

December 22, 2011

*Via electronic delivery: <https://ftcpublic.commentworks.com/ftc/2011coppauleview>*

Donald S. Clark  
Secretary  
Federal Trade Commission  
Office of the Secretary  
Room H-113 (Annex E)  
600 Pennsylvania Ave., N.W.  
Washington, DC 20580

Re: Comments of the Email Sender and Provider Coalition on the COPPA Rule Review, 16 CFR Part 312, Project No. P104503

Dear Mr. Clark:

The Email Sender & Provider Coalition (ESPC) hereby submits these comments to assist the Federal Trade Commission (FTC or Commission) in its consideration of the appropriateness and feasibility of its proposed revisions to the Children's Online Privacy Protection Rule (COPPA Rule or Rule).<sup>1</sup> The ESPC appreciates the Commission's efforts to identify issues and potential solutions by inviting participation by all interested stakeholders. We look forward to a final rule that provides businesses with reasonable, practical ways to help protect children's privacy online.

Formed in November 2002, the ESPC's membership is comprised of many of the largest and most innovative technology providers in the email industry, including Email Service Providers (ESPs), Mail Transfer Agents, application and solution developers, and deliverability solutions providers. Members include Acxiom Digital, Constant Contact, Datran Media, e-Dialog, Eloqua, Epsilon, Responsys, Return Path, StrongMail, and SubscriberMail. For more information, please visit [www.espcalition.org](http://www.espcalition.org).

The ESPC is made up of 54 leading companies. While ESPs serve the marketing needs of their clients, that is by no means the only customer group served. ESPs also deliver transactional messages such as account statements, airline confirmations, purchase confirmations, email publications, affinity messages, and relational messages. They also provide clients with the tools to integrate with their other online marketing efforts.

The ESP industry is robust and growing. ESPC's clients represent the full breadth of the U.S. marketplace, from the largest multi-national corporations (indeed, the vast majority of Fortune 500) to the smallest local businesses (members of the ESPC serve hundreds of thousands of small businesses). Members of the ESPC also represent local schools, national non-profit groups, political campaigns, major publications with millions of subscribers, and small affinity-

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<sup>1</sup> Proposed Rule and Request for Comment on the COPPA Rule, 76 Fed. Reg. 59804 (Sept. 27, 2011).

Donald S. Clark  
Secretary  
Federal Trade Commission  
December 22, 2011  
Page 2

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based newsletters. The use of ESPs by organizations large and small has become an industry standard.

The ESPC has the following comments on the Commission's proposed revision to the COPPA Rule's definition of personal information.

**1. It may be technically infeasible for businesses to comply with the proposed Rule's applicability to the use of persistent identifiers on general audience websites.**

The Commission proposes to broaden the Rule's definition of personal information to include persistent identifiers, when they are used for functions other than support for the internal operations of a website or online service. "Support for the internal operations of the website or online service" is proposed to be defined, in turn, as "those activities necessary to maintain the internal functioning of the website or online service, to protect the security or integrity of the website or online service, or to fulfill a [permitted] request of a child." If a use of a persistent identifier does not fall within this definition, then a website or online service subject to the COPPA Rule would be required to obtain verifiable parental consent prior to such use.

The COPPA Rule regulates a website or online service that (1) is directed to children under 13, or (2) that knowingly collects personal information from children under 13. A website or online service that is targeted to children may be able to comply with the requirement that it obtain verifiable parental consent prior to using a persistent identifier because it does not have to differentiate among users. It must assume that all users are children.<sup>2</sup>

A general audience site, on the other hand, presents significant (and, in some cases, perhaps insurmountable) practical compliance challenges. A general audience site is subject to COPPA with respect to a particular user only if it has actual knowledge that he or she is under 13. This means that, immediately upon identifying a particular user as under 13, a site or its service provider would have to find a way to tag him or her as such, so that covered persistent identifiers would be blocked from collecting information from him or her until verifiable parental consent has been obtained. In some instances, this is not possible with existing technology. Where, for example, a parent or guardian alerts the operator or online service that his or her child is under the age of 13, the operator of the website or online service will not be able to associate the child's name with an anonymous personal identifier. For this reason, to the extent that the "persistent identifiers" covered by the Rule includes cookie that store unique identifiers ("Cookie IDs"), the obligation to obtain verifiable parental consent should apply only to the extent that the

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<sup>2</sup> That said, the imposition of such a requirement will have the likely unintended consequence of requiring some child-directed sites – *i.e.*, those that do not collect personal information as the term is now defined – to actually collect more personal information from children, so that they can obtain the required consent.

