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June 30, 2010

Federal Trade Commission
Office of the Secretary
Room H-135 (Annex E)
600 Pennsylvania Avenue, N.W.
Washington, DC 20580

Filed electronically on June 30, 2010

Re: COPPA Rule Review, Project No. P104503

Greetings:

The Federal Trade Commission ("Commission") asked for public comment on its implementation of the Children's Online Privacy Protection Act ("COPPA"), 15 U.S.C., 15 U.S.C. §§ 6501-6508, through the Children's Online Privacy Protection Rule ("COPPA Rule"). The FTC seeks public comment on the COPPA Rule's costs and benefits as well as:

- What implications for COPPA enforcement are raised by mobile communications, interactive television, interactive gaming, or other similar interactive media
- The use of automated systems – those that filter out any personally identifiable information prior to posting – to review children's web submissions
- Whether operators have the ability to contact specific individuals using information collected from children online, such as persistent IP addresses, mobile geolocation data, or information collected in connection with behavioral advertising, and whether the Rule's definition of "personal information" should be expanded accordingly.
- Whether there are additional technological methods to obtain verifiable parental consent that should be added to the COPPA Rule, and whether any of the methods currently included should be removed
- Whether parents are exercising their right under the Rule to review or delete personal information collected from their children, and what challenges operators face in authenticating parents
- Whether the Rule's process for FTC approval of self-regulatory guidelines – known as safe harbor programs – has enhanced compliance, and whether the criteria for FTC approval and oversight of the guidelines should be modified in any way.

I write to submit comments to these questions in my own capacity as a consumer advocate and Internet privacy and security attorney devoted to consumer protection, technology, and online child safety.

Executive Summary

- In its current form, COPPA is not protecting children's privacy. Children are still creating accounts on social networking sites without first obtaining their parent's consent. They simply lie about their age. We need to shift the paradigm. Congress should revise COPPA to impose stronger restrictions on how website operators use child data, and place less emphasis on notice and parental consent.
- The Commission should require commercial website operators to make reasonable efforts to determine if a child is registering online, taking into consideration available technology. Too many operators turn a blind eye when child users falsify age information, and few face legal risk for deploying this passive approach.
- The Commission should regularly audit COPPA Safe Harbor programs to enhance industry compliance. It is unclear if the Commission has ever leveraged its legal right to inspect records of Safe Harbor programs.
- The Commission should adopt data breach notification rules for child data. Commercial website operators should notify parents whenever the confidentiality, security, and integrity of personal information about child users is compromised. Without it, parents can't take steps to protect their children.
- The Commission should develop a model COPPA privacy form to make disclosures to parents more readable and understandable. The Commission has already implemented similar tools for financial institutions, and adopting them to COPPA is achievable.
- Teens today are migrating away from traditional desktop web models with hand-held mobile platforms, and this technology should be developed to behave responsibly with child users.
- The Rule's definition of "personal information" doesn't need to be expanded. In fact, as technology advances, the line between personal information and non-personally identifiable information continues to diminish. What we need are better controls on how child information is used, secured, and shared.
- Updating the COPPA Rule to allow operators to leverage mobile text messaging to obtain verifiable parental consent for uses other than the "disclosures" defined by 16 C.F.R. § 312.2 is appropriate.

Background

When Congress enacted COPPA in 1998, the Internet was a different place. Only about 6 million teens used the Internet, and applicable rules didn't exist or were poorly defined. Congress enacted COPPA after industry failed to follow responsible marketing and data collection practices online. This failure affected those users too young to understand the permanent consequences of sharing sensitive personal information in a digitally networked environment.

Today, the landscape has drastically changed. Studies show that 93% of all teens (ages 12 to 17) in the U.S. are regular online users.¹ Nearly two-thirds of teen users go online daily (36% go online several times a day). And, no doubt, COPPA has succeeded in improving online data collection practices. It has taught website operators to consider the privacy implications of their business decisions, and, in some cases, how to keep parents informed.

But COPPA's effect on marketplace practices has also fallen short of its intended goal. Since COPPA went into effect, it has inadvertently discouraged the marketplace from creating websites specifically designed for the pre-teen demographic. Through its notice-and-parental consent model, the costs and challenges of complying with COPPA have proven to be too high. The result is a web environment that offers child users few age-suited places to socialize and interact. Instead, large numbers of teens (including those under 13) turn to general audience websites by lying about their age and circumventing outdated age-gate technologies on popular websites. As one researcher put it, "COPPA did not stop most children from creating accounts, but it did teach children and their parents an important lesson: Lying is the path to access."²

The research supports this conclusion. According to a 2009 Pew Internet & American Life Project, for example, 55% of online teens ages 12-13 use social networking websites like *Facebook* or *Myspace*.³ Specifically, 46% of 12-year-olds in the study used social networking websites, despite age restrictions that ask kids to refrain from registering or posting profiles, but do not **actively** prevent it.

