

September 24, 2012

**By Electronic Delivery To:**

Federal Trade Commission  
Office of the Secretary  
Room H-135 (Annex E)  
600 Pennsylvania Avenue, NW  
Washington, D.C. 20580

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

Dear Sir or Madam:

This comment letter is submitted by the Consumer Bankers Association (“CBA”)<sup>1</sup> in response to the proposals of the Federal Trade Commission (“FTC” or “Commission”) to make further modifications to proposed definitions in the Commission’s Rule implementing the Children’s Online Privacy Protection Act (“COPPA Rule”).<sup>2</sup> As further explained herein, CBA generally supports the proposed modifications, but cautions against taking those definitions or other COPPA Rule provisions as templates for adult privacy initiatives in which the FTC is involved. CBA also requests a slight amendment to the Commission’s proposed definition of “support for the internal operations of the Web site or online service” that will ensure the ability of Web sites and online services to assess and improve the quality of users’ experiences. The requested amendment will not permit personal identification of children or undermine the goals the COPPA Rule is intended to advance, which CBA and its members fully support.

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<sup>1</sup> The Consumer Bankers Association (“CBA”) is the only national financial trade group focused exclusively on retail banking and personal financial services – banking services geared toward consumers and small businesses. As the recognized voice on retail banking issues, CBA provides leadership, education, research, and federal representation for its members. CBA members include the nation’s largest bank holding companies as well as regional and super-community banks that collectively hold two-thirds of the total assets of depository institutions.

<sup>2</sup> Supplemental Notice of Proposed Rulemaking; Request for Comment, 77 Fed. Reg. No. 151, 46643-46653 (Aug. 6, 2012).

## **I. THE COPPA RULE’S REQUIREMENTS SHOULD NOT BE EXTENDED TO COVER ADULT PRIVACY PROTECTION**

As CBA pointed out in comments filed with the Commission on November 23, 2011, online information and services directed to children are not a significant activity for banks.<sup>3</sup> However, efficient and responsive consumer banking increasingly will rely on electronic communications and payment transfers over various platforms, including Internet access from personal computers and access to banking services from mobile devices. The CBA fully supports the FTC’s policy of creating “a safer, more secure online environment for children,” but continues to urge the Commission to develop its policies concerning online privacy for adults in accordance with the greater ability of adults to make informed choices about the collection, use and sharing of their personal information. Appropriate adult privacy practices are the focus of ongoing discussions within affected industries and organizations, and between those industries and organizations and government.<sup>4</sup> At the same time, the privacy practices of financial institutions continue to be the focus of extensive legal requirements that have helped to make banks the most privacy-conscious businesses in our economy.<sup>5</sup> These ongoing processes, along with Congress’s increased scrutiny of consumer privacy protection, will ensure the development of adult privacy protections that balance the interests of all affected parties. The importation of rules developed for the protection of children into the adult privacy environment, where consumers are capable of assessing the trade-offs between disclosures of information and the availability of valuable online services and content, will not produce an optimal result for consumers or the economy.

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<sup>3</sup> Letter from Jeffrey P. Bloch, Senior Regulatory Counsel, Consumer Bankers Association to Federal Trade Commission in COPPA Rule Review, 16 CFR Part 312, Project No. P104503 (Nov. 23, 2011)(“CBA Comments”).

<sup>4</sup> *See, e.g.*, the ongoing multistakeholder process conducted under the aegis of the National Telecommunications and Information Administration, <http://www.ntia.gov/other-publications/2012/privacy-multistakeholder-mobile-application-transparency>; *see also* Federal Trade Commission, “Protecting Consumer Privacy in an Era of Rapid Change: Recommendations for Businesses and Policymakers” (March 2012), <http://www.ftc.gov/os/2012/03/120326privacyreport.pdf>.

<sup>5</sup> Financial institutions are subject to a pervasive set of privacy-related statutes and regulations, including the Gramm-Leach-Bliley Financial Modernization Act, Pub. L. No. 106-102, 113 Stat. 1338 (1999) and the Right to Financial Privacy Act, 12 U.S.C. §§ 3401 *et seq.* These federal laws are supplemented by state statutes that in some cases are more restrictive than their federal counterparts. *See, e.g.*, California Financial Information Privacy Act, Cal. Fin. Code § 4051.5(a)(3).

