



## Public Interest Comment of Adam Thierer on

Proposed Revisions to Children’s Online Privacy Protection Rule<sup>1</sup>

December 23, 2011

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### I. Introduction

The Technology Policy Program at the Mercatus Center at George Mason University is dedicated to advancing knowledge of the impact of regulation on society. As part of its mission, the Mercatus Center conducts careful and independent analyses employing contemporary economic scholarship to assess rulemaking proposals from the perspective of the public interest. Thus, this comment on the Federal Trade Commission’s (“the Commission”) proposed revisions to the Children’s Online Privacy Protection Rule<sup>2</sup> does not represent the views of any particular affected party or special interest group but is designed to assist the Commission as it weighs the costs and benefits of expanded online privacy regulation.

### II. The Forest vs. the Trees

It goes without saying that COPPA and its accompanying rules are complicated. When considering the rule and proposals to amend it, it is easy to get lost in the weeds and ignore the bigger picture. That would be a mistake. The broader, more important questions that need to be asked here include:

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<sup>1</sup> Prepared by Adam Thierer, senior research fellow, Mercatus Center at George Mason University. This comment is one in a series of Public Interest Comments from the Mercatus Center’s Technology Policy Program and does not represent an official position of George Mason University.

<sup>2</sup> Federal Trade Commission, COPPA proposed rule, 16 CFR Part 312, *Federal Register* 76, no. 187, September 27, 2011, 59804-33, (hereinafter “COPPA Proposed Rule”).

- Will the proposed COPPA amendments and expanded regulatory requirements really do anything to make kids safer or their information more secure? Or will efforts to expand parental-consent requirements have the potential downside of also expanding the amount of information collected about both parents and children?
- Has the Commission attempted to conduct a cost-benefit analysis of these new regulations? Specifically, has the Commission considered the burdens that an expanded COPPA regime might impose on smaller operators? Could expanded regulation have a deleterious impact on market structure and competition by raising costs and effectively creating de facto barriers to entry?<sup>3</sup>
- Correspondingly, will expanded COPPA regulations discourage new innovations that could offer children and parents more rewarding (and safer) online experiences?
- To the extent that concerns about more targeted forms of online advertising are driving efforts to expand COPPA's coverage, has the Commission established a clear harm that expanded regulation would address? Are there potential benefits associated with more targeted forms of advertising to children that have not been considered?
- Will the new rules have an impact on the online cost equation by forcing various sites and services to charge higher prices, or charge prices for services that were previously free?<sup>4</sup>
- Will expanded regulation lead to expanded circumvention efforts by kids (and parents) who find the rules overly cumbersome?

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<sup>3</sup> The Commission does note that, "While the Rule's compliance obligations apply equally to all entities subject to the Rule, it is unclear whether the economic burden on small entities will be the same as or greater than the burden on other entities. That determination would depend upon a particular entity's compliance costs, some of which may be largely fixed for all entities (e.g., website programming) and others variable (e.g., Safe Harbor participation), and the entity's income or profit from operation of the website itself (e.g., membership fees) or related sources (e.g., revenue from marketing to children through the site). As explained in the Paperwork Reduction Act section, in order to comply with the rule's requirements, website operators will require the professional skills of legal (lawyers or similar professionals) and technical (e.g., computer programmers) personnel." COPPA Proposed Rule, 59825.

<sup>4</sup> See Adam Thierer, *Public Interest Comment on Protecting Consumer Privacy in an Era of Rapid Change*, Mercatus Center at George Mason University, February 18, 2011, 24-8, <http://mercatus.org/publication/public-interest-comment-protecting-consumer-privacy-era-rapid-change>; Adam Thierer, "Birth of the Privacy Tax," *Forbes.com*, April 4, 2011, <http://www.forbes.com/2011/04/02/privacy-tax-social-networking-advertising-opinions-contributors-adam-thierer.html>.

