Before the
FEDERAL TRADE COMMISSION
Washington, DC 20580

COMMENTS
of the
DIRECT MARKETING ASSOCIATION, INC.

on the

CHILDREN'S ONLINE PRIVACY PROTECTION RULE

COPPA Rule Review, 16 CFR Part 312

Project No. P104503

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I. Introduction

The Direct Marketing Association ("DMA") appreciates the opportunity to comment on the Federal Trade Commission's ("FTC" or "Commission") request for public comments on the Commission's proposal to amend the Children's Online Privacy Protection Rule (the "Rule" or "COPPA Rule").[1] The DMA has been a leader in children's privacy matters since before the passage of the Children's Online Privacy Protection Act of 1998 ("COPPA" or "Act"), and we share the Commission's commitment to ensuring that children enjoy safe experiences online.

The DMA (www.the-dma.org) is the world's largest global trade association of businesses and nonprofit organizations that use data and analytics to serve their current – and potential – consumers, customers, and donors with the most relevant messages and offers. DMA member organizations use and promote the full spectrum of marketing channels, including the Internet, email, mobile, mail, and telephone. Founded in 1917, DMA membership comprises more than half of the Fortune 100 companies and represents dozens of industries, including retail, hospitality, consumer products, finance, pharmaceuticals, entertainment, and publishing. DMA advocates standards for responsible marketing and requires all of its members to adhere to strict ethical guidelines in all of their marketing practices.

We welcome the Commission's ongoing tradition of engaging a broad spectrum of stakeholders in the agency's periodic reviews of the COPPA Rule and we are pleased to continue working with the Commission as it seeks to ensure that children receive appropriate protections in the online platforms of the twenty-first century.[2] Below we provide comments in thematic order, informed by our members' experiences, on the Commission's proposed amendments to the COPPA Rule with a focus on whether the proposal would incentivize the creation of children's online offerings in the marketplace. While we commend the Commission for certain positive aspects of the Commission's proposal, the DMA's overarching impression of the proposal is that many of the amendments would impede companies' efforts to provide children with interactive online offerings, in contravention of the goal of COPPA.

II. Executive Summary

When Congress passed COPPA in 1998, it had the foresight to enact a law that would withstand the test of time. The scope of the law was appropriately limited to children under age 13, and to websites and online services directed to children and to general audience sites only when operators have actual knowledge they are collecting personal information from children.

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[1] Federal Trade Commission, Proposed Rule Request for Comment, Children's Online Privacy Protection Rule, 76 Fed. Reg. 59804 (Sept. 27, 2011).

[2] The DMA has a history of actively engaging on this important matter, as seen through our participation in the 1996, 1997, 1999 FTC workshops on this topic, attendance at the 2010 workshop, and our submission of comments in response to the following notices from the Commission: Notice of Proposed Rulemaking, Children's Online Privacy Protection Rule, 64 Fed. Reg. 22750 (Apr. 27, 1999); Notice of Proposed Rulemaking, Children's Online Privacy Protection Rule, 66 Fed. Reg. 54963 (Oct. 31, 2001); Notice of Proposed Rulemaking, Request for Comment, Children's Online Privacy Protection Rule, 70 Fed. Reg. 2580 (Jan. 14, 2005); Request for Public Comment, Children's Online Privacy Protection Rule, 70 Fed. Reg. 21107 (Apr. 22, 2005); and Request for Public Comment, Implementation of the Children's Online Privacy Protection Rule, 75 Fed. Reg. 17089 (Apr. 5, 2010).

While much of the law was explicitly enumerated, Congress provided the Commission with some rulemaking authority to implement certain provisions of the law with the direction that the COPPA Rule must incentivize the creation of interactive children's online offerings.

As we discuss in our comments, the DMA is concerned that many of the Commission's proposals to update the COPPA Rule are both *ultra vires* to the statute and would discourage providers from developing and providing interactive offerings to children online. Specifically, our comments raise the following concerns:

- Any modifications to the COPPA Rule must ensure that the Rule still incentivizes the creation of interactive children's online offerings;
- A broad reading of the term "online service" presents practical implementation challenges;
- Expanding the term "collection" to include "encouraging" and "prompting" creates unintended implications for advertising, marketing, and content (however, eliminating any "100% deletion standard" from what constitutes "collection" appropriately removes an unrealistic hurdle to operators);
- Including "passive tracking" within the term "collection" has negative implications for website and online service operations, product development, and ad reporting and market research analytics;
- The "support for internal operations" exclusion to "disclosure" and "personal information" should be expanded;
- COPPA does not grant the Commission authority to modify the definition of "online contact information" as proposed;
- COPPA permits the Commission to modify the definition of "personal information" only by adding identifiers comprised of information that individually identifies a child and permits contact of that specific individual;
- The presence of child celebrities and celebrities who appeal to children should not be included as factors used to determine when a website or online service is directed to children;
- The proposed modifications to online privacy policies and direct parental notices run counter to the goal of streamlining disclosures;
- The sliding scale approach to obtaining verifiable parental consent should be preserved;
- The list of reasonable means to obtain verifiable parental consent should be expanded without creating a *de facto* requirement for Commission approval;

- The exceptions to obtaining verifiable parental consent should be preserved;
- Imposing data security requirements on service providers falls outside the statutory scope of COPPA;
- The proposed data retention and deletion requirements lack clarity and present implementation challenges;
- The self-regulatory safe harbor programs should incentivize participation; *and*
- Industry should be given ample time to assess the impact and implement any changes set forth by the Commission.

We trust that the Commission will take into consideration and address these concerns before issuing its final updated COPPA Rule.

III. The Commission Has a Vital Role in Ensuring that the COPPA Rule Incentivizes the Creation of Interactive Children's Online Offerings

As FTC Division of Advertising Practices Associate Director Mary Koelbel Engle testified at an October 5, 2011 House Energy and Commerce Subcommittee on Commerce, Manufacturing, and Trade hearing on children's privacy, "companies take their obligations under COPPA seriously."[3] Where compliance matters have arisen, the Commission has harnessed its authority under the statute to bring 17 enforcement actions that have resulted in more than $6.2 million in civil penalties.[4]

Having actively supported and worked with the Commission and Congress to pass COPPA, the DMA is pleased to see that the law has withstood the test of time.[5] COPPA was based in part on existing DMA guidelines and we subsequently worked with the Commission to develop a compliance manual, entitled *How to Comply with the Children's Online Privacy Protection Act*.[6] DMA believes that critical components of the statute include the law's application to children under age 13 and the requirement that COPPA applies to general audience websites and online services only when they have actual knowledge that they are collecting

[3] *Protecting Children's Privacy in an Electronic World: Hearing Before the H. Comm. on Energy and Commerce Subcomm. on Commerce, Mfg., and Trade*, 112th Cong. 5 (2011) (statement of Mary Koelbel Engle, Division of Advertising Practices Associate Director, Federal Trade Commission), *available at* http://republicans.energycommerce.house.gov/Media/file/Hearings/CMT/100511/Engel.pdf.
[4] FTC Bureau of Consumer Protection Business Center, Children's Online Privacy, Case Highlights, *available at* http://business.ftc.gov/legal-resources/30/35.
[5] *See* 144 Cong. Rec. S11659 (daily ed. Oct. 7, 1998) (statement of Sen. Bryan) (listing the DMA as a supporter of the children's Internet privacy language).
[6] DMA *et al*., *How to Comply with the Children's Online Privacy Protection Act* (Dec. 2006), http://www.ftc.gov/bcp/edu/pubs/business/idtheft/bus45.pdf.

personal information from children.[7] We support the Commission's position that Congress should not extend COPPA to apply to teenagers aged 13-17,[8] and that the actual knowledge standard should be retained.[9]

The DMA – like the Commission, and as recently reiterated by FTC Chairman Jon Leibowitz at his November 15, 2011 renomination hearing before the Senate Committee on Commerce, Science, and Transportation – believes that COPPA is appropriately confined to individuals under age 13.[10] There are constitutional reasons for limiting COPPA to individuals under age 13 because the courts have found that children, as they age, have a constitutional right to access information.[11] Moreover, practical challenges would emerge if COPPA applied to teens because many spend their online time on websites and online services intended for general audiences. If Congress were to impose such restrictions on teens, COPPA could expand across the Internet.

Additionally, we support the Commission's conclusion that Congress should retain the "actual knowledge" standard. DMA members abide by the actual knowledge standard which, along with the other COPPA principles, has been incorporated in our *Guidelines for Ethical Business Practice*.[12] This standard has been a workable one for our members, and has provided them with necessary certainty regarding the scope of COPPA such that they have continued to invest in innovative offerings over time. The adoption of a lesser standard could result in universal age screenings for all websites and online services and the expansion of data collection in direct contravention of COPPA's goal of minimizing such collection.

