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October 4, 2011

Federal Trade Commission
Washington, D.C.

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

As an attorney who has represented operators subject to COPPA and as the author of the COPPA chapter in the treatise, Proskauer on Privacy, I write to comment on the proposed revisions to the COPPA Rule. My primary comment urges that “email plus” consent be retained. In addition, I offer suggestions on other aspects of the proposed rule.

Email Plus Should be Retained.

Under the proposed rules, email plus consent will be jettisoned wholesale, with no “grandfather” provision, no phase-in, and with express recognition that there is no substitute on the horizon. I respectfully submit that this is not good policy.

Email plus has resulted in websites that shun communication tools while offering enticing content to young users. If there is no differential in the consent mechanism used, there will no incentive to exclude communication tools for children. In for a penny, in for a pound, as the saying goes.

When the Rule was originally enacted, the Commission recognized that the other consent mechanisms were more expensive and onerous (see, e.g., 64 Fed. Reg. at 59901 (“In determining what is a ‘reasonable effort’ under the COPPA, the Commission believes it is also appropriate to balance the costs imposed by a method against the risks associated with the intended uses of the information collected.”)). Opening an email is less time-consuming than having a trained employee take consents over the phone, examine a fax or snail mail form for how the signature looks, etc. That equation has not changed in the past dozen years. The Commission’s estimate of time to comply with this rule change – 60 hours, to change the notices and technically implement the new consent mechanism, and the focus on “lawyers” and “computer programmers” (76 Fed. Reg. 59804, 59827) – takes *no* account of the extra manpower that will be needed to carry through the consent process on a day-to-day basis as compared to email plus, not to mention the costs of getting upgraded consent from the parents of all current users.

Email plus is also easier for the parent (or a school functioning for the parent), who does not have to engage in a monetary transaction; print and mail or scan a form; photo-copy a drivers’ license; or make a phone call. This ease is commensurate with the lower risk entailed in websites that

shun communication tools and thus the risk of public disclosure of personal information. Nothing has changed in this regard since the Commission reached that same conclusion in 1999. 64 Fed. Reg. at 59902 (“[U]nder the second prong of the inquiry, the Commission believes that, until reliable electronic methods of verification become more available and affordable, these methods should be required only when obtaining consent for uses of information that pose the greatest risks to children.”).

The Commission should retain email plus.

Other Comments.

§ 312.2 Definition of “disclose or disclosure” – the proposed definition in subsection (a) contains the awkward placement of the phrase “in identifiable form”. As currently placed, it can be read that information obtained from children in identifiable form (and how else would it have been obtained?), cannot be released in any form. Presumably, the definition instead is meant to preclude the release of PI “in identifiable form”. I offer two solutions. The better solution is to add the phrase “in identifiable form” to the definition of “Release of personal information” after the term “personal information,” such that it reads: “*Release of personal information* means the sharing, selling, renting, or transfer of personal information in identifiable form to any third party.” The phrase should then be deleted from subsection (a) of the “disclose or disclosure” definition. Alternatively, the phrase should be moved within the “disclose or disclosure” definition from its current placement to the front, as follows: “The release of personal information in identifiable form collected by an operator from a child for any purpose”

§ 312.4(c)(1). The direct Notice provision relating to obtaining consent is not consistent with the exception rule (§ 312.5(c)(1)). Under the applicable exception rule, the operator can collect not only “a parent’s online contact information” but also the “name of the child or parent”.

§ 312.5(c)(1)); however, the direct Notice rule refers only to “the parent’s online contact information” and does not mention “name” at all. All the other direct Notice rules track the language of the related exception rule. Accordingly, the proposed rule should be amended by adding “and (if applicable) the name of the parent and/or child” after “the parent’s online contact information” in both § 312.4(c)(1)(i) and (vi).

§§ 312.4(c)(1) & 312.5(c)(2). This new provision permitting collection and notice where a website does not collect PI from a child needs at least two clarifications. **First**, the commentary makes clear that this is intended to give operators the “option” (76 Fed. Reg. at 59820) of providing such notice. The non-mandatory nature of this new provision should be made clear, so that new operators reading the rule do not fear that they are required to give such notice (perhaps by adding to § 312.5(c)(2), “Nothing in this Rule shall require an operator to make such collection or to give such notice.”). **Second**, the provision in the direct Notice that “the parent may refuse to permit the operator to allow the child to participate in the website or online service” should be deleted. There is no explanation as to how this can be implemented where the website/online service has not collected any information from the child; nor is this requirement present in any of the other direct Notice provisions. COPPA should continue to be focused on parents’ right to control their young children’s personal information, and should not be extended

to preventing access to websites that do not collect PI from children.

§ 312.5(c)(4). I have three comments on this revised multiple use exception rule. **First**, the rule needs a clarification, given the expanded definitions of PI and collection. Currently, the proposed rule provides that online contact information can be collected “where such information is not . . . combined with any other information collected from the child.” The Commission should add the word “personal” between “other” and “information” to make clear that the online contact information *can* be combined with, e.g., an IP address used for the internal operations of the website. Alternatively, the phrase “other than in connection with providing support for the internal operations of the website or online service” should be added at the end of the first sentence of § 312.5(c)(4). **Second**, there is a typo in the second sentence: the reference to § 312.4(c)(4) should be changed to § 312.4(c)(3). **Third**, the final sentence should be deleted and/or moved to a different location. The multiple use rule is the only one that contains the admonition that reasonable efforts do not include “where the notice to the parent was unable to be delivered.” It is not clear why this is present only in this subsection of the rule.

Thank you for your consideration of these comments.

Very truly yours,

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