

December 5, 2019

Joseph J. Simons
Chairman

Rohit Chopra
Commissioner

Christine S. Wilson
Commissioner

Noah Joshua Phillips
Commissioner

Rebecca Kelly Slaughter
Commissioner

Re: Request for Public Comment on the Federal
Trade Commission's Implementation of the
Children's Online Privacy Protection Rule

Dear Chairman Simons and Commissioners:

The undersigned 31 groups are pleased to submit this comment regarding the FTC's implementation of the Children's Online Privacy Protection Rule ("COPPA Rule"). As it considers how best to advance privacy and protect children, the FTC must first begin by using its authority under Section 6(b) of the FTC Act to answer critical questions about online digital advertising, children on general audience platforms, data brokers, and education technology that will inform the agency's approach. The FTC must not adopt any privacy-related rule or policy change unless and until it conducts the necessary studies.¹

The information marketplace that drives online digital advertising is extremely complicated, and 6(b) studies of these issues are long overdue. Websites, apps, platforms, and content providers all have access to a wealth of user information – including classes of information that constitute "personal information" under COPPA. Service providers collect this information to deliver functionality, but also to analyze performance and track, predict, and modify user behavior – including across multiple services and devices. Unnecessary data collection is common, transparency is rare, and misrepresentations about data practices are far too widespread. A comprehensive examination of these practices is severely needed.

¹ The FTC's 6(b) authority is intended for exactly this purpose – acquiring information and visibility into an area of commerce over which it has jurisdiction, such that any actions it takes are deliberate and based on full information. The agency has ordered a number of 6(b) investigations over the years, including an ongoing investigation in the privacy space: its inquiry into the privacy practices of broadband providers. *See, e.g.*, Press Release, Fed. Trade Comm'n, FTC Seeks to Examine the Privacy Practices of Broadband Providers (Mar. 26, 2019), <https://www.ftc.gov/news-events/press-releases/2019/03/ftc-seeks-examine-privacy-practices-broadband-providers> [<https://perma.cc/HF7S-MK8R>].

The FTC's current Notice of Inquiry seeking comments on the COPPA Rule further underscores the need for the requisite 6(b) studies. Many details about online operators' COPPA compliance practices are not known to the public due to a general lack of transparency, rendering it impossible for advocates, parents, and concerned citizens to answer many of the questions in the Commission's Notice. For example, a number of the questions the agency raises about the efficacy of certain mechanisms can only be answered with information that industry stakeholders solely have access to—the kind of information that both the FTC and the public must be able to evaluate without a filter.

While the agency has previously examined the issue of children's app disclosures on a smaller scale, it does not appear to have ever conducted a formal 6(b) inquiry into the collection and use of children's data.² That should change, and the FTC cannot base substantive policy decisions on the current dearth of details about how the information ecosystem functions. Rather, the FTC must conduct and complete a series of long-overdue studies to shed light on these opaque industries before it adopts any privacy-related rulemaking or major policy change.

The FTC should use its 6(b) authority to examine new methods of advertising to children

Advertising to children is a lucrative, booming business, and not enough is understood about these new methods of surveilling and monetizing children, or the impact that it has on their privacy and wellbeing.³ Cross-device identification has become ubiquitous, and makes it easier for advertisers to track children between devices.⁴ Ad attribution, the process of identifying user actions in an advertising

² See Press Release, Fed. Trade Comm'n, FTC Staff Conducts Follow Up Survey of Kids' Apps (Sept. 3, 2015), <https://www.ftc.gov/news-events/press-releases/2015/09/ftc-staff-conducts-follow-survey-kids-apps> (describing the 3 studies in February 2012, December 2012, and February 2015) [<https://perma.cc/4DDA-9UG3>].

³ See *PwC Kids Digital Media Report 2019 estimates global kids digital advertising market will be worth \$1.7bn by 2021*, SUPERAWESOME (June 11, 2019), <https://www.superawesome.com/2019/06/11/pwc-kids-digital-media-report-2019-estimates-global-kids-digital-advertising-market-will-be-worth-1-7bn-by-2021/> (estimating that the market for digital advertising to children would be worth \$1.7 billion by 2021) [<https://perma.cc/JDK2-XGLS>].

