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Microsoft

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VIA HAND DELIVERY

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

RE: COPPA Rule Review 2005, Project No. P054505

Dear Secretary Clark:

Microsoft submits these comments in response to the Commission's request for public comment on its implementation of the Children's Online Privacy Protection Act ("COPPA" or "the Act"), 15 U.S.C. §§ 6501-6508, through the Children's Online Privacy Protection Rule ("COPPA Rule" or "the Rule"). As a leading provider of e-commerce software and services, Microsoft is committed to creating a trusted environment for Internet users, and protecting children's online privacy is at the core of this commitment. We follow comprehensive privacy practices, develop and disseminate technological solutions to empower parents to help protect their children's online privacy, and work to educate children about the ways they can protect their personal information while using the Internet.

Microsoft appreciates the opportunity to provide comments on the COPPA Rule and commends the Commission's dedication to this important consumer protection issue. We have focused these comments on three specific issues that we believe present opportunities for the Commission to provide greater clarity for website operators on the scope of the Rule consistent with the goals of the Act.

- *First*, we urge the Commission to clarify that the Rule's specific notice obligations in § 312.4(b) do not apply to general audience websites.
- *Second*, we urge the Commission to clarify that the obligation to delete children's personal information in response to a request from a parent is not absolute and to modify the Rule to provide reasonable exceptions.
- *Third*, we urge the Commission to clarify that that a "limited" consent option is not required where disclosure is an inherent part of the online service offering.

I. THE COMMISSION SHOULD CLARIFY THAT THE RULE'S DETAILED NOTICE OBLIGATIONS DO NOT APPLY TO GENERAL AUDIENCE SITES.

COPPA obligates both operators of websites directed at children and operators with actual knowledge that they are collecting personal information from a child to provide notice to parents of the personal information they collect from children, how they use such information, and to whom such information is disclosed.[1] The Commission implemented this basic statutory requirement in section 312.3(a) of the COPPA Rule.

In section 312.4(b)(2) of the Rule, the Commission established detailed requirements regarding privacy notices on websites. This section lists several items that must be included in an operator's privacy notice, some of which are very specific to children and the rights of parents, such as:

- That the parent has the option to consent to the use of the child's information, but not to disclosure (§ 312.4(b)(2)(iv));
- That the operator cannot condition a child's participation on the disclosure of more personal information than is reasonably necessary (§ 312.4(b)(2)(v)); and
- That the parent can review and have deleted the child's personal information (§ 312.4(b)(2)(vi)).

The Act, however, obligates operators to provide the above disclosures only "upon request of a parent . . . whose child has provided personal information to that website or online service."[2] Nothing in the Act requires general audience websites that may not yet know whether a child under 13 has submitted personal information to post a privacy policy that includes the above-listed disclosures.

The Rule is not clear on whether or not it imposes such an obligation upon general audience sites. As noted above, section 312.4(b)(2) contains these specific notice requirements, but the opening language of this section explicitly references sites or online services "directed at children" and separate "children's area[s]" of general audience sites.[3] There is no indication that the scope of this section is intended to capture general audience sites with actual knowledge that a user is under 13. Thus, it appears by the plain language of section 312.4(b) that these more specific privacy notice obligations do *not* apply to general audience websites (outside of any separate "children's area[s]" that they may have); however, it far from certain that this is the Commission's position.

This apparent discrepancy in the scope of websites covered by sections 312.3(a) and 312.4(b) has been a source of confusion among companies trying to comply with COPPA. To eliminate the confusion, we urge the Commission to affirm that the specific notice obligations set forth in section 312.4(b) do not apply to general audience sites. This

[1] See 15 U.S.C. § 6502(b)(1)(A).
[2] 15 U.S.C. § 6502(b)(1)(B).
[3] See 16 C.F.R. § 312.4(b).

approach is consistent with the Act and it is good public policy. Any alternative interpretation would require every website on the Internet to provide specific notices regarding children because any site could find itself in the position of obtaining actual knowledge.

Of course, this clarification would not exempt those general audience sites that obtain actual knowledge from the requirement to provide notice to the parent. The Act and the COPPA Rule are clear that an operator with actual knowledge that it has collected personal information from a user under 13 has to either delete that child's information or provide notice to the parent as required by sections 312.5 and 312.4(c).

II. THE COMMISSION SHOULD CLARIFY THAT THE OBLIGATION TO DELETE CHILDREN'S PERSONAL INFORMATION IN RESPONSE TO A REQUEST FROM A PARENT IS NOT ABSOLUTE.

