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Donald S. Clark
Secretary
Federal Trade Commission
600 Pennsylvania Ave., NW
Washington, D.C. 20580

Re: Request for Public Comment on the Children's Online Privacy
Protection Rule, No. P104503

Requests to Investigate McDonald's Corp. General Mills, Inc.,
Doctor's Associates, Inc., Viacom, Inc., and Turner Broadcasting
Systems, Inc. for COPPA Violations in Connection with Viral
Marketing to Children

Dear Mr. Clark:

The Center for Digital Democracy ("CDD"), by its attorneys, the Institute for Public Representation ("IPR"), joined by American Academy of Child and Adolescent Psychiatry, Berkeley Media Studies Group, Campaign for a Commercial-Free Childhood, Center for Media Justice, Center for Science in the Public Interest, Children Now, Consumer Federation of America, Consumer Watchdog, ChangeLab Solutions, Global Action Project, Media Literacy Project, Privacy Rights Clearinghouse, Public Citizen, Public Health Advocacy Institute, and Rudd Center for Food Policy & Obesity at Yale (collectively, "Children's Privacy Advocates"), are writing to supplement the record of the COPPA Rule Review with new information about how child-directed websites are using a

* Admitted to the Maryland bar only; DC bar membership pending. Practice supervised by members of the DC bar.

viral marketing technique known as “refer-a-friend” to place third-party cookies on children’s computers and to collect and store photographs of children. We are also filing five Requests for Investigation of companies that, using refer-a-friend tactics, are collecting personal information from children on child-directed websites without providing notice and obtaining advance parental consent as required by the COPPA Rule.

“Refer-a-Friend” Marketing

“Refer-a-friend” is a form of viral marketing¹ that allows companies to leverage their relationships with children to reach other children. These companies encourage children who are playing games or engaging in other activities on their websites to provide the email addresses of their friends, then use those email addresses to send unsolicited marketing messages to the children’s friends. Along with email addresses, these companies may also collect other information of a sensitive nature from children. One website encourages children to submit photos of themselves, then sends them to their friends embedded within a marketing message.

With the help of sophisticated analytics partners, some companies also place tracking cookies on the computers of children who visit their sites. Not only are cookies placed on the computer of the child sending the refer-a-friend email, but they are also placed on the computer of the child who receives the email and clicks on the link. Cookies such as these may be used to track browsing behavior and construct marketing profiles of children.

For example, McDonald’s HappyMeal.com invites a child to make a “music video” by uploading a picture or taking one using a webcam. The child’s photo is inserted onto the body of a cartoon character that dances along to music in a

¹ Fed. Trade Comm’n, *Marketing Food to Children and Adolescents: A Review of Industry Expenditures, Activities, and Self-Regulation* ES-5 (2008), available at <http://www.ftc.gov/os/2008/07/P064504foodmktngreport.pdf> (describing viral marketing as described viral marketing as marketing “in which consumers are encouraged to share electronic promotional messages with other consumers. Typically, these efforts consist of ‘e-cards’ (electronic greeting cards) and ‘send-to-a-friend’ emails that can be sent from . . . product websites and contain hyperlinks back to the site.”).

video. The site then encourages the child to “share” the video with up to five of her friends by entering in their names and email addresses. Each friend receives an email with the subject line, “You’ve been tagged for fun by a friend! Check it out! It’s a Star in Video at the McDonald’s Happy Meal Website.” The email message says: “Your friend [name] is a music video super star! Check it out now at” followed by a link to the video. Then it reads: “Now it's your turn! Give yourself the star treatment and make a video starring you to share with your friends and family!” In this way, McDonald’s gets an ever-increasing number of children to visit the branded Happy Meal website.

