

September 24, 2012

VIA ELECTRONIC DELIVERY

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

RE: COPPA Rule Review, 16 CFR Part 312, Project No. P104503

Dear Secretary Clark,

Viacom Inc. (“Viacom”) appreciates the opportunity to comment on the Federal Trade Commission’s proposed revisions to the rules implementing the Children’s Online Privacy Protection Act (“COPPA”).¹ The Commission’s careful consideration of the record in this proceeding and sensitivity to how its proposed revisions will work in practice are essential to ensuring that the COPPA framework continues to protect children’s privacy online without impeding the development of high-quality, relevant, and educational online services for children, teens, families, and other audiences.

Executive Summary

In enacting COPPA, Congress struck a balance between protecting children’s privacy online and ensuring that children have access to high-quality, age-appropriate, and educational websites and online services.² As a result of that balance, the COPPA statute has proven to be a practical, flexible framework that has accommodated an ever-evolving and expanding range of technologies and business practices.

Viacom supports this framework and believes that, over the years, the Commission has appropriately respected the balance achieved by Congress in the statute.³ However, some of the

¹ Viacom is a leading global entertainment company that delivers content through television, motion pictures, and a wide range of digital media.

² See, e.g., 144 Cong. Rec. S 8482–83 (statement of Sen. Bryan); 15 U.S.C. §§ 6501-06.

³ Federal Trade Commission, Final Rule, *Children’s Online Privacy Protection Rule*, 64 Fed. Reg. 59888 (Nov. 3, 1999); Federal Trade Commission, Final Rule Amendment, *Children’s Online Privacy Protection Rule*, 67 Fed.

proposals set forth in the Commission’s most recent Supplemental Notice of Proposed Rulemaking (“Supplemental Notice”) risk upsetting that balance. As a number of the comments filed in this proceeding demonstrate, the proposals set forth in the Supplemental Notice raise significant questions about whether the Commission would exceed its statutory authority and constitutional limits if the Commission adopts them. In addition, in several important respects, the Supplemental Notice is ambiguous about the substance and scope of various entities’ COPPA obligations and raises a variety of practical challenges. Combined, these concerns would have the effect of disrupting the market for high-quality, free online content and services for children, teens, families, and other audiences.⁴

These comments first describe Viacom’s longstanding commitment to protecting children’s privacy while providing enriching educational and entertainment content for children, teens, families, and other audiences. We then discuss our concerns with the proposed rule and its practical effects to explain why (1) COPPA cannot — and should not — be applied to “child friendly” mixed audience sites and services unless the operators of such sites and services have actual knowledge that a user is a child, (2) the expansion of COPPA to “child-friendly” mixed audience sites and services would decimate the market for these sites and services and increase the need for a voluntary, streamlined notice-and-consent process for multiple operators collecting personal information through a single site or service, and (3) further clarification of the “support for internal operations” and “personal information” definitions is necessary to achieve greater harmony with prior Commission and self-regulatory guidance and to provide certainty for industry.

To address these concerns, we urge the Commission to take the following steps in its final COPPA rule:

- Refrain from treating “child-friendly” mixed audience sites and services as child-directed for purposes of the COPPA rule;
- Retain its longstanding guidance for determining whether and when a provider of a site or online service is an “operator” subject to COPPA;
- Continue to treat persistent identifiers as “personal information” for purposes of COPPA only if they are associated with individually identifiable information;

Reg. 18818 (Apr. 17, 2002); Federal Trade Commission, Final Rule Amendment, *Children’s Online Privacy Protection Rule*, 70 Fed. Reg. 21104 (Apr. 22, 2005).

⁴ Federal Trade Commission, Supplemental Notice of Proposed Rulemaking, *Children’s Online Privacy Protection Rule*, 77 Fed. Reg. 46643 (Aug. 6, 2012).

