June 16, 1999

Comments to the Secretary
Federal Trade Commission
Room H-159
600 Pennsylvania Avenue, N.W.
Washington, D.C. 20580

Re: Children's Online Privacy Protection Rules/Comment, P994504

To the Secretary:

We are pleased to submit the original and five copies of these comments, along with a 3 ½ inch diskette in Corel WordPerfect 7, on behalf of Mars Incorporated in response to the Federal Trade Commission's (FTC) Notice of Proposed Rulemaking to implement the Children's Online Privacy Protection Act of 1998 (COPPA). We are pleased that both COPPA and the proposed rule support and reflect principles developed by the Children's Advertising Review Unit (CARU), the leading organization offering self-regulatory guidelines and compliance programs for advertising and marketing to children. CARU Guidelines cover advertising to children in all media. As strong supporters of CARU, we ask that the FTC recognize the CARU Guidelines as a "safe harbor" for purposes of the proposed Rule. We write further to request some technical clarifications and modifications to the proposal to maximize flexibility while fully meeting the intent of COPPA, in response to the Notice. We stress that we fully support the objectives of COPPA, namely, ensuring that websites (or portions of websites) directed to children obtain consent from parents for the collection, use and/or disclosure of personal information from children, subject to reasonable exceptions.

I. Request for Safe Harbor Status for the CARU Guidelines

A. CARU Is the Leading Self-Regulatory Body for Children's Advertising and Marketing Practices and Its Guidelines on Interactive Electronic Media Should Be Recognized as a Safe Harbor by the FTC

CARU was established 25 years ago by the National Advertising Review Council (NARC) to promote responsible children's advertising. It is a program of the Council of Better Business Bureaus (CBBB) and follows procedures similar to those of the National Advertising Division (NAD) in addressing and resolving complaints about advertising. Funded by members of the children's advertising industry, CARU's Advisory Council includes leading experts in education, communications and child development, as well as representatives of national advertisers and advertising agencies interested in children's advertising. CARU's objectives are to help advertisers deal sensitively with the child audience in a responsible fashion, offering both general advisory services for advertisers and ad agencies and informational materials for parents, educators, and children. Company members of the CARU Advisory Council provide funding and support for CARU activities. As a testament to CARU's widespread acceptance, major national children's advertisers and advertising agencies generally support and adhere to the Guidelines in their advertising to children.

The CARU self-regulatory process was established well before new technologies such as interactive electronic media were even deemed possible. Indeed, CARU has a history of effectively responding to challenges posed by new technologies. For example, as 900/976 teleprograms came into vogue, CARU promptly acted to expand its self-regulatory guidelines to address such programs. Similarly, in response to the growth of the Internet, CARU adopted guidelines for interactive electronic media in 1996, making further revisions to the Guidelines in 1997 and again earlier this year. The CARU Guidelines on interactive electronic media have provided the philosophical underpinnings for COPPA.

B. The CARU Guidelines Meet the Intent of COPPA and the Requirements of the Rule

CARU Guidelines are in accord with the key principles of COPPA and the proposed Rule, and meet the necessary minimum protections for privacy safe harbors enunciated by the Department of Commerce (DOC). We understand that safe harbor status does not require that industry guidelines reflect every detail of the Rule. Rather, to be recognized, such guidelines must reflect the essential elements of the Act and the proposed Rule.

Importantly, the Guidelines also "are to be read within the broader context of the overall Guidelines, which apply to advertising in all media." The CARU Guidelines have been informed by FTC thinking on what constitutes false, deceptive and unfair advertising over the years. FTC

recognition under the safe harbor principles of the privacy portion of the CARU Guidelines will have the very important added benefit of making the CARU Guidelines in their entirety more visible and better known, encouraging broader adherence to all aspects of the Guidelines in advertising to children beyond the national advertising community which already follows these Guidelines.

We provide below, as requested by the FTC, a comparison of sections 312.3 through 312.9 of the proposed Rule with the CARU Guidelines, along with an explanation of how the Guidelines, assessment mechanism and enforcement procedures satisfy the requirements of COPPA. A copy of the full text is enclosed.