To be clear, this is not just about the future of online-business interests. Rather, these questions cut to the core of whether the public (including children) will be served with more and better digital innovations in the future. There is no free lunch, of course. Regulation—even well-intentioned regulation like COPPA—is not a costless exercise. There are profound trade-offs for online content and culture that must always be considered. These trade-offs were discussed in greater detail in a 2009 white paper about COPPA expansion that I co-authored with Berin Szoka.<sup>5</sup>

Personal responsibility must also be part of this discussion.<sup>6</sup> This is not to say parents are not already taking steps to guide their children’s online interactions. To the contrary, recent research by Boyd, Hargittai, Schultz, and Palfrey, which surveyed over 1,000 parents of children between the ages of 10 and 14, showed how parents already authorize or assist their child in getting around COPPA restrictions. “Although many sites restrict access to children, our data show that many parents knowingly allow their children to lie about their age—in fact, often help them to do so—in order to gain access to age-restricted sites in violation of those sites’ [Terms of Service],” the study noted.<sup>7</sup> “This is especially true for general-audience social media sites and communication services such as Facebook, Gmail, and Skype, which allow children to connect with peers, classmates, and family members for educational, social, or familial reasons,” they found. Their survey also revealed that 55 percent of parents of 12-year olds report their child has a Facebook account, and 82 percent of these parents knew when their child signed up. Also, 76 percent of parents assisted their 12-year old in creating the Facebook

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<sup>5</sup> Berin Szoka and Adam Thierer, “COPPA 2.0: The New Battle over Privacy, Age Verification, Online Safety & Free Speech,” *Progress on Point* 16, no. 11, the Progress & Freedom Foundation, May 21, 2009, <http://www.pff.org/issues-pubs/pops/2009/pop16.11-COPPA-and-age-verification.pdf>.

<sup>6</sup> Adam Thierer, “Kids, Privacy, Free Speech & the Internet: Finding the Right Balance,” (working paper, Mercatus Center at George Mason University, Arlington, VA, 2011), <http://mercatus.org/publication/kids-privacy-free-speech-internet>.

<sup>7</sup> Danah Boyd, Eszter Hargittai, Jason Schultz, and John Palfrey, “Why Parents Help Their Children Lie to Facebook about Age,” 16 (11) *First Monday*, November 7, 2011, <http://www.uic.edu/htbin/cgiwrap/bin/ojs/index.php/fm/article/view/3850/3075>.

account. Incidentally, a February 2010 Pew Internet & America Life survey found that 46 percent of 12-year-olds use social networking sites.<sup>8</sup>

Some policy makers or privacy advocates may question the wisdom of parents allowing (or even encouraging) children to essentially break the law by skirting COPPA's age-based restrictions, but this represents a choice best made by parents about how to best guide their children online. According to the Boyd, Hargittai, Schultz, and Palfrey study, 93 percent of parents said that they—not the government or companies—should have the final say about whether or not a child can access online sites or services. Almost half of them wanted sites and services to instead be required to offer a recommended-age rating system along the lines of movie or video-game ratings.

That is a perfectly logical response. COPPA's crude method of achieving online parental consent has always been a second-best approach to the challenge of raising children in the information age and guiding their online interactions. Parents don't necessarily want the law to block their children's access to social media sites and other online services, rather most of them clearly prefer to instead be given more information about those sites and services to determine what is appropriate for their kids. COPPA can help facilitate that at times by forcing parent-child conversations about online interactions. But effective parental oversight and mentoring can be accomplished in many other ways, and it is unclear that the approach COPPA embodies is necessarily the one most parents favor or find useful.<sup>9</sup> The study by Boyd, Hargittai, Schultz, and Palfrey certainly suggests otherwise.

This insight should also make it clear why layering on more regulations will only likely encourage more evasion of the rule by children and parents alike. A highly regulatory approach to children's access to social media or other online services may be well-intentioned, but

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<sup>8</sup> Amanda Lenhart, Kristen Purcell, Aaron Smith, and Kathryn Zickuhr, "Social Media & Mobile Internet Use among Teens and Young Adults," Pew Internet and American Life Project, February 3, 2010, 17, [http://www.pewinternet.org/~media/Files/Reports/2010/PIP\\_Social\\_Media\\_and\\_Young\\_Adults\\_Report\\_Final\\_with\\_toplevels](http://www.pewinternet.org/~media/Files/Reports/2010/PIP_Social_Media_and_Young_Adults_Report_Final_with_toplevels).

