LEADERSHIP AND
MARKETING EXCELLENCE

Before the
FEDERAL TRADE COMMISSION
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COMMENTS

of the

ANA – ASSOCIATION OF NATIONAL ADVERTISERS

on the

COPPA Rule Review
Project No. P195404

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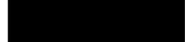

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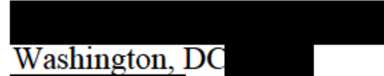
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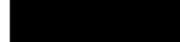

March 11, 2024

On behalf of the Association of National Advertisers ("ANA"), we provide these comments in response to the Federal Trade Commission's ("FTC" or "Commission") notice of proposed rulemaking ("NPRM") in relation to the Children's Online Privacy Protection Rule ("COPPA Rule" or "Rule").[1] The FTC states that the proposed modifications "are intended to respond to changes in technology and online practices, and where appropriate, to clarify and streamline the Rule."[2] The ANA shares the Commission's commitment to protecting children's online privacy and offers these comments to help improve the proposed updates to the Rule.

As America's oldest and largest advertising trade association, the ANA has long supported the efforts of brands, advertisers, marketing service providers, and countless other entities to provide enriching and safe experiences for children online. The ANA's mission is to drive growth for marketing professionals, brands and businesses, the industry, and humanity. The ANA serves the marketing needs of 20,000 brands by leveraging the 12-point ANA Growth Agenda, which has been endorsed by the Global CMO Growth Council. The ANA's membership consists of U.S. and international companies, including client-side marketers, nonprofits, fundraisers, and marketing solutions providers (data science and technology companies, ad agencies, publishers, media companies, suppliers, and vendors). The ANA creates Marketing Growth Champions by serving, educating, and advocating for more than 50,000 industry members that collectively invest more than $400 billion in marketing and advertising annually.

The ANA supports the Commission's goal of protecting children online, and we offer these comments to help improve the Rule for all stakeholders—kids, parents, businesses, and safe harbor programs alike. In Section I, we discuss the ANA's long history of pioneering children's privacy protections reflected in COPPA today, and we encourage the FTC to balance the need to protect children's privacy with the goal of fostering children's online engagement. In Section II, we note several ways the FTC's decision to refrain from making certain amendments to the Rule align with the letter and spirit of COPPA itself, and we commend helpful clarifications the Commission makes in the NPRM relating to certain key advertising functions. Finally, in Section III, we provide comment on specific provisions of the proposed modifications to the Rule related to applicability standards and definitions; notice and consent requirements; operational considerations; data security and retention requirements; and safe harbors. We suggest ways these proposed modifications should be refined or reconsidered to improve protections for children online, ease burdens on parents, and promote educational and enriching products and services for kids.

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[1] Notice of Proposed Rulemaking, Children's Online Privacy Protection Rule, 89 Fed. Reg. 2034 - 2076 (Jan. 11, 2024), located here (hereinafter, "NPRM").

[2] *Id.* at 2034.

I. The ANA Has a Lengthy History of Supporting Privacy Protections for Children Online

The ANA has been a leader in children's privacy matters, having actively supported and worked with the Congress to pass COPPA,[3] as well as engaged with the FTC in its subsequent COPPA rulemakings.[4] We share the Commission's strong commitment to ensuring that children enjoy safe experiences online. Our *Guidelines for Ethical Business Practice* (the "Guidelines"), a set of generally accepted principles of conduct for the advertising industry to promote responsible data stewardship, reinforce COPPA provisions and provide meaningful protections for personal information collected from children in online spaces.[5]

As the FTC considers amendments to the COPPA Rule to keep pace with technological changes since its last Rule review, we encourage the agency to balance the important dual aims of: (1) ensuring robust privacy protections for children online; and (2) incentivizing interactive children's offerings online. Legislative hearings considering COPPA in 1998 included explicit discussion of the legislation's key goals of enhancing parental involvement in children's online activities, maintaining the security of personally identifiable information collected from children online, and limiting the collection of personal information from children without parental consent.[6] Importantly, legislators emphasized that these goals should be accomplished "in a manner that preserves the interactivity of children's experience on the Internet and preserves children's access to information in this rich and valuable medium."[7] Congress recognized that protections for children should be crafted to permit them to develop proficiency with the Internet and further their own knowledge and academic achievements.[8] We encourage the FTC to continue to preserve this balance, which was prioritized by Congress, as the Commission considers updates to the COPPA Rule.

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[3] Prior to the passage of COPPA, the ANA, many of our member companies, and other industry groups worked for over a year to develop guidelines of the Children's Advertising Review Unit ("CARU") of the Council of Better Business Bureaus ("CBBB") that specifically addressed online privacy and information collection practices. Those guidelines were adopted in 1996 and helped serve as a model for COPPA and various self-regulatory initiatives. *See* 144 Cong. Rec. S11659 (daily ed. Oct. 7, 1998) (statement of Sen. Bryan) (listing the Direct Marketing Association ("DMA")—which subsequently became part of the ANA—as a supporter of the children's Internet privacy language).

[4] *See, e.g.,* ANA, *Comments on the COPPA Rule Review* (Dec. 10, 2019); ANA and DMA, *Comments on the COPPA Supplemental Notice of Proposed Rulemaking* (Sept. 24, 2012); DMA, *Comments on the COPPA Rule* (Dec. 23, 2011); DMA, *Comments on the COPPA Rule, COPPA Rule Review 2010* (July 10, 2010); DMA, *Comments on the COPPA Sliding Scale Amendment Proposal* (Nov. 30, 2001); ANA, *Comments on the COPPA Proposed Rulemaking* (June 11, 1999).

