

Federal Trade Commission
Supporting Statement for Proposed Amendments
in Supplemental Notice of Proposed Rulemaking to
the Children’s Online Privacy Protection Rule
16 C.F.R. Part 312
(OMB Control No. 3084-0117)

(1) Necessity for Collecting the Information

The Children’s Online Privacy Protection Act (“COPPA” or “Act”), 15 U.S.C. § 6501 *et seq.*, prohibits unfair and deceptive acts and practices in connection with the collection and use of personally identifiable information from and about children¹ on the Internet. The underlying goals of the Act are to: (1) enhance parental involvement in children’s online activities in order to protect the privacy of children in the online environment; (2) limit the collection of personal information from children without parental consent; (3) help protect the safety of children in online fora such as chat rooms, home pages, and pen-pal services in which children may make public postings of identifying information; and (4) maintain the security of children’s personal information collected online. *See* 144 Cong. Rec. S11657 (Oct. 7, 1998) (statement of Sen. Bryan).

The COPPA Rule (“Rule”), 16 C.F.R. Part 312, imposes requirements on operators of websites or online services directed to children under 13 years of age or that have actual knowledge that they are collecting personal information online from children of such age. Among other things, the Rule:

- (1) requires operators to provide notice to parents of the specific types of personal information sought to be collected from children and their uses (Section 312.3);
- (2) specifies the placement and content of the required online notice and describes the contents of the direct notice to parents (Section 312.4);
- (3) requires operators to obtain “verifiable parental consent” prior to collecting, using, or disclosing children’s personal information (Section 312.5);
- (4) requires operators to provide reasonable means to enable a parent to review the information (Section 312.6);
- (5) requires operators to establish procedures that protect the confidentiality, security, and integrity of personal information collected from children (Section 312.8).

In addition to the disclosure requirements imposed on covered operators, the Rule contains reporting requirements for entities voluntarily seeking approval as a COPPA safe harbor self-regulatory program (Section 312.10).

The Rule’s requirements are necessary because they expressly implement the Act’s requirements and goals.

¹ A “child” is defined under the Act as an individual under 13 years of age. 15 U.S.C. 6501(2).

The amendments proposed in the Commission’s Supplemental Notice of Proposed Rulemaking (“supplemental NPRM”)² would, among other things:

- (1) modify the definitions of “operator” and “website or online service directed to children,” potentially increasing the number of operators subject to the Rule;
- (2) modify the definitions of “personal information” and “support for internal operations,” potentially offsetting the burdens imposed by the proposed definitions of “operator” and “website or online service directed to children,” by decreasing certain operators’ recordkeeping, reporting, disclosure or other compliance requirements; and,
- (3) modify the definition of “screen or user name” to cover situations where a screen or user name functions in the same manner as online contact information.

The objectives of the proposed amendments are to modernize the Rule to ensure that children’s online privacy continues to be protected, as directed by Congress, as new online technologies evolve, and to clarify existing obligations for operators under the Rule. COPPA provides the authority for the amendments proposed.

(2) Use of the Information

The proposed amendments to the definitions of “operator” and “website or online service directed to children” in Section 312.2 would better insure that parents are provided notice of when a website or service wants to collect children’s personal information in instances where a child-directed site or service chooses to integrate into its property other services that collect visitors’ personal information. For example, the proposed change to the definition of “operator” would clarify that child-directed websites that do not collect personal information from users, but employ downloadable software plug-ins or permit third-parties, such as advertising networks, to collect personal information from their sites, are covered operators with responsibility for providing parental notice and obtaining consent. Additionally, the proposed changes to website or online service definition, among other things, will clarify that a plug-in or ad network is covered by the Rule where it knows or has reason to know that it is collecting personal information through a child-directed website or online service.

(3) Consideration to Use Improved Information Technology to Reduce Burden

By their terms and the very nature of the regulated industry, the Rule’s notice requirements make use of improved information technology (*i.e.*, electronic communications over the Internet) to reduce the burdens imposed by the Rule, consistent with the aims of the Government Paperwork Elimination Act, 44 U.S.C. § 3504 note. In particular, Section 312.4(b) of the Rule requires that notices be posted online on the operators’ website or online service, and Section 312.4(c) expressly contemplates that operators shall “tak[e] into account available technology” in ensuring that parents receive direct notice of their information practices. Notice under Section 312.4(c) incorporates by reference the requirement of Section 312.5(b) that

² 77 Fed. Reg. 46,643 (August 6, 2012).

operators obtain a parent’s consent through methods “reasonably calculated, in light of available technology, to ensure that the person providing consent is the child’s parent.” Thus, the Rule provides operators with the flexibility to employ appropriate, reasonable information technologies to comply with the notice and consent requirements.

