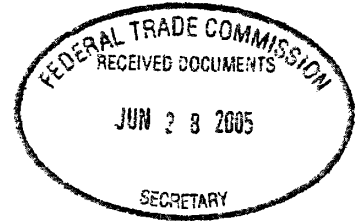


WASHINGTON LEGAL FOUNDATION
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June 27, 2005

Federal Trade Commission,
Office of the Secretary
Room 159-H (Annex C)
600 Pennsylvania Avenue, N.W.
Washington, D.C. 20580



Re: COPPA Rule Review 2005, Project No. P054505; Response to Request for
Comments, 70 Fed. Reg. 21107 (April 22, 2005)

Dear Sir or Madam:

The Washington Legal Foundation (WLF) is pleased to submit these comments on the costs and benefits of the Rule adopted by the Commission to implement the Children's Online Privacy Protection Act (COPPA). In particular, WLF is commenting on a child's ability to access online information of his or her choice and the effectiveness of and need for the "sliding scale" approach to obtain verifiable parental consent. As the sliding scale approach has adequately protected children's interests over the last five years, WLF strongly urges that it be retained.

WLF is a public interest law and policy center with supporters in all 50 states. WLF devotes a substantial portion of its resources to promoting the interests of a free-market economy and opposing excessive government regulation. In particular, WLF has litigated in support of limiting unwarranted government regulation of Internet and World Wide Web services. *See, e.g., Nat'l Cable & Telecommunications Ass'n v. Brand X Internet Services*, ___ U.S. ___ (June 27, 2005). WLF has also petitioned the Federal Trade Commission (Commission) to reject a

proposal by Commercial Alert to “protect” children by regulating product placement in motion pictures. *See* March 26, 2004 letter from WLF to FTC. WLF is concerned that modification of the sliding scale approach would unnecessary interfere with the ability of companies to operate legitimate websites providing any increased protection to children.

I. BACKGROUND

In 1998, as part of the effort to protect children’s online privacy, Congress enacted COPPA to prohibit certain unfair or deceptive acts or practices in connection with the collection, use, or disclosure of personal identifiable information from children on the Internet. 15 U.S.C. § 6501-08. In October 1999, the Commission adopted a final rule (the “Rule”) implementing COPPA. This Rule, which became effective April 21, 2000, provides a sliding scale approach that imposes requirements on operators of websites or online services that request and receive personal information from children less than 13 years of age.

Basically, under the sliding scale approach the level of requirements for parental consent depends on how a website operator uses a child’s personal information. For instance, if the website operator collects personal information for its internal use only, then parental consent can be obtained simply through an e-mail message to the parent, including additional steps which provide a guarantee that a parent is, in fact, the one providing the consent. Alternatively, if the use of personal information involves disclosing this information to third parties or to the public, COPPA requires that website operators use a more reliable method of obtaining verifiable parental consent. These methods include: using a print-and-send form that can be mailed back or

faxed to the website operator; requiring a parent to use a credit card in connection with the transaction; having a parent call a toll-free telephone number staffed by trained personnel; using a digital certificate that uses public key technology; and using e-mail accompanied by a PIN or password.

The above requirements are only a few of the obligations that are imposed on website operators. The operators must post a privacy policy on the homepage of their website, which is clearly labeled and placed in a prominent place and manner on the home page. The website operators must also provide notice about the site's information collection practices to parents and give parents a choice regarding how their child's personal information will be disclosed to third parties. In addition, parents must have access and ability to delete their child's personal information and be able to opt-out of future collection. Finally, the operators must maintain the confidentiality, security, and integrity of personal information collected from these children.

When COPPA was implemented, the Commission set the sliding scale approach to expire on April 21, 2002, as it anticipated that more sophisticated, reliable, and cost-efficient technology for obtaining parental consent would become readily available. When the rule was reviewed in early 2002, the Commission determined that this expected technology was still not available. Therefore, the expiration date was extended to April 21, 2005. When this date approached, the Commission noted again that more reliable electronic methods of obtaining verifiable parental consent were still not available at a reasonable cost. Furthermore, as the record indicated that there was public interest in the effectiveness of and need for the sliding

scale, the Commission extended the sliding scale until a full review of the Rule could be completed.

