



September 24, 2012

By Electronic Filing

Mr. Donald S. Clark
Office of the Secretary
Federal Trade Commission
Room H-135 (Annex E)
600 Pennsylvania Avenue, NW
Washington, DC 20580

RE: COPPA Rule Review, 16 CFR Part 312 (Project No. P-104503)

Dear Secretary Clark:

As a Commission approved safe harbor under the Children's Online Privacy Protection Act (COPPA), and a longtime advocate for advancement in the proliferation of informed parent consent, Privacy Vaults Online, Inc. dba PRIVO appreciates the opportunity to respond to the Commission's supplemental Notice of Proposed Rulemaking concerning its proposed revisions to its COPPA Rule. PRIVO submitted comments in response to the Commission's initial Notice of Proposed Rulemaking, as well. In those comments, PRIVO made two main points which remain relevant to the Commission's inquiries in this supplemental NPRM.

First, PRIVO noted that industry, kids and parents all need more clarification as to when a website is considered directed to children, particularly in situations where a site has a mixed audience comprised of both children under the age of 13 (U13) and either older teens or adults.

Second, PRIVO noted that the proposal to wholly eliminate the Email+ method of parental verification and the sliding scale of securing parental consent along with it, is an overly broad response to the limitations that the Commission has identified with Email+. PRIVO provided examples of situations in which an Email+-like method of securing verifiable parental consent could provide a high level of assurance that a website is communicating with a parent without imposing the greater burdens on website operators that having to use a credit card or SSN-type method of verification (full VPC) does. PRIVO noted that many site operators, faced with the possibility of having to use one of the more burdensome methods of full VPC, would attempt to circumvent application of COPPA's requirements to their sites. One such method would be for the site to block U13s from registering themselves, insist that parents come to the site to undertake registration, then rely on their belief that they are dealing only with parents (i.e., lack of actual knowledge that they are dealing with a U13) to claim that they do not collect any personal information from children and therefore are not covered by COPPA's requirements at all.¹ Alternatively, a site that must switch from the less costly Email+ method of parental verification to the more costly means of full VPC may be forced to drop or

¹ Sites may also curtail existing functionalities, or start-ups may be discouraged by the costs and burden associated with full VPC from bringing new services online entirely. Both these results run counter to Congress' intent and the Commission's goals. However, PRIVO submits that blocking of U13 registrations on sites to be particularly problematic as it gives the impression that sites and services continue to exist that allow children to access many of the benefits of the Internet. One has to have a fairly sophisticated understanding of the mechanics of these sites' registration processes to realize that these benefits are illusory and that the ability, particularly of older children, to use the Internet to express themselves is in fact significantly curtailed.

curtail other safety measures they currently employ to protect children, such as moderation of chat or uploaded pictures and videos. That is, when forced to use the highest level of full VPC, sites may simply ask parents for the highest level of permission, and with that permission in hand, turn U13s loose to share online without any child-friendly protections. On mixed audience sites that are child friendly, parents might reasonably expect, despite anything written in a site's Privacy Policy to the contrary, that a site that has gone to the extent of securing credit card or SSN information from the parent in order to get the parent's consent must be taking great measures to protect their child online, that the operator is creating something of a walled garden that allows the child to interact online safely. In reality, though, these mixed audience sites would be providing no greater security for children than any general audience social networking site would

These two issues remain centrally important to the Commission's supplemental inquiries. The issue of what a site's audience is underlies the questions of whether a site operator can be deemed to have actual knowledge that it is interacting with a U13 and whether a social plug-in or website analytics company can be deemed to have reason to believe it is collecting information from a U13. It determines whether a site that would be permitted to ask age-screening questions to gain actual knowledge under the Commission's proposal herein, or is prohibiting from doing so. PRIVO is concerned that the cumulative effect of permitting some sites to use age-screening while eliminating any intermediate level of parental consent verification equivalent to Email+ for sites that do not fall into that category, overly burdens child-directed sites and forces them to find justifications for circumventing COPPA's requirements rather than incentivizing them to seek out the innovative solutions that the Commission hopes to encourage.

