

June 11, 1999

Secretary
Federal Trade Commission
Room H-159
600 Pennsylvania Ave., NW
Washington, D.C. 20580

Re: Children's Online Privacy Protection Rule — Comment, P994504

Dear Sir/Madam:

Privacy is an important American value. The ability to keep others from learning information about ourselves is an essential part of our identity, humanity, and individuality. American law holds individual rights superior to collective demands and government power, so the ability to individually define and defend one's values is, in essence, a part of freedom. Privacy is a value, a set of preferences that can only be held by each individual for him- or herself. Each American must be free to protect and defend his or her own sense of privacy.

The Internet is a myriad of technical innovations that have dramatically increased the speed with which individuals, businesses, and governments can collect, compile, and pass along information. Along with a variety of social benefits, the Internet is bringing extraordinary new efficiencies to our nation's economic life. The benefits of this efficiency — in business-to-business e-commerce, for example — are already flowing to all Americans in the form of lower prices and greater consumer choice.

The Internet is probably the greatest engine for small business ever. A minimal investment can give a "Mom-and-Pop" business the same international profile and market access as a multinational corporation. Consumers can learn about more products and services that are better tailored for them, and they can demand terms of sale better suited to their needs.

Innovations like the Internet are meant to improve American life, not disrupt it, so use of the Internet must comport with our traditions. The tension between innovation and traditional privacy values underlie ongoing debates in society and in Congress over Internet privacy.

Problems associated with the Internet — and solutions to those problems — are better-known each day, as more people go online and as businesspeople learn how to serve public preferences better. The nascent e-commerce industry has a strong interest in making Americans comfortable and safe online. They have every incentive to solve marketing problems that may keep some Americans from using the Internet.

Congress passed the Children's Online Privacy Protection Act out of an abiding concern that children should not be exploited by bad actors on the Internet. It sought to preempt problems that could arise if parents lost control of what children reveal to strangers online. We emphasize that Congress acted preemptively. Hearings on the Children's Online Privacy Protection Act included no written testimony by or about children who had been harmed by practices the bill would prohibit. Congress passed the bill as a preventative measure.

Because the Children's Online Privacy Protection Act is one of the first laws to directly affect the Internet, we are keenly watching the development of regulations to implement the Act. We will study whether the regulations have their intended effect, empowering parents to protect their children, and whether the regulations have unintended consequences. We have heard, for example, that the proposed regulations may prevent teachers from guiding children from website to website in a classroom setting, for example.

We are particularly concerned with a legal determination made by the Federal Trade Commission ("FTC") that frustrates our access to information about the proposed rule. The Regulatory Flexibility Act ("Reg-Flex") requires a federal agency to prepare an initial regulatory flexibility analysis whenever it is required to publish a notice of proposed rulemaking. 5 U.S.C. § 603(a) (1994). This requirement may be avoided "if the head of the agency certifies that the rule will not, if promulgated, have a significant economic impact on a substantial number of small entities." 5 U.S.C. § 605(b) (1994). In 1996, Congress added to this provision, requiring a "factual basis" for the certification. Pub. L. No. 104-121, title II, §243(a), 110 Stat. 866 (Mar. 29, 1996).

We believe that the FTC's certification avoiding the Reg-Flex analysis, 64 Fed. Reg. 22761 (Apr. 27, 1999), is faulty in several respects. The law requires an analysis if the rule will have a significant economic impact on a substantial number of small entities. FTC certified that the rule would not have a significant impact for a number of reasons, none of which, unfortunately, related to the impact of the rule.

The certification is premised on a misreading of the law. For example, the certification says that the rule's requirements "are expressly mandated" by the Act. This confuses the impacts of the rule with the reason it is being promulgated.

The certification notes that "any additional costs of complying with the Rule, beyond those imposed by the statute or otherwise likely to be incurred in the ordinary course of business, are expected to be comparatively minimal." We know of no precedent for this "incremental-burden" theory of the Reg-Flex law. It also cannot apply to this rulemaking. The Children's Online Privacy Protection Act contains little operative language. It punishes violations of regulations issued by the FTC. If, hypothetically, the FTC were to fail to issue regulations, no one could violate the Act. Thus, the increment between the burdens imposed by the statute and the burdens imposed by the regulations is vast. The regulations were mandated by Congress, to be sure, but this certainly does not mean that they are without burden.

The statement of factual basis is also wanting. Such a statement would show that the agency has assessed the amount of the economic impact and considered it against some baseline — as a percentage of regulated small entities' income, for example. The statement would also reflect an assessment of the number of small entities that will be affected, and how substantial a portion of the total sector they are.

Even the most modest prognostications about the Internet suggest fantastic growth in the coming years. Secretary of Commerce William M. Daley predicted in April that Internet shopping will generate \$30 billion dollars next year. This will likely include significant marketing to children by small commercial entities. The FTC must study the nature and significance of the small entities that will use the Internet for this purpose before it can determine whether the regulations will have a significant impact on a substantial number of small entities. Unless nearly every prediction about the Internet is false, these regulations will have significant impacts, and the certification will be proved wrong.

The analysis required by the Reg-Flex law would help the FTC formulate the most appropriate regulations. More importantly, the analysis would help the public, the media, and Congress learn what types of small entities would be affected, and how. It would describe what types of reporting and recordkeeping requirements the regulations contain. It would identify overlapping or conflicting regulations. And it would describe alternatives and exemptions that could minimize the burden of the regulations while achieving the Act's purposes. *See* 5 U.S.C. § 603 (1994). This type of feedback is essential for Congress' consideration of whether further laws or amendments to existing laws are needed.

The certification also excused the FTC from conducting small business outreach as required by 5 U.S.C. § 609(a) (Supp. 1997). That section requires the FTC to use reasonable techniques like publication, direct notification, conferences, and hearings to give small entities an opportunity to participate in the rulemaking. We note that the FTC's June, 1998 report on privacy mentioned 212 websites that collect information from children. The fact that they are online enterprises makes it so easy to notify them; we would be sorely disappointed if the FTC's certification led it to fail to contact these known, likely subjects of this regulation.

Our study of the regulatory process shows that earlier public input on proposed regulation often has better effects because it comes before staff have committed themselves to one approach or set of approaches. The FTC's certification and failure to conduct required outreach has compromised this rulemaking by denying the public this crucial opportunity.

At least some redemption is available if an initial Reg-Flex analysis is performed and put out for comment before the regulations are finalized. We strongly urge that the FTC do this. Indeed, the law requires it because the requirements of a final Reg-Flex analysis can not be satisfied without an initial Reg-Flex analysis. *See Southern Offshore Fishing Ass'n v. Daley*, 995 F. Supp. 1411, 1436-37 (M.D. Fla. 1998). The House Judiciary Committee's Subcommittee on Commercial and Administrative Law will call a hearing on the subject if the FTC fails to do thorough and complete Reg-Flex analyses.

Very truly yours,

GEORGE W. GEKAS, Chairman
Subcommittee on Commercial
and Administrative Law
House Judiciary Committee

JAMES M. TALENT, Chairman
Committee on Small Business