



Inspiring Generations of Play

1375 Broadway • Suite 1001 • New York, NY 10018
t. 212.675.1141 • e. info@toyassociation.org

March 11, 2024

Via Electronic Submission: <https://www.regulations.gov>

U.S. Federal Trade Commission
Office of the Secretary
600 Pennsylvania Avenue NW
Suite CC-5610 (Annex E)
Washington, DC 20580

Re: COPPA Rule Review, Project No. P195404

The Toy Association, Inc. (TTA), on behalf of its members, welcomes the opportunity to submit these comments in response to the U.S. Federal Trade Commission’s (FTC or Commission) Notice of Proposed Rulemaking (NPRM), Children’s Online Privacy Protection Rule (COPPA Rule), 89 Fed. Reg. 2,034 (Jan. 11, 2024). By way of background, TTA represents more than 700 businesses – toy manufacturers, importers and retailers, as well as toy inventors, designers and testing labs – all involved in bringing safe, fun, and educational toys and games for children to market. The U.S. toy industry contributes an annual positive economic impact of \$109.2 billion to the U.S. economy. TTA and its members work with government officials, consumer groups, and industry leaders on ongoing programs to ensure safe play, both online and offline. We appreciate this opportunity to address legal, policy, operational, and practical aspects of the proposed revisions in response to this NPRM.

Safety, security and privacy by design are core principles for our members. We support strong and effective uniform national privacy standards to protect consumers, especially children. Our industry has championed the goals and objectives of the Children’s Online Privacy Protection Act of 1998 (COPPA), 15 U.S.C. §§ 6501–6506, since its enactment. TTA has actively contributed to prior FTC rulemakings to offer practical insights on application of the COPPA Rule and proposed Rule changes. Working with our Children’s Online Safety Committee (COSC), TTA has over the years developed a variety of COPPA compliance tools and training materials for its members to assist them in understanding COPPA requirements and implementing them in practice.

In addition to COPPA, toy industry members are affected by a variety of other privacy and data security laws in the U.S. and around the world. Thus, the toy industry is uniquely qualified to comment on changes to data and privacy requirements, including those in the FTC’s proposed amendments to the COPPA Rule.

COPPA has been effective for two principal reasons. First, COPPA created a uniform national framework for children’s privacy with a uniform age to identify a “child.” Second, COPPA strikes a careful balance between protecting children’s privacy, engaging parents, and authorizing legitimate business operations through both COPPA’s definitions and exceptions, and by authorizing different means to obtain parental consent depending on the circumstances. However, we agree with the

FTC that certain aspects of the COPPA Rule should be updated to reflect changes in technology and the market. We are very pleased that in many instances, the proposed Rule includes necessary and appropriate updates and adopts recommendations we provided in response to the FTC's 2019 request for comments (RFC) to the COPPA Rule, 84 Fed. Reg. 35842 (July 25, 2019). There are other proposed revisions which are of concern to our members. TTA addresses key areas of interest to our members in the comments below.

I. General Provisions

We support the FTC's decision to retain the "actual knowledge" standard and the reference age of a child, both of which are specifically incorporated into COPPA and cannot be changed absent Congressional action. In short, while we recognize that there are legitimate concerns regarding the privacy of individuals 13 years and older, we agree that the COPPA Rule is not the vehicle through which those concerns should be addressed.

II. Other Key Definitions

A. Online contact information

TTA supports adding "an identifier such as a mobile telephone number provided the operator uses it only to send a text message" to the non-exhaustive list of identifiers that constitute "online contact information" and the related restriction on using a mobile phone to call children, but we do not support further modifications to this definition. We note that additional modifications may be needed to ensure that the collection and use of a child's mobile telephone number, or a parent's mobile phone number collected from a child for purposes of sending parental notices and obtaining parental consent, do not conflict with potential restrictions under the Telephone Consumer Protection Act (TCPA) or related state laws. *See, e.g., Hall v. Smosh Dot Com, Inc.*, _F 4th _, 2023 U.S. App. LEXIS 16623 (9th Cir. 2023).