This suggests that something is wrong with the current framework. It also reveals a marketplace practice inconsistent with stated privacy promises (both *Facebook* and *Myspace* policy theoretically bar users under 13 from registering). To shift the trends here, the Commission should advance several changes as part of its review of the COPPA Rule.

COPPA Rule Review Comment

Congress should impose stronger restrictions on how website operators use child data, and place less emphasis on notice and parental consent. In its current form, COPPA places few restrictions on what type of information website operators can collect from children, what they can do with it, or who they can share it with. Instead, operators can do almost anything with child data as long as they obtain prior parental consent. This approach is not working.

¹ Amanda Lenhart, Kristen Purcell, Aaron Smith, and Kathryn Zickuhr, "Social Media & Mobile Internet Use Among Teens and Young Adults," Pew Internet & American Life Project, at 4, <http://pewinternet.org/Reports/2010/Social-Media-and-Young-Adults.aspx> (last visited on June 21, 2010).

² danah michele boyd, "Taken Out of Context American Teen Sociality in Networked Publics," at 151 Fall 2008, www.danah.org/papers/TakenOutOfContext.pdf

³ Lehnhart ET AL., *supra* note 1, at 17.

Children are still creating accounts on social networking sites without first obtaining their parent's consent. They simply lie about their age. We need to shift the paradigm. We should move away from the current notice-and-parental consent framework, to one that imposes well-defined standards on the way commercial operators interact with child users. Studies conclusively show that consumers rarely read complicated privacy notices, and few even understand what they're consenting to. As we move to mobile platforms, notice-and-choice models will prove even less effective.

To truly succeed here, Congress should revise COPPA. The focus must be to limit what type of information website operators can collect from children, what they can do with it, how they must secure it, and restrict how that information is shared.

The Commission should require commercial website operators to make reasonable efforts to determine if a child is registering online, taking into consideration available technology. COPPA's notice-and-parental consent requirements currently apply to sites "directed to children under 13" or to operators with "actual knowledge" that the user is under 13 years of age. This approach, however, has allowed commercial website operators to turn a blind eye when underage users falsify age information. Unless a child user self-identifies as being under 13 years of age, commercial website operators face minimal legal risk or business incentive to proactively comply with COPPA.

This approach also makes it difficult for the regulatory community (including the Safe Harbor programs) to bring actions or impose better standards on commercial websites. A more appropriate standard would require operators to make reasonable and diligent efforts to determine if a child is registering or posting personal information online, taking into consideration available technology.

The Commission should regularly audit COPPA Safe Harbor programs to ensure industry compliance. The COPPA Rule gives the Commission the right to inspect and copy records of approved "Safe Harbor" programs, including consumer complaints alleging violations of the guidelines, records of disciplinary actions, and results of independent assessments of subject operators' compliance.⁴ Since the Rule went into effect, however, it's unclear if the Commission has ever taken advantage of this regulatory audit provision. The opportunity to specifically inspect and copy records of potential COPPA violations – and making those records public – could give the Commission a better understanding of actual marketplace practices, and inspire commercial operators to improve online practices.

To fund this initiative, the Commission could transfer the audit costs to the target entity. This model is common in regulated industries (e.g., state insurance market conduct examinations), and forces companies to maintain adequately-staffed programs with practices aligned to stated policies.

⁴ 16 C.F.R. § 312.10(d).

Along the same lines, the Commission should examine the potential conflicts of interest that COPPA Safe Harbor programs face when taking enforcement action against their own clients. The COPPA Rule currently requires that Safe Harbor programs use “effective incentives for subject operators’ compliance with the guidelines.”⁵ Among several options, Safe Harbor programs can require violators to extend consumer redress, make voluntary payments to the United States Treasury, or refer repeat offenders to the Commission.

But at least two of the four entities sanctioned by the Commission as COPPA Safe Harbor programs are for-profit entities, and the others rely on membership dues for operational revenue. Needless to say, taking adverse actions against companies that fund your business can make it difficult to objectively decide what enforcement actions to take against client violators.

The COPPA Rule should also require commercial website operators to notify parents whenever the confidentiality, security, and integrity of personal information about child users is compromised. The COPPA Rule requires operators to establish and maintain reasonable procedures to protect the confidentiality, security, and integrity of personal information collected from children.⁶ But no portion of the Rule requires operators to notify regulators or parents if a child’s information is ever lost, stolen, or somehow misdirected. This leaves parents unable to protect their children, especially if a child’s contact information lands in the hands of registered sex offenders or other online predators.

This gap, unfortunately, is not covered by state law. Current data breach notification laws enacted by 46 states only trigger notification requirements when a person’s name combined with Social Security number, driver’s license number, or certain other account information is compromised. Children under 13 years old are seldom covered by these notice triggers.

