

Before the
FEDERAL TRADE COMMISSION
Washington, DC 20580

In the Matter of)
)
kidSAFE Safe Harbor Proposal) **P-135418**

COMMENTS OF CENTER FOR DIGITAL DEMOCRACY

The Center for Digital Democracy (CDD) respectfully submits these comments in response to the Federal Trade Commission’s (FTC or the agency) *Children’s Online Privacy Protection Rule Safe Harbor Proposed Self-Regulatory Guidelines; kidSAFE Seal Program Application for Safe Harbor*.¹ CDD is a national nonprofit, nonpartisan organization dedicated to promoting responsible use of new digital communications technologies, especially on behalf of children and their families. CDD has a strong interest in ensuring that FTC only approves self-regulatory guidelines that fully comply with the agency’s rules and with the underlying purpose of the Children’s Online Privacy Protection Act (COPPA), *i.e.* to prohibit the collection of personal information from children without the verifiable informed consent of their parents.

INTRODUCTION

kidSAFE Seal Program’s (kidSAFE) application² to become a COPPA Safe Harbor under the COPPA regulations³ is deficient and should be clarified and improved by the company before being considered by FTC. The company’s plan to name its privacy certification in a manner

¹ 78 Fed. Reg. 57319 (Sept. 18, 2013) (“Safe Harbor Notice”).

² kidSAFE Seal Program’s Application for COPPA Safe Harbor Approval (Aug. 15, 2013) *available at* <http://www.ftc.gov/os/2013/09/130916kidsafeapplication.pdf> [hereinafter App.].

³ 78 Fed. Reg. 3972, 4008–13 (Jan. 17, 2013).

similar to its safety certification program will mislead parents. While the company does a good job of incorporating most of the COPPA regulations into its rules,⁴ it fails to protect information obtained for internal operations from unfettered use by third parties. The redacted application materials that FTC published do not show that kidSAFE will effectively monitor or discipline its clients, and the consumer complaint mechanism that is offered for the use of parents discourages them from pursuing complaints and could potentially reject valid complaints. For these reasons FTC should require additional materials from the company and amendments to some of the proposed rules before it considers approving this application.

ANALYSIS

This submission discusses the kidSAFE application under the rubric of the six questions provided in FTC’s Federal Register notice of the Safe Harbor application.⁵

1. Please provide comments on any or all of the provisions in the proposed guidelines.

As an initial matter, kidSAFE’s plan to name its COPPA certification “kidSAFE+,” similar to its existing certification “kidSAFE,” seems likely to unduly confuse parents. Indeed, kidSAFE acknowledged this by boldface emphasizing in its application that: “For the sake of clarity, we are seeking Safe Harbor status for the ‘kidSAFE+’ aspect of our program only.”⁶ If those who are reviewing this application need to be alerted to this distinction, what will give normal online users sufficient warning of the difference?

⁴ See App. at Exhibit D 12–25 (laying out the full text of the updated COPPA regulations).

⁵ Safe Harbor Notice at 57319.

⁶ App. at Cover Letter 1.

Parents who see a kidSAFE or kidSAFE+ seal should not be expected to understand that one is an industry self-regulation related to safety while the other is related to privacy and compliance with legal duties under COPPA. Adding a “+” to a seal does not reflect the different focus of this proposed Safe Harbor certification, and instead implies that it is a certification for enhanced safety measures like those already provided by kidSAFE under its existing seal program.

Until the company renames its proposed seal or demonstrates how it will more clearly communicate “online privacy protection” to parents, FTC should not approve kidSAFE’s application. The agency should not allow Safe Harbor certifications that clutter websites but do not provide basic information that certification demonstrates COPPA compliance.

2. Do the provisions of the proposed guidelines governing operators’ information practices provide “the same or greater protections for children” as those contained in Sections 312.2 - 312.10 of the Rule?

Generally speaking, the kidSAFE proposed guidelines track the COPPA regulations. However, the kidSAFE guidelines do not provide equal protection to the COPPA regulations in connection with the disclosure to third parties of information collected for internal purposes.

COPPA rule § 312.2 defines “support for internal operations” as activities necessary to perform certain specific functions such as authenticating users—the activities are listed in the definition’s subsections (a) to (g). After listing these few allowed forms of internal operations, the rule states that the information collected to support internal operations is also limited by the proviso “so long as the information collected for the activities listed in paragraphs (a)-(g) is not used or disclosed to contact a specific individual, including through behavioral advertising, to amass a profile on a specific individual, or *for any other purpose.*” (emphasis added). Hence, a third party supplier of support for internal operations may not use information gleaned for any

purpose other than those enumerated as internal operations, and an operator who allows a third party to do this could be liable for COPPA violations.

The kidSAFE rules are inconsistent with that definition of “support for the internal operations” in that they read out the prohibition on using the information in “amassing a profile on a specific individual or for any other purpose” language. Specifically, in proposed rule 9(i) and accompanying endnote 71, the company tells its clients that they need only prohibit the use of information in behavioral advertising.⁷ Similarly, in another part of its application, the company indicates that kidSAFE does not prohibit providing collected information to third parties so long as it is not used for *marketing*.⁸ These provisions suggest that operators can provide confidential information gleaned from children to anyone who claims they will not use it for marketing or behavioral advertising, which would imperil COPPA compliance across the board. Thus, FTC should require that kidSAFE clarify its policies so that it fully aligns with the definition of “support for internal operations.”