We support revisions to the COPPA Rule that will allow operators to use mobile telephone numbers to contact parents to initiate the process of obtaining verifiable parental consent (VPC) or to provide certain direct notices. As we noted in our comments to the 2019 RFC, today's parents use their mobile phones, perhaps more than any other electronic device. Thus, allowing consent through text and other mobile communication mechanisms tracks with current technology and behavior while offering a convenient means through which VPC can be obtained. To the extent any legal barriers exist in making this change, we urge the Commission to work as expeditiously as possible to resolve them, as texting is clearly the preferred method of communication for today's parents.

B. Support for the internal operations of the Web site or online service

We strongly support retaining the "support for the internal operations" exception, which is critical to operating online services, and we oppose the proposed added restrictions on this exception. In our members' experience, the current language of the exception is adequate to protect children's privacy while allowing online services to function efficiently. The additional restrictions proposed to this exception—such as prohibitions on use of machine learning to "optimize" user attention or

“maximize” user engagement, restrictions on use “in connection with processes that encourage or prompt use of a website or online service,” and limiting personalization absent parental consent to “user-driven” engagement—are overly broad and lack clarity as to permitted versus prohibited practices. For example, the term “processes” is incredibly broad and undefined in the proposed regulations. Many routine practices could be considered “processes” that encourage children to use an online service, such as an advertising campaign that encourages children to play an online game, and could conceivably fall under that language. The vagueness of the proposed changes will add burdens without providing needed clarity between data collection for permissible content personalization and impermissible behavioral advertising.

Further, in the 2013 COPPA Rule update, the FTC specified that “support for internal operations” also includes activities such as intellectual property protection, payment and delivery functions, spam protection, optimization, statistical reporting, or de-bugging, expressly stating that it did not need to update Rule language for these activities to be covered. *See* 78 Fed. Reg. 3,972, 3,980–3,981 (Jan. 17, 2013). Any changes to the Rule must expressly state that these activities are still covered by this exception.

Finally, to the extent some proposed changes suggest that direct notices are needed, direct notice requirements for this exception are contrary to the purpose of the exemption and do not further privacy protections. Notice is not currently required to collect limited information to support internal operations. Adding a direct notice obligation would require an operator to collect additional personal information they do not otherwise need to collect, which conflicts with COPPA’s data minimization principles. We also oppose additional disclosures regarding this exception in an online notice of an operator’s information practices. We discuss our concerns regarding added notice requirements in further detail below in Section III of these comments.

C. Personal information

TTA supports revisions to the definition of “personal information” to add biometric data to the extent, consistent with COPPA, that such data “permit[s] the physical or online contacting of a specific individual.” 15 U.S.C. § 6501(8)(F). Adding an actual use element to the definition is needed to comport with the statute. TTA also supports codifying FTC enforcement guidance on handling audio files as proposed in the NPRM. In adopting these revisions, we believe the Commission should make clear that both categories of information should be treated similarly. To further this goal, we support an exception for biometric information that is promptly deleted, similar to the approach for audio files, as there are instances where biometric data may be collected and actually used, e.g., for security or other purposes. Both scenarios represent uses of specific types of information in specific circumstances that are well-defined so that operators can comply.

TTA has strong concerns with treating screen names, user names, and avatars (including those generated from a child’s image) as “online contact information” or “personal information” if no other personal information is collected from the child. While the Commission expresses concerns that the same screen name, user name, or avatar may be used by a child across different platforms, it is also common practice for different children to use the same name or avatar across platforms offered by an operator. Additionally, if a child can be contacted with their screen name

on any platform then there should have been an age-screen or parental consent given already. The point of the FTC's longstanding policy of allowing user names, screen names or avatars to be collected is to minimize the collection of additional personal information from children while allowing for some personalized, privacy-safe experiences. Without collecting more information, it is by design difficult, if not impossible, to contact children using this information. Thus, this proposed change is unnecessary and unduly burdensome for operators.

While not one of the FTC's proposed changes, TTA supports the continued ability to use automatic filtering technology to avoid "collecting" personal information from children. The Commission should retain its position that an operator will not be deemed to have "collected" personal information if it employs automated means to delete all, or virtually all, personal information from one-to-one communications.

D. Contextual Advertising

The FTC asks if given the sophistication of contextual advertising today, including that personal information collected from users may be used to enable companies to target even contextual advertising to some extent, should the Commission consider changes to the Rule's treatment of contextual advertising (*see* Question 10). TTA does not believe that changes are warranted when by its very nature contextual advertising is targeting the audience based on the content they are choosing and making common sense inferences about the audience. For our members experience, AI and machine learning used for contextual advertising only pertains to content analysis of the programming/show where the ads appear and not information collected from the viewer. TTA would be interested in additional information on techniques the FTC is aware of which enable companies to use personal information to individually target contextual advertising outside normal accepted parameters.

