

December 23, 2011

Via electronic filing: <https://public.commentworks.com/ftc/2011coppauleview>

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 Children's Advertising Review Unit of the Council of Better Business Bureaus, Inc. ("CARU") is pleased to have this opportunity to comment on the Federal Trade Commission's ("FTC" or "Commission") proposed modifications to regulations implementing the Children's Online Privacy Protection Act ("COPPA").

The scope of CARU's comment is limited to those proposed modifications which relate to the safe harbor program.¹

As the FTC is aware, CARU performs two separate roles in the self-regulation of children's online data collection. First, CARU's Guidelines,² which apply to all children's advertising industry members, require compliance with COPPA and certain other self-regulatory provisions designed to enhance compliance with COPPA. CARU monitors child-directed websites generally for compliance with these requirements even where a website operator does not participate in the CARU safe harbor program. If CARU finds violations, it seeks prompt, voluntary correction. If the company refuses to participate in the self-regulatory process or refuses to bring its practices into compliance, CARU will refer the company to the FTC for review. All of CARU's inquiries are publicly reported to ensure transparency and consistency. Since 2000, CARU has handled over 200 decisions involving COPPA related issues.

Second, CARU was the first recognized safe harbor program provider following the promulgation of COPPA. Under this program, CARU reviews an applicant's website for

¹CARU is limiting its comment to those revisions most directly related to CARU's responsibilities as a safe harbor program provider. CARU's supporters will be filing individual comments regarding the other proposed revisions. CARU expresses no views on these other proposed revisions.

² The Children's Advertising Review Unit, *Self-Regulatory Program for Children's Advertising*, Council of Better Business Bureaus, Inc., 2009.



compliance with COPPA and the CARU Guidelines and allows use of an icon to signify that CARU's review indicates that the participant meets these criteria. Unlike our general monitoring and enforcement program, this program applies only to companies voluntarily seeking to participate. CARU believes that the safe harbor program serves an important role by encouraging industry members to be compliant with COPPA while, at the same time, developing their own oversight programs. Since its inception, CARU's safe harbor program has grown every year.³

CARU is pleased that the Commission has consistently and publicly recognized the value of all of our self-regulatory programs. With respect to COPPA's safe harbor program requirements, CARU believes that its program has fulfilled its stated purposes. Indeed, as the Commission noted, "this section serves as an incentive for industry self-regulation; by allowing flexibility in the development of self-regulatory guidelines, it ensures that the protections afforded children under this Rule are implemented in a manner that takes into account industry-specific concerns and technological developments."⁴

Potential COPPA safe harbor participants under CARU are assigned a staff member who reviews the various requirements. CARU carefully exercises due diligence to determine whether companies are in compliance with COPPA and its self-regulatory guidelines before issuing its safe harbor icon. Once compliance is confirmed, a participant is a safe harbor member in good standing for a one year period. Prior to the expiration of a company's safe harbor status, CARU will contact the company and review its status prior to granting renewal. CARU also periodically reviews its safe harbor participants to ensure compliance.

CARU works informally with safe harbor participants to address issues identified by the CARU staff. It also takes disciplinary action for non-compliance, which may include the discontinuance of CARU's icon and, in appropriate cases, the reporting of the name and any specific concerns on the industry member's violation to the Commission.

CARU supports the FTC's proposal for more uniform review of safe harbor programs with an important caveat that is discussed more fully below. In general, CARU believes that most of the proposed modifications will not only strengthen the safe harbor program, but will facilitate and enhance the Commission's named goals of reliability, accountability, transparency and sustainability. Moreover, we believe that the safe harbor program provides an important vehicle for promoting widespread compliance with COPPA in a manner that conserves government resources and facilitates voluntary industry compliance consistent with the Congressional directive that the Commission provides incentives for self-regulation. Additionally, CARU believes some of the Commission's proposed modifications will create a level playing field among the various

³ Separately, the National Advertising Review Council (NARC) has established a separate program to monitor compliance with a new set of Principles for the collection and use of data for interest based advertising purposes, including the collection and use of data for OBA purposes from children. The NARC accountability program is described in a separate comment.

⁴ 1999 Statement of Basis and Purpose, 64 Fed. Reg. 59888, 59906 (footnote omitted).

safe harbor programs thereby encouraging more consistency regarding procedures and uniform administration.

CARU comments upon each of the proposed modifications seriatim below.

CARU is in agreement with the proposed modification of 16 CFR 312.10(b)(2) which seeks to have, at a minimum, an annual comprehensive review by the safe harbor provider of the operator's information policies, practices, and representations. As noted above, CARU performs such a review now prior to approving or renewing a safe harbor participant.

