Before the
FEDERAL TRADE COMMISSION
Washington, D.C. 20580

COMMENTS

of

PRIVACY FOR AMERICA

on the

Notice of Proposed Rulemaking
"COPPA Rule Review, Project No. P195404"

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Privacy for America is a coalition of top trade organizations and companies representing a broad cross-section of the American economy, including household brands, media companies, hospitality and travel companies, retailers, data services providers, financial institutions, advertisers, and more.[1] We welcome the opportunity to provide comments on the Federal Trade Commission's ("FTC" or "Commission") Notice of Proposed Rulemaking for the Children's Online Privacy Protection Rule ("COPPA Rule").[2]

We appreciate the Commission updating the COPPA Rule to "respond to changes in technology and online practices" and to clarify the COPPA Rule.[3] As the Commission continues to enforce the Children's Online Privacy Protection Act ("COPPA") and the COPPA Rule in new and unexpected ways, uncertainty for operators has grown.[4] We welcome the clarifications, and we recognize the Commission's efforts to hew closely to COPPA itself in several areas of this rulemaking. In particular, the Commission appropriately retained the "actual knowledge" standard and did not act on requests to apply a "constructive knowledge" standard.[5] Such requests reflected a misunderstanding of the Commission's authority under COPPA, where Congress clearly established actual knowledge as the standard and did not delegate the Commission authority to apply a different standard.[6] Similarly, the Commission's decision not to expand the COPPA Rule's definition of "personal information" to include inferred data is sound.[7] As the Commission recognized, COPPA regulates personal information "from" a child[8]—expanding the COPPA Rule to include personal information that is potentially "about" a child would exceed the Commission's authority.

We also share the Commission's commitment to strongly protecting personal information. Privacy for America's *Principles for Privacy Legislation* (the "Framework") provides a model for a preemptive federal law that would define a single, nationwide standard for privacy protections for individuals across the United States, including children.[9] Our Framework would clearly define and prohibit practices that are *per se* unreasonable due to the risk of harm to consumers or where practices undermine accountability, while preserving the benefits to individuals of all ages that result from responsible uses of data.[10]

Actions taken by the Commission in this rulemaking should likewise preserve these benefits. Specifically, any action the Commission takes in updating the COPPA Rule should be

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[1] Privacy for America, located here.
[2] Children's Online Privacy Protection Rule, 89 Fed. Reg. 2034 (proposed Jan. 11, 2024) [hereinafter *NPRM*].
[3] *NPRM* at 2034.
[4] *See, e.g.*, Kelly, Makena, *YouTube calls for 'more clarity' on the FTC's child privacy rules / The FTC has yet to provide good COPPA guidance*, THE VERGE (Dec. 11, 2019), available at https://www.theverge.com/2019/12/11/21011229/youtube-google-coppa-ftc-creators-videos-childrens-privacy-regulations.
[5] *NPRM* at 2037.
[6] *See* 15 U.S.C. § 6502(a)(1) (providing that "[i]t is unlawful for an operator of a website or online service directed to children, or any operator that has actual knowledge that it is collecting personal information from a child, to collect personal information from a child in a manner that violates the regulations prescribed under subsection (b)").
[7] *See NPRM* at 2042.
[8] 15 U.S.C. § 6502(a)(1).
[9] Privacy for America, *Principles For Privacy Legislation*, https://www.privacyforamerica.com/overview/principles-for-privacy-legislation/ [hereinafter *Privacy for America*].
[10] *Id.* at 4, 17-29.

in service of ensuring that children have meaningful access to a wide range of online content and that parents are able to make meaningful and informed choices on behalf of their children. As recognized by the Commission in prior COPPA rulemakings, the Internet offers children opportunities for learning, recreation, and communication.[11] Research also shows that Internet use among children can increase learning opportunities and build digital skills.[12] In light of such benefits, the Commission should take care to ensure that a range of online content remains accessible to children, and that the necessary protections for children do not hamper the ability of teens and adults to engage with and access online resources.

Our comments below address the following matters: (I) preserving responsible data practices that do not, and should not, require verifiable parental consent; (II) proposed new factors in the "website or online service directed to children" and how these will unduly expand the reach of the COPPA Rule and increase uncertainty in its application; (III) providing meaningful notices and consents for parents; (IV) proposed content-based restrictions on speech that likely violate the First Amendment; and (V) additional definitional considerations raised by the NPRM.

I. The COPPA Rule should permit responsible data practices without verifiable parental consent.

Privacy for America supports responsible data practices across the Internet and agrees that personal information collected from children should be subject to strong protections. Many of those reasonable, responsible, and essential practices should not require verifiable parental consent because they represent a low risk of harm to a child and provide immense benefits in return. We agree with the Commission that specific, responsible data practices that support the internal operations of an operator's property do not require verifiable parental consent.

a. The Commission appropriately identifies responsible data practices as "support for the internal operations of the website or online service."

Privacy for America supports the Commission's recognition that responsible uses of personal information fall within the "support for internal operations" exception to COPPA's parental consent requirement. In establishing the support for internal operations exception, the Commission in effect made a determination that uses of data falling within this exception are "appropriate" and that benefits to children provided through such uses are not outweighed by potential risks to privacy and security.[13] We agree with the Commission's assessment that ad attribution, payment and delivery functions, optimization, statistical reporting, fraud prevention, product improvement, and personalization meet this test.[14] Practices like these provide myriad benefits to children and pose minimal risk.