E. Mixed audience website or online service

We do not oppose adding a new definition in the Rule for a "mixed audience website or online service"; however, we have concerns with the specific language proposed by the FTC for such definition. As discussed in our 2019 comments to the FTC's RFC, the distinction between online services "primarily" directed to children and those "secondarily" directed to children can be confusing and involves subjective judgments based on multiple factors. Thus, any new definition under the COPPA Rule should not include either term. If a new definition for "mixed audience website or online service" is adopted, we recommend that the FTC establish that a "mixed audience website or online service", including apps or platforms, is one that offers content directed to children (as defined by the Rule), but whose target audience likely includes a significant number of individuals over the age of 13 (even if segments other than children do not comprise 50% or more of the audience). In such a circumstance, operators could still elect to treat all visitors as children or implement other appropriate measures to allow all visitors to experience age-appropriate content.

Avoiding a subjective definition of a mixed audience site is especially important to toy companies because online services featuring toy brands and characters often appeal to and target parents and adult nostalgia fans of our members' brands. The definition of a "mixed audience" site

does not mean that any site that children might visit should fall in that category, nor does it mean that sites featuring intellectual property that may be associated with children’s products—like an e-commerce site that sells toys or games—would fall in the mixed audience category. We recommend clarifying that e-commerce sites are general audience sites to minimize confusion and maintain the ability to utilize standard e-commerce tools like targeted advertising to reach adult purchasers. For example, while a large number of children may watch major sports programs such as the World Series, the Super Bowl, or the Olympics, these programs are viewed as intended for general audiences. Advertisers on such programs are not restricted to offering only kid-appropriate ads, and advertising guidelines for child-directed advertising offered by groups such as the Children’s Advertising Review Unit (CARU) do not apply.

TTA has significant concerns with numerical audience thresholds as a determinative factor to identify whether a site or service is directed to children or mixed audience—whether based on total audiences or percentages. The number of child visitors is simply one factor to consider in determining if a site is child-directed, in whole or in part. It should not be the sole determinative factor. The intent of the operator and whether the actual content is child-directed are more significant and most relevant in keeping with the statutory definition that only sites or online services “directed” or “targeted” to children, or those with actual knowledge that they are dealing with a child, are subject to COPPA. Elevating website audience composition over the other factors is inconsistent with traditional norms for advertising and risks undermining the intent of the statute. In the NPRM the Commission states their belief that, “the Rule’s multi-factor test, which applies a ‘totality of the circumstances’ standard, is the most practical and effective means for determining whether a website or online service is directed to children.” 89 Fed. Reg. at 2,047.

These definitions take on special importance where connected products are concerned. Most connected toys are primarily directed to children for COPPA purposes and are indeed “children’s products” for Consumer Product Safety Commission (CPSC) purposes. In contrast, a connected doorbell or refrigerator is a general audience product for both privacy and product safety purposes. It remains vital to retain distinctions between online sites and services available to all and those that are directed to children due to child-oriented content. These distinctions should be recognized in any new definition for “mixed audience website or online service” to avoid a situation where sites and services are improperly deemed “mixed audience” subject to COPPA.

F. Activity

The FTC has asked if it should define “activity” in connection with the prohibition on asking children for more information than necessary (*see* Question 18). This is not a question that has arisen over the years that the COPPA Rule has been in effect and the need for such a definition is not apparent. To the extent the FTC does propose a definition, a supplemental notice to solicit specific comments on the definition and rationale supporting such a definition would be warranted.

III. Notices

TTA has concerns with the additional detailed disclosures the FTC proposed be added to notices to parents. In particular, the requirement that operators provide additional notices to parents describing the collection of information covered by the “support for the internal

operations” exception, and identification of each third party with which personal information is shared.

