

**COMMENT FOR THE RECORD**

## **NetChoice Comment to FTC on COPPA NPRM**

NetChoice is a trade association of leading internet businesses that promotes the value, convenience, and choice that internet business models provide American consumers. Our mission is to make the internet safe for free enterprise and for free expression. We also work to promote the integrity and availability of the internet on a global stage, and are engaged on issues in the states, in Washington, D.C., and in international internet governance organizations.

### **Introduction**

The Federal Trade Commission has requested, from the public, comments regarding its notice of proposed rulemaking (NPRM) regarding the Children’s Online Privacy Protection Act (COPPA). Enacted nearly 24 years ago, COPPA acts as the primary legislative source of children’s privacy protections in the absence of a federal privacy standard. The FTC is the primary enforcement agency as stipulated in the law. The FTC has reminded the public that the COPPA rule, first promulgated by the commission after the passage of COPPA, was last updated in 2013, and a further update was considered in 2019. As the digital landscape continues to evolve, the FTC asks if it is not the right time to further update the COPPA rule.

NetChoice’s comments focus on the following, in line with information requested by the FTC:

- How the commission fails to appreciate its politicized reputation and the role Congressional oversight;

- How the NPRM is ill suited given the timing of current child privacy proposals being debated before Congress; and
- Specific concerns and issues regarding the changes proposed to the COPPA rule.

With that in mind, we would like to provide the commission with the following input regarding its notice of proposed rulemaking.

## Reading the Room

As the commission is no doubt aware, last month the House Judiciary Committee released a [report](#) entitled *Abuse of Power, Waste of Resources, and Fear: What Internal Documents and Testimony from Career Employees Show About the FTC Under Chair Lina Khan*.<sup>1</sup> The report outlines, in great detail, the many ways in which the senior leadership of the FTC has led the commission astray. Internal documents and staff themselves describe a working culture of fear and isolation, as well as a policy mission driven not by fidelity to the law but by a desire to acquire power and permanently alter the role of the agency.

It is within this context that we must read the FTC's NPRM. While at a policy level, this report is separate from COPPA and an update to the COPPA rule, it would be deeply irresponsible to allow the commission to continue, business as usual, without raising these major concerns and placing them in the record.

It is NetChoice's view that one cannot simply extirpate policy from the dysfunction at the FTC. The FTC must face head on the charges outlined in the House Judiciary Committee's report and take public steps to assuage concerns prior to charging forward on vital policy changes—especially policy as important as protecting children online.

Of the many issues raised by the House Judiciary Committee's report, perhaps the most damning for the commission is the charge that Chair Lina Khan has sidelined policy experts in her agency and purposefully pursues policy and legal challenges that she knows she will lose. The report suggests that this is motivated by a desire to trick Congress into giving her additional legal authority. How then, if it is likely FTC staff is dismissed from major policy debates and decisions, can we take the commission seriously? How are we

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<sup>1</sup> HJC, February 22, 2024

meant to distinguish between expert driven FTC work and political actions undertaken by a Chair intent on mismanagement?

With as much urgency as possible we call on the FTC to meaningfully address the charges leveled at the Chair in the House Judiciary Committee's report.

## **Privacy in a Vacuum**

It should also be recognized that the update to the COPPA rule is doubly ill-timed. As has been said above, the current state of the FTC poses unique challenges. Additionally, a Congressional debate is currently raging that could fundamentally shift the children's privacy landscape. Multiple proposals, including a change to COPPA itself (COPPA 2.0) are being considered. While NetChoice has major concerns with many of these proposals, whatever Congress chooses to do, if anything, will preempt the commission's rule update.

There is also an ongoing presidential race that could fundamentally shift the makeup of the commission. It is not obvious that by the time the FTC has finished its assessment of the comments and finished its final rule that the makeup of the commission will be the same, let alone whether it will be led by someone with the same perspective on this issue.

It would be better to allow a commission with all its members, led by a Chair who does not bully and belittle its expert staff, to examine this issue instead.

## **Vague Changes Degrade Service**

We write all this in the event the FTC moves forward with this process regardless of the clear concerns. Given that, we want to provide a handful of specific policy suggestions regarding proposed changes to the COPPA rule that overstep the FTC's authority and inadvertently degrade online services that Americans want and use today.

- The Commission proposes expanding the definition of "personal information" to include biometric identifiers. However, COPPA's definition of personal information is limited to information that "permits the physical or online contacting of a specific individual." Biometric identifiers alone do not permit such contact. The Commission has not demonstrated that biometric data is being misused in ways that allow

contact with children. Expanding the definition in this way is not supported by the statutory language.

- The proposed amendments related to the actual knowledge standard and website or online service directed to children definition are concerning. Congress deliberately chose an actual knowledge standard over a constructive knowledge standard when enacting COPPA. The Commission cannot override this legislative choice. Modifying these standards would sweep in many more websites and online services, even those not targeting children as their primary audience, imposing COPPA obligations on them and restricting general audience content.
- The proposed parental consent mechanisms do not work in reality. Requiring separate verifiable parental consent for disclosures will inundate parents with consent requests, leading to consent fatigue. The new methods the Commission proposes to add, while well-intentioned, raise authentication and privacy concerns of their own. The Commission should retain the current, flexible approach that allows operators to develop consent methods best suited for their users.
- The prohibition on using information collected from schools for any commercial purpose is unduly restrictive. Contextual advertising and first-party marketing allow operators to provide cost-free services to schools. Preventing these practices will result in less free content and tools for students. The Commission should allow a reasonable scope of commercial activity to sustain these valuable offerings.
- The changes to the mixed-audience provisions have the potential to be self-defeating. While the commission is hoping to avoid scenarios where users are incentivized to falsify their personal information, what they are actually accomplishing is penalizing platforms for attempting to default categorize users in the most protective postures possible.
- The “similar websites or online services” is the perfect example of a wildly unspecific requirement that will only lead to confusion. How is a service or platform supposed to know what the FTC will deem similar? As it stands, the FTC has a terrible track record of delineating markets and competitors. This is the same commission that argued major social media networks were not direct competitors to Meta. Such prior arguments make clear that this latest change is not based on evidence or solid legal footing.

- Finally, the additional requirements imposed on safe harbor programs are unjustified. The record does not demonstrate widespread issues with the current safe harbor system that would necessitate such enhanced obligations and disclosure requirements. These changes will increase costs and discourage participation in safe harbor programs.

Underlying the entire NPRM should be the major question of whether or not the commission actually has the authority to enact all the changes it is proposing. The Commission has not provided a compelling basis, grounded in data and aligned with its statutory mandate, to amend the COPPA rule. The proposed changes will impede operators' ability to provide engaging, diverse content for children online. While we do not trust the leadership of this FTC to answer that question honestly, it should still be asked.

## **Conclusion**

NetChoice raises the concerns in this NPRM because we want the FTC to succeed at its mission of protecting consumers. NetChoice recognizes the vital the FTC's role is in protecting the American consumer and how degraded its reputation has become under abysmal management. Our criticism is not against staff, most of whom are expert and dedicated public servants. However, their contributions are being directly undermined by leadership who sell them out and politicize their work. Until the fundamental problems with the leadership at the FTC are addressed, its mission—and the public trust—will suffer.