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March 11, 2024

Joel Christie
Acting Secretary
Federal Trade Commission
Office of the Secretary
600 Pennsylvania Ave. NW, Ste. CC-5610 (Annex E)
Washington, DC 20580

COPPA Rule Review, Project No. P195404

Dear Acting Secretary Christie:

On behalf of the Network Advertising Initiative (“NAI”), thank you for the opportunity to provide comments on the Federal Trade Commission’s (“FTC” or “Commission”) Notice of Proposed Rulemaking (“NPRM”) to amend the Children’s Online Privacy Protection Rule (“COPPA Rule” or “the Rule”) pursuant to the Children’s Online Privacy Protection Act (“COPPA”) on the initiative to protect youth mental health, safety, and privacy online.¹ The NAI shares the Commission’s goals of protecting children’s privacy. We appreciate the Commission’s efforts to update the COPPA Rule to ensure children’s privacy remains protected online while providing more guidance and clarity to digital advertisers and other actors operating primarily online.

I. Introduction and Overview of the NAI

The NAI has long supported enhanced safeguards for children’s privacy online. In our 2020 Code of Conduct, we prohibited NAI members from creating advertising segments targeting children under the age of 16 without verified parental consent, a step further than current federal law goes.² Certain state laws also prohibit the collection of personal data from children under the age of 16 without consent, including California and Connecticut.³ The patchwork of state privacy legislation has created different standards in different states, making compliance

¹ Federal Trade Commission, Children’s Online Privacy Protection Rule, 89 Fed. Reg. 2034 (proposed Jan. 11, 2024) (hereinafter “Proposed Rule”).

² *Compare* NETWORK ADVERTISING INITIATIVE, 2020 NAI Code of Conduct § II.D.1 (prohibiting NAI member companies from creating tailored advertising segments specifically targeting children under 16 without obtaining verifiable parental consent) *with* 15 U.S.C. § 6501(1) (2024) (defining “child” as an individual under the age of 13).

³ *See, e.g.*, CAL. CIV. CODE § 1798.120(c) (2024); CONN. GEN. STAT. § 42-520(a)(7) (2024).

difficult for online advertisers. Clear nationwide standards – such as those represented by COPPA and the COPPA Rule – are imperative to promote children’s privacy.

Within the digital advertising ecosystem, NAI members provide the technology that facilitates the selection, delivery, and measurement of advertisements between publishers and brands.⁴ NAI members will therefore usually not be in the position of operating websites or other digital properties that are directed to children within the meaning of the definition in the COPPA Rule. Nonetheless, NAI member companies routinely assess which websites and apps they engage with in an effort to avoid collecting advertising data related to children, even when they do not know the age of a given user. Further, for a number of reasons, the majority of digital advertisers decline to create advertising segments specifically targeting minors (*i.e.*, individuals under the age of 18). However, digital advertisers must still take federal COPPA requirements into account, in particular the Rule’s definition of website or online service directed to children.⁵

II. Comments to Specific Proposals

As a self-regulatory body, the NAI has been involved in developing higher standards and practices for digital advertisers that advance privacy-protective policies that work for businesses and can be operationalized and adopted throughout the industry. While the NAI is proud of its efforts and their demonstrable results, there are limitations inherent in the self-regulatory model that increasingly require public policies to apply seamlessly across the entire digital media industry, particularly when it comes to protecting children. Therefore, the NAI has been a leading proponent for legislation to create a uniform national standard for protection of consumer data, including children’s data, that is applied evenly across the entire industry, rather than merely those companies who embrace higher standards. Our comments below reflect our assessment of the Commission’s proposals on areas specific to digital advertisers.

A. Internal Operations and Notice Requirements

The NAI supports the Commission’s decision not to amend the Rule’s definition of *support for internal operations*.⁶ In particular, the NAI supports the Commission’s reaffirmation that ad attribution falls within the scope of this definition. Ad attribution is an essential practice, both for behavioral advertising and for providing programmatic contextual advertising. A change to this approach would render contextual ads ineffective across all child-directed properties, because of the inability to perform measurement and attribution. This would deprive these sites and apps of revenue and limit the ability to prevent click-fraud.

