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BY ELECTRONIC FILING

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

Re: COPPA Proposed Rule; Request for Comment on Proposal to Amend Rule to Respond to Changes in Online Technology, FTC Project No. P104503

Dear Secretary Clark:

The Entertainment Software Rating Board (ESRB), which operates the ESRB Privacy Online program, submits these comments in response to the request of the Federal Trade Commission (FTC) for public comment concerning the proposal to amend the Children's Online Privacy Protection Rule (16 C.F.R. § 312.1 – 312.12) ("Rule"). As one of the four certified COPPA Safe Harbor programs presently operating, we believe we bring particular insight and perspective to the proposed changes to the Safe Harbor provisions of the Rule (proposed 16 CFR 312.11). Our comments, therefore, are principally confined to that area.

As noted by the FTC in its June 2, 2010 notice to i-Safe denying its application for safe harbor status: "The safe harbor provisions set forth in COPPA provide a unique opportunity for industry members to participate in protecting children's privacy and safety online." As one of four authorized COPPA safe harbors granted this unique opportunity, ESRB Privacy Online is well positioned to address the issues currently facing safe harbor programs and recommend solutions that we think are consistent with Congress' original intent in the enabling legislation.

Congress' avowed purpose in providing for COPPA safe harbors was to facilitate industry self-regulation. Pursuant to the Rule, there are three key criteria an applicant must meet to be authorized as a safe harbor. Specifically, the applicant's proposed self-regulatory guidelines must: (a) meet or exceed the five statutory requirements set forth in COPPA (15 U.S.C. § 6502) and the Rule (16 C.F.R. § 312.3(a)-(3)); (b) include

an “effective, mandatory mechanism for the independent assessment of ... compliance with the guidelines,” such as random or periodic review of privacy practices conducted by a seal program or third party; and (c) contain “effective incentives” to ensure compliance with the guidelines such as mandatory public reporting of disciplinary actions, consumer redress, voluntary payments to the government, or referral of violators to the FTC. (16 C.F.R. § 312.10(b)(2))

Upon having their applications approved by the FTC, all four of the COPPA safe harbor programs were expected to satisfy these criteria on an ongoing basis. The passage of time and many years of experience now suggest, however, that there is room for improvement in the safe harbor provisions of the Rule, and that certain modifications may promote more effective safe harbors. The FTC, in its proposals, addresses a number of these potential improvements. We suggest, below, some additional concepts for the FTC’s consideration.

(1) Minimum Standards for Safe Harbors’ Auditing of Members

A review of the self-regulatory guidelines submitted to the FTC by the four authorized safe harbors (CARU, TRUSTe, Privo and ESRB Privacy Online) shows little differentiation between them. This is hardly surprising given the safe harbor approval process, which requires a side-by-side comparison of the substantive provisions of the COPPA rule with the corresponding provisions of the applicant’s proposed guidelines. Yet while the safe harbors have similar guidelines, each is a unique entity, offering different services and focusing on different market segments. We are concerned, therefore, that the proposed changes to paragraph b (“Criteria for approval of self-regulatory guidelines”), which would mandate a minimum level of annual member auditing by safe harbor programs, encourages all safe harbors to default to this minimum auditing standard where, in some situations, a greater frequency of auditing by the Safe Harbor may be appropriate. As an alternative, we suggest that the auditing provisions of the Rule require consideration of the types of businesses or industries the safe harbor services and the specific nature of their activities. Alternatively, if a Safe Harbor services multiple industries, the oversight in which the safe harbor engages should factor in a specific industry’s’ needs, which may be different than that of another industry.

For example, our members receive detailed quarterly compliance reports, which means issues and problems are spotted -- and corrected -- in a timely fashion, reducing a company’s risk for violating state and federal laws, including COPPA. We recognize, though, that quarterly monitoring may not be necessary or appropriate for all operators working with Safe Harbors. We believe the minimum auditing standards now being proposed by the FTC can and should encourage appreciation of the wide-ranging

nature and differing needs of various industries, and encourage safe harbors to structure their auditing plans accordingly.

(2) Examination of Applicants' Business Models and Capabilities

We fully support the FTC's changes to paragraph c ("Criteria for approval of self-regulatory guidelines"); specifically, the determination to require a detailed explanation of an applicant's business model and capabilities for operating a successful safe harbor program.[1] As noted above, the formal guidelines promulgated by each safe harbor applicant tend to be virtually identical, but propounding guidelines is only a first step. A thorough, considered implementation plan and workable business model that demonstrates an entity's ability to enforce its proposed guidelines is equally important. In short, we believe the FTC should attempt to determine if the written guidelines submitted by a safe harbor applicant are in fact capable of being implemented, let alone enforced.

It is understandable why the FTC would require existing safe harbor programs to submit, within 60 days of publication of the Final Rule amendments, proposed modifications to their guidelines to bring themselves into compliance with the revised Rule. We would suggest, however, that as part of this requirement, existing safe harbor programs provide up-to-date information of the type now to be required of applicants; specifically, a description of its business model and the mechanisms utilized for the assessment of members' compliance with safe harbor guidelines. This will allow the FTC to obtain a better understanding of the existing safe harbor programs and how they currently operate -- given that the existing safe harbors were all certified more than 10 years ago. Thereafter, should a safe harbor make material changes to its business model, legal status or methods of operation, notice to the FTC of such changes should be required. This more focused inquiry might well go hand-in-hand with encouraging greater transparency, generally, on the part of safe harbor programs.[2]

(3) Safe Harbor Reporting and Recordkeeping

We also support the FTC's proposed changes to paragraph d (Safe Harbor reporting and recordkeeping requirements); specifically, instituting a periodic reporting requirement for all Safe Harbors. We believe, however, that greater clarity is needed

[1] We would encourage the FTC to use this requirement to ensure that applicants wishing to be designated safe harbors truly demonstrate an ability to provide a robust self-regulatory presence. The safe harbor appellation should not be bestowed on individuals more properly classified as "privacy consultants," and who wish to trade on the phrase "safe harbor" for marketing purposes. In creating safe harbors, we doubt Congress assumed that a single individual would monitor and enforce compliance with all self-regulatory guidelines while providing the services required of a safe harbor (as outlined in 16 C.F.R. § 312.10(b)(2)).

[2] Safe harbors could be encouraged, for instance, to make publicly available, for the benefit of consumers, periodic listings of those entities that are participating members of their programs.

with respect to precisely what information is to be included in these reports to the FTC. More specifically, the FTC proposes that the reports contain, at a minimum, "the results of the independent assessment" of safe harbor members and "a description of any disciplinary action taken against" any such member. We presume that the FTC does not intend that safe harbors "name names" so to speak, identifying the particular companies that may have been subject to disciplinary action or whose audit results may reflect particular COPPA concerns. Rather, we assume that the FTC intends the information conveyed in these reports to be communicated in a general, aggregated fashion, without identifying particular companies or revealing details that could lead to the identification of such companies. We firmly believe (and we suspect the FTC does as well) that members of a safe harbor program must be granted a certain degree of anonymity -- both when a safe harbor poses questions to the FTC regarding the acceptability of certain practices engaged in by a member and when conveying information to the FTC under the newly-proposed reporting requirement. Were it otherwise, companies would be disinclined to join safe harbor programs or to remain as members of such a program. We suggest, therefore, that the FTC clarify the nature of the information it seeks with respect both to anonymity and the ability to submit aggregate versus company-specific data.

In closing, we would note our general support of the FTC's proposed changes to the Rule, and our hope that the insights provided herein with respect to the safe harbor provisions of the Rule will prove helpful.

Respectfully submitted,

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