

E-ALERT | Global Privacy & Data Security

August 2, 2012

FTC PROPOSES ADDITIONAL REVISIONS TO COPPA RULE

Yesterday, the Federal Trade Commission (“FTC”) issued a Supplemental Notice of Proposed Rulemaking (“Supplemental Notice”) that proposes additional revisions to the rule implementing the Children’s Online Privacy Protection Act (“COPPA”). COPPA governs the online collection, use, and disclosure of children’s personal information by (1) operators of websites and online services that are directed to children under the age of 13 and (2) operators of general audience websites or online services that have actual knowledge that a user is under 13.

The FTC did not adopt any final amendments at this time. Comments on the Supplemental Notice must be filed with the FTC by September 10, 2012.

The FTC previously had sought comment on proposed revisions to the COPPA Rule back in September 2011. It is taking this additional step to further “clarify the scope of the Rule and strengthen its protections for the online collection, use, or disclosure of children’s personal information.” Because these additional revisions were not contemplated in the FTC’s September 2011 proposal, additional public notice and comment is necessary before the final Rule is adopted.

Although the proposed revisions make only definitional changes, the potential impacts for website publishers, ad networks, and app developers are significant and, in effect, would expand COPPA to a whole new class of websites — “child-friendly mixed audience sites.”

Specifically, the Supplemental Notice proposes to revise the definitions of several key terms, including “operator,” “website or online service directed to children,” “personal information,” and “support for internal operations.”

■ **“Operator”:**

- *Joint Responsibility for “Co-Operators”:* Previous FTC guidance suggested that, in order to qualify as an “operator” under the COPPA rule, a website would need to have some “ownership, control, or access to the personal information” collected on its site. Because social plugins or ad networks collect data on child-directed sites directly from users, the website operator could argue that it does not own, control, or access the data and is not an “operator” for purposes of COPPA.

The Supplemental Notice changes this prior guidance. Instead, the revisions expand the definition of “operator” to include (1) third parties, such as social plug-ins and ad networks, that know or have reason to know that they collect personal information through child-directed websites and online services, and (2) child-directed websites or services that add this third-party functionality to their sites. The FTC stated that the child-directed site or service and the third-party operators for such site would all be held responsible for complying with COPPA as “co-operators.”

- *No Clear Position on Effectiveness of Joint Notice and Consent:* The FTC did not explicitly address the issue of whether third parties on child-directed sites could rely on notice provided and parental consent obtained by the website operator. The FTC stated that the website operator “is in an appropriate position to give notice and obtain consent from parents” and “is in the best position to know that its site or service is directed to children and can control which plug-ins, software downloads, or advertising networks it integrates

into its site.” In addition, the FTC suggested that site operators and third parties on the site should “cooperate to meet their statutory duty to notify parents and obtain parental consent.” However, the FTC did not take the next step of confirming that a third party can rely on a site operator’s notice and parental consent. Consequently, the COPPA Rule would remain ambiguous on this issue.

■ **“Website or Online Service Directed to Children”:**

- *Portions of Third-Party Services on Child-Directed Sites or Services May Be Deemed Child-Directed.* The Supplemental Notices states that third-party services, such as advertising networks and social media plugins, could be deemed directed to children and held “strictly liable” under COPPA when operating on child-directed properties if they have actual or constructive knowledge that they collect personal information through a child-directed site or service.
- *New Constructive Knowledge Standard:* Despite having rejected a constructive knowledge standard in the proposed COPPA Rule, the Supplemental Notice would deem a site or online service (including portions of a third-party service) to be child directed if it “**knows or has reason to know**” that it collects personal information through a website or service directed to children. The FTC emphasized that third-party services, such as plug-ins and ad networks, need not “monitor or investigate whether their services are incorporated into child-directed properties.” But the FTC explained that such services “will not be free to ignore credible information brought to their attention” that their services have been added to child-directed sites and that the standard requires “a person to draw a reasonable inference from information he does have.”
- *New Standard for Determining When a Site or Service Is Directed To Children:* Under the existing COPPA Rule, the FTC considers several factors — such as subject matter, visual content, use of animated characters or child-oriented activities and incentives, language, advertising, and audience composition — to determine if a site or service is directed to children. The Supplemental Notice replaces these factors, so that a site or service will be deemed to be directed to children if it meets **any one** of the following three criteria:
 1. It knowingly targets children under age 13 as its primary audience;
 2. Based on the overall content of the website or online service, it is likely to attract children under age 13 as its primary audience; or
 3. Based on the overall content of the website or online service, it 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 website 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.

This new standard, which could be interpreted quite broadly, has the potential to greatly expand the number of general audience sites that are deemed directed to children.

- *Expansion of COPPA To A New Category of “Child-Friendly Mixed Audience Sites”:* Although a number of general audience sites voluntarily use neutral age screens to avoid triggering COPPA’s requirements, age screens have never been legally required for purposes of complying with the COPPA Rule. In effect, however, the Supplemental Notice would move certain general audience sites into a new category of “child-friendly mixed audience sites” and require operators of these sites “to take an affirmative step to attain actual knowledge if they do not wish to treat all visitors as being under 13.” Because the Commission does not clearly define when a site is a “child-friendly mixed audience site,” it is unclear whether it includes teen-directed sites, family-friendly sites, or casual gaming sites.

- **“Personal Information”**: The Supplemental Notice clarifies when screen or usernames and persistent identifiers qualify as “personal information” under the COPPA Rule.
 - *Screen and Usernames*: The FTC was persuaded by the comments that allowing children to sign in to sites and services across devices or platforms using a single screen or username is beneficial. Consequently, the Supplemental Notice proposes to consider screen or usernames as “personal information” only when they function as online contact information by acting “like an email address, an instant messaging identifier, or ‘any other substantially similar identifier that permits direct contact with a person online.’”
 - *Persistent Identifiers*: The FTC clarified that persistent identifiers (e.g., IP addresses, cookie IDs, and device IDs) qualify as “personal information” for purposes of COPPA if they can be used to identify users over time or across different sites and services, unless the persistent identifier is used to support internal operations.
 - **“Support for Internal Operations”**: The Supplemental Notice amends the definition to help clarify that user authentication, maintaining user preferences, serving contextual advertisements, protecting against fraud or theft, performing network communications, and enabling site maintenance and analysis are covered. However, the FTC also made clear that none of the information collected may be used for behaviorally-targeted advertising, and, while the definition explicitly permits contextual advertising, it does not explicitly allow forms of first party advertising that are targeted based on a user’s behavior.
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