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[11] Children's Online Privacy Protection Rule, 64 Fed. Reg. 22750, 22750 (proposed Apr. 27, 1999).
[12] UNICEF, *Done right, internet use among children can increase learning opportunities and build digital skills* (Nov. 27, 2019), available at https://www.unicef.org/press-releases/done-right-internet-use-among-children-can-increase-learning-opportunities-and-build.
[13] *See* 15 U.S.C. § 6502(b)(2)(C)(ii).
[14] *NPRM* at 2045.

Using persistent identifiers for personalization, for example, allows operators to provide dynamic learning experiences. These identifiers may include learning-focused experiences, like educational apps that provide specific content based on a user's engagement and performance, among other experiences desired by consumers. Additionally, it is inherently reasonable for operators to use persistent identifiers to improve their products, engage in statistical reporting, and prevent fraud. If these uses were not permitted, the quality and safety of child-directed properties would be jeopardized.

Finally, numerous practices that the Commission identifies are essential for functional advertising. Digital advertising provides countless benefits to consumers and competition,[15] and contextual advertising is one of the limited means by which operators of child-directed properties can offer these valued products and services at no- or low- cost to families.[16] Ad attribution and optimization, for instance, allow marketers to determine which advertising campaigns are successful and to improve campaigns. If these practices were not permitted on child-directed properties absent parental consent, online operators would be unable to monetize child-directed properties without requiring payment from users, which would likely stifle the creation and maintenance of child-directed content. Similarly, payment and delivery functions are so fundamental to digital advertising that contextual advertising simply could not occur without these practices. Given the essential nature of these practices, it is therefore appropriate that parental consent is not required when they support the internal operations of an operator.

b. The COPPA Rule should continue to permit contextual advertising on child-directed properties.

To support the availability of child-directed content, the Commission rightly proposes to continue to permit contextual advertising on child-directed properties and not take action that would limit this form of advertising. Many operators rely on contextual advertising as a means to support low- or no-cost online content, and we appreciate the Commission's recognition of contextual advertising as an avenue for creating and funding the creation of valuable products and services meant to enhance and enrich children's online experiences.[17]

Under the support for internal operations exception, the COPPA Rule has allowed limited personal information to be collected and used to serve contextual advertising for over a decade. The monetization available through contextual advertising though limited enables many child-directed properties to be widely available to families.[18] While more data-driven forms of advertising provide substantially greater compensation to content creators,[19] contextual

[15] For example, the advertising-supported Internet economy contributed $2.45 trillion—or 12 percent—to the United States' gross domestic product ("GDP") in 2020. John Deighton and Leora Kornfeld, *The Economic Impact of the Market-Making Internet*, Interactive Advertising Bureau, 5 (Oct. 18, 2021), https://www.iab.com/wp-content/uploads/2021/10/IAB_Economic_Impact_of_the_Market-Making_Internet_Study_2021-10.pdf.
[16] *See NPRM* at 2043.
[17] *Id.* at 2043.
[18] *See id.* at 2042-2043 (addressing commenters' concerns regarding lost revenue from targeted advertising resulting in a "reduction of available child-appropriate content online due to operators' inability to monetize such content" and referring to contextual advertising as an avenue for monetization).
[19] While contextual advertisements support the ability of operators of child-directed properties to offer free or low-cost access to such properties, the support offered by contextual advertising is far less than the revenues that interest-based advertising provides to the wider Internet marketplace and to those operators that obtain verifiable parental

advertising as allowed under the COPPA Rule has been proven to be an incentive for innovative services to be created. Further restrictions on advertising supported services that are subject to COPPA would place more services behind paywalls accessible by only those with resources to pay—or prevent the creation of those services altogether.

This outcome is highlighted by a study examining the impact of the 2019 YouTube COPPA settlement on "Made for Kids" ("MFK") videos.[20] That study found that almost 42% of channels previously offering some MFK content moved to offering no MFK content after the settlement was imposed.[21] As the Commission knows, the settlement made clear that only contextual advertising done in compliance with COPPA is permissible on child-directed MFK content.[22] This study suggests that even the limited monetization available through contextual advertising was not "worth it" to many kids content creators, harming the variety and substantive choices made available to children and their parents. Further limiting contextual advertising could prove devastating for child-directed content and reduce children and families' access to such content. For example, the COVID-19 pandemic proved the importance of online content for children, and the ad-supported model allowed families of all income levels to access that content. Further, reports indicate that popular content creators rely on advertising as the source of revenue that allows them to create enriching and educational content for children.[23] We strongly encourage the Commission not to consider changes to the COPPA Rule's treatment of contextual advertising.

II. The Commission should only consider factors within an operator's control when evaluating the nature of a property and should not conflate a property being "appropriate" for children with it being "directed" to children.

The Commission states that it does not intend to expand the reach of the COPPA Rule by revising the "website or online service directed to children" to include additional factors.[24] However, the proposed addition of several new factors for consideration in this definition would lead to such an outcome, as well as conflating the alleged appropriateness of online content as somehow indicative of its intended audience.

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consent. Studies have shown the substantial value to both operators and consumers offered by interest-based advertising, with one study finding a 52% drop in publisher revenue when interest-based cookies were not present. Given the limitation on monetization already in place for children's sites, further restrictions on contextual advertising may well prove devastating. *See* Mastria, Lou, *New Study Shows Ad Revenue Benefit through Cookies – Reinforcing Previous 2014 DAA Research: We Can Have Both Personalization & Ubiquitous Privacy Protections*, DIGITAL ADVERTISING ALLIANCE (Sept. 5, 2019), available at https://digitaladvertisingalliance.org/blog/new-study-shows-ad-revenue-benefit-through-cookies-%E2%80%93-reinforcing-previous-2014-daa-research-we.

