Before the
FEDERAL TRADE COMMISSION
Washington, DC 20580

COMMENTS
of the
DIRECT MARKETING ASSOCIATION, INC.

on the

CHILDREN'S ONLINE PRIVACY PROTECTION RULE

COPPA RULE REVIEW 2010

PROJECT NO. P104503

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I. Introduction

The Direct Marketing Association ("DMA") appreciates the opportunity to comment on the Federal Trade Commission's ("FTC" or "Commission") request for public comments on the Commission's implementation of the Children's Online Privacy Protection Rule (the "Rule" or "COPPA Rule").[1] The DMA has been a longtime leader on children's privacy and safety issues, and we share the Commission's goal of ensuring that children under 13 receive appropriate protections.

The DMA (www.the-dma.org) is the leading global trade association of businesses and nonprofit organizations using and supporting multichannel direct marketing tools and techniques. DMA advocates industry standards for responsible marketing; promotes relevance as the key to reaching consumers with desirable offers; and provides cutting-edge research, education, and networking opportunities to improve results throughout the end-to-end direct marketing process. Founded in 1917, DMA today represents thousands of companies from dozens of vertical industries in the U.S. and 50 other nations, including a majority of the Fortune 100 companies, as well as nonprofit organizations. Included are Internet-based businesses, cataloguers, financial services, book and magazine publishers, retail stores, industrial manufacturers, and a host of other segments, as well as the service industries that support them.

We commend the Commission for seeking broad input from the public on its review of the COPPA Rule. We welcome opportunities for collaboration and we look forward to continuing to work with the Commission on this important matter.[2] Below we provide comments on our members' experiences with the COPPA Rule and an assessment of how well the regulation is positioned to address online technologies of the twenty-first century.

II. The COPPA Rule Plays an Important Role in Providing Protections to Children in the Online Environment

The DMA has been a longtime leader in children's privacy issues. The DMA supported and worked actively with Congress and the Commission in the years leading up to passage of the Children's Online Privacy Protection Act of 1998 ("COPPA" or "Act").[3] COPPA was based in part on existing DMA guidelines that were already followed by our members and was intended to allay concerns about sexual predators and others who might seek to contact children online and put them in harm's way, circumventing parents in their traditional role as gatekeepers.[4] The

[1] Request for Public Comment on the Federal Trade Commission's Implementation of the Children's Online Privacy Protection Rule, 75 Fed. Reg. 17089 (Apr. 5, 2010).

[2] The DMA has a long history of actively engaging on this important matter, as seen through our participation in the 1996, 1997, 1999 FTC workshops on this topic, attendance at the 2010 workshop, and our submission of comments in response to the following notices from the Commission: Notice of Proposed Rulemaking, Children's Online Privacy Protection Rule, 64 Fed. Reg. 22750 (Apr. 27, 1999); Notice of Proposed Rulemaking, Children's Online Privacy Protection Rule, 66 Fed. Reg. 54963 (Oct. 31, 2001); Notice of Proposed Rulemaking, Request for Comment, Children's Online Privacy Protection Rule, 70 Fed. Reg. 2580 (Jan. 14, 2005); Request for Public Comment, Children's Online Privacy Protection Rule, 70 Fed. Reg. 21107 (Apr. 22, 2005).

[3] *See* 144 Cong. Rec. S11659 (daily ed. Oct. 7, 1998) (statement of Sen. Bryan) (listing the DMA as a supporter of the children's Internet privacy language).

[4] *See* 144 Cong. Rec. S8482-83 (daily ed. July 17, 1998) (statement of Sen. Bryan).

DMA supported the legislation on the belief that young children present a special case. Unlike adults, children may not fully understand the consequences of their actions.

