September 24, 2012

BY ELECTRONIC FILING

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:

The Entertainment Software Association ("ESA") appreciates the Commission's careful consideration of the record in this proceeding and its efforts to balance the need to encourage parental involvement in a child's online activities with the need to facilitate rich, interactive online experiences for children. Most significantly, the Commission took important steps in the right direction in its Supplemental Notice of Proposed Rulemaking ("Supplemental NPRM") by further limiting the instances in which user or screen names will be treated as "personal information" for purposes of COPPA and revising the definition of "support for the internal operations" to more clearly cover industry practices that pose little or no risk to children's privacy.[1] ESA believes, however, that the Commission could further clarify the proposed scope

[1] 77 Fed. Reg. 46643 (Aug. 6, 2012) ("Supplemental NPRM").

of the revised definitions of personal information and internal operations consistent with its stated intent, and proposes herein such clarifying language.

Beyond this threshold issue, ESA is generally supportive of the Commission's goal of providing industry clearer guidance for how the revised COPPA Rule will apply to new technologies and practices, such as social plugins and online behavioral advertising. That said, ESA is concerned that, in certain respects, the supplemental revisions do not go far enough and that, in other respects, they exceed the bounds of the COPPA statute. Therefore, as described in more detail below, ESA encourages the Commission to:

1. Clarify that screen or user names may be used to contact children in circumstances where no additional personal information is collected or disclosed;

2. Explicitly recognize that the COPPA statute permits streamlined parental notice and consent procedures without holding multiple operators jointly responsible;

3. Decline to hold third-party platform services responsible for complying with the COPPA Rule solely because they have "reason to know" that personal information is collected through a child-directed website;

4. Encourage mixed audience sites that are directed to children to age screen their users through a voluntary safe harbor, rather than prescriptive rules; and

5. Phase in any new requirements over a six-month period and grandfather certain features and systems where the burden of compliance on parents and operators outweighs any corresponding benefit to children's privacy.

These five steps, in addition to those proposed in ESA's previously-filed comments, will help ensure that parents are well informed about and involved in their children's online activities while also affording operators sufficient flexibility to offer children innovative and engaging online experiences.

I. THE COMMISSION SHOULD REVISE THE TEXT OF THE COPPA RULE TO CLARIFY THAT SCREEN OR USER NAMES MAY BE USED TO CONTACT CHILDREN IN CIRCUMSTANCES WHERE NO ADDITIONAL PERSONAL INFORMATION IS COLLECTED OR DISCLOSED.

In the Supplemental NPRM, the Commission agreed with ESA and other commenters that the proposed revisions to the COPPA Rule's definition of "personal information" should be narrowed with respect to screen and user names. The Commission recognized that single sign-ins across sites and services can be beneficial for children and parents. In addition, the Commission emphasized that it did not intend to preclude the use of screen and user names to avoid the collection of individually identifiable information and that it continues to support "the data minimization purposes behind operators' use of screen and user names."[2]

ESA appreciates the Commission's thoughtful consideration of the practical effects the proposed revision could have on children's online activities and agrees with the Commission's objective of encouraging operators to continue taking steps to minimize the personal information that is collected online from children. ESA continues to believe, however, that the proposed expansion of the "personal information" definition to include screen and user names is unnecessary, and that the Commission's stated objectives are best achieved by continuing to permit operators flexibility to use screen names in lieu of personally identifiable information. Of course, where screen and user names function to enable children to make personal information "publicly available through a chat room, message board, or other means," such activities are already subject to COPPA, including the parental notice and consent requirements.[3]

[2] Supplemental NPRM, at 46646–47.

[3] 16 C.F.R. § 312.2.