[20] Cooper, James C., Lin, Tesary, and Johnson, Garrett, *COPPAcalypse? The YouTube Settlement's Impact on Kids Content Creation*, UNIV. PENN. (Sept. 1, 2022).

[21] *Id.* at 6.

[22] *See Fed. Trade Comm'n v. Google LLC and YouTube LLC*, No. 1:19-cv-02624, 12 (D.D.C. Sept. 4, 2019).

[23] *See, e.g.*, Oxenden, McKenna, *Now Let's Be a Starfish!: Learning With Ms. Rachel, Song by Song*, N.Y. TIMES (June 30, 2023) ("'Hardly any money has been spent on promoting or advertising "Songs for Littles,"' Ms. Griffin Accurso said. Though she is also wildly popular on other social media platforms like TikTok and Instagram, Ms. Griffin Accurso has the most followers on YouTube, which remains the platform where her work generates the most revenue from paid advertisements. The business became so successful in recent months that Ms. Griffin Accurso's husband, Aron Accurso, quit his full-time job as associate musical director and associate conductor for "Aladdin" on Broadway.").

[24] *See NPRM* at 2036-2037.

Moreover, by adding significant new factors to an already lengthy list, the Commission would further muddy the waters for entities that seek to operate on the Internet. Operators of online properties today already face substantial uncertainty regarding COPPA applicability, in part due to the Commission's novel interpretations of the existing factors in the COPPA Rule. The addition of new, vague factors is likely to increase such uncertainty and chill innovation and speech online, as well as materially burden adults' access to speech. As factors proliferate, general audience operators may feel compelled to take risk reducing measures like adding age screens, increasing the burden on speech for adults seeking to access those properties.[25] This risk-adverse activity could lead to reduced access to general audience properties, as operators may choose to block even potential child users even if that action would mean that some adult users are blocked from access.[26] This result would be an unfortunate outcome, as general audience properties provide significant value to audiences of all ages, including by offering news, educational material, and other types of useful information of widespread interest.

a. The definition of a "website or online service directed to children" should continue to consider only information within an operator's control.

The Commission proposes two new factors to the definition of "website or online service directed to children" that incorporate information outside of operators' knowledge and control: "the age of users on similar websites or services" and "reviews by users or third parties."[27] These two factors significantly deviate from the current factors—which reflect information within an operator's control, such as subject matter and music selection—and create the potential for the Commission to consider activity on online properties that an operator has no notice of when assessing the operator's COPPA compliance.

For instance, what the Commission and what an operator view as "similar" properties may vary greatly. There is no limiting principle as to what the Commission could deem "similar" in an enforcement context. Further, even if an operator and the Commission agree that a specific property is similar, an operator would not know the ages of users on such a property. An operator cannot reasonably be expected to incorporate such information into its own internal audience analyses without engaging in extensive research of all potentially similar properties and this type of data may not always be obtainable.

Indeed, knowing the Commission may evaluate the "age of users on similar websites or services" could effectively establish a duty of operators to investigate other online services—which conflicts with longstanding guidance. Since the COPPA Rule was first issued, the Commission has maintained that operators of general audience properties have no duty to

[25] Regulations leading to this outcome would likely violate the First Amendment. *See Ashcroft v. American Civil Liberties Union*, 542 U.S. 656, 667, 673 (2004) (holding that the Child Online Protection Act likely violated the First Amendment when means of preventing minors' access to harmful online content that did not burden adults' access to the same were likely available).
[26] *See COPPA FAQ* at H.3. (explaining that general audience websites or online services may "block children from participating[.]").
[27] *NPRM* at 2047.

investigate the ages of visitors to their properties.[28] However, by adding the "age of users on similar websites or services" as a factor the Commission will consider in determining whether a property is directed to children, general audience operators could essentially be required to investigate the age of visitors on third-party services that could possibly be considered "similar" to its own services—even if not the age of their *own* visitors. As it is also unclear how operators could conduct such investigation, this factor would create risk that operators could not readily mitigate. The Commission therefore should not impose such burdens and should not include this factor in the COPPA Rule.

Similarly, the inclusion of "reviews by users or third parties" raises the potential that the Commission will base enforcement on reviews of which the operator may not be aware. Popular properties may have hundreds of thousands, if not millions, of reviews spread across countless locations. Out of the top ten most downloaded paid iPhone games of 2023, six have over 100,000 reviews in the Apple App Store alone.[29] Operators may not have any notice of third-party reviews not on centralized platforms, as reviews may be spread across countless online properties and social media platforms. A blogger, for instance, could post a review that the operator may never learn of but that the Commission may hold as evidence. The proposed inclusion of this factor would indicate that operators should comb the Internet for references to their properties and assess every review to see if any reviews shed light on audience composition. This requirement would be incredibly burdensome for operators of all sizes, and such an effort may be entirely infeasible for small operators.

b. Evaluating the nature of a website or online service based on representations to third parties may conflate whether a property is "appropriate" for children with whether a property is "directed" to children.

The Commission also proposes to evaluate "representations to consumers or to third parties" when assessing if a website or online service is directed to children.[30] However, representations to consumers or third parties often refer to the appropriateness of the content rather than the intended audience of the content. Game developers, for instance, are required to answer age-related questions when a game undergoes review by the Entertainment Software Rating Board to receive a Rating Category.[31] The stated purpose of the Rating Category is to "suggest age-appropriateness."[32] Similarly, a cooking show may be rated "TV-G" because it is suitable to watch with children in the room, but that does not make the show directed to children.

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[28] FED. TRADE COMM'N, *Complying with COPPA: Frequently Asked Questions*, H.1., available at https://www.ftc.gov/business-guidance/resources/complying-coppa-frequently-asked-questions (last visited Feb. 21, 2024) ("The Rule does not require operators of general audience sites to investigate the ages of visitors to their sites or services. See 1999 Statement of Basis and Purpose, 64 Fed. Reg. 59888, 59892.") [hereinafter *COPPA FAQ*].

