UNITED STATES OF AMERICA
FEDERAL TRADE COMMISSION
WASHINGTON, D.C. 20580

Office of Chairman Jon Leibowitz

TO: Don Clark
FROM: Christine DeLorme
DATE: November 2, 2012
RE: COPPA Rule: Comments to be placed on the public record

On November 1, 2012, representatives of Direct Marketing Association, Inc. ("DMA") and the Association of National Advertisers ("ANA") met with FTC Chairman Leibowitz, his attorney advisors, and other agency staff to discuss the supplemental proposed amendments to the FTC's COPPA Rule.[1]

Mr. Ingis stated that the Supplemental Notice of Proposed Rulemaking ("SNPRM") showed responsiveness to concerns raised in response to the initial Notice of Proposed Rulemaking ("NPRM"). He also expressed that the collection of clickstream data from children under 13 for purposes of behavioral advertising should be covered under COPPA. Still, he stated that the proposals in the SNPRM are too broad and would undermine the availability of children's offerings on the internet.

Mr. Ingis stated that under the current COPPA regulatory scheme, website operators are allowed to collect personally identifiable information ("PII") from children so long as the websites are not directed to children and the operators do not have actual knowledge that the information is being collected from children under 13. He emphasized that this threshold of liability (of needing to either operate a site directed to children or have actual knowledge) should be preserved and also used for collection of clickstream data. In other words, he stated that the proposal in the SNPRM to define an online service as directed to children if the operator "knows or has reason to know" that it is collecting information through a COPPA-covered site effectively holds clickstream data to a higher standard than the "real" PII that can currently be collected by general audience sites with no actual knowledge that the information is coming from children.

Mr. Ingis stated that the Rule should therefore have an "actual knowledge" standard instead of a "knows or has reason to know" standard, and could incorporate several examples of factual scenarios illustrating such actual knowledge, such as a network selling advertising

[1] In attendance on behalf of the DMA were Rachel Thomas (Vice President, Government Affairs), Stu Ingis (of Venable LLP, General Counsel to DMA), and Emilio Cividanes (of Venable LLP). In attendance on behalf of ANA was Dan Jaffe, Group Executive Vice President, Government Relations.

In attendance from the FTC were: Chairman Jon Leibowitz, Steve Bellovin, Christine DeLorme, Lisa Harrison, Debbie Matties, and Rick Quaresima.

segments to children under 13. He further stated that such an approach would be the strongest against a potential legal challenge.

Mr. Ingis stated that the proposal to change the definition of "operator" to make a primary operator liable when a third party collects information through the operator's website is problematic. He stated that primary sites do not know who the third parties are, what they're collecting, or why. He stated that one of the reasons the Internet is successful is the fact that liability is not imposed for third party actions, and that to alter this model would change the very architecture of the Internet.

Mr. Ingis and FTC staff discussed what types of information are passed to third parties from a primary site. Mr. Ingis was unaware of what types of information would be passed to a third party advertiser from the primary site, besides the URL. The information used by the New York Times and the Wall Street Journal to tailor online ads was also discussed.

Mr. Ingis stated that there would not be a loophole if the Rule does not hold the primary operator responsible for collection by third parties, because the third party (*e.g.* an ad network) would still be liable if it had actual knowledge that it was collecting information from a child under 13. Mr. Ingis further stated that the real concern we have here is about targeting children under 13 for data collection, and that a network should be able to otherwise collect clickstream data. Mr. Ingis stated even if there is a contractual or financial arrangement between the primary operator and the third party, the third party might or might not be functioning as a legal agent of the primary operator.

FTC staff asked if DMA was familiar with the Open Feint closing letter that had been issued at the same time as the NPRM. Mr. Ingis stated that liability in situations with third party data collection should lie somewhere, just not with *both* the primary operator and the third party. He also stated that if you are overinclusive with who is covered under the Rule, it will create the need to collect additional information as part of the notification and consent process.

There was a discussion about ad exchanges that serve ads, resulting in a situation where a primary site might not know the identity of the particular ad network serving a particular ad. In response to a question about the possibility of a primary website sending a signal to ad exchanges (that could in turn be sent to ad networks) indicating that the primary site is directed to children, Mr. Ingis indicated that there are some sites that are voluntarily complying with COPPA even that they are not legally required to, and that such sites would not want to display any outward signal indicating that they are COPPA-covered websites. He suggested that perhaps the Commission could develop a safe harbor that would indicate that the use of such a self-identifying signal is not an admission that the website is covered by COPPA.