- For third parties that are integrated on child-directed or “child-friendly” mixed audience sites and services, continue to apply an “actual knowledge” standard, rather than an amorphous “reason to know” standard;
- Explicitly recognize that the COPPA statute permits a variety of voluntary “cooperative consent” mechanisms; and
- Harmonize the definitions of “support for internal operations” and “personal information” with previous Commission guidance and self-regulatory standards.

By taking these steps, the Commission will respect the balance that Congress struck between protecting children’s privacy online and promoting vibrant, engaging online experiences for children, teens, parents, and other audiences.

I. Viacom Has A History Of Providing Industry-Leading Educational And Entertainment Content For Children, Teens, And Families Online.

Nickelodeon, which is a business unit of Viacom, is a global entertainment brand that puts kids and families first. For example, Nickelodeon’s flagship website, Nick.com, features our enormously popular program franchises, including *iCarly* and *SpongeBob SquarePants*, and is a place where children can come to enjoy free content that is entertaining, educational, and interactive in an environment that is designed especially for a younger audience.⁵ Parents can similarly find on NickJr.com a broad range of free educational content and interactive activities for their children including games where children can practice their spelling, such as the Dora the Explorer-themed *Swiper’s Spelling Book Game*,⁶ or learn geometric shapes, such as the *Team Umizoomi: Catch That Shape Bandit*.⁷ In addition to its industry-leading websites for children and parents, Nickelodeon also offers a variety of free and affordable educational and entertaining mobile apps such as Nick Jr.’s *Unmizoomi: Zoom into Numbers*, which is a hands-on, interactive way for children to learn math concepts.⁸

Viacom is also a leading online destination for teens. Nickelodeon’s TeenNick offers an authentic teen experience across multiple platforms and integrated social media, including the

⁵ Nick.com, <http://www.nick.com/>.

⁶ Nick Jr., *Swiper’s Spelling Book Game*, <http://www.nickjr.com/games/swipers-spelling-book-game.jhtml?path=/games/dora-the-explorer/all-themes/all-ages/index.jhtml>.

⁷ Nick Jr., *Team Umizoomi: Catch That Shape Bandit*, <http://www.nickjr.com/kids-games/umi-shape-bandit-game.html>.

⁸ Apple iTunes Preview, *Unmizoomi: Zoom into Numbers*, <http://itunes.apple.com/us/app/team-umizoomi-math-zoom-into/id477561655>.

TeenNick website, which is for and about teens,⁹ and Nickelodeon's AddictingGames features a robust selection of free web-based and mobile games tailored for teens and college students.¹⁰

Viacom's steadfast commitment to protecting the privacy of our users, including those users who are under the age of 13, is reflected in our many efforts and initiatives that go above and beyond the COPPA rule's requirements. To provide just a few examples:

- Nickelodeon has partnered with consumer advocates, such as Common Sense Media, to encourage responsible behavior online and to educate children about protecting their online privacy.¹¹
- Nick.com offers numerous resources for parents, including an Online Safety Guide¹² and a layered privacy notice that is clear and straightforward, so that parents and their children can readily understand our information collection practices.¹³
- Applying "privacy by design" principles, Nick.com has taken a number of innovative steps to provide children an interactive experience online without collecting personal information. For instance, children participate in Nick.com's online chats and comment on games by signing in with their "NickName," a username that is not associated with any personal information.¹⁴ Nick.com clearly warns children not to include any personal information in their NickName, and the site's Ground Rules prohibit users from asking anyone for personal information or sharing their personal information with others.¹⁵ When users post comments using their NickNames, trained moderators monitor these posts and remove any personal information *before* it is posted online.

We attribute the success of our sites and apps not only to our commitment to provide compelling content and services of the highest quality, but also to our commitment to protect the privacy and safety of all our online users, including those who are under the age of 13. Viacom respects COPPA's clear distinction between websites and services that are directed to children

⁹ TeenNick, <http://www.teennick.com/>.