Following passage of COPPA, the DMA actively engaged in dialogue with the Commission on the development of the COPPA Rule.[5] DMA subsequently partnered with the Commission by co-authoring a compliance manual entitled *How to Comply with the Children's Online Privacy Protection Act*.[6] This guide presented the new requirements for protecting children's privacy online and helped explain the Commission's enforcement authority. The resource remains available today on the FTC's website section dedicated to education and guidance materials on children's privacy matters.[7]

The DMA believes the Rule continues to achieve the stated goals of COPPA: (1) enhancing parental involvement in children's online activities to protect the privacy of children in the online environment; (2) enhancing parental involvement to help protect the safety of children in online fora in which children may make public postings of identifying information; (3) maintaining the security of personally identifiable information of children collected online; and (4) protecting children's privacy by limiting the collection of personal information from children without parental consent.[8] The COPPA Rule has tried to maintain children's access to the Internet and to some of the interactive capabilities of the Internet, which offers a range of learning and enrichment opportunities, while also minimizing the potential compliance burdens on parents, children and companies.[9] At the same time, the regulation has sought to provide children with protections and ensure a role for parents as gatekeepers to grant their consent to the collection of their children's personal information according to a sliding scale approach unless the activities fall within enumerated email exceptions to the parental consent requirement.

With this review, the Commission has raised questions about whether the Rule remains well suited to providing protections in today's evolving online environment. The DMA encourages the Commission to bear in mind that children are growing up in a digital world, and increasingly their success in this global economy will depend on their ability to navigate online platforms and emerging technologies. As the Commission seeks to work within the framework set forth in the Act to help ensure that the COPPA Rule continues to serve its intended purposes, the DMA is committed to exploring with the Commission ways to continue to provide high-quality, innovative and responsible online experiences and content for children in the United States. It would be a disservice to our children and the U.S. economy if our regulations unnecessarily inhibited development of critical digital literacy or participatory skills in our youth or growth in new media and emerging technologies. The DMA therefore continues to support COPPA and carefully tailored protections for children that balance the goals of enhancing parental involvement, keeping children safe and preserving the interactivity of the Internet and other new media.

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[5] *See supra* note 2.
[6] DMA *et al*., *How to Comply with the Children's Online Privacy Protection Act* (Dec. 2006), http://www.ftc.gov/bcp/edu/pubs/business/idtheft/bus45.pdf.
[7] FTC, Privacy Initiatives: Education & Guidance, http://www.ftc.gov/privacy/privacyinitiatives/childrens_educ.html.
[8] *See* 144 Cong. Rec. S11657 (daily ed. Oct. 7, 1998) (statement of Sen. Bryan).
[9] *See* 64 Fed. Reg. 59888, 59889 (Nov. 3, 1999)

III. Extending the Scope of the COPPA Rule as Written Beyond Websites and Online Services That Have Traditionally Been Accessed Over the Internet Presents Challenges

The Commission has asked for comments on the possibility of modifying various defined terms in the COPPA Rule to reflect changes in online technologies and Internet activities that have emerged since the promulgation of the Rule.[10] In particular, the Commission has requested comments on expanding the definition of the term "Internet" to include such activities as mobile communications, interactive television, and interactive gaming.[11] The DMA believes that expanding COPPA to such new types of activities presents challenges because many do not involve a connection to the Internet or meet the other requirements of the statute.

COPPA imposes an obligation on "any person who operates a website *located on the Internet* or an *online* service"[12] and who collects personal information from children. COPPA encompasses websites or online services operated for commercial purposes that are directed to children or where the operator has actual knowledge that it is collecting personal information from a child.[13] At the time of COPPA's passage, Senator Bryan, the author of the legislation, reiterated in a floor statement that "[t]his is an online children's privacy bill, and its *reach is limited* to information collected *online* from a child."[14]

When issuing the implementing regulation, the Commission adopted Congress' definition of the term "Internet" from the Act nearly verbatim: "Internet means collectively the myriad of computer and telecommunications facilities, including equipment and operating software, which comprise the interconnected world-wide network of networks that employ the Transmission Control protocol/Internet Protocol, or any predecessor or successor protocols to such protocol, to communicate information of all kinds by wire, radio, or other methods of transmission."[15] In guidance, the Commission has further explained that "[r]egardless of how you initiate it, if the actual collection of personal information from children is *conducted over the Internet*, it is subject to the requirements of COPPA and the Rule," but that "[i]f the information collection does not take place *via the Internet*, but rather is conducted offline, it is not subject to COPPA or the Rule."[16] At the time of the passage of COPPA, most people accessed the Internet via modems that slowly transmitted signals over phone lines to desktops. The Commission has since interpreted this term also "to apply to *broadband networks*, as well as to intranets maintained by online services that either are accessible via the Internet, or that have gateways to the Internet."[17]