[29] APPLE, *Apple spotlights the top apps and games of 2023 on the App Store* (Dec. 12, 2023) https://www.apple.com/newsroom/2023/12/apple-spotlights-the-top-apps-and-games-of-2023-on-the-app-store/. As of February 2024, the following apps from the top ten paid iPhone games of 2023 had over 100,000 Apple App Store reviews: Minecraft (approximately 647,000), Heads Up! (approximately 191,000), Geometry Dash (approximately 180,000), Bloons TD 6 (approximately 278,000), MONOPOLY (approximately 166,000), and Plague Inc. (approximately 142,000).

[30] *NPRM* at 2047.

[31] Entertainment Software Rating Board, *Ratings Process*, available at https://www.esrb.org/ratings/ratings-process/ (last visited Feb. 21, 2024) [hereinafter *ESRB*].

[32] *ESRB*, *About ESRB*, available at https://www.esrb.org/about/ (last visited Feb. 28, 2024).

Therefore, age-related representations made to third parties as part of such processes are not intended to bear on child-directedness.

The Commission's potential reliance on representations like these conflate appropriateness and directedness. As the Commission has stated, "a general audience site does not become 'mixed audience' just because some children use the site or service."[33] Similarly, a general audience property should not become a mixed audience property just because the property does not include mature content and is presented as appropriate for children. Many of the casual mobile games that are popular on Apple's App Store, for example, are "appropriate" for children because they have accessible mechanics and low levels of violent content, resulting in a rating of "4+" or "9+" or "12+." However, those same games are not necessarily "directed" to children simply by being available to, and playable by, young gamers of varying skill levels. Additionally, any relevant information gleaned from representations to consumers and third parties is covered by an existing factor in the definition of a "website or online service directed to children"—"evidence regarding the intended audience."[34] Therefore, we recommend the Commission not add "representations to consumers or third parties" to this definition.

III. Notices and consents should be meaningful, not cumbersome and overly burdensome, and the Commission should enhance flexibility regarding consent.

Privacy for America is supportive of appropriate measures that enhance accountability, transparency, and consumer control.[35] Certain proposals in the NPRM will not meaningfully enhance accountability, transparency, or control. They would instead have negative consequences, such as creating confusion for both parents and operators, incentivizing lengthy privacy notices, and harming competition. In addition, in this section we encourage the Commission to provide additional flexibility regarding consent by permitting "text plus" consent and by clarifying that teachers are one of the school employees able to provide consent under the new "school authorization" exception.

a. Modifying the COPPA Rule to require "separate" consent for disclosures of personal information does not address identified harms and would impose unnecessary burdens on parents.

The Commission's proposal to require a "separate" verifiable parental consent for disclosure of personal information does not address particular harms and is unnecessarily burdensome on parents. Today, the COPPA Rule requires an operator to give parents the option to consent to the collection and use of a child's personal information without consenting to the disclosure of such information.[36] The NPRM proposes that operators would now need to obtain a "separate" verifiable parental consent to disclosures of personal information unless that disclosure is "integral" to a service.[37] However, the Commission has not identified why the current consent requirement insufficiently protects the privacy interests of children.

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[33] *COPPA FAQ* at D.3.
[34] 16 C.F.R. § 312.2.
[35] *Privacy for America* at 5.
[36] 16 C.F.R. § 312.5(a)(2).
[37] 16 C.F.R. § 312.5(a)(2) (proposed).

Instead, the Commission makes clear in the press release accompanying the NPRM that this proposal takes direct aim at targeted advertising.[38] While the Commission's proposal would require "separate" consent for disclosures for various data practices, including targeted advertising, the Commission indicates that other disclosures that permit direct contact with a child would *not* require separate consent. Indeed, the Commission explains that separate consent would not be necessary for online messaging forums which directly enable children to share information with other users if those forums are "integral" to the service.[39] It appears that the Commission's proposal is not focused on addressing specific potential harms, but is instead animated by its dislike of data sharing in general[40] and its particular dislike of a specific business practice that already requires parental consent to occur on properties subject to COPPA. The Commission's proposal will hinder many valuable and reasonable practices beyond targeted advertising, such as independent research activity, that rely on parental consent within the COPPA framework.

Such a sweeping change is unnecessary given the current granular consent requirement in the COPPA Rule. Specifically, the COPPA Rule already requires operators to offer granular choice to parents for disclosure of personal information.[41] A parent seeking to provide consent for the collection, use, and disclosure of personal information should not be required to do this in "separate" consents. A "separate" consent for disclosures would add only friction to the process of parents signing their child up for requested services. This additional friction may result in parents abandoning the consent process, even if the parent would otherwise permit the disclosure of personal information, and in doing so, make it even more challenging for operators to obtain consents vital to their business operations. Given the COPPA Rule's existing granular choice requirements, the proposed "separate" consent requirement for disclosures would create new burdens for businesses but provide no discernable benefit for parents or for the privacy interests of children not already addressed by the current COPPA Rule. We strongly encourage the Commission not to require "separate" consent for disclosure as proposed.

b. The proposed requirement to provide a notice regarding internal operations would result in long, jargon-filled notices.

