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December 23, 2011

VIA ONLINE SUBMISSION

Federal Trade Commission

Office of the Secretary

600 Pennsylvania Avenue, N.W.

Washington, DC 20580

Re: **Comment on the Federal Trade Commission Proposed Amendments to the Children's Online Privacy Protection Rule COPPA Rule Review, 16 CFR Part 312, Project No. P-104503**

On behalf of the Section of Antitrust Law of the American Bar Association (the "Section"), we respectfully submit these comments to the Federal Trade Commission ("FTC" or "Commission"). The views expressed in these comments have received approval from the Section's governing Council. They have not been approved by the House of Delegates or the Board of Governors of the American Bar Association and should not be construed as representing the policy of the American Bar Association.

The Section supports the efforts by the Commission to solicit public comment regarding the proposed amendments to the Children's Online Privacy Protection Rule

(“COPPA Rule”)¹, and the commitment to ensuring the protection of privacy of children that use and access the internet.

The purpose of these comments is to highlight for consideration potential issues raised by the proposed changes to COPPA. The comments address the proposed elimination of the sliding scale mechanism (often referred to as “e-mail plus”) for parental consent; incentives for development of new parental consent mechanisms; and the issues concerning verifying parental consent by cross-checking government-issued identification against a databases of such information.

The FTC recognizes that “[e]-mail plus has enjoyed wide appeal among operators who credit its simplicity,” and that “numerous commentators . . . support the continued retention of this method as a low-cost means to obtain parents’ consent,” but believes that “operators have no real way of determining whether the e-mail address provided by a child is that of a parent” and that “continued reliance on e-mail plus has inhibited the development of more reliable methods of obtaining verifiable parental consent.”²

While the Section acknowledges that the FTC’s conclusion may be correct, the Proposed Rule does not discuss any empirical research indicating that e-mail plus has inhibited more innovative methods of obtaining consent. Because of the far reaching implications of the proposed amendment, the Section recommends fact-finding and further investigation to determine whether, and to what extent, children fail to provide correct e-mail addresses for their parents when properly prompted. The Section further notes that there does not appear to be any such indication in the

¹ Request for Comment on Proposal to Amend Children’s Online Privacy Protection Rule, 76 Fed. Reg. 59804 (Sept. 27, 2011); available at <http://ftc.gov/os/2011/09/110915coppa.pdf>.

² 76 Fed. Reg. 59819 (Sept. 27, 2011).

FTC's case history, which largely involves circumstances in which operators fail to satisfy the existing e-mail plus standards. Moreover, additional fact-finding or investigation as to the reason(s) that "few, if any, new methods for obtaining parental consent have emerged" since 2006 may shed more light on this phenomenon and the impact that the elimination of e-mail plus will have on business, particularly small companies, and on the availability of free content.

In light of the foregoing, the Section suggests that a factual record be developed concerning the reliability of e-mail plus and the reason(s) for the purported lack of innovation with respect to verification methodologies before this widely-accepted and broadly-used business method is eliminated.

With regard to the development of new consent mechanisms, the FTC proposes to create an administrative review process under which it will evaluate whether a particular consent mechanism complies with the COPPA Rule. First, the review process requires an applicant to submit "a detailed description of the proposed parental consent mechanism, together with an analysis of how the mechanism meets the requirements of"³ COPPA that will be published in the Federal Register. It is plausible that such product developments and/or analyses may include trade secrets and/or other proprietary business information. If so, innovators may not be willing to use the process. Therefore, greater fact-finding or investigation may be useful to determine whether, and to what extent, the detailed disclosure required by the FTC would: (a) harm, not help, competition and innovation; (b) reduce the value of the proposed mechanisms; or (c) deter entry into the marketplace.

³ 76 Fed. Reg. 59820 (Sept. 27, 2011).

Second, the length of the 180-day review process could impose significant costs, particularly to new entrants and business with limited capital resources. Here too, additional fact-finding or investigation may be valuable in assessing whether, and to what extent, the response period will impact the likelihood that the methodology will be used. The six month determination period under §312.5(b)(3) is also not consistent with the expedited review process provided for certain antitrust conduct. For example, under the Final Statement of Antitrust Policy Regarding Accountable Care Organizations Participating in the Medicare Shared Savings Program issued by the FTC and Antitrust Division of the DOJ on October 28, 2011⁴, the Agencies commit to an expedited review of newly formed Accountable Care Organizations within 90 days, following the submission of extensive documentation by the applicant.

With regard to methods under which website operators can obtain verifiable consent, the Commission proposes amending section 312.5(b) of the Rule to permit

. . . verifying a parent’s identity by checking a form of government-issued identification against databases of such information, *provided that* the parent’s identification is deleted by the operator from its records promptly after such verification is complete.⁵

In its discussion of the proposal, the Commission recognizes that “information such as social security number, driver’s license number, or other records of government issued identification are sensitive data,” and suggests that privacy concerns might be ameliorated by “limiting the collection of such identification information to only those segments of information needed to verify the data” such as “the last four digits

⁴ 76 Fed. Reg. 67026 (Oct. 28, 2011).

⁵ 76 Fed. Reg. 59831.

of a person's social security number" and requiring that an operator delete the identification information upon completion of the verification process.⁶

Notwithstanding the potential use of truncated identifiers, and an instruction to delete identifiers once verification has been accomplished, the Section recommends that the Commission consider the following four factors when assessing whether consumers may be harmed if businesses require parents to submit government issued identification over the internet:

- Concerns have been raised by privacy groups and academics concerning the possibility that portions of a sensitive identifier might be used to re-construct the entirety of the identifier. These concern may be particularly acute in the context of truncated social security numbers where the omitted portions of the number may be derived from the age or birth place of the individual.⁷
- Consumers may be reluctant to provide government issued identifiers on-line even in situations in which representations are made that the information will not be maintained or recorded. Indeed, the FTC has specifically warned consumers that they should only provide social security numbers to businesses "when absolutely necessary."⁸ Other privacy groups have suggested federal and state legislation preventing companies from compelling consumers to disclose such data as a condition of obtaining service.⁹
- The transmission of truncated government identification numbers may not be expressly required, by statute, to be encrypted. As a result, the Proposed Rule might lead to such information being sent in a form in which it could be intercepted by an unauthorized third party.
- Despite the Proposed Rule's requirement that government-issued identification be deleted after verification, the Commission's past enforcement actions suggest that some companies which collect

⁶76 Fed. Reg. 59818.

⁷ See, e.g., Alessandro Acquisti and Ralph Gross, *Predicting Social Security Numbers From Public Data*, 27(106) Proceedings of the National Academy of Sciences 10975-980 (July 7, 2009).

⁸ FTC, *Fighting Back Against Identity Theft, Deter: Minimize Your Risk*, available at <http://www.ftc.gov/bcp/edu/microsites/idtheft/consumers/deter.html#ProtectyourSocialSecuritynumber>


⁹ See Electronic Privacy Information Center ("EPIC") discussion of effective legislation to protect social security numbers available at <http://epic.org/privacy/ssn/>

sensitive personal information, including social security numbers, do not destroy those numbers using reasonable and appropriate means.¹⁰

Conclusion

The Section supports the Commission's continued effort to help create a safer more secure online experience for children, and appreciates the opportunity to provide its comments.

Sincerely,


Richard M. Steuer
Chair, Section of Antitrust Law

¹⁰ See, e.g., *CVS Caremark Corp.*, FTC No. C-4259 (June 18, 2009); *Rite Aid Corp.*, FTC No. C-4308 (Nov. 12, 2010).