

October 11, 2019

April Tabor

Federal Trade Commission

Office of the Secretary

600 Pennsylvania Avenue NW

Suite CC-5610 (Annex C)

Washington, DC 20580

RE: Request for Public Comment on the Federal Trade Commission's Implementation of the Children's Online Privacy Protection Act Rule

Dear Acting Secretary Tabor,

The Information Technology & Innovation Foundation (ITIF) is pleased to submit these comments in response to the request for comment (RFC) from the Federal Trade Commission (FTC) on its implementation of the Children's Online Privacy Protection Act (COPPA).¹ ITIF is a nonprofit, non-partisan public policy think tank committed to articulating and advancing a pro-productivity, pro-innovation and pro-technology public policy agenda internationally, in Washington, and in the states. Through its research, policy proposals, and commentary, ITIF is working to advance and support public policies that boost innovation, e-transformation, and productivity.

The purpose of COPPA is to protect the privacy and safety of children under the age of 13 online.² The FTC has pursued this goal by creating rules intended to increase parental involvement and control of a child's online activities as well as protect the privacy of personally identifiable information about children online. This rule created requirements for operators of websites or online services (such as apps) directed to children under 13 years of age, and on operators of other websites or online services that have actual knowledge that they are collecting personal information online from a child under 13 years of age. These requirements include providing notice to parents and obtaining verifiable parental consent prior to collecting, using, or

¹ Federal Trade Commission, "Request for Public Comment on the Federal Trade Commission's Implementation of the Children's Online Privacy Protection Rule" (Federal Register, July 25, 2019), accessed October 2, 2019, <https://www.regulations.gov/document?D=FTC-2019-0054-0001>.

² 16 CFR part 312.

disclosing personal information from children, data minimization restrictions, and requirements to keep information from children secure.³

Much has changed in the digital products and services world since the FTC last conducted its mandatory review of COPPA in 2010, which culminated in amendments to its rules in 2013.⁴ For example, the policymakers that enacted COPPA could not have considered “smart” dolls, smart home devices for kids, messaging tools for children, or many of the varied educational apps available today. The number of apps in the two largest app stores has increased significantly since that time. The Apple App Store went from 900,000 apps in June 2013, to 2,200,000 by February 2019, and the Google Play Store saw similar increases from 1,000,000 apps in July 2013, to 2,700,000 in June 2019.⁵ Some of these apps are beneficial to children’s learning and development. For example, a 2016 study published in *Developmental Science*, a journal covering developmental psychology, demonstrated that infants learn social and cognitive skills through video chatting.⁶

Unfortunately, some advocates and policymakers often see the advent of new technologies and services available to children as a threat to them and have reacted by taking steps that end up limiting children’s access to technology. For example, after the 2018 release of Facebook’s child messaging app, Messenger Kids, several organizations and lawmakers joined together to call for the company to take down the app, arguing all social media use harms children.⁷ Advocacy groups have launched similar initiatives against other innovative products and services for children, such as Amazon’s smart speaker for children and smart dolls.⁸ As a result,

³ 16 CFR part 312.

⁴ See 78 FR 3972 (Jan. 17, 2013).

⁵ Sam Costello, “How Many Apps Are In the App Store” *LifeWire*, June 2019, accessed October 3, 2019, <https://www.lifewire.com/how-many-apps-in-app-store-2000252>; J. Clement, “Number of available applications in the Google Play Store from December 2009 to June 2019” *Statista*, July 3, 2019, accessed October 3, 2019, <https://www.statista.com/statistics/266210/number-of-available-applications-in-the-google-play-store/>.

⁶ Lauren Myers et al, “Baby FaceTime: Can Toddlers Learn from Online Video Chat?” *Developmental Science*, Vol. 20, Iss. 4, July 2017, accessed October 1, 2019, accessed on Wiley Online Library, <https://onlinelibrary.wiley.com/doi/abs/10.1111/desc.12430>.

⁷ Michael McLaughlin and Daniel Castro, “The Campaign for An Innovation-Free Childhood” *Information Technology and Innovation Foundation*, March 2018, accessed October 1, 2019, <https://itif.org/publications/2018/03/07/campaign-innovation-free-childhood>.

