

Dissenting Statement of Commissioner Maureen K. Ohlhausen
In the 2010 Children's Online Privacy Protection Act Rule Review
Project No. P104503

I voted against adopting the amendments to the Children's Online Privacy Protection Act (COPPA) Rule because I believe a core provision of the amendments exceeds the scope of the authority granted us by Congress in COPPA, the statute that underlies and authorizes the Rule.¹ Before I explain my concerns, I wish to commend the Commission staff for their careful consideration of the multitude of issues raised by the numerous comments in this proceeding. Much of the language of the amendments is designed to preserve flexibility for the industry while striving to protect children's privacy, a goal I support strongly. The final proposed amendments largely strike the right balance between protecting children's privacy online and avoiding undue burdens on providers of children's online content and services. The staff's great expertise in the area of children's privacy and deep understanding of the values at stake in this matter have been invaluable in my consideration of these important issues.

In COPPA Congress defined who is an operator and thereby set the outer boundary for the statute's and the COPPA Rule's reach.² It is undisputed that COPPA places obligations on operators of websites or online services directed to children or operators with actual knowledge that they are collecting personal information from children. The statute provides, "It is unlawful for an operator of a website or online service directed to children, or any operator that has actual knowledge that it is collecting personal information from a child, to collect personal information from a child in a manner that violates the regulations prescribed [by the FTC]."³

The Statement of Basis and Purpose for the amendments (SBP) discusses concerns that the current COPPA Rule may not cover child-directed websites or services that do not themselves collect children's personal information but may incorporate third-party plug-ins that collect such information⁴ for the plug-ins' use but do not collect or maintain the information for, or share it with, the child-directed site or service. To address these concerns, the amendments add a new

¹ 15 U.S.C. §§ 6501-6506.

² COPPA, 15 U.S.C. § 6501(2), defines the term "operator" as "any person who operates a website located on the Internet or an online service and who collects or maintains personal information from or about users of or visitors to such website or online service, or on whose behalf such information is collected and maintained . . ." As stated in the Statement of Basis and Purpose for the original COPPA Rule, "The definition of 'operator' is of central importance because it determines who is covered by the Act and the Rule." Children's Online Privacy Protection Rule 64 Fed. Reg. 59888, 59891 (Nov. 3, 1999) (final rule).

³ 15 U.S.C. §6502(a)(1).

⁴ If the third-party plug-ins are child-directed or have actual knowledge that they are collecting children's personal information they are already expressly covered by the COPPA statute. Thus, as the SBP notes, a behavioral advertising network that targets children under the age of 13 is already deemed an operator. The amendment must therefore be aimed at reaching third-party plug-ins that are either not child-directed or do not have actual knowledge that they are collecting children's personal information, which raises a question about what harm this amendment will address. For example, it appears that this same type of harm could occur through general audience websites and online services collecting and using visitors' personal information without knowing whether some of the data is children's personal information, which is a practice that COPPA and the amendments do not prohibit.

proviso to the definition of operator in the COPPA Rule: “Personal information is collected or maintained on behalf of an operator when: (a) it is collected or maintained by an agent or service provider of the operator; or (b) the operator benefits by allowing another person to collect personal information directly from users of such website or online service.”⁵

The proposed amendments construe the term “on whose behalf such information is collected and maintained” to reach child-directed websites or services that merely derive from a third-party plug-in some kind of benefit, which may well be unrelated to the collection and use of children’s information (e.g., content, functionality, or advertising revenue). I find that this proviso—which would extend COPPA obligations to entities that do not collect personal information from children or have access to or control of such information collected by a third-party—does not comport with the plain meaning of the statutory definition of an operator in COPPA, which covers only entities “on whose behalf such information is collected and maintained.”⁶ In other words, I do not believe that the fact that a child-directed site or online service receives any kind of benefit from using a plug-in is equivalent to the collection of personal information by the third-party plug-in on behalf of the child-directed site or online service.

As the Supreme Court has directed, an agency “must give effect to the unambiguously expressed intent of Congress.”⁷ Thus, regardless of the policy justifications offered, I cannot support expanding the definition of the term “operator” beyond the statutory parameters set by Congress in COPPA.

I therefore respectfully dissent.

⁵ 16 CFR § 312.2 (Definitions).

⁶ This expanded definition of operator reverses the Commission’s previous conclusion that the appropriate test for determining an entity’s status as an operator is to “look at the entity’s relationship to the data collected,” using factors such as “who owns and/or controls the information, who pays for its collection and maintenance, the pre-existing contractual relationships regarding collection and maintenance of the information, and the role of the website or online service in collecting and/or maintaining the information (*i.e.*, whether the site participates in collection or is merely a conduit through which the information flows to another entity.)” Children’s Online Privacy Protection Rule 64 Fed. Reg. 59888, 59893, 59891 (Nov. 3, 1999) (final rule).

⁷ *Chevron v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-43 (1984) (“When a court reviews an agency’s construction of the statute which it administers, it is confronted with two questions. First, always, is the question whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress.”).