Like the Commission, the DMA recognizes that the devices through which families may access the Internet have evolved. However, the DMA believes the Commission should exercise caution when considering whether to expand COPPA to new activities because Internet

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[10] Press Release, FTC Seeks Comment on Children's Online Privacy Protections (Mar. 24, 2010), http:www.ftc.gov/opa/2010/03/coppa.shtm.
[11] 75 Fed. Reg. 17089, 17090 (Apr. 5, 2010).
[12] 15 U.S.C. § 6501(2) (emphasis added).
[13] 15 U.S.C. § 6502(a)(1).
[14] 144 Cong. Rec. S11657 (daily ed. Oct. 7, 1998) (statement of Sen. Bryan) (emphasis added).
[15] 16 C.F.R. § 312.2.
[16] COPPA Rule FAQ #34 (Revised Oct. 7, 2008) (emphasis added), http://www.ftc.gov/privacy/coppafaqs.shtm.
[17] COPPA Rule FAQ #6 (Revised Oct. 7, 2008) (emphasis added), http://www.ftc.gov/privacy/coppafaqs.shtm.

connectivity varies across many of today's multi-purpose devices and business models and, even if such models and devices are connected to the Internet, any websites or services accessed through such models and devices should not fall under COPPA unless they meet the other requirements of the statute and regulation.

Devices used for the activities mentioned by the Commission – such as mobile "smart phones," televisions and services with interactive capability, and gaming consoles and devices – may or may not transmit information over the Internet. For instance, gaming consoles could enable children to communicate with each other within a closed intranet or other network of sorts, but not allow for outside access to the public Internet. We believe that in line with the Commission's past guidance and in light of the Act's legislative history, such non-Internet activities were not intended to be captured by COPPA. We further submit that parental approval is usually inherent in children's access to such devices, because costly purchases are generally made by adults and because many such devices include parental control mechanisms. Thus, the DMA cautions the Commission against taking sweeping actions to include *all* mobile communications, interactive television, interactive gaming, and other interactive media within the definition of "Internet" as these activities do not necessarily involve the Internet or connect to the Internet.

If the Commission were to conclude after further scrutiny that certain mobile communications, interactive television, and interactive gaming transmit information over the Internet, we encourage the Commission to be mindful that COPPA would still require further analysis to determine whether the statute and regulation apply to a specific resource. Namely, COPPA would only apply if the devices were delivering websites or online services that were directed to children over the Internet (or if the operators had actual knowledge that the person on the other end was a child) and the websites or services were collecting personal information from the children.

More significantly, the Commission should consider that different media platforms have unique capabilities and characteristics that differ significantly from the online world from technical, legal, and business model perspectives, which provide both challenges and opportunities to applying the existing COPPA Rule and achieving the stated objectives of COPPA. In the mobile space, for example, the number of wireless carriers and handheld devices, the variety of mobile operating systems, software applications, and storefronts, as well as the small screen sizes, would significantly complicate how to: (1) identify a subscriber for whom parental consent would be necessary; (2) obtain parental consent; and (3) provide privacy policy-type disclosures as COPPA currently prescribes. Similar challenges exist with interactive television capabilities that may be offered by cable and satellite providers. Subscription-based mobile, gaming and television platforms also may offer new parental controls and customer service contact that would afford new ways to provide enhanced parental involvement and address any safety concerns. It will be important to ensure clear guidance and a practical means of complying with any changes to the Rule in this area. We thus encourage the Commission to think through these issues and seek additional public participation before extending the Rule to apply to such emerging technologies and devices.

IV. The COPPA Rule Should Apply Only to Information That Personally Identifies a Child and Permits Contacting of That Specific Individual

The Commission has asked whether the COPPA Rule should apply to information beyond that which is already enumerated in the regulation.[18] When Congress passed COPPA, it made clear that the law applies to "personal information," which it defined as individually identifiable information about an individual online including: (1) a first and last name; (2) a home or other physical address including street name and name of a city or town; (3) an email address; (4) a telephone number; (5) a Social Security number; and (6) information concerning the child or the parents of that child that the website collects online from the child and combines with an identifier described above.[19] Additionally, the Act provided the Commission with discretion to include within the definition of "personal information" any other identifier that it determined would permit the physical or online contacting of a specific individual.[20] Under this authority, the Commission has now asked whether it should consider expanding the definition of "personal information" specifically to include screen names and/or passwords, zip codes, date of birth, gender, persistent IP addresses, mobile geolocation information, information collected in connection with online behavioral advertising, or other emerging categories of information.[21]