⁸ “Echo Dot Kids Edition Violates COPPA,” *Echo Kids Privacy*, accessed October 3, 2019, <https://www.echokidsprivacy.com>; Ephrat Livni, “Watchdogs say that what your child tells a “smart” doll is being

policymakers have moved the goal of COPPA from improving child safety into fundamentally limiting children's access to many types of online services. For example, some advocates and policymakers have recently called for banning all targeted advertisements for children—a step far beyond the original premise of the bill.⁹ Unfortunately, the FTC has joined some of these reactionary and discriminatory movements. For example, after the FTC settlement with Google and YouTube for alleged COPPA violations, the company stopped serving targeted advertising on children's content entirely, which could result in less revenue for content creators on the platform and worse content for kids.¹⁰ As such, conversations about COPPA tend to focus on how to strengthen the regulations, rather than asking whether the rules are striking the right balance between protecting children and enabling innovation. ITIF recommends the FTC conduct a careful analysis of how COPPA can be structured for its original purpose while enabling an increase in the quality and quantity of websites and online services for children.

As described in this filing, the COPPA restrictions on the collection and use of information about children have discouraged the development of ad-supported digital products and services for children. COPPA has no provisions to protect and encourage innovation across different business models, and the result has been a tightening of the regulations over time that have likely had a deleterious effect on the market for ad-supported children's products and services. Rather than impose additional rules on the websites, device makers, and app developers that could create products for children, the FTC should explore ways to lessen the regulatory burden of COPPA so as to foster more development of child-directed websites and online services using market-friendly methods. In particular, the FTC should recognize that the purpose of COPPA was not to limit advertising, and by limiting targeted ads with its strict rules on data collection, COPPA has made it difficult for companies to successfully monetize products and services directed at children. As a result, there are fewer high-quality ad-supported websites and online services for children, a situation which hurts low-income families the most because they may not be able to pay for alternatives.

recorded and monitored" *QZ*, December 11, 2016, accessed October 3, 2019, <https://qz.com/858376/watchdogs-say-that-what-your-child-tells-a-smart-doll-is-being-recorded-and-monitored/>.

⁹ Senator Edward Markey, "Senator Markey Blasts FTC YouTube Children's Privacy Settlement: FTC Stands for 'Forgetting Teens and Children,'" Senate, press release, September 4, 2019, accessed October 3, 2019, <https://www.markey.senate.gov/news/press-releases/senator-markey-blasts-ftc-youtube-childrens-privacy-settlement-ftc-stands-for-forgetting-teens-and-children>.

¹⁰ Susan Wojcicki, "An Update on Kids and Data Protection on YouTube" *YouTube*, September 4, 2019, accessed October 3, 2019, <https://youtube.googleblog.com/2019/09/an-update-on-kids.html>.

COPPA REGULATIONS ARE INEFFECTIVE AND INEFFICIENT AT PROTECTING CHILDREN ON THE INTERNET

While the purpose of COPPA is to protect children online, it is not clear how well the legislation (or its subsequent rule changes) has achieved this goal. The data handling practices required by COPPA do not apply to websites or online services that do not know whether an individual is under the age of 13 or that are not designed for this age group. As a result, most websites and online services directed at a general audience either do not inquire about the age of their users (and consequently do not need to implement the COPPA protections for young children) or state that children under the age of 13 are not allowed to use their website or service. Some websites and online services will block children under the age of 13 from their website using age verification. However, age verification is often trivial to circumvent. For example, a website or mobile app may use a form that asks the users to submit their age or year of birth that younger children can easily bypass by giving false information. In fact, there have been multiple reports that document the routine nature by which children circumvent current age verification technologies to use websites and online services like Facebook and Skype which are officially only available for individuals age 13 and over. For example, the social media website TikTok deleted a plethora of accounts in February 2019 because users had lied about their age.¹¹ Some children even access these websites and online services, in violation of the official terms of service, with the consent of their parents.¹²

In addition to being inefficient, COPPA regulations fall short in regard to protecting child safety. Congress introduced and passed COPPA in the midst of public concern about the ease with which child predators might obtain the names and addresses of children. However, while COPPA regulations prevent websites from collecting and selling personally identifiable information about children under the age of 13 without parental consent; in practice, this likely offers limited protection for the safety of children. There are many loopholes in COPPA that allow many online platforms, applications, and websites to avoid compliance. For example, COPPA exempts many websites and online services from its rules, such as those operated by non-profit organizations or entities otherwise exempt from the FTC Act.¹³ Moreover, COPPA does not apply to information about children that is collected online from adults, such as parents or friends. These loopholes are often exploited by bad actors to gather children's information. Certainly, all major app stores require apps to

¹¹ Dami Lee, "TikTok Users over 13 are Having their Accounts Deleted After Putting in the Wrong Birthdays" *The Verge*, February 28, 2019, accessed October 1, 2019, <https://www.theverge.com/2019/2/28/18245011/tiktok-age-coppa-child-privacy-accounts-deleted-ftc-requirement>.

¹² ITIF knows one 12-year-old who has created a false "adult" identity to access a messaging app in order to communicate with her father while he is overseas, in violation of the app's terms of service (the app is for users 16 and older).