Section 312.3. Regulation of unfair and deceptive acts and practices in connection with the collection, use and/or disclosure of personal information from and about children on the Internet.

The CARU Guidelines are entirely consistent with Section 312.3. The Guidelines state:

> CARU's aim is that the Guidelines will always support "notice," "choice" and "consent" as defined by the Federal Trade Commission, and reflect the latest developments in technology and its application to children's advertising.

The CARU Guidelines are entirely premised on the notion that parents should be given a reasonable means to review personal information collected from a child and to refuse to permit further use or maintenance. Advertisers must disclose, in language easily understood by a child, why information is requested, and whether it is intended to be shared, sold or distributed outside the collecting company. To comport with these obligations, advertisers must institute procedures to safeguard personal information.

Section 312.4. Notice

Proposed Section 312.4 establishes the notice requirements under COPPA. The CARU Guidelines are entirely consistent with the spirit of the proposed Rule. Any differences in detail are not material. (Indeed, in some instances, the proposed Rule could be construed to impose requirements which are impractical, and are not suited to the Internet medium, as we discuss later.) Operative sections of the CARU Guidelines which comport with this provision are as follows:

> In all cases, the information collection or tracking practices and information uses must be clearly disclosed, along with the means of correcting or removing the information. The disclosure notice should be prominent and readily accessible before any information is collected.

> The advertiser should disclose, in language easily understood by a child, why the information is being requested (e.g., "We'll use your name and e-mail to enter you in this contest and also add it to our mailing list.") and whether the information is intended to be shared, sold or distributed outside of the collecting advertiser company.
>
> All information that requires disclosure for legal or other reasons should be in language understandable by the child audience. Disclaimers and disclosures should be clearly worded, legible and prominent.
>
> If the information is optional, and not required to engage in an activity, that fact should be clearly disclosed in language easily understood by a child (e.g., "You don't have to answer to play the game"). The advertiser should clearly disclose what use it will make of this information, if provided, as in #2 above, and should not ask a child to disclose more personal information than is reasonably necessary to participate in the online activity (e.g., play a game, enter a contest, etc.).
>
> For online contact information collected to respond directly to a child's specific request, the company must directly notify the parent of the nature and intended uses and permit access to the information sufficient to permit a parent to remove or correct the information.
>
> If an advertiser communicates with a child by e-mail, there should be an opportunity with each mailing for the child or parent to choose by return e-mail to discontinue receiving mailings.

Section 312.5. Parental consent

Section 312.5 deals with parental consent. The CARU Guidelines require website operators to obtain verifiable parental consent any time a website operator collects real world, personally identifiable information which would enable the recipient to directly contact the child off-line through its on-line activities. The CARU Guidelines also require prior verifiable parental consent when personally identifiable information would be shared or distributed to third parties, except for parties that are agents or affiliates of the company or provide support for the internal operation of the website and that agree not to disclose or use the information for any other purpose. Relevant sections of the CARU Guidelines are as follows:

> Thus, in the case of Websites directed to children that collect personal information from children, reasonable efforts, taking into consideration available technology, should be made to establish that notice is offered to, and choice exercised by a parent or guardian.

- For real world, personally identifiable information, which would enable the recipient to directly contact the child offline, the company must obtain prior verifiable parental consent, regardless of the intended use.

- When personally identifiable information (such as email addresses, screen names) will be publicly posted which will enable others to communicate directly with the child online, or when the child will be able otherwise to communicate directly with others, the company must obtain prior verifiable parental consent.

- When personally identifiable information will be shared or distributed to third parties, except for parties that are agents or affiliates of the company or provide support for the internal operation of the Website and that agree not to disclose or use the information for any other purpose, the company must obtain prior verifiable parental consent.

- For online contact information collected to respond directly to a child's specific request, the company must directly notify the parent of the nature and intended uses and permit access to the information sufficient to permit a parent to remove or correct the information.

Section 312.6. Right of parent to review personal information provided by child.

