

**Before the
Federal Trade Commission
Washington, DC 20580**

In the Matter of)
)
Children's Online Privacy Protection Rule Review) FTC Project No. P104503
)
16 CFR Part 312)

**COMMENTS OF THE
FAMILY ONLINE SAFETY INSTITUTE**

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Comments of FOSI on the COPPA Rule Review, FTC File No. P104503

The Family Online Safety Institute (FOSI) is pleased to submit these comments in response to the Federal Trade Commission's (FTC) Request for Public Comment on proposed changes to amend the Children's Online Privacy Protection Rule (COPPA Rule) released on September 15, 2011.¹ These revisions are designed to encompass the changes in technology that have occurred in the years since COPPA and its Rule were passed and FOSI appreciates the Commission's efforts to monitor, evaluate, and enforce COPPA.

The passage of COPPA and its corresponding Rule took place in a very different technological era. The online landscape for all users has certainly changed in the past 11 years and none more so than for children. Gone are the days when we were primarily working to protect them from inappropriate material that they may come across online. Now we are dealing with content that kids themselves are producing, as well as troubling behaviors such as cyberbullying, sexting and online addiction and parents are often looking for guidance when it comes to their kids' online experiences. We need to ensure that children are both protected through COPPA and also have a rich variety of child-friendly environments to visit online.

I. FOSI Believes Empowered Parents, Balanced Government Oversight and Industry Self-Regulation Help Protect Kids Online

FOSI is an international, non-profit membership organization working to make the online world a safer place for children and their families. We do this by identifying and promoting the best practices, tools and methods in the field of online safety and privacy that also respect free speech. FOSI wants to ensure that there is a safe online environment to keep young kids engaged, entertained, and learning online and FOSI helps promote this through public events and outreach.

¹ *In Request for Public Comment on the Federal Trade Commission's Proposal to Amend the COPPA Rule to Respond to Changes in Online Technology*, Children's Online Privacy Protection Rule, 76 Fed. Reg. 59804 (Sept. 27, 2011) ("Notice") available at <http://ftc.gov/os/2011/09/110915coppa.pdf>.

A. About FOSI

FOSI's members represent the best of the Internet industry, including broadband providers, wireless carriers, social networking websites, technology companies, and major trade associations.² FOSI works as a trusted convener, bringing together leaders in government, industry, and the non-profit sectors to collaborate and innovate new solutions for online safety in a Web 2.0 world.

FOSI believes in building a culture of responsibility online to ensure that children have a safe and productive time on the Internet. We support balanced government oversight of industry self-regulatory efforts. This approach allows for maximum innovation and creative solutions while ensuring industry continues to raise the bar in the field of online safety. As part of this, we promote robust and comprehensive industry self-regulation. As a membership organization, we bring together leading technology companies, who often compete with one another on other issues or for market share, to discuss emerging issues and create best practices and new solutions to increase privacy measures for children and adults alike. COPPA's safe harbor program is a good example of an effective self-regulatory mechanism that involves effective government oversight, without overreaching, and provides an effective balance between the industry needs for innovation and the need to keep kids safe online.

B. FOSI Helps Encourage Discussions on FTC Revisions and Gather Opinions

In order to fully assess the implications of the proposed changes, FOSI has convened two panel discussions dedicated to the revisions. The first event, "Revising COPPA, a Discussion of the FTC's Proposals," co-hosted with Tech Freedom,³ focused solely on

² FOSI Members include: AOL, AT&T, BAE Systems Detica, BT Retail, Comcast, Disney, Entertainment Software Association, Facebook, France Telecom, Google, GSM Association, Microsoft, Motion Picture Association of America, NCTA, Nominum, Optenet, RuleSpace, Sprint, Symantec, Time Warner Cable, Telefónica, Telecom Italia, USTelecom, The Wireless Foundation, Verizon and Yahoo!.

³ Tech Freedom a non-profit, non-partisan technology policy think tank <http://techfreedom.org/>.

proposed revisions themselves,⁴ while the panel at the FOSI 2011 Annual Conference⁵ featured discussion on privacy as a whole, with special consideration given to children and COPPA.