¹³ 16 CFR part 312.2.

be compliant with COPPA through their terms of services, enforcing them on entities not originally covered by the law or even creating rules that go beyond their requirements. For example, in June 2019, Apple updated its rules for child-directed apps, essentially prohibiting any third-party ads and stopping data transmission to third parties.¹⁴

There are also potentially significant compliance issues with the current COPPA rule, as many websites and online services may not understand their responsibilities and do not properly configure their services to prevent third-party tracking or collect parental consent prior to that tracking. One 2018 automated analysis of 5,855 popular free children’s apps found that the majority engaged in behavior that could potentially run them afoul of COPPA by utilizing third-party software development kits (SDKs).¹⁵ While SDKs can be configured to be COPPA compliant, such as by disabling tracking, the authors suggest a majority of the apps using these kits likely do not use these options or incorrectly propagate them.¹⁶ Certainly, this study was an automated analysis that looked at probability of noncompliance, and may not accurately reflect the scope of the problem.

To be clear, ITIF is not arguing that COPPA should be changed to allow child-directed websites and online services to sell the personally identifiable information of children—marketing should not trump child safety. But COPPA, regardless of its admirable intent, should not be exempt from a critical evaluation, particularly when it comes to the potential negative effect of the law on the availability of high-quality children’s digital content and services. Moreover, it is unclear if government regulations are more effective than market forces, including self-regulation, at protecting children’s privacy and safety. Various industry-backed groups review child-directed sites for privacy and safety concerns, and issue seals of approval that enable parents to differentiate between business practices. In addition, non-profit organizations such as Parent’s Choice rate and review websites and online services for children. Finally, many of the most popular sites for children go far beyond the COPPA rules to employ strong controls to protect the privacy and safety of its users, such as by using active site moderators and automated technologies to prevent and reduce harassment. And most large digital platforms have their own rules for the types of acceptable content that can be directed at children.

¹⁴ “Updates to the App Store Review Guidelines,” *Apple Developer*, June 3, 2019, accessed October 4, 2019, <https://developer.apple.com/news/?id=06032019j>.

¹⁵ Irwin Reyes et al., “‘Won’t Somebody Think of the Children?’ Examining COPPA Compliance at Scale” Proceedings on Privacy Enhancing Technologies, (3), 2018, accessed on Berkeley, 63-83, <https://blues.cs.berkeley.edu/wp-content/uploads/2018/04/popets-2018-0021.pdf>.

¹⁶ *Ibid.*

Therefore, ITIF believes that it is worth opening an inquiry into whether COPPA-backed regulations are the most effective method of protecting children online and promoting overall child welfare, including children's ability to be able to have access to high-quality and beneficial digital products and services.

COPPA HAS STIFLED THE GROWTH OF INNOVATIVE, CHILD-DIRECTED WEBSITES AND ONLINE SERVICES

Although COPPA is supposed to protect children's privacy "in a manner that preserves the interactivity of children's experience on the Internet and preserves children's access to information in this rich and valuable medium," the rules propagated under COPPA appear to have blocked the development of more and better quality websites and online services for children. This is likely due, at least in part, to the COPPA rules which require websites and online services directed at children to develop processes to allow parents to review and delete information collected about their children and obtain verifiable parental consent for users under the age of 13.¹⁷ The reality is that information has value, but children, unlike adults, are not able to unlock this value on the Internet because this type of exchange is explicitly prohibited by the COPPA Rule. For example, under COPPA a website may not "condition a child's participation in a game, the offering of a prize, or another activity on the child disclosing more personal information than is reasonably necessary to participate in such activity."¹⁸ Whereas a website or app directed at the general public is allowed to offer free access in exchange for an email address and basic demographic information, the same is not true for those directed at children. Much of this information is innocuous, such as the grade level or interests (e.g., music, art, sports) of a child.

This regulatory environment has likely had a negative impact on the quality and quantity of websites and online services available to children by increasing compliance costs and discouraging investment.¹⁹ For example, in the more than 19 years since COPPA went into effect, there has been no website or service developed for children that approaches the level of popularity, quality, or sophistication of a general audience site like Facebook or Google. Moreover, even a cursory review of the websites available to children show that these sites have limited content, uninspiring design, and poor pedagogical tools. It is almost as if young children have been largely bypassed by the Internet revolution of the past two decades.

¹⁷ 16 CFR part 312.

¹⁸ See "§ 312.7 Prohibition against conditioning a child's participation on collection of personal information," in Title 16: Commercial Practices, Part 312—Children's Online Privacy Protection Rule, 15 U.S.C. 6501–6508, 64 FR 59911, Nov. 3, 1999.

