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GEORGETOWN LAW
INSTITUTE FOR PUBLIC REPRESENTATION

May 7, 2018

Re: ESRB Application for Modifications to Safe Harbor Program Requirements, Project No. P024526

Campaign for a Commercial-Free Childhood¹ and the Center for Digital Democracy,² by their counsel, the Institute for Public Representation, ask the FTC to reject the Entertainment Software Rating Board's ("ESRB's") application to modify its safe-harbor program unless the ESRB amends its proposal.³ The application as drafted would reduce protections for children below the already low bar set by COPPA. Violations of children's privacy, including breaches of children's data, are far too common. It is still too difficult for parents to find and understand the information about companies' data practices that parents need to make informed decisions to protect their children. In this environment, the FTC must ensure that COPPA safe harbor programs increase protections for children instead of weakening them.

COPPA's safe harbor provision allows operators of online services to satisfy their obligations under the FTC's COPPA Rule⁴ by participating in a self-regulatory program approved by the FTC.⁵ To merit approval, a self-regulatory program must (1) ensure that participants in the safe harbor program "provide substantially the same or greater protections for children" as those

¹ CCFC is a national advocacy organization dedicated to educating the public about commercialism's impact on kids' wellbeing and advocating for the end of child-targeted marketing. CCFC organizes campaigns against corporations that target children with harmful marketing, helps parents and professionals reduce the amount of time kids spend with ad-supported screens, and advocates for policies that limit marketers' access to children. CCFC has filed a number of Requests for Investigation with the Commission for violations of COPPA and Section 5 of the FTC Act.

² CDD is a DC-based nonprofit organization committed to protecting consumers in the digital marketplace. CDD's advocacy for internet privacy in the 1990s (when it operated as the Center for Media Education) led to Congress's 1998 adoption of COPPA. CDD also actively participated in the FTC's proceeding to update the COPPA rule, frequently comments on safe harbor applications, and filed many requests asking the FTC to investigate apparent violations of the COPPA rule.

³ Entertainment Software Rating Board's COPPA Safe Harbor Program Application To Modify Program Requirements, 83 Fed. Reg. 14,611 (Apr. 5, 2018).

⁴ 16 C.F.R. Part 312.

⁵ 15 U.S.C. § 6503(a); 16 C.F.R. § 312.11.

contained in the COPPA Rule; (2) use “[a]n effective, mandatory mechanism for the independent assessment” of compliance with the program guidelines; and (3) provide for “[d]isciplinary actions for subject operators’ non-compliance with self-regulatory program guidelines.”⁶

Although the ESRB represents that its proposed changes are minor or technical adjustments to its program requirements to “ensure they remain current with the Commission's COPPA-related regulations and guidance,”⁷ many of the changes would reduce protections for children’s privacy. Most notably, the ESRB’s proposed language would allow it to eliminate annual compliance reviews that are required by the COPPA Rule. The ESRB’s proposal also creates broader exemptions for speech-to-text audio and persistent identifiers than are allowed under COPPA.

We discuss these changes in more detail below.

I. Elimination of Annual Compliance Reports

The proposed agreement would allow ESRB to eliminate all annual compliance reports except for the initial report.

A COPPA safe harbor program must have “[a]n effective, mandatory mechanism for the independent assessment” of compliance with the program guidelines.⁸ That mechanism “must include a comprehensive review by the safe harbor program, to be conducted not less than annually, of each subject operator's information policies, practices, and representations.”

The current ESRB program requires ESRB to provide compliance reports “[t]wice a year.” The proposed language would require such reports “[a]t least once during the Initial Term and *no more than twice* during each Renewal Term.”⁹ The proposed Requirements Document does not define “Renewal Term” (it may be defined in the non-public Participation Agreement). Even assuming a “Renewal Term” of one year, “no more than twice” would allow ESRB to provide *no* compliance reports after the initial report. The ESRB says that this change is necessary because some participants join later in the fiscal year, but it does not explain why it inserted “no more than twice.”