At the event with Tech Freedom on October 12, 2011, Phyllis Marcus of the FTC provided introductory remarks and explained to the audience some of the key areas of proposed changes. Jim Dunstan of Tech Freedom; Dona Fraser from the Entertainment Software Rating Board, an FTC approved safe harbor; Kathryn Montgomery, professor at American University; and Rebecca Newton from Mind Candy, a social online gaming company, talked about dealing with COPPA compliance as well what the proposed changes will mean for parents and for site operators. The panelists discussed the proposed abolition of “email plus” the definition of a “child” and changes proposed to the safe harbor regime.⁶

At the FOSI Annual Conference there was a broader conversation around the general principle of online privacy for children and adults. The panel featured representatives from the FTC, industry and the Entertainment Software Rating Board, but also focused on the proposed changes.

These sessions were important to gather opinions and perspectives from a wide range of interested parties on the revisions. The debates helped audiences understand the impact of the changes, as well as promoting the amendments and highlighting the need for public comments. FOSI strongly encourages the Commission to review the videos from both of these panels to get multiple viewpoints about the implications of the proposed changes.⁷

⁴ FOSI/ Tech Freedom Discussion, “Revising COPPA,” Oct. 12, 2011 available at <http://www.fosi.org/fosi-events/previous-fosi-events.html> ;video is available at <http://techfreedom.org/event/revising-coppa-discussion-ftcs-proposals>.

⁵ See FOSI 2011 Annual Conference, “Evaluate. Innovate. Collaborate Strategies for Safe and Healthy Online Use,” available at <http://www.fosi.org/annual-conference-2011-overview.html>.

⁶ FOSI/ Tech Freedom Discussion, “Revising COPPA,” available at <http://techfreedom.org/event/revising-coppa-discussion-ftcs-proposals> .

⁷ *Id.* See also, “A New Beginning for Privacy Online?” (Nov. 9, 2011) available at <http://www.youtube.com/user/fosi#p/u/5/piamJqOVc2o>.

II. Proposed Revisions to the COPPA Rule

The FTC has proposed a number of revisions to key definitions and practices contained with COPPA and the COPPA Rule. FOSI commends the FTC for preserving its current definition of “child” at age 13, maintaining the actual knowledge standard, and advises the Commission to carefully evaluate the elimination of the sliding scale approach. The proposed changes to increase parental consent techniques and create a structure to evaluate new proposed methods will help give websites and parents additional methods for consent. FOSI approves of new procedures to ensure safe harbors remain efficient. Transparent practices and easy to understand notice and consent policies will allow parents to become informed and make decisions about their child’s participation on a website.

A. Definition of a “child”

The COPPA statute and the Rule, currently define child as “an individual under the age of 13.”⁸ FOSI is pleased to see that the FTC has determined that 13 remains the appropriate age.⁹ Raising this age would be problematic, and among many other issues, could result in age-verification for all users.¹⁰

New Research by the Pew Internet and American Life project in partnership with FOSI and Cable in the Classroom found that, 44% of children have lied about their age in order to access a website or sign up for an online account.¹¹ Far from protecting children, in

⁸ Children's Online Privacy Protection Act, 15 U.S.C. 6502(1).

⁹ COPPA’s Definition of “Child,” *Notice* at 59805.

¹⁰ See Adam Thierer, “*Kids, Privacy, Free Speech & The Internet: Finding The Right Balance*,” Mercatus Center, George Mason University, Aug. 2011, pg. 4, available at http://mercatus.org/sites/default/files/publication/Kids_Privacy_Free_Speech_and_the_Internet_Thierer_WP32.pdf.

¹¹ Amanda Lenhart et al., “*Teens, Kindness and Cruelty on Social Network Sites*,” The Pew Research Center’s Internet & American Life Project in partnership with FOSI and Cable in the Classroom, Nov. 9, 2011, available at <http://www.fosi.org/images/stories/research/PIP-Teens-Kindness-Cruelty-SNS-Report-Nov-2011.pdf>.

many cases a minimum age of 13 is causing children to lie.¹² This means that they are not being afforded the protections given by websites to their younger demographic. For example, the default settings for a 13 year old on Facebook include limiting the people with whom minors can communicate, limiting the sharing of photos and location, and restricting the ‘public setting.’¹³ When minors lie about their age and increase it to over 18 these safeguards are no longer applied as a default. Therefore, increasing the age above 13 would have created an incentive for more teens to lie about their age and they would lose out on positive protections.

Any increase in the age could also lead to serious constitutional concerns. The Supreme Court has found in a number of cases that teenagers have first amendment rights, although they may be more limited than those afforded to adults they are still protected.¹⁴

There are both practical and legal advantages to the way “child” is currently defined. Also, as it stands, the definition of a child has not caused the constitutional difficulties encountered by the Child Online Protection Act. Changes to the age would in all likelihood not be enforceable, legally or practically, so we commend the FTC for maintaining 13 as the correct age for COPPA.