In contrast to these unmoderated and unfiltered interactive features, and consistent with the data minimization principles that the Commission supports, operators often use screen and user names to permit limited social interactions that do not otherwise result in the collection, use, or disclosure of personal information. Indeed, in the video game context, for example, screen or user names (also commonly referred to as "gamer tags") are often used to provide interactive features that *promote*, rather than undermine, children's privacy and safety. For example, some forms of chat are canned, filtered, or moderated so that no personal information beyond the child's screen or user name is disclosed to other players. Video game publishers also use screen or user names to allow a child to play a game in multiplayer mode (i.e., game "matchmaking"). In such circumstances, the only interaction between the players is the game play, which does not involve any collection or disclosure of personal information. Screen or user names also enable child players to "gift" virtual items to each other. For instance, a child might be encouraged to help a friend advance to the next level by sharing a piece of armor or a special power, and screen or user names can facilitate this process. And a video game publisher might use a screen or user name to deliver personalized content or one-way "push" notifications to a particular player about the game, in which case the child is not able to transmit any personal information back to the video game publisher.

We understand the explanation provided in the Supplemental NPRM to convey that the Commission did not intend to cover these (and similar) uses of screen and user names, as uses that actually promote children's privacy by avoiding the collection of individually identifiable information plainly should not trigger COPPA. This point is critical. Ensuring that these common, well-established uses of screen and user names do not transform them into "personal

information" for COPPA purposes will encourage operators to provide children innovative and engaging online services while enabling operators to avoid having to collect more sensitive information, such as a parent's e-mail address, in order to obtain parental consent.

Although ESA believes the intended scope of the COPPA Rule as described in the Supplemental Notice is consistent with ESA's view, further revision of the actual text of the proposed COPPA Rule would clarify that activities similar to those described above do not equate to "direct contact" with a child online in a manner that triggers COPPA's requirements.

In particular, the Commission could further revise the definition of "support for internal operations" to make clear that screen or user names may be used to contact children in circumstances where such contacting is for the purpose of providing support for internal operations. Under this approach, the text of the COPPA Rule could be further revised as follows:

> (d) A screen or user name where it functions in the same manner as online contact information, as defined in this Section, except to the extent that the contact is for the purpose of providing support for the internal operations of the web site or online service;
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> ***
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> *Support for the internal operations of the Web site or online service* means those activities necessary to, for example: (a) Maintain or analyze the functioning of the Web site or online service; . . . so long as the information collected for the activities listed in (a)-(f) is not used or disclosed ~~to contact a specific individual or~~ for any other purpose.

This approach would help clarify that the activities identified above, such as using screen or user names to enable moderated or filtered chat and multiplayer game modes, do not trigger COPPA's parental notice and consent requirements because in such circumstances the

screen or user names function to support the internal operations of the video game service, such as authenticating users, personalizing content, fulfilling a child's request, and maintaining the functioning of the online service.[4]

II. THE PROPOSED EXPANSION OF THE "OPERATOR" DEFINITION DEMONSTRATES THE BENEFITS OF VOLUNTARY, STREAMLINED PARENTAL NOTICE AND CONSENT PROCEDURES.

The Supplemental NPRM would reverse longstanding Commission guidance and expand the "operator" definition to hold a provider of a child-directed website or online service ("Child-Directed Platform") responsible for complying with COPPA if it integrates into its site or service other services that (i) collect personal information from visitors through the Child-Directed Platform and (ii) are not provided by service providers ("Third-Party Platform Services").[5] For the first time, the Child-Directed Platform would be responsible for complying with COPPA even if it does not itself own, control, or have access to the collected personal information. And yet, the Supplemental NPRM is silent on the suitability of more flexible, streamlined approaches to notice and consent in multiple operator scenarios, without which the proposed expansion of COPPA's reach would undermine the very objectives the Commission has identified.

[4] To ensure that the definition also remains relevant as online technologies and practices continue to evolve, ESA also encourages the Commission to specify that the list included in the definition is illustrative, not exhaustive. For example, we understand that the Commission does not intend to exclude research and development activities, service improvements, or first-party marketing.

[5] The COPPA Rule's definition of a "third party" explicitly carves out a "person who provides support for the internal operations of the website or online service and who does not use or disclose information protected under this part for any other purpose" and distinguishes such entities from "operators" who are subject to COPPA's requirements. 16 C.F.R. § 312.2; *see also* 64 Fed. Reg. 22750, 22752 (Apr. 27, 1999). Given that the Commission is not proposing to revise this definition, we understand that plugin providers and ad networks that qualify for this service provider exemption would not be affected by the proposed changes.