⁴ As an example, LiveRamp, a digital advertiser, describes how its "identity graph" reaches "more than 300 million matched mobile devices" combined with "100+ sources for offline, historical information," *Identity Graph & Data Matching*, LIVERAMP, <https://liveramp.com/our-platform/identity-graph/> [<https://perma.cc/TG7A-AZPP>]; see also Sebastian Zimmeck et al., *A Privacy Analysis of Cross-Device Tracking*, in 2017 PROC. 26TH USENIX CONF. SECURITY SYMP. 1391, <https://www.usenix.org/conference/usenixsecurity17/technical-sessions/presentation/zimmeck> (discussing the prevalence of cross-device tracking, and finding that leveraging user data from more than one device made it easy to accurately identify

transaction, has become more granular, and new “persona”-based techniques have enabled more detailed tracking.⁵ As the digital media industry has increasingly turned to technology that incorporates artificial intelligence, augmented reality, and virtual reality, marketing and data-gathering techniques have evolved accordingly.⁶ “Playable” ads – ads with a game component – are another new and particularly manipulative advertising format for children when they already struggle to discern organic content from advertisements.⁷ The widespread adoption of a new series of metrics that provides details on content online – “brand safety” – also creates a wealth of data previously unavailable to marketers, brands, agencies and even the platforms themselves.

These techniques and others give rise to a slew of questions about new data-driven marketing techniques and their impact on children. These include: What kinds of new advertising practices are emerging, particularly given that browser blocking, third-party ad blocking, GDPR, and CCPA are putting pressures on the ad industry to find alternatives to traditional tracking methods? What is the likely impact of these new methods on a children’s psycho-social development, and what is the impact on the

device users, and that 17 of the advertisers randomly selected from a group of 40 Digital Advertising Alliance members failed to disclose their use of cross device tracking) [<https://perma.cc/EP4E-46YH>]; *Cross-Device Identification*, ASS’N OF NAT’L ADVERTISERS, <https://thedma.org/innovate/data-integrity-council/cross-device-id/> [<https://perma.cc/5A7B-JCWH>].

⁵ See INTERACTIVE ADVERT. BUREAU, DIGITAL ATTRIBUTION PRIMER 2.0 (2016), <https://www.iab.com/wp-content/uploads/2016/10/Digital-Attribution-Primer-2-0-FINAL.pdf> [<https://perma.cc/Z57Y-2ZQH>]; Alex Bauer, *Mobile Attribution 102: Building Attribution 2.0*, BRANCH BLOG (May 1, 2019), <https://blog.branch.io/mobile-attribution-102-building-attribution-2-0/#chapter3> (describing persona-based attribution as “a system that lives on top of all this fragmentation, stitching the splintered identity of each actual human customer back together into a cohesive whole, across channels and platforms and devices”) [<https://perma.cc/8P48-VT99>].

⁶ See, e.g., INTERACTIVE ADVERT. BUREAU, AUGMENTED REALITY FOR MARKETING, AN IAB PLAYBOOK (2019), <https://www.iab.com/wp-content/uploads/2019/10/IAB-AR-for-Marketing-Playbook-FINAL-June-2019.pdf> [<https://perma.cc/QF9H-LC4W>]; *New Ad Portfolio*, INTERACTIVE ADVERT. BUREAU, <https://www.iab.com/newadportfolio/> (offering “new media experiences like Emoji ads, 360-degree image and video ads, Virtual reality ads and Augmented reality ads”) [<https://perma.cc/2XRV-9MQA>].

⁷ See INTERACTIVE ADVERT. BUREAU, PLAYABLE ADS FOR BRANDS: AN IAB PLAYBOOK 7 (2019), <https://www.iab.com/wp-content/uploads/2019/05/IAB-Playables-Playbook-Final-June-2019.pdf> (“Playables are made up of three core elements - tutorial prompt, game/interactive experience, end card - each of which collect a unique set of metrics. Because playables are predominantly built in HTML5, interactions and data can be easily captured and leveraged for insights into consumer preferences, sentiments and behaviors.”) [<https://perma.cc/Q65X-L3S8>]; Susan Borst, *Playable Ads: Capturing the Attention of Consumers, Brands and Agencies Alike*, INTERACTIVE ADVERT. BUREAU (June 5, 2019), <https://www.iab.com/blog/2019-playables/> [<https://perma.cc/N2KR-BF32>].

family and social interactions? What kinds of data are collected via these new applications, especially with regard to being able to make inferences about behavioral and psychological traits? What data is collected for attribution purposes and is this data collected under the internal operations exception? What data, including personal data, is collected via brand safety measures with regard to children and teen sites, and how is it used?