While we support retention of the actual knowledge standard as it is understood to apply to the collection of "personal information" as that term is currently defined in the COPPA Rule, the Commission's proposed revision to the "personal information" definition raises concerns for how the actual knowledge standard will be interpreted in the future. The Commission has proposed modifying the definition of "personal information" to include such items as device identifiers, geolocation data, and audiovisual files.[13] The DMA is concerned that the collection of such new items by an operator could be interpreted as triggering the actual knowledge standard. An operator may collect any such information without "knowing" that it belongs to a child under 13 unless the operator also collects other information that establishes age. We urge the Commission to clarify in its Final Rule commentary and FAQs[14] that the collection of such identifiers by themselves will not create "actual knowledge" on the part of an operator.

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[7] *See* 15 U.S.C. § 6501(1) (defining "child" as an individual under age 13); 15 U.S.C. § 6502(a)(1) (articulating the "actual knowledge" standard).
[8] 76 Fed. Reg. at 59805.
[9] 76 Fed. Reg. at 59806.
[10] *See Nominations Hearing Before the S. Comm. on Commerce, Science, & Transportation*, 112th Cong. (2011) (testimony of Jon. D. Leibowitz, Chairman, Federal Trade Commission).
[11] *See* 76 Fed. Reg. at 59805.
[12] DMA, *Guidelines for Ethical Business Practice* at 10-11 (Jan. 2010), *available at* http://www.dmaresponsibility.org/Guidelines/.
[13] 76 Fed. Reg. at 59830.
[14] COPPA Rule FAQ #41 (Revised Oct. 7, 2008), http://www.ftc.gov/privacy/coppafaqs.shtm.

As the Commission embarks on amending the COPPA Rule to keep up with the rapid-fire pace of technological advances since its last review, we view the Commission as playing a vital role in ensuring that the COPPA Rule incentivizes the creation of interactive children's online offerings. Upon COPPA's passage, the author of the law, Senator Richard Bryan, stated that the law was meant to accomplish the following goals: (1) enhance parental involvement in children's online activities to protect the privacy of children in the online environment; (2) enhance parental involvement to help protect the safety of children in online fora in which children may make public postings of identifying information; (3) maintain the security of personally identifiable information of children collected online; and (4) protect children's privacy by limiting the collection of personal information from children without parental consent.[15] Significantly, Senator Bryan underscored that these goals were meant to be accomplished "in a manner that *preserves the interactivity of children's experience on the Internet* and preserves children's access to information in this rich and valuable medium."[16] He was also mindful that COPPA should encourage the use of interactive online platforms by our children so that they are prepared to compete in the global economy.[17] At the same time, Senator Bryan cautioned against implementing COPPA in a manner that would discourage use of the Internet: "The fact that deceptive acts may be committed on the Internet, is not a reason to avoid using the service. To tell children to stop using the Internet would be like telling them to forgo attending college because students are sometimes victimized on campus."[18]

We therefore encourage the Commission to be cautious of adopting any new measures that could unintentionally disincentivize the creation of interactive websites or online services tailored to children under age 13. As discussed below, we are concerned that several of the amendments now contemplated by the Commission could limit companies' ability to continue providing such websites and online services by increasing the costs, burdens, and technical challenges of COPPA compliance.

IV. A Broad Reading of the Term "Online Service" Presents Practical Implementation Challenges

The Commission has determined that the term "online service" requires no further defining in either the COPPA statute or Rule on the theory that the term already covers mobile applications (that receive behaviorally targeted ads, allow network-connected games, social networking activities, purchasing goods online), Internet-enabled gaming platforms, voice-over-Internet protocol services, and Internet-enabled location based services.[19] While the Commission's examples appear to be confined to services that use the Internet, we wish to reiterate that the law, in Senator Bryan's own words, "is limited to information collected online from a child."[20] Therefore, mobile communications and interactive services that do not involve a

[15] *See* 144 Cong. Rec. S11657 (daily ed. Oct. 7, 1998) (statement of Sen. Bryan).
[16] 144 Cong. Rec. S11657 (daily ed. Oct. 7, 1998) (statement of Sen. Bryan) (emphasis added).
[17] 144 Cong. Rec. S8482 (daily ed. July 17, 1998) (statement of Sen. Bryan) ("I think we all would agree that proficiency with the Internet is a critical and vital skill that will be necessary for academic achievement in the next century. The benefits of the Internet are extraordinary.").
[18] 144 Cong. Rec. S8483 (daily ed. July 17, 1998) (statement of Sen. Bryan).
[19] 76 Fed. Reg. at 59807.
[20] 144 Cong. Rec. S11657 (daily ed. Oct. 7, 1998) (statement of Sen. Bryan).

connection to the Internet should continue to fall outside the scope of COPPA. Furthermore, COPPA still may not apply if the online service is not directed to children (or the operator of a general audience online service has no actual knowledge that a person is a child) and if the operator does not collect personal information from children.

In the event that an online service meets all the criteria – that it is connected to the Internet, is directed to children (or the operator has actual knowledge that a person is a child), and collects personal information from such persons – we note that new media platforms have unique capabilities and business models that differ from the traditional online world in ways that could complicate COPPA compliance. For example, mobile devices have a variety of operating systems and applications in addition to small screen sizes that can present challenges to providing privacy notices and obtaining parental consent. We believe that if the COPPA Rule applies to mobile applications, operators should not be required to obtain parental consent for activities such as the downloading of music from mobile stores that require a user to be over the age of 13 to have an account in the first place. In the event that an operator gains actual knowledge that a person is a child under 13, we further believe that operators should be permitted to rely on the use of the credit card for any required parental consent. In conjunction with such transactions, operators should be allowed to rely on the one-time communication exception to parental consent (where an operator may collect personal information from a child on a one-time basis for the purpose of obtaining parental consent).

Moreover, we are concerned that because mobile operating systems often allow for the seamless integration of many social networking tools into gaming and other mobile applications, operators will face challenges in implementing the COPPA Rule if it is found to apply. On the one hand, operators will face challenges in balancing the reality that incorporation of such functionality is common, expected by many consumers, and an important factor for the economic success of an application. On the other hand, operators will need to wade through unclear legal implications and restrictions imposed on the incorporation of these types of tools into mobile applications that appeal to multiple age groups. Prior to extending COPPA to apply to new interactive online platforms, we thus recommend that the Commission provide clear practical guidance for how operators may implement COPPA in these environments.

V. Eliminating Any "100% Deletion Standard" from What Constitutes "Collection" Appropriately Removes an Unrealistic Hurdle to Operators

COPPA applies to the "collection" of personal information from a child. As currently written in the COPPA Rule, the term "collection" has been interpreted by some to include a "100% deletion standard" whereby operators that enable children publicly to post personal information are not deemed to have collected the information if the operator deletes all the personal information from the postings before they are made public and deletes such information from the operator's records.[21] The Commission has now determined that this stringent interpretation of this requirement has "set an unrealistic hurdle" to operators, and has proposed to

[21] 16 C.F.R. § 312.2 (defining "collects" or "collection"); 76 Fed. Reg. at 59808.

replace the standard with a "reasonable measures" standard designed to capture "all or virtually all" personal information.[22]

The DMA supports this clarification and favors it over the more stringent interpretation of the "collection" definition. Many of DMA's members already have in place automated deletion processes or are in the process of developing real-time monitoring services. These processes have enabled our members to use cost-efficient and reliable means of monitoring children's communications. At the same time, some operators have been cautious about investing in these technologies and creating children-directed websites and online services out of concern that they could be held liable if the automated systems are not 100% foolproof. The Commission's clarification would therefore encourage further development of children's offerings because the new standard would reduce liability exposure for an operator that seeks to take advantage of the deletion standard.

VI. Expanding the Term "Collection" to Include "Encouraging" and "Prompting" Creates Unintended Implications for Online Advertising, Marketing, and Content

COPPA applies when an operator "collects," or – as defined in the current version of the Rule – "requests" personal information from a child.[23] The Commission has proposed expanding "collection" beyond "requesting" also to include a more vague and lower threshold of "prompting" or "encouraging" a child to submit personal information online. The commentary to the proposed Rule explains that this amendment is intended to capture occasions when an operator requires information as well as when it merely prompts or encourages such collection.[24]

This proposal, when combined with the Commission's proposal to expand the definition of "personal information," raises serious concerns for advertising and marketing initiatives as well as for operations, system management, and product development on websites and online services directed to children and for such initiatives that appear on general audience sites when operators gain actual knowledge that a person is a child. If the Commission's proposals are adopted, we are concerned that operators would be required to comply with COPPA in connection with activities such as: essential analytics regarding performance and optimization of the website or online service; ad reporting and market research practices such as following when children click on advertisements or marketing materials; conducting market research where entities determine how well a particular digital offering or campaign is performing; logging the number and type of advertisements served; capping the frequency of advertisement or consent seen; statistical reporting; and calculating payment for the provision of such advertisements and marketing materials.