Because these issues and PRIVO's prior comments highlighting them remain central to this inquiry, PRIVO incorporates by reference the entirety of its previously submitted comments in this matter. In addition, a copy of those comments is attached hereto for ease of reference.

Finally, it is important that the Commission clarify in this proceeding precisely how COPPA applies to data collected in connection with the new family account proposal. It is PRIVO's experience that there is a pervasive belief in the industry that COPPA will apply to child accounts created by children on family account sites, but will not apply in any respect to accounts created by parents on those same sites. That is, site operators believe that because they are not collecting information from the child, but rather from the parent, they have no need to follow through with verifying the parental consent. They will thus be allowed to market directly to the U13 without having even created an email trail that the parent consented to that communication between the site and the child. . PRIVO believes that site operators will continue to gain actual knowledge that they are interacting with U13s and collect information from them, which will be combined with the original data provided by the parent at account registration. The linking of a unique identifier created for the child to engage with the site should trigger COPPA protections, including the right of the parent to request that information collected from the child be deleted.

A. Granting Sites the Opportunity to Ask Appropriate Age-Screening Questions In Conjunction With Additional Steps Can Significantly Enhance Sites' COPPA Compliance and the Commission's Enforcement Efforts Under COPPA

PRIVO fully supports allowing websites to ask appropriate age-screening questions as part of their COPPA compliance. Indeed, PRIVO believes that COPPA compliance and the Commission's enforcement efforts under COPPA would be most enhanced if both child-directed and mixed audience websites were permitted to use age screening. Under the Commission's proposal, significant liability rides upon getting the question of whether the site is child-directed or is merely interesting to children and families right. As will be shown in Section B below, PRIVO believes that there is no need to distinguish between these two groups because both continue to have parent verification obligations

under COPPA, even if the family account proposal is adopted. What is important is to distinguish between child-directed/mixed audience/family sites on the one hand and general audience sites on the other, so that general audience sites are not inadvertently required to use age-screening.

It can be tremendously difficult to determine what the age range of some sites is. This is due in part to the broad range of material that is developmentally appropriate for children in the teen/tween ages, such as between ages nine and 15. In addition, to keep their content relevant and enticing to children, sites increasingly adopt features that are commonly seen on general audience sites, such as sharing and live chat, which could lead an objective observer to conclude that the site is directed to an older or more general audience population. The Commission has long recognized that it can be difficult to identify which sites should be subject to COPPA and which should not. Its proposed definition of a child-directed site incorporates concepts of what the site's intended audience is, what the site's likely appeal is, and what the site's actual experience with attracting users is. The Commission asks whether the definitions are sufficiently clear to provide guidance to an operator as to when the operator is permitted to use age-screening. From PRIVO's perspective, it is not. PRIVO's experience is that site operators have completely different concepts of what it means to have a "primary" audience of U13s. Some believe that this means that the audience would be 75% or more comprised of U13s with only a few adults or older children engaged with the site, while others feel that it means, if their site is 51% U13, it must treat all users as U13s. The same issue arises with the definition of "disproportionate."

Therefore, PRIVO would propose that the Commission's inquiry be focused on distinguishing child-directed and mixed audience sites from general audience sites and that both child-directed and mixed audience sites be permitted to age-screen all users. Doing so has many benefits. First, use of the age-screen provides the site owner with the actual knowledge needed to take the appropriate next steps in the information collection and disclosure processes. Second, as the Commission noted, use of the age-screen provides the Commission with the information it needs to enforce its COPPA Rule. Third, the age-screen provides notice to the public that a site falls on the continuum of child-directed sites.² Finally, as will be shown in Section E below, allowing a broader category of sites to use the age-screen mechanism equalizes the burdens of COPPA compliance among the different categories of websites that are likely to engage with U13s on a significant basis.