(4) Efforts to Identify Duplication

The notice requirements of the Rule do not duplicate any other requirements of the Commission or, to its knowledge, the requirements of other federal or state government agencies.

(5) Efforts to Minimize Burden on Small Businesses

The Commission has designed the amendments proposed in the supplemental NPRM to minimize the compliance burden of these requirements as much as possible. See item (8) for more information.

(6) Consequences of Conducting Collection Less Frequently

A less frequent “collection” would violate the express statutory language and intent of the COPPA. The statute requires both that notice be given online and that separate notice regarding the operator’s information practices be given to parents.³ Parental notice under the proposed amended Rule works in tandem with the statute’s mandated parental consent requirement.⁴ Thus, the proposed Rule amendments do not require notices any more frequently than necessary for operators to comply with the statute and to enable parents to make an informed decision about an operator’s collection, maintenance, use, or disclosure of their children’s personal information.

(7) Special Circumstances Requiring Collection Inconsistent With Guidelines

The proposed “collection” is consistent with all applicable OMB PRA guidelines under 5 C.F.R. § 1320.11. No collection inconsistent with such guidelines is being proposed.

³ See 15 U.S.C. § 6502(b)(1)(A) (requiring website notice), (B) (notice to parents upon request). These requirements are reflected in the Commission’s Rule at Sections 312.3(a) (online notice), proposed 312.4(b) and (c) (form and content of online and direct to parent notices), and 312.6(a) (notice to parents upon their request).

⁴ See 15 U.S.C. § 6502(b)(1)(A)(ii) (requiring verifiable parental consent), § 6501(9) (defining “verifiable parental consent” to mean, in relevant part, any reasonable efforts, taking into consideration available technology, to ensure parental notice of the operator’s personal information collection, use, and disclosure practices). These requirements are reflected in the Commission’s Rule at Sections 312.4 (form and contents of notices) and 312.5 (parental consent and exceptions).

(8) Consultation Outside the Agency

Last year, the Commission sought public comment on PRA aspects of the Rule, as required by 5 C.F.R. 1320.8(d). *See* 76 Fed. Reg. 31,334 (May 31, 2011). No comments were received. On July 18, 2011, OMB approved the Rule's existing information collection requirements through July 31, 2014.

On September 27, 2011, the Commission published a Notice of Proposed Rulemaking ("NPRM") to amend the Rule, consistent with the requirements of the Act, to respond to changes in online technology, including in the mobile marketplace, and, where appropriate, to streamline the Rule. *See* 76 Fed. Reg. 59,804 (September 27, 2011). The Commission received over 350 comments, of which three related to PRA burden estimates.⁵

After reviewing these comments, and based upon its experience in enforcing and administering the Rule, the Commission issued its supplemental NPRM to clarify the scope of the Rule and strengthen its protections for children's personal information. As before, the Commission seeks public comment on its PRA burden analysis in addition to comment on the underlying proposed Rule amendments to which the analysis relates.

Under the existing OMB clearance for the Rule, the FTC has estimated that new operators will each spend approximately 60 hours to craft a privacy policy, design mechanisms to provide the required online privacy notice and, where applicable, direct notice to parents in order to obtain verifiable consent. At least a few commenters noted that this 60-hour estimate failed to take into account accurate costs of compliance with the Rule.⁶ None of these commenters, however, provided the Commission with empirical data or specific evidence on the number of hours such activities require. Thus, the Commission does not have sufficient information at present to revise its earlier hours estimate.

In drafting the proposed modifications to the Rule's definitions, the Commission has attempted to avoid unduly burdensome requirements for entities. The Commission believes that the proposed modifications will advance the goal of children's online privacy in accordance with COPPA. For each of the proposed modifications, the Commission has taken into account the concerns evidenced by the record to date. On balance, the Commission believes that the benefits to children and their parents outweigh the costs of implementation to industry.

