



December 23, 2011

Mr. Donald Clark  
Secretary  
Federal Trade Commission  
Room H-135 (Annex E)  
600 Pennsylvania Avenue, N.W.  
Washington D.C. 20580

RE: COPPA Rule Review, 16 CFR Part 312, Project No. P-104503

Dear Secretary Clark:

These comments are submitted by the National Retail Federation (“NRF”) in response to the request for public comment on the Federal Trade Commission’s (“FTC” or “Commission”) proposed amendments to the Children’s Online Privacy Protection Rule (“COPPA Rule” or “the Rule”).

As the world’s largest retail trade association and the voice of retail worldwide, NRF’s global membership includes retailers of all sizes, formats and channels of distribution as well as chain restaurants and industry partners from the United States and more than 45 countries abroad. In the U.S., NRF represents an industry that includes more than 3.6 million establishments and which directly and indirectly accounts for 42 million jobs – one in four U.S. jobs. The total U.S. GDP impact of retail is \$2.5 trillion annually, and retail is a daily barometer of the health of the nation’s economy.

Significant online as well as “click & mortar” retailing are becoming the norm in many areas of our industry. Moreover, the methods by which consumers and merchants interact are ever changing. This is a particular focus for NRF’s Shop.org division. For example, almost half (46.7%) of all adults 18 years and older plan to make some portion of their holiday purchases online. One-third expects to do between one quarter and one half of all their holiday shopping specifically online this year.<sup>1</sup>

NRF and the retail industry have long supported the objectives of COPPA – to protect children’s personal information from being collected online without parental knowledge and consent. U.S.

---

<sup>1</sup> NRF’s 2011 Holiday Consumer Intentions and Actions Survey, *available at* [http://www.nrf.com/modules.php?name=News&op=viewlive&sp\\_id=1225](http://www.nrf.com/modules.php?name=News&op=viewlive&sp_id=1225).

retailers take their responsibilities under COPPA seriously and are constantly evaluating compliance measures with new technologies to ensure compliance.

In enacting COPPA, Congress sought to “enhance parental involvement in a child’s online activities” to protect their privacy and safety online by limiting the collection of personal information from children without parental consent, “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.”<sup>2</sup>

Stifling future legitimate uses of information obtained with parental consent will have a negative impact on the quality of valuable content available for children and their parents. The dynamism and flexibility of the Internet has spurred the creation of innovative services based on the analysis and reconfiguration of available information. Wildly popular functions, such as “spot on” reading recommendations arose from the use of shared information. Consequently, NRF encourages the FTC to examining businesses practices and restrict identified practices as opposed to only permitting specific uses for information.

Retailers remain focused on innovation in the online sphere; however, that requires flexible regulations reflecting how businesses actually use information. When COPPA was enacted Congressional intent reflected two main themes that should remain the touchstone for rulemakings moving forward. First, the main purpose of COPPA was to ensure that websites obtain verifiable parental consent before information about a child may be collected. Second, information on its own should not be regulated unless and until a business connects certain information to an individual child making it personal.

An updated COPPA Rule should reflect the reality that online services will continue to evolve and that how children and their parents interact with new platforms is not entirely foreseeable. Drafting a rule that reacts to set of technical possibilities without reflecting the realities of business practice is a perilously narrow precedent. It is important to allow the development of the free content online without the harsh exclusionary language of the proposed amendment versus identifying practices that are not permissible under COPPA. COPPA was not drafted to limit children’s engagement but was intended to encourage and protect children’s interactive experience online.

Several of the FTC’s proposed rulemakings raise concerns about the future of online content for children.

#### Definitions

The proposed changes to the definitions and scope of the COPPA Rule raise a number of concerns within the retail industry. With regards to the changes to the definition of “collects or collection,”

---

<sup>2</sup> Statement of Sen. Bryan, 144 Cong. Rec. at S11657 (Oct. 7, 1998).

the restriction on passive tracking of children realistically should be limited to situation where an individual child is identified by the site operator. This limitation will strengthen the exclusion of tracking used for internal operations of a website or online service proposed by the FTC in the changes to the definition of “disclosure.”