There is also a series of related questions on how data collected from children could be used on a discriminatory basis. How pervasive is the use of classifications (or proxies) for race, ethnicity, or indicators of socio-economic status? Which demographics are excluded or targeted for which kinds of marketing efforts? What datasets and applications are used to specifically target children of color?⁸ Given years of research demonstrating that digital advertising can lead to unintentional discrimination, are advertisers considering how their ads could be targeting children on a discriminatory basis, and if so, how to prevent that? Have online services disregarded evidence of their products or ads having discriminatory effects? Are they considering how unhealthy foods and beverages may be marketed on a discriminatory basis?

The FTC should use its 6(b) authority to examine practices concerning data collection and retention

Considering the well-documented weaknesses of consent as a foundation for privacy protections, a crucial component of ensuring the protection of children's privacy is how companies are actually using the data they collect, and when (and whether) they're deleting it. In a recent complaint to the FTC, child advocates noted that Amazon did not delete children's information unless and until a parent requested the company do so, which violates COPPA.⁹ It's also very difficult for parents to get a comprehensive understanding about the kind of information being collected from or created about their children when technology pervades children's lives at school, at after-school activities, and in friends' homes.

⁸ See, e.g., *Alliance for Inclusive and Multicultural Marketing*, ASS'N OF NAT'L ADVERTISERS, <https://www.ana.net/content/show/id/aimm-home> [<https://perma.cc/R39C-VMKT>]; *Market Research*, CULTURE MKTG. COUNCIL, <http://culturemarketingcouncil.org/Market-Research> [<https://perma.cc/UJ9G-ZD23>].

⁹ *Amazon, Inc.'s Echo Dot Kids Edition for Violating the Children's Online Privacy Protection Act*, May 9, 2019, https://commercialfreechildhood.org/sites/default/files/devel-generate/ciw/echo_dot_complaint.pdf [<https://perma.cc/R487-E8K5>]. The company recently started offering a new opt-in deletion setting, which lets users have Alexa delete their voice recordings older than 3 or 18 months. It does not appear that Amazon has changed its policy of retaining recordings unless and until the parent deletes them or chooses this new setting. See Russell Brandom, *Amazon pushes Alexa privacy with new delete options*, VERGE (Sept. 25, 2019), <https://www.theverge.com/2019/9/25/20883745/amazon-alexa-privacy-hub-security-voice-recordings-echo-devices> [<https://perma.cc/9LHL-4HFG>].

Questions the FTC should be asking include: What are the common deletion practices for companies that collect children’s information, including general audience products and ed tech products in schools? What kinds of data are companies collecting about children? What methods are being used to analyze this data and what kinds of actionable decisions are being made as a result? What kind of data are the companies collecting from students in schools? How are schools choosing the ed tech products they use on students, and do they have any strategies to dispel conflicts of interest in product procurement, such as companies buying administrators and teachers expensive meals, or the use of brand ambassadors? How are schools obtaining consent from parents for products and services subject to COPPA?

The FTC should use its 6(b) authority to illuminate children’s presence on “general audience” platforms and those platforms’ awareness of children’s presence

General audience platforms purport to lack awareness of children on their platforms to avoid incurring liability under COPPA, but without more details it is impossible to accurately assess the problem. Indeed, there is evidence that so-called general audience platforms have access to information regarding children using their services, raising serious questions about their claims of ignorance. Leading platforms have incorporated a range of techniques to both attract and monetize children, as well as developing various methods to identify potential concerns, such as suicidal ideation.

For example, one recent *Washington Post* article on the failure of general audience platforms to comply with COPPA described how companies delete any child users they find, but companies like Instagram declined to provide any numbers (how many users and over what period).¹⁰ Nor is it widely understood how companies that position their platforms as “general audience” detect and identify children on their platforms. In addition, a number of third parties claim the ability to detect child-directed content on general audience platforms for the purpose of offering “brand safety” services to brands, ensuring that inappropriate ads are not paired with child-directed content. At the FTC’s recent COPPA workshop, many industry voices suggested that many of the viewers of child-directed content are actually adults, and that the FTC should carve out exceptions to COPPA for these viewers on child-directed content.

