

Federal Trade Commission
600 Pennsylvania Ave., NW
Washington, DC 20580

Re: Request for Public Comment on the Federal Trade Commission’s Implementation of the Children’s Online Privacy Protection Rule, Docket ID: FTC-2019-0054

To Whom It May Concern:

The Centre for Information Policy Leadership (CIPL)¹ welcomes the opportunity to respond to the Federal Trade Commission’s (FTC) Request for Public Comment² on its implementation of the Children’s Online Privacy Protection Act (COPPA) through the Children’s Online Privacy Protection Rule (COPPA Rule). For nearly 20 years, the COPPA Rule has played an essential role in protecting children online by placing restrictions on how companies providing online services to children may collect, use and disclose children’s data. With online technology changing so rapidly, the COPPA Rule must continue to evolve alongside these changes, and CIPL appreciates the FTC’s decision to open its review of the Rule earlier than required by statute to ensure it remains effective.

Over the years, several FTC Commissioners have stated that COPPA’s purpose is not only protecting children’s privacy online, but also ensuring that companies are able to innovate and develop “rich and engaging content for children,”³ and any updates to the COPPA Rule should reflect these dual goals. As the Commission looks to modernize the Rule, it must also consider the impact any changes will have on the creators of robust child-directed digital content and on the broader online ecosystem. With good reason, COPPA places an immense regulatory burden on the developers of the products and services it applies to, but it is essential that the Commission’s Rule stays within its statutory boundaries, and that its application does not discourage investment into innovative new services and products for children.

Comments

¹ CIPL is a global data privacy and cybersecurity think tank in the law firm of Hunton Andrews Kurth LLP and is financially supported by the law firm and 77 member companies that are leaders in key sectors of the global economy. CIPL’s mission is to engage in thought leadership and develop best practices that ensure both effective privacy protections and the responsible use of personal information in the modern information age. CIPL’s work facilitates constructive engagement between business leaders, privacy and security professionals, regulators and policymakers around the world. For more information, please see CIPL’s website at <http://www.informationpolicycentre.com/>. Nothing in this submission should be construed as representing the views of any individual CIPL member company or of the law firm of Hunton Andrews Kurth LLP.

² *In re Request for Public Comment on the Commission’s Implementation of the Children’s Online Privacy Protection Rule*, Request for Public Comment, 84 Fed. Reg. 35842 (Jul. 25, 2019) (“Notice”), <https://www.federalregister.gov/documents/2019/07/25/2019-15754/request-for-public-comment-on-the-federal-trade-commissions-implementation-of-the-childrens-online>

³ See Chairman Jon Leibowitz, *FTC Strengthens Kids’ Privacy, Gives Parents Greater Control Over Their Information By Amending Childrens Online Privacy Protection Rule: Rule Being Modified to Keep Up with Changing Technology* (Dec. 19, 2012), <https://www.ftc.gov/news-events/press-releases/2012/12/ftc-strengthens-kids-privacy-gives-parents-greater-control-over>; Commissioner Noah Phillips, “Taking Care: The American Approach to Protecting Children’s Privacy” (Nov. 15, 2018), https://www.ftc.gov/system/files/documents/public_statements/1422695/phillips_-_taking_care_11-15-18_0.pdf.

FTC Question 13: Should the Commission consider further revision to the definition of “Personal information”? Are there additional categories of information that should be expressly included in this definition, such as genetic data, fingerprints, retinal patterns, or other biometric data? What about personal information that is inferred about, but not directly collected from, children? What about other data that serve as proxies for personal information covered under this definition?⁴

The Rule’s definition of personal information should not be expanded to include information that is inferred about children. Such an inclusion would create significant uncertainty around the scope of the COPPA Rule and potentially stifle the development of new products and services. For example, contextual advertising, which is explicitly permitted under COPPA⁵ and is often held up by privacy advocates as a viable alternative to targeted advertising because it does not require the collection and use of personal data, uses inferred clues to share relevant ads. If the Commission were to include inferred data in the definition of personal information, it likely would have the unintended effect of prohibiting contextual advertising.

