

June 27, 2005

Via Electronic Filing

Mr. Donald S. Clark
Secretary
Federal Trade Commission
600 Pennsylvania Avenue, N.W.
Washington, D.C. 20580

Re: COPPA Rule Review 2005, Project No. P054505

Dear Secretary Clark:

The signatories to this letter (American Advertising Federation, American Association of Advertising Agencies, Association of National Advertisers, The Direct Marketing Association, Inc., and Magazine Publishers of America) (hereinafter “Associations”), collectively represent thousands of companies across a diverse cross-section of industry. Many of the companies that comprise our associations offer fun and educational Web site content for children.

These Associations share the Federal Trade Commission’s (“FTC” or “Commission”) commitment to protecting children’s privacy online. All of these Associations agree on a set of common principles discussed in this letter and are pleased to respond to the Commission request for public comment in this proceeding, 70 Fed. Reg. 21107, April 22, 2005.

As the experience of the past five years demonstrates, we believe that the Children’s Online Privacy Protection Act of 1998, 15 U.S.C. §§ 6501 *et seq.* (“COPPA” or “the Act”), has been highly effective in achieving its stated goals of (1) enhancing parental involvement in children’s online activities to protect the privacy of children in the online environment; (2) enhancing parental involvement to help protect the safety of children in online fora such as chat rooms in which children may make public postings of identifying information; (3) maintaining the security of personally identifiable information of children collected online; and (4) protecting children’s privacy by limiting the collection of personal information from children without parental consent. *See* 144 Cong. Rec. S11657 (October 7, 1998).

With respect to the Commission’s specific questions, the Associations believe that the Rule should be retained in its current form. It has successfully preserved the interactivity of children’s experience on the Internet and children’s access to information in this rich and valuable medium. The combination of the e-mail exceptions to parental consent, which cover many popular activities (*e.g.*, contests, online newsletters, and electronic postcards), and the sliding scale approach to parental consent, which takes into account whether children’s personal information is used internally or disclosed to others, have enabled commercial Web sites to continue to offer meaningful content and activities for children in a cost-effective

manner. In addition, COPPA has had an important impact on Web site operators' practices with respect to the collection and disclosure of personal information from children. As a result of COPPA, many of our members' sites have developed ways to offer content directed at children that do not require the collection of any personal information from children. For example, member company sites offer children the ability to create and use screen names that are not tied to any personal information. Similarly, many of our member companies' sites have limited the collection of personal information from children to e-mail addresses only to avail themselves of the exceptions to parental consent under COPPA. These exceptions have proven highly useful in preserving interactivity at children's Web sites while ensuring the continued viability of commercial Web sites directed at children.

The Associations have received virtually no complaints about companies' practices in connection with the collection of personal information from children online. Moreover, we are unaware of any concerns raised by our members or complaints from parents regarding the use of the sliding scale mechanism for obtaining parental consent. Our experiences, thus, indicate that the Rule has been effective and successful in protecting children's privacy over the last five years, and it should be preserved in its current form with minimal, if any, changes.

We would like to focus the remainder of our comments on some of the specific questions posed by the Commission with respect to (1) the factors used to determine whether sites are directed to children; (2) the definition of actual knowledge; (3) age-screening practices; (4) the use of credit cards as a means of obtaining verifiable parental consent; and (5) the effectiveness of the COPPA Safe Harbor Program. In addition, we would like to reiterate our support for the FTC's proposal to make permanent the sliding scale mechanism for obtaining parental consent.

I. The current factors used to determine whether Web sites are directed to children provide Web sites with clear guidance, and no additional clarification is necessary.

The Rule sets out a number of factors to be used in determining whether a Web site is targeted to children, such as its subject matter, language, whether it uses animated characters, and whether advertising appearing on the site is directed to children. The FTC also has indicated that it will consider empirical evidence regarding the ages of the site's visitors. In addition, consistent with the factor analysis set forth in the commentary to the Rule, we believe that looking at the overall character of the site, rather than just the presence or absence of one or more factors, provides helpful guidance in determining whether the site is directed at children and, thus, whether, in collecting personally identifiable information, the site's activities trigger the requirements of COPPA.