Section 312.6 governs the right of the parent to review personal information provided by a child. In keeping with CARU's principles of respecting and fostering the parent's role in providing guidance for their children, the Guidelines specify that advertisers who communicate with children through e-mail should encourage parents to check and monitor their children's use of e-mail and other on-line activities regularly. The CARU Guidelines contemplate parental choice, including the choice to discontinue receiving e-mail information or to delete information obtained about a child. For example, the Guidelines state:

> Further, these children's Guidelines must be overlaid on the broader, and still developing industry standards for protecting and respecting privacy preferences. These industry standards include disclosure of what information is being collected and its intended uses, and the opportunity for the consumer to withhold consent for its collection for marketing purposes.
>
> In all cases, the information collection or tracking practices and information must be clearly disclosed, along with the means of correcting or removing the information.

> For online contact information collected to respond directly to a child's specific request, the company must directly notify the parent of the nature and intended uses and permit access to the information sufficient to permit a parent to remove or correct the information.

Section 312.7. Prohibition against conditioning a child's participation on collection of personal information.

The CARU Guidelines, like Section 312.7, establish that operators of websites should not ask a child to disclose more personal information and is reasonably necessary to participate in the on-line activity. They state:

> If the information is optional, and not required to engage in an activity, that fact should be clearly disclosed in language easily understood by a child (e.g., "You don't have to answer to play the game"). The advertiser should clearly disclose what use it will make of this information, if provided, as in #2 above, and should not require a child to disclose more personal information than is reasonably necessary to participate in the online activity (e.g., play a game, enter a contest, etc.).

Section 312.8. Confidentiality, security, and integrity of personal information collected from children.

Operators, to adhere to the requirements of the CARU Guidelines, must have security procedures in place. The relevant provision in this regard states that:

> . . .these children's Guidelines must be overlaid on the broader, and still developing industry standards for protecting and respecting privacy preferences.

Companies cannot adhere to the Guidelines absent internal security mechanisms that protect children's personal information from loss, misuse, unauthorized access, or improper disclosure without consent. The CARU Guidelines recognize that security techniques are constantly evolving and changing, in part as a result of the ingenuity of hackers. Typical procedures that might be adopted include those outlined by the FTC, and the CARU staff inquires about the specific procedures used by a website in their checks of websites.

Section 312.9. Enforcement

Section 312.9 governs enforcement. No self-regulatory program itself has the authority of the FTC, but if the CARU staff is unable to reach a voluntary resolution regarding an alleged

violation of its guidelines with a company, the matter is referred to the FTC. Such instances are exceedingly rare, which emphasizes the effectiveness of the current CARU enforcement process for advertising issues. The procedure used by CARU of publishing reports of its determinations is very effective in providing powerful incentives for companies to comply with recommendations made by the CARU staff.

C. The CARU Guidelines Meet the Criteria for Approval of Self-regulatory Guidelines

As demonstrated above, the CARU Guidelines indeed reflect the essence of the principles of COPPA. This is certainly not surprising, as COPPA closely tracks the CARU Guidelines. The Guidelines also meet the key criteria outlined by the FTC for approval as a safe harbor.

The CARU Guidelines offer effective, mandatory mechanisms for the independent assessment of an operators' compliance, using both random periodic reviews of web sites by the CARU staff and seeding of web sites. CARU, like NAD, publicly reports on disciplinary action against subject advertisers, issuing press reports on the resolution of cases, as well as periodic summaries of its activities, including cases. The resultant public and peer pressure from these public reports serves two purposes. It offers companies an incentive to voluntarily take corrective action in response to an inquiry, and maintains the dynamic nature of the Guidelines, allowing the staff and the Advisory Council to respond to new issues and the challenges of new technologies. In the rare instances where voluntary compliance efforts fail, the matter is referred to the FTC.

The FTC has also indicated that to be approved, a safe harbor must include a "requirement" that operators subject to the guidelines implement the protections afforded children under this Rule. The CARU Guidelines do not "require" compliance; rather, CARU relies on peer pressure to achieve adherence to the Guidelines. Evidence of years of successful self-regulation of advertising by CARU demonstrate that "requiring" compliance is not a central element of this successful self-regulatory system. As a true self-regulatory system, the CARU and NAD procedures for self-regulation do not rely on mandates, but instead on the desire of business (including advertisers, advertising agencies and the media) to comply with legal requirements and consumer expectations by policing itself. (In this regard, it is worth noting that the Department of Commerce's own draft privacy "safe harbor" principles permit "self-certification," suggesting an Administration policy of allowing for maximum flexibility to achieve the desired result of appropriate privacy protection.) This aspect of the FTC's proposed rule should be eliminated as it is at odds with current policy and contrary to successful experience with industry self-regulation.

