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By Online Submission to: <https://ftcpublishcommentworks.com/ftc/2012coppauleview>

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

TRUSTe appreciates the opportunity to comment on the second round of proposed amendments to the Children's Online Privacy Protection Rule ("COPPA Rule" or "Rule"). TRUSTe knows well the technological and operational changes giving rise to the concerns that the Commission references in its Supplemental Notice of Proposed Rule Making; Request for Comment ("Supplemental Notice"). While we agree that the COPPA Rule should be additionally amended to address the concerns raised by the comments to the 2011 Notice of Proposed Rule Making; Request for Comment; TRUSTe still believes that some modification will be necessary to avoid unintended consequences as a result of the new proposed changes.

Specifically we would like to emphasize the following points:

1. Under the Commission's proposed definition of "operator," which specifically includes those who provide "online services", a number of third parties, whose services are integrated into the website, but who are not the primary owner/operator, are also considered "operators". This is a vague standard that provides limited or no guidance on when a third party may be subject to compliance obligations under the Rule. Depending on the primary operators' business model, these third parties may not know whether their services are integrated into sites that are directed to children under the age of 13, or to "mixed audience" sites.
2. The Commission's proposed definition of website for online services directed to children, will impose a "constructive knowledge" standard, instead of an "actual knowledge" standard, as the triggering event for COPPA compliance. This is also a vague standard that will result in an over-application of the COPPA Rule. It is unclear how third parties operators - particularly those who do not have direct contact with end users or actual knowledge of end user activities - will be able to comply with a "constructive knowledge" standard. An additional unintended consequence may be that general audience sites will now need to do age screenings prior to collecting any personal information - increasing their obligations into collection and use of personal data, and creating a burden for mixed audience sites for determining age, where such a burden did not exist before. While TRUSTe appreciates the Commission's intent to balance the interest of mixed audience sites with protecting the personal information of children, the adoption may have the consequence of adding an additional procedural step on mixed audience websites. TRUSTe supports a hybrid approach to mixed audience sites - sites that are already required to comply with COPPA under the current Rule are not required to treat

all visitors as children and must age screen to identify under age 13 visitors to comply with COPPA.

3. TRUSTe urges clarification in regards to the treatment of persistent identifiers. While TRUSTe supports the proposed changes to the definition of personal information around persistent identifiers – and providing greater protections for using children’s personal information for behavioral advertising - we believe that the role of the “operator” needs to be clarified here. Specifically, who has the obligation to obtain consent? When does an integrated third party have reason to know that they have collected information from children?

Definition of operator:

Question 1: The Commission proposes to revise the definition of operator to indicate that personal information is collected or maintained on behalf of an operation where it is collected in the interest of, a representative of, or for the benefit of, the operator.

- a. Is the proposed language sufficiently clear to cover websites or online services where they permit the collection of personal information by parties such as advertising networks, providers of downloadable software kits, or “social plug-ins”?*
- b. Do the proposed requirements of this provision provide sufficient guidance and clarity for an operator who does not otherwise collect personal information from children?*
- c. Is the proposed language sufficiently narrow to exclude entities that merely provide access to the Internet without providing content or collecting information from children?*
- d. Does the proposed language present any practical or technical challenges for implementation by the operator? If so, please describe such challenges in detail.*

TRUSTe agrees that the definition of “operator” needs to evolve to address all of the parties that collect personal information. However, as TRUSTe stated in our previous comments, it is not always appropriate for a third party that is integrated on a site to request consent¹. Special care should be taken to ensure that the expansion of the definition of operator, when taken in conjunction with the other changes to the Rule, do not create unintended consequences. The Commission’s own comments reflect the realization that not every entity that collects information from children under the age of 13 is the appropriate entity to provide notice and obtain consent.² TRUSTe thinks the primary operator is in a better position to obtain consent because they have a direct relationship with the user.

TRUSTe would find it helpful if the Commission, in addition to its modification to the definition of “operator”, would provide guidance as to when an operator of online services may rely on the notice and consent from the primary operator of the website. The currently proposed language may create obligations on third party operators integrated on a site where such obligation did not previously exist. The third party may not have any means to create a direct relationship with the data subject, and therefore may not be aware that they are required to obtain consent to collect personal information. This clarification will be particularly helpful considering the addition of the language “...On behalf of” as part of the definition of operator.

TRUSTe requests the Commission also provide guidance on when an entity will be considered

¹ TRUSTe Comments to COPPA Rule Review, 16CFR Part 312, Project No. P104503, December 15, 2011 (Comment 164) pages 7-8.

² 77 FR 46643

an operator when the entity itself does not collect, use, or have access to personal information from children. The primary operator may not be aware they now have an obligation to provide parental notice and obtain consent because they have integrated a third party service that collects personal information that they do not have access to, nor the right to use.

