

# Federal Trade Commission Hosts Workshop to Review the Children’s Online Privacy Protection Rule

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Privacy

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On Monday, the Federal Trade Commission held a workshop to examine whether to update the FTC’s rule adopted under the Children’s Online Privacy Protection Act (“COPPA Rule”). *The Future of the COPPA Rule: An FTC Workshop* featured a range of speakers and panelists, including representatives from industry, consumer groups, and academia.

The workshop is part of the Commission’s broader review of the COPPA Rule, and discussion topics revolved around those the FTC has identified in its [request for comments on the implementation of the COPPA Rule](#). In particular, workshop panelists reviewed the state of the world in children’s privacy, the scope of the Rule, definitions, exceptions, and misconceptions relating to the Rule, and the Rule’s regulation of persistent identifiers. Although the discussion revealed a few narrow issues on which there appears to be some general agreement, more frequently, it underscored that the conversation around potential COPPA Rule changes is still in its early stages. Workshop participants, particularly representatives from consumer groups, repeatedly called on the Commission to use its authority under Section 6(b) of the FTC Act to gather more detailed information on practices within the tech industry, without any indication of consumer harm. The workshop discussion laid the groundwork for the submission of more concrete evidence and proposals in comments, which are due on October 23.

Key concepts the workshop covered include the following:

## **Examination of the Actual Knowledge Standard**

Workshop participants focused extensively on whether actual knowledge is the appropriate standard to trigger COPPA’s protections or whether a constructive knowledge standard would be more appropriate. Consumer group representatives noted that the actual knowledge standard can incentivize companies to refrain from investigating whether they have children on their platform, while other commenters emphasized that the Commission has repeatedly concluded that standard would be unworkable and that it could raise constitutional concerns. Panelists compared the actual knowledge standard to the “willfully disregard” standard used (but not defined) in the California Consumer Privacy Act (“CCPA”).

## **Assessing the Significance of Audience Composition**

Workshop participants also spent a fair amount of time discussing how the audience composition of a particular service should factor into a determination of whether COPPA is triggered. Industry representatives noted that empirical evidence regarding audience composition (which is not always available) is already a factor in the child-directed determination and suggested that the Commission should continue to examine the full universe of relevant factors rather than focusing on a single one—including both the content of a service as well as the operator’s intended audience. Relatedly, a representative of a safe harbor program noted that the rating for a service should not be interpreted as an indicator of an intended audience but rather, as an indicator of what’s appropriate for a certain audience. Another industry representative noted that a difference exists between a service being directed to children, which is the COPPA standard, and a service being attractive to children, which is not the COPPA standard. Both Commission representatives and workshop participants repeatedly returned to the example of a sporting event as a situation in which a general audience service may appeal to a large child audience, but has never been treated as subject to COPPA. At the same time, industry participants noted that additional clarity on how the FTC would make a child-directed determination could be helpful to operators.

## **Representations to Marketers Matter**

Among both consumer group and industry representatives, there seemed to be consensus that how a company represents itself to marketers should matter in determining whether it is child-directed. Specifically, participants seemed to agree that if a company indicates to marketers that it is a good site or service for reaching children, then it would be reasonable to treat that site or service (or the relevant portion thereof) as directed to children. Some consumer group representatives went further, however, and suggested that an operator’s broader advertising strategies should be relevant, such as if it establishes a toy or movie franchise related to the service it offers, even though this approach would seem to disregard the fact that companies often tailor different sites, services, and products (e.g., toys versus men and women’s fashion) associated with a single franchise to different audiences.

## **Accounting for Adult Users of Child-Directed Services**

Several industry representatives also suggested the Commission consider how to account for adult users who have taken reasonable measures to identify themselves on child-directed websites. They identified contexts in which adults can legitimately use services that might be seen as child-directed, such as content with nostalgia value.

## **Thinking Beyond Notice-and-Consent**

Consumer group representatives frequently returned to the idea that while the FTC has, to date, enforced COPPA primarily as a notice-and-consent framework, consistent with trends in other emerging privacy regulation, the FTC should look to COPPA’s other requirements when considering how to bolster the Rule. They noted, for instance, that COPPA already includes a provision that restricts an operator conditioning a child’s participation in an activity on the child’s disclosing more personal information than reasonably necessary to participate in that activity, and suggested that provision effectively serves as a data minimization and use limitation provision. They also highlighted COPPA’s existing provision requiring operators to establish and maintain reasonable procedures to protect the confidentiality, security, and integrity of personal information collected from children.