Indeed, the expansive interpretation proposed in the Supplemental NPRM illustrates why voluntary, streamlined parental notice and consent procedures can be a useful and appropriate approach where multiple operators collect personal information through a single website or online service. Operators of Child-Directed Platforms often are not in a position to obtain parental consent before Third-Party Platform Services collect personal information through the platform because, as the Supplemental NPRM acknowledges, many providers of Child-Directed Platforms do not themselves access, own, or control any personal information on or through their platforms. This means that they have no way of contacting a child's parent in order to provide notice and obtain consent.

In such circumstances, operators of Child-Directed Platforms should be able to rely on the representations of or the steps taken by the Third-Party Platform Service to comply with COPPA. Otherwise, operators of the Child-Directed Platform would be encouraged to avoid the risk of COPPA liability by either (i) collecting additional (and more sensitive) categories of personal information, such as the parent's online contact information and the name of the child or the parent, in order to independently provide parental notice and obtain consent or (ii) removing Third-Party Platform Services from their Child-Directed Platforms altogether. Neither of these options benefits children or parents. As explained in our previously filed comments, requiring the operator of the Child-Directed Platform and the operator of the Third-Party Platform Service to separately provide notice and obtain consent for data collected through a single Child-Directed Platform could confuse and unduly burden parents.[6] This

[6] Letter from Christian Genetski, Senior Vice President & General Counsel, ESA, to Mr. Donald S. Clark, Secretary, Federal Trade Commission, 24 (Dec. 23, 2011), http://www.ftc.gov/os/comments/copparulereview2011/00349-82375.pdf.

problem is exacerbated where a child may interact with numerous Third-Party Platform Services through the Child-Directed Platform. For example, if a parent purchases a 99 cent mobile application that includes three different social plugins, the cost to the parent to provide parental consent for those three operators could exceed the cost of the mobile app itself.[7] And the removal of all Third-Party Platform Services from Child-Directed Platforms denies children access to innovative and engaging online experiences that help build important digital literacy skills and decimates the market for affordable, ad-supported websites and online services for children.

As explained in our previously filed comments, the COPPA statute and the FTC's COPPA Rule permit streamlined parental notice and consent procedures where multiple operators collect personal information through a single website or online service.[8] Such streamlined procedures could help minimize some of the practical challenges identified above. Where the Third-Party Platform Service has actual knowledge that a user is under 13 years old, the Child-Directed Platform can rely on the parental notice, consent, and access provided by the Third-Party Platform Service provider and need not independently comply with such obligations. In addition, this approach is consistent with the statement in the Supplemental NPRM encouraging operators to "cooperate to meet their statutory duty to notify parents and obtain parental consent."[9]

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[7] The current cost of a U.S. postage stamp is 45 cents. Therefore, a parent would need to pay $1.35 in postage to mail a print-and-send consent form to the three plugin providers.

[8] Letter from Christian Genetski, Senior Vice President & General Counsel, ESA, to Mr. Donald S. Clark, Secretary, Federal Trade Commission, 24–25 (Dec. 23, 2011), http://www.ftc.gov/os/comments/copparulereview2011/00349-82375.pdf. ESA continues to encourage the Commission to explicitly confirm that streamlined notice and consent procedures are permitted under COPPA.

[9] Supplemental NPRM, at 46645.

ESA does not agree, however, that operators of Child-Directed Platforms and Third-Party Platform Services generally should be "equally" or jointly and severally responsible under the COPPA Rule. As ESA explained in its comments, if a Third-Party Platform Service wants to collect, use, or disclose the child's personal information in ways that are materially different from the prior parental notice, that operator should be solely responsible for providing additional notice and obtaining further consent for such purposes. And because one operator is unlikely to have any insight or control over how another operator uses and discloses the child's personal information, each operator should remain solely liable for its own privacy practices.

