Microsoft Corporation

Microsoft

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VIA ELECTRONIC FILING

Mr. Donald S. Clark, Secretary
Federal Trade Commission
Office of the Secretary, Room H-113 (Annex E)
600 Pennsylvania Avenue NW
Washington, DC 20580

RE: COPPA Rule Review, 16 CFR Part 312, Project No. P104503

Dear Secretary Clark:

Microsoft appreciates the opportunity to provide these comments on the Commission's supplemental proposed revisions to its rule implementing the Children's Online Privacy Protection Act ("COPPA").[1] As explained in our previously-filed comments, Microsoft has a deep and long-standing commitment to protecting the privacy of consumers, including children, who use our websites and online services.[2] We continue to believe that COPPA and the Commission's COPPA Rule play an important role in encouraging parental involvement and protecting children's privacy and safety online. And we support the Commission's efforts to provide greater clarity to industry on the scope and application of the COPPA Rule.

We remain concerned, however, that in several important respects the proposed revisions to the COPPA Rule do not provide clear, practical guidance or result in tangible benefits for children and parents.[3] As explained below, the proposed treatment of persistent identifiers could have unintended consequences that would impede, rather than promote,

[1] 15 U.S.C. §§ 6501-6508.

[2] Letter from Michael D. Hintze, Microsoft Corporation, to Mr. Donald S. Clark, Secretary, Federal Trade Commission, at 2-3 (June 30, 2010), http://www.ftc.gov/os/comments/copparulerev2010/547597-00038-54848.pdf; Letter from Michael D. Hintze, Microsoft Corporation, to Mr. Donald S. Clark, Secretary, Federal Trade Commission, at 1 (Dec. 21, 2011), http://www.ftc.gov/os/comments/copparulereview2011/00326-82245.pdf ("2011 Microsoft Comments").

[3] Some of these issues are not the focus of the Supplemental Notice, and we incorporate by reference here our previous comments rather than repeating them.

privacy and safety online. In addition, although Microsoft appreciates the Commission's efforts to clarify and expand the definition of support for internal operations, further guidance is needed to enable innovation and to avoid the legal uncertainty that could undermine privacy and competition in the online marketplace. Finally, we request that the Commission explicitly approve practical, voluntary compliance methods for multiple operators who collect personal information through a single site or online service that is subject to COPPA, without imposing joint responsibility on such operators, and provide clearer guidance specifying when third-party service providers will be subject to COPPA. These additional revisions will help ensure that the Commission meets its goal of "clarify[ing] the scope of the Rule and strengthen[ing] its protections for children's personal information."[4]

I. The Proposed Treatment Of Persistent Identifiers May Lead To Unintended Consequences That Could Undermine — Rather Than Enhance — Children's Privacy.

The Supplemental Notice attempts to clarify when persistent identifiers will be treated as "personal information" subject to COPPA's requirements. However, under the revised approach, persistent identifiers still would be deemed "personal information," even if they are not combined with any other personal information, unless they are used to support the internal operations of the website or online service.[5]

We continue to believe that this may unintentionally undermine, rather than promote, the Commission's objectives. By placing persistent identifiers on an equal footing with data that directly identifies or allows contact with a child, such as the child's full name, e-mail address, and phone number — thereby requiring parental consent to use either for purposes beyond "support for internal operations" — the proposed rules reduce or remove incentives for businesses to take privacy-enhancing steps to anonymize or de-identify the child's personally identifiable information. As explained in our previously-filed comments, when given the choice to use an anonymized or de-identified persistent identifier or, for example, a user's existing e-mail address, some operators may forgo the additional work and expense of using anonymization and de-identification techniques, and instead rely on readily available identifiers that personally and directly identify a child.[6] This result does not further the goal of strengthening protections for children's personal information online.

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[4] 77 Fed. Reg. 46643, 46643 (Aug. 6, 2012) [hereafter, "Supplemental Notice"].