TRUSTe believes the proposed language places an undue burden on both the primary operator, and the third party operators integrated into the primary operator's website or online service. TRUSTe believes the language is clear in excluding entities that merely provide access to the Internet without providing content or collecting information from children. However, as the examples below illustrate, the proposed language has the unintended consequence of creating unclear obligations for both primary operators and third parties. The following use cases demonstrate the confusion the updated Rule may cause:

1. A third party service is integrated onto a primary operator's website and is unaware that the website is directed toward children. Will the third party service be required to create a consent event or can they rely on the consent obtained by the primary operator?
2. A primary operator of a website directed to children who does not collect personal information, but has third parties integrated on their site that do collect personal information. Will these third party operators need to put systems in place to collect and store information from children, provide parents notice, and track the consent? Additionally, should third party operators implement processes and systems to allow parents to exercise their right to withdraw consent, and request deletion of a child's personal information from the third party's system?
3. In the mobile context, it is unclear where consent should be obtained for third parties that have been integrated into applications directed at children. Will consent be collected when an application is installed or when the application is first used?

Definition of website or online service directed to children:

Question 2: The Commission proposes to identify four categories of websites or online services directed to children (paragraphs (a)-(d)). Does the proposed revised definition adequately capture all instances where a website or online service may be directed to children?

TRUSTe believes the proposed definition is overly inclusive and vague. Moving from an actual knowledge standard to a constructive knowledge standard will cause further confusion around which online services must comply with the Rule. TRUSTe thinks the "has reason to know," standard is too subjective and will create confusion for companies as to when they will be required to comply with the Rule. The unintended consequence of this subjective standard is that a large proportion of websites or online services will now feel the need to implement an age screen. Under the current Rule, general audience websites are not required to screen for age. The proposed Rule will expand this obligation on general audience websites and online services to screen for age.

There are two possible consequences to moving to a constructive knowledge standard, thereby increasing the likelihood that more sites will have age screening mechanisms:

1. Age screens in the mobile space will be challenging to implement and create poor user experiences. Also, it is unclear whether the age screen will need to be implemented at

the point of installation or when a user first opens an app.

2. Because of the ambiguity in the Rule, many websites that have not implemented an age screen in the past will be obligated to do so. This will cause many sites to collect more information than is required for their business model and may decrease conversion. An example would be a general audience website that requests name and email address when users sign up for a newsletter; would they now have to implement an age screen as well because a child may sign up?

Question 3: Is the newly proposed paragraph (c) within the definition of website or online service directed to children sufficiently clear to provide guidance to an operator as to when the operator is permitted to screen users for age and is required to comply with COPPA?

TRUSTe agrees with the proposal that websites not exclusively directed at children, but directed to families, should not be required to treat all users the same. Unfortunately, the proposed revised definition still has some level of ambiguity. It is unclear what the Commission intends with the use of the language “disproportionately large percentage”, and it would be helpful if the Commission would clarify this term. Further, it is also unclear what “general population” means. The Commission should clarify whether they are referring to the general population as a whole, or the population to which a website or online service is directed. Without this clarification, it will be challenging for sites to determine whether they need to comply with COPPA and places an obligation on these sites to implement an age screen.

Question 4a: Is the “knows or has reason to know” standard appropriate in this case? Should the standard be broadened, or should it be narrowed, in any way?

Under the current Rule, TRUSTe has observed that websites that might be considered mixed audience generally avoid collecting personal information from children under the age of 13. With the additional trigger of “constructive knowledge” as discussed above, it is possible that the proposed change to the Rule would now impose an affirmative obligation on any site, which could be considered a mixed audience website, to determine the age of its users. This additional obligation may have unintended consequences which have been discussed above. At a minimum, TRUSTe recommends that the Commission expand its guidance around the concept of “has reason to know” as applied to mixed audience websites. The standard should be narrowed. As it is currently written, an obligation would be placed on many websites except those clearly directed at adults. TRUSTe does not believe that this is the intent of the Commission to create such ambiguity with its proposed Rule.

TRUSTe recognizes the challenges that may have been generated in modifying the definition of operator as well as modifying the definition of “website” or “online service” directed to children (specifically, the discussion found in the Supplemental Notice with regard to the strict liability standard³). TRUSTe requests the Commission clarify the “has reason to know” component of the definition of “website or online service directed to children”. TRUSTe does not believe the current language provides enough insight to understand when parental notice and consent is required for an entity that may not be in direct contact with a child.

Question 4b: What are the costs and benefits to operators, parents, and children of the proposed

³ See [77 FR 46645](#). The strict liability standard is applicable to conventional child directed sites, however it being unworkable for advertising networks or plug-ins, is most helpful.

revisions?

Moving towards a constructive knowledge standard will broaden the range of who must comply with the Rule, by imposing an obligation to comply on companies that have not previously had such a burden. One unintended consequence is a poor user experience, created by increasing the instances when users will have to provide age to enter a site. Please see use cases above.

Question 4c: Does the proposed language present any practical or technical challenges for implementation by the operator? If so, please describe such challenges in detail.

