December 23, 2011

Via electronic filing: https://public.commentworks.com/ftc/2011copparulereview

Hon. Donald S. Clark
Federal Trade Commission
Office of the Secretary, Room H-135 (Annex E)
600 Pennsylvania Avenue, NW
Washington, DC 20580

Re: COPPA Rule Review, 16 CFR Part 312, Project No. P104503

Dear Secretary Clark:

The undersigned associations, which collectively represent thousands of online publishers, advertisers, and advertising service providers, are pleased to submit this comment in response to the Federal Trade Commission's ("Commission") proposed amendments to the Children's Online Privacy Protection Rule ("COPPA Rule").

The undersigned associations and our members share the Commission's goal of protecting children online. We also agree with Senator Richard Bryan, the author of the Children's Online Privacy Protection Act ("COPPA") that this goal should be pursued "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[,]" recognizing that online literacy is critical for academic and economic success.[1] As Senator Bryan pointed out: "The fact that deceptive acts may be committed on the Internet, is not a reason to avoid using the service. To tell children to stop using the Internet would be like telling them to forgo attending college because students are sometimes victimized on campus."[2]

The COPPA statute and the current COPPA Rule have met these goals. In our experience, they strike an appropriate and workable balance that protects children and ensures parental oversight and involvement in their children's online activities, while also preserving children's ability to access online resources in a safe and supervised manner. Although we are aware that some companies have been discouraged from providing online resources for children due to the burdens of COPPA compliance, children generally have access to a rich variety of online offerings.

Yet it is not feasible or necessary to extend COPPA's requirements across the Internet. We therefore agree with the Commission that Congress properly limited the scope of COPPA by defining a "child" as an individual younger than 13[3] and by providing that COPPA applies to

[1] 144 Cong. Rec. S11657 (daily ed. Oct. 7, 1998) (statement of Sen. Bryan); 144 Cong. Rec. S8482 (daily ed. July 17, 1998) (statement of Sen. Bryan) ("I think we all would agree that proficiency with the Internet is a critical and vital skill that will be necessary for academic achievement in the next century. The benefits of the Internet are extraordinary.").
[2] 144 Cong. Rec. S8483 (daily ed. July 17, 1998) (statement of Sen. Bryan).
[3] 15 U.S.C. § 6501(1).

general audience websites and online services only if they have "actual knowledge" that they are collecting "personal information" from a child.[4] We appreciate the Commission's reaffirmation that "actual knowledge" is a strict standard and share the Commission's views that lesser standards would not be workable.[5]

At the same time, the Commission proposes to amend the COPPA Rule in numerous respects. The cumulative effect of the changes set out in the Commission's proposed rule and request for comment ("Proposed Rule"), particularly the proposed redefinition of "personal information," could be significant. Below, we highlight the compliance challenges that the Proposed Rule is likely to create. We are concerned that these costs and burdens could ultimately limit the interactivity and availability of online activities of children. The Commission's proposed redefinition of "personal information," in particular, exceeds the Commission's authority under the COPPA statute and is based on an inaccurate characterization of industry self-regulatory standards.

The Proposed Rule poses numerous major compliance challenges that could negatively impact both companies and parents. To highlight just a few examples:

- The Proposed Rule potentially expands the universe of entities that should provide COPPA notice, as well as the situations in which such notice should be provided. This obligation could be triggered even by a very limited collection of non-personally identifying information. In such a situation, direct notices could not be delivered without requesting additional data from children that is not currently collected, such as a name or other personally identifying information.

- This broader scope of COPPA obligations under the Proposed Rule, coupled with provisions requiring direct notices to include certain elements, could inundate parents with multiple and lengthy notices for each website or online service accessed by a child. Implementation in the mobile environment would likely prove especially challenging.

- At the same time, the Commission proposes to eliminate the widely-used "e-mail plus" method of obtaining parental consent, shifting the parental consent process toward multi-step offline consent methods (which may need to be completed for multiple entities per website or online service). We anticipate that parents would likely find the notice and consent process contemplated by the Proposed Rule markedly more confusing, annoying, and onerous than the current regime. Given the many demands on parents' time and attention, we are concerned that this could result in a major reduction in parental consents obtained, solely due to the burdens of the process.

- The Commission also seeks to expand the definition of "collects or collection" to include instances when an operator prompts or encourages a child to submit personal information, as well as "all passive tracking of a child online" regardless of the technology used. We are concerned that these terms are both broad and vague, creating a wider enforcement scope while leaving companies uncertain when COPPA may be

[4] 15 U.S.C. § 6502(a)(1).
[5] 76 Fed. Reg. 59804, 59806 (Sept. 27, 2011).

triggered. For example, it is unclear whether merely including interactive features in a website could be considered "prompting" the submission of personal information. This concern is heightened given that it is also unclear what features could be considered sufficiently "necessary" to fall within the definition of "support for internal operations." To avoid liability risk, companies may become reluctant to offer interactive features in children's online resources.

- Similarly, the proposed new data retention and deletion requirements are both vague and broad, and therefore are likely to inhibit companies from offering rich and interactive children's offerings that must be supported by data over time.