Expanding the definition of "personal information" in this manner would cause a much broader set of information to be covered under the Rule than that which is typically included as personal information within the scope of U.S. privacy laws. We are concerned that such an expansion could have a fundamental and negative impact on online offerings to children that may rely on such information to provide interactive online experiences without individually identifying children. Such an expansion of the definition of personal information would require affirmative parental consent for many creative offerings at sites directed to children or those with actual knowledge of children under 13, which would be difficult and cost-prohibitive to obtain. The DMA strongly believes that information that constitutes "personal information" should include only information about a specific person that is used to identify that person. Within the context of the COPPA Rule, therefore, "personal information" should be limited to information that specifically identifies a child. Information should not be considered personal simply because it may link back to a particular device that connects to the Internet or is associated with a particular geographic area where a number of persons could be located. Rather, we believe that COPPA's definition of personal information was meant to apply only to data when it is linked back to a specific individual child.

Furthermore, we believe that based on the authority under which the Commission is seeking to expand the definition of "personal information," the definition should not encompass any new information that does not enable the physical or online *contacting* of a specific individual.[22] As headlines from the late 1990s indicate, a primary concern that motivated COPPA's passage focused on practices that enabled online predators to use the Internet to

[18] 75 Fed. Reg. 17089, 17090 (Apr. 5, 2010).
[19] 15 U.S.C. § 6501(8).
[20] 15 U.S.C. § 6501(8)(F).
[21] 75 Fed. Reg. at 17090.
[22] *See* 15 U.S.C. § 6501(8)(F).

contact children and lure victims.[23] In the legislative history, Senator Bryan also explained, "It is my understanding that 'contact' of an individual online is not limited to e-mail, but also includes any other attempts to communicate *directly with a specific, identifiable individual*. Anonymous, aggregate information—information that cannot be linked by the operator to a *specific individual*—is not covered by this definition."[24] Yet, the identifiers identified by the Commission —namely, screen names and/or passwords, zip codes, date of birth, gender, persistent IP addresses, mobile geolocation information, information collected in connection with online behavioral advertising—do not enable such contact. For instance, IP addresses, which enable many practical offerings on the Internet, do not inherently identify a child and thus are not a means by which to contact a specific person. Many companies use IP addresses for important safety matters. Other practical applications include using IP addresses to identify the country in which a user may reside to route them to a brand's local site. This functionality allows sites to ensure that language is appropriate for a visitor, and allows sites to comply with any contractual obligations to geofilter its content.

Additionally, as panelists at the Commission's COPPA Rule roundtable on June 2nd cautioned, including IP addresses within the regulation's definition of "personal information" would be impractical. An IP address is automatically collected when any person—child or adult—types in a URL, in order to deliver the requested content. When content is delivered to IP addresses, operators have no way of knowing in advance whether the person on the other end is a child. Operators of sites directed to children also would have no way of providing notice and seeking parental consent without obtaining an IP address. Treating IP addresses as "personal information" in all instances under the COPPA framework therefore would be unworkable given the means by which the Internet functions. Thus, we believe that the Commission reached the correct conclusion when it excluded IP addresses from the definition of "personal information" in promulgating the Rule in 1999, and we encourage the Commission to reaffirm this position.[25]

The other "identifiers" mentioned in the Commission's inquiry also are not means by which to contact a specific child, and thus should not be included within the definition of "personal information." For example, an operator could not reach a child if he only had a zip code. Thousands of people can live in a single zip code. Apart from the fact that such information does not inherently identify a child, zip codes are often used by operators to provide services of value to consumers, such as information specific to relevant time zones.