⁴ The NAI’s member list is public, and our members range in size from smaller startups to some of the largest tech companies in the world. While some of the larger members have parts of their businesses that function as a publisher, their NAI membership is a function of their company’s ad-tech business lines.

⁵ See 16 C.F.R. § 312.2 (2024) (definition of Web site or online service directed to children).

⁶ See 16 C.F.R. § 312.2 (2024) (definition of support for the internal operations of the Web site or online service).

Additionally, the Commission proposes a new disclosure requirement in § 312.4(d)(3) for operators that take advantage of the exception for internal operations to specify the particular internal operation(s) for which the operator has collected the persistent identifier, while also requiring identification of the means the operator uses to ensure that it does not use or disclose the persistent identifier to contact a specific individual.⁷ The NAI opposes the inclusion of this notice because a description of technical data governance controls would be unreasonably long and confusing to consumers, and it would not provide information that would be meaningful for effective consumer choice, since internal operations are already exempt from the Rule’s parental consent requirements.⁸

Further, the NAI believes that the the concerns raised by the Commission prompting the proposed change to § 312.4(d)(3) are adequately addressed by the other proposed changes to § 312.10 pertaining to data retention, and the additional disclosures required in the proposal,, making changes to § 312.4(d)(3) unnecessary.⁹ The NAI supports the changes to § 312.10 and believes this approach provides for specificity about uses, as well as steps companies take to ensure that partners adhere to these limited uses, rather than using persistent identifiers for profiling and tailored advertising. This would enable watchdogs and regulators to assess companies and for those companies to be held accountable to their promise to utilize the exceptions only for the purposes it is intended for.

B. Parental Consent and Notice Requirements for Third-Party Sharing

The Commission proposes additional new parental notice requirements at § 312.4(c)(iv) for operators sharing personal information with third parties. Under the proposal, these operators would be required to state that the parent can consent to the collection and use of the child’s information without consenting to the disclosure of such information, except where such information is integral to the nature of the website or online service.¹⁰ We do not believe the proposed text at § 312.4(c)(iv) is clear. If the amendment is read to require overly-detailed *separate* notices, they run the risk of overloading consumers with additional dialogue boxes and interstitial pop-ups that will unnecessarily confuse parents. As the Commission itself has noted, consumers do not have time to review “lengthy privacy notices,” especially highly technical notices that “are reportedly not readable to the average consumer.”¹¹ We are also mindful of the Commission’s past guidance on consumer notice, particularly on the use of

⁷ See Proposed Rule at 2074.

⁸ The NAI is also mindful of the Commission’s guidance on dark patterns, as well as state-level legal restrictions on the use of unnecessarily confusing choice mechanisms.

⁹ Specifically, the Commission noted it finds “merit” in concerns about a lack of transparency in how operators implement the support for internal operations exception. See Proposed Rule at 2050.

¹⁰ See Proposed Rule at 2073.

¹¹ Trade Regulation Rule on Commercial Surveillance and Data Security, 87 Fed. Reg. 51273, 52174-51275 (proposed Aug. 22, 2022).

confusing language.¹² This guidance is also in line with requirements in California to present notices that are easy to understand.¹³

We support the goals of the Commission in providing for more transparency and choice, but we believe there are alternative methods to achieve these goals that do not create additional consent dialogues. If the Commission's intent is to allow for operators to include such disclosures as a separate line item in the same notices they currently provide when obtaining verified parental consent, we would support that, provided the Commission clarifies its intent in the final rule and is not overly prescriptive with the administration of such an approach.

Alternatively, the Commission could allow operators to honor parents' choices as manifested by parental control settings and impute consent from a parent from those affirmative choices. For example, if a parent is able to change settings to allow for a child's data to be shared with a third-party publisher, the decision to change the setting to permit such sharing could constitute consent to such sharing. This could be achieved through an amendment to § 312.5(a)(2) reading:

An operator required to give the parent this option must obtain separate verifiable parental consent to such disclosure unless the parent has affirmatively directed such disclosure pursuant to section 312.6, and the operator may not condition access to the website or online service on such consent.

