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FTC Proposes Significant Changes to its Rule Regulating the Online Collection of Information from Children

By D. Reed Freeman and Julie O'Neill

On September 15, 2011, the Federal Trade Commission ("Commission") released its long-awaited proposed amendments to its rule implementing the Children's Online Privacy Protection Act ("COPPA Rule"). *Comments are due by November 28, 2011.*

The Commission proposes modifications to the COPPA Rule in three key areas:

- Expanding the definition of "Personal Information," and therefore the scope of the COPPA Rule, including to the use of cookies for purposes other than support for the internal operations of the site or service;
- Altering the parental notice provisions and eliminating one commonly used consent mechanism; and
- Imposing new data security requirements, including pass-through obligations and limits on data retention.

While the Commission normally reviews its trade regulation rules about every 10 years, it accelerated its review of the COPPA Rule – which it last reviewed in 2005 – in light of the perceived children's privacy concerns associated with rapid technological changes, including explosive growth in children's use of mobile devices and the proliferation of social networking and interactive gaming.

The Commission issued a Request for Public Comment on the COPPA Rule in April 2010. In response, it received 70 comments from industry representatives, advocacy groups, academics, and others, and it sought further input through a June 2010 public roundtable. Having considered the feedback and its own experience enforcing the COPPA Rule, the Commission has proposed changes that would significantly affect the way that many websites and online services operate. The notable proposed amendments are addressed below.

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1. The Commission proposes to greatly expand the definition of “Personal Information.”

Under the COPPA Rule, the online collection of “Personal Information” from a child generally triggers a site or online service operator’s obligation to obtain verifiable parental consent. The Commission proposes to greatly expand the definition of “Personal Information” to include each of the following new categories of information:

- **Online contact information**, which is defined, in turn, as “an email address or any other substantially similar identifier that permits direct contact with a person online, including but not limited to, an instant messaging user identifier, a *voice over internet protocol identifier*, or a *video chat user identifier*” (those parts in italics are new);
- **Screen or user name**, other than when used solely to maintain the technical functioning of the site or service.¹ Currently, a screen or user name constitutes personal information only when it reveals an individual’s email address;
- **A persistent identifier**, including, but not limited to, a customer number held in a cookie, an IP address, a processor or device serial number, or unique device identifier, *where such persistent identifier is used for functions other than or in addition to support for the internal operations of the site or service.*² The Commission explains that this proposal would permit operators to use persistent identifiers for purposes such as user authentication, improving navigation, maintaining user preferences, serving contextual advertising, and protecting against fraud or theft.
 - o On the other hand, the “Personal Information” definition would be triggered by – and verifiable parental consent would therefore be required for – other uses, including online profiling, personalized content, and behavioral advertising. This is new, and it is significant because there is no way to determine age from a cookie, IP address, processor or device serial number, unique device identifier, or other persistent identifier. That means that sites directed to children could not engage in behavioral advertising or personalized content without first obtaining verifiable parental consent. For sites not directed to children but still subject to the COPPA Rule (because they knowingly collect personal information from children under 13), it is not clear how this restriction would apply. Would it mean that a site would not be permitted to engage in behavioral advertising to, or create personalized content for, children on the site? Or that a site not directed to kids would have to stop behavioral advertising or creating personalized content if it has actual knowledge that the recipient is a child? If so, the site would have to tie age to a cookie ID – a practice in which the Commission may not want operators to engage. None of these issues is addressed in the commentary accompanying the proposed COPPA Rule amendments, and they are ripe for comment.
- **Photographs, videos, and audio files**, regardless of whether they are combined with a child’s name or contact information. Currently, the COPPA Rule deems a photograph to be personal information only if it is combined with other information that permits the physical or online contacting of the child. It does not currently address videos or audio files; and
- **Geolocation information**, if it provides information at least equivalent to a physical address. This is new, as the COPPA Rule does not currently address geolocation information. It is also significant, given children’s widespread use of mobile devices to access and use mobile websites, applications, gaming platforms, and other services.

The Commission’s proposals reflect its position that the line between what has traditionally been considered personal and nonpersonal information is increasingly blurred. They also reflect the Commission’s conclusion that persistent identifiers

¹ The Commission explains that “an operator may allow children to establish screen names for use within a site or service. Such screen names may be used for access to the site or service, to identify users to each other, and to recall user settings. However, where the screen or user name is used for purposes other than to maintain the technical functioning of the website or online service, the screen name becomes ‘personal information’ under the proposed Rule.”

² The COPPA Rule currently provides that these types of persistent identifiers constitute personal information only when they are associated with individually identifiable information, such as name, address, email address, phone number, or Social Security number.

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provide a site or online service with sufficient information to permit contact with a specific individual.

2. The Commission proposes to streamline its parental notice requirements.

A site or service subject to COPPA must provide parents with notice of its information practices in two ways: on the site or service itself (typically through the posting of a privacy policy) and in a notice delivered directly to the parent. The Commission proposes to revise these requirements to rely less on a posted privacy policy and more on the direct notice because it believes that the direct notice gives a parent the best opportunity to consider the operator's information practices. Specifically, the Commission proposes the following:

- **The online notice (the privacy policy):** The Commission proposes to streamline the content of the privacy policy by requiring that it include only: (1) all operators' contact information;³ (2) what information it collects from children, including whether the site or service allows a child to make personal information publicly available; (3) how it uses such information; and (4) its disclosure practices.⁴ In this way, "the Commission hopes to encourage operators to provide clear, concise descriptions of their information practices, which may have the added benefit of being easier to read on smaller screens (e.g., those on Internet-enabled mobile devices)."
- **The direct notice to parents:** The Commission intends for the direct notice to work as an effective "just-in-time" communication to a parent about the operator's information practices – an approach in keeping with the Commission's position that, to be most effective, privacy choices should be clearly and concisely described and offered in a context in which the individual is making a privacy-related decision.⁵ To that end, the Commission proposes to prescribe the content that must be included in each type of direct notice (the type depends on the type of consent sought).⁶ The goal is to ensure that parents receive the key information up front, directing them, via link, to the full privacy policy for additional information.