The Commission has stated that "improving site navigation" would be permissible as part of the internal operations of a site.[25] The commentary lacks clarity, however, on whether the

[22] 76 Fed. Reg. at 59808.
[23] 16 C.F.R. § 312.2 (defining "collects" or "collection").
[24] 76 Fed. Reg. at 59808.
[25] 76 Fed. Reg. at 59812.

collection of analytics for performance and optimization of a website or online service would fall into this "internal operations" exception.

Additionally, the mere displaying of an advertisement or marketing material on a website or online service could be viewed as "prompting" or "encouraging" a child to examine and click on the advertisement or material. When a child clicks on an advertisement or marketing display, "persistent identifiers" may be automatically collected as an integral component of delivering the advertising or marketing campaign. The Commission has explained that under its proposed revised definition of "personal information," "persistent identifiers" would not constitute personal information where such identifiers are used to support internal operations.[26] Specifically with respect to advertising, the Commission's commentary states that "serving contextual advertisements" would be permissible as part of the internal operations of a site.[27] However, "serving" a contextual advertisement only accounts for the frontend activity related to the advertisement delivery, and does not broadly encompass the backend after a child selects an advertisement. It also fails to account for market analytics that companies conduct on advertising and marketing campaigns.

Similarly, this new language is vague and overbroad to the extent it could be interpreted even more broadly to capture a website, online service, or advertisement's mere link to another website or online service, incorporation of "share" functionality, or its use of social network features like those available through Facebook and Twitter (regardless of whether a user must take additional steps to login and authenticate their identity or whether different terms and conditions of a website or online service may apply).

The DMA urges the Commission to strike the reference to "prompting, or encouraging" a child to submit personal information online. To the extent that the Commission seeks to clarify that an operator need not mandatorily require the submission of personal information to trigger COPPA (*e.g.*, providing blank lines in an online form for a child to complete would trigger COPPA), we recommend that the FTC merely incorporate the concept currently outlined in the Commission's FAQ #9.[28]

VII. Including "Passive Tracking" within the Term "Collection" Has Negative Implications for Website and Online Service Operations, Product Development and Ad Reporting and Market Research Analytics

The current definition of "collection" in the COPPA Rule includes "the passive tracking or use of any identifying code *linked* to an individual, such as a cookie."[29] The FTC has proposed revising this to read "the passive tracking of a child online."[30] The FTC has explained that it proposed the modification to clarify that collection includes *all* means of passive tracking

[26] 76 Fed. Reg. at 59830
[27] 76 Fed. Reg. at 59812.
[28] COPPA Rule FAQ #9 (Revised Oct. 7, 2008) ("The Rule governs any collection of personal information from children, even if children volunteer that information and are not required to input that information to participate on your website."), http://www.ftc.gov/privacy/coppafaqs.shtm.
[29] 16 C.F.R. § 312.2 (defining "collects" or "collection") (emphasis added).
[30] 76 Fed. Reg. at 59808-59809.

of a child online regardless of the technology used. The Commission's proposal raises new concerns when it is considered in conjunction with the FTC's proposed revision to the term "personal information," which under the new definition would include data that does not identify a specific individual (*e.g.*, unique device identifiers, IP addresses). As discussed in Section VI above, under the proposed revisions, an operator could not collect identifiers such as device identifiers or IP addresses as part of customized content, analytics, product development and optimization, market research, or ad reporting or delivery at sites or online services directed to children without triggering the obligations of COPPA.

The COPPA statute notably does not include a definition of "collection." To the extent that the FTC may be deemed to have authority to define "collection," the COPPA statute limits collection of data to information that enables the physical or online contacting of a specific individual.[31] As phrased in the current COPPA Rule, the reference to "passive tracking" is limited to data "linked" to an individual. Under the Commission's proposal, it remains unclear whether the data collected must still be "linked" to a child such that the data by itself would enable the physical or online contacting of a specific child. We therefore recommend leaving the COPPA Rule's current reference to passive tracking as is, or deleting the reference to passive tracking entirely.

VIII. The "Support for Internal Operations" Exclusion to "Disclosure" and "Personal Information" Should Be Expanded

The COPPA Rule's current definition of "disclosure" already captures the notion that information provided to persons who provide "support for internal operations" of a website or online service does not constitute a "disclosure." Within the definition of "disclosure," the term "support for internal operations" is defined as "those activities necessary to maintain the technical functioning of the Web site or online service, or to fulfill a request of a child as permitted by §§ 312.5(c)(2) and (3)." The FTC has now proposed to separate out the term "support for internal operations" from the definition of "disclosure" and to create a slightly modified stand-alone definition for "support for internal operations."[32] The new definition would expand the term to include activities necessary to protect a website or online service's security or integrity, but would also impose the limitation that any information collected for such internal operations would become personal information if it is used for a secondary purpose. Additionally, the FTC has proposed amending the definition of "personal information" (*see* Section X below for further discussion of the proposed amendments to the definition of "personal information") to include screen or user names and persistent identifiers, but not when they are used to support internal operations.

[31] 15 U.S.C. § 6501(8)(F).

[32] 76 Fed. Reg. at 59809 (the new definition for "support for the internal operations of the Website or online service" would now read "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 § 312.5(c)(3) and (4), and the information collected for such purposes is not used or disclosed for any other purpose.").

Because the "support for internal operations" provision plays an important role in limiting the definitions of both "disclosure" and "personal information," the DMA is concerned that the term "internal operations" is both vague and too narrow. Limiting the scope to "activities *necessary* to *maintain* the *technical* function of the Web site" easily could exclude many activities that may not be technically necessary for website maintenance but that serve vital operations and system management purposes, including intellectual property protection, compliance, public purpose, consumer safety, billing or product or service fulfillment, reporting, spam detection, use of IP addresses for geo-targeting, and basic content delivery and optimization activities that the FTC may deem unnecessary. This provision also does not include important product development, ad reporting, or market research analytics.

As we have discussed above, the Commission has clearly contemplated that serving advertisements (at least contextual advertisements) falls within the scope of "support for internal operations." For advertising and marketing campaigns to be viable, however, entities must also be able to conduct a variety of internal operations. For example, entities must cap the number of advertisements delivered, respond when a child selects an advertisement, analyze which campaigns are gaining traction, and determine which entities are entitled to compensation. Similarly, a website or online service may use information about user traffic and experiences in ways to update and improve its digital offerings and ensure its offerings are appealing and entertaining to its audiences.

Additionally, it is unclear whether using such a narrow definition of "internal operations" that are "necessary" for technical functioning of the website would allow authentication of a user across multiple platforms so they could access the same brand and similar content beyond a single website or online service and across multiple platforms. The commentary to the proposal seems to suggest that "support for internal operations" would include only protecting against fraud or theft within one website or online service.[33] If this narrow "operations" exclusion is limited to "within" a website or online service, we are further concerned that the exception will place small businesses at a disadvantage. Unlike larger companies, small businesses rely on leveraging the strength of third parties to run important operations such as analytics in order to be able to compete. We recommend that the Commission expand the definition of "support for internal operations" well beyond those merely necessary for technical functioning of the website or online service to encompass these operations that are important for the continued growth of engaging, diverse, and appropriate content for children and for the economic viability of those companies providing such content.

IX. COPPA Does Not Grant the Commission Authority to Modify the Definition of "Online Contact Information" as Proposed

The Commission has proposed revising the term "online contact information" to add examples of commonly used forms of online identifiers, which the FTC has identified to be instant messaging user identifiers, voice over Internet protocol (VOIP) identifiers, and video chat user identifiers.[34] The COPPA statute at 15 U.S.C. § 6501(12), which defines the term "online

[33] *See* 76 Fed. Reg. at 59812.
[34] 76 Fed. Reg. at 59810 & 59829-59830.

contact information" as "an e-mail address or another substantially similar identifier that permits direct contact with a person online," grants no explicit authority to the Commission to change the definition of "online contact information."[35] Congress chose not to elaborate on what constitutes "similar identifiers" and did not include discretion in the statute for the Commission to add examples to the definition in the COPPA Rule.

Moreover, the examples identified by the FTC are not "substantially similar" identifiers to email addresses that permit "direct contact with a person online." Email addresses by themselves encompass enough information to directly contact a person online. For instance, if the Commission's email address were FTC@FTC.gov, such an email address contains enough information to contact a person. The Commission's proposed identifiers, however, do not *standing alone* allow for such direct online contact. For example, if the FTC's instant messaging identifier were "FTCInstantMessagerID," a person would need more information and context (*e.g.*, such as the instant messaging system being used by the FTC) to complete the direct contact. The Commission's examples are thus equivalent to partial addresses that by themselves are insufficient to enable direct online contact and therefore should not be included in the Rule.