[5] ANA *Guidelines for Ethical Business Practice*, Part I, Sec. VII, Art. 3, located here (hereinafter, "Guidelines"); *see also* 144 Cong. Rec. S11659 (daily ed. Oct. 7, 1998) (statement of Sen. Bryan).

[6] *See* 144 Cong. Rec. S11659 (daily ed. Oct. 7, 1998) (statement of Sen. Bryan).

[7] *Id.* at S11657.

[8] 144 Cong. Rec. S8482 (daily ed. July 17, 1998) (statement of Sen. Bryan) ("I think we would all agree that proficiency with the Internet is a critical and vital skill that will be necessary for academic achievement in the next century. The benefits of the Internet are extraordinary.")

II. The ANA Supports the FTC's Decisions to Preserve Key Definitions and Scope Limits in the COPPA Rule

The ANA commends the Commission's careful consideration of comments submitted in the rulemaking process and its statements, through this NPRM, clarifying that key advertising functions—like ad attribution—are exempt from parental consent requirements. We also support the Commission's decision not to modify the COPPA Rule to include inferred data in the definition of personal information, adopt a constructive knowledge standard for user ages, or expand the Rule's applicability to services with incidental large numbers of child users. Such unnecessary changes to the Rule would disrupt the carefully balanced regulatory regime established by Congress and decades of FTC rulemaking. Similarly, the FTC's decision to clarify that key advertising functions like ad attribution fall outside of the scope of parental consent requirements aligns with COPPA and will help to preserve beneficial business practices that promote market competition, innovation, and investment in children's offerings online.

A. The ANA Agrees with the FTC's Guidance that Certain Advertising Practices Are "Support for Internal Operations of the Web Site or Online Service"

The ANA applauds the FTC's statement recognizing the "important balance between privacy and practicality" to be struck through the COPPA Rule and that persistent identifiers "are fundamental to the smooth functioning of the internet."[9] The Commission's guidance that certain advertising functions (such as ad attribution, personalization, product improvement, and fraud prevention) fall within the scope of the "support for the internal operations of the website or online service" definition provides useful clarity for businesses.[10] Practices such as these, including click/conversion tracking, ad modeling, and A/B testing, help to support the development of high-quality child-centered content by providing needed ad revenue.[11] These activities are performed without using data from a child for targeting or profiling purposes.[12]

Uncertainty surrounding permissible advertising practices can cause compliance confusion and hinder the development of valuable online offerings for children and families. The Commission's clarification that ad attribution, personalization, product improvement, and fraud prevention are already within the scope of the "internal operations" definition, and its acknowledgement that new practices may fall within the definition as technologies grow and change, establish a clear yet flexible standard that will open additional opportunities for the development of beneficial children's services and resources online.

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[9] NPRM at 2045, 2045 n. 141; *see also See* Final Rule, Children's Online Privacy Protection Rule, 78 Fed. Reg. 3972, 3980 (Jan. 17, 2013), located here.
[10] NPRM at 2044-46.
[11] *Id.* at 2044, n. 137; ANA, *Comments on the COPPA Rule Review* (Dec. 10, 2019).
[12] *Id.*

B. The ANA Agrees with the FTC's Decision Not to Include Inferred Data in the "Personal Information" Definition

We applaud the Commission's decision not to propose including inferred data or data that may serve as a proxy for "personal information" within the definition of that term.[13] The FTC correctly notes that the COPPA statute applies to personal information *from* a child, and that data from a source other than a child would contravene the statute.[14] An expanded definition incorporating inferred data would therefore exceed the Commission's authority and introduced significant ambiguities around the scope of the Rule.[15] This uncertainty, particularly when paired with the significant costs businesses have historically faced when updating compliance tools to respond to new COPPA Rule definitions, would undermine investment in new and enriching online services for children.[16] By declining to expand the definition of "personal information" to include inferred data, the Commission helps ensure the Rule's scope remains within the bounds of the FTC's statutory authority and also avoids creating unnecessary compliance burdens for businesses that could impact the availability of child-directed content online.[17] Rather than discouraging investment in such content, rejecting an expanded definition that includes inferred data permits continued market development of useful resources and content for children and families and aligns with the language and intent of COPPA.

C. The ANA Agrees with the FTC's Decision to Retain the "Actual Knowledge" Standard for COPPA Applicability

The ANA supports the Commission's decision to maintain the COPPA Rule's "actual knowledge" standard, [18] which appropriately preserves the standard articulated in the COPPA statute and avoids imposing undue burdens on operators. COPPA's application to general audience websites and services is explicitly limited to operators with "actual knowledge" of child users.[19] As a result, the FTC's intention to affirm this standard and reject a "constructive knowledge" standard aligns with the text and intent of the law. Expanding the Rule's applicability to entities that should have or could have known a user's age would have contravened Congressional intent and the plain language of the statute.