Refer-a-friend marketing is widely used on child-directed websites. For example, a Kaiser Family Foundation study found that 64% of the websites it reviewed enabled children to send e-greetings or other branded emails to their friends. Of those websites, 51% prompted children to email other children a challenge or link to a game, 41% prompted children to invite a friend to visit the website, and 41% prompted children to send information about the site to a friend.²

Viral marketing is also profitable. Researchers have quantified the value of word-of-mouth advertising by using “lifetime customer value” model that uses “customer strings,” defined as the “set of purchases by customer(s) linked by the word-of-mouth communication process initiated by [a] focal customer.”³ The value of a focal customer thus includes not only the value of purchases made by the focal customer, but also the value of all purchases made by customers reached as a result of word-of-mouth spread by that focal customer. In the case of tell-a-friend email systems, the child who provides her friends’ email addresses is the focal customer; the children who receive referral emails make up the other customers in the string. For a fast food company engaging in refer-a-friend marketing, the lifetime customer value of each child thus equals the total

² Elizabeth S. Moore, Kaiser Family Foundation, *It's Child's Play: Advergaming and the Online Marketing of Food to Children* 39 (2006), available at <http://www.kff.org/entmedia/upload/7536.pdf>.

³ John E. Hogan, Katherine N. Lemon, & Barak Libai, *Quantifying the Ripple: Word-of-Mouth and Advertising Effectiveness*, 44 J. Advertising Res. 271 (2004).

number of meals purchased by or at the request of all children in the customer string.

Refer-a-Friend Marketing Highlights the Urgent Need to Update COPPA

While investigating the refer-a-friend feature on children's websites, we discovered troubling practices that highlight the urgent need to revise the COPPA Rule definitions of personal information to take account of current marketing techniques.

Third-Party Cookies. In the COPPA Rule Review, the FTC is proposing to amend its current definition of personal information to make it clear that persistent identifiers, such as IP addresses and tracking cookies, fall under the definition of "personal information."⁴ CDD and other children's privacy advocates agreed with the FTC's conclusion that "persistent identifiers can permit the contacting of a specific individual," even without that individual's name.⁵

Several of the child-directed websites we investigated place third-party cookies both on the computer of the child that initially visits the website and on the computers of friends who click on the link in refer-a-friend emails. Some, if not all, of these cookies may be used for tracking and/or behavioral targeting. For example, HappyMeal.com placed a cookie from Webtrends Live; ReesesPuffs.com placed tracking cookies from Google's DoubleClick, Akamai, and BurstMedia; and Cartoon Network placed tracking cookies from Free Wheel, Scorecard Research, and Netratings Site Census.

Some of these cookies may be used to track children and analyze their behavior for the purpose of boosting "marketing success." For example, Webtrends, which places the cookie Webtrendslive.com, describes itself as providing marketers with "a competitive advantage through unified customer

⁴ Children's Online Privacy Protection Rule: Proposed Rule, 76 Fed. Reg. 59,804, 59,810-13 (Sept. 27, 2011).

⁵ Children's Online Privacy Protection Rule: Proposed Rule, 76 Fed. Reg. 59,804, 59,811 (Sept. 27, 2011); Comments of Children's Privacy Advocates, filed Project No. P-104503 (Dec. 23, 2011) at 26-27.

intelligence and optimization across mobile, social and web - all digital channels.”⁶ Another source describes Webtrends as

an analytics company that is part of a network of sites, cookies, and other technologies used to track you, what you do and what you click on, as you go from site to site, surfing the Web. Over time, sites like webtrends.live.com can help make an online profile of you usually including the sites you visit, your searches, purchases, and other behavior. Your profile can then be exchanged and sold between various companies like webtrends.live.com as well as being sold to other advertisers and marketers.⁷

When DoubleClick places a cookie on a visitor's computer, the network also creates a log entry that includes a user ID number, the user's IP address, and the URL of the referring website.⁸ Akamai's cookie may collect – and store for up to twelve months –

clickstream information, URLs, usage data regarding pages viewed, date and time, browser type, domain type, geographic location information, and other non-personally identifiable information. We may also use cookies and other similar mechanisms to collect, store, and use information about your computer system and associate this information with other non-personally identifiable information.⁹

The tracking of children's Internet activity by using cookies and persistent identifiers for the purpose of targeting advertisements to those children is at odds with COPPA. We urge the FTC to promptly revise the COPPA Rule to clarify that this activity is prohibited unless the operator first provides effective notice and obtains verifiable advance parental consent.