## **II. THE PROPOSED DEFINITION OF “SUPPORT FOR INTERNAL OPERATIONS” SHOULD BE REFINED TO ENSURE OPTIMIZATION OF CHILDREN’S ONLINE EXPERIENCES**

As the CBA’s comments of November 23, 2011 pointed out, banks do not ordinarily collect information from children under 13.<sup>6</sup> But, CBA’s members may engage in activities such as providing financial educational material to children younger than thirteen years old. This material may be provided in an online setting. A Web site presenting financial educational material for those younger than thirteen years old may wish to gauge, for example, which features of the Web site sustained the attention of the users, therefore providing more effective education. These analytics can also help determine what content may need to be redesigned or updated to be more successful in achieving the goal of sustaining interest in and achieving financial education. Similarly, if one of the goals of the Web site is to have users answer questions to determine their existing or gained knowledge, an analytic program can help determine how many users are completing the tasks presented rather than abandoning the program.

In its original Notice released on September 27, 2011, the Commission proposed to expand the definition of “personal information” to include elements such as “persistent identifier[s], including . . . an Internet Protocol (IP) address . . . where such persistent identifier is used for functions other than or in addition to support for the internal operations of, or protection of the security or integrity of, the Web site or online service.”<sup>7</sup> The proposed definition of the phrase “support for the internal operations of the Web site or online service” was “those activities necessary to maintain the technical functioning of the Web site or online service, to protect the security or integrity of the Web site or online service, or to fulfill a request of a child as permitted by Sections 312.5(c)(3) and (4), and the information collected for such purposes is not used or disclosed for any other purpose.”<sup>8</sup>

The Commission stated that these definitions “would permit operators’ use of persistent identifiers for purposes such as . . . improving site navigation.”<sup>9</sup>

In response to the original Notice, some commenters raised concerns that the definition of “support for internal operations” was potentially too narrow to encompass functions they believed the Commission intended to allow, such as improving site navigation and performing

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<sup>6</sup> CBA Comments at 1.

<sup>7</sup> Federal Trade Commission, Children’s Online Privacy Protection Act: Proposed Rule, Request for Comment, 76 Fed. Reg. 59804, 59830 (“Notice”).

<sup>8</sup> *Id.*

<sup>9</sup> *Id.* at 59812.

analytics. For example, the Association for Competitive Technology noted that apps developers “often use a UDID [unique device identifier] for analytics purposes: seeing what parts of their apps kids like best or least, and using this information to improve their existing and future products.”<sup>10</sup> Similarly, CTIA pointed out that unique identifiers that persist on a device can be used to determine if crashes, dropped calls or other events occur ten (10) times on a single device or one (1) time on each of ten different devices.<sup>11</sup> Scholastic noted that anonymous tracking of users’ identifiers helps it to “analyze what features on our Web site are of most interest to users who come from different external sources,” an activity that does not require Scholastic “to track the user across multiple sessions, but [does require the ability] to track the user’s behavior from a third party Web site to [the Scholastic] Web site and then across [that] Web site.”<sup>12</sup> The Toy Industry Association described analytic tools, based upon anonymous identifiers, that “measure the total outreach, behavior, and use of the website by its visitors without identifying a specific individual.”<sup>13</sup> Truste pointed to the example of a “website or online service offering free games for children that does not collect personal information, but partners with a third party analytics provider to collect aggregated data about its users including how the user got to the website or online service, and where the user went after they left the website or online service .”<sup>14</sup>

In its Supplemental Notice, the Commission cited these and other comments as supporting a revision of its “support for internal operations” definition to accommodate the “site maintenance and analysis . . . that many commenters view as crucial to their ongoing operations.”<sup>15</sup> The Supplemental Notice also stated that the revised definition will include “data practices that are sufficiently accepted or necessary for public policy reasons” as not to require notice to consumers.<sup>16</sup>

Reading the new definition in conjunction with the Commission’s explanatory statements, it is reasonable to conclude that all of the analytic activities described in the

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<sup>10</sup> ACT Comments at 4.

