

December 19, 2022

The Honorable Charles E. Schumer  
Majority Leader  
United States Senate  
322 Hart Senate Office Building  
Washington, D.C. 20510

The Honorable Nancy Pelosi  
Speaker  
United States House of Representatives  
1236 Longworth House Office Building  
Washington, D.C. 20515

The Honorable Mitch McConnell  
Minority Leader  
United States Senate  
317 Russell Senate Office Building  
Washington, D.C. 20510

The Honorable Kevin McCarthy  
Minority Leader  
United States House of Representatives  
2468 Rayburn House Office Building  
Washington, D.C. 20515

**URGENT**

**Re: Children and Teens' Online Privacy Protection Act (S. 1628)**

Dear Majority Leader Schumer, Speaker Pelosi, Leader McConnell, and Leader McCarthy:

We write to express our concerns about the Children and Teens' Online Privacy Protection Act (COPPA 2.0). This bill has received scant consideration: no hearing and no discussion whatsoever at markup. In the last week, the bill was substantially amended to get it into the omnibus. As a result, few understand the practical implications of the bill. As drafted, COPPA 2.0 would force many websites to age-verify all users. In the name of protecting privacy, the bill would create a perverse incentive to collect the most sensitive kinds of personal information, such as government identification credentials and biometric information—exactly the opposite of what privacy legislation should do.

There is broad consensus over the core of this bill: In general, teens deserve special protections. In particular, targeting ads to teens can be harmful and should be restricted. But *how* to implement those principles requires more careful legislative drafting than COPPA 2.0 received. Three aspects of the current version of COPPA 2.0 would force many, if not most, websites enjoyed by adults to begin age-verifying all users. First, the ban on “targeted advertising” would, in fact, apply to nearly all online advertising, including nearly all “contextual advertising.” Second, that ban applies when websites have “knowledge”—not “actual knowledge,” as under COPPA today—that their users are “minors” aged 13-16. Under this constructive knowledge standard, every general audience website *should* know that *some* of its users are minors. Because abandoning all advertising is not an option, websites will have no choice but to age-verify all users in order to continue serving any useful advertising.

Finally, many, if not most, of the sites and services enjoyed by adults are also used by minors. Because these sites could be considered “directed to” minors, they will have to assume that they are subject to COPPA, and even obtaining the affirmative express consent of every user to data collection will not suffice to protect them from liability under COPPA.

***A Poorly Targeted Ban on “Targeted” Advertising.*** COPPA 2.0 borrows its definition of “targeted advertising” from the American Data Privacy and Protection Act (H.R.8152) (ADPPA). Both bills ban “targeted advertising” to minors, but they work in a fundamentally different way.

This definition is far broader than it seems. It purports to carve out “contextual advertising,” but defines that term so narrowly as to be meaningless: advertising “based on the context in which the advertisement appears and does not vary based on who is viewing the advertisement.” This excludes valuable contextual advertising that poses minimal privacy concerns—indeed, most contextual advertising. For example, the time of day for a particular user might rationally result in advertisements for breakfast foods or restaurants in the morning, and others at night. A user’s *general* location might be used to serve ads for a florist or shoe store in the same city, rather than a large, national retailer—or even a local retailer across the country. But under this definition, a site would be forced to provide the same ad to each user, leading to irrelevant and inefficient advertising. Few, if any, websites could survive without using what would be considered “targeted advertising” under this definition.

As problematic as the ADPPA’s definition of “targeted advertising” is, the impact of that definition is narrower. Both ADPPA and COPPA ban “targeted advertising” to minors based on a “knowledge” standard.<sup>1</sup> In both cases, the absence of the word “actual” (a term used in COPPA today) means that courts will infer what a website *should* have known. The difference is that ADPPA goes on to provide that this requirement:

shall not be construed to require the affirmative collection or processing of any data with respect to the age of an individual or a proxy thereof, or to require that a covered entity implement an age gating regime. Rather, the determination of whether an individual is under 17 shall be based on the covered data collected directly from an individual or a proxy thereof that the covered entity would otherwise collect in the normal course of business.<sup>2</sup>

In other words, ADPPA’s drafters understood that, without such a caveat, their ban on “targeted advertising” would force websites to age-verify *all* users. COPPA 2.0’s drafters chose to implement essentially the same concept but without this caveat. This difference is, alone, proof of the need for further changes to COPPA 2.0 before the bill can be considered. At a minimum, COPPA 2.0 should include this caveat.