B. The Commission is Right to Maintain the Actual Knowledge Standard

FOSI is satisfied that the FTC has not proposed any amendments to the knowledge standard and is preserving the “actual knowledge” requirement for website operators.¹⁵ In our estimation, any attempt to impose a “constructive knowledge” standard would be unworkable and would impose unmanageable, and in some cases insurmountable, burdens on website

¹² See boyd, danah, Hargittai, Eszter, Schultz, Jason, and Palfrey, John. "Why parents help their children lie to Facebook about age: Unintended consequences of the ‘Children’s Online Privacy Protection Act’" *First Monday* [Online], Volume 16 Number 11 (31 October 2011) available at <http://www.uic.edu/htbin/cgiwrap/bin/ojs/index.php/fm/article/view/3850/3075>.

¹³ See Facebook Help Center, “How does privacy work for minors?” available at <https://www.facebook.com/help/?page=214189648617074>.

¹⁴ See *Tinker v. Des Moines Independent Community School District*, 393 U.S. 503 (1969) and *Board of Education v. Pico*, 457 U.S. 853 (1982).

¹⁵ COPPA’s “Actual Knowledge” Standard, *Notice* at 59806.

operators. The current actual knowledge standard provides an essential bright-line rule that allows website operators to conduct their business without undue concern of breaching the COPPA Rule and allows sites to take the necessary steps when they find out someone under 13 is on their website.

C. Clear Parental Notification Leads to Informed Choices and Empowered Parents

At FOSI we believe in ease of use for all users, adults and children alike. It is with this in mind that we approve some of the changes to parental notification proposed by the FTC.¹⁶ It is vital that in order for children to have safe and private experiences on the Internet privacy policies and parental notifications need to be clear, concise, and easy for parents to understand what they are consenting to so they can make informed decisions.

Recent research commissioned by FOSI and carried out by Hart Research Associates,¹⁷ showed that 96% of parents questioned say that they have spoken to their children about their online behavior. The verifiable parental consent process allows parents to engage with what their child is doing online. This is particularly useful for parents of young kids because it allows them to make an informed decision about the sites their children visit and information they are willing to let their children provide.

With a generation of parents who often know less about being online than their children increased engagement is necessary and “just in time” notifications provide parents with the salient information at the point of decision to ensure that their consent to their child’s involvement with the website is fully informed. Furthermore, we are pleased to see the simplification of privacy policies for websites. In order for informed and full consent, it is vital that parents understand clear language about what information will be collected about

¹⁶ See “Notice on Web site or Online Service” and “Direct Notice to a Parent,” *Notice* at 59815 and 59816.

¹⁷ Family Online Safety Institute, “*Who Needs Parental Controls? A Survey of Awareness, Attitudes, And Use of Online Parental Controls*,” Sept. 14, 2011, available at http://www.fosi.org/images/stories/research/fosi_hart_survey-report.pdf.

their child and what they are consenting to. FOSI thinks that the proposed changes for “just-in-time notice” requirements will make it easier for parents to see key information upfront to make informed decisions and will further empower parents.

D. Expansion of Parental Consent Mechanisms

FOSI commends the FTC for recognizing the need for new methods for obtaining verifiable parental consent.¹⁸ The addition of the use of electronic scans and video conferencing will provide modern options for companies to use. The collection of government identification may be an effective new mechanism if parents are willing to put forward their sensitive data. We are pleased to see that alternative methods have been considered and we sincerely hope that the FTC will conduct appropriate risk management and security assessments to ensure that the vital data, such as social security numbers and driver’s license numbers, remain private and are not retained for too long.

FOSI is pleased that the FTC is proposing a system to allow for innovative approaches to obtain parental consent.¹⁹ This new process will help create alternative methods for parents to use and could help make it easier for websites while still protecting kids and informing families. FOSI hopes that new mechanisms will be developed and agrees with the transparency of the public comment process and procedures for the new approval process. It is our hope that the decisions could be made in a timely manner. The FTC should evaluate whether 180 days is too lengthy for the determination. Safe harbors are in a unique position to work with member site operators to create new consent mechanisms and FOSI agrees with the Commission’s decision to amend the language to allow safe harbor approval for new methods of verifiable parental consent.

¹⁸ *See Notice* at 59818.

¹⁹ *Id.* at 59820.

