July 12, 2010

Via electronic filing: https://public.commentworks.com/ftc/2010copparulereview

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

Re: COPPA Rule Review, Project No. P104503

Dear Secretary Clark:

On behalf of TRUSTe, I thank you for the opportunity to provide comments as the Federal Trade Commission (FTC) considers how its Rule implementing the Children's Online Privacy Protection Act (COPPA) is working, and whether positive adjustments may be necessary to advance the protection of children's privacy. We believe that recent advances in online technologies, Web 2.0 user-generated content services, and the use of interactive and mobile interfaces present a changing use environment that merits consideration of new privacy risks for children. We also appreciate areas where enhanced flexibility for business compliance, leveraging new technologies, could dually assist online innovation, privacy protection, and the prudent use of the Internet and Internet services by children.

As you know, TRUSTe's Children's Privacy Seal Program is an FTC approved Safe Harbor program. Our program began in 2001 and currently services the largest number of companies and websites among the four existing safe harbor programs. Our program has benefitted from the opportunity to work closely with FTC staff both on interpretive issues and issues related to the activities of specific companies. Those informal dialogues, as well as recent joint meetings among all Safe Harbor programs with FTC staff, are appreciated and to be further encouraged.

Significantly, TRUSTe's own experience in working with the FTC leads us to the conclusion that the interaction between Safe Harbor Programs and the FTC does provide benefits as lawmakers intended with COPPA. When COPPA and its implementing Rule

were enacted, there was a collaborative and concerted effort by all stakeholders to find a workable and effective means to achieve the goals of the statute. Included in these goals are the Safe Harbor provisions, which were designed to presume a business' compliance with COPPA if it participated in an FTC-approved Safe Harbor Program.

The interaction with the FTC with respect to TRUSTe Children's Privacy Program sealholders has worked according to the law and Rule's expectation, with TRUSTe receiving referrals from the FTC on inquiries and the opportunity to positively assist Safe Harbor companies resolve issues when improvement is needed. We appreciate this working partnership with the FTC. It promotes efficient and effective resolution to specific complaints by individuals and more quickly promotes intervention to protect children and family privacy. It also preserves FTC resources for the most serious cases, including those of Safe Harbor participant companies that fail to make improvements to comply with Safe Harbor Program requirements. Self-regulation through the COPPA Safe Harbor provisions does work and can be effective, but its impact is currently very limited. Below, we address this in greater detail.

The focus of TRUSTe's further comments and suggestions for potential COPPA Rule enhancements will be directed at the following topics raised by your review:

1. Merit to allowing technologically responsive and flexible means for demonstrating verifiable parental consent;

2. Broadening mechanisms and thresholds for monitoring and deleting personally identifiable information provided by children less than 13 years of age;

3. Considerations for expanding the definition of personal information for purposes of the Rule; and

4. Use of FTC authority to approve and promote Safe Harbor Programs.

Specific Areas of the FTC's COPPA Review:

1. Merit to allowing technologically responsive and flexible means for demonstrating verifiable parental consent

TRUSTe POV: One of the key challenges to both protecting children's privacy and encouraging prudent participation by children in new online services and communication opportunities is obtaining verifiable parental consent for the collection of personal information consistent with the COPPA Rule and FAQ guidance. The nature of interaction on the Internet has changed greatly since the inception of the COPPA Rule. Much of the interaction between owners of web properties and children are "Just-in-Time" type interactions which do not lend themselves to the earlier asynchronys methods of notice and consent by a parent. For example, e-mail generally results in a break in time between the online service in which a child wishes to partake and the parent's

opportunity to indicate their consent. Further, the means of parental consent is easily manipulated now by children and can foster dishonesty by children in order to participate on a site online.

Additional tech-savvy mechanisms for "real time" or "just-in-time" parental consent are urgently needed. TRUSTe and large proportion of our Children's Privacy Program participants urge the FTC to consider more flexible guidance on acceptable means for demonstrating verifiable parental consent. Just as Internet services evolve, so must verification processes in order to allow for timely parental approvals of child behavior. Some options could include non-transactional uses of credit or smart cards, or cell phone enabled text verifications. Finally, as a further incentive for Safe Harbor participants, we encourage the FTC to permit such participants to engage in pilot testing periods for new parental verification mechanisms in order to contribute to a more dynamic set of options.

More "real time," parent-friendly, methods are evolving for purposes of parental verification Use of these methods would assist companies in launching new innovative services to children (rather than abandoning them), promote honesty by children online, and participation by parents in privacy decisions for their children.