<sup>9</sup> Adam Thierer, "The Unintended Consequences of Well-Intentioned Privacy Regulation," *Forbes.com*, November 6, 2011, <http://www.forbes.com/sites/adamthierer/2011/11/06/the-unintended-consequences-of-well-intentioned-privacy-regulation>.

ultimately, it is an exercise in futility. Treating children and their parents as online outlaws simply because they do not wish to go through the strict COPPA consent process will not result in children being safer online or parents being more empowered. Instead, we need a layered approach to online safety and child mentoring that incorporates education, media literacy, awareness-building, empowerment, social norms, self-regulation, and targeted enforcement efforts under Section 5 of the FTC Act.<sup>10</sup>

Finally, the Commission must not forget that, when it regulates online speech and social interactions, it is operating in the shadow of the First Amendment. The bar is even higher in the wake of the recent Supreme Court decision in *Brown v. EMA*, which struck down a California law requiring age verification and parental consent for the purchase of “violent” videogames by minors. The Court held that:

The Act’s purported aid to parental authority is vastly overinclusive. Not all of the children who are forbidden to purchase violent video games on their own have parents who care whether they purchase violent video games. While some of the legislation’s effect may indeed be in support of what some parents of the restricted children actually want, its entire effect is only in support of what the State thinks parents ought to want.<sup>11</sup>

In other words, even when policy makers believe they are acting in the best interest of kids or parents, it does not follow that government can regulate without constraint.

The remainder of this comment will briefly discuss a few specific concerns about the Commission’s proposed COPPA revisions.

### **III. Expansion of Personal Information Standard Will Create New Complications**

The Commission proposes broadening the definition of “personal information” to include geolocation information and certain types of persistent identifiers used for functions other than the website’s internal operations, such as tracking cookies used for behavioral advertising. That

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<sup>10</sup> Adam Thierer, *Parental Controls and Online Child Protection: A Survey of Tools and Methods, Special Report Version 4.0*, the Progress & Freedom Foundation, Summer 2009, [www.pff.org/parentalcontrols/index.html](http://www.pff.org/parentalcontrols/index.html). This report catalogues the tools and methods available to parents to control their kids’ Internet use and stresses the need for a layered approach to online child protection.

<sup>11</sup> *Brown v. Entertainment Merchants Association*, U.S. Supreme Court, Docket No. 08-1448, 16, <http://www.supremecourt.gov/opinions/10pdf/08-1448.pdf>.

will lead to added complications for a wide variety of online sites and application providers and their users. It will also complicate the wireless world as geolocation services expand and become a more ubiquitous part of our mobile digital experiences.

Persistent identifiers (including user names, screen names, gamer tags, avatars, etc.) help make the Internet, social media, gaming platforms, and all communications technologies more useful. In particular, they help make online activity that occurs across multiple sites easier and more functional. (Importantly, these identifiers do not always include personal information.) Thus, if expanded regulation complicates or diminishes the online experience, it would not be at all surprising if even more children and parents seek to evade COPPA's strictures.

The Commission seems preoccupied with a use scenario for persistent identifiers that would expand behavioral advertising to children. Ignoring the fact that the Commission has not shown how increased behavioral or targeted advertising harms children, the fact remains that persistent identifiers are extremely helpful for a wide variety of purposes to those operating across various sites and services. A Microsoft Xbox Live screen name and avatar, for example, are useful not just within the Xbox gaming environment, but also on online leaderboards (where players review rankings) and discussion forums where players are discuss game strategies or other matters. Those screen names and avatars can also be used on the Microsoft Windows phones that parents might give their children. And one can easily imagine a world in which Microsoft begins allowing these identifiers to be used for a wide variety of other purposes. It would be costly and counter-productive to demand COPPA's parental verification requirements be applied each time a child uses screen names or avatars in those many other contexts.

#### **IV. Misguided Rationale for Eliminating "Email Plus" Verification Standard**

The Commission proposes the elimination of the current "email plus" method of obtaining veritable parental consent on the grounds that "email plus has outlived its usefulness and

should no longer be a recognized approach to parental consent.”<sup>12</sup> The Commission believes that “continued reliance on email plus has inhibited the development of more reliable methods of obtaining verifiable parental consent.” In fact, the Commission notes that few, if any, new methods for obtaining parental consent have emerged since the sliding scale was last extended in 2006.”<sup>13</sup>

This could create short-term marketplace uncertainty for those sites and service that live under COPPA and use this method to stay in compliance with the law. Moreover, while it is true that few new parental consent methods have been introduced over the past five years, the Commission has not offered any conclusive evidence that the existence of email plus is to blame. The fact of the matter is that online verification is hard, even the parental consent variety. In a different context, banks are still just using simple 4-digit PIN authorizations at ATMs even though debit cards have now been on the market for decades. That does not necessarily mean that the PIN approach has stifled other forms of authentication, rather it is still just the most simple and efficient way of doing things.