[5] *Id.* at 46652 (defining "personal information" to include "[a] persistent identifier that can be used to recognize a user over time, or across different Web sites or online services, where such persistent identifier is used for functions other than or in addition to support for the internal operations of the Web site or online service. Such persistent identifier includes, but is not limited to, a customer number held in a cookie, an Internet Protocol (IP) address, a processor or device serial number, or unique device identifier").

[6] 2011 Microsoft Comments, at 8.

Further, given that the Commission's statutory authority to expand the scope of persistent identifiers captured by the Rule is in doubt to begin with, this change could create greater uncertainty that could disrupt the market for sites and services that are subject to COPPA. As a number of commenters cautioned, the statutory definition of "personal information" on which the Commission relies for its rulemaking authority is constrained, requiring that the persistent identifier "permit[] the physical or online contacting of a specific individual."[7] The record in this proceeding demonstrates that a persistent identifier, without more, does not identify a *specific individual*.[8] Moreover, as we illustrated in our previous comments, a persistent identifier does not permit "contacting" as that term is plainly understood.[9] Unlike a home address or a telephone number, neither the operator nor any third party can use a persistent identifier to initiate a communication with the user. Rather, a persistent identifier does no more than enable the entity that actually sets the cookie to recognize the device if and when the device returns to the website or visits another website within the entity's network. In other words, although the persistent identifier may be transmitted when the user's browser to initiates a "call" to the entity, unlike a telephone number, it does not allow the entity to initiate a "call" to the user. To avoid the legal uncertainty that the proposed revisions would create, the Commission should continue to subject the collection, use, or disclosure of persistent identifiers to COPPA's requirements only where such identifiers are combined with personal information.

II. The Definition Of "Support For The Internal Operations" Can Be Improved Even More To Facilitate Strong Privacy Practices And Robust Competition Online.

The Supplemental Notice proposes to expand the definition of "support for the internal operations for the Web site or online service" in order to provide industry greater clarity regarding the types of activities that will be considered internal operations.[10] For example,

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[7] 15 U.S.C. § 6501(8)(F); *see* Comments of Verizon and Verizon Wireless, FTC Project No. P104503, at 3-5 (filed Dec. 23, 2011); Comments of the National Cable & Telecommunications Association, FTC Project No. P104503, at 3-5 (filed Dec. 23, 2011) ("NCTA Comments"); Comments of the Interactive Advertising Bureau, FTC Project No. P104503, at 5-7 (filed Dec. 23, 2011) ("IAB Comments"); Comments of the American Association of Advertising Agencies, et al., FTC Project No. P104503, at 3-4 (filed Dec. 23, 2011).

[8] *See*, *e.g.*, IAB Comments, at 5 ("[N]one of the cited comments provide evidence or an explanation – because no such evidence or explanation exists – of how any one of these numeric identifiers, *standing alone*, could be used to contact an identified individual."); NCTA Comments, at 14 ("An IP address, for example, cannot inherently identify an individual. Indeed, a *dynamic* IP address may never be used again by the same computer. At most, a *static* IP address may indicate the use of a particular computer or device, but not a particular individual. For this reason, several U.S. courts have concluded that IP addresses do not constitute personal information.").

[9] 2011 Microsoft Comments, at 9.

[10] Supplemental Notice, at 46647.

consistent with Microsoft's earlier proposal,[11] the Commission removed the word "technical" before "functioning of the website" to clarify that the definition includes any activity that is necessary for the functioning of the website or online service. In addition, the Commission made explicit that the term includes analysis, network communications, user authentication, personalization of content, and contextual advertising.

We appreciate the fact that the Commission considered the feedback and removed the word "technical" from the definition of internal operations. We also appreciate the Commission's efforts to provide clearer guidance regarding the scope of the term. However, the definition could be further improved in at least two important respects.