2. Broadening mechanisms and thresholds for monitoring and deleting personally identifiable information provided by children

TRUSTe POV: A continuing challenge for businesses that are trying to comply with COPPA is effective monitoring for the contribution of personal information on sites that are fairly dynamic. This includes gaming sites, blogs, chat rooms and social networks. Techniques continue to be developed and each model can be effective or not, depending on the particular efficacy of its implementation. Companies do feel constrained from investing in technologies to assist them with monitoring because of what many consider statistically unrealistic requirements on effectiveness in catching all personal information before it is posted; rather than ranges of data elements and aggressive, but practical time parameters for monitoring and deleting personal data. The effect is that this may, again, discourage innovative services for children online. Another challenge can be unrealistic compliance costs for smaller and medium sized businesses.

Again, TRUSTe would like to work with the FTC to explore flexibile approaches that might be practical to assist businesses seeking compliance, while testing new technologies to assist them with monitoring. A review of the rule for pilot or test periods would be helpful. We would also encourage the FTC to advance studies of technologies available in order to assist Safe Harbor Programs and companies in meeting the Rule requirements.

3. Considerations for the definition of personal information for purposes of the Rule

TRUSTe POV: The definition of personal information for purpose of COPPA should be expanded to better reflect the range of ways that children now can be contacted both online and physically because of information relayed online.

We realize that the reach of new aspects of a Personal information definition will necessarily be impacted by the FTC interpretation of other terms, such as "Internet". We believe it will be important to reflect an understanding of the means of online connection, not just via the personal computer, but also via a myriad of mobile devices.

To date, in the COPPA rule, the FTC has defined personally identifiable information to extend to - "a persistent identifier, such as a customer number held in a cookie or a processor serial number, where such identifier is associated with individually identifiable information; or a combination of a last name or photograph of the individual with other information such that the combination permits physical or online contacting."

By example, today in our COPPA program, we find that untagged photos and videos may contain enough information without naming a child to allow for the child to be contacted online or physically contacted – i.e., location information about a team, association, membership. Likewise, other information can be collected today from chat rooms and blogs that provide a myriad of information, such as search data, geo-location information and cell phone number. All of this information can be attributable to individual children or families, creating the possibility of contact with a specific child, including through aggregated profile information.

In broadening the definition of personal information, we believe that there should be sufficient precision, such that businesses can understand the rules of the road in complying with COPPA. Also such that Safe Harbor program's like TRUSTe's can be sufficiently specific in architecting program requirements and can monitor data use and controls for effective compliance. The breadth of the definition needs to be 'commercially reasonable' for use.

We also think that it is important to allow children and their parents the opportunity to benefit from new and exciting uses of technology and networking, while preserving privacy protection for children.

The FTC has asked about four particular types of data and whether they should be covered by the definition: IP addresses, information used for behavioral advertising (i.e., IP address combined with click stream data), the aggregation of allegedly anonymous data, and geo-location information. Of the four listed, we see merit in including geo-location information, whether or not human readable, in the definition of personal information. We believe, however, that the FTC does not necessarily need to expand the definition of personal information, but rather has the authority to interpret geo-location information as included currently under the definition of personal information.

We believe that IP addresses, when combined with other data that identifies a child should be considered personal information. Again, as discussed at the FTC COPPA

Roundtable on June 4, could be interpreted under current provisions to be included as personal information for purposes of COPPA. However, alone, it may be an unnecessary or not a particularly useful expansion given that the IP address may only indicate a particular computer or computing device that is shared by many individuals and due to the dynamic nature of many IP addresses.

It may be more difficult to precisely enough define data types and information used for online behavioral advertising and the changing mechanisms facilitating the delivery of advertising to children. Work towards that is reasonable, given the impact of data that can be collected online to build a profile about a child for purposes of contacting them, which also may impact them from other privacy perspectives – dignity, sensitive information, reputation, and safety.

It is interesting to discuss whether the aggregation of anonymous data collected for specific purposes might be covered under an expanded personal information definition, while other purposes – such as analytics, might not make sense to cover. The purpose of the statute should be kept in mind, which is not to restrict the collection of all data, but data that could be particularly impactful when used and in light of the vulnerabilities of children in the areas of privacy protection and safety.

We encourage the FTC to consider the idea that not all data types being reviewed for purposes of inclusion as personal information should be treated in the same way under the rule. Some may require more vibrant notice and consent given their impact on children. Other data types may not require such aggressive notice. Also, the FTC should address are online and mobile applications that collect data, including unique user –ids, particularly when the data is shared with a third party in order to be used for advertising or other specific uses to contact a child.

