September 24, 2012

Federal Trade Commission
Office of the Secretary
Room H-113 (Annex E)
600 Pennsylvania Avenue, N.W.
Washington, DC 20580

Re: COPPA Rule Review, 16 CFR Part 312, Project No. P-104503

The Marketing Research Association (MRA) hereby submits these comments in response to the proposed amendments to the COPPA rules in the Supplemental Notice of Proposed Rulemaking.

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A. Introduction

MRA respectfully submits these comments in response to the Federal Trade Commission's ("the Commission") request for comment on the proposed amendments to the Children's Online Privacy Protection Act (COPPA)[1] in the Supplemental Notice of Proposed Rulemaking.

B. Making Third Parties Responsible for COPPA Compliance

MRA is concerned that the Commission wants to apply COPPA responsibilities to "independent entities or third parties, e.g., advertising networks or downloadable software kits (''plugins'')", and thus make them and the first-party operator "co-operators." For instance, third-party plugins not directed at children, but installed on a website directed at children, would be fully responsible for COPPA compliance.

[1] COPPA currently applies to: (1) operators of commercial websites or online services "directed to children" under 13 that collect personal information from children; and (2) operators of general audience sites that knowingly collect personal information from children under 13.

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Why would this be a problem? Most general-purpose third-party plugins or functionalities, like a survey research invitation, do not direct their services to children. Admittedly, if a third-party plugin is directed at children, the Commission may want to demand their compliance with COPPA, or if during the course of the interaction the plugin discovers data is being collected from a child, COPPA compliance would likely then come into play.

However, the proposal to expand compliance to third parties more broadly will make compliance more cumbersome and complicated, hurting research and commerce and encouraging avoidance.

C. Moving Beyond "Actual Knowledge" and "Directed to Children"

In the Supplemental Notice, the Commission proposes to expand COPPA's definitions to include websites and services that "know or have reason to know" they are collecting personal information through a site or service directed at children. MRA is very concerned that this new vague standard dramatically expands liability for COPPA in situations and circumstances and could result in massive hurdles of legal compliance in order to avoid potential lawsuits and fines. Even without explicitly requiring a company to fully and constantly assess, in former Defense Secretary Donald Rumsfeld's words, their "known unknowns," that will be the ultimate result.

The Commission's proposed new definition of "Web site or online service directed to children" is also problematic:
…means a commercial Web site or online service, or portion thereof, that: (a) Knowingly targets children under age 13 as its primary audience; or, (b) based on the overall content of the Web site or online service, is likely to attract children under age 13 as its primary audience; or, (c) based on the overall content of the Web site or online service, is likely to attract an audience that includes a disproportionately large percentage of children under age 13 as compared to the percentage of such children in the general population; provided however that such Web site or online service shall not be deemed to be directed to children if it: (i) Does not collect personal information from any visitor prior to collecting age information; and (ii) prevents the collection, use, or disclosure of personal information from visitors who identify themselves as under age 13 without first obtaining verifiable parental consent; or, (d) knows or has reason to know that it is collecting personal information through any Web site or online service covered under paragraphs (a)–(c).

The Commission's proposed expansion of the definition to include "based on the overall content of the Web site or online service, is likely to attract an audience that includes a disproportionately large percentage of children under age 13 as compared to the percentage of such children in the general population" will likely require COPPA compliance from sites and services directed at teenagers or even general audiences. The definition is too vague. What constitutes a "disproportionately large percentage of children" and how is an operator supposed to calculate it? How frequently would operators be supposed to calculate it, since such numbers would likely fluctuate?

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A site aimed at teenagers would potentially run afoul of attracting these "disproportionate" numbers. This proposal would thus effectively increase the age limit in COPPA's definition of a child through a back door.

MRA believes COPPA's focus should stay on operators with "actual knowledge" or those that specifically direct their sites/services primarily to children.