X. COPPA Permits the Commission to Modify the Definition of "Personal Information" Only by Adding Identifiers Comprised of Information That Individually Identifies a Child and Permits Contacting of That Specific Individual

COPPA applies to the collection of "personal information" from children. As defined by Congress, "personal information" is limited to "individually" identifiable information about a person online including: (1) a first and last name; (2) a home or other physical address including street name and city/town name; (3) an email address; (4) a phone number; (5) a Social Security number; and (6) information concerning the child or the parents of that child that the website collects online from the child and combines with an identifier listed above.[36] Additionally, Congress explicitly granted the Commission authority to include within the definition of personal information any other identifier that it determined would permit the physical or online contact of "a specific individual."[37] Citing this authority, the Commission has now proposed several revisions to the definition of "personal information," including persistent identifiers (regardless of whether they are associated with individually identifiable information), online behavioral advertising, screen names, geolocation information, photos, videos and audio files, and additional data elements.

The DMA believes that much of the Commission's proposal exceeds the statutory authority granted the FTC by COPPA, is impracticable, and seeks to expand "personal information" to include data that does not identify "a specific individual," including persistent identifiers, geolocation data, and any identifier that links the activities of a child across different websites or online services, even when the data is not combined with any other individual identifier. These proposals would negatively impact online content, marketing, and advertising,

[35] *Cf.* The COPPA statute's definition of "personal information" at 15 U.S.C. § 6501(8)(F) explicitly grants the Commission authority to modify the definition of personal information.
[36] 15 U.S.C. § 6501(8).
[37] 15 U.S.C. § 6501(8)(F).

and apply COPPA for the first time to various components of content, marketing, and advertising campaigns on websites and online services targeted to children.[38] One of Congress' primary motivations in passing COPPA, as reflected in various headlines from the time, was to protect children online from pedophiles that might use the Internet to contact and lure young children.[39] In the commentary to the Final COPPA Rule back in 1999, the FTC itself noted that online fora were "the most serious safety risks" and were "quickly becoming the most common resources used by predators for identifying and contacting children."[40] The proposed modifications to the definition of "personal information" lose sight of this purpose by proposing identifiers that do not enable contact with a specific, identifiable person and do not place children in danger. Moreover, they threaten to limit the development and availability of rich online content for children, much of which is currently subsidized by advertising.

A. *Ultra Vires* Act

The Commission's proposal to expand the definition of "personal information" to include data that does not identify a specific individual is an *ultra vires* act that falls outside the scope of authority granted to the FTC by the COPPA statute. As noted, COPPA provides that "personal information" may mean "any other identifier that the Commission determines permits the physical or online contact of *a specific individual*."[41] While it is true that the COPPA statutory definition includes such identifiers as "home or other physical address including street name and name of a city or town" and "telephone number" as examples of "personal information," which could lead to the contacting of a household instead of a specific individual, Congress limited the Commission's discretion to *add* identifiers to only those that permit contacting of "a specific individual." Moreover, addresses and telephone numbers are qualitatively different from the data elements included in the proposed new definition because a pedophile could attempt to contact a child by physically going to a home or calling a residential telephone. This concern is not present with the identifiers the Commission proposes to add. The proposed identifiers cannot be affirmatively used to contact a person. As stated by Senator Bryan, COPPA was meant to capture "attempts to communicate directly with *a specific, identifiable individual*" and was not intended to capture "*[a]nonymous, aggregate information*."[42] The Commission's proposed identifiers do not enable such contact with a specific, identifiable person. We discuss many of the Commission's proposed identifiers below.

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[38] 76 Fed. Reg. at 59810-59814, 59830.

[39] *See e.g.*, Yvette C. Hammett, *Teen Girls Get Scare Surfing Internet*, Stuart News, Jan. 7, 1997, at A1; *FBI Chief Warns of Internet Pedophiles*, Buffalo News, Apr. 9, 1997, at A4; Stanley Ziemba, *Legislators Fall in Line to Protect Kids* Online, Chicago Tribune, Apr. 25, 1999, at 1; Amanda Garrett, *Undercover Deputy Foils Chat Room Sex Scheme*, Cleveland Plain Dealer, Nov. 2, 1999, at 1A; Dan George and Nicole Lorince, *Online Danger Signals Better Use Caution Cruising the Information Highway, Picking up New Friends*, Cleveland Plain Dealer, Nov. 10, 1999, at 4; *Mom Crusades Against Sickos on the Internet*, Cincinnati Enquirer, Dec. 12, 1999, at B01.

[40] Federal Trade Commission, Final Rule, Children's Online Privacy Protection Rule, 64 Fed. Reg. 59888, 59890 (Nov. 3, 1999).

[41] 15 U.S.C. § 6501(8) (emphasis added). *See* 76 Fed. Reg. at 59810.

[42] 144 Cong. Rec. S11657 (daily ed. Oct. 7, 1998) (statement of Sen. Bryan) (emphasis added).

B. Persistent Identifiers

The Commission has proposed revising a provision of the COPPA Rule's current definition of personal information, which includes "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*."[43] Under the proposed revision, this provision would now read "a persistent identifier, including but not limited to, a customer number held in a cookie, an Internet Protocol (IP) address, a processor or device serial number, or unique device identifier, 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."[44]

We are concerned that the Commission has overstepped its statutory authority in removing the caveat that such identifiers must be "associated with individually identifiable information." The FTC has authority to *add* only identifiers that identify a specific individual. An IP address cannot inherently identify a child, and at most, an IP address may indicate only a particular computer or device. Because there is no public list of IP addresses, a predator would not be able to obtain an associated address without a subpoena. Unique device identifiers standing alone also do not identify specific individuals. We therefore question how IP addresses and unique device identifiers can be considered "personal information" under the statute.

Additionally, this modification would include other data elements that also were never meant to be covered by COPPA because they cannot be used to affirmatively make contact with a specific individual and that are necessary to the functioning of websites. We recognize that the Commission has attempted to address this concern by specifying that the collection of such identifiers would not be subject to COPPA when they are used as "support for internal operations."[45] However, as we have previously discussed, the Commission's proposed definition of "support for internal operations" is far too narrow. As proposed, "support for internal operations" would include the "serving" (*i.e.* displaying) of contextual ads, but would not permit (without COPPA implementation) the steps necessary after a child selects a contextual advertisement (*e.g.*, bringing the child to the advertised site) or necessary ad reporting and market analytics to support the contextual advertising campaign.[46] It is also unclear whether this exception would permit use of cookies, IP addresses, and unique device identifiers to provide other useful ad services to consumers, such as frequency capping, spam detection, and use of IP addresses for geo-targeting. In addition, the Commission's proposal is too restrictive. Although the commentary states that "support for internal operations" would also include

[43] 16 C.F.R. § 312.2 (emphasis added).
[44] 76 Fed. Reg. at 59810-59813, 59830.
[45] 76 Fed. Reg. at 59812 (explaining that the following would be permissible: (1) user authentication; (2) improving site navigation; (3) maintaining user preferences; (4) serving contextual advertisements; and (5) protecting against fraud or theft).
[46] The FTC states in its proposal that "the new language would require parental notification and consent prior to the collection of persistent identifiers where they are used for purposes such as amassing data on a child's online activities or behaviorally targeting advertising to the child. Therefore, operators such as network advertisers may not claim the collection of persistent identifiers as a technical function under the 'support for internal operations' exemption." 76 Fed. Reg. at 59812.

"improving site navigation," it is not clear that this exception would allow an online service to conduct analytics through its service to optimize its business and content offerings, including user traffic patterns and improving content delivered in ways that may be entertaining, educational, and beneficial for children and important for the continued growth of richer, interactive content for children.