Likewise, many operators have developed interactive online experiences for children through registrations with unique screen names that do not contain personally identifiable information. Registration in this manner has enabled children to experience a safe yet individualized experience, which contributes to children's digital literacy. For example, by using

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[23] *See e.g.*, Yvette C. Hammett, *Teen Girls Get Scare Surfing Internet*, Stuart News, Jan. 7, 1997, at A1; *FBI Chief Warns of Internet Pedophiles*, Buffalo News, Apr. 9, 1997, at A4; Stanley Ziemba, *Legislators Fall in Line to Protect Kids* Online, Chicago Tribune, Apr. 25, 1999, at 1; Amanda Garrett, *Undercover Deputy Foils Chat Room Sex Scheme*, Cleveland Plain Dealer, Nov. 2, 1999, at 1A; Dan George and Nicole Lorince, *Online Danger Signals Better Use Caution Cruising the Information Highway, Picking up New Friends*, Cleveland Plain Dealer, Nov. 10, 1999, at 4; *Mom Crusades Against Sickos on the Internet*, Cincinnati Enquirer, Dec. 12, 1999, at B01.

[24] 144 Cong. Rec. S11657 (daily ed. Oct. 7, 1998) (statement of Sen. Bryan) (emphasis added).

[25] 64 Fed. Reg. 59888, 59892 (Nov. 3, 1999) (stating that a static IP address does not fall within the Rule's definition of "personal information" unless it is associated with other individually identifiable personal information).

screen names, leading children's sites have been able to offer children personalized content (*e.g.*, horoscopes, weather forecasts, customized avatars for game play) as well as interactivity (*e.g.*, jokes, stories, letters to the editor) without identifying them individually. Other activities include swapping collectibles, playing games, identifying high score achievements, and challenging friends. The Commission itself has stated in its COPPA FAQ #38 that use of "screen names or other anonymous techniques to personalize the site" is a "creative way[] to provide rich content for children, while complying with COPPA."[26] Subjecting these anonymous information categories to the requirements of COPPA would thus have a fundamental and negative impact on business offerings to children that rely on such information.

The DMA also has concerns with including "mobile geolocation information" in the definition of "personal information." Geolocational information is currently an area of rapid innovation and advancement that will likely have many beneficial applications. We caution against imposing new restrictions that would likely stifle innovation in this nascent area and believe that this area would be better left to self-regulation at this time.

Furthermore, we believe that "information collected in connection with online behavioral advertising" is an area that should be left to self-regulation. The Commission itself advocated the development of self-regulatory programs on this subject when it issued the February 2009 Staff Report on *Self-Regulatory Principles For Online Behavioral Advertising*. In that report, the Commission staff expressed support for self-regulation in the context of online behavioral advertising "because it provides the necessary flexibility to address evolving online business models."[27] The DMA responded, along with four other leading associations, by releasing the *Self-Regulatory Principles for Online Behavioral Advertising* in July 2009.[28]

These Principles apply broadly to a diverse set of actors that work interdependently to deliver relevant advertising, and include a principle that specifically addresses children.[29] This principle directs entities not to collect personal information from children when such entities have actual knowledge that the children are under 13 or from sites directed to children under 13 for online behavioral advertising purposes.[30] Additionally, the principle provides that entities may not engage in online behavioral advertising directed to children when the entities have actual knowledge that a child is under 13 except as compliant with COPPA.[31] The DMA believes that robust self-regulation is the best and most appropriate way to address privacy concerns in connection with online behavioral advertising, including concerns related to children. In general, as panelists at the Commission's COPPA Rule roundtable on June 2nd noted, the advertising industry generally is not pursuing online behavioral advertising that targets

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[26] COPPA Rule FAQ #38 (Revised Oct. 7, 2008), http://www.ftc.gov/privacy/coppafaqs.shtm.
[27] FTC Staff Report: Self-Regulatory Principles For Online Behavioral Advertising, at 11 (Feb. 2009), *available at* http://www2.ftc.gov/os/2009/02/P085400behavadreport.pdf.
[28] American Association of Advertising Agencies, Association of National Advertisers, Direct Marketing Association, Interactive Advertising Bureau, and Council of better Business Bureaus, *Self-Regulatory Principles for Online Behavioral Advertising* (July 2009), *available at* http://www.the-dma.org/privacy/Self%20Regulatory%20Principles%20for%20Online%20Behavioral%20Advertising%2007-01-09.pdf.
[29] Principles at 16-17.
[30] *Id*.
[31] *Id*.

children. Thus, we encourage the Commission to continue its support of self-regulation in this area and to refrain from expanding the COPPA Rule's definition of "personal information" to include such information.