The retail community supports the FTC’s recognition that information regarding how individuals interact with and use a website or online service is critical to businesses development and improvement with children and adults alike. However, the proposed definition of “support of internal operations of the website or online service” is troubling in only recognizing that information may be collected by a website for one purpose. Retailers may have several legitimate uses for information including providing information based on settings provided by a user and saving prior purchase histories that are not solely for the internal operations of the website. For example, “reading recommendations” would not likely have been developed if this proposed rule had been in place. Limiting these services would severely restrict a user’s interaction with many sites which is contrary to the purpose of COPPA.

NRF strongly supports the FTC’s recognition of the value of screen names and persistent identifiers for the technical functioning of a websites. However, NRF continues to urge the Commission to identify prohibited practices instead of limiting the functionality of a website for a child even after they have received parental consent to use the service. As was mentioned, uses of information online are constantly evolving and for the FTC to identify situations where the information may not be used provides clarity for online businesses while protecting the future development of new online services.

Consumer information is important for retailers on several levels including setting preferences for future site visits and identifying useful options for consumers. Assuming that information only has one legitimate use will severely limit a child’s online experience even after they have received parental consent to engage with the website or online service. Several of the proposed changes indicate that the FTC would like to see more business development of mechanisms to protect children’s online experience (see obtaining verifiable parental consent). However, businesses constrained to one use of information collected from a child after obtaining parental consent are prohibited to use that information in developing any new technologies.

The proposed changes to the definition of personal information raise serious concerns for the retail community. The most effective way to balance the concerns of privacy and continuing to deliver online content to children is to exclude undesirable uses of information (tracking an individually identifiable child) instead of only allowing information to be used for the internal operation of a website. Individually geolocation information, ZIP code plus 4, ZIP code, birth date, and gender should not be considered personal information unless and until they are connected to an identified individual.

The proposed rule would include all photographs, video or audio files where the file contains a child's image or voice as personal information. NRF agrees that the stated purpose of COPPA, namely "ensur[ing] that parents are given notice and opportunity to decide where posting images or audio files is an activity in which they wish their children to engage," is important. However, the language of the FTC's proposed rules encompasses a wide range of online activities including a variety of contests run by retailers linked through websites such as Facebook where people post pictures that may include their children. The unintended consequences of this proposed rule are far reaching and present a myriad of unintended consequences.

Finally, the definition of "website or online service directed to children" should not be expanded based upon the presence of celebrities or celebrities who appeal to children. The fluidity of the marketing perception of celebrities in the tween category implicates a wide range of general purpose retail sites if the celebrity's presence is used to determine that a website is subject to the increasingly wide scope of COPPA requirements.

#### Parental Consent

Mechanisms for verifiable parental consent are a concern for NRF members subject to COPPA's requirements. The retail community encourages the FTC to adopt a flexible approach allowing for the use of "email plus" in circumstances where information collected from a child is minimal. For example, in entering a contest online a child enters very basic information, such as an email address, which is used to notify the winner. "Email plus" is sufficient to obtain verifiable parental consent in this case. In many cases, a stricter mechanism is appropriate because email plus might be gamed. The amount of resources that are necessary to obtain consent should be proportional to the information that is being collected from the child. The NRF supports a sliding scale approach to obtaining verifiable parental consent.

#### Data Retention and Deletion Requirements

FTC stated in the advanced notice of proposed rulemaking "[d]eleting unneeded information is an integral part of any reasonable data security strategy." But suggesting that information has only one purpose does not reflect business realities. COPPA's intent was to maintain children's access to valuable online content and restricting information use in this unprecedented manner threatens the very premise of the legislation.

"Necessity" should be defined flexibly to accommodate potential different purposes particularly when sensitive information is not at issue. Records of prior purchases and preferences provided by customers allow retailers to offer tailored suggestions. Information is retained by retailers for a number of different purposes aimed at providing customers what they want and except from the online experience.

In light of the constantly evolving online experience the FTC's proposed changes to the COPPA Rule should focus on identifying those categories of information collection practices that should not

National Retail Federation

December 23, 2011

Page 5

be permitted (e.g. tracking a person at an individually identifiable level) rather than narrowly restricting the information's use to a singular purpose which would endanger future development of online services for children.

We appreciate the Commission's interest in this area and its consideration of these points.

Respectfully submitted,



Mallory Duncan  
Senior Vice President, General Counsel  
National Retail Federation