¹⁰ AddictingGames, <http://www.addictinggames.com/tag/kid-games.jsp>.

¹¹ Common Sense Media, Press Release, *Common Sense Media Partners with Nickelodeon's The Big Help on Digital Citizenship and Anti-Bullying Campaign* (March 28, 2011), <http://www.common Sense Media.org/about-us/news/press-releases/common-sense-media-partners-nickelodeons-big-help-digital-citizenship-a>.

¹² Nickelodeon, Online Safety Guide, <http://www.nick.com/club/parents-online-safety-guide.html>.

¹³ Nickelodeon, Privacy Policy/Your California Privacy Rights, <http://www.nick.com/info/privacy-policy.html>.

¹⁴ Nickelodeon, Safety Information For Parents, <http://www.nick.com/club/parents-safety-information.html>.

¹⁵ Nickelodeon, Ground Rules, <http://www.nick.com/club/parents-ground-rules.html>.

under 13 and those that are directed to other audiences. Consequently, while we may use ad networks to deliver behaviorally-targeted ads to customize and improve users' experiences on certain sites, we do not employ such services on our sites and services that are directed to children. In this manner, the balance that Congress struck in the COPPA statute has been critical in ensuring that Viacom can continue to innovate and provide enriching, engaging, and age-appropriate educational and entertainment sites and services for children, teens, parents, and other audiences.

The careful balance struck by Congress in COPPA has enabled Viacom to provide children, teens, and families with a wide variety of engaging and age-appropriate websites and online services that meet their educational and entertainment needs while also protecting their privacy and safety online.

II. To The Extent The Commission Determines Greater Clarity Is Needed For “Child Friendly” Mixed Audience Sites And Services, It Should Adopt A Safe Harbor, Not Prescriptive Rules.

Viacom urges the Commission to refrain from creating a new category of “child-friendly” mixed audience sites and services. The Supplemental Notice would extend the definition of a “Web site or online service directed to children” beyond sites or services that are clearly “directed to children” to include a large number of “child-friendly” sites and services that are targeted to a “mixed” or general audience. Specifically, if a site or service, based on its overall content, “is likely to attract an audience that includes a disproportionately large percentage of children under age 13 as compared to the percentage of such children in the general population,” then, under the proposed rule, it would be deemed a “child-friendly” mixed audience site or service and would be required to treat all users as if they are under 13 unless the site or service age screens and acquires actual knowledge that a user is *not* a child.¹⁶

By expanding COPPA's reach to encompass “child-friendly” mixed audience sites, the proposed COPPA rule diverges from the practical, balanced approach that has benefitted children and their parents for more than a decade as technologies and business practices have evolved. As a threshold matter, Viacom agrees with the comments filed by the Online Publishers Association (“OPA”), which demonstrate that the proposed expansion of the “Web site or online service directed to children” definition would (1) be fatally vague; (2) contradict the plain language and legislative history of the COPPA statute; (3) undermine fundamental First Amendment principles; and (4) be inconsistent with COPPA's data minimization principles by requiring operators to collect more information than otherwise would be needed in order to provide parents notice and obtain consent.

¹⁶ 77 Fed. Reg. 46643, 46653 (Aug. 6, 2012).

The proposal also is unnecessary. Operators of child-directed websites or services have always been able to comply with COPPA by age gating, *i.e.*, determining whether a user is under 13 (in which case COPPA would apply) or 13 years of age or older (in which case it would not). This is because the statute's scope is expressly limited to collecting, using, and disclosing data from a "child," which is defined to be a person under the age of 13.¹⁷ If the user is 13 years old or older, then the site or service may collect personal information from that user, and the site or service has no obligation to obtain parental consent. The proposal therefore is unnecessary because it does not appear to solve an existing problem. Indeed, the voluminous record developed in connection with COPPA over the past two years — *e.g.*, 70 comments in 2010; 350 comments in 2011; and hundreds of pages of transcript from the Commission's June 2010 workshop on the COPPA rule review¹⁸ — contains no evidence that "child friendly" mixed audience sites and services pose any greater threat to children's privacy than any other sites and services that are directed to a general audience.