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<sup>1</sup> Compare ADPPA § 205(a) (“A covered entity shall not engage in targeted advertising to any individual under the age of 17 if the covered entity knows that the individual is under the age of 17”) with COPPA 2.0 §6(a)(1)(A)(ii)

<sup>2</sup> ADPPA § 205(c).

In addition, the definition of targeted advertising in both bills should be fixed so that it actually excludes contextual advertising as that term is commonly understood today. The definition excludes the “processing of personal information solely for measuring or reporting advertising or content performance, reach, or frequency, including independent measurement” but fails to exclude the processing of personal information solely for protecting against spam, fraud and abuse.

***Extending COPPA’s framework to teens is unworkable.*** Expanding the COPPA framework to cover teens 13-16 may seem like the obvious way to extend special protections to teens. But far from focusing COPPA 2.0 on a small number of teen-oriented sites, the bill will, as drafted, subject most sites used by adults to potential liability under COPPA 2.0, including heavy civil penalties.

COPPA presently requires “verifiable parental consent” for the “collection, use, or disclosure of personal information from children” by services and sites “directed to” children under 13 or whenever site operators have “actual knowledge” that users are under 13.<sup>3</sup> This has created an “Internet, Jr.” composed of sites specifically designed for children with very limited functionality.<sup>4</sup> Few adults, or even teens, would ever use these sites.

COPPA 2.0 extends this framework to sites directed to “minors” aged 13-16. The COPPA Rule, which implements the statute, directs the Federal Trade Commission to consider the subject matter, visual content, presence of child celebrities or celebrities who appeal to children, language, and other indicia to determine whether a site or service is directed to children.<sup>5</sup> But these indicia are significantly less useful when applied to teens; the topics, celebrities, language, and other content characteristics that appeal to teens are to a large extent shared with adult audiences as well. Thus, the FTC is likely to fall back on another prong of the COPPA Rule allowing the FTC to “consider competent and reliable empirical evidence regarding audience composition, and evidence regarding the intended audience.”<sup>6</sup> The FTC has never drawn a clear line as to what percentage of an audience must be children for the site to be considered “directed to” them. Uncertainty over where the FTC might draw a line with respect to minors would mean that sites used by tens or even hundreds of millions of American adults, from ESPN.com to most social networks, would reasonably fear that they would be covered by COPPA 2.0—even before the FTC brings its first enforcement action. For example, estimates show that nearly a third of TikTok users are under the age of 18.<sup>7</sup> A significant percentage of the users of other leading social networks are minors protected by COPPA 2.0.

If COPPA 2.0’s sponsors do not intend their bill to apply so broadly, the bill must say so. It is not sufficient to leave this question to the FTC to resolve in a subsequent rulemaking. One obvious remedy would be to make clear that COPPA 2.0 applies only to a site “directed to minors as its primary audience.” This clarification would distinguish between sites like *Teen Vogue* and social

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<sup>3</sup> 15 U.S.C. § 6502.

<sup>4</sup> A service’s “collection” of personal information is not limited to information collected for advertising purposes—it also includes enabling personal information to be shared by the user. 16 C.F.R. § 312.2.

<sup>5</sup> 16 C.F.R. Part 312.2 (2013).

<sup>6</sup> *Id.*

<sup>7</sup> Influencer MarketingHub, *The State of Influencer Marketing 2022* 16 (2022).

networks like Instagram and Twitter. Similarly, the bill could specify that evidence of audience composition could be considered in the “directed to” analysis only of sites directed to children, not to minors.

