



The Internet Association

July 1, 2013

The Honorable Edith Ramirez
Chairwoman
Federal Trade Commission
600 Pennsylvania Avenue, NW
Washington, DC 20580

Dear Chairwoman Ramirez:

As a trade association representing leading Internet companies and their global community of users, the Internet Association and our members share the Commission's strong commitment to protecting children's online privacy. Our members have worked diligently to come into compliance with the revised Children's Online Privacy Protection Act Rule ("COPPA Rule") by today's effective date.

We are writing to express concern, however, that a recently added COPPA Frequently Asked Questions ("FAQs") has created uncertainty that could make full compliance by the July 1, 2013, effective date unrealistic. In particular, COPPA FAQ D.5, which attempts to provide industry guidance in applying the "actual knowledge" standard for purposes of the COPPA Rule, is inconsistent with the text of the statute and the COPPA Rule and is causing more confusion than clarity.

Under the COPPA statute, operators whose websites and online services are directed to a general audience are subject to COPPA's requirements only if they have "actual knowledge" that they have collected personal information directly from users of another Web site or online service directed to children. The clear statutory distinction between websites and online services that are directed to children and those that are directed to a general audience but have actual knowledge carefully balances the need to protect children's online privacy with the need to encourage the continued development of the innovative and interactive online services that fuel our nation's economic growth.¹ COPPA FAQ D.5 upsets this careful balance.

The second example provided in COPPA FAQ D.5 could eviscerate the actual knowledge standard and, in effect, replace it with a "reasonable efforts" or "constructive knowledge" standard if it is interpreted too broadly. For example, staff have suggested informally that under the second example the company providing the embedded service may be deemed to have "actual knowledge" whenever an independent third party sends the embedded service provider a list of sites and online services with an explanation of their alleged child-directed nature.² Under

¹ Press Release, Interactive Advertising Bureau, "Ad-Supported Internet Responsible for 5.1 Million U.S. Jobs, Contributes \$530 Billion To U.S. Economy in 2011 Alone" (Oct. 1, 2012) (describing an IAB-commissioned study by researchers at the Harvard University Business School).

² Children's Online Privacy Protection Rule: Not Just for Kids' Sites (Apr. 2013),

<http://www.business.ftc.gov/documents/alt046-childrens-online-privacy-protection-rule-not-just-kids-sites>

this overly broad interpretation, any “independent evidence” that the site or service is child-directed that rises about a bare allegation provide actual knowledge if received by a representative of the embedded service provider, regardless of how credible or authoritative the evidence is. This approach imposes exactly the kind of lesser “reasonable efforts” or “constructive knowledge” standard that the Commission has rejected because it would “require operators to ferret through a host of circumstantial information to determine who may or may not be a child.” 76 Fed. Reg. 59804, 59806 (Sept. 27, 2011); *see also* 78 Fed. Reg. 3972, 3978 (Jan. 17, 2013) (“[I]t is reasonable to hold such entity liable only where it has *actual knowledge* that it is collecting personal information directly from users of a child-directed site or service.”).

An interpretation that would require companies to independently investigate allegations made by third parties is especially concerning given that the test for determining whether a site or service is child-directed contains a dozen different factors. 16 C.F.R. § 312.2 (defining “Web site or online service directed to children”). Under the revised COPPA Rule, “no single factor will predominate over another” in assessing whether a site or service is child-directed, and some factors depend on information, such as the intended and actual audience and data regarding how the content is advertised, that is known only by the child-directed content provider. 78 Fed. Reg. at 3984. Thus, creating this new “duty to investigate” could require the embedded service provider to review the entire website or service for its content, as well as provide the operator the opportunity to provide input relevant to the allegations.

Another concern is that COPPA FAQ D.5 does not place any restraints on the ability of third parties to lodge these allegations concerning the COPPA obligations of websites and online services. Third parties could, for example, make allegations without adequately assessing any or all of the COPPA Rule’s factors, and could send their allegations to any representative or through any means (including those not connected to COPPA compliance). Rival companies may seek to cut off embedded features on competing websites by making false or tenuous allegations. In addition, the resulting burden of having to conduct independent investigations could discourage innovation by emerging embedded service providers.

These concerns are enhanced given the difficulty an embedded service provider would face if the operator of the website or online service disagrees with the third party’s allegation that it is a child-directed site or service. Even though the operator of the site or service is best situated to assess the COPPA Rule’s factors and make a reliable and authoritative judgment about the child-directed nature of its site or service, the Commission has not confirmed that an embedded service provider could rely on the operator’s assessment in the face of these third-party allegations. In such a case, it would be unreasonable to require the embedded service provider to give greater credence to the third-party’s allegations, which will likely provide an incomplete picture of all the relevant factors for determining the child-directed nature of the content provider’s site or service. *See id.* at 3978; 76 Fed. Reg. at 59806.

In addition, this lesser standard could frustrate industry’s efforts to develop a technical solution that would allow child-directed sites and services to signal their child-directed nature to other

(“Another way an ad network or plug-in may have actual knowledge: If a concerned parent or someone else informs a representative of the ad network or plug-in that it’s collecting information from children or users of a child-directed site or service.”).

operators.³ If other “independent evidence” must be considered in addition to the signals provided by the child-directed content provider, a technical solution would no longer have the advantage of reducing the administrative burden of compliance. An industry standard also provides greater certainty because operators would have a specified, uniform process for when actual knowledge will be obtained. In contrast, if an individual could give an operator actual knowledge through any number of channels, including by simply sending an email to a business executive, there would be little incentive to participate in an industry standard. Thus, if companies are to dedicate considerable resources to develop and adopt an industry standard, we believe that the Commission should provide assurances that they would not be required additionally to field incoming allegations from third parties through other channels.

The COPPA Rule needs to be workable and to unambiguously set forth operators’ legal obligations if it is to be effective. Consequently, we encourage the Commission to revise COPPA FAQ D.5 to address these concerns. In the meantime, we appreciate the Commission’s statements that it “will exercise prosecutorial discretion in enforcing the Rule.”⁴ Given the uncertainty regarding the implementation of COPPA FAQ D.5, we urge the Commission to exercise its prosecutorial discretion where a company is attempting to comply in good faith under the actual knowledge standard. This approach would provide the Commission time to fine tune its informal guidance, would afford companies full and fair notice of the applicable legal requirements, and would ensure that all interested parties – particularly children and their parents – have the benefit of understandable and achievable privacy protections.

Thank you for your attention to this important issue. We would greatly appreciate the opportunity to meet with you to formally introduce you to our association and continue this discussion.

Sincerely,



Michael Beckerman
President and CEO
The Internet Association

Cc:
Commissioner Julie Brill
Commissioner Maureen Ohlhausen
Commissioner Joshua Wright

³ See, e.g., Steve Bellovin, “COPPA and Signaling,” Tech@FTC Blog (Jan. 2, 2013), <https://techatftc.wordpress.com/2013/01/02/coppa-and-signaling/>.

⁴ See Letter from Donald S. Clark, Secretary, Federal Trade Commission, to Michael Beckerman et al., at 4 (May 6, 2013), <http://www.ftc.gov/os/2013/05/130506copparule.pdf>.