Aside from specific additions to the definition of personal information for purposes of COPPA, continuing guidance from the FTC through FAQs, periodic interpretations or public dialogues can be helpful as to the environment in which children interact with online and through mobile devices continues to evolve.

4. Use of FTC authority to approve and promote Safe Harbor Programs

TRUSTe POV:

Self-regulation through the COPPA Safe Harbor provisions fulfills the intent of the statute, but its impact is limited to a relatively small universe of exceptional online companies (approximately 150 – 200). Notwithstanding that the law and Rule have provided for COPPA Safe Harbor programs for more than 10 years, uptake by business is a fraction of a percentage of business representation on the Internet that market to children. This indicates vast possibilities for lack of COPPA compliance by the majority of U.S. businesses on the Internet that are directed to children under 13 or which should have actual knowledge that personal information is being collected from such children at their sites. The lack of participation in the Safe Harbor option should be an issue

specifically studied by the FTC. We believe that the impact of COPPA could be greater. The FTC has the current authority to address this public need and we encourage this as part of the review and enhancement contemplated for the COPPA Rule.

TRUSTe encourages the FTC to promote business uptake of Safe Harbor Programs to ensure broad COPPA compliance across a larger population of enterprises directing their services to children, or who have actual knowledge of the participation of children on their sites. This may need to include a studied look at incentives for business participation and tools to assist businesses and individuals in learning more about approved COPPA Safe Harbor Programs, like TRUSTe's Children's Privacy Program.

At a minimum, TRUSTe encourages the FTC to consider enhancements to the COPPA rule that would establish procedural requirements for potentially two directories to be posted visibly on the FTC website, similar to publication by the U.S. Department of Commerce for the US-EU Safe Harbor Program. We encourage a process that 1) permits companies to register their participation in the Safe Harbor and to indicate the Safe Harbor Program in which they participate, including appropriate company contact details and Safe Harbor Program contact details; and 2) makes materials about each FTC-approved Safe Harbor Program and contact details for those entities publicly available on the FTC website.

Along with publication, it is important for the public to have a better understanding of criteria for approved Safe Harbor Programs, and a transparent and accessible means of commenting on Safe Harbor Program criteria. As a baseline, Safe Harbor Programs should be able to meet the criteria necessary for any effective "self-regulatory organization." These criteria need to reflect the principles of reliability, accountability, transparency, and sustainability. TRUSTe would like to work with the FTC in its consideration of some common criteria, while appreciating that beyond baseline elements to programs, differentiations among programs can also strengthen and promote new best practices for emerging businesses and expertise for specific sectors.

At a minimum, Safe Harbor Programs need to include not just a set of standards for implementing the Rule, but also robust methods of reviewing compliance with such standards and ongoing monitoring techniques to discover when participants fall out of compliance. Once a non-compliant state is found, the Safe Harbor should be in a position to resolve any non-compliance and support the participant's return to compliance and avoidance of future non-compliance.

TRUSTe also encourages the FTC to look at business models in support of Safe Harbor Programs. Such programs that do not have sufficient financial means to achieve sustainability will not serve to support the goals of the statute or the Rule. To that point, care should be taken in imposing overly burdensome requirements on a Safe Harbor which can be found in other trust audit schemes, such as SOX audit requirements.

Additionally, absent governmental funding, the FTC should consider the ability of a Safe Harbor Program to attract and maintain participants in a commercially reasonable

manner. Special care regarding this issue should be taken with regard to the idea of impartiality. TRUSTe believes that the concept of "impartiality" in terms of criteria is a more effective and commercially reasonable concept than "conflict of interest", as applied to Safe Harbor Programs and their business models. Such a criteria will support the goals of accountability and transparency without unduly burdening a Safe Harbor Program with administrative requirements or service limitations which can make a Safe Harbor Program financially untenable.

Separately, for companies not registered for a COPPA Safe Harbor Program, the FTC should begin to address how it monitors compliance, such that the burdens and benefits of COPPA compliance are not borne solely by Safe Harbor participant companies.

Closing

Thank you, again for the opportunity to comment on the COPPA Rule and potential enhancements. TRUSTe values its role in assisting businesses and consumers with a trustworthy experience online, including for one of our most vulnerable populations, America's children. We are committed to continuing partnership with the FTC as we provide COPPA Safe Harbor services through the TRUSTe Children's Privacy Program.

Sincerely,

Fran Maier
President and Chairman

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