B. Age-Screening Without Some Additional Steps, However, Does Not Provide Full Compliance with COPPA

The benefit of allowing sites to ask an age-screening question should be limited to allowing them to create two separate registration and notification paths that respect the fact that some of their users are adults or older children. It should not be to allow sites to wash their hands of COPPA for all users or for those who self-identify as 13 years of age or older. It is PRIVO's experience in discussing the potential uses of the proposed family account that many sites believe that it will permit them to block U13s and ostensibly collect all necessary information only from those who self-identify as parents - which, if true, would relieve them of all obligations to comply with COPPA.

Nearly a decade ago, PRIVO pioneered a "Parent With Me" registration path that the Commission accepted in approving PRIVO's application to become a COPPA safe harbor. Under this path, the site assumes that the user is a child, but asks if the site user's parent is with them at the time of their first engagement with the site. If the user responds that the parent is present, the site avoids the significant burden of registration drop off that occurs under Email+ when a child is asked to

² The Commission asks whether technology exists that can signal the public that a site is directed to children. For purposes of setting parent expectations regarding their interactions with a site, the age-screen question is a low-tech, but highly effective mechanism to do so.

input the parent's email account and no further activity can occur until the parent responds to the email. While avoiding this drop-off, the "Parent With Me" path still provides at least as high a level of assurance as Email+.

Under the "Parent With Me" path, the parent is immediately provided with all the required notice information on-screen and is allowed to indicate his or her consent to the child's use of the site on-screen. As a final step, the parent inputs his or her email address and responds to the email to activate the account he or she has now created. At this point the parent and/or child can provide additional data that has been previously permissioned. The activation process is no different than the process that parents go through whenever they sign up for a newsletter or other email subscription. It is not burdensome for parents or sites to engineer. Indeed, it is likely that most family account sites that would be created under the Commission's proposals herein would need to undertake this step to comply with email marketing regulations anyway.

The importance of this email verification, however, cannot be over-emphasized. It acts as a backstop to the age-screening question to be sure that a child has not simply lied on the age-screen question. It also acts as a notice delivery mechanism, so that the site's privacy and information use policies are presented to the self-identified parent at the time of registration, and as noted, it is likely to be required under other information use regulations and best practices. To fully appreciate the importance, it is necessary to understand the registration mechanisms that are developing in the industry, especially in response to the family account proposal.

First, based on PRIVO's experience with sites that have looked at the impact the adoption of the new family account proposed herein would have on them, PRIVO expects that in many cases, when the age-screen answer indicates that the respondent is thirteen years of age or older, the site, believing that it is not interacting with a U13 will immediately begin collecting the following types of information about the respondent:

- Name, address, telephone number
- Email address
- Facebook, Twitter or other social media information
- Likes and interests, including the opportunity to sign up for offers, engage in financial transactions on the site, and participate in sweepstakes or other promotions

It is the Commission's proposal that this level of information be collected without any verification based solely on the response to an age-screening question. The Commission has stated that it believes that the circumstances under which this information is being collected, i.e., from a mixed audience site that uses an age-screening mechanism, gives sufficient assurances that the age-screening question has not been answered falsely. However, the suite of above features that PRIVO anticipates will become available immediately to any user who responds to the age screening question indicating that they are not a U13 provides too much of an incentive to children to lie. And, as PRIVO pointed out above, there are good reasons to expand the use of the age-screening question to a larger group of sites that might attract U13s.

Next, based on PRIVO's experience, it is likely that many sites, in addition to collecting the above information from those who self-identify as being thirteen or older, will ask these users to provide the site with information about their U13 children. This information may be as limited as creating a screen name and password that the child can use to log in and use the site, or it may be more extensive, such as signing the child up for newsletters or birthday clubs, asking for the child's likes and interests, tracking the child's behavior, allowing the child to interact with other family and friends, or giving permission for the child to make purchases on the site and setting up a pool of money for the child to use in doing so. In this process, the site can easily provide the self-identified parents

with notice of the site's information collection policies and secure the parent's consent to the child's use of the site. In that respect, this process looks a good deal like the sort of information and consent gathering that currently occurs when a parent receives an Email+ verification email. However, it is done with no verification other than the response to the age-screening question. In getting rid of the Email+ method of verification due to its lack of reliability, the Commission could not have intended to replace it with something less reliable.