***Practical Consequences.*** What will it mean if sites used by large numbers of adults fear that they may be deemed “directed to” minors? Instead of “verifiable parental consent,” COPPA 2.0 allows such sites to collect “affirmative express consent” from minors. This distinction gets one important thing right: COPPA should not give parents access to, or control over, what their kids see and do online. Such concerns were raised when COPPA was first proposed in 1998,<sup>8</sup> leading lawmakers to drop provisions that would have covered teens. In this sense, COPPA 2.0 is clearly superior to the Kids Online Safety Act, which would hurt the most vulnerable teens by giving parents a veto over access to information.<sup>9</sup>

Nonetheless, from the perspective of users, such opt-ins reflect an outdated, shallow paradigm of privacy protection: they offer the illusion of protection, and they gather data that itself requires more safeguarding. While it may be easy for some sites—especially large sites with established user bases—to obtain such opt-ins, other sites may see their user base dwindle. And the real burden of COPPA compliance lies in other provisions of the statute. The COPPA Rule implements its own framework of obligations governing how COPPA-covered sites must operate, and the FTC has imposed large civil penalties for relatively technical violations of those obligations.<sup>10</sup> Such obligations, if they are to apply to large numbers of sites used by adults, should be addressed in comprehensive privacy legislation such as the ADPPA—not in a bill that purports to apply a privacy framework based on a 1998 statute only to a small number of sites.

Fixing COPPA 2.0’s targeted advertising provisions as proposed above will not be enough to ensure that COPPA 2.0 does not force age verification if websites used by adults still fear liability under the law for being “directed to” children. As the bill is drafted, websites enjoyed primarily by adults will face a perverse incentive to adopt age-verification as the only effective way to claim that their site excludes minors. This incentive poses the same First Amendment problem that led the courts to

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<sup>8</sup> Julie Jargon, *How 13 Became the Internet’s Age of Adulthood*, Wall St. J. (June 18, 2019), <https://www.wsj.com/articles/how-13-became-the-internets-age-of-adulthood-11560850201>.

<sup>9</sup> TechFreedom, *Letter on Kids Online Safety Act* (Dec. 6, 2022), <https://techfreedom.org/wp-content/uploads/2022/12/Kosa-Letter-December-6-2022.pdf>.

<sup>10</sup> Federal Trade Commission, *Report to Congress on COPPA Staffing, Enforcement and Remedies* (Aug. 2022), <https://www.ftc.gov/reports/federal-trade-commission-report-congress-coppa-staffing-enforcement-remedies> (WW International was fined \$1.5 million and required to destroy any algorithms or work product derived from data collected in violation of COPPA; Kuuhub Inc. and others must offer paid app subscribers a refund if they were under 18 when they signed up for the app and were fined \$3 million; OpenX Technologies was fined \$7.5 million and required to delete all ad request data it collected to serve targeted ads and implement a comprehensive privacy program); Federal Trade Commission, *Fortnite Video Game Maker Epic Games to Pay More Than Half a Billion Dollars over FTC Allegations of Privacy Violations and Unwanted Charges* (Dec. 19, 2022), <https://www.ftc.gov/news-events/news/press-releases/2022/12/fortnite-video-game-maker-epic-games-pay-more-half-billion-dollars-over-ftc-allegations> (EPIC fined because of use of “dark patters” and because voice and text communication were not turned off by default for children and teens).

strike down the Child Online Protection Act of 1998 (COPA): adults seeking to access lawful content and communicate online will be deterred if they are unable to do so anonymously.<sup>11</sup>

The protection of children and minors online is of utmost importance, and so requires particular care and thoughtfulness. Shoehorning COPPA 2.0—which has received no public discussion in committee meetings and has not been properly vetted by experts and civil society—into an omnibus spending bill in the closing days of the session sacrifices that thoughtfulness for the sake of expediency. This bill requires much more careful thought and input from stakeholders to ensure that its unintended consequences for minors, adults, and small businesses do not turn good intentions into bad law.

Sincerely,

**Berin Szóka**  
President, TechFreedom

**Ari Z. Cohn**  
Free Speech Counsel, TechFreedom

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<sup>11</sup> Striking down COPA for the first time, the Third Circuit noted that age verification “will likely deter many adults from accessing restricted content, because many Web users are simply unwilling to provide identification information in order to gain access to content, especially where the information they wish to access is sensitive or controversial.” *American Civil Liberties Union v. Ashcroft*, 322 F.3d 240, 259 (3d Cir. 2003). In 2008, striking down COPA again for the final time, the Third Circuit reiterated that age verification “would deter users from visiting implicated Web sites” and therefore “would chill protected speech.” *American Civil Liberties Union v. Ashcroft*, 534 F.3d 181, 197 (3d Cir. 2008).