

June 11, 1999

Mr. Donald S. Clark  
Secretary  
Federal Trade Commission  
Room H-159  
600 Pennsylvania Avenue, N.W.  
Washington, D.C. 20580

**Children's Online Privacy Protection Rule – Comment, P994504**

Dear Mr. Clark:

The Association of National Advertisers (ANA) appreciates the opportunity to submit these comments on the Commission's proposed rulemaking to implement the Children's Online Privacy Protection Act of 1998 (COPPA).

ANA worked closely with the Commission and members of Congress to develop balanced legislation that protects the unique interests of children in the online world. The business community recognizes that the full potential of the Internet will never be reached unless consumers and parents feel secure in this new environment. E-commerce is growing rapidly and children are a major force in this new marketplace. It is critical for the online business community to respect the privacy of our visitors because our customers demand it.

We commend the Commission for the leadership role it has taken on a broad range of electronic commerce issues. ANA generally supports the approach that the Commission has taken in the proposed rule. However, we do have concerns that the proposed rule goes substantially beyond the legislative intent in several areas.

Further, ANA believes it is essential that the Commission provide an opportunity for reply comments, as well as a public workshop, before the rulemaking becomes final. The proposed rule raises a number of complex, technical issues about a fast moving new marketplace. The shared experience of industry and the FTC on the telemarketing sales rule demonstrates the critical value of a careful, deliberate approach. ANA would be very interested in taking part in a public workshop on the proposed rule and would like the opportunity to provide reply comments.

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ANA is the advertising industry's oldest trade association and the only organization exclusively dedicated to serving the interests of companies that advertise regionally and nationally. The Association's membership is a cross-section of American industry, consisting of manufacturers, retailers and service providers. Representing more than 7,500 separate advertising entities, these member companies market a wide array of products and services to consumers and other businesses. Many of our member companies market products and services to children and have websites which are covered by the requirements of COPPA and the Commission's proposed rule.

### **Flexibility on Obtaining Parental Consent**

We commend the Commission for providing flexibility on the mechanisms for obtaining verifiable parental consent. That issue is the heart of the rulemaking. Each of the offline mechanisms identified (postal mail, facsimile, credit card, and toll-free telephone number) have costs and limitations that could diminish the interactive nature of the Internet.

Therefore, we strongly encourage the Commission to remain open to e-mail based mechanisms, such as the use of passwords or "pin" numbers or other information that only a parent is likely to be able to provide. Also, we urge the Commission to permit the use of a separate parent's e-mail address to obtain consent where information collected from a child is not shared with third parties or publicly posted. The risks to a child are minimal in such situations. This approach is consistent with the guidelines of the Children's Advertising Review Unit (CARU), as discussed below.

The development of digital signatures and other programs, such as the World Wide Web Consortium's Platform for Privacy Preferences (P3P), could provide user-friendly, technological solutions to the challenge of obtaining verifiable parental consent.

### **Safe Harbors**

ANA supports the proposed safe harbor rules. No government agency has the resources to effectively police cyberspace without the active support of strong, effective self-regulatory programs. The private sector already has developed several programs to protect children's privacy. The Commission's safe harbor provisions should further encourage the development of these various efforts.

The advertising community has always recognized that children are not miniature adults and deserve protections geared toward their special needs. In 1974, the National Advertising Review Council (NARC) established the Children's Advertising Review Unit (CARU) of the Council of Better Business Bureaus (CBBB) as the industry's self-regulatory body which promotes responsible children's marketing practices.

NARC is a strategic alliance of the advertising industry and the CBBB. Its Board of Directors is led by the Presidents of the CBBB, ANA, the American Association of Advertising Agencies (AAAA) and the American Advertising Federation (AAF). The NARC Board sets policy for CARU's self-regulatory program, which is administered by CBBB and is funded directly by members of the children's advertising industry, including many ANA member companies.