Additionally, the Commission asked whether the consent mechanism for disclosure should be offered at a different time or place than the mechanism for the underlying collection and use.¹⁴ Granular tools, like those we suggested above through amending § 312.5(a)(2), would allow for parents to exercise more choice and provide better clarity for operators and their partners. We believe that the exception for disclosures that are integral to the nature of the website or online service is the right approach, and the disclosure requirements are clear.

C. Treatment of Contextual Advertising

The Commission posed the following question regarding contextual advertising:

Operators can collect persistent identifiers for contextual advertising purposes without parental consent so long as they do not also collect other personal information. Given the sophistication of contextual advertising today, including that personal information collected from users may be used to enable companies to target even contextual advertising to some extent, should the Commission consider changes to the Rule's

¹² See FED. TRADE COMM'N, STAFF REPORT: BRINGING DARK PATTERNS TO LIGHT (Sept. 2022) (https://www.ftc.gov/system/files/ftc_gov/pdf/P214800%20Dark%20Patterns%20Report%209.14.2022%20-%20FINAL.pdf) at 25.

¹³ See CAL. CODE REGS., tit. 11, § 7004(a)(1) (2024).

¹⁴ Proposed Rule at 2070.

*treatment of contextual advertising?*¹⁵

As stated above, the NAI believes that even with the existing exceptions for ad attribution, the proposed requirements for data minimization create strong safeguards against the misuse of children’s data while allowing contextual advertising to run on websites directed to children. Contextual advertising is critical for websites directed to children: traditional behavioral advertising is not permitted without parental consent under COPPA, and the practice is prohibited in many state privacy laws for minors under the age of 16 without obtaining consumer consent.¹⁶ For many digital advertisers, the cost of advertising to teenagers who have aged out of COPPA’s protections but are still covered by state law is not worth the benefits of such advertising, and so they refrain from using behavioral advertising to target minors entirely.

Because of this, children’s websites and apps rely more heavily on contextual advertising than general audience websites do. Further restrictions on contextual advertising on websites or apps directed to children would close off the only viable path for child-directed content online to be supported by ad revenue, and free and lower-cost kids’ content online could dry up entirely.

Content designed for kids would then be available only for families that are able to pay subscription fees, and the variety of that content will be severely restricted. Further, in the absence of relying on contextual advertising, it is likely that websites and services will rely on basic run-of-network advertising, or ads that are served to a wide collection of websites without the ability to choose specific sites, and therefore are more likely to result in the showing of inappropriate ads to children e.g., for alcohol products or for gambling.

When websites and apps cannot support their operations through advertising, they often put paywalls in place in order to fund themselves. Subscription-based models—which have a low uptake for general audience websites—are impractical for websites directed to children.¹⁷ Access to the internet is critical for allowing children to develop important technical and critical skills and digital literacy, and lack of such access puts children at a disadvantage compared to their peers.¹⁸

Ultimately, the NAI concurs with the Commission that it struck the right balance in 2013 in allowing operators to collect persistent identifiers in order to serve contextual advertising without providing notice and parental consent, and we believe this approach should be

¹⁵ *Id.*

¹⁶ *See, e.g.*, CAL. CIV. CODE § 1798.120(c) (2024).

¹⁷ *See, e.g.*, Laura Hazard Owen, *Even People Who Like Paying for News Usually Only Pay for One Subscription*, NIEMAN LABS (June 11, 2019), <https://www.niemanlab.org/2019/06/even-people-who-like-paying-for-news-usually-only-pay-for-one-subscription/>.

¹⁸ Press Release, UNICEF, *Done Right, Internet Use Among Children Can Increase Learning Opportunities and Build Digital Skills* (Nov. 29, 2019) (<https://www.unicef.org/press-releases/done-right-internet-use-among-children-can-increase-learning-opportunities-and-build>).

maintained. Maintaining this exception in its current form will incentivize companies to continue using a form of advertising the FTC considers to be privacy-protective as well as ensure the financial viability of providing high-quality, safe, age-appropriate content for children.¹⁹

D. Definition of Website or Online Service Directed to Children

The NAI supports the Commission's decision not to substantively amend the definition of *website or online service directed to children*.²⁰ We share the Commission's goal of maximizing clarity in this definition and its application to online sites and services and believe the Commission's interpretation of the definition is correct.