⁶ Webtrends, About Us, <http://webtrends.com/about-us/> (last visited August 21, 2012).

⁷ Abine, What Is Webtrends.live.com?,

<http://www.donottrackplus.com/trackers/webtrends.live.com.php> (last visited August 21, 2012).

⁸ Google, How Does Google Use the DoubleClick Cookie to Serve Ads?,

<http://www.google.com/policies/privacy/ads/#toc-doubleclick> (last visited August 21, 2012).

⁹ http://www.akamai.com/html/policies/privacy_statement.html.

Collection and storage of photographs. In its COPPA Rule review, the FTC proposes to include photographs under the definition of personal information. It points out that “photographs of children, in and of themselves, may contain information, such as embedded geolocation data, that permits physical or online contact. In addition, facial recognition technology can be used to further identify persons depicted in photos.”¹⁰ The fact that major companies such as McDonald’s are already engaging in extensive collection of children’s photographs highlights the need to promptly update the COPPA Rule as proposed.

Our review of HappyMeal.com also revealed another serious problem with collecting images of children. We discovered that McDonald’s stores the photographs taken or uploaded by children using three of the site’s features in unprotected publicly-accessible directories.¹¹ As the Commission has recognized, information about children is one of the “clearest examples” of sensitive data.¹² McDonald’s failure to adopt any measures to protect children’s photographs from unauthorized outside access breaches its responsibility to maintain reasonable procedures to protect sensitive information, and constitutes an unfair act or practice in violation of § 5 of the Federal Trade Commission Act independent of COPPA.¹³

¹⁰ Children’s Online Privacy Protection Rule: Proposed Rule, 76 Fed. Reg. 59,804, 59,813 (Sept. 27, 2011).

¹¹ Photographs taken or uploaded by children using the Star in a Music Video!, Get in the Picture, and RonaldGram features of HappyMeal.com may be accessed and viewed at <http://www.happymeal.com/starvideo/>, <http://www.happymeal.com/ronaldframe/>, and <http://www.happymeal.com/ronaldgram/>, respectively.

¹² Fed. Trade Comm’n, *FTC Staff Report: Self-Regulatory Principles for Online Behavioral Advertising* 44 (2009). Data about health or finances are the other named clear examples of sensitive information.

¹³ Burke Kappler, Fed. Trade Comm’n Bureau of Consumer Protection, *Protecting Personal Information – Know Why* (Oct. 2007), <http://business.ftc.gov/documents/art08-protecting-personal-information-know-why>; see Fed. Trade Comm’n, Ceridian Corporation; Analysis of Proposed Consent Order to Aid Public Comment, 76 Fed. Reg. 26,729, 26,730 (May 9, 2011) (“The complaint alleges that Ceridian’s failure to employ reasonable and appropriate measures to prevent unauthorized access to sensitive personal information is an unfair act or practice”); Fed. Trade Comm’n, Ceridian Corporation; Analysis of Proposed Consent Order to Aid Public Comment, 76 Fed. Reg. 27,056 at 27,057 (May 10, 2011) (“The complaint alleges that Lookout’s failure to employ reasonable and appropriate measures to prevent unauthorized access to sensitive personal information is an unfair act or practice”).

Further, although the "Upload a Photo" form tells kids that "[y]our photo is stored for 2 weeks and then deleted," our investigation found that HappyMeal.com fails to follow this policy. A photo uploaded on August 2, 2012 was not deleted after two weeks. As of August 21, 2012, this photo was still stored at HappyMeal.com.¹⁴

The FTC Should Take Prompt Action to Enforce the Existing COPPA Rule

In addition to revising the COPPA Rule, the Commission should investigate and bring actions for violations of the existing COPPA Rule. The complaints filed today allege that McDonald's Corporation, which operates HappyMeal.com; General Mills, Inc., which operates ReesesPuffs.com and TrixWorld.com; Doctor's Associates, Inc., which operates SubwayKids.com; Viacom, Inc., which operates Nick.com; and Turner Broadcasting Systems, Inc., which operates CartoonNetwork.com, are currently violating the existing COPPA Rule.