Finally, the COPPA Rule already provides ample guidance and flexibility to determine when IP addresses or these other types of data elements could become personally identifiable, i.e., when combined or linked with other individually identifiable elements that identify the specific child and permit direct contact. Each of these types of data should continue to be evaluated based on the particular context and factual situation under the existing COPPA Rule.

V. The "Actual Knowledge" Standard for General Audience Sites Is Sound and Sufficiently Clear in Light of FTC Commentary and Guidance

The COPPA Rule applies both to operators of websites directed at children and to operators of general websites with "actual knowledge" that they are collecting personal information from a child. At the Commission's June 2, 2010, roundtable on the Rule, one panel specifically focused on the "actual knowledge" standard and panelists debated the appropriateness of the standard in today's online environment.[32] The DMA strongly supports retention of the "actual knowledge" standard that was selected by Congress when it passed the Act in 1998 and accordingly incorporated into the Rule. The DMA has adopted this standard and other COPPA principles outlined in the Rule into our own *Guidelines for Ethical Business Practice*, to which we hold all of our members.[33]

The "actual knowledge" standard is a workable standard that has enabled our members and operators of general sites to develop offerings with a degree of certainty. This certainty has encouraged operators to invest in the development of new online interactive offerings. It is our understanding that Congress deliberately chose to adopt the "actual knowledge" standard so that operators would not be tasked with an affirmative obligation and responsibility to monitor and account for everything found on any website. This standard, in which operators are responsible for what they actually know on the facts, promotes innovation. Adoption of a more subjective standard, such as the "reasonable expectation" standard used in the Council of Better Business Bureaus' Children's Advertising Review Unit's ("CARU") *Self-Regulatory Program for Children's Advertising*, could negatively impact not only children's offerings online, but all general audience websites.[34] Requiring all sites to abide by a standard of constructive knowledge could ironically result in a scenario in which operators would seek to collect more information from all visitors through universal age screenings for all sites, which in turn could dissuade operators from offering the sites in the first place contrary to the intent of COPPA and the Rule.

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[32] Federal Trade Commission, COPPA Rule Review Roundtable: Agenda (June 2, 2010), *available at* http://www.ftc.gov/bcp/workshops/coppa/Agenda_2010COPPARoundtable.pdf.
[33] Direct Marketing Association, *Guidelines for Ethical Business Practice* at 10-11 (Jan. 2010), *available at* http://www.dmaresponsibility.org/Guidelines/.
[34] Children's Advertising Review Unit, *Self-Regulatory Program for Children's Advertising* at 15, *available at* http://www.caru.org/guidelines/guidelines.pdf.

While the term "actual knowledge" is not defined in the Rule, we believe that the Commission has provided sufficient guidance on this term in both its commentary and FAQs to enable businesses to comply with the Rule. When the Commission first released the final Rule in 1999, FTC commentary explained that "[a]ctual knowledge will be present, for example, where an operator learns of a child's age or grade from the child's registration at the site or from a concerned parent who has learned that his child is participating at the site."[35] The Commission further clarified that although COPPA does not require websites to investigate the ages of visitor, if a site asks for and receives information from users from which the age of a visitor can be determined—for example, asking for age or date of birth or posing indirect questions that may elicit age information (*e.g.*, "what type of school do you go to?"—the operator may acquire actual knowledge that it is dealing with children under 13."[36] Similarly, the Commission's FAQs on the matter advise that "[i]f a child posts personal information on a general audience site but doesn't reveal his or her age, and you have no other information that would lead you to know that the visitor is a child, then you would not have 'actual knowledge' under the Rule and would not be subject to its requirements" but notes that "even where a child himself has not revealed his age on the site, actual knowledge will be present 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."[37] DMA members have found this guidance to be sufficiently clear.