II. Specific Comments on Aspects of the Rule

The FTC staff has done a commendable job in developing proposed rules implementing COPPA. In such a dynamic area, however, certain phrasing and details of some provisions of the proposed Rule will result in an impractical and inflexible approach that will not serve the best interests of consumers and businesses. We therefore provide below specific comments on key questions on the proposed Rule. For convenience, we address them in the order presented in the Notice.

Definitions

"Collects or collection." The FTC did not pose a specific question on this definition, but clarification is needed.

The FTC defines "collect or collection" to include "any online request for personal information by the operator regardless of how that personal information is transmitted to the operator." This potentially confuses online and offline information collection practices when the off-line information being collected will not result in the disclosure of personally identifiable information online. The FTC must clarify this point. COPPA provides that "personal information" includes "individually identifiable information about an individual collected online..." (emphasis added). The legislative history also indicates that COPPA was intended to apply only to online information collection, not to traditional collection of information in response to contests, sweepstakes, and the like. For example, if a contest is advertised on a website, on product packages, on television, and in newspapers, but the only way to enter is to mail in some proof of purchase with pertinent personal information using a pre-printed form (including a form that could be downloaded from a website), this traditional type of information-gathering should not be subject to the Act or the Rule. The CARU Guidelines do not require parental consent for offline information collection. To avoid confusion and to assure consistency with the statute, this proposed definition must be modified to clarify that it does not apply to any activities except those that will result in the collection of information online or in the public posting online of information collected from a child.

Question 3. Section 312.2 defines "operator."
(a) Is this definition sufficiently clear to provide notice as to who is covered by the Rule?
(b) What is the impact of defining the term in this way?

The proposed definition of a website operator includes the person who operates the website and who collects or maintains personal information from or about the users or visitors to the website or on whose behalf such information is collected or maintained. This definition must be read in conjunction with the proposed definition of a "third party." As proposed, a "third party" means

> . . .any person who is neither an operator with respect to the collection of personal information on the website or online service, nor a person who provides support for the internal operations of the website or online service.

Logically, the objective of the proposed rule is to assure that some responsible entity or entities are identified for purposes of compliance with COPPA. A better approach would be to specify that the "operator" is the entity responsible for the website and for the privacy policies of the website. Where the site operates under a recognized brand name, the legal name of the company or business unit might not even appear in the privacy notice, but consumers can readily identify either the parent company or the subsidiary. Brand names are names that consumers trust. Companies are not going to be willing to abrogate that consumer trust by not standing behind the product and product image. Listing names of multiple "operators" could prove confusing to consumers, particularly where the domain name is a brand name, making it more difficult to determine who has ultimate authority to respond to questions about privacy policies of the site.

Parent and affiliated companies should not be considered to be "third parties" for purposes of this rule. The approach of the CARU Guidelines is reasonable and sound. It defines third parties to exclude parties that are agents or affiliates of the company or provide support for the internal operation of the website <u>and</u> that agree not to disclose or use the information for any other purpose. We urge the FTC to adopt similar language. Logically, as long as these related entities operate under a common control and adhere to a common privacy policy, they should not be deemed to be "third parties."

The FTC did not pose a specific question regarding the definition of "personal information," but subpart (f), which addresses "a combination of a last name with other information such that the combination permits physical or online contacting," and subpart (g), which establishes that personal information includes "information concerning the child or the parents of that child that the operator collects online from the child and combines with an identifier described in this paragraph," must be clarified.

COPPA only governs information collected online. Subpart (f) should therefore be amended to read: ". . .with other information <u>collected online</u> such that. . ." Subpart (g) should be modified to state ". . .with an identifier <u>collected online</u> described. . ."

Notice

Question 5. Section 312.4(b) lists an operator's obligations with respect to the online placement of the notice of its information practices.