¹⁰ See Craig Timberg, *Sex, drugs, and self-harm: Where 20 years of child online protection law went wrong*, WASH. POST (June 13, 2019), <https://www.washingtonpost.com/technology/2019/06/13/sex-drugs-self-harm-where-years-child-online-protection-law-went-wrong/> (“Instagram spokeswoman Stephanie Otway said: ‘People under the age of 13 are not allowed to use Instagram. When we find an underage account, we will restrict access to that account and ask the account holder to prove their age. If they are unable to do so, we will delete the account from Instagram.’ Instagram declined to say how many accounts it has deleted for this reason.”) [<https://perma.cc/5LKG-ZSEB>].

These practices and claims give rise to many questions. Leading platforms and brands have a wealth of proprietary measurement and other data that can help the commission better understand how these services recognize child users. How do companies know when adults are engaging with child-directed content on general audience platforms, and how frequently does this occur? How many children are on “general audience” platforms? How are children and child-directed content detected both by those platforms themselves and by third parties? What signals do general audience platforms receive when a user arrives at their site that might help determine whether that person is an adult or a child? Given the pervasive use of general audience recording technology, such as smart TVs and smart speakers, how are companies dealing with the collection of children’s information? What happens when IoT devices, including smart toys,¹¹ collects data, including voice and video recordings, from a child who is not a member of the family that owns the device?

The FTC should use its 6(b) authority to identify how the data of children is being used by contemporary data platforms, including “marketing clouds,” “identity management” systems, in-house data management platforms, and data brokers.

Over the last several years, entire new categories of data gathering, analytics and activation platforms have emerged, creating a new regime for the collection and use of information. Consolidation of the data market, as well as the ability to provide informational resources for profiling and targeting in real time, has seen the emergence of various data and marketing clouds, such as by Oracle,¹² Adobe,¹³ and others. These vast new databases, which contain data on individuals and from multiple sources, enable “one-stop shopping” so consumers – including young people – can be profiled and targeted based on their race/ethnicity, geolocation, cultural and other interests.

¹¹ See *Smart Toys Market Size Worth USD 24.65 Billion by 2025: Hexa Research*, PR NEWSWIRE (Mar.12, 2019), <https://www.prnewswire.com/news-releases/smart-toys-market-size-worth-usd-24-65-billion-by-2025-hexa-research-300810651.html> [<https://perma.cc/9NPJ-8N57>].

¹² *Branded Data Providers*, ORACLE, <https://www.oracle.com/applications/customer-experience/data-cloud/solutions/data-as-a-service/data-providers.html> [<https://perma.cc/U8FH-2WNV>].

¹³ ADOBE, <https://www.adobe.com/experience-cloud/topics/personalization.html?promoid=4X3B94P8&mv=other> [<https://perma.cc/3MQH-V9T3>].

Leading brands like Coca Cola,¹⁴ PepsiCo¹⁵ and McDonald's¹⁶ have built extensive in-house data analytics and targeting systems, constructing their own data management platforms that facilitate the use of their "first-party" data assets through programmatic and other forms of targeting. With many companies now their own data brokers, new ways of compiling and analyzing data have emerged. Advances in data analytics also enable data "cloning" and targeting of vast numbers of people based on the use of information derived from a single person, known as "lookalike modeling."¹⁷

Ad-supported "app" business models using data for targeting and measurement techniques also pose a privacy concern for children. Methods for user "acquisition," audience segmentation,¹⁸ identifying "lifetime value,"¹⁹ "user level insights,"²⁰ and use of "mediation" techniques for multiple ad networks,²¹ have created a landscape that undermines children's privacy.

Children are a significant focus of this new data management environment, given their significant spending power and value as a market. Yet there are no independent studies to examine how these new aspects of today's digital data complex impact their privacy, or how it erodes the ability of their parents to identify potential

¹⁴ See MEDIAMATH, INC., MEDIAMATH AND MEDIA COM HELP COCA-COLA FIND AND PROGRAMMATICALLY TARGET AUDIENCES WITH INTEGRATED DSP + DMP APPROACH (2016), http://www.mediamath.com/blog/wp-content/uploads/2016/12/Coke_MediaCom_CaseStudy.pdf [https://perma.cc/SL92-Z3Q5].

