September 24, 2012

Federal Trade Commission
Office of the Secretary
Room H-113 (Annex E)
600 Pennsylvania Avenue, NW
Washington, D.C. 20580

Re: COPPA Rule Review, 16 C.F.R. Part 312, Project No. P104503

Dear Sir or Madam:

Apple appreciates the opportunity to comment on the Federal Trade Commission's Supplemental Notice of Proposed Rulemaking With Respect to the Children's Online Privacy Protection Rule [hereinafter Proposed Rule].[1] Apple supports the FTC's efforts to ensure the Children's Online Privacy Protection Act ("COPPA" or "Act") provides protection for children online while also accounting for the dynamic nature of the Internet.

Introduction

Apple is deeply committed to protecting the privacy of our customers. Apple has adopted a single comprehensive privacy policy for all its businesses and products, including the iTunes Store and the App Store. We are committed to providing our customers with clear notice, choice and control over their information. We have implemented industry-leading, innovative settings and controls that enable parents to protect their children while using Apple products. Parents can use controls to prevent their children from accessing specific device features, such as in-app purchasing, and can restrict by age level access to apps, music, movies and TV shows. In addition, we only allow Apple accounts that collect personally identifiable information for individuals aged 13 and over. Apple does not collect, use, or have access to any personal information about users collected via third party applications.

In 2008, Apple launched the App Store, where customers may shop for and acquire applications offered by third-party developers. In order to offer an app for download in the App Store, developers must register with Apple, pay a fee, and sign the iOS Developer Program License Agreement (PLA). The PLA requires compliance with all applicable laws, including COPPA. Developers and their apps may not collect user or device data without prior user

[1] 77 Fed. Reg. 46643 (proposed Aug. 6, 2012) (to be codified at 16 C.F.R. pt. 312)

consent. Developers that do not agree to these provisions may not offer applications on the App Store. Additionally, Apple has the right to terminate its license agreement with any developer that fails to comply with these provisions.

The App Store now offers over 700,000 apps for download covering a wide variety of areas including news, games, music, travel, education, business, sports and social networking. Many of these applications offer tremendous benefits to children, particularly in the education arena. As the Washington Post highlighted in April, educators are also now using applications available in our App Store to help children with special and unique needs.[2] Among others, there are applications designed to help children with Asperger's Syndrome practice social skills, and applications designed to help children with autism learn about shapes, colors and animals.[3]

This new app economy has generated enormous economic development. According to a study by Technet, the app revolution has added more than 450,000 jobs related to applications across multiple platforms in the U.S. since the introduction of the iPhone.[4] And with more than 30 billion downloads from the Apple App Store in less than four years, Apple alone has paid more than $5 billion in royalties to developers generated by sales of their apps.

Summary of Concerns

Apple has two primary concerns with the Proposed Rule: 1) the proposed expansion of the definition of "Operator," and 2) the proposed revisions to the definition of "Website or Online Service Directed to Children." If adopted, the effect of these new rules would be to slow the deployment of applications that provide tremendous benefits to children, and to slow the economic growth and job creation generated by the app economy.

1. Definition of "Operator"

To the extent the Commission intends the Proposed Rule to apply to platform providers such as Apple that do not "own, control or have access" to the information third party apps may collect from children, it is suggesting an approach that is irreconcilable not only with the original intent, text and requirements of COPPA, but also with the practical realities of the relationship among platform providers, app providers, and the end user.

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[2] *See* http://www.washingtonpost.com/lifestyle/the-best-apps-for-special-needs-kids/2012/04/18/gIQA1FwiQT_story.html

[3] *See* http://a4cwsn.com/free-educational-apps/ (Aug. 17, 2012); *See* http://momswithapps.com/apps-for-special-needs/ (September 2, 2012).

[4] *See* http://www.technet.org/wp-content/uploads/2012/02/TechNet-App-Economy-Jobs-Study.pdf

For third party apps, platform providers such as Apple cannot "give notice and obtain consent from parents" for the purposes of COPPA compliance because Apple does not "own, control, or have access" to personal information collected by third party apps. And Apple itself does not collect personal information from users of third party apps, or provide any personal information about our users to a developer. Nor, as suggested by the FTC in the preamble of the Proposed Rule, are platform providers such as Apple in the best position to know whether a third party's application is directed to children for the purposes of COPPA compliance – certainly the third party application developers that may be collecting information are better suited to make that determination.