(a) Are there other effective ways of placing notices that should be included in the proposed rule?
(b) How can operators make their links to privacy policies informative for parents and children?

Proposed Section 312.4 requires that notices be placed such that a typical visitor to the home page can see the link "without having to scroll down." Virtually all web site operators place the link to a privacy notice at the bottom of the home page. Website visitors are accustomed to scrolling down. There is no objective evidence suggesting that parents are missing privacy notices because the link appears at the bottom of the page, and it is contrary to current practice. The requirement of the Rule is a technical one and should be discarded.

With respect to the Notice at areas where children directly provide or are asked to provide personal information, the important thing is that the link to the notice appear in close proximity to the request for information. The link could appear just above or just below information as requested. Again, there is no objective data suggesting that the placement of the link is central or that adults looking for privacy notices are being actively mislead even if some scrolling is necessary; we suggest revising this to say that the link must be in close proximity to the request.

The CARU Guidelines take a simple approach the question of how to make notices and links to notices informative. Notices must be clear and easy to understand. The Guidelines provide examples of wording to use in links, like "Privacy," "Our Privacy Policy," "Note to Parents," or some similar designation.

Question 6. Section 312.4(b)(2)(i) requires the notice on the website or online service to state the name, address, phone number, and e-mail address of all operators collecting personal information through the website. Where there are multiple operators collecting personal information through the website are there other efficient means of providing information about the operators that the Commission should consider?

We concur that to be complete, website notices must provide information on the types of personal information collected, whether it is collected directly or passively, how it may be used, whether it is disclosed to third parties, and the like. The CARU Guidelines do not require, and we do not believe the Rule should require, that the name, address, phone number and e-mail address of "all operators collecting personal information from children through the website or online service "should be a required element of the Notice" where it is easy for the consumer to establish the physical location of the website operator. We appreciate the desire for the FTC to provide some assurances to consumers that the website operator has a physical presence somewhere so that complaints or issues about the site's privacy policy can be resolved by legal authorities, if necessary. A logical difference exists, however, between major internationally known companies who offer well recognized and well-loved brands, whose products can be found readily, and

whose identity is known, versus new companies, cybercompanies which may be located offshore, or companies who do not have a track record of responsible business dealings. We suggest that the Rule be modified to provide as follows:

> Where the physical location or identity of the website or online service could not be readily obtained by a consumer, or by a body implementing a recognized safe harbor program, the Notice must include the name, address, phone number and e-mail address of all operators collecting personal information from children through the website or on-line service.

Question 7. Section 312.4(b)(2)(iv) requires an operator to state whether the third parties to whom it discloses personal information have agreed to maintain the confidentiality, security, and integrity of that information. How much detail should an operator be required to disclose about third parties' information practices?

The CARU Guidelines specifically state that website operators should not knowingly link their sites with sites which do not comply with the Guidelines. Although the Company does not sell or share children's data to "third parties" as defined in the CARU Guidelines, if it did, they would require assurances of adherence to the CARU Guidelines, just as it would with linked sites. From a policy standpoint, however, there is no reason to burden a website operator with having to provide specific details of a third party's information practices. It should be adequate to inform the consumer that the third parties have agreed to adhere to an accepted "safe harbor," or to provide information to allow the parent to evaluate the third parties' individual privacy policies.

Question 8. Section 312.4(b)(2)(vi) requires an operator's notice to state that the parent has a right to review personal information provided by his or her child and to make changes to and/or have that information deleted, and to describe how the parent can do so. Is this information needed in the notice on the website or online service, or should it be included only in the notice provided directly to the parent under Section 312.4(c)?

By providing that notices "must state" certain information, the FTC's proposed rule will likely be construed as requiring close paraphrasing of the specific language used. This will result in stiff and less informative notices. Generally, notices should "communicate" pertinent information. Most websites use language that informs the parent how to delete the child's information from the website or find out more about it, but do not include a stiff "Miranda"-type warning. A notice which informs parents about the site's privacy policies and procedures, how personal information is or may be used (including whether or not it will be posted publicly in a chat room or bulletin board), the general types of entities or businesses to whom data might be disclosed and under what circumstances, and procedures to correct or update a child's information or to establish privacy preferences for the child, is wholly adequate.