E. FOSI Remains Cautious About the Abolition of the Sliding Scale Approach

Among the more controversial proposals by the FTC is the abolition of the sliding scale or “email plus” method of obtaining parental consent. Currently, site operators that only collect personal information for internal use are able to obtain verifiable parental consent by an email from the parent combined with another step, such as later sending a confirmation email to the parent or obtaining additional information to write or call the parent to confirm the consent.²⁰ There are concerns that this may not be a trustworthy method because children may email pretending to be parents.²¹

As the FTC recognized, “Email plus has enjoyed wide appeal among operators, who credit its simplicity.”²² There is some concern that a hasty elimination of this method may cause great difficulty for site operators who were collecting minimal information only for internal use and it may also confuse parents who have become accustomed to using this method of consent.²³ There may be many parents who do not have credit cards or do not feel comfortable providing credit card numbers or government identification details online, but were willing to email a website operator to provide consent. There may also be low-income families who do not have access to webcams and scanners to provide consent for other websites but were able to use the email plus method. The FTC should carefully evaluate the impact of removing email plus on parents and if this takes place, the Commission should work to improve public awareness about the change.

FOSI hopes that the FTC will take into account the impact of the abrupt elimination of email plus, especially without a similar replacement mechanism. We suggest if the Commission moves forward with this decision, then a sunset period should at least be

²⁰ 16 CFR §312.5 (b) (2).

²¹ “The Sliding Scale Approach to Parental Consent,” *Notice* at 59819.

²² *Id.* at footnotes 151 and 152.

²³ See comments of Rebecca Newton speaking at FOSI/ Tech Freedom Event, “*Revising COPPA*” Oct. 12, 2011 at 43:30 available at <http://techfreedom.org/event/revising-coppa-discussion-ftcs-proposals>.

provided to help websites transition to another mechanism as well as have time to provide parents and users with information about the changes.

F. Safe Harbor Oversight Will Help Ensure Compliance and Effectiveness

FOSI supports the FTC's efforts to increase accountability for safe harbor programs and believes that the new requirements will increase transparency and help ensure that the safe harbors remain an effective way to ensure COPPA compliance. Safe harbors will benefit from conducting annual reviews of members' information practices because this exercise will allow them to ensure that members remain compliant.

Applicants seeking safe harbor status should be able to provide a "detailed explanation of their business model and the technological capabilities and mechanisms that they will use for initial and continuing assessment of subject operators' fitness for membership in the safe harbor program."²⁴ This will help the FTC and any public commenters understand whether the applicant will be able to sufficiently serve as a safe harbor.

Additionally, FOSI supports the revision to include a regular audit process and the required reporting of any disciplinary action. These reporting requirements will also help ensure transparency and accountability because they will help the FTC understand the effectiveness of the safe harbor programs and ensure that each safe harbor maintains the capability to carry out its role.

III. The FTC's Oversight Is Key to Balancing Protection and Innovation

COPPA was passed more than a decade ago, yet still remains able to adapt to new technologies and has avoided the legal challenges that other laws around online children's issues have faced. Since it became effective in 2000 the FTC has conducted two reviews of

²⁴"Safe Harbor Reporting and Recordkeeping Requirements," *Notice* at 59823.

the Rule,²⁵ a roundtable discussion with representation from industry, non-profit and government,²⁶ as well as commencing a number of enforcement actions against those found in violation of the Rule.²⁷ The FTC's two reviews of the Rule, as well as the 2010 workshop, have kept interested parties updated, informed the Commission about the burden and impact of compliance and allowed the Commission to evaluate and understand changes brought by new technology while still protecting kids' information. FOSI commends the FTC for the regular review process and for moving this current review ahead of schedule.²⁸

A. FTC's COPPA Enforcement Actions Put Companies on Notice and Keep Pace with Technology Changes

The FTC's enforcement mechanism foreseen in the original Rule has provided a flexible and valuable tool that has allowed the FTC to constantly adapt to the changing technologies. A recent enforcement action against W3 Innovations LLC, an app developer,²⁹ shows that the FTC was able to use the Rule to ensure the compliance of a technology that was not widely available when COPPA was enacted. Other enforcement actions, such as those taken against Playdom, Inc.,³⁰ SONY,³¹ and most recently the social networking site,

²⁵ See, "FTC Seeks Comment on Proposed Revisions to Children's Online Privacy Protection Rule" September 16, 2011 available at <http://ftc.gov/opa/2011/09/coppa.shtm>; "Children's Online Privacy Protection Rule: Request for Comments," 75 FR 17089 (Apr. 5, 2010); Children's Online Privacy Protection Rule 71 FR 13427 (March 15, 2006) "FTC Seeks Comment on Proposed Revisions to Children's Online Privacy Protection Rule," Sept. 16, 2011 available at <http://ftc.gov/opa/2011/09/coppa.shtm>

²⁶ "Protecting Kids' Privacy Online. Reviewing the COPPA Rule" June 2, 2010 Roundtable available at <http://www.ftc.gov/bcp/workshops/coppa/index.shtml>.

