KRAFT Kraft Foods

Paul J. Petruccelli
Senior Food Law Counsel

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

Re: Children's Online Privacy Protection Rule -- Comment, P994504

Dear Mr. Secretary:

Kraft Foods, Inc. is pleased to submit these comments to the Federal Trade Commission concerning its proposed Children's Online Privacy Protection Rule.

Kraft has been a consistent supporter of appropriate online privacy protections for children under the age of 13. We were an early participant in the development of self-regulatory guidelines for this area by the Children's Advertising Review Unit (CARU) of the Council of Better Business Bureaus. We believe that the fundamental principles of parental notice and choice which are embodied in the Children's Online Privacy Protection Act (COPPA) and in the Commission's proposed rule are consistent with the guidelines CARU wisely adopted some two years ago. As a result, we are in general agreement with the philosophy of the proposed rule, and with most of its details.

Although we generally support the proposal, we are concerned that in certain respects it may impose excessively rigid requirements on those operating websites directed in whole or in part toward children.[1] We are also concerned about the clarity of certain provisions of the proposed rule, as discussed below.

Specific Concerns with the Proposal

Kraft believes that the following provisions of the rule require revision or clarification:

[1] Unless otherwise noted, references to "children" in this comment are intended as references to individuals under the age of 13.

1. The definitions of "collection" and "personal information" in Section 312.2 should be revised to clarify that personally-identifiable information submitted by downloading a form from a website, filling it out and mailing it in to the company, is not covered by the rule.
2. Section 312.4(b)(1)(ii) should be revised to indicate that a general notice of the company's privacy policy may be posted anywhere on the website's homepage.
3. Section 312.5(b) should be revised to indicate that the acceptable methods for obtaining verifiable parental consent include the use of email, under certain circumstances.
4. The application of Section 312.5 to certain one-time use situations, such as an online sweepstakes, should be clarified.
5. Section 312.5 should not require re-notification of parents following corporate mergers, unless the post-merger treatment of any submitted information will be different from its pre-merger treatment.

We discuss each of these issues below.

1. The Definitions of "Collection" and "Personal Information"

The Commission's proposed definition of "collection" in Section 312.2 sweeps quite broadly. In particular, the definition recites that collection refers to the gathering of any personal information by any means, including any online request for personal information "regardless of how that personal information is transmitted to the operator." In the Federal Register notice describing the proposal, the Commission notes that this definition would mean that a downloadable form, filled out by hand and sent by postal mail to a company, would be subject to the rule.

This expansive view of what constitutes the "collection" of "personal information" is not supported by COPPA. The statute refers only to "individually identifiable information about an individual *collected online* . . . ." There was no apparent intent on the part of Congress to reach offline transmission of information merely because the form to be used happened to be viewable from a website. This must be especially true where there is no risk that the information provided offline will subsequently be used to authorize online activities or be published in an online forum that others can view.

For example, Kraft Foods may on occasion conduct a sweepstakes or contest online, permitting direct online entry by potential participants. Because there are costs and complexities associated with this approach, however, in some instances we will

instead simply publish on our website the entry forms and contest rules that are also made available through other media -- such as on the back of the package, via a free-standing insert or other print advertisement, etc. Under the Commission's proposal, information provided by the child who downloads the entry form from the website and mails it in is covered by the rule, while information provided by the child who fills out the entry form on the package and mails it in is not covered. Certainly there is nothing in the language or legislative history of COPPA to suggest that Congress intended this peculiar result. Neither is there anything in the statute or legislative history to suggest that Congress, in the course of addressing concerns about information *provided electronically*, intended to reach outside that sphere and also regulate in a wholly new and different way practices that have been widespread in the promotional arena for decades.

Accordingly, we urge the Commission to modify its definitions of "collection" and "personal information" to make clear that the rule is not triggered merely by making available on one's website a downloadable entry form for a child-directed promotion. We recognize that there may be circumstances in which such an offline transmission of information is intended to be used for other purposes, which do relate to internet usage. For example, an operator may plan to use the personal information obtained via a contest as a basis for further *online* contacts with or activity involving the child. In that event, there may be a stronger basis for concluding that the information should be subject to the rule. However, where the information provided via a downloadable form is merely the same information that will be provided via other offline mechanisms, and will not be used for other online purposes, we believe the information should not be covered by the rule.

2. Privacy Policy Notices on Home Pages

In general, the Commission's rule will require that operators of child-directed websites provide notice of their practices regarding the collection, use and disclosure of personally-identifiable information submitted to them. Under Section 312.4(b), this notice must appear on the home page "and at each place on the website or online service where personal information is collected from children." Kraft has always provided a link to its privacy policy both on its home page and wherever personal information is collected, and we therefore support these requirements.

However, we recommend elimination of the "anti-scrolling" provision in Section 312.4(b)(1)(ii). This provision recites that the privacy policy link must be placed such that a typical visitor to the home page can see the link "without having to scroll down."