Section 312.6(a)(2) of the COPPA Rule requires operators to provide parents with the opportunity "to direct the operator to delete the child's personal information." This requirement is written as an absolute: the Rule contains no exceptions and allows no discretion for an operator in those cases where there may be compelling reasons to deny a parent's request to delete his or her child's personal information.

Microsoft asks the Commission to clarify that this obligation to delete is not absolute. We strongly support the goal of children's privacy and believe that verified parents should generally be able to request that an operator delete personal information about their children; however, the blanket standard contained in the Rule may place an unworkable burden on online entities. As the Commission knows, there may be numerous situations in which an operator should or even must retain a child's personal information – including where relevant litigation is threatened or pending; a law enforcement investigation is ongoing; the information is necessary to detect or prevent unlawful activity; or particular statutes, regulations, or even contracts require the retention of particular information. Such a clarification is therefore critical to avoid placing companies in the untenable situation of having conflicting obligations or competing imperatives.

Moreover, there may be cases where personal information is necessary to positively identify a requestor as the parent of the child. Under the COPPA Rule, the inability to verify a parent permits an operator to refuse to allow parental review of a child's personal information.[4] However, this exception does not extend to enable an operator to refuse a parental request to delete a child's personal information. But this may be necessary in various circumstances. For example, to eliminate evidence of a crime, a child predator may falsely claim to be a parent and submit a request to delete the personal information of his victim posted on a message board. Under the Rule, the operator may be obligated to delete the child's personal information, despite the operator's inability to verify that

[4] See 16 C.F.R. § 312.6(a)(3)(i).

the requestor actually is the parent of the child. This gap in the Rule starkly contradicts with COPPA's goal of protecting children.

The provision of the Rule requiring operators to delete children's information upon parental request is not contained in the Act. As a result, it is well within the discretion of the Commission to modify the provision accordingly – to continue to protect the privacy of children while allowing online businesses to function smoothly. We therefore urge the Commission to investigate and adopt a reasonable standard or set of exceptions to the deletion requirement of section 312.6(a)(2).

III. THE COMMISSION SHOULD CLARIFY THAT A "LIMITED" CONSENT OPTION IS NOT REQUIRED WHERE DISCLOSURE IS AN INHERENT PART OF THE ONLINE SERVICE OFFERING.

Under section 312.5(a)(2) of the COPPA Rule, "[a]n operator must give the parent the option to consent to the collection and use of the child's personal information without consenting to *disclosure* of his or her personal information to third parties." The definition of "disclosure" includes making personal information publicly available by any means, including the use by the child of online communications services (e.g., e-mail, chat rooms, IM, message boards, etc.).[5]

It makes no sense to require providers of those online services that inherently involve the disclosure of personal information (such as providers of e-mail services) to comply with this "limited consent" requirement. Such services are based on the ability to disclose personal information to third parties. Thus, the parent cannot realistically consent only to the use of his or her child's personal information and not to the disclosure of such information by these services. Indeed, in such circumstances, the "limited consent" option under § 312.5(a)(2) has the same effect as denying consent altogether. Offering three choices (full consent, limited consent and denial of consent), two of which have the same practical effect, would be confusing to the parent.

The COPPA Rule does not contemplate this very common scenario.[6] For this reason, we urge the Commission to modify the Rule to clarify that those online services that inherently involve the disclosure of personal information are not required to comply with section 312.5(a)(2).

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[5] See 16 C.F.R. § 312.2.

[6] COPPA FAQ No. 37, available at http://www.ftc.gov/privacy/coppafaqs.htm, addresses the scenario to some degree, suggesting that when communications services are bundled together with other online services, separate consent is not required for the *collection* of information necessary for the communications services. But it does not address the scenario where a communication service is offered by itself. Nor is it clear that the statement about not needing separate consent for the collection addressees the core issue of whether companies must tell parents of users who want to use communication services that they can consent to *collection and use*, but not to *disclosure*. We urge the Commission to address the issue in the Rule itself so as to provide the greatest clarity, transparency and certainty for companies that are providing communications and other services that inherently involve disclosure of personal information.

IV. CONCLUSION

Microsoft appreciates the opportunity to provide these comments to assist the Commission with its review of the COPPA Rule. We urge the Commission to develop rules that will provide clear guidance to companies that want to act responsibly in accordance with the Act. We are committed to protecting children's privacy online, and look forward to working with the Commission toward this common goal.

Sincerely,

Michael Hintze
Senior Attorney
Microsoft Corporation