Consequently, there is no reason to amend the COPPA rule in a manner that would subject "child friendly" mixed audience sites and services to more burdensome regulatory requirements. In fact, we believe that doing so would have the unintended effect of reducing the amount of interactive sites and services available to children and of driving children to more mature sites and services. Some operators of "child-friendly" mixed audience sites and services may respond by blocking children from using their interactive features in order to avoid having to obtain parental consent. In addition, some children might be drawn to more mature sites and services in order to avoid the age gates used on "child-friendly" mixed audience sites and services. Neither of these results would further COPPA's goals of promoting children's privacy and encouraging the development of age-appropriate children's content online.

However, if the Commission determines that there is a need to provide more certainty for operators of "child-friendly" mixed audience sites and services, then it could create a COPPA safe harbor for such sites and services. This approach is preferable to prescriptive rules because it achieves many of the benefits of the proposed approach without raising constitutional concerns or creating doubts about its legality.

¹⁷ 15 U.S.C. § 6501(1).

¹⁸ COPPA Rule Review Roundtables, Transcript (June 2, 2010), http://www.ftc.gov/bcp/workshops/coppa/COPPARuleReview_Transcript.pdf.

III. To Avoid A Tangled Web Of Compliance That Would Decimate The Market For Child-Directed And “Child-Friendly” Mixed Audience Sites and Services, The Proposed Expansion Should Be Avoided And, Instead, A Voluntary, Streamlined Compliance Process Should Be Encouraged.

To ensure that children, teens, families, and other audiences continue to have access to a wide array of high-quality, innovative content and apps online, the Commission should refrain from expanding the definitions of “operator,” “Web site or online service directed to children,” and “personal information” in the manner proposed, and should explicitly acknowledge that voluntary, streamlined notice-and-consent procedures are permitted under COPPA, without creating joint liability for all operators that collect personal information through the site or service.

The proposed amendments to the definitions of “personal information,” “operator,” and “Web site or online service directed to children” would create a tangled web of compliance by expanding COPPA’s requirements to (1) third-party services, such as ad networks and social plug-ins, that “know or have reason to know” that they collect persistent identifiers through “child-friendly” mixed audience sites or online services, and (2) first-party, “child-friendly” mixed audience websites and services that use these third-party services but that do not themselves own, control, or access personal information.¹⁹ Under the proposal, these parties would be “equally responsible” for complying with COPPA as “co-operators.”²⁰

While well intentioned, the proposed revisions would upset the careful balance that Congress struck in adopting the COPPA statute because they fail to fully appreciate the distributive nature of the Internet and the role that third-party services play in ensuring that users continue to have innovative and enriching online experiences. Websites and online services, including “child-friendly” mixed audience sites and services, often use various third parties to, for example, analyze, improve, and customize online content; provide engaging and enriching content and services; and deliver advertising that enables sites and services to be offered for free or a low cost. Although these third parties are able to collect certain information through the host website in connection with the third party’s services, the information typically is not shared with the host website or app developer, who often has little insight or control over the third party’s information practices.

By making these website publishers or app developers and a variety of third parties equally responsible for complying with COPPA for a particular site or service, the Supplemental Notice proposes to create a tangled web of compliance that would result in unworkable and

¹⁹ 77 Fed. Reg. at 46645.

²⁰ *Id.*

confusing rules and would devastate the market for affordable, ad-supported child-directed and “child-friendly” mixed audience sites and services.

- A. The proposed COPPA rule would dissuade third-party services, such as ad networks and plugin providers, from operating on child-directed and “child-friendly” mixed audience sites and services, thereby diminishing the quantity and quality of content and apps for children, teens and adults.

