Comments in response to the New York State Office of the Attorney General's (OAG) Advanced Notice of Proposed Rulemaking (ANPRM) for the New York Child Data Protection Act (S7695B)

Respectfully submitted,

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on behalf of

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Introduction.

On behalf of Common Sense Media, the Electronic Privacy Information Center, the NYS American Academy of Pediatrics, the Center for Digital Democracy, and Fairplay, we are pleased to submit these comments in response to the Advanced Notice of Proposed Rulemaking pursuant to New York General Business Law section 899-ee *et seq.* Common Sense Media (Common Sense) is the leading nonprofit organization dedicated to improving the lives of all children and families by providing the trustworthy information, education, and independent voice they need to thrive in the 21st century. The Electronic Privacy Information Center (EPIC) is a public interest research center in Washington, D.C. established in 1994 to focus public attention on emerging civil liberties issues and to secure the fundamental right to privacy in the digital age for all people through advocacy, research, and litigation. The NYS American Academy of Pediatrics (NYS AAP), District II, comprised of Chapters 1, 2, & 3, is an organization dedicated to the physical, mental, and social health and wellbeing of all infants, toddlers, children, and adolescents. The Center for Digital Democracy is a public interest research and advocacy organization, established in 2001, which works on behalf of citizens, consumers, communities, and youth to protect and expand privacy, digital rights, and data justice. Fairplay is a nonprofit organization committed to helping children thrive in an increasingly commercialized, screen-obsessed culture, and the only organization dedicated to ending marketing to children. Our groups are all united in our efforts to ensure the digital world respects and protects children's privacy.

As the New York State Office of the Attorney General (OAG) moves forward with crafting rules to protect children's privacy, we believe that the OAG should: interpret terms in ways that protect youth; look to other jurisdictions for guidance; and focus on interoperability when feasible. Specifically, the OAG should define "sale" and "primarily directed to minors" broadly and consistently with other jurisdictions, in order to ensure companies are not able to avoid protecting youth on a technicality. "Necessary services" should be narrowly defined. When considering transparency obligations, including with respect to languages and accessibility, the OAG can learn from the work of those who have crafted privacy rules before. And any technical signals should be as uniform and interoperable with other technical signal requirements as possible, both to ease the burden on companies and to simplify the experience for individuals.

Primarily directed to minors.

"Primarily directed to minors" means "targeted to minors" under GBL 899–ee(6). We believe this concept should be defined conceptually with "directed to children" as defined under the current Childrens' Online Privacy Protection Act (COPPA) Rule, expanded to also incorporate teens (as seen in the the Kids Online Safety and Privacy Act bill that passed the Senate in July 2024 and the Children's and Teens Online Privacy Protection Act, COPPA 2.0, that passed the U.S. House Energy and Commerce Committee in September). We do not believe there should be separate tests for younger or older teens. Rather, for any group of youth, the consideration

should include a totality of the circumstances standard, considering factors such as "subject matter, visual content, use of animated characters or child [or teen]-oriented activities and incentives, music or other audio content, age of models, presence of child celebrities or celebrities who appeal to children [or teens], language or other characteristics of the Web site or online service, as well as whether advertising promoting or appearing on the Web site or online service is directed to children [or teens]. … [and] competent and reliable empirical evidence regarding audience composition, and evidence regarding the intended audience."[1] We believe the OAG should pay particular attention to what services tell advertisers, the audience composition, and parent complaints, as this can be more age-specific than, say, a type of music.

We do not believe that regulations need to distinguish between sites that intend to be directed to children and those where minors independently find such sites and then flock to them. Children on such services are equally in need of protection. (This is not to say, however, that in enforcing the law, the OAG may not or should not take into consideration the intentionality of the service in reaching children, including when they became aware that many children were on their site.)

Sale.

"Sale" should be interpreted to explicitly cover the sharing of personal data for behavioral advertising or sharing of personal data into the commercial data broker ecosystem, whether or not monetary or other valuable consideration is exchanged at the time. This is consistent with how California privacy law treats this concept. Companies should not be able to commercially profit from sharing children's and teens' data.

Permissible processing.

In interpreting statutory terms in a manner that protects youth, "strictly necessary" should be limited to what is essential for a site or service to function. Sites may obtain specific consent for ancillary functions. Further, "strictly necessary" should explicitly exclude the monetization of youth data–in other words, services should not be allowed to claim they must use youth data for targeted advertising for their service to function. A contrary interpretation would render many of the protections of the bill moot.

Ancillary products or services should not be considered part of providing the "specific" product or service requested, otherwise this distinction of not needing consent would be meaningless. The OAG should look at a specific offering or service within a product–what specific product or service is the user seeking or requesting. In the example given by the OAG, looking up a recipe is the request by the user. A query of "what grocery stores are nearby me that have these ingredients" would be a distinct request. Ancillary offerings such as these should not be considered to be incorporated within another product or service.

[1] COPPA 2013 Rule definition of "Web site or online services directed to children" with addition of "or teens".

Informed consent.

In terms of helping to ensure informed consent, and ensuring that teenagers from all communities are provided with notices that will effectively convey the potential risks, costs, or benefits of processing, the OAG should look to privacy rules in the United Kingdom and California. In order to ensure audiences of all ages can understand notices, any notices should be written in a level appropriate to age and level of understanding of the audience. The UK Information Commissioner's Office (ICO) has excellent guidance re age appropriate transparency–recommending concise, clear, just-in-time notices presented at relevant moments for users. It breaks down recommendations for age-appropriate guidance into different age ranges, including younger teens and older teens. In addition, in terms of helping to ensure that teens of all communities understand notices, the OAG may wish to consider California's privacy regulations, which at § 7003 require that notices "Be available in the languages in which the business in its ordinary course provides contracts, disclaimers, sale announcements, and other information to consumers" and "Be reasonably accessible to consumers with disabilities. For notices provided online, the business shall follow generally recognized industry standards, such as the Web Content Accessibility Guidelines, version 2.1 of June 5, 2018, from the World Wide Web Consortium, incorporated herein by reference." Lastly, it should be just as easy to withdraw consent as it is to provide consent, so methods should be at least equivalent. This is a bedrock principle of consent being meaningful.

Regarding standards for device communications or signals that indicate a minor's informed consent or refusal, we recommend the OAG seek to adopt a standard or standards that are flexible and interoperable with signals other privacy regulators recognize. For example, with the Global Privacy Control standard, that is a technical signal recognized by both California[2] and Colorado as an opt-out of sale indication. Allowing for interoperability between different jurisdictions will benefit both businesses, who do not have to technically address a multitude of signals, as well as U.S. consumers, who will face less confusion and can more easily adopt a signal that works in multiple states.

[2] See "What is the GPC?".