The actual knowledge standard also comports with the FTC's longstanding assurances that operators do not have a duty to investigate the ages of users and reaffirms the Commission's repeated rejections of that standard in prior COPPA Rule reviews.[20] The actual knowledge

[13] *Id.* at 2042.
[14] *Id.*
[15] Children's Online Privacy Protection Act, 15 U.S.C. § 6502(a)(1) (hereinafter, "COPPA").
[16] *See* Final Rule, Children's Online Privacy Protection Rule, 78 Fed. Reg. 3972, 4008 (Jan. 17, 2013), located here (estimating over $18,000 in average annual compliance costs for each new operator subject to the Rule and $21,470,500 cumulatively in estimated labor costs for all new and existing operators subject to the Rule); *see also* William Rinehart, *What is the Cost of Privacy Legislation?*, Center for Growth and Opportunity at Utah State University (Nov. 17, 2022), located here.
[17] *Id.; see also* NPRM at 2042.
[18] NPRM at 2037.
[19] COPPA, 15 U.S.C. § 6502(a)(1).
[20] Final Rule, Children's Online Privacy Protection Rule, 78 Fed. Reg. 3972, 3978 (Jan. 17, 2013), located here; *see also* Proposed Rule Request for Comment, Children's Online Privacy Protection Rule, 76 Fed. Reg 59804, 59806 (Sept. 27, 2011) located here (explicitly stating that case law "makes clear that actual knowledge does not equate to

standard promotes certainty and avoids barriers to Internet resources, such as pervasive age gating, for children and adults alike. Consequently, retaining and reaffirming the actual knowledge standard not only aligns with the COPPA statute, but it also promotes clarity and certainty for businesses, which helps to foster the continued development of a vibrant market for children's offerings online.

D. The ANA Agrees with the FTC's Proposed Decision to Decline to Expand the COPPA Rule's Application to Services with Incidental "Large Numbers of Child Users"

The ANA strongly supports the Commission's proposed decision that amending the definition of "website or online service directed to children" to address websites with large numbers of child users is not necessary.[21] The Commission currently determines what is a "website or online service directed to children" based on several different factors, including factors that relate to audience composition.[22] Imposing COPPA liability based solely on "large numbers of child users" or other types of audience thresholds would introduce uncertainty by leaving operators guessing what constitutes a "large" or "disproportionate" number. Such ambiguity could disincentivize operators from creating new content, products, and services that, while not directed to children, nonetheless may have child audiences. Maintaining the existing multi-factor test allows the Commission to consider audience composition while appropriately focusing COPPA on online websites and online services that are truly directed to children.

III. The FTC Should Reconsider Certain Proposed Amendments to the COPPA Rule

Several of the FTC's proposed changes to the COPPA Rule should be reconsidered to ease burdens on parents, provide clear and consistent guidance for operators, and encourage continued development of offerings for children and participation in safe harbor programs. Below we provide comments on specific changes the FTC proposes for the COPPA Rule's (A) applicability standards and definitions; (B) notice and consent requirements; (C) operational considerations; (D) data security and retention requirements; and (E) safe harbors. We suggest that these changes should be removed or materially revised to improve the Rule for children, parents, operators, and safe harbors alike.

'knowledge fairly implied by the circumstances'; nor is actual knowledge 'constructive knowledge,' as that term is interpreted and applied legally" and discussing Congress's clear preference for an "actual knowledge" standard rather than a less strict standard).

[21] NPRM at 2035-37 ("Because the Commission already considers the demographics of a website's or online service's user base in its determination, the Commission does not believe it is necessary to modify the definition.")

[22] COPPA Rule, 16 C.F.R. § 312.2.

A. Applicability Standards and Definitions

1. Certain Factors Proposed for Determining Whether a Website or Online Service is Directed to Children Are Imprecise

Children's ability to access a wealth of information online benefits them by connecting them with myriad useful and educational materials that are readily available to them. However, proposed modifications to the Rule's applicability standards could create uncertainty about COPPA applicability in a shifting enforcement environment. Particularly when paired with the high costs of noncompliance, this uncertainty is likely to severely hinder innovation and discourage investment in new technologies or the creation of new offerings for children.

Small businesses and new market entrants disproportionately bear the costs of overly burdensome compliance obligations, especially in cases of uncertainty. Unlike larger market actors that may have substantial resources to devote to updating their compliance processes or creating such processes from scratch, smaller companies and start-ups will be forced to choose between funneling limited resources to navigating these complex regulatory ambiguities or risking noncompliance and resultant heavy fees.[23] These additional compliance burdens create significant barriers to entry that may encourage many small and new businesses to eschew the market for online children's content and services entirely.

The FTC's proposed amendments to the COPPA Rule consider including both (1) reviews by users or third parties; and (2) the age of users on similar websites or services as factors to consider for determining whether or not a website or online service is "directed to children."[24] The Commission should decline to add these factors to the Rule because they would create substantial uncertainty and are not workable barometers for judging if a website or online service is directed to children.