Viacom agrees with the comments filed by the Direct Marketing Association (“DMA”) that the proposed COPPA rule would create legal uncertainty and risk for website publishers, app developers, and third-party service providers that are integrated on either child-directed or “child-friendly” mixed audience sites and services. For example, the Supplemental Notice provides no clear guidance about:

- How to determine whether a site or service “is likely to attract an audience that includes a disproportionately large percentage of children under age 13,” in particular because there is no direction on (1) what percentage threshold would be deemed to be “disproportionately” large; (2) how a company would measure its under-13 audience given that internal and various third-party services’ audience measurements differ; and (3) how day-to-day fluctuations in audience compositions affect an entity’s COPPA obligations;
- What would constitute “credible information” under the new “reason to know” standard;
- How third parties must respond once they have a reason to know that the persistent identifiers they collect are from a “child-friendly” mixed audience site or service;
- In instances where third parties use persistent identifiers, how providers of child-directed or child-friendly sites and services can notify parents and obtain consent when they do not themselves access, own, or control any personal information;
- Whether, and to what extent, a child-directed or “child-friendly” mixed audience site or service must “coordinate” with each of the potentially numerous integrated third-party service providers, especially where there is no formal contractual relationship between the parties;
- How the Commission will apportion liability between website publishers and their third-party service providers, given that it can be difficult to determine when liability attaches and when it ends as various ad networks can be frequently integrated and removed from a site or service as advertising campaigns run their course; and

- Whether any third parties beyond social plugin providers and ad networks, such as Internet Service Providers, analytics providers, or embedded video player providers, would be deemed “operators” under the vague “on behalf of” standard, particularly given that a site or service would benefit whenever the third-party service provides “content, functionality, and/or advertising revenue.” Previously, the Commission sought to exclude such entities by adopting a policy that entities are not operators unless they own, control, or access personal information.²¹

Consequently, the proposed COPPA rule provides inadequate notice and is fatally vague.

In addition, these ambiguities would create a tangled web of compliance that might cause some third-party service providers to withdraw from child-directed and “child-friendly” mixed audience sites and services entirely, while others might significantly limit the services they offer on such sites and services. For example, an ad network might refuse to continue offering customized advertising on “child-friendly” mixed audience sites and services and instead offer only contextual ads or untargeted ads, which command a much lower advertising price paid to the website, in order to avoid the regulatory risk. A reduction in ad revenue to the website providing free and affordable content may lead to less content and less innovation. Likewise, an analytics company, despite the fact that it might only aggregate collected information, may choose not to participate in the market for child-directed or “child-friendly” mixed audience sites because the proposed changes create too much legal uncertainty. A reduction in analytics available to websites and services providing free and affordable content may lead to less relevant, less enriching, and less innovative interactive experiences.

Social plugins and customized advertising are essential to the commercial success and consumer enjoyment of many “child-friendly” mixed audience sites and services. For example, customized advertising and analytics have enabled the growth of the market for “child-friendly” mixed audience sites and services by offsetting the substantial cost of developing, deploying, and maintaining compelling, high-quality content and services. And consumers have benefited greatly from the broader availability of robust social media platforms through which they can express their ideas and communicate with others and from more relevant content and services.

²¹ Federal Trade Commission, Notice of Proposed Rulemaking, *Children’s Online Privacy Protection Rule*, 64 Fed. Reg. 22750, 22752 (Apr. 27, 1999) (“In determining who is the operator for purposes of the proposed Rule, the Commission will consider such factors as who owns the information, who controls the information, who pays for the collection or maintenance of the information, the pre-existing contractual relationships surrounding the collection or maintenance of the information, and the role of the website or online service in collecting and/or maintaining the information.”). In adopting the final COPPA Rule in 1999, the Commission explicitly stated that “ISPs and cable operators that merely offer Internet access would not be considered operators under the Rule.” *Id.* at 22752 n. 52.

