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Via Electronic Submission: privacyregulations@doj.ca.gov

California Department of Justice
ATTN: Privacy Regulations Coordinator
300 S. Spring St.
Los Angeles, CA 90013

Re: Comments on Proposed Regulations Under the CCPA

The Toy Association, Inc. (TTA), on behalf of its members, appreciates the Attorney General's effort to solicit input from stakeholders on the Proposed Text of the California Consumer Privacy Act Regulations (Proposed Regulations) implementing the California Consumer Privacy Act (CCPA) (Cal. Civ. Code §§ 1798.100–1798.199). By way of background, TTA represents more than 1,100 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.

The toy industry is deeply committed to privacy, security and product safety, and supports strong national standards to protect consumers. Our members not only create toys that are physically safe for children to play with, but also engage with children, as well as parents, online. Protecting children and maintaining the trust of parents are the most vital concerns for the toy industry. Likewise, we strongly believe that both safety and privacy should be governed by strong and effective preemptive national laws. Toy industry members are heavily regulated by an extensive set of preemptive laws, including the Children's Online Privacy Protection Act of 1998 (COPPA) (15 U.S.C. §§ 6501–6506), and a variety of product safety laws, such as the Consumer Product Safety Act (CPSA) (codified at 15 U.S.C. §§ 2051-2089) and Federal Hazardous Substances Act (FHSA) (15 U.S.C. §§ 1261-1278), as modified by the Consumer Product Safety Improvement Act (CPSIA). Thus, the toy industry is uniquely qualified to comment on consumer privacy and data security issues raised by these Proposed Regulations, including the important role of preemption, as envisioned by Congress when it enacted COPPA.

Our comments focus principally on inconsistencies between COPPA and the CCPA and Proposed Regulations, as well as the burdens the Proposed Regulations place on both businesses and parents. We do so with a view to offering constructive suggestions on how to align the Proposed Regulations with COPPA. We start with an analysis of the preemptive national framework established by COPPA. COPPA provides broader protections for children, including instances that do not constitute a "sale" under the CCPA. At the same time, as drafted, the Proposed Regulations include elements that are entirely inconsistent with the regulatory framework set forth in COPPA and thus are preempted. Key concerns are:

- CCPA definitions lack adequate clarity that only information collected with actual knowledge that it is from a child is covered. COPPA does not restrict the ability of parents to share their children's information.
- The Proposed Regulations do not account for new methods of verifiable parental consent that might be recognized by the Federal Trade Commission (FTC) under circumstances that may constitute a "sale" under the CCPA.
- As a result of restrictive definitions, the CCPA could restrict activities permitted under COPPA's "support for internal operations" exception.
- COPPA specifies that only parents can make requests to access, update and delete a child's personal information; there is no provision for requests to be made by an "authorized agent."
- Rules regarding access requests for household data could impermissibly violate COPPA.
- COPPA permits, and indeed requires, parents to deny access to children in instances where parental consent is needed and not provided.
- The proscriptive requirements for deleting information, and for receiving and responding to access requests, impose undue burdens on parents and are inconsistent with COPPA.

Finally, we also address considerations related to the opt-in system required for teens (age 13-15) under the CCPA, and offer some observations about the notice obligations outlined in the Proposed Regulations.

I. COPPA Preempts Inconsistent State Law, and the CCPA and Proposed Regulations Recognize Its Preemptive Effect

While many TTA members deal exclusively with parents and adult purchasers, a significant number of our members offer digital experiences directed, primarily or secondarily, to children under 13, so they are keenly aware of their obligations under COPPA. Thus, while our members are affected by the CCPA in all their operations, we highlight some important considerations with regard to the preemptive scheme for a comprehensive national children's privacy law established by Congress more than 20 years ago.

When it enacted COPPA in 1998, Congress recognized the importance of a uniform national preemptive regime governing children's privacy, stating:

> No State or local government may impose any liability for commercial activities or actions by operators in interstate or foreign commerce in connection with an activity or action described in this chapter that is inconsistent with the treatment of those activities or actions under this section.

See 15 U.S.C. §6502(d).

In balancing children's privacy rights with burdens on parents and the need to conduct business operations, Congress, and the FTC, have determined that a wide variety of activities do not require parental consent. For example, COPPA creates a harms-based framework for children's privacy that balances privacy risks to children under 13 for certain types of data collection and sharing with a recognition of business needs and consumer convenience through its definitions, exceptions, and "sliding scale" approach to parental consent. This has worked effectively over the years to safeguard children's privacy.