III. HOLDING THIRD-PARTY PLATFORM SERVICES WITH "REASON TO KNOW" RESPONSIBLE FOR COMPLYING WITH THE COPPA RULE WOULD BE CONTRARY TO THE COPPA STATUTE AND WOULD CREATE SIGNIFICANT PRACTICAL DIFFICULTIES.

The Supplemental NPRM would greatly expand the COPPA Rule to impose, for the first time, COPPA obligations on Third-Party Platform Services that are directed to a general audience but that have "reason to know that [they are] collecting personal information" through a Child-Directed Platform.

The Commission lacks statutory authority to adopt this proposed change. The statute is clear that a site or online service that is not directed to children is not subject to COPPA unless it has "actual knowledge" that it collects personal information from a child under 13.[10] This

[10] *See, e.g.*, 15 U.S.C. § 6502(b)(1)(A) (limiting the Commission's authority to promulgate regulations governing an operator of a general audience site or online service to those that have "actual knowledge that it is collecting personal information from a child").

statutory text precludes the Commission from subjecting such operators to a more subjective "reason to know" standard.

The fact that COPPA defines a "website or online service directed to children" to include a "portion" of a general audience site or service that is targeted to children does not alter this conclusion. Contrary to the assertion in the Supplemental NPRM, the COPPA statute does not provide the Commission "broad discretion" to define the term "Web site or online service directed to children." There is only one instance where the statute provides the Commission explicit, but limited, discretion to refine the statutory definitions, and that is in the definition of "personal information."[11] Under common principles of statutory interpretation, the fact that Congress could have provided the Commission broad authority to revise the definitions but chose not to do so is strong evidence that the Commission's statutory authority is constrained.

Even assuming that the Commission could broadly interpret (as opposed to redefine) the statutory definition of a "website or online service directed to children," it cannot do so in a way that is inconsistent with the plain meaning of the statute. The statute states that an online service, or a portion thereof, "shall not be deemed directed to children solely for referring or linking to a commercial website or online serviced directed to children by using information location tools, including a directory, index, reference, pointer, or hypertext link." However, this is exactly the function served by the Third-Party Platform Services that are the focus of the Supplemental NPRM. Social plugin providers and ad networks each use similar technologies (e.g., cookies and web beacons) to provide their Third-Party Platform Services. When a user

[11] *Id.* § 6501(8)(F) ("The term "personal information" means individually identifiable information about an individual collected online, including . . . any other identifier that the Commission determines permits the physical or online contacting of a specific individual.").

visits a website where the Third-Party Platform Service has been integrated, the Third-Party Platform Service technology points the user's browser to the servers of the Third-Party Platform Service provider so that specific information (e.g., an ad or social content) can be located and retrieved. These servers direct the content back to the user's browser, using the IP address and similar persistent identifiers that are automatically collected by the Third-Party Platform Service provider when the call is initiated. Because the proposed COPPA Rule would deem Third-Party Platform Services to be directed to children solely for referring or linking to a child-directed site or service, it is inconsistent with the statute's plain meaning.

Not only would the proposed expansion of the COPPA Rule go beyond the limits of the COPPA statute, but it also would raise significant practical challenges because the "reason to know" standard is impermissibly vague. In explaining what this standard means, the Commission states that operators "will not be free to ignore credible information *brought to their attention*."[12] However, existing Commission guidance is clear that an operator has actual knowledge "where a site learns of a child's age, for instance, from a concerned parent who has discovered that his child is participating on the site."[13] If age information must be brought to the operator's attention for the "reason to know" standard to be met, then the "reason to know" standard would be no different from the actual knowledge standard, and should be removed as superfluous. If, however, the Commission intends for the "reason to know" standard to go beyond actual knowledge, then it is not clear what information must be brought to the operator's attention to be "credible."

[12] Supplemental Notice, at 46645 (emphasis added).