¹⁵ See Katie Deighton, *PepsiCo Is Building an In-House Media and Data Team to Shape Its Adtech Agenda*, THE DRUM (May 14, 2019, 5:37 PM), <https://www.thedrum.com/news/2019/05/14/pepsico-building-house-media-and-data-team-shape-its-adtech-agenda> [https://perma.cc/X8D6-UCQG].

¹⁶ See Ann-Marie Alcántara & Patrick Kulp, *McDonald's \$300 Million Acquisition of Dynamic Yield Will Beef Up Its Personalization Efforts*, ADWEEK (Mar. 26, 2019), <https://www.adweek.com/brand-marketing/mcdonalds-300-million-acquisition-of-dynamic-yield-will-beef-up-its-personalization-efforts/> [https://perma.cc/HT93-WTT9].

¹⁷ See ANTHONY NADLER ET AL., DATA & SOC'Y, WEAPONIZING THE DIGITAL INFLUENCE MACHINE: THE POLITICAL PERILS OF ONLINE AD TECH 14 (2018), https://datasociety.net/wp-content/uploads/2018/10/DS_Digital_Influence_Machine.pdf [https://perma.cc/6GK8-5V9P].

¹⁸ See, e.g., *Customer Segmentation and Targeting*, SMART INSIGHTS, <https://www.smartinsights.com/digital-marketing-strategy/customer-segmentation-and-targeting/> [https://perma.cc/D8TL-XK4G].

¹⁹ See, e.g., *Ads Audiences*, FACEBOOK FOR BUSINESS, <https://www.facebook.com/business/help/1730784113851988> [https://perma.cc/U9VZ-KH3V].

²⁰ See, e.g., *Consumer-Level Analytics Revealed*, ZYBE, <https://www.zype.com/product/analytics/consumer-level-analytics/> [https://perma.cc/JTT4-GYG8].

²¹ See, e.g., *Maximum Revenue, Minimum Hassle, Mediation*, IRONSOURCE, <https://www.ironsrc.com/mediation/> [https://perma.cc/G5Q9-AJGL].

harms and make decisions about their privacy given the multitude of possible uses that these new, first-party management platforms enable.

Past studies have demonstrated that data brokers collect information on teenagers and students, and attribute child-related information to parents, but there have not been comprehensive studies on data brokers' collection of children's information specifically. At the same time, children's information is known to be commercially valuable because children influence family purchasing, are easily persuaded by ads, and develop key brand loyalties in childhood that may persist for years or even decades. A group of researchers at the Fordham Center on Law and Information Policy conducted an illuminating study on data brokers' collection of student information and found that an alarming number of brokers collect and market information about teenaged students.²² Yet similar studies do not exist about data brokers' collection and use of information from and about children specifically.

Questions the FTC should consider include: What kinds of information are data brokers compiling about children and students? What are their sources for this information, and to whom are they selling it? What kinds of first-party data management platforms are companies using to compile and analyze children's information?

The FTC should use its 6(b) authority to illuminate the efficacy – or lack thereof – of safe harbors

The FTC has asked the public to comment on whether the safe harbor process has been effective in enhancing COPPA compliance. But only the safe harbors themselves and the FTC are privy to crucial facts like how many violations have been brought to the harbor organizations' attention, how many were acted upon, the real-world impact on the composition of sites' visitors, and similar metrics. Since July 2014, all COPPA safe harbors have been required to file reports summarizing their annual comprehensive review of each subject operator's information policies, practices, and representations, as well as any disciplinary actions taken. But these annual reports have never been made public. CDD filed a request for copies of these reports under the Freedom of Information Act ("FOIA"). Although the FTC eventually made copies of some of these reports available to CDD, the FTC redacted all information that was needed to assess the effectiveness of the safe harbor program.²³ Notably, representatives

²² Cameron N. Russell, Joel Reidenberg, Elizabeth Martin, & Thomas B. Norton, *Transparency and the Marketplace for Student Data*, CENTER ON LAW AND INFORMATION POLICY, (2018), <https://pdfs.semanticscholar.org/0ac3/034c1d8b1073c32d942783ee29f05cf7b07c.pdf> [<https://perma.cc/66K2-76L2>].