By, in effect, severely constraining the social and/or advertising options available for child-directed and “child-friendly” mixed audience sites and services, the proposed COPPA rule would diminish the quantity and quality of content and services online for teens and adults. For example, as website publishers would find it more difficult to use third parties to customize the content and advertising on their “child-friendly” mixed audience sites, such sites would become less relevant and robust.

Likewise, mobile app consumers, who according to a recent survey by Harris Interactive prefer ad-supported apps over paid apps, would also suffer if social and/or advertising options would become constrained.²² App developers generally rely on one (or a combination) of three different business models to support the development, distribution, and maintenance of their mobile apps: (1) “ad-supported” apps that are offered to users at no cost and are supported instead through payments paid by advertisers; (2) “freemium” apps that provide users basic functionality at no cost and are supported instead through in-app consumer purchases; and (3) “paid” apps that are supported by consumers through one-time payments or subscription fees. The harder it is to employ advertisements on an application, the more likely the ad-supported model will disappear, leaving only paid apps.

Moreover, the price of apps that are offered at a reduced amount because they are also ad-supported would likely increase. Today, the average purchase price consumers pay for apps ranges from approximately \$2.50 to \$3.00, depending on the platform, and the app developer typically must pay a percentage of this price to the app store provider.²³ By impeding app developers’ ability to use third-party services to customize advertising on their “child-friendly” mixed audience apps, a number of app developers likely would be unable to recoup the cost of complying with COPPA through the cost of their apps alone and would need to either raise their prices, reduce investment in their apps (thereby diminishing their quality), or exit the “child-friendly” mixed audience market entirely.

The proposed COPPA rule also would have the unintended effect of undermining the goals of the COPPA statute. Because child-directed and “child-friendly” mixed audience sites and services typically do not own, control, or have access to the data that a third-party service provider collects through the site or service,²⁴ and because third-party service providers typically

²² Tim Peterson, “Mobile, Facebook App Users Prefer Ad-Supported Versus Paid,” ADWEEK (Aug. 15, 2012), <http://www.adweek.com/news/technology/mobile-facebook-app-users-prefer-ad-supported-versus-paid-142730>.

²³ Sarah Perez, “Games Decreasing in Popularity on Android, Entertainment Apps on the Rise,” TECHCRUNCH (Jan. 29, 2012), <http://techcrunch.com/2012/01/29/games-decreasing-in-popularity-on-android-entertainment-apps-on-the-rise/> (“[T]he average purchase price for just *paid* apps is higher on Android (\$3.17) than on iTunes (\$2.41). This is due to iTunes’ large number of \$0.99 downloads, however, which throw off the average.”) (emphasis in original).

²⁴ 77 Fed. Reg. at 46644 (acknowledging that the site or service “generally has no ownership, control, or access to the personal information collected by the plug-in”).

do not collect any contact information, these “operators” would need to begin collecting additional personal information from children, including at minimum a parent’s online contact information, in order to provide direct notice and obtain parental consent. This result would actually impose greater privacy costs on children and their parents.

- B. To ensure that teens and families continue to have access to a wide array of high-quality, innovative content and apps online, the Commission should refrain from expanding the COPPA rule as proposed.

To restore the balance struck by Congress, the Commission should refrain from expanding the COPPA rule as proposed. Instead, Viacom agrees with DMA, OPA, and the joint comments filed by the National Cable & Telecommunications Association (“NCTA”) and the Motion Picture Association of America (“MPAA”) that the Commission should retain its longstanding standard for determining when a provider of a site or online service is an “operator” subject to COPPA. Specifically, a provider of a site or online service should not be deemed to be an “operator” if it does not access, own, or control personal information collected by third parties through the site or service.