The CCPA, at §1798.145, recognizes the preemptive effect of some specific federal laws. For example, it confirms that the CCPA does not apply to collection of certain types of information covered by federal law, such as the Health Insurance Portability and [Availability] [sic] Act of 1996 (HIPAA), Gramm-Leach-Bliley, and the Drivers Privacy Protection Act of 1994. The CCPA does not expressly mention COPPA, but §1798.196 contains a general preemption section, stating:

> This title is intended to supplement federal and state law, if permissible, but shall not apply if such application is preempted by, or in conflict with, federal law or the California Constitution.

The Proposed Regulations appear to acknowledge COPPA's preemptive status, stating that the requirement for obtaining affirmative authorization from a child's parent or guardian for the "sale" of that child's personal information is "in addition to any verifiable parental consent required under [COPPA]." §999.330(a)(1). However, this single reference to COPPA and an attempt to specify in the Proposed Regulations that the CCPA obligations are "supplemental" do not cure potential conflicts with COPPA.

At the outset, it is worth noting that COPPA's protections for children's privacy are broader than those set forth in the CCPA. Under COPPA, for example, any "disclosure" of personal information either collected at a site directed to children or when an operator has actual knowledge that information was collected directly from a child under 13 – regardless of whether there was any exchange of "consideration" for that data - requires verifiable parental consent, unless an exception applies. The statute specifies that parental consent is required in two instances. First, is the "release of personal information collected from a child in identifiable form by an operator for any purpose, except where such information is provided to a person other than the operator who provides support for the internal operations of the website and does not disclose or use that information for any other purposes." Second, is "making personal information collected from a child by a website or online service directed to children or with actual knowledge that such information was collected from a child, publicly available in identifiable form, by any means including by a public posting." 15 U.S.C. § 6501(4).

Even absent an exchange of consideration that would constitute a "sale" as defined by the CCPA, allowing a child to disclose his or her personal information, including by posting selfies or videos, requires verifiable parental consent under COPPA if the information is collected directly from a child. In each case, consent is only required where the information is collected directly from the child, as the statute makes clear. COPPA fully permits parents to post pictures, videos and other information about their children online, including in social media.

Although verifiable parental consent requirements under the CCPA are narrowly focused on a "sale" of personal information with actual knowledge that it was collected from a child under 13, in practice, the CCPA's broad definitions of "personal information" and "sale" pose potential inconsistencies with COPPA. The CCPA's apparent requirement that a business obtain parental consent any time a business engages in the "sale" of "personal information," for example, may conflict with COPPA's exception that permits collection and use of certain information solely to support internal operations. Those arrangements typically do involve a service provider relationship, but that is not a necessary predicate to application of the COPPA exception under the COPPA Rule. Likewise, children may publicly post an "alias" to track and compare game scores anonymously with other users without violating COPPA. Indeed, this is deemed to offer a privacy-safe experience to children that allows them to engage in social interactions without exchanging any "personal" information as defined by COPPA. Because the Proposed Regulations do not address these definitions and inconsistencies, they fail to resolve the tensions between CCPA and the preemptive COPPA regime.

a. Proposed § 999.330 Conflicts with COPPA

The CCPA defines "personal information" at Section 1798.140(o)(1) to include a broad variety of data generally, including data traditionally considered to be anonymous, such as an alias, or an Internet Protocol (IP) address, as well as browsing history. It also includes "household information." Section 1798.140(o)(2) excludes from the broad definition of "personal information" only "publicly available" information. Importantly, and as noted above, COPPA applies only to personal information defined in the statute and COPPA Rule *collected directly from children*, either at a child-directed site or service or where the operator has actual knowledge that it collected personal information from a child under 13. Operators can freely collect and maintain the personal information of children provided by parents or other adults. This happens, for example, when parents, grandparents or others sign up for a gift registry or ask toy brands or retailers for recommendations on age-appropriate toys and games. COPPA imposes no restrictions or obligations in these circumstances.