The proposed draft also eliminates self-assessment questionnaires (SAQs) and site visits. According to the new language, “ESRB shall review Participant's Privacy Statement and related Online Information Practices with respect to the Monitored Products.” A company’s “Privacy Statement” is its online privacy policy. The ESRB’s proposed requirements document does not specify how ESRB will determine what a company’s “Online Information Practices” are.

⁶ 16 C.F.R. § 312.11(b).

⁷ Letter from Dona J. Fraser, Vice President, ESRB Privacy Certified, to Donald S. Clark, Sec’y, FTC, at 2 (June 23, 2013) [*herinafter* ESRB Letter], https://www.ftc.gov/system/files/attachments/press-releases/entertainment-software-rating-board-awarded-safe-harbor-status/sh_130701esrb_application.pdf (linked from <https://www.ftc.gov/safe-harbor-program>).

⁸ 16 C.F.R. § 312.11(b)(2).

⁹ ESRB Letter, ex. A at 3 (emphasis added).

In its letter to the FTC, the ESRB asserts that it will replace SAQs and on-site assessments with information-gathering via “video conferences, telephone conferences, and correspondence.”¹⁰ But this is not reflected in the language of the requirements. The ESRB removed sections requiring SAQs and on-site compliance reviews but did not add any language to require assessments by any means, including by “video conference, telephone conference, or correspondence.” By the language of the proposed requirements alone, the only information ESRB is required to review is the member company’s online privacy policy.

We do not oppose replacing on-site visits and SAQs with other ways of conducting effective assessments. We do, however, oppose removal of on-site assessments and SAQs without specifying how information will be gathered in their absence.

II. Removal of Speech-to-Text Recordings and Personal Identifiers from the Definition of Personal Information

The proposed language makes several changes to the definition of personal information (referred to in the Proposed Requirements as “Personal Information and Data,” or “PID”). Most notably, it excludes audio recordings “to the extent that such audio recordings are used solely to effectuate speech-to-text functionality in the Monitored Product and deleted immediately thereafter.” This language appears to be meant to track an October 2017 FTC Enforcement Policy Statement:

[W]hen a covered operator collects an audio file containing a child’s voice solely as a replacement for written words, such as to perform a search or fulfill a verbal instruction or request, but only maintains the file for the brief time necessary for that purpose, the FTC would not take an enforcement action against the operator on the basis that the operator collected the audio file without first obtaining verifiable parental consent. Such an operator, however, must provide the notice required by the COPPA Rule, including clear notice of its collection and use of audio files and its deletion policy, in its privacy policy.¹¹

The ESRB’s exclusion is overbroad. Operators have obligations regarding speech-to-text recordings, including obligations to disclose the collection and use of these recordings. Furthermore, these recordings can become personal information “when the operator requests information via voice that otherwise would be considered personal information under the Rule, such as name, for example.”¹² The ESRB’s definition of PID does not contain this exception to the exception. Because the ESRB’s program requires participants to give notice only of their

¹⁰ ESRB letter to FTC at 2.

¹¹ Enforcement Policy Statement Regarding the Applicability of the COPPA Rule to the Collection and Use of Voice Recordings, FTC (Oct. 20, 2017), <https://www.ftc.gov/public-statements/2017/10/federal-trade-commission-enforcement-policy-statement-regarding>.

¹² *Id.*

practices involving PID,¹³ removing speech-to-text from the definition of PID eliminates the disclosure requirement.