The Commission should develop a model COPPA privacy form to make disclosures to parents more readable and understandable. This form could build on the Commission’s remarkable efforts to create a model privacy notice for financial institutions subject to the Gramm-Leach-Bliley Act. Under this proposal, use of the form would be voluntary, and operators that elect to use it would obtain a legal safe harbor under the COPPA Rule. Standardizing the COPPA privacy notice could also make compliance with COPPA easier for website operators, especially those moving toward mobile platforms.

Teens today are migrating away from traditional desktop web models to hand-held mobile platforms, and this technology should be developed to behave responsibly with child users. Studies show that, in the past 5 years, 58% of 12-year

⁵ 16 C.F.R. § 312.10(b)(3).

⁶ 16 C.F.R. § 312.8

olds now own a mobile phone, up from 18% in 2004.⁷ And half of teens (51%) own portable gaming devices (e.g., PSP, DS, or Gameboy), and of those teens, 66% are between the ages of 12 and 13. Among teen mobile phone owners, more than 27% use their device to go online, and 24% of teens use a game console to go online.

This mobile platform presents unique challenges under COPPA's existing notice-and-parental-consent model. While all the risks continue to apply with the sharing of sensitive personal information in a mobile environment, the traditional tools for identifying kids under 13, providing legally-adequate notice, and obtaining verifiable parental consent often fail to work. This trend offers further support for moving away from the current notice-and-parental consent framework to one that defines what standards commercial operators may use when interacting with child users.

Along these lines, we have enough computing power today to reliably assess the age of users interacting with commercial networks. For example, instead of relying on age gates, mobile networks could automatically identify child users as minors subject to COPPA without collecting or disclosing any personal details (e.g., name, address). Once a user is identified as a child, restrictions should apply to sharing capabilities, posting, and other mobile behavior.

The Rule's definition of "personal information" doesn't need to be expanded. The COPPA Rule broadly defines "personal information" as "individually identifiable information about an individual collected online."⁸ This broad definition adequately captures many of the marketplace uses we currently see. To expand that definition further offers little societal benefit. Quite the contrary, as technology advances, the line between personal information and non-personally identifiable information swiftly diminishes. More and more, we find that enough non-personal details exist that allow for accurate identification of specific individuals.

Instead, what we need is more specific standards about how much information commercial entities are allowed to collect, and what they may do with it once collected. A better communal understanding of the tools that may put a commercial website operator on notice (actual or implied) about the likely age of a user would also prove helpful. How are tools like mobile geolocation being used in the marketplace? And what limits are reasonable to balance privacy and technology? Transparency about actual mobile marketplace practices may shed light on what changes should be made to the Rule's definition.

The Commission should update the COPPA Rule to allow operators to leverage mobile text messaging to obtain verifiable parental consent for uses other than the "disclosures" defined by 16 C.F.R. § 312.2. COPPA requires website operators to make reasonable efforts to obtain verifiable parental consent, taking into

⁷ Amanda Lenhart, Kristen Purcell, Aaron Smith, and Kathryn Zickuhr, "Social Media & Mobile Internet Use Among Teens and Young Adults," Pew Internet & American Life Project, at 4, <http://pewinternet.org/Reports/2010/Social-Media-and-Young-Adults.aspx> (last visited on June 21, 2010).

⁸ 16 C.F.R. § 312.2

consideration available technology.⁹ In some cases, the COPPA Rule also allows operators to get “verifiable parental consent” by “e-mail coupled with additional steps to provide assurance that the person providing the consent is the parent.”¹⁰ Operators may use this “e-mail plus” method as long as no sharing, selling, renting, or any other disclosure of a child’s personal information will occur.

But teens today rely more on text messaging than e-mail. Recent research shows that mobile phone texting has become the preferred channel of communication among teens.¹¹ Indeed, 72% of all teens in the U.S. are text-messengers. Thus, the Rule should be amended to allow operators to leverage mobile text messaging to obtain verifiable parental consent for uses of information other than the “disclosures” defined by 16 C.F.R. § 312.2.

Conclusion

To close, I applaud the Commission’s decision to review the COPPA Rule five years ahead of schedule. No doubt, technology continues to outpace the law, and frequent regulatory reviews gives parents and policymakers the best chance at staying current.

I extend my thanks to the Commission for all that it does to protect consumers and children online. Through its leadership and enforcement efforts, the Internet continues to grow into a better place for the global community to enjoy.

If I can help in any way, please let me know.

Respectfully submitted,

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⁹ 16 C.F.R. § 312.5(b).

¹⁰ 16 C.F.R. § 312.(b)(2).

¹¹ Amanda Lenhart, “Teens and Mobile Phones,” Pew Internet & American Life Project, April 20, 2010, <http://pewinternet.org/Reports/2010/Teens-and-Mobile-Phones.aspx> (last visited on June 21, 2010).