### **Expanding Protections to Teens**

Although the subject of expanding privacy protections to teens did not receive extensive attention, some consumer group representatives did underscore that frameworks such as the CCPA and the EU's General Data Protection Regulation already grant protections to 13 year olds. They noted that for 13 to 15 year olds, a "right to be forgotten" could be useful.

### **Improving the Safe Harbor Regime**

Although workshop participants acknowledged the continuing value of COPPA's safe harbor regime, both consumer group representatives and a representative from an existing safe harbor program acknowledged that transparency around the safe harbor programs could be improved. Participants seemed to agree that one way to improve the safe harbor framework is to make public certain elements of the required annual report a safe harbor must submit.

### **Mixed Reviews on Age Gate Effectiveness**

Workshop participants had differing opinions on the effectiveness of age gates in identifying children under 13. Consumer group representatives noted that broader changes such as setting up an entire tablet for a child user could be more effective, while industry representatives noted that no clear substitutes for age gates at the operator level have been proposed and that alternatives could force companies to collect more personal information than they otherwise need or want (which counterintuitively would diminish privacy for parents and children).

### **Considering the Impact on Under-Represented Groups**

Several consumer group representatives urged the Commission to consider the impact that regulation might have on under-represented groups, including on people of color or low-income families, warning that inadequate protection of privacy rights may exacerbate existing inequality and that unduly burdensome verifiable parental consent mechanisms (e.g., credit card charges) could make it harder for children from such families to have the same engaging child-appropriate experiences as their peers. They also noted that while COPPA exists to protect children, whom society recognizes as vulnerable, there may be subsets of children who are particularly vulnerable whom the Commission should take into account.

### **Incentivizing Platform Verifiable Parental Consent**

FTC staff specifically asked whether there were any measures the Commission could take to incentivize platforms to create verifiable parental consent ("VPC") mechanisms that could be used by other operators. Some consumer group representatives noted that obtaining VPC should not necessarily be easy for operators, that consumers expectations should align with the choice that consumers actually receive, and that making available comprehensible or accessible information necessary for informed VPC should be incumbent on operators. Industry representative suggested that the design of good consent models is evolving, and the FTC could exercise regulatory discretion and experiment with platform VPC models.

### **Accounting for Educational Technology**

FTC staff also asked whether and how the Commission should account for educational technology ("ed tech") in its COPPA Rule review. Workshop participants seemed to agree that, as FTC guidance currently permits, obtaining consent from a school rather than directly from a parent was appropriate if the children's personal information is used only for an educational purpose. However, there was less consensus around whether an operator should be able to use

personal information collected in the educational context to improve products and services. A representative from a school district also suggested tying COPPA to the school official exception under the Family Educational Rights and Privacy Act, which separately regulates access to student education records.

### **Persistent Identifiers and the Role of Advertising-Based Revenue**

Participants spent a meaningful amount of time debating the inclusion of persistent identifiers in the COPPA Rule's definition of personal information, the scope of the Rule's support for internal operations exception, and the effect these definitions have on advertising-based revenue. Although consumer group representatives suggested the support for internal operations exception was too broad, industry representatives underscored that the exception is what makes the inclusion of persistent identifiers in the definition of personal information beneficial for children and parents. Industry representatives also noted that while the exception permits the use of persistent identifiers for contextual advertising, revenue generated from contextual advertising is not as high as revenue generated from online behavioral advertising ("OBA"). Industry representatives also noted that advertising-based revenue helps ensure broader access to services, which is particularly important for users who otherwise would not be able to pay for a subscription-based services and for smaller operators who otherwise might be driven out of business. Consumer group representatives identified the problem with OBA as permitting the manipulation and influence of children, but industry representatives underscored that COPPA was not designed to be the policy vehicle for regulating advertising to children.

### **How To Strengthen the COPPA Rule.**

Overall, consumer group representatives advocated, unsurprisingly, for the expansion rather than contraction of children's privacy regulation. They noted that the fact that multiple laws are being passed worldwide demonstrates the need for more rather than less privacy protection (notwithstanding the fact that COPPA is the strictest children's privacy law worldwide). While industry representatives did not share this view, there did seem to be consensus among consumer group and industry representatives that greater and faster enforcement of COPPA could be an appropriate way to bolster the COPPA Rule's effectiveness.

If you have any questions concerning the material discussed in this client alert, please contact the following members of our Data Privacy and Cybersecurity practice:

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