As currently defined under COPPA, an "operator" is a person who operates an online service and collects or maintains personal information from or about the users of such service or on whose behalf such information is collected or maintained. The Proposed Rule seeks to expand the definition of operator by adding the following: "Personal information is collected or maintained on behalf of an operator where it is collected in the interest of, as a representative of, or for the benefit of, the operator."[5] The Commission explains its motivation for this revision in the preamble of the Proposed Rule by stating that even though the "child-directed site or service does not own, control or have access to the information collected, the personal information is collected on its behalf. The child-directed site or service benefits from its use of integrated services that collect personal information because the services provide the site with content, functionality, and/or advertising revenue."[6]

Historically, the Commission has recognized that entities lacking access and control over information that is collected are not "operators" within the meaning of this language. In 1999, interpreting "operator" for the first time, the Commission emphasized that "[w]here the website or online service merely acts as the conduit through which the personal information collected flows to another person or to another's website or online service, and the website or online service does not have access to the information, then it is not an operator under the proposed Rule."[7] The agency reiterated that view in the final rule.[8] The connection between platform providers such as Apple and information flowing between a user and an application is even more remote: the information flows directly between the user and the application, with no involvement by Apple, and Apple has no access to this information at any time.

In what would be a sharp reversal of settled law, a platform provider such as Apple could now be treated as an operator even if it does not have access to or control over the information

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[5] Proposed Rule, 77 Fed. Reg. 46643, 46652.

[6] Proposed Rule, 77 Fed. Reg. at 46644.

[7] Children's Online Privacy Protection Rule, 64 Fed. Reg. 22750, 22752 (proposed Apr. 27, 1999) (emphasis added).

[8] Children's Online Privacy Protection Rule, 64 Fed. Reg. 59888, 59891 (Nov. 3, 1999).

collected simply because it "benefits" in some way from the "content, functionality, and/or advertising revenue" that exists as a result of the app's presence on the platform.[9] If this is the meaning the Commission intended, we respectfully submit that it is a sweeping expansion of COPPA that cannot be squared with the statutory language or with the framework and purpose of the Act. Moreover, it would impose requirements on platform providers such as Apple that would be impossible to satisfy and would encourage Apple and other platform providers to eliminate apps that could *potentially* be viewed as "directed to children" in order to avoid liability. This result could be particularly counterproductive in the classroom, where new and interactive app-based learning tools are currently being deployed.

App developers are in the best position to monitor their compliance with COPPA because they control the two features of their apps most relevant to the Act: (1) the collection of information and (2) the targeting of children. By contrast, platform providers such as Apple have little information, if any, on these features. App developers know precisely what their apps do with respect to the collection of information because they write the source code for their apps, which dictates whether data will be collected, what data is collected and how it is used. Apple does not have access to an app's source code and cannot demand it because source code is generally treated as a protected trade secret by app developers. And even if Apple had access to source code, because Apple receives thousands of applications for review each week, it would be impractical to conduct a lengthy analysis of the code of each and every app. Further, some data collection functionality can even be hidden from the review process by use of a server-based mechanism.

While platform providers like Apple may make assessments of whether an app is suitable for children by assigning an age rating, this is a very different thing from determining whether an application is targeted at children for the purposes of data collection and legal liability. App developers create business plans, devise marketing strategies, conduct market research, and have information on the users interacting with their apps. They control the factors most relevant to the Commission's overall legal and policy goals.

Moreover, under such an interpretation of the Proposed Rule it would be impossible for Apple to take the responsive, real-time remedial steps required by COPPA. Under the Act, an operator must "provide, upon request of a parent . . . the opportunity at any time to refuse to permit the operator's further use or maintenance [of the information]."[10] Apple has no control over an app's collection and use of information, does not "use" this information, does not itself collect this information, and has no access to this information. Therefore, Apple is not in a position to stop the "further use" of this information.

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[9] Proposed Rule, 77 Fed. Reg. at 46644.