Collection and use of limited personal information under the “support for the internal operations” exception does not require any direct notice to parents at present; however, FTC’s proposed changes could be interpreted to require such notice. Proposed revisions to 16 C.F.R. § 312.4(c)(1)(iii) would require direct notice of “items of personal information the operator intends to collect from the child, how the operator intends to use such information, and the potential opportunities for the disclosure of personal information.” While the current Rule language does require direct notice for collection of “additional items of personal information,” 16 C.F.R. § 312.5(c)(7) specifically provides that there is “no obligation to provide notice under § 312.4” for information collected under the “support for the internal operations” exception. FTC’s proposed revisions would remove this language under § 312.5(c)(7) and replace it with an affirmative obligation to provide notice under § 312.4(d)(3), which applies to the “notice on the Web site or online service.” While the proposed revisions at first glance would appear to only require notice be provided in a privacy policy or other “notice on the Web site or online service,” this might not be the practical effect, as FTC is proposing to remove the explicit exception under § 312.5(c)(7) to providing direct notice of personal information collected under the “support for the internal operations” exception.

Thus, FTC’s proposed revisions could, in effect, require direct notice of personal information collected under the “support for the internal operations” exception, contrary to the underlying principle of this and other exceptions. We do not believe that the FTC intends such a requirement, which will force operators to collect parental contact information to send them a notice about exempt activities. To the extent that any changes are made to § 312.5(c)(7), or any other part of the Rule, it should be clear that direct notice is not required for personal information collected under the “support for the internal operations” or any other exception. As consent is not required for collection of information covered by the “support for the internal operations” exception, there is also no utility to requiring that an operator provide direct notice to parents to specify the particular internal operation(s) for which the operator is collecting a persistent identifier and describe the means it uses to ensure that it does not use or disclose the persistent identifier except as permitted under the “support for the internal operations” exception. Any proposed modification to provide such direct notice will only create a burden for operators.

We likewise do not support additional detailed descriptions and requirements related to this exception in posted privacy notices, as proposed. The FTC proposes to modify § 312.5(d)(3) to require disclosure as follows:

If applicable, the specific internal operations for which the operator has collected a persistent identifier pursuant to § 312.5(c)(7); and the means the operator uses to ensure that such identifier is not used or disclosed to contact a specific individual, including through behavioral advertising, to amass a profile on a specific individual, in connection with processes that encourage or prompt use of a website or online service, or for any other purpose (except as specifically permitted to provide support for the internal operations of the website or online service)...

There is no record evidence that such a detailed disclosure is useful or necessary to parents, who already object to detailed privacy notices. Operators relying on this exception must be able to demonstrate that they comply with the limits, and further disclosures are unduly burdensome without countervailing benefits.

We also question the utility of requiring that operators that share personal information with third parties identify those third parties, or specific categories of those third parties, in the direct notice to parents. Direct notices to parents must contain certain specific information and a link to the posted privacy policy. This allows notices to be reasonably succinct and provides the vehicle for them to access additional information. Several state laws, including those in California (see Cal. Civ. Code § 1798.100 et seq.) already require disclosing categories of third-party recipients in posted privacy policies, so placing this information in the direct notice would be redundant. These proposed requirements will simply make notices longer and more cumbersome, will be difficult to read (especially in text message form), and are unlikely to be meaningful to parents.

TTA also has concerns with including the specific, detailed security information as proposed. Security necessarily evolves and disclosures could, in a relatively short time, be outdated or risk exposing the data that companies seek to protect. We urge the FTC to avoid prescriptive notice requirements.

IV. Parental Consent

TTA strongly supports recognition of additional methods through which VPC can be obtained, but we would oppose expanding the types of activities for which VPC is required.

We support eliminating the need for a financial transaction where credit cards are used as a method of VPC and support the proposed two additional methods of VPC—knowledge-based authentication and use of facial recognition technology. We believe these changes will provide added flexibility for parents and increase the likelihood of obtaining VPC. The FTC has consistently recognized that flexibility is needed to balance privacy rights of children, and the interests of parents in controlling how their children’s data is collected and used, with legitimate business needs and operational simplicity to avoid undue burdens on them all. While the proposed amendments would explicitly recognize these new forms of VPC, the COPPA Rule should establish a procedure to recognize new forms of VPC while allowing operators the flexibility to choose among various methods that work best for them where robust VPC is needed. Technological advancements far outpace regulatory updates, and providing ways to protect children’s privacy through the broadest possible suite of effective and simple VPC options is critical. The FTC currently considers new forms of VPC through applications submitted by operators, and this type of mechanism should be retained.