[13] COPPA FAQ # 41(a), http://www.ftc.gov/privacy/coppafaqs.shtm; *see also* 64 Fed. Reg. 59888, 59892 (Nov. 3, 1999).

Footnote 18 of the Supplemental NPRM provides some additional, although potentially conflicting, guidance. That reference indicates that the standard "require[s] a person to draw a reasonable inference from information he does have." This language implies that an operator is responsible whenever it has constructive knowledge that a particular user is under 13. The Commission properly concluded in its 2011 proposed COPPA Rule, however, that imposing a constructive knowledge standard would be unworkable because it "might require operators to ferret through a host of circumstantial information to determine who may or may not be a child."[14]

Not only is it ambiguous when the operator of a Third-Party Platform Service will be deemed to have "reason to know" that it collects personal information through a child-directed site or service, but it also is even less clear when this "reason to know" standard would result in liability for the operator of the Child-Directed Platform. As explained above, the proposal suggests that a Child-Directed Platform and Third-Party Platform Services would be "equally responsible" for complying with COPPA as "co-operators." A Child-Directed Platform, however, is in no position to determine whether a Third-Party Platform Service knows or has reason to know that the website is child-directed (unless the operator of the Child-Directed Platform is required to notify the Third-Party Platform Service provider that the site or service is child-directed, which is not contemplated in the Supplemental NPRM).[15] The situation is further complicated by the fact that while some Third-Party Platform Services on the site might know

[14] 76 Fed. Reg. 59804, 59806 (Sept. 27, 2011).

[15] If COPPA is not triggered because a Third-Party Platform Service neither has actual knowledge or reason to know that it collects personal information on a Child-Directed Platform, then the operator of the Child-Directed Platform clearly should not incur liability as a co-operator.

or have reason to know that the platform is child-directed, others might not, which would leave the operator's COPPA obligations unclear and potentially inconsistent.

In light of these concerns, cautious operators may reasonably determine that the legal risk of inadvertently triggering the "reason to know" standard cautions against working with Child-Directed Platforms or, conversely, from permitting the use of Third-Party Platforms Services on the Child-Directed Platform. The cumulative effect, spread out over numerous operators across a variety of services, could be that children have less interactivity options to explore, a result that is contrary to the intent of COPPA.

The proposal also suffers from difficult technical obstacles. Plugins automatically collect persistent identifiers at the moment the user visits the site, so requiring parental notice and consent before any personal information is collected would be unworkable, unless the exception for "internal operations" is broadened. Similar technological issues have prompted the Commission in the past to limit how COPPA applies to the collection of persistent identifiers. For example, in implementing the COPPA statute in 1999, the Commission refused to interpret the definition of "personal information" to include persistent identifiers that are not associated with individually identifiable information, in part because this interpretation would make the COPPA Rule unworkable as some persistent identifiers "are automatically collected" when a user visits the site or service.[16] More recently, the Commission shifted the focus of the rules to how persistent identifiers are *used*, rather than how they are *collected*, acknowledging that treating persistent identifiers as personal information based on their

[16] 64 Fed. Reg. 59888, 59892 (Nov. 3, 1999).

collection would be "over-broad and unworkable" because "a site or service would be liable for collecting personal information as soon as a child landed on its home page or screen."[17]

To avoid these significant jurisdictional and practical concerns, the FTC should remove the "reason to know" standard from its proposed COPPA Rule. Under this alternative approach, where the operator of a child-directed video game site incorporates a social plugin on the site, for example, and does not otherwise collect personal information in a manner that triggers COPPA's requirements, then that website operator would not be responsible for providing parental notice and obtaining consent unless the social networking service obtains actual knowledge that a particular user is under 13. As described above, in such circumstances, the operator of the video game site should be able to rely on the steps taken by the social networking service to comply with COPPA's requirements.

IV. THE COMMISSION CAN BETTER CREATE THE RIGHT INCENTIVES USING A SAFE HARBOR FOR CHILD-FRIENDLY MIXED AUDIENCE SITES, AND SHOULD NOT REQUIRE SUCH SITES TO AGE-SCREEN THEIR USERS.