These and other aspects of the Proposed Rule would create costly and technically challenging, perhaps insurmountable, barriers to companies' ability to continue providing interactive online resources for children.[6] In particular, the Proposed Rule could limit companies' ability to offer free resources that are supported by online advertising. These barriers would be exacerbated by the hurdles to parental consent described above. As a result, we are concerned that companies would be forced to modify, reduce, or eliminate their children's offerings. Such a counterproductive outcome would reduce the array of online educational resources that are currently available even as online literacy and learning become ever more essential.

The Commission's proposed redefinition of "personal information" is one of the key changes that would drive the challenges identified above. The Commission seeks to expand the term "personal information" to include geolocation data, persistent identifiers (unless used to support internal operations), photographs and audio/video files, screen names and user names (even if they do not reveal an email address, unless the screen or user name is used to support internal operations), and any identifier that links the activities of a child across different websites or online services – even if such data elements are not combined with any personally identifying information or any other data element.

We believe that this effort to redefine "personal information" is not supported by the COPPA statute. "Personal information" is limited by statute to data that is "individually identifiable," and Congress authorized the Commission to define "identifiers" as "personal information" only if an identifier "permits the physical or online contacting of a specific individual."[7] The plain language and legislative history of COPPA do not support the Commission's novel interpretation that "personal information" should include data with which an operator is only "reasonably likely" to be able to contact an individual.[8] Moreover, we believe that the data elements proposed as "personal information" would not even meet this weakened standard.

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[6] The Commission proposes that COPPA requirements should not apply to the collection of persistent identifiers for support of internal operations. However, this exception is defined narrowly and does not apply to identifiers that link a child's activities across websites, even affiliated websites.

[7] 15 U.S.C. § 6501(8).

[8] A section-by-section analysis of COPPA, placed in the Congressional Record by author Senator Bryan, states that "contact" includes "attempts to communicate *directly* with a *specific, identifiable individual*" and does not include "information that cannot be linked by the operator to a specific individual". Cong. Rec. S11657 (October 7, 1998) (emphasis added).

IP addresses, customer numbers in cookies, device identifiers, and other identifiers that may be used across websites or online services permit the delivery of content and advertising to a *device*, not personal contact of a specific *individual*. The Commission asserts that the rise of portable devices means that "operators now have a better ability to link a particular individual to a particular computing device."[9] But a device may be used by many individuals, and these numeric identifiers, without additional data, do not provide any basis to identify which individual is using a device or to present content to one user rather than other users. Likewise, geolocation information standing alone does not identify or permit contact with a specific individual, but rather captures the location of a device. For example, even if geolocation data shows that a specific mobile device is located in a school, there is no way for the provider of a history game application to know, based on limited data such as the device's location or unique identifier alone, whether the game is being played by a child sitting in class or a teacher trying to plan a curriculum.

Photographs and audio/video files also do not permit the online contacting of a specific individual, any more than a photograph found on an offline bulletin board, without further information, could allow the contact of the photographic subject. Screen names and user names, as well, do not necessarily correspond to a person's real name or allow the contacting of that person, but may be used for a variety of different purposes by a website or online service.

The fact that these data categories do not permit the online contacting of a specific individual, as required by the COPPA statute, gives rise to the compliance challenges discussed above. COPPA's notice-and-choice regime cannot feasibly be extended to data that does not permit individual contact.

The undersigned associations also note that the Commission states, in support of this change, the view that the Self-Regulatory Principles for Online Behavioral Advertising do not "expressly require prior parental consent" for online behavioral advertising.[10] As explained in the comment submitted by the Digital Advertising Association ("DAA"), the organization responsible for administering and implementing the Self-Regulatory Principles, the Commission's statement does not reflect the Principles' application to children under 13. The Sensitive Data provision of the OBA Principles limits the collection and use of <u>any</u> data – not just data that are "personal information" as defined by COPPA – that can be associated with a particular computer or device for the purpose of engaging in online behavioral advertising where the entity collecting the data has actual knowledge the user is a child under 13. Moreover, even the Commission notes that it is "unclear" from the record whether any online behavioral advertising is directed to children.[11]

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[9] 76 Fed. Reg. at 59812.
[10] 76 Fed. Reg. at 59812-59813 n. 86.
[11] 76 Fed. Reg. at 59812-59813 n. 86.

To the extent that the Proposed Rule is motivated by an intent to extend COPPA to online behavioral advertising,[12] then, the Commission's amendments would be both overbroad and unnecessary. As discussed, the likely and counterproductive effect of the Proposed Rule would be to restrict children's access to interactive online resources by making it more difficult for companies to solicit and parents to provide the requisite consent for children's participation.

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We suggest that the Commission should reconsider its Proposed Rule in light of these significant and fundamental concerns. Moreover, given the important issues at stake, we ask that the Commission request and consider public comments on any new proposal that the Commission may eventually put forward, before such new proposal becomes effective.

We appreciate the Commission's consideration of this comment and we look forward to continuing to work with the Commission toward our shared goal of securing children's online protection and access to interactive online resources.

Sincerely,

American Association of Advertising Agencies
American Advertising Federation
Association of National Advertisers
Direct Marketing Association
Electronic Retailing Association
Interactive Advertisers Bureau
Magazine Publishers of America
NetChoice
Toy Industry Association
U.S. Chamber of Commerce

[12] *See, e.g.* 76 Fed. Reg. at 59812 (stating that the "catch-all" category is intended to capture data gathering for the purposes of online profiling or online behavioral advertising, although the proposed regulatory provision is not so limited).