Question 10. Section 312.4(c) details the information that must be included in the notice to the parent.

(a) What, if any, of this information is unnecessary?

(b) What, if any, other information should be included in the notice to the parent?

The proposed Rule suggests that the e-mail notices to parents must repeat information in the website notice. Internet users are accustomed to hyperlinks. It is duplicative to require the notice to parents to restate information found at the website notice. Indeed, the point of notifying parents is to provide them with an incentive to actually visit the website and see for themselves if it is one that they are comfortable with their children visiting. Consequently, we suggest that the Rule establish that a notice to parents which includes a link to the site's privacy policy is acceptable. Hyperlinks are indeed acceptable under the CARU Guidelines and this approach will better effectuate the purpose of the Act by giving parents an easy way to simply click on the link, review the privacy notice at the site, and visit the site directly, alone or with a child.

Again, using the phrase "notices must state the following," will likely result in an interpretation that close paraphrasing of the specific language appearing in the proposed Rule must be used. As noted above, we recommend that the proposed Rule substitute the word "communicate" for the word "state." This change is in keeping with the FTC's desire for notices to use easy to understand language, and to avoid technical legal statements that might make notices lengthier and thus less likely to be read.

We disagree that either the website notice or the notice to parents must state that the operator "may not condition the child's participation on the child disclosing more personal information than is reasonably necessary to participate in the activity." It is enough that the Act and the Rule establish this principle. Many sites offer children the opportunity to participate in fun activities at the site without providing any personal data. It is not common for any website notices to include specific language noting that they are prohibited from asking a child to provide more information than necessary; they simply avoid asking for such information. Likewise, rather than a specific statement that a parent can review, change or delete the child's information and how to do so, most companies use a statement like: "contact us at [email address] to correct, update or remove your child's name from our list." This statement is readily understood and is commonly part of a notice to parents which includes a hyperlink to the website notice.

Consent

Question 12. Section 312.5 requires operators to give the parent the opportunity to consent to the collection and use of the children's personal information without consenting to the disclosure of that information to third parties. Should the rule also require that the parent be given the option to refuse to consent to different internal uses of the child's personal information by the operator?

The essence of a sound privacy program is to provide notice, choice and consent. We endorse fully the right of a parent to withhold consent to any data sharing with third parties (as defined by the CARU Guidelines) and to inquire into the identity of related companies and to withhold consent entirely if there are objections to how data will be used. We also support mechanisms under which website operators offer choices to users about receiving information (like "click here to sign up for our e-mail newsletter"). And, with each issue of an e-mail newsletter, companies typically include information on how to unsubscribe.

Question 13. The commentary on Section 312.5(b) identifies a number of methods an operator might use to obtain verifiable parental consent.

(a) Are the methods listed in the commentary easy to implement?

(b) What are the costs and benefits of using the methods listed?

(c) Are there studies or other sources of data showing the feasibility, costs and/or benefits of the methods listed?

(d) Are there existing methods, or methods in development, to adequately verify consent using an e-mail-based mechanism?

(e) What are the costs and benefits of obtaining consent using an e-mail based mechanism?

(f) To what extent is digital signature technology in use now? Are there obstacles to the general commercial availability or use of digital signature technology?

(g) What, if any, other methods of obtaining consent should the Commission consider? Please describe how those methods work, their effectiveness, feasibility, costs and/or benefits, and, if still in development, when they will be available?

We agree that the FTC should not mandate the adoption of any one technology for the purpose of obtaining parental consent. Costs and feasibility of any given technique may differ from site to site, and some techniques may prove more effective for certain activities than other. Aside from the techniques outlined in the proposal, technological developments may well provide other mechanisms to obtain consent at reduced costs. Some techniques should presume the involvement of an adult. Use of a credit card to order merchandise should result in a presumption that the individual placing the order is an adult, for example. We also agree that where data will not be shared with third parties (as defined by the CARU Guidelines) or posted online, even more flexibility is merited on the issue of consent.

Question 14. With respect to methods of obtaining verifiable parental consent, should the Commission allow greater flexibility in mechanisms used to obtain verifiable parental consent in cases where the operator does not disclose children's personal information to third parties or enables a child to make such information publicly available through, for example, a chat room or bulletin board?