C. Online Behavioral Advertising

The FTC has also proposed expanding the definition of "personal information" to include "an identifier that links the activities of a child across different Web sites or online services."[47] This provision would for the first time in the COPPA Rule capture online behavioral advertising. The Commission in its October 5, 2011 Congressional testimony and proposed Rule commentary has taken the position that the *Self-Regulatory Principles for Online Behavioral Advertising* ("Principles"), which were released in July 2009 and are currently being implemented under the auspices of the Digital Advertising Alliance ("DAA"), are insufficient and do not require prior parental consent for online behavioral advertising.[48]

The Commission's statement does not reflect the Principles' application to children under 13. The Sensitive Data provision of the Principles limits the collection and use of any data – not just data that are "personal information" as defined by COPPA – that can be associated with a particular computer or device for the purpose of engaging in online behavioral advertising where the entity collecting the data has actual knowledge the user is a child under 13.[49]

The Commission also has yet to establish on the record evidence that data is being collected for online behavioral advertising purposes where the entity collecting the information has actual knowledge the user is a child. The Commission testified at the October 5, 2011 Congressional hearing in response to questioning that the FTC is not aware of the online ad industry engaging in online behavioral advertising directed at children, and industry has informed the Commission that it is not engaging in such a practice.[50] If any outliers were to emerge who were covertly conducting online behavioral advertising without appropriate disclosures, the Commission would already have at its disposal its Section 5 enforcement authority to address such a scenario without modifying COPPA. The addition of online behavioral advertising to the COPPA regime therefore is unnecessary and runs counter to the Commission's own support for self-regulation of online behavioral advertising in its February 2009 Staff Report on *Self-Regulatory Principles for Online Behavioral Advertising*.[51]

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[47] 76 Fed. Reg. at 59830.
[48] 76 Fed. Reg. at 59812-59813 n.86.
[49] American Association for Advertising Agencies, Association of National Advertisers, Council of Better Business Bureaus, Direct Marketing Association, and Interactive Advertising Bureau, *Self-Regulatory Principles for Online Behavioral Advertising* at Principle VI.A (July 2009), *available at* http://www.aboutads.info/resource/download/seven-principles-07-01-09.pdf.
[50] 76 Fed. Reg. at 59812 n.86.
[51] FTC Staff Report: Self-Regulatory Principles for Online Behavioral Advertising, at 11 (Feb. 2009), *available at* http://www2.ftc.gov/os/2009/02/P085400behavadreport.pdf.

Finally, as discussed above, the DMA believes that the Commission's attempt to expand the Rule to encompass online behavioral advertising extends beyond the scope of the COPPA statute. Online behavioral advertising provides customized advertisements to browsers and devices, not to specific identifiable individuals. The Commission has authority under COPPA to expand the definition of personal information only to include additional identifiers that identify "a specific individual," a standard that is not met by advertising data.[52] Information collected in connection with online behavioral advertising should thus be left to industry self-regulation.

D. Screen Names

The COPPA Rule's current definition of "personal information" captures a "screen name that reveals an *individual's* e-mail address."[53] The FTC's proposal would change this provision to read "a screen or user name where such screen or user name is used for functions other than or in addition to support for the internal operations of the Web site or online service."[54] Under this revised definition, screen names and user names, regardless of whether they identify an individual with an email address or other personally information, would now constitute personal information if they are used for anything other than internal operations.

It is unclear how screen names such as "DigitalAndyGorilla" or the unique screen names that many of DMA's members have used to provide safe, interactive online experiences for children contain any individually identifiable information or would raise any of the harms or original legislative concerns of COPPA. For instance, when disconnected from an email address, a screen name by itself does not contain enough information to "permit[] the physical or online contacting" of a specific individual, as required by the statute.[55] If placed on an envelope, a mail carrier could not deliver a letter addressed only to DigitalAndyGorilla. Even if the screen name "JohnSmith" were placed on a letter, that information alone would not be enough to enable the direct physical contacting of a specific person.[56] When considered in the online context, a screen name that is not connected to an email address and without more context (such as the system in which a screen name may be used) would not permit the online contacting of a specific child.

Additionally, much of the interactivity of the Internet and online services developed specifically for children depend on the continued use of such screen names. The proposal states that operators would still be able to use screen names *within* a single site (so long as no other

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[52] 15 U.S.C. § 6501(8)(F).
[53] 16 C.F.R. § 312.2 (emphasis added).
[54] 76 Fed. Reg. at 59830.
[55] 15 U.S.C. § 6501(8)(F).
[56] *See, e.g.*, United Kingdom Information Commissioner's Office (ICO), *Data Protection Technical Guidance Determining What Is Personal Data* ("A name is the most common means of identifying someone. However, whether any potential identifier actually identifies an individual depends on the contact. By itself the name John Smith may not always be personal data because there are many individuals with that name. However, where the name is combined with other information (such as an address, a place of work, or a telephone number(, this will usually be sufficient to clearly identify one individual. (Obviously, if two John Smiths, father and son, work at the same place then the name, John Smith, and company name alone will not uniquely identify one individual, more information will be required.)."), *available at* http://www.ico.gov.uk/upload/documents/determining_what_is_personal_data/whatispersonaldata2.htm.

"personal information" is collected/used/disclosed) without consent.[57] The FTC has said this means that operators would be able to use screen names to access a site, identify users to each other, or to recall user settings without obtaining consent. It is unclear how this would work and still permit use of screen names within a website for a broader range of functionality such as posts made in public forums, blogs, chat rooms, and leader boards. In addition, website or online content may be offered in substantially similar formats across platforms so that users can experience the same games and functionality in different places. For example, a version of an online game or magazine may be made available on a website as well as for tablets and smart phone devices. It would be more beneficial to consumers to allow access across platforms with the same screen names to the extent possible. Furthermore, some DMA members also use these types of unique screen names beyond a single website or service to other websites that they operate. The definition of what may constitute a single website or online service to the Commission in this context therefore has significant and practical consequences for many DMA members. Another scenario that is adversely affected by the Commission's approach is the ability of DMA members to recognize the achievements and contributions of website community members in other media. Some have provided recognition to fans by acknowledging game high scores and user generated submissions like artwork and comments along with attribution to unique screen names in creative advertising campaigns appearing on television and online services like YouTube.

Because "support for internal operations" is defined narrowly, it is unclear whether these innovative ways to provide interactive experiences for children or other harmless uses of screen names could occur without triggering COPPA parental consent requirements. So long as such screen names do not include individually identifiable information, the Commission should continue to permit them to be used by operators seeking to provide safe and engaging offerings to children.[58]

E. Geolocation Information

The Commission's proposal would add "geolocation information sufficient to identify street name and name of a city or town" to the definition of "personal information."[59] Geolocation information relates to a device, not an individual holding the device, and thus the FTC's proposal is *ultra vires* to the statute. Multiple consumers may share the same device. Additionally, geolocation information standing alone does not permit the physical or online contacting of an individual within the meaning of COPPA. A person would need real-time information to know where a device is currently located, and even then, the geolocation information would not identify a specific individual.

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[57] 76 Fed. Reg. at 59810.

[58] Moreover, those many members who have developed innovative websites using unique screen names since the adoption of COPPA will face significant economic burdens and business challenges if the FTC now determines that unique screen names are "personal information" that may require parental consent. For example, they would have to expend substantial time and resources involved with redesign of their sites to eliminate use of screen names as currently designed and incur significant costs to obtain parental consent for existing or future registered members.

[59] 76 Fed. Reg. at 59813 & 59830.

Moreover, geolocation information can be used for many informational, educational, and beneficial purposes in a variety of contexts that do not pose the concerns that the Commission has raised (*e.g.*, information based on city of residence such as weather, team scores, and television and movie schedules). The geolocation industry is an area of rapid innovation, and just as the government refrained from overregulating the Internet to allow for its evolution, so too should geolocation services be allowed to develop. We believe that this COPPA Rule proceeding is not the proper forum to address geolocation matters, and is an area that would be better left to self-regulation at this time.

F. Photos, Videos, and Audio Files

The current COPPA Rule includes within the "personal information" definition "a combination of a last name or photograph of the individual with other information such that the combination *permits physical or online contacting*."[60] The FTC has now proposed to replace this photo provision with the following: "a photograph, video, or audio file where such file contains a child's image or voice."[61] The Commission has notably left out the caveat that such photos/videos/audio files of a child would be required to "permit physical or online contacting." As discussed above, the COPPA statute only provides the Commission with authority to expand the definition of "personal information" to an identifier that "permits the *physical or online contact* of a specific individual."[62] The FTC has explained that it is concerned with embedded geolocation data within photos that would permit contact, facial recognition technology that could identify persons in the photos, and embedded metadata that provides latitude and longitude coordinates.[63] Regardless of whether such photos or videos contain geolocation data or meta data, and despite the FTC's proposed Rule commentary, the Commission's proposed definition would be overbroad because it does not include limiting language that would restrict covered photos and videos to those that "permit physical or online contacting."

Moreover, this change would likely have a significant impact on the industry's ability to offer and for children to have the opportunity to participate in fun, safe, and age appropriate user-generated content ("UGC") activities, contests, and promotions on websites directed to children. In addition to UGC contests, activities where a user can upload and send a photo to a family member or friend within the context of an online service or a promotional activity would no longer be feasible to offer on children's websites.