Children's Advertising Guidelines have been in existence since 1972, when they were first published by ANA. The CARU guidelines have been revised several times to meet changes in the marketplace. ANA, many of our member companies and other industry groups worked for over a year to develop new CARU guidelines that specifically address online privacy and information collection practices. Those guidelines were adopted in 1996 and helped serve as a model for COPPA and various self-regulatory initiatives, such as the Online Privacy Alliance (OPA). Those guidelines have had real impact in the marketplace as CARU has worked with many website operators to adopt privacy practices that protect children.

In addition to CARU, a number of other programs, including TrustE and BBBOnline are already providing substantial protection to children in the online environment. Many of our member companies have played a vital role in creating each of these programs. We are confident that CARU or other similar programs would be able to qualify under the safe harbor provisions of the proposed Rule.

Since the electronic marketplace is very dynamic, we urge the Commission to adopt a flexible, expedited approach to allowing revisions and updates to those self-regulatory guidelines that are granted safe harbor status.

### **Retroactive Application of the Rule Is Unfair**

ANA is strongly opposed to any effort to apply the terms of the proposed rule retroactively to information that has already been collected. The Commentary in Section B of the *Federal Register* Notice states that the Rule "protects personal information collected from children prior to the effective date of the final Rule if an operator wishes to use such information in the future. Thus, for example, an operator that maintains a database of children's personal information must provide notice to the parent and obtain parental consent prior to using such information once the Rule is effective."

Such an approach goes far beyond the language of COPPA or any legislative intent and raises serious legal and constitutional issues. In section 1302(8) of COPPA, Congress defined "personal information" as "individually identifiable information about an individual collected online . . ." (Emphasis added.) This would clearly preclude coverage of information that was collected offline.

Retroactive application would impose a tremendous and costly burden on thousands of companies that legally compiled marketing databases over a period of years that include information about children. It would force these companies to choose between destroying the data already collected, through all media forms, or carrying out a costly, complex plan for obtaining parental consent for information collected over a period of years or decades.

Such a retroactive application is the essence of "changing the rules in the middle of the game" and is patently unfair to the business community. We strongly urge the Commission to clarify that the

final Rule applies only to information collected online and used after the effective date of COPPA.

### **The Rule Should Apply Only to Information Collected Online**

ANA strongly opposes the expanded definition of "collects or collection" in proposed section 312.2 to cover information that is provided to an operator offline.

The Commentary in Section B of the *Federal Register* notice states: "This term includes all requests for personal information regardless whether the personal information is ultimately transmitted online or offline. Thus, it would include a situation where the website or online service directs the child to print out a form, respond in writing to the questions, and mail the form back to the website or online service."

Such an expanded definition is clearly beyond Congressional intent. As noted above, in section 1302(8) of COPPA, Congress defined "personal information" as "individually identifiable information about an individual collected online . . ." (Emphasis added). In a floor statement when the Senate passed the bill, Senator Richard Bryan (D-NV), the chief sponsor of COPPA, stated: "This is an online children's privacy bill, and its reach is limited to information collected online from a child." (Emphasis added). 144 Cong. Rec. S. 11657 (October 7, 1998).

In the offline world, marketers have never been required to obtain parental consent before collecting information from children through cereal box tops or surveys, which are mailed to the marketer. This long-standing practice is based on the reasonable assumption that parents will have sufficient opportunity to exercise choice and control over the information that a child sends to a marketer in this manner.

Congress was very aware of the distinction between "online information" and "offline information." COPPA was clearly intended to cover only information collected online. The expanded definition is an inappropriate attempt to establish new rules for the offline world, which was not the intent of Congress.

Such an approach could also result in inconsistent treatment of information and confusion for both marketers and consumers. Under the proposed rule, information that a website operator receives in the mail from a child using a downloaded entry form would be covered under COPPA. However, if the same child provided the same information to the online marketer using an entry form from a magazine or store takeaway, that information would not be covered under COPPA. Such distinctions make no sense and are unnecessary.

We urge the Commission to clarify that the rule applies only to information collected online.

## **A Mandated Location for Privacy Links is Unworkable**

Proposed section 312.4 would require that both the home page and each page where information is requested display a link to the operator's privacy policy "without having to scroll down." Such a mandate is unwise and unworkable.

