



Office of the Secretary

United States of America
FEDERAL TRADE COMMISSION
WASHINGTON, D.C. 20580

May 6, 2013

Michael Beckerman, Representing the Internet Association
Michael Zaneis, Representing the Interactive Advertising Bureau
William L. Kovacs, Representing the U.S. Chamber of Commerce
Julia Tama, Representing Nineteen Signatory Trade Associations
Jon Potter, Representing the Application Developers Alliance

Dear Mr. Beckerman, Mr. Zaneis, Mr. Kovacs, Ms. Tama, and Mr. Potter:

Thank you for your letters on behalf of the organizations that you represent requesting that the Federal Trade Commission (“FTC” or “Commission”) delay the effective date of the amendments to the Children’s Online Privacy Protection Rule (“Rule”).¹

As you know, the amended Rule is the product of an open and transparent process that began over three years ago, when the Commission announced that it would host a public roundtable to discuss the impact on the Children’s Online Privacy Protection Act (“COPPA”) of new technology and changes to the way children access and use the Internet.² Shortly thereafter, the FTC issued a request for public comment on its implementation of COPPA through the Rule. After the roundtable and the call for public comment, in 2011 the Commission issued a Notice of Proposed Rulemaking setting forth proposed changes to the Rule.³ In this notice, the Commission indicated its review of the COPPA Rule was on “an accelerated schedule” due to “the rapid-fire pace of technological change since the Commission’s 2005 review, including an explosion in children’s use of mobile devices, the proliferation of online social networking and interactive gaming.”⁴ The following year, the Commission issued a Supplemental Notice of Proposed Rulemaking.⁵ In both cases, the FTC solicited, and received, comments from a wide variety of stakeholders, including individual companies and trade associations that represent application (“app”) developers, online publishers, advertisers, and other entities with obligations under COPPA.

¹ Children’s Online Privacy Protection Rule final rule amendments, 78 FR 3972 (Jan. 17, 2013), *available at* <http://www.ftc.gov/os/fedreg/2013/01/130117coppa.pdf>.

² See <http://www.ftc.gov/opa/2010/03/coppa.shtm> (March 24, 2010 press release announcing workshop held on June 2, 2010).

³ 2011 Notice of Proposed Rulemaking (“2011 NPRM”) (Sept. 27, 2011), 76 FR 59804, *available at* <http://ftc.gov/os/2011/09/110915coppa.pdf>.

⁴ 2011 NPRM, 76 FR at 59804.

⁵ 2012 Supplemental Notice of Proposed Rulemaking (“2012 SNPRM”) (Aug. 6, 2012), 77 FR 46643, *available at* <http://ftc.gov/os/2012/08/120801coppa.pdf>.

Upon announcing the final amendments to the Rule on December 19, 2012, the Commission also issued a document detailing the basis and purpose for its decision to adopt certain of the proposed amendments.⁶ This statement of basis and purpose (“SBP”) sets forth the Commission’s analysis of the public comments received and explains both the rationale for, and the effect of, the specific changes to the Rule. Moreover, as the SBP notes, in analyzing the public comments and adopting the final amendments, the Commission took into account the costs and burdens of complying with the Rule. Indeed, the Commission specifically chose July 1 as the effective date in order to allow operators enough time to come into compliance.⁷ This six-month interval between the issuance of the final amended Rule and its effective date is consistent with the six-month interval between the issuance of the original Rule on November 3, 1999 and its effective date on April 21, 2000.

The Commission appreciates that some of your members will need to make changes to their business practices in order to comply with the amended Rule. At the same time, we note that all stakeholders have had sufficient opportunity to raise issues and articulate their concerns, the SBP provides sufficient guidance regarding the obligations the amended Rule will impose on COPPA-covered entities, and the more than six-month time period between issuance of the amended Rule and its effective date is adequate. Moreover, petitioners have not raised any concrete facts to demonstrate that a delay is necessary. In light of these factors, combined with the Congressional mandate to protect the privacy of children under the age of 13 and the Commission’s commitment to “[e]nsure that COPPA continues to meet its originally stated goals to minimize the collection of personal information from children and create a safer, more secure online experience for them,”⁸ the Commission finds no basis for delaying the effective date of the amended Rule.

Your letters note some specific concerns. First, the letters raise issues with respect to the “actual knowledge” standard and the liability of third parties that collect information from children on child-directed sites. As you know, even before the amendments to the Rule, COPPA applied to general audience Web sites and online services with actual knowledge that they were collecting personal information from children under 13. In the 2012 SNPRM, the Commission proposed holding any entity responsible for COPPA compliance if it “‘knows or has reason to know’ it is collecting personal information through a Web site or service directed to children.”⁹ However, in the final amended Rule, the Commission narrowed the standard proposed in the 2012 SNPRM so that a general audience entity is liable under COPPA when it has *actual knowledge* that it is collecting personal information directly from users of a child-directed site or service.¹⁰ Moreover, in the SBP to the final Rule the Commission provided specific guidance as to what would constitute actual knowledge:

⁶ See <http://www.ftc.gov/opa/2012/12/coppa.shtml> (Dec. 19, 2012 press release announcing adoption of final amendments to the COPPA Rule).

⁷ 78 FR at 3997.

⁸ 78 FR at 3972.

⁹ 2012 SNPRM, 77 FR at 46644.

¹⁰ 78 FR at 3978.