We do not believe that any additional guidance is necessary. These factors and the framework set forth by the FTC provide clear guidance as to whether Web sites are directed to children and, thus, whether their information collection is subject to the Act's requirements.

II. The term “actual knowledge” is sufficiently clear in light of the commentary to the Rule and other FTC guidance on the issue.

The definition of the term “actual knowledge” is important as it determines which Web site operators have obligations under COPPA. That is, the Rule applies to general audience Web sites if they have *actual knowledge* that a particular visitor is a child. Although this term is not specifically defined in the statute or the Rule, the FTC has provided guidance on the meaning of this term in both the commentary to the Rule and in its FAQ. Specifically, the FTC states in the commentary that a Web site is considered to have actual knowledge “where the operator learns of a child’s age or grade from the child’s registration at the site or from a concerned parent who has learned that his child is participating at the site.” 64 Fed Reg. 59888, 59892 (November 3, 1999) (commentary on the definition of “Operator”).

In addition, the Commission goes on to note that, although Web sites are not required to investigate the ages of visitors, if the site asks for and receives information from users from which age can be determined—for example, asking for age or date of birth or posing indirect questions that may elicit age information (*e.g.*, “what type of school do you attend?”)—the operator may acquire actual knowledge that it is dealing with children under 13. *Id.* Similarly, in a FAQ regarding general audience sites, the FTC states that “[i]f a child posts personal information on a general audience site, but doesn’t reveal his or her age and you have no other information that would lead you to know that the visitor is a child, then you would not have ‘actual knowledge’ under the Rule and would not be subject to its requirements. Collecting a child’s age, however, does provide ‘actual knowledge.’” *See* FAQ #38 at <<<http://www.ftc.gov/privacy/coppafaqs.htm#teen>>>.

The Associations believe that these clarifications provide sufficient guidance to general audience Web sites to determine whether they have the requisite actual knowledge to trigger the requirements of COPPA.

III. The FTC guidance with respect to best practices for age screening has been implemented by many of our members, and is an effective means of determining which visitors are children and, thus, a site’s obligations under COPPA.

We believe that Web sites are undertaking good age-screening practices, which have been effective in protecting children’s privacy. As the FTC notes in the commentary to the Rule, COPPA does not require operators of general audience Web sites to investigate the ages of their sites’ visitors. 64 Fed Reg. at 59892. However, if such sites do undertake to collect age or date of birth information, they are deemed to have “actual knowledge.” The FTC has provided some guidance in the form of best practices in connection with age screening, which we believe is helpful in addressing any perceived concerns with respect to children falsifying their age or date of birth information. Specifically, in a FAQ regarding Web sites directed at teens, the FTC has indicated that Web sites can identify which visitors are under 13—for example, by simply asking age (or birth year) when inviting visitors to provide personal

information. The guidance encourages Web sites to ask age in such a way as not to invite falsification. For example, the guidance states that Web sites should not prevent children from entering their correct age or date of birth by permitting visitors only to enter birth years starting with age 13. Similarly, the Commission has stated that sites' telling visitors that children under 13 should not provide their information or that they must ask their parents first, may only encourage children to falsify their information. See FAQ #39 at <<<http://www.ftc.gov/privacy/coppafaqs.htm#teen>>>. Further, the FTC has encouraged Web sites to use session cookies to prevent children from "back-clicking" to change their age once they realize that parental consent is required to collect their information for the activity.

Our members are familiar with, and have implemented, these best practices, particularly at Web sites where there are teen visitors and at general audience sites that are likely to attract a significant number of children visitors. Thus, we believe that the current definition of "actual knowledge" is clear, and Web sites are taking steps to help prevent falsification of age information by children visitors. We also believe that it is critical to preserve the status quo in terms of operators not having an affirmative duty to investigate the ages of Web site visitors. Moreover, Web sites also should not be responsible if a child misstates his or her age.