Finally, once a child's account has been created, either (a) by his/her "parent" and after the "parent" has been provided the site's terms and conditions and consented to the child's use of the site, or (b) by the child after the parent has been verified and provided consent through full VPC, the child will begin to use the account. At this point, if at no earlier point in time, there can be no doubt but that the site is collecting information from a child. The site knows that this user is a U13 user either because the parent told the site so in his/her registration or because the child registered after full VPC. In such a scenario, PRIVO does not believe that the Commission intended to allow users of its age-screening process to rely on that process to completely avoid the parental verification step that has always been required where information of this nature is collected from an individual known to be a U13. Therefore, PRIVO asks that the Commission clarify the application of COPPA to information collected through a family account. Specifically, PRIVO asks that the Commission clarify that if a site collects information from a user identified as a U13 during the registration by the child or by the parent on a family account site, the site must verify the parent through either the Email+ or full PVC methods currently applicable to child-directed sites.

C. The Commission Should Clarify What Types of "Age Information" That Can Legitimately be Relied Upon in the Age-Screening Process

The Commission has not identified what it considers to be "age information" that can be relied upon in the age-screening process. Historically, telling children that they must be 13 or older to use the site, then asking them whether they are older than 13, had not been considered to be "age neutral" screening. Accordingly, date of birth information is usually used. However, PRIVO routinely encounters situations in which sites collect a social media log-in, such as by integrating Facebook Connect with their sites. Where a user provides a working Facebook Connect log-in, the site believes that it has gained actual knowledge that it is dealing with a user who is not U13 because the terms of service of the social media site prohibit U13s from registering.

PRIVO requests that the Commission clarify that, given the evidence that U13s have circumvented the terms and conditions of sites that publicly declare themselves to be off-limits to U13s, child-directed and mixed audience sites cannot rely on the existence of an account on such a site as reliable age information for purposes of the COPPA age-screen mechanism. Nor should parents be required to set up a social media account and give up that information to the site in order to complete the age-screen process.

D. The Commission Should Also Clarify that Sites Using An Age-Screen Must Provide a Child Registration Path

As noted above, many operators believe that under the new family accounts, they will be permitted to collect information from the self-identified parent, rather than from the U13, and in so doing will be able to avoid all requirements of COPPA. If true, this would create an enormous incentive for sites to block U13s from registering on their sites so that parents are forced to do it for them, supporting sites' claim that COPPA simply does not apply to them. It is deceptive to allow a site to claim that it is somehow directed to both parents and children, yet prohibits children from participating fully in the features that are supposedly for them. To the extent sites are permitted to

engage in such tactics, the family account will have had the effect of diminishing the availability of child appropriate content on the Internet.

E. The Commission Should Reconsider Its Proposal to Eliminate a Sliding Scale Method of Parental Verification

As noted above, PRIVO supports the family account proposal, but believes that COPPA still requires that sites that gain knowledge that they are collecting information from a child, even where a parent was involved in establishing the child's account, must still undertake steps that would allow them to verify that they have in fact received consent from a parent. This is one situation where a verification method that does not rise to the level of full VPC could well continue to be useful both in providing a reasonable level of assurance and in providing an easily-implemented verification method for site operators. PRIVO provided many other such examples in its initial comments.

The Commission proposes eliminating the sliding scale because of the perceived limitations of the Email+ mechanism. But, the sliding scale is not the problem. It is actually a very reasonable approach that can be understood by all constituents. The problem is that the method currently used for the PLUS (+) in Email+ is too weak. There are numerous ways to improve the PLUS such that email coupled with other steps may be considered reasonable for internal marketing, but would not rise to the level of protection needed in situations where personal data is shared, tracked or publicly disclosed. PRIVO has previously detailed many such ways.