3. The Commission proposes to eliminate its sliding scale approach to obtaining parental consent. It also proposes new consent mechanisms and a way to obtain Commission approval of others.

The Commission proposes several significant changes to the ways in which an operator may obtain verifiable parental consent to the collection and use of a child's personal information.

- **Elimination of the sliding scale approach.** The COPPA Rule currently sets forth a two-tiered system for obtaining verifiable parental consent: an operator that uses a child's information only internally may use the so-called "email plus" consent mechanism, while more foolproof measures – such as a print, sign, and send back form or a phone call – are required if the operator will disclose the child's information to third parties. *On the grounds that "all collections of children's information merit strong verifiable parental consent," the Commission proposes to eliminate this distinction.*

³ The COPPA Rule currently requires that only one operator of a site or online service be identified, even when there are multiple operators.

⁴ The Commission also proposes to more succinctly require that the policy be clearly labeled and prominently located and be posted on an operator's home page and at each location where it collects personal information from children.

⁵ See "FTC Releases Draft Privacy Report Outlining Best Practices, Possible New Requirements Under Section 5 of the FTC Act, and Expressing Support for a 'Do Not Track' List" (Dec. 3, 2010), at <http://www.mofo.com/files/Uploads/Images/101203-Do-not-track-list.pdf>.

⁶ The types of notice are as follows: Notice to Obtain Parent's Affirmative Consent to the Collection, Use, or Disclosure of a Child's Personal Information; Notice to a Parent of Operator's Intent to Communicate with the Child Multiple Times (such as via a newsletter); Notice to a Parent In Order to Protect A Child's Safety; and Notice to Parent of a Child's Online Activities Not Involving the Collection, Use, or Disclosure of Personal Information. The last type of notice is new. It corresponds to a proposed new exception to parental consent which gives an operator the option to collect a parent's online contact information for the purpose of providing notice to him or her about a child's participation in a site or online service that does not otherwise collect, use, or disclose children's personal information. The parent's online contact information may not be used for any other purpose, disclosed, or combined with any other information collected from the child. According to the Commission, notifying a parent of a child's online activity in a site or service that does not otherwise collect personal information "is reasonable and should be encouraged."

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"Email plus" would no longer be an option. This is significant because "email plus" is currently the most common way of obtaining verifiable parental consent.

- **New mechanisms for obtaining consent.** The Commission proposes to add the following to its list of approved mechanisms for obtaining consent: electronically scanned versions of signed parental consent forms; the use of video verification methods (such as video conferencing); and collection of government-issued ID, verified against a database of such information.
- **Processes for pre-clearance of consent mechanisms.** To encourage the development of new mechanisms, the Commission proposes to establish a process through which parties may seek its approval of a particular consent mechanism. It also proposes to revise the COPPA Rule to say that operators participating in a Commission-approved COPPA safe harbor program may use any consent mechanism that the program deems compliant.

4. The Commission proposes new data security requirements, including pass-through obligations and limits on data retention.

The COPPA Rule already requires an operator to maintain procedures to protect the confidentiality, security, and integrity of children's personal information. The Commission proposes to strengthen that obligation by requiring an operator to take reasonable measures to ensure that any service provider or third party to which it releases such information has appropriate measures in place to protect the information. In addition, because the Commission views the deletion of unneeded information as an integral part of a data security program, it proposes adding a new data retention and deletion provision to the COPPA Rule. The proposal would permit an operator to retain children's personal information "for only as long as is reasonably necessary to fulfill the purpose for which the information was collected." Thereafter, an operator would be required to delete the information in a manner that safeguards against a breach.

5. The Commission declined to expand the scope of the COPPA Rule.

Also noteworthy are two actions that the Commission declined to take. First, the Commission decided against extending the COPPA Rule's coverage to adolescents over the age of 12, explaining that, for a variety of reasons, the statutory definition of a "child" remains appropriate. Second, the Commission found it unnecessary to revise the COPPA Rule's definition of a covered "online service" to take account of particular technologies. It concluded that "a host of current technologies that access the Internet or a wide area network are 'online services' [already] covered by . . . COPPA and the Rule," and it provided the following examples: mobile applications that allow children to play network-connected games, engage in social networking activities, purchase goods or services online, receive behaviorally targeted advertisements, or interact with other content or services;⁷ Internet-enabled gaming platforms; voice-over-Internet protocol services; and Internet-enabled location based services.

Conclusion

If adopted as currently drafted, the Commission's proposed changes to the COPPA Rule would not only sweep into the COPPA Rule's coverage sites and online services that are currently outside of it, but it would also require currently compliant sites and services to undertake a fresh review of their information collection practices, revise their privacy

⁷ The Commission's application of the definition of an online service was borne out in a recent COPPA enforcement action it brought against W3 Innovations, LLC, and Justin Maples, individually and as an officer of W3 Innovations (United States District Court for the Northern District of California, Case No. CV-11-03958-PSG, FTC File No. 102 3251). See <http://www.ftc.gov/opa/2011/08/w3mobileapps.shtml>.

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policies, direct notices, and data security procedures, and possibly adopt new mechanisms for obtaining verifiable parental consent. Affected businesses should therefore consider responding to the Commission's request for public comment on its proposed amendments. The deadline for submitting comments is November 28, 2011.

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