As was indicated at the July 1999 FTC workshop on COPPA and echoed in FTC guidance documents, no method of parental consent is foolproof. The Act and the Rule stress that Web sites must make reasonable efforts to ensure that the person providing consent is the child's parent. In addition, we are not aware of a growing practice of children falsifying their ages when asked for age information at Web sites. These facts, coupled with the continued awareness and promotion of best practices in connection with age screening, address concerns about back-clicking and inviting falsification.

IV. The use of a credit card should continue to be endorsed by the Commission as a method for obtaining verifiable parental consent.

Currently, the Rule allows Web sites to obtain consent for disclosures of information to third parties (*e.g.*, children's e-mail accounts, chat rooms, message boards) through the use of credit cards *in connection with a transaction*. The Associations believe that the use of credit cards in connection with a transaction is a reasonable means of verifying that the person providing consent is the child's parent and, thus, this method should continue to be among the available options for sites to obtain verifiable parental consent for disclosures to third parties.

At the outset, we note that only a limited number of our members use credit cards in connection with a transaction as a means of obtaining parental consent. We believe that this method of consent should continue to be endorsed. The majority of credit and debit cards are financial accounts that are issued to adults or individuals over 18 years of age. In the very limited instances where credit or debit cards may be issued to someone under 18, they are related to a parent account that is responsible for those financial charges. We are not aware of significant changes in the marketplace whereby companies are making credit or debit cards

available to children under the age of 13. Moreover, even if there are some children who have access to credit or debit cards, as with any of the methods of parental consent that currently are endorsed, there are always potential limitations that will be the exception rather than the rule. It will be important to continue to educate parents about these issues and about the importance of setting rules for children's online activities, as well as supervising children while they use the Internet.

With respect to whether the use of a credit card needs to be in connection with a transaction, consistent with the testimony we heard during the FTC's workshop on the COPPA issue, the Associations believe that many parents may feel uncomfortable giving their credit card number online at children's Web sites where there is no transaction involved. (*See* transcript of Public Workshop on Proposed Regulations Implementing the Children's Online Privacy Protection Act at 32). In addition, the extra step of having a transaction helps ensure that a parent is involved in the process as the presence of the transaction on the credit card bill would serve as a confirmation that the parent in fact has provided the consent. Particularly in light of current online scams, heightened concerns about online security, and the rise of such practices as phishing, parents may be reluctant to provide credit card numbers absent a transaction.

V. The safe harbor programs have proven effective and should be continued.

The Associations believe that there is an important role for safe harbor programs in encouraging companies to comply with COPPA's requirements. We are pleased that, to date, the FTC has approved the applications of four organizations for safe harbor status. Through their ongoing monitoring and Web site seeding, these organizations play an important role in helping ensure that Web sites comply with the COPPA requirements and the principles set forth in their respective guidelines, as well as with the overarching goal of helping protect the privacy of children online. In addition, they are an important educational resource on children's privacy issues, and serve to heighten awareness of children's privacy issues more generally. We are hopeful that the programs of other organizations will be approved as well. Many of our member companies participate in the programs offered by these organizations, and we encourage such participation.

VI. The FTC should adopt the sliding scale mechanism on a permanent basis; it has proven effective in protecting children's privacy, electronic verification technologies have not been widely adopted, and this approach has helped preserve meaningful children's online content.

As the Associations stated in our comments filed in the earlier sliding scale proceeding in February of this year, we strongly support the Commission's proposal to make permanent the sliding scale approach to obtaining parental consent. *See* attached Associations Comments in Project No. P054503 (re: COPPA). As demonstrated by the five-year trial period, the sliding scale approach has proven effective in protecting children's privacy and, thus, there is no need to delay making the Rule and sliding scale permanent. The penetration of electronic verification technologies has not changed in a way that alters the Commission's reasoning at the time of issuing the COPPA regulations. Finally, if the sliding scale approach is made permanent, it will foster the development of additional Web site content for children by providing companies with the regulatory certainty needed to undertake investments in a preferred parental consent mechanism.

