



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

December 23, 2011

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Re: COPPA Rule Review, 16 CFR Part 312, Project No. P104503. General Comments on the Proposed Modifications Which Relate to Online Behavioral Advertising (OBA).

Dear Mr. Clark:

The Online Interest-Based Advertising Accountability Program (Accountability Program)<sup>1</sup> is pleased to provide comments on the Federal Trade Commission's (FTC or Commission) proposed modifications to regulations implementing the Children's Online Privacy Protection Act (COPPA). The scope of the Accountability Program's comments is limited to those proposed modifications relating to online behavioral advertising (OBA).

#### Background

The Accountability Program's mission is to build consumer trust in online behavioral advertising by ensuring that all entities engaged in OBA participate in and comply with the Self-Regulatory Principles for Online Behavioral Advertising (the Principles). The Accountability Program monitors covered entities' compliance with the Principles; conducts outreach to companies and consumers to explain the Principles and the accountability process; institutes formal inquiries into cases of potential non-compliance; and works with covered entities to expeditiously resolve instances of non-compliance. To ensure transparency, the Accountability Program publishes its decisions and refers cases of non-participation or uncorrected non-compliance to the Commission.

#### Application of the Principles to the Proposed Modifications of COPPA regarding OBA

The FTC has proposed bringing data collected and used for OBA purposes under the requirements of COPPA by expanding the definition of "personal information" to cover OBA when collected from a child

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<sup>1</sup> The Accountability Program operates under the policy guidance of the National Advertising Review Council (NARC), and is administered by the Council of Better Business Bureaus, Inc. (CBBB).

under thirteen or a child-directed Web site.<sup>2</sup> However, the collection and use of a child's data for OBA purposes is already covered by the Sensitive Data Principle.<sup>3</sup>

In the commentary of its proposed modification to its COPPA Rules, the Commission states that the Principles do not require parental consent for OBA collection and use.<sup>4</sup> This is a misreading of the scope of the Sensitive Data Principle as applied to children. The Accountability Program recognizes that, as drafted, this provision is not a model of clarity. However, its intention is clear.<sup>5</sup> When creating voluntary Principles governing OBA, it was recognized that data collected about children is by its nature sensitive.<sup>6</sup> With that in mind, Principle VI.A. requires consent prior to the collection and use of any data for OBA purposes from children under thirteen or on child-directed Web sites. To be meaningful, that consent must be obtained from a parent, consistent with the requirements set forth in COPPA.

In its interpretation and enforcement of the Sensitive Data Principle with respect to children, the Accountability Program has very specific notice and consent expectations of operators of Web sites directed to children under the age of 13 and of third parties that may collect and use children's data for OBA purposes on these Web sites. Per the phrase in Principle VI.A., "except as consistent with COPPA," the notice requirements are modeled on the Commission's requirements for parental notice and consent. The operator of a child-directed Web site that wishes to permit third parties to collect children's data for OBA purposes, or intends to transfer data it collects to a third party, must, in its direct notice to parents, explain its OBA data collection, use, and transfer practices and obtain verifiable parental consent to them. Equally, if a Web site or third party collects and uses data for OBA purposes about a computer or device it knows is associated with a child under thirteen, it must provide the same direct notice and obtain verifiable parental consent. The notice to parents must clearly state that their child's data will be collected by or transferred to third parties for OBA purposes. A third party must either ensure that the Web site has obtained verifiable parental consent for third-party collection and use for OBA purposes or

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<sup>2</sup> Federal Trade Commission, Proposed Rule Request for Comment, Children's Online Privacy Protection Rule, 76 Fed. Reg. at 59830 (Sept. 27, 2011).

<sup>3</sup> See Principle VI, Sensitive Data. Specifically, Principle VI.A., Children, covers the collection and use of children's data for OBA purposes. It states: "Entities should not collect 'personal information,' as defined in the Children's Online Privacy Protection Act ('COPPA'), from children they have actual knowledge are under the age of 13 or from sites directed to children under the age of 13 for **Online Behavioral Advertising**, or engage in **Online Behavioral Advertising** directed to children they have actual knowledge are under the age of 13 except as compliant with the COPPA." (Emphasis added).

<sup>4</sup> 76 Fed. Reg. at 59812-59813.

<sup>5</sup> See Online Interest-Based Advertising Accountability Program Procedures, II. A: ("Definitions of substantive terms relating to the Principles are found in the Principles, and the accompanying Commentary, as these may from time to time be amended.... The Accountability Program will rely on and follow these definitions in its decisions, providing clarification in instances of ambiguity."). We note that the Accountability Program and the DMA coordinate their compliance work to ensure consistency.

<sup>6</sup> As the Principles make clear: "The Sensitive Data Principle recognizes that certain data collected and used for **online behavioral advertising purposes merits different treatment**. The Principles apply heightened protection for children's data by applying the protective measures set forth in the Children's Online Privacy Protection Act" Principles, Summary, at 4. (Emphasis added). This is an unambiguous statement that the Sensitive Data Principle applies the COPPA notice and consent standards to children's data collected and used for OBA purposes.

must itself fulfill these requirements. As provided by COPPA, a link to a privacy policy statement that explains these practices will not be sufficient.

In conferring heightened protection to children's data because it is sensitive, the Principles are able to avoid the problematic proposed classification of OBA, (which is almost always not personally identifiable information) as if it were in fact data that can be reasonably used to identify an individual. Adopting the FTC's proposal would stretch the traditional definition of PII to cover data that is not directly traceable back to an individual and thus add unnecessary layers of complexity and ambiguity regarding how to classify and treat various kinds of data.

#### The Benefits of a Self-Regulatory Approach

The Sensitive Data Principle governing the collection and use of children's data for OBA purposes is, like all the Principles, the result of a consensus process that created enforceable industry standards. These standards continue to evolve to respond to consumer concerns. Because online OBA involves many participants and has complex technical requirements that are continually changing, we believe that self-regulation is the best way to protect consumers while enabling innovation. Ensuring that all responsible parties provide clear notice and verifiable consent is best achieved through industry consensus standards. The FTC's proposal leaves unanswered a number of questions regarding scope, responsible entities, and responsibility for providing notice and obtaining verifiable parental consent. The Accountability Program's standards are already in place and we believe will provide the best and fastest way to resolve the ambiguities and unanswered technical issues inherent in the FTC proposal.

#### Conclusion

The Accountability Program is already engaged in conducting outreach, monitoring, and enforcing the Sensitive Data Principles throughout the OBA space. The Accountability Program believes that in this highly technical and quickly evolving area, self-regulation is best suited to resolve complexities, find flexible and workable solutions, and adapt to innovations across the advertising ecosystem. The Accountability Program believes it is well-positioned to monitor and enforce the advertising ecosystem's compliance with the Principles' heightened requirements for direct notice and verifiable parental consent for collecting and using children's data for OBA.

Respectfully submitted,

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