

August 20, 2018

Joseph J. Simons
Chairman

Rohit Chopra
Commissioner

Maureen K. Ohlhausen
Commissioner

Noah Joshua Phillips
Commissioner

Rebecca Kelly Slaughter
Commissioner

**Re: Competition and Consumer Protection in the 21st Century Hearings,
Project Number P181201**

Dear Chairman Simons and Commissioners:

The Center for Digital Democracy (CDD), Berkeley Media Studies Group, and Color of Change appreciate the opportunity to comment on the Federal Trade Commission's request for comment for its Competition and Consumer Protection in the 21st Century Hearings, Project Number P181201. Our organizations urge the Federal Trade Commission (FTC) to specifically acknowledge the important issues involving the privacy and welfare of young people by adding this issue to its proposed hearing agenda. The FTC has a vital statutory role to play in terms of children's privacy under the Children's Online Privacy Protection Act (COPPA). It also has acknowledged that teens require "additional protections" when it comes to ensuring their online privacy.¹ More generally, of course, the commission also has broad responsibility to protect the interests of youth in the commercial marketplace. Thus, we request that the commission add a 12th topic to the agenda of its upcoming hearings on "Competition and Consumer Protection in the 21st Century," in order to ensure that the welfare and privacy of children and teens are fully addressed. Specifically, we propose the following topic description: "The impact of the evolving contemporary digital data and media market place and consumer protection on the welfare and privacy of children and teens."

Despite the FTC's obligation to safeguard the privacy of children by investigating and enforcing the compliance with COPPA, there is little question that the commercial surveillance of children and teens continues unencumbered. We are particularly concerned that digital marketers and advertisers take advantage of children's cognitive, social and emotional vulnerabilities to undermine their privacy. Through a growing number of marketplace practices, young people,

¹ Federal Trade Commission, "FTC Privacy Report," 2012, <https://www.ftc.gov/news-events/media-resources/protecting-consumer-privacy/ftc-privacy-report>.

their parents, and caregivers are exposed to a growing set of unfair and often deceptive commercial practices.

Our organizations and other advocates have previously called on the FTC to recognize that current privacy and consumer protections for children and teens, including children of low income and color, are insufficient. The commission must ensure that youth receive the privacy and other consumer protections they deserve. The marketplace alone does not produce outcomes that are in the interest of young internet users and harms us all.

Advances in digital marketing and advertising, Big Data analytics, and artificial intelligence (AI), along with a dramatic expansion of overall data collection from multiple devices, have enabled marketers to further erode privacy protections and other safeguards. Young people are spending increasing amounts of time with digital applications and devices, which offer immersive, 3D “virtual reality” and branded experiences.² Toys now incorporate intelligent technologies that enable marketers to engage with children during play, gathering information on their interests, actions, and location.³ Children are a highly valuable and key market for the leading digital video companies—such as Google—that seek to target them on their networks and platforms.⁴

The forces that comprise contemporary marketing are poised to become more ubiquitous, personalized, and powerful.⁵ Each of the key elements that make up digital advertising to children and teens today is problematic, including ongoing commercial surveillance (e.g., geo-

² Brian Steinberg, “How Kids’ TV Networks Are Fighting Off Their Frightening Decline,” *Variety*, September 2, 2015, <https://variety.com/2015/tv/features/kids-tv-strategy-nickelodeon-disney-digital-1201582874/>; “How Fanta Does Youth Marketing Right,” <http://www.immersiveyouthmarketing.com/blog/brands-doing-youth-marketing-right-fanta>; Marty Swant, “SXSW Attendees Can Paint Their Own Virtual Reality Happy Meal Box,” *Adweek*, March 14, 2016, <https://www.adweek.com/digital/sxsw-attendees-can-paint-their-own-virtual-reality-happy-meal-box-170188/>; “DEWcision VR Racing: Pitch Black 360,” Mountain Dew, <https://www.youtube.com/watch?v=IigE5GIUykQ>.

³ “Cognitoys Dino Internet-Connected Smart Toy,” https://www.amazon.com/Cognitoys-Dino-Internet-Connected-Smart-Toy/dp/B075WY5FKV/ref=sr_1_1?s=toys-and-games&ie=UTF8&qid=1534360052&sr=1-1&keywords=internet+connected+toy&dpID=31hqvXUKY5L&preST=_SY300_QL70_&dpSrc=srch; “The 10 Best Games on Oculus Rift Right Now,” <http://blog.dubitlimited.com/2014/04/14/10-best-games-on-oculus-rift/>; Brian Naylor, “This Doll May Be Recording What Children Say, Privacy Groups Charge,” NPR, December 20, 2016, <https://www.npr.org/sections/alltechconsidered/2016/12/20/506208146/this-doll-may-be-recording-what-children-say-privacy-groups-charge>.

