UNITE Today the Commission approves long-awaited changes to its rule implementing the Children's Online Privacy Protection Act (COPPA).

[1] **I have categorically opposed other rulemaking actions in the final hours of the Biden-Harris Administration.[2] But these amendments to the old COPPA Rule are the culmination of a bipartisan effort initiated when President Trump was last in office.[3] They contain several measures improving data privacy and security protections for children. I therefore vote to issue the Final Rule. But I write separately to note serious problems with the Final Rule, problems that are the result of the outgoing administration's irresponsible rush to issue last-minute rules two months after the American people voted to evict them from office, which the Commission under President Trump will have to address.**

The Final Rule poses three major problems. The first involves a provision I support, but which should be clarified. [illegible] Rule does. It requires operators to disclose and receive parental consent as to the specific third parties to whom the operators will disclose children's data.

[4] This is a good change. Operators frequently rely on third-party vendors for various services such as payment processing, customer service, website analytics, and product development. But both the identities and quantities of such third-party recipients of children's data are central to the risk that the privacy and security of those data will be compromised. Sending children's data to third-party vendors with poor security records, or sending those data to many third-party vendors, increases the risk of accidental disclosure or data breach.

This change is good when considered in isolation. But because of another existing feature [illegible] changes to their privacy terms.

[5] As is often the case, the Final Rule does not define materiality with any specificity. Whether a change is material is dependent on the particular circumstances of

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[1] 15 U.S.C. § 6501 *et seq.;* 16 C.F.R. pt. 312 (2013 – "Old Rule", 2025 – "Final Rule").

[2] Dissenting Statement of Commissioner Andrew N. Ferguson, Regarding the Telemarketing Sales Rule, Matter No. R411001 (Nov. 27, 2024).

[3] Children's Online Privacy Protection Rule, Request for Public Comment, 84 Fed. Reg. 35842 (July 25, 2019).

[4] Final Rule §§ 312.4(c)(1)(iv), (c)(1)(v), 312.4(d)(2).

[5] Old and Final Rule §§ 312.4(b), 312.5(a)(1).

the change.[6] But the Commission's decision to require the disclosure of third parties' identities strongly suggests that the addition of new third-party data recipients, or the replacement of one third-party recipient with another, is always a "material change." After all, why would the Commission require disclosure of immaterial information?[7] And indeed, the addition of third parties *should* sometimes be treated as a material change. Parents might have good reason to deny consent if, for example, an operator switches from a reputable analytics provider to one with a track record of poor security and privacy practices, or to a provider located in, or controlled by, a foreign government hostile to the United States.

But not all additions or changes to the identities of third parties should require new consent. Collecting new parental consents is an inherently high-friction process, which could easily entail an operator losing a significant portion of its customers for reasons unrelated to the identity of the new third-party data recipient.[8] The contact information for parents might be out of date, or it simply might not be possible for the operator to get the parent to consider the request, even if the parents would be inclined to give the new consent upon consideration. It stands to reason that operators will be reluctant to make changes that require fresh consent, and the result could be that they are effectively locked into their existing third-party vendors. This stickiness would seriously impair competition. Insofar that any third-party service provider enjoys significant market power, the Final Rule could entrench that power by increasing the cost of switching to an upstart competitor. The upshot will be higher prices for website operators, and for consumers to whom the cost of those higher prices are passed.[9]

The Commission could have mitigated this issue easily. It could have explicitly provided that a mere addition of a third party providing a service similar to the service provided by a consented-to third party does not in and of itself require the operator to obtain fresh consent from

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[6] See Material, Black's Law Dictionary (12th ed. 2024) ("Of such a nature that knowledge of the item would affect a person's decision-making; significant; essential").

[7] Footnote 311 of the Final Rule's Statement of Basis and Purpose says that "[w]here an operator changes the roster of third-party recipients to which it discloses children's personal information after the operator has provided the roster of such recipients in its online notice, the Commission is not likely to consider the addition of a new third party to the already-disclosed category of third-party recipients to be a material change that requires new consent." This does not fix the problem. The right way to resolve inadequacies in a rule is to fix the rule, not to tack on to the Statement of Basis and Purpose unenforceable predictions that the Commission would be "unlikely" to consider certain conduct to be a violation.

[8] See F.A. Esbensen, et al., *Differential Attrition Rates and Active Parental Consent*, 23 Evaluation Review 316, 322 (1999) (noting non-response rates of 23% to 45% even after repeated requests when seeking parental consent for a social science survey to be conducted at school).

[9] This danger is partially mitigated by the rule's definition of "third parties" as excluding persons who "provide support for the internal operations of the website or online service and who does not use or disclose information protected under this part for any other purpose," but "support for the internal operations of the website or online service" is narrowly defined and does not necessarily cover all legitimate third-party disclosures. Old and Final Rule § 312.2. In the Statement of Basis and Purpose accompanying the 2013 amendments to the COPPA Rule, the Commission

users' parents. The Commission could have clarified that such a change is material for purposes of requiring new consent only when facts unique to the new third party, or the quantity of the new third parties, would make a reasonable parent believe that the privacy and security of their child's data is being placed at materially greater risk. Such a change could have substantially mitigated competition concerns while protecting children's data, especially because operators would still have to seek consent as to the new third parties from the parents of new users. Furthermore, the Final Rule could have required operators to give *notice* to every parent of every change in the identity of third-party service providers, which would empower parents to withdraw consent if the identity of the new third party concerned them.

The second serious problem with the Final Rule is the new requirement that personal information collected online not be retained indefinitely.[10] This change is motivated by the best of intentions, but it is poorly conceived. The previous COPPA Rule permitted the retention of children's data only for "as long as is reasonably necessary to fulfill the purpose for which the information was collected," a provision retained in the Final Rule.[11] This requirement permitted indefinite retention as long as the data continued to serve the same important function for which it was collected. The new categorical prohibition on indefinite retention is likely to generate outcomes hostile to users. For example, adults might be surprised to find their digital diary entries, photographs, and emails from their childhood erased from existence due to the operation of the Final Rule. Further, "indefinitely" is undefined. If companies can comply with the Final Rule by declaring that they will retain data for no longer than two hundred years, then the requirement is meaningless. And if "indefinite" is not meant to be taken literally, then it is unclear how the requirement is any different than the existing requirement to keep the information no longer than necessary to fulfill the purpose for which it was collected.

My final objection to these amendments is that the Commission missed the opportunity to clarify that the Final Rule is not an obstacle to the use of children's personal information solely for the purpose of age verification. Under both the old COPPA Rule and the Final Rule, the collection and use of information useful for age verification, such as photographs or copies of government-issued IDs, qualifies as the collection of a child's personal information requiring parental consent.[12] But operators of mixed-audience websites or online services—serving both adults and children—wanting to use more accurate age verification techniques than self-declaration would need such information to determine whether a new user is a child protected by COPPA in the first place. The old COPPA Rule and the Final Rule contain many exceptions to the general prohibition on the unconsented collection of children's data,[13]