Section 1798.120(b) of the CCPA implies, similar to COPPA, that the prohibition on a "sale" of personal information of children is linked to instances *where the business has collected the information directly from a child known to be under 13*. The proposed regulations at Section 999.330, however, state that "[a] business that has actual knowledge that it collects or maintains the personal information of children under the age of 13 shall establish, document, and comply with a reasonable method for determining that the person affirmatively authorizing the sale of the personal information about the child is the parent or guardian of that child." As drafted, the Proposed Regulation implies a broader restriction that does not square with either the CCPA or COPPA. Any attempted prohibition that would restrict the ability of businesses to freely interface with parents or adults, including obtaining from them information about their children, is inconsistent with and thus preempted by COPPA. A relatively simple solution exists to avoid this conflict: substitute "personal information of children under the age of 13" with "personal information collected from children under 13 with actual knowledge that they are under 13."

Even if that potential inconsistency is resolved as recommended above, the Proposed Regulations present another potential conflict with regard to the enumerated verifiable parental consent methods. The proposed rule at Section 999.330(a)(2) does outline methods recognized under the COPPA Rule as reasonably designed to assure that the individual providing consent is the child's parent or guardian. However, there is one missing element: the COPPA Rule allows authorized safe harbor organizations to approve alternative parental consent mechanisms not enumerated in the Rule. *See* 16 C.F.R. § 312.5(b)(3). To avoid inconsistency, the Proposed Regulations should be modified to automatically recognize other methods recognized by the FTC or by authorized COPPA safe harbor organizations under the process outlined in the COPPA Rule.

b. Allowing Consumer Requests through Authorized Agents Conflict with COPPA

Under the CCPA and Proposed Regulations, a business must honor consumers' requests to access, delete, or opt-out of the "sale" of their personal information made through a properly designated "authorized agent." In contrast, requests to access and delete children's information under COPPA must be submitted by the parent, and the operator must take steps to verify that the requestor *is actually the parent*. This is a direct conflict between COPPA and the CCPA, and the Proposed Regulations do not resolve this conflict.

While the parental authorization process at Section 999.330 does require reasonable steps to determine that the person authorizing a "sale" of personal information is the parent, the Proposed Regulations fail to clarify that under federal law, when it comes to accessing data obtained from children under 13, *a business may only honor requests by a verified parent or guardian.* COPPA makes no accommodation for requests from "authorized agents." The Proposed Regulations further add to the inconsistency with COPPA by requiring that a business receiving an opt-in request from a parent provide the parent notice of the right to opt-out at a later time, as provided under Section 999.315. That section, in turn, specifically allows for such requests to be made by an authorized agent. Additionally, the process for parents to opt-in to sale of a child's information is at odds with the provisions at Section 999.326 which allow an authorized agent to make access or deletion requests. Again, these provisions are inconsistent with COPPA.

Furthermore, the provisions in the Proposed Regulations outlining businesses' duties to respond to requests to know and requests to delete refer to potential conflicts with federal law as a reason to deny a request only as they relate to the requests to know. To clarify the preemptive status of COPPA, and reduce businesses' and consumers' potential confusion regarding their obligations and rights under the CCPA, TTA recommends that the Attorney General revise the Proposed Regulations to specify that all requests to know, delete, and opt into and out of the "sale" of "personal information" as they relate to children under age 13, may only be made directly by a verified parent or guardian, and that an "authorized agent" many not make such requests on behalf of either a child under 13 or a parent of such a child.

c. Right to Request to Know or Delete "Household" Data Conflicts with COPPA

The CCPA instructs the Attorney General to draft regulations to establish rules and procedures for requests pertaining to household information. The Proposed Regulations define a "household" as "a person or group of people occupying a single dwelling." §999.301(h). The Proposed Regulations appear to require businesses to honor requests to know or delete household information if the consumer making the request has a password protected account with the business. Absent a password-protected account, a business may provide aggregate household information, unless all members of the household make the request and the business can individually verify the identity of all members of the household.