The same is true of email plus in the COPPA context. Yet, the Commission is upending the process in the name of kick-starting innovation in the authentication space. It is an interesting gamble, but has the agency thought through the consequences of failure? In particular, by deleting email plus, might the Commission be requiring other forms of information to be collected that would actually raise different privacy concerns?

#### **V. Bringing Government IDs into the Process Gives Rise to Different Privacy Concerns**

The Commission makes another controversial proposal when discussing other mechanisms for obtaining verifiable parental consent. After rejecting SMS text messages and electronic “sign and send” methods for various reasons, the Commission proposes “allowing operators to collect a form of government issued identification—such as a driver’s license, or a segment of the parent’s Social Security number—from the parent, and to verify the parent’s identity by

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<sup>12</sup> COPPA Proposed Rule, 59819.

<sup>13</sup> *Ibid.*

checking this 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."<sup>14</sup>

In one sense, this is not surprising. Many government agencies already engage in official credentialing activities, so why not use the ones that are already required to facilitate COPPA enforcement? The answer to that question depends on one's disposition toward large government databases and the purposes to which they might be put. Those inherently distrustful of government aggregating and cross-referencing massive amounts of data about the citizenry will be uncomfortable with the idea of using driver's licenses and Social Security numbers for yet another thing in this world.

If the Commission gets people accustomed to the idea of using "official" forms of identification to authorize online activities it could be a slippery slope to something more nefarious. It may start with just driver's licenses and the last four digits of one's Social Security numbers but that might not be where it ends. Will biometric identifiers be required next? Will schools be roped into verification schemes since they possess the most data about children? Which government agencies collect all this info or have access to it?

Moreover, if the Commission is now getting rid of the "email plus" verification process and dismissing text messages and electronic "sign and send" methods as alternative, then one could argue that—at least indirectly—the Commission is starting to tip the market in favor of government solutions to online credentialing/verification. That is troubling.

## **VI. Video Conferencing as a Verification Method Unlikely to Scale**

One of the few new verification methods the Commission endorses—"having a parent connect to trained personnel via video-conference"—seems unworkable. It is unlikely video conferencing could be a scalable or cost-effective solution to obtaining verifiable parental

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<sup>14</sup> Ibid., 59818.



consent. Of course, to be fair, this is not the only consent mechanism the Commission is proposing.

Nonetheless, it is difficult to believe many parents would want to sit down in front of a webcam, fire up Skype (or whatever other video conferencing service they prefer), and start a video chat with someone who works for an online site or service. A lot of parents will find that annoying and invasive.

More practically, smaller sites probably do not have the manpower or resources to make this solution work. Making workers available at all hours to get on a video chat with a parent so that their child can get on the site is not going to be a scalable or workable verification solution for anyone except the largest online sites and services. And even the largest sites and services would not likely have the ability to shoulder this burden without incurring significant costs, which would eventually be passed along to consumers.

## **VII. Do New Data Deletion Requirements Foreshadow a Push for an Online “Eraser Button”?**

The Commission proposes adding a new data retention and deletion provision to the COPPA regulatory regime when noting that:

Operators shall retain children’s personal information for only as long as is reasonably necessary to fulfill the purpose for which the information was collected. In addition, it states that an operator must delete such information by taking reasonable measures to protect against unauthorized access to, or use of, the information in connection with its deletion.<sup>15</sup>

In one sense this is commendable. It would be wise for more online sites and services—especially those that handle information about children—to consider purging unneeded data more frequently. It helps minimize the potential for data security breaches as well as other problems. But if this is a prelude to a broader push for a so-called mandatory online “eraser button,” the Commission should be aware of the many problems such a proposal would engender.

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<sup>15</sup> Ibid., 59882.

