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FTC SEEKS COMMENTS ON PROPOSED REVISIONS TO CHILDREN'S ONLINE PRIVACY PROTECTION RULE

The Federal Trade Commission (FTC) is seeking public comments on proposed amendments to the Children's Online Privacy Protection Rule (the Rule), which gives parents control over what personal information websites may collect from children under 13 years of age.

Specifically, the Rule imposes certain requirements on operators of websites or online services directed to children under 13 years of age and operators of websites or online services that have actual knowledge that they are collecting personal information online from children under 13 years of age (collectively, operators). Among other items, the Rule requires that operators provide notice to parents and obtain their verifiable consent prior to collecting, using, or disclosing personal information from children under 13 years of age.

The proposed amendments are intended to respond to recent changes in online technology, including in the mobile marketplace, and focus on the following five areas:

- 1) definitions (including the definitions of "personal information" and "collection");
- 2) parental notice;
- 3) parental consent mechanisms;
- 4) confidentiality and security of children's personal information; and
- 5) the role of the self-regulatory safe harbor program.

DEFINITIONS

Personal Information

The Rule requires that operators obtain parental consent before collecting "personal information" from children under 13. "Personal information" is currently defined as any individually identifiable information about an individual collected online, including first and last name, physical address, email address, and telephone number.

The FTC seeks to update the definition to include geolocation information (if it provides information equivalent to a physical address) and certain types of persistent identifiers used for functions other than the website's internal operations, such as tracking cookies used for behavioral advertising. The definition would also include a photograph, video or audio file that contains the child's image or voice. Notably, the FTC declined to include date of birth, gender or zip code in the definition of "personal information," but is seeking input on whether the combination of these three items provides sufficient information to identify a specific individual.

Collection

The FTC seeks to modify the definition of "collection" so that it would allow children to participate in interactive communities without parental consent, provided that the operator takes "reasonable measures"

THE BOTTOM LINE

The FTC's amendments to the Children's Online Privacy Protection Rule will likely have a significant impact on the way operators collect personal information from children and provide parental notice and obtain parental consent. We strongly recommend following the development of the proposed amendments to determine how they may impact your online practices.

to delete all or virtually all of the child's personal information from a child's postings before it is made public.

PARENTAL NOTICE

The FTC's amendments seek to streamline and clarify the direct notice that operators must provide to parents before collecting children's personal information. Specifically, the FTC proposes reorganizing and standardizing the direct notice requirement by setting forth the precise items of information that must be disclosed (i.e., items of personal information already obtained from the child, the purpose of the notification, the action the parent must

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take and what use the operator will make of the personal information collected). The direct notice must also include a hyperlink to the operator's privacy policy.

PARENTAL CONSENT MECHANISMS

The FTC proposes adding new methods to obtain verifiable parental consent. These new methods include electronic scans of signed parental consent forms, video-conferencing and the use of a government issued identification checked against a database (provided that the parent's ID is deleted promptly after verification).

The FTC also proposes eliminating the "email plus" method of parental consent, which is available to operators who obtain information for internal use only. Under the "email plus" method, an operator can obtain parental consent via email, provided that the operator sends another delayed email confirmation to the parent. The FTC believes that the "email plus" method is inherently unreliable in providing verifiable parental consent, given that operators have no real way of determining whether the email address provided by a child is that of the parent, and there is no requirement that the parent's email response to the operator contain any additional information providing assurance that it is from the parent.

The FTC is continuing to request new methods of verifiable parental consent via a 180 day notice and comment process where interested parties can voluntarily seek FTC approval of a particular consent mechanism.

CONFIDENTIALITY AND SECURITY REQUIREMENTS

The FTC proposes strengthening the Rule's current confidentiality and security requirements. Specifically, the FTC proposes adding a requirement that operators:

- 1) ensure that any service providers or third-parties to whom they disclose a child's personal information have in place reasonable security procedures to protect it;
- 2) retain the information for only as long as reasonably necessary; and
- 3) properly delete such information by taking reasonable measures to protect against unauthorized access to or use of the information in connection with its deletion.

SAFE HARBOR

The FTC proposes strengthening its oversight of its self-regulatory "safe harbor programs" by requiring members to at least report periodically to the FTC the results of its audits.

OTHER NOTABLE ITEMS

The FTC declined to:

- >> Expand the definition of "child" to include teenagers, noting that such a change would raise a number of constitutional and practical issues.
- >> Amend the "actual knowledge" standard, explaining that operators of general audience websites are not required to investigate the ages of their users but, if they ask for and collect information establishing that a user is under 13, the Rule applies.

- >> Further define "online services." According to the FTC, mobile applications that allow children to play network-connected games, engage in social networking activities, purchase goods and services online, receive behaviorally targeted ads or interact with other content or services, are considered "online services" currently covered by the Rule. Likewise, Internet-enabled gaming platforms, voice-over-Internet protocol services, and Internet-enabled location based services are also "online services" currently covered by the Rule. For now, the FTC declined to make a determination as to whether short message services (SMS) and multimedia messaging services (MMS) are "online services," electing to further investigate the issue.

The deadline for written comments is November 28, 2011.

FOR MORE INFORMATION

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