Reviews appear in innumerable repositories across the Internet ecosystem, creating an impossibly large set of potential reviews stakeholders would have to examine to help them determine whether their site or online service meets the "directed to children" prong for COPPA applicability. This factor could also import a constructive knowledge standard into the Rule—a standard which the FTC has declined to adopt and Congress did not enact into law.[25] Moreover, reviews by users and third parties are entirely subjective and completely outside an operator's control. Any vocal minority could leave reviews creating an impression of a child audience, even if child users are actually rare. Further, listing reviews as a factor in this test incentivizes competitors to file false reviews in an attempt to influence how a website or online service is categorized. The proposed additional factor is too vague, and too vulnerable to misuse, to inform an accurate assessment of whether a website or online service is directed to children. The ANA

[23] *See* Daniel Castro, Luke Dascoli, & Gillian Diebold, *The Looming Cost of a Patchwork of State Privacy Laws*, Information & Technology Foundation, 10, 12 (Jan. 2022), available here (describing how shifting compliance costs often disproportionately burden small businesses because the associated costs represent a larger revenue percentage).
[24] NPRM at 2047, 2072.
[25] Proposed Rule Request for Comment, Children's Online Privacy Protection Rule, 76 Fed. Reg 59804, 59806 (Sept. 27, 2011) located here.

encourages the Commission to remove this amendment from the proposed updates to the COPPA Rule.

In addition, considering the age of users on "similar websites or services" would be challenging if not impossible for operators, because no guidelines exist to help entities determine what a "similar" website or service may be. Reasonable minds may differ in considering whether one service is similar to another or not. This factor, as well, would require operators to attempt to discern the ages of competitors' audiences, which may not be readily apparent or available. Even if this type of review were feasible, it would impose an extraordinary burden on operators to attempt to review any number of "similar" properties. If added to the COPPA Rule, this vague factor could expose many more websites and online services to COPPA liability, potentially unwittingly. Indeed, this factor raises the possibility of a website or service facing COPPA liability based on the ages of competitors' audiences even if this is unknown and unknowable to the operator. Adding the age of users on "similar websites or services" as a factor would be an unrealistic and imprecise guidepost for determining COPPA applicability because the standard is both vague and unduly burdensome. The factor should not be added as one to consider under the "directed to children" standard for COPPA applicability.

At the same time, the ANA encourages the Commission to consider steps to provide more guidance for applying the multi-factor test to websites and online services in practice, including for FTC Staff tasked with enforcing COPPA. The flexibility of the test, which can be a benefit for both operators and enforcers, will instead become a liability unless it is applied with rigor and consistency. Overbroad application of the multi-factor test to websites and online services that are not actually appealing to children will undercut trust in the enforcement process and chill innovation in the market for all users. For instance, while "use of animated characters" is one factor in the test, it is important to recognize that a large amount of animated content is available online that is not appealing to children but is intended for teens or adults. Such content includes animated content that would be too mature for children or that is nostalgic content accessed by adults revisiting favorites from their childhood but not popular with children today. Similarly, while countless "hyper casual" games exist in the market that may be easy enough for users of all ages, such games should not be considered child-directed unless they also meet the distinct factors set out in the COPPA Rule. The factor related to "celebrities who appeal to children" likewise has the potential to be interpreted overbroadly, as many celebrities are popular with all ages despite not promoting their brands to youth (or even offering content that is inappropriate for children, like explicit lyrics). It is critically important that the multi-factor test not become a means to bring within the scope of the COPPA Rule any online content that is clearly inappropriate for children. Such an outcome would undercut the language and goals of COPPA and chill the development of online resources for teen and adult users alike.

2. The FTC Should Preserve Protections for Content Personalization and Contextual Advertising

For years, the COPPA Rule has provided clear and robust protections for children online coupled with appropriate flexibility as to how businesses may implement those safeguards, which has encouraged innovation and diversity in children's online resources. The FTC's NPRM acknowledges that in its 2013 amendments to the COPPA Rule, the agency "struck an

important balance between privacy and practicality."[26] We encourage the Commission to continue to do so during the current examination of the COPPA Rule so children can reap the full benefits of robust and enriching online experiences.

The FTC currently considers content personalization and contextual advertising (in addition to personalization, product improvement, and fraud prevention) to be activities that provide "support for the internal operations of the website or online service" under the COPPA Rule.[27] The Rule thus permits operators to collect persistent identifiers for such activities without parental consent so long as operators do not also collect other personal information from a child. In the NPRM, the FTC questions whether it should limit permissible content personalization activities to "'user-driven' actions" only.[28] The FTC also asks if it should consider changes to the Rule's treatment of contextual advertising.[29] We strongly encourage the Commission to maintain without change the COPPA Rule's present approach to content personalization and contextual advertising.

Content personalization is extremely important to the functioning and utility of online services for children. The content of educational games, for example, is personalized to individual children as they advance through the game and master new skills. Children who have completed certain skills or lessons are able to advance to more difficult levels and challenges due to operator-driven content personalization that assists children in their learning. Operators are also able to surface content that is more likely to be interesting to a child user based on prior activities within that website or online service. If content personalization were limited to "user-driven actions," online resources for children would become less engaging and enriching. Concerns about overuse of online resources by children are best addressed by parents or educators, and not by engineering online resources to be "one size fits all" for children.