VI. Automated Systems of Review Exist That Meet the COPPA Rule's Deletion Exception to the Definition of "Collection"

The Commission has expressed an interest in the use of automated systems that can monitor and delete personally identifiable information from web submissions by children before they are made public.[38] The Commission's request for comments explains that the COPPA Rule considers personal information to have been "collected" when an operator enables children to make personal information publicly available *except where* the operator "deletes" all individually identifiable information from the postings before they are made public.[39] The Commission asks whether any automated systems exist that meet the deletion exception.[40]

A number of companies already have systems in place or are in the process of developing programs that offer such "real-time" monitoring services. Such systems have allowed companies to provide rich interactive content to children, which was a goal of COPPA.[41] These automated systems often provide companies with more cost-efficient, scalable and reliable means of monitoring children's conversations than using live monitors. Such technical solutions have also been found to be more effective than humans in helping to teach children not to post personal information and catching personal information as such filters are continuously updated. As automated systems advance, they have also begun to allow children more freedom to chat in real-

[35] 64 Fed. Reg. 59888, 59892 (Nov. 3, 1999).
[36] *Id*.
[37] COPPA Rule FAQ #41 (Revised Oct. 7, 2008), http://www.ftc.gov/privacy/coppafaqs.shtm.
[38] 75 Fed. Reg. 17089 (Apr. 5, 2010).
[39] *Id.* at 17090.
[40] *Id*.
[41] 144 Cong. Rec. S11657 (daily ed. Oct. 7, 1998) (statement of Sen. Bryan) ("The legislation accomplishes these goals in a manner that preserves the interactivity of children's experience on the Internet and preserves children's access to information in this rich and valuable medium.").

time than that which is available with programs that use traditional "white-list-chats," which only allow for the use of preapproved words. For example, there are now tools available that can create adaptive lists of permissible words, phrases and combinations and are updated in real time to keep pace with children's usage. Such automated tools can be used in combination with human monitoring. We encourage the Commission to support further development of these types of automated filtering technologies and best practices in its COPPA Rule review as a practical, responsible approach to comply with the COPPA Rule that will also promote children's access to interactive content and keep pace with emerging new media.

VII. The Sliding Scale Approach Remains a Reasonable Means of Obtaining Verifiable Parental Consent

The Commission has asked whether the consent requirement in the COPPA Rule has been effective in protecting children's online privacy and safety, and whether any of the enumerated means of obtaining parental consent should be modified.[42] The Rule currently sets forth a "sliding scale" approach to parental consent in which the required method of consent varies based on how the operator uses a child's personal information. If the operator discloses the information to others or allows the child to disclose information to the public, then a very reliable standard of obtaining consent is required because such a situation could place a child's safety at risk. If, however, the operator uses personal information collected from a child for only internal purposes, a less rigorous method of consent is required.

This sliding scale approach has proven to be a sound approach to protecting children online. On one end of the spectrum, when personal information is collected from children for internal purposes, the email-plus system (*i.e.*, sending an email plus: (1) a confirmatory email to the parent following receipt of consent; or (2) obtaining a postal address or phone number from the parent and confirming the parent's consent by letter or phone) has provided a reasonable means for operators to obtain consent, particularly in light of available technology.[43]

On the other end of the scale, the non-exhaustive list of approved methods of satisfying the very reliable means of obtaining parental consent (*e.g.*, (1) providing a consent form to be signed by a parent and returned to the operator by postal mail or fax; (2) requiring a parent to use a credit card in connection with a transaction; (3) taking calls from parents through a toll-free number staffed by trained personnel; (4) using a digital certificate that uses public key technology; and (5) using an email with a PIN/password obtained through one of the other listed verification methods) has provided operators with a variety of means to obtain verifiable parental consent.[44] Providing this illustrative, rather than exhaustive list of mechanisms, has helped provide flexibility to account for new technologies that can satisfy the Rule's consent requirements and better "future proof" the Rule. At the same time, the recognition of certain consent methods in the COPPA Rule has provided businesses with predictability and certainty, giving them an incentive to make significant investments in technology, security, and training to support the sliding scale. The DMA supports retention of the sliding scale system as one that

[42] 75 Fed. Reg. at 17090.
[43] 16 C.F.R. § 312.5(b).
[44] *Id.*

strikes a good balance between providing parents with control and not inhibiting children's beneficial Internet experiences.