<sup>11</sup> CTIA Comments at 8.

<sup>12</sup> Scholastic Comments at 13.

<sup>13</sup> Toy Industry Association Comments at 10.

<sup>14</sup> Truste Comments at 6.

<sup>15</sup> Federal Trade Commission, Children’s Online Privacy Protection Rule, Supplemental Notice of Proposed Rulemaking, Request for Comment, 77 Fed. Reg. 46643, 46648 (Aug. 6, 2012) (“Supplemental Notice”).

<sup>16</sup> *Id.*, 77 Fed. Reg. 46643, 46648 n. 44. The Commission’s finding that Web analytics, relying upon IP addresses and other persistent, anonymous identifiers, do not constitute collection of personal information is consistent with the findings of various courts that IP addresses are not personal information. *See United States v. Forrester*, 512 F.3d 500, 510 (9<sup>th</sup> Cir. 2008); *see also In re Application of the United States of American for an Order Pursuant to 18 U.S.C. § 2703(d)*, 830 F.Supp.2d 114 (E.D. Va. 2011).

comments cited by the Commission, which would have the effect of improving site operators' knowledge of their users' preferences and experiences without identifying those users, are within the scope of the new definition. However, the language of the new definition still leaves room for misunderstanding on this point, in at least two ways.

First, the proposed new definition states, in relevant part, that "support for the internal operations of the Web site or online service" includes "those activities necessary to: (a) Maintain or analyze *the functioning of the Web site or online service . . .*"<sup>17</sup> This language does not clearly reflect the Commission's intent and might cause needless confusion. Specifically, it might be argued that analytics designed to follow users' activities on a Web site or online service, for the purpose of identifying the relative popularity of particular features and the extent of participation in games, quizzes and other activities, relate to the user experience rather than the functioning of the Web site or online service, and therefore fall outside this definition. In order to ensure the new definition reflects the Commission's intent, CBA proposes the substitution of the phrase "maintain or analyze the functioning, usage, and engagement of users with the Web site or online service" for the proposed section (a) of the definition of "support for the internal operations of the Web site or online service."

Second, the proposed definition's requirement that internal support functions be "necessary" to the defined purposes invites disputes as to whether an analytic function that clearly promotes the permitted purposes is nonetheless "necessary." CBA believes the Commission would agree that so long as an analytic function does not identify a child and is reasonably designed to analyze the functioning of the Web site or online service, or to support improvements to the user experience, operators should not be required to prove the measures they adopt are "necessary" to the achievement of those purposes. The risk of disputes about the necessity, as opposed to the utility, of particular analytic functions could discourage site operators from implementing useful analytic tools that do not threaten children's privacy. Accordingly, CBA proposes that the definition be amended to state that activities *used to* "maintain or analyze the functioning, usage, and engagement of users with the Web site or online service" come within the definition.

Based upon our suggestions described above, CBA respectfully requests the Commission adopt the following definition of "support for the internal operations of the Web site or online service":

*Support for the internal operations of the Web site or online service* means those activities that are used to: (a) maintain or analyze the functioning, usage, and engagement of users with the Web site or online service; (b) perform network communications; (c) authenticate users of, or personalize the content on, the Web

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<sup>17</sup> *Id.*, 77 Fed. Reg. 46643, 46652-26653 (*emphasis added*).



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site or online service; (d) serve contextual advertising on the Web site or online service; (e) protect the security or integrity of the user, Web site or online service; or (f) fulfill a request of a child as permitted by sections 312.5(c)(3) and (4); so long as the information collected for the activities list in (a) – (f) is not used or disclosed to contact a specific individual or for any other purpose.

CBA believes the proposed modification to the definition will result in strict privacy protection for children while continuing children’s access to suitable and potentially valuable information online.

If the Commission has further questions concerning the views expressed in this comment letter, please contact the undersigned at (202) 552-6366 or Charles H. Kennedy of the law firm Wilkinson Barker Knauer, LLP, who assisted in the preparation of this comment letter, at (202) 383-3383.

Sincerely,

A vertical line representing a handwritten signature, starting with a small mark at the bottom.

Jeffrey Bloch  
Associate General Counsel