

**Oral Remarks – Open Commission Meeting
May 19, 2022**

**Policy Statement on Education Technology and
the Children’s Online Privacy Protection Act**

**Request for Public Comment on Amendments to the
Guides Concerning the Use of Endorsements and Testimonials in Advertising**

**I. Policy Statement on Education Technology and the Children’s Online Privacy
Protection Act**

Thank you, Chair Khan.

Today the Commission issues a Policy Statement on Education Technology and the Children’s Online Privacy Protection Act (“COPPA Policy Statement” or “Statement”).¹ Many thanks to the staff who worked on this Policy Statement:

- Division of Privacy and Identity Protection (BCP) – James Trilling, Peder Magee, Mark Eichorn, Kristin Cohen
- Division of Consumer and Business Education (BCP) – Lesley Fair, June Chang, Jennifer Leach
- BCP Director’s Office – Ian Barlow
- Office of General Counsel – Richard Gold, Josephine Liu

And thanks to the commenters, who raised many important issues about COPPA, franchising, and the state of the FTC. I share Ms. Harrington’s concerns and hope that leadership takes those concerns to heart.

During my tenure as a Commissioner, I have been an ardent advocate for federal privacy legislation and stronger privacy protections.² Within the consumer privacy context, protecting

¹ FTC Policy Statement on Education Technology and the Children’s Online Privacy Protection Act (May 19, 2022), <https://www.ftc.gov/COPPAstatement>.

² Oral Statement of Commissioner Christine S. Wilson, FTC, Before the U.S. House Committee on Energy and Commerce Subcommittee on Consumer Protection and Commerce (July 28, 2021), https://www.ftc.gov/system/files/documents/public_statements/1592954/2021-07-28_commr_wilson_house_ec_opening_statement_final.pdf; Oral Statement of Commissioner Christine S. Wilson, FTC, Before the U.S. Senate Committee on Commerce, Science, and Transportation (April 20, 2021), https://www.ftc.gov/system/files/documents/public_statements/1589180/opening_statement_final_for_postingrevd.pdf; Christine Wilson, Privacy in the Time of Covid-19, TRUTH ON THE MARKET (Apr. 15, 2020), <https://truthonthemarket.com/author/christinewilsonicle/>; Christine S. Wilson, A Defining Moment for Privacy: The Time is Ripe for Federal Privacy Legislation, Remarks at the Future of Privacy Forum, Feb. 6, 2020, https://www.ftc.gov/system/files/documents/public_statements/1566337/commissioner_wilson_privacy_forum_speech_02-06-2020.pdf; Oral Statement of Commissioner Christine S. Wilson Before the U.S. House Committee on Energy and Commerce Subcommittee on Consumer Protection and Commerce (May 8, 2019), https://www.ftc.gov/system/files/documents/public_statements/1519254/commissioner_wilson_may_2019_ec_opening.pdf; Oral Statement of Commissioner Christine S. Wilson, FTC, Before the U.S. Senate Committee on Commerce, Science, and Transportation Subcommittee on Consumer

children’s privacy has been a keen area of focus for me.³ The pandemic only served to deepen my concerns, as our society moved so many of its interactions online. COVID-19 and other events in 2020 laid bare many privacy and civil liberties issues, including those concerning educational technology (“ed tech”).⁴ Yes, ed tech facilitated continued learning as children were forced out of brick-and-mortar classrooms and into virtual ones. And for that, I am grateful. But ed tech has also enjoyed an ever-growing window into our children’s actions, their capabilities, and their personalities.⁵ Without appropriate guardrails, those insights can be misused.

The Commission enforces the Children’s Online Privacy Protection Act,⁶ which Congress passed in 1998; that Act empowered the FTC to engage in rulemaking in this area. The FTC has worked diligently to maintain the relevance of COPPA in the face of evolving technologies and emerging issues. Our seasoned staff have created and maintained extensive business guidance and consumer education resources on all issues falling within the COPPA purview, including ed tech.⁷ And the agency was engaged in further updating, including with respect to ed tech, just before the pandemic struck.

Protection, Product Safety, Insurance, and Data Security (Nov. 27, 2018), https://www.ftc.gov/system/files/documents/public_statements/1423979/commissioner_wilson_nov_2018_testimony.pdf.