[10] 15 U.S.C. § 6502(b)(1)(B)(ii) (2012) (emphasis added).

There is no evidence that Congress intended, in this context, that an entity in Apple's position be held liable for the actions of third parties. For instance, Congress does not make department stores liable for the data collection practices of the companies that sell children's products in a department store. Nor does Congress make the cable companies liable for the data collection practices of the studios that produce the children's content viewed on television. By proposing to extend the requirements of COPPA in this way, the Proposed Rule would mandate steps that simply cannot be taken, and would create an impossible burden for platform providers that could potentially be liable for the conduct and content of any third-party app.

2. Definition of "Website Or Online Service Directed To Children"

Coupled with the Commission's proposed changes to the definition of "operator," the proposed changes to the definition of "website or online service directed to children" could ultimately result in fewer apps being available – including apps designed for use in educational settings – and limited economic growth. COPPA defines a "website or online service directed to children" as "a commercial website or online service that is targeted to children," or the portion thereof that is so "targeted."[11] The Proposed Rule would include within this definition any operator that "knows or has reason to know that it is collecting personal information through any website or online service" that itself knowingly targets children or is likely to attract children as its primary audience or as a disproportionate share of its audience. [12] The Commission has stated that the phrase "reason to know" "does not impose a duty to ascertain unknown facts, but does require a person to draw a reasonable inference from information he does have."[13]

This proposed "reason to know" test has the potential to extend COPPA's reach in at least one important respect. In conjunction with the interpretation of "operator" discussed above, it could impose COPPA obligations on platform providers who merely have "reason to know" that apps available on the platform collect personal information and appeal to significant numbers of children. This approach would establish the wrong incentives for platform providers. The Commission has encouraged platforms to screen apps more thoroughly.[14] In the Commission's view, platform providers are "gatekeepers of the app marketplace," and thus "should do more." Apple is proud to be the industry leader in this regard.

The proposed "reason to know" standard, however, would incentivize platforms to do less, not more. Under this definition, the more a platform learns about an app, the more likely it is to be deemed to have "reason to know" that the app is collecting personal information from

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[11] 15 U.S.C. § 6501(10)(A)(i)-(ii) (2012) (emphasis added).

[12] Proposed Rule, 77 Fed. Reg. at 46645 (emphasis added).

[13] Id. at 46645 n.18.

[14] FTC Staff Report, Mobile Apps for Kids 2-3 (Feb. 2012).

children or is targeted to children.[15] Therefore, "doing more" as the Commission encourages would *increase* a platform provider's risk of liability. Platform providers that do some review of applications prior to making them available to consumers would be placed at a competitive disadvantage. They would have to either undertake an impossibly comprehensive and costly review that makes them unable to compete with unregulated platforms, or become an unregulated platform. The Commission should avoid such an outcome.

Even more, the "reason to know" standard would also serve to limit the diversity of apps available to consumers, and ultimately slow the job creation generated by the app economy. Platform providers simply can not ensure that a third party application is COPPA compliant, given the legal, technical and practical difficulties discussed above. Therefore, platform providers will be incentivized to adopt an overly conservative app review analysis in order to minimize liability in the event the Commission reaches contrary *ex post facto* conclusions regarding whether an app is targeted at children. This could result in many apps, including many widely used education apps, from reaching consumers. This will be true even for those apps that are not widely used by children and that should not, by any reasonable measure, fall within COPPA's reach. And by extension, the economic growth generated by the app economy would be limited.

Conclusion

Apple is strongly committed to protecting our customers' privacy and protecting children. We give our customers clear notice of our privacy policy, and our devices enable our customers to exercise control over their personal information in a simple and elegant way. We offer industry-leading parental controls to enable parents to manage their children's activities on their Apple devices. When we become aware that an application is in violation of our rules or the law, we remove that application from our App Store. We share the FTC's concern regarding the collection and potential misuse of children's data and we appreciate the opportunity to comment on the Proposed Rule.

Respectfully submitted,

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Apple, Inc.

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[15] See Proposed Rule, 77 Fed. Reg. at 46645 (new definition "does not impose a duty to ascertain unknown facts but does require a person to draw a reasonable inference from information he does have").