D. Screen/Usernames as Personal Information

In the 2011 COPPA Notice of Proposed Rulemaking, the Commission proposed to define as personal information "a screen or user name where such screen or user name is used for functions other than or in addition to support for the internal operations of the Web site or online service." However, in the Supplemental Notice, the Commission steps back from a move many public commentators felt was overboard: "…after reading the comments, the Commission is persuaded of the benefits of utilizing single sign-in identifiers across sites and services, for example, to permit children seamlessly to transition between devices or platforms via a single screen or user name.28 The Commission therefore proposes that a screen or user name should be included within the definition of personal information only in those instances in which a screen or user name rises to the level of online contact information.29 In such cases, a screen or user name functions much like an email address, an instant messaging identifier, or "or any other substantially similar identifier that permits direct contact with a person online.""

The Commission thus proposes "to modify paragraph (d) of the definition of personal information[2] as follows: *Personal information means individually identifiable information about an individual collected online, including: … (d) A screen or user name where it functions in the same manner as online contact information, as defined in this Section*".

MRA supports this proposed modification.

E. Persistent Identifiers / Support for Internal Operations

The Commission originally proposed modifying the definition of "personal information" to add "[a] persistent identifier, including but not limited to, a customer number held in a cookie, an Internet Protocol (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 Web site or online service" as well as "identifiers that link the activities of a child across different Web sites or online services." The Commission intended these changes to "require parental notification and consent prior to the collection of persistent identifiers where they are used for purposes such as amassing data on a child's online activities or behaviorally targeting advertising to the child." The Commission also excepted from COPPA restrictions the collection and the use of such identifiers if in "support of internal operations."

[2] COPPA's definitions are in §312.2

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In the Supplemental Notice, the Commission refines the exception and consolidates the definition of "persistent identifiers" and "internal operations":

Personal information means individually identifiable information about an individual collected online, including: (g) A persistent identifier that can be used to recognize a user over time, or across different Web sites or online services, where such persistent identifier is used for functions other than or in addition to support for the internal operations of the Web site or online service. Such persistent identifier includes, but is not limited to, a customer number held in a cookie, an Internet Protocol (IP) address, a processor or device serial number, or unique device identifier;

According to the Commission, "This proposal combines the two previous definitions into one and makes clear that an operator can only identify users over time or across Web sites for the enumerated activities set forth in the definition of support for internal operations."

The newly proposed definition of "support for internal operations" is: *Support for the internal operations of the Web site or online service means those activities necessary to: (a) Maintain or analyze the functioning of the Web site or online service; (b) perform network communications; (c) authenticate users of, or personalize the content on, the Web site or online service; (d) serve contextual advertising on the Web site or online service; (e) protect the security or integrity of the user, Web site, or online service; or (f) fulfill a request of a child as permitted by // 312.5(c)(3) and (4); so long as the information collected for the activities listed in (a)–(f) is not used or disclosed to contact a specific individual or for any other purpose.*

Some activists believe that every piece of personal data could somehow be linked back to an individual and that therefore every piece of personal data is personally identifiable. However, in the case of a "persistent identifier," we have a clear case of personal information that, at best, identifies a device and only permits online contact with that device, not a specific individual. MRA feels that the Commission would be better served to focus on the use or misuse of such information, rather than its collection, since such data is of limited use in and of itself. MRA also suggests that the exception for "internal operations" collection and use of such identifiers should be broadened to properly include marketing research, especially since behavioral tracking for research purposes poses a great potential to avoid bothering individuals and/or taking up their time. As MRA has expressed in multiple filings and forums to the Commission, behavioral tracking for research purposes is entirely different from marketing and advertising purposes and should be excepted accordingly.

F. Conclusion

The Commission's careful implementation and enforcement of reasonably constructed rules have made COPPA one of the most successful privacy laws in the United States. We do not wish to see that jeopardized.

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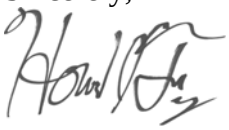
MRA and the whole survey and opinion research profession stand ready to work with the Commission in pursuit of our common goal: protection of children and respect for their parents while allowing for the lawful conduct of research and commerce. For the reasons illuminated in this comment, MRA respectfully requests the Commission to reconsider the proposed modified definitions.

Sincerely,



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