In addition, the FTC to date has recognized that support for internal operations should include contextual advertising, which the FTC has defined as "the delivery of advertisements based upon a consumer's current visit to a Web page or single search query, without the collection and retention of data about the consumer's activities over time."[30] Contextual advertising—by the FTC's own definition—is not targeted or personalized in any way. The type of advertisement served could be random or may be based solely on the content of the website or online service on which an advertisement appears. Thus, as the FTC has acknowledged, contextual advertising "is more transparent and presents fewer privacy concerns" than other activities.[31]

Contextual advertising is a long-standing market activity that presents one of the few remaining ways children's content creators may support free and low-cost content and resources

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[26] NPRM at 2045.
[27] *Id.* at 2044.
[28] *Id.* at 2070.
[29] *Id.*
[30] FTC, Preliminary FTC Staff Report, *Protecting Consumer Privacy in an Era of Rapid Change: A Proposed Framework for Businesses and Policymakers* at 55 n.134 (Dec. 2010), available here (hereinafter, "FTC Staff Report").
[31] Final Rule, Children's Online Privacy Protection Rule, 78 Fed. Reg. 3972, 3979 n.94 (Jan. 17, 2013), located here.

for kids online. Parental consent, while merited for certain data processing activities, is a significant hurdle for operators and families. Without the ability to tap into contextual advertising revenue, operators would be forced to choose between imposing paywalls or getting parental consent, which would limit access to children with wealthier and/or more engaged parents, or offering resources for free, which does away with any market incentive to provide online resources for children.

Requiring parental consent for contextual advertising would significantly limit the availability of online resources for children, in addition to impacting many operators who developed contextual ad-supported resources in reliance on the current COPPA Rule. We agree with the FTC's conclusion that it "struck the proper balance in 2013 when it expanded the personal information definition while also creating a new exception to the Rule's requirements" to allow operators to collect persistent identifiers for contextual advertising without parental consent,[32] and we urge the FTC to retain contextual advertising as part of that longstanding exception. The Commission should not alter the Rule's existing treatment of content personalization and contextual advertising.

As the FTC contemplates proposed modifications to the COPPA Rule, it should carefully consider the ways substantial changes could impose significant costs or impede other critical policy goals, such as ensuring a diverse array of online providers remain engaged in using new technologies and providing varied online offerings for children. It is crucial that the COPPA Rule remain flexible enough to encourage participation in the market from businesses of all sizes so that they may continue to contribute to a vibrant, competitive online marketplace and invest in innovative new children's content, products, and services.

3. The FTC's Proposed Biometric Identifiers Provision Is Vague

The proposed amendments to the COPPA Rule would add biometric identifiers that "*can be used* for the automated or semi-automated recognition of an individual," including any "data derived from voice data, gait data, or facial data" to the Rule's "personal information" definition.[33] While the ANA agrees that biometric identifiers can be personal information within the scope of COPPA, the FTC's proposal is overbroad, particularly as it appears to cover any data derived from voice, gait, or facial information even if that derived data is not itself "individually identifiable" as required by the statutory definition of "personal information." The proposed edit is also unnecessary. As the FTC recognizes, the Rule's current definition already covers facial features, voice, and gait due to its coverage of photos, videos, and audio.[34] If the FTC chooses to add biometric identifiers explicitly, the definition should be limited to instances where biometric information is used or intended to be used to recognize or identify a child (and therefore meets the "individually identifiable" standard set forth in COPPA) rather than data that "can" theoretically be used for that purpose but, in practice, is not used in that way. Such an approach would align with the definitions of similar terms in the majority of state privacy laws and regulations.[35]

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[32] NPRM at 2043.
[33] *Id.* at 2041-42, 2070, 2072 (emphasis added).
[34] *Id.* at 2041, n. 88.
[35] *See, e.g.,* Cal. Civ. Code § 1798.140(c); 4 CCR § 904-3, Rule 2.02; Va. Code Ann. § 59.1-575.

4. Operators Not Collecting Personal Information Directly from Children Should Not Be Exposed to COPPA Liability

The FTC proposes to extend COPPA liability to any entity that knowingly receives personal information that originated from a website or online service directed to children.[36] In order to accomplish this, the Commission proposes to treat any such entity as a website or online service that is directed to children.[37] While the Commission frames this edit as closure of a potential "loophole,"[38] the result would be a broad extension of COPPA liability beyond what the COPPA statute can support. This change would expand COPPA compliance burdens, as well as COPPA enforcement and fines, to a large universe of entities previously not subject to the law, merely on the basis of being "downstream" data recipients.

The proposed amendment attempts to frame any downstream data recipient, no matter how attenuated the relationship to the website or service that interacts with the child, as involved in targeting children in the same manner as the website or service itself. This expansion defies the plain meaning of the statutory term and Congress's intent when enacting COPPA. Moreover, it is unnecessary as the Commission already has ample tools at its disposal to enforce COPPA through prior COPPA Rule amendments holding operators strictly liable for activities on their websites and online services, as well as those collecting data directly from users, provided that they are aware of the child-directed nature of the site or service. These tools allow the FTC to address collection of children's personal information at the source. Attempting to expand COPPA liability further downstream is not justified by the statute and would have unforeseen negative consequences for a variety of entities that have never been exposed to the law and, most importantly, have made no effort to target their activities toward children.

B. Notice and Consent Requirements

1. Requiring Operators to Disclose the Identities or Specific Categories of Third-Party Partners in Privacy Notices Would Be Unduly Burdensome

The FTC proposes to require an operator to provide the identities or specific categories of third parties to which it discloses personal information in a privacy notice.[39] Providing names of third parties could create competition issues for entities or require them to abridge confidentiality clauses in contracts with partners. While the FTC does provide the option for operators to list the categories of third-party entities in the proposed modifications, requiring the "specific categories" of such third parties is an unclear standard that would expose operators to liability should the FTC judge the categories as not "specific" enough. The requirement to provide identities of or specific categories of third parties in privacy notices should be removed or modified so that operators have flexibility in how to define categories of third-party recipients. The FTC should also specify that changes to such categories would not constitute material changes requiring updated consent. Otherwise, operators will face significant uncertainty and potential for liability. If a parent has previously granted consent for disclosures to third parties, this should be sufficient for disclosures to new categories of third parties as well.