It is unclear to us why such a rigid approach is necessary. Internet users are quite accustomed to scrolling down in order to obtain additional information, and there is little reason to think that placement of the privacy policy link at the bottom of the home page, along with other links involving legal disclosures, has any effect on consumers' likelihood of reviewing the policy. Moreover, what is most important is the availability of a link at the place where personal information is being solicited or provided. As long as that link is appropriately placed, the specific placement of the link on a home page hardly seems critical.

We also think that Section 312.4(b)(1)(i), which seems to require a separate, specific link for privacy policies involving children, exacerbates this problem. This provision not only requires a link to the privacy policy applicable to children, but requires that it be described as such (*e.g.*, "Privacy Policy for Kids"). Thus, the rule would seem to require that all Kraft websites contain *two* privacy policy links -- one directed to children, and one directed to adults -- and that this dual linking approach be carried out throughout each of our websites. Again, this appears to be overkill; we presume it was not the Commission's intent to somehow penalize operators who have developed privacy policies applicable to all individuals by forcing them to place two privacy policy notices in multiple locations throughout their websites. As long as the presence of a privacy policy is clearly noted, and as long as the policy clearly describes how it applies to child-submitted information, a single link should suffice. We recommend that the Commission clarify the rule to indicate that this approach would be acceptable, at least as to sites that contain both adult- and child-directed elements.

3. Parental Consent Provided Via Email

Section 312.5 requires that an operator must make "reasonable efforts to obtain verifiable parental consent" before engaging in any collection, use or disclosure of personal information from children. As a general matter, we support the reasonable efforts standard embraced in the rule, just as we supported its development by CARU in 1997. We urge the Commission, however, to keep the "reasonable" in "reasonable efforts." In this regard, we suggest that what is reasonable may depend not only on what technologies are available, but also on the nature of the information collection and use.

What should be of greatest concern to the Commission is the collection *and subsequent disclosure* of a child's personal information by an operator. Thus, where an operator is collecting personal information with the purpose or intent of transmitting it to third parties, or with the intent to re-post the information in a public area on its website,

the reasonableness standard should require a great deal of effort indeed, for these are the very circumstances in which the risk to children is greatest. On the other hand, if an operator is collecting personal information simply so that it can communicate more readily with the child (*e.g.*, to provide a regular newsletter to the child), and if its policies prohibit other uses of the information such as public disclosure or transfer to third parties, then the Commission might well contemplate that notices provided via a parent's email address are sufficient to comply with the rule.

4. Exceptions to Parental Consent Under Section 312.5

As noted above, we generally support the requirements for parental consent that are included in the rule. However, because we engage in information collection from children only rarely and for very limited purposes, we are concerned that the circumstances under which exceptions are available be clear.

Specifically, in its Statement of Basis and Purpose for the final rule, we encourage the Commission to provide clear examples of situations which would (or would not) fall within each of the various exceptions. We interpret Section 312.5(c)(2), for example, as permitting the collection of a child's email address in connection with an occasional online sweepstakes or contest on a Kraft Foods-sponsored website. If the child wins a prize, this provision should further permit us to contact the child (by email) to notify him or her of the prize, and to obtain sufficient identifying information to be able to notify the child's parent of the matter and obtain parental consent, delivery information, etc. Unless we have an intent to retain this identifying information for purposes beyond the conduct of the sweepstakes or contest, these information collection activities should not raise issues under the rule. However, we do not think the rule is entirely clear on this point.

5. Re-notification Requirements Following Mergers

Section 312.5(a) requires that an operator obtain verifiable parental consent before any collection, use or disclosure of personal information from children, "including any collection, use or disclosure to which the parent has not previously consented." In general, we agree that this last phrase appropriately makes clear that permission once given for a limited use does not thereafter extend to other uses absent a re-notification to the parent. However, we are concerned about the suggestion in the Federal Register document (question 11) that a subsequent merger by an operator with another party would require re-notification of the child's parent. Given the frequency with which corporate mergers occur, we question whether the mere fact of a merger, without more,

should be a basis for requiring what in many instances is likely to be a costly and burdensome re-notification effort. Rather, in our view, as long as the merger does not result in a change in the post-merger entity's policies regarding the use of any previously-collected information, no re-notification should be mandated under the rule.

Conclusion

As we noted at the outset, Kraft has been and will remain a strong supporter of appropriate online privacy protections for children under the age of 13. In general, we believe that the principles of parental notice and choice which are embodied in COPPA and in the Commission's proposed rule are consistent with the guidelines CARU adopted in 1997. We trust that our comments may help the Commission avoid developing unduly prescriptive requirements in certain areas, or imposing procedures on operators which may be out of proportion to the limited nature of their information collection activities.

Respectfully submitted,

Paul J. Petruccelli
Senior Food Law Counsel