The Internet “eraser button” notion is challenged by both practical realities and principled concerns. It is unclear how even to enforce such a notion. Moreover, if it could be enforced, it would raise profound free speech issues since it is tantamount to digital censorship and would specifically threaten press freedoms. And the economic costs of such a mandate—especially on smaller operators—could be quite significant.<sup>16</sup>

Again, to be clear, the Commission is not proposing a formal “eraser button” in its latest COPPA revision, but by advocating that additional steps to be taken on the data deletion front, the agency might be pushing the equivalent of “eraser button lite” through the backdoor via COPPA expansion.

### VIII. Dodging the COPPA/Mandatory Age Verification Bullet

The Commission deserves credit for very wisely ignoring calls by some to extend the coverage of COPPA’s regulatory provisions from children under 13 all the way up to teens up to 18. The Commission notes:

The COPPA model would be difficult to implement for teenagers, as many would be less likely than young children to provide their parents’ contact information, and more likely to falsify this information or lie about their ages in order to participate in online activities. In addition, courts have recognized that as children age, they have an increased constitutional right to access information and express themselves publicly. Finally, given that adolescents are more likely than young children to spend a greater proportion of their time on Web sites and online services that also appeal to adults, the practical difficulties in expanding COPPA’s reach to adolescents might unintentionally burden the right of adults to engage in online speech.<sup>17</sup>

An effort to expand COPPA’s “verifiable parental consent” requirements to all teens would have raised thorny First Amendment issues as well as a host of practical enforcement concerns. That would have required Internet-wide age verification of children *and adults* in order to ensure that everyone was exactly who they claimed to be online. In turn, that would have raised constitutional issues similar to those that were already litigated as part of the decade-long legal

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<sup>16</sup> Adam Thierer, “Erasing Our Past On The Internet,” *Forbes.com*, April 17, 2011, <http://blogs.forbes.com/adamthierer/2011/04/17/erasing-our-past-on-the-internet>; Emma Llansó, “Do Not Track for Kids Act: Good Idea Raises Real Challenges,” Center for Democracy & Technology, May 16, 2011, <http://cdt.org/do-not-track-for-kids>.

<sup>17</sup> COPPA proposed rule, 59805.

battle over the Children’s Online Protection Act (COPA), a 1998 law sometimes confused with COPPA. COPA’s age-verification provisions were tested many times over and always found to be in violation of the First Amendment. The Commission deserves credit for avoiding this constitutional minefield.

## **IX. Conclusion**

In closing, it is important to note that sites and services that cater to children have been putting other safety procedures and practices into place as the Internet and social media evolves. This is important because parental notification is not the end of the online safety story. Indeed, *when it comes to online safety, it is not what happens before kids get in the door that counts, it is what happens after kids get inside that really matters.* The Commission ignores that distinction here and just keeps insisting that we can find better ways to perfect “verifiable parental consent” mechanisms. The more sensible operational baseline should be that kids generally *will* get online and onto the sites and service they most desire. This is not to say that this is always right or good, rather it is simply the new reality we must come to grips with in an age of ubiquitous, “always-on” digital connectivity.

In a recent Mercatus Center working paper entitled “Kids, Privacy, Free Speech & the Internet: Finding the Right Balance,” I outlined some of the constructive steps that online companies and independent organizations and app developers have been taking to help facilitate various online safety and privacy objectives.<sup>18</sup>

In closing, this much should be clear: our online and offline lives are growing more intertwined. That is true for both adults and kids. Consequently, our children will continue to get online at younger and younger ages, often with the help of their parents. We should not expect government regulation, no matter how well-intentioned, to stop that reality or to take over the difficult job of parenting in the information age.

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<sup>18</sup> Adam Thierer, “Kids, Privacy, Free Speech & the Internet: Finding the Right Balance,” (working paper, Mercatus Center at George Mason University, 2011), <http://mercatus.org/publication/kids-privacy-free-speech-internet>.

Whatever one thinks about the effectiveness or sensibility of the COPPA regulatory model for the Web 1.0 world, it is clear that the regime is being strained by the unforeseen realities of the Web 2.0 world of hyper-ubiquitous connectivity and user-generated content creation and sharing. The digital genie cannot be put back in the bottle. While COPPA may continue to have a marginal role to play in this rapidly evolving world, that role will likely be increasingly limited by the inherent realities of the information age.