If the FTC decides to include inferred data or similar proxies in the definition of personal information, it should define the terms narrowly and limit them to situations where it is necessary to prevent *direct harm* to a specific child. Otherwise, much innocuous information currently not considered to be “personal” under COPPA could be swept into the Rule. This would be especially problematic where that information is used for COPPA compliance, e.g., a country code used to ensure a user is presented with the right content or age-gating mechanism. These types of uses are notably different from the proxy data used to make decisions about or build a profile on a child.

If the Commission chooses to include additional types of biometric data in its definition of personal information, it is important to conform such terms to make them interoperable with international and existing US laws and not to hinder innovation. The Commission may want to look to biometric privacy laws adopted in states like Illinois and Texas⁶ when determining what additional types of biometric data to include.

FTC Question 14: Should the definition of “Support for the internal operations of the website or online service” be modified? Are there practices in addition to behavioral targeting and profiling that should be expressly excluded from the definition? Should additional activities be expressly permitted under the definition?⁷

Many companies in the modern digital ecosystem do not process the data they collect internally and instead hire service providers or third parties to do so on their behalf. COPPA crucially recognizes that certain releases are necessary to the operations of a site or service and do not trigger COPPA’s notice and consent requirements. CIPL therefore supports the clarification and expansion of the definition of “support for the internal operations of the website or online service” to include critical practices that are necessary for providing a service.

⁴ Notice, 84 Fed. Reg. at 35844.

⁵ 16 C.F.R. 312.2 (Definition of “support for internal operations”).

⁶ See 740 ILCS 14/5; Tex. Bus & Com. Code § 503.001.

⁷ Notice, 84 Fed. Reg. at 35844.

In 2013, the FTC expressly excluded profiling from, but included personalization in, the definition of “support for internal operations.”⁸ The lack of specificity surrounding this term has created significant uncertainty in the marketplace. CIPL believes that prohibiting profiling without consideration of the value of or risk to the data subject of the profiling activity is overly restrictive, and may prevent uses of data that could positively impact a child’s well-being and development. Particularly in the educational context, companies may use “profiling” to provide “personalized” curricula and learning paths for children. The Commission should expressly recognize a broader range of personalization activities, and a narrower category of profiling activities, to allow beneficial uses of data.

In addition, CIPL believes that the phrase “fulfill a request of a child” within the definition of support for internal operations under this section should be expanded to permit a broader range of requests and not be limited to one-time and multiple-use scenarios.

FTC Question 15: Does §312.2 correctly articulate the factors to consider in determining whether a website or online service is directed to children? Do any of the current factors need to be clarified? Are there additional factors that should be considered? For example, should the definition be amended, consistent with the statute, to better address websites and online services that do not include traditionally child-oriented activities, but that have large numbers of child users?⁹

The FTC should retain its approach of balancing various factors in determining whether a site or service is “directed to children.” In doing so, the Commission should continue to avoid preferencing a single determinative factor, such as numerical thresholds, over others, and should ensure that the overall content of the site or service continues to be considered in making a determination of whether it is child-directed. Because the COPPA Rule already considers whether there is “competent and reliable empirical evidence regarding audience composition” as one of its factors, it is unnecessary to amend the definition to address websites that have large numbers of child users.

In March 2018, CIPL issued a White Paper in connection with its ongoing GDPR Implementation Project.¹⁰ Entitled “GDPR Implementation in Respect of Children’s Data and Consent,” the White Paper encouraged EU regulators to adopt a risk-based test, modeled precisely on COPPA, to determine whether an information society service is “offered directly to a child.”¹¹ While the EU unfortunately declined to adopt COPPA’s risk-based model,¹² the FTC should not follow suit.

In its application of the COPPA Rule, the Commission has increasingly blurred the lines between services that are “primarily directed to children,” services that target children as one but not the primary audience

⁸ 16 C.F.R. 312.2.

⁹ Notice, 84 Fed. Reg. at 35844.

¹⁰ GDPR Implementation In Respect of Children’s Data and Consent, March 6, 2018, available at https://www.informationpolicycentre.com/uploads/5/7/1/0/57104281/cipl_white_paper_-_gdpr_implementation_in_respect_of_childrens_data_and_consent.pdf.