Donald S. Clark  
Secretary  
Federal Trade Commission  
December 22, 2011  
Page 3

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website or online service can, using existing technology, actually identify the cookie to a particular individual.

ESPC therefore propose that the Proposed Rule be modified as follows (proposed additions underlined):

Section #12.2, Definition of Personal Information, subsection (g):

*Personal information* means individually identifiable information about an individual collected online, including:

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(g) 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; provided, however, that if the operator of a website or online service that is not directed to children becomes aware that a visitor is under the age of 13, but has no means of determining which persistent identifier relates to that child, such personal identifier shall not be considered "personal information."

**2. The proposed changes would result in the creation by covered businesses of an extensive file of information associated with a child.**

Where it is possible to associate a persistent identifier with a child, the proposed changes could have an unintended negative effect on children's privacy: the maintenance by covered operators of extensive profiles identifiable to individual children. Many websites and online services do not attach personally identifiable information, such as user name, email address, or phone number, to the anonymous information that they collect through cookies and other persistent identifiers. This way, the anonymous data cannot be linked to an identifiable site user. If, however, such information falls within the Rule's definition of "personal information," then a covered business would have to flag it as such, in order to ensure that it is used, disclosed, and maintained in compliance with the Rule. The most logical way for it to do so would be to maintain all information relating to one child together, thereby not only greatly expanding the child's profile but also personalizing information that, when maintained separately, could not be used by another party to identify or contact a child. The result would potentially increase the risks to children associated with a breach of a covered company's data.

**3. The Commission should clarify the definition of "support for the internal operations of the website or online service."**

Donald S. Clark  
Secretary  
Federal Trade Commission  
December 22, 2011  
Page 4

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The Commission's proposal that certain data collected through persistent identifiers be regulated as personal information raises the crucial question of exactly which activities fall within the definition of "support for the internal operations of the website or online service." As drafted, the proposed Rule is not entirely clear. It provides only the definition: "those activities necessary to maintain the internal functioning of the website or online service, to protect the security or integrity of the website or online service, or to fulfill a [permitted] request of a child." The Commission's commentary to the proposed Rule provides some guidance, suggesting that the uses of persistent identifiers that do not qualify as "support for the internal operations of the website or online services" are those that involve the compilation of data about a child. Specifically, the Commission explains: "The Commission believes that when a persistent identifier is used only to support the internal operations of a website or online service, *rather than to compile data on specific computer users*, the concerns underlying COPPA's purpose are not present."<sup>3</sup> Similarly, the Commission's two examples of practices that would not fall within the "internal support" definition both involve the compilation of data on users: "amassing data on a child's online activities" and "behaviorally targeting advertising to the child."<sup>4</sup> If our interpretation of the proposed Rule and the Commission's commentary is correct, and persistent identifiers are covered by the Rule only when they are used to compile data on users, then we urge the Commission to incorporate that explanation into the Rule itself so that businesses have certainty about the Rule's requirements and applicability.

If, on the other hand, our understanding is not correct, then we respectfully suggest that the Commission provide covered businesses with greater clarity. In doing so, we urge the Commission to ensure that the "internal support" definition covers routine internal practices that provide great benefits to the site and site users, are not unexpected by parents, and present little, if any, risk of harm to the privacy of children, including, but not limited to, the use of persistent identifiers to measure advertising and email campaign effectiveness and conduct site analytics.<sup>5</sup>

Without clarity with respect to the "internal support" definition, businesses will have difficulty determining whether a particular collection of information is covered, and legitimate practices may therefore be chilled.

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The ESPC appreciates the opportunity to comment on the proposed Rule and looks forward to

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<sup>3</sup> 76 Fed Reg. at 59812 (emphasis added).

<sup>4</sup> *Id.*

<sup>5</sup> In its preliminary report on privacy, the FTC staff recognized that many data uses should not require consent. Preliminary FTC Staff Report, *Protecting Consumer Privacy in an Era of Rapid Change: A Proposed Framework for Businesses and Policymakers* (2010) at 53-54.




Donald S. Clark  
Secretary  
Federal Trade Commission  
December 22, 2011  
Page 5

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continuing to work with the Commission and other stakeholders.

Respectfully submitted by:

  
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D. Reed Freeman, Jr.  
Of Counsel, ESPC

Morrison & Foerster LLP  
2000 Pennsylvania Avenue, NW, Suite 6000  
Washington, DC 20006  
202.887.6948  
rfreeman@mofo.com