The DMA notes that the Rule's exceptions to the prior parental consent requirement remain an important feature of the COPPA scheme. It is a practical necessity for operators to be permitted to collect some personal information for the purpose of obtaining parental consent or providing notice.[45] In addition, the exception permitting operators to collect online contact information for one-time use in responding to a child's request continues to strike the right balance between protecting children's privacy and ensuring children's access to online offerings. To promote digital literacy, it is appropriate for website operators to have a means of responding to a voluntary request from an interested child rather than being required to ignore the child. Moreover, children's privacy is not jeopardized by such one-time use followed by deletion.

We also believe that the enumerated reliable means of obtaining verifiable parental consent generally remain just as valid today as they were when the Rule was first promulgated, including the method of requiring a parent to use a credit card in connection with a transaction.[46] In our experience, most credit cards historically have been issued to persons over the age of 18, and with the passage of the Credit CARD Act in May 2009, we expect that most new credit cards will not be issued to individuals under 21. The Credit CARD Act provides that creditors may not issue credit cards to persons under 21 unless the person has an application co-signed by a parent, guardian, or other person with a means to repay the debt or the person can provide financial information proving his own ability to repay the debt.[47] Thus, our members continue to favor this method as a reasonable means of obtaining parental consent.

Although we believe that there is no legal reason to update the enumerated list, we encourage the Commission to continue exploring ways to minimize the unintended consequences of the sliding scale requirement, such as by recognizing additional acceptable means of obtaining parental consent.[48] The sliding scale approach seeks to strike the right balance of providing parents with control while not limiting beneficial children's Internet experiences. Although the sliding scale has met the first goal, we are concerned that the requirement may also have unintentionally resulted in a consolidation of children's online offerings. Verifiable parental consent requirements continue to be cost-prohibitive for some businesses, especially smaller companies. As a result, some companies have chosen to forgo offering children's sites and have instead produced general audience sites, which in turn has resulted in an increase in online offerings that may not be age-appropriate for children.

Commission recognition of more efficient and economical means of obtaining parental consent, while not required, could encourage businesses to develop more online offerings for children. For example, as the Commission acknowledged during the roundtable event on June 2, 2010, more parents now have access to scanners and email than to faxes, and it is reasonable to submit scanned signed consent forms via email for a quicker response. We encourage the

[45] 16 C.F.R. 312.5(c).
[46] 75 Fed. Reg. at 17090-91; 16 C.F.R. § 312.5(b)(2).
[47] Credit Card Accountability Responsibility and Disclosure Act of 2009, Pub. L. No. 111-24, 123 Stat. 1734, 1747-51 (2009).
[48] *See* 16 C.F.R. § 312.5(b).

Commission to recognize other acceptable methods of verifying parental consent as technology evolves. We recommend that the Commission should explore methods that permit children immediate access to the offerings that interest them, are efficient and easy for parents, involve lower costs for businesses so they can redirect resources into developing children's content, and function in a mobile digital environment. In particular, the Commission should consider recognizing methods such as (1) leveraging parental controls that are now incorporated into many technologies, (2) text message transactions, and (3) digital signature mechanisms for mobile devices with Internet access. Although Commission recognition for parental consent methods is not required, it can provide greater certainty and predictability to encourage companies to invest in wider offerings for children.

The DMA emphasizes that we believe the Commission has taken the correct approach by not limiting the permissible consent methods to those that are specifically enumerated by the Commission. Section 312.5(b)(2) of the Rule as written permits operators to obtain parental consent through a variety of means so long as they are "reasonably calculated" to ensure that the person providing the consent is the child's parent. This standard encourages continued innovation in the area of parental consent and control, and enables companies to take advantage of new tools that are efficient for consumers and satisfy the Rule.

VIII. The Email Exceptions to Obtaining Verifiable Parental Consent Should Be Preserved

The Commission has asked operators about their experiences with the email exceptions to verifiable parental consent requirement, which permit operators to collect a child's email without obtaining a parent's consent in advance.[49] Many children's sites directed to children have been able to offer interactivity by relying on the email exceptions articulated in the Section 312.5(c) of the Rule. Our members have used these exceptions to provide beneficial and popular offerings to children, such as contests, newsletters, electronic postcards, and homework help. The ability of our member operators to rely on these email exceptions contributes to the interactivity of the Internet for children. We therefore support preserving the existing email exceptions in any revision of the COPPA Rule.

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We thank you for the opportunity to contribute comments and look forward to working with you on this important matter.

[49] 75 Fed. Reg. at 17091.