¹¹ *Id.*

¹² For example, the UK Information Commissioner’s office has stated that an information society service is “offered directly to a child” when it is made available to all users without any age restrictions or when any age restrictions in place allow users under the age of 18. See “Children and the GDPR” (Mar. 22, 2018), <https://ico.org.uk/media/for-organisations/guide-to-the-general-data-protection-regulation-gdpr/children-and-the-gdpr-1-0.pdf>.

(“mixed audience”), and general audience sites that don’t target children as an audience.¹³ The FTC should issue guidance based upon the multi-factor test in COPPA to ensure that content creators, app developers and platforms understand how the rules apply to their products and services.

In doing so, the FTC should ensure that the definition of “directed to children” is not so broad as to include many general audience services, which could negatively impact adults’ experiences with these services and deny them access to key features. An overly broad definition could result in all general audience sites using age-gates, which requires them to collect some personal information about all visitors, contravening FTC’s own guidance on COPPA which states that companies should minimize the amount of data they collect as part of implementing reasonable security procedures. Such an extensive use of age-gating would also create a more burdensome user experience.

The Commission should also retain its “mixed audience” exception, which allows companies to differentiate between children and adults using child-directed services under COPPA, as long as the operator properly age-gates its users.

FTC Question 18: Are the requirements in Section 312.4 of the Rule clear and appropriate? If not, how can they be improved? Should the notice requirements be clarified or modified in any way to reflect changes in the types or uses of children’s information collected by operators or changes in communications options available between operators and parents?¹⁴

The Commission should avoid using a prescriptive list of notice requirements and instead, outline the key information that should be included, such as: 1) what data is collected and how it is used, highlighting any unexpected uses; 2) disclosures to third parties (not including service providers); 3) what information is necessary for the product or service to function and what is optional; and 4) contact details for questions and complaints. This outcome-based approach offers companies flexibility as to how to communicate with parents. This approach also avoids exacerbating the information overload that can be associated with consent-based privacy protection models.

FTC Question 20: Section 312.5(b)(2) of the Rule provides a non-exhaustive list of approved methods to obtain verifiable parental consent (VPC) . . . Are there additional methods to obtain verifiable parental consent, based on current or technological changes? What are the costs and benefits of these additional methods? Should the Commission consider any changes to the Rule to encourage the development of new methods of parental consent?¹⁵

The use of data in the modern economy has strained COPPA’s traditional notice and consent approach to privacy protection. Notice and consent places too much responsibility on parents to understand an operator’s data collection and use practices and to make appropriate choices about whether to give or withhold consent in order to protect their children. While the Commission is constrained by statute to retain its notice-and-consent model, there are ways it can approve its current requirements.

¹³ See *U.S. v. Musical.ly*, No. 2:19-cv-1439 (C.D. Ca. Feb. 27, 2019), <https://www.ftc.gov/enforcement/cases-proceedings/172-3004/musically-inc> and *FTC and People of the State of New York v. Google LLC and YouTube, LLC*, No. 1:19-cv-02642 (D. D.C. Sept. 4, 2019), <https://www.ftc.gov/enforcement/cases-proceedings/172-3083/google-llc-youtube-llc>.

¹⁴ Notice, 84 Fed. Reg. at 35844.

¹⁵ *Id.* At 35845.

In particular, COPPA's pre-approved methods for VPC are costly to implement for companies and can often be burdensome for parents to navigate, which may result in children having fewer opportunities to engage with enriching content. Many companies have experienced a significant number of "drop off" occurrences when a VPC mechanism is included in the middle of an experience. To alleviate these burdens, the Commission should continue to examine additional parental consent methods that take into account important principles such as data minimization, equity and parental ease. In particular, it is important to consider methods for parents who are either unbanked, underbanked, or undocumented. The Commission may want to consider convening stakeholders to consider new methods of VPC that are less disruptive to the sign-up or onboarding process, better informs parents and gives children stronger privacy protections while also providing easier access to online opportunities. In doing so, the Commission should consider a sandbox approach where new methods could be tested over a controlled period.