³ For example, I gave the opening remarks at the workshop convened as part of the review of the COPPA rule. Christine S. Wilson, Opening Remarks at FTC Workshop: The Future of the COPPA Rule (Oct. 7, 2019), https://www.ftc.gov/system/files/documents/public_statements/1547693/wilson_-_ftc_coppa_workshop_opening_remarks_10-7-19.pdf. I also discussed children’s privacy issues at the Family Online Safety Institute. See Christine S. Wilson, The FTC’s Role in Supporting Online Safety (Nov. 21, 2019), https://www.ftc.gov/system/files/documents/public_statements/1557684/commissioner_wilson_remarks_at_the_family_online_safety_institute_11-21-19.pdf. And, in conjunction with the Commission’s settlement with Facebook, I worked with staff to obtain heightened protections in the settlement regarding the collection of data from minors. See Christine S. Wilson, Remarks at Global Antitrust Institute, FTC v. Facebook (Dec. 11, 2019), https://www.ftc.gov/system/files/documents/public_statements/1557534/commissioner_wilson_remarks_at_global_antitrust_institute_12112019.pdf.

⁴ Christine Wilson, Op-Ed, *Coronavirus Demands a Privacy Law*, WALL ST. J., May 13 2020, available at <https://www.wsj.com/articles/congress-needs-to-pass-a-coronavirus-privacy-law-11589410686>; Christine S. Wilson, Privacy and Public/Private Partnerships in a Pandemic, Keynote Remarks Privacy + Security Forum (May 7, 2020), https://www.ftc.gov/system/files/documents/public_statements/1574938/wilson-remarks_at_privacy_security_academy_5-7-20.pdf; Christine Wilson, Privacy in the Time of Covid-19, TRUTH ON THE MARKET (Apr. 15, 2020), <https://truthonthemarket.com/author/christinewilsonicle/>.

⁵ See, e.g., Comments of Campaign for a Commercial-Free Childhood, et al., In the Matter of Request for Public Comment on the FTC’s Implementation of the Children’s Online Privacy Protection Rule (Dec. 2019), available at: <https://fairplayforkids.org/wp-content/uploads/2019/12/CCFC-COPPA-comments.pdf> (detailing the breadth and scope of ed tech and the data collected about children from these technologies).

⁶ 15 U.S.C. §§ 6501-505.

⁷ See FED. TRADE COMM’N STAFF, COMPLYING WITH COPPA: FREQUENTLY ASKED QUESTIONS, at § N, available at <https://www.ftc.gov/business-guidance/resources/complying-coppa-frequently-askedquestions#N.%20COPPA%20AND%20SCHOOLS>; see also FTC Business Guidance: Children’s Privacy, <https://www.ftc.gov/business-guidance/privacy-security/childrens-privacy>; FTC Consumer Guidance: Protecting Kids Online, <https://consumer.ftc.gov/identity-theft-and-online-security/protecting-kids-online>; Christine S. Wilson, The FTC’s Role in Supporting Online Safety (Nov. 21, 2019), https://www.ftc.gov/system/files/documents/public_statements/1557684/commissioner_wilson_remarks_at_the_family_online_safety_institute_11-21-19.pdf.

In July 2019, we announced a rulemaking process to update the COPPA Rule with respect to three topics, including ed tech.⁸ And in October 2019, we hosted a public workshop to explore several topics related to children’s privacy, including the impact of new technologies and business models, the evolving nature of privacy harms, and the changes in the way parents and children use websites and online services.⁹ Ed tech received significant attention during that workshop; I was able to attend some portions of that workshop and found it quite informative. For all who are interested in this topic, I commend to you the workshop proceedings and related materials, available on the FTC website.¹⁰

Today, we propose to issue a Commission policy statement that encapsulates the guidance on ed tech that staff have already made public. Make no mistake – I am thankful that Commission staff over the years have worked to educate both businesses and parents about obligations and rights under COPPA. And I am pleased that we launched a rulemaking process to update the COPPA Rule itself. But this is the fourth time the Commission, under Chair Khan, has chosen to make policy announcements addressing issues under consideration in an ongoing rulemaking.¹¹ For each prior recommendation, I voted no.

The FTC website explains that “we issue policy statements that explain how the agency applies competition and consumer protection laws in a range of areas. Our goal is to promote transparency and encourage companies and people to comply with the laws we enforce.”¹² I strongly support these goals. But Commission policy statements, unlike Commission rules, are not independently enforceable. In any action based on the principles asserted in a policy

⁸ Request for Public Comment on the Federal Trade Commission’s Implementation of the Children’s Online Privacy Protection Rule, 84 Fed. Reg. 35842, 35845 (July 25, 2019), *available at* <https://www.federalregister.gov/documents/2019/07/25/2019-15754/request-for-public-comment-on-the-federaltrade-commissions-implementation-of-the-childrens-online>.

⁹ The Future of the COPPA Rule: An FTC Workshop (Oct. 2019), <https://www.ftc.gov/news-events/events/2019/10/future-coppa-rule-ftc-workshop>; Christine S. Wilson. Opening Remarks at FTC Workshop: The Future of the COPPA Rule (Oct. 7, 2019), https://www.ftc.gov/system/files/documents/public_statements/1547693/wilson_-_ftc_coppa_workshop_opening_remarks_10-7-19.pdf.