¹⁹ Daniel Castro, "In the matter of proposed modifications to the Children's Online Privacy Protection Rule" (Information Technology and Innovation Foundation, September 2012), comments to the Federal Trade Commission, <http://www2.itif.org/2012-ftc-coppa-filing.pdf>.

The differences can also be seen in the business models of general audience website versus those directed at children. Internet advertising has been the dynamo powering the Internet’s rapid growth. Online advertising supports the creation and maintenance of online content, applications, and services—including news, videos, music, games, social networking, reference, email and other online services. Indeed, many of the websites and online services that millions of Americans use daily for work and play would not be around today without online advertising. In fact, of the top five most popular websites in the United States—Google, Facebook, Amazon, Yahoo, and YouTube—four use online advertising almost exclusively to support their products and services.²⁰

In contrast, the business model for many of the popular websites directed at children under the age of 13 are often different, such as by charging fees or promoting a particular brand (e.g. Nickelodeon). Advertising to children is not necessarily a problem. For example, parents do not appear to be averse to allowing their children use apps with advertising. Indeed, a 2019 study of 135 children’s apps found 95 percent had at least one type of advertising.²¹ Instead, the greater concern is usually about the content of the advertising. For example, parents might be concerned about ads directed at children that promote unhealthy foods or behaviors, or about ads that contain deceptive or misleading claims or include content that is inappropriate for children. In this regard, it does not matter if an ad is targeted at a particular group of children. And in fact the restrictions on data collection have led some sites to use more in-content advertising—where marketing for products is integrated directly into the content of videos or games—which children may be unable to distinguish from ad-free content. For example, the FTC recently received a complaint about Kids YouTube channel *Ryan ToysReview*, which allegedly promoted sponsored products without disclosing the sponsorship.²²

The FTC has the ability to turn around some of this damage to the children’s digital ecosystem. Because targeted advertising supports most of the websites and online services responsible for free and low-cost

²⁰ “Rank” *SimilarWeb*, August 1, 2019, accessed October 1, 2019, <https://www.similarweb.com/top-websites/united-states>.

²¹ Marisa Meyer et al., “Advertising in Young Children’s Apps: A Content Analysis” *J Dev Behav Pediatr.*, 2019 Jan;40(1), 32-39, doi: 10.1097/DBP.0000000000000622, accessed on National Institutes of Health database, <https://www.ncbi.nlm.nih.gov/pubmed/30371646>.

²² Laura Smith and Bonnie Patten, “Ryan ToyReview’s Deceptive Native Advertising” (Truth in Advertising, August 2019), letter to Federal Trade Commission, accessed October 3, 2019, https://www.truthinadvertising.org/wp-content/uploads/2019/08/8_28_19-ltr-to-FTC-re-Ryan-ToysReview_Redacted.pdf.

content online, with reduced access to the information of their users, websites and online services will have a reduced ability to determine what ads their users would be most interested in without the cues that better targeting enables (in contrast to some special-interest sites which can do so somewhat more easily). This hurts educational sites for children, which lose out on needed revenue, and reduced welfare for families consuming educational materials, not only because there is less high quality content available (the subscription market does not provide enough support) but also because many websites and online services are not available at zero cost. If the FTC does not turn back some of the restrictive barriers it placed on data collection practices in its 2013 updated rules, or moves to make them even more stringent, it will likely further reduce access to high-quality content and services available to children online especially for free or at a low cost—hindering future development of Internet-content services for children and furthering the digital divide.²³

²³ Castro, “In the matter of proposed modifications to the Children’s Online Privacy Protection Rule.”

CONCLUSION

The goal of COPPA is to protect children’s safety and privacy online, not to stop them from accessing beneficial products and services. Given that the current COPPA Rule has had, and will likely continue to have, a negative impact on the Internet experience for children, the FTC should recalibrate its current effort. Policymakers should carefully consider how they can structure privacy and safety rules that still encourage responsible collection and use of personally identifiable information about children for legitimate purposes. For example, the FTC should make it easier for websites and online services directed at children to use targeted advertising, but maintain strict limits preventing websites and online services from selling data about children for illegitimate purposes.

The COPPA rulemaking actions should focus not only on the impact of rules on children’s online privacy, but also on the consequences of these rules on the availability of high-quality and free content and services online for children. Moreover, stricter rules on what personal information can be collected about children and who is allowed to collect this information would not benefit children. If policymakers and parents want more high-quality, low-cost (or free) websites and online services, including significantly higher quality educational content for children, then they should be pushing for rules that enable more targeted advertising.

Sincerely,

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