This is an important element of the COPPA Rule: it is common practice for sites and services that are child-directed to avoid the use of tailored advertising and rely instead on contextual advertising. A significant change to this definition could exceed the scope intended by statute and expand the universe of sites and services that are considered directed towards children. Such an approach is likely to have undesirable side effects that would be disadvantageous to both consumers and to operators, including a de facto prohibition on the use of tailored advertising across a wider range of sites and apps that rely on it to fund their operations than currently intended under COPPA, or the adoption of age-gating to prohibit the use of sites by children to avoid being inadvertently characterized as directed to children.

The NAI continues to support the Commission's multifactor approach to determining if a website or online service is directed to children.²¹ We believe additional clarity from the Commission could help businesses ensure better compliance with the Rule and aid ad-tech providers as they consider partnerships with particular publishers and websites. We believe certain factors weigh more heavily than others in making such a determination. For example, marketing materials and a company's own representations are indicative of an operator's understanding of its intended audience, as the Commission notes.²² Factors that focus on things within the control of the operators allow operators to effectively assess whether their product or service is "directed to children," as defined by the Commission.

However, we do not believe third-party reviews and the age of users on similar websites or services should be included in the list of factors, because there is a potential for these to be misleading. These factors are outside the control of operators, and could potentially give rise to liability for matters operators have no notice of. For example, many websites offer features for

¹⁹ *Self-Regulatory Principles for Online Behavioral Advertising* (Feb. 2009) (finding that contextual advertising, advertising based on a single search query, and first party advertising is "consistent with consumer expectations, and less likely to lead to consumer harm"), <https://www.ftc.gov/sites/default/files/documents/reports/federal-trade-commission-staff-report-self-regulatory-principles-online-behavioral-advertising/p085400behavadreport.pdf>.

²⁰ Proposed Rule at 2072.

²¹ *Id.*

²² *Id.* at 2047.

users to leave comments, but the ability to leave a comment by itself does not inherently bring in more users who are children. These comments and third-party reviews should not replace the operator’s judgment about their intended audience, or their own representations, such as the marketing of their website or service. Some sites and services are similar in certain ways but may appeal to an older or younger demographic depending on relatively minor details. For instance, news sites may inadvertently have more readership among young users, rather than by intent; a news site reporting on pop culture would bring in more younger readers than a website reporting on financial news, while still not being directed to children. The fact that a comparatively high number of young readers might visit the pop culture page of a general audience news site is outside the control of the operator.

Additionally, some websites or online services employ age verification technologies to determine the age of visitors to their properties. Under the existing COPPA Rule, date of birth is not considered personal information, and companies are free to collect it in order to make these assessments without triggering compliance obligations.²³ It would be helpful for operators if this same protection applied to other categories of information that may be collected for the same purpose. This would be consistent with the Commission’s approach to date of birth, and would allow operators to take advantage of the flexibility provided by the revised version without being penalized for doing so.

E. Safe Harbors

The Commission proposes updating safe harbor disclosure requirements to include additional disclosures, including updates to direct and online notices with additional information about operators’ information practices.²⁴ The NAI agrees that the safe harbor program is a critical element of COPPA. These programs help achieve the goal of the Commission and promote the privacy and safety of children while enhancing compliance with COPPA and reducing the enforcement burden on the Commission. The NAI also supports the Commission’s goal of enhancing oversight of, and transparency regarding, the safe harbor program.

The Commission is proposing triennial audits of safe harbor programs’ technological capabilities and mechanisms for assessing subject operators’ fitness for maintaining membership in the safe harbor program to further strengthen oversight.²⁵ The NAI supports this proposal: annual reports would be onerous, but triennial frequency is practical for these organizations to provide more extensive detail and for the FTC to better review the programs’ efficacy.

²³ See 16 C.F.R. § 312.2 (2024) (definition of personal information).

²⁴ Proposed Rule at 2076.

²⁵ *Id.*

III. Conclusion

The NAI appreciates the opportunity to submit comments to the Commission on this important topic. If we can provide any additional information, or otherwise assist your office as it continues to engage in the rulemaking process, please do not hesitate to contact me at leigh@networkadvertising.org, or David LeDuc, Vice President, Public Policy, at david@networkadvertising.org.

Respectfully Submitted,

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