As the sliding scale has adequately protected children's interest for the last five years and there is not any viable alternative, WLF fully supports the position that the COPPA Rule be permanently retained.

II. CHILDREN'S ABILITY TO ACCESS ONLINE INFORMATION OF THEIR CHOICE

In a day and age where Internet access is readily available, it is difficult for parents to ensure that their children are accessing only age-appropriate information online. Computers with online access can be found almost anywhere – at school, at a friend's house, public libraries, coffee shops, book stores, and even on airplanes. Most schools and public libraries block certain websites or will not allow children below a certain age access to online information without an adult. However, coffee shops, book stores, or other places that provide online access are not as strict. Therefore, the family home computer is the only online access a parent can actually control.

There are numerous Internet providers that empower parents with the ability to monitor their child's Internet activity, block age-inappropriate websites, or block all websites and only provide the child access to websites that are pre-approved by the parent. Most Internet providers allow a single home to have multiple screen names, which allows each person to log-on to the home computer under his or her own screen name by using a password. Therefore, if there are

children in the home in different age groups, the parents can provide each child access to age-appropriate online information.

However, as technology becomes more sophisticated, children become more adept at utilizing this technology; many children are at least as knowledgeable about computer usage as the average adult. Therefore, if a child desires access to online information which is not parent-approved, there are many other access options available. For instance, some parents do not block their children's access to online information, so there would be nothing stopping a child from going over to a friend or relative's house to access any online information desired. Or a child could simply figure out an older sibling's or parent's password and surf at will.

The Commission specifically requested comments on whether website operators are encouraging children to use the "back-button," so they can return to the entry screen in order to change their age to gain access. As stated before, there is no conceivable way, short of locking a child in a closet and not letting him out until adulthood, to absolutely prevent a child from viewing age-inappropriate websites. Therefore, if a child records his age on a website and then is informed that he will not be able to participate or access the website, any child with computer savvy is able to use the back-button to return to the entry screen. WLF is unaware of any evidence that website operators are encouraging such activity; but children are savvy enough to figure out how to use the back-button regardless whether they are encouraged to do so.

Even if website operators block the use of the back button to change information, the child only needs to open a new Internet window to access the information he was just denied. If a new window is opened website operators could not possibly know that the same person (or

child) has just closed out an Internet window and opened a new window in order to enter an older age. To the website operator, it is a new user. Therefore, there is nothing to be gained by amending the Rule by adopting requirements designed to eliminate children's use of the back-button.

III. THE EFFECTIVENESS OF AND NEED FOR THE SLIDING SCALE APPROACH TO OBTAIN VERIFIABLE PARENTAL CONSENT

The sliding scale approach has proven to be an effective means for allowing interactivity at children's websites without unduly burdening them with unnecessary and costly parental consent mechanisms that are unproven and could have the unintended effect of decreasing children's content on the Internet. Basically, the sliding scale approach encourages website operators to be good custodians of children's information by providing them with a low cost method to acquire parental consent if the information is used exclusively for internal use. If the child's personal information would be shared with the public or third parties, the sliding scale approach requires a more rigorous approach to obtaining parental consent.

As stated in the above section, if a child desires to obtain inappropriate online information, making the system more difficult for the parents and the website operators will not ensure that each parental consent the website operator receives is actually from the child's parent. Making the Rule more stringent would put an undue financial burden on businesses, especially small businesses.

There is no valid reason to require websites to change an established system to unproven technology to solve a problem that does not exist. The Commission has acknowledged that there

is a public demand for the current sliding scale to remain unchanged for numerous reasons, chief among them the unavailability of more sophisticated, reliable, and cost-efficient technology for obtaining parental consent. The sliding scale system of verifying parental consent is not only working well, but the only method available. In absence of evidence that a serious problems exists, changes in the Rule are unwarranted.

IV. CONCLUSION

When the cost and benefits of the COPPA Rule are weighed, it is clear that the current system is not only viable, but suitable. Therefore, the Washington Legal Foundation respectfully requests that as the sliding scale has adequately protected children's interest over the last five years, it should be retained.

Respectfully submitted.

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