



ENTERTAINMENT SOFTWARE RATING BOARD

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By Fedex and Electronic Submission

Donald S. Clark
Secretary
Federal Trade Commission
600 Pennsylvania Avenue, NW – Room 159-H (Annex C)
Washington, DC 20580

Re: COPPA Rule Review 2005, Project No. P054505

Dear Secretary Clark:

ESRB Privacy Online is pleased to respond to the Federal Trade Commission's ("Commission") request for comments on its implementation of the Children's Online Privacy Protection Act ("COPPA") through the Children's Online Privacy Protection Rule ("COPPA Rule"). Our comments focus on the continued use of credit cards as a means of obtaining verifiable parental consent, further clarifying the factors used to determine if a website is directed to children, and highlighting the overall success of COPPA's safe harbor programs.

Created in 1994, the Entertainment Software Rating Board ("ESRB") is an independent, non-profit, self-regulatory organization established to educate and protect consumers through programs like its ESRB ratings system and ESRB Privacy Online. ESRB Privacy Online is a third-party, privacy seal provider launched in 1999 to assist entertainment software companies in maintaining the highest standards in the collection of personal information online. In 2001, the Commission approved ESRB Privacy Online Children's Program Requirements to serve as a COPPA safe harbor.

Use of credit cards as a means of obtaining verifiable parental consent

The Commission requested comment on the use of credit cards as a means of obtaining verifiable parental consent. The COPPA Rule presently permits commercial website operators to "use a credit card in connection with a transaction" as a mechanism for obtaining verifiable parental consent. 16 C.F.R. § 312.5(b)(2). The Commission has now expressed concern about a trend of some companies "marketing debit cards to children" and the use of these cards "to circumvent the parental consent requirement." 70 Fed. Reg. 21,108 (Apr. 22, 2005).

Despite these concerns, we continue to support the use of credit cards as a means of obtaining verifiable parental consent. Although the use of debit cards may be an emerging trend among adult consumers in general, we are not aware of any reliable studies showing prevalent use of credit or debit cards by children under 13.¹

In light of the paucity of reliable research showing widespread debit card use among children under 13, we believe that the Commission should continue to allow commercial website operators to use credit cards as a means of obtaining verifiable parental consent. The Commission should, however, continue to monitor suitable and affordable technological tools for verifying age and parental consent. COPPA is a forward-thinking statute designed to continually evaluate “available technology” to carry out its congressional mandate of protecting children under 13 through parental notice and consent. See, e.g., 15 U.S.C. § 6501(9); 16 C.F.R. § 312.5(b)(1).

Additionally, the Commission points out that “some operators may be *failing* to conduct an actual transaction with the credit card, which provides some extra assurance that the person providing consent is the parent.” 70 Fed. Reg. 21,108 (Apr. 22, 2005) (emphasis added). This statement is confusing and should be clarified since it implies commercial website operators are required to conduct an actual transaction with the use of a credit card. However, in its COPPA supplemental materials, the Commission specifically explained that a commercial website operator need not conduct an actual transaction with the use of a credit card.

The verifiability of the credit card comes from the card issuer’s verification that the number is from a real credit card ... if [credit card companies] are willing to work with [commercial website operators] to verify a credit card without completing a transaction, then [commercial website operators] may use this method of obtaining consent.

Federal Trade Commission, *Frequently Asked Questions about the Children’s Online Privacy Protection Rule*, FAQ No. 34, available at <http://www.ftc.gov/privacy/coppafaqs.htm> (last visited on June 23, 2005).

Factors used to determine whether a website is directed to children

The Commission also requested comment on whether the factors for determining if a website is directed to children under 13 should be clarified or supplemented. We recommend that the Commission’s insightful analysis in evaluating Amazon.com’s “Toy Store” be made part of the public record through publication in the COPPA Rule’s Statement of Basis and Purpose.

¹ The only poll we found dealt with an older age group (13 to 17), and showed that just 11 percent of those teens had credit cards. See, e.g., Eileen Alt Powell, *Many Teens Carrying Credit and Debit Cards*, Associated Press, April 14, 2005, available at <http://www.msnbc.msn.com/id/7493536> (last visited on June 23, 2005).

In a November 24, 2004 letter, the Commission applied the COPPA-related factors for determining if a commercial website is directed to children under 13. Based on this analysis, the Commission concluded that Amazon.com's "Toy Store" area was not directed to children under 13 because:

1. The stated purpose of the websites was to sell toys to adults.
2. The vocabulary and other language used on these websites appeared to be directed to adults rather than children.
3. The websites did not host activities directed to a child audience.

Federal Trade Commission Letter to the Electronic Privacy Information Center, Nov. 24, 2004, available at http://www.epic.org/privacy/amazon/ftc_amazon.pdf (last visited on June 23, 2005).

To help clarify the "directed to children under 13" factors, we believe that the Commission's analysis in this case could be made part of the public record through publication in the COPPA Rule's Statement of Basis and Purpose. We would also urge the Commission to further clarify what other factors commercial websites — particularly those with animated graphic displays appealing to a broad audience — can use to determine if a website is "directed to children" under the COPPA Rule.

Effectiveness of COPPA's safe harbor programs

Finally, the Commission asked for comment on the effectiveness of COPPA's safe harbor programs. Overall, we believe COPPA's safe harbor programs have been successful in providing commercial website operators with incentives to comply with COPPA.

For example, our program alone presently has 30 member companies, representing more than 400 commercial websites. As part of our program, we regularly monitor and audit all member websites for COPPA compliance. We review all information gathering pages on ESRB Privacy Online certified member websites. Our members submit privacy self-assessment questionnaires annually. We conduct onsite audits for all new member companies. We assist member companies in drafting and updating their online privacy statements consistent with their actual privacy practices.

Moreover, our program is designed to assist consumers in addressing privacy related grievances with member companies. This program component ensures member companies resolve consumer privacy concerns swiftly and efficiently. Since our members are contractually bound to abide by the ESRB Privacy Online program requirements, failure to follow our guidelines may result in penalties, ranging from fines to Commission referral.

Since 1999, we have been committed to maintaining the program's credibility among consumers by ensuring that member companies have responsible and appropriate online information collection and disclosure practices. We monitor privacy trends and

regularly update our members about industry best practices. Time after time, our member companies have expressed unwavering support for our privacy program and its COPPA safe harbor component. In the end, our member companies significantly benefit from our proactive commitment to helping them maintain the highest standards in the protection of their customers' privacy, and consumers benefit from having greater confidence that their personal information will be handled responsibly online.

In sum, we continue to support the use of credit cards as a means of obtaining verifiable parental consent. Additionally, we believe that the Commission should clarify and supplement the factors used to determine if a commercial website is "directed to children under 13." To accomplish this goal, the Commission's analysis in its November 24, 2004 letter could be made part of the COPPA Rule's Statement of Basis and Purpose. Finally, we wholeheartedly believe that the COPPA Rule's safe harbor program is an effective tool to help ensure that commercial website operators comply with COPPA.

Respectfully submitted,

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ESRB