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[36] NPRM at 2072.
[37] *Id.* at 2072, 2047.
[38] *Id*. at 2047.
[39] *Id.* at 2070, 2073.

2. Proposed Notice Requirements Related to Support for Internal Operations Would Create Confusion Without Providing Meaningful Consumer Protection

The ANA supports the provision of meaningful notices to parents regarding the processing of personal data from children. However, certain new notice requirements in the proposed modifications to the COPPA Rule would confuse and burden parents without enhancing privacy protections for children. Several suggested changes create new parental consent requirements or lengthen the notices parents must read. Although such changes are intended to increase transparency, in practice the manner and content of these expanded notice and consent requirements would exacerbate the "notice fatigue" parents already experience when navigating today's Internet.[40] Rather than establishing rigid new notice and onerous consent requirements that add complexity and friction for parents, the Commission should strive to provide clarity and simplicity to parents. Prioritizing these goals would ease the burden on parents and foster an enriching online experience for children while still safeguarding children's privacy online.

The COPPA Rule permits operators to use "persistent identifiers" about a child *without* parental consent or parental notice if such use is necessary for support for internal operations (as defined by the Rule).[41] The proposed modifications to the Rule would, for the first time, impose specific notice requirements on websites and online services operating within this exception.[42] The proposal would require entities that use data to support internal operations to make certain explicit disclosures about persistent identifier use in privacy notices, including disclosures regarding (1) the specific internal operations for which the operator has collected a persistent identifier, and (2) how the operator ensures identifiers are used or disclosed for only internal operations purposes and not for contacting specific individuals, targeted advertising, profiling a specific individual, or to encourage or prompt the use of the website or online service.[43] This information is not meaningful for parents and merely increases the time and difficulty involved in parental consent. The FTC should abandon these modifications to ensure notices remain understandable and to allow essential, internal data processing functions to continue without undue burdens on parents.

This proposed amendment would also impose significant challenges on operators given that, as the FTC has recognized, not all valid internal operations support activities are explicitly listed in the Rule. While the COPPA Rule itself lists certain permissible internal uses in its "support for the internal operations of the Web site or online service" definition,[44] the FTC has

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[40] *See* Brooke Auxler & Paul H. Silvergate, *About One-Third of Consumers Report Feeling Overwhelmed by Tech Management During COVID-19*, Deloitte Insights (Aug. 19, 2021), available here (noting 43% of parents with minor children at home feeling "overwhelmed" by the need to manage devices and subscriptions).

[41] COPPA Rule, 16 C.F.R § 312.5(c)(7).

[42] As a technical matter, there also appears to be a drafting error in the NPRM as the FTC added the expanded notice requirement into 16 C.F.R. § 312.4(d) without modifying the corresponding exemption from the notice requirement under 16 C.F.R. § 312.5, so that operators would be tasked with providing information about internal operations in a notice that they are not required to provide.

[43] NPRM at 2074.

[44] COPPA Rule, 16 C.F.R § 312.2.

found that some internal uses are included within the definition even though they are not explicitly listed in the text of the Rule.[45] As a result, requiring an operator to disclose *every internal use* in a notice could create painstakingly long notices, as the proposed updates to the Rule could be read to require operators to disclose each and every internal processing activity they undertake in order to avoid claims of a deceptive omission. Moreover, the requirement could draw into question whether adding a new internal use to a notice would constitute a material change requiring updated consent.

Stringent notice requirements conflict with prior FTC statements acknowledging the shortcomings of overly detailed privacy notices.[46] The Commission has highlighted the burdens notice-and-choice models often place on consumers due to the proliferation of long and complex privacy notices.[47] In an online ecosystem already saturated with complex notices, parents are unlikely to carefully sift through even more detailed notice information, as the proposed modifications to the Rule would require. Thus, little value would be added by including significantly more information in privacy notices to parents. The ANA believes that current requirements for parental notices already cover key disclosure categories without overwhelming parents with unnecessary detail.

The requirement explicitly to disclose internal uses is particularly burdensome for operators because, under the current COPPA Rule, operators that perform functions entirely within the "support for internal operations" are not subject to other COPPA notice requirements. With this new proposed requirement, entities would be obligated for the first time to provide notices to consumers about their internal uses of data although these uses have, by definition, been deemed by the FTC to be benign and routine enough that they do not require notice. The new disclosure requirements related to "support for internal operations" would add more paperwork for parents and operators without any appreciable benefits for children's online privacy and should be removed.

3. Separate Parental Consent for Disclosures of Personal Information to Third Parties Is Unnecessary and Overly Burdensome for Parents

Proposed amendments to the COPPA Rule would require separate parental consent for any disclosure of personal information collected from a child to third parties or the public, including for targeted advertising.[48] Consent would be unnecessary only if the disclosure is deemed "integral to the nature of the online service."[49] The stated aim of this proposed new provision is to require parents to make a specific affirmative consent selection to permit targeted advertising.[50]

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[45] *See, e.g.*, NPRM at 2044-46 (explaining that ad attribution, while not explicitly listed as an activity providing "support for the internal operations of the website or online service" in the COPPA Rule, is in fact such an activity).
[46] FTC Staff Report at 19-20.
[47] *Id.* at 26-28.
[48] NPRM at 2051, 2073.
[49] *Id.* at 2049, 2051.
[50] *Id.* at 2051.