These provisions create a potential conflict with COPPA when the household includes children under the age of 13. Where an operator has obtained verifiable parental consent as required under COPPA, the operator likely has "household" information. As noted above, however, if information was collected from a child under 13, the operator must ensure that the requestor is a parent of that child, taking into account available technology, before honoring requests pertaining to the child's information. Under the Proposed Regulations, a consumer with a password-protected account with the business may be able to access a child's information, even if that individual is not that child's parent or guardian. TTA therefore recommends that the Proposed Regulations be revised to clarify that, if a business has household information because initially data was collected from a child under 13, only verified parents or guardians may obtain household information that includes the child's personal information.

d. Non-discrimination Provisions Conflict with Operator Duties under COPPA

Section 1798.125 of the CCPA prohibits discrimination against a consumer who exercises any of the rights set forth in the Act, including "denying goods or services to the consumer," but allows businesses to provide financial incentives to consumers who consent to the collection and sale of their personal information, as long as the incentives are reasonable related to the value of the information.

The Proposed Regulations include detailed rules relating to calculating the value of consumer personal information and disclosures relating to the offering of financial incentives.

These provisions conflict with COPPA. COPPA acknowledges that an operator may terminate a child's access to services if a parent refuses or withdraws consent. 16 C.F.R.§312.6(c). In fact, if services involve, *e.g.*, public disclosure of information, like posting videos or photos, operators subject to COPPA must prohibit the child from accessing the service or feature until parental consent is obtained. To the extent a denial or termination of service to a child could be considered discriminatory under CCPA under these circumstances, it entirely conflicts with COPPA. TTA requests that the Attorney General amend the Proposed Regulations to clarify that a business may deny a child under the age of 13 access to certain services requiring parental consent where the parent does not provide consent under COPPA, and that such denial of service shall not be considered a discriminatory practice under the CCPA.

Finally, we also recommend that the Proposed Regulations clarify that utilization of a credit card with a transaction as a method of verifiable parental consent does not constitute offering a financial incentive under the CCPA.

e. The Proposed Regulations Unnecessarily Increase the Burden on Parents

COPPA requires operators to avoid undue burdens to parents. The Proposed Regulations, in contrast, burden parents as well as businesses. Requests to delete information must involve a two-step process, as do requests to opt-in again to sale of personal information once a parent has opted out. These two-step processes conflict with COPPA's mandate to avoid burdening parents.

The Proposed Regulations set forth proscriptive requirements for businesses to receive and respond to access and deletion requests. A business must provide two or more methods for submitting requests (three if the business primarily interacts with customers in person at a retail location). § 999.312. These methods include at a minimum a toll-free number and a website if the business operates a website or mobile app; businesses may also allow requests to be submitted via email, via an in-person form or a mail-in form. These obligations are inconsistent with and preempted by COPPA, which allows an operator to elect a single method which parents must use to submit a request to access or delete their child's information.

II. Teen Privacy

The Proposed Regulations impose an obligation on a business to obtain "affirmative authorization" before collecting or maintaining any personal information from consumers aged 13-15 that it intends to "sell." The broad definition raises practical considerations. For example, suppose that an online service allows a 13 or 15-year-old to enter a sweepstakes by voluntarily filling out a form, and asks if the registrant would like to receive offers and updates from the third-party company furnishing the prize. This could potentially be deemed to constitute a "sale" under the CCPA. Section 1798.140(t)(2)(A) of the CCPA creates an exception for instances where a consumer uses or directs the business to intentionally disclose the personal information or uses the business to intentionally interact with the third-party, but the inartful wording of the statutory and rule language creates questions about whether this exemption applies where teens are concerned. If this exception does not apply, the Proposed Regulations require that the business must "clearly request" an "opt-in" for "selling" the information and then also ask the teen to "separately confirm their choice to opt-in." The act of filling

out a form and checking a box should adequately serve as the affirmative authorization to use the email for the purpose specified and to share it with a third-party.

III. Notices

The detailed requirements for the content of privacy notices outlined in the Proposed Regulations are burdensome for businesses and will likely make it more difficult for consumers to find the information they need. Notably, the Proposed Regulations outline 18 specific items or practices that must be disclosed in a CCPA privacy policy (some of which are redundant). The tension between offering user-friendly privacy polies and prescriptive, specific disclosure obligations is evident in these requirements.

Conclusion

The toy industry is second to none in its support for strong national consumer privacy and safety frameworks. We hope this submittal will assist the Attorney General as it finalizes the regulations under the CCPA. Please contact Ed Desmond at edesmond@toyassociation.org or Jennifer Gibbons at jgibbons@toyassociation.org if you would like additional information on our industry's perspective.

Sincerely,

Steve Pasierb
President & CEO

cc: Sheila A. Millar, Of Counsel