In addition, Viacom agrees with DMA, NCTA, and MPAA that the Commission should continue to treat persistent identifiers as “personal information” for purposes of COPPA only if they are associated with individually identifiable information. This approach not only would provide a more workable COPPA rule, but as the record in this proceeding demonstrates, it also would be more consistent with the plain language and meaning of the COPPA statute, which constrains the Commission’s authority to expand the definition of “personal information” to an identifier that “permits the physical or online contacting of a specific individual.”²⁵

The Commission also should continue to apply the actual knowledge standard that it has used — and defended — in the past to third parties whose general audience services are integrated on “child-friendly” mixed audience sites and services, rather than an amorphous “reason to know” standard.²⁶ This would provide much-needed certainty that would help ensure that the Internet remains a robust and relevant digital environment for teens and adults.

²⁵ 15 U.S.C. § 6501(8)(F).

²⁶ See Federal Trade Commission, Notice of Proposed Rulemaking, *Children’s Online Privacy Protection Rule*, 76 Fed. Reg. 59804, 59806-07 (Sept. 27, 2011) (“[T]he Commission is persuaded that [actual knowledge] remains the correct standard to be applied to operators of Web sites and online services that are not directed to children. Accordingly, the Commission does not advocate that Congress amend the COPPA statute’s actual knowledge requirement at this time. Actual knowledge is far more workable, and provides greater certainty, than other legal standards that might be applied to the universe of general audience Web sites and online services. . . . By contrast, imposing a lesser ‘reasonable efforts’ or ‘constructive knowledge’ standard might require operators to ferret through a host of circumstantial information to determine who may or may not be a child.”).

- C. The Commission should acknowledge that a single operator may satisfy COPPA's obligations for multiple operators collecting personal information on a single website or service, without triggering joint responsibility.

Viacom agrees with the other commenters in this proceeding that encourage the Commission to explicitly recognize that the COPPA statute permits voluntary “cooperative consent” mechanisms. Specifically, first-party and third-party operators should be able to rely on the COPPA compliance representations of their business partners, thereby encouraging first-party sites and services and their third-party service providers to seek assurances that each party will comply with COPPA's restrictions. For example, a first-party operator might rely on a third-party operator's contractual representation that it complies with applicable law. This is consistent with the Digital Advertising Alliance's Self-Regulatory Principles for Online Behavioral Advertising.²⁷

In addition, first-party and third-party operators should be able to streamline the notice-and-consent process by allowing one operator to rely on the parental notice provided and consent obtained by the other party. Specifically, if a first-party operator obtains parental consent, for example, the third-party operator could rely on the first-party operator's COPPA compliance method as long as that third party informs the first party of its data collection practices so that the first party may provide parents sufficient notice.²⁸

To be workable, any revised COPPA rule should clarify that each operator is responsible only for its own data collection, use, and disclosure practices. If both the first-party site or service provider and one or more third-party service providers are “operators” for purposes of the COPPA rule, it would be unrealistic and unreasonable to expect one operator to have the control, access, and resources to monitor the data practices of other operators. In many circumstances, one operator does not have access to the personal information collected by the other operators and does not have insight into or control over how those independently owned and operated companies manage personal information. Furthermore, one of the operators may engage in independent practices that trigger different, and potentially inconsistent, legal obligations. For

²⁷ Digital Advertising Alliance, *Self-Regulatory Principles for Online Behavioral Advertising* (July 2009), <http://www.iab.net/media/file/ven-principles-07-01-09.pdf>. Consistent with these self-regulatory principles, a first party should refer to “the entity that is the owner of the Web site or has Control over the Web site with which the consumer interacts and its Affiliates.”