COPPA generally makes it unlawful for any operator of a website directed to children to collect personal information from a child unless it first provides sufficient notice of the information collection and obtains "verifiable parental consent for the collection, use or disclosure of personal information from children." Email addresses fall under the definition of "personal information."

None of the companies subject to these complaints provide sufficient notice of their collection of email addresses from children. These companies also do not make any effort to obtain verifiable parental consent prior to collection and use of the children's email addresses. The collection of email addresses from children for viral marketing campaigns does not fall within any of the recognized exceptions to COPPA's requirement of parental consent. Nor do any of the websites comply with the guidance provided in the FTC's Frequently Asked Question ("FAQ") 44 regarding "electronic postcards."

¹⁴ Although the photo no longer appears in the directory at <http://www.happymeal.com/starvideo/>, it remains available at <http://www.happymeal.com/starvideo/20120802115448144.jpg> and in the video at http://www.happymeal.com/en_US/#MyHappyMeal?loadAppById=starVideo&ID=&upload=/starvideo/20120802115448144.jpg.

Refer-a-friend campaigns are also deceptive to children. It is well-understood that younger children lack the cognitive ability to recognize advertising, to understand persuasive intent, and to critically evaluate advertisements.¹⁵ When a child shares a game through a site's refer-a-friend function, neither the sender nor recipient is likely to understand that the game or video is advertising. Indeed, the language on some websites seems designed to disguise the fact that it is advertising.¹⁶

It is also unfair to use refer-a-friend campaigns to market to children. According to the Word of Mouth Marketing Association, viral marketing is effective because "76% of consumers don't believe the advertising they see, while 80% say they trust recommendations from people like themselves."¹⁷ But children are much more trusting than adults. Unlike adults, they lack the capacity to make an informed decision as to whether to share a friend's information because they have no concept of the value of a friend's email address to a particular company. Thus, using children to virally market products to other children online takes unfair advantage of children's trust and lack of experience.

Finally, we ask the FTC to rescind or clarify its guidance in FAQ 44. This non-binding guidance states that children's websites may send "electronic postcards" in the absence of parental consent without violating COPPA under certain conditions. While none of the websites named in the complaints complied with those conditions, we believe that they even if they had, they would still violate COPPA. Nothing in COPPA permits a website directed to children to collect the email address of a child from another child without verifiable consent

¹⁵ See, e.g., Dale Kunkel, *Children and Television Advertising*, in *Handbook of Children and the Media* 375 (Dorothy & Jerome Singer eds., 2001); Dale Kunkel et al., *Report of the APA Task Force on Advertising and Children* 20-21 (2004); Deborah R. John, *Consumer Socialization of Children: A Retrospective Look at Twenty-Five Years of Research*, 26 *J. Consumer Res.* 183, 184-85 (1999); Moniek Buijzen, *Reducing Children's Susceptibility to Commercials: Mechanisms of Factual and Evaluative Advertising Interventions*, 9 *Media Psychol.* 411, 413-14 (2007).

¹⁶ For example, on HappyMeal.com, the refer-a-friend form tells children, "Fill out the form below to send this game to your friends and family!" The recipient of the refer-a-friend solicitation receives an email containing a hyperlink to an advergame urging the child to "visit HappyMeal.com for more fun and games and to see the toys!"

¹⁷ Kristen L. Smith, *How to Define and Communicate Word-of-Mouth Success*, *Promo Xtra* (July 16, 2009), <http://chiefmarketer.com/news/how-define-and-communicate-word-mouth-success>.

of the parents of both children. Because the FTC's guidance could be read to suggest otherwise, it should be rescinded or clarified.

Respectfully submitted,

/s/

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