The COPPA Rule already requires parental consent for disclosures of personal information to third parties.[51] The language of the existing rule states: "An operator must give the parent the option to consent to the collection and use of the child's personal information without consenting to disclosure of his or her personal information to third parties."[52] Parents therefore are already assured of the ability to provide separate consents for (1) collection and use of personal information from children and (2) disclosures of personal information to third parties. Therefore, the separate consent obligation for disclosures to third parties is unnecessary and merely creates additional work for parents. The exception for disclosures "integral to the nature" of the website or service is unclear and therefore unhelpful in practice, as operators would be reluctant to rely on this exception in case the FTC later deems a disclosure to be not "integral" enough.

Unnecessary and overly burdensome parental consent requirements hinder children's access to online products and services. Burdensome requirements cause consent fatigue rather than providing parents with meaningful control over personal information associated with children. The proposed update to the Rule to add an explicit separate parental consent requirement for disclosures of personal information to third parties should be removed. Alternatively, to avoid overwhelming parents with consent requests, operators should be permitted to obtain verifiable parental consent to disclose personal information to third parties within the same interface and process used to obtain consent for collection and internal use.

C. Operational Considerations

1. The FTC Should Not Unreasonably Restrict Online Engagement Techniques

Proposed modifications to the COPPA Rule would prohibit operators from using online contact information or persistent identifiers to "encourage or prompt use of a website or online service" absent parental consent.[53] These restrictions are outside the scope of the FTC's authority under COPPA, as the law addresses privacy and does not provide a mandate for the Commission to address or police the extent of children's online engagement. In addition, these proposed modifications may abridge the First Amendment rights of both operators and children.

The FTC, for instance, proposes to add text to the COPPA Rule banning entities from using online contact information to prompt engagement with an online service under the "multiple contact" exemption to parental consent.[54] This proposed modification would unconstitutionally restrict users from receiving information about products and services and impermissibly burden commercial speech. With respect to the multiple contact exception in particular, courts have long affirmed that the First Amendment's protections include both the right of the speaker to speak and the right of the listener to receive information.[55] Regulations on commercially protected speech require the state to assert a substantial interest in protecting the speech. The regulation must directly and materially advance the state's asserted interest, and it

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[51] COPPA Rule, 16 C.F.R. § 312.5(a).
[52] *Id*. at § 312.5(a)(2).
[53] NPRM at 2045, 2070, 2074.
[54] *Id.* at 2074.
[55] *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc*., 425 U.S. 748, 756-57 (1976).

must be narrowly tailored to serve that interest.[56] As a result, broad rules that limit constitutionally protected speech—such as the proposed rule limiting businesses' legitimate interest in making engaging services for children—may be invalidated for running afoul of the First Amendment.

The proposed modifications would also ban operators from using persistent identifiers to encourage use of an online service under the support for internal operations exception to parental consent.[57] This proposed restriction is vague and unclear. On its face, this proposal could restrict *any feature* that makes the offered service more enjoyable or interesting to kids. For example, it may discourage operators from offering any form of incentive, personalization, recognition, or other positive reinforcement in educational games. No clear boundary exists between content personalization, which the NPRM reiterates is "support for internal operations,"[58] and other activities to optimize a child's attention or engagement, for which the NPRM proposes to require consent. Content personalization is designed to make services more tailored and enjoyable for users, thereby enhancing engagement, and operators will be discouraged from engaging in such personalization under the overbroad restriction set forth in the NPRM. The proposed modification to the COPPA Rule could also have the unintended and perverse result of driving children toward services that are more engaging and interesting, yet not intended for a child audience. The FTC should remove this restriction or, as an alternative, align the restriction with the FTC's existing COPPA FAQs, which already provide guidance to operators with respect to the use of push notifications specifically.[59]

2. "Text Plus" Consent Should Be Permitted to Update the Rule for Current Technology and Align with the FTC's "Email Plus" Consent Option

The ANA encourages the FTC to approve the use of "text plus" as a parental consent method consistent with the "email plus" method already set forth in the Rule. Currently, operators that use personal information from a child only for internal purposes and do not disclose it may obtain "email plus" consent from a parent to approve such use.[60] The "email plus" method involves emailing the parent for consent, receiving a consent in response, and sending a later communication to the parent via email, letter, or phone call to confirm their consent and let them know they can revoke it at any time. In the NPRM, the FTC proposes to add mobile phone numbers to the definition of "online contact information" in a manner that allows operators to contact parents by text message to obtain verifiable parental consent.