3. Are the mechanisms used to assess operators’ compliance with the proposed guidelines effective?

The COPPA regulations require a Safe Harbor applicant to provide detailed information on its business model and technological capabilities that, if ever provided by kidSAFE, has been

⁷ See App. at Exhibit D 4, 8–9.

⁸ App. at Exhibit E 3 (“The terminology regarding “marketing” under Rule 5(g) is there to exclude from the prohibition (i.e., allow) the sharing of personal information with third party vendors and service providers for non-marketing purposes, which is both allowed under our program and not subject to this “collection without disclosure” requirement under COPPA.”). This portion refers to a rule 5(g) (one of kidSAFE’s safety rules), which is redacted from this application and is not available to the public.

fully redacted from the information provided to the public. As a result, it is difficult to determine if operator assessments could be effective under the proposed Safe Harbor.

Section 312.11(c)(1) of the COPPA regulations states that: “A proposed safe harbor program’s request for approval shall be accompanied by . . . [a] detailed explanation of the applicant's business model, and the technological capabilities and mechanisms that will be used for initial and continuing assessment of subject operators’ fitness for membership in the safe harbor program.” Rather than providing this detailed information to the public, kidSAFE requested that all of its business model and technological capabilities be made secret.⁹ FTC did redact this information from the application, and as a result the public is not able to fully assess how kidSAFE plans to monitor its clients’ compliance.

In the portions of the application provided to the public, kidSAFE merely touts its discretion to investigate companies as it sees fit. The proposed kidSAFE rule 11(c) claims that “material violations” will be punished by increases in fees, termination of membership, revoking of certification, consumer redress, and anonymous payments to the United States Treasury.¹⁰ Nevertheless, in the accompanying endnotes to 11(c), the proposed rules make it clear that whether any discipline is administered is at kidSAFE’s “sole discretion.”¹¹ Though there are listed factors that kidSAFE will consider, all such determinations are “case-by-case”¹² and therefore there is no meaningful rubric on which the company’s decisions can be reviewed.

⁹ App. at Cover Letter 1 (redacted information contained in Exhibit B).

¹⁰ App. at Exhibit D 4.

¹¹ App. at Exhibit D 10 (quoted language in both endnotes 80 and 81).

¹² App. at Exhibit D 10 (endnote 81).

Furthermore, the company retains discretion to reject consumer complaints and not inform its clients about particular complaints. The company only plans to forward “valid” parental complaints to clients,¹³ showing that kidSAFE is going to disregard some subset of complaints it finds invalid. Once a “valid complaint” is forwarded to a client, kidSAFE reserves the right to terminate membership if the client does not comply.¹⁴ Nonetheless, in this description there is no explanation of how kidSAFE will monitor compliance or judge whether a complaint has been sufficiently responded to.

The Safe Harbor’s initial assessment of a client is described as “thorough” and “unparalleled,” but there is scarcely any information on what this means or the assessment mechanisms involved.¹⁵ Indeed, in the short section where kidSAFE discusses consequences for past violations it does not reveal how it initially discovered some of those violations.¹⁶ The anonymized and anecdotal examples of past disciplinary actions provided by the company do not show how operator assessments will work should kidSAFE become a COPPA Safe Harbor.

FTC may have significantly more information on the mechanisms kidSAFE plans to use, as the agency can review information redacted from the public application materials. If the agency is unable to publish additional information, even partially-redacted portions of the currently omitted Exhibits, on the kidSAFE business model and technological capabilities, then FTC should look even more closely at these areas and hold the proposal to a high standard.

¹³ App. at Exhibit F 3.

¹⁴ App. at Exhibit F 3.

¹⁵ App. at Exhibit F 2.

¹⁶ App. at Exhibit F 4.

Without increased transparency in this application the public has no knowledge of how rigorous the proposed measures will be.

Based on the information supplied to the public, kidSAFE has not carried the burden of showing it can reliably assess its clientele for COPPA compliance.

4. Are the incentives for operators' compliance with the proposed guidelines effective?

The incentives/disciplinary actions chosen by kidSAFE are unlikely to provide sufficient incentives for operators to comply with the Safe Harbor's rules and thereby COPPA.

The COPPA regulations lay out suggested disciplinary actions in § 312.11(b)(3). These include: mandatory public reporting of actions taken against operators; consumer redress; payments to the United States Treasury; referral of cases to FTC; and “[a]ny other equally effective action.” kidSAFE, through its listed disciplinary options, has avoided any reporting to the public or government and largely relies on monetary punishments that benefit itself (i.e. increased fees or termination of membership with no refund) or are effective only against minor infringers (i.e. the threat of refunding users fees or of temporarily losing a kidSAFE seal).¹⁷ There is no information in the application that shows these disciplinary actions will be effective in the future if kidSAFE is given the full responsibility of a COPPA Safe Harbor.