Alternatively, the Commission could consider an outcome- or criteria-based approach to VPC instead of a specified list of consent methods. The Commission could, for example, use the following criteria, allowing for the use of any method as long as it assures a minimum level of security and robustness: 1) establishing that the person consenting is an adult; 2) verification that any documents involved belong to the individual; 3) ensuring details requested come from a trusted source; 4) requiring that any knowledge-based authentication contains information that is not easily guessable or searchable online; and 5) confirming the identity of an adult making a self-assertion that she has authority to act for the child.

FTC Question 23: Should the Commission consider a specific exception to parental consent for the use of education technology in schools? Should such an exception result in a preemption of state laws?¹⁶

While the Commission's Statement of Basis and Purpose Accompanying the 1999 COPPA Rule states that the Rule "does not preclude schools from acting as intermediaries between operators and schools in the notice and consent process, or from serving as the parents' agent in the process,"¹⁷ CIPL recommends that the Commission enshrine a formal exception to parental consent for school-based educational purposes. Schools are uniquely suited to evaluate how they are using educational technology and the necessity of processing information. Such an exception should apply to the entirety of COPPA's obligations so that parents and service providers only have to interface with the school, and not with each other, as schools have existing relationships with parents that service providers do not. In fact, requiring service providers to obtain VPC would obligate the collection of additional information that isn't necessary for the provision of educational services, in contrast with COPPA's data minimization principle.

As technology becomes more and more prevalent in the classroom, it could be detrimental to a child's education, as well as disruptive to the education of other children, to require parental consent for every online service used in the classroom. Such a requirement could result in parents choosing to opt out of beneficial services, or simply failing to provide the necessary consent for any number of reasons. It could also result in administrative burden and classroom disruption for teachers to manage different lesson plans for students whose parents have provided consent and those whose parents have not. And if schools have to maneuver the intricacies of individualized consent, it is not only the students whose parents

¹⁶ *Id.*

¹⁷ 1999 Statement of Basis and Purpose, 64 Fed. Reg. 59888, at 59903 (Nov. 3, 1999).

withhold consent who suffer. Schools might decide that it is easier not to use certain tools if they are unable to receive unanimous parental consent.

Additionally, the COPPA exception for schools should align with FERPA's "school official" exception to provide consistency across federal statutes and avoid conflicting obligations. The Commission should also clarify that its Rule's approach to consent by educational institutions explicitly preempts state student privacy laws on parental consent that may impose different obligations on companies providing educational technology in schools. Preemption in this space would avoid a patchwork of state laws that are increasingly conflicting and unmanageable for service providers. Providing clarity in this space would provide a clear and comprehensive approach to the treatment of students' personal data in the educational context without compromising students' privacy or online safety.

FTC Question 24: Should the Commission amend the Rule to specifically include an exception that would allow operators not to obtain parental consent before collecting an audio file with a child's voice when the audio file is collected solely as a replacement for written words, such as to perform a search, so long as the audio file is held for a brief time and used only for that purpose? Should an operator be able to de-identify these audio files and use them to improve its products?¹⁸

The Commission should formalize and expand the exception for audio files containing a child's voice outlined in its 2017 Enforcement Policy Statement¹⁹ to advance the clarity and predictability of its COPPA approach. As the Enforcement Policy Statement acknowledges, in addition to making interactions with devices more seamless, voice commands can be a necessity for disabled individuals and children who have not yet learned to write. Audio files are necessary for these voice-related services as well as the research and development that sits underneath them, such as voice-activated search requests or voice recognition technology for security.

Companies are already relying upon the Commission's current guidance in the development of their products, and the Commission has not expressed any concerns with industry adhering to its guidance in the two years it has been in effect.

However, when formalizing the Enforcement Policy Statement, the Commission should avoid using the standard "solely as a replacement for written words," as voice commands will not necessarily always meet that standard. Finally, the Commission should ensure that it clearly provides for brief storage of identified audio files, to allow for processing of the request, prior to their deletion or de-identification, which comports with the Policy Statement's language that non-enforcement is appropriate where the audio file is "briefly maintained in order to fulfill the request and then deleted almost instantaneously."²⁰ The exception should also allow companies to retain these audio files as long as they are de-identified.