To avoid lengthy privacy notices, the Commission should not require operators to disclose the specific internal operations they use a persistent identifier for and associated internal controls they place on such uses in those notices. The Commission has criticized privacy notices as often "[being] opaque, lack[ing] uniformity, and [being] too long and difficult to navigate," and has advocated for clearer and shorter privacy notices.[42] The Commission also opined in its Advance Notice of Proposed Rulemaking on Commercial Surveillance and Data Security that

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[38] FED. TRADE COMM'N, *FTC Proposes Strengthening Children's Privacy Rule to Further Limit Companies' Ability to Monetize Children's Data* (Dec. 20, 2023), available at https://www.ftc.gov/news-events/news/press-releases/2023/12/ftc-proposes-strengthening-childrens-privacy-rule-further-limit-companies-ability-monetize-childrens.

[39] *NPRM* at 2051, FN 195.

[40] *Id.* at 2051.

[41] 16 C.F.R. § 312.5(a)(2).

[42] FED. TRADE COMM'N, *Protecting Consumer Privacy in an Era of Rapid Change*, 83 (2010), available at https://www.ftc.gov/sites/default/files/documents/reports/federal-trade-commission-bureau-consumer-protection-preliminary-ftc-staff-report-protecting-consumer/101201privacyreport.pdf.

"[m]any consumers do not have the time to review lengthy privacy notices[.]"[43] Privacy for America supports removing burdens from consumers with regard to privacy[44] and, given the Commission's concerns with lengthy notices, the proposed requirement regarding notice of specific internal operations is counterproductive to its own goals.[45]

This proposal will incentivize operators to provide long notices that include technical information—exactly the type of notices the Commission criticizes. The COPPA Rule already limits what "internal operations" for which an operator is allowed to use a persistent identifier. These are a set of uses that the Commission recognizes are reasonable and essential for the provision of a service, and as such, these uses do not require parental notice or consent. As consent is appropriately not required for such uses, disclosing what specific uses the operator leverages a persistent identifier for, and how it technically limits those uses, would neither achieve the Commission's stated transparency aims nor provide meaningful information to parents.[46] Additionally, the Commission has recognized that the list of "internal operations" in the COPPA Rule does not encompass all such uses, and requiring disclosure of all "internal operations" will incentivize operators to create laundry lists of all potentially relevant data practices to avoid running afoul of the COPPA Rule.[47] This proposal would merely result in longer, more complicated notices without providing meaningful benefits to parents.

The Commission explains that this proposal will help "ensure that operators follow the use restriction" under the COPPA Rule. However, the restrictions on how an operator may leverage the "internal operations" exception is independently imposed by the COPPA Rule,[48] and the Commission provides no support for its position that publicly describing the means used to restrict uses will increase compliance beyond what is already legally required. This proposal would work counter to many other policy objectives the Commission champions and create additional enforcement risk for operators that are already required to limit their use of data. We encourage the Commission not to implement this new notice requirement.

c. Setting forth the identities or specific categories of third parties and purposes of disclosure to such parties in the direct notice to parents will harm competition and lead to confusing notices.

The Commission's proposal that operators disclosing personal information to third parties set forth either the "identities or specific categories of third parties…and the purposes for such disclosure"[49] in the direct notice will lead to long notices that are burdensome on both parents and operators and harm competition among operators. Privacy for America supports accountability and transparency and agrees that notices can promote both,[50] but notices must balance disclosure with consumer benefits and the need for a competitive marketplace.

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[43] Trade Regulation Rule on Commercial Surveillance and Data Security, 87 Fed. Reg. 51273, 52174-51275 (proposed Aug. 22, 2022).
[44] *See Privacy for America* at 3.
[45] *NPRM* at 2045.
[46] *See id.* at 2045.
[47] *Id.* at 2044-46.
[48] 16 C.F.R. §§ 312.2 (defining "support for the internal operations of the website or online service"); 312.5(7).
[49] *See NPRM* at 2049; 16 C.F.R. § 312.4(c)(iv) (proposed).
[50] *See Privacy for America* at 5.

Requiring operators to either provide lists of specific third parties or lists of specific categories of third parties does not advance accountability or meaningful transparency and would instead harm competition.

Under this proposal, operators likely would be incentivized to list all potential third parties, or categories of third parties, and all potential purposes for disclosures to avoid the possible need to notify parents and obtain new consent if the operator's practices changed. In addition, the Commission does not provide any support for its assertion that such lists would help parents make an informed decision about whether to provide consent to an operator. Operators are already required to provide parents with information on the collection, use, and disclosure of personal information. It is not clear why knowing the specific third parties—or even specific categories of third parties— to which an operator discloses information would be meaningful to parents. Such a notice would further enhance burdens on both operators preparing notices and parents who are tasked with reading them, while also providing no substantial benefit to children's privacy. Our Framework supports shifting the burden away from individuals to read lengthy privacy notices,[51] and the Commission should also take steps to reduce this burden. Therefore, we recommend the Commission not implement this proposal.

The Commission's proposal would also harm innovation and competition. Operators that choose to list all specific third parties would be discouraged from engaging with any new vendors to avoid being required to update the notice, which could have a chilling effect on competition among service providers. Additionally, even operators that chose to list "specific categories" of third parties would be discouraged from relying on new vendor types to avoid updating the notice, which may inhibit the adoption of new technologies and disincentive innovation. Operators may also be incentivized to work with only large vendors that can provide a variety of services to avoid updating the notice or limiting the number of third parties contained in such a list, potentially harming small businesses.

Further, providing even the option of identifying specific third parties could increase the risk of anticompetitive behavior. Operators that choose this compliance path may reveal sensitive commercial information about themselves and their partners by disclosing these lists, namely, business relationships that would otherwise be confidential. If an operator listed a specific third party, the operator's competitors could use this information to gain insight into business relationships that would otherwise be inaccessible and use this information in anticompetitive ways. No proposal by the Commission should harm competition in this manner—this proposal should not be included in the final rule.

d. "Text plus" consent should be permitted when personal information is not "disclosed."