First, we continue to believe that the definition should explicitly state that "improving" a website or online service amounts to "support for internal operations." The Supplemental Notice indicates that the definition of "support for internal operations" is intended to include the collection and use of persistent identifiers for "improving site navigation" and "improving upon . . . a website or online service."[12] While we understand that the text of the COPPA Rule — such as "site maintenance and analysis" — is intended to permit *any* kind of site or service improvement, the current definition could be more explicit by including the word "improvements" in addition to "maintenance and analysis." This revision would make the text of the rule even clearer, providing industry greater certainty that would encourage important improvements to online sites and services and, in turn, benefit consumers by promoting innovation online.

Second, because there currently is no consensus regarding the meaning of "contextual" versus "behaviorally-targeted" advertising, it is critical that the Commission provide clear guidance about which specific practices constitute "support for internal operations" and which do not. Otherwise, the application of the COPPA Rule to the various entities within the online advertising ecosystem will remain unclear and open to divergent interpretations. For example, while some operators might take the position that "contextual advertising" is limited to advertising that is based solely on an individual's single action on a single webpage, such as the serving of a golf ad when an individual uses a search engine to search for "golf," others might interpret "contextual advertising" more broadly to permit the tracking of an individual's behavior over time in order to serve, for example, an ad for a Hawaiian golf vacation when an individual uses a search engine to first search for "golf" and for "Hawaii" within the same session.

Unfortunately, the Supplemental Notice only adds to the potential confusion by adding a proviso to the "support for internal operations" definition that prohibits persistent identifiers from being "used or disclosed to contact a specific individual" without parental notice and

[11] 2011 Microsoft Comments, at 16.

[12] Supplemental Notice at 46647.

consent.[13] The Supplemental Notice explains that this proviso is intended to mean that "none of the information collected may be used or disclosed to contact a specific individual, including through the use of behaviorally-targeted advertising."[14] As explained above in Section I, the notion that serving any advertisement constitutes "contacting" a person is a dubious one. However, even assuming for the sake of argument that ad serving can be considered a "contact," there is no reasonable basis for concluding that a behaviorally targeted ad "contacts" an individual, but that contextual advertising does not. For example, if advertising similar to the Hawaiian golf vacation package ad described above is, in fact, "contextual" advertising, then both the contextual advertising and behavioral advertising would "contact" the individual because both would use an IP address or similar persistent identifier to serve the ad. Thus, neither the proposed Rule nor the commentary provide a clear basis for distinguishing between these two types of advertising

If, as we understand is the case, the Commission's primary concern is to ensure that operators provide notice and obtain parental consent before directing online behavioral advertising to children,[15] then the Commission should revise its COPPA Rule to make this requirement explicit. Specifically, the Commission should specify that the definition of "support for internal operations" includes advertising activities except for "online behavioral advertising," which should be a clearly defined term. This approach would make it clear that advertising practices that do not present a meaningful privacy risk — including without limitation contextual advertising (narrowly defined), optimization, frequency capping, statistical reporting, performance tracking and similar metrics, and logging for various administrative purposes — qualify as "support for internal operations," while clearly excluding the activity that the Commission defines to be online behavioral advertising.

In addition to providing greater clarity, this approach would benefit children and parents by recognizing that a variety of advertising practices drive the creation of online content and services and the broader digital economy, permitting many website operators who otherwise would not be able to compete to offer their content and services online to a wide audience. Advertising likewise is critical to encouraging the development and distribution of mobile apps to consumers. According to a recent Nielsen survey, 51 percent of mobile users prefer ad-supported apps "if it means they can access content for free."[16] Simply stated, the Internet, including sites and services directed to children, would not be the diverse and useful medium it has become without online advertising. To ensure that the Internet continues to be a robust and enriching place for children, the Commission should avoid promulgating rules that frustrate operators' ability to continue providing the same quantity and quality of sites and online services, including those that are directed to children.

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[13] *Id.* at 46648.

[14] *Id.*

[15] *Id.* at 46647-48.