As noted above, much greater flexibility should be allowed where information collected from a child is not shared with third parties or publicly posted in chat rooms or bulletin boards. Additional personnel may well be needed to handle hard copy consent forms or to otherwise verify through some extrinsic data, like a drivers' license, that the individual giving consent is an adult. This type of information requires filing, and a mechanism to cross-reference consent forms with information on a child. The risks to the child are minimal where third parties are not given access to data or where personal information is not publicly posted. In those instances, we recommend adoption of the technique, which is consistent with the CARU Guidelines, of using a separate parent's e-mail address to obtain consent. This sort of approach might involve a child signing up for a contest or game. The site could include the standard notice reminding the child to request permission from a parent before signing up and to provide a separate parents' e-mail address. If no separate e-mail address is provided, the child is advised that he or she cannot enter the contest or game. If a separate e-mail address is provided, notice is sent to the parent who can "opt out" for the child. This is reasonable and a very common practice which meets the intent of the Act, while offering an opportunity for parental oversight and reasonable flexibility for the operator.

Question 17. Section 312.5(c)(1) allows an exception to prior parental consent where an operator collects the name or online contact information of a parent or child to be used for the sole purpose of obtaining parental consent or providing notice under this rule. Under this exception, if an operator has not obtained parental consent after a "reasonable time" from the date of the information collection, the operator must delete the information from its records.

(a) What is a "reasonable time" for purposes of this requirement? On what is this estimate of a "reasonable time" based?

(b) Alternatively, should an operator be required to maintain a "do-not-contact" list so as to avoid sending multiple requests for consent to a parent who has previously refused to consent? What are the costs and benefits of such a "do-not-contact" list?

The notion of what constitutes a "reasonable time" to obtain parental contact information - or to retain parental consents - may well vary depending on the activity. Flexibility is key. Factors to consider include the duration of the activity, the type of activity, and whether it is ongoing or intermittent. For example, if a child signs up to receive an e-mail newsletter which is sent out quarterly, a three month period might be reasonable. For a contest that lasts nine months, the contest duration period may be reasonable. Good faith and good judgment should prevail.

We oppose requiring website operators to maintain "do not contact" lists. The purpose of the parental notice and consent process under COPPA and CARU is to empower the parent to exert oversight and control over the child's Internet experience. The value of the Internet is that activities can change quickly, just as the emotional maturity and understanding of a child can change quickly. A parent who believes a child is not ready for a particular Internet experience

may determine that the child's maturity has advanced within a short period of time and not object. Or, the content may have changed. Further, retaining such information actually requires the website operator to collect and keep personal information about both the parent and the child for a period that might involve years. Such a requirement is completely contrary to the purpose and intent of COPPA. The burden of maintaining a "do not contact" list is therefore not warranted.

Prohibition against conditioning a child's participation on collection of personal information

Question 23. Section 312.7 prohibits operators from conditioning a child's participation in a game, the offering of a prize, or another activity on the child's disclosing more personal information than is reasonably necessary to participate in such activity. What kinds of information do sites collect as a condition of allowing a child to participate in a game, contest, chat room, or other online activity?

As noted above, many sites offer many opportunities for children to participate in site activities without providing any personal data. For other activities, like entering a contest, it makes sense that the child has to provide some personal data to enter, like name, address, e-mail address, etc. For some sites, winner notifications are sent only to parents, using the technique of a separate parents' e-mail address noted above. There may be many reasons why a website operator might require the provision of certain types of personal information when a child is registering for the site. Some websites, for example, seek information on birth dates when a child registers. Such information might be used as an additional double-check to determine if an individual requesting information about a child indeed is a parent or guardian, for example, or as a way of verifying the age of the child to assist in making the online experience age-appropriate. So long as the website operator has a reasonable basis for requesting the information, and the purpose for the data collection is disclosed, the request should be viewed as consistent with this provision.

Safe Harbor

Question 25. Section 312.10(b)(2) requires that, in order to be approved by the Commission, self-regulatory guidelines include an effective, mandatory mechanism for the independent assessment of subject operators' compliance with the guidelines. Section 312.10(b)(2) lists several examples of such mechanisms. What other mechanisms exist that would provide similarly effective and independent compliance assessment?