Privacy for America supports the Commission's explicit recognition of text messaging as a means by which operators can obtain parental consent.[52] Understanding that one of the Commission's aims in this rulemaking is to respond to changes in technology,[53] it is appropriate

[51] *See id.* at 3.
[52] *See NPRM* at 2040.
[53] *Id.* at 2034.

to expressly permit parents to use text messages to provide consent. When the Commission commenced its last update to the COPPA Rule in 2011, about 83% of American adults owned a cell phone.[54] Today, 97% of American adults own a cell phone.[55] Given the ubiquitous nature of cell phones and text message communication, enabling parents to provide verifiable parental consent via text message is aligned with parental expectations.

Indeed, the NPRM contemplates the use of a mobile telephone number in connecting with obtaining parental consent.[56] We encourage the Commission to include an explicit provision permitting a "text plus" consent method. Since the COPPA Rule was first adopted in 1999, the Commission has recognized "email plus" as a method by which parents can provide consent when personal information will be used only for internal purposes.[57] Like "email plus," a "text plus" consent method would be "easy for companies and parents to use, easy to understand, effective, and affordable."[58] Further, "text plus" would align with parents' expectations—adults are accustomed to verification methods that rely on text messaging. As the Commission advances its rulemaking, the Commission should build on its text messaging proposal by also permitting "text plus" consent when personal information will not be disclosed. For example, the Commission already takes steps towards permitting this option by adding a "mobile telephone number" to the definition of "online contact information." We suggest that the Commission ensure that "text plus" is recognized by including language in 16 C.F.R. § 312.5(b)(2)(vi) to formally recognize "text plus."

e. Clarifying that teachers can provide consent under the "school authorization" exception will help ensure students have access to important resources.

We appreciate the Commission's intent to codify its guidance about the COPPA Rule's application to the educational technology ("ed tech") sector.[59] Ed tech has become an increasingly essential tool for both educators and children and was an invaluable resource during the COVID-19 pandemic. By formally recognizing that schools, State educational agencies, and local educational agencies can provide consent on behalf of parents, the Commission's proposed codification of its ed tech guidance will enable educators to continue providing these resources to children and enhance educational opportunities.[60] Importantly, given the critical role ed tech

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[54] Smith, Aaron, *How Americans Use Text Messaging*, PEW RESEARCH CENTER (Sept. 19, 2011), available at https://www.pewresearch.org/internet/2011/09/19/how-americans-use-text-messaging/.
[55] PEW RESEARCH CENTER, *Mobile Fact Sheet* (Jan. 31, 2024), available at https://www.pewresearch.org/internet/fact-sheet/mobile/.
[56] *NPRM* at 2040 ("[Adding a mobile telephone number to the non-exhaustive list of identifiers that constitute 'online contact information'] would allow operators to collect and use a parent's or child's mobile phone number in certain circumstances, including in connection with obtaining parental consent through a text message… The Commission agrees that permitting parents to provide consent via text message would offer them significant convenience and utility.").
[57] *E.g.*, Children's Online Privacy Protection Rule, 64 Fed. Reg. 59888, 59909 (Nov. 3, 1999) (to be codified at 16 C.F.R. Part 312).
[58] Children's Online Privacy Protection Rule, 78 Fed. Reg. 3972, 3991 (Jan. 17, 2013) (to be codified at 16 C.F.R. Part 312).
[59] *NPRM* at 2043-2044.
[60] *Id.* at 2055 ("After careful consideration of the comments, the Commission proposes codifying in the Rule its long-standing guidance that schools, State educational agencies, and local educational agencies may authorize the collection of personal information from students younger than 13 in very limited circumstances; specifically, where the data is used for a school-authorized education purpose and no other commercial purpose.").

serves to a variety of types and levels of schooling, we agree with the Commission that a flexible approach regarding who at schools can provide authorization under the "school authorization" exception is appropriate.[61]

The Commission recognizes that schools may obtain and implement ed tech in different ways.[62] In some schools, teachers may obtain ed tech solutions for their classroom even if the school does not use the solution more widely due to the specialized nature of that classroom's needs. Indeed, certain ed tech solutions may be designed for individual teachers rather than schools more generally. To better account for such circumstances, the Commission should clarify that teachers have authority to provide consent for the collection of a child's personal information for a school-authorized purpose, as long as that consent is provided following the other notice and contractual requirements associated with a school's authorization established in the NPRM. Doing so would help to ensure that those closest to children's educational needs are able to readily implement solutions that will help students succeed. Finally, as the Commission continues to advance ed tech compliance under the COPPA Rule, we encourage the Commission to strengthen its work alongside other regulators, such as the Department of Education and state education boards, to harmonize requirements and guidance related to student privacy to the extent possible.

IV. The Commission may not restrict the content of online communications as proposed.

The proposed restrictions on use of information to "encourage or prompt use" of online properties and potential limitations related to "personalization" indicate the Commission's belief that certain types of speech are unsuitable for children absent verifiable parental consent. However, as explained in this Section, even if this is the Commission's opinion, restricting access to protected speech in these ways likely violates the First Amendment. The Supreme Court has determined that "[s]peech that is neither obscene as to youths nor subject to some other legitimate proscription cannot be suppressed solely to protect the young from ideas or images that a legislative body thinks unsuitable for them."[63] In fact, the Court has stated that even in regard to highly sensitive speech "the objective of shielding children does not suffice to support a blanket ban if the protection can be accomplished by a less restrictive alternative."[64] Further, the Supreme Court has made clear that children have "a significant measure of First Amendment protection"[65] and that the government does not have "free-floating power to restrict the ideas to which children may be exposed."[66] The Commission must respect the constitutional bounds of its authority in any proposed rulemaking.