Similarly, CARU does not take issue with that portion of proposed 16 C.F.R. 312.11(c) (1) – (3) which calls for a detailed explanation of a safe harbor applicant's technological capabilities and mechanisms that will be used for initial and continuing assessment of the subject operator's fitness for membership in the safe harbor program. The proposed modification of 16 C.F.R. 312.11(b)(3)(i) calls for the public reporting of "any" action taken against a website operator. CARU, however, does not believe that the proposed modification should be interpreted or implemented to require public reporting of every issue discovered during a routine review of safe harbor participants, or routine discussions with safe harbor participants related to questions about how to comply. Much of the value of self-regulation is that issues can be handled quickly and effectively. The reporting of "any" action taken against a website operator may have a chilling effect on the website operators' willingness to raise compliance issues themselves. To the extent the Commission seeks full disclosure of "any" action taken in connection with safe harbor participants, CARU believes it would not be in keeping with the Congressional directive to offer incentives for self-regulation.

The proposed modification of 16 C.F.R. 312.11(d) provides:

Reporting and recordkeeping requirements. Approved safe harbor programs shall:

- (1) Within one year after the effective date of the Final Rule amendments, and every eighteen months thereafter, submit a report to the Commission containing, at a minimum, the results of the independent assessment conducted under paragraph (b)(2), a description of any disciplinary action taken against any subject operator under paragraph (b)(3), and a description of any approvals of member operators' use of parental consent mechanism, pursuant to §312.5(b)(4);
- (2) Promptly respond to Commission requests for additional information; and
- (3) Maintain for a period not less than three years, and upon request make available to the Commission for inspection and copying;
 - i. Consumer complaints alleging violations of the guidelines by subject operators;

- ii. Records of disciplinary actions taken against subject operators; and
- iii. Results of the independent assessments of subject operators' compliance required under paragraph (b)(2).

With respect to the review and three (3) year file retention requirements, CARU performs these duties now. CARU does not take issue with the proposed reporting requirement to the FTC so long as it is interpreted and implemented reasonably and with the goal of promoting effective self-regulation. However, we would stress that the purpose of self-regulation is to promote voluntary compliance and correction. If the proposed changes to the safe harbor program were implemented in such a manner that the safe harbor program merely becomes an investigative arm of the FTC, the process would severely undermine the concept of self-regulation. For the same reason, while we agree that safe harbor entities need to regularly report information about their activities, we urge that the Commission continue its traditional process of seeking compliance information directly from the participants of the program and not from the safe harbor entities themselves.

Accordingly, as delineated above with respect to the proposed 16 C.F.R. 312.11(b)(3)(i), CARU believes that the proposed modification to 16 C.F.R. 312.11(d)(1) does not contemplate the specific naming of individual website operators. If that interpretation is not correct, however, rules that effectively give the Commission access to individual compliance assessments will chill participation. As a safe harbor provider directly overseeing the participating operators and conducting individual assessments, CARU strongly believes that reporting to the Commission of how many assessments were conducted and the number and nature of any disciplinary actions taken should be sufficient under this provision. Additionally, any transparency concerns on the part of the Commission would be met by referrals to the FTC in instances where participants do not agree to adhere to CARU or COPPA requirements. This is also the approach CARU takes with website operators who are not members of the CARU safe harbor program.

CARU believes that such reporting will satisfy the Commission's desire for improved transparency without creating a disincentive for companies to voluntarily participate in safe harbor programs, and thus further the Commission's goal of promoting broad compliance with this important law and Congressional directives to provide incentives for self-regulation.

Consequently, we suggest modifying proposed 312.11(d) as follows (in redline/strikeout format):

Reporting and recordkeeping requirements. Approved safe harbor programs shall:

- (1) Within one year after the effective date of the Final Rule amendments, and every eighteen months thereafter, submit a report to the Commission containing, at a minimum, a summary of the results of the independent assessment(s) conducted under paragraph (b)(2), a summary of consumer complaints alleging violations of the guidelines by subject operators, a description of any disciplinary action taken against any subject operator under paragraph (b)(3), and a description of any

approvals of member operators' use of parental consent mechanism, pursuant to §312.5(b)(4);

- (2) Promptly respond to Commission requests for additional information to confirm the program's compliance with the safe harbor requirements; and
- (3) Maintain for a period not less than three years, and upon request make available to the Commission for inspection and copying;
 - i. Consumer complaints alleging violations of the guidelines by subject operators; and
 - ii. Records of disciplinary actions taken against subject operators. ~~;~~ and
 - iii. ~~Results of the independent assessments of subject operators' compliance required under paragraph (b)(2).~~

We appreciate the opportunity to provide comments and look forward to working with the children's advertising industry to provide effective self-regulation of online data collection practices.

Respectfully submitted,

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of the Council of Better Business
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