Although the CARU Guidelines incorporate an independent assessment mechanisms in keeping with the provisions of the proposed rule, we note that there are many different examples of successful industry self-regulatory programs. Some may use logos or seals. Some rely entirely on self-certification. (We understand in this regard that the U.S. Department of

Commerce is prepared to recognize self-certification initiatives in the privacy context. We therefore question whether an "independent" compliance assessment is universally necessary to implement an industry safe harbor concept.) We urge the FTC to adopt flexible mechanisms to encourage a broad range of industry self-regulation. The marketplace will help to determine which approaches are most valued by the consumer, and doing so will encourage competition and continuous improvements in self-regulation while implementing the provisions of COPPA in a cost-effective fashion.

In the past, the CARU process has not required any sort of self-declaration of compliance. To be able to claim safe harbor status under COPPA, however, it might be appropriate to establish that a website intending to use its best efforts to adhere to the safe harbor provisions of the CARU Guidelines so indicate on its site.
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Question 26. Section 312.10(b)(3) requires that, in order to be approved by the Commission, self-regulatory guidelines include effective incentives for compliance with the guidelines. Section 312.10(b)(3) lists several examples of such incentives. What other incentives exist that would be similarly effective?

As a practical matter, consumer expectations are the most effective incentive for compliance. Companies with well-known brands have been leaders in fostering self-regulatory guidelines and programs designed to increase consumer confidence in the marketplace. These same companies are therefore not going to knowingly violate consumer trust by failing to adhere to their commitments about respecting the privacy of any of their customers, including children. The CARU process, which involves public postings of its determinations, thus provide a very effective incentive for compliance.

Nevertheless, the CARU Guidelines include the added incentive of referrals to the FTC of cases where voluntary resolution of issues is not achieved. In addition, the Geocities decision establishes that the FTC has an independent action against companies who indicate they are complying with third party guidelines but who fail to do so under its existing Section 5 authority.

Question 27. Section 1304(b)(1) of the Children's Online Privacy Protection Act requires the Commission to provide incentives for self-regulation by operators to implement the protections afforded children under the Act. The safe harbor provisions of Section 312.10 of the proposed rule are one such incentive. What other incentives should the Commission consider?

Recognizing multiple industry programs under the safe harbor provisions will advance the purposes of the Act. We understand that it is the Commission's intent that various types of self-regulatory programs might be recognized, offering both consumers and businesses a choice of programs and allowing market forces to determine their success. The availability of multiple

types of safe harbor programs should limit the potential that a single program becomes essentially a requirement of doing business.

Making sure that safe harbor requests are acted on expeditiously will provide an additional incentive. While we appreciate the Commission's desire to be sure that it has all relevant information to act on a safe harbor request, it would be helpful to establish that the review "clock" tolls, but does not restart, should the Commission have to seek additional information.

Another incentive the Commission might consider to promote self-regulation would be to establish that safe harbor guidelines can be revised and updated to reflect new thinking on privacy, or technological advancements, without the need for a full review by the FTC under the safe harbor provisions. We suggest that the FTC adopt specific regulatory language establishing that sponsoring organizations who provide privacy self-regulatory programs recognized under the safe harbor principles must notify the FTC of revisions. Absent some objection by the FTC within a specific period of time (we suggest 60 days), the updates should take effect in accordance with any procedures or standards of the sponsoring organization. This will save time and money for all concerned while effectuating the purposes of the Act and fostering the dynamism of the self-regulatory process that has been a hallmark of CARU. If, each time a change or correction occurs, the sponsoring body must resubmit the entire proposal, it will delay implementation of new measures designed to protect children and maximize flexibility.

Conclusion

We again commend the Commission staff for the thoughtful effort they have put into this proposed rule. The suggestions outlined above are intended to clarify and improve the final rule. We believe that recognizing CARU as a safe harbor is consistent with COPPA and in the best interest of consumers and the many members of the national advertising community who have so strongly supported advertising self-regulatory efforts over the years.

Respectfully submitted,

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Enclosure: CARU Guidelines

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