The Supplemental NPRM would create a new subcategory of "child-friendly mixed audience" sites and services from within those sites that are directed to children for those sites that, "[b]ased on the overall content of the Web site or online service, [are] 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." Those sites would not be considered directed to children where the operator does not collect personal information from any visitor prior to collecting age information and obtains parental consent

[17] 76 Fed. Reg. 59804, 59812 (Sept. 27, 2011).

for any user that indicates that he or she is under the age of 13 before any personal information is collected, used, or disclosed.

ESA agrees with the Commission that any operator, regardless of whether the site or service is directed to children or not, should be able to use a neutral age screen as a reasonably reliable mechanism to determine the age of a particular user. In the more than a decade since the COPPA Rule was first implemented, age screens have proven to be a practical method for operators to determine whether parental consent is required for a particular user, and efforts to encourage their widespread use are welcome.

However, ESA is concerned that the proposal in the Supplemental Notice could be read to mandate age screens for all child-friendly mixed audience sites, even those that are not child directed based on the factors in the definition. In its current form, the proposal for "child-friendly mixed audience" sites and services is ambiguous because it is unclear when a site or service will be "likely to attract" a "disproportionately large" audience of children and there is no guidance on how an operator should measure the percentage of children under 13 in the general population.

To avoid this legal uncertainty while still encouraging operators to use neutral age screens, ESA requests that the Commission adopt a safe harbor for operators that age gate their users and obtain parental consent for users who indicate they are under 13. As opposed to prescriptive rules, which could have the unintended effect of chilling innovation and discouraging the development of sites and services that are appropriate for children, a safe harbor would help ensure that sites and services that protect children's privacy and safety continue to be offered and flourish.

V. THE COMMISSION SHOULD PHASE IN ANY NEW REQUIREMENTS OVER A SIX-MONTH PERIOD AND GRANDFATHER CERTAIN FEATURES AND SYSTEMS.

If adopted, the Supplemental NPRM, combined with the previously proposed revisions, would profoundly expand the scope of the COPPA Rule in ways that will require operators who already are subject to COPPA and hundreds (or more realistically, thousands) of new operators to significantly alter their current business practices. Some of these changes—including the proposed elimination of the e-mail plus parental consent method, the expanded definition of "personal information," and the requirement to age screen users on child-friendly mixed audience sites—may require operators to develop and implement entirely new parental consent mechanisms or make technical changes to the ways in which their sites or services operate. To allow industry sufficient time to bring their sites and services into compliance, any revisions that ultimately are adopted in the final COPPA Rule should apply only to personal information that is collected more than six months after the final COPPA Rule is published in the *Federal Register*.[18]

In addition, there most certainly will be instances where the burden of compliance on parents and operators would outweigh any corresponding benefit to children's privacy. For example, if an operator previously allowed a child to register for a site or service using the e-mail plus parental consent method, it would be unduly disruptive and overly burdensome for the operator to obtain new consent from the child's parent using one of the other parental consent methods before any personal information could be collected from the child after the effective date of the new rules. Similarly, if personal information will be collected through a

[18] *See* 64 Fed. Reg. at 59898 (concluding that the new COPPA requirements would apply only to information collected after the effective date of the Commission's COPPA Rule).

system, such as a video game console, that was manufactured prior to the effective date of the final COPPA Rule, an operator should be permitted to continue collecting, using, or disclosing personal information from users through such system consistent with the existing COPPA Rule. Such systems should be grandfathered because it can be technologically difficult, if not impossible, to alter the system design after manufacturing has begun. Even if changes can be made through the software, which is not always the case, a user might refuse to install the necessary software updates. In situations like these, where the burden of compliance on parents and operators outweighs any corresponding benefit, grandfathering the feature or system is entirely appropriate.

CONCLUSION

We thank the Commission for its careful consideration of our prior submissions in this proceeding, and we appreciate the opportunity to comment on the supplemental revisions. We look forward to continue working with the Commission as it continues to consider these important issues.

Respectfully submitted,

/s/

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