Knowledge, by its very nature, is a highly fact-specific inquiry. The Commission believes that the actual knowledge standard it is adopting will likely be met in most cases when: (1) A child-directed content provider (who will be strictly liable for any collection) directly communicates the child-directed nature of its content to the other online service; or (2) a representative of the online service recognizes the child-directed nature of the content.¹¹

Furthermore, in the 1999 statement of basis and purpose to the original Rule the Commission indicated actual knowledge would be present where an operator learns of a child's age or grade from a registration or from a concerned parent, a position which staff has reiterated in its FAQs for many years.¹²

Second, the letters raise concerns with respect to the liability of child-directed sites and services for the conduct of third parties. The Commission carefully considered comments regarding its proposal to hold such sites and services strictly liable for any third-party collection of personal information, recognizing "the potential burden [such] standard places on child-directed providers, particularly small app developers."¹³ In adopting the final Rule, the Commission noted that "it cannot be the responsibility of parents to try to pierce the complex infrastructure of entities that may be collecting their children's personal information through any one site. . . the primary-content site or service is in the best position to know which plug-ins it integrates into its site."¹⁴ However, the Commission made clear that, although it would not provide a safe harbor from liability, the Commission would consider the level of due diligence exercised by a primary-content provider in applying its prosecutorial discretion.¹⁵

Third, the letters state that a delay is appropriate because of the lead time necessary for companies to address changes to the definition of personal information. We understand the main concern with the expanded definition of personal information involves the "persistent identifier" category. In both the 2011 NPRM and in the 2012 SNPRM, the Commission proposed to broaden the "persistent identifier" category in the definition of "personal information."¹⁶ These proposals – broader than were ultimately reflected in the Rule – were thus under consideration at an early stage of the rulemaking process. While the inclusion of persistent identifiers in the final amended Rule will mean certain operators will have new compliance obligations under COPPA, the Commission took several steps to reduce the potential burden in the Rule. For example, the Commission recognized "that persistent identifiers are also used for a host of functions that have little or nothing to do with contacting a specific individual, and that these uses are fundamental to the smooth functioning of the Internet, the quality of the site or service, and the individual user's experience."¹⁷ For this reason, the Commission created an exception to the Rule's notice

¹¹ *Id.* See also *Complying with COPPA: Frequently Asked Questions*, available at

<http://business.ftc.gov/documents/Complying-with-COPPA-Frequently-Asked-Questions>, FAQ 39.

¹² Children's Online Privacy Protection Rule final rule, 64 Fed. Reg. 59888, 59892 (Nov. 3, 1999) available at <http://www.ftc.gov/os/1999/10/64fr59888.pdf>.

¹³ 78 FR at 3977.

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ *Supra*, n.3.

¹⁷ 78 FR at 3980, 3998.

and consent requirements where an operator collects a persistent identifier for the sole purpose of providing support for its internal operations. Moreover, the Commission twice expanded its originally-proposed definition of support for internal operations. In the 2012 SNPRM, the Commission added “user authentication, maintaining user preferences, serving contextual advertisements, and protecting against fraud or theft” and, in the final Rule, frequency capping of advertisements and legal or regulatory compliance.¹⁸ Each of these changes by the Commission helps ease compliance by the effective date.¹⁹ Separate and apart from these limiting changes, the Commission also established a process whereby interested parties could in the future request approval of additional functions as “support for internal operations.”²⁰

While the final Rule sets standards for COPPA-covered entities, it also provides significant flexibility for operators to select the most appropriate cost-effective technologies to achieve the Rule’s requirements. For example, rather than set forth the specific methods that may be used to obtain verifiable parental consent, the Rule retains the standard that it may be obtained via any means reasonably calculated, in light of available technology, to ensure that the person providing consent is the child’s parent. The new data security and minimization requirements do not mandate any specific means to achieve those objectives. Finally, the Commission has made it easier for operators to comply with the Rule when they seek to avoid the collection of children’s personal information. The Rule adopts the “reasonable measures” standard for deleting all or virtually all personal information, thereby enabling operators to use competent filtering technologies to prevent children from publicly disclosing personal information.

Although the Rule does impose new obligations on child-directed sites and services, in selecting an effective date of July 1, 2013 the Commission determined that six months would be adequate time for such operators to assess whether third parties collect personal information through their site or service. Moreover, the Commission’s application of the actual knowledge standard for third parties, guidance as to the meaning of that standard, and provision of support for internal operations for all parties will make it less burdensome for operators to comply by July 1.

Of course, we continue to be mindful of the impact of the Rule on businesses. As with all of our enforcement activities, the Commission will exercise prosecutorial discretion in enforcing the Rule, particularly with respect to small businesses that have attempted to comply with the Rule in good faith in the early months after the Rule becomes effective. Further, the Commission follows a “policy for reducing, or in appropriate circumstances waiving, civil penalties for violations of a statutory or regulatory requirement by a small entity.”²¹ And of course, we will

¹⁸ 2012 SNPRM, 77 FR at 46648; 78 FR at 3980.

¹⁹ 78 FR at 3998.

²⁰ 16 C.F.R. 312.12(b).

²¹ See Notice and Request for Comment Regarding Compliance Assistance and Civil Penalty Leniency Policies for Small Entities (Apr. 8, 1997), available at <http://www.ftc.gov/os/1997/04/62fr16809.pdf>.

continue our efforts to educate the business community through a variety of means such as the webinars, the compliance hotline, the business center blog, and the recently revised FAQs.²² Indeed, the Commission would be pleased to have FTC representatives participate in any meetings of your groups to answer specific questions your members may have.

By direction of the Commission.

Donald S. Clark
Secretary

²² *Complying with COPPA: Frequently Asked Questions*, available at <http://business.ftc.gov/documents/Complying-with-COPPA-Frequently-Asked-Questions>.