¹⁰ The Future of the COPPA Rule: An FTC Workshop (Oct. 2019), <https://www.ftc.gov/news-events/events/2019/10/future-coppa-rule-ftc-workshop>.

¹¹ See FTC Enforcement Policy Statement Regarding Negative Option Marketing (Oct. 28, 2021), <https://www.ftc.gov/legal-library/browse/enforcement-policy-statement-regarding-negative-option-marketing>; FTC Policy Statement on Breaches by Health Apps and Other Connected Devices (Sept. 15, 2021), <https://www.ftc.gov/news-events/events-calendar/open-commission-meeting-september-15-2021>; see also Press Release, FTC and DOJ Seek Comments on Proposed Amendments to HSR Rules and Advanced Notice of Proposed HSR Rulemaking (Sept. 21, 2010), <https://www.ftc.gov/news-events/press-releases/2020/09/ftc-doj-seek-comments-proposed-amendments-hsr-rules-advanced> (announcing an FTC and the Antitrust Division of the Department of Justice jointly issued a Notice of Proposed Rulemaking and an Advanced Notice of Proposed Rulemaking seeking public comment regarding the Hart-Scott-Rodino Act (“HSR”) and its implementing rules). Despite the pendency of this HSR rulemaking proceeding seeking public comment, the FTC unilaterally withdrew business guidance regarding the treatment of debt, enacting a policy U-turn before assimilating public input. FTC Blog Post, Reforming the Pre-Filing Process for Companies Considering Consolidation and a Change in the Treatment of Debt (Aug. 26, 2021), <https://www.ftc.gov/news-events/blogs/competition-matters/2021/08/reforming-pre-filing-process-companies-considering>; FTC Statement, The Treatment of Debt as Consideration (Aug. 26, 2021), <https://www.ftc.gov/enforcement/premerger-notification-program/hsr-resources/treatment-debt-consideration>

¹² <https://www.ftc.gov/legal-library/browse/policy-statements>.

statement, the Commission still must prove that the conduct violates the FTC Act or the Commission rules covered by the statement.¹³

I believe it is appropriate to issue policy statements in areas where the application of the law may be unclear and the market might benefit from additional transparency.¹⁴ But I do not believe it is appropriate to issue a policy statement during the pendency of an ongoing rulemaking seeking public comment on the *precise issues* discussed in the statement.¹⁵ The Commission committed this due process foul with its policy announcements on data breaches for health apps, negative option marketing, and pre-merger notification filings. In each of those instances, we short-circuited the democratic process and undermined the value of public input.

Today, however, I am reluctantly voting yes on this policy statement. Why? The guidance in this statement neither expands the universe of entities covered by the COPPA Rule nor the circumstances under which the Commission will initiate enforcement.¹⁶ It essentially converts existing staff guidance into a Commission Policy Statement. If bestowing the imprimatur of the Commission on this *already existing* guidance causes some players in this industry to review their policies and take steps to better protect children’s privacy, that would be a welcome result.¹⁷

¹³ They are binding on the Commission, however, as they are issued pursuant to a Commission vote and must be rescinded through a vote.

¹⁴ An example in consumer protection includes the Commission’s Enforcement Policy Statement on Deceptively Formatted Advertisements, which addressed native advertising. This Statement was issued following a Commission workshop and provided notice to the market of how the Commission applied Section 5 to modern media. This area is not covered by a Commission rule. FTC Press Release: FTC Issues Enforcement Policy Statement Addressing “Native” Advertising and Deceptively Formatted Advertisements (Dec. 22, 2015), <https://www.ftc.gov/news-events/news/press-releases/2015/12/ftc-issues-enforcement-policy-statement-addressing-native-advertising-deceptively-formatted>.

¹⁵ Prior to the arrival of new agency leadership, the FTC had issued policy guidance during the pendency of a related rulemaking on only one occasion, and in that instance noted its intention to refrain from enforcement actions in the area. See Enforcement Policy Statement Regarding Certain Imported Textile, Wool, and Fur Products (Jan. 3, 2013), <https://www.ftc.gov/news-events/press-releases/2013/01/ftc-announces-enforcement-policy-statement-retailers-directly>; see also 76 Fed. Reg. 68690 (Nov. 7, 2001); Press Release, FTC Seeks Public Input in Review of Textile Labeling Rules (Nov. 1, 2011), <https://www.ftc.gov/news-events/press-releases/2011/11/ftc-seeks-public-input-review-textile-labeling-rules>. See Dissenting Statement of Commissioner Christine S. Wilson on Enforcement Policy Statement Regarding Negative Option Marketing (Oct. 28, 2021), <https://www.ftc.gov/legal-library/browse/cases-proceedings/public-statements/dissenting-statement-commissioner-christine-s-wilson-enforcement-policy-statement-regarding-negative> (describing my views on the issuance of policy statements during the pendency of open rulemakings); see also Christine S. Wilson, FTC Comm’r, Dissenting Statement of Commissioner Christine S. Wilson Regarding the Policy Statement on Breaches by Health Apps and Other Connected Devices at 6 (Sept. 15, 2021), <https://www.ftc.gov/public-statements/2021/09/dissenting-statement-commissioner-christine-s-wilson-regarding-policy>.