⁴ Julia Greenberg, “YouTube’s Kids App is Coming Under Fire for Junk Food Ads,” *Wired*, November 24, 2015, <https://www.wired.com/2015/11/youtubes-kids-app-is-coming-under-fire-for-junk-food-ads/>; Jeff Chester, “Kids Spending and Influencing Power: \$1.2 Trillion Say Leading Ad Firm,” Center for Digital Democracy, November 1, 2012, <https://www.democraticmedia.org/kids-spending-and-influencing-power-12-trillion-says-leading-ad-firm>.

⁵ “Marketing Technology Landscape,” http://cdn.chiefmartec.com/wp-content/uploads/2016/03/marketing_technology_landscape_2016_3000px.jpg.

tracking and social media sentiment mining⁶), micro-targeting, “native” advertising (new forms of stealth product placement), and “neuromarketing” practices expressly designed to trigger emotions and subconscious behaviors.

Deploying the latest insights from behavioral science to “weaponize” persuasion techniques is one of the most concerning developments in the digital marketing space, especially when it is used against children and teens.⁷ Companies employ social scientists and their “knowledge of psychological vulnerabilities to devise products that capture kids’ attention for the sake of industry profit.”⁸

Many companies marketing to children and teens, such as food and beverage brands, also have fully embraced the use of Big Data marketing that spans their digital, in-store, and other offline marketing. They use the latest technologies and methods that incorporate data in far-reaching ways, including using this information to make predictive decisions on what products to market to individuals and their communities.⁹ Data-management engines deployed by Pepsi, for example, create consumer profiles that include information on a person’s potential “lifetime value,” assign “scores” that identify how they respond to various forms of advertising, and provide a “holistic consumer view.”¹⁰

Now these privacy- and consumer protection-challenging practices, which comprise what are known as “360-degree”¹¹ ad campaigns, are being integrated along with recent advances in marketing automation, including applications involving AI, virtual and augmented reality, cognitive advertising, “emotion and facial recognition,” bio-sensor information from wearable devices, mobile ordering and payment systems, data storytelling, and an explosion of new brand-produced video and music content available on mobile and including platforms such as

⁶ “What is Sentiment Analysis?” <https://www.crimsonhexagon.com/blog/what-is-sentiment-analysis/>.

⁷ “12 Techniques of Persuasion Psychology That Will Lift Your Conversion Rate,” Upwork, <https://www.upwork.com/hiring/for-clients/12-techniques-of-persuasion-psychology/>.

⁸ Richard Freed, “The Tech Industry’s War on Kids,” Medium, March 12, 2018, <https://medium.com/@richardnfreed/the-tech-industrys-psychological-war-on-kids-c452870464ce>.

⁹ “Coca-Cola’s Unique Challenge: Turning 250 Datasets Into One,” *MIT Sloan Management Review*, May 27, 2015, <https://sloanreview.mit.edu/article/coca-colas-unique-challenge-turning-250-datasets-into-one/>.

¹⁰ Ashwin Nathan, “Frito-Lay’s D3 Convergence In Marketing: Design, Digital, and Demand,” <https://www.slideshare.net/MarTechConf/fritolays-d3-convergence-in-marketing-design-digital-and-demand-by-ashwin-nathan/1>

¹¹ “MTN DEW® KICKSTART™ Expands Product Lineup With Introduction Of Four Bold New Flavors,” January 19, 2016, <http://www.pepsico.com/live/pressrelease/mtn-dew-kickstart-expands-product-lineup-with-introduction-of-four-bold-new-flav01192016>.

YouTube,¹² Facebook,¹³ Snapchat.¹⁴ Increasingly, marketers are engaged in real-time tactics that take full advantage of what digital excels at—the ability to develop a comprehensive and continually updated profile of an individual along with the capability to deliver an ad or some marketing “experience” at any time—even during what is now called a “micromoment.”