[61] *Id.* at 2057.
[62] *Id.*
[63] *Erznoznik v. Jacksonville*, 422 U. S. 205, 213–214 (1975).
[64] *United States v. Playbook Entertainment Group, Inc.*, 529 U.S. 803, 804 (2000).
[65] *Id.* at 212–213.
[66] *See Brown v. Entertainment Merchants Ass'n*, 564 U.S. 786, 794 (2011).

a. The Commission's proposed restriction on information used to "encourage or prompt use of a website or online service" likely violates the First Amendment.

The Commission proposes to prohibit the use of online contact information and persistent identifiers to "encourage or prompt use of a website or online service" under the "multiple contact" and "support for the internal operations" exceptions to verifiable parental consent.[67] As explained below, these proposals would unduly restrict protected speech and violate the First Amendment.

The proposed prohibitions are content-based as they would disfavor protected speech with particular content,[68] such as marketing speech that encourages use of an operator's property and speech that intends to "maximize user engagement."[69] Restrictions on the content of protected speech are presumptively invalid.[70] Only restrictions that pass strict scrutiny may be upheld.[71] However, to withstand strict scrutiny, the Commission bears the burden of both identifying a compelling interest and narrowly drawing a solution to serve that interest.[72]

It is unlikely the Commission could meet this standard for this proposed restriction. First, the Commission has identified no compelling state interest that would be served by these limitations. At best, the Commission's interest is aiding parental control and authority over how an operator engages with a child. Even so, the Supreme Court has expressed its "doubts that punishing third parties for conveying protected speech to children just in case their parents disapprove of that speech is a proper governmental means of aiding parental authority."[73] Second, even if the Commission had a compelling interest, this solution is not narrowly drawn and is overbroad. For instance, this restriction could seemingly encompass any contact with a child user, as the lack of guardrails provided by the Commission could render any contact with a child to be viewed as "prompting" use of a service. Additionally, many properties today offer features that seek to engage users, educate users, and streamline and improve the user experience. Educational apps, for example, may notify the user to keep the child on track with their studies, while other apps intend to promote learning by prompting children to complete educational content before accessing entertainment content. Given the potentially broad application of the Commission's proposed restriction, this proposal could prohibit the implementation of such features absent parental consent.

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[67] *NPRM* at 2045, 2049.

[68] We understand that operators could collect persistent identifiers or online contact information to prompt and encourage use of the property so long as operators obtained verifiable parental consent under the proposed rule. However, the fact that operators could use information for this purpose if consent is obtained does not negate the fact that the proposed restrictions implicate—and violate—the First Amendment. Indeed, "an individual's right to speak is implicated when information he or she possesses is subjected to 'restraints on the way in which the information might be used' or disseminated." *Sorrell v. IMS Health Inc.*, 564 U.S. 552, 568 (2011) (citing *Seattle Times Co. v. Rhinehart*, 467 U.S. 20, 32 (1984); *Bartnicki v. Vopper*, 532 U.S. 514, 527 (2001); *Florida Star v. B. J. F.*, 491 U.S. 524 (1989); *New York Times Co. v. United States,* 403 U.S. 713 (1971) (*per curiam*)).

[69] *See Sorrell v. IMS Health Inc.*, 564 U.S. 552, 564 (2011) ("The statute thus disfavors marketing, that is, speech with a particular content."); *NPRM* at 2045, 2049.

[70] *E.g.*, *R.A.V. v. City of St. Paul*, 505 U.S. 377, 382 (1992) ("Content-based regulations are presumptively invalid").

[71] *Brown*, 564 U.S. at 799.

[72] *Id.*

[73] *Id.* at 802.

This restriction would therefore act as a blanket prohibition on speech rather than a narrowly drawn restriction. In addition, not all parents are concerned about speech that prompts or encourages their children to use a specific property and restricting speech "just in case" a parent disapproves of it is inappropriate.[74] Therefore, the Commission should not move forward with these proposals.[75]

b. Limiting the "support for the internal operations" exception to personalization only based on "user-driven action" would likely violate the First Amendment.

Question 9 in the NPRM addresses modifying the "support for the internal operations of the website or online service" definition to limit personalization to "user-driven" actions.[76] Such a modification would similarly restrict the content of operators' properties—and in doing so, limit the dissemination of protected speech to children in violation of the First Amendment. The Commission should not consider this modification.

As described above in Section IV.a of these comments, content-based restrictions presumptively violate the First Amendment and only restrictions that pass strict scrutiny are valid.[77] Like with the proposed restrictions related to "encouraging or prompting" use of online properties described above, limiting personalization to "user-driven" actions would impose a content-based restriction that is unlikely to withstand strict scrutiny review.[78] If the Commission proceeded with this modification, children would have ready access to limited personalized content. However, other speech—namely content personalized based on non-"user-driven" actions—would be inaccessible unless parents provided verifiable consent. Additionally, "user-driven" is not a defined or understood concept, so the potential restriction is seemingly boundless. We strongly discourage the Commission from limiting personalization under the "support for the internal operations" exception to "user-driven" actions.

V. The Commission should refine the proposed inclusion of "biometric identifiers" in the definition of "personal information" and not modify the definition of "online contact information" to include screen or user names.

The Commission also contemplates changes to the definitions of "personal information" and "online contact information." As explained below, any addition of "biometric identifiers" to the definition of "personal information" should be limited to identifiers used to identify a child. Additionally, the Commission should not consider modifications to the definition of "online

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[74] *See id.* at 804 ("While some of the legislation's effect may indeed be in support of what some parents of the restricted children actually want, its entire effect is only in support of what the State thinks parents ought to want. This is not the narrow tailoring to "assisting parents" that restriction of First Amendment rights requires.").