²⁷ "Operators of Online "Virtual Worlds" to Pay \$3 Million to Settle FTC Charges That They Illegally Collected and Disclosed Children's Personal Information," May 12, 2011, available at <http://www.ftc.gov/opa/2011/05/playdom.shtm>; see also, "Mobile Apps Developer Settles FTC Charges It Violated Children's Privacy Rule" August 15, 2011, available at <http://www.ftc.gov/opa/2011/08/w3mobileapps.shtm>.

²⁸ Notice at 59804 (explaining that the review is on an accelerated schedule).

²⁹ "Mobile Apps Developer Settles FTC Charges It Violated Children's Privacy Rule" August 15, 2011 available at <http://www.ftc.gov/opa/2011/08/w3mobileapps.shtm>

³⁰ "Operators of Online "Virtual Worlds" to Pay \$3 Million to Settle FTC Charges That They Illegally Collected and Disclosed Children's Personal Information" May 12, 2011, available at <http://www.ftc.gov/opa/2011/05/playdom.shtm>.

³¹ "Sony BMG Music Settles Charges Its Music Fan Websites Violated the Children's Online Privacy Protection Act," Dec. 11, 2008, available at <http://www.ftc.gov/opa/2008/12/sonymusic.shtm>.

Skid-e-Kids,³² demonstrate that the FTC is able to use enforcement actions to maintain the integrity of COPPA and effectively handle violations. The ability to use consent decrees that have both a restitution element, as well as imposing increased reporting by the wrongdoer, enables the Commission to send a clear message not just to the violator, but to the entire online community about the importance of obtaining parental consent before obtaining personal information from kids.

B. Increased Communication from the FTC is Needed for Clarity

The FTC has been very effective in its review process and has great resources for the public including OnGuard Online. One recommendation is to focus more on communicating with parents about COPPA so they truly understand why the age of 13 is a requirement for certain websites. There is also a need for the FTC to better inform the public about COPPA because many non-profit organizations, including hospitals, misunderstand COPPA and believe they are unable to provide sites and online services for those under 13. This is very important for those working to help at-risk kids who may be suicidal or engaged in self-harm.³³ We encourage the FTC to provide more education about where exceptions to COPPA apply as well as helping parents understand any changes from this Rulemaking.

IV. Conclusion

In conclusion, FOSI believes the FTC effectively balances government oversight with industry self-regulation and innovation when it comes to COPPA. FOSI is pleased that the Commission recognizes that it would be inappropriate to raise the age above 13 and thinks that it is right to maintain the actual knowledge standard. FOSI hopes the Commission will

³² “*Operator of Social Networking Website for Kids Settles FTC Charges Site Collected Kids’ Personal Information Without Parental Consent*,” Nov. 8, 2011 available at <http://www.ftc.gov/opa/2011/11/skidekids.shtm>

³³ See comments of danah boyd speaking at a joint FOSI/Microsoft event, “Kids, Privacy, and Online Drama,” December 13, 2011, at 1:20 available at <http://www.youtube.com/user/FOSI#p/u/0/WDKA7JyLnTw> (“Hospitals are actually for-profit companies, many of them, not all of them, many of them don’t actually make profit. But the challenge there is because they can’t do certain interventions there because of COPPA either, which becomes huge when we’re thinking about at-risk kids, suicide prevention, eating disorders, self -injury, these kinds of things.”).

exercise caution with the elimination of email plus, especially the impact of an abrupt elimination on both low-income families and website developers.

The Commission should continue to hold workshops in addition to future reviews to provide discussions about the effect of this rulemaking and evaluate any changes. Regular discussions after this rulemaking will enable the Commission to evaluate whether changes have stifled innovation or enhanced it. The Commission should help promote and encourage the development of website content for children under 13 and must ensure its rules do not keep well-meaning and creative website operators away from this space. We appreciate the FTC's efforts to expand parental consent mechanisms and strengthen oversight of safe harbors and would like the FTC to increase education and awareness campaigns to the public about the impact of changes from this rulemaking as well as about COPPA generally.

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