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We thank the Commission for this opportunity to provide comments on the COPPA Rule. As experience over the last five years clearly demonstrates, the COPPA Rule is effectively and successfully protecting children's privacy. The Rule has achieved its primary goal of empowering parents over commercial Web sites' use of their children's personal information online. Thus, we believe that the Rule should be preserved in its current form, to include extending the sliding scale on a permanent basis. We look forward to continuing to work with the Commission on the important goal of protecting children's privacy, while ensuring the continued growth of meaningful content for children online.

For additional information, please contact Alisa Bergman or Stuart Ingis, DLA Piper Rudnick Gray Cary US LLP, at 202/861-3900.

Sincerely,

American Advertising Federation
American Association of Advertising Agencies
Association of National Advertisers
The Direct Marketing Association, Inc.
Magazine Publishers of America

Attachment

February 14, 2005

Via Electronic Filing

Mr. Donald S. Clark
Secretary
Federal Trade Commission
600 Pennsylvania Avenue, N.W.
Washington, D.C. 20580

Re: Sliding Scale 2005, Project No. P054503 (re: COPPA)

Dear Secretary Clark:

The signatories to this letter include a wide range of trade associations and business coalitions (hereinafter "Associations"). These Associations collectively represent thousands of companies across a diverse cross-section of industry. Many of the companies that comprise our associations offer fun and educational Web site content for children.

These Associations share the Federal Trade Commission's ("Commission") commitment to protecting children's privacy online. Some of these Associations may also submit comments separately in this proceeding, 70 Fed. Reg. 2580, Jan. 14, 2005, but all agree on a set of common principles discussed in this letter. The Associations also collectively submitted comments on the earlier Notice of Proposed Rulemaking, 66 Fed. Reg. 54963, Oct. 31, 2001.

We strongly support the Commission's proposal to extend indefinitely the current sliding scale standard for obtaining verifiable parental consent. The five-year trial period for the sliding scale has demonstrated that this approach is working effectively. Further, we believe that retaining this standard will protect children while encouraging Web site operators to invest more resources in developing children's content on the Internet. The sliding scale approach has proven an effective means for allowing interactivity at children's Web sites without unduly burdening Web sites with costly parental consent mechanisms that could have the unintended effect of reducing children's content on the Internet. A flexible range of consent mechanisms depending on the use to which an operator puts the information has proven fully consistent with the statutory purpose of protecting child safety for those Web site activities that may present the most concerns about child safety.

The Associations believe that extending indefinitely the sliding scale mechanism for obtaining verifiable parental consent will have no negative implications. To our knowledge, new technologies have not yet been developed and to facilitate verifiable parental consent at a reasonable cost. Consistent with the statutory mandate, which provides that verifiable parental consent must be reasonably calculated “*taking into consideration available technology*,” 15 U.S.C. § 6501(9) (emphasis added), to ensure that the person providing the consent is the child’s parent, the sliding scale approach affords a readily available and viable means of obtaining consent.

Moreover, many of the Associations’ constituent companies with Web sites directed to children have created content whose continued existence is dependent upon the acceptable consent mechanisms under the sliding scale approach. If the sliding scale were to be phased out, these sites may be forced to retool their Web sites, undertaking more difficult and costly parental consent mechanisms. Ironically, the net effect of a sliding scale phase-out could be to eliminate some of the innovative interactive opportunities for children at these Web sites and/or a significant reduction in the amount of children’s content available over the Internet.

The parameters of the sliding scale approach are clear, providing Web sites with meaningful guidance on how to structure their activities around a preferred consent mechanism. Adopting the sliding scale permanently would help ensure the continued existence of meaningful children’s Web site content, and likely would foster the development of additional such content because it would encourage companies to make the types of investments in children’s content that they have been hesitant to make to date given the temporary nature of the sliding scale.

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For these reasons, the undersigned associations urge that the Commission extend the sliding scale standard indefinitely. For additional information, please contact Stuart Ingis at DLA Piper Rudnick Gray Cary US LLP, at (202)-861-3900.

Sincerely,

American Association of Advertising Agencies
Association of National Advertisers
Association of American Publishers
The Direct Marketing Association, Inc.
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