²⁸ We agree with other commenters in this proceeding, including kidSAFE, Scholastic, and the Association for Competitive Technology, that the use of e-payment accounts tied to a credit card should be a recognized method of obtaining parental consent under COPPA. Under this model, a credit card number is not required for each transaction, but the account number is associated with a credit card and an email or periodic statement alerts the parent of the child's online activity. As the record demonstrates, this approach is analogous to and just as reliable as the current credit card method of parental consent that has been explicitly approved by the Commission.

example, one operator might be a member of a self-regulatory program (such as the Digital Advertising Alliance’s Self-Regulatory Principles for Online Behavioral Advertising or a different Commission-approved COPPA safe harbor program) or otherwise be subject to separate statutory or regulatory obligations, such as health or financial privacy laws. Consequently, it would be unreasonable to hold multiple operators jointly responsible for COPPA compliance. In contrast, the voluntary approaches described above would incentivize operators to develop innovative and privacy-enhancing compliance mechanisms without introducing the unnecessary legal uncertainty that would accompany joint liability.

IV. The Commission Should Further Clarify The “Support For Internal Operations” and “Personal Information” Definitions To Achieve Greater Harmony With Past Commission Guidance And Self-Regulatory Standards.

Viacom appreciates the Commission’s efforts to further clarify and broaden the definition of “support for internal operations.”²⁹ While this effort is a step in the right direction, because the definition of “personal information” still broadly encompasses any persistent identifier “that can be used to recognize a user over time, or across different Web sites or online services, where such persistent identifier is used for functions other than or in addition to support for the internal operations of the Web site or online service,”³⁰ further clarification is needed to ensure that the COPPA rule is consistent with previous Commission guidance and the industry’s self-regulatory principles in order to avoid stifling innovation in the market for online sites and services.

First, consistent with the industry’s Self-Regulatory Principle’s for Online Behavioral Advertising, the Commission should clarify that “contextual advertising” is “advertising based on the content of the Web page being visited, a consumer’s current visit to a Web page, or a search query.”³¹ Currently, there is uncertainty about what “contextual” advertising means for purposes of the COPPA rule, and a clear regulatory definition that is consistent with industry’s common usage would provide certainty in this regard.

Second, consistent with the Commission’s Self-Regulatory Principles for OBA and the Commission’s 2012 Privacy Report, the Commission should clarify that the use of persistent identifiers for first-party advertising and other routine business practices will not be treated as “personal information” for purposes of the COPPA rule. Such practices do not present

²⁹ 77 Fed. Reg. at 46648.

³⁰ *Id.* at 46647.

³¹ Digital Advertising Alliance, *Self-Regulatory Principles for Online Behavioral Advertising*, at 23 (July 2009), <http://www.iab.net/media/file/ven-principles-07-01-09.pdf>.

meaningful privacy risks, and including them would only impede operators' efforts to provide children enriching, interactive sites and online services.

Third, the definition of "support for internal operations" should more explicitly include all of the uses permitted under the Digital Advertising Alliance's Self-Regulatory Program for Multi-Site Data, including: (1) operations and system management purposes, such as (a) intellectual property protection; (b) compliance, public purpose, and consumer safety; (c) authentication, verification, fraud prevention, and security; (d) billing or product or service fulfillment; and (e) reporting or delivery; (2) market research or product development; and (3) de-identification within a reasonable period of time.³²

More generally, Viacom agrees with DMA and OPA that the Commission should clarify that the uses listed in the "support for internal operations" definition are illustrative, and not exclusive, in order to provide industry sufficient flexibility to innovate and to accommodate new technologies and business practices that will no doubt emerge in the next decade before the Commission undertakes its next regularly-scheduled COPPA rule review.

Conclusion

Viacom thanks the Commission for considering its comments on the revisions proposed in the Supplemental Notice. We hope that these comments will allow the Commission, consistent with the balance that Congress struck in the COPPA statute, to better understand the practical impact the proposed revisions would have on the continued development of high-quality, relevant, and educational online services for children, teens, parents, and other audiences.

³² Digital Advertising Alliance, *Self-Regulatory Principles for Multisite Data* (November 2011), <http://www.aboutads.info/resource/download/Multi-Site-Data-Principles.pdf>.

Respectfully submitted,

/s/ _____

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