The Commission has considered, but has decided not to propose, an exemption for small businesses. The primary purpose of COPPA is to protect children's online privacy by requiring verifiable parental consent before an operator collects personal information. The record and the

⁵ *See* Nancy Savitt (comment 142) at p. 1; NCTA (comment 113), at pp. 23-24; and MPAA (comment 109) at pp. 15-16. These and the remaining comments can be found at <http://www.ftc.gov/os/comments/copparulereview2011/>.

⁶ *See id.*

Commission's enforcement experience have shown that the threats to children's privacy are just as great, if not greater, from small businesses or even individuals than from large businesses.⁷ Accordingly, an exemption for small businesses would undermine the very purpose of the statute and Rule. Still, the Commission's supplemental NPRM also seeks comments on ways in which the Rule could be modified to reduce any costs or burdens for small entities.

(9) Payments or Gifts to Respondents

Not applicable. The Commission makes no payments or gifts to respondents in connection with the proposed requirements.

(10) & (11) Assurances of Confidentiality/Matters of a Sensitive Nature

The requirements for which the Commission is seeking OMB approval do not involve collection or disclosure of confidential information but, rather, notice (*i.e.*, disclosure) of information practices by website and online service operators to the public and specifically to parents of children from whom personal information is sought to be collected.

(12) Hours Burden⁸

Number of Respondents: 625

There are an estimated 500 existing operators that will newly be covered by the modifications proposed in the supplemental NPRM plus 125 new operators per year to be covered by Rule through the proposed modifications (the 125 new operators are an incremental addition to the previously cleared FTC estimate of 100 new operators per year⁹ for a prospective three-year PRA clearance period).

The proposed changes to the definitions of “*operator*” and “*website or online service directed to children*” will potentially increase the number of operators subject to the Rule. The Commission believes, however, that the number of operators subject to the Rule's requirements

⁷ See, e.g., *United States v. RockYou, Inc.*, No. 3:12-cv-01487-SI (N.D. Cal., entered Mar. 27, 2012); *United States v. Godwin*, No. 1:11-cv-03846-JOF (N.D. Ga., entered Feb. 1, 2012); *United States v. W3 Innovations, LLC*, No. CV-11-03958 (N.D. Cal., filed Aug. 12, 2011); *United States v. Industrious Kid, Inc.*, No. CV-08-0639 (N.D. Cal., filed Jan. 28, 2008); *United States v. Xanga.com, Inc.*, No. 06-CIV-6853 (S.D.N.Y., entered Sept. 11, 2006); *United States v. Bonzi Software, Inc.*, No. CV-04-1048 (C.D. Cal., filed Feb. 17, 2004); *United States v. Looksmart, Ltd.*, Civil Action No. 01-605-A (E.D. Va., filed Apr. 18, 2001); *United States v. Bigmailbox.Com, Inc.*, Civil Action No. 01-606-B (E.D. Va., filed Apr. 18, 2001).

⁸ This discussion tracks the PRA focus of the Commission's supplemental NPRM. It is incremental to the PRA burden estimates previously posited for the September 27, 2011 NPRM. The combined estimated PRA burden effects, however, are summarized in item #15 of the instant Supporting Statement.

⁹ See Agency Information Collection Activities; Submission for OMB Review; Comment Request; Extension, 76 Fed. Reg. 31,334 (May 31, 2011).

should be offset by the clarification of the definition of *support for internal operations* and the carve out from the definition of *website or online service directed to children* of family friendly sites and services that take measures to identify and provide COPPA protections to child visitors. Some operators of child-directed properties will also likely adjust their information collection practices so as not to be covered by the Rule.

Estimated annual hours burden: 17,500 hours

(a) Recordkeeping Requirements: 0 hours

The proposed modifications to the Rule's definitions do not impose any incremental recordkeeping costs on operators.

(b) Disclosure Requirements: 17,500 hours

(1) New Operators

Under the existing OMB clearance for the Rule, the Commission has already accounted for the time that new operators will spend to craft a privacy policy (approximately 60 hours per operator), design mechanisms to provide the required online privacy notice and, where applicable, direct notice to parents in order to obtain verifiable consent. The proposed modifications to the Rule's definitions should not add to the burden for new operators. However, the Commission estimates an incremental increase of 125 new operators per year covered by the Rule given the proposed modifications. Aggregated for the estimated 125 operators per year that would be newly subject to the Rule, annualized disclosure burden would be 7,500 hours.