If we the sliding scale is flattened to push all U13 participation that leverages PII to the highest level of full VPC, it is likely to have the counter effect of shutting down parent consented legitimate marketing and communication to children. As noted above in connection with family accounts, to avoid the heavy obligations of full VPC, sites will choose to block registration by U13s and claim they lack actual knowledge that they are dealing with a U13. The other possibility is that sites that are forced to obtain more reliable and costly (\$.05-1.00 per verification plus the soft cost of lost conversions) consent will feel pressure to make up the compliance cost and loss of conversion by reducing the efforts they are currently making to mitigate the disclosure of U13 PII. The safeguards that are currently provided to produce reasonably safe online experiences will simply become too costly.

Requiring child-directed sites that currently rely on Email+ to jump up full VPC will also have such a disparate effect on those few sites that remain after the vast majority of sites are reclassified as family account sites, that their very existence will be threatened. A site that is able to claim it is a family site will be able to age-gate, and depending on the Commission's action on the clarifications herein, may be able to register only the self-identified parent, perhaps merely by collecting a social media log-in, and otherwise completely wash its hands of COPPA obligations. In contrast, a site dedicated to 8 to 12 year olds will have to incur the hard and soft costs of full VPC. The Commission recognizes that it must balance the interests of child safety online with the potentially chilling effect its safety regulations might have on the online industry. That balance is better struck where sliding scale mechanisms are available to all sites.

Accordingly, PRIVO reiterates its request that the Commission empower its safe harbors to continue to utilize the Email+ or other intermediate levels of verification where the safe harbor determines that such methods, in combination with other factors, provide an appropriate level of assurance for the features available on the site in question. PRIVO believes that a sliding scale approach implemented by a safe harbor like PRIVO will strike the appropriate balance between supporting interactivity on the Internet and minimizing the burdens on all parties involved. As noted in PRIVO's previous comments, the factors that should determine the level of consent required on the

sliding sale include: number of data sets collected including PII, the nature of the data sets collected, internal marketing efforts, sharing data with third parties, and public disclosures.

F. The Commission Should Allow An Exception From PII For Photos and Videos That Are Adequately Moderated

Because photos and videos have not, up until this point in time, been considered PII, many sites that permit U13s to upload photos and videos have secured parental consent via an Email+ type of method. Many of these sites ALSO fully moderate the posting of photos and videos with live human intervention to remove any of the categories of information that were previously considered PII, such as names of individuals, schools, locations and the like. The only remaining PII in these cases would be the child's face or voice, which cannot be edited out. As noted previously, the cost of providing this moderation is very high. If sites that provide moderation are required, under the Commission's elimination of the sliding scale, to incur the cost of full VPC, PRIVO believes that benefits of moderation will have to be abandoned. Accordingly, PRIVO requests that the Commission allow these sites to continue to use a sliding scale method of verification, in conjunction with a safe harbor program, to provide an adequately high level of assurance without jeopardizing the site's ability to continue to provide moderation.

G. The Commission Should Define Liability in a Way That Will Limit Financial Burdens & Encourage Innovation.

First, the Commission should adopt an exemption for first-party operators that did not have knowledge or direct involvement in an alleged violation when using third-party services for operational purposes including analytics, to meet the FTC's goal of promoting cooperation and innovation. The Commission's proposed rule states that "[p]ersonal 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." Under the proposed rule, additions to the definition of "operator" apply to websites or online services that are directed to children, and which use plug-ins or advertising networks.

PRIVO understands and supports the FTC's reasons behind this proposal. In most cases it is the first-party operator that should have the burden of providing the parent with notice of information collection and use practices; however, when it comes to fault and liability it is not always clear who should be held liable. As such, the proposal to expand the definition of an operator to include co-operator liability will provide intermediaries with strong incentives to take greater care when integrating their products or services onto child-directed sites. Nevertheless, the balance between providing strong protections under COPPA and minimizing the burdens on companies that will stand in the way of innovation must be weighed.