While we support recognition of new VPC methods, we oppose the proposal that operators obtain separate consents for collection and disclosure to third parties, and likewise oppose the proposed restriction on the exception for multiple contacts that may prompt or encourage use of a website or online service. In most instances where collected information is shared (outside the parameters of the “support for the internal operations” exception), third-party sharing is an intended part of the collection process and should be described in the notice as part of the VPC

process. The changes proposed would increase the number of notices and associated consents that must be provided while creating an additional and unnecessary burden for both businesses and parents.

TTA also opposes the additional restrictions on the exception for multiple contacts because the line between appropriate personalization (including recommendations on available new content) and the proposed restrictions is unclear and appears to be inconsistent with the statute. While some types of “personalization” can be “targeted advertising,” many types are not, and blanket restrictions could unduly restrict protected speech. We have concerns with the proposed restriction on “nudging” as the language proposed is both unduly vague and overbroad. What communications would fall under the proposed restriction on “push” notifications? Is an in-game notice that a child completed a game level and can go to the next level a “nudging” technique? Is an in-game, email or text notice that a new game or feature is available restricted under the proposal? We encourage the FTC to maintain its current consent requirements that allow child-appropriate content to be flagged or communicated.

V. Security and Integrity

We support requiring operators to establish, implement, and maintain a comprehensive security program. However, there are certain aspects of the FTC’s proposed requirements that we oppose because they will be particularly burdensome for small businesses. Requiring small companies to create a written children’s personal information security program may be reasonable at a high level, but the level of required detail is unclear. Adding audit requirements, obligations to designate employees to coordinate the security program, and requiring written assurances from other operators, service providers, and third parties to whom the operator releases children’s personal information do not appear necessary. Companies with a general data security policy should not be required to create a special children’s data security policy.

Operators are already required to maintain robust data security practices, under both COPPA and other laws, and to periodically review the adequacy of those practices. An obligation to perform additional assessments on an annual basis would be unduly burdensome, especially if data management procedures have not changed. In addition, businesses with smaller staff may be less able to designate employees to coordinate a security program, as such coordination would likely be in addition to employees’ existing roles at the business. Finally, separate written assurances are not always possible to obtain from third-parties, and requiring these types of assurances, which are typically already covered by contractual obligations and compliance with other laws, would be unduly burdensome.

VI. Safe Harbors

TTA members are concerned that the proposed modifications to the provisions regarding safe harbor programs will undermine the safe harbor process. The Commission is statutorily obligated to recognize and promote safe harbor programs. The proposed modifications will set new requirements that could be unduly burdensome for safe harbor programs to maintain and may discourage the scope of participation that Congress expressly encouraged when enacting COPPA.

These programs are already subject to detailed procedural obligations, and the need for additional oversight and reporting obligations has not been established.

VII. Effective Date

TTA urges consideration of a change to the effective date to a minimum of one year after adoption of a final rule. The majority of our members are small companies, and it will be difficult for them to meet the currently proposed six-month deadline. Our members expended considerable resources to update internal procedures when the Rule was updated in 2013 at a cost in both financial expenditures and time that was not expected. Anticipated time and costs to comply with a revised COPPA Rule are impossible to estimate until draft Rule language is available, but it is certain to take far longer than six months for businesses to digest and understand the scope and impact of an updated Rule, implement new internal procedures and training, and update data security and privacy practices.

Conclusion

Protecting the privacy and security of consumer data, especially data obtained from children, is central to building consumer trust for toy companies. The toy industry supports strong consumer privacy and safety frameworks that create a national uniform approach. We agree that tweaks to the Rule will benefit parents, children, and businesses alike. Any changes should demonstrate that they balance enhancing children's privacy and fostering business innovation and investment in content geared to children as well as assuring a smooth consumer experience. We hope these comments will assist the FTC as it reviews the many important issues raised by the Commission's proposed amendments to the COPPA Rule.

Please contact Ed Desmond at edesmond@toyassociation.org or Owen Caine at ocaine@toyassociation.org if you would like additional information on our industry's perspective.

Sincerely,

A handwritten signature in blue ink that reads "Andy Keimach". The signature is fluid and cursive, with the first name "Andy" being particularly prominent.

Andy Keimach
Interim President & CEO

cc: Sheila A. Millar, Of Counsel