FTC Question 25: To encourage general audience platforms that host child-directed content uploaded by third parties to take steps to identify and police child-directed content uploaded by others, should the Commission make modifications to the COPPA Rule? Should such platforms that identify and police child-

¹⁸ Notice, 84 Fed. Reg. at 35845.

¹⁹ See Federal Trade Commission, *Enforcement Policy Statement Regarding the Applicability of the COPPA Rule to the Collection and Use of Voice Recordings*, 2 (Oct. 2017), available at <https://www.ftc.gov/public-statements/2017/10/federal-trade-commission-enforcement-policy-statement-regarding>.

²⁰ *Id.*

directed content be able to rebut the presumption that all users of the child-directed third party content are children thereby allowing the platform to treat under and over age 13 users differently?²¹

The Commission should modify the COPPA Rule to ensure that platforms are able to rebut the presumption that all users of child-directed content are children where the platform takes reasonable steps, such as a neutral age gate plus additional verification, to ensure users interacting with the child-directed content are 13 or older. This is particularly important for general audience platforms with large numbers of adult users. These “reasonable steps” should not be prescriptive, and the Commission should allow companies to adopt their own approach as long as they meet certain standards outlined by the Commission.

FTC Question 29: Should the Commission approval of a safe harbor program be modified in any way? Should any changes be made to the criteria for approval of self-regulatory guidelines, consistent with the Act’s requirements? Should the Commission consider any changes to the safe harbor monitoring process, including any changes to promote greater transparency? Should the Rule include factors for the Commission to consider in revoking approval for a safe harbor program?²²

The safe harbor program is an essential construct of the COPPA statute and Rule, and allows for companies who participate to have peace of mind in their COPPA compliance programs. As such, the Commission should ensure that all certified COPPA safe harbors continue to meet their statutory obligations. CIPL supports increased transparency, accountability and oversight for safe harbors to ensure that, over the course of time, safe harbor organizations continue to have the skill and know-how to carry out their role properly.

To strengthen COPPA’s safe harbor certification regime, the FTC should ensure that safe harbor programs continue to meet the required performance standards over the course of time. To ensure that all approved safe harbors continue to meet these standards, the Commission should consider requiring that safe harbors incorporate compliance programs rooted in an accountability model similar to the privacy programs the Commission has required through its consent decrees.²³ Thus, the Commission could require approved safe harbors to implement privacy compliance and information management programs to map to the seven elements of accountability: leadership and oversight, risk assessment, policies and procedures, transparency, training and awareness, monitoring and verification, and response and enforcement. Following this model, an approved safe harbor would have to demonstrate to the Commission on a periodic basis that it has such a program and is regularly assessing and updating this program to comply with COPPA. This would include documenting those assessments and updates, ensuring transparency about how the program functions, continuing to provide employees training on the program, ensuring all employees are complying with its guidelines, and cooperating with the FTC in any investigations. If a safe harbor has not met these accountability standards, the Commission should be able to revoke its approval.

²¹ Notice, 84 Fed. Reg. at 35845-46.

²² *Id.* At 35847.

²³ See CIPL white paper on Organizational Accountability in Light of FTC Consent Orders, November 13, 2019, available at https://www.informationpolicycentre.com/uploads/5/7/1/0/57104281/cipl_white_paper_-_organizational_accountability_in_light_of_ftc_consent_orders_13_november_2019_.pdf.

Conclusion

Thank you for the opportunity to submit these comments and for considering them. If you would like to discuss any of the comments in this paper or require additional information, please contact Bojana Bellamy, bbellamy@huntonAK.com; Markus Heyder, mheyder@huntonAK.com; Nathalie Laneret, nlaneret@huntonAK.com; Sam Grogan, sgrogan@huntonAK.com; Matthew Starr, mstarr@huntonAK.com or Giovanna Carloni, gcarloni@huntonAK.com.