The growing popularity of “smart,” Internet-connected toys also poses significant privacy, security, and other risks to children.¹⁵ In the complaint against Genesis Toys and Nuance Communications, the Electronic Privacy Information Center, CDD, Campaign for Commercial Free Childhood (CCFC), and Consumers Union argued that “by purpose and design, these toys record and collect the private conversations of young children without any limitations on collection, use, or disclosure of this personal information. The toys subject young children to ongoing surveillance and are deployed in homes across the United States without any meaningful data protection standards.”¹⁶ Similarly, smartwatches that are marketed to allow parents to track the location of and stay in touch with very young children can pose real dangers to children. Research shows that these watches are unreliable, storing data unsafely and subject to hackers who might prey upon the child.¹⁷ Additionally, leading experts, CCFC and CDD, as well as members of Congress, say that the increasingly popular digital voice-enabled virtual assistants pose significant threats to children’s wellbeing and privacy.¹⁸

¹² “How Pepsi Max's 'Unbelievable' YouTube Channel Helped Increase Market Share,” <https://www.thinkwithgoogle.com/intl/en-gb/advertising-channels/video/how-pepsi-maxs-unbelievable-youtube-channel/>.

¹³ MacDonald’s Facebook Page, https://www.facebook.com/McDonaldsUS/?brand_redir=10150097174480584.

¹⁴ Hope King, “Snapchat Launches McDonald’s Filters,” CNNtech, June 17, 2015, <https://money.cnn.com/2015/06/17/technology/mcsnaps/>.

¹⁵ Federal Trade Commission, “In the Matter of Genesis Toys and Nuance Communications: Complaint and Request for Investigation, Injunction, and Other Relief Submitted by the Electronic Privacy Information Center, the Campaign for a Commercial Free Childhood, the Center for Digital Democracy, Consumers Union,” December 6, 2016, <https://epic.org/privacy/kids/EPIC-IPR-FTC-Genesis-Complaint.pdf>.

¹⁶ Electronic Privacy Information Center (EPIC), et al, letter submitted to Acting Chairman Maureen K. Ohlhausen and Commissioner Terrell McSweeney of the Federal Trade Commission, October 18, 2017, <http://www.commercialfreechildhood.org/sites/default/files/Smart%20Watch%20FTC%20letter%2010.18%20FINAL.pdf>.

¹⁷ “Significant Security Flaws in Smartwatches for Children,” October 18, 2017, <https://www.forbrukerradet.no/side/significant-security-flaws-in-smartwatches-for-children>.

¹⁸ “Experts and Advocates Caution Parents to Steer Clear of New Amazon Echo Dot for Kids,” May 11, 2018, <http://www.commercialfreechildhood.org/experts-and-advocates-caution-parents-steer-clear-new-amazon-echo-dot-kids>.

Children and Families of Color and Low Income, in Particular, are Subject to Unfair Digital Marketing Practices

The use of classifying and predictive algorithms can be a source of bias, and evidence is strong that their statistical models often produce discriminatory outcomes for a variety of reasons, including both implicit and explicit biases.¹⁹ Marketing and advertising of products and services to children is no different. For example, digital tools are commonly used in the area of marketing of junk food to children. Marketers collect an unending stream of data about purchases, location, preferences, behaviors and more. These data can exacerbate inequalities because they are shaped by current and past discriminatory policies and practices. For example, Jim Crow laws such as redlining have kept people of color out of certain neighborhoods,²⁰ and limited their access to affordable, fresh and healthy food. That impacts purchasing patterns, since where people live—and the products made available to them there—influence what food people prefer and buy. Once a community has shown a preference for a product, the food and beverage industry then uses past purchasing data to inform additional spending to continue marketing that product. As African-American and Latino children are already disproportionately exposed to more junk food non-digital marketing than their white counterparts,²¹ these classifying and predictive analytics are likely to reinforce inequities and keep communities of color disproportionately on the receiving end of junk food marketing, likely cementing adverse health outcomes in the future. It is our responsibility to intervene when market forces cannot ensure equitable health outcomes, especially regarding children, who are the least equipped to fend off the onslaught of unhealthy marketing.

Contemporary Digital Marketing Practices Take Advantage of Children’s Cognitive, Social, and Emotional Vulnerabilities

Children are still developing—psychologically, biologically, and socially. We know from decades of research that they are vulnerable to a range of advertising and marketing practices. The younger ones cannot always tell the difference between fantasy and reality or recognize advertising. For example, children under 8 have difficulty understanding persuasive intent, making it hard for them to realize that advertising and marketing techniques are tools marketers use to persuade them to buy something, as opposed to simply delivering factual information. Older children can be confused, especially by digital marketing techniques that are disguised as

¹⁹ Cathy O’Neil, *Weapons of Math Destruction: How Big Data Increases Inequality and Threatens Democracy* (New York: Crown Publishing Group, 2016).

²⁰ B. Mock, “Remember Redlining? It’s Alive and Evolving.” *The Atlantic*, October 8, 2015, <http://www.theatlantic.com/politics/archive/2015/10/rememberredlining-its-alive-and-evolving/433065/>; N. Trifun, “Residential Segregation After the Fair Housing Act. *Human Rights Magazine*, v. 36, n. 4 (2009).