In the event that "personal information" is expanded as the FTC has proposed, much like the Commission has revisited its approach to the definition of "collection" to allow companies to have systems to monitor and screen personal information that may be submitted in chat rooms and forums without running afoul of COPPA, the FTC should revisit its approach to this category of information and content and develop an exception like the newsletter email exception to maintain a way for children to experience this type of interactive online activity. For example, responsible companies should be allowed to collect an email address and UGC

[60] 16 C.F.R. § 312.2.
[61] 76 Fed. Reg. at 59813 & 59830.
[62] 15 U.S.C. § 6501(8) (emphasis added).
[63] 76 Fed. Reg. at 59813.

such as a photo, video, or audio recording that they can pre-screen and maintain until they have provided appropriate parental notice and an opportunity to opt-out or delete the content or until the operator can review and scrub to ensure that there is no personal information contained in the UGC prior to posting or further use of the submission.

G. Additional Data Elements

The Commission has asked for input on whether ZIP+4 should be added to the definition of "personal information" under the theory that ZIP+4 may be the equivalent of a physical address, which is already included in the definition of "personal information" in the COPPA statute.[64] We believe that ZIP+4 should not constitute "personal information" because ZIP+4 does not indicate a house address. ZIP+4 only indicates the block face (*i.e.* one side of a street between two consecutive intersections), which is similar to a census tract. The U.S. Postal Service cannot deliver a letter with only ZIP+4 on it. Moreover, Congress gave the FTC authority only to expand the definition of "personal information" to include identifiers that permit the contact of "*a* specific individual," not the contacting of more than one person.[65] Similarly, the combination of a birthdate, gender, and ZIP code should not constitute "personal information" because this combination alone does not allow the "contacting" of a specific individual within the meaning of COPPA. Adding these identifiers to "personal information" would raise the same concerns regarding statutory overreach identified above in connection with persistent identifiers and other data elements.

XI. The Presence of Child Celebrities and Celebrities Who Appeal to Children Should Not Be Included as Factors Used to Determine When a Website or Online Service Is Directed to Children

When the Commission released its proposed rule in this latest COPPA Rule review, the Commission included a proposal to add the presence of child celebrities and celebrities who appeal to children to the non-exhaustive list of factors that the FTC will use to determine if a website or online service is directed to children.[66] We are concerned that the inclusion of these factors has the potential to capture general audience sites, not just children's sites. Many celebrities appear in both children's movies and adult movies. For instance, movie review websites feature child celebrities and celebrities who appeal to children, but they are general audience sites. Although we understand that the presence of children celebrities and celebrities who appeal to children including athletes, actors, and musicians would just be one factor in a broad set of factors, because these particular factors have the significant potential to sweep too broadly, we recommend that the Commission refrain from adding them to the list.

In addition, the assessment of whether an application or other online service is directed to children is far more complicated in the mobile ecosystem. For example, unlike traditional media, there is no easily available, competent, or reliable data regarding "audience composition"

[64] 76 Fed. Reg. at 59813-59814.
[65] 15 U.S.C. § 6501(8) (emphasis added).
[66] 76 Fed. Reg. at 59814 & 59830.

of who buys or downloads applications.[67] Each mobile platform creates its own layer of review, classification, and rating of the age appropriateness of content that it distributes in its store. Furthermore, the presence of animated characters and child-oriented activities is far from determinative. Many parents download a wide range of content, including some that may be educational and/or appealing to their pre-school children and some intended for general audiences. The fact that children may play games like Angry Birds or Fruit Ninja that an adult downloaded does not make that content as well as any contained in marketing and advertisements targeted or intended for children.

Since the Commission first unveiled its proposal, we recognize that the FTC's approach toward determining whether certain items are directed to children has been evolving, and we encourage the Commission to apply that same approach to the COPPA Rule. In his October 12, 2011 testimony before the House Energy and Commerce Subcommittee on Commerce, Manufacturing, and Trade hearing on food marketing, FTC Bureau of Consumer Protection Director David C. Vladeck noted that when considering whether certain marketing was "directed to children," the Commission had determined that it would recommend "revisions to ensure that the criteria are flexible enough to be neither over-inclusive – covering marketing to a general or family audience – nor under-inclusive – leaving out marketing that is clearly targeted to children."[68] Vladeck elaborated that "the FTC staff believes that philanthropic activities, charitable events, community programs, entertainment and sporting events, and theme parks are, for the most part, directed to families or the general community and do not warrant inclusion with more specifically child-directed marketing." Additionally, he said that the Commission would not recommend that "companies change the trade dress elements of their packaging or remove brand equity characters from … products." Applying this same approach to the COPPA Rule, the DMA believes that including the presence of children celebrities and celebrities who appeal to children as factors in determining when a service is "directed to children" would be over-inclusive with a tendency to capture family and general audience websites and online services, and therefore should not be included in the Final COPPA Rule.

XII. The Proposed Modifications to Online Privacy Policies and Direct Parental Notices Run Counter to the Goal of Streamlining Disclosures

Under the Commission's proposal, modifications would be made to both the (1) online privacy policy requirement and (2) direct notice to parents requirement. The DMA is concerned that the proposed changes run counter to the Commission's stated goal of "streamlining" privacy policies.[69] Additionally, the proposal is not practical and would result in longer, less consumer-friendly and more confusing disclosures to the public. We discuss these concerns below.

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[67] This is further complicated by the fact that mobile application ratings indicating the "age appropriateness" of content do not necessarily indicate that the mobile application is intended for or being marketed to that same age demographic.

[68] *Food Marketing: Can "Voluntary" Government Restrictions Improve Children's Health?: Hearing Before the H. Comm. on Energy and Commerce Subcomm. on Commerce, Mfg., and Trade*, 112th Cong. 9-10 (2011) (statement of David C. Vladeck, Bureau of Consumer Protection Director, Federal Trade Commission), *available at* http://republicans.energycommerce.house.gov/Media/file/Hearings/Joint/101211_CMT_Health/Vladeck.pdf.

[69] 76 Fed. Reg. at 59815.

Under the current COPPA Rule, online privacy policies are permitted to disclose only one operator of a website or online service to respond to parental inquiries. Now, the Commission has proposed requiring all operators (*e.g.*, including ad networks) to disclose their name, physical address, telephone number, and email in the online privacy policy.[70] Due to the interdependent nature of today's Internet architecture, the number of entities that serve content or advertising could be substantial, and such entities often change. The sheer volume of entities required to be listed runs counter to the FTC's stated goal of "streamlining" the privacy policy.[71] Keeping such a list current with contact information and publicly available would be burdensome, costly, and difficult for operators with little benefit to consumers. Such detailed disclosures could desensitize consumers to the information such that they would gloss over the long disclosures. Small businesses that enter into numerous business partnerships with others in order to compete with larger businesses (which can often handle many functionalities in-house) would also be placed at a disadvantage because the disclosure burden imposed on the small businesses would be greater. Moreover, the requirement would amount to requiring all companies to provide public notice of changes in their business relationships. We recommend leaving the online privacy policy requirement as is in the current COPPA Rule.

Additionally, under the new COPPA Rule, operators would no longer be permitted to truncate direct parental notices.[72] This requirement, too, runs counter to the FTC's goal of streamlining the notices. The Commission's proposal can also be read to require all operators to provide the direct parental notices. If all the operators are required to provide such notices, parents may be inundated with notices and become over-burdened by them, or desensitized to them. The delivery of the notices by all the operators instead of one also risks the possibility that a parent could consent to one operator but not to another, but without the grant of consent to all operators, it might not be feasible to provide a site or online service to a child. The proposal thus is not practical. A more workable approach would be to permit one operator to provide the direct notice. An even more streamlined approach would be to borrow the "internal operations" approach that the Commission has proposed in the "personal information" context and to apply it to the "direct parental notice" such that an operator would be exempted from providing the notice if the personal information collected from a child is for internal purposes. With the passage of COPPA, Congress intended to preserve the availability of interactive online offerings for children. The practical result of the Commission's proposal, however, would be a reduction in such offerings. We recommend leaving the online privacy policy and direct notice requirements as is in the current COPPA Rule.