¹⁶ See Christine S. Wilson, FTC Comm’r, Dissenting Statement of Commissioner Christine S. Wilson Regarding the Policy Statement on Breaches by Health Apps and Other Connected Devices at 6 (Sept. 15, 2021), <https://www.ftc.gov/public-statements/2021/09/dissenting-statement-commissioner-christine-s-wilson-regarding-policy>.

¹⁷ I believe, based on my decades of experience counseling companies regarding compliance with FTC law, that parties likely already treat the guidance on ftc.gov as the Commission’s views. This is particularly true here, where in the 1999 Federal Register Notice promulgating the COPPA Rule, the Commission stated that it intended to provide guidance to the educational community regarding the Rule’s privacy protections. Children’s Online Privacy Protection Rule, 64 Fed. Reg. 59888, 59903 (Nov. 3, 1999), *available at*

In my view, however, issuing policy statements gives the *illusion* of taking action, particularly where those policy statements break no new ground. Rather than moving on quickly after the flurry of press coverage that will discuss the Commission’s “new” policies on ed tech and children’s privacy, I hope we turn to the important task of completing the COPPA Rule review. We should continue our dialogue with relevant stakeholders, finalize our thorough and objective assessment of the public comments we have received, and – if appropriate – make modifications to the scope of the Rule. And I have no doubt that our experienced and hard-working staff would be happy to do this work. I encourage Chair Khan and the leadership of the Bureau of Consumer Protection to prioritize our work on this Rule, and to devote the necessary resources to completing it swiftly.

I commend the staff for their work on this Rule and look forward to their recommendations on next steps. And I look forward to working with our newest colleague, Commissioner Bedoya, to expand privacy protections for all consumers, but especially for children. The depth and breadth of his expertise on privacy issues will add great value to the Commission’s work in this area. I anticipate that it will be rewarding both to learn from him and to collaborate with him in advancing our mission. Welcome to the Commission, Commissioner Bedoya!

II. Request for Public Comment on Amendments to the Guides Concerning the Use of Endorsements and Testimonials in Advertising

Thank you, Chair Khan, for giving staff the opportunity to present their excellent work on the proposed Federal Register Notice seeking comment on revisions to the Endorsement Guides. Many thanks to Amber Lee from the Division of Advertising Practices in the Bureau of Consumer Protection (BCP) for the informative presentation this afternoon. Thanks also to the broader array of staff who worked on the proposed Notice:

- Division of Advertising Practices (BCP) – Amber Lee, Michael Ostheimer, Michael Atleson, Richard Cleland, Serena Viswanathan
- BCP Director’s Office – Patty Hsue, Joannie Wei
- Division of Consumer and Business Education (BCP) – Rosario Mendez, June Chang
- Bureau of Economics – Shiva Koochi
- Office of General Counsel – Marie Choi, Josephine Liu

The Endorsement Guides,¹⁸ at their core, reflect basic truth-in-advertising principles – endorsements must be truthful and not misleading. An endorsement must reflect the honest opinion of the endorser and cannot be used to make a claim that the product’s marketer could not itself legally make. Testimonials and endorsements are a staple in modern advertising. Commission guidance explaining the circumstances under which we would view an endorsement as deceptive makes transparent our enforcement intentions, thereby facilitating compliance. I can

https://www.ftc.gov/sites/default/files/documents/federal_register_notices/childrens-online-privacyprotection-rule-16-cfr-part-312/991103childrensonlineprivacy.pdf.

¹⁸ Guides Concerning the Use of Testimonials and Endorsements in Advertising, 16 C.F.R. 255.

attest from my years in private practice that the FTC’s business guidance, including on endorsements,¹⁹ proved valuable for my colleagues and me when advising clients.

Updating our guidance to reflect new media and advertising trends is essential. I commend the staff on this proposed Notice and look forward to the comments from stakeholders on the proposals.

Finally, I echo Commissioner Phillips’ praise for the process employed in preparing this Federal Register Notice. It was a thoughtful process that reflected the expertise and knowledge of our staff, and that benefitted from a robust dialogue between the Commission and staff and among Commissioners. Thank you, Chair Khan, for this constructive approach.

¹⁹ FTC Business Guidance: “The FTC’s Endorsement Guides: What People Are Asking,” <https://www.ftc.gov/business-guidance/resources/ftcs-endorsement-guides-what-people-are-asking>.