(2) Existing Operators

The proposed modifications will not impose incremental disclosure time per existing operator, but, as noted above, would result in an estimated additional 500 existing operators that would hence be covered by the Rule. These entities will have a one-time burden to re-design their existing privacy policies and direct notice procedures that would not carry over to the second and third years of prospective PRA clearance. The Commission estimates that an existing operator's time to make these changes would be no more than that for a new entrant crafting a privacy policy for the first time, *i.e.*, 60 hours. Aggregated for the estimated 500 existing operators that would be newly subject to the Rule, this non-recurring adjustment, annualized over a three-year OMB clearance, would total 10,000 hours.

Estimated annual labor cost burden: \$2,747,454

(a) Recordkeeping

The proposed modifications to the Rule's definitions do not impose any incremental recordkeeping costs on operators.

(b) Disclosure

The Commission assumes that the time spent on compliance for new and existing operators would be apportioned five to one between legal (lawyers or similar professionals) and technical (*e.g.*, computer programmers, software developers, and information security analysts) personnel.¹⁰ As noted above, the Commission estimates a total of 17,500 hours of incremental disclosure burden from the proposed modifications to the definitions, annualized, for 625 additional operators (125 new operators + 500 existing operators that would be covered by the Rule). Thus, apportioned five to one, this amounts to, rounded, 14,583 hours of legal, and 2,917 hours of technical, assistance. Applying hourly rates of \$180 and \$42, respectively, for these personnel categories,¹¹ associated labor costs would total approximately \$2,747,454.

(c) Reporting

The proposed modifications to the Rule's definitions do not impose any incremental reporting costs on operators.

(13) Estimated Capital/Other Non-Labor Costs Burden

Capital and start-up costs associated with the Rule are minimal. Because websites will already be substantially equipped with the computer equipment and software necessary to comply with the Rule's proposed notice requirements, the primary costs incurred by the websites are the estimated labor costs [discussed in item (12)].

(14) Cost to the Federal Government

Because Commission staff anticipates that the incremental cost to the FTC to administer the proposed amendments will be de minimis, it retains the FTC's most recently cleared estimates of costs to the agency to implement the Rule: \$425,000. This consists of approximately 3 attorney/investigator work years at approximately \$415,000 per year and travel costs or other expenses associated with enforcing and administering the Rule of approximately \$10,000. Clerical and other support services are included in these estimates.

(15) Program Changes or Adjustments

The proposed changes to the definitions of "operator" and "website or online service

¹⁰ See FTC COPPA PRA Extension, 76 Fed. Reg. at 31,335 n. 1.

¹¹ The estimated rate of \$180 per hour is roughly midway between Bureau of Labor Statistics (BLS) mean hourly wages for lawyers (approximately \$62.74) in the most recent annual compilation available online and what Commission staff believes more generally reflects hourly attorney costs (\$300) associated with Commission information collection activities. The \$42 estimate of mean hourly wages for computer programmers, software developers, information security analysts, and web developers is based on an average of the salaries as reported by the BLS, *National Occupational and Wages* - May 2011.

directed to children” will potentially increase the number of operators subject to the Rule. The proposed changes to the definition of “personal information” would expand the definition to encompass additional types of information and thereby potentially increase the number of operators subject to the Rule. The proposed amendment to eliminate the sliding scale “email plus” method for obtaining parental consent may increase the burden for the limited category of operators whose information collection practices to date have enabled them to use this relatively low cost method of obtaining parental consent. Existing operators that currently use the email plus method would incur burden in the first year of implementation to convert to a more reliable method of obtaining verifiable parental consent. The proposed Rule amendments require a safe harbor applicant to submit a more detailed proposal than what the current Rule mandates. Existing safe harbor programs will thus need to submit a revised application and new safe harbor applicants will have to provide greater detail than they would under the current Rule.

The cumulative estimated incremental burden, annualized, for the above-noted proposed modifications, is 58,270 hours (40,770 hours regarding the September 27, 2011 NPRM;¹² 17,500 additional hours regarding the August 6, 2012 supplemental NPRM).

(16) Statistical Use of Information

There are no plans to publish information associated with the proposed requirements for statistical use.

(17) Display of Expiration Date for OMB Approval

Not applicable.

(18) Exceptions to Certification

Not applicable.

¹² Details underlying this estimate are presented in the September 27, 2011 NPRM and in the associated PRA Supporting Statement under ROCIS ICR Ref. No. 201108-3084-004.