Similarly, ESRB's proposed changes add an overbroad exception for personal identifiers. Under the ESRB's proposed changes, a persistent identifier is PID only "if additional PID is collected and/or the persistent identifier(s) are not used solely to support the internal operations of the Monitored Product." This language (which is ambiguous because of the use of "and/or") appears meant to follow a COPPA Rule provision that exempts operators from notice requirements if the operator "collects a persistent identifier and no other personal information and such identifier is used for the sole purpose of providing support for the internal operations of the Web site or online service."¹⁴ The COPPA Rule's exemption applies only to the parental notice and consent requirements of 16 C.F.R. §§ 312.4–312.5. Other requirements, such as the data security requirements and data retention requirements, still apply, and the COPPA Rule explicitly includes persistent identifiers in the definition of personal information in 16 C.F.R. § 312.2. ESRB's proposed language would therefore allow data practices that COPPA forbids.

III. Other Changes

The ESRB's Proposed Privacy Certified Kids Seal Requirements document also contains the following changes that weaken protections for children:

- The proposal eliminates language that explicitly applies ESRB Privacy Certified Kids Seal requirements to any *portion* of an online service directed at children, as opposed to the service as a whole.
- In the definition of PID, the proposal deletes "sufficient to identify street name and name of a city or town" from the description of geolocation information. This language is in the COPPA rule.¹⁵ Removing it creates ambiguity because it is not clear how specific geolocation information must be for it to be considered personal information under the ESRB's program.
- The new language for photographs or video recordings would add metadata, but it unnecessarily limits the definition of "PID" to images or recordings that show a child's face.
- The proposed changes allow a participant to link to its general privacy statement instead of linking to "its Kids Privacy Statement or to that portion of its General Privacy Statement that reflects Participant's Online Information Practices with respect to Children."

¹³ For example, the proposed language requires a Privacy Statement to include "a complete list of PID collected . . . and how it is used." ESRB Letter, ex. A at 5–6.

¹⁴ 16 C.F.R. § 312.5(c)(7).

¹⁵ See 16 C.F.R. § 312.2 (specifying that personal information includes "Geolocation information sufficient to identify street name and name of a city or town").

- The new language requires participants to disclose “potential opportunities for disclosure of the PID” collected from children. It is not clear what that means.
- In the Data Collection and Security, it adds the following: “If PID is not being utilized, Participant should not collect it.” This is a good sentiment, but “should not” is weak. The COPPA Rule’s data retention requirements prohibit operators from collecting any information they will not use.¹⁶

IV. Recommendations

As submitted, the ESRB’s proposal would weaken protections for children below the level required by COPPA. To correct these problems, we ask the FTC to require the following changes to the Proposed ESRB Privacy Certified Kids Seal Requirements:

- Replace language requiring compliance reports “no more than twice during each Renewal Term,” with “at least once per year” to comply with 16 C.F.R. § 312.11(b)(2).
- Add language explaining how ESRB will collect information about a participant’s “Online Information Practices.”
- Implement the exceptions for speech-to-text recordings and persistent identifiers as separate, free-standing, narrowly drawn provisions of the Requirements instead of exempting them entirely from the definition of PID.
- Define “Monitored Product,” which is not defined in the draft Requirements, to include any portion of a participant’s online service that is directed at children.
- Retain language from the existing Requirements specifying that geolocation information “sufficient to identify street name and name of a city or town” is PID.
- Replace “Photograph or video recording showing the individual’s face” in the definition of PID with “Photograph or video that contains the individual’s image.”
- Reinstate the language requiring each participant to link to “its Kids Privacy Statement or to that portion of its General Privacy Statement that reflects Participant’s Online Information Practices with respect to Children.”
- In the language stating, “If PID is not being utilized, Participant should not collect it,” replace the word “should” with “must” or “shall.”

¹⁶ See 16 C.F.R. § 312.10 (“An operator of a Web site or online service shall retain personal information collected online from a child for only as long as is reasonably necessary to fulfill the purpose for which the information was collected.”). If an operator does not use data at all, retention of that data for any length of time is never “reasonably necessary.”

V. Conclusion

Children's privacy is too important to allow safe-harbor providers to weaken their programs. We ask the FTC to reject ESRB's application to modify its program unless the ESRB corrects the deficiencies discussed above.

Respectfully submitted,

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