The addition of mobile phone numbers as "online contact information" in the proposed updates to the Rule is welcome, but the NPRM does not address how text messaging can be used as part of a recognized parental consent method. At minimum, the Rule should make clear that "text plus" consent is permissible for internal uses of personal consent, just as "email plus" consent is a permissible method. In proposing to allow text messaging as a method to obtain

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[56] *See, e.g., Central Hudson Gas & Electric v. Public Service Commission*, 447 U.S. 557, 566 (1980).
[57] NPRM at 2072.
[58] *Id*. at 2045 ("Other proposed additions—such as personalization, product improvement, and fraud prevention—are already covered [under support for internal operations].")
[59] FTC, *Complying with COPPA: Frequently Asked Questions*, Sec. J(9), located here (hereinafter, "COPPA FAQs").
[60] *See* COPPA Rule, 16 C.F.R. § 312.5(b)(2); *see also* COPPA FAQs, Sec. I(4).

consent, the FTC stated in the NPRM that "permitting parents to provide consent via text message would offer them significant convenience and utility" and that "consumers are likely accustomed to using mobile telephone numbers for account creation or log-in purposes."[61] These reasons also amply support the recognition of "text plus" as a consent method sufficient for parents to approve solely internal uses of their children's personal information. Indeed, for many parents today, texting has supplanted emailing as their primary online communication method. By approving "text plus" consent, the FTC would help update the COPPA Rule and reduce burdens on parents.

D. Data Security and Retention: The FTC Should Clarify Proposed Data Security and Retention Policy Rules

Proposed changes to the COPPA Rule would require operators to maintain a "written children's personal information security program" with specific elements, including designating an employee to coordinate the security program, annually performing assessments, designing and implementing safeguards to control risks, regularly testing and monitoring the safeguards, and annually evaluating the program to address circumstances that may have a material impact on the security program or any safeguards in place.[62] The FTC should clarify that operators with existing security programs that meet these requirements do not need to create a separate program specifically for children. Such a clarification would ease operational burdens and minimize duplication of resources for businesses.

In addition, under the proposed modifications to the Rule, entities must maintain and post a written "children's data retention policy."[63] The requirement would burden smaller operators disproportionately in comparison to their larger counterparts that can dedicate time and expenses to crafting, updating, and managing such a public policy. Additionally, the proposed modifications to the Rule again place the burden on parents to review and, in theory, make decisions based on the published policy. The requirement to post a policy is unnecessary and unduly burdensome, and it should be omitted from any final amendments to the Rule. If it is retained, it should be modified to recognize that operators that already publish a general data retention policy do not need to create a separate policy specific to children.

Finally, the proposed explicit ban on indefinite retention is unnecessary and redundant, given existing prohibitions on retaining personal information longer than reasonably necessary to fulfill the purpose of collection. The proposed modifications also do not acknowledge or account for certain instances when it is appropriate to extend retention of records without a fixed end date, for example to further security, prevent fraud and abuse, preserve financial records, comply with legal or other regulatory requirements, ensure service continuity, or retain data where a parent has consented to an extended retention period for personal information. The proposed data retention amendments should be removed from the Rule or, alternatively, clarified to provide exceptions for certain limited instances warranting indefinite record retention.

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[61] NPRM at 2040.
[62] *Id.* at 2075.
[63] *Id.*

E. Safe Harbors: Certain Proposed Requirements for Safe Harbors to Disclose Subject Operator Identities Should Be Removed from the Rule to Encourage Continued Participation in Safe Harbor Programs

In addition to championing the protections for minors already embedded in federal law and the current COPPA Rule through the *Guidelines*, the ANA has long supported protections for data from children by bolstering safe harbor programs that enhance COPPA compliance. As a founding member of the advertising self-regulatory program that includes the first FTC-approved COPPA safe harbor program, the Children's Advertising Review Unit ("CARU"), the ANA has strongly supported safe harbor program initiatives since their inception.[64] The COPPA Rule's existing safe harbor provisions have successfully promoted COPPA compliance while encouraging operators to adopt industry best practices that comply with—and often exceed—the children's privacy safeguards mandated by the Rule. Any changes to the COPPA Rule should be carefully tailored to bolster the existing robust protections for minors online and the continued participation in safe harbor programs. Unnecessary modifications would disrupt the established, carefully constructed regulatory regime, create increased uncertainty, and impose burdens on both businesses and parents.

Proposed modifications to the COPPA Rule would require safe harbor programs to submit an annual report to the Commission identifying each subject operator by name and all approved websites or online services of such subject operator, as well as any subject operators that have left the safe harbor program.[65] The proposed updates would also require safe harbor programs to publicly post a list of all current subject operators and update the list every six months.[66] Such requirements—particularly the requirement to disclose names of past and present subject operators in disclosures to the FTC—could discourage participation in safe harbor programs. Operators may view participation in safe harbor programs as an unnecessary risk given that their names would be required to be provided to the FTC during their participation in the program and if they ever choose to leave the program for any reason. Moreover, the requirement could result in safe harbors competing against each other for operators. The FTC should ensure that the COPPA Rule continues to incentivize participation in safe harbor programs, which help to promote responsible data practices, enhance oversight of operators, build trust with parents and educators, and facilitate COPPA compliance. The proposed modifications requiring safe harbors to disclose entity names to the Commission on an annual basis do not further these goals and should be removed.

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Thank you for the opportunity to submit comments on this important topic. Please do not hesitate to contact us with any questions regarding this submission.

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[64] Better Business Bureau, *Twenty Years of Successful Co-Regulation Under COPPA: A Model for Fostering Consumer Privacy* at 7 (Oct. 2019), located here. The Federal Trade Commission approved CARU as a COPPA safe harbor program on February 1, 2001. *Id.*

[65] NPRM at 2064, 2076.

[66] *Id.*