²¹ Rudd Center for Food Policy and Obesity, “Food Advertising Targeted to Hispanic and Black Youth: Contributing to Health Disparities,” August 2015, http://www.uconnruddcenter.org/files/Pdfs/272-7%20%20Rudd_Targeted%20Marketing%20Report_Release_081115%5B1%5D.pdf.

entertainment, embedded in an online game, or presented to them through a friend.²² For preteens (8-12), the research shows that they are in a unique stage in their development when their peer relationships are beginning to have a profound influence on their choices and preferences. They are inclined to behave impulsively and often do not think about the consequences of their actions before taking them. As they begin to explore their identities, they are particularly drawn to social media, posting photos and other personal information about themselves, and not always using good judgment about what they share.²³ Young people over 13 are impressionable and vulnerable to the influence of social media marketing, and are also challenged in their ability to make distinctions among all the myriad, sophisticated, subtle, and largely invisible ways in which marketing engages online users.²⁴

Companies use youth influencers and techniques such as “native advertising” that masquerade as editorial content, making it impossible for even the savviest children to understand they are being pitched the latest products, including unhealthy foods. Youth of color, and low-income children generally, cannot escape ad-supported digital content, much of which is designed to impact their emotions and behavior. Marketers are using technologies like geolocation to track young people, and artificial intelligence to predict what product to promote to someone at the most favorable time. Unless we develop fair digital marketing and privacy rules that protect youth, the marketplace will evolve to new extremes of commercial exploitation.

Need for Fair Marketing Practices for Children and Teens and Human Rights, Social, Economic and Ethical Impact Assessments

Fair marketing practices for children and teens could include, for example, rules on cross-device tracking and geotargeting, native advertising and product placement, “influencer marketing” and neuromarketing or any other implicit persuasive technique. Ultimately, we are concerned with the outcomes and impact of profiling across broad categories of consumers and the distribution of this impact, particularly on children and teens, and predictive algorithms. Therefore, we urge the FTC to develop, perhaps in cooperation with its European colleagues, methodologies to assess the human rights, social, economic and ethical impacts of the use of algorithms in modern data processing.²⁵ Such a broader view of the impact of algorithms would not only look at the effect on individual privacy, but also consider disparate impacts, as well as fairness, consumer

²² D. Kunkel and J. Castonguay, “Children and Advertising: Content, Comprehension, and Consequences,” in D. Singer and J. Singer (eds.), *Handbook of Children and the Media*, pp. 395-41 (Thousand Oaks, CA: Sage, 2012); D. R. John, “Consumer Socialization of Children: A Retrospective Look at Twenty-Five Years of Research,” *Journal of Consumer Research* 26, (1999): 183-213.

²³ C. Pechmann, L. Levine, S. Loughlin, et al, “Impulsive and Self-conscious: Adolescents’ Vulnerability to Advertising and Promotion,” *Journal of Public Policy & Marketing* 24, n. 2 (2005): 202-221.

²⁴ Kathryn C. Montgomery, “Youth and Surveillance in the Facebook Era: Policy Interventions and Social Implications,” *Telecommunications Policy* 39, n. 9 (October 2015): 771-786, <https://www.sciencedirect.com/science/article/abs/pii/S0308596114001955>.

²⁵ Alessandro Montelero, “AI and Big Data: A Blueprint for Human Rights, Social and Ethical Impact Assessment,” *Computer Law & Security Review* 34, n. 4 (August 2018): 754-772, <https://www.sciencedirect.com/science/article/pii/S0267364918302012>.

protection, competition, accountability and innovation. These impact assessments should be required for companies under consent order and could also be required of companies who come under special scrutiny for engaging in high-risk data practices.

An FTC proceeding on competition and consumer welfare must include a hearing on youth, including how effectively the FTC enforces COPPA. We believe that meaningful COPPA enforcement requires a better understanding of how the confluence of cross-device use, data analytics, personalization, and targeted content applications enable parents to make truly informed decisions regarding the privacy of their children. Beyond COPPA, the FTC must address what additional fair digital marketing and privacy rules we need to protect the welfare and privacy of children and teens. This FTC hearing should also examine current marketing and data practices of the leading digital media companies targeting youth, including Google, Facebook, Amazon, Disney and Nickelodeon.

We urge the commission to hold a hearing addressing the welfare and privacy of children and teens as part of this proceeding.

Respectfully submitted,

Berkeley Media Studies Group

Center for Digital Democracy

Color of Change