[16] Nielsen, *State of the Media: Consumer Usage Report* (2011), http://blog.nielsen.com/nielsenwire/mediauniverse/.

III. The Proposed Revisions To The Definitions Of "Operator" And "Website Or Online Service Directed To Children" Create Legal Ambiguities That Illustrate Why Streamlined COPPA Compliance Procedures Are Important And Why A Third-Party's COPPA Obligations Should Be Clarified.

While well-intentioned, the proposed COPPA Rule creates significant legal uncertainty for child-directed sites and services and third-party service providers in two significant respects.

First, the Supplemental Notice proposes to define the term "operator" expansively to include both child-directed sites and services and third parties that collect personal information through such platforms. The revised COPPA Rule also encourages operators of websites and services to cooperate with one another and creates a new concept of "co-operator" liability. As the Commission acknowledged in the Supplemental Notice, however, an ad network is not in a position to know whether the site on which it delivers ads are directed to children.[17] In addition, the Supplemental Notice provides no guidance regarding what coordination or mechanisms the ad network and the child-directed site or service would need to use to ensure compliance with the COPPA Rule, and it is not clear what liability would be imposed against "co-operators" where coordination is unsuccessful or one entity fails to properly provide notice or obtain consent.

The Commission should avoid imposing joint responsibility on independently owned and operated entities that have little or no direct control over or insight into each other's information and business practices, especially where the scope of each party's legal obligations is unclear. However, the Commission could reap the benefits of coordination while avoiding this legal uncertainty by acknowledging explicitly that multiple operators who collect, use, or disclose personal information through a single site or service may, on a *voluntary* basis, use streamlined parental notice and consent procedures to comply with COPPA. In some circumstances, one operator may be in direct contact with the child and, therefore, be able to provide notice and obtain parental consent more readily than the other operators. In such cases, it actually can promote the child's privacy to have this one operator provide notice and obtain consent for the various entities contributing content or services within the particular ecosystem, because it eliminates the need for each of those other operators to separately collect online contact information from the child in order to obtain parental consent. In addition, this approach would benefit parents because requiring each third party separately to obtain parental consent could be confusing, overwhelming, and costly for parents.

Second, the proposed expansion of the "website or online service directed to children" definition to include third parties that have a "reason to know" that they collect personal information through child-directed sites or services introduces an unworkable constructive knowledge standard into the COPPA Rule. While we appreciate the Commission's statement that an ad network need not "monitor or investigate whether [its] services are incorporated

[17] *See* Supplemental Notice, at 46644.

into child-directed properties," the requirement that "a person [] draw a reasonable inference from information he does have" could necessitate an enormous amount of human-powered analysis of data.[18]

Ad networks and similar third-party services have a variety of automated processes that allow them to scale their services and to operate efficiently and effectively. Although such an entity may possess or have access to information that could indicate that a site is child-directed, analyzing that data and drawing "reasonable inferences" from it would require significant human intervention.

Furthermore, even if an ad network were able to analyze the content of all of the websites to which it provides services, its evaluation could never be complete because the Commission considers a number of factors that have nothing to do with the website's content when determining whether a website or online service is directed to children, including competent and reliable empirical evidence regarding the intended audience. Given that ad networks serve ads on thousands of websites and millions of pages, this burden cannot realistically be met.

We therefore urge the Commission to permit third parties to rely on contractual representations that the site or service is or is not child-directed. To the extent the third party and the site or service operator have not entered into a contractual agreement that addresses this issue, then the third party's services should be deemed an "online service directed to children" only when that third party has *actual knowledge* that the site or service to which it provides services is directed to children.

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Microsoft thanks the Commission for considering these supplemental comments in connection with its ongoing review of the COPPA Rule. We look forward to continuing to work with the Commission toward our common goals of encouraging the development of innovative online content and services for children while protecting the privacy and safety of children online.

Sincerely,

Michael D. Hintze
Chief Privacy Counsel
Microsoft Corporation

[18] *Id*. at 46645.