²³ IPR filed the first FOIA request on July 2, 2014. After several delays, and partial responses, IPR received the final documents in response to this request on March 20, 2015. On July 13, 2015, IPR filed another request seeking the 2015 annual reports and it received the redacted copies on November 24, 2015. An additional request relating to both sets of annual reports was

from two COPPA safe harbor organizations, Privo and CARU, called for increased transparency for safe harbors at the FTC's October 7th workshop.

To assess the effectiveness of the safe harbor program, the FTC and the public need much more information than is presently available. For example, what percentage of child-directed websites, apps, and other online services participate in safe harbor programs? How (and how often) do safe harbors enforce their requirements and resolve complaints? How do they handle recidivism? These questions cannot be answered without additional information.

Conclusion

The necessary 6(b) studies on the issues outlined above would be consistent with calls by the Commission to base privacy policy-making on empirical data. As Commissioner Christine Wilson has said, "effective regulation requires a clear 'what,' 'why,' and 'how.'"²⁴ In the words of Chairman Joseph Simons, regulation requires "rely[ing] as much as possible on evidence and the data, and re-assess[ing] the evidence and data periodically."²⁵ And Commissioner Phillips stated recently at the FTC's public workshop examining COPPA, "any rulemaking must be grounded in facts, and supported by data and empirical evidence."

6(b) studies also serve an important public education function, enabling the FTC to shed light on non-transparent industry operations not only to inform its own policymaking, but also to inform interested members of the public. Accordingly, further investigation and reporting of industry data collection and use practices is essential in allowing consumer advocacy groups to contribute in addressing children's privacy harms.

The FTC should not reformulate any privacy-related policy based on woefully incomplete information. The FTC should operate with haste to undertake the requisite 6(b) studies of online digital advertising, children on general audience platforms, data brokers, and education technology to help inform the agency's approach to children's privacy. Only with more complete information can the agency and the public fully

filed on July 23, 2015, and the documents were received on September 23, 2016. On April 15, 2019, they asked for the safe harbor annual reports for the years 2016-2018. The FTC has not yet fulfilled this request.

²⁴ Christine Wilson, Comm'r, Fed. Trade Comm'n, Address at the British Institute of International and Comparative Law: Remembering Regulatory Misadventures: Taking a Page from Edmund Burke to Inform Our Approach to Big Tech (June 28, 2019), https://www.ftc.gov/system/files/documents/public_statements/1531816/wilson_remarks_biiicl_6-28-19.pdf [<https://perma.cc/362B-2B86>].

²⁵ Joseph Simons, Chairman, Fed. Trade Comm'n, Prepared Remarks at the Georgetown Law Global Antitrust Enforcement Symposium (Sept. 25, 2018), https://www.ftc.gov/system/files/documents/public_statements/1413340/simons_georgeto_wn_lunch_address_9-25-18.pdf [<https://perma.cc/S8CQ-V9Y5>].

understand what is at stake, and how agency policy can best serve children’s privacy. We will follow up with additional questions and suggestions for companies to consider in the agency’s 6(b) study.

Respectfully submitted,

Campaign for a Commercial-Free Childhood

Center for Digital Democracy

American Academy of Pediatrics

Badass Teachers Association

Berkeley Media Studies Group

Center for Science in the Public Interest

Children and Screens: Institute of Digital
Media and Child Development

Color of Change

Common Sense Media

Consumer Action

Consumer Federation of America

Consumer Federation of California

Consumer Reports

Consumer Watchdog

Corporate Accountability

Defending the Early Years

Electronic Frontier Foundation

Electronic Privacy Information Center

Obligation, Inc.

Parent Coalition for Student Privacy

Parents Across America

Parents Television Council

P.E.A.C.E. (Peace Educators Allied For
Children Everywhere)

Privacy Rights Clearinghouse

Public Citizen

Public Knowledge

The Story of Stuff

TRUCE (Teachers Resisting Unhealthy
Childhood Entertainment)

UnidosUS

United Church of Christ

USPIRG