[75] Even if a court deemed the restriction to be content-neutral, the restriction would be unlikely to be upheld under intermediate scrutiny. The Commission has not identified how this modification would further an important or substantial governmental interest and that such an interest is unrelated to the suppression of free expression. Additionally, the Commission has given no indication that the restriction on First Amendment freedoms is no greater than is essential to the furtherance of such interest. *See, e.g.*, *United States v. O'Brien*, 391 U.S. 367, 377 (1968).

[76] *NPRM* at 2070.

[77] *See e.g.*, *R.A.V.*, 505 U.S. at 382 (1992).

[78] For reasons similar to those addressed in Footnote 75 above, a restriction on "user-driven" would be unlikely to be upheld under intermediate scrutiny if a court deemed this restriction to be content-neutral.

contact information" to include screen and user names that could be used to permit contact on unrelated properties.

a. The definition of "biometric identifier" should conform to well understood definitions.

To the extent the Commission adds "biometric identifiers" to the definition of "personal information," the term should be defined based on the use of biometric information to identify an individual and permit the physical or online contacting of a specific individual.[79] The Commission's proposed definition states that it covers biometric information that "*can* be used for the automated or semi-automated recognition of an individual,"[80] potentially sweeping in a broad swath of data that could potentially be used for such purposes. This is too broad a definition and out of step with the many legislative definitions of a biometric identifiers that focus on the use of such data to identify an individual.

For instance, as states continue to enact consumer data privacy laws that require consent to process biometric identifiers, most states are expressly distinguishing between biometrics themselves and biometrics that are used to identify an individual.[81] Under these laws, consent is not needed to process biometrics unless the biometrics are used to identify a specific individual. Similarly, Privacy for America's Framework would require consent to collect biometric identifiers that are used to identify a specific individual.[82] We propose that the Commission's definition similarly focus on the use of biometric information for the identification and ability to permit the physical or online contacting of a child to establish clear, consistent protections for children.

Not only is focusing on identification prudent, but it also is necessary. COPPA gives the Commission limited authority to establish other identifiers as "personal information." Specifically, COPPA provides that the Commission may identify other identifiers that permit "the physical or online contacting of a specific individual" as personal information.[83] Biometrics themselves do not permit the physical or online contacting of a specific individual unless an operator takes steps to use that information to identify a child in order to contact them. As such, the Commission should amend its proposed definition of biometric identifiers to be limited to when such information is used to identify a child in order to contact them.

b. The definition of "online contact information" should not be revised to include screen and user names that could permit contact on unrelated properties.

The Commission asks whether a screen or user name that is not used to contact a child user should be included within the definition of "online contact information" because such a

[79] 15 U.S.C. § 6501(8)(F).
[80] *NPRM* at 2041 (emphasis added).
[81] *E.g.*, Conn. Gen. Stat. § 42-515(4), (38) (defining "biometric data" as "data generated by automatic measurements of an individual's biological characteristics, such as a fingerprint, a voiceprint, eye retinas, irises or other unique biological patterns or characteristics that are used to identify a specific individual", and defining "sensitive data" to include "biometric data")); *id.* § 42-520(a)(4) (requiring consent to process sensitive data).
[82] *Privacy for America* at 22-23.
[83] 15 U.S.C. § 6501(8)(F).

name "could enable one user to contact another by assuming that the user to be contacted is using the same screen or user name on another website or online service that does allow such contact."[84] The Commission should not include this type of information within the scope of the COPPA Rule.

First, doing so would frustrate the Commission's larger data minimization goals. Many operators collect anonymous screen or user names to avoid collecting personal information, such as name or email address, when such information is not otherwise needed for a child to use the property. If these screen or user names were treated as "online contact information" for which operators need to obtain parental consent to collect, the incentive to avoid collecting name, email address, or similar information would no longer be present.[85] Second, the concerns raised by the Commission are speculative and would create uncertainty about what information is covered by the COPPA Rule. An operator is unlikely to know that a user's screen or username is the same across unrelated properties. Additionally, if an operator does not use a screen name to contact a child through their property further burdens should not be placed on their service simply because another operator may allow a screen name to be used to contact a child on a different service. An operator cannot know whether a screen name on another service can be used to contact a child on a different service—indeed the same screen name may be used by entirely different individuals across services. Imposing liability on an operator based on the potential actions of other operators is unreasonable and should not be included within the COPPA Rule.

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Thank you for the opportunity to provide comments on the NPRM. Please contact Stu Ingis, Counsel to Privacy for America, at singis@venable.com with questions regarding this submission.

Sincerely,

Privacy for America

[84] *NPRM* at 2070.

[85] This outcome is contrary to the Commission's statements in prior COPPA rulemaking. In the 2013 COPPA rulemaking, commentators expressed concern that a proposed update would limit the use of anonymous screen names to enable certain practices. In response, the Commission clarified that the COPPA Rule "permits operators to use anonymous screen and user names in place of individually identifiable information, including use for content personalization, filtered chat, for public display on a Web site or online service, or for operator-to-user communication via the screen or user name." Children's Online Privacy Protection Rule, 78 Fed. Reg. 3972, 3978-3979 (Jan. 17, 2013) (to be codified at 16 C.F.R. Part 312). However, including screen names that may otherwise be anonymous within the definition of "online contact information" would impact those same anonymous screen names, impeding operators' ability to conduct such important functions and increasing the likelihood that operators would begin using individually identifiable information for these functions.