Websites or online services typically employ intermediary services to learn more about their products and services and increase revenues. Many of these third-party services are offered for free or at a low cost for operators. For the purposes of the proposed definition, PRIVO notes the existence of these five kinds of third-party services in the ecosystem: (1) intermediaries that help with operations like analytics; (2) advertising services; (3) social plug-in providers; (4) plug-ins that collect user-entered data including authentication plug-ins; and (5) and other intermediary products or services that are added to improve the website or service.

Using intermediary services often provides websites or online services with the ability to keep costs down while, at the same time, improving their products and services. In many instances, the websites or online services are often not in charge of the tracking technology like cookies that are placed by the intermediaries they work with.

Operations purposes like analytics are critical to any business model and the proposal to hold operators liable when using third-party analytics services will place a substantial financial burden on sites or services directed at children. Providing an analytics service internally is extremely costly for smaller players and imputing such a liability for operators risks reducing competition and hindering innovation in the online ecosystem. In the interest of encouraging cooperation amongst sites directed at children and intermediaries, PRIVO proposes that the Commission adopt an exception for first-party operators to avoid liability when using intermediaries for operations purposes where the operator has no control over tracking and has no direct involvement with the alleged violation. For all other non-operational purposes, PRIVO supports the notion that the first-party operator remains liable.

Second, the Commission should maintain the “Actual Knowledge” standard instead of the “Know or has Reason to Know” standard to encourage cooperation amongst first-party operators and intermediaries. The Commission proposes to modify the definition of website or online service directed to children to include any operator who “knows or has reason to know” it is collecting personal information through a host website or service directed to children. The Commission’s position here expands the definition such that intermediaries may be held responsible including social networking plug-ins and network advertising companies. The proposed “reason to know” standard adds an additional responsibility for intermediaries that collect data using tracking methods like cookies or identifiers. Even though the Commission notes that intermediaries like ad-networks or plug-ins do not have a duty to “monitor or investigate whether their services are incorporated into child-directed properties,” the “reason to know” threshold is too high. Such a standard will be counterproductive; intermediaries will be less inclined to work with first-party operators and first-party operators that rely on intermediaries will be forced to limit or discontinue their services. The “know or has a reason to know” standard is further compounded by the mixed audience site age-screen for sites that include a “disproportionately large percentage of children”. How should the plug-in react under this rule? Would the plug-in provider have to somehow determine whether the primary site successfully age-screened?

PRIVO believes that the Commission will better reach its desired outcome by maintaining the actual knowledge standard. PRIVO expects that third-party services like ad networks will place separate cookies (or other identifiers) on kids sites or services when working with first-party operators with sites directed at children.

The proposal to add a definition for “support for internal operations” will promote innovation and positive change in the industry that better protects children online if coupled with the “actual knowledge” standard. The Commission proposes to add a definition for “support for internal operations” to the COPPA Rule. If a persistent identifier is used for one of the following “support for internal operations” purposes, then it will not be considered personal information under COPPA when: (i) maintaining and analyzing the functioning of a website or online service; (ii) performing network communications; (iii) authenticating users of, or personalizing the content on, a website or online service; (iv) serving contextual ads on the website or online service; (v) protecting the security or integrity of user, website, or online service; and (vi) fulfilling a request of a child as permitted by COPPA.

PRIVO requests that the Commission apply an “actual knowledge” standard for these third parties so that the third parties will only have a duty to use a separate cookie or code to assist the website in their support for the operator’s internal operations without creating a behavioral profile or behaviorally targeting users.

PRIVO greatly appreciates the opportunity to provide these Comments.

Respectfully submitted,

Denise G. Tayloe
President and CEO
Privacy Vaults Online, Inc. d/b/a PRIVO