XIII. The Sliding Scale Approach to Obtaining Verifiable Parental Consent Should Be Preserved

The COPPA Rule for years has taken a sliding scale approach toward the parental consent requirement in which the required method of consent has varied based on how an operator uses a child's personal information. If the operator uses the information for internal purposes only, a less rigorous form of consent has been required, whereas a more rigorous

[70] 76 Fed. Reg. at 59815 & 59830.
[71] 76 Fed. Reg. at 59815.
[72] 76 Fed. Reg. at 59816 & 59830-59831.

standard of obtaining consent has been required if the operator discloses the information to others or allows the child to disclose the information to the public.[73] For the less rigorous end of the scale where information is collected for internal purposes, the FTC has allowed the "email plus" system to suffice (*i.e.*, sending an email plus: (1) a confirmatory email to the parent following receipt of consent; or (2) obtaining a postal address or phone number from the parent and confirming the parent's consent by letter or phone). In the Commission's latest proposal, however, the FTC has proposed eliminating the "email plus" method of obtaining parental consent (for internal data uses).[74]

The DMA has long supported the "email plus" means of obtaining parental consent. We encourage the Commission to reconsider the sliding scale means of obtaining parental consent. Many of our members have found email plus to be a useful method of obtaining consent for limited internal uses and have used it for years without incident or complaints that a child has falsified a parent's consent. The trend of obtaining streamlined consent through online means was recognized as a valid one when Congress over a decade ago passed the Electronic Signatures in Global and National Commerce Act ("ESIGN"). The record does not reflect any evidence of harm or need to remove the method. The Commission has proposed no alternatives to email plus and furthermore would eliminate any more business-friendly and intermediate methods of obtaining parental consent through automated means without the more rigorous verifiable parental consent mechanisms in situations where the operator is just using the personal information for internal purposes and is not publicly posting the information or providing it to any third parties. The elimination of this means of obtaining consent would create challenges for operators attempting to provide services to children in this difficult economic climate (*e.g.*, teachers facing budget cuts may be less likely to use online reading programs). If this proposal is adopted, companies will need to expend considerable cost and time to revamp their child-directed services, and we are concerned that some operators may be forced to close down their services altogether given the lack of new alternatives to the email plus system.[75]

Back in 2006 when the Commission last examined the sliding scale approach, the FTC explained that it ultimately "decided to retain the sliding scale approach indefinitely while it continues to monitor technological developments" because "the FTC determined that the risk to children's privacy from an operator collecting personal information for internal use only remains relatively low," "more secure technologies that might be used to obtain parental consent for information collection and internal operator use are not yet widely available at a reasonable cost," and because "the sliding scale approach has worked well, and that its continued use may foster the development of children's online content."[76] The Commission has not identified any reason why these reasons do not remain equally valid today or why it needs to take away this consumer-friendly and automated means of obtaining parental consent. We thus recommend preserving the sliding scale approach of obtaining parental consent.

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[73] 16 C.F.R. § 312.5.
[74] 76 Fed. Reg. at 59818-59819.
[75] The FTC states in the proposed Rule that "there appears to be little technical innovation in any area of parental consent." 76 Fed. Reg. at 59820.
[76] Press Release, FTC Retains Children's Online Privacy Protection (COPPA) Rule Without Changes (Mar. 8, 2006), http:www.ftc.gov/opa/2006/03/coppa_frn.shtm.

XIV. The List of Reasonable Means to Obtain Verifiable Parental Consent Should Be Expanded Without Creating a De Facto Requirement for Commission Approval

As part of the sliding scale approach to obtaining verifiable parental consent, the COPPA Rule provides a non-exhaustive list of approved methods for satisfying the very reliable means of obtaining parental consent for children's personal information that will be shared with others, or which the operator will permit the child publicly to post. The Commission has proposed a few additions to the approved list, declined to adopt various means of obtaining consent that were suggested by stakeholders during the FTC's 2010 review of the COPPA Rule, and proposed to create a *de facto* requirement for FTC approval of new means of obtaining parental consent. We address these proposals below, and encourage the Commission to clarify in the Final COPPA Rule commentary that even if the FTC declines to add certain means of obtaining verifiable parental consent to its non-exhaustive list of approved methods at this time, it may still include those methods at a future time.

A. Electronic Scans and Video Conferencing

At the outset, the DMA wishes to express our support for the Commission's proposed recognition of "electronic scans" and "video conferencing" as new permissible means of obtaining parental consent.[77] We agree with the FTC that these technologies are functionally equivalent to the written and oral methods of consent originally approved by the Commission upon the Rule's issuance over a decade ago.

B. Text Messages

The DMA believes, contrary to the Commission's initial proposal, that the Rule should adopt text messages as a means of obtaining parental consent. The Commission has taken the position that consent via SMS text message would be no more reliable than email plus, which the FTC has proposed to eliminate.[78] Additionally, the FTC has asserted that adding text messages as an avenue for obtaining verifiable parental would require a statutory change on the theory that COPPA only permits the collection of a parent's "online contact" information to obtain consent, and a phone number does not constitute "online contact information," which is defined at 15 U.S.C. § 6501(12) as an email or another substantially similar identifier that permits direct contact with a person online.[79]

We believe that the COPPA statute would permit the addition of text messages as a parental consent method. The COPPA statute addresses the subject of consent in the context of both when consent must be obtained[80] and when consent is not required.[81] Notably, the statute

[77] 76 Fed. Reg. at 59818 & 59831.
[78] 76 Fed. Reg. at 59817.
[79] 76 Fed. Reg. at 59817 (note that the FTC mistakenly cites to Sec. 6502 instead of Sec. 6501).
[80] *See* 15 U.S.C. § 6502(b)(1)(A)(ii), the authority under which the FTC has developed a non-exhaustive list of very reliable means of consent.
[81] *See* 15 U.S.C. § 6502(b)(2), which describes exceptions to the verifiable consent requirement.

limits requests to a parent's name or "online contact information of a parent" only in the context of *when consent is not required*. When not seeking to fall into an exception, the statute simply requires operators to "obtain verifiable parental consent,"[82] which is defined as "*any reasonable effort* (taking into consideration available technology), including a request for authorization for future collection, use, and disclosure described in the notice, to ensure that a parent of a child receives notice of the operator's personal information collection, use, and disclosure practices, and authorizes the collection, use, and disclosure, as applicable, of personal information and the subsequent use of that information before that information is collected from that child."[83] Nothing in the definition of "verifiable parental consent" therefore limits the means of obtaining consent to collecting "online contact information." In fact, the Commission has previously interpreted this provision to allow means of obtaining verifiable parental consent that do not constitute online contact information (*e.g.* signed forms to be returned by fax, credit cards, toll-free numbers, 16 C.F.R. §312.5(b)(2)). We thus respectfully ask the Commission to reconsider and to include in any final amended rule the use of text messages as a means of obtaining parental consent.

C. Online Payment Services

The FTC declined to add online payment services as an alternative to credit cards as a means of obtaining verifiable parental consent.[84] The DMA believes that online payment systems are part of the wave of the future and are increasingly being used by consumers. At the same time, online financial transactions are already part of the present and Congress recognized the validity and legal effect of contracts entered into electronically when it passed ESIGN back in 2000. In keeping with this decade-long practice, we recommend that the Commission not exclude online payment services from the non-exhaustive list of obtaining parental consent to help the Rule keep up to date with evolving technologies.

D. Digital Signatures

At this time, the Commission has declined to recognize digital signatures as a means of obtaining verifiable parental consent.[85] The DMA supports recognition of digital signature mechanisms as a means of obtaining parental consent. As we have discussed above, Congress already recognized the validity of electronic signatures when it passed ESIGN over a decade ago. Electronic signatures are used in a variety of transactions today, including financial ones, and such transactions depend on the acceptance of such signatures as confirmation of the underlying identity of the person signing the document. Consumers are comfortable entering into transactions online and favor the streamlining effects of being able to complete transactions online with digital signatures over more cumbersome offline processes. We believe this same logic should extend to electronic signatures that may be used to obtain verifiable parental consent.

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[82] 15 U.S.C. § 6502(b)(1)(A)(ii).
[83] 15 U.S.C. § 6501(9) (emphasis added).
[84] 76 Fed. Reg. at 59817-59818.
[85] 76 Fed. Reg. at 59818.

E. FTC Approval Process for Parental Consent Methods

The Commission has proposed establishing a new optional formal process for providers to seek approval of a proposed parental consent method from the Commission.[86] COPPA does not grant the Commission authority to propose a novel FTC approval process for acceptable consent mechanisms, and thus this proposal is *ultra vires* to the COPPA statute. Moreover, the creation of such an approval process would create a *de facto* requirement for FTC approval of any new consent mechanisms. This requirement could create the impression that only methods that have gone through the approval process are acceptable, and discourage operators from developing or using new means of obtaining parental consent that have not been approved. To further encourage the development of verifiable parental consent mechanisms, we therefore suggest that the Commission remove this proposal from the Final Rule. In the event that this proposal remains in the Final Rule, however, we recommend clarifying that the FTC approval process is not an exclusive process (*i.e.* website and online service providers also have the right to determine methods of verifiable parental consent without going to the FTC for approval), and that any denial by the FTC through its voluntary approval process must be fact-specific and non-precedential as other comparable technologies and systems could have material differences that were not considered by the Commission.

XV. The Exceptions to Obtaining Verifiable Parental Consent Should Be Preserved

The DMA continues to support the retention of the email exceptions in the COPPA Rule that allow for instances where consent is not required, as required by the COPPA statute at 15 U.S.C. § 6502(b)(2).[87] Such email exceptions have been beneficial in enabling our members to offer children's resources such as homework help, contests, newsletters, and electronic postcards.

