on the site. The Commission specifically intends to include ad networks in this requirement.[32] We do not believe that this proposal would provide any additional consumer benefit, given that the current COPPA Rule already requires the privacy policy to list all operators and provide contact information for a single operator that is prepared to respond to parents' questions on behalf of all operators.[33] The addition of more contact information is merely likely to confuse parents, counter to the Commission's stated preference for shorter and simpler privacy policies, in particular on a device where screen space is limited, and where operators are dynamic and continuously changing within a session. The IAB is further concerned that this requirement could distort competition by creating new COPPA and consumer relations consequences associated with changes in business arrangements. The IAB suggests that this requirement should be deleted from the final rule.

Concerns Related to the "Actual Knowledge" Standard. The Commission has reaffirmed COPPA's actual knowledge standard while proposing to define new types of "personal information." To the extent that these "personal information" amendments are retained in the final rule despite the concerns raised above, the IAB suggests that the Commission consider clarifying that the data types identified as personal information are not capable of creating "actual knowledge" sufficient to trigger COPPA. For example, an operator would not have actual knowledge of a user's age based on geolocation data

[31] 76 Fed. Reg. at 59830.
[32] 76 Fed. Reg. at 59815.
[33] 16 C.F.R. § 312.4(b)(2)(i).

showing that a device is located at a school on weekdays, because the device could belong to a teacher or other employee. Likewise, an uploaded photograph does not provide a basis to establish a user's age. Clarity in this respect is essential because, as the Commission noted, the actual knowledge standard plays an important role in narrowing the impact of the Commission's other proposed changes.

Amendments to Notice and Consent Requirements. The Proposed Rule includes several amendments that would affect COPPA compliance methods.

- **Lengthier Direct Notices.** The Proposed Rule would set forth required elements for "direct notices" to parents, disallowing truncated notices that link to privacy policies. Taken together, these required elements would necessitate lengthy direct notices. The IAB submits that this amendment is unnecessary because the existing Rule already ensures that interested parents have easy access, at the most relevant time, to information about an operator's data practices. In contrast, the IAB believes that the Proposed Rule may prove overwhelming for parents and would be challenging to implement in the mobile environment.

- **Elimination of "E-mail Plus" Method for Verifiable Parental Consent.** The Proposed Rule would eliminate the "e-mail plus" method of obtaining parental consent for internal data uses. The remaining consent methods enumerated in the Rule are more cumbersome for parents, generally requiring parents to utilize offline technology and/or multiple steps to provide consent. It is notable that, in the commercial e-mail context, Congress required that consumers should be able to opt out of receiving such messages either by reply e-mail or using another online mechanism, implicitly recognizing the hurdles imposed by the types of methods put forward under the Proposed Rule.[34] The burdens on parents would be even greater if the universe of entities required to obtain consent is expanded as the Proposed Rule contemplates. Even parents who are willing to provide consent may be stymied by the practical hurdles of providing consent through the limited methods in the Proposed Rule.

- **Approval Process for Parental Consent Methods.** The Proposed Rule would establish a new formal process for companies to seek approval of proposed parental consent. Contrary to the Commission's goal of developing new parental consent methods, the IAB notes that this type of process could create an implication that only approved methods are acceptable and thereby inhibit the use of any methods that are not so approved. The Commission's shifting view on whether the "e-mail plus" method is acceptable creates further uncertainty about what methods may be acceptable, and could contribute to increased reluctance to adopt new methods.

New Service Provider Data Security Requirements. COPPA already requires operators to take reasonable measures to protect personal information collected from

[34] 15 U.S.C. § 7704(a)(3).

children, to collect no more information than is reasonably necessary for an activity, and to delete personal information upon the request of a parent.[35] The Proposed Rule would also require operators covered by the Rule to have "reasonable measures to ensure" that any service provider or third party that receives personal information has "reasonable procedures" to protect the information. It is unclear what new measures (for operators) or procedures (for service providers) would be sufficient to satisfy this vague requirement, especially to the extent that it may encompass data that is not individually identifiable. Moreover, as a practical matter, companies have little ability to "ensure" actions by their business partners beyond establishing and enforcing contractual obligations. The IAB is concerned that these requirements, if finalized, would create a risk of liability to companies based on highly subjective standards and on third party activities.

New Data Retention and Deletion Rules. The Commission also proposes to require operators to retain children's personal information only as long as reasonably necessary and then to use reasonable methods to delete it. Similar to the new service provider requirements, the IAB is concerned that these aspects of the Proposed Rule do not provide clear guidance and would expose companies to liability based on enforcement authorities' subjective views of what data retention and deletion policies are "reasonable." Moreover, such "privacy by design" principles are not necessary or appropriate for incorporation into COPPA. Given that operators already have data security obligations, and absent evidence of consumer harm to support such a change, there is no reason to impose additional compliance costs on industry.

Self-Regulatory Safe Harbor Programs. The FTC has proposed to require safe harbor programs to audit each participant annually and to report findings and any disciplinary actions to the Commission. The IAB believes that these amendments may decrease companies' incentive to participate in safe harbor programs by increasing the burdens, risks, and likely costs of safe harbor participation. We encourage the Commission to avoid this counterproductive outcome.

Transition Considerations. Given that COPPA has been in place over a decade, transitioning to any new regulations that the Commission ultimately adopts would create implementation challenges for affected companies. Even if the Proposed Rule is not finalized in its current form, any amendment to such a long-standing regulation would likely require significant time and resources for operators to conduct business negotiations; adjust contracts; and design, test, and operationalize new systems for compliance. We submit that the Commission should establish a reasonable implementation period (such as one year) to enable operators to cope with these challenges. We also ask the Commission to recognize that any new regulations would not apply to data collected under a previous version of the COPPA Rule. Such retroactive application of new regulations would be impracticable. Finally, we suggest that if the Commission wishes to propose amended regulations that differ materially from the Proposed Rule, the Commission should reissue and request comment on its new

[35] 16 C.F.R. §§ 312.6(a)(2), 312.7, 312.8.

proposal. The importance and technical complexity of the COPPA Rule would make such public review and feedback extremely valuable.

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The IAB appreciates the opportunity to provide these comments to the Commission. The IAB and its member companies are committed to keeping children safe online, and we look forward to continuing to work with the Commission on this important issue. Please contact me at (202) 253-1466 with any questions.

Sincerely,

Michael Zaneis
Senior Vice President, Public Policy & General Counsel
Interactive Advertising Bureau