TRUSTe believes the proposed language presents practical and technical challenges. The proposed language places another obligation on websites by requiring them to anticipate if their site may be attractive to children. The technical challenge is that many more sites will be required to implement age screens, which will cause sites to employ additional technical resources in order to implement and monitor age collection. This additional obligation will impose significant costs on smaller operators, particularly those who operate websites with smaller audiences.

Question 5: Is there currently technology in use or available that would enable websites or online services to publicly signal (through code or otherwise) that they are sites or services “directed to children”? What are the costs and benefits of the voluntary use of such technology?

Technology is available that would enable websites or online services to publicly indicate that they are “directed to children.” Websites or online services can self-attest compliance through implementing machine-readable policies using XML, or demonstrate compliance using a third-party certification of compliance with COPPA (Safe Harbor). TRUSTe is able to provide a solution utilizing our hosted seal to easily communicate compliance with the Rule. Another approach is utilizing hosted privacy policies hosted by an approved Safe Harbor that are converted into machine-readable XML that can be “grep-ed”⁴ to identify websites and online services as complying with the Rule. Ad networks employ the technology to signal “do not target” through machine-readable policies.

However, sites targeting children need incentives to employ these technologies. As the Commission is considering adopting a “constructive knowledge” standard, an additional problem is how sites can signal that they do not target children under age 13.

Definition of Personal Information

Screen Names

TRUSTe believes that primary operators should be allowed to provide moderated chat features without verifiable parental consent. TRUSTe supports including screen names that function as online contact information as part of the definition of “personal information”. However, there is an unintended consequence for sites that provide moderated chat and filter out personal information. Under this new definition, operators offering a moderated chat feature would now be required to obtain verifiable parental consent. The proposed definition of “collects or collection” carves out an exception for companies that invested in technology to filter out personal information within a chat or forum prior to it being publicly available (moderated chat)

⁴ Grep is a command-line utility for searching plain-text data sets for lines matching a regular expression

to not be required to obtain verifiable parental consent. The proposed qualifier to screen name, functioning as online contact information, does not allow operators to utilize the exception in the definition of “collects or collection” for moderated chat features. TRUSTe recommends clarifying how sites that currently utilize the moderated chat exception should provide parental notice and give parents the opportunity to opt-out of allowing a child to participate in a moderated chat.

Persistent Identifiers and Support for Internal Operations

Question 7: The Commission proposes to combine the sub-definitions of personal information in proposed paragraphs (g) and (h) covering persistent identifiers, and to broaden the definition of support for internal operations.

- a. Is the proposed language sufficiently clear?*
- b. What are the costs and benefits to operators, parents, and children of the proposed revisions?*
- c. Do the proposed revisions present any practical or technical challenges for implementation by the operator? If so, please describe such challenges in detail.*

As indicated in our previous comments, TRUSTe supports providing greater protections for children’s personal information when it is used for behavioral advertising purposes⁵. TRUSTe supports the proposed changes to the definition of “personal information” around persistent identifiers and the clarification to the “Support for Internal Operations” definition.

However, some of the Commission’s other proposed changes could create unintended consequences that TRUSTe outlined in our previous comments regarding persistent identifiers.⁶ It is unclear if the consent would apply to collection across all of a third party’s network, or be limited to the site or online service with which the third party integrated. This change may also require a third party to insert itself between the primary operator and the end user, in cases where the primary operator does not collect personal information.

The “constructive knowledge,” standard makes it unclear when a third party would be required to get verifiable parental consent. Additionally, in the mobile context it is difficult to determine at what point consent should be given and in what form as many third parties are not aware that they are being integrated into an application or mobile optimized website directed at children. Additionally, the mobile context poses greater challenges; everything pulled off of a mobile device can be considered personal information because a unique device identifier is typically tied back to a unique individual. In this ecosystem, TRUSTe thinks the primary operator is in the best position to obtain parental consent.

TRUSTe appreciates the opportunity to provide comments on the proposed changes to the COPPA Rule and supports the overall direction of the Commission to provide continued privacy protections for children in light of emerging technologies.

TRUSTe hopes the Commission will consider the examples outlined above in thinking through the challenges and complexities around implementing the changes to the Rule as currently

⁵ TRUSTe Comments to COPPA Rule Review, 16CFR Part 312, Project No. P104503, December 15, 2011 (Comment 164) page 7.

⁶ TRUSTe Comments to COPPA Rule Review, 16CFR Part 312, Project No. P104503, December 15, 2011 (Comment 164) page 7.

proposed. Though there are challenges, there are also solutions. TRUSTe has provided an approved COPPA Safe Harbor program since 2001, and our program includes certification and technical solutions that help companies required to comply with the current COPPA Rule. We would be happy to brief the Commission further on these solutions, and how they might work to help companies demonstrate COPPA compliance.

For questions regarding these comments, please contact Joanne Furtsch, Director of Product Policy, at jfurtsch@truste.com.

Sincerely,

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General Counsel and Corporate Secretary