There is no proposed mechanism that would reveal repeat violators to the public or government. Where kidSAFE follows the suggested disciplinary actions, it removes any possibility of government oversight. As one example, it does allow for payments to the United States Treasury, but these payments are made anonymously.¹⁸ There is no mention or referral of

¹⁷ See App. at Exhibit F 4.

¹⁸ App. at Exhibit F 4.

cases to the FTC, even for a particularly bad operator. The other incentives listed are fully controlled by kidSAFE (i.e. raising fees, terminating membership without refund, removing kidSAFE icons, ordering consumer redress)¹⁹ and would not deter an operator who simply disregarded kidSAFE's actions and broke off contact with the Safe Harbor.

Further, even if some of the proposed disciplinary actions would be punitive, kidSAFE retains discretion to calibrate their use on “the severity of the violation.”²⁰ It is not clear from any rules put forth what violations would merit what disciplinary actions.²¹ The few anecdotal examples given by kidSAFE show only that it is reluctant to use all of the tools at its disposal, resorting only to removing the kidSAFE icons and ordering a few user fees refunded.²² Due to the generality of the user fee example,²³ it is unclear how many users were involved and whether this was a de minimis refund, for example of 99 cents for a purchased app, or something more significant. Weak measures are not going to be effective against wilful violators. These proffered examples do not prove that the measures the Safe Harbor would use, in its discretion, would actually cause operators to comply with COPPA. Without referral to the public or FTC, this

¹⁹ App. at Exhibit F 4.

²⁰ App. at Exhibit F 4.

²¹ As noted above, though kidSAFE lists some factors it might consider, it also retains full discretion to determine what is “material” and what punishment is appropriate. App. at Exhibit D 10.

²² App at Exhibit F 4.

²³ kidSAFE reportedly “required the affected members to issue full refunds to its consumers for previously-made transactions.” App. at Exhibit F 4. There is no attempt to quantify or further qualify these disciplinary actions.

proposed Safe Harbor will only be able to control clients who are seriously deterred by the mere threat of membership termination.

Until FTC receives more information about how kidSAFE will apply its disciplinary measures in the future it should not approve this application. Furthermore, any Safe Harbor that does not report any subset of violators to the public or FTC will necessarily have difficulty ensuring full COPPA compliance, so the agency should look carefully at the strength of the anonymous measures that kidSAFE has proposed.

5. Do the proposed guidelines provide adequate means for resolving consumer complaints?

The proposed method of processing consumer complaints is likely to be insufficient to assure these complaints are heard and resolved. As discussed above, kidSAFE plans to forward “valid complaints” directly to violating operators, and then somehow assure that clients respond to these complaints.²⁴ However, the intake of complaints seems flawed as designed and there is no recourse for a consumer (i.e. a parent) whose complaint is deemed invalid, with no right of appeal.

The kidSAFE website reveals the content of the company’s standard complaint form. When parents want to complain about an operator they are asked to name the kidSAFE client, rate the client for overall child safety and privacy, choose among check boxes for six types of complaints, and then “provide additional information” to describe a possible violation.²⁵ The parent can also supply his or her email address, and supporting uploads.²⁶

²⁴ App at Exhibit F 3.

²⁵ kidSAFE Seal Program, Report Issue Form, <http://www.proprofs.com/survey/t/?title=xs7un> (last visited Oct. 17, 2013).

²⁶ *Id.*

The form discourages participation. Strangely, the “additional information” box, which is the only place a parent could describe their complaint (unless they prepared and uploaded a separate document), only admits 200 characters.²⁷ Therefore any parent who had a complaint that could not be described easily in a few short sentences, or through one of the six checkboxes, runs the risk of having their complaint rejected for not expressing the problem sufficiently. Moreover, kidSAFE includes a disclaimer that it will only forward the complaint on to its client,²⁸ implying to parents that it will not mediate or demand a solution from the operator. This will discourage any parent with an unresolved complaint from further pursuing the issue with kidSAFE. Neither the website nor the application mention any further recourse for a parent whose complaint has not been addressed.

FTC should carefully assess whether the consumer complaint mechanism provided for this Safe Harbor would, by design, reject and marginalize parents’ complaints about privacy issues. The design described in the company’s application does not sufficiently allow for consumer complaints and resolution of consumer issues.

6. Does kidSAFE have the capability to run an effective safe harbor program? Specifically, can kidSAFE effectively conduct initial and continuing assessments of operators’ fitness for membership in its program in light of its business model and technological capabilities and mechanisms?

As already discussed, that information has been fully redacted from the public comments. There is no way for the public to assess the company’s business model or technological

²⁷ *Id.*

²⁸ *Id.* (“Note: Due to the nature of our program, we can only help address issues concerning a child's safety or privacy by forwarding your concern to the appropriate company. We cannot and will not respond to technical issues, account login problems, or any other concerns regarding a site or service we've certified.”).

capabilities. The statements about kidSAFE's intention to review its clients contained in the public documents do not demonstrate how the company would assess potential or existing clients.

CONCLUSION

In conclusion, for the reasons stated above FTC should reject kidSAFE's application as written, or require amendments and clarifying submissions from the company.

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October 18, 2013