While the Commission has proposed generally to preserve the existing exceptions to the consent requirement, we note that the FTC has proposed modifying 16 C.F.R. § 312.5(c)(3), which currently allows for the collection of a child's and parent's online contact information to respond directly more than once to a child's specific request. Specifically, the FTC has proposed eliminating the option to collect a parent's postal address for notification purposes by deleting the following language from the current regulation: "Mechanisms to provide such notice include, but are not limited to, sending the notice by *postal mail* or sending the notice to the parent's e-mail address, but do not include asking a child to print a notice form or sending an e-mail to the child."[88] The Commission has stated that collecting a postal address for notification purposes is outmoded. The revised regulation would retain the language from the statute that the operator must make "reasonable efforts" to ensure that the parent receives the notice. We agree with the Commission that there is no need to enumerate examples of what constitutes "reasonable efforts" in the language of the Rule, but recommend that the Commission revise its commentary to explain that the "reasonable efforts" language in the regulation remains broad enough to

[86] 76 Fed. Reg. at 59820 & 59831.
[87] 76 Fed. Reg. at 59820 & 59831.
[88] 76 Fed. Reg. at 59821 & 59831 (emphasis added).

encompass notice by postal mail.[89] Certainly the U.S. Mail, which is a government service with internal oversight, remains a reliable service through which notice may be provided. The Commission should focus its efforts on expanding, not eliminating, reliable and reasonable options for providing notice.

In addition to retaining the current listed exceptions, the Commission has proposed adding an additional exception to give operators the option to collect a parent's online contact information for the purpose of providing notice to or updating a parent about a child's participation in a site that "does *not* otherwise collect, use, or disclose children's personal information."[90] The DMA supports the proposed addition.

XVI. Imposing Data Security Requirements on Service Providers Falls Outside the Statutory Scope of COPPA

The COPPA statute and Rule already require operators to take reasonable measures to protect personal information collected from children. Without any evidence of harm or abuse in this area, the Commission has proposed legally to require operators also to take reasonable measures to ensure that any service provider or third party to whom children's personal information is released has reasonable procedures to protect the confidentiality, security, and integrity of the information.[91] As the FTC notes in its proposal, however, the COPPA statute is "silent on the data security obligations of third parties."[92] The Commission's proposal to capture service providers is therefore *ultra vires* to the statute.

Like other responsible companies in this area, DMA members appreciate the sensitivity of personal information collected from children and we already take appropriate steps by limiting the amounts and types of personal information collected from children, engaging reputable partners and service providers, and negotiating appropriate contractual assurances to ensure that this information is kept confidential, protected, and secure. Perhaps because many operators involved in online data collection from children under the age of 13 limit the data collected to non-personally identifiable information and email addresses collected under an exception, the DMA is unaware of cases with any alleged COPPA violation cases that involve data security breaches. The Commission's proposal could create new and unnecessary compliance costs and liability risks for operators through audits or whatever additional steps and due diligence the FTC may deem "reasonable." Given the proposed and cumulative expansion of the definition of "personal information," the number of operators, and the amount and types of data at issue, the burden of such a legal requirement would likely further disincentivize companies interested in providing children's online content.[93] Any recommendations for service providers and third

[89] The commentary in the current proposal states: "The Commission proposes to eliminate the option of collecting a parent's postal address for notification purposes." 76 Fed. Reg. at 59821.
[90] 76 Fed. Reg. at 59820 & 59831 (emphasis added).
[91] 76 Fed. Reg. at 59821-59822 & 59832.
[92] 76 Fed. Reg. at 59821 (citing 15 U.S.C. § 6503(b)(1)(D)).
[93] *See, e.g.*, Danah Boyd *et al.*, *Why Parents Help Their Children Lie to Facebook About Age: Unintended Consequences of the 'Children's Online Privacy Protection Act*, 16 FIRST MONDAY (Nov. 2011) ("[T]o avoid the economic cost, social issues, and technical challenges associated with obtaining consent, to evade the difficulties of dealing with youth's personal data, and to steer clear from the hefty fines and public embarrassment of enforcement

parties thus should be limited to guidelines or best practices and not implemented as part of the regulation.

XVII. The Proposed Data Retention and Deletion Requirements Lack Clarity and Present Implementation Challenges

The FTC has proposed requiring operators to retain children's personal information only as long as reasonably necessary and to use reasonable methods to delete the data on the grounds that the Commission has statutory authority to issue regulations requiring operators to establish reasonable procedures to protect information collected from children.[94] We are concerned about the effect of this proposal, especially in conjunction with the FTC's proposed expansion of the definition of "personal information." If the Commission's "personal information" proposed definition were adopted, this proposed deletion requirement would require companies to delete non-personally identifiable information, such as data used for website and marketing analytics. This proposed change would further create new operational challenges, unnecessary costs, and potential uncertainty and confusion among companies trying to comply with COPPA. Under the current structure of the Rule, companies subject to COPPA already must comply with numerous legal obligations including the requirements to limit the data collected from children to that which is reasonably necessary to participate in an activity, to honor any parental requests to delete personally identifiable information, to maintain the confidentiality and security for such data, and to remain liable for any unauthorized use, transfers, or disclosures of the data. Adding additional data minimization or deletion requirements is not necessary at this time or within the scope of COPPA.

Additionally, companies are in the best position to know how long various data should be retained to serve business purposes. The Commission's proposed language is unclear as to which entity (the operator or FTC) would determine what amount of retention time is reasonable and what measures for deletion are reasonable. Adding additional deletion or data minimization requirements adopted from the FTC's "privacy by design' concepts would not substantially advance the privacy interests at issue under COPPA, but would create substantial uncertainty, operational burdens, and a strong economic disincentive for those considering developing online services directed to children. We recommend that the Commission refrain from legislating "best practices" or adopting any additional Rules in this area under the authority of COPPA.

XVIII. Self-Regulatory Safe Harbor Programs Should Incentivize Participation

The Commission has proposed requiring COPPA safe harbor programs annually to audit participants and to report their findings and disciplinary actions to the Commission.[95] Based on feedback from our members, the DMA has reason to believe that this revision would decrease interest and participation in the safe harbor programs in contravention of the Commission's goal of increasing safe harbor participation. The proposed changes to the safe harbor program

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actions, *many Web sites simply decide to limit their services to children 13 and older*") (emphasis added), *available at* http://www.uic.edu/htbin/cgiwrap/bin/ojs/index.php/fm/article/viewArticle/3850/3075.

[94] 76 Fed. Reg. at 59822 & 59832.

[95] 76 Fed. Reg. at 59822-59823 & 59832.

structure would create increased burdens and risks for operators participating in the safe harbor program, which in turn would disincentivize their participation. Some of our members have already informed us that this disincentive is so great that they would end their participation in safe harbor programs if the annual audit and reporting requirements were implemented. The safe harbor programs play an important role in supplementing the Commission's oversight and promoting COPPA compliance through self-regulatory enforcement. We thus encourage the Commission to rethink the proposed modifications and to create incentives to participate in the safe harbor programs.

XIX. Industry Should Be Given Ample Time to Assess the Impact and Implement Any Changes Set Forth by the Commission

The proposed changes to the COPPA Rule, and in particular the proposed change to the approach of providing notices under COPPA and the substantial expansion of the "personal information" definition, raise significant operational and technology-related implementation issues that will be difficult to resolve and for which the Commission has little or no record. Given the interplay and cumulative effect of the definitions and provisions of COPPA, the resolution of the many open questions makes it difficult to assess the amount of time it could take to implement any adopted changes. For example, revision of the content of privacy policies and notices may also need to account for how to identify the many contacts for multiple operators who collect IP addresses and persistent identifiers. Parental consent mechanisms may need to be designed in cases where IP addresses and persistent identifiers are collected for purposes outside any "internal operation" exception. Similarly, websites using screen names publicly in other media or in connection with other personal information may need to reassess their practices and redesign their entire websites.

If the Commission ultimately adopts changes to the COPPA Rule, the FTC should provide operators an appropriate amount of time to work through these implementation issues, which could include significant technical and operational challenges and testing. At a minimum, the Commission should grant operators at least as much time to implement rule changes as it would afford itself to review and approve proposed parental consent mechanisms (*i.e.* at least 180 days) and grandfather in any data collected prior to any implementation deadlines to afford affected businesses the opportunity to implement such modifications. More realistically, we respectfully ask that the Commission provide operators with no less than one year to implement any changes to appropriately account for enormous staff time that would be required to address architecting, design, testing, and deployment.

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We thank you for the opportunity to contribute comments and look forward to working with you on this important matter.