At the Commission's public workshop on May 14<sup>th</sup>, ANA and many other industry groups argued that the FTC should provide marketers with flexibility in making required disclosures in the online environment. Marketers and their website operators have no control over how their webpages will appear on the computer screens of consumers. The link to the privacy policy should be "clearly and conspicuously" placed on the home page and each page where information is requested, but a mandate that the link be visible "without having to scroll down" is unworkable.

Such a mandate is contrary to the developed practice of many in the online industry, where important links are placed at the bottom of a page. Indeed, some operators place important links at various places throughout a screen, including separate frames. Rather than mandating any specific location, the Commission should simply require that the privacy link be "clearly and conspicuously" placed on the home page and any other page where information is requested.

All of the information contained in the link will subsequently be provided directly to the parent, who must provide verifiable consent before any information is collected. Thus, it would be regulatory overkill to mandate that the privacy link appear only at a specific location on the home page.

The final Rule should also clarify the situation where only a small portion of a large, general interest website is directed to children under age 13. In that case, the operator should not be required to place the children's privacy link on the home page for the larger site. Real estate on a home page is finite and the site should already have a general privacy policy link addressed to adults. The government should not impose an additional requirement for placing a children's privacy hyperlink on the home page for the larger site. Rather, the children's privacy link should appear in a clear and conspicuous location on the home page for the children's portion of the website, as well as any page where information is requested from a child.

## **The Proposal Expands Parents' Rights Beyond the Mandates of the Statute**

ANA is concerned that in two important areas, the proposed rule expands the rights of parents beyond the specific language of COPPA.

Proposed section 312.5(a)(2) provides: "An operator must give the parent the option to consent to the collection and use of the child's personal information without consenting to the disclosure of his or her personal information to third parties." (Emphasis added). No such requirement is included in the text of COPPA.

Proposed section 312.6(a)(3) states that an operator must provide parents with: "a means of reviewing and making changes to any personal information collected from the child." (Emphasis added.) Section 1303 of COPPA provides parents with the right "to obtain" any personal information collected from their child and the right to refuse any further use of that information.

There is no language in COPPA that gives parents the right to make changes in the information that has been collected.

We are concerned that both provisions go far beyond the specific language of COPPA and could impose additional burdens on marketers that were not anticipated by Congress. As a matter of business practice, some website operators may allow parents to pick and choose between the company's information practices, or allow parents to make corrections or additions to information that has already been collected about their children. However, the specific language of COPPA does not mandate either requirement. We urge the Commission not to expand the rules beyond the clear language of the legislation.

### **Treatment of Mergers and Corporate Affiliates**

Section 312.5 of the proposed rule requires operators to obtain an updated parental consent for any collection, use or disclosure of information about a child that was not covered by a previous consent. While we support the general concept, we are concerned about the suggestion in the Commentary and Question 11 from the *Federal Register* notice that this would necessarily require re-notification of all parents following a corporate merger. Such a requirement could be very expensive and complicated. If the information practices of the successor company are not materially different from those in place when the original parental consent was obtained, we believe there should be no requirement of parental re-notification.

We also urge the Commission to clarify its treatment of corporate affiliates for purposes of defining whether an entity is an "operator" or a "third party" under the proposed rule. Many of our member companies have numerous affiliates or subsidiaries under a corporate parent. So long as the various affiliates and the parent have the same information collection policies, the sharing of information by an operator with affiliates under control of the same corporate parent should not be deemed a third party use.

### **Conclusion**

While we have serious concerns about the specific provisions discussed above, ANA commends the Commission for the general approach of the proposed Rule. The FTC has done valuable and constructive work in drafting this proposal. To ensure that the rulemaking gets the thorough consideration it deserves, we believe it is critical that the Commission allow the opportunity for reply comments and a public workshop. We look forward to continuing to work with the Commission to develop a final rule that protects the privacy interests of children while preserving the interactive nature of cyberspace.

Thank you for your consideration of our views.

Sincerely,

Daniel L. Jaffe  
Executive Vice President